

SIDEWAYS GLANCES: THE TRIALS OF GERMAIN KATANGA AND PASCAL SIMBIKANGWA

Interview with
Judge Bruno Cotte¹ and Judge Olivier Leurent²
by Sandra Delval³
October 2014
Adapted from French by Corey E. Walker

In 2014, two important verdicts were announced in cases involving violations of international law. Both decisions were handled by French judges at the International Criminal Court (hereinafter "ICC") based in The Hague, and the Criminal Court of Paris.

On March 7, 2014, Germain Katanga was convicted by the Trial Chamber II of the ICC (*fr*: “la Chambre de première instance II de la CPI”). Katanga was sentenced on May 23, 2014, to 12 years of prison⁴ for crimes committed during the attack against Bogoro, a village in the Ituri district in the Democratic Republic of Congo's (*hereinafter* “DRC”) on February 24, 2003. Notably, Mr. Katanga's conviction including his substantial contribution to coordinating the attack and providing logistical support. Pursuant to Article 74 of the Rome Statute (*hereinafter* “the Statute”), Katanga was convicted as an accomplice to murder within the meaning of Article 25 (3) (d) of the Statute, as well as for attacks against civilian populations as such, or against individual civilians who were not involved in hostilities, destruction of enemy property and pillaging, as war crimes. Germain Katanga waived his

¹ Judge Bruno Cotte served at the ICC from 2008 to 2014. Beginning in 2000, Judge Cotte presided over France’s highest court for criminal matters, la Chambre criminelle de la Cour de cassation française. From 1995 to 2000, he was Attorney General at the Cour de Cassation and from 1990 to 1995 he served as the Public Prosecutor, or Procureur de la République, at the Civil Court of Paris. From May to September 1990, he served as Prosecutor General to the Appeals Court at Versailles, and Director of Criminal Cases and Pardons at the Ministry of Justice from 1984 to 1990.

² Since 2009, Judge Leurent has served to the Appeals Court of Paris, or la Cour d'appel de Paris (Chief Judge of the trial court). From 1990 to 2000 he served as an investigating judge at the Civil Court of Paris, where, beginning in 2004, he served as Vice President, and beginning in 2000 as Vice President within that Court’s Secretary General’s Office, or as chargé du secrétariat général de la présidence du Tribunal de Grande Instance de Paris.

³ Sandra Deval has been working for the past two years as a specialized legal assistant in international criminal and humanitarian law in the division of crimes against humanity and war crimes of the Prosecutors office within the Paris Court. Before, she worked in the International Criminal Court as one of the associated lawyers to the Chambers and in the defense team of the Special Court for Lebanon. After finishing her LL.M in the Academy of Humanitarian International Law in Geneva, she spend several months in the Extraordinary Chambers of the Cambodia Courts and she also worked for Human Rights Watch in the Hissène Habré case.

⁴ ICC, *Le Procureur v. Germain Katanga*, Trial Court II, Judgment rendered through the application of Article 74 of the Rome Statute, March 7, 2014, ICC-01/04-01/07-3436; ICC, *Le Procureur v. Germain Katanga*, Trial Court II, Decision concerning punishment (Article 76 of the Rome Statute), March 23, 2015, ICC-01/04-01/07-3484

right to appeal his conviction and sentence.⁵

This was the ICC's second trial and Judge Bruno Cotte of France presided it. It was the ICC's first trial that led to a final verdict.

On March 14, 2014, Pascal Simbikangwa was convicted for having voluntarily committed attacks upon the life of others, and for causing grave bodily or mental harm, in execution of a common plan to partially or totally destroy members of the Tutsi ethnic group, which constitutes genocide as defined in Article 211-1 of the French Penal Code. He was also convicted for aiding and abetting a large-scale and systematic practice of summary executions and inhumane acts inspired by political motivations and committed as a part of a concerted plan against a civilian population, which constitutes a crime against humanity under article 212-1 of the Penal Code. Pascal Simbikangwa was found to have managed barriers in Kigali, to have actively supplied arms, and to have provided the guards and Interahamwe with instructions for exterminating the Tutsi. Simbikangwa was sentenced to 25 years in prison and is awaiting the decision of his appeal.

Judge Olivier Leurent presided over the Simbikangwa case which was the first trial to take place in France concerning genocide.

During the two trials, the judges faced similar challenges related to testimonial evidence and translation—from Swahili and Lingala to French and English in one instance; and from Kinyarwanda to French in another. In both cases, witnesses and victims had to be taken into custody to assure their presence and testimony before the Court. Furthermore, judicial reclassifications were also decided during the two trials.

Despite similarities between the trials -both involved men accused of committing violations of international law that are shocking to the conscience of humanity thousands of miles from where they were to be judged- the trials differed in many aspects. In one case a six-week hearing was based on a single case file which was shared among, and made accessible to, all the parties involved (prosecution, defense and civil parties). The single case file was developed during a preliminary investigation that took almost four years. The joint record was made by the investigating judges who undertook efforts requested by the parties. The ICC trial's case file, which had contributions from the parties, was developed during arguments before the trial court, over the course of four years.

The trial courts were structured and functioned differently: one was made up of professional judges, and the other was composed of a jury; the role and place of the defendants, and the presiding judges also differed. The trials' differences and similarities are largely explained by the nature of the legal procedures governing their judicial processes. The Simbikangwa trial was adjudicated by the Criminal Court of Paris and followed French criminal procedure. On the other hand, the Katanga trial conformed to the founding and procedural texts of the ICC, which is more influenced by the *common law* procedure.

⁵ ICC, *Le Procureur v. Germain Katanga*, Notification of the withdrawal of the Germain Katanga appeal against the judgement rendered through an application of Article 74 by the Trial Court II, June 25, 2014, ICC-01/04-01/07-3497.

Having participated in the two trials –as a lawyer attached to the ICC’s appellate court, and as a the Attorney General’s Specialist Assistant- I’m able to compare their processes and procedures. I was most surprised to see that both trials encountered similar problems during arguments, notwithstanding the substantive differences between the trials’ processes and procedures. The proceedings before the ICC were very influenced by the Anglo-Saxon legal system and the criminal court’s proceedings applied French judicial procedure. It couldn’t have been any other way, but in one trial one observed a defendant who sat silent for years, while in the other trial the defendant’s presence was evident from the beginning until the conclusion of arguments. In one trial, the arguments centered on facts and context, and in the other trial arguments took into account the defendant’s personality, personal history, and his development. Throughout the process, I wondered about the reasons for these differences, which were tied to basic procedural differences, and how to achieve greater speed and fairness in the courts dealing with this particular type of litigation.

So that the wisdom gained during the trials might benefit jurists in the future, I thought it would be interesting to organize a meeting between the two judges who presided over the trials. I thought the judges might share their experiences – what they believe differentiated the cases, what they believe highlighted the trials’ similarities, and to hear their perspectives on each process’ fundamental differences. Judge Cotte, who presided over the trial of Germain Katanga before the ICC, and Judge Olivier Leurent, who presided over the trial of Pascal Simbikangwa before The Criminal Court of Paris, agreed to answer my questions. The exchange was fruitful, and highlights lessons and insights that would improve the conduct of similar trials.

I. *What challenges did you face as you managed and presided the trial process?*

Juge Bruno Cotte:

I had a striking feeling of “novelty” when I began to preside over the ICC trial and procedure, particularly because of the litigation's agreement: everything was new for me. I felt as if I'd entered a bubble. And my feeling was not only related to discovering the trial’s context. No, it was a feeling fueled by everything around me at the time, and all that has subsequently been my life for many, many years now. Nothing was as expected or familiar to me; not the procedure to apply- which was largely inspired by the common law- nor the judges and legal assistants with whom I had to work. I was unaware of how, coming from countries so very different from my own, they would work, or how the trial would proceed given the physical space and time constraints. In the Hague there was a totally sanitized courtroom with several screens, visual aids, and simultaneous translation. In short, it was a courtroom environment that was very different from what's found in French courts.

Juge Olivier Leurent :

I was not challenged by a sense of novelty in relation to the trial's procedure because Simbikangwa’s case applied French law. The trial court was empaneled as usual: a jury-- that is to say, six jurors and three professional judges. It was not a specially appointed criminal trial court as there is in some cases in France, like in terrorism situations.

I did not have to learn a new procedure, or even familiarize with a new courtroom because the case was tried in the Palace of Justice in Paris. However, the novelty that I faced was that of the litigation agreement, and especially the interaction between the jury and a judge serving as a specialist historian; that judge ran the risk of becoming the judge of history notwithstanding the judge's duty to judge a man and what was alleged against him as an individual. The confluence between a particularly complex historical context, a location of the events very distant geographically and temporally from France, and a jury, was new. That was a challenge for me because there was no way to predict how our French citizens would react to the complexities and challenges – challenges that were both related to history and that were specific to the individuals involved in the case.

II. How was the pre-trial phase, which was called "instruction" or "preliminary"-- handled in your own trials? A pre-trial instruction process exists in French court procedure. Did you consider a pre-trial phase necessary in the process? Did you find it appropriately tailored to the trial?

Judge Cotte:

It was a real surprise to me to discover that the founding texts of the ICC presupposed that after the confirmation of criminal charges by the pre-trial chamber⁶, (*fr.* une phase de mise en état) place-setting begins. In the Katanga trial, the place-setting phase took place over the course of one year. A one year period may seem long but it was shorter than the time needed by the Trial Court in the first case brought before the Court (the Thomas Lubanga trial) whose pre-trial process lasted almost two years. The case developed over the course of the trial and throughout the arguments.

Accordingly, the judges began the hearings without the case file, and without having substantial background information. Some judges didn't want any information of the matter upon which they were to judge, and preferred to discover all that was needed during the witness testimony, there

⁶ The Pre-trial chamber plays an important role throughout judicial procedures up until the conclusion of the indictment process (articles 55 - 61 of the Rome Statute): 1) before an inquiry begins: the Pre-trial chamber makes every useful effort to guarantee the efficiency and integrity of the judicial procedure; 2) at the opening of an inquiry: the Pre-trial chamber either grants or denies its authorization to open an inquiry, depending on whether it finds that there exists a reasonable basis for opening the inquiry, and if the case falls within the Court's competence. Otherwise, the Pre-trial chamber may take into account a challenge to the competence of the Court or the justiciability of a conflict. 3) during an inquiry: the pre-trial chamber must ensure the overall integrity of the judicial procedure; 4) as it relates to arrests and indictment; the prosecutor may request that a pre-trial chamber issue an arrest warrant or a summons, and request that the Pre-trial chamber receive the accused if it is reasonably convinced that the individual committed the crime for which the Court is competent.

Within a reasonable amount of time following the accused appearance, the Pre-trial chamber holds hearings to confirm the charges under its consideration before the trial. The prosecutor substantiates the charges with evidence sufficient to establish reasonable belief that the accused individual committed the crimes alleged. The individual can contest the charges, the prosecutor's substantiating evidence, and present her own evidence. After deliberation, the pre-trial chamber may confirm the charges or deny them if it has failed to find sufficient evidence.

questioning, cross examinations, and the production of written evidence. As a civil lawyer, I couldn't imagine knowing nothing about the case file. Without a doubt, I was in possession of the Pre-trial chamber's indictment,⁷ but the case file is actually developed during the hearings and that is when the three judges uncovered the facts that they were to consider.

Olivier Leurent:

That's the difference with our civil law system -and, I'd argue, its advantage on this particular point— when compared to a procedure that provides for the development of the case file during the hearing. I remain convinced of the investigating judge's effectiveness and independence, and I consider an independent judge to be more efficient and effective while working within roughly the same amount of time. The pre-trial phase in the Simbikangwa trial, for example, took 4 years.

In my opinion, the pre-trial phase guarantees an adversarial process because the parties can make requests, seek-out experts, be associated with preliminary expert inquiries, assist witness hearings, and request transportation to the location of the events in question. The preliminary investigation seems to me to be well suited in the truth seeking process that should animate the judges' decisions, and aids in discerning between the truth and lies. The search for truth in the preparatory investigation is considerably less difficult for investigating judges because they are more mobile and less numerous. The investigating judges have time to get to the bottom of things whereas a trial court is relatively fixed in place. That's something I truly believe:the preliminary investigation makes it easier to determine the truth.

Bruno Cotte:

I think that one lesson should be taken up by the ICC in regards to the development of case files. The case files should open before arguments and should be accessible to the jurists. And then, at the trial's hearing, the Court would entertain arguments that enable it to get straight to what's essential for seeking out the truth.

III. How did you prepare the arguments phase and the presentation of evidence?

Bruno Cotte:

Personally, I was very intrigued by common law procedure and I had to learn how to implement it as I presided over the trial. I think that I succeeded but I admit that I was often forced to improvise. One thing is certain: I was impressed by the quality of some of the principal examiners and the cross-examinations conducted by both the prosecutor as well as the defense teams. When a trial is conducted by real professionals, as was the case for me, it is possible to make real strides

⁷ ICC, Le Procureur v. Germain Katanga and Mathieu Ngudjolo, Pre-trial chamber I, Decision confirming indictment, or *Décision de confirmation des charges*, September 30, 2008, ICC-01/04-01/07-717.

A «*Décision de confirmation des charges*» is a decision delivered by a pre-trial chamber that establishes that the evidence presented provides substantial reason to believe that an accused individual committed the acts for which he has been charged.

towards determining the truth. Certain examinations and cross-examinations, which were conducted with great precision and determination during the Katanga trial, helped the trial proceed further along than would have been possible with an examination solely done by the judicial police, followed by an examination by an investigating judge.

However, I insist that for me it is essential that judges can begin their hearing with a case file, and that they familiarize themselves with its contents. This is a better way to conduct the arguments and to save time during the trial by retaining only those witnesses who are essential.

Once the presentation of evidence has begun, witness depositions proceed— usually without surprises. At most, it sometimes happens that a witness becomes ill, or that the prosecutor, upon realizing that one of its witnesses is no longer an asset, asks that witness is declared "hostile." In fact, the Court attended a request for a witness to be designated as "hostile." The Court deliberated on the question but ultimately held that the witness shouldn't be declared hostile, and it continued its deposition process⁸.

It's possible that in certain international criminal courts or ICC trials, the presiding judge is at arms-length from the process, or only intervenes at the beginning, at the margins in a trial's organization, and over the course of the arguments. When this happens, the parties take charge of the process, and the judges familiarize themselves with the evidence that they find persuasive during the arguments. I do not think that this is a recipe for a speedy trial or efficient fact-finding.

Olivier Leurent:

The Simbikangwa trial applied Article 309 of the French Code of Criminal Procedure in order to ensure the fairest trial as possible. When applying Article 309, the President organizes and manages the arguments and takes special care to respect the dignity of the defendant and the time spent for arguments.

In regards to the evolution of the hearing process in France, what I see is an increasingly obvious tendency to subsume our civil law within common law: to have a pre-trial phase that takes a long time, that is expensive, that is thorough, independent and impartial while having, at the same time, a cross-examination in the hearing and relegating the presiding judge's role to that of an arbitrator. This way of doing things was not my idea and I relied on Article 309's provisions. All that said, one felt during the hearing that the French procedural custom, where a witness who had already undergone two hours of questioning by the presiding judge, then found himself answering the same questions under examination and cross-examination, doesn't offer the same procedural safeguards built into the Anglo-Saxon system. This seriously prolongs the arguments at the risk of boring the jurors, as may be the case when the cross-examination is muddled and provides no value-added in the

⁸ Oral decision concerning a request made to the prosecutor to declare Witness 250 hostile, February 8, 2009, ICC-01/04-01/07-T-97-Red-FRA; Second decision concerning a request made to the Prosecutor to declare Witness 250 hostile, February 9, 2009, ICC-01/04-01/07-T-98-Red-FRA.

trial's search for truth. And yet it is always a little difficult, and requires some delicate maneuverings, for the presiding judge to interrupt an advocate, even when their questions have already been posed several times because, without warning, an important point could arise at any moment during the hearing.

This is an example of how Anglo-Saxon judicial procedure influences French criminal trials and prevents a presiding judge to adjudicate at a reasonable pace.

IV. What is a “place-setting” meeting?

Bruno Cotte:

The ICC's governing texts provide for holding organizational hearings, called the “place setting” hearings, to facilitate a fair and expeditious trial⁹. The ICC trial over which I presided had several place-setting hearings.¹⁰ Notably, 25 place-setting hearings were devoted to issues related to the status of the witnesses— that is, whether certain witnesses should be protected because they were in danger or vulnerable. Practically, then, the ICC must judge defendants whose home countries are characterized by constant insecurity. This particular context means that certain witnesses undertake very serious personal risks, and this obviously impacts a trial's pace. So I think it's necessary to find the proper balance between witnesses protection, which is crucial, - meaning that judges maintain discretion, or remove all identifying references to the witnesses-- and the defense's right to execute its duty. In some cases, protecting witnesses required relocating them elsewhere within his or her own country, or relocating them to another country or region altogether. All of these issues are complex and are therefore often handled before the opening arguments, in the place-setting meetings.

Other place-setting meetings may be held during arguments and, in some cases, as a part of the *ex parte* procedure (i.e., arguments made only in the presence of the party who requested the testimony). For example, one party may wish to make a claim or raise an issue to the Court that the party considers to be confidential. To begin with, the Court must assure that the *ex parte* confidentiality is really needed, and that the veil of confidentiality is lifted as soon as possible in order to recommence public and adversarial arguments.

The place-setting meetings were also held as the Court prepared transportation logistics in the DRC. The parties were in fact deeply involved in the preparations concerning transportation when the trial's procedures were developed.

V. What's the presiding judge's role at the beginning of the organizing process arguments on the merits?

Bruno Cotte:

I'll make a few observations to highlight the differences between the proceedings at the ICC and at the French trial court.

⁹ Rule 132 of the ICC Rules of Procedure and Evidence

¹⁰ Available at <http://www.icc-cpi.int/iccdocs/doc/doc1744373.pdf>

The drafters of the Rome Statute in 1998 wanted to incorporate some civil law practices into the ICC's governing texts. The Thomas Lubanga trial, the first ICC trial to be adjudicated, was chaired by a British judge. As authorized by the Statute, the judge guided the Lubanga trial according to common law procedure. But the judge was obviously intrigued by the civil law procedures that were also included in the Court's governing texts. For example, the judge is empowered in ways beyond what's common for arbitrators in common law: the judge is granted the right to question the witnesses and the parties. To me, all this speaks to an effective and workable first attempt to move from common law procedures towards civil law procedures.

As I said earlier, I couldn't imagine being totally absent during the preparations for the trial's argument, while knowing I would preside, and leaving all that up to the parties. So, at that stage, the Court played an active role. For example, the prosecutor asked to call and question about thirty witnesses over the course of 240 hours. The Court then considered the request, reviewed the witnesses' written statements and, ultimately, suggested that some witnesses were removed from consideration. The judge didn't think it was likely that those witnesses would provide anything that would sway the outcomes decisively. The parties accepted the judge's reduced witness list. The Court also asked the Prosecutor to reduce the time for witness examination from 240 hours to 120 hours. The Prosecutor reacted pretty strongly at the suggestion and argued for an increase in time. But the Judge's decision was ultimately accepted. The prosecution handled the delays well and did good quality work.

Furthermore the Court issued an order, by applying Rule 140 of the Rules of Procedure and Evidence, detailing precisely the procedure for arguments, the conditions under which the parties and participants (i.e., victims' advocates) would speak, rebut, or offer a rejoinder¹¹. This time-saving order was used throughout arguments: the parties referred to it in order to assure that they themselves followed procedural order, or to prod the presiding judge into enforcing procedural order. And so, yes, the Court's process as applied was deeply influenced by the common law. But, as the Court had no record prior to arguments, it was necessary to adopt rules most conducive to discovering the truth over the course of the hearings.

Finally, as I just said, it is a fact that the Court reserved the right to question witnesses. And, essentially the presiding judge asked the questions. Unlike the procedure that is followed in criminal trial courts, the Court's questions were always presented last--after the Prosecutor, the two legal representatives for the victims, and the two defense teams for Germain Katanga and Mathieu Ngudjolo presented their lines of questioning. For the most part, the Court exercised its right to question witnesses out of a need to clarify certain points. The Court's jurists were sometimes surprised that the parties had not asked certain questions that, from their perspective, were worthwhile. Was it that a point had been forgotten, or that neither party wished to broach or address one point or another? Whatever the reason, it was good that the Court could play a supplementary role.

Olivier Leurent:

¹¹ ICC, *Le Procureur v. Germain Katanga*, Appeals Court II, Instructions for the discharge of arguments and depositions in accordance with Rule 140, December 1, 2009, ICC-01/04-01/07-1665-Corr-tFRA.

There are not specific provisions in French legal texts for the preparation of hearings, but a hearing preparation process has developed from judicial practice. When a trial lasts longer than two weeks, it is customary for the presiding judge to create a hearing schedule for the parties, and the parties offer input concerning the schedule. One or several meetings with the trial's advocates are organized and the schedule is discussed. While the presiding judge manages scheduling, I modified the scheduling based on input from one party.

To me, this judicial practice seems essential and encourages buy-in from all parties in relation to the trial's process. I'd suggest that such a practice be written into law so that all parties' rights concerning the trial's scheduling are regulated and provided for. This would also empower the parties who would be involved *ab initio*— several weeks before opening arguments.

For these types of cases, preparing the hearing schedule is essential for a well-run trial. Without a specific limit, summoning witnesses can run up to just about the opening of the arguments and can completely disrupt a trial process. Strategies to delay or to call into question the very authority of the court weakens the judicial system. The law should, in my opinion, impose a minimum period of 6 weeks between the submission of witness summons, no matter from which party, (plaintiffs, prosecution, defense) and opening arguments.

VI. What role did the defendant play during the process? Did he give testimony? If so, at the beginning or at the end of the trial? Did the defendant have the right to remain silent? And where was the defendant situated in the actual court room?

Bruno Cotte:

I was surprised by how very little physical space the defendant was given during the trial. He was physically located in the last row, at one of the far ends of the court room. In common law procedure, the parties are essentially only interested in the witnesses, and defendants are not involved, or have very little involvement. The judges greeted and acknowledged the defendants when they entered and exited the court room (before the cases were divided, both Germain Katanga and Mathieu Ngudjolo were present¹²). The presiding judge regularly asked the defendants, "Is everything going OK?" and whether they understood what was happening in the trial. That surprised Anglo-Saxon defense teams who were amazed that the judge would speak directly to the defendants.

At the end of the arguments, after two years of trial, the defendants expressed their desire to testify under oath as witnesses¹³. They were not required to testify but they chose to do so. Were they and their lawyers aware that such a request could pose some difficulties? I do not know, but they were asked many questions, especially by the Court. Of course, it was not an attempt to trap the defendants, and in that regard, I was very attentive to the lawyers' reactions, especially the Anglo-Saxon defense team. At this stage of the hearing, the defendants had not had the opportunity to take the stand but they had paid close attention to the arguments, they'd taken notes, and were finally able

¹² CPI, Le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui, Chambre de première instance II, Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés, 21 novembre 2012, ICC-01/04-01/07-3319

¹³ Article 69 of the Rome Statute.

to tell their side of the story. But they still had to wait until the end of arguments which, for a French judge, is an unusual way to go about the process.

Olivier Leurent:

The importance given to the defendants in trial in France is light years from the defendant's status at the ICC. The defendant must have a central role in the trial because it is “the defendant’s trial.” The defendant must be able to speak at any time and be able to substantiate his assertions and input. I find that if we question the defendants as the hearing unfolds, just after a witness raises something new, or just after an expert states her conclusions, we benefit from a defendant's responses that are especially spontaneous and authentic. I doubt a defendant's spontaneity when we've tipped him off to the topics on which he'll be questioned three days before *he takes the stand*. That the defendant is granted a central role in the trial seems to me to advance in the search for the truth, and much more so than if the defendant is relegated to acting as an observer at his own trial.

VII. How do we ensure witness' safety and security?

Olivier Leurent:

The French practice for anonymous witnesses isn't well suited¹⁴ for international criminal cases because only a judge's order can detain or free parties to the case. We also need a witness protection mechanism that is engaged earlier in the trial process— with both parties granted access to case files, a delayed process for protecting the witnesses risks making their identification possible.

It seems to me that for this type of trial implementing a mechanism for anonymous witnesses is a complex undertaking. It's hard for me to see how the interpreters and video conference can work seamlessly, and maintain an audible connection to a witness who is thousands of kilometers away. Too, I believe jurors would be quite suspicious of witnesses about whom they know nothing, whose face they don't even see, and whose voice is altered through videoconference. That type of setup – if there are several witnesses testifying anonymously -- won't do for landing a conviction.

Witness protection remains a serious issue to explore because, as it stands, governing texts and procedure isn't well suited for these types of trials. We should really think carefully about the impact on jurors who find the current process overly complex and outdated. The jurors now demand more in terms of evidence that proves guilt. Indeed, jurors turned to the Internet to learn about the judges who were sitting right next to them, and about the case in general. For these types of trials in particular, the jurors might be concerned about political influence and manipulation. All that said, an anonymous witness mechanism seems very difficult to put into practice.

Bruno Cotte:

He raises an issue that is of common concern. Witnesses, almost to a one, were all deposed

¹⁴ Article 706-58 , Code of Criminal Procedure

before the Court with pseudonyms however, it goes without saying that the judges saw the witnesses and knew their identity. Some witnesses requested protection at the hearing stage: and others asked that they be allowed to enter the¹⁵ court room without passing within the defendant's line of sight, so as not to be emotionally triggered by the source of their trauma; others requested that there be a curtain drawn between themselves and the public and, also some asked, that their faces-- because the arguments were filmed – be blurred and their voices distorted. It's up to the particular court to rule on requests of this nature at the beginning of the hearing, and, when considering the requests to remember that public testimony is still the rule. For this purpose, the Court sought input from The Victims and Witnesses Protection Unit, and, in particular, the psychologists unit .

I want to highlight the sensitive issues raised when dealing with some witnesses who are called to testify about events that took place in the past, and that are significant sources of trauma. These are witnesses who have undertaken a very long trip and, accordingly, have been confronted by major cultural differences. We have as an example the instance in which the Court in The Hague provided clothing for some of the witnesses when they arrived. Understandably, the witnesses wanted to present themselves at the hearing in clothing best suited for the occasion, but often the witnesses weren't able to purchase the clothing for themselves.

It turned out that the duty to protect the witnesses frequently led to holding closed hearings at the request of the parties. To avoid a constant switching between public hearings and closed hearings, and to ensure that public hearings are the rule, the Court and parties developed a protocol. The parties accepted a process where at the beginning of the examination all questions were gathered, to the fullest extent possible, justifying a closed hearing.

But let's go back, for a moment, to testimonial evidence. Such evidence occupies a crucial role when forensic specialists' testimony is scant, and when written evidence –of the type that existed in abundance during the Nuremberg trial- is difficult to collect. The prosecutor was the subject of a good deal of criticism because most of the documents from which he worked were United Nations or other NGO reports. There's no doubt that these types of documents can become legal evidence, but the conditions under which the collected testimony was conveyed could not be taken into consideration in the way that the Court considers police or military interrogations, or more generally speaking, a line of questioning from professional jurists.

In cases like these, the prosecutor faces serious challenges in finding witnesses and is often forced to rely on aides who are responsible for finding people who are ready to undergo questioning. During the Lubanga case, actions by certain aides raised concerns because it appeared that some aides had been able to elicit testimony in an unethical manner- and perhaps even influence the testimony itself¹⁶.

The lack of written evidence and forensic findings by technical experts is a common problem in cases before the ICC and in cases before criminal trial courts. For the acquittal in favor of Mathieu Ngudjolo and the guilty verdict in the case against Germain Katanga, the Court attempted to develop

¹⁵ Rules 87 and 88, ICC Rules of Procedure and Evidence.

¹⁶ ICC, *Le Procureur v. Thomas Lubanga*, Appeals Court I, Judgment rendered through the application of article 74 of the Rome Statute, March 14 2012, ICC-01/04-01/06-2842, p. 97 - 108.

the prosecutor's line of questioning, so that if the prosecutor drew any useful conclusions they were available and so other courts would not face the same difficulties.

Olivier Leurent:

The existence of a unit devoted to the protection of victims and witnesses depends upon a neutral body, such as the ICC. It's a very interesting idea that would be an innovation in France. Such an impartial unit would be extremely useful under the authority of the trial court, for example.

In regards to the search for witness, I think it's interesting that the investigating judge acts as a filtering mechanism. The investigating judge has the ability to verify the authenticity and impartiality of testimony, as well as to ascertain how the witness was brought before the Court. The investigating judges for genocide crimes, crimes against humanity, and war crimes for the Paris first instance court (*fr.* Tribunal de Grande Instance) are very conscientious and guide a verification process at the Court itself. In my opinion, the French system affords greater assurances as it relates to retracing a witness's origins.

In regards to closed hearings, I recall that the issue arose during the preparations for the Simbikangwa trial. In France the conditions under which a trial is closed are limited in light of section 306 of the Code of Criminal Procedure – a public hearing is a guarantee in a democratic system, and at no point during the trial was it possible to have the trial legally removed from the public's view because rape was not alleged and there was no chance that the trial would disrupt public order.

Concerning the reliability of evidence in the cases' records, it was necessary to raise the jury's awareness and examine the witnesses carefully, with a line of questions that allowed witness to begin at the beginning, to retell their own paths –and the paths their families have taken– up to this point. That delicate work required, in my opinion, experience I was unable to draw before the Simbikangwa trial, and I admit I adapted my line of questioning for the hearings. It was all very new to me because in all the other cases in which I've dealt, the variety of evidence available allows me to corroborate or rebut testimonial and forensic evidence. I want to stress the need for some serious thinking concerning judges' approach to witnesses in terms of the witness's personal history and biographic details when they are called before the Court.

From that point of view, oral arguments in France serve as a filter for sifting out the truth. I recall lines of questioning during the Simbikangwa's trial whose probative force were particularly strong-- only oral arguments would have been able to bring certain things to light. That there is only testimonial evidence for these cases is- at the same time- what makes the cases difficult, but is also its strength if a careful and close examination is undertaken to determine a particular testimony's value.

VIII. What difficulties did you face understanding the case's context? Where there problems stemming from translation or interpretation during the trial?

Bruno Cotte:

Another challenge that arose in both our cases was the way the witnesses was questioned in order to assure their credibility and reliability. The risk of misinterpreting their words is permanent. The court has to have an in-depth understanding of the facts and the case's context. And that's the

reason why having a case file with a modicum of information before the arguments begin seems to me to be indispensable.

At the ICC, there's a real risk that each Court will judge its cases in its own particular way. I have frequently drawn attention to the fact that it was absolutely necessary to avoid having as many tribunals as there are courts, and that there should be mechanisms in place by which we can share and discuss best practices among ourselves. In order to fully appreciate the context in which the Rwandan genocide took place, and the context in which the war in the DRC took place, we felt that it was necessary to bring in experts who could contextualize the issues. Toward that end, I presided a trial that tried to include sociologists, historians, demographers, and anthropologists. Without a doubt, this allowed the Court to ask more targeted questions –questions that were more useful especially for anything that had to do with the defendant's cultural, religious and spiritual context. In the region under our consideration, the role of spiritual leaders is hugely important. In my opinion, it was necessary to understand the cultural context in order to determine, for example, whether the defendant initially obeyed their spiritual leader, a fetishist, or a superior as it would be understood within a Western context and its hierarchical structure. This contextualizing method and the responses it yielded were certainly as helpful to the parties, as to the three judges. This approach should be adopted more broadly.

It's true, I was surprised of how the mechanics of interpretation slowed the arguments. Swahili and Lingala, spoken by the witness during the trial, would first be translated into French and then into English. So it was necessary to ensure that the English interpretation was well done so that arguments could be followed. On top of that, the witnesses did not always clearly express themselves, making the interpreters' task more difficult. I constantly asked myself if the questions I tried to put in the simplest terms were interpreted correctly, and whether my questions were understood by the person being questioned. And, conversely, during the arguments I asked myself if the witnesses' statements were properly interpreted for the Court. Some of the parties, including the defense teams, interrupted the arguments several times to ensure that a particular phrase was correctly interpreted. All of this started an argument about meaning within the trial's overarching arguments, which was inevitably time consuming.

Olivier Leurent:

At the Simbikangwa trial, two translators were always present. Their presence was necessary because there was more than one occasion during which they discussed among themselves the accuracy of a particular translation— and those discussions were followed very closely by defendants. In addition, I was also confronted by particular cultural and religious practices. The inherent cultural differences had to be explored, and added to the problem of translations that can lead down the wrong path and cause an incorrect judgement if one isn't especially attentive. For example, the words "guns" and "fighters" were sources of a good deal of back and forth during the trial.

Furthermore, we had to establish a chain of responsibility. However, there is a difference between the Western view of political and administrative hierarchy and a particular country's cultural reality. For example, in some countries, to be personally associated with the President can trump any other form of hierarchy -administrative or military- and it is necessary to truly appreciate the facts and social contexts from which the facts emerged.

IX. In your opinion, is it necessary for the Court to relocate in order to adjudicate these types of cases?

Bruno Cotte:

I do not think we would have ruled the same way if the Court had not visited the sites under consideration. Upon my election as presiding judge, I raised the possibility of traveling to the scenes in question but the judges seated beside me were initially reluctant to the suggestion. Just before the end of arguments, an agreement was reached and the Court and parties decamped to the DRC, to the places where the defendants lived, and to Bogoro, where the events in question occurred. We were able to evaluate in situ the value of certain evidence and, accordingly, various witnesses' credibility. It turned out that some witnesses had confused certain dates or places, and that others had almost certainly lied or partially revised the stories they had told earlier. If we had to do it again, I would like to travel to the sites in question with the other judges and the prosecution and defense teams before the opening arguments on the merits, and then just before arguments on the merits close.

Olivier Leurent:

I, also share an interest for in site visits but in France such an undertaking occurs during the investigation stage. For me, the question that arises is whether the advocates of a person who is under investigation may accompany the investigating judges during the site visits and participate in fact finding in the field. All that is an open question, and it raises all kinds of challenges concerning timing, logistics, and costs.

In the Simbikangwa case, the Court considered it important, but insufficient, to have site visits by the investigating judge. The Court benefited from having at its disposal film from one of the civilian parties to the case. They filmed the streets, the houses and other locations reported to have been the Interahamwe's barricades. The films were shown after being subjected to challenges and rebuttals and supplemented knowledge gaps among the Court and jurors.

The question of a site visit was raised at the Simbikangwa trial. However, currently, the Court's governing texts make traveling beyond the criminal trial court legally impossible because it would call for bringing the public along, too, and the trial court doesn't have jurisdiction outside of France.

X. What was the Court's composition, and how was it put into place during the trial?

Bruno Cotte:

This is one of the major differences between the Katanga trial and the Simbikangwa trial. The ICC is made up of 18 judges who were not all magistrates in their home countries before being elected and arriving at the Tribunal. Ten of the judges were elected from "List A" and were experienced criminal law and criminal procedure specialists. The other 8 judges, who were selected from "List B," were diplomats and/or academics with specialized knowledge of international human rights law. This diversity of professional backgrounds can lead to some challenges because it is difficult to become a judge over night. And for certain judges it was necessary to sever ties with their academic community. Incidentally, this led to questions about split decisions and dissenting opinions in the Court's governing texts, due to the Court's need to ensure that it would not advance biased or personal

conclusions of law. Of these 18 judges, three were assigned to the trial court that adjudicated the Katanga case, so there was no jury.

Olivier Leurent:

The problem is different in France because of the foundational principle of oral hearings that has existed since the French Revolution; it's a principle that's not well suited to the complexities raised during these types of trials. I studied the procedure for four months while my assistants were not legally permitted to read the indictment and nor were the jurors. Although I am very much in support of this great institution that increases the status of the entire legal system, I wonder whether these types of cases should be put before a jury.

At its most fundamental, a jury's legitimacy is based on the relationship between the French public and the crimes that took place close their homes, or at least in an environment with which they have some familiarity. This case certainly concerns France because it is obvious that all of humanity is implicated. But I'm not sure that the jury has the training and the legitimacy to involve itself in the historical, geopolitical, diplomatic and political complexity these cases implicate, in particular as it relates to the facts of the case as well as its temporal and geographical distance. I was lucky to have benefitted from extremely conscientious jurors, but the tasks that were asked from them was really very difficult and required extraordinary commitment in the face of considerable human costs, because the defendant was facing life imprisonment. Despite the rigor and commitment with which the jurors pursued their work, and the respect I have for my fellow citizens, I wonder whether, considering the public's perception of international criminal justice, these cases shouldn't be entrusted to professional judges.

Up to now, the criteria for specially composed criminal trials— that is to say, Courts made up of professional judges exclusively-- as it relates to terrorism for example, is the danger faced by judges. It's not dependent on a case's complexity. Yet it's my opinion that we're in need of a more thorough criteria to maintain professionalism among judges and these types of extremely complex cases provide ample justification of that need.

Furthermore, that assistant judges are unable to access the procedural texts is totally inadequate. Professional judges should be able to study the case's file in its entirety, and not be limited to the oral arguments, which in turn would limit the number of expert witnesses. Historians are often uneasy testifying because the judicial procedure requires that they ignore the issues on which they will be questioned. Because of that restriction, they can't easily prepare their testimony. I noticed a disconnection between their meticulous historical work that is complex, impartial and objective, and the particularities attendant to testifying before a criminal court. However, the historians' testimonies were needed because the Court was unable to access a case file.

In these cases, the investigating judges provide a more fulsome context that benefits the parties, a context that would be very useful to the entire Tribunal. At the Simbikangwa trial, ten days were devoted to contextualizing the issues, and it will be necessary to repeat this process of contextualizing during the appeal or for other cases that return to trial and concern Rwanda. The contextualizing process could be avoided altogether if the trial court was composed of specialists for this particular type of litigation, and we could also then consider developing judges' specialization for these matters.

Furthermore, I wonder about drafting well- reasoned decisions without access to the case file during jury deliberations. It is time to seek legislative reform that allows access to the investigatory procedure during the deliberations. Such a reform would, in my opinion, improve the rationale detailed in written decisions.

XI. Does the defendant undergo a personality assessment during the trial? When does the assessment take place?

Bruno Cotte:

I recall that once while on assignment, at the Katanga trial, I wanted develop a case file describing the defendant's personality in order to better understand the defendant. The idea for such a case file surprised others with whom I worked whose legal tradition and formation differed from my own. Some even saw the creation of the personality case file as indicative of a presumption of guilt on my part. This is how I learned about the divided sequence of a criminal trial, and I had to give up on the idea¹⁷. The Katanga guilty verdict was handed down March 7, 2014¹⁸ . Then the sentencing phase of the trial began, and it was during that phase that the Court took into account the defendant's character and personal history. Finally the decision setting the sentence was rendered May 23, 2014¹⁹.

Olivier Leurent:

I, for one, am in favor of examining the defendant's personality at the same time that the Court seeks to determine a defendant's guilt. Although I'm aware that this practice would be totally foreign to common law lawyers, I believe in the practice because I consider decoupling the crime – that is, examining only the facts of the crime separate from the individual-- is a type of fiction because the crime is a part of an individual's biography. An individual's life path, or personal challenges, is an incredibly rich source from which to draw before examining the facts because a defendant's personality informs the examination of the way in which the crime took place. That deliberations concerning a defendant's guilt and deliberations concerning sentencing are separated isn't a shock to me, but determining guilt must be informed by reviewing a defendant's personality – those examinations illuminate one another.

XII. Can you speak to the judicial reclassification that took place during the took trials? In one case, the reclassification didn't seem to pose any challenges, but in another case the

¹⁷ Following arguments on the merits, the Court announces its verdict. If the accused individual is found guilty, a second phase begins which addresses the defendant's punishment and sentencing.

¹⁸ ICC, Le Procureur v. Germain Katanga, Appeals Court II, Judgment rendered through the application of article 74 of the Rome Statute, March 7, 2014, ICC-01/04-01/07-3436.

¹⁹ ICC, Le Procureur v. Germain Katanga, Appeals Court II, Decision concerning penalties (Article 76 of the Rome Statute), March 23, 2015, ICC-01/04-01/07-3484.

reclassification caused a stir.

Olivier Leurent:

In France, the judicial reclassification of the facts is accepted by France's highest criminal court and the European Court for the Protection of Human Rights under the condition that the investigating judges did not definitively settle the issue earlier in the process. If in fact the judicial reclassification has been taken care of earlier in the process, the trial court must consider that the question or issue is settled. If the issue does not arise in the course of the investigation, the trial court is free to raise the issue as a subsidiary or special question that supports the primary issues raised during deliberations. During the Simbikangwa trial's arguments and after lines of questioning from both parties, the Ministère Public, or Public Advocate, asserted that the most precise legal classification for "having committed" genocide through other individuals implied that the individual in question was the principal perpetrator, and not merely an *accomplice* to genocide. The Court considered the classification and, in the end, Simbikangwa was found guilty as a perpetrator of genocide, even though he had been charged for complicity in genocide.

Bruno Cotte:

For some jurists, the judicial reclassification considered by Trial Court II in the Katanga case was a tidal wave. In November 2012, the Court separated the two defendants' matters and handed down a decision acquitting Mathieu Ngudjolo. The Court rejected key witness²⁰²¹ called upon by the prosecutor, witnesses whose testimony he relied upon heavily but whose credibility was doubted by the Court. Once the Court divided the defendants' cases, the Court indicated that it was considering a reclassification of the criteria for culpability in relation to the second defendant. The basis for the reclassification was Regulation 55 of the Tribunal Procedure which provides a procedure for reclassification. Months earlier in the Lubanga case, the appeals court held that Regulation 55 was applicable here²².

The Anglo-Saxon defense team for the remaining defendant sought the opening of a new trial. Once again, the Appeals Chamber confirmed that the defense team could seek application of Regulation 55 and described the conditions under which that judicial norm applied²³. Implementing the reclassification procedure took 18 months because the defense wished to make additional

²⁰ ICC, *Le Procureur v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Court II, Decision concerning the implementation of Rule 55 of the Rules of the Court and the initiation of a separation of the charges against the defendants, November 21, 2012, ICC-01/04-01/07-3319.

²¹ ICC, *Le Procureur v. Mathieu Ngudjolo Chui*, Appeals Court II, Judgement rendered through the application of article 74 of the Rome Statute, December 18, 2012, ICC-01/04-02/12-3.

²² ICC, *Le Procureur v. Thomas Lubanga*, Appeals Court, Statement concerning appeals made by Thomas Lubanga Dyilo and the prosecutor against the decision informing the trial's parties and participants that the judicial classification can be modified in accordance with Rule 55-2 of the Rules of the Court, December 8, 2009, ICC-01/04-01/06-2205.

²³ ICC, *Le Procureur v. Germain Katanga*, Appeals Court, Statement concerning appeals made by Germain Katanga against the decision rendered by the Trial Court II, November 21, 2012, titled, "Decision concerning the implementation of Rule 55 of the Rules of the Court and order to separate the charges against the defendants," March 27, 2013, ICC-01/04-01/07-3363.

inquiries and locate new witnesses who would be able to speak to the elements that implicated this new criteria for criminal responsibility. I recall that the Preliminary Court remanded Katanga to the Trial Court. The Preliminary Court found that there were substantial reasons to hold that Katanga committed the crimes alleged against him— that the crimes were committed jointly with others, and *through* others as an intermediary— within the meaning of Article 25 (3) (a) of the Statute. The conviction that will eventually be rendered by the Court will be on the basis of Article 25 (3) (d) of the Rome Statute and means that, according to the Court, Germain Katanga contributed to the commission of crimes by a group of individuals acting in concert. We should also note that after having decided to appeal the case's outcome due to a disputed reclassification, the defendant decided to drop the appeal and he expressed his regrets to the victims.

XIII. Can you speak to decisions handed down by other tribunals on the arguments at issue in in these trials?

Olivier Leurent:

During the Simbikangwa trial, challenges arose in relation to the parties' use of decisions pertaining to similar crimes handed down by the International Criminal Tribunal for Rwanda ("ICTR") . In some instances, the same witnesses heard at trial were also heard by the ICTR, and those witnesses' credibility on certain points were questioned. That was entirely new because it is rare for a trial court to question an international court's decision. And explaining that to a jury was complicated, not to mention the challenge of explaining different jurisdiction's procedural differences. It all required an effort to educate the jury and careful examination of the parties to highlight for the Court and the jury the exact meaning of a particular section in the ICTR's decision. The challenge with such an effort being that ICTR decisions may be more than 500 pages and that each line must be considered within the context of the entire decision, and that is not at all well suited for a criminal trial with a jury.

Bruno Cotte:

That particular challenge didn't arise. There wasn't a decision brought up during my trial from an international tribunal or from the DRC jurisdiction based on similar facts.

XIV. What role did the press and media play?

Olivier Leurent:

I think the media has an undeniable role in informing the public during these closely watched, high-profile cases. It would be hypocritical to say that the media does not affect the public because, first of all, witnesses can read in the press what other witnesses have said before, and even develop an understanding of the Court's procedure notwithstanding that they are unable to attend hearings before their deposition. Moreover, newspaper articles can yield "spontaneous" testimony, and it's the presiding judge's discretion and responsibility to accept or deny such testimony. Finally, the presiding judge should broach the issue of the media's role with the jury to reassure them, and to remind the jury that while they are allowed to follow the press, they must remain impartial and that

the decision will be based solely on the arguments made at trial. All that is to say that we have to accept the current media landscape, not overlook its influence, and integrate it into the way the hearing is conducted.

Bruno Cotte:

I'll highlight that this is another major difference between the two trials. Only NGOs and the DRC's local press followed in detail the Katanga trial. I sometimes felt as if this justice was disconnected. Maybe that was due to the amount of time the arguments took? But I'll say that in any case there was almost nothing about the trial in the French press – in either the mainstream media or specialized publications – on the trial's progress. However, this was only the second case before the ICC with oral arguments conducted in French and whose outcome was likely to establish judicial precedents.

At the end of the interview, I took the opportunity to ask the judges whether they had any advice to offer their successors. Judge Cotte replied that it was necessary to approach this type of litigation with humility and that it required a lot of listening and hard work. Judge Leurent added that these cases required assiduous preparation in order to project the judge's legitimacy and authority when facing parties who often have in depth knowledge of the case's context, and, further, that they have had a familiarity with the contexts in which the issues arise for a much longer time than the presiding judge at the criminal trial. Judge Leurent reemphasized the need for a courteous hearing and respect for the rights of all the parties involved. He also insisted that the presiding judge must fully embrace his role and responsibilities and avoid ceding his power to guide the process in order to ensure that the arguments are high quality. Finally, he discussed the rich and complex relationship between the presiding judge and the jurors-- wherein the judge checks in with the jury to ensure that they are following the arguments, that they understand the arguments being made, and aren't checked-out after even 12 consecutive hours of hearings. The judge's relationship to the jury isn't one based on influence, but is in place to ensure that the jury remains attentive to all the arguments, whether the juror is in favor of an arguments or against it-- because that's the jury's duty.

In the light of the suggestions made by the two judges, it seems necessary to leverage their reflections in order to improve the adjudication procedures for similar cases, for cases that may come before the the ICC, and for cases that will come before French criminal trial courts that will address this type of litigation. Judge Cotte stressed the need for judges who are called to serve to be well informed of the case's issues, and to have access to case files before opening arguments. Though it's not necessary that such a case file be as thoroughly developed as a investigation file would be in the French legal context, in the interests of efficiency, Judge Cotte seemed convinced that the judges should not be relegated to discovering the facts of a case exclusively within the contexts of the arguments. He reiterated that this type of reform would enable the development of decisions improved by a greater understanding of the case's context and allow the process and arguments to

focus on what is essential. All of this would save considerable time in first instance proceedings.

Judge Leurent also suggested potential procedural reforms to more efficiently adjudicate this type of litigation in French courts and jurisdictions. The creation of a unit for the protection of victims and witnesses attached to Criminal Trial Court of Paris, an impartial institution, would in his opinion be very useful to facilitate logistics for witnesses arriving from foreign countries as well as their protection. In addition, according to Judge Leurent, this litigation's inherent complexity should be a criteria justifying the need to entrust these types of cases to professional judges. Without questioning the legitimacy of the jury, Judge Leurent reflected that the jury's work in these cases were particularly difficult. A criminal trial court composed specifically to adjudicate genocide, crimes against humanity, and war crimes, would allow a considerable amount of time to be saved as well as a more thorough comprehension of the cases' contexts. He also mentioned the need for the Court to have access to the case file in order to prepare a well-reasoned decision when the case is as complex as those at issue here.

Finally, Judge Leurent raised the possibility of legislative reform in regards to organizing the hearing earlier in the trial process. This judicial practice of involving the parties in the preparation of the criminal trial could be enshrined in law and would reduce the possibility that witnesses were summoned just before the opening arguments: for trials that last several weeks summoning witnesses could paralyze the institution. Along those lines, he suggests a minimum period of 6 weeks between summoning witnesses, no matter the summoning party (plaintiffs, prosecution, defense) and the opening arguments. Such a reform would address the need for a swift, fair and modern justice process responsive to international issues.

To me, it seems necessary to codify rules governing the examination of the parties during arguments. In France, such a rule would be welcome because Anglo-Saxon procedures and practices significantly influence the arguments in our trial court. But French procedure does not yet benefit from having explicit rules governing the examination and cross-examinations to which the parties are normally subjected. Such a rule would enable the parties to refer to explicit rules over the course of the hearing, or when the opposing party takes up their line of questioning, and to object to certain questions or courtroom behavior if the presiding judge fails to do so herself.

Thanks to these two experienced judges for offering their reflections. Thanks also to the many people who hope to see the procedures evolve at both the International Criminal Court and among French trial courts. It seems necessary to initiate discussions concerning potential procedural changes so that, after these first trials, international criminal justice continues to develop while maintaining efficiency, equity, and fairness.