

## Libya

by Chris Stephen, Tripoli

# ICC prosecutor says Libya is providing a fair trial for Senussi despite chaos

**The International Criminal Court's prosecutor ruled that despite civil war in Libya and militias storming the capital, she has no reason to think the country's former intelligence chief is getting an unfair trial.**

In a decision surprising to some human rights groups, who say judges are being intimidated and a defence attorney shot and wounded, prosecutor Fatou Bensouda declined requests from lawyers of Abdullah al-Senussi to ask judges to review their decision to let Libya try the case.

Senussi, Muammar Gaddafi's former spy chief, was indicted for war crimes and crimes against humanity by the ICC in 2011, blamed for oppressing rebels during Libya's Arab spring. Two years later, Hague judges ruled Libya was "able and willing" to give him a fair trial, allowing Tripoli to take the case.

But since then, civil war broke out. The Libya Dawn militia coalition captured Tripoli. And the recognized government fled to the eastern city of Tobruk, declaring it lost control of judicial organs in the capital [IJT-166]. Tripoli is now one of the world's most dangerous cities, with kidnappings, gun battles, air strikes, ISIS attacks and burnt homes of opposition politicians. Most embassies and the United Nations evacuated in July 2014.

### Trial in prison

Senussi's trial has continued under Libya Dawn, who have proclaimed their own government, unrecognized by the international community. Hearings are held approximately one day each month in the high-security Al-Habda prison [IJT-157].

With UN monitors having fled, no officials watch the trial for the ICC, but Bensouda said she has no reason to believe standards are not being met. "Despite the fact that the groups allegedly associated with Libya Dawn are in physical control of Tripoli and therefore the judicial and correctional facility system, there does not appear to

have been any significant disruption to the trial proceedings," her office wrote to Senussi's ICC-appointed lawyers Ben Emmerson and Rod Dixon on 17 February.

Emmerson and Dixon asked Bensouda in December to call for a review of the ICC's decision to allow the Tripoli trial after she told the UN Security Council in November: "On-going violence and alleged threats to judges, prosecutors and lawyers do not augur well for a fair trial that respects all the rights of an accused person."

Bensouda was not "fully convinced" a review is needed, senior special assistant of the prosecutor Sam Sasan Shoamanesh told IJT this week. "Neither the deteriorating security situation in Libya, nor the apparent change in power in Tripoli, have had a detrimental impact on the trial process so as to, in our assessment, negate the basis for the admissibility decision."

Facts on the trial's conduct are hard to come by, with militias controlling the city and the Tripoli court providing no written public record or list of charges. Sessions for Senussi and 22 co-defendants remain closed to the public. Journalists and relatives of the accused have access, although some lawyers and defence witnesses have fled. Senussi's original lawyer for the Tripoli trial quit after being shot in the leg, saying the attack was intimidation.

Amnesty International also urged Bensouda to seek a review in December. It provided a list of fair-trial infringements, including the lack of a lawyer for Senussi while under interrogation, and said judges told researchers they feared for their lives if they made the wrong decisions. "Libya is genuinely unable to bring him [Senussi] to justice," Amnesty said in a statement.

Equally concerned about due process is the United Nations Special Mission to Libya (UNSMIL), which monitored the trial for the ICC until it evacuated.

"The trial risks falling short of international standards," UNSMIL said in a statement on 19 February. "The prosecution present-

ed its case in less than one hour, without calling any witnesses. Despite obtaining copies of case materials after some delays, the [defence] lawyers reported difficulties in meeting clients in private."

### No government control

Emmerson and Dixon emphasize how the recognized government no longer controls Senussi's situation. They point out that lack of government control over his co-defendant, Saif al-Islam Gaddafi, held by militia in Zintan, was why the ICC refused to approve Libya trying him.

"The ICC risks being accused of inconsistency," Dixon told IJT. "If the government no longer has control of a defendant, it cannot offer him a trial. We think there are urgent grounds for a review." Senussi's ICC lawyers were never allowed to visit their client in Libya. Dixon says that should have been a "red flag" to Hague judges when deciding whether Tripoli would offer a fair trial.

The Libya investigations are proving some of the most controversial in the ICC's short history. They were ordered by the Security Council in 2011, only the second time the UN has taken such a step. So far, the prosecutor has charged three people: Senussi, Gaddafi and his father, Muammar Gaddafi, who was killed later that year.

In 2012, Melinda Taylor, an ICC-appointed defence lawyer, was kidnapped for four weeks by Zintan militia after journeying to meet Saif, who, in November 2011, was also captured by Zintan militia. They have since refused to hand him over to government control.

Despite the ICC declining Libya's request to try him, Saif was jointly charged with Senussi by Tripoli. The Libyan court decided that Saif could be part of the trial despite being in Zintan, ordering the proceedings be conducted by video link. The link has been established for several hearings since April, but shows only an empty room, with Saif yet to appear.

## Anger in Kosovo as law outlining special court is leaked

A document leaked last week to Kosovar media provides legal background for a court that will deal with crimes allegedly committed by the Kosovo Liberation Army (KLA) from 1998 to 2000.

The 45-page draft law reveals the first details of how a special court is to be set up to try former KLA members for claims put forward in a report by Council of Europe rapporteur Dick Marty [[IJT-157](#), [IJT-164](#)].

The law foresees "Specialized Chambers [that] are part of but independent from all levels of the Kosovo court system". Officially, Kosovo is envisaged as the headquarters, but the court would effectively work from a host state. The Netherlands previously said that it was asked to host the court. The international community, meanwhile, has pressed for a location outside Kosovo because of concerns about witness protection.

Opposition party Vetevendosje (meaning 'self-determination' in Albanian) slammed the draft proposal, maintaining that the court would in effect be "a completely parallel judicial system" and "remove the last pillar of sovereignty and independence that Kosovo has".

The 2011 Marty report tied top Kosovo politicians – notably, ex-prime minister and current foreign minister Hashim Thaci – to gruesome crimes against Serbs, including trade in organs harvested from prisoners of war.

In July, the Special Investigation Task Force (SITF), set up by the European Union to probe claims, found sufficient evidence to file an indictment on charges of war crimes and crimes against humanity for "several senior officials of the former KLA" [[IJT-165](#)].

Kosovo justice minister Hajredin Kuci last week insisted that the Kosovo judiciary cannot be blamed for not addressing the accusations earlier. He said that the international bodies mandated to try war crimes on Kosovo's territory "did not allow us to touch those cases". - UH

ECCC

by Ate Hoekstra, Phnom Penh

# US journalist: "I kept thinking I'd turn a corner and I'd see real life"

**When former Washington Post correspondent Elizabeth Becker testified as an expert witness this month at the Extraordinary Chambers in the Court of Cambodia (ECCC), she described a surreal visit to Cambodia under the Khmer Rouge regime where "every move was controlled" and everything staged for foreign journalists' benefit.**

Considered a leading expert on Cambodia, Becker was called to court because of her extensive research on the Khmer Rouge. Her widely quoted book 'When the war was over', first published in 1986, deals with Cambodia's years of horror. She is also one of the few foreigners ever permitted to visit the Khmer Rouge-led Democratic Kampuchea and meet with regime leaders. "I've never been on a trip like that in my life, before or after, where every move was controlled," Becker said during her testimony, which was widely covered in the Cambodian media.

Becker is the first historical expert to testify in Case 002/02, as the second trial against former head of state Khieu Samphan and the Khmer Rouge's chief ideologist, Nuon Chea, is called. The two octogenarians are the most senior leaders still alive. After being sentenced in August to life in prison for crimes against humanity, they now face trial for a second series of accusations, including genocide and forced marriages [[IJT-168](#)].

### "A closed-door society"

During her three-day testimony, Becker told a packed courtroom how she worked as a foreign correspondent for The Washington Post in the early 1970s. In 1978, she was invited to visit Cambodia by then Foreign Minister Ieng Sary. She went for a two-week tour with two other guests of the regime, American journalist Richard Dudman and Malcolm Caldwell, a radical British professor and supporter of Khmer Rouge leader Pol Pot. "It was a closed-door society. There was no communication, no telephone, nothing. It was a big question what was really going on in Democratic Kampuchea," Becker said.

Recalling the visit, Becker noted how the Khmer Rouge was presenting Democratic Kampuchea as immaculate, a country without crime and always plenty of food. But something was missing, she noted. "Beneath this lovely facade, was the other real-

ity of abandoned villas, homes and shops. But what made my stomach drop was what I didn't see," she told the court. "I kept thinking I'd turn a corner and I'd see real life. Kids playing a game, some women talking... There was nothing. No matter where I went, it was empty."

Responding to questions from Judge Jean-Marc Lavergne, Becker spoke about a meeting during which Pol Pot outlined a "very dramatic scenario" to his visitors. The leader conjured up images of the Vietnamese army coming in from the West, supported by the Warsaw Pact countries, she recalled. "He imagined that the NATO would be supporting Cambodia and Cambodia would win," Becker said.

Cambodia and Vietnam had been engaged in small military clashes along the border since 1970 and the Khmer Rouge was highly wary of Vietnamese expansionism. Just days after Pol Pot's shared vision, Vietnam invaded Cambodia and the Khmer Rouge regime was ousted.

### Cross-examination

On the second day of testimony, Nuon Chea's lawyer, Victor Koppe, cross-examined Becker. He pointed out that fellow journalist Dudman was significantly more positive in reports about the situation in Democratic Kampuchea. The witness quickly brushed the comparison aside, explaining that she had worked in Cambodia before the Khmer Rouge came to power but Dudman had not. "He's comparing it to nothing. He had not been to Cambodia before," she said.

On the last day of Becker's testimony, Nuon Chea broke his usual court silence with a question. He asked why the US in the 1970s bombed Cambodia for 200 days. "Many innocent Cambodian people died," he said.

Unruffled, Becker replied that then President Richard Nixon tried to use the attack to force the Khmer Rouge to the negotiating table. The attempt failed and the bombing stopped in August 1973. "They didn't want more reports of innocent Cambodians being killed," she said.

More witnesses are expected to testify in the coming months for Case 002/02, which is currently focusing on forced marriages and the existence of several security centres. A sentence is not expected before 2017.

Hissène Habré is due to face trial in Senegal within three months of the Extraordinary African Chambers (EAC) 13 February ruling that there is enough evidence against the former Chadian dictator to proceed.

The four Senegalese judges supported the prosecutor's final indictment and request to refer the case to the EAC trial chamber for crimes against humanity, war crimes and torture committed during Habré's 1982-1990 regime [IJT-175]. The trial is now set to open in the next three months, with the next step being to select three judges to hear the case.

"Getting Habré to court is a big victory for justice," said Jacqueline Moudeřna, the victims' lawyer and president of the Chadian rights watchdog ATPDH. Human Rights Watch's Reed Brody, who has followed the case for years, said a fair trial for Habré would show "that courts in Africa can be empowered to provide justice for African victims of crimes committed in Africa".

Ginette Ngarbaye, who was pregnant when she was arrested in 1985 and gave birth in prison, has seen all the twists and turns in the 15-year battle to get Habré to trial. "Our fight for justice was not useless. I can't help thinking of all those who died," she told IJT.

The EAC judges also referred to the five others who were supposed to be brought before the chambers. They noted that these suspects are still not in a position to stand trial. For three of them, Chad has yet to execute the 2013 international arrest warrants. The other two – the Directorate of Documentation and Security (DDS)'s former director Saleh Younouss and former coordinator Mahamat Djibrine – are already in custody, but Chad refuses to hand them over to Senegal [IJT-168]. The pair are currently on trial in N'Djamena [IJT-171]. - NM

## Ongwen transfer questions Uganda holding own war trials

**Uganda's decision to support the transfer of Dominic Ongwen [IJT-174] to the International Criminal Court (ICC), instead of trying the notorious Lord's Resistance Army commander at home, casts a shadow on the country's ability to hold domestic war crimes trials.**

After Ongwen's capture, many Ugandans hoped the former protégé of LRA warlord Joseph Kony would be domestically prosecuted before the specially set up International Crimes Division (ICD) [IJT-164].

The country had the ability to try Ongwen, but chose not to "because of the nature of crimes he committed," Peter Nyombi, Uganda's attorney general, told IJT. The atrocities extended beyond Uganda, into the Democratic Republic of Congo (DRC), South Sudan and the Central African Republic (CAR), he explained. Plus, Uganda had already referred the LRA situation to The Hague, so "we decided ICC was the best for the prosecution of Ongwen," Nyombi said.

The ICD was established in 2008 to hold national trials for serious offences like war crimes, crimes against humanity and genocide. It was part of efforts to implement the ultimately rejected Juba peace agreement reached that same year between the government and the LRA.

For nearly 20 years, Ugandan authorities have been at war with the LRA, notorious for kidnapping children to use as fighters and sex slaves. The group was forced out of northern Uganda in 2005 and 2006, but continues to be implicated in atrocities in DRC, South Sudan and CAR.

### ICD: structurally capable?

Local and international legal analysts have told IJT that problems, including inadequate witness protection measures and a high turnover of staff, prevent the ICD from fulfilling its potential. An extant amnesty law further complicates prosecutions [IJT-148].

While he applauds the idea behind the ICD, Kampala human rights lawyer Nicholas Opiyo told IJT "the court is structurally incapable of delivering justice in the manner that the International Criminal Court can". He stressed how in a domestic prosecution, victims of mass atrocities, like those in northern Uganda, would merely act as witnesses. But at the ICC, victims can participate in the proceedings and have a right

to reparations. Opiyo also fears a Ugandan court could not provide an equality of arms for defence and prosecution that "has the entire state mechanisms and resources" behind it.

"The ICD is fairly new and hasn't yet completed any war crimes cases, so it remains to be seen if it will deliver justice with due process rights of defendants fully protected," Maria Burnett, an Africa researcher for Human Rights Watch, told IJT. She added that the ICD's biggest problem currently seems to be getting suspected war criminals in custody.

### Amnesty Act thwarts prosecution

Mike Chibita, Uganda's director of public prosecution (DPP), said the ICD will not try other ICC LRA indictees or other LRA members accused of committing serious atrocities while the amnesty law is still in place. He cited the court's first-ever war crimes prosecution, of Thomas Kwoyelo, whose trial was halted in 2010 after the former mid-level LRA commander applied for amnesty. Kwoyelo, however, remains in custody while appeals are on-going.

The 2000 Amnesty Act allows not only voluntary surrenders, but also those captured to apply for amnesty. Being granted amnesty means individuals cannot be prosecuted for "any crimes committed in the cause of war or armed rebellion" as specified by the act.

In Uganda, at least 26,000 former combatants, over half from the LRA, have been granted amnesty, the offer of which is currently set to run until May 2015.

"When we start prosecutions of suspects of serious crimes who surrendered or were captured, they run to the Amnesty Commission to apply for amnesty and it's granted," Chibita told IJT. Once perpetrators are given amnesty, "there is no way we can proceed at all," he added.

After Kwoyelo, the attorney general requested the amnesty act to be declared unconstitutional, but the Supreme Court has yet to rule on that.

"The fact that the Kwoyelo case continues to drag says a lot and may persuade many people, including myself, that Uganda is not ready to accord someone like Dominic Ongwen a fair trial that will live up to the ICC's expectations," said Stephen Oola, a transitional justice expert at Makerere University.

# The International Criminal Court's trouble with witnesses

**For evidence, the International Criminal Court (ICC) depends almost entirely on witnesses. But several high-profile cases at The Hague court have been plagued by dubious testimony. IJT asked legal experts what the court faces as a result and why this problem has been so prevalent.**

So far, in the ICC cases involving the Democratic Republic of Congo, the Central African Republic (CAR) and Kenya, the prosecutor has had little by way of documents or video evidence. As such, "testimony is key," notes Nancy Combs, a professor at William & Mary Law School. But testimonies have not always been reliable. "The overarching problem," she says, "is that the credibility of many witnesses is questionable."

## Pressuring witnesses

More than other international tribunals, the ICC seems afflicted by untruthful witnesses. This became evident in its first trial, against Thomas Lubanga Dyilo. In 2012, the Congolese rebel leader was found guilty of using child soldiers. But in their verdict the judges were very critical of the Office of the Prosecutor (OTP). The chamber said three Congolese intermediaries working for the OTP "may have persuaded, encouraged, or assisted witnesses to give false evidence", resulting in "dishonest" testimonies against Lubanga. The judges ruled the three be investigated. But the OTP declined to prosecute its own intermediaries [IJT-159]. A missed "valuable opportunity", Combs calls it, for the prosecution to show "it takes witness truthfulness seriously".



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In the case against Jean-Pierre Bemba, however, the OTP is prosecuting. On trial for crimes allegedly committed by his militia in the CAR, the Congolese ex-vice-president is accused of leading a network to bribe defence witnesses into giving false statements. Now, five leading individuals of the network – including two of Bemba's own attorneys – are being charged with offenses against the administration of justice in a separate trial [IJT-159].

## Sloppy investigation

Yet the most persistent witness issues have been in the cases against Kenyan suspects. In December, on withdrawing charges against the most prominent, President Uhuru Kenyatta, ICC prosecutor Fatou Bensouda acknowledged that she lacked enough evidence, after "key witnesses" withdrew or changed their accounts and admitted they "lied" about "having been personally present at crucial meetings" [IJT-165, IJT-172]. Earlier she had abandoned the prosecution of co-accused Francis Muthaura for similar reasons [IJT-167].

Kenyatta's lead counsel, Steven Kay, says he had been warning about witness trustworthiness since the case opened in 2011. He knew some witnesses were unreliable because they first offered themselves to the defence, he explains. "Several witnesses wanted money from us. One asked for two million shilling [19,000 euros]," Kay tells IJT, adding that when he turned them down, the witnesses went to the OTP.

Kay accuses the prosecution of sloppy investigations and ignoring the fact that people were not eyewitnesses. "They [prosecutors] know that witness statements need to be corroborated and they didn't do that," he says. The defence team checked telephone data to reveal that a key witness was lying.

Kay claims the risk of unreliable witnesses is bigger in the "highly political" cases in Africa. Stephen Smith Cody, who has researched ICC witnesses and directs Berkeley Law School's Atrocity Response Program, said it's a universal problem. "Witnesses lying in criminal trials is nothing new. It might matter more for the ICC because of its symbolic significance on a global scale," he concedes.

## Intimidation

Another component to the ICC's trouble with

witnesses is even less measurable. In a statement concerning withdrawal of the Kenyatta case, Bensouda said that some key witnesses have died "while others were too terrified to testify". Defence lawyer Kay maintains that such accusations still need to be proven, but Combs tends to agree that intimidation is a real issue. "It is big. But it is hard to tell how big the problem is. There have certainly been indications that witnesses are threatened and intimidated in the Kenyatta case," she says.

The same goes for the trial against Kenya's Vice-President William Ruto and broadcaster Joshua Sang. In 2013, the court issued an arrest warrant for former OTP intermediary Walter Barasa, charged with attempts to "corruptly" influence three witnesses in the case. Kenyan authorities have yet to transfer Barasa to The Hague. In the meantime, dozens of witnesses have changed their statements and withdrawn from the trial [IJT-167]. "Not that I condone lying, but it is understandable that people pull out when they and their families are threatened," says Combs. Reports that a Ruto witness was recently murdered might enhance the threat.

## Protection

Compared to other situation countries, Kenya's reported levels of intimidation are "unique", says Cody. The difference, he explains, is that the Kenyan cases involve high-profile leaders "who have the security apparatus at their disposal". Cody sees the greater focus on witness protection as something positive to have emerged from the collapse of the Kenyatta case. "I am hopeful this experience will improve the overall protection system," he says.

While Kay admits he has "lost faith in the system", the two academics are more optimistic. Combs believes the court takes its witness troubles seriously and makes a best effort to get reliable testimony. "The ICC has been more open and transparent about it than other tribunals, where the issue was sometimes swept under the carpet," she says.

Cody, who surveyed 109 witnesses in the trials against Lubanga and Congolese warlord Germain Katanga, found most were satisfied with the ICC's services and protection. "This is not a story of the ICC failing on all levels," finds Cody.

*This is the first in a three-part series of articles on challenges faced by ICC prosecutors.*