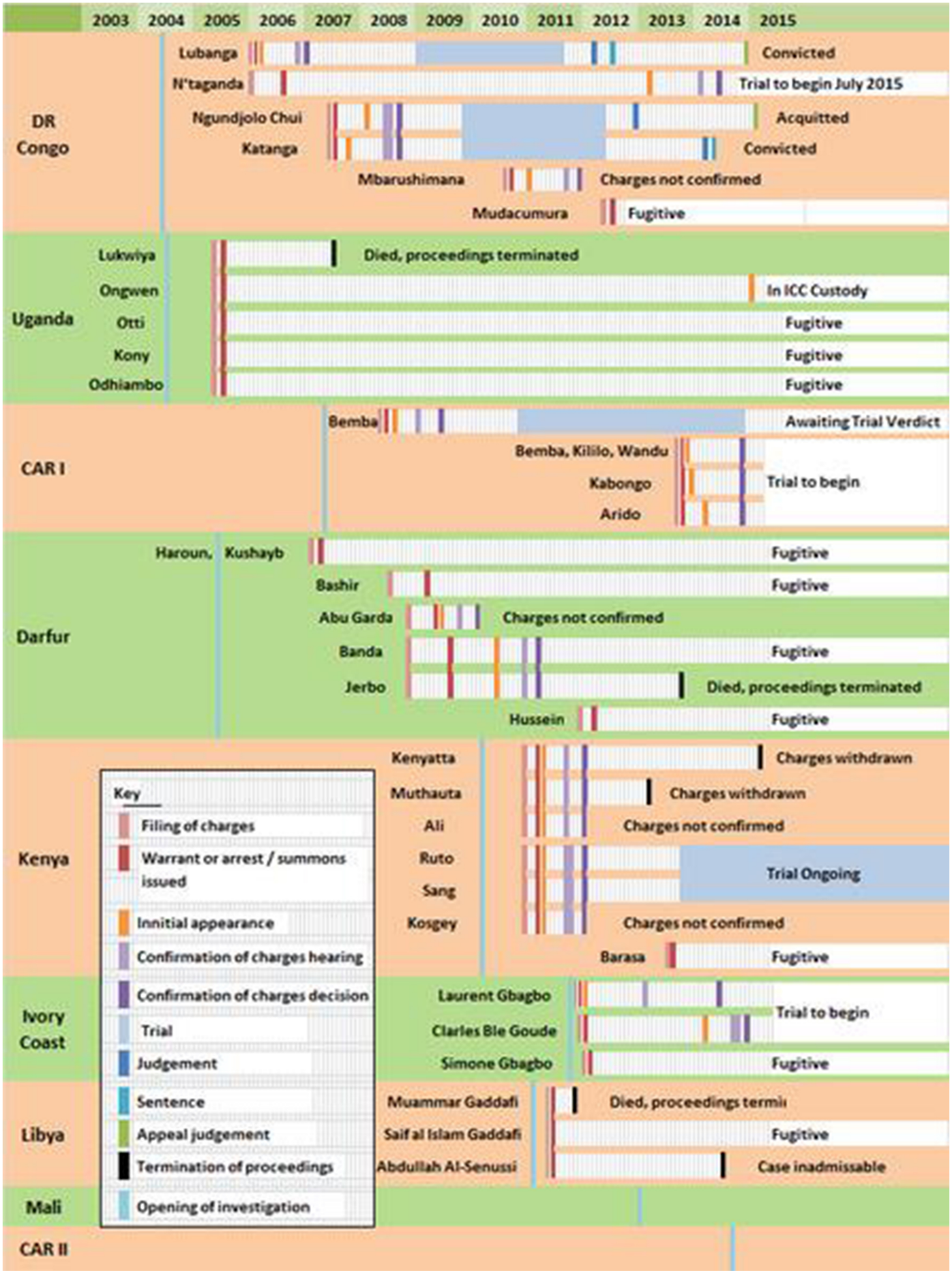

2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
DR Congo
Lubanga
Convicted
N'taganda
Trial to begin July 2015
Ngundjolo Chui
Acquitted
Katanga
Convicted
Mbarushimana
Charges not confirmed
Mudacumura
Fugitive
Uganda
Lukwiya
Died, proceedings terminated
Ongwen
In ICC Custody
Otti
Fugitive
Kony
Fugitive
Odhiambo
Fugitive
CAR I
Bemba
Awaiting Trial Verdict
Bemba, Kilolo, Wandu
Kabongo
Arido
Trial to begin
Darfur
Haroun, Kushayb
Fugitive
Bashir
Fugitive
Abu Garda
Charges not confirmed
Banda
Fugitive
Jerbo
Died, proceedings terminated
Hussein
Fugitive
Kenya
Kenyatta
Charges withdrawn
Muthauta
Charges withdrawn
Ali
Charges not confirmed
Ruto
Trial Ongoing
Sang
Kosgey
Charges not confirmed
Barasa
Fugitive
Ivory Coast
Laurent Gbagbo
Trial to begin
Clarles Ble Goude
Simone Gbagbo
Fugitive
Libya
Muammar Gaddafi
Died, proceedings termi
Saif al Islam Gaddafi
Fugitive
Abdullah Al-Senussi
Case inadmissable
Mali
CAR II
Key
Filing of charges
Warrant or arrest / summons issued
Innitial appearance
Confirmation of charges hearing
Confirmation of charges decision
Trial
Judgement
Sentence
Appeal judgement
Termination of proceedings
Opening of investigation

The ICC’s Investigation Problem and Safeguarding Justice for the Rohingya

October 31, 2019

The ICC’s Investigation Problem and Safeguarding Justice for the Rohingya

By: Jeremy Pizzi

As of the date of writing, Pre-Trial Chamber III of the International Criminal Court (ICC) is preparing to decide whether the Situation in Bangladesh/Myanmar is to become the Office of the Prosecutor’s (OTP) twelfth ongoing investigation going into 2020 (ICC Proposed Budget 2020, at para 107). As the OTP’s investigatory case load continues to increase, it seems natural to review whether it has the necessary capacity to deal with this increase in workload. The “investigatory capacity” of the ICC to carry out investigations while retaining the ability to perform such investigations within the standards required of criminal proceedings that respect the interests of justice, may have been taken for granted for too long. It is particularly notable that the Rome Statute provides no limitation to the number of situations that can be referred to the Prosecutor. This raises the overall issue about whether some fundamental changes in the OTP’s investigatory policies are needed.

Pattern of shortcomings

There were concerns about the investigatory practices of the OTP right from the start of its operations. Some thought that the ICC’s first prosecutor, Luis Moreno-Ocampo, perceived the institution as a “naming and shaming” organization at its core, placing at its forefront the message a case was going to send (*New York Times* “The Prosecutor and The President”). Underemphasizing the importance of the role of the ICC as a forensic body inherently risked making rigorous investigation a “subsidiary” element of the Court’s practice (New York Times “The Prosecutor and the President”). As it happens, the OTP’s investigatory practices under Moreno-Ocampo drew significant criticism over the course of his term. His policy of “short and focussed” investigations, which involved little time on the ground and heavy reliance on national and UN intelligence, were criticized as insufficient to meet the burden of proof a criminal trial demands (see Kambale, “A story of missed opportunities”; SáCouto & Thompson, “Investigative Management, Strategies, and Techniques of the ICC’s OTP” at 334-49). In addition, Moreno-Ocampo’s practice of aiming investigations at gathering just enough evidence to confirm charges was judged by some as inherently risking the collapse of cases at trial (SáCouto & Thompson, “Investigative Management, Strategies, and Techniques of the ICC’s OTP” at 343-44).

There is evidence, through Moreno-Ocampo’s and subsequently Fatou Bensouda’s tenure, to suggest that the OTP has gone to trial with insufficient evidence to support a reasonable prospect of

conviction. The Prosecution itself has indirectly been forced to admit its investigatory difficulties through multiple withdrawals of charges due to inadequate evidence concerning the Situation in Kenya (*Muthaura and Kenyatta* Withdrawal of charges, at para 9; Kenyatta Withdrawal of charges, at para 2). There have also been occasions in which the OTP did not meet the low evidentiary threshold of "substantial grounds to believe" required by article 61 for the confirmation of charges (see: *Abu Garda* Confirmation of charges, at 97; *Mbarushimana* Confirmation of charges, at 49, 149; *Muthaura* Confirmation of charges, at 154; *Ruto* Confirmation of charges, at 138). Lacking sufficient evidence at such a stage puts investigatory practices into question.

Further, the ICC's judiciary has at times been quite critical on these issues. In the *Bemba* Appeals Chamber acquittal decision, Judges Van den Wyngaert and Morrison criticized the "trial-readiness" of the OTP and stated that it was attempting to confirm "charges on the basis of samples and/or incomplete evidence" (*Bemba* Opinion of Jude Van den Wyngaert and Judge Morrison, at paras 28-29). In *Lubanga*, the Trial Chamber was of the view that the OTP had "fail[ed] to verify and scrutinise [important evidentiary] material sufficiently" during the investigatory process (*Lubanga* Judgement, at para 482). As a matter of fact, the lead investigator of this case himself testified that, during his tenure, he had at most 12 people working under him and that he had always deemed this number to be "insufficient" (*Lubanga* Transcript at 16). In *Ngudjolo Chui*, the Trial Chamber made it clear that "the Prosecution's [case] would have benefitted from a more thorough investigations of [important evidentiary] issues, which would have resulted in a more nuanced interpretation of certain facts, a more accurate interpretation of some of the testimonies taken and, again, an amelioration of the criteria used by the Chamber to assess the credibility of various witnesses" (*Ngudjolo Chui* Judgement , at para 123). In *Ruto and Sang*, both Judges Fremr and Eboe-Osuji made it clear that the Prosecution had not been able to produce evidence of a sufficient quality for proceedings to continue past the mid-trial stage (*Ruto and Sang* Decision on acquittal, at paras 131, 144 [reasons of Judge Fremr] and at paras 42, 135 [reasons of Judge Eboe-Osuji]), resulting in a "no case to answer" decision. In *Kenyatta*, the Majority stressed that "the Prosecution should have conducted a more thorough investigation prior to confirmation" (*Kenyatta* Decision on defence application, at para 123) and Judge Van den Wyngaert further raised "serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation" (*Kenyatta* Concurring opinion of Judge Van den Wyngaert, at para 1).

Most notably, the *Gbagbo and Blé Goudé* case demonstrated the clearest evidence yet of the OTP operating beyond its investigatory capacity. At the Pre-Trial stage, the Chamber adjourned proceedings to give the Prosecution more time to conduct investigations, explicitly conveying their "serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case" (*Gbagbo* Decision adjourning the confirmation of charges, at para 35). At trial, the proceedings were cut short by yet another "no case to answer" ruling going against the Prosecution. The Majority ruling made clear that a lesson to be learnt from the case was that "the Prosecutor cannot be expected to bring cases of this level of complexity and scope within a reasonable time frame with the limited resources that are currently available to her", the inherent

difficulties related to this being the “sheer difficulty of collecting and processing the enormous amount of information” through investigation (*Gbagbo and Blé Goudé* Reasons of Judge Henderson, at para 10 of the Preliminary Remarks).

This pattern suggests that the OTP is operating beyond the limits of its investigatory capacity, and that the result of this is the multiplication of investigations which produce insufficient evidence to support successful prosecutions. In the OTP’s own words, they are still in “a period of mixed results in court” where “significant setbacks” have, in part, been caused by both “residual effects” of the Moreno-Ocampo era strategy and shortcomings in the “present strategy” (OTP Strategic Plan 2019-2021, at 4).

Current state of ICC investigatory capacity and what this means for the Situation in Bangladesh/Myanmar

While the ICC is currently involved in eleven situations, the OTP has announced that it will prioritize active investigations in nine situations going into 2020 (ICC Proposed Budget 2020, at para 21). Additionally, there are nine situations that are in preliminary examination, with “several” in advanced stages that may become full investigations in 2020 (ICC Proposed Budget 2020, at para 23). While preliminary examinations do not engage the same investigatory resources as proper investigations, they still involve significant investigatory activities such as receiving and analysing testimony and information from reliable sources, undertaking field missions to meet with relevant stakeholders, and assessing potential sources of information for later investigation (OTP Policy Paper on Preliminary Investigations, at paras 85-86). In terms of personnel, they involve at a minimum a certain amount of staff from the Investigative Analysis Section and, when nearing the opening of a full investigation, the OTP plans to further incorporate staff from other sections within the Investigation Division (ICC Proposed Budget 2020, at para 106).

The OTP has proposed a grand total of 132 professional staff (99 established professional staff and temporary employees adding the equivalent of about 33 professional staff) for the Investigation Division for 2020 (ICC Proposed Budget 2020, at 75). In terms of investigative staff deployed to conduct direct investigatory work, the number of professional investigators available would be at most 105 (see ICC Proposed Budget 2020, at para 280) (This number was obtained by excluding the 27 professional staff of the Planning and Operations Section of the Investigation Division because while they support investigatory staff in various ways, but are the only section that does not get directly involved in investigatory activities.) This means that, on average, the OTP would have about 12 professional investigators per situation. If one was to be extremely generous and include all 179 total staff (professional and general service) within the Investigation Division, the OTP would have on average no more than 20 total staff per situation. If the Situation in Bangladesh/Myanmar is added to the OTP’s investigations, then these numbers lower to an average of about 10-11 professional investigators and 18 total staff per situation. These numbers are likely even greater than the true average available to the OTP as the impact of staff working on all ongoing preliminary examinations

has not even been considered (Primarily as there is insufficient information on how many staff are involved in such investigatory activities.)

The insufficiency of such an investigative capacity begins to materialise when it is compared to those of high-profile human rights investigations. The United Nation's International Fact-Finding Mission on Myanmar conducted its investigation, predominantly into human rights violations in the Rakhine State since August 2017, with a team of at least 18 total staff (the number of administrative and support staff is not indicated) including 13 investigators (UNFFM Report, at paras 1, 22). The Public International Law & Policy Group (PILPG) also conducted an investigation into these violations with 34 total staff, including 22 investigators (PILPG Report, at i-ii). These human rights investigations into ostensibly the same situation as the one the OTP intends to investigate operated with either the same or larger staff resources as the ICC's average. While the OTP could in all likelihood increase the staff resources allocated to the Bangladesh/Myanmar Situation by redistributing them from other investigations, it seems unlikely that this would exceed the PILPGs resources without severely hampering other ongoing investigations.

This suggests that the staff resources available to the OTP are likely no greater than those of human rights investigations that involve a lower evidentiary burden than criminal charges. The inadequacy of such resources is demonstrated by two fundamental differences between *human rights* investigations and *criminal* investigations. First, human rights investigations typically use "reasonable grounds to believe" as a standard of proof (UNFFM Report, at para 10; PILPG Report, at vii). However, as is well known, the Prosecution at the ICC can only obtain a conviction if they present proof that establishes "beyond reasonable doubt" the elements of an offence (art. 66(3) Rome Statute). A significantly greater effort is required to present proof "beyond reasonable doubt" than simply proof of "reasonable grounds to believe". Second, the depth and granularity of the work done in the context of a criminal investigation will go beyond the ambit of a human rights investigation. Notwithstanding intensive activities such as crime scene analysis and autopsies (which cannot take place anyway due to Myanmar's refusal to grant the ICC access), the evidentiary standards demanded by criminal proceedings will require criminal investigations to more rigorously assess the credibility and reliability of evidence. In addition, a criminal investigation faces the additional burden of having to prove the requisite mental element for an offence, something which will likely not factor as significantly into establishing a human rights violation.

This suggests that with the addition of an investigation into the Bangladesh/Myanmar Situation to its workload, the OTP may well be limited to conducting such an investigation below the standards required of criminal proceedings that respect the interests of justice.

Particular implications for the Situation in Bangladesh/Myanmar

There are particularities inherent to this situation that exacerbate the OTP's investigatory limitations outlined above. The scale of the situation is absolutely massive, with nearly a million refugees in Bangladesh who arrived since the alleged incidents (ICC Registry Request, at para 15). The ICC

Registry considers that there is an “extremely high number of victims” interested in participating in ICC proceedings (ICC Registry Request, at paras 15, 18). This means that significant resources will have to be dedicated to the collecting and processing of witness testimony. In addition, the location in which most physical evidence can be found, the Northern Rakhine state, will likely be inaccessible to OTP investigators. They may not have access to the specific sites in which the alleged coercive acts causing the forcible displacement of the Rohingya were committed. This means that the OTP will be lacking physical evidence relating to the deceased victims and direct physical evidence where the destruction took place in addition to the inability to obtain many relevant documents and witnesses that are in Myanmar. This may cause significant impediments, as it means that the OTP’s investigation and case would hinge on witness testimony primarily from the group which was the victim of the allegations in the situation. This brings into play the additional consideration of the difficulty in proving certain of the alleged crimes solely through witness testimony. In particular, this relates to how onerous it can be to prove, likely without any physical evidence, the killings (OTP Request for investigation, at paras 89ff) and rapes or other forms of sexual violence (OTP Request for investigation, at paras 94ff) which allegedly coerced the Rohingya into forcible displacement. Further, the Rohingya language is an oral language without a standardized written script (ICC Registry Request, at para 24). It is the only language that all Rohingya people understand and prefer (ICC Registry Request, at para 24; Translators without Borders Report, at 5, 8). This will demand important resources in translation/interpretation services and will increase the fact-finding burden due to the complexities associated with having to gather testimony in that language.

The difficulties inherent to the particular investigation of the Situation in Bangladesh/Myanmar will do nothing but further tax the limited investigatory resources of the OTP. The Court risks undermining its goal of ending impunity through investigations that are incapable of upholding the basic evidentiary standards a criminal trial demands and therefore dooming future prosecutions. Make no mistake, criminal justice does not demand convictions. Rather, such justice demands that the process of a criminal trial conform to certain standards. If we are unable to meet those, then is seems an unlikely dream that the Rohingya will ever bear witness to justice.

Conclusion

The ICC and OTP’s sustained efforts to engage in the creative redistribution of its resources that would allow the Court to pursue its course without fundamentally changing the average investigatory staff available for investigations has done little to stop significant investigatory shortcomings. Perhaps a simpler, more drastic, approach is due. It may well be that the best answer to such difficulties lies in either engaging in fewer cases or alternatively, drastically increasing resources. The evidence above shows that the OTP simply has its hands tied and is doing the best it can with extremely limited resources. Those who work within the OTP act with the utmost good faith and diligence, and the above criticism is not meant to reflect on their personal abilities. However, prosecuting international crimes involves a very high degree of complexity and attempting such an endeavour with resources loosely equivalent to those of international human rights investigations is near impossible. Without

significant increases in funding, it is crucial that the ICC's soon-to-be third Prosecutor appreciate the precarity of such a precious institution and have the resolve to take on fewer cases but pursue them with greater depth. The OTP itself has stated that this has become an inevitable strategy (OTP Strategic Plan 2019-2021, at 16, 18, 20). Nevertheless, with one of the most serious cases of mass atrocity in decades adding itself to the ICC's workload, it is also high time State Parties to the Rome Statute revised their reluctant approach to OTP investigations funding. If not, those very State Parties may look forward to the next *Gbagbo, Bemba* and others into the ICC's history.

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About the author

Jeremy Pizzi**Jeremy Pizzi** is in the final year of his joint B.C.L./LL.B. degree at the McGill University, Faculty of Law. He was the recipient of student funding from the Canadian Partnership for International Justice for his 2019 summer internship in the Chambers of the International Criminal Court (ICC). He worked on the Situations in Côte d'Ivoire and in Bangladesh/Myanmar at the ICC and has also substantially contributed to future petitions before the Inter-American Commission on Human Rights.

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