

Women's Initiatives for Gender Justice



gender 2013
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 with local and/or regional partners in Uganda, the Democratic Republic of the Congo, Sudan and Libya and a legal monitoring programme for all ICC Situation countries: Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic, Kenya, Libya, the Côte d'Ivoire and Mali.

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

- Political, institutional and legal monitoring and advocacy for accountability and prosecution of sexual and gender-based crimes before the ICC and domestic mechanisms
- 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 sexual and 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 sexual and gender-based crimes
- Advocacy for assistance and reparations for women victims/survivors of armed conflicts

The Women's Initiatives for Gender Justice was the first NGO to file before the ICC and is the only international women's human rights organisation to have been recognised with *amicus curiae* status by the Court. To date, the organisation has filed before the ICC on seven occasions, most recently on gender and reparations issues in *The Prosecutor v. Thomas Lubanga Dyilo* case.

The Women's Initiatives for Gender Justice works with more than 6,000 grassroots partners and members across multiple armed conflicts and has offices in The Hague, Cairo, Kitgum and Kampala to support our country-based programmes.

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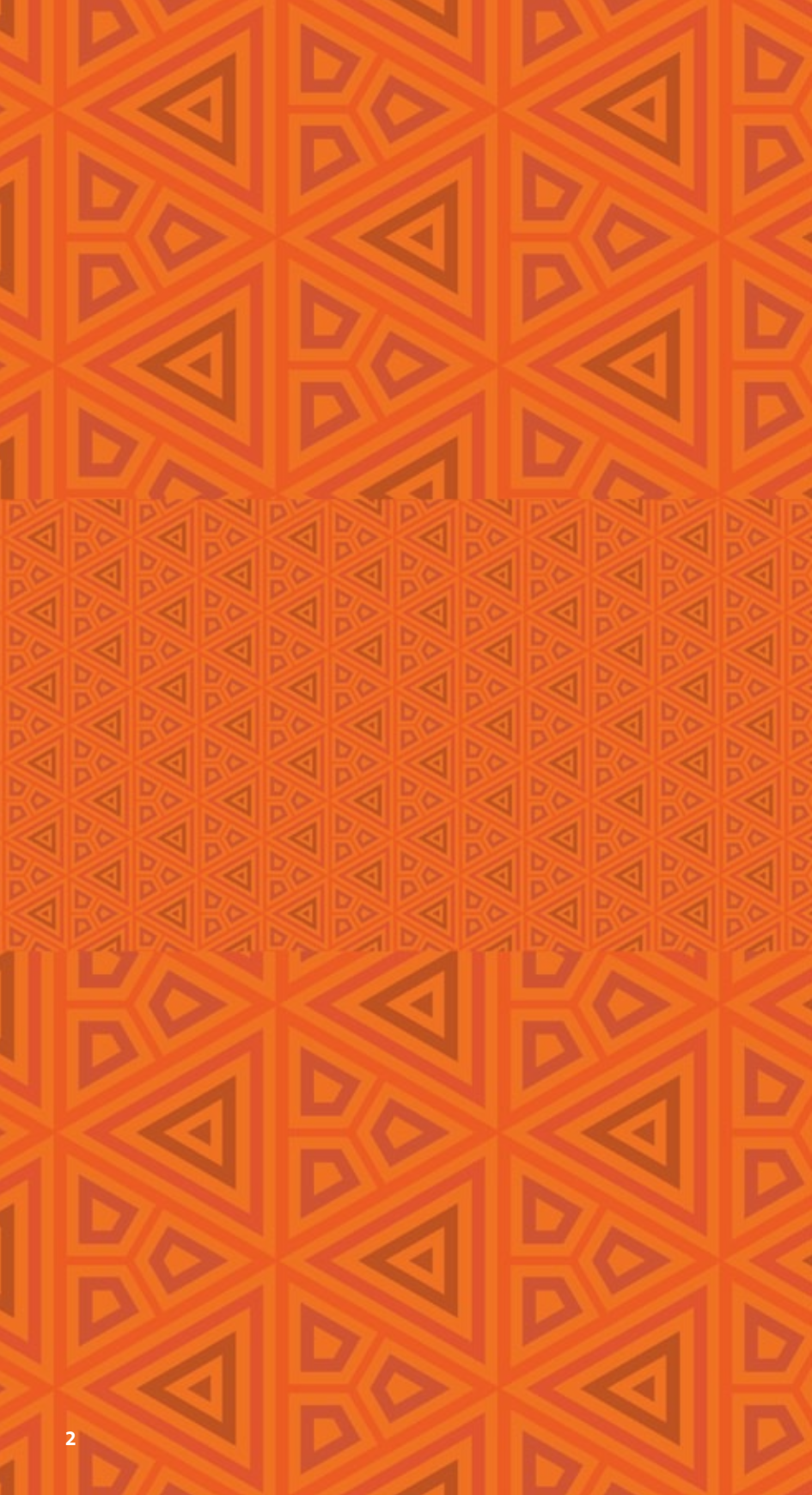
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Introduction

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This is the ninth *Gender Report Card on the International Criminal Court* produced by the Women’s Initiatives for Gender Justice. Its purpose is to assess the implementation by the International Criminal Court (ICC) of the Rome Statute, Rules of Procedure and Evidence (RPE) and Elements of Crimes, and in particular the gender mandates they embody, in the eleven years since the Rome Statute came into force.¹

1 The importance of these three instruments is evidenced by Article 21(1) of the Rome Statute, which states that ‘the Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence’.

The Rome Statute is far-reaching and forward-looking in many respects, including in its gender integration in the following key areas:

- **Structures** — requirement for fair representation of female and male judges and staff of the ICC, as well as fair regional representation; requirement for legal expertise in sexual and gender violence; requirement for expertise in trauma related to gender-based crimes; the unique establishment of the Trust Fund for Victims
- **Substantive Jurisdiction** — crimes of sexual violence, as well as definitions of crimes to include gender and sexual violence as constituting genocide, crimes against humanity and/or war crimes; the principle of non-discrimination in the application and interpretation of the law, including on the basis of gender
- **Procedures** — witness protection and support; rights of victims to participate; rights of victims to apply for reparations; special measures, especially for victims/witnesses of crimes of sexual violence

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

The *Gender Report Card* highlights the most significant developments taking place over the course of a year in relation to the work of the ICC and the ASP. Thus, as the work of the Court has evolved, so too has the focus of the *Gender Report Card*.

The *Gender Report Card 2013* focuses on the following areas:

- **States Parties/ASP**
- **Substantive Work of the ICC**

Within these sections, we review and assess the work of each organ of the Court between 18 August 2012 and 31 October 2013. Additionally, in light of important developments pending at the time of this cut-off date, unlike previous years in which we have launched the *Gender Report Card* at the ASP and accordingly ended our monitoring three months prior to the Assembly, we exceptionally extended our period of review through 31 December 2013 in relation to key decisions and events.²

This edition of the *Gender Report Card* contains a comprehensive analysis of important developments during the ASP, including the proposal and ultimate adoption of three amendments to the RPE, as well as the adoption of a resolution that fully operationalised the Court's Independent Oversight Mechanism (IOM). We provide an overview of all Situations and cases before the Court, and we outline and analyse charges brought by the Office of the Prosecutor for gender-based crimes. We summarise the most significant developments within the unprecedented number of trials underway or awaiting judgement³ before the Court during the period under review. We also cover issues of note in relation to the participation, protection and support of victims and witnesses, including changes to the victim participation application process and the allegations of sexual violence committed against witnesses under the Court's protection. Additionally, for the first time, the *Gender Report Card 2013* contains a section highlighting developments in the Court's ongoing appeals proceedings.⁴

2 Each section of the *Gender Report Card 2013* specifies the relevant period under review.

3 Trials underway include those in the Kenyatta and Banda cases, which are awaiting trial; the Bemba and Ruto and Sang cases, in which trials are ongoing; and the Katanga case, which was awaiting judgement at the time of writing this Report.

4 Appeals proceedings include the Lubanga sentencing and reparation appeals, as well as the appeals of the Ngudjolo trial judgement.

Departing from previous editions, the *Gender Report Card 2013* does not contain a section on **Structures and Institutional Development**. Given that two editions of the *Gender Report Card* will be published during 2014 on an exceptional basis, structures and institutional development will be comprehensively addressed in the 2014 issue of the *Gender Report Card*. The Women's Initiatives will also address other noteworthy decisions and developments not covered in the *Gender Report Card 2013* in forthcoming publications including the *Legal Eye on the ICC* eletter, and the *Gender Report Card 2014*.

As in every *Gender Report Card*, this year we have also included a section outlining the **Substantive Jurisdiction and Procedures** of the ICC. Furthermore, the *Gender Report Card 2013* includes a detailed **Recommendations** section, addressing the substantive work of both the Court and the ASP.

Substantive Jurisdiction and Procedures

Substantive Jurisdiction⁵

.....

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.⁶

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.⁷

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.⁸

Genocide

Rape and sexual violence

The Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention.⁹ 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’.¹⁰

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.¹¹

5 Footnote references in this section pertain to the Rome Statute of the International Criminal Court.
6 Articles 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g). See also corresponding Articles in the Elements of Crimes (EoC).
7 Articles 7(1)(h), 7(2)(g) and 7(3). See also Article 7(1)(h) EoC.
8 Articles 7(1)(c) and 7(2)(c). See also Article 7(1)(c) EoC.
9 Article 6.
10 Article 6(b) EoC.
11 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’.¹²

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.¹³

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.¹⁴

12 Article 54(1)(b).

13 Article 68. See also Rules 87 and 88 RPE.

14 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.¹⁵

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.¹⁶ 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.¹⁷

15 See also Rules 89-93 RPE.

16 Article 75. See also Rules 94 – 97 RPE.

17 Article 79. See also Rule 98 RPE.

States Parties/ASP

18 August 2012 — 30 November 2013

States Parties to the Rome Statute as of 30 November 2013¹⁸

.....

Total number of ICC States Parties: **122**

Total number of ASP Bureau members: **21**¹⁹

President of the ASP: **Ambassador Tiina Intelmann (Estonia)**

Vice-Presidents: **Ambassador Markus Börlin (Switzerland)** and **Ambassador Ken Kanda (Ghana)**

<i>Regional Group</i>	<i>Number of States Parties</i>	<i>% of States Parties</i>	<i>Number of Bureau members</i>	<i>% of Bureau members</i>
African States	34	27.9%	5	23.8%
Asia-Pacific States	18	14.8%	3	14.3%
Eastern European States	18	14.8%	4	19.05%
Group of Latin American and Caribbean States (GRULAC)	27	22.1%	4	19.05%
Western European and Others Group (WEOG)	25	20.5%	5	23.8%

18 Information as adapted from the ICC's website. See 'The States Parties to the Rome Statute', *ICC website*, available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>, last visited on 28 February 2014.

19 The Bureau of the ASP, which assists the ASP in the discharge of its functions, is composed of a President, two Vice Presidents and 18 members, elected by the ASP for three-year terms. The only members of the Bureau who are elected in their personal capacity are the President and the two Vice-Presidents. The other 18 members of the Bureau are States and are represented by country delegates. As of 30 November 2013 the other members of the Bureau are: 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. See Bureau of the Assembly, *ICC website*, available at <http://www.icc-cpi.int/en_menus/asp/bureau/Pages/bureau%20of%20the%20assembly.aspx>, last visited on 28 February 2014. The current Bureau assumed its functions at the beginning of the tenth session of the ASP on 12 December 2011.

African States (34)

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), Côte d'Ivoire (15 February 2013), 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).

Independent Oversight Mechanism

Article 112(4) of the Rome Statute provides that ‘the Assembly of States Parties may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy’. On 26 November 2009, an IOM was established by the ASP with the adoption by consensus of Resolution ICC-ASP/8/Res.1. While it was decided that the independent investigative capacity would be implemented immediately, the inspection and evaluation elements were brought into operation at a later date.²⁰ The IOM was established as of 2009 as a separate Major Programme in the ICC’s annual budget to recognise and ensure its operational independence.²¹

The 2009 resolution establishing the IOM contained an annex addressing the IOM’s scope, function, and jurisdiction (the ‘2009 Annex’). The 2009 Annex specified that the investigative unit would have *proprio motu* investigative powers and would incorporate whistle-blower procedures and protections; and that it would cover all elected officials,²² staff, and contractors.²³ The investigative unit would ‘operate in support of the existing disciplinary structures of the Court to conduct investigations on allegations of misconduct and to ensuring effective and meaningful oversight thereof.’²⁴ The 2009 Annex stated that the investigative functions of the IOM would replace those of the Presidency and provided instead that the factual findings of an IOM investigation would be transmitted to the Presidency, which would then convene a panel of three judges to consider making recommendations.²⁵ The 2009 Annex further provided for the operation of the IOM without prejudice to the privileges and immunities of Court staff and officials, as well as for the accountability of the IOM to the ASP, follow-up by the Court, and a memorandum of understanding with the UN Office of Internal Oversight to provide support services for one year for the operationalisation of the IOM.

20 ICC-ASP/8/Res.1, Annex, para 6(a).

21 ICC-ASP/8/Res.1, para 3. See also ICC-ASP/12/Res.6, Advance version, Annex, para 55.

22 Elected officials are defined as the Judges, the Prosecutor, a Deputy Prosecutor, the Registrar and the Deputy Registrar of the Court. ICC-ASP/12/Res.6, Advance version, para 28.

23 ICC-ASP/8/Res.1, Annex, paras 6(b), (c).

24 ICC-ASP/8/Res.1, Annex, para 7.

25 ICC-ASP/8/Res.1, Annex, para 10.

The provisions outlined in the 2009 Annex were followed by the adoption in 2010 of a resolution and operational mandate, including provisions for the investigative function and mode of operation for the IOM (the '2010 Operational Mandate'). The 2010 Operational Mandate addressed only the investigative function of the IOM, as the inspection and evaluation functions were not yet operationalised. According to the 2010 Operational Mandate the IOM 'may receive and investigate reports of misconduct or serious misconduct, including possible unlawful acts' by elected officials, staff, and contractors.²⁶ It provided for all reports of misconduct and serious misconduct to be submitted to the IOM, with the option also to submit a copy to the President of the Court.²⁷

As discussed further below, and consistent with the 2009 Annex, the 2010 Mandate provided for the initiation of investigations *proprio motu*, and stated that 'the office shall have the authority to initiate on a reasonable basis, carry out and report on any action which it considers necessary to fulfil its responsibilities with regard to investigations without any hindrance or need for prior clearance'.²⁸ The 2010 Operational Mandate provided for operational independence, but contained exceptions to the *proprio motu* powers in response to concerns about maintaining judicial and prosecutorial independence, specifically addressed in the form of an external third party review process as outlined below.

In the event of a report of misconduct or serious misconduct by staff or contractors that merits investigation, the 2010 Operational Mandate required that the relevant organ head be notified.²⁹ According to the 2010 Operational Mandate, if an investigation finds that criminal acts have occurred, the IOM will hand over the results of the investigation to the Court, and may

26 ICC-ASP/9/Res.5, Annex, para 2.

27 ICC-ASP/9/Res.5, Annex, para 3.

28 ICC-ASP/9/Res.5, Annex, para 13.

29 ICC-ASP/9/Res.5, Annex, para 18.

recommend referring the matter to national authorities.³⁰ The 2010 Operational Mandate also provided that the IOM may recommend to the relevant elected officials of the Court that privileges and immunities be waived in accordance with article 48, paragraph 5 of the Rome Statute.³¹ The IOM was to report quarterly to the Bureau and annually to the ASP, with the Court having a reasonable opportunity to respond in writing, and for the Presidency, Registrar or Prosecutor to provide the IOM with biannual reports to follow up on any disciplinary measures investigated by the IOM.³² Relevant provisions of the 2010 Operational Mandate are further discussed below.

Following a decision in 2011 that the IOM should be operationalised when a comprehensive agreement was reached on the modalities for the operation of the three functions, during 2012 The Hague Working Group of the ASP primarily considered the inspection and evaluation functions of the IOM.³³ In 2013, the Hague Working Group discussed the functions of the IOM at 16 informal consultations, and held additional meetings between the co-facilitators and with the heads of organs of the Court.³⁴ After the Hague Working Group reached consensus on a draft resolution, the ASP adopted Resolution ICC-ASP/12/Res.6 at their 12th session in November 2013, operationalising the IOM with the comprehensive mandate set out in the Rome Statute (the '2013 Operational Mandate').³⁵

The 2013 Operational Mandate, included as an annex to the Resolution, outlines the inspection, evaluation, and investigation functions of the IOM; the procedures applicable within each function; the modes of operation of the IOM including the principle of operational independence and procedures for reporting,

30 ICC-ASP/9/Res.5, Annex, para 31.

31 ICC-ASP/9/Res.5, Annex, para 32.

32 ICC-ASP/9/Res.5, Annex, paras 33-35.

33 ICC-ASP/12/27, paras 8, 12.

34 ICC-ASP/12/27, paras 11-12.

35 ICC-ASP/12/27, paras 11-12.

recommendations and follow-up; and provisions for the staffing and budget of the IOM. The IOM is currently developing a draft Manual of Procedures, which has not yet been finalised. Since 2006, the Women's Initiatives has advocated for the creation of the IOM, providing detailed recommendations to States Parties and the ASP on its scope, role and functions.³⁶ Recommendations for the further development of the Court's IOM are contained in the **Recommendations** section of this Report.

Structure of the IOM

At its ninth session in December 2010, the ASP decided that while the IOM is only carrying out its investigative functions, it should consist of two staff members: the Head of the IOM at the P-4 level and one further staff member at the P-2 level.³⁷ Pending the operationalisation of the IOM's full mandate, the ASP had decided that a Temporary Head of the IOM, seconded from the UNOIOS would be appointed, and decided to retain the post of Temporary Head through May 2014.³⁸ According to the resolution adopted in 2013, with its fully operationalised mandate

the IOM will consist of four staff members: the Head of Office at the P-5 level, an evaluation officer at the P-4 level, one other professional staff member at the P-2 level and administrative support at the general service level.³⁹ The Head of the IOM is to be selected by the Bureau of the ASP, and the work performance of the Head of the IOM will be evaluated by the President of the ASP.⁴⁰ At the time of writing this Report, the IOM is staffed only by the Temporary Head, no recruitment processes were underway and no additional staff members have been appointed. The Women's Initiatives had called for the appointment of the Head of the IOM at least at the P-5 level, to underscore the importance given to this function, 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.⁴¹ In addition, the Women's Initiatives had identified the need for a gender-competent IOM, both in the composition of its staff and in its operational scope, and that this need should be made explicit.⁴² The 2013 Operational Mandate does not address gender-competence of IOM staff or include sexual violence within the definition of serious misconduct.⁴³

36 See eg *Gender Report Cards 2006, 2007, 2008, 2009, 2010, 2011, 2012*, recommendations to States Parties/ASP.

37 ICC-ASP/9/Res.5, para 1.

38 The first Temporary Head of the IOM, Beverley Mulley, had been appointed on 12 April 2010, pursuant to the establishing Resolution, and served in that position from 19 July 2010 — 18 July 2011. ICC/ASP/10/27, para 6. As a Permanent Head was not appointed by the time of her departure, the ASP President requested the Registrar to proceed with the recruitment of Kristina Carey, also seconded from UNOIOS, who formally started her role as Temporary Head in November 2011. ICC/ASP/11/27, para 8. Following two requests from the Bureau, which in 2012 decided to defer the recruitment of the Head of the IOM until questions relating to operationalisation of the investigation, evaluation and inspection functions were decided (Seventh ICC-ASP Bureau Meeting, 28 February 2012, para 3), her secondment was first extended until 2013 and again until 31 May 2014. Seventh ICC-ASP Bureau Meeting, 28 February 2012, para 3, available at <http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2012-Bureau-7-D-28Feb2012.pdf>. See also Bureau of the ASP, First Meeting, 12 February 2013, para 6(g), available at <http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2013-Bureau-01-12-02-22013.pdf>.

39 ICC-ASP/12/Res.6, Advance version, para 4.

40 ICC-ASP/12/Res.6, Advance version, Annex, paras 51-52.

41 *Gender Report Card 2012*, p 286.

42 *Gender Report Card 2012*, p 286.

43 The 2013 Operational Mandate does reference the provisions of the Rome Statute applicable to staff of the Court, including providing for 'a fair representation of female and male persons' in staffing the IOM. ICC-ASP/12/Res.6, Advance version, para 6.

Inspection and evaluation functions

The 2013 Operational Mandate operationalised the IOM's inspection and evaluation functions. The inspection function provides that the ASP Bureau can request the IOM to conduct unscheduled/*ad hoc* inspections of any premises or processes.⁴⁴ Such requests shall be notified and preceded by a consultation with the relevant Head of Organ who may appoint an office representative to witness the inspection.⁴⁵ These inspections are defined as 'special, unscheduled, on-the spot verifications made of an activity directed towards the resolution of problems which may or may have not been previously identified'.⁴⁶ The 2013 Operational Mandate states that the IOM shall provide evaluations of any programme, project or policy, as requested by the ASP or the Bureau of the ASP.⁴⁷ An evaluation is defined as 'a judgement made of the relevance, appropriateness, effectiveness, impact and sustainability of a project or programme, based on agreed criteria and benchmarks'.⁴⁸ The IOM may also conduct its inspection and evaluation functions when requested by a Head of Organ.⁴⁹

The 2013 Operational Mandate includes provisions for requests to conduct an inspection or for carrying out an evaluation, as well as providing that all information gathered during these processes be kept confidential.⁵⁰ It also provides that the IOM shall deliver reports to the President of the ASP who will forward them to the Assembly or Bureau as appropriate. When the process is requested by a Head of Organ, the IOM reports to the requesting authority.⁵¹

44 ICC-ASP/12/Res.6, Annex, para 6.

45 ICC-ASP/12/Res.6, Annex, paras 9-11.

46 ICC-ASP/12/Res.6, Annex, para 6.

47 ICC-ASP/12/Res.6, Annex, para 16.

48 ICC-ASP/12/Res.6, Annex, para 16.

49 ICC-ASP/12/Res.6, Annex, paras 7, 17.

50 ICC-ASP/12/Res.6, Annex, paras 12-13, 23-24.

51 ICC-ASP/12/Res.6, Annex, paras 14-15, 25-26.

Investigative functions

According to the 2013 Operational Mandate, under its investigative functions the IOM is mandated to 'receive and investigate reports of misconduct or serious misconduct, including possible unlawful acts'⁵² of the Court's elected officials, staff and contractors. An investigation is defined as 'a legally based and analytical process designed to gather information in order to determine whether wrongdoing has occurred and if so, the persons or entities responsible'.⁵³

Both the 2010 and 2013 Operational Mandates cover 'misconduct' and 'serious misconduct'. While the Women's Initiatives, since 2006, has been calling for the IOM to include a definition of 'serious misconduct' that expressly includes sexual violence, rape, abuse and harassment, the 2010 Operational Mandate did not define 'serious misconduct' and did not expressly include sexual violence, rape, abuse and harassment.⁵⁴ The 2013 Operational Mandate refers to the Court's definition of 'serious misconduct' contained in Rule 24(1)(b) of the RPE, but also does not expressly include crimes of sexual violence within the definition of serious misconduct.⁵⁵ Under the 2013 Operational Mandate, some matters are expressly excluded from the IOM's investigative mandate, specifically contractual disputes and human resource management issues, including work performance, conditions of employment or personnel-related grievances, as well as offences against the administration of justice.⁵⁶ These issues had been similarly excluded in the 2009 Annex and the 2010 Operational Mandate.⁵⁷

52 ICC-ASP/12/Res.6, Advance version, Annex, para 28.

53 ICC-ASP/12/Res.6, Annex, para 28.

54 ICC-ASP/9/Res.5, Annex, para 2. See also *Gender Report Card 2012*, p 286.

55 ICC-ASP/12/Res.6, Advance version, Annex, para 28.

56 ICC-ASP/12/Res.6, Advance version, Annex, paras 29-30.

57 ICC-ASP/8/Res.1, Annex, para 7; ICC-ASP/9/Res.5, Annex, para 5.

The ability of the IOM to initiate an investigation on its own initiative (*proprio motu*) was an issue of contention in discussions leading to the creation and operationalisation of the IOM. In particular, in the discussions leading up to the adoption of the 2010 Operational Mandate, the Office of the Prosecutor had maintained that the ability of the IOM to initiate an investigation on its own motion constituted an ‘unacceptable risk of undue interference’ which threatened the independence of the Office of the Prosecutor.⁵⁸ Reflecting these concerns, while the 2010 Operational Mandate expressly allowed the IOM to initiate an investigation, as described above, it also stated that ‘[t]he authority of the [IOM] to initiate a case on its own motion does not in any way impede the authority or independence granted by the Rome Statute to the Presidency, judges, Registrar or Prosecutor of the Court. In particular, the [IOM] fully respects the notions of judicial and prosecutorial independence and its activities will not interfere with the effective functioning of the Court.’⁵⁹

In response to the concerns of and active lobbying by the Office of the Prosecutor and supported by a small number of NGOs, the 2010 Operational Mandate created a process for an external third party to determine whether the IOM could proceed in certain situations. The 2010 Operational Mandate provided that ‘[i]n case of an objection by a head of organ that an investigation initiated by the [IOM] on its own motion would undermine judicial or prosecutorial independence of that organ, the head of the organ shall notify the [IOM] and the [IOM] shall take into consideration these concerns.’⁶⁰ If the IOM determined that

the investigation should proceed, the Bureau was to appoint an external independent third party ‘with judicial or prosecutorial experience’ who would evaluate whether the investigation undermines judicial or prosecutorial independence.⁶¹ The IOM would proceed with the investigation only if the third party determined that the investigation did not undermine judicial or prosecutorial independence; otherwise the matter would be referred to the relevant Head of Organ to investigate and submit a report to the IOM, which if not satisfied could then seek clarifications from the Organ Head, and ultimately could investigate the Organ Head for failing to properly address the issue.⁶²

At the time of the negotiations, the Women’s Initiatives, along with other stakeholders, argued that the inclusion of these provisions risked undermining the very purpose of the IOM. The Women’s Initiatives recommended that ‘[i]mperative to an effective oversight mechanism, and to establishing and maintaining the credibility of the Court, no elected officials, including those in leadership positions within the organs of the Court, should have the right to exercise a veto power regarding the initiation of an investigation.’⁶³ Viewing the ability of the IOM to start investigations on its own motion as essential to ensure the integrity of the Court, the Women’s Initiatives had called for the IOM to be enabled to fully operationalise its *proprio motu* investigative powers consistently across all organs and areas of the Court.⁶⁴

58 ‘Legal Memorandum on the IOM Mandate’, OTP, 19 November 2010, para 83, available at <http://iccforum.com/media/background/lectures/ask-former-prosecutor/2010-11-19_OTP_Memorandum_on_IOM_Mandate_%28English%29.pdf>, last visited on 28 February 2014. See also *Gender Report Card 2010*, footnote 1308.

59 ICC-ASP/9/Res. 5, Annex, para 20.

60 ICC-ASP/9/Res.5, Annex, para 21.

61 ICC-ASP/9/Res.5, Annex, para 22. With reference to the third party procedure, footnote 8 to para 22 states that ‘The procedural framework, including confidentiality provisions, concerning the implementation of this paragraph shall be set out in the Operational Manual of the Independent Oversight Mechanism.’

62 ICC-ASP/9/Res. 5, Annex, paras 22-24.

63 *Gender Report Card 2010*, p 215.

64 *Gender Report Card 2010*, p 215; *Gender Report Card 2011*, p 339; *Gender Report Card 2012*, p 285.

Under the 2013 Operational Mandate, the provisions for an external third party mechanism were removed. However, the 2013 Operational Mandate does not contain the specific language regarding the authority of the IOM to start investigations on its own motion that appears in the 2010 Operational Mandate. Instead, the 2013 Operational Mandate simply states that '[a]ll reports of misconduct or serious misconduct, including possible unlawful acts, made against an elected official, staff member or contractor shall, if received by the Court, be submitted to the IOM.'⁶⁵ This provision was also explicitly included in the 2010 Operational Mandate.

Once the IOM's investigation function is triggered by receipt of a report that merits an investigation of misconduct or serious misconduct, the 2013 Operational Mandate, like the 2010 Operational Mandate, provides that the IOM shall notify the appropriate Head of Organ; however such notification 'does not include revealing the identity of the information source or any such circumstance, which might lead to the identification of the source' and must be treated as strictly confidential.⁶⁶ The 2013 Operational Mandate further requires consultation with the relevant Organ Head before any investigation of a staff member or contractor.⁶⁷ Should the relevant Head of Organ believe that the proposed investigation is outside of the IOM's legal mandate, 'the Head of Organ shall report such concerns to the Bureau and may seek a determination of the matter from the Presidency of the [ICC], whose determination will be issued within 15 working days, with the possibility of one 15 day extension, and will be binding.'⁶⁸ While under the 2010 Operational Mandate, the IOM could recommend to the relevant elected officials at the Court that privileges and immunities be waived in accordance with Article

65 ICC-ASP/12/Res. 6, Advance version, Annex, para 33.

66 ICC-ASP/12/Res.6, Advance version, Annex, para 32; ICC-ASP/9/Res.5, Annex para 18.

67 ICC-ASP/12/Res. 6, Advance version, Annex, para 34.

68 ICC-ASP/12/Res. 6, Advance version, Annex, para 35.

48, paragraph 5 of the Rome Statute, the 2013 Operational Mandate does not include such a provision and does not explicitly provide for the waiving of privileges and immunities.⁶⁹ Both the 2010 and 2013 Operational Mandates include the possibility that the IOM may recommend that the Court refer a matter, where criminal acts are reasonably suspected to have occurred, to the relevant national authority for possible criminal prosecution.⁷⁰

The Women's Initiatives has recommended that the IOM develop procedures for both referring cases to national jurisdictions regarding allegations of suspected criminal misconduct, and for cooperation with national authorities to investigate and prosecute such conduct. The Women's Initiatives has called for particular attention to 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.⁷¹

The reporting procedures set out that the results of investigations conducted by the IOM shall be transmitted to the Presidency, Registrar or Prosecutor of the Court, as appropriate, together with recommendations, including those for consideration of possible disciplinary or jurisdictional action.⁷² The Women's Initiatives has advocated for IOM reports not to be refined or amended by Heads of Organs once the reports are finalised, and that in addition, the direct participation of Heads of Organs in IOM

69 ICC-ASP/9/Res.5, para 32. Article 48(5) of the Rome Statute addresses waiver of the privileges and immunities. The privileges and immunities of: a Judge or the Prosecutor which may be waived by an absolute majority of the judges; the Registrar may be waived by the Presidency; the Deputy Prosecutor and staff of the Office of the Prosecutor may be waived by the Prosecutor; and Deputy Registrar and the staff of the Registry may be waived by the Registrar.

70 ICC-ASP/12/Res. 6, Advance version, Annex, para 41.

71 *Gender Report Card 2010*, p 216; *Gender Report Card 2011*, p 340; *Gender Report Card 2012*, p 287.

72 ICC-ASP/12/Res.6, Advance Version, Annex, para 40.

investigations should be at the explicit request of the IOM and should relate to the nature of the complaint and investigation.⁷³ The Women's Initiatives has also called for an annual report to the ASP, which includes the number and types of allegations and complaints received, whether these are from internal or external sources, and the number of allegations relating to each organ, division, and unit of the Court, to ensure a systemic rather than incident-based approach to preventing and addressing serious misconduct.⁷⁴

Reporting

In addition to the specific reporting procedures outlined above for the three functions of the IOM, the IOM is to submit quarterly reports to the Bureau, as well as a consolidated annual report to the ASP.⁷⁵ This report is to include a comprehensive section on the internal evaluations carried out by the Court during the year. All reports are to respect the confidentiality of staff members, elected officials, and contractors. Both the 2010 and 2013 Operational Mandates provide for the Court to review the annual report. The 2013 Operational Mandate provides that prior to the submission of the annual report, the report is to be circulated for comment to the Presidency, Prosecutor, and Registrar. Unlike the 2010 Operational Mandate, the 2013 Operational Mandate provides that these comments shall then be taken into account by the IOM, which is to inform the appropriate organ in case of any disagreement. The Court will also have the opportunity to provide its views on any matter contained in the report as an annex to the report.⁷⁶

73 *Gender Report Card 2010*, p 215; *Gender Report Card 2011*, p 339; *Gender Report Card 2012*, p 285.

74 *Gender Report Card 2010*, p 216; *Gender Report Card 2011*, p 340; *Gender Report Card 2012*, p 287.

75 ICC-ASP/12/Res.6, Annex, para 46.

76 ICC-ASP/12/Res.6, Annex, paras 47-48.

Anti-retaliation/whistleblower policy

The 2009 Annex states that it was envisaged that the IOM would include provisions for whistleblower procedures and protections.⁷⁷ However, these were not addressed in the 2010 Operational Mandate. Following this omission, the Women's Initiatives has called for such provisions to be included in the IOM Manual of Procedures.⁷⁸ In August 2011, the ASP's CBF recommended that the Court develop an anti-fraud policy, including whistleblowing provisions, 'as a matter of priority'.⁷⁹ The ASP subsequently at its 10th session in December 2011 invited the IOM, working in close consultation with the organs of the Court, Staff Union Council, and States Parties, to develop an anti-retaliation/whistleblower policy, which would then be adopted by the Court 'at the earliest time possible'.⁸⁰ At its 11th session in November 2012, the ASP 'acknowledged with satisfaction information concerning the draft policies and invited the Court to adopt the policies as soon as possible'.⁸¹

In June 2013, the Court reported that separate policies had been drafted on fraud and fraud prevention, as well as whistleblowers and the protection of whistleblowers; that these policies had been designed to be generally accessible and understandable; and that the policies will be supported by two Administrative Instructions that describe how the policies will be implemented.⁸² As of June 2013, it was 'expected that the policies would be enacted as Presidential Directives in the near future'.⁸³ The 2013 Operational Mandate states that pending

77 ICC-ASP/8/Res.1, Annex, para 6(b).

78 *Gender Report Card 2011*, p 340; *Gender Report Card 2012*, p 287.

79 ICC-ASP/12/8, para 1.

80 ICC-ASP/12/8, para 3.

81 ICC-ASP/12/8, para 3.

82 ICC-ASP/12/8, paras 5, 8.

83 ICC-ASP/12/8, para 8.

the adoption of these policies the IOM will take action on any act of retaliation, and provides the following guidelines:

- (a) No action may be taken against staff or others as a reprisal for submitting a report, providing information, or otherwise cooperating with the IOM;
- (b) Any reprisal action taken against any person suspected of having submitted a report, provided information or otherwise cooperated with the IOM shall constitute misconduct, for which disciplinary measures may be imposed; and
- (c) Disciplinary proceedings shall be initiated and disciplinary action shall be taken in respect of any elected official or staff member who is proven to have retaliated against a staff member or other person who has submitted a report, provided information, or otherwise cooperated with the IOM.⁸⁴

84 ICC-ASP/12/Res. 6, Annex, para 60.

Governance

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The ICC's internal governance framework is outlined in the Rome Statute and subsidiary texts,⁸⁵ and has been further developed through the adoption of resolutions by the ASP as well as the Court's practices. 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 CBF, at the ninth session of the ASP in December 2010, the ASP adopted Resolution ICC-ASP/9/Res.2, establishing a SGG to further consolidate the Court's internal management structures and to engage in 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'.⁸⁶ Initially established for one year, at the tenth session of the ASP, the SGG's mandate was extended until the end of 2012.⁸⁷ In its 2013 report, the SGG recommended to the ASP that its mandate be further extended.⁸⁸

This section provides an overview of the main issues addressed by the SGG during the period under review.⁸⁹ Recommendations for the development of the Court's governance structure are contained in the **Recommendations** section of this Report.

85 Part four of the Rome Statute contains provisions for the composition and administration of the Court.

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

87 ICC-ASP/10/Res.5, para 37.

88 ICC-ASP/12/37, para 53(a).

89 For a more detailed overview of the ICC's corporate governance framework and the past work of the SGG, see *Gender Report Card 2011*, p 93-100 and *Gender Report Card 2012*, p 70-75.

Study Group on Governance

Throughout its first year of work, the SGG focused its discussion on three issues, namely: the relationship between the Court and the ASP; strengthening the institutional framework of the Court; and increasing the efficiency of the criminal process. During the second year, in 2012, the SGG focused on two areas: ‘increasing the efficiency of the criminal process’ and ‘enhancing the transparency and predictability of the budgetary process’.⁹⁰ The SGG’s discussions in 2012 are reviewed in greater detail in the *Gender Report Card 2012*.⁹¹ At the 11th ASP in November 2012, following a recommendation of the Bureau,⁹² the ASP extended the mandate of the SGG for an additional year.⁹³ The Assembly also endorsed the proposed Roadmap aimed at expediting the criminal process of the Court and the recommendations to ‘improve the transparency, predictability and efficient conduct of the entire budget process.’⁹⁴ Subsequently, on 12 February 2013, the Bureau appointed Ambassador Håkan Emsgård (Sweden) as Chair of the Study Group.⁹⁵ Cary Scott-Kemmis (Australia) and Thomas Henquet (Netherlands) were appointed as Co-focal points for Cluster I ‘Increasing the efficiency of the criminal process’. On 13 August 2013, following the departure of Cary Scott-Kemmis, the Bureau appointed Shehzad Charania (United Kingdom) as a co-focal point. Klaus Keller (Germany) was appointed as the focal point for Cluster II, ‘Enhancing the transparency and predictability of the budgetary process.’⁹⁶ According to the SGG’s September 2013 Report outlining its activities for that year, the SGG held 15 meetings between January and September 2013.⁹⁷

90 ICC-ASP/11/31.

91 *Gender Report Card 2012*, p 72-75.

92 ICC-ASP/11/31 para 23(a). The previous year, the mandate of the SGG had already been extended on recommendation of the Bureau. See ICC-ASP/10/30 para 29(a) and ICC-ASP/10/Res.5, para 37.

93 ICC-ASP/11/Res.8, Advance version, para 40.

94 ICC-ASP/11/ Res.8, Advance version, para 41.

95 ICC-ASP/12/37, para 4.

96 ICC-ASP/12/37, para 4.

97 ICC-ASP/12/37, para 5.

Cluster 1: Increasing the efficiency of the criminal process

As in the previous year, the first cluster of topics considered by the SGG in 2013 related to expediting the criminal process. The discussions around cluster 1 took place in the presence of court representatives. At the outset, it was agreed that the primary focus of the review should be the RPE, in accordance with priority areas set in the Court’s first lessons learnt report.

In October 2012, a WGLL was established by the Court in accordance with the roadmap and in order to consider recommendations on proposals to amend the RPE.⁹⁸ The WGLL is composed solely of judges and determines its own working methods. The roadmap provides that the WGLL is to submit recommendations on proposals to amend the Rules that receive the support of at least five judges both to the SGG and to the ACLT.⁹⁹ The WGLL identified nine clusters that were designed to address multiple aspects of the Court’s procedures: ‘Pre-trial; Pre-trial and trial relationship and common issues; Trial; Victims participation and reparations; Appeals; Interim release; Seat of the Court; Language Issues; and Organisational Matters.’¹⁰⁰ Based on ‘the judicial experience of the Court at that stage’, the WGLL initially focused on three of the nine clusters: ‘Pre-trial’; ‘Pre-trial and trial relationship and common issues’; and ‘Seat of the Court’.¹⁰¹

98 ICC-ASP/11/31, Annex, para 5.

99 ICC-ASP/11/31, Annex, para 5. According to Regulation 4 of the Regulations of the ICC, the ACLT is to consider and report on proposals for amendments to the Rules, Elements of Crimes and the Regulations of the Court. The ACLT is composed of three judges, one from each Division; and one representative from each the Office of the Prosecutor, the Registry, and the list of counsel.

100 ICC-ASP/12/37/Add.1, para 2.

101 ICC-ASP/12/37/Add.1, para 3.

In March and August 2013, in accordance with the roadmap, the WGLL submitted its annual reports to the SGG. The 27 March 2013 report contained a concrete recommendation to amend Rule 100 of the RPE, which establishes the decision-making procedure for designating an alternate seat for the proceedings of the Court.¹⁰² On the basis of several meetings held by the SGG and the WGLL, the WGLL prepared revised recommendations which were subsequently endorsed by the SGG.¹⁰³ The WGLL report of 16 August 2013 contained a proposed amendment to Rule 68 of the RPE on prior recorded testimony for consideration at the 12th session of the ASP.¹⁰⁴ The SGG reported that, '[f]ollowing exchanges on the proposal, the Study Group provided its views to the WGLL, and a revised proposal was considered, endorsed and forwarded for the consideration of the Working Group on Amendments before the twelfth Assembly.'¹⁰⁵ Amendments to Rule 100 and Rule 68 were proposed and adopted at the 12th session of the ASP, as discussed further below. The SGG also considered and endorsed a revised roadmap prepared by the co-focal points.¹⁰⁶

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

At its tenth session, the ASP requested that the SGG consult with The Hague Working Group and develop recommendations to enhance 'the transparency and predictability of the budgetary process'.¹⁰⁷ During 2013, the SGG facilitated discussions with respect to: the Court's budgetary process, including the process of developing assumptions, priorities and objectives; CBF work practices, including interaction with the ASP; the conditions to be met to access the contingency fund; the necessity of an enhanced dialogue between the ASP and the Court for budget negotiations; the new approaches to accounting and budgeting through the introduction of IPSAS; and the question of whether or not the mandate for Cluster II should be renewed.¹⁰⁸ The outcome was a set of final recommendations by the SGG on the budget process.¹⁰⁹

The SGG recommended that the ASP recall resolution ICC-ASP/11/20, 'in which the Assembly note[d] the value of [the] judicial calendar and request[ed] to be periodically updated by the Court at meetings of The Hague Working Group on the current state of budgetary evaluation of judicial activities'.¹¹⁰ The SGG also recommended that the ASP 'stresses the importance of an enhanced engagement with the CBF' and 'welcomes [...] an enhanced dialogue between the Assembly and the Court'.¹¹¹ The last recommendation concerned the update to 'the current Financial Regulations and Rules, with a view to reflecting the subsidiary nature of the Contingency Fund'.¹¹²

The Court's proposed budget for 2013 and the report by the CBF are discussed in greater detail below.

102 ICC-ASP/12/37, para 16.

103 ICC-ASP/12/37, para 17.

104 ICC-ASP/12/37, para 18.

105 ICC-ASP/12/37, para 20.

106 ICC-ASP/12/37, paras 22-25.

107 ICC-ASP/10/Res.4, section H.

108 ICC-ASP/12/37, paras 31-51.

109 ICC-ASP/12/37, para 53.

110 ICC-ASP/12/37, para 53(d).

111 ICC-ASP/12/37, paras 53(e),(f).

112 ICC-ASP/12/37, para 53(g).

Amendments

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Amendments to the Rules of Procedure and Evidence

According to Article 51(2) of the Rome Statute, amendments to the RPE may be proposed by any State Party, the judges acting by an absolute majority, or the Prosecutor. The same provision provides that such amendments shall enter into force upon adoption by a two-thirds majority of the members of the ASP. Article 51(4) and (5) of the Statute further clarifies that the RPE, and any amendment thereto, must be consistent with the Statute and that, in the event of conflict between the Statute and the RPE, the Statute prevails.

As noted above, in order to allow for a year-round structured dialogue between subsidiary bodies of the ASP, the Court, and other stakeholders on proposals for amendment to the RPE, the ASP's SGG has created a roadmap for amendments. In addition, the ASP has created a Working Group on Amendments, which considers amendments to the Statute as well as the RPE. The Working Group on Amendments, chaired by Ambassador Paul Seger of Switzerland, was established to achieve greater clarity on both the substantive views on the amendment proposals and the procedure to be followed in dealing with amendment proposals. However, the existence of the SGG and Working Group on Amendments does not preclude the right of a State Party under Article 51(2) to submit an amendment proposal to the RPE at any time in the year prior to an ASP session.¹¹³

During its 12th plenary meeting, the ASP, by consensus, decided to amend a number of Rules in the RPE as well as enact new Rules. The amendments and new Rules related to the place of proceedings (Rule 100);¹¹⁴ prior recorded testimony (Rule 68);¹¹⁵ and the accused's presence at trial (Rules 134*bis*, *ter* and *quater*).¹¹⁶ As discussed below, the new Rule 134*bis* relates to presence through the use of video technology; the new Rule 134*ter* concerns excusal from presence at trial; and the new Rule 134*quater* specifically relates to excusal from presence at trial due to 'extraordinary public duties'.¹¹⁷ As also discussed

113 'Report on the 12th Session of the Assembly of States Parties to the Rome Statute', *Coalition for the International Criminal Court*, 2013, available at <http://www.coalitionfortheicc.org/documents/asp12_report.pdf>, last visited on 19 February 2014, p 19.

114 ICC-ASP/12/Res.7, Advance version, para 1.

115 ICC-ASP/12/Res.7, Advance version, para 2.

116 ICC-ASP/12/Res.7, Advance version, para 3.

117 ICC-ASP/12/Res.7, Advance version, para 3.

further below, amendments of Rules 68 and 100 followed the regular process for amendments described above, which entails that proposals are considered by the SGG and the WGA, whereas Rule 134 was amended following States Parties' proposals. According to an ICC press release, the amendments, which entered into force upon adoption by the Assembly, 'are intended to improve the efficiency of the Court's proceedings while safeguarding the rights of the accused'.¹¹⁸

The amendment process, which took place at the 2013 annual session of the ASP, received significant public attention due to its consideration of issues also raised by African States Parties and the African Union, relating to the prosecution of sitting Heads of State. Following threats to withdraw from the Rome Statute made by Kenya's Parliament in September 2013 and a request for a UN Security Council deferral, which was formally voted on and rejected in November 2013, in early November 2013, Kenya had proposed that a number of provisions in the Rome Statute, including Article 27 relating to the irrelevance of official capacity and Article 63 concerning the accused's presence at trial, be amended. These proposed changes to the Statute were discussed in the context of the ASP.¹¹⁹ However, Article 121(1) and (2) of the Statute make

it clear that amendments to the Statute can only be decided upon three months after their notification to States Parties. Kenya had not made a notification according to these rules, and consequently, no amendments of the Rome Statute could be considered at the 12th ASP. However, the amendments of the RPE relating to the accused's presence at trial put in place some similar changes to those Kenya was seeking in amending the Statute.

Amendment of Rule 100 concerning *in situ* hearings

In March 2013, the Court's WGLL had recommended an amendment of Rule 100, which the SGG recommended for adoption following consultations with the Court and revisions to the draft. On 5 June 2013, the revised proposal on Rule 100 was endorsed by the WGA during its meeting in New York,¹²⁰ and in September 2013 the SGG adopted the proposed amendment.¹²¹ The ASP enacted the amendment during the 12th ASP in November 2013.¹²² Rule 100 addresses the place of proceedings, and states that where the Court considers that it would be 'in the interests of justice', the Court may decide to sit in a State other than the Host State (also referred to as holding hearings '*in situ*'). Rule 100 provides that the Prosecutor, Defence or majority of judges of the Court may file an application or recommendation with the Presidency at any time after the initiation of an investigation, specifying in which State the Court would sit. Following consultations with the relevant Chamber and State, the decision would be made by the Plenary of Judges by two-thirds majority. The amended Rule 100 grants the Trial Chamber increased influence on the process of deciding whether *in situ* hearings should be used in specific cases; removes the requirement that the Plenary of Judges must approve the decision by two-thirds majority; and clarifies that *in situ* hearings can be conducted for parts of the trial or

118 'The Assembly of States Parties concludes its twelfth session', *ICC website*, 29 November 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR967.aspx>, last visited on 19 February 2014.

119 On 1 November 2013, the Bureau of the ASP had decided to recommend to the Assembly, pursuant to Rule 13 of the Rules of Procedure of the Assembly of States Parties, to include in the agenda of the 12th session of the Assembly an additional item entitled 'Special Segment as requested by the African Union: Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation'. See ICC-ASP/12/1/Add.2. On 21 November 2013, the ASP conducted the special session. See further 'Report on the 12th Session of the Assembly of States Parties to the Rome Statute', *Coalition for the International Criminal Court*, 2013, available at <http://www.coalitionfortheicc.org/documents/asp12_report.pdf>, last visited on 19 February 2014, p 6.

120 ICC-ASP/12/37, paras 16-17.

121 ICC-ASP/12/37, para 17.

122 ICC-ASP/12/Res.7, Advance version, para 1.

its entirety. According to the WGA, the purpose of the amendment of Rule 100 was to provide for a ‘more unambiguous and expeditious process for designating an alternate seat [of the Court].’¹²³

Amendment of Rule 68 concerning prior recorded testimony

Rule 68 sets out the conditions under which previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, may be used. The WGLL proposed an amendment of Rule 68 which was reviewed and revised by the SGG.¹²⁴ According to the WGA, the purpose of amending Rule 68 is to ‘allow the judges of the Court to reduce the length of [ICC] proceedings and streamline evidence presentation by increasing the instances in which prior recorded testimony could be introduced instead of hearing the witness in person, while paying due regard to the principles of fairness and the rights of the accused.’¹²⁵

As such, the amended Rule 68 broadens the scope for the use of prior recorded testimony. The original Rule 68 stipulated that when the Pre-Trial Chamber has not taken measures under Article 56,¹²⁶ the Trial Chamber could, in accordance with Article 69(2),¹²⁷ allow the introduction of previously recorded audio or video testimony of a

123 ICC-ASP/12/44, para 5.

124 ICC-ASP/12/37, paras 18-20.

125 ICC-ASP/12/44, para 8.

126 Article 56 contains provisions for the Pre-Trial Chamber to take measures to ensure the efficiency and integrity of the proceedings and the rights of the defence, in relation to a ‘unique investigative opportunity’ either presented by the Office of the Prosecutor or by the Pre-Trial Chamber’s own initiative.

127 Article 69(2) provides that: ‘The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.’

witness, or the transcript or other documented evidence of such testimony, in two situations: (a) where the witness who gave the previously recorded testimony is not present before the Trial Chamber, and both the Prosecutor and the Defence had the opportunity to examine the witness during the recording; or (b) where the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the Defence and the Chamber have the opportunity to examine the witness during the proceedings.

Provided that it is not be ‘prejudicial to or inconsistent with the rights of the accused’, the amended Rule 68 additionally grants the Chamber the power to allow the introduction of prior recorded testimony in situations where the witness who gave the previously recorded testimony is not present before the Trial Chamber, and the prior recorded testimony: goes to proof of a matter other than the acts and conduct of the accused (Rule 68(2)(b)); comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally (Rule 68(2)(c)); or comes from a person who has been subjected to interference (Rule 68(2)(d)).

The ASP emphasised that according to Article 51(4) of the Statute, amendments to the RPE shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted.¹²⁸

128 ICC-ASP/12/Res.7, Advance version, para 2.

New Rules 134bis, ter and quater concerning the accused's presence at trial

Unlike the amendments of Rules 68 and 100, the process of enacting the new Rules 134bis, ter and quater was initiated by States Parties shortly before the 12th Session of the ASP, without the usual consultations. On 30 October 2013, the WGA received a proposal from Botswana, Jordan and Lichtenstein, summarising previously unpublished positions by States in relation to a possible new Rule 134bis. It was stated that the paper was seeking to broaden the circumstances under which an accused may be excused from presence at trial, an issue which had also been addressed in an Appeals Chamber decision in the Ruto and Sang case.¹²⁹ The proposal was the subject of consultations between the SGG and the WGLL. Subsequently, the Kenyan Government submitted a proposal for amending articles in the Statute itself, which was circulated and reported on by the media.¹³⁰ The Government of Kenya requested that the WGA consider amendments of Article 63 concerning the accused's presence at trial and Article 27 concerning the

irrelevance of official capacity.¹³¹ More specifically, the Kenyan proposal requested that the WGA consider amending Article 63(2) in order to allow that 'in exceptional circumstances', an accused may — on a case-by-case basis, where alternative measures had been put in place and considered and where 'strictly necessary' — be excused from continuous presence at trial. Furthermore, the Kenyan proposal requested the WGA to consider adding a paragraph 3 to Article 27, according to which: 'notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions.'¹³²

On 1 November 2013, the Chair of the SGG, Håkan Emsgård, requested Judge Monageng, who was chairing the WGLL, to consult with other judges of the WGLL, as well as the ACLT, and provide the SGG with views on the legal

129 'Human Rights Watch Memorandum for the Twelfth Session of the [ICC ASP]', *Human Rights Watch*, November 2013, available at <http://www.hrw.org/sites/default/files/related_material/HRW%20ASP%2012%20Memorandum%20Final%20ENG_0.pdf>, last visited on 19 February 2014, p 19-21. See also the *Trial Proceedings* section of this Report.

130 See eg 'Row over proposed video link trials', *Standard Digital*, 22 November 2013.

131 Kenya also requested the WGA to consider amending Article 70 concerning offences against the administration of justice; Article 122 concerning an Independent Oversight Mechanism; and the Preamble's reference to the principle of complementarity (suggestion that the ICC, in addition to being complementary to national criminal jurisdictions, should also be complementary to regional criminal jurisdictions). See Letter from the Permanent Mission of Kenya to the UN to Chairperson of the Working Group on Amendments, Ambassador Paul Seger of Switzerland, dated 7 November 2013. See also 'Kenya's proposed agenda items for the 12th Session of the Assembly of State Parties', *Journalists for Justice*, 2013, available at <<http://www.scribd.com/doc/183221222/Kenya-s-proposed-agenda-items-for-the-12th-Session-of-the-Assembly-of-State-Parties>>, last visited on 20 February 2014.

132 The proposal was seemingly inspired by the Appeals Chamber's ruling, which had established many of the same standards for excusing an accused from presence at trial. See Letter from the Permanent Mission of Kenya to the UN to Chairperson of the Working Group on Amendments, Ambassador Paul Seger of Switzerland, dated 7 November 2013, pp 3-4. See also 'Kenya's bid to amend the Rome Statute likely to fail', *The Star*, 23 November 2013.

aspects of the proposal.¹³³ In a reply on 4 November 2013, Judge Monageng noted that, unlike the other proposals for amendments of the RPE, the present proposal had been initiated by States Parties and communicated to the Court on an urgent basis, resulting in the Court not being able to engage in its regular consultation process for proposed amendments, which involves ‘not only those judges of the WGLL and ACLT, but also all judges of the Court, as well as the representatives of the Office of the Prosecutor, the Registry, and counsel who sit on the ACLT’.¹³⁴ Judge Monageng further observed that in so far as the ‘amended proposal was not consistent with the Statute, the Court would be compelled not to apply the rule in accordance with article 51(5) of the Statute’. Taking note of the Appeals Chamber’s decision, which had reversed Trial Chamber V(a)’s decision on the accused’s presence at trial, Judge Monageng concluded that ‘the amendment proposal as it currently stands raises concerns as to its conformity with article 63(1) of the Statute’.¹³⁵ In this regard, Judge Monageng first emphasised that the proposal could be understood to mean that the accused may seek excusal from the entirety of the trial, which she implied would be inconsistent with the Appeals Chamber’s ruling that the Trial Chamber only enjoys limited discretion under Article 63(1) and that ‘any absence must be limited to that which is strictly necessary’.¹³⁶ Second, Judge Monageng observed that ‘further reflection’ would be ‘warranted’ on the issue concerning use of communication technology, an issue which had not been explicitly addressed in the Appeals

Chamber’s ruling.¹³⁷ Finally, Judge Monageng stated that the list of hearings mentioned in the proposal where the Trial Chamber may require the physical presence of the accused was based on the Trial Chamber’s decision, which had been reversed by the Appeals Chamber.¹³⁸

On 8 November 2013, the Government of the UK submitted a proposal which sought to ‘clarify the fact that the Chamber may allow presence of the accused through the use of video technology’.¹³⁹ The draft rule proposed by the UK stated: ‘In accordance with article 63, paragraph 1, and after hearing the participants and the Registry, a Chamber may allow the accused to be present by means of video technology for part or parts of the trial.’¹⁴⁰ The proposal suggested that the language could be incorporated into the RPE as a new Rule 134*ter*. The UK Government noted that the proposed language made clear that it must be interpreted in accordance with Article 63(1) of the statute, and that the language allowed the Chamber discretion to interpret the provision after hearing views from the participants and registry. The language ‘part or parts of the trial’ was also intended to give the Chamber the ability to ensure that the accused would be physically present in the Courtroom for parts of the proceedings such as the handing down of the verdict.¹⁴¹

A working paper, not attributed to any particular delegation, which was circulated to States Parties and NGOs on 11 November 2013, attempted to merge the various proposals on

133 See letter from Håkan Emsgård, Ambassador of Sweden and Chair of the Study Group on Governance, to Judge Monageng, Chair of the Working Group on Lessons Learned, dated 1 November 2013.

134 See letter from Judge Monageng to Ambassador Håkan Emsgård, dated 4 November 2013.

135 See letter from Judge Monageng to Ambassador Håkan Emsgård, dated 4 November 2013.

136 See letter from Judge Monageng to Ambassador Håkan Emsgård, dated 4 November 2013.

137 See letter from Judge Monageng to Ambassador Håkan Emsgård, dated 4 November 2013.

138 See letter from Judge Monageng to Ambassador Håkan Emsgård, dated 4 November 2013.

139 See Letter from the United Kingdom Mission to the United Nations to Ambassador Paul Seger, dated 8 November 2013.

140 See Letter from the United Kingdom Mission to the United Nations to Ambassador Paul Seger, dated 8 November 2013.

141 See Letter from the United Kingdom Mission to the United Nations to Ambassador Paul Seger, dated 8 November 2013.

amendments of the rules concerning presence at trial.¹⁴² The working paper included a proposal for a new Rule 134*bis*, according to which ‘the accused shall be present during the trial in accordance with article 63, paragraph 1’, as well as a new Rule 134*ter* concerning presence through the use of video technology and a new Rule 134*quater* concerning excusal from presence at trial.¹⁴³ The proposed Rule 134*ter* allowed the Trial Chamber, on a case-by-case basis and after hearing the parties/participants and the Registry, to grant the request of an accused subject to a summons to appear to be allowed to be present in the courtroom through the use of video technology during part or parts of his or her trial.

The proposed Rule 134*quater* allowed the Trial Chamber to grant the request of an accused subject to a summons to appear to be excused and to be represented by counsel only during part or parts of his or her trial if the Chamber is satisfied that ‘exceptional circumstances exist to justify such an absence’; ‘alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be insufficient or inappropriate’; ‘the accused has explicitly waived his or her right to be present at the trial’; and ‘the rights of the accused will be fully ensured in his or her absence, including through representation by counsel’. The proposed Rule 134*quater* further stated that the Trial Chamber’s decision must be made on a ‘case-by-case basis, with due regard to the subject matter of the specific hearings in question’, and ‘any absence must be limited to what is strictly necessary’. However, the proposed Rule also entailed an exception to the above requirements, as it stipulated that ‘if the accused is a sitting Head of State or Government, or a person entitled to act in such capacity’, and ‘has prior to the commencement of the

trial submitted to the jurisdiction of the Court’, ‘appearance by such person throughout the trial may, if he or she so wishes, be by counsel, provided a notice in writing has been filed with the Court stating that the accused has explicitly waived his or her right to be present at the trial and the trial chamber is satisfied that the rights of the accused will be fully ensured in his or her absence’.¹⁴⁴ The proposals made in the working paper provided the foundation for additional consultations in the WGA and among States Parties, which ultimately resulted in the adoption of new Rules 134*bis*, *ter* and *quater*.

The new Rule 134*bis*, formally adopted on 27 November 2013, concerning presence at trial through the use of video technology, allows an accused subject to a summons to appear to submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial and provides that the Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

The new Rule 134*ter*, concerning excusal from presence at trial, allows an accused subject to a summons to appear to submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial. The Rule provides that the Trial Chamber shall only grant the request if it is satisfied that: (a) exceptional circumstances exist to justify such an absence; (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate; (c) the accused has explicitly waived his or her right to be present at the trial; and (d) the rights of the accused will be fully ensured in his or her absence. The Trial Chamber is to rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. The Rule

142 Working paper on file with the Women’s Initiatives for Gender Justice.

143 Working paper on file with the Women’s Initiatives for Gender Justice.

144 Working paper on file with the Women’s Initiatives for Gender Justice.

provides that any absence ‘must be limited to what is strictly necessary and must not become the rule.’

The new Rule 134*quater*, concerning excusal from presence at trial due to ‘extraordinary public duties’, allows an accused subject to a summons to appear ‘who is mandated to fulfil extraordinary public duties at the highest national level’ to submit a written request to the Trial Chamber to be excused and to be represented by counsel only. The Rule provides that the request must specify that the accused explicitly waives the right to be present at the trial. The Trial Chamber is to ‘consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured.’ The decision shall be taken with due regard to the subject matter of the specific hearing in question and is subject to review at any time.

Several countries, including Botswana, Kenya, Nigeria, Namibia, Uganda, South Africa, Zambia, Tanzania, Senegal, Tunisia and Sierra Leone, took the floor during the ASP to welcome the resolution outlining the amendments.¹⁴⁵

On 15 January 2014, in an oral ruling relating to Ruto’s request to be excused from continuous presence at trial, Trial Chamber V(a) applied the new Rule 134*quater*. The Chamber excused Ruto from presence at trial, except for the following hearings:

- 1 when victims present their views and concerns in person;
- 2 for the entirety of the delivery of the judgement in the case;

145 ‘Report on the 12th Session of the Assembly of States Parties to the Rome Statute’, *Coalition for the International Criminal Court*, 2013, available at <http://www.coalitionfortheicc.org/documents/asp12_report.pdf>, last visited on 19 February 2014, p 21.

- 3 for the entirety of the sentencing hearing, if applicable;
- 4 for the entirety of the sentencing, if applicable;
- 5 for the entirety of the victim impact hearings, if applicable;
- 6 for the entirety of the reparation hearings, if applicable;
- 7 for the first five days of hearing starting after a judicial recess as set out in regulation 19*bis* of the regulations of the Court;
- 8 for any other attendance directed by the Chamber either or other request of a party or participant as decided by the Chamber.¹⁴⁶

The Ruto and Sang case and the Trial and Appeals Chamber jurisprudence regarding presence at trial are further addressed in the **Trial Proceedings** section of this Report.

146 ‘Trial in the Ruto and Sang case: Relevant information and materials’, *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/Pages/ruto-sang.aspx>, last visited on 20 February 2014.

Elections

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Election of 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'.¹⁴⁷ 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'.¹⁴⁸ According to Article 42(4), the Prosecutor 'shall nominate three candidates for each position of Deputy Prosecutor to be filled'.

As discussed in detail in the *Gender Report Card 2012*,¹⁴⁹ 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:¹⁵⁰

- Mr Paul Rutledge (Australia);
- Mr James Stewart (Canada); and
- Ms Raija Toiviainen (Finland).¹⁵¹

On 16 November 2012, James Stewart was elected Deputy Prosecutor by the ASP.¹⁵²

147 Article 42(2) of the Rome Statute.

148 Article 42(3) of the Rome Statute.

149 See *Gender Report Card 2012*, p 80-81.

150 ICC-ASP/11/17.

151 ICC-ASP/11/17, Appendix II.

152 ICC-ASP/11/20, Advance version, paras 30-31.

Election of the Board of the Trust Fund for Victims

The Board of the Trust Fund for Victims has five members, elected for a term of three years, who serve in an individual capacity on a *pro bono* basis and who may be re-elected once.¹⁵³ The members of the Board are elected by the ASP, according to provisions that require them all to be of a different nationality, and are to be elected taking into account equitable geographical and gender distribution, as well as representation of the principal legal systems of the world.¹⁵⁴ The members of the Board are required to be 'of high moral character, impartiality and integrity and shall have competence in the assistance to victims of serious crimes'.¹⁵⁵

During the 11th session of the ASP, held at the World Forum in The Hague, from 14 to 22 November 2012, elections of the Board of the TFV took place. The following five members were (re)elected:

- 1 Mr Sayeman Bula-Bula (Democratic Republic of the Congo) (nominated by African States);
- 2 Mr Motoo Noguchi (Japan) (nominated by Asian States);
- 3 Ms Elisabeth Rehn (Finland) (nominated by Western Europe and other States);
- 4 Mr Denys Toscano Amores (Ecuador) (nominated by Latin American and Caribbean States); and

¹⁵³ ICC-ASP/1/Res.6, Annex, para 2.

¹⁵⁴ ICC-ASP/1/Res.6, Annex, para 3. The geographical distribution allocates one seat each to: African States; Asian States; Eastern European States; Group of Latin American and Caribbean States; and Western European and Other States. ICC-ASP/1/Res.7, para 8.

¹⁵⁵ ICC-ASP/1/Res.6, Annex, para 3. See further ICC-ASP/11/S/06.

- 5 Ms Vaira Vīķe-Freiberga (Latvia) (Eastern European States).¹⁵⁶

Election of one judge to fill a judicial vacancy

Following resignation of Judge Anthony Thomas Aquinas Carmona (Trinidad and Tobago) in March 2013 after his election as President of Trinidad and Tobago, an election was announced to fill the judicial vacancy.¹⁵⁷ On 26 November 2013, during the 12th session of the ASP, Geoffrey A. Henderson of Trinidad and Tobago was elected as a Judge, receiving 98 votes out of 99 votes cast (one abstaining).¹⁵⁸ Judge Henderson was the only candidate following the withdrawal on 21 November 2013 of the candidate from Uruguay.¹⁵⁹

¹⁵⁶ See 'Fourth election of the members of the Board of Directors of the Trust Fund for the benefit of victims', *ICC website*, 27 November 2012, available at <http://www.icc-cpi.int/en_menus/asp/elections/trust%20fund%20for%20victims/2012/Pages/fourth%20election%20of%20the%20members%20of%20the%20board%20of%20directors%20of%20the%20trust%20fund%20for%20t.aspx>, last visited on 20 February 2014. By a communication, dated 11 October 2012, the Permanent Mission of Argentina to the United Nations announced the withdrawal of the candidature of Ms. Maria Cristina Perceval. See *ICC website*, available at <http://www.icc-cpi.int/en_menus/asp/elections/trust%20fund%20for%20victims/2012/Pages/regional%20criteria.aspx>, last visited on 20 February 2014.

¹⁵⁷ ICC-ASP/12/S/14.

¹⁵⁸ '2013 - Election of a judge — Result', *ICC website*, 26 November 2013, available at <http://www.icc-cpi.int/en_menus/asp/elections/judges/2013/Pages/2013-alphabetical%20listing.aspx>, last visited on 20 February 2014.

¹⁵⁹ ICC-ASP/12/45/Add.1. The Government of Uruguay had nominated the candidate by a communication dated 7 October 2013.

Judges of the International Criminal Court as of 31 October 2013

<i>Judge</i>	<i>Country/Group</i>	<i>List</i>	<i>Gender</i>	<i>Year of election</i>	<i>Current term length</i>	<i>Year current term expires</i>
Appeals Division						
Akua Kuenyehia President of the Appeals Division	Ghana/African	B	F	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Sang-Hyun Song President of the Court (2009-2015)	Korea/Asian	A	M	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	Latvia/Eastern European	B	F	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Sanji Mmasenono Monageng First Vice President of the Court (as of March 2012)	Botswana/African	B	F	2009	9	2018
Trial Division						
Kuniko Ozaki President of the Trial Division	Japan/Asian	B	F	2010	8 years 2 months	2018
Joyce Aluoch	Kenya/African	A	F	2009	9	2018
Howard Morrison	UK/WEOG	A	M	2012	9	2021
Robert Fremr	Czech Republic/ Eastern European	A	M	2012	9	2021
Chile Eboe-Osuji	Nigeria/African	A	M	2012	9	2021
Geoffrey A Henderson	Trinidad and Tobago/ GRULAC	A	M	2014	7	2021
Fatoumata Dembele Diarra ¹⁶⁰	Mali/African	A	F	2003	9	2012/end of Katanga and Ngudjolo
Sylvia Steiner ¹⁶¹	Brazil/GRULAC	A	F	2003	9	2012/end of Bemba
Bruno Cotte ¹⁶²	France/WEOG	A	M	2007	4 years 2 months	2012/end of Katanga and Ngudjolo

160 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*.

161 Judge Sylvia Steiner'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. Jean-Pierre Bemba Gombo*.

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

Judges of the International Criminal Court as of 31 October 2013 *continued*

<i>Judge</i>	<i>Country/Group</i>	<i>List</i>	<i>Gender</i>	<i>Year of election</i>	<i>Current term length</i>	<i>Year current term expires</i>
Pre-Trial Division						
Ekaterina Trendafilova President of the Pre-Trial Division	Bulgaria/Eastern European	A	F	2006	9	2015
Hans-Peter Kaul	Germany/WEOG	B	M	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Christine Van den Wyngaert	Belgium/WEOG	A	F	2009	9	2018
Cuno Tarfusser Second Vice President of the Court (as of March 2012)	Italy/WEOG	A	M	2009	9	2018
Silvia Fernández de Gurmendi	Argentina/GRULAC	A	F	2010	8 years 2 months	2018
Olga Herrera Carbuccion	Dominican Republic/GRULAC	A	F	2012	9	2021
Unassigned						
Miriam Defensor-Santiago	Philippines/Asian	B	F	2012	9	2021

Composition of Chambers as of 31 October 2013

<i>Chamber / Judge</i>	<i>Case and/or Situation</i>	<i>Stage of proceedings</i>
Pre-Trial Division		
Pre-Trial Chamber I		
<ul style="list-style-type: none"> ■ Presiding Judge Silvia Fernández de Gurmendi (Argentina) ■ Judge Hans-Peter Kaul (Germany) ■ Judge Christine Van den Wyngaert (Belgium) 	<p>Côte-d'Ivoire Situation <i>Prosecutor v. L Gbagbo</i> <i>Prosecutor v. S Gbagbo</i> <i>Prosecutor v. Blé Goudé</i></p>	<p>Confirmation of charges hearings adjourned In custody in Côte-d'Ivoire In custody in Côte-d'Ivoire</p>
	<p>Libya Situation <i>Prosecutor v. Gaddafi et al</i></p>	<p>PTC I decided that the case against Al-Senussi is inadmissible, decision may be appealed; Pending arrest and surrender of suspect (Saif Al-Islam Gaddafi)</p>
Pre-Trial Chamber II		
<ul style="list-style-type: none"> ■ Presiding Judge Ekaterina Trendafilova (Bulgaria) ■ Judge Hans-Peter Kaul (Germany) ■ Judge Cuno Tarfusser (Italy) 	<p>Uganda Situation <i>Prosecutor v. Kony et al</i></p>	<p>Pending arrest and surrender of suspects</p>
	<p>CAR Situation <i>Prosecutor v. Bemba</i> <i>Prosecutor v. Bemba et al</i> (Article 70)</p>	<p>At trial stage At pre-trial stage</p>
	<p>Kenya Situation <i>Prosecutor v. Ruto and Sang</i> <i>Prosecutor v. Kenyatta</i> <i>Prosecutor v. Barasa</i></p>	<p>At trial stage At trial stage Pending arrest and surrender of suspect</p>
	<p>DRC Situation <i>Prosecutor v. Lubanga</i> <i>Prosecutor v. Katanga</i> <i>Prosecutor v. Ntaganda</i></p>	<p>Trial concluded (convicted) At trial stage Pending commencement of confirmation of charges hearings scheduled for 10 Feb 2014</p>
	<p><i>Prosecutor v. Mudacumura</i> <i>Prosecutor v. Mbarushimana</i> <i>Prosecutor v. Ntagajoba</i></p>	<p>Pending arrest and surrender of suspect Charges not confirmed Trial concluded (acquitted)</p>
	<p>Darfur Situation <i>Prosecutor v. President Al'Bashir</i> <i>Prosecutor v. Harun and Kushayb</i> <i>Prosecutor v. Hussein</i> <i>Prosecutor v. Abu Garda</i> <i>Prosecutor v. Banda and Jerbo</i></p>	<p>Pending arrest and surrender of suspect Pending arrest and surrender of suspects Pending arrest and surrender of suspect Charges not confirmed At trial stage; proceedings against Jerbo terminated on 4 October 2013 due to his death</p>
	<p>Mali Situation</p>	

Composition of Chambers as of 31 October 2013 *continued*

<i>Chamber / Judge</i>	<i>Case and/or Situation</i>	<i>Stage of proceedings</i>
Trial Division		
Trial Chamber I		
<ul style="list-style-type: none"> ■ Presiding Judge Sir Adrian Fulford (UK) ■ Judge Elizabeth Odio Benito (Costa Rica) ■ Judge René Blattmann (Bolivia) 	<i>Prosecutor v. Lubanga</i>	Trial judgement and sentencing and reparations decisions issued
Trial Chamber II		
<ul style="list-style-type: none"> ■ Presiding Judge Bruno Cotte (France) ■ Judge Fatoumata Dembele Diarra (Mali) ■ Judge Christine Van den Wyngaert (Belgium) 	<i>Prosecutor v. Katanga and Ngudjolo</i>	Katanga at trial; Ngudjolo acquitted
Trial Chamber III		
<ul style="list-style-type: none"> ■ Presiding Judge Sylvia Steiner (Brazil) ■ Judge Joyce Aluoch (Kenya) ■ Judge Kuniko Ozaki (Japan) 	<i>Prosecutor v. Bemba</i>	At trial
Trial Chamber IV		
<ul style="list-style-type: none"> ■ Presiding Judge Joyce Aluoch (Kenya) ■ Judge Silvia Fernández de Gurmendi (Argentina) ■ Judge Chile Eboe-Osuji (Nigeria) 	<i>Prosecutor v. Banda</i>	Trial scheduled to start on 5 May 2014
Trial Chamber V(a)		
<ul style="list-style-type: none"> ■ Presiding Judge Chile Eboe-Osuji (Nigeria) ■ Judge Olga Herrera Carbuccion (Dominican Republic)¹⁶³ ■ Judge Robert Fremr (Czech Republic) 	<i>Prosecutor v. Ruto and Sang</i>	Trial started on 10 September 2013
Trial Chamber V(b)		
<ul style="list-style-type: none"> ■ Presiding Judge Kuniko Ozaki (Japan) ■ Judge Robert Fremr (Czech Republic) ■ Judge Chile Eboe-Osuji (Nigeria) 	<i>Prosecutor v. Kenyatta</i>	Trial start date vacated; no new date assigned
Appeals Division		
Appeals Chamber		
<ul style="list-style-type: none"> ■ Presiding Judge Akua Kuenyehia (Ghana) ■ Judge Sang-Hyun Song (Republic of Korea) ■ Judge Erkki Kourula (Finland) ■ Judge Anita Ušacka (Latvia) ■ Judge Sanji Mmasenono Monageng (Botswana) 	N/A	N/A

163 In the decision of 21 May 2013, the Presidency temporarily attached Judge Olga Herrera Carbuccion to the Trial Division. ICC-01/09-01/11-745.

Budget

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The Court's initial proposed programme budget requested for 2014 was €126.07 million, representing an increase of €10.95 million, or 9.5%, over the 2013 ASP approved budget.¹⁶⁴ The primary cost drivers for this increase are the activities in the Mali situation (€5.55 million), overall strengthening of investigative capacity (€2.20 million), Benda and Jerbo trial-related costs (€2.01 million),¹⁶⁵ witness protection and relocation (€1.55 million) and common system costs (€1.36 million).¹⁶⁶ At the 12th session of the ASP in November 2013, the ASP reviewed the Court's proposed budget, along with the recommendations of the CBF and adopted a budget of €121.65 million. This represents an increase of €6.03 million over last year's approved budget.

The 2014 budget was adopted by consensus at the 12th plenary meeting of the ASP on 27 November 2013.¹⁶⁷ During this meeting, States Parties approved a budget of €121.65 million, although the CBF recommended a budget of €121.57 million.¹⁶⁸ The approved budget represents a 5.2% increase compared to last year's approved budget of €115.62 million. The budget increase mostly relates to an increase in resources of the OTP and the Registry. The OTP was allocated €33.22 million out of the €35.74 million requested and the Registry was allocated €66.29 million out of the €68.11 million requested.¹⁶⁹ This represents, respectively, a 17.6 % and 2.7% increase over the 2013 approved budget for these organs. With respect to the Contingency Fund, further discussed below, the Court proposed to maintain it at its current level¹⁷⁰ and the ASP decided not to replenish it since it is consistent with the €7 million threshold.¹⁷¹

164 ICC-ASP/12/10, paras 2-3.

165 Proceedings against Jerbo terminated in October 2013 due to confirmation of his death. For a more detailed discussion of this issue, see the *Trial Proceedings* section of this Report.

166 ICC-ASP/12/10, para 32.

167 ICC-ASP/12/Res.1, Advance version.

168 ICC-ASP/12/Res.1, Advance version. See also ICC-ASP/12/15, para 5.

169 ICC-ASP/12/Res.1, Advance version, para 1. See also ICC-ASP/12/10, Table 4.

170 As of 1 January 2013, the opening balance of the Contingency Fund stood at €7.5 million. ICC-ASP/12/15, para 22.

171 ICC-ASP/12/Res.1.

This section reviews selected issues as proposed in the Court's budget and highlighted by the CBF in its report.

The proposed programme budget for 2014

The Court's proposed budget is based on assumptions from the OTP that it will conduct five full investigations and ten limited investigations in eight situations, as well as the fact that preliminary examinations are also foreseen in eight situations.¹⁷² Of the cases currently before the Court, two verdicts have been delivered,¹⁷³ five cases are at the trial preparation or trial stage,¹⁷⁴ and two cases are at the stage of the confirmation of charges hearing.¹⁷⁵ Increased judicial activity is also foreseen in the Appeals Chamber, where the Court anticipated that there will be final appeals against the trial judgements, reparations decision and other decisions in the Lubanga, Katanga, Ngudjolo and Bemba cases.¹⁷⁶

The 2014 budget assumptions were developed by the Court based on increased judicial and prosecutorial activity, as estimated at the end of June 2013.¹⁷⁷ The proposed budget increase mainly relates to one organ of the Court, the OTP,

172 ICC-ASP/12/10, para 23. Note that Annex III to the Court's Proposed Programme Budget for 2014, entitled 'Assumptions for the proposed programme budget for 2014', lists five full investigations and 13 limited investigations. ICC-ASP/12/10, Annex III.

173 *The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Mathieu Ngudjolo Chui*.

174 Estimate of the Women's Initiatives for Gender Justice based on the 2013 trial proceedings in the Katanga, Bemba, Ruto and Sang, Kenyatta, and Banda cases. Trial proceedings in the Katanga case have been completed, but the Trial Chamber has not yet issued its trial judgement at the time of writing this Report. Should the charges be confirmed in the Ntaganda and Gbagbo cases, this could add a 6th or 7th trial to the 2014 activities of the OTP.

175 *The Prosecutor v. Bosco Ntaganda* and *The Prosecutor v. Laurent Gbagbo*.

176 ICC-ASP/12/10, para 22.

177 ICC-ASP/12/10, para 17.

which accounted for approximately €7 million out of the €10.95 million requested increase.¹⁷⁸ As the Court-wide service provider, the Registry provides assistance and support to the OTP.¹⁷⁹ The requested budget increase by the OTP led the Registry to request a €3 million increase in order to ensure the adequate functioning of the Court.¹⁸⁰

The proposed budget for the Secretariat of the ASP for 2014 represents a 3.9% decrease from the 2013 approved budget as a result of lower costs for organising the annual session of the ASP at United Nations Headquarters in New York.¹⁸¹ The Judiciary also foresaw a 4.5% negative resource growth for 2014. This is mostly due to a significant fall in judges' costs resulting from the implementation of the revised pension system for judges.¹⁸²

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 (so-called 'zero-growth budget').¹⁸³ During the 2012 ASP, the Assembly used the Court's paper assessing the impact of measures to bring the level of the 2013 budget in line with the level of the approved budget for 2012 as a reference to understand the Court's options in terms of budgetary reductions. The Assembly invited the Court to prepare such a report again and to submit it in conjunction with its submission of the 2014 proposed programme budget.¹⁸⁴

178 ICC-ASP/12/10, Table 4.

179 ICC-ASP/12/10 para 265.

180 ICC-ASP/12/10, Table 4 and para 267.

181 ICC-ASP/12/10, Table 4 and para 606.

182 ICC-ASP/12/10, Table 4 and para 68.

183 ICC-ASP/12/11, para 1. See also *Gender Report Card 2012*, p 88.

184 ICC-ASP/12/11, para 2.

In its submission, the Court took into account the main cost drivers and the corresponding resource requirements, and noted that the level of resources initially identified for the Court's 2014 proposed programme budget was almost €5 million higher than the budget actually proposed. After a detailed internal review a substantial reduction was achieved, however the Court warned that 'further reductions cannot be achieved without significantly impairing the Court's effectiveness, and in particular that of the OTP, to conduct timely, high quality efficient and effective investigations and prosecutions, thus affecting the Court's very *raison d'être*'.¹⁸⁵ The paper concluded that 'the impact for the Court of bringing the 2014 proposed programme budget down to the 2013 approved level would be the equivalent of having to stop all of its operations in two or three of the situations actively under the jurisdiction of the Court.'¹⁸⁶

Investigations and prosecutions

The proposed budget for the OTP for 2014 (€35.74 million) represents a 26.5 % increase (€7.47 million) from the 2013 approved budget (€28.26 million).¹⁸⁷ The OTP outlined that this increase is largely due to the necessity to enhance the quality and efficiency of its work.¹⁸⁸ It proposed that this increase be phased-in over the next four years.

The OTP stressed that each year it had 'increased its level of activities, peaking at 18 cases in eight different situations in 2013' without any increase in the number of staff.¹⁸⁹ Nevertheless, the OTP also noted the drawbacks of this approach, which resulted in difficulties reaching the necessary

evidentiary depth in all of the concurrent cases it managed. For this reason, the OTP has decided to focus more intensively on fewer cases by reducing the number of active investigations foreseen from seven to five.¹⁹⁰ The OTP also emphasised issues with staffing levels and the fact that the rotational model, by which limited resources are shifted around from case to case as they are most urgently needed, is overstretched.¹⁹¹ Therefore, the proposed 2014 budget programme included a request for an additional 32 positions.¹⁹²

Several points were contentious in the proposed budget programme as it related to the OTP. In its latest report, the CBF stated that it had not received a strategic plan that would support an increase of this magnitude in investigation capability.¹⁹³ The CBF recommended that 16 positions, half of the 32 requested, be approved. The CBF also recommended the reduction of the proposed budget by €2.2 million.¹⁹⁴ To reach this conclusion, the CBF examined the average cost per case in recent years. It found that the average cost per case was €1.31 million and applied this to the 16 ongoing cases for a total amount of €20.9 million. The CBF further acknowledged that 2014 would provide the OTP with the first opportunity to apply its new strategy from the beginning of a case and recommended the approval of the OTP's request for €4.8 million for the two new cases.¹⁹⁵

185 ICC-ASP/12/11, para 10.

186 ICC-ASP/12/11, para 13.

187 ICC-ASP/12/10, Table 4.

188 ICC-ASP/12/10, para 122.

189 ICC-ASP/12/10, para 136. This comment had also been made the previous year; see *Gender Report Card 2012*, p 89.

190 ICC-ASP/12/10, para 137.

191 ICC-ASP/12/10, paras 127-128.

192 ICC-ASP/12/15, para 73 and footnote 19.

193 ICC-ASP/12/15, para 73.

194 ICC-ASP/12/15, para 76.

195 ICC-ASP/12/15, para 77.

Registry

The proposed budget for the Registry for 2014 (€68.11 million) represents a 5.6% increase (€3.59 million) from the 2013 approved budget (€64.52 million).¹⁹⁶ This was justified by a foreseen increase in the Registry's level of services and support to the OTP. The Court stated that the increase in judicial and prosecutorial activities will inevitably and directly impact and drive the Registry's workload and operations. Based on these additional cost drivers, the Registry initially anticipated an increase of €7 million. It achieved a reduction of €3.5 million through efficiency of gains and careful allocation, redeployment and reprioritisation of resources. The Registry noted that 'had it not been for the increased resources needed to support the operations of the OTP, the Registry would have presented a proposed budget at nearly the same level as the approved budget for 2013.'¹⁹⁷

While the CBF welcomed the efforts of the Registry to identify an important reduction, it recommended a further reduction of €1.1 million.¹⁹⁸ The CBF noted that it had recommended a reduction in the budget of the OTP and that as a service provider of the OTP, the Registry's budget should similarly be reduced.

196 ICC-ASP/12/10, Table 4.

197 ICC-ASP/12/10, paras 267-268 and 271-272.

198 ICC-ASP/12/5, para 81.

Legal aid

According to the CBF, legal aid remains one of the main cost drivers of the Court's budget.¹⁹⁹ In February 2012, and at the request of the ASP, the Registrar presented a proposal for a review of the legal aid system, which would result in savings. Subsequently, the Bureau of the ASP implemented a revised remuneration scheme applicable to counsel for victims and defence, which shifted compensation from a gross pensionable remuneration mode to a net basic salary. Following another request for consultation, the Registry produced a supplementary report in August 2012 which was endorsed by the CBF.²⁰⁰

At its twentieth session, held from 22 to 26 April 2013, the CBF recognised that the updated legal aid system was 'fully functional and meets the needs of its end-users, keeping the principles of balance between resources and means of the defendant and the prosecution, objective compensation systems, transparency, continuity and flexibility.'²⁰¹ At its most recent session, the CBF noted that the new arrangements implemented on 1 April 2012 and the application of resolution ICC-ASP//11/Res.1 had already generated savings of over €440,000.²⁰²

Nevertheless, the CBF identified two sets of events that might impact on the amount available for legal aid. First, decisions rendered by the Court have a direct impact on the budget of the Registry, and these financial repercussions are difficult to assess beforehand. The CBF requested that a report be submitted on ways to improve existing procedures in order to make it easier to quantify financial requirements.²⁰³ Second, as payment of reparations to victims is an innovative procedure that has never been

199 ICC-ASP/12/5/Rev.1, para 81.

200 ICC-ASP/12/11 paras 1-2. See also *Gender Report Card 2012*, p 91-92.

201 ICC-ASP/12/5/Rev.1, para 81.

202 ICC-ASP/12/15, para 133.

203 ICC-ASP/12/15, para 137.

applied by the ICC, the CBF asked the Court to prepare the ground for discussions of rules that would need to be observed.²⁰⁴

The Contingency Fund

The Contingency Fund was established in 2004 by the ASP in the amount of €10 million. The purpose of the Fund is to enable the Court to meet the costs associated with a new situation following a decision by the Prosecutor to open an investigation; and 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.²⁰⁵ In 2013, there were seven requests to access the Contingency Fund.²⁰⁶

The CBF reiterated its request that after a notification to access the Fund, the Court systematically present a written report with an update on the use of resources.²⁰⁷ The CBF ‘urged the Court to maintain very strict budgetary discipline when requests [are formulated]’.²⁰⁸

204 ICC-ASP/12/15, para 138.

205 Committee on Budget and Finance, Policy and Procedure Manual, Advance Version, p 47. See also *Gender Report Card 2012*, p 90.

206 ICC-ASP/12/15, Annex IV.

207 ICC-ASP/12/15, para 26.

208 ICC-ASP/12/15, para 27.

Substantive Work of the ICC

18 August 2012 — 31 October 2013*

* In light of important developments pending at the time of this cut-off date, we exceptionally extended our period of review in relation to key decisions and events. These exceptions are specified under the relevant sub-sections.

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 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 Article 12(3) or Article 15 are subject to authorisation by the Pre-Trial Chamber.

At the time of writing this Report, the Court has eight Situations under investigation. Four of those — Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali — 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, which was not a State Party at the time. However, in February 2013 Côte d'Ivoire became the 122nd State Party to the ICC.

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.²⁰⁹ 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.

In a report published in November 2012, the Office of the Prosecutor indicated that a situation under preliminary examination goes through four consecutive phases: (i) an initial assessment of all communications received under Article 15;²¹⁰ (ii) an analysis of all information on alleged crimes received or collected to determine whether the preconditions for jurisdiction have been met and whether there is a reasonable basis to believe the crimes fall under the subject-matter jurisdiction of the Rome Statute; (iii) an analysis

209 'Report on Preliminary Examination Activities 2012', *OTP*, November 2012, p 1, available at <<http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>>, last visited on 29 May 2013.

210 Under Article 15, the Prosecutor may obtain information of crimes from numerous sources, and is required to analyse the seriousness of the material and information received. The Prosecutor, however, is not obliged to start an investigation, or to give an official or public response upon receipt of an Article 15 communication.

of admissibility, including complementarity and gravity; and, (iv) following a determination that a situation is 'facially admissible', an examination of the interests of justice.²¹¹

At the time of writing this Report, the Office of the Prosecutor lists eight countries as under preliminary examination. Afghanistan (since 2007), Honduras (since 2010), Republic of Korea (since 2010), and Comoros (since 2013) are listed as under phase two (subject-matter jurisdiction). Colombia (since 2006), Georgia (since 2008), Guinea (since 2009), and Nigeria (since 2010) are in phase three of preliminary examination (analysis of admissibility). 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,²¹² and in 2012 the Office declined to proceed in Palestine.²¹³

The Office of the Prosecutor continues to receive communications pursuant to Article 15 of the Rome Statute. The latest public information indicates that as of the end of 2013, the Office had received 10,470 communications under Article 15.²¹⁴

211 'Report on Preliminary Examination Activities 2012', *OTP*, November 2012, p 5, available at <<http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>>, last visited on 21 February 2014.

212 'OTP response to communications received concerning Iraq', *OTP*, 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 21 February 2014; 'OTP response to communications received concerning Venezuela', *OTP*, 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 21 February 2014. See further *Gender Report Card 2012*, p 96.

213 'Update on Situation in Palestine', *OTP*, 3 April 2012, p 96-97, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>, last visited on 21 February 2014. See further *Gender Report Card 2012*.

214 'Communications, Referrals and Preliminary Examinations', *ICC website*, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx>, last visited on 21 February 2014.

One new preliminary examination was made public during the period covered by the *Gender Report Card 2013*. On 14 May 2013, the Office of the Prosecutor indicated that it had received a referral from the Union of Comoros (Comoros) in relation to alleged crimes committed in May 2010 on the vessel *Mavi Marmara*.²¹⁵ Comoros has been a State Party to the Rome Statute since 2006. The *Mavi Marmara*, a vessel registered in the Comoros Islands, was one of six vessels sailing to Gaza on 30 May 2010 to attempt to break the Israeli naval blockade of the Gaza strip. Of the five other vessels, four were also registered in an ICC State Party (three in Greece; one in Cambodia) and one in Turkey, not a State Party to the ICC.

Nine passengers on the *Mavi Marmara* were killed when Israeli forces intercepted and boarded the flotilla in international waters. The referral by Comoros follows an earlier submission in October 2010 of an Article 15 communication relating to the same incident by lawyers acting for the families of those killed or injured, and on behalf of the Turkish Human Rights Group IHH Humanitarian Relief Foundation, the owner and operator of the *Mavi Marmara*.²¹⁶ The submission by Comoros, submitted by the same Turkish law firm as the October 2010 Article 15 communication, underscored that it 'supports' the earlier submission.²¹⁷

Comoros alleged that war crimes and crimes against humanity were committed during the attack on the vessels, including murder, torture or inhumane treatment, wilfully causing great suffering, destruction of property, unlawful deportation, intentionally directing attacks against the civilian population, outrages upon personal dignity, and other inhumane acts of

a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. Making reference to Article 12(2)(a), which provides that the ICC may exercise jurisdiction if crimes within its jurisdiction have been committed in a 'State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, [in] the State of registration of that vessel or aircraft', Comoros argued that the alleged crimes fall within the territorial jurisdiction of the ICC. Comoros further submitted 'that the ICC will also have jurisdiction over this matter if it decides to accept the declaration made by the Palestinian Authority under Article 12(3) of the Rome Statute in January 2009'.²¹⁸ Comoros thus requested the Prosecutor 'to urgently initiate an investigation as under Articles 13(a) and 14 of the Rome Statute, into the attack on the Gaza Freedom Flotilla'.²¹⁹

Following the receipt of the submission, the Prosecutor made a public statement: 'In accordance with the requirements of the Rome Statute my office will be conducting a preliminary examination in order to establish whether the criteria for opening an investigation are met. After careful analysis of all available

215 'ICC Prosecutor receives referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel "MAVI MARMARA"', *OTP*, 14 May 2013, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-14-05-2013.asp>, last visited on 21 February 2014. See also ICC-01/13-1-Anx1.

216 See further *Gender Report Card 2011*, p 137.

217 'Referral from Comoros', *OTP*, 14 May 2013, para 10, available at <<http://icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>, last visited on 21 February 2014.

218 'Referral from Comoros', *OTP*, 14 May 2013, para 20, available at <<http://icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>, last visited on 21 February 2014. The Palestinian National Authority lodged a declaration under Article 12(3) in January 2009 and the OTP received over 400 communications under Article 15 in relation to crimes allegedly committed in Palestine. In April 2012, the OTP announced it would not be proceeding with a formal investigation in Palestine. For more information about the OTP's decision, see *Gender Report Card 2012*, p 96-97. See also 'Update on Situation in Palestine', *OTP*, 3 April 2012, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>, last visited on 21 February 2014.

219 'Referral from Comoros', *OTP*, 14 May 2013, para 69, available at <<http://icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>, last visited on 29 May 2013.

information, I shall make a determination that will be made public in due course.²²⁰

In two subsequent letters dated 29 May and 21 June 2013, Comoros further clarified that its request to open investigations is inclusive of all incidents from 31 May 2010 onwards, and ‘encompasses all other crimes flowing from this initial incident’. Comoros also clarified that the referral ‘also encompasses other flotilla vessels bearing State Party flags in addition to the Mavi Marmara’.²²¹ By letter dated 26 June 2013, Prosecutor Bensouda thus indicated to the Presidency of the ICC that the preliminary examination into incidents committed from 31 May 2010 includes the vessels registered in Greece and Cambodia.

In a decision issued on 5 July 2013, the Presidency of the ICC indicated that, pursuant to Regulation 46(2) of the Regulations of the Court,²²² it had assigned the ‘situation on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia’ to Pre-Trial Chamber I.²²³ In a press

220 ‘ICC Prosecutor receives referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel “MAVI MARMARA”’, *OTP*, 14 May 2013, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-14-05-2013.aspx>, last visited on 21 February 2014.

221 ICC-01/013-1-Anx2. The clarifications were submitted to the OTP in response to a request by the Office dated 16 May 2013, in which the OTP posed two questions: whether only the Mavi Marmara vessel carrying the Comoros flag or also other flotilla vessels bearing State Party flags were covered by the referral; and whether the referral encompasses the 6 June 2010 incident.

222 Regulation 46(2) provides: ‘The Presidency shall assign a situation to a Pre-Trial Chamber as soon as the Prosecutor has informed the Presidency in accordance with Regulation 45. The Pre-Trial Chamber shall be responsible for any matter, request or information arising out of the situation assigned to it, save that, at the request of a Presiding Judge of a Pre-Trial Chamber, the President of the Pre-Trial Division may decide to assign a matter, request or information arising out of that situation to another Pre-Trial Chamber in the interests of the administration of justice.’

223 ICC-01/13-1.

release issued the same day, the Presidency clarified that ‘this is a procedural matter only, and is not the beginning of an investigation’.²²⁴ The Presidency stressed that the decision as to whether or not to open an investigation, following a state referral, is made by the Office of the Prosecutor, and that as such the Pre-Trial Chamber shall not play any role in this determination.

At the time of writing this Report, a decision as to whether or not an investigation will be opened into this situation has not been made public.

224 ‘2010 events on Comorian, Greek and Cambodian vessels: Situation assigned to ICC Pre-Trial Chamber I’, *ICC Press Release*, ICC-CPI-20130705-PR926, 5 July 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr926.aspx>, last visited on 21 February 2014.

Democratic Republic of the Congo

In June 2004, following a referral by the Government of the DRC earlier that year, the Situation in the 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’.²²⁵ 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. Five of those individuals have been arrested or surrendered to the Court. One arrest warrant remains 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.

Thomas Lubanga Dyilo (Lubanga), the first accused to come into the Court’s custody in 2006 and the first to stand trial, was convicted in March 2012, and sentenced to 14 years imprisonment in July 2012. The trial judgement and sentencing decision, as well as the reparations decision, issued in August 2012, are currently under appeal. The ongoing appeal proceedings are discussed in

225 ‘The Office of the Prosecutor of the International Criminal Court opens its first investigation’, ICC-OTP-20040623-59, *OTP Press Release*, 23 June 2004, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx>, last visited on 21 February 2014.

greater detail in the **Appeals Proceedings** section of this Report. The second trial arising out of investigations in the Ituri region, against Germain Katanga (Katanga) and Mathieu Ngudjolo Chui (Ngudjolo), concluded in early 2012. As described in the **Trial Proceedings** section of this Report, in November 2012 the Trial Chamber severed the cases against Katanga and Ngudjolo. In December, the Trial Chamber acquitted Ngudjolo of all charges and ordered his immediate release. At the time of writing this Report, the trial judgement against Katanga has not yet been issued, and he remains in the Court’s custody. A fourth suspect, Bosco Ntaganda (Ntaganda), who had been at large since the issuance of his first Arrest Warrant in 2006,²²⁶ surrendered to the ICC in March 2013.

Following the Prosecution’s investigation in North 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.²²⁷ In 2012, the Prosecution pursued a second case arising out of 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. At the time of writing, Mudacumura’s Arrest Warrant remains outstanding.

Of the seven individuals charged by the Prosecution in the DRC Situation, only Lubanga was not charged with gender-based crimes. A more detailed overview of the charges for gender-based crimes in all cases and Situations is provided in the **Charges for Gender-based Crimes** section of this Report.

226 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.

227 ICC-01/04-01/10-465-Red. The decision is discussed in more detail in the *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 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, who reportedly died in October 2006, were terminated after confirmation of his death in 2007.²²⁸ In November 2007, the Office of the Prosecutor informed the Pre-Trial Chamber that it received information that Otti had been killed under orders of Kony in October 2007.²²⁹ However, at the time of writing this Report, the Court's public documents continue to treat Otti as a suspect at large. Only Kony and Otti are charged with gender-based crimes.

Investigations in the Uganda Situation have focused primarily on crimes committed by the LRA. Proceedings before the ICC in the Uganda Situation are relatively inactive pending the arrest or surrender of Kony, Odhiambo and Ongwen. No further arrest warrants have been issued since the opening of investigations.

228 ICC-02/04-01/05-248.

229 ICC-02/04-01/05-258.

Central African Republic

The Situation in the CAR was referred to the Court in December 2004 by the Government of the CAR.²³⁰ 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.

At the time of writing this Report, charges have been brought in the CAR Situation against Jean-Pierre Bemba Gombo (Bemba), alleged President and Commander-in-Chief of the MLC. The case against Bemba includes charges for gender-based crimes. Charges against Bemba relate to crimes allegedly committed by MLC soldiers in the CAR in 2002-2003, when the MLC allegedly entered the CAR territory temporarily to assist the weakened forces that had remained loyal to the then-CAR President Ange-Félix Patassé, in order to suppress an attempted coup led by François Bozizé, former Chief of Staff of the CAR national forces. Patassé was exiled from the CAR in 2003, at which time Bozizé seized power.

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 in August 2012, and concluded in November 2013. The case is now awaiting closing arguments. The Bemba case is discussed in more detail in the **Trial Proceedings** section of this Report.

230 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', ICC-OTP-20050107-86, *OTP Press Release*, 2005, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx>, last visited on 21 February 2014.

On 20 November 2013, in connection with the Bemba trial, new charges were brought against Bemba, and against the lead attorney of the Bemba Defence team, Aimé Kilolo-Musamba; the case manager of the team, Jean-Jaques Mangenda Kabongo; a member of the Congolese parliament, Fidèle Babala Wandu; and Narcisse Arido, a defence witness, all of whom were subsequently taken into the custody of the Court. These charges, alleging offences against the administration of justice, under Article 70 of the Rome Statute, are discussed further in the **Victim and Witness Issues** section of this Report.

The CAR continues to experience significant violence and unrest. In December 2012, violence in the CAR escalated, when a coalition of rebel groups operating under the name of 'Seleka' advanced on Bangui, the capital of the country. The Seleka coalition was composed of at least three armed rebel groups that had been operating in northern CAR since 2003. The group claimed that the Government had failed to abide by peace agreements signed between 2007 and 2011, and was calling for: the execution of the DDR programme; the implementation of recommendations resulting from the Inclusive Political Dialogue; the amendment of the Constitution; and the resignation of President François Bozizé. Although a ceasefire was signed between the Seleka coalition and President Bozizé in January 2013, in March Seleka stated that the government had not upheld the agreement, by failing to integrate Seleka soldiers into the army, and by refusing to send home foreign troops.²³¹ On 24 March 2013, the Seleka coalition, led by Michel Djotodia, seized Bangui. President Bozizé reportedly fled to Cameroon,²³² and on 25 March 2013, Djotodia declared himself President and Defence Minister of the CAR, and suspended the National Assembly and Constitution.²³³ Djotodia subsequently set up

a transitional Cabinet and appointed several leaders of the Seleka coalition to run the existing government ministries. On 13 September 2013, Djotodia dissolved the Seleka coalition but the ex-rebels refused to disarm and continued to commit crimes. Subsequently, local self defence militias, known as 'anti-balaka' or anti-machetes, led several attacks against former Seleka rebels.

Following the coup by Seleka, the African Union reportedly suspended the country's membership, and imposed sanctions, travel restrictions and an asset freeze on seven Seleka members, including Djotodia.²³⁴ The European Union suspended its aid programme, indicating this would only be restored upon the restoration of the rule of law.²³⁵

In a statement issued on 14 August, the UN Security Council expressed its 'deep concern at the security situation in the Central African Republic, characterised by a total breakdown in law and order, and the absence of the rule of law'.²³⁶ The UN further noted 'reports of widespread human rights violations, notably by Séleka elements, including those involving arbitrary arrests and detention, sexual violence against women and children, torture, rape, extrajudicial killings, recruitment and use of children and attacks against civilians'.²³⁷ In a statement on 7 August, Chief Prosecutor Bensouda expressed concern about the continuing deterioration of the situation in the CAR and the commission of crimes that include 'attacks against civilians, murder, rape, and recruitment of child soldiers'. She reiterated 'previous calls to those responsible for committing these crimes to

231 'President Is Said to Flee as Rebels Seize Capital of the Central African Republic', *New York Times*, 24 March 2013.

232 'Central African Republic president fled to Cameroon', *CNN*, 25 March 2013.

233 'Djotodia to rule by decree, suspends constitution', *France* 24, 26 March 2013; 'CAR rebel head Michel Djotodia "suspends constitution"', *BBC News*, 26 March 2013.

234 'Djotodia to rule by decree, suspends constitution', *France* 24, 26 March 2013.

235 'EU to keep Central African Republic aid suspended', *Reuters*, 23 April 2013.

236 'Security Council Press Statement on Central African Republic', *United Nations*, 14 August 2013 available at <<http://www.un.org/News/Press/docs/2013/sc11093.doc.htm>>, last visited on 21 February 2014.

237 'Security Council Press Statement on Central African Republic', *United Nations*, 14 August 2013 available at <<http://www.un.org/News/Press/docs/2013/sc11093.doc.htm>>, last visited on 21 February 2014.

desist forthwith'. She added, '[m]y office will do its part in investigating and prosecuting those most responsible for the commission of serious crimes, if necessary. Our past activities, notably the prosecution of Mr Jean-Pierre Bemba, have shown that we will not hesitate to do so.'²³⁸ On 31 May 2013, the CAR Prosecutor announced that they had issued an international arrest warrant for former President Bozizé, charging him with crimes against humanity and incitement to genocide, including murder, summary executions, abduction, arbitrary detention and destruction of property, in addition to economic crimes.²³⁹ At the time of writing this Report, Bozizé remains in Cameroon. The CAR authorities indicated that the arrest warrant was issued in the context of its investigations into crimes committed during Bozizé's ten years in power. The authorities confirmed that 'other international arrest warrants are being issued' without naming specific individuals.²⁴⁰ The ICC reportedly continues to monitor the situation.²⁴¹

On 10 October 2013, the UN Security Council unanimously approved a resolution sponsored by France aimed at stabilising the CAR. Under the resolution, the Council adjusted the mandate of BINUCA and authorised the deployment of an African-led International Support Mission in the CAR to be referred to as MISCA.²⁴²

238 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to situation in Central African Republic', *OTP*, 7 August 2013, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-07-08-2013.aspx>, last visited on 21 February 2014.

239 'Central African Republic issues arrest warrant for ex-president', *Reuters*, 31 May 2013; 'CAR issues arrest warrant for ex-president', *Al Jazeera*, 1 June 2013.

240 'CAR issues arrest warrant for ex-president', *Al Jazeera*, 1 June 2013.

241 'CAR issues arrest warrant for ex-president', *Al Jazeera*, 1 June 2013.

242 'Central African Republic: Security Council reinforces UN office, backs African Union peacekeeping role', *UN News*, 10 October 2013. See also S/RES/2121.

Darfur

In March 2005, the Situation in Darfur became the first Situation to be referred to the ICC by the UN Security Council.²⁴³ 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 2007.²⁴⁴

At the time of writing this Report, the Court has issued arrest warrants or summonses to appear in five cases, involving seven individuals. Four of these individuals have been charged with gender-based crimes. 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. The charges against Banda and Jerbo were confirmed in March 2011, and their trial is scheduled to start in May 2014. However, on 21 April 2013 the Defence for Jerbo reported that he had died in North Darfur, on 19 April 2013. The circumstances surrounding Jerbo's death, as well as the trial preparations in the case against Banda and Jerbo, are described in more detail in the section on **Trial proceedings**. The arrest warrants for President Omar Hassan Ahmad Al'Bashir (President Al'Bashir), issued in 2009 and 2010, for Ahmad Muhammed Harun

243 S/Res/1593.

244 'Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)', *ICC website*, 11 June 2010, para 11, available at <http://www.icc-cpi.int/NR/rdonlyres/5B7C603A-6D74-4A24-8979-C38372FB9EEA/282156/Finalformat_tedspeechUNSC_11062010postdeliveryclean.pdf>, last visited on 21 February 2014.

(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.

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 PNU faced a challenge from opposition candidate Raila Odinga, leader of the ODM.²⁴⁵

The Situation in Kenya has involved an admissibility challenge by the Government,²⁴⁶ a continuing active lobby by the Kenyan Government with the 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.²⁴⁷ 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.²⁴⁸ 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. Three of the six individuals were charged with gender-based crimes. 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 — were scheduled to start in April 2013. However, in March 2013, the Prosecution announced the withdrawal of all charges against Muthaura, and in December 2013 requested an adjournment of the trial against Kenyatta. Securing witness testimony for the trials remains an ongoing challenge for the Prosecution, and on 2 October 2013, an arrest warrant was unsealed for Kenyan Journalist Walter Barasa (Barasa), charging offences against the administration of justice under Article 70, for his alleged role in corruptly influencing witnesses. Further, the start of the trials has been postponed a number of times due to delays in the Prosecution's disclosure of evidence, the need to address and decide on various Defence applications before the Chamber, the scope of post-confirmation investigations, and the subsequent requests by the Prosecution to add new witnesses to its witness list. These developments are discussed in the **Trial Proceedings** section of this Report.

Following presidential elections on 4 March 2013, and the confirmation of these results by the Kenyan Supreme Court on 30 March 2013, Kenyatta became the first ICC indictee elected to be a Head of State, and therewith became the first sitting Head of State to face trial before the ICC. Ruto was elected as Kenya's Vice-President. Kenyatta's election, as well as ongoing challenges for cooperation with the ICC in the Kenya Situation, are discussed in greater detail in the **Trial Proceedings** section of this Report.

245 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.

246 The challenge was unsuccessful. See further, *Gender Report Card 2011*, p 265-271.

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

248 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 of the Gaddafi Regime on anti-government protestors. The Prosecutor officially announced the opening of an investigation on 3 March 2011.

The Court initially issued Arrest Warrants for 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)²⁴⁹ and his brother-in-law Abdullah Al-Senussi (Al-Senussi) remain outstanding. None of the individuals charged in the Libya Situation have been charged with gender-based crimes. Cooperation with the ICC regarding the execution of the outstanding arrest warrants remains on ongoing challenge, and Libya has also challenged the admissibility of the cases against Gaddafi and Al-Senussi.²⁵⁰ Pre-Trial Chamber I found, in a decision handed down in May 2013,²⁵¹ that Gaddafi's case remained admissible before the ICC. However, in October 2013, in the first such decision by

249 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.

250 ICC-01/11-01/11-130-Conf and ICC-01/11-01/11-307-Red2.

251 ICC-01/11-01/11-344-Red.

the ICC, the Pre-Trial Chamber found that Al-Senussi's was inadmissible and that he should instead be tried in Libya.²⁵²

Côte d'Ivoire

The Situation in Côte d'Ivoire 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,²⁵³ and the second time the Prosecutor has initiated an investigation *proprio motu*. However, subsequent to the opening of an investigation in 2012, in 2013 Côte d'Ivoire deposited its instrument of ratification of the Rome Statute and thus became the 122nd State Party, and the 34th African State to ratify the Rome Statute.²⁵⁴

The initiation of the investigation in Côte d'Ivoire followed a deterioration of the situation in the country 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'.²⁵⁵ 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. On 23 June 2011 the ICC Prosecutor requested authorisation to initiate investigations into the Situation in

252 ICC-01/11-01/11-466-Red.

253 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.

254 'Côte d'Ivoire ratifies the Rome Statute', *ICC Press Release*, ICC-ASP-20130218-PR873, 18 February 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr873.aspx>, last visited on 21 February 2014.

255 'Côte d'Ivoire: six months of post-electoral violence: Summary', *Amnesty International*, 25 May 2011, p 3, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_836.pdf>, last visited on 21 February 2014.

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.

The transfer of former President Laurent Koudou Gbagbo (Laurent Gbagbo) to the ICC on 30 November 2011 marked the first time a former Head of State came into the Court's custody. Simone Gbagbo, wife of Laurent Gbagbo, became the first woman for whom an arrest warrant was publicly issued by the ICC when her Arrest Warrant, issued under seal on 29 February 2012, was unsealed in November 2012. Both Laurent and Simone Gbagbo are charged with gender-based crimes, making Simone Gbagbo one of few women in international criminal law ever to have been charged with gender-based crimes. An arrest warrant against a third suspect and member of Laurent Gbagbo's inner circle, Charles Blé Goudé, was unsealed on 30 September 2013. The Arrest Warrant against Blé Goudé also includes gender-based crimes.

The confirmation of charges hearing in the case against Laurent Gbagbo took place in February 2013, but in June 2013, the Pre-Trial Chamber adjourned the confirmation proceedings.²⁵⁶ At the time of writing this Report, Simone Gbagbo and Blé Goudé remain in the custody of the authorities of Côte d'Ivoire, who have expressed an intention to try them domestically, and have filed an admissibility challenge in the Simone Gbagbo case.²⁵⁷

256 ICC-02/11-01/11-432.

257 ICC-02/11-01/12-11-Red.

Mali

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.²⁵⁸ 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.²⁵⁹

On 16 January 2013, Prosecutor Bensouda announced that, pursuant to Article 53(1), her Office had formally opened an investigation into alleged crimes committed in Mali since January 2012.²⁶⁰ The Prosecutor indicated that her Office's investigation will focus on crimes committed in the three northern regions of Mali. Jointly with the announcement opening the investigation, the Prosecutor publicly released her Article 53(1) Report on the Situation in Mali.²⁶¹ The report

258 Government of Mali, 'Referral Letter', *ICC website*, 13 July 2012, available at <<http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>>, last visited on 21 February 2014.

259 'ICC Prosecutor Fatou Bensouda on the Malian State Referral of the Situation in Mali since January 2012', ICC-OTP-20120718-PR829, *OTP Press Release*, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr829.aspx>, last visited on 21 February 2014. The Prosecutor's statement refers to reports of 'instances of killings, abductions, rapes and conscription of children'.

260 'ICC Prosecutor opens investigation into war crimes in Mali: 'The legal requirements have been met. We will investigate'', ICC-OTP-20130116-PR869, *OTP Press Release*, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx>, last visited on 21 February 2014.

261 'Article 53(1) Report on the Situation in Mali', *OTP*, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportEN G16Jan2013.pdf>, last visited on 21 February 2014. While the Office of the Prosecutor is not required to make public its report when acting pursuant to a referral under Article 53(1), the Prosecutor indicated that her Office 'decided to do so in the interests of promoting clarity with respect to its statutory activities and decisions'.

indicated that the Situation in Mali is marked by two main events: first, the emergence of a rebellion in the North on or around 17 January 2012, which resulted in Northern Mali being seized by armed groups; and, second, a coup d'état by a military junta on 22 March 2012, which led to the removal of President Touré shortly before scheduled presidential elections. The report identifies the main actors to the conflict as government forces, the MNLA, AQIM, Ansar Dine, and the MUJAO.

The Prosecutor announced that, following an assessment of the evidence, her Office had concluded that there was a reasonable basis to believe that the following war crimes had been committed in Mali since January 2012: murder;²⁶² the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court;²⁶³ mutilation, cruel treatment and torture;²⁶⁴ intentionally directing attacks against protected objects;²⁶⁵ pillaging;²⁶⁶ and rape.²⁶⁷ The Office of the Prosecutor also indicated that it would continue to investigate allegations relating to the use, conscription, and enlistment of children.²⁶⁸ The Prosecutor did not find a reasonable basis to believe that crimes against humanity under Article 7 had been committed, but indicated that this assessment could be revisited in the future following further analysis and investigation.

In her Report, the Prosecutor referenced information from international organisations and non-governmental organisations indicating that, following the takeover of the North by armed groups, more than 50 cases of rape or attempted rape were recorded, mostly in the period from March to May 2012, in Gao, Timbuktu, Niafounke, villages around Dire, and in the Menaka region.

262 Article 8(2)(e)(i).
 263 Article 8(2)(c)(iv).
 264 Article 8(2)(c)(i).
 265 Article 8(2)(e)(iv).
 266 Article 8(2)(e)(v).
 267 Article 8(2)(e)(vi).
 268 Article 8(2)(e)(vii).

Following reports of abuse committed by the Malian forces in the region, in a statement on 28 January 2013, Prosecutor Bensouda urged the Malian authorities 'to put an immediate stop to the alleged abuses and on the basis of the principle of complementarity, to investigate and prosecute those responsible for the alleged crimes'.²⁶⁹ The Prosecutor reminded all parties to the conflict that her Office has jurisdiction over all serious crimes committed within the territory of Mali from January 2012 onwards, and that all those alleged to be responsible for serious crimes must be held accountable.

On 20 June 2013, the UN Security Council welcomed a peace agreement signed between the Interim Government of Mali and rebel groups, providing for an immediate ceasefire and allowing the national presidential elections of July to take place.²⁷⁰ Subsequently, in August 2013, Ibrahim Boubacar Keita was elected as President of Mali.²⁷¹ In September 2013, rebel groups suspended their participation in the peace agreement and resumed negotiations a few days later.²⁷²

On 31 October 2013, the Prosecutor met with Mali's Minister of Justice Mohamed Ali Bathily and Prime Minister Oumar Tatam Ly. She declared on Malian television that the purpose of her visit was to report on the progress of their investigations in Mali.²⁷³ At the time of writing this Report, no arrest warrants have been issued in the Mali Situation.

269 'Statement by ICC Prosecutor concerning Mali', *OTP*, 28 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/otpstatement280113.aspx>, last visited on 21 February 2014.
 270 'Security Council press statement on Mali', *United Nations*, 20 June 2013.
 271 'Mali: UN mission welcomes confirmation of presidential election results', *United Nations*, 20 August 2013.
 272 'Rebels in Mali Suspend Peace Deal With Government', *New York Times*, 26 September 2013.
 273 'Mali. L'enquête pour crimes de guerre présumés se poursuit', *Le Nouvel Observateur*, 1 November 2013.

Charges for gender-based crimes

18 August 2012 – 31 October 2013*

*The Laurent Gbagbo case has been included through 31 December 2013 in relation to the Confirmation of Charges hearing.

At the time of writing this Report, charges for gender-based crimes have been brought in six of the eight Situations under investigation by the ICC: Uganda, the DRC, the CAR, Darfur, Kenya and Côte d’Ivoire. No charges for gender-based crimes have yet been brought against the three suspects named in the Libya Situation,²⁷⁴ and no arrest warrants or summons to appear have yet been sought in the Mali Situation.

Charges for gender-based crimes have now been brought in 14 of the 20 cases involving crimes under Article 5²⁷⁵ of the Rome Statute, a proportion of 70%. Charges for gender-based crimes have been included in: the Kony *et al* case in the Uganda Situation; the Katanga, Ngudjolo, Ntaganda, Mbarushimana and

274 In her reports to the United Nations Security Council on 7 November 2012 and 3 May 2013, Prosecutor Fatou Bensouda recalled that her Office had confirmed to the Security Council in May 2012 that it was proceeding with a second case relating to gender-based crimes that had been committed during the 2011 uprising. The Prosecutor indicated that her office was continuing to analyse information gathered to determine whether crimes within the jurisdiction of the ICC had occurred. However, the Prosecutor noted in her November report that her office was facing ‘many challenges in the collection of evidence to prove the commission of sexual and gender-based crimes’ and that it was ‘mindful of the seriousness and the sensitivity of the crime of rape in Libya for victims, their families and for Libyan society’. Given these concerns, the Prosecutor indicated that her office was also assessing whether the protection of victims and witnesses could be assured if a case relating to sexual and gender-based crimes were to be pursued. See ‘Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)’, *ICC website*, 7 November 2012, paras 21-22, available at <http://www.icc-cpi.int/iccdocs/otp/UNSCreportLibyaNov2012_english5.pdf>, last visited on 20 February 2014; ‘Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)’, *ICC website*, 8 May 2013, para 21, available at <<http://www.icc-cpi.int/iccdocs/otp/UNSC-report-Libya-May2013-Eng.pdf>>, last visited on 20 February 2014.

275 In analysing the charges for gender-based crimes, we follow the distinction made in the Rome Statute between crimes listed in Article 5, which limits the jurisdiction of the Court to ‘the most serious crimes of concern to the international community as a whole’, specifically genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8), and the crime of aggression; and the lesser category of crimes included as offences against the administration of justice listed in Article 70. 2013 was the first year in which offences under the administration of justice were charged and made public. These statistics therefore do not include cases alleging offences against the administration of justice: against Barasa in the Kenya Situation and against Bemba, Kilolo-Musamba, Mangenda Kabongo, Babala Wandu, and Arido in the CAR Situation.

Mudacumura cases in the DRC Situation; the Bemba case in the CAR Situation; the Al’Bashir, Harun and Kushayb, and Hussein cases in the Darfur Situation; the Kenyatta case in the Kenya Situation; and the Laurent Gbagbo, Simone Gbagbo, and Blé Goudé cases in the Côte d’Ivoire Situation. No charges for gender-based crimes were included in the Lubanga case in the DRC Situation, the Abu Garda and Banda and Jerbo cases in the Darfur Situation, the Ruto and Sang case in the Kenya Situation, and the Gaddafi *et al* case in the Libya Situation.

The status of charges for gender-based crimes in each case including crimes within Article 5 of the Rome Statute, and against each individual, are set out in detail below. Of the 31 individual suspects and accused who have been charged by the ICC in these cases, 18 have been charged with gender-based crimes, a proportion of 58%.

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 related 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. The majority of the Pre-Trial Chamber (Judge Sanji Mmasenono Monageng dissenting), did not confirm any of the charges, including for gender-based crimes,

against Mbarushimana.²⁷⁶ Nonetheless, the arrest warrant against him contained the broadest range of gender-based crimes that had been sought by the Office of the Prosecutor to date, suggesting efforts to make greater use of the explicit codification of sexual and gender-based crimes included in the Rome Statute.

Since the publication of the *Gender Report Card 2012*, and as of 31 October 2013, charges for gender-based crimes have been brought by the Office of the Prosecutor in one new case, that against Charles Blé Goudé. Also in the Côte d’Ivoire Situation, in November 2012, an arrest warrant for Simone Gbagbo, which was issued earlier in February that year, was unsealed and includes charges for gender-based crimes. Simone Gbagbo is the first woman to be publicly indicted by the ICC. At the time of writing this Report, the arrest warrants for Charles Blé Goudé and Simone Gbagbo remain outstanding.

276 The majority found substantial grounds to believe that seven out of the eight war crimes alleged had been committed by the FDLR but did not find substantial grounds to believe that Mbarushimana was individually criminally responsible for these alleged crimes. Furthermore, the majority did not find substantial grounds to believe that any of the five crimes against humanity alleged had been committed. See *Gender Report Card 2012*, p 116-123.

Status of all gender-based charges across each case as of 31 October 2013

This chart lists the 14 cases and 18 individuals against whom charges for gender-based crimes have been sought by the Prosecutor.

<i>Case</i>	<i>Stage of proceedings</i>	<i>Charges for gender-based crimes</i>
<i>Prosecutor v. Ngudjolo</i>	Acquitted	Charges against Ngudjolo: <ul style="list-style-type: none"> • Rape as a crime against humanity • Rape as a war crime • Sexual slavery as a crime against humanity • Sexual slavery as a war crime
<i>Prosecutor v. Katanga</i>	Trial completed, awaiting trial judgement	Charges against Katanga: <ul style="list-style-type: none"> • Rape as a crime against humanity • Rape as a war crime • Sexual slavery as a crime against humanity • Sexual slavery as a war crime
<i>Prosecutor v. Bemba</i>	At trial	Charges against Bemba: <ul style="list-style-type: none"> • Rape as a crime against humanity • Rape as a war crime
<i>Prosecutor v. Kenyatta</i>	Trial adjourned as of December 2013	Charges against Kenyatta: <ul style="list-style-type: none"> • 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
	In April 2013, the Prosecution withdrew the charges against Muthaura	Charges against Muthaura: <ul style="list-style-type: none"> • 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: <ul style="list-style-type: none"> • 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
<i>Prosecutor v. Laurent Gbagbo</i>	Awaiting confirmation of charges hearing scheduled for February 2014	Charges against Laurent Gbagbo: <ul style="list-style-type: none"> • 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
<i>Prosecutor v. Ntaganda</i>	Confirmation of charges hearing scheduled for February 2014	Charges against Ntaganda: ²⁷⁷ <ul style="list-style-type: none"> • 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

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277 In the application for the arrest warrant by the Office of the Prosecutor and the decision by the Pre-Trial Chamber, rape and sexual slavery charges are referred to as a single count.

Status of all gender-based charges across each case as of 31 October 2013 *continued*

<i>Case</i>	<i>Stage of proceedings</i>	<i>Charges currently included</i>
Prosecutor v. Mbarushimana	No charges confirmed for trial, suspect released from custody	Charges against Mbarushimana: <ul style="list-style-type: none"> • 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
Prosecutor v. Simone Gbagbo	Arrest warrant issued, no accused in custody	Charges against Simone Gbagbo: <ul style="list-style-type: none"> • 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. Charles Blé Goudé	Arrest warrant issued, no accused in custody	Charges against Goudé: <ul style="list-style-type: none"> • Rape and other forms of sexual violence as a crime against humanity • [Persecution as a crime against humanity]²⁷⁸
Prosecutor v. Mudacumura	Arrest warrant issued, no accused in custody	Charges against Mudacumura: <ul style="list-style-type: none"> • Rape as a war crime • Torture as a war crime • Mutilation as a war crime • [Outrages upon personal dignity as a war crime]²⁷⁹
Prosecutor v. Hussein	Arrest warrant issued; no accused in custody	Charges against Hussein: <ul style="list-style-type: none"> • 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

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278 The charge of persecution as a crime against humanity is provisionally included as a gender-based crime subject to the availability of further information regarding the acts underlying the crime, and based on a comparison of the arrest warrant for Blé Goudé with arrest warrants for Laurent Gbagbo, Simone Gbagbo, which are substantially similar and contain charges of persecution which include acts of rape and sexual violence as clarified in the amended DCC for Laurent Gbagbo. ICC-02/11-01/11-592-Anx1, paras 218, 220, 235.

279 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.

<i>Case</i>	<i>Stage of proceedings</i>	<i>Charges currently included</i>
<i>Prosecutor v. Al’Bashir</i>	Arrest warrant issued, no accused in custody	Charges against Al’Bashir: <ul style="list-style-type: none"> • Sexual violence causing serious bodily or mental harm as an act of genocide • Rape as a crime against humanity
<i>Prosecutor v. Harun & Kushayb</i>	Arrest warrant issued, no accused in custody	Charges against Harun: <ul style="list-style-type: none"> • 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: <ul style="list-style-type: none"> • 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)
<i>Prosecutor v. Kony et al</i>	Arrest warrant issued, no accused in custody	Charges against Kony: <ul style="list-style-type: none"> • Sexual slavery as a crime against humanity • Rape as a crime against humanity • Rape as a war crime Charges against Otti [believed deceased]: <ul style="list-style-type: none"> • Sexual slavery as a crime against humanity • Rape as a war crime

Developments in cases including gender-based crimes

During the period under review, there have been significant developments in many of the cases which include charges for gender-based crimes. The case against Ngudjolo, the first case to include these charges to reach the stage of trial judgement, resulted in an acquittal in December 2012. However, as discussed in detail in the **Trial Proceedings** section of this Report, as the judges could not find beyond a reasonable doubt that Ngudjolo was the lead commander of the Lendu combatants from Bedu-Ezekere at the time of the Bogoro attack, as the Prosecutor had alleged, they also did not reach any legal findings about the charges of rape and sexual slavery.²⁸⁰ The trial judgement against Katanga, who was charged in relation to the same attack, was delayed by the Trial Chamber while they considered a change to the legal characterisation of the facts, specifically to the mode of liability under which he was charged.²⁸¹ This is also discussed in the **Trial Proceedings** section of this Report. The trial judgement in the Katanga case was rendered in March 2014.

In the Bemba case, the second case to go to trial including charges for gender-based crimes, the Defence finished presenting its evidence on 14 November 2013, and the case has reached the stage of closing arguments. However, as discussed in the **Trial Proceedings** and **Victims and Witnesses** sections of this Report, issues with Defence witness testimony have resulted in new charges against Bemba, two members of his Defence team and two of his associates for

280 See further Women's Initiatives for Gender Justice, 'Special Issues the Ngudjolo judgement', *Legal Eye on the ICC eLetter*, February 2013, April 2013 and January 2014, available at <<http://www.iccwomen.org/news/index.php>>.

281 See 'Modes of Liability: A review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, November 2013, p 116-130, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

offences against the administration of justice for allegedly corruptly influencing witnesses and presenting evidence and documents known to be false or forged.

At the time of writing this Report, the closing arguments had yet to take place and no date had been scheduled for them. In addition, the Trial Chamber notified the parties in Bemba that it was considering a change to the legal characterisation of the facts with respect to the mode of liability under which Bemba was charged.²⁸²

Witness issues also affected the Muthaura and Kenyatta case in the Kenya Situation, during the period under review. The Muthaura and Kenyatta case is the only case in the Kenya Situation including charges of gender-based crimes. The case suffered significant setbacks in respect of the availability of witnesses to testify, which was among the factors leading the Prosecutor to withdraw charges against Muthaura completely in March 2013, and in December 2013 to adjourn the Kenyatta case while the Prosecution assessed whether it had enough evidence to proceed. These developments are discussed in more detail below and in the **Trial Proceedings** section of this Report.

The above developments resulted in the delay of a number of cases at the trial stage, and therefore delays in delivering jurisprudence on gender-based crimes at the ICC. However, the period under review also saw continued progress in respect of the Prosecutor seeking to charge gender-based crimes. As noted above, in September 2013 an arrest warrant inclusive of gender-based crimes was unsealed against Blé Goudé in the Côte d'Ivoire Situation. With this arrest warrant, the Côte d'Ivoire Situation

282 See 'Modes of Liability: A review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, November 2013, p 111-116, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

is the Situation in which gender-based crimes have been most consistently charged, having been brought against each of the three suspects in the Situation: Blé Goudé, Laurent Gbagbo, and Simone Gbagbo. However, as will be discussed further in this section, the Pre-Trial Chamber has also raised questions about the evidence offered in support of the charges in the most advanced case in the Situation, that against Laurent Gbagbo. As further discussed below, in June 2013, the majority of the Pre-Trial Chamber adjourned his confirmation of charges proceedings, requesting further investigations by the Prosecution before it could rule on the confirmation of charges. This Pre-Trial Chamber decision, with Judge Silvia Fernández de Gurmendi dissenting,²⁸³ follows earlier statements by the Judges at the time of issuing the arrest warrant for Laurent Gbagbo that the charges of rape and other forms of sexual violence were not well substantiated. In issuing the arrest warrant, the Pre-Trial Chamber noted that the Prosecution had ‘not referred to any witness statements, witness summaries, or affidavits’ and therefore had only found that the ‘low evidential threshold’ of reasonable grounds to believe was met as required.²⁸⁴

Ntaganda, the alleged former Deputy Chief of Staff and commander of operations of the FPLC, surrendered to the ICC in March 2013 and faces charges including rape and sexual slavery as both war crimes and crimes against humanity, and persecution, including acts of sexual violence, as a crime against humanity.²⁸⁵ Ntaganda was initially indicted in a sealed arrest warrant issued in August 2006, which

was unsealed in April 2008, for the more limited charges of enlistment, conscription and use of child soldiers, with the Prosecution adding more charges against Ntaganda in a second arrest warrant issued in July 2012. In requesting the second arrest warrant, in May 2012, the Prosecutor requested additional 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 2003.²⁸⁶ On 13 July 2012, Pre-Trial Chamber II issued a second arrest warrant for Ntaganda charging him 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).²⁸⁷ In relation to the gender-based crimes, the DCC specifies that Ntaganda is allegedly responsible for rape and sexual slavery committed by UPC/FPLC militia members against child soldiers within the militia, as well as against civilians.²⁸⁸ This case marks the first time in international law that the ICC has charged a senior military figure with acts of rape and sexual slavery committed against child soldiers within his own militia group and under his command.²⁸⁹ Ntaganda’s confirmation of charges hearing took place in February 2014.

283 Judge Fernández de Gurmendi’s dissent is summarised below.

284 See *Gender Report Card 2012*, p 130-131.

285 For more information about the Ntaganda case, see *Gender Report Card 2009*, p 55; *Gender Report Card 2010*, p 99-100, *Gender Report Card 2011*, p 149-150; *Gender Report Card 2012*, p 114-115 and p 174-177. See also ‘Statement by WI and partners’, available at <<http://www.iccwomen.org/documents/Statement-on-Ntaganda-surrender.pdf>>.

286 ICC-01/04-611-Red.

287 ICC-01/04-02/06-36-Red. See further *Gender Report Card 2012*, p 114-115.

288 ICC-01/04-02/06-203-AnxA, paras 67, 72, 74, 77-79, 84, 89, 100-108 and p 57-58.

289 See ‘ICC Commencement of the Confirmation of Charges Hearing, *The Prosecutor v. Bosco Ntaganda*’, ICC website, available at <http://www.iccwomen.org/news/berichtdetail.php?we_objectID=213>, last visited on 10 March 2014.

The Prosecutor's approach to gender-based crimes

As in previous editions of the *Gender Report Card*, the Women's Initiatives continues to review decisions and analyse factors that may contribute to or interfere with the success of charges for gender-based crimes. In the past, the Women's Initiatives has noted that these charges have been particularly vulnerable relative to charges for other crimes: that charges for gender-based crimes, when they have been brought, have been particularly susceptible to being dismissed, or in some instances recharacterised, in the early stages of proceedings, in particular seeking the issuance of an arrest warrant or summons to appear,²⁹⁰ and

290 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, and that is therefore not possible to make a direct and comprehensive comparison concerning the attrition rate of these charges. This analysis is based solely on those cases in which gender-based charges were initially sought and the Prosecution application for an arrest warrant or summons to appear is publicly available. In the Women's Initiatives' analysis of nine cases, namely the cases against Bemba, Kenyatta, Harun and Kushayb, Al'Bashir, Hussein, Gbagbo, Mbarushimana, Ntaganda and Mudacumura, 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. 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.

the confirmation of charges phase²⁹¹ before the Pre-Trial Chambers. The Women's Initiatives has also noted that the roles of both the Prosecution and the Pre-Trial Chambers are significant in determining the success of charges for gender-based crimes.²⁹² Notably, since her election in 2011, Chief Prosecutor Fatou Bensouda has

291 In 2012, the Women's Initiatives analysed decisions on the confirmation of charges in five cases involving gender-based crimes, namely the cases against Bemba, Katanga, Ngudjolo, Mbarushimana and Kenyatta. In these five cases, the Pre-Trial Chamber has declined to confirm 16 of 32 total charges of gender-based crimes sought by the Prosecution, representing 50% of the gender-based crimes charges sought at this stage of proceedings. In the case against Katanga and Ngudjolo, the Pre-Trial Chamber declined to confirm two charges of outrages upon personal dignity as a war crime 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 570. In the Bemba case in the CAR Situation, three gender-based charges (two counts of rape as torture as both a war crime and a crime against humanity, and one count of outrages on personal dignity as a war crime) were not confirmed. In the confirmation decision, Pre-Trial Chamber II held that charging rape, rape as torture and outrages upon personal dignity would be cumulative charging and 'detrimental to the rights of the defence'. ICC-01/05-01/08-424, paras 202-205 and paras 310-312. In the Mbarushimana case in the DRC Situation, the Pre-Trial Chamber declined to confirm any charges against the accused, including eight charges for gender-based crimes, because, on the basis of the evidence submitted by the Prosecution, the Chamber did not find there were reasonable grounds to believe that Mbarushimana was individually criminally responsible for the alleged crimes committed by the FDLR and as such declined to confirm any charges against Mbarushimana. ICC-01/04-01/10-465-Red, para 340. Lastly, in the case against Muthaura, Kenyatta and Ali in the Kenya Situation, the Chamber did not confirm any charges, including three charges for gender-based crimes, 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. 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.

292 For analysis of the role of the Prosecutor and Pre-Trial Chamber see *Gender Report Card 2010*, p 88-89; *Gender Report Card 2011*, p 121-134; *Gender Report Card 2012*, p 103-131.

consistently stated that her office will prioritise the investigation and prosecution of gender-based crimes.²⁹³ Within the period under review, one new investigation has been initiated, in the Situation of Mali in January 2013, with rape included within the scope of the investigation.²⁹⁴

293 See eg 'Launch of the [GRC] on the [ICC] 2011 - statement by Fatou Bensouda, Prosecutor Elect of the [ICC]', 13 December 2011; 'The incidence of the Female Child Soldier and the [ICC]', 4 June 2012; 'Statement of the Prosecutor of the [ICC], Fatou Bensouda, to mark the International Day for the Elimination of Violence Against Women', 25 November 2013. These statements are available on the ICC website at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/index.aspx>, last visited on 20 February 2014. Among the measures taken by the Prosecutor is the appointment of a Special Gender Advisor. In August 2012 the Prosecutor appointed Brigid Inder to this position. Ms Inder is the Executive Director of the Women's Initiatives for Gender Justice, and is appointed as the external Special Adviser on Gender pro bono and in her individual capacity. See 'ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, as Special Gender Advisor', ICC-OTP-20120821-PR833, *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr833.aspx>, last visited on 20 February 2014. See also *Gender Report Card 2012* p 40, 77. Ms Inder is the second Special Gender Adviser to be appointed to the Prosecutor, following the appointment of Catharine MacKinnon by former Prosecutor Luis Moreno Ocampo. See *Gender Report Card 2009*, p 26, 29; *Gender Report Card 2010*, p 46, 51, 65; *Gender Report Card 2011*, p 58, 64. The Office of the Prosecutor states that 'Special Advisers to the OTP are persons with recognised expertise in their field, who provide advice to the Prosecutor at her request or on their own initiative on training, policies, procedures and legal submissions. They work on a pro-bono basis and like all ICC staff, are required to sign a confidentiality agreement.' 'ICC Prosecutor Fatou Bensouda appoints Patricia Sellers, Leila Sadat and Diane Marie Amann as Special Advisers', ICC-OTP-20121212-PR861, 12 December 2012, *ICC Press Release*, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr861.aspx>, last visited on 10 March 2014.

294 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"', ICC-OTP-20130116-PR869, 16 January 2013, *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr869.aspx>, last visited on 20 February 2014.

Draft Policy Paper on Sexual and Gender-based Crimes

Since early 2012, while still Prosecutor-elect, as well as since taking office in June 2012, Prosecutor Bensouda has frequently mentioned the importance of developing a Sexual and Gender-based Crimes Policy for her office.²⁹⁵ In December 2012 the Office of the Prosecutor, with the Special Adviser on Gender, began work on this policy and conducted a series of internal consultations with staff of the OTP, drawing on their experience and lessons learned in analysing, investigating and prosecuting gender-based crimes. These consultations included staff from each division of the OTP, the specialist units and field staff. In a statement made to mark the International Day for the Elimination of Violence against Women on 25 November 2013, the Prosecutor stated that:

In line with other national and international initiatives to stop unchecked violence against women, my Office has set a clear strategic priority to find innovative methods to boost investigations and prosecutions of sexual and gender-based crimes. Additionally, we will soon finalise our draft policy on sexual and gender crimes, which will further guide our work in fighting impunity for such egregious crimes.²⁹⁶

295 'Statement Prosecutor Elect of the International Criminal Court at Sydney Conference: "Gender Justice and the ICC: Progress and Reflections"', *OTP*, 14 February 2012, p 6, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement%20prosecutor%E2%80%90elect%20of%20the%20international%20criminal%20court%20at%20sydney%20confere.aspx>, last visited on 26 February 2014.

296 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to mark the International Day for the Elimination of Violence Against Women', *OTP*, 25 November 2013, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/Prosecutor-Elimination-Violence-Women.aspx>, last visited on 26 February 2014.

In terms of next steps, at a 25 November reception to mark the International Day for the Elimination of Violence against Women, which was co-hosted by the Women's Initiatives for Gender Justice and the Swedish Ministry for Foreign Affairs, the Prosecutor clarified that the draft would be shared with staff of the Office of the Prosecutor for comment, would be revised accordingly, and would then be circulated to external partners for comment.²⁹⁷ The draft was accordingly circulated to external partners for comment on 7 February 2014.

The Policy Paper on Sexual and Gender-based Crimes will be the first such policy produced by an international court.

Office of the Prosecutor Strategic Plan June 2012–2015

In October 2013, the Office of the Prosecutor released its Strategic Plan for 2012–2015, which outlines changes for the Office at the levels of policy, resources, and organisational performance.²⁹⁸ The Strategic Plan identifies a number of 'future challenges', including: high demand and limited resources; developing jurisprudence that indicates that the Prosecution 'needs to be (more) trial-ready at an earlier stage in the proceedings', with 'more and different kinds of evidence than what the Office considered would suffice in its focused investigations and prosecutions approach'; investigations with limited tools,

and of 'increasingly complex organisational structures that do not fit the model of traditional, hierarchical organisations'; and the need for State cooperation.²⁹⁹

As the Strategic Plan notes, many of the challenges it identifies have arisen in judicial decisions; issues addressed in the Strategic Plan also include many issues raised by the Women's Initiatives.³⁰⁰ For example, in response to the judicial 'requirement of higher evidentiary standards' the Office of the Prosecutor proposes to 'expand and diversify its collection of evidence so as to meet the higher evidentiary threshold.' It states that under the new Strategic Plan the 'notion of focused investigations is replaced by the principle of in-depth, open-ended investigations,' and further states that this new approach has been applied in the Mali investigation in 2013.³⁰¹ Notably, the Strategic Plan also states a clear goal to have cases 'as trial ready as possible' at the confirmation hearing, in response to developing jurisprudence from Pre-Trial Chambers seeking the presentation of developed evidence at the confirmation phase.³⁰²

The Strategic Plan includes as one of its six strategic goals to '[e]nhance the integration of a gender perspective in all areas of our work and continue to pay particular attention to sexual and gender-based crimes and crimes against children.' Noting a 'serious and systematic underreporting of sexual and gender-based violence', the Plan states that the Office 'will focus on these crimes and will continue to pay special attention to them from the stage of preliminary examinations,

297 'Speech of the Prosecutor of the ICC at the Reception organised by Women's Initiatives to mark the International Day for the Elimination of Violence Against Women', *Women's Initiatives for Gender Justice website*, available at <<http://www.iccwomen.org/news/docs/WI-WomVoices12-13/downloads/ProsecutorsKeynoteSpeech25-11-13.pdf>>.

298 'OTP Strategic Plan June 2012-2015', *ICC website*, p 6, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf>, last visited on 20 February 2014 (OTP Strategic Plan).

299 OTP Strategic Plan, p 5.

300 See eg *Gender Report Card 2012*, p 106-113 and Recommendations; *Gender Report Card 2011*, p 121-134 and Recommendations; *Gender Report Card 2010*, p 88-89 and Recommendations.

301 OTP Strategic Plan, p 6, 34.

302 OTP Strategic Plan, p 6.

through to its case selection'.³⁰³ It further states that the Office of the Prosecutor will 'continue to be innovative in its evidence collection and presentation of these charges to the Court'; provide training to its investigators on dealing with vulnerable victims and witnesses; draw on the experience of other tribunals in investigating and prosecuting these crimes; and adopt gender-sensitive approaches to investigations.³⁰⁴ The Strategic Plan also notes a number of policies that the Office intends to finalise, including its Sexual and Gender-based Crimes Policy.³⁰⁵

DRC: Developments in the Ntaganda case

While the approach of the Prosecutor to pay particular attention to gender crimes, as outlined in the Strategic Plan, signals a positive shift, ongoing cases continue to experience difficulties. The Women's Initiatives has noted that, in particular in the cases arising from the initial investigations in the DRC that gave rise to the Lubanga, Katanga, and Ngudjolo cases, as well as the first arrest warrant for Ntaganda, the Prosecution did not adequately and fully investigate gender-based crimes. In the case of Lubanga, the Prosecution did not include these crimes in its investigations and consequently did not charge the accused with acts of sexual violence.³⁰⁶ The lack of charges for gender-based crimes has been one of the issues litigated in the trial and reparations phases in the Lubanga case, in which trial testimony included clear indications of the commission of sexual violence crimes, and

306 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 Cards 2008, 2009, 2010, 2011 and 2012*. 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/news/docs/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>.

303 OTP Strategic Plan, p 27.

304 OTP Strategic Plan, p 27.

305 OTP Strategic Plan, p 27.

in which the eligibility of victims/survivors of gender-based crimes for reparations is at issue.³⁰⁷

Important charges for gender-based crimes have been added in the second arrest warrant for Ntaganda, as outlined above. However, 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.³⁰⁸ The Pre-Trial 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'.³⁰⁹ However, the Chamber also emphasised that the evidence supporting the allegation of sexual slavery as a crime against humanity, which at that time consisted of two witness statements and other circumstantial

307 See the requests to submit *amicus curiae* observations from Women's Initiatives in the Lubanga case, *Legal Filings by the Women's Initiatives for Gender Justice*, ICC-01/04-01/06-403, ICC-01/04-313; see further, *Gender Report Card 2009*, p 86-90 describing the filings and decisions regarding modifying the legal characterisation of the facts under Regulation 55 to include charges of sexual slavery and cruel and inhuman treatment in the Lubanga case. See further *Gender Report Card 2012*, p 132-163 describing the trial judgement in the Lubanga case, and p 198-223 describing the sentencing and reparations decisions. The inclusion of harm arising from gender-based crimes within the scope of the reparations order was among the issues raised by the Women's Initiatives in the *amicus curiae* filing before the Trial Chamber, and in the Trial Chamber's decision on reparations. See further, *Legal Filings by the Women's Initiatives for Gender Justice*, ICC-01/04-01/06-2876.

308 ICC-01/04-02/06-36-Red, para 40.

309 ICC-01/04-02/06-36-Red, para 37.

evidence, may not be sufficient to reach the standard of proof required at future stages of proceedings.³¹⁰ 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'.³¹¹

Following the issuance of the second arrest warrant against Ntaganda, and following internal conflict in Ntaganda's M23 militia group in late 2012 and early 2013³¹² and the split of the M23 into two factions in February 2013, Ntaganda crossed from DRC into Rwanda.³¹³ On 18 March 2013, Ntaganda arrived at the American Embassy in Kigali, where, according to American officials, he requested to be transferred to the ICC.³¹⁴ He was flown to

310 ICC-01/04-02/06-36-Red, para 40.

311 ICC-01/04-02/06-36-Red, para 42.

312 'UN Group of Experts Midterm Report established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council', *United Nations*, 19 July 2013, p 7, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_433.pdf>, last visited on 20 February 2014.

313 'UN Group of Experts Midterm Report established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council', *United Nations*, 19 July 2013, p 8, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_433.pdf>, last visited on 20 February 2014.

314 'Notorious warlord gives himself up to international criminal court', *The Guardian*, 19 March 2013; 'UN Group of Experts Midterm Report established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council', *United Nations*, 19 July 2013, p 8, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_433.pdf>, last visited on 20 February 2014.

the Netherlands on 22 March 2013 and was transferred to the ICC detention centre in The Hague.³¹⁵ Ntaganda made his initial appearance before Judge Tendafilova, the presiding judge of Pre-Trial Chamber II, on 26 March.³¹⁶ As noted above, the confirmation of charges proceedings in the Ntaganda case took place in February 2014. An amended DCC was filed in January 2014.³¹⁷

The Lubanga, Katanga, and Ngudjolo cases are further discussed in the **Trial Proceedings** and **Appeals Proceedings** sections of this Report.

Kenya: Charges for gender-based crimes in the Muthaura and Kenyatta case

The Muthaura and Kenyatta case was the only case in the Kenya Situation to include charges of gender-based crimes. Specifically, the accused were charged as indirect co-perpetrators pursuant to Article 25(3)(a) for the crimes against humanity of murder, deportation or forcible transfer of population, rape, persecution and other inhumane acts.³¹⁸ Although the Prosecutor had originally charged the acts of forced circumcision and penile amputation as 'other forms of sexual violence', in both issuing the summonses to appear and confirming the charges, the Pre-Trial Chamber recharacterised the acts as 'other inhumane acts'.³¹⁹ The Women's Initiatives has expressed

315 'Bosco Ntaganda in the ICC's custody', *ICC Press Release*, 22 March 2013. See also 'Statement by WI and partners', available at <<http://www.iccwomen.org/documents/Statement-on-Ntaganda-surrender.pdf>>.

316 ICC-01/04-02/06-T-2-ENG, p 8 lines 23-24.

317 ICC-01/04-02/06-203-AnxA.

318 Pursuant to Articles 7(i)(a); 7(i)(d); 7(i)(k); 7(i)(g); and 7(i)(h). For additional information about the Kenya investigation see *Gender Report Card 2010*, p 118-127; for information about the charges sought against the six suspects and the confirmation hearings see *Gender Report Card 2011*, p 168-182; for information on the confirmation of charges decisions see *Gender Report Card 2012*, p 128-130.

319 ICC-01/09-02/11-382-Red, para 266. See further *Gender Report Card 2011*, p 179-181. While 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', 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'. ICC-01/09-02/11-T-5-Red-ENG, p 88, lines 9-15; ICC-01/09-02/11-382-Red, para 266. In addition, the Chamber stated that 'not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence'. ICC-01/09-02/11-382-Red, para 265. For a more detailed analysis of the charges for gender-based crimes in this case see *Gender Report Card 2012*, p 128-130. See also 'Kenya: Plea to ICC over forced male circumcision', *IRIN News*, 25 April 2011; and, 'In Kenya, Forced Male Circumcision and a Struggle for Justice', *The Atlantic*, 1 August 2011.

concern about the recharacterisation of these acts, explaining that:

The forced circumcision of Luo men has both political and ethnic significance in Kenya and therefore has a specific 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.³²⁰

The Women's Initiatives maintained that in recharacterising these gender-based charges, the Pre-Trial Chamber overlooked the broader context of the crimes, including 'the force and the coercive environment, as well as the intention and purpose of the acts'. The Women's Initiatives pointed out, however, that 'the prosecutor had also failed to stress these points in its application for summonses to appear, which merely stated that these acts were of a sexual nature, without elaborating on this point'.³²¹

As discussed in detail in the **Trial Proceedings** section of this Report, the Prosecution has faced considerable difficulties in securing witnesses to testify at the Muthaura and Kenyatta trial. In addition, the trial date was postponed a number of times, for reasons described more fully in the **Trial Proceedings** section of this Report. Finally, during a status conference held on 11 March 2013, Prosecutor Bensouda notified Trial Chamber V that her Office was withdrawing all charges against Muthaura.³²² The Prosecutor stated that she had come to the conclusion that there was no longer 'a reasonable prospect of conviction at trial' and that there was no prospect that further

320 See *Gender Report Card 2011*, p 180-181. See also 'Kenya: Plea to ICC over forced male circumcision', *IRIN News*, 25 April 2011; see also 'In Kenya, Forced Male Circumcision and a Struggle for Justice', *The Atlantic*, 1 August 2011.

321 See *Gender Report Card 2011*, p 181.

322 ICC-01/09-02/11-T-23-ENG.

investigations would remedy this.³²³ Following the withdrawal of charges against Muthaura, the Prosecution continued to prepare for trial with the Kenyatta case. However, on 19 December 2013, the Prosecution informed the Trial Chamber that 'it has insufficient evidence to proceed to trial at this stage' in the Kenyatta case and therefore requested an adjournment of the trial date for three months. The Prosecution stated that the adjournment would enable it to undertake additional investigations and 'to determine whether a case can be presented to the Chamber that establishes the Accused's guilt beyond reasonable doubt'.³²⁴ Both the withdrawal of charges against Muthaura and the adjournment of the Kenyatta case are discussed in the **Trial Proceedings** section of this Report. While the Ruto and Sang trial continues, at the time of writing this Report it remains unclear whether any of the remaining charges for gender-based crimes will be tried in the Kenya situation. The Ruto and Sang trial is discussed further in the **Trial Proceedings** section of this Report.

323 ICC-01/09-02/11-T-23-ENG, p 3 lines 19-24.

324 ICC-01/09-02/11-875, para 3. The Prosecution request was based on one witness stating that he is no longer willing to testify and another witness admitting to providing false evidence concerning an event 'at the heart of the Prosecution's case'. ICC-01/09-02/11-875, para 2.

Côte d'Ivoire: The adjournment of the confirmation proceedings in the Laurent Gbagbo case

The confirmation of charges stage has presented a particular hurdle for charges for gender-based crimes. Overall, as of 31 October 2013, four out of a total of 14 individuals (or 28.6%) who have appeared before the Court for a confirmation of charges hearing, and for whom a confirmation of charges decision has been issued, have been released without charge.³²⁵ As of 31 October 2013, confirmation of charges proceedings have been held in nine cases³²⁶ against 15 individuals. In the eight cases in which confirmation decisions have been rendered,³²⁷ 19 of 32 charges for gender-based crimes have not proceeded to trial, including charges that were not confirmed by the Pre-Trial Chamber and charges that were withdrawn by the Prosecution against Muthaura. This represents 59% of all charges for gender-based crimes. At the time of writing this Report, four decisions on the confirmation of charges have been rendered in four cases involving gender-based crimes, namely the cases against Bemba; Katanga and Ngudjolo;³²⁸

Mbarushimana; and Kenyatta, Muthaura and Ali.³²⁹ In these four cases, the Pre-Trial Chamber has declined to confirm 16 of 32 total charges of gender-based crimes sought by the Prosecution, representing 50% of the gender-based crimes charges sought at this stage of proceedings.³³⁰

325 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 and Jerbo (Darfur Situation); Muthaura, Kenyatta, Ruto and Sang (Kenya Situation).

326 Lubanga; Katanga and Ngudjolo; Bemba; Mbarushimana; Abu Garda; Banda and Jerbo; Kenyatta, Muthaura and Ali; Ruto, Sang and Kosgey; Laurent Gbagbo

327 Lubanga; Katanga and Ngudjolo; Bemba; Mbarushimana; Abu Garda; Banda and Jerbo; Kenyatta, Muthaura and Ali; Ruto, Sang and Kosgey. As discussed in this section, at the time of writing this Report, the confirmation decision for Laurent Gbagbo remains outstanding.

328 At the time the confirmation of charges decision was rendered, the case against Katanga and Ngudjolo had been joined. In November 2012, the Trial Chamber again severed the two cases.

329 At the time of the confirmation of charges decision, Kenyatta was charged jointly with Muthaura and Ali. The Pre-Trial Chamber declined to confirm charges for Ali, and subsequent to the confirmation decision, the Prosecution withdrew the charges against Muthaura in 2013.

330 In the case against Katanga and Ngudjolo, the Pre-Trial Chamber declined to confirm two charges of outrages upon personal dignity as a war crime 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 577 and p 211. In the Bemba case in the CAR Situation, three gender-based charges (two counts of rape as torture as both a war crime and a crime against humanity, and one count of outrages on personal dignity as a war crime) were not confirmed. In the confirmation decision, Pre-Trial Chamber II held that charging rape, rape as torture and outrages upon personal dignity would be cumulative charging and 'detrimental to the rights of the defence'. ICC-01/05-01/08-424, para 202. In the Mbarushimana case in the DRC Situation, the Pre-Trial Chamber declined to confirm any charges against the accused, including eight charges for gender-based crimes, because, on the basis of the evidence submitted by the Prosecution, the Chamber did not find there were reasonable grounds to believe that Mbarushimana was individually criminally responsible for the alleged crimes committed by the FDLR and as such declined to confirm any charges against Mbarushimana. ICC-01/04-01/10-465-Red. Lastly, in the case against Muthaura, Kenyatta and Ali in the Kenya Situation, the Chamber did not confirm any charges, including three charges for gender-based crimes, 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. 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. ICC-01/09-02/11-382-Red.

In the case against Laurent Gbagbo, in the decision on the issuance of an arrest warrant, Pre-Trial Chamber III 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 the Prosecution's evidence may not be sufficient at subsequent stages of the proceedings.³³¹ As described below, the Prosecution's evidence in the Laurent Gbagbo case, and specifically the amount and type of evidence necessary at the confirmation of charges stage of proceedings, were at issue in the context of the confirmation of charges hearing and subsequent decision of Pre-Trial Chamber I to request additional information from the Prosecution.

Laurent Gbagbo confirmation of charges hearing

The confirmation of charges hearing for Laurent Gbagbo was held from 19 to 28 February 2013. In presenting its case, the Prosecution selected four incidents that it considered were 'representative of the crimes committed by the pro-Gbagbo forces in a sustained series of attacks put into motion by Mr Gbagbo during the post-election violence' between 28 November 2010 and 8 May 2011.³³² The Prosecution maintained that the evidence supporting these incidents would show that Laurent Gbagbo was 'responsible for the killings of at least 166 persons, the rapes of at least 34 women and girls, the infliction of serious bodily injury and suffering on at least 94 persons, and for committing the crime of persecution against at least 294 victims'.³³³

331 ICC-02/11-01/11-9-Red, para 59.

332 ICC-02/11-01/11-T-14-ENG, p 45 lines 10-12.

333 ICC-02/11-01/11-T-14-ENG, p 45 lines 14-17.

The four events selected by the Prosecution were:

- 1 On 16 December 2010 in Abidjan, supporters of Mr Ouattara who were civilians marched towards the radio broadcasting house, that is the RTI, in order to install the new general manager of that institution. Pro-Gbagbo forces crushed that demonstration with violence, whereas there had been no provocation in the days following, and up to 19 December 2010 the pro-Gbagbo forces launched violent attacks against civilians in various neighbourhoods in Abidjan. When this wave of attacks ended the pro-Gbagbo forces had killed at least 54 persons, had 3 wounded at least 50 and had raped at least 17 women and young girls and on each of 4 those occasions the victims were civilians.
- 2 On 3 March 2011, more than 3,000 women gathered for a peaceful march in Abobo, a densely populated neighbourhood of Abidjan, with a view to calling for the resignation of Mr Gbagbo and to demonstrate against the violation of human rights. Pro-Gbagbo forces, [...] opened fire without any warning on the 10 demonstrators, killing seven women and grievously wounding several others.
- 3 The third event occurred two weeks later on 17 March 2011. Pro-Gbagbo forces based at the Commando Camp in Abobo shelled a densely populated civilian area where a local market, a mosque and residential homes were located. During that single attack, more than 25 civilians were killed and more than 40 were wounded following the shelling of the market and the surrounding neighbourhoods.
- 4 On 12 April, young militia, young pro-Gbagbo militia and police officers and mercenaries attacked several sectors of Yopougon and summarily executed or burnt alive more than 80 persons. The perpetrators of these acts also raped some 17 women and in some cases killed their husbands.³³⁴

334 ICC-02/11-01/11-T-14-ENG, p 48-50.

In its opening statement at the hearing, the Prosecution announced that it would provide, as evidence to support its allegations, witness statements and excerpts, video excerpts, reports from the UN and a number of NGOs, other documentary evidence and computer-based information, and information that was seized in the Laurent Gbagbo presidential residence.³³⁵ When addressing the general requirements for crimes against humanity, specifically ‘the widespread and systematic nature of the attacks’,³³⁶ the Prosecution described 45 incidents, including the four mentioned above,³³⁷ allegedly committed by the pro-Gbagbo forces to show the ‘repetitive nature’ of the attacks, the *modus operandi* of the pro-Gbagbo forces,³³⁸ and to demonstrate that these attacks against civilians were widespread and systematic, as required for crimes against humanity.³³⁹ The Prosecution stated that those 45 incidents were documented through ‘witness information, video material and other materials from NGOs or the United Nations’.³⁴⁰

Instances of rape and other forms of sexual violence were presented as part of two of the four selected incidents, and supported by witness statements, as well as by reference to an Amnesty International report, reports of local NGOs and

a Human Rights Watch report.³⁴¹ In relation to the first incident, the Prosecution referred to two witnesses who stated that they had been ‘brutally attacked and raped by police officers’, one of whom said she was raped several times and to whom the police officers said that ‘Simone Gbagbo had asked them to rape all the women who took part in the walk and if they were not able to rape them to shove a stick into them’.³⁴² Another witness reported that the police officer who raped her told her that ‘the Dioulas had asked for this’.³⁴³ In relation to this incident, the Prosecution also cited an Amnesty International report describing cases of women subject to sexual violence on 16 December 2012, the day of the march,³⁴⁴ and a Human Rights Watch article.³⁴⁵ In relation to the fourth incident, the Prosecution presented the statement of a witness who was a minor when she was raped by two militias³⁴⁶ and referred to the Human Rights Watch report,³⁴⁷ as well as a report

335 ICC-02/11-01/11-T-14-ENG, p 50 lines 17-22.

336 ICC-02/11-01/11-T-15-Red-ENG, p 31 lines 16-19.

337 The Prosecution noted that these 45 incidents were mentioned in paras 23-29 of the DCC, and that this was not an ‘exhaustive list’. ICC-02/11-01/11-T-15-Red-ENG, p 38 lines 7-11.

338 ICC-02/11-01/11-357, paras 26-29 and ICC-02/11-01/11-T-15-Red-ENG, p 38 line 12.

339 ICC-02/11-01/11-357, paras 30-31 and ICC-02/11-01/11-T-15-Red-ENG, p 46 lines 17-22. At the hearing, the Prosecution noted that the described incidents ‘were sustained and regular over a period of five months, from the end of November 2010 to May 2011’ and that they had affected a ‘vast area of the country’. ICC-02/11-01/11-T-15-Red-ENG, p 46 lines 4-10.

340 ICC-02/11-01/11-T-15-Red-ENG, p 38 lines 9-10.

341 ICC-02/11-01/11-T-16-Red-ENG, p 11-59. For the first incident, the Prosecution relied mostly on evidence based on the Independent International Commission of Inquiry on Côte d’Ivoire and on the Human Rights Council’s documentation, as well as a report by Amnesty International. ICC-02/11-01/11-T-16-Red-ENG, p 26 lines 1-10. For the second incident, the Prosecution relied on crime-based witness statements and video footage, which it alleged, were ‘corroborated by a large number of UN, NGO and media reports’. ICC-02/11-01/11-T-16-Red-ENG, p 35 lines 23-25. For the third incident, the Prosecution relied on excerpts of witness statements, which, it alleged, were corroborated by ‘detailed reports of the UN, Human Rights Watch and victim accounts collected by two local Human Rights NGOs’. ICC-02/11-01/11-T-16-Red-ENG, p 42, lines 11-13. For the fourth incident, the Prosecution relied on excerpts of witness statements, some of them interviewed by NGOs, and a Human Rights Watch report.

342 ICC-02/11-01/11-T-16-Red-ENG, p 21 lines 4 and 7-9.

343 ICC-02/11-01/11-T-16-Red-ENG, p 21 lines 3-10.

344 ICC-02/11-01/11-T-16-Red-ENG, p 22 lines 10-20.

345 ICC-02/11-01/11-T-16-Red-ENG, p 23 lines 13-15 and p 24 lines 5-7.

346 ICC-02/11-01/11-T-16-Red-ENG, p 57 lines 10-21.

347 The Prosecution noted that Human Rights Watch had reported ‘at least three rapes in Yopougon, in addition to the execution of the husband of one of the women’, and that ‘the perpetrators of the rapes were armed with Kalashnikovs, machetes, and knives’ and that ‘some of them were wearing military garbs, others were in civilian attire’. ICC-02/11-01/11-T-16-Red-ENG, p 58 lines 12-15.

published by a local NGO, which stated that ‘pro-Gbagbo militias, including Young Patriots, forcibly entered people’s homes’, were carrying arms, and raped at least 17 women, including the mentioned witness.³⁴⁸

Throughout the hearing, the Defence challenged the evidence presented by the Prosecution.³⁴⁹ It stated that ‘most of what the Prosecutor refers to as “evidence” is only newspaper articles and reports of non-governmental organisations’,³⁵⁰ alleged a lack of credibility of the Prosecution witnesses,³⁵¹ and challenged the authenticity of Prosecution evidence such as videos and documents seized at the Gbagbo Presidential residence.³⁵² The Defence also submitted that the evidence presented was not sufficient to establish that the facts alleged in the DCC actually occurred, that they could be attributed to Laurent Gbagbo, or that they constituted crimes against humanity.³⁵³ As to the four incidents selected by the Prosecution, the Defence contended that ‘none of these events is properly documented by the Prosecution’ and that ‘the evidence presented by the Prosecution does not support its own description of the facts.’³⁵⁴ In particular, in relation

348 The Prosecution added that according to this report ‘most of these women were victims of gang-rapes’ and that ‘the rapes were carried out at the victims’ homes, in the street, or in common courtyards and for the most part were committed in the neighbourhoods of Mami-Faitai and Sicobois’. The Prosecution further quoted a victim of rape of Dioula ethnic origin who had stated in an affidavit that militias had come to her neighbourhood and that she had been raped by three of them. ICC-02/11-01/11-T-16-Red-ENG, p 58 lines 4-11.

349 ICC-02/11-01/11-T-18-Red-ENG, p 31 line 14.

350 ICC-02/11-01/11-T-18-Red-ENG, p 31 lines 18-19. The Defence added that ‘in those reports the sources of the information and the facts recounted lack[ed] clarity’.

351 ICC-02/11-01/11-T-18-Red-ENG, p 32-35.

352 ICC-02/11-01/11-T-18-Red-ENG, p 35-36.

353 ICC-02/11-01/11-T-18-Red-ENG, p 37.

354 ICC-02/11-01/11-T-18-Red-ENG, p 38. In relation to the second of the four incidents (the ‘Women’s march’), the Defence specifically challenged the Prosecution’s reliance on summaries of anonymous witnesses, noting that the Court’s jurisprudence has not attributed a high probative value to this type of evidence. ICC-02/11-01/11-T-19-Red-ENG, p 9.

to the Prosecution’s allegations that rape was committed by pro-Gbagbo forces, as described above, the Defence argued that the Prosecution did not establish the identity of the alleged perpetrators, nor did it provide the identity of the victims.³⁵⁵ In relation to the Prosecution’s allegations that a young girl had been gang-raped on 18 December 2010, the Defence contended that ‘this description has practically been taken verbatim out of an Amnesty International report’,³⁵⁶ and that the Prosecution had relied on the same report to prove its allegations that six women had been raped after having been detained in a house guarded by gendarmes,³⁵⁷ without providing sufficient information on the identity of the victims and the alleged perpetrators. The Defence made similar claims regarding several other examples of rape and sexual violence presented by the Prosecution.³⁵⁸

355 ICC-02/11-01/11-T-19-Red-ENG, p 35-36.

356 ICC-02/11-01/11-T-18-Red-ENG, p 48 line 19. In relation to this incident, the Defence argued that the Prosecution had not provided any information regarding where the girl had been abducted, where the rape had taken place, what was the identity of the victim and of the alleged perpetrators. The Defence made similar claims regarding several other examples of rape and sexual violence presented by the Prosecution.

357 ICC-02/11-01/11-T-18-Red-ENG, p 49.

358 ICC-02/11-01/11-T-18-Red-ENG, p 48-51. In relation to the fourth incident presented by the Prosecution (the attacks in Yopougon), the Defence noted that the Prosecution had only identified one victim of rape, that this case could not be linked to pro-Gbagbo forces, and that a single case could not be demonstrative of a policy. The Defence argued that ‘the Prosecutor tries once again to inflate the number of rape victims that are supposed to have been the victims of pro-Gbagbo forces in Yopougon and he bases himself on forms compiled by local NGOs and Human Rights Watch’, and further stated that ‘[w]e can use the same procedure to show that the rapes perpetrated in Yopougon are the tragic consequence of the general chaos that happened at that time.’ ICC-02/11-01/11-T-19-Red-ENG, p 35, lines 2-12. It further argued that ‘it is crucial to note here that the NGO report mentioned by the Prosecutor mentions the rape of 17 women, but the rapes are perpetrated by young people in the neighbourhood without any link to any of the two parties to the conflict’. ICC-02/11-01/11-T-19-Red-ENG, p 36 lines 9-11.

Pre-Trial Chamber I's decision adjourning the confirmation of charges hearing

On 6 June 2013, Pre-Trial Chamber I (Judge Silvia Fernández de Gurmendi dissenting) issued a decision under Article 61(7)(c)(i) of the Rome Statute, adjourning the hearing on the confirmation of charges proceedings in the case against Laurent Gbagbo.³⁵⁹ In this decision, the Pre-Trial Chamber expressed concern about the sufficiency and quality of the evidence and directed the Prosecution 'to consider providing, to the extent possible, further evidence or conducting further investigation'.³⁶⁰ Specifically, having evaluated the Prosecution's evidence presented at the confirmation hearing,³⁶¹ the Chamber considered that the evidence presented 'viewed as a whole, although apparently insufficient, does not appear to be so lacking in relevance and probative value

359 ICC-02/11-01/11-432. Article 61(7)(c)(i) states that the Pre-Trial Chamber may adjourn the confirmation of charges hearing and request the prosecutor 'to consider providing further evidence or conducting further investigation with respect to a particular charge'.

360 ICC-02/11-01/11-432, para 44.

361 Following two postponements of the confirmation of charges hearing in 2012 in this case, Pre-Trial Chamber I issued a decision on 14 December 2012, setting the date for the commencement of the hearing for 19 February 2013. ICC-02/11-01/11-325. The first postponement, in June 2012, was a result of Defence request for additional time to prepare for the hearing. ICC-02/11-01/11-152-Red and the second, in August 2012, was related to the health condition of the suspect ICC-02/11-01/11-201, with annex. On 2 November 2012, Pre-Trial Chamber I issued a decision finding Gbagbo to be fit to take part in the proceedings. ICC-02/11-01/11-286-Red. Prior to the confirmation of charges hearing, the Prosecution filed an amended version of the DCC on 17 January 2013. ICC-02/11-01/11-357. The original DCC had been submitted on 16 May 2012. ICC-02/11-01/11-124-Anx1-Red. The hearing on the confirmation of charges was held from 19 to 28 February 2013. ICC-02/11-01/11-T-14-ENG; ICC-02/11-01/11-T-15-ENG; ICC-02/11-01/11-T-16-ENG; ICC-02/11-01/11-T-17-ENG; ICC-02/11-01/11-T-18-ENG; ICC-02/11-01/11-T-19-ENG; ICC-02/11-01/11-T-20-ENG; ICC-02/11-01/11-T-21-ENG. Following the confirmation of charges hearing, the Prosecution, the OPCV and the Defence filed written submissions. ICC-02/11-01/11-420-Red; ICC-02/11-01/11-419; ICC-02/11-01/11-429-Red.

that it [left] the Chamber with no choice but to decline to confirm the charges'.³⁶² The Pre-Trial Chamber made particular remarks about the Prosecution's reliance on open source information, and noted 'with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity'. The Chamber stated:

Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.³⁶³

The Pre-Trial Chamber recalled that the evidentiary threshold established by Article 61(7) for the confirmation of charges phase requires 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged', and that to meet this threshold, 'the Prosecutor must "offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations"'.³⁶⁴ The Pre-Trial Chamber further recalled that '[i]t is incumbent on the Prosecutor to clearly define in the [DCC] all the facts and circumstances and to

362 ICC-02/11-01/11-432, para 15.

363 ICC-02/11-01/11-432, para 35.

364 ICC-02/11-01/11-432, paras 16-17. The Chamber referred to, for example, decisions of Pre-Trial Chamber I in the Lubanga case, ICC-01/04-01/06-803-tENG; in the Katanga and Ngudjolo case, ICC-01/04-01/07-717; and of Pre-Trial Chamber II in the Bemba case, ICC-01/05-01/08-424; and in the Ruto and Sang case, ICC-01/09-01/11-373. The Chamber also referred to Pre-Trial Chamber II decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the prosecutor against Jean-Pierre Bemba Gombo, in which it interpreted 'substantial' grounds to mean "'significant", "solid", "material", "well built", "real" rather than "imaginary"', ICC-01/05-01/08-424, para 29.

propose therein their legal characterisation'. The Chamber noted that the same evidentiary threshold applies to all factual allegations, including those related to the individual crimes charged, as well as to the contextual elements of the crimes and the criminal responsibility of the suspect.³⁶⁵

The evidence of an 'attack'

The Pre-Trial Chamber noted that in the instant case, the individual incidents alleged by the Prosecutor to prove the contextual elements of crimes against humanity, namely, 'that there was an "attack directed against any civilian population"', formed part of the facts and circumstances of the case.³⁶⁶ Accordingly, the Chamber found that each of these incidents had to be proved to the same evidentiary threshold as applicable to all other facts — that of 'substantial grounds to believe'.³⁶⁷ However, the Chamber also noted that there is a difference between the crimes that 'underlie a suspect's individual criminal responsibility', which must be 'linked to the suspect personally', and crimes 'committed as part of incidents which only establish the relevant context', which do not require the same 'individualised link'.³⁶⁸ The information adduced as proof of the latter may be 'less specific' than what is needed to prove the crimes charged, but must still include the identity of the perpetrators, or which group they belong to, and the identity of the victims or information about 'their real or perceived political, ethnic, religious or national allegiance(s)'.³⁶⁹ The Chamber further held that when the existence of 'an attack directed against any civilian population' is alleged by describing a series of incidents, the Prosecutor must establish 'a sufficient number of incidents' to that same evidentiary threshold of substantial grounds to believe.³⁷⁰

365 ICC-02/11-01/11-432, para 19.

366 ICC-02/11-01/11-432, para 21.

367 ICC-02/11-01/11-432, para 22.

368 ICC-02/11-01/11-432, para 22.

369 ICC-02/11-01/11-432, para 22.

370 ICC-02/11-01/11-432, para 23.

The type of evidence required at the confirmation of charges stage

In considering the type of evidence that must be provided at the stage of the confirmation of charges, the Pre-Trial Chamber noted that Article 61(5) only requires the Prosecution to present 'sufficient evidence' and that the Prosecutor 'may rely on documentary and summary evidence and need not call the witnesses expected to testify at the trial'. The Pre-Trial Chamber stated that it 'must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation'.³⁷¹ The Chamber referred to the Appeals Chamber decision on the confirmation of charges in the Mbarushimana case in which the Chamber stated that 'the investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber'.³⁷² In its view, this approach 'ensures continuity in the presentation of the case and safeguards the rights of the Defence'.³⁷³

The Pre-Trial Chamber expressed its 'general predisposition towards certain types of evidence' while recognising that a certain degree of flexibility is needed in the assessment of evidence.³⁷⁴ It noted its general preference for forensic and other material evidence, and that testimonial evidence is, to the extent possible, based on the 'first-hand and personal observations of the witness'.³⁷⁵ The Pre-Trial Chamber explained that 'heavy reliance' on anonymous hearsay that is contained in documentary evidence such as press articles and NGO reports is 'problematic' because it 'unduly' limits the Defence's right to investigate and challenge the evidence presented by the

371 ICC-02/11-01/11-432, paras 24-25.

372 ICC-02/11-01/11-432, para 25 citing ICC-01/04-01/10-514(OA 4).

373 ICC-02/11-01/11-432, para 25.

374 ICC-02/11-01/11-432, para 26.

375 ICC-02/11-01/11-432, para 27.

Prosecution, and limits the Chamber's ability to assess the trustworthiness of the source and determine the probative value of that information.³⁷⁶ The Chamber also noted that this type of evidence cannot easily be used to corroborate other similar type of evidence, as it will be difficult in most cases to determine whether those 'unknown sources' are 'truly independent from each other'.³⁷⁷

Although recognising the Prosecution's right to rely on documentary and summary evidence and not to call witnesses for the hearing pursuant to Article 61(5) of the Statute, the Pre-Trial Chamber highlighted the 'intrinsic shortcomings' of this type of evidence.³⁷⁸ The Chamber distinguished between 'anonymous hearsay contained in documentary evidence' and 'anonymous or summary witness statements at the confirmation hearing'.³⁷⁹ The Chamber explained that the Prosecutor would be required to conduct further investigations to identify the source of the former type of evidence, thus 'limit[ing] the [Chamber's] ability to evaluate the credibility of the witness'.³⁸⁰ On the other hand, 'the situation is different' in relation to the latter type of evidence, given that 'the Chamber knows the identity of the witness and it may also be assumed that the witness will later be called at trial'.³⁸¹

The Pre-Trial Chamber noted 'with serious concern' that in the present case the Prosecutor 'relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity', and affirmed that 'such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation'.³⁸² More concretely, the Chamber

noted that the Prosecutor relied on anonymous hearsay drawn from NGO and UN reports as well as press articles as the 'sole evidence' to prove most of the 45 incidents presented by the Prosecutor. The Chamber noted that at the hearing, the Prosecutor made it clear that she was relying on 41 additional incidents, besides the four incidents charged, to establish the alleged existence of an 'attack directed against any civilian population'. However, it also acknowledged that in its written submissions, the Prosecutor contended that the four incidents charged were sufficient to establish such an attack.³⁸³

The Pre-Trial Chamber further noted that many of these incidents were 'described in very summary fashion' making its assessment of whether the perpetrators were acting pursuant to or in furtherance of a policy to attack a civilian population difficult. It also noted that there was an 'incomplete picture' as to the structural connections between the pro-Gbagbo forces involved in the various incidents and the presence and activities of the armed forces who opposed them.³⁸⁴

However, the Pre-Trial Chamber considered that these 'difficulties in the evidentiary record of the Prosecutor' did not have to automatically lead to the 'immediate refusal to confirm the charges'. Although the majority did not want to accept 'allegations proved solely through anonymous hearsay in documentary evidence', it noted that past jurisprudence that predated the Appeals Chamber decisions in Mbarushimana and the Kenyatta cases³⁸⁵ may have appeared 'more forgiving in this regard'. For that reason it was prepared 'out of fairness' to give the Prosecution additional time to present or collect further evidence as the Prosecutor might have not

376 ICC-02/11-01/11-432, paras 29-30.

377 ICC-02/11-01/11-432, para 30.

378 ICC-02/11-01/11-432, para 31.

379 ICC-02/11-01/11-432, para 32.

380 ICC-02/11-01/11-432, paras 32-33.

381 ICC-02/11-01/11-432, para 32.

382 ICC-02/11-01/11-432, para 35.

383 ICC-02/11-01/11-432, para 36 and footnote 49.

384 ICC-02/11-01/11-432, para 36.

385 ICC-01/04-01/10-514 (OA4) and ICC-01/09-02/11-425.

‘deemed it necessary to present all her evidence or largely complete her investigation’.³⁸⁶

Adjourning the confirmation of charges hearing

Pursuant to Article 61(7)(c)(i) of the Rome Statute, the Pre-Trial Chamber requested the Prosecutor to consider providing further evidence or conducting further investigation with respect to six concrete issues,³⁸⁷ to submit an amended DCC with detailed and precise information on the facts of the case, including on all incidents forming the contextual elements of crimes against humanity, a new list of evidence, and an updated consolidated Elements Based Chart.³⁸⁸

The six concrete issues with respect to which the Chamber asked the Prosecutor to consider providing further evidence or conducting further investigation relate to: (i) the positions, movements and activities of all armed groups opposed to the ‘pro-Gbagbo forces’ between November 2010 and May 2011; (ii) the organisational structure of the ‘pro-Gbagbo forces’; (iii) information about the alleged policy/plan to attack the pro-Ouattara civilian population; (iv) more detailed information related to each of the incidents allegedly constituting the attack against the pro-Ouattara civilian population, such as whether the physical perpetrators were acting pursuant to or in furtherance of the alleged policy, to which sub-groups of the ‘pro-Gbagbo forces’ they belonged, the number of victims, their real or perceived allegiances and the harm they suffered, and the links between incidents inside and outside Abidjan; (v) more specific evidence

related to each of the sub-incidents that are part of the ‘RTI’ and ‘Yopougon’ incidents, including more detailed evidence for the alleged cases of sexual violence; and (vi) evidence indicating who fired the ammunitions and who was the alleged target at the ‘Women’s March’ and the ‘Shelling of Abobo’ events.³⁸⁹

Dissenting opinion by Presiding Judge Silvia Fernández de Gurmendi

Judge Silvia Fernández de Gurmendi issued a dissenting opinion,³⁹⁰ disagreeing with the majority on three main grounds: (i) the majority’s ‘expansive interpretation of the applicable evidentiary standard at the confirmation of charges stage that exceeds what is required and indeed allowed by the Statute’;³⁹¹ (ii) the facts and circumstances that need to be proven to the applicable evidentiary standard;³⁹² and (iii) the list of issues for which further evidence was requested from the Prosecutor, which she found was ‘either not relevant or not appropriate to prove or disprove the charges’, as well as the majority’s request for an amended DCC, which she considered ‘exceeds the role and functions assigned by the Statute to the Pre-Trial Chamber’.³⁹³ While recognising that the adjournment of the hearing was a procedural avenue permitted by the Statute, as further explained below, she did not agree with the majority’s formulation of the terms of the adjournment.³⁹⁴

386 ICC-02/11-01/11-432, para 37. The Chamber cited the Appeals Chamber judgement on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’, in which it stated that the ‘Pre-Trial Chamber need not reject the charges but may adjourn the hearing and request the Prosecutor to provide further evidence’. ICC-01/04-01/10-514 (OA4), para 48.

387 ICC-02/11-01/11-432, para 44.

388 ICC-02/11-01/11-432, para 45.

389 ICC-02/11-01/11-432, para 44.

390 ICC-02/11-01/11-432-Anx.

391 ICC-02/11-01/11-432-Anx, para 3.

392 ICC-02/11-01/11-432-Anx, para 4.

393 ICC-02/11-01/11-432-Anx, para 5.

394 ICC-02/11-01/11-432-Anx, para 2.

The evidentiary requirements at the confirmation of charges stage

Judge Fernández de Gurmendi disagreed with the majority's interpretation of the Appeals Chamber's decisions in the Muthaura *et al* and Mbarushimana cases as marking a shift in jurisprudence, requiring the Prosecutor to '(i) "present all her evidence"; (ii) "largely complete her investigation"; and (iii) "present [...] her strongest possible case"'.³⁹⁵ While noting that the majority's decision to allocate more time to the Prosecutor 'to adapt to supposedly new rules' derived from those Appeals Chamber decisions came 'rather late in the process',³⁹⁶ she stated that she disagreed that the decisions had 'any bearing on relevant past jurisprudence' of other Pre-Trial Chambers.³⁹⁷

In her view, the Appeals Chamber in the Muthaura *et al* case only confirmed the jurisprudence of other Pre-Trial Chambers in affirming that the contextual elements of the crimes charged must also be proven to the threshold of 'substantial grounds to believe'.³⁹⁸ She further opined that in the Mbarushimana case, the Appeals Chamber confirmed its earlier jurisprudence in the Lubanga case, where it determined that 'ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing' but also that 'this is not a requirement of the Statute' and that the investigation 'may be continued beyond the confirmation hearing'.³⁹⁹ She accordingly disagreed with the assumptions drawn from the Mbarushimana decision by the majority that the Prosecutor must now 'present all her evidence' and 'has presented her strongest possible case based on a largely completed

investigation'.⁴⁰⁰ Judge Fernández de Gurmendi maintained that whether or not it is desirable for investigations to be essentially completed before the confirmation of charges, the majority had turned a 'policy objective' into a 'legal requirement'.⁴⁰¹ She also rejected the majority's assumption that the Prosecutor had presented all of her evidence or her strongest possible case.⁴⁰² She added that even if the Office of the Prosecutor had completed its investigation, there is 'no legal requirement for her to submit to the Chamber all her evidence'. She considered that the Prosecutor might have sound reasons not to rely on certain evidence, even when of particular importance, including evidence related to the safety, physical and psychological well-being of victims, witnesses or other persons at risk that might warrant redactions or the non-disclosure of the identities of witnesses.⁴⁰³ In her view, such a decision by the Prosecutor would be in line with Article 61(5) of the Statute, which requires only 'sufficient evidence' to establish substantial grounds to believe.⁴⁰⁴ She also recalled that the Appeals Chamber affirmed in the Mbarushimana case that the Prosecutor 'need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe'.⁴⁰⁵ She concluded that 'it is not for the Chamber to speculate on whether it has received all the evidence or the "strongest possible" evidence, but solely to assess whether it has sufficient evidence to determine substantial grounds to believe that the person has committed the crime charged'.⁴⁰⁶

395 ICC-02/11-01/11-432-Anx, para 7.

396 ICC-02/11-01/11-432-Anx, para 8.

397 ICC-02/11-01/11-432-Anx, para 9.

398 ICC-02/11-01/11-432-Anx, paras 10-11.

399 ICC-02/11-01/11-432-Anx, para 14. Judge Fernández de Gurmendi recalled that she was an *ad hoc* member of the Appeals Chamber in the Mbarushimana case, and as such she subscribed to the mentioned decision.

400 ICC-02/11-01/11-432-Anx, para 13.

401 ICC-02/11-01/11-432-Anx, para 15.

402 ICC-02/11-01/11-432-Anx, para 16.

403 ICC-02/11-01/11-432-Anx, para 18.

404 ICC-02/11-01/11-432-Anx, para 19.

405 ICC-02/11-01/11-432-Anx, para 19, citing ICC-01/04-01/10-514. She also referred to the *travaux préparatoires*, which demonstrate that access to the file of the Prosecutor by the Chamber was 'not preferred' as this could entail unnecessary delays. ICC-02/11-01/11-432-Anx, para 20.

406 ICC-02/11-01/11-432-Anx, para 21.

The type of evidence required

Judge Fernández de Gurmendi found that the majority's approach to evidence undermined the 'flexibility in the assessment of evidence' and the 'possibility for the Prosecutor to rely solely on documentary and summary evidence', while the legal framework permits all types of evidence, with the exceptions foreseen in Article 69(7) of the Statute, and authorises the Chamber to assess 'freely' the probative value of each item of evidence in the concrete circumstances.⁴⁰⁷ Judge Fernández de Gurmendi found the majority's approach 'particularly problematic' in view of Article 61(5) of the Statute, which allows the Prosecutor to rely solely on documentary and summary evidence, and in light of the limited purpose of the confirmation hearing.⁴⁰⁸ She stated that Pre-Trial Chambers should not enter into 'a premature in-depth analysis of the guilt of the suspect' and should not 'seek to determine whether the evidence is sufficient to sustain a future conviction'.⁴⁰⁹ Having in mind the 'gatekeeper' function of Pre-Trial Chambers, she warned against an 'expansive interpretation' of their role, which may 'encroach upon the functions of trial Judges, generate duplications, and end up frustrating the judicial efficiency that Pre-Trial Chambers are called to ensure'.⁴¹⁰ She added that the majority's approach may be seen as an incentive for the Prosecutor to submit as much evidence as possible, including live witnesses, which is contrary to previous efforts of Pre-Trial Chambers to discourage this type of evidence,⁴¹¹ and result in extending the already lengthy pre-trial proceedings.⁴¹²

Judge Fernández de Gurmendi drew a distinction between the facts and circumstances described in the charges and other facts 'contained in the

narrative of the DCC or discussed in some way at the confirmation of charges hearing'.⁴¹³ She noted that the facts and circumstances described in the charges must be distinguished from other facts 'from which the facts and circumstances of the charges can be inferred'.⁴¹⁴ She referred to a judgement of the Appeals Chamber in the Lubanga case, where the Chamber distinguished the facts and circumstances described in the charges from 'the evidence put forward by the Prosecutor, as well from background or other information contained in the DCC'.⁴¹⁵

She further noted that, in compliance with an instruction of the Chamber, the Prosecutor had separated in the DCC the factual allegations related to the charges from other facts 'upon which the Prosecutor relies in order to prove one or more of those factual allegations that are described in the charges'.⁴¹⁶

Proof of an 'attack' as required for crimes against humanity

Judge Fernández de Gurmendi disagreed with the majority's view that the individual incidents presented by the Prosecutor in support of her allegation that there was an attack directed against a civilian population are part of the facts and circumstances that must be proven to the threshold of 'substantial grounds to believe'.⁴¹⁷ She attributed this difference of opinion to a different interpretation of Article 7(1) of the Statute.

While the majority viewed all 45 incidents presented by the Prosecutor as constituting the 'attack against the civilian population', Judge Fernández de Gurmendi held that the Prosecutor only needed to prove to the applicable threshold the existence of an 'attack' and the 'underlying

407 ICC-02/11-01/11-432-Anx, para 24.

408 ICC-02/11-01/11-432-Anx, paras 23-25.

409 ICC-02/11-01/11-432-Anx, para 25.

410 ICC-02/11-01/11-432-Anx, para 26.

411 Judge Fernández de Gurmendi only referred to one other specific decision in this case. ICC-02/11-01/11-325.

412 ICC-02/11-01/11-432-Anx, paras 27-28.

413 ICC-02/11-01/11-432-Anx, para 33.

414 ICC-02/11-01/11-432-Anx, para 34.

415 ICC-02/11-01/11-432-Anx, para 33, citing ICC-01/04-01/06-2205, para 35.

416 ICC-02/11-01/11-432-Anx, para 35.

417 ICC-02/11-01/11-432-Anx, paras 36-37.

crimes that are attributed to Mr Gbagbo, which were allegedly committed during four out of the 45 “incidents”.⁴¹⁸ She stated that the Prosecutor did not have to prove to the same threshold the ‘remaining “incidents”’, which were in her view, neither contextual elements nor underlying acts within the meaning of Article 7(1)(a) but merely facts that ‘serve to prove, together with *all* available evidence, the attack and/or its widespread or systematic nature’.⁴¹⁹ In her view, only the ‘incidents’ during which crimes that are attributed to Laurent Gbagbo were committed would form part of the facts and circumstances contained in the charges. And thus, the Prosecutor does not need to ‘allege each such “incident” as part of the facts and circumstances of the charges as required by the Majority’.⁴²⁰

More precisely, Judge Fernández de Gurmendi held that an ‘attack’ means a ‘*course of conduct* involving a multiple commission of acts’⁴²¹ and is not ‘a mechanical aggregate of a certain number of “incidents”’.⁴²² In this respect, she referred to jurisprudence of other Pre-Trial Chambers where all relevant acts, together with all other available evidence, were taken into consideration to ‘substantiate *as a whole* the existence of an attack or course of conduct’.⁴²³

In addition, Judge Fernández de Gurmendi held that it is the attack, and not each individual act or incident, as suggested by the majority in its list of issues which require further evidence, that needs to be proven to have been committed pursuant to or in furtherance of a ‘policy’ in the meaning of Article 7(2)(a) of the Statute.⁴²⁴

For these reasons, and in particular having in mind the requirements of Article 7 of the Statute and the ‘limited object and purpose of the confirmation hearing’, Judge Fernández de Gurmendi concluded that the additional evidence being requested of the Prosecutor was ‘either not appropriate or not relevant to prove the charges as formulated by the Prosecutor’.⁴²⁵ She disagreed with the majority’s request for an amended DCC given that she did not agree that the mentioned incidents constituted the contextual elements of the crimes charged, and because in her view, the Chamber does not have ‘the power to shape the factual allegations of the charges or to request the Prosecutor to reframe the charges’.⁴²⁶ She opined that the majority’s request ‘amount[ed] to a request for the Prosecutor to amend the charges’, which is something that the Chamber may only do in relation to the legal characterisation of the facts pursuant to Article 61(7)(c)(ii).⁴²⁷

418 ICC-02/11-01/11-432-Anx, para 40

419 ICC-02/11-01/11-432-Anx, para 41 (emphasis in original).

420 ICC-02/11-01/11-432-Anx, para 44.

421 ICC-02/11-01/11-432-Anx, para 44 (emphasis in original).

422 ICC-02/11-01/11-432-Anx, para 43. She also noted that the term ‘incident’ has no ‘specific legal meaning’ and cannot be ‘equated with the statutory notion of “acts referred to in para 1 against any civilian population”. ICC-02/11-01/11-432-Anx, paras 42-43.

423 ICC-02/11-01/11-432-Anx, para 45 (emphasis in original). She referred to the decisions of Pre-Trial Chamber II in the Bemba case, ICC-01/05-01/08-424; in the Situation in the Republic of Kenya, ICC-01/19-09-Corr; and in the Ruto and Sang case, ICC-01/09-01/11-373; and of Pre-Trial Chamber III in the Situation in the Republic of Côte d’Ivoire, ICC-02/11-14-Corr.

424 ICC-02/11-01/11-432-Anx, para 47. In this regard, Judge Fernández de Gurmendi referred again to the *travaux préparatoires* to note that although the phrase ‘policy to commit *those acts*’ had been discussed in the context of Article 7, this formulation was replaced by the current one of ‘policy to commit such attack’. ICC-02/11-01/11-432-Anx, para 48 (emphasis in original).

425 ICC-02/11-01/11-432-Anx, para 49.

426 ICC-02/11-01/11-432-Anx, para 50.

427 ICC-02/11-01/11-432-Anx, para 51.

Prosecution and Defence appeals of the decision adjourning the confirmation of charges proceedings

On 10 June and 25 June 2013, respectively, the Prosecution⁴²⁸ and the Defence⁴²⁹ requested leave to appeal the decision of Pre-Trial Chamber I, adjourning the hearing on confirmation of charges pursuant to Article 82(1)(d). On 31 July 2013, the majority of Pre-Trial Chamber I issued a decision partially granting the Prosecution request and rejecting the Defence request.⁴³⁰ Judge Silvia Fernández de Gurmendi issued a dissenting opinion.⁴³¹ On 12 August 2013, the Prosecution filed its appeal.⁴³² The appeal addressed a number of issues, including the nature of the confirmation proceedings, submitting that the impugned decision elevated the requirements for the Prosecutor to meet the standard of proof for confirmation of charges contrary to the limited scope and purpose of the proceedings.⁴³³

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- 428 ICC-02/11-01/11-435. The Common Legal Representative of victims jointly with the OPCV, and the Defence, all responded to this request. ICC-02/11-01/11-437; ICC-02/11-01/11-438.
- 429 ICC-02/11-01/11-439. The Prosecution and the OPCV responded to this request. ICC-02/11-01/11-443; ICC-02/11-01/11-442.
- 430 ICC-02/11-01/11-464. The majority only found that only one of the three issues raised by the Prosecution was an appealable issue, but with modifications. The issue on appeal, as modified by the majority was: '[w]hether the Pre-Trial Chamber erred in holding that, when the Prosecutor alleges that an "attack against any civilian population" consists of multiple smaller incidents, none of which alone rises to the level of the minimum requirements of article 7 of the Statute and which allegedly took place at different times and places, a sufficient number of these incidents must be proved to the requisite standard, meaning that each of these incidents must be supported with sufficient evidence before the Chamber can take them into consideration to determine whether those incidents, taken together, indicate that there are substantial grounds to believe that an 'attack' took place.' ICC-02/11-01/11-464, para 36.
- 431 ICC-02/11-01/11-464-Anx.
- 432 ICC-02/11-01/11-474.
- 433 ICC-02/11-01/11-474, paras 76-79.

The Appeals Chamber judgement confirming the decision adjourning the confirmation of charges proceedings

On 16 December 2013, the Appeals Chamber confirmed the decision adjourning the confirmation of charges hearing⁴³⁴ and dismissed the appeal filed by the Prosecution.⁴³⁵ Regarding the Prosecution's first ground of appeal,⁴³⁶ the Appeals Chamber noted that the Prosecution 'd[id] not dispute that the facts and circumstances underpinning the contextual elements of crimes against humanity must be proven to the standard of substantial grounds to believe, which is essentially the issue for which leave to appeal was granted.'⁴³⁷ The Chamber recalled that the Prosecution argued, contrary to the understanding of the Pre-Trial Chamber, that those facts and circumstances set out in paragraphs 97 and 105 of the DCC 'incorporated by reference the factual allegations underlying the four Charged Incidents.'⁴³⁸ However, the Chamber found that the Prosecution 'd[id] not accurately reflect the charges that were presented in the DCC for the purposes of the confirmation of charges hearing' and thus 'failed to demonstrate any error on the part of the Pre-Trial Chamber under this aspect of the First Ground of Appeal'.⁴³⁹

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- 434 ICC-02/11-01/11-572.
- 435 ICC-02/11-01/11-572.
- 436 The Prosecution's first ground of appeal was that 'the Majority erred in requiring that in this case a sufficient number of incidents underlying the contextual elements, including the 41 Incidents, must be established to the standard of proof enshrined in Article 61(7) and by applying that standard of proof to the subsidiary facts and evidence that relate to the 41 Incidents'.
- 437 ICC-02/11-01/11-572, para 38, referencing ICC-02/11-01/11-464, paras 36-37.
- 438 ICC-02/11-01/11-572, para 39.
- 439 ICC-02/11-01/11-572, para 40.

The Chamber further explained that the DCC paragraphs in question stated that the four charged incidents were committed as part of a widespread and systematic attack, but ‘did not contain any *factual* allegation relative to the attack against the civilian population’ apart from information regarding the political affiliations of the alleged perpetrators and victims. It thus considered that these paragraphs could not be understood as providing ‘sufficient’ factual basis to bring the suspect to trial, within the meaning of Regulation 52(b).⁴⁴⁰

The Chamber added that, contrary to the Prosecution’s argument, these paragraphs did not ‘necessarily lead to the understanding that the four Charged Incidents — and these incidents alone — were intended to establish the existence of a widespread and systematic attack’. Rather, it found that the paragraphs indicated that the crimes charged, and the underlying four incidents, were ‘committed *as part* of the attack, and not that they actually *constituted* the attack’.⁴⁴¹ The Chamber concluded that the factual allegations on the basis of which the Prosecution intended to prove the attack against the civilian population were set out in the sub-section entitled ‘[a]ttack against a civilian population’ under Section E of the DCC,⁴⁴² which includes all 45 incidents mentioned in a chronological order.

The Chamber was not persuaded by the Prosecution’s argument that the four charged incidents and the remaining 41 incidents had a different nature and purpose. More specifically, it disagreed with the Prosecution’s indication that the facts and circumstances underlying the contextual elements related to the four charged incidents, while the facts relevant to the 41 incidents constituted “‘subsidiary facts and

440 ICC-02/11-01/11-572, paras 41-42 (emphasis in original).

441 ICC-02/11-01/11-572, para 43 (emphasis in original).

442 ICC-02/11-01/11-572, para 44. The sub-section ‘[a]ttack against a civilian population’ under Section E of the DCC comprises paras 20-29.

evidence [...] from which proof as to the material facts may be inferred” or a description of “the evidence from which proof of the material facts may be inferred””.⁴⁴³ It reiterated in this respect that in its factual allegations, the Prosecution had described a series of events without making a distinction as to their relevance to establishing an attack against a civilian population.⁴⁴⁴

The Chamber further recalled that in the impugned decision, the Pre-Trial Chamber did not require that each of the 45 incidents be proven to the requisite standard.⁴⁴⁵ In this respect, the Chamber held that ‘it is for the Prosecutor to plead the facts relevant to establishing the legal elements and for the Pre-Trial Chamber to determine whether those facts, if proven to the requisite threshold, establish the legal elements of the attack’. It added that ‘the question of how many of the incidents pleaded by the Prosecutor would suffice to prove an “attack” in the present case is a matter for the Pre-Trial Chamber to determine’ and ‘not a question that can be determined in the abstract’.⁴⁴⁶

443 ICC-02/11-01/11-572, paras 45-46.

444 In its response to the Prosecution document in support of the appeal, the Defence had also argued that the DCC did not distinguish between the four charged incidents and the other 41 incidents. ICC-02/11-01/11-509, para 46. The Defence had further noted that the Prosecution relied on all 45 incidents to establish the ‘attack’ during the confirmation hearing, and that it was only at the end of this hearing and in the Prosecution subsequent written submissions that the Prosecution changed its strategy and said that the four charged incidents were sufficient to establish the existence of the ‘attack’. ICC-02/11-01/11-509, para 34.

445 The Appeals Chamber cited the impugned decision in the part where the Pre-Trial Chamber held that ‘when alleging the existence of an “attack against any civilian population” by way of describing a series of incidents, the Prosecutor must establish to the requisite threshold that a *sufficient number of incidents* relevant to the establishment of the alleged “attack” took place. This is all the more so in case none of the incidents, taken on their own, could establish the existence of such an “attack”’. ICC-02/11-01/11-432, para 23 (emphasis in original).

446 ICC-02/11-01/11-572, para 47.

For these reasons, the Appeals Chamber dismissed the Prosecution's first two arguments under its first ground of appeal⁴⁴⁷ and found that the Pre-Trial Chamber 'did not err in treating the Prosecutor's factual allegations as encompassing the 41 Incidents in addition to the four Charged Incidents'.⁴⁴⁸

Regarding the Prosecution's third argument under its first ground of appeal that 'the Pre-Trial Chamber misapplied and misinterpreted the term attack under article 7(2)(a) of the Statute, in finding that it encompassed a certain number of incidents, rather than a course of conduct involving a multiple commission of acts'⁴⁴⁹ — the Appeals Chamber noted that the legal requirements necessary to establish an 'attack' within the meaning of Article 7 'were not articulated in the Impugned Decision'.⁴⁵⁰ It found that the Pre-Trial Chamber did not establish any requirements as a matter of law, and that its statement, mentioned above, only related to the Prosecution's factual allegations.⁴⁵¹ The Appeals Chamber held that 'any determination by the Appeals Chamber of the merits of this issue would be made in the abstract and would

447 The Chamber decided to consider jointly the two first arguments under the first ground of appeal, which were the following: '(i) that "the 'facts and circumstances' contained in the DCC that need to be established and that are relevant to the existence of the 'attack' do not refer to any 'incidents' other than the four Charged Incidents"; and (ii) that "the standard of proof under [a]rticle 61(7) exclusively applies to the elements of the crimes (including the contextual elements) and to findings of fact that are essential to establish these elements" and that, in this case, "the subsidiary facts relevant to the 41 Incidents are not essential to establishing the 'attack'". ICC-02/11-01/11-572, para 16.

448 ICC-02/11-01/11-572, para 48.

449 ICC-02/11-01/11-572, para 16 (internal quotations omitted).

450 ICC-02/11-01/11-572, para 53. The Defence had also argued that Pre-Trial Chamber did not make any finding on the legal definition of an attack, and that the Pre-Trial Chamber would only make a determination on the legal elements of crimes against humanity in the confirmation decision. ICC-02/11-01/11-509, paras 61, 66.

451 ICC-02/11-01/11-572, para 53.

be premature in the absence of any findings or interpretation by the Pre-Trial Chamber', and noting that it is not an 'advisory body', declined to consider this argument.⁴⁵²

As to the Prosecution's second ground of appeal,⁴⁵³ the Appeals Chamber noted at the outset that it mirrored the first issue in respect of which the Prosecution had requested leave to appeal,⁴⁵⁴ and in relation to which the Pre-Trial Chamber denied the Prosecution leave to appeal.⁴⁵⁵ The Appeals Chamber recalled its previous jurisprudence in which it declined to consider arguments submitted by an appellant which go beyond the issue for which leave to

452 ICC-02/11-01/11-572, para 54.

453 The Prosecution's second ground of appeal was that 'the Majority erred in its interpretation and application of the standard of proof under Article 61(7) of the Statute'. ICC-02/11-01/11-474, para 6. Under this issue, the Prosecution alleged the following four sub-errors: (i) 'the majority erred by holding that the prosecutor must largely complete her investigation to meet the threshold under Article 61(7)'; (ii) 'the majority erred by finding that the Prosecutor must present all her evidence and her strongest possible case at the confirmation of charges stage in order to meet the standard of proof under Article 61(7)'; (iii) 'the majority erred by finding that recent jurisprudence has modified the interpretation of the standard of proof under Article 61(7)'; (iv) 'the majority erred in its "general disposition towards certain types of evidence" for the confirmation of charges stage'. ICC-02/11-01/11-474, paras 57-74.

454 In its request for leave to appeal the impugned decision, the Prosecution presented its first issue as follows: 'whether the Decision correctly interpreted and applied the evidentiary standard under Article 61(7)'. ICC-02/11-01/11-435, para 3(i).

455 The Pre-Trial Chamber had rejected leave to appeal this issue because it found that it was not formulated with sufficient clarity and did not arise from the impugned decision. More specifically, it found that the Prosecution had not identified any legal or factual error in its reasoning regarding the evidentiary threshold, and that it had 'selectively pick[ed] elements from the Chamber's reasoning in other sections of the Decision, which do not deal with the evidentiary standard'. It also found that the arguments presented by the Prosecution seemed to result from a 'misreading' of the impugned decision and 'a failure to distinguish the question of how to define the standard of proof from the question of how the Prosecutor can be expected to meet this standard'. ICC-02/11-01/11-464, paras 20-22.

appeal was granted⁴⁵⁶ and concluded that the Prosecution's second ground of appeal went beyond the scope of the appeal. It recalled that although the Appeals Chamber has taken into account arguments that went beyond the scope of the issue on appeal but were 'intrinsically linked' to that issue, this was not the case in the instant appeal. It noted in this regard that while the Prosecution's second ground of appeal 'revolve[d] around the evidentiary threshold for the confirmation of charges', the issue for which leave was granted 'relate[d] to the interpretation of the charges in the case at hand and the question of whether and which of the incidents alleged by the Prosecutor must be proved to the relevant standard'.

The Appeals Chamber also concurred with the Pre-Trial Chamber's finding that the errors alleged by the Prosecution under the second ground of appeal did not arise from the impugned decision. It concluded that since the Appeals Chamber 'is not an advisory body', it would not determine these issues in the abstract, and thus decided not to consider the second ground of appeal.⁴⁵⁷

Accordingly, the Appeals Chamber dismissed all of the Prosecution's arguments and confirmed the impugned decision.

456 ICC-02/11-01/11-572, para 63, referencing ICC-01/04-01/06-2582 (OA 18), ICC-02/04-179 (OA) and ICC-02/04-01/05 (OA 2).

457 ICC-02/11-01/11-572, paras 65-66.

Trial proceedings

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18 August 2012 – 31 October 2013*

**The Katanga case, in relation to the order setting the date for the trial judgement, and the Bemba case, in relation to Defence witness testimony, have been included through 30 November 2013. The Kenya cases have also been included through 30 November 2013, with the following exceptions: the Ruto and Sang case, in relation to the Appeals Chamber decision on the Prosecution request to amend the DCC, and the Kenyatta case, in relation to the Prosecution application to adjourn the start of the trial, which are included through 31 December 2013.*

In the period covered by the *Gender Report Card 2013*, four of the ICC's cases were at the trial stage of the proceedings: the Ngudjolo and Katanga cases in the DRC Situation; the Bemba case in the CAR Situation; and the Banda and Jerbo case in the Darfur Situation. The Ngudjolo and Katanga trial began in November 2009 and concluded with closing arguments in May 2012. The second trial, against Bemba, began in November 2010. The third, against Banda, is scheduled to begin in May 2014.

Two cases have reached the completion of the trial phase to date. Following the conviction of Thomas Lubanga Dyilo in March 2012, the case is now before the Appeals Chamber. The Lubanga case was also the first at the ICC to enter the reparations phase of proceedings. These proceedings are discussed in more detail in the **Appeals Proceedings** section of this Report. A second individual in the DRC Situation, Mathieu Ngudjolo Chui, was acquitted of all charges by Trial Chamber II in December 2012. The appeal of this judgement is now before the Appeals Chamber and is discussed in the **Appeals Proceedings** section of this Report.

This section analyses in detail the Trial Judgement acquitting Ngudjolo of all charges, and the proceedings related to his release from ICC custody. It discusses the Chamber's severance of the cases against Ngudjolo and Katanga, and the subsequent proceedings undertaken under Regulation 55 regarding the reclassification of Katanga's individual criminal responsibility. This section also provides an overview of the Bemba Defence case and testimony of witnesses called by the Defence. Finally, this section includes discussion of the Banda and Jerbo trial, including the death of Jerbo and termination of the case against him in October 2013, as well as a Defence request to terminate the proceedings against Banda.

DRC:

The Prosecutor v. Mathieu Ngudjolo Chui

Ngudjolo Trial Judgement

On 18 December 2012, in the ICC's second trial judgement, Trial Chamber II (Judge Van den Wyngaert concurring), acquitted Mathieu Ngudjolo Chui (Ngudjolo) of all crimes charged by the Prosecution in the case *The Prosecutor v. Mathieu Ngudjolo Chui*.⁴⁵⁸ Ngudjolo was tried jointly with Germain Katanga (Katanga), constituting the Court's second trial, as well as the second case, after the Lubanga case, arising from the DRC Situation. The Katanga and Ngudjolo case was the first in which crimes of sexual violence had been charged.⁴⁵⁹ The trial centred on an attack on the village of Bogoro in the Ituri region by the FNI and the FRPI on 24 February 2003. Katanga and Ngudjolo were the alleged commanders of the FRPI and FNI, respectively. On 21 November 2012, Trial Chamber II issued a decision, implementing Regulation 55⁴⁶⁰ and severing the cases against Ngudjolo and Katanga.⁴⁶¹

Ngudjolo was charged under Article 25(3)(a) of the Statute with seven counts of war crimes: rape, sexual slavery, wilful killings, directing

attack against a civilian population, using children under the age of 15 to take active part in the hostilities, destruction of property, and pillaging.⁴⁶² He was also charged with three counts of crimes against humanity: rape, sexual slavery and murder.⁴⁶³

The Trial Chamber's key conclusions

The trial judgement resulting in Ngudjolo's acquittal was based on the Trial Chamber's factual conclusions concerning the evidence related to the organisation and structure of the Lendu combatants from Bedu-Ezekere within the relevant period, including Ngudjolo's role and function. Although the Prosecution had initially argued that Ngudjolo was the Commander-in-Chief of the FNI, the evidence presented during trial revealed that the FNI was officially created at a later date. The Trial Chamber held that this change in terminology did not constitute a modification of the charges and referred to the Lendu combatants from Bedu-Ezekere in lieu of the FNI.⁴⁶⁴

While the Chamber affirmed that the events as alleged, including the crimes, had taken place,⁴⁶⁵ it concluded that, in the absence of sufficient evidence, it could not find beyond a reasonable doubt that Ngudjolo was the lead commander of the Lendu combatants from Bedu-Ezekere at the time of the Bogoro attack. Similarly, while finding

458 ICC-01/04-02-12-3.

459 Both Katanga and Ngudjolo were charged with rape and sexual slavery.

460 For a detailed description of the application of Regulation 55 of the Regulations of the Court to the modes of liability in this case, see 'Modes of Liability: A review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, November 2013, p 109-130, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>; see also 'Use of Regulation 55 in the Katanga case' in the *Trial Proceedings* section of this Report.

461 ICC-01/04-01/07-3319. The cases were joined on 10 March 2008. ICC-01/04-01/07-257. In its decision severing the cases, the Trial Chamber authorised all participating victims whose participation had not been revoked to continue their participation in both cases. ICC-01/04-01/07-3319, para 64.

462 Articles 8(2)(b)(xxii); 8(2)(a)(i); 8(2)(b)(i); 8(2)(b)(xxvi); 8(2)(b)(xii); and 8(2)(b)(xvi).

463 Articles 7(1)(g) and 7(1)(a).

464 ICC-01/04-02-12-3, paras 347-352.

465 Specifically concerning the sexual violence charges, the Chamber found, as a factual matter, that there was extensive evidence attesting to the commission of rape and sexual enslavement. ICC-01/04-02-12-3, para 338. See 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC trial of Germain Katanga and Mathieu Ngudjolo Chui', CICC Press Conference, 23 November 2009, available at <<http://www.iccwomen.org/news/docs/Katanga-Statement.pdf>>.

the use of child soldiers to be a generalised phenomenon in Ituri, and more specifically that child soldiers from Bedu-Ezekere had participated in the attack on Bogoro, the Chamber concluded that it did not have enough evidence to link Ngudjolo to this crime beyond a reasonable doubt.⁴⁶⁶ Although deciding to acquit Ngudjolo based on the absence of sufficient evidence to prove his criminal responsibility, the Chamber underscored that the failure to establish his guilt beyond a reasonable doubt did not call into question the alleged facts in the case. It stated, 'finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent'.⁴⁶⁷

The trial against Ngudjolo and Katanga represented the first time at the ICC that victims/survivors of rape and sexual slavery were called by the Prosecution to testify about those crimes. Three witnesses who were victims of sexual violence gave extensive testimony, in both open and closed session, describing the multiple rapes to which they were subjected during the attack, and their abduction and rape after the attack.⁴⁶⁸ In the closing arguments, the discussion of these charges centred on the credibility of the witnesses

466 ICC-01/04-02/12-3, para 516.

467 ICC-01/04-02/12-3-TENG, para 36.

468 For a detailed summary of the testimony on gender-based crimes presented by the Prosecution witnesses, see *Gender Report Card 2010*, p 165-176. Three additional Prosecution witnesses addressed rape, sexual slavery and forced marriage in the course of their testimony. See *Gender Report Card 2011*, p 226-228. At the start of the trial in November 2009, the Women's Initiatives had expressed concern about the sufficiency of the evidence presented with respect to gender-based crimes at the pre-trial stage, particularly about the relatively small witness pool for the sexual violence charges in this case. Women's Initiatives for Gender Justice, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', 23 November 2009. See further *Gender Report Card 2008*, p 47-48. In 2006 and 2007, the Women's Initiatives interviewed 112 women victims/survivors of sexual violence in Eastern DRC, who described horrific incidents of individual rape, gang rape and sexual slavery. Approximately 30 of the interviewees attributed these alleged crimes to the FNI and FRPI.

who had testified about their experiences of rape and sexual enslavement, the temporal scope of the charges and the issue of cumulative charging.⁴⁶⁹ In the final judgement, the Chamber made very limited findings concerning the sexual violence charges, but found that, as a factual matter, there was extensive evidence attesting to the commission of rape and sexual enslavement.⁴⁷⁰

In the trial judgement, the Trial Chamber indicated that 366 victims had been authorised to participate in the case, including 11 child soldiers; however, two victims were withdrawn upon the request of their Legal Representative.⁴⁷¹ The Chamber noted that the victims were divided into two groups for the purpose of common legal representation: a principal group of victims and child soldier victims.⁴⁷²

469 For a more detailed analysis and summary of the closing arguments in this case see *Gender Report Card 2012*, p 224-247.

470 ICC-01/04-02/12-3, para 338.

471 ICC-01/04-02/12-3, paras 30, 32. For additional information on the withdrawal of victims in the Katanga and Ngudjolo case, see *Gender Report Card 2011*, p 283-284.

472 ICC-01/04-02/12-3, para 30, citing ICC-01/04-01/07-1488.

Ngudjolo's release

At the conclusion of the judgement, the Chamber ordered the Registry to take the necessary measures for ensuring Ngudjolo's immediate release, and ordered the VWU to take any necessary measures to ensure the protection of witnesses who had testified in the case.⁴⁷³ However, Ngudjolo's actual release was delayed by numerous procedural obstacles and, following a request by Ngudjolo for asylum alleging fear of persecution based on his testimony in the case, he remained at a detention centre for refugees at Schiphol airport in the Netherlands for approximately four months prior to his release on 4 May 2013.

Prosecution appeal

As explained further in the **Appeals Proceedings** section of this Report, the Prosecution appealed Ngudjolo's acquittal on 20 December 2012.

Legal Eye on the ICC analyses

The Ngudjolo Trial Judgement and matters related to his release following his acquittal are discussed in greater detail in three special issues of the Women's Initiatives *Legal Eye on the ICC eLetter*. The February 2013 First Special Issue on the Ngudjolo Judgement discusses the Trial Chamber's Judgement, focusing on its findings in relation to the Prosecution investigation, the credibility of witnesses, the events in Bogoro, and Ngudjolo's alleged criminal responsibility.⁴⁷⁴ The April 2013 Second Special Issue on the Ngudjolo Judgement describes the proceedings regarding Ngudjolo's release following his acquittal as well as Judge Van den Wyngaert's separate and concurring opinion on Article 25(3)(a).⁴⁷⁵ The January 2014 Third Special Issue on the Ngudjolo Judgement covers the Prosecution appeal of the judgement and details Ngudjolo's release in May 2013 from the Schiphol immigration detention centre in the Netherlands.⁴⁷⁶

473 ICC-01/04-02/12-3-tENG, p 197.

474 Women's Initiatives for Gender Justice, 'First Special Issue on Ngudjolo Judgement', *Legal Eye on the ICC eLetter*, February 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye2-13-FULL/LegalEye2-13.html>>.

475 Women's Initiatives for Gender Justice, 'Second Special Issue on Ngudjolo Judgement', *Legal Eye on the ICC eLetter*, April 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye4-13-FULL/LegalEye4-13.html>>.

476 Women's Initiatives for Gender Justice, 'Third Special Issue on Ngudjolo Judgement', *Legal Eye on the ICC eLetter*, January 2014, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye1-14/LegalEye1-14.html>>.

DRC:

The Prosecutor v. Germain Katanga

Use of Regulation 55 in the Katanga case

On 21 November 2012, six months into the deliberations phase of the case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,⁴⁷⁷ a majority of Trial Chamber II (Judge Christine Van den Wyngaert dissenting), issued a decision, severing the cases against Ngudjolo and Katanga and giving notice to the parties and participants that it planned to invoke Regulation 55 of the Regulations of the Court concerning a possible legal recharacterisation of the facts (Regulation 55 Notice Decision).⁴⁷⁸ Regulation 55 provides that:

- 1 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.
- 2 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. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may

order a hearing to consider all matters relevant to the proposed change.

- 3 For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:
 - (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and
 - (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

As noted above, in the Decision, the Trial Chamber found that Ngudjolo's case was unaffected by the proposed recharacterisation under Regulation 55 and thus severed his case pursuant to Article 64(5) so as not to impermissibly lengthen his trial.⁴⁷⁹ It indicated that victims who had been granted authorisation to participate in the Katanga and Ngudjolo case could continue to participate in both cases.⁴⁸⁰ Trial Chamber II subsequently issued the trial judgement in the case *The Prosecutor v. Mathieu Ngudjolo Chui* on 18 December 2012, acquitting him of all charges (Judge Van den Wyngaert concurring).⁴⁸¹

477 The cases were joined on 10 March 2008. ICC-01/04-01/07-257. 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.

478 ICC-01/04-01/07-3319.

479 ICC-01/04-01/07-3319, paras 58-62. The Regulation 55 Notice Decision, including Judge Van den Wyngaert's dissent, is discussed in more detail in 'Modes of Liability: A review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, November 2013, p 116-122, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

480 ICC-01/04-01/07-3319, paras 63-64.

481 ICC-01/04-02/12-3; ICC-01/04-02/12-4, (Judge Van den Wyngaert concurring).

The proposed recharacterisation

The recharacterisation specifically under consideration by the majority related to the mode of liability⁴⁸² pursuant to which Katanga was charged, from indirect co-perpetration under Article 25(3)(a) to common purpose liability under Article 25(3)(d)(ii). The majority indicated that the recharacterisation would apply to all the charges with the exception of the crimes of enlistment, conscription and use of child soldiers.

Article 25(3)(a) establishes three forms of criminal responsibility as a principle: individual, direct perpetration; co-perpetration; and, indirect perpetration. It provides that a person will be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if the person: ‘(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.’

Significantly, in the confirmation of charges decision in this case, issued on 26 September 2008, Pre-Trial Chamber I combined indirect perpetration with co-perpetration to form a new, fourth mode of liability: indirect co-perpetration.⁴⁸³ The Pre-Trial Chamber applied this mode of liability to all of the crimes charged in this case,⁴⁸⁴ with the exception of the crimes of enlisting, conscripting and using child soldiers actively in hostilities, which it qualified under co-perpetration.⁴⁸⁵

482 Modes of liability can be understood as the grounds upon which the accused can be held criminally liable for committing a crime within the jurisdiction of the Court.

483 ICC-01/04-01/07-717.

484 Katanga was charged under Article 25(3)(a) of the Statute with seven counts of war crimes: rape, sexual slavery, wilful killings, directing attack against a civilian population, using children under the age of 15 to take active part in the hostilities, destruction of property, and pillaging. Articles 8(2)(b)(xxii); 8(2)(a)(i); 8(2)(b)(i); 8(2)(b)(xxvi); 8(2)(b)(xii); and 8(2)(b)(xvi). He was also charged with three counts of crimes against humanity: rape, sexual slavery and murder. Articles 7(1)(g) and 7(1)(a).

485 As described in greater detail below, the majority indicated that the recharacterisation would not apply to the crime of the enlistment, conscription and use of child soldiers.

In contrast to the principal forms of liability set forth in Article 25(3)(a), subsection (d) has been referred to as a ‘residual form of accessory liability’,⁴⁸⁶ as well as a ‘catch all form of liability’.⁴⁸⁷ Article 25(3)(d)(ii) provides for liability when an accused:

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

The differences in the constituent elements of each of these forms of liability and the advanced stage of trial at which the notice was given have had important implications for the Defence case and its right to a fair trial. The proceedings concerning the implementation of Regulation 55 have further been characterised by a series of dissenting opinions. This section provides an overview of the procedures and substantive issues that have arisen to date in light of the Regulation 55 Notice Decision.

Majority holding on Regulation 55 Notice decision

In the Regulation 55 Notice Decision, issued on 21 November 2012, the majority of Trial Chamber II indicated that the proposed recharacterisation came after an objective examination of the totality of the evidence, and acknowledged

486 ICC-01/04-01/06-803-tENG, para 337.

487 ICC-01/09-01/11-373, para 354.

the advanced stage of the proceedings.⁴⁸⁸ It underscored its discretion to invoke Regulation 55 as long as it did not exceed the facts and circumstances as described in the confirmation of charges decision.⁴⁸⁹ It found that there was no temporal limitation to invoking Regulation 55, absent fair trial concerns, and in light of the protections afforded by subsections (2) and (3) of the Regulation.⁴⁹⁰ The Chamber cited extensively to the jurisprudence of the ECHR, finding that legal recharacterisations after the first instance decision in national courts did not create fair trial concerns.⁴⁹¹

The majority decision proceeded to examine the specific fair trial rights at issue in its decision to invoke Regulation 55 at such an advanced stage of the proceedings, namely: the right to be informed promptly and in detail of the nature, cause and content of the charges (Article 67(1)(a)); the right to the time and facilities necessary for the preparation of one's defence (Article 67(1)(b)); the right to be tried without excessive delays (Article 67(1)(c)); and the right against self-incrimination (Article 67(1)(g)). It found that the proposed recharacterisation would not violate these rights.

Specifically, concerning the right to be informed promptly and in detail of the nature, cause and content of the charges, the majority cited to ECHR jurisprudence and concluded that it was essential to ensure that the facts underlying the charges upon which the legal recharacterisation was based were initially contained within the confirmation decision. The majority found that the proposed legal recharacterisation was based on the facts supporting the legal elements of the

488 ICC-01/04-01/07-3319, paras 8, 14. The decision was issued over one year after the evidentiary hearings had ended (11 November 2011), after the formal closing of the evidence (7 February 2012) and six months after the closing arguments (15-23 May 2012).

489 ICC-01/04-01/07-3319, paras 10-14.

490 ICC-01/04-01/07-3319, paras 15, 20.

491 ICC-01/04-01/07-3319, paras 16-18.

confirmed charges against Katanga, which he had the opportunity to contest during trial.⁴⁹²

Regarding the right to the time and facilities necessary for the preparation of one's defence, the majority noted the close relationship between Regulation 55(2) and (3) and Article 67(1)(b), and that the Appeals Chamber, in the Lubanga case, had underscored the necessity to rigorously apply these protections.⁴⁹³ Specifically, citing to ECHR jurisprudence, it found that by issuing the present decision giving notice to the parties and participants and providing for their effective exercise of their right to submit observations, Article 67(1)(b) was not jeopardised.⁴⁹⁴

Regarding the right to be tried without undue delay, the majority noted the Appeals Chamber's findings in its decision in the Lubanga case that the application of Regulation 55 did not necessarily imply a violation of Article 67(1)(c), but depended on the circumstances of the particular case.⁴⁹⁵ It found that in the instant case, the application of Regulation 55 would not result in excessive delays as: i) Ngudjolo would be addressed separately; and ii) the majority considered that it could enable the Katanga Defence to prepare an efficacious and effective defence without prolonging the proceedings to cause undue delay. In this regard, it noted that it had provided the Defence with information to assist it, and that the Chamber had wide latitude

492 ICC-01/04-01/07-3319, paras 22-23.

493 ICC-01/04-01/07-3319, paras 35-36. On 8 December 2009, the Appeals Chamber issued a decision in the Lubanga case, reversing Trial Chamber I's decision to invoke Regulation 55 upon the request of the Legal Representatives of Victims, which had sought to modify the legal characterisation of the facts presented by the Prosecution in order to add the crimes of inhuman and cruel treatment and sexual slavery. ICC-01/04-01/06-2205. The Appeals Chamber decision in the Lubanga case was referenced repeatedly in these proceedings. For detailed information on the Appeals Chamber's decision on the use of Regulation 55 in the Lubanga case, see *Gender Report Card 2010*, p 130-132.

494 ICC-01/04-01/07-3319, para 38.

495 ICC-01/04-01/07-3319, para 43.

to define the modalities of applying Regulation 55 to prevent excessive delays, which it could re-evaluate later in light of any delays actually occasioned.⁴⁹⁶

In addressing the right against self-incrimination, the majority noted that the relationship between Regulation 55 and Article 67(1)(g) was a question of first instance for the Court, but that according to ECHR jurisprudence, a legal recharacterisation did not violate the right against self-incrimination.⁴⁹⁷ It further emphasised that the right aimed to prevent illegally obtained confessions, and related to the accused's decision whether to testify. In this regard, it noted that Katanga freely chose to testify, to answer the Chamber's questions and to spontaneously provide additional explanations and descriptions, assisted by counsel. It thus found that he was not subjected to any pressure or restraint.⁴⁹⁸

Dissenting opinion of Judge Van den Wyngaert

Judge Van den Wyngaert dissented 'in the strongest possible terms' from the majority's decision to trigger Regulation 55.⁴⁹⁹ She found, *inter alia*, that it went 'well beyond any reasonable application of the provision and fundamentally encroaches on the accused's right to a fair trial'.⁵⁰⁰ She maintained that the mode of liability was 'noticeably' different, and could potentially lead to a re-opening of the trial.⁵⁰¹ She further considered that the Katanga and Ngudjolo cases should not have been severed.⁵⁰²

496 ICC-01/04-01/07-3319, para 44.

497 ICC-01/04-01/07-3319, paras 47-48.

498 ICC-01/04-01/07-3319, paras 49-51.

499 ICC-01/04-01/07-3319, Dissenting opinion of Judge Christine Van der Wyngaert, para 1.

500 ICC-01/04-01/07-3319, Dissenting opinion of Judge Christine Van der Wyngaert, para 1.

501 ICC-01/04-01/07-3319, Dissenting opinion of Judge Christine Van der Wyngaert, paras 2-3.

502 ICC-01/04-01/07-3319, Dissenting opinion of Judge Christine Van der Wyngaert, para 6.

Following the Appeals Chamber decision in the Lubanga case, Judge Van den Wyngaert maintained that the decision to give notice under Regulation 55(2) implied a two-step analysis, namely: i) whether the proposed recharacterisation accorded with the crimes and mode of participation without exceeding the facts and circumstances set forth in the charges; and ii) a determination as to whether the recharacterisation was unfair, according to the Chamber's discretion. She argued that the majority decision violated both steps, and was thus contrary to Regulation 55 and Articles 64(2) and 67(1).⁵⁰³

Appeals Chamber decision on Defence appeal of Regulation 55 Notice Decision

On 21 December 2012, the Defence sought leave to appeal the Trial Chamber's decision implementing Regulation 55 pursuant to Article 82(1)(d),⁵⁰⁴ which the Trial Chamber granted on 28 December.⁵⁰⁵

On 27 March 2013, a majority of the Appeals Chamber (Judge Tarfusser dissenting) affirmed the Trial Chamber's decision.⁵⁰⁶ The majority held that Regulation 55 could be invoked at any stage during the proceedings, but cautioned the Trial Chamber to take the necessary measures to ensure the Defence's fair trial rights.⁵⁰⁷ Specifically, the majority suggested that the Trial Chamber would need to be vigilant over excessive delays, and that more detailed information about the possible recharacterisation would need to be provided in order to ensure the Defence's right to be informed promptly and in detail of the nature, cause and content of the charges.⁵⁰⁸ It also considered the Defence argument that the proposed recharacterisation fell outside of the scope of the facts and circumstances described

503 ICC-01/04-01/07-3319, Dissenting opinion of Judge Christine Van der Wyngaert, paras 10-11.

504 ICC-01/04-01/07-3323.

505 ICC-01/04-01/07-3327.

506 ICC-01/04-01/07-3363.

507 ICC-01/04-01/07-3363, paras 1, 17.

508 ICC-01/04-01/07-3363, paras 99, 101.

in the charges by fundamentally altering the narrative of the charges and relying on subsidiary facts.⁵⁰⁹ It concluded that, at the present stage of the proceedings, it was not immediately apparent that the contemplated change would exceed the facts and circumstances as described in the charges.⁵¹⁰

Dissenting opinion of Judge Cuno Tarfusser

Judge Tarfusser concurred that notice of Regulation 55 could be given at any time during trial, but dissented on two issues: i) he did not find that Regulation 55 applied to the type of change contemplated by the Trial Chamber; and ii) he found that the decision violated Katanga's right to be informed in detail of the nature, cause and content of the charges.⁵¹¹

The Regulation 55 Notice Decision, including Judge Van den Wyngaert's dissent as well as the Decision on the Defence appeal, together with Judge Tarfusser's dissent, are described in more detail in the Women's Initiatives November 2013 Expert Paper on Modes of Liability.⁵¹²

509 ICC-01/04-01/07-3363, para 44.

510 ICC-01/04-01/07-3363, para 56.

511 ICC-01/04-01/07-3363, Dissenting opinion of Judge Cuno Tarfusser, para 1.

512 'Modes of Liability: A review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, November 2013, p 116-130, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

Observations by the parties and participants on the application of Article 25(3)(d)

In its document in support of the appeal, the Defence had requested suspensive effect,⁵¹³ which the Appeals Chamber granted given that its decision could have a significant impact on the proceedings.⁵¹⁴ In light of the suspension, the Trial Chamber ordered the parties to submit their observations on the application of Article 25(3)(d)(ii) after the Appeals Chamber's decision.⁵¹⁵ The Defence, Prosecution and both teams of Victims' Legal Representatives filed observations on the interpretation to be given to each of these elements and their application to the Katanga case. This section briefly highlights several of the key issues presented in their filings.

Prosecution observations

In its observations, the Prosecution asserted that, overall, the evidence submitted in the case met the legal requirements of Article 25(3)(d).⁵¹⁶ Concerning the required elements of Article 25(3)(d)(ii), it argued that the 'common purpose' was the functional equivalent of the common plan as required by Article 25(3)(a), and thus only needed to contain an element of criminality, but did not need to be specifically directed at the commission of a crime.⁵¹⁷ It suggested that Article 25(3)(d) applied irrespective of whether

513 ICC-01/04-01/07-3339.

514 ICC-01/04-01/07-3344, para 9.

515 ICC-01/04-01/07-3345.

516 ICC-01/04-01/07-3367.

517 ICC-01/04-01/07-3367, paras 5-7. In the Confirmation of Charges decision in the Lubanga case, Pre-Trial Chamber I held that, co-perpetration under Article 25(3)(a) required the existence of a common plan, which 'must include an element of criminality, although it does not need to be specifically directed at the commission of a crime'. ICC-01/04-01/06-803-tEN, para 344. In contrast, in the Katanga and Ngudjolo Confirmation of Charges decision, Pre-Trial Chamber I held that the 'common plan must include the commission of a crime'. ICC-01/04-01/07-717, para 523.

the accused was a member of the group acting with a common purpose. It argued that ‘any’ contribution of the crime was sufficient;⁵¹⁸ and that the provision required ‘any link’ between the conduct and the crime.⁵¹⁹ Concerning the requirement that the contribution be intentional, the Prosecution referred to Article 30(2),⁵²⁰ arguing that the intent must apply to the conduct and not the consequences.⁵²¹

The Defence observations

On 15 April 2013, the Defence submitted comprehensive observations on the application of Article 25(3)(d)(ii) to the case.⁵²² At the outset, it maintained that despite the Appeals Chamber determination that Regulation 55 notice could, *per se*, be given at any stage of the proceedings, the extent of the change effectuated at the late stage of the proceedings was in the circumstances of this case unfair.⁵²³ The Defence argued that the Trial Chamber provided

inadequate notice of the facts and evidence relating to the new mode of liability, contrasting the 98-page confirmation of charges decision detailing the charges with the five paragraphs provided in the Regulation 55 Notice Decision.⁵²⁴ In response to the Appeals Chamber finding that any decision concerning fair trial rights violations could only be made after assessing the final judgement, the Defence argued that it was ‘inappropriate for an accused to have to wait to read the final judgement to have a clear view of the case he faced’.⁵²⁵

Concerning the elements of the proposed mode of liability, in contrast to the Prosecution, the Defence argued that Article 25(3)(d) required that the common purpose of the group be criminal, that the accused did not form part of the group, and that his contribution was ‘real’ or ‘significant’.⁵²⁶ It argued that the purpose of the group to which Katanga contributed was legitimate. Regarding the subjective elements of 25(3)(d)(ii), the Defence argued that the ‘intentional contribution must be made in the knowledge, not only of the general criminal purpose of the group, but also that the group had the intention of committing specific crimes under the ICC Statute’.⁵²⁷ It asserted that the criteria of occurrence in the ordinary course of events, as defined in Article 30(2)(b), did not apply as Article 25(3)(d) specified the intent and knowledge required.⁵²⁸ The Defence argued, therefore, that ‘the crimes must have been intended as part of the common purpose of the group’.⁵²⁹

518 The level of contribution required by Article 25(3)(d) was the subject of extensive discussion in the Mbarushimana Confirmation of Charges decision. In that case, Pre-Trial Chamber I found that the individual’s responsibility needed to reach ‘a certain threshold of significance below which responsibility under this provision [did] not arise’, and that Article 25(3)(d) ‘liability would become overextended if any contribution were sufficient’. The Chamber held that the contribution must ‘be at least significant’. ICC-01/04-01/10-465-Red, paras 276-278, 283. In contrast, in her separate opinion to the Appeals Chamber review of the Pre-Trial Chamber’s decision, Judge Fernández de Gurmendi observed that the term ‘significant’ appeared nowhere in the text of Article 25(3)(d), and thus that ‘there should not be a minimum threshold or level of contribution’ under Article 25(3)(d). Separate opinion of Judge Silvia Fernández de Gurmendi, ICC-01/04-01/10-514, paras 7, 9.

519 ICC-01/04-01/07-3367, paras 9-13.

520 Article 30(2) defines intent. It states: ‘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.’

521 ICC-01/04-01/07-3367, para 15.

522 ICC-01/04-01/07-3369.

523 ICC-01/04-01/07-3369, paras 2-4.

524 ICC-01/04-01/07-3369, paras 17-19, citing Judge Tarfusser’s dissent, as described above.

525 ICC-01/04-01/07-3369, para 20.

526 ICC-01/04-01/07-3369, paras 42, 44, 45, citing the Mbarushimana Confirmation of Charges decision ICC-01/04-01/10-465-Red, para 283.

527 ICC-01/04-01/07-3369, para 123.

528 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.’

529 ICC-01/04-01/07-3369, para 110.

The Defence further argued that Katanga could not be held liable for rape, sexual violence and pillaging as the Pre-Trial Chamber had found that these crimes were not part of the common plan, but rather that they would occur in the ordinary course of events.⁵³⁰ The Defence asserted that Katanga's contribution was not criminal even if the consequences were, as the crimes were not part of the purpose, nor intended by the group's members. It asserted that the Prosecution must establish that the accused had knowledge of the intent to commit the specific crime, not merely an awareness of the criminal purpose.

Regarding Katanga's contribution to the crimes, the Defence argued that there was no evidence of Katanga's actual knowledge of any specific criminal intent and that there was no nexus between Katanga's contribution and the commission of the alleged crimes.⁵³¹ It further argued that he could not be found guilty for pillage, destruction, rape, sexual slavery or the use of child soldiers, as the Prosecution had to prove that 'he made a direct contribution to the crimes', which could not extend to crimes that 'did not involve bullets'.⁵³²

Regarding potential fair trial concerns, particularly the right against self-incrimination, the Defence argued that a change to the mode of liability caused real prejudice, as the Defence could not now undo its defence under indirect co-perpetration. It requested that the Chamber either decide not to invoke Regulation 55, or not to base the trial judgement on Katanga's testimony. Invoking the right to an impartial trial, the Defence argued that the Trial Chamber did not contemplate Article 25(3)(d) as an alternative mode of liability, but rather because the evidence did not support a conviction under Article 25(3)(a). It thus asserted that the Regulation 55 Notice Decision

530 ICC-01/04-01/07-3369, para 130.

531 ICC-01/04-01/07-3369, para 110.

532 ICC-01/04-01/07-3369, para 88.

gave the perception that Katanga would have been acquitted under Article 25(3)(a), and that (d)(ii) was being invoked in order to sustain a conviction.⁵³³

In conclusion, the Defence indicated its need for further factual details in order to prepare effective additional investigations. It specifically requested the Judges' position on the remaining evidence, namely, the 'evidential parameters'.⁵³⁴ It noted that its additional investigations would entail issues such as who formed part of the group with a common purpose and Katanga's relationship with them.⁵³⁵

Observations of the Legal Representatives of child soldier victims

In their observations, filed on 8 April 2013, the Legal Representatives for child soldier victims, *inter alia*, expressed their support for the requalification, characterising it as well-founded.⁵³⁶ They requested the Trial Chamber to provide reasons for its decision to exclude the crime of using child soldiers from the proposed recharacterisation in its decision giving notice of the implementation of Regulation 55⁵³⁷ and requested authorisation to submit observations on this issue in light of the reasons provided.⁵³⁸

The Legal Representatives argued that the Pre-Trial Chamber's characterisation of the crimes pertaining to the use of child soldiers under co-perpetration was inappropriate. They argued that because the Pre-Trial Chamber had applied indirect co-perpetration to all of the other crimes, it had included the crimes related to child soldiers within the common plan,

533 ICC-01/04-01/07-3369, para 149.

534 ICC-01/04-01/07-3369, para 132.

535 ICC-01/04-01/07-3369, paras 181-184.

536 ICC-01/04-01/07-3366, para 15.

537 The Defence requested the Trial Chamber to reject the Legal Representatives' request for an explanation as to why it did not invoke Regulation 55 as applied to the crime of using child soldiers. ICC-01/04-01/07-3369, para 190.

538 ICC-01/04-01/07-3366, para 20.

rendering the application of co-perpetration to the crimes of using child soldiers artificial.⁵³⁹

Observations of the Legal Representatives of the principal group of victims

The Legal Representatives for the principal group of victims submitted observations on 8 April 2013.⁵⁴⁰ They recalled that the Pre-Trial Chamber had required the common plan to contain an element of criminality, but not that it be a crime recognised under the Statute.⁵⁴¹ The Legal Representatives also observed that the text of the provision did not explicitly indicate a minimum contribution, and cited Pre-Trial Chamber II's Confirmation of Charges decision in the Ruto case, which suggested that the issue must be examined *vis-à-vis* the causal link between the contribution and the crime rather than on the degree of importance of the contribution.⁵⁴² Concerning the subjective elements of Article 25(3)(d), they underscored that the accused did not have to share the criminal intent of the group.⁵⁴³

The Legal Representatives argued that the evidence in this case established beyond reasonable doubt Katanga's guilt under both Article 25(3)(a) and (d).⁵⁴⁴ In response to the Defence argument that the group acting with a common purpose was not defined, the Legal Representatives noted that the Ngiti combatants were the same group as described in the

confirmation of charges decision, as the FPRI was only one name given to that group. They noted that in the Ngudjolo Trial Judgement, the Trial Chamber found that the issue of the name of the group did not affect the charges, and argued that the same reasoning should apply by analogy in this case.⁵⁴⁵ Noting the 'incessant' inter-ethnic attacks between the Hema and the Lendu and Ngiti at the time, the Legal Representatives argued that although the pillage, destruction, rape and sexual slavery did not necessarily form part of the common plan, in light of the practice of the combatants in other attacks against civil populations, the implementation of the common plan to efface Bogoro would inevitably result in the commission of such acts, as these crimes were a method of war.⁵⁴⁶ Concerning Katanga's contribution, the Legal Representatives argued that Katanga intended the conduct that contributed to the commission of the crimes.⁵⁴⁷

539 ICC-01/04-01/07-3366, paras 45-46.

540 ICC-01/04-01/07-3365.

541 ICC-01/04-01/07-3365, para 17. As noted above, in the Confirmation of Charges decision in the Lubanga case, Pre-Trial Chamber I held that, co-perpetration under Article 25(3)(a) required the existence of a common plan, which 'must include an element of criminality, although it does not need to be specifically directed at the commission of a crime'. ICC-01/04-01/06-803-tEN, para 344. In contrast, in the Katanga and Ngudjolo Confirmation of Charges decision, Pre-Trial Chamber I held that the 'common plan must include the commission of a crime'. ICC-01/04-01/07-717, para 523.

542 ICC-01/04-01/07-3365, paras 20-23.

543 ICC-01/04-01/07-3365, para 26.

544 ICC-01/04-01/07-3365, para 29.

545 ICC-01/04-01/07-3365, paras 34-36. In the Ngudjolo trial judgement, the Chamber found that the Prosecution change in terminology from the FNI to the Lendu combatants of Bedu-Ezekere did not affect the basis of the confirmed charges, the essential facts and circumstances of which the accused was aware from the beginning of the process for fair trial purposes. ICC-01/04-02/12-3, paras 347-351.

546 ICC-01/04-01/07-3365, para 69.

547 ICC-01/04-01/07-3365, para 95.

Trial Chamber II decision, transmitting additional legal and factual material

In light of the Appeals Chamber decision, described above, on 15 May 2013, the majority of Trial Chamber II issued a decision (Judge Van den Wyngaert dissenting), providing additional factual and legal information to the Defence related to the possible recharacterisation under Regulation 55.⁵⁴⁸ The majority indicated that all of the factual allegations were included in the confirmation of charges decision, and provided citations to the relevant paragraphs throughout the decision. It noted, however, that it could not provide the Defence with reference to all of the supporting evidence, as it had not yet deliberated on this aspect of the case against Katanga. The majority noted that the Defence had already benefitted from the Chamber's analysis of the credibility of Defence witnesses, as set forth in the Ngudjolo Trial Judgement, as well as its decision not to rely on two Prosecution witnesses concerning Katanga's criminal responsibility, as set forth in its decision implementing Regulation 55.⁵⁴⁹ The majority then set out a list of the factual elements and main factual allegations on which it would carry out the possible recharacterisation.⁵⁵⁰

Furthermore, the majority invited the Prosecution, Defence and the Legal Representatives of Victims to submit additional observations. It ordered the Defence, if it wanted to carry out further investigations or recall witnesses as provided for under Regulation 55(3), to provide all of the evidence in support of such a request, indicating whether these measures were necessary to adopt a particular line of defence, and how the evidence on the record would not otherwise allow it to do so.⁵⁵¹

548 ICC-01/04-01/07-3371-TENG.

549 ICC-01/04-01/07-3371-TENG, para 14.

550 ICC-01/04-01/07-3371-TENG, para 15.

551 ICC-01/04-01/07-3371-TENG, paras 26-27.

The Trial Chamber's decision is discussed in further detail in the Expert Paper *Modes of Liability*.⁵⁵²

Dissenting opinion of Judge Van den Wyngaert

Judge Van den Wyngaert dissented from the majority, finding, *inter alia*, that the 'complementary' information provided by the majority was not within the 'facts and circumstances' as confirmed by the Pre-Trial Chamber, and was not sufficiently specific to satisfy Article 67(1)(a).⁵⁵³ She provided several examples of how the factual elements provided by the majority went beyond the charges.⁵⁵⁴

She also argued that the factual exposition provided by the majority contained insufficient detail.⁵⁵⁵ She concluded by reiterating her position that the Trial Chamber should immediately proceed to an Article 74 judgement.⁵⁵⁶

Defence requests to conduct additional investigations and to recall witnesses

In response to the invitation by the majority of the Trial Chamber, on 24 May 2013, the Prosecution and Legal Representatives of child soldier victims submitted observations on its decision transmitting additional legal and

552 *Modes of Liability: A review of the International Criminal Court's jurisprudence and practice*, Women's Initiatives for Gender Justice, November 2013, p 128-130, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

553 ICC-01/04-01/07-3371, Dissenting opinion of Judge Van den Wyngaert, para 4.

554 ICC-01/04-01/07-3371, Dissenting opinion of Judge Van den Wyngaert, paras 10, 13.

555 ICC-01/04-01/07-3371, Dissenting opinion of Judge Van den Wyngaert, paras 28-29, 31, 36.

556 ICC-01/04-01/07-3371, Dissenting opinion of Judge Van den Wyngaert, para 42. Article 74 sets forth the requirements of the trial judgement.

factual material.⁵⁵⁷ In its observations, submitted 3 June 2013, the Defence, *inter alia*, indicated the insufficiency of the additional elements provided by the majority of the Chamber and reiterated its request to conduct additional investigations in relation to a list of issues such as ‘Katanga’s relationship with individual group members to establish his specific relationship and knowledge of their criminal intentions’,⁵⁵⁸ as well as ‘the previous behaviour of the individuals or group members and Katanga’s specific knowledge of them.’⁵⁵⁹ It indicated that it would require 6 months to conduct the investigations, as it would take three months to prepare the Congo-based investigations and to address security issues.⁵⁶⁰

On 26 June 2013, the majority of the Trial Chamber issued a decision, partially granting the Defence request to conduct additional investigations, to call and recall both exonerating and incriminating witnesses and to present new evidence.⁵⁶¹ The majority characterised the Defence’s second observations indicating of the need for additional investigations as without detail, other than a vague list of issues to be investigated.⁵⁶² The majority re-ordered the issues listed by the Defence for the purpose of additional investigations in order of importance for the requalification, and provided additional details concerning each one.

The majority of the Trial Chamber ordered the Defence to provide its first list of witnesses by 29 July, and then a definitive list of evidence by 17

September, including witnesses and documentary evidence.⁵⁶³ It noted that once in possession of a precise list of witnesses that the Defence intended to call, it could rule on the need for implementing Rule 55(3)(b) pursuant to its discretion, and according to its assessment of the Defence ‘need’ to question or re-question witnesses or to present additional evidence.⁵⁶⁴ If it appeared that the new evidence was necessary for the full exercise of the rights of the Defence, the majority indicated that it would announce a re-opening of the evidence, ordering the Registry to organise witness appearances.⁵⁶⁵

Dissenting opinion of Judge Van den Wyngaert

Judge Van den Wyngaert issued a short dissent, disagreeing with the majority ‘that the present proceedings can be prolonged consistently with the Court’s statutory scheme and the accused’s right to a fair trial’.⁵⁶⁶ She found that the present decision was only needed because a majority of the Chamber had applied Regulation 55 in a manner that exceeded the scope of the charges. She reiterated her position that the Chamber should immediately proceed to an Article 74 judgement.

Defence observations on its first DRC mission

After having requested and been granted a deadline extension,⁵⁶⁷ on 5 August 2013, the Defence submitted observations, indicating that it had conducted a mission to the DRC in July, and had met with Prosecution Witnesses 323, 233 and 268 in the presence of a Prosecution

557 ICC-01/04-01/07-3375, (Legal Representatives of child soldier victims); ICC-01/04-01/07-3376, (Prosecution). The Trial Chamber also granted (ICC-01/04-01/07-3382) the Prosecution request (ICC-01/04-01/07-3380) to respond to the Defence observations. The Prosecution submitted the response on 12 June (ICC-01/04-01/07-3384-Red2), to which the Defence replied (ICC-01/04-01/07-3386-Red).

558 ICC-01/04-01/07-3379-Red-Corr, para 49.

559 ICC-01/04-01/07-3379-Red-Corr, para 49.

560 ICC-01/04-01/07-3379-Red-Corr, paras 56-57.

561 ICC-01/04-01/07-3388.

562 ICC-01/04-01/07-3388, para 16.

563 ICC-01/04-01/07-3388, para 62.

564 ICC-01/04-01/07-3388, paras 52-53.

565 ICC-01/04-01/07-3388, paras 63-64.

566 ICC-01/04-01/07-3388-Anx, para 1.

567 ICC-01/04-01/07-3392, para 5. In its decision granting the Defence request, the majority found that the material and administrative constraints resulting from the necessity to travel to the DRC, with which both the Defence and Prosecution were confronted, constituted just reason for granting the extension of time pursuant to Regulation 35(2).

representative.⁵⁶⁸ The Defence indicated that it did not seek the recall of these or any other Prosecution witnesses and expressed its concern about the difficulties posed 'by post-trial questioning of prosecution witnesses' outside of the context of the trial, including risks concerning the questions potentially posed by the Prosecution to the recalled witnesses.⁵⁶⁹

The Defence indicated that it was unable to meet the deadline set by the Chamber for it to provide the names of other potential Defence witnesses to be recalled. It cited a handicap imposed by 'the current, extreme, security difficulties pertaining in Ituri and North Kivu, rendering investigations either extremely difficult or impossible to conduct'.⁵⁷⁰

The inability of the Defence to conduct additional investigations

In a decision issued on the 18 September 2013, the majority of Trial Chamber II (Judge Van den Wyngaert dissenting) observed that in a new, confidential filing on 17 September, the Defence had indicated to the Chamber the impossibility of conducting the necessary investigations in the DRC due to the deteriorating security situation in the East of the country.⁵⁷¹ The Chamber recalled that the Defence had argued that in light of its inability to conduct investigations, the invocation of Regulation 55 would violate the Defence's fair trial rights.⁵⁷²

Observing, however, that Katanga's Defence was able to travel to the DRC in July and to meet with those persons it had desired to question, the Trial Chamber requested Registry observations on the situation in Ituri from July through 15 September 2013.⁵⁷³

In a subsequent decision, issued on 2 October 2013, the majority of the Chamber (Judge Van den Wyngaert dissenting) referred to additional difficulties listed by the Defence in its confidential filing, namely difficulties with transport, phone communications, and obstacles raised by the authorities of the detention centre in Kinshasa where it had sought to interview a detained witness. It further noted that in light of these obstacles, the Defence had requested the Chamber to exercise its discretion and not proceed with the potential recharacterisation pursuant to Regulation 55.⁵⁷⁴

The majority of the Chamber further observed that the Registry had submitted its confidential observations pursuant to the Chamber's request on 22 September.⁵⁷⁵ It noted that while recognising the existing difficulties of conducting additional investigations in the DRC, the Registry had indicated that travel to Bogoro, Zumbe and Nyakunde would have been possible under escort prior to 23 August; it would also have been possible to go to Goma and Beni prior to 21 August. It noted that the Registry had proposed alternatives in which those persons with whom the Defence wanted to meet could be transferred temporarily to Bunia or Uganda, which the Defence did not do. The Registry had also indicated that the Defence had not responded to two requests to update the Security section of the Registry with its mission plans. Finally, the Registry underscored that the events following the 21 August had rendered any mission to Ituri impossible for an indeterminate period.⁵⁷⁶

The majority of the Chamber further recalled that in their respective submissions, the Prosecution and the Victims' Legal Representatives agreed with the Registry⁵⁷⁷ and argued that the

568 ICC-01/04-01/07-3394-Red, paras 1-4.

569 ICC-01/04-01/07-3394-Red, paras 12-13.

570 ICC-01/04-01/07-3394-Red, para 15.

571 ICC-01/04-01/07-3398, para 7, citing ICC-01/04-01/07-3397-Conf.

572 ICC-01/04-01/07-3398, para 8.

573 ICC-01/04-01/07-3398, para 9.

574 ICC-01/04-01/07-3406, para 7.

575 ICC-01/04-01/07-3406, para 8, citing ICC-01/04-01/07-3400-Conf.

576 ICC-01/04-01/07-3406, para 8.

577 ICC-01/04-01/07-3406, paras 10-11, citing ICC-01/04-01/07-3402-Conf-Red and ICC-01/04-01/07-3397-Conf.

Defence had not demonstrated that it had done everything possible to remedy the situation.⁵⁷⁸ The Defence requested⁵⁷⁹ and was granted the right to reply to these observations as they raised important issues related to the lack of Defence diligence as well as to the status and relevance of its additional investigations. The majority indicated that once it had received the Defence reply, it would decide on the necessity for holding a status conference, as requested by the Prosecution.⁵⁸⁰

While recognising the importance given to additional investigations since its decision invoking Regulation 55, the majority observed that in the event of a decision to invoke Regulation 55, additional investigations and new evidence were not the only available options open to the Defence: it could also make use of evidence already in the file, adapting its line of defence to the proposed recharacterisation. In addition to completing or nuancing its arguments in prior filings, the majority noted that the Defence could continue its investigations utilising the alternatives proposed by the Registry.⁵⁸¹ Conscious of the need to conclude the case, the majority invited the Defence to file, if it desired and based on the evidence already in the file, additional observations on the three key issues listed in the Chamber's 26 June decision, namely: (i) the Nyankunde and other attacks prior to Bogoro; (ii) the identification of the perpetrators of the crimes; and (iii) the links between the arms delivered to Ngiti combatants and the crimes committed in Bogoro. The majority of the Trial Chamber observed that it would decide on this issue, along with other key issues related to the proposed requalification under Regulation 55, in the forthcoming trial judgement.⁵⁸²

578 ICC-01/04-01/07-3406, paras 10-11.

579 ICC-01/04-01/07-3406, para 12, citing ICC-01/04-01/07-3403-Conf and ICC-01/04-01/07-3404-Conf.

580 ICC-01/04-01/07-3406, para 15.

581 ICC-01/04-01/07-3406, para 17.

582 ICC-01/04-01/07-3406, para 14.

Dissenting opinion of Judge Van den Wyngaert

Judge Van den Wyngaert issued a dissenting opinion, *inter alia*, reiterating her position that the Chamber should immediately issue the Article 74 judgement based on Article 25(3)(a).⁵⁸³ She found it 'improper' to request the Defence to submit additional observations on the basis of existing evidence.⁵⁸⁴ She found that requesting Defence observations on existing evidence would not assist the Chamber in determining whether the recharacterisation would be fair without additional investigations. She indicated that she was under the impression that the majority had accepted the need for such investigations concerning the three identified issues, and that it was now 'backtracking' from this position.⁵⁸⁵

Final Defence observations on Article 25(3)(d) as applied to existing evidence

In response to the invitation extended by a majority of the Trial Chamber, on 25 October 2013, the Defence submitted complementary observations on Article 25(3)(d). It noted that since the Chamber had invoked Regulation 55, the Defence had consistently maintained that it could not present an adequate defence without conducting additional investigations.⁵⁸⁶ The Defence expressed its 'deep concern' with respect to the submission of observations on existing evidence as 'an alternative' to further investigations, as the two were mutually exclusive.⁵⁸⁷ At the same time, it submitted that the necessary investigations would further delay the proceedings, endangering its right to an expeditious trial. Furthermore, the circumstances in the DRC, which remained uncertain, compelled the Defence to request

583 ICC-01/04-01/07-3406-Anx, para 1.

584 ICC-01/04-01/07-3406-Anx, para 2.

585 ICC-01/04-01/07-3406-Anx, para 3.

586 ICC-01/04-01/07-3417, para 3.

587 ICC-01/04-01/07-3417, para 7.

what it characterised as the ‘one reasonable and fair option, which is for the Chamber to say that enough is enough, and to move to judgement’.⁵⁸⁸ However, it clarified that the lack of the reasonable opportunity to investigate required that the trial judgement be made based on the original mode of liability.

The Defence, *inter alia*, reiterated its argument that Katanga could not be held liable for pillage, destruction, rape or sexual slavery under Article 25(3)(d)(ii). It recalled that the Pre-Trial Chamber had established that pillage, rape and sexual slavery were not part of the common plan, but rather would occur in the ordinary course of events.⁵⁸⁹ It argued that occurring in the ordinary course of events did not apply to Article 25(3)(d), and thus that he could not be held responsible for those crimes, as it was irrelevant whether he knew that these crimes would occur in the ordinary course of events. Furthermore it argued that his alleged role as coordinator could not have led directly or indirectly to the crimes of rape, sexual slavery, pillage or the use of child soldiers. The Defence thus requested that he be acquitted on those counts, irrespective of whether he made a significant contribution.⁵⁹⁰

Trial Chamber II’s order, setting the date for the trial judgement

On 19 November, Trial Chamber II issued a decision, indicating that it would address all of the outstanding issues raised by the Defence in the upcoming trial judgement. Specifically, the Chamber observed that in its submission of 25 October, the Defence had argued both that additional investigations were necessary and at the same time that the Chamber must issue the trial judgement quickly, especially in light of the fact that the situation in the DRC was

588 ICC-01/04-01/07-3417, para 8.

589 ICC-01/04-01/07-3417, para 38, citing ICC-01/04-01/07-717, paras 550-551.

590 ICC-01/04-01/07-3417, para 39.

likely to be prolonged.⁵⁹¹ The Chamber found that the Defence request for additional time to conduct investigations was ‘intrinsically tied’ to the issue of whether it had benefited from a real opportunity to conduct investigations and was also closely tied to whether the accused had had the possibility and the means to fully and efficaciously present its defence in this case.⁵⁹² The Chamber confirmed that it did not envisage at this stage the possibility of the Defence conducting additional investigations, and indicated that it would also address the Defence request to exclude portions of Katanga’s testimony in the trial judgement.⁵⁹³

On that same day, Trial Chamber II issued an order, scheduling the pronouncement of the trial judgement for 7 February 2014.⁵⁹⁴ Due to health concerns of one of the Judges, the date of the trial judgement was postponed to 7 March 2014.⁵⁹⁵

On 11 December 2013, the Defence requested a permanent stay of the proceedings in the event that the Chamber decided to render a decision on requalified charges, other than an acquittal.⁵⁹⁶ It argued that it would be manifestly unfair for the Chamber to issue a judgement based on the recharacterised charges without allowing the Defence to conduct additional investigations.

At the time of the writing of this Report, these proceedings remain ongoing.

591 ICC-01/04-01/07-3419, paras 8-9.

592 ICC-01/04-01/07-3419, para 11.

593 ICC-01/04-01/07-3419, paras 12, 14.

594 ICC-01/04-01/07-3420.

595 ‘Katanga case: Judgment rescheduled to be delivered on 7 March 2014’, ICC-CPI-20140204-MA150, *ICC Press Release*, 4 February 2014, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/MA150.aspx>, last visited on 25 February 2014.

596 ICC-01/04-01/07-3422, para 1.

CAR:

The Prosecutor v. Jean-Pierre Bemba Gombo

During the period under review, trial proceedings continued in the case against Jean-Pierre Bemba Gombo in the Situation of the Central African Republic. Bemba, a Congolese national, is the first accused before the ICC to be charged under the doctrine of command responsibility, for his alleged responsibility as a military commander of the MLC. He is charged with two counts of crimes against humanity (rape⁵⁹⁷ and murder⁵⁹⁸) and three counts of war crimes (rape,⁵⁹⁹ murder⁶⁰⁰ and pillaging⁶⁰¹) for alleged atrocities committed in the CAR during a non-international, armed conflict from October 2002 through March 2003. In 2002, the CAR President Ange-Felix Patassé invited the MLC into the CAR to help him suppress an attempted coup by a rebel movement led by Francois Bozizé, former Chief-of-Staff of the CAR armed forces. The MLC is alleged to have entered the CAR in October 2002 and to have committed crimes of rape, murder and pillage against the population.

The Prosecution had originally sought a broader range of charges of gender-based crimes, including rape as a crime against humanity and a war crime, rape as torture as a crime against humanity and a war crime, and other forms of sexual violence as a war crime and a crime against humanity.⁶⁰² However, in both the arrest warrant and in the confirmation of charges decision, the Pre-Trial Chambers narrowed the charges.⁶⁰³ In issuing the Arrest Warrant for Bemba, in May 2008, Pre-

Trial Chamber III declined to include charges of other forms of sexual violence, holding that the facts submitted by the Prosecutor were not of comparable gravity to those listed in the Statute.⁶⁰⁴ In June 2009, in the confirmation of charges decision, Pre-Trial Chamber II reasoned in part that charges of rape as torture and outrages upon personal dignity were cumulative to charges of rape and therefore impermissible, and that in addition there was insufficient evidence or imprecise pleading to substantiate some charges, including rape as torture and outrages upon personal dignity. The Women's Initiatives requested⁶⁰⁵ and was granted leave to file an *amicus curiae* brief, challenging the Pre-Trial Chamber's reasoning and arguing that all charges of gender-based crimes requested by the Prosecution should be included.⁶⁰⁶ However, on 18 September 2009, Pre-Trial Chamber II declined to grant the Prosecution request for leave to appeal, and the case proceeded to trial on the more limited charges of rape.⁶⁰⁷

Trial proceedings in the Bemba case commenced on 22 November 2010 before Trial Chamber III. The Prosecution presented its case over a 16-month period from November 2010 to March 2012, during which time it called a total of 40 witnesses.⁶⁰⁸ Of these, 14 witnesses, including two expert witnesses, testified directly about

597 Article 7(1)(g).

598 Article 7(1)(a).

599 Article 8(2)(e)(vi).

600 Article 8(2)(c)(i).

601 Article 8(2)(e)(v).

602 Articles 7(1)(g) and 8(2)(e)(vi); 7(1)(f) and 8(2)(c)(i); 8(2)(c)(ii); 7(1)(g) and 8(2)(e)(vi).

603 See further, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo', *Women's Initiatives for Gender Justice*, 22 November 2010, available at <http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf>.

604 ICC-01/05-01/08-14-tENG, para 40.

605 ICC-01/05-01/08-447.

606 ICC-01/05-01/08-451. See also 'Legal Filings: *The Prosecutor v. Jean-Pierre Bemba Gombo, The Prosecutor v. Thomas Lubanga Dyilo*', *Women's Initiatives for Gender Justice*, February 2010, available at <<http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf>>.

607 ICC-01/05-01/08-532.

608 For a detailed description of the Prosecution's presentation of its case against Bemba, including witness testimony, see *Gender Report Card 2012*, p 252-256.

sexual and gender-based crimes, including ten female witnesses and nine witnesses who were direct victims of sexual violence.⁶⁰⁹ This remains the largest amount of direct testimony on crimes of sexual violence heard by the Court to date. Between May and June 2012, victims who had been granted leave to participate in the case submitted evidence and shared their views and concerns through their legal representatives. In total, five victims were also granted leave to directly address the Chamber, including two in person and three via video-link. The three victims who addressed the Court via video-link would not have their testimony become part of the body of materials considered to be evidence in the case because they would not be testifying under oath, nor would they be questioned by the parties.⁶¹⁰

The Defence case

The Defence began to present its case in August 2012. In September 2012, the Trial Chamber provided notice that Bemba's mode of liability may be subject to change,⁶¹¹ and on 13 December 2012 decided to temporarily suspend the trial to give the Defence time to investigate and prepare for the possible change.⁶¹² In its decision giving notice of a possible re-characterisation of the facts, the Trial Chamber explained that Pre-Trial Chamber II, in its confirmation of charges decision, had found that there were sufficient grounds to establish Bemba's knowledge that MLC troops were committing or about to commit crimes. However, the Pre-Trial Chamber did not consider the 'should have known' standard set out as an alternative in Article 28(a)(i) of the Rome Statute. The Trial Chamber gave notice in its decision that upon having heard all the evidence, the Chamber may modify the legal characterisation of the facts to consider,

609 See *Gender Report Card 2012*, p 252.

610 For a detailed description of the victims' submission to the Court, see *Gender Report Card 2012*, p 257-261.

611 ICC-01/05-01/08-2324.

612 ICC-01/05-01/08-2480.

pursuant to Regulation 55(2), the 'should have known' alternate form of knowledge contained in Article 28(a)(i).⁶¹³ Upon receiving submissions from the parties and participants regarding the potential effects that a possible modification of the legal characterisation of the charges would create, considering the need to strike a balance between the obligation to ensure a fair and expeditious trial with the duty to ensure the right of the accused to have adequate time to prepare its defence, the Trial Chamber temporarily suspended the proceedings until 4 March 2013.⁶¹⁴ However, the trial resumed on 25 February 2013, after the Trial Chamber granted the Defence motion to vacate the suspension decision and decided to lift the temporary suspension.⁶¹⁵ In June 2012, the Bemba Trial Chamber had ordered the Defence to present its evidence within 230 hours and during 8 months, setting 19 July 2013 as the expected completion of the presentation of Defence evidence.⁶¹⁶ In the end, however, the final Defence witness on the public record appeared on 14 November 2013.⁶¹⁷

Within days of the Defence completing the presentation of its evidence, on 20 November 2013, Judge Tarfusser, as single Judge of Trial Chamber II, issued five warrants of arrest for Bemba, members of his Defence team, and for

613 ICC-01/05-01/08-2324, para 5.

614 ICC-01/05-01/08-2480, para 22.

615 ICC-01/05-01/08-2500. The Defence had argued that 'absent a formal decision to amend the charges accordingly or to render a decision that Regulation 55 is in fact being relied upon in the proceedings for that purpose, the Trial Chamber has no lawful authority to prosecute the accused under this theory of liability.' Therefore, the Defence informed the Chamber that it would not be requesting to re-call any Prosecution witnesses or seeking to call any additional evidence. It would further decline to conduct any additional investigation and requested the trial to re-commence as soon as possible.

616 ICC-01/05-01/08-2225, para 11.

617 'Witness Details Logistics Support Central Africans Gave Bemba's Fighters', *Open Society Justice Initiative*, 14 November 2013, available at <<http://www.bembatrial.org/2013/11/witness-details-logistics-support-central-africans-gave-bembas-fighters/>>, last visited on 23 February 2014.

other associated persons.⁶¹⁸ In issuing the arrest warrants, Judge Tarfusser found that there were reasonable grounds to believe that the individuals were criminally responsible for the commission of offences against the administration of justice by corruptly influencing witnesses before the ICC and presenting evidence that they knew to be false or forged.⁶¹⁹ These allegations against Defence counsel, which are unprecedented at the ICC, are discussed in detail in the **Victim and Witness Issues** section of this Report.

Defence witness testimony

In total, the Defence called 34 witnesses to testify on behalf of Bemba. The number of actual witnesses called was significantly reduced from the original 63 witnesses included on the witness list, which also included three expert witnesses. The Defence witness list was continually pared down due to difficulties in obtaining witness testimony, as further discussed in the **Victim and Witness Issues** section of this Report. Near the completion of the Defence case, the Chamber itself chose to call two witnesses, as permitted under Articles 64 and 69 of the Statute. The Chamber specifically had requested the testimony of two individuals, who had been repeatedly mentioned by both Prosecution and Defence witnesses, but whom neither party had called. On 18 October 2013, the Judges directed the Registry to locate the two individuals. Once located, one individual refused to testify. However the second, referred to as Witness 1 by the Chamber, testified from an undisclosed location beginning

on 18 November 2013. All of the testimony of this witness was given in closed session.

Apart from three expert witnesses, the majority of Defence witnesses required protective measures including the use of pseudonyms, face and voice distortion, and testimony in private or closed session. The Defence also experienced security concerns and difficulties in logistics which significantly hindered its ability to call witnesses. These difficulties are also discussed further in the **Victim and Witness Issues** section of this Report.

The Defence announced at a status conference in June 2013 that Bemba would be seeking leave to give a statement to the Court. The Prosecution objected, requesting that if Bemba were to give a statement to the Court, the Prosecution should be allowed to cross-examine him. However, the Chamber rejected the Prosecution request, noting that Bemba was not testifying under oath and thus was not required to be subject to cross-examination. Although the Bemba Defence requested that Bemba give his unsworn statement at the close of defence testimony, he is now expected to give his statement at the start of the closing statement of the Defence as ordered by the Chamber.⁶²⁰

The following section gives an overview of the publicly available testimony given during the Bemba Defence case, while noting that many Defence witnesses gave all or significant portions of their testimony in closed session, and it is therefore not possible to ascertain the subject of their testimony or the role they may have played relative to the alleged crimes. At the time of writing of this Report, official transcripts for much of the Defence case have not been made available. Where possible, this section refers to the official transcript, and otherwise the information has been drawn from reports of organisations monitoring the daily trial proceedings.⁶²¹

618 Those arrested included Aimé Kilolo-Musamba, lead lawyer of the Bemba Defence team; Jean-Jacques Mangenda Kabongo, a member of the Bemba Defence team and case manager; Fidèle Babala Wandu, a member of the Congolese parliament and deputy secretary general of the MLC, and Narcisse Arido, a Defence witness in the Bemba trial. As noted, there was also a warrant for Bemba himself.

619 'Bemba case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo', ICC-CPI-20131124-PR962, *ICC Press Release*, 24 November 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr962.aspx>, last visited on 25 February 2014.

620 ICC-01/05-01/08-2860, para 7.

621 Specifically, the Open Society Justice Initiative, International Bar Association, and Coalition for the International Criminal Court.

The witnesses called by the Defence fall roughly into four main categories: experts, MLC insiders, CAR Government loyalists, and CAR rebels. In presenting the Defence case, Bemba's counsel called into question the identity of the perpetrators of violence, suggesting that the perpetrators were not the MLC troops, but rather likely rebels or other CAR Government troops. However, the main focus of the Defence case was the presentation of evidence intended to support the conclusion that Bemba did not have effective control over his troops once they crossed over from the DRC into the CAR. Bemba's Defence argued, the MLC troops were under the control of the CAR Government. Finally, the Defence sought to show that, where Bemba could, he tried to control his troops, to warn them against committing war crimes, and where he found that crimes were committed, to ensure that they were tried in a military court.

Expert witnesses

The Defence called three expert witnesses as part of its case. The first was a military expert from France, **General Jacques Seara**, who primarily testified about the chain of command structure.⁶²² General Seara had provided an expert report, which was criticised by both the Prosecution and the Legal Representatives of Victims, who maintained that much of the report was in direct contradiction to the Prosecution's military expert, who previously testified, and that it was lacking in analysis.⁶²³

The Defence next called a geo-political expert, **Octave Dioba**.⁶²⁴ His testimony was allowed by the Chamber over the Prosecution's objections that it was not relevant.⁶²⁵ Dioba addressed the internal conflict within the DRC and stated that the power-

622 General Seara testified on 14, 15, 16, 17, 21, 22 and 23 August 2012.

623 ICC-01/05-01/08-T-234-Red-ENG, p 54 line 15.

624 Dioba testified on 3, 4, 5, 6, 7 and 10 September 2012.

625 'Judges Reject Prosecution Bid to Exclude a Defence Expert Witness', *Open Society Justice Initiative*, 28 August 2012, available at <<http://www.bembatrial.org/2012/08/judges-reject-prosecution-bid-to-exclude-a-defense-expert-witness/>>, last visited on 19 February 2014.

sharing Lusaka Agreement signed by the warring Congo factions legitimised Bemba's forces as administrative and military authorities of the Congo.⁶²⁶ Dioba also testified that while some MLC troops may have attacked civilians, Bemba could not be held strategically or politically responsible since he neither controlled the troops nor had policy making powers.⁶²⁷

Eyamba George Bokamba, the final expert witness for the Defence, was a linguistics expert whom the Defence called to refute Prosecution witnesses who testified that members of the MLC could be identified as such because they spoke Lingala rather than Sango.⁶²⁸ The Prosecution had introduced evidence of the language spoken by alleged perpetrators as proof of their membership in the MLC. Bokamba gave testimony on the origins and social linguistics of the Lingala language, which is the language that is widely spoken in the DRC. He prepared a report with two key elements: (1) the social linguistics of Lingala in the CAR; and (2) the structural relationships between Sango, the Central African language, and Lingala, as well as the use of Lingala in the CAR.⁶²⁹

626 'Expert Says Bemba Troops were a "Legitimate" Force in the CAR Conflict', *Open Society Justice Initiative*, 3 September 2012, available at <<http://www.bembatrial.org/2012/09/expert-says-bemba-troops-were-a-legitimate-force-in-the-car-conflict/>>, last visited on 19 February 2012.

627 'Geopolitical Expert Says Bemba Troops Represented Congo in CAR Conflict', *Open Society Justice Initiative*, 4 September 2012, available at <<http://www.bembatrial.org/2012/09/geopolitical-expert-says-bemba-troops-represented-congo-in-car-conflict/>>, last visited on 19 February 2014.

628 Professor Bokamba was a linguistics expert and professor of linguistics at the University of Illinois and testified as an expert witness for the Defence on 11, 12, 13, and 14 September 2012.

629 'Prosecutors Challenge Report of Geopolitical Expert', *Open Society Justice Initiative*, 5 September 2012, available at <<http://www.bembatrial.org/2012/09/prosecutors-challenge-report-of-geopolitical-expert/>>, last visited on 19 February 2014.

Effective control over troops

In an effort to cast doubt as to the level of control that Bemba exercised over his troops while they were participating in operations in the CAR, the Defence team called upon many witnesses to testify about the command structure after the merging of the CAR Government loyalists and the MLC troops, which had been sent to provide support to the CAR Government. In total, 14 Defence witnesses testified about this issue in open court. The Defence team called into question Bemba's ability to communicate with his troops across the border, as well as Bemba's abilities as a military leader. The Defence suggested that Bemba was given the military title of 'Commander in Chief' of the MLC as an honorary gesture but that he was unequipped to actually lead troops.

Several Defence witnesses testified regarding how military operations were coordinated. **Witness 49**, a former MLC militia member, testified that MLC military operations were coordinated through radio transmissions at MLC headquarters located in Gbadolite, in the DRC. All messages transmitted through the centre, which was known as Charlie Tango Romeo, were received by operators, recorded in log books, and then forwarded to the Chief of General Staff for action to be taken.⁶³⁰ When asked by the Defence whether there was more than one radio centre, the witness stated that there was only one transmission centre which was located two or three meters from the MLC Chief of Staff.⁶³¹ On cross-examination, the Prosecution showed video footage of Bemba in his living room issuing orders to his troops via radio. The witness agreed with the Prosecution's assertion that the radio equipment had been procured for MLC communications but stated that the equipment was controlled by operators who regularly changed the frequencies and coded

communication to avoid its interception. He added that the equipment might have been set up at Bemba's home at his request but it would have been quickly returned to the MLC operations centre.⁶³²

The testimony of Defence witnesses described MLC troops who, once in the CAR, did not have any way to communicate with headquarters in Gbadolite. **Witness 45**, a former member of the MLC's 28th Battalion, corroborated previous Defence testimony regarding communication equipment, noting that the unit did not have any communication devices when it crossed over. The witness stated that when the first unit arrived on the ground it was given a communication device by Colonel Thierry of the Central African General Staff, who provided it with a radio transmitter system called the phone system.⁶³³ **Witness 39**, former MLC militia member, also testified to this issue. During cross-examination, the Prosecution suggested to Witness 39 that previous witness testimony had indicated that Bemba, by means of radio and satellite phone bypassed the chain of command and reached out directly to his commanders stationed in the CAR. In response, Witness 39 stated, 'I find that surprising,' explaining that it was possible that Bemba might have maintained communication with the MLC commanders but it would only have been in order to ascertain soldiers morale rather than to issue any orders.⁶³⁴ **Witness 7**, former intelligence officer in the FACA, testified extensively with regard to the communication equipment, noting that information came by way of the Centre for Command Operations organised by President Patassé's commanders.⁶³⁵

Witness 7 added further to this argument, stating that the accused's troops received orders from the CAR authorities. He said the Congolese troops crossed into the CAR aboard a ferry belonging to

630 ICC-01/05-01/08-T-270-Red-ENG, p 33 lines 15-18, p 34 lines 11-20.

631 ICC-01/05-01/08-T-270-Red-ENG, p 35 lines 2-6.

632 ICC-01/05-01/08-T-271-Red-ENG, p 42-43.

633 ICC-01/05-01/08-T-295-Red-ENG, p 29 lines 3-5.

634 ICC-01/05-01/08-T-309-Red-ENG, p 51-52.

635 ICC-01/05-01/08-T-250-Red-ENG, p 44, lines 11-22.

SOCATRAF and that they arrived in Bangui four to five days after the October 25, 2002 *coup* attempt by Bozizé. Witness 7 also claimed that Congolese troops received a daily subsistence allowance of 2,500 Central African Francs, the same that FACA soldiers received.⁶³⁶ Providing more details, the witness indicated that once the Congolese troops arrived in Bangui, President Patassé's defence minister met the troops and they were provided with FACA uniforms, ranger boots, ammunition, vehicles, and communication equipment. During cross-examination, the Prosecution presented a communication log in which General Mukiza of the MLC was quoted as stating that his troops had been 'abandoned' by the Central African authorities and that there was no coordination between them and other loyalist forces. The communication, addressed to the MLC's Chief of General Staff at their headquarters in Congo, was dated 30 October 2002. In response to this evidence, the witness replied, 'I do not know how to answer that question, Counsel.'⁶³⁷

Witness 50, former member of the CAR presidential guard, explained that the presidential guard led the MLC troops during operations because the foreign troops 'did not know the terrain or the ground properly.'⁶³⁸ After the witness noted that the presidential guard was also working in tandem with the country's regular armed forces, the FACA, the Victims' Legal Representatives inquired as to who commanded the forces. The witness answered, 'I do not know the commander's name. I don't know who their commander was, but I can talk about Mazi and Lengbe. They were of the FACA and then you also had other officers. What I can say is that I don't have the names of the other FACA officers, to the extent that my duties were limited.'⁶³⁹

636 'Intelligence Officer: CAR Army Supplied Logistics to Bemba Troops', *Open Society Justice Initiative*, 19 September 2012, available at <<http://www.bembatrial.org/2012/09/intelligence-officer-car-army-supplied-logistics-to-bemba-troops/>>, last visited on 19 February 2014.

637 ICC-01/05-01/08-T-250-Red-ENG, p 59 lines 24-25.

638 ICC-01/05-01/08-T-255-Red-ENG, p 43 lines 23-24.

639 ICC-01/05-01/08-T-255-Red-ENG, p 43 lines 16-19.

Witnesses also testified that Bemba did not have the ability to command his private militia because he had such an elementary military background.

Witness 21, former senior member of the MLC, stated that the planning of operations was not done by an individual.⁶⁴⁰ It was done by the General Staff, an organ led by the Chief of General Staff, and that as such it was team work. The Witness noted that the military rank given to Bemba was an honorary one given his status as the political leader of the MLC.

Finally, the Defence introduced testimony to show that Bemba lost authority over his troops once he put them at the disposal of the CAR authorities. According to the testimony of Defence witnesses,⁶⁴¹ the conditions of the agreement between the CAR and Bemba were that Central African authorities would provide logistical resources, that the operations command would be the responsibility of the CAR officers, and that the management of discipline of the troops would also be the responsibility of the CAR authorities. However, Witness 21 stated that this agreement was made orally between Bemba and President Patassé.⁶⁴² When asked by Judge Aluoch how the witness knew of this oral agreement, Witness 21 replied that he had heard from two people who attended the meeting Bemba had with a few officials of the MLC, during which the decision was taken to give a positive response to the CAR authorities. Witness 6 corroborated this, adding that upon arrival in the CAR, the MLC troops received uniforms from the Central African military and were integrated into the national army.⁶⁴³ Witness 6 also noted that they received logistics from that country's authorities.

640 'Bemba had "Elementary" Military Knowledge but Troops were Well-Trained', *Open Society Justice Initiative*, 8 April 2013, available at <<http://www.bembatrial.org/2013/04/bemba-had-elementary-military-knowledge-but-troops-were-well-trained/>>, last visited on 19 February 2014.

641 Witness 50, Witness 7, and Witness 45.

642 'Bemba "Lost Authority" Over Troops Deployed in CAR', *Open Society Justice Initiative*, 12 April 2013, available at <<http://www.bembatrial.org/2013/04/bemba-lost-authority-over-troops-deployed-in-car/>>, last visited on 19 February 2014.

643 'Witness Says Central Africans Commanded Bemba's Troops', *Open Society Justice Initiative*, 21 June 2013, available at <<http://www.bembatrial.org/2013/06/witness-says-central-africans-commanded-bembas-troops/>>, last visited on 19 February 2014.

Whether MLC troops committed atrocities

The Defence advanced two arguments with respect to whether the MLC troops committed atrocities in the CAR. Defence witness testimony was used to show, first, that MLC fighters were not in the area where the alleged crimes took place on the dates in question. Second, the Defence introduced testimony to show that it was not easy or possible to identify MLC fighters simply by uniforms or specific languages spoken. In total, 17 Defence witnesses testified in open session with regard to these issues.

In order to cast doubt as to whether MLC soldiers were in the area of alleged crimes, many witnesses stated that MLC soldiers were not deployed in those areas. Witness 45 claimed, in response to Prosecution questioning over a document stating that MLC fighters committed crimes in Bossembele and Bozoum, that MLC soldiers were not deployed in either place during December 2002 when the document states that the crimes took place.⁶⁴⁴

The Bemba Defence also sought to prove, through witness testimony, that MLC soldiers were well-trained. Witness 21 stated that the organisation had high-level officers who had been trained at renowned military academies such as Sandhurst and West Point.⁶⁴⁵ He indicated that the group's code of conduct was highly important, and that it was the document most read by the soldiers. Witness 21 noted that there was awareness-raising during training,

with a moral speech or lecture given to the fighters that repeated the provisions of the code, and this helped ensure good relations between MLC fighters and civilians. In addition, he testified that residents of the town of Sibut in the CAR offered thanks to MLC fighters after they liberated the town from rebel control.⁶⁴⁶ The Defence provided video footage of residents describing brutal crimes allegedly committed by rebel forces. The witness further responded to the Prosecution cross-examination regarding reports which mention MLC soldiers as perpetrators of crimes, such as a report on Radio France International, stating that these were simply based on rumour.⁶⁴⁷

Another Defence witness, **Prosper Ndouba**, the former spokesperson of President Patassé, testified extensively with regard to atrocities he alleged were committed by the Bozizé forces, who abducted him and held him for 38 days in October and November 2002.⁶⁴⁸ He testified regarding looting and the torture and murder of two young men, as well as regarding Bozizé's fighters raping the daughter of a well-known Patassé Government official. Ndouba also testified about the language spoken by his captors, stating that the Bozizé rebels spoke the local language Sango, Chadian Arabic, and broken French.⁶⁴⁹ This testimony was called into question by the Prosecution during cross-examination, which noted that it conflicted with accounts given

644 'MLC Troops "Were Not Present in Towns where Crimes were Committed"', *Open Society Justice Initiative*, 19 March 2013, available at <<http://www.bembatrial.org/2013/03/mlc-troops-were-not-present-in-towns-where-crimes-were-committed/>>, last visited on 19 February 2014.

645 'Bemba had "Elementary" Military Knowledge but Troops were Well-Trained', *Open Society Justice Initiative*, 8 April 2013, available at <<http://www.bembatrial.org/2013/04/bemba-had-elementary-military-knowledge-but-troops-were-well-trained/>>, last visited on 19 February 2014.

646 'Witness Says Locals Offered MLC Fighters "Heartfelt Thanks"', *Open Society Justice Initiative*, 9 April 2013, available at <<http://www.bembatrial.org/2013/04/witness-says-locals-offered-mlc-fighters-heartfelt-thanks/>>, last visited on 19 February 2014.

647 'Insider Says Media Reports about MLC Crimes were Unverified', *Open Society Justice Initiative*, 11 April 2013, available at <<http://www.bembatrial.org/2013/04/insider-says-media-reports-about-mlc-crimes-were-unverified/>>, last visited on 19 February 2014.

648 'Former Patassé Spokesperson Recounts Bozizé Rebel Atrocities', *Open Society Justice Initiative*, 14 September 2012, available at <<http://www.bembatrial.org/2012/09/former-patasse-spokesperson-recounts-bozize-rebel-atrocities/>>, last visited on 19 February 2014.

649 'Former Patassé Spokesperson Recounts Bozizé Rebel Atrocities', *Open Society Justice Initiative*, 14 September 2012, available at <<http://www.bembatrial.org/2012/09/former-patasse-spokesperson-recounts-bozize-rebel-atrocities/>>, last visited on 19 February 2014.

by the witness in a book which was published in 2006.⁶⁵⁰ In the book Ndouba stated that Bemba's MLC fighters were Lingala speakers, but when questioned about the discrepancy, the witness explained that when he was with Bozizé rebels, some of them did speak Lingala among themselves. He stated that they spoke Lingala so that they would be taken for MLC troops and not rebels. When the Prosecution questioned why the rebels would speak Lingala in order to pretend to be MLC when the MLC troops were not in CAR at the time, the witness replied that the rebels expected that they would arrive.⁶⁵¹ Other examples of inconsistencies brought out by the Prosecution included the witness stating during his in-court testimony that he had no contact with his family during his captivity, while it was detailed in his book, and he admitted upon cross-examination that his family members did visit him on two occasions. Ndouba also testified that at the time of his captivity and throughout the entire period no other armed forces were present in Bangui, while the Prosecution pointed out that in his book he recounts hearing discussions that MLC forces had taken up positions in the capital on 25 October 2002, the night of his capture.⁶⁵²

Other witnesses called by the Defence gave testimony that defended the MLC fighters.

Witness 57, a former aide to Patassé, stated that MLC fighters protected displaced civilians during the 2001 coup attempt. '[T]he president sent me with a helicopter, and we were able to

650 'Witness says Central African Soldiers Spoke Lingala', *Open Society Justice Initiative*, 17 September 2012, available at <<http://www.bembatrial.org/2012/09/witness-says-central-african-soldiers-spoke-lingala/>>, last visited on 19 February 2014.

651 'Witness says Central African Soldiers Spoke Lingala', *Open Society Justice Initiative*, 17 September 2012, available at <<http://www.bembatrial.org/2012/09/witness-says-central-african-soldiers-spoke-lingala/>>, last visited on 19 February 2014.

652 'Witness says Central African Soldiers Spoke Lingala', *Open Society Justice Initiative*, 17 September 2012, available at <<http://www.bembatrial.org/2012/09/witness-says-central-african-soldiers-spoke-lingala/>>, last visited on 19 February 2014.

overfly the area to see the people in Ouango, in Zongo, while others were on the mountains. And they were happy. They were satisfied with the situation'.⁶⁵³ Witness 57 also gave testimony about the recruitment of 'shoe shiners' by Bozizé, noting that many of the Congolese nationals who Bozizé recruited worked as shoe shiners and came from the PK5 suburb.⁶⁵⁴ This testimony contradicted some Prosecution witnesses who previously stated that the Congolese Shoe Shiners in Bangui joined the MLC when they arrived in the capital.⁶⁵⁵ **Witness 9**, a former soldier with the CAR armed forces, corroborated Witness 57's testimony regarding the 'shoe shiners', noting that the shoe shiners could speak the local Sango, which MLC fighters could not.⁶⁵⁶

The date of the arrival of the MLC fighters was of importance to the Defence case as they sought to place the arrival in the CAR on 30 October 2002 at the earliest, five days after the Bozizé rebels had occupied several Bangui suburbs including Boy-Rabe, PK 12, Gobongo, the 4th arrondissement, the 8th arrondissement, and the road to Damara.⁶⁵⁷ Witness 64, Witness 4, Witness 49, Witness 50, Witness 13 and Witness 57 all testified that the Bemba fighters did not cross over until 30 October 2002.

Court martials for MLC fighters

Four Defence witnesses provided testimony with regard to the court martial system, which the Defence team claims that Bemba initiated in order to punish those MLC fighters responsible for war crimes and crimes against humanity during the alleged atrocities.⁶⁵⁸

653 ICC-01/05-01/08-T-256-Red-ENG, p 20 lines 5-8.

654 ICC-01/05-01/08-T-257-Red-ENG, p 55-56.

655 ICC-01/05-01/08-T-126-Red-ENG, p 44-46.

656 'Witness Absolves Bemba Troops of Murder and Pillaging', *Open Society Justice Initiative*, 14 June 2013, available at <<http://www.bembatrial.org/2013/06/witness-absolves-bemba-troops-of-murder-and-pillaging/>>, last visited on 19 February 2013.

657 ICC-01/05-01/08-T-256-Red-ENG, p 29 line 9.

658 Witnesses D04-48, D04-49, and D04-16.

Witness 49, a former insider to the MLC,⁶⁵⁹ testified that when Bemba heard reports of his soldiers committing abuses, Bemba wrote to a human rights organisation and to Central African authorities calling for investigations to be carried out in order to establish the truth.⁶⁶⁰ He testified that eight soldiers who were investigated and about whom incriminating evidence was found were prosecuted by court martial.

Providing context regarding the justice system at the time in the DRC, **Witness 48** explained that throughout the MLC territory, there were four ordinary level courts: Gbadolite, Gemena, Lisala, and Bas-Uele; and a peace court in Zongo.⁶⁶¹ The witness noted that the system of justice in the country was based on the Lusaka Accord, which provided a common status to the three DRC authorities, and that the system of justice operating in the MLC controlled territory was the same as the rest of the country with the same number of sitting judges.⁶⁶² Witness 48 also explained that the MLC had put into place a court martial system, which fell under the Justice Ministry but was operated jointly with the Defence Ministry.⁶⁶³

According to **Witness 15**, a former member of the MLC, when Bemba heard about allegations of his troops' misconduct in the CAR, he contacted the authorities there to demand an investigation.⁶⁶⁴

659 'Prosecutor Challenges Witness on Date Bemba's Fighters Joined Conflict', *Open Society Justice Initiative*, 20 November 2012, available at <<http://www.bembatrial.org/2012/11/contest-over-date-bembas-fighters-joined-conflict/>>, last visited on 23 February 2014.

660 'Witness: Bemba's Soldiers Had no Time to Commit Abuses', *Open Society Justice Initiative*, 21 November 2012, available at <<http://www.bembatrial.org/2012/11/witness-bembas-soldiers-had-no-time-to-commit-abuses/>>, last visited on 19 February 2014.

661 ICC-01/05-01/08-T-267-Red-ENG, p 11 lines 14-15.

662 ICC-01/05-01/08-T-267-Red-ENG, p 11-12.

663 ICC-01/05-01/08-T-267-Red-ENG, p 12 lines 12-25.

664 'Witness: Bemba Ordered Probe into Conduct of Troops', *Open Society Justice Initiative*, 12 September 2013, available at <<http://www.bembatrial.org/2013/09/witness-bemba-ordered-probe-into-conduct-of-troops/>>, last visited on 19 February 2014.

Witness 48 testified that all soldiers, including MLC soldiers, who were convicted of committing crimes, were prosecuted and served full terms.⁶⁶⁵ The witness identified documents including the report on investigations into alleged atrocities by MLC soldiers, charges laid out by Prosecutors, and judgements delivered by a military court. The documents also included prison records, showing sentences given to soldiers. The sentences ranged from 3 to 24 months.⁶⁶⁶ Witness 48 also refuted Prosecution allegations on cross-examination that those convicted at the Gbadolite court martial were pardoned and released shortly after their conviction, stating that the convicted soldiers served their full-terms.⁶⁶⁷

Judge Steiner posed some questions directly to Witness 48. The Judge noted that most of the accused MLC soldiers were interrogated by military Prosecution investigators in the middle of the night. She also observed that the investigations report was sent to the court martial on 3 December with a decision to follow only a few days later on 7 December 2002. Noting no evidence having been brought before the judges and all accused pleading not guilty, she asked Witness 16 if this was a regular procedure in his view.⁶⁶⁸ The witness indicated that this was, indeed, a normal procedure in court martial trials in the DRC and that prior to prosecution, the investigation has been done and the case filed with a view on the case already pending. Judge Steiner also asked if it were normal for a court to issue a decision on a Saturday in front of local and international media, and the witness responded that Saturday is a normal working day in the DRC so this was not unusual.⁶⁶⁹

665 ICC-01/05-01/08-T-267-Red-ENG.

666 ICC-01/05-01/08-T-267-Red-ENG, p 63 lines 16-24.

667 ICC-01/05-01/08-T-267-Red-ENG, p 67-68.

668 ICC-01/05-01/08-T-277-Red-ENG, p 20-21.

669 ICC-01/05-01/08-T-277-Red-ENG, p 22 lines 10-17.

Testimony about rape

As noted above, while the Prosecution called a significant number of witnesses to testify to the charges of rape in the Bemba case, the Defence did not seek to introduce testimony to disprove the allegations that rape occurred. However, it did introduce testimony that indicated that rape was committed not by the MLC soldiers, but by other actors, primarily the rebel factions within the CAR. Within the testimony of witnesses called by the Defence, some testified to their knowledge of rapes occurring, some testified that they witnessed rape, and one woman, Witness 30, testified about having been raped by the rebel forces.

Witness 7, a former intelligence officer with the CAR Government forces, recounted atrocities committed by the Bozizé rebels during their occupation of Bangui prior to the MLC's arrival. He said that among the rebel ranks were children, some of them as young as 10 years old. He testified that the rebels were uncontrollable and without means of replenishing their supplies, so they lived off the population. He noted that they were aggressive, threatened people, seized property and raped women, and that whoever tried to stop them would be shot.⁶⁷⁰

Witness 2, a former soldier in the CAR armed forces, testified that the Bozizé rebels committed murders, rapes and pillaging. He testified that the rebels took vehicles, domestic appliances, doors of houses were forced open, and that people were killed. He further testified that extensive destruction happened in the days following the rebels' capture of power on 15 March 2003.⁶⁷¹

670 'Patassé Officials Defend Conduct of Bemba's Fighters', *Open Society Justice Initiative*, 21 September 2012, available at <<http://www.bembatrial.org/2012/09/patasse-officials-defend-conduct-of-bembas-fighters/>>, last visited on 19 February 2014.

671 'Former Central African Soldier Blames Bozizé Fighters for Atrocities', *Open Society Justice Initiative*, 12 June 2013, available at <<http://www.bembatrial.org/2013/06/former-central-african-soldier-blames-bozize-fighters-for-atrocities/>>, last visited on 19 February 2014.

Witness 6, a former soldier in the CAR armed forces, testified that General Mazzi, who was in charge of commanding operations for the CAR against the rebels, instructed the Congolese fighters not to loot or rape.⁶⁷²

Witness 4, another former CAR Government soldier, testified about crimes alleged to have been committed by the rebels. The Legal Representative for Victims presented this witness with the earlier testimony of a Prosecution witness from Sibut, who stated that Bemba's troops raped girls, some of them as young as ten years old, who were seen running around the town naked and crying. In response, Witness 4 stated that the residents of Sibut warmly welcomed the joint Congolese and CAR troops and that the CAR troops would never have allowed Congolese to come into their country and rape and murder their own people.⁶⁷³

Witness 3, a former CAR Government soldier testified that he was present during incidents of rape by FACA soldiers. He said the rapes angered him as that wasn't the reason for being there. He stated that the goal was to free Central Africans, not to rape. He testified that his colleagues raped women whose husbands they suspected of being rebels. The witness also stated that once, when he expressed disapproval of his colleagues' behaviour, one of them pulled a gun on him. Witness 3 blamed the lack of discipline among CAR soldiers on the short duration of the training received.⁶⁷⁴

672 'Witness Says Central Africans Commanded Bemba's Troops', *Open Society Justice Initiative*, 21 June 2013, available at <<http://www.bembatrial.org/2013/06/witness-says-central-africans-commanded-bembas-troops/>>, last visited on 19 February 2014.

673 'Witness Maintains Bemba Troops did not Commit Crimes', *Open Society Justice Initiative*, 20 June 2013, available at <<http://www.bembatrial.org/2013/06/witness-maintains-bemba-troops-did-not-commit-crimes/>>, last visited on 19 February 2014.

674 'Witness Tells Bemba Trial CAR Soldiers Raped Wives of Suspected Rebels', *Open Society Justice Initiative*, 25 June 2013, available at <<http://www.bembatrial.org/2013/06/witness-tells-bemba-trial-car-soldiers-raped-wives-of-suspected-rebels/>>, last visited on 19 February 2014.

Witness 56 first served in the CAR Government forces before switching sides to become a fighter for the rebels. He testified that his colleagues in the rebel group committed rape, murder and pillaging, and that during these pillaging operations they spoke the Congolese language of Lingala.⁶⁷⁵

Witness 23, a former rebel fighter, testified that the rebels committed numerous crimes, including rape and pillaging. Specifically, the witness testified that rebel fighters in the CAR committed several rapes after abusing drugs.⁶⁷⁶

Witness 29 testified that the CAR rebels raped his wife when they arrived in his neighbourhood on 26 October 2002. He testified that ‘following a tip-off from a neighbour that rebels were holding his wife, he went to her rescue’. He testified that the men who had raped his wife spoke to him in Sango.⁶⁷⁷

Witness 30, according to the information publicly available, was the first woman to be called by the Defence. She testified regarding being raped by rebels loyal to Bozize during October 2002. She recalled that as a result of the rape she was in pain and unable to leave her home. She stated that she had learned later that the rebels had also raped other women in her neighbourhood.⁶⁷⁸

675 ‘Witness Regrets ICC is Unaware of Crimes Bozizé Forces Committed’, *Open Society Justice Initiative*, 13 May 2013, available at <<http://www.bembatrial.org/2013/05/witness-regrets-icc-is-unaware-of-crimes-bozize-forces-committed/>>, last visited on 19 February 2014.

676 ‘Witness: Central African Rapes were Fueled by Drug Abuse’, *Open Society Justice Initiative*, 21 August 2013, available at <<http://www.bembatrial.org/2013/08/witness-central-african-rapes-were-fueled-by-drug-abuse/>>, last visited on 19 February 2014.

677 ‘Victims of Bozizé Rebels Recount Atrocities at Bemba Trial’, *Open Society Justice Initiative*, 28 August 2013, available at <<http://www.bembatrial.org/2013/08/victims-of-bozize-rebels-recount-atrocities-at-bembatrial/>>, last visited on 19 February 2014.

678 ‘Bemba Witness Says She Was Raped by Bozizé Rebels’, *Open Society Justice Initiative*, 2 September 2013, available at <<http://www.bembatrial.org/2013/09/bemba-witness-says-she-was-raped-by-bozize-rebels/>>, last visited on 19 February 2014.

Kenya: Introduction

The Kenya Situation has been under investigation by the ICC since March 2010, when Pre-Trial Chamber II authorised then Prosecutor Moreno-Ocampo's request to open an investigation *proprio motu* into the Situation in Kenya.⁶⁷⁹ The Kenya Situation arose out of post-election violence in the country in relation to the general elections in December 2007. Following the Prosecution application, in March 2011 the Pre-Trial Chamber issued summonses to appear for six suspects in two separate cases. The first case initially involved three suspects aligned with the Orange Democratic Movement at the time of the post-election violence, namely William Samoei Ruto (Ruto), Joshua Arap Sang (Sang) and Henry Kiprono Kosgey (Kosgey). The second case initially involved three suspects aligned with the Party of National Unity at the time of the post-election violence, namely Francis Kirimi Muthaura (Muthaura), Uhuru Muigai Kenyatta (Kenyatta) and Mohammed Hussein Ali (Ali). In January 2012, Pre-Trial Chamber II confirmed charges against Ruto, Sang, Muthaura and Kenyatta, but declined to confirm the charges against Kosgey and Ali.⁶⁸⁰

679 ICC-01/09-19.

680 ICC-01/09-01/11-373; ICC-01/09-02/11-382-Red. For a more detailed analysis of the decisions on the confirmation of charges, see *Gender Report Card 2012*, p 128-130.

The Kenyan cases have currently been assigned to two separate trial chambers: Trial Chamber V(a) is presiding over the case against Ruto and Sang, whereas Trial Chamber V(b) presides over the case against Kenyatta.⁶⁸¹

681 On 8 April 2013, Judge Christine Van den Wyngaert submitted a request to the Presidency to be recused from Trial Chamber V pursuant to Article 41 of the Rome Statute and Rule 33 of the Rules of Procedure and Evidence, referring among others to an 'unprecedented and unusually high workload', which the Judge indicated followed from working on five cases simultaneously. Moreover, the Judge noted that the assignment to Trial Chamber V was from the outset intended to be temporary, and which she had accepted 'on the clear understanding that it would be limited in time and only for the purposes of the preparation of the two Kenya trials'. ICC-01/09-02/11-729-AnxI, paras 2-3. In a decision issued on 26 April 2013, the Presidency granted her request, and stated that Judge Van den Wyngaert would be replaced in Trial Chamber V by Judge Robert Fremr. ICC-01/09-01/11-706-AnxII. Further, on 2 May 2013, Judge Kuniko Ozaki, who had been assigned to Trial Chamber V on 29 March 2012, submitted a request to the Presidency to be excused from exercising her functions as judge in the Ruto and Sang case. ICC-01/09-02/11-739-AnxI. Like Judge Van den Wyngaert, Judge Ozaki submitted her request pursuant to Article 41(1) of the Rome Statute and Rule 33 of the Rules of Procedure and Evidence, referring to her increased workload by virtue of sitting on three simultaneous trials. For these reasons, and given that the Ruto and Sang case is scheduled to begin shortly, Judge Ozaki requested the Presidency to be excused from her functions in that case. ICC-01/09-02/11-739-AnxI. On 21 May 2013, the Presidency granted her request. ICC-01/09-02/11-739-AnxII. In a decision of 21 May, the Presidency dissolved Trial Chamber V with immediate effect, temporarily attached Judge Olga Herrera Carbucciona to the Trial Division, and constituted the following two Trial Chambers: Trial Chamber V(a), to deal with the case against Ruto and Sang, composed of Judge Olga Herrera Carbucciona, Judge Robert Fremr, and Judge Chile Eboe-Osuji (Presiding Judge); and Trial Chamber V(b), to deal with the case against Kenyatta, composed of Judge Kuniko Ozaki (Presiding Judge), Judge Robert Fremr, and Judge Chile Eboe-Osuji. ICC-01/09-02/11-739 and ICC-01/09-01/11-745, p 4-5; ICC-01/09-02/11-741; ICC-01/09-01/11-750.

Muthaura and Kenyatta were charged as indirect co-perpetrators pursuant to Article 25(3)(a) for the crimes against humanity of murder, deportation or forcible transfer of population, rape, persecution and other inhumane acts.⁶⁸² Ruto was charged as an indirect co-perpetrator pursuant to Article 25(3)(a), and Sang as having otherwise contributed to the commission of crimes within the meaning of Article 25(3)(d), with three counts of crimes against humanity: murder, deportation or forcible transfer of population and persecution.⁶⁸³ In addition to the two cases relating to the post-election violence, on 2 October 2013, an arrest warrant was unsealed against Kenyan Journalist Walter Barasa.⁶⁸⁴ As of 30 November 2013, Barasa, who is suspected of corruptly influencing witnesses, was yet to appear before the ICC.

While there were significant reports of sexual violence taking place in the context of the post-election violence, including in materials presented by the Prosecutor in the request to open an investigation in Kenya,⁶⁸⁵ in 2010, the Prosecutor sought charges for gender-based crimes in only one of the two cases, namely in the case against Muthaura and Kenyatta. The charges were confirmed in relation to the commission of rape in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008. Along with charges of rape, the Prosecution also brought evidence of forcible circumcision and penile amputation to support the charge of 'other forms of sexual violence'. However, in both the decision issuing the summons to appear as well as in the decision

on the confirmation of charges, the Pre-Trial Chamber recharacterised this evidence as 'other inhumane acts', reasoning 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'.⁶⁸⁶ The Chamber stated that 'not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence'.⁶⁸⁷

As discussed in detail below, trials for both cases were originally scheduled to begin in April 2013. However, both trials have been postponed a number of times due to delays in the Prosecution's disclosure of evidence, the need to address and decide on various Defence applications before the Chamber, the scope of post-confirmation investigations, the withdrawal of Prosecution witnesses and the consequent requests by the Prosecution to add new witnesses. Whereas the trial hearings in the case against Ruto and Sang commenced on 10 September 2013, it is uncertain when the Kenyatta case will commence. On 19 December 2013, the Prosecution informed the Trial Chamber that 'it has insufficient evidence to proceed to trial at this stage' and therefore requested an adjournment of the Kenyatta trial date for three months. The Prosecution maintained that the adjournment would enable it to undertake additional

682 Pursuant to Articles 7(i)(a); 7(i)(d); 7(i)(k); 7(i)(g); and 7(i)(h).

683 Pursuant to Articles 7(i)(a); 7(i)(d); and 7(i)(h), Pre-Trial Chamber II had found that there are no substantial grounds to believe that Sang is responsible as an indirect co-perpetrator, as charged by the Prosecution, and instead charges were confirmed under Article 25(3)(d). For a more detailed analysis of the confirmation of charges decisions in the two cases see *Gender Report Card 2012*, p 128-130.

684 01/09-01/13-1-Red2. The arrest warrant was issued on 2 August 2013 by Judge Cuno Tarfusser, acting as the Single Judge of Pre-Trial Chamber II.

685 See *Gender Report Card 2010*, p 122-124.

686 ICC-01/09-02/11-01, para 27; ICC-01/09-02/11-382-Red, para 266.

687 ICC-01/09-02/11-382-Red, para 265. For a more detailed analysis of the charges for gender-based crimes in this case see *Gender Report Card 2012*, p 128-130. 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. 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.' See also 'Kenya: Plea to ICC over forced male circumcision', *IRIN News*, 25 April 2011; 'In Kenya, Forced Male Circumcision and a Struggle for Justice', *The Atlantic*, 1 August 2011.

investigative steps 'to determine whether a case can be presented to the Chamber that establishes the Accused's guilt beyond reasonable doubt'.⁶⁸⁸

The Prosecution has also faced challenges in both Kenya cases due to a number of Prosecution witnesses withdrawing and/or recanting their testimony, as well as allegations made by the Prosecution that the Government of Kenya is not fully cooperating with the ICC, including by failing to provide documents critical to the prosecution of the cases. Whereas the Defence has stated that the Prosecution's cases are flawed and based on a 'glaring conspiracy of lies',⁶⁸⁹ the Prosecution has alleged that the challenges mentioned above are connected to the current political climate in Kenya.⁶⁹⁰

Kenya held presidential elections on 4 March 2013, with Kenyatta and Ruto running on a combined ticket. Kenyatta's victory in the elections was contested by opponent Raila Odinga, who argued that there had been 'massive irregularities'.⁶⁹¹

688 ICC-01/09-02/11-875, para 3. The Prosecution request was based on one witness stating that he is no longer willing to testify and another witness admitting to providing false evidence concerning an event 'at the heart of the Prosecution's case'. ICC-01/09-02/11-875, para 2.

689 See the remarks made in the Ruto Defence opening statement. ICC-01/09-01/11-T-27-ENG, p 50 lines 7-8. Similar allegations have been made by the Kenyatta Defence. See for example the remarks made in the application for a stay of the proceedings. ICC-01/09-02/11-822-Red.

690 See eg the remarks made in the Prosecution's third request for in-court protective measures in the Ruto case. ICC-01/09-01/11-1102-Red.

691 Raila Odinga claimed that 'among other irregularities, voters registers had been tampered with, Cord's Presidential election agents were chased from the tallying centre at Bomas of Kenya while he has also said that Cord has a pile up of documents about irregularities written to IEBC during the tallying process'. Further, Raila Odinga argued that there were 'instances where the number of votes cast did not tally with the number of votes announced by IEBC while he also gave examples where votes from certain constituencies were announced twice without explanations'. See 'Raila Press Conference: Shocking Revelations of Election Rigging By IEBC', *Kenya Stochohm Blog*, 9 March 2013; 'The system was against me but I have moved on, says Raila', *Daily Nation*, 24 May 2013.

However, on 30 March 2013, the Supreme Court of Kenya decided to uphold the election results, having found that the presidential election was conducted in compliance with the 'provisions of the Constitution and all relevant provisions of the law'.⁶⁹² With his election, Kenyatta became the first ICC indictee who, subsequent to being charged, was elected as a Head of State, and therewith also became the first sitting Head of State to face trial before the ICC.⁶⁹³

The Defence teams for Kenyatta, Ruto and Sang have all filed a number of applications relating to the trial hearings, which will be analysed in greater detail below. Among others, both Kenyatta and Ruto have filed applications requesting the Trial Chamber to allow them to waive their right to be present at trial.⁶⁹⁴ In addition, the Defence for Ruto and Sang have filed applications for conducting *in situ* hearings,

692 Presidential Election Petition, *Supreme Court of Kenya*, Petition No. 5 of 2013, 30 March 2013, available at <<http://www.judiciary.go.ke/portal/order-of-the-court-in-the-supreme-court-of-kenya-presidential-election-petition.html>>, last visited on 24 February 2014. The judgement, which was published two weeks after the ruling, is available at <<http://www.judiciary.go.ke/portal/assets/files/Adverts/Petition%20No.%205%20of%202013%20%20Judgement.pdf>>, last visited on 24 February 2014.

693 However, an arrest warrant has been issued for Sudan's sitting Head of State, President Omar Al'Bashir (ICC-02/05-01/09-1 and ICC-02/05-01/09-95), and the former Head of State of Côte d'Ivoire, Laurent Gbagbo, is detained in The Hague pending the confirmation of charges decision in his case.

694 ICC-01/09-01/11-685; ICC-01/09-02/11-809. As discussed in further detail below, both Trial Chambers conditionally granted these requests, but the Appeals Chamber reversed the decision in Ruto, a decision which led the Trial Chamber to reverse its decision with respect to Kenyatta. See, respectively, ICC-01/09-01/11-777; ICC-01/09-02/11-830; ICC-01/09-01/11-1066; ICC-01/09-02/11-863. However, as discussed below, following an amendment of the Rules of Procedure and evidence during the 12th ASP, Trial Chamber V(a) granted Ruto's request not to be present at trial, except for a limited number of hearings where his presence is required.

either in Kenya or Tanzania.⁶⁹⁵ With reference to the withdrawal of witnesses, abuse of process and related issues, the Kenyatta Defence has also applied to have the case referred back to the Pre-Trial Chamber, and subsequently applied for a stay of the proceedings, in both instances unsuccessfully.⁶⁹⁶

Article 27 of the Rome Statute stipulates that heads of states and other government officials are not exempt from criminal responsibility.⁶⁹⁷ Although the suspects in the Kenya cases have voluntarily appeared before the ICC in response to summonses to appear and have stated their commitment to continue to cooperate with the Court, as discussed in further detail below, since Kenyatta and Ruto came to power, this commitment has increasingly been conditional.

⁶⁹⁵ ICC-01/09-01/11-567. As discussed in further detail below, on 3 June 2013, Trial Chamber V(a) notified the Presidency that ‘it may be desirable to hold the commencement of trial and other portions thereof, to be determined at a later stage, in Kenya or, alternatively, in Tanzania’. ICC-01/09-01/11-763. However, the Plenary of Judges subsequently decided that the trial will commence at the seat of the Court in The Hague. ‘Ruto and Sang case: Trial to open in The Hague’, *ICC Press Release*, ICC-CPI-20130715-PR931, 15 July 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr931.aspx>, last visited on 24 February 2014. Additionally, Trial Chamber V(b) has requested observations from the parties on where the Court shall sit for trial, though there was no application from the Kenyatta Defence to this effect. ICC-01/09-02/11-781.

⁶⁹⁶ The applications were made in ICC-01/09-02/11-622 and ICC-01/09-02/11-822-Red, respectively. The Trial Chamber’s decision on the request to refer the case back to the Pre-Trial Chamber, which is discussed in further detail below, can be found in ICC-01/09-02/11-728. The Trial Chamber’s decision to reject the request for a stay of the proceedings, which was made on 5 December 2013, is briefly discussed below. ICC-01/09-02/11-868-Red.

⁶⁹⁷ The Rome Statute thus presents a modification to the rule in customary international law that heads of states and foreign ministers are granted immunity. On the immunity of heads of states and foreign ministers in customary international law, see ‘Head of State Immunity is a Part of State Immunity: A Response to Jens Iverson’, *EJIL: Talk*, 27 February 2012; ‘Immunity for International Crimes’, *Chatham House*, November 2011.

In addition, the Government of Kenya, supported by the African Union and others, has made various attempts to end the ICC cases or to alter how they are conducted. Among other things, the Government, with the support of the African Union, has attempted to obtain a UN Security Council deferral. The Government has also openly put forward and supported an amendment to the Rules of Procedure and Evidence regarding the provisions requiring the accused’s presence at trial. As discussed further in the **States Parties/ASP** section of this Report, an amendment to Rule 134 reflecting some of Kenya’s proposals was adopted by the Assembly of States Parties in November 2013, whereby the accused are not required to be continuously present at trial.

This section provides an overview of the proceedings in the Kenya cases, including: the dropping of charges against Muthaura; preparations for trial in the cases against Kenyatta, Ruto and Sang; the opening of the Ruto and Sang case and the first witness testimony; and issues litigated in both cases including the presence of the accused at trial and the location of the trial.

Kenya:

The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta

Prosecution withdraws all charges against Muthaura⁶⁹⁸

The Prosecution's decision to withdraw charges against Muthaura

On 11 March 2013, during a status conference, ICC Prosecutor Fatou Bensouda notified Trial Chamber V that her Office was withdrawing all charges against Muthaura.⁶⁹⁹ This is the first time the Office of the Prosecutor has withdrawn all charges against an accused. The Prosecutor stated that her Office had proceeded with the case against Muthaura in 'good faith, believing that there was a case against him', but had come to the conclusion that there was no longer 'a reasonable prospect of conviction at trial' and that there was no prospect that further investigations would remedy this.⁷⁰⁰

On the same day, the Prosecution notified the Chamber in writing of its withdrawal of all charges against Muthaura. The Prosecution explained the reasons for withdrawing charges, emphasising that '[t]he Muthaura case has presented serious investigative challenges, including a limited pool of potential witnesses, several of whom have been killed or died since the 2007-2008 post-election violence in Kenya, and others who are unwilling to testify or provide evidence to the Prosecution'.⁷⁰¹ The Prosecution stated that despite assurances of its willingness to cooperate with the Court, the Government of Kenya has 'in fact provided only

limited cooperation to the Prosecution, and has failed to assist it in uncovering evidence that would have been crucial, or at the very least, may have been useful' in the case against Muthaura.⁷⁰² Moreover, the Prosecution observed that there have been 'post-confirmation developments with respect to a critical witness against Muthaura, who recanted a significant part of his incriminating evidence after the confirmation decision was issued, and who admitted accepting bribes from persons allegedly holding themselves out as 'representatives of both accused'.⁷⁰³ Although not mentioned in the Prosecution's notification, it was clear from subsequent submissions that the witness in question was Prosecution Witness 4, whom the Prosecution no longer intends to call at trial.⁷⁰⁴

702 ICC-01/09-02/11-687, para 11.

703 ICC-01/09-02/11-687, para 11.

704 See for example the Prosecution's statements during the 18 March status conference concerning the question of whether the decision to no longer rely on Prosecution Witness 4 has any impact on the case against Kenyatta. ICC-01/09-02/11-T-24-ENG, p 36-37. In its written notification, the Prosecution elaborated on the legal basis for the decision to withdraw charges. The Prosecution acknowledged that the proceedings in the case were at a stage between confirmation of the charges and the commencement of the trial during which procedures for withdrawal of charges are not explicitly provided in the Rome Statute. However, the Prosecution submitted that taking guidance from Articles 61(4) as well as 61(11), there is a legal basis for the Prosecution to use its discretion to withdraw charges and notify the Chamber of the decision. ICC-01/09-02/11-687, para 2. In the alternative, the Prosecution submitted that, should the Chamber find that leave must be granted to withdraw the charges, the Chamber should take into account that 'at this stage, there is no reasonable prospect' of a conviction of Muthaura, and thus grant the leave requested. ICC-01/09-02/11-687, paras 8-9.

698 The decision to withdraw charges against Muthaura is discussed in greater detail in Women's Initiatives for Gender Justice, *Legal Eye on the ICC eLetter*, June 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye6-13-FULL/LegalEye6-13.html>>.

699 ICC-01/09-02/11-T-23-ENG.

700 ICC-01/09-02/11-T-23-ENG, p 3 lines 19-24.

701 ICC-01/09-02/11-687, para 11.

Whereas the Defence for Muthaura did not object to the Prosecution notification of the withdrawal of charges,⁷⁰⁵ the Legal Representative for Victims submitted that any withdrawal of charges requires approval by the Chamber.⁷⁰⁶

The Trial Chamber's decision

On 18 March 2013, Trial Chamber V, by majority (Presiding Judge Ozaki dissenting), granted permission to the Prosecution to withdraw the charges against Muthaura and ordered that the proceedings against Muthaura be terminated.⁷⁰⁷

The Chamber noted that neither Article 61(4) nor Article 61(9) of the Statute covers a situation where charges are withdrawn after the confirmation decision but before the commencement of the trial.⁷⁰⁸ Instead, the decision was made with reference to the powers granted to the Chamber under Article 64(2), according to which the Trial Chamber shall 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused'.⁷⁰⁹ The Chamber emphasised that '[i]n the present case, the Prosecution has submitted that current evidence does not support the charges against Mr Muthaura and that it has no reasonable prospect of securing evidence that could sustain proof beyond reasonable doubt [and] the Muthaura Defence does not contest the Prosecution's withdrawal'.⁷¹⁰

Having granted the withdrawal of all charges, the Chamber decided that the conditions imposed on Muthaura in the decision issuing

the Summonses to Appear in March 2011 would cease to have effect, but reminded Muthaura that the Court has jurisdiction over intentional acts of interference with witnesses.⁷¹¹

Partly dissenting opinion of Judge Ozaki

The Presiding Judge of Trial Chamber V, Judge Ozaki, delivered a partly dissenting opinion to the decision on the withdrawal of charges against Muthaura, holding that the proceedings could have been terminated without the Chamber granting leave.⁷¹² Judge Ozaki held that according to Article 61(9) — which she considered *lex specialis*⁷¹³ in relation to amending or withdrawing the charges in the post-confirmation phase of proceedings before the Court — there is no requirement for the Prosecution to seek the permission of any Chamber in order to withdraw the charges in the period following confirmation and prior to the commencement of the trial proper. Accordingly, Judge Ozaki disagreed with the majority that a requirement for Trial Chamber approval of a Prosecution decision to withdraw the charges can be read into Article 64(2). In her opinion, this interpretation is inconsistent with the wording of Article 61(9), and more broadly with the Prosecution's responsibility to initiate investigations and frame the charges upon which the accused is brought to trial.⁷¹⁴

Concurring separate opinion of Judge Eboe-Osuji

Judge Eboe-Osuji issued a concurring separate opinion to the decision on the withdrawal of charges against Muthaura. Judge Eboe-Osuji

705 During the status conference, the Muthaura Defence submitted that the Prosecution has the discretion, at this stage of the proceedings, to withdraw the charges without leave of the Chamber, and argued that the case against Muthaura should end as soon as possible. ICC-01/09-02/11-T-23-ENG ET, p 10-12.

706 ICC-01/09-02/11-T-23-ENG ET, p 21-22.

707 ICC-01/09-02/11-696.

708 ICC-01/09-02/11-696, para 10.

709 ICC-01/09-02/11-696, para 11.

710 ICC-01/09-02/11-696, para 11.

711 ICC-01/09-02/11-696, para 12.

712 ICC-01/09-02/11-698, Partial dissenting opinion of Judge Ozaki, para 1.

713 The law governing a specific subject matter, which as a general principle overrides a law that governs a matter in more general terms. See 'Definitions', *USLegal*, available at <<http://definitions.uslegal.com/l/lex-specialis/>>, last visited on 24 January 2014.

714 ICC-01/09-02/11-698, Partial dissenting opinion of Judge Ozaki, paras 2-3.

agreed with the outcome of the Chamber's decision that the case against Muthaura be discontinued, and agreed that such a decision requires the permission of the Chamber.⁷¹⁵ Specifically, he stated his agreement with the submission of the Legal Representative for Victims, who had argued that in light of the procedures of the *ad hoc* tribunals and the 'general flow of the Rome Statute' — including the rights of the Defence, the interests of victims, and the interest of the 'general order in the administration of justice' — the Chamber's approval of the Prosecution's withdrawal of charges is required.⁷¹⁶ Accordingly, Judge Eboe-Osuji held that the silence of Article 61(9) should be understood as 'an error of omission in legislative drafting',⁷¹⁷ which the judges are expected to fill in light of the 'context, object and purpose of the Rome Statute'.⁷¹⁸ Relying on these interpretative methods, Judge Eboe-Osuji examined the interest of the defendant, the interests of victims and the interests of 'orderly administration of justice', noting with respect to the latter that 'this Court would have acted in vain, if after all [its] decisions, the Prosecutor is to be free to withdraw confirmed charges before the commencement of trial, without the Court having a say'.⁷¹⁹

715 ICC-01/09-02/11-698, Concurring separate opinion of Judge Eboe-Osuji, para 1.

716 ICC-01/09-02/11-698, Concurring separate opinion of Judge Eboe-Osuji, paras 9-11.

717 ICC-01/09-02/11-698, Concurring separate opinion of Judge Eboe-Osuji, para 12.

718 ICC-01/09-02/11-698, Concurring separate opinion of Judge Eboe-Osuji, para 29.

719 ICC-01/09-02/11-698, Concurring separate opinion of Judge Eboe-Osuji, paras 30-33. As a caveat, Judge Eboe-Osuji noted that the 'adjectival considerations' surrounding the Prosecution's decision to request that the charges be withdrawn, including the Prosecution's allegations that witnesses have been killed, are 'very troubling' but cannot be addressed by the Court since the Prosecution has brought no charges against Muthaura relating to a possible involvement in this conduct. ICC-01/09-02/11-698, Concurring separate opinion of Judge Eboe-Osuji, para 3.

Trial Chamber V denies Kenyatta's application to send case back to Pre-Trial Chamber⁷²⁰

Trial Chamber's decision on Article 64(4) application

On 5 February 2013, the Defence for Kenyatta filed an application to the Trial Chamber pursuant to Article 64(4) of the Rome Statute⁷²¹ to refer the 'preliminary issue' of the confirmation of charges decision to the Pre-Trial Chamber for reconsideration (Article 64(4) Application).⁷²² The Defence argued that it was necessary to refer the decision back to the Pre-Trial Chamber in order to 'ensure the fair and effective functioning of the proceedings and maintain the integrity of the Court'.⁷²³ In support of its request, the Defence cited a variety of reasons, discussed further below, including the Prosecution's failure to disclose a potentially exculpatory affidavit.

On 26 April 2013, Trial Chamber V issued a decision denying the Defence request, while reprimanding the Prosecution for its failure to timely disclose the affidavit to the Defence and directing the Prosecution to conduct a review of its case file and certify by 21 May 2013 that it has reviewed all materials in its possession.⁷²⁴

720 The Trial Chamber's decision is analysed in greater detail in Women's Initiatives for Gender Justice, *Legal Eye on the ICC eLetter*, August 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye8-13/LegalEye8-13.html>>.

721 Article 64(4) provides that the Trial Chamber 'may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division'.

722 ICC-01/09-02/11-622.

723 ICC-01/09-02/11-622.

724 ICC-01/09-02/11-728. The Trial Chamber noted that, whereas in its initial Article 64(4) Application the Defence had only requested a referral of the confirmation decision to the Pre-Trial Chamber for reconsideration, in later filings the Defence had 'broadened' the relief it was requesting. Accordingly, the Chamber observed that the Defence's primary request was for an order that the proceedings against Kenyatta be terminated, whereas in the alternative the Defence had requested that the Chamber order a stay of the proceedings or refer the confirmation decision back to the Pre-Trial Chamber for reconsideration. Additionally, the Chamber noted that the Defence had requested that the Prosecution be reprimanded as a consequence of its failure to disclose exculpatory evidence. ICC-01/09-02/11-728, paras 66-68.

The Chamber recalled that, in support of its requests, the Defence had raised ‘four separate, but interrelated’ issues:

- 1 The Prosecution’s conduct with respect to the non-disclosure, prior to the confirmation hearing, of Witness 4’s affidavit and other materials (Issue 1);
- 2 The validity of the confirmation decision as a result of ‘deficiencies’ in the Prosecution’s evidence, including the alleged lack of credibility of witnesses (Issue 2);
- 3 Alleged ‘new and radically altered allegations’ against the accused as a result of the Prosecution’s removal of Witness 4 from its witness list and its reliance on a substantial body of new evidence collected after the confirmation hearing (Issue 3); and
- 4 The impact of the withdrawal of the charges against Muthaura on the case against Kenyatta (Issue 4).⁷²⁵

Concerning non-disclosure of Witness 4’s affidavit (Issue 1),⁷²⁶ the Defence had argued that the confirmation decision was ‘manifestly unsound’ due to the Prosecution’s failure to disclose the affidavit.⁷²⁷ Although the Chamber did not find reasons to believe that the Defence was right in arguing that ‘members of the Prosecution purposely tried to withhold the Affidavit from the Defence until after the Confirmation Decision’, the Chamber found that the Prosecution made ‘a grave

mistake when it wrongly classified the Affidavit’.⁷²⁸ Accordingly, the Chamber found ‘the Prosecution’s conduct in failing to disclose the Affidavit and other documents related to Witness 4 to be a cause for serious concern, both in terms of the integrity of the proceedings and the rights of [Kenyatta]’.⁷²⁹ However, the Chamber stressed that Witness 4 was no longer a Prosecution witness, and that the Defence will have an ‘opportunity to challenge the credibility of other evidence relied upon by the Prosecution at confirmation in corroboration of Witness 4’s evidence’.⁷³⁰ For these reasons, the Chamber held that it would be ‘disproportionate to terminate or stay the proceedings as a result of the non-disclosure’, and further that it was unnecessary to refer this issue to the Pre-Trial Chamber pursuant to Article 64(4), ‘given that the issue came to light during the period when the Chamber was responsible for the conduct of the proceedings and is fully competent to resolve it’.⁷³¹ Instead, the Chamber decided that the ‘appropriate remedy is for the Chamber to reprimand the Prosecution for its conduct and to require it to conduct a complete review of its case file and certify before this Chamber that it has done so in order to ensure that no other materials in its possession that ought to have been disclosed to the Defence, are left undisclosed’.⁷³²

725 ICC-01/09-02/11-728, para 21.

726 As discussed in more detail in Women’s Initiatives for Gender Justice, *Legal Eye on the ICC eLetter*, June 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye6-13-FULL/LegalEye6-13.html>>, Witness 4, an important Prosecution witness in the case against Muthaura and Kenyatta, recanted a significant part of his incriminating evidence after the confirmation decision was issued, and admitted accepting bribes from persons allegedly holding themselves out as representatives of both accused.

727 ICC-01/09-02/11-706, para 4. The affidavit in question, not a non-ICC statement, was ‘a 28-page affidavit, prepared for asylum proceedings in another country’. ICC-01/09-02/11-664-Red2, para 34.

728 The Chamber found that the mistake ‘occurred as a result of a deficient review system in place (at the time) within the Prosecution, where — apparently — persons without knowledge of the overall state of the evidence against the accused, or at a minimum the overall evidence provided by the witness concerned, performed a review of the Affidavit’. In this regard, the Chamber recalled the Prosecution’s obligation under Articles 54(1) and 67(2) of the Rome Statute to disclose potentially exonerating evidence in its possession to the Defence as soon as practicable, and underscored that such potentially exonerating evidence includes information that ‘may affect the credibility of prosecution evidence’. ICC-01/09-02/11-728, paras 92-93.

729 ICC-01/09-02/11-728, para 95.

730 ICC-01/09-01/11-728, para 96.

731 ICC-01/09-02/11-728, para 97.

732 In addition, the Chamber stressed that ‘given that the failure to disclose the Affidavit appears to have resulted from a deficient internal review procedure, the Prosecution can reasonably be expected, if it has not already done so, to make appropriate changes to its internal procedures’. ICC-01/09-02/11-728, para 97.

Concerning the validity of the confirmation decision (Issue 2), the Defence had argued that the evidence that remained, given that the Prosecution no longer sought to rely on Witness 4, did not meet the required threshold to establish that Kenyatta had committed the crimes as charged.⁷³³ Having observed that such submissions constitute an ‘impermissible attempt to have the Chamber effectively entertain an appeal of the Confirmation Decision’ whereby all the evidence relied on in the confirmation decision be reconsidered, the Chamber concluded that only the Pre-Trial Chamber can entertain a request for leave to appeal the confirmation decision and it is only the Appeals Chamber that can hear an appeal of the confirmation decision.⁷³⁴ The Chamber further stated that it was not persuaded that the non-disclosure of the Affidavit materially impacted the confirmation process,⁷³⁵ and thus concluded that this issue did not provide a basis to terminate or stay the proceedings, nor a basis for referring the issue back to the Pre-Trial Chamber for reconsideration.⁷³⁶

Concerning the alleged new and altered allegations (Issue 3), the Defence had submitted that the Prosecution’s case against Kenyatta had fundamentally changed following the confirmation of charges decision due to ‘the inclusion of new or radically altered post confirmation allegations’ and evidence disclosed by the Prosecution in the weeks leading up to the commencement of trial.⁷³⁷ In this regard, the Chamber observed that the Prosecution is ‘not necessarily required to rely on entirely the same evidence at trial as it did at the confirmation of charges stage’, and there may be ‘good reasons for the Prosecution to substitute, at trial, the evidence it used during the confirmation hearing to establish the charges’ with other evidence, as long as this

other evidence pertained to the same charges.⁷³⁸ The Chamber further disagreed with the Defence that the Prosecution had substituted key events with other events not confirmed by the Pre-Trial Chamber, and thus concluded that ‘none of the allegations to which the Defence points exceed the facts and circumstances described in the confirmed charges and reflected in the Updated DCC’.⁷³⁹ Accordingly, the Chamber concluded that ‘the deficiencies complained of do not meet the requirements for a termination or stay of proceedings as they can and will be resolved during trial’ and rejected that these ‘post-confirmation developments could justify a referral of the case back to the Pre-Trial Chamber for reconsideration’.⁷⁴⁰

Concerning the impact of the withdrawal of charges against Muthaura on Kenyatta’s case (Issue 4), the Defence had submitted that the Prosecution’s decision to withdraw all charges against Muthaura in March 2013 ‘destroys the factual and legal matrix of the “common plan” as confirmed by the Pre-Trial Chamber because the Prosecution had alleged that Kenyatta and Muthaura were the “two sole principal perpetrators who *devised* the common plan”’.⁷⁴¹ In this regard, the Chamber observed that the questions of what level of contribution is necessary from co-perpetrators, the evidentiary standard for the evidence related to co-perpetrators who are not charged, and other issues relating to the alleged mode of liability of Kenyatta as an indirect co-perpetrator ‘are matters for trial’.⁷⁴²

733 ICC-01/09-02/11-707-Corr-Red.

734 ICC-01/09-02/11-728, paras 99-100.

735 ICC-01/09-02/11-728, para 101.

736 ICC-01/09-02/11-728, para 104. Judge Ozaki did not join the last part of the reasoning as explained in her separate opinion discussed further below.

737 ICC-01/09-02/11-655-Corr, para 11.

738 ICC-01/09-02/11-728, para 105. The Chamber further noted that it was not clear whether the Defence submissions referred to new facts and circumstances, ‘or merely to new evidence in support of the facts and circumstances underlying the charges as outlined in the Updated [Document Containing the Charges]’: ICC-01/09-02/11-728, para 106.

739 ICC-01/09-02/11-728, paras 108-110.

740 The Chamber thus agreed with the Prosecution and Legal Representative that ‘changes in the evidence (as opposed to the charges) between the confirmation of charges and the trial stages cannot be a basis for seeking a new confirmation process’ ICC-01/09-02/11-728, paras 110-111.

741 ICC-01/09-02/11-707-Corr-Red, para 16 (emphasis in original).

742 In this connection, the Chamber concluded that it is ‘not bound by the interpretation of Article 25(3)(a) as applied by the Pre-Trial Chamber in the Confirmation Decision’. ICC-01/09-02/11-728, para 114.

In addition to the four issues discussed above, the Trial Chamber remarked upon the concerns expressed by the Defence with respect to the quantity of evidence that was collected by the Prosecution post-confirmation. Although the Chamber emphasised that the post-confirmation investigations have 'not altered the charges against the accused, or undermined the integrity of the proceedings to such an extent that a fair trial is no longer possible', it expressed concern about the 'considerable volume of evidence collected by the Prosecution post-confirmation and the delays in disclosing all relevant evidence to the Defence'.⁷⁴³ The Chamber found that the 'most appropriate remedy for the prejudice caused to the accused consists of providing the Defence with further time to conduct

743 In this regard, the Chamber stated that while it did not consider that the Statute 'prohibits the Prosecution from conducting post-confirmation investigations, it is mindful of the Appeals Chamber's recent statement in *Mbarushimana* that the investigation should be "largely completed" by the Confirmation Hearing'. ICC-01/09-02/11-728, paras 117-118. The Chamber further found that in so far as the Prosecution continues post-confirmation investigations for the purpose of collecting evidence which it 'could reasonably have been expected to have collected prior to confirmation', a Trial Chamber 'would need to determine the appropriate remedy based on the circumstances of the case', including possible 'exclusion of all or part of the evidence so obtained as a remedy for the Prosecution's conduct as well as to allay any potential prejudice caused to the accused'. ICC-01/09-02/11-728, para 121. While holding in the present case that the Prosecution 'should have conducted a more thorough investigation prior to confirmation in accordance with its statutory obligations under Article 54(1)(a) of the Statute', the majority indicated that the Prosecution may have been guided by the Appeals Chamber's earlier jurisprudence, particularly a decision by the Appeals Chamber in the *Lubanga* case in October 2006, 'without the benefit of its subsequent elaboration in *Mbarushimana*, which intervened only after the confirmation hearing in the present case'. The Chamber further observed that the Prosecution explained its continued investigations post-confirmation on the basis of the general security situation in Kenya. While the Chamber held that this explanation 'lacked the degree of specificity which would have been expected, [it] accepts that the circumstances under which the Prosecution was operating were difficult and may have affected its ability to conduct a fuller investigation prior to confirmation'. ICC-01/09-02/11-728, paras 123-124. Judge Van den Wyngaert appended a separate concurring opinion, which is discussed further below, with additional views on post-confirmation investigations.

its investigations and to fully prepare for trial in light of the new evidence'.⁷⁴⁴ Accordingly, the Chamber did not grant the Defence request, but decided that it is 'necessary that the Prosecution provide an updated version of the document containing the charges, which reflects the withdrawal of the charges against Mr Muthaura'.⁷⁴⁵

Separate opinion of Judge Ozaki

Judge Ozaki issued a separate opinion, fully concurring with the final outcome of the Chamber's decision on the Defence requests, but disagreeing with her colleagues that the Defence's challenge to the validity of the confirmation decision could amount to a 'preliminary issue' within the meaning of Article 64(4) of the Statute.⁷⁴⁶ Specifically, Judge Ozaki held that it would 'never be proper for the Chamber to refer the case back to the Pre-Trial Chamber pursuant to Article 64(4) of the Statute for the purpose of reviewing the validity of the charges', as a Trial Chamber 'does not have the competence to refer back to the Pre-Trial Chamber an issue over which it has no competence to begin with'.⁷⁴⁷

744 ICC-01/09-02/11-728, para 125. In this regard, the Chamber maintained that three months after the date of full disclosure provides adequate time to prepare and should thus be taken as guidance as to the time needed, but 'in light of the Chamber's above findings' it decided to seek the Defence's views on time needed for preparation before deciding on the final trial date. ICC-01/09-02/11-728, para 127.

745 The Chamber also invited the Prosecution to update its pre-trial brief to reflect these changes by 6 May 2013. ICC-01/09-02/11-728, para 116. The updated document containing the charges and pre-trial brief were both filed by the Prosecution on 6 May 2013. See ICC-01/09-02/11-732; ICC-01/09-02/11-732-AnxA-Red; ICC-01/09-02/11-732-AnxA-Corr-Red.

746 ICC-01/09-02/11-728-Anx1, para 2.

747 Accordingly, she held that in the case of 'a finding by the Chamber that there were serious substantive deficiencies in the Confirmation Decision which may render the charges flawed or invalid, the appropriate course would be for the Prosecution to be invited to withdraw or seek amendment of the charges pursuant to Article 61(9) of the Statute'. Judge Ozaki found that, if the Prosecution were to refuse to do so, the trial would continue, or, if the Chamber were to find that the continuation of the trial on the basis of such charges would violate the fundamental rights of the accused so that a fair trial becomes impossible, 'it would rely on its general power and obligation as set out in Article 64(2) of the Statute, and terminate or stay the proceedings'. ICC-01/09-02/11-728-Anx1, para 3.

Concurring opinion of Judge Van den Wyngaert

Judge Van den Wyngaert fully concurred with the elucidation in the decision of the Prosecution's rights and obligations under Article 54(1)(a) of the Statute⁷⁴⁸ but 'would have gone further' than her colleagues with respect to the 'serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation'.⁷⁴⁹ Specifically, Judge Van den Wyngaert held that 'the facts show that the Prosecution had not complied with its obligations under Article 54(1)(a) at the time when it sought confirmation and that it was still not even remotely ready when the proceedings before this Chamber started'.⁷⁵⁰ The Judge maintained that 'there can be no excuse for the Prosecution's negligent attitude towards verifying the trustworthiness of its evidence', emphasising that the incidents relating to Witness 4 were 'clearly indicative of a negligent attitude towards verifying the reliability of central evidence in the Prosecution's case', which revealed 'grave problems in the Prosecution's system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff'.⁷⁵¹ In addition, Judge Van den Wyngaert held that the Prosecution had 'violated its obligation under article 54(1)(c) of the Statute to fully respect the rights of persons arising under the Statute'.⁷⁵² While Judge Van den Wyngaert held that the appropriate remedy for the Prosecution's 'failure to fulfil its obligations under Article 54(1)(a)' would be to exclude all or part of the evidence obtained by way of 'excessive and unwarranted

748 Article 54(1)(a) provides that in order to establish the truth, the Prosecutor shall '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'.

749 ICC-01/09-02/11-728-Anx2, para 1.

750 ICC-01/09-02/11-728-Anx2, para 1.

751 ICC-01/09-02/11-728-Anx2, para 4.

752 ICC-01/09-02/11-728-Anx2, para 5.

post-confirmation investigation', she agreed with her colleagues that there are mitigating circumstances in this case which 'lessen the need to resort to such a drastic measure'.⁷⁵³

Concurring separate opinion of Judge Eboe-Osuji

While Judge Eboe-Osuji concurred with the Trial Chamber's decision to reject the Defence request to send the case back to the Pre-Trial Chamber and with the rejection of the alternative request to terminate or stay the case, he wrote separately 'to amplify more fully' certain aspects of the decision with which he concurred, as well as to explain his 'inability' to join the reasoning regarding post-confirmation investigations.⁷⁵⁴ Among others, he noted that the concerns of the Defence with respect to 'the extent to which the disclosure obligations of the Prosecution have been fulfilled' were justified.⁷⁵⁵ With respect to the alleged violations of the rights of the accused, Judge Eboe-Osuji noted that he was 'not convinced that the mistaken failure to disclose the Asylum Affidavit itself has been established as having already violated the rights of the accused in a manner that caused material prejudice or already undermined the integrity of the judicial process'.⁷⁵⁶ With respect to the Defence request to refer the confirmation decision back to the Pre-Trial Chamber due to the issues surrounding Witness 4, Judge Eboe-Osuji concluded that doing so would not be in the interest of 'public policy', nor would it be necessary to avoid a 'miscarriage of

753 ICC-01/09-02/11-728-Anx2, para 6.

754 ICC-01/09-02/11-728-Anx3-Corr2-Red, para 2.

755 However, he also observed that it was 'encouraging that the Prosecution continued to reveal and admit lapses in their disclosure compliance as they discovered them', and further stated his satisfaction with the Prosecution having withdrawn on its own initiative the charges against Muthaura 'on grounds of insufficient evidence or the prospect of it'. ICC-01/09-02/11-728-Anx3-Corr2-Red, para 21.

756 ICC-01/09-02/11-728-Anx3-Corr2-Red, para 22.

justice'.⁷⁵⁷ With respect to the Defence complaint concerning the scope of post-confirmation investigations, Judge Eboe-Osuji found that his colleagues reasoning amounted 'largely to the beginnings of drips of dicta that will presently undermine the Prosecutor's confidence in conducting post-confirmation investigations when she sees the need; while possibly crystallising in the future into a hard limitation that will forbid post-confirmation investigations, as a general rule, permitting them only in "exceptional circumstances"'.⁷⁵⁸ In terms of the legal basis for the Chamber's findings, Judge Eboe-Osuji disagreed with his colleagues that the controlling law is signalled by the Appeals Chamber's decision in Mbarushimana, according to which the 'investigation should largely be completed at the stage of the confirmation of charges hearing'.⁷⁵⁹ Instead, he held that the applicable law could be identified in the Appeals Chamber's rejection in the Lubanga case of the Pre-Trial Chamber's finding that, barring exceptional circumstances, the investigation must be brought to an end by the time the confirmation hearing starts.⁷⁶⁰ Consequently, Judge Eboe-Osuji concluded that the right remedy will 'seldom be to forbid the use of the further evidence resulting from the impugned investigation, where no clear prejudice to the Defence has been shown such as is beyond reasonable cure by the grant of more time'.⁷⁶¹

757 Judge Eboe-Osuji undertook a detailed examination of how these two concepts apply to the Defence's request. ICC-01/09-02/11-728-Anx3-Corr2-Red, paras 23-85.

758 ICC-01/09-02/11-728-Anx3-Corr2-Red, para 87.

759 ICC-01/09-02/11-728-Anx3-Corr2-Red, para 88. According to Judge Eboe-Osuji, 'what was effectively expressed in the *obiter* in Mbarushimana is no more than a reiteration of the continuing *desirability* of that *ideal* situation'. ICC-01/09-02/11-728-Anx3-Corr2-Red, para 89 (emphasis in original).

760 Judge Eboe-Osuji emphasised that in this case the Appeals Chamber had clarified that 'the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth'. ICC-01/09-02/11-728-Anx3-Corr2-Red, para 90.

761 ICC-01/09-02/11-728-Anx3-Corr2-Red, para 94.

Kenyatta applies for a stay of the proceedings

In an application made on 10 October 2013, the Kenyatta Defence stated that it was 'in possession of substantial evidence of a serious, sustained and wide-ranging abuse on the process of the Court' carried out by Prosecution Witnesses OTP-11; OTP-12; and OTP-118 as well as a Prosecution intermediary.⁷⁶² On this basis, the Defence applied for a permanent stay of the proceedings due to abuse of process, or in the alternative requested the Trial Chamber to hold an evidential hearing entailing the calling of live evidence to determine this issue conclusively prior to the commencement of trial.⁷⁶³

More specifically, the Defence stated that it had 'extensive evidence' that Prosecution witnesses and intermediaries have 'intimidated and interfered' with potential Defence witnesses and embarked upon 'a wide scale course of conduct against the Defence for the benefit of the Prosecution amounting to a perversion of the course of justice before the Court'.⁷⁶⁴ The Defence further stated that this conduct has prevented the Defence from obtaining witness cooperation, and that the 'foundation of the Prosecution is now so tainted by the illegal actions' of Prosecution witnesses and intermediaries that it 'is repugnant to the rule of law and seriously prejudicial to the integrity of the trial process to put Uhuru Kenyatta on trial'.⁷⁶⁵

762 ICC-01/09-02/11-822-Red, para 1.

763 ICC-01/09-02/11-822-Red, para 2.

764 ICC-01/09-02/11-822-Red, para 4.

765 ICC-01/09-02/11-822-Red, paras 6-7. The Defence submitted that the doctrine of abuse of process requires the permanent stay of proceedings where it is impossible to guarantee the accused a fair trial, or where the integrity of the judicial process is irremediably vitiated by such serious prejudice that to continue the proceedings would offend the fundamental principles of justice, and that both thresholds have now been reached. ICC-01/09-02/11-822-Red, para 71.

In the Prosecution’s response, it was observed that the Defence application for a permanent stay of proceedings ‘comes nowhere near the high threshold the Appeals Chamber has established for such relief’.⁷⁶⁶ The Prosecution submitted that the allegations regarding offences against the administration of justice — even if ultimately established — are insufficient to warrant a stay.⁷⁶⁷ The Prosecution further submitted that the Defence’s credibility challenges ‘do not justify a stay — they show why a trial is necessary’, and in this regard emphasised that even if viewed ‘in the light most favourable to the Defence, the arguments regarding the credibility of the Prosecution’s Mungiki witnesses merely raise possible avenues of cross-examination and lines of defence’.⁷⁶⁸ The Prosecution also submitted that there is ‘no basis for the Defence’s alternative request for relief — an evidentiary hearing prior to trial’ and in this regard noted that ‘even if every allegation in the Application is accepted as true — which is the maximum the Defence could hope to establish in an evidential hearing — they would be inadequate to justify a stay’, meaning that a hearing would accomplish nothing

766 ICC-01/09-02/11-848-red, para 1.

767 ICC-01/09-02/11-848-red, para 3. In this regard, the Prosecution observed that ‘if, after a full investigation, the Defence’s allegations are established on the basis of reliable evidence, the appropriate action will be taken pursuant to Article 70 of the Statute’, but ‘any action under Article 70 can be conducted in parallel with the Accused’s trial; it need not displace it’. Moreover, the Prosecution observed that the Chamber will be able to fashion remedies at trial to compensate for the unfairness, if any, it determines the Defence has suffered as a result of the alleged misconduct. ICC-01/09-02/11-848-red, paras 3-4.

768 ICC-01/09-02/11-848-red, para 5. The Mungiki is considered a criminal organisation allegedly involved in the post-election violence. The Prosecution has noted the difficulties associated with accessing the organisation, emphasising that Mungiki members are ‘afraid for their lives as a result of the extra-judicial killings of members of the organisation’ and do not wish ‘to expose themselves to the government security apparatus by talking to the Prosecution’. ICC-01/09-02/11-848-red, para 12.

other than a further delay and an unnecessary diversion of judicial resources.⁷⁶⁹

Notwithstanding the Prosecution’s response to the Defence application for a stay of the proceedings, as discussed in further detail below, on 19 December 2013, the Prosecution informed the Trial Chamber that ‘it has insufficient evidence to proceed to trial at this stage’ and therefore requested an adjournment of the Kenyatta trial date for three months, which, if granted, the Prosecution hoped would enable it to undertake additional investigative steps ‘to determine whether a case can be presented to the Chamber that establishes the Accused’s guilt beyond reasonable doubt’.⁷⁷⁰ As discussed below, on 23 January 2014, the Trial Chamber vacated the trial commencement date of 5 February 2014 and scheduled a status conference for 5 February 2014, but did not set a new trial date.⁷⁷¹

On 5 December 2013, Trial Chamber V(b) issued its decision on the Defence application, denying the Defence request to impose a stay

769 ICC-01/09-02/11-848-red, para 7. The Legal Representative of Victims similarly requested the Trial Chamber to deny the Defence Application. In summary, the Legal Representative submitted that: The Application was made in the context of ‘a multi-faceted campaign by the Accused, supported by his Government, to avoid trial’; a permanent stay of the proceedings due to abuse of process is to be used in very exceptional circumstances, and is an unsuitable remedy for dealing with offences against the administration of justice; a pre-trial evidential hearing is not envisaged in the Court’s regulatory structure, is unnecessary, and might dissuade key witnesses from testifying at trial; tools are available within the trial process to deal fairly with the matters raised in the Application; repeatedly litigating the credibility of key prosecution witnesses before trial has even begun is neither appropriate nor necessary; the trial is the proper forum in which to test prosecution evidence and to present evidence in support of the Accused; the Defence should ‘not be rewarded for employing yet another delaying tactic’. ICC-01/09-02/11-840-Red, para 1.

770 ICC-01/09-02/11-875, para 3.

771 ICC-01/09-02/11-886.

of proceedings.⁷⁷² Having recalled that a stay of proceedings is ‘an exceptional remedy only to be granted as a last resort’, the Chamber held that ‘a significant portion of the material relied upon by the Defence in the Application would more appropriately be used during cross-examination, rather than being presented prematurely as an attempted substitute for the trial itself.’⁷⁷³ The Chamber further stated that the alleged difficulties encountered in the Defence’s trial preparation do not warrant a stay of the proceedings, ‘particularly when those difficulties have been aggravated by the Defence’s own conduct.’⁷⁷⁴ Having rejected the application, the Chamber stated that ‘a variety of steps could be taken to address whatever unfairness, if any, the Defence faced in its trial preparation, including: (i) ruling certain testimony and other materials inadmissible, (ii) determining that certain evidence be given little to no weight at the end of the trial, (iii) making evidentiary inferences to counterbalance the fact that the Defence may have been wrongfully deprived of access to specific evidence, (iv) adjourning the trial to allow for additional investigations, and (v) ensuring that appropriate measures

are taken to protect Defence witnesses.’⁷⁷⁵ The Chamber was thus ‘unpersuaded that it would be odious or repugnant to the administration of justice to allow the proceedings to continue’, and further stated that it was ‘not persuaded that it is impossible for a fair trial to take place.’⁷⁷⁶ The Chamber also rejected the Defence request for a pre-trial evidentiary hearing to determine the issue of abuse of process, stating that it was ‘not persuaded that having an evidentiary hearing of the kind described by the Defence would materially impact this determination.’⁷⁷⁷

772 ICC-01/09-02/11-868-Red, para 104. Judge Eboe-Osuji attached a concurring separate opinion, in which he stated that he fully concurred with the outcome of the Chamber’s decision denying the request to stay Proceedings, and with ‘much of the reasoning expressed in the Main Opinion’. He preferred, however, to express himself ‘differently, in light of divergent views—possibly a matter of important nuances—on some of the legal premises of the decision’. ICC-01/09-02/11-868-Anx, para 1.

773 ICC-01/09-02/11-868-Red, para 99.

774 In this regard, the Chamber emphasised that the Defence had ‘acted with serious disregard for the safety of its own witnesses’, which ‘constituted a violation of the Defence’s obligations to respect confidential information and not to expose witnesses to unnecessary pressure outside the courtroom’. The Chamber warned the Defence that ‘future violations in this regard may be referred to the Registry pursuant to Article 34(l)(a) of the Code of Conduct’. ICC-01/09-02/11-868-Red, para 100.

775 The Chamber emphasised that the ‘fact that so many other options short of a stay of proceedings are available to respond to the Defence’s allegations confirms that granting the relief sought in the Application would be a disproportionate remedy’. ICC-01/09-02/11-868-Red, para 101. The Chamber also emphasised that ‘none of the findings in the present decision should be considered as pre-determining the credibility of any trial witnesses, the admissibility of any evidence or the need to implement any of the remedial measures outlined above. ICC-01/09-02/11-868-Red, para 102.

776 ICC-01/09-02/11-868-Red, para 103.

777 ICC-01/09-02/11-868-Red, para 108.

Kenya:

The Prosecutor v. William Samoei Ruto and Joshua Arap Sang

Appeals Chamber dismisses as inadmissible the Prosecution appeal against the decision on the Prosecution request to amend the Updated DCC

Background and the Appeals Chamber's decision

On 16 August 2013, Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II, rejected the Prosecution request to amend the Updated DCC, which had been filed as a confidential filing on 22 July 2013.⁷⁷⁸ The Prosecution had requested the Chamber's permission, pursuant to Article 61(9) of the Statute and Rule 128 of the Rules, to amend the charges for the limited purpose of extending the temporal scope of the crimes alleged in Counts 1 to 6 in the greater Eldoret area from 1 January through 4 January 2008 to 30 December 2007 through 4 January 2008.⁷⁷⁹ After the Single Judge granted the Prosecution request for leave to appeal,⁷⁸⁰ on 19 September 2013, the Prosecution filed its appeal, submitting that the Single Judge applied a wrong legal standard with regard to the Prosecution request to amend the updated DCC. First, the Prosecution submitted that the Appeals Chamber should determine whether the request causes 'unfair prejudice to the accused by assessing the type of amendment requested, its impact in light of the overall case and whether there is any available remedy that can minimise the prejudice to the accused'.⁷⁸¹ Second, the Prosecution submitted that the Appeals Chamber should consider the factors supporting the amendment, 'in particular, the Prosecution's duty to establish the truth and its right to continue its investigations after confirmation, the rights of the victims to participate in the proceedings where their interests are affected, and the nature of the amendment requested and whether it is supported by evidence'.⁷⁸² Third, the Prosecution submitted that the Appeals Chamber should consider the two

778 ICC-01/09-01/11-859, footnote 13 citing the Prosecution confidential filing ICC-01/09-01/11-824-Conf.

779 ICC-01/09-01/11-859, para 13 citing the Prosecution confidential filing ICC-01/09-01/11-824-Conf. The Single Judge observed that the Prosecution had on various occasions used a language to the effect that the temporal scope of the case was broadened to include the period not confirmed by the Chamber, and that by so doing, 'the Prosecutor showed persistent disregard for the Court's procedural regime envisaged by its founders, more specifically, those parts of the statutory documents which determine the structure of the proceedings, the functions of the pre-trial and trial chambers as well as the role and the procedural standing of the Prosecutor'. ICC-01/09-01/11-859, para 26. Considering whether to grant or deny the Prosecution request for amending the temporal scope of the charges, the Single Judge held that the Prosecutor should 'not benefit from an unfettered right to resort to article 61(9) of the Statute at her ease, particularly, if such permission will negatively affect other competing interests, such as the fairness and expeditiousness of the proceedings, which would result in causing prejudice to the rights of the accused'. ICC-01/09-01/11-859, para 31. The Single Judge emphasised that the Prosecutor had failed to provide the Chamber with 'any justification or valid reasons for such procedural conduct and excessive delays' (amounting to 7 months), which she stated was a 'compelling reason for the Single Judge not to accept the Prosecutor's argument that rejecting the requested amendment would cause a "monumental" prejudice to her case'. ICC-01/09-01/11-859, para 38.

780 ICC-01/09-01/11-912.

781 ICC-01/09-01/11-956, para 1.

782 ICC-01/09-01/11-956, para 1.

sets of factors and reject the amendment only if it still causes unfair prejudice to the rights of the accused.⁷⁸³

On 13 December 2013, the Appeals Chamber, by majority (Judge Ušacka dissenting),⁷⁸⁴ rendered its decision, in which, *inter alia*, it dismissed as inadmissible the Prosecution appeal against the decision on the Prosecution request to amend the Updated DCC.⁷⁸⁵ The Appeals Chamber observed that before addressing the merits of the Prosecution's arguments as to why the Impugned Decision was erroneous, it had to first consider whether the relief sought 'can, at this point in time, still be granted'.⁷⁸⁶ In this regard, the Chamber found that Article 61(9)

783 ICC-01/09-01/11-956, para 1. Accordingly, the Prosecution requested the Appeals Chamber to find that the Single Judge erred in the test or procedure that she applied to reject the Prosecution request, confirm the correct test and apply it to the request, and therefore, grant the Prosecution request to amend the temporal scope of the charges to include crimes committed in the greater Eldoret area on 30 and 31 December 2007. In the alternative, the Prosecution requested the Chamber to find that the Single Judge erred in the test that she applied to reject the Prosecution request, confirm the correct test, and to apply the test to the Prosecution request and instruct the Pre-Trial Chamber to authorise the amendment of the temporal scope of the charges on an expedited basis. In the further alternative, the Prosecution requested the Chamber to find that the Single Judge erred in the test that she applied to reject the Prosecution request, confirm the correct test, and to instruct the Pre-Trial Chamber to apply the correct test and make a new determination on an expedited basis. ICC-01/09-01/11-956, para 34. The Prosecution further requested that the Appeals Chamber should decide this appeal on an expedited basis. ICC-01/09-01/11-956, para 35. On 3 October 2013, pursuant to Regulation 28(2), the Prosecution invited the Appeals Chamber to order the Prosecution to make limited clarifications within one working day in the Appeal against the Decision on the Prosecution request to Amend the Updated DCC. The request was based on the Ruto Defence Response, in which it had been stated, *inter alia*, that the Prosecution did not 'expressly identify the Issue actually certified for appeal or focus its arguments on the same' and that the Prosecution 'jettison[ed] the Issue certified for appeal in favour of one it considers more convenient'. ICC-01/09-01/11-1010, paras 1, 4.

784 ICC-01/09-01/11-1123-Anx.

785 ICC-01/09-01/11-1123.

786 ICC-01/09-01/11-1123, para 25.

of the Statute 'prescribes that an amendment of the charges is no longer possible after the trial has begun' and further observed that opening statements in the present case were made on 10 September 2013, while the first witness was heard on 17 September 2013.⁷⁸⁷ Accordingly, the Chamber observed that 'irrespective of the precise moment at which the trial begins within the meaning of article 61(9) of the Statute, in the instant case, the trial has commenced'.⁷⁸⁸ The Chamber further held that the wording of Article 61(9) of the Statute 'indicates that not only the request to amend the charges has to be filed before the commencement of the trial, but also that the entire process of amending the charges must be completed by that time, including the granting of permission for the amendment by the Pre-Trial Chamber'.⁷⁸⁹ The Chamber emphasised that the 'only modification possible under the Court's legal framework thereafter is a change to the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court'.⁷⁹⁰ Accordingly, the Appeals Chamber held that, once the trial has commenced, it is no longer possible to amend or to add to the charges, irrespective of when the Prosecutor filed her request to amend the charges, and accordingly dismissed as inadmissible the Prosecution's appeal.⁷⁹¹

787 ICC-01/09-01/11-1123, para 27.

788 ICC-01/09-01/11-1123, para 27.

789 ICC-01/09-01/11-1123, para 29. The Appeals Chamber thus rejected the Prosecutor's submission that despite the wording of article 61(9) of the Statute, her appeal was not moot because she had asked for an amendment of the charges before the opening of the trial, and because that appellate jurisdiction, if intervening correctively, or instructing a lower chamber to make a new determination, will seek to re-instate the status quo ante and restore the party's situation as it was at the time when the right was affected by the lower Court. ICC-01/09-01/11-1123, para 28.

790 In this regard, the Chamber emphasised that Regulation 55 was introduced 'precisely to mitigate the fact that after the commencement of the trial the charges cannot be amended (including by the addition of more serious charges)'. ICC-01/09-01/11-1123, paras 29-30.

791 In this regard, the Chamber emphasised that the Prosecutor had failed to request a postponement of the trial in order to have the issue resolved prior to the commencement of the trial. ICC-01/09-01/11-1123, paras 31-32.

Dissenting opinion of Judge Ušacka

Judge Ušacka disagreed with the majority's decision to dismiss the appeal as inadmissible, emphasising that the dismissal was based on an interpretation given to Article 61(9) of the Statute which is 'merely one of several possible ways to address the period of time during which charges may be amended'.⁷⁹² In Judge Ušacka's view, the first sentence of Article 61(9) should be read in a way that provides a potential remedy for the Prosecutor's request, if any error is found on the merits of the appeal, and she therefore observed that the correct course of action would have been for the Appeals Chamber to first address the merits of the appeal, and only after doing so should the Appeals Chamber have fully assessed the implications of dismissing the appeal.⁷⁹³

Judge Ušacka observed that the majority had not relied on a systematic interpretation of Article 61 of the Statute, as they failed to take into account '[A]rticle 61 of the Statute in its entirety, its place in Part V of the Statute ('Investigation and Prosecution'), the full content of paragraph 9 of that article, the purpose of the confirmation proceedings, or the implications on the rights of the accused if a trial were to commence while an amendment request is pending'.⁷⁹⁴ She emphasised that to require the Prosecutor to take into account the length of amendment proceedings would 'be at odds with the fact that the Trial Chamber may commence the trial at any time'.⁷⁹⁵

792 ICC-01/09-01/11-1123-Anx, para 1.

793 ICC-01/09-01/11-1123-Anx, para 1.

794 ICC-01/09-01/11-1123-Anx, para 13.

795 ICC-01/09-01/11-1123-Anx, para 19. In this regard, she observed that the issue of when the Prosecution may seek an amendment and whether the amendment process must be finalised before the commencement of the trial 'are not easily answered and have many implications' and emphasised that imposing a requirement that the amendment proceedings must be concluded before the commencement of the trial 'limits considerably the scope of application of the Prosecutor's right to amend the charges and appears to be contrary to the overall purpose of article 61 (9) of the Statute'. ICC-01/09-01/11-1123-Anx, para 23.

Ruto and Sang trial commences

On 10 September 2013, the trial hearings in the Ruto and Sang case commenced, with both of the accused present before Trial Chamber V(a). Ruto and Sang pleaded not guilty to all charges.⁷⁹⁶

In the Prosecution's opening statement, Chief Prosecutor Fatou Bensouda emphasised that the two accused persons were charged for their role 'in the terrible crimes committed against the Kenyan people during the 2007 post-election violence: Mr Ruto, as a powerful politician, for his alleged role in planning and organising violence to achieve his political ambitions and satisfy his thirst for political power; Mr Sang, a radio broadcaster, for his alleged role in using his public voice to further Mr Ruto's criminal plans'.⁷⁹⁷ Prosecutor Bensouda stated that the Prosecution will demonstrate that Ruto and his 'syndicate of powerful allies', including his co-accused Sang, sought to exploit the historical tensions between Kalenjin and Kikuyu ethnic groups for their own political and personal ends.⁷⁹⁸ Accordingly, the Prosecutor stated that the violence was not 'random and spontaneous acts of brutality', but 'a carefully planned, co-ordinated and executed campaign of violence, specifically targeting perceived PNU supporters, targeting their homes and targeting their businesses'.⁷⁹⁹ The Prosecutor further stated that it will prove that this campaign of violence was 'conceived, planned, and implemented by a network of influential Kalenjin', led by their anointed leader, Ruto, 'a powerful political figure in the Rift Valley'.⁸⁰⁰ Sang, the Prosecution stated, functioned as the 'main mouthpiece' used by Ruto to spread his message.⁸⁰¹ Prosecutor Bensouda ended her statement by emphasising that the Prosecution 'intervened in this matter only after the Kenya efforts to establish a domestic mechanism to investigate the violence failed',⁸⁰² and further observed that the trial is the

796 ICC-01/09-01/11-T-27-ENG, p 12-13.

797 ICC-01/09-01/11-T-27-ENG, p 14 lines 6-11.

798 ICC-01/09-01/11-T-27-ENG, p 15 lines 11-14.

799 ICC-01/09-01/11-T-27-ENG, p 15 lines 17-20.

800 ICC-01/09-01/11-T-27-ENG, p 16 lines 3-5.

801 ICC-01/09-01/11-T-27-ENG, p 16 lines 16-17.

802 ICC-01/09-01/11-T-27-ENG, p 17 lines 9-10.

‘culmination of a long and difficult investigation’, which has been ‘fraught with co-operation challenges and obstacles relating to the security of witnesses.’⁸⁰³

Senior Trial Attorney Anton Steynberg continued the Prosecution’s opening statement relying on audio-visuals, including maps and video clips, and explained that these showed that the violence, which Ruto and Sang were responsible for organising and inciting, was aimed at targeting the Kikuyus in the Rift Valley.⁸⁰⁴ Prosecutor Steynberg also emphasised that the Prosecution expects that the Defence will rely on certain former Prosecution witnesses who have now recanted their written statements, noting that the Prosecution, if necessary, will present evidence as to the true motives behind their actions, namely that they have ‘been bribed to do so.’⁸⁰⁵

In the Ruto and Sang case, as discussed further in the section on **Victim Participation** in this Report, 628 victims have been accepted to participate in the trial proceedings, all of whom are represented by a single Legal Representative, Wilfred Nderitu.⁸⁰⁶ In his opening statement, the Legal Representative for Victims expressed hope that the Chamber would keep in mind that the victims are an ‘integral component of the case.’⁸⁰⁷ The Legal Representative further quoted a number of victims and pointed out that while the Prosecution and the Defence ‘may line up their witnesses to tell the 2007/2008 story, no one can relate the ordeal more vividly than the victims themselves.’⁸⁰⁸ The Legal Representative also emphasised that many of the victims he represented ‘are victims of repeat victimisation,

in some cases going back to the pre-election ethnic cleansing episodes of 1992 and 1997.’⁸⁰⁹ The Legal Representative concluded by stressing that justice requires that the Bench ‘be angry at the gross injustices meted out against innocent victims’, though such anger should not take the form of ‘irrational, temperamental anger, but rather rational, tempered outrage.’⁸¹⁰

The Ruto Defence, represented by lead Defence Counsel Karim Khan, in its opening statement emphasised that it saw the trial as an opportunity ‘to put forward the truth’, and to ‘blow away, hopefully, some of the cobwebs of confusion, the deceptions, the errors and the misconceptions that have so woefully befallen the Prosecutor in her investigations.’⁸¹¹ The Defence stated that throughout his life Ruto has been committed to ‘a brighter Kenyan future, a cohesive, united Kenya, marching forward not as a disparate group of ethnic communities, but as one people under one flag.’⁸¹² The Defence further criticised the Prosecution for being ‘exceptionally deficient’; for having ‘swallowed hook, line, and sinker, indifferent to the truth’; and for being guilty of ‘lazy prosecution.’⁸¹³ Having showed various video clips from political rallies in 2007 and other public events, the Defence noted that it should be clear that Ruto ‘is not a man driven by ethnic hatred.’⁸¹⁴ In contrast, the Defence argued, Ruto has been calling for peace.⁸¹⁵ The Defence concluded the opening statement by suggesting that the Prosecution ‘drop the case.’⁸¹⁶

In its opening statement, the Sang Defence emphasised that the Prosecutor had not conducted ‘proper investigations’, and that Sang did ‘not belong to this Court’, as he had ‘never belonged, as alleged, to any network.’⁸¹⁷ Further, the Sang Defence

803 ICC-01/09-01/11-T-27-ENG, p 18 lines 22-24.

804 ICC-01/09-01/11-T-27-ENG, p 20-34.

805 ICC-01/09-01/11-T-27-ENG, p 33 lines 11-19.

806 ‘Case Information Sheet (Prosecutor v. William Samoei Ruto and Joshua Arap Sang)’, *ICC Website*, available at <<http://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf>>, last visited on 24 February 2014.

807 ICC-01/09-01/11-T-27-ENG, p 35 lines 19-21.

808 ICC-01/09-01/11-T-27-ENG, p 37 lines 4-5. One of the victims quoted had stated that ‘[t]he only right I had, and the only mistake I made, was to have been present at the scene of commission of the crime.’ ICC-01/09-01/11-T-27-ENG, p 35 lines 13-15.

809 ICC-01/09-01/11-T-27-ENG, p 38 lines 15-17.

810 ICC-01/09-01/11-T-27-ENG, p 45 lines 7-9.

811 ICC-01/09-01/11-T-27-ENG, p 45-46.

812 ICC-01/09-01/11-T-27-ENG, p 46 lines 8-11.

813 ICC-01/09-01/11-T-27-ENG, p 46 lines 22-23, p 48 lines 23-25, p 51 lines 10-11, respectively.

814 ICC-01/09-01/11-T-27-ENG, p 70 lines 4-5.

815 ICC-01/09-01/11-T-27-ENG, p 76-77.

816 ICC-01/09-01/11-T-27-ENG, p 80 lines 10-15.

817 ICC-01/09-01/11-T-28-ENG, p 2 lines 14-18.

stated that Sang is ‘a law-abiding citizen’, who was ‘instrumental in calling for peace and calm in the period of violence, and his character is greatly and extensively governed by the Christian values which he was brought up in’.⁸¹⁸ The Sang Defence played various audio-tapes, which the Defence claimed pointed to Sang advocating for peace in the context of the election violence.⁸¹⁹ Although the Prosecution had objected, Sang was allowed to make a statement before the Chamber, in which he emphasised that he was interviewing politicians across the entire political spectrum during his time with KASS FM and was only an employee at the radio station who followed his superiors’ instruction.⁸²⁰

As of 22 November 2013, eight Prosecution witnesses had testified in the case, generally with significant portions of their testimony taking place in private session due to the need to protect the identity of the witnesses. Following the Prosecution requests,⁸²¹ Trial Chamber V(a) has authorised that a variety of protective measures be utilised for the witnesses that have testified, including image and voice distortion during testimony; assignment and use of a pseudonym; and limited *in camera* sessions.⁸²²

818 ICC-01/09-01/11-T-28-ENG, p 3 lines 7-10.

819 ICC-01/09-01/11-T-28-ENG, in particular p 5-8.

820 ICC-01/09-01/11-T-28-ENG, p 29-34. Following the Sang Defence opening statement, the Prosecution clarified that it did not claim that the accused was driven by ‘any endemic or inherent enmity towards the Kikuyu people’, but that he was driven by ‘a thirst for power or a quest for power and that he exploited existing tensions between the Kikuyu and the Kalenjin’ to that effect. ICC-01/09-01/11-T-28-ENG, p 41 lines 20-24. Additionally, the Prosecution clarified that its case was not about ‘an indictment of the Kalenjin people and the Kalenjin tradition’, but that ‘Ruto and his network, including elders in the Kalenjin tradition [...] hijacked those traditions’ in order to advance their political ends. ICC-01/09-01/11-T-28-ENG, p 42 lines 6-11. Finally, the Prosecution clarified that it would present ‘up to 22’ crime base witnesses, which means that the Prosecution will present additional witnesses who are not crime base witnesses. ICC-01/09-01/11-T-28-ENG, p 42 lines 12-16.

821 See ICC-01/09-01/11-845-Conf-Red; 01/09-01/11-1044-Red2; ICC-01/09-01/11-1102-Red.

822 The Chamber has granted the Prosecution requests in oral decisions during the trial hearings. See for example ICC-01/09-01/11-T-29-Red3-ENG, p 5.

The testimonies of these witnesses have focused on describing the violence that took place in the Rift Valley following the disputed 2007 election and the nature of the attacks, including their connection to ethnicity, and the context and locations in which they took place;⁸²³ political meetings and rallies that took place in 2007 and earlier, in which Ruto took part, including the statements he made during these meetings;⁸²⁴ Ruto’s relationship with other individuals and organisations, including the ODM political party, in the period surrounding the post-election violence and earlier;⁸²⁵ and issues pertaining to the radio

823 See eg ‘ICC Kenya Monitor’, *Open Society Justice Initiative*, summaries of testimony of Witness 535 (<http://www.icckkenya.org/2013/11/witness-describes-hundreds-being-ordered-to-carry-id-cards-in-their-mouths/>); Witness 423 (<http://www.icckkenya.org/2013/11/witness-clarifies-he-did-not-say-attackers-had-guns/>); <http://www.icckkenya.org/2013/11/witness-describes-four-day-attack-in-yamumbi/>; <http://www.icckkenya.org/2013/11/i-was-warned-of-attacks-days-before-2007-elections-says-witness/>); Witness 268 (<http://www.icckkenya.org/2013/10/witness-describes-how-kalenjin-owned-businesses-in-kapsabet-were-not-destroyed/>); Witness 487 (<http://www.icckkenya.org/2013/10/witness-tells-court-he-saw-drunken-man-being-hacked-to-death/>); Witness 376 (<http://www.icckkenya.org/2013/10/rutos-lawyer-denies-his-client-spoke-in-code-to-call-for-the-removal-of-kikuyu-in-rift-valley/>); <http://www.icckkenya.org/2013/10/fourth-prosecution-witness-describes-attack-in-langas-area/>); Witness 536 (<http://www.icckkenya.org/2013/09/first-prosecution-witness-narrates-how-attack-on-church-was-conducted/>).

824 See eg ‘ICC Kenya Monitor’, *Open Society Justice Initiative*, summaries of testimony of Witness 268 (<http://www.icckkenya.org/2013/11/witness-and-defense-lawyer-disagree-on-meaning-of-some-political-statements/>); <http://www.icckkenya.org/2013/10/witness-describes-how-kalenjin-owned-businesses-in-kapsabet-were-not-destroyed/>); Witness 487 (<http://www.icckkenya.org/2013/10/defense-lawyer-asks-witness-about-location-of-political-rallies/>); Witness 376 (<http://www.icckkenya.org/2013/10/rutos-lawyer-denies-his-client-spoke-in-code-to-call-for-the-removal-of-kikuyu-in-rift-valley/>).

825 See eg ‘ICC Kenya Monitor’, *Open Society Justice Initiative*, summaries of testimony of Witness 326 (<http://www.icckkenya.org/2013/10/ruto-was-the-kalenjins-leader-in-the-odm-party-says-witness/>); <http://www.icckkenya.org/2013/10/second-prosecution-witness-describes-how-odm-came-into-being/>).

show hosted by Sang, including the topics discussed and the persons interviewed.⁸²⁶

The trial hearings have been marked by numerous Defence allegations that Prosecution witnesses are lying and deceiving the Court. For example, the Ruto Defence, during its cross-examination, made various allegations that Prosecution Witness 536, whose testimony focused on the Kiambaa Church burning, was lying,⁸²⁷ that Prosecution Witness 326, who among others testified on political meetings and rallies held in the context of the 2007 elections, was lying and that the witness had been influenced by the ICC Prosecutor's promises of a 'good life', protection, financial gain and relocation to Europe,⁸²⁸ that Prosecution Witness 376, who testified about the attacks in the Langas estate in

826 See eg 'ICC Kenya Monitor', *Open Society Justice Initiative*, summaries of testimony of Witness 268 (<http://www.icckeny.org/2013/11/judges-decline-to-admit-into-evidence-some-recordings-of-program-sang-hosted/>; <http://www.icckeny.org/2013/11/witness-tells-court-radio-presenter-occasionally-allowed-divergent-views-on-his-show/>; <http://www.icckeny.org/2013/10/listeners-to-sangs-show-supported-odm-discussed-land-says-witness/>); Witness 326 (<http://www.icckeny.org/2013/10/ruto-was-the-kalenjins-leader-in-the-odm-party-says-witness/>).

827 Notes of Women's Initiatives for Gender Justice Legal Monitor.

828 The Ruto Defence stated *inter alia* that, 'you came out of hibernation after five years to deliberately deceive this court that you could be a witness for the prosecution'; 'after failing to give evidence to the Waki Commission and being frustrated at home, you saw an opportunity for riches, safe houses and relocation'. The Ruto Defence also repeatedly alleged that the witness was 'lying' with regard to the question of who was present at a particular press conference in 2007; generally alleged that witness was attempting to deceive the Court and 'deliberately fabricating evidence'. On several occasions, the Ruto Defence reminded the witness that he was under oath, and spoke of the consequences of giving false testimony. Judge Eboe-Osuji interrupted to clarify that only 'intentionally lying' can lead to prosecution, and that wrongly recalling minor details is not a crime. However, Judge Eboe-Osuji further stated that the value of witness' testimony may be re-evaluated if the witness is providing wrong information (which would amount to 'wasting the Court's time'). The Sang Defence also made allegations that the witness was lying with respect to attending certain meetings. Notes of Women's Initiatives for Gender Justice Legal Monitor; 'You have not stopped lying since you came here, Ruto defence tells witness', *Daily Nation*, 11 October 2013.

Eldoret area, was lying with respect to being present during the killing of an unnamed victim,⁸²⁹ and that Prosecution Witness 487, who testified on Ruto's participation in political rallies, was not telling the truth.⁸³⁰

The trial hearings were adjourned on 22 November 2013, and at the time of writing this Report, were scheduled to resume on 13 January 2014.⁸³¹ In so far as the Kenyatta trial commences, Trial Chamber V(a) has indicated that the two trials will be conducted in alternating periods in blocks of four weeks for each case.⁸³²

829 Notes of Women's Initiatives for Gender Justice Legal Monitor.

830 Notes of Women's Initiatives for Gender Justice Legal Monitor; 'Ruto team lays siege on flip-flop witness', *Daily Nation*, 24 October 2013. In addition, the Ruto Defence has implied that Prosecution witnesses are lying and deceiving the Court in contexts not related to the cross-examination of Prosecution witnesses. For example, during the opening statement, the Ruto Defence stated that 'those that think that there's a foreign court in a foreign land that can be easily deceived, that they can spin a yarn that will entrap an innocent man, should be aware that this Court can arrest and detain anybody who seeks to pervert the course of justice [...] no system of law anywhere in the world can operate with lying witnesses, with a culture where people can feel, as a shortcut to a better life, they may think, they can lie'. ICC-01/09-01/11-T-27-ENG, p 49-50.

831 However, the trial hearings did not resume until 16 January 2014. See 'Trial of Ruto and Sang resumes but largely closed to the Public', *Open Society Justice Initiative*, 17 January 2014.

832 ICC-01/09-01/11-T-26-Red-ENG, p 28-29. Trial Chamber V(a) had earlier rejected the Ruto Defence request to vary the Court sitting schedule to a '2 weeks on, 2 weeks off' basis: On 29 August 2013, the Chamber rejected the Defence application and confirmed that it will sit on a daily basis from 10 September to 4 October 2013, and from 14 October to 1 November 2013. Although the Chamber recognised that Ruto has 'constitutional responsibilities', it held that it is 'the imperatives of speedy trial, pursuant to the dictates of Article 64(2) of the Statute, that command the dominant consideration in the matter of the Chamber's sitting schedule', and further stated that it was 'not persuaded that this is an efficient way to conduct the proceedings in the present case'. Accordingly, whereas the Chamber stated that it appreciated the parties' and the Legal Representative's preference for a schedule based on two to four weeks' breaks, it was 'not persuaded that this is an efficient way to conduct the proceedings in the present case.' ICC-01/09-01/11-889, para 7.

Kenya: Common issues for both cases

Decisions on the accused's presence at trial

Trial Chamber V(a)'s decision with respect to Ruto

Although Article 63(1) of the Statute states that 'the accused shall be present during the trial', citing their functions as President and Deputy President, respectively, both Kenyatta and Ruto have sought permission to be excused from physical presence at trial. On 18 June 2013, Trial Chamber V(a), by majority (Judge Carbuccia dissenting),⁸³³ rendered its decision on Ruto's request of 17 April 2013 for excusal from continuous presence at trial, granting the request 'within the limits of certain conditions'.⁸³⁴

In part, these conditions related to certain hearings where Ruto must be physically present, namely:

- 1 the entirety of the opening statements of all parties and participants;
- 2 the entirety of the closing statements of all parties and participants;
- 3 when victims present their views and concerns in person;
- 4 the entirety of the delivery of judgement in the case;
- 5 the entirety of the sentencing hearings (if applicable);

⁸³³ Judge Carbuccia disagreed with the majority's decision to grant the Defence's request. Judge Carbuccia found that pursuant to Article 63(1) of the Statute, the presence of the accused during the trial is required, 'subject to the exceptional circumstance explicitly contained in paragraph 2 of that same provision'. ICC-01/09-01/11-777-Anx2, para 3.

⁸³⁴ ICC-01/09-01/11-777, para 2.

- 6 the entirety of the sentencing (if applicable);
- 7 the entirety of the victim impact hearings (if applicable);
- 8 the entirety of the reparation hearings (if applicable); and
- 9 any other attendance directed by the Chamber.⁸³⁵

As another condition, the Chamber decided that '[t]he absence resulting from excusal from continuous presence at the trial at other times must always be seen to be directed towards performance of Mr Ruto's duties of state'.⁸³⁶ As the Chamber granted Ruto's request for excusal from continuous presence at trial, Ruto's subsidiary request to attend the trial via video link was dismissed.⁸³⁷

The Appeals Chamber's decisions

On 24 June 2013, the Prosecution sought leave to appeal Trial Chamber V(a)'s decision on Ruto's request for excusal from continuous presence at trial 'on two fundamental legal issues that go to the interpretation and application of the principle enshrined in Article 63(1) whereby

⁸³⁵ ICC-01/09-01/11-777, para 3 (a).

⁸³⁶ ICC-01/09-01/11-777, para 3 (b). Furthermore, the Chamber conditioned the decision on the Ruto Defence filing with the Registry a waiver, which was attached to the decision. ICC-01/09-01/11-777, para 3 (c). The Chamber stated that '[v]iolation of any of these conditions of excusal may result in the revocation of the excusal and/or the issuance of an arrest warrant as appropriate', and established that the 'decision and its conditions may, from time to time, be reviewed by the Chamber, of its own motion or at the request of any party or participant'. ICC-01/09-01/11-777, paras 105-106.

⁸³⁷ ICC-01/09-01/11-777, conclusions. See further the initial joint Defence submissions on the legal basis for the accused's presence at trial via video link of 28 February 2013. ICC-01/09-01/11-629.

'[t]he accused shall be present during the trial', namely: (i) the scope of the requirement under Article 63(1) that the accused be present during the trial and whether, or to what extent, the Trial Chamber has a discretionary power to excuse an accused from attending most of the trial; and (ii) whether the test for an excusal of the accused developed by the majority is supported by the applicable law.⁸³⁸ On 18 July 2013, Trial Chamber V(a), by majority (Judge Eboe-Osuji dissenting),⁸³⁹ granted leave to the Prosecution to appeal the impugned decision on the first and second

issue.⁸⁴⁰ On 29 July 2013, the Prosecution filed its appeal with the Appeals Chamber.⁸⁴¹ Besides requesting that the Appeals Chamber reverse the Trial Chamber's decision, the Prosecution requested the Appeals Chamber to grant suspensive effect to the appeal by ordering that Ruto be required to attend trial until the appeal has been decided.⁸⁴² On 20 August 2013, without prejudice to the eventual decision on the merits of the Prosecution's appeal, the Appeals Chamber granted the Prosecution request for suspensive effect, meaning that Ruto was required to be present at the trial hearings until the Chamber delivered its decision.⁸⁴³

In mid September 2013, five African states — Tanzania, Rwanda, Burundi, Uganda and Eritrea — filed requests with the Court for leave to file *amicus curiae* briefs before the Appeals Chamber with respect to the pending decision relating to Ruto's presence at trial.⁸⁴⁴ These filings represent the first time that States Parties, and non-States Parties, which are not directly affected by the proceedings, have applied for, and been granted, leave to submit *amicus curiae* observations. Besides submitting that they could be 'of assistance for the determination of the relevant issues in the Appeal' relating to the interpretation of Article 63, some of the applications emphasised that the Appeal 'raises the issue of State cooperation',⁸⁴⁵ while

838 ICC-01/09-01/11-783, paras 2-4. On 27 June 2013, the Ruto Defence filed a response to the Prosecution leave application, requesting the Chamber to reject it. ICC-01/09-01/11-788.

839 In his dissenting opinion to Trial Chamber V(a)'s decision on the Prosecution's leave to appeal, Judge Eboe-Osuji emphasised, *inter alia*, that although 'presented under the guise of the tests indicated in article 82(1)(d) of the Statute, there is an enduring worry that the application for leave to appeal is really motivated by the need to test the correctness of the Chamber's resolution of a novel legal question for the Court—a resolution with which the party seeking leave disagrees'. ICC-01/09-01/11-817-Anx, para 2. Judge Eboe-Osuji also held that 'there is 'much that is wrong' with the Prosecution's view that 'all accused persons must be treated in the same manner, irrespective of the peculiar dictates of their individual circumstances', and in this regard observed that 'reasonable differences between or among accused persons according to the particular circumstances of each' are allowed, as long as every accused has equal opportunity to seek the procedural relief in question. ICC-01/09-01/11-817-Anx, paras 8-9. On this basis, Judge Eboe-Osuji stated that he was unable to see a 'solid grounding' in the reasoning of his colleagues, emphasising that the 'Majority's worry as to the possibility of a risk that the Appeals Chamber may disagree with the Trial Chamber in relation to the existence of the excusal discretion is just as speculative in the mouth of the Majority as it is in that of the Prosecution'. ICC-01/09-01/11-817-Anx, para 13. Having noted that Appellate courts do not nullify proceedings on the basis of 'harmless errors', Judge Eboe-Osuji further observed that even if the Appeals Chamber should disagree with the Trial Chamber, it would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. ICC-01/09-01/11-817-Anx, paras 13-14. Judge Eboe-Osuji thus concluded that leave should not have been granted under Article 82(1)(d).

840 ICC-01/09-01/11-817. The Chamber was thus satisfied that both issues were appealable issues within the meaning of Article 82(1)(d) of the Statute. ICC-01/09-01/11-817, paras 17-19.

841 ICC-01/09-01/11-831.

842 ICC-01/09-01/11-831, para 43.

843 ICC-01/09-01/11-862, para 11.

844 On 10 September 2013, the Registry transmitted the requests received from the United Republic of Tanzania and the Republic of Rwanda. See ICC-01/09-01/11-918 and ICC-01/09-01/11-921, respectively. On 11 September 2013, the Registry transmitted a new document received from the United Republic of Tanzania as well as the requests received from the Republic of Burundi, the State of Eritrea and the Republic of Uganda. See ICC-01/09-01/11-922, ICC-01/09-01/11-924, ICC-01/09-01/11-926 and ICC-01/09-01/11-928, respectively.

845 See eg ICC-01/09-01/11-922-anx.

others stated that the decision could impact the willingness of states that are not currently State Parties to ratify the Rome Statute.⁸⁴⁶ The Appeals Chamber, by majority (Judge Anita Ušacka dissenting),⁸⁴⁷ ruled that Tanzania, Rwanda, Burundi, Uganda and Eritrea may file observations on the matters identified in their requests.⁸⁴⁸ On 17 September 2013, the five States jointly submitted an *amicus curiae* brief, suggesting that Article 63 should be interpreted in a ‘broad and flexible’ manner that encourages state cooperation without endangering the constitutional obligations of ‘the highest office holders’ and that the Trial Chamber’s decision was ‘strictly correct’.⁸⁴⁹

On 25 October 2013, the Appeals Chamber delivered its judgement on the Prosecutor’s appeal against the Trial Chamber’s decision of 18 June 2013. The Appeals Chamber rejected Ruto’s request for an oral hearing and reversed the Trial Chamber’s decision.⁸⁵⁰

846 See eg ICC-01/09-01/11-921-anx.

847 ICC-01/09-01/11-942-ANX. Judge Anita Ušacka disagreed with the majority’s decision to grant the five States’ request to file observations under rule 103, noting that ‘[i]t is noteworthy that the proposed observations of the Applicant States appear to be aimed at highlighting the impact of judicial decisions of the Court in terms of encouraging or discouraging State cooperation or ratification of the Rome Statute by States that are currently not party thereto.’ In this regard, she stated that she had ‘serious reservations about the appropriateness of permitting five States, four of which are party to the Statute and one which is not, to submit observations of this nature in the circumstances of the present appeal’. ICC-01/09-01/11-942-ANX, para 3. She further held that ‘a distinction must be drawn between the role of the judiciary, on the one hand, and the role of States Parties, on the other hand’, and that ‘[a] strict separation between these two roles must be observed in order to preserve the independence of the judiciary’. ICC-01/09-01/11-942-ANX, para 4.

848 ICC-01/09-01/11-942. The Appeals Chamber rejected requests made at a later stage by Ethiopia and Nigeria for leave to submit observations under rule 103 of the Rules of Procedure and Evidence, noting among others that the requests related to ‘precisely the same issues’ as those raised by the five States that had already been granted leave. ICC-01/09-01/11-988, para 12.

849 ICC-01/09-01/11-948, paras 2-3.

850 ICC-01/09-01/11-1066.

In its judgement, the Appeals Chamber held that Article 63(1) of the Statute does ‘not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused’, but that the discretion that the Trial Chamber enjoys under article 63 (1) of the Statute ‘is limited and must be exercised with caution’.⁸⁵¹ The Appeals Chamber established the following limitations:

- 1 The absence of the accused can only take place in exceptional circumstances and must not become the rule;
- 2 The possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial;
- 3 Any absence must be limited to that which is strictly necessary;
- 4 The accused must have explicitly waived his or her right to be present at trial;
- 5 The rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and
- 6 The decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested.⁸⁵²

Concerning the question of whether Article 63(1) of the Statute is absolute in its terms or whether the provision allows the Trial Chamber some measure of discretion to excuse an accused person from attendance during the trial, the Appeals Chamber first observed that the accused person ‘is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant

851 ICC-01/09-01/11-1066, paras 1-2.

852 ICC-01/09-01/11-1066, para 2.

therein'.⁸⁵³ The Chamber further observed that it 'is important for the accused person to have the opportunity to follow the testimony of witnesses testifying against him or her so that he or she is in a position to react to any contradictions between his or her recollection of events and the account of the witness'; that it is 'through the process of confronting the accused with the evidence against him or her that the fullest and most comprehensive record of the relevant events may be formed'; that the 'continuous absence of an accused from his or her own trial would have a detrimental impact on the morale and participation of victims and witnesses'; and, more broadly, that 'the presence of the accused during the trial plays an important role in promoting public confidence in the administration of justice'.⁸⁵⁴ However, the Appeals Chamber was 'not persuaded by the Prosecutor's argument that a literal, contextual and teleological interpretation of Article 63 of the Statute shows that the removal of a disruptive accused is the only exception to the requirement that the accused shall be present during the trial'.⁸⁵⁵ The Appeals Chamber elaborated that '[d]uring the course of prolonged criminal proceedings, unforeseen circumstances may arise, necessitating the absence of the accused person on a temporary basis', and in this regard observed that 'the interests of justice and the psychological well-being of witnesses would not be best served if the trial had to be automatically adjourned in each such instance'.⁸⁵⁶

Accordingly, the Chamber held that '[a] measure of flexibility in the management of proceedings in such circumstances accords with the duty of the Trial Chamber to ensure that a trial is "fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and

witnesses" under article 64 (2) of the Statute' and helps to ensure 'justice in each individual case'.⁸⁵⁷

On this basis and having considered the *travaux préparatoires* as a secondary means of interpretation, the Appeals Chamber concluded that Article 63(1) of the Statute 'does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused'.⁸⁵⁸ The Appeals Chamber thus concluded that the Trial Chamber 'did not err in law when it found that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused person, on a case-by-case basis, from continuous presence at trial'.⁸⁵⁹ However, the Appeals Chamber found that the Trial Chamber had 'not properly exercised its discretion in the instant case', as the discretion that the Trial Chamber enjoys under Article 63(1) is 'limited and must be exercised with caution' and the presence of the accused 'must remain the general rule'.⁸⁶⁰ On this basis, the Appeals Chamber established the six standards for excusal from presence during trial mentioned above.⁸⁶¹

The Appeals Chamber concluded that the Trial Chamber interpreted the scope of its discretion 'too broadly and thereby exceeded the limits of its discretionary power', in particular because the Trial Chamber provided Ruto with 'what amounts to a blanket excusal before the trial had even commenced, effectively making his absence the general rule and his presence an exception'.⁸⁶² Finally, the Appeals Chamber observed that the Trial Chamber had excused Ruto 'without first exploring whether there

853 ICC-01/09-01/11-1066, para 49.

854 ICC-01/09-01/11-1066, para 49.

855 ICC-01/09-01/11-1066, para 50.

856 ICC-01/09-01/11-1066, para 50.

857 ICC-01/09-01/11-1066, para 50.

858 ICC-01/09-01/11-1066, para 55.

859 However, the Appeals Chamber held that the Trial Chamber's reference to Article 64(6)(f) of the Statute as the basis for this discretion was 'misplaced', as the Trial Chamber 'enjoys a measure of discretion under Article 63(1) of the Statute. ICC-01/09-01/11-1066, para 56.

860 ICC-01/09-01/11-1066, para 61.

861 ICC-01/09-01/11-1066, para 62.

862 ICC-01/09-01/11-1066, para 63.

were any alternative options’, and that the Trial Chamber ‘did not exercise its discretion to excuse Mr Ruto on a case-by-case basis, at specific instances of the proceedings, and for a duration limited to that which was strictly necessary’.⁸⁶³

Separate opinion of Judges Kourula and Ušacka

Judge Erkki Kourula and Judge Anita Ušacka appended a separate opinion to the judgement, in which they joined the majority in reversing the Trial Chamber’s decision, but stated their disagreement with the reasoning by which the majority reached their conclusions.⁸⁶⁴ In particular, the two judges disagreed with the majority’s finding that ‘the Trial Chamber did not err in law when it found that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused, on a case-by-case basis, from continuous presence at trial’.⁸⁶⁵ Having emphasised that the interpretation of provisions of the Statute is governed by Article 31 of the Vienna Convention on the Law of Treaties, the two judges observed that the ‘ordinary meaning of article 63(1) of the Statute is clear and unambiguous: “[t]he accused shall be present during trial”’.⁸⁶⁶

863 ICC-01/09-01/11-1066, para 63.

864 ICC-01/09-01/11-1066-ANX.

865 ICC-01/09-01/11-1066-ANX, para 1.

866 The use of the word ‘shall’, the two judges noted, clearly establishes that the presence of the accused is a requirement of the trial. ICC-01/09-01/11-1066-ANX, para 6.

They also observed that this interpretation was confirmed when Article 63(1) is read in its context, noting that the exceptions to the requirement that the accused be present are explicitly set out in the Statute, most notably in Article 63(2), and the possibility for the accused to waive his or her right to be present at the confirmation hearing is explicitly set out in Article 61(2)(a).⁸⁶⁷

Turning to the object and purpose of the Statute, the two judges found that ‘this also supports the conclusion that the presence of the accused is required during the trial’, noting that it ‘seems indisputable that the establishment of the presence of the accused as a requirement is consistent with the gravitas of the proceedings and their importance from the perspective of the victims of the alleged crimes and the international community as a whole’.⁸⁶⁸

The two judges further noted that in addition to the other factors mitigating in favour of the presence of the accused during the trial set out by the majority, it ‘is axiomatic that the presence of the accused at these hearings is important to facilitate his or her ongoing participation in the defence of the case against him or her’, and it ‘is important that the accused is present in order to allow the judges to have the opportunity to observe all parties, including the accused, as the evidence is presented’.⁸⁶⁹

867 In this light, they observed that Articles 63(2) and 61(2)(a) of the Statute, explicitly provide for the absence of the accused and clearly regulate the consequences of the accused’s absence in those cases and any related impact on the exercise of his or her rights, ‘demonstrating that the Statute does not allow for the introduction of a further unwritten exceptions to the requirement of presence’. ICC-01/09-01/11-1066-ANX, para 7.

868 ICC-01/09-01/11-1066-ANX, para 8.

869 ICC-01/09-01/11-1066-ANX, para 9.

On the basis of the above reasoning, they concluded that they ‘would have found that the ordinary meaning to be given to article 63(1) of the Statute in its context and in the light of its object and purpose is clear: the accused is required to be present during the trial’.⁸⁷⁰ In sum, the judges found that the Trial Chamber erred in law in finding that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused, on a case-by-case basis, from continuous presence at trial.⁸⁷¹

Decisions on Ruto’s presence in connection to the Westgate Shopping Centre attack

Due to the Appeals Chamber’s decision to grant suspensive effect pending the Prosecution’s appeal of Trial Chamber V(a)’s decision on Ruto’s excusal from continuous presence at trial, Ruto was present at the initial trial hearings. However, in the context of the late September 2013 attack on the Westgate Shopping Centre in Nairobi, the Trial Chamber adjourned the hearings for a period of seven trial hearing days in order to allow Ruto to return to Nairobi to address the crisis and aftermath surrounding the Westgate Attack.⁸⁷² Having excused Ruto from the proceedings, the Chamber held that it had ‘no discretion to continue the trial in Mr Ruto’s absence as a function of the Appeals Chamber’s suspensive effect decision’.⁸⁷³

In the context of the attack on the Westgate Shopping Centre, on 23 September 2013, the Defence also requested the Appeals Chamber to reconsider its decision to grant suspensive effect to the Trial Chamber’s decision on Ruto’s presence at trial.⁸⁷⁴ However, in its ruling of 27 September 2013, the Appeals Chamber dismissed Ruto’s request for reconsideration of the decision on the request for suspensive effect, noting *inter alia* the Prosecution’s concerns with regard to proceeding on the basis of an incorrect legal framework and the difficulties that may arise should witnesses who testified in Ruto’s absence be unwilling or unable to return to testify again.⁸⁷⁵

870 ICC-01/09-01/11-1066-ANX, para 10. While the two judges observed that since the meaning of Article 63(1) is clear there was no need to have recourse to the *travaux préparatoires*, given the ‘short period of time that has elapsed since the negotiations of the Statute were concluded, the *travaux préparatoires* may yet serve as a useful reference’. In this regard, they emphasised that ‘a wholesale departure from the intention of the drafters in order to give effect to a creative interpretation of the Statute would appear to be an inappropriate arrogation of the legislative function by the judiciary’. ICC-01/09-01/11-1066-ANX, para 11.

871 Having found that no such discretion exists, they also held that it was unnecessary to address the second ground of appeal raised by the Prosecutor. ICC-01/09-01/11-1066-ANX, para 16.

872 ICC-01/09-01/11-T-35-ENG; ICC-01/09-01/11-T-37-Red-ENG.

873 ICC-01/09-01/11-T-37-Red-ENG, p 8 lines 8-10.

874 ICC-01/09-01/11-977. The Prosecution opposed the request. See ICC-01/09-01/11-987-red.

875 ICC-01/09-01/11-993-red, para 10.

Trial Chamber V(a)'s practice concerning Ruto's presence at trial following the Appeals Chamber decision

Immediately following the Appeals Chamber's decision, on 25 October 2013, the Ruto Defence requested that Ruto be allowed to be absent from trial hearings from 28 to 30 October. The Defence stated that Kenyatta had planned a three-day meeting in Rwanda and cited the need for Ruto to be in Kenya to take charge of state affairs.⁸⁷⁶ The Trial Chamber granted the request, noting that the Prosecution had not opposed it.⁸⁷⁷ Additionally, on 1 November, the Trial Chamber granted Ruto's request to be absent from trial hearings from 4 to 8 November. The Defence had cited the need for Ruto to be in the country for the first three days due to Kenyatta undertaking a three-day official visit to South Africa, whereas excusal for the last two days was requested with reference to allowing Ruto to be in Nairobi in order to chair a 'refugee and drought meeting'.⁸⁷⁸ Finally, on 8 November, the Trial Chamber granted Ruto's request to be absent on 21 November, the first day of the trial hearings' resumption.⁸⁷⁹ The Defence had made the request citing the circumstance that Kenyatta would be attending the 3rd Africa-Arab summit in Kuwait from 18 to 20 November, and sought the excusal for 21 November on the basis that Kenyatta should be allowed to return to the country. The Prosecution opposed the last excusal request, with senior trial lawyer Anton

⁸⁷⁶ ICC-01/09-01/11-T-59-Red-ENG, p 13-19.

⁸⁷⁷ ICC-01/09-01/11-T-59-Red-ENG, p 81. While Trial lawyer Anton Steynberg had stated that on this occasion the Prosecution would not oppose the application, he cautioned that the prosecution's 'concession on this occasion should not be read as an undertaking for the future and not as a precedent to the Prosecution's attitude in the future'. ICC-01/09-01/11-T-59-Red-ENG, p 77 lines 7-8.

⁸⁷⁸ Notes of Women's Initiatives for Gender Justice Legal Monitor; 'Uhuru to leave for SA as Ruto jets in to run State affairs', *Daily Nation*, 2 November 2013.

⁸⁷⁹ Notes of Women's Initiatives for Gender Justice Legal Monitor; 'Ruto's ICC trial adjourned to Nov 21', *Daily Nation*, 8 November 2013.

Steynberg stating that Ruto's absence from court was 'becoming the general rule rather than the exception, contrary to the ruling of the ICC Appeals Chamber'.⁸⁸⁰

As media reports indicated that Ruto would not be in Kenya on 21 November, but instead be heading the Kenya delegation to the ASP in The Hague, on 20 November the Prosecution filed a request for provision of further information and reconsideration of the Chamber's decision to excuse Ruto from presence on the mentioned day.⁸⁸¹ The Ruto Defence submitted that the

⁸⁸⁰ He further noted that 'the only way to determine whether Mr Ruto's absence is the rule rather than the exception is to look at the days he has been away cumulatively'. Notes of Women's Initiatives for Gender Justice Legal Monitor; 'Ruto's ICC trial adjourned to Nov 21', *Daily Nation*, 8 November 2013.

⁸⁸¹ The Prosecution stated that it had 'been informed' that Ruto was set to lead the Kenyan delegation to the ASP 12th Session, and in this regard noted that Ruto's excusal request was 'premised on the fact that he would be constitutionally required to be present in Kenya until 21 November', due to the absence of Kenya's President during that time. Considering Ruto's imminent attendance at the ASP Session in The Hague, the Prosecution submitted that 'the underlying rationale for the request for excusal is no longer valid: either Kenyatta will return to Kenya before 20 November 2013, making Ruto available to appear at trial on 21 November, or alternatively Ruto's presence in Kenya is not in fact indispensable, notwithstanding Kenyatta's absence'. ICC-01/09-01/11-1104, para 1. Additionally, the Prosecution observed that, '[a]s leader of the Kenyan delegation to the ASP Session, it is highly likely that Ruto will address the Member States, take part in discussions with other delegates and give media interviews', and in this regard recalled this Chamber's previous directions that parties to the proceedings in this case are 'to refrain from commenting on the merits of the case in the press'. ICC-01/09-01/11-1104, para 2. The Prosecution requested the following relief: (a) That the Chamber direct the Defence to take explicit instructions and confirm or deny that Kenyatta will be attending the Africa-Arab Summit in Kuwait, and hence will be outside Kenya until 21 November 2013; (b) That the Chamber vacates its order excusing Ruto from attending his trial on 21 November 2013 and order his appearance; and (c) That the Chamber clarify that its prior rulings with respect to public statements on the merits of the case also apply at the ASP meeting and related events, or in the alternative, deliver a fresh order to this effect. ICC-01/09-01/11-1104, para 18.

Prosecution request should be dismissed ‘as precipitous, unnecessary and fundamentally lacking in legal foundation’,⁸⁸² noting that the request was ‘characterised by speculation and misconceived assumptions’.⁸⁸³ The Trial Chamber rejected the Prosecution request in an oral ruling.⁸⁸⁴ Ruto never attended the ASP and remained in Kenya while Kenyatta was out of the country.

In sum, as of 30 November 2013, the Trial Chamber had granted all of Ruto’s requests to be absent at trial, amounting to absence for a total of nine trial hearing days.

Trial Chamber V(b)’s decision with respect to Kenyatta’s presence at trial

On 28 February 2013, with the date for the start of trial set for 11 April 2013, the Kenyatta Defence submitted its request to the Trial Chamber to permit Kenyatta to be present during the trial via video-link from Kenya, as a means of participation in the proceedings on a regular basis, arguing that such a modality would satisfy the presence requirement in Article 63(1) of the Statute.⁸⁸⁵ The Prosecution and the Legal Representative opposed the request.⁸⁸⁶ Pursuant to the Trial Chamber’s order on submissions regarding the accused’s presence at trial via video link of 26 March 2013,⁸⁸⁷ on 9 April 2013, the Registry transmitted

its observations to the Chamber on possible modalities of a video link.⁸⁸⁸

On 23 September, however, the Kenyatta Defence requested that Kenyatta ‘be conditionally excused from continuous presence at trial’ submitting that ‘his physical presence is required only in respect of the opening and closing of trial and delivery of judgement’.⁸⁸⁹ The Defence further requested that in respect of ‘all other hearings’ at which Trial Chamber V(b) requires the presence of the accused, or at which ‘President Kenyatta requests to be present’, such presence is fulfilled by way of video-link.⁸⁹⁰ As in Ruto, both the Prosecution and the Legal Representative opposed the request.⁸⁹¹

On 18 October 2013, Trial Chamber V(b), by majority (Judge Ozaki partially dissenting),⁸⁹² delivered its decision on the Defence application, granting the request within the same limitations as Trial Chamber V(a) had granted Ruto’s

882 01/09-01/11-1109, para 1.

883 01/09-01/11-1109, para 4.

884 ‘ICC judges allow Ruto to skip trial despite Bensouda’s appeal’, *Daily Nation*, 21 November 2013.

885 ICC-01/09-02/11-667.

886 The Prosecution noted that the request lacked any legal basis since Article 63(1) is clear that an accused is required to be physically present at trial and that granting the request would not be in interests of justice. ICC-01/09-02/11-703. The Legal Representative additionally stated that the victims consulted had expressed strong opposition to permitting the accused to participate in trial by video link. ICC-01/09-02/11-686, para 10.

887 ICC-01/09-02/11-705.

888 ICC-01/09-02/11-715. The Registry noted that a secure location with good internet connection would be needed; that whereas the video link itself would be encrypted, phone communication between the parties in the courtroom and in the remote location would have to rely on local networks; and that with the need for having a reliable and constant electricity supply, a UPS or a generator should be used as backup. The Registry also noted that in so far as witnesses are to appear via video-link at the same time with the accused appearing on a video-link, an upgrade of Courtroom I is required. The Registry estimated the cost of the arrangement to amount to around €50,000 for a period of 12 months, and noted that a two-month period would be needed to make the necessary arrangements for trial hearings via video link.

889 ICC-01/09-02/11-809, para 1.

890 ICC-01/09-02/11-809, para 1.

891 The Prosecution submitted that the Defence’s request for conditional excusal from continuous presence at trial should be rejected because it ‘lacks a basis in law’. ICC-01/09-02/11-818, para 1. The Legal Representative also submitted that there was no legal basis for granting the request, and additionally submitted that the victims ‘are opposed to the absence of the Accused from the courtroom’. ICC-01/09-02/11-819, para 3.

892 ICC-01/09-02/11-830-Anx2.

request.⁸⁹³ The Chamber noted that the functions of an executive head of state or government are ‘significantly different from those of any other citizen—even of those who run the most important commercial enterprises within the state’.⁸⁹⁴ While the Chamber observed that the judicial inquiry into the allegations must go on, it also stated that it ‘is entirely possible to conduct such an inquiry in this Court, in a manner that permits the concerned head of state or government reasonable leeway to manage the affairs of his or her nation, when compatriots have given him or her that sovereign mandate—through the democratic process—in full knowledge of any criminal charge laid against that individual as an accused person, enjoying the presumption of innocence, before this Court’.⁸⁹⁵ The Chamber further observed that the ‘Rome Statute, when construed properly, implicates no jural dissonance that necessarily precludes such an arrangement’.⁸⁹⁶ In the circumstances, the Chamber held, it is ‘correct to conditionally grant

893 ICC-01/09-02/11-830, para 5. The Chamber stated that ‘the entirety of the material reasoning employed in [the Ruto] decision is fully applicable to the current request of Mr Kenyatta, with necessary variations’. An important point of variation, according to the Chamber, was that ‘Kenyatta is the President’, and that was ‘all the more reason that the Ruto relief should apply to Mr Kenyatta in a stronger way’. The reasoning of the majority in the Ruto Decision was therefore ‘fully adopted’ by the Chamber for purposes of the present decision. Strictly speaking, the Chamber stated, ‘no more needs be said than has already been said in the decision of the majority of the Trial Chamber V(A)’. ICC-01/09-02/11-830, para 67. Yet, the Chamber provided a detailed analysis of how Articles 27 and 63 should be interpreted, which was based, *inter alia*, on the arguments that the *Travaux Préparatoires* have limited value for interpreting rules in the Rome Statute and that considerations of ‘public policy’ must inform the interpretation of the Statute. ICC-01/09-02/11-830, paras 68-122. Besides granting the request, the Chamber noted that ‘in recent filings, including the one currently under consideration, the Kenyatta Defence refers to Mr Kenyatta and their team repeatedly by using his title as President’, and in this regard directed the Kenyatta Defence ‘to refrain from including Mr Kenyatta’s official title in its filings’. ICC-01/09-02/11-830, paras 56-57.

894 ICC-01/09-02/11-830, para 1.

895 ICC-01/09-02/11-830, para 3.

896 ICC-01/09-02/11-830, para 3.

the Defence request of the Chamber to excuse Uhuru Kenyatta from continuous presence at trial, in order to permit him to discharge his functions of state as the executive President of Kenya; while his trial proceeds, as it must do, in this Court’.⁸⁹⁷

Judge Ozaki delivered a partially dissenting opinion, stating that she disagreed with the decision of the majority to grant the Defence request for the accused to be conditionally excused from continuous presence at trial.⁸⁹⁸ Judge Ozaki stated that she disagreed with the majority that (i) Article 63(1) imposes no corollary obligation on the Chamber to require the accused’s presence and (ii) that the Chamber retains a discretion, by virtue of Articles 64(2) and 64(6)(f), to set aside this duty and to excuse an accused from attending substantially all of the trial.⁸⁹⁹ With regard to the Kenyatta request to participate in the trial by means of video-link, Judge Ozaki considered that the Chamber ‘retains a limited discretionary power to permit an accused to participate by means of video link where this is specifically justified by the circumstances’, but that when such discretion is exercised it ‘represents an exception to the general requirement of physical presence and any such determination should again

897 ICC-01/09-02/11-830, para 4. The Chamber stated that, to the extent that the Kenyatta Defence request for video link is incorporated in the primary relief requested in the Excusal Request, it was rejected, and that it did not consider it necessary to proceed to an analysis of the alternative request relating to the use of video-link. ICC-01/09-02/11-830, para 127.

898 ICC-01/09-02/11-830-Anx2, para 2.

899 ICC-01/09-02/11-830-Anx2, para 7. However, Judge Ozaki found that Article 64(2) and (6)(f) of the Statute does reserve ‘a limited discretionary power for the Chamber which would permit granting an accused, irrespective of his or her official status, a conditional excusal from presence at trial in certain exceptional circumstances’, but that such discretion should be ‘restrictively interpreted’. ICC-01/09-02/11-830-Anx2, para 16. Accordingly, Judge Ozaki held that determinations regarding excusal should only be considered on a ‘case by case basis, considering presence of the accused at trial as a whole and taking into account factors including the fairness and expeditiousness of the proceedings, the stage of proceedings, the rights of the accused under Article 67 of the Statute, the impact on victims and witnesses and the reason submitted to justify such an excusal’. ICC-01/09-02/11-830-Anx2, para 17.

be made on a case-by-case basis'.⁹⁰⁰ Accordingly, 'without prejudice to subsequent specific requests for excusal being raised for consideration on a case-by-case basis', Judge Ozaki would not have granted either the primary or alternative relief sought in the request.⁹⁰¹

Judge Eboe-Osuji delivered a separate further opinion, in which he stated that he and Judge Fremr 'fully agreed on what we have said in the majority Decision', but he felt it important to make additional observations on a number of issues.⁹⁰² Judge Eboe-Osuji's observations covered a number of topics, including the 'negative impact on the image of the court';⁹⁰³ 'the propriety of taking into account statements of leaders of states';⁹⁰⁴ and 'the

900 ICC-01/09-02/11-830-Anx2, para 20.

901 ICC-01/09-02/11-830-Anx2, para 22. Judge Ozaki observed that 'portions of the Majority decision reasoning' was 'repetitive, irrelevant to the question before the Chamber (including the use of selective quotations from various authorities) and/or, in some cases, incorrect', and in this regard emphasised that the Chamber should 'confine itself to consideration of the specific legal and/or factual matters before it'. ICC-01/09-02/11-830-Anx2, para 21.

902 ICC-01/09-02/11-830-Anx3-Corr2, para 1.

903 In this regard he observed that 'the empirical data points in the opposite direction', noting 'the stream of concerns registered by a number of African States, both individually and through the collective instrumentality of the African Union', and that it is 'not only naive for the judges and the prosecutor of this Court to ignore the views of heads of state in important questions of the day in international affairs, but it is also possibly wrong, as a matter of law, to do so'. ICC-01/09-02/11-830-Anx3-Corr2, paras 2-8.

904 In this regard he observed that the 'judicial attitude of ignoring statements of leaders of States is likely contrary to how international law as such really works', in part because 'political considerations, in the manner of state practice, are often an ingredient in the formation of customary international law itself', and further noted that the statements of leaders of State cannot be ignored by judges because 'Article 31(3)(b) of the VCLT recognises the "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"', and such subsequent state practice 'sits in superior hierarchy to *travaux préparatoires* as an aid to treaty interpretation'. ICC-01/09-02/11-830-Anx3-Corr2, paras 11-13.

Court's work in Africa as a matter of concern in the present case'.⁹⁰⁵

On 28 October 2013, following the Appeals Chamber's ruling on presence at trial in Ruto, the Prosecution filed a motion for reconsideration of Trial Chamber V(b)'s decision on Kenyatta's presence at trial (and in the alternative, an application for leave to appeal the decision).⁹⁰⁶ In summary, the Prosecution observed that

905 In this regard he observed that '[i]t is a matter, judicially noticeable, that, currently, the docket of the Court comprises exclusively of situations in Africa', which has 'led to criticisms that some may view as likely having the effect of weakening the confidence of the Court in the discharge of its mandate and, in turn, the relative potency of the Court'. ICC-01/09-02/11-830-Anx3-Corr2, paras 16-18. While Judge Eboe-Osuji held that '[i]t is understandable that the exclusively African content of the Court's current docket is a matter of concern for African leaders' and '[i]t may be accepted that they are entitled to press that concern in every legitimate way, as a matter of public policy', he also observed that the 'concern does not make legitimate all the demands and arguments that have been made in its name', including the 'complaint frequently heard that the Court has been used to target Africans and their leaders—including the accused in this case'. ICC-01/09-02/11-830-Anx3-Corr2, para 19. He also observed that it 'is difficult in those circumstances to accept as reasonable the proposition that the cases may no longer continue because some of those accused of complicity in the events have now been elected into office—after their cases have been in process at the Court', and instead found that the 'best approach' is to accept that these cases must be dealt with in 'a reasonable way, in accordance with the applicable regime of international law as expressed in the Rome Statute—including both Article 27 and indeed a sensible application of Article 16'. ICC-01/09-02/11-830-Anx3-Corr2, paras 39-40. Moreover, he stated that '[w]ere the prosecution to succeed in proving its case beyond a reasonable doubt, the Chamber could be urged in sentencing, to take into account any real contributions that the accused had made in the meantime in 'the consolidation of peace, reconciliation, reconstruction, democracy and development' in their country and their efforts "to ensure that the country does not slide back into violence and instability"', and 'such mitigating circumstances could result in penitent credits or suspended sentence pending completion of term of office, depending, of course, on other considerations as well'. ICC-01/09-02/11-830-Anx3-Corr2, para 43.

906 ICC-01/09-02/11-837.

the 'authoritative judgement of the Appeals Chamber effectively voids the *Kenyatta* decision, which fully adopts the reasoning of the *Ruto* decision, comes to the same conclusions, and grants identical relief'.⁹⁰⁷

On 26 November, the Trial Chamber, pursuant to Articles 63, 64 and 67 of the Rome Statute, by majority (Judge Eboe-Osui dissenting),⁹⁰⁸ granted the Prosecution motion for reconsideration; rejected the primary relief sought in the excusal request and determined that the Chamber will apply the standard as established by the Appeals Chamber to any future requests for excusal; and affirmed the excusal decision in all other aspects.⁹⁰⁹ The Chamber noted that the Statute does not provide guidance on reconsideration, but stated its agreement with the observation made by Trial Chamber I in *Lubanga* that it would be incorrect to state that decisions can only be varied 'if permitted by an express provision in the Rome Statute framework'.⁹¹⁰ The Chamber considered that the powers of a chamber allow it to reconsider its own decisions, prompted by (one of) the parties or *proprio motu*, when they are 'manifestly unsound and their consequences are manifestly unsatisfactory' and that reconsideration should only be done in 'exceptional circumstances'.⁹¹¹ In the present case, the Chamber considered that the judgement of the Appeals Chamber, even if rendered in the *Ruto* and *Sang* case, provided 'important new information' and 'guidance in relation to the question at issue that cannot be set aside by this Chamber', and thus considered that the reconsideration standard was satisfied.⁹¹²

907 ICC-01/09-02/11-837, para 1.

908 ICC-01/09-02/11-863-Anx-Corr.

909 ICC-01/09-02/11-863, paras 16-18.

910 ICC-01/09-02/11-863, para 11.

911 ICC-01/09-02/11-863, para 11.

912 ICC-01/09-02/11-863, para 12.

Amendment of Rule 134

As discussed in more detail in the **States Parties/ASP** section of this Report, during the 12th ASP held from 20 to 28 November 2013, Rule 134 of the Rules of Procedure and Evidence was amended to allow that an accused, subject to summons to appear, may on a case-by-case basis be present at trial through the use of video technology; and further that, in exceptional circumstances, an accused subject to summons to appear may be excused from presence at trial on a case-by-case basis while an accused who is 'mandated to fulfil extraordinary public duties at the highest national level' can be excused from presence and be represented by counsel only.⁹¹³

913 The new Rule 134*bis* concerning presence through the use of video technology reads: '(1) An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial; (2) The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.' The new Rule 134*ter* concerning excusal from presence at trial reads: '(1) An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial. (2) The Trial Chamber shall only grant the request if it is satisfied that: (a) exceptional circumstances exist to justify such an absence; (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate; (c) the accused has explicitly waived his or her right to be present at the trial; and (d) the rights of the accused will be fully ensured in his or her absence. (3) The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.' The new Rule 134*quater* concerning '[e]xcusal from presence at trial due to extraordinary public duties reads: '(1) An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial. (2) The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.' See Resolution ICC-ASP/12/Res.7.

On 15 January 2014, in an oral ruling relating to Ruto's request to be excused from continuous presence at trial, Trial Chamber V(a) applied the new Rule 134*quater*. The Chamber excused Ruto from presence at trial, except for the following hearings:

- 1 when victims present their views and concerns in person;
- 2 for the entirety of the delivery of the judgement in the case;
- 3 for the entirety of the sentencing hearing, if applicable;
- 4 for the entirety of the sentencing, if applicable;
- 5 for the entirety of the victim impact hearings, if applicable;
- 6 for the entirety of the reparation hearings, if applicable;
- 7 for the first five days of hearing starting after a judicial recess as set out in regulation 19*bis* of the regulations of the Court;
- 8 for any other attendance directed by the Chamber either or other request of a party or participant as decided by the Chamber.⁹¹⁴

Accordingly, the Trial Chamber departed from the standards created by the Appeals Chamber.⁹¹⁵

914 'Trial in the Ruto and Sang case: Relevant information and materials', *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/Pages/ruto-sang.aspx>, last visited on 24 February 2014.

915 The Appeals Chamber's ruling, ICC-01/09-01/11-1066, is discussed above.

Decisions on the location of the trials

Trial Chamber V(a) recommends that parts of the Ruto and Sang trial be conducted in Kenya or, alternatively, Tanzania

According to Articles 3 and 62 of the Statute and Rule 100 of the Rules of Procedure and Evidence, the ICC can consider holding proceedings in locations other than at the seat of the Court in The Hague, 'where the Court considers that it would be in the interests of justice'.⁹¹⁶ To date the Court has yet to hold any portion of any legal proceeding or trial in another location, although changes to the place of proceedings have been considered in several cases at different stages of the proceedings. In 2008 and 2012 in the Lubanga⁹¹⁷ and Bemba⁹¹⁸ cases respectively, Trial Chamber I and Trial Chamber III considered such a change in order to facilitate the testimony of witnesses. In 2011, in the two Kenya cases, Pre-Trial Chamber II considered holding the confirmation of charges hearings in Kenya.⁹¹⁹ Similarly, in 2012 and 2013, the Defence requested to change the place of the trial proceedings so that the defendants could carry out their political functions in Kenya.⁹²⁰

On 3 June 2013, the Trial Chamber notified the Presidency that it may be desirable to hold the commencement of the Ruto and Sang trial and other portions thereof in Kenya or, alternatively, in

916 Rule 100 of the RPE. As discussed in the *States Parties/ASP* section of this Report, Rule 100 was amended during the 12th ASP.

917 ICC-01/04-01/06-T-50-ENG, p 4 lines 11-21.

918 ICC-01/05-01/08-2242-Red, para 29. See also ICC-01/05-01/08-2448, 30 November 2012, Decision shortening time for observations on the 'Registry report to the Chamber on the feasibility of the modalities of specific arrangements in relation to witness testimony', paras 1-2.

919 See ICC-01/09-01/11-127; ICC-01/09-01/11-122.

920 ICC-01/09-02/11—551; ICC-01/09-02/11—581.

Tanzania.⁹²¹ Whereas the Chamber acknowledged the ‘importance of security for victims and witnesses in these proceedings and the need to ensure a fair and impartial trial free of any undue influence’, it emphasised the ‘proposed benefits of moving the trial to Kenya as a means of bringing justice closer to victims and the affected communities in Kenya’.⁹²² The Chamber further underscored ‘the significance of holding the trial close to the locality where the alleged crimes were committed’, while noting that ‘the parties, the Registry and the views of the Common Legal Representative for Victims himself are all favourable to the proposal that a portion of the trial be held away from The Hague’.⁹²³ In order to facilitate an expeditious further examination of the proposal to hold portions of the trial in Kenya or, alternatively, in Tanzania, the Chamber stated that it had requested the Registry to explore practical aspects of the proposal and prepare a feasibility study.⁹²⁴

The Plenary’s decision

On 15 July 2013, the ICC issued a press release which stated that, in a plenary session of 11 July 2013, the judges of the ICC, acting under Rule 100 of the Rules of Procedure and Evidence, had decided that the commencement of the trial will take place at the seat of the Court in The Hague, thus rejecting the joint Defence request to hold hearings in Kenya or in Tanzania and the Trial

921 ICC-01/09-01/11-763. On 24 January 2013, the Ruto and Sang Defence had filed a joint application for a change of place concerning where the Court shall sit for trial, requesting that the trial be moved from the seat of the court in The Hague, to either Kenya or Tanzania. See ICC-01/09-01/11-567. On 21 February 2013, the Prosecution made its submissions on the topic. See ICC-01/09-01/11-615. On 22 February 2013, the Legal Representative filed its observations on the Defence application. See ICC-01/09-01/11-620. On 8 March 2013, as ordered by the Chamber, the Registry filed its report with observations on the possibilities for changing the place where the court shall sit for trial. See ICC-01/09-01/11-643.

922 ICC-01/09-01/11-763, para 10.

923 ICC-01/09-01/11-763, para 10.

924 ICC-01/09-01/11-763, para 12.

Chamber’s recommendations.⁹²⁵ The decision of the Plenary, which was made public on 26 August 2013, made it clear that the required two-thirds majority necessary for a decision to change the seat of the Court had not been reached since nine judges had voted in favour of changing the seat of the Court to Kenya and five judges against it, and nine judges had voted in favour of changing the seat of the Court to Tanzania and four judges against, while one abstained.⁹²⁶ In reaching the decision, the judges had considered ‘factors such as: security issues; the costs of holding proceedings outside The Hague; the potential impact upon victims and witnesses; the length and purpose of the proceedings to be held away from the seat of the Court; the potential impact on the perception of the Court; and the potential impact on other proceedings before the Court’.⁹²⁷

The decision outlined the views of the judges in favour as well as those against holding proceedings away from the seat of the Court. The first group of judges⁹²⁸ ‘were of the opinion that the interests of justice would be served by bringing the proceedings as close as possible to the affected communities and to the location bearing the closest connection to the case’ and considered that the initiative would ‘give the affected communities a sense of ownership of the proceedings and demonstrate the way in which the Court functions, which would in turn

925 ‘Ruto and Sang case: Trial to open in The Hague’, *ICC Press Release*, ICC-CPI-20130715-PR931, 15 July 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr931.aspx>, last visited on 24 February 2014.

926 ICC-01/09-01/11-875-Anx, para 14.

927 ICC-01/09-01/11-875-Anx, para 12.

928 In relation to holding proceedings in Kenya Judges Monageng, Kuenyehia, Kourula, Trendafilova, Aluoch, Ozaki, Herrera Carbuccia, Fremr and Eboe-Osuji voted in favour. Judges Song, Tarfusser, Kaul, Ušacka and Fernández de Gurmendi voted against. In relation to holding proceedings in Tanzania; Judges Monageng, Tarfusser, Kuenyehia, Trendafilova, Aluoch Ozaki, Herrera Carbuccia, Fremr and Eboe-Osuji voted in favour. Judges Song, Kaul, Kourula and Fernández de Gurmendi voted against. Judge Ušacka abstained. ICC-01/09-01/11-875-Anx, footnotes 16-17.

further the Court's outreach programmes and help dispel criticisms that the Court is foreign to Africa'.⁹²⁹ The latter group of judges emphasised that while, as a matter of principle, they were in favour of holding proceedings closer to the affected communities and events, a survey of the views of the interested communities had not been sought in the instant case. They further expressed concern that 'holding proceedings away from the seat of the Court, in Kenya particularly, would be against the express will of some of the participants, given that a large majority of victims had maintained that holding the trial in Kenya may be inimical to their sense of security'.⁹³⁰ These judges also emphasised that rather than making savings to the budget, conducting proceedings in either Arusha or Nairobi would 'entail considerably higher costs than holding proceedings in The Hague'.⁹³¹ Furthermore, this group of judges stated that, '[i]n the specific circumstances of the case', they were 'not persuaded that holding the opening statements in Arusha or Nairobi was the best solution, due to an acute risk of politicisation surrounding the commencement of the Court's proceedings in the case and of ensuing negative press coverage or anti-ICC demonstrations'.⁹³²

Separate opinion of Judge Ozaki

Judge Ozaki attached a separate opinion, in which she stated that while she shared 'some of the concerns expressed by the judges who opposed holding proceedings away from the seat of the Court, especially with regard to the risk of politicisation of the proceedings and the security of victims and witnesses', she nevertheless voted for holding proceedings either in Kenya or

Tanzania.⁹³³ In this regard she emphasised that 'the Plenary should in principle refrain from overriding case-specific assessments made by the Chamber, given that the Chamber itself is most familiar with the details of the case'.⁹³⁴

Separate opinion of Judge Eboe-Osuji

Judge Eboe-Osuji attached a separate opinion in which he stated that as the presiding judge in the case, he felt 'an obligation to issue a separate opinion in this matter'.⁹³⁵ Having observed that nine out of the 14 judges present voted in support of the recommendation to commence the case either in Nairobi (as the preferred location) or Arusha (as the alternative location), he stated that '[i]t is highly to be regretted that the votes of five judges (including that of the President of the Court), who did not vote in favour of either of the alternative recommendations, were able to deny the two-thirds majority — ie the 10 votes — actually needed to approve the recommendation'.⁹³⁶ Judge Eboe-Osuji also observed that the reasons advanced by the five judges who did not vote in favour were 'regrettable', and in this regard emphasised that 'grave doubts exist that the fear of the risk of "politicisation" of the trial in Kenya is a reasonable basis to reject the idea of commencement of the trial even in Kenya', since the case 'by its very nature has already been "politicised"'.⁹³⁷

929 ICC-01/09-01/11-875-Anx, para 15. The judges in favour of holding proceedings away from the seat of the Court also emphasised a number of other factors, including that the risks associated with conducting proceedings away from the seat of the Court were 'manageable or acceptable'. ICC-01/09-01/11-875-Anx, para 18.

930 ICC-01/09-01/11-875-Anx, paras 21-22.

931 ICC-01/09-01/11-875-Anx, para 23.

932 They also stated that this view was 'without prejudice to the possibility of holding proceedings in the aforementioned locations at a later stage, following a new security assessment'. ICC-01/09-01/11-875-Anx, para 24.

933 ICC-01/09-01/11-875-Anx, para 27.

934 ICC-01/09-01/11-875-Anx, para 27.

935 ICC-01/09-01/11-875-Anx, para 28.

936 ICC-01/09-01/11-875-Anx, paras 29-31.

937 ICC-01/09-01/11-875-Anx, paras 32-33. Related hereto, he stated that '[w]ithout a doubt, the risk of demonstrations was allowed unduly to preoccupy consideration in the course of the Plenary, notwithstanding the absence of any suggestion that the demonstrations would be anything but peaceful'. ICC-01/09-01/11-875-Anx, para 37. He further noted that it 'was obvious that the Prosecution's late change of position had weighed on the mind of the judges who voted against the proposal', which was seen to be 'problematic for a number of reasons'. ICC-01/09-01/11-875-Anx, paras 45-46. Among others, Judge Eboe-Osuji strongly implied that an 'Open Letter' to the ICC, written by 'Kenyan for Peace with Truth and Justice', which stated opposition to the idea of conducting hearings in Kenya or Tanzania had politicised the process and influenced the Prosecutor as well as some of the judges in the Plenary. See eg ICC-01/09-01/11-875-Anx, para 50.

Presidency denies Ruto Defence request to vacate the decision of the Plenary of Judges

On 1 September 2013, the Ruto Defence applied to the Presidency of the ICC requesting that the decision of the Plenary of Judges be vacated, or in the alternative, that the Presidency reconvene the Plenary of Judges to decide whether the decision is void due to 'procedural impropriety'.⁹³⁸ The Defence submitted that the Plenary Decision must be vacated due to 'gross procedural unfairness', arising from the failure to reject the Prosecution's additional observations, which had been filed 'on the eve of the Plenary of Judges convening', or alternatively, the failure to adjourn the Plenary session in order to allow the Defence and other interested parties to respond to the submissions.⁹³⁹

On 6 September 2013, The Presidency dismissed the Defence application, noting that on 12 July 2013, the day after the Plenary had met, Judge Eboe-Osuji had presented a motion to vacate the Plenary's decision. Judge Eboe-Osuji reasoned that there had been procedural irregularities because the Prosecution had filed its second set of observations immediately before the Plenary met and the Defence had not had the possibility to respond.⁹⁴⁰ The Presidency stated that the majority of judges had not supported vacating the decision on

938 ICC-01/09-01/11-897, para 1.

939 ICC-01/09-01/11-897, para 2. Citing the Separate opinion of Judge Eboe-Osuji, the Defence submitted that it was clear that these additional submissions of the Prosecution were 'either decisive or weighed heavily on the deliberations and decision of the Plenary of Judges'. ICC-01/09-01/11-897, paras 2-4. The Defence also submitted that 'the appearance of fairness was undermined by the fact that the Prosecution's change of position was filed one day after the delivery of the Open Letter to the President of the Court from a known opponent of Mr. Ruto who opposed Trial Chamber V(A)'s decision to excuse Mr. Ruto from continuous presence at trial'. ICC-01/09-01/11-897, para 6.

940 ICC-01/09-01/11-911, para 7.

these grounds and observed that the Defence had brought forward the same arguments.⁹⁴¹

Trial Chamber V(b) orders further observations on where the Court shall sit for trial

On 29 July 2013, Trial Chamber V(b) issued an order for further observations on where the Court shall sit for trial in the case against Kenyatta.⁹⁴² The Chamber recalled that the only application for a change of the place where the Court shall sit for trial was made by the Muthaura Defence and that in view of the withdrawal of the charges, applications previously made by the Muthaura Defence were moot.⁹⁴³ Nonetheless, the Chamber found it appropriate to request the parties' and participants' observations on the question of whether the Chamber may consider the matter on its own and issue a recommendation to the Presidency irrespective of the discontinuance of the procedure initiated by the application.⁹⁴⁴ The parties filed their observations in August

941 ICC-01/09-01/11-911, para 8. The Presidency also stated that there is no legal basis in the Statute for challenging a Plenary decision. ICC-01/09-01/11-911, paras 12-13.

942 ICC-01/09-02/11-781.

943 ICC-01/09-02/11-781, para 7.

944 ICC-01/09-02/11-781, para 7. In this regard, the Chamber noted 'that in March 2013, after the submission of the observations by the parties, the Common Legal Representative for Victims and the Registry, a general election took place in the Republic of Kenya, including a presidential election', and emphasised that '[t]his fact is of relevance to the Chamber's consideration of the matter, should it decide to make a recommendation to the Presidency'. ICC-01/09-02/11-781, para 8. Accordingly, the Chamber found it necessary to seek updated observations regarding the place where the Court shall sit for trial, and thus directed the Prosecution, the Kenyatta Defence, the Legal Representative and the Registry to file, no later than 13 August 2013, observations on (1) the propriety of the Chamber considering the matter of the place for trial on its own, and (2) the issue whether the opening of trial and/or another appropriate portion of trial shall be held in Kenya or Tanzania. ICC-01/09-02/11-781, para 9.

2013,⁹⁴⁵ but at the time of writing this Report, the Chamber was yet to rule on the matter.

Protection of witnesses in the context of the trials⁹⁴⁶

Following the Prosecution requests,⁹⁴⁷ in the Ruto and Sang case Trial Chamber V(a) has authorised that a variety of protective measures be utilised for the witnesses that have testified, including image and voice distortion during testimony; assignment and use of a pseudonym; and limited *in camera* sessions.⁹⁴⁸

945 The Kenyatta Defence stated that it had ‘no objection to the Chamber considering the matter of the place of trial *proprio motu* and issuing a recommendation to the Presidency irrespective of the fact that Mr Muthaura is no longer an accused’, and further noted that it did ‘not object to the Chamber holding the opening of the trial or another appropriate portion of the trial in Kenya or Tanzania’. ICC-01/09-02/11-784, paras 2, 5. In contrast, the Prosecution and the Legal Representative submitted that the Trial Chamber cannot, on its own initiative, submit a recommendation to the Presidency for change the place where the Court shall sit for trial. See ICC-01/09-02/11-790, paras 4-5; ICC-01/09-02/11-786, para 3, respectively. The Prosecution additionally submitted that, in the event the Chamber disagrees with the above, changing the place where the Court sits for the trial, or any part thereof, would be ‘against the interests of justice and its witnesses’. ICC-01/09-02/11-790, para 25. Among others, the Prosecution emphasised that ‘circumstances have changed such that holding any part of the trial in Kenya would not be in the interests of justice’ as ‘recent events reveal the existence of a high level of hostility towards the ICC in Kenya’, and further pointed to an ‘ongoing campaign by elements of the Government of Kenya to discredit the Court and derail the present case’, which have ‘created a context in which elements of the Kenyan population may not welcome the ICC or its staff should any portions of the trial be held in Kenya’. ICC-01/09-02/11-790, paras 12-16.

946 The Chambers’ decisions relating to the participation and protection of victims and witnesses which were made before the commencement of the trials are discussed in the *Victim and Witness Issues* section of this Report. Accordingly, this section only provides for a brief summary of the decisions relating to protection of witnesses made in the context of the trial hearings in the Kenya cases.

947 See ICC-01/09-01/11-845-Conf-Red; 01/09-01/11-1044-Red2; ICC-01/09-01/11-1102-Red.

948 The Chamber has granted the Prosecution requests in oral decisions during the trial hearings. See eg ICC-01/09-01/11-T-29-Red2-ENG, p 5.

In the run-up to the commencement of the Kenyatta trial, on 11 October 2013, the Prosecution filed a request for protective measures and protection against self-incrimination for its first ten witnesses. As in the Ruto and Sang case, the Prosecution requested the Chamber to authorise image and voice distortion; continued use of witness pseudonyms; and limited *in camera* sessions for identifying evidence.⁹⁴⁹ Additionally, the Prosecution requested the Chamber to provide assurances against self-incrimination under Rule 74 for six of its first ten witnesses, emphasising that public disclosure of the potentially self-incriminating evidence of these witnesses may expose them to a risk of prosecution outside this Court.⁹⁵⁰ In this regard, the Prosecution submitted, *inter alia*, that unlike in previous cases before the Court, there was no guarantee by the Government of Kenya not to prosecute ICC witnesses on the basis of their testimony; neither did any domestic amnesty laws apply to the perpetrators of the post-election violence.⁹⁵¹

Whereas the Legal Representative for Victims submitted that he did not oppose the relief sought in the Prosecution request,⁹⁵² the Kenyatta Defence submitted that the Prosecution request should be rejected.⁹⁵³ The Defence submitted that the requested measures ‘constitute inducements to the identified witnesses to provide evidence to fit the Prosecution case and effectively grant an immunity against prosecution for individuals who may either: (a) bear responsibility for acts of serious violence during the PEV; or (b)

949 ICC-01/09-02/11-823-Red2, para 1. As in the Ruto and Sang case, the Prosecution emphasised that recent actions by the Kenyan Parliament have exacerbated witnesses’ concerns and ‘chilled the willingness of Kenyans to be seen to cooperate with the ICC, which in turn increases the risks to witnesses’. ICC-01/09-02/11-823-Red2, paras 9-10.

950 ICC-01/09-02/11-823-Red2, para 2.

951 ICC-01/09-02/11-823-Red2, para 30.

952 ICC-01/09-02/11-834.

953 ICC-01/09-02/11-854.

be falsely claiming to have committed such crimes'.⁹⁵⁴ Further, the Defence submitted that the in-court protective measures sought by the Prosecution under Article 68(1), including image and voice distortion, continued use of witness pseudonyms, and limited *in camera* sessions for identifying evidence, 'are neither necessary nor proportionate and should be denied'.⁹⁵⁵

At the time of writing this Report, Trial Chamber V(b) was yet to rule on the Prosecution request.

Delays commencing the trials

The trial date for the Ruto and Sang case has been vacated two times. On 8 March 2013, Trial Chamber V decided to vacate the trial commencement date of 10 April 2013 and set the new date for start of trial for 28 May 2013.⁹⁵⁶

Further, on 6 May 2013, the Chamber announced that it had decided to provisionally vacate the trial date of 28 May 2013, emphasising that it was 'not feasible, at this stage', to retain 28 May 2013 as the start date for the trial due to 'a number of procedural issues relating to the conduct of proceedings', including the Prosecution 12 April 2013 request to add five new witnesses to its witness list and add their evidence to its list of evidence.⁹⁵⁷ Emphasising the Prosecution's late disclosure of evidence and requests to add new witnesses for trial, on 3 June 2013, Trial Chamber

954 ICC-01/09-02/11-854, para 2.

955 ICC-01/09-02/11-854, para 3.

956 ICC-01/09-01/11-642.

957 ICC-01/09-01/11-722. The Chamber stated that a new trial date will be set following a public status conference which was conducted on 14 May 2013, during which the parties and participants presented their observations on the Prosecutor's request to add five witnesses to the list of witnesses, the Defence's request to vacate the trial date and related issues. See 'Ruto and Sang case: Trial to open in The Hague', ICC-CPI-20130715-PR931, *ICC Press Release*, 15 July 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr931.aspx>, last visited on 25 February 2014.

V(a) set a new trial date for 10 September 2013, which was the date the trial actually commenced.⁹⁵⁸

The trial date for the Kenyatta case has been vacated four times. On 7 March 2013, Trial Chamber V vacated the trial commencement date of 11 April 2013 in the case against Muthaura and Kenyatta. The Trial Chamber provisionally set a new date of 9 July 2013 in order to resolve the 'very serious issues' raised by the Defence applications requesting a referral back to the Pre-Trial Chamber, as well as 'the defence submissions relating to the impact of delayed disclosure'.⁹⁵⁹ Further, as described above, in response to the scope of the Prosecution's post-confirmation investigation and related issues, in its decision on Kenyatta's Article 64(4) Application of 26 April 2013, the Trial Chamber decided that the Defence would be provided with further time, beyond 9 July 2013, to conduct its investigations and fully prepare for trial.⁹⁶⁰

958 The Defence had requested to be allowed extra time to prepare for trial and vacate the trial date of 28 May 2013 and set a new trial date for November. Although the Chamber stated that it was 'deeply concerned by both the significant volume of late disclosure in this case and the fact that at this late date, additional evidence still remains to be disclosed to the Defence', it stated that it was 'not persuaded that an additional delay of such an extensive period (more than five months) is necessary in order to permit the Defence adequate time to carry out investigations and otherwise adequately prepare for trial'. The Chamber further recalled its previous decision delaying the original trial date, in which it had held that 'the disclosure of a large amount of materials dose to the scheduled commencement date of trial puts a significant burden on the Defence's preparation'. ICC-01/09-01/11-762, paras 90-91. Taking into account that 'very recent disclosure' of screening notes and the identity of P-534 are still unknown to the Defence and that the present decision had authorised the Prosecution to add to its witness list two witnesses whose identities were not yet known to the Defence, the Chamber concluded 'that three months after the full disclosure of the evidence that the Prosecution intends to rely on at trial allows the Defence sufficient time to be ready for trial', and accordingly adjourned the trial date until 10 September 2013. ICC-01/09-01/11-762, paras 92-94.

959 ICC-01/09-02/11-677, para 10.

960 ICC-01/09-02/11-728, para 125. The Trial Chamber noted that the 'most appropriate remedy' for the 'prejudice' caused by post-confirmation investigation is to provide the Defence with 'further time to conduct its investigations and to fully prepare for trial in light of the new evidence', and invited the Defence to make submissions on the time needed for preparation before deciding on the trial date (but meanwhile retained 9 July as the trial date). See ICC-01/09-02/11-728, paras 124-128. As the Chamber had invited, on 14 May 2013, the Kenyatta Defence submitted its written observations on the time required to prepare for trial, requesting that the trial date be set for January 2014. See ICC-01/09-02/11-735-Red.

Following the parties' submissions, on 20 June 2013, Trial Chamber V(b) set a new trial date for 12 November 2013. In this connection, the Chamber emphasised that the Defence should be 'entitled to several additional weeks preparation time, on top of the three month period previously determined by the Chamber, to compensate for the time expended on completing the disclosure of the audio files and the review of the transcripts of the follow-up interviews conducted after 9 January 2013'.⁹⁶¹

961 ICC-01/09-02/11-763-Red, para 38. The Chamber recalled that the Defence had requested the Chamber to postpone the commencement of trial until January 2014, whereas the Prosecution had submitted that the trial should begin as soon as possible and, at the latest, shortly after the Court's summer recess. ICC-01/09-02/11-763-Red, paras 3, 16. Taking note of its earlier statement that it 'would be guided by its previous finding that three months after the date of full disclosure provides adequate time to prepare', the Chamber observed that the question now before it 'is whether to grant the Defence additional time, beyond three months, for its preparations and when that period should start running'. ICC-01/09-02/11-763-Red, para 28. The Chamber emphasised that 'the disclosure deadline of 9 January 2013 was a final deadline and disclosure was expected to take place on a rolling basis prior to then', and in this regard observed that it 'was not anticipated when setting that deadline and allocating three months preparation time to the Defence that such a significant volume of newly collected evidence would only be disclosed in January 2013'. ICC-01/09-02/11-763-Red, para 30. The Chamber also stated that it was not 'anticipated that the Prosecution would request delayed disclosure in respect of such a significant number of its witnesses'. In these circumstances, the Chamber did 'not accept the arguments of the Prosecution or the Legal Representative that the Defence has already had sufficient time to prepare its case'. ICC-01/09-02/11-763-Red, paras 31-32. The Chamber concluded that while 'in principle' it would have set the date of commencement of the trial for early October 2013, 'scheduling conflicts, logistical and other constraints, including availability of courtrooms, arising from the other ongoing cases before the Court prevent the Chamber from setting this date and necessitate a further delay of approximately one month before trial can commence'. ICC-01/09-02/11-763-Red, para 40.

With reference to ongoing Defence investigations relating to the presence of Prosecution witnesses during their alleged meetings with Kenyatta, during a status conference on 6 September 2013, the Kenyatta Defence requested that the trial date be postponed to January 2014.⁹⁶² Whereas the Prosecution and the Legal Representative initially opposed the request,⁹⁶³ the Prosecution soon after stated its agreement with the Defence that the trial date of 12 November should be vacated and a new trial date set for February 2014 in order to give the Prosecution additional time to investigate factual allegations relating to Prosecution witnesses raised by the Defence.⁹⁶⁴ Citing the parties' agreement, the Trial Chamber decided to vacate the trial date of 12 November 2013 and provisionally set a trial commencement date of 5 February 2014.⁹⁶⁵

However, on 19 December 2013, the Prosecution requested an adjournment of the provisional trial date for three months, 'which will enable it to undertake additional investigative steps — including those not previously open to the Prosecution — to determine whether a case can be presented to the Chamber that establishes the Accused's guilt beyond reasonable doubt'.⁹⁶⁶ The Prosecution additionally proposed that the Chamber convene a status conference in the last week of January 2014 in which the Prosecution

962 See 'President Kenyatta Seeks Trial Date Adjournment To January', K24, 6 September 2013.

963 See 'President Kenyatta Seeks Trial Date Adjournment To January', K24, 6 September 2013.

964 ICC-01/09-02/11-842-red. The Defence's written application was made in ICC-01/09-02/11-763-835-Red.

965 ICC-01/09-02/11-847.

966 The Prosecution observed that there was 'potential for these investigative steps to produce evidence shedding light on key allegations in this case', and in this regard emphasised that it 'believes they must be pursued in accordance with its Article 54(1) duties, to ensure that every effort has been made to hold to account those most responsible for the crimes committed during the 2007-2008 post-election violence ('PEV'), and to seek justice on behalf of the victims, who continue to wait for their day in court, almost six years after the crimes were committed'. ICC-01/09-02/11-875, para 3.

will update the Chamber on the progress of the investigative steps, and answer any questions the Chamber may have.⁹⁶⁷

The Prosecution stated that one of its witnesses, P-0012, recently admitted that he ‘provided false evidence regarding the event at the heart of the Prosecution’s case against the Accused’, and that it thus no longer intended to call P-0012 as a witness. The Prosecution further stated that another witness, P-0011, had informed the Prosecution that he is no longer willing to testify at trial.⁹⁶⁸ In light of these developments, the Prosecution considered that ‘it has insufficient evidence to proceed to trial at this stage’.⁹⁶⁹

With respect to P-0012, the Prosecution stated that the witness had stated in a number of interviews that he attended a meeting at Nairobi State House on or about 30 December 2007, in which he described the ‘[a]ccused participating in the organisation and funding of violence that later unfolded against perceived ODM supporters’, but during the last interview, conducted on 4 December 2013, he ‘admitted that he was not at the alleged 30 December 2007 meeting and had previously lied to the Prosecution regarding this event’.⁹⁷⁰ With respect to P-0011, the Prosecution stated that on 1 November 2013, the witness had informed the Prosecution that he was no longer willing to

967 ICC-01/09-02/11-875, para 4. Having noted that the Defence will likely wish to make submissions on the matters raised in the application, the Prosecution suggested that ‘it would be appropriate for the Chamber to convene a status conference so that the parties can state their positions and the Chamber can ask any questions it may have’, and in this regard observed that ‘it would be appropriate for the status conference to be held during the week beginning 27 January 2014 because by that time, the Prosecution will be in a position to update the Chamber regarding the progress of the investigative steps laid out in confidential, *ex parte* Annex A’. ICC-01/09-02/11-875, para 23.

968 ICC-01/09-02/11-875, para 2.

969 ICC-01/09-02/11-875, para 3.

970 The witness instead stated that he had ‘learned about the alleged meeting from someone else’. ICC-01/09-02/11-875, paras 7-9.

appear as a witness in the Kenyatta case and asked to be removed from the list of witnesses.⁹⁷¹

As to the significance of the witnesses, the Prosecution observed that the loss of P-0012’s purportedly eye-witness account ‘has a substantial effect on the Prosecution’s case’, since P-0012’s account ‘lay at the heart of the Prosecution’s evidence, providing a critical link between the Accused and the crimes in Nakuru and Naivasha’.⁹⁷² Having considered the impact of P-0012’s recantation on the case as a whole, the Prosecution stated that it did not consider that it ‘is currently in a position to present a case that satisfies the evidentiary standard applicable at trial, “beyond reasonable doubt”’.⁹⁷³ Additionally, the Prosecution stated that P-0011’s withdrawal had ‘undermined the Prosecution’s case, removing evidence regarding the intermediaries who allegedly oversaw the attacks on the Accused’s behalf, as well as evidence regarding the logistical support provided to the attackers’.⁹⁷⁴

The Prosecution submitted that the proposed adjournment would enable it to conduct ‘additional investigative steps, including those not previously open to the Prosecution, to determine whether a case can be presented to the Chamber that will establish the Accused’s guilt to Article 66(3)’s beyond reasonable doubt standard’.⁹⁷⁵ More specifically, the Prosecution submitted that the proposed adjournment would enable the Chamber to ‘adjudicate the

971 ICC-01/09-02/11-875, para 11. The Prosecution stated that its staff spoke with P-0011 on 12 November to discuss his wish to withdraw, but P-0011 maintained that he was unwilling to continue as a witness. Whereas during a meeting with staff from the Prosecution and Victim and Witness Issues Unit on 17 December 2013 the witness had stated that he may be willing to reconsider his position, the Prosecution stated that he did not make a ‘firm commitment’. ICC-01/09-02/11-875, paras 12-13.

972 ICC-01/09-02/11-875, para 15.

973 ICC-01/09-02/11-875, para 15.

974 ICC-01/09-02/11-875, para 16.

975 ICC-01/09-02/11-875, para 18. These investigative steps were addressed in a confidential, *ex parte* Annex.

Prosecution application for a finding of non-compliance against the Government of Kenya, which, if successful, may cause the Government to produce the information the Prosecution has requested regarding the accused's finances.⁹⁷⁶ Additionally, the Prosecution submitted that the proposed adjournment would enable the Prosecution 'to determine conclusively whether P-0011 is willing to testify'.⁹⁷⁷ The Prosecution also submitted that the proposed adjournment would 'not unduly infringe upon the Accused's Article 67(1)(c) right to be tried without undue delay', a right the Prosecution observed that the accused had 'at least partially waived'.⁹⁷⁸ Finally, the Prosecution submitted that an adjournment would 'protect the legitimate interests of the victims in ensuring that all possible avenues are pursued to bring the principal perpetrators of the PEV to justice'.⁹⁷⁹

On 23 January 2014, Trial Chamber V(a) decided to vacate the trial date of 5 February 2014. The Chamber did not set a new trial date, but scheduled a status conference for 5 February, during which the Legal Representative was granted leave to be present, as he had requested.⁹⁸⁰

976 In this regard, the Prosecution submitted that it is 'necessary to exhaust this line of inquiry — hitherto blocked by the GoK — to determine whether the existing witness testimony regarding the Accused's alleged funding of the PEV can be corroborated by documentary evidence', and further noted that it 'is also appropriate for the GoK's failure fully to comply with its co-operation obligations to be adjudicated, so that the Assembly of States Parties can determine whether and what action to take with respect to those failures'. ICC-01/09-02/11-875, para 19.

977 ICC-01/09-02/11-875, para 20.

978 In this regard, the Prosecution emphasised that the Accused had 'sought repeated adjournments, most recently on 25 October 2013'. ICC-01/09-02/11-875, para 21.

979 ICC-01/09-02/11-875, para 21. In this regard, the Prosecution noted that while the case 'has presented significant investigative challenges, the Prosecution remains committed to doing its utmost to secure justice for the victims of the PEV', and observed that the adjournment request 'seeks to ensure that this Court does everything in its power to ensure that the principal perpetrators of the PEV are held to account'. ICC-01/09-02/11-875, para 22.

980 ICC-01/09-02/11-886.

Sudan:

The Prosecutor v. Abdullah Banda Abaeker Nourain and Saleh Mohammed Jerbo Jamus

The first case in the Darfur Situation to reach the trial stage of proceedings is the case against Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo). The case is the second in the Darfur Situation in which the ICC has issued summonses to appear, rather than arrest warrants, and where the suspects have appeared voluntarily in response to these summonses. The other case in which a summons to appear was issued, for Abu Garda, was dismissed at the pre-trial stage because the Pre-Trial Chamber declined to confirm charges against the accused. The other four individuals charged in the Darfur Situation, all subject to arrest warrants, remain at large.⁹⁸¹ The case against Banda and Jerbo was assigned to a Trial Chamber in March 2011 and has been in trial preparation since that date. On 4 October 2013, Trial Chamber V terminated the proceedings against Jerbo on the basis of evidence indicating that he had died.⁹⁸² The trial against Banda is scheduled to begin in May 2014, almost three years after the issuance of the confirmation of charges decision. The delay can be attributed primarily to translation problems.

Banda and Jerbo are Sudanese citizens of Zaghawa ethnicity. Banda was the former military commander of the JEM, before establishing a splinter group, the JEM Collective Leadership, along with Abu Garda. Jerbo was the Chief of Staff of the splinter group, the SLA-Unity, which had broken away from the Sudanese Liberation Movement Army. Banda and Jerbo were each charged with three counts of war crimes in connection with an attack in

September 2007 against the AMIS peacekeeping operation based at the MGS Haskanita.

The confirmation of charges decision in the case was handed down on 7 March 2011 by Pre-Trial Chamber I, confirming three counts of war crimes: violence to life and attempted violence to life; intentionally directing attacks against personnel, installations, material, units, and vehicles involved in a peacekeeping mission; and pillaging.⁹⁸³ The Chamber confirmed the charges based on Banda and Jerbo's alleged responsibility as co-perpetrators under Article 25(3)(a). In addition, the Chamber confirmed that the injuries caused to the eight AMIS personnel who were not killed qualified as attempted murders, and as such confirmed Banda and Jerbo's alleged responsibility under Article 25(3)(f) for those crimes. This marks the first time that a Pre-Trial Chamber of the ICC has confirmed liability for inchoate (or incomplete) offences within the meaning of Article 25(3)(f). The case does not include charges for gender-based crimes.

Following the confirmation of charges decision, on 16 March 2011, the ICC Presidency constituted Trial Chamber IV to hear the case against Banda and Jerbo. One year later, when a date for the start of trial had not yet been set for the reasons outlined below, Judge Diarra submitted a request to be excused from exercising her duties in Trial Chamber IV 'by reason of the end of her term of office in the year 2012'.⁹⁸⁴ On 6 March 2012, the Presidency granted the request and indicated that her

981 See *Gender Report Card 2012*, p 179-180.

982 ICC-02/05-03/09-512-Red.

983 Pursuant to Article 8(2)(c)(i), 8(2)(e)(iii), 8(2)(e)(v). ICC-02/05-03/09-121-Corr-Red.

984 This request was filed through a memorandum dated 14 February 2012. ICC-02/05-03/09-308-Anx1.

excusal from Trial Chamber IV would take effect as of 12 March 2012, the date of expiration of her term of office.⁹⁸⁵ On 16 March 2012, the Presidency assigned Judge Chile Eboe-Osuji (Nigeria) to Trial Chamber IV to replace Judge Diarra.⁹⁸⁶

Following the submission of a joint statement on agreed facts by the Defence and Prosecution on 16 May 2011, the Chamber's deliberations at trial in this case will be limited to only three contested issues, namely: (i) whether the attack on the MGS Haskanita was unlawful; (ii) if the attack was unlawful, whether the accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and (iii) whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.⁹⁸⁷ However, despite a swift confirmation process, with the Defence not contesting any of the material facts alleged in the Prosecution document containing the charges, and the submission of a joint statement on agreed facts, the case has faced difficulties in advancing to trial.

985 See ICC-02/05-03/09-308-Anx2.

986 ICC-02/05-03/09-308. On 2 April 2012, the Defence submitted a request for Judge Eboe-Osuji's disqualification, arguing 'his impartiality might reasonably be doubted' because of prior commentary about the relationship between the ICC and the African Union (AU), namely: 'the fact that he shares the nationality of the forces the Accused fought against, shares the nationality of the primary victim group, and was endorsed for his position by the government of Nigeria and the AU'. ICC-02/05-03/09-317, para 3. On 5 June 2012, a plenary of the Presidency, by an absolute majority of eleven Judges, with two Judges in disagreement and three Judges abstaining, denied the Defence request. ICC-02/05-03/09-344-Anx.

987 The Trial Chamber rehearsed the contested issues in its decision on the Defence temporary stay of proceedings, ICC-02/05-03/09-410, para 106, referencing ICC-02/05-03/09-227, paras 24, 46.

Ongoing translation problems

Pursuant to Article 67(f), the accused has the right 'to have the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks'. Both Banda and Jerbo indicated that they speak and fully understand Zaghawa, a local Sudanese language.

Pursuant to its responsibility to ensure the availability of interpreters and translation services, following the confirmation of charges decision, the Registry indicated to the Chamber that the Court did not have interpreters competent to translate documents and proceedings from Zaghawa into either French or English, the two working languages of the Court.⁹⁸⁸ At the time, the Registry indicated that it would need at least six months for the training of required interpreters. During a subsequent status conference convened to discuss issues relating to the translation problems, the Prosecution also described numerous practical considerations impacting on the ability to disclose evidence in Zaghawa, including: (i) the fact that Zaghawa is not a written language; (ii) the fact that Zaghawa vocabulary is limited to no more than 5,000 words, rendering it difficult to translate certain words and concepts from languages of the Court such as English, French and Arabic into Zaghawa; (iii) the fact that relevant material would first have to be transliterated and then read on to audio tapes in Zaghawa; and (iv) the fact that the page-count of material that needs to be disclosed to the Defence was approximately 3,700 pages.⁹⁸⁹ On 1 July 2011, the Trial Chamber ordered the Registry to undertake the necessary preparations for the provision of interpretation for the accused immediately and to begin any necessary training

988 ICC-02/05-03/09-129.

989 ICC-02/05-03/09-131, para 10.

of Zaghawa interpreters.⁹⁹⁰ On 16 August 2011, it further ordered the Prosecution to immediately start the process of translating into Zaghawa all witness statements it intended to rely upon during trial.⁹⁹¹

In numerous filings following these orders of the Trial Chamber, the Registry and Prosecution indicated that, despite their best efforts to secure translators, they continued to experience technical difficulties, including relating to the length of time needed to arrange for the necessary translation and training. Taking into account the difficulties faced by both the Registry and the Prosecution, the Trial Chamber ordered both to submit monthly reports on the progress of translation.⁹⁹² Following a number of status conferences and updates, and in consultation with the parties and participants, on 6 March 2013 Trial Chamber IV set the date for the commencement of trial for 5 May 2014 and established the final deadline for disclosure for 2 May 2013.⁹⁹³ The Trial Chamber indicated that this decision was based on: issues relating to disclosure; operational and logistical issues relating to the appearance of the two accused and arrangements for their travel to the seat of the Court in The Hague;⁹⁹⁴ ongoing difficulties in securing a fourth Zaghawa interpreter needed for providing simultaneous interpretation during the trial proceedings; and protection issues.

990 ICC-02/05-03/09-172.

991 ICC-02/05-03/09-19.

992 ICC-02/05-03/09-211.

993 ICC-02/05-03/09-455.

994 The Trial Chamber noted that this would be the first trial before the ICC in which the accused would not be in the custody of the Court, but would appear voluntarily in response to Summonses to Appear, subject to the conditions outlined therein. The Chamber thus acknowledged that extra time was also needed for the Registry to confirm with the Netherlands the arrangements to be put in place to ensure the presence of both accused during trial. ICC-02/05-03/09-455, para 24.

Defence request for temporary stay of proceedings

On 6 January 2012, the Defence for Banda and Jerbo filed a request for a temporary stay of proceedings, arguing that ‘given the current security situation and active obstruction by the very government whose actions are the focus of the Defence investigation efforts’, it was unable to present an effective defence and as such, the minimum guarantees for a fair trial could not be met.⁹⁹⁵ The Defence outlined numerous ‘absolute obstructions’ to carrying out investigations in Sudan that further impacted its ability to meet with witnesses and with the accused persons.⁹⁹⁶ The Defence also argued that it was unable to access certain key documents, and that its investigations were hampered by the deaths of potential witnesses. The Defence pointed out that this case was ‘unique’ particularly as it was the first case pending trial following a UN Security Council Resolution with the Non-State Party openly not cooperating with the Court and ‘ha[ving] criminalised cooperation with the ICC’.⁹⁹⁷ The Defence underscored that it was also the first Situation in which neither the Prosecution nor the Defence were able to travel to the country where the alleged crimes took place. On 30 January 2012, the Prosecution and Legal Representatives submitted their responses to the Defence request, opposing a temporary stay of proceedings.⁹⁹⁸

On 26 October 2012, Trial Chamber IV issued its decision, denying the Defence request. Recalling the standard set by the Appeals Chamber in the Lubanga case in 2010 that in order to grant a stay of proceedings it must be clear that ‘it [is] impossible to piece together the constituent elements of a fair trial’, the Trial Chamber underscored that the granting of a stay of proceedings was a ‘drastic remedy’ to be applied only in exceptional circumstances.⁹⁹⁹

995 ICC-02/05-03/09-274, paras 18, 24.

996 ICC-02/05-03/09-274, para 4.

997 ICC-02/05-03/09-274, paras 2, 4.

998 ICC-02/05-03/09-286-Red; ICC-02/05-03/09-285.

999 ICC-02/05-03/09-410, para 80.

In its decision, the Chamber underscored that the evidence, which the Defence claimed was unavailable because of the obstructions to the investigation, must be identified with sufficient specificity to warrant a stay of proceedings. The Chamber found that the Defence had not properly substantiated its claim but stressed that it may take the investigatory difficulties into account when weighing the entirety of the evidence presented at trial, in order to resolve any unfairness to the accused. It thus found that ‘an unsubstantiated claim that lines of defence and exculpatory evidence might have become available had the defence been allowed to enter the Sudan is insufficient to meet the high threshold set out for a stay of proceedings’.¹⁰⁰⁰ Finding that ‘a fair trial is not prospectively impossible’, the Chamber underlined that ‘Any prejudice resulting from unfairness can be relieved against by the Trial Chamber in the trial process’.¹⁰⁰¹

In its decision, the Trial Chamber also touched upon the ongoing difficulties regarding translation, recalling its orders relating to translation and the continuing combined efforts of the Registry and the Prosecution to provide the accused persons with a full translation of incriminating evidence. The Chamber confirmed that ‘the efforts and the progress made in order to provide the accused persons with Zaghawa translations of the statements of witnesses in relation to the contested issues is an important factor to allow for meaningful defence investigations, including taking informed instructions from the accused persons’.¹⁰⁰²

With regard to the Defence’s claimed inability to gain access to relevant documents from the AU, the UN Security Council, OCHA, UNMIS and the Government of Nigeria, the Chamber noted that the Prosecution continued its efforts to obtain relevant documents and information, which was to be disclosed to the Defence. While the Chamber acknowledged that there had been delays, it found that ‘it [wa]s premature to conclude that further efforts and attempts by the Prosecution to secure these important documents would be unsuccessful’.¹⁰⁰³ Similarly, regarding Defence access to information obtained by the Prosecution subject to confidentiality agreements pursuant to Article 54(3)(e), the Chamber rejected the claim that ‘there [wa]s no prospect that any prejudice resulting from the situation [could] be resolved in due course’.¹⁰⁰⁴

In sum, the Chamber rejected the Defence request for a temporary stay of proceedings because it found that the Defence ‘ha[d] not shown any prejudice that, in the Chamber’s view, [could not] be remedied in the course of trial’.¹⁰⁰⁵

Judge Eboe-Osuji issued a separate concurring opinion, agreeing with the Chamber’s conclusion, but offering different views on ‘some of the questions of principle and policy involved in this sort of litigation at this tribunal’.¹⁰⁰⁶ Particularly, Judge Eboe-Osuji maintained that there was ‘better practical sense in a judicial policy of discouraging applications for stay (or at least rulings on such applications) until the conclusion of evidence in the case’.¹⁰⁰⁷ Further, he underscored that, ‘as a matter of principle, fault on the part of the prosecution or the victims should be a factor to be considered in

1000 ICC-02/05-03/09-410, para 102.

1001 ICC-02/05-03/09-410, para 114.

1002 ICC-02/05-03/09-410, para 135.

1003 ICC-02/05-03/09-410, para 142.

1004 ICC-02/05-03/09-410, para 150.

1005 ICC-02/05-03/09-410, para 155.

1006 ICC-02/05-03/09-410, Concurring separate opinion of Judge Eboe-Osuji, para 2.

1007 ICC-02/05-03/09-410, Concurring separate opinion of Judge Eboe-Osuji, para 82.

any inquiry on stay of proceedings'.¹⁰⁰⁸ In that respect, Judge Eboe-Osuji outlined that:

the good sense of that approach is evidence with a judicial policy that favours deferring decisions on stay applications until the completion of the evidence, when the Trial Chamber is best able to take all factors of possible unfairness of trial, including their origins, into account in the ultimate outcome in the case — which may be a stay at that point or a verdict of acquittal on grounds of unfair trial.¹⁰⁰⁹

On 5 November 2012, the Defence requested leave to appeal the decision,¹⁰¹⁰ which was granted by the Trial Chamber on 13 December 2012.¹⁰¹¹ At the time of writing this Report, a decision on the Defence appeal had not yet been issued.

Alleged death of one of the accused

On 21 April 2013, the Defence notified the Trial Chamber that it had been informed a day earlier that Jerbo had died during an attack in North Darfur on 19 April 2013 and was buried the same day.¹⁰¹² The Defence indicated that it was informed that Jerbo was killed by forces of the Justice and Equality Movement faction led by Gibril Ibrahim. News reports about the incident on 19 April indicated that Jerbo died when JEM, led by Gibril Ibrahim, and its splinter faction JEM-Bashar (led by Mohamed Bashar, and of which Jerbo was the deputy general commander) clashed in North Darfur.¹⁰¹³ It was unclear whether Jerbo was the target of the attack and whether there were other casualties. On 10 May 2013, the Defence submitted a second filing indicating that no death certificate or other document from a governmental authority confirming Jerbo's death was issued.¹⁰¹⁴ The Defence later submitted further information, indicating that subsequent to Jerbo's death, Mohamed Bashar, the leader of JEM-Bashar, and Suleiman Arko, Bashar's deputy, were killed on 12 May 2013 by JEM forces led by Gibril Ibrahim.¹⁰¹⁵ The African Union, UNAMID and the EU all condemned the attack.¹⁰¹⁶

The splinter faction JEM-Bashar reportedly broke away from JEM last year and subsequently entered into peace negotiations with the

1008 ICC-02/05-03/09-410, Concurring separate opinion of Judge Eboe-Osuji, para 132

1009 ICC-02/05-03/09-410, Concurring separate opinion of Judge Eboe-Osuji, para 132.

1010 ICC-02/05-03/09-412.

1011 ICC-02/05-03/09-428.

1012 A public redacted version of the notification was published on the Court's website on 23 April 2013, ICC-02/05-03/09-466-Red.

1013 'JEM and its Bashar splinter faction clash in North Darfur', *Radio Dabanga*, 19 April 2013.

1014 ICC-02/05-03/09-475-Conf, as cited in ICC-02/05-03/09-476, para 5.

1015 ICC-02/05-03/09-480, para 4. See also 'Darfur rebel-faction leader killed in Chad', *Al Jazeera*, 13 May 2013; 'Darfur IFC condemns Bashar's death and deplores surge of violence', *Sudan Tribune*, 4 June 2013.

1016 'International condemnation of Sudan DDPD signatory leader's slaying', *Radio Dabanga*, 15 May 2013; 'Conflicting reports as JEM-Bashar leader dies near Chad-Sudan border', *Radio Dabanga*, 15 May 2013.

Sudanese Government. Following the signing of an agreement between JEM-Bashar and the Sudanese Government in Doha in March 2013, which forms part of the ongoing peace negotiations within the framework of the DDPD, signed in May 2011, members of the JEM-Bashar splinter group were reportedly assigned positions within the Sudanese army and Government.¹⁰¹⁷

In accordance with the Chamber's instructions,¹⁰¹⁸ on 6 May 2013, the Prosecution, the Registry and the Common Legal Representatives of Victims filed observations on the Defence notification. Given that Jerbo's death had not been officially confirmed and that, due to Sudan's lack of cooperation, the Registry did not foresee any confirmation by the Sudanese authorities in the near future, and in light of the Court's approach taken after the death of other suspects, the Registry did not recommend a termination of the proceedings against Jerbo.¹⁰¹⁹ The Prosecution and Common Legal Representatives made similar observations.¹⁰²⁰ Further, given the silence of the Rome Statute on the possibility of trials *in absentia*, the Registry and the Common Legal Representatives recommended the Trial Chamber to sever the cases against Banda and Jerbo, so as not to prejudice the continuation of the trial against Banda pending confirmation of Jerbo's death.¹⁰²¹

1017 'Sudan, JEM-Bashar sign protocol on political and military participation', *Radio Dabanga*, 29 March 2013; 'Darfur's JEM-Bashar assigned positions in Sudan government', *Radio Dabanga*, 1 April 2013.

1018 The instructions to file observations on the Defence notification were sent to the Prosecution, Registry and Common Legal Representative by email dated 26 April 2013. ICC-02/05-03/09-473-Red.

1019 ICC-02/05-03/09-473-Red, paras 4-9, referring to Lukwiya and Otti in the Uganda Situation, and Muammar Gaddafi in the Libya Situation.

1020 ICC-02/05-03/09-471; ICC-02/05-03/09-472.

1021 ICC-02/05-03/09-473-Red, para 10; ICC-02/05-03/09-472, para 33.

In a decision on 16 May 2013, the Trial Chamber officially put the parties on notice pursuant to Article 64(5) that it may order the cases against Banda and Jerbo to be severed. However, the Chamber indicated it would benefit from further submissions on the issue and ordered the Prosecution and the Defence to submit observations on the Registry's and Common Legal Representatives' recommendations to sever the cases.¹⁰²² While the Defence did not object to the severance of the two cases,¹⁰²³ the Prosecution submitted that, while it did not in principle oppose the severance, severing the cases before obtaining confirmation of Jerbo's death would be premature.¹⁰²⁴

On 4 October 2013, the Trial Chamber issued a decision, terminating the proceedings against Jerbo.¹⁰²⁵ Despite the fact that the Defence was unable to obtain an official death certificate for Jerbo, the Chamber held that the production of an official death certificate was only 'one of the avenues' available to the Chamber to prove that a person was deceased, but not an 'essential pre-requisite' to the termination of the proceedings.¹⁰²⁶ The Chamber was satisfied that the evidence showed that 'it [wa]s not possible to obtain an official death certificate with respect to Mr Jerbo in the near future' and found that the Defence's offer to assist in obtaining unofficial death certificates would be of no useful purpose.¹⁰²⁷ It was, however, convinced that the evidence produced¹⁰²⁸ indicated that Jerbo's death occurred on 19 April 2013.¹⁰²⁹ Because of the absence of an official death certificate, the Chamber accepted the Prosecution's proposal that the termination of

1022 ICC-02/05-03/09-476.

1023 ICC-02/50-03/09-480, para 7.

1024 ICC-02/05-03/09-479-Red, paras 1, 5-7.

1025 ICC-02/05-03/09-512-Red.

1026 ICC-02/05-03/09-512-Red, paras 17-18.

1027 ICC-02/05-03/09-512-Red, para 21.

1028 The evidence on the basis of which the Chamber reached its decision was redacted in the publicly available version of the decision.

1029 ICC-02/05-03/09-512-Red, para 24.

the proceedings would be without prejudice to resuming them 'should information become available that he is alive', instead of severing the case against Jerbo from the case against Banda pursuant to Article 64(5).¹⁰³⁰ Judge Eboe-Osuiji appended a separate opinion, agreeing that the proceedings should come to an end 'without prejudice', but in his view the outcome should have been formulated as a 'discontinuance without prejudice' rather than 'termination without prejudice'.¹⁰³¹

Prior to this decision, on 4 September 2013, the Defence had requested the Trial Chamber to terminate the proceedings against Banda on the grounds that the Prosecution failed to disclose in due time exonerating evidence, namely the statements of two witnesses, which should have been disclosed prior to the confirmation of the charges.¹⁰³² It argued that the case was only before the Trial Chamber because the Prosecution had 'misled' the Pre-Trial Chamber as to the results of its investigation, 'concealing inconvenient truths that raised serious issues as to the legality of the attack on MGS Haskanita'.¹⁰³³ The Defence referred, in particular, to the Document Containing the Charges where it addressed the 'critical issue' of whether MGS Haskanita was a lawful target because intelligence information was being leaked from it to the Government of Sudan through a certain Captain Bashir, and to the Prosecution's argument that Captain Bashir had been removed from MGS Haskanita by AMIS soon after 10 September 2007, following a complaint made by the revolutionary movements. The Defence noted that in order to

1030 The Chamber added that 'should there be a need to reopen the case against Mr Jerbo, the case shall proceed from the stage of the proceedings at which it currently stands'. ICC-02/05-03/09-512-Red, para 25.

1031 ICC-02/05-03/09-512-Red-Anx, para. 1.

1032 ICC-02/05-03/09-503-Red, para 2. The Defence indicated that these statements were only disclosed to it 'nearly three years after the material was collected and two and a half years after the confirmation of charges hearing'.

1033 ICC-02/05-03/09-503-Red, para 44.

support this submission, the Prosecution had relied on the evidence of the two mentioned witnesses.¹⁰³⁴ The Defence submitted that the prejudice caused to its ability to investigate the facts of the case was such that the only appropriate relief was to terminate the proceedings and that a mere reprimand would not be sufficient.¹⁰³⁵

The Prosecution responded to the Defence request on 27 September 2013, opposing it and arguing that 'the information contained in the statements referred to by the Defence is not exonerating evidence', and that it had 'disclosed the statements to the Defence one year in advance of the commencement of the trial and within the disclosure deadline set by the Chamber'.¹⁰³⁶ In its reply to the Prosecution's submissions, the Defence explained that without the statements of those two witnesses, the evidence presented by the Prosecution showing that Captain Bashir left MGS Haskanita before 29 September 2007 would leave the impression that AMIS had ordered his removal, but that the witnesses' statements in question showed that that had not been the case.¹⁰³⁷ The Defence further explained that whether Captain Bashir was removed by AMIS and sent off the base by the Government of Sudan or whether he left on his own will, 'raise[d] issues, which go to the heart of the confirmation decision and the contested issues'.¹⁰³⁸ It further explained that 'at confirmation it was accepted that impartiality is one of the three requisite elements making up the definition of a peacekeeping mission', and added 'in order to maintain its impartiality, a peacekeeping mission must not allow any party to gain a definite military advantage from its operations'.¹⁰³⁹ It argued that in this case, 'AMIS

1034 ICC-02/05-03/09-503-Red, paras 8-9, referencing ICC-02/05-03/09-79, para 56 and ICC-02/05-03/09-84-ConfAnx, line 137.

1035 ICC-02/05-03/09-503-Red, para 44.

1036 ICC-02/05-03/09-506-Red, para 3.

1037 ICC-02/05-03/09-513-Red, paras 10, 12.

1038 ICC-02/05-03/09-513-Red, para 17.

1039 ICC-02/05-03/09-513-Red, para 17.

were faced with an individual using his position within their ranks to supply intelligence to one party to the conflict, effectively providing such advantage', and that 'the evidence suggest[ed] that AMIS did nothing to remove or restrict Captain Bashir and he left the base only on the instruction of his own party, apparently free to return any time the [Government of Sudan] wished to take advantage of his access to the base'.¹⁰⁴⁰ In addition, the Defence explained that 'at confirmation the issue of whether MGS Haskanita was a legitimate military target was explored in the light of the Prosecution evidence, which overwhelmingly suggested that Captain Bashir was supplying targeting information to the [Government of Sudan]'.¹⁰⁴¹ It continued, arguing that 'the fact that Captain Bashir was removed by the [Government of Sudan] sometime after hearing of the original complaints strongly suggests that the Government had a replacement source of intelligence within MGS Haskanita, either overtly [...] or covertly'.¹⁰⁴² At the time of writing this Report, a decision on the Defence request for termination of proceedings against Banda has not yet been issued.

1040 ICC-02/05-03/09-513-Red, para 17.

1041 ICC-02/05-03/09-513-Red, para 18.

1042 ICC-02/05-03/09-513-Red, para 18. In this respect, it further explained, 'it is not reasonable to assume that Captain Bashir was acting on his own initiative; his actions were evidently coordinated with [Government of Sudan] ground and air forces. No army would have voluntarily removed such a source without providing for his replacement. In these circumstances, the fact that Captain Bashir was removed by the [Government of Sudan] suggests that there was no reason for the Movements to believe that MGS Haskanita had ceased to be a legitimate military target'.

Appeals proceedings

DRC:

The Prosecutor v. Thomas Lubanga Dyilo

On 14 March 2012, in the ICC's first case, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I convicted Thomas Lubanga Dyilo (Lubanga) of the war crimes of conscripting and enlisting children under the age of 15, and using them to participate actively in hostilities.¹⁰⁴³

On 10 July 2012, the Trial Chamber sentenced Lubanga to 14 years of imprisonment.¹⁰⁴⁴ On 7 August 2012, after an inclusive process, in which the Trial Chamber received observations from the parties, participants and several international and non-governmental organisations, including the Women's Initiatives for Gender Justice, the Trial Chamber issued a decision on the principles and procedures to be applied for reparations.¹⁰⁴⁵ Each of these decisions — the conviction, sentence and reparations decisions — has been appealed, and at the time of writing this Report, these appeals remain pending.

This section briefly summarises the three appeal proceedings in the Lubanga case, highlighting the key issues raised within each appeal.

Defence appeal of the Article 74 conviction

On 3 October 2012, the Defence sought leave to appeal the trial judgement.¹⁰⁴⁶ On 28 November 2012, prior to submitting its document in support of the appeal, the Defence sought leave to submit new evidence in its appeal of both the conviction and the sentence.¹⁰⁴⁷ Specifically, it requested the Appeals Chamber's authorisation to present identifying documentation and to call two new Defence witnesses –Witnesses 40 and 41. These witnesses had appeared in Prosecution video excerpts relied upon by the Chamber in the trial judgement to conclude that there were child soldiers under the age of 15 within the FPLC. The Defence suggested that the evidence would demonstrate that the witnesses were 20 and 19 years old, respectively, at the time that the video was filmed and thus not under the age of 15. It also sought to produce evidence related to Prosecution Witness 297, which it maintained would reveal the extent of the infiltration of the Congolese secret service into the Prosecution investigation. It recalled that in the trial judgement, the Chamber had found that Prosecution Intermediary 316 was a member of the Congolese secret service.¹⁰⁴⁸

1043 ICC-01/04-01/06-2842. For a more detailed description of the Lubanga Trial Judgement, see *Gender Report Card 2012*, p 132-163.

1044 ICC-01/04-01/06-2901. For a more detailed description of the Lubanga Sentencing decision, see *Gender Report Card 2012*, p 199-205.

1045 ICC-01/04-01/06-2904. For a more detailed description of the Lubanga Decision on Reparations, see *Gender Report Card 2012*, p 206-223.

1046 ICC-01/04-01/06-2934; ICC-01/04-01/06-2942-Red.

1047 ICC-01/04-01/06-2942-Red.

1048 See Women's Initiatives for Gender Justice, 'Third Special Issue on Lubanga Judgement', *Legal Eye on the ICC eLetter*, August 2012, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye8-12-FULL/LegalEye8-12.html>>.

Finally, it sought to include evidence concerning a list of FPLC members signed by Bosco Ntaganda in 2004 that was only disclosed by the Prosecution as a ‘courtesy’ upon Defence request. It argued that this late disclosure, effectuated on 29 October 2012, demonstrated the Chamber’s limitations in ensuring that the Prosecution’s late and incomplete disclosure did not violate Lubanga’s right to a fair trial.

On 3 December 2012, the Defence submitted its document in support of the appeal.¹⁰⁴⁹ It argued that the Trial Chamber had violated its right to be informed of the nature, cause and content of the charges, as it had relied on insufficiently precise evidence in reaching its conclusions, after having discarded Prosecution evidence introduced by nine former child soldier witnesses due to its lack of credibility.¹⁰⁵⁰ It further asserted that the Chamber had made both legal and factual errors in finding that it had ameliorated any prejudice caused by the Prosecution’s failure to perform its statutory duties to investigate and disclose exonerating evidence, including that related to the credibility of incriminating evidence.¹⁰⁵¹ It also challenged the Prosecution failure to comply with its obligation to remain impartial, as demonstrated by numerous biased public statements.¹⁰⁵² The Defence argued that these public statements resulted in violations of the Defence’s right to

a fair trial.¹⁰⁵³ The Defence argued that in light of the exclusion of the evidence presented by Prosecution alleged former child soldier witnesses, there was insufficient evidence demonstrating the existence of child soldiers under the age of 15 within the FPLC.¹⁰⁵⁴ It further asserted that the Chamber made factual and legal errors with respect to the crimes of enlisting and conscripting children under the age of 15 and using them actively in hostilities, as well as with respect to Lubanga’s individual criminal responsibility. The Prosecution filed its response on 19 February 2013, requesting that the Appeals Chamber reject the Defence appeal in its entirety, including its request to submit additional evidence.¹⁰⁵⁵ The Defence filed its reply on 28 February 2013.¹⁰⁵⁶

Victim participation in the appeal

On 13 December 2012, the Appeals Chamber granted the right to participate in the appeals against the conviction and the sentence to those victims who had participated in the trial phase, and whose authorisation to participate had not been withdrawn by the Trial Chamber.¹⁰⁵⁷ It reasoned that pursuant to Regulation 86(8), decisions on victims’ applications to participate, ‘shall apply throughout the proceedings in the same case’.¹⁰⁵⁸ It found that the personal interests of participating victims were affected by the appeals ‘in the same way as during trial’ and indicated that the two teams of Legal Representatives could file consolidated

1049 ICC-01/04-01/06-2948-Red.

1050 ICC-01/04-01/06-2948-Red, paras 1-20. In the judgement, the Trial Chamber found 12 Prosecution witnesses, primarily alleged former child soldiers, to be unreliable, as described in greater detail in the *Gender Report Card 2012*, p 145.

1051 ICC-01/04-01/06-2948-Red, paras 40-65. For additional information on the Prosecution failure to disclose and the resulting stays in the proceedings, see *Gender Report Card 2010*, p 139-146 and *Gender Report Card 2009*, p 131-132.

1052 ICC-01/04-01/06-2948-Red, paras 101-102. For a more detailed description of public statements issued by the Office of the Prosecutor, see *Gender Report Card 2010*, p 151-152.

1053 See *Gender Report Card 2011*, p 218-219, concerning the Defence abuse of process claims, alleging the same violations.

1054 ICC-01/04-01/06-2948-Red, paras 124-137. The Defence, *inter alia*, criticised the Chamber for its reliance on video evidence to demonstrate the ages of child soldiers within the FPLC.

1055 ICC-01/04-01/06-2969-Red.

1056 ICC-01/04-01/06-2989-Red.

1057 ICC-01/04-01/06-2951. As noted above, the participation of nine victims had been withdrawn by the Trial Chamber. ICC-01/04-01/06-2842, paras 499-502.

1058 ICC-01/04-01/06-2951, para 3.

responses to the documents in support of the appeals of the conviction and sentence.¹⁰⁵⁹

On 4 February 2013, the Legal Representatives of the V01 group of victims, representing 22 victims, submitted their observations on the appeals of the conviction and sentence, as well as on the Defence request to present additional evidence.¹⁰⁶⁰ The filing underscored the victims' interest in affirming the conviction, especially as reparations were contingent upon it.¹⁰⁶¹ They argued, *inter alia*, that even if the Prosecution did not fulfil its statutory obligations, sanctioning its error with an acquittal would violate the victims' right to access to justice.¹⁰⁶² Concerning the Defence request to submit additional evidence, they questioned the relevance of the ages of two particular recruits in light of the overall number of child soldiers. They also argued that the 2004 list of FPLC combatants, which was not disclosed in a timely manner by the Prosecution, was irrelevant as it did not reflect the militia members during the period of the charges.¹⁰⁶³ On 11 February, the Legal Representatives of the V02 group of victims, representing 117 victims, filed brief observations, expressing their agreement with the conviction.¹⁰⁶⁴ They also asserted that the Chamber correctly applied the mode of liability.¹⁰⁶⁵

As of the time of writing this Report, the Appeals Chamber has not yet issued a decision on the Defence appeal of Lubanga's conviction.

1059 ICC-01/04-01/06-2951, para 3.

1060 ICC-01/04-01/06-2966.

1061 ICC-01/04-01/06-2966, para 9.

1062 ICC-01/04-01/06-2966, paras 13-14.

1063 ICC-01/04-01/06-2966, paras 115-116. The Legal Representatives further observed that the Trial Chamber had discarded the testimony of Prosecution Witness 297 as not reliable. ICC-01/04-01/06-2966, para 117, citing ICC-01/04-01/06-2842, para 429.

1064 ICC-01/04-01/06-2976-Corr-Red, para 14. The Appeals Chamber had authorised the Legal Representatives to file observations at a maximum page limit of 100 pages; their submission was 12 pages in length.

1065 ICC-01/04-01/06-2976-Corr-Red, paras 43-46.

The Defence and Prosecution appeals against the sentencing decision

The sentencing decision

On 10 July 2012, Trial Chamber I issued the first sentencing decision of the ICC, sentencing Thomas Lubanga Dyilo to 14 years of imprisonment for the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities.¹⁰⁶⁶ The Trial Chamber deducted from his sentence the six years Lubanga spent in detention since his surrender to the ICC in March 2006.¹⁰⁶⁷ The Chamber held that in determining Lubanga's sentence, it could consider facts and circumstances outside the framework of the confirmation of charges decision. Ultimately, it considered the following four factors: the gravity of the crime; the individual circumstances of the convicted person; aggravating circumstances; and mitigating circumstances. Its analysis, however, centred on an assessment of the gravity of the crime as one of the 'principal factors' to be considered in sentencing.¹⁰⁶⁸ Noting their serious nature, the Chamber underscored several key aspects of the crimes, 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.¹⁰⁶⁹

1066 The Trial Chamber differentiated the sentence for each of the crimes, sentencing Lubanga 12 years for the crime of enlisting children under the age of 15, 13 years for conscripting children under the age of 15 and 14 years for using children under the age of 15 to participate actively in hostilities, with a total sentence of 14 years imprisonment. ICC-01/04-01/06-2901, paras 98-99.

1067 ICC-01/04-01/06-2901. The Chamber declined, however, to deduct the time Lubanga spent in detention in the DRC, as it was unable to find that his detention there was tied to the crimes recognised by the Court, pursuant to Article 78(2). For a detailed description of the sentencing decision see *Gender Report Card 2012*.

1068 ICC-01/04-01/06-2901, para 36, citing Article 78(1) of the Statute and Rule 145 of the Rules of Procedure and Evidence.

1069 ICC-01/04-01/06-2901, para 37.

The Trial Chamber declined to find any aggravating circumstances, although the Prosecution and Legal Representatives of Victims had advanced several, including the severe punishment of recruits,¹⁰⁷⁰ sexual violence, the particular defencelessness of the victims, and discriminatory motive. The Prosecution had argued that sexual violence and rape could be considered for the purpose of sentencing, even though Lubanga was not convicted for these acts, because they showed that the crimes were committed with 'particular cruelty and against victims who were particularly defenceless'.¹⁰⁷¹ It recalled that the 'child soldiers had to endure brutal conditions at the camps. They were subjected to repeated beatings that were tantamount to torture. Some of them died as a result.'¹⁰⁷² It also argued that sexual violence and rape demonstrated gender discrimination, as the harm was gender-based.¹⁰⁷³ Finally, while recognising that the age of the victims, as young as five and six years old, could not be taken into account as an aggravating factor as it was a constituent element of the crime, the Prosecution asserted that it could 'not be ignored by the Chamber' as an aggravating factor.¹⁰⁷⁴

The Legal Representatives of the V01 group of victims argued that Lubanga must have known that the recruitment of vulnerable persons would likely result in rape and sexual violence and that the child soldiers would be submitted to the abuse of their superiors typical of informal armed groups, including inhuman and degrading treatment, rape and sexual slavery.¹⁰⁷⁵ They also requested that the Chamber consider the

particular vulnerability of the victims.¹⁰⁷⁶ The Legal Representatives of the V02 group of victims also argued that Lubanga acted with a discriminatory motive, specifically on the grounds of age and sex, as female recruits additionally suffered from sexual violence.¹⁰⁷⁷ However, the Chamber declined to find that sexual violence constituted an aggravating circumstance, including as a discriminatory motive, and further declined to find that it related to the gravity of the crime.¹⁰⁷⁸

Judge Odio Benito issued a partial dissent, noting at the outset that she agreed with the majority that 'no aggravating circumstances are to be considered'.¹⁰⁷⁹ However, she disagreed with the majority on, *inter alia*, 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; and (ii) the imposition of a differentiated sentence for each of the three crimes.¹⁰⁸⁰ She 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'.¹⁰⁸¹ 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 stated, '[a]ll three crimes unmistakably put young children under the age of 15 at risk of severe physical and emotional harm and death'.¹⁰⁸² She opined that Lubanga should be sentenced to 15 years for each crime, with a joint total sentence of 15 years.¹⁰⁸³

1070 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, Partially dissenting opinion of Judge Odio Benito, para 14.

1071 ICC-01/04-01/06-2881, para 31.

1072 ICC-01/04-01/06-2881, para 19.

1073 ICC-01/04-01/06-2881, paras 30-36. The Prosecution further asserted that sexual violence, rape and conjugal subservience should be considered under Article 21(3).

1074 ICC-01/04-01/06-2881, para 38.

1075 ICC-01/04-01/06-2880, paras 15-16.

1076 ICC-01/04-01/06-2880, para 16.

1077 ICC-01/04-01/06-2882, para 4.

1078 ICC-01/04-01/06-2901, paras 67, 69, 81.

1079 ICC-01/04-01/06-2901, Partially dissenting opinion of Judge Odio Benito, para 1.

1080 ICC-01/04-01/06-2901, Partially dissenting opinion of Judge Odio Benito, paras 2-3.

1081 ICC-01/04-01/06-2901, Partially dissenting opinion of Judge Odio Benito, para 21.

1082 ICC-01/04-01/06-2901, Partially dissenting opinion of Judge Odio Benito, para 25.

1083 ICC-01/04-01/06-2901, Partially dissenting opinion of Judge Odio Benito, paras 26-27.

On 3 October 2012, both the Prosecution and the Defence sought leave to appeal Lubanga's sentence.¹⁰⁸⁴ The Prosecution argued that the 14-year sentence was 'manifestly inadequate and disproportionate to the gravity of the crime', constituting 'a discernible error'.¹⁰⁸⁵ It also argued that the Chamber erred in failing to find that cruel treatment and sexual violence constituted aggravating factors.¹⁰⁸⁶

The Defence argued that the Trial Chamber had committed legal and factual errors affecting the length of Lubanga's sentence when it: (i) concluded that the crimes were 'generalised'; (ii) concluded that it could base its determination of gravity on the 'generalised' nature of the crime; (iii) found that the fair trial rights violations against Lubanga during trial did not warrant a sentence reduction; (iv) refused to deduct the time Lubanga spent in detention in the DRC from his sentence; and (v) concluded that it could consider facts outside of the facts and circumstances set forth in the charges, namely, sexual violence and cruel treatment, for the purpose of sentencing.¹⁰⁸⁷

Victim participation in the appeals

In their observations, the Legal Representatives of the V01 group of victims underscored the victims' personal interest in the sentence and that pursuant to Rule 145, the sentence must take into consideration the harm caused to victims, their vulnerability and the number of

1084 ICC-01/04-01/06-2935; ICC-01/04-01/06-2933. On 3 December 2012, both parties filed their documents in support of the appeals. ICC-01/04-01/06-2949; ICC-01/04-01/06-2950.

1085 ICC-01/04-01/06-2950, para 2.

1086 ICC-01/04-01/06-2950, paras 67-81. The Defence filed its response to the Prosecution document in support of the appeal on 4 February 2013. ICC-01/04-01/06-2967.

1087 ICC-01/04-01/06-2950, paras 26-78. For more information on the Defence abuse of process claims, alleging fair trial rights violations, see *Gender Report Card 2011*, p 218-219. The Prosecution filed its response to the Defence document in support of the appeal on 19 February 2013. ICC-01/04-01/06-2968-Red.

victims.¹⁰⁸⁸ They focused their arguments on the Prosecution's third ground of appeal, relating to the test applied by the Chamber that conditioned aggravating circumstances on the condemned person's individual criminal responsibility.¹⁰⁸⁹ They argued that the Chamber should have taken the victims' suffering into account either as part of the gravity of the offence, or as an aggravating circumstance. In this regard, they stated that '[h]anding down a sentence for the presence of children under the age of 15 years in an armed group without taking account of the conditions of their presence, in particular conditions tantamount to inhuman or degrading treatment and/or sexual violence suffered by young victims, does not equate to proper justice'.¹⁰⁹⁰ They noted that Judge Odio Benito had recalled that under Rule 145(1)(c) of the RPE, the Chamber must 'consider the damaging effects that recruitment, particularly the harsh treatment and sexual violence had upon very young children, as an exacerbating factor in the determination of the sentence'.¹⁰⁹¹ They further asserted that there was no reason why indirect or unforeseen consequences of the crime could not be taken into account.¹⁰⁹² The Legal Representatives of the V02 group of victims did not submit any observations on the appeals of the sentence.¹⁰⁹³

As of the time of the writing of this Report, the Appeals Chamber had not yet issued a decision on the appeals of the Article 76 decision on sentence.

1088 ICC-01/04-01/06-2966, para 89.

1089 ICC-01/04-01/06-2966, para 90.

1090 ICC-01/04-01/06-2966, para 97.

1091 ICC-01/04-01/06-2966, para 98. Rule 145(1)(c) lists additional factors to be considered by the Chamber in determining the sentence, *inter alia*: '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'.

1092 ICC-01/04-01/06-2966, para 106.

1093 ICC-01/04-01/06-2976-Corr-Red. On 28 March, the Prosecution filed a response to the observations filed by the Legal Representatives of the V01 group of victims. ICC-01/04-01/06-3004.

Appeals against the reparations decision

As noted above, following Lubanga's conviction, Trial Chamber I issued a decision on 7 August 2012, establishing the principles and procedures to be applied to the ICC's first decision on reparations.¹⁰⁹⁴ The decision reflected the participation of all parties and participants in the case, other organs of the Court, including the Registry, the OPCV and the Trust Fund for Victims, and the *amicus curiae* participation of NGOs, including the Women's Initiatives for Gender Justice.¹⁰⁹⁵

The reparations decision was subsequently appealed on numerous grounds by the Defence,¹⁰⁹⁶ the Legal Representatives of the V01 group of victims,¹⁰⁹⁷ and jointly by the OPCV and the Legal Representatives of the V02 group of victims.¹⁰⁹⁸ A preliminary determination by the Appeals Chamber, finding that the Trial Chamber's decision constituted an order for reparations pursuant to Article 75, enabled victims to participate as parties, rather than as participants, in the reparations appeals proceedings.¹⁰⁹⁹ It also established the scope of victims that could participate in the reparations appeals, enabling the participation of victims whose participation had been withdrawn by the Chamber, but rejecting that of unidentified victims who could benefit from a collective reparations award, but who had not yet submitted an application.¹¹⁰⁰

On 8 March 2013, the Women's Initiatives for Gender Justice requested leave to file observations on the reparations appeals proceedings, in accordance with the Appeals Chamber's directions.¹¹⁰¹ Similarly, *Justice Plus*, *Terre des Enfants*, *Fédération des Jeunes pour la*

Paix Mondiale and *Avocats Sans Frontières* filed a joint request to submit observations.¹¹⁰² On 14 March, the Defence requested authorisation to respond to the requests to submit observations as *amicus curiae* presented by NGOs under Rule 103 and as authorised by the Appeals Chamber.¹¹⁰³ In response to the Defence request, on 26 March, the Appeals Chamber invited the Defence, the Legal Representatives of Victims and the OPCV to file observations on the requests to submit *amicus curiae* submitted by the Women's Initiatives and Justice Plus, *Terre des Enfants*, *Fédération des Jeunes pour la Paix Mondiale* and *Avocats Sans Frontières*.¹¹⁰⁴

On 8 April, the Defence and the Legal Representatives of Victims filed their observations on the requested *amicus* participation. The Legal Representatives of the V01 group of victims did not oppose the *amicus* participation, maintaining that the experience of NGOs working on the ground with victims would be useful.¹¹⁰⁵ The Legal Representatives requested that the deadline for their observations be established so as not to delay the proceedings. On 9 April, the Defence filed a public, redacted version of its observations, opposing the *amicus* participation and underscoring its earlier opposition to their participation in the procedures establishing the reparations principles.¹¹⁰⁶ It argued, *inter alia*, that all *amicus* participation must be limited to legal questions, that factual questions should be strictly prohibited, and that the observations must be 'objective, impartial and independent'.¹¹⁰⁷

On 22 July 2013, the Defence requested a status conference to determine the date upon which the pending appeals would be examined.¹¹⁰⁸ At the time of writing this Report, the appeals of the decision on reparations remain pending.

1094 ICC-01/04-01/06-2904.

1095 For a detailed summary of the reparations decision and the *amicus curiae* submission of the Women's Initiatives for Gender Justice, see *Gender Report Card 2012*, p 206-223.

1096 ICC-01/04-01/06-2905, ICC-01/04-01/06-2919.

1097 ICC-01/04-01/06-2914.

1098 ICC-01/04-01/06-2909.

1099 ICC-01/04-01/06-2953.

1100 ICC-01/04-01/06-2953, paras 64, 72.

1101 ICC-01/04-01/06-2993. The Appeals Chamber indicated that the organisations who had participated in the reparations proceedings before the Trial Chamber could file a request to submit observations pursuant to Rule 103.

1102 ICC-01/04-01/06-2994.

1103 ICC-01/04-01/06-2999, paras 1-4.

1104 ICC-01/04-01/06-3000.

1105 ICC-01/04-01/06-3008.

1106 ICC-01/04-01/06-3015-Red, paras 3, 9.

1107 ICC-01/04-01/06-3015-Red, paras 13-15.

1108 ICC-01/04-01/06-3043.

DRC:

The Prosecutor v. Mathieu Ngudjolo Chui

Trial Chamber II's trial judgement acquitting Ngudjolo

As described above in the **Trial Proceedings** section, the Ngudjolo trial judgement principally consisted of Trial Chamber II's factual conclusions related to the organisation and structure of the Lendu combatants from Bedu-Ezekere within the relevant period, including Ngudjolo's role and function. While the Chamber affirmed that the events as alleged, including the crimes, had taken place, it concluded that, in the absence of sufficient evidence, it could not find beyond a reasonable doubt that Ngudjolo was the leader of the Lendu combatants from Bedu-Ezekere at the time of the Bogoro attack. The Trial Chamber thus acquitted Ngudjolo of all charges based on the absence of sufficient evidence to prove his criminal responsibility.

The Trial Chamber had specifically found that the Prosecution's three key witnesses, Witnesses 250, 279 and 280, were not credible and thus could not be relied upon for the purpose of this case. The Prosecution appeared to have relied heavily on the testimony of these three witnesses to demonstrate Ngudjolo's authority as the lead commander of the Lendu militia.¹¹⁰⁹ The Chamber had also found that several of the witnesses who had testified on this issue had based their knowledge on hearsay, and thus accorded this testimony little probative value. In this regard, the Chamber had reasoned

1109 ICC-01/04-02/12-3, paras 342-344. The Chamber had further suggested that the Prosecution should have engaged in a more 'attentive' analysis of the civil status and educational history of its witnesses. It had noted that it was the Defence teams that had provided a large number of civil status documents and educational records, and that the Prosecution had never challenged the authenticity of such documents, which had carried significant weight in the Chamber's assessment of the credibility of the Prosecution witnesses' testimony. ICC-01/04-02/12-3, para 121.

that it could not exclude the possibility that these witnesses had associated Ngudjolo's status as the leading commander at the end of March 2003 to the position he had occupied at the time of the attack in February of that year.¹¹¹⁰ The Trial Chamber had further declined to infer from the Prosecution evidence of Ngudjolo's participation in high-level activities in March 2003 that he was effectively the lead commander of the Lendu combatants from Bedu-Ezekere at the time of the Bogoro attack in February.¹¹¹¹

Prosecution appeal of Ngudjolo's acquittal

The Prosecution filed its notice of appeal two days after the issuance of the trial judgement on 20 December 2012.¹¹¹² On 19 March 2013, the Prosecution submitted a confidential, *ex parte* document in support of the appeal, asserting three grounds of appeal. On 22 March 2013, the Prosecution filed a confidential, redacted version of its document in support of the appeal with the third ground of appeal entirely redacted.¹¹¹³ On 3 April 2013, the Prosecution filed a public, redacted version of its document in support of the appeal. The third ground of appeal remained fully redacted and was classified as confidential, *ex parte*.¹¹¹⁴

1110 ICC-01/04-02/12-3, paras 432-439, 496.

1111 ICC-01/04-02/12-3, paras 499, 501, 503.

1112 ICC-01/04-02/2-10.

1113 ICC-01/04-02/12-39-Conf-Red.

1114 ICC-01/04-02/12-39-Red2. On 16 May, the Appeals Chamber granted the second joint request by the Victims' Legal Representatives to reclassify the third ground of the Prosecution appeal. It ordered the Registry to reclassify it as confidential, in order to enable the Legal Representatives of Victims to submit observations. ICC-01/04-02/12-71. The Victims' Legal Representatives subsequently requested a partial lifting of the confidential classification of the third ground of appeal. ICC-01/04-02/12-76-Conf, cited in ICC-01/04-02/12-77. The Appeals Chamber has not yet ruled on their request.

In its first ground of appeal, the Prosecution argued that Trial Chamber I had misapplied the standard of proof ‘beyond reasonable doubt’. It asserted that by engaging in ‘a hypothetical alternative reading of the evidence’, the Chamber effectively required proof ‘beyond any doubt’.¹¹¹⁵ The second ground of appeal asserted that the Chamber had erred in failing to consider the totality of the evidence in its assessment of witness credibility, the facts of the case, and Ngudjolo’s guilt. Noting that the Chamber could rely on circumstantial evidence, and that hearsay evidence was admissible, it asserted that the Chamber had failed to consider relevant corroborating evidence when it assessed specific facts.¹¹¹⁶ The redacted third ground claimed that the ‘Trial Chamber infringed the Prosecution’s right to a fair trial under Article 64(2)’,¹¹¹⁷ by failing to disclose Registry reports on the Court’s surveillance of Ngudjolo’s phone calls, allegedly related to his subornation of, and threats to, witnesses through third parties.¹¹¹⁸

The Prosecution requested a reversal of the trial judgement, a factual finding by the Appeals Chamber concerning Ngudjolo’s position of authority, and a full or partial retrial. At the time of writing, the Appeals Chamber had not yet issued a decision on the appeal.¹¹¹⁹

1115 ICC-01/04-02/12-39-Red2, paras 38, 53, emphasis in original.

1116 ICC-01/04-02/12-39-Red2, paras 72, 83, 85. In both grounds of appeal, the Prosecution relied heavily on the testimony of Witness 317, who was identified as Sonia Bakar, an investigator in the MONUC human rights section charged with investigating the Bogoro attack. She testified that Ngudjolo had admitted to her that he had organised the Bogoro attack, as well as a subsequent attack on Mandro. See the transcripts of her testimony: ICC-01/04-01/07-228-ENG; ICC-01/04-01/07-229-ENG; ICC-01/04-01/07-230-ENG. The Prosecution asserted that the Trial Chamber’s decision not to give weight to her testimony, which it had found credible, demonstrated its failure to properly assess the probative value of the evidence.

1117 ICC-01/04-02/12-39-Red2, para 31 and p 76.

1118 See ICC-01/04-02/12-90-Corr-Red, para 237.

1119 The Defence response to the Prosecution document in support of the appeal was made public on 24 October 2013. ICC-01/04-02/12-90-Corr2-Red. The Prosecution reply to the Defence response was filed on 29 July 2013, and made available on the Court’s website on 28 October 2013. ICC-01/04-02/12-126. Ngudjolo’s response to the Prosecution reply was also made available on 28 October 2013. ICC-01/04-02/12-134-Red. These filings will be described in forthcoming publications.

Victim participation in the appeal of the trial judgement

On 6 March 2013, the Appeals Chamber granted a joint request¹¹²⁰ by the Legal Representatives of Victims to participate in the appeal, reiterating their right to access confidential documents, but not those classified as *ex parte*.¹¹²¹ On 23 September 2013, the Chamber held that two anonymous victims from the V02 group of victims could continue to participate without revealing their identities to the parties. The Chamber reasoned that the participation of victims at the appellate stage was limited to filing observations on the Document in Support of the Appeal and the response to that document, and that the Legal Representatives had made observations on behalf of all the victims, including the anonymous ones, with no distinction between victims’ concerns. At the same time, the Chamber found that the identities of the anonymous victims would have to be disclosed to the parties should they wish to participate at the hearing or make observations as individuals. The Chamber thus ordered the Legal Representatives of the V02 group of victims to contact the victims to determine whether they were willing to have their anonymity lifted vis-à-vis the parties.¹¹²² Despite Defence objections to the continued participation of anonymous victims,¹¹²³ the Appeals Chamber found that given the late stage of the proceedings and the difficulties encountered by the Legal Representatives in contacting the victims, further submissions on this issue were not required.¹¹²⁴

At the time of writing this Report, the appeals proceedings remain ongoing.

1120 ICC-01/04-02/12-23.

1121 ICC-01/04-02/12-30.

1122 ICC-01/04-02/12-140, paras 18-20.

1123 The Defence objected to the continued participation of two anonymous former child soldier victims and four deceased victims from the V01 group of victims. See ICC-01/04-02/12-63, paras 9, 10, 16, 17 and ICC-01/04-02/12-91-tENG, para 12. On 3 June 2013, the Legal Representatives for both groups of victims filed their observations on the legal and factual issues raised by the Defence objection to the continued participation of wholly anonymous and deceased victims. ICC-01/04-02/12-79-tENG; ICC-01/04-02/12-80-tENG.

1124 ICC-01/04-02/12-154, para 9.

Victim and witness issues

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18 August 2012 – 31 October 2013*

**The Kenya case has been included through 30 November 2013. The section on allegations of sexual violence against ICC witnesses has been included through 31 December 2013. The Bemba and Barasa cases in relation to Article 70 of the Statute have been included through 30 November 2013 and 31 January 2014, respectively.*

Victim participation and legal representation

Victim participation in proceedings before the ICC is regulated in Article 68(3) of the 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. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the RPE.

There are also a number of important provisions in the RPE, as well as the Regulations of the Court, which provide a definition of ‘victim’ for the purposes of the Statute, address legal representation for victims, and set out the procedure to be followed in applications to participate and the format of participation in the proceedings.¹¹²⁵

The victim application process is governed by Rule 89 of the RPE, which requires the victim or a person acting with the consent of or on behalf of the victim to submit a written application to the Registrar, who must then submit it to the relevant Chamber. The Chamber may reject the application if it finds the person is not a victim or does not fulfil the criteria set forth in Article 68(3).¹¹²⁶

1125 See, in particular, Rules 85 and 89-93, RPE and Regulations 80-81, Regulations of the Court.

1126 Rules 89(1) and 89(2) of the RPE. Under Rule 85, the term ‘victims’ is defined as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court’ and may include ‘organisations or institutions’.

In 2005, standard application forms were developed by the VPRS to facilitate victims' applications. New forms were developed by the Court in consultation with civil society and introduced on 3 September 2010. These forms and a booklet explaining the functions of the Court, victims' rights and how to complete the participation and reparation forms were made available on the Court's website.¹¹²⁷ Various Chambers have clarified what information must be included in the application.¹¹²⁸

The RPE contain detailed provisions for the appointment of legal representatives for victims, and outline their role in the proceedings once appointed. Under the Rules, a victim may choose a legal representative¹¹²⁹ or, 'for the purposes of ensuring the effectiveness of the proceedings, the Chamber may request victims or groups of victims to choose a common legal representative with the Registry's assistance.¹¹³⁰ In 'facilitating the coordination of victim representation', the Registry may refer victims to its list of legal counsel or suggest a common legal representative'.¹¹³¹ If victims are unable to choose a common legal representative, the Chamber

may request the Registrar to make the choice for them.¹¹³² In the selection of common legal representatives, the Chamber and the Registry are obliged to take all reasonable steps to ensure that the distinct interests of the victims are represented and that any potential conflicts of interest are avoided.¹¹³³ The 'distinct interests of the victims' are defined in Article 68(1) of the Statute as including: age, gender, health and the nature of the crime, particularly if the crime involves sexual or gender violence or violence against children.¹¹³⁴

The OPCV is an independent office of the Court established for the purpose of providing support and assistance to victims and their legal representatives, providing legal research and advice and, where appropriate, appearing before the Chambers on specific issues. The Chamber may also appoint counsel from the OPCV to represent individual victims or groups of victims.¹¹³⁵ The OPCV's functions have been extended through an amendment to Regulation 81 of the Regulations of the Court, which entered into force in June 2012. Currently its mandate includes: providing support and assistance to victims and their legal representatives, including legal research and advice; appearing before the Court in relation to specific issues; advancing submissions, on the instruction or with the leave of the Chamber, in particular prior to the submission of victims' applications to participate in the proceedings, when applications pursuant to Rule 89 are pending, or when a legal representative has not yet been appointed; acting when appointed under Regulation 73 or Regulation 80; and representing a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice.¹¹³⁶

1127 'Forms', *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/forms.aspx>, last visited on 26 February 2014.

1128 Various Chambers have clarified what information must be included in the application submitted under Rule 89. For example, the Single Judge of Pre-Trial Chamber II recalled in the Ntaganda case that to be considered 'complete', application forms must include: the identity of the applicant; the date of the crime(s); the location of the crime(s); a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court; proof of identity; if the application is made by a person acting with the consent of the victim, the express consent of that victim; if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; and a signature or thumb-print of the Applicant on the document at the very least on the last page of the application. ICC-01/04-02/06-67, para 30.

1129 Rule 90(1), RPE.

1130 Rule 90(2), RPE.

1131 Rule 90(2), RPE.

1132 Rule 90(3), RPE.

1133 Rule 90(4), RPE.

1134 Rule 90(4), RPE, read together with Article 68(1) of the Rome Statute.

1135 Regulations 80(2) and 81, Regulations of the Court.

1136 Regulation 81(4), Regulations of the Court.

Efforts to enhance the efficiency and effectiveness of the victim participation process

In December 2011, November 2012 and November 2013, the ASP issued calls for the revision of the victim participation system in light of the backlog in processing victim applications for participation.¹¹³⁷ In 2011, the ASP requested the Court to conduct a review of the victim participation system in close consultation with the Bureau of the ASP and relevant stakeholders and to report thereon to the Assembly at its 11th session'.¹¹³⁸ In its report to the 11th session of the ASP,¹¹³⁹ in November 2012, the Court proposed various options for improving the victim application system

1137 In 2011, in Resolution ICC-ASP/10/Res.5, the ASP noted with concern 'reports from the Court on the continued backlogs the Court has had in processing applications from victims seeking to participate, a situation which might impact on effective implementation of the rights of victims under the Rome Statute' and underlined the 'need to consider reviewing the victim participation system with a view to ensuring its sustainability, effectiveness and efficiency'. In 2012, in Resolution ICC-ASP/11/Res.7, para 4, the ASP noted 'with continued concern reports from the Court on the persistent backlogs the Court has had in processing applications from victims seeking to participate in proceedings'. In 2013, in Resolution ICC-ASP/12/Res.5, para 3, the ASP expressed 'concerns about the difficulty the Court has encountered, on some occasions, in processing applications from victims seeking to participate in proceedings'. In 2011 and 2012, the Registry informed the Chambers on various occasions that it was unable to process or transmit to the Chamber the victim applications before the deadline established by the Chamber. See *Gender Report Card 2011*, p 274. In its report to the 11th Session of the ASP, in November 2012, the Court acknowledged that due to the lack of resources in the Registry, and in particular the VPRS, the Registry was 'unable to keep pace' with the applications that had to be processed and that a 'sizeable backlog of applications exist[ed]'. ICC-ASP/11/22, para 12.

1138 ICC-ASP/10/Res.5, para 49.

1139 The Court explained that the report 'contain[ed] the outcome of the Court's preliminary review of the current system for victims' applications and identifies possible options for ensuring sustainability, effectiveness and efficiency of the process', in line with ASP Resolution ICC-ASP/10/Res.5, and that this preliminary review would 'further be considered in the context of the Court's Report on Lessons Learnt' as a response to the invitation of the ASP's SGG for the Court 'to take stock of the lessons learnt in its first decade of operations and to reflect upon measures that may expedite the judicial proceedings and enhance their efficiency'. ICC-ASP/11/22, para 2. The drafting of the report was facilitated by the Deputy Registrar, in consultation with the Registry, the independent offices of the OPCV and for OPCD, the Office of the Prosecutor, legal advisors in Chambers, and the Presidency. The judges were not involved in the preparation of the report. ICC-ASP/11/22, p 3, fn 4.

and noted that the proposed changes could lead to the 'adoption of a new system that would require modification of the Court's legal framework'.¹¹⁴⁰ Without excluding additional possibilities that it had not considered, the Court presented the following options¹¹⁴¹: (i) continue to implement the current system;¹¹⁴² (ii) implement a partly collective application process;¹¹⁴³ (iii) apply a collective processing of applications by the Registry;¹¹⁴⁴ (iv)

1140 ICC-ASP/11/22, para 20. The Court noted that '[t]he options identified include ones that could be done within the current system, and ones that could require amendments to the Court's practices, Regulations, Rules and Statute'. ICC-ASP/11/22, para 3.

1141 ICC-ASP/11/22, para 21.

1142 The Court noted that while this option would not 'require any amendment to the legal framework or significant changes to established practice', it would not be sustainable 'without additional resources to the actors involved in determining applications'. ICC-ASP/11/22, para 24.

1143 The Court noted that at that point it was 'evaluating the *Gbagbo* experience and while there [we]re some indications that it may be more satisfying for some victims than an individual approach, this still ha[d] to be verified', and that 'a complete assessment of the advantages and disadvantages w[ould] be possible after the conclusion of the full participation cycle - namely the end of the pre-trial phase in *Gbagbo*'. It added, '[i]ndications are that the option may not be suitable for all circumstances, especially where no natural or pre-established groups can be identified and/or where victims are scattered over a wide geographical area'. ICC-ASP/11/22, para 38. In connection with this option, the Court noted that a variation of the partly collective approach 'would be for the Registry to continue to receive individual or partly collective applications, but to deal with them collectively in its reporting to the Chambers', whereby '[p]articular variables would be entered by the Registry into the database (time, place, crime, perpetrator etc.) and extracted so as to group applicants linked to a particular incident', and '[t]he Registry report to the Chamber would summarise the incident and list all the victims claiming to have suffered harm as a result'. It further explained that '[t]he Chamber's decision would accordingly list the victims accepted or rejected per incident, but would not give an individualised treatment to each victim'. However, the Court noted that '[t]his has not been judicially considered, so it is not clear whether or not it would require amendment to the legal framework'. ICC-ASP/11/22, footnote 28.

1144 The Court explained that this approach would involve 'fully collective applications, allowing a group of applicants to present information and to participate on a collective basis' and noted that '[a]s the fully collective application options are untested it is uncertain whether they would require amendments to the legal framework, especially Article 68(3) RS, Rules 85 and 89 of the RPE and Regulation 86 of the RoC'. ICC-ASP/11/22, paras 39, 41.

utilise a Registry report as the basis for observations and decision-making; (v) allow judicial decision-making on the status of victims without litigation between the parties;¹¹⁴⁵ and (vi) addressing victims' applications only at the pre-trial stage.¹¹⁴⁶

At its 11th session in 2012, the ASP called upon the Court to urgently introduce changes to the system of victim participation in order to ensure its 'sustainability, effectiveness and efficiency'.¹¹⁴⁷ To this end, it requested the ASP Bureau 'to prepare, in consultation with the Court, any amendments to the legal framework for the implementation of a predominantly collective approach in the system for victims to apply to participate in the proceedings'.¹¹⁴⁸

In October 2013, in a report for the 12th session of the ASP, reflecting the outcome of the consultations held by The Hague Working Group of the Bureau¹¹⁴⁹ with the Court and other stakeholders, the Bureau noted that 'both the Court and other stakeholders agree that there is a need to review the participation system with the aim of simplifying it' and added that '[i]n general terms, the main concern in this matter is the existence of different approaches within the Court considering the victims' right to participate and the resources that are needed to implement the different options'. Regarding the issue of a consistent and harmonised approach,¹¹⁵⁰ it noted that 'while States Parties have expressed the need for a uniform system, the Court has stressed that it is up to the

1145 The Court noted that '[t]his option would likely require amendment of Rule 89.1 RPE (requiring transmission of the applications to the parties) and the RoC'. ICC-ASP/11/22, para 59.

1146 The Court noted that '[s]uch an option could be introduced by amendment to Rule 89(1) RPE and Regulation 86 RoC, and may require amendment of Article 68(3) of the Statute'. ICC-ASP/11/22, para 67.

1147 ICC-ASP/11/Res.7, para 4.

1148 ICC-ASP/11/Res.7, para 5.

1149 The Bureau of the Assembly of States Parties established two Working Groups in 2004, one based in The Hague and one in New York. See 'Bureau of the Assembly', ICC website, available at <http://www.icc-cpi.int/en_menus/asp/bureau/Pages/bureau%20of%20the%20assembly.aspx>, last visited on 27 February 2014.

1150 In its report, the Bureau noted that the Court 'ha[d] explained that different approaches have been adopted by different Chambers since 2012, notably in the Gbagbo, Bosco Ntaganda and the Kenya proceedings'. ICC-ASP/12/38, footnote 14.

Judges within their judicial independency to choose the method of participation, bearing in mind the fact that the number of victims seeking to participate in the cases before the Court can vary greatly'.¹¹⁵¹ It concluded that 'discussions on victims' participation should continue'.¹¹⁵²

Although no amendments to the legal framework in relation to the victim participation system were introduced at the 12th session of the ASP in 2013, the Assembly adopted a resolution in which it once again 'call[ed] upon the Court to explore ways to harmonise the application process for victims to participate in the proceedings before the Court, and in consultation with all relevant stakeholders'. The ASP indicated its 'appreciation of all the efforts to enhance the efficiency and effectiveness of victim participation'. Specifically, it invited the Bureau 'to explore, in consultation with the Court, the need for possible amendments to the legal framework for the participation of victims in the proceedings', and decided to 'continue discussions on this topic focusing, through its Bureau, on victims' participation'.¹¹⁵³

As described below, in the reporting period, the number of applications for victim participation was much lower than in previous years. The VPRS also indicated that, contrary to previous years, by June 2013 there was no backlog in processing applications.¹¹⁵⁴

1151 ICC-ASP/12/38, para 10.

1152 ICC-ASP/12/38, para 10.

1153 ICC-ASP/12/Res.5, paras 3-4, 20.

1154 Information provided by the VPRS in an email dated 11 July 2013. However, the consequences of previous backlogs were still made evident in 2013. For example, in *The Prosecutor v. Thomas Lubanga Dyilo* case, delays in processing victim applications submitted in 2011 resulted in their applications being addressed by the Appeals Chamber at the tail end of the appeals proceedings, in 2013. In November 2011, the Registry had informed Trial Chamber I that it had not transmitted approximately 30 victim applications that had been completed in July of that year, before the closing arguments, due to a 'lack of resources', and sought guidance from the Chamber as to whether to transmit them. ICC-01/04-01/06-2817. On 27 January 2012, the Chamber instructed the Registry to transmit these applications only if and when the sentencing and reparation proceedings began. ICC-01/04-01/06-2838. However, these applications were not transmitted before the Trial Chamber issued decisions on sentencing and reparations. Rather, they were submitted to the Appeals Chamber for consideration in the late stages of the appeals of the conviction and sentencing decisions, after all of the parties and participants had submitted their final observations. The Appeals Chamber issued its decision, admitting 30 victims to participate on 27 August 2013, acting in the interests of justice. ICC-01/04-01/06-3045-Red2.

Victim applications for participation

Overview of applications for victim participation 2005-2013

From 2005 until the end of June 2013, the Court received a total of 12,998 applications from persons seeking to participate as victims in proceedings.¹¹⁵⁵ Of those applications, 357 were received between 1 September 2012 and 30 June 2013.¹¹⁵⁶ This figure represents a significant decrease in comparison to previous years, over which applications for victim participation steadily increased. Between 1 September 2011 and 31 August 2012, the Court received 6,485 applications.¹¹⁵⁷ Between 31 August 2010 and 1 September 2011, the Court received 2,577 applications.¹¹⁵⁸ Between 1 October 2009 and 30 August 2010, the Court received 1,765 applications for participation,¹¹⁵⁹ while between 2005 and 30 September 2009, the Court received a total of 1,814 applications.¹¹⁶⁰

1155 Figures provided by the VPRS by email dated 11 July 2013 (hereinafter 'VPRS email'). All figures in this section are accurate as of 30 June 2013. The VPRS email included information on the number of received victim applications for participation and the number of applicants authorised to participate in proceedings from 1 September 2012 to 30 June 2013. Percentages in this section have been calculated on the basis of information provided by the VPRS. Due to the rounding principle, sometimes percentages may add up to slightly more or less than 100%. Whereas in previous years, the statistics covered a full year (1 September through 31 August the following year), this year the statistics covered a ten-month period (1 September 2012 through 30 June 2013). In this section, whenever data is presented 'up to 30 June', it refers to the overall data from 2005 until 30 June 2013. The VPRS also indicated that it had received three applications in the Kenya Situation and related cases (one female applicant, and two male applicants), which were unclear as to the type of application, be that for reparations, victim participation or both. These applications were not included in the figures provided. The Court has received a total of 23,742 applications from victims, including applications for participation, reparations and the three unknown applications.

1156 Based on figures provided by the VPRS by email dated 11 July 2013. In the report on the Court's activities submitted to the 12th session of the ASP, the Court noted that between 16 September 2012 and 15 September 2013, the VPRS 'received 1,615 applications for participation and 1,566 applications for reparation in relation to the proceedings pending before the Court'. ICC-ASP/12/28, para 90. It further states that 'the Court received 716 applications for participation of victims in proceedings and 722 applications for reparation. The Registry filed 70 transmissions, observations and reports in relation to victim issues'. ICC-ASP/12/28, para 3.

1157 See *Gender Report Card 2012*, p 265.

1158 See *Gender Report Card 2011*, p 280.

1159 See *Gender Report Card 2010*, p 185.

1160 See *Gender Report Card 2009*, p 95.

Breakdown by Situation of applications for victim participation

<i>Situation</i>	<i>Number of applications between 1 Sept 2012 and 30 June 2013</i>	<i>%</i>	<i>Number of applications up to 30 June 2013</i>	<i>%</i>
DRC	0	0%	2,188	16.8%
Uganda	5	1.4%	1,140	8.8%
Darfur	1	0.3%	264	2%
CAR	0	0%	5,599	43.1%
Kenya	272	76.2%	3,518	27.1%
Libya	0	0%	7	0.1%
Côte d'Ivoire	79	22.1%	282	2.2%
Mali	0	0%	0	0%
Totals	357	100%	12,998	100%

Gender breakdown of applications by Situation

Of the 12,998 applications for victim participation received by the Court as of 30 June 2013, the gender of 9,256 applicants was registered by the VPRS. 4,956 (or 53.5%) of these applicants were male,¹¹⁶¹ and 4,300 (or 46.5%) were female.¹¹⁶² The gender of 28.5% applicants was registered as 'unknown', representing a slight decrease in such applicants as compared to last year.¹¹⁶³ 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 the applicant has not indicated her/his gender on the application form and it was not possible to retrieve the information from the application.¹¹⁶⁴ In the period between 1 September 2012 and 30 June 2013, no new applicants registered their gender as 'unknown'.

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 a total of 5,599 applications, 2,172 (or 38.8%) which were from male applicants and 1,997 (or 35.7%) which were female applicants. For a little over a quarter of all applications in this Situation — 1,409 applications, or 25.2% — the gender was registered as 'unknown'. The Kenya Situation and related cases represent 27.1% of all applications received as of 30 June 2013. Of the 3,518 applications received in this Situation, 953 (or 27.1%) were from male applicants and 749 (or 21.3%) were from female applicants. Significantly, in this Situation, the gender was registered as 'unknown' in more than half of all applications received (1,816 applications, representing 51.6%). According to the VPRS, in all new applications received in the Kenya Situation and related cases between 1 September 2012 and 30 June 2013, the gender was registered. In 2011, the VPRS reported that gender was not registered in 19.8% of the applications for participation received in the Kenya Situation.¹¹⁶⁵ The VPRS reported in 2012 that in the Côte d'Ivoire Situation and related cases,¹¹⁶⁶ the Court received as many applications for victim participation from male victims as from female victims. Overall, from 2005 until June 2013, the Court received more applications from male victims than from female victims in all Situations and cases.

1161 The information provided by the VPRS email indicated that 4,956 applications from male victims were received, representing 53.5% of the 9,256 applicants for whom their gender was registered. The 4,965 male applicants represent 38.1% of all 12,998 applications received by the Court as of 30 June 2013.

1162 The information provided by the VPRS email indicated that 4,300 applications from female victims were received, representing 46.5% of the 9,256 applicants for whom their gender was registered. The 4,300 female applicants represent 33.1% of all 12,998 applications received by the Court as of 30 June 2013.

1163 The information provided by the VPRS email indicated that a total of 12,998 were registered by the VPRS since 2005. The gender of 3,705 applicants (or 28.5%) was registered as 'unknown'. Last year, the VPRS reported that the gender was registered as unknown for 29.5% of all applications received (3,705 out of a total of 12,641 applicants).

1164 Explanation provided by the VPRS to the Women's Initiatives by emails dated 3 September 2012 and 20 September 2012.

1165 See *Gender Report Card 2011*, p 279.

1166 In 2012, the VPRS reported that it received 91 applications from male and female victims in the Côte d'Ivoire Situation and related cases. See *Gender Report Card 2012*, p 263.

Gender breakdown by Situation of applications for victim participation up to 30 June 2013¹¹⁶⁷

Situation	Number of male applicants	% male applicants	Number of female applicants	% female applicants	Number of institution/organisation 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	16.8%
Uganda	504	44.2%	320	28.1%	2	0.2%	314	27.5%	1,140	8.8%
Darfur	115	43.6%	58	22%	1	0.4%	90	34.1%	264	2%
CAR	2,172	38.8%	1,997	35.7%	21	0.4%	1,409	25.2%	5,599	43.1%
Kenya	953	27.1%	749	21.3%	0	0%	1,816	51.6%	3,518	27.1%
Libya	3	42.9%	3	42.9%	0	0%	1	14.3%	7	0.1%
Côte d'Ivoire	141	50%	120	42.6%	0	0%	21	7.4%	282	2.2%
Mali	0	0%	0	0%	0	0%	0	0%	0	0%
Totals	4,956	38.1%	4,300	33.1%	37	0.3%	3,705	28.5%	12,998	100%

1167 Figures as of 30 June 2013. All figures in this table are based on information provided by the VPRS by email dated 11 July 2013 and relate only to applications for participation registered by the VPRS.

Gender breakdown by Situation of applications for victim participation between 1 September 2012 and 30 June 2013

Situation	Number of male applicants	% male applicants	Number of female applicants	% female applicants	Number of institution/organisation applicants	% institution/organisation applicants	Number of gender unknown applicants	% gender unknown applicants	Total	%
DRC	0	0%	0	0%	0	0%	0	0%	0	0%
Uganda	3	60%	2	40%	0	0%	0	0%	5	1.4%
Darfur	1	100%	0	0%	0	0%	0	0%	1	0.3%
CAR	0	0%	0	0%	0	0%	0	0%	0	0%
Kenya	162	59.6%	110	40.4%	0	0%	0	0%	272	76.2%
Libya	0	0%	0	0%	0	0%	0	0%	0	0%
Côte d'Ivoire	50	63.3%	29	36.7%	0	0%	0	0%	79	22.1%
Mali	0	0%	0	0%	0	0%	0	0%	0	0%
Totals	216	60.5%	141	39.5%	0	0%	0	0%	357	100%

Victim participation at the ICC as of 30 June 2013¹¹⁶⁸

Of the 12,998 applications for participation that have been received by the Court as of 30 June 2013, a total of 6,987 victims were accepted to participate, representing close to 54% of all applicants. During the reporting period, between September 2012 and 30 June 2013, a total of 837 victims were accepted to participate, specifically in the Bemba case, arising from the CAR Situation, and the Laurent Gbagbo case, arising from the Côte d'Ivoire Situation.

¹¹⁶⁸ All information is based on figures provided by the VPRS by email dated 11 July 2013.

Breakdown by Situation/case of victims who were formally accepted to participate in proceedings¹¹⁶⁹

<i>Situation or case</i>	<i>Number of victims accepted between 1 Sept 2012 and 30 June 2013</i>	<i>Total number of victims accepted up to 30 June 2013</i>
DRC	0	203
<i>Prosecutor v. Lubanga</i>	0	120
<i>Prosecutor v. Katanga</i>	0	364
<i>Prosecutor v. Ngudjolo</i>	0	364 ¹¹⁷⁰
<i>Prosecutor v. Ntaganda</i>	0	0
<i>Prosecutor v. Mudacumura</i>	0	0
<i>Prosecutor v. Mbarushimana</i>	0	132
Uganda	0	21
<i>Prosecutor v. Kony et al</i>	0	41
Darfur	0	11
<i>Prosecutor v. Abu Garda</i>	0	87 ¹¹⁷¹
<i>Prosecutor v. Harun and Kushayb</i>	0	6
<i>Prosecutor v. Al'Bashir</i>	0	12
<i>Prosecutor v. Banda and Jerbo</i>	0	89
<i>Prosecutor v. Hussein</i>	0	0
CAR	0	0
<i>Prosecutor v. Bemba</i>	777	5,229
Kenya	0	0
<i>Prosecutor v. Ruto and Sang</i>	0	327
<i>Prosecutor v. Kenyatta</i>	0	233
Libya	0	0
<i>Prosecutor v. Gaddafi and Al-Senussi</i>	0	0
Côte d'Ivoire	0	0
<i>Prosecutor v. Laurent Gbagbo</i>	60	199
<i>Prosecutor v. Simone Gbagbo</i>	0	0
Totals	837	6,987 ¹¹⁷²

1169 Figures as of 30 June 2013. Email communication with the VPRS dated 11 July 2013.

1170 As described earlier in this Report, in November 2012, Trial Chamber II severed the cases against Ngudjolo and Katanga. In the decision, the Chamber held that 'the victims allowed to participate in the initial proceedings [we]re authorised to continue participating in both of the severed proceedings'. ICC-01/04-01/07-3319-TENG, para 65. For this reason, the 364 victims that were authorised to participate in the joint trial against Ngudjolo and Katanga have been listed as victim participants in both cases. However, as these are the same victims, they have only been counted once in the total number of victims that have been accepted to participate in proceedings as of 30 June 2013.

1171 Following the non-confirmation of charges against Abu Garda in 2009, all 87 victims re-applied for, and were granted, participation status in the Banda and Jerbo case. In order to present an accurate figure of the total number of victims accepted to participate, these 87 victims participants in the Abu Garda case were not counted in the total number of victims accepted, as they were already accounted for in the 89 victim participants in the Banda and Jerbo case.

1172 As indicated above, the victims who were authorised to participate in the case against Ngudjolo and Katanga, following the severance of the cases, have only been counted once in the total number of victims accepted to participate as of 30 June 2013, as they are the same victims.

Breakdown of participants by Situation¹¹⁷³

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. However, in practice, the Court's jurisprudence has limited the potential for victims to enjoy a general right to participate at the Situation stage of proceedings.

In December 2008 and February 2009, the Appeals Chamber issued two decisions in the DRC and Darfur Situations, rejecting the granting of 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 the victims before they can be granted the right to participate.¹¹⁷⁴ 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, 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.¹¹⁷⁵ 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.¹¹⁷⁶

The CAR Situation, and specifically the Bemba case, continues to represent the overwhelming majority of victims accepted to participate as of 30 June 2013. Close to three quarters of all victims (74.8%) were accepted in this Situation.¹¹⁷⁷ The DRC Situation and related cases, in which a total of 819 victim participants were accepted to participate, represent 11.7% of all victim participants, a slight decrease from 13.1% last year.¹¹⁷⁸ In contrast to the CAR Situation, the victims accepted to participate in the DRC Situation are participating in four cases.¹¹⁷⁹

1173 Figures as of 30 June 2013.

1174 ICC-01/04-556 and ICC-02/05-177. See further *Gender Report Card 2009*, p 99-100.

1175 See *Gender Report Card 2011*, p 281-291.

1176 See 'A guide for the Participation of Victims in the proceedings of the court', *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/participation/Pages/booklet.aspx>, last visited on 27 February 2014.

1177 According to figures provided by the VPRS, 5,229 of the 6,987 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 74.8% of the total number of participating victims before the Court. This has been primarily due to a substantial increase in accepted participants during 2011 and 2012. As of 30 August 2010, the CAR Situation and Bemba case amounted to less than 14% of the total number of participating victims (135 of 975 in total). See further *Gender Report Card 2012*, p 266-268 and *Gender Report Card 2010*, p 189.

1178 See *Gender Report Card 2012*, p 268.

1179 In 2012, there were five cases, involving six individuals, in the DRC Situation. Since the publication of the *Gender Report Card 2012*, Trial Chamber II severed the cases against Ngudjolo and Katanga. These cases are now treated separately. In the decision severing the cases, the Chamber ruled that the victim participants that had been accepted in the joint trial maintained their status in both cases. ICC-01/04-01/07-3319-tENG, para 65. They have, however, only been counted once in the total number of victim accepted in the DRC Situation and related cases, as they are the same victims.

There has been no increase in the number of victim participants accepted in the Uganda Situation or in the case against Joseph Kony *et al.*¹¹⁸⁰ The Uganda Situation still accounts for slightly less than 0.9% of all victim participants.¹¹⁸¹ The victim participants in the Darfur Situation and related cases represent a little over 1.7% of participating victims.¹¹⁸² No victim participants were accepted in the Kenya Situation or related cases in the period between 1 September 2012 and 30 June 2013, which now accounts for 8% of the total number of participating victims, the third highest percentage by Situation behind the DRC and the CAR.¹¹⁸³ In the Côte d'Ivoire Situation and related cases, 60 new victims were accepted in the period between 1 September 2012 and 30 June 2013, all of whom were accepted in the case against Laurent Gbagbo. This Situation and related cases now represent 2.8% of all accepted participants.¹¹⁸⁴

Breakdown by Situation of victims who were formally accepted to participate in proceedings¹¹⁸⁵

<i>Situation and cases</i>	<i>Number of victim participants 1 Sept 2012 to 30 June 2013</i>	<i>% of victim participants 1 Sept 2012 to 30 June 2013</i>	<i>Number of victim participants up to 30 June 2013</i>	<i>% of victim participants up to 30 June 2013</i>
DRC	0	0%	819	11.7%
Uganda	0	0%	62	0.9%
Darfur	0	0%	118	1.7%
CAR	777	93%	5,229	74.8%
Kenya	0	0%	560	8%
Libya	0	0%	0	0%
Côte d'Ivoire	60	7.2%	199	2.8%
Mali	0	0%	0	0%
Totals	837	100%	6,987	100%

1180 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. As such, there has not been an increase in the number of victims accepted to participate in this Situation.

1181 The VPRS email indicated 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 0.89% of the 6,987 accepted victim participants.

1182 118 victims, or 3.3%, of the 6,987 victim participants pertain to the Darfur Situation and the three associated cases. As indicated above, following the non-confirmation of charges against Abu Garda in 2009, all 87 victims re-applied for, and were granted, participation status in the Banda and Jerbo case. In order to present an accurate figure of the total number of victims accepted to participate, these 87 victims in Abu Garda were not recounted in the total number of victims accepted, as they were already accounted for in the 89 victim participants in the Banda and Jerbo case. These 87 victims have been eliminated from the number of participants accepted as of 31 August 2012. See further *Gender Report Card 2012*, p 268.

1183 According to figures provided by the VPRS, the Kenya Situation and cases represent 560 of the 6,987 participating victims at the Court, which amounts to 8% of the total.

1184 The VPRS email indicated that a total of 199 out of 6,987 victims have been accepted in the Côte d'Ivoire Situation and related cases.

1185 Figures as of 30 June 2013. Email communication with the VPRS dated 11 July 2013.

Breakdown of participants by gender¹¹⁸⁶

Of the 6,987 victims authorised to participate in the proceedings, the gender of 824 (or 11.8%) was registered as ‘unknown’.¹¹⁸⁷ The overall division between male and female victims has remained largely the same as last year. Female victim participants account for 2,920 of the 6,987 victim participants (or 41.8%), while 3,227 of the victim participants (or 46.2%) are male and 16 are institutions and/or organisations (representing 0.2%).¹¹⁸⁸ In the proceedings against President Al’Bashir and Harun and Kushayb all of the victim participants are male.¹¹⁸⁹ In the Lubanga, Katanga and Ngudjolo cases, approximately 70% of the victims authorised to participate are male.¹¹⁹⁰ No victims have yet been authorised to participate in the Libya Situation, in the case against Gaddafi and Al-Senussi, or in the Mali Situation. With the exception of the Mbarushimana case in the DRC Situation, the Kenyatta case in the Kenya Situation and the Laurent Gbagbo case in the Côte d’Ivoire Situation, the majority of victim participants are male victims. In the Kenya Situation and related cases, and the Côte d’Ivoire Situation and related cases, a little over half of all victim participants are female victims.¹¹⁹¹

The case with the highest relative number of female victims authorised to participate in the proceedings was the Mbarushimana case, in which 62.1% (82 of 132) victims were female. 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 in which victims could participate, unless the Office of the Prosecutor decides to bring additional evidence in this case and, on that basis, to request the confirmation of charges. The second highest percentage of female victims in a single case is in the Kenyatta case in the Kenya Situation, in which 57.5% of the victims authorised to participate in the proceedings are female.¹¹⁹² In the Laurent Gbagbo case, female victims represent close to 52% of all victim participants.¹¹⁹³

Regarding the two cases in which victims were authorised to participate between 1 September 2012 and 30 June 2013, in the Bemba case, the majority were female,¹¹⁹⁴ while in the Laurent Gbagbo case, the majority were male.¹¹⁹⁵

1186 Figures as of 30 June 2013.

1187 In 2012, the VPRS indicated that the gender could be registered as ‘unknown’ either because the information had not yet been entered in their database or because the applicant did not specify her/his gender in the application and it was not possible to retrieve this information from the application form. The VPRS had also indicated that the development of its database was ongoing and that the new database should be fully operational in 2013, which would enable the VPRS to extract gender disaggregated data. Explanation provided by the VPRS by emails dated 3 September 2012 and 20 September 2012.

1188 During the period covered by the *Gender Report Card 2012*, 46.4% of all victim participants were male, and 40.2% were female victims.

1189 The VPRS email indicated that all 12 victim participants in the case against President Al’Bashir were male, as were the six participants in the Harun and Kushayb case.

1190 The VPRS email indicated that of the 120 victims authorised to participate in the Lubanga case, 87 were male victims (representing 72.5%). In the Katanga and Ngudjolo cases, 246 of the 364 victims (or 67.6%) authorised to participate were male.

1191 The VPRS email indicated that 284 of the 560 victims authorised to participate in the Kenya Situation and related cases (representing 50.7%) were female. In the Côte d’Ivoire Situation and related cases, 103 out of 199 victims (representing 51.8%) were female.

1192 The VPRS email indicated that 134 of the 233 victims authorised to participate in the Kenyatta case were female.

1193 The VPRS email indicated that 103 of the 199 victims authorised to participate in the Laurent Gbagbo case were female, representing 51.8%.

1194 In the Bemba case, out of the 777 victims authorised to participate, 429 were female, while 344 were male. Figures provided by the VPRS by email dated 11 July 2013.

1195 In the Gbagbo case, out of the 60 victims authorised to participate, 32 were male and 28 were female. Figures provided by the VPRS by email dated 11 July 2013.

Gender breakdown by Situation/case of victims who were formally accepted to participate in proceedings up to 30 June¹¹⁹⁶

Situation or case	Number of male participants	% male participants	Number of female participants	% female participants	Number of institution/organisation participants	% institution/organisation participants	Number of participants gender not registered	% gender not registered	Total
DRC Situation	135	66.5%	65	32.0%	3	1.5%	0	0%	203
<i>Prosecutor v. Lubanga</i>	87	72.5%	33	27.5%	0	0%	0	0%	120
<i>Prosecutor v. Katanga</i>	246	67.6%	117	32.1%	1	0.3%	0	0%	364
<i>Prosecutor v. Ngudjolo</i>	246	67.6%	117	32.1%	1	0.3%	0	0%	364 ¹¹⁹⁷
<i>Prosecutor v. Ntaganda</i>	0	0%	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Muducumura</i>	0	0%	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Mbarushimana</i>	48	36.4%	82	62.1%	0	0%	2	1.5%	132
DRC Situation and 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
<i>Prosecutor v. Kony et al</i>	22	53.7%	19	46.3%	0	0%	0	0%	41
Uganda Situation and cases	37	59.7%	25	40.3%	0	0%	0	0%	62

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¹¹⁹⁶ Figures as of 30 June 2013. All the figures and percentages were calculated on the basis of data provided by the VPRS by email dated 11 July 2013.

¹¹⁹⁷ As described earlier in this Report, in November 2012, Trial Chamber II severed the cases against Ngudjolo and Katanga. In the decision, the Chamber held that 'the victims allowed to participate in the initial proceedings [we]re authorised to continue participating in both of the severed proceedings'. ICC-01/04-01/07-3319-tENG, para 65. For this reason, the 364 victims that were authorised to participate in the joint trial against Ngudjolo and Katanga have been listed as victim participants in both cases. However, as these are the same victims, they were only counted once in the subtotal for the DRC Situation and related cases, and in the total number of victims that have been accepted to participate in proceedings as of 30 June 2013.

Gender breakdown by Situation/case of victims who were formally accepted to participate in proceedings up to 30 June *continued*

Situation or case	Number of male participants	% male participants	Number of female participants	% female participants	Number of institution/organisation participants	% institution/organisation participants	Number of participants gender not registered	% gender not registered	Total
Darfur Situation	8	72.7%	3	27.3%	0	0%	0	0%	11
<i>Prosecutor v. Abu Garda</i>	45	0%	42	0%	0	0%	0	0%	87 ¹¹⁹⁸
<i>Prosecutor v. Harun and Kushayb</i>	6	100%	0	0%	0	0%	0	0%	6
<i>Prosecutor v. Al'Bashir</i>	12	100%	0	0%	0	0%	0	0%	12
<i>Prosecutor v. Banda and Jerbo</i>	47	52.8%	42	47.2%	0	0%	0	0%	89
<i>Prosecutor v. Hussein</i>	0	0%	0	0%	0	0%	0	0%	0
Darfur Situation and cases	73	61.9%	45	38.1%	0	0%	0	0%	118
CAR Situation	0	0%	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Bemba</i>	2,229	42.6%	2,166	41.4%	12	0.2%	822	15.7%	5,229
CAR Situation and related cases	2,229	42.6%	2,166	41.4%	12	0.2%	822	15.7%	5,229
Kenya Situation	0	0%	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Ruto and Sang</i>	177	54.1%	150	45.9%	0	0%	0	0%	327
<i>Prosecutor v. Kenyatta</i>	99	42.5%	134	57.5%	0	0%	0	0%	233
Kenya Situation and cases	276	49.3%	284	50.7%	0	0%	0	0%	560

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1198 As indicated above, the 87 victim participants accepted in the Abu Garda case all re-applied for, and were granted, participation status in the Banda and Jerbo case following the non-confirmation of charges against Abu Garda. In order to present an accurate figure of the total number of victim participants accepted by the Chambers, the 87 victims accepted in Abu Garda were not added to the subtotal for the Darfur Situation and related cases, or in the totals in this table.

Gender breakdown by Situation/case of victims who were formally accepted to participate in proceedings up to 30 June *continued*

Situation or case	Number of male participants	% male participants	Number of female participants	% female participants	Number of institution/organisation participants	% institution/organisation participants	Number of participants gender not registered	% gender not registered	Total
Libya Situation	0	0%	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Gaddafi et al</i>	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
<i>Prosecutor v. Laurent Gbagbo</i>	96	48.2%	103	51.8%	0	0%	0	0%	199
<i>Prosecutor v. Simone Gbagbo</i>	0	0%	0	0%	0	0%	0	0%	0
Côte d'Ivoire Situation and cases	96	48.2%	103	51.8%	0	0%	0	0%	199
Mali Situation	0	0%	0	0%	0	0%	0	0%	0
Total ¹¹⁹⁹	3,227	46.2%	2,920	41.8%	16	0.2%	824	11.8%	6,987

¹¹⁹⁹ These totals excluded the 87 victims in the Abu Garda case, and the 364 victims in the Ngudjolo case, for the reasons explained above.

Overview of female victim participants¹²⁰⁰

Of the 2,920 female victims authorised to participate in proceedings before the ICC, 2,166 (or 74.2%) were accepted to participate in the Bemba case.¹²⁰¹

<i>Situation and case</i>	<i>Number of female victims accepted to participate as of 30 June 2013</i>	<i>Percentage of female victims accepted to participate</i>
DRC Situation	65	2.2%
<i>Prosecutor v. Lubanga</i>	33	1.1%
<i>Prosecutor v. Katanga</i>	117	4%
<i>Prosecutor v. Ngudjolo</i>	117 ¹²⁰²	
<i>Prosecutor v. Ntaganda</i>	0	0%
<i>Prosecutor v. Mudacumura</i>	0	0
<i>Prosecutor v. Mbarushimana</i>	82	2.8%
DRC Situation and cases	297	10.2%
Uganda Situation	6	0.2%
<i>Prosecutor v. Kony et al</i>	19	0.7%
Uganda Situation and cases	25	0.9%
Darfur Situation	3	0.1%
<i>Prosecutor v. Abu Garda</i>	42 ¹²⁰³	
<i>Prosecutor v. Harun and Kushayb</i>	0	0%
<i>Prosecutor v. Al'Bashir</i>	0	0%
<i>Prosecutor v. Banda and Jerbo</i>	42	1.4%
<i>Prosecutor v. Hussein</i>	0	0%

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1200 Figures as of 30 June 2013.

1201 The female participants represent 41.8% of all accepted victim participants. These figures were based on the total number of accepted victim participants for whom the VPRS was able to register their gender, and did not take into account those victims for whom the VPRS was unable to register their gender. The VPRS has indicated that for a total of 824 (or 11.8% of all victim participants) it was unable to register their gender.

1202 As described earlier in this Report, in November 2012, Trial Chamber II severed the cases against Ngudjolo and Katanga. In the decision, the Chamber held that 'the victims allowed to participate in the initial proceedings [we]re authorised to continue participating in both of the severed proceedings'. ICC-01/04-01/07-3319-tENG, para 65. For this reason, the 117 female victims who were authorised to participate in the joint trial against Ngudjolo and Katanga were listed as victim participants in both cases. However, as these are the same victims, they were only counted once in the subtotal for the DRC Situation and related cases, and in the total number of female victims that have been accepted to participate in proceedings as of 30 June 2013. A percentage was therefore not provided.

1203 As indicated above, the 42 female victim participants accepted in the Abu Garda case all re-applied for, and were granted, participation status in the Banda and Jerbo case following the non-confirmation of charges against Abu Garda. In order to present an accurate figure of the total number of victim participants accepted by the Chambers, these 42 victims were counted only once in the subtotal for the Darfur Situation and related cases, and in the total number of female victims who were accepted to participate in proceedings as of 30 June 2013. A percentage was therefore not provided.

Overview of female victim participants *continued*

<i>Situation and case</i>	<i>Number of female victims accepted to participate as of 30 June 2013</i>	<i>Percentage of female victims accepted to participate</i>
Darfur Situation and cases	45	1.5%
CAR Situation	0	0%
<i>Prosecutor v. Bemba</i>	2,166	74.2%
CAR Situation and cases	2,166	74.2%
Kenya Situation	0	0%
<i>Prosecutor v. Ruto and Sang</i>	150	5.1%
<i>Prosecutor v. Kenyatta</i>	134	4.6%
Kenya Situation and cases	284	9.7%
Libya Situation	0	0%
<i>Prosecutor v. Gaddafi and Al-Senussi</i>	0	0%
Libya Situation and cases	0	0%
Côte d'Ivoire Situation	0	0%
<i>Prosecutor v. Laurent Gbagbo</i>	103	3.5%
<i>Prosecutor v. Simone Gbagbo</i>	0	0%
Côte d'Ivoire Situation and cases	103	3.5%
Total	2,920	

Victim applications for reparations

Gender breakdown of applications for reparations¹²⁰⁴

For the second year, the VPRS has made available data on the applications for reparations received by the Court, including a gender breakdown of these statistics. As of 30 June 2013, the Court received a total of 10,751 applications for reparations, 388 of which were received during the period between 1 September 2012 and 30 June 2013. Of these 388 applications, 300 were received in the Kenya Situation, 82 in the Côte d'Ivoire Situation, five in the Uganda Situation and one in the Darfur Situation.¹²⁰⁵

As of 30 June 2013, most of the applications for reparations were received in the context of the Kenya and the CAR Situations and related cases (41.5% and 37.5%, respectively). The DRC Situation, the only Situation in which the Court's reparations mandate has so far been triggered following the conviction of Lubanga in March 2012,¹²⁰⁶ accounts for 12.4% of all applications for reparations.

For approximately one-third of the total number of applications received as of 30 June 2013, the gender of the applicant was registered as 'unknown'.¹²⁰⁷ Of the 7,149 applicants for reparations for whom the gender was registered, 3,683 (or 51.5%) were male applicants and 3,466 (or 48.4%) were female applicants. The Court received 11 applications for reparations from institutions and/or organisations.

During the period between 1 September 2012 and 30 June 2013, the VPRS was able to register the gender of all new applications for reparations. In the Kenya, Côte d'Ivoire and Uganda Situations, most of the applications were filed by male applicants.¹²⁰⁸

1204 Figures as of 30 June 2013.

1205 Figures provided by the VPRS by email dated 11 July 2013.

1206 The implementation of the reparations order issued by Trial Chamber I in the Lubanga case in August 2012 was suspended, pending the resolution of the appeals. For a further discussion see the *Victim and Witness Issues* section of this Report.

1207 The VPRS explained that the gender of the applicant could be registered as 'unknown' either because the information had not yet been entered in their database or because the applicant did not specify her/his gender in the application and it was not possible to retrieve this information from the application form. The VPRS had also indicated that the development of their database was ongoing and that the new database should be fully operational in 2013, which would enable the VPRS to extract gender disaggregated data. Explanation provided by the VPRS by emails dated 3 September 2012 and 20 September 2012.

1208 In the Kenya Situation, 177 applications were filed by male applicants and 123 by female applicants; in the Côte d'Ivoire Situation, 53 applicants were male and 29 were female; and in the Uganda Situation, three were male and two were female. In the Darfur Situation, there was only one male applicant. Figures provided by the VPRS by email dated 11 July 2013.

Situation and cases	Number of male applicants	% male applicants	Number of female applicants	% female applicants	Number of institution/organisation applicants	% institution/organisation 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	12.4%
Uganda	88	19.6%	114	25.3%	0	0%	248	55.1%	450	4.2%
Darfur	27	14.4%	4	2.1%	0	0%	156	83.4%	187	1.7%
CAR	1,720	42.7%	1,562	38.8%	10	0.2%	737	18.3%	4,029	37.5%
Kenya	1,181	26.5%	921	20.7%	0	0%	2,355	52.8%	4,457	41.5%
Libya	3	42.9%	3	42.9%	0	0%	1	14.3%	7	0.1%
Côte d'Ivoire	147	50.7%	122	42.1%	0	0%	21	7.2%	290	2.7%
Mali	0	0%	0	0%	0	0%	0	0%	0	0%
Totals	3,683	34.3%	3,466	32.2%	11	0.1%	3,591	33.4%	10,751	

Changes introduced to the victim participation and the legal representation system

The system for victim participation and legal representation continues to evolve as the number of cases before the court and applicants to participate increase. In the second half of 2012 and throughout 2013, three Pre-Trial and Trial Chambers took steps towards revising or adjusting the victim application and participation procedure, as well as the legal representation system. This section provides an overview of these developments and discusses in detail three key decisions during the reporting period related to victim participation and legal representation of victims in the Kenyatta, Ruto and Sang, and Ntaganda cases.

The section also includes an update on developments in the Laurent Gbagbo case, in which three key decisions on victim participation were issued in 2012, as previously summarised in the *Gender Report Card 2012*.¹²⁰⁹ The decisions in the Kenyatta, Ruto and Sang, and Ntaganda cases, together with those issued in the Laurent Gbagbo case, represent an attempt by the Chambers to simplify and expedite the application procedure for victim participation, as well as a trend towards collective applications, or the 'grouping' of victims in some form at the application phase. In terms of the legal representation of victims, the decisions emphasise the importance of greater geographical proximity between the victims in the Situation countries and the legal teams representing them.

¹²⁰⁹ See *Gender Report Card 2012*, p 274-283.

The Prosecutor v. Muthaura and Kenyatta and The Prosecutor v. Ruto and Sang

The first decisions on victims participation in both the Muthaura and Kenyatta¹²¹⁰ and Ruto and Sang cases were issued on 30 March 2011.¹²¹¹ In the Muthaura and Kenyatta case, on 26 August 2011, Judge Ekaterina Trendafilova, acting as Single Judge of Pre-Trial Chamber II, granted the applications of 233 victims to participate in the confirmation of charges proceedings and, upon the Registry's proposal,¹²¹² appointed Morris Azuma Anyah as Common Legal Representative for all the participating victims.¹²¹³ In the Ruto and Sang case, on 5 August 2011, as Single Judge of Pre-Trial Chamber II, Judge Trendafilova, granted the applications of 327 victims to participate in the confirmation of charges proceedings and appointed Sureta Chana as Common Legal Representative.¹²¹⁴ After Pre-Trial Chamber II

¹²¹⁰ On 18 March 2013, the Trial Chamber granted the Prosecution request to withdraw all charges against Muthaura. See ICC-01/09-02/11-T-23-ENG; ICC-01/09-02/11-687; ICC-01/09-02/11-696. See further Women's Initiatives for Gender Justice, 'Prosecution withdraws all charges against Francis Kirimi Muthaura', *Legal Eye on the ICC eLetter*, June 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye6-13-FULL/LegalEye6-13.html>>.

¹²¹¹ ICC-01/09-01/11-17; ICC-01/09-02/11-23. Subsequent decisions on victim participation in 2011 are described in *Gender Report Card 2011*, p 291.

¹²¹² The Registry submitted its recommendation for common legal representation in both cases only weeks before the confirmation hearing, while acknowledging that 'this may hinder the common legal representative's efforts to become familiar with the proceedings to date, and also to meet and take instructions from his/her clients'. ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 42. See *Gender Report Card 2011*, p 301. The Registry further indicated that it was 'not convinced that the current legal representatives have established meaningful relationships of trust with a significant number of their clients'. ICC-01/09-01/11-243, para 22.

¹²¹³ ICC-01/09-02/11-267.

¹²¹⁴ ICC-01/09-01/11-249. Following this decision, five victims, who had been represented by four other Legal Representatives, filed a motion with the Pre-Trial Chamber, objecting to the appointment of Sureta Chana as their Common Legal Representative. They argued, *inter alia*, that the procedure followed by the Registrar to select a common legal representative contained 'serious errors' and 'violations of law' such as: the fact that the victims had not been involved in the selection procedure, that the Registrar did not consider their views on the matter, and that they were not afforded an opportunity to organise themselves to arrange legal representation themselves. ICC-01/09-01/11-314; ICC-01/09-01/11-322. See further *Gender Report Card 2011*, p 302-303.

confirmed the charges against four of the six accused in both cases on 23 January 2012, the Appeals Chamber confirmed on 23 April 2012 that the appointed Common Legal Representatives would remain in their positions until their appointments were expressly brought to an end.¹²¹⁵

On 3 October 2012, Trial Chamber V rendered identical decisions on victims' legal representation and participation in the Muthaura and Kenyatta and the Ruto and Sang cases, which introduced significant changes to the system of victim participation and legal representation.¹²¹⁶ The decisions aimed to address the challenges presented by the large number of victims seeking to participate¹²¹⁷ as well as the security concerns within Kenya.¹²¹⁸ The key change introduced was the creation of a two-pronged approach to the victim participation application process, according to which victims who sought to appear individually before the Court would be required to follow the established application procedure foreseen by Rule 89(1), and victims who did not seek to appear individually before the Court would follow a new procedure, not explicitly foreseen by the Court's legal framework, in which victims would register with the Registry in order that their views and concerns be expressed by their Common Legal Representatives appointed by the Court.¹²¹⁹

1215 ICC-01/09-01/11-409; ICC-01/09-02/11-416. For further information regarding the confirmation of charges in these two cases, see *Gender Report Card 2012*, p 128-130.

1216 ICC-01/09-02/11-498 and ICC-01/09-01/11-460, respectively. At the time of this decision, Kenyatta was standing trial jointly with Muthaura. As noted above, in March 2013, the Prosecution withdrew all charges against Muthaura.

1217 At the time of this decision, 3,518 applications of victims to participate had been received by the Court in the Kenya Situation and in the two cases, of which 560 had been accepted: 233 victims in the Kenyatta case, and 327 in the Ruto and Sang case. As noted above, these numbers remained the same as of 30 June 2013.

1218 ICC-01/09-01/11-460, paras 24,30; ICC-01/09-02/11-498, paras 23, 29.

1219 ICC-01/09-01/11-460, para 25; ICC-01/09-02/11-498, para 24.

The decisions also replaced the Common Legal Representatives in each case with others to be based in Kenya and represent all victims in the case. The Chamber determined that these local common legal representatives would be assisted by OPCV staff, who would perform a number of functions on behalf of the representatives, including attending hearings on a daily basis. These decisions¹²²⁰ and relevant submissions which followed are described in detail below.

Decisions on victims' representation and participation

Trial Chamber V emphasised that both decisions applied only to victims' participation in the proceedings under Article 68(3) and did not apply to their potential participation in future reparations proceedings, governed by Article 75 and to be determined at a later phase of the proceedings.¹²²¹ It underscored that victims' personal interests should be seen in a broad sense, and that participation must be 'meaningful' and not 'purely symbolic'.¹²²² The Chamber recalled the two criteria for victim participation under Article 68(3) of the Statute, namely: (i) that it had the discretion to determine the appropriate stage(s) for victims to present their views and concerns; and (ii) that it must ensure that participation was not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial.¹²²³ The Chamber recalled that this provision did not create an 'unfettered right for victims to

1220 Given that these two decisions by Trial Chamber V were identical, citations will be provided for both cases; the first reference given will be to the Ruto and Sang case. Only specific differences in the decisions will be explicitly mentioned.

1221 ICC-01/09-01/11-460, para 2; ICC-01/09-02/11-498, para 2.

1222 ICC-01/09-01/11-460, para 10; ICC-01/09-02/11-498, para 9.

1223 ICC-01/09-01/11-460, para 11; ICC-01/09-02/11-498, para 10.

participate'.¹²²⁴ At the same time, it recalled its duty under Article 68(1) to protect the safety, physical and psychological well-being, dignity and privacy of victims. It noted that it was obliged to ensure that victims were treated in a fair and equitable manner without discrimination and that they were not subjected to an unnecessarily complicated procedure.¹²²⁵

In relation to the determination of the appropriate stage of the proceedings for victim participation, the Chamber referenced previous jurisprudence, finding that participation is 'not a once-and-for-all event, but rather should be decided on the basis of the evidence or issue under consideration at any particular point in time'.¹²²⁶ It therefore underscored that participation required a case-by-case determination. Regarding the need to ensure that victim participation did not compromise the rights of the accused to a fair and impartial trial, the Chamber reiterated that the participation of victims was limited to the presentation of their views and concerns, that victims were not parties to the proceedings, and that 'the Chamber must ensure that [their] participation d[id] not unduly delay the proceedings or limit the accused's preparation of their defence due to the time and resources required for reviewing, and submitting observations on, victims' applications'.¹²²⁷

As to the manner of participation, the Trial Chamber referred to the procedure set forth in Rules 89 to 91. In particular, it noted that Rule 89(1) stipulated that the Chamber is to 'specify the proceedings and manner in which

1224 ICC-01/09-01/11-460, para 11; ICC-01/09-02/11-498, para 10, referencing, *inter alia*, ICC-01/04-01/06-1432, paras 99-10.

1225 ICC-01/09-01/11-460, para 12; ICC-01/09-02/11-498, para 11.

1226 ICC-01/09-01/11-460, para 13; ICC-01/09-02/11-498, para 12, referencing Trial Chamber I's decision ICC-01/04-01/06-1110, para 101.

1227 ICC-01/09-01/11-460, paras 14-15; ICC-01/09-02/11-498, paras 13-14.

participation is considered appropriate'. The Chamber read Rule 90(2) and (3)¹²²⁸ together with the second sentence of Article 68(3) and found 'no unqualified right on behalf of victims to participate individually in the proceedings'.¹²²⁹

The 'differentiated approach' adopted by the Chamber

Trial Chamber V considered that, while other Trial Chambers had required victims seeking to participate in the proceedings to follow the application procedure established by Rule 89, pursuant to which legal representation was organised in accordance with Rules 90 and 91, a different approach should be applied in these proceedings in order 'to give effect to the qualifying criteria in Article 68(3)' and to take into account the specific circumstances of each case.¹²³⁰ The Chamber based its decision to diverge from standard practice on the large number of victims involved, 'estimated to be in the thousands',¹²³¹ the 'unprecedented security concerns', and 'other difficulties that may be associated with the completion of a detailed

1228 Rule 90(2) of the RPE provides, in pertinent part: '[w]here there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular group of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives.' Rule 90(3) of the RPE provides that '[i]f the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.'

1229 ICC-01/09-01/11-460, para 21, ICC-01/09-02/11-498, para 20.

1230 ICC-01/09-01/11-460, para 23; ICC-01/09-02/11-498, para 22. The Trial Chamber further explained that in accordance with Article 51(4) and (5), which provide that the RPE shall be consistent with the Statute and that 'in the event of conflict between the Statute and the RPE, the Statute should prevail', it would apply the Rules — in particular Rule 89(1) — 'in the manner that it considers to be most consistent with the norms indicated in Article 68(3) of the Statute'. ICC-01/09-01/11-460, para 22; ICC-01/09-02/11-498, para 21.

1231 ICC-01/09-01/11-460, para 30; ICC-01/09-02/11-498, para 29.

application form'.¹²³² In the Chamber's view, in these cases, the procedure stipulated in Rule 89 was neither appropriate nor necessary to implement Article 68(3).¹²³³

As noted above, Trial Chamber V outlined a two-pronged approach to be followed in this case, entailing different application procedures for two distinct groups of victims. It found that victims seeking to present their views and concerns individually by appearing directly before the Chamber in-person or via video-link should follow the application procedure established by Rule 89 and would be assigned a common legal representative. By contrast, victims not seeking to appear directly before the Chamber would be allowed to present their views and concerns through the common legal representative and would not be required to follow the Rule 89 procedure but could register with the Court as victim participants.¹²³⁴ The Chamber considered that the application procedure stipulated in Rule 89 was not appropriate for cases when, due to the large number of victims, the common legal representatives would be unable to present the individual views and concerns of victims.¹²³⁵ It further considered that this 'differentiated procedure' was one that, in the circumstances of the case, best allowed the Chamber to comply with the requirements of Article 68(3).¹²³⁶

The Trial Chamber found that it would not be feasible to assess all applications before the start of the trial due to the large number of victims and the time that would be required

to assess them.¹²³⁷ It also considered that some victims 'may be vulnerable and feel afraid to relate the events they suffered' and thus find it difficult to complete the application form. It further noted the 'precarious security situation in Kenya',¹²³⁸ which could increase risks for victims and intermediaries. It thus concluded that not requiring all victims to follow the Rule 89 procedure would ensure that all victims were treated in a 'fair and consistent manner'¹²³⁹ and that limiting the number of individual applications submitted under Rule 89 would ensure the effective representation of the victims' interests given that the common legal representative could voice the victims' 'shared legal and factual concerns' in this case.¹²⁴⁰

To ensure respect for the rights of the accused, the Trial Chamber indicated that it would oversee any intervention by the common legal representatives.¹²⁴¹ Furthermore, the parties would be able to present their observations on the applications of individual victims who would appear before the Court and who would have to 'identify themselves *vis-à-vis* the parties'.¹²⁴² Given that this approach would require less time, the Chamber found that it would contribute to the trial of the accused without undue delay.¹²⁴³ The fact that the Chamber would not assess the eligibility of each victim who registered with the Court did not, in its view, prejudice the rights of the accused given that 'registration does not imply any judicial determination of the status of the

1232 ICC-01/09-01/11-460, para 24; ICC-01/09-02/11-498, para 23.

1233 ICC-01/09-01/11-460, para 24; ICC-01/09-02/11-498, para 23.

1234 ICC-01/09-01/11-460, para 25; ICC-01/09-02/11-498, para 24.

1235 ICC-01/09-01/11-460, para 28; ICC-01/09-02/11-498, para 27.

1236 ICC-01/09-01/11-460, para 29; ICC-01/09-02/11-498, para 28.

1237 ICC-01/09-01/11-460, para 30; ICC-01/09-02/11-498, para 29.

1238 ICC-01/09-01/11-460, para 31; ICC-01/09-02/11-498, para 30.

1239 ICC-01/09-01/11-460, para 32; ICC-01/09-02/11-498, para 31.

1240 ICC-01/09-01/11-460, para 33; ICC-01/09-02/11-498, para 32.

1241 ICC-01/09-01/11-460, para 34; ICC-01/09-02/11-498, para 33.

1242 ICC-01/09-01/11-460, para 35; ICC-01/09-02/11-498, para 34.

1243 ICC-01/09-01/11-460, para 36; ICC-01/09-02/11-498, para 35.

individual victims’ and that ‘when assessing any submissions or requests made by the common legal representative, the Chamber will be mindful of the fact that the represented victims have not been subject to an individual assessment by the Court’.¹²⁴⁴

The Chamber did not discuss the implications of its decision not to make a ‘judicial determination’ on the status of victims who only registered with the Court, including whether it would have any impact on the assessment of the submissions or requests made by the Common Legal Representatives. The Chamber also abstained from addressing the potential impact of this ‘differentiated procedure’ on the ability of the registered victims to later participate in reparations proceedings, in the event that they occur.

The new application procedure for victim participation

Trial Chamber V detailed the procedure to be followed for victim applications based upon the above considerations. It clarified that victims who did not seek to present their views and concerns individually to the Chamber, but rather to express their views and concerns ‘solely through common legal representation’, would not have to submit an application pursuant to Rule 89(1), but could ‘register’ by providing their names, contact details and information on the harm suffered.¹²⁴⁵ It indicated that the aim of this alternative procedure was to allow the victims to ‘formalise their claim of victimhood’, to ‘establish a personal connection’ with the common legal representatives, and to assist the Court in communicating with victims.¹²⁴⁶ The Chamber also noted that some victims might not wish to register due to a number of difficulties,

1244 ICC-01/09-01/11- 460, para 38; ICC-01/09-02/11-498, para 37.

1245 ICC-01/09-01/11- 460, para 49; ICC-01/09-02/11-498, para 48.

1246 ICC-01/09-01/11- 460, para 50; ICC-01/09-02/11-498, para 49.

including security concerns, particularly as ‘a number of victims were subjected to the alleged crime of rape’ and the fact that the ‘alleged events occurred less than five years ago’.¹²⁴⁷ It cautioned, however, that the views and concerns of all victims, including those who chose not to or were unable to register, should be equally voiced and represented by the Common Legal Representatives.¹²⁴⁸ It further specified that the Common Legal Representatives should decline to consider the views and concerns of ‘persons whom he or she has reason to believe do not qualify as victims’ in the case.¹²⁴⁹

Trial Chamber V assigned to the Common Legal Representatives the task of representing the views and concerns of all individuals qualifying as victims in the case, including: those who would follow the application procedure set out in Rule 89, those who would simply ‘register’ with the Court, and those who either chose not to or were unable to register but who the Common Legal Representatives had reason to believe qualified as victims in the case. The Chamber tasked the Common Legal Representatives to determine who constitutes a victim in cases where the application procedure foreseen in Rule 89 does not have to be followed.

The Chamber found that the victims who sought to present their views and concerns individually could do so at any stage of the proceedings through a request submitted by the Common Legal Representatives, who could rely on the OPCV’s assistance.¹²⁵⁰ The Trial Chamber noted

1247 ICC-01/09-01/11- 460, para 51; ICC-01/09-02/11-498, para 50.

1248 ICC-01/09-01/11- 460, paras 52-53; ICC-01/09-02/11-498, paras 51-52.

1249 ICC-01/09-01/11- 460, para 53; ICC-01/09-02/11-498, para 52.

1250 ICC-01/09-01/11- 460, paras 56-57; ICC-01/09-02/11-498, paras 55-56. In this request, the common legal representatives should explain why those individuals ‘are considered to be best placed to reflect the interests of the victims’ and provide a ‘detailed summary of the aspects that will be addressed by each victim if authorised to present his or her views and concerns’.

that these victims would need to submit an application to participate pursuant to Rule 89(1), which the Chamber would transmit to the parties together with its assessment of the application for their observations.¹²⁵¹ The Chamber would determine, on the basis of these applications and the request submitted by the Common Legal Representatives, ‘whether the suggested form of participation is appropriate and identify a limited number of victims who may be authorised to participate individually by appearing directly before the Chamber’.¹²⁵² It added that ‘where necessary, [it] may ask the Common Legal Representative to make a selection of a specified number of applications, from which [it] will select those eligible for personal appearance’.¹²⁵³

The Chamber instructed the VPRS and the Common Legal Representatives to ensure that all victims in the case were informed of the new procedure. It determined that the victims who had already been authorised to participate at the confirmation of charges stage should be considered as having ‘registered for the purpose of participation through the common legal representation system’.¹²⁵⁴ It instructed the Registry to ‘review the applications of individuals who were authorised to participate at the confirmation of charges stage and assess whether they still fall under the definition’.¹²⁵⁵ The Chamber further instructed the VPRS and the Common Legal Representatives to periodically submit statistics on the victim population in order for the parties to be

1251 ICC-01/09-01/11-460, para 58; ICC-01/09-02/11-498, para 57.

1252 ICC-01/09-01/11-460, para 57; ICC-01/09-02/11-498, para 56.

1253 ICC-01/09-01/11-460, para 57; ICC-01/09-02/11-498, para 56.

1254 ICC-01/09-01/11-460, para 62; ICC-01/09-02/11-498, para 61.

1255 ICC-01/09-01/11-460, para 62; ICC-01/09-02/11-498, para 61. The Trial Chamber set out the definition of victim, in line with previous jurisprudence. ICC-01/09-01/11-460, paras 46-47; ICC-01/09-02/11-498, paras 45-46.

sufficiently informed about whose interests each common legal representative represented, as well as to ‘ensure the transparency of the proceedings related to the participation of victims’, and to prepare a report on the general situation of victims, including both registered and non-registered victims.¹²⁵⁶

The new system of legal representation of victims

Trial Chamber V held that the victims would be represented by appointed common legal representatives, and by the OPCV acting on their behalf before the Chamber.¹²⁵⁷ It determined that the common legal representatives’ responsibilities included being the point of contact for victims, in order to assist them in formulating their views and concerns and to appear on their behalf ‘at critical junctures of the trial’ involving victims’ interests.¹²⁵⁸ At the same time, it held that the OPCV would function as the ‘interface’ between the common legal representatives and the Chamber, attending hearings and intervening on their behalf, as well as assisting them in preparing written submissions.¹²⁵⁹ The Chamber instructed the Registry and the OPCV to submit a joint proposal on ‘the division of responsibilities and effective functioning of the common legal representation system’ as set out in the decisions.¹²⁶⁰

1256 ICC-01/09-01/11- 460, para 39; ICC-01/09-02/11-498, para 38.

1257 ICC-01/09-01/11- 460, para 41; ICC-01/09-02/11-498, para 40.

1258 ICC-01/09-01/11- 460, paras 42, 71, 73; ICC-01/09-02/11-498, paras 41, 70, 72. The Chamber explained that it had decided to ‘follow the practice of Trial Chambers I, II and III, which authorised the legal representatives of victims to make opening and closing statements at the trial’ and that these statements ‘may be made by the Common Legal Representative in person’. It added that ‘the Chamber may invite individual victims, who have been selected in accordance with the procedure outlined [...] above, to present their views and concerns during opening and closing statements’. ICC-01/09-01/11- 460, para 71; ICC-01/09-02/11-498, para 70.

1259 ICC-01/09-01/11- 460, para 42-43; ICC-01/09-02/11-498, paras 41-42.

1260 ICC-01/09-01/11- 460, para 45; ICC-01/09-02/11-498, para 44.

The Trial Chamber held that when deciding on the selection of the common legal representatives, it had to ‘find a balance’ between the following requirements: the need to ensure the meaningful participation of victims; that victims were able to understand the proceedings; the efficiency and celerity of the proceedings; and that victim participation was not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial.¹²⁶¹ It further held that in these cases, such requirements ‘may best be achieved with a Common Legal Representative based in Kenya’, which would ensure greater geographic proximity to the victims.¹²⁶² The Chamber directed the Registry to propose candidates for common legal representatives and listed the requirements that should be taken into account in the selection process, namely ‘the candidate’s knowledge of the details of the case and of the specific situation of the victim community and the candidate’s willingness and ability to maintain an ongoing presence in Kenya throughout the course of the proceedings’.¹²⁶³

1261 ICC-01/09-01/11-460, para 59; ICC-01/09-02/11-498, para 58.

1262 ICC-01/09-01/11- 460, para 60; ICC-01/09-02/11-498, para 59.

1263 ICC-01/09-01/11- 460, para 61; ICC-01/09-02/11-498, para 60. The Chamber added that the Registry could also consider the general criteria for the selection of common legal representatives provided by the Registry and approved by the Single Judge at the confirmation of charges, which included: ‘(i) [a]n established relationship of trust with the victims or ability to establish such a relationship; (ii) [d]emonstration of an ability and willingness to take a victim-centred approach to their work; (iii) [f]amiliarity with the country where the crimes in connection to which the victims are admitted to participate in the proceedings have been allegedly committed; (iv) [p]ossession of relevant expertise and experience, demonstrated by previous experience in criminal trials, experience representing large groups of victims and specialised study in relevant academic fields; (v) [r]eadiness to commit a significant amount of time to maintain contact with a large number of clients, to follow developments in Court’s proceedings, to take any appropriate steps in the proceedings, and to maintain adequate contact with the Court; and (vi) [a] minimum level of knowledge in information technology.’

Modalities of participation through the common legal representatives

Trial Chamber V established the modalities of victim participation through the common legal representatives under the new system of representation. Regarding confidential material, it held that the common legal representatives could have access to such material to the extent that its content was relevant to the personal interests of the victims. It specified that the party filing a confidential submission would determine whether the common legal representatives could have access to the submission or not.¹²⁶⁴ The Chamber also held that the disclosure of confidential material to individual victims would require prior approval by the Chamber, specifying that any request in that regard should provide the reasons why it was necessary to share it with the victim(s), the identity of the victim(s) and how the common legal representative would guarantee that the information would not be further circulated.¹²⁶⁵ Similar procedures would apply to victims’ access to evidence.¹²⁶⁶

The Chamber held that the OPCV would be entitled to attend public, as well as closed or *ex parte* hearings, to be determined on a case-by-case basis, on behalf of the common legal representatives. The Chamber reiterated that the common legal representatives would participate in person at ‘critical junctures’ of the proceedings, such as during opening and closing statements,¹²⁶⁷ at which point the individual victims who were previously authorised to make statements could do so.¹²⁶⁸ The common legal representatives would also be given the

1264 ICC-01/09-01/11- 460, para 67; ICC-01/09-02/11-498, para 66.

1265 ICC-01/09-01/11- 460, para 68; ICC-01/09-02/11-498, para 67.

1266 ICC-01/09-01/11- 460, para 69; ICC-01/09-02/11-498, para 68.

1267 ICC-01/09-01/11- 460, para 71; ICC-01/09-02/11-498, para 70.

1268 ICC-01/09-01/11- 460, para 73; ICC-01/09-02/11-498, para 72.

opportunity to file responses to documents in the case file, provided that they demonstrated that the issue at stake was ‘directly related to the interests of victims’.¹²⁶⁹

The Chamber held that the questioning of witnesses or the accused could be conducted by the OPCV on behalf of the common legal representatives upon authorisation by the Chamber. It reiterated that such questioning must be limited to issues relevant to the victims’ interests and should be done in a ‘neutral form’.¹²⁷⁰ The Chamber also held, in line with prior practice, that the common legal representatives could request to present evidence, which would be subject to the observations of the parties and a final determination by the Chamber.¹²⁷¹

Implementation of the decisions

Following Trial Chamber V’s instruction to the Registry and OPCV to submit a joint proposal on ‘the division of responsibilities and effective functioning of the common legal representation system’ as set out in the decisions, the Registry and OPCV failed to reach an agreement. They thus filed separate submissions in each case on 17 October 2012.¹²⁷²

The OPCV’s proposal

(i) Preliminary remarks

The OPCV considered that the appointment of legal representatives based in Kenya, who would be supported by OPCV staff acting on their behalf, ‘might give rise to both legal and practical impediments’.¹²⁷³ The OPCV noted that it had consistently maintained that ‘its staff

cannot form part of, or be otherwise assimilated to, external legal representatives’ teams’, as this would ‘jeopardise the core principle of independence of the Office’ and ‘its ability to work on multiple cases simultaneously’.¹²⁷⁴ Moreover, the OPCV noted that the new system could create ‘conflicting standards and mechanisms of accountability’, as its staff would remain accountable to the OPCV’s Principal Counsel and bound by the Staff Rules and Regulations, while also receiving instructions from the external legal representatives. The OPCV also noted that it had ‘insufficient resources to dedicate to “secondments” of this nature’.¹²⁷⁵

(ii) The proposed solution

In spite of these challenges, the OPCV proposed that one P-3 legal officer assigned to each case could adequately fulfil the tasks envisaged by the Chamber for the OPCV.¹²⁷⁶ These staff members could provide legal research and advice to the legal representatives as well as appear in the courtroom. As they would already be working on these cases, the legal officers would be fully aware of all relevant developments, which would ‘optimise the preparation of the trial’.¹²⁷⁷ The OPCV noted, however, that given its workload

1269 ICC-01/09-01/11-460, para 72; ICC-01/09-02/11-498, para 71.

1270 ICC-01/09-01/11-460, paras 75-76; ICC-01/09-02/11-498, paras 74-75.

1271 ICC-01/09-01/11-460, para 77; ICC-01/09-02/11-498, para 76.

1272 ICC-01/09-01/11-462; ICC-01/09-02/11-507; ICC-01/09-01/11-463; ICC-01/09-02/11-508.

1273 ICC-01/09-01/11-462, para 14; ICC-01/09-02/11-507, para 14.

1274 ICC-01/09-01/11-462, para 15; ICC-01/09-02/11-507, para 15.

1275 ICC-01/09-01/11-462, para 15; ICC-01/09-02/11-507, para 15.

1276 ICC-01/09-01/11-462, para 18; ICC-01/09-02/11-507, para 18. As recalled by the OPCV, the functions entrusted by the Chamber to the OPCV to be performed on behalf of the new common legal representatives were the following: (i) attending hearings in which victims were allowed to participate in order to ensure that the common legal representatives were ‘fully informed of the day-to-day developments in the proceedings’; (ii) making submissions on behalf of the common legal representatives; (iii) questioning witnesses on behalf of the common legal representatives, ‘except where the Chamber has authorised the Common Legal Representative to appear in person’; and (iv) assisting the common legal representatives in preparing relevant written submissions. ICC-01/09-01/11-462, para 13; ICC-01/09-02/11-507, para 13.

1277 ICC-01/09-01/11-462, para 19; ICC-01/09-02/11-507, para 19.

and the existing allocation of staff to the various Situations and cases, it did not have sufficient resources for such 'secondment'.¹²⁷⁸ In this regard, the OPCV observed that two 'separate and autonomous' teams had been established to work on the two cases in the Kenya Situation, between whom no confidential information was shared, and that this arrangement should be maintained as, 'victims are very sensitive to cultural and ethnic matters'.¹²⁷⁹ The OPCV indicated that it would hold discussions with the external legal representatives once they were appointed regarding 'the most efficient way of cooperating'.¹²⁸⁰

The OPCV argued that accountability for the functions performed by OPCV staff on behalf of the common legal representatives would fall under the responsibility of the common legal representatives.¹²⁸¹ Having in mind that this was an 'unprecedented' matter, the OPCV suggested the establishment of a 'dispute resolution mechanism to arbitrate between the Common Legal Representative, the member(s) of the OPCV working on his or her behalf, and/or the OPCV'.¹²⁸²

(iii) Contested issues

In the OPCV's view, points of disagreement existed with the Registry related both to the way in which the Chamber's decisions should be implemented and to the legal implications

1278 ICC-01/09-01/11-462, para 21; ICC-01/09-02/11-507, para 21.

1279 ICC-01/09-01/11-462, para 17; ICC-01/09-02/11-507, para 17. At the pre-trial stage of the proceedings, in its submissions on the appointment to represent victims in both cases, the OPCV found it necessary 'out of an abundance of caution', and given the 'possibility of real or perceived conflicts of interests', to constitute two separate and autonomous legal teams, one for each of the two cases. ICC-01/09-01/11-45, paras 5-7; ICC-01/09-02/11-49, paras 5-7.

1280 ICC-01/09-01/11-462, para 22; ICC-01/09-02/11-507, para 22.

1281 ICC-01/09-01/11-462, para 24; ICC-01/09-02/11-507, para 24.

1282 ICC-01/09-01/11-462 para 25; ICC-01/09-02/11-507, para 25.

regarding the status of OPCV staff.¹²⁸³ The OPCV explained that the main point of contention related to the allocation of resources. While the OPCV indicated that 'without said additional resources the OPCV will be unable to fulfil its mandate in the different situations and cases',¹²⁸⁴ the Registry, as described in more detail below, asserted that the resources for additional staff could not be taken from the legal aid budget.

The OPCV and the Registry further disagreed on the applicability of the OPCV Staff Rules and Regulations to OPCV staff when assisting the common legal representatives. While the Registry did not consider them applicable under such circumstances, the OPCV maintained that such a scenario would *de facto* deprive OPCV staff member of their entitlements under the Rules and Regulations.¹²⁸⁵

The Registry's proposal

(i) The resources needed to implement the Chamber's decisions

Regarding the OPCV's suggestion of assigning a legal officer to each case to assist the common legal representatives, the Registry indicated that it was not yet clear whether the legal officers would fulfil the necessary requirements as counsel in order to assume the duties assigned by the Chamber.¹²⁸⁶ It noted in this regard that the OPCV had been entrusted by the Chamber with functions of two different types, namely: those to be performed 'as counsel appointed in the case' — such as attending hearings, making submissions on behalf of the common legal representatives and questioning witnesses; and the function of assisting the

1283 ICC-01/09-01/11-462 para 26; ICC-01/09-02/11-507, para 3 [*sic*], actual para 26.

1284 ICC-01/09-01/11-462 paras 30-31; ICC-01/09-02/11-507, paras 7-8.

1285 ICC-01/09-01/11-462 paras 32-33; ICC-01/09-02/11-507, paras 9-10.

1286 ICC-01/09-01/11-463, para 16, ICC-01/09-02/11-508, paras 16-17.

common legal representatives in preparing written submissions, which fell ‘within its basic mandate’.¹²⁸⁷ Referencing a decision of the Appeals Chamber in the Lubanga case,¹²⁸⁸ the Registry argued that ‘certain functions require to be performed by counsel’ and that legal assistants may be ‘admissible to stand in for counsel, but as a limited exception’.¹²⁸⁹ It also recalled that the OPCV staff acting on behalf of the common legal representatives would be responsible under the Code of Professional Conduct for Counsel. The Registry concluded that it would only consider the suitability of the staff allocated by the OPCV to assist the common legal representative once their identities, qualifications and experience were known.¹²⁹⁰

As regards the resources needed to implement the Chamber’s decisions, the Registry argued that the OPCV would need to provide staff ‘fulfilling the qualifications as Counsel under Rule 22 of the RPE and Regulation 67 of the RoC’.¹²⁹¹

Regarding the financial resources needed, the Registry indicated that the legal aid budget could not be used to meet the additional resources that would be required by the OPCV. It reasoned that the persons in question would be appointed as staff of the Court and that the legal aid scheme in place only foresees legal representative teams composed of one counsel and one case manager. It concluded that the required additional resources ‘would have to

be found outside the legal aid budget’, or the OPCV would ‘have to work on the basis of its existing resources’.¹²⁹² As to the resources to be provided to the common legal representatives, the Registry noted that it would take into consideration the assistance that would be provided by the OPCV in order to ‘avoid unnecessary duplications’.¹²⁹³

(ii) The regulatory framework applicable to OPCV staff

The Registry argued that the independence of the OPCV as provided for in Regulation 81(2) was only defined *vis-à-vis* the Registry and that it was not affected by OPCV staff performing functions on behalf of external common legal representatives.¹²⁹⁴ Moreover, the Registry considered that the Staff Regulations and Rules governing recruitment and performance did not apply to OPCV staff members ‘with respect to the performance of their functions when assisting counsel’.¹²⁹⁵ The Registry agreed that OPCV staff members performing functions on behalf of the common legal representatives would fulfil these tasks under the latter’s responsibility, and noted that they would be bound by professional secrecy and confidentiality, pursuant to the Code of Professional Conduct for Counsel.¹²⁹⁶ The Registry welcomed the establishment of a dispute resolution mechanism, but noted that it ‘would rather avoid playing a role in the resolution of such conflicts’.¹²⁹⁷ It recommended that the Chamber resolve any such conflicts.¹²⁹⁸

1287 ICC-01/09-01/11-463, paras 10, 12; ICC-01/09-02/11-508, paras 10, 12, citing Regulations 80(2) and 81(4)(a) of the Regulations of the Court.

1288 ICC-01/04-01/06-834.

1289 ICC-01/09-01/11-463, paras 13-14; ICC-01/09-02/11-508, paras 13-14.

1290 ICC-01/09-01/11-463, para 17; ICC-01/09-02/11-508, para 17. As later determined by the Chamber, the Registry’s interpretation of the decisions on this point was incorrect, as the required staff did not have to possess the qualifications as counsel. ICC-01/09-01/11-479, para 8; ICC-01/09-02/11-537, para 7.

1291 ICC-01/09-01/11-463, para 16, ICC-01/09-02/11-508, para 16.

1292 ICC-01/09-01/11-463, para 19; ICC-01/09-02/11-508, para 19.

1293 ICC-01/09-01/11-463, para 20; ICC-01/09-02/11-508, para 20.

1294 ICC-01/09-01/11-463, para 24; ICC-01/09-02/11-508, para 24.

1295 ICC-01/09-01/11-463, para 25; ICC-01/09-02/11-508, para 25.

1296 ICC-01/09-01/11-463, para 26; ICC-01/09-02/11-508, para 26.

1297 ICC-01/09-01/11-463, para 27; ICC-01/09-02/11-508, para 27.

1298 ICC-01/09-01/11-463, para 27; ICC-01/09-02/11-508, para 27.

On 27 November 2012, the Registry submitted additional observations, completing its proposal on the division of responsibilities and effective functioning of the new common legal representation system in both cases.¹²⁹⁹ These observations covered three issues, two of which related to the segregation of information between the two teams working on the Kenya cases regarding confidential and under-seal documents. The Registry noted that it was for the Chamber to decide whether a legal officer at the P-3 level could indeed perform the functions it had assigned to the OPCV.

Selection and appointment of victim Legal Representatives

As noted above, in the Ruto and Sang case, on 5 August 2011, Counsel Sureta Chana was appointed by the Single Judge of Pre-Trial Chamber II as Common Legal Representative of the 327 victims participating in the case.¹³⁰⁰ In the Muthaura and Kenyatta case, on 26 August 2011, Counsel Morris Anyah was appointed by the Single Judge of Pre-Trial Chamber II as Common Legal Representative of the 233 victims participating in that case.¹³⁰¹ On 23 April 2012, the Appeals Chamber confirmed the appointment of both Common Legal Representatives and indicated that they would remain in that position until their appointment was 'expressly brought to an end'.¹³⁰²

Following Trial Chamber V's 3 October 2012 decisions, as the Registry prepared to submit recommendations for the candidates for common legal representative upon the Chamber's instructions, it contacted counsel in each case, Morris Anyah and Sureta Chana, to inquire whether they wished to continue representing victims under the new system

1299 ICC-01/09-01/11-483; ICC-01/09-02/11-542.

1300 ICC-01/09-01/11-249.

1301 ICC-01/09-02/11-267.

1302 ICC-01/09-02/11-416; ICC-01/09-01/11-409.

established by the Chamber.¹³⁰³ In a letter addressed to the Registry, on 11 October 2012, Mr Anyah requested not to be nominated by the Registry for common legal representative.¹³⁰⁴ Counsel Chana, the Common Legal Representative of Victims in the Ruto and Sang case, indicated that she remained interested and available to represent the victims in that case. However, she explained that she was unable to relocate to Kenya during the trial.¹³⁰⁵ She also submitted that she did not believe it was 'desirable' for the common legal representative to be based in Kenya and that she believed she could carry out her duties as common legal representative without 'maintaining a personal presence there'.¹³⁰⁶

On 5 November 2012, the Registry issued two calls for expressions of interest and submitted its recommendations for the positions.¹³⁰⁷ Upon the Trial Chamber's instruction, the Registry's selection was made according to previously established criteria.¹³⁰⁸ The Registry

1303 ICC-01/09-01/11-467, para 14; ICC-01/09-02/11-517, para 14.

1304 ICC-01/09-02/11-517, para 15; ICC-01/09-02/11-517-Anx2-Conf-Exp. The reasons for his decision remain unknown to the public as the letter was transmitted to the Chamber confidentially, *ex parte*, available to the Registry only.

1305 ICC-01/09-01/11-467, para 15.

1306 ICC-01/09-01/11-479, para 4.

1307 ICC-01/09-01/11-467; ICC-01/09-02/11-517.

1308 ICC-01/09-01/11-460; ICC-01/09-02/11-498, para 60. The criteria for common legal representation was established by Single Judge Ekaterina Trendafilova of Pre-Trial Chamber II for the purpose of determining victim participation in the confirmation of charges proceedings. These included *inter alia*: 'knowledge of the details of the case and of the specific situation of the victim community and willingness and ability to maintain an ongoing presence in Kenya throughout the course of proceedings'; 'an established relationship of trust with the victims or ability to establish such a relationship'; 'demonstration of an ability and willingness to take a victim-centred approach to their work'; 'familiarity with the country where the crimes in connection to which the victims are admitted to participate in the proceedings have been allegedly committed'. ICC-01/09-01/11-249, paras 69-74; ICC-01/09-02/11-498, paras 83-88.

noted that it was ‘not aware of any reason why a single common legal representative could not continue to represent all victims’ in each case, but recommended that this matter should be kept under review and that ‘should any conflict or significant divergence of interest arise at any point, the Registry could propose the arrangement of separate legal representation’.¹³⁰⁹

In light of its ‘30 day deadline to submit a recommendation for the position of common legal representative’, the Registry noted that it had ‘not attempt[ed] to conduct a consultation process with the affected communities on the criteria to be applied in the common legal representation selection process’.¹³¹⁰ It indicated, however, that the selection criteria applied drew upon that ‘developed by the Registry in the context of the selection process followed to identify a common legal representative at the confirmation of charges stage of the case, where the views of the relevant communities were taken into account’.¹³¹¹ The Registry stated that once the Chamber appointed the common legal representatives, it would discuss with them the composition of their teams and ‘other resources to be made available in conformity with the Court’s legal aid scheme’.¹³¹²

Concerning the Ruto and Sang case, the Registry noted that given Counsel Sureta Chana’s ‘indication of interest’, it had invited her for a selection interview, along with other shortlisted candidates.¹³¹³

On 20 November 2012, following the Registry’s recommendations, Trial Chamber V appointed Fergal Gaynor as Common Legal Representative in the Muthaura and Kenyatta case.¹³¹⁴ The

Chamber clarified that, contrary to the Registry’s interpretation, its 3 October 2012 decisions did not require the OPCV to provide staff fulfilling the qualifications of ‘counsel’ to act on behalf of the appointed legal representative, but rather that they should fulfil the requirements for assistant counsel.¹³¹⁵ On 23 November 2012, in the Ruto and Sang case, the majority of Trial Chamber V appointed Wilfred Nderitu as Common Legal Representative of Victims.¹³¹⁶ The majority, Judge Eboe-Osuji dissenting, decided that Counsel Chana’s application could not be accepted because she was unable to be based in Kenya, although she possessed the necessary skills, knowledge and experience.¹³¹⁷ The Chamber considered that the requirement to be based in Kenya was ‘very important to the overall functionality of the role envisaged for the common legal representative in the new system established by the Chamber in its Decision’.¹³¹⁸

In his dissenting opinion, Judge Eboe-Osuji argued, *inter alia*, that the Trial Chamber’s statement that some of the objectives related to victim participation ‘*may best* be achieved with a Common Legal Representative based in Kenya’¹³¹⁹ should not be applied as a ‘peremptory edict

1309 ICC-01/09-01/11-467; ICC-01/09-02/11-517, para 7.

1310 ICC-01/09-01/11-467; ICC-01/09-02/11-517, para 8.

1311 ICC-01/09-01/11-467; ICC-01/09-02/11-517, para 8.

1312 ICC-01/09-01/11-467; ICC-01/09-02/11-517, para 18.

1313 ICC-01/09-01/11-467, para 15.

1314 ICC-01/09-02/11-537. The undertakings executed by Fergal Gaynor were registered in the record on 6 December 2012. ICC-01/09-02/11-559.

1315 ICC-01/09-01/11-479, para 8; ICC-01/09-02/11-537, para 7.

1316 ICC-01/09-01/11-479. The undertakings executed by Wilfred Nderitu were registered in the record on 14 January 2013. ICC-01/09-01/11-550.

1317 ICC-01/09-01/11-479, para 5.

1318 ICC-01/09-01/11-479, para 5.

1319 ICC-01/09-01/11-479, Dissenting opinion of Judge Eboe-Osuji, para 3, emphasis in original, referencing ICC-01/09-01/11-460, para 59. As described above, the objectives mentioned by the majority and recalled by Judge Eboe-Osuji included: ‘(a) the need to ensure that the participation of victims, through their legal representative, is as meaningful as possible, as opposed to purely symbolic; (b) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial; (c) the Chamber’s duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity, and (d) the Chamber’s obligation under Article 68(3) of the Statute to ensure that the manner in which victims participate is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.

that overrides all other considerations', to be interpreted in a way that 'counsel for victims must be based in Kenya for the duration of the trial or else be effectively disqualified'.¹³²⁰ He found that those objectives, in the circumstances of the case, 'are better achieved by assignment of counsel who have longstanding familiarity with the case and are able to maintain an otherwise sufficiently effective presence in Kenya, though not able to be based there on a full-time basis and at all times',¹³²¹ and found that this factor had not given 'due weight' by the majority.¹³²²

Following the appointment of the Common Legal Representatives in each case, the OPCV submitted to the Chamber their Agreements on Cooperation as confidential, *ex parte* annexes.¹³²³

Observations regarding the new victim participation and representation system in the Kenya cases

A Kenya-based human rights NGO, Kituo Cha Sheria — The Centre for Legal Aid Empowerment — and Counsel Sureta Chana, submitted observations to Trial Chamber V, sharing concerns regarding its decisions on victims' representation and participation. These observations are described below.¹³²⁴

***Amicus curiae* observations by Kituo Cha Sheria**

Kituo Cha Sheria requested leave to submit *amicus curiae* observations in both cases on 30 October 2012. The request was granted by Trial Chamber V on 15 November 2012 in the Muthaura and Kenyatta case and on 16 November 2012 in the Ruto and Sang case.¹³²⁵

1324 Prior to the 3 October decisions, two requests to submit *amicus curiae* observations on issues related to victim participation and legal representation had already been filed. One was submitted by the Civil Society Organisation Network on 24 August 2012, who requested leave to submit observations on the 'modalities of victim participation at the trial phase of the proceedings'. ICC-01/09-01/11-450. On 5 September 2012, *Kituo Cha Sheria* requested leave to submit observations on the following three issues: '(i) the importance of meaningful participation for victims in Kenya; (ii) the victims' application process and its timeframe; and (iii) the modalities of victims' participation and their representation at trial'. ICC-01/09-01/11-454; ICC-01/09-02/11-480. However, on 13 September 2012, Trial Chamber V rejected both requests, finding that it had 'already received from the Registry a "Draft Protocol on the application process for victim participation and reparations at the Trial stage", in response to which the Registry was informed that no further proposals concerning this issue would be required'. ICC-01/09-01/11-456, para 4. This protocol was referenced as a confidential, *ex parte* document. ICC-01/09-01/11-451-Conf-Exp and five confidential, *ex parte* annexes. The Chamber concluded that it did not consider that the applicants' submissions 'would assist at this stage with the proper determination of issues related to the victims' application process and the modalities of their participation'. ICC-01/09-01/11-456, para 4.

1325 ICC-01/09-01/11-473; ICC-01/09-02/11-532.

1320 ICC-01/09-01/11-479, Dissenting opinion of Judge Eboe-Osuji, para 5, emphasis in original.

1321 ICC-01/09-01/11-479, Dissenting opinion of Judge Eboe-Osuji, para 6.

1322 ICC-01/09-01/11-479, Dissenting opinion of Judge Eboe-Osuji, para 7.

1323 ICC-01/09-01/11-640; ICC-01/09-02/11-680.

On 23 November 2012,¹³²⁶ Kituo Cha Sheria submitted *amicus curiae* observations regarding the modalities of implementing the new system for victims' representation and participation in the Ruto and Sang and Muthaura and Kenyatta cases.¹³²⁷ Kituo Cha Sheria submitted that the ongoing presence of the common legal representative in Kenya would raise 'serious security concerns' given the public interest in these cases.¹³²⁸ It noted, in particular, that it would be important to ensure the security of information, as the legal representatives would possess confidential information.¹³²⁹ It argued that the Court should accordingly take the necessary steps to ensure that the common legal representatives and their teams were adequately equipped with a safe and secure office, including tools to safeguard confidential information.¹³³⁰

Regarding the functioning of the teams representing the victims, Kituo Cha Sheria submitted that it was essential to ensure both effective communication between the OPCV team in The Hague and the legal representatives in Kenya,¹³³¹ as well as that the common legal representatives be provided with sufficient resources.¹³³² In this regard, it maintained that the Court's legal aid system should accommodate the need for the legal representatives to travel throughout the proceedings to various areas of the country to meet with geographically dispersed victims.¹³³³

1326 This was the second time that *Kituo Cha Sheria* requested leave to submit *amicus curiae* observations in both cases. ICC-01/09-01/11-464; ICC-01/09-02/11-514.

1327 ICC-01/09-01/11-478; ICC-01/09-02/11-540.

1328 ICC-01/09-01/11-478, para 11; ICC-01/09-02/11-540, para 11.

1329 ICC-01/09-01/11-478, para 11; ICC-01/09-02/11-540, para 11.

1330 ICC-01/09-01/11-478, para 12; ICC-01/09-02/11-540, para 12.

1331 ICC-01/09-01/11-478, para 16; ICC-01/09-02/11-540, para 16.

1332 ICC-01/09-01/11-478, para 17; ICC-01/09-02/11-540, para 17.

1333 ICC-01/09-01/11-478, para 18; ICC-01/09-02/11-540, para 18.

Kituo Cha Sheria also cautioned that the new system of representation must be well explained to the victims in order to avoid creating confusion as to who represented their interests in court.¹³³⁴

Kituo Cha Sheria suggested that the Trial Chamber adopt a flexible approach when interpreting the concept of 'critical junctures' in determining when the common legal representatives would be allowed to appear before the Court. It considered that the proceedings would benefit from the Common Legal Representatives' presence in the courtroom in order to properly convey the views and concerns of the victims and bolster the Legal Representatives' credibility in the eyes of their clients.¹³³⁵

Kituo Cha Sheria argued in favour of an 'effective and transparent' registration process with the assistance of the Registry and some form of judicial review by the Chamber in order to avoid a 'dilution of the procedural rights of victims', which could call into question the victim participation regime.¹³³⁶ It further pointed out that the Chamber's decisions did not clarify the criteria for granting certain victims the opportunity to present their views and concerns in person and that 'experience illustrates that no two stories of harm are precisely the same, or necessarily representative of the harm suffered by the collective, particularly in instances of sexual violence'.¹³³⁷

Kituo Cha Sheria suggested that the reports on the situation of victims, which the VPRS and Common Legal Representatives were tasked with submitting to the Chamber, should also include

1334 ICC-01/09-01/11-478, para 22; ICC-01/09-02/11-540, para 22.

1335 ICC-01/09-01/11-478, para 24; ICC-01/09-02/11-540, para 24.

1336 ICC-01/09-01/11-478, para 27; ICC-01/09-02/11-540, para 27.

1337 ICC-01/09-01/11-478, para 30; ICC-01/09-02/11-540, para 30.

information on methodology and statistics that attested to the veracity of the identity of the participating victims. It highlighted the importance of informing the victims regarding the change to the legal representation system and ensuring that the Common Legal Representatives are properly introduced in the relevant communities. It further requested the Chamber to provide clarity on the issue of reparations, given that the standard application form had included information relevant both to victim participation and reparations.¹³³⁸

Observations by the Common Legal Representative in the Ruto and Sang case, Sureta Chana

Common Legal Representative Sureta Chana filed a request on 6 November 2012 to present the views and concerns of victims on their legal representation at the trial phase.¹³³⁹ She submitted that the Chamber's forthcoming decision on victim representation directly affected their personal interests, recalling that Article 68(3), as well as general principles of fairness and justice, required the Chamber to, prior to taking a decision on the legal representation of victims, 'permit the victims to present their views and concerns on the issue or otherwise consult with the victims'.¹³⁴⁰

Chana recalled that although Trial Chamber V had stated during the first status conference in the case '[w]ith regard to the participation of victims in this trial, the Chamber will request submissions in order to issue a decision on this matter in due course', it had never requested such submissions.¹³⁴¹ She further noted that neither victims, nor their Common Legal Representative had access to the 'Draft Protocol on the application process for victim participation' referred to by the Chamber in its decision rejecting the earlier requests for leave to submit

1338 ICC-01/09-01/11-478, para 36; ICC-01/09-02/11-540, para 36.

1339 ICC-01/09-01/11-469.

1340 ICC-01/09-01/11-469, paras 1, 11.

1341 ICC-01/09-01/11-469, para 4, referencing ICC-01/09-01/11-T-15-ENG.

amicus curiae observations.¹³⁴² In addition, she noted that although the Registry had invited her to express her 'views on the content of the joint proposal to be developed with the OPCV' following the Chamber's 3 October 2012 decision, this could not be considered a 'true consultation process'. She further observed that by the time that Chamber's decision had already been issued.¹³⁴³ Likewise, she noted that she had not been included in the consultation meeting held between the Registry and the OPCV to discuss the joint proposal.¹³⁴⁴ She also recalled that the Registry had acknowledged that it did not attempt to consult with victims regarding its proposal for a common legal representation system due to time constraints, but suggested that there remained 'ample time for consultations with the victims' from that moment until the beginning of the trial scheduled for April 2013.¹³⁴⁵

Chana submitted that the following issues arose from Trial Chamber V's 3 October 2012 decisions, which merited further consideration: (i) the dual system of participation created by the decision; (ii) the preference that the common legal representative be based in Kenya; (iii) whether the proposed system of legal representation for the trial phase sufficiently addressed victims' security concerns; (iv) the division of responsibilities between OPCV and the common legal representative; and (v) the seniority and experience of the lawyer who would represent the victims in the proceedings on a daily basis.

In relation to the first issue, Chana raised questions concerning whether the new system led to two groups of victims, namely, 'first-class victims' who would individually appear before the Court and 'second-class victims' who would not and whose victim status would

1342 ICC-01/09-01/11-469, para 5, referencing ICC-01/09-01/11-456.

1343 ICC-01/09-01/11-469, para 12. She added that she had only been given three days to reply to the Registry.

1344 ICC-01/09-01/11-469, para 13.

1345 ICC-01/09-01/11-469, para 14.

not be individually determined by the Court. She also questioned whether ‘the voice’ of the second group of victims would be significantly diminished.¹³⁴⁶

In relation to the second issue, she questioned whether being based in Kenya would ensure that the common legal representatives would perform their functions more effectively due to the ‘external pressures’ that would be ‘more easily brought to bear on a lawyer who is a practitioner in Kenya, and whose practice in Kenya could potentially be threatened by those with influence’.¹³⁴⁷ She added that the field-based legal representatives may also not have the ‘necessary degree of independence to represent the victims’ interests without possible influence’, and that given that the victims were located in remote areas, being based in Kenya would not guarantee improved access for victims to their legal representative.¹³⁴⁸

As to the third issue, Chana questioned whether and how the OPCV could ensure data security, particularly in relation to the ‘handling of confidential information in the field, by the common legal representative and others’.¹³⁴⁹ Regarding the fourth issue, she questioned how victims could ‘effectively ensure that the submissions made on their behalf in the proceedings accurately reflect their views, especially in cases of disagreement between OPCV and the common legal representative’.¹³⁵⁰

On 13 December 2012, Trial Chamber V issued a decision, rejecting Counsel Chana’s request.¹³⁵¹

1346 In this respect, she recalled that the Chamber stated that ‘when assessing any submissions or requests made by the common legal representative, the Chamber will be mindful of the fact that the represented victims have not been subject to an individual assessment by the Court’. ICC-01/09-01/11-469, para 16(a), referencing ICC-01/09-01/11-460, para 38.

1347 ICC-01/09-01/11-469, para 16(b).

1348 ICC-01/09-01/11-469, para 16(b).

1349 ICC-01/09-01/11-469, para 16(c).

1350 ICC-01/09-01/11-469, para 16(d).

1351 ICC-01/09-01/11-511.

The Chamber considered that the request was ‘largely an attempt to ultimately persuade it to reconsider matters that it had already examined’ in its decision on victim participation.¹³⁵²

Nevertheless, and bearing in mind that the former Common Legal Representative acquired ‘a unique perspective on the victims’ views and concerns’ in the case, the Chamber invited her to file an application for leave to submit *amicus curiae* observations.¹³⁵³

Accordingly, on 24 December 2012, Counsel Chana filed a request for leave to submit observations as *amicus curiae*.¹³⁵⁴ She indicated that her observations would focus on the ongoing implementation of the system of victim representation and participation outlined in the Chamber’s decisions of 3 October 2012, highlighting the need to ensure that victims were consulted before any changes were made to the arrangements for their legal representation and/or before any outstanding matters significantly affecting their legal representation were finalised.¹³⁵⁵ At the time of writing this Report, a decision has not yet been issued by the Chamber on this request.

Registry reports on the victims’ situation

As instructed by Trial Chamber V in its decisions of 3 October 2012, the Registry has submitted bi-monthly periodic reports on the status of victims in both cases.¹³⁵⁶ In the first periodic report for each case,¹³⁵⁷ submitted on 21 January 2013, the VPRS informed the Chamber of its efforts to inform victims and intermediaries in Kenya about the new system of legal representation, as well as its meetings with the newly-appointed Common Legal Representatives regarding the

1352 ICC-01/09-01/11-511, para 6.

1353 ICC-01/09-01/11-511, para 7.

1354 ICC-01/09-01/11-519.

1355 ICC-01/09-01/11-519, para 16.

1356 ICC-01/09-01/11-460, para 55; ICC-01/09-02/11-498, para 54.

1357 ICC-01/09-01/11-566-Anx; ICC-01/09-02/11-606-Anx.

registration system for victims.¹³⁵⁸ For internal purposes only, the victims were divided into three groups: (i) those who were accepted to participate during the pre-trial proceedings and who remained within the scope of the case following the confirmation of charges hearing; (ii) those who submitted applications during the course of the proceedings but whose applications were not transmitted to the Pre-Trial Chamber due to late reception or missing information and who were still within the scope of the case; and (iii) those who have never submitted applications to the Court but who, due to the harm suffered, nevertheless fell within the scope of the case.¹³⁵⁹

The VPRS further informed the Chamber that it would undertake the following measures in order to implement the decision: (i) review the applications that have been received to date in an effort to determine which applicants remained within the scope of the case; (ii) assist in grouping victims based on current geographic location in order to ensure that as many victims as possible would benefit from the opportunity of participating directly through the Common Legal Representative; (iii) assist in setting up meetings between the Common Legal Representative and those victims wishing to participate in the proceedings; (iv) continue the mapping exercise in an effort to identify as accurately as possible additional victims who may be linked to the case; (v) continue to train intermediaries in order to enable them to assist in identifying and mapping victims within the scope of the case; (vi) receive completed registration forms from the Common Legal Representative and enter them into the database; and (vii) provide the Common Legal Representative with updates including individual victim reference numbers for each victim registered.¹³⁶⁰

1358 ICC-01/09-01/11-566-Anx, para 2; ICC-01/09-02/11-606-Anx, para 2.

1359 ICC-01/09-01/11-566-Anx, para 5; ICC-01/09-02/11-606-Anx, para 5.

1360 ICC-01/09-01/11-566-Anx, para 6; ICC-01/09-02/11-606-Anx, para 6.

In the second periodic report in the Ruto and Sang case,¹³⁶¹ submitted on 25 March 2013, the VPRS informed the Chamber that it had carried out a joint mission with the Common Legal Representative, during which they met with 96 out of the 120 victims who were authorised to participate at the confirmation of charges stage of the proceedings and who the VPRS considered to remain within the scope of the case.¹³⁶² The VPRS also met victims who it had assessed as having fallen outside the scope of the case as a result of the Pre-Trial Chamber II's decision on 26 January 2012, which narrowed the temporal parameters of the charges.¹³⁶³ The VPRS had identified 149 victims who appeared to have fallen outside the scope of the case.¹³⁶⁴ The VPRS also reported that during the meetings with victims, participants questioned, *inter alia*, why the charge of rape was not included in this case.¹³⁶⁵

In its second periodic report in the Kenyatta case,¹³⁶⁶ submitted on 21 March 2013, the VPRS informed the Chamber that it had carried out a joint mission with the Common Legal Representative, during which they met with 170 out of the 208 victims who were authorised to participate at the confirmation of charges stage of the proceedings and who the VPRS considered to remain within the scope of the case.¹³⁶⁷ The VPRS also met with victims who it had assessed as having fallen outside the scope of the case as a result of the Pre-Trial Chamber II's decision on 26 January 2012, which narrowed the temporal parameters of the charges.¹³⁶⁸ The VPRS also informed the Chamber that it had identified 18 victims who appeared to have fallen outside the scope of the case, four victims who died and a duplication of applications in relation

1361 ICC-01/09-01/11-661-Anx.

1362 ICC-01/09-01/11-661-Anx, para 2.

1363 ICC-01/09-01/11-661-Anx, para 2.

1364 ICC-01/09-01/11-661-Anx, para 8.

1365 ICC-01/09-01/11-661-Anx, para 9(c).

1366 ICC-01/09-02/11-701-Anx.

1367 ICC-01/09-02/11-701-Anx, para 2.

1368 ICC-01/09-02/11-701-Anx, para 2.

to one victim. Thus, 208 out of the 233 victims authorised to participate at the confirmation of charges stage of the proceedings remained within the scope of the case.¹³⁶⁹

On 22 July 2013, the Registry submitted its fourth periodic reports¹³⁷⁰ on the general situation of victims in Kenya in the Kenyatta case, and on 23 July in the Ruto and Sang case.¹³⁷¹ The reports covered two main topics: (i) information concerning the activities of the Common Legal Representatives in the field, including details and statistics about the victim population and information on the general situation of registered and non-registered victims; and (ii) information concerning the activities of the VPRS in the field.

In the Ruto and Sang case, the report noted that during the reporting period, the Common Legal Representative had cited 'continuing security concerns relating to travel outside Nairobi as the reason for restricting his meetings with new clients'.¹³⁷² He had met with a number of intermediaries and victim representatives during the reporting period, including representatives from Uasin Gishu, Vihiga and Nairobi counties, who reported on the general situation of the victims. According to the report, some of the issues raised 'across the locations' included that: 'the victims continue to remain in a very difficult physical, psychological and economic situation as a result of the post-election violence'; 'the victims are cautious about being identified as participating in the Court's proceedings due to a misunderstanding of the role of victims compared to that of witnesses in the proceedings'; and 'the victims would like the case to be heard in The Hague'.¹³⁷³

1369 ICC-01/09-02/11-701-Anx, para 8.

1370 On 21 May 2013, the Registry informed the Chamber that it was not in a position to submit the third periodic reports in both cases as a result of the 'relative lull in field related activities' due to events surrounding the presidential elections held on 4 March 2013 in Kenya. ICC-01/09-01/11-753; ICC-01/09-02/11-738.

1371 ICC-01/09-01/11-825; ICC-01/09-02/11-776.

1372 ICC-01/09-01/11-825-AnxA, para 1.

1373 ICC-01/09-01/11-825-AnxA, para 3.

On 19 August 2013, the Defence for Sang filed a request in relation to the fourth periodic report on the general situation of victims in Kenya.¹³⁷⁴ The Defence submitted that the report was 'deficient' because it left out 'significant developments, known to the [Common Legal Representative], which are directly pertinent to the situation of victims in Kenya'; namely, the fact that Kenyan media had reported that a representative of 93 of the victims registered in the Ruto and Sang case had written a letter indicating that they wished to withdraw from the case.¹³⁷⁵ According to the Defence, the letter expressed their desire to immediately withdraw since they were 'no longer confident that the process which is going on at the court is beneficial to our interests as victims of the 2007-2008 post-election violence'.¹³⁷⁶ The Defence thus requested the Chamber to order the VPRS and the Common Legal Representative to provide the Chamber an update on the participation status of those 93 victims. The Defence submitted that although the trial was about to start, neither the Chamber nor the parties knew precisely which victims were participating in the case and that 'in such circumstances, it is unclear whose views and concerns the [Common Legal Representative] actually represents'.¹³⁷⁷

On 5 September 2013, in response to a request of the Chamber,¹³⁷⁸ the Common Legal Representative filed a report on the withdrawal of victims from the Turbo area,¹³⁷⁹ in which the Common Legal Representative proposed that the 'victims should still be presumed

1374 ICC-01/09-01/11-861.

1375 ICC-01/09-01/11-861, paras 2-3. The Defence attached the letter to its request in a confidential annex. The letter, from the Chairman of the Amani Peace Building and Welfare Organisation of Turbo, was addressed to the Victims and Witness Office in Maanweg. ICC-01/09-01/11-861, footnote 3. As reported by the Defence, the letter contained various criticisms of the Court and the OTP in particular. ICC-01/09-01/11-861, para 8.

1376 ICC-01/09-01/11-861, para 3.

1377 ICC-01/09-01/11-861, paras 4, 15.

1378 ICC-01/09-01/11-896-Corr-Red, para 4.

1379 ICC-01/09-01/11-896-Corr-Red.

to be participating victims until they have communicated their individual withdrawal to the Common Legal Representative and/or the Court¹³⁸⁰ and requested the Chamber to ‘take appropriate measures for further investigations’ in relation to the ‘root cause for the withdrawal by victims from participation in the proceedings’ given that he lacked the resources to do so.¹³⁸¹ The Common Legal Representative also requested the Chamber to ‘direct the Court’s Security and Safety Section to undertake regular reporting procedures on security incidents in the field and to provide security briefs to the Trial Chamber and to the Common Legal Representative after the occurrence of security incidents’.¹³⁸²

On 14 November 2013, Trial Chamber V(A) issued a decision on this report,¹³⁸³ directing the Registry to withdraw some victims from the database¹³⁸⁴ and, ‘in cooperation with the LRV as appropriate, to the extent possible and having due regard at all times to the safety and well-being of the individuals concerned, to confirm whether the contact information they have available for [some] victims [was] updated and correct’.¹³⁸⁵ The Chamber also directed the Common Legal Representative to inform all mentioned victims of this decision ‘whenever this [wa]s possible and to the extent it relates to them, and having due regard to their safety, well-being, dignity and privacy’;¹³⁸⁶ directed the Registry and the Common Legal Representative to include in their periodic report to Chambers

1380 ICC-01/09-01/11-896-Corr-Red, para 23.

1381 ICC-01/09-01/11-896-Corr-Red, para 25.

1382 ICC-01/09-01/11-896-Corr-Red, para 28.

1383 ICC-01/09-01/11-1098-Red2.

1384 ICC-01/09-01/11-1098-Red2, para 41.

1385 ICC-01/09-01/11-1098-Red2, para 42. The information regarding the number or identity of victims was redacted.

1386 ICC-01/09-01/11-1098-Red2, para 43.

certain information related to victims;¹³⁸⁷ and invited the Common Legal Representative to ‘submit to the VWU, as appropriate, any individual security situation that would need the attention of the VWU pursuant to Regulation 80(1) of the Regulations of the Registry’.¹³⁸⁸

In the Kenyatta case, the report noted that during the reporting period, the Common Legal Representative met with 109 victims, out of which 96 were registered and ‘introduced to their lawyer for the first time’.¹³⁸⁹ According to information submitted by the Common Legal Representative, out of the total of 109 victims, 97 who fell within the scope of the case had submitted applications during the course of proceedings. However, their applications were not transmitted to the Pre-Trial Chamber ‘due to late reception or missing information’.¹³⁹⁰

In both cases, the VPRS, in conjunction with the Field Security Unit, conducted activities ‘aimed at assessing the security situation in the relevant areas and planning and organising activities related to victim participation ahead of the commencement of trial’.¹³⁹¹ With

1387 ICC-01/09-01/11-1098-Red2, para 44. The specific information requested was the following: ‘(a) any information as to whether victims have become unreachable or contact information in the database is outdated or incorrect; (b) proposals as to how the situation of victims who are uncontactable should be dealt with; (c) information concerning any referral of victims to the VWU for assessment and the results of any such assessment, as referred to at paragraph 31 above; (d) information about any security incidents of direct relevance to this case, as described at paragraph 37 above’.

1388 ICC-01/09-01/11-1098-Red2, para 45. In addition, in this decision, the Chamber also rejected the Defence request to obtain the application numbers of the 40 withdrawing or uncontactable victims, which the Defence had filed on 13 September 2013. ICC-01/09-01/11-941.

1389 ICC-01/09-02/11-776-AnxA, para 1. As noted in the report, ‘the other victims present in the meetings were either previously met or have yet to be registered’.

1390 ICC-01/09-02/11-776-AnxA, para 3.

1391 ICC-01/09-01/11-825-AnxA; ICC-01/09-02/11-776-AnxA, para 1.

respect to the VPRS' additional activities in both cases, the report noted that during the reporting period, the VPRS had carried out a number of activities in conjunction with civil society organisations and the Common Legal Representatives, including conducting a workshop with civil society organisations both from Nairobi and around the country. Together with the Common Legal Representatives, the VPRS conducted a series of bilateral meetings with key intermediaries and others from the relevant areas in the Nyanza, Western and Rift Valley Provinces, aimed at gaining 'a better understanding of the realities on the ground at the village, city, county and provincial level so as to ensure, to the extent possible, the safety and security of the participants involved in activities relating to the participation of victims in Court's proceedings during the coming months'.¹³⁹² Furthermore, the report stated that the VPRS had 'continued its review of the applications for participation in proceedings that had been received but that were not transmitted to the Pre-Trial Chamber due to late reception or missing information, in order to establish which appear to fall within the scope of the Case'.¹³⁹³

On 23 September 2013, the Registry filed its fifth periodic reports on the general situation of victims in Kenya. The Ruto and Sang case report noted that during the reporting period, the Common Legal Representative met with and registered 175 victims who had been 'introduced to their lawyer for the first time'.¹³⁹⁴ He met these victims in six groups. All of these victims fell within the scope of the case and had submitted applications earlier in the proceedings but their

applications had not been transmitted to the Pre-Trial Chamber 'due to late reception or missing information'.¹³⁹⁵ During two of these meetings, the victims alleged suffering pressure from the community to withdraw from participating in the case and some expressed fear of reprisals.

The Kenyatta case report noted that during the reporting period, the Common Legal Representative met with 151 victims.¹³⁹⁶ 125 of these victims had met previously with the Common Legal Representative, while 26 of them met with the Representative for the first time. The 26 victims had submitted applications during the pre-trial proceedings and had either been accepted to participate, or their applications had not been transmitted to the Pre-Trial Chamber 'due to late reception or missing information', although they fell within the scope of the case.¹³⁹⁷ The Common Legal Representative met the victims in four groups in various locations. He and his team also conducted telephone consultations with victims, met with some victims individually and in small groups, and provided information to victims by phone.

In both cases, the victims with whom the Common Legal Representatives met alleged to still suffer the consequences of having lost their property, displacement, physical injuries, rape, murder and missing relatives and/or trauma. Many reported lacking means of subsistence and the ability to afford medical care. Some complained about the bias in the government's approach to IDP resettlement.¹³⁹⁸

In both cases, VPRS activities undertaken during the reporting period included: being 'involved in developing and transmitting clear and coherent messages to the wider victim population

1392 ICC-01/09-01/11-825-AnxA; ICC-01/09-02/11-776-AnxA, paras 5-6.

1393 ICC-01/09-01/11-825-AnxA; ICC-01/09-02/11-776-AnxA, para 7.

1394 ICC-01/09-01/11-980-AnxA, para 1. As noted in the report, 'the victims who have submitted application forms for participation in the proceedings at an earlier stage of the proceedings are considered registered once they have attended a meeting with the [Common Legal Representative] and confirmed their continued interest'.

1395 ICC-01/09-01/11-980-AnxA, para 3.

1396 ICC-01/09-02/11-810-AnxA, para 1. As noted in the report, 'the other victims present in the meetings were either previously met or have yet to be registered'.

1397 ICC-01/09-02/11-810-AnxA, para 3.

1398 ICC-01/09-01/11-980-AnxA, para 4; ICC-01/09-02/11-810-AnxA, para 5.

through intermediaries and by providing input to the [PIDS] on outreach messages'; continuing to map the victims of the case to facilitate the work of the Common Legal Representatives; and organising a workshop with the PIDS, the Common Legal Representatives, intermediaries and civil society organisations to discuss issues related to the participation of victims.¹³⁹⁹

On 25 November 2013, the Registry filed its sixth periodic reports on the general situation of victims in Kenya.¹⁴⁰⁰ In the Ruto and Sang case, it reported that the activities of the Common Legal Representative in the field were very limited due to his presence in The Hague for the beginning of the trial on 10 September 2013, as well as his presence in Court throughout the month of September, making it impossible for him to meet with the victims.¹⁴⁰¹ During that period, the VPRS organised an expert training seminar on psycho-social approaches to interacting with victims for members of the Common Legal Representatives team, intermediaries and civil society organisations.¹⁴⁰² The VPRS also held a

1399 ICC-01/09-01/11-980-AnxA, paras 5-6; ICC-01/09-02/11-810-AnxA, paras 6-7.

1400 ICC-01/09-01/11-1119-AnxA; ICC-01/09-02/11-860-AnxA.

1401 ICC-01/09-01/11-1119-AnxA, paras 1, 3. The Common Legal Representative also reported to the VPRS that 'during the reporting period he "sought out and was enjoined" in a case before the High Court of Kenya, entitled "*Walter O Barasa vs. The Cabinet Secretary Ministry of Interior and National Co-ordination, Hon Attorney General, the Director of Public Prosecutions, and the Inspector General of Police*", and that he "was admitted as an interested party to the above mentioned domestic case in his capacity as legal representative of victims in the Case". ICC-01/09-01/11-1119-AnxA, para 4.

1402 ICC-01/09-01/11-1119-AnxA, paras 1, 3, 5. The objectives of the seminar, according to the VPRS, were *inter alia*: 'to ensure that persons who are interacting with victims are equipped with the necessary tools to engage effectively and avoid causing further harm to victims through that interaction'; 'to improve the participants' ability to communicate messages to victims, including complex, difficult and negative messages, and provide tools to maximise comprehension and the retention of information'; 'create awareness of the various psycho-social schools of thought (Individual, Community, Human Rights) and how they might be useful in practice to persons who are interacting with victims in Kenya'.

meeting with the intermediaries assisting victims in the case, who 'conveyed frustrations expressed by victims who had submitted applications at a previous stage of the proceedings but were not considered to fall within the current scope of the Case, [and] who had not received information about their status and were wondering why they had not been contacted by a lawyer'.¹⁴⁰³ The VPRS assured the intermediaries that the Registry would endeavour to convey information to the victims. The VPRS also met with IDP Network, an organisation representing internally displaced persons, which reported that 'as many as 31,000 victims of the post-electoral violence were residing in unrecognised IDP camps, among whom there are likely to be victims falling within the scope of the Case'.¹⁴⁰⁴ It undertook to look into the issue of victims in IDP camps and identify any victims falling within the scope of the case.¹⁴⁰⁵

In the Kenyatta case, in the reporting period, the Common Legal Representative met with 338 victims in 11 groups during two missions in various locations throughout the country.¹⁴⁰⁶ Out of the 338 victims, 215 were registered and met with the Common Legal Representative for the first time.¹⁴⁰⁷ Out of these 215 victims, 115 had not previously submitted applications to the VPRS using the Court's standard application forms. These 115 victims filled in a form, created jointly by the VPRS and the Common Legal Representative,¹⁴⁰⁸ on the basis of which the Common Legal Representative verified them as victims of the case, in accordance with the Chamber's 3 October 2012 decision.

1403 ICC-01/09-01/11-1119-AnxA, para 6.

1404 ICC-01/09-01/11-1119-AnxA, para 7.

1405 ICC-01/09-01/11-1119-AnxA, paras 6-7.

1406 ICC-01/09-02/11-860-AnxA, paras 1, 8.

1407 As stated in the report, the remaining 163 victims 'had either previously been met or have yet to be registered'. ICC-01/09-02/11-860-AnxA, footnote 1.

1408 ICC-01/09-02/11-860-AnxA, paras 1, 9.

The report described in more detail the system devised by the VPRS and the Common Legal Representative 'to facilitate registration for victims who wish to register and participate' in this case and who had not previously submitted an application to the VPRS using the Court's standard application forms.¹⁴⁰⁹ It recalled that potential victims of the case had been identified by the VPRS and the Common Legal Representative through past and on-going mapping exercises, and that the identified victims were met 'in groups and in locations close to where they reside'. It added that 'trained intermediaries and sometimes victims themselves are used at the outset to help facilitate these meetings including *inter alia* by giving advice on safe and appropriate meeting venues and by inviting the victims in the group to the meeting'.¹⁴¹⁰ Then, victims were asked to fill in a two-page registration form,¹⁴¹¹ on the basis of which the Common Legal Representative would verify whether they qualified as victims of the case. Once the verification process was complete, the victims could choose to 'register with the Registry, in which case the registration form will be sent by the [Common Legal Representative] to the VPRS', and once received, the VPRS 'registers the registration forms, assigns application numbers, scans them and enters the key data into the database'.¹⁴¹² The report

clarified that victims were 'grouped in the electronic system according to the same grouping used in the field by the [Common Legal Representative]' and that 'the number of victims in a particular group is limited in order to enable them to be managed effectively by the [Common Legal Representative] team'.¹⁴¹³ In addition, the Common Legal Representative provided the VPRS with a 'meeting form' after each meeting with a group of victims, which contained information on the groups.¹⁴¹⁴

During the reporting period, the Common Legal Representative and his team also met individually and spoke with clients via the phone 'where issues of security or physical well-being were at stake'.¹⁴¹⁵ Several clients also approached him and his team after watching or hearing him on TV and the radio, and shared their views and concerns on topics addressed in those programmes.¹⁴¹⁶

The report outlined key information regarding the victims who had registered during the reporting period, as well as the general situation of all victims in the case, for each of the 11 meetings held by the Common Legal Representative.¹⁴¹⁷ There were several

1409 The report stated that 'in constructing the registration system, the VPRS and [Common Legal Representative] remained mindful of the challenges presented by the various contextual circumstances outlined in the 3 October Decision, as well as the need to facilitate consistent interaction between the [Common Legal Representative] and large numbers of victims while ensuring efficiency and flexibility'. ICC-01/09-02/11-860-AnxA, para 4.

1410 ICC-01/09-02/11-860-AnxA, para 5.

1411 The registration form included, according to the report, 'space for the collection of the information listed in paragraph 48 of the 3 October Decision as well as questions designed to aid the [Common Legal Representative] in determining whether or not the individual can be considered a victim of the Case'.

1412 ICC-01/09-02/11-860-AnxA, paras 5-6.

1413 ICC-01/09-02/11-860-AnxA, para 6. The report further explained that 'grouping in the database is designed to allow the VPRS and the [Common Legal Representative] to keep track of the victims registered as the numbers increase, and to centralise and collate the information received'. ICC-01/09-02/11-860-AnxA, para 7.

1414 As explained in the report, 'the information derived from the meeting forms is used by the VPRS to compile the two month periodic reports for the Chamber, and allows the VPRS to be kept up-to-date on the latest composition of the groups in the field as well as the activities of the [Common Legal Representative] in the field'. ICC-01/09-02/11-860-AnxA, para 7.

1415 ICC-01/09-02/11-860-AnxA, para 9.

1416 ICC-01/09-02/11-860-AnxA, para 9.

1417 The 11 meetings were held in Western Province, Nyanza Province, and Rift Valley Province.

reports of sexual violence¹⁴¹⁸ and other types of violence, such as attacks with *pangas*,¹⁴¹⁹ the murder or beating of loved ones and looting during the post-election violence. During these meetings, the victims reported having lost their businesses or other sources of income, having been displaced and not having proper housing or financial assistance for their loss of property and displacement, suffering from psychological trauma and not having access to proper medical and psychological care. According to the report, some victims claimed that the government had taken a discriminatory approach when providing assistance to victims.¹⁴²⁰

As indicated in the report, during the relevant period, the VPRS attended two of the 11 meetings with victims in order to 'provide preliminary information to the victims, to assist with the registration and provide information to victims who were identified as not falling within the scope of the Case as a result of the [Common Legal Representative's] verification Procedure',¹⁴²¹ organised an expert training seminar on psycho-social approaches to interacting with victims for members of the Common Legal Representative team, intermediaries and civil society organisations, and held meetings with intermediaries and the IDP Network.¹⁴²²

1418 In the meeting in Western Province, a newly-registered victim reported that her daughter was raped and contracted HIV as a result. In the Rift Valley Province, a man reported that his wife and daughters had been gang raped during the post-election violence, and that his wife had bled to death. In a separate meeting, a member of the group reported that her daughter was raped and later discovered that she had contracted HIV as a result of the rape. Another member of the group reported that she was gang-raped and left for dead near a river, and that she had also contracted HIV as a result of the rapes. In a meeting in Nyanza Province, one of the members of the group reported that she was gang-raped after being caught as she was fleeing the violence. In another meeting in the Rift Valley Province, two members of the group reported they had been forcibly circumcised with a machete during the post-election violence, one elderly member of the group stated that he was severely beaten when trying to stop a forced circumcision from taking place. Another member of the group reported that his wife was raped. In other two meetings in Nyanza Province, four women reported that they had been raped. One of the victims who had been previously registered and who had been raped, also reported 'having her genitals mutilated with a crude implement'. ICC-01/09-02/11-860-AnxA, para 10.

1419 A broad, heavy knife.

1420 ICC-01/09-02/11-860-AnxA, para 10.

1421 ICC-01/09-02/11-860-AnxA, para 11.

1422 ICC-01/09-02/11-860-AnxA, paras 12-14.

The Prosecutor v. Bosco Ntaganda

Decision establishing principles on the victims' application process

On 28 May 2013, Judge Ekaterina Trendafilova, acting as Single Judge of Pre-Trial Chamber II, rendered a decision establishing principles on the victims' application process in pre-trial proceedings in the case against Bosco Ntaganda (Ntaganda), with the express aim of 'streamlining' and 'rationalising' the process, as well as 'enhancing its predictability, efficiency and expeditiousness'.¹⁴²³ This decision represents the most recent initiative by a Chamber to simplify the victim participation system. The Single Judge drew upon the pre-trial victims' application process in the Laurent Gbagbo case, including lessons-learned, as outlined by the Registry.¹⁴²⁴ The Single Judge adopted her own 'variations' for this particular case, for example by adopting a new 'simplified form' for victims' applications for participation. The Single Judge also highlighted the importance of clarifying at an early stage in the proceedings the functions of the different sections of the Registry in ensuring the meaningful participation of victims.

¹⁴²³ ICC-01/04-02/06-67, para 1. Elsewhere in the decision, the Single Judge also referred to the ASP Resolution that called for ensuring the 'sustainability, effectiveness and efficiency' of the victims' participation system. ICC-01/04-02/06-67, para 17, referencing ICC-ASP/10/Res5, para 49.

¹⁴²⁴ In January 2012, Single Judge Silvia Fernández de Gurmendi initiated a revision of the victim application and participation process in the Gbagbo case. This was the first case before the Court in which significant changes were introduced to the victim application process as it had been implemented to date, in an attempt to simplify and expedite the procedure. The Gbagbo case was initially before Pre-Trial Chamber III. On 15 March 2012, the Presidency dissolved Pre-Trial Chamber III and assigned the Situation in Côte d'Ivoire to Pre-Trial Chamber I. ICC-02/11-01/11-59. See further *Gender Report Card 2012*, p 274-283.

The Registry's observations regarding the 'partly collective' application system adopted in the Laurent Gbagbo case

On 6 May 2013, in response to a request by the Single Judge, the Registry submitted its observations on the partly collective application process adopted in the Laurent Gbagbo case.¹⁴²⁵ At the outset, the Registry placed its prior proposal in the Laurent Gbagbo case within the wider context of the process of reviewing the victim participation system. In addition, it stressed that its observations were based on its own experience, not that of the Chamber, nor of the parties and participants. It noted that its proposed approach in the Laurent Gbagbo case was:

expressly intended to contribute to a review of the victim application system currently underway that is aimed at identifying ways that could be found, whether within the existing legal framework or involving amendments to that framework, to improve efficiency and sustainability and effectiveness, especially in cases involving potentially large numbers of victims.¹⁴²⁶

The Registry referred to the ASP Resolution adopted at its Ninth Session, which had highlighted the 'need to consider reviewing the victim participation system with a view of ensuring its sustainability, effectiveness and efficiency' and had requested the Court to undertake this review in consultation with the Bureau and relevant stakeholders.¹⁴²⁷ The Registry added that it had viewed the experience in the Gbagbo case as an opportunity to 'test an approach with a view to its possible refinement

¹⁴²⁵ ICC-01/04-02/06-57. These observations were initially filed as confidential (ICC-01/04-02/06-57-Conf) given that they were in response to a decision by the Single Judge that was also notified as confidential (ICC-01/04-02/06-54-Conf). The observations were made public after a decision of Pre-Trial Chamber II on 28 May 2013.

¹⁴²⁶ ICC-01/04-02/06-57, para 5.

¹⁴²⁷ ICC-01/04-02/06-57, para 5 and footnote 12.

and adoption as a standard model for other situations and cases'.¹⁴²⁸ It also noted that the lessons drawn from the Laurent Gbagbo case were used in the Kenya cases when designing a registration process for victims.¹⁴²⁹

The Registry highlighted that the approach adopted in the Laurent Gbagbo case was of a 'partly collective system', in which each individual victim was asked to describe the individual harm suffered, ensuring that the individual character of the harm was not lost.¹⁴³⁰ It stressed that this approach did not include the adoption of a notion of 'collective harm', nor did it suggest that victims would participate collectively rather than individually, except for the fact that they participated through a common legal representative, as in most cases.¹⁴³¹

As positive aspects of the system adopted in the Laurent Gbagbo case, the Registry underlined the psychological benefits for victims who had met in groups with the VPRS staff for the purposes of consultation on common legal representation, information about the status of their application and coordination regarding completing applications. It also noted that grouping victims by location and crime assisted the Victims' Legal Representatives in managing their contacts with their clients.¹⁴³²

However, the Registry also warned that bringing together groups of victims for the purposes of an application process would 'not always be feasible or advisable' because '[i]n some cases the security context may not be conducive for such meetings, in others not all victims

1428 ICC-01/04-02/06-57, para 5.

1429 ICC-01/04-02/06-57, para 5.

1430 ICC-01/04-02/06-57, para 6, emphasis in original.

1431 ICC-01/04-02/06-57, para 6. In its proposal of a partly collective application process in the Gbagbo case, the Registry had suggested that such an approach would allow it to 'record the groups' perspectives on, *inter alia*, notions of the collective harm suffered by the members of the group or community'. ICC-02/11-01/11.

1432 ICC-01/04-02/06-57, para 7.

feel comfortable speaking in front of groups, whether due to the nature of the harm suffered (such as victims of sexual violence) or generally due to tensions within a community, fear of stigmatisation, or other reasons'.¹⁴³³ The Registry pointed out that the 'lack of trust' that may exist among victims was manifested in the Laurent Gbagbo case by their reluctance to appoint a single contact person for the group.¹⁴³⁴ The Registry recalled that the VPRS, in its evaluation of the Laurent Gbagbo experience and drawing on the experience of its psychologists, who had met with the groups of victims, cautioned that 'a group artificially brought together for the purpose of completing a form could lead to a negative experience for victims'.¹⁴³⁵

As a result, the Registry concluded that any collective system would need to be 'sufficiently flexible' to accommodate both situations in which it was possible and those in which it was not possible to physically bring together groups of victims.¹⁴³⁶ It noted that the VPRS recommended against 'repeating the aspect of the Laurent Gbagbo approach that involved a division of the *formal* application into two elements, the group form and individual declarations'.¹⁴³⁷ The Registry concluded that it would be more advisable to collect 'core information from each victim' and that any other information regarding a group could be collected and stored by the VPRS. The Registry suggested that each victim would complete a 'short form of one or two pages with information that is essential for assessing the application as well as minimum contact details', which would be similar to the 'Individual Declaration' used in the Laurent Gbagbo case but additionally contain a description of the events.¹⁴³⁸ The VPRS could then 'group them together and process

1433 ICC-01/04-02/06-57, para 8.

1434 ICC-01/04-02/06-57, para 8.

1435 ICC-01/04-02/06-57-Conf, para 8.

1436 ICC-01/04-02/06-57, para 9.

1437 ICC-01/04-02/06-57, para 9, emphasis in original.

1438 ICC-01/04-02/06-57, para 9.

them collectively'.¹⁴³⁹ This approach would have the advantage of allowing for more flexibility in the processing of applications, as each victim would not be 'permanently linked to one group' and, instead, could at a later stage be considered separately — both individually and as part of another group.¹⁴⁴⁰

Regarding the role of Registry staff and intermediaries in the application process, the Registry highlighted the benefits of having the staff of VPRS, VWU and of the PIDS directly involved at the application phase, as it allowed the Registry to guide the process, learn important lessons, provide explanations and accurate information directly to victims, and consult with victims regarding common legal representation. It also gave victims an 'opportunity to express themselves to Court staff, and not only to intermediaries'.¹⁴⁴¹ However, the Registry pointed out that it was not always feasible to have its staff so directly involved given the insufficient ICC field presence, shortage of resources, security concerns, tensions in the communities, and other reasons.¹⁴⁴²

The Registry suggested that intermediaries would always be needed in order to identify and reach out to victims, and that even if VPRS staff was directly involved in the application process, more use could be made of intermediaries in helping victims to complete applications.¹⁴⁴³ However, it also stressed the importance of assessing, selecting, training and monitoring the intermediaries properly.¹⁴⁴⁴ It recalled that

1439 ICC-01/04-02/06-57, para 9.

1440 ICC-01/04-02/06-57, para 10. The Registry had found that in the Gbagbo case, the grouping of victims presented problems when at a later stage individual victims needed to be considered separately from the group as this required additional time and the 'cumbersome' process of 'unravel[ling] the groups and recharacteris[ing] them in the database'.

1441 ICC-01/04-02/06-57, para 11.

1442 ICC-01/04-02/06-57, para 13.

1443 ICC-01/04-02/06-57, paras 12-13.

1444 ICC-01/04-02/06-57, para 13.

the guidelines governing the relations between the Court and intermediaries, drafted in April 2012, offered an important framework for those efforts.¹⁴⁴⁵ The Registry concluded that it was important to ensure the 'continuous presence' of its staff in the field and to provide this type of support, even when it is not possible to have VPRS staff directly assisting victims in completing the applications.¹⁴⁴⁶ The Registry noted in particular the importance of having a psychologist or a support person from the VWU present during meetings with groups of victims in order to avoid re-traumatisation and harm caused to the applicants.¹⁴⁴⁷

The Registry highlighted the importance of the work conducted by the VPRS and the PIDS in providing accurate and relevant information to victims related to their potential participation in the proceedings, when such opportunity arose. It noted, however, that it was important to target such information not only towards victims who may be linked to the case but also to the wider affected communities in order to increase their understanding of why only some victims were granted the opportunity to participate in the proceedings before the Court.¹⁴⁴⁸

As regards the efficiency of the application process, the Registry observed that overall, the approach adopted in the Laurent Gbagbo case had the effect of reducing the amount of information to be addressed and the amount of time required for staff to manage it. At the same time, it noted that 'an unusual number of applicants' had provided supplementary documents, which somewhat reduced that effect. It also noted that this approach required 'more intensive engagement in the field' for Registry staff.¹⁴⁴⁹ It concluded that the challenges

1445 ICC-01/04-02/06-57, para 13 and footnote 16.

1446 ICC-01/04-02/06-57, para 13.

1447 ICC-01/04-02/06-57, para 15.

1448 ICC-01/04-02/06-57, para 14.

1449 ICC-01/04-02/06-57, para 16.

faced in the Laurent Gbagbo case could be met through ‘improvements in internal organisation of the work methods’ and by ‘better advance knowledge and preparation’.¹⁴⁵⁰ The lessons learned regarding the complexities of dealing with groups of victims led the Registry to recommend all of the above-mentioned adjustments to the process in the Ntaganda case.

The Single Judge’s decision on victim participation in the confirmation of charges proceedings

The role of the specialised sections of the Registry

As noted by Single Judge Ekaterina Trendafilova, the 28 May 2013 decision was intended to establish ‘guiding principles’ and ‘detailed instructions’ to the specialised sections of the Registry at an early stage in the proceedings, in order to organise the participation of victims in an efficient and expeditious manner.¹⁴⁵¹ The Single Judge placed significant emphasis on the outreach functions performed by different sections of the Registry. She underlined that ‘a comprehensive and timely outreach mission, targeted at potential victim applicants in the present case, is essential in order for the application stage to run smoothly and efficiently’.¹⁴⁵²

For this purpose, the Single Judge found that the PIDS was obliged to ensure that potential victims received ‘accurate, concise, accessible and complete information’ on the Court’s mandate and on the roles that victims can play in the proceedings in accordance with the Statute.¹⁴⁵³ She further found that this information should also include details on the material, temporal and geographical scope of the case against the suspect, as well as the fact that claims for reparations were not conditional upon previous participation in the proceedings.¹⁴⁵⁴ The Single Judge also noted the importance of adequately communicating to potential victims the Trust Fund for Victims’ role in providing access to ‘immediate and meaningful assistance’ and that the

1450 ICC-01/04-02/06-57, para 16.

1451 ICC-01/04-02/06-67, para 3.

1452 ICC-01/04-02/06-67, para 12.

1453 ICC-01/04-02/06-67, para 13.

1454 ICC-01/04-02/06-67, para 13.

Trust Fund’s projects have already been put in place in the DRC.¹⁴⁵⁵ As to the relation between the PIDS and the VPRS, the Single Judge stressed that if well-coordinated, there would be no overlap. She further noted the important role of the PIDS in preparing the ground for the VPRS to carry out its field missions.¹⁴⁵⁶

The new ‘simplified’ application form

Recalling the requirements of Rule 85 and the Court’s previous jurisprudence on victim participation requirements,¹⁴⁵⁷ as well as the ‘specific features of this case’,¹⁴⁵⁸ the Single Judge adopted a ‘concise and simplified’ individual application form to be applied in the Ntaganda case.¹⁴⁵⁹ The Single Judge found that the new, one-page, ‘simplified form’ contained only the information that was ‘strictly required by law’.¹⁴⁶⁰

As explained by the Single Judge, the new form was structured according to the requirements of Rule 85.¹⁴⁶¹

1455 ICC-01/04-02/06-67, para 15.

1456 ICC-01/04-02/06-67, para 16.

1457 The Single Judge recalled that other Pre-Trial Chambers of the Court had established that in order to qualify as a victim, the following requirements must be met: (i) the identity of the applicant appeared duly established; (ii) the event(s) described in the application for participation constitute(s) one or more crimes within the jurisdiction of the Court, with which the suspect was charged; and (iii) the applicant suffered harm as a result of the crime(s) with which the suspect was charged. ICC-01/04-02/06-67, para 20.

1458 The Single Judge did not, however, elaborate on what these specific features were.

1459 ICC-01/04-02/06-67, paras 17-25.

1460 ICC-01/04-02/06-67, para 21. The form was annexed to the decision.

1461 ICC-01/04-02/06-67, para 22. The first section addressed the identification of the victim (name, age, sex, ethnic group or tribe, proof of identity of the victim or of the relationship to the victim, and proof of identity of the person acting on behalf of the victim or proof of relationship to the victim). This section was followed by two spaces in which the victim, or the person acting on his or her behalf, was to describe: (i) the events from which he or she claimed to have suffered, and (ii) the harm that resulted from those events, including the date, location and identity of the person who, in his or her view, was responsible for those events. The form also contained a question as to whether the victim intended to apply for reparations in the event the suspect was convicted. The form concluded with a space for the signature of the victim, or the person acting on his or her behalf, the date and location. It provided for three options if the person filling out the form was acting on the behalf of the victim (eg, if the victim is a child who was under 18, if the victim was a disabled adult, or if the victim was an adult and gave his or her consent). ICC-01/04-02/06-67-Anx.

The Single Judge opined that its simplicity would significantly assist applicants in filling out the form, the VPRS in processing the applications, and the Chamber in assessing them, thus enhancing the 'overall efficiency and expeditiousness of the proceedings'.¹⁴⁶² She also considered that an additional benefit of this simplified form with concise information would be to streamline the process of redactions by minimising the need for this type of protective measure.¹⁴⁶³ Furthermore, the Single Judge instructed the VPRS to collect and store any relevant additional information that the applicants may submit, including their contact details, language proficiency, preferences as to legal representation and security concerns.¹⁴⁶⁴ She recalled that victim participants would have ample opportunity to share their views and concerns with the Court throughout the proceedings.¹⁴⁶⁵

The Single Judge tasked the VPRS to be directly involved in assisting the applicants in completing the simplified forms,¹⁴⁶⁶ and when this was not possible, the VPRS should utilise intermediaries in the field who would operate under the VPRS' control. The Single Judge found that the intermediaries should be leaders in the affected communities, who were trusted by the population. She tasked the VPRS with training the intermediaries and found that the VPRS would be responsible for their proper performance.¹⁴⁶⁷ The Single Judge also tasked the VPRS with processing victims' applications and transmitting them to the Chamber.¹⁴⁶⁸ It was required to ensure that all transmitted applications were 'complete' and in line with the requirements established by the Court's jurisprudence.¹⁴⁶⁹

1462 ICC-01/04-02/06-67, para 18.

1463 ICC-01/04-02/06-67, para 22.

1464 ICC-01/04-02/06-67, para 24.

1465 ICC-01/04-02/06-67, para 25.

1466 ICC-01/04-02/06-67, para 26.

1467 ICC-01/04-02/06-67, paras 27-28.

1468 ICC-01/04-02/06-67, para 29.

1469 ICC-01/04-02/06-67, para 30.

'Grouping' of victims' applications by the Registry

The Single Judge endorsed the approach adopted by Pre-Trial Chamber I in the Laurent Gbagbo case¹⁴⁷⁰ of grouping victims' applications, with some variations based on the Registry's observations. The Single Judge found that the VPRS would be responsible for the grouping of victims in line with certain criteria in order to transmit to the Chamber the applications collectively.¹⁴⁷¹ The criteria proposed included, but was not limited to: (i) the location of the alleged crime(s); (ii) the time of the alleged crime(s); (iii) the nature of the alleged crime(s); (iv) the harm(s) suffered; (v) the gender of the victim(s); and (vi) other specific circumstances common to victims.¹⁴⁷² The Single Judge held that grouping victims would expedite the application process, as well as the Chamber's assessment of the applications.¹⁴⁷³ The Single Judge clarified that she would 'assess the applications individually but will take a decision on each distinct group of applicants as established according to appropriate criteria'.¹⁴⁷⁴

Furthermore, the Single Judge determined that the report to be submitted by the Registry to the Chamber together with the victims' applications pursuant to Regulation 86(5)¹⁴⁷⁵ should include two annexes, including one containing the groups of applicants with reference to the criteria that was applied by the VPRS and its own assessment of the applications, and another

1470 The Single Judge referred to Pre-Trial Chamber I's second decision in the Gbagbo case on issues related to the victims' application process. ICC-02/11-01/11-86. See further *Gender Report Card 2012*, p 280-281.

1471 ICC-01/04-02/06-67, para 33.

1472 ICC-01/04-02/06-67, para 35.

1473 ICC-01/04-02/06-67, para 34.

1474 ICC-01/04-02/06-67, para 34.

1475 Regulation 86(5) provides that '[t]he Registrar shall present all applications described in this regulation 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.'

with the copies of the completed applications.¹⁴⁷⁶ This report and its annexes would be shared with the Defence with redactions of identifying information whenever deemed necessary by the VPRS or expressly requested by the applicant. She indicated that the report and annexes could be shared with the Prosecution without redactions. She further indicated that the applications should be transmitted to the Chamber on a rolling basis, every one to three weeks, while the VPRS should submit all completed applications to the Chamber and the parties no later than 30 days before the start of the confirmation of charges hearing.¹⁴⁷⁷

Legal representation of victims

The Single Judge did not find that legal representation of victims was required at the pre-trial stage of the proceedings, as the VPRS' assistance and support would be sufficient to ensure their right to apply for participation. However, she instructed the Registry to begin organising the legal representation of victims, namely: (i) to consult with applicants as to their preferences for legal representation; (ii) to assess whether they could be represented by a common legal representative, including by the OPCV;¹⁴⁷⁸ and (iii) if common legal representation was an option, and in consultation with the OPCV, to start identifying an appropriate 'assistant to counsel', in accordance with Regulation 81(3) and in line with the model created by the decision of the Single Judge of Pre-Trial Chamber I in the Laurent Gbagbo case.¹⁴⁷⁹

1476 ICC-01/04-02/06-67, paras 37, 41-44.

1477 ICC-01/04-02/06-67, paras 39-40.

1478 ICC-01/04-02/06-67, paras 45-46.

1479 ICC-01/04-02/06-67, para 47. The Single Judge referred to the Pre-Trial Chamber I decision on victims' participation and victims' common legal representation at the confirmation of charges hearing and in the related proceedings in the Gbagbo case. ICC-02/11-01/11-138. She recalled that according to that model, OPCV lead counsel was appointed as common legal representative of all participating victims and was assisted by a team member based in the field 'with wide knowledge of the context' and 'paid by the Court's legal aid budget'.

Protection and witness issues

Trial Chamber V's decisions on witness preparation in the Kenya Situation

On 2 January 2013, the majority of Trial Chamber V delivered two decisions, Judge Eboe-Osuji partially dissenting, concerning witness preparation in the Muthaura and Kenyatta¹⁴⁸⁰ and the Ruto and Sang¹⁴⁸¹ cases, both arising from the Kenya Situation.¹⁴⁸² In these decisions, the majority determined that witness preparation — understood to involve ‘a meeting between a witness and the party calling that witness, taking place shortly before the witness’s testimony, for the purpose of discussing matters relating to the witness’s testimony’¹⁴⁸³ — would be permitted in the cases. The decision to allow witness preparation presents a significant departure from the practice so far endorsed by ICC Chambers.

Background to the decision and party submissions

On 13 August 2012, the Prosecution filed submissions on the permissible scope of witness preparation, seeking a modification of the ‘Familiarisation Protocol’¹⁴⁸⁴ applied by Trial Chambers I, II and III, to enable the party calling a witness to meet with the witness before he or she was to testify. The modification would ‘allow the party calling a witness to talk to the witness in advance of testimony, with safeguards to avoid coaching or otherwise improperly influencing the witness’.¹⁴⁸⁵ The purpose of the meeting would include reviewing the topics to be covered in examination and

1480 ICC-01/09-02/11-588.

1481 ICC-01/09-01/11-524.

1482 Given that these two decisions by Trial Chamber V were largely identical, citations will be provided for both cases; the first reference given will be to the Muthaura and Kenyatta case. Only specific differences in the decisions will be explicitly mentioned.

1483 ICC-01/09-02/11-588, para 4; ICC-01/09-01/11-524, para 4.

1484 The ‘Familiarisation Protocol’ refers to ‘the support provided by the VWU to witnesses as set out in the Registry’s “Unified protocol on the practices used to prepare and familiarise witnesses for giving testimony”’. ICC-01/09-02/11-588, para 4; ICC-01/09-01/11-524, para. 4. It permitted ‘a very brief courtesy meeting between counsel and witness, but barred factual discussions and placed the task of witness familiarisation on the Victim and Witnesses Unit’. ICC-01/09-02/11-462, para 1; ICC-01/09-01/11-446, para 1.

1485 ICC-01/09-02/11-462, paras 1, 5, 6, 31, and ICC-01/09-02/11-462-AnxA; ICC-01/09-01/11-446, paras. 5, 6, 31, and ICC-01/09-01/11-446-AnxA.

cross-examination; reviewing the witness's prior statements; showing the witness potential exhibits for comment; and answering any questions from the witness.¹⁴⁸⁶ In the case against Muthaura and Kenyatta, the Legal Representative of Victims indicated his support for the proposed modification apart from aspects related to preparing a witness for cross-examination.¹⁴⁸⁷ In contrast, the Defence teams for both Muthaura and Kenyatta opposed the proposed modification, claiming it aimed at 'nothing less than to school' the Prosecution's witnesses.¹⁴⁸⁸ The Ruto and Sang Defence also opposed the proposal.¹⁴⁸⁹

Majority decision

The Chamber held that witness preparation would be permitted in the case in accordance with a 'Witness Protection Protocol', which was based on the Prosecution's proposal and attached in an Annex to its decision.¹⁴⁹⁰ Although the Familiarisation Protocol would continue to be adhered to in the case, the Witness Protection Protocol would regulate all contact between the calling party and its witnesses and in this area supersede the Familiarisation Protocol.¹⁴⁹¹

In deciding to allow witness preparation, the Chamber reasoned that prohibiting pre-testimony meetings would be 'neither practical nor reasonable' and that 'judicious witness preparation aimed at clarifying a witness's evidence and carried out with full respect for the rights of the accused is likely to enable a more accurate and complete presentation of the evidence, and so to assist in the Chamber's truth finding function'.¹⁴⁹²

¹⁴⁸⁶ ICC-01/09-02/11-588, para 5.

¹⁴⁸⁷ ICC-01/09-02/11-476, para 4.

¹⁴⁸⁸ ICC-01/09-02/11-475-Red, para 12.

¹⁴⁸⁹ ICC-01/09-01/11-452.

¹⁴⁹⁰ ICC-01/09-02/11-588, para 53; ICC-01/09-01/11-524, para 51.

¹⁴⁹¹ ICC-01/09-02/11-588, para 54; ICC-01/09-01/11-524, para 52.

¹⁴⁹² ICC-01/09-02/11-588, para 52; ICC-01/09-01/11-524, para 50.

Legal basis for the decision

Given that the Rome Statute is silent on the issue of witness preparation Trial Chamber V based its decision on Article 64(2) of the Statute, which provides that Trial Chambers shall 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses', as well as Article 64(3) (a) of the Statute, which requires Trial Chambers to 'confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings'.¹⁴⁹³ The Chamber found that under Article 64, judges have significant discretion as to the procedures they adopt to manage the trial 'as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims'.¹⁴⁹⁴ The Trial Chamber observed that the fact that the Statute is silent on a particular procedural issue 'does not necessarily imply that it is forbidden'.¹⁴⁹⁵ It further noted that the statutes and rules of procedure and evidence of the *ad hoc* tribunals are also silent on the issue, and those tribunals have allowed flexibility in relation to witness preparation.¹⁴⁹⁶

The Chamber's observations concerning merits and risks of witness preparation

The Trial Chamber identified two major benefits of witness preparation, namely: (i) the facilitation of a fair and expeditious trial, and

¹⁴⁹³ ICC-01/09-02/11-588, paras 30-31; ICC-01/09-01/11-524, paras 26-27.

¹⁴⁹⁴ ICC-01/09-02/11-588, para 31; ICC-01/09-01/11-524, para 27.

¹⁴⁹⁵ ICC-01/09-02/11-588, para 31; ICC-01/09-01/11-524, para 27. This conclusion stands in contrast to how other ICC Chambers have ruled on the matter of witness preparation. See ICC-01/04-01/06-679, ICC-01/04-01/06-1049, ICC-01/05-01/08-1016, ICC-01/04-01/07-1134 (as also cited in ICC-01/09-02/11-588, footnotes 56-57; ICC-01/09-01/11-524, footnotes 45-46).

¹⁴⁹⁶ ICC-01/09-02/11-588, paras 32-33; ICC-01/09-01/11-524, paras 28-29. The Chamber cited the ICTR Appeals Chamber's decision in *The Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para 8.

(ii) the protection of witness well-being. With respect to the former, the Chamber emphasised the importance of obtaining relevant, accurate and complete testimonies, something that could be advanced by allowing substantive witness preparation whereby witnesses were permitted to re-engage with the facts underlying their testimony, and potential exhibits were shown to them before they testified.¹⁴⁹⁷ Concerning the latter, the Chamber stated that the procedures provided for in the Familiarisation Protocol did not necessarily fully guarantee the well-being and dignity of witnesses, especially given the ‘specific situation in Kenya’.¹⁴⁹⁸ Consequently, the Chamber concluded that proper witness preparation would enhance the protection and well-being of witnesses, notably by helping reduce their stress and anxiety about testifying.¹⁴⁹⁹

The Chamber also examined the main concerns expressed by the Defence with respect to witness preparation. In the case against Muthaura and Kenyatta, these concerns related to the potential to improperly influence the testimony of a witness; the risk that preparation would be used as a substitute for thorough pre-trial investigations; and the possibility that it would result in late disclosure.¹⁵⁰⁰ In the case against Ruto and Sang, the Defence had submitted that permitting witness preparation immediately prior to in-court testimony was not the most effective way of ascertaining the truth; there

was a risk that it would be used to re-interview witnesses with the aim of improving the calling party’s case; and it would result in late disclosure.¹⁵⁰¹ The Chamber rejected these concerns.¹⁵⁰²

Safeguards

The Trial Chamber considered that witness preparation could be safeguarded from the risk of abuse through various measures, including the use of guidelines delineating permissible and prohibited conduct, which it included in the Witness Protection Protocol. It also established a requirement that preparation sessions be video recorded and that the non-calling party could request the Chamber to order the disclosure of the video. Furthermore, it considered that the use of cross-examination, as well as questioning by the Chamber, concerning the extent of witness preparation could serve as an important safeguard.¹⁵⁰³

Partly dissenting opinions of Judge Eboe-Osuji

Judge Eboe-Osuji attached a partly dissenting opinion to each decision.¹⁵⁰⁴ Judge Eboe-Osuji concurred with the outcome of the Chamber’s decision permitting counsel to engage in the ethical preparation of witnesses for the purposes of their testimonies in Court but did not agree with the stipulation in the Witness Protection Protocol prohibiting the ‘practising’

1497 ICC-01/09-02/11-588, paras 35-40; ICC-01/09-01/11-524, paras 31-36. The Chamber expressed its agreement with the ICTY Trial Chamber’s findings in *The Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice on ‘Proofing’ Witnesses, 10 December 2004, p 2, in which it was held that substantive witness preparation was ‘likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial’.

1498 ICC-01/09-02/11-588, para 41; ICC-01/09-01/11-524, para 37.

1499 ICC-01/09-02/11-588, para 41; ICC-01/09-01/11-524, para 37.

1500 ICC-01/09-02/11-588, para 42, citing ICC-01-09-02/11-475-Red.

1501 ICC-01/09-01/11-524, para 38, citing ICC-01-09-01/11-452.

1502 In the Muthaura and Kenyatta case, for example, the Chamber stated that it was ‘not convinced that preparing witnesses for testimony will have the effect of reducing any helpful spontaneity in their testimony’, nor was it convinced that ‘witness preparation, properly conducted, is likely to result in substantive alterations to a witness’s testimony at trial’. ICC-01/09-02/11-588, paras 43-46. See also ICC-01/09-01/11-524, paras 39-42.

1503 ICC-01/09-02/11-588, paras 47-51; ICC-01/09-01/11-524, paras 43-49. These and other measures are further detailed in ICC-01/09-02/11-588-Anx; ICC-01/09-01/11-446-AnxA.

1504 ICC-01/09-02/11-588, Partly dissenting opinion of Judge Eboe-Osuji; ICC-01/09-01/11-524, Partly dissenting opinion of Judge Eboe-Osuji.

of testimony.¹⁵⁰⁵ Judge Eboe-Osuji maintained that practising a testimony can be a practical way of imbuing the witness with a measure of confidence, as well as to identify problem spots in delivery for purposes of enhancing efficiency in courtroom testimonies.¹⁵⁰⁶ Judge Eboe-Osuji further emphasised the importance of witness preparation for victims of sexual violence, who may find the experience of testifying humiliating and distressing, which can lead to re-victimisation and embarrassment. Judge Eboe-Osuji considered that 'the better approach, then, lies in a system that encourages thorough, ethically appropriate preparation of the victim-witnesses about the evidence that they are called upon to give'.¹⁵⁰⁷

1505 ICC-01/09-02/11-588, Partly dissenting opinion of Judge Eboe-Osuji, paras 49-53; ICC-01/09-01/11-524, Partly dissenting opinion of Judge Eboe-Osuji, paras 49-53. According to paragraph 3 of the Protocol, 'any attempt to influence a witness to testify to factual events that the witness did not observe or perceive is prohibited. Coaching, training or practising are not allowed.' ICC-01/09-02/11-588-Anx, para 3; ICC-01/09-01/11-524-Anx, para 3.

1506 ICC-01/09-02/11-588, Partly dissenting opinion of Judge Eboe-Osuji, paras 49-53; ICC-01/09-01/11-524, Partly dissenting opinion of Judge Eboe-Osuji, paras 49-53.

1507 ICC-01/09-02/11-588, Partly dissenting opinion of Judge Eboe-Osuji, para 37; ICC-01/09-01/11-524, Partly dissenting opinion of Judge Eboe-Osuji, para 37.

Article 70 cases

CAR: The Prosecutor v. Jean Pierre Bemba Gombo

Bemba Defence witness challenges

The Bemba Defence was faced with witness challenges throughout the year. Failure to bring Defence witnesses to The Hague in a timely manner or to set up video-link facilities in the countries where they are based continued to slow down the presentation of evidence. Several witnesses went missing, including one witness who testified for three days but then did not return to the Court to complete his testimony and another who never boarded the plane to The Hague and became 'untraceable',¹⁵⁰⁸ causing confusion and further delay. In addition, the use of protective measures was extensive and included video-link testimony from undisclosed locations, voice and image distortion and closed testimony. These measures were more often the rule rather than the exception. In June 2012, Trial Chamber III ordered the Defence to present its evidence within 230 hours over 8 months¹⁵⁰⁹ and in May 2013 set 19 July 2013 as the expected completion date of the Defence phase.¹⁵¹⁰ Ultimately, the Defence presentation of evidence continued until 14 November and it called a total of 34 witnesses. On 19 November, Trial Chamber III refused to grant the Defence an extension to present its final two witnesses.¹⁵¹¹

1508 'Witness Disappears Before Completing Testimony in Bemba's ICC Trial', *Open Society Justice Initiative*, 2 October 2012, available at < <http://www.bembatrial.org/2012/10/witness-disappears-before-completing-testimony-in-bembas-icc-trial/>>, last visited on 21 February 2014.

1509 ICC-01/05-01/08-2225, paras 10-11.

1510 ICC-01/05-01/08-2731, para 7, referencing ICC-01/05-01/08-T-311-CONF-ENG ET, p 30 line 11 and p 31 line 2.

1511 'Presentation of Defense Evidence Ends in Bemba Trial', *Open Society Justice Initiative*, 26 November 2013, available at < <http://www.bembatrial.org/2013/11/presentation-of-defense-evidence-ends-in-bemba-trial/>>, last visited on 21 February 2014.

Unavailability of witnesses

The Bemba Defence began presenting evidence on 14 August 2012 and at that time had planned to call 63 witnesses, including three experts.¹⁵¹² From early on in its case, the Defence faced challenges in obtaining the presence of witnesses.

Following the presentation of its expert witnesses, the Defence began its examination of Witness 7, a former intelligence officer in the FACA. The witness took the stand on September 19, 2012 and was due to conclude his testimony on Monday, September 24, with questioning by Legal Representatives of Victims participating in the trial. However, the witness did not appear at the court to conclude his testimony. At a status conference, Presiding Judge Sylvia Steiner stated that Witness 7 did not present himself for unknown reasons, and the Registry reported that the witness had left his accommodation the previous evening. Judge Steiner thus suspended Witness 7's testimony until further notice. In a decision on 21 October 2013, the Chamber determined that although the witness did not complete his testimony, it was relevant, and that allowing the evidence provided to remain in the record would cause no prejudice to the parties.¹⁵¹³

On 27 September 2012, Defence Witness 11 was scheduled to travel to The Hague to provide testimony; however, the witness did not board his flight. Upon learning that the witness could not be located, the bench instructed the Registry to cancel his journey and inform relevant authorities that the justification for his visa no longer applied.¹⁵¹⁴

1512 'Presentation of Defense Evidence ends in Bemba Trial', *Open Society Justice Initiative*, 26 November 2013, available at < <http://www.bembatrial.org/2013/11/presentation-of-defense-evidence-ends-in-bembatrial/>>, last visited on 21 February 2014.

1513 ICC-01/05-01/08-2839.

1514 'Witness Disappears Before Completing Testimony in Bemba's ICC Trial', *Open Society Justice Initiative*, 2 October 2012, available at < <http://www.bembatrial.org/2012/10/witness-disappears-before-completing-testimony-in-bembas-icc-trial/>>, last visited on 21 February 2014.

Following these two incidents, the Trial Chamber filed an 'Order setting an agenda for a status conference on issues related to the presentation of evidence by the defence', scheduled for 2 October 2012.¹⁵¹⁵ The agenda included: measures to ensure the smooth presentation of evidence by the Defence and avoid gaps in the appearance of witnesses; possible changes in the order of appearance of witnesses; and potential alternatives to live testimony, including the possibility of hearing evidence *in situ*.¹⁵¹⁶ On 1 October 2012, the Defence provided the Chamber and Registry a proposal for a change in the order of witnesses.¹⁵¹⁷

At the status conference, the Defence submitted that it did not foresee any obstacles to obtaining the appearance of at least 30 of the remaining witnesses in a timely manner. At that time, the Defence indicated that there remained five witnesses who already possessed travel documents and who were currently residing in Europe and 30 other witnesses who would not face any trouble travelling to the seat of the Court. However, the Defence also noted that some of the witnesses scheduled to testify at that point were vulnerable and others might be likely to incriminate themselves during their testimony, while still others had security concerns for themselves or their families.

The Registry noted that specific requests for protective measures were not received from the Defence during initial contacts with Defence witnesses and their families. As a result, security concerns may have arisen even where in-court protective measures were in place. The Registry emphasised that it was necessary for the Defence to communicate with the Registry in order to provide witnesses with the full range of resources available to them according to their specific situations.

1515 ICC-01/05-01/08-2327.

1516 ICC-01/05-01/08-2327, para 3.

1517 ICC-01/05-01/08-2329, para 6.

The Prosecution expressed concern about the expeditiousness of the Defence's presentation of evidence. It also suggested that Witness 7's decision not to continue his testimony and the disappearance of Witness 11 might not have been a coincidence.¹⁵¹⁸

To enable the Chamber to determine changes in the order of Defence's presentation of evidence, the judges ordered the Defence, Registry, and VWU to carry out joint consultations to review any potential difficulties in relation to the appearance of some of the Defence witnesses. Furthermore, in its decision on 2 October 2012, the Trial Chamber directed that five Europe-based witnesses and another whose location was not disclosed should testify next as they did not face any difficulties in travelling to the Court.¹⁵¹⁹

After a three week hiatus from testimony, the Trial continued on 15 October 2012.¹⁵²⁰ However, shortly thereafter, the Trial was once again faced with the absence of available witnesses. On 31 October, two and a half months into the Defence presentation of evidence and having heard ten Defence witnesses, Judge Steiner indicated that the Court was facing difficulties in avoiding gaps between the testimonies of the upcoming witnesses.¹⁵²¹ At that time, Judge Steiner set the next trial date for 5 November and asked the Defence and the VWU to work together to ensure that a witness would be in court and ready to testify, noting that at the time, they were not even sure which witness might be

available.¹⁵²² The Victims Representatives expressed concern regarding the difficulty of preparing for court without knowledge of which witness would be testifying. Judge Steiner requested that the Chamber receive this information as soon as possible.¹⁵²³ On 5 November, the hearing was cancelled without reason, and the trial resumed on 6 November with the testimony of Witness 48 for three days, most of which was heard in closed session.¹⁵²⁴ Another witness was then not scheduled to testify until 19 November when the 12th Defence witness, Witness 49, began testimony, much of which was given in closed session.¹⁵²⁵ Two more witnesses, Witness 16 and Witness 66, testified at the end of November and into early December. On 4 December, the Trial Chamber indicated that the trial would resume on 10 December with a new witness. However, on 10 December, the week's hearings were cancelled due to the unavailability of witnesses.¹⁵²⁶

By the end of December 2012, 14 Defence witnesses had provided testimony. In a Court order issued on 7 December 2012, the Chamber granted a Defence request to convene a closed session status conference to discuss an efficient way to proceed with witnesses in the new year.¹⁵²⁷ Due to the difficulties faced by Defence witnesses travelling to the Court, the Bench indicated its intention to explore alternative options such as *in situ* proceedings or video link testimony in an effort to advance the proceedings.¹⁵²⁸

1518 'Witness Disappears Before Completing Testimony in Bemba's ICC Trial', *Open Society Justice Initiative*, 2 October 2012, available at <<http://www.bembatrial.org/2012/10/witness-disappears-before-completing-testimony-in-bembas-icc-trial/>>, last visited on 21 February 2014.

1519 ICC-01/05-01/08-2329, para. 14.

1520 'Bemba Trial Resumed with Testimony of Sixth Defense Witness', *Open Society Justice Initiative*, 15 October 2012, available at <<http://www.bembatrial.org/2012/10/bemba-trial-resumes-with-testimony-of-sixth-defense-witness/>>, last visited on 23 February 2014.

1521 ICC-01/05-01/08-T-266-Red-ENG, p 46 lines 4-9.

1522 ICC-01/05-01/08-T-266-Red-ENG, p 46 lines 8-17.

1523 ICC-01/05-01/08-T-266-Red-ENG, p 48 lines 1-8.

1524 ICC-01/05-01/08-T-267-Red-ENG.

1525 'Code of Conduct "Was a Bible to Bemba's Soldiers"', *Open Society Justice Initiative*, 19 November 2012, available at <<http://www.bembatrial.org/2012/11/code-of-conduct-was-a-bible-to-bembas-soldiers/>>, last visited on 21 February 2014.

1526 'Bemba Hearings Cancelled this Week', *Open Society Justice Initiative*, 10 December 2012, available at <<http://www.bembatrial.org/2012/12/bemba-hearings-cancelled-this-week/>>, last visited on 21 February 2014.

1527 ICC-01/05-01/08-2471.

1528 'Bemba Hearings Cancelled this Week', *Open Society Justice Initiative*, 10 December 2012, available at <<http://www.bembatrial.org/2012/12/bemba-hearings-cancelled-this-week/>>, last visited on 23 February 2014.

However, trial delays continued into 2013 and by early May the Defence had to reduce its witness list from 63 to 50.¹⁵²⁹ During the month of January 2013 the trial experienced a delay when the Chamber suspended the hearings to enable the Defence to prepare for a possible change to the legal characterisation of the facts relating to the charges.¹⁵³⁰ The Chamber lifted the suspension on 6 February 2013 and called another closed session status conference on 11 February to discuss ways to expedite the presentation of Defence evidence.¹⁵³¹ The trial resumed on 25 February. From that point through the rest of the Defence testimony, due to logistical difficulties in travelling to the Court, witnesses often testified via video-link from an undisclosed location. After three witnesses appeared in this manner, on 14 March, bad weather disrupted the video signal transmitting Witness 45's testimony, and the trial was briefly interrupted again.¹⁵³²

The trial was again postponed for a week in April for undisclosed reasons.¹⁵³³ The Bench ordered another status conference on 16 April to enable the Defence and Registry to address issues relating to the presentation of Defence

evidence.¹⁵³⁴ On 3 May 2013, the proceedings were once again stalled due to difficulties in getting witnesses to appear before the Court.¹⁵³⁵

During a status conference on 3 May, the judges revealed that Witness 56 refused to testify out of fear for his security if he were to testify via video-link from his current location. Judge Steiner stated that failure by Witness 56 to testify had effectively paralysed the proceedings since no other witness was available to appear before the Chamber in the near future.¹⁵³⁶ Judge Steiner also indicated that unless the Chamber was presented with new and compelling reasons for the witness to refuse to testify via video-link the Chamber might exclude him from the witness list.¹⁵³⁷

The Defence noted that the Witness was an important witness who was expected to name members of the former rebel group of François Bozizé, the deposed leader of the CAR, which perpetrated violent crimes 'incorrectly attributed' to Bemba's troops. It maintained that the witness reasonably feared for his security because the leader of the country where the witness was based was a 'very personal friend' to Bozizé.¹⁵³⁸

The Registry reported that it had entered into immunity and privileges agreements with an unnamed country and Court officials would be able to assist Defence witnesses based there to testify via video-link. However, it noted that it would take at least four weeks' preparation before video-link testimony from this country

1529 'Judges Approve Revised Bemba Witness List', *Open Society Justice Initiative*, 20 May 2013, available at <<http://www.bembatrial.org/2013/05/judges-approve-revised-bemba-witness-list/>>, last visited on 21 February 2014.

1530 'Bemba's Defense Wants Trial to Resume Immediately', *Open Society Justice Initiative*, 4 February 2013, available at <<http://www.bembatrial.org/2013/02/bembas-defense-wants-trial-to-resume-immediately/>>, last visited on 21 February 2014. For a more detailed discussion of these issues see the *Trial Proceedings* section of this Report.

1531 'Status Conference Discusses Bemba's Upcoming Witnesses', *Open Society Justice Initiative*, 11 February 2013, available at <<http://www.bembatrial.org/2013/02/status-conference-discusses-bembas-upcoming-witnesses/>>, last visited on 21 February 2014.

1532 ICC-01/05-01/08-T-294-Red-ENG, p 21 lines 19-23.

1533 'Bemba Trial Stalls Due to Absence of Defense Witnesses', *Open Society Justice Initiative*, 3 May 2012, available at <<http://www.bembatrial.org/2013/05/bemba-trial-stalls-due-to-absence-of-defense-witnesses/>>, last visited on 21 February 2014.

1534 'Bemba Hearings Cancelled for the Week', *Open Society Justice Initiative*, 17 April 2013, available at <<http://www.bembatrial.org/2013/04/bemba-hearings-cancelled-for-the-week/>>, last visited on 23 February 2014.

1535 'Bemba Trial Stalls Due to Absence of Defense Witnesses', *Open Society Justice Initiative*, 3 May 2013, available at <<http://www.bembatrial.org/2013/02/status-conference-discusses-bembas-upcoming-witnesses/>>, last visited on 23 February 2014.

1536 ICC-01/05-01/08-T-311-Red-ENG, p 4 lines 14—17.

1537 ICC-01/05-01/08-T-311-Red-ENG, p 5 lines 3-9.

1538 ICC-01/05-01/08-T-311-Red-ENG, p 7 lines 21-25.

could commence. In another unnamed country that hosted Defence witnesses, the requisite authorisations and administration permissions were still pending.¹⁵³⁹

In a submission on 10 May 2013, the Defence stated that because of uncooperative authorities in three unnamed countries, it was unable to secure the testimony of several witnesses and was therefore removing them from the witness list.¹⁵⁴⁰ The Defence further commented on the problems in each of these countries. Specifically, most of the remaining witnesses were currently in 'Country 1', which required government authorisation to testify. While those applications had been made, the response from the government was 'painfully slow or non-existent'.¹⁵⁴¹ 'Country 2' held a few more witnesses and they were unable to travel from that country for undisclosed reasons. The Defence did note in its submission that this country was not a State Party to the Rome Statute. The Registry was working to arrange video-link testimony, but as of 10 May 2013, no concrete arrangement had been made. Finally, 'Country 3' housed the rest of the problematic witnesses. The Defence reported that arrangements and negotiations for these witnesses to testify were still being finalised and video-link testimony could not begin for at least four weeks.¹⁵⁴²

The Chamber approved the amended list of witnesses, as well as the order of appearance for the next five witnesses.¹⁵⁴³ On 30 May, the Defence stated in its filing that six witnesses — Witnesses 18, 2, 9, 3, 4, and 6 — were available to testify from that date through July 8 and that all but one would testify via video-link.¹⁵⁴⁴ The Defence also noted that it would not be calling Witness 8 due to ongoing and significant

security concerns and dropped Witness 11 from its list¹⁵⁴⁵ without explanation.¹⁵⁴⁶ With respect to Witness 18, the Defence relayed information from the Registry that the witness had received authorisation to testify but that the authorisation was at risk of being revoked should this witness not be called immediately. Thus, the Defence requested that it be allowed to present this witness without delay.¹⁵⁴⁷ The trial resumed on 5 June 2013 with Witness 18.¹⁵⁴⁸ Another 6 witnesses were successfully heard in the month of June, bringing the total Defence witness count to 25.

A status conference was held on 27 June 2013 to assess the situation of the remaining Defence witnesses. At the status conference, the Defence revealed that Bemba would be called as the last witness on the Defence roster. It was noted that there were still 23 remaining witnesses. Fifteen witnesses had been dropped from the original witness list. The Defence also stated that ten of the upcoming witnesses were victims whose evidence was absolutely crucial for the Defence case. However, the Defence noted that they were based in a country where the Registry had not yet been able to set up video-link facilities to allow witnesses to testify remotely.¹⁵⁴⁹

At this status conference, the judges rejected the Defence conclusion that it should be allowed the same amount of time as the Prosecution to present its case. Judge Steiner reasoned that the Prosecution was in a different position than the Defence, as the burden of proof rested with the Prosecution. Judge Steiner also noted that the Defence chose to call 60 witnesses — 20 more

1539 ICC-01/05-01/08-T-311-Red-ENG, p 16 lines 15-23.

1540 ICC-01/05-01/08-2624, para 6.

1541 ICC-01/05-01/08-2624, para 9.

1542 ICC-01/05-01/08-2624, para 15.

1543 ICC-01/05-01-08-2630.

1544 ICC-01/05-01/08-2644, paras 3-4.

1545 ICC-01/05-01/08-2630.

1546 ICC-01/05-01/08-2644, para 6.

1547 ICC-01/05-01/08-2644, paras 3-4.

1548 Even then, the testimony of the witness had to be suspended and postponed half way through due to illness on the part of the witness.

1549 'Bemba to Testify in his Own Defense', *Open Society Justice Initiative*, 27 June 2013, available at < <http://www.bembatrial.org/2013/06/bemba-to-testify-in-his-own-defense/>>, last visited on 21 February 2014.

than the Prosecution had called. In response, the Defence noted that it was the Court, rather than the Defence, which was experiencing difficulty in getting the witnesses to testify.¹⁵⁵⁰

Throughout July, leading up to the August court recess, a number of attempts were made to ensure the completion of witness testimony. For example, on 3 July 2013, the Chamber decided to allow video-link testimony for Witness 15 in order to allow the witness to give his testimony prior to the recess.¹⁵⁵¹ The witness had been expected to give evidence in person at the seat of the Court beginning 8 July but due to undisclosed medical and logistical difficulties, it was reported that the witness would not be able to travel before 15 July. Rather than waiting, the Court granted the Defence request to hear the witness via video-link from 15 to 17 July.¹⁵⁵² However, the hearings were cancelled for undisclosed reasons.¹⁵⁵³ Meanwhile, the Defence withdrew three more witnesses from its list, bringing the total number of witnesses it intended to call to 45.¹⁵⁵⁴ As 25 had already given testimony, 20 witnesses remained on the Defence list. However, by the end of September, only a few weeks after the trial resumed from summer recess, the hearings were again postponed due to the failure of the Court to ensure the presence of the witnesses either

in person or via video-link.¹⁵⁵⁵ By mid-October, 32 Defence witnesses had testified. Thirteen witnesses remained to testify, following a month of unsuccessful attempts to secure their testimony.¹⁵⁵⁶ At that point, the judges announced that they planned to call two witnesses, who were frequently named in testimony by both Prosecution and Defence witnesses. Ultimately, however, only one was willing to testify.¹⁵⁵⁷

Though the Chamber had set the deadline for the completion of Defence testimony for 25 October, the judges again granted the Defence additional time in order to call four witnesses it deemed important to its case.¹⁵⁵⁸ Witness testimony resumed on 30 October, and the Bemba Defence was instructed to conclude its testimony on 15 November.¹⁵⁵⁹ In a decision on 19 November 2013, the Chamber ruled that it no longer expected the two outstanding Defence witnesses to testify and ordered the Registry

1550 'Bemba to Testify in his Own Defense', *Open Society Justice Initiative*, 27 June 2013, available at <<http://www.bembatrial.org/2013/06/bemba-to-testify-in-his-own-defense/>>, last visited on 21 February 2014.

1551 ICC-01/05-01/08-2723.

1552 'Hearings in Bemba Trial Resume Next Week', *Open Society Justice Initiative*, 9 July 2013, available at <<http://www.bembatrial.org/2013/07/hearings-in-bemba-trial-resume-next-week/>>, last visited on 23 July 2014.

1553 'Bemba Trial Hearings Cancelled This Week', *Open Society Justice Initiative*, 16 July 2013, available at <http://www.bembatrial.org/2013/07/bemba-trial-hearings-cancelled-this-week/>, last visited on 23 February 2014.

1554 'Hearings in Bemba Trial Resume Next Week', *Open Society Justice Initiative*, 9 July 2013, available at <<http://www.bembatrial.org/2013/07/hearings-in-bemba-trial-resume-next-week/>>, last visited on 23 February 2014.

1555 'Hearings in Bemba Trial Postponed to Wednesday', *Open Society Justice Initiative*, 30 September 2013, available at <<http://www.bembatrial.org/2013/09/hearings-in-bemba-trial-postponed-to-wednesday/>>, last visited on 23 February 2014; 'Missing Witness Delays Bemba Hearings Yet Again', *Open Society Justice Initiative*, 2 October 2013, available at <<http://www.bembatrial.org/2013/10/missing-witness-delays-bemba-hearings-yet-again/>>, last visited on 23 February 2014.

1556 'Judges to Call Two Witnesses in Bemba Trial', *Open Society Justice Initiative*, 21 October 2013, available at <<http://www.bembatrial.org/2013/10/judges-to-call-two-witnesses-in-bembas-trial/>>, last visited on 23 February 2014.

1557 'Judges to Call Two Witnesses in Bemba Trial', *Open Society Justice Initiative*, 21 October 2013, available at <<http://www.bembatrial.org/2013/10/judges-to-call-two-witnesses-in-bembas-trial/>>, last visited on 23 February 2014.

1558 'Bemba's Lawyers Granted More Time to Present their Evidence', *Open Society Justice Initiative*, 25 October 2013, available at <<http://www.bembatrial.org/2013/10/bembas-lawyers-granted-more-time-to-present-their-evidence/>>, last visited on 23 February 2014.

1559 'Bemba's Lawyers Granted More Time to Present their Evidence', *Open Society Justice Initiative*, 25 October 2013, available at <<http://www.bembatrial.org/2013/10/bembas-lawyers-granted-more-time-to-present-their-evidence/>>, last visited on 23 February 2014.

to inform the authorities that their testimony was no longer required.¹⁵⁶⁰ The judges noted that the delays in ensuring the appearance of the two witnesses were attributable to the continuous and contradictory requests made by the witnesses and the Defence with regard to the conditions required for their appearance.¹⁵⁶¹ Thus, the Defence testimony was concluded.

Bemba is expected to make an unsworn statement as part of the Defence closing statement. The Trial Chamber denied a request by the Prosecution to cross-examine Bemba on the grounds that cross-examining the Accused could conflict with his right not to confess guilt and to remain silent.¹⁵⁶²

Allegations of fraud and witness tampering

Days after the conclusion of Defence testimony, two members of the Bemba Defence team were arrested in relation to allegations of fraud, which had been made by both the Defence and Prosecution during the proceedings. In October 2013, the Defence sought to initiate Article 70(1) proceedings against a prosecution witness alleging false testimony.¹⁵⁶³ However, the Chamber denied the application on the ground

of insufficient evidence.¹⁵⁶⁴ In March 2013, Defence Witness 45 was intensely questioned by the judges and the Prosecution regarding handwritten notes that he brought with him on the stand as he testified. Among the notes were details of his contact with Bemba's lawyers, crimes perpetrated by members of Bozizé's rebel force 'most of whom spoke Lingala' and information on the provision of communication equipment to foreign fighters by CAR army officials. In response to Prosecution questioning, Witness 45 denied having a script or being coached by the Defence regarding his testimony, maintaining that he had never been instructed not to refer to notes, that he wrote the notes, and that he had not been given any information.¹⁵⁶⁵

On 3 May 2013, the Prosecution submitted an application, requesting judicial assistance in obtaining evidence with respect to an investigation pursuant to Article 70.¹⁵⁶⁶ On 8 May 2013, Judge Tarfusser, Single Judge of Trial Chamber II, granted the request and ordered the Registrar to make available to the Prosecution information with regard to Bemba's telephone communications at the detention centre.¹⁵⁶⁷ Subsequently, on 19 July 2012, the Prosecution requested and was granted authorisation to seize information from The Netherlands and Belgium for the purpose of obtaining information regarding privileged calls between the accused persons.¹⁵⁶⁸ On 19 November, pursuant to Article 58, the Prosecutor applied for the issuance of an arrest warrant against Bemba, along with the lead attorney of the Bemba Defence team, Counsel Aimé Kilolo-Musamba (Kilolo); the case manager of the team, Jean-Jaques Mangenda Kabongo (Mangenda); a member of the Congolese parliament, Fidèle Babala Wandu (Babala); and a Defence witness, Narcisse Arido (Arido).¹⁵⁶⁹

1560 ICC-01/05-01/08-2899-Corr-Red.

1561 ICC-01/05-01/08-2899-Corr-Red, para 16.

1562 ICC-01/05-01/08-2860.

1563 Article 70(1) of the Statute provides: 'The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally: (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth; (b) Presenting evidence that the party knows is false or forged; (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence; (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties; (e) Retaliating against an official of the Court on account of duties performed by that or another official; (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.'

1564 ICC-01/05-01/08-2830.

1565 ICC-01/05-01/08-T-300-Red-ENG, p 20-25.

1566 ICC-01/05-01/13-1-Red2-tENG.

1567 ICC-01/05-01/13-1-Red2-tENG, para 1.

1568 ICC-01/05-01/13-1-Red2-tENG, para 3.

1569 ICC-01/05-01/13-1-Red2-tENG. p 1.

On 20 November 2013, Judge Tarfusser, the Single Judge of Trial Chamber II issued the warrant as requested.¹⁵⁷⁰ Judge Tarfusser found that there were reasonable grounds to believe that the suspects were criminally responsible for the commission of offences against the administration of justice by corruptly influencing witnesses before the ICC and presenting evidence that they knew to be false or forged.¹⁵⁷¹ The Prosecutor issued a statement alleging that Bemba ‘ordered, solicited and induced [...] attempts to pervert the course of justice in relation to his on-going trial’.¹⁵⁷²

The Arrest Warrant charges Bemba with presenting evidence which is false or forged by ordering, soliciting or inducing his associates to present such evidence under Article 70(1)(b), together with Article 25(3)(b). He is also charged with corruptly influencing witnesses by ordering, soliciting or inducing his associates to commit an offence against the administration of justice consisting of the transfer of money to and the coaching of witnesses under Article 70(1)(c), read with Article 25(3)(b).¹⁵⁷³

Kilolo is charged with presenting evidence known to be false or forged under Article 70(1)(b), read together with Article 25(3)(a), by presenting false or forged documents to the Court. He is also charged with corruptly influencing witnesses pursuant to Article 70(1)(c), together with Article 25(3), by bribing and coaching them to provide false testimony to the Court.¹⁵⁷⁴

Mangenda is charged with presenting evidence known to be false or forged under Article 70(1)(b), read with Article 25(3)(c), by aiding, abetting or otherwise assisting in the presentation of evidence known to be false or forged. He is also charged with corruptly influencing witnesses under Article 70(1)(c), together with Article 25(3)(c), by aiding, abetting or otherwise assisting in the bribery of witnesses and in coaching them to provide false testimony.¹⁵⁷⁵

Babala is charged with corruptly influencing witnesses under Article 70(1)(c) read with Article 25(3)(a) by bribing witnesses to provide false testimony, as well as with presenting evidence known to be false or forged, pursuant to Article 70(1)(b), read with Article 25(3)(c), by aiding, abetting or otherwise assisting in the presentation of evidence known to be false or forged.¹⁵⁷⁶

Arido is charged with corruptly influencing witnesses under Article 70(1)(c), together with Article 25(3)(c), by bribing witnesses to give false testimony, as well as with presenting evidence known to be false or forged by aiding, abetting or otherwise assisting in the presentation of evidence known to be false or forged, pursuant to Article 70(1)(c), read with Article 25(3)(c).¹⁵⁷⁷

On 27 November 2013, Bemba appeared before the Court with Aimé Kilolo-Musamba and Fidèle Babala Wandu, denying the charges. The

1570 ICC-01/05-01/13-1-Red2-tENG.

1571 ‘Bemba case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo’, ICC-CPI-20131124-PR962, *ICC Press Release*, 24 November 2013, available at < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr962.aspx>, last visited on 27 February 2014.

1572 ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the issuance of a second warrant of arrest against Jean-Pierre Bemba Gombo, and the arrest of four other individuals’, *OTP Statement*, 24 November 2013, available at < http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement-OTP-24-11-2013.aspx>, last visited on 27 February 2014.

1573 ICC-01/05-01/13-1-Red2-tENG, p 3-4.

1574 ICC-01/05-01/13-1-Red2-tENG, p 4.

1575 ICC-01/05-01/13-1-Red2-tENG, p 4-5.

1576 ICC-01/05-01/13-1-Red2-tENG, p 5.

1577 ICC-01/05-01/13-1-Red2-tENG, p 5-6.

Bemba Defence stated that the new charges had harmed the Defence case, noting that it had questions regarding the timing of the new case and the consequences of the arrests on the main case, as well as concerns about the involvement of the Prosecution as a party to the main case.¹⁵⁷⁸

On 28 November, a status conference was held in the main case against Bemba in order to assess the status of the case and discuss Bemba's options on counsel moving forward. Bemba could not confirm who would lead his defence, stating, '[g]iven the upheavals that took place, I did not have the opportunity to discuss this with Mr Kilolo. I do not think it would be honourable or appropriate to take this decision today without having discussed with him.'¹⁵⁷⁹

Bemba and his Counsel were barred from talking to each other after the arrest. Restrictions as to the interactions between Bemba and Kilolo were lifted on 4 December 2013, and on 5 December Bemba requested more time to consider his Defence team composition.¹⁵⁸⁰ On 6 December, the Chamber decided to allow Peter Haynes, who had previously been acting Co-Counsel, to act as Lead Counsel for Bemba until otherwise decided.¹⁵⁸¹ At the time of writing this Report, there were no new developments in relation to this matter.

1578 'Bemba and His Lawyer Deny Witness Tampering Charges', *Open Society Justice Initiative*, 27 November 2013, available at <<http://www.bembatrial.org/2013/11/bemba-and-his-lawyer-deny-witness-tampering-charges/>>, last visited on 27 February 2014.

1579 ICC-01/05-01/08-T-359-ENG, p 4, 11-16.

1580 ICC-01/05-01/08-2915-Anx.

1581 ICC-01/05-01/08-2918.

Kenya: *The Prosecutor v. Walter Barasa*

On 2 October 2013, an arrest warrant for Kenyan Journalist Walter Barasa was unsealed. The sealed arrest warrant had been originally issued on 2 August 2013 by Judge Tarfusser, acting as the Single Judge of Pre-Trial Chamber II.¹⁵⁸² The arrest warrant includes three counts: count 1 relates to corruptly influencing Witness P-0336 by offering to pay him between up to one and a half million Kenyan Shillings (KES) to withdraw as an OTP witness. This crime was allegedly 'committed during the period 20 May to 21 July 2013 and at or near Kampala, Uganda'.¹⁵⁸³ Count 2 relates to corruptly influencing Witness P-0536 by offering to pay her and her husband a total of one million four hundred thousand KES to withdraw as a Prosecution witness. This crime was allegedly 'committed during the period 20 May to 25 July 2013 and at or near Kampala, Uganda'.¹⁵⁸⁴ Count 3 relates to attempting to corruptly influence Witness P-0256 by inducing her to meet with Witness P-0336 for the purpose of offering her a bribe to withdraw as a Prosecution witness, and/or by corruptly inducing her to withdraw as a witness. This crime was allegedly 'committed during the period 21 to 22 July 2013 and at or near Kampala, Uganda'.¹⁵⁸⁵ With respect to Counts 1 and 2, Barasa was charged under Article 70(1)(c) read with Article 25(3)(a), and in the alternative for attempt under Article 25(3)(f), whereas for Count 3 he was only charged under Article 70(1)(c) read with Article 25(3)(f).¹⁵⁸⁶ At the time it was issued this was the first public arrest warrant issued by the Court for offenses against the administration of justice.

Immediately following the Chamber's decision to unseal the arrest warrant, the Prosecution

1582 01/09-01/13-1-Red2.

1583 01/09-01/13-1-Red2, p 3-4.

1584 01/09-01/13-1-Red2, p 4-5.

1585 01/09-01/13-1-Red2, p 5.

1586 ICC-01/09-01/13-1-Red2, p 3-5.

issued a press release, in which it was stated that: ‘the evidence collected so far indicates that there is a network of people who are trying to sabotage the case against Mr Ruto *et al* by interfering with Prosecution witnesses. Walter Barasa, against whom compelling evidence has been collected, has been part of this network, and his actions fit into this wider scheme that the Office continues to investigate.’¹⁵⁸⁷

On the same day, Kenya’s Attorney General Githu Muigai informed the Kenyan media that: ‘[t]he procedure for enforcing any warrant issued by the [ICC] against any individual in Kenya is subject to the very clear procedure set out under the International Crimes Act 2010’. According to the Attorney General, the Act requires that the Minister in charge of the interior, upon receiving a formal warrant of arrest, presents it to the judiciary for enforcement. Furthermore, ‘during the judicial consideration of the legality of the warrant, the subject is entitled to make representations to the court’. The Attorney General observed that ‘the final determination on the enforce-ability of the warrant is therefore a judicial one.’¹⁵⁸⁸

1587 ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Warrant of Arrest issued against Walter Barasa’, *OTP Statement*, 2 October 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/statement-OTP-02-10-2013.aspx>, last visited on 27 February 2014. Prosecutor Bensouda additionally stated that an attempt to have Barasa arrested in ‘a third country had failed’. Bensouda noted that Kenya, as a member of the ICC, is obliged to obey the warrant, regardless of any hearing in the country: ‘Some countries do require a court hearing before carrying out the transfer, but the outcome of that court hearing should be Barasa’s transfer’. See ‘International court charges Kenyan with bribing witnesses’, *Reuters*, 2 October 2013. The same point was made shortly after by ICC Spokesperson Fadi El-Abdalla. See ‘Court maintains that Kenya as a State party to the Rome Statute has an obligation to enforce arrest warrant’, *Standard Digital*, 4 October 2013.

1588 ‘Enforcing of ICC warrant of arrest against Walter Barasa subject to Kenyan judicial process, says AG Muigai’, *Standard Digital*, 2 October 2013. The same point was later made by Barasa’s lawyer, Nick Kaufman. ‘Court to rule on ICC arrest order’, *Daily Nation*, 3 October 2013.

On 2 October, Barasa claimed his innocence during an interview with Reuters and BBC. Media reported that Barasa is a former employee of the ‘People newspaper in Eldoret’, which was recently bought by ‘Mediamax Network Ltd’, in which Kenyatta’s family is reportedly the main shareholder.¹⁵⁸⁹ Media also reported that Barasa claimed the ICC arrest warrant against him resulted from his refusal to cooperate with the Prosecution.¹⁵⁹⁰

On 6 October, Kenya’s Attorney General confirmed that Kenya’s Interior Cabinet Secretary had received the original copies of the warrant of arrest from the ICC, and that ‘the necessary transitory instruments have now been prepared and are ready for submission before the Judiciary’ the day after.¹⁵⁹¹ On 8 October, Barasa’s lawyer filed an application with the High Court in Nairobi requesting the Court to stop his arrest and handing over to the ICC, arguing, *inter alia*, that ‘the Cabinet Secretary and the Attorney General have unlawfully failed to consider that under the International Crimes Act, they were obliged

1589 ‘ICC seeks Walter Barasa arrest for Kenya “witness tampering”’, *BBC News*, 2 October 2013.

1590 Barasa claimed that he had been working with investigator Paul Irani, who later ‘intimidated and harassed’ him, as he informed him that he should ‘cooperate with the OTP or risk arrest’. ‘Journalist Walter Barasa claims arrest order linked to his non-cooperation with ICC’, *Standard Digital*, 3 October 2013. Further, on 31 October, Barasa told media houses that he would seek ‘summons to be issued to ICC investigator Paul Irani and Trial Attorney Cynthia Tai to show cause why the Court should not make a finding that they had fabricated evidence against him contrary to provisions of the Rome Statute and the International Crimes Act’. ‘Walter Barasa hits out at ICC claiming court is corrupt’, *Standard Digital*, 31 October 2013. Additionally, in late October, several former Prosecution witnesses filed sworn affidavits stating that the charges against Barasa were ‘based on false allegations’, and some of these witnesses further claimed that they were coerced by the Prosecution to sign statements implicating Barasa. ‘Ex-witness opposes Barasa ICC arrest order’, *Daily Nation*, 31 October 2013; ‘Former Ruto, Sang witnesses defend Barasa’, *Daily Nation*, 28 October 2013.

1591 ‘Chief Justice Willy Mutunga to appoint a judge to preside Walter Barasa extradition’, *Standard Digital*, 6 October 2013.

to refuse the ICC's request for the exceptional circumstances that would make it oppressive to surrender the petitioner to the ICC'.¹⁵⁹² However, on 11 October, it was reported that Barasa's application, originally filed before Judge George Odunga, as well as the request to have him transferred to the ICC would be heard together by Principal High Court Judge Richard Mwongo.¹⁵⁹³ During High Court hearings on 16 October, Barasa's lawyer submitted that Section 4 of the International Crimes Act, under which Internal Security Minister Ole Lenku sought the arrest warrant against Barasa, violates the Kenyan Constitution and that the Act is thus not binding on the court. However, Kenya's Director of Public Prosecution submitted that the arrest warrant application was in line with the provisions of the International Crimes Act.¹⁵⁹⁴

During a press briefing in Nairobi on 16 October, ICC Outreach Coordinator for Kenya and Uganda (PIDS), Maria Mabinty Kamara, stated that the ICC 'could leave Kenya to handle the case facing journalist Walter Barasa if the country establishes credible proceedings against him'.¹⁵⁹⁵ However, the ICC Prosecution appeared to contradict this message, as it soon after stated that 'the principle of complementarity does not apply to proceedings under the Rome Statute where a person is accused of corruptly influencing a witness or obstructing or interfering with the attendance or testimony of a witness, as the ICC has jurisdiction over such offences if committed intentionally'.¹⁵⁹⁶

1592 'Barasa in court to stop his trial arrest warrant', *Daily Nation*, 8 October 2013.

1593 'Barasa extradition case to be decided next week', *Standard Digital*, 11 October 2013. On October 9, High Court Judge George Odunga ordered that Barasa 'must get all the necessary security arrangements to ensure that he is not kidnapped and handed over to the ICC until an application he has filed locally challenging the charges is heard and determined'. 'Give ICC wanted Barasa protection — court', *Capital News*, 9 October 2013.

1594 'Court cannot effect arrest warrant, Journalist Walter Barasa says', *Standard Digital*, 16 October 2013.

1595 'ICC uncertain on action if Uhuru fails to attend trial', *Daily Nation*, 16 October 2013.

1596 'ICC claims the first right to try Barasa', *Daily Nation*, 21 October 2013.

During High Court hearings on 14 January 2014, Justice Richard Mwongo authorised the Director of Public Prosecutions to formally apply for the arrest and handing over of Barasa to the ICC. The Judge ruled that he would hear the Public Prosecutions' application *ex parte*. Justice Mwongo further directed the Prosecution to present him with the Interior Minister's request for the arrest of Barasa on January 20 and further stated that he would make his ruling on 31 January. During the hearings, Barasa's lawyer, Kibe Mungai, stated that he would appeal the Judge's decisions, arguing it would be against 'the rules of natural justice to have the matter heard in his absence'. Finally, Justice Mwongo announced that Barasa's petition, which challenges Kenya's continued cooperation with the ICC, would be heard on 28 January, stating that '[i]t is clear the petition touches on several issues including the trial of [Kenyatta and Ruto] at the International Criminal Court and needs to be heard'.¹⁵⁹⁷

On 31 January 2014, Justice Mwongo rejected Barasa's petition challenging the constitutionality of the extradition proceedings against him. Specifically, Justice Mwongo stated that '[t]he applicant has not demonstrated that the extradition proceedings by the Cabinet Secretary are invalid' and thus also rejected the claim made by Barasa's lawyers that the International Crimes Act is unconstitutional.¹⁵⁹⁸ Justice Mwongo further stayed the extradition proceedings for 14 days pending any appeal by Barasa. Accordingly, the judge ruled that Barasa should not currently be arrested by the Kenyan police.¹⁵⁹⁹

1597 'Barasa blow in ICC battle against arrest', *Daily Nation*, 14 January 2014.

1598 The Judge held that Kenya's Criminal Procedure Code provided sufficient guidelines to guide such proceedings. 'ICC: Barasa's petition against transfer dismissed', *Standard Digital*, 31 January 2014; 'High Court dismisses Walter Barasa bid to defy ICC arrest warrant', *Daily Nation*, 31 January 2014.

1599 'High Court dismisses Walter Barasa's petition', *The Star*, 31 January 2014.

Allegations of sexual violence against ICC witnesses by an ICC staff member

In February 2013, the Women's Initiatives for Gender Justice became aware of allegations that rape and sexual violence had been committed by staff of the ICC VWU against witnesses/victims staying in the ICC safe house in Kinshasa, DRC, under the Court's Protection Programme.

The Women's Initiatives held several meetings with relevant and senior level staff within the VWU, the OPCV and the Registrar, urging a comprehensive response to these allegations. On 4 April 2013, the Women's Initiatives wrote to President of the ASP, Ambassador Tiina Intelmann, President of the ICC, Judge Sang-Hyun Song, and the Registrar, Silvana Arbia, copying Ambassador Markus Börlin, Vice President of the ASP and Coordinator of the Hague Working Group, stating that it had held meetings with Registry staff and 'while everyone has expressed alarm about this issue and some steps have been taken, we remain concerned and unconvinced that this matter is being addressed with the necessary efficacy, independence and level of expertise required to address such serious allegations of sexual violence in a full and robust manner.' The letter stated that the allegations of sexual violence committed against ICC witnesses/victims by staff of the Court occurred during the 2008-2009 period and that 'such allegations hold profound implications for the ICC, its credibility and its work and therefore the resolution of these issues requires leadership both within the Court as well as from the ASP.'

According to the letter, the staff member(s) directly involved in the alleged acts of sexual violence may have already been dismissed for activities involving allegations of embezzlement and/or theft of ICC funds designated for the Kinshasa safe house and other VWU activities in the DRC. In the letter, the Women's Initiatives stated that the financial misconduct issues appeared to have existed for some time and may even have been known by other ICC staff members for several years. According to the letter, these issues were finally addressed at the end of 2012 with the suspension of the VWU staff member(s) involved. At this time, residents of the safe house were notified about the suspension and as a result, several witnesses/victims informed a VWU staff member about the rapes allegedly committed by the same staff member involved in the financial misconduct.

In its letter, the Women's Initiatives opined that:

[w]hile the direct responsibility for the alleged sexual violence lies with the perpetrator(s) of these acts, that multiple acts of criminality have been alleged and remained unknown or ignored for so long indisputably suggests the existence of an environment ripe for abuse and therefore one which readily enables the commission of such crimes.

The Women's Initiatives noted that if substantiated, the sexual violence allegations:

represent a systemic failure of multiple processes, including protective measures, field office operations, recruitment procedures, staff vetting processes, performance monitoring and management practices, as well as the management processes and oversight functions at all levels of the VWU both within the Unit itself as well as by those with senior-level responsibilities for overseeing and ultimately managing the activities of the VWU.

In the letter, the Women's Initiatives stated that while the VWU, due to its mandate, is required to exercise greater confidentiality than some other areas of the Court, this does not diminish its requirement to be accountable. On the contrary, the Women's Initiatives noted that the VWU must instead establish 'rigorous accountability mechanisms to ensure that confidentiality practices do not provide a safe haven for non-compliance with established codes of conduct and professional practices'. According to the Women's Initiatives, 'a culture of exceptionalism and unaccountability prevails within the VWU'.

Given the serious nature of the allegations, the Women's Initiatives called for the immediate initiation of a comprehensive, independent inquiry into the allegations, to be conducted by an external body. The Women's Initiatives advised that the inquiry should examine, *inter alia*: the decisions and conduct of staff at all managerial levels in relation to the VWU and its activities; the specific allegations of rape and the injuries, harm and suffering of the alleged victims of the crimes, including whether any children were conceived and the possible transmission of sexually transmitted infections, including HIV, as a result of the rapes; the responsibility or innocence of those alleged to have committed the rapes; the context within which the alleged crimes occurred, including a thorough review of the supervisory and managerial responsibilities in relation to the staff directly involved, the protection-related work of the VWU, the Kinshasa field office management and the management of the safe house; the chain of information and responsibility, including who knew what and when, what they did with this information, to whom it was reported and what, if any action was taken; whether any other incidents of sexual violence were allegedly committed by ICC staff members in other settings, either by the same or different individuals, in relation to any areas of the Court's work; and whether any ICC staff or the affected witnesses/victims had been intimidated or harassed in relation to the allegations of sexual violence.

The Women's Initiatives maintained that the inquiry should result in a comprehensive set of recommendations, as well as appropriate action taken in relation to all those bearing responsibility. Furthermore, the Women's Initiatives suggested that the independent inquiry be undertaken by the United Nations Office of Internal Oversight, given its experience with issues of institutional accountability and

its specific expertise in conducting inquiries into allegations of sexual exploitation and abuse by UN staff, including peacekeepers.

The Women's Initiatives also called for the finalisation at the 12th Session of the ASP of the IOM, with the necessary independence, including the ability to initiate investigations, along with high level staff capacity and resources to ensure it has the structural authority and means to fulfil its mandate. In the letter, the organisation stated that the IOM mandate should include a strong definition of sexual violence, exploitation and abuse. The Women's Initiatives urged States Parties to make a concerted effort in 2013 to conclude discussions about the IOM and ensure it becomes fully operational and highlighted the lack of progress on this issue over the eight years the IOM had been under discussion by the Court and the ASP.

Finally, the Women's Initiatives called on the ICC to strengthen its crisis management response capacity. According to the letter, the ICC had been ill-prepared to effectively respond to the allegations and unable to formulate the necessary responses, beyond the relocation of the affected individuals. The Women's Initiatives noted that little progress had been made towards establishing a coordinated, organised and effective crisis-response system since the last external crisis in 2012 when ICC staff members had been detained in Libya.¹⁶⁰⁰

1600 'ICC statement on the detention of four staff members in Zintan, Libya', ICC-CPI-20120615-PR812, ICC Press Release, 15 June 2012, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr812.aspx>, last visited on 27 February 2014.

Following the letter, President Intelmann quickly responded to the Women's Initiatives, expressing her concern about the allegations, her commitment to ensuring that States Parties would monitor the Court's response to this issue, and her intention to raise this as a matter of urgency with the incoming Registrar, Herman von Hebel. A week after the letter was circulated, on 12 April 2013, the ICC issued a press release, announcing the opening of 'a formal internal inquiry into allegations communicated by four individuals under the ICC's protection programme that they had been subject to sexual abuse by a former ICC staff member working in the [DRC]'.¹⁶⁰¹

The press release explained that '[b]efore opening the inquiry, appropriate actions were taken by the ICC to ensure the safety, security and well-being of the four individuals, in addition to supplementary measures aiming at providing reinforced psychological and medical support and legal assistance'. It clarified that the goal of the inquiry was to 'establish[...] the facts underlying the allegations and fairly determin[e] any possible responsibilities'.

During May and June, the Women's Initiatives continued to advocate for an independent external inquiry with States Parties and the newly-appointed Registrar, Herman von Hebel.¹⁶⁰² Ultimately, on 20 June 2013, the Court issued a press release, announcing the commission of an independent external review of the allegations. The press release highlighted that '[t]he results of the initial internal inquiry confirmed the seriousness of the allegations and the need for more detailed investigation of the surrounding circumstances. Furthermore the incident highlighted operational and organisational issues that require more in-depth review'.¹⁶⁰³

1601 'ICC internally inquires on allegations of sexual abuse by former ICC staff member', ICC-CPI-20130412-PR895, *ICC Press Release*, 12 April 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr895.aspx>, last visited on 27 February 2014.

1602 Registrar Herman von Hebel was appointed on 8 March 2013 and took office on 18 April 2013.

1603 'ICC commissions an independent external review of the allegations of sexual assault', ICC-CPI-20130620-PR922, *ICC Press Release*, 20 June 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr922.aspx>, last visited on 27 February 2014.

On 20 December 2013, the Registrar released the public version of the report of the external Independent Review Team.¹⁶⁰⁴ The four-member Review Team was chaired by Brenda Hollis and included Berit Bachen Dahle, Nigel Verrill, and Judith Brand. The Independent Review Team Public Report was transmitted to the President of the ASP, Ambassador Tiina Intelmann, and ‘to relevant ICC Judges and parties to the proceedings concerned’.¹⁶⁰⁵

In the Report, the Review Team set forth the purpose of the review as follows:

- 1 To establish all facts and circumstances surrounding the allegations of sexual crimes against witnesses;
- 2 To identify all responsible individuals, including those responsible for exercising managerial oversight to the suspected person(s) and the relevant units/offices/sections responsible for the Court’s victim and witness protection systems;

- 3 To establish all facts and provide a documented analysis of the nature and sufficiency of the Court’s response to the allegations; and
- 4 To provide an analysis of any institutional short-comings in the Court’s existing victim and witness protection systems.¹⁶⁰⁶

The Review Team expressed that it agreed, with one exception, with the findings and conclusions made by the Preliminary Investigation Officer in relation to the facts and circumstances surrounding the alleged sexual crimes.¹⁶⁰⁷ The Team stated that ‘there can be no doubt that one person, and one person alone, would bear criminal responsibility for the alleged crimes if proven — the alleged perpetrator’.¹⁶⁰⁸ However, the Team further noted that: ‘Other VWU staff have likely engaged in inappropriate conduct that could provide a basis for disciplinary action if they remained members of the ICC VWU’ and that others have ‘failed the VWU and the Registry in the manner in which they have carried out, or failed to carry out, their supervisory, oversight and senior management duties’.¹⁶⁰⁹ The Team underscored that ‘relevant and credible information suggests that the chronic and pervasive structural and functional shortcomings of the VWU contributed significantly to the alleged perpetrator’s ability to carry out the alleged criminal conduct over a prolonged period of time’.¹⁶¹⁰

1604 ‘The external independent review submits its report on alleged sexual abuses in DRC’, ICC-CPI-2013-1220-PR977, *ICC Press Release*, 20 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr977.aspx>, last visited on 27 February 2014. See also ‘Independent Review Team Public Report, Post Incident Review of Allegations of Sexual Assault of For Victims Under the Protection of the International Criminal Court in the Democratic Republic of Congo by a Staff Member of the Court’, *Independent Review Team*, December 2013 (Independent Review Team Public Report), available at <<http://www.icc-cpi.int/iccdocs/registry/Independent-review-team-ReportEng.pdf>>, last visited on 26 February 2014. The report noted that a written and oral report had also been submitted to the Registrar. Independent Review Team Public Report, p. 2.

1605 ‘The external independent review submits its report on alleged sexual abuses in DRC’, ICC-CPI-2013-1220-PR977, *ICC Press Release*, 20 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr977.aspx>, last visited on 27 February 2014.

1606 Independent Review Team Public Report, p 2.

1607 Independent Review Team Public Report, p 2. The exception indicated by the Team related to the potential criminal liability of IRS police officers.

1608 Independent Review Team Public Report, p 3.

1609 Independent Review Team Public Report, p 3.

1610 Independent Review Team Public Report, p 3.

The Review Team concluded that, with one exception,¹⁶¹¹ namely, the Field Witness Officer, DRC VWU Field Office, there was ‘no information to indicate the failures on the part of supervisors and managers were ill-motivated or ill-intended’ and noted that there were ‘a significant number of dedicated VWU staff and supervisors who have worked valiantly to advance the mandate of the VWU despite the pervasive structural and functional short-comings evident in the Unit’.¹⁶¹² The Team further found that the VWU’s response to the allegations was mixed. While the field staff, once aware of the allegations, took ‘timely and appropriate action,’ including immediately informing headquarters, the response from headquarters ‘did not seem to comport with the seriousness of these allegations’.¹⁶¹³ Specifically, the Team noted ‘confusion at the [headquarters] level as to who was responsible for dealing with the matter and a reluctance to take ownership of it’, resulting in inadequate guidance to the field staff and no preliminary investigation until April 2013.¹⁶¹⁴ The Team also found that the response from headquarters was ‘*ad hoc* and delayed in relation to the needs of the alleged victims’, and that these responses ‘were not coordinated within the VWU’.¹⁶¹⁵ Furthermore, while the Team acknowledged that the allegations triggered an important procedural change, requiring at least two staff members to be present during all visits with victims, witnesses and protected persons, including at least one female staff member for visits with female victims, witnesses or protected persons, it noted that these safeguards were implemented ‘only sporadically because of staff shortages’.¹⁶¹⁶

1611 The Field Witness Officer, DRC VWU Field Office.

1612 Independent Review Team Public Report, p 3.

1613 Independent Review Team Public Report, p 4.

1614 Independent Review Team Public Report, p 4.

1615 Independent Review Team Public Report, p 4.

1616 Independent Review Team Public Report, p 4.

Overall, the Review Team found ‘institutional short-comings’ in the existing VWU systems, which:

encompass the whole of the structure and functioning of the VWU, and require prompt attention to ensure the well being of both the persons whom the VWU is mandated to protect, support and assist, and also of the VWU staff, who feel alienated, isolated and unappreciated in the current dysfunctional VWU environment.¹⁶¹⁷

The Review Team included a list of ‘short-comings’ that it found were ‘institutional and chronic and require considered and timely corrective action’.¹⁶¹⁸ Specifically, they pertained to the VWU’s: ‘dysfunctional, “stovepipe” structure’; ‘recruitment process, which many believe is based on friendship, not on the requisite experience and skill sets’; ‘*ad hoc*’ training, which ‘does not emphasise the consequences of victimisation and trauma for the structure and functioning of the VWU’; absence of clear and comprehensive standard operating procedures; the ‘lack of an effective supervisory and monitoring regimen based on “intrusive supervision” as opposed to passive supervision’; lack of clear reporting lines and mandatory reporting subject to monitoring and audit; insufficient information sharing; the lack of a safe and effective complaints system; and ‘a protection programme which is not well planned, implemented or organised, and which lacks consistency’.¹⁶¹⁹

In the press release announcing the release of the Independent Review Team Public Report, the Registrar reiterated his ‘determination to address the serious allegations concerned with

1617 Independent Review Team Public Report, p 4.

1618 Independent Review Team Public Report, p 5-6.

1619 Independent Review Team Public Report, p 4-5.

great rigor and transparency'.¹⁶²⁰ The Court indicated that 'disciplinary measures, including dismissal, have already been taken in respect of certain staff involved' and that the Registry was 'in the process of analysing the content of the full report in order to assess whether further disciplinary action is required'.¹⁶²¹ It further noted that the Registry had made the reorganisation of management within the protection programme a priority and would consider the findings of the Panel 'in the context of his overall plans to reorganise the Registry'.¹⁶²² ASP President Tiina Intelmann 'welcomed the submission of the report which identifies the personal and institutional responsibilities and short-comings' and 'stressed the expectation of States Parties to receive information about the follow-up to the report as soon as feasible'.¹⁶²³

The public redacted version of the report was also filed on 20 December 2013 before the Appeals Chamber in the Lubanga¹⁶²⁴ and Ngudjolo¹⁶²⁵ cases and before the Trial Chamber in the Katanga case.¹⁶²⁶ In transmitting the

1620 'The external independent review submits its report on alleged sexual abuses in DRC', ICC-CPI-2013-1220-PR977, *ICC Press Release*, 20 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr977.aspx>, last visited on 27 February 2014.

1621 'The external independent review submits its report on alleged sexual abuses in DRC', ICC-CPI-2013-1220-PR977, *ICC Press Release*, 20 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr977.aspx>, last visited on 27 February 2014.

1622 'The external independent review submits its report on alleged sexual abuses in DRC', ICC-CPI-2013-1220-PR977, *ICC Press Release*, 20 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr977.aspx>, last visited on 27 February 2014.

1623 'The external independent review submits its report on alleged sexual abuses in DRC', ICC-CPI-2013-1220-PR977, *ICC Press Release*, 20 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr977.aspx>, last visited on 27 February 2014.

1624 ICC-01/04-01/06-3055.

1625 ICC-01/04-02/12-157.

1626 ICC-01/04-01/07-3423.

document to the Trial Chamber in the Katanga case and the Appeals Chamber in the Ngudjolo case, the Registry referenced the reports submitted by the VWU to the Chambers 'on the situation of the *witnesses under the protection of the VWU in the present case* who have raised allegations of sexual assault by a former staff member of the Court'.¹⁶²⁷ In transmitting the document to the Appeals Chamber in the Lubanga case, the Registrar noted the 'multiple reports' submitted by the VWU to the Appeals Chamber 'on the situation of the *victims under the protection of the VWU in the present case* who have raised allegations of sexual assault by a former staff member of the Court'.¹⁶²⁸ The Registry further noted the relevant provisions of the statutory framework that pertain to the powers and responsibilities of the Registrar and VWU with respect to victims and witnesses.¹⁶²⁹ No further indication has been made by the Registry or the Chambers as to how the allegations of sexual assault may impact these three cases.

To date, there is no publicly available information regarding the redress, including reparations, made available to the four witnesses. It is also unclear whether the alleged perpetrator is or will be the subject of a formal criminal investigation. The ICC waived the immunity and privileges of the staff member involved thus clearing the way for a potential prosecution.

At the time of writing this Report, no one at a senior directorial level bearing ultimate responsibility for the oversight of the VWU has been held accountable for the failure of the management system and security programme which lead to the multiple rapes of four

1627 ICC-01/04-02/12-157, p 3; ICC-01/04-01/07-3423, p 3, emphasis added.

1628 ICC-01/04-01/06-3055, p 3, emphasis added, referring to several confidential filings.

1629 Articles 43(6), 44 and 68, Rome Statute; Rules 16-19, RPE; Regulation 41, Regulations of the Court; and Regulations 79-96, Regulations of the Registry.

witnesses while under the protection of the ICC. In addition, it does not appear that the external inquiry was tasked with examining whether other witnesses within the Kinshasa safe house had been raped or experienced other forms of sexual violence, abuse or coercion committed by the same or different staff members or contractors employed by the Court. Furthermore, to date, no inquiry has examined whether witnesses in any other ICC safe house have been raped, sexually abused or coerced by ICC staff members or contractors engaged by the Court. Finally, it remains unclear in the public report whether the external inquiry was tasked with providing any recommendations for addressing the far-reaching shortcomings in the structure and functioning of the VWU, which it identified in its report.

Recommendations

States Parties/ASP

Judiciary

Office of the Prosecutor

Registry

States Parties/ASP

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Independent Oversight Mechanism

- **Ensure** the development of a detailed definition of ‘serious misconduct’¹⁶³⁰ in the IOM Manual of Procedures and the ICC Staff Rules and Regulations. States Parties should also adopt an IOM resolution at the 13th session of the ASP in December 2014, which expressly includes rape and other forms of sexual violence, including sexual abuse and harassment within the definition of serious misconduct.
- **Prioritise** the recruitment of the permanent Head of the IOM as well as the subsequent appointment of the staff positions outlined in the IOM Operational Mandate. Competencies prioritised in the recruitment of the Head of the IOM should include: the ability to act independently and withstand institutional pressure; demonstrated gender competence; advanced investigative skills; strong drafting abilities; and a well developed conceptualisation of the IOM as representing the interests of the public, States Parties and the Court in ensuring an ethical, law-abiding and credible public institution.
- **Make explicit** and reflect in the appointments made to the IOM the need for gender-competence in the composition of its staff and operational scope.
- **Make explicit** the ability of the IOM to initiate investigations *proprio motu* in addition to its function of receiving reports of misconduct and serious misconduct from the Court in order to start an investigation. The IOM’s ability to initiate investigations *proprio motu* consistently and across all organs and areas of the Court is a necessary complement to the reporting obligation and to ensure the independence and integrity of the IOM.
- **Urgently adopt** a new IOM resolution at the 13th session of the ASP which includes a provision for the waiver of privileges and immunities in accordance with Article 48, paragraph 5 of the Rome Statute. Given the importance of promoting transparency and accountability, such a provision should be explicit within the formal resolution adopted by the ASP. It would also give greater effect to the IOM’s power to recommend that a matter is referred to the relevant national authority for possible criminal prosecution in instances when criminal acts are reasonably suspected to have occurred.
- **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, 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.

¹⁶³⁰ The 2013 Operational Mandate refers to the Court’s definition of ‘serious misconduct’ contained in Rule 24(1)(b) of the RPE but does not expressly include crimes of sexual violence within the definition. ICC-ASP/12/Res.6, Advance Version, Annex, para 28.

Recommendations

- **Urgently finalise**, release and enact the Anti-Fraud and Anti-Retaliation/Whistleblower Policies as envisaged in the 2009 Operational Mandate adopted by the ASP. Further ensure that clear information about the existence and content of the Policies is made available to all staff.
- **Elaborate** an IOM outreach programme to facilitate the dissemination of information to Court staff on the IOM's role, mandate and proceedings. The need for continuous outreach activity within the Court's organs was identified by the first IOM Temporary Head following her preliminary meetings with Court personnel in 2010.¹⁶³¹
- **Advance and implement** 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 accordingly ensure that all staff are provided with mandatory training regarding the Court's position on sexual exploitation and abuse, and the consequences for staff of such conduct. 'Serious misconduct' in this regard should be defined in the applicable Rules and Regulations to expressly include, but not be limited to, rape and other forms of sexual violence, including sexual abuse and harassment.
- **Within its annual report** to the ASP, the IOM should provide detailed information regarding the number and types of allegations and complaints, the source, whether internal or external, and the number of allegations relating to each organ, division and unit of the Court. This will enable the IOM 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 will further ensure a systemic rather than incident-based approach to preventing and addressing serious misconduct.
- **Finalise and operationalise** the IOM Manual of Procedures.

¹⁶³¹ 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

- **Each organ** of the ICC should strictly adhere to the requirements in the Rome Statute regarding gender and geographical representation in the recruitment of staff. This should also apply to the promotion and development of staff and avoid perceived or actual discrimination based on gender or other status and identities. A reduction in compliance or ongoing non-compliance with these provisions has resulted in a widening rather than closing of the gap between the number of men and women appointed to professional posts at the ICC across all organs, as well as expanding the gender gap in relation to appointments at mid and senior level positions.
- **Strengthen** compliance with the recommended desirable numbers of nationals appointed to professional posts, as agreed by States Parties, unless there is a clear rationale to explain or justify over-representation of nationals from specific states parties, eg nationals with language skills relevant to the situations under investigation by the ICC.

As of 2012, the State Party which most exceeded the top-end of the desirable range of nationals, as determined by the Committee on Budget and Finance, was the Netherlands. As of August 2012, the number of Dutch nationals appointed to professional posts exceeded the top-end of the desirable range by 113%.

- **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 effective and that quality management procedures are fully established by the 13th session of the ASP. The ASP, as part of its governance duties, should actively review reports of the respective bodies, while leaving direct management to the appropriate organ and staff structures.
- **The ASP** should ensure that proposals to amend the Court's legal texts including the Rome Statute, Rules of Procedure and Evidence, and Regulations of the Court, follow the established procedures involving the Working Group on Lessons Learnt, the Advisory Committee on Legal Texts and the ASP's Working Group on Amendments, prior to considering the adoption of new provisions. Any amendments should be made on the basis of a thorough examination of the existing provisions and proposed changes, should take into account how proposed changes may affect the Court's legal mandate, and ensure that the changes augment and strengthen the work of the ICC and maintain the integrity of the Rome Statute.
- **The Court** and the ASP should fully embrace and support an effective and thorough structural review process in 2014 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 carry out its mandate effectively, 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.
- **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 2014.
- **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. Recruitment for all positions at the ICC must comply with best practice standards and the relevant ASP resolutions.
- **The Registry** should urgently request, and the ASP should immediately provide, the necessary funds for the position of Psychologist/Trauma Expert within the Victims and Witnesses Unit 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 recruited urgently, to support the four trials and two confirmation of charges hearings expected in 2014.¹⁶³²
- **In implementing** the revised legal aid system, the Court and ASP should monitor and evaluate its effectiveness and ensure it does not impede the right to a fair trial, and supports the right to adequate representation and participation of victims.

¹⁶³² The Office of the Prosecutor's proposed budget for 2014 envisaged pre-trial activities in two cases (Ntaganda and Gbagbo) and trial hearings in four cases (Kenyatta, Ruto and Sang, Bemba, Banda). ICC-ASP/12/10, para 22.

- **In implementing** the system of legal aid for 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 13th session of the ASP, to open an ICC-African Union Liaison Office with an advance team in 2015. Such an office would:
 - stabilise and enhance regional support for the ICC among African Union 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 African Union 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. Future Security Council Resolutions referring Situations to the ICC should support the provision of funds, if a referral results 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.¹⁶³³
- **The Court** should consider the submission of a three-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.

Elections

To the ASP

- **Elect** six new Judges at the 13th session of the ASP, taking into account equitable geographical representation, fair representation of male and female judges, and the need for legal expertise on violence against women and children as mandated by the Statute in Articles 36(8)(a) and 36(8)(b).
- **Actively seek** and nominate¹⁶³⁴ qualified and highly experienced judicial candidates, including female candidates, with the required expertise including gender competence and legal expertise to further expand the judicial authority of the ICC and the capacity to interpret the progressive provisions of the Rome Statute with impartiality and legal rigour.

1633 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.

1634 The nomination period for the 2014 Judicial Election to be held in December 2014 runs from 28 April to 20 July 2014. See '2014-Election', *ICC website*, available at <http://www.icc-cpi.int/en_menus/asp/elections/Pages/election2014.aspx>, last visited on 17 March 2014.

Judiciary

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- **Appoint** two P5 gender legal advisers within the Pre-Trial and Trial Divisions to augment existing sources of legal advice and support the cohesion of judgements and consistency of interpretations across Chambers and between divisions. In light of the number of cases with charges for gender-based crimes now under consideration, the complexity of these crimes and the theories of liability, dedicated posts serving as expert resources for the judges could provide valuable assistance.
- **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.
- **Review** and assess the collective victim applications process, including through consultations with victims. The potential impact of a collective victim application process on victim participation should be taken into account.
- **Evaluate** and monitor the efficacy of the diverse victim participation models introduced by Chambers in different cases. Based on this evaluation, the judges should adopt a common system to harmonise the rights of victims with the Court's capacity to process applications and assist and represent victims who are formally recognised to participate in proceedings.

Recommendations

- **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 her or his 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.
- **Continue** utilisation of the special measures provided by 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 reflects 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. 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 2014**, 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 Court. The results of the audit should be shared with the Study Group on Governance and the Bureau of the Assembly of States Parties.

- **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,¹⁶³⁵ or found to have been proven beyond a reasonable doubt at trial. 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 make public the results of the internal inquiry into the events that gave rise to the detention of ICC staff while on mission in Libya in June 2012. The public report should address: 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 learnt 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.¹⁶³⁶

1635 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 *The 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.

1636 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

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- **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. This should include active monitoring by the Prosecution of changes within the VWU in relation to protection practices and management of the safe houses, as well as implementation of the new requirement that when visiting females who are under protection in ICC safe houses, one of the two VWU staff members undertaking this visit must be a woman.
- **Continue to review** the Prosecution's strategy for the investigation and presentation of evidence of sexual and gender-based crimes, taking into account existing jurisprudence as well as the Office of the Prosecutor's Strategic Plan for 2012-2015 and Draft Policy Paper on Sexual and Gender-Based Crimes.¹⁶³⁷ Based on a review of judicial decisions in several cases, it appears that the judges are requesting the OTP to 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; and that sufficient evidence from diverse sources, including witness testimony, is gathered and presented in support of all charges, including charges for gender-based crimes, at all stages of the proceedings.
- **In the event** of a conviction, ensure that submissions from the Prosecution at the sentencing and reparations phases of the proceedings, for all crimes including gender-based crimes, include a gender analysis of the harm that resulted from the crimes. The Prosecution's submissions should contain detailed reasoning supporting recognition of these harms in determining the sentence according to Rule 145(c) and as aggravating circumstances under Rule 145(2)(b), as well as for including these harms within the scope of the reparations order.
- **Finalise and begin** implementation of the Office of the Prosecutor's Draft Policy Paper on Sexual and Gender-Based Crimes. Concurrent with finalisation of the Draft Policy, the Prosecution should undertake a planning phase, which includes identification of any structural and operational changes necessary, and the budgetary implications for, full implementation of the policy. The planning process should include a review of staff skills and competencies, as well as plans for training existing staff and recruitment of additional staff in line with the expertise needed to implement the policy. The planning phase should also include identification of focal points and delegation of responsibilities for implementing different aspects of the policy, as well as timeframes and benchmarks for assessment of progress and follow-up. The Office of the Prosecutor should also undertake a review of other existing Prosecution policies as well as its 2010 Operations Manual and harmonise these documents with the Policy Paper on Sexual and Gender-Based Crimes.

1637 'OTP Strategic Plan June 2012-2015', *ICC website*, paras 58-63, available at <http://iccpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf>, last visited on 20 February 2014. 'Draft Policy Paper on Sexual and Gender-based Crimes', *ICC website*, February 2014, available at <<http://icc-cpi.int/iccdocs/otp/OTP-draft-policy-paper-February2014-Eng.pdf>>, last visited on 18 March 2014.

- **Review and strengthen** the Prosecution's practices for identifying and articulating the mode of liability to be charged, particularly in relation to sexual and gender-based crimes, taking into account the available provisions within the Rome Statute, existing jurisprudence from the ICC, as well as relevant jurisprudence from other international Courts and Tribunals. More than 50% of charges for gender-based crimes have been dismissed before trial at the ICC.¹⁶³⁸ In addition, within the two cases to have reached the judgement stage inclusive of charges for gender-based crimes, the accused have been either acquitted of all charges or of a limited number of charges, including those of rape and sexual slavery based on the Chamber's determination that the evidence presented was not sufficient to prove the criminal liability of the accused beyond a reasonable doubt.
- **In addition** to the external Special Advisor on Gender, 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 2014, more staff with gender expertise will be required to ensure the integration of gender issues within the heightened caseload, which includes five active investigations, maintenance of ten residual investigations, monitoring of at least eight potential Situations,¹⁶³⁹ two cases at the pre-trial stage, four cases at the trial preparation or trial stage, and appeals in four cases.¹⁶⁴⁰
- **As underscored** in the trial judgement in the Lubanga case and by the proceedings in the Kenya Situation against Muthaura and Kenyatta, the Office of the Prosecutor must continue to strengthen and refine its procedures for vetting, interviewing and managing local intermediaries in relation to their work with the Office in locating and liaising with potential and actual witnesses. The Prosecution should also continue to review and strengthen its contacts with, and assessments of, the security and viability of trial witnesses, including continuing to actively investigate potential witness tampering or intimidation, and bringing charges under Article 70 for offences against the administration of justice when applicable.

1638 As of 31 October 2013, decisions on the confirmation of charges have been rendered in five cases which included charges for gender-based crimes; namely, against Bemba, Katanga, Ngudjolo, Mbarushimana and Kenyatta. In these five cases, Pre-Trial Chambers have declined to confirm 16 of 32 total charges of gender-based crimes sought by the Prosecution, representing 50% of the gender-based crimes charges sought at this stage of proceedings. See further, *Gender Report Card 2012*, p 106-108.

1639 ICC-ASP/12/10, paras 22-23.

1640 In submitting their proposed budget for 2014, the Office of the Prosecutor envisaged pre-trial activities in two cases (Ntaganda and Gbagbo); trial preparation in one case (Banda); trial hearings in four cases (Kenyatta, Ruto and Sang, Bemba, Banda); and appeals in four cases (Lubanga, Katanga, Ngudjolo, Bemba). ICC-ASP/12/10, para 22.

Registry

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- **Urgently** address the significant management and oversight issues within the VWU as exposed by the alleged rape of four ICC victims/witnesses over a two-year period by a VWU staff member. This crisis exposed a number of serious issues including the failure of the management structures to have: prevented these acts; identified the security breaches earlier; and responded to these allegations once they arose in a timely, professional and effective manner.
- **Conduct** an immediate appraisal of senior directorial level staff bearing ultimate responsibility for the VWU, regarding their performance in ensuring effective management and supervisory structures, decision making processes and transparency and oversight of recruitment and training of VWU personnel. The Independent Review Team's public report indicated a number of institutional and chronic short-comings in the VWU's management structure and practices, as well as the lack of effective supervision.¹⁶⁴¹
- **Urgently oversee** a change in the culture and working practices within the VWU. The Independent Review Team public report on the alleged sexual assault of ICC witnesses and the ICC Registrar have stated that a new procedure has been introduced requiring at least two staff members to be present during visits with victims, witnesses and protected persons including at least one female staff member to be present for visits which involve female protected persons.¹⁶⁴² However, there are no female field officers currently employed by the VWU in any of the field offices and thus they are unable to implement this new procedure.
- **Immediately carry out** an independent inquiry involving all ICC safe houses in the DRC and elsewhere in order to assess whether any other victims or witnesses have been raped, sexually abused, coerced or harassed by ICC staff, intermediaries or others contracted by the Court.
- **Urgently establish** a crisis management system to ensure the ICC is able to respond to crises in a coordinated, organised and effective manner. It appears that little progress has been made towards establishing such a system since the 2012 crisis when ICC staff members and defence counsel were detained in Libya by the local authorities. At that time, members of the OPCD were accused by the Libyan authorities of smuggling spying devices and a coded letter to their client, Saif al-Islam Gaddafi. To date the Presidency has not reported on this issue to the ASP nor has a public report been made available.
- **Promote** the Lists of Counsel, Assistants to Counsel, Professional Investigators, and Experts. 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.

¹⁶⁴¹ Independent Review Team Public Report, p 4-6.

¹⁶⁴² Independent Review Team Public Report, p 4-6.

- **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.
- **Increase promotion** of, and access to, the ICC Legal Aid system. Initiate a review of Regulation 132 of the Regulations of the Registry 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.¹⁶⁴³ This Regulation was not amended following the recent review of the Regulations, which resulted in revised Regulations issued on 4 December 2013. 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 eight 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 establish safeguards to address security concerns, including ensuring that victim representations made under Article 15(3) remain confidential and are not accessible to the Prosecution.

¹⁶⁴³ Regulation 4 of the Regulations of the Registry sets forth procedures for the revision of the Regulations. Proposals to amendments to the Regulations are submitted by the Registry to the Presidency for approval.

Recommendations

- **In 2014** 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 (28.5%) continues to be high.¹⁶⁴⁴ 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.
- **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'.¹⁶⁴⁵ 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.

1644 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.

1645 In 2012, the VPRS indicated that 'gender' may be registered as 'unknown' either because the information has not yet been entered in its database or because the applicant has not indicated her/his gender in the application and it is not possible to retrieve this information from the application form. The VPRS also indicated that the development of its database is ongoing and should be fully operational in 2013, which would enable the VPRS to extract gender disaggregated data. Explanation provided by VPRS by emails dated 3 September 2012 and 20 September 2012.

Acronyms used in the Gender Report Card 2013

ACLT	Advisory Committee on Legal Texts	MGS	Military Group Site
AMIS	African Union Mission in Sudan	MISCA	African-led International Support Mission in the CAR
AQIM	Al-Qaeda in the Islamic Maghreb	MLC	<i>Mouvement de libération du Congo</i>
ASP	Assembly of States Parties	MNLA	<i>Mouvement national de libération de l'Anzawad</i>
AU	African Union	MONUC	United Nations Mission in the Democratic Republic of the Congo
BINUCA	United Nations Integrated Peacebuilding Office	MUJAO	<i>Mouvement pour l'unicité et le jihad en Afrique de l'Ouest</i>
CAR	Central African Republic	NGO	Non-governmental organisation
CBF	Committee of Budget and Finance	ODM	Orange Democratic Movement
DCC	Document Containing the Charges	OPCD	Office of Public Counsel for the Defence
DDPD	Doha Document for Peace in Darfur	OPCV	Office of the Public Counsel for Victims
DDR	Disarmament, Demobilisation, and Reintegration programme	OTP	Office of the Prosecutor
DRC	Democratic Republic of the Congo	PEV	Post-election violence
ECHR	European Court of Human Rights	PIDS	Public Information and Documentation Section
EoC	Elements of Crimes	PNU	Party of National Unity
FACA	Central African Armed Forces	RPE	Rules of Procedure and Evidence
FDLR	<i>Forces démocratiques de libération du Rwanda</i>	SGG	Study Group on Governance
FNI	<i>Front de nationalistes et intégrationnistes</i>	SLA	Unity Sudanese Liberation Army Unity
FPLC	<i>Forces patriotiques pour la libération du Congo</i>	SOCATRAF	Central African transportation service
FRPI	<i>Force de résistance patriotique en Ituri</i>	TVF	Trust Fund for Victims
GRC	Gender Report Card	UN	United Nations
GRULAC	Group of Latin American and Caribbean States	UNOIOS	United Nations Office of Internal Oversight
GTA	General Temporary Assistance	VPRS	Victim Participation and Reparation Section
ICC	International Criminal Court	VWU	Victims and Witnesses Unit
ICTR	International Criminal Tribunal for Rwanda	WEOG	Western European and Others Group
ICTY	International Criminal Tribunal for the former Yugoslavia	WGA	Working Groups on Amendments
IDP	Internally Displaced Person	WGLL	Working Group on Lessons Learnt
IOM	Independent Oversight Mechanism		
IPSAS	International Public Sector Accounting Standards		
JEM	Justice and Equality Movement		
LRA	Lord's Resistance Army		

Publications by the Women's Initiatives for Gender Justice

- *Gender Report Card on the International Criminal Court 2013*
- *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
- *Expert Paper, Modes of Liability: A review of the International Criminal Court's current jurisprudence and practice*, November 2013
- *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
- *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
- *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

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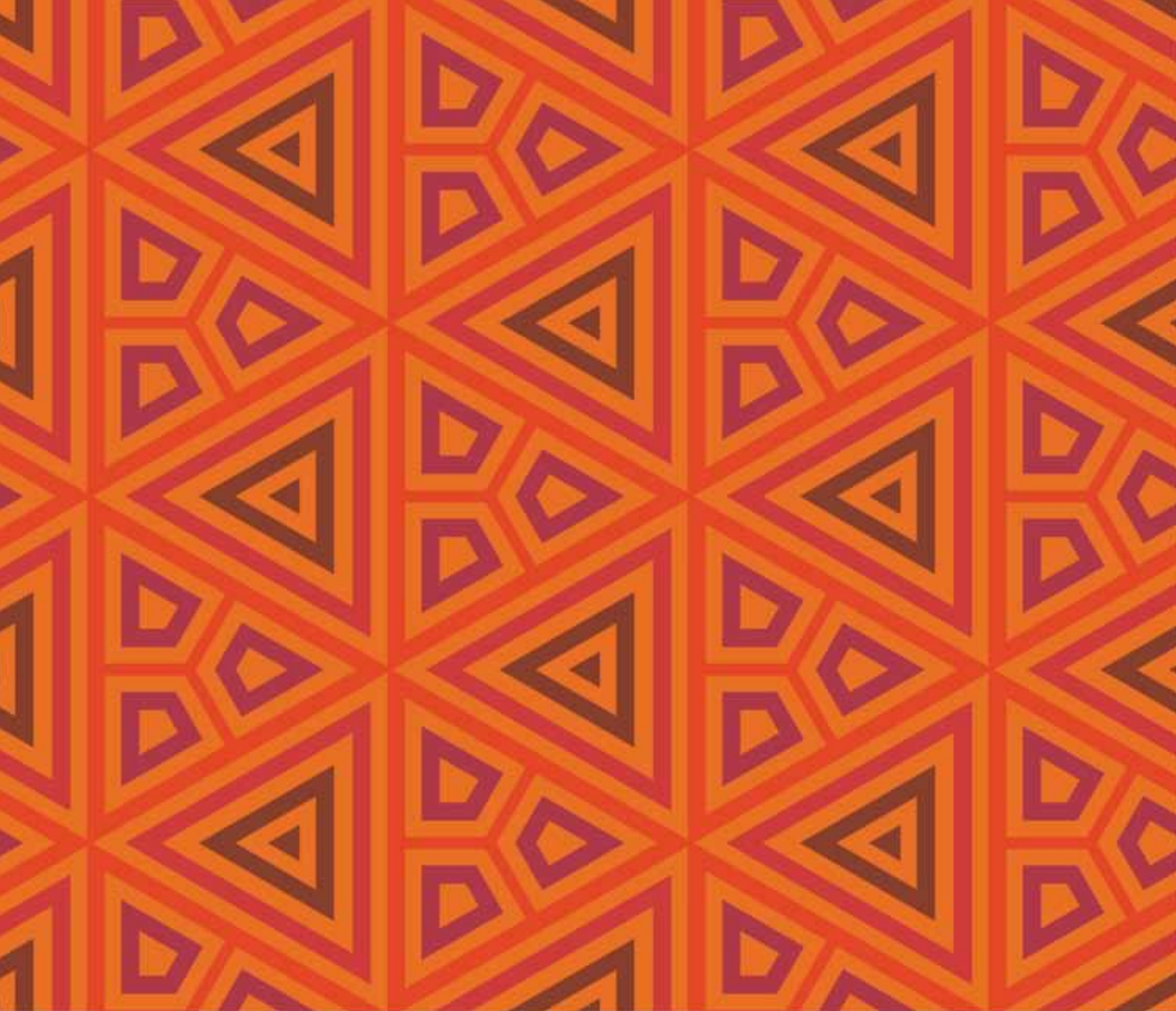
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