Women's Initiatives for Gender Justice

SPECIAL EDITION

gender 2012 report card

on the International Criminal Court

The Women's Initiatives for Gender Justice is an international women's human rights organisation that advocates for gender justice through the International Criminal Court (ICC) and domestic mechanisms, and works with women most affected by the conflict situations under investigation by the ICC.

The Women's Initiatives for Gender Justice has country-based programmes and legal monitoring initiatives in seven ICC Situation countries: Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic, Kenya, Libya, and Côte d'Ivoire.

The strategic programme areas for the Women's Initiatives include:

- Political and legal advocacy for accountability and prosecution of gender-based crimes
- Capacity and movement building initiatives with women in armed conflicts
- Conflict resolution and integration of gender issues within the negotiations and implementation of Peace Agreements (Uganda, DRC, Darfur)
- Documentation and data collection in relation to the commission of gender-based crimes in armed conflicts
- Victims' participation before the ICC
- Training of activists, lawyers and judges on the Rome Statute and international jurisprudence regarding gender-based crimes
- Advocacy for assistance and reparations for women victims/survivors of armed conflicts

In 2006, the Women's Initiatives for Gender Justice was the first NGO to file before the ICC and to date is the only international women's human rights organisation to have been recognised with *amicus curiae* status by the Court. The organisation has submitted legal filings to the ICC on six occasions, and has been recognised as *amicus curiae* in the *Prosecutor v. Jean-Pierre Bemba* and the *Prosecutor v. Thomas Lubanga Dyilo* cases.

Women's Initiatives for Gender Justice

Cairo Office	Kampala Office	Kitgum Office	The Hague Office
	PO Box 12847	PO Box 210	Noordwal 10
Cairo	Kampala	Kitgum	2513 EA The Hague
Egypt	Uganda	Uganda	The Netherlands, Europe

telephone +31 (070) 302 9911
info@iccwomen.org
@4GenderJustice
www.iccwomen.org

The Women's Initiatives for Gender Justice would like to acknowledge and thank the following donors for their financial support:

- Anonymous
- Foundation Open Society Institute
- Oxfam Novib
- The Sigrid Rausing Trust

Gender Report Card on the International Criminal Court 2012

ISBN 978-94-90766-10-8

gender 2012 report card

on the International Criminal Court

List of Tables in the *Gender Report Card 2012*

Structures and Institutional Development

States Parties/ASP

Substantive Work of the ICC

Contents

Contents *continued*

States Parties/ASP

Substantive Work of the ICC

Introduction

Welcome to a Special Edition of the *Gender Report Card on the International Criminal Court* (ICC). This Special Edition marks ten years since the entry into force of the Rome Statute, in 2002. This is the eighth edition of the *Gender Report Card on the ICC*, an annual publication which assesses the implementation by the ICC of the Rome Statute, Rules of Procedure and Evidence (RPE) and in particular the gender mandates they embody.

Gender integration in the Rome Statute

The Rome Statute of the ICC is visionary in its approach to gender-based crimes and contains the most advanced articulation in international criminal law of violence against women. Gender-based crimes are included within the jurisdiction of the Court as war crimes, crimes against humanity and acts of genocide. Unique among international courts and tribunals, the ICC is statutorily required to deliver a justice that is gender-inclusive; the Statute contains provisions that require the Court to apply and interpret the law in a manner that is consistent with internationally recognised human rights and without any adverse distinction founded on grounds such as gender. The Rome Statute also contains unique provisions for the participation of victims and for the establishment of the Trust Fund for Victims, an institution with the dual mandates of providing assistance to victims of crimes within the jurisdiction of the Court, and implementing Court-ordered reparations.

The Statute, RPE and Regulations of the Court require the ICC to take into account the specific needs of victims/survivors of gender-based crimes, and include provisions for witness protection and support, victim participation and reparations, principles of evidence in cases of sexual violence and special measures, especially for victims/witnesses of crimes of sexual violence. The Statute contains provisions requiring fair representation of female and male judges and staff of the ICC as well as fair regional representation, legal expertise in sexual and gender violence, violence against children, and expertise in trauma related to gender-based crimes.

The International Criminal Court in 2012

As of April 2012, the ICC has 121 States Parties. The ICC has opened investigations in seven Situations, and has an additional eight countries under preliminary examination. The Court has received at least 9,332 communications pursuant to Article 15. Since 2002, the ICC has opened 16 cases involving 29 individuals, of whom 15 have appeared before the Court. In 2011, the ICC concluded its first trial and in 2012 issued its first trial judgement, sentence, and reparations decision. Six individuals have been brought into the Court's custody pursuant to arrest warrants and nine suspects have voluntarily appeared before the Court in response to a summons to appear. Charges for gender-based crimes have been brought in six of the seven Situations, and in 11 of the 16 cases currently before the Court, a proportion of almost 70%.

In 2012, women have been appointed to, and currently hold, the posts of Chief Prosecutor, Registrar, and President of the Assembly of States Parties. There are ten women and eight men on the bench of the ICC, making women currently the majority of the judges in the ICC's Chambers. Of the 699 staff of the ICC, excluding judges, 47% are women. The ICC has received 12,641 applications for victim participation, and 10,363 applications for reparations. The Trust Fund for Victims is operational with 28 ongoing projects in Uganda and the Democratic Republic of the Congo (DRC) pursuant to its assistance mandate, and will be implementing the ICC's first reparations in the case against Thomas Lubanga Dyilo.

Special Edition of the *Gender Report Card on the International Criminal Court*

In this Special Edition of the *Gender Report Card on the International Criminal Court*, we highlight important events and trends in the institutional development and substantive work of the ICC over the past 12 months.

As in past years, we review the gender breakdown of the ICC's staff. We provide a statistical review of geographical and gender equity among professional staff, and those on the list of legal counsel, assistants to counsel, and professional investigators. We also report on the work of the ICC's Trust Fund for Victims, and the Office of Public Counsel for Victims during 2012.

The Court's progress is the result of the combined efforts of each of the ICC's four organs — the Presidency, Judiciary, Office of the Prosecutor, and Registry — together with the Assembly of States Parties. In this Special Edition, we reflect on the gender justice and other milestones the Court has reached in its first ten years, including:

- The election of the first woman as Chief Prosecutor, Fatou Bensouda of The Gambia;[1]
- The election of the first woman as President of the Assembly of States Parties, Ambassador Tiina Intelmann of Estonia;[2]
- The first trial judgement and sentence, in *The Prosecutor v. Thomas Lubanga Dyilo*;
- The first reparations decision, in *The Prosecutor v. Thomas Lubanga Dyilo*;
- The closing arguments in *The Prosecutor v. Katanga and Ngudjolo*, the first case to include charges of gender-based crimes; and
- The ongoing testimony of victims/survivors of gender-based crimes before the ICC.

1 Chief Prosecutor Fatou Bensouda was unanimously elected by the Assembly of States Parties at its tenth session in December 2011, and took office on 15 June 2012.

2 Ambassador Tiina Intelmann was elected and took office at the tenth session of the Assembly of States Parties in December 2011.

In this Edition, we also focus on current issues that are critical to the further development of the institution, its jurisprudence, and the ICC's ability to fulfil its mandate, including:

- A review of the charges for gender-based crimes, and summary and analysis of decisions on these charges, particularly at the arrest warrant, summons to appear, and pre-trial stages of the case;
- The 12 arrest warrants that remain outstanding, all of which arise out of complex political and social contexts in Uganda, the DRC, Sudan, and Libya;
- The system of victim participation, including a recent proposal to implement a collective application scheme; and
- The resources needed to support the Court's activities and the budget process.

While implementing the Rome Statute is a task we all share, it is the particular responsibility of the Assembly of States Parties and the ICC. This Special Edition of the *Gender Report Card* is an assessment of the progress to date in implementing the Statute and its related instruments in concrete and pragmatic ways towards establishing a Court that truly embodies the Statute upon which it is founded and is a mechanism capable of providing gender-inclusive justice.

As in every *Gender Report Card* this year we also provide detailed recommendations addressing structures and institutional development, as well as the substantive work of both the Court and the Assembly of States Parties.

Structures and Institutional Development

15 October 2011 — 4 October 2012

Structures

The Rome Statute[1] creates the International Criminal Court (ICC) which is composed of four organs:[2]

- **the Presidency**
- **the Judiciary** (an Appeals Division, a Trial Division and a Pre-Trial Division)
- **the Office of the Prosecutor** (OTP)
- **the Registry**

The Presidency is composed of three of the Court's judges, elected by an absolute majority of the judges, who sit as a President, a First Vice-President and a Second Vice-President. The Presidency is responsible for 'the proper administration of the Court, with the exception of the Office of the Prosecutor'.[3]

The Judiciary The judicial functions of each Division of the Court are carried out by Chambers. The Appeals Chamber is composed of five judges. There may be one or more Trial Chambers, and one or more Pre-Trial Chambers, depending on the workload of the Court. Each Trial Chamber and Pre-Trial Chamber is composed of three judges. The functions of a Pre-Trial Chamber may be carried out by only one of its three judges, referred to as the Single Judge.[4] There is a total of 18 judges in the Court's three divisions.[5]

The Office of the Prosecutor (OTP) has responsibility for 'receiving referrals, and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court'.[6]

---

1 Footnote references in this section pertain to the Rome Statute of the International Criminal Court.
2 Article 34. The composition and administration of the Court are outlined in detail in Part IV of the Statute (Articles 34-52).
3 Article 38.
4 Article 39.
5 Article 36 of the Rome Statute provides for there to be 18 judges on the bench of the Court. In addition to the 18 judges on the bench, the mandates of Judge Fatoumata Dembele Diarra (Mali), Judge Sylvia Steiner (Brazil) and Judge Bruno Cotte (France), whose terms have concluded, have been extended to complete their trials as provided for by Article 36(10).
6 Article 42(1).

The Registry is responsible for the 'non-judicial aspects of the administration and servicing of the Court'.[7] The Registry is headed by the Registrar. The Registrar is responsible for setting up a Victims and Witnesses Unit (VWU) within the Registry. The VWU is responsible for providing, in consultation with the OTP, 'protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses'.[8]

Gender equity

The Rome Statute requires that, in the selection of judges, the need for a 'fair representation of female and male judges'[9] be taken into account. The same principle applies to the selection of staff in the OTP and in the Registry.[10]

Geographical equity

The Rome Statute requires that, in the selection of judges, the need for 'equitable geographical representation'[11] be taken into account in the selection process. The same principle applies to the selection of staff in the OTP and in the Registry.[12]

7 Article 43(1).
8 Article 43(6).
9 Article 36(8)(a)(iii).
10 Article 44(2).
11 Article 36(8)(a)(ii).
12 Article 44(2).

Gender expertise

Expertise in trauma

The Registrar is required to appoint staff to the VWU with expertise in trauma, including trauma related to crimes of sexual violence.[13]

Legal expertise in violence against women

The Rome Statute requires that, in the selection of judges and the recruitment of ICC staff, the need for legal expertise in violence against women or children must be taken into account.[14]

Rule 90(4) of the Rules of Procedure and Evidence (RPE) requires that, in the selection of common legal representatives for the List of Legal Counsel, the distinct interests of victims are represented. This includes the interests of victims of crimes involving sexual or gender violence and violence against children.[15]

Legal Advisers on sexual and gender violence

The Prosecutor is required to appoint advisers with legal expertise on specific issues, including sexual and gender violence.[16]

Trust Fund for Victims

The Rome Statute requires the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and for their families.[17]

13 Article 43(6).
14 Articles 36(8)(b) and 44(2).
15 Article 68 (1).
16 Article 42(9).
17 Article 79; see also Rule 98 RPE.

ICC staff

Recruitment of ICC staff[18]

		men	women
Overall staff[19] *(699 incl professional & general posts & elected officials excl judges)*		53%	47%
Overall professional posts[20] *(362 including elected officials, excluding judges)*		51%	49%
Judiciary	Judges[21]	44.5%	55.5%
	Overall professional posts[22] *(excluding judges)*	40%	60%
OTP overall professional posts[23]		54%	46%
Registry overall professional posts[24]		49%	51%

18 Figures as of 31 July 2012. Information provided by the Human Resources Section of the ICC.

19 The overall number of occupied posts changed by one individual compared with the number of occupied posts in 2011 (698). The percentage of female and male professionals changed slightly with 1% more female employees than in 2011 when women were 46% of the overall staff. Figures from the ICC as of 31 March 2012 for existing positions, indicate there were 702 established and filled posts, 188 general temporary assistants (GTA) posts, 82 interns, five visiting professionals, 44 consultants and 23 elected officials including the Judges, the Prosecutor, the Deputy Prosecutor, the Registrar and Deputy Registrar (see the *Report of the Committee on Budget and Finance on the work of its eighteenth session*, ICC-ASP/11/5, 9 August 2012, p 27). These figures differ only slightly from those reported by the ICC on 31 March 2011 when there were 702 established and filled posts, 193 approved GTA posts, 86 interns, seven visiting professionals and 49 consultants (see the *Report of the Committee on Budget and Finance on the work of its sixteenth session*, ICC-ASP/10/5, 17 June 2011, p 35). In total, 761 established posts were approved by the ASP in the 2012 budget. The number of approved posts did not change from 2011.

20 This year, there are 362 occupied professional posts, including elected officials but excluding judges. This figure is 52% of the overall number of professional and general staff. In 2011, professional posts were 51% of the total. This year female professionals occupy 49% of the total number of professional posts, which represents a slight increase from 2011 when 48% of the professional staff were female employees.

21 As provided for by Article 36 of the Rome Statute, there are 18 judges on the bench of the ICC of which 10 (55.5%) are women and eight (44.5%) are men. For the fourth year in a row, women are the majority on the bench. The election of six new judges to replace the judges whose terms finished in March 2012 took place during the tenth session of the Assembly of States Parties from 12 to 21 December 2011 in New York. Of the 19 judicial nominees, two were women. Both of these candidates, Olga Venecia Guerrera Carbuccia from Dominican Republic and Miriam Defensor-Santiago from the Philippines, were elected. The four other judges elected during the tenth session of the Assembly of States Parties were Judge Howard Morrison, United Kingdom; Judge Anthony T. Caramona, Trinidad and Tobago; Judge Robert Fremr, Czech Republic; and Judge Chile Eboe-Osuji, Nigeria. Judge Fatoumata Dembele Diarra (Mali), Judge Sylvia Steiner (Brazil) and Judge Bruno Cotte (France), whose terms have already concluded, will continue in office to complete their trials as provided for by Article 36(10) of the Rome Statute.

22 This year, women constitute 60% of the total number of professional staff in the Judiciary. This represents a slight decrease from 2011, when female professionals were 61% of the total employees in this organ. Although female professionals have been the majority of staff in the Judiciary since 2007, they have been largely appointed to lower and mid level posts. Women comprise the majority of those appointed at the P3 level (12 women, nine men). All of the P2 level posts are held by female professionals (four posts). At the more senior levels, there is one more male professional than female in the P4 posts (two men and one woman). The three P5 posts are occupied by two men (Senior Legal Adviser and Chef de Cabinet, based in The Hague) from the WEOG region and one woman (Head of the New York Liaison Office, based in New York) from the Africa region. The Chef de Cabinet (P5), position which in 2011 was reported by the ICC 'as vacant and filled on a GTA contract', has been occupied by a male professional from the WEOG region since March 2011. This year, the ICC reported the Chef de Cabinet position as vacant and under recruitment as of 24 July 2012, although the male professional from WEOG remains in this position.

23 The gender breakdown of female and male employees within the OTP is the same as in 2011, with female professionals comprising 46% (65) of the total number of professional staff (141). This figure is 3% less than in 2010 when female professionals comprised 49% of the OTP professional staff. In the past four years, the recruitment statistics for appointments of professional staff members in this Organ remained in the 54%-46% range. As in past years, the female/male differential remains high in all senior positions with both D1 posts occupied by men and almost three times the number of male appointees than female at the P5 level (three women and eight men). At the P4 level, there are currently twice as many men than women (eight women and 16 men). In 2011, there were 10 women and 16 men appointed at the P4 level. At the P3 level, there are 16 (36%) female appointees and 28 (64%) male appointees. This figure represents a slight change in the staff composition at this level compared with 2011, when there were 15 (36.5%) women and 26 (63.5%) men employed at the P3 level within the OTP. As in 2011, female professionals are the majority at the P1 and P2 levels, comprising respectively 67% and 61% of those appointed to these posts.

24 For the past six years, the overall recruitment statistics for professional appointments within the Registry has remained within the 52% – 48% range. This year, the majority of employees within the Registry are women with 51% (91) female and 49% (89) male appointees of the total number of professional staff (180). Last year, female employees were 48%, in 2010 49% and in 2009 women employees were the majority at 52% of the total number of staff. This year, two men and one woman occupy posts at the D1 level, and 20% more men than women are appointed at the P3 level. In 2011, there were 26% more men than women appointed at the P3 level. In 2012, there are nine men (one more than in 2011) and seven women appointed at the P5 level. Women are the majority at the P4 (53%), P2 (61%) and P1 (67%) levels. In 2011, these figures were respectively 56%, 53% and 62%.

Executive Committee and senior management		men	women
Judiciary	Presidency[25]	**67%**	**33%**
	Heads of Sections or equivalent posts[26]	**50%**	**50%**
OTP	Executive Committee[27]	**67%**	**33%**
	Heads of Divisions[28]	**100%**	**0%**
	Heads of Sections[29]	**82%**	**18%**
Registry	Heads of Divisions[30]	**100%**	**0%**
	Heads of Sections[31]	**53%**	**47%**

25 Please note that this figure represents the gender breakdown of the President (male) and the two Vice-Presidents (one male and one female) only. On 11 March 2012, the 18 judges of the ICC bench elected a new Presidency. President Sang-Hyun Song (Republic of Korea) was confirmed for a second three-year term. The bench elected Judge Sanji Mmasenono Monageng (Botswana) and Judge Cuno Tarfusser (Italy) as respectively First and Second Vice-Presidents.

26 There are three Heads of Sections or equivalent posts in the Judiciary: the Chef de Cabinet, the Head of the New York Liaison Office and the Senior Legal Adviser to the Chambers. Of these, one (Chef de Cabinet) has been occupied by a man from WEOG at a P5 level since March 2011 although the Judiciary indicates this position is currently vacant and under recruitment as of 24 July 2012. The two other positions are occupied by a woman (Africa region) and a man (WEOG).

27 The Executive Committee is composed of the Prosecutor and the three Heads of Division (Prosecutions; Investigations; Jurisdiction, Complementarity and Cooperation). The post of Deputy Prosecutor (Prosecutions) is currently vacant. On 11 September 2012, Prosecutor Fatou Bensouda nominated three candidates for this post to be elected by States during the eleventh session of the Assembly of States Parties to be held in The Hague from 14 to 22 November 2012. The candidates are Ms Raija Toiviainen (Finland); Mr Paul Rutledge (Australia); and Mr James Stewart (Canada). The vacancy was advertised for nine weeks (from 9 February until 15 April 2012). A total of 120 applications were received during this period. Of the three executive posts currently filled, two are occupied by men (Head of the Investigation Division and Head of the Jurisdiction, Complementarity and Cooperation Division) and one by a woman (Chief Prosecutor). Although the post of Head of the Investigation Division is filled, the elected position of Deputy Prosecutor (Investigations) has been vacant since 2007.

28 Of the three Head of Division posts in the OTP, one is vacant. Both filled posts are occupied by men.

29 Of the 22 Heads of Sections and equivalent posts in the OTP, five are vacant. Last year, one of these posts was vacant (Head Prosecution Team –Darfur). Women occupy 18% of the filled Head of Sections positions (Head Legal Advisor Section, Head Prosecution Team CAR and Head Prosecution Team Kenya). This is 3% less than in 2011 and 14% less than in 2010 when women occupied 32% of Heads of Sections and equivalent posts within the OTP. Please note that the same individual (male) is Head of the Prosecution Team DRC II and of the Prosecution Team Côte d'Ivoire. These posts have been counted separately in the table.

30 In 2009, following an internal reorganisation, the Division of Victims and Counsel was disbanded. There are now two Divisions within the Registry – the Common Administrative Services Division and the Division of Court Services. Both Heads of Division posts are held by male appointees.

31 Out of 18 Heads of Sections and equivalent posts in the Registry, one is vacant (Legal Advisory Services Section). Of the 17 filled positions, eight are occupied by women (47%). This represents a slight decrease in the figure regarding female professionals occupying Heads of Sections or equivalent posts within the Registry from 2011, when women were 48% of the total filled posts.

Field Offices[32]	*men*	*women*
Overall field staff[33] *(88 including professional and general staff)*	**74%**	**26%**
Overall field staff per country[34] *(including professional and general staff)*		
Central African Republic (the CAR) [18][35]	**78%** [14]	**22%** [4]
Côte d'Ivoire [3]	**100%** [3]	**0%** [0]
Democratic Republic of Congo (the DRC) [43]	**79%** [34]	**21%** [9]
Uganda [18]	**61%** [11]	**39%** [7]
Kenya [6]	**50%** [3]	**50%** [3]
Overall field staff per section[36] *(including professional and general staff)*		
Field Operations Section [26][37]	**81%**	**19%**
Service Desk [3]	**100%**	**0%**
Outreach Unit [11]	**64%**	**36%**
Planning and Operations Section [6]	**100%**	**0%**
Security and Safety Section [11]	**100%**	**0%**
Victims and Witnesses Unit [20]	**60%**	**40%**
Victims Participation and Reparation Section [7]	**28.5%**	**71.5%**
Secretariat of the Trust Fund for Victims [4]	**75%**	**25%**

32 Figures as of 31 July 2012. Information provided by the Human Resources Section of the ICC.

33 As of 31 July 2012, the Court was present in five out of the seven Situations under investigation (the CAR; the DRC – Kinshasa and Bunia; Côte d'Ivoire; Uganda; and Kenya –Registry task-force). As anticipated in the *Proposed Programme Budget for 2012 of the International Criminal Court* (ICC-ASP/10/10, 21 July 2011, p 73), the two field offices operating in Chad in relation to the Darfur cases were closed at the end of 2011. In 2012, the Court established an administrative field presence in Côte d'Ivoire through the use of existing resources. While no further reductions in the number of field offices are planned for 2013, the Court intends to reduce the number of field-based staff in Uganda and the DRC. (See *Proposed Programme Budget for 2013 of the International Criminal Court*, ICC-ASP/11/10, 13 August 2012, p 76). Out of 88 posts in the field offices, 21 (24%) are professional positions. This is the same figure as in 2011. This year, 26% of overall field staff are female professionals. While this constitutes a 6% increase from 2011, field positions continue to be overwhelmingly occupied by male employees (74%).

34 The newly created administrative presence in Côte d'Ivoire is staffed by male professionals. The second highest gender differential at the field office level is in the DRC with 58% more men than women appointed, followed by the CAR with a 57% male/female differential, and Uganda with 22% difference. In 2011, the gender differential was 66% for both the DRC and the CAR and 39% for Uganda. This year, the Registry task-force in Kenya, which in 2011 was staffed by male professionals only, has three more staff posts and an equal number of men and women. These figures show an improvement in the gender representation at the field level. In comparison with 2011, the number of overall field staff increased in the DRC (from 35 to 43) and in the Registry task-force in Kenya (from three to six), decreased in Uganda (from 23 to 18) and remained the same in the CAR (18 staff).

35 The total number of staff in each field office is reported in brackets.

36 As in 2010 and 2011, the Field Operations Section has the highest number of staff in the field offices (26 staff members, 29.5% of overall field staff). The Field Operations Section has a presence in all country-based offices including the Registry task-force in Kenya. The Victims and Witnesses Unit (VWU) has 20 staff members (23%), four less than in 2011, in the DRC, the CAR and Uganda field offices. These reductions have been experienced in the the CAR and Uganda offices, which have one VWU staff less each, while the DRC office increased by one additional staff member from the VWU compared with 2011. Last year, the VWU also had two staff deployed in Chad where ICC field offices were closed at the end of 2011. The Outreach Unit has 11 staff members (12.5%), two less than in 2011, across three field offices (the CAR, the DRC and Uganda) and the Registry task-force in Kenya. The Security and Safety Section also has 11 staff members (12.5%), three more than in 2011, and is represented in all of field offices including the Kenya task-force . The Trust Fund for Victims is represented by P-level staff in Uganda (two Regional Programme Officers, one female and one male for the DRC and the CAR Situations, and for Uganda and Kenya Situations, respectively). The Fund is represented by two GTA Field Assistants (both male, general staff) in the Bunia forward field presence in the DRC. The male/female differential is high across almost all Sections/Units represented in the field offices with 100% male employees in the Service Desk, Security and Safety Section and Planning and Operations Section. This year, 71.5% of staff of the Victims Participation and Reparation Section (VPRS) located in field offices are female professionals. The Victims and Witnesses Unit has the strongest gender balance in field offices with 60% male and 40% female staff.

37 Total number of staff per Section/Unit is reported in brackets.

Field Offices *continued*	*men*	*women*
Overall professional staff[38] *(21 professional posts excluding language staff)*	**48%**	**52%**
Overall professional staff per country[39] *(professional posts excluding language staff)*		
Central African Republic (the CAR) [3][40]	**0%** [0]	**100%** [3]
Côte d'Ivoire [3]	**100%** [3]	**0%** [0]
Democratic Republic of Congo (the DRC) [7]	**57%** [4]	**43%** [3]
Uganda [4]	**50%** [2]	**50%** [2]
Kenya [4]	**25%** [1]	**75%** [3]

38 Out of 88 staff working in field offices, 21 (24%) are in professional posts, excluding language staff. While in 2011 the overwhelming majority of professional posts were occupied by men (80%), this year women are 52% of the total professional staff at the field level. In the CAR field office, all of the three professional staff members are women. All of these staff members are from France. As in 2010 and 2011, the field office with the highest number of professional staff is the DRC office with seven staff (33% of the total professional field staff), followed by the Uganda and Kenya task-force with four staff each (19%) and the CAR and Côte d'Ivoire with three staff each (14.5%). In 2012, a P4 level post has been established for the first time in a field office (female – Registry task-force Coordinator in Kenya). Women comprised 87.5% of P2 appointments (occupying seven out of eight P2 posts), but 33% of P3 positions in field offices are occupied by female professionals (three out of nine). This year, professionals from the Western European and Others Group (WEOG) constitute 57% of the total professional staff in the field offices, a slight decrease from 2011 (62%). Professional appointees from the Africa region comprise 23% of the total number of field staff, followed by the Group of Latin American and Caribbean Countries (GRULAC) at 10% and Asia and Eastern Europe at 5%. Individuals from 15 countries and from every region are represented in the field offices. French nationals comprise the highest number of staff members from a single country assigned to field offices (seven). The remaining 14 countries (Argentina, Belgium, Canada, Cyprus, Italy, Malawi, Mali, Mexico, Nigeria, Rwanda, Serbia, Sierra Leone, Spain and the United States of America) each have one national appointed to a professional post.

39 In 2012, gender figures across all field offices, with the exception of Côte d'Ivoire where all of the staff are male professionals, show an improvement in the male/female differential when compared with previous years. All professional staff members in the CAR are female. Women are also the majority in Kenya were they comprised 75% of the overall professional staff. In Uganda, 50% of the professional staff are female and in the DRC women constitute 43% of the professional staff.

40 The total number of staff is reported in brackets.

ICC-related bodies		men	women
Trust Fund for Victims	Board of Directors[41]	40%	60%
	Secretariat[42]	50%	50%
ASP Bureau	Executive[43]	67%	33%
	Secretariat[44]	43%	57%
	Committee on Budget and Finance[45]	75%	25%
Project Office for the Permanent Premises – Director's Office[46]		50%	50%
Independent Oversight Mechanism[47]		–	100%

41 Figures as of 14 August 2011. Information at <http://trustfundforvictims.org/board-directors>. The members of the current Board of Directors of the Trust Fund for Victims were elected for a three-year term during the eighth Session of the Assembly of States Parties in The Hague in November 2009. Currently the Board of the Trust Fund for Victims is composed by the Chair, Elisabeth Rehn (Finland – WEOG), and Board members Vaira Vīķe-Freiberga (Latvia-Eastern Europe), Betty Kaari Murungi (Kenya – Africa) and Bulgaa Altangerel (Mongolia – Asia). Board member Eduardo Pizarro (Colombia – GRULAC) resigned in May 2012 following his appointment as Ambassador for Colombia to the Netherlands. A new Board will be elected during the eleventh session of the Assembly of States Parties to be held in The Hague from 14 to 22 November 2012. The nomination period for the Board of the Trust Fund for Victims was from 16 May to 8 August 2012. The nominees are: Sayeman Bula-Bula (Democratic Republic of the Congo – Africa); Motto Naguchi (Japan – Asia); María Cristina Perceval (Argentina – GRULAC); Elisabeth Rehn (current Chair - Finland – WEOG); and Vaira Vīķe-Freiberga (current Board member – Latvia – Eastern Europe).

42 Figures as of 14 August 2012. Information provided by the Secretariat of the Trust Fund for Victims. As in 2011, two posts out of 12 (17%) are vacant (one post in the CAR is under recruitment and one post, which was redeployed from Kenya to The Hague, has not been filled yet). Of the 12 posts, six are professional posts and six are general service posts. Out of the filled positions, 50% are occupied by female professionals compared with 57% in 2010, 71% in 2009 and 73% in 2008.

43 Figures as of 14 December 2011. Information at < http://www.icc-cpi.int/NetApp/App/MCMSTemplates/AspContent.aspx?NRMODE=Published&NRNODEGUID={B1B90971-4103-41C3-AAF2-A4C8733E24E8}&NRORIGINALURL=/Menus/ASP/Bureau/&NRCACHEHINT=Guest# >. The Bureau of the Assembly consists of a President, two Vice-Presidents and 18 members. Please note that the only members who are elected in their personal capacities are the President (Ambassador Tiina Intelmann, Estonia) and two Vice-Presidents (Ambassador Markus Börlin, Switzerland and Ambassador Ken Kanda, Ghana). The other 18 members of the Bureau are States and are represented by country delegates. The current Bureau assumed its functions at the beginning of the tenth session of the ASP on 12 December 2011. On 26 July 2011, the Bureau of the Assembly of States Parties recommended that Ambassador Intelmann be elected as the new President of the ASP. This is the first time that a woman has been elected to this position.

44 Figures as of 23 July 2011. Information provided by the Secretariat of the Assembly of States Parties. This year, two positions (Special Assistant to the Director and Administrative Assistant) out of nine professional and general posts are under recruitment. Of the four filled posts for professional staff in the Secretariat, two are held by men (D1 and P5) and two by women (P4 and P3). Women represent the majority (67%) of staff in the filled administrative assistants' positions (G-level posts).

45 Figures as of 5 January 2012. Information at < http://www.icc-cpi.int/Menus/ASP/Elections/Commitee+on+Budget+and+Finance/2011/Nominations/CBFResult2011.htm>. The Committee on Budget and Finance was established pursuant to ASP Resolution ICC-ASP/1/Res.4. The Committee is composed of 12 members elected by the Assembly of States Parties. Members must be experts of recognised standing and experience in financial matters at the international level and must be from a State Party as required by the ASP Resolution on the procedure for the nomination and election of members of the Committee on Budget and Finance (ICC-ASP/1/Res. 5). Of the 12 members, nine (75%) are men and three (25%) are women. The regional majority of four members (33%) are from WEOG (Canada, France, Germany and Italy). The remaining regions have two members each – Africa (Burundi and Sierra Leone), GRULAC (Mexico and Ecuador), Asia (Japan and Jordan) and Eastern Europe (Estonia and Slovakia). Six new members of the Committee were elected during the tenth session of the Assembly of States Parties from 12 to 21 December 2011 to replace the members whose term of office expired on 20 April 2012. The six newly elected members come from Eastern Europe (Slovakia – one member), Africa (Sierra Leone – one member), GRULAC (Ecuador - one member) and Asia (Japan and Jordan – one member each).

46 Figures as of 31 July 2012. Information provided by the Human Resources Section of the ICC. The Director's Office is comprised of two professional staff – the Project Director (D1, male, from the UK) and Deputy Project Director (P4, female, from Belgium).

47 In its seventh plenary session on 26 November 2009, the ASP adopted Resolution ICC-ASP/8/Res.1 by consensus, thereby establishing an Independent Oversight Mechanism (IOM). On 12 April 2010, a Temporary Head of the IOM (female) was appointed at a P5 level on secondment from the UN Office of Internal Oversight Services (OIOS) for a one-year period from July 2010 until July 2011. During the ninth session of the Assembly of States Parties in New York in December 2010, States decided to change the grade of the Head of the IOM from P5 to P4. On 30 August 2011, a second Temporary Head of the IOM (female) was appointed at a P4 level on secondment from the OIOS. On 28 February 2012, the Bureau of the ASP decided to extend her appointment and to defer the recruitment of the permanent Head of the IOM pending a decision regarding the full operational functions of the IOM.

Disciplinary Boards	*men*	*women*
Disciplinary Advisory Board[48] *(internal)*	**67%**	**33%**
Appeals Board[49] *(internal)*	**44.5%**	**55.5%**
Disciplinary Board for Counsel[50]	**33%**	**67%**
Disciplinary Appeals Board for Counsel[51]	**100%**	**0%**

48 Figures as of 28 September 2012. Information provided by the Human Resources Section of the ICC. The figure in the table represents the gender breakdown of the nine members of the Disciplinary Advisory Board, excluding the Secretary (female) and the alternate Secretary (female). This year, male members (six) are twice as many as female members (three). In 2011, women were the majority on the Disciplinary Advisory Board (55.5%). Eight out of nine members are from WEOG countries (France – four members; Belgium, Ireland, Germany, and United Kingdom – one member each). There is only one member from a non-WEOG country (Lebanon - Asia). Please note, according to the Human Resources Section, some of the members of the Disciplinary Advisory Board are in the General Service (GS) category, whose nationalities are not included in the figures regarding geographical representation.

49 Figures as of 28 September 2012. Information provided by the Human Resources Section of the ICC. The figure in the table represents the gender breakdown of the nine members of the Appeals Board, excluding the Secretary (female) and the alternate Secretary (female). As in 2011, five out of nine members (members and alternates) are women. Six members of the Board are from WEOG countries (United Kingdom – two members; Australia, France, New Zealand and the United States – one member each), one is from Africa (South Africa), one from GRULAC (Venezuela) and one from Eastern Europe (Bosnia and Herzegovina). Please note, according to the Human Resources Section, some of the members of the Disciplinary Advisory Board are in the General Service (GS) category, whose nationalities are not included in the figures regarding geographical representation.

50 Figures as of 28 September 2012. Information at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/ICC+Disciplinary+Organs+for+Counsel/>. The Disciplinary Board for Counsel is composed of two permanent members - one female and one male - and one male alternate member. All members are from WEOG countries (France, Canada and Germany). Article 36 of the Code of Professional Conduct for Counsel outlines the composition and management of the Disciplinary Board.

51 Figures as of 28 September 2012. Information at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/ICC+Disciplinary+Organs+for+Counsel/>. The Disciplinary Appeals Board for Counsel is composed of the President (Judge Sang-Hyun Song, Republic of Korea) and the two Vice-Presidents (Judge Sanji Mmasenono Monageng, Botswana and Judge Cuno Tarfusser, Italy) of the Court, who take precedence over other judges under Regulation 10 of the Regulations of the Court, and of two male permanent members and one male alternate (all of them from WEOG countries: France, United Kingdom and Spain). Please note that the figure in the table represents only the permanent members, excluding the three judges.

Geographical and gender equity among professional staff[52]

The 'Top 5' by region and gender and the 'Top 10' overall[53]

(includes elected officials, excludes language staff)

WEOG[54] — 61% overall (197 staff) — 48% men (94) — 52% women (103)

Western European and Others Group

'Top 5' countries in the region
(range from 13 – 45 professionals)

1 France [45][55]
2 United Kingdom [27]
3 The Netherlands [17]
4 Canada [15]
5 Germany [13]

'Top 5' countries by gender
(range from 5 – 30 female professionals)

1 France [30][56]
2 United Kingdom [10]
3 Australia, Canada, Italy, the Netherlands, Spain [7]
4 Germany [6]
5 Belgium, United States of America [5]

Africa[57] — 17% overall (56 staff) — 71.5% men (40) — 28.5% women (16)

'Top 5' countries in the region
(range from 1 – 10 professionals)

1 South Africa [10]
2 Arab Republic of Egypt, Senegal [4]
3 The Gambia, Niger, Nigeria, Kenya, Sierra Leone [3]
4 Côte d'Ivoire, the DRC, Ghana, Mali, Uganda, United Republic of Tanzania [2]
5 Algeria, Benin, Burkina Faso, Cameroon, Guinea, Lesotho, Malawi, Mauritius, Rwanda, Togo, Zimbabwe [1]

'Top 3' countries by gender
(range from 1 – 3 female professionals)

1 South Africa [3]
2 The Gambia, Sierra Leone, Uganda [2]
3 Algeria, Côte d'Ivoire, Mauritius, Kenya, Rwanda, United Republic of Tanzania, Zimbabwe [1]

52 Figures as of 31 July 2012. Information provided by the Human Resources Section of the ICC. The ICC figures on geographical representation include elected officials but exclude language staff.

53 Note that it has not always been possible to establish a 'Top 5' list or 'Top 10' list by country and by gender because for some regions there are not enough appointees or females appointed to professional posts to arrive at a 'Top 5' or 'Top 10'. In those instances, 'Top 4', 'Top 3'or 'Top 9' lists have been established.

54 In 2012, nationals from the Western European and Others Group account for 61% of the overall professional staff at the ICC, a slight increase from 2011 when this figure was 58.5%. This year, the number of female WEOG appointees is 52% compared with 49% in 2011.

55 The number of staff per country is reported in brackets. As in previous years, French nationals constitute the overwhelming majority of professional staff appointed to the Court. This year 23% (45 individuals) of the overall number of WEOG professionals are French nationals compared with 22% (43 individuals) in 2011. The 2012 figure regarding the number of French staff is more than the combined figures of the next two WEOG States with nationals appointed to professional posts. These are the United Kingdom with 27 nationals appointed to ICC professional posts and the Netherlands with 17. France accounts for 14% of the overall professional staff at the ICC. The top three States remain the same and in the same order as in 2010 and 2011. Four out of the five countries included in the 'Top 5' (France, the Netherlands, the UK and Canada) have more staff members than the number indicated within the desirable range for these states, as specified by the Committee on Budget and Finance (CBF). The only country in the 'Top 5'to be underrepresented at the Court based on the desirable range indicated by the CBF is Germany with 13 employees compared to the range of 20.98-28.38 (*Report of the Committee on Budget and Finance on the work of its eighteenth session*, ICC-ASP/11/5, 9 August 2012, p 25). The ICC applies the same system of desirable ranges for geographical distribution of staff as the UN Secretariat (ICC-ASP/1/Res.10, Article 4). The desirable range for the ideal number of nationals to be recruited is determined by the consideration of three factors, each given a 'weight' (%): The membership factor: number of ICC Member States from the same region (40%); The population factor: size of each Member States' population (5%); The contribution factor: percentage the Member State contributes to the ICC's budget (55%).

56 The number of female staff per country is reported in brackets. France is again the country with the highest number of female appointees to professional posts. There are three times more French female professionals than the next country with the highest number of female staff, the United Kingdom. No new country has joined the 'Top 5' by gender in the WEOG region.

57 Nationals from the Africa region account for 17% of the overall number of professional staff at the ICC. In 2012, Africa is the region with the highest percentage of male appointees to professional positions and with the highest regional male/female differential for professional posts for the sixth year in a row. Since 2010, South Africa has had the highest number of appointees from the Africa region. This year, 12 new States (Algeria, Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Guinea, Lesotho, Malawi, Mauritius, Rwanda, Togo, Zimbabwe) are represented in the 'Top 5' tier of African countries with appointees at the Court. Algeria is the only new country to join 'Top 3' countries by gender (one female professional). Botswana, Ghana and Mali, which last year had one female appointee each, in 2012 are no longer part of the 'Top 3' countries by gender.

GRULAC[58] — 9% overall (28 staff) — 39% men (11) — 61% women (17)

Group of Latin American & Caribbean Countries

'Top 5' countries in the region
(range from 2 – 6 professionals)

1 Colombia [6]
2 Argentina [5]
3 Peru [4]
4 Trinidad and Tobago [3]
5 Chile, Ecuador, Mexico, Venezuela [2]

'Top 4' countries by gender
(range from 1 – 4 female professionals)

1 Colombia [4]
2 Peru [3]
3 Argentina, Mexico [2]
4 Brazil, Chile, Costa Rica, Ecuador, Venezuela, Trinidad and Tobago [1]

Eastern Europe[59] — 7% overall (23 staff) — 43.5% men (10) — 56.5% women (13)

'Top 4' countries in the region
(range from 1 – 5 professionals)

1 Romania, Serbia [5]
2 Croatia [4]
3 Russian Federation [2]
4 Albania, BiH,[60] Bulgaria, FYROM,[61] Georgia, Poland, Ukraine [1]

'Top 4' countries by gender
(range from 1– 4 female professionals)

1 Serbia [4]
2 Romania [3]
3 Croatia [2]
4 BiH, Bulgaria, FYROM, Russian Federation [1]

Asia[62] — 6% overall (21 staff) — 48% men (10) — 52% women (11)

'Top 3' countries in the region
(range from 1 – 4 professionals)

1 Islamic Republic of Iran, Japan [4]
2 Lebanon, the Philippines, Singapore [2]
3 China, Cyprus, Jordan, Mongolia, Republic of Korea, Occupied Palestinian Territory, Sri Lanka [1]

'Top 3' countries by gender
(range from 1 – 4 female professionals)

1 Japan [4]
2 the Philippines [2]
3 China, Cyprus, Islamic Republic of Iran, Lebanon, Singapore [1]

58 Nationals from the Group of Latin American and Caribbean Countries account for 9% of the overall staff at the ICC, 1% less than last year. For the sixth year in a row, women represent the majority of staff appointed from this region (61%). This represents an increase of 4% in male appointees from 2011 when female appointees were 65% of the total from this region. In 2010, women constituted 63% of professionals appointed from this region; in 2009, 62%; in 2008, 60%; and in 2007, 56%. While no new states joined the 'Top 5' tier of GRULAC countries with appointees at the Court, two states previously in this tier (Bolivia and Costa Rica) have not been included in the 'Top 5' for 2012.

59 As in 2011, nationals from the Eastern European region account for 7% of the overall professional staff at the ICC. Representation of staff from this region has been static at around this level for the last five years. The percentage of women professionals from this region (56.5%) decreased by 7.5% from 2011 (64%). This decrease corresponds to three fewer women from Eastern Europe among ICC staff in 2012. Despite this decrease, women have been the majority of appointees from this region since 2009. This year it was not possible to establish a 'Top 5' list of countries for this region. Latvia, which was previously within the 'Top 5' tier of Eastern European countries with appointees at the Court and the 'Top 4' list of countries by gender in 2011, is no longer represented at the Court.

60 Bosnia and Herzegovina.

61 The Former Yugoslav Republic of Macedonia.

62 Nationals from Asia account for 6% of the overall professional staff at ICC, a 1% decrease from 2011 and 2010. This decrease has been evenly spread between female and male appointees and has not impacted on the gender breakdown for this region (52% female and 48% male appointees) when compared to 2011. The Islamic Republic of Iran and Japan share the highest number of nationals appointed to the ICC from the Asia region with four each. This year it was not possible to establish a 'Top 5' list by country for this region. A 'Top 3' list was created instead. However, the composition of countries included in both lists did not change from 2011, although their positions within the lists changed. The top-end of the range (five in 2011 and four in 2012) also changed this year.

Overall 'Top 10' – region and gender

'Top 10' countries

(range from 8 – 45 professionals)[63]

1 France [45]
2 United Kingdom [27]
3 The Netherlands [17]
4 Canada [15]
5 Germany [13]
6 Australia, Italy [12]
7 Belgium [11]
8 South Africa, Spain [10]
9 United States of America [9]
10 Ireland [8]

'Top 9' countries by gender

(range from 1 – 30 female professionals)[64]

1 France [30]
2 United Kingdom [10]
3 Australia, Canada, Italy, the Netherlands, Spain [7]
4 Germany [6]
5 Belgium, United States of America [5]
6 Colombia, Japan, Serbia [4]
7 Austria, Greece, Peru, Romania, South Africa [3]
8 Argentina, Croatia, The Gambia, Mexico, New Zealand, the Philippines, Sierra Leone, Uganda [2]
9 Algeria, BiH, Brazil, Bulgaria, Cyprus, Chile, China, Costa Rica, Côte d'Ivoire, Ecuador, FYROM, Islamic Republic of Iran, Ireland, Lebanon, Mauritius, Kenya, Portugal, Russian Federation, Rwanda, Singapore, Switzerland, Sweden, Trinidad and Tobago, United Republic of Tanzania, Venezuela, Zimbabwe [1]

63 There are 12 countries represented in the 'Top 10' list in 2012, compared to 10 countries in 2011 and 13 in 2010. The range, from 8 to 45 professionals, did not change significantly from last year (8 to 43). France is again the country with the highest number of professionals (45), two more than last year. WEOG constitutes 92% of the countries listed in the 'Top 10' (11 of the 12 countries on the list). In 2011, nine of the 10 countries represented in the 'Top 10' list were from WEOG (90%). This figure has been consistently increasing since 2008. In 2010, 10 out of 13 countries were from WEOG (77%). In 2009, this figure was 71%, and in 2008 it was 67%. As in 2011, the only non-WEOG country in the 'Top 10' is South Africa (Africa region) with 10 professionals. This is the second year in a row in which there is only one region other than WEOG represented on the 'Top 10' list. In 2010, Eastern Europe was represented by Romania at number 10 of the list. The Latin American and Caribbean region is not represented for the third year in a row, and Asia is not represented for the fifth year running. This year WEOG countries occupy the first seven places of the 'Top 10' list. In 2011, countries from this region occupied the first nine places.

64 There are 52 countries represented in the 'Top 9' list by gender. In 2011, 55 countries were included in a 'Top 9' list and in 2010, 48 countries were included in a 'Top 10' list. The range in 2012 is 1 to 30 staff members. This is the sixth year in a row that France has ranked highest with 30 female professionals appointed to the Court, three more than in 2011. This year, 67% of the French nationals appointed to the ICC are female. WEOG countries occupy the first five places of the 'Top 9' list by gender. Colombia (GRULAC), Japan (Asia) and Serbia (Eastern Europe) are the first non-WEOG countries on the list with four female appointees each. The first five levels on the list this year are occupied by 10 countries with no new additions from previous years. The countries included in the 'Top 9' by gender have changed since last year with the exclusion of Botswana, Mali and Ghana (Africa), and Latvia (Eastern Europe) and the inclusion of Algeria (Africa).

Legal Counsel

Appointments to the List of Legal Counsel[65]	men	women
Overall *(433 individuals on the List of Legal Counsel)*[66]	75%	25%
'Top 5'[67]		
1 UK [52], 2 USA [47], 3 France [46], 4 the DRC [41], 5 Belgium [28]		
WEOG[68] *(59% of Counsel)*	75.5%	24.5%
'Top 5'		
1 UK [52], 2 USA [47], 3 France [46], 4 Belgium [28], 5 Canada [20]		
Africa[69] *(35% of Counsel)*	74%	26%
'Top 5'		
1 the DRC [41], 2 Kenya [25], 3 Senegal [14], 4 Cameroon [13], 5 Mali [11]		

continues overleaf

65 Figures as of 31 May 2012. Information provided by the Counsel Support Section of the Office of the Registrar.

66 In 2012, 433 individuals are on the List of Legal Counsel. Of the 433 individuals on the List, 108 are women (25%) and 325 are men (76.5%). For the second year in a row the percentage of female lawyers appointed to the List of Legal Counsel is above 20%. In 2011, women were 23.5% of the List of Legal Counsel. Since 2008, the percentage of female lawyers on the List of Legal Counsel has increased by 5%. The List is overwhelmingly comprised of male lawyers with three times the number of men than women appointed to the List of Legal Counsel.

67 The number of appointees is reported in brackets.

68 According to these figures, 59% (254) of appointees to the List of Legal Counsel are from the WEOG region. This is the same percentage as in 2011. This year for the first time since the List was created in 2006, the country with the highest number of appointees within WEOG and across all regions is not the USA, but the UK with 52 appointees. As in previous years, appointees from the USA, a non-State Party, have been included in the calculation for the WEOG region. The composition of appointees changed slightly in 2012 with women comprising 24.5% of Counsel from WEOG. This represents a modest increase of 1.5% compared with 2011.

69 According to these figures, 35% (152) of appointees to the List of Legal Counsel are from Africa. For the fourth year in a row, the percentage of individuals appointed from this region has increased (26% in 2008, 28% in 2009, 30% in 2010 and 33% in 2011). Appointments of nationals from Algeria, Cameroon, Arab Republic of Egypt, Mauritania, Morocco, Rwanda and Zimbabwe, which are non-States Parties, have been included in the calculation for the Africa region. For the second year in a row, the percentage of women appointed to the List of Legal Counsel from this region has slightly increased (women comprised 25% of the total appointees in 2011 and 26% in 2012). In 2011, the number of African female appointees (25%) more than doubled when compared to 2010 (12%); this year the increase has been 1%. Also in 2012 and despite this increase, appointees from Africa are overwhelmingly male lawyers (74%). From the seven Situation countries, only the DRC with 41 appointees is in the 'Top 5' list of countries of overall appointees. In total, 76 appointees (17.5%) are from six of the countries within which the ICC is conducting investigations. The breakdown is as follows: 41 from the DRC; 25 from Kenya; five from the CAR; three from Uganda; and one each from Côte d'Ivoire and Sudan. Please note that the Sudanese lawyer appointed to the List has dual nationality (British and Sudanese) and this year has been included within the UK figures. As in 2011, there are no appointees from Libya. Of the 76 appointees from Situation countries, 13 are women (five from the DRC, four from Kenya, two from the CAR and one each from Uganda and Côte d'Ivoire). This figure represents 3% of the total List of Counsel and 17% of the appointees from Situation countries. In 2011, these figures were respectively 2% and 13%.

Legal Counsel CONTINUED

Appointments to the List of Legal Counsel *continued*	*men*	*women*
Eastern Europe[70] *(2% of Counsel)* Only 10 appointments from Eastern Europe: FYROM [4], Serbia [3], Croatia, Slovenia, Romania [1 appointee each]	**70%**	**30%**
Asia[71] *(2% of Counsel)* Only 10 appointments from Asia: Malaysia [4], India, Kuwait, Pakistan, Japan, Singapore and the Philippines [1 appointee each]	**70%**	**30%**
GRULAC[72] *(2% of Counsel)* Only seven appointments from GRULAC: Argentina [3] Brazil [2], Mexico, Trinidad and Tobago [1 appointee each]	**100%**	**0%**

70 According to these figures, 2% (10) of appointees to the List of Legal Counsel are from Eastern Europe. While the number of appointees increased slightly with two more individuals appointed since 2011, the percentage against the total number of appointees to the List of Legal Counsel did not change. Although the percentage of female lawyers from this region decreased slightly this year, women represent 30% of total lawyers from Eastern Europe. In 2011, women comprised 37.5% of appointees to the List from this region. Eastern Europe has the highest proportion of women on the List of Legal Counsel for the sixth year in a row.

71 According to these figures, 2% (10) of appointees to the List of Legal Counsel are from the Asia region. This represents 2% less than in 2011. As in past years, appointments of nationals from India, Malaysia, Kuwait, Pakistan and Singapore, which are non-States Parties, have been included in the calculation for the Asian region. As in 2011, there are three women from this region appointed to the List of Legal Counsel (two from Malaysia and one from India).

72 According to these figures, 2% (seven) of appointees to the List of Legal Counsel are from GRULAC. The number of appointees from this region has not changed significantly since the List of Legal Counsel was created in 2006. There continues to be no women lawyers from the GRULAC region appointed to the List of Legal Counsel.

Appointments to the List of Assistants to Counsel[73]	*men*	*women*
Overall *(129 individuals on the List of Assistants to Counsel)*[74] **'Top 5'** 1 France (18 appointees) 2 Cameroon, the DRC, Kenya (13 appointees each) 3 Canada (8 appointees) 4 Belgium, USA (7 appointees each) 5 Italy, UK (6 appointees each)	**43%**	**57%**
WEOG[75] *(51% of Assistants to Counsel)* **'Top 5'** 1 France [18] 2 Canada [8] 3 Belgium, USA [7] 4 Italy, UK [6] 5 Germany [5]	**36%**	**64%**
Africa[76] *(46% of Assistants to Counsel)* **'Top 4'**[77] 1 Cameroon, the DRC, Kenya [13] 2 South Africa [3] 3 Ghana, Côte d'Ivoire, Nigeria, Uganda [2] 4 Benin, the CAR, Chad, Congo, Arab Republic of Egypt, Guinea, Rwanda, Tunisia, Zimbabwe [1 appointee each]	**47.5%**	**52.5%**
Eastern Europe[78] *(1.5% of Assistants to Counsel)* Only two appointments from Eastern Europe: Hungary, Ukraine [1 appointee each]	**50%**	**50%**
Asia[79] *(1.5% of Assistants to Counsel) – 2* Only two appointments from Asia: India, Sri Lanka [1 appointee each]	**100%**	**0%**

73 Figures as of 31 May 2012. Information provided by the Counsel Support Section of the Office of the Registrar.

74 In 2012, 129 individuals have been appointed to the List of Assistants to Counsel. This figure represents a slight increase from 2011 when appointees to this List were 115. As in 2011, women are the majority of appointees to the List of Assistants to Council, comprising 57% of the total appointees. In 2011, female lawyers were 56.5% of the List.

75 According to these figures, 51% (66) of appointees to the List of Assistants to Counsel are from the WEOG region. The country with the highest number of appointees across all regions is France with 18 appointees, four more than in 2011, of whom 14 (78%) are women. Last year, 11 women from France had been appointed to the List of Assistants to Counsel comprising 73% of the total appointees from this country. Appointees from the USA, which is a non-State Party, have been included in the calculation for the WEOG region. As in 2011, WEOG has the highest proportion of women appointed to the List of Assistants to Counsel with 64% female professionals appointed to the List. Last year, the percentage of women appointees was slightly lower at 62.5%.

76 According to these figures, 46% (59) of appointees to the List Assistants to Counsel are from Africa. This figure represents a slight decrease from 2011 when appointees from this region were 47.8% of the total. Appointees from Cameroon, Arab Republic of Egypt, Côte d'Ivoire, Rwanda, and Zimbabwe, which are non- States Parties, have been included in the calculation for the Africa region. Women represent 52.5% of the total number of appointees from the Africa region. In 2011, female lawyers comprised 53% of the total appointees from the Africa region. Out of the seven Situation countries, five are represented on the List of Assistants to Counsel: the DRC and Kenya with 13 appointments each; Uganda and Côte d'Ivoire with two appointees each; and the CAR with one appointee. Of the total of 31 appointees from these countries, 16 are women (51.6% - seven from the DRC, six from Kenya, two from Uganda and one from Côte d'Ivoire). In 2011, female lawyers from Situation countries were 52% of the appointments from these countries.

77 Please note that this year it was not possible to create a 'Top 5' List for Africa. A 'Top 4' List of countries was created instead.

78 According to these figures, 1.5% (two) of appointees to the List of Assistants to Counsel are from Eastern Europe. As in 2011, female professionals appointed to the List of Assistants to Counsel are 50% of the total from this region.

79 According to these figures, 1.5% (two) of the appointees to the List of Assistants to Counsel are from Asia. There are still no female professionals appointed to the List of Assistants to Counsel from this region.

Professional Investigators

Appointments to the List of Professional Investigators[80]	men	women
Overall *(29 individuals on the List of Professional Investigators)*[81]	96.5%	3.5%

'Top 3'[82]

1 Mali (14 appointees)
2 Ghana (4 appointees)
3 UK (2 appointees)

80 Figures as of 31 May 2012. Information provided by the Counsel Support Section of the Office of the Registrar.

81 Currently there are 29 individuals on the List of Professional Investigators. Of these, 28 are men (96.5%) and one is a woman (3.5%). The female investigator is from Eastern Europe (Poland). No more women were appointed to this List since 2007.

82 Countries represented on the List of Investigators with one appointee each are: Australia, Belgium, Brazil, Canada, Congo, Niger, Poland, Rwanda and the USA.

Trust Fund for Victims

The mission of the Trust Fund for Victims (TFV) is to support programmes that address the harm resulting from the crimes under the jurisdiction of the ICC by assisting victims to return to a dignified and contributory life within their communities.

In accordance with Rule 98 of the Rules of Procedure and Evidence (RPE), the TFV fulfils two primary mandates:

- **to implement awards for reparations** ordered by the Court against the convicted person,[83] and
- **to use the other resources for the benefit of victims** subject to the provisions of Article 79 of the Rome Statute.[84]

The TFV's first mandate on reparations is linked to a criminal case against an accused before the ICC. Resources are collected through fines or forfeiture and awards for reparations, which can be complemented with 'other resources of the Trust Fund' if the Board of Directors so determines.[85]

Reparations to, or in respect of, victims can take many forms, including restitution, compensation and rehabilitation. This broad mandate leaves room for the ICC to identify the most appropriate forms of reparation in light of the context of the situation, and the wishes and views of the victims and their communities. Under the general assistance mandate, the TFV promotes victims' holistic rehabilitation and reintegration where the ICC has jurisdiction in three legally defined categories: physical rehabilitation, psychological rehabilitation and material support.[86]

83 Rule 98 (2), (3), (4) of the RPE.
84 Rule 98 (5) of the RPE.
85 *Trust Fund for Victims Global Strategic Plan 2008-2011*, Version 1, August 2008, p 16.
86 *Trust Fund for Victims Global Strategic Plan 2008-2011*, Version 1, August 2008, p 16.

The TFV invites project proposals from organisations operating in the field and if proposals are approved, transmits them to the TFV Board of Directors and to the relevant ICC Chambers for approval. The TFV grant-making process emphasises: participation by victims in programme planning, sustainability of community initiatives, transparent and targeted granting, accessibility for applicants that have traditionally lacked access to funding, addressing the circumstances of girls and women, strengthening capacity of grantees and coordinating efforts to ensure that the selection and management of grants is strategic and coherent.[87]

The total amount of funds available in the TFV's Euro bank accounts as of 30 June 2012 was €3,480,545.26.[88] For the period 1 July 2011 to 30 June 2012, the TFV received €3,246,151 as voluntary contributions from 18 States Parties.[89] This is the highest level of contributions in cash from States Parties, amounting to 32% of total contributions received by the Fund since its creation in 2004 (€9,986,900 from 30 countries).[90]

However, by October 2012, the Trust Fund had received €942,800 of which €640,000 was an unexpected donation from the UK in July 2012, to mark the 10th anniversary of the establishment of the ICC.[91] During the first six months of 2012 the TFV raised €252,252 as voluntary contribution from States Parties.[92]

The overall funds raised for 2012 are the lowest since the Trust Fund became operational in 2008.

In addition to donations from States Parties, the Fund received a low level of contributions from institutions and individuals for a total of €9,900.61 for the period 1 July 2011-30 June 2012.[93] In-kind and/or matching donations managed by implementing partners amounted to €495,590 for the period from 1 July 2011 to 31 March 2012

87 *Trust Fund for Victims Global Strategic Plan 2008-2011*, Version 1, August 2008, p 16.

88 Figures as of 30 June 2012. R*eport to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012*, ICC-ASP/11/14, 7 August 2011, p 8. Please note that this amount is the result of the sum of the balance of the savings account (€3,220,000) and of the Euro account (€280,545.26), and it includes €1,200,000 as reserves to supplement orders for reparations from the Court; and €600,000 for the sexual and gender-based violence programme in the CAR.

89 Figures as of 30 June 2012. *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012*, ICC-ASP/11/14, 7 August 2012, p 8.

90 *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 42; and *TFV Contribution to the Gender Report Card 2012*, information provided by the Secretariat of the Trust Fund for Victims on 14 August 2012.

91 E*mpowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 42; and *TFV Contribution to the Gender Report Card 2012*, information provided by the Secretariat of the Trust Fund for Victims on 14 August 2012.

92 *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 42; and *TFV Contribution to the Gender Report Card 2012*, information provided by the Secretariat of the Trust Fund for Victims on 14 August 2012.

93 Figures as of 30 June 2012. *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012*, ICC-ASP/11/14, 7 August 2011, p 8.

and the income from interest was €16,762.21.[94] Germany is the TFV's largest donor with €2,014,794 contributed since 2006; and Sweden has provided the largest single contribution of 10 million SEK or €1,154,379.94 in 2011.[95]

The total funds obligated for grants in the Democratic Republic of Congo (the DRC) and Northern Uganda since 2007/2008 amount to €7,779,458.[96] In addition, €600,000 has been allocated to activities in the Central African Republic (the CAR). During its ninth meeting in March 2012, the TFV Board of Directors decided to raise the Fund's reserve to supplement orders for reparations of €200,000, thus bringing the current reserve for reparations to €1,200,000.[97]

The TFV has 34 approved projects under the assistance mandate, of which 28 are currently active in Eastern DRC and Northern Uganda.[98] According to the Fund, the majority of projects which were active throughout 2012 will be confirmed and extended in 2013.[99] During its ninth meeting in The Hague in March 2012, the TFV Board of Directors decided to approve programme extensions in the DRC and Northern Uganda for a total amount of €1,306,432.[100]

The TFV estimates that the number of beneficiaries of projects implemented in Eastern DRC and Northern Uganda increased from 81,516 as of 30 June 2011 to 83,400 as of 30 June 2012.[101] Between 2010 and 2012, the estimated number of beneficiaries reached by the TFV projects under its assistance mandate increased by 19%, from 70,200 to the current estimate of 83,400. Given the difficulties and inconsistencies in counting indirect beneficiaries, in 2010 the Fund has ceased reporting on them to focus on different categories of direct beneficiaries.[102]

94 Figures as of 30 June 2012. *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012*, ICC-ASP/11/14, 7 August 2011, p 8.

95 *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 42; and *TFV Contribution to the Gender Report Card 2012*, information provided by the Secretariat of the Trust Fund for Victims on 14 August 2012.

96 Email communication with the Secretariat of the Trust Fund for Victims, 4 October 2012.

97 *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012*, ICC-ASP/11/14, 7 August 2011, p 7.

98 Twelve in the DRC and 16 in Northern Uganda. Email communication with the Secretariat of the Trust Fund for Victims, 4 October 2012.

99 While usually the Fund and implementing partners sign year-long contracts, projects can be extended depending on the availability of funds to provide beneficiaries with multi-year assistance. *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 4; and *TFV Contribution to the Gender Report Card 2012*, information provided by the Secretariat of the Trust Fund for Victims on 14 August 2012.

100 *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012*, ICC-ASP/11/14, 7 August 2011, p 7.

101 Please note that data for 2012 are based on an estimate of beneficiaries reached during the first quarter of the year combined with the figures of previous years. *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 5.

102 Email communication with the Secretariat of the Trust Fund for Victims, 16 September 2011. In 2010, the Fund reported 182,000 indirect beneficiaries defined as the families and communities of the direct recipients of assistance and rehabilitation projects. *Recognising Victims and Building Capacity in Transitional Societies*, Programme Progress Report, Spring 2010, p 6.

Victims[103] benefiting from the Fund's projects are grouped into six categories, namely:

- Victims of sexual and gender-based violence (SGBV), both male and female, including child-mothers;
- Widows and widowers;
- Former child soldiers and abducted youth;
- Orphans and vulnerable children, including children born as a result of rape;
- Victims of physical and mental trauma, including victims of torture and wounded civilians;
- Family members of victims and victims not falling in any of the other categories; and
- Community peacebuilders, defined as 'traditional leaders and other community members reached through the TFV's reconciliation activities'.[104]

Out of the total number of beneficiaries 48% are in Northern Uganda and 52% are in Eastern DRC. In 2010, 42% of beneficiaries were reached by projects in Northern Uganda and 58% in Eastern DRC and in 2011 these figures were respectively 47% and 53%.[105] It is estimated that 5,392 survivors of sexual violence have been benefiting from the assistance provided by the TFV during 2011.[106]

In September 2008, the Board of Directors of the TFV launched a global appeal to assist 1.7 million victims of sexual violence over three years. Since 2008 in response to this appeal, earmarked donations amounting to €1,739,582 have been received from the Principality of Andorra, Finland, Norway, Denmark and Germany.[107] Norway continues to be the TFV's single largest supporter of the sexual and gender-based violence projects of the TFV.[108] In 2011, 19.95% of the total earmarked contributions received by the Fund were earmarked for sexual and gender-based violence projects. Since the beginning of the Fund's operations, the percentage of funds earmarked for sexual and gender-based violence over the total earmarked cash contributions received is 76.5%.[109] As of 30 June 2012, nine sexual and gender-based violence projects— eight in the DRC and one in Uganda—are being supported by the earmarked funding.[110]

In addition to the funds received in response to the September 2008 appeal to assist victims of sexual violence, the Netherlands earmarked €57,000 for a project focused on supporting former child soldiers in 2010 and €250,000 for projects falling under the

103 As defined in Rule 85 of the RPE.
104 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations*, Programme Progress Report, Summer 2011, p 6.
105 *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 5. Please note that the TFV is currently reviewing statistics on victims' categories and no updated information on the breakdown of beneficiaries by category was made available this year.
106 *Earmarked Support at the Trust Fund for Victims*, Programme Progress Report, Winter 2011, p 7.
107 *Earmarked Support at the Trust Fund for Victims*, Programme Progress Report, Winter 2011, p 4.
108 Norway contributed €253,500 in April 2011 and a total of €698,400 since 2008. *Earmarked Support at the Trust Fund for Victims*, Programme Progress Report, Winter 2011, p 4.
109 Email communication with the Secretariat of the Trust Fund for Victims, 4 October 2012.
110 *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 10. Please note that the TFV is currently reviewing statistics on victims' categories and no updated information on the breakdown of beneficiaries reached by sexual and gender-based violence earmarked projects was made available this year.

Fund's assistance mandate in 2011/12.[111] Germany earmarked €155,000 to support a Legal Advisor in 2010 to assist with preparations for administering reparations. In 2011, Germany earmarked an additional €110,000 to continue supporting the Legal Advisor through to the end of the year.[112]

On 7 August 2012, Trial Chamber I activated the TFV's reparations mandate with its decision in the case *The Prosecutor v Thomas Lubanga Dyilo*.[113] On 14 March, Trial Chamber I found Lubanga guilty of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. On 10 July, the Chamber sentenced him to 14 years of imprisonment.[114] In its 7 August decision, Trial Chamber I determined that reparations will be implemented with the resources that the Fund has currently available for this purpose.[115]

In March 2012, the Board of the TFV approved the increase of the reparations reserve to €1.2 million.[116] In addition, the Board is requesting the Assembly of States Parties to consider the allocation of €1 million to complement the reserves of the Fund to implement Court-ordered reparations awards in order to decrease the amount of funds taken from the TFV's current assets which are also used to carry out activities under the assistance mandate.[117]

111 Email communication with the Secretariat of the Trust Fund for Victims, 4 October 2012.
112 *TFV Contribution to the Gender Report Card 2012*, information provided by the Secretariat of the Trust Fund for Victims on 14 August 2012.
113 ICC-01/04-01/06-2842. See *First trial judgement in the Lubanga case* section of this Report.
114 ICC-01/04-01/06-2901. See *First reparations and sentencing decisions in the Lubanga case* section of this Report.
115 ICC-01/04-01/06-2904. See *First reparations and sentencing decisions in the Lubanga case* section of this Report.
116 Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012, ICC-ASP/11/14, 7 August 2011, p 4.
117 As provided for by the TFV Regulations 21(d), 35 and 36. Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012, ICC-ASP/11/14, 7 August 2011, p 9.

TFV projects 2011-2012[118]

Northern Uganda	There are 16 active projects in Northern Uganda.[119] The total obligated funds since 2007/2008 amount to €2,651,207.[120] Out of the 16 active projects, one uses SGBV earmarked funds[121] and two are projects funded through 'common basket' funds whose beneficiaries include SGBV victims/survivors.[122] The remaining projects are providing psychological and physical rehabilitation and material support to adults and children, including women and girls, as part of the integrated approach. One-third of active projects in Northern Uganda deal with victims' medical rehabilitation (five out of 16).[123] Since 2008, an estimated 38,900 victims have been reached by Trust Fund activities in Northern Uganda.[124] Given the absence of violence related to the case under investigation by the ICC since 2006 in the areas of intervention of the Fund, its activities in Northern Uganda are currently in their transition phase. The Fund is preparing its exit strategy by closely collaborating with its implementing partners to ensure that the achievements reached during the four years of activity are sustainable in the long term.[125]
the DRC	There are 12 active projects in the DRC.[126] The total obligated funds since 2007/2008 amount to €5,128,251.[127] Out of the 12 active projects, eight (67%),[128] use SGBV earmarked funding. The remaining projects provide psychological and physical rehabilitation and material support to adults and children, including women and girls, as part of the integrated approach. Since 2008, the TFV reached an estimated 43,600 victims in Eastern DRC.[129]

118 As of 30 June 2012.
119 *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012*, ICC-ASP/11/14, 7 August 2011, p 5.
120 Email communication with the Secretariat of the Trust Fund for Victims, 4 October 2012.
121 Project TFV/UG/2007/R2/040.
122 TFV/UG/2007/R1/020 supporting former girl soldiers of whom 267 are child mothers; and TFV/UG/2007/R2/038 targeting around 2,600 victims at the community level of whom 431 are victims/survivors of SGBV.
123 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations*, Programme Progress Report, Summer 2011, p 12.
124 *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 7.
125 *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 7.
126 *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012*, ICC-ASP/11/14, 7 August 2011, p 5.
127 Email communication with the Secretariat of the Trust Fund for Victims, 4 October 2012.
128 TFV/DRC/2007/R1/001; TFV/DRC/2007/R2/036; TFV/DRC/2007/R1/021; TFV/DRC/2007/R1/022; TFV/DRC/2007/R2/031; TFV/DRC/2007/R2/033; TFV/DRC/2007/R2/043; and TFV/DRC/2007/R2/029.
129 *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 6.

TFV projects 2011-2012 *continued*

the CAR	On 30 October 2009, the TFV notified Pre-Trial Chamber II of its proposed activities in the CAR as established by Rule 50 of the Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3. The Chamber responded on 16 November 2009 requesting that the Board of Directors officially inform the Pre-Trial Chamber when a decision about the specific activities and projects to develop in the CAR was made. A three-month Call for Expressions of Interest to 'provide integrated rehabilitation assistance to victim survivors of SGBV, their families and affected communities so they are able to move from victim-hood to stability as survivors'[130] was launched on 6 May 2011 and closed on 5 August 2011. Out of 19 organisations which presented their Expressions of Interest, nine were selected by the TFV and invited to a workshop on proposal development in February 2012. Following the workshop, the nine organisations submitted their proposals which were reviewed by the Secretariat and approved by the Board of Directors. The procurement phase will be closed with the final approval of the Procurement Review Committee, and the launch of the projects is expected at the end of 2012.[131]
Darfur	There were no projects in 2012.
Kenya	There were no projects in 2012.
Libya	There were no projects in 2012.[132]
Côte d'Ivoire	There were no projects in 2012.[133]

130 *ICC's Trust Fund for Victims Launches Expression of Interest Supporting Victim Survivors of Sexual and Gender-Based Violence in the Central African Republic*, Trust Fund for Victims Press Release, 6 May 2011, available at <http://www.trustfundforvictims.org/sites/default/files/imce/CAR_Press_Release.pdf>, last visited on 7 September 2011.

131 *Empowering Victims and Communities Towards Social Change*, Programme Progress Report, Summer 2012, p 7-8.

132 The Libya Situation was referred to the ICC by the UN Security Council under Article 13(b) of the Rome Statute on 26 February 2011. The ICC Prosecutor opened investigations in the Libya Situation on 3 March 2011.

133 Pre-Trial Chamber III authorised the ICC Prosecutor to open investigations in Côte d'Ivoire on 3 October 2011. Côte d'Ivoire is the seventh Situation under investigation by the ICC.

Office of the Public Counsel for Victims[134]

The Office of the Public Counsel for Victims (OPCV) was created on 19 September 2005 pursuant to Regulation 81(1) of the Regulations of the Court[135] to support the legal representatives of victims and victims themselves through legal research and advice, as well as by appearing in Court in respect of specific issues.[136] Regulation 80(2) establishes also that a Chamber can appoint Legal Counsel from the OPCV to represent a victim. Moreover, victims can decide themselves to be represented by the OPCV. The Office is also responsible for protecting the interests of applicants (potential victims) during the application process and before they have been formally recognised as victims by a Chamber.

In summary, the OPCV performs the following roles:

1 It protects the interests of victim applicants before they have been formally recognised as victims by a Chamber;

2 It assists the legal representatives of victims by providing legal advice and research if so required;

3 It can be asked by a victim's legal representative to stand in Court as *ad hoc* Counsel on specific issues or during specific hearings;

4 It can act as Counsel when appointed by a Chamber or requested by a victim; and

5 It can act as Counsel assisted by the Counsel selected by the victim, if the latter does not fulfil all the requirements established by the Court to act as Counsel.

Pursuant to Regulation 81(2), the OPCV is an independent office which falls under the Registry for administrative purposes.

134 Further information about victims' participation can be found in the *Victim Participation* section of this pubiication.

135 Regulations of the Court, ICC-BD/01-01-04, adopted on 26 May 2004.

136 Regulation 81(4)(a)and (b).

Between 2006 and September 2012, the number of victims assisted and represented by the OPCV has increased from 85 to 3,579.[137] Following a decision issued in the Uganda Situation on 9 March 2012 by the Single Judge appointing the OPCV as legal representative of all applicants and recognised victims who were already participating in the proceedings,[138] the number of victims represented and assisted by the OPCV in relation with the Uganda Situation significantly increased from 117 to 1,138. As a consequence, victims in Uganda this year are the majority of those represented and assisted by the OPCV (31.8%), followed by victims in relation to the CAR Situation (30.8%).[139] While the number of victims represented and assisted by the OPCV in relation to the Situations in Sudan (39) and Kenya (280) increased slightly with respect to 2011, the number of victims in the DRC Situation (736) experienced a small decrease from last year.[140] Victims in relation to the two new Situations under investigation by the ICC, Libya and Côte d'Ivoire, are respectively seven and 277.

Cumulatively, the OPCV is assisting 3,579 victims of which 1,440 are female (40%) and 2,139 are male (60%).[141] In 2011, 774 female victims were assisted by the OPCV, comprising 36.5% of the total. In 2012, 1,594 new victims are being assisted or represented by the Office. In every Situation in which the Office is providing assistance, female victims are the minority (see Table on Victims represented by the OPCV per Situation, at page 35 of this Report).

This year, the number of female victims per Situation represented and assisted by the OPCV ranges from 14% in relation to the Situation in Libya to 46% in the DRC Situation. Female victims are 45% of the total number of victims being assisted and represented by the OPCV in the relation to the Situation in the CAR and 43% of those represented and assisted by the Office in relation to the Situation in Côte d'Ivoire. In Kenya 35% and Sudan 31% of those represented and assisted by the Office are female. These figures represent an increase in the number of female victims formally recognised to participate in each of the Situations and represented and assisted by the OPCV compared with 2011. The most significant increases have been in relation to the DRC and Sudan Situations. Last year, female victims represented and assisted by the OPCV were 42% of the total in relation to the CAR Situation, 36% in Kenya, 30% in Uganda and in the DRC and 14% in Sudan.

137 Figures as of 5 September 2012. Information provided by the Office of Public Counsel for Victims. According to figures provided by the Office, OPCV assisted and represented 85 victims in 2006, 150 in 2006, 397 in 2008, 550 in 2009, 2,025 in 2010, 2,003 in 2011 and 3,597 in 2012.

138 ICC-02/04-191, p 20.

139 Email communication with the Office of Public Counsel for Victims, 27 September 2012.

140 In 2011, the OPCV represented and assisted 21 victims in relation with the Sudan Situation, 222 in relation to the Kenya Situation, and 748 in relation with the DRC Situation.

141 Figures as of 5 September 2012. Information provided by the Office of Public Counsel for Victims.

According to data provided by the OPCV, in 2012 sexual violence and rape were reported by 70% of the female victims represented by the OPCV in the CAR and reported by the majority of female victims assisted and represented by the OPCV in relation to the Situation in Côte d'Ivoire (60%).[142] According to the Office, sexualised violence is also reported by female victims in Kenya (15%), Uganda and the DRC (10% each). None of the female victims currently assisted by the OPCV in Sudan and Libya reported having been subjected to rape and sexual violence.[143] These figures, with the exception of Côte d'Ivoire and Libya, for which there was no such information available in 2011, are the same as last year.[144]

Since 2006, the OPCV has provided support to 177 external legal representatives and provided legal advice and research on 1,188 occasions.[145] From 1 January to 5 September 2012, the OPCV provided legal advice on 210 occasions and supported 42 external legal representatives. These figures represent an increase when compared with data from 1 January to 23 August 2011 when the office provided legal advice on 170 occasions and supported 39 external legal representatives.[146]

The OPCV has one general service post and nine professional posts. As in 2011, all of these posts are currently filled. Of the professional posts, 44.5% are occupied by women and 55.5% by men. This is the same gender breakdown as last year. The one P5 post within OPCV is held by a woman. Men and women equally share P4 and P3 positions (one man and one woman at P4 level and one man and one woman at P3 level). The two P2 posts are both occupied by male professionals and the two P1 posts are occupied by a female and male professional. The general service post (GS5) is occupied by a man.[147] While in 2010 all the regions were represented in the Office and three staff were from the WEOG region, this year five out of 10 staff are from this region and the GRULAC region is not represented by any staff. Eastern Europe and Africa are both represented by two staff each and one staff member is from the Asia region.[148]

142 Figures as of 5 September 2012. Information provided by the Office of Public Counsel for Victims.
143 Figures as of 5 September 2012. Information provided by the Office of Public Counsel for Victims.
144 As in 2011, no information was available regarding the number of victims represented and assisted by the OPCV per Case, the gender breakdown, and the type of crimes reported by Situation and Case.
145 Email communication with the Office of Public Counsel for Victims, 5 September 2012.
146 Email communication with the Office of Public Counsel for Victims, 5 September 2012.
147 Email communication with the Office of Public Counsel for Victims, 27 September 2012.
148 Email communication with the Office of Public Counsel for Victims, 27 September 2012.

Victims represented and assisted by the OPCV per Situation[149]

		men	women
Overall[150]	[3,579][151]	**60%**	**40%**
the CAR[152]	30.8% of total victims [1,102]	**55%**	**45%**
Uganda[153]	31.8% of total victims [1,138]	**67%**	**33%**
the DRC[154]	20.5% of total victims [736]	**54%**	**46%**
Sudan[155]	1.1% of total victims [39]	**69%**	**31%**
Kenya[156]	7.85% of total victims [280]	**65%**	**35%**
Libya[157]	0.2% of total victims [7]	**86%**	**14%**
Côte d'Ivoire[158]	7.75% of total victims [277]	**57%**	**43%**

149 Figures as of 5 September 2012. Figures include both applicants and victims formally recognised by the Court.

150 The total number of victims represented and assisted by the OPCV as of 5 September 2012 is 3,579. This figure represents 1,460 more victims than in 2011, a 69% increase. This is mainly due to the significant increase in the number of victims represented and assisted by the OPCV in the Situation in Uganda (from 117 in 2011 to 1,138 in 2012) following the decision by the Single Judge to appoint OPCV as legal representative of all applicants and recognised victims already participating in the proceedings (ICC-02/04-191, p 20). As in 2010 and 2011, the majority of victims represented and assisted by the OPCV are male (60%). In 2011, male victims comprised 63.5% of the total and in 2010 62%.

151 The total number of victims represented and assisted by the OPCV per Situation is reported in brackets.

152 Out of 1,102 victims represented and assisted by the OPCV in the CAR, 55% are men and 45% women. This represents a 3% increase in the number of female victims represented and assisted by the Office compared to 2011 and a 6% increase when compared with 2010. After drastically decreasing by 36% between 2010 and 2011, the proportion of the number of victims from the CAR assisted and represented by the OPCV relative to the overall number of victims represented and assisted by the Office decreased again in 2012 by almost 20%.

153 In Uganda, the OPCV is assisting 1,138 victims, almost ten times more than in 2011. Of these, 67% are men and 33% are women. This is almost the same figure as in 2011. This year Ugandan victims constitute the majority of the total number of victims being assisted or represented by the Office. This significant increase follows the decision issued on 9 March 2012 (ICC-02/04-191, p 20) by the Single Judge to appoint OPCV as legal representative of all applicants and recognised victims already participating in the proceedings (email communication with the Office of Public Counsel for Victims, 27 September 2012).

154 Out of 736 victims represented and assisted by the OPCV in the DRC, 54% are men and 46% are women. In 2010, 748 victims were represented and assisted by the OPCV in relation to the DRC Situation, of whom 30% were women. Please note that the number of victims represented and assisted by the OPCV in relation to the Situation in the DRC does not include the potential beneficiaries of the reparations plan related to the case *The Prosecutor v. Thomas Lubanga Dyilo*. The DRC constitutes 20.5% of the total number of victims represented or assisted by the OPCV, a 14.5% decrease from 2011 when the figure was 35% of the total.

155 There are 39 Sudanese victims assisted by the OPCV, of whom 69% are male and 31% are female. These figures represent a 17% increase in the percentage of female victims represented or assisted by the OPCV from 2011 when 14% of the total victims represented and assisted by the OPCV in relation to this Situation were women. This year, Sudan constitutes 1.1% of the total number of victims assisted or represented by the OPCV, a small change from last year.

156 There are 280 victims represented and assisted by the OPCV in relation to the Situation in Kenya, of whom 65% are men and 35% are women. The Kenya Situation accounts for 7.85% of the total number of victims represented and assisted by the OPCV. These figures did not change significantly from 2011 when the OPCV was representing and assisting 222 victims in relation to this Situation, of whom 64% were male and 36% were female, accounting for 10% of the total victims represented and assisted by the Office.

157 There are seven victims represented and assisted by the OPCV in relation to the Libya Situation, of whom one is a woman. All of these victims applied in the context of Article 19 proceedings on admissibility (email communication with the Office of Public Counsel for Victims, 27 September 2012). The Libya Situation was referred to the ICC by the UN Security Council under Article 13(b) of the Rome Statute on 26 February 2011. The ICC Prosecutor opened investigations in the Libya Situation on 3 March 2011.

158 The OPCV is representing and assisting 277 victims in relation to the Situation in Côte d'Ivoire. Of these, 43% are female victims and 57% are male victims. The number of victims assisted and represented by the OPCV in this Situation relates to those who were authorised to participate in the context of the Confirmation of Charges (139) and to applications received by the OPCV in the context of Article 19 proceedings on admissibility (email communication with the Office of Public Counsel for Victims, 27 September 2012). Pre-Trial Chamber III authorised the ICC Prosecutor to open investigations in Côte d'Ivoire on 3 October 2011.

ICC budgetary matters

	2007	*2008*	*2009*	*2010*	*2011*	*2012*
Overall ICC budget (in million)	**€88.872**	**€90.382**	**€102.23**	**€103.623**	**€103.61**	**€108.8**[159]
Overall implementation rate	**90.5%**[160]	**93.3%**[161]	**92.5%**[162]	**95.2%**[163]	**98.7%**[164]	*not available*
Implementation rate 1st trimester	**21.4%**[165]	**23.7%**[166]	**30.0%**[167]	**30.7%**[168]	**31.8%**[169]	**31.5%**[170]

159 This budget figure excludes the €2.2 million replenishment of the Contingency Fund approved by States during the tenth session of the Assembly of States Parties in New York from 12 to 21 December 2011. The Contingency Fund balance as of 31 December 2011 was €7,157,974 (*Report of the Committee on Budget and Finance on the work of its eighteenth session*, 9 August 2012, ICC -ASP/11/5, p 6, footnote 2).
160 *Report of the Committee on Budget and Finance on the work of its tenth session*, 26 May 2008, ICC-ASP/7/3, p 8-10.
161 *Report of the Committee on Budget and Finance on the work of its twelfth session*, 13 May 2009, ICC-ASP/8/5, p 5.
162 *Report of the Committee on Budget and Finance on the work of its fourteenth session*, 6 July 2010, ICC-ASP/9/5, p 5-7.
163 *Report of the Committee on Budget and Finance on the work of its sixteenth session*, 17 June 2011, ICC-ASP/10/5, p 9. Please note that this implementation rate is for €102,250,000, which excludes the approved budget for the Review Conference of €1,370,000.
164 *Report of the Committee on Budget and Finance on the work of its eighteenth session*, 9 August 2012, ICC -ASP/11/5, p 7.
165 Rate of implementation of the 2007 budget as of 31 March 2007, ICC-ASP/6/2.
166 Rate of implementation of the 2008 budget as of 31 March 2008, ICC-ASP/7/3.
167 Rate of implementation of the 2009 budget as of 31 March 2009, ICC-ASP/8/5.
168 Rate of implementation of the 2010 budget as of 31 March 2010, ICC-ASP/9/6.
169 Rate of implementation of the 2011 budget as of 31 March 2011, ICC-ASP/10/5.
170 Rate of implementation of the 2011 budget as of 31 March 2012, ICC-ASP/11/5.

Institutional Development

Gender training

Registry

No information on gender training within the Registry was made available to the Women's Initiatives for Gender Justice.

Office of the Prosecutor[171]

According to information provided by the OTP, between June 2011 and July 2012, OTP staff participated in and provided gender-related presentations at the following events:

- On 17-23 September 2011, a senior OTP staff member participated in the development of a Training Manual following the attendance of Prosecutor Bensouda at the 16-20 May 2011 *Technical Learning, Design and Development* meeting for a course on *Sexual Exploitation and Abuse* organised by the Kofi Annan International Peacekeeping Training Center in Accra, Ghana.
- On 14-25 November 2011, three senior OTP staff participated as trainers in the *Sexual Exploitation and Abuse Pilot Training Course* organised by the Kofi Annan International Peacekeeping Training Center in Accra, Ghana.
- On 24-26 January 2012, a senior OTP staff member attended the *Gender Is My Agenda Campaign* 19th Pre-Summit Consultative Meeting on Gender Mainstreaming in the AU in Addis Ababa, Ethiopia.
- On 30 January-3 February 2012, an OTP staff member participated as a trainer and observer in the Institute for International Criminal Investigations (IICI) *Pilot Training on Sexual and Gender-Based Violence Investigations* in The Hague, the Netherlands.
- On 6-8 March 2012, two senior OTP staff participated and provided presentations at the *Africa Network of Forensic Medicine* (ANFM) Forum in Kampala, Uganda, during which issues relating to the investigation of sexual and gender-based violence were discussed.
- On 20-24 May 2012, a senior OTP staff member attended the *14th International Symposium of the World Society of Victimology* in The Hague, the Netherlands, during which issues relevant to the treatment of victims of sexual and gender-based violence were discussed.

171 Information as of 17 August 2012. Information provided by the Jurisdiction, Complementarity and Cooperation Division, OTP.

Gender training CONTINUED

- On 14-18 May 2012, an OTP staff member participated as an expert in the *Learning, Design and Development* workshop co-facilitated by the UN Special Representative of the Secretary-General on Sexual Violence in Conflict and the Kofi Annan International Peacekeeping Training Centre during the *Prevention of Conflict Related Sexual Violence for National Security Forces* meeting in Accra, Ghana.
- On 22 May 2012, a senior OTP staff member made a presentation on sexual and gender-based violence investigations and prosecutions at the United Nations Regional Information Center for Western Europe (UNRIC) during an event organised by UNRIC in partnership with the Flemish United Nations Association in Brussels, Belgium.
- Following the UK's 29 May 2012 announcement of an initiative designed to prevent sexual violence in conflict, the OTP has been in contact with the UK officials working on the project, and will be involved in further consultations as the initiative develops.
- In August 2012, Prosecutor Fatou Bensouda appointed Brigid Inder as her Special Gender Advisor.[172]
- On 6-7 September 2012, Prosecutor Bensouda and other senior OTP staff members participated in the *Symposium on Strengthening Gender Justice through International Prosecutions*, co-organised by the Women's Initiatives for Gender Justice and UN Women, held in The Hague, the Netherlands. Prosecutor Bensouda gave a keynote address during the opening panel of the Symposium and participated in a special panel of three Chief Prosecutors from the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone.

During the reporting period, Prosecutor Bensouda made the following policy statements and presentations on the prosecution of sexual and gender-based crimes:

- On 21-22 October 2011, Prosecutor Bensouda and a senior OTP staff member attended and made presentations on *Sexual and Gender Based Crimes from the ICC Perspective* at a meeting organised by the Africa Legal Aid in Gabarone, Botswana.
- On 13 December 2011, Prosecutor Bensouda gave her first public statement as the Prosecutor-elect during the launch of the *Gender Report Card on the ICC 2011,* organised by Women's Initiatives for Gender Justice, in New York, US;

172 *ICC Prosecutor Fatou Bensouda Appoints Brigid Inder as Special Gender Advisor*, Press Release, 21 August 2012, ICC-OTP-20120821-PR833, available at <http://www.icc-cpi.int/NR/exeres/D053D941-1C4E-44CA-BEDC-AA289B4EDA96.htm>, last visited on 10 October 2012.

- On 14 February 2012, Prosecutor Bensouda gave a keynote speech on *Gender Justice and the ICC: Progress and Reflections*, during the international conference *10-year review of the ICC — Justice for all? The International Criminal Court*, organised by the Faculty of Arts and Social Sciences and the Faculty of Law at the University of New South Wales in Sydney, Australia.
- On 4 June 2012, Prosecutor Bensouda gave a keynote speech on *The incidence of the Female Child Soldier and the International Criminal Court* at an event organised by the Eng Aja Eze Foundation in New York, US.

Judiciary

No gender training seminars were organised by the Judiciary in 2012.

Policies[173]

Sexual harassment policy[174]

Policy

Although there is a policy, the parameters and procedures are lower than what is considered 'best practice' in this field.

Procedure

Procedures are not featured in the policy itself but are outlined in Chapter X of the Staff Rules. Formal complaints are forwarded to the Disciplinary Advisory Board[175] which hears the case with brief statements and rebuttals by the staff member who has allegedly violated the Policy, and if the staff member wishes, by a representative (who must be a staff member or a former staff member of his or her choosing). There is no indication in the Staff Rules of a right for complainants to participate in the proceedings nor their access to a representative. The Board must make a decision within 30 days and the staff member may appeal the decision to the Administrative Tribunal of the International Labour Organisation.

Article 46 of the Rome Statute deals with senior ICC officials (judges, the Registrar, Deputy Registrar, Prosecutor or Deputy Prosecutor) who can be removed from office if they are found to have committed 'serious misconduct' or 'a serious breach of his or her duties under Statute' as provided for in the Rules of Procedure and Evidence. Any individual may make a complaint which would be considered by a panel of judges formed by the Presidency. Should there be grounds to consider serious misconduct has occurred this is referred to the Bureau of the ASP to further investigate. A decision respecting removal from the office of a senior ICC official is dealt with by secret ballot of the ASP in various ways (see Articles 46(2) and 46(3) of the Rome Statute) depending on the office being dealt with (Rule 26 RPE).

Training

There has been no training undertaken for staff on the Sexual Harassment Policy. Nevertheless, Section 4.5 of the Sexual Harassment Policy requires managers and supervisors to 'ensure that all staff, including existing and new employees' have knowledge of the policy, their rights and how to use the grievance procedure. Section 4.6 of the Policy further requires all staff to be trained on issues related to harassment and for training programmes to be held *on an ongoing basis*.

173 No new relevant policies were made available to the Women's Initiatives for Gender Justice since September 2008.

174 'Sexual and Other Forms of Harassment', Administrative Instructions ICC. *Report on the activities of the Court*; ICC-ASP/4/16, 16 September 2005, para 12: <http://www2.icc-cpi.int/NR/rdonlyres/264D7935-F9C6-41DD-9F00-E1BA2ACE4F38/278507/ICCASP416_English.pdf>. Sexual harassment is defined as 'any unwelcome sexual advance, request for sexual favour or other verbal, non-verbal or physical conduct of a sexual nature, which interferes with work, alters or is made a condition of employment, or creates an intimidating, degrading, humiliating, hostile or offensive work environment'.

175 The Disciplinary Advisory Board is comprised of one member and two alternate members appointed by the Registrar (in consultation with the Presidency); one member and two alternate members appointed by the Prosecutor; and one member and two alternate members elected by the staff representative body, at least one of whom shall be a staff member of the OTP.

Sexual harassment policy continued

Focal point

Registrar or Prosecutor in the first instance, or a third party if the staff member feels uncomfortable approaching the Registrar or Prosecutor directly (ie manager, staff counsellor, fellow staff member, representative of the Human Resources Section, Court Medical Officer or member of the Staff Representative Body). No designated focal point(s) apart from the Registrar or Prosecutor have been appointed.

Equal opportunity policy[176]

Policy

The Court 'recruits, hires, promotes, transfers, trains and compensates its staff members on the basis of merit and without regard for race, colour, ethnicity, religion, sexual orientation, marital status, or disability'. Gender discrimination is not mentioned in this overarching provision, but it is enumerated in the Policy's provision on non-discrimination in relation to opportunities for employment, transfer and training. Discrimination is described as both direct and indirect.

Procedure

Grievance procedures are described in Section 6 of the Policy and are identical to the procedures for the Sexual Harassment Policy (see above).

Training

There has been no training undertaken on the Equal Opportunity Policy for the designated focal points and staff.

Focal point

Registrar or Prosecutor in the first instance, or a third party if the staff member feels uncomfortable approaching the Registrar or Prosecutor directly. No designated focal point apart from the Registrar or Prosecutor is appointed.

176 *Report on the activities of the Court*; ICC-ASP/4/16, 16 September 2005, para 12: <http://www2.icc-cpi.int/NR/rdonlyres/264D7935-F9C6-41DD-9F00-E1BA2ACE4F38/278507/ICCASP416_English.pdf>

Parental leave within the Staff Rules

Policy

ICC staff are entitled to a continuous period of 16 weeks' maternity leave with full pay; a continuous period of 8 weeks' adoption leave with full pay; and 4 weeks of 'other parent leave' with full pay in connection with the birth or adoption of the staff member's child.

Procedure

A staff member seeking maternity leave must present a medical certificate stating the probable date of delivery of her child; maternity leave may commence between six and three weeks prior to the probable date of delivery. A staff member seeking adoption leave shall inform the Registrar or the Prosecutor at least one month prior to the anticipated commencement of the adoption leave and submit the documentary proof available at that time. A staff member seeking 'other parent leave' must submit proof of the birth or adoption of the child within three months of the other parent leave ending.

Training

Staff are not given an orientation on staff rules and conditions including the parental leave provisions.

Focal point

Direct managers for maternity leave and other parent leave; Registrar or Prosecutor for adoption leave.

Compensation of judges

Policy

As adopted by the ASP 2004, 'spouse' is defined as a partner by marriage recognised as valid under the law of the country of nationality of a judge or by a legally recognised domestic partnership contracted by a judge under the law of the country of his or her nationality.

Procedure

See Recommendations.

Training

See Recommendations.

Focal point

Assembly of States Parties.

Private legal obligation of staff members[177]

Policy

Staff members are required to comply with applicable national laws and regulations, fulfil their legal obligations, and honour orders of competent courts without involving the Court, including judicially established family obligations.

Procedure

Section 4 of the *Administrative Instructions on Private Legal Obligations of Staff Members* establishes the procedures applicable in cases of non-compliance with family support court orders and determines that, in spouse and child support cases, the Court may use its discretion to cooperate with a request from a competent judicial authority to facilitate the resolution of family claims even without the consent of the staff member. The staff member has to submit evidence to the Human Resources Section that he or she has taken all the necessary steps.

Training

No training has been organised for the staff up to now.

Focal point

No focal point indicated.

177 Administrative Instruction ICC/AI/2008/004, 15 August 2008.

Recommendations

Structures and Institutional Development

Appointments and recruitment

- **All organs** of the Court should address the ongoing trend of inconsistent compliance with the Staff Rules and Regulations regarding recruitment processes. Within some organs of the Court, there is a widespread practice of considering policies and regulations as guidelines rather than instructions to be applied consistently. The Committee on Budget and Finance (CBF) has noted on several occasions the lack of transparency and other concerns in the Court's recruitment processes.[178]

  In 2011, at the seventeenth session of the CBF, the Committee noted that there were five cases pending before the International Labour Organisation Administrative Tribunal (ILOAT). According to the ICC, since the Court was established, the ILOAT has issued seven judgements in cases initiated by current or past ICC staff, three of which found in favour of the Court and four found for the complainants.[179] ILO-related cases appear to suggest that management and compliance oversight functions, including in relation to the application of Staff Rules and Regulations, are not routinely effective. Such cases constitute an expense for the ICC,[180] and in this regard in 2011, the CBF recommended that 'the Court ensure it has policies in place to reinforce managerial accountability and reduce the risk of increased liabilities resulting in staff grievances'.[181]

- **The Court** should implement effective human resource management practices to ensure that all organs consistently comply with the ICC Rules and Regulations and support the exercise of best practices in relation to recruitment and personnel processes. The Court leadership must ensure that the Human Resource Sections are supported to monitor deviations from the Staff Rules and empowered to implement corrective interventions, should such deviations be identified.

- **The Court** should be proactive in addressing imbalances in gender and geographical representation at mid-to-senior level positions and create an institution supportive of staff learning and development.

- **The Heads of Organs and ASP** must ensure there is a safe working environment for employees, including an adequate and integrated internal system to deal with grievances, conflicts, disputes and complaints including, but not limited to, sexual and other forms of harassment. Strong disciplinary measures should be taken to address such harassment including, if warranted, termination of employment or in the case of an elected official, removal from office.

- **Staff should** feel safe and be encouraged to report improper or inappropriate behaviour or actions which could compromise the good standing of the Court, without fear of reprisals or retaliations.

178 See the *Report of the Committee on Budget and Finance on the work of its fourteenth session*, ICC-ASP/9/5, 6 July 2010, para 55; and the *Report of the Committee on Budget and Finance on the work of its sixteenth session*, ICC-ASP/10/5, 17 June 2011, para 57 and 60.

179 *Report of the Court on human resources management*, ICC-ASP/11/7, 4 May 2012, p 16.

180 Since 2007, the Court has paid at least €270,941 to former staff members. In 2010, €330,690 was indicated in the budget for cases pending before the ILOAT. *Report of the Committee on Budget and Finance on the work of its seventeenth session*, Advance Version, ICC-ASP/10/15, 6 September 2011, p 11.

181 *Report of the Committee on Budget and Finance on the work of its seventeenth session*, Advance Version, ICC-ASP/10/15, 6 September 2011, p 11.

- **The Court** must ensure that its internal complaints procedures are sufficiently robust, transparent, provide adequate protection for staff and whistleblowers, are an effective mechanism for accountability, uphold the rights of employees and ensure the positive reputation and good standing of the Court as a whole.

- **Given the high number** of cases before the Court which include charges for gender-based crimes, Chambers should appoint a gender advisor at a P5 level to ensure effective and consistent competence in addressing these issues, within and between judicial divisions.

- **In addition** to the Special Gender Advisor, the OTP should establish internal gender focal points within the Jurisdiction, Complementarity and Cooperation Division, Investigations Division and Prosecutions Division. The diversity and complexity of the OTP's work requires attention and capacity in relation to gender issues across each of the Divisions. Given the increase in cases and investigations anticipated in 2013, more staff with gender expertise will be required to ensure the integration of gender issues within the heightened case load which includes seven active investigations, maintenance of nine residual investigations, monitoring of at least eight potential Situations,[182] and five cases at the trial preparation or trial stage.[183]

- **The OTP** should adopt benchmarks to assist its recruitment practices towards addressing the persistent gender disparity in appointments to mid and senior level posts. In the OTP, the male/female differential remains high in senior positions with almost three times the number of male appointees at the P5 level and eight more male appointments at the P4 level. Male appointees are also in the majority at the P3 level. Women continue to be overwhelmingly appointed at the P1 and P2 levels.

- **The Court** should form an inter-organ committee, with support from external experts, to prepare a three-year plan to ensure gender and geographical representation and gender competence in mid-to-senior level decision-making and management positions. Although there are significant variations between the organs, overall, women are overwhelmingly clustered into the P1 and P2 professional levels. Such a recruitment plan should detail a proactive role for the Court and provide a common framework for the activities of each organ in recruitment, including specific objectives to guide the Court in its employment practices and to redress the under-representation of women in P3-D1 posts. The plan should include indicators to assess progress in organisational competence across all organs and related bodies, including the Trust Fund for Victims, the OPCV, the OPCD and the ASP Secretariat. The three-year plan could also be integrated into the Court's overall Strategic Plan as a crucial aspect of its strategic goals of 'quality of justice' and being 'a model of public administration'.

- **The Court** must urgently strengthen its quality management procedures to ensure each unit, team, entity, division and organ is operating at a high performance level and is able to meet their specific responsibilities in a consistent, effective and impactful manner.

182 *Proposed Programme Budget for 2013 of the International Criminal Court*, ICC-ASP/11/10, 13 August 2012, p 9.

183 Estimate of the Women's Initiatives for Gender Justice based on the 2012 trial proceedings in the Bemba, Ruto & Sang, Muthaura & Kenyatta, and Banda & Jerbo cases (pending resolution of the translation issues). Trial proceedings in the Katanga & Ngudjolo case have completed but the Trial Chamber has not yet issued its trial judgement. Should the charges be confirmed in the Gbagbo case, this could add a sixth trial to the 2013 activities of the OTP.

- **Considering** the progress and efforts made by the Court in recent years with the introduction of the rebuttal mechanism associated with the performance appraisal system, a review of the appraisal programme itself should be considered within the 2013-2014 period.[184]

- **The Court** should continue to strengthen and refine its work in the management of unsatisfactory performance including overseeing performance-related transitions from the ICC. Such a process must comply with the requirements of a fair and transparent process, ensure proper documentation of performance issues and provide clarity for staff members regarding expected performance results within reasonable timeframes.[185]

- **As part** of the next Strategic Plan, the Court should establish time-specific 'placement goals' for hiring suitably skilled women and those from non-represented or under-represented countries and regions. Placement goals serve as reasonably attainable objectives or targets that are used to measure progress towards achieving equal employment opportunities, and enable the Court to identify 'problem areas' resulting in disparities in relation to the appointment, promotion or attrition of competent staff who are otherwise under-represented in general, or under-represented in certain grade levels, such as women in mid-to-senior level positions within the ICC.

- **France** once again has the highest number of nationals appointed to the Court. Between 2008 and 2012, there has been an 87.5% increase in the number of French nationals appointed to professional posts. The number of French nationals (45) in 2012 is 105% more than the top-end of the desirable range of country representation for France, as specified by the Committee on Budget and Finance (CBF).[186] The desirable range for France is 16.27–22.01 nationals appointed to the ICC.[187]

- **The two countries** with the second and third highest number of appointees are the United Kingdom and the Netherlands. Both of these countries are also overrepresented within the Court with the number of nationals appointed to professional positions exceeding the top-end of desirable level of representation per country as specified by the CBF. With 27 nationals appointed to professional posts within the Court against a desirable range of 17.42-23.57, the UK exceeds the top-end of the desirable range by three individuals (13%). In the case of the Netherlands, the current number of employees (17), exceeds the top-end of the desirable range of 5.60–7.58, by 9 individuals (113%).[188]

- **The ceiling** to address overrepresentation by a state within a region should be implemented, gender balanced, equitable at all career levels, and support the development of competence within the ICC.

184 *Report of the Court on human resources management*, ICC-ASP/11/7, 4 May 2012, p 14.
185 *Report of the Court on human resources management*, ICC-ASP/11/7, 4 May 2012, p 14.
186 The ICC applies the same system of desirable ranges for geographical distribution of staff as the UN Secretariat (ICC-ASP/1/Res.10, Article 4). The desirable range for the ideal number of nationals to be recruited is determined by the consideration of three factors, each given a 'weight' in percentages: The membership factor: number of ICC Member States from the same region (40%); The population factor: size of each Member States' population (5%); The contribution factor: percentage the Member State contributes to the ICC's budget (55%).
187 *Report of the Committee on Budget and Finance on the work of its eighteenth session*, ICC-ASP/11/5, 9 August 2012, p 25.
188 *Report of the Committee on Budget and Finance on the work of its eighteenth session*, ICC-ASP/11/5, 9 August 2012, p 25.

- **The practices** which have given rise to the significant increase in the number of appointments of certain nationals should be reviewed by the ICC to assess how such an increase occurred, whether this reflects a policy decision, a change in 'practice', some form of bias or is necessitated by the operations of the Court. In addition, the overrepresentation of nationals should be assessed as to whether this profile is justifiable and significantly contributes to the efficacy and competence of the Court in the performance of its core functions and responsibilities.

- **The ASP** should urgently increase the resources for the Human Resources Sections of the ICC to ensure they are able to fulfil the many tasks and functions which fall within their mandate. When compared with other international organisations of comparable size, the Human Resource Sections of the ICC are underfunded, inhibited in their ability to lead and oversee compliance strategies and lack sufficient resources to address all of the demands.

- **Prioritise** the need for ongoing gender training for staff of each organ of the Court and require attendance at internal and external gender training seminars to be mandatory. Although gender issues are sometimes incorporated into the training organised by the different organs and sections of the Court, including the induction training for new staff, greater attention should be given to hiring staff with this expertise and providing training activities solely dedicated to developing greater competence on gender issues.

- **Ensure immediate** and full compliance by every organ of the Court regarding the advertising of all ICC posts on the Court's website, in compliance with Resolution ICC-ASP/1/Res.10.[189]

- **Continue to diversify** the tools for advertising ICC vacancies through media, email listserves or other means that are accessible to a larger audience.[190] For example:

  - Websites, listserves, blog sites or newsletters of NGO networks, regional or national bar associations, and national or regional print media in countries underrepresented among Court staff, and

  - Networks, websites, blog sites or newsletters of national, regional and international women's and human rights organisations and networks, national or local associations of women police, national associations of women lawyers, women judges' associations and women's networks within other judicial associations such as the International Bar Association, the International Criminal Bar and the International Association of Prosecutors.

- **Actively** collect *Curricula Vitae* of competent women and other professionals even when there are no job openings, and keep these documents as active files for future hiring processes.

189 *Selection of the staff of the International Criminal Court*, ICC-ASP/1/Res.10, 9 September 2002. This Resolution was adopted by consensus during the first session of the Assembly of States Parties held from 3 to 10 September 2002 in New York.

190 The Court has developed different human resources activities in the last years. These include a recruitment mission to a country of an underrepresented Eastern European country in 2009, advertising campaigns in newspapers, magazines and employment websites, and participation to job fairs. According to the Court, the use of other low-cost measures, including the fast-tracking for the recruitment of nationals form non- or underrepresented States, to address the underrepresentation of specific States Parties will be considered. *Report of the Court on human resources management*, ICC-ASP/11/7, 4 May 2012, p 3-5.

Field Offices

- **During 2013-2014**, the Registry should conduct an assessment and survey of the impact on local communities of the scaling down and closures of the field offices carried out in 2011 and 2012 to evaluate the impact of these decisions on the interface between the Court and victims' communities, and on their access to information about the ICC. Such an exercise should be considered before proceeding with the planned reduction of field-based staff in the DRC and Uganda.[191]

- **The ASP** should ensure the Field Offices are adequately funded and effectively managed with stronger coordination within the offices, to ensure they are operating in an effective and accountable manner, utilising field office resources efficiently and able to perform a range of complex functions.

- **The ASP** should resist any consideration by the ICC to withdraw from the exercise of its jurisdiction in relation to the referral of the Situation of Uganda. The Court should retain jurisdiction due to the limited capacity of the Ugandan International Crimes Division (ICD), at this stage, to meet the standards of the Rome Statute, particularly in relation to gender-based crimes. In the first trial before the ICD, the Office of the Director of Public Prosecutions was found to have overlooked critical issues including whether the accused qualified for amnesty under the Ugandan Amnesty Act.[192] Such an oversight ultimately led to a dismissal of the case[193] which has been before the Ugandan Supreme Court on appeal since 12 April 2012. In such circumstances, the principle of complementarity has not been met. As such, the ICC cannot withdraw from Uganda and leave justice processes to a local judicial mechanism which, at this time, is demonstrably unable to provide justice in relation to war crimes, crimes against humanity and genocide.

- **The ICC** should continue the progress it has made towards strengthening the gender representation, capacity and operations of the field offices. In 2011, 20% of the professional posts in the field offices were held by women, compared with 52% in 2012. This increase is reflected across all of the offices and is primarily due to the reduction of male staff in the DRC, Uganda and the CAR offices and the appointment of one more woman in each of the DRC and the CAR offices and three more women appointed to the Kenya task force. Overall, women are clustered into the P2 levels in the field offices with 33% of P3 posts held by women. The P4 post established this year located in the Kenya task force is held by a woman.

- **The ICC** should also address the lack of representation of nationals appointed to professional posts within field offices. Currently there are no nationals from the countries with field offices appointed to professional positions.

191 *Proposed Programme Budget for 2013 of the International Criminal Court*, ICC-ASP/11/10, 13 August 2012, p 76.
192 Ugandan Amnesty Act, 1 January 2000.
193 For further information on the Ugandan ICD case, please see the *Outstanding Arrest Warrants* section of this Report.

Budget

- **The Court must** continue to prioritise improvements in its budget process as well as embark on longer term financial planning.[194]
- **The Court should** consider the submission of a 3-year expenditure forecast to the CBF, in addition to the proposed annual budget, as a means of encouraging medium-term planning, reducing unexpected budget expenditures and building the capacity of the Court, a large and complex institution, to more effectively identify known or knowable costs.
- **The ASP should approve** a minimum budget of €118.54 million for the 2013 budget, as requested by the ICC. Currently the CBF has proposed the adoption of a budget of €115 million for 2013,[195] a modest increase of 4% from the 2012 approved budget (excluding the rent of €6.02 million for the interim premises).[196] Additional funds are needed and justified in 2013 given the greater number of trials and investigations expected this year.
- **The ASP should adopt** a decision at the eleventh ASP to open an ICC–African Union Liaison Office with an advance team in 2013. Such an office would:
  - Stabilise and enhance regional support for the ICC among AU governments;
  - Increase awareness among African peoples of the work and mandate of the ICC; and
  - Provide cohesion between the ICC and the policy related efforts of the AU regarding regional prevention and accountability for war crimes, crimes against humanity and genocide.
- **The ASP should** support the recommendation of the CBF that all State Parties 'pay their assessed contributions in full and on time, in order to ensure that the Court had sufficient funds throughout the year, in accordance with regulation 5.6 of the Financial Regulations and Rules'.[197]
- **All States Parties** who are in arrears must provide the minimum payment required to avoid the application of Article 112(8). According to the *Report of the Committee on Budget and Finance on the work of its nineteenth session*, as of 2 October 2012, seven States Parties remained in arrears and were ineligible to vote.[198]
- **The ICC should** complete a thorough report for consideration by the CBF at its twentieth session in 2013 regarding the establishment of the Junior Professional Officer (JPO) programme.[199] While assisting with the reduction in staffing levels, such a programme should not act as a *de facto* recruitment strategy for the Court.

194 In 2011, the Committee on Budget and Finance (CBF) noted a number of budget issues, including the unprecedented number of potential expenses which were not contained in the 2012 proposed budget. The Committee also noted the significantly higher expenses in the Judiciary which had been miscalculated in the 2012 budget submitted by this organ to the CBF. (*Report of the Committee on Budget and Finance on the work of its seventeenth session*, Advance Version, ICC-ASP/10/15, 6 September 2011, p 8).
195 [Draft] *Report of the Committee on Budget and Finance on the work of its nineteenth session*, ICC-ASP/11/10, 8 October 2012, p 4.
196 Resolution ICC-ASP/10/Res.4, 21 December 2011, para 1.
197 [Draft] *Report of the Committee on Budget and Finance on the work of its nineteenth session*, ICC-ASP/11/10, 8 October 2012, p 10.
198 [Draft] *Report of the Committee on Budget and Finance on the work of its nineteenth session*, ICC-ASP/11/10, 8 October 2012, p 10.
199 [Draft] *Report of the Committee on Budget and Finance on the work of its nineteenth session*, ICC-ASP/11/10, 8 October 2012, p 12.

Victims and witnesses

- **Between 4 May** and 1 June 2011, the judges of the ICC invited submissions regarding a review of the roles of the Office of Public Counsel for Victims (OPCV) and the Office of Public Counsel for the Defence (OPCD). On 1 June 2011, the Women's Initiatives for Gender Justice submitted a paper which analysed the role of the OPCV and each of the entities currently working on victims issues within the ICC. The Women's Initiatives included a statutory review of each of the primary bodies, namely the OPCV, the Victims and Witness Unit (VWU) and the Victims Participation and Reparation Section (VPRS) as well as an analysis of the mandate, roles and challenges for each of these entities. The submission identified:
  - The need for greater clarity in the delineation of roles and avoidance of duplication;
  - Greater coordination and cooperation between the current bodies, especially the OPCV and the VPRS;
  - The interconnected nature of the tasks undertaken by the OPCV, the VPRS and the Public Information and Documentation Section (PIDS);
  - The impact on victims and victimised communities of poor programme coordination and delivery, and the mutual impact each section has on the other in the performance of their activities.
- **The judges** should publish the outcomes of the review along with their recommendations for strengthening the efficient functioning of each entity as well as supporting the effective participation of victims before the ICC.
- **The VPRS and PIDS** should both receive an increase in resources and be required to develop complementary communication strategies designed to reach potential female applicants and victims. Currently male victims are the majority of victims applying to the Court, formally recognised by the Court and participating in outreach activities of the ICC.[200]
- **The ASP** should significantly increase the resources available to the Victims and Witnesses Unit to enable them to address the large number of witnesses within its programme due to the increase in the number of investigations and trials in 2013. The VWU must also have the resources needed to respond to their full mandate to provide support and protection to victims and intermediaries whose lives may be at risk as a result of engaging with, or assisting ICC enquiries and investigations or at risk as a result of testimony provided by a witness.[201] Currently victims and intermediaries are excluded from the security provisions of the Court and as such participate or assist the Court at great potential risk to themselves, their families and their communities.

200 Based on data provided by the VPRS as of 20 September 2012, male victims are the majority of recognised victims in the following cases: Lubanga and Katanga & Ngudjolo with regard to the DRC Situation; Kony *et al* in the Uganda Situation; Abu Garda, Harun & Kushayb, Al'Bashir and Banda & Jerbo in the Sudan Situation; Bemba in the CAR Situation; and Ruto & Sang in the Kenya Situation. See the table on *Gender breakdown by Situation/Case of victims who have been formally accepted to participate in proceedings*, page 270.

201 Rule 16 (2), Rome Statute.

- **In 2013** the Court should develop, as a matter of urgency, a comprehensive security framework inclusive of witnesses, victims[202] and intermediaries[203] to ensure that protection mechanisms are tailored to their particular status, level of risk and specific circumstances.
- **The VWU** should ensure that protection and support measures are sensitive to the particular circumstances of women in conflict situations and ensure women and girls who are formally recognised by the Court as 'victims' benefit from appropriate protection procedures.
- **The Registry** should urgently request, and the ASP should immediately provide, the necessary funds for the position of Psychologist/Trauma Expert to be upgraded to an established post.[204] This position has been categorised as a GTA since 2009. Such expertise is mandated by Article 43(6) of the Rome Statute and as such this position should be securely integrated within the structure of the VWU as an established post.
- **The VWU** should plan to increase the number of Psychologists/Trauma Experts to four by 2014, given the significant increase in cases and trials before the ICC for which the sole Trauma Expert provides critical and independent support to witnesses and to Chambers, upon their request.
- **The ASP** should support an increase in resources for the VPRS to further promote the victim application process and participation facility available under the Rome Statute. The VPRS must make it a priority to inform women in all of the conflict Situations of the victim application process, their right to apply, and the possibility of being recognised to participate in ICC proceedings.
- **In the next** 12 months, steps should be taken to urgently address and strengthen the institutional and personnel capacities of the VPRS including, but not limited to: conducting a review of the senior management processes and oversight of the Section; conducting a skills audit of the Section staff; reviewing performance and roles; fully implementing the new data collection function introduced in 2010; and creating a more effective mechanism and response strategy to avoid a backlog of unprocessed victim application forms.
- **In 2013** the VPRS should prioritise completion of the implementation of the new database system for processing applications and provide more accurate data on applicants and recognised victims. Currently there are significant gaps in the data and profile of applicants seeking to be recognised formally as victims by the ICC. The percentage of applicants whose gender is registered as unknown (29.3%) continues to be high.[205]

202 Victims who have been formally recognised by the ICC to participate in proceedings.
203 With an emphasis on local intermediaries.
204 *Proposed Programme Budget for 2013 for the International Criminal Court*, ICC-ASP/11/10, 13 August 2012, p 118.
205 According to the VPRS 'gender' may be registered as 'unknown' either because the information has not yet been entered in their database or because the applicant has not indicated their gender in her/his application and it is not possible to retrieve this information from the application form. VPRS has indicated that the development of their database is ongoing and should be fully operational in 2013, which will enable the VPRS to extract gender disaggregated data. Explanation provided by the VPRS by emails dated 3 September 2012 and 20 September 2012.

- **The safety practices** adopted by the VPRS in their country-based consultations should ensure that applicants and victims are not overly exposed to each other, to the wider community nor to NGOs who are not directly involved as intermediaries with the specific victims. [206]

- **The methodology** employed by the VPRS for consulting victims about their views on legal representation should ensure that victims are provided with information regarding the full range of options for legal representation, along with relevant security issues, including the protection the ICC is able/unable to provide. Victims should not feel pressured into agreeing to a common legal representative and should be provided with accessible information about all available options associated with legal representation and their rights as applicants before the ICC.

Legal Counsel and Professional Investigators

- **The Counsel Support Section** (CSS) should ensure that the application form for the List of Legal Counsel seeks information about candidates' experience representing victims of gender-based crimes. Currently, lawyers with this specialised expertise are not yet explicitly encouraged to apply. The Registry should encourage applications from lawyers with this experience on the ICC website and develop a 'Frequently Asked Questions' page to promote a better understanding of the application process.

- **In May 2010**, the Registry of the ICC, in collaboration with the International Bar Association, launched the *Calling African Women Lawyers* campaign to address the consistent underrepresentation of women on the List of Legal Counsel. The campaign, initially planned for six months, was extended to the end of 2011. Activities associated with the Campaign, including events addressed to African women lawyers organised in African countries, have been discontinued in 2012 due to budgetary constraints. However, the campaign website remains active.

  A review of the figures indicates there has been a 233% increase in the number of African women appointed to the List of Legal Counsel between 2010-2012. There are now 40 African women on the List, compared with 12 appointees in 2010. Between 2010 and 2011, more women were appointed to the List in a 12-month period than in any other year since the List of Legal Counsel was opened in 2006. However, during 2012 there has only been a 1% increase in the number of African women on the List. This small increase may be related to the cessation of all activities aimed at proactively reaching out to African women lawyers during 2012 due to budgetary constraints.

- **The CSS** should report to the eleventh session of the ASP on their proposed strategies for continuing this intervention as well as initiating other campaigns to promote the List of Legal Counsel to women lawyers in other regions. Currently 433 individuals have been appointed to the List, of which 325 are men (75%) and 108 are women (25%).

206 The Women's Initiatives for Gender Justice makes these recommendations regarding VPRS field consultations based on feedback from victims, applicants and partners in the Situation countries.

- **A comprehensive evaluation** of the campaign should be conducted by the CSS. In addition, the CSS should establish baseline data for new regional campaigns to enable it to monitor and evaluate the impact of tailored interventions in increasing applications from women lawyers, and ultimately increasing the number of women lawyers appointed to the List.

- **On 26 May 2011**, a second regional campaign was launched by the Court. Unlike the Africa-based campaign, the *Calling Arab Counsel* campaign does not focus specifically on women lawyers from the MENA region. In 2012, six appointees from this sub-region have been included on the List of Legal Counsel, three less than in 2011. Only one is a woman. This year, two appointees to the List of Assistants to Counsel (both male) come from Arabic speaking countries.

- **From the outset** the CSS should integrate gender-specific strategies within any new regional campaign and ensure that both female and male lawyers are made aware of the List of Legal Counsel. In light of the proven impact of such strategies in raising the awareness among female African lawyers, increasing applications from this population, and ultimately increasing the number of female lawyers appointed to the List with the appropriate level of experience and expertise, such strategies should be replicated for any new regional campaign.

- **Such campaigns** must actively seek applications from lawyers with experience in prosecuting cases of gender-based violence or representing victims/survivors of such crimes. This is particularly important for the *Calling Arab Counsel* campaign given the low number of lawyers from this region currently on the List of Legal Counsel, the allegations of rape and sexual violence in the Libyan conflict and the existing charges for such crimes in four out of the seven arrest warrants and summonses to appear in the Sudan Situation.

- **In addition** to the online promotion of the campaigns, other events, workshops and information seminars for lawyers should be held within the targeted regions. CSS campaigns must be linked to broader, integrated strategies and ensure that over time, the necessary skills and expertise among lawyers on the List of Counsel will address the distinct interests of victims, particularly victims of sexual or gender violence, as obligated under Rule 90(4).

- **The CSS** should embark on a vigorous recruiting campaign to increase the number of women on the List of Professional Investigators, as well as of individuals coming from the Situation countries. Currently, only one woman is included in the list out of a total of 29 members, and only one investigator comes from a Situation country (the DRC).

- **Prioritise** the need for training individuals on the List of Legal Counsel, the List of Assistants to Counsel and the List of Professional Investigators on the gender provisions of the Rome Statute and interviewing/working with victims of rape and other forms of sexual violence.

- **The ASP** should fund a financial investigation function for legal assistance to assist with the determination of indigence and support additional resources for the legal aid scheme.

- **A specific form** to assess the indigence of victims should be developed as a matter of urgency.

Trust Fund for Victims

- **The Trust Fund for Victims** (TFV) should urgently embark upon developing and launching a public fundraising strategy and vigorous resource mobilisation campaign. The level of funding raised by the TFV in 2012 (€942,800) is the lowest since the Fund became operational in 2008. Of this figure, €640,000 was provided by the UK in an unexpected donation in July 2012. Prior to this announcement, less than €300,000 had been secured by the Trust Fund for its assistance and reparations mandates in 2012.
- **The fundraising campaign** should consider: retaining current donors; attracting new donors among States Parties; reaching out to non-States Parties who may wish to engage with the Court through the Trust Fund; encouraging both cash and in-kind donations; developing a specific strategy with the private sector; implementing a scheme for individual donors and high-net individuals; and launching more targeted donor appeals.
- **As of October 2012,** no new funds have been received since 2011 for victims of sexual and gender-based violence and no new fundraising efforts have focused on this important initiative. The Fund has received a total of €1,740,000 as earmarked contributions in response to the appeal launched in September 2008. Norway is the largest contributor to the sexual and gender-based violence initiatives with €698,400 donated since the appeal was launched. The appeal should be renewed for a further three-year period given the needs of victims/survivors and the scope of the problem in situations under the jurisdiction of the ICC. Through the promotion of the Trust Fund and raising global awareness of the challenges faced by victims of these crimes, especially in situations of armed conflict, the TFV should aim to 'leverage' other resources in support of the special appeal for victims of sexual and gender-based violence.
- **The ASP** must provide sufficient core funds for the operational budget of the Trust Fund and not require the TFV to utilise voluntary contributions to cover institutional overhead and administrative costs. Sufficient resources for the TFV are vital for providing support to victims, ensuring its stability as a structure and inspiring further contributions from a variety of public and private sector sources.
- **During the eleventh session** of the Assembly of States Parties, States should approve the request advanced by the Board of Directors of the Fund to allocate €1 million to complement the TFV's reserves for the implementation of Court-ordered reparations. The current total amount available for reparations for all cases is €1.2 million. This would decrease the strain on the Fund's current resources, in light of the limited fundraising undertaken in 2012, which are necessary to carry out the TFV's assistance mandate.[207]
- **The Trust Fund** should urgently communicate to States, donors and civil society, the process for developing its Strategic Plan which expired in 2012 and ensure continuity of objectives, programme strategies, and direction for this new phase of its work including the initiation of reparations. Like the TFV's strategic management process in 2008, the development of the new plan should ensure the involvement of key stakeholders including civil society and grassroots women's organisations as a way to promote transparency regarding the TFV's future intentions and priorities. Such a process would assist with promoting the TFV and generating greater visibility, in support of its fundraising initiatives.

207 As provided for by the TFV Regulations 21(d), 35 and 36. *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2011 to 30 June 2012*, ICC-ASP/11/14, 7 August 2011, p 9.

- **In addition** to the criteria for the 'special vulnerability of women and girls'[208] to be addressed in projects, the Secretariat should adopt proactive strategies to solicit proposals explicitly from women's groups and organisations. Benchmarks could be established to ensure that applications from women's organisations, for the purpose of benefiting women victims/survivors, are between 45%-55% of the overall number of proposals received and funded.
- **The engagement** of local women's organisations with TFV intermediaries could be further encouraged by their inclusion in capacity building initiatives to enhance their ability to be prospective partners with the TFV in the future.
- **The TFV** should ensure that intermediaries with whom they partner have sound gender policies and strategies for addressing gender issues within their projects.
- **The Board and Secretariat** of the Trust Fund for Victims must ensure that implementation of Court orders for reparations are designed to integrate gender strategies, include women victims/survivors as recipients and participants, and address often invisible issues of gender bias among potential implementing partners.
- **The Secretariat** of the TFV should urgently prioritise the establishment of the *ad hoc* expert Advisory Committee on Reparations approved by the Board of the TFV at their Annual Meeting held in March 2011. The establishment of the expert Advisory Committee would assist the TFV's work in designing the framework and operational parameters for the reparations programme. This is particularly urgent following the decision issued by Trial Chamber I on 7 August 2012 on the implementation of reparations to victims related to *The Prosecutor v. Thomas Lubanga Dyilo* case.
- **Implementation** of the reparations programmes and future assistance projects should be guided by the findings of the longitudinal evaluation carried out by the TFV in 2010. The preliminary findings of this research have identified differences between the way female and male victims/survivors relate to both justice and reparations issues.[209]
- **The Secretariat** should continue to monitor the situation in Kenya and proceed towards an assessment of the Kenyan Situation in 2013, mindful of the relevant international and domestic judicial processes.
- **The TFV** should begin consideration of possible assessments of the Situations in Libya and the Côte d'Ivoire, subject to the relevant judicial processes.

208 *Trust Fund for Victims Global Strategic Plan 2008-2011*, Version 1, August 2008, p 16.

209 The methodology and analysis for the longitudinal research study was developed by Kristin Kalla, Senior Programme Officer, and Peter Dixon, Research Associate, as described in *Learning from the TFV's Second Mandate: from Implementing Rehabilitation to Assistance to Reparations*, Programme Progress Report, Fall 2010, p 11.

Office of the Public Counsel for Victims (OPCV)

- **Given the** increase in the number of victims applying to participate in proceedings before the ICC and requesting assistance from the OPCV, an increase in staff is urgently required in order for the Office to respond to the growing demands on its role. The number of victims assisted and represented by the OPCV has increased since 2006 when 85 victims were assisted and represented by the Office to 3,579 victims in 2012.
- **This year** information regarding the breakdown of victims by case, and by the type of crimes reported by victims per Situation and case was not available. However, with the new database system introduced in 2010, in future years the OPCV will be able to provide information regarding the gender breakdown of victims they represent by each case, every Situation and the specific crimes reported. This will provide the OPCV, and the Court as a whole, with more information about the type of applicant, the gender of victims and types of crimes for which victims are seeking redress and participation in proceedings before the ICC.
- **Over the next** 12 months the OPCV should develop a long term strategic plan which includes a significant increase in the number of staff. Currently the OPCV has a staff of 10 (nine professional staff and one general staff) working with over 3,579 applicants.
- **The ASP** should support growth in the capacity of the OPCV to 15 full-time staff by January 2014 and allocate additional funds for 2013 in light of the assumptions made by the ICC regarding the provision of legal aid support for twelve victim's representative teams,[210] each of which will qualify for assistance, legal advice and research to be provided by the OPCV.
- **Overall**, across all Situations, male victims are the majority of those attending PIDS outreach activities,[211] the majority of those represented or assisted by the OPCV (60% of the total, 3.5% less than in 2011) and the majority of those formally recognised as victims by the Court (46.4%).[212] Men are the majority of victims represented and assisted by the OPCV in every Situation before the ICC, with a male/female differential ranging from 72% in relation to the Situation in Libya (where 14% of the victims are female and 86% are male) to 8% in relation to the Situation in the CAR (where 46% of the victims a female and 54% are male).

210 *Proposed Programme Budget for 2013 of the International Criminal Court*, ICC-ASP/11/10, 13 August 2012, p 9.

211 Data reported in the *Gender Report Card 2011* showed that 74% of those attending outreach activities between 1 October 2010 and 30 July 2011 were men. Email communication with Outreach Unit, 13 September 2011.

212 The complete breakdown of victims formally accepted to participate in proceedings is as follows: male victims, 46.4%; female victims, 40.2%; institutions and organisations, 0.2%; and victims whose gender has not been registered, 13.2%. Figures as of 31 August 2012. Information provided by the Victims Participation and Reparation Section by email dated 20 September 2012. See the *Gender breakdown by Situation/Case of victims who have been formally accepted to participate in proceedings*, page 270.

Policies and internal audits

- **During 2013**, the Presidency of the ICC should oversee a review of the Staff Code of Conduct and carry out an audit on workplace compliance with Staff Rules and Regulations. These audits should include each organ and be implemented at all levels of the institution. Inter-organ committees could be established to assist with the framework of the audits and include the necessary expertise. The results of the audits should be shared with the Bureau of the Assembly of States Parties. Recommendations to address any incidents or patterns of harassment, non-compliance or corruption should be presented to the ASP. The ICC has a responsibility to ensure the legal rights of employees are respected and to provide staff with a non-discriminatory, equality-based, ethically-sound, human-rights respecting work environment.
- **The Court** should designate focal points for the Sexual Harassment Policy and Equal Opportunity Policy, clarify and/or amend the procedure involved in making formal complaints (ie whether complainants have a right to participate in the proceedings before the Disciplinary Advisory Board or whether complainants have access to a representative) and conduct staff-wide orientation on the grievance procedures for both Policies.
- **Implement** training for ICC staff on the grievance procedures for the Sexual Harassment and Equal Opportunity Policies.
- **Develop** and promote a flexible employment policy, so that ICC staff are aware of, and not discouraged from exercising provisions relating to parental leave, modified work schedules or other accommodation as needed. This facilitates the recruitment, and enables the ongoing employment, of staff members (primarily women) with family and other commitments.
- **Ensure** adequate access to and information about childcare resources or facilities, and encourage the Human Resources Section to include additional information on its Recruitment page of the website thus indicating the ICC is responsive to the needs of those with family commitments.
- **Establish** a mentorship programme for staff, particularly female staff and staff from regions underrepresented in management positions, to support their potential advancement towards decision-making and senior posts.
- **Encourage** senior personnel at the Court to participate in training on 'managing workplace diversity' to facilitate a positive workplace environment for women and individuals from other underrepresented groups and provide the necessary resources to carry this out.
- **Give consideration** to amending Article 112(3)(b) of the Statute, so that gender competence within the ASP Bureau is mandated, in addition to equitable geographical distribution and adequate representation of the principal legal systems of the world.

- **Review** and amend the current definition of 'spouse' in the Conditions of Service and Compensation of Judges of the ICC to include all domestic partnerships including same-sex partners, whether legally recognised or not under the law of the country of a judge's nationality. Same-sex unions have been legal in the Netherlands, the seat of the Court, since 1998 and are recognised by the United Nations within its staff rules and regulations.
- **Develop** and implement sexuality-based anti-discrimination training for the judges and Bureau of the ASP to assist with the Compensation amendment for judges in relation to domestic partnership.

Substantive Jurisdiction and Procedures

Substantive Jurisdiction[213]

War crimes and crimes against humanity

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other sexual violence

The Rome Statute explicitly recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence as war crimes in international and non-international armed conflict as well as crimes against humanity.[214]

Crimes against humanity

Persecution and trafficking

In addition to the crimes of sexual and gender-based violence listed above, persecution is included in the Rome Statute as a crime against humanity and specifically includes for the first time the recognition of gender as a basis for persecution.[215]

The Rome Statute also includes trafficking in persons, in particular women and children, as a crime against humanity within the definition of the crime of enslavement.[216]

Genocide

Rape and sexual violence

The Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention.[217] The EoC specify that 'genocide by causing serious bodily or mental harm [may include] acts of torture, rape, sexual violence or inhuman or degrading treatment'.[218]

Non-discrimination

The Rome Statute specifically states that the application and interpretation of law must be without adverse distinction on the basis of enumerated grounds, including gender.[219]

213 Footnote references in this section pertain to the Rome Statute of the International Criminal Court.
214 Articles 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g). See also corresponding Articles in the Elements of Crimes (EoC).
215 Articles 7(1)(h), 7(2)(g) and 7(3). See also Article 7(1)(h) EoC.
216 Articles 7(1)(c) and 7(2)(c). See also Article 7(1)(c) EoC.
217 Article 6.
218 Article 6(b) EoC.
219 Article 21(3).

Procedures

Measures during investigation and prosecution

The Prosecutor shall 'take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court and, in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children'.[220]

Witness protection

The Court has an overarching responsibility 'to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses', taking into account all relevant factors including age, gender, health and the nature of the crime, in particular sexual or gender-based crimes. The Prosecutor is required to take these concerns into account in both the investigative and the trial stage. The Court may take appropriate protective measures in the course of a trial, including *in camera* proceedings, allowing the presentation of evidence by electronic means and controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation. The latter measures shall, in particular, be implemented in the case of a victim of sexual violence or a child.[221]

The Rome Statute provides for the creation of a Victims and Witnesses Unit (VWU) within the Court's Registry. The VWU will provide protective measures, security arrangements, counselling and other appropriate assistance for victims and witnesses who appear before the Court, and others at risk on account of their testimony.[222]

220 Article 54(1)(b).
221 Article 68. See also Rules 87 and 88 RPE.
222 Articles 43(6) and 68(4).

Evidence

The Rules of Procedures and Evidence (RPE) provide special evidentiary rules with regard to crimes of sexual violence. Rules 70 ('PRINCIPLES of Evidence in Cases of Sexual Violence'), 71 ('EVIDENCE of Other Sexual Conduct') and 72 ('IN Camera Procedure to Consider Relevance or Admissibility of Evidence') of the RPE stipulate that questioning with regard to the victim's prior or subsequent sexual conduct or the victim's consent is restricted. In addition, Rule 63(4) of the RPE states that corroboration is not a legal requirement to prove any crime falling within the jurisdiction of the Court and in particular crimes of sexual violence.

Participation

Article 68(3) of the Rome Statute explicitly recognises the right of victims to participate in the justice process, directly or through legal representatives, by presenting their views and concerns at all stages which affect their personal interests.[223]

Rule 90(4) of the RPE requires that there be legal representatives on the List of Legal Counsel with expertise on sexual and gender-based violence.

Rule 16(1)(d) of the RPE states that the Registrar shall take 'gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings'.

Reparations

The Rome Statute includes a provision enabling the Court to establish principles and, in certain cases, to award reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.[224] The Statute also requires the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and for their families.[225]

223 See also Rules 89-93 RPE.
224 Article 75. See also Rules 94 – 97 RPE.
225 Article 79. See also Rule 98 RPE.

States Parties/ASP

29 November 2011 — 11 October 2012

This section highlights key issues and important developments in relation to the ICC Assembly of States Parties (ASP). At the time of writing this Report, the ICC has 121 States Parties, with the accession of Vanuatu in December 2011, and Guatemala in April 2012. In 2012, the ASP has further progressed its discussions on the governance of the Court, focusing on expediting the criminal process, and enhancing the transparency and predictability of the budgetary process.

In a milestone for the Court, at the tenth session of the ASP in 2011, new senior leaders were elected to both the Office of the Prosecutor and the ASP. Significantly, both the positions of Chief Prosecutor and President of the ASP are now held by women. Six new judges have also been elected to the bench of the ICC including two female judges, thus bringing the total number of women serving as judges at the ICC to 10, a majority of the Court's 18 judges. Ensuring resources for the work of the Court remains a focus for the eleventh session of the ASP, with a number of States Parties supporting a zero-growth budget.

In this section we also discuss the budget proposed by the Court, including a discussion of funding for legal aid for both defence and victims, field offices and the contingency fund.

States Parties to the Rome Statute as of 17 August 2012[226]

Total number of ICC States Parties: **121**
Total number of ASP Bureau members: **21**

President of the ASP: Ambassador Tiina Intelmann (Estonia)
Vice-Presidents: Ambassador Markus Börlin (Switzerland) and Ambassador Ken Kanda (Ghana)

Regional Group	*Number of States Parties*	*% of States Parties*	*Number of Bureau members*	*% of Bureau members*
African States	**33**	**27.3%**	**5**	**23.8%**
Asia-Pacific States	**18**	**14.9%**	**3**	**14.3%**
Eastern European States	**18**	**14.9%**	**4**	**19.05%**
Group of Latin American and Caribbean States (GRULAC)	**27**	**22.3%**	**4**	**19.05%**
Western European and Others Group (WEOG)	**25**	**20.7%**	**5**	**23.8%**
Totals	**121**		**21**	

226 Information as adapted from the ICC's website. See <http://www.icc-cpi.int/Menus/ASP/states+parties/>, last visited on 11 October 2012.

African States (33)

Benin (22 January 2002), Botswana (8 September 2000), Burkina Faso (30 November 1998), Burundi (21 September 2004), the Central African Republic (3 October 2001), Cape Verde (11 October 2011), Chad (1 January 2007), Comoros (18 August 2006), Congo (3 May 2004), the Democratic Republic of the Congo (11 April 2002), Djibouti (5 November 2002), Gabon (20 September 2000), Gambia (28 June 2002), Ghana (20 December 1999), Guinea (14 July 2003), Kenya (15 March 2005), Lesotho (6 September 2000), Liberia (22 September 2004), Madagascar (14 March 2008), Malawi (19 September 2002), Mali (16 August 2000), Mauritius (5 March 2002), Namibia (20 June 2002), Niger (11 April 2002), Nigeria (27 September 2001), Senegal (2 February 1999), Sierra Leone (15 September 2000), Seychelles (10 August 2010), South Africa (27 November 2000), Tunisia (22 June 2011), Uganda (14 June 2002), United Republic of Tanzania (20 August 2002), and Zambia (13 November 2002).

Asia-Pacific States (18)

Afghanistan (10 February 2003), Bangladesh (23 March 2010), Cambodia (11 April 2002), Cook Islands (18 July 2008), Cyprus (7 March 2002), Fiji (29 November 1999), Japan (17 July 2007), Jordan (11 April 2002), Maldives (21 September 2011), Mongolia (11 April 2002), Marshall Islands (7 December 2000), Nauru (12 November 2001), Philippines (30 August 2011), the Republic of Korea (13 November 2002), Samoa (16 September 2002), Tajikistan (5 May 2000), Timor-Leste (6 September 2002), Vanuatu (2 December 2011).

Eastern European States (18)

Albania (31 January 2003), Bosnia and Herzegovina (11 April 2002), Bulgaria (11 April 2002), Croatia (21 May 2001), Czech Republic (21 July 2009), Estonia (30 January 2002), the Former Yugoslav Republic of Macedonia (6 March 2002), Georgia (5 September 2003), Hungary (30 November 2001), Latvia (28 June 2002), Lithuania (12 May 2003), Montenegro (3 June 2006), Poland (12 November 2001), Republic of Moldova (12 October 2010), Romania (11 April 2002), Serbia (6 September 2001), Slovakia (11 April 2002), and Slovenia (31 December 2001).

GRULAC States (27)

Antigua and Barbuda (18 June 2001), Argentina (8 February 2001), Barbados (10 December 2002), Brazil (20 June 2002), Belize (5 April 2000), Bolivia (27 June 2002), Chile (29 June 2009), Colombia (5 August 2002), Costa Rica (30 January 2001), Dominica (12 February 2001), Dominican Republic (12 May 2005), Ecuador (5 February 2002), Grenada (19 May 2011), Guatemala (2 April 2012), Guyana (24 September 2004), Honduras (1 July 2002), Mexico (28 October 2005), Panama (21 March 2002), Paraguay (14 May 2001), Peru (10 November 2001), Saint Kitts and Nevis (22 August 2006), Saint Lucia (18 August 2010), Saint Vincent and the Grenadines (3 December 2002), Suriname (15 July 2008), Trinidad and Tobago (6 April 1999), Uruguay (28 June 2002), and Venezuela (7 June 2000).

WEOG States (25)

Andorra (30 April 2001), Australia (1 July 2002), Austria (28 December 2000), Belgium (28 June 2000), Canada (7 July 2000), Denmark (21 June 2001), France (9 June 2000), Finland (29 December 2000), Germany (11 December 2000), Greece (15 May 2002), Iceland (25 May 2000), Ireland (11 April 2002), Italy (26 July 1999), Liechtenstein (2 October 2001), Luxembourg (8 September 2000), Malta (29 November 2002), the Netherlands (17 July 2001), New Zealand (7 September 2000), Norway (16 February 2000), San Marino (13 May 1999), Spain (24 October 2000), Sweden (28 January 2001), Switzerland (12 October 2001), Portugal (5 February 2002), and the United Kingdom (4 October 2001).

Focus: Governance

With the adoption of the Rome Statute in 2002, the international community established a *sui generis* international criminal court with a complex institutional structure. The internal governance framework is provided for under the Rome Statute (Articles 34-52) and subsidiary texts and has been further developed through the Court's practices. Pursuant to Article 34 of the Rome Statute, the Court is composed of the following four organs, each with distinctive functions ascribed to it by the Statute:

- **The Presidency**[227]
- **The Appeals Division, the Trial Division and the Pre-Trial Division** (the Chambers)[228]
- **The Office of the Prosecutor** (OTP)[229]
- **The Registry**[230]

The independence of the different organs constitutes a crucial aspect of the Rome Statute governance structure and is central to the integrity of investigations and judicial proceedings. The ASP, in turn, provides overall management oversight to the Presidency, the Prosecutor and the Registrar regarding the proper administration of the Court.

227 Article 38 provides that the Presidency is responsible for the proper administration of the Court, with the exception of the OTP. The Presidency shall coordinate with and seek concurrence of the Prosecutor on all matters of mutual concern.

228 Articles 39 and 40 provide that the judges of the three Divisions (including the members of the Presidency) are responsible for the conduct of judicial proceedings before the Court. The judges shall be independent in the performance of their duties.

229 Article 42 provides that the OTP acts independently as a separate organ of the Court, and the Prosecutor has full authority over the management and administration thereof. The Presidency and Prosecutor coordinate on matters of mutual concern.

230 Acting within the Presidency's overall responsibility and subject to the authority of the President over the Registrar, pursuant to Article 43, the Registry carries out the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor.

Following the carrying out of governance evaluations and risk assessments undertaken by different organs of the Court, consolidated in a Court-wide Corporate Governance Statement in 2010, and upon the recommendation by the Committee of Budget and Finance (CBF), at the ninth session of the ASP in December 2010, the ASP adopted Resolution ICC-ASP/9/Res.2 establishing a Study Group on Governance (SGG) to further consolidate the Court's internal management structures. Initially established for one year, at the tenth session of the ASP, the SGG's mandate was extended until the end of 2012.[231] In its 2012 report, the SGG recommended to the ASP that its mandate be further extended.[232]

This section provides an overview of the Court's current corporate governance framework, in addition to a brief discussion of the SGG's work. Recommendations for the development of the Court's governance structure are contained in the **Recommendations** section of the *Gender Report Card 2012*.

The ICC's corporate governance framework

One of the key aspects of the ICC's institutional structure is guaranteeing the independence of the different organs of the Court, in particular the Office of the Prosecutor, while ensuring a harmonised, coordinated approach to the effective and efficient management of the Court. Articles 34 to 52 of the Rome Statute establish a clear division between the functions and authority of the Office of the Prosecutor and the other organs of the Court.[233] According to the Statute, neither the Registry nor the Presidency has any authority over the management and administration of the Office of the Prosecutor, and *vice versa*, while the Registrar shall exercise her or his functions under the authority of the President of the Court.[234] The Rome Statute's governance framework 'left open the possibility of different arrangements for the servicing of the various organs',[235] and in practice, the Court has established administrative services largely coordinated by the Registry, with the Office of the Prosecutor also maintaining a significant level of administrative functions tailored for its operations.[236]

Since the entry into force of the Rome Statute in 2002, the Court has continually sought to develop and clarify the responsibilities of the different organs while ensuring respect for their independent functions. In 2006, the then-President, then-Prosecutor and then-Registrar carried out an assessment of the risks facing the ICC. The assessment concluded that the three major risks facing the Court were: (i) a lack of effectiveness or quality in the Court's operations; (ii) divisions within the Court; and (iii) the loss of external support for the Court.[237] Subsequently, in 2008 an enterprise risk management exercise was carried out in order to assess the objectives, priorities and responsibilities of the

231 ICC-ASP/10/Res.5, para 37.
232 Draft report of the Study Group on Governance, 2012, para 9.
233 ICC-ASP/9/34, paras 9-12.
234 Article 43(2).
235 ICC-ASP/9/34, para 13. See also Articles 34-52 of the Rome Statute.
236 These include interpretation services, procurement functions, IT and other administrative support. The OTP also operates its own in-house development of job descriptions, evaluation of applicants and construction of the selection panel to ensure recruitment processes meet the specific needs of the Office.
237 ICC-ASP/9/34, para 1.

different organs,[238] which recommended that the Court adopt a formal 'corporate governance framework' to provide additional clarity. The ICC Corporate Governance Statement was adopted by the President and the Prosecutor on 25 February 2010[239] and on 15 March 2010 the agreement on the Roles and Responsibilities of the Organs in Relation to External Communication was internally adopted.[240]

238 ICC-ASP/10/7, para 1.

239 ICC-ASP/9/34, Annex 1 (hereinafter 'Corporate Governance Statement'). The Corporate Governance Statement provides greater clarity on the distinction between the Presidency, the OTP and the Registry. The Statement explicitly excludes the judicial functions of the Chambers. Pursuant to the Statement, the main function of the Presidency is to facilitate the proper administration of the Court, with the exception of the OTP (para 2). The OTP is fully independent and the Prosecutor has full authority over the management and administration of his Office, including staff, facilities and other resources (para 3). The Registry is responsible for the administration and servicing of all non-judicial aspects of the Court, again without prejudice to the OTP's independence. However, the Prosecutor relies upon the Registry for its services where necessary (para 6). The Registry functions under the authority of the President of the Court, who oversees the work of the Registry at a general level and provides guidance on major issues. The Statement also provides that in discharging their duties pertaining to the proper administration of the Court, all organs shall coordinate with and seek concurrence in questions of mutual concern (para 5).

240 ICC-ASP/9/34, Annex 2 (hereinafter 'Statement on External Relations'). The agreement on the Roles and Responsibilities of the Organs in Relation to External Communications provides greater clarity on the delineation of functions pertaining to external relations and public information. It provides that the ultimate responsibility for external communication by the Court lies with the Presidency and the Prosecutor; they must coordinate their actions and consult upon matters of mutual concern (para 3). Pursuant to the so-called 'One Court principle', the President will act as 'the external face of the Court'. The Prosecutor, however, is entirely independent and may also conduct OTP-related external relations independently (para 3(b)(a)). The Registry is accountable to the Presidency in all its external relations activities (para 3(c)(a)). On matters of mutual concern, which include annual reports of the Court to the ASP, the development of a Court-wide external communications strategy and external agreements binding the Court as a whole, the organs shall coordinate their actions.

In August 2009, the CBF instructed the Presidency to submit a report 'on the measures that the Court is taking to increase clarity on the responsibilities of the different organs and a common understanding throughout the Court of such responsibilities'.[241] The Governance Report was submitted to the ninth session of the ASP on 3 December 2010.[242] It noted that progress had been made throughout the year to maximise clarity and minimise internal divisions, but recommended that the Court take the following steps: (i) implement an institution-wide management control system; (ii) develop a common understanding of services; and (iii) provide further clarity on the roles and responsibilities, and potential overlaps, in specific areas.[243]

Study Group on Governance

The SGG was established by the ASP at its ninth session in 2010, for the purpose of engaging a 'structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficacy and effectiveness of the Court' and 'with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau'.[244] The SGG is mandated to assess a wide-range of topics, including strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence.

In the first year of its work, the SGG held meetings on 14 separate occasions throughout 2011, and focused its discussions on three issues: (i) the relationship between the Court and the ASP; (ii) strengthening the institutional

241 ICC-ASP/8/20, vol II, part B 2, para 26.

242 ICC-ASP/9/34 (hereinafter '2010 Governance Report').

243 2010 Governance Report, para 39.

244 ICC-ASP/9/Res.2, paras 1, 2.

framework of the Court; and (iii) increasing the efficiency of the criminal process.[245] The SGG's discussions in 2011 are discussed in greater detail in the *Gender Report Card 2011*.[246] At the tenth ASP in December 2011, following a recommendation made by the Bureau which stressed the importance of continuing to engage with governance-related issues,[247] the ASP extended the mandate of the SGG for an additional year.[248] Subsequently, in March 2012, the Hague Working Group extended the chairmanship of Ambassador Pieter de Savornin Lohman (the Netherlands), and appointed Kanbar Hossein Bor (United Kingdom) and Cary Scott-Kemmis (Australia) as its two focal points for the following two 'clusters', respectively: (i) expediting the criminal process; and (ii) enhancing the transparency and predictability of the budgetary process.[249]

Parallel to the discussion in the Study Group on Governance, the ICC's Advisory Committee on Legal Texts (ACLT) discussed a proposal for an amendment to Rule 132 of the Rules of Procedure and Evidence. The ACLT, which held its first constituting meeting on 27 February 2006,[250] was established pursuant to Regulation 4 of the Regulations of the Court, which provides that there shall be an Advisory Committee on Legal Texts to 'consider and report on proposals for amendments to the Rules, Elements of Crimes and these Regulations'. Pursuant to Regulation 4, the ACLT is composed of three judges, one from each Judicial Division, elected for three year terms to the ACLT; one representative from the Office of the Prosecutor; one representative from the Registry; and one representative of counsel included in the list of legal counsel.[251] The ACLT acts as an advisory body to the Presidency, and submits its recommendations on amendments to the judges during a plenary session.

The ACLT's proposed amendment to Rule 132 would allow 'one judge in a Trial Chamber to act on behalf of the whole Trial Chamber in relation to trial preparation issues'.[252] The proposed amendment would only relate to limited preparatory work prior to the start of trial that could be undertaken by a Single Judge, with substantive issues being dealt with by the three judges of the Trial Chamber. At present, in contrast to Article 39(2)(b)(iii), which allows for the functions of the Pre-Trial Chamber to be carried out by a Single Judge, Article 39(2)(b)(ii) provides that the functions of the Trial Chamber shall be carried out by three Judges. The proposal prepared by the ACLT was submitted to the ASP for consideration by the President of the Court by way of letter addressed to ASP President Ambassador Intelmann on 12 October 2012.[253]

245 ICC-ASP/10/30.
246 *Gender Report Card 2011*, p 97-100.
247 ICC-ASP/10/30, para 29(a).
248 ICCASP/10/Res.5, para 37.
249 Draft report of the Study Group on Governance, 2012.
250 'Annual report of the Advisory Committee on Legal Texts issued pursuant to rule 16 of the Rules of Procedure of the Advisory Committee on Legal Texts', *Advisory Committee on Legal Texts*, 21 March 2011, available at <http://212.159.242.181/NR/rdonlyres/1664CD7A-64EC-4E3D-9E36-7DFF434BDB49/283359/ACLTFirstAnnualReport21March2011Eng.pdf>, last visited on 29 October 2012.
251 The ACLT is composed of Judge Akua Kuenyehia, a judge in the Appeals Division; Judge Christine Van den Wyngaert, a judge in the Trial Division; Judge Ekaterina Trendafilova, a judge in the Pre-Trial Division; Fabricio Guariglia, representative from the Office of the Prosecutor; Didier Preira, Deputy-Registrar and representative from the Registry; Professor Kenneth S. Gallant, representative of counsel included in the list of counsel. 'Annual report of the Advisory Committee on Legal Texts issued pursuant to rule 16 of the Rules of Procedure of the Advisory Committee on Legal Texts', *Advisory Committee on Legal Texts*, 27 September 2012, available at <http://www.icc-cpi.int/NR/rdonlyres/4FA90B7E-C186-4952-AC0F-1381E6DCD387/284989/ACLTAnnualReport27September2012_English.pdf>, last visited on 23 October 2012.
252 'Proposal to amend the Rules of Procedure and Evidence', 25 September 2012, unpublished, para 2. Rule 132(2) currently reads as follows: 'In order to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber may confer with the parties by holding status conferences as necessary.'
253 2012/PRES/502.

Cluster 1: Expediting the criminal process

The first cluster of topics considered by the SGG related to expediting the criminal process, focusing on the courtroom practice of the ICC particularly in the pre-trial and trial stages of proceedings. The discussions around cluster 1 took place in the presence of court representatives. At the outset, it was agreed that the focus should be on possible amendments to the Rules of Procedure and Evidence. The SGG recognised that any proposed amendments to the Rules of Procedure and Evidence should accord with the 'overarching strategic and policy considerations of the Rome Statute',[254] pursuant to Article 51 of the Statute.[255]

As a first step in this process, the Court conducted an initial review, to identify and prioritise areas related to the criminal procedure that required further consideration, which was completed on 21 August 2012 with the preparation of a report entitled 'Lessons Learnt: First Report to the Assembly of States Parties'.[256] The SGG reported that the Lessons Learnt exercise identified nine areas[257] that call for further study, and included a proposed roadmap which set out a process by which the SGG could conduct a review of criminal procedures (the roadmap).[258] Subsequent discussions within the SGG focused on refining the roadmap.[259]

The roadmap contemplates a process whereby the Working Group on Lessons Learnt (WGLL), established in October 2012 and composed solely of judges, will consider recommendations on proposals to amend the Rules of Procedure and Evidence, ultimately to be submitted for deliberation at the twelfth session of the ASP in 2013. Recommendations that receive the support of at least five judges will be transmitted to the SGG. The SGG will convey its views on these recommendations, as well as any alternative recommendations, back to the WGLL, who will consider the budgetary implications of the proposals and produce a second report on the proposed changes. The SGG will decide whether to endorse any of the recommended changes, and will produce a report in this regard at least 60 days prior to the commencement of the twelfth session of the ASP in 2013.[260]

254 Draft report of the Study Group on Governance, 2012, para 11.

255 Article 51 deals with the Rules of Procedure and Evidence and any amendments thereto.

256 At the time of writing this Report, the Lessons Learnt report has been shared with States Parties but has not been made publicly available.

257 The Lessons Learnt exercise identified the following nine areas: pre-trial; pre-trial and trial relationship, and common issues; trial; victim participation and reparations; appeals; interim release; the seat of the court; language issues; and organisational matters.

258 Draft report of the Study Group on Governance, 2012, paras 12-13.

259 Draft report of the Study Group on Governance, 2012, para 14.

260 'Draft report of the Study Group on Governance', 2012, unpublished, Annex 1: The Roadmap on reviewing the criminal procedures of the International Criminal Court, articles 5-11.

Cluster 2: Enhancing the transparency and predictability of the budgetary process

At its tenth session, the ASP requested the SGG to consult with The Hague Working Group and develop recommendations to enhance 'the transparency and predictability of the budgetary process'.[261] During 2012, the SGG facilitated discussions with respect to the following: the Court's budgetary process, including the process of developing assumptions, priorities and objectives; CBF work practices, including interaction with the ASP; the possibility of biennial budgets and medium-term forecasting; and the process adopted by the Presidency for the election of the Registrar.[262] The outcome was a report containing a detailed set of recommendations designed to improve the transparency, predictability and efficiency of each phase of the budget process.[263]

In its report, the SGG concluded that the budgetary process would benefit from 'an enhanced dialogue between States Parties and the Court on the assumptions, objectives and priorities'[264] that underpin the programme budget. In order to facilitate this, it recommended that an exchange take place between States Parties and the Court once the Court had agreed upon assumptions and other relevant parameters which would impact the Court's draft programme budget. The purpose of the dialogue would be to increase awareness, rather than seek State Party approval.[265] The SGG also recommended other measures to improve communication, including: developing defined procedures, potentially by way of templates, by which States could submit queries to the Court about the budget, and the Court could respond;[266] ensuring that States Parties are aware of the unforeseen effect that resolutions and decisions could have on the Court's budget;[267] and addressing the need for enhanced budgetary certainty relating to the use of the Contingency Fund by either capping or deferring replenishment.[268]

The SGG also considered the implications of adopting a biennial budget and requested the Court to prepare a discussion paper which articulates fully the positive and negative implications of adopting a biennial budget.[269] It considered the concept of 'medium-term budget forecasting' and, while acknowledging the unpredictable nature of the Court's activities, emphasised that this could be used as a tool to enhance the predictability of the Court's budget and outline known and potential cost drivers in future budget years.[270]

The Court's proposed budget for 2013, in addition to the report by the CBF, is discussed in greater detail below.

261 ICC-ASP/10/Res.4, Section H.
262 Draft report of the Study Group on Governance, 2012, paras 20-22.
263 Draft report of the Study Group on Governance, 2012, Annex 2: Report of the Study Group on Governance (Cluster II, budget process).
264 Draft report of the Study Group on Governance, 2012, Annex 2: Report of the Study Group on Governance (Cluster II, budget process), para 5.
265 Draft report of the Study Group on Governance, 2012, Annex 2: Report of the Study Group on Governance (Cluster II, budget process), paras 5-9.
266 Draft report of the Study Group on Governance, 2012, Annex 2: Report of the Study Group on Governance (Cluster II, budget process), paras 22-23.
267 Draft report of the Study Group on Governance, 2012, Annex 2: Report of the Study Group on Governance (Cluster II, budget process), paras 24-26.
268 Draft report of the Study Group on Governance, 2012, Annex 2: Report of the Study Group on Governance (Cluster II, budget process), paras 34-37.
269 Draft report of the Study Group on Governance, 2012, Annex 2: Report of the Study Group on Governance (Cluster II, budget process), paras 38-39.
270 Draft report of the Study Group on Governance, 2012, Annex 2: Report of the Study Group on Governance (Cluster II, budget process), paras 18-20.

Milestone:
New leadership for the ICC

This year marks a significant transition in leadership for the Court, and a milestone in the election of the first woman to serve as Chief Prosecutor of the ICC and President of the Assembly of States Parties (ASP). These positions were elected at the tenth session of the ASP in December 2011, along with two new Vice Presidents of the Bureau of the ASP, and 18 new Bureau members. At its tenth session, the ASP also elected six new Judges. An overview of the judges serving on the ICC's bench in 2012 is provided below. The recruitments for the position of Deputy Prosecutor, described more fully below, and for the position of Registrar[271] are ongoing.

271 The term of the current Registrar ends in April 2013. In accordance with Article 43(4), the Registrar is elected by the plenary of the judges of the Court 'by an absolute majority by secret ballet, taking into account any recommendation of the Assembly of States Parties'. She or he shall serve a five year term on a full time basis, renewable once for the same period subject to re-election (Article 43(5)).

Election and inauguration of Chief Prosecutor Bensouda

On 15 June 2012, Fatou Bensouda of The Gambia was officially sworn in as the new Chief Prosecutor of the ICC, having been unanimously elected by the ASP in December 2011.

Article 42(3) of the Rome Statute provides that the Prosecutor 'shall be [a person] of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. [She/he] shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.' Article 42 does not require the Prosecutor to have the nationality of a State Party. ASP Resolution ICC-ASP/1/Res.2 calls for the ASP to make 'every effort [...] to elect the Prosecutor by consensus',[272] and if consensus cannot be reached, for the Prosecutor to be elected by secret ballot by an absolute majority of the members of the ASP.[273] Following a protracted nomination process, Bensouda was unanimously elected in December 2011.

The outgoing Chief Prosecutor, Luis Moreno Ocampo of Argentina, took office on 16 June 2003 and in accordance with Article 42(4)[274] served a nine-year term ending in June 2012. In accordance with the provisions of the Rome Statute, Bensouda will serve a nine-year term, ending in June 2021.

Chief Prosecutor Bensouda's election was welcomed by civil society who, subsequent to the election, issued statements citing her prosecutorial experience and qualifications for the role.[275] Following her election, Bensouda acknowledged the importance of civil society, in particular local women's groups,[276] and stated that her Office would continue to pursue prosecutions for gender-based crimes under the Rome Statute.[277] On 21 August 2012, the Prosecutor announced the appointment of Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, as Special Gender Advisor to the Prosecutor, an external position providing expert advice to the Prosecutor and her office on gender issues on a *pro bono* basis.[278] Inder is the second Special Gender Advisor to be appointed at the ICC.[279]

272 ICC-ASP/1/Res.2, para 29.

273 ICC-ASP/1/Res.2, para 30.

274 Article 42(4) provides that 'the Prosecutor and Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election'.

275 'Statements from Civil Society welcoming Prosecutor Fatou Bensouda', *Women's Initiatives for Gender Justice*, 15 June 2012, available at <http://www.iccwomen.org/documents/Welcoming-Prosecutor-Bensouda.pdf>, last visited on 11 October 2012; 'Fatou Bensouda sworn in as new ICC Prosecutor', *Coalition for the ICC*, 15 June 2012, available at <http://www.iccnow.org/documents/CICC_PR_Bensouda_Swearing_In__150612_FINAL.pdf>, last visited on 29 October 2012.

276 Remarks of Ms Fatou Bensouda, Prosecutor-Elect of the ICC at the Launch of the Gender Report Card on the ICC 2011, *The Office of the Prosecutor*, 13 December 2011, available at <http://icc-cpi.int/NR/rdonlyres/BCB9AB3F-4684-4EC3-A677-73E8E443148C/284154/111213StatementFB.pdf>, last visited on 11 October 2012.

277 Fatou Bensouda, Prosecutor-Elect of the ICC, 'Gender Justice and the ICC: Progress and Reflections', International Conference: 10 years review of the ICC. Justice for All? The International Criminal Court, *The Office of the Prosecutor*, 14 February 2012, available at <http://icc-cpi.int/NR/rdonlyres/FED13DAF-3916-4E94-9028-123C4D9BB0C9/0/StatementgenderSydeny140212.pdf>, last visited on 11 October 2012.

278 'ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, as Special Gender Advisor', *ICC Press Release*, ICC-OTP-20120821-PR833, 21 August 2012, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/pr833?lan=en-GB>, last visited on 11 October 2012.

279 See further, 'ICC Chief Prosecutor Fatou Bensouda appoints Brigid Inder as Special Gender Advisor: Statement by the Women's Initiatives for Gender Justice', 27 August 2012, available at < http://www.iccwomen.org/documents/WI-Statement.pdf>. Among the priorities Inder has identified for her appointment are strengthening the identification and articulation of gender issues and gender-based violence within the Office of the Prosecutor's cases and filings; securing charges for gender-based crimes; increasing access and gender-justice outcomes for victims/survivors; strengthening the institutional knowledge and structural responses of the Office of the Prosecutor to gender issues more widely; and expanding awareness of and support for the Office's mandate.

The Search Committee process

Coming at a critical moment for the Court, the December 2011 prosecutorial elections were the focus of intense political interest. Prior to the elections, and in accordance with ASP resolution ICC-ASP/9/INF.2 adopted on 6 December 2010, the States Parties of the ICC had been involved in a year-long process to identify the next Prosecutor. The resolution states that in accordance with para 29 of Resolution ICC-ASP/1/Res.2, 'every effort shall be made to elect the Prosecutor by consensus'. The Resolution further states that:

> The Bureau is of the view that such efforts should be undertaken in a structured and transparent manner as outlined below. It is understood that this process does not prevent any State Party from submitting a formal nomination. Nevertheless, States Parties are encouraged to make use of this process with a view to arriving at a consensus candidate ideally both for nomination and election.[280]

The resolution also provided for the Bureau to form a Search Committee to 'facilitate the nomination and election, by consensus, of the next Prosecutor'.[281] The Search Committee was composed of five members, one from each regional group.[282]

According to its Terms of Reference, the Search Committee could receive expressions of interest in the position from individuals, States, regional and international organisations, civil society, professional associations and other sources and could actively search for, and informally approach, suitable candidates. The Search Committee was tasked with reviewing the expressions of interest and producing 'a shortlist of at least three suitable candidates for consideration by the Bureau'.[283]

During the informal selection process conducted by the Search Committee between 13 June and 9 September 2011, the Committee received expressions of interest from 52 potential candidates. In October the Search Committee presented four names to the Bureau of the ASP as their recommendations for the position of Prosecutor.[284] From these four, Fatou Bensouda of The Gambia and Mohamed Chande Othman of Tanzania emerged as the two candidates with the most support.[285] However, agreement on a consensus candidate could not be reached by the deadline the Bureau had given itself and on 28 November 2011 the Secretariat of the ASP announced that the nomination period had been extended until 30 November.[286]

In a paper released on 28 November 2011, and circulated to all States Parties, the Women's Initiatives for Gender Justice reviewed the nomination and election process, and also provided a comparative analysis of the legal and prosecutorial experience of the two leading

280 ICC-ASP/9/INF.2, para 3.

281 The Terms of Reference for the Search Committee were adopted by the Bureau of the Search Committee on 6 December 2010 (ICC-ASP/9/INF.2).

282 The five members of the Search Committee were from Jordan (Asia), Slovakia (Eastern Europe), South Africa (Africa), Mexico (GRULAC) and the UK (WEOG). With the exception of Slovakia, all of these countries are also represented on the ASP Bureau, the body to which the Search Committee transmitted its recommendations of a shortlist. As such, the Search Committee was composed in such a way that could give rise to a disproportionate representation of these countries in the decision-making process. For more information about the Search Committee and its Terms of Reference, see *Gender Report Card 2011*, p 102-107.

283 ICC-ASP/9/INF.2, para 6.

284 ICC-ASP/11/17. The final four candidates were Fatou Bensouda (The Gambia); Andrew T. Cayley (UK); Mohamed Chande Othman (Tanzania); and Robert Petit (Canada).

285 '2011 ICC Prosecutorial Elections: States Parties Working Towards Consensus Candidate', Media advisory, *Coalition for the International Criminal Court*, 24 November 2011, available at <http://www.iccnow.org/documents/CICC_MA_PROS_ELECTION_241111.pdf>, last visited on 11 October 2012.

286 ICC-ASP/10/S/95.

candidates.[287] On 30 November, Mohamed Othman withdrew his candidacy and the same day the President of the ASP announced that there was a consensus among States Parties in favour of Bensouda as the next Chief Prosecutor of the ICC.[288]

Review of the process

The Resolution, adopted by States Parties to establish the Search Committee, included a requirement for regional representation but did not include any provisions regarding gender representation or the need for gender competence on the Committee.[289] In a departure from the general recruitment principles applied by the ICC and articulated repeatedly within the Rome Statute, the need for gender 'skills' and representation on this Committee was overlooked by the ASP and subsequently the Bureau, and as such all five members of the Search Committee were male. In addition, according to the terms of the Resolution, States on the Committee were appointed as representatives of their regional group;[290] however, according to the Search Committee's final report, members served in their personal capacity rather than as regional representatives.[291]

As pointed out in the 28 November paper by the Women's Initiatives, a further complication with the composition of the Search Committee was that four-fifths of the Committee was also represented on the ASP Bureau, the body to which, according to the Resolution,[292] the Committee submitted its recommendations for the final candidates. This was also the body that would present the single consensus candidate to the ASP for election. Given the level of duplicate representation on the Committee and the Bureau, the ability of the Search Committee to seek out and tap applicants, as provided for in the resolution, presented a procedural challenge.

The Resolution provided guidance on the applicable criteria for the position of Chief Prosecutor of the ICC with reference to Article 42 of the Rome Statute. However, the Search Committee did not further annunciate any specific criteria during the nomination process and as such the process was unclear about the core competencies deemed desirable for this post, beyond the general reference to Article 42 of the Statute.[293]

According to the Search Committee's final report, during the interview phase the Committee did not pose any questions to candidates regarding their experience prosecuting gender-based crimes, and did not ask candidates how they would manage the office to ensure gender competency within the structure, or how they would implement Article 42(9) of the Rome Statute, requiring the appointment of advisers with legal expertise on specific issues, including but not limited to sexual and gender-based violence and violence against children.

287 Women's Initiatives for Gender Justice, 'Election of the Prosecutor for the International Criminal Court: Review of the Process and Final Candidates', 28 November 2011, available at <http://www.iccwomen.org/documents/Prosecutor-Election-2011.pdf>.

288 'ICC's designated prosecutor says committed to justice', AFP, 2 December 2011, available at <http://www.google.com/hostednews/afp/article/ALeqM5g_t1id2ORBpHrjN1n0iRsK-lUhUg?docId=CNG.19e82d0bd297e7653a81a07789ad6e98.b1>, last visited on 11 October 2012.

289 ICC-ASP/9/INF.2.

290 ICC-ASP/9/INF.2, para 4.

291 ICC-ASP/11/17, para 10.

292 ICC-ASP/9/INF.2, para 6.

293 The most relevant provision of Article 42 is paragraph 3, which provides that 'the Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.'

Follow-up on the process

In a Resolution adopted at its tenth session following the election of Fatou Bensouda as Prosecutor, the ASP 'note[d] the process established by the Bureau of the Assembly of States Parties for the election of the second Prosecutor of the International Criminal Court and requeste[d] the Bureau, through open-ended consultations with States Parties, to examine ways of strengthening future elections of the Prosecutor, including an evaluation of such a process'.[294] Pursuant to this Resolution, in 2012 the ASP Bureau appointed Duncan Laki Muhumuza, of Uganda, as its focal point for the follow-up on the election of the Prosecutor 'to seek initial views from States Parties regarding the process for the election of the Prosecutor'.[295] Muhumuza facilitated discussions in the New York Working Group during 2012.

Election of the Deputy Prosecutor

Pursuant to the Rome Statute, the Chief Prosecutor shall be assisted by one or more Deputy Prosecutors, 'who shall be entitled to carry out any of the acts required by the Prosecutor under this Statute'.[296] The Rome Statute further provides that the Deputy Prosecutors shall be of different nationalities than the Prosecutor. Like the Chief Prosecutor, Deputy Prosecutors 'shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases'.[297] According to Article 42(4), the Prosecutor 'shall nominate three candidates for each position of Deputy Prosecutor to be filled'.

In a letter to the President of the ASP dated 4 September 2012, Prosecutor Bensouda submitted her nomination of the following three candidates for the position of Deputy Prosecutor:[298]

- Mr Paul Rutledge (Australia);
- Mr James Stewart (Canada); and
- Ms Raija Toiviainen (Finland).[299]

The announcement for the position of Deputy Prosecutor for Prosecutions was advertised for nine weeks from 9 February until 15 April 2012.[300] The letter of 4 September 2012 indicated that Prosecutor Bensouda considered 120 applicants for the position and conducted an 'extensive interview process'. A press release by the Office of the Prosecutor further stated that 'the process, which started in May 2012, included an initial screening, written test, oral presentations, face-to-face interviews as well as interaction with Senior Managers and Trial

294 ICC-ASP/10/Res.5, para 22.
295 Seventh ICC-ASP Bureau Meeting, 28 February 2012, Agenda and Decisions, available at <http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2012-Bureau-7-D-28Feb2012.pdf>, last visited on 11October 2012.
296 Article 42(2) of the Rome Statute.
297 Article 42(3) of the Rome Statute.
298 ICC-ASP/11/17.
299 ICC-ASP/11/17, Appendix II.
300 ICC-ASP/11/17, Annex I.

Lawyers within the Office'.[301] In her letter to the President of the ASP, Prosecutor Bensouda indicated that she was also assisted by two persons external to her Office.[302]

Of the 120 considered applicants, fifteen candidates were selected for an initial screening interview. Thirteen of the candidates accepted the initial interview, and subsequently six were selected for full interviews.[303] In her letter to the President of the ASP, Prosecutor Bensouda indicated that 28 of the applicants considered were female (representing 23%) and 92 were male (representing 77%). The Office considered both applicants from States Parties (78 candidates, or 65%) and non-States Parties (42 candidates, or 35%). Of those shortlisted for the initial screening process, 12 candidates were male and 3 were female.[304] Of the six candidates who were invited for the full in-person interview, 4 were male and 3 were female.[305]

The Deputy Prosecutor for Prosecutions will be elected at the eleventh session of the ASP in November 2012.

301 'ICC Prosecutor submits shortlist of Deputy Prosecutor candidates to the Assembly', *ICC Press Release*, ICC-OTP-20120911-PR835, 11 September 2012, available at <http://www.icc-cpi.int/Menus/ASP/Press+Releases/Press+Releases+2012/PR835.htm>, last visited on 11 October 2012.

302 ICC-ASP/11/17, Annex.

303 ICC-ASP/11/17, Annex.

304 Of these, 10 male and 3 female applicants accepted the interview.

305 ICC-ASP/11/17, Appendix I.

Election of the ASP President and the Bureau

In accordance with the Rome Statute, the Bureau of the ASP assists the Assembly in the discharge of its functions, and is composed of a President, two Vice Presidents and 18 members, elected by the ASP for three-year terms.[306] The President and the two Vice-Presidents are elected in their personal capacities. In December 2011, the ASP elected a new President and two new Vice Presidents, in addition to 18 new members to the Bureau of the ASP, following the completion of the terms of outgoing President of the ASP Ambassador Christian Wenaweser (Liechtenstein) and Vice Presidents Ambassador Jorge Lomonaco (Mexico) and Ambassador Simona-Mirela Milescu (Romania).

Ambassador Tiina Intelmann of Estonia, the new ASP President, is the first woman to assume the post. Ambassador Markus Börlin (Switzerland) and Ambassador Ken Kanda (Ghana) were elected as Vice-Presidents. The current Bureau assumed its functions at the beginning of the tenth session of the ASP in December 2011 and is composed of representatives from Argentina, Belgium, Brazil, Canada, Chile, Czech Republic, Gabon, Finland, Hungary, Japan, Nigeria, Portugal, the Republic of Korea, Samoa, Slovakia, South Africa, Trinidad and Tobago, and Uganda.[307]

306 Article 112(3) of the Rome Statute.

307 For an overview of the current members of the Bureau of the ASP see <http://www.icc-cpi.int/Menus/ASP/Bureau/>.

Election of six new judges

In December 2011 at its tenth session, the ASP elected six new judges to the bench of the ICC. Pursuant to Article 36(1) of the Rome Statute, the ICC shall have 18 judges.[308] At the time of writing this Report eight of the ICC's judges are male and 10 are female. In addition to these 18 judges, the mandates of three of the six outgoing judges (one male judge and two female judges) have been extended to complete their respective trials.[309] In accordance with Article 36(10), 'a judge assigned to a Trial or Appeals Chamber in accordance with Article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before the Chamber'. Judges whose terms have been extended in accordance with this provision serve on the bench only for the limited purposes of the ongoing trial and/or appeal and cannot be assigned to another division or Chamber. These judges do not serve on the plenary of Judges and as such do not take part in the election of the President and Vice-Presidents and in the assignment of the judicial divisions.

Judges of the International Criminal Court as of 17 August 2012

Judge	*Country/Group*	*List*[310]	*Gender*	*Year of appointment*	*Current term length*	*Year current term expires*
Appeals Division						
Sang-Hyun Song, President (elected as President 2009, re-elected 2012)	Korea/Asian	A	M	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Sanji Mmasenono Monageng, First Vice President	Botswana/African	A	F	2009	9	2018
Akua Kuenyehia	Ghana/African	B	F	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Erkki Kourula	Finland/WEOG	B	M	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Anita Ušacka, President of the Appeals Division	Latvia/Eastern European	B	F	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015

308 Article 36(2) specifies that the Presidency may propose an increase of judges, subject to certain conditions and the approval of the ASP.

309 Initially, the mandates of five of the six outgoing judges were extended. However, following the delivery of the trial judgement, and sentencing and reparations decisions in the case against Lubanga, described more fully in the *First trial judgement in the Lubanga case* and *First sentencing and reparations decisions in the Lubanga case* sections of this Report, the terms of Judge Sir Adrian Fulford (UK), Judge Elizabeth Odio Benito (Costa Rica) and Judge René Blattmann (Bolivia) ended and, as of 31 August 2012, they are listed as 'former Judges' on the ICC's website. Judge Blattmann's term was originally scheduled to expire in 2009. See further <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges/Former+Judges.htm>, last visited on 11 October 2012. At present, the mandate of Judge Sylvia Steiner (Brazil) has been extended to allow her to complete the Bemba trial; the mandates of Bruno Cotte (France) and Judge Fatoumata Dembele Diarra (Mali) have been extended until the completion of the Katanga & Ngudjolo trial. See further <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/The+Judges/Judges+continuing+in+office+to+complete+proceedings.htm>, last visited on 11 October 2012.

310 Judges must either have established competence in criminal law and procedure ('list A' judges) or competence in international law ('list B' judges).

Judge	*Country/Group*	*List*	*Gender*	*Year of election*	*Current term length*	*Year current term expires*
Trial Division						
Joyce Aluoch, President of the Trial Division	Kenya/African	A	F	2009	9	2018
Kuniko Ozaki	Japan/Asian	B	F	2010	8 years 2 months	2018
Howard Morrison	UK/WEOG	A	M	2012	9	2021
Anthony Carmona	Trinidad & Tobago/ GRULAC	A	M	2012	9	2021
Robert Fremr	Czech Replublic/ Eastern European	A	M	2012	9	2021
Chile Eboe-Osuji	Nigeria/African	A	M	2012	9	2021
Fatoumata Dembele Diarra[311]	Mali/African	A	F	2003	9	2012/end of Katanga & Ngudjolo
Sylvia Steiner[312]	Brazil/GRULAC	A	F	2003	9	2012/end of Bemba
Bruno Cotte[313]	France/WEOG	A	M	2007	4 years 2 months	2012/end of Katanga & Ngudjolo
Pre-Trial Division						
Silvia Fernández de Gurmendi, President of the Pre-Trial Division	Argentina/GRULAC	A	F	2010	8 years 2 months	2018
Hans-Peter Kaul	Germany/WEOG	B	M	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Ekaterina Trendafilova	Bulgaria/Eastern European	A	F	2006	9	2015
Christine Van den Wyngaert	Belgium/WEOG	A	F	2009	9	2018
Cuno Tarfusser, Second Vice President	Italy/WEOG	A	M	2009	9	2018
Olga Herrera Carbuccia	Dominican Republic/ GRULAC	A	F	2012	9	2021
Unassigned[314]						
Miriam Defensor-Santiago	Philippines/Asian	B	F	2012	9	2021

311 Judge Fatoumata Dembele Diarra's term has expired, however pursuant to Article 36(10) of the Rome Statute she is continuing in office to complete the trial in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

312 Judge Sylvia Steiner's term has expired, however pursuant to Article 36(10) of the Rome Statute she is continuing in offence to complete the trial in *The Prosecutor v. Jean-Pierre Bemba Gombo*.

313 Judge Bruno Cotte's term has expired, however pursuant to Article 36(10) of the Rome Statute he is continuing in offence to complete the trial in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

314 From the Court's website it appears that at the time of writing this Report, Judge Defensor-Santiago, who was elected in December 2011, has not yet been sworn in and therefore has not been assigned to any of the Judicial Divisions. See 'Five ICC judges sworn in today at a ceremony held at the seat of the Court', *ICC Press Release*, ICC-CPI-20120309-PR772, 9 March 2012, available at <http://www.icc-cpi.int/NR/exeres/206CFC07-3398-46BA-A6E7-06B1FDD2777A.htm>, last visited on 17 October 2012.

Composition of Chambers as of 17 August 2012[315]

Chamber / Judge	*Case and/or Situation*	*Stage of proceedings*
Pre-Trial Division		
Pre-Trial Chamber I		
■ Presiding Judge Silvia Fernández de Gurmendi (Argentina) ■ Judge Hans-Peter Kaul (Germany) ■ Judge Christine Van den Wyngaert (Belgium)	**Côte-d'Ivoire Situation** *Prosecutor v. Gbagbo* **Libya Situation** *Prosecutor v. Gaddafi et al*	 Awaiting hearing and decision on confirmation of charges Awaiting decision on admissibility challenge
Pre-Trial Chamber II		
■ Presiding Judge Ekaterina Trendafilova (Bulgaria) ■ Judge Hans-Peter Kaul (Germany) ■ Judge Cuno Tarfusser (Italy)	**Uganda Situation** *Prosecutor v. Kony et al* **CAR Situation** **Kenya Situation** **DRC Situation** *Prosecutor v. Ntaganda* *Prosecutor v. Mudacumura* **Darfur Situation** *Prosecutor v. President Al'Bashir* *Prosecutor v. Harun & Kushayb* *Prosecutor v. Hussein*	 Pending arrest and surrender of suspect Pending arrest and surrender of suspect Pending arrest and surrender of suspect Pending arrest and surrender of suspects Pending arrest and surrender of suspects Pending arrest and surrender of suspect
Trial Division		
Trial Chamber I		
■ Presiding Judge Sir Adrian Fulford (UK) ■ Judge Elizabeth Odio Benito (Costa Rica) ■ Judge René Blattmann (Bolivia)	*Prosecutor v. Lubanga*	Trial judgement and sentencing and reparations decisions issued
Trial Chamber II		
■ Presiding Judge Bruno Cotte (France) ■ Judge Fatoumata Dembele Diarra (Mali) ■ Judge Christine Van den Wyngaert (Belgium)	*Prosecutor v. Katanga & Ngudjolo*	At trial
Trial Chamber III		
■ Presiding Judge Sylvia Steiner (Brazil) ■ Judge Joyce Aluoch (Kenya) ■ Judge Kuniko Ozaki (Japan)	*Prosecutor v. Bemba*	At trial

315 This overview only includes active cases. The cases against Mbarushimana and Abu Garda, against whom charges were not confirmed, have therefore not been included. For a more detailed discussion of the confirmation of charges decision in the Mbarushimana case, see the *Charges for gender-based crimes* section of this Report. For a more detailed discussion of the confirmation of charges decision in the Abu Garda see *Gender Report Card 2010*, p 109-111.

Chamber / Judge	*Case and/or Situation*	*Stage of proceedings*
Trial Division		
Trial Chamber IV		
■ Presiding Judge Joyce Aluoch (Kenya) ■ Judge Silvia Fernández de Gurmendi (Argentina) ■ Judge Chile Eboe-Osuji (Nigeria)	*Prosecutor v. Banda & Jerbo*	Pending a decision on the start of trial
Trial Chamber V		
■ Presiding Judge Kuniko Ozaki (Japan) ■ Judge Christine Van den Wyngaert (Belgium) ■ Judge Chile Eboe-Osuji (Nigeria)	*Prosecutor v. Ruto & Sang* *Prosecutor v. Muthaura & Kenyatta*	Trial scheduled to start in April 2013
Appeals Division		
Appeals Chamber		
■ Presiding Judge Erkki Kourula (Finland) ■ Judge Sang-Hyun Song (Republic of Korea) ■ Judge Akua Kuenyehia (Ghana) ■ Judge Anita Ušacka (Latvia) ■ Judge Sanji Mmasenono Monageng (Botswana)	N/A	N/A

Focus:
Budget of the ICC

At its nineteenth session in 2012, the ASP Committee on Budget and Finance (CBF) proposed a budget of €115 million for 2013.[316] According to the CBF and the Court's financial submissions to the Committee, the ICC proposed a 2013 budget of €118.54 million, representing an increase overall of €9.6 million, or 8.8%, over the 2012 ASP-approved budget.[317] The primary cost drivers for this increase are the rent and maintenance of the interim premises of the Court (€6.02 million), common system costs (€3.88 million), trial preparations for the two Kenya cases (€2.04 million), and legal aid (€0.90 million).[318] At the eleventh session of the ASP in November 2012, the ASP will decide upon the Court's proposed budget, along with the recommendations of the CBF. The ASP may also make further changes beyond the CBF recommendations. This section reviews selected issues as proposed in the Court's budget and considered by the CBF in its report.

316 In its report, the CBF noted that the rent for the interim premises (amounting to €6.02 million), which until now had been covered by the Host State, would be a temporary cost until the Court moved to its permanent premises. For this reason, the CBF recommended that the amount necessary to cover the rent, in addition to the interest on loan for the permanent premises (amounting to €204,568), should be exempted when comparing the level of the 2013 proposed programme budget against the approved budget of 2012. ICC-ASP/11/15, Advance version, para 113. While the CBF recommended budget of €115 million suggests an increase of the Court's budget compared to the 2012 approved budget, excluding the rent, this represents only a €0.18 million or 0.17% increase.

317 ICC-ASP/11/10/Corr.1; ICC-ASP/11/10/Corr.2. At its tenth session, the ASP approved a budget of €108.8 million for the Court, in addition to €2.2 million for the replenishment of the Contingency Fund.

318 ICC-ASP/11/10, para 29; ICC-ASP/11/10-Cor.1, Table 5.

The Court's proposed budget is based on the assumptions from the Office of the Prosecutor that it will conduct seven investigations in seven situation countries, will maintain the current case-load of nine residual investigations, and will continue to monitor at least eight other potential situations.[319] Of the cases currently before the Court, one verdict has been delivered,[320] five cases are at the trial preparation or trial stage,[321] and in one case a confirmation of charges hearing is due to begin.[322] Increased judicial activity is also foreseen in the Appeals Chamber, where the Court anticipated that there will be final appeals against the trial judgement, reparations decision and other decisions in the cases against Lubanga and Katanga & Ngudjolo, in addition to interlocutory appeals.[323]

Following the CBF's recommendation at its eighteenth session, held from 23 to 27 April 2012, where it emphasised the importance of 'strong fiscal discipline' within the context of zero-based budgeting,[324] the Court's proposed 2013 budget identifies several areas where it has been required to reduce and/or modify its activities to meet cost limitations, including through increased reliance on general temporary assistance (GTA) contractors, and pro-bono consultants rather than permanent employees;[325] a reduction in the number of GTA and consultancy positions;[326] a reduced field presence;[327] and the redeployment of staff and resources.[328] The Court has expressed concern at the pressures imposed by many of these cost-saving techniques and has indicated that further cost-cutting measures will compromise its ability to conduct fair, effective, and expeditious proceedings as mandated by the Rome Statute.[329] Cutbacks in the areas of human resources and personnel are part of a trend that has developed in recent years, and the Court has indicated elsewhere that the deficits imposed by the 2012 budget have already resulted in an 'unexpected and unprecedented vacancy rate imposed for GTAs, have had an adverse impact on the Court and have threatened to compromise its ability to meet its contractual obligations *vis-à-vis* its employees'.[330]

319 ICC-ASP/11/10, para 19.

320 *The Prosecutor v. Thomas Lubanga Dyilo*.

321 Estimate of the Women's Initiatives for Gender Justice based on the 2012 trial proceedings in the Bemba, Ruto & Sang, Muthaura & Kenyatta, and Banda & Jerbo (pending resolution of the translation issues) cases. Trial proceedings in the Katanga & Ngudjolo case have completed, but the Trial Chamber has not yet issued its trial judgement. Should the charges be confirmed in the Gbagbo case, this could add a sixth trial to the 2013 activities of the OTP.

322 *The Prosecutor v. Laurent Gbagbo*.

323 ICC-ASP/11/10, para 48.

324 ICC-ASP/11/5, Advance version, paras 32-34. In 2012, the CBF released a Policy and Procedure Manual which reiterates that since the establishment of the Court it 'has always been concerned about the high cost of creating a permanent international bureaucracy' and has recommended that the Court 'establish the leanest structure possible'. See Committee on Budget and Finance, Policy and Procedure Manual, Advance Version, p 66, 81.

325 ICC-ASP/11/10, paras 62, 73, 87, 93-101, 128-129, 138, and 186.

326 ICC-ASP/11/5, Advance version, paras 114, 196, 435, and 456.

327 ICC-ASP/11/10, paras 244-248.

328 ICC-ASP/11/10, paras 26, 172, 249, 412, 434, and 456. This reflects the approach adopted by the Court in its *Seventh Status Report on the Court's progress regarding efficiency measures*, which will also be considered by the ASP in November 2012, and which emphasises the importance of (1) a "flexible approach" to the redeployment of staff and the cross-training of staff to work in a variety of different roles depending on the needs of the court; (2) an expanded workload and responsibilities for individual staff members, even when this necessitates a decrease in the level of service provided and increased overtime hours, if it results in an overall efficiency; (3) the closure of field offices and the more efficient use of resources that occurs when staff are pooled at headquarters rather than deployed to the field. ICC-ASP/11/9.

329 ICC-ASP/11/10, paras 82, 97, 364, and 414.

330 ICC-ASP/11/15, Advance version, Annex III.

While noting some improvements in the 2013 proposed budget, including 'better justifications and more refined assumptions',[331] the CBF stated that the 2013 proposed budget did not account for a number of costs, which could have significant impacts on the Court's finances: (i) the potential confirmation of charges in the Gbagbo case; (ii) the establishment of the African Union Liaison Office, which has an estimated cost of €436,700; and (iii) the expansion of the mandate of the Independent Oversight Mechanism (IOM) to include inspection and evaluation, estimated to be €212,300.[332] The CBF also noted that the costs related to the delay in the translation of the Lubanga trial judgement, which is still awaited, were not foreseen in 2012.[333]

Zero-growth budget

In December 2011, the ASP passed a resolution requiring any proposed increase of the budget for 2013 to be compensated by proposed reductions elsewhere, in order to bring the budget in line with the level of the 2012 approved budget (a so-called 'zero-growth budget').[334] Jointly with the proposed programme budget for 2013, the Court submitted a paper, in which it identified a list of measures which, if adopted by the ASP, could bring about substantial reductions to the budget.[335] However, the Court stressed that these measures 'are not a proposal from the Court for further reductions as the Court has already submitted the most economical and efficient budget proposal'.[336] In the paper the Court expressed concern about the impact and consequences these additional reductions would have on the ability of the Court to implement its mandate.[337] The Court indicated that, should the ASP decide such additional absorptions are necessary, 'its prosecutorial and judicial operations would be severely impacted, resulting in the suspension of most activities in a number of situations and cases before the Court'.[338] The Court stressed that such cuts would 'not only directly affect the judicial and prosecutorial independence of the Court, but in many instances would constitute a direct breach of the Rome Statute and the legal texts governing the mandate of the Court'.[339] Concretely, the Court identified:

> Should the Assembly, in any case, wish to pursue this avenue in order to achieve further reductions in the Court's budget at the cost of forcing the Court to breach its obligations under the Statute, the Court has estimated that the impact of an absorption of €7.4 million would be equal to suspending activities in relation to the situations in Uganda, Darfur (Sudan) and Libya as well as postponing trial hearings in the Kenya cases beyond 2013.[340]

In the paper, the Court noted that in order to reduce the 2013 proposed budget of the Judiciary to the 2012 level, 'a reduction of €1.15 million is required, [which] largely reflects the

331 ICC-ASP/11/15, Advance version, para 2.
332 ICC-ASP/11/15, Advance version, para 116.
333 ICC-ASP/11/15, Advance version, para 117.
334 Resolution ICC-ASP/10/Res. 4, section H, para 2; ICC-ASP/11/5, Advance Version, para 35.
335 ICC-ASP/11/15, Advance version, Annex III.
336 ICC-ASP/11/15, Advance version, Annex III, para 4.
337 In addition to the measures identified, the Court indicated that an additional €7.4 million would have to be absorbed should the ASP decide that the 2013 budget cannot exceed the 2012 approved budget. The Court indicated that, should the Assembly adopt the reductions proposed in the paper, this would constitute a €2.5 million reduction from the proposed 2013 budget, which would still leave a gap of €1.4 million as compared with the 2012 budget. Second, a further €6.02 million requirement for rent for the interim purposes would need to be absorbed by the budget. Together, this would mean that a total of €7.4 million would need to be absorbed, in addition to the reduction measures of €2.5 million. See ICC-ASP/11/15, Advance version, Annex III, para 38 and Table 9.
338 ICC-ASP/11/15, Advance version, Annex III, para 39.
339 ICC-ASP/11/15, Advance version, Annex III, para 39.
340 ICC-ASP/11/15, Advance version, Annex III, para 39.

cost of three judges necessary for constituting a second Trial Chamber in the Situation in Kenya – costs which are inelastic and not subject to possible absorptions or reductions due to statutory requirements of the minimum number of judges per Chamber'.[341] The Court stressed that the required reductions would 'cut deep' into staffing resources and would 'take away the entire GTA budget', eliminating staff capacity to carry out essential Chamber-support functions, including in relation to victim participation, disclosure of evidence, and witness protection issues.[342]

Similarly, with respect to further reductions that could be imposed on the Office of the Prosecutor, the paper stressed that the only option to reduce the Office's 2013 budget would be to reduce investigations, 'which strikes at the core of the Rome Statute and protracts impunity' and could result in 'the suspension of trials, particularly where the accused is/are not in detention or trial proceedings have commenced'.[343] The Court concluded that to suspend investigations to address budgetary cuts 'would constitute a serious threat to the prosecutorial independence and have a detrimental effect not only on the Office of the Prosecutor but on the Court as a whole'.[344]

While the CBF in its report recommended reductions amounting to €3 million overall compared to the Court's proposed programme budget, it also 'accepted in many instances the Court's analysis of the negative impact of other cuts identified in the paper'.[345]

341 ICC-ASP/11/15, Advance version, Annex III, para 22.
342 ICC-ASP/11/15, Advance version, Annex III, para 22.
343 ICC-ASP/11/15, Advance version, Annex III, para 27.
344 ICC-ASP/11/15, Advance version, Annex III, para 43.
345 ICC-ASP/11/15, Advance version, Annex V, para 1.

Investigations and prosecutions

The proposed budget for the Office of the Prosecutor for 2013 (€28,660,000) represents a 3.4% increase (€936,300) from the 2012 approved budget (€27,723,700). The Office of the Prosecutor outlined that this increase is largely due to forward commitments for common system costs and inflation in travel costs. The Office stressed that, over the past several years it has 'increased its productivity without a corresponding increase in its resource requirements'.[346] In 2012, for example, the Office was able to absorb the costs of investigations in Côte d'Ivoire and reduce its resource requirements for Libya. The Office underscored that it aims to further increase its level of activity without a commensurate increase in resources or personnel in 2013, primarily by implementing cost-saving techniques similar to those adopted in 2012, including by postponing key recruitments and terminating a number of GTA positions. However, the Office of the Prosecutor expressed concern that these measures have already resulted in a slowdown in investigations and prosecutions. The Office indicated that with the 2013 proposed budget it has 'reached the limit of its absorptive capacity and any further reductions to the resources requested would greatly impact on the aforementioned efficiency/output balance and hamper the Office's capability to deliver on its assumptions'.[347] The Office added that 'further reductions would either result in an investigation being terminated, or further slow-down all investigations to levels that would potentially increase costs in other related areas', including witness protection, legal representation of victims and witnesses, and the length of proceedings.[348]

346 ICC-ASP/11/10, para 111.
347 ICC-ASP/11/10, para 114.
348 ICC-ASP/11/10, paras 113-114.

The Registry expressed similar concerns with respect to the its proposed budget, noting that each section of the Registry had been asked to 'prepare a budget lower than the level of the 2012 appropriations' notwithstanding an increased need for resources.[349] The Registry noted that this was a 'very challenging' process, due to 'unavoidable' increases of nearly €3.6 million in staff and legal aid costs.[350] Following the issuance of the Chambers' decision to commence the two trials in the Kenya Situation in April 2013, the Registry underlined that its proposed budget for 2013 would 'unavoidably exceed the approved level for the 2012 budget'. The Registry thus requested a 1.4% increase in its budget of €1.4 million, including €1.2 million for the purpose of the Kenya trials.[351]

Field offices

In 2013, the Registry will maintain six field presences, while decreasing field-based staffing in Uganda and the DRC, limiting the Kampala, Uganda field office 'to the minimum capacity',[352] and reducing the Bunia (DRC) field office to only a 'small forward field presence'.[353] The field offices in Bangui (the CAR) and Kinshasa (the DRC) will continue their activities. In 2011, the Registry closed its field offices in Abéché and N'Djamena, Chad, which functioned primarily to support activities in the Darfur Situation.[354] Additionally, the budget for 2013 does not appear to contemplate a field presence in Libya and provides only for a 'small administrative field presence' in Côte d'Ivoire.[355] These reductions will exacerbate those that were made with respect to field operations in the 2012 approved budget, and the Court has stressed that 'budget constraints have put serious strain on the [Field Operations] Section's ability to deliver and meet the operational needs of its clients and thus the ability of the Court to implement its mandate in the situation countries'.[356]

The Contingency Fund

The Contingency Fund was established by the ASP in 2004, to enable the Court to meet (a) the costs associated with a new situation following a decision by the Prosecutor to open an investigation; and (b) unavoidable expenses for developments in existing situations that could not be foreseen or could not be accurately estimated at the time of adoption of the budget.[357]

While acknowledging the 'unforeseeability in the Court's activities', particularly in relation to the opening of new situations or new developments in existing cases, this year the CBF expressed concern about the number of notifications to the Contingency Fund and about the fact that 'this might lead to a weakening of financial discipline on the Court's part'.[358] The CBF noted that in 2012 it had received seven notifications from the Court of the need to access the Contingency Fund, amounting to €3.69 million, covering costs relating to the Situations in Kenya, Côte d'Ivoire, the DRC, Libya and the CAR.[359] The CBF underlined that, while the Contingency Fund is an important tool for the Court, 'it should not be used in a way that would undermine budgetary integrity'.[360] The CBF thus recommended that within 60 days after a notification to access the Fund, the Court must present a written report to the CBF with an update on the use of the resources.

349 ICC-ASP/11/10, para 196.
350 ICC-ASP/11/10, para 196.
351 ICC-ASP/11/10, paras 195-202, Table 36.
352 ICC-ASP/11/10, para 247.
353 ICC-ASP/11/10, para 245.
354 ICC-ASP/10/10, p 73-77.
355 ICC-ASP/11/10, para 245.
356 ICC-ASP/11/10, para 248.
357 Committee on Budget and Finance, Policy and Procedure Manual, Advance Version, p 47.
358 ICC-ASP/11/15, Advance version, para 28.
359 ICC-ASP/11/15, Advance version, para 23, Table 1.
360 ICC-ASP/11/15, Advance version, para 29.

Legal aid

According to the CBF, legal aid has been one of the main cost drivers of the Court's budget for at least the last two years.[361] The CBF report indicated that from 2006 to June 2012, the costs for legal aid to Defence amounted to €11.51 million, with the costs for legal aid to victims amounting to €15.85 million. Cumulatively, the CBF noted that it had cost the Court € 27.36 million to implement its legal aid scheme.[362]

At its tenth session, the ASP had requested the Registrar to present a proposal for a review of the legal aid system, which would result in savings of at least €1.5 million, before 15 February 2012. Following a consultation process with civil society and counsel,[363] the Registrar submitted a formalised proposal to the Bureau of the ASP in February 2012.[364] The proposal recommended: (i) changes to the structure of teams providing legal representation to victims; (ii) changes to the structure of defence teams; (iii) changes to the remuneration structure for defence counsel and counsel representing victims; (iv) limits to the amount of professional charges that are reimbursable; and (v) changes to the remuneration structure when counsel is not required to be physically present at the Court in The Hague.

On 23 March 2012, in accordance with recommendations issued by The Hague Working Group,[365] the Bureau of the ASP implemented a revised remuneration scheme applicable to counsel for victims and defence, which shifts compensation from a gross pensionable remuneration mode to a net basic salary, in order to account for what the Registry perceived as duplicative payment structures and to further ensure a degree of equivalence with counterparts working for the Office of the Prosecutor.[366] The Bureau further decided that the remaining issues be subjected to further consultation, and requested the Registrar to 'present proposals for an enhanced role of the Office of Public Counsel for Victims (OPCV) as part of the review of the legal aid system', to be considered at the 11th session of the ASP in 2012.[367]

Based on further consultations, the Registry produced a supplementary report in August 2012,[368] recommending: (i) that remuneration be reduced in circumstances where counsel holds multiple mandates;[369] (ii) that the legal aid travel policy be revised, to provide for reduced daily stipends; and (iii) that remuneration be

361 ICC-ASP/11/15, ICC-ASP/10/10. See also *Gender Report Card 2011*, p 113.

362 ICC-ASP/11/15, Advance version, para 91.

363 The consultation period has been criticised as abbreviated by civil society. At the tenth ASP, held in December 2011, States Parties requested the Registrar to prepare a comprehensive proposal for a review of the legal aid system by 15 February 2012. The Registrar circulated a discussion paper on 19 December 2011, setting out a series of proposed amendments, and requested feedback from interested stakeholders by 31 January 2012.

364 'Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011', *The Registry*, 20 February 2012.

365 'Report of The Hague Working Group on legal aid', *The Hague Working Group*, 21 March 2012.

366 'Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011', *The Registry*, 20 February 2012.

367 'Proposal for a review of the legal aid system of the Court in accordance with resolution ICC-ASP/10/Res.4 of 21 December 2011', *The Registry*, 20 February 2012, paras 38-54.

368 'Supplementary Report of the Registry on four aspects of the Court's legal aid system', CBF/19/6, 17 August 2012.

369 The Registry explained that situations may arise where counsel who is already representing a client before the Court, may be freely chosen by another individual as their representatives as well (for instance, Banda and Jerbo are both represented by the same counsel, chosen by the accused individually). When both individuals are determined indigent, this could have an impact on the Court's legal aid budget. The Registry proposed that in case of simultaneous mandates, counsel would receive 50% of the fee for the second mandate. 'Supplementary Report of the Registry on four aspects of the Court's legal aid system', CBF/19/6, 17 August 2012, paras 14-17.

reduced during phases when trial activities are considerably reduced. The Registry did not recommend any changes to the role of the OPCV, acknowledging that making substantive changes in that regard would involve 'a series of considerations and consequences which need to be carefully studied and therefore not be based merely on cost-saving initiatives'.[370]

The CBF report endorsed the proposals made by the Registry in its August 2012 supplementary report and indicated that this would save €1.1 million. The CBF thus recommended the ASP to reduce the legal aid budget by €1.1 million.[371] In accordance with the views of the ASP regarding cross-cutting measures, while the ASP has not yet formally adopted the Registry's proposal, the Registrar cut legal aid to the Defence teams of Katanga and Ngudjolo as of 1 July 2012, on the basis of an anticipated reduced workload during the period between closing arguments and the delivery of the trial judgement.[372] Both the Katanga and Ngudjolo Defence challenged the Registrar's decision, arguing that this constituted a violation of the accused's fair trial rights. In an oral decision issued on 18 September 2012, Trial Chamber II subsequently held that the Registrar's decision breached the fundamental principle of equality of arms. Although the Chamber recognised that the Defence teams may have a reduced workload during the period between closing arguments and the delivery of its judgement, it noted that this would be difficult to quantify and that various points of litigation may arise during this period. The Court stressed the importance of maintaining the integrity of the Defence teams, indicating that it would be prejudicial to require the Defence to lay off members of their team only to have to rehire at a later date.[373]

Security Council referrals

Article 13 of the Relationship Agreement adopted by the UN and the ICC on 4 October 2004 provides that 'the United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to Article 115 of the Statute shall be subject to separate arrangements'. The Security Council resolutions referring the Darfur and Libya Situations to the ICC provided that 'none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily'.[374]

As noted in previous years, the referral of Situations by the UN Security Council can significantly impact on the Court's budget. For example, in 2011 the referral of the Libya Situation constituted one of the main costs drivers of the Court's 2012 budget.[375] While Article 115 of the Rome Statute provides that the Court may be provided with funds by the UN 'subject to the approval of the General Assembly,

370 'Supplementary Report of the Registry on four aspects of the Court's legal aid system', CBF/19/6, 17 August 2012, para 49.
371 ICC-ASP/11/15, Advance version, para 98.
372 Following a similar rationale, the Registrar cut funding to the Lubanga Defence team subsequent to closing arguments in August 2011, on the basis that such costs were not 'reasonably necessary' for an effective and efficient defence. This decision was ultimately reversed by Trial Chamber I, which held that an accused is entitled to a guarantee of his fair trial rights for the entirety of the trial. ICC-01/04-01/06-2800.
373 At the time of writing this Report, the transcript of the Chamber's oral decision had not yet been made publicly available on the Court's website. See 'Trial Chamber Cancels Registry Decision on Legal Aid', *Katangatrial.org*, 18 September 2012, available at <http://www.katangatrial.org/2012/09/trial-chamber-cancels-registry-decision-on-legal-aid/>, last visited on 12 October 2012; 'Katanga and Ngudjolo Protest Cuts in Legal Aid', *Katangatrial.org*, 14 September 2012, available at <http://www.katangatrial.org/2012/09/katanga-and-ngudjolo-protest-cuts-in-legal-aid/>, last visited on 12 October 2012.
374 UN Security Council Resolution 1593 (2005), para 7; UN Security Council Resolution 1970 (2011), para 8.
375 See further *Gender Report Card 2011*, p 116.

in particular in relation to the expenses incurred due to the referrals by the Security Council', in practice the Court's expenses have been financed by contributions from States Parties. In its 2011 report, the CBF had noted that 'as a matter of principle it is unclear why the Assembly should alone bear the full costs' for UN Security Council referrals.[376] Accordingly, the CBF recommended that this issue should be discussed by the Bureau and/or the working groups to determine whether to raise the issue with the Security Council. At the time of writing this Report, public information about this discussion has not been made available.

376 ICC-ASP/10/15, Advance version, para 35.

Substantive Work of the ICC

17 September 2011 — 17 August 2012*

* The *Gender Report Card 2012* includes a review of developments and judicial decisions up to 17 August 2012. Selected important events and decisions have also been included through October 2012.

Focus:
Overview of cases and Situations

Pursuant to Article 13 of the Rome Statute, the ICC may exercise jurisdiction over a situation: (a) when the situation has been referred to the Prosecutor by a State Party; (b) when the United Nations (UN) Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Prosecutor; or (c) when the Prosecutor initiates an investigation into a situation *proprio motu* (on her own initiative). The Prosecutor may initiate investigations on her own initiative on the basis of information received on crimes within the jurisdiction of the Court. Any person or organisation may submit such information to the Office of the Prosecutor under Article 15 of the Statute. Non-States Parties may also lodge a declaration accepting the ICC's jurisdiction under Article 12(3). The initiation of an investigation subsequent to such a declaration is considered a *proprio motu* investigation by the Prosecutor. *Proprio motu* investigations initiated either under Articles 12(3) or 15 are subject to authorisation by the Pre-Trial Chamber.

The first three Situations to come before the Court (Uganda, the Democratic Republic of the Congo and the Central African Republic) were referred by the Governments of these respective countries, all ICC States Parties. The UN Security Council has referred two Situations to the Court: in 2009, the Situation in Darfur and, in 2011, the Situation in Libya; neither Sudan nor Libya is an ICC State Party. The Office of the Prosecutor has so far initiated two investigations *proprio motu*: Kenya and Côte d'Ivoire. While Kenya is a State Party to the Rome Statute, the Prosecutor initiated the Côte d'Ivoire investigation *proprio motu* following an Article 12(3) declaration by the Government of Côte d'Ivoire.

Situations under preliminary examination

Prior to opening an investigation into a Situation, the Office of the Prosecutor carries out a preliminary examination, to determine whether a situation meets the legal criteria established by the Rome Statute to warrant investigation by the ICC.[377] The preliminary examination takes into account jurisdiction, admissibility and the interests of justice. A preliminary examination can be initiated by a decision of the Prosecutor, on the basis of information received on crimes within the jurisdiction of the ICC pursuant to Article 15; a referral from a State Party or the UN Security Council; or a declaration by a non-State Party pursuant to Article 12(3) of the Statute. There is no specified time within which the Office of the Prosecutor must reach a decision about whether to open an investigation, and situations can remain under preliminary examination for several years before a decision is made as to whether or not the legal requirements for formal investigation are met.

As of the writing of this Report, the Office of the Prosecutor lists eight countries as under preliminary examination: Afghanistan (since 2007); Colombia (since 2006); Georgia (since 2008); Guinea (since 2009); Honduras (since 2010); Korea (since 2010); Mali (since 2012); and Nigeria (since 2010). On three occasions, the Office has decided not to proceed after completing a preliminary examination; in 2006 the Office issued decisions deciding not to proceed with formal investigations in Iraq and Venezuela, and in 2012 the Office declined to proceed in Palestine.

377 'Draft Policy Paper on Preliminary Examinations', *Office of the Prosecutor*, 4 October 2010, available at <http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf>, last visited on 11 October 2012.

Following the receipt and analysis of at least 404 communications under Article 15 in relation to the situation in Iraq, and at least 34 communications in relation to Venezuela, in February 2006, the Office of the Prosecutor officially announced that at that stage, the statutory requirements to seek authorisation from the Pre-Trial Chamber to initiate an investigation into either one of those situations had not been satisfied.[378]

The Palestinian National Authority lodged a declaration under Article 12(3) in January 2009 and the Office of the Prosecutor has received over 400 communications under Article 15 in relation to crimes allegedly committed in Palestine. In analysing the Palestinian declaration, one of the issues raised was whether the Palestinian National Authority qualified as a "State" under the Rome Statute and could thus accept the Court's jurisdiction under Article 12(3) as a non-State Party. Having assessed the information and arguments received, however, on 3 April 2012 the Office of the Prosecutor concluded that the Rome Statute does not confer powers upon the Office to make this determination.[379] In its decision, the Office of the Prosecutor concluded that such powers lie solely with the relevant bodies of the UN or the Assembly of States Parties.[380] Observing that 'the current status granted to Palestine by the United Nations General Assembly is that of 'observer',

378 'OTP response to communications received concerning Iraq', *The Office of the Prosecutor*, 9 February 2006, available at <http://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>, last visited on 11 October 2012; 'OTP response to communications received concerning Venezuela', *The Office of the Prosecutor*, 9 February 2006, available at < http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf> , last visited on 11 October 2012.

379 'Update on Situation in Palestine', *The Office of the Prosecutor*, 3 April 2012, available at <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>, last visited on 11 October 2012, para 6.

380 'Update on Situation in Palestine', *The Office of the Prosecutor*, 3 April 2012, available at <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>, last visited on 11 October 2012, para 6.

not as a 'Non-member State', the Office of the Prosecutor stated that it 'could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of Article 12 or should the Security Council, in accordance with Article 13(b), make a referral providing jurisdiction'.

In July 2012, the Office of the Prosecutor received a letter from the Government of Mali, referring the situation in the country since January 2012 to the ICC.[381] Following the receipt of the letter, Chief Prosecutor Fatou Bensouda instructed her office to initiate preliminary examinations into the situation in Mali. The Prosecutor's statement on the referral of the situation highlighted reports of sexual violence, among other crimes.[382] At the end of August 2012, the Office of the Prosecutor conducted a mission in Mali 'aimed at verifying the seriousness of the information received by the OTP on alleged crimes committed in Mali since January 2012, and at assessing whether the Rome Statute criteria for opening an investigation are met'.[383] A decision as to whether an investigation will be opened has not been made public at the time of writing this Report.

The Office of the Prosecutor continues to receive communications pursuant to Article 15 of the Rome Statute. As of the end of 2011, the Office reported that it has received 9,332 communications, of which 4,316 were manifestly outside the jurisdiction of the Court.[384]

381 Government of Mali, 'Referral Letter', 13 July 2012, available at <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>, last visited on 11 October 2012.

382 'ICC Prosecutor Fatou Bensouda on the Malian State Referral of the Situation in Mali since January 2012', *OTP Press Release*, 18 July 2012, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr829>, last visited on 11 October 2012. The Prosecutor's statement refers to reports of 'instances of killings, abductions, rapes and conscription of children'.

383 *OTP Weekly Briefing*, Issue #130, 28 August – 11 September 2012.

384 'Communications, Referrals and Preliminary Examinations', available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/>, last visited on 11 October 2012.

Democratic Republic of the Congo

In June 2004, following a referral by the Government of the DRC earlier that year, the Situation in the Democratic Republic of the Congo (DRC) became the first Situation under ICC investigation. Opening the investigation, Prosecutor Moreno Ocampo announced that he would 'investigate grave crimes allegedly committed on the territory of the [...] DRC since 1 July 2002'.[385] His announcement referenced reports from States, international organisations and non-governmental organisations of 'thousands of deaths by mass murder and summary execution in the DRC since 2002'. He noted that reports pointed to 'a pattern of rape, torture, forced displacement and the illegal use of child soldiers'. The Office of the Prosecutor is continuing investigations in the DRC, currently focusing on North and South Kivu. Since the opening of the investigation, the Office of the Prosecutor has requested arrest warrants against six individuals. Four of those individuals have been arrested and surrendered to the Court. Two arrest warrants remain outstanding. The DRC Situation was the first Situation in which the Court started trial proceedings, and is the first and, to date, only Situation in which the Court has completed a trial process.

The first trial, against Thomas Lubanga Dyilo (Lubanga), concluded with closing arguments in August 2011. Following the Court's first trial judgement, issued in March 2012, which convicted Lubanga of the enlistment, conscription and use of child soldiers, Lubanga was sentenced to 14 years imprisonment. The trial and sentencing judgement, as well as the August 2012 reparations decision, the first to be issued by the Court, are discussed in greater detail in the **First trial judgement in the Lubanga case** and **First sentencing and reparations decisions in the Lubanga case**

385 ICC-OTP-20040623-59, para 3.

sections of this Report. A second trial arising out of investigations in the Ituri region, against Germain Katanga (Katanga) & Mathieu Ngudjolo Chui (Ngudjolo), concluded in early 2012 and is currently awaiting the trial judgement. The closing arguments in this case are discussed more fully in the **Closing arguments in first case including gender-based crimes charges** section of this Report. A fourth suspect, Bosco Ntaganda (Ntaganda), against whom an Arrest Warrant was first issued in 2006,[386] remains at large.

Following the Prosecution's investigation in North Kivu and South Kivu, a fifth suspect, Callixte Mbarushimana (Mbarushimana) was arrested and transferred to the Court's custody in October 2010. However, Mbarushimana was released before trial in December 2011 following the Pre-Trial Chamber decision not to confirm any charges.[387] In 2012, the Prosecution pursued a second case arising out the investigation in North and South Kivu against Sylvestre Mudacumura (Mudacumura). Having initially declined to issue an arrest warrant for Mudacumura in May 2012, Pre-Trial Chamber II issued an Arrest Warrant against him in July 2012 following the submission of a second request by the Office of the Prosecutor. The decisions by the Pre-Trial Chamber in the Mbarushimana and Mudacumura cases are discussed in more detail in the **Charges for gender-based crimes** section of this Report. At the time of writing, Mudacumura's Arrest Warrant remains outstanding.

386 As described in the *Charges for gender-based crimes* section of this Report, in May 2012, the Prosecutor requested a second Arrest Warrant against Ntaganda, including charges of gender-based crimes.

387 ICC-01/04-01/10-465-Red. The decision is discussed more fully in the section on *Charges for gender-based crimes* section in this Report.

Uganda

The Prosecutor opened an investigation into the Situation in Uganda in July 2004, following a referral by the Government of Uganda in January of that year. This was the first referral of a Situation by a State Party to the Rome Statute. In 2005, the ICC issued the Court's first arrest warrants, against five alleged senior leaders of the Lord's Resistance Army (LRA) – Joseph Kony (Kony), Vincent Otti (Otti), Raska Lukwiya (Lukwiya), Okot Odiambo (Odiambo) and Dominic Ongwen (Ongwen) – with a total of 86 counts of war crimes and crimes against humanity. No suspects have been arrested in the Kony *et al* case to date. However, it is believed that only Kony, Odhiambo and Ongwen remain at large. Proceedings against Lukwiya were terminated after confirmation of his death in 2006. In September 2008, the Office of the Prosecutor indicated that it had confirmed the death of Vincent Otti as well, and was preparing to terminate proceedings against him. However, the Court's public documents continue to treat Otti as a suspect at large.

Investigations in the Uganda Situation have focused primarily on crimes committed by the LRA. Ongoing efforts to apprehend the remaining LRA leaders are described in more detail in the section on **Outstanding Arrest Warrants** in this Report. Proceedings before the ICC in the Uganda Situation are relatively inactive pending the arrest of Kony, Odhiambo and Ongwen. No further arrest warrants have been issued since the opening of investigations.

Central African Republic

The Situation in the Central African Republic (CAR) was referred to the Court in December 2004 by the Government of the CAR.[388] The Prosecutor publicly announced the opening of an investigation in May 2007. The investigation has focused on serious crimes committed during the peak of violence in 2002-2003, while continuing to monitor crimes committed since 2005, particularly in the north of the CAR. In announcing the investigation, Prosecutor Moreno Ocampo noted an exceptionally high number of rapes reported during the peak of the violence, at least 600 in a period of five months.

To date, charges have only been brought in the CAR Situation against Jean-Pierre Bemba Gombo (Bemba), alleged President and Commander-in-Chief of the *Mouvement du libération du Congo* (MLC). Following the issuance of his Arrest Warrant in 2008, and the confirmation of charges in 2009, Bemba's trial commenced on 22 November 2010. In March 2012, the Prosecution called its final witness in this case, and the Defence case began on 14 August. The Bemba case is discussed in more detail in the **Ongoing testimony on gender-based crimes at the ICC** section of this Report.

388 ICC-01/05-1, p 1; ICC-01/05-01/08-14, para 1. The referral was made public by the Prosecution in early 2005: 'Prosecutor receives referral concerning Central African Republic', *OTP Press Release*, ICC-OTP-20050107-86, 7 January 2010, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic?lan=en-GB>, last visited on 11 October 2012.

Darfur

In March 2005, the Situation in Darfur became the first Situation to be referred to the ICC by the United Nations (UN) Security Council.[389] Pursuant to Article 13(b), the Security Council may refer a Situation to the Prosecutor where genocide, crimes against humanity and/or war crimes 'appear to have been committed' in that State. Sudan is not a State Party to the Rome Statute and has not cooperated with the ICC's investigations since the issuance of the first arrest warrants in this Situation in 2007.[390]

At the time of writing this Report, the Court has issued arrest warrants or summons to appear in five cases, involving seven individuals. Three suspects, Bahar Idriss Abu Garda (Abu Garda), Abdallah Banda Aba Kaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo), all alleged rebel commanders, have appeared before the Court voluntarily in response to summonses to appear, which were issued in 2009. However, in February 2010, the Court dismissed the case against Abu Garda before trial, finding insufficient evidence to confirm the charges against him. While the charges against Banda and Jerbo were confirmed in March 2011, a date has not yet been set for their trial due to translation and interpretation issues. The arrest warrants for President Omar Hassan Ahmad Al'Bashir (President Al'Bashir), issued in 2009 and 2010, for Ahmad Muhammed Harun (Harun) and Ali Muhammad Al-Al-Rahman (Kushayb), issued in 2007, and for Abdel Raheem Muhammad Hussein (Hussein), issued in 2010, all of whom are senior Government and/or military officials, remain outstanding. Sudan's failure to cooperate with the Court remains a major issue; this is discussed in greater detail in the section on **Outstanding Arrest Warrants** of this Report.

389 Resolution 1593, UNSC, 5158th meeting, S/Res/1593 (2005), 31 March 2005.

390 Prosecutor of the International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)', New York, 11 June 2010, para 11, available at <http://www.icc-cpi.int/NR/rdonlyres/5B7C603A-6D74-4A24-8979-C38372FB9EEA/282156/FinalformattedspeechUNSC_11062010postdeliveryclean.pdf>, last visited on 18 October 2012.

Kenya

The Prosecutor requested authorisation from the Pre-Trial Chamber to open investigations into the Situation in Kenya in 2009. This marked the first time the Prosecutor used the *proprio motu* powers under Article 15 of the Rome Statute. The Situation in Kenya arose out of the violence surrounding the Kenyan national elections held on 27 December 2007, following a disputed election, in which incumbent President Mwai Kibaki of the Party of National Unity (PNU) faced a challenge from opposition candidate Raila Odinga, leader of the Orange Democratic Movement (ODM).[391]

The Situation in Kenya has involved an admissibility challenge by the Government, an active lobby by the Kenyan Government with the African Union (AU) for support for an Article 16 deferral of the cases by the UN Security Council, and domestic legal challenges to the ICC's investigations.[392] The Kenyan Situation was the first Situation in which a State Party challenged the admissibility of a case under Article 19 of the Rome Statute.[393] Nonetheless, all six suspects against whom the Court issued summonses to appear in March 2011 have appeared voluntarily before the Court and the Court has confirmed charges against four of the six individuals. The two trials – the first against William Samoei Ruto (Ruto) and Joshua Arap Sang (Sang), both aligned with the ODM at the time of the post-election violence; the second against Francis Kirimi Muthaura (Muthaura) and Uhuru Muigai Kenyatta (Kenyatta), both aligned with the PNU at the relevant time – are scheduled to start in April 2013. The confirmation of charges decisions in these cases are discussed in the **Charges for gender-based crimes** section of this Report.

391 For more detailed background about the post-election violence and the opening of investigations by the ICC, see *Gender Report Card 2010*, p 118-127; and *Gender Report Card 2011*, p 168-182.

392 For more information see *Gender Report Card 2011*, p 170-176, 265-271.

393 The Kenyan Government challenged the admissibility of both cases arising out of the Kenyan Situation on 30 March 2011, several weeks after the Court issued summonses to appear against six individuals in the two cases. On 30 May 2011, Pre-Trial Chamber II issued a decision rejecting the challenges and finding the cases admissible. Kenya unsuccessfully appealed this decision; on 30 August 2011, the Appeals Chamber confirmed the Pre-Trial Chamber's decision holding the cases admissible. For a detailed analysis of the admissibility challenge and the decisions by the Pre-Trial and Appeals Chamber, see *Gender Report Card 2011*, p 265-271.

Libya

The Situation in Libya is the second situation referred to the Office of the Prosecutor by the UN Security Council. On 26 February 2011, the UN Security Council issued Resolution 1970, giving the ICC jurisdiction over the Situation in Libya, which is not an ICC State Party. The referral followed the violent repression of demonstrations that began on 15 February 2011, demanding an end to the regime and dictatorship of Muammar Mohammed Abu Minyar Gaddafi (Muammar Gaddafi) in the Libyan Arab Jamahiriya (Libya), and came 11 days after the first report of alleged unlawful attacks by state security forces on anti-government protestors. The Prosecutor officially announced the opening of an investigation on 3 March 2011.

The Court initially issued Arrest Warrants against three individuals on 27 June 2011. Following the confirmation of the death of Muammar Gaddafi, the proceedings against him were terminated in November 2011. At the time of writing this Report, the Arrest Warrants against his son Saif Al-Islam Gaddafi (Gaddafi)[394] and his brother-in-law Abdullah Al-Senussi (Al-Senussi) remain outstanding. As described in more detail in the section on **Outstanding Arrest Warrants** of this Report, cooperation with the ICC regarding the execution of the outstanding arrest warrants has

394 Following the termination of proceedings against Muammar Gaddafi in November 2011, the Court refers to Saif Al-Islam Gaddafi as Gaddafi. For the sake of consistency, we also refer to Saif Al-Islam Gaddafi as Gaddafi in this Report.

been further complicated by the detention of ICC staff members on mission in Libya. Libya has also challenged the admissibility of the case against Gaddafi, which is the second time a State has filed such a challenge.[395]

Côte d'Ivoire

The Situation in Côte d'Ivoire is the most recent to come under ICC investigation, and marks the first investigation opened following an Article 12(3) declaration by a non-State Party to the Rome Statute to accept the Court's jurisdiction,[396] and the second time the Prosecutor has initiated an investigation *proprio motu*. The transfer of former President Laurent Koudou Gbagbo (Gbagbo) to the ICC on 30 November 2011 marked the first time a former Head of State came in to the Court's custody. To date, Gbagbo is the only individual for whom the Court has issued an arrest warrant in the Côte d'Ivoire Situation.

The Situation in Côte d'Ivoire deteriorated quickly in November 2010, when violence broke out following presidential elections, which has been described as 'the most serious humanitarian and human rights crisis in Côte d'Ivoire since the *de facto* partition of the country in September 2002.'[397] Following the intensification of violence, the Government of Côte d'Ivoire, which initially accepted the Court's jurisdiction in 2003, reaffirmed its acceptance of ICC jurisdiction pursuant to Article 12(3) in December 2010 and May 2011, and on 23 June 2011 the ICC Prosecutor requested authorisation to initiate investigations into the Situation in Côte d'Ivoire, which was granted by the Pre-Trial Chamber on 3 October 2011. On 22 February 2012, after the submission of additional information by the Office of the Prosecutor at the Chamber's request, Pre-Trial Chamber III extended the investigation to include potentially relevant crimes committed between 2002 and 2010.

While the confirmation of charges hearing against Gbagbo was originally scheduled to take place in June 2012, the hearing has been postponed twice: once to allow the Defence further time to prepare their case and again in August 2012 for medical reasons relating to the accused. At the time of writing this Report, a date for the confirmation of charges hearing has not yet been set. The Arrest Warrant issued for Gbagbo on 3 October 2011 is discussed more fully in the **Charges for gender-based crimes** section of this Report.

395 As discussed above, Kenya also unsuccessfully challenged the admissibility of the cases against the six suspects. See further, *Gender Report Card 2011*, p 265-271.

396 Pursuant to Article 12(3), a non-State Party can lodge a declaration accepting the jurisdiction of the Court. Following such a declaration, it is up to the Prosecutor to decide *proprio motu* whether to request authorisation from the Pre-Trial Chamber to initiate investigations.

397 'Côte d'Ivoire: six months of post-electoral violence: Summary', *Amnesty International*, 25 May 2011, available at <http://www.amnesty.org/en/library/info/AFR31/003/2011/en>, last visited on 19 October 2012.

Focus:
Charges for gender-based crimes

This Special Edition of the *Gender Report Card on the ICC* provides an overview of the status of charges for gender-based crimes across the Situations and cases. It examines some of the trends that have emerged in the Court's recent practice, and some of the challenges for the prosecution of gender-based crimes. In this Report, we focus on important developments over the past year in cases where gender-based crimes have been charged, specifically in three cases from the DRC Situation – Ntaganda, Mbarushimana, and Mudacumura – and in the Kenya and Côte d'Ivoire Situations. In other sections of this Report, there is detailed discussion of the Trial Chamber's treatment of sexual violence in the Lubanga trial judgement, in the absence of charges for gender-based crimes. In the *Closing arguments in the first case including gender-based crimes charges* and *Ongoing testimony for gender-based crimes at the ICC* sections, this Report addresses courtroom arguments and testimony in the Katanga & Ngudjolo and Bemba cases, the first two cases at the trial stage in which gender-based crimes were charged.

Status of charges for gender-based crimes across Situations and cases

At the time of writing this Report, charges for gender-based crimes have been brought in six of the seven Situations: Uganda, the DRC, the CAR, Darfur, Kenya and Côte d'Ivoire. No charges for gender-based crimes have yet been brought in the Libya Situation, although the Office of the Prosecutor has indicated that investigations into sexual violence in Libya are ongoing.

Charges of gender-based crimes have now been brought in 11 of the 16 cases currently before the Court, a proportion of almost 70%.[398] Charges for gender-based crimes have been included: in the Kony *et al* case in the Uganda Situation; in the Katanga & Ngudjolo, Ntaganda, Mbarushimana and Mudacumura cases in the DRC Situation; in the Bemba case in the CAR Situation; in the Al'Bashir, Harun & Kushayb and Hussein cases in the Darfur Situation; in the Muthaura & Kenyatta case in the Kenya Situation; and in the Gbagbo case in the Côte d'Ivoire Situation. No charges for gender-based crimes were brought in the Lubanga case in the DRC Situation, the Abu Garda or Banda & Jerbo cases in the Darfur Situation, the Ruto & Sang case in the Kenya Situation or, to date, in the Gaddafi & Al-Senussi case in the Libya Situation.[399] The specific charges in each case are set out in detail below. Of the 29 individual suspects and accused who have been charged by the Court, 16 have been charged with crimes of gender-based violence, a proportion of just over 55%.[400]

Sexual violence has been charged as a war crime, a crime against humanity and an act of genocide at the ICC. Specific charges have included causing serious bodily or mental harm, rape, sexual slavery, other forms of sexual violence, torture, persecution, other inhumane acts, cruel or inhuman treatment and outrages upon personal dignity. The applications for Arrest Warrants for Bemba and Mbarushimana are the only publicly available applications for which the majority of crimes charged relate to acts of sexual and gender-based violence. The highest number of gender-based charges included in an arrest warrant for any one individual was for Mbarushimana and Kushayb with eight charges each, followed by Harun and Hussein with seven charges. No charges, including for gender-based crimes, were confirmed against Mbarushimana by the Pre-Trial Chamber, which did not find there were substantial grounds to believe that he was individually criminally responsible for the alleged crimes committed by the FDLR, as discussed in detail later in this section. However, the Arrest Warrant against him contained the broadest variety of gender-based crimes which had been sought by the Office of the Prosecutor to date, reflecting efforts to make greater use of the full range of sexual and gender-based crimes included in the Rome Statute.

Since the publication of the *Gender Report Card 2011*, the Office of the Prosecutor has brought charges for gender-based crimes in four cases: against Gbagbo in the Côte d'Ivoire Situation, against Hussein in the Darfur Situation, and against Ntaganda and Mudacumura in the DRC Situation.

398 Eleven out of 16 cases constitute 68.75% of all cases presented by the Office of the Prosecutor at the time of writing this Report.

399 Before the arrest warrants were initially issued in the Gaddafi & Al-Senussi case in June 2011, former Prosecutor Moreno Ocampo stated that his Office was conducting ongoing investigations into allegations of rape and sexual violence and would consider adding charges of rape to the case following the issuance of arrest warrants. According to the public record, no further action appears to have been taken at the time of writing this Report. See 'Libya: Gaddafi investigated over use of rape as weapon', *BBC News*, 8 June 2011, available at <http://www.bbc.co.uk/news/world-africa-13705854>, last visited on 12 October 2012. See further *Legal Eye on the ICC* e-letter, July 2011, available at <http://www.iccwomen.org/news/docs/LegalEye7-11/LegalEye7-11.html> and *Gender Report Card 2011*, p 189-190.

400 Sixteen out of 29 suspects and accused represents 55.17% of all individuals charged by the Prosecution.

Status of all gender-based charges across each case as of 17 August 2012

The chart lists the 16 individual indictees for whom charges for gender-based crimes have been sought by the Prosecutor.

Case	*Stage of proceedings*	*Charges for gender-based crimes currently included*
Prosecutor v. Katanga & Ngudjolo	At trial, awaiting trial judgement	Charges against Katanga: • Rape as a crime against humanity • Rape as a war crime • Sexual slavery as a crime against humanity • Sexual slavery as a war crime Charges against Ngudjolo: • Rape as a crime against humanity • Rape as a war crime • Sexual slavery as a crime against humanity • Sexual slavery as a war crime
Prosecutor v. Bemba	At trial	Charges against Bemba: • Rape as a crime against humanity • Rape as a war crime
Prosecutor v. Muthaura & Kenyatta	Trial scheduled to begin in April 2013	Charges against Muthaura: • Rape as a crime against humanity • Other inhumane acts as a crime against humanity • Persecution (by means of rape and other inhumane acts) as a crime against humanity Charges against Kenyatta: • Rape as a crime against humanity • Other inhumane acts as a crime against humanity • Persecution (by means of rape and other inhumane acts) as a crime against humanity
	No charges were confirmed against Ali	Charges against Ali: • Rape as a crime against humanity • Other inhumane acts as a crime against humanity • Persecution (by means of rape and other inhumane acts) as a crime against humanity
Prosecutor v. Gbagbo	Confirmation of charges hearing, date to be determined	Charges against Gbagbo: • Rape and other forms of sexual violence as a crime against humanity • Persecution (including acts of rape and sexual violence) as a crime against humanity
Prosecutor v. Mbarushimana	No charges confirmed for trial, suspect released from custody	Charges against Mbarushimana: • Torture as a crime against humanity • Torture as a war crime • Rape as a crime against humanity • Rape as a war crime • Other inhumane acts (including acts of rape and mutilation of women) as a crime against humanity • Inhuman treatment (including acts of rape and mutilation of women) as a war crime • Persecution (based on gender) as a crime against humanity • Mutilation as a war crime

continued next page

Case	*Stage of proceedings*	*Charges currently included*
Prosecutor v. Ntaganda	Arrest warrant issued, no accused in custody	Charges against Ntaganda[401]: • Rape and sexual slavery as a crime against humanity • Rape and sexual slavery as a war crime • Persecution (including acts of sexual violence) as a crime against humanity
Prosecutor v. Mudacumura	Arrest warrant issued, no accused in custody	Charges against Mudacumura: • Rape as a war crime • Torture as a war crime • Mutilation as a war crime • Outrages upon personal dignity as a war crime[402]
Prosecutor v. Hussein	Arrest Warrant issued; no accused in custody	Charges against Hussein: • Persecution (including acts of sexual violence) as a crime against humanity (2 counts) • Rape as a crime against humanity (2 counts) • Rape as a war crime (2 counts) • Outrages upon personal dignity as a war crime
Prosecutor v. Al'Bashir	Arrest Warrant issued; no accused in custody	Charges against Al'Bashir: • Sexual violence causing serious bodily or mental harm as an act of genocide • Rape as a crime against humanity
Prosecutor v. Harun & Kushayb	Arrest Warrant issued; no accused in custody	Charges against Harun: • Rape as a crime against humanity (2 counts) • Rape as a war crime (2 counts) • Outrages on personal dignity as a war crime • Persecution by means of sexual violence as a crime against humanity (2 counts) Charges against Kushayb: • Rape as a crime against humanity (2 counts) • Rape as a war crime (2 counts) • Outrages upon personal dignity as a war crime (2 counts) • Persecution by means of sexual violence as a crime against humanity (2 counts)
Prosecutor v. Kony et al	Arrest Warrant issued; no accused in custody	Charges against Kony: • Sexual slavery as a crime against humanity • Rape as a crime against humanity • Rape as a war crime Charges against Otti (believed deceased): • Sexual slavery as a crime against humanity • Rape as a war crime

401 In both the application and decision, rape and sexual slavery charges are referred to as a single count.

402 This charge of outrages upon personal dignity is provisionally included as a gender-based crime charge subject to the availability of further information regarding the acts underlying the charge. The application is redacted and thus the factual basis for the charge is unclear. However, we note that in other cases the Office of the Prosecutor has frequently charged outrages upon personal dignity arising out of sexual violence.

Challenges for the prosecution of gender-based crimes

The Women's Initiatives' analysis, as discussed in previous editions of the *Gender Report Card on the ICC*, has noted the vulnerability of charges for gender-based crimes at the ICC relative to charges for other crimes. Charges for gender-based crimes, when they have been brought, have been particularly susceptible to being dropped, or in some instances recharacterised, in the early stages of proceedings, in particular seeking the issuance of an arrest warrant or summons to appear, and the confirmation of charges phase.

Gender-based crimes were not charged in the Lubanga case, as discussed in detail later in this Report and as raised by the Women's Initiatives in 2006, as the first NGO to file before the Court.[403] No case containing charges of gender-based crimes has yet reached the stage of a trial or appeal judgement, although the case against Katanga & Ngudjolo, containing charges of rape and sexual slavery, is awaiting trial judgement. The Pre-Trial Chamber is charged with determining whether the Prosecution has presented sufficient evidence to meet the legal standards for issuing arrest warrants and summonses to appear, and with confirming charges. The Women's Initiatives' analysis of nine cases, namely the cases against Bemba, Muthaura & Kenyatta, Harun & Kushayb, Al'Bashir, Hussein, Gbagbo, Mbarushimana, Ntaganda and Mudacumura,[404] shows that only seven charges out of a total of 204 requested by the Prosecution have not been included in the arrest warrants or summonses to appear issued by the Pre-Trial Chamber, and five of those seven charges related to sexual or gender-based violence.[405] Four cases involving gender-based crimes have reached the confirmation of charges phase to date, namely the cases against Bemba, Katanga & Ngudjolo, Mbarushimana and Muthaura & Kenyatta. In those four cases, the Pre-Trial Chamber declined to

403 Following the announcement of the charges against Lubanga in 2006, the Women's Initiatives expressed concern that the case did not contain charges for gender-based crimes. Since the early stages of the case, the Women's Initiatives has advocated for further investigation and re-examination of the charges. See further *Gender Report Card 2008, 2009, 2010* and *2011*. On 16 August 2006, the Women's Initiatives submitted a confidential report and a letter to the Office of the Prosecutor describing concerns that gender-based crimes had not been adequately investigated in the case against Lubanga and providing information about the commission of these crimes by the UPC. A redacted version of this letter is available at <http://www.iccwomen.org/documents/Prosecutor_ Letter_ August_2006_Redacted.pdf>. The Women's Initiatives was the first NGO to file before the Court in respect of the absence of charges for gender-based crimes in the Lubanga case in 2006. ICC-01/04-01/06-403. See also *Legal Filings submitted by the Women's Initiatives for Gender Justice to the International Criminal Court*, available at<http://www.iccwomen.org/publications/articles/docs/Legal_Filings_submitted_by_the_WIGJ_to_the_International_Criminal_Court_2nd_Ed.pdf>.

404 In conducting research on gender-based crimes charges at the ICC, the Women's Initiatives notes that the public availability of information regarding which charges were sought and which charges were included at each of these procedural stages in each case is inconsistent, thereby making direct comparisons concerning the attrition rate of these charges impossible. This analysis is therefore based solely on those cases in which gender-based charges were initially sought and the Prosecution's application for an arrest warrant or summons to appear is publicly available.

405 Two counts of 'other forms of sexual violence' were not included in the Arrest Warrant in the Bemba case because the Pre-Trial Chamber held that 'the facts submitted by the Prosecutor do not constitute other forms of sexual violence of comparable gravity to the other forms of sexual violence set forth in Article 7(1)(g)'. For the charges included in the Arrest Warrant see further *Gender Report Card 2008*, p 50-51. Initially, all 14 charges sought in the Mudacumura case were rejected by the Pre-Trial Chamber on the grounds of a lack of specificity in the application for the Arrest Warrant, but following the submission of a revised application by the Prosecution, an Arrest Warrant was issued for the nine counts of war crimes but not the five counts of crimes against humanity. Of these five counts, three (rape, torture and persecution) related to sexual and gender-based violence and two (murder and other inhumane acts) did not. The Chamber did not include any charges for crimes against humanity because, on the basis of the evidence presented it did not find that reasonable grounds to believe that there was an organisational policy of the FDLR to attack the civilian population, as required to for crimes against humanity. This decision is discussed in detail below.

confirm exactly half of all charges of gender-based crimes sought by the Prosecution.[406] As of 17 June 2012, 50% of the charges for gender-based crimes sought by the Office of the Prosecutor had been dismissed before the trial stage of the proceedings.

In some cases, judicial decisions, including those reviewing charges for gender-based crimes, have examined the investigations conducted by the Office of the Prosecutor,[407] and raised issues with the evidence presented to the Pre-Trial Chambers. During the period under review, Pre-Trial Chamber decisions, particularly at the arrest warrant/summons to appear stage of proceedings, have expressed concern about the evidence presented to support sexual violence charges in the Katanga & Ngudjolo, Mbarushimana, Mudacumura and Ntaganda cases in the DRC Situation, in the Gbagbo case in the Côte d'Ivoire Situation, and the Muthaura & Kenyatta case in the Kenya Situation. These decisions are discussed later in this section.

The Pre-Trial Chambers have in a number of decisions also interpreted the law in ways which differed from established jurisprudence and led to a decline in the confirmation rate of charges of gender-based crimes.[408] In the 2006 decision issuing the Arrest Warrant for Bemba, Pre-Trial Chamber III did not include a charge of other forms of sexual violence as a crime against humanity, which had been based on allegations that MLC troops had forced women to undress in public in order to humiliate them, because it held that 'the facts submitted by the Prosecutor do not constitute other forms of sexual violence of comparable gravity to the other forms of sexual violence set forth in Article 7(1)(g)'.[409] In the 2009 confirmation of charges decision in the Bemba case, Pre-Trial Chamber II further dismissed charges of rape as torture and outrages upon personal dignity and confirmed only charges of rape. The Chamber held that charging rape, rape as torture, and outrages upon personal dignity would be cumulative charging and 'detrimental to the rights of the defence'.[410] In July 2009, the Women's Initiatives filed an *amicus curiae* brief in the Bemba case,

406 Sixteen of 32 total charges for gender-based crimes (representing a proportion of exactly 50%) across the four cases were not confirmed for trial. Two charges of outrages on personal dignity were not confirmed in the Katanga & Ngudjolo case; three gender-based charges (two counts of torture and one count of outrages on personal dignity) were not confirmed in the Bemba case; eight charges of gender-based crimes were dismissed in the Mbarushimana case (two counts of torture, two counts of rape, other inhumane acts, inhuman treatment, persecution and mutilation); three counts of gender-based crimes charged against Ali (rape, other inhumane acts and persecution) were not confirmed in the Muthaura & Kenyatta case. Prior to the release of the confirmation of charges decisions in the Mbarushimana and Muthaura & Kenyatta cases, the Women's Initiatives had noted that the failure rate for charges of gender-based crimes at the confirmation of charges phase was 33%. The attrition rate of charges for gender-based crimes has increased since 2011. See further *Gender Report Card 2011*, p 125.

407 Trial Chamber I, in issuing its trial judgement in the Lubanga case, presented a thorough review of and commentary on the Prosecution investigations in Ituri, 'in order to demonstrate the extent of the problems the investigators faced and the background to the considerable reliance that the prosecution placed on certain intermediaries'. ICC-01/04-01/06-2842, para 124. The Lubanga trial judgement is discussed in more detail in the *First trial judgement in the Lubanga case* section of this Report. In the confirmation of charges decision in the Mbarushimana case, the Pre-Trial Chamber identified a number of concerns with the Prosecution's investigation and presentation of evidence, which contributed to the Chamber's decision not to confirm any charges (ICC-01/04-01/10-465-Red, paras 51, 82). Similarly, in his Dissenting Opinion to the confirmation of charges decision in the Muthaura & Kenyatta, and Ruto & Sang cases in the Kenya Situation, Judge Kaul also expressed concern about the sufficiency of the Prosecution's investigations at that stage of proceedings (ICC-01/09-02/11-382-Red, Dissent, paras 49-52; and ICC-01/09-01/11-373, Dissent, para 44-47). These decisions are described more fully below.

408 See further *Gender Report Card on the ICC 2011*, p 125-128.

409 ICC-01/05-01/08-14-tEN, para 40. While the Pre-Trial Chamber in the case against Katanga & Ngudjolo, did find that forced nudity constituted outrages upon personal dignity, it subsequently declined to confirm this charge because it had not found sufficient evidence to link the crime to the accused's common plan 'to wipe out Bogoro village' (ICC-01/04-01/07-717, para 578).

410 ICC-01/05-01/08-424. See further *Gender Report Card 2009*, p 63-67.

in response to the decision not to confirm these charges. The filing, among other things, set out the legal principles under which cumulative charging is allowed in both international and domestic practice and is consistent with the rights of the accused.[411]

Charges for gender-based crimes were brought in one of the two cases in the Kenya Situation,[412] despite the Prosecutor's request to open investigations in 2009 having contained multiple references to reports that gender-based crimes had been committed.[413] The Prosecution was subsequently unsuccessful in having the full range of these charges included in the summonses to appear against the suspects, as well as in the confirmation of charges decisions, as discussed later in this section.[414] In the Muthaura & Kenyatta case, in both issuing the Summonses to Appear and confirming the charges, Pre-Trial Chamber II recharacterised the act of forced male circumcision and penile amputation as the charge of other inhumane acts, while the Prosecution had characterised the act as the charge of other forms of sexual violence.[415] As further discussed below, the Prosecution argued that the acts of forcible circumcision 'weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities as men within their society and were designed to destroy their masculinity'.[416] However, the Chamber found that 'the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men'.[417]

Following the Abu Garda case in the Darfur Situation, the Mbarushimana case represented the second time a Pre-Trial Chamber has declined to confirm any charges against the accused.[418] This decision is discussed in detail below. Subsequently, in January 2012, Pre-Trial Chamber II declined to confirm charges against Kosgey and Ali, two of six suspects in the Kenya Situation. Overall, four out of a total of 14 individuals who have appeared before the Court for a confirmation of charges hearing have been released without charge.[419] This means that as of 17 June 2012, the judges have determined that the Prosecution has not provided sufficient evidence to confirm the charges against just under one-third of the individuals who have come into the Court's custody or voluntarily appeared in response to a summons to appear.

411 ICC-01/05-01/08-447 and ICC-01/05-01/08-466. See further *Legal Filings submitted by the Women's Initiatives for Gender Justice to the International Criminal Court*, available at <http://www.iccwomen.org/publications/articles/docs/Legal_Filings_submitted_by_the_WIGJ_to_the_International_Criminal_Court_2nd_Ed.pdf >; *Gender Report Card 2009*, p 63-67; and *Gender Report Card 2010*, p 114-116.

412 Despite reports that gender-based crimes were committed by both sides to the conflict, charges for gender-based crimes have not been included in the case against Ruto & Sang. They were included in the case against Muthaura & Kenyatta. See *The Prosecutor v. Francis Kirimi Muthaura & Uhuru Muigai Kenyatta* (ICC-01/09-02/11-01). See further *Gender Report Card 2011*, p 169-170.

413 ICC-01/09-3. See further *Gender Report Card 2010*, p 122-125.

414 As described in further detail below, in the case against Muthaura and Kenyatta, the Pre-Trial Chamber reclassified acts of forced circumcision, originally charged by the Prosecution as 'other forms of sexual violence', as 'other inhumane acts'. See further *Gender Report Card 2011*, p 179-182.

415 ICC-01/09-02/11-382-Red, para 266. See further *Gender Report Card 2011*, p 179-181.

416 ICC-01/09-02/11-T-5-Red-ENG, p 88, lines 9-15.

417 ICC-01/09-02/11-382-Red, para 266.

418 In the case of *The Prosecutor v Bahar Idriss Abu Garda*, on 8 February 2010, Pre-Trial Chamber I declined to confirm the charges sought by the Prosecution (ICC-02/05-02/09-243-Red). See *Gender Report Card 2011*, p 163-164; *Gender Report Card 2010*, p 109-111; and *Gender Report Card 2009*, p 61-62.

419 No charges were confirmed against Abu Garda (Darfur Situation), Mbarushimana (the DRC Situation), Kosgey and Ali (Kenya Situation). Charges were successfully confirmed against Lubanga, Katanga, Ngudjolo (the DRC Situation); Bemba (the CAR Situation); Banda, Jerbo (Darfur Situation); Muthaura, Kenyatta, Ruto and Sang (Kenya Situation).

Investigations

A number of judicial decisions have contained commentary and discussion about the strategic decisions and investigative methodology of the Office of the Prosecutor. In the Lubanga case, as discussed in the **First trial judgement in the Lubanga case** section of this Report, a significant portion of the trial judgement was devoted to a review of the investigations in the DRC, setting out 'the history to the investigations extensively in order to demonstrate the extent of the problems the investigators faced and the background to the considerable reliance that the prosecution placed on certain intermediaries'.[420] In the Mbarushimana confirmation of charges decision, described in more detail below, the Pre-Trial Chamber cautioned that some of the investigative techniques of Prosecution investigators, may significantly weaken the probative value of the evidence thus obtained. The Pre-Trial Chamber, after having examined transcripts of witness interviews, expressed concern that Prosecution investigators had allowed themselves to be led by preconceived ideas of the necessary evidence.[421] Specifically, the Pre-Trial Chamber noted 'specific, explicit and insistent prompting' of an investigator when interviewing insider witnesses,[422] and generally observed that the interviewing techniques 'seem hardly reconcilable with a professional and impartial technique of witness questioning'.[423] Since 2010 the Women's Initiatives has raised concerns about the over-reliance on open source material to construct charges and subsequently conducting field investigations to substantiate these charges.[424] The Women's Initiatives' analysis of the application for the Arrest Warrant in the Mbarushimana case indicates that open source information comprised a significant proportion of the evidence cited in the Prosecution's application specifically in relation to the charges for gender-based crimes.[425]

Issues with investigations were also raised in the Kenya Situation. In his dissenting opinion on the confirmation of charges in the two cases, Judge Kaul expressed reservations 'regarding the Prosecutor's respect for Article 54(1)(a) of the Statute during his investigation on the proceedings conducted by the Chambers of this Court'.[426] Judge Kaul stressed that any investigation carried out by the Office of the Prosecutor must be 'as comprehensive, professional, expeditious and thereby as effective as possible'.[427] Judge Kaul also criticised the Prosecutor for pursuing a strategy of phased investigations, namely gathering only enough evidence to satisfy the standard of proof for the current phase of proceedings 'in the expectation or hope that in a further phase after the confirmation proceedings, additional and more convincing evidence may be assembled to attain the "beyond reasonable doubt" threshold'.[428]

420 ICC-01/04-01/06-2842, para 124.

421 ICC-01/04-01/10-465-Red, para 51. The concerns expressed by the Pre-Trial Chamber are described in more detail in the section on *Mbarushimana* below.

422 ICC-01/04-01/10-465-Red, para 257.

423 ICC-01/04-01/10-465-Red, para 51.

424 See further Brigid Inder, 'Statement by the Women's Initiatives for Gender Justice at the Launch of the *Gender Report Card on the ICC 2010*,' New York, 6 December 2010, available at <http://www.iccwomen.org/documents/GRCLaunch2010-Speech_2.pdf>

425 'Overview of use of open source information in applications for warrants of arrest/summons to appear before the International Criminal Court', Internal research memo, *Women's Initiatives for Gender Justice*, March 2011.

426 ICC-01/09-02/11-382-Red, Dissent, para 46 and ICC-01/09-01/11-373, Dissent, para 41. Article 54(1)(a) provides that 'the Prosecutor shall, in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally'.

427 ICC-01/09-02/11-382-Red, Dissent, para 49 and ICC-01/09-01/11-373, Dissent, para 44.

428 ICC-01/09-02/11-382-Red, Dissent, para 52 and ICC-01/09-01/11-373, Dissent, para 47.

Judge Kaul warned that such an investigative approach could lead to significant evidentiary problems in later stages of proceedings, which could eventually result in cases collapsing at trial.[429]

Quality and sufficiency of evidence

Likewise, decisions have commented on the quality and sufficiency of the evidence submitted by the Prosecution, which in some cases has led to the dismissal of charges for gender-based crimes due to a lack of evidence at the application for the arrest warrant phase,[430] as well as in judicial decisions regarding confirmation of charges.[431] In addition, judges from several Pre-Trial Chambers have described secondary and/or open source material as 'hearsay evidence' and of a lower probative value.[432] A review of five publicly available applications for arrest warrants or summonses to appear, conducted by the Women's Initiatives in 2010,[433] illustrated that the Office of the Prosecutor appeared to rely heavily on open source material to verify the sexual violence charges, with in some instances, open source material constituting the only material

429 Specifically, Judge Kaul stated: 'I believe that such an approach, as tempting as it might be for the Prosecutor, would be risky, if not irresponsible: if after the confirmation of the charges it turns out as impossible to gather further evidence to attain the decisive threshold of "beyond reasonable doubt", the case in question may become very difficult or may eventually collapse at trial, then with many serious consequences, including for the entire Court and the victims who have placed great hopes in this institution.' ICC-01/09-02/11-382-Red, Dissent, para 52 and ICC-01/09-01/11-373, Dissent, para 47.

430 For example, in the Prosecutor's application for an Arrest Warrant in *The Prosecutor v. Jean Pierre Bemba Gombo*, two counts of 'other forms of sexual violence' were included in addition to the charges rape, rape as torture, and outrages upon personal dignity: 'other forms of sexual violence' as a crime against humanity under Article 7(1)(g) of the Statute and 'other forms of sexual violence' as a war crime under Article 8(2)(e)(vi). These charges related to forcing women to undress in order to publicly humiliate them (ICC-01/05-01/08-26-tFRA-Red). Later in May 2008, the Pre-Trial Chamber requested additional information on the 'other forms of sexual violence' charges (ICC-01/05-01/08-89 [public redacted version dated 3 September 2008]). These charges were not included in the initial Arrest Warrant against Bemba issued on 23 May 2008 (ICC-01/05-01/08-1-tENG) and were not included in the Amended Arrest Warrant of 10 June 2008 (ICC-01/05-01/08-tENG) because the Pre-Trial Chamber was not convinced that the facts presented by the Prosecutor amounted to 'other forms of sexual violence of comparable gravity' to the other offences in Article 7(1)(g) and Article 8(2)(e)(vi).

431 See eg the decision on the confirmation of charges in *The Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, discussed in the OTP Investigation and Prosecution Strategy Section of the *Gender Report Card 2010*; the decision on the confirmation of charges in *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, discussed in the *Gender Report Card 2009* p 63-67; and the decision on the confirmation of charges in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, in particular the dissenting opinion of Judge Ušacka, ICC-01/04-01/07-717, discussed in the *Gender Report Card 2008*, p 47-48.

432 For instance, in the Mbarushimana case, the Chamber stressed: 'As a general principle, the Chamber finds that information based on anonymous hearsay must be given a low probative value in view of the inherent difficulties in ascertaining the truthfulness and authenticity of such information. Accordingly, such information will be used only for the purpose of corroborating other evidence.' (ICC-01/04-01/10-465-Red, para 78). Similarly, in the Ruto & Sang, and Muthaura & Kenyatta cases in the Kenya Situation, the Chamber underscored: 'With respect to indirect evidence, the Chamber is of the view that, as a general rule, such evidence must be accorded a lower probative value than direct evidence. The Chamber highlights that, although indirect evidence is commonly accepted in the jurisprudence of the Court, the decision on the confirmation of charges cannot be based solely on one such piece of evidence.' (ICC-01/09-01/11-373, para 74 and ICC-01/09-02/11-382-Red, para 86). This decision echoed similar concerns expressed in the confirmation of charges decision in the Bemba case (ICC-01/05-01/08-424, para 51).

433 At the time of the review, the following applications for arrest warrants or summonses to appear had been made public in some form: Harun & Kushayb (ICC-02/05-56); Bemba (ICC-01/05-01/08-26); President Al'Bashir (ICC-02/05-157-AnxA); Mbarushimana (ICC-01/04-01/10-11-Red2); and Muthaura, Kenyatta and Ali (ICC-01/09-31-Red2).

supporting these charges.[434] Not all applications for arrest warrants or summonses to appear are publicly available, and the available public versions of applications are often heavily redacted, including the references to witness statements or internal Prosecution investigator's reports. However, an analysis of the available information shows that public source information was relied upon in the Bemba and Abu Garda cases. In the Bemba case not all charges were confirmed, and in the Abu Garda case no charges were confirmed.[435]

In the Katanga & Ngudjolo case, the sufficiency of the evidence offered to support sexual violence charges was an issue at the pre-trial stage of the case. In 2008, during the confirmation of charges proceedings, the Chamber withdrew evidence obtained from two witnesses the Prosecution planned to call to testify about rape and sexual slavery, who the Prosecution had preventatively relocated on its own initiative.[436] The Prosecution subsequently withdrew the charges of sexual violence, on the basis that without these witnesses these charges became 'insufficiently substantiated', and that 'the possibility of the crimes of sexual slavery, rape and outrages upon personal dignity forming part of the proper scope of the trial is undermined'.[437] While the evidence was later reintroduced, and the Chamber ultimately confirmed the charges of rape and sexual slavery,[438] these issues highlighted the relatively small witness pool for the sexual violence charges in this case. The majority of the Chamber found the evidence was sufficient to confirm charges of rape and sexual slavery, however Judge Ušacka issued a dissent, finding that the evidence presented was in her view not sufficient 'to establish substantial grounds to believe that the suspects intended for rape and sexual slavery to be committed during the attack on Bogoro village, or even in the aftermath of the Bogoro attack, or to establish the suspects' knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of events'.[439] Judge Ušacka stated that she appreciated 'the difficulty the Prosecution must face in acquiring evidence which would directly link a suspect to these types of crimes when criminal responsibility is alleged under article 25(3)(a) of the Statute on the basis of the existence of a common plan'.[440] Rather than declining to confirm the charges, however, Judge Ušacka stated that 'a better course of action would have been for the Chamber to adjourn the hearing on these charges pursuant to article 61(7)(c)(i) of the Statute and request the Prosecutor to provide further evidence which links the suspects with the crimes charged'.[441]

434 'Open source evidence and attrition of charges at the ICC', Internal research memo, Women's Initiatives for Gender Justice, April 2011. See further *Gender Report Card 2010*, p 63-67 and 109-111 and *Gender Report Card 2011*, p 125-127.

435 See further *Gender Report Card 2010*, p 63-67 and 109-111 and *Gender Report Card 2011*, p 125-127.

436 The Prosecution had relocated these witnesses because it believed there was 'a concrete risk that they are exposed to as a consequence of their cooperation with the Prosecution' (ICC-01/04-01/07-453, para 40). Single Judge Steiner ordered that the evidence provided by these two witnesses, including statements, interview notes and interview transcripts, was inadmissible for the purposes of the confirmation hearing (ICC-01/04-01/07-428-Corr). The excluded evidence provided by these two witnesses underpinned the sexual violence charges in the case, which at that point were limited to sexual slavery.

437 ICC-01/04-01/07-453, paras 25, 30. See also ICC-01/04-01/07-422, whereby the Prosecution notified the Court that it was no longer seeking charges of sexual slavery against Katanga & Ngudjolo as a result of the judges' decision to exclude the evidence provided by the two witnesses, but that it would reintroduce the charge if an appeal was granted.

438 Following the inclusion of the two witnesses in the Court's Witness Protection Programme, new charges were filed in June 2008. For a more detailed discussion of these issues see *Gender Report Card 2008*, p 47-48.

439 ICC-01/04-01/07-717, Partly Dissenting Opinion of Judge Anita Ušacka, para 14. See further *Gender Report Card 2008*, p 48.

440 ICC-01/04-01/07-717, Partly Dissenting Opinion of Judge Anita Ušacka, para 27.

441 ICC-01/04-01/07-717, Partly Dissenting Opinion of Judge Anita Ušacka, para 29.

As discussed in more detail below, in the decision issuing the Arrest Warrant for Ntaganda in July 2012, the Chamber signalled that the evidence supporting the allegation of sexual slavery as a crime against humanity, which consisted of two witness statements and other circumstantial evidence, may not be sufficient to reach the standard of proof required at future stages of proceedings.[442] Further, in the decision on the issuance of an Arrest Warrant for Gbagbo in the Côte d'Ivoire Situation, the Chamber noted that the Prosecutor had not referred to any witness statements, witness summaries, or affidavits, to substantiate the charges of rape and other forms of sexual violence constituting a crime against humanity and expressed concern that this evidence may not be sufficient at subsequent stages of the proceedings.[443]

In other decisions, Chambers have also expressed concern about the specificity of the evidence tendered by the Prosecution, and have at times declined to issue an arrest warrant and/or confirm charges for this reason. Most notably, while the second application for an Arrest Warrant for Mudacumura was successful, as described more fully below, the first application was dismissed in its entirety for lacking the proper level of specificity needed for the Chamber to evaluate the charges and the evidence. In the confirmation of charges decisions in the Mbarushimana case and in the two Kenyan cases, the Chamber expressed concern about a lack of specificity in the document containing the charges relating to the crimes charged and the locations and incidents in which the crimes were committed. These decisions are described more fully below.

442 ICC-01/04-02/06-36-Red, para 40.
443 ICC-02/11-01/11-9-Red, para 59.

Mode of liability

To date, there have been a number of decisions from Chambers interpreting the Rome Statute articles relating to criminal responsibility and in some instances Chambers have questioned the mode of liability initially advanced by the Prosecution in its cases. As discussed later in this section, the Pre-Trial Chamber in Mbarushimana declined to confirm any charges against the accused because, based on the evidence advanced by the Prosecution, it could not conclude that Mbarushimana was responsible for the crimes charged, despite finding that there were reasonable grounds to believe some of the crimes had been committed.[444] Judge Monageng dissented on the approach taken by the majority in this decision. In contrast to the majority, Judge Mongageng was satisfied that the evidence presented by the Prosecution established to the requisite standard of proof that Mbarushimana 'facilitate[d] the commission of crimes to such an extent that they can be classified as a significant contribution'.[445] Likewise, Judge Fulford's separate opinion to the Lubanga judgement, discussed in the **First trial judgement in the Lubanga case** section of this Report, raised issues concerning the interpretation of Article 25(3)(a), disagreeing with the Pre-Trial Chamber and majority of the Trial Chamber's interpretation of the requirements for co-perpetrator liability.[446]

444 This decision is described in more detail, below.
445 ICC-01/04-01/10-465-Red, Dissent, para 82.
446 Judge Fulford's separate opinion and the trial judgement in the Lubanga case are described more fully in the section *First trial judgement in the Lubanga case*.

In the Gbagbo case, the Pre-Trial Chamber also expressed concern about the mode of liability presented by the Office of the Prosecutor. While the Chamber held that the evidence presented in the request for the arrest warrant was sufficient to issue the warrant, it expressed doubt as to whether the Prosecutor had advanced the correct mode of liability under Article 25(3)(a) or whether the more appropriate form of liability should instead be command responsibility pursuant to Article 28.[447] The Office of the Prosecutor has alleged individual criminal responsibility under Article 28 in only one case to date, against Bemba in the CAR Situation. In the Gbagbo decision, the Chamber indicated that this issue may be reassessed by the Chamber at a later point in the proceedings.[448]

Issuing the second Arrest Warrant for Ntaganda, the Pre-Trial Chamber also indicated that the mode of liability may be reviewed at a later stage, while the Prosecution alleged indirect co-perpetration under Article 25(3)(a) and the arrest warrant was issued on this basis. As described below, in the decision on the confirmation of charges in the case against Ruto, Kosgey and Sang in the Kenya Situation, the Chamber noted an inconsistency in pleading by the Prosecution regarding the modes of liability advanced.[449] These decisions are discussed later in this section. In 2009, the confirmation of charges hearing proceedings in the Bemba case were adjourned by Pre-Trial Chamber III because the Pre-Trial Chamber questioned whether the Prosecution had advanced Article 25 as the proper mode of liability in the document containing the charges and invited the Prosecution to reconsider putting forward Article 28, which is the mode of liability eventually confirmed for trial.[450]

447 Article 28(a) states: 'A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.'

448 ICC-02/11-01/11-9-Red, para 77.

449 ICC-01/09-01/11-373, para 283.

450 ICC-01/05-01/08-388. The Pre-Trial Chamber questioned whether Bemba should face charges under Article 25, or whether, alternatively, he should face charges under Article 28 of the Rome Statute. While both modes of liability were raised and treated as potential outcomes by the parties and participants during the confirmation proceedings, the application for an arrest warrant in May 2008, along with the document containing the charges, contemplated Bemba's liability only under Article 25. In response to the Chamber's invitation, the Office of the Prosecutor filed an amended document containing the charges, which included Article 28 as an alternative, rather than substitute, mode of liability. Subsequently, in the confirmation of charges decision of 15 June 2009, the Pre-Trial Chamber determined that Article 28(a) was the most appropriate form of liability. Bemba is the first accused to stand trial for his command responsibility under Article 28(a).

The Prosecutor v. Bosco Ntaganda

In August 2006, Pre-Trial Chamber I issued a Warrant of Arrest for Ntaganda,[451] containing six counts of war crimes relating to the enlistment, conscription and use of children under the age of 15 years to participate actively in hostilities.[452] The alleged crimes took place in the Ituri region in Eastern DRC between September 2002 and September 2003. Ntaganda was the alleged Deputy Chief of the General Staff of the *Forces patriotiques pour la libération du Congo* (FPLC) and alleged Chief of Staff of the *Congres national pour la défense du people* (CNDP). Following the 2009 Goma Peace Agreements signed between the DRC Government and the CNDP, Ntaganda was absorbed into the Congolese Army (FARDC) and promoted to the rank of General. As described in the **Outstanding Arrest Warrants** section of this Report, in April 2012 it was reported that Ntaganda reportedly led the desertion of former CNDP members from the Congolese Army and the creation of a new movement, the *Mouvement du 23 Mars* (M23). The original application for an Arrest Warrant for Ntaganda was filed jointly under seal with the application for an Arrest Warrant against Thomas Lubanga,[453] and the crimes Ntaganda was originally charged with mirror those for which Lubanga was tried and convicted. Despite the issuance of the Arrest Warrant, however, as described in more detail in the section on **Outstanding Arrest Warrants**, Ntaganda remains at large.

Following the verdict in the Lubanga trial, described in more detail in the **First trial judgement in the Lubanga case** section of this Report, on 15 March 2012 Prosecutor Moreno Ocampo stated that he intended to add charges of murder and rape to the Arrest Warrant for Bosco Ntaganda.[454] On 14 May 2012, the Office of the Prosecutor filed an additional application for a Warrant of Arrest for Ntaganda under Article 58,[455] seeking to add charges for murder, rape and sexual slavery, and pillage, both as war crimes and as crimes against humanity, committed in Ituri between September 2002 and September 2003. The Office of the Prosecutor stated that 'based on the Lubanga judgement, the Prosecution is asking the Pre-Trial Chamber to expand the charges against Bosco Ntaganda',[456] and the Prosecution application for the Arrest Warrant noted that many of the factual allegations made against Ntaganda rely either on evidence introduced during the Lubanga trial or on relevant factual findings of the Trial Chamber in the Lubanga trial judgement.[457] The Prosecution sought an additional seven charges against Ntaganda: murder, rape and sexual slavery, and persecution (on ethnic grounds) as crimes against humanity;[458] and murder, attacks against a civilian population, rape and sexual slavery and pillaging as war crimes.[459] Ntaganda was alleged to be individually criminally responsible as a co-perpetrator under Article 25(3)(a).[460] While Ntaganda is implicated in the ongoing commission of crimes in North and South Kivu, as discussed later in this Report, the Office of the Prosecutor has not to date sought any charges relating to crimes in those regions.

On 13 July 2012, Pre-Trial Chamber II[461] delivered its decision on the Prosecution's application under Article 58,[462] issuing a second Warrant of Arrest for Ntaganda. The Pre-Trial Chamber was satisfied that there were reasonable grounds to believe that Ntaganda was individually criminally responsible as an indirect co-perpetrator under Article 25(3)(a) for three counts of crimes against humanity (murder, rape and sexual slavery, and persecution) and four counts of war crimes (murder, rape and sexual slavery, attacks against a civilian population, and pillage). The Chamber was likewise satisfied that the Prosecution had established that both the crimes and the case against Ntaganda fell within the jurisdiction of the Court, and had

451 ICC-01/04-02/06-2-Anx-tENG.

452 Ntaganda was charged with conscription of children under the age of 15 as a war crime under Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii), enlistment of children under the age of 15 as a war crime under Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii), and use of children under the age of 15 to participate actively in hostilities as a war crime under Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii).

453 ICC-01/04-98-US-Exp.

454 'ICC Prosecutor Seeks Long Sentence for Lubanga', *Radio Netherlands Worldwide*, 15 March 2012, available at <http://www.rnw.nl/international-justice/article/icc-prosecutor-seeks-long-sentence-lubanga>, last visited on 12 October 2012.

455 ICC-01/04-611-Red.

456 'Statement: ICC Prosecutor on New Applications for Warrants of Arrest, DRC Situation', 14 May 2012, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/otpstatement14052012>, last visited on 12 October 2012.

457 ICC-01/04-611-Red, p 6.

458 Pursuant to Articles 7(1)(a), 7(1)(g) and 7(1)(h).

459 Pursuant to Articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(vi) and 8(2)(e)(v).

460 ICC-01/04-611-Red, paras 117-119. The Lubanga trial judgement listed Bosco Ntaganda as one of the participants in a common plan, along with Thomas Lubanga, Floribert Kisembo and Chief Kahwa. See ICC-01/04-01/06-2842, paras 1131, 1271.

461 Pre-Trial Chamber II is composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Hans-Peter Kaul (Germany) and Judge Cuno Tarfusser (Italy).

462 ICC-01/04-02/06-36-Red.

provided reasonable grounds to believe that the crimes were committed pursuant to an organisational policy by the *Union des patriotes congolais* (UPC)/FPLC.[463]

The Chamber found reasonable grounds to believe that crimes of rape and sexual slavery had taken place, including allegations that women of Lendu ethnicity and other non-Hema 'female civilians' were 'abducted, systematically raped, and subjected to other forms of sexual violence as part of the UPC/FPLC policy to gain control over Ituri'.[464] However, the Chamber emphasised that the evidence supporting the allegation of sexual slavery as a crime against humanity, which consisted of two witness statements and other circumstantial evidence, may not be sufficient to reach the standard of proof required at future stages of proceedings.[465] The Prosecution had not specified what underlying criminal conduct was alleged to form the basis for the charge of persecution on ethnic grounds as a crime against humanity, but the Pre-Trial Chamber held that it would 'rely on the underlying acts of murder, rape and sexual slavery, as well as on the war crimes [...] committed during the incidents expressly pleaded by the Prosecutor in support of his allegations against Mr Ntaganda'.[466]

Ntaganda was therefore charged with the following gender-based crimes:

- Rape and sexual slavery as a crime against humanity, perpetrated by the UPC/FPLC forces in the district of Ituri, including attacks on Mongbwalu town and Sayo village in November 2002 and in Lipri, Bambu, Kobu and surrounding villages between February and March 2003 (Count 4).
- Rape and sexual slavery as a war crime, perpetrated by the UPC/FPLC forces in the district of Ituri, including attacks on Mongbwalu town and Sayo village in November 2002 and in Lipri, Bambu, Kobu and surrounding villages between February and March 2003 (Count 5).
- Persecution as a crime against humanity, perpetrated by means of rape and sexual slavery among other crimes, against the non-Hema (primarily Lendu) population in the district of Ituri, including attacks on Mongbwalu town and Sayo village in November 2002 and in Lipri, Bambu, Kobu and surrounding villages between February and March 2003 (Count 6).

The Office of the Prosecutor charged Ntaganda on the basis of indirect co-perpetration under Article 25(3)(a) of the Statute, and the arrest warrant was issued on this basis. However, in its decision issuing the second Arrest Warrant, the Pre-Trial Chamber emphasised that none of its conclusions regarding the applicability of Article 25(3)(a) would 'prejudice any subsequent finding regarding the applicability of a different mode of liability at a later stage of the proceedings'.[467]

463 ICC-01/04-02/06-36-Red, paras 8-12 and 22-27.
464 ICC-01/04-02/06-36-Red, para 37.
465 ICC-01/04-02/06-36-Red, para 40.
466 ICC-01/04-02/06-36-Red, para 42.
467 ICC-01/04-02/06-36-Red, para 66.

The Prosecutor v. Callixte Mbarushimana

Pursuant to an Arrest Warrant issued under seal on 28 September 2010,[468] Callixte Mbarushimana (Mbarushimana) was arrested in France and transferred to the Court on 11 October 2010. On 16 December 2011, Pre-Trial Chamber I,[469] in a majority decision,[470] declined to confirm any of the charges against Mbarushimana and ordered his immediate release from the Court's custody. Mbarushimana was charged with crimes related to his alleged responsibility as Executive Secretary of the *Forces démocratiques pour la libération du Rwanda* (FDLR). The Prosecution claimed that, through his role on the FDLR's Steering Committee and his direction of the FDLR's media campaign from Paris, Mbarushimana contributed to the FDLR's common plan to create a 'humanitarian catastrophe' in Eastern DRC, with the aim of forcing the international community to intervene and to put pressure on the Governments of the DRC and Rwanda to negotiate a political settlement with FDLR leaders allowing for their return to Rwanda. The Prosecution alleged that Mbarushimana issued 'extortive negotiation demands' on behalf of the FDLR and accused him of 'publicly, immediately, repeatedly, vehemently and falsely deny[ing] the FDLR's direct involvement in the crimes'.[471]

As described above, the case against Mbarushimana contained the broadest range of charges for gender-based crimes against any ICC suspect to date: eight out of 13 charges against Mbarushimana were for gender-based crimes, including rape, torture, mutilation, cruel treatment, other inhumane acts and persecution.[472]

468 For a more detailed analysis of the Arrest Warrant for Mbarushimana see *Gender Report Card 2010*, p 94-97.

469 At the time of this decision, Pre-Trial Chamber I was composed of Presiding Judge Sanji Mmasenono Monageng (Botswana), Judge Sylvia Steiner (Brazil) and Judge Cuno Tarfusser (Italy).

470 Presiding Judge Monageng issued a dissenting opinion, described in more detail below.

471 ICC-01/04-01/10-448-Red, paras 1-8.

472 In the Arrest Warrant against Mbarushimana, seven out of 11 charges were for gender-based crimes. Between the issuance of the Arrest Warrant and filing the Document Containing the Charges, which forms the basis for the confirmation of charges hearing, the Prosecutor added a further two charges (mutilation and pillage as war crimes) pursuant to Article 61(4). The eight out of 13 charges for gender-based crimes were: torture as a crime against humanity, torture as a war crime, rape as a crime against humanity, rape as a war crime, other inhumane acts (based on rape and mutilation of women) as a crime against humanity, inhuman treatment (based on rape and mutilation of women) as a war crime, persecution (based on gender) as a crime against humanity, and mutilation as a war crime.

Confirmation of charges decision

War crimes

The Prosecution charged Mbarushimana with eight counts of war crimes: attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property and pillaging.[473] Despite finding the contextual elements for war crimes had been satisfied,[474] the Chamber expressed concern 'that the charges and the statements of facts in the [document containing the charges] have been articulated in such vague terms that the Chamber had serious difficulties in determining, or could not determine at all, the factual ambit of a number of the charges'.[475] Specifically, the Chamber observed that the evidence submitted by the Prosecution in regards to a number of incidents either came from a single UN or NGO report the source of which is anonymous,[476] created doubt about who was the subject of the attack,[477] or was in fact inconsistent with UN, NGO and media reports.[478]

Having analysed the information submitted to it by the Prosecution, the Pre-Trial Chamber found substantial grounds to believe the following war crimes were

473 Pursuant to Articles 8(2)(e)(i), 8(2)(c)(i), 8(2)(c)(i)-2 or 8(2)(e)(xi)-1, 8(2)(c)(i), 8(2)(e)(vi), 8(2)(c)(i), 8(2)(e)(xii) and 8(2)(e)(v).

474 The Pre-Trial Chamber found substantial grounds to believe that a non-international armed conflict took place in North and South Kivu from at least 20 January 2009 until at least 31 December 2009 in which the FDLR was engaged. ICC-01/04-01/10-465-Red, para 107.

475 ICC-01/04-01/10-465-Red, para 110.

476 The Chamber noted that for the incidents in Malembe, Busheke, Ruvundi, Mutakato and Kahole, the Prosecution relied solely upon a UN or NGO (Human Rights Watch) report to substantiate its charges. The Chamber noted that the sources of information contained in these reports are anonymous. ICC-01/04-01/10-465-Red, paras 117, 120.

477 For instance, the Chamber held that, in relation to the alleged attacks on Kibua and Katoyi, the evidence submitted by the Prosecution, including the statements by two witnesses, demonstrated that the FDLR was attacked in those locations. Similarly, in relation to the attack in Miriki, one witness stated that the FDLR was attacked and defended itself against the Congolese Army (FARDC). ICC-01/04-01/10-465-Red, paras 114, 119.

478 In relation to the attack in Remeka, five Prosecution witnesses mentioned having heard that the FDLR was fighting in Remeka, but in light of UN, NGO, and media reports about this incident, the Chamber noted that there are clear inconsistencies regarding the dates of this battle as well as the crimes alleged to have been committed (ICC-01/04-01/10-465-Red, para 115).

committed by the FDLR: (i) attacks against civilians;[479] (ii) murder;[480] (iii) mutilation;[481] (iv) rape;[482] (v) cruel treatment;[483] (vi) destruction of property;[484] and (vii) pillaging.[485] Most of these charges were limited geographically to only five of the 25 incidents referred to by the Prosecution; some were limited even further. The Chamber did not find substantial grounds to believe torture as a war crime was committed by the FDLR, citing to insufficiency of evidence submitted by the Prosecution.[486] However, despite finding that certain crimes were committed, as explained in more detail below, on the basis of the evidence submitted to it by the Prosecution, the Chamber did not find there were substantial grounds to believe that Mbarushimana was individually criminally responsible for these alleged crimes committed by the FDLR and as such declined to confirm any charges against Mbarushimana.

With regard to the other locations where the Chamber did not find substantial grounds to believe the FDLR committed war crimes, throughout its decision, the Chamber noted several times that, although it was satisfied that there were substantial grounds to believe that the crimes had been committed, the Prosecution had not provided sufficient evidence as to the identity of the perpetrators of the violence.[487] At times, the Chamber noted, the information provided by witnesses regarding the identity of perpetrators was 'either based on accounts of third parties or [on] assumptions'.[488] As such, the Chamber was unable to conclude to the requisite standard of proof that the acts were committed by the FDLR. Similarly, for a number of the charges, the Chamber noted that the Prosecution had failed to provide any evidence substantiating the allegation that an attack had taken place.[489]

Crimes against humanity

The Prosecution charged Mbarushimana with five counts of crimes against humanity: murder, inhumane acts, rape, torture and persecution.[490] The Chamber noted that 'the core of the Prosecution's submission is the existence of an order to create a 'humanitarian catastrophe' by directing attacks on the civilian population, emanating from the leadership of the FDLR in early 2009'.[491] However, the Chamber observed that none of the FDLR insider witnesses, in their statements, 'directly and spontaneously' testified about the existence of an order to create a

479 In Busurungi in May 2009 (ICC-01/04-01/10-465-Red, para 151), in Manje in July 2009 (para 191), in Malembe in August 2009 (para 203), and in Mianga in April 2009 (para 219).

480 In Busurungi in March 2009 (ICC-01/04-01/10-465-Red, para 133), in Busurungi in May 2009 (para 151), in Manje in July 2009 (para 191), in Mianga in April 2009 (para 219).

481 In Busurungi in May 2009 (ICC-01/04-01/10-465-Red, para 160).

482 In Busurungi in May 2009 (ICC-01/04-01/10-465-Red, para 164).

483 In Busurungi in May 2009 (ICC-01/04-01/10-465-Red, para 168), in Manje in July 2009 (para 192); and in Malembe in August 2009 (para 208).

484 In Busurungi in May 2009 (ICC-01/04-01/10-465-Red, para 175), in Manje in July 2009 (para 196), and in Mianga in April 2009 (para 225).

485 In Busurungi in May 2009 (ICC-01/04-01/10-465-Red, para 178).

486 Relating to events in Busurungi, although finding substantial grounds to believe the war crime of cruel treatment was committed and observing that the criminal conduct falling under that charge could constitute both the war crime of cruel treatment and the war crime of torture, the Chamber found that 'the Prosecution fails to provide any evidence in support of the allegation that this particularly conduct was perpetrated with the purpose of obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind...' ICC-01/04-01/10-465-Red, para 169. Similarly, regarding the charges of rape and torture in Manje, the Chamber observed that the Prosecution 'appears to attribute to the same conduct described as "rape" the legal characterisation of torture through "aggravated rape" which, in the view of the Chamber, has not been sufficiently substantiated. In this regard, the Chamber notes that the Prosecution has not advanced any other factual allegations to support its charge of torture.' ICC-01/04-01/10-465-Red, para 194. In addition, regarding the incident in Malemba, the Chamber noted that the Prosecution did not address allegations of rape and torture in its factual description of the crimes charged. Charges of attacking civilians, murder and destruction of property in Kipopo, Luofu and Kasiki were also not addressed by the Prosecution in its factual description of the charges (paras 229, 236).

487 For instance, relating to alleged attacks against civilians, acts of murder, mutilation, rape and torture in Busurungi in April 2009, the Chamber held that 'the Prosecution does not provide any reliable indicia with regard to who the perpetrators were' (ICC-01/04-01/10-465-Red, para 136).

488 ICC-01/04-01/10-465-Red, para 136.

489 For instance, in assessing whether there were substantial grounds to believe the war crime of attacking civilians was committed in Busurungi in March 2009, the Chamber noted that 'the Prosecution has not provided any statement of facts which may offer the Chamber a sufficient legal and factual basis to analyse this attack' (ICC-01/04-01/10-465-Red, para 130).

490 Pursuant to Articles 7(1)(a), 7(1)(k), 7(1)(g), 7(1)(f) and 7(1)(h).

491 ICC-01/04-01/10-465-Red, para 245.

'humanitarian catastrophe' emanating from the FDLR leadership.[492] Significantly, the Chamber noted that those witnesses who did speak about or acknowledge this order, 'mostly do so after specific, explicit and insistent prompting by the investigator, and they attach to such order a meaning that is different to that which is alleged by the Prosecution'.[493] In addition, several witnesses actually spoke about the need to protect civilians.[494]

The Pre-Trial Chamber noted that other pieces of evidence 'purportedly supporting' the Prosecution's allegation of the existence of this order are a Human Rights Watch report and a statement taken by a UN Group of Experts on the DRC.[495] The majority noted, however, that 'this qualifies at best as indirect evidence, and on its own is not enough to contradict or outweigh the information contained in direct evidence gathered from insider witnesses'.[496] In light of this finding and the discrepancies between the Prosecution's allegations and the evidence submitted, the majority did not find substantial grounds 'to believe that the FDLR pursued the policy of attacking the civilian population'.[497] In the absence of such policy, the majority did not find substantial grounds to believe any of the charged crimes against humanity had been committed.[498]

492 ICC-01/04-01/10-465-Red, para 255.
493 ICC-01/04-01/10-465-Red, para 257.
494 ICC-01/04-01/10-465-Red, para 258.
495 ICC-01/04-01/10-465-Red, para 259.
496 ICC-01/04-01/10-465-Red, para 260.
497 ICC-01/04-01/10-465-Red, para 263.
498 ICC-01/04-01/10-465-Red, paras 266-267.

Individual criminal responsibility

The Prosecution alleged that Mbarushimana was responsible for the crimes committed by the FDLR under Article 25(3)(d)[499] of the Rome Statute. The Chamber considered that contributions giving rise to individual criminal responsibility under Article 25(3)(d) need to reach 'a certain threshold of significance below which responsibility under this provision does not arise'.[500] The Chamber held that in order to be held criminally responsible under Article 25(3)(d) 'a person must make a *significant* contribution to the crimes committed or attempted', taking into account the person's relevant conduct and the context in which this conduct is performed (emphasis added).[501]

Observing its conclusions regarding the non-existence of a policy satisfying the contextual elements of crimes against humanity, the Chamber stressed that it could only assess the suspect's alleged responsibility for the seven counts of war crimes which it found there were substantial grounds to believe had been committed by the FDLR.[502] In analysing the information submitted to it by the Prosecution, the majority did not find that the suspect 'provided any contribution to the commission of [...] crimes, even less a "significant" one'.[503]

The Chamber observed that there were substantial grounds to believe that throughout 2009, Mbarushimana acted as the FDLR's Executive Secretary and was a member of its Executive and Steering Committees.[504] Similarly, the Chamber found substantial grounds to believe that in this capacity, Mbarushimana issued several press statements and often spoke to journalists on behalf of the FDLR. However, the Chamber did not find any evidence that Mbarushimana had any power over the commanders

499 Article 25(3)(d) provides that 'a person shall be held responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ... in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime'.
500 ICC-01/04-01/10-465-Red, paras 276, 283.
501 ICC-01/04-01/10-465-Red, para 285 (emphasis added).
502 As described above, the Chamber found substantial grounds to believe attacks against civilians, murder, mutilation, rape, cruel treatment, destruction of property, and pillaging had been committed by the FDLR in five of the 25 incidents alleged by the Prosecution.
503 ICC-01/04-01/10-465-Red, para 292.
504 ICC-01/04-01/10-465-Red, para 295.

and soldiers on the ground.[505] Finding that 'by far the most significant responsibility vested in the suspect was the issuance of press releases on behalf of the organisation', the Chamber did not find substantial grounds to believe that Mbarushimana 'contributed to the FDLR's alleged plan of attacking civilians by agreeing to conduct an international media campaign in support of it'.[506] Similarly, the Chamber did not find substantial grounds to believe Mbarushimana had knowledge of the crimes committed and that he denied these crimes in furtherance of a policy of the organisation.[507]

Finally, the Chamber noted that although some of the statements attributed to Mbarushimana in press releases and radio speeches strongly demonstrate an attempt to encourage the troops through words, and such language could have a galvanising effect on the soldiers, only one witness could even recall these statements.[508] At least seven former FDLR soldiers, whose statements were submitted by the Defence, said they had not heard of Mbarushimana or his role within the FDLR.[509] In addition, several insider witnesses clarified in their statements that Mbarushimana's power within the FDLR was very limited, being a 'politician' or 'only a press-person'.[510] The Chamber found that 'the little evidence which might support the allegation that the press releases and radio appearances had some impact on the FDLR's military efforts is either too limited or too inconsistent for it to take the view that the allegation is proven to the requisite standard'.[511]

Accordingly, the majority of Pre-Trial Chamber I found that the evidence submitted to it by the Prosecution did not provide substantial grounds to believe that Mbarushimana was individually criminally responsible for the alleged crimes committed by the FDLR under Article 25(3)(d) of the Statute. In the absence of finding Mbarushimana criminally responsible, the Chamber, by majority, declined to confirm any of the charges against Mbarushimana and ordered his immediate release.

Evidence

In addition to the problems identified concerning the sufficiency of the evidence to confirm charges against Mbarushimana, Pre-Trial Chamber I also expressed concern about the investigative practices of the Office of the Prosecutor,[512] about the vagueness of the charging document submitted by the Prosecution,[513] and about the Prosecution's reliance on NGO and other reports to substantiate charges.[514] With respect to the techniques adopted by several Prosecution investigators, the Chamber noted:

> The reader of the transcripts of interviews is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations. Suggesting that the witness may not be 'really remembering exactly what was said', complaining about having 'to milk out' from the witness details which are of relevance to the investigation, lamenting that the witness 'does not really understand what is important' to the investigators in the case, or hinting at the fact that the witness may be 'trying to cover' for the suspect, seem hardly reconcilable with a professional and impartial technique of witness questioning. Accordingly, the Chamber cannot refrain from deprecating such techniques and from highlighting that, as a consequence, the probative value of evidence obtained by these means may be significantly weakened.[515]

505 The Chamber noted that 'both his residence in Paris and the very nature of his tasks – limited as they were to issues concerning the relationship of the FDLR with the media and the external world – make it apparent that there is no link between him and the FDLR soldiers and troops on the ground'. In fact, the Chamber cited to several witness statements indicating that although Mbarushimana was the *de jure* Executive Secretary of the FDLR, given his residence abroad, it was in fact someone else, remaining unnamed in the Chamber's decision, who took over the leadership of the commissioners and reported to Mbarushimana. ICC-01/04-01/10-465-Red, paras 297-298.

506 ICC-01/04-01/10-465-Red, para 299.

507 ICC-01/04-01/10-465-Red, paras 314-315.

508 ICC-01/04-01/10-465-Red, para 324.

509 ICC-01/04-01/10-465-Red, para 323.

510 ICC-01/04-01/10-465-Red, para 326-327, 332.

511 ICC-01/04-01/10-465-Red, para 333.

512 ICC-01/04-01/10-465-Red, para 51.

513 ICC-01/04-01/10-465-Red, para 110.

514 The Chamber noted that for the incidents in Malembe, Busheke, Ruvundi, Mutakato and Kahole, the Prosecution relied solely upon a UN or NGO (Human Rights Watch) report to substantiate its charges. The Chamber noted that the sources of information contained in these reports are anonymous. ICC-01/04-01/10-465-Red, paras 117, 120.

515 ICC-01/04-01/10-465-Red, para 51.

On the opening day of the confirmation of charges hearing, the Defence raised a number of challenges to the content of the Prosecution's Document Containing the Charges (DCC), including an alleged lack of specificity.[516] Briefly addressing some of these concerns, the Pre-Trial Chamber expressed concern about the use by the Prosecution of the words 'include but are not limited to' to refer to the locations of incidents relied upon in the DCC, without providing any reasons as to why these other locations cannot be specifically pleaded. The Chamber stressed that 'the Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing. The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.'[517]

Dissenting opinion by Presiding Judge Monageng

Presiding Judge Monageng appended a dissenting opinion to the confirmation of charges decision, disagreeing with the majority's decision to decline to confirm the charges against Mbarushimana. In contrast to the majority, Judge Monageng was satisfied that the evidence presented by the Prosecution did establish, to the requisite standard of proof, the existence of an organisational policy to create a 'humanitarian catastrophe' and to attack the civilian population and that Mbarushimana 'did facilitate the commission of crimes to such an extent that they can be classified as a significant contribution'.[518] Judge Monageng argued that the majority placed too much emphasis on apparent inconsistencies between the evidence and the Prosecution's allegations. While acknowledging that there were some differences between the allegations and the evidence presented, Judge Monageng found that the evidence when taken in its entirety confirmed the Prosecution's allegations. Significantly, she stated that, although the Prosecution's case against Mbarushimana was not a conventional one, 'what the majority [saw] as "insufficient evidence" [she saw] as "triable issues" deserving of the more rigorous fact finding that only a Trial Chamber can provide'.[519]

On the basis of the evidence submitted by the Prosecution, Judge Monageng would have confirmed Mbarushimana's individual criminal responsibility under Article 25(3)(d) for the following ten counts: attacks against the civilian population as a war crime; murder as both a war crime and crime against humanity; mutilation as a war crime; inhumane acts as a crime against humanity; cruel treatment as a war crime; rape as both a crime against humanity and a war crime; destruction of property as a war crime, and pillaging as a war crime. Judge Monageng did not find substantial grounds to believe that torture or persecution as crimes against humanity had been committed.

516 ICC-01/04-01/10-T-6-Red2-ENG, p 14-20.
517 ICC-01/04-01/10-465-Red, para 82.
518 ICC-01/04-01/10-465-Red, Dissent, para 104.
519 ICC-01/04-01/10-465-Red, Dissent, para 134.

The Prosecution appeal

Immediately following the issuance of the decision declining to confirm any of the charges and ordering Mbarushimana's release, the Prosecution filed a request to stay the order to release Mbarushimana 'until such time as [the Pre-Trial Chamber] has ruled on the Prosecution's leave to appeal or, if leave is granted, until the Appeals Chamber rules on the request for suspensive effect'.[520] Following a rejection of this request on 19 December 2011,[521] the Prosecution directly appealed and requested the Appeals Chamber for suspensive effect of Mbarushimana's release.[522] This was also rejected by the Appeals Chamber on 20 December 2011.[523] Mbarushimana was subsequently released from ICC custody to France on 23 December 2011. However, upon arrival there he was rearrested by the French authorities to be tried nationally for his alleged responsibility for the 1994 Rwandan genocide.[524] The Rwandan authorities have also expressed interest in trying Mbarushimana for involvement in the genocide.[525] At the time of writing this Report, there is no further information available as to whether Mbarushimana is still being held by French authorities or whether he has been charged by the Rwanda authorities.

On 27 December 2011, the Prosecution requested leave to appeal the confirmation decision.[526] Making reference to the dissenting opinion of Judge Monageng, the Prosecution sought leave to appeal four issues.[527] On 1 March 2012, Pre-Trial Chamber I granted the Prosecution leave to appeal on three of the four issues requested.[528]

On 30 May 2012, the Appeals Chamber issued a decision confirming the findings of the Pre-Trial Chamber in the confirmation of charges decision and rejecting the Prosecution appeal.[529] The Appeals Chamber evaluated the Prosecution's first and second grounds of appeal together, regarding the correct

520 ICC-01/04-01/10-466, para 3.

521 ICC-01/04-01/10-469. The Pre-Trial Chamber stressed that, in accordance with Article 61(10) of the Rome Statute, an Arrest Warrant ceases to have effect with respect to any charges which are not confirmed. Noting that the grounds on which the Prosecution sought to stay Mbarushimana's release ('to prevent irreparable prejudice to the Prosecution') is not a condition recognised in Article 58(1) of the Statute, the Pre-Trial Chamber refused the Prosecution's request. Likewise, the Chamber did not find any legal basis for confining Mbarushimana's release to the territory of the Netherlands, as requested in the alternative by the Prosecution.

522 ICC-01/04-01/10-470.

523 ICC-01/04-01/10-476. The Appeals Chamber provided the reasons for its decision in a subsequent decision issued on 24 January 2012. ICC-01/04-01/10-483.

524 'France re-arrests Rwandan rebel', *Al Jazeera*, 23 December 2011, available at <http://www.aljazeera.com/news/africa/2011/12/201112231949163709 48.html>, last visited on 12 October 2012.

525 'Rwanda: State to File Genocide Charges Against Mbarushimana', *AllAfrica.com*, 27 December 2011, available at <http://allafrica.com/stories/201112270738.html>, last visited on 12 October 2012.

526 ICC-01/04-01/10-480.

527 ICC-01/04-01/10-480, para 2. Specifically, the Prosecution requested leave to appeal: (i) whether the correct standard of proof in the context of Article 61 allows the Chamber to deny confirmation of charges supported by the Prosecution evidence, by resolving inferences, credibility doubts and perceived inconsistencies against the Prosecution and thereby preventing it from presenting its case at trial; (ii) whether a proper interpretation of the scope and nature of a confirmation hearing, as defined by Article 61, allows the Pre-Trial Chamber to evaluate the credibility and consistency of witness interviews, summaries and statements without the opportunity to examine the witnesses that would be possible at trial; (iii) whether a proper interpretation of Article 54(1)(a) forbids an investigator to prompt direct information that incriminates the Suspects and therefore justifies the Chamber's refusal to give the witness statement full weight; and (iv) whether the mode of liability under Article 25(3)(d) requires that the person make a 'significant' contribution to the commission or attempted commission of the crime.

528 ICC-01/04-01/10-487. The Chamber did not grant leave to appeal the issue regarding permissible methods of questioning by investigators. The Chamber held that the formulation of this issue in the request for leave to appeal had mischaracterised the findings of the Pre-Trial Chamber in the confirmation of charges decision, as the Chamber had not found that it was 'forbidden' for investigators to ask follow-up questions of witnesses for the purposes of obtaining information. The Chamber underscored that 'in the Confirmation Decision, the Chamber quoted several instances where Prosecution investigators told witnesses who had given evidence which fell outside the Prosecution theory of the case that their answers were unsatisfactory. [...] The Chamber's reasoning on this point was that the specific questioning techniques identified by the Chamber were so aggressive that they created a risk of distorting the witnesses' answers. As the Chamber never articulated the general legal principle identified by the Prosecution, namely that prompting direct information from witnesses was forbidden, the proposed issue does not arise from the Confirmation Decision and leave to appeal is denied.' ICC-01/04-01/10-487, paras 32-33.

529 ICC-01/04-01/10-514.

approach to evaluation of evidence by the Pre-Trial Chamber at the confirmation of charges phase. The Prosecution had argued (i) that any ambiguities, conflicts, inconsistencies or inferences relating to the evidence advanced at the confirmation hearing should be drawn in the Prosecution's favour, and (ii) that the Pre-Trial Chamber had 'wrongly exceeded the scope and nature of a confirmation hearing' by attempting to evaluate the credibility and consistency of witnesses and evidence on the basis of documentary evidence and summaries only and without the opportunity to examine those witnesses directly, as would be the case at trial.[530] The Appeals Chamber considered the nature of a confirmation of charges hearing and its statutory framework and concluded that 'it is by its nature an evidentiary hearing, with the Pre-Trial Chamber required to evaluate whether the evidence is sufficient to establish substantial grounds to believe the person committed each of the crimes charged'.[531] The Chamber acknowledged that 'in order to make this determination as to the sufficiency of the evidence, the Pre-Trial Chamber must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to credibility arising from [it]'.[532] Furthermore, the Chamber noted that Article 61(6) grants an accused person the right to challenge the evidence presented by the Prosecutor and to present his or her own evidence, and concluded that 'for these rights to have any meaning, the Pre-Trial Chamber must therefore evaluate the contested evidence and resolve any ambiguities, contradictions, inconsistencies or doubts as to credibility [which have been] introduced by the contestation of the evidence'.[533]

The Chamber likewise rejected the Prosecution's argument that the Pre-Trial Chamber could not properly evaluate the evidence introduced at a confirmation hearing in the absence of all the evidence which would ultimately be introduced at trial, noting that in a 2006 interlocutory decision arising out of the Lubanga case, the Appeals Chamber had previously instructed that 'the investigation should largely be completed at the stage of the confirmation of charges hearing', thereby making 'most of the evidence' available to be submitted to the Pre-Trial Chamber.[534] The Appeals Chamber was not persuaded by the Prosecution's argument that the Pre-Trial Chamber could not assess the credibility of witnesses in the absence of in-person testimony, and cited previous Appeals Chamber jurisprudence stating that this was permissible at the pre-trial phase.[535]

530 ICC-01/04-01/10-499, paras 4-7.
531 ICC-01/04-01/10-514, para 39.
532 ICC-01/04-01/10-514, para 39.
533 ICC-01/04-01/10-514, para 40.
534 ICC-01/04-01/10-514, para 44, citing ICC-01/04-01/06-568, para 54.
535 ICC-01/04-01/10-514, para 45.

The Appeals Chamber cautioned, however, that Pre-Trial Chambers should 'take great care' in making a 'presumptive' determination that a witness is or is not credible.[536]

In relation to the final ground of appeal, regarding the correct standard to be applied to the contribution required of an accused person to uphold a finding of individual criminal responsibility under Article 25(3)(d), the Appeals Chamber declined to consider the merits of the Prosecution's argument. The Chamber found that a critical element of responsibility under Article 25(3)(d) was the existence of a 'group of persons acting with a common purpose' and reasoned that 'the question of whether there was a "significant" contribution only arises when there was a crime committed or attempted by a group acting with a common purpose'.[537]. As the Pre-Trial Chamber had not found substantial grounds to believe that the FDLR leadership constituted a group acting with common purpose for the purposes of the confirmation decision, the question of the exact extent of Mbarushimana's contribution to that common purpose was moot. The Appeals Chamber noted that 'even if the Pre-Trial Chamber had adopted a different interpretation of "contribution" under Article 25(3)(d), it would not have confirmed the charges against Mr Mbarushimana'.[538] Therefore, the alleged error of law regarding the degree of contribution required would not have materially affected the confirmation decision, and therefore if the Appeals Chamber were to discuss the issue, 'it would be doing so in a vacuum and thereby be engaging in what would be a purely academic discussion'.[539]

Judge Fernández de Gurmendi issued a separate opinion on the limited issue of whether the Appeals Chamber should have addressed the alleged legal error of the Pre-Trial Chamber in its interpretation of article 25(3)(d).[540]

536 ICC-01/04-01/10-514, para 48.
537 ICC-01/04-01/10-514, para 65.
538 ICC-01/04-01/10-514, para 66.
539 ICC-01/04-01/10-514, para 68.
540 ICC-01/04-01/10-514, Separate Opinion of Judge Silvia Fernández de Gurmendi, para 1. Judge Fernández de Gurmendi found that the Pre-Trial Chamber had indeed applied the significant contribution standard, thereby introducing a minimum threshold into a provision which represents 'a residual form of accessory liability, applicable if other forms of responsibility are not at issue' (paras 4, 7, 9). Judge Fernández de Gurmendi did not believe that 'infinitesimal' contributions should give rise to individual criminal responsibility under the provision, but was not persuaded that adding a requirement that the contribution should be 'significant' would adequately address that issue (paras 11-12). The Judge noted the Pre-Trial Chamber's comparison between the modes of liability applied at the Court and those applied at the *ad hoc* ICTY and ICTR tribunals, but found that, given the differences between the respective systems, 'the level of contribution required by members of a joint criminal enterprise cannot be "imported" into Article 25(3)(d) of the Statute' (para 14).

The Prosecution had alleged that the Pre-Trial Chamber erred in imposing a higher level of contribution than required by the Statute.[541] Judge Fernández de Gurmendi was not persuaded by the Pre-Trial Chamber's arguments for establishing a threshold requiring a 'significant' contribution for the purposes of individual criminal responsibility under Article 25(3)(d), and therefore would have held that the Pre-Trial Chamber had erred in making this finding. [542]

Following the decision of the Appeals Chamber rejecting the Prosecution's appeal and upholding the confirmation of charges decision, the Office of the Prosecutor issued a statement acknowledging the Appeals Chamber ruling and stating that it was 'evaluating the decision to see whether it is possible to present a new case against Mr Mbarushimana presenting additional evidence'.[543] At the time of writing this Report, no further ICC-related charges had been brought against Mbarushimana, who, as discussed in the Outstanding arrest warrants section of this Report, was arrested by the French authorities in December 2011 for his alleged involvement in the 1994 Rwandan genocide.[544]

541 ICC-01/04-01/10-514, Separate Opinion of Judge Silvia Fernández de Gurmendi, para 50.

542 ICC-01/04-01/10-514, Separate Opinion of Judge Silvia Fernández de Gurmendi, para 15.

543 'OTP Statement following the Appeals Chamber decision', 30 May 2012, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/press%20releases/otpstatement300512>, last visited on 12 October 2012.

544 'France re-arrests Rwandan rebel', *Al Jazeera*, 23 December 2011, available at <http://www.aljazeera.com/news/africa/2011/12/20111223194916370948.html>, last visited on 12 October 2012.

The Prosecutor v. Sylvestre Mudacumura

Major General Sylvestre Mudacumura (Mudacumura)[545] is a Rwandan national, and the alleged current Supreme Commander of the FDLR, a militia group operating in North and South Kivu in Eastern DRC. Mudacumura is alleged to be a member of the FDLR Steering Committee, as well as Supreme Commander of the Army and President of the High Command, making him the highest-ranking military commander in the FDLR.[546] On 13 July 2012, Pre-Trial Chamber II[547] issued a Warrant of Arrest for Mudacumura for ordering nine counts of war crimes, including murder, rape, torture, mutilation, cruel treatment, pillage and destruction of property.[548] The Pre-Trial Chamber had rejected the Prosecution's previous application for a Warrant of Arrest for Mudacumura in May 2012 for lack of specificity, as discussed below.

This is the second case to arise out of the ICC's investigation in North and South Kivu, and the second prosecution of a senior figure in the FDLR, after Mbarushimana.[549] The Prosecution alleged that Mudacumura was part of a common plan, along with Mbarushimana and Ignace Murwanashyaka, the

545 The interim report of the Group of Experts on the Democratic Republic of the Congo (S/2012/348) concerning violations of the arms embargo and sanctions regime by the Government of Rwanda, S/2012/248/Add.1, which is discussed in more detail in the section on *Outstanding Arrest Warrants*, below, indicated that in early 2012, Rwandan officials helped to orchestrate an assassination attempt against Mudacumura. The report alleged that Rwanda tasked the *Forces de défense congolais* (FDC) with this mission, providing them with weapons, ammunition, and several trained ex-CNDP officers. On 11 January 2012, the FDC carried out an operation at the FDLR headquarters, which resulted in the death of FDLR Chief of Staff Leodomir Mugaragu (Addendum to the GoE report on DRC, p 18).

546 ICC-01/04-616-Red2, para 29.

547 Pre-Trial Chamber II is composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Hans-Peter Kaul (Germany) and Judge Cuno Tarfusser (Italy). In March 2012, the Presidency had issued a decision reassigning the judicial divisions, following the completion of the terms of a number of judges, as described in the ASP section of this Report. The decision also reassigned the DRC Situation and related cases, which were previously with Pre-Trial Chamber I, to Pre-Trial Chamber II. ICC-02/11-01/11-59.

548 ICC-01/04-01/12-1-Red.

549 For a more detailed analysis of the case against Mbarushimana, see further *Gender Report Card 2010*, p 94-97 and *Gender Report Card 2011*, p 150-155.

alleged President of the High Command of the FDLR, to create a 'humanitarian catastrophe' by means of attacks against the civilian population in North and South Kivu in order to extort political concessions from the Governments of the DRC and Rwanda. However, as discussed below, the Pre-Trial Chamber found that the Prosecution had not provided sufficient evidence to prove the existence of the common plan.

First application for a Warrant of Arrest for Mudacumura

On 14 May 2012, the Office of the Prosecutor announced that it had filed an application for a Warrant of Arrest for Mudacumura, who it referred to as 'one of the main leaders of the FDLR' along with Mbarushimana and Murwanashyaka, for five counts of crimes against humanity and nine counts of war crimes.[550] The crimes were alleged to have been committed by FDLR forces in North and South Kivu between 20 January 2009 and 31 August 2010. The Prosecution sought to charge Mudacumura with five counts of crimes against humanity (murder, rape, torture, persecution and other inhumane acts[551]) and nine counts of war crimes (attacks against a civilian population, murder or wilful killing, rape, torture, mutilation, cruel treatment, destruction of property, pillage and outrages upon personal dignity[552]). The Prosecution alleged that Mudacumura was individually criminally responsible for the crimes as an indirect co-perpetrator under Article 25(3)(a), or, in the alternative, that he was responsible for ordering the crimes under Article 25(3)(b) or as a superior under Article 28(a).[553]

The publicly available version of the Prosecution's application for a Warrant of Arrest under Article 58, filed on 14 May 2012, was heavily redacted, with redactions including information about basic issues such as the Court's jurisdiction, the admissibility of a case or the categories of evidence relied on.[554] While the Office of the Prosecutor has been cautious about redacting certain information in previous public versions of Article 58 applications, so as to preserve the identity of victims or witnesses, as well as protect sensitive information about a case or investigation, it has not previously redacted information to this extent.

On 31 May 2012, Pre-Trial Chamber II issued a decision dismissing the Prosecutor's application in its entirety.[555] Although the Chamber based its decision on an unredacted version of the application, it appears that even the material which the Office of the Prosecutor chose not to make public did not contain some of the crucial pieces of information required by the Chamber. The Chamber noted that Article 58(2)(b)(c) of the Rome Statute requires that the Prosecutor's application for a warrant of arrest should contain both 'a specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed' and 'a concise statement of the facts which are alleged to constitute those crimes'.[556] This provision, as well as the provisions regarding the fair trial rights of an accused person, impose a legal responsibility on the Prosecutor to provide sufficiently specific information regarding the crimes for which the accused person is sought and the factual basis for those crimes. As the Pre-Trial Chamber stated: 'it is beyond controversy that the fundamental principles of fair trial do not allow the Chamber to establish on its own any of the connections which are missing in the Prosecutor's Application'.[557] It later went on to emphasise that 'it is for the Prosecutor to plead the specific crimes he believes to be proven and it is for

550 'Statement: ICC Prosecutor on New Applications for Warrants of Arrest, DRC Situation', 14 May 2012, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/otpstatement14052012>, last visited on 12 October 2012.

551 Pursuant to Articles 7(1)(a), 7(1)(g), 7(1)(f), 7(1)(h) and 7(1)(k).

552 Pursuant to Articles 8(2)(e)(i), 8(2)(c)(i)-1, 8(2)(e)(vi), 8(2)(c)(i)-4, 8(2)(c)(i)-2, 8(2)(c)(i)-3, 8(2)(e)(xii), 8(2)(e)(v) and 8(2)(c)(ii).

553 ICC-01/04-612-Red, para 71.

554 All of the information provided under the following headings was redacted in its entirety: categories of evidence relied on; the structure, leadership and functioning of the FDLR in 2009 and 2010; the existence of an organisational policy to attack a civilian population; the existence of a widespread or systematic attack against the civilian population of North and South Kivu in 2009 and 2010; the individual criminal responsibility of Mudacumura under Article 25(3)(a); the individual criminal responsibility of Mudacumura under Article 28(a); jurisdiction and admissibility of the case before the ICC; issues of victim and witness protection; and one other section of the application in which both the heading and the content were redacted. The application likewise provided a numbered list of the charges sought by the Prosecution and the relevant Article of the Statute under which the crime was charged, but no further information for any of the counts, such as where, when or how the crimes were alleged to have been committed, appears to have been included.

555 ICC-01/04-613.

556 ICC-01/04-613, para 4.

557 ICC-01/04-613, para 4.

the Chamber only to evaluate whether his allegations are substantiated to the relevant evidentiary standard' (emphasis in original).[558]

The Chamber found, however, that the Prosecutor's application did not meet this legal requirement of specificity. For example, the Chamber noted that:

> although paragraph 32 of the application lists all of the crimes alleged to have been committed by Mr Mudacumura, no proper counts or any other kind of accompanying description of the specific facts underlying those crimes, as required by Article 58(2) of the Statute, are provided in that paragraph. Although several criminal acts allegedly committed in various places in the Kivu provinces are described in different paragraphs of the application, the Prosecutor has not precisely identified the spatial parameters of each of those alleged crimes. Even where the underlying acts (murder, rape, etc.) are mentioned with regard to specific locations and dates, there is no clarity whether, in relation to these incidents, the Prosecutor is seeking Mr Mudacumura's arrest for war crimes, crimes against humanity, or both.[559]

The Chamber also struggled to determine which factual allegations corresponded to which charges, noting that in one part of the application 'multiple crime bases and underlying criminal acts are named in the same paragraph with no detailed and precise indication as to which crimes are alleged in respect of which incident'.[560] In relation to another part of the application, 'an attack on a series of villages in a single area [was] mentioned and the Chamber [was] not able to verify which of the underlying criminal acts in the last line of this paragraph correspond to which village(s)'.[561]

The Chamber also emphasised the importance of specificity to the exercise of its discretion whether or not to issue a Warrant of Arrest, noting that sufficiently specific information is 'essential for the Chamber to be properly informed why its authority to deprive a person of his or her liberty should be exercised'.[562] Given the deficiencies in the Prosecutor's application in this case, the Chamber refused to issue an arrest warrant and dismissed the Prosecutor's application without examining its merits.[563] This is the first time to date that a publicly available application for a warrant of arrest has been dismissed in its entirety.

Second application for a Warrant of Arrest for Mudacumura

On 13 June 2012, the Office of the Prosecutor submitted a second application for a Warrant of Arrest for Mudacumura.[564] The public redacted version of this application became available on 4 July 2012. The second application contained the same charges as the first – five counts of crimes against humanity and nine counts of war crimes – and alleged the same modes of liability (indirect co-perpetration,[565] ordering or superior responsibility). As in the original application, the Prosecution alleged that Mudacumura was part of a common plan, along with Mbarushimana, Murwanashyaka and Gaston Iyamuremye, to conduct a widespread and systematic attack against the civilian population in North and South Kivu designed to extort political concessions for the FDLR in Rwanda.[566] The Prosecution further alleged that Mudacumura issued an order to all FDLR commanders, which was read out to FDLR troops in the field, ordering them to attack civilians, to treat civilians as 'enemies and traitors' and make them 'suffer', and 'to pillage civilian property and burn down entire villages to create a tide of refugees and ensure that civilians supportive of the FARDC's offensive could never return'.[567]

The second application provided significantly more detail about the activities of the FDLR, Mudacumura's alleged involvement, and the locations and dates on which specific attacks underlying the alleged crimes were alleged to have taken place. The Prosecution's charges relate to attacks on the following locations in North and South Kivu: Kipopo (Masisi territory) on or about 12-13 February 2009; Mianga (Walikale territory) on or about 12 April 2009; Busurungi and surrounding villages (Walikale territory) on or about 3

558 ICC-01/04-613, para 7.
559 ICC-01/04-613, para 6.
560 ICC-01/04-613, para 6.
561 ICC-01/04-613, para 6.
562 ICC-01/04-613, para 8.
563 'Situation in the DRC: Pre-Trial Chamber II Dismisses the Prosecutor's Application for an Arrest Warrant Against Sylvestre Mudacumura', *ICC Press Release*, ICC-CPI-20120531-PR799, 31 May 2012, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/pr799>, last visited on 12 October 2012.
564 ICC-01/04-616-Red2.
565 The Prosecution also included an additional alternative mode of liability, namely as an indirect individual perpetrator under Article 25(3)(a). This represents one of the most varied ranges of modes of liability which has been pleaded to date by the Office of the Prosecutor. See ICC-01/04-616-Red2, paras 24-31.
566 ICC-01/04-616-Red2, para 2.
567 ICC-01/04-616-Red2, para 17.

March and 9-10 May 2009; Manje (Masisi territory) on or about 20-21 July 2009; Malembe (Walikale territory) in late July, early August, on or about 11-13 August and 15 September 2009; Mutakato (Walikale territory) on or about 2-3 December 2009; Pinga (Masisi territory) on or about 14 February 2009, as well as some additional locations and incidents which are redacted.[568] Based on this additionally available information, it appears that at least some of the crimes alleged in the application against Mudacumura are the same as those alleged in the Prosecution's case against Mbarushimana.[569]

On 13 July 2012, Pre-Trial Chamber II issued its decision on the Prosecutor's application,[570] granting a Warrant of Arrest for Mudacumura for nine counts of war crimes but dismissing the charges for crimes against humanity. The Chamber was satisfied that the case fell within the jurisdiction of the Court and was admissible.[571] It noted the similarities between the case against Mudacumura and the case against Mbarushimana, but held that 'the findings from Pre-Trial Chamber I in the Mbarushimana confirmation decision should not, in principle, affect the outcome of the present assessment, as this is a distinct case before a new Chamber involving a different person and a lower standard of proof'.[572]

The Chamber then went on to examine the issue of whether there were reasonable grounds to believe that one or more crimes outlined in the application had been committed. The Chamber began by assessing whether the contextual or *chapeau* requirements for crimes against humanity – a widespread or systematic attack, directed against a civilian population with knowledge of the attack, pursuant to or in furtherance of a state or organisational policy to commit such an attack – had been proven in this case. The Chamber found that the FDLR qualified as an 'organisation' within the meaning of Article 7(2)(a) of the Statute, and that there were reasonable grounds to believe that the FDLR was responsible for the commission of multiple acts which could meet the definition of individual crimes against humanity under Article 7(1) between 20 January 2009 and the end of September 2010.[573] However, the Chamber did not find 'reasonable grounds to believe that these acts were committed pursuant to or in furtherance of an official FDLR policy to attack the civilian population',[574] as is required under Article 7 of the Statute.

The Chamber acknowledged that, between 2009 and 2010, civilians were killed, abducted, raped, mutilated, subjected to cruel treatment, displaced or had their homes destroyed by FDLR military operations.[575] However, the Chamber found that 'nearly all of the FDLR attacks alleged by the Prosecutor were retaliatory attacks against military positions',[576] and that '[a] great deal of evidence also points to it being the FDLR's policy not to harm civilians or to abuse them and that members of the FDLR leadership did not want civilians to be killed during FDLR operations.'[577] Although some of the attacks did target both legitimate military objectives and civilians who were not taking direct part in hostilities, the Chamber found that 'it still cannot be reasonably inferred that the order to commit a humanitarian catastrophe was actually applied by the FDLR troops on the ground in accordance with an organisational policy to attack the civilian population as such' (emphasis in original).[578] The Chamber concluded that 'the failure to observe the principles of international humanitarian law does not in itself, particularly in the context of the circumstances of the present case as portrayed in the material submitted, reveal the existence of such a policy.'[579]

Although Pre-Trial Chamber II acknowledged that Pre-Trial Chamber I had found reasonable grounds to believe that the FDLR did have an organisational policy to attack the civilian population when it issued a Warrant of Arrest for Mbarushimana in October 2010, it held that 'on the basis of the current evidentiary record (which has significantly expanded since September 2010), the Chamber does not consider that the existence of an organisational policy is reasonably tenable'.[580] The Chamber therefore did not find that there were reasonable grounds to believe

568 While the public redacted version of the application for the Arrest Warrant for Mudacumura lists only a number of locations in North Kivu, with various other locations having been redacted, it states that it is based on locations in both North and South Kivu.

569 Mbarushimana was charged with 13 of the same 14 crimes as Mudacumura, the only difference being one additional charge of outrages upon personal dignity against Mudacumura. Many of the incidents and attacks referred to in the Mbarushimana application are also cited in the second Mudacumura application, such as the attacks on Busurungi in March and May 2009, in Manje in July 2009, in Mianga in April 2009 and in Malembe in August 2009.

570 ICC-01/04-01/12-1-Red.

571 ICC-01/04-01/12-1-Red, paras 9-17.

572 ICC-01/04-01/12-1-Red, para 20. Under Article 58 of the Statute, the standard of proof applicable to the arrest warrant stage of the proceedings is 'reasonable grounds to believe'.

573 ICC-01/04-01/12-1-Red, para 23.

574 ICC-01/04-01/12-1-Red, para 23.

575 ICC-01/04-01/12-1-Red, para 25.

576 ICC-01/04-01/12-1-Red, para 26.

577 ICC-01/04-01/12-1-Red, para 26.

578 ICC-01/04-01/12-1-Red, para 26.

579 ICC-01/04-01/12-1-Red, para 26.

580 ICC-01/04-01/12-1-Red, para 28.

that crimes against humanity had been committed by the FDLR. It is worth noting that, in its decision on the confirmation of charges against Mbarushimana, issued in December 2011 and described more fully above, Pre-Trial Chamber I had also revised its assessment of the existence of an organisational policy on the part of the FDLR to attack the civilian population, and found that the evidence provided by the Prosecution was not sufficient to establish the existence of such a policy.[581]

The Chamber did find reasonable grounds to believe that the contextual elements of war crimes had been satisfied. The Chamber found that there were reasonable grounds to believe that the following gender-based crimes had been committed:

- The war crime of mutilation, perpetrated by the FDLR at or near Busurungi and surrounding villages on or about 9-10 May 2009, relating to incidents where a pregnant woman had her eye pierced by bayonets and other civilians had their genitals removed as part of a reprisal attack against the FARDC.[582]
- The war crime of rape, perpetrated by the FDLR at or near Busurungi and surrounding villages on or about 9-10 May 2009, Manje on or about 20-21 July 2009 and three other redacted locations.[583]
- The war crime of torture, perpetrated by the FDLR at or near Busurungi and surrounding villages on or about 9-10 May 2009 and another redacted location, relating to incidents of severe assaults, aggravated rape, mutilation and/or inhumane treatment.[584]
- The war crime of outrages upon personal dignity, perpetrated by the FDLR at a redacted location, relating to incidents where FDLR soldiers humiliated, degraded or otherwise violated the dignity of one or more civilians.[585]

581 ICC-01/04-01/10-465-Red, paras 242-267.
582 Pursuant to Article 8(2)(c)(i)-2. ICC-01/04-01/12-1-Red, para 43.
583 Pursuant to Article 8(2)(e)(vi). ICC-01/04-01/12-1-Red, para 47.
584 Pursuant to Article 8(2)(c)(i)-4. ICC-01/04-01/12-1-Red, para 50.
585 Pursuant to Article 8(2)(c)(ii). ICC-01/04-01/12-1-Red, para 56. As noted above, the charge of outrages upon personal dignity is provisionally included as a gender-based crime charge subject to further information becoming available regarding the acts underlying the charge. The application is redacted when it comes to the facts underlying the outrages charge, however we note that the charge of outrages upon personal dignity is frequently related to sexual violence when it has been charged by the Office of the Prosecutor.

The Chamber also found reasonable grounds to believe that five other war crimes had been committed: murder, cruel treatment, attacks against a civilian population, pillage and destruction of property.[586]

In relation to the individual criminal responsibility of Mudacumura, the Prosecution had presented three alternative modes of liability: indirect co-perpetration under Article 25(3)(a); ordering under Article 25(3)(b); and superior or command responsibility under Article 28(a). The Chamber noted that co-perpetration under Article 25(3)(a) requires that the accused person must be part of a common plan or agreement involving an element of criminality, but found that in this case, the Prosecution had failed to prove the existence of a common plan among the FDLR's leadership to attack the civilian population of North and South Kivu.[587] The Chamber therefore did not find reasonable grounds to believe that Mudacumura was responsible as an indirect co-perpetrator under Article 25(3)(a).

The Chamber then examined the requirements for individual criminal responsibility for ordering the commission of crimes, a form of accessorial liability under Article 25(3)(b):

> (i) the person is in a position of authority;
>
> (ii) the person instructs another person in any form to either (a) commit a crime (which occurs or is attempted) or (b) to perform an act or omission in the execution of which a crime is carried out;
>
> (iii) the person's order had a direct effect on the commission or attempted commission of the crime; and
>
> (iv) the person is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the person's order.[588]

The Chamber found that there were reasonable grounds to believe that each of these requirements had been satisfied in relation to Mudacumura, and that there were reasonable grounds to believe the following: that he had acted in a position of authority and control over FDLR forces; that compliance with his orders was required within the FDLR; that under his authority, a general order to create a humanitarian catastrophe had been issued in early 2009, as well as a general order to pillage civilian property to sustain the FDLR's military efforts; and that there was evidence that Mudacumura had given specific prior approval to the attacks on Mianga and Busurungi.[589]

586 Pursuant to Articles 8(2)(c)(i)-1, 8(2)(c)(i)-3, 8(2)(e)(i), 8(2)(e)(v) and 8(2)(e)(xii).
587 ICC-01/04-01/12-1-Red, paras 60-62.
588 ICC-01/04-01/12-1-Red, para 63.
589 ICC-01/04-01/12-1-Red, paras 64-65.

Therefore, the Chamber found that there were reasonable grounds to believe that Mudacumura was individually criminally responsible as an accessory under Article 25(3)(b) for ordering nine counts of war crimes. This marks the first time that a Warrant of Arrest has been issued on the basis of accessorial liability at the ICC, as well as the first time the Prosecution has attempted to plead accessorial liability under Article 25(3)(b). The Chamber did not directly address the issue of Mudacumura's potential responsibility as a military superior under Article 28(a), but did note that its findings '[did not] prejudice any subsequent finding regarding the applicability of a different mode of liability at a later stage of the proceedings'.[590]

The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang

The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, Mohammed Hussein Ali

On 23 January 2012, Pre-Trial Chamber II[591] issued a majority decision, with Judge Kaul dissenting, on the confirmation of charges in the Kenya Situation, in the case against William Samoei Ruto (Ruto), Henry Kiprono Kosgey (Kosgey) and Joshua Arap Sang (Sang), and in the case against Francis Kirimi Muthaura (Muthaura), Uhuru Muigai Kenyatta (Kenyatta) and Mohammed Hussein Ali (Ali). The Pre-Trial Chamber confirmed three charges of crimes against humanity against Ruto and Sang[592] and five charges of crimes against humanity against Muthaura and Kenyatta.[593] No charges were confirmed against Kosgey or Ali. The cases against Ruto & Sang, and Muthaura & Kenyatta were subsequently transmitted to Trial Chamber V.[594] On 19 July 2012, Trial Chamber V issued a decision scheduling the two trials to commence 10 and 11 April 2013, respectively.[595]

At the time of the post-election violence that erupted in Kenya following the December 2007 elections, Ruto, Kosgey and Sang were associated with Prime Minister Odinga's Orange Democratic Movement (ODM). Ruto is a former Minister of Higher Education, Science and Technology; Kosgey is a Member of Parliament and Chairman of the ODM; and Sang is the head of operations at a Kenyan radio station, Kass FM. Muthaura, Kenyatta and Alli were aligned with the Party of National Unity (PNU) of President Kibaki. Muthaura is the former Head of the Public Service and Secretary to the Cabinet of Kenya; Kenyatta is the Deputy Prime Minister and former Minister for Finance; and Ali is currently the Chief Executive of the Kenyan Postal Corporation and was the Commissioner of Police during the post-election violence. Together, these two sets of cases represented leadership positions of both sides of the coalition Government of ODM and PNU.

In the decision on the confirmation of charges in the case against Ruto, Kosgey and Sang, the Chamber expressed concern about the Prosecution's apparent 'inconsistent labelling of criminal responsibility' for some of the crimes charged. It noted that, while seeking to charge Ruto and Kosgey with co-perpetrator liability under Article 25(3)(a), the Prosecution had described their alleged responsibility as having 'committed or *contributed* to the commission of' the crimes; similarly, while seeking to charge Sang pursuant to Article 25(3)(d) with accessorial liability, the description of Sang's alleged responsibility again included the phrase '*committed* or contributed to'.[596] However, the Chamber noted that 'although such inconsistency or lack of precision may raise an issue of deficiency' in the document containing the charges', the Prosecution's presentation of the elements underlying the mode of liability for each suspect 'cures

590 ICC-01/04-01/12-1-Red, para 69. The Chamber found in its decision (paras 67-68) that Mudacumura had been 'informed of allegations of crimes' and 'accusations towards forces under his authority', that he had tried to cover up the nature of the FDLR's activities in Mianga and Busurungi and that, in some instances, commanders who had been accused of crimes were promoted on Mudacumura's orders. These would all be relevant factual findings for the purposes of superior responsibility.

591 Pre-Trial Chamber II is composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Hans-Peter Kaul (Germany) and Judge Cuno Tarfusser (Italy).

592 The Pre-Trial Chamber found substantial grounds to believe Ruto and Sang were responsible for the following crimes and thus confirmed three charges of crimes against humanity: murder, deportation or forcible transfer of population, and persecution (on political grounds), pursuant to Articles 7(1)(a), 7(1)(d) and 7(1)(h). ICC-01/09-01/11-373.

593 The Pre-Trial Chamber found substantial grounds to believe Muthaura and Kenyatta were responsible for the following crimes and thus confirmed five charges of crimes against humanity: murder, deportation or forcible transfer of population, rape, other inhumane acts, and persecution (on political grounds), pursuant to Articles 7(1)(a), 7(1)(d), 7(1)(g), 7(1)(k) and 7(1)(h). ICC-01/09-02/11-382-Red.

594 Trial Chamber V is composed of Presiding Judge Kuniko Ozaki (Japan), Judge Christine van den Wyngaert (Belgium) and Judge Chile Eboe Osuji (Nigeria).

595 ICC-01/09-01/11-440 and ICC-01/09-02/11-451.

596 ICC-01/09-01/11-373, para 283 citing ICC-01/09-01/11-261-AnxA, para 133 (emphasis in original). In this regard, the Chamber recalled its decision issuing the summonses to appear against the three individuals, in which it had also expressed concern about this inconsistency. ICC-01/09-01/11-373, para 284 citing ICC-01/09-01/11-1, para 36.

the apparent inconsistency'.[597] The Chamber held that there were substantial grounds to believe that Ruto was responsible as co-perpetrator pursuant to Article 25(3)(a), and that Sang was responsible under Article 25(3)(d). In the case against Muthaura, Kenyatta and Ali, the Chamber confirmed the charges against Muthaura and Kenyatta pursuant to Article 25(3)(a).

The Prosecutor sought charges of gender-based crimes in one of the two cases in the Kenya Situation, in the case against Muthaura & Kenyatta (rape and other forms of sexual violence). While the Pre-Trial Chamber had recharacterised the charge of 'other forms of sexual violence' as 'other inhumane acts' in the decision issuing the Summons to Appear, as described above, pursuant to Article 61(4)[598] in the document containing the charges, the Prosecutor again brought evidence relating to the forcible circumcision of Luo men as other forms of sexual violence. However, in the 23 January decision, the Chamber continued to characterise evidence relating to the forcible circumcision of Luo men as 'other inhumane acts' rather than as 'other forms of sexual violence' (the original charge sought by the Prosecutor), on the grounds that, in the Chamber's view, 'not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence'.[599] As noted above, while the Prosecution advanced further evidence to substantiate the sexual nature of the acts of forcible circumcision and penile amputation, the Chamber held that 'the evidence placed before it does not establish the sexual nature of the acts of forcible circumcision and penile amputation visited upon Luo men'.[600] The Women's Initiatives has previously expressed concern about the Chamber's decision to reclassify acts of forcible circumcision as other inhumane acts, stating that in doing so the Pre-Trial Chamber overlooked the broader context of the crimes, including the force and coercive environment, as well as the intention and purpose of the acts.[601] As Brigid Inder, Executive Director of the Women's Initiatives, stated:

> What makes these acts a form of sexual violence is the force and the coercive environment, as well as the intention and purpose of the acts. [...] The forced circumcision of Luo men has both political and ethnic significance in Kenya and therefore has a special meaning. In this instance, it was intended as an expression of political and ethnic domination by one group over the other and was intended to diminish the cultural identity of Luo men.[602]

In declining to confirm any charges against Kosgey or Ali, the Chamber noted that the evidence presented by the Office of the Prosecutor regarding their alleged responsibility was insufficient. Regarding Kosgey's alleged responsibility, the Chamber noted that the Prosecutor had primarily relied on the 'detailed description of one anonymous witness (Witness 6) to prove the allegations regarding Kosgey's role within the organisation',[603] and that this statement could not be corroborated by any of the other evidence submitted.[604] In light of the Chamber's earlier finding that statements from anonymous witnesses would be given lower probative value,[605] and given the absence or insufficiency of corroborating evidence, the Chamber was not satisfied that the Prosecutor had met the necessary evidentiary standard required to confirm the charges against Kosgey.[606] The Chamber did not confirm the charges against Ali due to insufficient evidence to uphold the allegation that he was responsible for the inaction of police in response to the attack against the civilian supporters of the ODM.[607] In particular, the Chamber found that the alleged police failure mainly occurred 'as a result of ethnic bias on the part of individual police officers, as well as of ineptitude and failure of senior police officers to sufficiently appreciate the violence [...], leaving the police officers on the ground often overwhelmed and outnumbered by the attackers'.[608] In the absence of sufficient evidence to establish police involvement in the attack, even by means of inaction, the Chamber could not attribute any responsibility for their conduct to Ali, and therefore held that there was not enough evidence to establish substantial grounds to believe that Ali was individually criminally responsible for the crimes charged.[609]

597 ICC-01/09-01/11-373, para 285.
598 Article 61(4) provides that 'before the [confirmation of charges] hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges [...]'.
599 ICC-01/09-02/11-382-Red, para 265.
600 ICC-01/09-02/11-382-Red, para 266.
601 See *Gender Report Card 2011*, p 180-181.
602 'Kenya: Plea to ICC over forced male circumcision', *IRIN News*, 25 April 2011, available at <http://www.irinnews.org/Report/92564/KENYA-Plea-to-ICC-over-forced-male-circumcision>, last visited on 19 October 2012. See also 'In Kenya, Forced Male Circumcision and a Struggle for Justice', *The Atlantic*, 1 August 2011, available at <http://www.theatlantic.com/international/archive/2011/08/in-kenya-forced-male-circumcision-and-a-struggle-for-justice/242757/>, last visited on 19 October 2012.
603 ICC-01/09-01/11-373, para 293.
604 ICC-01/09-01/11-373, para 294.
605 ICC-01/09-01/11-373, para 78.
606 ICC-01/09-01/11-373, para 297.
607 The Prosecution alleged that the police had to a certain extent participated in the attack, by means of a deliberate failure to act or the creation of a 'free zone' in which the attacks could occur with impunity.
608 ICC-01/09-02/11-382-Red, para 226.
609 ICC-01/09-02/11-382-Red, paras 423-427.

In the confirmation of charges decisions in the case against Muthaura & Kenyatta, Pre-Trial Chamber II commented on the Prosecution's evidence brought to substantiate the charges of rape, referencing the Prosecution's reliance on NGO and other reports, and noted that 'in their totality, the aforementioned items of evidence reach the threshold [of proof] required at this stage of proceedings'.[610] The Pre-Trial Chamber also discussed the specificity in the Prosecution's document containing the charges regarding the exact locations of the crimes. Referencing that the Prosecution used the terms 'in locations including' to set out the geographic locations of the incidents supporting the charges, the Chamber stated that:

> [it] does not believe that the use of the expression "in or around locations including Nakuru and Naivasha" in the text of the charges is to be understood to include any other locations than "in or around Nakuru" and "in or around Naivasha". Therefore, the Chamber will only assess the evidence with respect to the events that, according to the Prosecutor's allegations, took place in these locations.'[611]

The Chamber used similar language in the confirmation of charges decision in the Ruto & Sang case.[612] In this decision, the Chamber underlined that the Prosecutor 'should provide a proper degree of specificity in his document containing the charges, which refers to the precise locations of the alleged incidents where crimes took place.[613]

610 ICC-01/09-02/11-382-Red, para 259.
611 ICC-01/09-02/11-382-Red, para 106.
612 In this decision, the Chamber held that its assessment would be limited to Turbo town, the greater Eldoret area, Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi District because of a lack of specificity in the document containing the charges.
613 ICC-01/09-01/11-373, para 99.

The Prosecutor v. Laurent Koudou Gbagbo

On 3 October 2011, Pre-Trial Chamber III issued a decision granting the Prosecutor's request for authorisation to commence an investigation in Côte d'Ivoire, making it the seventh Situation before the ICC.[614] Following the authorisation of the opening of an investigation, on 25 October 2011, the Prosecutor filed a confidential application under Article 58 for an Arrest Warrant for Laurent Koudou Gbagbo (Gbagbo) for four counts of crimes against humanity (murder, rape and other forms of sexual violence, persecution, and other inhumane acts[615]) committed in Côte d'Ivoire during the post-election violence from 28 November 2010 onwards.[616] Gbagbo is the former President of Côte d'Ivoire. The Prosecutor submitted that Gbagbo, with the support of individuals from his inner circle, adopted a policy of attacking his political opponent Alessane Ouattara, Ouattara's supporters and civilians perceived to be supporting Ouattara, 'to retain power by all means, including by lethal force'.[617] According to the Office of the Prosecutor, this policy was carried out by pro-Gbagbo forces, 'under the joint authority and control of Mr Gbagbo and his inner circle'.[618]

614 The Pre-Trial Chamber, in examining the Prosecutor's evidence, found that the information submitted by the Prosecutor provided a reasonable basis to believe that crimes within the ICC's jurisdiction were committed in Côte d'Ivoire, including murder, imprisonment or other severe deprivation of liberty, rape and enforced disappearances as crimes against humanity, and murder and intentionally directing attacks against the civilian population as war crimes. The Pre-Trial Chamber also found that the information indicated reasonable grounds to believe various other crimes, including additional gender-based crimes, had been committed in addition to those specified in the Prosecutor's request. In four instances in its decision, the Pre-Trial Chamber expanded on the crimes cited by the Prosecutor, adding torture and other inhumane acts as a crime against humanity as well as rape as a war crime and sexual violence, pillage, cruel treatment and torture as war crimes amounting to an expanded and corrected version of the crimes brought by the Prosecutor in his original request. ICC-02/11-14, paras 83-86, 144-148, 162-169. Following the submission of additional information at the Chamber's request, on 22 February 2012, Pre-Trial Chamber III extended the investigation to include potentially relevant crimes committed between 2002 and 2010. ICC-02/11-36. See further *Gender Report Card 2011*, p 195-199.
615 Pursuant to Articles 7(1)(a), 7(1)(g), 7(1)(h) and 7(1)(k).
616 ICC-02/11-24-US-Exp.
617 ICC-02/11-01/11-9-Red, para 5.
618 ICC-02/11-01/11-9-Red, para 5.

On 23 November 2011, Pre-Trial Chamber III[619] issued the Arrest Warrant for Gbagbo under seal, which was unsealed on 30 November 2011 following his transfer from detention in the Côte d'Ivoire, where he had been held since 11 April 2011, to the Court's custody. Having analysed the information submitted to it by the Prosecutor, the Chamber was satisfied that there are reasonable grounds to believe that following the disputed presidential elections in Côte d'Ivoire, pro-Gbagbo forces attacked the civilian population in Abidjan and in the west of the country from 28 November 2010 onwards, targeting civilians who they believed to be supportive of Ouattara.[620] The Chamber satisfied itself that these attacks were committed pursuant to an organisational policy and were widespread and systematic.[621] The Chamber was satisfied that there were reasonable grounds to believe that Gbagbo was responsible under Article 25(3)(a) of the Statute for the crimes of humanity of murder, rape and other forms of sexual violence, other inhumane acts and persecution committed in Côte d'Ivoire between 16 December 2010 and 12 April 2011.

However, with regard to the charge of rape and other forms of sexual violence constituting a crime against humanity, the Chamber noted that 'the Prosecutor has not referred to any witness statements, witness summaries or affidavits in support of this count'.[622] Nonetheless, 'given the low evidential threshold' at this stage of the proceedings, the Chamber did find reasonable grounds to believe Gbagbo was responsible for these crimes.

In assessing the evidence concerning Gbagbo's mode of liability, the Pre-Trial Chamber also expressed doubt about the correct mode of liability advanced by the Prosecutor,[623] observing that:

> it is undesirable at this early stage of the case, for the Chamber to limit the options that may exist for establishing criminal responsibility under the Rome Statute, because this will ultimately depend on the evidence and the arguments in the case. Until the Chamber has heard full arguments from the parties, it is premature to decide, certainly with any finality, whether Article 25(3)(a) of the Statute is the correct basis for proceeding against Mr Gbagbo (either standing alone or along with other provisions) or whether the various elements of the prosecution's theory of "indirect co-perpetration" are relevant to, or applicable in, this case.[624]

Given that the Prosecutor's application was made under Article 25(3)(a), the Chamber analysed the test of co-perpetrator liability advanced by the Prosecution,[625] and found each element was fulfilled. However, the Chamber noted that although it is satisfied 'that this substantial test, as proposed by the Prosecution, is [...] made out, it is likely that this issue (ie Mr Gbagbo's suggested liability as an "indirect co-perpetrator" under Article 25(3)(a) of the Statute) may well need to be revised in due course with the parties and participants'.[626]

619 At the time of this decision, Pre-Trial Chamber III was composed of Presiding Judge Silvia Fernández de Gurmendi, Judge Elisabeth Odio Benito and Judge Fulford. In March 2012, the Presidency issued a decision reassigning the judicial divisions, following the completion of the terms of a number of Judges, as described in the ASP section of this Report. The decision also reassigned the Côte d'Ivoire Situation and Gbagbo case to Pre-Trial Chamber I, which is composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Hans-Peter Kaul (Germany) and Judge Christine van den Wyngaert (Belgium). ICC-02/11-01/11-59.

620 ICC-02/11-01/11-9-Red, para 36.

621 ICC-02/11-01/11-9-Red, paras 47, 54.

622 ICC-02/11-01/11-9-Red, para 59.

623 In the application for the Arrest Warrant, the Prosecutor focused exclusively on individual criminal responsibility under Article 25(3)(a) of the Statute, rather than charging command responsibility under Article 28 in the alternative, which the Chamber seems to suggest.

624 ICC-02/11-01/11-9-Red, para 74.

625 In its application, the Prosecution advanced that the test for under Article 25(3)(a) is a substantial one and involves the following elements: (i) the existence of a common plan between Gbagbo and his inner circle; (ii) Gbagbo and the members of his inner circle were each aware that implementing the common plan would in the ordinary course of events result in the commission of the crimes; (iii) Gbagbo was aware of the relevant circumstances that enabled him and the other members of his inner circle to exercise joint control over the crimes; (iv) Gbagbo has the necessary intent and knowledge; (v) the coordinated and essential contribution to the crimes on the part of Gbagbo and his inner circle; and (vi) the crimes were executed by pro-Gbagbo forces who complied on an almost automatic basis with the orders given by Gbagbo and his inner circle. ICC-02/11-01/11-9-Red, para 75.

626 ICC-02/11-01/11-9-Red, para 77.

Milestone:
First trial judgement in the Lubanga case

On 14 March 2012, Trial Chamber I delivered the first trial judgement of the ICC in the case against Thomas Lubanga Dyilo (Lubanga), convicting Lubanga, as former President of the *Union des patriotes congolais* (UPC) and Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (FPLC), of the war crimes of conscripting and enlisting children under the age of 15, and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute, from early September 2002 to 13 August 2003.[627] Lubanga is a Congolese national of Hema ethnicity, born in 1960 in the DRC. The ICC issued a Warrant for his arrest in February 2006, and he was arrested on 16 March 2006. Since that time, Lubanga has remained in the custody of the ICC. The charges were confirmed by Pre-Trial Chamber I in January 2007.

Lubanga was the first accused to come into the Court's custody in 2006 and the first to stand trial before the ICC. In accordance with the Rome Statute, the judgement was delivered in open court, and subsequently a written version containing a 'full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions' was made available.[628] While the Trial Chamber delivered a unanimous verdict, two Judges appended a separate or dissenting opinion. The trial judgement in the Lubanga case marks the first time a Trial Chamber of the ICC has issued a judgement on the guilt or innocence of the accused. Despite procedural difficulties throughout the trial, including two formal stays of proceedings and an adjournment, the Lubanga trial presents an important milestone for the Court and for international criminal law in general. It was the first international criminal trial ever held on the conflict in Eastern DRC, and one of the few international criminal cases in history to charge and convict an individual with acts of enlistment, conscription and use of child soldiers.

627 ICC-01/04-01/06-2842. On 3 October 2012, the Lubanga Defence filed an application to appeal the judgement. ICC-01/04-01/06-2934.

628 Article 74(5).

In a statement issued following the delivery of the trial judgement, the Women's Initiatives for Gender Justice stated: 'the judges' decision today provides justice for children abducted, abused, and forced to fight by the UPC, and it may also deepen our collective understanding of the terror and impact on children, boys and girls, who are forced to participate in armed conflicts'.[629]

The Prosecution did not charge Lubanga with gender-based crimes, despite reports by the United Nations and other sources relating to their commission by the UPC/FPLC. The DRC is known to have one of the highest rates of sexual violence in the world,[630] and significant information exists, gathered by local and international organisations, including the Women's Initiatives for Gender Justice, illustrating that sexual violence was a defining characteristic of the conflict in Eastern DRC and that the commission of gender-based crimes against girls was common for those abducted by militia groups, including by the UPC/FPLC.[631] A detailed discussion concerning the absence of charges for sexual violence and the resulting implications is set out below, in the section on **Sexual violence in the Lubanga case**.

Following the first official stay of proceedings in 2008 due to disclosure obligations and confidentiality conditions under Article 54(3)(e) agreements between the Office of the Prosecutor and information providers,[632] the trial against Lubanga eventually commenced on 26 January 2009, two years after the decision on the confirmation of charges had been issued by Pre-Trial Chamber I. The presentation of evidence stage in the case officially closed on 20 May 2011, with closing arguments taking place in August 2011. Over the course of 204 hearings, Trial Chamber I heard a total of 67 witnesses. It delivered a total of 275 written and 347 oral decisions.[633] During the trial, 129 victims participated, of whom 34 were female and 95 male.[634]

629 Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, 'First Conviction by the ICC: *The Prosecutor v. Thomas Lubanga Dyilo*', 14 March 2012, available at <http://www.iccwomen.org/documents/Press-Statement-on-Lubanga-conviction.pdf>. See further discussion of the Lubanga case in Brigid Inder, 'The ICC, child soldiers and gender justice', *European Parliament Magazine*, November 2011, available at <http://viewer.zmags.com/publication/5ebbab6d?page=55/5ebbab6d/55>, last visited on 12 October 2012.

630 The UN Special Representative for Sexual Violence in Conflict, Margot Wallström, referred to the DRC as the 'rape capital of the world'. See Statement delivered at the United Nations Security Council Open Meeting on 'Women, Peace and Security: Sexual Violence in Situations of Armed Conflict', New York, 27 April 2011, available at <http://www.stoprapenow.org/uploads/features/StatementofSRSGWallstromSecurityCouncilOpenMeeting27April2010.pdf?v=h1wnEb3xrBE>, last visited on 12 October 2012.

631 Women's Initiatives for Gender Justice, 'Letter to the Prosecutor', 16 August 2006, available at <http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>; United Nations Security Council, Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council, covering a 'Special report on the events in Ituri, January 2002-December 2003', S/2004/573, 16 July 2004; 'Democratic Republic of the Congo – Mass Rape – Time for Remedies', *Amnesty International*, 26 October 2004, available at <http://www.amnesty.org/en/library/asset/AFR62/018/2004/en/618e1ff2-d57f-11dd-bb24-1fb85fe8fa05/afr620182004en.pdf>, last visited on 12 October 2012;'Democratic Republic of Congo: Ituri – How many more have to die?', *Amnesty International*, August 2003, available at <http://www.unhcr.org/refworld/pdfid/45b9a04e2.pdf>, last visited on 12 October 2012; 'Seeking Justice: The Prosecution of Sexual Violence in the Congo War', *Human Rights Watch*, March 2005, available at <http://www.hrw.org/sites/default/files/reports/drc0305.pdf>, last visited on 12 October 2012.

632 For a full summary of this issue please see *Gender Report Card 2008*, p 46.

633 ICC-01/04-01/06-2842, para 11.

634 ICC-01/04-01/06-2842, para 15.

Following the issuance of the trial judgement, on 10 July 2012, Trial Chamber I sentenced Lubanga to 14 years imprisonment, in a decision delivered in open court.[635] Pursuant to the Statute, the Chamber deducted from his sentence the six years already spent in detention since his surrender to the ICC in March 2006. Subsequently, on 7 August 2012, the Trial Chamber issued its decision establishing the principles and procedures to be applied to reparations.[636] These two decisions are analysed in greater detail, in the **First reparations and sentencing decisions in the Lubanga case** section of this Report.

This section of the Report provides a thorough review and analysis of the first trial judgement issued by the ICC, starting with a brief overview of the structure and content of the 624-page judgement, and including a detailed analysis of each section of the judgement.

Brief overview of the trial judgement

At the outset of the judgement, the Chamber described the charges and a brief procedural history of the case, including issues related to victim participation. The Chamber then provided a summary of the submissions by the Prosecution, Defence and the Legal Representatives of Victims, including the Office of Public Counsel for Victims (OPCV). It also summarised the relevant historical and factual context to the case, covering the background to the conflict in Ituri, the conflict between the Hema and Lendu ethnic groups, and the creation of the UPC. The Chamber dedicated a section of the judgement to the standards used in evaluating the evidence, drawing particular attention to the oral testimony of alleged former child soldiers, and dismissing the Defence challenge to the entirety of the Prosecution evidence.

635 ICC-01/04-01/06-2901.
636 ICC-01/04-01/06-2904.

The Lubanga case involved a complex procedural history, including repeated Defence challenges to the Prosecution's evidence and use of intermediaries. As a result, the Trial Chamber devoted a significant portion of the trial judgement to detailing the investigative approach taken by the Office of the Prosecutor, in which it determined, *inter alia*, that the majority of the alleged former child soldier witnesses for the Prosecution were unreliable. Due to contradictions in their testimonies, the Chamber withdrew the victim participation status of six of the Prosecution witnesses who had been recognised as victims, as well as the status of three victims who had been authorised to participate upon the request of their Legal Representative.

The Chamber also recharacterised the nature of the armed conflict as internal rather than international pursuant to Regulation 55 of the Regulations of the Court. This was in agreement with the original charges as brought by the Office of the Prosecutor.[637] It then established the legal framework within which Lubanga was charged: conscripting and enlisting children under the age of 15 or using them to participate actively in hostilities,[638] clarifying its interpretation of the relevant provisions in light of the submissions of the parties. Having established the applicable legal framework, the Chamber assessed the relevant evidence to conclude that the UPC/FPLC conscripted, enlisted and used children under the age of 15 to actively participate in hostilities. The majority considered evidence related to the severe punishments and sexual violence inflicted on recruits only as context to the crimes. Judge Odio Benito dissented, finding sexual violence to be inherent in the crime of 'use actively in hostilities'. Judge

637 In its document containing the charges, the Office of the Prosecutor considered that the alleged crimes were committed in the context of an armed conflict not of an international character. ICC-01/04-01/06-356-Conf-Anx1, para 7 as cited in ICC-01/04-01/06-803-tEN, para 200.
638 Article 8(2)(e)(vii) of the Statute.

Odio Benito's separate and dissenting opinion addressed several concerns, including (i) the legal definition of the crimes of enlistment, conscription and using children under the age of 15 to directly participate in hostilities; (ii) whether the concept of 'national armed forces' should extend to non-State forces; (iii) the manner in which the majority dealt with the dual status victims/witnesses in evaluating their participation in this case; and (iv) the evidentiary value of video evidence. The Chamber then addressed Lubanga's individual criminal responsibility. This section of the judgement detailed the objective and subjective elements of co-perpetration, and found Lubanga responsible as a co-perpetrator pursuant to Article 25(3)(a) of the Statute. Judge Fulford issued a separate opinion on the legal requirements of co-perpetration under Article 25(3)(a) of the Statute, but concurred with the approach taken by the majority. The issues on which Judge Fulford and Judge Odio Benito issued their separate and dissenting opinions are discussed in more detail below, in the context of the relevant sections of the trial judgement.

Charges and procedural history

At the outset of the trial judgement, the Trial Chamber set forth the factual and legal context necessary for understanding the judgement. It outlined the charges and the key procedural events that arose during trial. Specifically, it noted that Pre-Trial Chamber I had charged Lubanga under Article 8(2)(b)(xxvi) and e(vii) of the Statute, namely, within the context of an international and a non-international conflict, respectively.[639] It also noted that while the Pre-Trial Chamber's decision confirming the charges had contained a legal characterisation of the facts, it 'did not expressly identify the facts that supported each of the legal elements of the crimes charged'.[640] In this regard, the Trial Chamber underscored that the judgement did not exceed the facts and circumstances as established by the Pre-Trial Chamber.

639 ICC-01/04-01/06-2842, para 1, citing ICC-01/04-01/06-803-tEN, p 157.

640 ICC-01/04-01/06-2842, para 8.

In its summary of the procedural history of the case, the Chamber noted the Appeals Chamber's dismissal of the accused's jurisdictional challenge,[641] and highlighted the four major procedural events that significantly affected the course of the proceedings:

> (i) the Trial Chamber decision of 13 June 2008 to stay the proceedings 'as a consequence of the failure by the Office of the Prosecutor to disclose a significant body of potentially exculpatory evidence covered by certain confidentiality agreements that had been entered into on the basis of Article 54(3)(e)';[642]
>
> (ii) the Appeals Chamber reversal[643] of the decision of a majority of the Trial Chamber[644] (Judge Fulford dissenting),[645] 'notifying the parties and participants that the legal characterisation of the facts may be subject to change pursuant to Regulation 55 of the Regulations of the Court', concerning evidence related to sexual violence and the ill treatment of recruits;[646]
>
> (iii) the Trial Chamber's decision to impose a second stay of the proceedings on 8 July 2010 'because of the prosecution's non-compliance with an order for the disclosure of the name of Intermediary 143',[647] which was reversed by the Appeals Chamber;[648] and

641 ICC-01/04-01/06-2842, para 9, citing ICC-01/04-01/06-772.

642 ICC-01/04-01/06-2842, para 10, citing ICC-01/04-01/06-1401. See further *Gender Report Card 2009*, p 130-133, and *Gender Report Card 2008*, p 46.

643 ICC-01/04-01/06-2205.

644 ICC-01/04-01/06-2049.

645 ICC-01/04-01/06-2069. See further *Gender Report Card 2010*, p 129-132.

646 Regulation 55(1) of the Regulations of the Court provides: 'In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges'. See section *Sexual Violence in the Lubanga case*, below.

647 ICC-01/04-01/06-2842, para 10, citing ICC-01/04-01/06-2517-Red.

648 ICC-01/04-01/06-2582. See further *Gender Report Card 2010*, p 139-151

(iv) the Defence application of 10 December 2010, seeking a permanent stay of the proceedings, and arguing 'that four of the intermediaries used by the prosecution had prepared false evidence and the Prosecutor was aware that some of the evidence connected to these individuals was untruthful, and moreover he failed in his obligation to investigate its reliability',[649] which the Trial Chamber dismissed.[650]

In its overview of the case, the Chamber also noted that it had authorised the applications of 129 victims (34 female and 95 male), most of whom were alleged former child soldiers, to participate on a prima facie basis pursuant to Article 68(3).[651] It noted that all 129 victims claimed they had suffered harm as a result of the crimes allegedly committed by the accused, and that 'many also alleged that they had suffered harm as a result of other crimes, such as sexual violence and torture or other forms of ill-treatment, which are not the subject of charges against the accused'.[652]

The Chamber indicated that three victims had given evidence upon the request of their Legal Representatives, who were granted in-court protective measures to do so, and that the latter had submitted 13 items into evidence.[653] It underscored the protective measures that had been provided to victims, including anonymity, which resulted in only 23 victims' identities being revealed to the parties.[654] It outlined the key procedural decisions throughout the trial determining the scope and modalities of victim participation, including, inter alia, the ability to present their views and concerns through their common legal representatives; and their ability to tender evidence, including that related to reparations.[655]

649 ICC-01/04-01/06-2842, para 10, citing ICC-01/04-01/06-2657-Red.
650 ICC-01/04-01/06-2690-Red2. See further *Gender Report Card 2011*, p 218-221.
651 ICC-01/04-01/06-2842, para 15.
652 ICC-01/04-01/06-2842, para 16, n.54. Specifically, '30 victims (18 female and 12 male) referred to acts of sexual violence which they either suffered or witnessed'; and, '30 victims (5 female, 25 male) referred to acts of torture which they either suffered or witnessed'.
653 ICC-01/04-01/06-2842, para 11.
654 ICC-01/04-01/06-2842, para 18.
655 ICC-01/04-01/06-1119, paras 115-116, 123-126.

Overview of parties' and participants' submissions and background to the conflict

Prosecution submission

The Chamber briefly described the Prosecution's principal factual allegations against the accused, beginning with his becoming President of the UPC in September 2000, which assumed power in Ituri through its military wing, the FPLC, in September 2002. The political and military aims of the UPC/FPLC led to the recruitment of young persons 'regardless of their age — by targeting schools and the general public, and through coercive campaigns in the villages'.[656] The Prosecution alleged that as President and Commander-in-Chief of the UPC/FPLC, Lubanga directed the military conquest of Ituri, giving orders for battles and ensuring that 'the military was properly equipped with funds, ammunition, weapons and vehicles'.[657]

The Chamber described the Prosecution submission that the accused orchestrated recruitment campaigns targeting children of all ages, who were trained and sent to the front line. It alleged that they were beaten, whipped, imprisoned and inadequately fed, and that young girls were raped. The Prosecution contended that Lubanga frequently saw children under the age of 15 within the ranks and included them as his personal body guards. The Chamber also described the Prosecution allegation that orders to demobilise minors were issued by Lubanga in response to pressure from the international community concerning the use of child soldiers in the conflict.[658]

The Chamber noted that the Prosecution had consistently argued that the crimes were committed in the context of a non-international conflict. The Chamber also noted that not all of the facts set forth by the Prosecution fell within the parameters of the facts and circumstances described in the confirmation of charges decision, namely, 'the use of girls as sexual slaves together with the resulting unwanted pregnancies'.[659] The Chamber's deliberations of these issues are discussed more fully below.

656 ICC-01/04-01/06-2842, para 26.
657 ICC-01/04-01/06-2842, para 28.
658 ICC-01/04-01/06-2842, paras 29-34.
659 ICC-01/04-01/06-2842, para 36.

Defence case

The Chamber indicated that the Defence had presented a bifurcated case, the first part of which challenged the testimony of all of the Prosecution child soldier witnesses, reiterating the arguments rehearsed in its prior application for a permanent stay in the proceedings.[660] The Defence also challenged the Prosecution failure to verify the reliability of its evidence, arguing that this precluded the Chamber from making any findings 'beyond a reasonable doubt'. The second part of the Defence submission focused on the individual criminal responsibility of the accused, asserting, *inter alia*, that: Lubanga maintained no minor body guards; there was no conflict between late May 2003 and 13 August 2003; the common plan was not criminal; and the demobilisation decrees negated any intent on the part of the accused.

Submissions by the Legal Representatives of Victims

The Chamber summarised the submissions of the Legal Representatives of Victims, including the OPCV, highlighting their response to Defence challenges regarding victims' identities. It also noted their contention that cruel treatment and sexual violence should be considered in assessing the accused's criminal responsibility.[661]

Factual overview

Subsequently, the Chamber provided a factual overview, covering the background to the conflict in Ituri, the conflict between the Hema and Lendu ethnic groups specifically, and the creation of the UPC. The Chamber referred to extensive expert testimony on the DRC's colonial past until Laurent Kabila came to power in May 1997, succeeded by his son Joseph Kabila in 2001. At this time 'there were at least ten conflicts within the country involving nine national armies and nineteen irregular armed forces. Six of these conflicts took place either in Orientale Province (in which Ituri is located) or in Ituri itself.'[662] It described Ituri as fertile and rich in resources, such as gold, diamonds, oil, timber and coltan, and noted that the experts suggested that much of the violence was economically motivated, including exploitation of the social unrest by the Ugandan national army for economic advantage.[663]

The Chamber noted that the DRC contains approximately 450 ethnic groups, 18 of which are in Ituri, including the Hema, Lendu and Ngiti. It described the ethnic divisions fostered by Belgian colonial rule, and how armed confrontation between Hema and Lendu ethnic groups beginning in 1998-1999 escalated through the involvement of the Ugandan and Rwandan armies, leading to an almost 'catastrophic' humanitarian situation in Ituri by March 2000.[664]

Finally, the Chamber noted that the UPC was created within this context in September 2000. It described a mutiny of Hema militia officers, including the accused, in April 2002 from the *Rassemblement Congolais pour la Démocratie – Kisangani/Mouvement de Libération* (RCD-ML), and the subsequent arrest and detention of Lubanga in Kampala. It indicated that in early August 2002, the RCD-ML dissidents took control over Bunia, but whether the UPC was responsible for forcing out the RCD-ML remained a matter of contention.[665]

Evaluation of the evidence

The Chamber dedicated a section of the judgement to the standards used in evaluating the evidence. In addition to referencing the relevant criteria from within the statutory framework, it discussed its evaluation of oral testimony, drawing particular attention to the oral testimony of alleged former child soldiers. The Chamber indicated that in doing so, it:

> considered the entirety of the witness's account; the manner in which he or she gave evidence; the plausibility of the testimony; and the extent to which it was consistent, including as regards other evidence in the case. The Chamber has assessed whether the witness's evidence conflicted with prior statements he or she had made, insofar as the relevant portion of the prior statement is in evidence. In each instance the Chamber has evaluated the extent and seriousness of the inconsistency and its impact on the overall reliability of the witness.[666]

660 The Defence had argued for a permanent stay in the proceedings based on three main contentions: (i) four Prosecution intermediaries solicited false testimony from all alleged former child soldier witnesses; (ii) one participating victim (an allegedly important Congolese politician) solicited false testimony and the Congolese authorities fraudulently intervened in the investigations; and (iii) the Prosecution failed to investigate all relevant exculpatory material and ensure timely disclosure. ICC-01/04-01/06-2657.

661 ICC-01/04-01/06-2842, para 60. See *Gender Report Card 2011*, p 214-215.

662 ICC-01/04-01/06-2842, para 70.

663 ICC-01/04-01/06-2842, paras 71-72.

664 ICC-01/04-01/06-2842, paras 75-80.

665 ICC-01/04-01/06-2842, paras 88-90.

666 ICC-01/04-01/06-2842, para 102.

It further stated that 'witnesses who were children at the time of the events, or who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account'.[667] In this regard, it considered the expert testimony of a psychologist on the impact of trauma on memory.[668]

The Chamber noted the 'considerable degree of flexibility' under the statutory framework to consider evidence other than direct oral evidence, including circumstantial evidence.[669] It also noted the issues that had arisen in translating the evidence that was given in a number of different languages. It again referenced the need for in-court protective measures, anonymity and the use of redactions for witnesses and their families. Finally, the Chamber briefly addressed the Defence challenge to the entirety of the Prosecution evidence. The Defence had argued that the Prosecution 'failed to fulfil its obligations as regards disclosure and to investigate exculpatory circumstances', and that this failure 'impair[ed] the reliability of the entire body of evidence presented at trial by the Prosecution'.[670] In dismissing this challenge the Chamber found that it had taken the appropriate measures throughout the trial to ensure fairness to the accused.[671]

667 ICC-01/04-01/06-2842, para 103.

668 Dr Elisabeth Schauer testified as an expert witness for the Chamber on 7 April 2009. For a detailed overview of her testimony, see *Gender Report Card 2009*, p 84-85.

669 ICC-01/04-01/06-2842, paras 107-109, 111.

670 ICC-01/04-01/06-2842, para 119.

671 ICC-01/04-01/06-2842, paras 119-123. For a detailed overview of these proceedings and issues in the Lubanga trial see *Gender Report Card 2008*, p 45-46; *Gender Report Card 2009*, p 68-90; *Gender Report Card 2010*, p 129-159; and *Gender Report Card 2011*, p 203-224.

The Prosecution investigation and use of intermediaries

Over the course of the Lubanga case, the Prosecution's investigation and use of intermediaries[672] surfaced as major issues.[673] The start of the trial was delayed on 13 June 2008 for five months due to the Prosecution's unmet obligation to disclose exonerating evidence to the Defence, resulting in the Trial Chamber issuing a formal stay of proceedings until the issues were resolved.[674] The proceedings were stayed a second time in July 2010 for three months, due to the Prosecution's refusal to immediately comply with the Trial Chamber's order to disclose the identity of an intermediary implicated in instances of 'alleged inappropriate behaviour'.[675]

Intermediaries played a critical role in assisting the Office of the Prosecutor to identify and contact witnesses for the Lubanga case, and in the overall progress of investigations in Ituri. The Prosecution used seven intermediaries to contact approximately half of the witnesses that testified against the accused in this case.[676] Questions concerning whether intermediaries influenced witness testimony emerged as an affirmative line of defence soon after the opening of the Prosecution case in January 2009.

672 Intermediaries are both individuals and organisations working in the field that act as liaisons between the ICC, including the Office of the Prosecutor, and individuals and communities. The Court has consistently recognised the fundamental role played by intermediaries in assisting the Prosecution and other bodies of the Court, including the OPCV and the Victim Participation and Reparations Section (VPRS) within the Registry, as well as the Trust Fund for Victims (TFV) in working with victims, communities and potential witnesses, and witnesses.

673 See generally *Gender Report Card 2008, 2009, 2010* and *2011*.

674 Article 54(3)(e) of the Statute allows the Prosecution to 'agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents'. At issue was the Prosecution's use of this provision to avoid disclosing material and exonerating evidence necessary for the preparation of the defence in violation of the rights of the accused. On 13 June 2008, the Trial Chamber stayed the proceedings due to the Prosecution failure to disclose potentially exculpatory material to the Defence. See further *Gender Report Card 2009*, p 130-133, and *Gender Report Card 2008*, p 46.

675 ICC-01/04-01/06-2517-Red. See further *Gender Report Card 2010*, p 139-159.

676 ICC-01/04-01/06-2434-Red2, para 2.

The first Prosecution witness, an alleged former child soldier, recanted his testimony and stated that an intermediary had instructed him on its contents.[677] Following this and other allegations that witness testimony had been fabricated at the instigation of Prosecution intermediaries, in December 2010, the Defence filed for abuse of process.[678] In its filing, the Defence requested a permanent stay of proceedings and the immediate release of the accused. While the Trial Chamber ultimately rejected the application for a permanent stay in a decision in March 2011, it reaffirmed its right to reserve judgement on the factual allegations set forth in the Defence submissions in its evaluation of the evidence, including on the credibility of witnesses.[679] Consequently, in the trial judgement, the Trial Chamber found all but one of the alleged former child soldiers called as witnesses by the Prosecution to be unreliable.

In light of these issues, the Chamber devoted a section of the judgement[680] to the investigative history of the case 'in order to demonstrate the extent of the problems the investigators faced and the background to the considerable reliance that the prosecution placed on certain intermediaries'.[681] By carefully examining the serious security and other constraints under which the investigators operated, the Chamber legitimised the necessity and practice of working with intermediaries in the field. At the same time, it identified the Prosecution's 'lack of proper oversight of the intermediaries' and its 'negligence in failing to verify and scrutinise [the] material' presented by a number of witnesses 'whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on'.[682] The Trial Chamber's discussion of the Prosecution investigation in the DRC focused on several key, interrelated themes that had a significant impact upon the evidence presented at trial: security and practical difficulties; collaboration with NGOs and international organisations; corroboration of the evidence concerning alleged former child soldiers; and the Prosecution's reliance on intermediaries. The Chamber found that the Prosecution's undue reliance on three of its principal intermediaries, without appropriate and adequate supervision, created the significant possibility that they improperly influenced witnesses to falsify their testimony, rendering most of it unreliable.[683]

677 ICC-01/04-01/06-2434-Red2, para 7, citing ICC-01/04-01/06-T-110-Conf-ENG, p 40 line 10.

678 ICC-01/04-01/06-2657. For more information regarding the Defence abuse of process claim, see *Gender Report Card 2010*, p 139-159 and *Gender Report Card 2011*, p 214-221.

679 ICC-01/04-01/06-2690-Red2, para 189. The Trial Chamber found that a stay of proceedings would constitute a disproportionate remedy, following an earlier Appeals Chamber decision, which had found that the second stay of proceedings to be a 'drastic' remedy. ICC-01/04-01/06-2582.

680 ICC-01/04-01/06-2842, paras 124-177.

681 ICC-01/04-01/06-2842, para 124.

682 ICC-01/04-01/06-2842, para 482.

The Prosecution investigation

In its decision on intermediaries of 31 May 2010, the Trial Chamber stated that 'the precise role of the [Prosecution] intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in the trial'.[684] In this decision, the Trial Chamber ordered the Prosecution to call appropriate representatives 'to testify as to the approach and the procedures applied to intermediaries'.[685] In response to this order, the Prosecution called two investigators, Bernard Lavigne and Nicolas Sebire.[686] In the trial judgement, the Chamber made extensive reference to their testimony in its discussion of the Prosecution investigation, particularly that of Bernard Lavigne, who had led the investigation team.

As recounted by the Chamber, the Office of the Prosecutor opened its investigation in the DRC on 23 June 2004, with an 'emerging focus' on the Ituri region.[687] The Deputy Prosecutor (Head of Investigations) decided that the DRC investigation team would be led by a francophone magistrate in order to provide a degree of 'legal control'.[688] The Prosecutor subsequently appointed Bernard Lavigne as the team leader. In his testimony before the Chamber, Lavigne described that he reported directly to the Deputy Prosecutor and his assistant, who in turn, reported to the Prosecutor,[689] while a parallel

683 The paucity of credible witness testimony may have also increased the Chamber's reliance on video and other documentary evidence in reaching a finding of guilt, as discussed in greater detail, below.

684 ICC-01/04-01/06-2434-Red2, para 135.

685 ICC-01/04-01/06-2434-Red2, para 146.

686 Bernard Lavigne, team leader of the investigation, gave testimony to the Chamber by deposition in November 2010. Investigator Nicolas Sebire also testified before the Chamber in November 2010. In the trial judgement, the Chamber found both witnesses to be 'essentially reliable', though 'not necessarily accurate on every issue'. ICC-01/04-01/06-2842, para 125.

687 ICC-01/04-01/06-2842, paras 125, 136.

688 ICC-01/04-01/06-2842, para 125, citing Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p 13 lines 15-19.

689 The Deputy Prosecutor, and the Deputy Head of the Investigation Division, were Bernard Lavigne's direct supervisors. In turn, these posts reported to the Prosecutor. ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p 14 lines 22-23, p 15 lines 13-25, p 16 lines 1-4.

structure, described as 'joint teams', composed of representatives from the Prosecution, Investigation, and Jurisdiction, Complementarity and Cooperation Divisions working on the same case, reported directly to the Prosecutor and the Executive Committee.[690]

As described in the judgement, Lavigne's first task was to establish a team, which consisted of approximately 12 members recruited from NGOs, and others with experience in international justice and human rights.[691] Between 2004 and 2007, Lavigne also focused on establishing a protection programme within the Office of the Prosecutor.[692] According to Lavigne, the investigators identified a number of militia groups that were potentially responsible for the commission of several crimes within the jurisdiction of the Court, and ultimately narrowed their focus to two groups: the UPC and the *Front de nationalistes et integrationnistes* (FNI)/*Force de resistance patriotique en Ituri* (FRPI).[693] Both investigators testified that initial field investigations were difficult for numerous reasons, including the lack of sufficient documentary material, severe travel restrictions and 'the lack of external support for the Court's activities in the field', namely 'contradictions and inconsistencies' in the approach and support provided by the UN.[694] Lavigne testified that these obstacles delayed efforts to locate witnesses and hampered efforts to provide security for them.[695]

Lavigne also testified that the investigation team did not have an operational field office in place in the DRC until 2006.[696] Prior to the establishment of the field office, the investigators conducted their interviews in a variety of different locations, including churches, 'libraries, schools, deserted areas and rented houses'.[697] The investigators were deployed for ten days at a time, but the testimony revealed that the field conditions and the lack of a field office sometimes gave rise to a loss of motivation.[698] An investigation team member was in the field 'as frequently as possible' in the first months of the investigation, but due to the lack of sufficient investigations staff, Lavigne testified that it was not possible to maintain a permanent field presence.[699] He expressed his belief that maintaining a permanent field presence 'would have been the correct approach'.[700]

Generally, the investigators' testimonies indicated certain investigatory challenges posed by the directions coming from within the Office of the Prosecutor. The Chamber recalled that the investigators testified that the specific objectives of the investigation varied 'because of changes in the choices of the [Office of the Prosecutor] and the way it conducted its cases', resulting in 'inconsistent requests' being made to the investigators.[701] Lavigne suggested that 'the [Office of the Prosecutor] hesitated in formulating its objectives and the steps to be taken to attain them'.[702] In his testimony, Lavigne could not recall exactly when the Prosecutor decided to prosecute Lubanga for crimes relating to child soldiers, but that it was decided 'that they would only try to prosecute the accused on this basis', following an evaluation of the available documentation, which included an evaluation of UN reports and NGO documents.[703]

Lavigne testified that during the initial investigations, 'UN agencies had received information to the effect that some individuals were falsely presenting themselves at demobilisation centres as former child soldiers from the militias in order to join the reintegration programme'.[704] He further explained that 'it became known in Bunia that a threatened witness might be relocated and some individuals treated this as an opportunity to secure free re-housing'.[705]

690 ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p 15 lines 1-12. The Executive Committee is composed of the Prosecutor (at the time of this investigation, Chief Prosecutor Luis Moreno Ocampo) and the three Heads of Division (Prosecutions; Investigations; Jurisdiction, Complementarity and Cooperation).

691 ICC-01/04-01/06-2842, para. 126.

692 ICC-01/04-01/06-2842, paras 126, 127.

693 The investigation into crimes allegedly committed by the FNI/FPRI, eventually led to the second case in the DRC Situation, against Germain Katanga (Katanga), the alleged commander of FRPI, and Mathieu Ngudjolo Chui (Ngudjolo), the alleged commander of FNI. Closing arguments in this case were held from 15-23 May 2012, and Katanga and Ngudjolo are currently awaiting the trial judgement by Trial Chamber II. For more information about the Katanga & Ngudjolo case, see *Gender Report Card 2009, 2010, 2011*. The closing arguments in this case are described more fully in the *Closing arguments in first case including gender-based crimes charges* section of this Report.

694 ICC-01/04-01/06-2842, paras 133, 135, 139, 140. *The Mission de l'Organisation des Nations Unies en république démocratique du Congo* (MONUC).

695 ICC-01/04-01/06-2842, para 135.

696 ICC-01/04-01/06-2842, para 162.

697 ICC-01/04-01/06-2842, para 162.

698 ICC-01/04-01/06-2842, para 165.

699 ICC-01/04-01/06-2842, para 166.

700 ICC-01/04-01/06-2842, para 166.

701 ICC-01/04-01/06-2842, para 144.

702 ICC-01/04-01/06-2842, para 144.

703 ICC-01/04-01/06-2842, para 145-146.

704 ICC-01/04-01/06-2842, para 147.

705 ICC-01/04-01/06-2842, para 147.

Security risks and impacts

Both investigators testified that the investigation team faced significant security threats. In his testimony, Lavigne reported that armed groups were still active on the outskirts of the city and that he heard the sound of gunfire every evening during his first mission to Bunia.[706] Lavigne also stated that one of the investigators reported that his vehicle was struck by bullets during a mission to a village while being escorted by armoured vehicles from *Mission de l'Organisation des Nations Unies en république démocratique du Congo* (MONUC).[707] Because the investigation team did not have an operational field office in place in the DRC until 2006,[708] MONUC personnel accompanied the team on visits outside Bunia to provide security.[709] The investigators risked being attacked or abducted during their investigations, or becoming involved in confrontations between MONUC troops and other armed opposition groups.[710] Lavigne further testified that safety risks and travel restrictions limited investigators' ability to travel to villages to meet with potential witnesses. The fact that '[a]ny foreigner seen in Bunia was assumed to be from the ICC' made operating in an open way impossible and forced the investigators to do 'everything possible to hide the fact that they were conducting an investigation'.[711]

Lavigne testified that the serious security situation affected the investigators' duty of protection with regard to potential witnesses. The investigators considered that 'all witnesses – not just from the prosecution – were at risk, regardless of whether individual threats were credible'.[712] This led the investigators to adopt a 'very specific and rigorous policy for investigators and witnesses', which slowed their work but prioritised security.[713] While several militias were investigated regarding threats to witnesses, Lavigne testified that 'the real problem was not the threat from the various groups but rather the risk of an individual being identified by members of his or her community, village or family as having cooperated with the Court'.[714] Lavigne noted that as a result, the investigators did not pursue additional information that might have corroborated witness accounts, such as contacting the families of witnesses or checking school records for alleged child soldiers. He explained that such actions would have exposed the witness 'to the risk of immediate abduction' by political or military leaders still active in Bunia, and investigators 'would have been immediately identified if they had visited the neighbourhoods'.[715]

706 ICC-01/04-01/06-2842, paras 151-152.
707 ICC-01/04-01/06-2842, para 155.
708 ICC-01/04-01/06-2842, para 162.
709 ICC-01/04-01/06-2842, para 155.
710 ICC-01/04-01/06-2842, para 155.
711 ICC-01/04-01/06-2842, para 154.
712 ICC-01/04-01/06-2842, para 156.
713 ICC-01/04-01/06-2842, para 156.
714 ICC-01/04-01/06-2842, para 159.

Corroborating the ages of alleged former child soldiers

Given that one recurring issue in the case was whether some intermediaries had encouraged children to lie about aspects of their past, including their ages, the Chamber reviewed the investigative steps taken by the Office of the Prosecutor to objectively establish the ages of alleged child soldiers. In his testimony, Bernard Lavigne had noted that, at the relevant time, 'the civil administration in the DRC functioned only to a limited extent, and the conditions the team were operating under were not ideal for establishing, with ease, the age of the alleged child soldiers'.[716] Lavigne testified that 'as an investigation leader, [he] was not alone in considering that a prosecution forensic expert should be instructed immediately, in order to provide at least an approximate idea of age', and that this remained an 'important debate' within the Office of the Prosecutor.[717] However, Lavigne testified that 'the Executive Committee within the [Office of the Prosecutor] was of the view that the statements given by the witnesses sufficiently indicated that the relevant individuals were below 15 years of age'.[718] The investigators requested, but did not collect in person, relevant civil status documents from the administration in Bunia and information about whether the children had been seen by a doctor.[719] The Chamber noted that investigators did not speak to their families or arrange interviews with the children due to security concerns.[720] Lavigne testified that their policy 'was to not meet with the families in order to avoid endangering them: it was feared that a member of the extended family might reveal to the militia leaders the identity of the individual who had provided the information. This policy was applied to all witnesses and it was only varied on an exceptional basis.'[721]

Lavigne testified that he did not ask village chiefs about child soldiers, given the formers' close ties to the militia groups. He further explained that investigators

715 ICC-01/04-01/06-2842, paras 160-161.
716 ICC-01/04-01/06-2842, para 169.
717 ICC-01/04-01/06-2842, para 170.
718 ICC-01/04-01/06-2842, para 170.
719 ICC-01/04-01/06-2842, para 171.
720 ICC-01/04-01/06-2842, para 172.
721 ICC-01/04-01/06-2842, para 172.

did not request the files of child soldiers from the headmasters or directors of the relevant schools to cross-check their ages. Although, he noted that Intermediary 143 carried out some research into school registers and requested birth certificates for some individuals on behalf of their families in order to pass the information on to investigators.[722] However, he clarified that the Prosecution 'was not seeking to verify whether particular children were listed in the relevant school registers; instead [...] they wanted to establish whether, at a particular age, a child would be in an identified class'.[723]

The Chamber concluded that, while acknowledging the difficulties faced by investigators in the field, 'this failure to investigate the children's histories has significantly undermined some of the evidence called by the prosecution'.[724] It also noted that 'the prosecution invited the Chamber to draw conclusions as to the age of various witnesses when it had presented markedly contradictory evidence on this issue',[725] citing differences between the oral testimony and documentary evidence as to the ages of several alleged former child soldiers.

The Prosecution's reliance on intermediaries

From the investigators' testimony it became clear that the Prosecution's extensive reliance on intermediaries in this case was in large part due to the prevailing security concerns in the DRC. The Chamber noted that 'from the outset of the investigation, human rights activists gave the investigators the names of potential witnesses, since they had "seen these people and they knew what they were going to say" '.[726] Lavigne explained that the intermediaries were 'better placed' to move about freely and to speak to witnesses and potential witnesses without endangering them.[727] He testified that as a result, 'the investigation team or some of the activists suggested the latter should act as intermediaries'.[728] The other investigator called to testify, Nicolas Sebire, stated that 'the only solution to the security problem was to use intermediaries, who enabled the team to contact witnesses'.[729] As the Chamber noted, 'many – although by no means all – of the evidential difficulties in this case as far as the prosecution is concerned have been the result of the involvement of three particular intermediaries (P-0143, P-0316 and P-0321)'.[730]

Intermediary 143 introduced numerous witnesses to the Prosecution, including five of the alleged former child soldiers whom the Trial Chamber found lacking in credibility, and one of the other intermediaries in question.[731] As noted above, the Prosecution's failure to immediately comply with the Chamber's order to disclose the identity of Intermediary 143 was the subject of the second stay of proceedings in this case in July 2010.[732] In evaluating the allegations concerning witness tampering, the Chamber concluded that there was 'a risk' that Intermediary 143 'persuaded, encouraged or assisted witnesses to give false evidence'.[733]

722 ICC-01/04-01/06-2842, para 173.
723 ICC-01/04-01/06-2842, paras 174-5. Lavigne had also stated that, although the Independent Electoral Commission (IEC) — the body that issues voter ID cards — had been set up during this time, it only provided the ages of parents rather than their children. The Chamber disagreed, given that the Defence had introduced IEC documentation containing the names of four prosecution witnesses (P-007, P-008, P-0010 and P-0294).
724 ICC-01/04-01/06-2842, para 175.
725 ICC-01/04-01/06-2842, para 177.
726 ICC-01/04-01/06-2842, para 167, citing transcript of deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, page 48, lines 13-15.
727 ICC-01/04-01/06-2842, para 167.
728 ICC-01/04-01/06-2842, para 167.
729 ICC-01/04-01/06-2842, para 167.
730 ICC-01/04-01/06-2842, para 168.
731 Including alleged former child soldier Witnesses 6, 7, 8, 10, 11 and Intermediary 31. ICC-01/04-01/06-2842, paras 209, 221.
732 ICC-01/04-01/06-2517-Red, paras 8, 31. These events are described in more detail in *Gender Report Card 2010*, p 147-151.
733 ICC-01/04-01/06-2842, para 291.

Intermediary 321 facilitated contact between the Prosecution and its first witness, who recanted his testimony.[734] In addition to the testimony of alleged former child soldiers and Defence witnesses, alleging that Intermediary 321 had encouraged and assisted them to give false evidence, the Chamber also noted discrepancies between the lists of alleged former child soldiers from which the witnesses were selected. Essentially, the discrepancies indicated that Intermediary 321 had not utilised lists provided by the Office of the Prosecutor in setting up interviews between investigators and the children; eight of the 11 children whom the investigator met with in 2007 were not on the original list provided by the Prosecution.[735] The Chamber concluded that 'a real possibility exist[ed]' that Intermediary 321 'encouraged and assisted witnesses to give false evidence'.[736]

Intermediary 316 also had contact with numerous witnesses.[737] He was simultaneously employed by the Congolese intelligence services, *Agence Nationale de Renseignement*.[738] The Chamber expressed its concern 'that the prosecution used an individual as an intermediary with such close ties to the government that had originally referred the situation in the DRC to the Court'.[739] It also determined that Intermediary 316 had falsely claimed that Congolese police services had threatened witnesses,[740] and had lied about the fact that his assistant and his family had been murdered, and that the killers were pursuing him.[741] Of the three intermediaries in question, the Chamber issued its strongest words of condemnation regarding Intermediary 316, stating that there were 'strong reasons to believe' that he 'persuaded witnesses to lie as to their involvement as child soldiers within the UPC'.[742]

734 On 28 January 2009, the Prosecution's first witness, Witness 298, recanted his testimony, stating 'what he had said that morning did not come from him but from someone else'. ICC-01/04-01/06-2434-Red2, para 7, citing ICC-01/04-01/06-T-110-CONF-ENG, p 40 line 10. These events are described in more detail in *Gender Report Card 2010*, p 139-144.

735 ICC-01/04-01/06-2842, paras 442-445.

736 ICC-01/04-01/06-2842, para 483.

737 Including alleged former child soldier witnesses 15 and 38, upon both of whose testimony the Trial Chamber relied in part. ICC-01/04-01/06-2842, paras 295, 296.

738 ICC-01/04-01/06-2842, para 302.

739 ICC-01/04-01/06-2842, para 368.

740 The UN had confirmed that the harassment had not occurred. See ICC-01/04-01/06-2842, paras 312-321.

741 His family is alive. See ICC-01/04-01/06-2842, para 369.

742 ICC-01/04-01/06-2842, para 374.

In the judgement, the Trial Chamber formally 'communicated' this evidence to the Prosecution for the purpose of an Article 70[743] investigation into the alleged improprieties of these three intermediaries, and concluded:

> The prosecution should not have delegated its investigative responsibilities to the intermediaries ... notwithstanding the extensive security difficulties it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Irrespective of the Chamber's conclusions regarding the credibility and reliability of these alleged former child soldiers, given their youth and likely exposure to conflict, they were vulnerable to manipulation.[744]

The Chamber's analysis established the links between each intermediary in question and the alleged former child soldier witnesses. In doing so, it thus combined its assessment of the reliability and credibility of evidence proffered by each alleged former child soldier witness with the evidence concerning the improper influence over these witnesses by the intermediaries in question. The Chamber determined witness reliability by using the standard of whether it was:

> persuaded beyond reasonable doubt that the alleged former child soldiers have given an accurate account on the issues that are relevant to this trial (*viz* whether they were below 15 at the time they were conscripted, enlisted or used to participate actively in hostilities and the circumstances of their alleged involvement with the UPC).[745]

743 Article 70 of the Rome Statute covers offences against the administration of justice.

744 ICC-01/04-01/06-2842, para 482.

745 ICC-01/04-01/06-2842, para 180.

During the trial proceedings, the Chamber heard testimony from 11 Prosecution witnesses who were alleged former child soldiers. Evaluating the reliability of these witnesses together with the evidence concerning the intermediaries, the Chamber determined that all of the alleged former child soldiers who were witnesses for the Prosecution gave contradictory evidence concerning either their ages, school attendance, the identity and well-being of family members, or the circumstances of their recruitment, with one exception.[746] This led the Chamber to reject 'the prosecution's submission that it [had] established beyond reasonable doubt that P-0007, P-0008, P-0010, P-0011, P-0157, P-0213, P-0294, P-0297 and P-0298 were conscripted or enlisted into the UPC/FPLC when under the age of 15 years, or that they were used to participate actively in hostilities' during the relevant period.[747] These witnesses were all alleged former child soldiers or their immediate relatives. The Chamber found only one of the alleged former child soldier witnesses for the Prosecution to be reliable: Witness 38.

The Chamber recognised that the witnesses might have given a truthful account of elements of their testimonies, while 'lying about particular crucial details, such as their identity, age, the dates of their military training and service, or the groups they were involved with', facts directly related to the guilt of the accused.[748] For example, while the Chamber found Prosecution Witness 38 to be a credible witness, it also found that he was above the age of 15 when he joined the UPC. Conversely, the Chamber relied on those portions of the testimony of Prosecution Witness 10 (a female alleged former child soldier) concerning the video of the training camp in Rwampara, although it otherwise found her not to be a credible witness. In general terms, with respect to former child soldiers, the Chamber contrasted the testimony of Defence witnesses with that of the Prosecution witnesses whose testimony they were contradicting, finding the Defence witnesses 'internally consistent', 'credible' and 'reliable'.[749] The lack of witness credibility had an additional and direct impact on victim participation. Finding their testimony to be unreliable, the Chamber reversed its original *prima facie* determination authorising the participation of six Prosecution witnesses as victims in the proceedings: Witnesses 7, 8, 10, 11, 298 and 299 (five alleged former child soldiers and the father of one alleged former child soldier).[750]

In a separate and dissenting opinion, Judge Odio Benito disagreed with the majority, finding that the victim-status of these individuals should remain unaffected even if their testimony could not be used to convict the accused. Addressing the circumstances surrounding the testimony of each of these witnesses individually, she found that despite inconsistencies, evidence confirmed that some of them had been, and others could have been, recruited, including Witness 10 who had also suffered sexual violence.[751]

Judge Odio Benito specifically referenced the expert testimony of Dr Elisabeth Schauer, which addressed the 'intellectual and cognitive consequences' of the trauma suffered by children, including problems with memory, and underscored that the witnesses 'were subject to multiple interviews and strenuous examination and cross-examination, which took place on numerous occasions, during a period of time ranging from 2005 to 2009-2010. In all of these interviews and interrogatories they were asked to recall events that occurred between 2002 and 2003.'[752] While conceding the existence of doubt as to the exact ages of the children at the time of the events, Judge Odio Benito stated that 'it has been proven that all of them were certainly children or adolescents at the time of their interviews with OTP investigators in 2005'.[753] She found it additionally 'unfair and discriminatory' to impose a higher evidentiary standard on dual status victims, as other participating victims had 'not been subject to thorough examination by the parties and the Chamber'.[754]

746 See *Judicial determinations on the credibility of witnesses contacted by intermediaries* on the next page of this Report. The Chamber found Witness 38 to be credible. It also partially relied on the testimonies of Witnesses 10 and 15.

747 ICC-01/04-01/06-2842, paras 480, 481.

748 ICC-01/04-01/06-2842, para 180.

749 See, eg, ICC-01/04-01/06-2842, paras 243, 244, 262, 284, 365, 418, 435.

750 ICC-01/04-01/06-2842, para 484. Relying on Judge Odio Benito's dissent, described below, the OPCV subsequently requested the Chamber to reconsider its decision to withdraw the status of four participating victims (Witnesses 7, 8, 10 and 11) in order to prevent 'manifestly unsatisfactory consequences'. ICC-01/04-01/06-2845. The Trial Chamber rejected the OPCV's request *in limine*, finding that it was 'unwarranted and is without any legal basis'. ICC-01/04-01/06-2846, para 3.

751 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, paras 22-29.

752 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, paras 31-32.

753 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 32.

754 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 35.

Judicial determinations on the credibility of witnesses contacted by intermediaries

Witnesses introduced to the OTP by Intermediary 143

Witness 7 was authorised to participate in the proceedings as a victim. He claimed to have been recruited into the UPC when he was under the age of 15, but gave contradictory evidence about his date of birth, name and the name of his father, and concerning information pertaining to his alleged service with the UPC. Documentary evidence contradicted his testimony regarding his school attendance, and the names of his family members.

Witness 8 was authorised to participate in the proceedings as a victim. He claimed to have been recruited into the UPC when he was under the age of 15 and to be the cousin of P-0007. He gave contradictory evidence about his date of birth and the names of his parents, and documentary evidence contradicted his testimony regarding his school attendance and the names of his family members. The account of his military service was contradictory and 'implausible'.

Witness 10 was authorised to participate in the proceedings as a victim. She claimed to have been recruited into the UPC when under the age of 15, but gave conflicting testimony as to her age and her service, including the name of the commander whom she served.

Witness 11 was authorised to participate in the proceedings as a victim. He claimed to have been recruited into the UPC when he was under the age of 15. Substantial discrepancies arose concerning his name, date of birth, schooling, the alleged death of his mother (she is alive) and the dates and circumstances of his joining the UPC. His evidence was significantly contradicted by Defence Witness D-0024, a close family member.

Witness introduced to the OTP by Intermediary 316

Witness 15 indicated, at the outset of his testimony, that Intermediary 316 instructed him to lie. He was recalled by the judges, and testified at great length about how Intermediary 316 directed him to falsify his testimony. He stated that he did not serve as part of the UPC.

Witnesses introduced to the OTP by Intermediary 321

Witness 157 provided evidence about his military service, some of which was contradictory. The Chamber found his evidence too vague to rely upon.

Witness 213 gave inconsistent testimony concerning his, name, schooling, alleged abduction and service with the UPC.

Witness 293 is the mother of Witness P-0294, and testified concerning the year of his birth, which was contradicted by documentary evidence.

Witness 294 gave inconsistent and incorrect testimony about his age, the center with which he went through demobilisation and his mother's name. The Chamber found that he used the details of his brother's military service to contribute to his own account.

Witness 297 provided inconsistent and false testimony concerning his schooling, the name and alleged death of his mother (she is alive), his alleged military service and the age at which he allegedly served.

Witness 298 participated as a victim in the proceedings. He was the first witness called to give evidence, and began by stating that he had given false statements to the Prosecution as he had been promised benefits for doing so by Intermediary 321. He provided inconsistent testimony concerning his age and schooling. There were also inconsistencies in the testimonies of P-0298 and P-0299 (his father) over the death of his mother (she is still alive). The Chamber found he had lied concerning his military service.

Witness 299 is the father of Witness P-0298 and participated as a victim in the proceedings. He testified concerning his son's age, military service and the fact that his mother is alive (although he stated that he told his son she was deceased). He indicated that his son did not take the initiative to demobilise, but, rather, was picked up off the street by an NGO. The Chamber declined to rely on his testimony as it did not rely on his son's testimony.

The three participating victims who gave evidence

In January 2010, for the first time at the ICC, three participating victims were given the opportunity to testify as witnesses in the proceedings against Lubanga.[755] Referring to the testimony of Defence witnesses that raised material doubts as to the identities of two of the victim-witnesses who had testified, in the trial judgement, Trial Chamber I withdrew the victim participation status of the three victims who had been authorised to appear as witnesses upon request by their Legal Representatives. The Chamber based its decision to withdraw their status on their 'evasiveness' and the internal inconsistencies in their testimony, including the fact that they could not identify photos of the parents of the children whose identities were in question.

At issue was the assertion by Defence Witnesses 32 and 33 that Victims a/0225/06 and a/0229/06 had stolen their identities at the instigation or encouragement of Victim a/0270/07, who claimed that he was their guardian. Victim a/0270/07 was alleged to have encouraged 'pupils at the Institute where he worked to claim falsely that they had been child soldiers in order to participate in proceedings before the ICC',[756] with the aim of receiving benefits. Victims a/0225/06 and a/0229/06, as well as Defence Witnesses 32 and 33, paid Victim a/0270/07 to register them as victims. Witnesses 32 and 33 were later told that others were going to replace them. The Chamber found the Defence witnesses credible, partly based on the fact that they correctly identified photographs of the parents of Thonifwa Uroci Dieudonne and Jean-Paul Bedijo Tchonga, whom they claimed to be.

755 For a detailed overview of their testimony, see *Gender Report Card 2010*, p 137-139.

756 ICC-01/04-01/06-2842, para 491, citing ICC-01/04-01/06-2657-Red, paras 200-228.

Reclassification of the armed conflict

The classification of the armed conflict, whether international or non-international, was an ongoing issue in the Lubanga case. Initially, Lubanga was charged with six counts of war crimes, namely enlistment, conscription and use of child soldiers in the context of a non-international armed conflict (Article 8(2)(e)(vii)), as well as enlistment, conscription and use of child soldiers in the context of an international armed conflict (Article 8(2)(b)(xxvi)), on the basis of the Pre-Trial Chamber's assessment that the conflict in Ituri had constituted an armed conflict of an international character from July 2002 to 2 June 2003 and then had changed to an internal armed conflict between 2 June and December 2003.[757] Although the Prosecution had only charged the accused within the context of a non-international conflict,[758] the Pre-Trial Chamber had found sufficient evidence to establish substantial grounds to believe that Uganda supplied arms and training, and eventually seized control of Bunia. It had held that Uganda's involvement had rendered the conflict international until 2 June 2003, the date of the effective withdrawal of the Ugandan army.[759] Subsequently, the Pre-Trial Chamber had denied requests to appeal this issue by both the Prosecution and the Defence, referring the parties to the possibility of requesting a recharacterisation of the facts by using Regulation 55 of the Regulations of the Court.[760]

After the transfer of the case file to the Trial Chamber, which requested and received submissions by the parties on this issue, the Trial Chamber had notified the parties and participants in accordance with Regulation 55 'that the legal characterisation of the facts may be subject to change'.[761] It also invited submissions from the parties and participants on the

757 ICC-01/04-01/06-803-tEN, para 220.

758 ICC-01/04-01/06-2842, para 527.

759 ICC-01/04-01/06-803-tEN, para 219-220.

760 ICC-01/04-01/06-915, para. 44. Regulation 55 allows the Chamber to change the legal characterisation of facts to accord with the crimes or the mode of liability, without exceeding the facts and circumstances of the charges. Specifically, Regulation 55(2) states that 'if, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions'.

761 ICC-01/04-01/06-2049, para 35.

classification of the conflict in its order concerning closing arguments in the case.[762]

In the trial judgement, the Trial Chamber concluded that the conflict between the UPC/FPLC and other armed groups in Ituri between September 2002 and 13 August 2003 constituted an internal conflict.[763] Noting the absence of guidance within the statutory framework on the definition of armed conflict, the Chamber relied extensively on relevant jurisprudence from the International Criminal Tribunal for the former Yugoslavia (ICTY), including on the co-existence of international and internal conflicts 'taking place on a single territory at the same time'.[764] It found that the evidence established beyond a reasonable doubt that within the timeframe of the charges, there were 'a number of simultaneous armed conflicts in Ituri and in surrounding areas within the DRC, involving various different groups', including the UPC.[765]

The Chamber underscored the extensive evidence demonstrating that for the purpose of this case, the UPC/FPLC had engaged in armed conflict with the RCD-ML, the *Armée populaire congolaise* (APC) and the FRPI. In determining whether the UPC/FPLC was party to an international armed conflict, the Chamber framed the relevant inquiry as 'whether between September 2002 and 13 August 2003, the UPC/FPLC, the APC and the FRPI were used as agents or "proxies" for fighting between two or more states (namely Uganda, Rwanda, or the DRC)'.[766] Agreeing with the Pre-Trial Chamber, the Trial Chamber adopted the 'overall control' test to determine whether an armed group acted on behalf of the state, thus internationalising the conflict.[767]

Although finding that both Rwanda and Uganda had supported the UPC/FPLC during the period in question, the Trial Chamber held that there was 'insufficient evidence to establish (even on a *prima facie* basis) that either Rwanda or Uganda exercised overall control over the UPC/FPLC'.[768]

Applying Regulation 55, the Chamber changed the legal characterisation of the facts 'to the extent that the armed conflict relevant to the charges was non-international in nature'.[769] Accordingly, the Chamber limited its assessment to Lubanga's individual criminal responsibility for the enlistment, conscription and use of child soldiers pursuant to Article 8(2)(e)(vii), as described in more detail below.

762 In accordance with these instructions, in its closing arguments in August 2011, the Prosecution argued that the conflict was non-international in character. The Prosecution thus urged the Chamber to re-characterise the charges on the basis of Regulation 55(2). ICC-01/04-01/06-T-356-ENG, p 43-49. For a detailed analysis of the Prosecution's closing arguments on this issue, see *Gender Report Card 2011*, p 210-211.

763 ICC-01/04-01/06-2842, para 567.

764 ICC-01/04-01/06-2842, paras 533, 540. The Chamber also found that although the very distinction between an international and internal armed conflict has been called into question by some academics and practitioners, it was enshrined within the Rome statutory framework. ICC-01/04-01/06-2842, para 539.

765 ICC-01/04-01/06-2842, para 543.

766 ICC-01/04-01/06-2842, para 552.

767 ICC-01/04-01/06-2842, para 541. The 'overall control' approach refers to whether a State maintains control over an armed group to the extent that the armed group is operating on behalf of the State, for the purpose of determining whether a conflict is international in nature.

768 ICC-01/04-01/06-2842, para 561.

769 ICC-01/04-01/06-2842, para 566.

Crimes charged

In light of the diverse interpretations submitted by the parties and participants, the Chamber elucidated the definitions of the three crimes with which Lubanga was charged, namely conscription, enlistment or use of children under 15 or using them to participate actively in hostilities. At the outset of its analysis and in light of its conclusion that the UPC was engaged in a non-international conflict, a majority of the Chamber found it unnecessary to interpret Article 8(2)(b)(xxvi)[770] as the elements of the two crimes were 'similar'.[771] It noted, however, one 'significant difference in wording', namely that Article 8(2)(b)(xxvi) employed the term 'national armed forces', while Article 8(2)(e)(vii) referred to 'armed forces or groups'.[772] The majority limited its discussion of the different wording to one sentence, indicating that its prior interpretation and consideration of 8(2)(b)(xxvi) would be 'relevant' to its analysis of Article 8(2)(e)(vii).

Judge Odio Benito dissented on the absence of any discussion in the majority opinion as to whether the concept of 'national armed forces' pursuant to Article 8(2)(b)(xxvi) was limited to the armed forces of a state.[773] She underscored that the Defence had argued throughout the proceedings that the conflict was international in nature, and that the confirmation of charges decision had encompassed both Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii), thus rendering this a live issue and the possible subject of an appeal. Clarifying her position on the issue, she stated:

> the recruitment of children under the age of 15 is prohibited under international customary law, regardless of whether this was committed in the context of an international or non-international armed conflict and regardless of the nature of the armed group or force that recruited the child. It would be contrary to the "object and purpose" of the Rome Statute and contrary to internationally recognised human rights (and thus contrary to Article 21(3) of the Rome Statute) to exclude from the prohibition of child recruitment, and armed group, solely for the nature of its organisation (State or non-state armed group). [sic]

Consequently, the concept of enlistment, conscription and use in both Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Rome Statute should be understood as encompassing any type of armed group or force, regardless of the nature of the armed conflict in which it occurs.[774]

The Chamber initiated its discussion of the legal framework by noting that the Rome Statute was the 'first treaty to include these offences as war crimes'.[775] The Elements of Crimes, in relation to the crime of enlistment, conscription and use of child soldiers, set forth:

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities;
2. Such person or persons were under the age of 15 years;
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years;
4. The conduct took place in the context of and was associated with an armed conflict not of an international character;
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

As its discussion of Elements 3 and 5 of the Elements of Crimes fell under its analysis of the accused's individual criminal responsibility, described in more detail below, the Chamber focused in this section on interpreting Elements 1 and 4.

The Chamber found it unnecessary to discuss its interpretation of Element 4 in any detail, given the 'plain and ordinary meaning of this provision'; it held that it was sufficient to show 'a connection between the conscription, enlistment or use of children under 15 and an armed conflict that was not international in character'.[776]

770 Article 8(2)(b)(xxvi) concerns the war crimes of conscription and enlistment of children under the age of 15 or using the to participate actively in hostilities in the context of an international armed conflict. It provides: 'For the purpose of this Statute, "war crimes" means: Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities'.

771 ICC-01/04-01/06-2842, para 568.

772 ICC-01/04-01/06-2842, para 568.

773 The Pre-Trial Chamber had held that the term was not limited to State armed forces. ICC-01/04-01/06-803-tEN, paras 268-285.

774 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, paras 13-14.

775 ICC-01/04-01/06-2842, para 569.

776 ICC-01/04-01/06-2842, para 573. Similarly, the Chamber's discussion of Element 2 was contained in its evaluation of the evidence, described below.

Of the three relevant acts within Element 1 (conscripting, enlisting and using children to participate actively in hostilities), the Chamber first held that by virtue of the use of the word 'or', the Statute established three separate offences. In this regard, it noted that while the purpose behind conscription and enlistment was often to use children in hostilities, it was not a statutory requirement.[777] Conversely, it held that a child could be found to have been used in hostilities without evidence being provided as to his or her enlistment or conscription.[778] Secondly, the Chamber agreed with the submissions of the Prosecution, OPCV and Legal Representatives of Victims that while, according to their ordinary meanings, enlistment was voluntary and conscription contained an element of compulsion, the distinction was irrelevant as a child cannot consent to recruitment.[779]

Regarding the use of children to participate actively in hostilities, in the confirmation of charges decision, the Pre-Trial Chamber had adopted a distinction concerning which activities constituted 'active' participation and those which were 'clearly unrelated to hostilities' as referenced in a footnote of the Preparatory Committee's draft Statute.[780] According to the Pre-Trial Chamber, children engaged in tasks such as 'food deliveries to an airbase or the use of domestic staff in married officer's quarters' did not actively participate in hostilities.[781] In contrast, the Trial Chamber held that the determinative factor was whether the child was 'at the very least, a potential target'.[782] It stated: 'In the judgment of the Chamber these combined factors — the child's support and this level of consequential risk — mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them'.[783] It held that given the diversity of roles performed by children, whether a particular activity constituted 'active participation' could only be determined on a case-by-case basis.

In reaching this interpretation, the Chamber drew upon several sources of law, namely: (i) Article 4(3)(c) of Additional Protocol II to the 1949 Geneva Convention, containing an absolute prohibition against the recruitment and use of children under the age of 15 in internal hostilities; (ii) Article 38 of the Convention on the Rights of the Child, prohibiting the same; and, (iii) the jurisprudence of the Special Court for Sierra Leone (SCSL), given that Article 21 of the Statute of the SCSL contains identical wording to Article 8(e)(vii) of the Rome Statute.[784] The Chamber underscored the underlying purpose of these provisions, namely:

> to protect children under the age of 15 from the risks that are associated with armed conflict, and first and foremost they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear).[785]

In this regard, the Chamber referred to the 'relevant background evidence' provided by the expert testimony of UN Special Representative for Children and Armed Conflict Radhika Coomaraswamy that 'children in this context frequently undertake a wide range of tasks that do not necessarily come within the traditional definition of warfare. As a result, they are exposed to various risks that include rape, sexual enslavement and other forms of sexual violence, cruel and inhumane treatment, as well as further kinds of hardship that are incompatible with

777 ICC-01/04-01/06-2842, para 609.
778 ICC-01/04-01/06-2842, para 620.
779 ICC-01/04-01/06-2842, paras 617-618. The Chamber indicated, however, that this distinction could be taken into consideration at the sentencing or reparations phases of the proceedings. As discussed in more detail below, a majority of the Chamber differentiated Lubanga's sentence for each of the three crimes. ICC-01/04-01/06-2901, paras 98-99. Judge Odio Benito dissented to the Majority's decision to differentiate the sentence. ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 25.
780 ICC-01/04-01/06-2842, paras 621-623, citing UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, page 21 and footnote 12, in relevant part: 'It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.'
781 ICC-01/04-01/06-803-tEN, para 262.
782 ICC-01/04-01/06-2842, para 628.
783 ICC-01/04-01/06-2842, para 628.
784 ICC-01/04-01/06-2842, paras 603-604.
785 ICC-01/04-01/06-2842, para 605.

their fundamental rights'.[786] The Chamber further found that the term utilised in the Rome Statute, 'to participate actively in hostilities', was intended to encompass a wider range of activities than the use of the term 'direct participation' found in Additional Protocol II to the Geneva Convention.[787]

A majority of the Chamber concluded its analysis by noting that while the Prosecution had referred to sexual violence in its opening and closing statements, it had not requested an amendment to the charges, and that it had opposed the inclusion of rape and sexual enslavement as unfair to the accused at the time of the joint request by the Legal Representatives of Victims.[788] The Chamber concluded that:

> Regardless of whether sexual violence may properly be included within the scope of "using [children under the age of 15] to participate actively in hostilities" as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue.[789]

The majority indicated, however, that it would consider whether to take sexual violence into account for the purpose of sentencing and reparations.[790] Judge Odio Benito dissented on the majority's decision not to include sexual violence in its definition of 'use to participate actively in hostilities', and leave its application open to a case-by-case, evidence-based determination, as described in more detail, below.

Evidentiary assessment

At the outset of its analysis of the evidence on the conscription, enlistment and use of child soldiers under the age of 15 in hostilities, the Chamber reiterated that it would not rely on the testimonies of nine Prosecution witnesses, the majority of whom were alleged former child soldiers.[791] In light of its finding that the alleged former child soldier witnesses had lied about their ages, among other crucial facts,[792] as described above, prior to its analysis of the evidence, the Chamber devoted a section to setting forth its conclusions as to the credibility and reliability of both the Prosecution and Defence witnesses upon whom it did rely in concluding beyond a reasonable doubt that 'children under the age of 15 were conscripted, enlisted and used by the UPC/FPLC to participate actively in hostilities between 1 September 2002 and 13 August 2003'.[793] Ultimately, the Chamber indicated that it relied on witnesses who worked for international organisations or NGOs, Prosecution witnesses who testified about military matters, Prosecution witnesses who provided evidence about selected video footage and relevant Defence witnesses. The Chamber also relied on Prosecution Witness 38's testimony in this section, having found him to be a reliable former child soldier witness, albeit recruited when he was over the age of 15.[794]

786 ICC-01/04-01/06-2842, para 606. See further *Gender Report Card 2010*, p 135-136.

787 ICC-01/04-01/06-2842, para 627. The Chamber also noted that the broader term 'children associated with armed conflict' had been used throughout the trial and was 'clearly designed to afford children with the greatest possible protection', but found that it did not form part of the wording of the charges. ICC-01/04-01/06-2842, para 606.

788 ICC-01/04-01/06-2842, para 629. In May 2009, the Legal Representatives of Victims had filed a joint submission, requesting that the Trial Chamber consider modifying the legal characterisation of the facts pursuant to Regulation 55 of the Regulations of the Court to add the crimes of sexual slavery and inhuman and cruel treatment to the existing characterisation. In their filing, the Legal Representatives had argued that in a number of instances, witness testimony showed that both 'the widespread and systematic' commission of sexual slavery and inhuman and/or cruel treatment of recruits, including the treatment of girls pregnant as a result of rape, 'were committed in the context of the charges confirmed'. ICC-01/04-01/06-1891, paras 15, 33, 34. A majority opinion found that Regulation 55 permitted the Trial Chamber to modify the legal characterisation of facts to include facts and circumstances not originally contained in the charges. ICC-01/04-01/06-2049. Judge Fulford issued a dissent in which he argued that the majority's reading of Regulation 55 as two separate provisions was flawed, with significant negative consequences for the rights of the accused. ICC-01/4-01/06-2054. The Appeals Chamber reversed the majority decision on procedural grounds, holding that 'Regulation 55(2) and (3) of the Regulations of the Court may not be used to exceed the facts and circumstances described in the charges or any amendment thereto'. ICC-01/04-01/06-2205, para 1. For a more detailed analysis of the Appeals Chamber's decision, see *Gender Report Card 2010*, p 129-131.

789 ICC-01/04-01/06-2842, para 630.

790 ICC-01/04-01/06-2842, para 631.

791 The Chamber indicated specifically that it would not rely on Witnesses 7, 8, 10, 11, 157, 213, 294, 297 and 298. ICC-01/04-01/06-2842, para 633.

792 ICC-01/04-01/06-2842, para 180.

793 ICC-01/04-01/06-2842, para 916.

794 ICC-01/04-01/06-2842, paras 348, 481, 690-693.

Noting that it had heard evidence from numerous non-expert witnesses as to the ages of the alleged former child soldiers, the Chamber found that it was 'feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 years old and a child who is undoubtedly over 15'.[795] The Chamber returned to this conclusion several times in its discussion of the evidence on this issue. It further concluded that:

> the sheer volume of credible evidence ... relating to the presence of children below the age of 15 within the ranks of the UPC/FPLC has demonstrated conclusively that a significant number were part of the UPC/FPLC army. An appreciable proportion of the prosecution witnesses, as well as D-0004, testified reliably that children under 15 were within the ranks of the UPC/FPLC.[796]

The Chamber accepted 'that for many of the young soldiers shown in the video excerpts, it is often very difficult to determine whether they are above or below the age of 15'. In this regard, the Chamber noted that 'instead, [it] has relied on video evidence in this context only to the extent that [the videos] depict children who are clearly under the age of 15'.[797]

First addressing the crimes of conscription and enlistment, the Chamber found that cumulative and consistent evidence established that 'children below the age of 15 were integrated into the armed wing of the UPC (the FPLC)'.[798] After analysing the evidence related to rallies, recruitment drives and mobilisation campaigns, the Chamber stated that it was 'sure that considerable pressure was exerted on various communities to send young people, including children under the age of 15, to join the UPC/FPLC army during the timeframe of the charges'.[799] Although the Chamber heard evidence that the UPC/FPLC conducted training in numerous camps, it was able to conclude from the evidence presented at trial that children under the age of 15 were trained at the UPC/FPLC headquarters, Rwampara, Mandro and Mongbwalu.[800]

In assessing the evidence regarding the use of child soldiers, the Chamber reiterated that the 'decisive factor' in determining whether an indirect role was to be treated as 'active participation' was 'whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target'.[801] The Chamber found that during the period of the charges children under 15 were used by the UPC/FPLC 'to participate in combat in Bunia, Kobu and Mongbwalu, among other places'.[802] It concluded that 'a significant number of children under the age of 15' were used as military guards as well as 'escorts and bodyguards for the main staff and the commanders'.[803] It relied extensively on video evidence to conclude that Lubanga also used a significant number of children under 15 'within his personal escort and as his bodyguards'.[804]

The Chamber relied upon the testimony of one Prosecution witness, which was corroborated by a Defence witness, to confirm the existence of a 'Kadogo unit' containing approximately 45 children within the ranks of the UPC/FPLC, 'some of them under the age of 15'.[805] It also found that 'a significant number of girls under the age of 15 were used for domestic work, in addition to other tasks they carried out as UPC/FPLC soldiers, such as involvement in combat, joining patrols and acting as bodyguards'.[806]

795 ICC-01/04-01/06-2842, para 643.

796 ICC-01/04-01/06-2842, para 643. The Chamber also relied on one piece of documentary evidence in reaching its conclusion, specifically: a letter dated 12 February 2003 from the National Secretary for Education to the G5 Commander of the FPLC addressing the position of children within the FPLC, which it found to 'significantly corroborate other evidence'. ICC-01/04-01/06-2842, para 748. It declined to rely on four other documentary materials presented by the Prosecution.

797 ICC-01/04-01/06-2842, para 644.

798 ICC-01/04-01/06-2842, para 769.

799 ICC-01/04-01/06-2842, para 785. Judge Odio Benito dissented on the majority decision not to consider three video excerpts of rallies to contribute to the evidence that the accused was involved in recruitment of children under the age of 15. ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 43.

800 ICC-01/04-01/06-2842, paras 791, 800, 811, 815, 818, 819. The Chamber was unable to conclude that children under the age of 15 were trained at the camp at Kilo.

801 ICC-01/04-01/06-2842, para 820.

802 ICC-01/04-01/06-2842, para 834.

803 ICC-01/04-01/06-2842, paras 838, 857.

804 ICC-01/04-01/06-2842, para 869.

805 ICC-01/04-01/06-2842, para 877. The term 'kadogo' was used by the witnesses to refer to small children or child soldiers. See ICC-01/04-01/06-2842, paras 636-638.

806 ICC-01/04-01/06-2842, para 882. Although the Chamber found that children under the age of 15 were incorporated into the local self-defence forces, it also found that they were independent of the UPC/FPLC. It did, however, conclude that self-defence forces sent children under the age of 15 to be trained by the UPC/FPLC, who never returned. ICC-01/04-01/06-2842, para 907.

The Chamber considered the severe punishments and sexual violence to which recruits 'would have been subjected' as providing context for the crimes.[807] Concerning the evidence of sexual violence, the majority of the Chamber stated:

> Given the prosecution's failure to include allegations of sexual violence in the charges, as discussed above, this evidence is irrelevant for the purposes of the Article 74 Decision save as regards providing context. Therefore, the Chamber has not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused.[808]

Judge Odio Benito's separate and dissenting opinion

Judge Odio Benito dissented from the majority decision that declined to legally define 'use to participate actively in the hostilities', instead leaving it to a case-by-case, evidence-based determination, dependent upon the charges and evidence produced by the Prosecution. She asserted that, '[t]he Chamber has the responsibility to define the crimes based on the applicable law, and not limited to the charges brought by the prosecution against the accused'.[809] Grounding her analysis in the requirement, pursuant to Article 21(3), to interpret the Statute in a non-discriminatory manner consistent with international human rights, she referred to the purpose of the legal prohibition, 'to protect the life and personal integrity of children under the age of 15', to find it 'impermissible' and 'a step backward in the progressive development of international law' that the Chamber declined 'to enter a comprehensive legal definition of a crime and leave it open to a case-by-case analysis or to the limited scope of the charges brought against the accused'.[810] She suggested that the purpose of the ICC proceedings was not limited to a finding of guilt or innocence of the accused, but 'should also attend to the harm suffered by the victims as a result of the crimes'.[811]

Judge Odio Benito argued for a comprehensive legal definition of 'use to participate actively in the hostilities', one that would include sexual violence and other ill-treatment. While agreeing with the majority's finding that the decisive factor in deciding whether an 'indirect' role could be considered as 'active participation' was whether the support provided by the child exposed him or her to real danger, Judge Odio Benito argued for a broader definition of the concept of 'risk', with clearly gendered implications. Specifically, she found that risk could emanate from both the opposing party to the conflict as well as from the armed forces into which the child had been recruited.[812] Judge Odio Benito argued that sexual violence should be considered as both intrinsic to the legal definition of the crime to 'use to participate actively in the hostilities', as well as the substance of separate crimes, as set forth in the Statute.[813] A more detailed discussion of Judge Odio Benito's dissenting opinion in relation to the Chamber's exclusion of the sexual violence testimony in its findings is provided below, in the section on **Sexual violence in the Lubanga case**.

807 ICC-01/04-01/06-2842, paras 889, 898.
808 ICC-01/04-01/06-2842, para 896.
809 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 15.
810 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 7.
811 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 8. She further stated that the harm suffered by the victims should not only be 'reserved for reparations proceedings, but should be a fundamental aspect of the Chamber's evaluation of the crimes committed'.
812 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 18.
813 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 20.

Individual criminal responsibility

In the trial judgement, the Chamber found Lubanga guilty as a co-perpetrator under Article 25(3)(a) of the Rome Statute.[814] Article 25(3)(a) provides in relevant part that 'a person shall be criminally responsible and liable for punishment ... if that person ... commits such a crime, whether as an individual, jointly with another person, or through another person, regardless of whether that other person is criminally responsible'. The Chamber applied the five factors of individual criminal liability as established by the Pre-Trial Chamber — set out below — to find that the evidence presented by the Prosecution satisfied all five elements (two objective and three subjective) of co-perpetration.[815]

Objective factors of co-perpetration

Following the Pre-Trial Chamber's reasoning in the confirmation of charges decision, the Trial Chamber required that the Prosecution prove two objective elements in relation to each charge:

> (i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events; (ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime.[816]

The existence of a common plan

Following the holdings of the Pre-Trial Chamber, the Trial Chamber determined that under the charge of co-perpetration, two or more individuals[817] must act jointly within a common plan. It held that 'committing the crime in question does not need to be the overarching goal of the co-perpetrators', but rather that 'the common plan included a critical element of criminality, namely that, its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed'.[818] The Chamber stressed that the existence of a common plan may be inferred from circumstantial evidence.[819]

In its review of the evidence concerning the existence of a common plan between the accused and his alleged co-perpetrators, the Chamber examined: the context of the creation of the UPC and its objectives; the events leading up to the takeover of Bunia; the creation and structures of the FPLC; and, the roles of Lubanga and the alleged co-perpetrators before and during the timeframe of the charges, including whether they were in contact with each other and the nature of that contact.[820] The Chamber considered evidence prior to the time period of the charges as background and contextual information from which to infer the joint involvement of the co-perpetrators over a significant period of time, prior to, and during, the UPC's control of Ituri.[821] Prior evidence was also considered to determine whether the accused 'knew that children below the age of 15 who had been previously recruited would remain within the UPC/FPLC following September 2002'.[822] The Chamber found that the training camps organised prior to the takeover of Bunia (and prior to the charging period) later became part of the FPLC and continued to be used in that context.

Specifically, the Chamber found that prior to the time period of the charges, and particularly in the summer of 2000, Lubanga and his principal co-perpetrators 'were jointly involved in organising the training of Hema youths in the context of the mutiny [against the RCD-ML]'.[823] The Chamber noted that a Prosecution witness testified that Lubanga became the spokesperson for Hema mutineers, a group that later became the UPC;[824] another gave evidence regarding Lubanga visiting the children at the Kyankwanzi training camp, where he also personally underwent military training.[825] Evidence submitted for two additional time periods, that prior to the takeover of Bunia and during the summer of 2002 while the accused was detained in Kinshasa, was also considered to infer the development of the common plan to build an army to control Ituri. Relying on witness testimony, in addition to documentary evidence, the Chamber found that 'by the summer of 2002 Thomas

814 ICC-01/04-01/06-2842, para 1358.
815 ICC-01/04-01/06-803-tEN. The legal characterisation of co-perpetration was the subject of Judge Fulford's Separate Opinion, described in more detail, below.
816 ICC-01/04-01/06-2842, para 1018. See also ICC-01/04-01/06-80-tEN, paras 343, 346. As discussed in greater detail below, in a Separate Opinion, Judge Fulford specifically found that as a matter of law, the statutory framework did not require the Prosecution to prove that the accused's contribution was 'essential'. Separate Opinion of Judge Fulford, para 15.
817 The Chamber noted that Lubanga's alleged co-perpetrators included, *inter alia*: Floribert Kisembo, Bosco Ntaganda, Chief Kahwa, and Commanders Tchaligonza, Bagonza and Kasangaki. ICC-01/04-01/06-2842, para 1352.
818 ICC-01/04-01/06-2842, paras 984-985.
819 ICC-01/04-01/06-2842, para 988.
820 ICC-01/04-01/06-2842, paras 1023-1024.
821 ICC-01/04-01/06-2842, para 1116.
822 ICC-01/04-01/06-2842, para 1135.
823 ICC-01/04-01/06-2842, para 1045.
824 ICC-01/04-01/06-2842, paras 1027-1028.
825 ICC-01/04-01/06-2842, paras 1031-1033; 1036.

Lubanga personally intended to take over Bunia'.[826] Witnesses testified regarding the role of the accused in the recruitment of troops, including children under the age of 15, during the summer of 2002.[827] After the takeover of Bunia, the Chamber found that the evidence established that 'by September 2002 at the latest, the UPC had a military wing (the FPLC)', and that the UPC exercised political and military control over Bunia with 'clear military aims' to expand its role in Ituri.[828]

Following its evaluation of the evidence, the Trial Chamber framed the common plan agreed to by the co-perpetrators as one 'to build an effective army to ensure the UPC/FPLC's domination of Ituri, and he [Lubanga] was actively involved in its implementation'.[829] The Chamber concluded that as President of the UPC from September 2002, Lubanga participated in the common plan 'to build an effective army in order to ensure the UPC/FPLC's political and military control over Ituri'.[830] The Chamber noted that the common plan, and Lubanga's contribution to the plan, remained unchanged during the timeframe of the charges.[831]

Essential contribution

In determining whether Lubanga provided an 'essential contribution', the Chamber analysed his position within the UPC/FPLC, including his *de facto* authority, and the 'entirety of the contribution he made' in furtherance of the crimes.[832] It noted that, as President and Commander-in-Chief of the UPC/FPLC, 'there was no one in command above him'.[833] It found that pursuant to a decree in December 2002, 'defence and security were the responsibility of the Presidency and the positions of Minister and Deputy Minister for Defence were unassigned. Thomas Lubanga therefore retained the defence and security portfolios for himself.'[834] The Chamber heard evidence regarding Lubanga's involvement in planning and operations, including the provision of logistical support, weapons, food, uniforms and other necessities,[835] and found that despite an attempted coup and a series of defections, he maintained ultimate authority.[836] The Chamber also found that the UPC/FPLC was a 'well-structured organisation',[837] with 'efficient reporting mechanisms in place to ensure that the accused was informed of all significant developments within the FPLC'.[838] The Chamber relied on video footage and witness testimony to determine that the UPC/FPLC had the technical means to communicate information and instructions effectively throughout the hierarchy,[839] and that the accused convened meetings with military staff, and that he played 'an active role in making decisions and issuing instructions'.[840]

The Chamber also assessed Lubanga's 'personal involvement' in relation to the crimes in order to determine whether his contribution was essential.[841] It relied on the testimony of Prosecution witnesses to find that Lubanga 'was actively involved in the exercise of finding recruits', but could not determine from the evidence that he was personally and directly involved in the recruitment of children under the age of 15.[842] However, the Chamber was 'sure' that he was informed about these activities, and that 'he not only condoned the recruitment policy but he also played an active part in its implementation, and he approved the recruitment of children below the age of 15'.[843] Specifically, the Chamber relied on the testimony of Prosecution witnesses that Lubanga visited the training camp at Mandro, the EPO camp and headquarters.[844] It also relied on video footage of his visit to the Rwampara training camp where he was 'in the presence of dozens of young people, some of whom are well below the age of 15'.[845] In this regard, the Chamber found that 'although recruitment and training fell within the jurisdiction of the military authorities', Lubanga endorsed recruitment initiatives by visiting the training camps where he

826 ICC-01/04-01/06-2842, paras 1108; 1125.
827 ICC-01/04-01/06-2842, paras 1074-1084.
828 ICC-01/04-01/06-2842, para 1125.
829 ICC-01/04-01/06-2842, para 1134.
830 ICC-01/04-01/06-2842, para 1136.
831 ICC-01/04-01/06-2842, para 1134. The Chamber relied on video footage of a rally in Bunia in January 2003, demonstrating 'clear evidence that the accused and his co-perpetrators met with each other and were otherwise in personal contact during the period of the charges'. ICC-01/04-01/06-2842, para 1218.
832 ICC-01/04-01/06-2842, paras 1140-1141.
833 ICC-01/04-01/06-2842, para 1142.
834 ICC-01/04-01/06-2842, para 1147.
835 ICC-01/04-01/06-2842, paras 1148, 1151.
836 ICC-01/04-01/06-2842, para 1169.
837 ICC-01/04-01/06-2842, para 1176.
838 ICC-01/04-01/06-2842, para 1190.
839 ICC-01/04-01/06-2842, para 1197.
840 ICC-01/04-01/06-2842, paras 1201, 1212.
841 ICC-01/04-01/06-2842, para 1224.
842 ICC-01/04-01/06-2842, para 1234.
843 ICC-01/04-01/06-2842, para 1234.
844 ICC-01/04-01/06-2842, paras 1236 - 1241
845 ICC-01/04-01/06-2842, para 1242. The Chamber included a lengthy excerpt of the transcript of Lubanga's speech at the Rwampara training camp. It found that the speech, when viewed in conjunction with other evidence, established 'Lubanga's position of authority and his control over the other co-perpetrators, some of whom were present during the accused's speech'. ICC-01/04-01/06-2842, para 1267.

encouraged recruits and by making speeches at public rallies.[846] The Chamber also primarily relied on several video excerpts, demonstrating that he and his staff retained body guards under the age of 15.[847] In this regard, the Chamber specifically noted that the use of children as bodyguards constituted 'their use to participate actively in hostilities'.[848]

The Chamber concluded that 'Lubanga's role was essential to the implementation of the common plan'.[849] It reasoned:

> The role of the accused within the UPC/FPLC and the hierarchical relationship with the other co-perpetrators, viewed in combination with the activities he carried out personally in support of the common plan, as demonstrated by the rallies and visits to recruits and troops, lead to the conclusion that the implementation of the common plan would not have been possible without his contribution.[850]

Separate opinion by Judge Fulford

As described above, the Trial Chamber applied the legal framework on co-perpetration as established by the Pre-Trial Chamber, which involved two objective elements: the existence of a common plan and the accused's essential contribution to it. Judge Fulford issued a separate opinion in which he departed from the 'control over the crime' approach adopted by both the Pre-Trial Chamber[851] and the majority of the Trial Chamber. However, he concurred with the application of the legal framework as adopted by the Pre-Trial Chamber, as to do otherwise would be unfair to the Defence.[852]

Favouring a plain-text reading of Article 25(3)(a) of the Statute, Judge Fulford argued that the two reasons put forward by the Pre-Trial Chamber for adopting the 'control over the crime' principle were unnecessary and imposed an unfair burden on the Prosecution.[853] Specifically, he noted that the Pre-Trial Chamber had found this approach necessary to distinguish between principles and accessories, as well as to extend to individuals 'notwithstanding their absence from the scene of the crime'.[854] Regarding the first basis, Judge Fulford argued that a plain language reading of the provision revealed that the modes of commission 'were not intended to be mutually exclusive'.[855] He rejected the concept of a 'hierarchy of seriousness' and underscored that these approaches derived from the German domestic legal system, in which sentencing depended upon the mode of liability. He noted that pursuant to Rule 145(1)(c), however, degree of participation was only one of a number of relevant factors for sentencing.[856] He also opined that the 'control over the crime' approach to establish liability over principles was rendered unnecessary based on his reading of the provision in which individuals with indirect involvement, or 'notwithstanding their absence from the scene' could be 'prosecuted as co-perpetrators without relying on this principle'.[857]

Departing from the Pre-Trial Chamber and majority reading of Article 25(3)(a), Judge Fulford found that the text required only an 'operative link between the individual's contribution and the commission of the crime', not that the accused's involvement was essential.[858] He concluded that the following four elements were necessary to establish co-perpetration:

> (i) the involvement of at least two individuals;
>
> (ii) coordination between those who commit the offence, which may take the form of an agreement, common plan or joint understanding, express or implied, to commit a crime or to undertake action that, in the ordinary course of events, will lead to the commission of the crime;
>
> (iii) a contribution to the crime, which may be direct or indirect, provided either way there is a causal link between the individual's contribution and the crime;
>
> (iv) intent and knowledge, as defined in Article 30 of the Statute, or as "otherwise provided" elsewhere in the Court's legal framework.[859]

846 ICC-01/04-01/06-2842, para 1266.
847 ICC-01/04-01/06-2842, paras 1247 – 1257, 1262.
848 ICC-01/04-01/06-2842, paras 1247, 1270.
849 ICC-01/04-01/06-2842, paras 1270, 1272.
850 ICC-01/04-01/06-2842, para 1270.
851 ICC-01/04-01/06-803-tEN, paras 326-338.
852 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, para 2.
853 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, para 3.
854 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, paras 5-6.
855 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, para 7.
856 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, paras 9-11. In the decision on sentencing, the Chamber noted that Lubanga's degree of participation, namely, 'aware that the crime would occur in the ordinary course of events', and not that he had 'meant' to commit the crimes, was an important factor in the determination of his sentence. ICC-01/04-01/06-2901, para 52.
857 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, para 12.
858 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, para 15.
859 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, para 16.

Judge Fulford proffered that this approach provided a more 'realistic basis' for the Court to undertake assessments of co-perpetrator liability than 'an *ex post facto* assessment' of whether an individual essentially contributed to war crimes, crimes against humanity or genocide.[860] However, he acknowledged that to preserve the rights of the accused, the Trial Chamber could not change the test to a lesser test of 'contribution', as opposed to a test of 'essential contribution', at this stage of the proceedings and without prior notice. Therefore, he concurred with the majority on this issue, while writing separately to clarify his position on the law.

Subjective elements of co-perpetration

Pursuant to Article 30, the Prosecution must show that the accused committed the crimes with the necessary 'intent and knowledge'.[861] As such, the Chamber held that it was necessary for the Prosecution to prove that : (i) 'Lubanga intended to participate in implementing the common plan, and additionally, that he was aware that the conscription, enlistment or use of children below the age of 15 will occur in the ordinary course of events as a result of the implementation of the common plan';[862] (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan; and (iii) the accused was aware of the factual circumstances that established the existence of an armed conflict, and of the link between these circumstances and his conduct.[863] Although Article 8(2)(e)(vii) of the Elements of Crimes establishes a lesser evidentiary standard of 'knew or should have known' with regard to the ages of the victims,[864] the Prosecution had argued that the Chamber should convict the accused only on the basis that he 'knew' there were children under 15 years in the UPC/FPLC.[865]

860 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, para 17.

861 Article 30(1) provides: 'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'.

862 ICC-01/04-01/06-2842, para 1274, citing Article 30(2)(b) and (3), internal quotations omitted.

863 ICC-01/04-01/06-2842, paras 1018, 1274. The Chamber held that the Prosecution was not required to prove that the accused knew there was an armed conflict. ICC-01/04-01/06-2842, para 1016.

864 Article 8(2)(e)(vii) of the Elements of Crimes states: 'The perpetrator knew or should have known that such a person or persons were under the age of 15 years'.

865 ICC-01/04-01/06-2842, para 944.

In making its determination, the Chamber relied on evidence of a conversation concerning Lubanga's frequent attempts to 'convince the population to provide food and to make youngsters available in order to join, and to train with, the army of the UPC/FPLC'.[866] The Chamber relied upon testimony, as well as the video footage of his visit to the Rwampara camp, to find that the accused knew there were children below the age of 15 in the UPC/FPLC troops, particularly acting as bodyguards.[867] However, the bulk of the Chamber's analysis concerning the first two mental elements centred on the accused's alleged efforts to demobilise child soldiers as this reflected his knowledge of their conscription, enlistment and use. In this regard, the Chamber examined the documentary evidence related to demobilisation orders issued by Lubanga,[868] which the Prosecution had characterised as a 'sham',[869] and the Defence had relied upon to argue that the 'alleged crimes were not a virtually certain consequence of creating the armed force'.[870] For example, the Chamber considered a 12 February 2003 letter referring to a UPC-initiated demobilisation programme to 'clearly demonstrate [...] that children under 15 years of age were serving in the FPLC in February 2003'.[871]

The Chamber also considered evidence related to a series of meetings between the accused and other representatives of the UPC/FPLC with MONUC and NGOs concerning the demobilisation of child soldiers, including evidence that the UPC/FPLC threatened individuals working in the field of demobilisation.[872]

866 ICC-01/04-01/06-2842, para 1277. The evidence is not publicly available.

867 ICC-01/04-01/06-2842, paras 1278-1279, noting that the video footage provided 'compelling evidence on Thomas Lubanga's level of knowledge'.

868 These included: the demobilisation instructions of 21 and 30 October 2002; the request for a report on the status of implementation of the orders, dated 27 January 2003 and a report dated 16 February 2003 indicating that the orders had been correctly disseminated; a letter of 12 February 2003, referring to a demobilisation programme for child soldiers from ages 10-15 'initiated in the name of the UPC'; a demobilisation decree of 1 June 2003 ; and a follow-up memo dated 5 June 2003 containing specific instructions. ICC-01/04-01/06-2842, paras 1292-1316. The Chamber noted that the alleged reference numbers on these documents are out of order and do not correspond with the numbers of other documents issued by the UPC/FPLC during the respective dates. ICC-01/04-01/06-2842, paras 1294, 1295, 1305, 1306.

869 ICC-01/04-01/06-2842, paras 1276, 1280, 1306.

870 ICC-01/04-01/06-2842, para 1324.

871 ICC-01/04-01/06-2842, para 1312.

872 ICC-01/04-01/06-2842, paras 1283-1290.

The Chamber was persuaded that:

> by May 2003 at the latest Thomas Lubanga was fully aware of the prohibition on child recruitment and was aware of the concerns of outside bodies as to the recruitment and use of child soldiers, and that this issue was repeatedly raised regardless of the precise nature or context of their meetings. Moreover, the evidence demonstrates the UPC/FPLC attempted to impede the work of the organisations which were involved with helping child soldiers during the period of the charges.[873]

Concerning the demobilisation orders, the Chamber noted that they were made public by the media,[874] and heard testimony concerning the human rights concerns generated by international media coverage of child soldiers.[875] The Chamber was thus persuaded that the UPC was subjected to strong external pressure, and was 'sure' that the demobilisation letter of 1 June 2002 was issued in response.[876]

The Chamber further determined that effective implementation of the demobilisation orders had not been demonstrated 'even on a *prima facie* basis', but rather, that 'child recruitment continued'.[877] In addition to witness testimony, it relied on video footage after the charging period of UPC representatives giving speeches indicating that children remained within the ranks of the FPLC.[878] Specifically, it found that while in some instances weapons and uniforms were taken away from minors, they were later returned, and children were subsequently deployed in battle.[879] The Chamber found this to be 'compelling evidence that [the children's] involvement was the result of the common plan, namely to use soldiers of any age to maintain control over Bunia'.

The Chamber combined its analysis of the first two subjective elements, and concluded that Lubanga:

> was fully aware that children under the age of 15 had been, and continued to be, enlisted and conscripted by the UPC/FPLC and used to participate actively in hostilities during the timeframe of the charges. This occurred, in the ordinary course of events, as a result of the implementation of the common plan – to ensure that the UPC/FPLC had an army strong enough to achieve its political and military aims.[880]

It again referred to the video of the training camp in Rwampara as 'compelling evidence' to demonstrate Lubanga's 'awareness of, and his attitude towards, the enduring presence of children under the age of 15 in the UPC'.[881]

The Chamber found that the third subjective element, regarding the accused's awareness of the 'factual circumstances that established the existence of an armed conflict throughout the period of the charges', was satisfied 'on the basis of the evidence rehearsed above', referring to the entire section on criminal responsibility.[882] It concluded:

> The accused and other members of the UPC/FPLC articulated the organisation's military aims. Child soldiers were recruited as a result of the implementation of a common plan in order to ensure the UPC/FPLC was able to implement its military aims, and the accused was aware that they were being recruited, trained and used in military operations. Hence, the Chamber finds beyond reasonable doubt that Thomas Lubanga was fully aware of the undoubted link between the crimes of conscripting and enlisting children under the age of 15, and using them to participate actively in hostilities and the armed conflict or the factual circumstances that established the existence of the armed conflict.[883]

873 ICC-01/04-01/06-2842, para 1290.
874 ICC-01/04-01/06-2842, paras 1303, 1315.
875 ICC-01/04-01/06-2842, para 1317. The witness stated: 'Photographs were being taken, especially where child soldiers were moving around with weapons. And sometimes they would try to focus on the area where heavy weapons were located, and this was disturbing. This was embarrassing, because this was going to take on a different dimension. A lot was already being said about child soldiers, that it is – was not a good thing. Almost everyone was aware of that at that time.'
876 ICC-01/04-01/06-2842, para 1320. The Chamber noted that the 1 June 2002 order was issued one week after a European journalist interviewed a UPC/FPLC soldier 'no more than 13 years old', wearing a red beret and carrying his weapon, that was aired on television. ICC-01/04-01/06-2842, paras 1318-1319.
877 ICC-01/04-01/06-2842, para 1312.
878 ICC-01/04-01/06-2842, para 1344.
879 ICC-01/04-01/06-2842, paras 1322-1324.
880 ICC-01/04-01/06-2842, para 1347.
881 ICC-01/04-01/06-2842, para 1348.
882 ICC-01/04-01/06-2842, paras 1349.
883 ICC-01/04-01/06-2842, para 1350.

Significantly, the Chamber relied on one video, of the accused's 12 February 2003 visit to the training camp at Rwampara,[884] to prove each of the five elements of co-perpetration, in conjunction with other evidence. As noted above, the Chamber relied on the video's depiction of the co-perpetrators together to establish the existence of a common plan.[885] The video also proved the 'essential contribution' of the accused because, when viewed along with the other evidence, it established his contribution given his 'position of authority and his control over the other co-perpetrators' to the common plan.[886] It relied most heavily on the video of the visit to Rwampara in assessing the mental elements of the crimes, specifically the awareness of the accused that children under 15 years of age were among UPC/FPLC troops.[887] The Chamber's heavy reliance on video evidence to establish Lubanga's individual criminal responsibility as a co-perpetrator possibly reflected the lack of sufficient credible witness testimony, given that the Chamber determined that it could not safely rely upon the testimony of alleged former child soldier witnesses for the Prosecution, as described above.[888]

Finding that all elements of co-perpetration had been satisfied beyond a reasonable doubt, Trial Chamber I held Lubanga individually criminally responsible as co-perpetrator under Article 25(3)(a), and convicted him of the war crimes of conscripting and enlisting children under the age of 15, and using them to participate actively in hostilities in the context of an armed conflict of a non-international nature from early September 2002 to 13 August 2003.[889]

884 The video, EVD-OTP-00570, was introduced through Witness 30. The video depicted the accused exhorting the troops — which included children under the age of 15 — to train, to use weapons, and to provide security for the Congolese people. ICC-01/04-01/06-2842, para 1242.

885 ICC-01/04-01/06-2842, paras 1211-1212.

886 ICC-01/04-01/06-2842, para 1267.

887 The Chamber indicated that the video showed 'recruits who were clearly under the age of 15', and stated that 'the accused saw UPC/FPLC recruits under the age of 15 at the camp in Rwampara in February 2003'. ICC-01/04-01/06-2842, paras 792-793.

888 In two exceptions, the Chamber found Prosecution Witness 38 to be a credible witness. It also relied on Prosecution Witness 10's testimony only insofar as it related to the video of the training camp in Rwampara.

889 ICC-01/04-01/06-2842, para 1358.

Sexual violence in the Lubanga case

As described above, the case against Lubanga did not include charges of gender-based crimes. However, in a number of statements prior to, and at the time of, the opening of an investigation in the DRC Situation in 2004, then Prosecutor Moreno Ocampo made multiple references to the commission of gender-based violence by militia groups, alleged to be under Lubanga's command.[890] From the early stages of the investigation, the Women's Initiatives advocated for the Office of the Prosecutor to both investigate and include charges for gender-based crimes in the DRC Situation and in the case against Lubanga. Nonetheless, the Prosecutor's Arrest Warrant for Lubanga did not include charges for gender-based crimes.[891]

On 16 August 2006, the Women's Initiatives submitted a letter and confidential report to the Office of the Prosecutor, outlining concerns that gender-based crimes had not been adequately investigated in the Lubanga case, and encouraging the Prosecutor to investigate further.[892] The confidential report presented the Prosecutor with documentation of 55 interviews

890 See for instance Address by Prosecutor Luis Moreno Ocampo, Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 6 September 2004, available at <http://www.iccnow.org/documents/OcampoAddress_ASP06Sept04.pdf>, last visited on 12 October 2012; United Nations General Assembly, Report of the International Criminal Court, A/60/177, 1 August 2005; ICC-ASP/4/16; 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', *ICC Press Release*, ICC-OTP-20040623-59, 23 June 2006, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation>, last visited on 12 October2012.

891 ICC-01/04-01/06-2-tEN.

892 Women's Initiatives for Gender Justice, 'Letter to the Prosecutor', August 2006, available at <http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>.

of individual victims/survivors of rape and sexual violence; of these, 31 interviewees were victims/survivors of rape and sexual slavery allegedly committed by the UPC. The letter further underscored that the selective charges brought by the Prosecutor, including the absence of charges for gender-based crimes, would have a significant impact on the scope of victims that could be authorised to participate in the proceedings.[893] The communication also expressed concern that 'no investigations appeared to have been undertaken in this case into allegations of child soldiers being raped given especially that the only crimes included in the arrest warrant relate to child soldiers'.[894]

With no response to the letter and dossier forthcoming from the Office of the Prosecutor, on 7 September 2006, the Women's Initiatives became the first NGO to file observations under Rule 103 before the Court, concerning the absence of charges for gender-based crimes in the Lubanga case.[895] This filing, as well as a second filing submitted on 10 November 2006 in the DRC Situation, requested the Pre-Trial Chamber under Article 61(7)(c) to exercise its supervisory jurisdiction over the Prosecutor's discretion and request the Prosecutor to consider providing further evidence, conduct further investigations, or amend the charges.[896] The filing to the judges included the dossier the Women's Initiatives has previously submitted to the Office of the Prosecutor. However, no further charges were brought, and the Lubanga case proceeded through the confirmation proceedings, and to trial, on the original charges.[897] Despite the absence of charges of gender-based crimes in the case against Lubanga, extensive evidence on sexual violence was heard throughout the trial proceedings. Since 2008, the Women's Initiatives has advocated for sexual violence to be recognised as an integral component of each of the three crimes for which Lubanga was charged, and eventually convicted.

As described in more detail below, the Prosecution's decision not to include a gender perspective in the earliest stages in conducting the investigation and in framing the charges to be brought against Lubanga had numerous implications throughout each stage of the proceedings. The absence of any factual findings related to the sexual violence committed against recruits in the trial judgement, and its exclusion from the definition of the crimes for which Lubanga was convicted, rendered these aspects of the crimes invisible, and impeded their consideration for the purposes of sentencing. Furthermore, it resulted in the omission of the harm suffered primarily by female recruits in the assessment of the gravity of the crime.

893 The limited charges would also eventually have an impact on the definition of the crimes within the trial judgement, and the scope of the harm recognised for the purpose of Lubanga's sentence and the reparations proceedings, as discussed in greater detail below.

894 Women's Initiatives for Gender Justice, 'Letter to the Prosecutor', August 2006, available at <http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>.

895 ICC-01/04-01/06-403. See also *Legal Filings submitted by the Women's Initiatives for Gender Justice to the International Criminal Court*, 2nd Edition, available at <http://www.iccwomen.org/publications/articles/docs/Legal_Filings_submitted_by_the_WIGJ_to_the_International_Criminal_Court_2nd_Ed.pdf>.

896 See also *Legal Filings submitted by the Women's Initiatives for Gender Justice to the International Criminal Court*, 2nd Edition, available at <http://www.iccwomen.org/publications/articles/docs/Legal_Filings_submitted_by_the_WIGJ_to_the_International_Criminal_Court_2nd_Ed.pdf>.

897 For further information on the absence of charges for sexual violence in the Lubanga case, see *Gender Report Card 2010*, p 129-159; *Gender Report Card 2011*, p 203-224.

Evidence of sexual violence presented during trial

In its opening statement in January 2009, the Prosecution described the use of rape during recruitment. It related that child soldiers were encouraged to rape women as part of their training, and were sent by their commanders to look for women and to bring them to the camp.[898] Then Prosecutor Moreno Ocampo stated that girl soldiers, some as young as 12 years old, 'were the daily victims of rape by their commanders' and they were used as 'cooks and fighters, cleaners and spies, scouts and sexual slaves'.[899] The Office of the Prosecutor acknowledged the multiple roles of girl soldiers, and also underlined that sexual violence was part of their daily lives: 'One minute they will carry a gun, the next minute they will serve meals to the commanders, the next minute the commanders will rape them. They were killed if they refused to be raped.'[900] A Legal Representative of Victims, representing a former girl soldier, confirmed these facts in her opening statement, asserting that 'rape began as soon as they were abducted and continued throughout their stay with the UPC. In fact, often the abuses were greatest in the initial stages of their abduction and in the training camps where they were trained to become militia soldiers.'[901]

The Trial Chamber also heard a significant amount of direct testimony on sexual violence from Prosecution witnesses.[902] Analysis by the Women's Initiatives for Gender Justice of the publicly available transcripts of testimony given in open court indicates that of the majority of Prosecution witnesses who testified during the presentation of the Prosecution case in 2009, at least 21 out of 25, testified in open court about girl soldiers, and a significant number of Prosecution witnesses, at least 15, also testified about gender-based crimes, in particular rape and sexual slavery, that took place within the context of the crimes charged against Lubanga.[903]

While this testimony was not relied on by the Chamber in convicting Lubanga, the crimes described were exemplary of the experiences of girl soldiers within the UPC. Among the Prosecution witnesses relied upon by the Chamber, Witness 38 described the roles performed by girls in the camps, which included providing sexual services.[904] Witness 299 testified that 'the PMFs' [girl soldiers'] job was to take the commanders' bags, and their other job was to be their wives'.[905] Witness 7 confirmed that 'commanders took girls who were recruits and said "today you will come and sleep with me"', and that the girls were not allowed to say no.[906] In response to questions from Judge Odio Benito about sexual violence committed against girl soldiers during the initial training phase, Witness 16 confirmed that 'out of here, being in the centre for the first time, the trainers and other guards in the centre took advantage of the situation and they would rape the recruits'.[907] Witness 89 also stated that rape and sexual violence were commonly committed against girl soldiers. He testified that 'there were commanders who took girls as women. They would get them pregnant, and these girls then had to leave the camp and go to the village.'[908] He also testified that this 'had to be accepted' when a commander wanted a girl.[909] Witness 10, a former girl soldier upon whose testimony the Chamber partially relied, was also a victim of sexual violence.[910]

898 ICC-01/04-01/06-T-107-ENG, p 10 lines 8-10. The Legal Representative for Victims, Carine Bapita, also referred extensively to acts of sexual violence committed against girl recruits and the consequent harm in her opening statements in the case. ICC-01/04-01/06-T-107-ENG, p 52 line 18- p 55 line 8.

899 ICC-01/04-01/06-T-107-ENG, p 11 line 24 - p 12 line 4. See generally, p 11 line 17 - p 13 line 8. See *Gender Report Card 2009*, p 69-71.

900 ICC-01/04-01/06-T-107-ENG, p 11 lines 23-25, p 12 lines 1-12. See *Gender Report Card 2009*, p 69-70.

901 ICC-01/04-01/06-T-107-ENG, p 53 lines 14-21. See *Gender Report Card 2009*, p 69-70.

902 The Trial Chamber heard witness testimony by a number of former child soldiers, describing acts of sexual violence committed primarily against girl soldiers. See *Gender Report Card 2009*, p 68-85.

903 Analysis by the Women's Initiatives for Gender Justice of the publicly available transcripts of witness testimony. For a detailed overview of these testimonies, see *Gender Report Card 2009*, p 71-85.

904 ICC-01/04-01/06-T-114-ENG, p 22 lines 16-19; p 82 lines 1-3.

905 ICC-01/04-01/06-T-122-ENG, p 26 lines 23-25.

906 ICC-01/04-01/06-T-148-ENG, p 49 lines 14-22.

907 ICC-01/04-01/06-T-191-Red-ENG, p 15 lines 19-22.

908 ICC-01/04-01/06-T-196-ENG, p 7 lines 23-24; p 8 lines 1-3.

909 ICC-01/04-01/06-T-196-ENG, p 7 lines 23-24; p 8 lines 2-3, 6-16. In reference to the sexual violence to which Witness 10 was subjected, Judge Odio Benito stated in her dissent, 'this life experience of a young woman has to be taken into account, notwithstanding that these aspects of her testimony cannot be relied on for the purposes of an Article 74 decision'. ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 27.

910 ICC-01/04-01/06-T-145-Red-ENG, p 29, lines 15 to 25; p 30, line 25 - p 31, line 9.

Attempt to amend the charges

On the basis of the testimony presented by Prosecution witnesses, during the trial the Legal Representatives of Victims attempted to broaden the charges against Lubanga to specifically include gender-based crimes. In May 2009, the two teams of Legal Representatives filed a joint submission, requesting the Trial Chamber to consider modifying the legal characterisation of the facts pursuant to Regulation 55 of the Regulations of the Court[911] to add the crimes of sexual slavery and inhuman and cruel treatment to the existing characterisation.[912] In their filing, they argued that the evidence and witness testimony in the case could support additional charges of sexual slavery and inhuman and cruel treatment of recruits, including girl recruits who were pregnant as a result of rape.[913] While the majority opinion[914] found that Regulation 55 permitted the Trial Chamber to modify the legal characterisation of facts to include facts and circumstances not originally contained in the charges, the Appeals Chamber reversed this decision on procedural grounds. It held that 'Regulation 55(2) and (3) of the Regulations of the Court may not be used to exceed the facts and circumstances described in the charges or any amendment thereto'.[915]

911 Regulation 55 provides that the Chamber may change the legal characterisation of the facts in its final decision on the merits based on the evidence presented before it during the trial.

912 ICC-01/04-01/06-1891.

913 The Prosecution had argued against additional charges being brought against the accused as being unfair. See ICC-01/04-01/06-2901, para 60 and ICC-01/04-01/06-2842, para 629.

914 ICC-01/04-01/06-2049. Judge Fulford issued a dissent in which he argued that the majority's reading of Regulation 55 as two separate provisions was flawed, with significant negative consequences for the rights of the accused, ICC-01/4-01/06-2054.

915 ICC-01/04-01/06-2205, para 1. The Appeals Chamber further held that additional facts and circumstances can only be added according to the procedure set forth in Article 61(9), which gives the Prosecutor, rather than the Trial Chamber, the power to introduce new facts and circumstances. ICC-01/04-01/06-2205, para 94. For a more detailed analysis of the Appeals Chamber's decision, see *Gender Report Card 2010*, p 129-131.

The inclusion of gender-based crimes within the concept of the crimes charged

In addition to the testimony of Prosecution witnesses concerning the commission of sexual violence within the UPC/FPLC, the testimony of expert witnesses addressed the inclusion of gender-based violence within the concept of the crimes charged. The expert testimony of Radhika Coomaraswamy, UN Special Representative for the Secretary General (SRSG) for Children in Armed Conflict, highlighted that girls recruited into armed groups play multiple roles, including combat, scouting and portering, in addition to being victims of sexual slavery and forced marriage. SRSG Coomaraswamy urged the Chamber to consider 'the central abuse perpetrated against girls during their association with armed groups after they have been recruited or enlisted, regardless of whether or not they mostly engaged in direct combat functions during conflict'.[916] She added that 'though some are mainly combatants, others may be mainly sex slaves ... they have all been recruited and enlisted into this group...'[917] The testimony of expert witness Dr Elisabeth Schauer also referred to 'sexual violence, including torture, rape, mass rape, sexual slavery, enforced prostitution, forced sterilisation, forced termination of pregnancies, giving birth without assistance and being mutilated are some of the key gender-based experiences of both women and girls during armed conflicts'.[918]

Furthermore, in its closing arguments, the Prosecution told the Chamber that in addition to the tasks that they performed identically to boy soldiers, girl soldiers were subjected to specific abuse, such as rape by fellow soldiers. It maintained that the enlistment and conscription of children under the age of 15 encompassed 'all the acts suffered by the child during the training and during the time they were forced to be a soldier. This interpretation is particularly relevant to capture the gender abuse, a crucial part of the recruitment of girls.'[919] The Prosecution urged the Chamber to make clear that the girls forced into marriage with commanders were not the wives of commanders but victims of recruitment, and should be particularly protected by demobilisation programmes and by the ICC.[920]

916 ICC-01/04-01/06-T-223-ENG, p 15 line 25, p 16 lines 1-2.

917 ICC-01/04-01/06-T-223-ENG, p 30 lines 11-19. See *Gender Report Card 2010*, p 135-136.

918 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 13. See further *Gender Report Card 2009*, p 84-85.

919 ICC-01/04-01/06-T-356-ENG, p 10 lines 1-7; ICC-01/04-01/06-2748-Red, para 138. See *Gender Report Card 2011*, p 205-211.

920 ICC-01/04-01/06-T-356-ENG, p 10 lines 8-11; ICC-01/04-01/06-2748-Red, paras 139, 227-234, 385.

Reference to sexual violence in the trial judgement

With no amendments to the charges, and the unsuccessful attempt by the Legal Representatives to use Regulation 55, gender-based crimes received limited mention in the trial judgement. The Trial Chamber held that, given the Prosecution omission of factual allegations regarding sexual violence in its document containing the charges, and therefore its exclusion from the confirmation decision, it was precluded from taking allegations of sexual violence into consideration in the judgement. It left the question open, stating:

> Regardless of whether sexual violence may properly be included within the scope of "using [children under the age of 15] to participate actively in hostilities" as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue.[921]

The Chamber was careful to limit the basis for its consideration of this evidence, stating that, 'given the prosecution's failure to include allegations of sexual violence in the charges ... this evidence is irrelevant for the purposes of the Article 74 Decision save as providing context'.[922] The Chamber referred to both the written submissions and the in-court testimony of expert witness SRSG Coomaraswamy, which 'suggested that the use for sexual exploitation of boys and girls by armed forces or groups constitutes an "essential support function" '.[923] The Chamber also stated that 'Ms Coomaraswamy gave relevant background evidence that children in this context frequently undertake a wide range of tasks that do not necessarily come within the traditional definition of warfare', which exposed them to risks, including 'rape, sexual enslavement and other forms of sexual violence'.[924]

Unable to consider evidence related to sexual violence for the purpose of the conviction, the Trial Chamber noted that it had 'not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused',[925] with implications for sentencing, as discussed in greater detail in the **First sentencing and reparations decisions in the Lubanga case** section of this Report. In doing so, it recognised the accused's right to be fully informed of the charges against him under Article 67(1)(a) of the Statute.

921 ICC-01/04-01/06-2842, para 630.
922 ICC-01/04-01/06-2842, para 896.
923 ICC-01/04-01/06-2842, footnote 1811.
924 ICC-01/04-01/06-2842, para 606.
925 ICC-01/04-01/06-2842, para 896.

The Trial Chamber's formulation of the crimes

In the trial judgement, the Chamber's formulation of the crimes of conscription, enlistment and use of child soldiers neither explicitly encompassed, nor addressed, sexual violence. The Chamber's analysis of the legal findings centred on the correct interpretation of the crime of using children under the age of 15 years to participate actively in hostilities.[926] Taking into account the relevant statutory provisions, as well as previous international criminal jurisprudence on the issue, the Chamber came to the following formulation of 'active participation':

> Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an 'indirect' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors — the child's support and this level of consequential risk — mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes 'active participation' can only be made on a case-by-case basis.[927]

While establishing a broad definition of the crime 'use to actively participate in hostilities', the Chamber did not make any definitive legal finding on whether sexual violence could or should be properly included within the scope of the crime. However, the Chamber indicated that it would consider 'in due course' whether evidence of sexual violence 'ought to be taken into account for the purposes of sentencing and reparations'.[928]

926 ICC-01/04-01/06-2842, paras 619-628.
927 ICC-01/04-01/06-2842, para 628.
928 ICC-01/04-01/06-2842, para 631.

Judge Odio Benito's separate and dissenting opinion

In her separate and dissenting opinion, Judge Odio Benito found that sexual violence was an 'intrinsic' aspect of the legal concept of 'use to participate actively in the hostilities'.[929] She argued that the majority's decision not to include sexual violence within the concept of 'use to participate actively in the hostilities' rendered this aspect of the crime invisible. Judge Odio Benito stated that the: 'invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group'.[930] Specifically, she argued that the Chamber had a 'duty' to include sexual violence within the legal definition of 'use to participate actively in the hostilities', regardless of the 'impediment of the Chamber' to base its decision on this aspect of the crime pursuant to Article 74(2) of the Statute.[931]

Judge Odio Benito characterised sexual violence as 'an intrinsic element' of the crime of using child soldiers, and 'a direct and inherent consequence to their involvement with the armed group'.[932] She further underscored the disparate impact that sexual violence had upon female child soldiers, explaining: 'Sexual violence and enslavement are the main crimes committed against girls and their illegal recruitment is often intended for that purpose'.[933] She also emphasised the 'gender-specific potential consequence of unwanted pregnancies for girls that often lead to maternal or infant's deaths, disease, HIV, psychological traumatisation and social isolation'.[934]

With respect to the majority's definition of the crimes, Judge Odio Benito argued for a broader definition of the concept of 'risk', with clearly gendered implications. She asserted that risk could emanate from both the opposing party to the conflict as well as the armed forces into which the child had been recruited.[935] She stated that:

> Children are protected from child recruitment not only because they can be at risk for being a potential target to the 'enemy' but also because they will be at risk from their 'own' armed group who has recruited them and will subject these children to brutal trainings, torture and ill-treatment, sexual violence and other activities and living conditions that are incompatible and in violation to these children's fundamental rights. The risk for children who are enlisted, conscripted or used by an armed group inevitably also comes from within the same armed group.[936]

Consequently, Judge Odio Benito found the majority's approach to be discriminatory, as it failed to take into account the full range of human rights violations, pursuant to Article 21(3).[937] She argued that it was:

> discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or a porter which is mainly a task given to young boys. The use of young girls' and boys' bodies by combatants within or outside the group is a war crime and as such encoded in the charges against the accused.[938]

929 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 16.
930 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 16.
931 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 17.
932 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 20.
933 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 21.
934 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 20.
935 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 18.
936 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 19.
937 Article 21 concerns the applicable law that the Court shall apply. Article 21(3) specifically provides that: 'The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.
938 ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito, para 21.

Focus:
Outstanding arrest warrants

Under the Rome Statute, the ICC does not have enforcement powers to secure the execution of arrest warrants. For this reason, state cooperation and political will are paramount for delivering suspects to the Court. Pursuant to the Court's complementarity provisions, States Parties may also play a role in trying suspects domestically instead of at the ICC. As described below, the ICC continues to face challenges in securing the execution of arrest warrants, particularly in situations of ongoing conflict.

In this section, we focus on the twelve ICC arrest warrants that remain outstanding at the time of writing this Report. We discuss these cases, and the Situations and contexts in which the suspects are operating, many of whom continue to be implicated in ongoing violations of international law. While the number of outstanding arrest warrants cannot be taken as an indicator of the success of the ICC's first ten years, as illustrated below the particular circumstances of each Situation will benefit from increased international cooperation, enhanced coordination between states and international and regional entities, and other measures to support arrests towards either an ICC or domestic trial.

In its first ten years the ICC has named 29 suspects, three of whom have died while the arrest warrant was outstanding.[939] Of the remaining 26 named suspects, states have cooperated with the ICC to secure the execution of arrest warrants against six individuals, and nine voluntary appearances in response to summonses to appear. This means that six of 17 arrest warrants, or 35.3%, have been executed at the ICC, and nine of nine summonses to appear, or 100%, have been answered. Including both arrest warrants and summonses to appear, over half, or 57.7% of named suspects have appeared before the Court.

939 Proceedings against Muammar Mohammed Abu Minyar Gaddafi (Libya Situation) and Raska Lukwiya (Uganda Situation) have been officially terminated following the confirmation of their death. The Office of the Prosecutor also indicated it had confirmed the death of Vincent Otti (Uganda Situation), although the Court's website continues to treat him as a suspect at large.

As of 17 August 2012, the ICC has four suspects in custody: Germain Katanga (Katanga), Mathieu Ngudjolo Chui (Ngudjolo), Jean-Pierre Bemba Gombo (Bemba), and Laurent Koudou Gbagbo (Gbagbo). Thomas Lubanga Dyilo (Lubanga), who was convicted in March of 2012, remains in ICC custody pending any appeals on his conviction and a decision on his transfer to another country to begin serving the remainder of his 14 year sentence.[940]

Of the 23 persons currently charged by the ICC,[941] twelve arrest warrants remain outstanding: Joseph Kony (Kony), Vincent Otti (Otti), Okot Odhiambo (Odhiambo) and Dominic Ongwen (Ongwen) in the Uganda Situation; Bosco Ntaganda (Ntaganda) and Sylvestre Mudacumura (Mudacumura) in the DRC Situation; President Omar Hassan Ahmad Al'Bashir (President Al'Bashir), Ahmad Muhammad Harun (Harun), Ali Muhammad Ali-Al-Rahman (Kushayb) and Abdel Raheem Muhammad Hussein (Hussein) in the Darfur Situation; and Saif Al-Islam Gaddafi (Gaddafi)[942] and Abdullah Al-Senussi (Al-Senussi) in the Libya Situation.

The reasons that these arrest warrants remain outstanding differ. In some instances the suspects have successfully evaded arrest by surrounding themselves with militias and remaining mobile in remote and difficult to access locations (for example, Kony *et al*). In some instances suspects are being protected by states or there is insufficient political will to arrest them, and some suspects either currently hold or have held high political or military positions (for example, all arrest warrants in the Sudan Situation are against high level political and/or military figures). Further, in the Libya Situation, both suspects are currently in detention in Libya, a non-State Party, which to date has declined to surrender them to the ICC and is actively preparing for domestic trials.[943] These circumstances are more fully described below.

940 A number of States Parties have already indicated their willingness to enforce sentences imposed by the ICC, including Austria, Belgium, Denmark, Finland, Mali, Serbia and the United Kingdom by virtue of a Declaration on the Enforcement of Sentences under Article 103 of the Rome Statute. See <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/>, last visited on 12 October 2012. Under Article 49(1) of the Headquarters Agreement between the ICC and the host State, 'the Court shall endeavor to designate a State of enforcement', ie the convicted person shall serve his sentence in a country other than the host State (the Netherlands). However, in certain situations, the convicted person could serve the remainder of his sentence in the Netherlands, for instance if no State is designated (Article 49(2), Headquarters Agreement) or if, following conviction and final sentence or after reduction in accordance with Article 110 of the Rome Statute, the time remaining to be served is less than six months (Article 50(1), Headquarters Agreement).

941 While the Court has issued arrest warrants or summonses to appear for a total of 29 individuals, charges were not confirmed against Abu Garda, Mbarushimana, Ali and Kosgey, and proceedings against Lukwiya and Gaddafi were terminated following official confirmation of their death. In September 2008, the Office of the Prosecutor indicated it had confirmed the death of Otti as well and was preparing to terminate proceedings against him, however the Court's public documents continue to treat Otti as a suspect at large: <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda?lan=en-GB>, last visited on 12 October 2012. Accordingly, the following 23 persons are currently subject to charges by the ICC: Lubanga, Katanga, Ngudjolo, Ntaganda, Mudacumura, Kony, Otti, Odhiambo, Ongwen, Banda, Jerbo, President Al'Bashir, Harun, Kushayb, Hussein, Bemba, Ruto, Sang, Muthaura, Kenyatta, Saif Al-Islam Gaddafi, Al-Senussi, and Gbagbo. For six of these 23 individuals the Court has issued summonses to appear, rather than arrest warrants.

942 Following the termination of proceedings against Muammar Gaddafi in November 2011, the Court refers to Saif Al-Islam Gaddafi as Gaddafi. For the sake of consistency, while having referred to Saif Al-Islam Gaddafi as Saif Al-Islam in the *Gender Report Card 2011*, here we refer to him as Gaddafi.

943 'At Hague, Libya Insists It Should Try Qaddafi Son', *New York Times*, 10 October 2012, available at <http://www.nytimes.com/2012/10/11/world/africa/libya-insists-on-trying-seif-al-islam-el-qaddafi.html?_r=0>, last visited on 15 October 2012.

Since 2009, the Court has significantly increased its use of summonses to appear, with suspects and accused voluntarily making appearances at the Court to answer charges, and being allowed to remain at liberty pending court proceedings. There are six current summonses to appear, two in the Darfur Situation, for Abdallah Banda Aba Kaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo); and four in the Kenya Situation, for William Samoei Ruto (Ruto), Joshua Arap Sang (Sang), Francis Kirimi Muthaura (Muthaura), and Uhuru Muigai Kenyatta (Kenyatta). Three further summonses to appear have been issued and complied with, against Bahar Idriss Abu Garda (Abu Garda) in the Darfur Situation,[944] as well as against Henry Kiprono Kosgey (Kosgey) and Mohammed Hussein Ali (Ali) in the Kenya Situation;[945] however, there are no active proceedings against these individuals following the Pre-Trial Chambers' decisions not to confirm any charges.

To date the Court has employed a variety of diplomatic avenues to secure the appearance of indicted individuals, including the development of procedures regarding non-cooperation by States Parties. Pursuant to Article 87 of the Rome Statute, the Court 'shall have the authority to make requests to States Parties for cooperation' and 'where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.[946] Requests for cooperation can include the arrest and surrender of suspects,[947] but may also include other types of cooperation such as the identification and whereabouts of persons or the location of items, the taking of evidence or the production of evidence and expert reports, the execution of searches and seizes, the protection of victims and witnesses and the preservation of evidence.[948]

The importance of state cooperation in the execution of requests for the arrest and surrender of suspects and other forms of assistance was reaffirmed by the Assembly of States Parties (ASP) in its Declaration on Cooperation adopted at the Review Conference in Kampala, Uganda, in June 2010, which underscored 'the importance of effective and comprehensive cooperation by States, international and regional organisations so that the Court can properly fulfil its mandate' and reaffirmed 'that those States under an obligation to cooperate with the Court must do so'.[949] Cooperation has also been an important

944 Following his voluntary appearance at the confirmation of charges hearing in October 2009, the Pre-Trial Chamber declined to confirm charges against Abu Garda in February 2010, on the basis that the Prosecution had not submitted sufficient evidence to establish substantial grounds to believe that he was individually criminally responsible as a direct or indirect co-perpetrator for the attack on the Haskanita Military Group Site. This marked the first time in the Court's history that a Pre-Trial Chamber had declined to confirm any charges against an accused. ICC-02/05-02/09-243-Red. See further *Gender Report Card 2010*, p 109-111.

945 In January 2012, Pre-Trial Chamber II issued two decisions in the Kenya Situation, confirming charges against four individuals (against Ruto and Sang; and against Muthaura and Kenyatta), but declining to confirm any charges against Kosgey and Ali, on the grounds that the Prosecution had not provided sufficient evidence to prove their individual criminal responsibility. ICC-01/09-01/11-373 and ICC-01/09-02/11-382-Red.

946 Article 87(1)(a) and 87(7).

947 Pursuant to Articles 89 and 91.

948 Pursuant to Article 93 and 96. To date, a number of States Parties, including the DRC, France, Belgium, Germany, Côte d'Ivoire and the Netherlands, have provided assistance in the form of the execution of arrest warrants in the arrests of Lubanga, Katanga, Ngudjolo, Bemba, Mbarushimana and Gbagbo, and the transfer of suspects to the custody of the Court. States have also provided assistance in the form of intelligence, the provision of forensic services to the Office of the Prosecutor free of charge, the identification, and the localisation and freezing or seizure of assets. See ICC-ASP/10/40, para 15.

949 Declaration on Cooperation, 9th plenary meeting, Declaration RC/Decl.2, 8 June 2010.

topic at the annual ASP meetings, with the Court regularly providing updates on cooperation to the ASP, which has included, most recently, the acknowledgement that 'lack of cooperation and assistance or delays in executing requests have a cost. They may lead to delays in the investigation activities and other Court proceedings and operations, thereby affecting the Court's efficiency and as a consequence increasing the running costs. The delays may also affect the integrity of the proceedings.'[950] State cooperation, including the domestic implementation of the Rome Statute to facilitate the execution of cooperation requests, is also subject to ongoing discussion in The Hague Working Group of the Bureau of the ASP.

The ICC continues to remind States Parties of their obligations under the Statute to comply with cooperation requests from the Court. For instance, following indications that ICC indictee President Al'Bashir was to travel to an ICC State Party, Pre-Trial Chambers have issued a number of decisions requesting observations from those States prior to the alleged visit taking place, regarding their possible non-cooperation. At times, Pre-Trial Chambers have also officially referred a question of non-cooperation to the UN Security Council for it to take any measures it deems necessary. As described more fully below, Pre-Trial Chambers have also issued decisions making an explicit finding of non-cooperation. Following a finding of non-cooperation by the Court, referring the matter to the ASP, the ASP may also employ a number of procedures, including a formal response by way of an open letter from the President of the ASP to the State concerned,[951] as well as an informal response, including measures that may be taken by the President of the ASP, in order to respond to an impending or ongoing situation of non-cooperation.[952]

950 ICC-ASP/10/40, para 5.
951 For instance, the President of the ASP has sent letters to the Foreign Ministers of Kenya, Chad and Djibouti, on 28 August 2010, 13 September 2010 and 17 May 2011, respectively.
952 ICC-ASP/10/37, paras 13-20.

Legal basis for ICC arrest warrants

Under Article 58 of the Rome Statute, after the opening of an investigation, the Prosecutor may present evidence to the Pre-Trial Chamber and request the issuance of an arrest warrant or summons to appear.[953] On receiving a request for an arrest warrant or summons to appear from the Prosecutor, the Pre-Trial Chamber must be satisfied that the evidence provided by the Prosecutor shows reasonable grounds to believe that the suspect committed the crimes as charged.[954] The Statute further provides that an arrest warrant should be issued if the Pre-Trial Chamber decides that the arrest of the person appears necessary to ensure their appearance at trial, to ensure that they do not obstruct or endanger the investigation or court proceedings, or to prevent the person from continuing with the commission of a crime within the jurisdiction of the Court.[955]

Part 9 of the Rome Statute contains extensive provisions on international cooperation and judicial assistance. Article 86 provides that 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. Further, Article 89(1) provides that States Parties shall 'comply with requests for arrest and surrender'. Under Article 88, States Parties are required to pass implementing legislation that ensures there are procedures available for all the forms of cooperation specified in Part 9 of the Statute. In the event of a State referral of a Situation to the ICC by a State Party, such as the Uganda, the DRC, and the CAR Situations, that State is responsible for all the obligations under the Statute. However, even in cases where the Situation was initially referred to the Court by a State Party, as with the DRC, the CAR, and

953 Article 58(1), Rome Statute of the ICC.
954 Article 58(1)(a), Rome Statute of the ICC.
955 Article 58(1)(b), Rome Statute of the ICC.

Uganda, state cooperation is not guaranteed. For instance, as described below, the Arrest Warrant for Ntaganda in the DRC Situation remains outstanding, and until recently, the DRC Government had refused to arrest him, and had at one point promoted him to a senior position in the national army.

When a Situation is referred to the ICC by the UN Security Council, acting under Chapter VII of the UN Charter, the State concerned is responsible for cooperating with the Court in all matters concerning the investigation, prosecution and arrest of indicted individuals.[956] However, as described below, in both Situations that were referred to the Court by the UN Security Council (Darfur and Libya), state cooperation presents a significant and ongoing challenge and, to date, only three of the nine individuals charged in those Situations have appeared before the Court. Significantly, these three voluntarily appeared before the Court in response to a summons to appear without State interference. Both Libya and Sudan have openly refused to arrest or surrender the remaining indictees.

Lastly, when the Prosecutor opens an investigation pursuant to Article 15, as in the Kenya Situation, that State is required to cooperate under its treaty obligations as a State Party.

956 Pursuant to the terms of the UN Security Council Resolution, the State concerned must cooperate with the Court. For instance, Resolution 1593, referring the Situation in Darfur to the ICC, provides that the UN Security Council 'decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully'. Resolution 1593, UNSC, 5158th meeting, S/Res/1593 (2005), 31 March 2005, para 2. The Resolution referring the Situation in Libya to the ICC contains a similar provision. Resolution 1970, UNSC, 6491th meeting, S/1970 (2011), 26 February 2011, para 5.

Uganda

The Prosecutor opened an investigation into the Situation in Uganda in July 2004, following a referral by the Government of Uganda in January of that year. In October 2005, the Court announced that it had issued five warrants of arrest for the senior commanders of the Lord's Resistance Army (LRA) – Kony, Otti, Odhiambo, Ongwen and Lukwiya. *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen* remains the only case arising out of the Situation in Uganda. As described in the **Charges for gender-based crimes** section above, two of these five suspects, Kony and Otti, were charged with gender-based crimes.

As of 2012, it is believed that only three suspects remain at large, Kony, Odhiambo, and Ongwen. Proceedings against Lukwiya were terminated after the Court received confirmation of his death in 2006. Likewise, in September 2008, the Prosecutor indicated that it had confirmed the death of Otti and was preparing to terminate proceedings against him.[957] The arrest warrants against Kony, Odhiambo and Ongwen have been outstanding longer than any others at the ICC.

Joseph Kony is the alleged Commander-in-Chief of the LRA. A sealed Warrant for his Arrest was issued by Pre-Trial Chamber II on 8 July 2005 (unsealed on 13 October 2005).[958] Kony is charged with 12 counts of crimes against humanity, including sexual slavery, rape, enslavement, murder and other inhumane acts,[959] and 21 counts of war crimes, including inducing rape, murder, cruel treatment of civilians, pillaging, and forced enlistment of children.[960] The charges relate to crimes allegedly committed in 2003-2004 in Uganda.

957 However, the Court's public documents continue to treat Otti as a suspect at large.
958 ICC-02/04-01/05-53.
959 Pursuant to Articles 7(1)(g), 7(1)(c), 7(1)(a) and 7(1)(k).
960 Pursuant to Articles 8(2)(e)(vi), 8(2)(c)(i), 8(2)(e)(v) and 8(2)(e)(vii).

Okot Odhiambo is the alleged Deputy Army Commander of the LRA and the alleged Brigade Commander of the Trinkle and Stockree Brigades of the LRA. A sealed Warrant for his Arrest was issued by Pre-Trial Chamber II on 8 July 2005 (unsealed on 13 October 2005).[961] Odhiambo is charged with two counts of crimes against humanity, including murder and enslavement,[962] as well as eight counts of war crimes, including murder, intentionally directing an attack against a civilian population, pillaging and forced enlistment of children.[963] The charges relate to crimes allegedly committed in 2004 in Uganda.

Dominic Ongwen is the alleged Brigade Commander of the Sinia Brigade of the LRA. A sealed Warrant for his arrest was issued by Pre-Trial Chamber II on 8 July 2005 (unsealed on 13 October 2005).[964] Ongwen is charged with three counts of crimes against humanity (murder, enslavement, and other inhumane acts[965]) as well as four counts of war crimes (murder, cruel treatment, intentionally directing an attack against a civilian population, and pillaging[966]). The charges relate to crimes allegedly committed in 2004 in Uganda.

961 ICC-02/04-01/05-56.
962 Pursuant to Articles 7(1)(a) and Article 7(1)(c).
963 Pursuant to Articles 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(v) and 8(2)(e)(vii).
964 ICC-02/04-01/05-57.
965 Pursuant to Articles 7(1)(a), 7(1)(c) and 7(1)(k).
966 Pursuant to Articles 8(2)(c)(i), 8(2)(e)(i) and 8(2)(e)(v).

The Lord's Resistance Army in the DRC, the CAR, and South Sudan

Over the course of the more than 20-year conflict in Northern Uganda, the LRA is believed to be responsible for the abduction of tens of thousands of children who have been trained to fight and, in many instances, forced to kill their own family members.[967] Thousands of girls and women have been raped and sexually and domestically enslaved.[968] The LRA is a highly mobile militia group, which is known to move on foot in isolated areas on the borders of the DRC, the CAR, South Sudan and Sudan. Many of those formerly abducted have regularly referenced the physical pain caused by walking thousands of kilometres carrying heavy goods and supplies. As a further consequence, pillaging and destruction of property in already impoverished areas has been widespread.[969]

During the conflict, nearly 2 million people were displaced in IDP camps, with limited access to

967 Women's Initiatives for Gender Justice, 'Amnesty and Accountability in Uganda', unpublished article on file, May 2012; 'Uganda: The Horror', *Smithsonian Magazine*, February 2005, available at <http://www.smithsonianmag.com/people-places/uganda.html>, last visited on 15 October 2012; 'Survivors: Stories of War and Perseverance, *Enough: the project to end genocide and crimes against humanity*, available at <http://www.enoughproject.org/files/pdf/lra_survivors.pdf>, last visited on 15 October 2012; Aaron Jacobsen, 'Preventing, Demobilizing, Rehabilitating, and Reintegrating Child Soldiers in African Conflicts', *The Journal of International Policy Solutions*, Spring 2007, available at <http://irps.ucsd.edu/assets/012/6360.pdf>, last visited on 15 October 2012; 'Development and the Next Generation: World Development Report 2007', *The World Bank*, available at <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/09/13/000112742_20060913111024/Rendered/PDF/359990WDR0complete.pdf>, last visited on 15 October 2012, p 182.
968 Aaron Jacobsen, 'Preventing, Demobilizing, Rehabilitating, and Reintegrating Child Soldiers in African Conflicts', *The Journal of International Policy Solutions*, Spring 2007, available at <http://irps.ucsd.edu/assets/012/6360.pdf>, last visited on 15 October 2012; 'Surrounded: Women and Girls in Northern Uganda', *Migration Policy Institute*, June 2005, available at <http://www.migrationinformation.org/Feature/display.cfm?id=310>, last visited on 12 October 2012.
969 Women's Initiatives for Gender Justice, 'Amnesty and Accountability in Uganda', unpublished article on file, May 2012.

sanitation, clean water and sufficient food.[970] Reports indicate high levels of sexual violence within the camps, committed predominantly by family members or other camp dwellers. At the height of the conflict, thousands of people, mostly children, walked from their villages to the nearest towns every evening seeking safety in the grounds of local hospitals and churches. Girls and young women among these 'night commuters' were often victims of rape and other forms of sexual violence as they made their way to the shelters.[971]

Kony, Odhiambo and Ongwen are reported to be traveling with small groups of LRA fighters, including abducted women and children, moving between the bordering countries of the DRC, the CAR and South Sudan. Reports indicate that the LRA continues to commit significant atrocities in these regions.[972] The United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) reported that, following a lull in the latter half of 2011, the LRA's activities have increased again in 2012.[973] A total of 128 presumed LRA attacks have been reported in the CAR and the DRC between January and June 2012. Although the frequency of the reported attacks is comparable to 2011, the geographic focus of the group has changed, with no reported attacks in South Sudan in the first half of 2012,[974] and an increased presence in the CAR, where there were more attacks in the first three months of 2012 than in all of 2011.[975] Despite this shift, however, there continues to be nearly one LRA attack per week in the DRC,[976] and South Sudan continues to be affected by the activities of the LRA, with more than 57,000 people displaced due to attacks in previous years.[977]

According to the UNOCHA, in recent years, the LRA appears to have moved from a strategy that relies on high profile killings and mutilations to one that relies on short-term kidnappings and lootings. Reported deaths from LRA attacks in the DRC, the CAR, and South Sudan have declined from 335 in 2010 to 120 in 2011. However, the total numbers of people who have been displaced as a result of LRA activities has increased substantially, from 380,953 to 465,696.[978]

970 'UNHCR closes chapter on Uganda's internally displaced people', *UN High Commissioner for Refugees*, 6 January 2012, available at <http://www.unhcr.org/4f06e2a79.html>, last visited on 12 October 2012.

971 Women's Initiatives for Gender Justice, 'Amnesty and Accountability in Uganda', unpublished article on file, May 2012; 'Yearbook 2006: Unfinished Business, Chapter 11', *Small Arms Survey*, p 280-281, available at <http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2006.html>, last visited on 12 October 2012; 'Surrounded: Women and Girls in Northern Uganda', *Migration Policy Institute*, June 2005, available at <http://www.migrationinformation.org/Feature/display.cfm?id=310>, last visited on 12 October 2012; 'Thousands of 'Night Commuters' Flee to Town Centers as War Rages in Northern Uganda', *Women's Refugee Commission*, 21 January 2004, available at <http://womensrefugeecommission.org/press-room/448-thousands-of-night-commuters-flee-to-town-centers-as-war-rages-in-northern-uganda-sexual-viol>, last visited on 12 October 2012; 'Uganda: Child 'Night Commuters'', *Amnesty International*, 18 November 2005, available at <http://www.amnestyusa.org/node/54986>, last visited on 12 October 2012.

972 See also *Gender Report Card 2010*, p 90-93; *Gender Report Card 2009*, p 52-53.

973 'Humanitarian action in LRA-affected areas: Regional overview of needs and response', *United Nations Office for the Coordination of Humanitarian Affairs*, 25 June 2012, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Regional%20Overview%20of%20Humanitarian%20Needs%20and%20Response%20in%20LRA%20affected%20areas.pdf>, last visited on 12 October 2012.

974 'LRA Regional Update: Central African Republic, DR Congo and South Sudan April – June 2012', *United Nations Office for the Coordination of Humanitarian Affairs*, 16 July 2012, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report_842.pdf>, last visited on 12 October 2012.

975 'Humanitarian action in LRA-affected areas: Regional overview of needs and response', *United Nations Office for the Coordination of Humanitarian Affairs*, 25 June 2012, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Regional%20Overview%20of%20Humanitarian%20Needs%20and%20Response%20in%20LRA%20affected%20areas.pdf>, last visited on 12 October 2012.

976 'Lord's Resistance Army Update', *Sudan Human Security Baseline Assessment*, 5 July 2012, available at <http://www.smallarmssurveysudan.org/facts-figures-armed-groups-southern-sudan-LRA.php>, last visited on 12 October 2012.

977 'Humanitarian action in LRA-affected areas: Regional overview of needs and response', *United Nations Office for the Coordination of Humanitarian Affairs*, 25 June 2012, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Regional%20Overview%20of%20Humanitarian%20Needs%20and%20Response%20in%20LRA%20affected%20areas.pdf>, last visited on 12 October 2012

978 'Humanitarian action in LRA-affected areas: Regional overview of needs and response', *United Nations Office for the Coordination of Humanitarian Affairs*, 25 June 2012, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Regional%20Overview%20of%20Humanitarian%20Needs%20and%20Response%20in%20LRA%20affected%20areas.pdf>, last visited on 12 October 2012.

Domestic proceedings against the LRA

In 2009, the Government of Uganda began to implement aspects of the signed Juba peace agreements,[979] including through the establishment of the International Crimes Division (ICD),[980] which is mandated to try war crimes, crimes against humanity, genocide, terrorism, human trafficking, piracy and other international crimes defined in the Uganda International Criminal Court Act 2010 (ICC Act), the Geneva Conventions Act of Uganda (1964), and the Ugandan Penal Code Act.[981]

As of the time of writing this Report, the ICD's first case against Thomas Kwoyelo *alias* Latoni (Kwoyelo), a former senior commander/officer in the LRA, remains stalled.[982] Although Kwoyelo has been in the ICD's custody since March 2009, his trial did not begin until 11 July 2011. He was originally charged under the Ugandan 1964 Geneva Conventions Act with 12 counts of destruction of property, wilful killing and taking hostages.[983] At the start of the trial, the indictment was amended to include: murder, attempted murder, kidnapping, kidnapping with intent to murder, robbery and robbery using a deadly weapon, charged under the Ugandan Penal Code Act.[984] Kwoyelo pleaded not guilty to all charges.[985] Notably, there were no charges for gender-based crimes in this case, despite Kwoyelo's rank within the LRA and the multiple sources describing the militia's practice of assigning abducted girls and young women to senior officers and commanders for sexual and domestic purposes.[986] It is also noteworthy that no charges were brought under the Ugandan ICC Act although some of the incidents for which Kwoyelo is charged are also incidents which have been the subject of ICC investigations.[987] The Women's Initiatives and the Greater North Women's Voices for Peace Network (GNWVPN) made a statement at the opening of the ICD in July 2011, calling on the ICD to, among other things, ensure that the interests and needs of victims/survivors of sexual violence are taken into account at every stage of the proceedings.[988]

At the ICD hearing on 15 August 2011, the Defence raised several issues, including a challenge to the case on the basis of the accused's application for amnesty

979 Juba Agreement on Accountability and Reconciliation and its Annexure, signed on 29 June 2007 and 19 February 2008.

980 The War Crimes Division of the High Court, established in 2008, was reconstituted as the ICD in 2011 without having tried any cases. For a detailed discussion of developments at the War Crimes Court (WCC) and the ICD, see *Gender Report Card 2010*, p 90-93 and *Gender Report Card 2011*, p 139-141.

981 The International Crimes Division was established in 2011 pursuant to a Legal Notice issued by the Chief Justice of the High Court on 31 May 2011. ('The High Court (International Crimes Division) Practice Directions', Legal Notice no. 10 of 2011, Legal Notices Supplement, Uganda Gazette, no. 38, vol. CIV). Local women's rights and peace networks, as well as members of the legal community, continue to raise questions about the constitutionality of the ICD. Under Ugandan law the power to legislate by such notice requires the authorisation of Parliament, which was reportedly neither sought nor obtained as part of the establishment of the ICD. The Chief Justice purportedly issued the Legal Notice under powers conferred by Article 133(1)(a) and (b) of the Ugandan Constitution. However, this Article does not confer on the Chief Justice the power to legislate. The Ugandan Constitution is based on the doctrine of separation of powers. Article 133(1)(a) and (b) provide that: '(1) The Chief Justice (a) shall be the head of the judiciary and shall be responsible for the Administration and supervision of all courts in Uganda; and (b) may issue orders and directions to the courts necessary for the proper and efficient administration of justice'. Article 133(1)(a) and (b) thus does not explicitly confer on the Chief Justice the power to legislate.

982 Information on the ICD, Amnesty Act, and developments in Uganda provided by Jane Anywar Adong, Legal Officer in the Kampala Office of the Women's Initiatives for Gender Justice. The Women's Initiatives established a Legal Monitoring Programme on the ICD in 2010.

983 'Uganda Set for First War Crimes Trial', *Institute for War and Peace Reporting*, 14 July 2010, available at <http://iwpr.net/report-news/uganda-set-first-war-crimes-trial>, last visited on 15 October 2012. According to the Indictment filed by the DPP, all the attacks by the LRA that took place in Kilack County, Amuru District between 1987 and 2005 were either commanded by Kwoyelo or were carried out with Kwoyelo's knowledge and authority.

984 Amended Indictment, *Prosecutor v. Kwoyelo Thomas alias Latoni*.

985 Record of Proceedings in HCT-00-ICD-CASE No. 0002 of 2010 held in Gulu on 11 July 2011.

986 Women's Initiatives for Gender Justice, 'Amnesty and Accountability in Uganda', unpublished article on file, May 2012.

987 See *OTP Weekly Briefing*, Issue #65, 23-29 November 2010, available at <http://www.icc-cpi.int/NR/rdonlyres/7105B39A-2F30-43FF-9222-D7349BF15502/282732/OTPWBENG.pdf>, last visited on 15 October 2012, p 1.

988 See further *Gender Report Card 2011*, p 140.

under the Uganda Amnesty Act.[989] Kwoyelo applied for amnesty on 2 January 2010, but reportedly received no response from the Director of Public Prosecutions (DPP).[990] In March 2010, the Amnesty Commission wrote to the DPP requesting certification 'to enable the Amnesty Commission to grant an amnesty certificate', also with no response.[991] The Defence, in consultation and with the consent of the DPP, requested referral of these issues to the Constitutional Court, which was granted by the ICD. The Constitutional Court ultimately decided in Kwoyelo's favour and directed the ICD to stop all proceedings.[992] Appeals of this order are ongoing, and Kwoyelo remains in custody.

Under the Amnesty Act of 2000, an amnesty is 'declared in respect of any Ugandan who has, at any time since 26 January 1986, engaged in or is engaging in war or armed rebellion against the Government of the Republic of Uganda by actual participation in combat; collaborating with the perpetrators of the war or armed rebellion; committing any other crime in the furtherance of the war or armed rebellion; or assisting or aiding the conduct or prosecution of the war or armed rebellion'.[993] The Act further provides that a person who qualifies under the Act 'shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion'.[994]

989 The Defence raised issues related to amnesty, disclosure of mitigating/exculpatory evidence, and the appropriateness of proceeding under the Geneva Convention of 1949. During the Constitutional Direction Proceedings before the Registrar Court of Appeal, Defence revised these three issues, dropped the issue related to the Geneva Conventions Act, and proceeded with an issue related to the failure of the Director of Public Prosecutions to process Kwoyelo's application for amnesty. Prosecution had no objection but, with leave of court, added the issue regarding the constitutionality of sections 2, 3 and 4 of the Amnesty Act.

990 '"Witness to the Trial", Monitoring the Kwoyelo Trial', *Refugee Law Project*, Issue 1, 11 July 2011, available at <http://www.refugeelawproject.org/others/Newsletter_on_Kwoyelo_trial_progress_Issue_1.pdf>, last visited on 15 October 2012, p 1.

991 '"Witness to the Trial", Monitoring the Kwoyelo Trial', *Refugee Law Project*, Issue 1, 11 July 2011, available at <http://www.refugeelawproject.org/others/Newsletter_on_Kwoyelo_trial_progress_Issue_1.pdf>, last visited on 15 October 2012, p 1.

992 Uganda v. Thomas Kwoyelo, Constitutional Reference No. 36/2011, arising out of HCT-00-ICD-Case No. 02/10 (Constitutional Court of Uganda).

993 Section 3, Amnesty Act (CAP 294).

994 Section 3(2), Amnesty Act (CAP 294).

Conversely, the Amnesty (Amendment) Act of 2006[995] provides that a person shall not be eligible for amnesty if he or she is declared not eligible by the Minister by statutory instrument made with the approval of Parliament. However, the conditions for declaring an individual ineligible for amnesty are unclear and the powers to do so remain discretionary. Over the course of its work, the Amnesty Commission has granted more than 24,000 certificates of amnesty to ex-combatants.[996] Approximately half of the beneficiaries are individuals affiliated with the LRA, including members more senior than Kwoyelo, some of whom are allegedly responsible for the retaliatory massacres committed in the DRC by the LRA during Operation Lightning Thunder.[997] To date, no one has been denied amnesty.

Since 2008, the GNWVPN and the Women's Initiatives for Gender Justice have advocated for the Amnesty Act to be allowed to lapse and for it to be replaced by the justice and reconciliation instruments proposed under the Juba Peace Agreements. Members of the GNVWPN have criticised the Amnesty Act on the basis that it does not foster justice and reconciliation, but rather contributes to negative attitudes towards those granted amnesty.[998] The Act is considered by large sections of the community to provide support to former perpetrators, while no support is being provided to victims by the Government and district councils. In addition, according to local women's rights actors, even among those granted amnesty the 'treatment is not equal with former commanders treated considerably better than those abducted, especially the female abductees'.[999] On 25 April 2012, following several technical meetings and community consultations, the Uganda Justice, Law and Order

995 Effective as of 19 July 2006.

996 *Uganda v. Thomas Kwoyelo*, Constitutional Reference No. 36/2011, arising out of HCT-00-ICD-Case No. 02/10 (Constitutional Court of Uganda), p 24.

997 'Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division', *Human Rights Watch*, January 2012, p 14, available at <http://www.hrw.org/sites/default/files/reports/uganda0112ForUpload_0.pdf>, last visited on 15 October 2012.

998 Women's Initiatives for Gender Justice, 'Amnesty and Accountability in Uganda', unpublished article on file, May 2012; Consultations with the Greater North Women's Voices for Peace Network by the Women's Initiatives for Gender Justice, May 2012.

999 Women's Initiatives for Gender Justice, 'Amnesty and Accountability in Uganda', unpublished article on file, May 2012; Consultations with the Greater North Women's Voices for Peace Network by the Women's Initiatives for Gender Justice, May 2012.

Sector (JLOS) concurred, recommending that the Amnesty Act be permitted to lapse. Its mandate expired on 24 May 2012.[1000]

While issues with Kwoyelo's application for amnesty remain unresolved, the potential of the ICD as a source of domestic accountability remains important. On 12 May 2012, another top LRA commander, Major General Caesar Acellam, was arrested by Ugandan forces.[1001] It is not yet clear whether the ICD will try Acellam, whether he will be prosecuted in the regular courts, or whether he will be prosecuted by the army under military law. The Women's Initiatives is advocating that the ICD should hear this case, and that Acellam should not qualify for amnesty given his direct leadership role in the commission of serious crimes.

Democratic Republic of the Congo

The Situation in the Democratic Republic of the Congo (DRC) was referred by the Government of the DRC in March 2004, and a formal investigation was opened in June of that year. In opening the investigation, Prosecutor Moreno Ocampo announced that he would 'investigate grave crimes allegedly committed on the territory of the [...] DRC since 1 July 2002'.[1002] The announcement cited secondary sources that alluded to the 'thousands of deaths by mass murder and summary execution in the DRC since 2002' and which, according to the Prosecutor, point to 'a pattern of rape, torture, forced displacement and the illegal use of child soldiers'. There are five cases arising out of the Situation in the DRC: *The Prosecutor v. Thomas Lubanga Dyilo, The Prosecutor v. Bosco Ntaganda, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, The Prosecutor v. Callixte Mbarushimana*, and *The Prosecutor v. Sylvestre Mudacumura*. The Office of the Prosecutor is continuing investigations in the DRC, focusing specifically on North and South Kivu.[1003]

The ICC has issued arrest warrants against six individuals in the DRC Situation, two of which remain outstanding. The first trial in the DRC Situation, against Lubanga, was completed in August 2011. In March 2012, the Court convicted him for crimes relating to the use of child soldiers.[1004] The second trial, against Katanga and Ngudjolo, following closing arguments in May 2012, is currently awaiting the trial judgement by Trial Chamber II.[1005] While charges were brought

1000 'The Amnesty Law (2000) Issues Paper', Transitional Justice Working Group - JLOS, April 2012, available at <http://www.jlos.go.ug/uploads/JLOS-Amnesty%20Issues%20Paper%20[public%20report].pdf>, last visited on 15 October 2012, p 26.

1001 'Lord's Resistance Army Update', Small Arms Survey, 24 May 2012, available at <http://reliefweb.int/report/uganda/lord%E2%80%99s-resistance-army-update-24-may-2012>, last visited on 15 October 2012.

1002 ICC-OTP-20040623-59.

1003 'Report of the International Criminal Court to the United Nations for 2010/11', 19 August 2011, A/66/309, p 12-13.

1004 The trial judgement, sentence, and the reparations proceedings in this case are discussed in greater detail in the *First trial judgement in the Lubanga case* and *First sentencing and reparations decisions in the Lubanga case* sections of this Report, below.

1005 The closing arguments in this case are discussed more fully in the *Closing arguments in the first case including charges of gender-based crimes* section, below.

against a fourth suspect, Mbarushimana, in December 2011 the Pre-Trial Chamber declined to confirm any of these charges for trial, and as such he was released. Two individuals, Ntaganda and Mudacumura, remain at large. The issuance of a second Arrest Warrant for Ntaganda and the Arrest Warrant for Mudacumura, as well as the confirmation of charges decision in Mbarushimana, are all discussed in detail in the **Charges for gender-based crimes** section of this Report. With the exception of the Lubanga case, all of the cases in the DRC Situation to date now include charges for gender-based crimes.

Bosco Ntaganda is the alleged Deputy Chief of General Staff of the FPLC and alleged Chief of Staff of the CNDP armed group. Following the Goma Peace Agreements, signed between the DRC Government and the CNDP on 23 March 2009, Ntaganda was absorbed into the Congolese Army (FARDC), where he was appointed to the rank of General. In April 2012, Ntaganda was involved in a mutiny against the Congolese Army, leading to the emergence of the *Mouvement du 23 Mars* (M23 movement). A sealed Arrest Warrant for Ntaganda was issued on 22 August 2006 by Pre-Trial Chamber I (unsealed on 28 April 2008),[1006] which charged Ntaganda with six counts of war crimes, including enlistment and conscription of children under the age of 15, and using children under the age of 15 to participate actively in hostilities.[1007] A second Arrest Warrant was issued by Pre-Trial Chamber II on 13 July 2012,[1008] including charges for rape and sexual slavery, murder and persecution as crimes against humanity,[1009] and rape and sexual slavery, murder, attacks against the civilian population and pillaging as war crimes.[1010] The charges relate to crimes allegedly committed in the Ituri region of Eastern DRC in 2002-2003.

1006 ICC-01/04-02/06-2-Anx-tENG.
1007 Pursuant to Articles 8(2)(b) (xxvi) and 8(2)(e)(vii), 8(2)(b)(xxvi) and 8(2)(e)(vii), and 8(2)(b)(xxvi) and 8(2)(e)(vii).
1008 ICC-01/04-02/06-36-Red.
1009 Pursuant to Articles 7(1)(g), 7(1)(a) and 7(1)(h).
1010 Pursuant to Articles 8(2)(e)(vi), Article 8(2)(c)(i), 8(2)(e)(i) and 8(2)(e)(v).

Sylvestre Mudacumura is the alleged Supreme Commander of the FDLR, an alleged member of the FDLR Steering Committee and President of the High Command, making him the highest-ranking military commander in the FDLR. The Arrest Warrant for Mudacumura was issued on 13 July 2012[1011] by Pre-Trial Chamber II, charging him with nine counts of war crimes: attacks against a civilian population, murder, rape, torture, mutilation, cruel treatment, destruction of property, pillage, and outrages upon personal dignity.[1012] The charges relate to crimes allegedly committed in North and South Kivu, Eastern DRC in 2009-2010.

Continued conflict and rising security concerns in Eastern DRC

The security situation in Eastern DRC has deteriorated significantly in the last year, especially following the defection of Ntaganda and other former CNDP members from the FARDC in April 2012, and the creation of a new movement, the M23, which caused an increase in clashes between different armed groups.

The *Mouvement du 23 Mars* (M23) is named in reference to peace agreements signed in Goma on 23 March 2009 which absorbed members of the CNDP into the Congolese Army.[1013] Immediately after the signing of the Goma Agreement, the Women's Initiatives expressed concern to the Secretary General of the UN about specific aspects of the Agreement, including about the lack of a vetting mechanism for combatants prior to their integration into the Army, the absence of provisions in the Agreement requiring formal retraining of CNDP police and combatants, and the amnesty provisions applying to the CNDP. The Women's Initiatives raised concerns that the absence of such measures and the possibility of amnesty could contribute to the repeated perpetration of gender-based crimes, as well as other crimes, by CNDP

1011 ICC-01/04-01/12-1-Red.
1012 Pursuant to Articles 8(2)(e)(i), 8(2)(c)(i), 8(2)(e)(vi), 8(2)(c)(i)-4, 8(2)(c)(i)-2, 8(2)(c)(i)-3, 8(2)(e)(xii), 8(2)(e)(v) and 8(2)(c)(ii).
1013 Members of M23 allege that the Government has failed to abide by the 2009 agreement and their demands include a more substantive political integration and recognition of the CNDP within the Congolese Army. See 'Face to face with the rebels of DR Congo', *Al Jazeera*, 28 May 2012, available at <http://www.aljazeera.com/indepth/features/2012/05/20125287218448259.html>, last visited on 15 October 2012.

personnel, especially by those who had committed these crimes in the past.[1014] These concerns were conveyed to the UN Secretary General in June 2009 in an Open Letter from the Women's Initiatives, signed by 65 partners in Eastern DRC, representing over 180 local women's and human rights organisations.[1015] This analysis of the Goma Agreement was confirmed in October 2009 by Professor Philip Alston, UN Special Rapporteur on extra-judicial killings, who stated that attacks on civilians by the FARDC had escalated, in his opinion, due to the lack of training and the failure to fully integrate former armed group members belonging to the CNDP.[1016] These concerns were further confirmed by the convictions of members of the regular army, led by a former CNDP member, for rape as a crime against humanity.[1017]

In its interim report submitted to the UN Security Council on 18 June 2012, including an addendum submitted on 25 June,[1018] the UN Group of Experts on the DRC (GoE)[1019] expressed concern over the security situation in the DRC following the defection of former CNDP members of the Congolese Army. The GoE's report focuses specifically on the status of foreign and Congolese armed groups that continue to operate in the DRC, the ongoing mutiny in North and South Kivu, and the emergence of the M23 movement and its resulting impact on civilians.

In an addendum to the interim report, the GoE concluded that there is substantial evidence that the Rwandan Government is providing material and financial support to armed groups operating in the Eastern DRC, including the M23.[1020] Beginning at the earliest stages of M23's inception, the GoE documented a systematic pattern of military and political support provided to the rebellion by Rwandan authorities. In particular, the GoE alleged that the Rwandan Government: directly assisted in the creation of M23 by transporting weapons and soldiers through Rwandan territory, including by opening a supply route through Rwanda to Runyoni; recruited Rwandans and Congolese refugees for M23, including children under the age of 18; provided weapons and ammunition to M23; mobilised and lobbied political and financial leaders for the benefit of M23, including by convening meetings with influential community leaders to convey the message that the Rwandan Government supports M23; directed the Rwandan Defence Force (RDF) to reinforce M23 units on the battlefield against the Congolese army; deployed RDF units to the DRC to reinforce specific M23 operations; and provided support to other armed groups, including the FARDC.[1021] Notably, Ntaganda and Makenga, M23's military leader, have reportedly regularly crossed the border into Rwanda to meet with senior RDF officers, to coordinate operations and supplies.[1022] Movements across the border have also been reported on several occasions by the Women's Initiatives' partners.

The Rwandan Government has categorically denied the allegations set out in the addendum and on 27 July 2012, filed an official response to the report, seeking to characterise the addendum as a political attack, arguing that it is a 'carefully orchestrated media and political strategy to cast Rwanda as the villain in this new wave

1014 See the May 2009 issue of *Women's Voices eLetter*, available at <http://www.iccwomen.org/news/docs/Womens_Voices_May_2009/WomVoices_May09.html>.

1015 The Open Letter is available at <http://www.iccwomen.org/publications/Open_Letter.pdf>.

1016 'Press statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions. Mission to the Democratic Republic of the Congo, 5-15 October 2009', OHCHR, 15 October 2009, available at <http://www2.ohchr.org/english/issues/executions/docs/PressStatement_SumEx_DRC.pdf>, last visited on 15 October 2012. See also the December 2009 issue of *Women's Voices e-letter*, available at <http://www.iccwomen.org/news/docs/Womens_Voices_Dec2009/Womens_Voices_Dec2009.html>.

1017 For more information about the Baraka trial see Women's Initiatives for Gender Justice, 'Commanding officer convicted of mass rape in Fizi', *Womens Voices eLetter*, April 2011, available at <http://www.iccwomen.org/WI-WomVoices0411/WomVoices0411.html#2>.

1018 The release of the interim report was reportedly delayed due to objections raised by the United States about the inclusion of information that implicates the Government of Rwanda in the M23 rebellion. Senior American officials reportedly felt that the issue of Rwanda's involvement in the armed rebellion would be better pursued through quiet diplomacy. See 'Is the U.S. blocking a controversial U.N. report to shield Rwanda?', *Foreign Policy*, 20 June 2012, available at <http://turtlebay.foreignpolicy.com/posts/2012/06/20/is_the_us_blocking_a_controversial_un_report_to_shield_rwanda>, last visited on 15 October 2012; 'UN Report on Rwanda fuelling Congo conflict "blocked by US" ', *The Guardian*, 20 June 2012, available at <http://www.guardian.co.uk/world/2012/jun/20/rwanda-congo-conflict-blocked-us?cat=world&type=article>, last visited on 15 October 2012.

1019 The UN Group of Experts on the DRC was established by the UN Secretary General in 2004, pursuant to UN Security Council Resolution 1533, S/Res/1533 (2004), adopted by the UN Security Council at its 4926th meeting, on 12 March 2004.

1020 Addendum to the interim report of the Group of Experts on the Democratic Republic of the Congo (S/2012/348) concerning violations of the arms embargo and sanctions regime by the Government of Rwanda, S/2012/248/Add.1, hereinafter 'Addendum to GoE Report on DRC'.

1021 Addendum to GoE Report on DRC, p 7-14, 16-23.

1022 Addendum to GoE Report on DRC, p 17.

of tensions in the Eastern DRC'.[1023] According to the Government of Rwanda, the 'fundamental weakness' of the addendum is that it relies on conjecture, speculation, and the testimony of unidentified witnesses, and thus many of its accusations are both impossible to verify or to disprove.[1024]

As a result of the allegations against Rwanda set out in the addendum to the GoE report, the United States of America announced that it would withhold all military aid and training to Rwanda for this fiscal year.[1025] This signals a significant change in policy for the United States, which had been one of Rwanda's strongest allies in the period following the 1994 genocide in Rwanda. Other donor countries, including the United Kingdom, the Netherlands and Germany, have also withheld aid to Rwanda.[1026]

1023 'Rwanda's response to the allegations contained in the addendum to the UN Group of Experts interim report', *Republic of Rwanda, Ministry of Foreign Affairs and Cooperation*, 27 July 2012, para 2, available at <http://www.minaffet.gov.rw/fileadmin/templates/minaffet/doc/Rwanda%27s%20Response.pdf>, last visited on 15 October 2012.

1024 'Rwanda's response to the allegations contained in the addendum to the UN Group of Experts interim report', Republic of Rwanda, Ministry of Foreign Affairs and Cooperation, 27 July 2012, para 3, available at <http://www.minaffet.gov.rw/fileadmin/templates/minaffet/doc/Rwanda%27s%20Response.pdf>, last visited on 15 October 2012.

1025 The United States will, however, continue to support Rwandan peacekeeping missions, for instance in Darfur. 'DRC conflict leads US to stop military aid to Rwanda', *Radio Netherlands WorldWide*, 22 July 2012, available at <http://www.rnw.nl/africa/article/drc-conflict-leads-us-stop-military-aid-rwanda>, last visited on 15 October 2012; Emailed statement by Hilary Fuller Renner, US State Department spokeswoman, cited in 'DRC conflict leads US to stop military aid to Rwanda', *Radio Netherlands WorldWide*, 22 July 2012, available at <http://www.rnw.nl/africa/article/drc-conflict-leads-us-stop-military-aid-rwanda>, last visited on 15 October 2012.

1026 'UK and the Netherlands withhold Rwanda budget aid', *BBC News*, 27 July 2012, available at <http://www.bbc.co.uk/news/world-africa-19010495>, last visited on 15 October 2012; 'Germany suspends Rwanda aid', *Deutsche Welle*, 28 July 2012, available at <http://www.dw.de/dw/article/0,,16129347,00.html>, last visited on 15 October 2012.

Bosco Ntaganda and the emergence of M23

Until the end of 2011, Ntaganda exercised de facto operational command of FARDC soldiers in North and South Kivu.[1027] In order to protect his security and economic interests, he placed loyal ex-CNDP officers in important command positions and deployed predominantly CNDP units to areas of strategic importance. Similarly, in the build-up to the legislative elections in November 2011, Ntaganda used his power to force the election of CNDP candidates in Massisi.[1028]

In early 2012, there was renewed international pressure for the arrest of Ntaganda and in a public statement in April, the DRC President Joseph Kabila indicated that he was considering Ntaganda's arrest.[1029] The statement signalled a policy shift, as the Government of the DRC has previously refused to arrest Ntaganda on the basis that his presence was essential to the peace process in North and South Kivu.[1030] Despite this policy shift, the DRC Government has expressed the intention to try Ntaganda domestically, rather than surrender him to the ICC, should it be successful in arresting him.[1031] Fearing arrest, in March 2012, Ntaganda strengthened the ex-CNDP presence in Goma, deploying approximately 200 soldiers to protect the streets surrounding his residence.[1032]

1027 UN Group of Experts Report established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, S/2012/346, 21 June 2012 (hereinafter 'UN GoE Report on DRC'), p 15-17.

1028 UN GoE Report on DRC, p 15-17. The results of the elections were initially annulled by the Supreme Court in April 2012. However in October 2012, it is reported that, because of the inability of the electoral commission to organise new elections, the results were validated. 'Nord-Kivu: certaines communautés désapprouvent les résultats des legislatives pour Masisi', *Radio Okapi*, 3 October 2012, available at <http://radiookapi.net/actualite/2012/10/03/nord-kivu-certaines-communautes-desapprouvent-les-resultats-des-legislatives-pour-masisi/>, last visited on 15 October 2012.

1029 'Congo's 'terminator': Kabila calls for Ntaganda arrest', *BBC News*, 11 April 2012, available at <http://www.bbc.co.uk/news/world-africa-17683196>, last visited on 15 October 2012.

1030 'DR Congo: Arrest Bosco Ntaganda for ICC Trial', *Human Rights Watch*, 13 April 2012, available at <http://www.hrw.org/news/2012/04/13/dr-congo-arrest-bosco-ntaganda-icc-trial>, last visited on 15 October 2012.

1031 'Amnesty International's efforts to ensure the arrest of Bosco Ntaganda', *Amnesty International*, 19 April 2012, available at <http://www.amnesty.org/en/news/amnesty-international-s-efforts-ensure-arrest-bosco-ntaganda-2012-04-19>, last visited on 15 October 2012.

1032 UN GoE Report on DRC, p 18.

In April 2012, Ntaganda defected from the FARDC and helped to orchestrate a mutiny against the army leadership, involving an estimated 300 to 600 soldiers.[1033] Amid Ntaganda's mounting fears over an imminent arrest and unease within the CNDP at the prospect of reforms within the army which would result in the loss of certain privileges, ex-CNDP officers launched mutinies in both North and South Kivu, deserting the army and regrouping at specified assembly points in order to drive FARDC loyalists out of military bases.[1034] The GoE report indicated that 'despite Government efforts to block his exit from Goma, Ntaganda managed to flee to Massisi on 7 April 2012', eventually retreating with his troops on 4 May 2012 to establish a new front in Rutshuru.[1035] Subsequently, on 6 May 2012, the CNDP issued a statement, announcing the creation of the M23 movement.[1036]

On 13 August 2012, Women's Initiatives' partners in the DRC reported that M23 raised their own flag at Rutshuru, with soldiers continuing to defect from the FARDC to join M23. Subsequently, on 17 August 2012, M23 established a parallel government in the Rutshuru Territory, North Kivu, on the border with Rwanda, and appointed Jean-Marie Runiga Lugerero as its President, Colonel Sultani Makenga as its military commander, and François Rucogoza Tuyihimbaze as the Executive Secretary.[1037] M23 has distanced itself from Ntaganda, stating that he is not in a position to assume a high command role, and that officers have been advised to stop responding to Ntaganda's orders. However, unofficial sources indicate that Ntaganda continues to be considered the highest commander of the movement.[1038]

The security situation in Eastern DRC has deteriorated following the recent mutiny; civilians continue to suffer abuses from both armed groups and the Congolese security forces, and reprisal attacks remain common.[1039] Women's Initiatives' partners in North and South Kivu have reported mass displacement and increased violence since Ntaganda's defection in April, and continued human rights violations, including rape, forced recruitment of child soldiers, killings and pillage, committed not only by the M23, but also by other armed groups, including the FDLR. Significantly, Women's Initiatives' partners have reported infiltrations of armed groups from Rwanda and Burundi, and indicated that several armed groups have joined M23 since its creation.

An unforeseen consequence related to the emergence of M23 has been the creation of a 'security vacuum' in North and South Kivu, as security forces have been pulled to Rutshuru from other fragile areas, creating room for armed groups to battle for control of towns.[1040] The rebellion has had further significant humanitarian consequences. The clashes in Massisi provoked a wave of displaced persons and refugees; humanitarian agencies registered 45,000 displaced persons and over 6,750 refugees in April and May alone.[1041] Between 19 April and 4 May, Ntaganda's troops forcibly recruited at least 149 boys and young men in areas near Massisi, including at least 48 children under the age of 18.[1042]

On 10 May 2012, women in Goma organised a sit-in to demonstrate against the deterioration of the security situation in North and South Kivu, which was attended by more than 80 women, who protested against impunity and the ongoing high levels of violence in the DRC. Subsequently, on 16 August 2012, women's rights activists, including Women's Initiatives' partners, demonstrated against the ongoing insecurity at the International Conference on the Great Lakes Region (ICGLR), which was held to address issues related to peace and security in the region. Although women's groups requested a meeting with State representatives, this request was denied. Partners further report that civilians in Eastern DRC do not wish to engage in dialogue with the mutineers in order to negotiate a resolution to the violence.

1033 'DR Congo: Bosco Ntaganda recruits children by force', *Human Rights Watch*, 16 May 2012, available at <http://www.hrw.org/news/2012/05/15/dr-congo-bosco-ntaganda-recruits-children-force>, last visited on 15 October 2012.
1034 UN GoE Report on DRC, p 18.
1035 UN GoE Report on DRC, p 23-24.
1036 'Face to face with the rebels of DR Congo', *Al Jazeera*, 28 May 2012, available at <http://www.aljazeera.com/indepth/features/2012/05/20125287218448259.html>, last visited on 15 October 2012.
1037 Communiqué Officiel N°0026/M23/2012, M23, 20 August 2012, available at <http://www.m23mars.org/communique-officiel-n0026m232012.html/>, last visited on 15 October 2012.
1038 UN GoE Report on DRC, p 27.
1039 UN GoE Report on DRC, p 43-47.
1040 'Eastern Congo reaches new depths of suffering as militias take control', *Oxfam America*, 7 August 2012, available at: <http://www.oxfamamerica.org/press/pressreleases/eastern-congo-reaches-new-depths-of-suffering-as-militias-take-control>, last visited on 15 October 2012.
1041 UN GoE Report on DRC, p 24.
1042 'DR Congo: Bosco Ntaganda recruits children by force', *Human Rights Watch*, 16 May 2012, available at <http://www.hrw.org/news/2012/05/15/dr-congo-bosco-ntaganda-recruits-children-force>, last visited on 15 October 2012; see also Addendum to GoE Report on DRC, p 4-7.

Reports of sexual violence

Women and children continue to be targets of sexual violence, and the UN GoE noted an increase in the reported cases of sexual violence in Eastern DRC, particularly in North and South Kivu, since the commencement of the instability in the region.[1043] Groups allegedly responsible for increased sexual violence include the Congolese army, M23, the FDLR, the Mai Mai Cheka and Raia Motumboki, as well as smaller armed groups, such as the Mai Mai Nyatura and *Force de défenses pour le droits humains* (FDH).[1044]

Since October 2009, a special mobile gender justice court convened by the Government of the DRC[1045] has been operating in Eastern DRC to try cases of rape and sexual violence, with potential jurisdiction over other crimes as well. In February 2011, the first FARDC commanding officer and the first military figure within the DRC to have been charged with sexual violence as a crime against humanity, Lieutenant-Colonel Kibibi, was convicted and sentenced to 20 years imprisonment by the mobile court for mass rape as a crime against humanity in relation to the 2011 New Year's Day attack in Fizi, South Kivu.[1046] It has been reported that between October 2009 and August 2011, the mobile court has heard 248 cases, with 44 acquittals, 140 convictions for rape and 49 convictions for other offenses, and has resolved 15 cases outside of the mobile court system.[1047]

Despite the convictions by the mobile gender justice courts, impunity for sexual violence in Eastern DRC continues. There has been little progress, for example, in the trial and in the arrest of those accused of perpetrating the mass rape in Walikale in July and August 2010. In early December 2011, the military court for North Kivu decided to relocate the trial to where the crimes had occurred in Walikale territory. To date, security concerns have not allowed the court to sit in Walikale and the trial has stalled. In late April 2012, the NDC attacked the FARDC and the police camps in Luvungi, where most of the 2010 rapes had taken place, and stole the police's equipment.[1048]

1043 UN GoE Report on DRC, p 44.

1044 UN GoE Report on DRC, p 44.

1045 Funded by the Open Society Initiative for Southern Africa (OSISA) and the Open Society Justice Initiative (OSJI), and implemented by the American Bar Association Rule of Law Initiative, the special mobile gender justice court aims at making justice accessible to victims/survivors living in remote areas of South Kivu, Eastern DRC, and complements ICC prosecutions of sexual and gender-based crimes in the province. The special mobile gender court focuses on cases of rape and sexual violence, but can also try other crimes.

1046 For more information about the Kibibi trial, see *Gender Report Card 2011*, p 147. For more information about the New Year's Day attack in Fizi, see Women's Initiatives for Gender Justice, 'More mass rape reported in the Kivus after the incidents in the Walikale Territory', *Women's Voices eLetter*, January 2011, available at <http://www.iccwomen.org/news/docs/Womens_Voices_Jan11/WomVoices1-11.html#1>.

1047 'Justice in the DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo', *Open Society Foundations*, June 2012, available at <http://www.soros.org/publications/justice-drc-mobile-courts-combat-rape-and-impunity-eastern-congo>, last visited on 15 October 2012.

1048 UN GoE Report on DRC, p 44.

Darfur

The Situation in Darfur was referred to the ICC on 31 March 2005 by the UN Security Council, pursuant to Rome Statute Article 13(b), which permits the Security Council to refer a Situation to the Prosecutor where genocide, crimes against humanity and/or war crimes 'appear to have been committed' in that State.[1049] Sudan is not a State Party to the Rome Statute, and has not cooperated with the ICC's investigations since 2007.[1050] There are currently four cases in the Situation in Darfur, Sudan: *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali-Al-Rahman, The Prosecutor v. Omar Hassan Ahmad Al'Bashir, The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, and *The Prosecutor v. Adbel Raheem Muhammad Hussein*.

The Situation in Darfur includes the largest number of arrest warrants and summonses to appear of all of the Situations before the Court, with seven named suspects. While all of the suspects for whom summonses to appear have been issued – namely Abu Garda, Banda, and Jerbo – have voluntarily appeared before the Court, all four of the arrest warrants remain outstanding. As in previous years, Sudan's failure to cooperate with the Court remains a major issue, and President Al'Bashir continues to enjoy support from a number of States, including States Parties to the Rome Statute as well as the African Union. As described below, the ICC indictees remain at large in a difficult context, with growing unrest and civil protests across Sudan, continued violence in the South Kordofan and Blue Nile regions, a compromised peace process for Darfur, and ongoing violations of international law.[1051]

Omar Hassan Ahmad Al'Bashir has been the President of Sudan since 16 October 1993. A first Arrest Warrant was issued by Pre-Trial Chamber I on 4 March 2009,[1052] and a second Arrest Warrant was issued on 12 July 2010. Al'Bashir has been charged with five counts of crimes against humanity –rape, murder, extermination, forcible transfer of population and torture[1053] – two counts of war crimes –intentionally directing attacks against a civilian population or against civilians not taking part in hostilities, and pillaging[1054]– and three counts of genocide – genocide by killing, genocide by causing serious bodily or mental harm, including through sexual violence, and genocide by deliberately inflicting each target group conditions of life calculated to bring about the group's physical destruction.[1055] The charges relate to crimes allegedly committed in Darfur in 2003-2008.

1049 United Nations Security Council, Resolution 1593 (2005), 31 March 2005, S/Res/1593.

1050 Prosecutor of the International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)', New York, 11 June 2010, para 11, available at <http://www.icc-cpi.int/NR/rdonlyres/9AE1D7E1-4083-4D19-9FB8-46EADDB42D83/282156/FinalformattedspeechUNSC_11062010postdeliveryclean.pdf>, last visited on 15 October 2012; Prosecutor of the International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)', New York, 5 June 2010, available at <http://www.icc-cpi.int/NR/rdonlyres/CBAD6E54-6C8D-4F43-BE64-74A91C49275D/0/StatementUNSCdarfur5June2011.pdf>, last visited on 15 October 2012.

1051 Amira Khair, Sudan Programme Officer for the Women's Initiatives for Gender Justice, provided information and feedback for the section on Darfur.

1052 ICC-02/05-01/09-1.

1053 Pursuant to Articles 7(1)(g), 7(1)(a), 7(1)(b), 7(1)(d) and 7(1)(f).

1054 Pursuant to Articles 8(2)(e)(i) and 8(2)(e)(v).

1055 Pursuant to Articles 6(a), 6(b) and 6(c).

Ahmad Muhammad Harun is currently the Governor of South Kordofan, a key strategic and oil-rich province, which borders both Darfur and Abyei and is the subject of disputes between Sudan and South Sudan. Harun is the former Minister of State for the Interior of the Government of Sudan and the former Minister of State for Humanitarian Affairs. An Arrest Warrant for Harun was issued by Pre-Trial Chamber I on 27 April 2007.[1056] Harun is charged with 20 counts of crimes against humanity – Including rape, persecution, murder, forcible transfer of population, inhumane acts, imprisonment or severe deprivation of liberty, and torture[1057] – and 22 counts of war crimes – including rape, outrages upon personal dignity, murder, attacks against the civilian population, destruction of property and pillaging.[1058] The charges relate to crimes allegedly committed in Darfur in 2003-2004.

Abdel Raheem Muhammad Hussein is currently the Minister of National Defence in the Republic of Sudan. He is formerly the Minister of Interior and the Special Representative of the President in Darfur, and in this capacity he worked closely with Harun and Kushayb as well as with President Al'Bashir. The Arrest Warrant for Hussein was issued by Pre-Trial Chamber I on 1 March 2012.[1059] Hussein is charged with seven counts of crimes against humanity – rape, persecution, murder, forcible transfer of population, inhumane acts, imprisonment or severe deprivation of liberty and torture[1060] – and six counts of war crimes – rape, outrages upon personal dignity, attacks against the civilian population, murder, destruction of property and pillage.[1061] The charges relate to crimes allegedly committed in Darfur in 2003-2004.

1056 ICC-02/05-01/07-2.

1057 Pursuant to Articles 7(1)(g), 7(1)(h), 7(1)(a), 7(1)(d), 7(1)(k), 7(1)(e) and 7(1)(f).

1058 Pursuant to Articles 8(2)(e)(vi), 8(2)(c)(ii), 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(xii) and 8(2)(e)(v).

1059 ICC-02/05-01/11-2.

1060 Pursuant to Articles 7(1)(g), 7(1)(h), 7(1)(a), 7(1)(d), 7(1)(k), 7(1)(e) and 7(1)(f).

1061 Pursuant to Article 8(2)(e)(vi), 8(2)(c)(ii), 8(2)(e)(i), 8(2)(c)(i), 8(2)(e)(xii) and 8(2)(e)(v). While the press release of the ICC announcing the issuance of the Arrest Warrant indicates Hussein has been charged with 20 counts of crimes against humanity and 21 counts of war crimes, as noted, the Arrest Warrant against Hussein appears to have simplified the charges, grouping different counts for a similar crime under one charge.

Ali Muhammad Ali Abd-Al-Rahman (Kushayb) is allegedly a senior Janjaweed commander. An Arrest Warrant for Kushayb was issued by Pre-Trial Chamber I on 27 April 2007.[1062] Kushayb is charged with 22 counts of crimes against humanity – including rape, persecution, murder, forcible transfer of population, inhumane acts, imprisonment or severe deprivation of liberty, and torture[1063] – and 28 counts of war crimes – including rape, outrages upon personal dignity, violence to life and person, attacks against the civilian population, destruction and pillaging.[1064] Kushayb was arrested by the Government of Sudan in 2007 and re-arrested in 2008. However, he was released on both occasions and never turned over to the ICC. Following the issuance of an Arrest Warrant for Sudanese Defence Minister Hussein in 2012, Kushayb reportedly oversaw an operation designed to destroy the evidence of mass graves in the Wadi Salih area of West Darfur. Reports indicated that individuals working under Kushayb were instructed to hire new settlers to burn all traces of bodies and bones and to destroy all evidence of extra-judicial killing by the governments and its militias.[1065] The charges against Kushayb relate to crimes allegedly committed in Darfur in 2003-2004.

Conflict in South Kordofan and Blue Nile Regions

Although South Sudan seceded peacefully on 9 July 2011, violent conflict continues in the border states of South Kordofan and Blue Nile. There are reports of ongoing cross-border violence, aerial assaults by Sudan, heavy shelling, destruction of property, arbitrary arrests and detentions, extrajudicial killings, sexual violence, and widespread population displacement.[1066] According to observers, conditions

1062 ICC-02/05-01/07-3.

1063 Pursuant to Articles 7(1)(g), 7(1)(h), 7(1)(a), 7(1)(d), 7(1)(k), 7(1)(e) and 7(1)(f).

1064 Pursuant to Articles 8(2)(e)(vi), 8(2)(c)(ii), 8(2)(c)(i), 8(2)(e)(i), 8(2)(e)(xii) and 8(2)(e)(v).

1065 'Authorities hire new settlers to destroy evidence of mass graves', *Radio Dabanga*, 5 April 2012, available at <http://www.radiodabanga.org/node/28085>, last visited on 15 September 2012.

1066 United Nations Security Council Resolution 2046, 2 May 2012, S/RES/2046 (2012); 'Sudan: Crisis Conditions in Southern Kordofan', *Human Rights Watch*, 4 May 2012, available at <http://www.hrw.org/news/2012/05/04/sudan-crisis-conditions-southern-kordofan>, last visited on 15 October 2012.

in the border region have reached the threshold of a 'great humanitarian catastrophe' and a 'humanitarian crisis'.[1067]

Tensions between the Governments of Sudan and South Sudan escalated on 9 April 2012, when South Sudan's armed forces reportedly entered Heglig in South Kordofan and occupied Sudan's oil production forces. More than 20,000 civilians were displaced amidst the resulting armed clashes. Although it was reported that Sudan eventually gained control of Heglig on 20 April 2012, both sides have continued to engage in cross-border conflict.[1068] It is notable that Hussein, as the Minister of Defense, faced heavy criticism in the wake of the South Sudanese attack on Heglig and many Sudanese Members of Parliament called for his resignation.[1069]

1067 'In Sudan, seeing echoes of Darfur', *The New York Times*, 18 February 2012, available at <http://www.nytimes.com/2012/02/19/opinion/sunday/kristof-in-sudan-seeing-echoes-of-darfur.html>, last visited on 15 October 2012; 'Sudan: crisis conditions in Southern Kordofan', *Human Rights Watch*, 4 May 2012, available at <http://www.hrw.org/news/2012/05/04/sudan-crisis-conditions-southern-kordofan>, last visited on 15 October 2012.

1068 'Updated: SPLA claim seizure of South Kordofan's Heglig oil area', *Sudan Tribune*, 10 April 2012, available at <http://www.sudantribune.com/SPLA-claim-seizure-of-South,42191>, last visited on 15 October 2012; United Nations Office for the Coordination of Humanitarian Affairs, 'Sudan Humanitarian Update', 2nd Quarter 2012, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_4230.pdf>, last visited on 15 October 2012; International Displacement Monitoring Centre, 'IDP News Alert', 3 May 2012, available at <http://reliefweb.int/report/kenya/idp-news-alert-3-may-2012>, last visited on 15 October 2012.

1069 'Sudan: Bashir says South Sudan opted for war, vows retake of Heglig', *All Africa*, 12 April 2012, available at <http://allafrica.com/stories/201204130242.html>, last visited on 15 October 2012; 'Sudan says liberation of Heglig "really close", negotiations with south suspended', *Sudan Tribune*, 12 April 2012, available at <http://www.sudantribune.com/Sudan-says-liberation-of-Heglig,42216>, last visited on 15 October 2012; 'Sudan: Defense Minister under pressure to resign over Heglig's takeover', *All Africa*, 14 April 2012, available at <http://allafrica.com/stories/201204160308.html>, last visited on 15 October 2012; 'Sudanese MP's demand probe against those responsible for the fall of Heglig', *Sudan Tribune*, 16 April 2012, available at <http://www.sudantribune.com/Sudanese-MP-s-demand-probe-against,42290>, last visited on 15 October 2012.

Ongoing violations of international law

Citing the continuous and indiscriminate airstrikes, the arbitrary detentions, and the widespread rape of women and children, independent observers have concluded that actions taken by Government forces in South Kordofan are in serious violation of international humanitarian law and could amount to war crimes.[1070] In this context, in April 2012, *Al Jazeera* released footage of Harun addressing troops before a battle with rebel fighters, which may be interpreted as encouraging war crimes. The footage, which is undated, shows Harun addressing soldiers before they entered rebel territory, saying: 'You must hand over the place clean. Swept, rubbed, crushed. Don't bring them back alive. We have no space for them.' An army commander standing next to Harun adds: 'Don't bring them back, eat them alive'.[1071]

Then-Prosecutor Moreno Ocampo responded to the footage by renewing calls for Harun's arrest, saying:

> A commander has a responsibility to ensure that his troops are not violating the law. He cannot encourage them to commit crimes. 'Take no prisoners' means a crime against humanity or a war crime, because if the prisoner was a combatant it is a war crime and if the prisoner was a civilian it's a crime against humanity.'[1072]

In a statement on 3 April 2012, Baroness Catherine Ashton, the foreign policy chief of the European Union stated:

> I am alarmed at video footage showing Ahmed Haroun, the Governor of Southern Kordofan, urging Sudanese soldiers to take no prisoners during fighting in Southern Kordofan and a Government of Sudan spokesman defending these statements. A deliberate policy of taking no prisoners during armed conflicts constitutes a war crime. The Geneva Conventions prohibit ordering that there shall be no survivors. The Government of Sudan must ensure that the Sudan Armed Forces abide by international humanitarian law at all times.[1073]

1070 'Sudan: crisis conditions in Southern Kordofan', *Human Rights Watch*, 4 May 2012, available at <http://www.hrw.org/news/2012/05/04/sudan-crisis-conditions-southern-kordofan>, last visited on 15 October 202.

1071 'Sudan Governor to Troops: Take No Prisoners', *Al Jazeera*, 1 April 2012, available at <http://www.aljazeera.com/news/africa/2012/03/201233111443351997l.html>, last visited on 15 October 2012.

1072 'Sudan Governor to Troops: Take No Prisoners', *Al Jazeera*, 1 April 2012, available at <http://www.aljazeera.com/news/africa/2012/03/201233111443351997l.html>, last visited on 15 October 2012.

1073 'EU condemns Sudan governors "take no prisoners' call"', Al Arabiya News, 3 April 2012, available at <http://english.alarabiya.net/articles/2012/04/03/205220.html>, last visited on 15 October 2012.

The Sudanese Government has defended Harun, stating that his comments were 'not interpreted correctly', and that he did not order the soldiers to kill civilians but to kill rebels, which was justifiable in the context of a war. Rabi Abdel Atti, a senior adviser to Sudan's information ministry, was reported as saying: 'What do you want us to do if rebels come and invade the area and threaten civilians and disturb peace and security in the area? I think that what is said by the governor is absolutely correct to confront those. They are coming to kill our soldiers and our soldiers have a right to kill them.'[1074]

Harun has accused *Al Jazeera* of editing the video to distort his statements. According to Harun, 'Rub it, crush it and sweep it' is a slogan used by Sudan's Central Reserve forces. He has alleged that the word 'don't' was added to the phrase 'bring them back alive' in order to link his actions to the charges that have been brought against him by the ICC. Harun has indicated that he will begin legal proceedings against *Al Jazeera*.[1075]

1074 'Sudan Governor to Troops: Take No Prisoners', *Al Jazeera*, 1 April 2012, available at <http://www.aljazeera.com/news/africa/2012/03/201233111443351997l.html>, last visited on 15 October 2012.

1075 'South Kordofan governor vows to sue Al Jazeera TV over "fabricated" video', *Sudan Tribune*, 3 April 2012, available at <http://www.sudantribune.com/South-Kordofan-governor-vows-to,42127>, last visited on 15 October 2012

Shifting support for President Al'Bashir

Despite the outstanding ICC arrest warrants for him, President Al'Bashir continues to travel, reportedly making visits to countries such as: Saudi Arabia, Qatar, Chad, Djibouti, Libya, China, Malawi, Ethiopia, Eritrea, Iran, and Egypt since the first Arrest Warrant was issued in March 2009.[1076]

Notably, in January 2012, President Al'Bashir visited Libya, where he offered to assist with the peace process and to help disarm former rebels.[1077] Libya's decision to host President Al'Bashir was widely criticised by human rights groups who indicated that it 'raises

1076 *Gender Report Card 2010*, p 101-104; *Gender Report Card 2011*, p 156-158; 'Omar al-Bashir, Sudan President, Should Have Been Arrested in China: UN', *The Huffington Post*, 30 June 2011, available at <http://www.huffingtonpost.com/2011/06/30/omar-al-bashir-sudan-president-arrested-china-criticized-united-nations_n_887611.html>, last visited on 15 October 2012; 'Sudan's President to Tehran today for NAM summit', *Sudan Tribune*, 28 August 2012, available at <http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=43736>, last visited on 15 October 2012; 'Sudan's Bashir heads to Saudi for Pilgrimage', *Al Arabiya*, 1 April 2009, available at <http://www.alarabiya.net/articles/2009/04/01/69685.html>, last visited on 15 October 2012; 'Defiant Bashir travels to Cairo', *Al Jazeera*, 25 March 2009, available at <http://www.aljazeera.com/news/africa/2009/03/2009325135710312782.html>, last visited on 15 October 2012; 'Sudanese President Omar al-Bashir to visit Egypt,' *Egypt Independent*, 12 September 2012, available at <http://www.egyptindependent.com/news/sudanese-president-omar-al-bashir-visit-egypt-sunday>, last visited on 15 October 2012; 'President Al-Bashir thrilled by his three days Eritrea visit', *Tesfa News*, 29 May 2012, available at <http://www.tesfanews.net/archives/8021>, last visited on 15 October 2012.

1077 'Sudan's Bashir offers to help Libya during criticised visit', *BBC News*, 7 January 2012, available at <http://www.bbc.co.uk/news/world-africa-16454493>, last visited on 15 October 2012. During the visit, President Al'Bashir reportedly warned Libyans to be cautious of the remnants of Gaddafi's regime, stating that such groups could pose a threat to the new government: 'We are afraid for the Libyan people ... the remnants of Kadhafi's regime are still present ...They benefited from the regime. They stole Libyan money and accumulated it. They are present in and outside Libya. They lost their interests, so be careful of them.' 'Sudan: Bashir warns Libya of Kadhafi remnants', *All Africa*, 8 January 2012, available at <http://allafrica.com/stories/201201090058.html>, last visited on 15 October 2012.

questions about the [National Transitional Council's] stated commitment to human rights and the rule of law'.[1078]

President Al'Bashir's most recent visit to Iran, in August 2012 for a summit with 30 Heads of State, is significant due to the presence of UN Secretary-General Ban Ki-moon at the summit. The Sudanese Ministry of Foreign Affairs and various media outlets reported that Ban Ki-moon met with President Al'Bashir to discuss the ongoing peace negotiations between Sudan and South Sudan.[1079] However, a spokesperson for the UN Secretary-General indicated that 'there was no such meeting between Ban Ki-moon and Al-Bashir in Tehran, there might have been a handshake when they passed each other, but nothing more than that'. [1080] Other recent trips include a May 2012 visit to Eritrea to attend the country's Independence Day celebrations,[1081] a July 2012 trip to Ethiopia to attend the nineteenth African Union Summit,[1082] a September 2012 trip to Ethiopia to sign an agreement with South Sudan[1083] and an August 2012 trip to Saudi Arabia to attend a two-day summit on Islamic solidarity.[1084]

In 2011 and 2012, some States have expressed unease about hosting the Sudanese President and have signalled an intention to enforce the ICC arrest warrants against him. While President Al'Bashir visited Qatar at least five times in the last two years, his invitation to the Doha-hosted UN Alliance of Civilisations forum in December 2011 was cancelled after several European nations and the UN Secretariat voiced objections to his attendance.[1085] Most notably, German President Christian Wulff threatened to boycott the conference if President Al'Bashir attended, stating that 'participation will be out of the question for me if reports are confirmed that Sudanese President Omer Al-Bashir will attend'. The incident has been referred to by the Sudanese media as a 'diplomatic embarrassment' for the President.[1086] Similarly, the Nineteenth Session of the African Union, held between 9 and 16 July 2012, was moved from Malawi after the President of Malawi indicated that she would order the arrest of President Al'Bashir if he travelled to the country.[1087]

A majority of individuals informally consulted by the Women's Initiatives believe that since the negotiations of the Comprehensive Peace Agreement (CPA) in Navaisha in 2005 there has been discomfort within

1078 'Rights group criticises Bashir's Libya trip', *Al Jazeera*, 7 January 2012, available at <http://www.aljazeera.com/news/africa/2012/01/201217113723218318.html>, last visited on 15 October 2012; 'Sudan: rights groups criticize Bashir's visit to Sudan', *All Africa*, 8 January 2012, available at <http://allafrica.com/stories/201201091231.html>, last visited on 15 October 2012.

1079 Sudan's president to Tehran today for NAM summit', *Sudan Tribune*, 29 August 2012, available at <http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=43736>, last visited on 15 October 2012; 'Ban Ki-moon and Sudan's Bashir meet in Tehran', *Sudan Tribune*, 30 August 2012, available at <http://www.sudantribune.com/spip.php?article43758>, last visited on 15 October 2012.

1080 'UN: No meeting al-Bashir and Ban Ki-moon', *Radio Dabanga*, 3 September 2012, available at <http://www.radiodabanga.org/node/35283>, last visited on 15 October 2012.

1081 'President Al-Bashir thrilled by his three days Eritrea visit', *Tesfa News*, 29 May 2012, available at <http://www.tesfanews.net/archives/8021>, last visited on 15 October 2012.

1082 'AU moves summit to Ethiopia after Malawi refuses Bashir's attendance', *Sudan Tribune*, 12 June 2012, available at <http://www.sudantribune.com/AU-moves-summit-to-Ethiopia-after,42899>, last visited on 15 October 2012.

1083 On 27 September 2012, Sudan and South Sudan reached agreement on border security, oil production and citizenship issues. The two countries have failed to reach agreement on Abyei or Heglig. 'Sudan and South Sudan sign landmark deal', *Al Jazeera*, 27 September 2012, available at <http://www.aljazeera.com/news/africa/2012/09/201292712585354211 3.html>, last visited on 15 October 2012.

1084 'High-level participation leads to summit success', *Arab News*, 17 August 2012, available at <http://www.arabnews.com/saudi-arabia/high-level-participation-leads-summit-success>, last visited on 15 October 2012.

1085 'Are Bashir's visits to Qatar and Saudi Arabia a Signal to Bashar', *Gulf States Newsletter*, 22 March 2012, available at <http://www.gsn-online.com/are-bashir%E2%80%99s-visits-to-qatar-and-saudi-arabia-a-signal-to-bashar>, last visited on 15 October 2012.

1086 'Diplomatic embarrassment for Sudanese president at Doha conference', *Sudan Tribune*, 11 December 2011, available at <http://www.sudantribune.com/Diplomatic-embarrassment-for,40964>, last visited on 15 October 2012.

1087 The Government of Malawi reportedly received a letter from the African Union stipulating that Malawi was not in a position to dictate who could attend the meeting, and that if it insisted on barring President Al'Bashir's attendance, the meeting would be moved to Ethiopia. Refusing to concede, Malawi subsequently withdrew its invitation to host the AU Summit. 'Malawi: Summit Meeting Declined', *New York Times*, 9 June 2012, available at <http://www.nytimes.com/2012/06/09/world/africa/malawi-african-union-summit-meeting-declined.html>, last visited on 15 October 2012; 'Sudan's Bashir demands AU Summit Moves from Malawi', *BBC News*, 7 June 2012, available at <http://www.bbc.co.uk/news/world-africa-18359924>, last visited on 15 October 2012.

President Al'Bashir's National Congress Party (NCP) concerning some of the political positions adopted by the President. This is confirmed by a November 2008 document recently disclosed by Wikileaks, which indicates that Ali Osman Taha, Sudanese Vice President and former Director of Sudan's National Intelligence and Secret Service (NISS), and Deng Alor, then-Sudanese Foreign Minister, exchanged criticisms of President Al'Bashir and contemplated his replacement.[1088]

More recently, discontent within the party has crystallised and has become more public, with some members criticising President Al'Bashir for allegations of corruption levelled against him and his family,[1089] as well as for irresponsible and embarrassing public statements, including publicly referring to the SPLM as an 'insect' to be crushed,[1090] in a speech that has been interpreted as racist.[1091] In January 2012, various news outlets reported that an anonymous group had submitted a memo to President Al'Bashir, containing demands for reforms of state policy, including action against government corruption. The memo was reportedly signed by a thousand members of the NCP and its predecessor National Islamic Front.[1092]

1088 'Wikileaks: VP Taha & Gosh appear open to removing Sudan's Al'Bashir', *Sudan Tribune*, 4 September 2011, available at <http://www.sudantribune.com/spip.php?article40051>, last visited on 15 October 2012.

1089 In February 2012, the privately owned daily newspaper Al-Tayyar was shut down after it published a commentary accusing Al'Bashir of condoning corruption by failing to ensure that high-level officials are held accountable for their actions and by questioning how the President and his family were able to amass so many properties. See 'Sudan suspends daily on charges of undermining national security', *Sudan Tribune*, 22 February 2012, available at <http://www.sudantribune.com/Sudan-suspends-daily-on-charges-of,41692>, last visited on 15 October 2012.

1090 'Bashir vows to "free" South Sudan's people from SPLM', *Sudan Tribune*, 19 April 2012, available at <http://www.sudantribune.com/Bashir-vows-to-free-South-Sudan-s,42308>, last visited on 15 October 2012.

1091 'Arman holds "racist" Bashir responsible for church attack in Sudan's capital', *Sudan Tribune*, 24 April 2012, available at <http://www.sudantribune.com/Arman-holds-racist-Bashir,42377>, last visited on 15 October 2012.

1092 'Mysterious "reform memo" mirrors split of Sudan's Islamists', *Sudan Tribune*, 11 January 2012, available at <http://www.sudantribune.com/Mysterious-reform-memo-mirrors,41265>, last visited on 15 October 2012; 'Sudan's Bashir politely brushed aside reform demands: source', *Sudan Tribune*, 17 January 2012, available at <http://www.sudantribune.com/Sudan-s-Bashir-politely-brushed,41313>, last visited on 15 October 2012.

President Al'Bashir and his supporters have taken steps to try to quell growing discontent within the NCP. On 22 February 2012, President Al'Bashir chaired a meeting that approved a series of changes to leadership positions and which replaced several long-standing senior figures in the party. Most significantly, President Al'Bashir's assistant, Nafie Ali Nafie, was replaced by Hamed Sideeg, a long-time member of the Islamist movement and a rapporteur at the party's leadership council and the Islamist Shura council.[1093]

A new Arrest Warrant: The Prosecutor v. Abdel Raheem Muhammad Hussein

On 1 March 2012, Pre-Trial Chamber I[1094] issued an Arrest Warrant for Abdel Raheem Muhammad Hussein (Hussein), the current Minister of National Defence in Sudan, for his alleged responsibility under Article 25(3)(a) of the Rome Statute, as an indirect co-perpetrator, for crimes against humanity and war crimes committed in Darfur.[1095] The Arrest Warrant has not been executed and, like President Al'Bashir, Hussein continues to travel with relative impunity, recently taking trips to Tripoli, Libya to take part in a regional conference on border security in March 2012[1096] and to Addis Ababa, Ethiopia to participate in negotiations with South Sudan in July 2012. [1097]

Between August 2003 and March 2004, the time period relevant to the Arrest Warrant, Hussein was the Minister of Interior, Special Representative of the President in Darfur, and an influential member of the key decision making group within the Government of Sudan. He worked closely with Harun and Kushayb, as well as with President Al'Bashir, and the Prosecutor has thus charged Hussein with the same crimes charged

1093 'Sudan's NCP shuffles top leadership positions amid growing pressure for reforms', *Sudan Daily News*, 24 February 2012, available at <http://www.sudantribune.com/spip.php?article41703>, last visited on 15 October 2012.

1094 At the time of this decision, Pre-Trial Chamber I was composed of Presiding Judge Sanji Mmasenono Monageng (Botswana), Judge Sylvia Steiner (Brazil) and Judge Cuno Tarfusser (Italy). Following the reassignment of judicial divisions later in March 2012, the Darfur Situation and related cases were referred to Pre-Trial Chamber II.

1095 ICC-02/05-01/12-1-Red.

1096 'Libya becomes first nation to receive Sudan defence minister after ICC warrant', *Sudan Tribune*, 12 March 2012, available at <http://www.sudantribune.com/Libya-becomes-first-nation-to,41879>, last visited on 15 September 2012.

1097 'Sudan's defence minister returns to Addis Ababa after talks with Bashir', *All Africa*, 24 July 2012, available at <http://allafrica.com/stories/201207250722.html>, last visited on 15 September 2012.

in the case against Harun and Kushayb, and with crimes that overlap with those alleged to have been committed by President Al'Bashir.[1098]

In rendering its decision, the Pre-Trial Chamber relied on evidence and findings that had been made in the cases against Harun & Kushayb, and President Al'Bashir, including with respect to the contextual elements of the crimes. The Chamber recalled that in 2002, rebel groups, including the Sudan People's Liberation Movement/Army (SPLM/A) and the Justice and Equality Movement (JEM), resorted to armed violence against the Government in Khartoum and, beginning in December 2002, launched several attacks in Darfur. Throughout 2003 and 2004, the Government of Sudan increased its military operations and launched attacks in North and West Darfur in an attempt to curb the rebellion.[1099]

The Pre-Trial Chamber found that there were reasonable grounds to believe that Hussein, as a high-ranking Sudanese political and military leader, helped to formulate and implement a common plan to carry out a counterinsurgency campaign against the SPLM/A, the JEM and other armed groups opposing the Government of Sudan in Darfur, including by recruiting, mobilising, funding, training, and deploying the police force and the militia/Janjaweed in Darfur, with the knowledge that these forces would commit war crimes and crimes against humanity. The Chamber held that a core component of the common plan was the unlawful attack of the civilian population in Darfur, belonging to the Fur, Masalit, and Zaghawa groups and perceived by the Government of Sudan as being allied with the SPLM/A, the JEM, and other armed groups opposing the Government.

The Pre-Trial Chamber found that there were reasonable grounds to believe that Hussein was responsible for seven counts of crimes against humanity and six counts of war crimes between August 2003 and March 2004.[1100] Four of the 13 charges are for gender-based crimes, specifically:

- Outrages upon personal dignity as a war crime under Article 8(2)(c)(ii) of the Statute, namely the violation of the dignity of women and girls from the primarily Fur population in the town of Arawala and surrounding areas in the Wadi Salih area in West Darfur, in or around December 2003.
- Rape as a crime against humanity pursuant to Article 7(1)(g), namely the rape of women and girls from the primarily Fur population in the town of Bindisi and surrounding areas on or about 15 August 2003, and in the town of Arawala and surrounding areas, in or around December 2003.
- Rape as a war crime pursuant to Article 8(2)(e)(vi), namely the rape of women and girls from the primarily Fur population in the town of Bindisi and surrounding areas on or about 15 August 2003, and in the town of Arawala and surrounding areas, in or around December 2003.
- Persecution as a crime against humanity pursuant to Article 7(1)(h)[1101]

Charges were also brought for: attacks against the civilian population, destruction of property, murder and pillaging as war crimes,[1102] and for murder, forcible transfer of population, torture, inhumane acts, and imprisonment or severe deprivation of liberty as crimes against humanity.[1103]

The Government of Sudan has dismissed the Arrest Warrant issued for Hussein as 'meaningless'. A Foreign Ministry spokesperson has indicated that 'the government will not issue any statement reacting to the ICC decision because we believe it means nothing to us. We don't care about any decision coming from the ICC.'[1104] President Al'Bashir has questioned the timing of the Arrest Warrant and has accused the ICC of issuing the Arrest Warrant to coincide with Sudanese Armed Forces victories in Blue Nile and South Kordofan, stating that the Arrest Warrant for the Minister of Defence is a symbolic way of targeting the Sudanese army. [1105]

1098 ICC-02/05-01/12-1-Red, paras 2, 3.

1099 ICC-02/05-01/12-1-Red, para 16.

1100 While the press release of the ICC announcing the issuance of the Arrest Warrant indicates Hussein stands charged with 20 counts of crimes against humanity and 21 counts of war crimes, as noted above, the Arrest Warrant against Hussein appears to have simplified the charges, grouping different counts for a similar crime under one charge.

1101 ICC-02/05-01/12-1-Red, para 13.

1102 Pursuant to Articles 8(2)(e)(i), 8(2)(e)(xii), 8(2)(c)(i) and 8(2)(e)(v).

1103 Pursuant to Articles 7(1)(a), 7(1)(d), 7(1)(f), 7(1)(k), and 7(1)(e).

1104 'War crimes warrant for Sudan minister', *Al Jazeera*, 2 March 2012, available at <http://www.aljazeera.com/news/africa/2012/03/20123263020568112.html>, last visited on 15 October 2012.

1105 'Sudan's Bashir orders mobilisation of paramilitary forces, slams US and its special envoy', *Sudan Tribune*, 3 March 2012, available at <http://www.sudantribune.com/Sudan-s-Bashir-orders-mobilization,41791>, last visited on 15 October 2012; 'Sudan's Bashir slams ICC warrant for defense minister', *Al Arabiya*, 4 March 2012, available at <http://english.alarabiya.net/articles/2012/03/04/198413.html>, last visited on 15 October 2012.

Judicial determinations on non-cooperation and Head of State immunity

Faced with continued non-compliance with respect to the arrest warrants issued for President Al'Bashir and the other high-level political and/or military figures from Sudan, the ICC continues to remind States Parties of their obligations under the Rome Statute. In 2010, for example, Pre-Trial Chamber I received information that President Al'Bashir was planning to travel to Kenya and the CAR and in response issued decisions requesting observations from both countries about the existence of any problem that could impede the arrest and surrender of Al'Bashir.[1106] Similarly, following the receipt of information that President Al'Bashir had traveled to Djibouti in 2011, the Court formally issued a decision, informing the UN Security Council and the ASP about the visit, and requesting the UN Security Council to take any action it deemed necessary.[1107]

Most recently, on 12 and 13 December 2011, Pre-Trial Chamber I issued decisions on the failures of Malawi[1108] and Chad,[1109] respectively, to comply with cooperation requests issued by the Court with respect to the arrest and surrender of President Al'Bashir. President Al'Bashir had visited Malawi on 14 October 2011 to attend a summit for the Common Market for Eastern and Southern Africa (COMESA), and had visited Chad on 7 and 8 August 2011 to attend the inauguration ceremony of the Chadian President. He was not arrested, despite the fact that prior to the visits the Registry had sent a *note verbale* to remind each State of its obligations in this regard.

In response to requests from Pre-Trial Chamber I about President Al'Bashir's visit to the countries,[1110] Malawi and Chad filed observations on 10 November 2011[1111] and 29 September 2011,[1112] respectively. Referencing the fact that Sudan is not a party to the Rome Statute, Malawi argued that Article 27, which waives the immunity of Heads of State, is not applicable, and that it had appropriately afforded President Al'Bashir immunities and privileges 'in line with the established principles of public international law'.[1113] Malawi also indicated that it had decided to 'fully align' itself with the position adopted by the African Union, which requires its members not to cooperate with the Court regarding the Arrest Warrant for President Al'Bashir, and which relies in part on the wording of Article 98 of the Statute.[1114] In its filing, Chad echoed some of these arguments, stating that it could not 'accede to the Prosecutor's request' to arrest President Al'Bashir due to its membership in the African Union.[1115]

In its decisions of 12 and 13 December 2011, the Chamber acknowledged that there is 'an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State'.[1116] While Article 27(2) of the Rome Statute provides that immunities will not prevent the Court from exercising its jurisdiction,[1117] Article 98(1) prohibits the Court from requiring a State to act in a manner that is inconsistent with its obligations under international law relating to the immunities of a third State.[1118]

In an attempt to resolve the ambiguities in the Rome Statute related to Head of State immunity, the Chamber traced the development and status of immunities conferred to Heads of State in respect of proceedings before international courts, noting that all had rejected the idea of immunities for Heads of States. Referencing the governing legal instruments and relevant judicial decisions of courts and tribunals established subsequent to World War II, including Nuremburg, Tokyo, the former Yugoslavia, Rwanda and

1106 For more information about these decisions, see *Gender Report Card 2011*, p 156 – 157.
1107 For more information about this decision, see *Gender Report Card 2011*, p 157.
1108 ICC-02/05-01/09-139-Corr.
1109 ICC-02/05-01/09-140-tENG.
1110 The Pre-Trial Chamber had requested observations from Chad on 18 August 2011 (ICC-02/05-01/09-132) and from Malawi on 19 October 2011 (ICC-02/05-01/09-137).
1111 Malawi's observations were transmitted to the Pre-Trial Chamber in two confidential annexes by the Registry. ICC-02/05-01/09-138. As described above, in 2012 Malawi changed its position and indicated it would arrest President Al'Bashir if her were to travel to its territory to attend the annual AU Summit, which was subsequently moved to Ethiopia.
1112 ICC-02/05-01/09-135-Anx1.
1113 ICC-02/05-01/09-139-Corr, para 8, 13, citing Malawi's observations.
1114 ICC-02/05-01/09-139-Corr, paras 8, 13, citing Malawi's observations.
1115 ICC-02/05-01/09-140-tENG, para 7, citing ICC-02/05-01/09-135-Anx1 p 3.
1116 ICC-02/05-01/09-139-Corr, para 37; ICC-02/05-01/09-140-tENG, para 13.
1117 Article 27(2) of the Rome Statute provides that 'immunities or special procedures which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.
1118 Article 98(1) of the Rome Statute provides that 'the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity'.

Sierra Leone, all of which provide that a sitting Head of State may be prosecuted before an international tribunal or court, the Chamber concluded that 'the principle in international law that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court'.[1119]

The Chamber noted, as well, that indictments and international prosecutions against Heads of State have increased in the last decade, including against Slobodan Milosevic, Charles Taylor, Muammar Gaddafi, and Laurent Gbagbo, and that this demonstrates that 'international prosecutions against Heads of State have gained widespread recognition as accepted practice'.[1120] Similarly, the Chamber attributed meaning to the fact that, at the time of issuing the decision, 120 States Parties had ratified the Rome Statute, indicating a widespread acceptance of the fact that high-level State officials no longer enjoy immunity under international law. The Chamber concluded that a 'critical mass' had been reached, and that 'if it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context'.[1121]

The Chamber thus held that 'customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes'.[1122] Accordingly, it concluded that both Malawi and Chad had failed to cooperate with the Court and had not met their obligations under the Rome Statute. The Court ordered the President to transmit its decision to the Security Council, through the Secretary General of the United Nations, and to the ICC ASP.[1123]

1119 ICC-02/05-01/09-139-Corr, para 36; ICC-02/05-01/09-140-tENG, para 13.
1120 ICC-02/05-01/09-139-Corr, para 39; ICC-02/05-01/09-140-tENG, para 13.
1121 ICC-02/05-01/09-139-Corr, para 42; ICC-02/05-01/09-140-tENG, para 13.
1122 ICC-02/05-01/09-139-Corr, para 43; ICC-02/05-01/09-140-tENG, para. 13.
1123 ICC-02/05-01/09-139-Corr, para 47; ICC-02/05-01/09-140-tENG, para 14.

Libya

The Situation in Libya was unanimously referred to the ICC by the UN Security Council, acting under Chapter VII of the UN Charter, on 26 February 2011.[1124] The referral was made in response to the violent repression of demonstrations that began on 15 February 2011, demanding an end to the regime and dictatorship of Muammar Gaddafi (Gaddafi Regime) in the Libyan Arab Jamahiriya (Libya).[1125] Pursuant to Article 13(b) of the Rome Statute, the Security Council may refer a situation to the ICC Prosecutor where genocide, crimes against humanity and/or war crimes 'appear to have been committed' in that State. Security Council Resolution 1970 gave the ICC jurisdiction over the Situation in Libya, which is not a State Party to the Rome Statute. The Libya referral is the second referral of a Situation to the ICC Prosecutor by the Security Council; the first was the referral of the Situation in Darfur in March 2005.[1126]

There is currently one case arising out of the Situation in Libya, The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi. To date, neither Gaddafi,[1127] nor Al-Senussi has been charged with gender-based crimes. However, the Office of the Prosecutor has confirmed that the investigations into allegations of rape and

1124 Resolution 1970, UNSC, 6491st meeting, S/Res/1970 (2011), 26 February 2011.
1125 The Libya referral by the Security Council was issued 11 days after the first reports of alleged unlawful attacks by state security forces of the Gaddafi Regime on anti-government protestors. See 'Gaddafi's son in civil war warning', *Al Jazeera*, 21 February 2011, available at <http://english.aljazeera.net/news/africa/2011/02/2011220232725966251.html>, last visited on 15 October 2012.
1126 Resolution 1593, UNSC, 5158th meeting, S/Res/1593 (2005), 31 March 2005.
1127 Following the termination of proceedings against Muammar Gaddafi in November 2011, the Court refers to Saif Al-Islam Gaddafi as Gaddafi. For the sake of consistency, while having referred to Saif Al-Islam Gaddafi as Saif Al-Islam in the Gender Report Card 2011, here we refer to him as Gaddafi.

other forms of sexual violence are ongoing.[1128] Proceedings had also been initiated against Muammar Gaddafi, but on 20 October 2011 he was killed in his hometown in Sirte.[1129] Following official confirmation of his death, the proceedings against him were terminated on 22 November 2011.[1130]

At the time of writing this Report, the arrest warrants for Gaddafi and Al-Senussi remain outstanding. Although both suspects have been arrested and are currently detained in Libya, Libyan authorities have refused to surrender them to the ICC. As discussed below, ongoing challenges to the execution of the ICC arrest warrants in the Libya Situation include non-cooperation, the prolonged detention of ICC officials while on mission in Libya, and an admissibility challenge filed by the Libyan Government on 1 May 2012.

Saif Al-Islam Gaddafi is the son of former Libyan leader Muammar Gaddafi, and was allegedly part of his father's inner circle. Although Saif Al-Islam Gaddafi formally held the role of honorary chairman of the Gaddafi International Charity and Development Foundation, an international NGO headquartered in Tripoli, he is alleged to have also assumed the role of de facto Libyan Prime Minister. Pre-Trial Chamber I issued an Arrest Warrant for Saif Al-Isam Gaddafi on 27 June 2011, [1131] charging him with murder and persecution on political grounds as crimes against humanity.[1132] The charges relate to crimes allegedly committed in Libya from 15 February until at least 28 February 2011. Saif Al-Islam Gaddafi was captured near the town of Obar on 19 November 2011, reportedly trying to flee to Niger.[1133] To date, the Libyan authorities have refused to hand him over to the ICC.[1134] In May 2012, Libya officially filed an admissibility challenge before the ICC and has indicated it intends to try Saif Al-Islam Gaddafi in Libya.

1128 During the Symposium 'Strengthening Gender Justice through International Prosecutions', co-hosted by the Women's Initiatives for Gender Justice and UN Women, the Office of the Prosecutor indicated that the second investigations in Libya focused exclusively on sexual violence. See also 'Overview of ICC cases and sexual violence charges (as of 6 Sept 2012)', ICC Office of the Prosecutor, 6 September 2012, made available at the Symposium, The Hague.

1129 'Muammar Gaddafi: How He Died', *BBC News*, 24 October 2011, available at <http://www.bbc.co.uk/news/world-africa-15390980>, last visited on 15 October 2012; See further *Gender Report Card 2011*, p 183-192.

1130 ICC-01/11-01/11-28.

1131 ICC-01/11-14.

1132 Pursuant to Articles 7(1)(a) and 7(1)(h).

1133 'Gaddafi's son Saif al-Islam captured in Libya', *BBC News*, 19 November 2011, available at <http://www.bbc.co.uk/news/world-middle-east-15804299>, last visited on 15 October 2012.

1134 On 23 November 2011, the Libyan Government wrote to Pre-Trial Chamber I to confirm the arrest of Gaddafi, to inform the Court that it was currently investigating the crimes allegedly committed by Gaddafi, and to articulate its position that the Libyan judiciary has primary jurisdiction over Gaddafi. The letter also referenced the possibility of Gaddafi's surrender to the ICC, stating that this would be discussed, and that the Court would be officially informed when a decision was made. ICC-01/11-01/11-34.

Abdullah Al-Senussi is a Colonel in the Libyan Armed Forces and the head of the Libyan Military Intelligence. Pre-Trial Chamber I issued an Arrest Warrant for Al-Senussi on 27 June 2011,[1135] charging him with murder and persecution on political grounds as crimes against humanity.[1136] The charges relate to crimes allegedly committed in Libya from 15 February until at least 28 February 2011. Al-Senussi was arrested on 17 March 2012 in Mauritania, reportedly shortly after he arrived on a regular flight from Morocco on a fake Malian passport. The arrest was carried out in a joint operation with French authorities.[1137] Subsequent to the arrest, Libya, France, and the ICC all filed formal extradition requests with the Mauritanian authorities.[1138] After being arrested, Al-Senussi was reportedly held in a luxury villa in Mauritania for 45 days under anti-terrorist laws before being charged in late May 2012 with entering the country on falsified documents.[1139] On 5 September, a Mauritanian Government official confirmed that Al-Senussi had been extradited to Libya 'on the basis of guarantees given by the Libyan authorities', without specifying the nature of these guarantees.[1140] At the time of writing this Report, no public information was available about the possibility of a domestic trial against Al-Senussi in Libya.

1135 ICC-01/11-15.

1136 Pursuant to Articles 7(1)(a) and 7(1)(h).

1137 'Gaddafi spy chief Abdullah al-Senussi held in Mauritania', *BBC News*, 17 March 2012, available at <http://www.bbc.co.uk/news/world-africa-17413626>, last visited on 15 October 2012. A French court has convicted Al-Senussi of involvement in the attack and sentenced him to life in prison.

1138 French authorities are seeking Al-Senussi's extradition on the basis of his involvement in a 1989 attack on a French plane that killed 170 people. See 'Libya rejects claims it cannot try Abdullah al-Senussi', *The Telegraph*, 18 March 2012, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9151625/Libya-rejects-claims-it-cannot-try-Abdullah-al-Senussi.html>, last visited on 15 October 2012.

1139 'Abdullah al-Senussi central figure in three-way custody battle', *The Guardian*, 25 May 2012, available at <http://www.guardian.co.uk/world/2012/may/25/abdullah-al-senussi-custody-battle>, last visited on 15 October 2012.

1140 'Mauritania extradites Al-Senussi', *The Guardian*, 5 September 2012, available at <http://www.guardian.co.uk/world/2012/sep/05/mauritania-extradites-al-senussi>, last visited on 1 October 2012.

Political situation and context

Since the official establishment of the National Transitional Council (NTC) on 5 March 2011 to facilitate a democratic process in Libya following the toppling of the Gaddafi Regime, security remains a pressing issue in the country. The Libyan authorities continue to face considerable challenges, with respect to both ending the ongoing violence and to ensuring accountability for crimes committed during the war. Recent reports published by NGOs and by the International Commission of Inquiry on Libya[1141] have confirmed that armed militias operating across Libya continue to commit widespread human rights abuses with impunity.[1142] It has been reported that hundreds of armed militia groups, established during the civil war and celebrated in Libyan society for their role in toppling the Gaddafi Regime, continue to operate independent of any legal framework.[1143] According to reports, outside the mandate of any governmental authority, militia groups continue to seize suspected Gaddafi-loyalists and hold them in detention centres before transferring them to official or semi-official

1141 The International Commission of Inquiry on Libya was established by the United Nations Human Rights Council at its fifteenth special session to examine alleged crimes committed during the Libyan civil war. Situation of Human Rights in the Libyan Arab Jamahiriya, UNHRC, 15th meeting, A/HRC/RES/S-15/1, 25 February 2011.

1142 'Militias Threaten Hopes for New Libya', *Amnesty International*, February 2012, available at <http://www.amnesty.org/en/library/asset/MDE19/002/2012/en/dd7c1d69-e368-44de-8ee8-cc9365bd5eb3/mde190022012en.pdf>, last visited on 15 October 2012; 'Rule of Law or Rule of Militias', *Amnesty International*, 12 July 2012, available at <http://www.amnesty.org/en/library/asset/MDE19/012/2012/en/f2d36090-5716-4ef1-81a7-f4b1ebd082fc/mde190122012en.pdf>, last visited on 15 October 2012; Report of the International Commission of Inquiry on Libya, 19th session of the Human Rights Council, A/HRC/19/68, 2 March 2012.

1143 'Militias Threaten Hopes for New Libya', *Amnesty International*, February 2012, available at <http://www.amnesty.org/en/library/asset/MDE19/002/2012/en/dd7c1d69-e368-44de-8ee8-cc9365bd5eb3/mde190022012en.pdf>, last visited on 15 October 2012; 'Rule of Law or Rule of Militias', *Amnesty International*, 12 July 2012, available at <http://www.amnesty.org/en/library/asset/MDE19/012/2012/en/f2d36090-5716-4ef1-81a7-f4b1ebd082fc/mde190122012en.pdf>, last visited on 15 October 2012.

detention centres run by the military.[1144] Large numbers of detainees are reportedly being held without trial, at risk of torture, and without any means to challenge the legality of their detention.[1145]

The NTC has, however, taken some steps towards re-establishing a justice system, including by passing a number of laws and by attempting to initiate local trials.[1146] In December 2011, the NTC passed a law establishing the National Council for Civil Liberties and Human Rights, which has authority to receive complaints on human rights violations and to file cases in court.[1147] The NTC also recently enacted a transitional justice law intended to address violations that occurred during the Gaddafi regime, as well as during the revolution of 2011 and the election of the new Government in 2012. The law establishes a fact-finding and reconciliation commission, which is tasked with investigating incidents of human rights violations and disappeared persons, as well as a compensation fund to provide reparations for victims.[1148] However, the law has not yet been implemented and it remains unclear whether it will be retained by the General National Congress (GNC),[1149] Libya's new governing body, elected in July 2012 to replace the NTC.[1150]

Prior to the transfer of power to the GNC, on 2 May 2012, the NTC also passed a number of laws to facilitate national reconciliation, criminalising associations with, and glorifications of, the Gaddafi Regime, and facilitating the referral of 'supporters of the former regime' currently detained by militias, to the competent judicial authorities.[1151] The NTC also passed Law 38,[1152] which grants a blanket amnesty to those who committed crimes during the civil war if their actions were aimed at 'promoting or protecting the revolution' against Muammar Gaddafi. However, Law 35, passed the same day, excludes certain crimes

1144 'Militias Threaten Hopes for New Libya', *Amnesty International*, February 2012, available at <http://www.amnesty.org/en/library/asset/MDE19/002/2012/en/dd7c1d69-e368-44de-8ee8-cc9365bd5eb3/mde190022012en.pdf>, last visited on 15 October 2012; 'Rule of Law or Rule of Militias', *Amnesty International*, 12 July 2012, available at <http://www.amnesty.org/en/library/asset/MDE19/012/2012/en/f2d36090-5716-4ef1-81a7-f4b1ebd082fc/mde190122012en.pdf>, last visited on 15 October 2012.

1145 'Militias Threaten Hopes for New Libya', *Amnesty International*, February 2012, available at <http://www.amnesty.org/en/library/asset/MDE19/002/2012/en/dd7c1d69-e368-44de-8ee8-cc9365bd5eb3/mde190022012en.pdf>, last visited on 15 October 2012.

1146 Report of the International Commission of Inquiry on Libya, nineteenth session of the Human Rights Council, A/HRC/19/68, 2 March 2012.

1147 Report of the International Commission of Inquiry on Libya, nineteenth session of the Human Rights Council, A/HRC/19/68, 2 March 2012.

1148 Paul Salem and Amanda Kadlec, 'Libya's Troubled Transition', *Carnegie Paper*, June 2012, available at <http://carnegieendowment.org/2012/06/14/libya-s-troubled-transition/cat5#>, last visited on 15 October 2012.

1149 On 7 July 2012, Libya's National Transitional Council, which had governed Libya since the end of the civil war, supervised democratic elections for the General National Congress (GNC). Composed of 200 seats, the GNC is tasked with drafting and ratifying a constitution for the country and will remain in existence for 11 months. At the end of this period, there will be general elections for a new legislature and the GNC will be dissolved. See Report of the International Commission of Inquiry on Libya, 19th session of the Human Rights Council, A/HRC/19/68,2 March 2012; 'After the elections, what next for transitional justice in Libya?', *No Peace Without Justice*, 25 July 2012, available at <http://www.npwj.org/ICC/After-Elections-What-Next-Transitional-Justice-Libya.html>, last visited on 15 October 2012. '

1150 On 8 August 2012, the NTC formally transferred power to the GNC, which elected Mohammed Magarief of the National Front Party as President on 9 August 2012. 'Libyan assembly votes Gaddafi opponent as president', *Reuters*, 9 August 2012, available at <http://www.reuters.com/article/2012/08/09/us-libya-assembly-idUSBRE8781ID20120809>, last visited on 15 October 2012.

1151 'Libya: As Deadline Passes, Militias Still Hold Thousands', *Human Rights Watch*, 14 July 2012, available at <http://www.hrw.org/news/2012/07/14/libya-deadline-passes-militias-still-hold-thousands>, last visited on 15 October 2012; 'Libya: Revoke Draconian New Law', *Human Rights Watch*, 5 May 2012, available at <http://www.hrw.org/news/2012/05/05/libya-revoke-draconian-new-law>, last visited on 15 October 2012.

1152 *Law 38, On Some Procedures for the Transitional Period*. The law provides that there shall be no penalty for 'military, security, or civil actions dictated by the February 17 Revolution that were performed by revolutionaries with the goal of promoting or protecting the revolution'. See 'Libya: Letter to the ICC Prosecutor on Libyan Amnesty Laws', *Human Rights Watch*, 25 May 2012, available at <http://www.hrw.org/news/2012/05/25/libya-letter-icc-prosecutor-libyan-amnesty-laws>, last visited on 15 October 2012.

from amnesty, including torture and rape.[1153] Again, the status of these laws following the transfer of power from the NTC to the GNC remains unclear.

On 24 June 2012, Libya announced that Tunisia had extradited Muammar Gaddafi's former Prime Minister, Al Baghdadi Ali al-Mahmoudi to Libya. Mahmoudi fled to Tunisia in August 2011, at the time rebel fighters occupied Tripoli, and he is the first Gaddafi-era senior official to be returned to Libya for trial. Mabrouk Khochid, Mahmoudi's lawyer in Tunisia, has not been permitted to see Mahmoudi since Tunisia's Justice Minister announced an extradition was imminent, and has publicly stated that he believes his client will be tortured.[1154] At the time of writing this Report, it is unknown what charges Mahmoudi faces or whether the trial has begun.[1155]

Furthermore, as described in more detail below, despite repeated requests for the surrender of Gaddafi to the ICC, Libya has expressed its intention to try him domestically and, to date has refused to transfer him to the ICC. In April, the Government announced that it intended to charge Gaddafi with financial corruption, murder and rape, and on 23 August, indicated the trial would start in September.[1156] The announcement followed Libya's admissibility challenge filed with the ICC in May, described in more detail below.

Rape and sexual violence

As described in more detail in the *Gender Report Card 2011*,[1157] numerous reports indicate that rape and other forms of sexual violence were prevalent during the civil unrest in Libya. However, and despite public statements by the former Prosecutor on the widespread nature of rape and sexual violence during the conflict, neither Gaddafi nor Al-Senussi have been charged with rape or other forms of sexual violence. Nonetheless, the Office of the Prosecutor has indicated that the investigations into these allegations are ongoing.[1158]

In its third report to the United Nations Security Council on 16 May 2012, then-Prosecutor Moreno Ocampo indicated that his Office had interviewed a number of victims and perpetrators and had concluded that a pattern of sexual violence took place in Libya from 15 February 2011 until the end of the conflict, predominantly rape perpetrated by armed men in the home or a similar locale, and rape perpetrated in detention centres as a means of punishment or to extract information.[1159] As lawyers and human rights organisations in Libya have indicated that they are sometimes reluctant to document crimes of sexual violence due to fear of reprisals against the victims,[1160] the Office of the Prosecutor explained that it had 'adopted a strategy which seeks to limit the exposure of victims by focusing on obtaining alternate evidence and identifying avenues of investigation which support charges without the need for multiple victim statements'. Accordingly, then Prosecutor Moreno Ocampo indicated that his Office was obtaining evidence from security forces, doctors and nurses.[1161]

In September 2011, the Women's Initiatives initiated a documentation programme on gender-based crimes in conjunction with Libyan partners, focusing on the documentation of rape and other forms of sexual violence. The documentation programme is also collecting data and information on the consequences

1153 'Libya: Letter to the ICC Prosecutor on Libyan Amnesty Laws', *Human Rights Watch*, 25 May 2012, available at <http://www.hrw.org/news/2012/05/25/libya-letter-icc-prosecutor-libyan-amnesty-laws>, last visited on 15 October 2012.

1154 Tunisia extradites former Gaddafi PM to Libya', 24 June 2012, *Reuters*, available at <http://www.reuters.com/article/2012/06/24/us-libya-baghdadi-idUSBRE85N0BN20120624>, last visited on 15 October 2012.

1155 On 6 July, Human Rights Watch reported that Libya had yet to bring Mahmoudi before a judge or inform him of the charges against him. See 'Libya: Ensure due process for detained ex-prime minister', *Human Rights Watch*, 6 July 2012, available at <http://www.hrw.org/news/2012/07/06/libya-ensure-due-process-detained-ex-prime-minister>, last visited on 15October 2012.

1156 'Gaddafi son faces trial in Libya', *The Independent*, 24 August 2012, available at <http://www.independent.ie/world-news/middle-east/gaddafi-son-faces-trial-in-libya-3208951.html>, last visited on 15 October 2012.

1157 *Gender Report Card 2011*, p 189-190.

1158 During the Symposium 'Strengthening Gender Justice through International Prosecutions', co-hosted by the Women's Initiatives for Gender Justice and UN Women, the Office of the Prosecutor indicated that the second investigation in Libya focused exclusively on sexual violence. See also 'Overview of ICC cases and sexual violence changes (as of 6 Sept 2012)', *ICC Office of the Prosecutor*, 6 September 2012, made available at the Symposium, The Hague.

1159 Third Report of the Prosecutor to the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), 16 May 2012.

1160 'Women and the Arab Spring: Taking Their Place?', *FIDH*, 8 March 2012, available at <http://www.europarl.europa.eu/document/activities/cont/201206/20120608ATT46510/20120608ATT46510EN.pdf>, last visited on 15 October 2012.

1161 Third Report of the Prosecutor to the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), 16 May 2012, para 34.

of these crimes, which include women having been divorced by their husbands as a consequence of rape, not having sought or had access to medical treatment and assistance, and having limited financial means to support themselves and their children.

The detention of ICC staff in Libya

In accordance with Pre-Trial Chamber decisions, which appointed the Office of Public Counsel for Defence (OPCD) to temporarily represent Gaddafi's interests before the Court,[1162] and authorised both the OPCD and the Registry to conduct personal visits with Gaddafi,[1163] Court staff conducted site visits to Libya on two separate occasions, in March and June 2012. The second visit resulted in the detention of four ICC representatives who were detained for 25 days after having met with Gaddafi. Although the detention of the ICC staff members drew significant international media attention, in the absence of an official public review and report from the ICC, few public records exist which relate a full account of the incident. One account was included in the OPCD response to Libya's admissibility challenge.[1164]

The second site visit to Libya was authorised by Pre-Trial Chamber I on 27 April 2012, following a request from the OPCD.[1165] In its decision authorising the site visit, the Pre-Trial Chamber stated that the visit was necessary to enable privileged communication between the OPCD and Gaddafi, to give full effect to his right to appoint counsel of choice, and to address concerns related to Gaddafi's potential transfer to another detention centre in Libya.[1166] The Pre-Trial Chamber noted that Libyan authorities had previously indicated that they would facilitate access to Gaddafi by his ICC lawyers. Following receipt of the decision Libyan authorities confirmed that they would permit a privileged visit, and noted that the Libyan authorities had confirmed that 'any statements made by the OPCD which are made within their proper remit of defending Gaddafi in criminal proceedings would not and cannot constitute a violation [of Libyan law]'.[1167]

According to the OPCD, as the visit was being arranged, Dr Ahmed El-Gehani, the Libyan focal point to the ICC, was informed that the OPCD wished to review documents with Gaddafi, discuss issues related to his representation in the domestic proceedings and bring personal items to him.[1168] The OPCD account indicated that the Libyan authorities did not voice any objections.[1169] Accordingly, the following ICC staff members travelled to Libya on 6 June 2012: Melinda Taylor, OPCD Counsel; Helene Assaf, Translator and Interpreter; Alexander Khodakov, External Relations and Cooperation Senior Adviser at the Registry; and Esteban Peralta Losilla, Chief of the Counsel Support Section.

According to the OPCD, a meeting with Gaddafi had been scheduled for the morning of 7 June 2012. Despite some initial delays,[1170] the meeting proceeded. It was monitored by a guard who informed the ICC team through an interpreter that he was illiterate and did not understand English.[1171] During the meeting, Gaddafi requested that the ICC interpreter, Assaf, help him complete a statement confirming his wish to be tried before the ICC, as well as execute documents appointing a power of attorney. Gaddafi also tried to sign a letter he had written in which he claimed that he would not receive a fair trial in Libya.

As set out by the OPCD in its 31 July filing:

> When Gaddafi attempted to sign this statement after reading it, the guard, who had informed the ICC delegation through the interpreter that he was illiterate, did not understand English and that his sole purpose of being present was to ensure issues of physical security, confiscated the statement and brought it to Dr Gehani to read.
>
> The 'guard', who is actually Mr Ahmed Amer – a councilor who speaks several languages—was planted in the room to deliberately trick the delegation. He came back into the room and (in the presence of the ICC interpreter), started shouting that this statement was very dangerous, violated Libyan national security, and that the Defence should not have it back.
>
> The Defence attempted to seek instructions from Gaddafi in relation to the content of the challenge to admissibility filed by the Libyan government,

1162 ICC-01/11-01/11-39.
1163 ICC-01/11-01/11-52. The Chamber held that a personal visit from the Registry and the OPCD was the best mechanism by which to ensure that Gaddafi was well informed about the current stage of the proceedings and the interim appointment of the OPCD to represent his interests.
1164 ICC-01/11-01/11-190-Corr-Red.
1165 ICC-01/11-01/11-129.
1166 ICC-01/11-01/11-129, para 9.
1167 ICC-01/11-01/11-160, para 29.
1168 ICC-01/11-01/11-190-Corr-Red, para 260.
1169 ICC-01/11-01/11-190-Corr-Red, paras 260-261.
1170 The OPCD recounted that although Libyan ICC Focal Point Dr Gehani had agreed to meet with them to discuss further details concerning the procedures for the visit on the morning of 7 June 2012, he arrived late and insisted that the delegation depart immediately for Zintan, without discussing the procedures in advance. ICC-01/11-01/11-190-Corr-Red, para 262.
1171 ICC-01/11-01/11-190-Corr-Red, paras 11-13.

> however [...] several additional documents were confiscated, including an annex to the challenge to admissibility filed by the Government of Libya. When the Defence attempted to go through the other annexes with Gaddafi, the guard abruptly cut the visit short. The entire visit only lasted approximately 45 minutes and had been constantly disrupted by the fact that Mr Amer kept confiscating documents and demanding to read Defence documents, which were on the table.[1172]

The OPCD filing stated that, following the meeting, all four members of the ICC team were immediately arrested and detained. They were informed that their visit with Gaddafi had been secretly filmed, and that this had been orchestrated by the Libyan authorities in advance of the visit.[1173] According to the OPCD, Dr Gehani attempted to assert that, in his view, the meetings between Gaddafi and the OPCD were not subject to legal privilege, as the OPCD had only been appointed on a temporary basis.[1174] The OPCD filing further stated that Dr Gehani also attempted to compel the ICC interpreter to respond to questions relating to communications between the OPCD and Gaddafi, on the basis that the interpreter was not an ICC official and therefore not protected by the privileges and immunities of the ICC.[1175]

According to the OPCD, Dr Gehani informed the ICC delegation that all four ICC officials were detained under the authority of the Prosecutor General and were suspects. The OPCD filing stated that the legal basis for the detention was not explained, that no written legal orders justifying the detention were provided, and that the manner in which the Libyan authorities intended to proceed changed several times.[1176] The ICC delegation was initially informed that it could leave the next morning, following the 'interrogation' of the 'guard' and Gaddafi by Libyan authorities, but, ultimately, all four ICC officials were informed that they remained under arrest and were prevented from leaving.[1177]

1172 ICC-01/11-01/11-190-Corr-Red, paras 11-13.
1173 ICC-01/11-01/11-190-Corr-Red paras 263-264.
1174 ICC-01/11-01/11-190-Corr-Red, para 264.
1175 ICC-01/11-01/11-190-Corr-Red, para 264.
1176 ICC-01/11-01/11-190-Corr-Red, para 268.
1177 ICC-01/11-01/11-190-Corr-Red, para 268-269. In public statements, the Libyan authorities indicated that only one ICC official had been arrested and that the others had remained in detention 'out of solidarity'. While this story was widely reported in the media, according to the OPCD, all four officials were detained 'incommunicado'. See for instance, 'Libya frees ICC team, *The Voice of Russia*, 3 July 2012, available at <http://english.ruvr.ru/2012_07_03/80088365/> last visited on 15 October 2012; 'ICC Staff Locked Up in Libya: Un Unfolding Debacle', *Justice in Conflict*, 12 June 2012, available at <http://justiceinconflict.org/2012/06/12/icc-staff-locked-up-in-libya-an-unfolding-debacle>, last visited on 15 October 2012.

On 10 June 2012, the ICC officials were transferred to a jail, which was surrounded by tanks. According to the OPCD account, they were not provided with any legal documentation regarding the basis for the continued detention and were not provided with an explanation as to how the documents in the possession of the OPCD violated domestic law or national security.[1178] The OPCD account also indicated that their phones were confiscated and they were unable to communicate with ICC representatives, lawyers or family members.[1179]

During the detention of the ICC officials, representatives of the Libyan Government issued statements indicating that Taylor had been found with suspicious documents, including documents from one of Gaddafi's former accomplices, Mohammed Ismail, as well as blank documents with Gaddafi's signature.[1180] The OPCD filing submitted that later, representatives of the Libyan Government and the leader of the Zintan group, Al-Outairi, also alleged that Taylor had been in possession of a miniature video camera pen and a similar type of watch, for the purposes of spying.[1181] The spokesperson for the Libyan Government, Naser Almanea, stated that the detained team 'went beyond their authorities by exchanging documents that threaten the national security'.[1182]

On 22 June 2012, following a visit from Libya's Attorney General, the ICC issued a statement indicating that it 'deeply regrets any events which may have given rise

1178 ICC-01/11-01/11-190-Corr-Red, para 270.
1179 ICC-01/11-01/11-190-Corr-Red, para 274.
1180 'ICC lawyer meeting Gaddafi son detained in Libya', *Reuters*, 9 June 2012, available at <http://www.reuters.com/article/2012/06/09/us-libya-icc-idUSBRE8580FH20120609>, last visited on 15 October 2012; 'ICC lawyer held in Libya faces 45 day detention', *Reuters*, 11 June 2012, available at <http://www.reuters.com/article/2012/06/11/us-libya-icc-idUSBRE85A1E520120611>, last visited on 15 October 2012.
1181 'Libya accuses Australian ICC official of passing secret letter to Gaddafi's son', *The Guardian*, 25 June 2012, available at <http://www.guardian.co.uk/world/2012/jun/25/melinda-taylor-libya-accuse-spying>, last visited on 15 October 2012; 'ICC team will remain in custody in Libya', *Al Jazeera*, 11 June 2012, available at: <http://www.aljazeera.net/news/pages/cef311f8-78fb-4ccd-acb2-4155634cc55b>, last visited on 15 October 2012 (original in Arabic).
1182 'The detention of ICC team is a national security issue', *Libya Al-Youm*, 15 June 2012, available at <http://www.libya-alyoum.com/news/index.php?id=21&textid=10215>, last visited on 15 October 2012 (original in Arabic).

to concerns on the part of the Libyan authorities'.[1183] In material part, the statement provides:

> The ICC takes very seriously the information reported by Libyan authorities in relation to the ICC staff members' visit. The ICC fully understands the importance of the matter for the Libyan authorities and the people of Libya.
>
> The Court attaches great importance to the principle that its staff members, when carrying out their functions, should also respect national laws. The information reported by the Libyan authorities will be fully investigated in accordance with ICC procedures following the return of the four staff members. For this purpose, the Court will be seeking further background information from the Libyan authorities. The ICC will remain in close contact with the Libyan authorities to inform them of progress.
>
> The ICC deeply regrets any events that may have given rise to concerns on the part of the Libyan authorities. In carrying out its functions, the Court has no intention of doing anything that would undermine the national security of Libya.[1184]

The ICC team was released from detention on 2 July 2012. That same day, ICC President Song stated: 'When the ICC has completed its investigation, the Court will ensure anyone found guilty of any misconduct will be subjected to appropriate sanctions'.[1185] In statements to the media, Dr Gehani indicated that Taylor had been freed due to her status as an ICC employee, which gave her legal immunity, but continued to emphasise that she had broken Libyan laws and had been in possession of documents that were a threat to national security.[1186] The Prosecutor General's office indicated that Taylor was expected to appear before a court in Tripoli on 23 July, and that if she did not return a ruling would be made *in absentia*.[1187]

1183 Statement on the detention of four ICC staff members', *ICC Press Release*, ICC-CPI-20120622-PR815, 22 June 2012.

1184 'Statement on the detention of four ICC staff members', *ICC Press Release*, ICC-CPI-20120622-PR815, 22 June 2012.

1185 See 'Libya frees international criminal court legal team accused of spying', *The Guardian*, 2 July 2012, available at <http://www.guardian.co.uk/world/2012/jul/02/libya-releases-icc-officials>, last visited on 15 October 2012.

1186 'Libya frees four from International Court's team', *The New York Times*, 2 July 2012, available at <http://www.nytimes.com/2012/07/03/world/africa/libya-frees-four-from-international-criminal-court.html>, last visited on 15 October 2012; 'ICC staff expected to be released today', *Al Jazeera*, 2 July 2012, available at <http://www.aljazeera.net/news/pages/f6edd4f8-0a05-4020-80e1-4ecff0ffed17>, last visited on 15 October 2012 (original in Arabic).

1187 'Libya ICC lawyer Melinda Taylor and colleagues fly out', *BBC News*, 2 July 2012, available at <http://www.bbc.co.uk/news/world-africa-18683786>, last visited on 15 October 2012.

Four days after her release, in a 6 July 2012 press conference, Taylor confirmed that the authorities responsible for implementing the detention had treated her with dignity and respect, but emphasised that she had never been provided with an order or decision concerning the legal basis for the arrest or detention.[1188] Taylor denied any wrongdoing, stating that she believed her actions to have been consistent with her legal obligations under the Rome Statute and Rules of Procedure and Evidence and the Code of Professional Conduct for Counsel. She also emphasised that the rights of her client, Gaddafi, were 'irrevocably prejudiced' during her visit to Zintan. She stated: 'among other things, the Libyan authorities deliberately misled the Defence concerning whether the visit with Gaddafi would be monitored, and seized documents that were covered by legal professional privilege and ICC protective orders'.[1189] Given these events, Taylor asserted that it would not be possible for Gaddafi to obtain a fair trial in Libya.

Given the serious nature, and large-scale implications for the ICC, of this crisis and of the allegations made by the Libyan authorities, on 6 August 2012, the Women's Initiatives for Gender Justice sent a letter to President Song, calling for a transparent and robust investigation, and emphasising the importance of a response that is commensurate with the seriousness of the violations and errors, should any be determined.[1190] The letter stressed that despite the safe return of the ICC staff members, the incident has potentially significant implications for the security of ICC staff and the ICC's ability to conduct field missions, especially those whose work requires them to be stationed or conduct missions within the conflicts under ICC investigation. The letter to the President also stated that the circumstances surrounding the detention and subsequent release of the ICC staff members may also have significant political implications for the Court and had raised questions regarding the Court's working procedures.

The letter called for a comprehensive and independent investigation focusing not only on the alleged

1188 'Statement of the Defence for Saif Al-Islam Gaddafi', 6 July 2012, available at <http://resources.news.com.au/files/2012/07/06/1226419/474686-aus-file-melinda-taylor-statement.pdf>, last visited on 15 October 2012.

1189 'Statement of the Defence for Saif Al-Islam Gaddafi', 6 July 2012, available at <http://resources.news.com.au/files/2012/07/06/1226419/474686-aus-file-melinda-taylor-statement.pdf>, last visited on 15 October 2012.

1190 Letter from the Women's Initiatives for Gender Justice to the President of the ICC regarding the investigation into the situation leading to ICC staff detention in Libya, 6 August 2012, on file with the Women's Initiatives for Gender Justice.

actions of the Defence Counsel, but also on the larger environment within the ICC which had given rise to this significant crisis for the Court. The letter further underlined that the investigation should address all areas that may have given rise to the crisis, including: an analysis of the preparatory stage of deployment; an examination of the security assessment and evaluation carried our prior to the mission; a determination as to whether or not the necessary and appropriate protocols and agreements had been established between the ICC and the Libyan authorities prior to deployment; an evaluation of the composition of the mission team; a full review and evaluation of the response by the ICC once staff had been detained, including what lessons have been learned to strengthen the crisis response facility of the ICC should it face similar situations in the future; and a review and evaluation of the post-release phase.

Admissibility challenge

In November 2011, subsequent to talks with the Libyan Government in Tripoli following Gaddafi's arrest, Prosecutor Moreno Ocampo was reported in the media as stating that the ICC should facilitate a fair trial in Libya. He indicated: 'Saif is captured so we are here to ensure co-operation ... if they [Libyans] prosecute the case, we will discuss with them how to inform the judge, and they can do it, but our judges have to be involved'.[1191] That same day, the ICC issued a formal statement, clarifying the procedures before the Court. The statement indicated that 'contrary to what has been reported in the media, Pre-Trial Chamber I of the ICC remains seized of the case and the Libyan obligation to fully cooperate with the Court remains in force'.[1192] The Court stressed that, should Libya wish to conduct national proceedings, the appropriate procedure would be for the country to file an admissibility challenge, and emphasised that 'any decision on the admissibility of a case is under the sole competence of the Judges of the ICC'.

In a letter to the Court, dated 23 November 2011,[1193] the Libyan Government officially confirmed that Gaddafi was being held as a prisoner of war in Zintan and that he was being investigated for a variety of crimes allegedly committed in Libya, including murder, rape, and financial corruption. The Libyan Government further indicated that, in its view, it had primary jurisdiction over Gaddafi and, in submissions dated 23 January[1194] and 22 March 2012,[1195] formally requested that the surrender of Gaddafi be postponed, pending ongoing domestic investigations and its intended admissibility challenge. The Pre-Trial Chamber denied both requests and ordered Libya to 'proceed immediately with the surrender of Gaddafi to the Court'.[1196] Following the formal submission of the admissibility challenge by Libya on 1 May 2012,[1197] however, on 1 June 2012 Pre-Trial Chamber I granted Libya's request that the surrender of Gaddafi be postponed pending the outcome of the admissibility challenge.[1198] The Chamber's decision granting the request emphasised the importance of the principle of complementarity to the mandate and structure of the Court, and stated: 'it would be untenable for the Court to insist on compliance with a request for arrest and surrender, even at the risk of hampering the national proceedings, while its own investigation is suspended'.[1199]

1191 'ICC agrees to let Libya try Gaddafi's son', *Al Jazeera*, 23 November 2011, available at <http://www.aljazeera.com/news/africa/2011/11/201111229358866550.html>, last visited on 15 October 2012.

1192 'Course of action before the ICC following the arrest of the suspect Saif Al Islam Gaddafi in Libya', *ICC Press Release*, ICC-CPI-20111123-PR746, 23 November 2011 .

1193 ICC-01/11-01/11-34.

1194 On 23 January 2012, the Libyan Government requested that Gaddafi's surrender to the Court be postponed pursuant to Article 94 of the Rome Statute. Article 94 provides: 'If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.' This request was denied by Pre-Trial Chamber I on 7 March 2012, on the basis that Article 94(1) applies to other requests for cooperation under Part 9 of the Statute, but does not apply to requests for surrender. ICC-01/11-01/11-72, para 15.

1195 On 22 March 2012, Libya notified Pre-Trial Chamber I of its intention to challenge the admissibility of the case against Gaddafi, and requested that the Chamber suspend the execution of its surrender request pursuant to Article 95 of the Statute. This was also rejected by the Chamber, on the basis that there was no formal admissibility challenge before the Court. ICC-01/11-01/11-100, para 18.

1196 ICC-01/11-01/11-72, para 15; ICC-01/11-01/11-100, para 19.

1197 ICC-01/11-01/11-130-Red. This is the second time a State has filed an admissibility challenge with the ICC. The first time a State challenged the admissibility of a case was in the Kenya Situation in March 2011. For more detail about the procedure of challenging the admissibility of a case before the ICC, see further *Gender Report Card 2011*, p 263-271.

1198 ICC-01/11-01/11-163.

1199 ICC-01/11-01/11-163, para 36.

In its 1 May 2012 admissibility challenge submitted pursuant to Article 19 of the Statute,[1200] the Libyan Government argued that the case was inadmissible 'on the grounds that its national judicial system is actively investigating Mr Gaddafi and Mr Al-Senussi for their alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of State policy, amounting to crimes against humanity'.[1201] The Government argued that it was both able and willing to bring the two individuals to justice, and requested that the Chamber 'give full effect to the principle of complementarity' and accord primacy to the Libyan national justice system in accordance with the object and purpose of the Rome Statute.[1202] Libya indicated that it sought a ruling from the Chamber, declaring the case against Gaddafi & Al-Senussi inadmissible and quashing the surrender request.[1203]

The admissibility challenge set out the charges that the Libyan authorities are 'likely' to pursue against Gaddafi, including 'intentional murder, torture, incitement to civil war, indiscriminate killings, misuse of authority against individuals, arresting people without just cause and unjustified deprivation of liberty' as violations of the Libyan Criminal Code of 1953.[1204] The admissibility challenge asserted that the Libyan investigation 'includes the same allegations of murder and persecutions that form the basis for [the warrant for Gaddafi] ... as well as other criminal acts not included in the ICC Article 58 Decision',[1205] relating to 'crimes committed in Tripoli, Benghazi and Misrata during the period commencing from 15 February 2011 until the liberation of Libya'.[1206] On this basis, the Libyan authorities argued, the criminal proceedings against Gaddafi in Libya would satisfy the 'same person, same conduct' test required for a challenge under Article 19 to succeed.[1207]

1200 Pursuant to Article 19, a challenge to the admissibility of a case may be made by: '(a) an accused or a person for whom an arrest warrant or summons to appear has been issued under Article 58; (b) a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or (c) a State from which acceptance or jurisdiction is required under Article 12'.

1201 ICC-01/11-01/11-130-Red, para 1.

1202 ICC-01/11-01/11-130-Red, para 2.

1203 On 4 July 2011, the ICC issued a formal surrender request to the Libyan authorities, requesting the arrest and surrender of the indictees to the ICC. ICC-01/11-01/11-5.

1204 ICC-01/11-01/11-130-Red, para 75. The crimes were to be charged as violations of Articles 368, 435, 293, 296, 431, 433 and 434 of the Libyan Criminal Code of 1953.

1205 ICC-01/11-01/11-130-Red, para 75.

1206 ICC-01/11-01/11-130-Red, para 1.

1207 ICC-01/11-01/11-130-Red, paras 82-87. The Arrest Warrant issued for Gaddafi by the ICC contains two charges of crimes against humanity, for murder and persecution. (ICC-01/11-01/11-3).

The application emphasised the good treatment and '[protection] from harm or death at the hands of vigilantes' which the Libyan Government had provided for Gaddafi, as evidence of 'the falsity of the OPCD's accusations of poor treatment'.[1208] In a number of filings submitted to the ICC between February and April 2012, following the arrest and detention of Gaddafi in Libya, the OPCD challenged the legality of his arrest in Libya,[1209] the conditions of his detention, his inability to access a lawyer or contact family members,[1210] and Libya's 'blatant non-compliance' with the ICC.[1211]

The Libyan admissibility challenge set out detailed information as to the progress of the investigation against Gaddafi and the relevant criminal procedure and fair trial guarantees,[1212] noting that the Libyan Government had taken steps to restore law and order in Libya while 'remaining focused on negotiating the safe and orderly transfer of Gaddafi from a secret location to a specially constructed prison facility in Tripoli'.[1213] The Libyan Government also argued that, because at the time of filing the admissibility challenge, Al-Senussi was not yet in either Libyan or

1208 ICC-01/11-01/11-130-Red, para 35.

1209 The OPCD challenged the legality of the domestic arrest of Gaddafi, expressing concern that he had never been informed of the legal basis of his arrest, and indicating that he had been 'deprived of the protections of Article 55 of the Rome Statute'. (ICC-01/11-01/11-51-Red, paras 3, 15). Responding to the Libyan authorities' indications that it wanted the case referred to Libya, the OPCD stressed: 'when viewed against the lack of due process afforded to Mr. Gaddafi, and the general backdrop of credible reports concerning allegations of torture and mistreatment of detainees, there is no basis for asserting that the ICC should defer the case to Libya'. (ICC-01/11-01/11-51-Red, para 5).

1210 The OPCD argued Gaddafi's conditions of detention in Libya 'significantly violate his rights' (ICC-01/11-01/11-87, para 4), and that 'he has not seen any sunlight, he has not had any fresh air, and he has not seen any persons other than the guards' and that 'he is kept in a room with no windows and can only leave his room to go to the toilet'. (ICC-01/11-01/11-70-Red2, para 28). The OPCD further criticised the Libyan authorities for failing to afford Gaddafi due process, indicating that the Attorney General informed Gaddafi that '[his] case was "special" so that the normal rules [for filing complaints about procedures] couldn't be applied' (ICC-01/11-01/11-70-Red2, para 32), and that he has been denied access to a lawyer and has not been allowed to see family members (ICC-01/11-01/11-70-Red2, paras 35-36, 45-46).

1211 ICC-01/11-01/11-115, para 35.

1212 ICC-01/11-01/11-130-Red, paras 39-49 and 56-67.

1213 ICC-01/11-01/11-130-Red, para 35.

ICC custody,[1214] it would be both unreasonable and contrary to the principle of complementarity to require Libya to implement national proceedings against both individuals named in the Arrest Warrant in the case in order to be able to challenge the admissibility of the case against Gaddafi.[1215] It submitted that the proper scope of its admissibility challenge related only to the case against Gaddafi, but noted that if the Chamber concluded that a challenge under Article 19 must relate to the case as a whole, it would challenge the admissibility of the case against both Gaddafi and Al-Senussi.[1216] The Chamber later agreed that the Libyan admissibility challenge 'must be understood to only concern the case against Gaddafi', and held that it would not consider the admissibility of the case against Al-Senussi in resolving the present application by the Libyan authorities.[1217] At the time of writing this Report there was no indication as to whether Libya intended to expand its admissibility challenge to include the case against Al-Senussi, following the transfer of Al-Senussi from Mauritania to Libya, and a decision on the admissibility challenge has not yet been issued by the Pre-Trial Chamber.

On 20 August 2012, Dr Gehani, the Libyan focal point to the ICC, announced that the trial of Gaddafi in Libya would commence in September 2012, indicating that he had been charged with urging supporters to kill demonstrators and revolutionaries during the 2011 uprising.[1218] Dr Gehani stated that the trial, which was expected to last up to six months, would be held in Zintan and would be heard by three Libyan judges. Some reports further indicated that prosecutors would rely on phone intercepts, video clips, documents, and witness statements, as well as declarations made by Gaddafi on television during the revolution.[1219] On 6 September, however, Libyan authorities stated that the trial had been delayed to allow time to question Al-Senussi following his extradition from Mauritania to Libya. Prosecution spokesperson Taha Ba'ara confirmed: 'We expect the trial of Gaddafi to be delayed a little because Abdullah Senussi will be able to provide new information that can be used in Saif's trial'.[1220] According to media sources, the questioning of Al-Senussi has already begun.[1221] At the time of writing this Report, however, no further information as to the potential start of the trial of Gaddafi in Libya was publicly available.[1222]

1214 On 5 September 2012, however, Mauritania extradited Al-Senussi to Libya. At the time of writing this Report, Libya had not yet indicated whether it intends to file a second admissibility challenge for the case against Al-Senussi or amend the current challenge to include the case against him. See 'Mauritania extradites Gadaffi spy chief Senussi to Libya', *The Guardian*, 5 September 2012, available at <http://www.guardian.co.uk/world/2012/sep/05/mauritania-gaddafi-senussi-libya >, last visited on 15 October 2012.

1215 ICC-01/11-01/11-130-Red, paras 68-74.

1216 ICC-01/11-01/11-130-Red, para 74.

1217 ICC-01/11-01/11-134, para 8.

1218 Saif al-Islam Gaddafi faces trial in Libya, *The Guardian*, 20 August 2012, available at: <http://www.guardian.co.uk/world/2012/aug/20/saif-islam-gaddafi-trial-libya?CMP=EMCNEWEML1355>, last visited on 15 October 2012; 'Libya: Saif Gaddafi to go on trial next month', *The Telegraph*, 18 August 2012, available at: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9484459/Libya-Saif-Gaddafi-to-go-on-trial-next-month.html>, last visited on 15 October 2012.

1219 'Libya: Saif al-Islam to stand trial in September, *Middle East Confidential*, 23 August 2012, available at <http://me-confidential.com/5441-libya-saif-al-islam-gaddafi-to-stand-trial-in-september.html>, last visited on 15 October 2012.

1220 'Libya delays trial of Muammar Gaddafi's son to hear from spy chief', *The Guardian*, 6 September 2012, available at <http://www.guardian.co.uk/world/2012/sep/06/libya-muammar-gaddafi-son-trial>, last visited on 15 October 2012.

1221 'Libya delays trial of Muammar Gaddafi's son to hear from spy chief', *The Guardian*, 6 September 2012, available at <http://www.guardian.co.uk/world/2012/sep/06/libya-muammar-gaddafi-son-trial>, last visited on 15 October 2012.

1222 Should Gaddafi be convicted domestically, he could face the death penalty. While the Libyan authorities have indicted that 'there is also a possibility under Libyan law for commutation of a death sentence to one of life imprisonment in cases where the family members of victims "forgive" the convicted person', should Gaddafi be tried, convicted and sentenced to death in Libya prior to a decision on the admissibility of the case before the ICC, the domestic trial could significantly affect the ICC's ability to rule on admissibility. ICC-01/11-01/11-130-Red, para 67.

Milestone:
First reparations and sentencing decisions in the Lubanga case

In July and August 2012, respectively, Trial Chamber I issued the first reparations and sentencing decisions of the ICC in the case Thomas Lubanga Dyilo (Lubanga). The decisions follow the delivery of the ICC's first trial judgement delivered in March 2012, in which Lubanga was found guilty of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.[1223] The decisions, rendered pursuant to Articles 75 and 76 of the Rome Statute, represent another very important milestone for the Court, signalling an end to the accountability process for Lubanga and firmly establishing reparations as a key feature of the Rome Statute and therefore of the mandate of the ICC. This section provides a detailed analysis of both these decisions and the submissions made by the parties, participants and *amici curiae*, including the Women's Initiatives for Gender Justice, on the principles and procedures to be applied to the reparations proceedings.

1223 The trial judgement is discussed more fully in the *First trial judgement in Lubanga case* section of this Report.

Sentencing decision

In an important milestone for the ICC, on 10 July 2012, Trial Chamber I issued the first sentencing decision of the ICC in the Lubanga case.[1224] The decision sentenced Lubanga to 14 years imprisonment for the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.[1225] The Chamber also ordered that the six years already spent in detention since his surrender to the ICC in March 2006 be deducted from the sentence. Judge Odio Benito issued a dissenting opinion, including on the majority's findings relating to the sexual violence testimony. Although the judges confirmed that they could in principle consider sexual violence for the purpose of sentencing, despite the fact that the Prosecution did not bring charges for these crimes, the majority decision on sentencing did not recognise the commission of sexual violence as part of the harm suffered in its evaluation of the gravity of the crimes, nor as an aggravating factor. The Chamber's findings on this issue, as well as Judge Odio Benito's dissenting opinion, are described in more detail below.

As the first sentence for a conviction issued by the ICC, the Chamber enumerated several standards, defining the relevant legal parameters for sentencing not specifically prescribed by the statutory framework. First, the Chamber held that it could consider facts and circumstances outside of the framework of the confirmation of charges decision, finding that none of the provisions applicable to sentencing established such limitation. It stated, 'the evidence admitted at this stage can exceed the facts and circumstances set out in the Confirmation Decision, provided the defence has had a reasonable opportunity to address them'.[1226] Secondly, it established the applicable standards of proof. In line with jurisprudence from the *ad hoc* tribunals, it determined that the 'beyond a reasonable doubt' standard would apply to aggravating circumstances, as they could significantly affect the length of the sentence; and a 'balance of probabilities' standard would be applied to mitigating circumstances.[1227]

In determining the sentence, the Chamber considered the following four factors: the gravity of the crime, the individual circumstances of the convicted person, aggravating circumstances and mitigating circumstances. As another of the standards enunciated in this case, it held that issues considered when assessing the gravity could not also be taken into account when considering aggravating circumstances.[1228]

1224 The sentencing hearing in the Lubanga case was held on 13 June 2012.

1225 ICC-01/04-01/06-2901. On 3 October 2012, the Defence filed an application seeking to appeal the decision on sentencing. ICC-01/04-01/06-2935.

1226 ICC-01/04-01/06-2901, paras 20, 29-31. The Chamber noted the measures it had undertaken to ensure fairness to the Defence in sentencing, namely that: it had ordered a separate sentencing hearing in the event of a conviction, following a Defence request (ICC-01/04-01/06-1140, para 32); it had held that evidence relating to sentencing could be admitted during the trial, for efficiency and judicial economy (ICC-01/04-01/06-2360, para 38); and, the Defence had had adequate notice on matters to be considered by the Chamber in sentencing, as well as adequate time and facilities to prepare.

1227 ICC-01/04-01/06-2901, paras 33-34.

1228 ICC-01/04-01/06-2901, para 35, citing to the **Nikolić** case from the ICTY case. *Prosecutor v.* ***Nikolić***, Case No. IT-02-60/1-A, Appeals Chamber, Judgment on Sentencing Appeal, 8 March 2006, para 58. This holding, prohibiting 'double counting', contributed to the Chamber's decision that there were no aggravating circumstances, as the Prosecution and Legal Representatives of Victims had argued the same factors as contributing to the gravity of the crime as well as to aggravating circumstances, as described in more detail, below.

The gravity of the crime

The Chamber's analysis centred on its assessment of the gravity of the crime, as one of the 'principal factors' to be considered in sentencing.[1229] Noting their serious nature, the Chamber underscored several key aspects of the crimes for which Lubanga was convicted, namely: that conscription involved compulsion; that using children to actively participate in hostilities exposed them to 'real danger as potential targets'; and the vulnerability of children.[1230]

The Chamber described the purpose of the prohibition, which was to protect children from the effects of conflict, including fatal and non-fatal injuries and trauma from recruitment, as well as the traumas of separation from family and schooling and exposing them to violence and fear.[1231] It cited the testimony of expert witness Dr Elisabeth Schauer, who described the debilitating effects of the resultant post-traumatic stress disorder (PTSD), other 'severe forms of multiple psychological disorders', drug abuse, depression, dissociation and 'demonstrated suicidal behaviour'.[1232] The Chamber also referred to the testimony of SRSG on Children and Armed Conflict Radhika Coomaraswamy, who described children voluntarily joining armed forces 'as a pure matter of survival', due to their extreme poverty or family abuse.[1233]

The Chamber further considered the list of factors set forth in Rule 145(1)(c).[1234] As to the 'circumstances of manner, time and location of the crimes', the Chamber acknowledged that it had made no finding beyond a reasonable doubt about the precise number or proportion of recruits who were under the age of 15, but that the judgement had concluded that 'the involvement of children was widespread'.[1235] Regarding the 'degree of participation and intent of the convicted person', the Chamber indicated that an 'important foundation' for the sentence was its finding that Lubanga had 'agreed to, and participated in, a common plan to build an army' and 'was aware' that the crimes would occur in the ordinary course of events.[1236] It noted specifically that it had not found that Lubanga had 'meant' to commit the crimes, and that his participation as a co-perpetrator was as a political leader and Commander-in-Chief of the army, who, *inter alia*, personally encouraged child recruits and used them as bodyguards.[1237]

Regarding the 'individual circumstances of the convicted person', the Chamber noted that Lubanga was 'clearly an intelligent and well-educated individual', whose 'marked level of awareness' was a relevant factor in the determination of the sentence.[1238]

1229 ICC-01/04-01/06-2901, para 36, citing Article 78(1) of the Statute and Rule 145 of the Rules of Evidence and Procedure.
1230 ICC-01/04-01/06-2901, para 37.
1231 ICC-01/04-01/06-2901, para 38.
1232 ICC-01/04-01/06-2901, paras 39-42. Dr Elisabeth Schauer testified as an expert witness for the Chamber on 7 April 2009. For a summary of her testimony, see *Gender Report Card 2009*, p 84.
1233 ICC-01/04-01/06-2901, para 43. SRSG Radhika Coomaraswamy testified as an expert witness on 7 January 2010. For a summary of her testimony, see *Gender Report Card 2010*, p 135.
1234 Rule 145(1)(c) requires the Chamber to consider: 'the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person'. As indicated by Judge Odio Benito in her dissenting opinion, described below, the majority of the Chamber did not address 'the harm caused to the victims and their families' in its consideration of the gravity of the crime.
1235 ICC-01/04-01/06-2901, para 43.
1236 ICC-01/04-01/06-2901, para 52.
1237 ICC-01/04-01/06-2901, para 52.
1238 ICC-01/04-01/06-2901, para 56.

Aggravating circumstances

Rule 145(2)(b) of the Rules of Procedure and Evidence obliges the Chamber to consider the following possible aggravating circumstances:

> (i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature; (ii) Abuse of power or official capacity; (iii) Commission of the crime where the victim is particularly defenceless; (iv) Commission of the crime with particular cruelty or where there were multiple victims; (v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3; (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

The Chamber declined to find any aggravating circumstances although the Prosecution and Legal Representatives of Victims had advanced several, including the severe punishment of recruits,[1239] sexual violence, the particular defencelessness of the victims and discriminatory motive. The Chamber held that despite having found that a number of recruits had been subject to 'a range of punishments' during training, the evidence did not support a conclusion beyond a reasonable doubt that these punishments occurred in the ordinary course of the crimes or that Lubanga ordered or encouraged the punishments, was aware of them 'or that they can otherwise be attributed to him in a way that reflects his culpability'.[1240] The Chamber also rejected as 'double counting' arguments by the Prosecution and Legal Representatives of Victims that the extremely young ages of some of the children and their vulnerability constituted an aggravating circumstance, since it was already considered in the Chamber's assessment of the gravity.[1241]

1239 The Chamber recalled that it had heard evidence of the use of whips and canes, and detention in a covered trench. ICC-01/04-01/06-2901, para 57. In her dissent, Judge Odio Benito underscored the testimony concerning 'two individuals who died as result of being punished, one of whom was a child about 14 years old', as well as testimony relating that a child had been flogged until he lost the use of his right arm. ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 14.

1240 ICC-01/04-01/06-2901, para 59.

1241 ICC-01/04-01/06-2901, para 78.

Sexual violence alone and as a discriminatory motive

The Chamber initiated its discussion on sexual violence as an aggravating factor by 'deprecating' the attitude of former Prosecutor Moreno Ocampo for failing to include it in the charges. It stated:

> The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. He advanced extensive submissions as regards sexual violence in his opening and closing submissions at trial, and in his arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber. However, not only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis. Notwithstanding this stance on his part throughout these proceedings, he suggested that sexual violence ought to be considered for the purposes of sentencing.[1242]

As a threshold matter, the Chamber held that it could consider sexual violence with regard to sentencing with 'no consequential unfairness' to the Defence, despite 'the prosecution's failure to charge' Lubanga for rape and sexual violence and despite the fact that this evidence was not considered for the purpose of conviction.[1243]

The Chamber indicated that it was entitled to consider sexual violence under three of the factors related to gravity pursuant to Rule 145(1)(c) — specifically, harm suffered by the victims, nature of the unlawful behaviour and circumstances of manner — and as an aggravating circumstance under Rule 145(2)(b)(iv), to demonstrate that the crime was committed with particular cruelty.[1244]

1242 ICC-01/04-01/06-2901, para 60.

1243 ICC-01/04-01/06-2901, paras 61, 67, 68. In her dissent, Judge Odio Benito reiterated that the consideration of cruel treatment and sexual violence, although not included in the facts and circumstances of the confirmation of charges decision, caused no unfairness to the Defence 'given the procedural safeguards implemented by the Chamber'. ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 8.

1244 ICC-01/04-01/06-2901, para 67.

In other words, the Chamber clearly indicated in the section on aggravating circumstances that it could consider sexual violence as part of the harm suffered, or as an aggravating circumstance. Yet, despite holding that it was in principle entitled to consider sexual violence as part of the harm suffered, the Chamber did not mention the evidence related to sexual violence in its discussion of the gravity of the offence. In fact, it did not address the harm suffered by the victims at all in its determination of the gravity of the offence.

The Chamber also declined to find the sexual violence and rape committed against recruits to constitute an aggravating circumstance for the same reasons as it rejected punishment. It concluded:

> On the basis of the totality of the evidence introduced during trial on this issue, the Majority is unable to conclude that the sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible. Moreover, nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability.[1245]

These two omissions — the failure to address sexual violence as part of the gravity of the offence or as an aggravating circumstance — were the subject of Judge Odio Benito's dissent, described below. The Chamber also rejected assertions by the Prosecution and the Legal Representatives of Victims that sexual violence constituted an aggravating circumstance, showing that (i) the crime was committed with 'particular cruelty', and (ii) as discriminatory motive.

The Chamber also did not consider sexual violence as an aggravating circumstance to show that the crime was committed with 'particular cruelty'. Rather, it found that the underlying evidence did not meet the relevant criteria. It stated: 'it remains necessary for the Chamber to be satisfied beyond reasonable doubt that: (i) child soldiers under 15 were subjected to sexual violence, and (ii) this can be attributed to Mr Lubanga in a manner that reflects his culpability, pursuant to Rule 145(1)(a)'.[1246]

Echoing the trial judgement, in which the Chamber had declined to make any factual findings as to whether the responsibility for the commission of sexual violence against recruits could be attributed to the accused,[1247] it again found that this impeded its ability to consider the sexual violence as an aggravating circumstance. In this regard, the Chamber's discussion of sexual violence in the sentencing decision included a second reprobation of the former Prosecutor for his failure to present evidence on this issue at the sentencing hearing. It stated:

> Although the former Prosecutor was entitled to introduce evidence on this issue during the sentencing hearing, he failed to take this step or to refer to any relevant evidence that had been given during the trial. As a result, in the view of the Majority, the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond a reasonable doubt. Therefore, this factor cannot properly form part of the assessment of his culpability for the purposes of sentence.[1248]

The Chamber also dismissed arguments that the sexual violence constituted gender-based harm and thus a discriminatory motive pursuant to Rule 145(2)(b)(v).[1249] It stated that it had not been presented with 'any evidence that Mr Lubanga deliberately discriminated against women in committing these offences, in the sense suggested by the prosecution or the victims'.[1250] Consequently, despite the evidence presented at trial on sexual violence, and its ability to consider for the purpose of sentencing facts outside the parameters of the confirmation of charges decision, the Chamber did not take sexual violence into account in determining Lubanga's sentence.

The Chamber concluded its analysis by indicating that it would assess whether sexual violence was relevant for reparations in a forthcoming decision.[1251] The reparations decision, issued on 7 August 2012, is discussed in greater detail, below.

1245 ICC-01/04-01/06-2901, para 74.
1246 ICC-01/04-01/06-2901, para 69.
1247 ICC-01/04-01/06-2842, para 896.
1248 ICC-01/04-01/06-2901, para 75.
1249 ICC-01/04-01/06-2901, para 81, citing ICC-01/04-01/06-2881, paras 35, 36, (internal quotations omitted).
1250 ICC-01/04-01/06-2901, para 81. The Prosecution had not argued that the discrimination was 'deliberate', but rather that as gender-based harm sexual violence was discriminatory pursuant to international human rights standards, applicable pursuant to Article 21(3). ICC-01/04-01/06-2881, paras 35-36. The Prosecution argument was also advanced by Judge Odio Benito in her dissent, described below. The Legal Representatives of Victims made a similar assertion. ICC-01/04-01/06-2882, para 10.
1251 ICC-01/04-01/06-2901, para 76.

Mitigating circumstances

Rule 145(2)(a) requires that the Chamber take into account any:

> Mitigating circumstances such as:
> (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
> (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court.

While the Defence advanced several mitigating circumstances — including necessity, in order to prevent a massacre, Lubanga's attempts during the period of the charges to secure peace, and the demobilisation orders issued by Lubanga[1252] — the Chamber found only one mitigating circumstance in its sentencing decision: Lubanga's cooperation with the Court.

The Chamber described Lubanga as 'respectful and cooperative throughout the proceedings, notwithstanding some particularly onerous circumstances'.[1253] The 'onerous circumstances' referred to were: the Prosecution's 'failure to disclose exculpatory material', resulting in a stay in the proceedings;[1254] its 'repeated fail[ure] to comply with the Chamber's disclosure orders' regarding the identity of one of its intermediaries, 'leading to a second stay of the proceedings and a second provisional order releasing Mr Lubanga';[1255] and the Prosecution 'use of a public interview, given by Ms Beatrice le Fraper du Hellen, to make misleading and inaccurate statements to the press about the evidence in the case and Mr Lubanga's conduct during the proceedings'.[1256] The decision to find a mitigating circumstance attributable to the Prosecution constituted the Chamber's third reprobation of the Prosecution in the sentencing decision.

The length of the sentence

The Statute proscribes sentences exceeding 30 years, 'unless the extreme gravity of the crime and the individual circumstances of the convicted person warrant a term of life imprisonment', and requires that the sentence be 'proportionate to the crime' and 'reflect the culpability of the convicted person'.[1257] The Chamber summarised all of the factors considered in the determination of the sentence for the crimes committed:

> widespread recruitment and the significant use of child soldiers during the timeframe of the charges; the position of authority held by Mr Lubanga within the UPC/FPLC and his essential contribution to the common plan that resulted, in the ordinary course of events, in these crimes against children; the lack of any aggravating circumstances; and the mitigation provided by his consistent cooperation with the Court during the entirety of these proceedings, in circumstances when he was put under considerable unwarranted pressure by the conduct of the prosecution during the trial.[1258]

Article 78(3) of the Statute requires that when convicted for more than one crime, the Chamber pronounce a sentence for each, as well as a joint total

1252 ICC-01/04-01/06-2901, paras 83-87. The Prosecution and Legal Representatives of Victims had asserted that there were no mitigating circumstances in the case. See ICC-01/04-01/06-2881, para 7; ICC-01/04-01/06-2880, paras 17-21; and ICC-01/04-01/06-2882, para 5.

1253 ICC-01/04-01/06-2901, para 91.

1254 ICC-01/04-01/06-2901, para 91. For more information on the Prosecution failure to disclose exculpatory material to the Defence pursuant to Article 54(3)(e) of the Statute, see ICC-01/04-01/06-1401; see also *Gender Report Card 2009*, p 130-133.

1255 ICC-01/04-01/06-2901, para 91. For more information on the Prosecution failure to disclose the identity of Intermediary 143, see ICC-01/04-01/06-2517; see also *Gender Report Card 2010*, p 147-151.

1256 ICC-01/04-01/06-2901, para 91. For more information on Fraper du Hellen's interview with the lubangatrial.org website, see ICC-01/04-01/06-2433; see also *Gender Report Card 2010*, p 151-152.

1257 ICC-01/04-01/06-2901, para 21 (internal quotations omitted). See also Articles 77(1) and 81(2)(a) of the Statute and Rule 145(1)(a), 145(3) of the Rules of Procedure and Evidence.

1258 ICC-01/04-01/06-2901, para 97. In determining the length of imprisonment, the Chamber also considered two decisions issued by the Special Court for Sierra Leone in which separate sentences were handed out for the crime of using child soldiers: the RUF case, characterised by its large scale, 'significant degree of brutality' and 'exceptionally high' gravity (imposing 50, 52 and 40 years imprisonment, respectively, for each of the three convicted persons), and the CDF case, (imposing 7 years, with one mitigating circumstance). ICC-01/04-01/06-2901, paras 13-15, citing, respectively, *The Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Sentencing Judgment, 8 April 2009 and *The Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Trial Chamber, Sentencing Judgment, 9 October 2007, (conviction overturned on appeal).

sentence.[1259] Accordingly, the Chamber sentenced Lubanga to 13 years imprisonment for the crime of conscripting children under the age of 15 into the UPC; 12 years for the crime of enlisting children under the age of 15 into the UPC; and 14 years for using children under the age of 15 to participate actively in the hostilities, to be served concurrently. It thus sentenced Lubanga to a total of 14 years imprisonment.[1260] Pursuant to Article 78(2),[1261] the Chamber deducted the time spent in detention from his arrest for the Court in March 2006. The Chamber declined the Defence request to deduct the time Lubanga spent in detention in the DRC, as there was insufficient evidence that he was detained for conduct related to the crimes for which he was convicted.[1262] Consequently, over six years will be deducted from the sentence, and Lubanga will serve approximately eight additional years in prison.

Judge Odio Benito's dissenting opinion

Judge Odio Benito disagreed with the majority decision on two aspects of the sentencing decision: (i) the absence of any consideration of the harm suffered as a result of the severe punishment and sexual violence committed against recruits as a factor in determining the gravity of the crime pursuant to Rule 145(1)(c); and (ii) the imposition of a differentiated sentence for each of the three crimes.[1263]

Judge Odio Benito criticised the majority for disregarding 'the harm caused to the victims and their families', which she contended was a 'fundamental factor' that '*shall* be considered by the Chamber pursuant to Rule 145(1)(c)'.[1264] She stated:

> The evidence received as regards the punishments and harsh conditions of children in the recruitment camps and the sexual violence they suffered (mainly but not exclusively the girls) at their young age should be taken into consideration when determining the sentence against the convicted person as it touches upon the gravity of the crimes [...] and particularly the damage caused to the child victims and their families as a result of these crimes.[1265]

According to Judge Odio Benito, the evidence presented at trial demonstrated 'beyond a reasonable doubt' the range of punishments to which the recruits were subjected.[1266] She rehearsed the evidence on the harm caused to victims and their families, also drawing from the expert testimonies of Dr Schauer and SRSG Radhika Coomaraswamy. Judge Odio Benito referred specifically to those aspects of their testimonies that underscored 'the differential gender effects and damages that these crimes have upon their victims, depending on whether they are boys or girls'.[1267]

1259 Article 78(3) states: 'When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment'.

1260 ICC-01/04-01/06-2901, paras 98-99, 106. The Chamber did not impose a fine, given Lubanga's financial situation.

1261 Article 78(2) requires the Chamber to deduct the time spent in detention pursuant to an order from the Court. It also permits the Chamber to deduct other time in detention 'in connection with the conduct underlying the crime'.

1262 ICC-01/04-01/06-2901, para 102. The Chamber evaluated the evidence related to his pre-trial detention in the DRC using the 'balance of probabilities' standard.

1263 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, paras 2-3.

1264 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 5 (emphasis in original).

1265 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 6.

1266 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 7. She did not make a similar finding with regard to sexual violence being demonstrated beyond a reasonable doubt.

1267 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 13. Specifically, she noted that: 'Ms Schauer stated that sexual violence, including torture, rape, mass rape, sexual slavery, enforced prostitution, forced sterilisation, forced termination of pregnancies, giving birth without assistance and being mutilated are some of the key gender-based experiences of both women and girls during armed conflicts'.

In contrast to the majority, Judge Odio Benito rehearsed the 'abundant' fact-based witness testimony on the harm caused to victims and their families, including: the harsh punishments that involved whipping, beating with a cane and imprisonment, resulting in the death of two persons, one of whom was 14 years old; the use of young girls as domestic servants, including subjecting them to sexual abuse; the pervasive sexual abuse of girls, including one as young as 12, many of whom became pregnant and aborted, sometimes on multiple occasions; and the difficulty of reintegrating these young girls into their families, including the children born as a result of rape.[1268]

Departing from the majority, Judge Odio Benito found that these were 'exacerbating factors pursuant to Rule 145(1)(c) all of which may be attributed to Lubanga since he was found guilty beyond a reasonable doubt of the crimes that caused such harms to the child victims and their families'.[1269] She further underscored the discriminatory impact of the offences on 'particularly girls under the age of 15 who were subject to sexual violence (and consequently to unwanted pregnancies, abortions, HIV and other sexually transmitted diseases) as a result of their recruitment within the UPC'.[1270] Citing General Recommendation No. 19 on Violence against Women, by the Committee on the Elimination of Discrimation Against Women, she noted that the sexual violence suffered by the children in this case:

> impaired and most likely nullified, perhaps for the rest of their lives, the enjoyment of other human rights and fundamental freedoms of its victims (including *inter alia*, their right to education, their right to health, including sexual and reproductive health, and their right to a family life).[1271]

Although Judge Odio Benito agreed with the majority that there were no aggravating circumstances in this case, her dissent removed any intent requirement in finding discrimination. She stated that 'although, as noted by the Majority of the Chamber, Mr Lubanga may not have "deliberately discriminated against women in committing these offences", the crimes for which he was convicted resulted in the discrimination of women'.[1272] In this regard, she also invoked CEDAW, which defines violence against women as discrimination.[1273]

Judge Odio Benito also disagreed with the majority decision to impose lower sentences for the crimes of enlistment and conscription, for 12 and 13 years, respectively. She argued that as all the crimes resulted from the same plan and resulted in the same harm to the victims, whether they had been enlisted or recruited and 'regardless of whether they were used to participate actively in the hostilities'.[1274] She stated, 'all three crimes unmistakably put young children under the age of 15 at risk of severe physical and emotional harm and death'.[1275] She opined that Lubanga should be sentenced to 15 years for each crime, with a joint total sentence of 15 years.[1276]

1268 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, paras 14-19.
1269 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 20.
1270 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 21.
1271 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 21.
1272 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 21, citing the majority decision, para 81.
1273 Article 1 of CEDAW, General Recommendation No. 19, Violence Against Women, 1992, A/47/38 provides: 'Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.
1274 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 25.
1275 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, para 25.
1276 ICC-01/04-01/06-2901, Dissenting Opinion of Judge Odio Benito, paras 26-27.

Decision on reparations

For the first time in proceedings at the ICC, on 7 August 2012, Trial Chamber I decided on the principles and procedures to be applied to reparations for victims in the context of the case against Thomas Lubanga Dyilo.[1277] The Registry had determined Lubanga indigent for the purpose of the reparations proceedings, which limited his personal contribution to the award. Having determined that reparations were to be implemented through the Trust Fund for Victims (TFV or Trust Fund), within the limits of its resources, the Chamber thus initiated the Trust Fund's reparations mandate. However, in the decision, the Chamber 'decline[d] to issue specific orders to the TFV on the implementation of reparations that are to be funded using voluntary contributions'.[1278]

As stated by Pre-Trial Chamber I at the outset of the Lubanga case, and quoted by the Trial Chamber:

> The reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system.[1279]

Given the absence of specificity in the statutory framework concerning the reparations phase, in the Court's first reparation's decision, the Chamber clarified several key issues, described in more detail, below. At the same time, the potential wider application of the principles enunciated by the Chamber to other cases, including the importance of gender inclusivity, was circumscribed by the Chamber's explicit holding, limiting their application only to the present case.[1280]

The decision approved a wide range of reparative remedies, emphasising the principles of gender-inclusiveness, non-discrimination, flexibility, responsiveness to the needs of vulnerable victims and the importance of victims' agency in the design and priorities for reparations programmes. In addition to broadly establishing the legal framework, principles and procedures to be applied to administering reparations in the Lubanga case, a large portion of the decision provided a comprehensive summary of the numerous submissions by the parties and participants to the case, other organs of the Court, including the Registry, the Office of Public Counsel for Victims (OPCV) and the Trust Fund for Victims,[1281] and international and non-governmental organisations, including the Women's Initiatives for Gender Justice, the International Center for Transitional Justice (ICTJ), UNICEF, *Terres des Enfants, Justice Plus, Centre Pélican, Fédération des Jeunes pour la Paix Mondiale and Advocats Sans Frontières*, which were granted leave to submit observations.[1282]

At the time of writing this Report, appeals against the reparations decision have been filed by the Defence,[1283] by the Office of Public Counsel for Victims jointly with one of the teams of Legal Representatives of Victims,[1284] as well as by the second team of Legal Representatives.[1285] On 17

1277 ICC-01/04-01/06-2904. On 13 August 2012, the Defence requested leave to appeal the decision on reparations. ICC-01/04-01/06-2905. On 3 September 2012, the Legal Representatives also sought leave to appeal the reparations decision. ICC-01/04-01/06-2914.

1278 ICC-01/04-01/06-2904, para 289(d).

1279 ICC-01/04-01/06-2904, para 178, citing ICC-01/04-01/06-1-US-Exp-Con, para. 150.

1280 ICC-01/04-01/06-2904, paras 180-181.

1281 The Trust Fund for Victims is an independent body within the Court charged with implementing Court-ordered reparations and with providing physical and psychosocial rehabilitation and material support to victims of crimes within the jurisdiction of the ICC.

1282 While the decision on 20 April 2012 also granted leave to the *Fondation congolaise pour la Promotion des droits humains et la Paix* (FOCDP), they did not submit observations to the Chamber.

1283 On 13 August 2012 the Defence requested from the Trial Chamber leave to appeal the Decision of 7 August 2012 on two grounds: the beneficiaries of reparations and the reparations procedure, citing eight issues under these grounds, ICC-01/04-01/06-2905. On 29 August 2012 Trial Chamber 1 granted leave to appeal on four of the above issues, ICC-01/04-01/06-2911. On 6 September 2012 the Defence filed a new appeal directly before the Appeals Chamber, pursuant to Article 82(4) of the Rome Statute, Rules 150 and 153 of the Rules of Procedure and Evidence and Regulation 57 of the Regulations of the Court, requesting that the Chamber find that the 7 August 2012 Decision on reparations constitutes an "order for reparations", suspend its effects immediately and ultimately set it aside, ICC-01/04-01/06-2917, paras 6 , 15.

1284 The OPCV and one of the teams of Legal Representatives of Victims jointly filed an appeal on 24 August 2012 directly before the Appeals Chamber on the grounds that the Trial Chamber had erred in law by: (i) dismissing individual applications; (ii) deciding to refer the case to a newly constituted Trial Chamber; and (iii) delegating reparation responsibilities to non-judicial entities, requesting that the Appeals Chamber reverse the reparations decision insofar as it relates to these issues. ICC-01/04-01/06-2909, paras 16(1), 20(2), 24(3), 26.

1285 The second team of Legal Representatives of Victims filed an appeal before the Appeals Chamber on 18 September 2012 on the grounds that the Trial Chamber had erred in law by: (i) dismissing individual applications; (ii) 'absolving the convicted person from any obligations as regards reparations'; and (iii) as an alternative to the previous issue, 'in deciding that the Defence and the Prosecutor remain parties to reparation proceedings' and requested that the Chamber set the Decision aside. ICC-01/04-01/06-2914, paras 10(1), 15(2), 19(3), 27.

September the Appeals Chamber issued a decision on the conduct of the appeal proceedings, requesting observations from the Legal Representatives of Victims, the OPCV, the Defence, the Prosecution and the Trust Fund for Victims, including on the nature of the 7 August decision on reparations.[1286] In its filing in response to the Appeals Chamber's request, the Trust Fund underscored the difficulty in moving forward on the implementation of the reparations proceedings in the absence of judicial clarity about a number of issues in the reparations decision. The Trust Fund underlined that 'because the impugned decision calls for an elaborate and resource intensive process to be managed by the Trust Fund, it is a practical necessity to achieve as much legal clarity at as early a stage as possible'.[1287] The Trust Fund thus urged the Appeals Chamber to allow for a comprehensive appeals process. At the time of writing this Report, a decision on the different appeals against the reparations decision has not yet been issued. Notices of appeal were also filed by both the Prosecution and the Defence against the decision on sentencing pursuant to Article 76,[1288] and by the Defence against the 14 March trial judgement;[1289] however, at the time of writing this Report these appeals have not been submitted to the Appeals Chamber.

1286 ICC-01/04-01/06-2923. The Appeals Chamber requested observations on the appeals on reparations, 'addressing the admissibility of the appeals and the question of the making of observations on the appeals, including on the following issues: a) the nature of the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 (ICC-01/04-01/06-2904; hereinafter: "Impugned Decision"); and b) whether Mr Thomas Lubanga Dyilo, who was not ordered to make any specific reparations, and claimants for reparations, including those whose right to participate in the proceedings was withdrawn by virtue of the Trial Chamber's "Judgment pursuant to Article 74 of the Statute" of 14 March 2012 (ICC-01/04-01/06-2482) as well as those victims who may be affected by an order for collective reparations, have the right to appeal it under article 82 (4) of the Statute.' The Appeals Chamber also requested observations regarding the suspensive effect requested by the Defence. In response, the Prosecution (ICC-01/04-01/06-2930), Defence (ICC-01/04-01/06-2929), Legal Representatives (ICC-01/04-01/06-2931), and the Trust Fund for Victims (ICC-01/04-01/06-2927) all filed submissions on the questions set out by the Chamber.

1287 ICC-01/04-01/06-2927, para 26.

1288 ICC-01/04-01/06-2933 and ICC-01/04-01/06-2935, respectively.

1289 ICC-01/04-01/06-2934.

The following section provides an overview of the submissions on the reparations proceedings from the parties, participants, the OPCV, Trust Fund for Victims and several *amici curiae*, as well as the 7 August decision by Trial Chamber I establishing the principles and procedures to be applied to reparations.

Procedural background

In a scheduling order[1290] issued the same day as the trial judgement, the Trial Chamber invited submissions from parties and participants, as well as the Registry, the Trust Fund for Victims and other interested parties, on the principles to be applied and procedures to be followed by the Chamber with regard to reparations.[1291] The Office of the Prosecutor, the Defence, the Legal Representatives for Victims, the Registry, the OPCV and the Trust Fund all filed submissions.[1292] Prior to the Chamber's order, the Registry and the Trust Fund had submitted lengthy observations on the full range of issues to be considered by the Chamber.[1293]

On 28 March 2012, the Women's Initiatives for Gender Justice filed a request for leave to participate in the reparations proceedings, indicating that it would provide observations on, *inter alia*: ensuring a gender perspective in the elaboration of reparations principles, the recognition of harm caused by sexual violence, ensuring a gender perspective in the design of the reparations order, the importance of effective consultations with victims and the transformative role

1290 ICC-01/04-01/06-2844.

1291 Specifically, the Chamber invited observations on the following five issues: (a) whether the Chamber should order individual or collective reparations; (b) to whom the reparations should be directed; how the harm was to be assessed; and, which criteria to apply; (c) whether it was possible or appropriate to make a reparations order against the convicted person; (d) whether the Chamber should order reparations to be issued through the Trust Fund for Victims; and, (e) whether the parties or participants sought to call expert evidence. ICC-01/04-01/06-2844, para 8.

1292 ICC-01/04-01/06-2866 (Defence); ICC-01/04-01/06-2867 (Prosecution); ICC-01/04-01/06-2864 (Legal Representative of Victims); ICC-01/04-01/06-2869 (Legal Representative of Victims); ICC-01/04-01/06-2865 (Registry); ICC-01/04-01/06-2865 (OPCV); ICC-01/04-01/06-2872 (Trust Fund for Victims).

1293 ICC-01/04-01/06-2806; ICC-01/04-01/06-2803.

of reparations for advancing gender equality.[1294] On 20 April 2012, the Trial Chamber issued its decision, granting the request.[1295] The Chamber also granted leave to participate to ICTJ, FOCDP, UNICEF, and the joint filing of the NGOs *Terres des Enfants, Justice Plus, Centre Pélican, Fédération des Jeunes pour la Paix Mondiale and Avocats Sans Frontières*. The Chamber benefited from particularly active participation in the reparations phase of the proceedings, and clearly drew upon the full range of submissions, which are also summarised in more detail below, in the substance of the reparations decision.

Defining characteristics of the Lubanga case: the parties' and participants' concerns

The parties' and participants' (hereinafter 'participants') responses to the Chamber's invitation were shaped by the specific characteristics of the Lubanga case, namely: the Prosecution's decision not to include charges for gender-based crimes and its trial strategy to address these issues, the local culture and understanding of rights and the crimes at issue in this case, Lubanga's indigence[1296] and the limited number of reparations applications that had been received by the Court to date. In addition to these juridical parameters, they addressed the socioeconomic and cultural context of the region, one characterised by 'large-scale poverty with chronic insecurity'[1297] due to ethnic conflict, 'other structural violence',[1298] and, as noted by the Women's Initiatives, the 'gender discrimination [that] is deeply rooted' in most societies.[1299]

1294 ICC-01/04-01/06-2853. The filing is also available at <http://www.iccwomen.org/documents/Womens-Initiatives-request-Lubanga-reparations.pdf>. For a more detailed summary of the Women's Initatives' observations on reparations see Special Issue # 4 of the Legal Eye on the ICC, forthcoming. This was the Women's Initiatives' fourth request for leave to participate before the ICC in relation to the Lubanga case. The Women's Initiatives was the only women's rights organisation to submit observations as part of these reparations proceedings, and it is the only international women's human rights organisation to have been admitted as *amicus curiae* before the ICC.

1295 ICC-01/04-01/06-2870.

1296 ICC-01/04-01/06-2865, para 27.

1297 ICC-01/04-01/06-2872, para 140.

1298 ICC-01/04-01/06-2878, para 19.

1299 ICC-01/04-01/06-2876, para 8; see also ICC-01/04-01/06-2872, para 33.

The potential impact of the limited charges brought by the Prosecution on the scope of the reparations order was a primary concern of the participants for two reasons.[1300] First, the direct victims of the crimes for which Lubanga was convicted were former child soldiers, primarily of the same ethnicity (Hema) as the convicted person. Participants had expressed concerns regarding the potential 'pernicious effects'[1301] of providing reparations to only one ethnic group as 'counter-productive to a reconciliation process'.[1302] As described by the ICTJ, 'the Hema community considers Lubanga a hero...but for the Lendu victims of attacks carried out by the UPC under Lubanga's leadership, murder, rape, torture, looting, and destruction of property are seen as the "real crimes" committed by the UPC'.[1303] The participants had also suggested that the ambiguous status of child soldiers, as both victims and perpetrators of crimes, could preclude them from coming forward to benefit from any reparations awards for fear of stigmatisation and reprisals.[1304]

Secondly, the limited charges did not include rape or sexual violence. During the trial, however, Prosecution witnesses gave extensive evidence and testimony concerning sexual violence committed against child soldiers by the UPC. In the trial judgement, the majority of the Chamber had found that it was precluded from considering evidence concerning sexual violence, pursuant to Article 74(2),[1305] because such factual allegations had not been included in the Pre-Trial Chamber's confirmation of

1300 ICC-01/04-01/06-2867, para 18, in which the Prosecution recognised the potential exclusion of Lendu civilian victims of UPC attacks and female recruits who were victims of sexual violence.

1301 ICC-01/04-01/06-2879, para 23.

1302 ICC-01/04-01/06-2872, paras 66, 137, 141-142, 148-149; ICC-01/04-01/06-2878, para 7, stating that 'reparations should not fuel existing or latent tensions'; ICC-01/04-01/06-2879, para 67, stating 'a reparations order that is seen as focusing exclusively on Hema victims, which represent the bulk of direct victims of the crime in this case, may reinforce the frustration and skepticism'; ICC-01/04-01/06-2877, para 15; ICC-01/04-01/06-2806, para 25.

1303 ICC-01/04-01/06-2879, para 23; see also ICC-01/04-01/06-2877, para 37.

1304 ICC-01/04-01/06-2872, paras 149-150; ICC-01/04-01/06-2877, para 15; see also ICC-01/04-01/06-2879, para 22, noting that Hema families and commanders concealed children associated with armed groups, and that they were thus excluded from formal demobilisation and reintegration processes.

1305 Article 74(2) prescribes that the judgement 'shall not exceed the facts and circumstances described in the charges'.

charges decision.[1306] In its 10 July 2012 decision on sentencing,[1307] as discussed above, the majority of Trial Chamber I[1308] did not explicitly consider sexual violence in its assessment of the gravity of the crimes, and the Chamber did not find that the sexual violence committed against recruits constituted an aggravating circumstance. As noted by the Chamber, 'although the former Prosecutor was entitled to introduce evidence on this issue during the sentencing hearing, he failed to take this step or to refer to any relevant evidence that had been given during trial'.[1309] Rather, the majority of the Chamber had indicated in both the judgement and in the sentencing decision that it would determine in due course whether sexual violence would be considered for the purposes of reparations.[1310] As the Women's Initiatives pointed out, the Prosecution's decision not to bring charges for sexual violence had the potential to limit the provision of reparations for related harm, which would have had a clearly discriminatory impact based on gender.[1311] Indeed, with the exception of the Defence, all participants recommended that the reparations order encompass harm from sexual and other forms of gender-based violence, as 'part and parcel'[1312] of the harm caused by child conscription.

Participants had also identified cultural differences and distinct local understandings of rights and the crimes charged in this case as having important implications for the implementation of a reparations award. The Trust Fund had explained that 'affected communities in Ituri lack an understanding concerning the crimes' in this case.[1313] It had noted that children continued to be enlisted and conscripted, that it was not seen as a crime, and thus, 'former child soldiers are not viewed as victims'.[1314] Furthermore, they described a 'lack of understanding as to why the right not to be enlisted and conscripted as a child is an important right to safeguard'.[1315] Consequently, several participants had suggested the need for a sensitisation campaign to accompany any reparations order.[1316]

UNICEF had noted that 'another challenge is to craft reparations in a manner that respects local conceptions of rights, where the rights and obligations of individuals, especially children and young adults, may not be clearly dissociated from collective rights and responsibilities of the community'.[1317] For example, it had suggested that measures be adopted to ensure the award is managed in the best interests of the child/beneficiary when undertaken by a parent or guardian.[1318] According to *Avocats Sans Frontières*, et al, consultations had revealed that the principal risk was that beneficiaries may feel obliged to redistribute awards to family members and customary leaders in order to maintain good relations and to avoid curses tied to cultural beliefs, or to reduce insecurity given the presence of militia leaders. They had argued that 'uneducated and unsupervised' beneficiaries would be unable to make 'smart use of the awards', and underscored the potential for 'corruption and misappropriation of funds'.[1319]

Cultural norms pertaining to collective rights and the structural subordination of women also have important implications for the implementation of reparations. One Legal Representative of Victims had suggested that local customs be applied by providing

1306 ICC-01/04-01/06-2842, para 631. Judge Odio Benito issued a Separate and Dissenting Opinion, in which she found that sexual violence was an 'intrinsic' aspect of the legal concept of 'use to participate actively in the hostilities'. Separate and Dissenting Opinion of Judge Odio Benito, para 16.

1307 ICC-01/04-01/06-2901.

1308 Trial Chamber I was composed of Presiding Judge Sir Adrian Fulford (UK), Judge Elizabeth Odio Benito (Costa Rica) and Judge René Blattmann (Bolivia). Judge Odio Benito issued a Separate and Dissenting Opinion, in which she found that the severe punishments and sexual violence to which the victims were subject should have been considered in the majority's assessment of the gravity of the crime pursuant to Rule 145 of the Rules of Procedure and Evidence. See Separate and Dissenting Opinion of Judge Odio Benito, paras 2, 6-23.

1309 ICC-01/04-01/06-2901, para 75.

1310 ICC-01/04-01/06-2842, para 631; ICC-01/04-01/06-2901, para 76.

1311 ICC-01/04-01/06-2876, para 21.

1312 ICC-01/04-01/06-2806, para 20.

1313 ICC-01/04-01/06-2872, para 143.

1314 ICC-01/04-01/06-2872, paras 144-145, and citing REDRESS, *Justice for victims: the ICC reparations mandate*, REDRESS Trust, 20 May 2011, p 24.

1315 ICC-01/04-01/06-2872, para 147.

1316 ICC-01/04-01/06-2877, para 25, suggesting that any financial benefit provided to former child soldiers, given that they also committed gross human rights violations, should be accompanied by an awareness campaign to counter their negative image and to encourage solidarity with them; ICC-01/04-01/06-2878, para 20.

1317 ICC-01/04-01/06-2878, para 15.

1318 ICC-01/04-01/06-2878, para 27.

1319 Translation, ICC-01/04-01/06-2877, para 26. Original submission in French: 'De même, des bénéficiaires non formés et encadrés peuvent ne pas avoir les attitudes et aptitudes nécessaires pour utiliser l'argent à bon escient. Enfin, en l' absence de mesures d' encadrement et d' accompagnement rigoureuses, le risque de corruption ou de concussion ne peut pas être écarté. Dès lors, et quand bien même les victimes pourraient être intéressées par une réparation 'monétaire' , limiter leurs besoins à cette seule dimension semblerait inapproprié.'

chattel in the value of a dowry (three cows and seven goats) 'to cleanse the affront undergone by the girl and her family' for rape and marriage (forced or not), resulting in unwanted children.[1320] In this regard, the Women's Initiatives had underscored the importance of consultations for assessing:

> whether women have decision-making power in their families and communities, whether women are legally permitted or culturally able to keep and/or own any material form of reparations which may be provided, and will have full access to other forms of reparations, including to the full array of possible programmes, projects and services that may be offered.[1321]

The Women's Initiatives had further emphasised that consultations with victims 'should also assess any gaps between the official understanding and formal definitions of reparations and women's expectations of what constitutes reparations, what women's priorities for reparations are, and how these differ from those of men or the community as a whole'.[1322]Lubanga's indigence also shaped the forthcoming reparations decision. As explained by the Prosecution, because of his limited resources, Lubanga could not 'possibly compensate all his victims for the damage and loss they suffered'.[1323] Furthermore, it had noted that 'reparation awards ordered to be paid personally by the convicted person can only be directed to victims whose harm is linked to the crimes for which the person has been convicted'.[1324] Practically speaking, this significantly limited Lubanga's personal contribution to the reparations award. At the same time, as pointed out by the Trust Fund, utilising its 'other resources' to complement the reparations order would imply 'a bias towards awards of a collective nature',[1325] thus linking the sources of funding to the nature of the award.

At the time of the proceedings, the Registry had received 85 reparations applications,[1326] constituting approximately 2/3 of the number of the 129 victims authorised to participate at trial.[1327] In contrast, the Trust Fund had indicated that approximately 15,000 children were demobilised in Ituri from 2003-2009, 2,900 of whom could have been associated with the UPC/FPLC.[1328] According to the Trust Fund and *Avocats Sans Frontières, et al*, the limited number of applicants, 'a small, and not necessarily representative sample of victims', underscored the limitations of adopting a 'purely applications-based approach'.[1329] They submitted that the fear of being associated as a former child soldier was an important factor for why so few victims had submitted formal applications with the Court.[1330] The Women's Initiatives noted that 'limiting reparations to individuals whose application for victim participation status and reparations have been accepted would likely have an unintended exclusionary effect on women and girls who may be reluctant to come forward due to fears of stigmatisation or other obstacles preventing their access to services and justice generally'.[1331] Noting the limited number of victims who had been accepted to participate in the proceedings relative to the number of individuals and communities affected by the crimes, the Women's Initiatives further underscored that 'it is important that reparations be designed with the potential to reach unidentified victims, in particular women and girls'.[1332]

The Registry had also suggested that it was appropriate for the Chamber to consider the 'broader bearing' of its reparation decision in the DRC, 'such as, for instance, on any complementary steps that might be taken at [the] national level'.[1333] The Trust Fund had echoed that the principles established by the Chamber should 'address the wider dimension of the situation that gave rise to the violations experienced by victims, placing the Court's reparations regime in

1320 ICC-01/04-01/06-2869, para 27.
1321 ICC-01/04-01/06-2876, para 35.
1322 ICC-01/04-01/06-2876, para 34.
1323 ICC-01/04-01/06-2867, para 10.
1324 ICC-01/04-01/06-2867, para 17.
1325 ICC-01/04-01/06-2872, para 18.
1326 ICC-01/04-01/06-2852. Subsequently, on 16 August 2012, the Registry indicated it had received one additional application for reparations, with a total of 86 applications for reparations. ICC-01/04-01/06-2906.
1327 ICC-01/04-01/06-2843, noting that 34 are female and 95 are male.
1328 ICC-01/04-01/06-2872, paras 106-107, citing data from the National Disarmament, Demobilization and Reinsertion programme. The data represents children under the age of 18. UNICEF noted that 4,637 children were released from armed camps in Ituri one year after the time period of the charges against Lubanga. ICC-01/04-01/06-2878, para 9.
1329 ICC-01/04-01/06-2872, para 107; see also ICC-01/04-01/06-2877, paras 8, 10.
1330 ICC-01/04-01/06-2872, para 180; see also ICC-01/04-01/06-2877, para 11.
1331 ICC-01/04-01/06-2876, para 22; see also ICC-01/04-01/06-2878, para 33, noting that girls and women were 'often reluctant to identify themselves as having been associated with an armed force or group, and may be similarly reluctant to apply to be granted victims' status by the Court. They rarely come forward to participate in formal release and reintegration processes for fear of being stigmatised'.
1332 ICC-01/04-01/06-2876, para 20.
1333 ICC-01/04-01/06-2865, para 24.

the national transitional justice context within the situation country'.[1334] Linking the reparations order to proceedings at the national level could have important implications given that, as noted by ICTJ, 'no victim has successfully obtained actual payment of compensation from either convicted perpetrators or from the State' to date in national-level processes in the DRC.[1335]

The Women's Initiatives' observations on ensuring a gender perspective in reparations

At the outset of the observations submitted on 10 May 2012, the Women's Initiatives for Gender Justice underscored the fact that the Rome Statute contains 'unique provisions among international courts and tribunals, requiring [the ICC] to provide gender-inclusive justice' as well as 'specific provisions requiring the Court to apply and interpret law consistent with internationally recognised human rights and without any adverse distinction founded on grounds such as gender'.[1336] Noting that 'women and girls experience conflict differently from men and boys, and often bear a disproportionate burden in situations of armed conflict',[1337] the filing proposed that the principles adopted by the Chamber should include specific gender-responsive methodologies and refrain from prejudicing the rights of victims, including victims of sexual violence, under national and international law.

The Women's Initiatives encouraged the Chamber to apply an expanded concept of harm in the reparations phase of the proceedings and suggested that reparations should not be limited to a narrow assessment of the harms attached to the charges, but should be inclusive of the breadth of harm suffered as a result of the crimes.[1338] The Women's Initiatives stressed that 'any harm which can be reasonably assessed to be a direct consequence of the crimes for which the accused has been convicted can legitimately be considered for inclusion in a reparations order'.[1339]The Women's Initiatives further submitted that in the absence of an authoritative definition of harm in either the Court's statutory framework or in its prior jurisprudence, the Chamber should interpret the concept of 'harm' for the purposes of the reparations phase of proceedings, taking into account the object and purpose of the provision in question, as read and understood in the context of the Statute as a whole.[1340] In this regard, the Women's Initiatives underscored that 'any interpretation of harm that sought to unnecessarily restrict the number or category of victims who could take part in the Court's reparations scheme would undermine the object and purpose of the relevant provisions of the Statute'.[1341]

Throughout the submission, the Women's Initiatives reiterated several key reparations principles for ensuring gender justice such as: a gender-inclusive approach; non-discrimination; the importance of effective consultations with women, girls and victims/survivors; a broad concept of harm; and the transformative function of reparations. Specifically, the filing underscored that reparation strategies and initiatives must effectively recognise and integrate gender issues in order for the particular needs of girls and women to be addressed and satisfied.[1342] Women and girls must be integrated into the consultation process, and have agency and voice in that process.[1343] The filing emphasised that reparations should be designed to be transformative of existing communal and gender relations.[1344]

The reparations decision

At the outset of the reparations decision, the Chamber underscored the growing recognition in international criminal law of the 'need to provide effective remedies for victims'.[1345] It stated that 'to the extent achievable' in this case, reparations must 'relieve the suffering caused by these offences; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers'.[1346] It noted that reparations can be directed to individuals and, more broadly, to communities.[1347] While the Chamber acknowledged that the statutory framework should be applied in a broad and flexible manner in order to provide the 'widest possible remedies' for victims, it limited the principles established within the decision 'to the circumstances of the present case'.[1348]

1334 ICC-01/04-01/06-2872, para 89.
1335 ICC-01/04-01/06-2879, para 5.
1336 ICC-01/04-01/06-2876, para 8.
1337 ICC-01/04-01/06-2876, para 8.
1338 ICC-01/04-01/06-2876, para 37.
1339 ICC-01/04-01/06-2876, para 37.
1340 ICC-01/04-01/06-2876, para 41.
1341 ICC-01/04-01/06-2876, para 42.
1342 ICC-01/04-01/06-2876, para 8.
1343 ICC-01/04-01/06-2876, paras 34, 35.
1344 ICC-01/04-01/06-2876, paras 13, 17.
1345 ICC-01/04-01/06-2904, para 177.
1346 ICC-01/04-01/06-2904, para 179.
1347 ICC-01/04-01/06-2904, para 179.
1348 ICC-01/04-01/06-2904, paras 180-181.

Principles on reparations

Article 75(1) of the Rome Statute provides: 'The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. In establishing reparations principles, the Chamber first referenced applicable law, including Article 21(3), requiring that reparations be both non-discriminatory and consistent with international human rights standards.[1349] It also 'accept[ed] that the right to reparations is a well-established and basic human right', citing numerous international declarations and regional human rights treaties in support of this right.[1350]

Non-discrimination and equality

The Chamber established equality and non-discrimination, on the full range of possible grounds, as a basic principle, one that it reiterated throughout the decision. It stated, 'all victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings'.[1351] It further applied this principle to ensure equal access to information relating to the right to reparations, as well as to ensure that the needs of all victims be taken into account, in particular: children, the elderly, persons with disabilities and victims of sexual or gender-based violence.[1352] The Chamber also indicated that reparations 'should avoid replicating discriminatory practices or structures that predated the commission of the crimes'.[1353]

The Chamber reflected upon the importance of ensuring victims' safety, their physical and psychological well-being and privacy, as well as the necessity of avoiding further stigmatisation.[1354] In this regard, it recognised the potential need to adopt positive measures to prioritise particularly vulnerable victims who required more urgent assistance, including, *inter alia*: 'the victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatised children, for instance following the loss of family members'.[1355] It further noted that pursuant to Article 75(6) the reparations decision should in no way prejudice the rights of victims under national and international law.

Participants had suggested that the Chamber should consider the basic humanitarian principle of 'do no/less harm', and non-discrimination for the full range of protected categories.[1356] In particular, the Trust Fund had stressed the importance of avoiding stigmatisation and discrimination against: women and girls, rural and slum inhabitants, victims of sexual and gender-based violence, disabled, mutilated persons, orphans and other vulnerable children, elderly and the illiterate. It had underscored that positive measures may be necessary to redress inequalities affecting vulnerable victims.[1357] The Women's Initiatives had indicated that 'even in the design of reparations awards aimed at benefitting the community as a whole, the needs of specific groups of victims, in particular women and girls, must explicitly be taken into account, and care must be taken to avoid replicating discriminatory practices given the differences between and within the communities'.[1358]

Gender-inclusive approach and victims of sexual violence

The Chamber held that a 'gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations [... and that] gender parity in all aspects of reparations is an important goal of the Court'.[1359] It further stated: 'outreach activities, which include, firstly, gender- and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance'.[1360] In this regard, the Chamber required consultations with victims on issues, such as the identity of the beneficiaries, their priorities and the obstacles they have encountered in their attempts to secure reparations.[1361] The Chamber further indicated that gender-sensitive measures should be adopted 'to meet the obstacles faced by women and girls when seeking to access justice in this context', as well as to 'enable women and girls in the affected communities to participate in a significant and equal way in the design and implementation of any reparations orders'.[1362]

1349 ICC-01/04-01/06-2904, paras 184, 186. The Chamber also noted that it had considered the jurisprudence of regional human rights tribunals and mechanisms.
1350 ICC-01/04-01/06-2904, para 185. The Registry had encouraged the Chamber 'to establish a positive right of victims to reparations'. ICC-01/04-01/06-2865, paras 6, 12.
1351 ICC-01/04-01/06-2904, para 187.
1352 ICC-01/04-01/06-2904, paras 188-189.
1353 ICC-01/04-01/06-2904, para 192.
1354 ICC-01/04-01/06-2904, paras 190, 192.
1355 ICC-01/04-01/06-2904, para 200.
1356 ICC-01/04-01/06-2878, para 5; ICC-01/04-01/06-2872, paras 65-68.
1357 ICC-01/04-01/06-2872, paras 28- 29.
1358 ICC-01/04-01/06-2876, para 13.
1359 ICC-01/04-01/06-2904, para 202.
1360 ICC-01/04-01/06-2904, para 205.
1361 ICC-01/04-01/06-2904, para 206.
1362 ICC-01/04-01/06-2904, paras 208-209.

The Women's Initiatives had specifically requested that the Chamber integrate gender issues into the reparations principles and had underscored the importance of effective consultation with victims to ensure that a gender perspective was incorporated and that women and girls had access to reparations.[1363] The filing had suggested that consultations should seek the views of women and girls regarding types of reparations that would be meaningful for them in light of cultural and familial constructs, and their preferences concerning which reparations model they wished to pursue.[1364]

After the majority of the Chamber had declined to recognise sexual violence as an inherent aspect of the crimes charged in the judgement, and as part of the harm suffered for the purposes of sentencing, in the reparations decision, the Chamber affirmatively included victims of sexual violence within the scope of the reparations to be provided in this case. The Chamber indicated that reparations awards should be formulated and implemented as appropriate for victims of sexual and gender-based violence. It stated:

> the consequences of these crimes are complicated and they operate on a number of levels; their impact can extend over a long period of time; they affect women and girls, men and boys, together with their families and communities; and they require a specialist, integrated and multidisciplinary approach.[1365]

The Women's Initiatives had argued that the provision of collective reparations was necessary 'to address the harms caused by sexual violence, which [was] a defining characteristic of the conflict in eastern Democratic Republic of Congo (DRC), and an integral component of each of the crimes for which Mr Lubanga was convicted'.[1366] The filing had asserted that collective reparations should aim to 'rehabilitate individual victims/survivors of gender-based crimes and to contribute to the transition of society into a community based on non-violence and non-discrimination for all of its members' by integrating violence prevention strategies.[1367] The filing had further suggested that collective reparations could simultaneously address the shame and stigmatisation experienced by victims of gender-based crimes through public education as well as by providing services to victims in a way that ensures their identities and experiences were not revealed to the public.[1368]

Child victims

Concerning child victims, the Chamber noted the differential impact of the crimes on girls and boys, and referenced the fundamental principle of the 'best interests of the child' standard.[1369] It reflected on 'the importance of rehabilitating former child soldiers and reintegrating them into society', ordering the provision of information to child victims and their parents and guardians and noting the importance of considering their views on individual and collective reparations.[1370]

Other principles

The Chamber held that reparations should be 'appropriate, adequate and prompt'.[1371] It indicated that the awards should be proportionate to the harm, and should aim at 'reconciling the victims of the present crimes with their families and all the communities affected by the charges'.[1372] It found that 'whenever possible, reparations should reflect local cultural and customary practices unless these are discriminatory, exclusive or deny victims equal access to their rights'.[1373] It further held that reparations should support self-sustaining programmes, and economic benefits should be paid in instalments, rather than as a lump sum.

1363 ICC-01/04-01/06-2876, paras 8, 31-35; see also ICC-01/04-01/06-2865, para 21, suggesting that 'consultations should include the wider communities in which the victims reside'.
1364 ICC-01/04-01/06-2876, para 34.
1365 ICC-01/04-01/06-2904, para 207.
1366 ICC-01/04-01/06-2876, para 15, citing Separate and Dissenting Opinion of Judge Odio Benito, ICC-01/04-01/06-2842, para 21.
1367 ICC-01/04-01/06-2876, para 17.
1368 ICC-01/04-01/06-2876, paras 18, 19.
1369 ICC-01/04-01/06-2904, paras 210-211.
1370 ICC-01/04-01/06-2904, paras 214-216.
1371 ICC-01/04-01/06-2904, para 242. See ICC-01/04-01/06-2863, para 19, asserting that reparations be 'prompt and proportional to the gravity of the violations and the harms suffered'.
1372 ICC-01/04-01/06-2904, para 244.
1373 ICC-01/04-01/06-2904, para 245.

Modalities for reparations

Individual versus collective reparations

In the decision, the Chamber recognised that both 'victims and groups of victims may apply for and receive reparations', and that the statutory framework enabled the Court to provide both individual and collective reparations.[1374] It noted that 'individual and collective reparations are not mutually exclusive, and they may be awarded concurrently'.[1375] The decision required that a collective approach to reparations should be taken in order to reach unidentified victims, but the Chamber did not go into specific details about the modalities of this collective approach. At the same time, the Chamber indicated that collective reparations 'should address the harm suffered on an individual and collective basis'.[1376] Conversely, the Chamber did not require that individualised reparations be provided, and if so, that they 'should be awarded in a way that avoids creating tensions and divisions within relevant communities'.[1377] Having determined that reparations were to be made 'through' the Trust Fund[1378] (see below), the Chamber endorsed a community-based approach to collective reparations, finding that this 'would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures'.[1379]

In contrast to the general guidelines established by the Chamber with regard to the provision of collective or individual reparations awards, the issue was elaborated extensively by the participants in their submissions. Several participants had noted that no definitive definitions of the terms 'collective' and 'individual' reparations exist. With the exception of the Defence, which argued in favour of limiting the reparations order to only those individuals who completed the formal application process, the participants all advocated for the provision of both collective and individual reparations awards. The Women's Initiatives submitted that the Chamber 'should order both collective and individual reparations, with an emphasis on collective reparations' and that 'the modalities of collective reparations should have individualised components and allow for the taking into account of individual considerations'.[1380] The observations suggested that collective reparations have individualised components that would acknowledge the individual and differentiated experiences of victims as a key to restoring their rights, as well as for the individual's personal healing and well-being.

Several participants had expressed a preference for individualised awards within the statutory framework, as Article 75(2) 'foresees as a first option the possibility of individual awards directly to each victim from the convicted person'.[1381] Both UNICEF and the Prosecution had argued that individual reparations acknowledged the harm suffered by, and the rights of, the individual, and could be tailored to the specific needs of the individual.[1382] The Legal Representatives of Victims and the OPCV had also argued that individual reparations should be granted to all child soldiers enlisted within the UPC, who participated in the proceedings and applied for reparations.[1383] The ICTJ had asserted that the reparations order should prioritise the immediate and direct victims of the crime, by providing individual awards for compensation to those who apply, and individual measures of satisfaction to each former child-soldier victim.[1384] It had stated, 'victims who participated in the proceedings expect to be awarded a form of individual reparations'.[1385]

The parties and participants had also identified several significant drawbacks to the provision of individualised reparations. UNICEF had cautioned the Chamber against providing 'direct cash benefits to children associated with armed forces' in the

1374 ICC-01/04-01/06-2904, para 217.
1375 ICC-01/04-01/06-2904, para 220. The Registry had noted, 'in practice such concepts are neither entirely distinct nor mutually exclusive'. ICC-01/04-01/06-2865, para 29; UNICEF had also argued that the two types of reparations were not 'mutually exclusive, but rather mutually reinforcing'. ICC-01/04-01/06-2878, para 12.
1376 ICC-01/04-01/06-2904, para 221.
1377 ICC-01/04-01/06-2904, para 220.
1378 Article 75(2) provides: 'Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79'.
1379 ICC-01/04-01/06-2904, para 274.
1380 ICC-01/04-01/06-2876, para 10.
1381 ICC-01/04-01/06-2872, p 19; ICC-01/04-01/06-2877, para 23.
1382 ICC-01/04-01/06-2878, para 25; ICC-01/04-01/06-2867, para 9.
1383 ICC-01/04-01/06-2869, para 22; ICC-01/04-01/06-2864, para 25; ICC-01/04-01/06-2863, para 45.
1384 ICC-01/04-01/06-2879, para 17. The ICTJ specifically argued that: compensation should be appropriate to the circumstances of each victim; victims of sexual violence should be awarded an additional amount; and, an award contributing financial assistance for the care of children born of rape related to the crime should be considered.
1385 ICC-01/04-01/06-2879, para 18.

'unstable and polarised' environment in Ituri.[1386] The Trust Fund had underscored the disproportionately costly and cumbersome process of identifying victims in the field and of verifying their information. It had reiterated concerns regarding the potential stigmatisation and re-traumatisation to individual victims who come forward, and increased jealousy and tension within the community. It had also expressed concern about the possibility of providing reparations to former child soldiers to be seen as a reward for their role in the conflict, and thus constituting an incentive for future enlistment.[1387]

The participants had noted the discretionary nature of an award for collective reparations, as Rule 97(1) of the Rules of Procedure and Evidence allows the Chamber to award collective reparations 'where it deems appropriate'. The Trust Fund had noted that the statutory framework remained silent as to an explicit definition of the term.[1388] It had argued specifically for the provision of community-based collective reparations, asserting that systemic harm was suffered at the community level.[1389]

Avocats Sans Frontières, et al, had suggested that collective reparations may be more adapted to the situation in the present case because of their inclusive nature and more sustainable impact, as expressed by local counterparts through consultations.[1390] They had asserted that the widespread, systematic nature of the crimes, affecting categories of persons, mitigated in favour of a collective approach. They had referred to collective suffering that could not be reduced to an aggregate of individuals, and argued that the ephemeral nature of financial reparations would not serve a restorative function, and thus should be supplemented with additional measures.[1391] The Trust Fund had argued that the provision of community-based, collective reparations was more sustainable, feasible, conducive to reconciliation and the most effective use of limited funds, given that the costly mandatory verification requirement would not be needed. It had suggested that the use of collective reparations would mitigate the risks of stigmatisation and retraumatisation of victims as well as tension within the community.[1392] UNICEF and the Women's Initiatives in their respective filings had both noted the importance of collective reparations awards, with UNICEF stressing such awards for 'those victims who are unwilling or unable to come forward and apply for reparations',[1393] including women and girls. The Women's Initiatives stated that:

> limiting reparations to individuals whose application for victim participation status and reparations have been accepted would likely have an unintended exclusionary effect on women and girls who may be reluctant to come forward due to fears of stigmatisation or other obstacles preventing their access to services and justice generally. Collective reparations, especially those specifically addressing women's needs, may be necessary to ensure their accessibility to female victims.[1394]

In contrast, one team of Legal Representatives of Victims had indicated that issuing collective reparations to former child soldiers would be difficult as they did not form a collectivity. They had asserted that community-based collective reparations did not 'make sense' as the victims were often in conflict with their own community (the Hema from Ituri). They had explained that even though this community suffered by having its youth in a militia, a large portion of the community had accepted this, had supported those recruiting child soldiers and had even collaborated in the recruitment.[1395] The Defence had argued that collective reparations could only benefit those victims individually recognised by the ICC.[1396] It thus drew a distinction between 'indemnification to redress in a collective manner harm suffered individually by several victims recognised by the Court' from indemnifying a community presenting itself as a victim of a crime, without its individual members being identified.[1397]

1386 ICC-01/04-01/06-2878, para 40.

1387 ICC-01/04-01/06-2872, para 151. This concern was also expressed by the Legal Representatives for victims. See ICC-01/04-01/06-2869, para 34. See also ICC-01/04-01/06-2877, paras 24, 40-41, arguing against providing strictly individualised reparations, and that individual reparations should be redirected to support collective benefits, given that collective rights were violated.

1388 ICC-01/04-01/06-2872, paras 175-177.

1389 ICC-01/04-01/06-2872, para 154. The Trust Fund had also highlighted the relationship between the source of funding and the nature of the award, as funding through the Trust Fund would imply the provision of collective awards. ICC-01/04-01/06-2872, para 18.

1390 ICC-01/04-01/06-2877, paras 20-22.

1391 ICC-01/04-01/06-2877, paras 23-25.

1392 ICC-01/04-01/06-2872, paras 153-172; see also ICC-01/04-01/06-2878, para 36, asserting the 'imperative to diminish the risk that the victims be singled out, identified, stigmatised or alienated as the sole recipients of reparations'.

1393 ICC-01/04-01/06-2878, para 36.

1394 ICC-01/04-01/06-2876, para 22.

1395 ICC-01/04-01/06-2864, para 16, 17. They supported collective reparations in order to reintegrate former child soldiers.

1396 ICC-01/04-01/06-2866, para 56.

1397 ICC-01/04-01/06-2866, paras 51-52.

Forms of reparations: restitution, compensation and rehabilitation

The Chamber held that although Article 75 specifically mentioned restitution, compensation and rehabilitation, this list was not exclusive. Rather, it held that reparations could also be symbolic, preventative and transformative, and reiterated that they should be gender-sensitive.[1398] Concerning restitution, it noted that restoring the victim to his or her position before the crime was committed may be unachievable for the crimes at issue in this case, but may be appropriate for legal entities, such as schools and other institutions.[1399]

The Chamber had found that compensation should be considered when: 'i) the economic harm is sufficiently quantifiable; ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and iii) the available funds mean this result is feasible'.[1400] It specifically held that in order to ensure gender inclusivity, compensation should not reinforce 'previous structural inequalities', nor should it perpetuate 'prior discriminatory practices'.[1401] The Chamber noted that compensation could be applied 'to encompass all forms of damage, loss and injury', specifically including: physical harm;[1402] moral and non-material damage;[1403] material damage;[1404] lost opportunities;[1405] and costs.[1406]

1398 ICC-01/04-01/06-2904, para 222.
1399 ICC-01/04-01/06-2904, paras 223-225.
1400 ICC-01/04-01/06-2904, para 226.
1401 ICC-01/04-01/06-2904, para 227.
1402 The Chamber expressly included 'causing an individual to lose the capacity to bear children'. ICC-01/04-01/06-2904, para 230.
1403 The Chamber referred to physical, mental and emotional suffering.
1404 The Chamber included: 'lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings'. ICC-01/04-01/06-2904, para 230.
1405 The Chamber stated: 'those relating to employment, education and social benefits; loss of status; and interference with an individual's legal rights (although the Court must ensure it does not perpetuate traditional or existing discriminatory practices, for instance on the basis of gender, in attempting to address these issues)'. ICC-01/04-01/06-2904, para 230.
1406 The Chamber referred to the costs of legal and other experts, medical, psychological and social services, including assistance for boys and girls with HIV/AIDS.

The Chamber referred to victims' 'right to rehabilitation', which 'shall include': medical care, psychological, psychiatric and social assistance and legal and social services.[1407] It noted that the aim of rehabilitation was the victims' reintegration into society, and thus reparations should include 'education and vocational training, along with sustainable work opportunities'.[1408] The Chamber also indicated that rehabilitation measures should address the shame experienced by victims, should avoid their further victimisation, and could include the local communities in order to encompass more transformative objectives.[1409]

In addition to setting out the above-mentioned framework on the potential forms of reparations, the Chamber briefly expressed its preference as to the content of the reparations order. It stated, 'providing medical services (including psychiatric and psychological care) along with assistance as regards general rehabilitation, housing, education and training' should be considered.[1410] It also expressed its support for providing ongoing assistance to village savings and loan schemes, as well as existing partnerships between the Trust Fund and other organisations to establish local systems of 'mutual solidarity' or 'community savings plan'.[1411]

Most participants had prioritised a collective reparations order focused on the rehabilitation of former victims through the provision of medical and psycho-social services, educational opportunities, vocational training and sustainable economic activity.[1412] UNICEF had also highlighted the support of schools 'as a safe place of learning while promoting the socioeconomic reintegration of victims'.[1413] The ICTJ had asserted that the reparations order should prioritise the immediate and direct victims of the crime, by providing individual awards of measures of rehabilitation, including access to medical and psychological care, and access to skills training or financial assistance for continuing education.[1414]

1407 ICC-01/04-01/06-2904, paras 232-233.
1408 ICC-01/04-01/06-2904, para 234.
1409 ICC-01/04-01/06-2904, paras 235-236.
1410 ICC-01/04-01/06-2904, para 221.
1411 ICC-01/04-01/06-2904, para 275.
1412 ICC-01/04-01/06-2878, para 41; ICC-01/04-01/06-2863, paras 94, 97, 101-107; ICC-01/04-01/06-2877, paras 29-34. The ICTJ and the OPCV suggested that these measures be provided as individual reparations.
1413 ICC-01/04-01/06-2878, para 41.
1414 ICC-01/04-01/06-2879, para 17.

Similarly, the OPCV had suggested that individual reparations in the form of compensation should be provided to victims based on the concept of 'project of life', as well as for non-material damages and past and future medical expenses.[1415] It had argued that the concept of 'project of life' or 'life plan' as developed by international jurisprudence on reparations was the most adapted tool for repairing the harm experienced by former child soldiers, especially female child soldiers who suffered sexual abuse, given the long-term psychological impact.[1416] It had stated:

> Girls who were raped during armed conflicts and consequently become pregnant, face major disruptions to their "project of life". They face great difficulties during the process of being accepted back into their families and communities, with girl mothers and their children experiencing the highest levels of rejection and abuse upon return. They may be unable to marry, which may also deprive them of emotional, financial and material security particularly in the African context. They may be denied access to productive activities such as communal farms or local markets, which may force them to live in poverty. They may be prevented from attending school, which may deprive them of the opportunity to raise themselves out of poverty. They may suffer from HIV/AIDS or other sexually transmitted diseases as a consequence of the rape, which have very serious implications for their health and hence their life plan.[1417]

The OPCV had argued that the forms of repairing a 'project of life' should vary based on the needs of the individual, and should include: reintegration, physical and mental health care, education or vocational training and sustainable work opportunities.[1418]

Other forms of reparations

The Chamber listed other potential forms of reparations, including symbolic reparations, 'such as commemorations and tributes', the conviction and the sentence itself, as well as the wide publication of the judgement in order to raise awareness about the crimes.[1419] It referred to its broad mandate, enabling it to provide other forms of reparations, such as:

> establishing or assisting campaigns that are designed to improve the position of victims; by issuing certificates that acknowledge the harm particular individuals experienced; setting up outreach and promotional programmes that inform victims as to the outcome of the trial; and educational campaigns that aim at reducing the stigmatisation and marginalisation of the victims of the present crimes.[1420]

The Chamber reiterated that other forms of reparations measures could also be directed to address the shame experienced and to prevent future victimisation, especially for victims who suffered sexual violence and ill-treatment.[1421]

1415 ICC-01/04-01/06-2863, paras 45-82.
1416 ICC-01/04-01/06-2863, paras 47-61.
1417 ICC-01/04-01/06-2863, para 55.
1418 ICC-01/04-01/06-2863, para 57. The Defence had contended that the opportunity must have actually existed prior to the commission of the crime and that allegations related to 'life plan' should be assessed in light of the factual circumstances prevailing in the DRC at the time, namely civil war. ICC-01/04-01/06-2866, paras 65-67.

1419 ICC-01/04-01/06-2904, paras 236-238. However, the omission of sexual violence from within the definitions of the crimes in the trial judgement and the absence of any recognition of the harm suffered by recruits from sexual violence in the sentencing decision may render these forms of reparations of little remedial value to victims of gender-based crimes.
1420 ICC-01/04-01/06-2904, para 239.
1421 ICC-01/04-01/06-2904, para 240.

Implementing an order against Lubanga

The Chamber held that Lubanga could contribute to the process through a voluntary apology to individuals or a group of victims either publicly or confidentially.[1422] As noted above, the Registry had indicated that Lubanga had a 'total lack of identified resources at this stage', and that his only participation in a reparation order would necessarily be non-monetary.[1423] Several participants had suggested that the Chamber initiate renewed inquiries into the existence of any assets.[1424] The Legal Representatives of Victims and the Trust Fund had suggested that the Chamber determine a global reparations order and attach it to at least a portion of the condemned person's future assets and revenue, so that the funds thus provided by the Trust Fund would constitute an advance or 'starting capital'.[1425]

At the same time, some participants had underscored the symbolic value of 'ordering the convicted person to pay compensation, regardless of his purported indigence'.[1426] The Legal Representatives for Victims had suggested that reparations derived directly from the condemned person would be imbued with psychological significance.[1427] The Women's Initiatives had also supported the concept of symbolic reparations against Lubanga, noting that such an order 'would provide a powerful public recognition of wrong doing'.[1428]

The Prosecution and ICTJ had proposed that the Chamber should order the convicted person to pay a nominal, symbolic sum to individual reparations applicants in recognition of their loss.[1429] The participants also asserted that the Chamber could order reparations in the form of 'satisfaction', such as a public apology, a commemoration or memorial to victims, or full public disclosure of the truth, among other options.[1430] The Women's Initiatives had suggested that this could take the form of 'a public acknowledgement of responsibility during a public ceremony broadcasted by local and national radio and television involving the victims/survivors, or a public apology'.[1431] The ICTJ had noted that given the continued frustration over 'the perceived exclusion of violations committed against Lendu victims [...] [a] reparations order that publicly acknowledges the suffering of *all* victims in Ituri can provide a powerful tool for reconciliation'.[1432]

1422 ICC-01/04-01/06-2904, paras 241, 269.
1423 ICC-01/04-01/06-2865, para 27.
1424 ICC-01/04-01/06-2872, para 239.
1425 ICC-01/04-01/06-2864, paras 37-38, 42; ICC-01/04-01/06-2872, paras 240, 253.
1426 ICC-01/04-01/06-2879, para 63; ICC-01/04-01/06-2872, para 241.
1427 ICC-01/04-01/06-2864, para 34.
1428 ICC-01/04-01/06-2876, para 54.
1429 ICC-01/04-01/06-2867, para 11; ICC-01/04-01/06-2879, para 63.
1430 ICC-01/04-01/06-2867, para 12; ICC-01/04-01/06-2878, para 42, citing the importance of 'culturally appropriate symbolic reparations' that result from consultations with victims and communities; ICC-01/04-01/06-2863, paras 111-121; ICC-01/04-01/06-2877, paras 49-53.
1431 ICC-01/04-01/06-2876, para 55.
1432 ICC-01/04-01/06-2879, para 67 (emphasis added).

Beneficiaries, causation and the burden of proof

Concerning the beneficiaries of reparations, the Chamber noted that pursuant to Rule 85 of the Rules of Procedure and Evidence:

> reparations may be granted to direct and indirect victims, including the family members of direct victims [...]; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.[1433]

The Chamber required a 'close personal relationship' between an indirect and a direct victim, recognising any cultural variations on the concept of 'family'.[1434] It adopted a broad application of the reparations decision, noting that reparations can be granted to legal entities, including non-governmental and charitable organisations, such as public schools, hospitals and institutions, those who were harmed as a result of assisting or intervening on behalf of direct victims, and organisations as well as individuals who attempted to prevent the commission of the crimes.

As noted above, the Chamber held that reparations beneficiaries would not be limited to those who had submitted applications.[1435] It delegated to the Registry the task of determining the legal representation of existing victim applicants as well as the broader group of potential victims.[1436] It ordered the Registry to transmit the applications it had received to date to the Trust Fund for its consideration for their inclusion.[1437] On 16 August 2012, the Registry transmitted 86 applications for reparations to the Trust Fund.[1438]

1433 ICC-01/04-01/06-2904, para 194.
1434 ICC-01/04-01/06-2904, para 195.
1435 The Defence had argued that in order to obtain reparations, victims must file a separate reparations request pursuant to Rules 89 and 94 of the Rules of Procedure and Evidence, including the submission of the appropriate form. It had further underscored the need for verifying the information provided by the victims on reparation applications forms, given that Defence verifications in this case had led to the Chamber withdrawing nine victims presenting as former child soldiers from the proceedings. ICC-01/04-01/06-2866, paras 3-7, 11-12.
1436 ICC-01/04-01/06-2904, para 268.
1437 ICC-01/04-01/06-2904, para 284.
1438 ICC-01/04-01/06-2906.

The Chamber held that for individual victims both unofficial and official identification documents would be accepted to establish their identities, including a statement signed by two credible witnesses.[1439] The Chamber indicated that any awards or benefits from other bodies would be taken into account in order to ensure fairness and non-discrimination.[1440]

The Chamber noted that the statutory framework did not define the causal link required between the harm and the crime for the purpose of reparations. It found that reparations should not be limited to 'direct' harm, nor to the 'immediate effects' of the crimes.[1441] It held that the standard to be applied was 'proximate cause', in other words, a ' "but/for" relationship between the crime and the harm'.[1442] In light of the 'fundamentally different nature' of the reparations proceedings as compared with the judgement convicting Lubanga, the Chamber held that a 'less exacting' burden of proof should apply, namely: 'a balance of probabilities' standard.[1443] In this regard, it noted the difficulties victims faced in obtaining evidence to support their claims, indicating the application of a flexible approach to this issue.[1444]

1439 ICC-01/04-01/06-2904, paras 197-198.
1440 ICC-01/04-01/06-2904, para 201.
1441 ICC-01/04-01/06-2904, paras 248-249.
1442 ICC-01/04-01/06-2904, paras 249-250. The Defence had argued for a narrow interpretation of the concept of 'victim', which pursuant to Rule 85 of the Rules of Procedure and Evidence, suffered harm, direct or indirect, as a consequence of the crime for which the condemned was found guilty during the relevant period. ICC-01/04-01/06-2866, paras 3-7.
1443 ICC-01/04-01/06-2904, paras 251-252. The Defence and the Prosecution were in agreement that the Chamber should adopt the 'balance of probabilities' standard. ICC-01/04-01/06-2866, para 40; ICC-01/04-01/06-2867, para 24, asserting that the lesser *prima facie* standard should be applied to supporting documentation. The Defence specifically argued that victims must prove by a 'preponderance of the evidence' their identity, date of birth, enlistment within the FPLC or participation in the hostilities during the relevant period, and harm tied to these facts. ICC-01/04-01/06-2866, para 45.
1444 ICC-01/04-01/06-2904, paras 252, 254. The participants had suggested that the Chamber adopt a 'flexible' approach, involving presumptions of harm and circumstantial evidence. ICC-01/04-01/06-2872, paras 21-22, 24-26, 30-34, 40-42; ICC-01/04-01/06-2878, para 6; ICC-01/04-01/06-2863, para 19. The Women's Initiatives had argued that the standard of proof for establishing both harm and causation 'should take into account the difficulties in obtaining documentary and other evidence'. ICC-01/04-01/06-2876, para 46.

Noting that the statutory framework did not define 'harm', nor the causal relationship required between the harm suffered and the crime committed, the Women's Initiatives had urged the Chamber to take a 'purposive' approach and interpret 'harm' in a way that would not restrict the category of victims who could receive reparations.[1445] The Women's Initiatives had stressed that 'any harm which can be reasonably assessed to be a direct consequence of the crimes for which the accused has been convicted can legitimately be considered for inclusion in a reparations order' and that 'reparations should not be limited to a narrow assessment of the harms attached to the charges, but should be inclusive of the breadth of harm suffered as a result of these crimes'.[1446] With the exception of the Defence, the participants had supported a broad interpretation of the definition of 'harm', and had largely concurred on the forms of harm that should be recognised in this case.

The Prosecution had argued that broadening the scope of the reparations award would ameliorate the exclusionary implications of its selective charging strategy, and would be more 'equitable', as it would allow for reparations to be provided for Lendu civilian victims of UPC attacks as well as female recruits who were raped and sexually assaulted.[1447] The Women's Initiatives had asserted that all types of harm suffered by victims should be addressed, including, but not limited to: 'physical and psychosocial harm arising from abduction/forced conscription and being forced to fight; rape and other forms of sexual violence; sexual slavery; ostracisation from families and within communities; loss of family life, childhood, education, and other opportunities; and, unwanted pregnancies, STDs, and PTSD, as well as other health and reproductive health complications'.[1448]

The OPCV had also identified the harm suffered by indirect victims in this case, namely the family members of child soldiers: psychological harm from the forced recruitment of their relatives with 'very real risk of serious injury or death'; psychological harm resulting from continued uncertainty of the situation of their relatives; psychological harm due to the sudden loss of a family member.[1449] The Trust Fund had emphasised the harm at the community level, including: the lack of educated youth affecting the socioeconomic prospect of communities; the impact on the social fabric of the community due to the rejection and stigmatisation of victims for the violence, substance abuse and other behavioural problems associated with PTSD; the exclusion of child mothers and their children from families, schools and communities; community envy over the benefits obtained through demobilisation processes; and, harm caused by the proximity of training camps.[1450]

As noted above, with the exception of the Defence,[1451] all participants had concurred that the Chamber should recognise the harm caused by the sexual violence committed against recruits. As the Women's Initiatives had stated, 'rape was an integral component of the conscription process for girl soldiers and sexual violence constituted an integral component to the crimes for which Mr Lubanga has been convicted'.[1452] At the same time, the ICTJ had cautioned the Chamber 'to avoid the reinforcement of existing gender stereotypes [...] for instance, the stereotypical depiction of sexual violence survivors as female may lead to the exclusion of girl child soldiers who suffered from other types of violence, such as forced labour, or the invisibility of boys as victims of sexual violence'.[1453]

The Defence had sought to narrow the definition of 'harm' to be addressed by a reparations order, asserting that only harm that is personal, actual and has not already been redressed can be the subject of a reparations claim.[1454] In this regard, the Defence had noted that the Trust Fund has financed six projects targeting former child soldiers in Ituri, including the provision of reintegration support and professional training. The Defence had suggested that it was highly probable that victims submitting reparations applications in this case have already benefitted from these programmes, and had argued that they should not receive cumulative benefits.[1455]

1445 ICC-01/04-01/06-2876, paras 39-42.
1446 ICC-01/04-01/06-2876, para 37.
1447 ICC-01/04-01/06-2867, paras 18-20.
1448 ICC-01/04-01/06-2876, para 36; see also ICC-01/04-01/06-2863, para 36, listing the same forms of harm for child soldier victims.
1449 ICC-01/04-01/06-2863, para 37.
1450 ICC-01/04-01/06-2872, para 154.
1451 The Defence had argued that harm from sexual violence should be excluded from the reparations order, as such crimes were not proven beyond a reasonable doubt, Lubanga was not prosecuted for such crimes, nor was his responsibility for them established. It had also argued that the crime of enlisting child soldiers did not necessarily result in the commission of sexual violence against them. It had asserted that no other international tribunal had considered sexual violence as a characteristic of the crimes for which he was convicted, and that sexual violence was not linked to the hostilities, and thus could not be considered as a component of the crime of the enlistment of child soldiers. ICC-01/04-01/06-2885, paras 41-45.
1452 ICC-01/04-01/06-2876, para 37.
1453 ICC-01/04-01/06-2879, para 59.
1454 ICC-01/04-01/06-2866, paras 60-62.
1455 ICC-01/04-01/06-2866, paras 69-73.

Procedural issues

Engagement of the Trust Fund for Victims

While the Chamber found that the judiciary should maintain competence in monitoring the process of implementation, it held that 'reparations in this case will be dealt with principally by the TFV, monitored and overseen by a differently composed Chamber'.[1456] It stated:

> The Chamber is of the view that the TFV is well placed to determine the appropriate forms of reparations and to implement them. It is able to collect any relevant information from the victims, and the Chamber notes the TFV is already conducting extensive activity in the DRC for the benefit of victims in the context of the general situation of which this case is a part.[1457]

In delegating these tasks to the Trust Fund, the Chamber set forth its interpretation of the relevant legal framework. Specifically, it found that a reparations award made 'through' the Trust Fund was 'not limited to the funds and assets seized and deposited with the Trust Fund, but the award can, at least potentially, be supported by the Trust Fund's own resources'.[1458] It held that Regulation 56 of the Regulations of the Trust Fund imposed 'an obligation on the TFV's Board of Directors to complement the resources collected from a convicted person with "the other resources of the Trust Fund"'.[1459] In other words, the Chamber found that the Trust Fund '*shall* complement the funding of a reparations award, albeit within the limitations of its available resources and without prejudice to its assistance mandate' (emphasis in original).[1460]

The Chamber also delegated the task of selecting, appointing and overseeing a multidisciplinary team of experts to the Trust Fund, as described in more detail, below. The Chamber endorsed the five-step implementation plan proposed by the Trust Fund, to be implemented by the Trust Fund, together with the Registry, the OPCV and a multidisciplinary team of experts, including experts on child soldiers, violence against boys and girls and gender issues.[1461] As recounted by the Chamber, the five step plan entailed: (i) the Trust Fund, Registry, OPCV and experts would establish which localities would be involved (focussing on, but not limited to, the places referred to in the judgement); (ii) a consultation process with victims and communities in the identified localities; (iii) during the consultation phase an assessment of harm should be carried out by the experts; (iv) public debates should be held in each locality to explain the reparations principles and procedures and to address victims' expectations;[1462] and, (v) the collection of proposals for collective reparations developed within each locality to be presented to the Chamber for approval.[1463]

The Chamber also delegated to the Trust Fund the assessment of harm, to be conducted during the consultative phase in the localities, as well as the identification of victims and beneficiaries. It thus ordered the Registry to transfer the application forms received to the Trust Fund for consideration for inclusion among reparations beneficiaries.[1464] The Chamber indicated that the Chamber should be regularly updated on the status of implementation, and be seized of any contested issues.[1465] The Chamber 'otherwise declin[ed] to issue specific orders to the TFV on the implementation of reparations that are to be funded using voluntary contributions'.[1466]

1456 ICC-01/04-01/06-2904, para 261.
1457 ICC-01/04-01/06-2904, para 266.
1458 ICC-01/04-01/06-2904, para 271. The Trust Fund had indicated that the Board of Directors recently increased the amount reserved to complement reparations awards in all cases before the Court to 1.2 million Euros. ICC-01/04-01/06-2872, para 244.
1459 ICC-01/04-01/06-2904, para 271.
1460 ICC-01/04-01/06-2904, para 273 (emphasis in original). There had been an important difference in the views of the Registry and the Secretariat of the Trust Fund for Victims with respect to whether the Trust Fund Board had the sole discretion over the use of the Fund's 'other resources', or whether the Court may compel the Trust Fund to use these funds to complement reparations awards. See further, ICC-01/04-01/06-2806, paras 122-143, 148-151, 156-159, 126-129, and ICC-01/04-01/06-2803-Red, paras 120-136.
1461 ICC-01/04-01/06-2904, para 264.
1462 Both the ICTJ and the Trust Fund had suggested that the Chamber should consider holding a reparations hearing in the DRC 'as a way to reach victims who have not had access to the court'. ICC-01/04-01/06-2879, para 14; ICC-01/04-01/06-2872, para 231, noting that an *in situ* hearing 'would increase the transparency of the reparations process, and value of the reparations measures ordered by the Chamber'.
1463 ICC-01/04-01/06-2904, para 282. See Trust Fund's proposal ICC-01/04-01/06-2872, paras 184, 190-219, 230-231.
1464 ICC-01/04-01/06-2904, paras 283-284.
1465 ICC-01/04-01/06-2904, para 286.
1466 ICC-01/04-01/06-2904, para 289(d).

In this regard, all participants, except the Defence,[1467] had supported the involvement of the Trust Fund in implementing reparations, given its experience implementing projects on behalf of victims in the region and its institutional links as part of the Court.[1468] As the Women's Initiatives had noted, the Trust Fund's role was explicitly envisioned by the statutory framework.

Experts

The Chamber 'strongly recommend[ed]' that a multidisciplinary team of experts be retained to:

> provide assistance to the Court in the following areas: (a) an assessment of the harm suffered by the victims in this case; (b) the effect that the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities had on their families and communities; (c) identifying the most appropriate form of reparations in this case, in close consultation with the victims and their communities; (d) establishing those individuals, bodies, groups or communities who should be awarded reparations; and (e) accessing funds for these purposes. The team of experts needs to be in a position to assist the Court in the preparation and implementation of a reparations plan.[1469]

Further, the Chamber indicated that the team should include persons from both the DRC and internationals, as well as specialists in child and gender issues.

Both the Trust Fund and the Women's Initiatives had highlighted that the statutory framework provides for the 'appointment of experts at two distinct but complementary levels, one being the appointment of experts by the Chamber to assist them in respect of reparations proceedings, and two, the appointment of an expert panel to assist the Trust Fund with consultations with victims/survivors, assessment of harm and causation, design of the awards, and implementation of reparations orders in this case'.[1470] The Trust Fund had submitted that at the proceedings stage, experts could contribute to: the establishment of a causal link of damages going beyond material damage, taking into account trauma and psychological harm; addressing the need for reconciliation and gender-sensitive approaches in order to avoid further harm; providing a comparative approach to administrative reparations processes in transitional justice contexts; providing expertise on the security situation in Ituri; and, facilitating a greater understanding of the customs and beliefs in Ituri relating to justice and reconciliation in the communities.[1471]

1467 The Defence had indicated that it was not adverse to the Trust Fund implementing programmes to benefit a wider scope of victims than those recognised in this case, as long as such programmes were not linked in any way with this case or to a reparations order against Lubanga. ICC-01/04-01/06-2885, para 39.

1468 ICC-01/04-01/06-2867, paras 31-32; ICC-01/04-01/06-2864, paras 44-45. The Trust Fund had provided extensive observations on its potential role in carrying out the necessary assessments prior to, and implementing, the reparations award. See ICC-01/04-01/06-2872, paras 183-184, 190-219, 230-231, 247.

1469 ICC-01/04-01/06-2904, para 263.

1470 ICC-01/04-01/06-2876, para 48; ICC-01/04-01/06-2872, para 257.

1471 ICC-01/04-01/06-2872, para 257.

The Trust Fund had also proposed that experts would also be useful 'for achieving practical tasks related to implementation', especially for the mapping of victims and localities, the assessment of harm and conducting a final evaluation of the implementation.[1472] It had suggested that an inter-disciplinary team of experts would be needed for the assessment of harm, including: an anthropologist, child protection specialist, psychoanalyst, social worker, public health specialist, conflict analyst and victims' counsel.[1473] UNICEF had recommended the inclusion of local religious and traditional leaders, teachers and academics, government officials and civil society actors among experts to be considered by the Chamber.[1474]

The Women's Initiatives had underscored the importance of ensuring that appointed experts have the necessary gender expertise. The filing had argued that all teams of experts should include members with 'specific expertise in gender-based violence and working with victims/survivors, children, and other vulnerable groups, as well as specific expertise on reparations for victims/survivors of gender-based crimes and girl soldiers, in addition to expertise on the impact of sexual violence on boy soldiers (for instance, those forced to rape as part of enlistment/conscription or forced to find girls for commanders)'.[1475] The Women's Initiatives had further submitted that the establishment of the expert panel to assist the Chamber, 'is conceived as being distinct from the Trust Fund's *ad hoc* multidisciplinary expert advisory committee on reparations, which is intended to assist the Trust Fund in the design of its overall reparations programme'.[1476]

Other procedural matters

The Chamber also noted the obligations of States Parties to cooperate fully in the enforcement of the decisions of the Court, as well as in assistance in identifying and freezing the assets of the accused.[1477] It requested that the Registry undertake the necessary outreach activities to publicise the principles and the reparations proceedings with national authorities, local communities and affected populations.[1478] It indicated that although it was 'mainly concerned' with victims at this stage in the proceedings, both the Prosecution and the Defence remained parties to the reparations proceedings.[1479]

1472 ICC-01/04-01/06-2872, paras 260-262.
1473 ICC-01/04-01/06-2872, para 262.
1474 ICC-01/04-01/06-2878, para 18.
1475 ICC-01/04-01/06-2876, para 49.
1476 ICC-01/04-01/06-2876, para 47. In its March 2011 Annual Meeting, the Board of the Trust Fund approved the establishment of the *ad hoc* Expert Advisory Committee on Reparations.

1477 ICC-01/04-01/06-2904, paras 256-257, 276-280.
1478 ICC-01/04-01/06-2904, paras 258-259.
1479 ICC-01/04-01/06-2904, para 267.

Milestone:
Closing arguments in the first case including gender-based crimes charges

In May 2012, closing arguments were heard in the first trial at the ICC to include charges for gender-based crimes, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.[1480] The trial against Germain Katanga (Katanga) and Mathieu Ngudjolo Chui (Ngudjolo) was the ICC's second trial, as well as the second case, after the Lubanga case, arising from the DRC Situation. The case centred on an attack on the village of Bogoro in the Ituri region by the *Front de nationalistes et integrationnistes* (FNI) and the *Force de resistance patriotique en Ituri* (FRPI) on 24 February 2003. At the time of the attack, Katanga and Ngudjolo were the alleged commanders of the FRPI and the FNI, respectively. As of 17 August 2012, the case is awaiting trial judgment by Trial Chamber II.[1481]

Prior to his transfer into ICC custody on 18 October 2007, Katanga had been held in detention at the central prison in Makala in the DRC since 9 March 2007. Ngudjolo was arrested in the DRC and transferred into the custody of the Court in February 2008. The two cases were joined on 10 March 2008.[1482] Both Katanga and Ngudjolo were charged pursuant to Article 25(3)(a) with seven counts of war crimes, specifically rape, sexual slavery, using children under the age of 15 to take active part in hostilities, directing an attack against a civilian population, wilful killings, destruction of property and pillaging.[1483] They were additionally charged with three counts of crimes against humanity: rape, sexual slavery and murder.[1484]

1480 For a more detailed explanation of the charges against the accused, see *Gender Report Card 2010*, p 160.

1481 Trial Chamber II is composed of Presiding Judge Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Christine Van den Wyngaert (Belgium).

1482 ICC-01/04-01/07-257.

1483 Pursuant to Articles 8(2)(b)(xxii), 8(2)(b)(xxvi), 8(2)(b)(i), 8(2)(a)(i), 8(2)(b)(xiii) and 8(2)(b)(xvi). The Pre-Trial Chamber found there was sufficient evidence to conclude there were substantial grounds to believe that the conflict was of an international character, based on the involvement of Uganda. ICC-01/04-01/07-717, para 240. The nature of the conflict was one of the main issues in dispute during the closing arguments.

1484 Pursuant to Articles 7(1)(g) and 7(1)(a). In its 30 September 2008 decision confirming the charges, Pre-Trial Chamber I declined to confirm charges for the war crime of torture or inhuman treatment, the war crime of outrages upon personal dignity, and the crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. ICC-01/04-01/07-717.

The trial in the Katanga & Ngudjolo case commenced on 24 November 2009, and the presentation of evidence stage officially closed on 7 February 2012.[1485] According to information provided by Trial Chamber II, over the course of the trial, there were approximately 3,290 filings, the Chamber had held approximately 240 hearings, and had issued 130 oral rulings and approximately 450 written decisions.[1486] The Prosecution called 19 witnesses; the Katanga and Ngudjolo Defence teams called 17 and 11 witnesses, respectively.[1487] For the first time at the ICC, both of the accused testified on their own behalf; Katanga in September and October 2011, and Ngudjolo in November 2011.[1488] Both accused also made brief closing statements, which are described below.[1489] During the trial, 364 victims (246 male and 117 female victims, and 1 institution) had been authorised to participate in the proceedings. The victims were divided into two groups and represented by two teams of Legal Representatives.[1490]

Significantly, from 16 to 20 January 2012, the Chamber, including the Judges, the parties, the Legal Representatives of Victims, representatives from the Registry and the Court Clerk, travelled to Ituri, Eastern DRC, to make observations and better assess the evidence presented at trial.[1491] This marked the first time an ICC Trial Chamber visited the site of alleged crimes.

From 15-23 May 2012, Trial Chamber II heard closing arguments presented by the Prosecution, the Legal Representatives of Victims and both Defence teams, which focused primarily on the key legal and factual issues that remained in dispute.[1492] The Chamber reserved time after each presentation to ask additional questions. The Chamber also reserved time for a short rebuttal period after the closing of the Defence. Finally, the two accused offered closing remarks, which differed markedly in both their tone and content.[1493]

1485 ICC-01/04-01/07-3235. Additional time was granted to the Prosecution and Legal Representatives for Victims to include observations in light of the trial judgement issued in the Lubanga case on 14 March 2012; the Defence teams were able to include such observations within the existing deadline.

1486 ICC-01/04-01/07-T-340-ENG, p 61 lines 11-14.

1487 The Chamber indicated that an unspecified number of witnesses were called by both Defence teams. ICC-01/04-01/07-T-336-ENG, p 1 lines 18-22. Three Defence witnesses requested and, after extensive proceedings, were granted the opportunity to apply for asylum in the Netherlands. See further *Gender Report Card 2011*, p 327-332; ICC-01/04-01/07-3254.

1488 Pursuant to Article 67(1)(h) of the Statue, the accused can make 'an unsworn oral or written statement in his or her defence'.

1489 After having requested translation into Lingala due to his inability to follow the proceedings in French, starting on 27 September 2011, Germain Katanga testified and made closing remarks in French, resulting in the Chamber's order to the Registry to cease Lingala translation. ICC-01/04-01/07-T-315-ENG, p 10 line 23. See further *Gender Report Card 2011*, p 231-232. Mathieu Ngudjolo both testified and made closing remarks in Lingala. See ICC-01/04-01/07-T-315-ENG, p 6 line 1 and ICC-01/04-01/07-T-340-ENG, p 47 lines 21-24.

1490 In this case, there were essentially two different groups of victims: (i) the (former) child soldiers who were victims of the crime of using them to participate in hostilities; and (ii) the victims who suffered attacks by the FNI/FRPI, including attacks committed by the child soldiers. To avoid conflicts of interests between these two groups if represented by a single Legal Representative, Trial Chamber II appointed two (external) common Legal Representatives: one for the child soldiers and one for the other victims. ICC-01/04-01/07-1328. The closing arguments of both Legal Representatives are discussed in this section.

1491 'ICC judges in case against Katanga and Ngudjolo Chui visit Ituri', *ICC Press Release*, ICC-CPI-20120127-PR765, 27 January 2012.

1492 They did so in compliance with the Trial Chamber's order. ICC-01/04-01/07-3274.

1493 Rule 141(2) of the Rules of Procedure and Evidence provides that the last word will go to the Defence. Having both testified before the Chamber under oath during the presentation of the Defence case, during the closing arguments both Katanga and Ngudjolo addressed the Chamber, in French and Lingala respectively.

Central to the discussion was the nature of the conflict as international or internal, and whether the Chamber could recharacterise it pursuant to Regulation 55 of the Regulations of the Court.[1494] Emerging from the same Situation and timeframe of investigations as the Lubanga case, the role of intermediaries and the reliability of alleged former child soldier witnesses for the Prosecution were also key issues of contention in the Katanga & Ngudjolo case. The parties and participants further addressed the ethnic dimensions of the conflict, the authority of the two accused and their respective roles within the armed groups under their alleged command.

Regarding the charges of rape and sexual slavery against both accused, the discussion focused on the credibility of the Prosecution witnesses, the temporal scope of the charges and the issue of cumulative charging for sexual crimes as both war crimes and crimes against humanity. The submissions during closing arguments also addressed at length the issue of whether the attack in Bogoro was directed at the civilian population, as required for charges of crimes against humanity. The role of victim participation also arose throughout the closing arguments, as it was called into question by the Defence.

This section highlights some of the main arguments made by the Prosecution, Defence, and Legal Representatives of Victims in respect of the following issues: crimes of sexual violence, specifically the charges of rape and sexual slavery; the characterisation of the conflict; issues pertaining to witness credibility and the role of intermediaries; the establishment of crimes against humanity; the common plan; and the alleged individual criminal responsibility of Katanga and Ngudjolo. The role of victims in the proceedings also emerged as an issue during the closing statements of the parties and the Legal Representatives of Victims, and is described briefly, below.

1494 Regulation 55 allows the Chamber to change the legal characterisation of facts to accord with the crimes or the mode of liability, without exceeding the facts and circumstances of the charges. Specifically, Regulation 55(2) states that 'if, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions'.

Crimes of sexual violence

The Katanga & Ngudjolo case was the first at the ICC in which crimes of sexual violence were charged by the Prosecution. The discussion of these charges during the closing arguments centred on the credibility of the witnesses who testified about their experiences of rape and sexual enslavement, the temporal scope of the charges and on the issue of cumulative charging.

Prosecution statements

On 15 May 2012, Prosecutor-elect Fatou Bensouda opened the Prosecution's closing statements. Bensouda summarised the charges, the context of the wars in the DRC, and described the attack on Bogoro. Bensouda further described the testimony of Prosecution witnesses who were survivors of the attack. She recalled them testifying about 'hiding to save their lives', 'family members and friends being butchered', 'civilians being hunted down and murdered in the bush surrounding the village', and 'seeing the village being looted and destroyed by attackers'.[1495]

Bensouda referenced the testimony of gender-based crimes presented to the Chamber:

> These courageous women relived how they were captured by combatants and raped, how they were abducted, and attacked and taken to militia camps only to be used as sex slaves by the so-called husbands and other combatants. They were repeatedly raped by these combatants and they also described how they were mistreated and held in detention against their will at militia camps where they were forced to submit to sexual intercourse and manual labour.
>
> The consequences for these women were severe. Their prolonged captivity and repeated sexual slavery affected their physical and psychological well-being. Some contracted venereal diseases. Two of these witnesses became pregnant while sexually enslaved. As they stand — as they stated, sexually abused women often feel ashamed as rape is still considered a taboo in these communities and, even though they were victims, their husbands, families and society can reject them.[1496]

Later in the Prosecution closing arguments, Trial Lawyer for the Prosecution Dianne Luping addressed the crimes of sexual violence in detail. Luping underscored that the three sexual violence victims who testified (Witnesses 132, 249 and 353),[1497] 'were all clear and compelling about their own experiences of rape and sexual slavery that they suffered in the aftermath of the Bogoro attack'.[1498] She contended that alleged inconsistencies of these witnesses by the

1495 ICC-01/04-01/07-T-336-ENG, p 6 lines 14-17.

1496 ICC-01/04-01/07-T-336-ENG, p 6 lines 24-25, p 7 lines 1-10.

1497 For a detailed account of witness testimony related to sexual violence, including that of Witnesses 132 and 249, see *Gender Report Card 2010*, p 165-176, and *Gender Report Card 2011*, p 226-228. Witness 353, a witness for the Prosecution, testified in November 2010 that she was kept in a house where she was repeatedly raped by two men, which she described as having been taken as their wife. At the start of her testimony, Presiding Judge Cotte indicated that Witness 353 was a very vulnerable witness and was at a 'high risk of stigmatisation' if her identity were to be made public. The VWU had further recommended that 'when questions relate to any form of sexual violence, that the witness be questioned with all possible respect and in a very sensitive manner'. ICC-01/04-01/07-T-212-Red-ENG, p 69-71. The publicly available transcripts of her testimony indicated that Witness 353 spoke about sexual violence in general terms in open court and that a significant portion of her testimony was given in closed session.

1498 ICC-01/04-01/07-T-336-ENG, p 46 lines 19-20. Regarding the charges of rape and sexual slavery, Legal Representative for the principal group of victims Denis also addressed the reliability of the testimony of Prosecution Witness 132, countering Defence assertions that her testimony was plagued with contradictions. She underscored the trauma that the victim underwent, and the VWU determination that she was a vulnerable witness, to explain any contradictions in her testimony.

Defence did not 'go to the heart of the witnesses' accounts of their rape, of their sexual slavery and therefore [did] not mean that their testimonies [were] not reliable, or not credible'.[1499]

Luping clarified that the Prosecution did not have to prove that the accused personally committed crimes of sexual violence, but rather that 'when the accused entered into the common plan to attack Bogoro, they knew that these crimes of rape and sexual slavery would occur in the ordinary course of events'.[1500] She noted in this regard that 'Prosecution witnesses testified that it was common, in particular for commanders, to keep abducted women as sex slaves'.[1501]

Luping addressed two legal issues: the temporal scope of the rape charges and the type of evidence necessary to prove the charges of rape and sexual enslavement. The Prosecution asserted that the rape charges extended beyond the day of the attack on Bogoro to rape perpetrated in the aftermath of the attack, including while the victims were held in captivity, as confirmed in the charges and as properly notified to the Defence. Luping noted the Defence contention that Witness 132 was not raped, but underwent a 'circled marriage ceremony' and was offered presents after being abducted by Ngiti during the Bogoro attack.[1502] In response, the Prosecution argued that:

> to prove rape it's enough to prove that the rapist took advantage of a coercive environment. Similarly to prove sexual slavery, it's enough to prove the victim was deprived of her liberty when kept as a sex slave. And under Rule 70, there's a presumption that a victim can't give voluntary or genuine consent if she's held in a coercive environment, and there's nothing that she says or does that can infer that she consented if she's being held coercively. Now, the coercive environment in which all three Witnesses 132, 249 and 353 were raped and kept as sex slaves was inherent in all their cases in the fact that they were all abducted against their will at gunpoint from Bogoro, detained by combatants to live in military camps with enemy armed combatants and kept under surveillance making immediate escape difficult.[1503]

Defence statements

In the closing arguments, Counsel for the Katanga Defence Sophie Menegon addressed the sexual crimes charges. She first underscored that only two Prosecution witnesses - Witnesses 132 and 249[1504] - testified that they were raped in Bogoro during the attack or immediately thereafter. She then noted that these two witnesses, in addition to Witness 353, alleged that they were taken to camps, 'where allegedly they were forced to be the wives of soldiers'.[1505] She argued that their credibility was significantly undermined by inconsistencies that went to the heart of their testimony. She asserted that Witness 132 'was particularly inconsistent'.[1506] She further noted that Witnesses 132 and 249 were introduced to the Prosecution through Intermediaries 143 and 316, further undermining their reliability.[1507]

1499 ICC-01/04-01/07-T-336-ENG, p 47 lines 16-18.
1500 ICC-01/04-01/07-T-336-ENG, p 50 lines 7-9.
1501 ICC-01/04-01/07-T-336-ENG, p 50 lines 14-15.
1502 ICC-01/04-01/07-T-336-ENG, p 53 line 15. In a highly redacted section of its closing brief, the Katanga Defence asserted that the witness 'developed a relationship' with an assailant, 'and entered into a form of marriage with him'. ICC-01/04-01/07-3266-Corr2-Red, para 980. In its closing brief, the Prosecution argued that all such marriages were forced, conducted without the women's consent. ICC-01/04-01/07-3251-Corr-Red, para 81.
1503 ICC-01/04-01/07-T-336-ENG, p 53 lines 21-25, p 54 lines 1-6.
1504 For a detailed description of the testimony of Witnesses 132 and 249, see *Gender Report Card 2010*, p 167-176.
1505 ICC-01/04-01/07-T-338-Red-ENG, p 62 line 19.
1506 ICC-01/04-01/07-T-338-Red-ENG, p 62 line 25.
1507 The credibility of Prosecution witnesses and the role of intermediaries are discussed in more detail, below.

She thus argued that 'their testimony should be dismissed or given only minor probative value and their testimony certainly isn't enough to prove beyond reasonable doubt that the crimes of rape and sexual enslavement occurred in Bogoro'.[1508]

Addressing the alleged responsibility of the accused for the charges of sexual violence, Menegon argued that rape and sexual enslavement were not a predictable consequence of the attack occurring in the ordinary course of events. She also referred to the prohibition by the *féticheurs* of sexual crimes,[1509] and argued that there was no reference to sexual violence being committed in the other, related attacks. She stated that the 'Prosecution mentioned attacks on Tchomia and Kasenyi where such crimes were allegedly committed by Ngudjolo's men, but that has nothing to do with Mr Katanga and in no way proves Katanga's knowledge of such crimes during the attack on Bogoro'.[1510] She also highlighted the testimony of one Defence witness who denied that gender-based crimes were committed in the camp at Aveba.

In its oral arguments, the Ngudjolo Defence team contested the rape and sexual enslavement charges as crimes against humanity, as a consequence of its argument that the civilian population was not targeted for the purpose of establishing crimes against humanity in this case. It referred the Chamber to its final brief in this regard, as it intended to focus its closing arguments on other aspects of the case.[1511]

1508 ICC-01/04-01/07-T-338-Red-ENG, p 64 lines 13-15.
1509 See further, see *Gender Report Card 2010*, p 176-177.
1510 ICC-01/04-01/07-T-338-Red-ENG, p 65 lines 15-18.
1511 ICC-01/04-01/07-T-339-Red-ENG, p 8 lines 3-5. At the time of writing this Report, the Ngudjolo Defence final brief, ICC-01/04-01/07-3265, was not available on the ICC website. The Ngudjolo Defence had expressed its intent to challenge the Prosecution expert medical testimony confirming the injuries to which the three sexual violence witnesses had testified, and requested that the Chamber authorise its chosen experts, and to convey the confidential reports of Prosecution expert, Dr Baccard, as well as the public redacted versions of the transcripts of the witnesses' testimonies. ICC-01/04-01/07-2829; ICC-01/04-01/07-3008-Conf. The Chamber's decision on these requests does not appear on the public record in the case.

Cumulative charging for crimes of sexual violence

Concerning the cumulative charging of sexual crimes, Katanga Defence Counsel Menegon first contended that the acts of rape that occurred after the sexual enslavement should be subsumed within the act of sexual enslavement, citing a decision of the Trial Chamber of the Special Court for Sierra Leone in the Issa Hassan Sesay case. In its final brief, the Katanga Defence had submitted that, 'were the Chamber to consider that the factual and contextual elements of these crimes were met, there should not be a cumulative conviction for rape and sexual slavery as both war crime and crime against humanity'.[1512] Specifically, the Defence had argued that the only difference between the two crimes was the context, as crimes against humanity required a widespread attack against the civilian population, and that the underlying elements were so similar, it would amount to charging Katanga twice for the same acts.[1513] Menegon encouraged the Chamber to take an independent approach, without reference to the holdings of the ICTY, especially in the Čelebići case, which she argued was erroneously established on an American precedent.

Trial Lawyer for the Prosecution Belbenoit Avich responded to Defence arguments regarding cumulative charging for rape and sexual slavery as both crimes against humanity and war crimes. Belbenoit stressed that this practice was 'well-established by jurisprudence and criminal international tribunals' and cited numerous cases from the ICTY in support.[1514]

1512 ICC-01/04-01/07-3266-Corr2-Red, para 1321.
1513 ICC-01/04-01/07-3266-Corr2-Red, paras 1322-1326, and citing Pre-Trial Chamber II's decision on cumulative charging in the Bemba case. ICC-01/05-01/08-424. On 31 July 2009, The Women's Initiatives filed an *amicus curiae* brief in the Bemba case, clarifying several important issues with respect to cumulative charging. See ICC-01/05-01/08-466.
1514 ICC-01/04-01/07-T-336-ENG, p 61 lines 18-23, citing the ***Jelisić, Kordić & Čerkez and Čelebići*** judgements of the ICTY.

He underscored that 'there is a well-established jurisprudence, since the Celebici case, that multiple qualifications of the same event based on different incriminating facts is possible when each of the incriminating facts is a distinct factor that is absent from the other qualification'.[1515] Belbenoit underlined that the 'distinguished elements' for war crimes related to 'a violation of specific principles', and for crimes against humanity involved 'an intention or awareness of action within a generalised or systematic attack on a specific population'.[1516] Cumulative charging of crimes of sexual violence was also an issue in the Bemba case in the confirmation of charges decision, and addressed by the *amicus curiae* brief filed by the Women's Initiatives in that case.[1517]

1515 ICC-01/04-01/07-T-336-ENG, p 61 lines 24-25; p 62 lines 1-2.

1516 ICC-01/04-01/07-T-336-ENG, p 62 lines 9-11.

1517 The *amicus curiae* brief filed by the Women's Initiatives on 31 July 2009 addressed the issue of cumulative charging as an issue of general interest to the Court and in reference the Bemba case. First, the brief argued that, in its Confirmation Decision, the Pre-Trial Chamber improperly dismissed charges of gender-based crimes on the grounds that cumulative charging was detrimental to the rights of the accused. The brief further argued that, while the Chamber used the appropriate test for cumulative charging as set forth by the ICTY Appeals Chamber in *Prosecutor v. **Delalić***, it did not properly apply the test to the facts in this case. In national courts and international tribunals, cumulative charging has never been posited as violating the rights of the accused. The Women›s Initiatives argued that cumulative charging was distinct from charges lacking in evidence and as such was ‹not inimical to the due process rights of the accused; they remain[ed] safeguarded throughout the trial. Upon a finding of guilt, cumulative convictions [we]re impermissible, but at the charging stage, whether charges [were] cumulative or not, their inclusion in the indictment [did] not violate fair trial practices'. ICC-01/05-01/08-466. See further *Legal Filings by the Women's Initiatives for Gender Justice to the International Criminal Court*, 2nd Edition, available at <http://www.iccwomen.org/publications/articles/docs/Legal_Filings_submitted_by_the_WIGJ_to_the_International_Criminal_Court_2nd_Ed.pdf>..

Characterisation of the conflict

The characterisation of the conflict, as international or non-international, was the most contested issue in the closing arguments, with both Defence teams and the Legal Representatives for both groups of victims arguing strenuously that the Chamber maintain its characterisation as international.

Prosecution statements

As in the Lubanga case, the Prosecution maintained that the conflict in Ituri was of a non-international nature. However, in the Katanga & Ngudjolo case, the Prosecution further argued that the characterisation of the conflict as international or internal was 'immaterial' to the crimes charged.[1518] Addressing these issues for the Prosecution, Luping limited her statements, as requested by the Chamber, to the legal basis for recharacterising the conflict. Specifically, she argued that pursuant to Regulation 55 of the Regulations of the Court and Article 74 of the Statute, the Chamber could modify the character of the conflict without it constituting an amendment of the charges. She asserted that any recharacterisation would thus not result in prejudice to the Defence.[1519] She suggested that the Chamber gave notice to the Defence at the start of trial that all legal characterisations were subject to modification pursuant to Regulation 55, thus satisfying the requirement to give notice.[1520]

1518 ICC-01/04-01/07-T-336-ENG, p 54 lines 12-14.

1519 ICC-01/04-01/07-T-336-ENG, p 54 lines 17-25, citing an Appeals Chamber judgement from the Lubanga case, ICC-01/04-01/06-2205, paras 75-77. In the trial judgement in the Lubanga case, Trial Chamber I recharacterised the conflict from international to non-international. ICC-01/04-01/06-2842, para 566.

1520 ICC-01/04-01/07-T-336-ENG, p 55 lines 2-5, citing ICC-01/04-01/07-1547, paras 17, 21.

Following clarifications requested by the Chamber as to the context in which the attack on Bogoro occurred, and the 'details of simultaneous conflicts, if any, taking place in the region relevant to the characterisation of the conflict',[1521] Luping summed up the Prosecution position:

> the relevant armed conflict at the time of the Bogoro attack in which that attack took place was a non-international armed conflict in Ituri, involving local armed groups divided largely along ethnic lines; namely, the conflict between the respective Lendu and Ngiti armed groups commanded at the time of the Bogoro attack by the accused, against the predominantly Hema armed groups of the UPC as well as the PUSIC. This non-international armed conflict amongst these local armed groups existed both before and after the Bogoro attack, in particular in the period August 2002 to at least mid-2003.[1522]

Concerning the involvement of foreign actors, the Prosecution submitted that any such involvement did not change the nature of the conflict at the time of the Bogoro attack. In response to the Chamber's questions, it identified other joint attacks demonstrating an organisational policy to target civilians, namely attacks on: Nyankunde, Mandro, Kasenyi, Tchomia, the Lake Albert area and prior attacks on Bogoro. Luping noted in this regard that the attacks prior to Bogoro involved the same combatants and that 'in its essentials the organisation responsible for these attacks remained the same', even if operating under a different name.[1523]

1521 ICC-01/04-01/07-T-337-Red-ENG, p 4 lines 20-21.
1522 ICC-01/04-01/07-T-337-Red-ENG, p 4 lines 22-24, p 5 lines 1-5.
1523 ICC-01/04-01/07-T-337-Red-ENG, p 8 lines 4-5.

Defence statements

The Katanga Defence position was that the existence of neither an international, nor a non-international conflict had been proved. Counsel for the Katanga Defence Andreas O'Shea addressed legal issues related to the use of Regulation 55, and argued that there was no evidential basis to apply Regulation 55 to change the nature of the conflict. He contended that proper notice and an opportunity to the parties to submit observations must be given prior to invoking Regulation 55. He further argued that a recharacterisation of the conflict would alter the nature of the charges in violation of Article 67(1) and go beyond the confirmation of charges decision in violation of Article 74(2).

Counsel for the Katanga Defence Nathalie Wagner specifically argued that recharacterising the conflict as non-international would broaden the crimes of murder, wilful killing, pillage and destruction of property, thus causing prejudice to the Defence. By way of example, she stated, 'wilful killing under Article 8(2)(a) limits the crime committed against those, and I quote, "adverse to the party to the conflict," end quote. No such restriction is placed with respect to the same crime being committed in non-international armed conflict'.[1524] She also argued that the concepts of protected persons, protected property and pillaging differed based on whether the conflict was characterised as international or internal. She underscored that the definition set forth by the Pre-Trial Chamber was based on an international conflict only.

Counsel for the Ngudjolo Defence, Professor Jean-Pierre Fofé Djofia Maleva, characterised the conflict as follows:

> The Bogoro attack of 23 February 2003 was not part of an interethnic armed conflict between the Hema and the Lendu, not at all. Maître Kilenda

1524 ICC-01/04-01/07-T-338-Red-ENG, p 73 lines 17-20.

> has just established that this attack was part of a complex, dense conflict that was not an interethnic conflict, but one that pitted high level foreign international parties against each other within a context of military, economic and strategic as well as territorial considerations.[1525]

Fofé affirmed that the Ngudjolo Defence's position was that the conflict was international in nature, with involvement of both Uganda and Rwanda.[1526]

Legal Representatives of Victims' statements

Legal Representative of child soldier victims Jean-Louis Gilissen spoke extensively about the nature of the conflict. He asserted that the characterisation of the conflict was a central issue for the victims, and in contrast to the Prosecution, argued that it was international. Gilissen stressed that the UPC and the FNI/FRPI operated as proxies for the Governments of Uganda and the DRC, emphasising Uganda's political and economic interventions, and the occupation by the UPDF in areas of the Ituri region.[1527] Gilissen argued that the goal of the DRC government in Kinshasa 'was to regain control over Ituri', as a foreign force and its subsidiaries had occupied the area.[1528] He further stated that the 'young people who were involved, those who were actually in Bogoro and others' he had spoken to were thinking 'to defeat the Hema, the UPC, [...] to beat the Ugandans'.[1529] Gilissen argued that there was a clear distinction between the circumstances surrounding this case and those of the Lubanga case, in which Trial Chamber I recharacterised the conflict as non-international in the trial judgement.[1530] Legal Representative for the principal group of victims Denis also argued that there was sufficient evidence for the Chamber to conclude that the conflict was of an international nature, emphasising Uganda's role in the conflict.[1531]

The common plan

Prosecution statements

Senior Trial Lawyer for the Prosecution Eric MacDonald presented the Prosecution position regarding the common plan, which covered the background to, and motives for, the attack, the planning and carrying out of the attack, and the crimes that were committed. He noted that the Lendu and Ngiti were hemmed into an enclave by the UPC, who were of Hema ethnicity, and that they 'could no longer travel freely on the major roads', and thus had no access to Bunia, Bogoro, nor Lake Albert, where they could obtain supplies,.[1532] Furthermore, they were victims of repeated attacks by the UPC in which hundreds of civilians died. MacDonald emphasised the ethnic dimension of the conflict, stating: 'during these months of conflict amongst the various ethnic groups, hatred grew. The Lendu and Ngiti communities grew to hate the Hema.'[1533]

MacDonald argued that the fact that Bogoro was surrounded in the attack was a clear indication that it was premeditated. He asserted that only 20-25 soldiers from the *Armée populaire congolaise* (APC) were present at the Bogoro attack to assist with the heavy weaponry, in contrast to the Defence contention that there were approximately 150. He characterised the attack as 'a true massacre'.[1534] Following clarifications from the Chamber on the Prosecution's position regarding the alleged

1525 ICC-01/04-01/07-T-339-ENG, p 6 lines 12-17.
1526 ICC-01/04-01/07-T-340-ENG, p 22 lines 10-12.
1527 ICC-01/04-01/07-T-337-Red-ENG, p 39 lines 2-13.
1528 ICC-01/04-01/07-T-337-Red-ENG, p 41 line 24.
1529 ICC-01/04-01/07-T-337-Red-ENG, p 44 lines 21-25, p 45 lines 1-3.
1530 ICC-01/04-01/06-2842, para 566.
1531 ICC-01/04-01/07-T-337-Red-ENG, p 65 lines 8-10.
1532 ICC-01/04-01/07-T-336-ENG, p 33 lines 11-18.
1533 ICC-01/04-01/07-T-336-ENG, p 34 lines 12-13.
1534 ICC-01/04-01/07-T-336-ENG, p 45 line 10.

presence of APC soldiers at Bogoro, MacDonald reiterated the Prosecution position that 'at that time, within the collectivity of Walendu-Bindi, there were APC soldiers, combatants', and stressed that the Prosecution 'challenge[d] the presence of 150 APC soldiers at the time of the Bogoro attack'.[1535]

Judge Cotte later returned to the issue of the presence of the APC, asking the Prosecution: '[...] can you say that there were any APC combatants in Bogoro at the time of the attacks'?[1536] To this, MacDonald responded that the Prosecution was aware that:

> Witness 28, and other victims who were witnesses, asserted that they saw APC combatants in Aveba and Bogoro. The answer therefore is there may have been APC combatants in the area, but that has no bearing on the responsibility of the two accused persons as to their leadership of the combatants. . . . So the answer is it is possible that there may have been APC combatants in the area. The number which we offer would be between two to 25.[1537]

Following Judge Cotte's intervention: 'you must be aware that the time must come for the Court to determine who did what on 23 February in Bogoro', MacDonald responded: 'If there is a third party, it must be a third co-perpetrator who is not called before this Court. In any event, that does not change the scope and nature of the charges before the Court'.[1538]

Following questions by the Chamber about the use of heavy weaponry at Bogoro, MacDonald responded that 'indeed the combatants did have heavy weaponry, such as mortars and rocket launchers, firearms and bladed weapons, including machetes, spears and arrows'.[1539] In light of Defence arguments related to the role of the APC in providing assistance in the use of heavy weaponry, MacDonald explained that 'according to the Prosecution evidence no witness said that the APC members were handling heavy weaponry, other than rocket launchers'.[1540]

The Chamber also specifically inquired into the ethnic hatred involved in the conflict and which actors were consumed by, and helped to spread, this hatred. MacDonald emphasised the ethnic hatred and 'spirit of vengeance'[1541] among the combatants. Following questions from the Chamber as to whether the Prosecution contended that Katanga and Ngudjolo were 'factors in sustaining that ethnic hatred' or 'were in a position to stop the expression of this hatred',[1542] MacDonald answered, '[w]ell, to cut to the chase, your Honour, yes'.[1543] Judge Cotte inquired further: 'so with regard to the propagation of this hatred and this desire for vengeance, do you think that there were other people, other prominent people within the region, who might also have helped spread this hatred and this thirst for vengeance'?[1544] In response, MacDonald noted that the communities were surrounded in enclaves, and that witnesses spoke of famine. He underscored the role of the *féticheurs*, or spiritual priests. Judge Cotte pressed further, asking:

> Now can you tell us whether you have actual evidence that we may not have in mind right at this particular moment that would show that there was any kind of rhetoric or speeches

1535 ICC-01/04-01/07-T-337-Red-ENG, p 20 lines 1-4.
1536 ICC-01/04-01/07-T-337-Red-ENG, p 22 lines 20-24.
1537 ICC-01/04-01/07-T-337-Red-ENG, p 22 line 25, p 23 lines 1-4, lines 11-12.
1538 ICC-01/04-01/07-T-337-Red-ENG, p 23 lines 16-20.
1539 ICC-01/04-01/07-T-337-Red-ENG, p 15 lines 14-16.
1540 ICC-01/04-01/07-T-337-Red-ENG, p 15 lines 24-25, p 16 line 1.
1541 ICC-01/04-01/07-T-337-Red-ENG, p 10 line 6.
1542 ICC-01/04-01/07-T-337-Red-ENG, p 11 lines 1-5.
1543 ICC-01/04-01/07-T-337-Red-ENG, p 11 line 6.
1544 ICC-01/04-01/07-T-337-Red-ENG, p 11 line 25, p 12 lines 1-2.

> being given, a specific example of this hate that you say was present? This is what is — this is what is of interest to us.[1545]

In response, MacDonald referred to the songs sung before battle in which the singer would have to catch a Hema person and kill him, as recounted by various witnesses. Presiding Judge Cotte concluded the exchange by stating: 'I think it is important to — for all parties and participants to realise that we need more clarification about this hatred'.[1546]

Defence statements

On behalf of the Katanga Defence, Dr Caroline Buisman addressed the issue of the common plan, and submitted that 'the Prosecution is conflating a legitimate plan with a criminal plan. We submit there's only evidence that there was a legitimate plan'.[1547] The Defence acknowledged that Katanga made a contribution to the 'legitimate plan [...] to get rid of a UPC base, a very strong military base, based in Bogoro'.[1548] She also indicated that the Defence accepted that there were civilian casualties at Bogoro, but that this was not known to the accused before his participation in the plan.

Buisman further argued that there was very little evidence of ethnic hatred binding the two groups. She asserted that Katanga bore no hatred toward the Hema, having grown up with a Hema family. She further noted the significant presence of Hema refugees in Aveba, where Katanga was based. She clarified that Katanga 'was fighting the Ugandans'.[1549] She underscored the concurrence between the Defence and the Legal Representatives of Victims on the involvement of EMOI and the RCD-K/ML in a broader plan. She reiterated that the plan would have been carried out without Katanga, so his contribution was not essential. Regarding Katanga's control, she stated:

> You have to control the crime and if there is not this tight coalition between the two groups, how can anyone argue that Mr Katanga should be held liable for crimes committed by people under Ngudjolo's commands? We submit that would be unfair indeed. Well, on this issue we submit the joint structure is very, very thin, very thin indeed. There is no history, no joint history, there has been no joint attacks we submit before Bogoro, and also so after Bogoro.[1550]

Addressing these issues for the Ngudjolo Defence, Lead Counsel Jean-Pierre Kilenda Kakengi Basila addressed the historical context to the conflict. Concerning the motives for the attack on Bogoro, he stated that 'the destruction of the UPC is a win/win operation, as someone would put it, for all the parties of this new coalition; namely, the Government of Kinshasa, Uganda, the APC and the local groups, [*Front pour l'Intégration et la Paix en Ituri* (FIPI)] and FRPI [...] it is for that reason alone that the EMOI was in Beni'.[1551] He characterised the Prosecution version of the facts as 'contrary to what is obvious'.[1552]

1545 ICC-01/04-01/07-T-337-Red-ENG, p 13 lines 11-14.
1546 ICC-01/04-01/07-T-337-Red-ENG, p 13 line 25, p 14 lines 1-3.
1547 ICC-01/04-01/07-T-338-Red-ENG, p 55 lines 17-21.
1548 ICC-01/04-01/07-T-338-Red-ENG, p 56 lines 2-4.
1549 ICC-01/04-01/07-T-338-Red-ENG, p 58 lines 2-3.
1550 ICC-01/04-01/07-T-338-Red-ENG, p 61 lines 2-8.
1551 ICC-01/04-01/07-T-339-ENG, p 3 lines 12-15, p 4 lines 1-2.
1552 ICC-01/04-01/07-T-339-ENG, p 4 lines 8-9.

Legal Representatives of Victims' statements

Legal Representative of Victims Denis, like the Prosecution, described the context as one of interethnic strife and widespread, systemic attacks on the civilian population. She stated that the victims knew 'that this conflict between the Lendu/Ngitis on the one hand, and the Hemas on the other hand, has existed for a long time'.[1553] Echoing the Prosecution, she emphasised the ethnic nature of the conflict, drawing examples from witness testimony to that effect throughout the trial. She explained:

> And why should we dwell for so long on this issue? It is necessary to understand this issue in order to better grasp the attitude of the military groups towards the civilian population. It also explains why we are dealing here with combatants who are consumed by hatred for the other communities and therefore blindly obeyed their commanders. This context is necessary to understand the context of systematic and wide-spread attacks against the civilian population.[1554]

1553 ICC-01/04-01/07-T-337-Red-ENG, p 61 lines 12-14.
1554 ICC-01/04-01/07-T-337-Red-ENG, p 62 lines 10-15.

Crimes against humanity charges

Another key issue in dispute during closing arguments was whether the facts in the case met the requirements to establish crimes against humanity, namely, a widespread, systematic attack against the civilian population. The parties and participants disputed such issues as whether there were civilians in Bogoro at the time, the number of civilians killed and whether an attack on a single town could constitute 'widespread' and 'systematic'.

Prosecution statements

In light of Defence arguments that the target of the attack was the UPC military camp in Bogoro and not the civilian population, Trial Lawyer for the Prosecution Dianne Luping argued that there was an organisational policy to target Hema civilians at Bogoro. The Prosecution clarified that the alleged crimes covered the attack in Bogoro as well as other attacks against the civilian population in Ituri, but that an attack against a large number of civilians within a small geographic area was recognised as sufficient by the Pre-Trial Chamber in the confirmation of charges decision.[1555] Following questions from the Judges concerning the organisational policy to attack civilians, Luping underscored that 'insiders of both the accused's groups describe a policy of revenge and targeting of all Hema as the enemy, with no distinction made between civilians or combatants'.[1556] In response to the Chamber's question regarding whether the civilian population was the principal target, the Prosecution responded that there was no legal requirement that it be so. The Prosecution submitted:

1555 ICC-01/04-01/07-T-336-ENG, p 57 lines 10-25, citing ICC-01/04-01/07-717, paras 395, 408 and the ICTY case *The Prosecutor v.* ***Jelisić***, IT-95-10-T, paras 18, 21, 53 and 57, concerning the attack on the town of **Brčko**.
1556 ICC-01/04-01/07-T-337-Red-ENG, p 8 lines 18-19; ICC-01/04-01/07-3290, paras 635, 645, 665-669.

> It simply suffices that the attack is carried out against a predominantly civilian population with intent and knowledge. We recall that motives are irrelevant for the purposes of crimes against humanity, as it may be that the ultimate purpose of the attack is to secure a part of the territory, or to weaken the enemy's morale. However, this doesn't negate or exclude the applicability of crimes against humanity if their constituent elements are present.[1557]

MacDonald also outlined the crimes committed at Bogoro, stating:

> They burnt down homes, with civilians still inside. They killed women, children and the elderly in the classrooms using knives and other bladed weapons. After driving out the UPC soldiers, the attackers set the bush on fire to force the civilians who were hiding there to come out and then they were killed. They did not hesitate to use civilians who had been captured as bait, so to speak, to lure the others out of their hiding places and then kill them.[1558]

MacDonald thus emphasised that the crimes 'were conducted in a widespread manner throughout the entire village of Bogoro. These crimes were systematic in nature [and] not the consequences of a few isolated combatants who went too far'.[1559]

Defence statements

Defence Counsel for Katanga O'Shea, conceded that an unknown number of civilians were killed and that combatants committed excesses. He underscored that the Prosecution indicated civilians went to the military base, which the Defence argued was the target of the attack. He further argued that, according to an Appeals Chamber decision in the Kunarac case at the ICTY, civilians must be the primary objective to constitute a crime against humanity. He contended that the attack against Bogoro could not qualify as 'widespread' or 'systematic'. Katanga Defence Counsel Wagner also challenged the Prosecution assertion regarding the number of civilians killed in the attack, stating that the Prosecution had submitted inconsistent numbers. He indicated that 'the crux of our argument is that the Prosecution has failed to prove beyond reasonable doubt the protective status of at least some of the victims'.[1560]

For the Ngudjolo Defence, Prof Fofé further emphasised that the target on that day was the UPC military camp, and that the attack in question was not a widespread or systematic attack targeting the civilian population of Bogoro.[1561] He asserted that some civilians had sought refuge at the UPC camp, and others participated in the hostilities, and therefore did not enjoy protective status. He thus argued that the contextual element necessary for establishing crimes against humanity, namely a widespread, systematic attack on the civilian population, had not been established.

1557 ICC-01/04-01/07-T-337-Red-ENG, p 9 lines 9-14.
1558 ICC-01/04-01/07-T-336-ENG, p 45 lines 10-16.
1559 ICC-01/04-01/07-T-336-ENG, p 45 lines 21-23.
1560 ICC-01/04-01/07-T-338-Red-ENG, p 71 lines 3-5.
1561 ICC-01/04-01/07-T-339-ENG, p 6 line 25, p 7 lines 1-2.

Legal Representatives of Victims' statements

Concerning the systematic attack against the civilian population, Legal Representative of Victims Denis summarised the witness testimony:

> The witnesses described how their village was surrounded to ensure that no one escaped. We heard that the attack started as from 5 a.m. People were still in bed and sleeping. The idea was to kill them silently. The attack was extremely violent, various firearms were used, but machetes were also used to finish off those who had fallen. During the attack and after the attack civilians were hunted down, men, women and children were pursued and killed and then the combatants resorted to pillaging.[1562]

Denis then addressed the presence of civilians in Bogoro, as disputed by the Defence in their closing briefs. She argued that despite the insecure situation, to which the inhabitants were accustomed, they believed that the UPC would repel any attack and lacked the economic means to flee. She also countered Defence claims that the civilians in Bogoro were actually combatants,[1563] and disputed the Defence assertion that civilians were killed by a few combatants who had gone 'too far or got out of control'.[1564] She stated: 'On the contrary, we have evidence from a number of witnesses who were amongst the attackers. They described what they described as the technique followed during the attack. They said that they had a method that they usually used, that things were organised. First, a group of people would shoot at the victims and then a second group would go after those people with machetes.'[1565]

Concerning the looting and destruction of the village, Denis noted witness testimony concerning looting and destruction as a technique of war. She stated: 'It was their method that they used whenever attacking a village. In particular, this method was to torch the houses so that the civilians would have to come out and then the civilians would be killed'.[1566] She went on to describe the testimony of one Prosecution witness who 'specified that the main reason for joining the militia in many cases was to engage in looting and it was also one of the techniques of the attackers; namely, it was allowed to loot the village once the attack was over. This witness explained how, after the attack, civilians did arrive and engage in looting under the control of the attackers'.[1567]

1562 ICC-01/04-01/07-T-337-Red-ENG, p 64 lines 12-18.
1563 ICC-01/04-01/07-T-337-Red-ENG, p 67 lines 22-25.
1564 ICC-01/04-01/07-T-337-Red-ENG, p 69 line 4.
1565 ICC-01/04-01/07-T-337-Red-ENG, p 69 lines 6-10.
1566 ICC-01/04-01/07-T-337-Red-ENG, p 71 lines 6-9.
1567 ICC-01/04-01/07-T-337-Red-ENG, p 71 lines 10-14.

Witness credibility and the role of intermediaries

Derived from the same Situation as the Lubanga case,[1568] the role of Prosecution intermediaries in potentially influencing witness testimony arose in the Katanga & Ngudjolo case as well.

Prosecution statements

Senior Trial Lawyer for the Prosecution Eric MacDonald concluded the Prosecution closing arguments by addressing the issues of witness credibility and intermediaries. He underscored that the credibility of all witnesses, including the two accused who testified should be considered. He listed relevant criteria for assessing witness credibility, including 'the consistency of the testimony, the existence or not of contradictions with prior statements, or the testimonies of other witnesses'.[1569] He continued:

> The Chamber will also have to assess the nature of the contradictions in question, as well as their relevance. Do they relate to a crucial aspect or to a peripheral aspect? There is also the corroboration of other evidence, the degree of precision, and the general context of the case. There is also the personal situation of each witness, such as their age, vulnerability, and relationship with other witnesses, or the accused. Their bias, against or in favour of the accused, or any motivation to provide false testimony. The Prosecution also submits that the Chamber has entire discretion to take into consideration certain parts of the testimony of any given witness, and not to take into consideration other parts.[1570]

MacDonald focused on the Defence allegation that the four main Prosecution witnesses, Witnesses 28, 250, 279 and 208, were not credible as they had been improperly influenced during the investigations by Prosecution intermediaries,[1571] the same intermediaries whose role was called into question in the Lubanga case, especially Intermediary 143. The Prosecution argument focused on countering specific factual details set forth in the Defence final briefs. MacDonald argued that: '28, 250, 279, 280, provide such detail that it is impossible for intermediaries to have had any influence on them'.[1572]

The Prosecution emphasised the documentary and video evidence that was not obtained through its investigations, but through confidentiality agreements pursuant to Article 54(3)(e), which was thus free of the possible influence of intermediaries. MacDonald drew the Chamber's attention to witness testimony concerning admissions by both accused to having organised the attack on Bogoro, witnesses who had no contact with intermediaries, and to the documentary evidence that was 'independent of any investigation done by the OTP and, what's more, that evidence is contemporaneous with the events. The same holds true for the video evidence. The video evidence speaks for itself'.[1573] To conclude, the Prosecution requested that the Chamber look to the totality of the evidence and take a 'logical approach'[1574] to find the two accused guilty as charged.

1568 For a detailed description about the role of Prosecution intermediaries in the Lubanga case, see ICC-01/04-01/06-2842, paras 178-479. See further *Gender Report Card 2011*, p 214-215, 218-221 and *Gender Report Card 2010*, p 139-156.

1569 ICC-01/04-01/07-T-336-ENG, p 64 lines 22-24.

1570 ICC-01/04-01/07-T-336-ENG, p 65 lines 3-12, referring to the Lubanga trial judgement in which Trial Chamber I had to make a similar assessment.

1571 ICC-01/04-01/07-T-336-ENG, p 65 lines 18-20.

1572 ICC-01/04-01/07-T-336-ENG, p 69 lines 12-14.

1573 ICC-01/04-01/07-T-336-ENG, p 69 line 25, p 70 lines 1-2. In its trial judgement in the Lubanga case, Trial Chamber I relied extensively on video evidence to convict Lubanga. See, Lubanga Judgement section, above.

1574 ICC-01/04-01/07-T-336-ENG, p 71 line 8.

Defence statements

Lead Counsel for Katanga, David Hooper, referred to the credibility of Prosecution witnesses as 'the heart of the case, the main battle-field between the Defence and the Prosecution'.[1575] He indicated that the Prosecution case was built primarily on the testimonies of Witnesses 28, 219, 279 and 250, and subsequently challenged their credibility,[1576] stating:

> there can be very few cases brought before a national court, let alone a High Court such as this, the International Criminal Court, with Prosecution witnesses of this base quality, of this low currency, these devalued witnesses. And our crucial submission, as I said at the outset, is that the Prosecution hasn't proved its case because it has to prove it through these witnesses, these four, and it cannot surely substantiate its case on any one of them. [...] Well, the Defence say they are lying. Those witnesses are lying. It's not a question of mistake, an error.[1577]

Hooper drew links between the main Prosecution witnesses and those Prosecution intermediaries whose practices were called into question by Trial Chamber I in the Lubanga case, namely Intermediaries 143 and 316.[1578] Specifically, he linked Witnesses 28, 279 and 280 with Intermediary 143, and Witnesses 250 and 159[1579] with Intermediary 316. He attributed the lack of credible witnesses to 'the way in which the Prosecution investigation was structured and conducted [...] problems like that were bound, bound to occur. The system was inadequate largely because of course of the reliance on intermediaries'.[1580] He reiterated Trial Chamber I's conclusion in the Lubanga case that 'the Prosecution should not have delegated its investigative responsibilities' and underscored 'that as a matter of principle that Court rejected a series of witnesses as a result of the essentially unsupervised actions of the principal intermediaries'.[1581]

Speaking for the Ngudjolo Defence, Prof Fofé asserted three Prosecutorial 'excesses', namely: a 'shallow analysis',[1582] a poor choice of witnesses, and harassment of Ngudjolo in attempting to unilaterally amend the charges.[1583] He argued that the Prosecution 'wanted to pin guilt on

1575 ICC-01/04-01/07-T-338-Red-ENG, p 22 lines 1-2.
1576 ICC-01/04-01/07-T-338-Red-ENG, p 22 lines 4-8, 15-16.
1577 ICC-01/04-01/07-T-338-Red-ENG, p 23 lines 7-12, 19-20. Specifically, regarding Prosecution Witnesses 279 and 280, Hooper argued that they both lied about their ages by six years, as well as other crucial details. He also referred to Prosecution Witness 250 providing a false date of birth, lying about his participation in a militia and the fact that his parents were dead, though they remain alive. He argued that Witness 28 lied about his age, gave a false name, 'made up the name of a whole family of siblings', 'produced forged school reports and he admitted that he'd lied about abduction and that he' been told to by the intermediary'. ICC-01/04-01/07-T-338-Red-ENG, p 28 lines 24-25, p 29 line 1. Some portions of the transcripts relating to these challenges were redacted.
1578 In the Lubanga trial judgement, Trial Chamber I specifically found that there was 'a risk' that Intermediary 143 'persuaded, encouraged or assisted witnesses to give false evidence, and found that there were 'strong reasons to believe' that Intermediary 316 'persuaded witnesses to lie as to their involvement as child soldiers within the UPC'. ICC-01/04-01/06-2842, para 483.
1579 Prosecution Witness 159 testified between 17 and 29 March 2010. On 14 December 2010, the Prosecution informed the Chamber that it would no longer rely on his testimony. ICC-01/04-01/07-2631-Conf. On 24 February 2011, the Chamber held that it would not accord any weight to Witness 159's testimony. ICC-01/04-01/07-2371. On 13 January 2012, the Chamber ordered the Prosecutor to provide information concerning any steps that had been taken in regard to the alleged false testimony of Witness 159, and whether it intended to initiate perjury proceedings against him. ICC-01/04-01/07-3223. The Prosecution indicated that it intended investigate the alleged false testimony after the termination of the proceedings. ICC-01/04-01/07-3225. See further *Gender Report Card 2011*, p 230-231.
1580 ICC-01/04-01/07-T-338-Red-ENG, p 31 lines 10-13.
1581 ICC-01/04-01/07-T-338-Red-ENG, p 32 lines 6, 8-10.
1582 ICC-01/04-01/07-T-339-ENG, p 25 line 10.
1583 ICC-01/04-01/07-T-339-ENG, p 12 lines 13-16.

Mathieu Ngudjolo'[1584] and demonstrated a lack of critical thought through the selection of poor witnesses in attempting to do so. Specifically, he argued that the Prosecution failed to exercise proper oversight over witnesses testifying to alleged admissions to third parties by the accused. Prof Fofé noted that the Prosecution case against Ngudjolo was based in large part on the testimony of Witness 250,[1585] and argued that the witness's testimony 'is full of lies' about his age, his family and his military training.[1586]

Concerning Prosecution intermediaries, Prof Fofé stated that 'they played a deleterious role in the quest for the truth. Their role was absolutely negative. Whether it be [Witness] 250, [Witness] 279 or [Witness] 280, the intermediaries played a very negative role. They played a role that amounted to corruption'.[1587] He argued that by agreeing to pay the witnesses' school fees, the intermediaries would secure that the children would do anything asked of them. Prof Fofé also briefly discussed the allegedly false testimonies of Witnesses 279 and 280, whom he argued were called by the Prosecution to address the issue of child soldiers, but who were not under the age of 15, nor in the militia, nor in Zumbe.

1584 ICC-01/04-01/07-T-339-ENG, p 12 line 18.
1585 Witness 250's testimony covered 'the FNI, the alleged existence at the Zumbe camp of soldiers and a headquarters of the FNI under Mathieu Ngudjolo, recruitment and training of combatants, including child soldiers, means of communication and auto-defence in Zumbe, the planning of the attack on Bogoro on 24 February 2003, participation in this alleged trip to Zumbe and Aveba, the pillaging, dead bodies and how they were buried, the attack on Mandro'. ICC-01/04-01/07-T-339-ENG, p 16 lines 11-16.
1586 ICC-01/04-01/07-T-339-ENG, p 16 lines 21-23.
1587 ICC-01/04-01/07-T-339-ENG, p 18 lines 20-23.

Alleged individual criminal responsibility of Katanga

Prosecution statements

The Prosecution alleged that Katanga was responsible for the crimes charged under Article 25(3)(a). Trial Lawyer for the Prosecution Lucio Garcia presented the Prosecution position regarding Katanga's authority at the time of the Bogoro attack. As discussed below, the Defence claimed that Katanga was a coordinator in Aveba, and that he became president of the combatants in Tchey in March 2003, after the attack on Bogoro. In contrast, the Prosecution contended that:

> Germain Katanga, at the time of the Bogoro attacks, was the leader of the Ngiti combatants in the Walendu-Bindi collectivity. He was and he was known to be the president of the FRPI at that time. The FRPI at the time of the Bogoro attacks was a military structure that was organised and had a hierarchy and was under Germain Katanga's authority and control.[1588]

Among the evidence relied upon by the Prosecution concerning Katanga's authority within the FRPI were letters that were contemporaneous with the Bogoro attack, seized in October 2004 from the Medhu camp 'at the behest of the Bunia High Court with the assistance of MONUC', the authenticity of which was challenged by the Defence.[1589]

1588 ICC-01/04-01/07-T-336-ENG, p 21 lines 23-25, p 22 lines 1-2.
1589 ICC-01/04-01/07-T-336-ENG, p 25 lines 16-21. The Prosecution obtained these letters through a confidentiality agreement with MONUC pursuant to Article 54(3)(e), and thus argued that the 'chain of command' rendered them reliable. See also ICC-01/04-01/07-T-336-ENG, p 39 lines 2-14.

Trial Lawyer for the Prosecution Belbenoit Avich specifically addressed two issues related to the subjective elements of the charges: (i) the mental element requirement for conducting crimes, and (ii) the term 'knowledge by the accused that a consequence will flow from the normal flow of events' pursuant to Article 30(3) of the Statute,[1590] as raised by the Katanga Defence in its final brief.[1591] The Defence had contended that intent was required, and had relied on the confirmation of charges decision in the Bemba case to assert that *dolus eventualis* does not apply to Article 30(2)(b). On this basis, the Defence had argued that to meet the mental requirement, the accused must be 'virtually certain' that the events will result from the implementation of the common plan. In response, the Prosecution argued that virtual certainty was not found in the language of the provision, and was thus an 'erroneous interpretation'.[1592] The Prosecution argued that Article 30(2)(b) required only that the accused were aware that the consequence would occur in the ordinary course of events and that it does not require them to be aware of the criminal consequences that will follow.[1593] To support this reading, the Prosecution cited specifically to the trial judgement in the Lubanga case, in which a majority of Trial Chamber I adopted a strict interpretation of Article 30(2)(b), holding that 'the co-perpetrators only "know" the consequences of their conduct once they have occurred. At the time the co-perpetrators agree on a common plan and throughout its implementation, they must know the existence of a risk that the consequence will occur.'[1594] The Prosecution thus urged Trial Chamber II to adopt the same interpretation.

Defence statements

Hooper underscored that 'the overarching submission that we make is that in this case the Prosecution has not proved its story, has not proved its case'.[1595] He described the '300 or more UPC soldiers' stationed in Bogoro as a 'formidable force',[1596] well-trained in both light and heavy arms. He attributed the 'surprising victory' of the local attacking forces (the FPRI/FNI) who 'were not trained soldiers' to having 'had to defend themselves by force of circumstance'.[1597] He argued that 'they had had war thrust upon them by the extensive attacks inflicted on that impoverished community by the UPDF, the Ugandan army, who had committed atrocities over a substantial area of Walendu-Bindi killing, destroying villages, destroying facilities, committing atrocities'.[1598] Underscoring his argument that the FPRI were engaged in self-defence, he stated: 'the men of Walendu-Bindi, in our submission, were clearly a defending force and not an attacking force; they were classic autodéfense. They were defending themselves village-by-village, in a traditional manner'.[1599] He further asserted that this 'ragtail force' had received significant weaponry only a few weeks before the attack on Bogoro.[1600]

1590 Article 30 of the Statute provides in full: '(1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. (2) For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. (3) For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly'.

1591 ICC-01/04-01/07-T-336-ENG, p 59 lines 1-6, referring to ICC-01/04-01/07-3266-Corr2-Red, para 1125.

1592 ICC-01/04-01/07-T-336-ENG, p 59 lines 19-22.

1593 ICC-01/04-01/07-T-336-ENG, p 60 lines 19-23.

1594 ICC-01/04-01/07-T-336-ENG, p 61 lines 3-10, citing Trial Chamber I's strict interpretation of Article 30(2)(b) in the trial judgement in the Lubanga case, ICC-01/04-01/06-2842, para 1012.

1595 ICC-01/04-01/07-T-338-Red-ENG, p 6 lines 8-13.

1596 ICC-01/04-01/07-T-338-Red-ENG, p 7 lines 7, 22.

1597 ICC-01/04-01/07-T-338-Red-ENG, p 8 lines 12, 17-18.

1598 ICC-01/04-01/07-T-338-Red-ENG, p 8 lines 19-23.

1599 ICC-01/04-01/07-T-338-Red-ENG, p 9 lines 1-3.

1600 ICC-01/04-01/07-T-338-Red-ENG, p 9 lines 18-19.

Hooper thus attributed the success of the attack to the involvement of additional actors:

> We submit that the reason why the success — that this attack was a success was that they were — the local people were backed by people who were in the know, by APC advisers and fighters who had those skills. This was not either a plan that had been hatched by a 24-year-old young man still at school, Germain Katanga, with some skills in hunting, and Mathieu Ngudjolo who was essentially, whatever else, a maternity nurse.[1601]

While the Prosecution asserted that the FNI and FRPI 'could not have attacked Bogoro without the consent of the two accused',[1602] Hooper argued that Katanga's contribution was not essential to the plan to attack Bogoro, and underscored his age at the time of the attack — 24 — throughout his remarks. Instead, Hooper attributed the planning of the attack and the control of the militia to the *État-Major Operational Intégré* (EMOI) and the 'RCD-K/ML[1603] and its APC forces'.[1604] Hooper argued that it was not incumbent on the Defence to prove EMOI control, but rather, that the Prosecution bore the burden of negating the issue. He referenced extensive evidence in support of this assertion, including a letter dated 23 November 2002, also relied on by the Ngudjolo Defence as described below.[1605]

Concerning Katanga's authority, Hooper argued that he was a coordinator based in Aveba with no military authority. He submitted that the Chamber should carefully weigh titles and ranks, and not give them 'undue weight as a reliable indicator of effective control and authority' as various groups were 'trying to put on the make-up and the face of responsible, hierarchical structured organisations in order to benefit, to be seen as viable, in order to receive the benefits of pacification'.[1606]

Katanga's closing statement

Katanga began his statement by referring to the victims of the conflict in Ituri. [1607] He reiterated that he was not in Bogoro and did not plan the attack. He expressed his desire to see those guilty for the crimes be identified and punished, 'while victims are recognised and rehabilitated'.[1608] Katanga 'salute[d]' the judges for their 'upright nature and honesty',[1609] and expressed appreciation for the determination of the Prosecution to advance the proceedings. He went on to 'extend [his] thoughts to the child soldiers and victims who are the corner-stone of this trial', thanking them for their participation.[1610]

Katanga emphasised his age, 24 years 9 months, at the time of the Bogoro attack, and the fact that he came from a poor family. He described how the 'false accusations that were levelled against me [...] do hurt me quite deeply'.[1611] Katanga asked the Chamber to disregard

1601 ICC-01/04-01/07-T-338-Red-ENG, p 10 lines 10-12.
1602 ICC-01/04-01/07-T-337-Red-ENG, p 35 lines 6-13, 22.
1603 *Rassemblement Congolais pour la Démocratie.*
1604 ICC-01/04-01/07-T-338-Red-ENG, p 13 lines 20-23; ICC-01/04-01/07-3266-Corr2-Red, paras 602-639.
1605 ICC-01/04-01/07-T-338-Red-ENG, p 15 lines 21-25, citing EVD-D03-00136.
1606 ICC-01/04-01/07-T-338-Red-ENG, p 35 lines 24-25, p 36 lines 1, 6-7.
1607 ICC-01/04-01/07-T-340-ENG, p 48 lines 14-18, 22-24. Katanga stated: 'Today, my thoughts go out to all the victims of the conflicts in Ituri in general and particularly the conflict in Bogoro. My thoughts go out to all those who have lost loved ones, who have lost their property and their wealth. For all those whose pride and dignity have suffered, I extend to them my compassion in regard to all the suffering that they have suffered because of the foolishness and wickedness of human nature. [...] Today, all eyes are on the outcome or focused on the outcome of this trial. Everybody, including myself, is impatient to see the light of truth on the Bogoro events emerge, these events for which I am here to plead that I am innocent'.
1608 ICC-01/04-01/07-T-340-ENG, p 49 lines 6-8.
1609 ICC-01/04-01/07-T-340-ENG, p 51 lines 1-5.
1610 ICC-01/04-01/07-T-340-ENG, p 49 lines 23-24.
1611 ICC-01/04-01/07-T-340-ENG, p 51 lines 13-14.

the 'bodged findings by the Prosecutor in his investigations',[1612] and concluded by 'asking for justice to be done in all fairness, mindful of the truth and the facts and the solid nature of the evidence before you'.[1613]

Alleged individual criminal responsibility of Ngudjolo

Prosecution statements

The Prosecution alleged that Ngudjolo was responsible for the crimes charged under Article 25(3)(a). Trial Lawyer for the Prosecution Gilles Dutertre addressed the legal and factual aspects of Ngudjolo's authority. The Ngudjolo Defence contended that the FNI did not exist at the time of the attack on Bogoro. In contrast, Dutertre stated the Prosecution position: 'beyond the name we are dealing here with the same people, the same group, the same troops, whether it was the FNI or not. It was Ngudjolo's combatants who were in Bogoro on 24 February 2003 and this issue of name alone cannot bring about the acquittal of the accused'.[1614] While the Defence contended that this change represented an amendment of the charges, Dutertre argued 'that there was no addition or amendment of the charges'. He stated, 'from the very beginning, Mathieu Ngudjolo was notified of the charges against him; that is, that he was the commander of the group of Lendu combatants in Bedu-Ezekere which participated in the Bogoro attack jointly with Ngiti group led by Germain Katanga'.[1615] In addition, Diane Luping argued that not every organisational change was relevant as then 'an organisation could defeat liability under Article 7 of the Statute simply by agreeing to change its name each day'.[1616] She underscored the Prosecution's submission that 'in its essentials the organisation responsible for these attacks remained the same', adding that 'over time an organisation carrying out an attack against a civilian population may evolve, may even change its name, but the relevant question when considering the responsible organisation and organisational policy is not whether the organisation is identical over time in all its aspects, but whether in its essence it remained the same'.[1617]

Along with asserting that Ngudjolo was the commander of the Lendu combatants in Bedu-Ezekere during the period of the charges, Dutertre argued that Ngudjolo was present during the attack on Bogoro. While not denying that Ngudjolo underwent nursing training, Dutertre refuted the evidence that he was simply a nurse in Kambutso, who delivered a baby and was caring for the mother during the attack on Bogoro, as the Ngudjolo Defence had claimed. In its final brief, the Prosecution had focused on the testimony of insider witnesses, particularly Witness 250, who testified that Ngudjolo was the supreme commander of the combatants of Bedu-Ezekere after the fall of Lompondo and prior to the attack on Nyankunde, both of which occurred before the attack on Bogoro.[1618] The Prosecution characterised Ngudjolo as someone with status in his community who was selected as a leader when one was required,[1619] describing this rapid transformation as follows:

> There is, indeed, a very rapid change relating to the transformation into Chief of Staff. The Bedu-Ezekere group was under attack, it was surrounded at that time and they needed a leader. They organised themselves therefore accordingly, and Mr Ngudjolo, your Honours, had all what was needed to become a chief at that time, or a

1612 ICC-01/04-01/07-T-340-ENG, p 52 lines 21-24.
1613 ICC-01/04-01/07-T-340-ENG, p 53 lines 1-2.
1614 ICC-01/04-01/07-T-336-ENG, p 10 line 25, p 11 lines 1-4.
1615 ICC-01/04-01/07-T-336-ENG, p 11 lines 15-19, citing the confirmation of charges decision ICC-01/04-01/07-717, paras 9-544.
1616 ICC-01/04-01/07-T-337-Red-ENG, p 8 lines 10-11.
1617 ICC-01/04-01/07-T-337-Red-ENG, p 8 lines 4-9.
1618 ICC-01/04-01/07-3251-Corr-Red, paras 352-357.
1619 ICC-01/04-01/07-T-337-Red-ENG, p 29 lines 7-17.

> leader at that time. He was a native of that group. He was a son of the soil. He came from a family of notables. His brother was a notable. He had some status in the community. He had travelled outside of the group. He had been a corporal in the civil guard and, therefore, had some measure of experience in fighting in Goma. Therefore, at that crucial moment he had the qualities and qualifications required. The group needed a chief at that time, they did not have time on their hands and Ngudjolo was the right man to be the chief — the leader — and he became the leader.[1620]

Defence Statements

Lead Counsel Kilenda addressed the individual criminal responsibility of Ngudjolo for his Defence. Kilenda referenced the 'retrospective' use of the name FNI by Prosecution witnesses.[1621] He asserted that the Prosecution had developed 'a new theory, introducing a new element which consists in presenting Ngudjolo as the chief of the Lendu militia of Bedu-Ezekere',[1622] constituting an amendment to the confirmed charges. He stated, 'the Prosecutor cannot substitute his construction for the testimony of his witnesses'.[1623] He argued that the issue was not one of mere nomenclature, but was 'decisive' for determining the mode of responsibility.[1624] Specifically, he asserted that the Prosecution was:

> classifying Ngudjolo as the leader of the militia of Bedu-Ezekere because, quite simply, he has not succeeded (1) to demonstrate the extent of the FNI in Bedu-Ezekere at the relevant time; (2) to prove that Mathieu Ngudjolo had the capacity of the highest commander and the commander of the FNI; (3) to prove an alliance between the FNI and the FRPI at the relevant time and the planning by these two organisations of an attack on Bogoro on 24 February 2003.[1625]

Kilenda further disputed that Ngudjolo's presence as colonel on 6 March 2003 in Bunia and his subseqent signature to the Cessation of Hostilities Agreement on 18 March demonstrated the requisite authority and participation in the attack on Bogoro. He challenged 'the Prosecution to present or adduce before this Court a single documentary evidence that establishes the military capacity, or the status as combatant, of Mathieu Ngudjolo before 6 March 2003'.[1626] He further challenged the Prosecution to submit documentary evidence demonstrating contact between the accused prior to 8 March and Ngudjolo's participation in an attack prior to the 6 March attack in Bunia.

Kilenda attributed the planning of the attack on Bogoro to President Kabila of the DRC, arguing that President Kabila had 'sought to guarantee the integrity of the Congolese territory as well as the unity of the country which had come under threat because of the cessationist inclinations of the UPC'.[1627] In this regard, Kilenda drew the Chamber's attention to the testimony of Defence Witness Floribert Ndjabu, 'president of the FNI, [who] explained to this Chamber that the FNI was not existent in Bedu-Ezekere at the time of the events and that Mathieu Ngudjolo was not the commander'.[1628]

1620 ICC-01/04-01/07-T-337-Red-ENG, p 29 lines 7-17.
1621 ICC-01/04-01/07-T-339-ENG, p 34 line 1.
1622 ICC-01/04-01/07-T-339-ENG, p 33 lines 23-24.
1623 ICC-01/04-01/07-T-339-ENG, p 34 lines 5-6.
1624 ICC-01/04-01/07-T-339-ENG, p 37 line 11. Prof Fofé also criticised the Prosecution reference to the FNI as mere 'nomenclature'. ICC-01/04-01/07-T-339-ENG, p 23 line 2. On the contrary, he contended that the FNI was a fact, not a legal qualification, and the Prosecution could not now refer to a Lendu militia in light of evidence that the FNI was not in existence at the time of the attack.
1625 ICC-01/04-01/07-T-339-ENG, p 37 lines 23-25, p 38 lines 1-3.
1626 ICC-01/04-01/07-T-339-ENG, p 44 lines 9-11.
1627 ICC-01/04-01/07-T-339-ENG, p 46 lines 19-22.
1628 ICC-01/04-01/07-T-339-ENG, p 47 lines 16-18.

He reiterated Ndjabu's testimony that EMOI, under the direction of President Kabila, had planned the attack. He further referred to Katanga's testimony regarding EMOI's role in Beni in planning the attack on Bogoro. Like the Katanga Defence, Kilenda referred to a letter dated 22 November 2002 from the former *Chef du cabinet*, Samba Kaputo, ordering the reinforcement of troops for future operations on targeted sites, which included Mandro and Bogoro.[1629] He underscored the lack of response by the Prosecution and Legal Representatives of Victims to the letter, stating: 'this silence says it all'.[1630]

Lastly, Kilenda referred to the written closing brief of the Katanga Defence to refute Ngudjolo's essential contribution to the common plan. He quoted:

> The Prosecution has not been able to establish that Germain Katanga and Mathieu Ngudjolo co-ordinated the essential contributions that led to this plan to wipe Bogoro off the map. There is no proof that the two were co-ordinating efforts. Nor is there any proof that Ngudjolo made any kind of contribution and certainly not an essential contribution.[1631]

Ngudjolo's closing statement

In contrast to Katanga's statement, Ngudjolo discussed the facts of the case in detail, referring to specific witness testimony and the Prosecution arguments, and asserting his innocence.[1632] Ngudjolo reiterated the arguments of his Defence counsel concerning the main participants in the conflict and their motive, to drive out the UPC. He provided highly detailed observations on the relationships between each of the armed groups involved, their strategic interests with regards to their alignment, their participation in the battle in Bogoro, and their length of stay in the region.

Ngudjolo concluded his statements with the following remarks:

> And so what is my final position? What I can say, in conclusion, is that I never planned the attack on Bogoro with Germain Katanga. I never sent soldiers to take part in the battle. I was never a member of the FNI and I was never a member of the FRPI. I was never a member of any military group or militia within Ituri. I never had any soldiers under my command. My work is one of — is the work of a humanitarian. I was not a combatant. I was a nurse and I trained community health workers.[1633]

1629 Citing EVD-D03-00136.
1630 ICC-01/04-01/07-T-339-ENG, p 57 line 17.
1631 ICC-01/04-01/07-T-339-ENG, p 57 lines 8-12, citing ICC-01/04-01/07-3266-Corr2-Red, para 1216, (internal quotations omitted).
1632 ICC-01/04-01/07-T-340-ENG, p 54 lines 16-24.
1633 ICC-01/04-01/07-T-340-ENG, p 60 lines 19-25.

Closing statements of the Legal Representatives of Victims

Child soldier victims

Legal Representative of Victims Julie Goffin began the presentation for the Legal Representatives of child soldier victims, and spoke to the role of victims in the process. She noted that it was in the victims' interests 'to have the truth ascertained and in return benefit from the revelation of the truth. The victims provide light on the events, and they are in a position to make a contribution to the ascertainment of the truth. It is essential that their participation in the proceedings should be significant'.[1634]

Concerning the ages of the victims, Legal Representative of Victims Gilissen contrasted arguments that the former child soldiers were actually adults with witness testimony concerning the looting of the village by children. In this regard, he noted that 'we assert that there certainly were children under 15 present'.[1635] Gilissen further asserted that 'the witnesses did not make these assessments of age randomly, or just guess at ages. The tools that were used, for example voices that had not broken, the physical characteristics of these children, the mental and psychological characteristics of these children who were obviously under 15'.[1636]

Gilissen drew the Chamber's attention to several key international provisions, emphasising the distinction between the terms 'direct participation' and 'active participation' in hostilities, the latter being the term used in the Statute, and providing for greater protection.[1637] He also stressed that Article 4(1) of the Optional Protocol on the Convention on the Rights of the Child, to which the DRC is a signatory, prohibited any form of participation by children in hostilities.

Gilissen concluded the remarks of his team of Legal Representatives by stating:

> The victims have a right to the truth. They have a right to understand what happened to them. They have the right to understand and to know the name or the names of those who destroyed their lives, and I'm referring there only to those who were lucky enough to survive. Many of them died.[1638]

1634 ICC-01/04-01/07-T-337-Red-ENG, p 36 lines 18-22.
1635 ICC-01/04-01/07-T-337-Red-ENG, p 46 lines 12-19.
1636 ICC-01/04-01/07-T-337-Red-ENG, p 47 lines 3-12.
1637 Regarding the participation of children in the hostilities, O'Shea argued for the Katanga Defence that the terms 'direct' and 'active' participation involved the same quality and degree of participation, citing interpretive guidelines of the International Committee of the Red Cross. He further argued that there should not be different tests applied to determine the direct or active participation of adults and that of children, 'because it would create an incoherent body of law and it would be inconsistent with the practice of International Humanitarian Law'. He rejected the holding in the Lubanga judgement, which had established the appropriate test to be whether the child was subject to a risk of danger. He stated, 'danger is not the decisive factor because necessarily any contribution to war effort places a person in greater danger and it's only a matter of degree, so the real question is harm'. ICC-01/04-01/07-T-338-Red-ENG, p 51 lines 4-6, 17-19.
1638 ICC-01/04-01/07-T-337-Red-ENG, p 51 lines 15-18.

Principal group of victims

Speaking on behalf of the principal group of victims, Legal Representative for Victims Fidel Nsita Luvengika refuted several Defence assertions, including that the Legal Representatives of Victims were assuming a prosecutorial role, and that there was collusion between the victims and the Prosecution. He asserted that the Legal Representatives of Victims should be able to address issues related to the credibility of witnesses when affecting victims' interests.

Nsita noted that during the trial phase over 350 victims were authorised to participate in the proceedings, although not all of them survived to see the end of the trial. He stated that, 'victims have tried to follow as much as possible the unfolding of these proceedings using ordinary means, such as radio sets with poor reception, or summaries of the proceedings, on what has been transpiring here in the Court, but they have also been misinformed by local media'.[1639]

In reference to the Registry's denial of logistical and financial assistance to the Legal Representative to conduct a field mission in order to personally meet with clients,[1640] Nsita stated, 'let me say it clearly to you that my clients expressed deep regret when they learnt that the Courts [sic] would not allow them to have discussions with their lawyers as they prepared their final submissions'.[1641] He went on: 'In fact, they said that they felt that, "The ICC did not need victims, that the ICC does not want to listen to us. How can we believe that they want to listen to us when they deny our lawyer the opportunity to defend us"? That is what they said'.[1642]

Judge Cotte addressed this concern, stating:

> Now, you'll have to tell the victims that you represent that the decision taken is compatible with the provisions that govern the operations of this Court, so please try to explain to them. We do not want any misunderstanding to occur. Please tell them as well — and we know that you are aware of this — that the situation of the victims, no matter who they may be, throughout the entire trial has never been a minor concern of the Chamber. The Chamber has always been very much concerned.[1643]

1639 ICC-01/04-01/07-T-337-Red-ENG, p 52 lines 22-25.
1640 See ICC-01/04-01/07-3277.
1641 ICC-01/04-01/07-T-337-Red-ENG, p 53 lines 2-4.
1642 ICC-01/04-01/07-T-337-Red-ENG, p 53 lines 7-9.
1643 ICC-01/04-01/07-T-337-Red-ENG, p 77 lines 2-8.

Milestone:
Ongoing testimony on gender-based crimes at the ICC

Since the signing of the Rome Statute, three cases have reached and/or completed the trial phase of proceedings at the ICC. The first, against Thomas Lubanga Dyilo (Lubanga) in the DRC Situation, began in January 2009 and completed with the ICC's first trial judgement issued in March 2012.[1644] The second, against Germain Katanga (Katanga) and Mathieu Ngudjolo Chui (Ngudjolo), also in the DRC Situation, began in November 2009 and is currently awaiting the trial judgement.[1645] The third, against Jean-Pierre Bemba Gombo in the CAR Situation, began in November 2010 and is currently ongoing.

While only two of the three cases that have reached the trial phase of proceedings at the ICC include charges for gender-based crimes,[1646] testimony about such crimes has featured in all three cases. In this Special Edition of the *Gender Report Card on the ICC*, we provide an overview of this testimony. This section also includes relevant new testimony on sexual violence proffered by a Prosecution witness and by victims called to testify and/or present their views and concerns before the Court in the case against Bemba since the publication of the *Gender Report Card 2011*.

1644 The trial judgement and sentencing decision, in addition to the reparations proceedings in this case, are discussed in greater detail in the *First trial judgement in the Lubanga case* and *First reparations and sentencing decisions in the Lubanga case* sections of this Report.

1645 The closing arguments in this case are discussed more fully in the *Closing arguments in the first case including gender-based crimes charges* section of this Report.

1646 As described in more detail in the *Charges for gender-based crimes* section, above, Katanga, Ngudjolo and Bemba have been charged with gender-based crimes; the case against Lubanga did not include such charges.

As of 17 August 2012, accounting for all three cases, the Trial Chambers of the ICC have heard testimony from approximately 100 Prosecution witnesses, 48 Defence witnesses, seven victim-witnesses who were authorised to testify following a request to the Chamber by the Legal Representatives of Victims, and six expert witnesses called by the Chamber. The Court also allowed three victims to present their story to the Chamber without tendering it into evidence.[1647] Of these 164 witnesses, at least 39 testified about rape and other forms of sexual violence.[1648] At least a further 27 witnesses also referenced gender-based crimes more generally in their testimonies, including the presence of girl soldiers in troops, and rape committed in their communities. As described more fully below, the majority of these witnesses testified in the context of the case against Bemba. The Chambers have also heard about gender-based crimes from a number of expert witnesses called by the Prosecution and by the Chamber.

Many of the non-expert witnesses who have testified about sexual violence were characterised by the Trial Chambers as vulnerable witnesses and, accordingly, were granted a broad range of protective measures to facilitate their in-court testimonies. As provided in the Rome Statute, these protective measures were determined by the Trial Chambers on a case-by-case basis, based on an assessment by the Victims and Witnesses Unit (VWU) of the Court. To date, protective measures granted include the use of a pseudonym, face and voice distortion of the public video feed, a screen to prevent the witness from being seen by or seeing the accused (although witnesses can see and be seen by Defence counsel), and the presence of a resource person or psychologist during their testimony to assess and monitor the witness. Over the course of the trials, witnesses have also frequently been allowed to testify in private or closed session, so that the public is unable to hear and, in the case of closed sessions, also unable to see the proceedings. Vulnerable witnesses have been permitted to take breaks in testimony that addresses difficult subject matters. Some witnesses have testified entirely in closed session.[1649] Since extensive testimony was given in closed or private session, and in many cases the identifying details of the witnesses were also given in closed or private session, the descriptions of witness testimony provided in this section are necessarily limited.

1647 Analysis of the public transcripts of the Bemba case indicate that from the start of trial on 22 November 2010 until 16 August 2011, Trial Chamber III heard from 40 Prosecution witnesses, from two victim-witnesses called to testify by their Legal Representative, from three additional victims, and from one military expert called by the Defence. At the time of writing this Report, the Defence case is ongoing. The Defence is expected to call a total of 63 witnesses. Public information made available by the Court at the end of the proceedings against Katanga & Ngudjolo indicates that Trial Chamber II heard from 24 Prosecution witnesses, 28 Defence witnesses (including the two accused), two victims called by their Legal Representatives and two experts called by the Chamber. See 'Trial Chamber II to deliberate on the case against Germain Katanga and Mathieu Ngudjolo Chui', *Press Release*, ICC-CPI-20120523-PR796, 23 May 2012. Information made available by the Court at the end of the trial against Lubanga indicates that Trial Chamber I heard from 36 Prosecution witnesses, 19 Defence witnesses, three victims called by the Legal Representatives and four experts called by the Chamber. See 'Trial Chamber I to deliberate on the case against Thomas Lubanga Dyilo', *Press Release*, ICC-CPI-20110826-PR714, 26 August 2011.

1648 These 39 witnesses were either victims of gender-based crimes or witnesses to the commission of such crimes.

1649 For instance, in the Bemba case, Witness 75, Witness 63, Witness 169 and Witness 36 provided all of their testimony in closed session.

Overview of testimony on gender-based crimes in all trials

The Prosecutor v. Thomas Lubanga Dyilo

As described in more detail in the **Charges for gender-based crimes** section above, the Lubanga case did not contain charges for gender-based crimes. Despite the absence of such charges, however, testimony about sexual violence featured prominently. Based on a review of available transcripts of testimony given in open court, the majority of the Prosecution witnesses, at least 21 out of 25, testified in open court about girl soldiers, and a significant number of Prosecution witnesses, at least 15, also testified about gender-based crimes, in particular rape and sexual slavery that took place within the context of the crimes charged against Lubanga.[1650] This information was both volunteered by witnesses and provided in response to questions posed by the parties and participants and by the Chamber.

Witness testimony centred specifically on the different roles and responsibilities of girl and boy recruits. Witnesses testified that the young recruits all received the same training, were outfitted in the same uniforms and issued with the same weapons, and were all sent into the battlefield to fight, with no distinction made on the basis of either age or gender.[1651] Witnesses also testified that, in addition to their duties as soldiers, the girls were expected to cook for their commanders and to provide them with 'sexual services'.[1652] Some of the witnesses referred to this latter role as 'sleeping with' the commander or being his 'wife',[1653] while others used the term 'rape' to describe what the young girls experienced.[1654] Those witnesses made it clear that the girls involved had no choice in the matter and could have been killed for refusing. At least one witness, Witness 10, a young woman who had served in the UPC, testified about having been raped.[1655] Likewise, the Chamber also heard testimony from witnesses who were forced to commit acts of rape and sexual violence.[1656]

1650 While not all of this testimony was relied on by the Chamber when it convicted Lubanga, the crimes described are exemplary of the experiences of girl soldiers within the UPC. For a detailed description of this testimony, see *Gender Report Card 2009*, p 71-83.

1651 Witness 38 (ICC-01/04-01/06-T-113-ENG, p 36 lines 15-17; ICC-01/04-01/06-T-114-ENG, p 81 lines 4-8); Witness 213 (ICC-01/04-01/06-T-132-ENG, p 13 lines 12-14, 19-20; p 43 lines 23-24); Witness 8 (ICC-01/04-01/06-T-138-ENG, p 20 lines 7-15); Witness 7 (ICC-01/04-01/06-T-148-ENG, p 39 lines 24-25; p 40 lines 1-4; p 42 lines 19-22); Witness 294 (ICC-01/04-01/06-T-150-ENG, p 74 lines 8-13); Witness 17 (ICC-01/04-01/06-T-154-ENG, p 42 lines 3-7); Witness 55 (ICC-01/04-01/06-T-176-ENG, p 28 lines 4-8; p 35 lines 2-11); Witness 157 (ICC-01/04-01/06-T-186-ENG, p 37 lines 23-25). See further *Gender Report Card 2009*, p 71-83.

1652 Witness 38 (ICC-01/04-01/06-T-114-ENG, p 22 lines 16-19; p 82 lines 1-3; p 23 lines 15-25; p 24 lines 1-4); Witness 299 (ICC-01/04-01/06-T-122-ENG, p 27 lines 16-21); Witness 55 (ICC-01/04-01/06-T-178-Red3); Witness 89 (ICC-01/04-01/06-T-196-ENG, p 7 lines 11-21). See further *Gender Report Card 2009*, p 71-83.

1653 Witness 299 (ICC-01/04-01/06-T-122-ENG, p 26 lines 24-25; p 27 lines 16-21); Witness 213 (ICC-01/04-01/06-T-133-ENG, p 4 lines 20-23); Witness 11 (ICC-01/04-01/06-T-138-ENG, p 65 lines 23-25; p 66 line 1; p 74 lines 2-11); Witness 7 (ICC-01/04-01/06-T-148-ENG, p 49 lines 15-22; ICC-01/04-01/06-T-149-ENG, p 27 lines 16-25; p 28 lines 1-5); Witness 294 (ICC-01/04-01/06-T-151-ENG, p 4 lines 14-15; p 5 lines 14-25; p 6 lines 1-3); Witness 31 (ICC-01/04-01/06-T-202-ENG, p 10 lines 12-25; p 11 lines 1-3). See further *Gender Report Card 2009*, p 71-83.

1654 Witness 298 (ICC-01/04-01/06-T-123-ENG, p 32 lines 8-25; p 33 lines 1-2); Witness 8 (ICC-01/04-01/06-T-138-ENG, p 20 lines 1-6); Witness 16 (CICC Informal Summary, 22 June 2009). See further *Gender Report Card 2009*, p 71-83.

1655 Witness 10 (ICC-01/04-01/06-T-144-ENG; ICC-01/04-01/06-T-145-ENG). See further *Gender Report Card 2009*, p 74-76.

1656 Witness 8 testified that they were ordered by the commanders to take the girls from their parents, and take them to a place where they could rape them, and then set them free (ICC-01/04-01/06-T-138-ENG).

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

While the first witness testimony at the ICC relating to gender-based crimes arose in the context of the Lubanga case, the first time witness testimony was intended to prove charges of sexual violence occurred in the case against Katanga & Ngudjolo. As described in more detail in the **Charges for gender-based crimes** section above, Katanga and Ngudjolo are both charged with rape as a war crime and a crime against humanity, and with sexual slavery as a war crime and a crime against humanity. These are the first charges of gender-based crimes to reach the trial phase of proceedings at the ICC.

Over the course of the Prosecution case, three female witnesses testified about sexual violence.[1657] Two of them testified about having been raped by several soldiers and on several occasions;[1658] one of them stated that some of the soldiers subsequently told her that she was now his wife.[1659] One of the witnesses was brought to and kept in a camp prison where she was regularly raped by multiple perpetrators, and was later forced into marriage with a man who came to the camp to rape her.[1660]

Apart from the female witnesses, a number of male witnesses for the Prosecution testified that women were abducted, taken hostage, and forced into marriage, and that women and girls played multiple roles during the attack. Women and girls were forced to adopt multiple roles, including as wives to the soldiers in military camps;[1661] as 'female military personnel' or PMFs fighting with weapons;[1662] as labour to help loot and transport looted property;[1663] were abducted for the purpose of being sexual slaves;[1664] and were often described as victims in testimony about those killed in the attack.[1665] One witness also testified about the mutilation of women as

1657 Witness 132, Witness 249 and Witness 287. For a detailed analysis and description of their testimony see *Gender Report Card 2010*, p 165-176.

1658 Witness 249 (ICC Video Summary 'Affaire Katanga et Ngudjolo Chui: procès, témoins, 3-21 mai 2010,' 1:57-3:45, available at <http://www.youtube.com/user/IntlCriminalCourt#p/c/BF83D291B0382424/19/O_QpnklvnTs>, last visited on 12 October 2012; ICC-01/04-01/07-T-136-Red-ENG, p 78 lines 15-25) and Witness 132 (ICC-01/04-01/07-T-139-Red-ENG, p 13-14; p 19 lines 2-25; p 20 lines 1-24; p 48 lines 6-23; p 50 lines 16-22; p 51 lines 17-25; p 52 lines 1-25). See further *Gender Report Card 2010*, p 167-176.

1659 Witness 132 (ICC-01/04-01/07-T-140-Red-ENG, p 17 line 25; p 18 lines 1-7; ICC-01/04-01/07-T-141-Red-ENG, p 41 lines 22-23; p 42 lines 4, 15). See further Gender Report Card 2010, p 174-175.

1660 Witness 132 (ICC-01/04-01/07-T-139-Red-ENG, p 27-29, 40). See further *Gender Report Card 2010*, p 169-176.

1661 The following witnesses made reference in open session to women and girls serving as wives to soldiers: Witness 233 (ICC-01/04-01/07-T-85-Red-ENG, p 9 lines 1-6; ICC-01/04-01/07-T-86-Red-ENG, p 27 lines 11-14); Witness 279 (CICC informal summary); Witness 280 (ICC-01/04-01/07-T-158-Red-ENG, p 58-60); Witness 267 (ICC-01/04-01/07-T-166-Red-ENG, p 27-28, ICC-01/04-01/07-T-170-Red-ENG, p 32-34); Witness 219 (ICC-01/04-01/07-T-206-Red-ENG, p 43 lines 4-23). See further *Gender Report Card 2010*, p 164-165; *Gender Report Card 2011*, p 226-227.

1662 The following witnesses made reference in open session to women and girls fighting or serving as PMF: Witness 250 (ICC-01/04-01/07-T-98-Red-ENG, p 32 lines 23-25, p 33 lines 1-3; ICC-01/04-01/07-T-107-RedENG, p 62 lines 13-14; ICC-01/04-01/07-T-108-Red-ENG, p 47 lines 16-18); Witness 161 (ICC-01/04-01/07-T-111-RedENG, p 13 lines 12-15); Witness 267 (ICC-01/04-01/07-T-166-Red-ENG, p 26-27). See *Gender Report Card 2010*, p 164-165.

1663 The following witnesses made reference in open session to women and girls looting and transporting property: Witness 250 (ICC-01/04-01/07-T-107-Red-ENG, p 26 lines 16-18; ICC-01/04-01/07-T-107-Red-ENG, p 64 lines 5-6; ICC-01/04-01/07-T-107-Red-ENG, p 45-48, p 60; ICC-01/04-01/07-T-108-Red-ENG, p 27, lines 6-9); Witness 161 (ICC-01/04-01/07-T-111-Red-ENG, p 13 lines 12-15, p 52, lines 17-21, p 53 lines 14-15); Witness 363 (ICC-01/04-01/07-T-117-Red-ENG, p 63 lines 7-9). See *Gender Report Card 2010*, p 164-165.

1664 Witness 12 (ICC-01/04-01/07-T-196-Red-ENG, p 34 lines 5-7); Witness 28 (ICC-01/04-01/07-T-218-Red-ENG, p 25 lines 1-16). See further *Gender Report Card 2011*, p 227.

1665 The following witnesses made reference in open session to women and girls as victims killed in the attack: Witness 250 (ICC-01/04-01/07-T-107-Red-ENG, p 18 lines 5-9, p 19 lines 1-3); Witness 250 (ICC-01/04-01/07-T-107-Red-ENG, p 45-48, p 60; ICC-01/04-01/07-T-108-Red-ENG, p 81 lines 23-25); Witness 161 (ICC-01/04-01/07-T-109-Red-ENG, p 53); Witness 279 (CICC informal summary). See *Gender Report Card 2010*, p 164-165.

a specific battle practice.[1666] Based on the public record of the case, two male witnesses testified in open session about rape of others, and did so in general terms.[1667] A number of witnesses also testified about the use of 'fetishes' and battle practices in warfare, and about the conditions attached to such use, including that soldiers must not commit rape.[1668] One such 'fetish' involved applying a specific mixture onto the soldiers' faces, or taking a specific drug, administered by special doctors, who were allegedly inhabited by spirits.[1669] However, the witness testimony indicated that the prohibition on rape when using fetishes only applied in certain circumstances, and that the conditions did not apply for example when fighting against the Hemas.[1670]

1666 Witness 219 testified about a system called gilet, which involved the mutilation and killing of men and women. (ICC-01/04-01/07-T-206-Red-ENG, p 17 lines 14-21). See further *Gender Report Card 2011*, p 227.

1667 Witness 279 (ICC-01/04-01/07-T-148-Red-ENG, p 21-23; ICC-01/04-01/07-T-153-Red-ENG, p 5-6); Witness 267 (ICC-01/04-01/07-T-170-Red-ENG, p 35-37). See *Gender Report Card 2010*, p 164-165.

1668 Witness 279 (ICC-01/04-01/07-T-148-Red-ENG, p 14 lines 7-17; p 15 lines 5-6, 11-14; p 32 lines 1-4); Witness 280 (ICC-01/04-01/07-T-157-Red-ENG, p 8 lines 8-13; p 19 lines 1-7; ICC-01/04-01/07-T-160-Red-ENG, p 11 lines 24-25; p 12 lines 18-19); Witness 28 (ICC-01/04-01/07-T-218-Red-ENG, p 65 lines 20-25); and Defence Witness 148 (ICC-01/04-01/07-T-280-Red-ENG, p 37 line 25, p 38 line 1). See further *Gender Report Card 2010*, p 176-177; *Gender Report Card 2011*, p 227-228.

1669 See further *Gender Report Card 2010*, p 176-177.

1670 ICC-01/04-01/07-T-157-Red-ENG, p 8 and 19. See further *Gender Report Card 2010*, p 176-177.

The Prosecutor v. Jean-Pierre Bemba Gombo

To date, the Bemba case includes the largest number of witnesses to testify about sexual violence at the ICC. Bemba is the alleged founder and former President and Commander-in-Chief of the *Mouvement du libération du Congo* (MLC, also referred to as the 'Banyamulengue'), and stands trial for two counts of crimes against humanity (murder and rape[1671]) and three counts of war crimes (murder, rape and pillaging[1672]). This case was the first at the ICC against a high-profile political and military figure, and the first in which the accused is charged with command responsibility under Article 28(a) of the Rome Statute.[1673]

During the 16 months in which the Prosecution presented its case (November 2010 – March 2011), it called a total of 40 witnesses, 14 of whom, including two expert witnesses, were called to testify directly about sexual and gender-based crimes. According to the public record of the case, at least a further 16 witnesses also mentioned rape in their testimony.[1674] Of the twelve crime-base witnesses called to testify about sexual violence, including ten female witnesses, at least nine were direct victims/survivors of sexual violence.[1675]

Over the course of the Prosecution case, witnesses testified about the widespread nature of rape, gang-rape and the commission of multiple rapes by

1671 Pursuant to Articles 7(1)(a) and 7(1)(g).

1672 Pursuant to Articles 8(2)(c)(i), 8(2)(e)(vi) and 8(2)(e)(v).

1673 For a detailed description of the case against Bemba, including witness testimony, see *Gender Report Card 2011*, p 234-253.

1674 Apart from the 14 witnesses who were called by the Prosecution to testify directly about sexual violence, the following 16 witnesses also mentioned rape in their testimony: Witness 38, Witness 63, Witness 209, Witness 112, Witness 108, Witness 173, Witness 178, Witness 33, Witness 65, Witness 151, Witness 47, Witness 31, Witness 213, Witness 69, Witness 219, and Witness 45.

1675 Witness 22, Witness 87, Witness 68, Witness 81, Witness 82, Witness 80, Witness 79, Witness 23, Witness 29. For a detailed account of their testimony, see *Gender Report Card 2011*, p 239-251.

different perpetrators,[1676] rape in public and in front of family members,[1677] rape of high-standing members of the community,[1678] rape of children, and rape of men. Witnesses also told the Court that the MLC soldiers, or Banyamulengue, were armed while committing rape and threatened their victims with their weapons.[1679] A number of witnesses testified that the MLC soldiers did not say anything during the rapes.[1680]

Prosecution witnesses also spoke extensively about the profound social impact of the rapes, and told the Court that they felt embarrassed about what happened.[1681] Some also spoke about the stigma attached to the crime, which caused their communities to ostracise them.[1682] For instance, at the start of his testimony about the crimes committed against him and his family, Witness 23, a male victim of sexual violence, stated that the acts that the Banyamulengue carried out against him and his family made him 'feel like a dead man'.[1683] Similarly, Witness 22 indicated that following the attack, she wanted to commit suicide.[1684] Witnesses also spoke about being abandoned by family members as a consequence of the rape.[1685] For instance, Witness 23 explained to the Court that his third wife had left him because of the attack he had suffered: 'Once they had sodomised me, she said to me, "You are no longer a man. You are a woman like myself, so I cannot live with you. I have to leave you"'.[1686] Witnesses also testified that they continue to suffer from depression as a result of having been raped, and one witness testified that she contracted HIV.[1687]

A number of witnesses also testified in open court specifically about the rape of children; some told the Court that their young daughters were raped and 'deflowered' by the Banyamulengue.[1688] Other

1676 Of these, nine testified that they were gang-raped (Witness 22, Witness 87, Witness 68, Witness 23, Witness 81, Witness 82, Witness 80, Witness 79, Witness 29). One witness (Witness 119) testified that she was a witness to the gang-rape of others. For a detailed account of their testimony, see *Gender Report Card 2011*, p 240-244.

1677 Witness 47 (ICC-01/05-01/08-T-177-Red-ENG, p 23 lines 19-24); Witness 69 (ICC-01/05-01/08-T-192-ENG); Witness V1 (ICC-01/05-01/08-T-220-ENG, p 30 lines 21-22); and Victim 542 (ICC-01/05-01/08-T-227-Red-ENG, p 24 lines 20-21).

1678 Witness 23 (ICC-01/05-01/08-T-51-Red-ENG, p 35 lines 4-14, p 36 lines 4-22). For a detailed account of his testimony, see *Gender Report Card 2011*, p 249-250.

1679 Witness 82 (ICC-01/05-01/08-T-58-Red-ENG, p 18 lines 3-18); Witness 80 (ICC-01/05-01/08-T-61-Red-ENG, p 14 lines 1-7); Witness 79 (ICC-01/05-01/08-T-77-Red-ENG, p 13 lines 20-25, p 14 lines 1-7); Witness 119 (ICC-01/05-01/08-T-82-Red-ENG, p 41 lines 4-24); Witness 87 (ICC-01/05-01/08-T-44-Red-ENG, p 39-40); Witness 68 (ICC-01/05-01/08-T-48-Red-ENG, p 27 lines 17-25); Witness 81 (ICC-01/05-01/08-T-55-Red-ENG, p 10-12); Witness 73 (ICC-01/05-01/08-T-74-Red-ENG, p 12 lines 12-25, p 13 lines 1-20); Witness 47 (ICC-01/05-01/08-T-177-Red-ENG, p 13 lines 1-19, p 25 lines 13-16; p 46 lines 22-25, p 47 lines 1-4).

1680 Witness 22 (ICC-01/05-01/08-T-41-Red-ENG, p 14 lines 14-24); Witness 79 (ICC-01/05-01/08-T-77-Red-ENG, p 10 lines 11-14).

1681 Witness 29 (ICC-01/05-01/08-T-81-Red-ENG, p 6 lines 13-15); Witness 87 (ICC-01/05-01/08-T-45-Red-ENG, p 18 line 18); Witness 68 (ICC-01/05-01/08-T-48-Red-ENG, p 40 lines 16-23).

1682 Witness 82 (ICC-01/05-01/08-T-58-Red-ENG, p 26 lines 24-25, p 27 lines 1-3); Witness 80 (ICC-01/05-01/08-T-61-Red-ENG, p 24 lines 20-25, p 25 lines 1-20; p 26 lines 4-12); Witness 79 (ICC-01/05-01/08-T-77-Red-ENG, p 17 lines 20-25, p 18 lines 1-25; p 19 lines 1-2); Witness 42 (ICC-01/05-01/08-T-64-Red-ENG, p 21 lines 7-14); Witness 23 (ICC-01/05-01/08-T-51-Red-ENG, p 32 lines 7-9, p 37 lines 23-25, p 38 lines 1-3, 8-19). Witness 38, while not a direct victim of sexual violence, also addressed the stigma attached to rape (ICC-01/05-01/08-T-34-Red-ENG, p 52 lines 3-18).

1683 ICC-01/05-01/08-T-51-Red-ENG, p 31 lines 17-18.

1684 ICC-01/05-01/08-T-41-Red-ENG, p 17 lines 14-15.

1685 Witness 22 (ICC-01/04-01/08-T-42-Red-ENG, p 17 lines 6-9); Witness 81 (ICC-01/05-01/08-T-55-Red-ENG, p 16 lines 8-19).

1686 ICC-01/05-01/08-T-51-Red-ENG, p 41 line 25; p 41 lines 1-2.

1687 Witness 29 (ICC-01/05-01/08-T-80-Red-ENG, p 48 lines 4-18).

1688 Witness 23 (ICC-01/05-01/08-T-51-Red-ENG, p 43 lines 5-25, p 44 lines 1-17); Witness 80 (ICC-01/05-01/08-T-61-Red-ENG, p 11 lines 19-24, p 26 lines 9-12); Witness 42 (ICC-01/05-01/08-T-64-Red-ENG, p 18 lines 7-8, p 21 lines 1-2, p 48 lines 16-25, p 49 lines 1-8); Witness 73 (ICC-01/05-01/08-T-71-Red-ENG, p 7 lines 2-20, p 8 lines 6-11); and Witness 79 (ICC-01/05-01/08-T-77-Red-ENG, p 9 lines 6-14, p 10 lines 21-25, p 11 lines 1-25, p 12 lines 1-12).

witnesses testified about having been witness to the rape of young girls.[1689] At least three witnesses, two of whom were direct victims of sexual violence themselves, spoke about the rape of men.[1690] The testimony of the 12 crime-base witnesses called to testify directly about sexual violence is discussed more fully in the *Gender Report Card 2011*.[1691] Significant testimony about gender-based crimes presented by other Prosecution witnesses, notably Witness 69, and the victims called by their Legal Representatives is discussed in greater detail below.

Testimony about gender-based crimes in the Bemba case

During the period covered by the *Gender Report Card 2012*, Trial Chamber III heard testimony from 12 Prosecution witnesses, including one expert witness,[1692] two witnesses who were called by the Legal Representatives of Victims, and three victims who were authorised by the Court to present their views and concerns in a non-evidentiary context. At least eight of the witnesses mentioned rape and other forms of sexual violence in their testimony, and two were direct victims of sexual violence. In addition one of the victims presenting their views and concerns in a non-evidentiary context spoke about having been a victim of gender-based crimes. In this section, we focus specifically on the experiences of gender based-violence recounted by three individuals: one Prosecution witness, Witness 69 – who was sodomised by MLC soldiers – and two of the victims called by the Legal Representatives, one of whom was a victim/survivor of sexual violence perpetrated by the MLC.

Witness 69, who testified for the Prosecution in November 2011, testified that he and his wife were raped by the Banyamulengue and that they killed his sister when she refused to give them money.[1693] The witness testified that when the Banyamulengue first came to their village, he sent his wife and children to take refuge at PK22. He stayed at his house with his sister. The witness testified that a group of Banyamulengue came to his house and killed his sister. After they had killed his sister, the Banyamulengue hit the witness and threw him on the ground. Witness 69 recounted that 'since that beating, since that attack, I have tears streaming from my eyes on a permanent basis'.[1694] Following these events, the witness joined his wife and children at PK22. Witness 69 stated that a couple of weeks later, when it appeared calm had returned, they returned home, only to find that 'calm hadn't returned. Upon our return from Gobongo, we suffered all these acts of violence.'[1695]

Witness 69 testified that, following their return home, another group of six armed Banyamulengue came to his house and ordered his wife to go outside. He stated that because his wife was slow, they forcibly dragged her outside, threw her to the ground and forced her to get up again. The witness, who appeared to be very emotional, recounted what happened:

1689 Witness 38 (ICC-01/05-01/08-T-33-Red-ENG, p 53 lines 1-8; ICC-01/05-01/08-T-34-Red-ENG, p 40 lines 1-22); and Witness 119 (ICC-01/05-01/08-T-82-Red-ENG, p 39 lines 18-23, p 44 lines 18-19); Witness 151 (ICC-01/05-01/08-T-173-ENG, p 7 lines 14-18); Witness 47 (ICC-01/05-01/08-T-177-Red-ENG, p 12 lines 9-25, p 13 lines 1-19).

1690 Witness 23 (ICC-01/05-01/08-T-51-Red-ENG) and Witness 69 (ICC-01/05-01/08-T-192-ENG; ICC-01/05-01/08-T-193-ENG) were themselves direct victims of sexual violence perpetrated by the Banyamulengue. Witness 80 told the Court that when her husband tried to intervene while they were raping her, the Banyamulengue raped him too (ICC-01/05-01/08-T-61-Red-ENG, p 9 lines 10-13).

1691 *Gender Report Card 2011*, p 239-252.

1692 Witness 219, Daniel Ishmael Opande, former commander of the UN peacekeeping missions in West-Africa and Liberia, was the fourth expert witness called by the Prosecution. Daniel Opande provided testimony to the Court following his submission of an expert military report on the chain of command and control within the MLC. The Chamber had previously heard from Dr Adeyinka Akinsulure-Smith, Prof William Samarin and Dr André Tabo. See further *Gender Report Card 2011*, p 252-253.

1693 ICC-01/05-01/08-T-192-ENG, p 31 lines 7-24.

1694 ICC-01/05-01/08-T-192-ENG, p 36 lines 23-25.

1695 ICC-01/05-01/08-T-192-ENG, p 52 lines 5-6.

> They took a bag of cassava and asked her to lie down on the floor so that they could rape her. Oh my God, I'm telling you that it all happened right in front of me. They slept with my wife. There were six of them. Six of them on this lady. When I saw that, that sad event, during that time two of them were right beside me underneath the mango tree where they had shot my sister and they said "Don't you move. Above all, don't move." So they did all of those crimes and then they left the house.
>
> During that time my wife was still down on the ground, and when I tried to protest, they ordered me to keep quiet and then they grabbed me and you, the lawyers, you say that you saw all those things. Is that true? Did you experience these events? If you're there to do this work, well, you do your work but don't provoke me. They grabbed me. They took me into one of the bedrooms. They threw me to the ground and they grabbed a bag, and during that time my wife was still on the ground, tired, exhausted, worn out, and when they brought the bag they ordered me to lie down. They threw me to the ground. One of them came and sodomised me. Oh my God. My God.
>
> A few moments later, another one of them came and he ordered me to stay down on the ground. "Stay down on the ground," and I had to obey. A few moments after that, another one came and he also – he had a rifle and he was at the threshold of the door. Oh, my God.[1696]

Witness 69 later confirmed that of the six soldiers that came to his house, four raped his wife and two sodomised him.[1697] He confirmed that some of them were standing guard while others were committing the rape. Their weapons were left on the ground next to them.[1698] He explained that his children managed to run away when they saw the Banyamulengue attack their parents, to seek refuge with family members.[1699]

Witness 69 testified that when he went to his wife to care for her after the Banyamulengue had left, 'the semen of her attackers was leaking out of her vagina'.[1700] He later added that his wife was also anally assaulted by the soldiers. He stated: 'It was horrible. It was unbearable, but I only heated up water to give her some care because at that time there was no hospital'.[1701] He explained that as a result of the rape, his wife has had to have an operation: 'the sperm that was in her belly – the sperm that was in her belly formed a type of ball and we were obliged to operate on her in order to extract this ball. She is still alive and she continues to suffer'.[1702]

When asked by the Prosecution if he knew why the Banyamulengue had raped him, the witness stated:

> Mr Prosecutor, those men behaved like madmen. They were smoking hemp, and they were consuming home-made alcohol. Bootleg alcohol. What could I do? What could I do? Those men were up to their eyeballs in intoxication. They were – had a very bad attitude. They were very aggressive.[1703]

Witness 69 added that he was not only anally assaulted, but was forced to perform fellatio on one of the soldiers. He recounted: 'He told me by threatening me, "Open your mouth to me so that I can have sex with you". In my mind, I was thinking to let him put his penis in my mouth and then I should bite it'.[1704]

1696 ICC-01/05-01/08-T-192-ENG, p 47 lines 10-25, p 48 lines 1-4.
1697 ICC-01/05-01/08-T-193-Red-ENG, p 12 lines 17-18.
1698 ICC-01/05-01/08-T-193-Red-ENG, p 20 lines 2-5.
1699 ICC-01/05-01/08-T-193-Red-ENG, p 13 lines 10-14.
1700 ICC-01/05-01/08-T-192-ENG, p 48 lines 15-16.
1701 ICC-01/05-01/08-T-192-ENG, p 56 lines 16-17.
1702 ICC-01/05-01/08-T-193-Red-ENG, p 13 lines 17-19.
1703 ICC-01/05-01/08-T-193-Red-ENG, p 16 lines 22-25.
1704 ICC-01/05-01/08-T-193-Red-ENG, p 24 lines 13-19.

Witness 69 testified that many of his neighbours, both men and women, were raped by the Banyamulengue.[1705] When asked about the ongoing effects of these rapes upon his community, he stated that it was 'total desolation' and that 'some victims are in the throes of dying at this very point in time'.[1706] He added that many also 'feel shame about recounting what was done to them'.[1707] Others, he recounted, suffered sexually transmitted diseases, including HIV/AIDS as a result of the rape.[1708]

Witness 69 confirmed that he and his family still suffer from what happened. He added:

> Your Honours, I'm telling you I was – my anus was ripped apart. Bemba's men humiliated me. They humiliated me and I'm telling you my family is completely destroyed. My wife, my children, we were all subjected to this. [...]
>
> I say it once again and I am – I am dying of this. I am dying because of the violence and the abuse committed by Bemba's men and you can see every month we would hear that someone had died and the people of the Central African Republic are still dying.[1709]

In response to questions from the Prosecution about whether his community knew what happened to him and his wife, Witness 69 explained:

> I believe that I was very clear and precise a short while ago. As you know, when something that serious happens to you it would normally be known to the neighbours. Everyone knew it, Mr Prosecutor. We lost our dignity. We were subjected to humiliating and degrading acts. I am asking myself questions. What are we going to do? My wife and myself were subjected to atrocious acts. We no longer have any value. We are wondering what we are going to do in order to recover our dignity.
>
> I'm expecting you to tell me something. Please answer me, your Honours. [...] What are you going to do for us to enable us to recover our dignity? Do you think that it is normal for us to have been subjected to those acts? I do not think so. It is for that reason that we travelled to your Court to be able to express ourselves.
>
> What are we going to do to restore peace in the Central African Republic? Imagine that even children are pointing us out and saying "That man was sodomised and his wife was raped by the Banyamulengues". What are we going to do, ladies and gentlemen of the Court. Your Honours, I am appealing to you to open your eyes to analyse this case. Please ask Bemba that question so that he should give us an answer. I do not know what else to say. I lack words to express what I'm feeling, what I'm experiencing. I'm not lying to you, your Honours. I am not able to sleep. My wife had an operation. Sperm of the Banyamulengue were taken out.[1710]

Witness 69 subsequently stated that he considers himself 'a finished man'.[1711] He added: 'And let me tell you that every two months I feel — I suffer from abdominal pain because of the sperm that remains in my belly. I see myself as a dead man and this is why I'm submitting to you my complaint'.[1712]

1705 ICC-01/05-01/08-T-193-Red-ENG, p 26-30.
1706 ICC-01/05-01/08-T-193-Red-ENG, p 29 lines 1-6.
1707 ICC-01/05-01/08-T-193-Red-ENG, p 29 line 24.
1708 ICC-01/05-01/08-T-193-Red-ENG, p 30 lines 2-9.
1709 ICC-01/05-01/08-T-192-ENG, p 49 lines 5-8, 22-25.
1710 ICC-01/05-01/08-T-194-Red-ENG, p 13 lines 4-25.
1711 ICC-01/05-01/08-T-194-Red-ENG, p 14 line 10.
1712 ICC-01/05-01/08-T-194-Red-ENG, p 14 lines 14-16.

Victims testify in the Bemba case

In a decision issued on 22 February 2012,[1713] Trial Chamber III[1714] authorised five victims to address the Chamber following the completion of the Prosecution case in March 2012. Two of the victims were invited to testify in person; they appeared in May 2012. Subsequently, the remaining three victims addressed the Trial Chamber via video link from Bangui. In a decision issued on 25 May 2012, the Trial Chamber clarified that the victims due to address the Chamber via video link would not be testifying under oath, that they would not be questioned by the parties and that, therefore, their views and concerns would not form part of the evidence of the case.[1715] While the judges of the ICC have authorised victims to testify in all of the three cases that have proceeded to trial, this is the first time the ICC has authorised victims to present their views and concerns without their story being considered as evidence.[1716]

In the 22 February decision, the Chamber reiterated that Article 68(3) establishes a right for victims to have their views and concerns represented in, and considered by, the Chamber in a manner not prejudicial to or inconsistent with the rights of the accused, particularly the accused's right to an expeditious trial.[1717] The Chamber underlined that, despite this right, victims are not parties to the proceedings.[1718] The Chamber then endorsed the approach taken by Trial Chamber I in the Lubanga case to define the distinction between authorising victims to provide their views and concerns, the threshold for which is lower and which does not become part of the trial evidence, and authorising victims to give evidence, the threshold for which is 'significantly higher'.[1719] Having set out the different criteria to determine which victims might be authorised to present their views and concerns and/or evidence,[1720] the majority authorised the following five victims:[1721]

- Victim a/0866/10, a victim of pillage and repeated gang rape in the town of Mongoumba, who witnessed pillage and murder in several locations, who understands Lingala and was thus able to understand the soldiers, was authorised to present evidence;
- Victim a/0542/08, a victim of pillage and rape by MLC soldiers in the town of Bossangoa, was not authorised to present evidence but was authorised to present her views and concerns because nothing had been presented on this type of harm from Bossangoa;
- Victim a/0394/08, a victim of pillage in the town of Damara, was not authorised to present evidence as his testimony would be cumulative of evidence presented by the Prosecution. He was authorised to present his views and concerns as illustrative of the harm suffered by a significant number of victims in Damara;
- Victim a/1317/10, a victim of pillage who could provide information about murder, rape and pillage, was authorised to provide evidence, largely because he saw the accused in the town of Sibut and his testimony would go to the charge of criminal responsibility; and
- Victim a/0511/08, who was injured by gunshot and witnessed the murder of his mother, was authorised to give his views and concerns only.

1713 ICC-01/05-01/08-2138. Judge Steiner issued a partly dissenting opinion, ICC-01/05-01/08-2140.
1714 Trial Chamber III is composed of Presiding Judge Sylvia Steiner (Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan).
1715 ICC-01/05-01/08-2220.
1716 ICC-01/05-01/08-T-227-Red-ENG, p 21 lines 3-5.
1717 ICC-01/05-01/08-2138, para 15.
1718 ICC-01/05-01/08-2138, para 13.
1719 ICC-01/05-01/08-2138, paras 19-20.
1720 ICC-01/05-01/08-2138, paras 23-24 referencing ICC-01/04-01/07-1665.
1721 ICC-01/05-01/08-2138, paras 38-39, 41-42, 45, 49, 53-54.

In accordance with this decision, Victims a/0866/10 and a/0542/08 appeared before the Court in person. The other three presented their views and concerns via a video link and were guided in the presentation of their statement by their Legal Representative. Two of the victims are victims/survivors of rape. Others also spoke about gender-based crimes in their testimony. This section describes those parts of their testimonies and/or statements relating to gender-based crimes.

Significantly, the two victims who were authorised to present evidence did so without any protective measures, testifying in full public view and with their identities disclosed to the public. When asked by Douzima Lawson, the Victims' Legal Representative, why she had not requested any protective measures to give her testimony, Victim a/0866/10 responded:

> I cannot ask for my voice or image to be distorted. I want it to be natural, be myself and say before the Judges and before the whole world what I suffered. I know myself who asked the Central African counsel not to enjoy protective measures. I accepted to testify publicly. God is my witness. I cannot come here and ask for my image or voice to be distorted.[1722]

The first victim, Victim a/0866/10,[1723] started her testimony on 1 May 2012. Victim a/0866/10, testified that she was gang-raped twice by a group of MLC soldiers. Following a determination by the Victims and Witnesses Unit (VWU), she testified with the help of an in-court support assistant and a psychologist was present during her testimony. Prior to the start of her testimony, the Chamber also reminded the parties 'to try to use short, simple, open-ended questions and [to] avoid asking embarrassing and/or unnecessarily intrusive or repetitive questions'.[1724] In this section, Victim a/0866/10 is referred to as **Witness V1**.

Witness V1 described to the Court how the MLC troops arrived in her village and how she tried to get her family to safety. She testified that the MLC took her with them because she spoke Lingala and could function as a translator. She was also forced to assist carrying looted items to the soldiers' trucks. The witness testified that after having taken the looted items out of the vehicles, the soldiers told her that if she wanted them to spare her life, she should show them the border with Mongoumba town. Witness V1 testified that when she did not respond, one of the soldiers said to her: 'We are going to kill you. We will not spare your life, because if we spare your life you will betray us'.[1725] She stated two of the soldiers then raped her. She recounted what happened:

> Then one of them asked me to take off my clothes, and I refused to do so. Then he took two bottles and broke them before me in order to frighten me and, yes, I was indeed frightened. Then he ordered me to take off my clothes. I was afraid but I couldn't do that. I was wearing a pair of jeans, and under that there were undergarments and my panties. So he took off my pair of trousers, and all that was left on me were my undergarments and my panties. He took off my pair of trousers and while he did so I tried to fight him off, and then one of them kicked me in the – kicked me, kicked my feet, and then I fell to the ground and then one of them slept with me and then another one slept with me again while the others looked on.[1726]

1722 ICC-01/05-01/08-T-220-ENG, p 53 lines 1-5.
1723 Victim a/0866/10 was identified as Pulchérie Makiandakama.
1724 ICC-01/05-01/08-T-220-ENG, p 2 lines 23-25, p 3 line 1.
1725 ICC-01/05-01/08-T-220-ENG, p 29 lines 5-7.
1726 ICC-01/05-01/08-T-220-ENG, p 29 lines 23-24, p 30 lines 1-7.

Witness V1 stated that there were about 20 soldiers, 'who were watching the show, so to speak'.[1727] When asked what the reaction of these 20 soldiers was, she stated: 'as they looked on, some of them were shouting with joy while others fired into the air, but only one of them was against the whole thing'.[1728]

The witness recounted how she was forced to accompany the MLC soldiers on further pillaging after the rape, forced to carry looted items and to act as interpreter between the MLC soldiers, speaking Lingala, a Congolese language, and the Central African people. She also testified that the MLC soldiers killed another man because he refused to give them sheep: 'they cut his penis off, which they put into his mouth, and it was at that time that the Muslim died'.[1729]

Witness V1 testified that she was raped a second time by a larger group of soldiers, after she was forced to carry the looted items to the river, and after one of the soldiers used his knife to cut open her clothes. When asked how many people raped her the second time, the witness responded: 'Before I could – before I fainted, I looked around and I saw that two people had just slept with me, and then a third person came and a fourth. Afterwards I saw that there were a lot of people who were around me, and who raped me. I reckon there were 12 of them'.[1730] She confirmed that the soldiers were armed while raping her.[1731] She added:

> Some of them held me to the ground. One was on my arm, others on my feet, and it was at that time that they started sleeping with me. Afterwards they returned and they turned me over and they slept with me in the anus, in the vagina and even in the mouth, and it was afterwards that I started vomiting and lost consciousness.[1732]

1727 ICC-01/05-01/08-T-220-ENG, p 30 line 19.
1728 ICC-01/05-01/08-T-220-ENG, p 30 lines 21-22.
1729 ICC-01/05-01/08-T-220-ENG, p 33 lines 8-9.
1730 ICC-01/05-01/08-T-220-ENG, p 36 lines 9-12.
1731 ICC-01/05-01/08-T-220-ENG, p 37 lines 1-3.
1732 ICC-01/05-01/08-T-220-ENG, p 36 lines 15-20.

Witness V1 told the Court that one of the soldiers, a commander, objected to her being raped and that he intervened when she started vomiting. She explained that he convinced the other soldiers not to kill her and he eventually assisted her to flee into the bush.[1733]

When asked whether she was seen by a medical doctor, Witness V1 stated that she had not consulted with a doctor on her own initiative, but that her mother convinced her to be seen by a doctor from Doctors Without Borders. However, it was difficult for her to be examined by a doctor because she was 'traumatised'. She added: 'they did not touch me because I was in great pain and not even a small finger could be put into my vagina. It was so painful. And so the doctors consulted me. I was traumatised. I had pain all over my body. I had been forced to carry several items. I had been raped. And so things were very difficult for me.'[1734]

Witness V1 also testified that she still suffers the consequences of having been raped, including ostracisation in her community:

> In my community, I'm no longer considered a human person, and by extension in the whole of the CAR I'm not considered a human being. You know, I was a human being, but I was treated like an animal, a burden, and that is why I cannot live normally. I cannot live with – calmly and live as all other girls of my age do. I cannot do that because I was treated like an animal. You see, I'm a woman. Before these events I was a woman with dignity. I could have a family with dignity, but I lost my dignity. I was forced to change the man in my life. Really, I have no longer any dignity.
>
> [...]

1733 ICC-01/05-01/08-T-220-ENG, p 38-41.
1734 ICC-01/05-01/08-T-220-ENG, p 49 lines 19-24.

> You know, I have to live in peace, without any concerns in my country, and be able to make a household with a man that I love, but now if I speak to somebody, or I have problems with somebody, everything that's said to me goes back to what the Banyamulengue did to me. They say 'You're not a human being. The Banyamulengue humiliated you. Can you stand before me and say anything?' And sometimes people spit on me, so that's how I'm stigmatised. How can I stand before somebody and say anything to anyone?[1735]

Victim a/1317/10, the second victim to provide evidence in person, hereinafter referred to as **Witness V2**, also testified without protective measures in full public view.[1736] Witness V2 is the president of a youth movement in Sibut, the CAR, and provided testimony about murder, rape and pillage. While not having been a witness to rape himself, Witness V2 recounted that he knew of several cases where girls as young as ten years old had been raped, and that some had died as a result.[1737] While he could not estimate the number of girls and women who had been raped 'because the girls were ashamed, ashamed to state that they had been raped by the Banyamulengue, [...] afraid of being stigmatised',[1738] Witness V2 confirmed that rape occurred in many localities. He added that one woman was often raped by a group of soldiers, sometimes as many as 10 or 20 soldiers.[1739] Witness V2 also testified that he had seen a girl running around naked, throwing up sperm.

The three victims who were authorised to present their views and concerns in a non-evidentiary context, rather than testify under oath, addressed the Chamber on 25 and 26 June 2012. Two of them, Victim 542[1740] and Victim 511,[1741] testified with their identities revealed to the public. One of the victims addressed the Chamber on gender-based crimes. This section focuses on her statements.

Victim 542 told the Court that MLC soldiers came to her house and threatened her to give them money. She stated that there was a woman among the group of soldiers who was carrying a child. The woman used her weapon and assaulted the victim and her daughter, who were hiding under the bed.[1742] After the Banyamulengue had looted her compound, Victims 542 explained she fled together with her mother and daughter into the bush.

She told the Court that 'some Banyamulengues came to where we had taken refuge and they ordered us to put our hands up'.[1743] She recounted what happened after that:

> They then asked me to stand up. They also asked me to come with them. I asked them "But where are you taking me?" They forcibly compelled me to follow them back towards the direction from whence they came. They grabbed me and I asked them what – why they were doing all that? Why they were grabbing me? They told me that they wanted to sleep with me. I told them that I was not in good shape, but despite that one of them pushed me to the ground. I told them that I was having my period and that it was not possible to have sexual intercourse. Despite all that, they didn't want to hear anything.
>
> One of them started sleeping with me while the other was standing up.

1735 ICC-01/05-01/08-T-220-ENG, p 53 lines 8-18, 21-25, p 54 lines 1-2.
1736 Victim a/1317/10 was identified as Judes Mbetingou.
1737 ICC-01/05-01/08-T-222-ENG, p 54 lines 15-16.
1738 ICC-01/05-01/08-T-222-ENG, p 54 lines 19-20.
1739 ICC-01/05-01/08-T-222-ENG, p 55 lines 2-3.
1740 Victim 542 was identified as Béatrice Namndouto.
1741 Victim 511 was identified as Francis Félicien Vouloube De Mbioka.
1742 ICC-01/05-01/08-T-227-Red-ENG, p 8 lines 8-10.
1743 ICC-01/05-01/08-T-227-Red-ENG, p 15 lines 2-4.

> One of them asked them to come near me, and then some of them spread my legs and then one of them put the barrel of his gun into my vagina. It was the rapist who was doing that. In the meantime, one of them was still standing up. His ammunition has fallen to the ground. He picked the ammunition up, and shortly afterwards they started kicking me, asking me to stand up. When I stood up I was no longer feeling well, and after that act they went away and they were making fun of me and laughing.[1744]

Victim 542 added that she was raped in front of her daughter.[1745] Victim 542 also spoke about the continued effects that the rape has had on her. In addition to significant physical injury, she explained to the Court that she suffers psychologically. She told the Court: 'I consider myself to be dead, because something like this has never happened in my country before'.[1746] Victim 542 also explained that her husband, who had fled to Bangui during the events, subsequently abandoned her when he found out she had been raped by the Banyamulengue. She stated:

> He was told that I had been raped by the Banyamulengue and his relatives told him to get rid of me because I had been raped by the Banyamulengue and I certainly had been infected by them, and so my husband repudiated me. He refused to help me, not even financially so that I could support the children. He went away and he abandoned me, leaving me all alone; alone to face all these difficulties and burdens.[1747]

The second man she had met a while after, with whom she now has two children, also abandoned her when he found out what had happened to her.[1748] Victim 542 also explained to the Court that she is stigmatised in her community, stating that 'people were singling me out. Everyone would point me out and say that I had been a victim of rape'.[1749] She also confirmed that many women in Bossangoa had been raped and suffered stigmatisation as a result.[1750]

When asked by Presiding Judge Steiner why she had wanted to tell her story before the Court and how she felt having told her story, Victim 542 answered:

> Madam President, thank you for that question. I do not feel at ease each time I have to give an account of the acts that I was subjected to, but for the time being I feel relieved. [...] I have told you what happened to me. If I did not do that, I would not feel comfortable. It is for that reason that I decided to express all my concerns and talk about everything that happened to me to the Court.[1751]

1744 ICC-01/05-01/08-T-227-Red-ENG, p 15 lines 8-22.
1745 ICC-01/05-01/08-T-227-Red-ENG, p 24 lines 20-21.
1746 ICC-01/05-01/08-T-227-Red-ENG, p 24 lines 1-2.
1747 ICC-01/05-01/08-T-227-Red-ENG, p 25 lines 5-10.
1748 ICC-01/05-01/08-T-227-Red-ENG, p 25 lines 20-23.
1749 ICC-01/05-01/08-T-227-Red-ENG, p 26 lines 1-3.
1750 ICC-01/05-01/08-T-227-Red-ENG, p 27 lines 4-9.
1751 ICC-01/05-01/08-T-227-Red-ENG, p 29 lines 17-19, 22-24.

Focus:
Victim participation and reparations

The concept of victim participation in proceedings before the ICC is based on Article 68(3) of the Rome Statute, which states that:

> **where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused.**

There are also a number of important provisions in the Rules of Procedure and Evidence – particularly Rules 85 and 89-93, which provide a definition of 'victim' for the purposes of the Statute, address the legal representation of victims, and establish the procedure to be followed in applications to participate and the modalities of participation in proceedings.

From 2005 until the end of August 2012, the Court received a total of 12,641 applications from persons seeking to participate as victims in proceedings.[1752] Of those applications, 6,485 – almost half of the total number of applications – were received between 1 September 2011 and 31 August 2012.[1753] This is a significant increase over previous years and demonstrates a clear trend of continuous increases in applications for victim participation at the Court. Between 30 August 2010 and 1 September 2011, the Court received 2,577 applications for participation.[1754] Between 1 October 2009 and 30 August 2010, the Court received 1,765 applications for victim participation,[1755] while the total number of applications for participation received between 2005 and 30 September 2009 was 1,814.[1756] Of the 12,641 applications for participation that have been received by the Court, as of 31 August 2012, a total of 6,237 victims have been accepted to participate, representing just over 49% of all applicants.[1757]

1752 These figures were initially provided by the VPRS by email dated 3 September 2012. Following an email exchange between the VPRS and the Women's Initiatives for Gender Justice, the consolidated information relied upon in this Report was provided by email dated 20 September 2012. The VPRS email includes information on the number of victim participation applications received as of 31 August 2012 and the number of applicants authorised to participate in proceedings as of 31 August 2012 (hereinafter 'VPRS email'). Percentages in this section have been calculated on the basis of information provided by the VPRS. Due to the rounding-up principle, sometimes percentages may add up to slightly more than 100%.

1753 Based on figures provides by the VPRS by email dated 20 September 2012.

1754 See *Gender Report Card 2011*, p 280.

1755 See *Gender Report Card 2010*, p 185.

1756 See *Gender Report Card 2009*, p 95.

1757 Based on figures provided by the VPRS by email dated 20 September 2012.

Gender breakdown of applications by Situation[1758]

Of the 12,641 applications for victim participation received by the Court as of 31 August 2012, the gender of 8,899 applications has been registered by the VPRS.[1759] A total of 37 applications from institutions and/or organisations have been received by the Court. Of those applicants whose gender is registered, 4,470 (or 53.2%) are male applicants,[1760] and 4,159 (or 46.7%) are female applicants.[1761] As of 31 August 2012, for almost 30% of all applications registered by the VPRS the gender of the applicant was registered as 'unknown'.[1762] The VPRS has indicated that the designation of 'unknown gender' means that this information may either not yet have been entered into the database, or because the applicant has not indicated her/his gender on the application form and it was not possible to retrieve this information from the application.[1763]

A little under half of all applications for participation were received in the context of the Bemba case arising out of the CAR Situation. In this Situation, the Court has received 5,599 applicants, 2,172 (or 38.8%) of whom are male applicants and 1,997 (or 35.7%) of whom are female applicants. Nonetheless, for a little over a quarter of all applications in this Situation – 1,409 applications, or 25.2% – the gender is registered as 'unknown'. The Kenya Situation and related cases represent 25.7% of all applications received as of 31 August 2012. Of the 3,246 applications received in this Situation, 791 (or 24.4%) are male applicants and 639 (or 19.7%) are female applicants. Significantly, in this Situation, for more than half of all applications received (1,816 applications, representing 55.9%) their gender is registered as 'unknown'. This represents a significant increase from last year, when the VPRS reported that gender was not registered for 19.8% of the applications for participation received in the Kenya Situation.[1764] Interestingly, in the Côte d'Ivoire Situation and the Gbagbo case, the Court has received as many applications for victim participation from male victims as from female victims (91 applications from both women and men, each representing 44.8%). For 21 victim applications in this Situation, their gender remained registered as 'unknown'. With the exception of the Côte d'Ivoire Situation and related cases, in all Situations the Court has received more applications from male victims than from female victims.

1758 These figures are accurate as of 31 August 2012.

1759 This year the Women's Initiatives for Gender Justice was provided with a full gender breakdown of relevant statistics, including on victim participants in all proceedings, applications to participate, applications for reparations, and victims who were accepted to participate. In previous years, the statistics available from VPRS have varied and did not always include a full gender breakdown of these figures. See further *Gender Report Card 2010*, p 190-191; *Gender Report Card 2011*, p 278-279.

1760 The information provided by the VPRS email states that 4,470 applications from male victims were received, representing 53.2% of the 8,899 applicants for whom their gender is registered. The 4,470 male applicants represent 37.5% of all 12,641 applications received by the Court as of 31 August 2012.

1761 The information provided by the VPRS email states that 4,159 applications from female victims were received, representing 46.7% of the 8,899 applicants for whom their gender is registered. The 4,159 female applicants represent 32.9% of all 12,641 applications received by the Court as of 31 August 2012.

1762 The information provided by the VPRS email indicates that a total of 12,641 were registered by the VPRS since 2005. The gender of 3,705 applicants (or 29.3%) is registered as 'unknown'. The VPRS has indicated that the gender may be registered as 'unknown' either because the information has not yet been entered in their database or because the applicant did not specify their gender in her/his application and it is not possible to retrieve this information from the application. VPRS indicated that the development of their database is ongoing and that the new database should be fully operational next year, which will enable the VPRS to extract gender disaggregated data. Explanation provided by the VPRS by emails dated 3 September 2012 and 20 September 2012.

1763 Explanation provided by the VPRS by emails dated 3 September 2012 and 20 September 2012.

1764 See *Gender Report Card 2011*, p 279.

Gender breakdown by Situation of applications for victim participation[1765]

Situation and cases	Number of male applicants	% male applicants	Number of female applicants	% female applicants	Number of institution/org applicants	% institution/organisation applicants	Number of gender unknown applicants	% gender unknown applicants	Total	%
DRC	1,068	48.8%	1,053	48.1%	13	0.6%	54	2.5%	2,188	17.3%
Uganda	501	44.1%	318	28.0%	2	0.2%	314	27.7%	1,135	9.0%
Darfur	114	43.3%	58	22.1%	1	0.4%	90	34.2%	263	2.1%
CAR	2,172	38.8%	1,997	35.7%	21	0.4%	1,409	25.2%	5,599	44.3%
Kenya	791	24.4%	639	19.7%	0	0.0%	1,816	55.9%	3,246	25.7%
Libya	3	42.9%	3	42.9%	0	0.0%	1	14.3%	7	0.1%
Côte d'Ivoire	91	44.8%	91	44.8%	0	0.0%	21	10.3%	203	1.6%
Totals	**4,740**	**37.5%**	**4,159**	**32.9%**	**37**	**0.3%**	**3,705**	**29.3%**	**12,641**	

1765 Figures as of 31 August 2012. All figures in this table are based on information provided by the VPRS by email dated 20 September 2012 and relate only to applications for participation registered by the VPRS.

Victim participation at the ICC in 2012[1766]

Number of victims who have applied to participate between 1 Sept 2011 and 31 Aug 2012: **6,485**
Number of victims who have applied to participate since 2005: **12,641**[1767]
Percentage of total number of applicants accepted to participate to date: **49.3%**[1768]

Situation or case	*Number of victim participants accepted between 1 Sept 2011 and 31 Aug 2012*	*Total number of victim participants accepted as of 31 August 2012*
DRC Situation	**-1**[1769]	**203**
Prosecutor v. Lubanga	**-3**[1770]	**120**
Prosecutor v. Katanga & Ngudjolo	**-2**[1771]	**364**
Prosecutor v. Ntaganda	**0**	**0**
Prosecutor v. Mudacumura	**0**	**0**
Prosecutor v. Mbarushimana	**2**	**132**
Uganda Situation	**0**	**21**
Prosecutor v. Kony et al	**0**	**41**
Darfur Situation	**0**	**11**
Prosecutor v. Abu Garda	**0**	**87**
Prosecutor v. Harun & Kushayb	**0**	**6**
Prosecutor v. Al'Bashir	**0**	**12**
Prosecutor v. Banda & Jerbo	**0**	**89**
Prosecutor v. Hussein	**0**	**0**
CAR Situation	**0**	**0**
Prosecutor v. Bemba	**2,833**	**4,452**
Kenya Situation	**0**	**0**
Prosecutor v. Ruto & Sang	**0**	**327**
Prosecutor v. Muthaura & Kenyatta	**0**	**233**
Libya Situation	**0**	**0**
Prosecutor v. Gaddafi	**0**	**0**
Côte d'Ivoire Situation	**0**	**0**
Prosecutor v. Gbagbo	**139**	**139**
Totals	**2,968**	**6,237**

1766 All information is based on figures provided by the VPRS by email dated 20 September 2012.

1767 This is a marked increase from last year, at which time 6,156 victims had applied to participate in the proceedings since 2005. More than 50% of all applications were received by the Court between 1 September 2011 and 31 August 2012 (6,485 applications were received this year, representing 51.3% of all applications received since 2005).

1768 Of the 6,237 victims who have been accepted to participate in proceedings, a little under 50% (2,968 victims, representing 47.6%) were accepted during the period covered by the *Gender Report Card 2012*.

1769 The VPRS indicated that the discrepancy between the number of victims accepted to participate in the Situation stage of proceedings in 2011 (804 victims) and 2012 (803 victims) is due to a decision issued in the record of the Katanga & Ngudjolo case in 2008 (ICC-01/04-01/07-579) which granted victims status in relation to the DRC situation. That decision was subsequently modified (ICC-01/04-01/07-589), which then denied the status of a victim to an application which was initially accepted. The VPRS indicated that the latest decision had not been taken into account in their database. Explanation provided by VPRS by email dated 20 September 2012.

1770 During the period covered by the *Gender Report Card 2012*, an additional 6 victims were accepted to participate in the Lubanga case prior to the issuance of the trial judgement in March 2012. At the time of the trial judgement, a total of 129 victims had been accepted to participate in the case. As discussed in more detail in the *First trial judgement in the Lubanga case* section, above, in the trial judgement, Trial Chamber I withdrew the participation status of nine victims. This means that in the period 1 September 2011 through 31 August 2012, the total number of victims accepted to participate in the Lubanga case decreased with 3, when compared to those victims who had been accepted to participate as of 1 September 2011 (123).

1771 In a decision dated 16 August 2011, Trial Chamber II withdrew the victim participation status of two victims in the Katanga & Ngudjolo case. ICC-01/04-01/07-3064.

Breakdown of participants by Situation[1772]

Pursuant to Article 68 of the Rome Statute, victims may apply for and be granted the right to participate at all stages of proceedings before the Court, including the pre-trial, trial and appeal phases, but, in practice, the Court's jurisprudence has limited the potential for victims to have a general right to participate at the Situation stage of proceedings. In December 2008 and February 2009, the Appeals Chamber issued two important decisions in the DRC and Darfur Situations, rejecting participation rights to victims at the investigation stage of a Situation and holding that there must be specific judicial proceedings capable of affecting the personal interests of victims before they can be granted the right to participate.[1773] These decisions temporarily put an end to the granting of participation rights to new victim applicants at the Situation stage, although they did not affect the status of victims who had already been accepted to participate in relation to a Situation before the Court. As described in the *Gender Report Card 2011*, decisions in the DRC, the CAR and Kenya Situations set out the procedural framework to be followed in relation to new and future applications for victim participation in specific judicial proceedings at the Situation stage.[1774] Under the current system of victim participation at the Court, victims who have suffered harm caused by the commission of crimes within the jurisdiction of the Court may apply to participate at the Situation stage, while victims who have suffered harm as a result of specific crimes included in the charges against a suspect or accused person can also apply to participate in that specific case.[1775]

There has been a noted change in the relative percentages of victim participants accepted in each of the Situations before the Court. Due to a substantial increase in the number of victim participants in the CAR Situation over the last year, specifically in the Bemba case, this Situation and case now represent over 70% of the victims accepted to participate before the Court.[1776] In 2010, the DRC Situation and associated cases had accounted for the overwhelming majority (almost 70%) of victims accepted to participate before the Court.[1777] In 2012, this number had decreased to 13.1%.[1778]

1772 Figures as of 31 August 2012.

1773 ICC-01/04-556 and ICC-02/05-177. See further *Gender Report Card 2009*, p 99-100.

1774 See *Gender Report Card 2011*, p 281-291.

1775 See <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Participation/Booklet.htm>, last visited on 12 October 2012.

1776 According to figures provided by the VPRS, 4,452 of the 6,237 victims granted the right to participate, are participating in the CAR Situation and cases. Although no victim participants have been accepted in the CAR Situation itself, victim participants in the Bemba case alone account for 71.38% of the total number of participating victims before the Court. As of 30 August 2010, the CAR Situation and cases amounted to less than 14% of the total number of participating victims (135 of 975 in total).

1777 See further *Gender Report Card 2010*, p 189. As of 30 August 2010, 661 of the 974 accepted applications to participate (67.86%) related to the Situation in the DRC and the three cases then arising from it. As of 30 September 2009, the DRC Situation and cases accounted for almost 85% of victim participation (644 of 771 victim participants or 83.5%).

1778 According to figures provided by the VPRS, 819 (or 13.13%) of the 6,237 victims granted the right to participate before the Court, are doing so in proceedings related to the DRC Situation and cases. The number of ictim participants in the DRC Situation and related cases has decreased as compared to last year, when 823 victim participants were accepted to participate in this Situation. During the period covered by the *Gender Report Card 2012*, the Court accepted a further six victims in the Lubanga case and an additional two victims in the Mbarushimana case. However, as explained above, the Court subsequently withdrew the victim participation status of nine victims in the Lubanga case (ICC-01/04-01/06-2842) and two victims in the Katanga & Ngudjolo case (ICC-01/04-01/07-3064). Further, the VPRS indicated that the discrepancy between the number of victims accepted to participate in the Situation stage of proceedings in 2011 (804 victims) and 2012 (803 victims) is due to a decision issued in the record of the Katanga & Ngudjolo case in 2008 (ICC-01/04-01/07-579) which granted victims status in relation to the DRC situation. That decision was subsequently modified (ICC-01/04-01/07-589), which then denied the status of a victim to an application which was initially accepted. The VPRS indicated that the latest decision had not been taken into account in their database. Explanation provided by VPRS by email dated 20 September 2012.

In contrast with the CAR Situation, the victims accepted to participate in the DRC Situation and related cases represent three cases involving four accused.

There has been no increase in the number of victim participants accepted in the Uganda Situation or the case against Joseph Kony.[1779] As a result, the Uganda Situation now accounts for a slightly less than 1% of the victim participants, down from a little under 2% last year.[1780] The victim participants in the Darfur Situation and associated cases represent a little over 3% this year.[1781] No victim participants had been accepted in the Kenya Situation or cases during the period covered by the *Gender Report Card 2012*, but it now accounts for 9% of the total number of participating victims, the third highest percentage by Situation behind the DRC and the CAR.[1782]

1779 As indicated in the *Structures & Institutional Development* section of this Report, following a decision by the Single Judge in the Uganda Situation on 9 March 2012, all victim applicants and recognised victims who were already participating in the proceedings are now represented by the OPCV (ICC-02/04-191). While the Court has received more applications for victim participation in the Uganda Situation and the Kony *et al* case since the publication of the *Gender Report Card 2010*, at the time of writing this Report a decision has not yet been issued granting or denying participation status to these victims and as such there has not been an increase in the number of victims accepted to participate in this Situation.

1780 The VPRS email indicates that a total of 62 applicants have been accepted to participate in the Uganda Situation and the Kony *et al* case since 2005. This amounts to 0.99% of the 6,237 accepted victim participants.

1781 The VPRS email indicates that 205 or 3.3% of the 6,237 victim participants relate to the Darfur Situation and the three cases associated with it.

1782 According to figures provided by the VPRS, the Kenya Situation and cases represent 560 of the 6,237 participating victims at the Court, which amounts to 9% of the total.

Breakdown by Situation of victims who have been formally accepted to participate in proceedings[1783]

Situation and cases	*Number of victim participants as of 31 Aug 2012*	*% of victim participants as of 31 Aug 2012*[1784]	*Number of victim participants as of 1 Sept 2011*[1785]	*% of victim participants as of 1 Sept 2011*
DRC Situation and cases	**819**	**13.1%**	**823**	**25.2%**
Uganda Situation and cases	**62**	**1%**	**62**	**1.9%**
Darfur Situation and cases	**205**	**3.3%**	**205**[1786]	**6.3%**
CAR Situation and cases	**4,452**	**71.4%**	**1,619**	**49.5%**
Kenya Situation and cases	**560**	**9%**	**560**	**17.1%**
Libya Situation and cases	**0**	**0%**	**0**	**0%**
Côte d'Ivoire Situation	**139**	**2.2%**	**0**	**0%**
Totals	**6,237**		**3,269**	

1783 Figures as of 31 August 2012. Email communication with the VPRS dated 20 September 2012.

1784 The VPRS email indicates that 6,237 applications to participate have been accepted as of 31 August 2012.

1785 According to VPRS figures for last year, 3,182 applications to participate in proceedings had been accepted as of 1 September 2011. Note that, last year, the VPRS indicated that the figures related to the Darfur Situation and cases did not include the 87 victim participants who had been accepted in the context of the case against Abu Garda. In 2009, the Pre-Trial Chamber declined to confirm the charges against Abu Garda and no public decision has been issued regarding the status of the 87 victims who had been granted the right to participate in that case. All 87 victims re-applied for, and were granted, participatory status in the Banda & Jerbo case. This year, the VPRS again included the figures of the Abu Garda case in its overview of victim participation at the ICC. In order to present accurately compare the period covered by this year's *Gender Report Card* and the *Gender Report Card 2011*, the 87 victims in the Abu Garda case have been added to the statistics of 2011. Including the accepted victim participants in the Abu Garda case, a total of 3,269 victims were granted the right to participate before the Court as of 1 September 2011. See further *Gender Report Card 2011*, p 277.

1786 As indicated above, in order to present an accurate comparison between the period covered by this year's *Gender Report Card* and the *Gender Report Card 2011*, the 87 victims in Abu Garda have been added to the 2011 data.

Breakdown of participants by gender[1787]

According to figures provided by the VPRS this year, of the 12,641 applications for victim participation received, the Court has authorised 6,237 victims to participate in proceedings.[1788] For a number of these (824 or 13.2%) their gender is registered as 'unknown'.[1789] Female victim participants account for 2,505 of the 6,237 victim participants (or 40.2%), while 2,896 of the victim participants (or 46.4%) are men and 12 are institutions and/or organisations (representing 0.2%).[1790] In some cases, including the proceedings against President Al'Bashir and Harun and Kushayb, all of the victim participants are male,[1791] while in the Lubanga and Katanga & Ngudjolo cases approximately 70% of the victims authorised to participate are male.[1792] No victims have yet been authorised to participate in the Libya Situation or in the case against Gaddafi & Al-Senussi. With the exception of the Mbarushimana case in the DRC Situation, the Muthaura & Kenyatta case in the Kenya Situation and the Gbagbo case in the Côte d'Ivoire Situation, a significant majority of victim participants are male victims. In the Kenya Situation and related cases, a little over half of all victim participants are female victims.[1793]

The case with the highest relative number of female victims authorised to participate in the proceedings is the Mbarushimana case, in which 62.1% (82 of 132) victims are female. As described in more detail in the **Charges for gender-based crimes** section of this Report, the Mbarushimana case contained the broadest range of gender-based crimes brought before the ICC to date. However, in December 2011, the Pre-Trial Chamber declined to confirm any of the charges against Mbarushimana and he was subsequently released. While the case against Mbarushimana is not yet listed on the Court's website as closed, there are no active proceedings for victims to participate in, unless the Office of the Prosecutor brings additional evidence in this case and, on that basis, requests the confirmation of charges. The second highest percentage of female victims in a single case is in the Muthaura & Kenyatta case in the Kenya Situation, where 57.5% of the victims authorised to participate in the proceedings are female.[1794] In the Gbagbo case female victims represent 54% of all victim participants.[1795]

1787 Figures as of 31 August 2012.

1788 Based on information provided by the VPRS by email dated 20 September 2012.

1789 The VPRS indicated that the gender may be registered as 'unknown' either because the information has not yet been entered in their database or because the applicant did not specify their gender in her/his application and it is not possible to retrieve this information from the application. VPRS indicated that the development of their database is ongoing and that the new database should be fully operational next year, which will enable the VPRS to extract gender disaggregated data. Explanation provided by the VPRS by emails dated 3 September 2012 and 20 September 2012.

1790 The last available gender breakdown of the victims authorised to participate in the proceedings indicated that of the 974 victims accepted as of 30 August 2010, 642 (or 65.9%) were male victims and 327 (or 33.6%) were female victims. See further *Gender Report Card 2010*, p 191. During the period covered by the *Gender Report Card 2011* a gender breakdown of the victims accepted to participate in proceedings was not available.

1791 The VPRS email indicates that all 12 victim participants in the case against President Al'Bashir are male, as are the six participants in the Harun and Kushayb case.

1792 The VPRS email indicates that of the 120 victims authorised to participate in the Lubanga case, 87 are male victims (representing 72.5%). In the Katanga & Ngudjolo case, 246 of the 364 victims (or 67.6%) authorised to participate are male.

1793 The VPRS email indicates that 284 of the 560 victims authorised to participate in the Kenya Situation and related cases (representing 50.7%) are female.

1794 The VPRS email indicates that 134 of the 233 victims authorised to participate in the Muthaura & Kenyatta case are female.

1795 The VPRS email indicates that 75 of the 139 victims authorised to participate in the Gbagbo case are female.

Gender breakdown by Situation/case of victims who have been formally accepted to participate in proceedings[1796]

Situation and cases	Number of male participants	% male participants	Number of female participants	% female participants	Number of institution/org participants	% institution/org participants	Number of gender unknown participants	% gender unknown	Totals
DRC Situation	135	66.5%	65	32.0%	3	1.5%	0	0%	203
Prosecutor v. Lubanga	87	72.5%	33	27.5%	0	0%	0	0%	120
Prosecutor v. Katanga & Ngudjolo	246	67.6%	117	32.1%	1	0.3%	0	0%	364
Prosecutor v. Ntaganda	0	0%	0	0%	0	0%	0	0%	0
Prosecutor v. Mudacumura	0	0%	0	0%	0	0%	0	0%	0
Prosecutor v. Mbarushimana	48	36.4%	82	62.1%	0	0%	2	1.5%	132
DRC Situation and related cases	**516**	**63%**	**297**	**36.3%**	**4**	**0.5%**	**2**	**0.2%**	**819**
Uganda Situation	15	71.4%	6	28.6%	0	0%	0	0%	21
Prosecutor v. Kony et al	22	53.7%	19	46.3%	0	0%	0	0%	41
Uganda Situation and related cases	**37**	**59.7%**	**25**	**40.3%**	**0**	**0%**	**0**	**0%**	**62**
Darfur Situation	8	72.7%	3	27.3%	0	0%	0	0%	11
Prosecutor v. Abu Garda	45	51.7%	42	48.3%	0	0%	0	0%	87
Prosecutor v. Harun & Kushayb	6	100%	0	0%	0	0%	0	0%	6
Prosecutor v. Al'Bashir	12	100%	0	0%	0	0%	0	0%	12
Prosecutor v. Banda & Jerbo	47	52.8%	42	47.2%	0	0%	0	0%	89
Prosecutor v. Hussein	0	0%	0	0%	0	0%	0	0%	0
Darfur Situation and related cases	**118**	**57.6%**	**87**	**42.4%**	**0**	**0%**	**0**	**0%**	**205**

continued next page

1796 All the figures and percentages used in this table have been calculated on the basis of data provided by the VPRS by email dated 20 September 2012. Where one individual has been accepted to participate in both a Situation and a specific case (or accepted as a victim participant in more than one case) they are included in both sets of figures.

Situation and cases	Number of male participants	% male participants	Number of female participants	% female participants	Number of institution/org participants	% institution/org participants	Number of gender unknown participants	% gender unknown	Totals
CAR Situation	0	0%	0	0%	0	0%	0	0%	0
Prosecutor v. Bemba	1,885	42.3%	1,737	39%	8	0.2%	822	18.5%	4,452
CAR Situation and related cases	**1,885**	**42.3%**	**1,737**	**39%**	**8**	**0.2%**	**822**	**18.5%**	**4,452**
Kenya Situation	0	0%	0	0%	0	0%	0	0%	0
Prosecutor v. Ruto & Sang	177	54.1%	150	45.9%	0	0%	0	0%	327
Prosecutor v. Muthaura & Kenyatta	99	42.5%	134	57.5%	0	0%	0	0%	233
Kenya Situation and related cases	**276**	**49.3%**	**284**	**50.7%**	**0**	**0%**	**0**	**0%**	**560**
Libya Situation	0	0%	0	0%	0	0%	0	0%	0
Prosecutor v. Gaddafi et al	0	0%	0	0%	0	0%	0	0%	0
Libya Situation and related cases	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**
Côte d'Ivoire Situation	0	0%	0	0%	0	0%	0	0%	0
Prosecutor v. Gbagbo	64	46%	75	54%	0	0%	0	0%	139
Côte d'Ivoire Situation and related cases	**64**	**46%**	**75**	**54%**	**0**	**0%**	**0**	**0%**	**139**
Totals	**2,896**	**46.4%**	**2,505**	**40.2%**	**12**	**0.2%**	**824**	**13.2%**	**6,237**

Breakdown of applications for reparations[1797]

This year, for the first time, data on the applications for reparations received by the Court was made available by the VPRS, including a gender breakdown of these statistics. As of 31 August 2012, the Court has received a total of 10,363 applications for reparations, the majority of which was received in the context of the Kenya Situation and related cases (4,157 or 40.1%), the CAR Situation and related cases (4,029 or 38.9%) and the DRC Situation and related cases (1,331 or 12.8%). For 3,591 (or 34.7%) of the total number of applications for reparations received the gender was registered as 'unknown'.[1798] The Court received 11 applications for reparations from institutions and/or organisations. Of the 6,761 applicants for reparations for whom the gender is registered, 3,449 (or 51%) are male applicants and 3,312 (or 49%) are female applicants.

1797 Figures as of 31 August 2012.

1798 The VPRS explained that the gender may be registered as 'unknown' either because the information has not yet been entered in their database or because the applicant did not specify their gender in her/his application and it is not possible to retrieve this information from the application. VPRS indicated that the development of their database is ongoing and that the new database should be fully operational next year, which will enable the VPRS to extract gender disaggregated data. Explanation provided by the VPRS by emails dated 3 September 2012 and 20 September 2012.

Gender breakdown by Situation of applications received for reparations[1799]

Situation and cases	Number of male applicants	% male applicants	Number of female applicants	% female applicants	Number of institution/org applicants	% institution/org applicants	Number of gender unknown applicants	% gender unknown applicants	Total	%
DRC	517	38.8%	740	55.6%	1	0.1%	73	5.5%	1,331	12.8%
Uganda	85	19.1%	112	25.2%	0	0%	248	55.7%	445	4.3%
Darfur	26	14%	4	2.2%	0	0%	156	83.9%	186	1.8%
CAR	1,720	42.7%	1,562	38.8%	10	0.2%	737	18.3%	4,029	38.9%
Kenya	1,004	24.2%	798	19.2%	0	0%	2,355	56.7%	4,157	40.1%
Libya	3	42.9%	3	42.9%	0	0%	1	14.3%	7	0.1%
Côte d'Ivoire	94	45.2%	93	44.7%	0	0%	21	10.1%	208	2%
Totals	**3,449**	**33.3%**	**3,312**	**32.0%**	**11**	**0.1%**	**3,591**	**34.7%**	**10,363**	

1799 All figures in this table are based on information provided by the VPRS by email dated 20 September 2012 and relate only to applications for reparations registered by the VPRS.

Partially collective victim participation process

In 2005, standard application forms were developed by the VPRS to facilitate victims' applications. A booklet explaining the functions of the Court, victims' rights and how to complete the participation and reparations forms was made available on the Court's website, along with the standard application forms. In 2009, the Court undertook a review of these application forms in consultation with civil society. New forms were introduced on 3 September 2010 and are available on the ICC's website.[1800] They are considerably shorter than the original forms, having been reduced from 17 pages to 7, and appear to have been made simpler and clearer to complete. A single new form also combines the applications for victim participation and victim reparations into one document. The system for victim participation continues to evolve and presents significant challenges to the Court, particularly in terms of balancing the increasing number of victims applying, and being recognised, to participate in proceedings with the fair trial rights of the accused, including the right to an expeditious trial, as well as concerning the institutional capacity to manage and process the victims applications and victims' legal representation.

1800 Forms, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Forms.htm>, last visited on 15 October 2012.

The Prosecutor v. Laurent Koudou Gbagbo

In 2012, Single Judge Silvia Fernández de Gurmendi initiated a revision to the victim application and participation process, with the principal aim to improve the expeditiousness of the victim participation process for the Gbagbo case in time for the confirmation of charges hearing.[1801] At the request of the Single Judge, the Registry developed a proposal for a 'partially collective' victim participation process. The Prosecution,[1802] Defence,[1803] the Office of Public Counsel for Victims (OPCV),[1804] and REDRESS[1805] submitted comprehensive observations. These parties and participants expressed concerns about substantive changes to the system of victim participation as well as about the process initiated by the Single Judge in the Gbagbo case. The implementation of a partially collective application process could have a significant impact on victim participation in the Gbagbo case, as well as in future cases before the Court.[1806]

Rule 89(4) of the Rules of Procedure and Evidence provides that where there are numerous applications, the Chamber may consider them in a manner that ensures the effectiveness of the proceedings. Rule 90 also permits the Chamber to request common legal representation in cases with numerous victims.[1807] In her first decision on the matter, the Single Judge noted that for the limited purpose of the Article 15 proceedings in the Gbagbo case,[1808] the Chamber had

1801 Judge Fernández de Gurmendi was responsible as Single Judge for carrying out the functions of Pre-Trial Chamber II in the Situation in Côte d'Ivoire and the related cases. ICC-02/11-01/11-61.

1802 ICC-02/11-01/11-54.

1803 ICC-02/11-01/11-52.

1804 ICC-02/11-01/11-66.

1805 ICC-02/11-01/11-62.

1806 Notably, at its tenth session in December 2011, the ASP, noting the continued backlogs in processing victims' applications, requested the Court to review the system of victims' applications to ensure sustainability, effectiveness and efficiency.

1807 As noted by Trial Chamber II in the Katanga & Ngudjolo case, common legal representation attempts to reconcile 'the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible'. ICC-01/04-01/07-1328, para 11.

1808 Article 15 addresses the Office of the Prosecutor's powers to initiate investigations, investigate, and submit to the Pre-Trial Chamber a request for authorisation to open an investigation. Following the submission of a request to initiate investigations from the Prosecutor, 'victims may make representations to the Pre-Trial Chamber', pursuant to Article 15(3).

received 1,047 communications purporting to be victims' representations, of which 679 had appeared to meet the requirements of Rule 85.[1809]

Several concerns regarding both the substance and procedure of the proposed system for victims' collective participation were raised by the filings by the parties, the OPCV and REDRESS. They expressed uncertainty concerning the potential effect of the proposed changes to the victim participation process on the expeditiousness of the proceedings as well as on the substantive value of victim participation. Specifically, they raised questions regarding: whether the forms and process proposed by the Registry were in conformity with the applicable legal framework, which explicitly foresees individual victim participation;[1810] whether the process would actually be more efficient and could be implemented within the existing budget;[1811] and the potential implications for the rights of both the Defence and participating victims.[1812] With regard to victims' rights, the submissions specifically expressed concern relating to ensuring legitimate representation of the groups through potential intermediaries or 'contact persons', and the legitimacy of the use of these 'contact persons',[1813] as well as the ability to ensure confidentiality and accessibility for vulnerable victims, including victims of gender-based violence.[1814]

As these and other issues were raised throughout the proceedings, internal procedural and substantive inconsistencies in both the Registry's proposal and the Single Judge's related findings were revealed, and subsequently clarified. For example, the Registry proposed both the use of intermediaries and a process that required VPRS-only assistance to victims. Likewise, the Single Judge initially foresaw the engagement of contact persons to file applications 'on behalf of' victims, conflating the two provisions set forth in Rule 89(3) of the Rules of Procedure and Evidence.[1815]

1809 ICC-02/11-01/11-33, para 6, footnote 7. Rule 85 of the Rules of Procedure and Evidence sets forth the criteria for determining victim status.

1810 ICC-02/11-01/11-66, paras 10-15.

1811 ICC-02/11-01/11-52, paras 33-37; ICC-02/11-01/11-66, paras 25-27.

1812 ICC-02/11-01/11-52, para 27; ICC-02/11-01/11-66, para 34.

1813 ICC-02/11-01/11-52, paras 29-30; ICC-02/11-01/11-66, para 30; ICC-02/11-01/11-62, paras 32-40.

1814 ICC-02/11-01/11-66, para 16; ICC-02/11-01/11-62, para 26-27, 34; ICC-02/11-01/11-51, para 25.

1815 Rule 89(3) of the Rules of Procedure and Evidence provides: 'An application [for victim participation] may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled'.

Further, although the clear focus of the proposed revisions was to encourage individual applicants to join their claims for the purpose of efficiency, the Registry simultaneously suggested that the proposed form and process, with significant involvement of the VPRS, would enable victims to claim collective harm.

Although the Single Judge's order that the Registry urgently initiate the process in order to implement a partially collective system of victim participation in time for the confirmation of charges hearing,[1816] the subsequent decision to authorise the participation of 139 victims did not make reference to the six collective applications received. The Single Judge subsequently included all of the victim applicants into one group for the purpose of common legal representation for the confirmation of charges hearing, in line with established jurisprudence.[1817] The decisions issued by the Single Judge are discussed in more detail, below.

The Registry's proposed system for the partially collective participation of victims constitutes part of a long-term project, stemming from an ASP resolution.[1818] The Registry's proposal was drawn from its prior practice, particularly in the Article 15 proceedings[1819] in the Kenya Situation.[1820] However, as explained by

1816 ICC-02/11-01/11-33, paras 7, 9, 11.

1817 ICC-02/11-01/11-138, para 40.

1818 On 21 December 2011, the ASP adopted Resolution ICC-ASP/10/Res.5 'underlining the "need to consider reviewing the victim participation system with a view to ensuring its sustainability, effectiveness and efficiency"'. ICC-02/11-01/11-29-Red, para 19.

1819 Article 15 addresses the Prosecutor's powers to initiate investigations, investigate, and submit to the Pre-Trial Chamber a request for authorisation to open an investigation. Following the submission of a request to initiate investigations from the Prosecutor, 'victims may make representations to the Pre-Trial Chamber', pursuant to Article 15(3).

1820 In relation to victim representations for the purposes of the Article 15(3) proceedings in Kenya, on 10 December 2009, the Pre-Trial Chamber requested the VPRS to: (i) identify community leaders and other appropriate representatives of the range of victims' communities; (ii) make contact with such community leaders and representatives, whether directly or through intermediaries; (iii) provide information to community representatives about the current process, including that they may make representations to Pre Trial Chamber II, and how they could do so; (iv) ensure that it was made clear to community representatives that the process of making representations to the Court was strictly voluntary; and (v) explain to the community representatives that the victims they represent may make either collective or individual representations, or both. ICC-01/09-4. The Registry subsequently undertook a mission in Kenya and submitted a detailed report to the Pre-Trial Chamber outlining the process it had undertaken and the challenges encountered. See further ICC-02/11-01/11-29-Red, paras 6-18.

the Registry, a lower threshold applied to victims' representations pursuant to Article 15(3) in relation to the Prosecution's investigations, since it served a different purpose and was substantially different from the pre-trial application process. Notably, victims' representations under Article 15(3) do not require the submission of identity documents, evidence of the consent of victims to have a person act on their behalf, if applicable, a full description of the incident and the harm suffered or information as to why the personal interests of victims are affected, information which is required for the purposes of participation at the pre-trial phase.[1821]

Many of the issues raised by the parties and participants were either not fully addressed by the three relevant decisions on victim participation and common legal representation, or remained unclear from the documents available to the public.[1822] Significantly, among the concerns raised was the potential effect of group participation on particularly vulnerable victims, especially victims of sexual violence. As noted by REDRESS and the OPCV, victims of gender-based violence might be disinclined to share their experience and the harm suffered in the context of a larger group. Conversely, the group might not fully take their experiences into consideration in a collective account of the events due to concepts of shame and cultural norms.[1823]

At the time of writing this Report, the Court did not appear to have undertaken a review of the new, partially collective application system, the new application forms, or their impact on the efficiency, effectiveness and value of victim participation. Nonetheless, following the submission of the Registry's proposal in the Gbagbo case, Single Judge Kaul in the Uganda Situation has requested the Registry to prepare a similar process in that Situation and the Kony *et al* case.[1824]

Development of the Registry's proposal in the Gbagbo case

The Registry's initial observations: proposed 'mixed approach'

Following a meeting between the VPRS, other representatives of the Registry and the Single Judge to assess 'the victims' application process and to explore different options, including the possibility of applying a collective approach to victims' applications for participation in the present case',[1825] on 20 January 2012, the Registry filed a comprehensive confidential report, 'containing observations on the possible legal, financial and practical implications of such a collective approach'.[1826] The report contained the Registry's observations on: the approach adopted in the Kenya Situation regarding victim participation in the Article 15[1827] process and its potential application to the Gbagbo case, the Registry's views on the collective participation of victims, and the Registry's proposed approach in the present case. The Registry underscored the budgetary implications, possible conflicts with the existing legal framework, and potential practical obstacles, including the limited time frame, the fact that the new VPRS' database was not yet fully operational, and delays occasioned by verifications.

In its filing, the Registry expressed concern about the request by the Single Judge for a collective application process. The Registry clearly indicated that while a collective-only process could reduce the workload involved in reviewing applications, it was not compatible with the legal framework, which foresees individual victim participation.[1828] It asserted that a wholly collective approach would require amendments to the ICC's statutory framework.[1829] This argument

1821 ICC-02/11-01/11-29-Red, para 18.
1822 ICC-02/11-01/11-33; ICC-02/11-01/11-86; ICC-02/11-01/11-138.
1823 As the system for collective participation develops, in addition to the need to balance the individual right to participate in the proceedings with a more collectivised process, any attempts to ensure cultural sensitivity, including providing for the recognition of collective harm, must not replicate local discriminatory practices, including those that discriminate against women. See also the observations of the Women's Initiatives for Gender Justice on gender and reparations in the Lubanga case, ICC-01/04-01/06-2876.
1824 ICC-02/04-191, para 22.
1825 ICC-02/11-01/11-43, para 1.
1826 ICC-02/11-01/11-43, para 2. In its filing, the Registry indicated that the submission of the report followed an informal email request from a legal officer of Pre-Trial Chamber III on 17 January 2012. However, the procedural history section of the filing was almost entirely redacted. A public, redacted version of the report was made available on 6 February 2012, ICC-02/11-01/11-29-Red.
1827 Article 15 of the Rome Statute addresses the Proseuctor's powers to initiate investigations, investigate, and submit to the Pre-Trial Chamber a request for authorisation to open an investigation.
1828 ICC-02/11-01/11-29-Red, paras 23, 25.
1829 ICC-02/11-01/11-29-Red, para 25.

was reiterated several times by both the OPCV[1830] and the Defence[1831] in their subsequent observations.

The Registry suggested that implementing substantial changes in the victim participation system was part of a long-term project, and it was thus not possible to implement such 'radical changes in the following months' for the Gbagbo case. The Registry indicated that it could implement less radical changes within the available financial resources in the short term.[1832]

Ultimately, the Registry suggested that a 'mixed approach', one that would reflect 'individual considerations through a collective approach would require a clearly defined methodology in terms of both collection and processing of information'.[1833] However, it also noted that such a mixed approach would likely result in discrepancies between individual and collective applications, requiring verification by the Registry and thus additional delays and costs.[1834] Concerns over discrepancies related to vulnerable victims, especially victims of gender-based crimes, as well as the potential duplication of applications, were also raised by the parties,[1835] the OPCV[1836] and REDRESS.[1837]

1830 In its filing of 19 March, the OPCV asserted that Article 68(1) requires a strictly personalised, individual approach. It indicated that while it supports the goals of the Registry and Single Judge, the 'mixed approach' would create confusion. It argued that the collective form disregards the complexity and magnitude of the crimes, as it provided for a single perpetrator and location, assuming that the crime(s) occurred at the same time. The OPCV stressed that the individual declaration form does not take into account the relevant criteria, as set forth in Regulation 86, when compared to the form currently in use. ICC-02/11-01/11-66, para 10-14.

1831 The Defence reiterated the Registry's observation that the statutory framework would have to be amended, as it foresees individual participation. Essentially, the Defence argued that collective participation would require a modification of the victims' scope of participation, as victim would be granted participation status without necessarily having met the necessary criteria for their applications to be found admissible, as required by Regulation 86 of the Regulations of the Court. It noted that the prima facie standard for establishing that applicants were victims of the crimes charged was already low. ICC-02/11-01/11-41, paras 13-16, 19.

1832 ICC-02/11-01/11-29-Red, para 32.

1833 ICC-02/11-01/11-29-Red, para 27.

1834 ICC-02/11-01/11-29-Red, para 28.

1835 ICC-02/11-01/11-52, paras 35-36; ICC-02/11-01/11-54, para 5.

1836 ICC-02/11-01/11-66, para 33.

1837 ICC-02/11-01/11-62, paras 26-27, 34.

Specifically, the Registry proposed a three-fold approach: (i) an initial mapping report to identify the main communities of victims, their representatives, civil society groups and security concerns; (ii) the collection and processing of victims' applications to participate and for reparations; and (iii) the organisation of common legal representation for victims.[1838] The first would involve gathering information on the nature and features of victims' communities, and identifying potential intermediaries and service providers; the Registry would then establish a mechanism to identify, contact and assist relevant victims and develop a secure core network of intermediaries, for future communication, transmission of application and trainings.[1839] The proposed use of intermediaries to assist victims and to facilitate future communication with the Court became an issue of concern for the Defence[1840] and the OPCV.[1841]

Finally, the Registry requested the Chamber to set a 'reasonable final deadline' for the submission of victims' applications to the Registry for participation in the confirmation of charges hearing.[1842] It recommended using the approach for common legal representation adopted for the Kenya Situation and in Banda & Jerbo case,[1843] and that the legal representatives should be selected at the early stages of the case. It thus suggested that the Chamber initiate this process at the earliest opportunity.[1844]

In a decision issued on 6 February 2012, the same day the Registry's observations were made public, the Single Judge indicated that the development of

1838 ICC-02/11-01/11-29-Red, para 34. The Single Judge would later hold that the partially collective application process was applicable to participation only, not reparations. ICC-02/11-01/11-86, para 31.

1839 ICC-02/11-01/11-29-Red, paras 35, 37.

1840 ICC-02/11-01/11-52, paras 29, 38-42.

1841 ICC-02/11-01/11-66, para 28, 30.

1842 ICC-02/11-01/11-29-Red, para 38. This request was reiterated by the Defence on two occasions. ICC-02/11-01/11-41, para 20. In response to the requests by the Registry and the Defence asking that the Chamber establish a deadline for the submission of victims' applications well in advance of the confirmation of charges hearing, in a decision on 5 April 2012, the Single Judge set the deadline for the submission of victims' applications to 9 May 2012. ICC-02/11-01/11-86.

1843 In the Banda & Jerbo case in the Darfur Situation, and in the Ruto *et al* and Muthaura *et al* cases in the Kenya Situation, the Registry filed proposals for common legal representation of victims at an early stage of the proceedings. See further *Gender Report Card 2011*, p 298-302.

1844 ICC-02/11-01/11-29-Red, para 39.

a partially collective system for the purposes of this case 'would be without prejudice to continuing the long-term consideration of a collective system that could eventually be applied by the Court as a whole and could, in fact, serve as a valuable experience which may be beneficial to such a long-term project'.[1845] She agreed with the Registry in finding that under the existing legal framework, 'collective victims' applications cannot be imposed but individual victims may be encouraged to join with others so that a single application is made by a person acting on their behalf, with their consent', pursuant to Rule 89(3).[1846] The Single Judge thus framed the partially collective process in terms of the joinder of individual claims, and did not distinguish the two provisions set forth in Rule 89(3): the possibility to act on behalf of a victim and making an application with the victim's consent.

The Single Judge ordered the Registry to urgently conduct a mapping exercise to identify the main communities or groups of victims to 'encourage potential individual applicants to join with others and to that effect to consent to a single application to be made on their behalf in accordance with Rule 89(3)'.[1847] Finally, the Single Judge ordered the Registry to propose an application form for that purpose

The Registry's proposal on a partly collective application process for victim participation

On 23 January 2012, the Registry submitted a confidential *ex parte* proposal on a partly collective application process for victims' participation,[1848] which was made public on 29 February.[1849] The filing contained two annexes, a draft collective application form and individual declaration form, and a report explaining the proposed implementation of the process. At the outset of the report, the Registry reiterated its three main concerns: (i) the system's compliance with the statutory framework; (ii) the need to both enhance efficiency and 'the substantive value of the victims' participation process'; and (iii) the limited time and resources available in the present case.[1850]

The Registry underscored that the proposal was 'not a scheme for collective participation', and the groups would not, as such, be considered as victims. Rather, the Registry characterised the proposal as a step toward a more collective approach. It indicated that the proposal would allow for the 'individual presentation and treatment of victims' applications for participation [...] while at the same time introducing a measure of collective management of the process'.[1851] The proposal thus contained two elements – a group form and an individual declaration form; the former to describe elements common to the group; the latter to confirm the individual's participation in the group and to describe the personal harm suffered.[1852] The Registry further underscored that applicants would not be obliged to use the collective form, which would be offered in appropriate circumstances only, and that it also expected to receive individual application forms.[1853]

The Registry indicated that it had attempted to ensure that each element of information as set forth in Regulation 86(2) of the Regulations of the Court[1854] were addressed in the proposed forms to the same extent that they were in the individual application form currently in use. It suggested that the proposed forms only departed from the current form to the extent necessary to take collective elements into account, and that both the collective application and individual declaration forms would be submitted to the parties for their observations.[1855] The Prosecution,[1856] Defence[1857] and the OPCV,[1858] in their respective filings, all expressed concern about both the content of the information solicited on the forms and the fact that the parties would be required to review two forms.

The Registry indicated that the proposed approach was possibly more efficient, as it would greatly reduce the number of pages to be reviewed and processed, but that it might not have either sufficient time, or

1845 ICC-02/11-01/11-33, para 7. The Single Judge also held that the Registry's proposed forms and systems were to be utilised for the purposes of the Gbagbo case only. See ICC-02/11-01/11-86, para 16.
1846 ICC-02/11-01/11-33, para 8, failing to distinguish clearly between the provisions set forth in Rule 89(3).
1847 ICC-02/11-01/11-33, para 10.
1848 The Registry's proposal was submitted to the Single Judge several days prior to the Single Judge's decision, 6 February 2012, ordering the Registry to develop the proposal and a form. It was also submitted before its prior report had become public and transmitted to the parties, also on 6 February.
1849 ICC-02/11-01/11-45.
1850 ICC-02/11-01/11-45, para 8.
1851 ICC-02/11-01/11-45, para 10.
1852 ICC-02/11-01/11-45, para 11.
1853 ICC-02/11-01/11-45, para 12.
1854 Regulation 86(2) sets out the requirements for standard application forms for victim participation. The proposed collective application form did not inquire into the ethnicity or the languages spoken by the group. See ICC-02/11-01/11-45-AnxB, question 6. While the collective application form disaggregated information by gender for adults, the individual declaration forms do not indicate the sex or the age of the applicant. ICC-02/11-01/11-45-AnxB, question 5.
1855 ICC-02/11-01/11-45, paras 13, 15, 18.
1856 ICC-02/11-01/11-54, para 5.
1857 ICC-02/11-01/11-52, paras 12-15, 22.
1858 ICC-02/11-01/11-66, paras 12-15.

the resources to assist all interested groups in the field given that the number of applications, the location of each group and the time required for consultation with each group all remained unforeseen.[1859] The Registry reiterated the risk of overlap between individual and collective applications. For example, one victim may be linked to more than one group if the same person suffered more than one crime in different locations.[1860] It also foresaw potential discrepancies between collective applications and individual declarations if the individual raised acts outside the experience of the group, or suffered crimes of a more sensitive nature, such as sexual violence.[1861]

The Registry indicated that the presence of its staff in the field to meet with, and provide assistance to, the groups would be 'essential', given that the method had not yet been tested. It also argued that significant staff presence would serve as a means of quality control, ensuring the completion of applications and the necessary supporting documentation.[1862] However, as detailed below, the Prosecution identified problems with 52, or approximately one third, of the 164 applications received.[1863]

The Registry further underscored the potential for capturing collective harm through a more collective process.[1864] It indicated that it planned to 'use the opportunity to record in the form the group's perspectives on, *inter alia*, notions of the collective harm suffered by the members of the group or community, reparations (including collective reparations) and input on common legal representation'.[1865]

The Registry drew the Single Judge's attention to the potential risks involved in requiring groups to select a representative to 'act on their behalf'. REDRESS also provided extensive observations on this issue.[1866] The Registry suggested that this could create divisions within each of the groups, especially if there had been no pre-existing structure linking the group. It also noted the difficulties of ascertaining whether consent had been freely given, and whether the particular suffering of all members of the group would be taken into account. It also suggested that difficulties might arise if the group or members of the group wanted to change the person acting on its behalf. It asserted that where existing structures were already in place, such as associations, families or clans, there might be a genuine willingness and consent to the person acting on behalf of the group.[1867]

The Prosecution, the OPCV and REDRESS expressed particular concern about grouping victims and having persons acting on behalf of that group in relation to victims of gender-based crimes. The Prosecution suggested that while some victims would consent to disclose their identities, others would wish to remain anonymous, which could pose a problem with regard to the collective application, as the particulars concerning the victimisation might inadvertently

1859 ICC-02/11-01/11-45, paras 17, 19, 32. The Registry envisaged the following process: (i) it would receive applications in the field to be registered, scanned and processed by the VPRS in The Hague; (ii) the group form would be given a unique application number with its own stamp; (iii) the individual declaration form would be attached to the group form and also given a unique application number. They would appear as related in the internal system; (iv) the Registry would submit one report to the Chamber on each group application pursuant to Regulation 86(5), which would cover both the collective and individual elements; and (v) the Registry would transmit both forms to the parties with the necessary redactions pursuant to Rule 89(1). The Registry further indicated that it had developed a less ambitious work plan as proposed in its first report, more adapted to the existing budget. ICC-02/11-01/11-45, paras 19, 20.

1860 The Prosecution underscored, however, that each applicant could be represented by only one common legal representative. ICC-02/11-01/11-54, para 8. The Single Judge would later hold that individuals could only pertain to one group. ICC-02/11-01/11-86, paras 27-28.

1861 ICC-02/11-01/11-45, para 23.

1862 ICC-02/11-01/11-45, para 29. However, several applications were rejected as incomplete or due to the lack of supporting documentation.

1863 ICC-02/11-01/11-131, paras 4-9.

1864 ICC-02/11-01/11-45-AnxA, para 28.

1865 ICC-02/11-01/11-45-AnxA, para 30. The Registry specifically proposed to use the opportunity to consult with victims concerning their preferences concerning common legal representation, and to initiate a process of selection in order to make a recommendation to the Chamber. ICC-02/11-01/11-45, para 43.

1866 REDRESS underscored: 'Victims' poverty and illiteracy makes them susceptible to manipulation'. It noted the perception that group leaders might benefit more from the process than victims, which resulted in internal tensions within groups, and that victims might have difficulty voicing disagreement and seek to leave the group. It also identified the difficulties in ensuring the inclusion of women as group representatives. Finally, REDRESS noted that victims' representatives often lacked sufficient legal understanding in order to convey the outcome of the process, and required basic legal training. See ICC-02/11-01/11-62, paras 40-53.

1867 ICC-02/11-01/11-45-AnxA, paras 34, 35. The Registry did not clearly differentiate between the possibility to act on behalf of a victim and make an application with the victim's consent, as set forth in Rule 89(3).

reveal their identities.[1868] The OPCV expressed concern that the public collection of victims' views could prevent them from fully sharing sensitive information. It suggested that the victims of sexual violence often hid such crimes from their communities and families, and thus the collective application form would discourage their participation or put them in potentially re-traumatising situations.[1869] It also contended that victims might be easily influenced or compelled to follow the views expressed by the group or 'leader'.[1870] OPCV underlined that:

> victims of gender crimes cannot be part of a collective action since, in most of instances, the crime suffered from is hidden from the community, and even from their own family. Encouraging the use of a collective form might therefore result in discouraging the participation of victims of gender crimes or in putting some of them in a very delicate and potentially traumatising situation, which would clearly defeat the purpose of the application process and will violate the obligation of the Court pursuant to article 68(1).[1871]

Similarly, REDRESS stressed that the group might not be 'all-embracing of victims' experiences', and that there is 'a risk that women and girls would be under-represented in victims' groups'.[1872] REDRESS further underscored that there is a risk that the harm suffered by victims of gender-based crimes may not be included in the group's collective claim, either because victims/survivors may be reluctant to report such crimes or because of a tendency by group or family members to omit such references due to shame and stigmatisation.[1873]

1868 ICC-02/11-01/11-54, para 7.
1869 ICC-02/11-01/11-66, para 16.
1870 ICC-02/11-01/11-66, para 16.
1871 ICC-02/11-01/11-51, para 25.
1872 ICC-02/11-01/11-62, paras 33, 36.
1873 ICC-02/11-01/11-62, para 34.

Second decision on victim participation

After having received extensive observations by the parties, the OPCV and by REDRESS, on 5 April 2012, the Single Judge issued a decision, clarifying many of the inconsistencies and detailing more precisely the process to be followed.[1874] At the outset of the decision, she clarified that the draft collective application form was for use in the instant case only, and 'does not — and could not — replace the standard form approved by the Presidency for the entire Court'.[1875] In contrast to the submissions by the Prosecutor, OPCV and the Defence, she found that the individual declaration form included 'the information necessary under the statutory provisions' for participation, but noted that in order to testify at the confirmation of charges hearing 'further information could be provided, if needed, in order to allow proper questioning of the victims'.[1876] She also found that the form would obtain sufficient information for the legal representatives to effectively perform their mandate. She indicated that the attached identity document would be authoritative regarding the date of birth and gender of the applicant, so that it was not necessary that this information be specifically indicated on the form.[1877]

The Single Judge held that only Registry staff could assist applicants in filling out the collective form, finding that VPRS assistance would minimise duplication. She stated, 'it will be the responsibility of VPRS staff in the field to explain to victims that they may only apply once, either individually or collectively'.[1878] In response to the concerns expressed by the Defence, REDRESS and the OPCV concerning 'sensitive categories of victims', including victims of sexual crimes, she found that the 'close involvement of VPRS staff [was] crucial' as they could suggest that the victims file individual applications or form

1874 ICC-02/11-01/11-86.
1875 ICC-02/11-01/11-86, para 16.
1876 ICC-02/11-01/11-86, paras 17, 19, 20. The Single Judge made no specific finding on the process by which supplementary information would be obtained in the future, especially for victims of sensitive crimes, such as sexual violence.
1877 ICC-02/11-01/11-86, paras 21-23.
1878 ICC-02/11-01/11-86, paras 27-28. Although for the purposes of the confirmation of charges hearing all participating victims were to be joined into one group with one common legal representative (see below), It remains unclear from the Single Judge's holding how effective participation and representation would be assured to victims who have suffered harm from more than one incident or crime charged should the victims be divided into more than one group in the future.

a distinct, 'more homogenous' group. She reaffirmed in this regard that the VPRS was obliged pursuant to Rule 16(1)(d) to take 'gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings'.[1879] In response to the Defence and the OPCV's concerns regarding the application of the concept of 'collective harm', the Single Judge stated that 'the fact that individual victimisation will be alleged by the applicants within a common collective narrative does not mean that the harm will lose its individual character', but rather 'the personal character of the harm suffered by each of the applicants constituting the group will be fully retained'.[1880]

The Single Judge held that the partially collective application form applied only to participation in the proceedings, not to reparations, and that additional information would be needed from the victims should the charges be confirmed and for the reparations phase.[1881] Concerning potential confusion regarding the 'contact person', the Single Judge clarified that Rule 89(3) envisaged two alternatives: a person making an application with the victim's express consent, and a person acting on behalf of a victim who cannot apply for him or herself, such as a child or a disabled victim. She found that the first alternative applied in the context of the partially collective application form, and held that the contact person would be limited to making the application and could assist with further communications between the Court and victims if needed.[1882] She thus clarified that the individual victims forming part of a group would be admitted to participate on their own behalf.[1883]

In light of the Single Judge's holding that the involvement of VPRS staff was essential in providing assistance to victims to fill out the applications, she first instructed the Registry to modify the form to enquire only as to whether the member of the group or the contact person had been assisted by a translator or interpreter.[1884]

The Single Judge requested that in the forthcoming report on the applications,[1885] the Registry draft a paragraph on each individual applicant, containing the information required by Rule 85, including 'the location, time and the specific alleged event and the resultant harm suffered by the applicants'.[1886] The Single Judge further ordered the Registry: to immediately consult with the applicants concerning their preferences for legal representation, to assess whether they could be grouped further for the purpose of common legal representation, to identify potential common legal representatives, and to provide recommendations to the Chamber in this regard no later than 16 May.[1887]

1879 ICC-02/11-01/11-86, para 29.

1880 ICC-02/11-01/11-86, para 30.

1881 ICC-02/11-01/11-86, para 31. The Single Judge made no specific finding on the process by which supplementary information would be obtained in the future, especially for victims of sensitive crimes, such as sexual violence.

1882 ICC-02/11-01/11-86, para 34.

1883 ICC-02/11-01/11-86, para 35. The Single Judge ordered the Registry to modify the collective application for participation. In light of her holding, clarifying that the contact person would not act 'on behalf of' the victim, but only file an application with his or her consent, pursuant to Rule 89(3), she instructed the Registry to amend both the collective and individual forms accordingly. ICC-02/11-01/11-86, paras 33-34, requiring the deletion of question 14 in part B of the collective form, and section 4 of the individual declaration form. Likewise, she instructed the Registry to amend the form to allow persons to act on behalf of children or the disabled, providing evidence of kinship or guardianship and proof of identity of both persons. ICC-02/11-01/11-86, para 36. The modifications ordered by the Single Judge thus brought the forms into conformity with Rule 89(3).

1884 ICC-02/11-01/11-86, para 27, requiring a modification of question 2 of the proposed form.

1885 Regulation 86(5) of the Regulations of the Court provides: 'The Registrar shall present all applications [for victim participation] to the Chamber together with a report thereon. The Registrar shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims'.

1886 ICC-02/11-01/11-86, para 38. The Single Judge rejected the Defence request to obtain a copy of the report, and ordered the Registry to transmit unredacted copies of the applications to the Chamber and the Prosecution, and to redact identifying information from those transmitted to the Defence. ICC-02/11-01/11-86, paras 39, 41-43.

1887 ICC-02/11-01/11-86, para 38.

Registry's report on victim's application to participate and proposal for common legal representation

On 16 May 2012, the Registry filed its first report on the victims' applications to participate in the proceedings related to the Gbagbo case and a report on victims' common legal representation.[1888] The Registry's report on the victims' application for participation, pursuant to Regulation 86(5) of the Regulations of the Court, included a total of 63 applications, individual and collective, to participate.[1889] These included six collective applications, to which 101 individual declarations were attached, collected by the Registry during a mission to Côte d'Ivoire from 11 April to 10 May 2012. The Registry indicated that it had also received 75 individual applications, of which 57 were complete.[1890]

Jointly with its report on victims' applications, the Registry submitted a proposal for common legal representation,[1891] indicating that it had conducted consultations with victims while on mission in Côte d'Ivoire and that common legal representation would be organised in this case prior to any victims having been accepted. The Registry recommended appointing a single common legal representative.

1888 ICC-02/11-01/11-123, ICC-02/11-01/11-120. On 12 March 2012, the Registry filed a report on the mapping of victims, containing a brief summary of the 'preliminary information on civil society actors that work with or provide assistance to victims of the post-electoral violence', prepared by an expert consultant. The Registry's filing noted that although the consultant had also initiated a parallel mapping of victims' groups, this information was not included in his preliminary report to the Registry. Rather, it contained information on 10 out of 61 existing organisations that provided assistance to victims, which the consultant had planned to screen during his mission. Two of the organisations focused exclusively on female victims. The Registry stated that 'while this preliminary information is an important first step, it does not permit as such to draw any objective conclusion with regards to specific possible groupings of victims for the purpose of applying to participate in the proceedings'. ICC-02/11-01/11-55, paras 8-10. The consultant's final mapping report was submitted as an annex to its first report on victim participation on 16 May. ICC-02/11-01/11-123-Anx7.

1889 ICC-02/11-01/11-123.

1890 ICC-02/11-01/11-123, p 4, footnote 6.

1891 ICC-02/11-01/11-120.

Decision on victims' participation and common legal representation

On 4 June 2012, the Single Judge issued a decision on victims' participation and their common legal representation for the confirmation of charges of hearing.[1892] The Prosecution[1893] and Defence[1894] had submitted their observations on the applications prior to the decision, identifying numerous problems. In particular, the identification of numerous incomplete applications by both parties[1895] raised questions concerning the practical effectiveness of the costly VPRS field presence, which was intended to ensure quality control and complete applications, including all of the necessary supporting documentation. In her decision, Judge Fernández de Gurmendi rehearsed the criteria for participation, to be demonstrated on a *prima facie* basis, and indicated that a case-by-case assessment would be based on the 'intrinsic coherence' of the application.[1896] With respect to the appointment and role of a 'contact person', the Single Judge found that in addition to the provisions enabling an individual to file an application with the victim's consent or to apply 'on behalf of' a victim who could not otherwise do so, pursuant to Rule 89(3), 'individual

1892 ICC-02/11-01/11-138.

1893 ICC-02/11-01/11-131, para 4. The Prosecution identified 112 applicants that met all of the criteria of Rule 85(a). It identified 42 incomplete applications that related to one of the four incidents charged, and two additional incomplete applications from victims of widespread attacks initiated during the time period in question, all of which were missing documents. It identified seven completed applications not related to one of the four incidents charged. The Prosecution also noted one applicant that applied on behalf of her daughter, who was over the age of 18 and should thus have submitted her own application.

1894 ICC-02/11-01/11-133. The Defence prefaced its observations on the applications with a critique of the partially collective system, arguing that this system did not save time, because it required parties to analyse and cross-reference the collective application forms with the individual declaration forms. It further questioned the logic underlying the establishment of each group, noting that the form indicated the alleged crime to be the common link between the applicants, while the individual members of each group alleged different crimes on their declaration forms. Like the Prosecution, the Defence found numerous applications incomplete, and argued that they should be rejected based on the jurisprudence of Court.

1895 Despite the high number of incomplete applications identified by the parties, the Single Judge rejected only 18 applications, as detailed below. ICC-02/11-01/11-138.

1896 ICC-02/11-01/11-138, paras 20-24.

victims could provide their consent for a third person ("contact person") to make a joint single application for all of them'.[1897]

The Single Judge adopted the Registry's suggestion to place all of the victims into one group for the purpose of common legal representation, and endorsed its suggestion regarding the structure of the legal team, namely: principal counsel, a team member based in the field and a case manager.[1898] However, rather than adopt the selection panel's recommendation regarding legal counsel,[1899] she appointed counsel from the OPCV to be lead counsel, as 'the most appropriate and cost-effective system at this stage as it would enable to combine understanding of the local context with experience and expertise of proceedings before the Court, without causing undue delay in the case at hand'.[1900] She suggested that the system for common legal representation could be revisited in the future.

After rehearsing the full range of victims' participatory rights, she admitted 139 applicants, rejected 18 applicants, and deferred the decision as to one upon the receipt of more information.[1901] The Single Judge did not indicate on which grounds the 18 applicants were rejected, and made no reference to the collective applications filed, or to the implementation of the system for partial collective participation.

1897 ICC-02/11-01/11-138, para 26, providing no legal citation or reference.

1898 ICC-02/11-01/11-138, paras 38, 40.

1899 The Registry's report submitted on 16 May 2012 indicated that after widely distributing a call for counsel and conducting interviews with short-listed candidates, a selection panel suggested establishing a team comprised of legal counsel and a team member based in the field in order to combine experience and expertise in international criminal litigation with an understanding of the case and victims' situation in the field and the capacity to continually inform and receive instructions from clients. The list of proposed counsel was submitted in a confidential annex. ICC-02/11-01/11-120, paras 11-16.

1900 ICC-02/11-01/11-138, para 45.

1901 The Single Judge noted that where there was doubt about the extent of the assistance provided to the victim in filling out the application, she would either reject the application or defer the decision until further information was received. ICC-02/11-01/11-138, para 23.

Recommendations

States Parties/ASP

Judiciary

Office of the Prosecutor

Registry

States Parties/ASP

Independent Oversight Mechanism

- **Prioritise** development of the full breadth of functions of the Independent Oversight Mechanism (IOM) by 2014, including investigation, inspection and evaluation facilities, as described in Article 112(4) of the Rome Statute.

- **Harmonise** within the IOM the functions and roles currently carried out by a range of other ICC bodies, including the Internal Auditor, the External Auditor, the Committee on Budget and Finance, the Office of Internal Audit and the Audit Committee. The UNOIOS recommendation in the assurance mapping study that inspection and evaluation could be carried out by the Office of Internal Audit[1902] runs contrary to the intention of Article 112(4) which provides that the IOM shall have 'inspection, evaluation and investigation' functions. Any potential duplication in the current oversight functions being carried out by the Office of Internal Audit should be harmonised within the IOM.

- **Enable** the IOM to fully operationalise its powers to investigate consistently across all organs and areas of the Court. This is essential to ensure the integrity of the Court, and to demonstrate the necessary level of independence and accountability. Imperative to an effective oversight mechanism, and to establishing and maintaining the credibility of the Court, no elected officials, including those in leadership positions within organs of the Court, should have the right to exercise a veto power regarding the initiation of an investigation. IOM reports should not be refined or amended by Heads of Organs once the reports are finalised. In addition, the direct participation of Heads of Organs in IOM investigations should be at the explicit request of the IOM and relate to the nature of the complaint and investigation.

1902 'Report on the assurance mapping study in the International Criminal Court', *Office of Internal Oversight Services, United Nations*, 25 May 2011.

- **Provide** a clear definition of the IOM's powers to initiate investigations, ensuring that the IOM retains the power to initiate investigations following the receipt of information provided by Organ Heads, staff or contractors, and the discovery of information. Following the adoption of Resolution ICC-ASP/9/Res.5 at its ninth session in December 2010, which adopted the IOM Operational Mandate,[1903] in 2011 discussions focused on the IOM Manual of Procedures, without a formal decision having been adopted by the ASP in December 2011.[1904] While discussions on the IOM have continued in 2012, the IOM facilitator has indicated that, due to time constraints, no discussion took place on the operationalisation of the IOM's investigative function.[1905] In September 2012, the Hague Working Group again deferred the discussion on the IOM for final adoption by the ASP at its twelfth session in 2013. When discussions on the IOM resume in 2013, they should ensure that the IOM can initiate investigations following the receipt and discovery of information.
- **Make** the IOM ultimately accountable only to the ASP, in compliance with the intentions contained within the Rome Statute, and fully independent from every organ of the Court, its officers and divisions.
- **Prioritise** the recruitment of the permanent Head of the IOM and reclassify the position to a P5 level to underscore the importance given to this function by States Parties, to reflect the seriousness of the issues the IOM will deal with, and to provide the IOM with the necessary structural authority to implement the mandate conferred to it by States Parties.[1906]
- **Provide**, with urgency, a definition of 'serious misconduct', expressly including sexual violence, rape, abuse and harassment.
- **Make explicit** the need for a gender-competent IOM in the composition of its staff and operational scope.

1903 ICC-ASP/9/Res.5, Annex. The IOM Operational Mandate as adopted by the ASP in December 2011 dealt solely with the IOM's investigative function. The IOM Operational Mandate provides that where the relevant Organ Head objects to the initiation of an investigation by the IOM *proprio motu* because it would interfere with judicial or prosecutorial independence, such concerns shall be taken into account. If disagreement between the IOM and the Organ Head about the need for an investigation persists, the matter shall be determined by a third party, to be appointed by the Bureau of the ASP. ICC-ASP/9/Res.5, paras 20-25.

1904 In 2011, progress was made on the development of the Manual of Procedures, which was drafted by the first Temporary Head of the IOM, and which sets out in detail the IOM's mandate, including the details of its functions. While the Manual of Procedures was scheduled to be submitted to the ASP for its consideration and approval in 2011, in October 2011 the Hague Working Group deferred all discussions relating to the IOM to 2012. One of the more contentious issues during the discussions in 2011 and 2012 was the interpretation of ASP Resolution ICC-ASP/9/Res.5, particularly the interpretation of the term '*proprio motu*', and whether it provides for two or three ways for opening investigations by the IOM. Most States Parties are of the view that, pursuant to the IOM Operational Mandate, the IOM can initiate an investigation: (i) after a referral by a Head of Organ of alleged misconduct; (ii) after receiving a complaint from a staff member or contractor; and (iii) on its own accord. See 'Draft amendment to the proprio motu/external third party section of the Manual of Procedures', *Hague Working Group*, 28 June 2011, para 76. See also the Office of the Prosecutor, 'Contribution paper on the Investigation Function of the IOM', 25 June 2012.

1905 '[Draft] Report to the Bureau on the Independent Oversight Mechanism', 2 October 2012, *Hague Working Group Facilitator*, para 18.

1906 Currently, the post of Head of the IOM is classified at a P4 level.

- **Ensure** that the IOM develops procedures to refer cases to national jurisdictions regarding allegations of suspected criminal misconduct and to cooperate with national authorities to investigate and prosecute such conduct. Particular attention should be paid to alleged cases of sexual violence, given the variations in national jurisdictions regarding the definition of rape and other forms of sexual violence, including sexual harassment.

- **Elaborate** an outreach programme for the IOM to Court staff so that they are properly informed of the IOM's role, mandate and proceedings. The need for a continuous outreach activity within the Court's organs has been identified by the first IOM Temporary Head following her preliminary meetings with Court personnel in 2010.[1907]

- **Approve** rules for the IOM that hold accountable staff members found to have committed criminal offences or other serious misconduct (including, if appropriate, by termination of employment). The Staff Rules and Regulations should therefore ensure that all staff are provided with training, including training of ICC personnel on the Court's position on sexual exploitation and abuse, so that there can be no misunderstanding regarding conduct that is not acceptable and the potential consequences of such misconduct. 'Serious misconduct' in this regard should be defined in the applicable rules and regulations to expressly include, but not be limited to, sexual violence, rape, abuse and harassment, and should result in an automatic waiver of immunity for ICC staff. All staff should be provided with training on these rules.

- **Relying** solely on national laws and authorities may not be sufficient in circumstances where certain acts are not criminalised in the country within which they have occurred, but may be criminalised by international law and laws applicable to a majority of States Parties and where the alleged criminality is consistent with the definitions in the Rome Statute. In such instances, particularly in relation to rape and other forms of sexual violence where national variations exist in the definitions of rape, there should be a procedure for the IOM to be able to conduct an investigation, reach its own determination and advise on the appropriate response to the allegations.

- **Request** the IOM to provide an annual report to the ASP, outlining the number and types of allegations and complaints, the source (external, internal) and the number of allegations relating to each organ, division and unit of the Court. In this way the IOM will be able to track patterns of misconduct, waste or mismanagement within the Court and provide recommendations to the Court for interventions to address the repetition of such conduct by particular divisions or specific individuals. This ensures a systemic rather than incident-based approach to preventing and addressing serious misconduct.

- **Finalise and operationalise** the IOM Manual of Procedures and ensure it includes provisions on whistle blower protection and protection from retaliation.

1907 Discussion Paper on the IOM, prepared by the facilitator, Mr Vladimir Cvetkovic (Serbia), for the sixth meeting of The Hague Working Group on 10 September 2010, para B(1)(1)(a).

Governance

- **Strengthen** the Court's institutional framework and existing management structure to support the increasing work of the Court.
- **The ASP** should ensure that the bodies within the Court responsible for compliance, including compliance with Staff Rules and Regulations, are working and that quality management procedures are fully established by the twelfth session of the ASP. The ASP, as part of their governance duties, should actively review reports of the respective bodies, while leaving actual management to the appropriate organ and staff structure.
- **The Court** should strengthen quality management procedures to ensure that they meet professional standards.
- **The Court and the ASP should** fully embrace and support an effective and thorough structural review process in 2013 to address issues of: institutional efficiency; under-utilisation or under-performance of sections or posts; under-resourcing of critical areas supporting the mandate and efficacy of the Court; organisational and individual performance; human resource allocation; and financial support to ensure a sustainable and effective ICC.

Budget

To the ASP

- **Approval** of the annual Court budget should be based on the mandate of the ICC, the demand on the Court and the available resources. In its annual review of the budget, the ASP should ensure the Court is sufficiently funded to effectively carry out its mandate, and that it exercises the most efficient use of resources for maximum impact. Under-resourcing could hinder the Court's work in significant areas, such as investigations, legal proceedings, outreach and field operations. It could also affect the Court's ability to adequately protect witnesses, victims and intermediaries during trial, and limit resources necessary to facilitate victim participation in the proceedings. Appreciating the current economic environment, States should also balance the importance of providing sufficient funds for the ICC to carry out its mandate as a criminal court.
- **The ASP** should significantly increase the resources available to the VWU to enable it to address the larger number of witnesses within its programme due to the increase in the number of investigations and trials in 2013. The VWU must also have the resources needed to respond to its full mandate to provide support and protection to victims and intermediaries whose lives may be at risk as a result of engaging with, or assisting ICC enquiries and investigations or at risk as a result of testimony provided by a witness.[1908] Currently victims and intermediaries are excluded from the security provisions of the Court and as such participate or assist the ICC at great risk to themselves, their families and their communities.

1908 Rule 16 (2), Rome Statute.

- **Finance** the activities of the Court through the regular budget, avoiding the use of the Contingency Fund to support the core activities of the Court. A reliance on the Contingency Fund to support activities that are fully anticipated by the Court not only contradicts the purpose of the Fund, but sets a dangerous precedent for future years. Replenishing the Contingency Fund should also be a priority for the ASP in 2013.

- **While for some** appointments a GTA position may be appropriate, permanent appointments should be made for positions that have been mandated by the Rome Statute and its subsidiary bodies. Regardless of the nature of the contract with staff (GTA or regular contract), all positions must be advertised and recruited in a transparent manner in compliance with the Staff Rules and Regulations.

- **The Registry** should urgently request, and the ASP should immediately provide the necessary funds for the position of Psychologist/Trauma Expert within the VWU to be upgraded to an established post. This position has been categorised as a GTA since 2009. Such expertise is mandated by Article 43(6) of the Rome Statute and as such this position should be securely integrated within the structure of the VWU as an established post. In addition, four new Psychologist/Trauma Expert posts should be urgently recruited to support the five trials and one confirmation of charges hearing expected in 2013.

- **The review** of the legal aid system should not be solely driven by a concern for the costs of the system of legal aid mandated by the Court's basic documents, but should rather be based on the effectiveness of the system. It is imperative that such revision not impede the right to a fair trial, and the right to adequate representation and participation of victims.

- **In reviewing** the system of legal aid to victims, ensure that the right of victims to choose their legal representative, as set out in Rule 90(1), is respected. While the right of victims to choose their legal representative is subject to the Chamber's prerogative to manage the proceedings, victims should not be pressured into agreeing to a common legal representative and should be provided with accessible information about all available options associated with legal representation and their rights as applicants before the ICC. In addition, the possibility to choose external legal counsel has a number of benefits that would be lost with a full internalisation of victim representation, including allowing for counsel with international experience, strong domestic experience and local knowledge (eg language and culture) and allowing victims, especially victims of sexual violence, to choose a female counsel who may have expertise important to them, such as experience representing victims/survivors of sexual and gender-based violence.

- **Adopt** a decision at the eleventh session of the ASP to open an ICC-African Union Liaison Office with an advance team in 2013. Such an office would:

  - Stabilise and enhance regional support for the ICC among AU governments;
  - Increase awareness among African peoples of the work and mandate of the ICC; and
  - Provide cohesion between the ICC and the policy related efforts of the AU regarding regional prevention and accountability for war crimes, crimes against humanity and genocide.

- **Undertake** discussions with the UN Security Council and UN General Assembly regarding financing costs arising from referrals of Situations to the Court by the UN Security Council under Article 16 of the Rome Statute. As provided for in Article 115 of the Rome Statute, the expenses of the Court may be covered by 'funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council'. As noted, referrals of Situations by the UN Security Council can significantly impact on the Court's budget. For example, in 2011 the Libya Situation constituted one of the main cost drivers of the Court's budget. Future Security Council Resolutions referring Situations to the ICC should support the provision of funds should a referral result in the Office of the Prosecutor initiating an investigation; and should also explicitly include a reference to immunity for ICC staff.

To the Court

- **The Court should** accurately and with specificity present its budget proposals to the CBF. The Court must continue to prioritise improvements in its budget process as well as embark on longer term financial planning and a multi-year budget cycle and forecast.[1909] In its report, the CBF noted improvements in the 2013 proposed budget, including 'better justifications and more refined assumptions'.[1910] The CBF also 'accepted in many instances the Court's analysis of the negative impact of other [budget] cuts identified in the paper'.[1911] The CBF also noted that the 2013 proposed budget did not account for a number of costs, which could have significant impacts on the Court's finances.[1912]

- **The Court should** consider the submission of a 3-year expenditure forecast to the CBF, in addition to the proposed annual budget, as a means of encouraging medium term planning, reducing unexpected budget expenditures and building the capacity of the Court, a large and complex institution, to more effectively identify known or knowable costs.

Implementing legislation

- **States should undertake** a holistic and expansive implementation of the Rome Statute into domestic legislation, ensuring that the gender provisions are fully included, enacted and advanced in relevant legislation and judicial procedures.

- **The Court should retain** jurisdiction in situations where a government may have initiated domestic prosecutions for crimes within the jurisdiction of the ICC until such time as the national process demonstrates full compliance with the complementarity standards and threshold of the Rome Statute including in relation to the Articles, Elements of Crimes, and Rules of Procedure and Evidence with regard to the prosecution of gender-based crimes.

1909 In 2011, the CBF noted a number of budget issues, including the unprecedented number of potential expenses which were not contained in the 2012 proposed budget. The Committee also noted the significantly higher expenses in the Judiciary which had been miscalculated in the 2012 budget submitted by this organ to the CBF. ICC-ASP/10/15, Advance version, p 8.
1910 ICC-ASP/11/15, Advance version, para 2.
1911 ICC-ASP/11/15, Advance version, Annex V, para 1.
1912 ICC-ASP/11/15, Advance version, para 116-117.

Elections

To the ASP

- **Elect a new Deputy Prosecutor** at the eleventh session of the ASP, taking into account the requirement that the Deputy Prosecutor 'shall be [a person] of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases [and] have excellent knowledge of and be fluent in at least one of the working languages of the Court' as provided for in Article 42(3) of the Rome Statute.

- **Provide a recommendation** to the judges regarding the qualifications, experience and criteria desired for the position of Registrar taking into account the requirement that the Registrar 'shall be [a person] of high moral character, be highly competent in and have an excellent knowledge of and be fluent in at least one of the working languages of the Court' as provided for in Article 43(3) of the Rome Statute. The general recommendation should encourage the judges to consider candidates with strong management experience; a track-record in leading large institutions (staff of over 400+ employees); experience in managing institutional complexities; sound financial, administrative, policy and human resource experience; and combined experience of more than 20+ years in management positions including as a senior manager, director, CEO, Registrar or equivalent post.

- **Ensure** a future Search Committee, or similar structure for the position of Chief Prosecutor, adequately addresses geographical and gender representation as reflected in the Rome Statute in the general staffing of the ICC and as explicitly stated in provisions regarding the composition of the bench of the ICC. In contrast to the general geographical and gender representation principles outlined in the Rome Statute,[1913] the 2010 ASP Resolution forming the Search Committee[1914] omitted inclusion of a gender provision and consequently an all-male Search Committee was appointed.

- **Ensure** the explicit inclusion of gender-provisions within the Resolution establishing a future Search Committee for the position of Chief Prosecutor.

- **Support** the Search Committee to initiate and carry out its work in a timely manner allowing for sufficient consultations, interviews with candidates, the sharing of information with all States Parties, ensuring sufficient time for States to become familiar with the final candidates and for the exchange of views.

- **Retain** the practice of submitting at least three suitable candidates to the ASP for election, thus ensuring all States Parties are actively involved in the election of the Chief Prosecutor.

1913 Articles 36(8) and 44(2) of the Rome Statute. See further 'Election of the Prosecutor for the International Criminal Court: Review of the Process and Final Candidates', *Women's Initiatives for Gender Justice*, 28 November 2011, available at <http://www.iccwomen.org/documents/Prosecutor-Election-2011.pdf>.

1914 ICC-ASP/9/INF.2.

- **Enhance** transparency in the Search Committee process and avoid the perception that a small group of States, via the Search Committee and/or the Bureau of States Parties, can determine the election of the next Chief Prosecutor through:
  - Ensuring sufficient diversity among the States represented on the Search Committee and the Bureau, eg no more than one State Party should be represented on both the Search Committee and the Bureau. In the 2011 election process, four-fifths of the States on the Search Committee were also represented on the Bureau, to whom they submitted the final short list of candidates. This duplication contributed to many States questioning the transparency of the process.
  - Regular briefings by the Search Committee for all regional groups with full disclosure of the process, the interviews with final candidates, and the decision-making procedures undertaken by the Search Committee.
  - The provision to States Parties of the objective reasons for elimination and inclusion of candidates in the final short list submitted to the Bureau and the ASP for election.
  - Ensuring consistency in the representational mandate of the Search Committee. In the 2011 election process, those on the Search Committee were deemed to be regional representatives.[1915] However in their final report, the members of the Search Committee identified themselves as acting in their personal capacity, rather than as representatives of the regional groups.[1916]
- **The Bureau** should provide the short list of candidates, established by the Search Committee, to the ASP for election without further refinement. The Bureau should have an oversight function during the election process by ensuring the Search Committee carries out its tasks in line with the ASP Resolution establishing the Committee; by ensuring that all States are informed of the short-listed candidates once these have been determined by the Committee; and by ensuring the final election is carried out in an efficient and professional manner.
- **Ensure** the development of explicit and detailed criteria for the position of Chief Prosecutor in line with the general criteria outlined in Article 42(9) of the Rome Statute.

1915 ICC-ASP/9/INF.2, para 4.
1916 ASP/2011/117, para 10.

Judiciary

- **In 2013**, the Judges should appoint a Registrar in accordance with Article 43(3), with high level management experience; a sound track record in leading large institutions reflecting the size and scale of the registry staff of the ICC (400+ employees); experience in managing institutional complexities; sound administrative, policy and human resource experience; a significant record in the development and management of annual budgets of over €100 million; and combined experience of 20+ years in management positions including as a senior manager, director, CEO, Registrar or comparable post.
- **Ensure** that Rule 90(4) of the Rules of Procedure and Evidence is respected in the appointment of common legal representatives for groups of victims, by ensuring that the distinct interests of individual victims, particularly the distinct interests of victims of sexual and gender-based violence and child victims, are represented and that any conflict of interest is avoided.
- **Ensure** that requests to the Registry for a proposal for the common legal representation of victims in the proceedings are made in a timely manner, so as to allow for sufficient time to consult with and seek input from victims to ascertain their views and wishes in relation to legal representation.
- **Ensure** that victims participating in the proceedings can readily access the modalities that have been granted to them. In this regard, the Court should take steps to streamline the process whereby participating victims do not need to apply to participate at each phase of proceedings including interlocutory appeals. Expansive, meaningful participation by victims is not incompatible with the rights of the accused, and a fair and impartial trial.
- **Continue to allow** the active participation of victims, through their legal representatives, in proceedings including their ability to present evidence and to question witnesses.
- **Ensure** that any (partially) collective victim applications process, as is currently in use in the Gbagbo case, is thoroughly reviewed and assessed, including through consultations with victims, before it is adopted in other cases and Situations. The implementation of a partially collective application process could have a significant impact on victim participation before the Court.
- **Closely monitor and review** the quality and efficacy of victim participation in relation to the collective legal representation as outlined and ordered by the judges in the Ruto & Sang, and Muthaura & Kenyatta cases.[1917]
- **The *Victims' Form for Indigence*** should be finalised and approved by the judges as a matter of urgency. This has been pending approval since 2006. The form is the basis for assessing whether an individual qualifies for the Legal Aid Programme, which would enable her or him to engage Counsel to represent his or her interests. For many victims, the Legal Aid Programme represents her or his only means to have representation before the ICC. The *Victims' Form for Indigence* must be accessible for victims and intermediaries to understand and must be handled with complete confidentiality to ensure the safety of both.

1917 ICC-01/09-01/11-460; ICC-01/09-02/11-498.

- **Continue utilisation** of the special measures provided in the Rome Statute and the Rules of Procedure and Evidence to facilitate the testimony of victims of sexual violence. The effective use of these provisions by Trial Chambers I, II and III reflect the importance and necessity of such measures.

- **In managing** witness testimony, ensure that victims of sexual violence are given the opportunity to testify about their experiences in full. Such testimony 'is a vital component of the justice process and a crucial part of the experience of justice for victims/witnesses of these crimes'.[1918] Minimise interventions by judges and counsel in such testimony, while taking necessary measures to preventing re-traumatisation of witnesses in consultation with the VWU.

- **During 2013**, the Presidency of the ICC should oversee an audit on sexual and other forms of harassment and an audit on workplace compliance with Rules and Regulations. These audits should include each organ and be implemented at all levels of the institution. The results of the audit should be shared with the Study Group on Governance and the Bureau of the Assembly of States Parties. See the **Structures and Institutional Development Recommendations**.

- **The Presidency** should consider organising a legal seminar for all judges on the existing jurisprudence from the *ad hoc* tribunals in relation to gender-based crimes. Judicial decisions at the ICC have at times departed from existing jurisprudence, and misapplied established tests, with the result that charges have not been included in summonses to appear, arrest warrants, or confirmed in confirmation of charges proceedings.[1919] In issuing decisions, judges should include legal reasoning, including explicit and detailed reference to legal authority relied upon.

- **The Presidency** should consider organising a judicial seminar on the application of the standards of proof required at the different stages of proceedings. This would ensure a more consistent and universal approach by all ICC judges in each Division of Chambers.

- **The Presidency** should urgently undertake, and make public, a transparent, comprehensive and independent investigation into the events that gave rise to the detention of ICC staff while on mission in Libya. The investigation should focus not only on the alleged conduct of the Defence Counsel, but also on the larger environment within the ICC which may have contributed to this significant crisis for the Court. The investigation should address all aspects of the crisis, including: an analysis of the preparatory stage of deployment; an examination of the security assessment and evaluation carried out prior to the mission; a determination as to whether or not the necessary and appropriate protocols and agreements had been established between the ICC and the Libyan authorities prior to deployment; an evaluation of the composition of the mission team; a full review and evaluation of the response by the ICC once staff had been detained, including what lessons have been learned to strengthen the crisis response facility of the ICC should it face similar situations in the future; and a review and evaluation of the post-release phase.[1920]

1918 'Presentation by Brigid Inder to the UNHCHR Expert Meeting on Gender and Witness and Victim Protection', *UN High Commissioner for Human Rights*, Geneva, 26-27 May 2011.

1919 See eg the decision on confirmation of charges in *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, in which Pre-Trial Chamber II used the appropriate test for cumulative charging as set forth by the International Criminal Tribunal for the former Yugoslavia Appeals Chamber in *Prosecutor v. **Delalić***, but did not properly apply the test to the facts in this case; see also *Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/05-01/08-466. See also the decision on the issuance of Summonses to Appear in *The Prosecutor v. Francis Kirimi Muthaura, Muigai Uhuru Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-1, para 27, in which Pre-Trial Chamber I considered forced circumcision not to be an act of a sexual nature, without further elaborating on its finding. The Chamber's limited reasoning and its denial of appeal on this point represents a problematic precedent for the ICC's interpretation of the law regarding gender-based crimes.

1920 Letter from the Women's Initiatives for Gender Justice to the President of the ICC regarding the investigation into the situation leading to ICC staff detention in Libya, 6 August 2012, on file with the Women's Initiatives for Gender Justice.

Office of the Prosecutor

- **Continue** and strengthen coordination between the Office of the Prosecutor and the VWU to ensure that witnesses, including women, minors, and victims of sexual and gender-based crimes, are safely supported and protected.
- **Strengthen** the investigatory strategies to ensure sufficient evidence is collected to be able to sustain charges for gender-based crimes. As of 17 June 2012, 50% of the charges for gender-based crimes sought by the Office of the Prosecutor have been dismissed during the pre-trial phase.[1921]
- **Urgently review** the Prosecution's strategy for the investigation and presentation of evidence of gender-based crimes. For example, ensure that all documents presented to Chambers clearly specify the links between the facts and the elements of each crime alleged, thereby demonstrating the need to charge distinct crimes for the purpose of addressing different types of harm experienced by the victims.
- **In addition** to the Special Gender Advisor, the Office of the Prosecutor should establish internal gender focal points within the Jurisdiction, Complementarity and Cooperation Division, Investigations Division and Prosecutions Division. The diversity and complexity of the Office of the Prosecutor's work requires attention and capacity in relation to gender issues across each of the Divisions. Given the increase in cases and investigations anticipated in 2013, more staff with gender expertise will be required to ensure the integration of gender issues within the heightened case load which includes seven active investigations, maintenance of nine residual investigations, monitoring of at least eight potential Situations,[1922] and five cases at the trial preparation or trial stage.[1923]
- **As underscored** in the trial judgement in the Lubanga case, the Office of the Prosecutor must continue to strengthen and refine its procedures for, and more effectively manage, the engagement of credible local intermediaries in relation to their work with the Office in locating and liaising with potential and actual witnesses.

1921 16 of 32 total charges for gender-based crimes across the four cases were not confirmed for trial. Two charges of outrages on personal dignity were not confirmed in the Katanga & Ngudjolo case; three gender-based charges (two counts of torture and one count of outrages on personal dignity) were not confirmed in the Bemba case; eight charges of gender-based crimes were dismissed in the Mbarushimana case (2 counts of torture, 2 counts of rape, other inhumane acts, inhuman treatment, persecution and mutilation); while the three counts of gender-based crimes charged against Ali (rape, other inhumane acts and persecution) were not confirmed in the Muthaura & Kenyatta case. Prior to the issuance of the confirmation of charges decisions in the Mbarushimana and Muthaura &Kenyatta cases, the Women's Initiatives had noted that the failure rate for charges of gender-based crimes at the confirmation of charges phase was 33%. The attrition rate of charges for gender-based crimes has increased since 2011. See further *Gender Report Card 2011*, p 125.

1922 ICC-ASP/11/10, p 9.

1923 Estimate of the Women's Initiatives for Gender Justice based on the 2012 trial proceedings in the Bemba, Ruto & Sang, Muthaura & Kenyatta, and Banda & Jerbo (pending resolution of the translation issues) cases. The trial proceedings in the Katanga and Ngudjolo case have completed but the Trial Chamber has not yet issued its trial judgement. Should the charges be confirmed in the Gbagbo case, this could add a sixth trial to the 2013 activities of the OTP.

- **Draft** a code of conduct for counsel applicable to Prosecution counsel. The current Code of Professional Conduct for counsel only applies to 'defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the International Criminal Court'.[1924]

Registry

- **Promote** the Lists of Counsel, Assistants to Counsel, Professional Investigators, and Experts to women. Highlight the need for expertise on sexual and gender-based violence among all potential applicants, and seek such information in the candidate application form. Currently, lawyers with this specialised expertise are not yet explicitly encouraged to apply. The Registry should encourage applications from lawyers with this experience on the ICC website. The CSS should keep updated and accurate lists publicly available on the Court's website.
- **Prioritise** the need for training individuals on the List of Legal Counsel and the List of Assistants to Counsel on the gender provisions of the Rome Statute and interviewing/working with victims of rape and other forms of sexual violence.
- **Rule 90(4)** mandates that when appointing common legal representatives for groups of victims, Chambers and the Registry shall take all reasonable steps to ensure that the distinct interests of individual victims are represented, and that conflicts of interest are avoided. The Registry must ensure that all appointments of common legal representatives remain faithful to this mandate, particularly when the group includes victims of sexual and gender-based violence and/or child victims, and ensure that proposals for common legal representation are presented to the Chambers in a timely manner.
- **The VPRS** must adequately consult with participating victims to ascertain their views and wishes in relation to legal representation, and take those views and concerns into account when making proposals for common legal representation to the Chambers. The section should develop a systematic approach to common legal representation, including adequate consultation with participating victims, taking into account the resources and time needed for such consultation.
- **Guidelines** will be essential to ensure that the distinct interests of victims of crimes of sexual or gender-based violence, especially women and children, are protected when groups of victims are represented by a common legal representative. Training on gender issues and increasing the number of women on the List of Legal Counsel could also assist in ensuring that these distinct interests are protected.

1924 Article 1, Code of Professional Conduct for counsel, ICC-ASP/4/Res.1.

- **Increase** promotion of, and access to, the ICC Legal Aid system. In the context of the ongoing review of the Regulations of the Registry, revise Regulation 132 to allow for a presumption of indigence for victims in appropriate cases, including for women, indigenous communities, those under 18 years of age, and those living in IDP camps.[1925] Streamline the process of applying for legal aid to minimise the burden for victims and their legal representatives.

- **Increase** resources to, and the promotion of, the process for victims to apply for participant status in the proceedings of the Court. The Court must make it a priority to inform women in the seven conflict Situations of their right to participate, the application process, and the protective measures the ICC is able/unable to provide for victims.

- **Actively** plan for the participation of women when seeking input from victims at the situation phase, and put in place safeguards to address security concerns, including ensuring that victim representations made under Article 15(3) remain confidential and are not accessible to the Prosecution.

- **In 2013** VPRS should prioritise completion of the implementation of the new database system for processing applications and provide more accurate data on applicants and recognised victims. Currently there are significant gaps in the data and profile of applicants seeking to be recognised formally as victims by the ICC. The percentage of applicants whose gender is registered as unknown (29.3%) continues to be high.[1926] Identifying trends in the number of victims applying to participate in Court proceedings is critical in order to understand any barriers faced by certain groups of victims and for the purpose of targeting resources and activities towards underrepresented groups. It is also critical to enhance the VPRS's work, planning and internal evaluation regarding the accessibility of the victim participation process to all 'categories' of victims.

- **In the next 12 months**, steps should be taken to urgently address and strengthen the institutional and personnel capacities of the VPRS including, but not limited to: conducting a review of the quality management processes and oversight of the Section; conducting a skills audit of the Section staff; reviewing performance and roles; fully implementing the new data collection function introduced in 2010; and creating a more effective mechanism and response strategy to avoid a backlog of unprocessed victim application forms.

- **Ensure** that the Court's outreach strategies cover all aspects of the Court's procedures and include outreach to communities generally to explain the requirements for victim participation and what it means to be a victim before the Court. Insufficient outreach or incomplete outreach conducted by the Court through the VPRS and the PIDS can significantly and directly increase security concerns for victims participating in ICC trials.

1925 Regulation 4 of the Regulations of the Registry states procedures for the revision of the Regulations. Proposals to amendments to the Regulations are submitted by the Registry to the Presidency for approval. Amendments to Regulation 132 are being considered in the ongoing review at the time of writing this Report.

1926 According to the VPRS 'gender' may be registered as 'unknown' either because the information has not yet been entered in their database or because the applicant has not indicated their gender in her/his application and it is not possible to retrieve this information from the application form. VPRS has indicated that the development of their database is ongoing and should be fully operational in 2013, which will enable the VPRS to extract gender disaggregated data. Explanation provided by the VPRS by emails dated 3 September 2012 and 20 September 2012.

- **Review** the code of conduct for counsel. The review should address issues concerning its scope, so as to ensure it applies to all persons acting on behalf of accused persons or victims. Article 1 of the Code of Professional Conduct for counsel, adopted by the ASP in December 2005, provides that it only applies to 'defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the International Criminal Court'.[1927] The review should further address procedures for monitoring compliance with, and responding to, perceived, reported or actual breaches of the code of conduct, with a view towards strengthening those procedures and provisions of the code of conduct.

1927 Trial Chamber III found that the code does not apply to legal consultants working for a defence team. ICC-01/05-01/08-769.

Acronyms used in the *Gender Report Card 2012*

ACHPR	African Court on Human and Peoples' Rights
ACLT	Advisory Committee on Legal Texts
APC	*Armée populaire congolaise*
ASP	Assembly of States Parties
AU	African Union
CAR	Central African Republic
CBF	Committee on Budget and Finance
CEDAW	Convention on the Elimination of Discrimination against Women
CNDP	*Congrès national pour la défense du peuple*
COMESA	Common Market for Eastern and Southern Africa
CPA	Comprehensive Peace Agreement
DCC	Document containing the charges
DDPD	Doha Document for Peace in Darfur
DPP	Director of Public Prosecutions
DRA	Darfur Regional Authority
DRC	Democratic Republic of the Congo
DRC-CICC	DRC Coalition for the ICC
FARDC	*Forces armées de la Republique démocratique du Congo*
FDH	*Force de défenses pour les droits humains*
FDLR	*Forces démocratiques pour la libération du Rwanda*
FNI	*Front de nationalists et integrationnists*
FOCDP	*Fondation congolaise pour la promotion des droits humains et la paix*
FPLC	*Forces patriotiques pour la libération du Congo*
FRPI	*Forces de resistance patriotique en Ituri*
GNC	General National Congress
GNWVPN	Greater North Women's Voices for Peace Network
GoE	Group of Experts
GRULAC	Group of Latin American and Caribbean Countries
GTA	General temporary assistance
ICC	International Criminal Court
ICD	International Crimes Division (Uganda)
ICGLR	International Conference on the Great Lakes Region
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IDP	Internally Displaced Person
IEC	International Electoral Commission
JEM	Justice and Equality
JLOS	Justice, Law and Order Sector (Uganda)
JUPEDEC	*Jeunesse Unie pour la Protection de l'Environnement et le Développement Communautaire*
LAS	League of Arab States
LJM	Liberation and Justice Movement
LRA	Lord's Resistance Army
M23	*Mouvement du 23 Mars*
MLC	*Mouvement de libération du Congo*
MONUC	*Mission de l'Organisation des Nations Unies en République démocratique du Congo*
MP	Member of Parliament
NCP	National Congress Party
NGO	Non-governmental organisation
NISS	National Intelligence and Security Service
NTC	National Transitional Council (Libya)
ODM	Orange Democratic Movement
OPCD	Office of Public Counsel for Defence
OPCV	Office of Public Counsel for Victims
OSISA	Open Society Initiative for Southern Africa
OSJI	Open Society Justice Initiative
OTP	Office of the Prosecutor
PMFs	*Personnel militaire féminin*, a term used to described girl soldiers
PNU	Party of National Unity
PTSD	Post-Traumatic Stress Disease
RCD-ML	*Congolais pour la démocratie-Kisangani/ Mouvement de libération*
RDF	Rwandan Defence Force
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SGG	Study Group on Governance
SLA-AW	Sudan Liberation Army-Abdul Wahid
SPLM	Sudan People's Liberation Movement
SPLM/A	Sudan People's Liberation Movement/ Army
SPLM-N	Sudan People's Liberation Movement-North
SRSG	Special Representative of the Secretary General
STD	Sexually Transmitted Disease
TFV	Trust Fund for Victims
UN	United Nations
UNICEF	United Nations' Children Fund
UNOCA	United Nations Regional Office for Central Africa
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UPC	*Union des patriotes congolais*
UPDF	Ugandan People's Defence Force
VPRS	Victims Participation and Reparation Section
VWU	Victims and Witnesses Unit
WEOG	Western European and Others Group
WGLL	Working Group on Lessons Learnt

Publications by the Women's Initiatives for Gender Justice

- *Gender Report Card on the International Criminal Court 2012*
- *Gender Report Card on the International Criminal Court 2011*
- *Gender Report Card on the International Criminal Court 2010*
- *Gender Report Card on the International Criminal Court 2009*
- *Gender Report Card on the International Criminal Court 2008*
- *Rapport Genre sur la Cour Pénale Internationale 2008* (*Gender Report Card on the International Criminal Court 2008*, French Edition)
- *Advance Preliminary Report: Structures and Institutional Development of the International Criminal Court*, October 2008

- *In Pursuit of Peace – À la Poursuite de la Paix*, April 2010

- *Making a Statement*, Second Edition, February 2010, reprinted October 2010
- *Prendre Position* (*Making a Statement*, French Edition), Deuxième édition, février 2010

- *Legal Filings Submitted by the Women's Initiatives for Gender Justice to the International Criminal Court: The Prosecutor v. Jean-Pierre Bemba Gombo and The Prosecutor v. Thomas Lubanga Dyilo*, February 2010; Second Edition, August 2012

- *Women's Voices/Dwan Mon/Eporoto Lo Angor/Dwon Mon: A Call for Peace, Accountability and Reconciliation for the Greater North of Uganda*, Second Edition, May 2009, reprinted July 2009 and September 2011

- *Profile of Judicial Candidates*, Election November 2009
- *Profile of Judicial Candidates*, Election January 2009
- *Profile of Judicial Candidates*, Election November 2007

- *Gender in Practice: Guidelines and Methods to Address Gender-based Crime in Armed Conflict*, October 2005

- *Information Card Series: Rights and the Rome Statute*, English, French, Arabic, Spanish, Swahili, Farsi Editions, September 2005

- *Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunals' Jurisprudence and the International Criminal Court's Elements of Crimes*, September 2005

Visit our website www.iccwomen.org to subscribe to the Women's Initiatives' two regular e-letters: *Women's Voices / Voix des Femmes*, and *Legal Eye on the ICC / Panorama légal de la CPI.*

Acknowledgements

Authors Brigid Inder, Katharine Orlovsky, Dieneke de Vos, Lori Mann, Niamh Hayes

Collation and analysis of statistics Vanina Serra

Thanks to the staff of the Women's Initiatives for Gender Justice for their support including Amira Khair, Jane Anywar Adong and Jane Odwong Akwero, and to our interns: Megan Kammerer, for her contribution to editing, research and initial drafting; Sarah Pepper for her contribution to editing; and Laila Alodaat for her contribution to research and legal monitoring.

We would also like to thank the International Criminal Court for the provision of personnel data and training information.

Design and production Keri Taplin, Montage Design

Photography

Front cover photograph: Stock photography

Back cover photographs (see below):

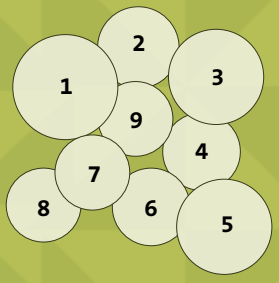

Photo 1: Fatou Bensouda, Chief Prosecutor of the International Criminal Court
Photo 2: Jane Odwong Akwero, Women's Initiatives for Gender Justice
Photo 3: Ambassador Tiina Intelmann, President of the ASP
Photo 4: Members, Greater North Women's Voices for Peace Network, Uganda
Photo 5: Silvana Arbia, Registrar of the International Criminal Court
Photo 6: Valerie Oosterveld, Associate Professor, Faculty of Law, University of Western Ontario, Canada
Photo 7: Niemat Kuku, Sudan
Photo 8: Michelle Jarvis, Senior Legal Adviser to the Prosecutor, International Criminal Tribunal for the Former Yugoslavia
Photo 9: Gladys Ayot, Greater North Women's Voices for Peace Network, Uganda

Photo credits
Photos 1 and 5: Provided by the International Criminal Court
Photos 2, 6, 7, 8 and 9: Photographer Henry Arvidsson, on behalf of the Women's Initiatives for Gender Justice, taken at the International Symposium *Strengthening Gender Justice through International Prosecutions*, The Hague, The Netherlands, September 2012
Photo 3: Provided by the Permanent Mission of Estonia to the United Nations
Photo 4: Photographer Jane Odwong Akwero, Women's Initiatives for Gender Justice

Women's Initiatives for Gender Justice

Noordwal 10
2513 EA The Hague
The Netherlands

Tel +31 (0)70 302 9911
Fax +31 (0)70 392 5270

info@iccwomen.org
@4GenderJustice
www.iccwomen.org

ISBN 978-94-90766-10-8