

# Can Art Change Legal Practice? A Case Before the International Criminal Court

By Julien Seroussi and Franck Leibovici  
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Julien Seroussi is a sociologist. Franck Leibovici is an artist and poet. Since 2016, they have been working on, and with, the International Criminal Court ('ICC'), on fact-discovering practices within Chambers. Their approach intends to expand lawyers' repertoire of methodologies to enable them to adopt and apply techniques and gestures taken from other disciplines. Drawing on art and social sciences, the authors built new material and conceptual tools that may likely change ordinary probative practices. Without infringing legal procedures, they provide the judges a pathway to carry out a documentary investigation inside all the means of proof collected by the parties, but also aim at improving the dialogue of the ICC with other social worlds with similar concern for truth and justice.

## 1. Genealogy

Seroussi was recruited by the ICC as an 'analyst in Chambers' in 2009 to work on the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. Created at the initiative of Marianne Saracco, Judge Bruno Cotte's Legal Officer, the position of 'Chamber Analyst' was intended to reduce the level of de-contextualization impairing the ability of the Trial Chamber to judge crimes committed in the Democratic Republic of the Congo ('DRC') from a courtroom in The Hague. For Judge Cotte, trained in Civil Law, the challenge of re-contextualization was all the more fundamental in that Common Law-influenced ICC-proceedings do not allow the transmission of a pre-trial 'dossier' to the trial phase.<sup>1</sup>

While in Chambers, Seroussi was in charge of following the facts of the trial in order to structure a consistent deliberation process, with the preparation of the judgement in mind. The work consisted of extracting as much data as possible from the transcripts of the hearings and the documentary evidence, in order to immerse the judges in the specificities of the Congo. The documents tendered were not only analysed as evidence to prove crimes or assign responsibility, but as means to better grasp cultural practices that could be crucial to understanding criminal policies. For example, the analysis enabled the judges to uncover the role of '*fetichieurs*' (witch doctors) in the chains of authority, giving more factual substance to the concept of "quasi-automatic obedience to orders", which is characteristic of the form of criminal responsibility adopted by the Pre-Trial Chamber in the Katanga case.<sup>2</sup>

<sup>1</sup> Franck Leibovici and Julien Seroussi, "Le Statut en pratique: saisie des faits et deliberation", in Julian Fernandez, Xavier Pacreau and Muriel Ubéda-Saillard (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article*, 12th edition, Paris, A. Pedone, 2019.

<sup>2</sup> Julien Seroussi, "How do international lawyers handle facts? The role

After the publication of the judgment, Seroussi and Leibovici – the present writers – decided to reprocess the public evidence, using tools from visual arts and poetry. Indeed, these disciplines have developed over the last century a toolbox designed to deal with numerous and heterogeneous documents that can be useful to international judges. The ambition is that legal officers can take better advantage of the semantic richness of all the available documents tendered during a trial by experiencing new ways of arranging evidence, through a variety of material support and different modes of reading. As artistic practices are based on know-how rather than academic knowledge, they create a learning-by-doing process which ultimately makes a legal officer also an analyst.

## 2. Expanding the Methodological Repertoire for 'Seeing' a Document

Each discipline develops its own tools, and each tool allows the production of a singular type of knowledge. According to the various "professional visions",<sup>3</sup> different kinds of data can be extracted from the same field. An archaeologist does not 'see' the same things as a farmer or a forensic scientist. Each profession mobilizes a different methodology and extracts different elements from the same ground. Following this line of thought, the ambition of our project on *law intensity conflicts* is to provide judges with a toolbox that will enable them to expand their methodological repertoire for processing documents, thus proposing other 'professional visions' to Chambers. There is no strong legal framework surrounding deliberation-practice, which is left to the discretion of each Chamber. There are therefore no serious legal impediments forbidding the judges to experiment with new ways of thinking inspired by other disciplines regarding the management of a large volume of documents.

This ambition is manifested on two levels. First, it moves away from a purely representational conception of art centred on creating a moving or beautiful picture. It favours a more active conception of art that can provide methodological tools for the analysis of evidence. Art can *act* in the public debate by different means than the classic symbolic representation of a state of things, seen or imagined. Second, the project aims at modifying the very practice of deliberation of the judges. We offer new tools and building techniques that enhance the ability of the judges to extract data and to contextualize evidence tendered in court and to move beyond what

of folk sociological theories at the International Criminal Court", in *British Journal of Sociology*, 2018, vol. 69, no. 4, pp. 962-983.

<sup>3</sup> Charles Goodwin, "Professional Vision", in *American Anthropologist*, New Series, 1994, vol. 96, no. 3, pp. 606-33.

the parties have to say about them.

To develop the most accurate tools possible, we worked for five years on a single trial, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. This trial assessed the responsibility of two alleged militia leaders in a massacre in the village of Bogoro in eastern DRC in February 2003. The devices that we have proposed take the form of very simple but effective operations. All the prototypes invented during the project, which cannot be properly displayed in a policy paper, will be the subject of a book under preparation.

We can, however, give an overview of some of the issues addressed by our devices: presenting the evidence tendered by the parties in a polemic timed face-to-face to bring out the documental strategies of the parties (*tendering parties*, 2019); reconstructing the material pad from the stamps of the militias to follow the splitting of the different armed groups (*dislocation*, 2016); elaborating a matrix that matches documentary evidence with factual allegations to visualize, even before the hearings begin, which allegations will be sustained and which will be voided (*bingos!*, 2020); and assembling the testimonies of different witnesses around the main themes to see which facts are strongly supported and which ones are weak in order to reconsider the credibility of the witnesses on the basis of the reliability of a statement (*a rashomon effect*, 2018).

### 3. The Example of *muzungu*

Of the fifteen prototype installations developed over these five years, we will only detail the device entitled *muzungu – those who go round and round in circles* (2016). Judges can experience difficulties in having a synoptic vision of the whole corpus of evidence, which is usually printed on A4 sheets, stored in plastic sleeves, and then kept in binders. Our first gesture was to set up a 10-meter-long wall, covered with magnetic paint on which all the documentary evidence could be hung with small magnets, and thus seen in a single glance. The second gesture provides means to connect the documents together by encoding the evidence with keywords and colour codes. With this setup, legal officers can select and assemble the evidence on small mobile magnetic boards to test different storylines.

The visual micro-arrangements, made in the tradition of Aby Warburg's *Mnemosyn Atlas*, are based on the idea that such montages of images are likely to bring out new micro-narratives. To do so, one must be willing to start from the images themselves, instead of using them as purely illustrative materials of the factual allegations brought by the decision confirming the charges ('the charges'). By asking legal officers to go through the corpus of evidence in search of possible documents that could be index-linked to the images, *muzungu* proposes an exploration of the evidence itself by trying to bring to the surface their latent content. These perspectival or aspectual readings of the documents are temporarily stabilized with the help of tags, the list of which can evolve through the work process.

In our view, *muzungu* can change the way legal officers look at facts. Through a new organization of the work environment, the device creates a confrontation in space between, on the one hand, the wall of evidence which gathers all the documents regarded as admissible by the judges and, on the other, the limited evidence used to support the factual allegations in the charges. By pinpointing the gap between the investigation and the accusation brief, *muzungu* raises the question of how to take advantage of this abundant material, which should not be treated as leftovers, especially as trial chambers must look at the evidence as a whole. If raising this question can already be considered as a contribution by *muzungu* to the analysis of facts, the usefulness of the device lies also in the answers it provides.

To the legal officer who wants to use only legal tags to connect the evidence, *muzungu* already offers a new way of reasoning. Thanks to the wall display, the legal officers have the opportunity to add more visual documents into their lines of thought and argumentation. Indeed, the device upgrades the importance of pictures and diagrams which tend to play a minor role compared to testimonies during the deliberation. Thus, *muzungu* strengthens what can be called the 'visual culture' of legal officers, which is otherwise very much text-driven. The tag-creation process can enable legal officers to find their way inside this large amount of evidence with a new compass. Beyond the legal looking-glass, legal officers can tag evidence by use of social science concepts or with intellectual categories that belong to the affected communities. Offering this opportunity to think out of the legal box, *muzungu* enables legal officers to create and to dive into the cultural context in which the crimes were committed. Through the crossing of narratives built with different tags, the team of legal officers should be able to create a thicker description of the situation in order to improve the factual basis of their legal characterization.<sup>4</sup>

### 4. Science Studies and Poetry

Science studies have made it possible to move from the question of assessing the 'scientificity' of disciplines to that of describing the practical activities of scientific researchers. Immersed in the daily life of 'science in the making', anthropologists have brought to light all the practical operations necessary for the constitution of 'scientific facts': the gradual disappearance of the author from a proposition which turns into an impersonal and timeless statement (also known as 'how a quote becomes a fact'); the extension of the scientific networks that can take up the conclusions of published papers and the mobilization of different social worlds.<sup>5</sup> On the basis of this model established on the observation of laboratories, the method was applied to the world of law. Moving away from comments on case-law, the social scientist worked their way to deliberation rooms to observe the law in the making.<sup>6</sup>

What are judgments at the ICC made of? By which operations are they characterized? Rather than starting from the legal conclusions of the judgement, we have considered the means and materiality of a judgement.<sup>7</sup> Focusing on the evidence tendered in court, we bring the technical manipulations operated on the evidence to light.<sup>8</sup> To a certain extent, it is a follow-up to the judges' effort to make explicit their legal reasoning in their decisions, but the redescription of the practices takes also the law out of a purely discursive conception. By doing so, it triggers an open debate within the legal community on the modes of deliberation and the strategies of verification, which are perhaps even more diverse than the oppositions between different legal traditions.

This attention to gestures, to the materiality of documents, to their different modes of display has been worked on at length in art and poetry. Inside this field, the term of 'investigation' is precisely used to describe the ability to grasp a given material through specific tools in order to foster the emergence of types of *latent*,

<sup>4</sup> Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture", in Clifford Geertz (ed.), *The Interpretation of Cultures: Selected Essays*, Basic Books, New York, 1973.

<sup>5</sup> Bruno Latour and Steve Woolgar, *Laboratory Life: The Construction of Scientific Facts*, Princeton University Press, Princeton, 1979.

<sup>6</sup> Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat*, Polity Press, Cambridge, 2009.

<sup>7</sup> Joël Hubrecht, "Rendre visible le processus du procès: muzungu/bogoro par Franck Leibovici et Julien Seroussi", in *Les Cahiers de la Justice*, 2018, vol. 4, no. 4, pp. 699-713.

<sup>8</sup> Franck Leibovici and Julien Seroussi, *a tender map of 25.3* (Indian ink, colored inks on Korean paper, collages, color pencils, four kakemonos of 200 x 80 cm), 2020.

but not exploited knowledge. This body of work does not belong to the ‘documentary’ genre, an instituted genre which aims at a more or less faithful recording of reality, but to the *documental*, which focuses on the fact that devices and displays give us access to situations as well as artifacts.<sup>9</sup>

This approach considers that any production of knowledge implies a specific *instrumentarium* and practices of professional communities. We find it, for example, in the ‘objectivist’ poetry of the American poet Charles Reznikoff (1894-1976), who drew on the transcripts of trials of various cases between 1890 and 1914 to write a history of the United States.<sup>10</sup> Without changing a single word of the statements taken from these transcripts, Reznikoff worked on the enunciations, simply going to the line before the end of the sentence, which give them the appearance of a free verse poem. Above all, his work consisted of carefully selecting fragments from a large archive and rearranging them geographically and thematically, so as to construct clarifying pictures of the country’s history. Organized according to a geographical division of the country (north, south, east, west) and broad categories (such as mores, professional life and family life), *Testimony* offers short playlets that, to the uninformed reader, look like micro-fictions in free verse, but which are first and foremost a technique for synthesizing the data produced by thousands of criminal trials, spread over more than twenty-five years: law produces social science data, without knowing it; poetry extracts, organizes and publicizes them. Reznikoff adopted the same technique when he composed *Holocaust*,<sup>11</sup> based on the transcripts of the Nuremberg Tribunal and the Eichmann trial.

## 5. Low Tech Practices v. Digital Legal Tools?

Since 2004, the evolving ICC Legal Tools Project has developed digital legal tools, such as the widely used ICC Legal Tools Database which saw more than 5 million hits in 2020.<sup>12</sup> From the start, the project sought to facilitate digital capacity building and to construct a public commons of legal sources.<sup>13</sup> But it also developed the ICC Case Matrix as a methodological innovation on how the meeting of evidence and legal requirements of crimes could be reconceptualised and visualized. The ICC Case Matrix has influenced ICC work-processes<sup>14</sup> and inspired other software platforms such as I-DOC.<sup>15</sup> Weary of the reluctance of ICC members to use digital tools, the creators of the ICC Case Matrix advised the judges against trying to deploy it in cases.

<sup>9</sup> Franck Leibovici, *des documents poétiques*, Marseille, Al Dante, 2007; Franck Leibovici, *des opérations d’écriture qui ne disent pas leur nom*, Paris, Questions Théoriques, 2020.

<sup>10</sup> Charles Reznikoff, *Testimony: The United States 1885-1915: Recitative*, New Directions Press, 1965.

<sup>11</sup> Charles Reznikoff, *Holocaust*, Black Sparrow Press, 1975.

<sup>12</sup> See ICC, ‘Virtual Training for Counsel on Legal Tools’, Press Release, 22 September 2021 (<https://www.legal-tools.org/doc/r2yxti/>).

<sup>13</sup> Morten Bergsmo, “Decomposition Works in Our Favour”, Policy Brief Series No. 114, Torkel Opsahl Academic EPublisher (‘TOAEP’), Brussels, 2020 (<http://www.toaep.org/pbs-pdf/114-bergsmo/>); “Complementarity and the Challenges of Equality and Empowerment”, Policy Brief Series No. 8 (2011), TOAEP, Brussels, 2011 (<http://www.toaep.org/pbs-pdf/8-bergsmo/>); and the first five chapters in Morten Bergsmo (ed.): *Active Complementarity: Legal Information Transfer*, TOAEP, Oslo, 2011 (<http://www.toaep.org/ps-pdf/8-bergsmo/>).

<sup>14</sup> Morten Bergsmo, Olympia Bekou and Annika Jones, “New Technologies in Criminal Justice for Core International Crimes: The ICC Legal Tools Project”, in *Human Rights Law Review*, vol. 10, no. 4, pp. 715-729; Olympia Bekou, “Enhancing the Quality of Investigations: What Role Can the In-Depth Analysis Charts Play?”, in Xabier Aguirre Aranburu, Morten Bergsmo, Simon De Smet and Carsten Stahn (eds.), *Quality Control in Criminal Investigation*, TOAEP, Brussels, 2020, pp. 587-609 (<http://www.toaep.org/ps-pdf/38-qcci/>).

<sup>15</sup> See <https://www.casematrixnetwork.org/cmn-knowledge-hub/i-doc/>.

This encouraged us to favour an analogue or ‘low tech’ approach that was as material as possible, with several benefits: our prototypes would be easier to use for non-digital natives, and the problem of technical- (updating of standards and formats) and content-maintenance would be reduced. Analogue tools can make it easier to implement requisite changes in the environment. The internal organization of the teams must also be taken into account from the start, to understand how tasks can be allocated. The internal life of an administration should be internalized in relation to an analogue tool, whereas a digital application has a much greater non-located or context-free transportability.

Many members of ICC Chambers actually use, but informally, “intellectual technologies”<sup>16</sup> to help them in their analyses and reflections: diagrams on the corners of sheets, flowcharts on loose sheets, or collages of evidence for comparison purposes. Our approach gives a generic character to these current ways of doing things in ICC Chambers, but always in an informal way (let us note that none of these visualization techniques appear in hearings or judgments). Their analogue materiality offers a great simplicity and makes it possible to carry out simple yet unusual conceptual operations.

To take the example of the ICC Case Matrix again, the matrix form is a writing format in its own right, an ‘intellectual technology’ in Goody’s sense, insofar as it makes it possible to carry out conceptual operations that would be difficult or costly to carry out by other means. The rules that must be set out to ensure the correct use of its operativity make it what Wittgenstein calls a ‘language game’.<sup>17</sup> As a matter of fact, one of our prototypes (*bingos!*, 2020) was built to highlight the role of ICC Case Matrix ‘templates’ among operations governing the management of evidence during the hearings. Indeed, there is a transversal adoption of the Case Matrix language game in different departments of the ICC, from deep-chart analysis to the good-practice guides, as intended by its creators.

But if we have considered that analogue tools could better transform probatory practices, their digitization would also be precious, once lawyers are more familiar with the embedded techniques and gestures. In addition to the advantage of working from one’s workstation, digital processes offer a manageability and variety of access to the evidence that can be augmented with all sorts of metadata, producing different levels of context. Finally, the digitization of our analogue tools would allow, like the ICC Case Matrix, to broaden the audience: jurists, researchers, non-governmental organizations and associations could have specific access to the evidence and the way it is processed.

## 6. From a Technical Problem to a Protocol for Standardizing a Procedure

Our prototypes are usually the result of a successful negotiation with the Court. For example, in order to offer a Swahili version of our book, *bogoro*, composed from excerpts of transcripts (English or French, the two working languages of the Court), we requested access to the video recordings of the trial to find the Swahili equivalent of the passages we had selected. The trial files had been encapsulated in an ICC-specific format, ‘ftr’ (*for the record*), designed to switch easily from one language to another, according to the four audio channels set up during the hearings. The experience was thus close to that of the trial participants. In order to decrease the size of the files, the video image had been highly compressed and could not be edited. The court management service, in conjunction

<sup>16</sup> Jack Goody, *The Domestication of the Savage Mind*, Cambridge University Press, 1977.

<sup>17</sup> Ludwig Wittgenstein, *Philosophical Investigations*, 4th edition, Wiley-Blackwell, Oxford, 2009.



with the video production department and the IT department, had to go back to the original recordings of the trial in mini-dv tapes to provide us with high-definition, editable digital files. Knowing that one hour of recording is equivalent to one hour of capture, the conversion work was long and laborious. It became clear that while the Court had the duty to give access to this public record, it was not the case in practice: the technical standards for a public broadcasting had not been put in place, for the simple reason that no one had ever asked for them before we did. Our request opened the way to the standardization and routinization of a protocol that would convert the videos into ‘.mov’ format and the images into unlocked ‘.tiff’ or ‘.jpg’ formats.

Once the video files were accessible and manipulable, the question of language arose: how to find a passage in Swahili, from English or French, when one does not speak Swahili? The Court therefore had to mobilize a sworn interpreter, authorized to hear everything, including the passages in closed sessions, in order to set the markers for the passages sought in Swahili. Because we had retained the transcript numbers, page numbers, and line numbers from the original ‘.pdf’ file, the technicians were able to re-match the original transcripts to the video recordings and find every segment we had selected, using the corresponding time codes. After months of work, they were able to send us several external hard drives containing all the audio-visual files needed to reconstruct a Swahili version of *bogoro*. The first chapters were broadcast in December 2017 by Ntoné Edjamé on his pan-African radio *Chimurenga*.

At the time of our request, the Court asked us in exchange to be able to use, for its own purposes, what could in our work be considered as ‘deliverables’. It could thus broadcast audio clips from *bogoro*, via the outreach department, as part of a didactic programme to make the trial more understandable to the public who did not follow its everyday proceedings. Based on our excerpts, one could cross-read the trial thematically, by focusing on specific issues rather than by hearing dates.

## 7. The International Criminal Court as a Cultural Platform

Our different devices offer the possibility of transporting the public elements of trials to the affected populations in a much simpler way than technical judgments that can only be read thoroughly by a few experts. Access to the public evidence via these material devices would thus make it possible to better include the communities concerned by the ICC trials into the conversation. Conversely, it would give access to international lawyers to the vernacular readings of evidence by members of the affected populations who may have a closer analysis of the documents extracted from their social world.

As a matter of fact, new collaborations within and outside the Court have emerged. Inside the ICC, we plan to organize a series of workshops that will bring together members of different branches of the Court to work on evidentiary issues with social scientists, artists, graphic designers, and art conservators. These encounters will facilitate the circulation of existing knowledge inside the Court. For instance, the output of the analysts of the Office of the Prosecutor do not find the expected echo among the judges, who do not have analysts in their teams to receive this knowledge.

Outside the ICC, we organized a meeting at the Musée du Quai Branly (Paris) between social science researchers and the Prosecutor’s investigators to share their knowledge for the first time.<sup>18</sup> For instance, the ability of a conservator from the Musée du Quai Branly to reconstruct the context of use of ritual objects (Who? What? Where? How?) enriches the questions a legal investigator can raise in the field and what he or she should collect. Similarly, when a curator details the parameters for transforming a corpus of objects into a structured museum collection – that is, into objects of knowledge – it sheds light on how the ICC could transform the archives of its trials into living memory and a rich form of culture.

These few examples of the new links that are being forged around this project all contribute to making the Court a site of cultural exchanges that goes beyond its judicial function. If the most *doctrinaire* jurists see in this a deviation from the Court’s mission, we are making the exact opposite bet. In our opinion, the implementation of international criminal law can only be achieved if the Court succeeds in becoming the vascularized centre of numerous cultural exchanges between the different professional bodies that work on the situations that it has the duty to adjudicate. Contrary to national justice systems, the Court does not have a police force to build strong legal truth. Its unique chance to become more relevant to the affected communities – but also to the international community – is to improve its intellectual toolbox.

*Julien Seroussi is a social scientist. He started to take an interest in international criminal justice during his Ph.D. on the legal and political battles over the definition of the universal jurisdiction of national judges. After serving as an analyst in the Chambers of the ICC from 2009 to 2012, he worked at the French National Special War Crimes Unit in Paris. With his co-author, he is working on fact-finding at the crossroads of art, law and social sciences. Together they published the book bogoro, 2016 and set up different exhibitions in Berlin, Cracow, Metz and Paris. Franck Leibovici is a poet and artist. His artistic devices aim to navigate through opaque, technical or messy environments. Always starting from documents produced by a specific situation, his ‘instruments-artworks’ are activated, as ‘artworks’ in the art world, and as ‘tools’ in the field of his investigations. His work has been shown, among other venues, at the National Museum of Modern Art – Pompidou Center (Paris), Venice biennale and Taipei biennale. Since 2014, he and his co-author have engaged a cycle called ‘law intensity conflicts’ (books, exhibitions, lectures) where artistic displays and social science approaches aim to enlarge legal practices in fact processing. The authors have received support for some parts of this project from the Fondation de la Maison des Sciences de l’Homme (FMSH) and the Fondation Carasso.*

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<sup>18</sup> Musée du Quai Branly, “Bogoro, une enquête”, 2 December 2017 (available on its web site).



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