5

From Feminist Reimaginings to the Field

Reflections from an International Criminal Lawyer

Angela Mudukuti in conversation with Louise Chappell

INTRODUCTION

Chappell: Angela, many thanks for agreeing to share your range of experiences as a practitioner in international criminal law [ICL] with us. Can I start by you telling me about what inspired you to become an international criminal lawyer, and what positions have you held in this field?

Mudukuti: Thanks, Louise. I grew up in Zimbabwe and, at the time, it was still a racist and patriarchal society. And so, being a black woman, you find yourself at the bottom of the hierarchy. And, even as a young child, you see how people who look like you are treated. And so, from the very beginning, there was that desire, impetus, and that motivation to change things and to be a positive part of that change, and I felt like law was an empowering tool to do that. I felt very strongly about being a lawyer and being able to defend the rights of people who look like me and other people who are marginalised and not treated fairly in society. And that's where it all started. I decided to study law as an undergraduate degree, and then I did a masters in international criminal law and spent a brief time in private practice in Zimbabwe. After that I was lucky enough to get an internship at the International Criminal Court, back in the day when they still had paid internships. That was a truly formative experience because it opened my eyes to the world of international criminal law and reaffirmed all my choices, as far as wanting to be in human rights and international criminal law.

After my internship, I was retained by the Court. I worked within the Office of the Prosecutor and learnt a great deal about how international organisations work and the challenges that come

with doing this kind of work. It was interesting and exciting to be at what I envisioned then as the pinnacle of international criminal law. But I also knew it would be very valuable to build more domestic experience and to work directly with affected communities as part of civil society. Working at the Southern Africa Litigation Centre, which is the Johannesburg-based human-rights organisation, provided such an opportunity. I ran the International Criminal Justice programme, and what we were doing there was strategic litigation using international criminal law domestically. Using domestic frameworks to bring international justice is very important because I feel international criminal law cannot just happen at the ICC or at the tribunals: it needs to happen at the domestic level as well, otherwise the principle of complementarity means nothing and the sustainability of the system remains in question. So, working at that level, I was able to work on universal jurisdiction cases, including for crimes against humanity committed in Zimbabwe, to be investigated and prosecuted in South Africa. Also, the attempts to arrest former Sudanese president Omar al-Bashir when he was in South Africa – that was one of my cases as well. And so, using international law at the domestic level, making it a reality, and making it palpable, tangible, and practical, was at the core of my work at the Southern Africa Litigation Centre. I also had the honour of working with the late Professor Cherif Bassiouni at his institute in Siracusa, Italy. And, at that point, we were writing a report on the human rights violations perpetrated by the Gaddafi forces and the rebels during the time of the conflict. My role was to assist with the IHL [international humanitarian law]/ICL analysis of those crimes in the context of this report. And it was, again, just a wonderful opportunity to put everything I'd learnt and experienced into practice, and to apply it to a new situation, and also to work in a situation where the violations were ongoing. Working with Professor Cherif Bassiouni who was, of course, just full of knowledge and insight and experience, was an incredible experience, one that I'm very grateful for. Since then, I've worked with many other civil society organisations, for example: Human Rights Watch, Open Society Foundation – and with both Human Rights Watch and Open Society Foundation the role was multifaceted, but one of the key things was institutional reform at the ICC. Because, of course, the ICC has had its struggles, it's not a perfect institution, and

civil society is very proactively involved in trying to make sure we have the most efficient and effective court possible. That included looking at issues such as workplace harassment, bullying, the way in which officials are elected at the ICC, gender balance, geographical balance. Because, ultimately, we need institutions like the ICC to be in peak form internally, to better position themselves to fulfil their mandate. So, it was great to work in that context as well and, having been at the ICC, I knew how things worked on the inside. Working on the outside to improve the inside was a great experience. It was also an opportunity to remain constructively critical as a supporter of the Court, as a person who wants the best for the Court.

Over the course of my career, I have also been engaged in capacity-building: training investigators and prosecutors on how to best investigate and prosecute international crimes within their domestic contexts. I did this among other things at the Wayamo Foundation, where we were training prosecutors and investigators in several African countries – Nigeria, Kenya, Tanzania, Rwanda – and it was particularly interesting, again, because it was centred on this idea of making international justice sustainable, which means domestic prosecutors and investigators have to be equipped to do the job, otherwise it's very difficult to make progress. Working with different legal cultures, different legal traditions was particularly valuable because you have a much better appreciation of the constraints within each system. And so knowing that and how to best navigate these constraints depending on the situation was very helpful and also just a reality check as far as what happens at the international level and what happens at the domestic level, and how to marry those two, and how it is sometimes very difficult to do that. But finding ways was part of the role, and I enjoyed doing that work. I've been an independent consultant for the last couple of years and working with different organisations on different issues, including accountability for sexual and gender-based violence, and that's included amicus briefs at the ICC and before domestic courts. And also, speaking out and doing a lot of research and writing on decolonising international criminal justice and human rights, and reconsidering how we work within this framework that, unfortunately, does not acknowledge the inherent bias that's been built in over time. And so, in a nutshell – sorry, a very big nutshell – that's basically what I've been doing with my time.

ON INTERSECTIONALITY

Chappell: That's incredible, Angela – such a diverse and rich range of experiences which very few people have. So many people in ICL get channelled into silos, either at the international or domestic level, but crossing over between them as you have done doesn't happen so often. You've really been able to see the key touchpoints across the entire ICL: the system, understanding where things link together and where they are falling short.

So, Angela, given your breadth of experience in the international criminal justice field, what's your view about the body of law that we have to work with: customary law, case law, jurisprudence of the different tribunals, and the Rome Statute, as it's been interpreted? Is it adequate for addressing the intersectional nature of atrocity and, if not, what would you suggest is needed to transform the ICL system to better recognise intersectionality?

Mudukuti: Intersectionality is key and it is built in, in some parts of the body of law you've mentioned. For example, the Rome Statute, Article 21 (3) talks about intersectionality – not that it names it explicitly – but that's the way the principle has been applied. And I think it makes a lot of sense. The current bodies of law that we have, they're obviously very useful and have been instrumental to bringing justice for core international crimes. But I do think that there is a lot more that can be done and, by that, I mean to be truly intersectional in our approach we need to understand that these laws, these institutions, were not built in a vacuum, they were built within a particular political and geopolitical dynamic which, unfortunately, has always been colonial in nature. And so, I think we need to understand that and understand how it's affected the jurisprudence, and how it's affected the laws we have today. The way in which we can understand that is to look at other disciplines. For example, third-world approaches to law or critical race theory, and all the different types of feminism. There's a very nice quote from Angela Davis. She says: 'Feminism involves so much more than gender equality. It involves so much more than gender.'[1] And this is exactly what we need to understand: within each of these disciplines, there are multiple lenses through which we can look at them. And I think international criminal law needs to be looked at through these

[1] A. Davis, *Freedom Is a Constant Struggle: Ferguson, Palestine, and the Foundations of a Movement* (Chicago: Haymarket Books, 2016) no page numbers.

different lenses. We need to understand that these disciplines bring value that will ultimately help us fully understand the intersectional nature of atrocity crimes. So I think we need to be more expansive in our thinking there.

I also think that we need to understand that the racial and the geographic makeup of these institutions – the ICC in particular, for example – leaves a lot to be desired. Right now at the International Criminal Court, out of the 473 professional staff at the ICC, 256 of them come from the Western Europe and Others group, otherwise known as the WEOG. It's essentially the Global North. That's more than half of the professional staff at the ICC who come from one of five regions. At the leadership level, nationals from WEOG also hold the most senior positions: currently a staggering 55.6 per cent of the most senior D1 positions; and high percentages across the second and third most senior roles, with 72 per cent of P5 positions and 56 per cent of P4 positions.

Given that we're talking about the coloniality of this field, having one group of people predominantly white, predominantly from the Global North, be responsible or in charge of these organisations, I think is detrimental. International institutions like the ICC have to be diverse. We have to have people from all regions. The system recognises five regions. We need to see that on staff. In reflecting on these worrying statistics, one has to think about how that came to be and one of the sources is an actual ASP [Assembly of States Parties] resolution, which states, in relation to staffing, 'the Court's selection of staff in the Professional category is guided by a system of desirable ranges based on that of the United Nations'.[2] The desirable ranges, or in other words percentages, are calculated by considering three factors: the total number of state parties, a state's financial contribution to the budget, and its population size. These factors are attributed weights that determine the final outcome. At present, substantial weight is given to membership (40 per cent), which is equal for each state party, the greatest importance is given to the state's contribution (55 per cent), and the final 5 per cent is determined according to the population size of the country. Therefore, your state's financial contribution affects staffing positions at the ICC. I think this is hugely problematic

[2] ICC-ASP/1/Res. 10, 9 September 2002.

because it can result in the exclusion of those people who do not come from states that, for whatever reason, provide less money to the ICC. And that results in the skewed dynamic where most of the Court staff members come from Western Europe. I don't think that's a sustainable system. It needs to change.

The staff composition affects how cases are approached, how investigators engage with victims and survivors, how they interpret and collect evidence. This affects how the case is framed, presented, and brought before the judges and then, ultimately, on the bench itself, it has to be a diverse bench because how they render their judgments is influenced by their own legal and cultural background, and other factors such as race or their own intersecting identities, for example. We can't divorce these things. These things all influence the jurisprudence that comes out of the Court. So, my message is always one for diversity and not just racial diversity, not just geographical diversity, but also, of course, gender. At the ICC right now, unfortunately, we're still stuck in the two binaries. We only have statistics for men and women, there's nothing else, which is something that needs to be addressed but, even when we look at those statistics alone, at the ICC now, in terms of professional staff, it's roughly 48 per cent female and then the rest is male, which may not seem so bad but the problem is, when you dig deeper, you see that the leadership positions are predominantly held by men. And so what we have at the ICC is an organisation that is predominantly led by men from the Global North, who are usually white. Now, there are exceptions to this of course, but that's the general situation, and that has to change because we need a system that is fully representative and inclusive because all of this affects intersectionality. Intersectionality includes looking at who is doing the work and where they come from, and I think that's essential because it affects how they go about the work; and if we're actually going to deliver justice for core international crimes we have to be intersectional in our approach.

Chappell: That's so important to bring that together, both the physical beings who are there as well as the way that anyone thinks about intersectionality . . .

Mudukuti: Louise, can I also just add: I think the primary thing we should all be focused on is understanding the lived experience of the victims and survivors. And, if everybody who is engaging with victims, witnesses, and survivors comes from one group, one

region out of five regions, there's a lot that could be missed: cultural nuances, subtleties. And, if we fully want to understand the nature of atrocity, we have to fully understand the intersectional harm endured by victims and witnesses, and I just think we could all do more to improve this.

GEOGRAPHICAL AND GENDER REPRESENTATION INTEGRAL TO JUDICIAL INTEGRITY

Chappell: I agree with you Angela. I think you've really touched on a critical point there. I'd like to turn now to your publications and work on judicial integrity and independence and about the nomination and election of judges at the ICC. What reflections do you have about the composition of the bench in particular and the skills, qualifications, qualities, that are needed to be a judge at the ICC? And what are some of the ways to ensure that we get the most qualified judges possible?

Mudukuti: I think the first point is one that I made earlier, which is about the diversity of the bench; geographical representation on the bench. At this point, again, the bench is very heavy as far as WEOG representation is concerned. Currently, six out of eighteen judges are from WEOG. Before the 2020 election, the women were greatly outnumbered. There were six female judges and twelve men. Thankfully, that's changed now. We do have gender parity on the bench, which is wonderful, and it's taken long enough but I think these two metrics need to be considered as we look at the bench and the composition of the bench because, as I mentioned, it affects how international criminal jurisprudence develops. For example, we all know the influence Judge Navi Pillay has had on accountability for sexual violence when she sat on the ICTR [International Criminal Tribunal for Rwanda] bench.

I think we need to look at the responsibility state parties to the Rome Statute bear, because they nominate judicial candidates through their national nominations system and then they elect judges. They need to nominate women and men, not just men. They also need to conduct elections in a way that recognises the need for geographical representation. So I think the burden there is on state parties to rectify that system. As far as the qualities, qualifications, and skills are concerned, I think the Rome Statute does have some good criteria, including high moral character.

But I think there is a lack of specificity, for example, to be a P_4 at the ICC, you need a certain number of years of experience before you're even considered for the job. For judges, there is no specified number of relevant years of legal experience. As a consequence, the levels of experience on the bench are inconsistent. So, I think we need more specificity and detail as far as the qualifications and skills requirement for judicial elections. But, again, this is something that state parties need to negotiate and agree on, and that hasn't always been easy. There's a lot of work to be done there.

Chappell: Do you think there's an appetite in the Assembly of States Parties to think about either adding more qualifications or even just paying more attention to the quality of the candidates? Have you noticed any moves in that direction at all?

Mudukuti: I think there are some states which recognise that this has been a problem and they're eager to change it. There's been a lot of discussion on improving national nomination processes because national nomination processes are how we get judges in the first place. States will put forward candidates, and in some states there is no process. You get nominated when you have friends in high places at the time regardless of your qualifications. Open Society Justice Initiative has done some great research in this area.
In some states, the national nomination procedure is not always merit-based and being part of the political elite has been the key to being nominated. There has been no process to vet you or to check your qualifications, or to check that you're the best person for the job. There are states which have shown leadership on this and have begun to change the national nomination processes, and are trying to encourage other states to do the same. But ultimately, I think there is a reluctance that, I wouldn't say is malicious, but I think, for some states, it's a case of prioritising. They don't see this as an urgent issue that needs to be resolved. Other states feel it's convenient that there is a quick and easy 'process' to nominate someone, so to be asked to go back to a national nomination process and to tell the public how you appointed someone, and what your process is, is seen as a nuisance and an inconvenience. But now the Advisory Committee on the Nomination of Judges plays a far more active role and they do request states to explain their national nomination process. Some states have done that, other states have not. There is potential and there is movement but it is going to

take some time until everybody feels like this is a priority and that the system should be standardised.

Chappell: That's so interesting. I do think that the committee's work is important but, as you say, there's a lot of reasons why states might make particular appointments and don't want the Assembly or the ICC getting involved in domestic affairs, necessarily. So, it's tough.

on civil society and advancing gender and racial justice

Chappell: My next question for you is, given your experience working in civil society organisations in the international criminal justice field, what role do you think these organisations have in holding the ICC and other international tribunals to account, to advocate particularly for gender and racial justice, including on the bench? In your view, what could these organisations do better to advance these goals?

Mudukuti: I've worked as a member of civil society on exactly these issues and I can tell you that civil society organisations do a great deal in holding the ICC to account, including advocating for internal reform, for example, better workplace conditions and the eradication of discrimination and harassment, gender and geographical balance, as well as pushing the Court to more effectively execute its mandate. I think it's very important work. Civil society's been very active for many years in different ways, on institutional reform issues, but at the end of the day, it's about state parties changing the system. It's about state parties prioritising gender balance on the bench, gender balance at the ICC, and geographical balance. And it's the work of civil society to try and convince states to do that. But I think it's also on states to recognise the urgency and the need to change this because, as we've seen in the past, the ICC has been accused of targeting a certain group in its investigations and prosecutions. Whilst I think that accusation and resulting discussions lack nuance and have been oversimplified and abused by those seeking to escape accountability for grave crimes, the point is, it is a perception and having staff composed predominately of people from the WEOG region is not helping and ought to be addressed.

However, I should note that we have seen some important shifts: for example, the Office of the Prosecutor has diversified the geography of its docket – especially if you look at preliminary

examinations. Five years ago they were mostly African situations and now that has shifted. So, there is a recognition of the need to geographically diversify the ICC's docket, as far as situations under investigation or prosecution.

But ultimately, state parties are responsible for championing issues of internal institutional reform because they have power as an Assembly to make important changes. So, it's not just up to civil society; I think we need to also acknowledge the role that state parties play in this, and the influence they have.

Chappell: An important issue you're raising here is the importance for civil society not only to be operating at the international level in and around the Court but at the domestic level as well. It reinforces the point that we need to be working at multiple levels at once, to make sure that states are sensitive enough to issues of diversity and representation when they get to the floor of the ASP.

So, the next question: What do you think is required for judges at the ICC to acknowledge and act on the intersectional qualities of international crimes and their survivors?

Mudukuti: I think this ties up nicely with the first question. I would say that just an understanding that there are different disciplines that can inform how we approach international criminal justice, so looking at third-world approaches to international law, critical race theory, feminism, improves intersectional judging. I think it's very important for judges to be open to those disciplines as a lens. Obviously, at the end of the day they have to write a judgment that's founded on international criminal law and human rights law, having carefully weighed the evidence; but how you view the law, I think, can be positively influenced when you are aware of other schools of thought and the context in which the ICC and international criminal justice were born. So, I think knowledge of and an openness to understanding and appreciating what those different disciplines or schools of thought could bring is useful. I think judges also need to be open to continuous learning and approach it with humility. There is this perception – and I've seen this at the domestic level and international level, in all my capacity-building efforts – that you cannot have a workshop for judges and call it 'capacity-building' because some judges believe that is inappropriate given their level of seniority. So, you call it a 'retreat' instead, and that's fine, but the point is continuous learning for everybody is not a bad idea. The ICC does have annual retreats for judges, so I think

there are valuable opportunities to augment the skills and experience judges already have.

I think the admission of amicus briefs is a practice that should continue. No one judge is an expert on absolutely every facet of the law: that's impossible. But, when you allow amicus briefs, you're giving other experts the opportunity to act as friend of the Court and provide insights that could positively contribute to the jurisprudence.

We saw it recently with the Ongwen Appeals Chamber process where they admitted roughly nineteen amicus briefs. This is a great practice because you're bringing different perspectives to the table. Acknowledging the realistic limits of any one person, any one judge, one bench, and allowing other experts to feed into the process is absolutely essential. What happened in the Ongwen Appeals Chamber process was progressive because different amicus briefs were accepted, many different perspectives were put before the Court, and the judges were able to draw from those in reaching their final conclusion. That should continue. Obviously, we need to be mindful of not extending judicial proceedings longer than they have to be, and that does happen when you have many amicus briefs, but I think there's a way in which to balance this, because we don't want trials that take decades of course, but we also want to make sure that we get the best judgment, especially at the appeals level, and amicus briefs can contribute a great deal.

ON THE VALUE OF AMICUS BRIEFS

Chappell: Well, that brings us nicely to my last question. How important do you think it's been to have *amicus curiae* briefs presented in cases including sexual-violence crimes? Do you think these interventions have shifted the bench's view around sexual violence or intersectional issues in particular?

Mudukuti: I think, particularly looking at the Ongwen process where I submitted an amicus brief along with other incredible minds, including several authors in this book, was a good example of bringing different expertise to the process. For example, where certain issues were not covered by the main parties, *amici* were able to cover these issues. As with anything in life, you will have submissions that take us forward and some that do the opposite but accepting different views is very important from a due process

standpoint. What I will say though is, when I look at all the amicus briefs that were accepted by the appeals chamber, unfortunately, again, it was mostly people from the Global North, and mostly there were a lot of briefs from men, for example, which is fine – it's valuable – but I think we need to make sure that voices or groups that are marginalised or usually excluded from these processes are included. I would have loved to see more submissions from African scholars, from Ugandan scholars, from women, regardless of whether they identify as feminist or not. That's a challenge that can be overcome. There are other challenges: for example, the deadlines were very tight. We had three weeks to submit leave to intervene and then the full brief was required a month later. Now, if you're a practitioner on the ground, working on several issues at the same time, it's very hard to turn over a draft in such a short space of time. Again, I am mindful of the need to have deadlines and not unnecessarily prolong proceedings, but balance is needed. And, also, how far and wide was this call for amicus briefs shared? I don't think it went very far. I have recently spoken to people who didn't even know it was an option. So, I think there are some things you can change including publishing calls for submissions as far as possible to reach a wider audience – and I think it's on all of us, not just the Court, not just civil society. I think anybody who cares about this field needs to be more proactive in bringing different voices to bear on international justice at the ICC.

Chappell: Again, I think you're pointing to a resource issue here too, aren't you? If you have such a tight timeframe but you don't necessarily have the resources in your small NGO [non-governmental organisation], it's very hard to turn something around like that very quickly. Do you think there is anything in particular that explains why the Appeals Chamber allowed so many briefs in the *Ongwen* case? Is there something unique to *Ongwen*, or do you think the ICC is gradually becoming more open to amicus briefs in general?

Mudukuti: It's a very good question. I cannot say for certain but perhaps it was a combination of factors, such as a recognition that there are experts outside of the Court who can add value and should be allowed to participate in proceedings of this nature. I think that's also something that we've seen evolve over time. My hope is that other chambers will follow suit. But we have to balance that with the length of proceedings and just how long it takes to make all of this happen, and to make sure you're including everybody.

Chappell: It does stand out as a very good example, I think. And, as we've seen over the years, the expertise for writing these briefs is building over time, which is also important.

Angela, thank you again for providing such important insights into the operation of the ICC, intersectionality, and judging. It's been fascinating for me and I'm sure for the readers of our book too.