

# Election of the Prosecutor for the International Criminal Court

## *Review of the Process and Final Candidates*

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### Introduction

With the term of the current Prosecutor of the International Criminal Court (ICC) drawing to a close next June, the States Parties of the ICC have been involved in a year-long process to identify the next Prosecutor.

Coming at a critical moment not only for the Court, but also for promoting global support for and conformity with the rule of law, addressing impunity, and avoiding a return to victors’ justice, this election is the focus of intense political interest.

During the ninth session of the Assembly of States Parties (ASP), States Parties to the Rome Statute decided to create a Search Committee to ‘facilitate the nomination and election, by consensus, of the next Prosecutor’.<sup>1</sup>

The sentiments underpinning the creation of the Search Committee are laudable, and indeed a genuine and thorough process for electing such an important position should be established. Unfortunately, this first attempt at an alternative process has been marked by concerns about sufficiency of transparency and accessibility for States, civil society and the public at large.

Although stating they wanted to avoid a politically charged process, the Bureau established a Search Committee composed entirely of political representatives of States

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<sup>1</sup> The Terms of Reference for the Search Committee were adopted by the Bureau of the Search Committee on 6 December 2010 (ICC-ASP/9/INF.2).



Parties. As such, one could not have constructed a more inherently political body to undertake the election process.

Expressing an admirable desire to operate more along the lines of a recruitment procedure, the Search Committee conducted the nomination process without a job description and did not produce or make transparent criteria against which candidates would be assessed. It also appears to have never made explicit the core competencies deemed desirable for this important position, beyond referencing Article 42 of the Rome Statute.<sup>2</sup> The absence of these hallmarks of a professional recruitment or technical review process, appears to have hindered the efficacy of the Committee and led to some frustrations.

Many States and NGOs have privately expressed their concerns regarding the lack of information and transparency, and their overall sense of discomfort with the election process.

### **The candidates**

On 25 October, the final report of the Search Committee, dated 22 October, was made public.<sup>3</sup> In its report, the Search Committee submitted the names of the final four candidates for the position of Prosecutor:

- Fatou B. Bensouda, Deputy Prosecutor (Prosecutions), International Criminal Court (The Gambia)
- Andrew T. Cayley, International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia (UK)
- Mohamed Chande Othman, Chief Justice of Tanzania (Tanzania)
- Robert Petit, Counsel, Crimes Against Humanity and War Crimes Section, Department of Justice, Canada (Canada)<sup>4</sup>

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<sup>2</sup> The most relevant provision of Article 42 is paragraph 3, which provides that ‘the Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.’

<sup>3</sup> ASP/2011/117.

<sup>4</sup> ASP/2011/117, para 2.



In a letter to States Parties, dated 28 October 2011, President of the ASP Ambassador Wenaweser (Liechtenstein) reiterated that the Bureau aimed to present a consensus candidate 'by the Thanksgiving weekend' (i.e. 24 November).<sup>5</sup>

However, in a public statement issued on 24 November by the Coalition for the ICC (CICC), it was reported that no consensus candidate had yet been identified, but that States Parties would continue to try to reach a consensus candidate.<sup>6</sup> As of 28 November, the Bureau had not issued an official statement on this matter.

The statement indicated that the front-runners for the position of ICC Prosecutor were the two African candidates, **Fatou Bensouda** and **Mohamed Chande Othman**. The statement also outlined that the nomination period had been extended to 30 November 'to give states more time to achieve consensus on one of the two front-runners'. The next meeting of States Parties is scheduled for 1 December 2011 in New York, at which time it will become clear 'whether consensus has been reached on a single candidate or, failing this, whether both candidates will be formally nominated for election at the upcoming ASP on 12 December 2011'.<sup>7</sup>

## Review of the candidates

A brief review of the experience of the official final four candidates indicates distinct differences between the contenders regarding their prosecutorial experience, especially that which relates to prosecuting crimes in international courts.

**Ms Bensouda** began her prosecutorial career in 1987 and has more than ten years experience prosecuting international crimes both at the ICTR and the ICC. Since 2005, Ms Bensouda has been the Head of the Prosecutions Division of the ICC, lead Prosecutor

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<sup>5</sup> President of the ASP Ambassador Wenaweser, 'Letter to Permanent Representatives of States Parties to the Rome Statute', 28 October 2011, available at <[http://www.icc-cpi.int/iccdocs/asp\\_docs/Elections/EP2011/2011-10-28-PASP-Consensus-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Elections/EP2011/2011-10-28-PASP-Consensus-ENG.pdf)>, last visited on 26 November 2011.

<sup>6</sup> '2011 ICC Prosecutorial Elections: States Parties Working Towards Consensus Candidate', Media advisory, Coalition for the International Criminal Court, 24 November 2011, available at <[http://www.iccnw.org/documents/CICC\\_MA\\_PROS\\_ELECTION\\_241111.pdf](http://www.iccnw.org/documents/CICC_MA_PROS_ELECTION_241111.pdf)>, last visited on 25 November 2011.

<sup>7</sup> '2011 ICC Prosecutorial Elections: States Parties Working Towards Consensus Candidate', Media advisory, Coalition for the International Criminal Court, 24 November 2011, p 2, available at <[http://www.iccnw.org/documents/CICC\\_MA\\_PROS\\_ELECTION\\_241111.pdf](http://www.iccnw.org/documents/CICC_MA_PROS_ELECTION_241111.pdf)>, last visited on 25 November 2011. The election of the next Chief Prosecutor is also analysed in *Gender Report Card on the International Criminal Court 2011*, to be published in December 2011.



in several of its cases and a member of the senior leadership team in the Office of the Prosecutor.

**Mr Cayley** has more than 15 years experience prosecuting international crimes at the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ICC and is currently the International Co-Prosecutor at the Extraordinary Chambers in the Courts of Cambodia (ECCC).

**Mr Othman** has three years experience as a prosecutor in Tanzania between 1974-1977, and five years experience prosecuting international crimes, with four years at the International Criminal Tribunal for Rwanda (ICTR) and one year as Prosecutor for the UN Transitional Administration in East Timor (UNTAET).

**Mr Petit** has been a state prosecutor since 1989 and has almost ten years experience prosecuting international crimes at the Special Court for Sierra Leone, the International Criminal Tribunal for Rwanda (ICTR) and one year as Prosecutor for UNTAET.

While all candidates are undoubtedly talented lawyers, the contrast in prosecutorial experience suggests that the unofficial final two candidates could also easily have been Fatou Bensouda and Andrew Cayley or Fatou Bensouda and Robert Petit.

## **Unofficial ‘final’ two candidates**

### ***Mohamed Chande Othman***

A review of Mr Othman’s prosecutorial career in international criminal law and the three cases for which he acted as prosecuting counsel indicates that none of the cases he was responsible for went to trial. In all three of the cases, either a plea bargain was negotiated or the indictment was withdrawn.<sup>8</sup>

From the available information, it appears that Mr Othman has not led a case to trial in his personal capacity within the OTP nor guided a criminal trial through an international court. His work at the ICTR does not appear to have included the experience of leading witness testimony in international proceedings, presenting evidence of war crimes, crimes against humanity or genocide in a trial situation, nor does it appear that he was

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<sup>8</sup> See *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision to Withdraw the Indictment, 18 March 1999 [indictment withdrawn], *Prosecutor v. Serushago*, ICTR-98-39-S, Judgement and Sentence, 5 February 1999 [guilty plea], and *Prosecutor v. Ruggiu*, ICTR-97-32-I, Judgement and Sentence, 1 June 2000 [guilty plea].



required to respond to Defence tactics and strategies in an international trial as opposing Counsel.

In the case of *The Prosecutor v. Serushago* (ICTR-98-39),<sup>9</sup> with Mr Othman as the Senior Legal Officer, the OTP negotiated a plea agreement with the Defence which included dropping the charge of rape as a crime against humanity. This was the only charge dropped in the plea bargain arrangement. The original indictment against Serushago (who was one of the leaders of the Interahamwe in Gisenyi prefecture) included five counts – genocide, murder as a crime against humanity, extermination as a crime against humanity, torture as a crime against humanity and rape as a crime against humanity.<sup>10</sup>

Serushago agreed to plead guilty to four of the five charges, excluding the charge of rape as a crime against humanity, and the rape charge was withdrawn on the application of the Prosecutor. What became a frequent feature of guilty pleas at the ICTR – no-one has ever pleaded guilty to a rape charge at the Rwanda Tribunal, but charges relating to sexual violence have been dropped in a number of cases in exchange for a guilty plea on other charges – began with the Serushago case.

Nothing in either the Trial or Appeals Judgement on Serushago’s guilty plea or sentence refers to sexual violence, meaning that the decision to drop the charge resulted in a complete excision of sexual violence evidence from the final record of the case.

In the case of *The Prosecutor v. Ruggiu* (ICTR-97-32),<sup>11</sup> Mr Othman appears to have worked on this case as Senior Legal Adviser and subsequently as acting Chief of Prosecutions. Again, a guilty plea was negotiated for genocide and one count of persecution as a crime against humanity. Ruggiu entered a guilty plea in May 2000, and was sentenced to 12 years in prison for each count, to be served concurrently.

In the case of *The Prosecutor v. Ntuyahaga* (ICTR-98-40),<sup>12</sup> Mr Othman was initially the Senior Legal Advisor and then the acting Chief of Prosecutions. This was a high profile case relating to an event which took place on the first day of the genocide, and which involved the murder of Rwanda’s only female head of state, Prime Minister Agathe Uwilingiyimana, and the murder of ten Belgian peacekeepers.

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<sup>9</sup> *Prosecutor v. Serushago*, ICTR-98-39-S, Judgement and Sentence, 5 February 1999.

<sup>10</sup> *Prosecutor v. Serushago*, ICTR-98-39-I, Modified Indictment, 14 October 1998.

<sup>11</sup> *Prosecutor v. Ruggiu*, ICTR-97-32-I, Judgement and Sentence, 1 June 2000.

<sup>12</sup> *Prosecutor v. Ntuyahaga*, ICTR-98-40-T, Decision to Withdraw the Indictment, 18 March 1999.



In February 1999, the ICTR Office of the Prosecutor filed a motion requesting leave to withdraw the indictment, citing among other things a wish to promote the exercise of concurrent jurisdiction by Belgium.<sup>13</sup> However, the Office could not guarantee that Ntuyahaga would be prosecuted by Belgium for all crimes for which he was indicted by the ICTR, thus risking whether Ntuyahaga would ever be prosecuted in another jurisdiction. The decision to withdraw the indictment was widely criticised at the time. Although Ntuyahaga was ultimately tried and convicted in Belgium in 2007 for the murder of the ten Belgian peacekeepers, he has never been prosecuted for his involvement in the murder of Agathe Uwilingiyimana.

### *Recent Experience*

More recently, for the last six years Mr Othman has been a judge in Tanzania, first in The High Court then in the Court of Appeal, and finally in December 2010 he was appointed Chief Justice of Tanzania. He has presided over criminal trials involving murder, human trafficking, constitutional petitions, armed gang robbery, sexual violence and corruption.<sup>14</sup>

### ***Fatou Bensouda***

At the ICTR, Ms Bensouda was involved as a trial attorney and then Senior Legal Advisor in five cases.

Ms Bensouda worked on *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (ICTR-99-52), commonly referred to as ‘the Media Case’,

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<sup>13</sup> The reasons given were as follows: (i) to promote the exercise of concurrent jurisdiction (by allowing the Belgians to prosecute him for the murder of the peacekeepers); (ii) the OTP’s goal of shedding light on what occurred in Rwanda in 1994 would not be advanced by prosecuting a single count indictment relating only to the murder of the PM and ten Belgian peacekeepers (iii) the narrowing of the indictment had deprived the Prosecutor of the ability to prosecute the full extent of the accused’s criminal involvement; and (iv) the Belgian government had instituted criminal proceedings against Ntuyahaga.

<sup>14</sup> Prior to this, Mr Othman held the following positions: Member of the Advisory Committee on the Archives of the ICTR and ICTY (2008-2009); Commissioner High-Level Commission of Inquiry on Lebanon, UN Human Rights Council (2006); Senior Legal and Justice Sector Reform Adviser, UNDP, Cambodia (Dec 2003 – Oct 2004); Head of Delegation of the International Federation of the Red Cross and Red Crescent (IFRC), in Hanoi, Vietnam (1994), and Conakry, Guinea (06/01/1992 – 15/03/1993); Deputy Chief of Mission, the Coordinator for Afghanistan, UNOCA, Teheran, Iran (1989 – 1990: 1 year); Desk/Regional Officer, IFRC, Geneva (1977 – 1989); Public Prosecutor, Bank of Tanzania (1975 – 1977); and Assistant State Attorney, Attorney General’s Office, Tanzania (3/1974 – 3/1975). Mr Othman is currently a UN Human Rights Council Independent Expert on the Human Rights situation in the Sudan. Information as adapted from his curriculum vitae, Annex 8 to the Search Committee’s Report, ASP/2011/117.



as a Trial Attorney. In this case, the ICTR convicted the three accused of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and persecution and extermination as crimes against humanity.<sup>15</sup> Nahimana and Barayagwiza were found guilty on the basis of their positions within *Radio Télévision Libre des Mille Collines* (RTLM), which broadcasted virulent messages inciting hatred.

Although the Trial Judgement in the case of *The Prosecutor v. Bagosora et al*<sup>16</sup> (ICTR-96-7), commonly referred to as the ‘Military I trial’, was delivered after Ms Bensouda’s tenure at the ICTR, she was involved in the early stages of this trial. The trial was against high-level military leaders and involved crimes of sexual and gender-based violence. In December 2008, the ICTR convicted three of the four accused of several counts of genocide, crimes against humanity (murder, extermination, rape, persecution and other inhumane acts) and war crimes (violence to life and outrages upon personal dignity).<sup>17</sup>

The trial of *The Prosecutor v. Protais Zigiranyirazo* (ICTR-01-7) took place between October 2006 and May 2008, after Ms Bensouda had already joined the ICC. However she was involved in the early preparations for this trial. Zigiranyirazo was initially convicted of genocide and extermination as a crime against humanity in December 2008,<sup>18</sup> but in November 2009 the Appeals Chamber reversed these convictions and acquitted him on all counts.<sup>19</sup>

Ms Bensouda worked on the case of *The Prosecutor v. Félicien Kabuga* (ICTR-98-44B), in particular on his indictment where he is charged with conspiracy to commit genocide; genocide, or alternatively complicity in genocide; direct and public incitement to commit genocide; and extermination as a crime against humanity.<sup>20</sup> Kabuga was initially charged together with seven other individuals: the case of *Prosecutor v. Karemera et al* (ICTR-98-44) commonly referred to as the ‘Government I case’.<sup>21</sup> Pending the arrest of Kabuga, in September 2003 the case against him was severed.

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<sup>15</sup> Appeals Judgement, ICTR-99-52-A, 28 November 2007.

<sup>16</sup> *The Prosecutor v. Theoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuza, and Anatole Nsengiyumva.*

<sup>17</sup> *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Trial Judgement and Sentence, 18 December 2008.

<sup>18</sup> *Prosecutor v. Zigiranyirazo*, ICTR-01-7-T, Trial Judgement and Sentence, 18 December 2008.

<sup>19</sup> *Prosecutor v. Zigiranyirazo*, ICTR-01-7-A, Appeals Judgement, 16 November 2009.

<sup>20</sup> *Prosecutor v. Kabuga*, ICTR-98-44B-I, Amended Indictment, 1 October 2004.

<sup>21</sup> The case initially involved seven accused: Augustin Bizimana, Edouard Karemera, Callixte Nsabonimana, André Rwamakuba, Mathieu Ndirumpatse, Joseph Nzirorera and Félicien Kabuga. Félicien Kabuga and Augustin Bizimana are still at large; Joseph Nzirorera passed away during his trial; the case against Callixte





Ms Bensouda was also involved in the investigation and preparatory stages of the case of *The Prosecutor v. Tharcisse Renzaho* (ICTR-97-31). Tharcisse Renzaho was prefect of Kigali-Ville prefecture and had the rank of colonel in the Rwandan army. In July 2009, Renzaho was convicted of genocide; murder and rape as crimes against humanity; and murder and rape as serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II.<sup>22</sup>

### *Recent Experience*

For the last six years, Ms Bensouda has been the Deputy Prosecutor of the ICC and has been prosecuting war crimes, crimes against humanity and genocide before this Court. Ms Bensouda is familiar with every situation under ICC analysis, every investigation underway, and every case before the ICC. She has appeared in Court in the trials of *The Prosecutor v. Thomas Lubanga Dyilo*, *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui* and *The Prosecutor v. Jean-Pierre Bemba Gombo*.

It is well known that one of these cases, *The Prosecutor v. Thomas Lubanga Dyilo*, has encountered significant procedural issues, and that the two other cases have faced challenges in proving the full set of charges at the Confirmation of Charges stage of proceedings. However, to date plea bargains have not been a feature of the OTPs strategy, with the office favouring instead to prosecute every indictment. In addition, the Prosecution is pursuing charges for gender-based crimes in two of these three cases. Importantly, Fatou Bensouda has held the post of Deputy Prosecutor during this period, in contrast to Mr Othman who was acting Chief Prosecutor in two of his three ICTR cases, as described above.

Ms Bensouda has led witness testimony, addressed Chambers, presented legal arguments, and has been tried and tested in the cut and thrust of international criminal trials involving highly competent defence counsel.

Since 2005, Ms Bensouda has been a member of the leadership team of the Office of the Prosecutor (OTP). In her capacity as Deputy Prosecutor, she has established relationships with senior diplomats in numerous countries. She has also led the development of OTP relationships with regional political bodies, including the European

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Nzabonimana was severed. The case against Karemera *et al* is currently ongoing at the ICTR and involves Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera.

<sup>22</sup> *Prosecutor v. Renzaho*, ICTR-97-31-T, Judgement and Sentence, 14 July 2009.





Union, the African Union, the Organisation of American States, the Caribbean Community and others.

In addition, in June 2011, the African Union endorsed Ms Bensouda's candidacy for the position of Chief Prosecutor. No objections nor abstentions were entered at the time of this endorsement.

A reasoned, merit-based review of the candidates, suggests that Ms Bensouda brings demonstrably more relevant professional experience and greater prosecutorial skills to the post of Chief Prosecutor.

In fact, it appears Mr Othman may have been tapped for the wrong job and should perhaps have been nominated instead to contest the judicial election, also to be held at the forthcoming ASP. His judicial experience within Tanzania, humanitarian law work with the International Federation of the Red Cross and Red Crescent (IFRC), leadership on a UN Commission of Inquiry, and assignment as an Independent Expert for the UN Human Rights Council, are well suited for a judicial post.

### **Challenges in the nomination and election process**

Given the quantifiable differences between these two candidates, how have we arrived at this current impasse where a consensus has not yet been reached? It is possible that the answer lies in the nomination and selection process itself.

The most obvious challenge in the process has been that four-fifths of the Search Committee is also represented on the ASP Bureau, the body to which, according to the Resolution,<sup>23</sup> the Committee will report its recommendations for the final candidates. This is also the body that will ultimately present a single consensus candidate to the ASP for 'election'. To be clear, this means that 80% of the Search Committee referred the final list of four candidates to themselves as the Bureau. And as the Bureau, they are now responsible for choosing the final candidate.

The process has not ensured that a sufficient diversity of States has been closely involved in the nomination process, and too much has been left in the hands of a small group of States who have been represented on both the Search Committee and the Bureau. According to the terms of the Resolution, States on the Committee were

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<sup>23</sup> ICC-ASP/9/INF.2, para 6.



representing their region;<sup>24</sup> however, according to the final report from the Search Committee, members served in their personal capacity, and not as regional representatives.<sup>25</sup> Such inconsistency in representation and the relatively limited delineation of interests, reduced the consensus building period to the final weeks of the process.

The second challenge is located within the Resolution adopted by States Parties creating the Search Committee. The Resolution included a requirement for regional representation but did not include any provisions regarding gender representation nor the need for gender competence on the Committee. In a departure from the general recruitment principles applied by the ICC and articulated repeatedly within the Rome Statute for a range of positions, the need for gender ‘skills’ and representation on this Committee was overlooked by the Bureau. Subsequently, all five members of the Search Committee were male.

According to the Search Committee’s final report, during the interview phase the Committee did not pose any questions to candidates regarding their experience prosecuting gender-based crimes, nor were they asked how they would manage the office to ensure gender competency within the structure, or how they would implement Article 42(9) of the Rome Statute, requiring the appointment of advisers with legal expertise on specific issues, including but not limited to sexual and gender violence and violence against children. The decision to not include either this expertise or representation on the Committee and to not enquire about the candidates’ skills in this area may indicate an unintentional bias within the process itself.

The third challenge in the process was the modality of the Search Committee to be able to seek out and tap applicants. Mr Othman has been transparent in making it known that he was asked by the Committee to apply. Given the level of duplicate representation on the Committee and the Bureau, which will eventually select the Chief Prosecutor, the tapping of candidates by the Committee was, at best, procedurally awkward. It instilled further vulnerability in the process by creating an unintended yet systemic impropriety in the nomination procedure, thus risking the possible perception that those responsible for facilitating the nomination and election process may also have interests in promoting certain candidates.

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<sup>24</sup> ICC-ASP/9/INF.2, para 4.

<sup>25</sup> ICC-ASP/2011/117, para 10.

### **Women’s Initiatives for Gender Justice**



Added to these challenges, the current impasse is primarily due to one or a small number of States refusing to join the solid consensus now in favour of Fatou Bensouda. It is possible one of the States unwilling to join the consensus currently has a case before the ICC involving charges for crimes against humanity against government employees and Ministers.

There is no doubt that all States Parties, whether under investigation by the ICC or not, should have a say in the election of the next Chief Prosecutor. Their right to a voice in this process is not diminished by the existence of criminal proceedings. Necessarily, the Bureau is enabling their views to be fully aired.

At the same time, it is counter-productive for any State to feel it has an unlimited ability to subvert the election process.

Refusal to join the consensus is an incontestable right, but it should be duly weighted by the larger membership of States Parties to the Rome Statute.

Although there have been significant challenges in the 2011 nomination and election process, this should not deter States from seeking to refine a future procedure which addresses some of the challenges outlined and genuinely assists States to successfully counter-balance the competing elements of experience, independence, electability, and the best interests of the ICC.

