
 PROFILE

Navanethem Pillay,
South Africa

*Judge of the International
Criminal Court*



The Beginning

When she was only six years old, Navanethem Pillay was called to testify in a trial in a South African court concerning the robbery of her father. This was her first courtroom experience and it proved to be influential in the path her life subsequently took. She has spent a good part of her adult life in courtrooms, although the roles she has played there are perhaps different from anything she could have imagined as a child growing up in apartheid South Africa.¹

Pillay served as a judge on the International Criminal Tribunal for Rwanda from 1995 to 2003. For more than four of those years, she acted as the tribunal's president. Based upon this international judicial experience, she was nominated to serve as a judge on the historic first bench of the International Criminal Court.

The story of Pillay's path to the international judiciary is a remarkable one. She was born in Durban and grew up in a household where there was not even a newspaper to read. Her father was a bus driver, and her mother, like many Indian women, had never been to school, as her parents did not see the need for a daughter's education. Pillay observed of her situation as a young South African of color:

You were aware that you got secondhand books handed down from the white school. You were aware that you couldn't enter a park or a beach reserved for whites only. We grew up thinking there

40 THE INTERNATIONAL JUDGE

must be rights out there, and we've got to learn from the rest of the world. We were inspired by student movements outside South Africa. The Harvard student protest against apartheid caught our attention. As we went to high school, police would come and question us, search us, students with pamphlets protesting some terrible law or something else. At the university the police fired on students, and also at the university we were forcibly put into segregated camps. Everything was a struggle.

These experiences led Pillay to the study of law. She reminisced about how she came to read the Nuremberg court cases during her first year at Natal University, when she was twenty years of age:

Law courses were scheduled to suit the white students who were working in law firms. I would go early in the morning, since the first lecture was seven to eight in the morning and the next was seven to eight at night. I had the whole day, and I didn't have bus fare to go home and come back. I just sat in the library and read these Nuremberg cases.

Upon finishing her Bachelor of Law degree, Pillay had to decide how to pursue the legal profession despite multiple constraints.

I started off as a lawyer, and I always say I was trebly disadvantaged. I was black, I was a woman, and I was of a poor class. When I applied for positions at law firms, I was told: "We can't have our white secretaries take dictations from a black person. What if you fall pregnant? Is your father a lawyer or a business man?" And that's why I started a law practice on my own. I became the first woman to open her own law practice in Natal. Some male colleagues said that I was being presumptuous.²

Pillay found that as a beginning lawyer, she had to take any kind of work she could find, including defending her colleagues who were banned, put under house arrest, or charged under the Suppression of Communism Act. This was work she had no experience in, but she gained it quickly on the job. She also learned a great deal about South African courts in the apartheid era:

You learned that the courts often served as a tool of the apartheid system to keep "order and security." As I defended cases of racial discrimination, I realized that I had to learn international humanitarian law so we could raise international legal norms as standards for justice in the courtroom. In cases under the Terrorism Act, the state would detain hundreds, torture them, and bring them to court as witnesses. We had no access to those witnesses. We needed to

Profile: Navanethem Pillay 41

know the rights of defendants and victims under conventions such as the International Convention on Civil and Political Rights, the Geneva Convention, and the Torture Convention. We tried to raise these arguments in the courts, and the courts would say, "We have our own laws, we are not interested in international law or the decisions of foreign courts." That's what motivated me to learn about international law and human rights.

Pillay found a notice in the newspaper about scholarships to Harvard Law School, applied to the Master of Laws Program, and was accepted. This experience was to be transformative for her. Not only did she study international law, but she also met many students who were supportive of the anti-apartheid struggle in her country. Two years after returning to South Africa, she headed once again for Harvard, where she received her doctorate in law. Pillay reports that her South African colleagues were baffled by all this study. Would it allow her to come back and charge higher fees? they asked. She wondered herself sometimes about the point of all this hard work. But, Pillay notes, the usefulness of her studies was to be proven later on. "I didn't realize that one day all this would come in handy, but it did. It qualified me to be an international judge."

First, however, Pillay served as judge in her home country in the post-apartheid era, when nonwhites were finally allowed to occupy such positions. In 1995, she became the first woman of color to be appointed acting judge of the Supreme Court of South Africa.

I had never entered a judges' room before; there had been no black judges when Mandela made me an acting judge. He called me himself to say the appointment gave him great personal joy. When news of the appointment was reported in the press, some white members of the Bar Counsel called a meeting and took a decision to monitor whether I was competent to serve as a judge. The president of the Bar Counsel came into my courtroom to observe me. The white judges whom I had just joined could have treated me similarly. Instead they supported me, if only for the reason that they objected to the notion that judges could be monitored.

Being a black judge in the new South Africa held some unique challenges. Pillay was very familiar with criminal cases since that was what she had been handling as a lawyer for years. But civil cases were largely outside her experience, especially commercial and corporate work, which had all gone to white lawyers in the past. She reports that none of the black law students in her class, for instance, had ever personally handled a check, yet some of their cases revolved around the misuse of negotiable instruments. Pillay tackled these cases involving property and commercial

42 THE INTERNATIONAL JUDGE

disputes but admits to having been happier when judicial resources were focused more on the protection of human rights.

It was during her time as a judge in South Africa that Pillay was approached by human rights organizations outside the country about the International Criminal Tribunal for Rwanda that was being set up in Arusha, Tanzania, in the aftermath of the genocide. Pillay confesses to having known little at the time about recent events in Rwanda. “We were in the euphoria of our own elections when it all happened. So we missed it! I had no real sense of the atrocities committed.”

Pillay was encouraged to stand for election to the first bench of the Rwandan tribunal, being told that the bench needed a woman and an African. But Pillay was reluctant to leave South Africa, which had just entered an exciting era.

I left home very grudgingly but was persuaded by supporters, who said, “Look, if you don’t like it, you can resign after a year.” But in the end, I spent eight and a half years at the International Criminal Tribunal for Rwanda in Arusha. Any personal discomfort I might have felt paled in comparison to the suffering of Rwandans and their need for justice.

From South Africa to Tanzania

Navi Pillay arrived at the International Criminal Tribunal for Rwanda in 1995. The early days of the tribunal were frustrating, Pillay reports:

I felt like we were set up for failure. There were no courtrooms, offices, or library for the first two years. It was a logistical nightmare to be based in a remote town, declared a hardship area by the UN. But there was the determination to make it work. And for me it was much more. We believed that an international court could be hosted in Africa.

The mix of judges that Pillay found on the ICTR bench made for interesting professional challenges. There were six judges on the bench from as many countries, later increased to eighteen. They represented a wide gamut of cultures, languages, training, and past professional experience. And this past experience did not, in many cases, include that of judge in criminal jurisdictions. Pillay’s own experience was primarily that of a defense counsel, one who was an advocate for the underdog and an activist. She describes her first reactions to being an international judge:

First I thought, “How is this going to work?” Each of us was trained in our own law and our own procedure. And we were each

Profile: Navanethem Pillay 43

somewhat territorial and defensive about our own systems. But we had to put in place an international system of justice not tied to any one national system. We learned to respect each other's suggestions about procedures and rules for the court. Sometimes we would debate and debate the alternative procedures, from civil and common law systems, and then realize, in the end, that the procedures might be different but the principle was the same.

I felt inadequate when I started as I thought the other judges would all be more experienced, as international judges or international lawyers. It's when I sat in courtroom that I realized that my criminal law background actually gave me an advantage. The ICTR statute provides for an adversarial system of criminal trials. And I was in a criminal courtroom, which is what I had been doing day in and day out as defense counsel. I soon got over the feeling of inadequacy when I realized that, actually, most of my colleagues had even less international court experience than I had. It was, after all, new to all of us.

As judges, we were careful to exercise independence and impartiality at all times. However, it was not easy to remain neutral or impassive to the evidence of killings, torture, and sexual violence perpetrated upon hundreds of thousands of people. The personal accounts of suffering that I listened to for the eight years I was at the ICTR still remain with me. Witnesses told us that they had waited for the day when they could see justice done in court.

After four years, Pillay was elected to replace the first ICTR president, the Senegalese judge Laity Kama. She took over the presidency at a time when the tribunal was coming under frequent criticism, both from the United Nations and the greater public, for the slowness of trials, the cost of maintaining of the court, and the small number of defendants. At the same time, there were serious tensions between the ICTR chambers and registry, two sections of the tribunal that function autonomously and not always in tandem. One of Pillay's achievements as president, according to her, was to secure proper administrative support for the judicial function, by appealing to the UN Secretary General to effect changes in the registry. At one point, she made a request for such changes before the General Assembly itself. This took a lot of courage—or perhaps naiveté, says Pillay—but in the end she was successful. Despite the tensions within the court that such actions created, Pillay was reelected as ICTR president by her peers.³

Pillay sat on some very influential cases while serving as a trial judge with the ICTR, some of which have contributed powerfully to recent developments in international criminal and human rights law. In *Prosecutor v. Jean-Paul Akayesu*,⁴ she and her colleagues rendered a judgment

44 THE INTERNATIONAL JUDGE

against the mayor of the Taba commune in Rwanda, finding him guilty of genocide through the use of rape. This case is groundbreaking in that the ICTR recognized that rape and sexual violence can constitute genocide when they are committed with the intention of destroying in whole or in part a particular group. Pillay also presided over the so-called Media Case,⁵ a high-profile trial that sentenced two Rwandan journalists to life and a third for thirty-five years on charges of inciting Hutu soldiers, militia, and civilians to murder hundreds of thousands of Tutsi and moderate Hutu. For the first time since the Nuremberg trials, an international court convicted journalists of inciting genocide. This landmark judgment of the international court carefully differentiates between illicit hate speech and legitimate political discourse.⁶

Women judges are often thought by the public to have a particular interest in gender crimes and their prosecution. Certainly, the extent and nature of gender crimes in the Balkans and in Rwanda, as well as the participation of women on both the prosecutorial and judicial staff of the ICTY and ICTR, served to advance the consideration of gender crimes and the development of jurisprudence to address them. Pillay found herself in a delicate position vis-à-vis gender crimes in Rwanda when she became the tribunal president. On the one hand, she did not feel that it was her position to push for the prosecution of gender crimes since such crimes were not part of the charges outlined in the indictments. On the other hand, she was called upon to answer questions by both the General Assembly and civil society about the blatant lack of charges of genocide in ICTR indictments.

Normally, we would say that judges—especially criminal judges—are supposed to sit back and not give any directions on how the prosecution should go. You do not go beyond that indictment, you just focus on the specific allegations against the individual. Two women judges in the ICTY, Elizabeth Odio Benito and Gabrielle MacDonald, asked the prosecutor whether rape counts had been investigated when they were hearing applications for the confirmation of indictments. I had read the expert group's report on which the Security Council based the decision to set up the ICTR. And that expert group documented sexual violence. We had taken judicial notice of that document. With this in mind, I and other judges directed questions to witnesses on rape and sexual violence that they had witnessed.

I was delivering the human rights address at the United Nations on December 10, 1998, when questions were directed to me about why there were no rape charges. National judges are sheltered from public scrutiny to some extent by the sub judice rule.⁷ But

Profile: Navanethem Pillay 45

international judges are far more exposed to the glare of international scrutiny and made accountable. The eyes of the international public are on you. I discovered the public was watching and questioning us. The question put to me by a representative from an NGO was, "Why, out of twenty-one indictments issued to date, is there no charge of rape?" The question deserved a serious response, which only the prosecutor could make, not a judge.

The questions alerted me, during the course of court testimony from a doctor from Médecins sans Frontières when we were hearing evidence, to ask whether he had seen any evidence of sexual violence or rape on the bodies of victims who were injured or killed. Later, that intervention was one of the grounds for appeal—that I had asked this question in early days, showing a bias. When witnesses volunteered evidence of sexual violence, in the Akayesu case, the three judges questioned them for more information.

NGOs were thus instrumental in bringing certain issues, like gender crimes, to the attention of ICTR judges.

It is not only civil society that has played a central role in connecting international criminal tribunals with the concerns of the greater public, however. The press has played an equally powerful role in this regard. The courts depend upon the press to disseminate information about their decisions and major accomplishments; without this publicity, the full impact of their work in bringing about justice, and even reconciliation, cannot be felt. At the same time, a court staff often feels that the press does not report on their work accurately, which can ultimately harm the reputation of the institution. Pillay speaks of a junior journalist who visited the ICTR while there happened not to be any trials in session. This was subsequently reported as "These judges are doing nothing!" in a half dozen papers, without any fact checking. A full account of the work of the tribunal is available on the court Web site, provided and maintained by the outreach office. "The public has access to it," says Pillay. "But the media is not interested in it. You don't sell papers with that kind of information. You need something sensational."⁸

Despite challenging moments in the life of the ICTR, Pillay feels that the tribunal has had a major impact in Rwanda. Its judicial proceedings have allowed Rwandans to turn their attention to a lower level of accused perpetrator, leaving the complex prosecution of those believed to be most responsible for the genocide to the international community. Ordinary Rwandans have willingly agreed to testify at the court and traveled a long distance to do so. Other African nations have cooperated in the tribunal's work, transferring suspects to Arusha and accepting convicted criminals to serve out sentences in their prisons. Basing the tribunal

46 THE INTERNATIONAL JUDGE

in Africa was an important part of the legitimacy that it has earned. Pillay recognizes, however, that the mandate of the ICTR was hard for many Rwandans to accept.

There are sovereignty issues. "Who is this other body that can impose its system of justice over us?" It's unheard-of. You only respect your own. I don't think South Africa would have liked it if apartheid perpetrators had been put on trial somewhere else, by some other people. We would have really developed an attitude against these so-called judges. "Who are they? What's their qualification?"

But I think that the two ad hoc tribunals have gained credibility and acceptance from the international community. The outside world has seen that international criminal justice can be a reality. Even I didn't think it was possible, because each one of us was trained in our own system. But the test of our accomplishment is in the jurisprudence produced. Were the judgments just political, or did the judges really have the reasons and evidence to convict? It is telling that they have acquitted some of the defendants.

Just as in the Nuremberg trials, the fact that some individuals indicted for crimes against humanity have been exonerated demonstrates that justice is being pursued fairly. This is a point of pride among a number of ICTR judges.

From Ad Hoc Tribunal to Permanent Court

In 2003, Pillay was ready to step down from her position at the ICTR and return to South Africa. Her time as judge and then president had been stressful and exhausting and she was ready to give up the work of international justice. She told her government that she would not stand for reelection at the ICTR. Pillay reminisced:

I thought eight years was long service. I wanted to go back home and retire. Justice Albie Sachs [of the South African Constitutional Court] told me, "You won't last seventy-two hours here! After that you will be totally bored!"

Around that same time, nominations were being made for the new bench of the International Criminal Court. Pillay's name was put forward, and she finally acquiesced to being considered for a judgeship. She confessed to being moved that people had noticed the work she had accomplished in Arusha, a corner of the world that was not always on the international radar screen.

Profile: Navanethem Pillay 47

International courts have often been criticized for the overly political nature of their judicial elections, and the ICC is no exception. By visiting the United Nations and its various missions in New York wearing the hat of ICTR president, Pillay was able to avoid much of the aggressive campaigning that is normally done to garner the necessary votes for election.⁹ Instead of promoting her own election to the ICC, she visited diplomats and officials on behalf of ICTR judges up for election and kept discussion of herself to a minimum. She was asked difficult questions as a candidate for the ICC bench, however, which she answered frankly.

“Do you think the ICC will be able to avoid the mistakes made by the ad hoc tribunals?” I answered, “No, there will be the same mistakes again.” “Will the ICC be less expensive?” “No,” I replied, “it’s going to be just as expensive if not more.”

Despite what might be considered unpopular answers to such questions, Pillay was elected in the first of thirty-three rounds of highly public and sometimes contentious voting. She was elected for a term of six years and currently sits on a bench of eighteen judges.

Pillay does believe that some lessons have been learned from the ICTY and ICTR experiences, however. This is particularly true in the way that the ICC interacts with both civil society and victims of the crimes being prosecuted. The prominence of gender crimes in the trials of the ad hoc tribunals has made practitioners of international justice very aware of how these issues should be approached in the new permanent criminal court. More generally, NGOs have been instrumental both in the establishment of the ICC and in the formulation of its rules and procedures. Pillay noted:

I think there are lessons learned in the way that the ICC has been set up. The prosecutor works very closely with civil society. He relies on civil society to bring complaints to his notice. And we have had experts on victims’ reparation address the judges.

Gender is an issue not just in the crimes that the ICC will deal with but also in the very composition of the court itself. The ICC is the first international judicial institution that has striven for a gender balance on the bench. With her now long experience in international judicial institutions, Pillay finds herself serving as an inspiration and source of advice for other women judges.

Not only women judges from international courts but also from national courts get together to exchange views on issues pertinent to them. I support the participation of women judges. Not because I think women judges decide in a particular way and men judges

48 THE INTERNATIONAL JUDGE

decide in a different way, but because of the principle of equality. You can't keep 50 percent of the population out of the decision-making process. Then you have skewed justice.

And yet I do think women come with a particular sensitivity and understanding about what happens to people who are raped. You know, we understand when we are told that it's like getting a death sentence. And we understand when the witness says, "I'll be sick for the rest of my life." She means she has been rendered HIV positive. I think the world is understanding better now after the huge incidence of rape of men and boys in the Balkans, that it is a gender crime of violence.

Had it not been for the NGO movement in civil society having such an influence over the structure of the ICC election process, I don't think we would have gotten the seven women on our bench. And to illustrate that, we look at the ICJ—how long have they been in operation and they still only have a single woman? This is like most courts in the world. It's a hot issue in South Africa right now about promoting more women to the high court bench. What I hear most from women judges in South Africa who reach out to me is, "But you know, we are in the minority here. We just can't make a difference. I'm only one of two or we're only three out of eighteen or whatever. The bench is dominated by men and we can't make a difference." That's the main complaint.

And yet I assure you, amongst colleagues, it doesn't mean women support other women judges in decision making or in personal differences. It's really an equality issue. Courts have got to be seen to be equal.

As of 2006, the ICC had yet to conduct a full-blown trial. Since the court started work in 2003, the prosecutorial division has taken on a number of investigations and issued several indictments. The three divisions of the ICC judiciary—the pretrial, trial, and appeal chambers—have been involved in numerous activities, including the development of rules and procedures, decision making on various motions, confirmation of indictments, formulation of professional development plans, and the creation of an ICC judicial code of ethics, a process in which Navi Pillay has taken a leading role.¹⁰

The path from Durban to The Hague was long and hard and full of unexpected turns, leading to a destination that Navanethem Pillay could not have envisaged—as a girl growing up in apartheid South Africa, as a law student, or even as a newly elected ICTR judge. She now occupies a position with the potential to set the development of law in new directions.