



**gender** 2011  
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 works with women most affected by the conflict situations under investigation by the ICC.

Currently the Women's Initiatives for Gender Justice has country-based programmes in six ICC Situation countries: Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic, Kenya and Libya. The organisation has also initiated a violence against women advocacy project in Kyrgyzstan.

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

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

In 2006, the Women's Initiatives for Gender Justice was the first NGO to file before the ICC and to date is the only international women's human rights organisation to have been recognised with *amicus curiae* status by the Court.

## Women's Initiatives for Gender Justice



Noordwal 10  
2513 EA The Hague  
The Netherlands, Europe  
Tel +31 (070) 302 9911  
Fax +31 (070) 392 5270  
info@iccwomen.org  
www.iccwomen.org

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The Women's Initiatives for Gender Justice dedicates the *Gender Report Card on the International Criminal Court 2011* to the women and girls who were harmed or lost their lives in armed conflicts all over the world, and to our partner and friend **Albertine Tonnet**, who passed away this year. Her exceptional strength, passion and dedication to women's human rights in the Central African Republic will continue to inspire our work.



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# Introduction

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**This is the seventh *Gender Report Card* 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 (EoC) and in particular the gender mandates they embody, in the nine years since the Rome Statute came into force.<sup>1</sup>**

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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 aspects, 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 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* analyses, and provides recommendations on, the work of the ICC in the following sections:

- **Structures and Institutional Development**
- **Substantive Jurisdiction and Procedures**
- **The Assembly of States Parties**
- **Substantive Work of the ICC**

Within these sections, we review and assess the work of each organ of the Court from 18 September 2010 to 16 September 2011. We provide summaries of the most important judicial decisions, the investigations, charges and prosecutions brought by the Office of the Prosecutor (OTP), and the work of the many sections of the Registry towards an accessible and administratively efficient Court.

# Structures and Institutional Development

1 October 2010 — 14 October 2011

# Structures

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## The Rome Statute<sup>2</sup> creates the International Criminal Court (ICC) which is composed of four organs:<sup>3</sup>

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

**The Presidency** is composed of three of the Court's judges, elected by an absolute majority of the judges, who sit as a President, a First Vice-President and a Second Vice-President. The Presidency is responsible for 'the proper administration of the Court, with the exception of the Office of the Prosecutor'.<sup>4</sup>

**The Judiciary** The judicial functions of each Division of the Court are carried out by Chambers. The Appeals Chamber is composed of five judges. There may be one or more Trial Chambers, and one or more Pre-Trial Chambers, depending on the workload of the Court. Each Trial Chamber and Pre-Trial Chamber is composed of three judges. The functions of a Pre-Trial Chamber may be carried out by only one of its three judges, referred to as the Single Judge.<sup>5</sup> There is a total of 19 judges in the Court's three divisions.<sup>6</sup>

**The Office of the Prosecutor** (OTP) has responsibility for 'receiving referrals, and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court'.<sup>7</sup>

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2 Footnote references in this section pertain to the Rome Statute of the International Criminal Court.

3 Article 34. The composition and administration of the Court are outlined in detail in Part IV of the Statute (Articles 34-52).

4 Article 38.

5 Article 39.

6 Article 36 of the Rome Statute provides for there to be 18 judges on the bench of the Court. Judge René Blattmann (Bolivia), whose term ended in March 2009, remains on Trial Chamber I until it renders its decision in the Lubanga case.

7 Article 42(1).

**The Registry** is responsible for the ‘non-judicial aspects of the administration and servicing of the Court’.<sup>8</sup> The Registry is headed by the Registrar. The Registrar is responsible for setting up a Victims and Witnesses Unit (VWU) within the Registry. The VWU is responsible for providing, in consultation with the OTP, ‘protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses’.<sup>9</sup>

## Gender Equity

The Rome Statute requires that, in the selection of judges, the need for a ‘fair representation of female and male judges’<sup>10</sup> be taken into account. The same principle applies to the selection of staff in the Office of the Prosecutor (OTP) and in the Registry.<sup>11</sup>

## Geographical Equity

The Rome Statute requires that, in the selection of judges, the need for ‘equitable geographical representation’<sup>12</sup> be taken into account in the selection process. The same principle applies to the selection of staff in the OTP and in the Registry.<sup>13</sup>

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8 Article 43(1).

9 Article 43(6).

10 Article 36(8)(a)(iii).

11 Article 44(2).

12 Article 36(8)(a)(ii).

13 Article 44(2).

## Gender Expertise

### Expertise in Trauma

The Registrar is required to appoint staff to the Victims and Witnesses Unit (VWU) with expertise in trauma, including trauma related to crimes of sexual violence.<sup>14</sup>

### Legal Expertise in Violence Against Women

The Rome Statute requires that, in the selection of judges and the recruitment of ICC staff, the need for legal expertise in violence against women or children must be taken into account.<sup>15</sup>

Rule 90(4) of the Rules of Procedure and Evidence (RPE) requires that, in the selection of common legal representatives for the List of Legal Counsel, the distinct interests of victims are represented. This includes the interests of victims of crimes involving sexual or gender violence and violence against children.<sup>16</sup>

### Legal Advisers on Sexual and Gender Violence

The Prosecutor is required to appoint advisers with legal expertise on specific issues, including sexual and gender violence.<sup>17</sup>

## Trust Fund for Victims

The Rome Statute requires the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and for their families.<sup>18</sup>

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14 Article 43(6).

15 Articles 36(8)(b) and 44(2).

16 Article 68 (1).

17 Article 42(9).

18 Article 79; see also Rule 98 RPE.

# ICC Staff

## Recruitment of ICC Staff<sup>19</sup>

	<i>men</i>	<i>women</i>
<b>Overall staff</b> <sup>20</sup>		
<i>(698 including professional and general posts, and elected officials excluding judges)</i>	<b>54%</b>	<b>46%</b>
<b>Overall professional posts</b> <sup>21</sup> <i>(357 including elected officials, excluding judges)</i>	<b>52%</b>	<b>48%</b>
<b>Judiciary</b>		
Judges <sup>22</sup>	<b>42%</b>	<b>58%</b>
Overall professional posts <sup>23</sup> <i>(excluding judges)</i>	<b>39%</b>	<b>61%</b>
<b>OTP overall professional posts</b> <sup>24</sup>	<b>54%</b>	<b>46%</b>
<b>Registry overall professional posts</b> <sup>25</sup>	<b>52%</b>	<b>48%</b>

19 Figures as of 31 July 2011. Information provided by the Human Resources Section of the ICC.

20 These figures relate to posts which are occupied as of 31 July 2011. The overall number of staff positions occupied increased by one individual compared with 2010. The percentage of female and male professionals has slightly changed from 2010 when there were 53% men and 47% female employees at the Court. Figures from the ICC as of 31 March 2011 for existing positions indicate there were 702 established filled posts, 193 posts approved as general temporary assistants (GTA), 86 interns, seven visiting professionals, 49 consultants and 23 elected officials including the Judges, the Prosecutor, the Deputy Prosecutor, the Registrar and Deputy Registrar. Please note that the last two positions are not elected by States Parties. (See the *Report of the Committee on Budget and Finance on the work of its sixteenth session*, ICC-ASP/10/5, 17 June 2011, p 35). In total, 761 established posts were approved by the ASP in the 2011 budget.

21 This year, the total number of occupied professional posts, including elected officials but excluding judges, is 357 or 51% of the overall staff. Last year, professional posts were 51.5% of the total. After two years during which half of the professional posts at the Court were occupied by women, this year female professionals are 48% of the total.

22 There are currently 19 judges on the bench of the ICC of which 11 (58%) are women and eight (42%) are men. For the third year in a row, women are the majority on the bench. Article 36 of the Rome Statute outlines the bench of the ICC as being comprised of 18 judges. Judge René Blattmann (Bolivia), whose term ended in March 2009, remains on Trial Chamber I until it renders its decision in the Lubanga case. The election of new judges, to replace the six judges whose terms are finishing in March 2012, will be held during the tenth session of the Assembly of States Parties from 12 to 21 December 2011 in New York. Of the judges whose terms will come to completion in 2012, three are women (Judge Diarra – Mali, Judge Odio Benito – Costa Rica, and Judge Steiner – Brazil). The nomination period for the election of judges was open between 13 June and 16 September 2011. Of the 19 judicial nominees, only two are women of whom one is from the Group of Latin America and the Caribbean region (Olga Venecia Guerrero Carbuccia – Dominican Republic) and one from the Asia region (Miriam Defensor-Santiago – the Philippines).

23 These figures represent the actual posts filled in the Judiciary. Women constitute 61% of the total professional staff in the Judiciary. Female professionals have been the majority in the Judiciary since 2007 predominantly in the mid and lower level posts with women comprising the majority at the P3 level (12 women, nine men). At the more senior levels, male professionals slightly exceed women in the P4 posts (two men and one woman), while the three P5 posts are occupied by two males (Senior Legal Adviser, based in The Hague; Chef de Cabinet, based in The Hague,) both from the WEOG region and one woman (Head of the New York Liaison Office, based in New York) from the Africa region. Until 2011, the Judiciary had reported on the appointments for three P5 established positions. This year, they reported only on two P5 posts and described the Chef de Cabinet position as vacant and filled on a GTA contract.

24 This year, there is a 3% decrease in the overall number of women appointed to professional posts in the OTP. This decrease has been predominantly at the P3 level. The female/male differential remains high in all senior positions with both D1 posts occupied by men, almost three times the number of male appointees at the P5 level (three women and eight men) and 24% more males than females appointed at the P4 level (10 women and 16 men). These figures are the same as in 2010. At the P3 level, there are 15 (36.5%) female appointees and 26 (63.5%) male appointees. Female professionals are the majority at the P1 and P2 levels, comprising respectively 69% and 58% of those appointed to these posts.

25 For the past five years, the overall recruitment statistics for professional appointments within the Registry has remained within the 52% – 48% range. This year there are 52% male and 48% female appointees, in 2010 the figures were 51% and 49% and in 2009 the figures were 48% and 52%. There are still three times more men than women appointed at the D1 level, and 26% more men than women appointed at the P3 level. In 2011, there are eight men and seven women appointed at the P5 level, and women are the majority at the P4 (56%), P2 (53%) and P1 (62%) levels.

<b>Executive Committee and Senior Management</b>		<i>men</i>	<i>women</i>
<b>Judiciary</b>	Presidency <sup>26</sup>	<b>67%</b>	<b>33%</b>
	Heads of Sections or equivalent posts <sup>27</sup>	<b>67%</b>	<b>33%</b>
<b>OTP</b>	Executive Committee <sup>28</sup>	<b>75%</b>	<b>25%</b>
	Heads of Divisions <sup>29</sup>	<b>67%</b>	<b>33%</b>
	Heads of Sections <sup>30</sup>	<b>79%</b>	<b>21%</b>
<b>Registry</b>	Heads of Divisions <sup>31</sup>	<b>100%</b>	<b>0%</b>
	Heads of Sections <sup>32</sup>	<b>52%</b>	<b>48%</b>

26 Please note that this figure represents the gender breakdown of the President (male) and the two Vice-Presidents (one male and one female) only. A new President and two Vice-Presidents will be elected in 2012.

27 There are three Heads of Sections or equivalent posts in the Judiciary: the Chef de Cabinet, the Head of the New York Liaison Office and the Senior Legal Adviser to the Chambers. Of these, one (Chef de Cabinet) is reported by the ICC as being vacant although there is a male appointee occupying the post at a P5 level. The two other filled positions are occupied by a woman and a man.

28 The Executive Committee is composed of the Prosecutor and the three Heads of Division (Prosecutions; Investigations; Jurisdiction, Complementarity and Cooperation). Three out of the four executive posts are occupied by men. Although the post of Head of the Investigations Division is filled, the elected position of Deputy Prosecutor (Investigations) has been vacant since 2007.

29 Of the three Head of Division posts in the OTP, two are filled by men and one by a woman.

30 Of the 19 Heads of Sections and equivalent posts in the OTP, one is vacant (Head Prosecution Team Darfur). Only 21% of the filled Head of Sections positions are held by women. This is 11% less than in 2010.

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

32 Out of 22 Heads of Sections and equivalent posts in the Registry, one is vacant (Protocol and Events). Of the filled positions, 48% are occupied by women.

<b>Field Offices</b> <sup>33</sup>	<i>men</i>	<i>women</i>
<b>Overall field staff</b> <sup>34</sup> (86 including professional and general staff)	<b>80%</b>	<b>20%</b>
<b>Overall field staff per country</b> <sup>35</sup> (including professional and general staff)		
Central African Republic (CAR) [18] <sup>36</sup>	<b>83%</b>	<b>17%</b>
Chad – Darfur [7]	<b>86%</b>	<b>14%</b>
Democratic Republic of Congo (DRC) [35]	<b>83%</b>	<b>17%</b>
Uganda [23]	<b>69.5%</b>	<b>30.5%</b>
Kenya [3]	<b>100%</b>	<b>0%</b>
<b>Overall field staff per section</b> <sup>37</sup> (including professional and general staff)		
Field Operations Section [25] <sup>38</sup>	<b>96%</b>	<b>4%</b>
Service Desk [3]	<b>100%</b>	<b>0%</b>
Outreach Unit [13]	<b>54%</b>	<b>46%</b>
Planning and Operations Section [7]	<b>100%</b>	<b>0%</b>
Security and Safety Section [8]	<b>100%</b>	<b>0%</b>
Victims and Witnesses Unit [24]	<b>66%</b>	<b>34%</b>
Victims Participation and Reparation Section [3]	<b>67%</b>	<b>33%</b>
Secretariat of the Trust Fund for Victims [2]	<b>50%</b>	<b>50%</b>
Investigation Teams [1]	<b>100%</b>	<b>0%</b>

33 Figures as of 31 July 2011. Information provided by the Human Resources Section of the ICC.

34 As of 31 July, the Court had field offices in four out of the six Situations under investigation (CAR, DRC, Chad for Darfur, Uganda) and a Registry task-force in Kenya. This number will be reduced once the closing down of the two field offices in Chad is completed in December 2011. (See *Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, 21 July 2011, p 73). Out of 86 posts in the field offices, 21 (24%) are professional positions with 15 (71%) of these posts occupied by male professionals. More than three times the number of men than women are appointed to field positions at both the professional and general levels. During 2011, there was a significant decrease of 15 staff (professional and general) from the field offices predominantly from the DRC field office (decrease of eight from 2010) and the Chad field office (decrease of six from 2010).

35 As in 2010, the field office with the highest gender differential is Chad with 72% more men than women appointed, followed by CAR and the DRC both with a 66% male/female differential, and Uganda with 39%. There are three male staff members comprising the Registry task-force in Kenya.

36 The total number of staff is reported in brackets.

37 Despite a decrease in the field offices of 12 staff members from Field Operations Section since 2010, this Section continues to have the highest number of staff in the field offices at 25 staff (29% of overall field staff). The Field Operations Section has a presence in all country-based offices including the Registry task-force in Kenya. The Victims and Witnesses Unit has 24 staff members (28%) across the four field offices but does not have a presence in the Registry task-force in Kenya. The Outreach Unit has 13 staff members (15%) across three field offices (CAR, DRC and Uganda). This is the same figure as in 2010. The only Sections/Units which are represented in each of the four offices and the Registry task-force in Kenya are the Field Operations Section (with 25 staff) and the Security and Safety Section (with eight staff). Following the redeployment of its representative in the DRC, this year the Trust Fund for Victims is represented by P-level staff only in Uganda (two Regional Programme Officers – one for the DRC and CAR Situations, and one for Uganda and Kenya Situations). The Fund is represented by two GTA Field Assistants (general staff) in the Bunia forward field presence in the DRC. The male/female differential is high across almost all Sections/Units represented in the field offices with 100% male employees in the Service Desk, Security and Safety, Investigation Teams, and the Planning and Operations Section. The Trust Fund for Victims has the strongest gender balance in the field offices with one male professional and one female professional, followed by the Outreach Unit with 54% male and 46% female employees and the VVU with 66% male and 34% female appointees.

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



<b>Field Offices</b> <i>continued</i>	<i>men</i>	<i>women</i>
<b>Overall professional staff</b> <sup>39</sup> (21 professional posts excluding language staff)	<b>80%</b>	<b>20%</b>
<b>Overall professional staff per country</b> <sup>40</sup> (professional posts excluding language staff)		
Central African Republic (CAR) [4] <sup>41</sup>	<b>50%</b> [2]	<b>50%</b> [2]
Chad – Darfur [1]	<b>100%</b> [1]	<b>0%</b> [0]
Democratic Republic of Congo (DRC) [8]	<b>75%</b> [6]	<b>25%</b> [2]
Uganda [7]	<b>71%</b> [5]	<b>29%</b> [2]
Kenya [1]	<b>100%</b> [1]	<b>0%</b> [0]

39 Out of 86 staff working in field offices, 21 (24%) are in professional posts, excluding language staff. The overwhelming majority of professional posts are occupied by men (80%). Last year, men were 67% of the total professional staff. As in 2010, the field office with the highest number of professional staff is the DRC office with eight staff (38% of the total professional field staff), followed by Uganda with seven staff (33%) and CAR with four staff (19%). The field office in Chad (one staff) and the Registry task-force in Kenya (one staff) both have 5% of the total professional staff. Professional staff in field offices have all been appointed at the P2 and P3 levels. There are more than twice as many P3 staff members as P2 staff (respectively 15 and six). Women professionals are the majority at the P2 level (66%), and only two out of 15 P3 grade posts are occupied by women (13%). This year, professionals from the Western European and Others Group (WEOG) region constitute 62% of the total professional staff, 12% more than in 2010. Professional appointees from the Africa region make up 28.5% of the total, followed by Asia and the Group of Latin American and Caribbean Countries (GRULAC), both at 5%. Individuals from a total of 13 countries from every region are represented in the field offices, with the exception of Eastern Europe. French nationals comprise the highest number of staff members from a single country assigned to field offices (six), followed by Belgium, Canada and Niger (two professionals each). The remaining countries have one national each appointed to a professional post.

40 As in 2010, half of the staff of the CAR field office are female professionals. In the DRC, women are 25% of the professional staff, which is 11% less than in 2010. In Uganda, 29% of the staff are female professionals. In Chad and Kenya, all of the professional posts are occupied by men.

41 The total number of staff is reported in brackets.

## ICC-related Bodies

		<i>men</i>	<i>women</i>
<b>Trust Fund for Victims</b>	Board of Directors <sup>42</sup>	<b>40%</b>	<b>60%</b>
	Secretariat <sup>43</sup>	<b>50%</b>	<b>50%</b>
<b>ASP Bureau</b>	Executive <sup>44</sup>	<b>67%</b>	<b>33%</b>
	Secretariat <sup>45</sup>	<b>50%</b>	<b>50%</b>
	Committee on Budget and Finance <sup>46</sup>	<b>75%</b>	<b>25%</b>
<b>Project Office for the Permanent Premises – Director's Office<sup>47</sup></b>		<b>50%</b>	<b>50%</b>
<b>Independent Oversight Mechanism<sup>48</sup></b>		–	–

42 Figures as of 23 August 2011. Information at <<http://trustfundforvictims.org/board-directors>>. The members of the current Board of Directors of the Trust Fund for Victims were elected for a three-year term during the eighth Session of the Assembly of States Parties in The Hague in November 2009.

43 Figures as of 3 August 2011. Information provided by the Secretariat of the Trust Fund for Victims. Two posts out of 12 (17%) are vacant (one GTA post in CAR is under recruitment and one GTA post in Kenya is not filled). Out of the 12 posts, seven are approved posts and five are GTAs. Of the 12 posts, six are professional posts, of which one is a GTA, and six are general service posts, of which two are fixed term positions and four are GTAs. Of the filled positions, 50% are occupied by female professionals compared with 57% in 2010, 71% in 2009 and 73% in 2008.

44 Figures as of 26 July 2011. Information at <<http://www.icc-cpi.int/Menus/ASP/Bureau/>>. The Bureau of the Assembly consists of a President, two Vice-Presidents and 18 members. Please note that the only members who are elected in their personal capacity are the President (Ambassador Christian Wenaweser, Liechtenstein) and two Vice-Presidents (Ambassador Jorge Lomonaco from Mexico and Ambassador Simona Mirela Miculescu from Romania). The other 18 members of the Bureau are States and are represented by country delegates. The current Bureau assumed its functions at the beginning of the seventh session of the ASP on 14 November 2008. On 26 July 2011, the Bureau of the Assembly of States Parties recommended that Ambassador Tiina Intelmann (Estonia) be elected as the new President of the ASP at the beginning of the tenth ASP session in New York from 12 to 21 December 2011. This is the first time that a woman has been nominated and will be elected to this position.

45 Figures as of 26 July 2011. Information provided by the Secretariat of the Assembly of States Parties. This year, one position (Special Assistant to the Director) out of nine professional and general posts is vacant. Of the four professional staff in the Secretariat, two are held by men (D1 and P4) and two by women (P4 and P3). Women represent the majority (75%) of staff in administrative assistants posts.

46 Figures as of 7 February 2011. *Nomination and Election of Members of the Committee on Budget and Finance*, Note Verbale of 7 February 2011, ICC-ASP/10/S/CBF/05. The Committee on Budget and Finance was established pursuant to the ASP Resolution ICC-ASP/1/Res.4. The Committee is composed of 12 members elected by the Assembly of States Parties. Members must be experts of recognised standing and experience in financial matters at the international level and must be from a State Party as stated by the ASP Resolution on the procedure for the nomination and election of members of the Committee on Budget and Finance (ICC-ASP/1/Res. 5). Of the 12 members, nine (75%) are men and three (25%) are women. The regional majority of four members (33%) are from WEOG (Canada, France, Germany and Italy). The remaining regions have two members each – Africa (Uganda and Burundi), GRULAC (Mexico and Uruguay), Asia (Japan and Jordan) and Eastern Europe (Estonia and Slovakia). The term of office for six of the 12 members will expire on 20 April 2012. Six new members of the Committee will be elected during the tenth session of the Assembly of States Parties from 12 to 21 December 2011. The six members whose term of office expires on 20 April 2012 come from Eastern Europe (Slovakia – one member), Africa (Uganda – one member), GRULAC (Uruguay – one member) and Asia (Japan and Jordan – one member each). The nomination period for the new members was open from 13 June to 14 October 2011.

47 Figures as of 31 July 2011. Information provided by the Human Resources Section of the ICC. The Director's Office is composed of two professional staff – the Project Director (D1, male from the UK) and Deputy Project Director (P4, female, from Belgium).

48 In its seventh plenary session on 26 November 2009, the ASP adopted Resolution ICC-ASP/8/Res.1 by consensus, thereby establishing an Independent Oversight Mechanism (IOM). On 12 April 2010, a Temporary Head of the IOM (female) was appointed at a P5 level on secondment from the UN Office of Internal Oversight Services (OIOS) for a one-year period from July 2010 until July 2011. The position is currently vacant and under recruitment. Given the difficulties in filling the position, a new Temporary Head (female) has been seconded from the OIOS. As decided by the Assembly of States Parties during its ninth session held in New York in December 2010, the post of Head of the IOM is now a P4 grade instead of a P5.

<b>Disciplinary Boards</b>	<i>men</i>	<i>women</i>
<b>Disciplinary Advisory Board</b> <sup>49</sup> ( <i>internal</i> )	<b>45%</b>	<b>55%</b>
<b>Appeals Board</b> <sup>50</sup> ( <i>internal</i> )	<b>45%</b>	<b>55%</b>
<b>Disciplinary Board for Counsel</b> <sup>51</sup>	<b>33%</b>	<b>67%</b>
<b>Disciplinary Appeals Board for Counsel</b> <sup>52</sup>	<b>100%</b>	<b>0%</b>

49 Figures as of 19 September 2011. Information provided by the Human Resources Section of the ICC. The figure in the table represents the gender breakdown of the nine members of the Disciplinary Advisory Board, excluding the Secretary (female) and the alternate Secretary (female). Seven out of nine members are from WEOG countries (Belgium – two members; France – two members; Spain, Germany, Ireland – one member each). There is one member each from Eastern Europe and Africa (respectively Serbia and South Africa).

50 Figures as of 19 September 2011 and reconfirmed 26 October 2011. Information provided by the Human Resources Section of the ICC. The figure in the table represents the gender and regional breakdown of the nine members of the Appeals Board, excluding the Secretary (female) and the alternate Secretary (female). Five out of nine members (members and alternates) are women. Four members of the Board are from WEOG countries (Australia, United Kingdom, Italy and the United States), three are from Africa (Ghana, Kenya and Senegal) and two are from GRULAC (Venezuela and Colombia).

51 Figures as of 19 September 2011. Information provided by the Human Resources Section of the ICC. The Disciplinary Board for Counsel is composed of two permanent members – one female and one male – and one male alternate member. All members are from WEOG countries (France, Canada and Germany). Article 36 of the Code of Professional Conduct for Counsel outlines the composition and management of the Disciplinary Board.

52 Figures as of 19 September 2011. Information provided by the Human Resources Section of the ICC. The Disciplinary Appeals Board for Counsel is composed of the President (Judge Sang-Hyun Song, Republic of Korea) and the two Vice-Presidents (Judge Fatoumata Dembele Diarra from Mali and Judge Hans-Peter Kaul from Germany) of the Court (who take precedence over other judges under Regulation 10 of the Regulations of the Court) and of two male permanent members and one male alternate (all of them from WEOG countries: France, United Kingdom and Spain). Please note that the figure in the table represents only the permanent members, excluding the three judges.

## Geographical and Gender Equity among Professional Staff<sup>53</sup>

### The 'Top 5' by Region and Gender and the 'Top 10' overall<sup>54</sup>

(includes elected officials, excludes language staff)

#### WEOG<sup>55</sup>

**58.5% overall (198 staff) 51% men (101) 49% women (97)**

	<b>'Top 5' countries in the region</b> (range from 15 – 43 professionals)	<b>'Top 5' countries by gender</b> (range from 5 – 27 female professionals)
Western European and Others Group	<ol style="list-style-type: none"> <li>1 France [43]<sup>56</sup></li> <li>2 United Kingdom [28]</li> <li>3 The Netherlands [18]</li> <li>4 Germany [16]</li> <li>5 Canada [15]</li> </ol>	<ol style="list-style-type: none"> <li>1 France [27]<sup>57</sup></li> <li>2 United Kingdom [11]</li> <li>3 Australia, Germany, the Netherlands [7]</li> <li>4 Spain, United States of America [6]</li> <li>5 Belgium, Canada, Italy [5]</li> </ol>

#### Africa<sup>58</sup>

**17.5% overall (59 staff) 69.5% men (41) 30.5% women (18)**

	<b>'Top 5' countries in the region</b> (range from 2 – 8 professionals)	<b>'Top 2' countries by gender</b> (range from 1 – 2 female professionals)
	<ol style="list-style-type: none"> <li>1 South Africa [8]</li> <li>2 Nigeria [5]</li> <li>3 Arab Republic of Egypt, Kenya, Senegal [4]</li> <li>4 The Gambia, Ghana, Mali, Niger, Sierra Leone, Uganda [3]</li> <li>5 DRC, United Republic of Tanzania [2]</li> </ol>	<ol style="list-style-type: none"> <li>1 The Gambia, Kenya, Sierra Leone, South Africa, Uganda [2]</li> <li>2 Botswana, Côte d'Ivoire, Ghana, Mali, Mauritius, Rwanda, United Republic of Tanzania, Zimbabwe [1]</li> </ol>

53 Figures as of 31 July 2011. Information provided by the Human Resources Section of the ICC. The ICC figures on geographical representation exclude language staff and include elected officials.

54 Note that it has not always been possible to establish a 'Top 5' or 'Top 10' for gender because for some regions there are not enough females appointed to professional posts to arrive at a 'Top 5' or 'Top 10'. In those cases, a 'Top 4', 'Top 3', 'Top 2' or 'Top 9' list has been established.

55 Nationals from the Western European and Others Group account for 58.5% of the overall professional staff at the ICC. For the first time since 2008, the number of female WEOG appointees has dropped below 50% (54% in 2010, 55% in 2009, 49% in 2008).

56 The number of staff per country is reported in brackets. This year 22% (43 individuals) of the WEOG professionals are French nationals. This figure is only slightly less than the combined figures of the next two WEOG States with nationals appointed to professional posts (the United Kingdom and the Netherlands). France accounts for 13% of the overall professional staff at the ICC. The top three States remain the same and in the same order as in 2010. This year, two countries have been excluded from the 'Top 5' list of staff by region: Australia and the United States of America.

57 The number of female staff per country is reported in brackets. Despite a slight decrease, France is still the country with the highest number of female appointees and has almost three times the number of female staff than the next country on the list, the United Kingdom. This year for the first time, with five female appointees each, Belgium and Italy have joined the 'Top 5' by gender in the WEOG region.

58 Nationals from the Africa region account for 17.5% of the overall number of professional staff at the ICC. This figure is slightly higher than in 2009 and 2010 (16%). For the fifth year in a row, Africa is the region with the highest percentage of male appointees to professional positions and with the highest regional male/female differential. In 2011, men represent 69.5% of the overall number of appointees from this region, a 5.5% decrease from last year. In 2009, this figure was 73%; in 2008, 70%; and in 2007, it was 64%. Two new States, The Gambia and Uganda, are represented in the 'Top 5' tier of African countries with appointees to the Court. Six new countries, Botswana, Côte d'Ivoire, Ghana, Mali, Mauritius and Zimbabwe, joined the 'Top 2' countries by gender (one female professional).

<b>GRULAC<sup>59</sup></b>	<b>10% overall (34 staff)</b>	<b>35% men (12)</b>	<b>65% women (22)</b>
<i>Group of Latin American &amp; Caribbean Countries</i>	<b>‘Top 5’ countries in the region</b> <i>(range from 1 – 6 professionals)</i>	<b>‘Top 4’ countries by gender</b> <i>(range from 1 – 4 female professionals)</i>	
	1 Argentina, Colombia [6]	1 Colombia [4]	
	2 Peru, Trinidad and Tobago [4]	2 Argentina, Brazil, Peru [3]	
	3 Brazil [3]	3 Costa Rica, Mexico, Trinidad and Tobago [2]	
	4 Chile, Costa Rica, Ecuador, Mexico, Venezuela [2]	4 Chile, Ecuador, Venezuela [1]	
	5 Bolivia [1]		

<b>Eastern Europe<sup>60</sup></b>	<b>7% overall (25 staff)</b>	<b>36% men (9)</b>	<b>64% women (16)</b>
	<b>‘Top 5’ countries in the region</b> <i>(range from 1 – 6 professionals)</i>	<b>‘Top 4’ countries by gender</b> <i>(range from 1 – 4 female professionals)</i>	
	1 Romania [6]	1 Romania [4]	
	2 Croatia [5]	2 Croatia, Serbia [3]	
	3 Serbia [4]	3 Bulgaria [2]	
	4 Bulgaria [2]	4 BiH, FYROM, Latvia, Russian Federation [1]	
	5 Albania, BiH, <sup>61</sup> FYROM, <sup>62</sup> Georgia, Latvia, Poland, Russian Federation, Ukraine [1]		

<b>Asia<sup>63</sup></b>	<b>7% overall (23 staff)</b>	<b>48% men (11)</b>	<b>52% women (12)</b>
	<b>‘Top 5’ countries in the region</b> <i>(range from 1 – 5 professionals)</i>	<b>‘Top 3’ countries by gender</b> <i>(range from 1 – 5 female professionals)</i>	
	1 Japan [5]	1 Japan [5]	
	2 Islamic Republic of Iran [4]	2 Singapore [2]	
	3 Singapore [3]	3 Cyprus, Islamic Republic of Iran, Lebanon, the Philippines [1]	
	4 Lebanon, Republic of Korea [2]		
	5 China, Cyprus, Jordan, Mongolia, Occupied Palestinian Territory, the Philippines, Sri Lanka [1]		

59 Nationals from the Group of Latin American and Caribbean Countries account for 10% of the overall staff at the ICC, 1% more than last year. For the fifth year in a row, women represent the majority of staff appointed from this region (65%), 2% more than last year (63%). In 2009, women constituted 62% of professionals appointed from this region; in 2008, 60% and in 2007, 56%. One new state, Bolivia, joined the ‘Top 5’ tier of GRULAC countries with appointees at the Court. One new state, Chile, joined the ‘Top 4’ tier of countries by gender.

60 Nationals from the Eastern European region account for 7% of the overall professional staff at the ICC. Representation of staff from this region has been static at around this level (7%) for the last four years. The percentage of women professionals from this region (64%) increased by 5% from 2010 (59%). Women have been the majority of appointees from this region since 2009. Two new states, Bulgaria and Latvia, joined the ‘Top 5’ tier of Eastern European countries with appointees at the Court. One new state, Latvia, is represented in the ‘Top 4’ list of countries by gender.

61 Bosnia and Herzegovina.

62 The Former Yugoslav Republic of Macedonia.

63 For the second year in a row, nationals from Asia account for 7% of the overall professional staff at ICC. In addition, the number of women appointed from this region increased by one individual. Female professionals are now slightly more than half of the total of professional appointees from Asia (52%). One new state, China, joined the ‘Top 5’ tier of Asian countries with appointees at the Court. China also joined the ‘Top 3’ list of countries by gender.

## Overall 'Top 10' – Region and Gender

### 'Top 10' countries

(range from 8 – 43 professionals)<sup>64</sup>

- 1 France [43]
- 2 United Kingdom [28]
- 3 The Netherlands [18]
- 4 Germany [16]
- 5 Canada [15]
- 6 Australia [13]
- 7 Belgium [12]
- 8 Italy [10]
- 9 Spain [9]
- 10 South Africa [8]

### 'Top 9' countries by gender

(range from 1 – 27 female professionals)<sup>65</sup>

- 1 France [27]
- 2 United Kingdom [11]
- 3 Australia, Germany, the Netherlands [7]
- 4 Spain, United States of America [6]
- 5 Belgium, Canada, Italy, Japan [5]
- 6 Romania, Colombia [4]
- 7 Argentina, Austria, Brazil, Croatia, Peru, Serbia [3]
- 8 Bulgaria, Costa Rica, Gambia, Greece, Kenya, Mexico, New Zealand, Sierra Leone, Singapore, South Africa, Trinidad and Tobago, Uganda [2]
- 9 BiH, Botswana, Chile, China, Côte d'Ivoire, Cyprus, Ecuador, FYROM, Ghana, Ireland, Islamic Republic of Iran, Latvia, Lebanon, Mali, Mauritius, the Philippines, Portugal, Russian Federation, Rwanda, Sweden, Switzerland, United Republic of Tanzania, Venezuela, Zimbabwe [1]

- 64 There are 10 countries represented in the 'Top 10' list in 2011, compared to 13 countries in 2010. The range, from 8 to 43 professionals, did not change significantly from last year (6 to 44). France is again the country with the highest number of professionals (43), one less than last year. Nine of the 10 countries listed in the 'Top 10' are from the WEOG region (90%). Last year, 10 out of 13 countries were from WEOG (77%). In 2009, this figure was 71%, and in 2008 it was 67%. WEOG countries occupy the first nine places on the list. The only non-WEOG country in the 'Top 10' is South Africa (Africa) with eight professionals. Last year, Africa was represented in the 'Top 10' by South Africa and Nigeria. While Eastern Europe was represented by Romania at number 10 last year, this year it is not represented at all. The Latin American and Caribbean region is not represented for the second year in a row, and Asia is not represented for the fourth year running.
- 65 There are 55 countries represented in the 'Top 9' list by gender. Last year, 48 countries were included in the 'Top 10' list. In 2008, there were 43 countries included in a 'Top 8' list. The range in 2011 is 1 to 27, compared with the range of 1 to 32 in 2010. In 2009, the range was from 1 to 30 female appointments. This is the fifth year in a row that France has ranked highest with 27 female professionals appointed to the Court, five less than in 2010. The percentage of French female professionals out of the total number of French appointees has decreased by 10% since 2010 (from 73% to 63%). WEOG countries occupy the first four places of the 'Top 9' list by gender. As in 2009 and 2010, the first non-WEOG country on the list is Japan (Asia – five female professionals) ranking number five overall on the list with Belgium, Canada and Italy (WEOG). The first five places on the list this year are occupied by 11 countries with Belgium, Italy and Japan being the new additions from the previous years. The countries included in the 'Top 9' by gender have changed since last year with the exclusion of Nigeria and Tunisia (Africa), and the inclusion of Botswana, Côte d'Ivoire, Ghana, Mali, Mauritius, Zimbabwe (Africa), China (Asia), Chile (GRULAC) and Latvia (Eastern Europe).

# Legal Counsel

## Appointments to the List of Legal Counsel<sup>66</sup>

	<i>men</i>	<i>women</i>
<b>Overall</b> (403 individuals on the List of Legal Counsel) <sup>67</sup>	<b>76.5%</b>	<b>23.5%</b>
<b>'Top 5'</b> <sup>68</sup>		
1 USA [47], 2 UK [45], 3 France [44], 4 DRC [38], 5 Belgium [25]		
<b>WEOG</b> <sup>69</sup> (59% of Counsel)	<b>77%</b>	<b>23%</b>
<b>'Top 5'</b>		
1 USA [47], 2 UK [45], 3 France [44], 4 Belgium [25], 5 Canada [19]		
<b>Africa</b> <sup>70</sup> (33% of Counsel)	<b>75%</b>	<b>25%</b>
<b>'Top 5'</b>		
1 DRC [38], 2 Kenya [19], 3 Cameroon, Senegal [12], 4 Mali [10], 5 CAR, Nigeria [6]		

*continues overleaf*

<sup>66</sup> Figures as of 26 July 2011. Information provided by the Counsel Support Section of the Office of the Registrar.

<sup>67</sup> In 2011, 403 individuals are on the List of Legal Counsel. Please note that for four of the appointees (1%), the gender has been indicated (male) but the nationality is unknown. Of the 403 individuals on the List, 95 are women (23.5%) and 308 are men (76.5%). This is the first time that the percentage of female lawyers appointed to the List of Legal Counsel has been above 20% since the List was opened in 2006. In 2010, women were 18% of the List of Legal Counsel, 19% in 2009 and 20% in 2008. The List of Legal Counsel is overwhelmingly comprised of male lawyers with more than three times the number of men than women appointed to the List.

<sup>68</sup> The number of appointees is reported in brackets.

<sup>69</sup> According to these figures, 59% (237) of appointees to the List of Legal Counsel are from the WEOG region. This is a 5.5% decrease from 2010. This is the largest decrease in the percentage of WEOG appointees to the List of Legal Counsel since 2006 and is offset by slight increases in appointees from Africa, Asia and Latin America and the Caribbean. The country with the highest number of appointees across all regions continues to be the USA, with 47 appointees in 2011. As in previous years, appointees from the USA, which is not a State Party, have been included in the calculation for the WEOG region. The composition of appointees changed slightly in 2011 with women comprising 23% of WEOG Counsel. This represents a modest increase of 1.5% from 2010.

<sup>70</sup> According to these figures, 33% (134) of appointees to the List of Legal Counsel are from Africa. For the third year in a row, the percentage of individuals appointed from this region has increased (26% in 2008, 28% in 2009 and 30% in 2010). Appointments of nationals from Algeria, Cameroon, Arab Republic of Egypt, Mauritania, Morocco, Rwanda, Sudan and Zimbabwe, which are not States Parties, have been included in the calculation for the Africa region. This is the first time that the percentage of women appointed to the List of Legal Counsel from this region has increased since 2006. This year, the number of African female appointees (25%) doubled when compared to 2010 (12%). Despite this progress, appointees from Africa are overwhelmingly male lawyers (75%). From the seven Situation countries, only the DRC is in the 'Top 5' list of countries of overall appointees. In total, 68 appointees (17%) are from four of the countries within which the ICC is conducting investigations. The breakdown is as follows: 19 from Kenya, six from CAR, four from Uganda, and one from Sudan. This is the first year that a Sudanese lawyer (male) has been appointed to the List of Legal Counsel. There are no appointees from Libya nor Côte d'Ivoire which are both new situations opened for investigation by the ICC in 2011. Of the 68 appointees from Situation countries, nine are women (four from DRC, two from Kenya, two from CAR and one from Uganda). This figure represents 2% of the total List of Counsel and 13% of the appointees from Situation countries.

# Legal Counsel CONTINUED

Appointments to the List of Legal Counsel <i>continued</i>	<i>men</i>	<i>women</i>
<b>Eastern Europe</b> <sup>71</sup> (2% of Counsel) Only eight appointments from Eastern Europe: Serbia [3], FYROM [2], Croatia, Slovenia, Romania [1 appointee each]	<b>62.5%</b>	<b>37.5%</b>
<b>Asia</b> <sup>72</sup> (3% of Counsel) Only nine appointments from Asia: Malaysia [3], India, Kuwait, Pakistan, Japan, Singapore and the Philippines [1 appointee each]	<b>67%</b>	<b>33%</b>
<b>GRULAC</b> <sup>73</sup> (2% of Counsel) Only five appointments from GRULAC: Argentina [3] Brazil [2], Mexico, Trinidad and Tobago [1 appointee each]	<b>100%</b>	<b>0%</b>

71 According to these figures, 2% (eight) of appointees to the List of Legal Counsel are from Eastern Europe. This figure is the same as in 2010. In addition, the gender figures are also exactly the same as in 2010 with 62.5% male and 37.5% females appointed from the region. Although the figures are static for Eastern Europe, this region has the highest proportion of women on the List of Legal Counsel for the fifth year in a row.

72 According to these figures, 3% (12) of appointees to the List of Legal Counsel are from the Asia. This represents 1% more than in 2010. Appointments of nationals from India, Malaysia, Kuwait, Pakistan and Singapore, which are not States Parties, have been included in the calculation for the Asian region. For the first time, three women from Asia have been appointed to the List of Legal Counsel (two from Malaysia and one from India).

73 According to these figures, 2% (eight) of appointees to the List of Legal Counsel are from GRULAC. This represents a slight increase from 2010 (1.5%). There continue to be no women lawyers from the GRULAC region appointed to the List of Legal Counsel.



<b>Appointments to the List of Assistants to Counsel</b> <sup>74</sup>	<i>men</i>	<i>women</i>
<b>Overall</b> (115 individuals on the List of Assistants to Counsel) <sup>75</sup>	<b>43.5%</b>	<b>56.5%</b>
<b>'Top 5'</b> 1 France (14 appointees) 2 Cameroon (13 appointees) 3 DRC, Kenya (12 appointees each) 4 UK (7 appointees) 5 Canada, USA (6 appointees)		
<b>WEOG</b> <sup>76</sup> (48.6% of Assistants to Counsel)	<b>37.5%</b>	<b>62.5%</b>
<b>'Top 5'</b> 1 France [14] 2 UK [7] 3 Canada [6] 4 Belgium, Italy, USA [5] 5 Germany [4]		
<b>Africa</b> <sup>77</sup> (47.8% of Assistants to Counsel)	<b>47%</b>	<b>53%</b>
<b>'Top 5'</b> 1 Cameroon [13] 2 DRC, Kenya [12] 3 South Africa [3] 4 Nigeria, Republic of the Congo, Uganda [2] 5 Benin, CAR, Chad, Côte d'Ivoire, Arab Republic of Egypt, Ghana, Guinea, Rwanda, Zimbabwe [1 appointee each]		
<b>Eastern Europe</b> <sup>78</sup> (1.75% of Assistants to Counsel) – 2	<b>50%</b>	<b>50%</b>
Only two appointments from Eastern Europe: Hungary, Ukraine [1 appointee each]		
<b>Asia</b> <sup>79</sup> (1.75% of Assistants to Counsel) – 2	<b>100%</b>	<b>0%</b>
Only two appointments from Asia: India, Sri Lanka [1 appointee each]		

74 Figures as of 26 July 2011. Information provided by the Counsel Support Section of the Office of the Registrar.

75 In 2011, 115 individuals, of whom 56.5% are female professionals, have been appointed to the List of Assistants to Counsel. Women professionals were also the majority on this list in 2007 (64% women), the year in which figures for this List were last made available to the Women's Initiatives for Gender Justice. Since 2007 there has been an increase of 100 individuals to the List of Assistants to Counsel.

76 According to these figures, 48.6% (56) of appointees to the List of Assistants to Counsel are from the WEOG region. The country with the highest number of appointees across all regions is France with 14 appointees, of whom 11 (73%) are women. Appointees from the USA, which is not a State Party, have been included in the calculation for the WEOG region. WEOG has the highest proportion of women appointed to the List of Assistants to Counsel with 62.5% female professionals appointed to the List this year.

77 According to these figures, 47.8% (55) of appointees to the List Assistants to Counsel are from Africa. Appointees from Cameroon, Arab Republic of Egypt, Côte d'Ivoire, Rwanda, and Zimbabwe, which are not States Parties, have been included in the calculation for the Africa region. Since 2007 there has been an increase of 54 individuals from this region appointed to the List of Assistants to Counsel. Women represent 53% of the total number of appointees from the Africa region. Out of the seven Situation countries, five are represented on the List of Assistants to Counsel: the DRC and Kenya, with 12 appointments each, Uganda, with two appointees, and CAR and Côte d'Ivoire with one appointee each. Of the total of 27 appointees from these countries, 14 are women (52% – six from the DRC and Kenya and two from Uganda).

78 According to these figures, 1.75% (two) of appointees to the List of Assistants to Counsel are from Eastern Europe. Female professionals appointed to the List of Assistants to Counsel are 50% of the total from this region.

79 According to these figures, 1.75% (two) of the appointees to the List of Assistants to Counsel are from Asia. There are no female professionals appointed to the List of Assistants to Counsel from this region.

# Professional Investigators

## Appointments to the List of Professional Investigators<sup>80</sup> *men* *women*

**Overall** (28 individuals on the List of Professional Investigators)<sup>81</sup> **96.5%** **3.5%**

### 'Top 3'<sup>82</sup>

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

80 Figures as of 26 July 2011. Information provided by the Counsel Support Section of the Office of the Registrar.

81 Currently there are 28 individuals on the List of Professional Investigators. Of these, 27 are men (96.5%) and one is a woman (3.5%). The female investigator is from Eastern Europe (Poland). In 2007, when these figures were last made available to the Women's Initiatives for Gender Justice, there was also only one woman on the List of Professional Investigators, which at that time represented 8% out of 13 individuals appointed to the List. This indicates that all the individuals appointed to this List since 2007 have been men.

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

# Trust Fund for Victims

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

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

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

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

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

83 Rule 98 (2), (3), (4) of the RPE.

84 Rule 98 (5) of the RPE.

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

86 *Ibidem*.

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

The total amount of funds available in the TFV's Euro bank accounts as of 30 June 2011 was €3,491,210.83.<sup>88</sup> During the period from 1 July 2010 to 30 June 2011, the TFV received €1,943,113.99<sup>89</sup> as voluntary contributions from 14 States Parties<sup>90</sup> and €9,404.76 from institutions and individuals.<sup>91</sup> In-kind and/or matching donations from implementing partners amounted to €450,040 for the same period and the income from interest was €26,097.06.<sup>92</sup> Germany is the TFV's largest single contributing country with €1,714,800 contributed since 2006.<sup>93</sup>

The total funds obligated for grants in the Democratic Republic of Congo (DRC) and northern Uganda since 2007/2008 amount to €5,344,545. In addition, €600,000 has been allocated to activities in the Central African Republic (CAR). The current reserve to supplement orders for reparations from the Court amounts to €1,000,000.<sup>94</sup>

The TFV has 34 approved projects, of which 28 are currently active in the DRC and northern Uganda.<sup>95</sup> Of the total active projects, 27 were extended at the beginning of 2011.<sup>96</sup>

87 Ibidem.

88 Figures as of 30 June 2011. Email communication with the Secretariat of the Trust Fund for Victims, 18 October 2011. Please note that this amount includes €1,000,000 as reserves to supplement orders for reparations from the Court; and €600,000 for the sexual and gender-based violence programme in CAR.

89 Figures as of 30 June 2011. Email communication with the Secretariat of the Trust Fund for Victims, 18 October 2011.

90 *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2010 to 30 June 2011*, ICC-ASP/10/14, 1 August 2011, p 11 of the French version.

91 Figures as of 30 June 2011. Email communication with the Secretariat of the Trust Fund for Victims, 18 October 2011.

92 *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2010 to 30 June 2011*, ICC-ASP/10/14, 1 August 2011, p 7 of the French version.

93 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 35.

94 Figures as of 30 June 2011. Email communication with the Secretariat of the Trust Fund for Victims, 16 September 2011.

95 Twelve in DRC and 16 in Northern Uganda. Of the six inactive projects, two are on-hold (Uganda, TFV/UG/2007/R1/017 and TFV/UG/2007/R1/023), three have been closed and the beneficiaries transferred to two other projects (DRC, TFV/DRC/2007/R1/026 and TFV/DRC/2007/R1/011 were included in TFV/DRC/2007/R2/030; and TFV/DRC/2007/R2/028 has been taken over by TFV/DRC/2007/R2/029), and one (TFV/DRC/2007/R1/004) has reached its closing date. Email communication with the Trust Fund Secretariat, 14 September 2010; *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 4 and 8.

96 While usually the Fund and implementing partners sign year-long contracts, projects can be extended depending on the availability of funds to provide beneficiaries with multi-year assistance. *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 4.

The project extensions allowed for an increase of 11,000 direct beneficiaries in both the DRC and northern Uganda since the beginning of 2011 when beneficiaries were estimated at 70,200.<sup>97</sup> Given the difficulties and inconsistencies in counting indirect beneficiaries, the Fund has ceased reporting on them to focus on different categories of direct beneficiaries.<sup>98</sup>

Currently, victims<sup>99</sup> benefiting from the Fund's projects are grouped into six categories, namely:

- Victims of sexual and gender-based violence (SGBV), both male and female, including child-mothers;
- Widows and widowers;
- Former child soldiers and abducted youth;
- Orphans and vulnerable children, including children born out of rape;
- Victims of physical and mental trauma, including victims of torture and wounded civilians;
- Family members of victims and victims not falling in any of the other categories; and
- Community peacebuilders, defined as 'traditional leaders and other community members reached through the TFV's reconciliation activities'.<sup>100</sup>

Out of the total number of beneficiaries, 53% are in the DRC and 47% are in northern Uganda. In 2010, 42% of beneficiaries were reached by projects in northern Uganda and 58% in the DRC. As in 2010, the vast majority of victims benefitting from currently active projects are community peacebuilders (75%, 61,348 in total of which 26,144 are in northern Uganda and 35,204 are in the DRC). This category is followed by that of victims of sexual and gender-based violence, constituting almost 7% of the total number of beneficiaries overall (5,392 of which 2,611 are in northern Uganda and 2,718 are in the DRC).<sup>101</sup>

In September 2008, the Board of Directors of the TFV launched a global appeal to assist 1.7 million victims of sexual violence over three years. In response to this appeal, earmarked donations amounting to €1,740,000 have been received from the Principality of Andorra, Finland, Norway, Denmark and Germany.<sup>102</sup> Norway is the TFV's single largest supporter of the sexual and gender-based violence appeal.<sup>103</sup> Out of the total contributions received by the Fund, 43.5% were earmarked for sexual and gender-based violence projects in 2009 and 37% in 2010.<sup>104</sup>

97 *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2010 to 30 June 2011*, ICC-ASP/10/14, 1 August 2011, p 3 of the French version.

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

99 As defined in Rule 85 of the RPE.

100 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 6.

101 *Ibidem*.

102 *Ibidem*, p 36.

103 *Ibidem*. Norway contributed €253,500 in April 2011 and a total of €698,400 since 2008.

104 Email communication with the Secretariat of the Trust Fund for Victims, 18 October 2011.

As of 31 July 2011, nine sexual and gender-based violence projects— eight in the DRC and one in Uganda—are being supported by the earmarked funding.<sup>105</sup> The estimated number of beneficiaries reached by earmarked SGBV projects in 2011 is 32,499 (28,143 in northern Uganda<sup>106</sup> and 4,356 in DRC<sup>107</sup>). As in 2010, the majority of the beneficiaries reached in northern Uganda are community peacebuilders (26,144), followed by victims of SGBV (1,999).<sup>108</sup> These figures were respectively 17,732 and 1,670 in 2010.<sup>109</sup> In the DRC, it is estimated that 725 beneficiaries belong to the category of community peacebuilders while the majority of individuals directly benefiting from earmarked SGBV projects are victims of SGBV (2,738), followed by children of SGBV victims (850) and child mothers (43).<sup>110</sup> In 2010, earmarked projects in the DRC reached 725 community peacebuilders, 2,158 victims/survivors of SGBV, 907 children of SGBV victims and 187 child mothers.<sup>111</sup>

In addition to the funds received in response to the September 2008 appeal to assist victims of sexual violence, in 2010, the Netherlands pledged USD57,000 for a project focused on child soldiers and Germany pledged €155,000 to support a Legal Advisor to assist with preparations for administering reparations. In 2011, Germany pledged an additional €110,000 to support the Legal Advisor through to the end of the year.<sup>112</sup>

A three-month Call for Expressions of Interest to support victims of sexual and gender-based violence in CAR was launched on 6 May 2011. The final list of submissions will be presented to the Board of Directors following the technical review by the Secretariat of the Fund. Following the Board approval, a filing will be initiated with the Pre-Trial Chamber for observations from all the parties to the Case and for final approval by the Chamber. It is expected that activities in CAR will start at the beginning of 2012.<sup>113</sup>

The goal of the Call for Expressions of Interest is to 'provide integrated rehabilitation assistance to victim survivors of SGBV, their families and affected communities so that they are able to move from victim-hood to stability as survivors.'<sup>114</sup>

At the beginning of 2010, the TFV initiated a longitudinal evaluation of a sample of 2,585 victims benefitting from the Fund's assistance throughout northern Uganda and the DRC to improve the understanding of the impact that the TFV is having on affected

105 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 38-41.

106 *Ibidem*, p 7. Please note that this figure includes both new and old beneficiaries.

107 Email communication with the Secretariat of the Trust Fund for Victims, 21 October 2011.

108 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 7.

109 *Ibidem*.

110 Email communication with the Secretariat of the Trust Fund for Victims, 21 October 2011.

111 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 7.

112 Email communication with the Secretariat of the Trust Fund for Victims, 16 September 2011.

113 *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2010 to 30 June 2011*, ICC-ASP/10/14, 1 August 2011, p 6 of the French version.

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

communities.<sup>115</sup> As reported by the Trust Fund for Victims in its Fall 2010 *Programme Progress Report*,<sup>116</sup> the preliminary findings show three main issues:

- The impact of violence has a gender aspect. According to the preliminary findings made public by the Fund, female beneficiaries of its projects ‘... have experienced more severe psychological and social consequences. This, in turn, might relate to how women approach issues of rehabilitation, reparation and reconciliation’,<sup>117</sup>
- The interviewees’ views on reparations and justice are influenced by their daily needs, the kind of violence experienced and its consequences. According to the preliminary findings made public by the Fund, there seems to be a link between ‘... women and girls’ attitude and their more severe self-reported psychological symptoms and more negative relations *vis-à-vis* their families and communities’,<sup>118</sup>
- According to the Trust Fund for Victims, the preliminary findings also show that the beneficiaries that recognise the assistance they are receiving as coming from the TFV, view it as a form of recognition from the Court.<sup>119</sup>

The full report of the evaluation will be made public before the end of 2011.

The Trust Fund has identified its priorities for 2012 as improving its fundraising results and financial reporting, conducting an assessment of the Kenyan Situation, initiating activities in CAR supporting victims of sexual and gender-based violence, evaluating activities in the DRC and northern Uganda, analysing and publishing the results of the longitudinal study, and preparing for Court-ordered reparations.<sup>120</sup>

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115 *Learning from the TFV's Second Mandate: from Implementing Rehabilitation to Assistance to Reparations, Programme Progress Report*, Fall 2010, p 11.

116 *Learning from the TFV's Second Mandate: from Implementing Rehabilitation to Assistance to Reparations, Programme Progress Report*, Fall 2010.

117 *Ibidem*, p 11.

118 *Ibidem*, p 12.

119 *Ibidem*.

120 *Proposed Budget Programme for 2012 of the International Criminal Court*, ICC-ASP/10/10, 21 July 2010, p 147.

## TFV Projects 2010-2011<sup>121</sup>

### Northern Uganda

Of the 18 projects approved, two are on-hold and awaiting proposal.<sup>122</sup> The total obligated funds since 2007/2008 amount to €1,621,206.<sup>123</sup> Out of the 18 approved projects, one uses SGBV earmarked funds<sup>124</sup> and two are projects funded through 'common basket' funds whose beneficiaries include SGBV victims/survivors.<sup>125</sup> The remaining projects are providing psychological and physical rehabilitation and material support to adults and children, including women and girls, as part of the integrated approach. One-third of active projects in northern Uganda deal with victims' medical rehabilitation (five out of 16).<sup>126</sup> The number of victims benefitting from TFV projects is 38,625. Of these, 68% are community peacebuilders. The second largest category is that of victims of physical and/or mental trauma (9%), closely followed by the category of victims' family members and other victims (8%).<sup>127</sup>

### DRC

There are 16 projects approved, of which 12 are active.<sup>128</sup> The total obligated funds since 2007/2008 amount to €3,723,339.<sup>129</sup> Since the beginning of the year, seven projects have been extended and scaled-up to continue providing assistance to victim/survivors.<sup>130</sup> Out of the 16 projects approved, eight,<sup>131</sup> representing 50% of those approved, use SGBV earmarked funding. The remaining projects provide psychological and physical rehabilitation and material support to adults and children, including women and girls, as part of the integrated approach. The number of victims benefitting from TFV projects is 42,891. Of these, 82% are community peacebuilders. The second largest category of victims is that of orphans and vulnerable children (7%) followed by SGBV victims (6.5%).<sup>132</sup>

121 As of 30 June 2011.

122 Projects TFV/UG/2007/R1/017 and TFV/UG/2007/R1/023.

123 Email communication with the Secretariat of the Trust Fund for Victims, 16 September 2011.

124 Project TFV/UG/2007/R2/040.

125 TFV/UG/2007/R1/020 supporting former girl soldiers of whom 267 are child mothers; and TFV/UG/2007/R2/038 targeting around 2,600 victims at the community level of whom 431 are victims/survivors of SGBV.

126 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 12.

127 *Ibidem*, p 6.

128 Of the four inactive projects, three have been closed and the beneficiaries transferred to two other projects (DRC, TFV/DRC/2007/R1/026 and TFV/DRC/2007/R1/011 were included in TFV/DRC/2007/R2/030; and TFV/DRC/2007/R2/028 has been taken over by TFV/DRC/2007/R2/029), and one (TFV/DRC/2007/R1/004) is closed having reached its closing date. Email communication with the Secretariat of the TFV, 16 September 2011.

129 Email communication with the Secretariat of the Trust Fund for Victims, 16 September 2011.

130 TFV/DRC/2007/001-CRS; TFV/DRC/2007/036-CRS; TFV/DRC/2007/R1/021-ALT; TFV/DRC/2007/R1/022-AMAB; TFV/DRC/2007/R2/027-RHA; and TFV/DRC/2007/R2/030-KAF.

131 TFV/DRC/2007/R1/001; TFV/DRC/2007/R2/036; TFV/DRC/2007/R1/021; TFV/DRC/2007/R1/022; TFV/DRC/2007/R2/031; TFV/DRC/2007/R2/033; TFV/DRC/2007/R2/043; and TFV/DRC/2007/R2/029.

132 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 6.



## TFV Projects 2010-2011 *continued*

### CAR

On 30 October 2009, the TFV notified Pre-Trial Chamber II of its proposed activities in CAR as established by Rule 50 of the Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3. The Chamber responded on 16 November 2009 requesting that the Board of Directors officially inform the Pre-Trial Chamber when a decision about the specific activities and projects to develop in CAR was made. A three-month Call for Expressions of Interest to 'provide integrated rehabilitation assistance to victim survivors of SGBV, their families and affected communities so they are able to move from victim-hood to stability as survivors'<sup>133</sup> was launched on 6 May 2011 and closed on 5 August 2011. The final list of submissions will be presented to the Board of Directors following the technical review by the Secretariat of the Fund. Following the Board approval, a filing will be initiated with the Pre-Trial Chamber for observations from all the parties to the Case and for final approval by the Chamber. It is expected that activities in CAR will start at the beginning of 2012.<sup>134</sup>

### Darfur

There were no projects in 2011.

### Kenya

There were no projects in 2011.

### Libya

There were no projects in 2011.<sup>135</sup>

### Côte d'Ivoire

There were no projects in 2011.<sup>136</sup>

<sup>133</sup> *ICC's Trust Fund for Victims Launches Expression of Interest Supporting Victim Survivors of Sexual and Gender-Based Violence in the Central African Republic*, Trust Fund for Victims Press Release, 6 May 2011, available at <[http://www.trustfundforvictims.org/sites/default/files/imce/CAR\\_Press\\_Release.pdf](http://www.trustfundforvictims.org/sites/default/files/imce/CAR_Press_Release.pdf)>, last consulted on 7 September 2011.

<sup>134</sup> *Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2010 to 30 June 2011*, ICC-ASP/10/14, 1 August 2011, p 6 of the French version.

<sup>135</sup> The Libya Situation was referred to the ICC by the UN Security Council under Article 13(b) of the Rome Statute on 26 February 2011. The ICC Prosecutor opened investigations in the Libya Situation on 3 March 2011.

<sup>136</sup> Pre-Trial Chamber III authorised the ICC Prosecutor to open investigations in Côte d'Ivoire on 3 October 2011. Côte d'Ivoire is the seventh Situation under investigation by the ICC.

# Outreach Programme

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**The ICC defines outreach as one of its three external communication functions, in addition to external relations and public information. All of these functions are carried out by the Public Information and Documentation Section (PIDS). More specifically, the Outreach programme is managed by the Outreach Unit within PIDS.**

The Court's *Integrated Strategy for External Relations, Public Information and Outreach* (2005)<sup>137</sup> defines outreach as the 'process of establishing sustainable, two-way communication between the Court and communities affected by Situations that are the subject of investigations or proceedings. It aims to provide information, promote understanding and support for the Court's work, and to provide access to judicial proceedings.'<sup>138</sup>

According to the Outreach Unit, a gender perspective is included in the messages it delivers during face-to-face sessions or through media. When outreach activities are specifically conducted for women, information focused on explaining charges of interest to this group, namely sexual and gender-based violence, is included.

In 2008, the Unit developed guidelines for Outreach Officers on how to speak about gender-based crimes. The guidelines were developed particularly for the DRC and CAR, but are used in all the Situations in which the Outreach Unit operates.<sup>139</sup> The guidelines give four key messages that have to be communicated when addressing the subject of sexual and gender-based violence:

- 'Acts of sexual and gender-based violence have a dramatic effect in the communities; sexual and gender-based violence represents a wide variety of crimes;
- Acts of sexual and gender-based violence are part of the most serious crimes against the international community as a whole; acts of sexual and gender-based violence shall not remain unpunished;
- Victims of sexual and gender-based violence have rights even though they hardly manage to exercise them; and
- Sexual and gender-based violence requires a specific prosecutorial strategy.'<sup>140</sup>

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137 *Integrated Strategy for External Relations, Public Information and Outreach*, at <[http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402\\_IS\\_En.pdf](http://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf)>, last consulted on 29 September 2011.

138 *Ibidem*, p 3.

139 Email communication with the Outreach Unit, 13 September 2011.

140 Email communication with the Outreach Unit, 22 September 2009.

According to the Unit, sessions dedicated only to women are usually informal and conducted by female facilitators to allow women to freely express their ideas, convey their concerns and report their stories.<sup>141</sup> The methodology employed by the Unit to reach women victims involves their field staff (or Situation specific staff) partnering with local NGOs and women's groups, international organisations and community leaders.<sup>142</sup> In the DRC for example, the Unit reports that the field-based team has been partnering with *Association des Femmes des Medias* (AFEM), a local female media organisation based in South Kivu, to broadcast ICC-related programmes on their radio station. The DRC Outreach team has reportedly also been working in partnership with the Gender Unit of the UN Stabilisation Mission (MONUC) and the international NGO V-Day. In CAR, the Outreach Unit works with several women's associations to involve them in outreach activities. The partnering with women's groups is also utilised in relation to Sudan and Uganda.<sup>143</sup>

Based on information from the Outreach Unit, outreach programmes have been developed for five of the seven Situations currently under investigations: CAR, the DRC, Darfur, Uganda, and Kenya.<sup>144</sup> According to the Outreach Unit, from 1 October 2010 to 30 July 2011, the Unit held a total of 450 activities in connection with five out of the six Situations under investigation by the ICC.<sup>145</sup> Of these, 24% (108) were held in Uganda, 31.5% (142) in the DRC, 16.5% (74) in relation to the Situation in Darfur,<sup>146</sup> 23.5% (106) in CAR and 4.5% (20) in Kenya. The activities reached a total of 32,324 people, of which 8,302 were women (26%).<sup>147</sup>

Of the total number of activities, 40 (9%) were directed exclusively towards women in CAR, the DRC, Sudan and Uganda. Last year,<sup>148</sup> 422 meetings were held for 46,499 beneficiaries of whom 25% were women.<sup>149</sup>

As in previous years, outreach activities focused largely on the DRC and Uganda where 250 outreach activities (55.5%) out of the total 450 were carried out. This represents

141 According to the Outreach Unit, in the DRC, for example, women participating in 'mixed' interactive meetings ask considerably less questions than those attending women-only sessions and do not share their stories as easily as when only a female audience is participating in the meeting. Email communication with the Outreach Unit, 5 September 2011.

142 Email communication with the Outreach Unit, 5 September 2011.

143 Email communication with the Outreach Unit, 5 September 2011.

144 Please note that no information is available regarding the number of female participants in outreach events in Kenya; and no interactive sessions exclusively for women have been organised in Kenya during the period relevant to this report.

145 Email communication with the Outreach Unit, 13 September 2011. At 30 July 2011, there were six Situations under ICC investigation. On 3 October 2011, Pre-Trial Chamber III authorised the ICC Prosecutor to open investigations in Côte d'Ivoire. Based on the raw figures provided by the Outreach Unit, the Women's Initiatives for Gender Justice calculated that an average of 45 events were organised every month, with the monthly average figures for activities per Situation as follows: 11 meetings per month in Uganda; 14 in the DRC; more than seven in relation to the Situation in Sudan; more than 10 in CAR; and two in Kenya.

146 Please note that the Outreach Unit carries out its activities in Sudanese refugee camps in Chad and with the Sudanese diaspora in Europe. No outreach activity is carried out within Sudan.

147 Email communication with the Outreach Unit, 13 September 2011. The number of women beneficiaries of the outreach sessions conducted in Kenya was unavailable.

148 Please note that figures related to 2010 consider a one-year period, from 1 October 2009 and 1 October 2010.

149 Email communication with the Outreach Unit, 30 September 2010.

a significant decrease from 2010 when 84% of the total activities were carried out in these two Situation countries. There was an increase in activities in CAR with 106 in total (23.5%), which is twice the number of activities carried out in 2010. In relation to the Darfur Situation, 74 meetings were organised with Sudanese refugees in Chad and the diaspora in Europe,<sup>150</sup> 19 more than in 2010. According to the Outreach Unit, 457 women out a total of 2,709 participants, attended Sudan-related outreach activities in 2011. Although this number is low, this figure represents a significant increase in the actual number of women included in activities in 2010 (177). In Kenya, the Outreach unit organised 20 sessions. No information on the number of women attendees is available.

Out of the four Situations for which figures on attendance by women are available, activities in CAR have the strongest participation of women with 44% of participants attending interactive meetings. In the DRC, 35% of attendees were women. For activities in relation to the Darfur Situation, women were 17% of attendees. In Uganda, 7% of attendees at outreach activities were women. In comparison with 2010, there has been a decrease in the percentage of women attending outreach activities in all the Situations except for Darfur, where there was a 7% increase in women's attendance (17% in 2011 compared to 10% in 2010). The percentage of women attending outreach activities decreased by 5% in the DRC, by 3% in Uganda and by 2% in CAR.

The Unit estimates that a potential audience of 74,800,000 people across the five Situations in which outreach activities are carried out received information about the Court through radio and TV programmes and printed publications every month during the period under consideration.<sup>151</sup> The estimated potential audience between 1 October 2009 and 1 October 2010 was 70,000,000.<sup>152</sup>

The PIDS was involved in developing and launching the *Calling African Female Lawyers* campaign. The campaign, jointly launched by the ICC and the International Bar Association in May 2010, was extended throughout 2011. On 26 May 2011, a similar campaign, *Calling Arab Counsel*, was launched in Doha, Qatar, to increase the number of Arabic speaking lawyers authorised to practice at the Court.<sup>153</sup> This campaign does not include an explicit objective to increase the number of Arabic speaking women, nor women from the MENA region and larger Arab world.

150 Please note that the breakdown by location of outreach activities in relation to the Situation in Darfur made available to the Women's Initiatives for Gender Justice refers to the period from 1 October 2010 to 30 September 2011. According to the Unit, between 1 October 2010 and 30 September 2011, a total of 86 outreach activities were carried out of which 20 (23%) were in Chad and 66 (77%) were held in Europe with the Sudanese diaspora. Out of the total number of events organised in Chad, 13 were public events held in refugee camps and seven were private sessions held in Abéché and N'Djamena. With regard to the meetings in Europe, 12 out of 66 were public events and the remaining 54 were private sessions. Meetings with the diaspora in Europe took place in the Netherlands, France, Germany, the UK and Ireland. In 2010, 55 outreach activities were carried out in relation to the Situation in Darfur, of which 22% (12) were held in Chad. Figures as of 30 September 2011. Email communication with the Outreach Unit, 25 October 2011.

151 Email communication with the Outreach Unit, 13 September 2011.

152 Email communication with the Outreach Unit, 30 September 2010.

153 *ICC launches campaign to encourage Arab counsel to practice before the Court*, ICC Press Release, ICC-CPI-20110526-PR676, 26 May 2011, available at <<http://www.icc-cpi.int/NR/exeres/6AA892F9-ED30-4D19-931B-2632D66692FF.htm>>, last consulted on 13 October 2011. Further information about these campaigns can be found in the *Trends Section – List of Legal Counsel and Assistants to Counsel* of this Report.

## Outreach activities 2010-2011<sup>154</sup>

### Uganda

The four staff members<sup>155</sup> of the Outreach field office in Uganda organised 108 interactive activities in the period under consideration. In 2010, the Unit organised 165 interactive sessions. The meetings were attended by a total of 11,194 people, almost 50% less than in 2010 when there were 22,984 participants. According to the Outreach Unit, 786 women (7%) attended outreach activities through what the Unit calls its 'gender outreach programme'. This figure is more than three times less than in 2010 when, according to the Outreach Unit, 2,397 women attended interactive sessions in Uganda. The Unit estimates that a potential audience of 19 million people were reached on a monthly basis through information distribution strategies utilising different media.

### DRC

The six staff members of the Outreach field office organised a total of 142 interactive sessions in the period under consideration of which 16 were exclusively for women (11%). Last year, there were only five sessions organised exclusively for women. A total of 10,026 people participated in these meetings, of which 35% (3,526) were women. This represents a 5% decrease since 2010 in the number of women who attended outreach activities in the DRC. The Unit estimates that a potential audience of 25 million people were reached on a monthly basis through information distribution strategies utilising different media.

### CAR

The three staff members based in CAR organised a total of 106 interactive sessions attended by 8,079 people. Of these, 44% were women. In 2010, women who attended interactive sessions were 46% of the total. According to information provided by the Unit, in 2011, 72% of activities were carried out in the interior of the country. Outreach activities were regularly carried out in each location every two to three months and held only in Sango, the local language. The Unit estimates that a potential audience of 800,000 people were reached on a monthly basis through information distribution strategies utilising different media.

<sup>154</sup> Figures as of 30 July 2011. Information provided by the Outreach Unit of the ICC. Please note that while 2011 figures refer to a 10-month period (from 1 October 2010 to 30 July 2011), 2010 figures refer to a full year period (from 1 October 2009 to 1 October 2010).

<sup>155</sup> Please note that, as of July 2011, the Outreach Unit has three staff members in Uganda. Email communication with the Outreach Unit, 13 September 2011.

## Outreach activities 2010-2011 *continued*

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### Sudan

The Outreach Unit does not have any staff based in Chad. One staff member, based in The Hague, is responsible for outreach activities in relation to the Darfur Situation. According to the Unit, a total of 2,709 individuals participated in the 74 interactive sessions organised in refugee camps in Chad and with the Sudanese diaspora in Europe in the period under consideration.<sup>156</sup> Out of the total sessions carried out in relation to the Darfur Situation, 11% were organised exclusively for women. According to the Unit, in 2011 there was a significant increase in the number of women attending sessions organised both in the Chadian refugee camps (150 in 2010 compared to around 400 in 2011) and within the Sudanese diaspora in Europe (women were less than 5% of the total participants in 2010 and more than 10% in 2011). Female participants represent 17% of the total, a 7% increase from 2010. The Unit estimates that a potential audience of 10 million people were reached on a monthly basis through information distribution strategies utilising different media.

### Kenya

The Unit began its activities in Kenya in December 2009. Currently the Outreach Unit has one staff member based in the country. A total of 20 interactive sessions were organised with an attendance of 316 people. According to the Unit, sessions exclusively engaging women will take place at a later stage following the finalisation of the first three phases of the implementation of Outreach activities in the country.<sup>157</sup> The Unit estimates that a potential audience of 20 million people were reached on a monthly basis through information distribution strategies utilising different media.

### Libya<sup>158</sup>

No outreach activities were carried out in Libya in the period under consideration. The Unit is in the process of recruiting two temporary staff members, based in The Hague.

### Côte d'Ivoire<sup>159</sup>

No outreach activities were carried out in Côte d'Ivoire in the period under consideration.

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156 Please see footnote 148 for a breakdown of outreach activities per location as of 30 September 2011.

157 The phases are: assessment of the Kenya Situation; training of media on the Court; and use of media to inform the public about the ICC and the status of the Kenya Situation. Email communication with the Outreach Unit, 5 September 2011.

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

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

# Office of the Public Counsel for Victims<sup>160</sup>

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The Office of the Public Counsel for Victims (OPCV) was created on 19 September 2005 pursuant to Regulation 81(1) of the Regulations of the Court<sup>161</sup> to support the legal representatives of victims and victims themselves through legal research and advice, as well as by appearing in Court in respect of specific issues.<sup>162</sup> Regulation 80(2) establishes also that a Chamber can appoint Legal Counsel from the OPCV to represent a victim. Moreover, victims can decide themselves to be represented by the OPCV. The Office is also responsible for protecting the interests of applicants (potential victims) during the application process and before they have been formally recognised as victims by a Chamber.

In summary, the OPCV performs the following roles:

- 1 It protects the interests of victim applicants before they have been formally recognised as victims by a Chamber;
- 2 It assists the legal representatives of victims by providing legal advice and research if so required;
- 3 It can be asked by a victim's legal representative to stand in Court as *ad hoc* Counsel on specific issues or during specific hearings;
- 4 It can act as Counsel when appointed by a Chamber or requested by a victim; and
- 5 It can act as Counsel assisted by the Counsel selected by the victim, if the latter does not fulfil all the requirements established by the Court to act as Counsel.

Pursuant to Regulation 81.2, the OPCV is an independent office which falls under the Registry for administrative purposes.

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160 Further information about victims' participation can be found in the *Victim Participation and Legal Representation* sections of this Report.

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

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

Since 2006, the number of victims assisted and represented by the OPCV has increased from 85 victims in 2006 to 2,119 in 2011.<sup>163</sup> Of the total number of victims assisted by the OPCV as of October 2011, 83% are victims in relation to the CAR (1,011) and DRC (748) Situations.<sup>164</sup> The majority of victims represented by the OPCV in 2010 were also from CAR (1,051 or 84%).

During 2011, the number of victims represented in the DRC Situation significantly increased from 63 in 2010 to 748 in 2011 largely due to the opening of a third DRC case (*The Prosecutor v. Callixte Mbarushimana*).<sup>165</sup> The number of victims represented by the OPCV in relation to the Situations in Darfur (21) and Uganda (117) did not change or experienced very small changes when compared to 2010.<sup>166</sup> Finally, the number of victims represented by the OPCV in the Kenya Situation increased from one victim in 2010 to 222 victims in October 2011.

Out of the 2,119 victims assisted by the OPCV, 774 are female (36.5%) and 1,345 are male (63.5%). In 2010, female victims assisted by the OPCV were 479, comprising 38% of the total. Male victims are the majority of those being assisted and represented by the OPCV in every Situation in which the Office is assisting victims. The number of female victims per Situation ranges from 14% of victims assisted by the OPCV in relation to the Situation in Darfur to 42% in the CAR Situation. Female victims are 30% of the total number of victims being assisted and represented by the OPCV in the DRC. In Uganda 32% and Kenya 36% of those represented and assisted by the Office are female. In 2010, 44% of the DRC victims being assisted by the OPCV were women. In CAR this figure was 39%, in Uganda 32%, in Sudan 14% and in Kenya 0%.<sup>167</sup> These figures demonstrate an overall increase in the actual number of victims and women victims being assisted and represented by the OPCV, although there is a proportional decrease in the female statistics relative to the overall number of victims assisted by the Office. This is largely explained by the significant shift in the proportion of female victims assisted by the Office in the DRC Situation from 44% in 2010 to 30% in 2011. The proportion of female and male victims in Uganda and Sudan have remained the same, with significant increases in the number of female victims assisted or represented by the OPCV in Kenya and CAR.

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163 Figures as of 14 October 2011. Email communications with the Office of Public Counsel for Victims, 23 August 2011 and 14 October 2011.

164 Ibidem.

165 According to data provided by the OPCV via email communication on 23 August 2011, out of the total number of 873 victims represented in the DRC Situation, 764 (87.5%) were in relation to *The Prosecutor v. Callixte Mbarushimana*. Please note that the difference in the total number of victims represented in the DRC Situation as of 23 August 2011 (873) and as of 14 October 2011 (748) is due to new Legal Representatives being selected by the victims. Email communication with the Office of Public Counsel for Victims, 24 October 2011.

166 In 2010, the OPCV assisted and represented 21 victims in relation to the Darfur Situation and 116 victims in relation to the Uganda Situation.

167 Please note that 2010 figures regarding Kenya are on one victim only (male). See *Gender Report Card on the International Criminal Court 2010*, p 32-35.



The only Situation in which the actual number of victims assisted by the OPCV did not change from 2010 is the Darfur Situation with a total of 21 victims assisted of whom three are women and 18 are men.

According to data provided by the OPCV, sexual violence and rape are reported by 70% of female victims in CAR, which this year is also the Situation with the highest percentage of female victims assisted by the OPCV (42%).<sup>168</sup> Sexualised violence is also reported by female victims in Kenya (15%), Uganda and the DRC (10% each). None of the female victims assisted by the OPCV in Sudan reported having been subjected to rape and sexual violence.<sup>169</sup> These figures, with the exception of Kenya for which this information was not yet available, are the same as in 2010.<sup>170</sup>

Since 2006, the OPCV has provided support to 135 external legal representatives and provided legal advice and research on 978 occasions.<sup>171</sup>

The OPCV has one general service post and nine professional posts, all of which are currently filled. Of the professional posts, 44.5% are occupied by women and 55.5% by men. The P5 post is held by a woman and 50% of the two P4 posts are held by a male and female professional. Both P3 posts are occupied by male professionals. Men and women equally share P2 and P1 positions (one man and one woman at P2 level and one man and one woman at P1 level). The general service post (GS5) is occupied by a man.<sup>172</sup> While in 2010 all the regions were represented in the Office and three staff were from the WEOG region, this year five out of 10 staff are from this region and the GRULAC region is not represented by any staff. Eastern Europe and Africa are both represented by two staff each and Asia has one staff appointed to the OPCV.<sup>173</sup>

168 Figures as of 14 October 2011. Email communication with the Office of Public Counsel for Victims, 14 October 2011.

169 Ibidem.

170 This year, no information was available regarding the number of victims represented and assisted by the OPCV per Case, the gender breakdown, and the type of crimes reported by Situation and Case.

171 From 1 January to 23 August 2011, the OPCV provided legal advice on 170 occasions and supported 39 external legal representatives. Email communication with the Office of Public Counsel for Victims, 23 August 2011.

172 Email communication with the Office of Public Counsel for Victims, 14 October 2011.

173 Ibidem.

<b>Victims represented by the OPCV per Situation<sup>174</sup></b>		<i>men</i>	<i>women</i>
<b>Overall<sup>175</sup></b>	[2,119] <sup>176</sup>	<b>63.5%</b>	<b>36.5%</b>
<b>CAR<sup>177</sup></b>	48% of total victims [1,011]	<b>58%</b>	<b>42%</b>
<b>Uganda<sup>178</sup></b>	6% of total victims [117]	<b>68%</b>	<b>32%</b>
<b>DRC<sup>179</sup></b>	35% of total victims [748]	<b>70%</b>	<b>30%</b>
<b>Sudan<sup>180</sup></b>	1% of total victims [21]	<b>86%</b>	<b>14%</b>
<b>Kenya<sup>181</sup></b>	10% of total victims [222]	<b>64%</b>	<b>36%</b>

174 Figures as of 14 October 2011. Figures include both applicants and victims formally recognised by the Court. Email communication with the Office of Public Counsel for Victims, 14 October 2011.

175 The total number of victims represented and assisted by the OPCV as of 14 October 2011 is 2,119. This figure represents 867 more victims than in 2010. Of these, the majority of victims are in the CAR Situation (1,011). The majority of victims represented by the OPCV are male (63.5%). In 2010 male victims comprised 62% of the total.

176 The total number of victims is reported in brackets.

177 Out of 1,011 victims represented and assisted by the OPCV in CAR, 58% are men and 42% women. This represents a 3% increase in the number of female victims represented by the Office compared to 2010. The proportion of the number of victims from CAR assisted by the OPCV relative to the overall number of victims assisted by the Office dramatically decreased in 2011 by 36%. In 2010, CAR victims were 84% of the overall number of victims being assisted by the OPCV. Now this figure is 48% of the victims represented by the OPCV. Please note that the decrease in the number of victims assisted and represented by the OPCV in relation to the Situation in CAR (from 1,051 in 2010 to 1,011 in 2011) is due to the appointment of different Legal Representatives for some of the victim. Email communication with the Office of Public Counsel for Victims, 24 October 2011.

178 In Uganda, the OPCV is assisting 117 victims, one more than in 2010. Of these, 68% are men and 32% are women. This is the same figure as in 2010. Ugandan victims constitute 6% of the total number of victims being assisted or represented by the Office, 3% less than last year.

179 Out of 748 victims represented by the OPCV in DRC, 70% are men and 30% are women. In 2010, 63 victims were represented by the OPCV in relation to the DRC Situation, of whom 44% (28) were women. The significant increase in the number of victims assisted by the OPCV is largely due to the opening of the third DRC case, the Prosecutor v. Callixte Mbarushimana. DRC constitutes 35% of the total number of victims represented or assisted by the OPCV, a 30% increase from 2010 when the figure was 5% of the total (63 victims).

180 There are 21 Sudanese victims assisted by the OPCV, of whom 86% are male victims and 14% are female victims. These are the same figures as in 2010. This year, Sudan constitutes 1% of the total number of victims assisted or represented by the OPCV, a 1% decrease from last year.

181 There are 222 victims assisted by the OPCV in relation to the Situation in Kenya, of whom 64% are men and 36% are women. The Kenya Situation accounts for 10% of the total number of victims assisted by the OPCV. Last year, the OPCV was assisting one male victim in relation to the Situation in Kenya.

# ICC Budgetary Matters

	2007	2008	2009	2010	2011
<b>Overall ICC budget</b>	<b>€88,871,800</b>	<b>€90,382,000</b>	<b>€102,230,000</b>	<b>€103,623,300</b>	<b>€103,610,000</b>
<b>Overall implementation rate</b>	<b>90.5%</b> <sup>182</sup>	<b>93.3%</b> <sup>183</sup>	<b>92.5%</b> <sup>184</sup>	<b>95.2%</b> <sup>185</sup>	<i>not available</i>
<b>Implementation rate 1st trimester</b>	<b>21.4%</b> <sup>186</sup>	<b>23.7%</b> <sup>187</sup>	<b>30.0%</b> <sup>188</sup>	<b>30.7%</b> <sup>189</sup>	<b>31.8%</b> <sup>190</sup>

182 *Report of the Committee on Budget and Finance on the work of its tenth session*, 26 May 2008, ICC-ASP/7/3, p 8-10.

183 *Report of the Committee on Budget and Finance on the work of its twelfth session*, 13 May 2009, ICC-ASP/8/5, p 5.

184 *Report of the Committee on Budget and Finance on the work of its fourteenth session*, 6 July 2010, ICC-ASP/9/5, p 5-7.

185 *Report of the Committee on Budget and Finance on the work of its sixteenth session*, 17 June 2011, ICC-ASP/10/5, p 9. Please note that this implementation rate is for €102,250,000, which excludes the approved budget for the Review Conference of €1,370,000.

186 Rate of implementation of the 2007 budget as of 31st March 2007, ICC-ASP/6/2.

187 Rate of implementation of the 2008 budget as of 31st March 2008, ICC-ASP/7/3.

188 Rate of implementation of the 2009 budget as of 31st March 2009, ICC-ASP/8/5.

189 Rate of implementation of the 2010 budget as of 31st March 2010, ICC-ASP/9/6.

190 Rate of implementation of the 2011 budget as of 31 March 2011, ICC-ASP/10/5.

# Overview of Trends

## Recruitment of ICC staff

**The overall number of staff** currently employed by the ICC including professional and general staff and elected officials, excluding judges, is 698. Of the overall employees, 54% are men and 46% are women. In 2010, the figures were 697 professional staff, with 53% male and 47% female employees.

**In 2011**, the gender figures for both overall staff and professional appointees changed slightly from 2010, with a 1% increase in the number of male staff (54%) and a 2% increase in the number of men appointed to professional positions (52%). However, the figures for the appointments of women to mid-to-senior professional levels did not change significantly. There are considerably more men appointed at almost all senior levels within the OTP and the Registry with a gender gap of 45% at senior levels in some sections. Overall, male appointees comprise 60% of the staff appointed at the P3-D1 levels when the figures for both the Registry and the OTP are combined. The majority of female professionals in these organs continue to be appointed at the lower professional levels, constituting 57% of the appointments at the P1 and P2 grades.

**In 2011**, there are 339 professional staff<sup>191</sup> representing 79 nationalities.

**French nationals** continue to be the largest group of appointees from a single country. This has been a consistent feature in the profile of the Court since 2007. Between 2008 and 2011, there has been a 79% increase in the number of French nationals appointed to professional posts within the ICC. This year, appointees with French nationality decreased by one individual in the overall figures from 44 staff in 2010 to 43. There are 27 French female professionals this year, which is a decrease of five staff members when compared to 2010.

**Of the overall number** of employees, 357 (51%) are employed as 'professional staff', including language staff. While in the past two years women and men comprised 50% each of the professional employees, this year men are 52% of the total number of professional staff. This slight increase is likely due to the fluctuations in the gender figures in the Registry and the OTP (respectively with a 1% and 3% increase in the number of male employees).

<sup>191</sup> Please note that this figure excludes judges and language staff.

**There are 33 P5 level positions** (all established posts) within the ICC, of which 29 are currently occupied.<sup>192</sup> The unoccupied posts are the Chef de Cabinet (Presidency), Special Adviser to the Registrar on External Relations (Registry), Chief of Legal Advisory Section (Registry), and a Senior Trial Lawyer (OTP). Of these, the Special Adviser to the Registrar on External Relations (Registry) and Chief of Legal Advisory Section (Registry), have been advertised and are under recruitment. The post of Chef de Cabinet (Presidency) has not been advertised and therefore there has not yet been a recruitment process. Despite this, an appointment has been made to the Chef de Cabinet position which is currently occupied by a male appointee from the United Kingdom. This position is described by the Human Resources Section as currently filled on a GTA contract. The categorisation of the Chef de Cabinet post as a GTA differs from its status for every other year, as reported on in our previous publications of the *Gender Report Card on the ICC*.

**The Chef de Cabinet post** (Presidency) is the only known P5 established post to be filled by a GTA, the only P5 post in the Court filled without a recruitment process and the only occupied P5 post to be described by the Court as vacant.

**The current P5 posts** are filled with nationals from every region. WEOG dominates the P5 level with 62% (18) of appointees coming from Germany (five), France (three), the USA and Spain (two each), and the UK, Canada, Australia, Ireland, Finland and Italy (one each). Nationals from the Africa region occupy 20.6% (six) of P5 posts with appointees coming from South Africa (three), Kenya, Senegal and Mali (one each). GRULAC and Asia both have 7% (two) of P5 appointees with posts filled by nationals from Argentina, Ecuador, the Philippines<sup>193</sup> and Singapore, respectively. Eastern Europe has 3.4% (one) of appointees at the P5 level with a national from Serbia.

**Currently, 12 women** have been appointed to the 29 occupied P5 posts. Of these, 66.7% of the female professional staff at a P5 level are within the Registry and the Independent Bodies (the Trust Fund for Victims and the Office of the Public Counsel for Victims). In 2010, there were 13 women in P5 posts. This has decreased due to the departure of a P5 female professional from the Chef de Cabinet post (Presidency, a non-independent body) during 2011. Out of a total of nine professionals appointed at the D1 level, one is a woman (Director, Internal Audit, Registry).

<sup>192</sup> Figures as of 31 July 2011. Information provided by the Human Resources Section of the ICC.

<sup>193</sup> According to the OTP, the position of Coordinator for Prosecutions is held by a Philippine national. In reality, this position has been filled by a female from the United States of America for almost two years. There have been two separate recruitment processes for this position during this period.

# Overview of Trends CONTINUED

**The number of women judges** on the bench is the same as in 2010. Of the 19 judges currently serving at the ICC, 11 are women. The election of new judges, to replace the six judges whose terms are finishing in March 2012, will be held during the tenth session of the Assembly of States Parties from 12 to 21 December 2011 in New York. Of the judges whose terms will come to completion in 2012, three are women (Judge Diarra - Mali, Judge Odio Benito - Costa Rica, and Judge Steiner - Brazil). The nomination period for judicial candidates opened on 13 June and closed on 16 September 2011. Of the 19 judicial nominees, only two are women of whom one is from the Group of Latin America and the Caribbean region (Olga Venecia Guerrera Carbuccion – Dominican Republic) and one from the Asia region (Miriam Defensor-Santiago – the Philippines).

**Among the judicial staff** there are currently 22% more women than men (61% women, 39% men) in professional posts. Women are largely in the P2 and P3 level positions. Although the overall figures show a strong representation of women, there are twice as many men than women at both the P4 and P5 grades. There are no P1 positions in the Judiciary.

**The number of women** employed in professional posts within the OTP decreased by 3% from last year with 46% of the overall professional posts held by women compared to 49% in 2010. This is the first time that the percentage of female professionals in the OTP has decreased since 2007 when the figure was 38%.

**The persistent trend of the over-representation** of female professionals in the lower-to-mid level grades, which has characterised the OTP's recruitment activities

since its beginning, has been confirmed again in 2011. Women constitute more than twice the number of men at the P1 level (11 women and five men) and there are 16% more women than men appointed at the P2 level (25 women and 18 men). The number of female professionals starts to decrease at the P3 grade with a 26% male/female differential (26 men and 15 women).

**Within the OTP**, the female/male differential remains highest in the senior positions with almost three times the number of male appointees at the P5 level (three women and eight men) and 24% more males than females appointed at the P4 level (10 women and 16 men). The gender gap at both the P5 and P4 levels remain persistently high. Since recruitment began, there has never been less than a 45% gender gap in the P5 posts and not less than a 20% gender gap in the P4 positions within the OTP. Both D1 level posts are held by men.

**In the Registry**, 48% of professional posts are held by women. The statistics for the Registry have been stable at around this figure for the past five years. There are more women than men in the P4 (56%), P2 (53%), and P1 (62.5%) levels. The male/female differential at the P3 level increased by 4% from 2010 with 26% more male professionals appointed to this level. The Registry continues to have the strongest dispersement of female appointees throughout many, although not all, professional levels.

**The gender gap between men and women within the Registry** at the P5 level decreased to 6% – an improvement of 14% compared to 2010. However, there are still three times more men than women at the D1 level (one woman and three men). This is the same figure as in 2010.

## Executive Committee and Senior Management

**Two out of three** members of the ICC Presidency are male judges.<sup>194</sup>

**The Executive Committee** of the OTP is comprised of one woman and three men. The three Head of Division posts within the OTP are occupied by two men (Head Investigations and Head of the Jurisdiction, Complementarity and Cooperation Division), and a woman (Deputy Prosecutor, Prosecutions). The position of Deputy Prosecutor (Head of Investigations) has been vacant since 2007. However, a Head of Division has been appointed during this period, although not at a Deputy Prosecutor level. The position of Head of Jurisdiction, Complementarity and Cooperation, vacant since 31 May 2010, was filled by the new Head in February 2011.

**The Registrar** is the only female head of an organ at the ICC.<sup>195</sup>

**The two Head of Division** posts in the Registry are held by men. There has never been a female appointed as a Head of Division within the Registry. In 2010, a woman was appointed to a D1 position for the first time.<sup>196</sup>

**Among the non-judicial staff** within the Judiciary, two of the three Heads of Sections or equivalent posts (P5) are held by men (both from the WEOG region) and one P5 post is held by a woman (Africa region).

**In the OTP**, of the 19 positions as Heads of Sections or equivalent posts, one is vacant (5.2%). More than three times more Sections are led by men than women (respectively 14 [79%] and four [21%]). This figure represents an 11% decrease in the number of Heads of Sections or equivalent posts held by women in 2010 when women occupied six management posts (32%).

**Out of 22 Heads** of Sections or equivalent posts in the Registry, one is vacant (4.5%). There has been a slight increase in the Heads of Section or equivalent posts held by women in the Registry from 47% in 2010 to 48% in 2011. For the past four years, the gender balance has been stable with a 2-3% fluctuation in the gender statistics for Heads of Sections.

<sup>194</sup> The members of the ICC Presidency are President Judge Sang-Hyun Song (Republic of Korea); First Vice-President Judge Fatoumata Dembele Diarra (Mali); and Second Vice-President Judge Hans-Peter Kaul (Germany). Elections for a new Presidency will be held at the beginning of 2012.

<sup>195</sup> Ms Silvana Arbia (Italy).

<sup>196</sup> Director, Internal Audit, an Independent Body.

# Overview of Trends CONTINUED

## Field Offices

**The ICC has field offices** in four out of the seven Situations currently under investigation by the ICC (CAR, DRC,<sup>197</sup> Chad [for Darfur] and Uganda) as well as a Registry task-force in Kenya.

During 2011, the Field Operations Section conducted a review of the Court's field presence based on '... judicial developments in the six situations before the Court, and on the need to make adequate provision for the operational needs of the various clients in the field.'<sup>198</sup>

As a result of this review and the budget assumptions for 2012,<sup>199</sup> the Court intends to close both its field offices in Chad by December 2011 thus ceasing the Court's field presence for Darfur.<sup>200</sup> During 2012, the field presence in Uganda will also be scaled down, with an anticipated decrease of 62.5% in the presence

197 Please note that the ICC in the DRC has a field presence in both Kinshasa and Bunia. The Court refers to the presence in Kinshasa as 'field office' and to the presence in Bunia as 'forward field presence'. *Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, 21 July 2011, p 73.

198 Ibidem.

199 The budget assumptions for 2012 as listed in the Proposed Budget for 2012 are the following: Use of one courtroom team as, although a number of cases will proceed simultaneously during 2012, trial-hearings will be scheduled consecutively; Seven investigations in six situation countries to be conducted by the Office of the Prosecutor, nine residual investigations and monitoring of eight other potential situations; Reduced number of five field presences for the Registry; and Seven defence teams and twelve victim's representative teams to receive legal aid during 2012. *Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, p 2-3, paras 12-16.

200 The Abéché field office was closed in July 2011 and the N'Djamena field office will be closed by December 2011.

of Registry staff in Kampala.<sup>201</sup> According to the field presence organigramme for 2011-2012, all of the Registry professional posts (P2 and P3 levels) will be redeployed and the Registry sections will be represented by general service staff only. From April 2012, the Victims and Witnesses Unit (VWU) will no longer have a presence in Uganda. The Public Information and Documentation Section (PIDS) is withdrawing the P2 Field Outreach Coordinator and will maintain one G5 Field Outreach Assistant instead of three.<sup>202</sup> In the DRC, the Registry staff presence will increase by 10.5% in Kinshasa and by 7% in Bunia, while the OTP and TFV presence will remain at the same levels.<sup>203</sup> There are no changes planned for the field office in CAR (Bangui).<sup>204</sup> Finally, a limited Registry task-force will be retained for Kenya.<sup>205</sup>

**According to the Proposed Programme Budget 2012**, the Field Operations Section posts will be redeployed from the two Chad field offices and from the Kampala field office to other duty stations.<sup>206</sup>

**The scaling down** of the Kampala field presence and the closing down of the N'Djamena office are likely to have an impact on the affected communities in both Uganda and Darfur.

201 Please note that, during 2012, the Office of the Prosecutor will also have a 50% increase in its Kampala-based staff. The Secretariat of the Trust Fund for Victims will maintain the same level of presence in the Kampala office as in 2011. *Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, 21 July 2011, p 74.

202 *Field Staffing Organigramme 2011-2012*.

203 *Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, 21 July 2011, p 74.

204 Ibidem.

205 Ibidem.

206 Ibidem, p 75.



**The total number of staff** deployed in the four existing field offices and the Registry task-force, including professional and general staff, is 86—15 less than in 2010. Of these, 21 (24%) are professional staff (excluding language staff).

**Men comprise 80%** of the total field staff, a 3% increase from 2010. In addition to the Kenya task-force which is composed only of men, the Chad office retains the highest male/female differential with 72% more men than women appointed. Uganda is the field office with the lowest gender differential (39% more men). The male/female gap in both CAR and the DRC is 66%.

**There are almost three times** more men than women assigned to professional posts in field offices (15 men and six women). As in 2010, the only field office with a gender balance is CAR with men and women occupying half (50%) of the four professional posts. In the DRC, women professionals occupy one-fourth of the posts (two out of eight) and in Uganda two posts out of seven are occupied by female professionals (28.5%). For Chad and Kenya, all appointees to professional posts are male.

**Women are the majority** of appointees at the P2 level (66%), with a 4% increase from 2010, but only two out of 15 P3 posts are occupied by female professionals. There are no P1, P4 or P5 level staff based in the field offices.

**The field office** with the highest number of staff is the DRC office with 41% (35) of overall field staff and 38% (eight) of the total number of professional staff. The Uganda office has 27% of overall staff and 33% of professional staff, the CAR office has 21% and 19% respectively, and the Chad office has 13% and 8% respectively. Finally, the Kenya task-force has 3% of overall staff and 5% of professional staff.

**In total**, eight Sections and Units are represented at the field level, of which six belong to the Registry and two to the Office of the Prosecutor.<sup>207</sup> Following the redeployment of a P3 Field Officer from Bunia (DRC), to Kampala (Uganda), the Secretariat of the Trust Fund for Victims currently has a field presence at the P-level in Uganda only. The Fund however is represented by two general service GTA local field staff in the forward field presence in Bunia (DRC).

**Despite a decrease** of 12 staff deployed in the field from 2010, the Field Operations Section continues to have the highest presence in the field offices with 25 (29%) staff across all country-based offices, including the Kenya task-force. The Victims and Witnesses Unit has 24 (28%) staff members divided between the four field offices, but it does not have a presence in the Kenya Registry task-force. As in 2010, the Outreach Unit has 13 (15%) representatives across three field offices (CAR, DRC and Uganda). The only Sections/Units that are represented in all four offices and in the Registry task-force in Kenya are the Field Operations Section and the Security and Safety Section. The Secretariat of the Trust Fund for Victims is currently represented at the P-level only in Uganda. The male/female differential is high across almost all Sections/Units represented at field level, with the Service Desk, the Security and Safety Sections, the Planning and Operations Section and the Investigation Teams having only male

<sup>207</sup> The Registry is represented by the Field Operations Section, the Service Desk, the Outreach Unit, the Security and Safety Section, the Victims and Witnesses Unit, and the Victims Participation and Reparation Section. The Office of the Prosecutor is represented by the Planning and Operations Section and the Investigation Teams. The latter, now present in Uganda, was not represented at the field level in 2010. Information provided by the Human Resources Section of the ICC.

# Overview of Trends CONTINUED

appointees in the field offices. The Trust Fund for Victims has the strongest gender balance in the field offices with one male and one female professional, followed by the Outreach Unit with 54% male and 46% female employees and the Victims and Witnesses Unit with 66% male and 34% female appointees.

**Currently**, all professional staff in the field offices are recruited internationally. There are no national staff members hired at a professional grade in any of the field offices.<sup>208</sup>

## Professionals from the WEOG region

comprise 62% of the total number of field staff, 12% more than in 2010. African appointees comprise 28%, and Asia and GRULAC share the remaining posts with 5% each. Eastern Europe is not represented at the field office level. As in 2010, of the 13 countries with nationals in field offices, France has the highest number of appointees (six professionals), followed by Belgium, Canada and Niger, all of which have two appointees each. Female professional staff members come from only four out of the 13 countries represented. Three women have been appointed from France, and one each from Sierra Leone, Cyprus and Argentina.

<sup>208</sup> *Report of the Court on human resources management*, ICC-ASP/9/8, 30 July 2010, p 7-8. During 2010, inter-organ consultations were held to discuss the creation of the National Professional Officer and the Field Service categories. No mention of this was found in the 2011 Human Resources Report.

## Geographical and Gender Equity among Professional Staff

**According to ICC figures**, there are 339 professional staff, excluding language staff, representing 79 nationalities. The number of professional staff and nationalities represented at the Court has constantly increased from 324 staff and 72 nationalities in 2010, 305 staff and 71 nationalities in 2009, and 261 staff and 65 nationalities in 2008.

**The WEOG region** has the largest number of appointees (58.5%) amongst professional staff. This figure follows the general recruitment trend in recent years with WEOG appointees accounting for 61% of the ICC professional staff in 2010 and 2009, and 58% of the staff in 2008. This year there was a slight increase in the number of professional staff appointed from the Africa region, up to 17.5% from 16% in 2010. There was also a slight increase to 10% in appointees from GRULAC compared with 9% of professional staff in 2010. Appointees from Eastern Europe and Asia were at the same levels as in 2010 and both regions account for 7% of professional posts at the ICC. There continues to be a significant disparity between WEOG and the other regions, although this year there was a slight reduction in WEOG staff.

**For the fifth year in a row**, French nationals account for the highest number of appointees from a single country. Between 2008 and 2011, the number of French nationals appointed to professional posts within the ICC increased by 79%.

**To date**, there are 43 French nationals appointed to professional posts, one less than in 2010. The number of French nationals is twice as high as the top-end of the desirable range of country representation for France, as specified by the Committee on Budget and Finance (CBF).<sup>209</sup> The desirable range for France is to have between 16.37 and 22.15 nationals appointed to the ICC.<sup>210</sup> This year, the combined figures of the next two highest WEOG states (the United Kingdom with 28 and the Netherlands with 18 appointees respectively) is slightly less than the number of French nationals alone. When compared to the region with the next highest number of professional staff, there are 35 more French appointees than South Africans, the first national group within the Africa region.

**These figures** indicate that no corrective measures were taken in the last two years to address the over-representation of French nationals at the Court, as highlighted in the *Gender Report Card on the ICC 2009 and 2010*, produced by the Women's Initiatives for Gender Justice.

**Within the WEOG region** several other countries exceed the top-end of the desirable range indicated by the CBF. Of these, the Netherlands, Belgium and Australia have the highest difference between the top-end of the desirable range and current number of staff at the Court. With 18 staff, the Netherlands has 125% more staff members than indicated by the CBF for the highest end of the desirable range (7.67). Belgium also has more than twice the number of staff indicated as desirable by the CBF with 11 staff compared to a top-end figure of 4.39. Australia has exactly twice the number of staff with 16 current employees compared to a top-end desirable figure of 7.97.<sup>211</sup>

**Some WEOG States Parties** are underrepresented in professional posts. Germany is the country with the highest difference between the lowest end of the desirable range identified by the CBF (21.43) and the actual number of professional staff currently employed by the Court (16) within the WEOG region.<sup>212</sup> However, Germany has the highest number of nationals in P5 posts from a single country (five).

**Although in other regions** — with the exception of Asia — some countries are overrepresented based on the ranges indicated by the CBF, it is in the WEOG region where the difference between the top-end range and the actual number of staff is the highest. The WEOG region also has the lowest percentage of countries which are States Parties but are not represented within the Court (28%).<sup>213</sup> In the Africa region, 45% of States Parties from this

209 The ICC applies the same system of desirable ranges for geographical distribution of staff as the UN Secretariat (ICC-ASP/1/Res.10, Article 4). The desirable range for the ideal number of nationals to be recruited is determined by the consideration of three factors, each given a 'weight' in percentages: The membership factor: number of ICC Member States from the same region (40%); *The population factor*: size of each Member States' population (5%); *The contribution factor*: percentage the Member State contributes to the ICC's budget (55%).

210 *Report of the Committee on Budget and Finance on the work of its sixteenth session*, ICC-ASP/10/5, 17 June 2011, p. 33.

211 Ibidem.

212 Ibidem.

213 As of 24 October 2011, 119 countries are States Parties to the Rome Statute of the ICC, of which 33 from the African region, 17 from Asia, 18 from Eastern Europe, 26 from GRULAC, and 25 from WEOG.

# Overview of Trends CONTINUED

region do not have nationals at the Court. In Eastern Europe 50% of States Parties do not have nationals employed at the ICC. In the GRULAC region this figure is 60% of States Parties. Asia is the region with the highest percentage of States Parties not represented by staff members with 66%.

**The Asia region** has the country with the highest difference between the lowest desirable range and the actual number of staff employed. This is Japan, with five staff members compared to a lowest desirable range of 32.37 potential staff.

**Compared to 2010 and 2009**, the number of women in professional posts is higher than men in three regions: GRULAC (65% women compared to 63% in 2010), Eastern Europe (64% women compared with 59% in 2010) and, for the first time, Asia (52% women compared with 50% in 2010). This year, the number of women in professional posts is no longer higher than the number of men in the WEOG region (49% women compared with 54% in 2010).

**As in 2010 and 2009**, France is the country with the highest number of women (27 individuals) appointed from the WEOG region. Although there are five less appointees this year, there are 16 more French female appointees than the next highest number of female appointees –the United Kingdom which has 11 female appointees. The number of women from France appointed to professional posts however shows a 10% decrease from 2010 when 73% of the overall French professional staff were women. Two states joined the ‘Top 5’ tier of WEOG countries with women appointees at the Court: Belgium and Italy (five female appointees each).

**Currently**, 18 (62%) of the 29 occupied P5 posts are filled by nationals from the WEOG region. A review of these posts by country indicates that five of the P5 posts are occupied by German nationals, three occupied by France, two occupied by the USA and Spain, and one appointee each from the UK, Canada, Australia, Ireland, Finland and Italy.

**Of the P5 posts** held by nationals from the WEOG region, 11 appointees are male (61%) and seven are female (39%). The female appointees are from Germany (three), Australia, Spain, Italy and the USA (one each).

**Africa has the second highest** number of staff at the ICC and for the first year there has been a decrease in the number of male appointees. Since 2006, the Africa region has had the lowest percentage of women appointed to the Court relative to the overall number of appointees from the region. This year, for the first time in three years, the percentage of female professionals has increased. In 2011, 30.5% of African appointees are women compared with 25% in 2010, 27% in 2009, and 30% in 2008. Male appointees from Africa have dominated the regional figures. This year, Uganda joined the ‘Top 5’ tier of African countries with the highest number of appointees at the Court, and Botswana, Ghana, Côte d’Ivoire, Mali, Mauritius and Zimbabwe joined the ‘Top 2’ by gender with one female professional each.

**Currently**, six (20.6%) of 29 occupied P5 posts (20.6%) are filled by nationals from the Africa region. A review of these posts by country indicates that three P5 posts are occupied by South African nationals, with one appointee each from Kenya, Senegal and Mali.

**Of the P5 posts** held by nationals from the African region, four appointees are male (67%) and two female (33%). The female appointees are from Kenya and South Africa.

**For the fifth year in a row**, GRULAC has more women than men appointed to professional posts within the Court, however it should be noted that most continue to be clustered in the lower-to-mid level posts with one woman from GRULAC appointed to a P5 position (Chief, Victims and Witnesses Unit, Ecuador). This region has the highest proportion of women appointees, relative to the overall number of appointments from the region – 65% of the 34 GRULAC appointees are women. One new state, Chile, joined the ‘Top 5’ tier of GRULAC countries with women appointees at the Court.

**For the third year in a row**, Eastern Europe has more women than men appointed to the Court and increased this by 5% compared with 2010. However, it should be noted that most are clustered into the lower-to-mid level professional posts with one woman from Eastern Europe appointed to a P5 position (Chief, Court Interpretation and Translation Service, Serbia). Two new countries, Bulgaria and Latvia, joined the ‘Top 5’ list of states with appointees at the ICC. Latvia also joined the ‘Top 4’ tier of Eastern European countries by gender, with one female appointee.

**For the first time**, women are the majority of appointees from the Asia region (52%). Since 2009, the number of women from the Asia region appointed to the Court has increased by three individuals (7%). As in 2010 and 2009, Japan is the country from the region with the highest number of appointees (five). All of the Japanese professionals appointed to the Court are women and most are appointed at lower-to-mid level positions. According to the OTP, one P5 post, Coordinator of Prosecutions, is held by a woman from the Philippines, although this post has been filled by a female from the United States of America for almost two years. This year, one new country, China, joined the ‘Top 5’ list by country and the ‘Top 3’ with one woman appointed to a professional post within the Court.

**With the exception of WEOG**, it was not possible to create a ‘Top 5’ list of countries by gender per region due to an insufficient number of female nationals appointed to professional posts. In the case of GRULAC and Eastern Europe, there is a ‘Top 4’ with a range of 1-4 female professionals; Asia has a ‘Top 3’ with a range of 1-5 female professionals; and finally Africa has a ‘Top 2’ with a range of 1-2 female professionals.

**A ‘Top 9’ based on ‘gender’** by country (not region) with a range of 1-27 for female appointments was established this year. The first five places on the list are occupied by the same seven countries from the WEOG group as in 2008, 2009 and 2010, with the addition of Belgium and Italy, respectively ranking number seven and six in 2010. Japan is again the first non-WEOG country represented on the list, ranking fifth with five female appointees. Colombia has the highest number of women professionals from the GRULAC region with four appointees and ranks number sixth along with

# Overview of Trends CONTINUED

Romania, the first Eastern European country to appear in the list. The Gambia, Kenya, Sierra Leone, South Africa, and Uganda are the highest ranking countries from the Africa region with two female appointees each.

**While the states included** in the ‘Top 10’ list of countries with the highest numbers of appointees to the Court have not changed significantly in the last four years, the number of regions represented in this list has undergone a gradual, but steady decrease. This year, only WEOG countries occupy the first nine places on the list with a single non-WEOG country, South Africa, appearing in the list at number 10. In 2010, there were more countries from the Africa region on the ‘Top 10’ list and at least one country from Eastern Europe. The GRULAC region was last included in the ‘Top 10’ list in 2009 and Asia in 2008. No new countries joined the ‘Top 10’ list.

**There are currently** 10 professionals from the current Situations before the Court, an increase from 2010 when a total of six professionals were nationals of these countries. While the number of appointees from the DRC did not change from last year (two male appointees), the number of nationals from Kenya and Uganda increased, respectively by one and two. The Côte d’Ivoire has one employee at the Court. CAR, Libya and Sudan are not represented by any professionals at the Court. Out of the 10 appointees from Situations currently under investigation at the ICC, five are women (two from Kenya, two from Uganda and one from Côte d’Ivoire). Last year, only two women from Situation-countries were appointed to the Court (one from Kenya and one from Uganda).

**In the OTP**, six senior posts (P5 level) are held by nationals from the WEOG region with only one being a female appointee (Germany). Three senior posts (P5 level), are held by nationals from the Africa region (two from South Africa, one from Senegal). Of these, two are male and one is a female appointee. This represents a decrease from 2010, when four senior posts were held by professionals coming from Africa. GRULAC has one senior post within the OTP (male, Argentina), as in 2010. According to the OTP, the Coordinator of Prosecutions is a female from the Philippines although the post is actually filled by a female from the United States of America. This makes the total number of senior level WEOG appointees seven within the OTP. The position of Head of the Jurisdiction, Complementarity and Cooperation Division (D1) is held by a professional coming from the Africa region (male, Lesotho). The other D1 grade post (Chief of Planning and Operations Section) is held by a national from the WEOG region (male, Belgium).<sup>214</sup>

**In the Registry**, nine senior (P5 level) posts are held by nationals from the WEOG region, one more than in 2010. Two senior posts (P5 level) are held by nationals from Africa (both males from Mali and South Africa), one less than in 2010.<sup>215</sup> As in 2010, one senior post is held by a national from Eastern Europe (female, Serbia) and one by a national from Asia (male, Singapore). Unlike 2010, GRULAC is represented at the P5 level in the Registry (one female, Ecuador). The position of Deputy Registrar (D1-LA) is held by a professional coming from the Africa region (male, Senegal). The remaining three D1 grade

<sup>214</sup> Figures as of 31 July 2011. Information provided by the Human Resources Section of the ICC.

<sup>215</sup> The former Chief of Legal Advisory Section (male-Lesotho) was appointed as Head of the Jurisdiction, Complementarity and Cooperation Division (OTP) in 2011.

posts are all occupied by WEOG professionals (two males from Belgium and Germany, and one female from France).<sup>216</sup>

**Within the Court**, there is one Under Secretary General (USG – Prosecutor)<sup>217</sup> who is a male from Argentina and two Assistant Secretary Generals (ASG – the Registrar and the Deputy Prosecutor)<sup>218</sup> both of whom are females from Italy and The Gambia, respectively.

**In the Judiciary**, Asia, Africa and WEOG are represented in the Presidency, respectively by the President (Judge Sang-Hyun Song from the Republic of Korea) and two Vice-Presidents of the Court (Judge Fatoumata Dembele Diarra from Mali and Judge Hans-Peter Kaul from Germany).

**There are three** P5 positions in the Judiciary: the Chef de Cabinet, the Head of the New York Liaison Office and the Senior Legal Adviser to the Chambers. Of these, one (Chef de Cabinet), is reported by the ICC as being vacant although there is a male appointee from WEOG (United Kingdom) in the post at a P5 level. The two other officially filled positions are occupied by an African woman (Kenya, Head, New York Liaison Office) and a male appointee from WEOG (France, Senior Legal Adviser).

**None of the Heads** of the OTP, Registry, ASP Secretariat, and Secretariat of the TFV are from Africa, Asia or Eastern Europe. The incoming ASP President is a woman from Eastern Europe.<sup>219</sup>

**Following the recommendation** expressed by the Committee on Budget and Finance at its twelfth session in April 2009, the Human Resources Section of the Court prepared a two-year plan to conduct recruitment missions in under-represented and non-represented regions. The first such mission was conducted in December 2009 in Estonia.<sup>220</sup> While more missions in Eastern European countries were planned for the first half of 2010, no activities were carried out in 2010 nor 2011 due to budgetary and human resource constraints. In the Court's Report to the ASP on human resource management, the Registrar has indicated that the Section will work on an alternative strategy, in light of the zero growth in the budget, to stimulate an increase in awareness about the Court's employment possibilities in under-represented and not represented countries.<sup>221</sup>

**All the members** elected to the Disciplinary Board for Counsel (two permanent and one alternate) and to the Disciplinary Appeals Board for Counsel (two permanent and one alternate) are from WEOG countries, respectively from France, Canada and Germany, and from France, the United Kingdom and Spain.

216 The positions are Director of Common Administrative Service Division, Director, Division of Court Services, and Director, Internal Audit. Figures as of 31 July 2011. Information provided by the Human Resources Section of the ICC.

217 Prosecutor Luis Moreno Ocampo (Argentina).

218 Deputy Prosecutor Fatou Bensouda (The Gambia) and Registrar Silvana Arbia (Italy).

219 On 26 July 2011, the Bureau of the Assembly of States Parties recommended that Ambassador Tiina Intelmann (Estonia) be elected as new President of the ASP at the beginning of the tenth ASP session in New York from 12 to 21 December 2011. This is the first time that a woman is elected to this position.

220 *Report of the Court on human resources management*, ICC-ASP/9/8, 30 July 2010, p 5.

221 *Report of the Court on human resources management*, ICC-ASP/10/9, 22 June 2011, p 4.

# Overview of Trends CONTINUED

**The majority** of members of the Disciplinary Advisory Board, seven out of nine, are from WEOG. The two non-WEOG members of the Disciplinary Advisory Board are from Africa (South Africa) and Eastern Europe (Serbia). This year, the majority of the Appeals Board, five out of nine are non-WEOG members – two from GRULAC (Venezuela and Colombia), and three from Africa (Senegal, Ghana and Kenya). The WEOG members are from Australia, Italy, the United Kingdom and the United States.

## Legal Counsel

**As of 26 July 2011**, there are 403 individuals on the List of Legal Counsel of whom 95 are women (23.5%) and 308 are men (76.5%). This is the first year that the percentage of female professionals appointed to the List of Legal Counsel has increased since 2008. This is primarily due to the significant increase in the number of women lawyers from the Africa region appointed to the List during 2011. Despite this increase, women are still underrepresented on the List of Legal Counsel with three times more men than women appointed.

**Although the overall geographical** breakdown of the List of Legal Counsel reflects the same pattern as the past three years, the percentage of representatives from the WEOG region (59%) is 5.5% lower than in 2010 when 64.5% of those on the List were from this region. Between 2008 and 2010, there was a steady decrease of around 2% each year of WEOG appointees to the List of Counsel. The percentage of individuals from the Africa and Asia regions appointed to the List of Legal Counsel has increased by 3% each since 2010.

**Of the 403 individuals** on the List of Legal Counsel, 18.5% appointees are from countries that are not States Parties to the ICC. In 2010, 20% of appointees were from non-States Parties. The United States of America has the highest number of appointees (47) for the fifth year in a row. From the Africa region, non-States Parties represented on the List are Cameroon with 12 appointments, Morocco with three appointees, and Algeria, the Arab Republic of Egypt, Mauritania, Rwanda, Sudan and Zimbabwe with one appointee each. In Asia, the only State Party represented on the List of Legal Counsel is Japan, while the other members all come from non-States Parties (Malaysia with three appointees and Kuwait, India, Pakistan and Singapore with one each).



**This year, for the first time** since 2006, the number of African women appointed to the List of Legal Counsel increased. The number of African female appointees (25%) compared to the total number of appointees from the region more than doubled when compared to the number of female appointees in 2010 (12%). Despite this progress, appointees from Africa are overwhelmingly male lawyers (75%).

**Of the 403 individuals** on the List of Legal Counsel, 68 (17%) are from five out of the seven Situations before the Court. The breakdown is as follows: 38 from the DRC, 19 from Kenya, six from CAR, four from Uganda, and one from Sudan. This is the first year that a Sudanese lawyer (male) has been appointed to the List of Legal Counsel. Libya and Côte d'Ivoire, new situations opened for investigation by the ICC in 2011, do not have any appointees on the List of Legal Counsel. From the seven Situation countries, only the DRC made it to the 'Top 5' list of overall appointees.

**Of the 68 appointees** from Situation countries, nine are women (four from DRC, two from Kenya, two from CAR and one from Uganda). This figure represents 2% of the total List of Counsel and 13% of the appointees from Situation countries.

**Under Rule 90(4)** of the Rules of Procedure and Evidence, the ICC is required to 'take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of victims, particularly as provided in Article 68(1),<sup>222</sup> are represented and that any

222 Article 68(1) obligates the Court to take 'appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. ... the Court shall have regard to all relevant factors including age, gender ... and the nature of the crimes, in particular but not limited to, where the crime involves sexual or gender violence or violence against children'.

conflict of interest is avoided'. This therefore requires the Court to ensure that the List of Legal Counsel includes individuals with expertise on sexual or gender violence. The Counsel Support Section, in its coordination and oversight of the List of Legal Counsel, does not systematically consider this criterion when assessing the eligibility of applicants to the List, and does not actively seek information from applicants with regard to their experience in this area.

**There are** 115 individuals on the List of Assistants to Counsel, of whom 56 (48.6%) are from WEOG, 55 (47.8%) from Africa and two each (1.75%) from Eastern Europe and Asia. The GRULAC region is not represented on the List of Assistants to Counsel. Since 2007 there has been an increase of 100 individuals to the List of Assistants to Counsel.

**Of the 115 individuals** appointed to the List of Assistants to Counsel, 56.5% are women. Female professionals were also the majority on this list in 2007 (64% women), the year in which figures for this List were last made available to the Women's Initiatives for Gender Justice.

**There are 13%** more women than men on the List of Assistants to Counsel. All regions except Asia, which does not have any women appointed to the List, have more women than men appointed. The highest percentage of female appointees on the List of Assistants is from the WEOG region with 62.5%. Africa has the second highest percentage of female appointees on the List with women comprising 53% of those appointed from the region. There are two individuals from Eastern Europe appointed on the List of Assistants to Counsel – one woman and one man.

# Overview of Trends CONTINUED

**On 12 May 2010**, the Public Information and Documentation Section and Counsel Support Section of the Registry launched the *Calling African Female Lawyers* campaign, in cooperation with the International Bar Association. The purpose of the campaign, initially planned until the end of 2010 but extended throughout 2011, was to increase the number of female lawyers from Africa authorised to represent defendants or victims at the Court. From the launch of the campaign until the end of December 2010, 17 special events were held in 16 different countries, including in four Situation countries (DRC, CAR, Kenya and Uganda).<sup>223</sup> Of these 17 events, 12 were conducted in African countries<sup>224</sup> and five in WEOG countries.<sup>225</sup> According to the *Report on the 2010 'Calling African Female Lawyer' Campaign*, and the data made available to the Women's Initiatives for Gender Justice,<sup>226</sup> from the beginning of the campaign in May 2010 to 26 July 2011, 22 African women have been appointed to the List of Legal Counsel.<sup>227</sup>

**As of 26 July 2011** there are 34 African women on the List of Legal Counsel, constituting 8% of the total number of individuals appointed to the List (403).<sup>228</sup> This constitutes a 4.5% increase from 2010 when there were 12 African women (3.5%) included on the List of Legal Counsel, out of a total 340 individuals.<sup>229</sup>

**African women** now represent 36% of the total number of women appointed to the List (34 out of 95).<sup>230</sup> In 2010, African women were 19% of the total number of women admitted to the List (12 out of 62).<sup>231</sup>

223 *Report on the 2010 'Calling African Female Lawyers' Campaign*, International Criminal Court and International Bar Association, 2010, p 4, at <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/FemaleCounselReport2010Eng.pdf>>, last consulted on 31 August 2011.

224 *Ibidem*. Events were held in Uganda, CAR, South Africa, Mali, Kenya, DRC, Nigeria (two events), Tanzania, Ghana, Botswana and Senegal.

225 *Ibidem*. Events were held in the Netherlands, the United Kingdom, France and Belgium.

226 Figures as of 26 July 2011. Information provided by the Counsel Support Section of the Office of the Registrar.

227 *Report on the 2010 'Calling African Female Lawyers' Campaign*, International Criminal Court and International Bar Association, 2010, p. 6, at <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/FemaleCounselReport2010Eng.pdf>>, last consulted on 31 August 2011.

228 Figures as of 26 July 2011. Information provided by the Counsel Support Section of the Office of the Registrar.

229 Figures as of 30 June 2010. Information provided by the Counsel Support Section of the Office of the Registrar.

230 Figures as of 26 July 2011. Information provided by the Counsel Support Section of the Office of the Registrar.

231 Figures as of 30 June 2010. Information provided by the Counsel Support Section of the Office of the Registrar.

**The number of African women** appointed to the List of Assistants to Counsel increased from five at the beginning of the campaign<sup>232</sup> to 29 in July 2011. African women appointees thus represent 45% of all the women on the List (29 out of 64) and 25% of all the individuals on the List of Assistants to Counsel (29 out of 114).

**According to the campaign report**, all complete applications received from African women have been decided upon. However there are a high number of incomplete applications still pending.<sup>233</sup>

**On 26 May 2011**, the *Calling Arab Counsel* campaign was launched by the ICC.<sup>234</sup> Currently, the number of appointees coming from Arab countries<sup>235</sup> on the List of Legal Counsel is nine, of whom only one is a woman (Tunisia).<sup>236</sup>

**On the List of Assistants** to Counsel, only one male appointee comes from an Arab country (Arab Republic of Egypt).<sup>237</sup> Considering that two out of the seven Situations currently under investigation by the ICC are Arabic-speaking countries (Libya and Sudan), an increase in the number of appointees to both lists with these language skills is necessary in the coming months.

232 *Report on the 2010 'Calling African Female Lawyers' Campaign*, International Criminal Court and International Bar Association, 2010, at <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/FemaleCounselReport2010Eng.pdf>>, last consulted on 31 August 2011.

233 *Report on the 2010 'Calling African Female Lawyers' Campaign*, International Criminal Court and International Bar Association, 2010, page 6, at <<http://www.icc-cpi.int/iccdocs/PIDS/femalecounsel/FemaleCounselReport2010Eng.pdf>>, last consulted on 31 August 2011. According to the figures made available to the Women's Initiatives for Gender Justice by the Counsel Support Section of the Office of the Registrar, 51 applications to the List of Legal Counsel and 27 to the List of Assistants from African female lawyers were pending as of 26 July 2011.

234 *ICC launches campaign to encourage Arab counsel to practice before the Court*, ICC Press Release, ICC-CPI-20110526-PR676, 26 May 2011, available at <<http://www.icc-cpi.int/NR/exeres/6AA892F9-ED30-4D19-931B-2632D66692FF.htm>>, last consulted on 13 October 2011.

235 Arab countries are usually defined as including all the members of the League of Arab States. Please note that Court's documents do not indicate the specific countries addressed by the *Calling Arab Counsel* campaign. As reference, the full list of the 21 members of the League of Arab States is available at <[236 Figures as of 26 July 2011. Information provided by the Counsel Support Section of the Office of the Registrar. Appointees from Arab countries come from Morocco \(three appointees\), Algeria, the Arab Republic of Egypt, Kuwait, Mauritania and Sudan.](http://www.arableagueonline.org/wps/portal/las_en/inner/lut/p/c5/vzLJkoJAEES_xQ8gumVRPLJKo0BAIwoXwoVFQRocBuz--tGYy1z0NGHlpSKyKt8lQQleavbDudj3Z9Lsa7ADySzVF34QiYEAZWwsIOJ15Dkrnoee8PDj1748f_stgi2IVVCz5rEk706FQU8fvhgFAtci1wzEIJn_SZHMKUQ-lN11qfEo4kEldlBM8YW2iFUsuDDMXP14D9lmdHSDh uGG_9LVNb74FBv9yq0KUyuL_TK6dRlj3apAisdIazJOJu9Z5vSDLOFzrAj-K8sGSVGTw6NoWyse7zpxRkMJC78x-l7YzLgmaP3yti5rB9Pt6cDZermgitBJVVtfsyznD7WPNtj9SJIJoWta-FLCtCNIORbtjpyG5W1rVurYzSN-BDLC-9HKlqyDIW2qqa0kMnNqbP0-8dyekKHgFZHZWk6Y2bOAHtdTOcA9nNf-X8ADDueY4!dl3/d3/L2dBI5EvZ0FBIS9nQSEh/?pcid=69747e00425e3086ba20fbc0e4251219></a>>, last consulted on 31 August 2011.</p>
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237 Figures as of 26 July 2011. Information provided by the Counsel Support Section of the Office of the Registrar.

# Overview of Trends CONTINUED

## Professional Investigators

There are **28 individuals** on the List of Professional Investigators of whom twenty are from Africa, six from WEOG, one from Eastern Europe and one from GRULAC. There is only one woman on the List of Professional Investigators (Eastern Europe). Half of the appointees are from Mali. With 24 out of 98 applications, Mali is also the country with the highest number of candidates whose applications are pending or under review.<sup>238</sup>

## Staff Expertise in Sexual and Gender-based Violence

In **March 2009** the Victims and Witnesses Unit (VWU) in the Registry hired a Trauma Expert, on a GTA contract, with special expertise in gender violence. This was the first time that expertise in trauma related to sexual and gender-based violence had been used as a primary criterion for recruiting a position at the Court. Despite the post of Psychologist/Trauma expert being mandated by the Rome Statute, and the expansion of the cases and trials before the ICC to which this post provides expert advice and support, the Registry has again indicated this as a GTA post at a P3 grade in the 2012 Proposed Programme Budget.<sup>239</sup>

<sup>238</sup> Figures as of 26 July 2011. Information provided by the Counsel Support Section of the Office of the Registrar.

<sup>239</sup> *Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, 21 July 2011, p 124.

## Special Advisers to the Prosecutor

### Professor Mireille Delmas-Marty

was appointed Special Adviser on the Internationalization of Legal Issues in May 2011. Professor Delmas-Marty joined Professor McCormack, Special Adviser on International Humanitarian Law since March 2010, Professor Alvarez, Special Adviser on International Law since April 2010, Professor Méndez, Special Adviser on Crime Prevention since June 2009, and Professor MacKinnon, Special Adviser on Gender Crimes since November 2008, to the group of Special Advisers to the Prosecutor.

The **Special Advisers** work on a pro-bono basis and provide legal expertise on specific issues to assist with the development of policies, practices and legal submissions. The appointment of advisers with expertise on specific legal issues is provided for by the Rome Statute. The OTP has also indicated that members of the Advisory Council will advise on the development of specific expertise within the office.

In **November 2009**, Benjamin Ferencz was appointed as Special Counsel to the OTP and made an honorary member of the OTP Advisory Council.<sup>240</sup>

<sup>240</sup> See the *Trial Proceedings* section of this Report.

## Trust Fund for Victims (TFV)

**Out of 12 posts** at the Trust Fund Secretariat (of which seven are approved posts and five are GTAs), two are vacant. Of the 12 posts, six are professional posts (five approved posts and one GTA) and six are general service posts (two fixed terms positions and four GTAs). Women occupy half of the filled positions (50% women and 50% men) at the professional and general service levels, and overall. This figure represents a 7% decrease in the number of women in professional posts with respect to 2010 and a 21% decrease with respect to 2009. The most senior positions of Executive Director (D1) and Senior Programme Officer (P5) are occupied respectively by a man and a woman.

**Of the six professional posts** at the Trust Fund Secretariat, five (83%), of which one is a GTA position, are occupied by nationals from WEOG countries and one (17%) by a national from the Africa region.

**Out of the 34 TFV projects** approved by the Chambers, of which 18 are in northern Uganda and 16 in eastern DRC, 28 projects are active. Of the six inactive projects, two are on-hold and awaiting proposals (both of these relate to Uganda), three have been closed and their beneficiaries transferred to two other projects (DRC), and one is completed having reached its closing date (DRC).

**The total funds** obligated for grants in the Democratic Republic of Congo (DRC) and northern Uganda since 2007/2008, is €5,344,545. In addition, €600,000 has been allocated to activities in the Central African Republic (CAR). The current reserve to supplement orders for reparations from the Court amounts to €1,000,000.

**The TFV funds** available in the Fund's Euro bank accounts as of 30 June 2011 are €3,491,210.83. Last year, the TFV had €3,760,527.15 available as of the end of June. In 2009, the resources for the same time period amounted to €3,131,248.

**Since the establishment** of the Trust Fund in 2004, a total of 28 countries have made donations. Germany is the largest State donor having provided €1,714,800 in contributions. Finland and the United Kingdom are the next largest contributors to the Fund.<sup>241</sup>

**Of the 18 projects** approved for Uganda, three (17%) support women and girls victims/survivors. Of these, one uses earmarked funds for sexual and gender-based violence (SGBV) and two receive common basket funds. Of the 16 projects approved in the DRC, eight (50%) use earmarked funds for SGBV and work directly with women and girls victims/survivors.

**On 6 May 2011**, the Fund issued a three-month Call for Expressions of Interest in CAR. Activities in the country are expected to start at the beginning of 2012 and will focus on victims/survivors of sexual and gender-based violence, their families and affected communities.

**In response to** the €10 million appeal to assist 1.7 million victims of sexual violence under the jurisdiction of the Court launched by the Board of Directors of the TFV on 10 September 2008, the Fund received a total of €1,740,000 as earmarked donations from the Principality of Andorra, Denmark, Finland, Germany and Norway. With a total of €698,400 donated since 2008, Norway is the largest single contributor to sexual and gender-based violence initiatives.<sup>242</sup>

241 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 35.

242 *Ibidem*.

# Overview of Trends CONTINUED

**There are 81,516** estimated beneficiaries of the TFV projects.<sup>243</sup> Of the total estimated victims benefitting from TFV projects, 75% belong to the category of community peacebuilders, defined by the Fund as 'leaders and participants to large-scale meetings who also suffered during the conflict, and are now working to promote victims' rights, healing and reconciliation in their communities with support from the TFV's peace building projects'.<sup>244</sup> By the end of 2010, 73% of victims belonging to this category were benefitting from the Fund's projects.<sup>245</sup>

**The estimated number** of individuals directly benefitting from projects supported by earmarked donations from the Sexual Violence Fund is 32,499, 40% of the total number of direct beneficiaries. Of this, 87% are in northern Uganda and 13% in eastern DRC. The overwhelming majority of direct beneficiaries in northern Uganda are described as community peacebuilders (93%). Victims/survivors constitute 7% of direct beneficiaries of earmarked projects. In eastern DRC, the majority of direct beneficiaries are victims/survivors of SGBV (63%), followed by children of SGBV victims (19.5%), community peacebuilders (16.5%) and child mothers (1%).<sup>246</sup>

243 These include those who are still receiving assistance from past years, as well as beneficiaries of common basket and earmarked projects. *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 6. Please note that the estimated number of direct beneficiaries indicated in the Report is 82,756, but the total resulting by summing up the number of beneficiaries per category is 81,516.

244 *Recognising Victims and Building Capacity in Transitional Societies, Programme Progress Record*, Spring 2010, p 7.

245 Please note that the percentage reported in the *Gender Report Card 2010* (56%) referred to data as of 30 March 2010.

246 Figures as of 30 June 2011. Email communication with the Secretariat of the Trust Fund for Victims, 21 October 2011.

**The preliminary findings** of a longitudinal evaluation on a sample of around 2,600 beneficiaries in northern Uganda and the DRC carried out at the beginning of 2010, identified a differential impact of conflict-related violence on men and women. According to the TFV, the preliminary findings indicate that the gendered aspect of the violence suffered and its consequences have a clear influence on the views of female victims/survivors on both justice and reparations issues.<sup>247</sup> The full research report will be available in December 2011.

**The current Board of Directors** of the TFV was elected during the eighth session of the Assembly of States Parties from 18-26 November 2009 in The Hague for a three-year term. Members are from Mongolia (Asia), Kenya (Africa), Colombia (GRULAC), Finland (WEOG) and Latvia (Eastern Europe).<sup>248</sup> Out of five members, three (60%) are women. The Chair of the Board is also a woman.<sup>249</sup>

247 *Learning from the TFV's Second Mandate: from Implementing Rehabilitation to Assistance to Reparations, Programme Progress Report*, Fall 2010, p 11-12.

248 Ms. Elisabeth Rehn (Finland), His Excellency, Mr Bulgaa Altangerel (Mongolia), Ms. Betty Kaari Murungi (Kenya), Mr. Eduardo Pizarro Leongómez (Colombia) and Her Excellency, Ms Vaira Veik-Freiberga (Latvia).

249 Ms Elisabeth Rehn (Finland).

## Outreach Programme

**From 1 October** 2010 to 30 July 2011, a total of 450 interactive outreach sessions were organised in relation to five of the seven Situations currently under investigation by the ICC. According to the Public Information and Documentation Section of the ICC, these sessions directly addressed 32,324 people of whom one-fourth were women (8,302).

**As in previous years**, outreach activities focused on Uganda and DRC with 108 and 142 sessions respectively. Activities in CAR saw a considerable increase with twice as many interactive sessions held than in 2010 (106 compared to 53). There were 74 activities held for Sudanese affected communities in Chad and with the diaspora in Europe.<sup>250</sup> In Kenya, a total of 20 interactive sessions were carried out in the period under consideration.

250 Please note that the breakdown by location of outreach activities in relation to the Situation in Darfur made available to the Women's Initiatives for Gender Justice refers to the period from 1 October 2010 to 30 September 2011. According to PIDS, between 1 October 2010 and 30 September 2011, a total of 86 outreach activities were carried out of which 20 (23%) were held in Chad and 66 (77%) were held in Europe with the Sudanese diaspora. Out of the total number of events organised in Chad, 13 were public events held in refugee camps and seven were private sessions held in Abéché and N'Djamena. With regard to the meetings in Europe, 12 out of 66 were public events and the remaining 54 were private sessions. Meetings with the diaspora in Europe took place in the Netherlands, France, Germany, the UK and Ireland. In 2010, 55 outreach activities were carried out in relation to the Situation in Darfur, of which 22% (12) were held in Chad. Figures as of 30 September 2011. Email communication with the Outreach Unit, 25 October 2011.

**The highest number of women** attending outreach activities is in CAR (44%). This may reflect the sexual violence crimes committed and charged in the CAR Situation and specifically in the Jean-Pierre Bemba case.<sup>251</sup> In the DRC, women constitute 35% of the total number of participants at Outreach meetings. In Sudan and Uganda, 17% and 7% respectively of the participants are women. No information was available for Kenya with regards to the number of women participants.

**In comparison** with 2010, all the Situations, except Darfur, showed a decrease in the number of women who participated in interactive outreach meetings this year. Women were 46% of the total participants in CAR, 40% in the DRC and 10% in Uganda.

**As in 2010**, Uganda is the country with the highest attendance at Outreach meetings (11,194), but has the lowest percentage of women participants. Figures relating to women's attendance in Uganda are lower than those of 2009 and were a reversal on the positive increase in 2010.<sup>252</sup> This data indicates the ongoing need for a more intense campaign and more specialised strategies to reach out to affected women in the Greater North.

**The Unit** estimates that 74,800,000 people, the majority of whom are in the DRC (25 million), were potentially exposed to information about the Court through radio and television programmes across the five Situations in which outreach activities are carried out.

251 See the *Trial Proceedings* section of this Report.

252 In 2011, 786 women attended outreach activities in Uganda. In 2009, this figure was slightly higher at 837. Last year, a total of 2,397 women attended interactive sessions in the country. Please note that while the 2010 figures cover a one-year period (from 1 October 2009 to 1 October 2010), this year's information related to a 10-month period (from 1 October 2010 to 30 July 2011).

# Overview of Trends CONTINUED

## Office of Public Counsel for Victims

**As of 14 October** 2011, the Office of the Public Counsel for Victims (OPCV) assisted 2,119 applicants and victims admitted by the Chambers to participate in proceedings – a 69% increase from 2010. While victims from CAR still constitute the majority of those represented or assisted by the OPCV (1,011), their percentage against the total number decreased by 36% (from 84% in 2010 to 48% in 2011). This year, the DRC Situation has the second highest number of victims represented and assisted by the Office with 748 (35%). Victims in the Uganda and Darfur Situations are respectively 6% and 1% of the total. This year the OPCV also supported 222 victims from the Kenya Situation representing 10% of the total number of victims assisted.

**Overall**, across all Situations, male victims are the majority of those represented or assisted by the OPCV (63.5% of the total, 1.5% more than in 2010). Men are also the majority of applicants and recognised victims in every Situation and case. As in 2010, Sudan has the highest male/female differential (72% difference). While last year 44% of DRC victims assisted by the OPCV were women, this year the figure is 30%. This indicates that the significant increase in the number of victims assisted and represented by the OPCV in relation to the Situation in the DRC (from 63 in 2010 to 748 in 2011) has primarily involved male victims. While female victims assisted and represented by the Office in relation to the Situation in the DRC are eight times more than in 2010 (28 in 2010 and 225 in 2011), male victims are 15 times more than in 2010 (35 in 2010 and 523 in 2011). In 2011, 42% of the victims from CAR are women compared with 39% last year.

**Gender-based crimes** were reported by 70% of the female victims from CAR being assisted by the OPCV. In DRC and Uganda, 10% of female victims reported crimes of sexual violence and rape. In Kenya, 15% of female victims reported sexualised crimes. With the exception of Kenya for which this figure was not available in 2010, the percentages of female victims reporting rape and sexual violence in the different Situations are the same as in 2010.<sup>253</sup>

**There are nine professional** and one general service posts within the OPCV, none of which is vacant. While in 2010 women comprised the majority of staff and occupied all the three senior posts (one P5 and two P4), this year women occupy four out of the nine professional posts and two out of three senior posts (one P5 and one P4). This year, GRULAC is not represented in the Office and 50% of the 10 staff members are from WEOG. In 2010, all the regions were represented in the Office and WEOG appointees were three out of the nine filled posts.

<sup>253</sup> This year, no information about the number of victims represented and assisted by the OPCV by Case, their gender breakdown, and the type of crimes reported by Situation and by Case was made available to the Women's Initiatives for Gender Justice.



# Institutional Development

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## Gender Training

### Registry

Staff of the Victims Participation and Reparation Section (VPRS) participated in four gender-related meetings between 6 July 2010 and 9 September 2011, of which two were in Kenya, one was in Uganda and one was in The Hague. Information regarding the extent and nature of the training, the number of VPRS staff who attended and the specific gender focus of the training was not provided and as such it is unclear whether these were meetings intended to support and build the capacity building of VPRS staff regarding gender issues.

On 26-27 May 2011, a Psychologist from the Victims and Witness Unit delivered a presentation on the 'Challenges in developing gender-sensitive witness and victim protection in proceedings and programs' at the 'Expert meeting on Gender and Witness and Victim Protection' organised by the Office of the United Nations High Commissioner for Human Rights (UNHCHR). She also participated in detailed discussions on gender-specific challenges regarding protection issues.

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

### Office of the Prosecutor<sup>254</sup>

While the OTP provided a list of meetings to which staff gave presentations or speeches, no information was provided about the gender training workshops and courses attended by OTP staff for the purpose of developing their capacity in this area.

According to information provided by the OTP, between September 2010 and June 2011, OTP staff participated in and gave presentations at the following events:

- On 29 September – 1 October 2010, an OTP senior staff member attended a 'Precarious Progress: UN Resolutions on Women, Peace and Security' working conference organised by the Joan B. Kroc Institute for Peace & Justice (IPJ) at the University of San Diego and co-convened by the International Action Network on Small Arms (IANSA), the NGO Working Group on Women, Peace and Security, the United Nations Development Fund for Women (UNIFEM), and the Women's Initiatives for Gender Justice in San Diego, US;
- On 13-15 October 2010, OTP staff gave a presentation on 'Sexual Violence in the DRC' at the 3rd annual 'Marche Mondiale des Femmes' in Bukavu, DRC;
- On 15-16 October 2010, a staff member attended a 'Proving International Sex Crimes' international expert seminar co-organised by the Forum for International Criminal and Humanitarian Law, Yale University and the University of Cape Town in New Haven, US;

<sup>254</sup> Information as of 27 July 2011. Information provided by the Jurisdiction, Complementarity and Cooperation Division, OTP.

# Gender Training CONTINUED

- On 24 November 2010, OTP staff members delivered a presentation at a 'Women, Peace and Security' 4-day training course organised by the Grotius Centre and Oxfam Novib in The Hague, the Netherlands;
  - On 3-4 December 2010, a senior staff member delivered a presentation on 'An Holistic Approach to Gender Justice' at an 'ICC Complementarity' workshop organised by the Africa Legal Aid in Nairobi, Kenya;
  - On 16 December 2010, OTP staff attended a 'Contribution of Migrants and Migrant Women to the Discourse on Gender-Based Violence' brainstorming session organised by Africa Legal Aid in The Hague, the Netherlands;
  - On 21 February 2011, an OTP staff member attended a 'Mainstreaming of Violence Against Women' workshop organised by the Dutch Ministry of Foreign Affairs in The Hague, the Netherlands;
  - On 7-8 March 2011, an OTP staff member delivered a presentation at the 'Thematic Investigation and Prosecution of International Sex Crimes' international expert seminar co-organised by the Forum for International Criminal and Humanitarian Law, Yale University and the University of Cape Town in Cape Town, South Africa;
  - On 8 April 2011, an OTP staff member delivered a presentation at the 'International Conference on Systematic Sexual Violence' organized by the Centre on Law and Globalization in The Hague, the Netherlands;
- On 26-27 May 2011, an OTP staff member delivered a presentation on the 'Challenges in developing gender-sensitive witness and victim protection in proceedings and programs' at the 'Gender and Witness and Victim Protection Programming' UNHCR expert meeting.
  - On 27-28 June 2011, an OTP senior staff member attended the '18th Pre-Summit Consultative Meeting on Gender Mainstreaming in the African Union' organised by GIMAC and Femmes Africa Solidarité in Malabo, Equatorial Guinea.
  - In February 2011, the Special Advisor to the Prosecutor on Gender, Catherine MacKinnon, gave an expert review of a short paper called 'The Investigation and Prosecution of sexual violence' drafted by the Sexual Violence and Accountability Project at UC Berkeley's Human Rights Center.

The Deputy Prosecutor, Fatou Bensouda, participated in the following gender-related events:

- The '1325 in 2020: Looking Forward ... Looking Back' high-level seminar organised by the African Centre for the Constructive Resolution of Disputes (ACCORD) in Durban, SA, on 8-9 October 2010;
- The 'Third annual Marche Mondiale des Femmes' in Tervuren, Belgium, on 10 October 2010;
- The '18th Pre-Summit Consultative Meeting on Gender Mainstreaming in the African Union' organised by Femmes Africa Solidarité in Addis Ababa, Ethiopia, on 24-26 January 2011;

- An 'Informal gathering of women from the international justice and human rights sectors' organised by Africa Legal Aid on 8 March 2011 to commemorate International Women's Day;
- The 'Droit des Femmes, Droit des Femmes Migrantes et Droit International Humanitaire' international colloquium organised by the Alliance for Migration, Leadership and Development (AMLD) on 15-16 March 2011 in Dakar, Senegal, during which she gave a presentation on 'The place of sexual violence in the strategy of the Office of the Prosecutor of the ICC'; and
- The 'Sexual Exploitation and Abuse' course during a Learning, Design and Development meeting organised by the Kofi Annan International Peacekeeping Training Center in Accra, Ghana, on 16-20 May 2011.

In June 2011, the Prosecutor recorded a video interview on UNSCR 1325 for E-Quality, the Dutch information and research centre for gender, family and diversity issues.

In the period under consideration, OTP senior staff participated in the following gender-related training events:

- In September 2010, an OTP senior staff member delivered an in-house three day training course on 'Techniques for interviewing victims of sexual violence';
- On 26-29 October, an OTP senior staff member conducted a 'Techniques for conducting sexual and gender-based crimes interviews' training at a training seminar organised by INTERPOL in Arusha, Tanzania; and

- On 15-16 December 2010, an OTP senior staff member delivered a two-day in-house training on 'Leading Victims and Witnesses of Sexual Violence in the Bemba Trial' training for the OTP Central African Republic Trial team.

## Judiciary

No training on gender issues was organised by the Judiciary in 2011.

# Policies<sup>255</sup>

## Sexual Harassment Policy<sup>256</sup>

### Policy



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

### Procedure



Procedures are not featured in the policy itself but are outlined in Chapter X of the Staff Rules. Formal complaints are forwarded to the Disciplinary Advisory Board<sup>257</sup> which hears the case with brief statements and rebuttals by the staff member who has allegedly violated the Policy, and if the staff member wishes, by a representative (who must be a staff member or a former staff member of his or her choosing). There is no indication in the Staff Rules of a right for complainants to participate in the proceedings nor their access to a representative. The Board must make a decision within 30 days and the staff member may appeal the decision to the Administrative Tribunal of the International Labour Organisation.

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

### Training



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

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

256 'Sexual and Other Forms of Harassment', Administrative Instructions ICC. *Report on the activities of the Court*; ICC-ASP/4/16, 16 September 2005, para 12: <[http://www2.icc-cpi.int/NR/rdonlyres/264D7935-F9C6-41DD-9F00-E1BA2ACE4F38/278507/ICCASP416\\_English.pdf](http://www2.icc-cpi.int/NR/rdonlyres/264D7935-F9C6-41DD-9F00-E1BA2ACE4F38/278507/ICCASP416_English.pdf)>. Sexual harassment is defined as 'any unwelcome sexual advance, request for sexual favour or other verbal, non-verbal or physical conduct of a sexual nature, which interferes with work, alters or is made a condition of employment, or creates an intimidating, degrading, humiliating, hostile or offensive work environment'.

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

## Sexual Harassment Policy continued

### Focal point



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

## Equal Opportunity Policy<sup>258</sup>

### Policy



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

### Procedure



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

### Training



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

### Focal point



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

<sup>258</sup> *Report on the activities of the Court*; ICC-ASP/4/16, 16 September 2005, para 12: <[http://www2.icc-cpi.int/NR/rdonlyres/264D7935-F9C6-41DD-9F00-E1BA2ACE4F38/278507/ICCASP416\\_English.pdf](http://www2.icc-cpi.int/NR/rdonlyres/264D7935-F9C6-41DD-9F00-E1BA2ACE4F38/278507/ICCASP416_English.pdf)>

## Parental Leave within the Staff Rules

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### Policy



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

### Procedure



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

### Training



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

### Focal point



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

## Compensation of Judges

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### Policy



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

### Procedure



See Recommendations.

### Training



See Recommendations.

### Focal point



Assembly of States Parties.

## Private Legal Obligation of Staff Members<sup>259</sup>

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### Policy



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

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### Procedure



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

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### Training



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

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### Focal point



No focal point indicated.

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<sup>259</sup> Administrative Instruction ICC/AI/2008/004, 15 August 2008.

# Recommendations

## Structures and Institutional Development



## Appointments and Recruitment

- **All organs** of the Court should reverse the growing trend of optional compliance with the Staff Rules and Regulations regarding recruitment processes. There is an increasing practice by the leadership within the ICC and those whom they direct, to consider Court policies and regulations as guidelines rather than instructions which must be consistently applied. The Committee on Budget and Finance (CBF) has noted on several occasions the lack of transparency in the Court's recruitment processes<sup>260</sup> and the lack of written administrative instructions.<sup>261</sup>
- **At the seventeenth** session of the CBF, in 2010, the Committee noted that there were five cases pending before the International Labour Organisation Administrative Tribunal. It is unclear whether these cases relate to a breach of due process and non-compliance by the Court in relation to the Staff Rules and Regulations, however such litigation appears to indicate management and compliance-oversight functions within the Court are not sufficiently effective. In addition, such cases may constitute a significant expense for the ICC.<sup>262</sup>
- **The Court** should implement effective human resource management practices to ensure that all organs are always in compliance with the ICC Rules and Regulations and begin to establish best practices in relation to recruitment and other processes. The Registrar and the Prosecutor must ensure that the human resource units under their management are supported to monitor deviations from the Rules and establish corrective interventions should such deviations be identified.
- **The Court** must be willing to address imbalances in gender and geographical representation at mid-to-senior level positions as well as create an institution supportive of staff learning and development.
- **The Heads of Organs** and ASP must ensure there is a safe working environment for employees, including an adequate and integrated internal system to deal with grievances, conflicts, disputes and complaints including, but not limited to, sexual and other forms of harassment. Strong disciplinary measures should be taken to address such harassment. A pattern of similar behaviour by an individual should result in termination of their employment contract or in the case of an elected official, removal from office.
- **Staff should** feel safe and be encouraged to report improper or inappropriate behaviour or actions which could compromise the good standing of the Court, including if such behaviour is demonstrated by a Head of Organ or others in leadership positions, without fear of reprisals or retaliations.

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

261 *Report of the Committee on Budget and Finance on the work of its sixteenth session*, ICC-ASP/10/5, 17 June 2011, para 57.

262 Since 2007, the Court has paid at least €270,941 to former staff members. In 2008 alone, the ICC was ordered by the International Labour Organization Administrative Tribunal to pay approximately €190,000 to an individual for breach of due process by the Office of the Prosecutor. (See *ILO Judgment No. 2757*, 105th Session, 9 July 2008). In 2010, €330,690 was indicated in the budget for cases pending before the ILOAT. Administrative costs for ILOAT procedures since 2007 amount to €34,947. *Report of the Committee on Budget and Finance on the work of its seventeenth session*, Advance Version, ICC-ASP/10/15, 6 September 2011, p 11.

- **The Court** must ensure that its internal complaints procedures are sufficiently robust, transparent, provide adequate protection for staff and whistleblowers, are an effective mechanism for accountability, uphold the rights of employees and ensure the positive reputation and good standing of the Court as a whole.
- **In addition** to the Special Adviser on Gender Issues, the OTP should appoint full-time internal gender experts in the Jurisdiction, Complementarity and Cooperation Division as well as the Investigations and Prosecution Divisions. Given the increase in cases and investigations anticipated in 2012, more staff with gender expertise will be required to ensure the integration of gender issues within the heightened case load expected next year which includes seven active investigations, maintenance of nine residual investigations, monitoring of at least eight potential Situations,<sup>263</sup> and potentially six trials.<sup>264</sup> Gender expertise within the OTP is essential to strengthen the institutional capacity on these issues, and to enhance the integration of gender issues in the discussions and decisions regarding investigations, the construction of case hypotheses, the selection of cases and prosecution strategy.
- **The OTP** should adopt benchmarks to assist its recruitment practices towards addressing the alarming and persistent gender disparity in appointments to mid and senior level posts. In the OTP, the male/female differential remains high in senior positions with almost three times the number of male appointees at the P5 level and six more male appointments at the P4 level. Male appointees are the majority also at the P3 level. Women are still the overwhelming majority at the P1 and P2 levels.
- **The Court** should form an inter-organ committee, with support from external experts, to prepare a three-year plan to ensure gender and geographical representation and gender competence at the Court, in mid-to-senior level decision-making and management positions. Women are overwhelmingly clustered into the P1 and P2 levels with relatively few women in mid and senior management posts across the Court. Such a plan should detail a proactive role for the Court and provide a common framework for the activities of each organ in recruitment, including specific objectives to guide the Court in its employment practices and to redress the under-representation of women in P3-D1 posts. The plan should include indicators to assess progress in organisational competence across all organs and related bodies, including the Trust Fund for Victims, the OPCV, the OPCD and the ASP Secretariat. The three-year plan could also be integrated into the Court's overall Strategic Plan as a crucial aspect of its strategic goals of 'quality of justice' and being 'a model of public administration'.

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263 *Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, 21 July 2011, p 3. Please note that the figure related to the seven active investigations includes the Situation in Côte d'Ivoire, for which investigations were authorised by Pre-Trial Chamber III on 3 October 2011, after the 2012 Proposed Programme Budget was prepared.

264 Estimate of the Women's Initiatives for Gender Justice based on ongoing trial proceedings in the Katanga and Ngudjolo and Bemba cases; commencement of trial proceedings in the Banda and Jerbo case subject to the resolution of interpretation issues; and commencement of trial proceedings in the Ruto *et al*, Muthaura *et al*, and Mbarushimana cases subject to charges being confirmed.

- **As part of** the next phase of the Strategic Plan, the Court should establish time-specific ‘placement goals’ for hiring suitably skilled women and those from under-represented or non-represented countries and regions. Placement goals serve as reasonably attainable objectives or targets that are used to measure progress towards achieving equal employment opportunities, and enable the Court to identify ‘problem areas’ resulting in disparities in relation to the appointment, promotion or attrition of competent staff who are otherwise under-represented in general, or under-represented in certain grade levels, such as women in mid-to-senior level positions within the ICC.
- **France once** again has the highest number of nationals appointed to the Court. Between 2008 and 2011, there has been a 79% increase in the appointment of French nationals to professional posts. The ceiling to address ‘overrepresentation’ by one state within a region should be implemented, gender balanced, equitable at all career levels, and support the development of competence within the ICC.
- **The practices** which have given rise to the significant increase in the number of appointments of French nationals should be reviewed to see how such an increase occurred, whether this reflects a policy decision, a change in ‘practice’ or some form of bias. In addition, the overrepresentation of French nationals should be assessed as to whether this profile significantly contributes to the efficacy and competence of the Court in the performance of its core functions and responsibilities and could in anyway be justified.
- **The ASP** should immediately increase the resources for the Human Resources Section of the Registry to ensure it is able to fulfil the many tasks and functions which fall within its mandate. When compared with other international organisations of comparable size, the Human Resource Section of the ICC is underfunded, inhibited in its ability to lead compliance strategies and lacks sufficient resources to address all the demands on the office. As an immediate step, the ASP should support the approval of the P4 position of Head of the Staffing Unit.<sup>265</sup>
- **The OTP** should place greater emphasis on recruiting expertise (in relation to investigations, prosecutions, analysis and trauma) on sexual and gender-based violence. The Court should seek candidates with a solid background and experience in conducting criminal investigations along with gender analysis skills, sound prosecutorial experience including prosecuting perpetrators of gender-based crimes.
- **Prioritise** the need for ongoing gender training for staff of each organ of the Court and make attendance at internal and external gender training seminars mandatory. Although gender is sometimes incorporated into the training organised by the different organs and sections of the Court, including the induction training for new staff, greater attention should be given to hiring staff with this expertise and providing training activities solely dedicated to developing greater competence on gender issues. The President, Registrar and Prosecutor should ensure staff attendance for each organ of the Court.

<sup>265</sup> Proposed Programme Budget for 2012 of the International Criminal Court, ICC-ASP/10/10, p 92.

- **Diversify** the advertisement of ICC vacancies in media, email listserves or other means that are accessible to a larger audience. For example:
  - Websites, listserves, blog sites or newsletters of NGO networks, regional or national bar associations, and national or regional print media in countries under-represented among Court staff, and
  - Networks, websites, blog sites or newsletters of national, regional and international women's organisations and networks, national or local associations of women police, national associations of women lawyers, women judges' associations and women's networks within other judicial associations such as the International Bar Association, the International Criminal Bar and the International Association of Prosecutors.
- **The ICC** may also consider 'out-sourcing' its recruitment activities.
- **Actively** collect Curricula Vitae of competent women and other professionals even when there are no job openings, and keep them as active files for future hiring processes.

## Field Offices

- **The Registry** should conduct a mid-year assessment and survey on the impact on local communities of the scaling down and closures of the field offices. The findings of this survey should be analysed and submitted to the Committee on Budget and Finance at its nineteenth session from 24 September to 3 October 2012. In 2012, there will be significant changes in the locations and staffing levels of the ICC field offices. The new composition of the offices includes retaining the two existing field offices in Kinshasa (DRC) and CAR (Bangui), the forward field presence in eastern DRC (Bunia), a reduction in the field office in Kampala (Uganda), and a limited Registry task-force in Kenya. By the end of 2011, the Court will not have any field presence in Chad (for Darfur) with closure of the two in-country offices. The reorganisation of the field presence of the Court follows a strategic review carried out by the Field Operations Section which focused on an increased link between field operations and judicial developments, as well as on the budget assumptions for 2012.<sup>266</sup> The reduction in field presence will have a direct impact on the interface between the Court and victims' communities, inhibit access to information and reduce direct interactions between local communities and the ICC.
- **The ASP** should ensure the Field Offices are adequately funded and effectively managed with stronger coordination within the offices, to ensure they are operating in an efficient manner and able to perform a range of complex functions.

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<sup>266</sup> The budget assumptions for 2012 as listed in the Proposed Budget for 2012 are the following: Use of one courtroom team as, although a number of cases will proceed simultaneously during 2012, trial-hearings will be scheduled consecutively; Seven investigations in six Situation countries to be conducted by the Office of the Prosecutor, nine residual investigations and monitoring of eight other potential situations; Reduced number of five field presences for the Registry; and Seven defence teams and twelve victims' representative teams to receive legal aid during 2012. *Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, p 2-3, para 12-16.

- **The ASP** should resist any efforts or proposals to reduce the field office in Uganda and for the OTP to withdraw from the exercise of its jurisdiction in relation to the referral of the Situation of Uganda to the ICC. The Court must retain jurisdiction and therefore a strong field office in Uganda, due to the failure of the jurisdiction of the Ugandan International Crimes Division (ICD) to meet the standards of the Rome Statute, particularly in relation to gender-based crimes. In addition, in the first trial before the ICD, the Office of the Director of Public Prosecutions was found to have overlooked critical issues including whether the accused qualified for amnesty under the Ugandan Amnesty Act.<sup>267</sup> Such an oversight ultimately led to a dismissal of the case.<sup>268</sup> In such circumstances, the ICC cannot abandon the victims of the conflict in Uganda to a local judicial process which, at this time, is demonstrably incapable of providing justice in relation to war crimes, crimes against humanity and genocide.
- **Measures** should be taken to address the significant gap between the number of women and men appointed to field office positions. Currently, only 20% of the overall field staff are women and there are more than twice as many men than women assigned to professional posts in the field.
- **The ICC** should also address the underrepresentation of nationals appointed to professional posts within field offices. Currently there are no nationals from the countries with field offices appointed to professional positions in any of these offices.

## Budget

- **The Court must** prioritise improvements in its budget process as well as embark on longer term financial planning. This year the Committee on Budget and Finance (CBF) noted a number of budget issues, including the unprecedented number of potential expenses which were not contained in the 2012 proposed budget.<sup>269</sup> They also noted the significantly higher expenses in the Judiciary which had been miscalculated in the 2012 budget submitted by this organ to the CBF.<sup>270</sup> The Presidency had not accurately considered the number of the newly elected judges required for the expected cases in 2012, amounting to an additional expense of approximately €1 million.
- **Submit** to the CBF each year a 3-year expenditure forecast, in addition to the proposed next year's budget, as a means of encouraging medium term planning, reducing unexpected budget items and building the capacity of the Court, a large and complex institution, to more effectively identify known or knowable costs.

<sup>267</sup> *Ugandan Amnesty Act*, 1 January 2000.

<sup>268</sup> For further information on the Ugandan ICD case, please see the *OTP – Uganda* section of this Report.

<sup>269</sup> *Report of the Committee on Budget and Finance on the work of its seventeenth session*, Advance Version, ICC-ASP/10/15, 6 September 2011, p 8.

<sup>270</sup> *Ibidem*, p 7.

## Victims and Witnesses

- **Between 4 May** and 1 June 2011, the judges of the ICC invited submissions regarding a review of the roles of the Office of Public Counsel for Victims (OPCV) and the Office of Public Counsel for the Defence (OPCD). On 1 June, the Women's Initiatives for Gender Justice submitted a paper which analysed the role of the OPCV and each of the entities currently working on victims issues within the ICC. The Women's Initiatives included a statutory review of each of the primary bodies, namely the OPCV, the Victims and Witness Unit (VWU) and the Victims Participation and Reparation Section (VPRS) as well as an analysis of the mandate, roles and challenges for each of these entities. The submission identified:
  - The need for greater clarity in the delineation of roles and avoidance of duplication;
  - Greater coordination and cooperation between the current bodies, especially the OPCV and the VPRS;
  - The interconnected nature of the tasks undertaken by the OPCV, the VPRS and the Public Information and Documentation Section (PIDS);
  - The impact on victims and victimised communities of poor programme coordination and delivery, and the mutual impact each section has on the other in the performance of their activities.
- **The judges** should publish the outcomes of the review along with their recommendations for strengthening the efficient functioning of each entity as well as enhancing the effective participation of victims before the ICC.
- **The VPRS and PIDS** should have a mutual increase in resources and be required to develop complementary communication strategies designed to reach potential female applicants and victims. Currently male victims are the majority of victims applying to the Court, recognised by the Court and participating in outreach activities of the ICC. The low participation rates of women in outreach activities and the restricted number of women-specific information strategies organised by PIDS, as well as the limited outreach initiatives undertaken by the VPRS, have a direct connection to the relatively low numbers of women applying to the ICC to be recognised as victims and therefore able to participate in the justice process.
- **The ASP** should significantly increase the resources available to the Victims and Witnesses Unit to enable them to address their full mandate to provide support and protection, not only to witnesses but also to victims and intermediaries whose lives may be at risk as a result of engaging with, or assisting ICC enquiries and investigations or at risk as a result of testimony provided by a witness.<sup>271</sup> Currently victims and intermediaries are excluded from the security provisions of the Court and as such participate or assist the ICC at great risk to themselves, their families and their communities..

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271 Rule 16 (2), Rome Statute.

- **In 2012** the Court should develop, as a matter of urgency, a comprehensive security framework inclusive of witnesses, victims<sup>272</sup> and intermediaries<sup>273</sup> to ensure that protection mechanisms are tailored to their particular status, level of risk and specific circumstances.
- **The VWU** should ensure that protection and support measures are sensitive to the particular circumstances of women in conflict situations and ensure women and girls who are formally recognised by the Court as ‘victims’ benefit from appropriate protection procedures.
- **The Registry** should urgently request, and the ASP should immediately provide, the necessary funds for the position of Psychologist/Trauma Expert to be upgraded to an established post. This position has been categorised as a GTA since 2009. Such expertise is mandated by Article 43(6) of the Rome Statute and as such this position should be securely integrated within the structure of the VWU as an established post.
- **The VWU** should plan to increase the number of Psychologists/Trauma Experts to four by 2013, given the significant increase in cases and trials before the ICC to which the sole Trauma Expert provides critical and independent support to witnesses and to Chambers, upon their request.
- **During 2012**, the Victims Participation and Reparation Section (VPRS) should implement policies and practices to enable them to work effectively with victims of sexual violence and other forms of gender-based crimes, elderly victims, children and persons with disabilities.
- **The ASP** should support an increase in resources for the VPRS to further promote the victim application process and participation facility available under the Rome Statute. The VPRS must make it a priority to inform women in all of the conflict Situations of the victim application process, their right to apply, and the possibility of being recognised to participate in ICC proceedings.
- **In the next 12 months**, steps should be taken to urgently address and strengthen the institutional and personnel capacities of the VPRS including, but not limited to: conducting a review of the senior management processes and oversight of the Section within the Division of Court Services; conducting a skills audit of the Section staff; reviewing performance and roles; introducing a stronger data collection function; and creating a more effective mechanism and response strategy to address the large backlog of unprocessed victim application forms.
- **The Registrar** should urgently initiate an audit to identify the reasons for the current backlog of over 6,000 victims’ applications<sup>274</sup> and instigate immediate remedies to address this problem. In October 2010, there were 900 unprocessed victims’ applications.<sup>275</sup> In the intervening period, no action has been taken by the Division of Court Services to identify the cause of the backlog and to take steps to immediately stem the growing number of unprocessed victims’ applications. During 2012, the Division should develop strategies for long term changes within VPRS to avoid a repetition of such limited functionality.

272 Victims who have been formally recognised by the ICC to participate in proceedings.

273 With an emphasis on local intermediaries.

274 See the *Victim Participation* section of this Report.

275 *Gender Report Card 2010*, p 57.

- **The safety** practices adopted by the VPRS in their country-based consultations should be strengthened<sup>276</sup> to ensure that applicants and victims are not overly exposed to each other, to the wider community nor to NGOs who are not directly involved as intermediaries with the specific victims.
- **The methodology** employed by the VPRS for consulting victims about their views on legal representation should be revised to ensure that victims are provided with information regarding the full range of options for legal representation, along with relevant security issues, including the protection the ICC is able/unable to provide to victims. Victims should not feel pressured into agreeing to a common legal representative and should be provided with accessible information about all available options associated with legal representation and their rights as applicants before the ICC.

## Legal Counsel and Professional Investigators

- **The Counsel Support Section** (CSS) should ensure that the application form for the List of Legal Counsel seeks information about candidates' experience representing victims of gender-based crimes. Currently, lawyers with this specialised expertise are not yet explicitly encouraged to apply. The Registry should encourage applications from lawyers with this experience on the ICC website and develop a 'Frequently Asked Questions' page to promote a better understanding of the application process.
- **In May 2010**, the Registry of the ICC, in collaboration with the International Bar Association, launched the *Calling African Women Lawyers* campaign to address the consistent underrepresentation of women on the List of Legal Counsel. The campaign, initially planned for six months, was extended to the end of 2011. A review of the figures indicates a 183% increase in the number of African women appointed to the List in 2011 compared with the figures for 2010. There are now 34 African women on the List of Counsel compared with 12 appointees in 2010. This is the largest increase in the number of women appointed to the List in a 12 month period, since the List was opened in 2006.
- **The CSS** should report to the tenth session of the ASP on the impact of the campaign and their proposed strategies for continuing this intervention as well as initiating other campaigns to promote the List of Legal Counsel to women lawyers in other regions. Currently 403 individuals have been appointed to the List of which 308 are men (76.5%) and 95 are women (23.5%).
- **A comprehensive evaluation** of the campaign should be conducted by the CSS. In addition, the CSS should establish baseline data for new regional campaigns to enable them to monitor and evaluate the impact of tailored interventions in increasing applications from women lawyers, and ultimately increasing the number of female lawyers appointed to the List.

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<sup>276</sup> The Women's Initiatives for Gender Justice makes these recommendations regarding VPRS field consultations based on feedback from victims, applicants and partners in the Situation countries.



- **On 26 May 2011**, a second regional campaign was launched by the Court. Unlike the Africa-based campaign, the *Calling Arab Counsel* campaign does not focus specifically on women lawyers from the Arab world. Currently only nine appointees from this sub-region are on the List of Legal Counsel, of whom only one is a woman. Only one appointee to the List of Assistants to Counsel (male) comes from an Arabic speaking country.
- **From the outset** the CSS should integrate gender-specific strategies within the *Calling Arab Counsel* campaign and ensure that both female and male lawyers are made aware of the List of Legal Counsel. In light of the proven impact of such strategies in raising the awareness amongst female African lawyers, increasing applications from this population, and ultimately increasing the number of female lawyers appointed to the List with the appropriate level of experience and expertise, such strategies should be replicated for the new campaign. As a result of failing to instigate any gender-specific measures prior to 2010, 76.5% of appointees to the List are men. The number of male lawyers is three times higher than female lawyers for every region except Eastern Europe.
- **Such campaigns** must actively seek applications from lawyers with experience in prosecuting cases of gender-based violence or representing victims/survivors of such crimes. This is particularly important for the *Calling Arab Counsel* campaign given the low number of lawyers from this region currently on the List of Legal Counsel, the allegations of rape and sexual violence in the Libyan conflict and the existing charges for such crimes in three out of the six arrest warrants and summonses to appear for Sudan.
- **In addition** to the online promotion of the campaigns, other events, workshops and information seminars for lawyers should be held within the targeted regions. CSS campaigns must be linked to broader, integrated strategies and ensure that over time, the necessary skills and expertise among lawyers on the List of Counsel will address the distinct interests of victims, particularly victims of sexual or gender violence, as obligated under Rule 90(4).
- **The CSS** should embark on a vigorous recruiting campaign to increase the number of women on the List of Professional Investigators, as well as of individuals coming from the Situation countries. Currently, only one woman is included in the list out of a total of 28 members, and only one investigator comes from a Situation country (DRC).
- **Prioritise** the need for training individuals on the List of Legal Counsel, the List of Assistants to Counsel and the List of Professional Investigators on the gender provisions of the Rome Statute and interviewing/working with victims of rape and other forms of sexual violence.
- **The ASP** should fund a financial investigation function for legal assistance to assist with the determination of indigence and support additional resources for the legal aid scheme.
- **The Court** should have clear and transparent guidelines readily available for victims and Counsel, and widely promote the legal aid scheme to ensure victims/survivors can access this important mechanism. These guidelines would be a useful tool to better inform communities and intermediaries about how the Legal Aid Programme operates, its eligibility criteria, and how to both apply for Legal Aid and choose Legal Counsel.
- **A specific form** to assess the indigence of victims should be developed as a matter of urgency.

## Trust Fund for Victims

- **The Trust Fund for Victims** (TFV) should urgently develop a fundraising strategy and embark on a vigorous campaign to mobilise resources. Such a campaign should consider: retaining current donors; attracting new donors amongst States Parties; reaching out to non States Parties who may wish to engage with the Court through the Trust Fund; encouraging both cash and in-kind donations; developing a specific strategy with the private sector; implementing a scheme for individual donors; and launching more targeted donor appeals. The total amount of funds available in the TFV's Euro bank accounts as of 30 June 2011 was €3,491,210.83,<sup>277</sup> around €300,000 less than in 2010. From the beginning of the Fund in 2004, 28 countries have donated to the TFV.<sup>278</sup> According to the Secretariat of the Trust Fund for Victims, State contributions received between 1 July 2010 and 30 June 2011 amounted to €1,943,113.99<sup>279</sup> which represents a slight increase from last year when contributions received amounted to €1,826,043.16.
- **The Fund** received a total of €1,740,000 as earmarked contributions in response to the appeal launched in September 2008 for victims of sexual violence, with Norway being the largest contributor to sexual and gender-based violence initiatives with €698,400 donated since the appeal was launched. Considering 2011 is the last year of the three-year appeal, the objective of reaching €10 million in earmarked contributions will most likely not be achieved. The appeal should therefore be renewed for a further three-year period. The Board of the Trust Fund and the Secretariat should establish effective fundraising strategies for the Trust Fund as a matter of urgency. Through the promotion of the Trust Fund and raising global awareness of the challenges faced by victims of war and armed conflict, the Secretariat should aim to 'leverage' other resources in support of the special appeal for victims of sexual violence.
- **The ASP** must provide sufficient core funds for the operational budget of the Trust Fund and not require the TFV to utilise voluntary contributions to cover institutional overhead and administrative costs. Sufficient resources for the TFV are vital for providing support to victims, ensuring its stability as a structure and inspiring further contributions from a variety of public and private sector sources.
- **In addition** to the criteria for the 'special vulnerability of women and girls'<sup>280</sup> to be addressed in projects, the Secretariat should adopt proactive strategies to solicit proposals explicitly from women's groups and organisations. Benchmarks could be established to ensure that applications from women's organisations, for the purpose of benefiting women victims/survivors, are between 45%-55% of the overall number of proposals received and funded.
- **The engagement** of local women's organisations with TF intermediaries could be further encouraged by their inclusion in capacity building initiatives to enhance their ability to be prospective partners with the TFV in the future.

277 Figures as of 30 June 2011. Email communication with the Secretariat of the Trust Fund for Victims, 18 October 2011. Please note that this amount includes €1,000,000 as reserves to supplement orders for reparations from the Court; and €600,000 for the sexual and gender-based violence programme in CAR.

278 *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report*, Summer 2011, p 35.

279 Figures as of 30 June 2011. Email communication with the Secretariat of the Trust Fund for Victims, 18 October 2011.

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

- **The TFV** should ensure that intermediaries with whom they partner have sound gender policies and strategies for addressing gender issues within their projects.
- **The Board** and Secretariat of the Trust Fund for Victims must ensure that implementation of Court orders for reparations are designed to integrate gender strategies, include women victims/survivors as recipients and participants, and address often invisible issues of gender bias amongst potential implementing partners.
- **The TFV** Secretariat should establish as soon as possible the ad hoc expert Advisory Committee on Reparations, approved by the Board of the TFV,<sup>281</sup> to specifically assist its work in designing the framework and operational parameters for the reparations programme.
- **Implementation** of the reparations programmes and future assistance projects should be guided by the findings of the longitudinal evaluation carried out by the TFV in 2010. The preliminary findings of this research identifies differences between the way female and male victims/survivors relate to both justice and reparations issues.<sup>282</sup>
- **The Secretariat** should continue to monitor the situation in Kenya and proceed towards an assessment of the Kenyan Situation in 2012, mindful of the relevant international and domestic judicial processes.
- **The TFV** should begin consideration of possible assessments of the situations in Libya and Côte d'Ivoire, subject to the relevant judicial processes.
- **The ASP** should approve the request by the Trust Fund for a Legal Adviser (P4), Financial Officer (P3) and Field Programme Assistant for Kenya (G5).<sup>283</sup>

## Outreach

- **In 2012**, the Court should continue to develop strategies for outreach in all seven Situations in which the ICC is now conducting investigations, with specific attention to women and girls who may not have access to mass outreach events and need safe and alternative fora to discuss gender issues including the impact of gender-based crimes. This year, women were 26% of the total number of participants at interactive sessions. The momentum established by the Unit in 2010 towards reaching more women should be continued and expanded. Activities solely directed towards women should be included in outreach strategies from the beginning of activities in new Situations.
- **In 2012**, PIDS should invest in increasing the number of female participants in their activities in Uganda and Sudan as these two Situations currently have the lowest percentage of women participating in interactive sessions (7% and 17%, respectively).

281 The proposal was adopted by the Board at their Annual Meeting held 21-22 March 2011 in The Hague.

282 *Learning from the TFV's Second Mandate: From Implementing Rehabilitation to Assistance to Reparations, Programme Progress Report*, Fall 2010, p 11.

283 The Secretariat has a total of 12 staff posts, of which ten are filled. The vacancies include a GTA post for the CAR office (under recruitment) and one GTA post for Kenya (not filled). The six professional posts are currently filled along with four of the six general posts.

- **The Outreach Unit** should add greater transparency to their data collection methodology and provide a stronger distinction between their attendance at events organised by others compared with specific strategies initiated by the Outreach Unit itself to work with victimised communities. Currently all activities are being described as 'outreach' without any distinction of who organised the event, the type of activity and for which purpose.
- **The Unit** should also produce figures in relation to the breakdown of their own activities – type of activity, purpose, content – in addition to their general quantitative figures about the number of activities and the numbers of male and female participants.
- **The ASP** should approve funds to enable the hiring of two more staff to the Outreach Unit. Currently there are 17 staff, in five locations, covering seven Situations.
- **The Unit** should recruit new staff emphasising the experience and expertise in communication, community development and mobilisation, and working with victims/survivors of gender-based crimes to ensure that effective programmes are developed to reach women and diverse sectors of communities in each of the seven conflict Situations. The benefits of using local knowledge, practices and languages regarding information dissemination to strengthen the Court's outreach work should be taken into account when recruiting Outreach staff.
- **In 2012**, outreach activities exclusively focusing on women should be initiated in Kenya. In light of the limited charges for gender-based crimes confirmed by the Pre-Trial Chamber, more information about the Court, its functions, and the right to apply to be recognised as victims, should be highlighted.
- **Alternative** education tools, such as radio drama in all four Darfuri languages already developed by the Outreach staff, should be broadcast more widely.
- **In 2012**, an assessment of the Libya and Côte d'Ivoire Situations should be carried out to draft an outreach plan for both countries. Specific strategies to reach out to women should be included in the plans from the outset.
- **Considering** that two out of the seven Situations are in Arabic-speaking countries, in 2012, the Public Information and Dissemination Section (PIDS) should reach out to journalists, the legal community and NGOs from the Middle East and North Africa region (MENA) and the Arab world to inform them of the proceedings of the Court. Information about the Court in this region is essential to increasing the understanding of the Court's functions and jurisdiction. The legal community should also be addressed to facilitate their potential interest in the List of Legal Counsel and Assistants to Legal Counsel.
- **The outreach** guidelines developed in 2008 regarding how to address gender-based violence should be further developed and fine-tuned to incorporate not only generic messages but to also address the gender-related issues specific to each Situation.

## Office of the Public Counsel for Victims

- **Given the** increase in the number of victims applying to participate in proceedings before the ICC and requesting assistance from the OPCV, an increase in staff is urgently required in order for the Office to respond to the growing demands on its role. The number of victims assisted and represented by the OPCV has increased since 2006 when 85 victims were assisted and represented by the Office to 2,119 victims in 2011.
- **The ASP** should support the request by the OPCV for a P3 GTA position (Legal Officer) in 2012 to assist with the increase in the anticipated number of both external legal representatives and victims represented and assisted, due to the opening of the Situations in Libya and Côte d'Ivoire.
- **This year** information regarding the breakdown of victims by Case, and by the type of crimes reported by victims per Situation and Case was not available. However, with the new database system, the OPCV in future years should be able to provide information regarding the gender breakdown of victims they represent by each case, every Situation and the specific crimes reported. This would provide the OPCV, and the Court as a whole, with more information about the type of applicant, the gender of victims and types of crimes for which victims are seeking redress and participation in proceedings before the ICC.
- **Over the next** 12 months the OPCV should develop a long term strategic plan which includes a significant increase in the number of staff. Currently the OPCV has a staff of 10 (9 professional staff and one general staff) working with over 2,119 applicants. This constitutes a 69% increase from 2010, when the OPCV was working with 1,252 applicants.
- **The ASP** should support a growth in the capacity of the OPCV to 15 full-time staff by January 2013 and allocate additional funds for 2012 in light of the assumptions made by the ICC regarding the provision of legal aid support for twelve victim's representative teams,<sup>284</sup> each of which will qualify for assistance, legal advice and research to be provided by the OPCV.
- **Overall**, across all Situations, male victims are the majority of those attending PIDS outreach activities, the majority of those formally recognised as victims by the Court, and therefore the majority of those represented or assisted by the OPCV (63.5% of the total, 1.5% more than in 2010). Men are the majority of formally recognised victims in every Situation before the ICC, with a male/female differential ranging from 72% in relation to the Situation in Darfur (where 14% of the victims are female and 86% are male) to 16% in relation to the Situation in CAR (where 42% of the victims are female and 58% are male). The male/female differential in relation to the Situation in the DRC is 40% (30% of victims are female and 70% are male). In Uganda, the male/female gap in recognised victims is 36% (32% of victims are female and 68% are male) and in relation to the Situation in Kenya the differential is 28% (36% of victims are female and 64% are male).

<sup>284</sup> 284 Proposed Programme Budget for 2012 of the International Criminal Court, ICC-ASP/10/10, 21 July 2011, p 3.

## Policies and Internal Audits

- **The Prosecutor** and the Registrar should instigate an employment policy, or integrate relevant provisions within the existing Staff Code of Conduct, regarding personal relationships between employees or between employees and elected officials. Such a policy should address the complexity of such a situation particularly where one party reports to the other, either directly or indirectly. Any employment policy about relationships at work is intended to ensure that staff do not commit, and are not open to allegations of, acts of inappropriate behaviour, favouritism, abuse of authority or conflict of interest.<sup>285</sup> It is also intended to ensure that all employees feel confident of fair and consistent treatment without the fear that a relationship will influence their or other employees' treatment or wider working relationships.<sup>286</sup> Among other issues, this policy should:
  - Ensure that the rights of both parties, particularly the rights of the more junior employee, are protected. Parties should refrain from any actions which could indicate or create the perception that relevant parties may receive unfair advantage or preferential treatment because of the relationship;<sup>287</sup>
  - Safeguard against a breach of confidentiality and avoid actions or relationships that may conflict or appear to conflict with job responsibilities and the best interests of the ICC;
  - Avoid the perception of impropriety within the Court and each of its organs; and
  - Require the parties to report the relationship to their immediate manager in order for steps to be taken to avoid the issues outlined above. Should one such party be an elected official eg the Prosecutor or a Judge, then such an individual should report the relationship to the President of the ASP. Should a series of such workplace relationships occur by the same individual(s) or a pattern of similar behaviour emerge, then the appropriate action by the relevant manager or Head of Organ should be taken. Where the person responsible for such behaviour is an elected official, then such actions should be reported to the ASP President and Bureau as a disciplinary matter. The President and Bureau are to be guided in their response to such a situation according to the process outlined in Article 46 of the Rome Statute.

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285 See <<http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1084086219&type=RESOURCES>>, last consulted on 1 November 2011.

286 Ibidem.

287 Examples of 'unfair advantage' or 'preferential treatment' may include, but are not limited to, promotions; transfers (either horizontal or vertical) into or within the division or organ where one party to the relationship holds a leadership position; selection without due process for attendance at prestigious events and travel privileges, among other areas.

- **During 2012**, the Presidency of the ICC should oversee a sexual harassment audit of the Court. This should include each organ and be implemented at all levels of the institution. An inter-organ committee could be established to assist with the framework of the audit and include the necessary expertise such as that of the Special Adviser on Gender Issues to the Prosecutor, Professor Catharine MacKinnon.<sup>288</sup> The results of the audit should be shared with the Bureau of the Assembly of States Parties. Recommendations to address any incidents or patterns of harassment should be developed to ensure the legal rights of employees are respected and to provide staff with a non-discriminatory, equality-based, human-rights respecting work environment.
- **The Court** should designate focal points for the Sexual Harassment Policy and Equal Opportunity Policy, clarify and/or amend the procedure involved in making formal complaints (ie whether complainants have a right to participate in the proceedings before the Disciplinary Advisory Board or whether complainants have access to a representative) and conduct staff-wide orientation on the grievance procedures for both Policies.
- **Implement** training for ICC staff on the grievance procedures for the Sexual Harassment and Equal Opportunity Policies.
- **Develop** and promote a flexible employment policy, so that ICC staff are aware of, and not discouraged from exercising provisions relating to parental leave, modified work schedules or other accommodation as needed. This facilitates the recruitment, and enables the ongoing employment, of staff members (primarily women) with family and other commitments.
- **Ensure** adequate access to and information about childcare resources or facilities, and encourage the Human Resources Section to include additional information on its Recruitment page of the website thus indicating the ICC is responsive to the needs of those with family commitments.
- **Establish** a mentorship programme for staff, particularly female staff and staff from regions under-represented in management positions, to support their potential advancement towards decision-making and senior posts.
- **Encourage** senior personnel at the Court to participate in training on 'managing workplace diversity' to facilitate a positive workplace environment for women and individuals from other under-represented groups and provide the necessary resources to carry this out.
- **Give consideration** to amending Article 112(3)(b) of the Statute, so that gender competence within the ASP Bureau is mandated, in addition to equitable geographical distribution and adequate representation of the principal legal systems of the world.
- **Review** and amend the current definition of 'spouse' in the Conditions of Service and Compensation of Judges of the ICC to include all domestic partnerships including same-sex partners, whether legally recognised or not under the law of the country of a judge's nationality. Same-sex unions have been legal in the Netherlands, the seat of the Court, since 1998 and are recognised by the United Nations within its staff rules and regulations.
- **Develop** and implement sexuality-based anti-discrimination training for the judges and Bureau of the ASP to assist with the Compensation amendment for judges in relation to domestic partnership.

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288 Professor MacKinnon is a renowned expert on the issue of sexual harassment as a form of sex discrimination and contributed to early litigation on workplace harassment in the United States of America.

# Substantive Jurisdiction and Procedures



# Substantive Jurisdiction<sup>289</sup>

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## 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.<sup>290</sup>

## 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.<sup>291</sup>

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.<sup>292</sup>

## Genocide Rape and Sexual Violence

The Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention.<sup>293</sup> 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'.<sup>294</sup>

## 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.<sup>295</sup>

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289 Footnote references in this section pertain to the Rome Statute of the International Criminal Court.

290 Articles 8(2)(b)(xxii), 8(2; (e)(vi) and 7(1)(g). See also corresponding Articles in the Elements of Crimes (EoC).

291 Articles 7(1)(h), 7(2)(g) and 7(3). See also Article 7(1)(h) EoC.

292 Articles 7(1)(c) and 7(2)(c). See also Article 7(1)(c) EoC.

293 Article 6.

294 Article 6(b) EoC.

295 Article 21(3).

# Procedures

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## 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'.<sup>296</sup>

## 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.<sup>297</sup>

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.<sup>298</sup>

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296 Article 54(1)(b).

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

298 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.<sup>299</sup>

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.<sup>300</sup> 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.<sup>301</sup>

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299 See also Rules 89-93 RPE.

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

301 Article 79. See also Rule 98 RPE.

# States Parties/ASP

5 November 2010 — 28 November 2011

## States Parties to the Rome Statute as of 11 October 2011<sup>302</sup>

Total number of ICC States Parties: **119**

Total number of ASP Bureau members: **21**<sup>303</sup>

President of the ASP: Ambassador Christian Wenaweser (Liechtenstein)<sup>304</sup>

Vice-Presidents: Ambassador Jorge Lomonaco (Mexico) and Ambassador Simona-Mirela Miculescu (Romania)

<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	<b>33</b>	<b>27.7%</b>	<b>5</b>	<b>23.8%</b>
Asia-Pacific States	<b>17</b>	<b>14.3%</b>	<b>3</b>	<b>14.3%</b>
Eastern European States	<b>18</b>	<b>15.1%</b>	<b>4</b>	<b>19.05%</b>
Group of Latin American and Caribbean States (GRULAC)	<b>26</b>	<b>21.9%</b>	<b>4</b>	<b>19.05%</b>
Western European and Others Group (WEOG)	<b>25</b>	<b>21%</b>	<b>5</b>	<b>23.8%</b>
<b>Totals</b>	<b>119</b>		<b>21</b>	

302 Information as adapted from the ICC's website. See <<http://www.icc-cpi.int/Menus/ASP/states+parties/>>.

303 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 two Vice-Presidents. The other 18 members of the Bureau are States and are represented by country delegates. The other members of the Bureau are: Australia, Brazil, Burkina Faso, Estonia, Gabon, Georgia, Japan, Jordan, Kenya, Nigeria, Norway, Samoa, Slovenia, South Africa, Spain, Trinidad and Tobago, the United Kingdom and Venezuela. See <<http://www.icc-cpi.int/Menus/ASP/Bureau/Bureau+of+the+Assembly.htm>>. The current Bureau assumed its functions at the beginning of the seventh session of the ASP on 14 November 2008.

304 On 26 July 2011, the Bureau of the Assembly of States Parties recommended that Tiina Intelmann (Estonia) be elected as the new President of the ASP at the beginning of the tenth session in New York from 12-21 December 2011.

## African States (33)

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

## Asia-Pacific States (17)

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) and Timor-Leste (6 September 2002).

## 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 (26)

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), 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).

# Governance

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

- **The Presidency**<sup>305</sup>
- **The Appeals Division, the Trial Division and the Pre-Trial Division** (the Chambers)<sup>306</sup>
- **The Office of the Prosecutor** (OTP)<sup>307</sup>
- **The Registry**<sup>308</sup>

The independence of the different organs constitutes a crucial aspect of the Rome Statute governance framework and is central to the integrity of investigations and judicial proceedings. The Assembly of States Parties (ASP), in turn, shall provide overall management oversight to the Presidency, the Prosecutor and the Registrar regarding the proper administration of the Court.

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

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

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

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

Following a number of governance evaluations and risk assessments undertaken by different organs of the Court to assess the Court's corporate governance framework over the years, which were consolidated in a Court-wide Corporate Governance Statement in 2010, and upon the recommendation by the Committee on Budget and Finance (CBF),<sup>309</sup> at the ninth session of the ASP in December 2010, the ASP adopted Resolution ICC-ASP/9/Res.2 establishing a Study Group on Governance (SGG). The SGG was established for the duration of one year to further consolidate the Court's institutional structure.

This section provides an overview of the Court's current corporate governance framework, in addition to a brief discussion of the SGG's mandate and the issues discussed. Many of the questions before the SGG have not yet been resolved, and one of the questions before the Assembly of States Parties in December 2011 is whether to extend the SGG's mandate by another year. Recommendations for the development of the Court's governance structure are contained in the **Recommendations** section of the *Gender Report Card 2011*.

## The ICC's corporate governance framework

One of the key aspects of the ICC's institutional structure is guaranteeing the independence of the different organs of the Court, in particular the OTP, while ensuring a harmonised, coordinated approach to the effective and efficient management of the Court. The basic framework outlined in Articles 34 *et seq.*, creates a clear distinction between the functions and authority of the OTP and the other organs of the Court.<sup>310</sup> According to the Statute, neither the Registry nor the Presidency has any authority over the management and administration of the OTP, nor *vice versa*, while the Registrar shall exercise her or his functions under the authority of the President of the Court.<sup>311</sup> Nonetheless, certain (administrative) competencies of the Registry, the OTP and the Presidency may overlap with the competencies of a Chamber. Although the governance framework as provided for by the Rome Statute left open the possibility of the emergence of separate administrative structures for each organ, in practice, the Court, in consultation with the ASP and the CBF, has established that administrative services are to be coordinated through the Registry. The Prosecutor, however, maintained a significant level of administrative functions for the OTP which may duplicate the services provided by the Registry or services which could potentially be provided by the Registry. The OTP operates its own in-house development of job descriptions, evaluation of applicants and construction of the selection panel to tailor recruitments for the specific needs of the Office.

Since the adoption of the Rome Statute in 2002, the Court has continually sought to develop internal coordination and clarify the responsibilities of the different organs while ensuring respect for their independent

<sup>309</sup> ICC-ASP/9/20, vol. II, part B.2, paras 22-33.

<sup>310</sup> ICC-ASP/9/34, paras 9-12.

<sup>311</sup> Article 43(2).



functions, by carrying out various risk assessments. In 2006, the then-President, Prosecutor and then-Registrar carried out an assessment of the major risks facing the ICC. They concluded that the three major risks facing the Court were: (i) a lack of effectiveness or quality in the Court's operations; (ii) divisions inside the Court; and (iii) the loss of external support for the Court.<sup>312</sup> Subsequently, in 2008 a comprehensive enterprise risk management exercise was carried out in order to reassess the effectiveness and efficiency of existing measures as regards to internal coordination and the distinction of responsibilities between the organs. This assessment identified a number of core risks, including 'diverging or conflicting objectives/non-alignment of priorities' and 'lack of clarity on responsibilities between different organs'.<sup>313</sup> Following this report, in August 2009 the CBF instructed the Presidency to submit a report 'on the measures that the Court is taking to increase clarity on the responsibilities of the different organs and a common understanding throughout the Court of such responsibilities',<sup>314</sup> which was submitted to the ninth session of the ASP on 3 December 2010.<sup>315</sup>

The 2008 risk assessment concluded that the Court would benefit from a formal 'corporate governance framework' to provide additional clarity about the different roles and responsibilities of its organs. The ICC Corporate Governance Statement was adopted by the President and the Prosecutor on 25 February 2010<sup>316</sup> and on 15 March 2010 the agreement on the Roles and Responsibilities of the Organs in Relation to External Communication was adopted.<sup>317</sup>

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

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

312 ICC-ASP/9/34, para 1.

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

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

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

The 2010 Governance Report outlined that although great progress has been made throughout the years to maximise clarity and minimise internal divisions, the Court should pay particular attention to: (i) implementing an institution-wide management control system; (ii) developing a common understanding of services; and (iii) providing further clarity on the roles and responsibilities, and potential overlaps, in specific areas.<sup>318</sup>

On 17 June 2011 the CBF issued its report on the implementation and operation of the ICC's governance arrangements.<sup>319</sup> This report set out the measures the Court has taken to further improve its governance framework pursuant to the 2010 Governance Report, including:

- Continued inter-organ coordination through the Coordination Council which meets on a monthly basis to fulfil its mandate 'to discuss and coordinate on, where necessary, the administrative activities of the organs of the Court',<sup>320</sup> the adoption of a Coordination Council Tracker System, and the creation of various inter-organ working groups to facilitate coordination and mutual cooperation between the different organs;<sup>321</sup>
- A proper, integrated management control system is currently under consideration within the Registry, which will act as a reporting mechanism by the Registry to the Presidency, thus providing the Presidency with the information necessary to maintain strategic oversight;<sup>322</sup>
- The development of a common understanding of services between the Registry and the OTP, pursuant to the Corporate Governance Statement which set out the foundational principles;<sup>323</sup> and
- The clarification on responsibilities of the different organs of the Court, notably between the OTP and the Registry in regards to the protection of persons at risk on account of their interaction with the Prosecution, setting out, amongst other things, the respective responsibilities on the OTP and the Registry with regard to the different protection tools.<sup>324</sup>

318 2010 Governance Report, para 39.

319 ICC-ASP/10/7, previously issued as CBF/16/6.

320 Regulations of the Court (as amended on 14 June and 14 November 2007), ICC-BD/01-02-07, Regulations 3.2.

321 ICC-ASP/10/7, para 5-11.

322 ICC-ASP/10/7, para 12-14.

323 ICC-ASP/10/7, para 15-19.

324 ICC-ASP/10/7, para 20-22.

## Study Group on Governance

At its ninth session in December 2010, the ASP decided to establish a Study Group on Governance (SGG) to further consolidate the Court's internal management structures. For the duration of one year, the SGG served specifically 'to conduct a structured dialogue between States Parties and the Court with a view of strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence' and 'to facilitate [this dialogue] with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau'.<sup>325</sup> The SGG was mandated to assess a wide-range of topics, including strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence.

The SGG has focused its work on three specific 'clusters': (i) the relationship between the Court and the Assembly of States Parties; (ii) strengthening the institutional framework of the Court; and (iii) increasing the efficiency of the criminal process.<sup>326</sup> In his discussion paper, the chair of the SGG stressed the importance of having an ongoing dialogue with all organs of the Court and the ASP, as well as the need for transparency, openness, inclusiveness and flexibility in the SGG's work.<sup>327</sup>

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

326 SGG, First meeting, 16 March 2011, Agenda and Decisions.

327 SGG, First meeting, 16 March 2011, Agenda and Decisions.

## Cluster 1: Relationship between the Court and the ASP

The first cluster of topics considered by the SGG during 2011 concerned the relationship between the Court and the ASP. In this regard, the first cluster focused on three particular questions: (i) the extension of judges' terms; (ii) election process of judges and of their President/ the President of the Court; and (iii) the scope and mandate of judicial independence *vis-à-vis* administrative accountability. In particular, the first cluster aimed to provide more clarity about how the Court's judicial proceedings are managed to ensure that judges can depart the Court upon reaching the end of their term or, when an extension is needed, that this extension is kept to a minimum. The SGG did not address nor review the election process of the post of Chief Prosecutor and the scope and mandate of independence *vis-à-vis* administrative accountability.

The Rome Statute,<sup>328</sup> the Regulations of the Court<sup>329</sup> and the Rules of Procedure and Evidence<sup>330</sup> give the President and the Judges a great deal of discretion regarding the appointment of judges to a specific division. Given the requirement of Article 36(10) that 'a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before

328 Article 35 (Election of judges on a full-time basis and distinction between those judges who are at the Court on a full-time basis and those who are not); Article 36(1) and (10) (the number of judges; and notwithstanding the expiry of their term, the requirement for judges to complete any trial or appeal the hearing of which has already commenced before that Chamber); Article 38 (Election and powers of the Presidency); Articles 39 and 40 (Structure of Chambers and Independence of the judges).

329 Regulations 9 (Term of office), 11, 12, 13, 14, 15 and 16 – Structure of Presidency, Service within Appeals Chamber, Presiding judges, Presidency of Division, Replacement/ Alternate Judges.

330 Rules 4 (Plenary sessions), 38 (Replacements) and 39 (Alternate judges).

that Chamber', the assignment of a judge to a particular division may have implications for the extension of their mandate. This, in turn, may have significant budgetary consequences for the Court. Notably, as discussed in greater detail in the **ASP – Elections** section of this Report, the six Judges whose terms will end in March 2012 could all have their mandate extended given that they are currently serving on the bench of an ongoing trial<sup>331</sup> and on the Appeals Chamber.<sup>332</sup> A judge whose mandate has been extended only serves in that capacity for the limited purpose of the extension and no longer participates in the plenum of judges.

The SGG focused specifically on two questions regarding judges' mandates. The first related to the discretion of the President to temporarily attach a 'pre-trial judge' to the trial division and *vice versa*.<sup>333</sup> The second concerned the assignment of judges to a particular division. Judges are assigned to a particular division of the Court, ie pre-trial, trial or appeals division,<sup>334</sup>

331 Judges Fulford and Odio-Benito are on the Lubanga case; Judge Steiner is on the Bemba case; Judges Diarra and Cotte are on the Katanga case. Their mandates will likely be extended until the end of the respective trial, pursuant to Article 36(10).

332 Judge Nsereko is on the Appeals Chamber and should the Appeals Chamber be seized of a matter on Appeal, his mandate will be extended.

333 For instance, despite Judge Silvia Fernández de Gurmendi's (Argentina) assignment to the pre-trial division, following the confirmation of charges decision by Pre-Trial Chamber I in the case against Banda & Jerbo, on 16 March 2011 the President temporarily attached her to the pre-trial division to hear the case against Banda & Jerbo. ICC-02/05-03/09-124.

334 Article 39(1) provides that 'the Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.'

by the plenary of judges for a period of three years, with the exception of an appointment to the appeals division.<sup>335</sup>

Pursuant to the SGG's request, on 23 June 2011, the Presidency submitted an information note to the SGG on the practices of the Presidency relevant to the composition of Chambers. In the information note, the Presidency set out the factors relevant to the composition of Chambers, including the divisional composition, the long-term needs of the Court, the workload and appropriate representation, and the need for potential extensions of mandate.<sup>336</sup> Additional factors include gender and geographical balance of a particular Chamber, the representation of the principal legal systems and the appropriate experience and expertise (eg a balance between List A and List B judges).<sup>337</sup> The Presidency noted that these factors are assessed on a case-by-case basis and the assessment cannot always be carried out in public. However, the Presidency stressed that 'even where a justification for a given composition might not be easily discernible to outsiders, it always results from a detailed assessment and balancing of the above factors, guided by the overarching objective of ensuring the efficient management of the Court's workload'.<sup>338</sup>

335 Article 39(3)(b) provides that judges in the appeals division serve in that function until the end of their term.

336 Information note on the practices of the Presidency relevant to the composition of Chambers, 23 June 2011, para 4.

337 Information note on the practises of the Presidency relevant to the composition of Chambers, 23 June 2011, para 4.

338 Information note on the practises of the Presidency relevant to the composition of Chambers, 23 June 2011, para 6.

## Cluster 2: Strengthening the institutional framework of the Court

The second cluster related to strengthening the institutional framework within the Court. This covered the powers and competences of the President of the Court and the follow up of the 2010 Governance Report with the CBF. Specific issues that fell under this cluster were: the powers and competences of the President in relation to the judiciary; the relationship between the Presidency and the Registry with regard to the administration of the Court; and the administrative accountability of the OTP and its relationship with the other Court organs.<sup>339</sup> However, the primary focus of the discussions under cluster 2 was on the Court's budgetary structure and the internal processes for the establishment of the budget, with a number of States Parties suggesting the Court should adopt a resource-driven approach to its budget, despite the Court's criminal justice mandate being demand-driven. For a more detailed discussion of the Court's Proposed Programme Budget 2012 and the CBF's recommendations to the ASP, see the **ASP – Budget** section of this Report.

In the past three years there has been a significant change in the governance relationship between the President and the Registrar with the former asserting greater management over the work of the Registrar and somewhat curtailing the functions of her Office. This has appeared to reduce the seniority of the post of Registrar, a position regarded in other International Tribunals as a member of the senior leadership of the Court given its status as a Head of Organ. Since 2009, the Registrar's decision-making functions have been increasingly reduced. Such intense oversight of the Registrar was not evident in the relationship between the first ICC President, Judge Philippe Kirsch and the first Registrar of the ICC, Bruno Cathala.

<sup>339</sup> Interim report of the Study Group on Governance, 19 July 2011.

## Cluster 3: Increasing the efficiency of the criminal process

The third cluster concerned increasing the efficiency of the criminal process. This cluster discussed matters relating to expediting the criminal process, including the number of judges in each division; the number of judges in the Trial Chambers; evidentiary issues; a review of pre-trial proceedings; a review of the system of victim participation; the use of status conferences and case management questions; and the setting of deadlines for filings and proceedings. Reparations, in particular the desirability of the establishment of reparations principles before the initiation of reparation proceedings, also formed part of the SGG's mandate under cluster 3. The SGG's comments in the context of cluster 3 echo in particular the observations presented by Judge Fulford to the ninth session of the ASP in December 2010, discussed in more detail in the **Trial Proceedings** section of this Report.

As part of its mandate under cluster 3, the SGG considered whether the Court could increasingly rely upon the admission into evidence of written statements, rather than in-person testimony, for more circumstantial facts or less central facts, or in case a witness is unavailable to appear in person. The SGG noted that the use of in-person witness testimony may have an impact upon the length and efficiency of proceedings. The focal point for cluster 3 also highlighted that accepting written, rather than oral, testimony '[may] reduce the vulnerability of witnesses to intimidation and the need for witness protection by dispensing with their presence in a court room'.<sup>340</sup> However, the Rome Statute clearly provides for the primacy of orality under Article

<sup>340</sup> 'Discussion paper on Cluster 3: specific areas where action may be necessary', prepared by the focal point Yoshiaki Ogawa (Japan), 9 June 2011.

69(2), which has been confirmed by the Appeals Chamber in the Bemba case.<sup>341</sup>

The SGG also examined the impact of the system of victim participation under the Rome Statute on the efficiency of the criminal process. It observed that, although at present victim participation does not impact upon the length of proceedings, as the Court is faced with a rapid increase in the number of victim participants it may be useful to evaluate the impact of the current system on the work of the Court, specifically requesting the input from judges.<sup>342</sup>

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341 This decision, as well as the principle of primacy of orality provided for under Article 69(2), is discussed in more detail in the *Trial Proceedings* section of this Report.

342 'Discussion paper on Cluster 3: specific areas where action may be necessary', prepared by the focal point Yoshiki Ogawa (Japan), 9 June 2011.

# Elections 2011

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**In 2011, during its tenth session, the ASP will hold elections for six judges and the Chief Prosecutor. In addition, the ASP will elect six new members to the Committee on Budget and Finance (CBF). These elections come at a crucial time in the Court's development. The ICC's second Chief Prosecutor will inherit active investigations in seven Situations, a full caseload, and the ongoing work of developing the investigative and trial practices of the world's first permanent international criminal court. The new Chief Prosecutor will also be the public face of the Court's investigations and prosecutions, and as such will be looked to by victims, the general public, and the diplomatic community to represent the highest levels of professionalism, competence and personal and professional integrity. The six judges who are elected in 2011 will be joining active Pre-Trial, Trial, and Appeals Chambers which are charged with making important decisions about investigations and arrest warrants, managing complex criminal trials, contending with a dynamic and evolving body of law, and delivering solid and well-reasoned decisions.**

The processes for nomination and election of these important positions are set out in the Rome Statute and further elaborated by the ASP as described below. While the formal elections will take place at the ASP's tenth session, in fact many of the most important decisions and selection processes will have taken place prior to the ASP itself. In respect of the Prosecutor position, a Search Committee has been convened for the selection process and to assist with the identification of a consensus candidate for election at the ASP meeting. With respect to the judges, as of the closing date of the nomination period of 16 September 2011, 19 candidates had been nominated, only two of whom are female; two of the candidates are from WEOG, five from GRULAC, two from Eastern European States, eight from African States and two from Asian States.

## Election of the next Chief Prosecutor

The current Chief Prosecutor of the ICC, Luis Moreno-Ocampo of Argentina, took office on 16 June 2003. Under Article 42(4) of the Rome Statute, the Chief Prosecutor's term of office is nine years, and she or he is not eligible for re-election. The next Prosecutor is expected to assume her or his duties in mid-2012 and serve a nine year term, expiring in 2021, unless at the time of election a shorter term is agreed upon.<sup>343</sup>

Article 42(3) of the Rome Statute provides that the Prosecutor 'shall be [a person] of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. [She/he] shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.' Every nomination of a suitable candidate must be accompanied by a statement setting out how the candidate fulfils the requirements as set out in Article 42(3).<sup>344</sup> According to the ASP Resolutions governing the process, nominations for the position should preferably enjoy support of multiple States Parties.<sup>345</sup> The period for nominations lasts 12 weeks and opens 26 weeks prior to the elections.<sup>346</sup> For these elections, the nomination period opened on 13 June 2011. Because of the creation of a Search Committee for the position of Chief Prosecutor, as described below, no formal nominations by States have been made and the nomination period has been extended

343 Article 42(4).

344 ICC-ASP/1/Res.2, para 26.

345 ICC-ASP/1/Res.2, para 25.

346 ICC-ASP/1/Res.2, para 24; ICC-ASP/3/Res.6, para 3.

until 9 December 2011,<sup>347</sup> to facilitate the implementation of paragraph 33 of Resolution ICC-ASP/3/Res.6 (Consolidated version), which provides that 'every effort shall be made to elect the Prosecutor by consensus'.<sup>348</sup> Article 42 does not require the Prosecutor to have the nationality of a State Party. ASP Resolution ICC-ASP/1/Res.2 calls for the ASP to make 'every effort [...] to elect the Prosecutor by consensus',<sup>349</sup> and if consensus cannot be reached, for the Prosecutor to be elected by secret ballot by absolute majority of the members of the ASP.<sup>350</sup>

## Establishment of the Search Committee

At its ninth session in 2010, the Bureau of the ASP established a 'Search Committee for the Position of the Prosecutor of the International Criminal Court', a new body mandated to 'facilitate the nomination and election, by consensus, of the next Prosecutor'.<sup>351</sup> The Search Committee was composed of five members, one from each regional group.

347 The nomination period has been extended seven times with two weeks: see *Note Verbale* of 5 September, extending the nomination period until 16 September; *Note Verbale* of 21 September, extending until 30 September; *Note Verbale* of 3 October, extending until 14 October; *Note Verbale* of 19 October, extending until 28 October; *Note Verbale* of 2 November, extending until 11 November; *Note Verbale* of 14 November 2011, extending until 25 November 2011; and *Note Verbale* of 28 November 2011, extending until 9 December 2011.

348 ICC-ASP/3/Res.6, Consolidated version, para 33.

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

350 ICC-ASP/1/Res.2 para 30.

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



## Terms of Reference

According to its Terms of Reference, the Search Committee could receive expressions of interest in the position from individuals, States, regional and international organisations, civil society, professional associations and other sources and could actively search for and informally approach suitable candidates.<sup>352</sup> States could also formally nominate candidates outside of this process, but were actively encouraged to use the mechanism of the Search Committee.<sup>353</sup> Subsequent to receiving these expressions of interest, the Search Committee submitted a shortlist to the ASP Bureau for consideration, taking into account the applicable criteria, in particular those set out in Article 42. The Terms of Reference did not elaborate further on criteria that might be applied beyond those set out in Article 42, the particular procedures the Search Committee would use to arrive at the short list of candidates, or a schedule of meetings or time frame for stages of the process.

## Composition of the Search Committee

The Terms of Reference for the Search Committee called for regional representation, in that the Bureau would designate one representative per regional group to serve on the Committee.<sup>354</sup> However, according to the final report, the

352 Candidates must fulfil the qualification requirements contained in Article 42 of the Rome Statute. This section adopts the Search Committee's terminology in referring to 'candidates', however, the process up to 29 November has not been a formal nomination process and there are therefore no formal candidatures until a formal nomination is made by 9 December 2011, according to the *Note Verbale* of 28 November 2011 extending the nomination period until 9 December.

353 ASP Bureau Search Committee, Terms of Reference of 6 December 2010 (ICC-ASP/9/INF.2), para 3. In his statement of 22 July 2011, the President of the Assembly said he welcomed the fact that States have shown their respect for this process by refraining from submitting formal nominations and campaign activities, see ICC-ASP-20110722-PR703.

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

Search Committee claims that members served in their personal capacities and not as representatives of their states. The report also notes that members recused themselves from interviews and discussions regarding the merits of candidates who had their same nationality.<sup>355</sup> The Terms of Reference did not contain any provisions for gender representation on the Search Committee, nor was there any leadership provided by the ASP Bureau to ensure gender balance or gender representation. Consequently, all five members appointed to the Search Committee were men.

The five members of the Committee were from Jordan (Asia), Slovakia (Eastern Europe), South Africa (Africa), Mexico (GRULAC) and the UK (WEOG).<sup>356</sup> With the exception of Slovakia, all of these countries are also represented on the ASP Bureau,<sup>357</sup> the body to which the Search Committee transmitted its recommendations of a 'shortlist of at least three suitable candidates, where possible for consideration by the Bureau for the final candidates for chief prosecutor'.<sup>358</sup> As such, the Search Committee was composed in such a way that could give rise to a disproportionate representation of these countries in the decision-making process.<sup>359</sup>

355 ASP/2011/117, paras 10, 23. The Search Committee report, however, does not indicate which members recused themselves of which interviews.

356 Members of the Search Committee: Coordinator – Prince Zeid Ra'ad Zeid Al-Hussein (Jordan – Asia); Deputy Coordinator – Miloš Koterec (Slovakia – Eastern Europe); Baso Sangqu (South Africa – Africa); Joel Hernández (Mexico – GRULAC) and Sir Daniel Bethlehem (UK – WEOG).

357 In addition to Jordan, Mexico, South Africa and the UK, which all serve on the Search Committee as well as on the ASP Bureau, the other members of the Bureau are: Australia, Brazil, Burkina Faso, Estonia, Gabon, Georgia, Japan, Kenya, Liechtenstein, Nigeria, Norway, Romania, Samoa, Slovenia, Spain, Trinidad and Tobago, and Venezuela.

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

359 Of these, two countries had candidates who were shortlisted amongst the final eight interviewed for the position.

*Representation of States in ASP Bureau and Search Committee in comparison*

<i>Regional group</i>	<i>Number of States Parties per region</i>	<i>Combined regional representation on the ASP Bureau and the Search Committee</i>	<i>Difference</i>
<b>WEOG</b>	<b>22%</b>	<b>23%</b>	<b>+1%</b>
<b>Africa</b>	<b>27%</b>	<b>23%</b>	<b>-4%</b>
<b>GRULAC</b>	<b>22%</b>	<b>19.5%</b>	<b>-2.5%</b>
<b>Eastern Europe</b>	<b>16%</b>	<b>19.5%</b>	<b>+3.5%</b>
<b>Asia</b>	<b>13%</b>	<b>15%</b>	<b>+2%</b>

A comparison of the regional representation of States in the ASP Bureau with those on the Search Committee shows that some regions are over-represented in the recruitment process for the Chief Prosecutor, relative to the actual number of States Parties in that region. In particular, WEOG, Eastern Europe and Asia are over-represented; while Africa and GRULAC are under-represented in the recruitment process, relative to their membership. The African region has the highest number of States Parties, and GRULAC the second highest number of States Parties.

**Regional representation on the ASP Bureau and Search Committee**

Combining the number of members from each region on the ASP Bureau and Search Committee, the percentages of representation per regional group are as follows:

<i>Regional group</i>	<i>Representation on ASP Bureau &amp; Search Committee</i>	<i>Total members</i>
<b>WEOG</b>	5 Bureau members + 1 Search Committee member:	<b>6 members (= 23%)</b>
<b>Africa</b>	5 Bureau members + 1 Search Committee member:	<b>6 members (= 23%)</b>
<b>GRULAC</b>	4 Bureau members + 1 Search Committee member:	<b>5 members (= 19.5%)</b>
<b>Eastern Europe</b>	4 Bureau members + 1 Search Committee member:	<b>5 members (= 19.5%)</b>
<b>Asia</b>	3 Bureau members + 1 Search Committee member:	<b>4 members (= 15%)</b>

## Work of the Search Committee

The Terms of Reference governing the Search Committee process contained a requirement to inform the Bureau regularly and in detail about the progress of the nomination and election, and that the Bureau subsequently would keep States Parties informed of the progress of nomination and election. However, these minimal requirements under the heading of 'transparency' were on their own insufficient to guarantee a transparent and accessible process. Throughout, many States expressed quiet frustration at not being made more aware of the nomination process and concern at the lack of transparency regarding the methodology utilised by the Search Committee for assessing candidates. There were also no provisions requiring either body to share information about the candidates or selection process with civil society, in the Terms of Reference.<sup>360</sup> In practice, the Search Committee did not make such information readily available to States. The Terms of Reference contained limited provisions for confidentiality. Specifically, only potential candidates who had expressed interest themselves could request the Committee that their information (name, nationality, gender and current affiliation) not be shared with the Bureau, however such confidentiality agreements do not apply to individuals who have been shortlisted for consideration by the Bureau.<sup>361</sup>

Nonetheless, throughout the Search Committee process, up-to-date and detailed information was for the most part not available to States Parties, civil society or the general public prior to the release of the Committee's final report, as discussed below, with the Search Committee and Bureau often citing confidentiality constraints. The Search Committee's final report notes

that it gave a number of briefings on request to representatives of civil society and other interested parties.<sup>362</sup> However, the report does not specify how many briefings or to which representatives such briefings were provided, and insufficient information was made available on how to access the Committee to receive such briefings. While the Search Committee did receive, and specifically mentioned,<sup>363</sup> a letter containing recommendations from a small group of NGOs, the letter did not examine the Search Committee process itself. Critically, the letter from civil society leaders also overlooked the gender related issues regarding the Search Committee as well as the gender competencies relevant for the position of Chief Prosecutor. According to the letter, it was prepared 'with the active involvement of the Coalition for the ICC', but without consultation of the Coalition's 2500 members, for the reason that it was 'not feasible to seek global endorsement'.<sup>364</sup>

As of 8 September 2011, according to the decisions adopted by the Bureau of the ASP at its twelfth meeting on 8 September<sup>365</sup> the Search Committee had received a total of 42 suggestions and expressions of interest. Twelve potential candidates were female, while 30 were male; 21 were nationals of the African Group, one of the Eastern European Group, three of GRULAC Group and 16 of the WEOG Group. According to the Search Committee's final report, it considered a total of 52 individuals,

<sup>362</sup> ASP/2011/117, para 24.

<sup>363</sup> ASP/2011/117, para 18.

<sup>364</sup> The letter, dated 16 March 2011, is available at <[http://coalitionfortheicc.org/documents/NGO\\_Letter\\_ICC\\_prosecutor\\_criteria\\_03\\_16\\_11.pdf](http://coalitionfortheicc.org/documents/NGO_Letter_ICC_prosecutor_criteria_03_16_11.pdf)>, last visited on 21 November 2011. Unfortunately, the Steering Committee of the CICC was not consulted about the contents of the civil society letter prior to it being sent to the Search Committee.

<sup>365</sup> Agenda and Decisions adopted at the twelfth ASP-Bureau meeting, 8 September 2011, available at <<http://www.icc-cpi.int/NR/rdonlyres/ED973FD7-F236-4E38-8E0E-4C52449BDAA3/283776/Bureau12AgendaandDecisions14sep1030.pdf>>, last visited on 24 October 2011.

<sup>360</sup> ASP Bureau Search Committee, Terms of Reference, 6 December 2010, para 7.

<sup>361</sup> ASP Bureau Search Committee, Terms of Reference, 6 December 2010, para 8.

including 'a number of highly qualified female candidates'.<sup>366</sup> The report noted that 'the gender diversity was not as great as the Search Committee would have hoped'.<sup>367</sup> Information is not available about the extent to which the Search Committee took a proactive approach to seek out qualified female candidates for consideration or whether any efforts were made to ensure information about the position was widely disseminated through relevant professional associations, networks, academic institutions and States.

According to their final report, the Search Committee drew up an interview list of eight candidates, selected based on the information available to the Committee at that point, including '*curriculum vitae*, academic articles and other commentaries on their work, press and other reports, such references as were then available', and other material including publicly available information.<sup>368</sup> The eight candidates who were selected for interviews also submitted personal statements, references, and other relevant documentation. The Search Committee did not make public the geographical or gender breakdown of the eight candidates. According to informal information, the interview list included only two women and at least two candidates from non-States Parties. Candidates appear to have been predominantly from the WEOG and Africa regions. There were no candidates from the Asian and Eastern European regions.

366 ASP/2011/117, para 27.

367 ASP/2011/117, para 27.

368 ASP/2011/117, para 30.

The Search Committee reported that they conducted standard format interviews with each of the eight candidates that covered, among other things 'his or her familiarity with the work of the ICC; managerial experience; the appropriate balance between OTP management, hands-on prosecutorial work and public engagement; perceptions of the strengths and weaknesses of the OTP; appreciation of the interaction between the OTP, other ICC organs and the ASP; language proficiency and previous prosecutorial experience and/or judicial experience in the handling of criminal cases'.<sup>369</sup> The candidates were also asked how they would shape prosecutorial strategies in the short, medium and long term; about the perceived gap in case selection; witness proofing and disclosure; the perception that the Court is an international criminal court for Africa; the candidate's most complex cases; the efficiency of the Office of the Prosecutor; and desired qualities in the selection of Deputy Prosecutors.<sup>370</sup>

According to the Search Committee's final report no questions were asked regarding the gender competencies of the candidates or regarding any experience prosecuting gender-based crimes, or that this was a criteria considered in the selection process for the shortlist. According to the report, the candidates were also not asked how they would structure the office to ensure this competency, or how they would implement Article 42(9) of the Rome Statute, requiring the appointment of advisers with legal expertise on specific issues, including but not limited to sexual and gender violence and violence against children.

369 ASP/2011/117, para 31.

370 Agenda and Decisions adopted at the fourteenth ASP Bureau Meeting, 14 October 2011, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Bureau/ICC-ASP-2011-Bureau-14-D-14Oct2011.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2011-Bureau-14-D-14Oct2011.pdf), last visited on 26 October 2011.

The Search Committee selected a shortlist from the eight candidates, which they then presented to the Bureau at its sixteenth meeting on 25 October 2011.<sup>371</sup> Pursuant to Rule 42(2) of the Rules of Procedure of the Assembly of States Parties, this sixteenth ASP-Bureau meeting was open to all States Parties, including those not represented in the Bureau.<sup>372</sup>

On 25 October, the report of the Search Committee, dated 22 October, was made public.<sup>373</sup> In its report, the Search Committee submitted the following four candidates for the position of Prosecutor:

- Fatou B. Bensouda, Deputy Prosecutor (Prosecutions), International Criminal Court (The Gambia)
- Andrew T. Cayley, International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia (UK)
- Mohamed Chande Othman, Chief Justice of Tanzania (Tanzania)
- Robert Petit, Counsel, Crimes Against Humanity and War Crimes Section, Department of Justice, Canada (Canada)<sup>374</sup>

In announcing the shortlist, the Search Committee stressed that it considered its role to be that of a ‘technical committee of the Bureau’, and noted that it did ‘not differentiate between candidates in terms of suitability or make any preferential treatment concerning any candidate’.<sup>375</sup>

371 Agenda and Decisions adopted at the fourteenth ASP-Bureau meeting, 14 October 2011, available at <[http://www.icc-cpi.int/iccdocs/asp\\_docs/Bureau/ICC-ASP-2011-Bureau-14-D-14Oct2011.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2011-Bureau-14-D-14Oct2011.pdf)>, last visited on 26 October 2011.

372 Rule 42(2) provides: ‘As a general rule, meetings of the Bureau and of subsidiary bodies with limited membership shall be held in private unless the body concerned decides otherwise.’

373 Report of the Search Committee for the Position of the Prosecutor of the International Criminal Court, ASP/2011/117, 22 October 2011.

374 ASP/2011/117, para 2.

375 ASP/2011/117, para 5.

The nomination period was set to end on 25 November, and it was expected that a consensus candidate would be announced at that time. However, in a public statement issued on 24 November by the Coalition for the ICC (CICC), it was reported that no consensus candidate had yet been identified, but that States Parties would continue to try to reach a consensus candidate.<sup>376</sup> The statement indicated that the front runners for the position of ICC Prosecutor were the two African candidates, Fatou Bensouda (who in June 2011 had received the endorsement of the African Union) and Mohamed Chande Othman. The statement also outlined that the nomination period was extended to 30 November ‘to give states more time to achieve consensus on one of the two front-runners’. The next meeting of States Parties is scheduled for 1 December 2011 in New York, at which time it will become clear ‘whether consensus has been reached on a single candidate or, failing this, whether both candidates will be formally nominated for election at the upcoming ASP on 12 December 2011’.<sup>377</sup>

376 ‘2011 ICC Prosecutorial Elections: States Parties Working Towards Consensus Candidate’, Media advisory, *Coalition for the International Criminal Court*, 24 November 2011, available at <[http://www.iccnw.org/documents/CICC\\_MA\\_PROS\\_ELECTION\\_241111.pdf](http://www.iccnw.org/documents/CICC_MA_PROS_ELECTION_241111.pdf)>, last visited on 25 November 2011.

377 ‘2011 ICC Prosecutorial Elections: States Parties Working Towards Consensus Candidate’, Media advisory, *Coalition for the International Criminal Court*, 24 November 2011, p 2, available at <[http://www.iccnw.org/documents/CICC\\_MA\\_PROS\\_ELECTION\\_241111.pdf](http://www.iccnw.org/documents/CICC_MA_PROS_ELECTION_241111.pdf)>, last visited on 25 November 2011.

## Election of six new Judges

In December 2011, the ASP will elect six new judges to the bench of the ICC. Rome Statute Article 36(1), provides for the ICC's judicial bench to be composed of 18 judges, subject to a proposal by the Presidency to increase the number of judges.<sup>378</sup> At the time of writing this Report, 19 Judges are currently serving at the ICC, due to the extension of Judge Blattmann's term of office in 2009 to complete the trial of Thomas Lubanga Dyilo. Of the current Judges, 11 are female and eight are male, making the ICC the only international judicial body to have a majority of female judges serving on the bench.

### Judges of the International Criminal Court as of 16 September 2011

<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>
<b>Appeals Division</b>						
Sang-Hyun Song, President (2009-2012)	Korea/Asian	A	M	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Daniel David Ntanda Nsereko	Uganda/African	A	M	2007	4 years 2 months	2012
Akua Kuenyehia	Ghana/African	B	F	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Erkki Kourula	Finland/WEOG	B	M	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Anita Ušacka President of the Appeals Division	Latvia/Eastern European	B	F	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015

<sup>378</sup> Article 36(2) provides: 'The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate.'

<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>
<b>Trial Division</b>						
Sir Adrian Fulford, <sup>379</sup> President of the Trial Division	UK/WEOG	A	M	2003	9	2012
Fatoumata Dembele Diarra, First Vice President	Mali/African	A	F	2003	9	2012
Elizabeth Odio-Benito <sup>380</sup>	Costa Rica/GRULAC	A	F	2003	9	2012
Bruno Cotte	France/WEOG	A	M	2007	4 years 2 months	2012
Joyce Aluoch	Kenya/African	A	F	2009	9	2018
Christine Van Den Wyngaert	Belgium/WEOG	A	F	2009	9	2018
Kuniko Ozaki	Japan/Asian	B	F	2010	8 years 2 months	2018
René Blattmann	Bolivia/GRULAC	B	M	2003	6	2009/end of Lubanga
<b>Pre-Trial Division</b>						
Sylvia Steiner, <sup>381</sup> President of the Pre-Trial Division	Brazil/GRULAC	A	F	2003	9	2012
Hans-Peter Kaul, Second Vice President	Germany/WEOG	B	M	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Ekaterina Trendafilova	Bulgaria/Eastern European	A	F	2006	9	2015
Sanji Monageng	Botswana/African	B	F	2009	9	2018
Cuno Tarfusser	Italy/WEOG	A	M	2009	9	2018
Silvia Fernández de Gurmendi <sup>382</sup>	Argentina/GRULAC	A	F	2010	8 years 2 months	2018

379 Judge Fulford is also serving in the Pre-Trial Division on Pre-Trial Chamber III.

380 Judge Odio-Benito is also serving in the Pre-Trial Division on Pre-Trial Chamber III.

381 Judge Steiner is also serving in the Trial Division as the Presiding Judge of Trial Chamber III.

382 Judge Fernández de Gurmendi is also serving in the Trial Division on Trial Chamber IV.

The Statute provides that ‘the judges shall be chosen from persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices’.<sup>383</sup> Candidates must either have established competence in criminal law and procedure (‘list A’ candidates) or competence in international law (‘list B’ candidates). Candidates who fulfil the competence requirements of both list A and list B can choose on which list to appear.<sup>384</sup> Candidates are further required to have an excellent knowledge of and be fluent in at least one of the working languages of the Court.<sup>385</sup> There can be only one national of a State Party serving at any given time.<sup>386</sup> Article 36 further provides that, in the nomination and election of judges, States Parties shall take into account the need within the membership of the Court for the representation of the principal legal systems of the world; equitable geographical representation; and a fair representation of female and male judges. The Statute also requires that States Parties take into account ‘the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children’.<sup>387</sup>

All of the six judges who are due to retire in 2012 are from List A; three are men and three are women. With the retirement of these six judges, the Court will be losing a considerable amount of trial experience, both because these are List A judges with criminal trial law experience, but also, and more importantly, because they have the amassed considerable experience from having served on the ICC’s only trial proceedings to date. With the exception of Judge Nsereko, who is in the Appeals Chamber, all of the departing judges are serving in Trial Chambers hearing ongoing

trials. Judges Fulford and Odio-Benito are in Trial Chamber I, hearing the Lubanga case; Judges Cotte and Diarra are in Trial Chamber II, hearing the Katanga & Ngudjolo case; and Judge Steiner is in Trial Chamber III, hearing the Bemba case. Of these, Judges Fulford, Steiner and Cotte are presiding judges. As noted previously, the term of Judge Blattmann, also part of Trial Chamber I, has already been extended to allow him to continue hearing the Lubanga case. Should any of these trials be ongoing at the time the judges are due to retire in March 2012, their terms may also be extended pursuant to Article 36(10)<sup>388</sup> to allow them to conclude the trial proceedings. Similarly, should the Appeals Chamber be seized of an interlocutory appeal at the time of Judge Nsereko’s retirement, his term may also be extended. The status of each of these trials is discussed in the **Trial Proceedings** section of this Report.

The possible extension of judges’ mandates will also have significant budgetary implications for the Court. Although the Court does not anticipate calling all new judges to fulltime service, the CBF noted that it had been informed that there is no assurance that this scenario would be maintained and that it is likely that at least some of these six judges might be called to full-time service in 2012.<sup>389</sup> In addition to the required eighteen judges on the bench, should a number of judges’ mandates be extended, the Court may have up to an additional seven judges in service.<sup>390</sup>

The nomination period for the December 2011 judicial election ran from 13 June through 2 September 2011, and was extended with two weeks until 16 September 2011.<sup>391</sup> At the end of the nomination period, 19 candidates had been

383 Article 36(3).

384 Article 36(5).

385 Article 36(3)(c) of the Rome Statute. Although the ICC has six official languages (Arabic, Chinese, English, French, Russian and Spanish), the Court has two working languages: English and French.

386 Article 36(7).

387 Article 36(8)(b).

388 Article 36(10) provides that ‘a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber’.

389 ICC-ASP/10/15, Advance version, para 104.

390 One judge whose term was extended in 2009 to hear the end of the Lubanga case, in addition to up to six judges whose terms end in March 2012.

391 ICC-ASP/10/S/57.



nominated.<sup>392</sup> 16 of them on list A and three on list B; 17 of them male and two female; two of them are from WEOG, five from GRULAC, two from Eastern European States, eight from African States and two from Asian States.<sup>393</sup>

392 Rosolu John Bankole Thompson (Sierra Leone); Ajmi Bel Haj Hamouda (Tunisia); Vinod Boolell (Mauritius); Modeste-Martineau Bria (the CAR); Anthony Thomas Aquinas Carmona (Trinidad and Tobago); Bruno Cathala (France); Eduardo Cifuentes Muñoz (Colombia); Władysław Czapliński (Poland); Miriam Defensor-Santiago (Philippines); Chile Eboe-Osuji (Nigeria); Robert Fremr (Czech Republic); Olga Venecia Herrera Carbuccion (Dominican Republic); Gberdao Gustave Kam (Burkina Faso); Javier Laynez Potisek (Mexico); Antoine Kesia-Mbe Mindua (the DRC); Howard Morrison (UK); Hamani Mounkaila Nouhou (Niger); George A Serghides (Cyprus); and Jorge Antonio Urbina Ortega (Costa Rica).

393 For this round of judicial elections, an Independent Panel on ICC Judicial Elections, was established by the Coalition for the International Criminal Court. The Panel was composed of The Honourable Justice Richard Goldstone, former Chief Prosecutor of the UN International Criminal Tribunals for Rwanda and the former Yugoslavia, Chair; The Honourable Patricia Wald, former Chief Judge of the United States Court of Appeals for the District of Columbia and former Judge of the UN International Criminal Tribunal for the former Yugoslavia, Vice-Chair; The Honourable Hans Corell, former Judge of Appeal and former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations; Judge O-Gon Kwon, Judge and Vice President of the UN International Criminal Tribunal for the former Yugoslavia and former Presiding Judge at the Daegu High Court; and Dr Cecilia Medina Quiroga, Director of the Human Rights Centre at the University of Chile and former Judge and President of the Inter-American Court of Human Rights. The Panel's mandate was to independently assess whether each judicial candidate fulfils the qualifications prescribed by Article 36 of the Rome Statute. On 26 October 2011, the Panel released a 'Report on International Criminal Court Judicial Nominations 2011'. Unfortunately, the report of the Panel provided a very limited assessment of each candidate with regard to the provisions of Article 36, in particular whether they met the specific requirements set out in Article 36(3)(b), the so-called List A and List B criteria, depending on which list the candidate's government designated in their nomination. The panel found that four of the candidates were 'not qualified' for the list for which they had been nominated, while the other 12 candidates were designated 'qualified', without further comment or analysis. As such, the expertise and experience represented by the members of the Panel appears to have been applied in a limited way. The Panel also made a number of observations regarding the process of nomination and election and the criteria for judicial candidates, suggesting that these at some point be addressed by the ASP. The report of the Panel is available at <[www.iccindependentpanel.org](http://www.iccindependentpanel.org)>.

Any State Party to the Rome Statute can nominate candidates for election to the Court, either '[b]y the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or [b]y the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court'.<sup>394</sup> Nominations must be accompanied by a written *note verbale* sent to the Assembly of States Parties by the respective State Party setting out how the candidate fulfils the requirements of Article 36. Each State Party can nominate one candidate; States can also nominate a national of another State Party.<sup>395</sup>

In addition to the general voting procedures, Resolution ICC-ASP/3/Res.6 also sets out specific minimum requirements with regards to the number of judges of a particular region or gender, as well as the number of judges from each respective list (ie list A or list B experience) on the bench, the so-called 'minimum voting requirements'. In the December 2011 election, for the first time, the minimum voting requirement regarding gender is zero for female and two for male candidates. As noted above, only two women have been nominated for the December 2011 election.

394 Article 36(4)(a).

395 Article 36(4)(b).

## Election of six CBF members

In addition to a new Chief Prosecutor and six Judges, the ASP in December 2011 will also elect six new members to the Committee on Budget and Finance (CBF). The CBF is an expert body of the Court 'responsible for the technical examination of any document submitted to the Assembly that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature, as may be entrusted to it by the Assembly of States Parties'.<sup>396</sup> In particular, every year in preparation for the yearly ASP meeting, the CBF is responsible for evaluating the Court's Proposed Programme Budget and making specific recommendations concerning the budget to the ASP. The Proposed Programme Budget for 2012, in addition to the CBF's recommendations, is discussed in detail in the **Budget** section of this report.

The CBF is composed of 12 members, who shall not be of the same nationality and shall be 'experts of recognised standing and experience in financial matters at the international level'.<sup>397</sup> CBF members are elected on the basis of geographical representation. African States, Asian States, Eastern European States and GRULAC shall each have two seats. WEOG shall have four seats.<sup>398</sup> CBF members serve for a total of three years and may be re-elected.

At the December 2011 election, the ASP will elect six new members; one from the Group of African States, two from the Group of Asian States; one from the Group of Eastern European States; one from GRULAC; and one from WEOG.<sup>399</sup> The initial nomination period ran from 13 June through 2 September 2011, and was subject to being extended should the number of nominations at the end of the nomination period be less than the number of seats.<sup>400</sup> The nomination period was extended three times for periods of two weeks because the number of nominees for GRULAC remained below the number of seats.<sup>401</sup> As of the end of the nomination period on 14 October 2011, seven candidates had been nominated for the six seats.<sup>402</sup> Members of the CBF are to be elected by consensus upon recommendation by the Bureau following consultations with the regional groups.<sup>403</sup>

396 ICC-ASP/1/Res.4, para 3.

397 ICC-ASP/1/Res.5, para 1.

398 ICC-ASP/1/Res.5, para 8.

399 ICC-ASP/10/S/CBF/05, Annex III 'Terms of Office'.

400 ICC-ASP/1/Res.5, para 4.

401 The President first extended the nomination period to 16 September 2011 (ICC-ASP/10/S/CBF/58), then to 30 September 2011 (ICC-ASP/2011/087) and finally to 14 October 2011 (ASP/2011/113).

402 African States, two nominations: Samuel P.O. Itam (Sierra Leone) and Rosette Nyirinkindi Katungye (Uganda); Asia-Pacific States, two nominations: Fawzi Gharaibeh (Jordan) and Masatoshi Sugiura (Japan); Eastern European States, one nomination: Elena Sopková (Slovakia); WEOG, one nomination: Hugh Adsett (Canada); and GRULAC, one nomination: Mónica Sánchez Izquierdo (Ecuador).

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

# Budget for the ICC

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At its seventeenth Session in 2011, the Committee on Budget and Finance (CBF) of the Assembly of States Parties (ASP) proposed a budget of €112,181,630 for the ICC in 2012.<sup>404</sup> The Court had proposed a 2012 budget of €117,733,000, representing an increase of €14,125,100, or 13.6%, over the ASP-approved budget for 2011. The primary cost drivers for this increase are the new Situation in Libya (€7,200,000) and the increase in the cost of legal aid for defence and victims (€4,900,000), amounting to 85% of the total budget increase.<sup>405</sup> The CBF underlined that the potential increases for 2012 could be higher than those identified by the Court and reach €130 million.<sup>406</sup> At the tenth session of the ASP in December 2011, the ASP will review the CBF recommendations and decide whether to adopt them. The ASP also retains the power to make further changes beyond the CBF recommendations. This section reviews selected issues as proposed in the Court's budget and considered by the CBF in their report. Detailed recommendations on the budget are contained in the *Recommendations* section of this Report.

In 2012, the Court will have at least seven Situations under investigation, and at least two ongoing trials<sup>407</sup> with the possibility of at least four further trials starting in 2012.<sup>408</sup> The Court's proposed budget is based on the assumption that the Prosecutor will conduct seven active investigations in six Situations and will maintain nine residual investigations.<sup>409</sup> At least eight other potential situations will be monitored.<sup>410</sup> In addition, the Court based its budget requests on the assumption that trial hearings

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404 ICC-ASP/10/15-Annex IV, Advance version.

405 ICC-ASP/10/10, para 4.

406 ICC-ASP/10/15, Advance version, para 26.

407 *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, and *The Prosecutor v. Jean-Pierre Bemba Gombo*.

408 *The Prosecutor v. Callixte Mbarushimana*, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, subject to charges being confirmed, and *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, subject to translation issues being resolved.

409 ICC-ASP/10/10, para 14.

410 ICC-ASP/10/10, para 14.

will be conducted consecutively instead of simultaneously, thus reducing the costs related to two or more Court teams operating at the same time. However, in its recommendations the CBF stressed that the need for parallel trials could not be ruled out.

The CBF's report underscores the critical importance of the Court adequately explaining and justifying its funding needs in its proposed budget. Budget increase requests not properly substantiated were not recommended for approval by the CBF. In reviewing the Court's proposed 2012 budget, the CBF expressed concern about managing cost drivers and included in the report a section on strategic considerations for their management. Further, in light of the ASP request of December 2010 that the Court draw up a 'zero growth' budget,<sup>411</sup> the CBF also expressed concern about the Court having to introduce large reductions in its activities and potentially cease certain programme activities that were previously mandated by the ASP without proper strategic guidance from the ASP on these matters. The CBF noted that the Court is now arriving at a point when the expectations on the type and level of activity are diverging from the level of available resources.<sup>412</sup>

Despite these concerns, the CBF recommended a number of cuts to the proposed budgets of the Major Programmes of the Court that could have an impact on the Court's activities. For example, it recommended cuts to travel budgets of each Major Programme from the 2012 proposed programme budget,<sup>413</sup> which could have an

411 The ASP requested the Court, in addition to the regular budget, to draw up budget options for 2012 which cost the full range of core Court activities and other important activities that could be achieved within the same budget allocation as 2011, hence the term 'zero-growth budget'.

412 ICC-ASP/10/15, Advance version, para 29.

413 The CBF recommended the following cuts: 8.2% for Major Programme I (the Judiciary); 7% for Major Programme II (Office of the Prosecutor); 10% for Major Programmes III (Registry), IV (Secretariat of the ASP), VI (Secretariat of the TFV) and VII-1. Major Programme VII-5's travel budget remains at the level of 2011 (IOM). ICC-ASP/10/15, Advance version, paras 11-25.

impact on both outreach and investigations. It also recommended cuts to the budget reserved for GTA positions<sup>414</sup> and for consultants in four Major Programmes. In addition, the CBF called for a review of the legal aid system<sup>415</sup> and guidance from the Assembly for a reparations strategy.<sup>416</sup>

In its recommendations to the ASP in December 2010 following its fifteenth session, the CBF recommended freezing the number of permanent posts at the 2010 level until a report justifying all posts has been drafted and reviewed.<sup>417</sup> As a result, in the 2012 budget, the Court has increasingly requested GTA positions instead of permanent positions. In some instances, GTA positions have been indicated instead of permanent appointments for positions that have been mandated by the Rome Statute and its subsidiary bodies. For example, in its proposed budget, the VWU restricts the position of a trauma expert within the VWU to a GTA rather than a permanent appointment.<sup>418</sup> However, under Article 43(6), the Registrar is required to appoint staff with expertise in trauma, including trauma related to crimes of sexual violence.

The Court reported that in 2011 it notified the CBF of the need to access the Contingency Fund to cover the cost of transferring detained witnesses from the DRC to the Netherlands, legal aid costs, the cost of the new Situation in Libya, the cost of the Kenya Situation and costs arising from trial activities during the second half of the year.<sup>419</sup> In its report, the CBF recalled its position that the Court must 'exercise utmost caution and restraint when preparing its supplementary budgets for accessing the Fund'.<sup>420</sup> The CBF reiterated that the Contingency Fund 'should

414 General Temporary Assistance positions.

415 ICC-ASP/10/15, Advance version, para 30.

416 ICC-ASP/10/15, Advance version, para 36.

417 ICC-ASP/9/15, para 81.

418 ICC-ASP/10/10, paras 399-401.

419 ICC-ASP/10/15, Advance version, para 66.

420 ICC-ASP/10/15, Advance version, para 68.

not be used in a way that would undermine budgetary integrity', and recommended that the Court set out clear criteria and prioritisation for what may and may not be included in Contingency Fund notifications.<sup>421</sup> Noting that at the time of the seventeenth CBF session 'it was unclear ... that the rate of expenditure under the Contingency Fund would materialise',<sup>422</sup> the CBF recommended that the Court review its proposed activities for which notification under the Contingency Fund was required, to assess whether all resources were still required. The Court was also requested to prepare an updated forecast to the ASP, including the expenditure of both the regular budget and the Contingency Fund notifications up to the end of November 2011.<sup>423</sup>

The CBF also expressed concern that in its proposed budget, the Court did not include a number of potential costs, including interim premises rent, Contingency Fund replenishment, funds for the permanent premises, costs of potential new situations (such as Côte d'Ivoire<sup>424</sup>) or any requirement to call more of the six judges to be elected in December 2011 to full-time service.<sup>425</sup> The Presidency had erroneously informed the CBF that it would most likely not need to call all of the six newly elected judges to full-time service in 2012, but was unable to provide assurances that this scenario would be maintained.<sup>426</sup> The CBF noted that these costs could potentially increase the budget to € 130 million. The CBF requested the Court to set out clear criteria for notifications to the Contingency Fund and submit this as a report to the eighteenth session of the CBF.<sup>427</sup>

421 ICC-ASP/10/15, Advance version, para 68.

422 ICC-ASP/10/15, Advance version, para 70.

423 ICC-ASP/10/15, Advance version, para 70.

424 On 3 October 2011, Pre-Trial Chamber III authorised the Prosecutor's initiation of an investigation into the Situation in Côte d'Ivoire.

425 ICC-ASP/10/15, Advance version, para 77.

426 ICC-ASP/10/15, Advance version, para 104.

427 ICC-ASP/10/15, Advance version, para 68.

## Legal Aid

Pursuant to Regulations 83, 84 and 85 of the Regulations of the Court and Regulations 113 and 130-139 of the Regulations of the Registry, the Registry shall provide legal assistance to all persons with insufficient means to pay for their legal counsel. Regulation 83 of the Regulations of the Court provides that legal aid for the defence 'shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances'.<sup>428</sup> The Regulations provide that the scope of legal aid for victims is to be determined by the Registrar in consultation with the Chamber.<sup>429</sup> When a person is eligible for legal aid, the Registrar shall determine the applicant's means and whether he or she shall be provided with full or partial payment of legal assistance.<sup>430</sup>

The CBF report identifies legal aid as one of the main cost drivers in the 2012 proposed budget, and notes that it is likely to remain so for the foreseeable future.<sup>431</sup> Increases in legal aid costs represent close to an additional €5,000,000 in the Court's Proposed Programme Budget for 2012,<sup>432</sup> with the costs of legal aid for defence increasing €2.5 million, amounting to a total proposed budget of €3,583,200, and the costs for legal aid for victims increasing €2.4 million, amounting to a total of €3,990,500.<sup>433</sup> Although the proposed budget for legal aid for victims is slightly higher than that for legal aid for defence, the costs for legal aid for defence for the period 2005-2011 has been significantly higher than the costs of legal aid for victims (€8,614,400 for defence compared to €3,553,000 for victims' legal aid).<sup>434</sup>

428 Regulation 83(1), Regulations of the Court.

429 Regulation 83(2), Regulations of the Court.

430 Regulation 84, Regulations of the Court.

431 ICC-ASP/10/15, Advance Version, para 30.

432 ICC-ASP/10/10, para 243.

433 ICC-ASP/10/10, Table 52: Sub-programme 3190.

434 Expenditure as of 23 August 2011. ICC-ASP/10/15, Advance version, Annex III, Table 2.

In light of the significant increase in the number of cases before the Court, the CBF recommended an urgent review of the legal aid system to be undertaken by the Court, and expressed concern about the possibility of an automatic increase each year in funds requested for legal aid as the Court's activities continue to increase.<sup>435</sup> However, in its report, the CBF notes the costs incurred by the Court for the first two cases in the DRC Situation (Lubanga and Katanga & Ngudjolo) amount to €41,585,800, not including legal aid to the defence in the amount of €6,638,500 and for victims in the amount of €2,802,400.<sup>436</sup> The CBF notes that this amount also does not include possible appeals and reparations phases. Citing the growing financial impact of the current legal aid system on the Court's finances, and acknowledging the need to strike a balance between the right of individuals to defend themselves and the obligations arising from the Court's basic documents, the CBF notes that there are nonetheless choices lying within the sole remit of the ASP, in particular whether to maintain the current system or to introduce greater flexibility while at the same time respecting the obligations of the Court.<sup>437</sup>

In setting out possibilities for potential change of the legal aid system, the CBF recommends limiting the total amount allotted to teams, setting an overall ceiling of €500,000 per accused per year. The CBF also suggests putting an end to the compensation of professional charges. With respect to legal aid for victims, the CBF notes that limiting victims' legal representation to internal counsel from the OPCV is more cost efficient but that this should not exclude the possibility of obtaining external counsel in the event of conflicting interests between groups of victims. In the event that external counsel is retained, they recommend an amount of €223,000 per group of victims [per year].<sup>438</sup>

435 ICC-ASP/10/15, Advance version, para 30.

436 ICC-ASP/10/15, Advance version, Annex III. No cost breakdowns are provided for these figures. The costs incurred for the defence and for victims are for the period of 2005 – 23 August 2011.

437 ICC-ASP/10/15, Advance version, Annex III.

438 ICC-ASP/10/15, Advance version, Annex III.

## Security Council Referrals

The Libya Situation, one of the main cost drivers of the 2012 proposed budget, was the second Situation referred to the ICC by the UN Security Council (UNSC). The CBF notes that because these Situations were referred to the Court by the UNSC, 'as a matter of principle it is unclear why the Assembly should alone bear the full costs'.<sup>439</sup> Accordingly, the CBF suggested that this issue be addressed by the Bureau and/or one of the working groups to determine whether to raise this issue with the Security Council for future referrals.

## Investigations

The proposed budget for the OTP for 2012 (€318,027,000) represents a 19.6% (€52,047,000) increase from the 2011 approved budget (€265,980,000).<sup>440</sup> The OTP outlined that this budget increase is largely due to the referral of the Libya situation. The OTP plans for a rotation of resources and staff to accommodate for the increase in activity and no new permanent posts are requested by the OTP, while additional GTA posts are requested.

The OTP proposes no new posts in the investigation teams, intending to meet all investigation needs for the new situation through using existing resources, and through the rotation of investigation teams. Specifically, the Prosecutor proposes transferring investigation staff from the Lubanga and Katanga & Ngudjolo cases to the two Kenyan cases and the Mbarushimana case.<sup>441</sup> The OTP forecasts that in 2012 it will have seven active investigations and maintenance of nine residual investigations,<sup>442</sup> including a potential six trial proceedings in 2012.<sup>443</sup>

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

440 ICC-ASP/10/10, p 25-28.

441 ICC-ASP/9/10, para 89.

442 ICC-ASP/10/10, para 14.

443 Estimate of the Women's Initiatives for Gender Justice based on ongoing trial proceedings in the Katanga & Ngudjolo and Bemba cases; commencement of trial proceedings in the Banda & Jerbo case subject to the resolution of interpretation issues; and commencement of trial proceedings in the Ruto *et al*, Muthaura *et al*, and Mbarushimana cases subject to charges being confirmed.

## Field Offices

The Registry will reduce its field presences from seven to five by the end of 2011, closing down its field office in Abéché and its presence in N'Djamena, Chad.<sup>444</sup> The field presence in Kampala is also to be substantially reduced. The budget does not envision opening new field offices, notwithstanding Libya having become a new Situation under investigation by the ICC within the period of the budget,<sup>445</sup> the potential that new investigations will be opened during 2012 and an anticipated increased workload.<sup>446</sup> The CBF welcomes the Registry's proposal for the reorganisation of field presences and a 62.5% decrease in the Registry field-based staffing, which is meant to achieve overall savings.<sup>447</sup> The Field Offices are further discussed in the **Structures and Institutional Development** section of this Report.

## VWU

The proposed budget for the Victims and Witnesses Unit (VWU) for 2012 (€63,409,000) represents a 7.6% (€4,452,000) increase from the 2011 approved budget (€58,957,000). Major cost drivers for the VWU's budget include the number of service requests received for the Initial Response System (IRS), relocations, resettlements and local protective measures. In its proposed budget, the VWU cut down the number of areas budgeted for the IRS and the number of witness relocations in the Kenya Situation and plans to reduce the cost of local protective measures in the CAR, DRC and Kenya Situations.<sup>448</sup>

In addition, the VWU has started work on the exit strategies for the current participants in the ICC Protection Programme (ICCPP). Additional requests for protective measures in the Situation in Libya will occur, but the CBF notes that reductions in these areas could impede the quality of witness protection that is crucial given the inadequacy of national protection mechanisms. An additional Support Assistant has been planned for 11 months in light of the increase in activities and of the new Situation in Libya.

Pursuant to Article 43(6), the Registrar is required to appoint staff with expertise in trauma, including trauma related to crimes of sexual violence. To that effect, the VWU has requested a P3 GTA Psychologist/Psychological Trauma expert. The Psychologist/Psychological Trauma expert will conduct psychological assessments of witnesses who are testifying before the Court, in particular vulnerable witnesses such as victims of gender-based violence, children, former child soldiers and highly traumatised persons. The Psychological Trauma expert is vital for providing appropriate psychological services to victims and witnesses appearing before the Court, but the position is still a temporary position and there is no mention of it becoming a permanent post. No specific appointments in relation to gender expertise are made.

444 ICC-ASP/10/10, p 73-77.

445 Côte d'Ivoire also became a new Situation under Investigation by the ICC in 2011. However, the Court's Proposed Budget was issued prior to the decision by Pre-Trial Chamber III authorising the investigation and as such does not budget for the Côte d'Ivoire Situation.

446 ICC-ASP/10/10, para 220.

447 ICC-ASP/10/15, Advance version, para 121.

448 ICC-ASP/10/10, p 124-128.

# Substantive Work of the ICC

**Office of the Prosecutor**

**Trial Proceedings**

**Judiciary – Key Decisions**

**18 September 2010 — 16 September 2011\***

*\*The Gender Report Card 2011* includes a review of developments and judicial decisions in all Situations and cases up to 16 September 2011. Selected important events and decisions have also been included through November 2011.



# Office of the Prosecutor

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## Investigation and Prosecution Strategy

### Overview of Situations and cases 2011

Since the publication of the *Gender Report Card 2010*, the Office of the Prosecutor has opened two new investigations, in the Situations of Libya and Côte d'Ivoire. This brings the total number of Situations under investigation by the Office of the Prosecutor to seven: Uganda, the Democratic Republic of the Congo (DRC), Darfur, the Central African Republic (CAR), Kenya, Libya, and Côte d'Ivoire. In the DRC Situation, trial proceedings in the first case, against Thomas Lubanga Dyilo (Lubanga), have been concluded, and proceedings continued in the second trial against Germain Katanga (Katanga) and Mathieu Ngudjolo Chui (Ngudjolo). In the Situation of the CAR, on 22 November 2010, the Office commenced its third trial, against Jean-Pierre Bemba Gombo (Bemba).

In the Darfur Situation, the Office of the Prosecutor prepared for its fourth trial, against Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo), however trial proceedings have been delayed by interpretation issues, as discussed below. In the Kenya Situation, after the issuance of Summonses to Appear for six individuals, for the first time the admissibility of a case was challenged by a State Party. Following a rejection of this challenge on appeal, the Court held confirmation hearings against the six suspects on 1 – 8 September and 21 September – 5 October 2011, respectively. A confirmation of charges hearing was also held in the case of Callixte Mbarushimana (Mbarushimana) in the DRC Situation from 16 – 21 September. All of these developments are discussed in detail below.

## Arrest Warrants and Summonses to Appear

As of the writing of this report, the ICC has five suspects in custody: Lubanga, Katanga, Ngudjolo, Bemba, and Mbarushimana. All of the suspects being held in The Hague are Congolese (although Bemba is being tried for crimes committed in the CAR). Nine arrest warrants remain outstanding: Joseph Kony (Kony), Okot Odhiambo (Odhiambo) and Dominic Ongwen (Ongwen)<sup>449</sup> in the Uganda Situation; Bosco Ntaganda (Ntaganda) in the DRC Situation; President Omar Hassan Ahmad Al’Bashir (President Al’Bashir), Ahmad Muhammad Harun (Harun) and Ali Muhammad Ali-Al-Rahman (Kushayb) in the Darfur Situation; and Muammar Mohammed Abu Minyar Gaddafi (Gaddafi), Saif Al-Islam Gaddafi (Saif Al-Islam) and Abdullah Al-Senussi (Al-Senussi) in the Libya Situation.

Since 2009, the Court has significantly increased its use of summonses to appear, with suspects and accused voluntarily making appearances at the Court to answer charges, and being allowed to remain at liberty pending court proceedings. There are eight current Summonses to Appear, two in the Darfur Situation, for Banda and Jerbo; and six in the Kenya Situation, for William Samoei Ruto (Ruto), Henry Kiprono Kosgey (Kosgey), and Joshua Arap Sang (Sang), for Francis Kirimi Muthaura (Muthaura), Uhuru Muigai Kenyatta (Kenyatta) and Mohammed Hussein Ali (Ali). A ninth accused, Bahar Idriss Abu Garda (Abu Garda), also answered a Summons to Appear in the Darfur Situation,

449 Vincent Otti (Otti) and Raska Lukwiya (Lukwiya) are deceased. Proceedings against Lukwiya were terminated after confirmation of his death in 2006. In September 2008, the Office of the Prosecutor indicated it had confirmed the death of Vincent Otti as well and was preparing to terminate proceedings against him. However, the Court’s public documents continue to treat Otti as a suspect at large: <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda?lan=en-GB>.

however, there are no active proceedings against him following the Pre-Trial Chamber's decision not to confirm any charges against him.

## Overview of charges and prosecution of gender-based crimes

Since the opening of the ICC's first investigations in the DRC Situation, the Women's Initiatives for Gender Justice has been advocating for the Office of the Prosecutor to investigate gender-based crimes in every Situation, and for the Prosecutor to bring charges of gender-based crimes in all cases where there is sufficient evidence that such crimes have been committed. 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,<sup>450</sup> and is to date the only international women's human rights organisation to have been accepted as *amicus curiae* at the ICC. In July 2009, the Women's Initiatives filed an *amicus curiae* brief in the Bemba case, in response to Pre-Trial Chamber II declining to confirm all the charges of gender-based crimes in the confirmation of charges decision.<sup>451</sup>

At the time of writing this Report, charges have been brought in six of the seven Situations before the Court: Uganda, the DRC, the CAR, Darfur, Kenya and Libya. No charges have yet been brought in the Côte d'Ivoire Situation, although investigations have been authorised as of 3 October 2011.<sup>452</sup> Charges for gender-

based crimes have been included in five of the seven Situations, namely: Uganda, the DRC, the CAR, Darfur and Kenya. No charges for gender-based crimes have yet been sought in the Libya Situation, although the Prosecutor has indicated that he intends to carry out further investigations into allegations of sexual violence with a view to potentially adding charges for rape at a later stage of proceedings in the Gaddafi *et al* case.<sup>453</sup>

With respect to the cases, charges of gender-based crimes have now been brought in seven of the 13 cases currently before the Court. There are charges of gender-based crimes in the Kony *et al* case in the Uganda Situation; in the Katanga & Ngudjolo and Mbarushimana cases in the DRC Situation; in the Bemba case in the CAR Situation; in the Al'Bashir and Harun & Kushayb cases in the Darfur Situation; and in the Muthaura *et al* case in the Kenya Situation. No charges of gender-based crimes were brought in the Lubanga and Ntaganda cases in the DRC Situation, the Abu Garda and Banda & Jerbo cases in the Darfur Situation, the Ruto *et al* case in the Kenya Situation or, to date, in the Gaddafi *et al* case in the Libya Situation. The specific charges in each case are discussed in detail below. These 13 cases involve a total of 26 individual suspects and accused; of these, 12 have been charged with gender-based crimes.

Sexual violence has been charged as a war crime, 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 on personal dignity. The applications for an Arrest Warrant against Bemba and Mbarushimana were the

450 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/LegalFilings-web-2-10.pdf>>.

451 ICC-01/05-01/08-447 and ICC-01/05-01/08-466. 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/LegalFilings-web-2-10.pdf>>; *Gender Report Card 2009*, p 63-67; and *Gender Report Card 2010*, p 114-116.

452 ICC-02/11-14.

453 'Libya: Gaddafi investigated over use of rape as weapon', *BBC News*, 8 June 2011, available at <<http://www.bbc.co.uk/news/world-africa-13705854>>, last visited on 24 October 2011. See also *Legal Eye on the ICC* e-letter, July 2011, available at <<http://www.iccwomen.org/news/docs/LegalEye7-11/LegalEye7-11.html>>.

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 against any one individual was against Mbarushimana<sup>454</sup> and Kushayb<sup>455</sup> (both 8 charges), followed by Harun.<sup>456</sup> Although, at the time of writing this Report, no decision on the confirmation of charges has been issued in the Mbarushimana case, the Arrest Warrant against Mbarushimana contains the broadest range of gender-based crimes sought to date, reflecting a new effort by the Office of the Prosecutor to make greater use of the full range of sexual and gender-based crimes included in the Rome Statute.<sup>457</sup>

Women's Initiatives' analysis of charges for gender-based crimes at the ICC shows that these charges are the most vulnerable category of crimes, in that they tend to be either omitted from filings or fail to reach the trial phase of the proceedings. This vulnerability is based on a number of factors involving both the Office of the Prosecutor and the Pre-Trial Chambers, including failures at the investigation phase, insufficient evidence, incorrect characterisation of facts or restrictive interpretations of the definition of some gender-based crimes. In some instances, gender-based crimes have not always been fully investigated by the Office of the Prosecutor, or have not been included by the Prosecutor in his request for an arrest warrant or summons to appear, even in situations where

454 Mbarushimana is currently in custody of the Court and awaiting the confirmation of charges decision.

455 Kushayb is currently still at large.

456 Harun is currently still at large.

457 Mbarushimana is charged with the following gender-based crimes: torture as a crime against humanity (based on rape and mutilation); torture as a war crime; rape as a crime against humanity (based on rape and mutilation); rape as a war crime; other inhumane acts (based on rape and mutilation of women) as a crime against humanity; inhuman treatment (based on rape and mutilation of women) as a war crime; mutilation as a war crime; and persecution (based on gender) as a crime against humanity.

such information was provided to the Prosecutor by NGOs including the Women's Initiatives.<sup>458</sup> Charges for gender-based crimes have also not been included or have been minimally included in Situations in which the Prosecutor's request to open an investigation contains significant amounts of information showing that such crimes were committed. For example, in the DRC and Kenya Situations, the Prosecutor's requests to open an investigation contained many references to reports of gender-based crimes having been committed; however, for the first two suspects sought in the DRC Situation<sup>459</sup> the Prosecution failed to include such charges, and in one of the two Kenya cases<sup>460</sup> the Prosecution failed to have the full range of such charges included in the Summonses to Appear, as discussed below.

458 On 16 August 2006, the Women's Initiatives submitted a confidential report and a letter to the Office of the Prosecutor describing our grave concerns that gender-based crimes had not been adequately investigated in the case against Thomas Lubanga and providing information about the commission of these crimes by the UPC. A redacted version of this letter is available at <[http://www.iccwomen.org/documents/Prosecutor\\_Letter\\_August\\_2006\\_Redacted.pdf](http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf)>.

459 See the Warrants of Arrest in *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06-2-tEN, 10 Feb 2006) and *The Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06-2-Anx-tENG, 22 Aug 2006).

460 *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*.

## Status of all gender-based charges across each case as of 16 September 2011

The chart lists only the 12 individual indictees for whom charges for gender-based crimes have been sought by the Prosecutor.

<i>Case</i>	<i>Stage of proceedings</i>	<i>Charges currently included</i>
<i>Prosecutor v. Bemba</i>	At trial	Charges against Bemba: <ul style="list-style-type: none"> <li>• Rape as a crime against humanity</li> <li>• Rape as a war crime</li> </ul>
<i>Prosecutor v. Kony et al</i>	Arrest Warrant issued; no accused in custody	Charges against Kony: <ul style="list-style-type: none"> <li>• Sexual slavery as a crime against humanity</li> <li>• Rape as a crime against humanity</li> <li>• Rape as a war crime</li> </ul> Charges against Otti (believed to be deceased): <ul style="list-style-type: none"> <li>• Sexual slavery as a crime against humanity</li> <li>• Rape as a war crime</li> </ul>
<i>Prosecutor v. Al'Bashir</i>	Arrest Warrant issued; no accused in custody	Charges against President Al'Bashir: <ul style="list-style-type: none"> <li>• Sexual violence causing serious bodily or mental harm as an act of genocide</li> <li>• Rape as a crime against humanity</li> </ul>
<i>Prosecutor v. Harun &amp; Kushayb</i>	Arrest Warrant issued; no accused in custody	Charges against Harun: <ul style="list-style-type: none"> <li>• Rape as a crime against humanity (2 counts)</li> <li>• Rape as a war crime (2 counts)</li> <li>• Outrages on personal dignity as a war crime</li> <li>• Persecution by means of sexual violence as a crime against humanity (2 counts)</li> </ul> Charges against Kushayb: <ul style="list-style-type: none"> <li>• Rape as a crime against humanity (2 counts)</li> <li>• Rape as a war crime (2 counts)</li> <li>• Outrages on personal dignity as a war crime</li> <li>• Persecution by means of sexual violence as a crime against humanity (2 counts)</li> </ul>
<i>Prosecutor v. Katanga &amp; Ngudjolo</i>	At trial	Charges against Katanga: <ul style="list-style-type: none"> <li>• Sexual slavery as a crime against humanity</li> <li>• Sexual slavery as a war crime</li> <li>• Rape as a crime against humanity</li> <li>• Rape as a war crime</li> </ul> Charges against Ngudjolo: <ul style="list-style-type: none"> <li>• Sexual slavery as a crime against humanity</li> <li>• Sexual slavery as a war crime</li> <li>• Rape as a crime against humanity</li> <li>• Rape as a war crime</li> </ul>

*continued overleaf*

## Status of all gender-based charges across each case as of 16 September 2011 *continued*

<i>Case</i>	<i>Stage of proceedings</i>	<i>Charges currently included</i>
<i>Prosecutor v. Mbarushimana</i>	Confirmation of charges hearing held in September 2011; no decision issued at time of writing	<p>Charges against Mbarushimana:</p> <ul style="list-style-type: none"> <li>• Torture as a crime against humanity</li> <li>• Torture as a war crime</li> <li>• Rape as a crime against humanity</li> <li>• Rape as a war crime</li> <li>• Other inhumane acts (based on rape and mutilation of women) as a crime against humanity</li> <li>• Inhuman treatment (based on rape and mutilation of women) as a war crime</li> <li>• Persecution (based on gender) as a crime against humanity</li> <li>• Mutilation as a war crime</li> </ul>
<i>Prosecutor v. Muthaura et al</i>	Confirmation of charges hearing held in September-October 2011; no decision issued at time of writing	<p>Charges against Muthaura:</p> <ul style="list-style-type: none"> <li>• Rape as a crime against humanity</li> <li>• Other inhumane acts as a crime against humanity</li> <li>• Persecution (by means of rape and other inhumane acts) as a crime against humanity</li> </ul> <p>Charges against Kenyatta:</p> <ul style="list-style-type: none"> <li>• Rape as a crime against humanity</li> <li>• Other inhumane acts as a crime against humanity</li> <li>• Persecution (by means of rape and other inhumane acts) as a crime against humanity</li> </ul> <p>Charges against Ali:</p> <ul style="list-style-type: none"> <li>• Rape as a crime against humanity</li> <li>• Other inhumane acts as a crime against humanity</li> <li>• Persecution (by means of rape and other inhumane acts) as a crime against humanity</li> </ul>

## The role of the Pre-Trial Chamber

Once a situation has been referred to the ICC or the Prosecutor decides *proprio motu* to proceed with a Situation, the Pre-Trial Chamber plays the role of ‘gatekeeper’ in respect of the Prosecutor’s ability to proceed to the next phase of the proceedings. In order to open an investigation in a situation, once the Prosecutor concludes that there is a reasonable basis to proceed, he or she submits a request for authorisation to the Pre-Trial Chamber, together with supporting material.<sup>461</sup> In order to be included in the charges at trial at the ICC, the evidence presented by the Prosecutor to support the charges must then withstand increasing levels of scrutiny by the Pre-Trial Chamber as prescribed by the Rome Statute. On receiving a request for an arrest warrant or summons to appear from the Prosecutor, the Pre-Trial Chamber must be satisfied that the evidence provided by the Prosecutor shows reasonable grounds to believe that the suspect committed those crimes as charged.<sup>462</sup> At the confirmation of charges stage of the proceedings, the Pre-Trial Chamber must be satisfied that the evidence provided by the Prosecutor shows substantial grounds to believe that the suspect committed those crimes as charged.<sup>463</sup>

Charges for gender-based crimes appear to be particularly susceptible to attrition by judicial decisions at the arrest warrant or summons to appear stage, and at the confirmation of charges stage of the proceedings. (No case to date, and thus none containing gender-based crimes, has yet reached the stage of trial judgement or appeal judgement.) In conducting research on gender-based crimes charges at the ICC, the Women’s Initiatives notes that the public availability of information regarding which charges were sought and which charges were included at each of these procedural stages in

each case is inconsistent, thereby making direct comparisons impossible. However, the available information does allow analysis of five cases in which gender-based charges were initially sought and the Prosecution’s application for an arrest warrant or summons to appear is publicly available (the cases against Bemba, Harun & Kushayb, President Al’Bashir, Mbarushimana and Muthaura *et al*). In these five cases, only two charges out of a total of 138 requested by the Prosecution were not included in the arrest warrants or summonses to appear issued by the Pre-Trial Chamber, and both of these charges related to sexual or gender-based violence.<sup>464</sup>

Women’s Initiatives’ analysis also shows that only two cases involving gender-based crimes, Bemba and Katanga & Ngudjolo, have reached the confirmation of charges phase to date,<sup>465</sup> and in those two cases, the Pre-Trial Chamber refused to confirm 33% of all charges of gender-based crimes sought by the Prosecution. In total, a third of charges for gender-based crimes have never made it to the trial stage of the proceedings.<sup>466</sup>

464 Two counts of ‘other forms of sexual violence’ were not included in the Arrest Warrant in the Bemba case. See further *Gender Report Card 2008*, p 50-51.

465 Although gender-based crimes have been sought by the Prosecution in the Mbarushimana and Muthaura *et al* cases, which have been subject to a confirmation of charges hearing, no decision has yet been issued by the Pre-Trial Chamber.

466 Ten out of fifteen charges (66.6%) of gender-based crimes were confirmed in the Bemba and Katanga & Ngudjolo cases. Two charges of outrages on personal dignity were not confirmed in the Katanga & Ngudjolo case (eight charges of rape and sexual slavery went forward to trial), while two counts of torture and one count of outrages on personal dignity were not confirmed in the Bemba case (two charges of rape were confirmed against Bemba). 40% of gender-based crimes (6 out of 10) were not successfully confirmed in these two cases. The offences of rape as a crime against humanity and rape as a war crime were confirmed in the Bemba case, while torture as a war crime, torture as a crime against humanity and outrages on personal dignity as a war crime were not confirmed. In the Katanga & Ngudjolo case, the crimes of rape as a crime against humanity, rape as a war crime, sexual slavery as a crime against humanity and sexual slavery as a war crime were confirmed, but the crime of outrages on personal dignity as a war crime was not confirmed.

461 Article 15(3).

462 Article 58(1)(a).

463 Article 61(7).

Gender-based violence charged as torture or outrages on personal dignity has never been successfully confirmed at the ICC.

The reasons for the vulnerability of charges for gender-based crimes have varied from case to case. In some cases, for example in the Lubanga case, the absence of any charges for gender-based crimes appears to result from the failure on the part of the Prosecution to prioritise sexual and gender-based violence in its investigations and prosecutorial strategy.<sup>467</sup> In some instances, the Pre-Trial Chamber found that the Prosecution had not provided sufficient evidence of gender-based crimes to uphold the charges sought. In the Katanga & Ngudjolo case, for example, the Prosecution did not provide sufficient evidence to link the defendants with the charges of outrages on personal dignity.<sup>468</sup> In the Muthaura *et al* case, the geographic scope of the charges of gender-based crimes were narrowed due to the failure of the Prosecution to provide evidence of their commission in certain locations, as well as the individual criminal responsibility of Muthaura, Kenyatta or Ali for gender-based crimes committed in other locations.<sup>469</sup> Women's Initiatives' research shows in some instances the Office of the Prosecutor may rely too heavily on information from UN reports, NGO reports or information provided by governments, press clippings or newspaper articles, to construct charges at the application for arrest warrant or summons to appear and confirmation of charges stages of proceedings, rather than a solid reliance on witness testimonies and other primary evidence. An initial review conducted by the Women's Initiatives of the publicly available

467 See further *Gender Report Card 2010*, p 89.

468 Judge Ušacka submitted a dissenting opinion to the confirmation of charges decision in the Katanga & Ngudjolo case, where she held that the Prosecution had not provided sufficient evidence to link the accused to the crimes of rape and sexual slavery and that further evidence on these charges should have been requested. See further *Gender Report Card 2008*, p 48-49.

469 See discussion of this in the *Muthaura et al* section below.

arrest warrant applications shows a liberal use of open source material in cases for which charges have been dismissed.<sup>470</sup>

In other instances, charges of gender-based crimes were not included due to legal findings by the Pre-Trial Chamber, including legal findings which adopted interpretations of the Rome Statute and Elements of Crimes which were in some cases excessively narrow and in others directly contradictory to existing international criminal jurisprudence on gender-based crimes.<sup>471</sup> For example, in the decision on the Prosecutor's application for a warrant of arrest in the Bemba case,<sup>472</sup> the Pre-Trial Chamber did not include a charge of other forms of sexual violence as a crime against humanity in the arrest warrant, which had been based on allegations that MLC troops had forced women to undress in public in order to humiliate them. 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)'.<sup>473</sup> The Chamber did not cite any legal authority for this proposition beyond a footnote to the relevant provision in the Elements of Crimes and did not provide further legal reasoning for their decision.

470 Not all applications for arrest warrants or summonses to appear are publicly available, and the available public versions of applications are often heavily redacted, including the references to witness statements or internal Prosecution investigator's reports. However, an analysis of the available information shows that public source information was relied upon in the Bemba and Abu Garda cases. In the Bemba case, as noted in this section, not all charges were confirmed, and in the Abu Garda case, no charges were confirmed. See further *Gender Report Card 2010*, p 63-67 and 109-111.

471 See for example the discussion of the Pre-Trial Chamber's legal findings on the contextual elements of crimes against humanity in the Muthaura *et al* case, discussed further below.

472 ICC-01/05-01/08-14-tEN.

473 ICC-01/05-01/08-14-tEN, para 40. The charge of other forms of sexual violence as a war crime, based on the same facts, was recharacterised as outrages on personal dignity.



However, in the 1998 trial judgement in the Akayesu case at the ICTR, the first international criminal judgement to address or define rape and other forms of sexual violence as a crime against humanity, the Trial Chamber explicitly cited forced public nudity as an archetypal example of acts which would constitute the crime of other forms of sexual violence.<sup>474</sup>

Further examples of legal findings from Chambers which have restricted or narrowed the gender-based charges sought by the Prosecutor can be found in numerous other cases before the Court. In the Muthaura *et al* case, the Pre-Trial Chamber recharacterised a charge of other forms of sexual violence relating to the forcible circumcision of men of Luo ethnicity as other inhumane acts on the grounds that, in the Chamber's view, 'acts of forcible circumcision cannot be considered "acts of a sexual nature" as required by the Elements of Crimes'.<sup>475</sup> In the Bemba case, the Pre-Trial Chamber found that the practice of cumulative charging was 'detrimental to the rights of the defence',<sup>476</sup> and therefore subsumed the charges of torture and outrages on personal dignity within the charge of rape.<sup>477</sup> It is a matter of some concern to note that the Defence in the Mbarushimana confirmation of charges hearing has cited this decision in the Bemba case to urge the Pre-Trial Chamber to restrict the scope of the charges for gender-based crimes sought by the Prosecution in that case.<sup>478</sup>

In scrutinising the submissions of the Prosecutor at the early stages of the proceedings – the request to open an investigation; the request for an arrest warrant or summons to appear; and the confirmation of charges – the Pre-Trial Chamber also plays a role in calling attention

to problems with the Prosecution's submission of evidence to substantiate crimes, including but not limited to gender-based crimes. In some instances, for instance in the decision authorising the investigation in Côte d'Ivoire, this role has been corrective, where the Pre-Trial Chamber has signalled to the Prosecutor that, based on his own submissions, it sees more crimes that should be included in an investigation or case. In theory, the Prosecutor then has the opportunity to carry out further investigations or to revise his submissions to explicitly include the crimes signalled by the Pre-Trial Chamber.

For example, in the decision granting the Prosecutor's request to open an investigation in the Situation in Côte d'Ivoire, the Pre-Trial Chamber throughout its decision noted multiple instances of 'other underlying acts not presented by the Prosecutor'. In examining the evidence submitted by the Prosecutor, the Pre-Trial Chamber found that the information indicated reasonable grounds to believe that various additional crimes, including gender-based crimes, had been committed in addition to those specified in the Prosecutor's request. In four instances in its decision, the Pre-Trial Chamber expanded on the crimes cited by the Prosecutor, adding torture as a crime against humanity<sup>479</sup> as well as rape,<sup>480</sup> pillage,<sup>481</sup> cruel treatment and torture<sup>482</sup> as war crimes to the crimes initially requested by the Prosecutor. The Chamber's decision amounted to an expanded and corrected version of the crimes set out by the Prosecutor in his original request to open an investigation. This decision and a dissenting opinion by Presiding Judge Fernández de Gurmendi are discussed in detail below. It is worth noting that the two judges forming the majority in this decision, Judges Fulford and Odio-Benito, are both part of Trial Chamber I, and

474 *The Prosecutor v. Akayesu*, Trial Judgement, ICTR-96-4-T, 2 September 1998, para 688.

475 ICC-01/09-02/11-01, para 27.

476 ICC-01/05-01/08-424, para 202.

477 See further *Gender Report Card 2009*, p 64-65.

478 See the section on *Mbarushimana* below and ICC-01/04-01/10-T-6-Red2-ENG, p 16-20.

479 ICC-02/11-14, paras 83-86.

480 ICC-02/11-14, paras 144-148.

481 ICC-02/11-14, paras 162-165.

482 ICC-02/11-14, paras 166-169.

in that context have presided over protracted litigation during the trial phase in the Lubanga case, deriving from the Prosecutor's limited charging, as discussed below.

In other instances, the Pre-Trial Chamber has responded to the Prosecution's omission of details or evidence by sending the case on to the next stage of the proceedings with limited charges. For example, in the decision confirming charges in the Bemba case, in respect of gender-based crimes, the case was sent to trial with the limited charges of rape as a war crime and crime against humanity. The Prosecutor had originally requested charges for the additional gender-based crimes of rape as torture, other alleged acts of torture as a crime against humanity (including the act of forcing victims to watch the rape of family members), and rape and other acts as outrages upon personal dignity. While the Pre-Trial Chamber's decision was in part based on a finding that in its view the Prosecutor had improperly engaged in the practice of 'cumulative charging', the Pre-Trial Chamber also declined to include charges because it found the Prosecutor had failed to provide adequate detail or sufficient facts in the amended document containing the charges with respect to certain charges.<sup>483</sup>

In the Kenya Situation, in the Muthaura *et al* case, a substantial part of the Prosecutor's application did not survive the initial scrutiny of the Pre-Trial Chamber. Specifically, in the decision issuing Summonses to Appear for Muthaura, Kenyatta and Ali, the Pre-Trial Chamber excluded events in Kisumu and Kibera in their entirety, which had originally included charges of rape. It also excluded events in Naivasha from the rape charge and recharacterised forcible circumcision from other forms of sexual violence to other inhumane acts, as discussed above. In addition to the Pre-Trial Chamber's strict interpretation of the background requirements for crimes against

483 For a full discussion of this decision, see *Gender Report Card 2009*, p. 63-67.

humanity, which in part impacted upon the charges included in the Summonses, it also cited to an insufficiency of evidence brought by the Prosecution. In particular, the events in Kisumu and Kibera were excluded in part because of the Prosecutor's failure to provide sufficient evidence of the individual criminal responsibility of the defendants for the events in these two areas. The exclusion of events in Naivasha from the rape charge was also due to the Prosecutor's failure to provide sufficient evidence of rape in Naivasha.

### The role of participating victims and their legal representatives

NGOs and Legal Representatives of participating victims have also taken a more active role in attempting to address or correct the absence of charges for gender-based crimes, when there is evidence that such crimes have been committed and could have been charged.

In the Lubanga case, in May 2009, the Legal Representatives for participating victims filed a joint submission, requesting the Trial Chamber to consider modifying the legal characterisation of the facts under Regulation 55 of the Regulations of the Court,<sup>484</sup> to add the crimes of sexual slavery and inhuman and cruel treatment to the existing characterisation. This filing came after the Trial Chamber had heard a significant amount of testimony about crimes of sexual violence from Prosecution witnesses.<sup>485</sup> In their filing, the Legal Representatives outlined a number of instances in which they argued that the witness testimony showed the widespread and/or systematic inhuman and/or cruel treatment of recruits. The Legal

484 The application was filed by the Legal Representatives after oral notice was provided to the Chamber, Prosecution and Defence in an open hearing on 8 April 2009 (ICC-01/04-01/06-T-167-ENG, p 26 lines 24-25, p 27 lines 1-7), and after making reference to the forthcoming request in one of the Legal Representative's opening statements (ICC-01/04-01/06-T-107-ENG, p 57 lines 4-7).

485 *Gender Report Card 2009*, p 68-85.

Representatives' application requested that the Chamber use Regulation 55 of the Regulations of the Court, which provides that the Chamber may change the legal characterisation of the facts in its final decision on the merits based on the evidence presented before it during the trial. The filing was ultimately unsuccessful. While a majority opinion<sup>486</sup> found that Regulation 55 permitted the Trial Chamber to modify the legal characterisation of facts to include facts and circumstances not originally contained in the charges, the Appeals Chamber reversed this decision and held that the majority had erred in its interpretation of Regulation 55. The Appeals Chamber held that 'Regulation 55(2) and (3) of the Regulations of the Court may not be used to exceed the facts and circumstances described in the charges or any amendment thereto'.<sup>487</sup>

In the Kenya Situation, the Victims' Common Legal Representative filed a request on 15 August 2011,<sup>488</sup> seeking permission to submit observations to the Pre-Trial Chamber on specific issues of law and/or fact, relating to the exclusion of acts of destruction and/or burning of property in the charges against Ruto, Kosgey and Sang. The Legal Representative noted that the Prosecution's Document Containing the Charges and Annex<sup>489</sup> both refer explicitly to evidence of destruction and burning of property, but fail to expressly include such acts in the charge of persecution.<sup>490</sup> Stressing that almost all of the 327 victims accepted to participate in the case had suffered loss as a direct result of destruction and/or burning of property and that all would seek reparations for this loss, she sought to submit observations on, among other things, the Pre-Trial Chamber's powers under Article 61 of the Statute. At issue was whether

under Article 61<sup>491</sup> the Pre-Trial Chamber has the power, on its own motion, on a motion of a party, or at the request of a victim's representative: (i) to confirm a charge additional to the charges specified by the Prosecutor where there is sufficient evidence to support an additional charge; (ii) when confirming a charge that has been specified by the Prosecutor, to confirm or clarify that the charge includes acts in addition to those specified by the Prosecutor; or (iii) to order, direct, request or invite the Prosecutor to add additional charges, or to include additional acts within the scope of an existing charge; and whether, if the PTC has these powers, such powers should be exercised.<sup>492</sup> While this request was initially rejected for being premature prior to the confirmation of charges hearing,<sup>493</sup> the Legal Representative filed again following the hearing.<sup>494</sup> In this second filing, the Legal Representative submitted that the Pre-Trial Chamber should exercise its power under Article 61(7)(c)(ii) to expressly include acts of destruction of property and looting, as well as add counts of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health regarding acts of destruction of property, looting and the infliction of personal injuries to the charges against Ruto, Kosgey and Sang.<sup>495</sup> These filings and decisions are discussed in detail below in the **OTP – Kenya** section of this Report.

486 ICC-01/04-01/06-2049.

487 ICC-01/04-01/06-2205, para 1.

488 ICC-01/09-01/11-263.

489 ICC-01/09-01/11-242 and ICC-01/09-01/11-242-AnxA.

490 ICC-01/09-01/11-263, para 11.

491 Article 61 addresses the procedures in preparation for and during the confirmation of charges hearing and sets out the requirements for the confirmation of charges. It also provides that the Pre-Trial Chamber can adjourn the confirmation hearing and request the Prosecutor to submit additional evidence or amend a charge because the evidence submitted appears to establish a different crime.

492 ICC-01/09-01/11-263, para 15.

493 ICC-01/09-01/11-274.

494 ICC-01/09-01/11-333.

495 ICC-01/09-01/11-333, para 27.

## The role of NGOs

NGOs, including the Women's Initiatives for Gender Justice, have also taken a more active role in attempting to address or correct to absence of charges for gender-based crimes. In the Lubanga case, on 16 August 2006, the Women's Initiatives for Gender Justice submitted a confidential report detailing 55 interviews with victims/survivors of gender-based crimes, 31 of whom identified the *Union des patriotes congolais* (UPC) as allegedly responsible for the acts. In an accompanying letter to the Office of the Prosecutor, the Women's Initiatives expressed grave concerns that gender-based crimes had not been adequately investigated, and provided information about the commission of these crimes by the UPC.<sup>496</sup> In September and November 2006, the Women's Initiatives filed two requests to participate as *amicus curiae* in the Lubanga case and DRC Situation, respectively.<sup>497</sup> In these requests, the Women's Initiatives asked the judges to review the Prosecutor's exercise of discretion in the selection of charges and to determine whether broader charges could be considered, also relying on Article 61(7) of the Rome Statute. Despite reports of gender-based crimes allegedly committed by the UPC, as documented by a range of United Nations (UN) agencies and NGOs, including the Women's Initiatives, no gender-based crimes were included in the charges against Lubanga.

On 13 July 2009, in the Bemba case, the Women's Initiatives for Gender Justice filed a request to submit *amicus curiae* observations to the Pre-Trial Chamber in support of the Prosecution request for leave to appeal the decision of the Pre-Trial Chamber not to include charges of rape as torture and outrages upon personal dignity in the confirmation of charges decision. The Women's Initiatives was granted *amicus curiae* status on 17 July 2009, and on 31 July filed an *amicus curiae* brief. The Women's Initiatives, working with the eminent scholar and practitioner Patricia Viseur-Sellers, argued that cumulative charging 'does not violate fair trial practices'.<sup>498</sup> Following the practice in national and international courts, 'as long as a charge has a sufficient evidentiary basis, the determination of whether charges are cumulative can occur at the end of trial' upon a finding of guilt. While at that stage cumulative convictions are impermissible, the inclusion of cumulative charges in the indictment is in keeping with a fair trial.<sup>499</sup> However, on 18 September 2009, the Pre-Trial Chamber denied the Prosecution's request for leave to appeal.<sup>500</sup> The *amicus curiae* filing and the related decisions are discussed in detail in the *Gender Report Card 2009*.<sup>501</sup>

496 The redacted version of this letter is available at <[http://www.iccwomen.org/documents/Prosecutor\\_Letter\\_August\\_2006\\_Redacted.pdf](http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf)>.

497 The requests for leave are available in *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/LegalFilings-web-2-10.pdf>>.

498 'Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence', *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-466, para 22.

499 'Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence', *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-466, para 22.

500 ICC-01/05-01/08-532.

501 *Gender Report Card 2009*, p 142-144.

As is clear from the discussion above, although the primary responsibility for investigative strategy and the selection of charges in relation to gender-based violence falls on the Prosecutor, a number of other actors, including the Pre-Trial Chamber, the legal representatives of victim participants and NGOs, have also sought to contribute to the ultimate characterisation of facts and charges regarding gender-based crimes at the pre-trial stage of proceedings. Likewise, although the investigative and evidentiary failings of the Prosecutor have given rise to the loss of several charges of gender-based crimes prior to trial, the legal findings of the Pre-Trial Chamber have also had a significant negative impact on the number of charges for gender-based violence which make it to trial. However, while errors made by the Office of the Prosecutor can be and have been highlighted or amended by interventions from participating victims or *amici curiae*, decisions taken by a Pre-Trial Chamber which then refuses the parties leave to appeal cannot be remedied.

## Litigation regarding public statements by the Prosecutor and Office of the Prosecutor

In a number of situations, Defence counsel have challenged the Prosecutor and Office of the Prosecutor on the grounds that public statements made by representatives of the Office have in some way infringed on the rights of the accused. In some instances, the Chambers have found that the contentions have merit, and in almost all cases have issued strongly worded opinions reminding the Prosecution of its obligations under the Rome Statute to refrain from making public statements that could impact upon the merits of the case *sub judice*. Chambers have stressed repeatedly that all parties and participants have a duty to safeguard the proper administration of justice and the integrity of judicial proceedings.

### Kenya Situation

On 30 March 2011, the Defence for Muthaura sought an intervention by the Pre-Trial Chamber concerning its claims that the Prosecutor made extra-judicial statements to the press that negatively impacted upon the rights of the Defence, infringed upon his fair trial rights and the integrity of the judicial process and presented irreparable prejudice to the Defence.<sup>502</sup> The Muthaura Defence cited in particular to statements made during a 14 March press conference, following the issuance of Summonses to Appear, in which the Prosecutor presented his theory as uncontested facts.<sup>503</sup> The Muthaura Defence asserted that in so doing, the Prosecutor risked polluting the witness pool, arguing that ‘the more putative witnesses hear the Prosecutor’s narrative, presented as uncontroverted truth, the greater the risk that witnesses who have a different recollection may doubt themselves and be

502 ICC-01/09-02/11-20.

503 ICC-01/09-02/11-20, para 8.

reluctant to come forward for the Defence'.<sup>504</sup> The Muthaura Defence thus sought an order from the Pre-Trial Chamber to the Prosecutor 'to refrain from making any further public comments touching on the merits of the present case' or, in the alternative, when a press statement is absolutely necessary, to clearly indicate that the assertions made are allegations on the part of the Prosecution. It also requested that 'any further contravention of the orders of the Pre-Trial Chamber in this regard may attract consideration of judicial sanction'.<sup>505</sup>

On 5 May 2011, Pre-Trial Chamber II issued a decision, rejecting the request. The Chamber reiterated that

as a matter of principle ... the safeguarding of the proper administration of justice and the integrity of the judicial proceedings requires the parties, participants and any person involved in the proceedings, to refrain from making public statements or engage in any other activity which could have an impact on the evidence or the merits of the case or could be perceived as showing a predetermination of the cause pending before the Court.<sup>506</sup>

Although the Chamber observed that the Defence filing raised issues of legitimate concern to the Defence, it found that the statements made by the Prosecutor at the 14 March press conference did not exceed his role as Prosecutor in the proceedings.<sup>507</sup> The Chamber observed that the statements made by the Prosecutor were not related to the crimes with which Muthaura is charged, or those which he may bring before the Chamber as charges, but rather concerned 'the position held by Mr Muthaura

504 ICC-01/09-02/11-20, para 12.  
 505 ICC-01/09-02/11-20, para 26.  
 506 ICC-01/09-02/11-83, para 6.  
 507 ICC-01/09-02/11-83, para 11.

at the time of the press conference *vis-à-vis* the Kenyan police, while making clear reference to the "protection [of witnesses]" and the related "conditions of the judges".<sup>508</sup> Taking note of the Prosecutor's responsibility for the protection of witnesses during his investigations, the Chamber found that 'the Prosecutor's answers to the press have properly reflected his role in the present criminal proceedings and cannot be understood as prejudging the questions which are yet to be determined by the Chamber'.<sup>509</sup>

Similarly, in an attempt to intervene in the proceedings as *amicus curiae*,<sup>510</sup> on 20 January 2011 Ali submitted that he suffered grave prejudice by the Prosecutor publicly announcing him as a suspect before a decision was made on the issuance of Summonses to Appear.<sup>511</sup> Sang, in a filing on 9 February 2011, asserted similar arguments and specifically requested the Chamber to disqualify the Prosecutor from prosecuting the Kenyan cases.<sup>512</sup> This request was rejected because the Chamber found that it had no competence to deal with such requests for disqualification, which, pursuant to Article 42(8),<sup>513</sup> should be dealt with by the Appeals Chamber.<sup>514</sup> In a decision on the Ali request on 11 February 2011, the Pre-Trial Chamber acknowledged the concerns expressed by Ali, but it did not find that these concerns rendered the proceedings under Article 58 adversarial. The Chamber noted, however, that

508 ICC-01/09-02/11-83, para 10.  
 509 ICC-01/09-02/11-83, para 11.  
 510 Following the application for Summonses to Appear by the Prosecution in December 2010, Ali, Ruto and Sang all attempted to intervene in the proceedings before Pre-Trial Chamber II as *amicus curiae*. Their requests were dismissed for lack of procedural standing. The Pre-Trial Chamber stressed that the proceedings related to Article 58 are between the Prosecutor and the Chamber only.  
 511 ICC-01/09-37-AnxA.  
 512 ICC-01/09-44-Anx.  
 513 Article 42(8) provides that 'any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber'.  
 514 ICC-01/09-47.

while it is not the Chamber's role to comment and advise the Prosecutor on his interaction with the press and media, the Chamber nevertheless is concerned if his actions have the potential to affect the administration of justice and the integrity of the present proceedings before the Chamber. In this respect, the Chamber expresses its deprecation regarding the Prosecutor's course of action in the present case, as it has unduly exposed the Applicant to prejudicial publicity before a determination of the Chamber pursuant to article 58 of the Statute has even been made.<sup>515</sup>

## DRC Situation

The Defence claims in the Kenya Situation echoed similar challenges in both the Mbarushimana and Lubanga cases, as well as a challenge by the Office of Public Counsel for Defence (OPCD) in the Libya Situation, discussed below. On 31 January 2011, Pre-Trial Chamber I declined the Mbarushimana Defence request that the Chamber 'order the Prosecutor to publish an immediate and public retraction of the Press Release' issued a few hours after his arrest in France on 11 October 2010.<sup>516</sup> Specifically, the Defence claimed that the press release asserted as undisputed fact that Mbarushimana was a leader of the *Forces démocratiques pour la libération du Rwanda* (FDLR), which committed more than 300 rapes in North Kivu province, and referred to Mbarushimana as a *génocidaire*. It alleged that such statements infringed on the right to a fair and impartial hearing, the presumption of innocence and the Prosecutor's role as an impartial functionary. The Chamber did not find that the alleged infringements were serious enough to warrant ordering the measures

sought by the Defence. However, it expressed its concern that parts of the press release 'were formulated without due care and may lead to misinterpretation', and that 'the Prosecutor should be mindful of the suspect's right to be presumed innocent until proven guilty'.<sup>517</sup>

In the Lubanga case, Trial Chamber I issued a decision on 12 May 2010,<sup>518</sup> criticising Beatrice Le Fraper du Hellen, former Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor, for statements made during an interview with Lubanga.org. The Chamber found that Le Fraper du Hellen's interview breached her obligations to speak publicly 'about the proceedings in a fair and accurate way, avoiding any comment about issues that are for the Chamber to determine'.<sup>519</sup> The Chamber, however, decided not to take any concrete action besides expressing its 'strongest disapproval' of the interview. For a more detailed discussion of this decision, see the *Gender Report Card 2010*.<sup>520</sup>

515 ICC-01/09-42, para 22.

516 ICC-01/04-01/10-51, para 2.

517 ICC-01/04-01/10-51, para 17.

518 ICC-01/04-01/06-2433.

519 ICC-01/04-01/06-2433, para 40.

520 *Gender Report Card 2010*, p 151-152.

## Libya Situation

In another decision on 8 September 2011, Pre-Trial Chamber I in the Libya Situation considered an application filed by the OPCD on 25 May 2011 concerning statements made by the Prosecutor and other staff of the Office of the Prosecutor in a press conference on 16 May 2011 and in interviews published in *The National* and *El Pais*.<sup>521</sup> The OPCD submitted that the statements were ‘prejudicial to the rights of the Defence, in particular, the presumption of innocence’ and ‘impair the integrity of the proceedings ... by portraying as having been established issues which are for the Court to determine’.<sup>522</sup> It requested the Chamber to direct the Prosecutor to publicly clarify that the guilt of the accused is not established until a decision is made by the Chamber or, alternatively, to make an announcement reaffirming the presumption of innocence. The OPCD further requested the Chamber to direct the Prosecutor to abstain from making public statements violating the presumption of innocence and the rights of the Defence, and to rule that the names of those for whom the Prosecutor has filed an application for an arrest warrant remain confidential until the Pre-Trial Chamber has issued a decision upon the request.

The Chamber referred to its previous decision in the Mbarushimana case, reiterating that ‘allegations of prejudice to suspects on account

of public statements suggesting their guilt before a conviction by a court ... are primarily of relevance to the issue of presumption of innocence’;<sup>523</sup> and that ‘the Prosecutor should be mindful of the suspects’ right to be presumed innocent until proven guilty’ when making public statements.<sup>524</sup> The Chamber further took into consideration that public statements must be considered in their entirety, and found that with respect to the contested statements, the Prosecutor and the Prosecution staff member had been mindful of the rights of the Defence, and had expressly stated that the Judges still had to decide on the Prosecutor’s application. The Chamber found that the statements were not prejudicial to the rights of the Defence and the presumption of innocence or ‘portray ... as having been established issues which are for the Court to determine’.<sup>525</sup> Pre-Trial Chamber I thus rejected the request.

521 ICC-01/11-17. See also ‘Press Conference, ICC Prosecutor – 16 May 2011’, available at <<http://www.youtube.com/watch?v=Q5XOorxeFUg>>, last visited on 25 October 2011; ‘Q&A with Luis Moreno-Ocampo, chief prosecutor of the International Criminal Court’, *The National*, 18 May 2011, available at <<http://www.thenational.ae/news/worldwide/asia-pacific/q-a-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court>>, last visited on 25 October 2011; ‘Investigamos más nombres en el árbol genealógico de la represión en Libia’, *El Pais*, 23 May 2011, available at <[http://www.elpais.com/articulo/internacional/Investigamos/nombres/arbol/genealogico/represion/Libia/elpepiint/20110523elpepiint\\_4/Tes](http://www.elpais.com/articulo/internacional/Investigamos/nombres/arbol/genealogico/represion/Libia/elpepiint/20110523elpepiint_4/Tes)>, last visited on 25 October 2011.

522 ICC-01/11-5-tENG, para 3.

523 ICC-01/04-01/10-51, para 7.

524 ICC-01/04-01/10-51, para 17.

525 ICC-01/11-5-tENG, para 3.



## Situations and Cases

### Situations under preliminary examination

As of 20 June 2011, the Office of the Prosecutor is conducting preliminary examinations in Colombia, Afghanistan, Georgia, Guinea, Palestine, Nigeria, Honduras, and the Republic of Korea. During a preliminary examination, the Office of the Prosecutor determines whether a situation meets the legal criteria established by the Statute to warrant investigation by the ICC.<sup>526</sup> 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, taking into consideration information received on crimes within the jurisdiction of the Court under Article 15<sup>527</sup> of the Rome Statute; a referral from a State Party or the UN Security Council (UNSC); or a declaration by a non-State Party pursuant to Article 12(3) of the Statute.<sup>528</sup>

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526 'Draft Policy Paper on Preliminary Examinations', *Office of the Prosecutor*, 4 October 2010, available at <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm>>, last visited on 25 October 2011.

527 Article 15 provides that the Prosecutor may initiate investigations *proprio motu* (on his own initiative) on the basis of information on crimes within the jurisdiction of the Court.

528 Article 12(3) provides that a non-State Party may lodge a declaration accepting the Court's jurisdiction with respect to the crime in question.

In 2006, the Office of the Prosecutor announced its preliminary examination in Colombia, which focuses on alleged crimes within the jurisdiction of the Court, as well as domestic investigations and proceedings within Colombia against paramilitary and guerrilla leaders, politicians and military personnel. It is also examining allegations of crimes committed by international networks supplying armed groups. The announcement of a preliminary examination has not yet led to the opening of an investigation. The Office of the Prosecutor has also initiated a preliminary examination of crimes within the jurisdiction of the Court by all actors in Afghanistan. This preliminary examination was made public in 2007. In August 2008, the Office of the Prosecutor announced a preliminary examination into the situation in Georgia, and has exchanged information with and visited both Russia and Georgia.

The Palestinian National Authority lodged an Article 12(3) declaration with the Registrar in January 2009. Currently, the Office of the Prosecutor is examining issues related to jurisdiction, including whether the declaration meets the statutory requirements, and whether there are national proceedings with respect to the alleged crimes.<sup>529</sup> Finally, in October 2009, the Office of the Prosecutor announced its examination in Guinea, focusing on allegations

surrounding the events of 28 September 2009 in Conakry, including allegations of crimes of sexual violence.

On 18 November 2010, the Office announced its preliminary examination in Nigeria, which focuses on crimes committed in central Nigeria since mid-2004. The preliminary examination in Honduras was also announced publicly on 18 November 2010. The Office has received numerous communications involving various allegations, and is conducting preliminary examinations into crimes linked to the coup of June 2009.

On 6 December 2010, the Office of the Prosecutor announced that it had initiated preliminary examinations in the Republic of Korea, focusing on war crimes allegedly committed by North Korean forces on the territory of the Republic of Korea. The Office is examining whether the following incidents constitute war crimes under the jurisdiction of the Court: (i) the shelling of Yeonpyeong Island on 23 November 2010, resulting in the killing of South Korean marines and civilians and the injuring of many others; (ii) the sinking of the Cheonan, a South Korean warship, which was hit by a torpedo allegedly fired from a North Korean submarine on 26 March 2010, resulting in the death of 46 persons.

529 In the context of the discussion of the potential UN membership of Palestine, on 28 September 2011 the Prosecutor reportedly stated that if Palestine becomes a non-member observer state, the Palestinian Authorities might be eligible to appeal to the ICC to initiate an investigation: 'If the General Assembly says they are an observer state, in accordance with the all-state formula, this should allow them [...] to be part of the International Criminal Court.' He cautioned, however, that the initiation of an investigation depended on more than statehood. See 'Palestinians could pursue war crimes charges without full statehood: ICC prosecutor', *The Star*, 28 September 2011, available at <<http://www.thestar.com/news/article/1061595>>, last visited on 25 October 2011.

## Article 15 communications

The Office of the Prosecutor continues to receive communications pursuant to Article 15 of the Statute. 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. If upon a review of such a communication the Prosecutor concludes that there is no reasonable basis for an investigation, pursuant to Article 15(6)<sup>530</sup> and Rule 49 of the Rules of Procedure and Evidence,<sup>531</sup> the Prosecutor shall inform those who provided information. As of 13 September 2011, the Office reported that it has received 9,247 communications, of which 4,327 were manifestly outside the jurisdiction of the Court.<sup>532</sup>

In October 2010, an Article 15 communication was filed confidentially by lawyers acting for the families of those killed or injured in a raid by the Israeli Defence Forces on a flotilla bound for

Gaza.<sup>533</sup> In May 2010, nine passengers on the ship MV Mavi Marmara were killed when Israeli forces intercepted and boarded the flotilla in international waters. The communication to the Office of the Prosecutor was submitted on behalf of both the families of the victims and the Turkish human rights group IHH Humanitarian Relief Foundation, the owner and operator of the Mavi Marmara. All nine victims held Turkish citizenship, and one, a 19-year-old man, had dual Turkish-American citizenship.<sup>534</sup> Although neither Turkey nor Israel are States Parties, the ship was sailing under the flag of Comoros, which has ratified the Rome Statute.<sup>535</sup>

On 13 September 2011, the Survivors Network of those Abused by Priests (SNAP) and five individual complainants, represented by attorneys from the Centre for Constitutional Rights,<sup>536</sup> filed a complaint<sup>537</sup> with the Prosecutor of the ICC against high-ranking Vatican officials:

530 Article 15(6) provides that: 'If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.'

531 Rule 49 provides that: 'Where a decision under article 15, paragraph 6, is taken, the Prosecutor shall promptly ensure that notice is provided, including reasons for his or her decision, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information to him or her under article 15, paragraphs 1 and 2, or the integrity of investigations or proceedings. The notice shall also advise of the possibility of submitting further information regarding the same situation in the light of new facts and evidence.'

532 *OTP Weekly Briefing*, Issue #95, 5-14 July 2011.

533 'ICC urged to act over flotilla raid', *Al Jazeera*, 14 October 2010, available at <<http://english.aljazeera.net/news/middleeast/2010/10/20101014125820963565.html>>, last visited on 25 October 2011; 'Gaza flotilla attack: calls for International Criminal Court to step in', *The Guardian*, 8 October 2010, available at <<http://www.guardian.co.uk/world/2010/oct/08/israel-aid-flotilla-raid-calls>>, last visited on 25 October 2011.

534 'Gaza flotilla activists were shot in head at close range', *The Guardian*, 4 June 2010, available at <<http://www.guardian.co.uk/world/2010/jun/04/gaza-flotilla-activists-autopsy-results>>, last visited on 17 November 2011.

535 See <<http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Comoros.htm>>.

536 The Centre for Constitutional Rights is a non-profit legal and educational organisation based in the United States of America (USA) dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.

537 The complaint is a communication under Article 15 of the Rome Statute, which provides that the Prosecutor, having received information on crimes within the jurisdiction of the Court, shall analyse the seriousness of that information and, if he concludes that there is a reasonable basis to proceed with an investigation, he shall request authorisation from the Pre-Trial Chamber to initiate an investigation *proprio motu*.

namely, Pope Benedict XVI,<sup>538</sup> Cardinal Angelo Sodano, Cardinal Tarcisio Bertone and Cardinal William Levada. The complaint requested the Prosecutor to investigate and prosecute high-ranking Vatican officials for rape and other forms of sexual violence as crimes against humanity and for torture as a crime against humanity.<sup>539</sup>

The complaint presented 20,000 pages of supporting material,<sup>540</sup> and alleged that sexual assaults by priests were not an isolated problem, but have occurred for decades on a widespread and systematic basis throughout the Church and across the globe. It is alleged that high-ranking Vatican officials tolerated and enabled rape and child sex crimes to occur and to continue through their policies and practices: namely by destroying evidence, obstructing justice, shifting priests to other dioceses, punishing whistleblowers or blaming victims. The complainants maintain that, as the Vatican is a centralised and hierarchical institution,<sup>541</sup> its high-ranking officials were responsible for the system that allowed sexual violence against children and permitted the majority of offenders to go unpunished.

Should the Prosecutor decide to investigate the allegations against Vatican officials, several jurisdictional and procedural issues will have to be resolved. Article 12 of the Rome Statute provides that the ICC has jurisdiction if the crimes in question have either been committed on the territory of a State Party to the Rome Statute or have been committed by a national of a State Party. Pope Benedict XVI is a German national and two of the other accused are Italian, and so are nationals of States Parties, however Cardinal William Levada is an American. Because the United States of America (USA) is not a State Party to the Rome Statute, it is unlikely that the Court can exercise jurisdiction over Cardinal William Levada insofar as he is accused for crimes committed in the USA since crimes committed in the USA do not qualify as crimes occurred on the territory of a State Party. Equally, if Pope Benedict XVI is accused in his capacity as head of the Vatican, he may argue that he is entitled to immunity as a Head of State, although Article 27 of the Rome Statute provides that immunities based on a person's official capacity do not exempt that person from criminal responsibility under the Rome Statute. In addition, in light of the fact that only crimes committed after the Court became operational on 1 July 2002 fall within the ICC's jurisdiction, and that the majority of the crimes listed in the complaint were committed in the decades before 2002, the Court would not be able to take into consideration facts or events which occurred before 1 July 2002. The complainants will also have to persuasively argue that incidents of child sexual abuse and related Church activities to conceal or condone them, which took place after July 2002, could be considered to rise to the level of a 'widespread or systematic attack against a civilian population'.

538 Pope Benedict XVI is sued both in his capacity as Pontiff and in his former capacity as Cardinal Joseph Ratzinger, Prefect of the Congregation for the Doctrine of Faith (CDF), the entity of the Vatican responsible for addressing allegations of sexual abuse committed by priests.

539 OTP-CR-159/11, available at <<http://s3.documentcloud.org/documents/243877/victims-communication.pdf>>, last visited on 25 October 2011.

540 The materials included testimonies, case studies, declarations of experts, letters, statements, photographs, findings of multiple commissions of inquiry, and guilty pleas of bishops.

541 According to Canon Law, 1938 Code c. 331, the Pope has 'supreme full, immediate and universal ordinary power'. He is the direct superior of the bishops as heads of the dioceses who are the heads of parishes led by priests. Cardinals are appointed by the Pope and the College of Cardinals serves as the Pope's supreme advisory body.

## Situations and cases under investigation

### 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 second Situation to become the subject of an investigation by the Office of the Prosecutor. At the time of writing this Report, the sole case in the Uganda Situation, *The Prosecutor v. Joseph Kony et al.*, concerns crimes allegedly committed by the Lord's Resistance Army (LRA). No suspects have been arrested in the Kony *et al* case to date.

#### International Crimes Division Uganda

The Government of Uganda has proceeded with preparations for domestic trials to be held before the International Crimes Division (ICD) within the High Court of Uganda.<sup>542</sup> The ICD was initially established as the War Crimes Division (WCD) in 2008, as part of the efforts to implement the Juba Peace Agreements.<sup>543</sup> For its first case, the bench of the ICD was composed of three Ugandan judges, Justice Dan Akiiki Kiiza, Justice Elizabeth Ibanda Nahamyia, and Justice Alfonse Chigamoy Owiny-Dollo, and sat at the premises of the High Court in Gulu, Northern Uganda. From 1 – 11 March 2011, the Head of the International Crimes Unit and the Head of the Terrorism and War Crimes Investigation Unit visited the ICC to meet with the Prosecution in their preparation for the first war

crimes cases in Uganda.<sup>544</sup> The ICC Office of the Prosecutor reported that it is providing support and assistance to the Ugandan national process.

The first case to come before the ICD was that of Thomas Kwoyelo *alias* Latoni (Kwoyelo), a former senior commander/officer in the LRA. According to the indictment filed by the Director of Public Prosecutions in Uganda, all attacks by the LRA which took place in Kilak County, Amuru District between 1987 and 2005 were either commanded by him or were carried out with his knowledge and authority. Kwoyelo was charged with grave breaches of the Geneva Convention Act of Uganda (1964),<sup>545</sup> including wilful killing, taking of hostages, extensive destruction of property, causing serious injury to body, inhumane treatment, and extensive destruction of property.<sup>546</sup> The case opened on 11 July 2011, in Gulu. Kwoyelo pled not guilty to all charges.

A Stakeholder's Meeting was held on 11 July immediately prior to the plea taking, at which the Judges and Registrar of the ICD addressed the observers including civil society and took questions from those present. A delegation from the Greater North Women's Voices for Peace Network (GNWVNP), together with the Women's Initiatives for Gender Justice, attended the Stakeholder's Meeting and presented a joint statement expressing the concerns of the women and communities in the greater north with respect to the work of the ICD.<sup>547</sup> The GNWVNP and Women's Initiatives had previously exchanged views on the justice process with

542 The ICD was established pursuant to Legal Notice No. 10 of 2011, 31 May 2011, 'The High Court (International Crimes Division) Practice Directions, 2011'. As such, there are questions as to whether the ICD was established properly, as under Ugandan law a legal notice requires the authorisation of Parliament, which was not obtained in this instance. Information on the ICD provided by Jane Adong Anywar, Legal Officer in the Kampala Office of Women's Initiatives for Gender Justice.

543 For a review of the Juba Peace Agreements, and Women's Initiatives work on the Peace Process in northern Uganda, see *Women's Voices/Dwan Mon/Eporoto Lo Angor/Dwan Mon: A Call for Peace, Accountability and Reconciliation for the Greater North of Uganda*, Women's Initiatives for Gender Justice, June 2009 (2nd Ed).

544 *OTP Weekly Briefing*, Issue #78, 8-14 March 2011. The International Crimes Unit is part of Uganda's Directorate of Public Prosecutions and the Investigation Unit is part of Uganda's Police. The Office of the Prosecutor reported the names of the Units as the 'War Crimes Prosecution Unit' and 'War Crimes Investigation Unit'.

545 The Geneva Convention Act of Uganda domesticates the Geneva Convention of 1949.

546 Amended Indictment, *Prosecutor v. Kwoyelo Thomas alias Latoni*.

547 'Issues raised by the Greater North Women's Voices for Peace Network at the Stakeholder's Meeting organised by the International Crimes Division in Gulu.' A portion of this statement as delivered by the Delegation appears in Episode 1 on <[http://www.refugeelawproject.org/kwoyelo\\_trial.php](http://www.refugeelawproject.org/kwoyelo_trial.php)>, last visited on 25 October 2011.

the ICD Judges, Prosecution, Investigators, and Registrar during a meeting in Soroti, northern Uganda in 2009, following the 'Women's Dialogue on Accountability and Reconciliation'.<sup>548</sup>

At the Stakeholder's Meeting, the GNWVPN and the Women's Initiatives acknowledged the opening of the ICD as 'a milestone in raising our hope and expectations for the realisation of justice, accountability and meaningful peace'. The joint statement called attention to the girls and women who were abducted and who are victims/survivors of gender-based crimes committed by the LRA. Specifically, the statement expressed concern that the Geneva Convention Act under which Kwoyelo was charged does not adequately address gender-based crimes, which are recognised in the Rome Statute of the ICC. The GNWVPN and the Women's Initiatives called upon the ICD to apply international standards, specifically those contained in the Rome Statute, in particular to ensure that the interests and needs of victims/survivors of sexual violence are taken into account at every stage of the proceedings. Specifically, the Judges of the ICD were asked how they planned to guarantee the rights of victims/survivors to be kept informed about, and to participate in, the proceedings, the right to apply for reparations, and how the rights of the Defence would be safeguarded to ensure a fair trial. The GNWVPN and the Women's Initiatives asked the ICD, the Government of Uganda, and other stakeholders to ensure 'meaningful participation of the women and achievement of real justice'.

548 The 'Women's Dialogue on Accountability and Reconciliation' was convened by the Women's Initiatives for Gender Justice in Soroti, northern Uganda, from 1-4 June 2009. See Women's Initiatives for Gender Justice, 'Women from the Greater North meet at the Women's Dialogue on Accountability and Reconciliation workshop in Soroti' *Women's Voices e-letter*, July 2009, available at <[http://www.iccwomen.org/news/docs/WomVoices\\_July09/index.html#uganda1](http://www.iccwomen.org/news/docs/WomVoices_July09/index.html#uganda1)>.

Since 2004, women's rights activists in the Greater North of Uganda and the Women's Initiatives for Gender Justice have called on the Office of the Prosecutor to investigate all parties to the conflict, especially those crimes alleged to have been committed by the UPDF and other government personnel. We continue to work closely with Ugandan women's rights and peace activists towards mobilising women to be partners and participants in the implementation of the Peace Recovery, and Development Plan (PRDP), Juba Peace Agreements, and international and domestic efforts for accountability and reconciliation.<sup>549</sup>

The Defence raised a number of preliminary objections at the outset of the proceedings, and requested that these issues be forwarded to the Constitutional Court for adjudication. The primary issue argued by the Defence was that Kwoyelo had lodged a valid application for amnesty on 12 January 2010, and should have been granted amnesty under the terms of Uganda's Amnesty Act. The Defence also questioned the constitutionality of proceeding under the 1949 Geneva Convention, and of the detention of Kwoyelo in the private residence of a military official. On 22 September 2011, the Constitutional Court handed down a decision addressing the first issue raised by the Defence, that of Kwoyelo's application for amnesty.<sup>550</sup> According to the Constitutional Court, the Amnesty Commission and the Director of Public Prosecutions<sup>551</sup> failed to accord Kwoyelo equal treatment under the Amnesty Act, and therefore their failure to grant his application is unconstitutional. The

549 For an overview of the peace process in Northern Uganda, and the Women's Initiatives work on the peace process, see the Introduction by Brigid Inder in *Women's Voices/ Dwan Mon/Eporoto Lo Angor/Dwan Mon: A Call for Peace, Accountability and Reconciliation for the Greater North of Uganda*, Women's Initiatives for Gender Justice, June 2009 (2nd Ed).

550 Constitutional Petition No. 036/11 (Reference) [arising out of HTC-00-ICD-Case No. 02/10] Between Thomas Kwoyelo *alias* Latoni, Applicant, and Uganda, Respondent.

551 The Director of Public Prosecutions is Richard Buteera. Buteera is believed to be one of the candidates selected by the ASP Search Committee for the shortlist and interviewed for the position of Prosecutor of the ICC.

Constitutional Court ordered that the case file be returned to the ICD with a direction to ‘cease the trial of the applicant forthwith’. On 11 November 2011, the ICD held a hearing in Gulu at which they ceased all proceedings against Kwoyelo, in compliance with the order of the Constitutional Court. The ICD further directed the Director of Public Prosecutions to comply with the Amnesty Act. Kwoyelo remained in custody pending the DDP’s compliance with the Amnesty Act, and in the absence of an order from the Constitutional Court that he should be released. The Women’s Initiatives trial monitor who was present at the hearing reported a mixed response to the decision of the ICD. While victims/survivors of the LRA expressed pain and anger, and a feeling that justice had been denied, others expressed the view that failure to grant Kwoyelo amnesty and release him would send the wrong signal to LRA combatants who remained at large.

The Amnesty Act became law on 21 January 2000. It declares an amnesty ‘in respect of any Ugandan who has at any time since the 26th day of January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by actual participation in combat; collaborating with the perpetrators of the war or armed rebellion; committing any other crime in the furtherance of the war or armed rebellion; or assisting or aiding the conduct or prosecution of the war or armed rebellion’.<sup>552</sup> In order to qualify for amnesty, a person must meet the requirements of the Act, including reporting to one of the listed authorities, renouncing and abandoning involvement in the war or armed rebellion, and surrendering any weapons in his or her possession.<sup>553</sup> A person who is charged with or is under lawful detention in relation to the crimes listed in the Amnesty Act may also qualify for amnesty if they declare to the detaining or judicial authority that they have renounced the activity listed in the Act, and declare their intention to apply for amnesty.<sup>554</sup> The GNWVPN

and the Women’s Initiatives have called for the work of the Amnesty Commission to be concluded with the completion of the Juba Peace Talks.<sup>555</sup>

At the time of writing this Report, the Kwoyelo case was the only LRA related case being heard by the ICD. The ICD also has jurisdiction over cases brought under the penal code, as well as cases brought under the anticorruption and antiterrorism acts. In 2012, Women’s Initiatives will launch a Gender Justice Legal Monitoring Programme specifically focused on domestic war crimes trials in Uganda. The Gender Justice Legal Monitoring Programme builds on Women’s Initiatives’ work on the Juba Peace Talks since 2007, with a focus on the Agreement on Accountability and Reconciliation, as well as on our existing advocacy and analysis of Uganda’s domestic legislation to try the LRA, in particular the Uganda International Criminal Court Act 2010 (ICC Act).<sup>556</sup>

555 ‘Statement on Accountability and Reconciliation – Domestic and International Solution’, August 2007, in *Women’s Voices/ Dwan Mon/Eporoto Lo Angor/Dwan Mon: A Call for Peace, Accountability and Reconciliation for the Greater North of Uganda*, Women’s Initiatives for Gender Justice, June 2009 (2nd Ed).

556 The ICC Act was passed in Uganda on 25 May 2010, immediately prior to the opening of the ICC Review Conference in Kampala. It became law when it was subsequently published on 25 June of that year. The passage of the ICC Act gave the force of law to the Rome Statute in Uganda; made provisions within the domestic law of Uganda for the punishment of international crimes of genocide, crimes against humanity, and war crimes; provided for Uganda to cooperate with the ICC in the performance of its functions; provided for the arrest and surrender to the ICC of persons alleged to have committed crimes within its jurisdiction; provided for various forms of request for assistance to the ICC; enabled Ugandan courts to try, convict and sentence persons who have committed crimes referred to in the Statute; enabled the ICC to conduct proceedings in Uganda; and provided for the enforcement of sentences and orders imposed by the ICC. Significantly, the Act limited the jurisdiction of Ugandan courts to those crimes committed after 25 June 2010, and is thus inapplicable to the majority of the crimes committed in the 25-year conflict with the LRA. As the Rome Statute is annexed to the ICC Act, its provisions are therefore incorporated into Ugandan law. However, the ICC Rules of Procedure and Evidence and Elements of Crimes which contain important procedural safeguards and detailed definitions of gender crimes, are not annexed to the Act.

552 Section 2, Amnesty Act (CAP 294).

553 Section 3(1), Amnesty Act (CAP 294).

554 Section 3(2), Amnesty Act (CAP 294).

## The Lord's Resistance Army in the DRC, the CAR and South Sudan

As of 2011, it appears the LRA is continuing to move between the DRC, the CAR and South Sudan. Activities by the militia group have increased in 2011, most noticeably in the DRC. It has been reported that in the first four months of 2011 alone, the LRA carried out at least 120 attacks, 97 of which were in the DRC.<sup>557</sup> This represents nearly half the total number of attacks reported in 2010. In March, the UN High Commissioner for Refugees (UNHCR) reported that since January 2011, LRA attacks intensified in particular in Province Orientale, killing at least 35 people, abducting 104 others and displacing more than 17,000 people.<sup>558</sup> The UNHCR expressed particular concern that LRA attacks appear to be specifically targeted at more populated areas, including Niangara, Dungu, Faradje and Ango (Haut and Bas Uele districts, Province Orientale, DRC). Those who are abducted by the LRA are often used as porters, are forced to work in the fields or used as sex slaves. Attacks carried out by the LRA reportedly included murders, mutilations and amputations of lips and ears.<sup>559</sup> Another report documents that as of 31 August 2011 at least 170 attacks were carried out by the LRA in the DRC, in which at least 52 civilians were killed, and at least 214 abducted.<sup>560</sup>

557 'US/Central Africa: Protect Civilians From LRA Abuses', *Human Rights Watch*, 23 May 2011, available at: <<http://www.unhcr.org/refworld/docid/4ddb89f52.html>>, last visited on 25 October 2011.

558 'New LRA attacks against populated areas of northeastern Democratic Republic of the Congo', *UN High Commissioner for Refugees*, 1 March 2011, available at <<http://www.unhcr.org/refworld/docid/4d6ceecf2.html>>, last visited on 25 October 2011.

559 'New LRA attacks against populated areas of northeastern Democratic Republic of the Congo', *UN High Commissioner for Refugees*, 1 March 2011, available at <<http://www.unhcr.org/refworld/docid/4d6ceecf2.html>>, last visited on 25 October 2011.

560 'Lord's Resistance Army', Sudan Human Security Baseline Assessment (HSBA), last updated 10 October 2011, p 5-6, available at <<http://www.smallarmssurveysudan.org/pdfs/facts-figures/armed-groups/southern-sudan/HSBA-Armed-Groups-LRA.pdf>>, last visited on 25 October 2011.

Attacks by the LRA in South Sudan have reportedly focused in particular on West Equatoria state. Most attacks took place in mid-2010, with occasional attacks in October, November and December of that year. It has been reported that at least 21 attacks were carried out between mid-2010 and mid-2011, resulting in at least 15 deaths, 66 abductions and 500 displaced persons.<sup>561</sup> LRA fighters have also been seen in South Darfur in October 2010 but it has been reported that these groups have subsequently moved into the CAR and the DRC.<sup>562</sup>

In February and March 2011, the Women's Initiatives conducted a literature review of over 20 articles, media sources and reports on the LRA activities in the CAR. Unlike their original platform in Uganda, the LRA has never claimed to have a political agenda with regard to CAR itself. Their presence appears to be about the 'survival' of the militia group, and an attempt to distance the group from the UPDF (Ugandan People's Defence Force) whilst maintaining cross-border activity with the Congo and a secure presence in Sudan.

The literature review analysed the chronology of the LRA's presence in CAR, including details of 130 separate attacks during a three-year period, an analysis of the modes of commission, and the effects of the LRA on the local population in these areas and on the region as a whole. The review found that from February 2008 to March 2011, at least 290 people have been killed and 874 abducted during attacks carried out

561 'Lord's Resistance Army', Sudan Human Security Baseline Assessment (HSBA), last updated 10 October 2011, p 6, available at <<http://www.smallarmssurveysudan.org/pdfs/facts-figures/armed-groups/southern-sudan/HSBA-Armed-Groups-LRA.pdf>>, last visited on 25 October 2011.

562 'Lord's Resistance Army', Sudan Human Security Baseline Assessment (HSBA), last updated 10 October 2011, p 7, available at <<http://www.smallarmssurveysudan.org/pdfs/facts-figures/armed-groups/southern-sudan/HSBA-Armed-Groups-LRA.pdf>>, last visited on 25 October 2011.



by the LRA.<sup>563</sup> These are estimates based on the lowest figures provided, and the exact numbers for those killed and abducted are likely to be much higher. It is also estimated by Oxfam International that 100% of the girls who are abducted by the LRA are raped.<sup>564</sup> It should be noted that there are significant discrepancies between reports regarding the numbers attacked and affected by the LRA's activities due to the difficulties in gaining access to these locations. It is estimated that nearly one third of those abducted by the LRA are children who are forcibly recruited into the LRA as fighters and as sex slaves.<sup>565</sup> Therefore, a significant portion of the militia is composed of those who are not voluntarily a part of the LRA's political or military agendas and activities.<sup>566</sup>

Following the 'Women, Peace, Justice, Power' workshop in Bangui in November 2009, the Women's Initiatives for Gender Justice has been advocating for the ICC to open investigations into the crimes committed by the LRA in the CAR, the DRC and South Sudan, so as to reflect the scope and scale of the crimes committed by the LRA beyond Ugandan borders.

563 Figures compiled by the Women's Initiatives for Gender Justice on the basis of available reports.

564 'Ghosts of Christmas Past, Protecting Civilians from the LRA, Joint NGO Briefing Paper', *Oxfam International*, 14 December 2010, available at <<http://www.oxfam.org/sites/www.oxfam.org/files/lra-ghost-christmas-past-20101214.pdf>>, last visited on 25 October 2011.

565 'CAR/DR Congo: LRA Conducts Massive Abduction Campaign', *Human Rights Watch*, 11 August 2010, available at <<http://www.hrw.org/en/news/2010/08/11/cadr-congo-lra-conducts-massive-abduction-campaign>>, last visited on 25 October 2011.

566 'A Vision for Advancing Gender Justice, 2010-2012', internal document by the Women's Initiatives for Gender Justice.

### *The Prosecutor v. Joseph Kony et al*

Five alleged senior leaders of the LRA – Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen – were charged in 2005 with a total of 86 counts of war crimes and crimes against humanity. Only two of these five suspects – Joseph Kony and Vincent Otti – have been charged with gender-based crimes. Kony is charged with one count of sexual enslavement as a crime against humanity, one count of rape as a crime against humanity, and one count of inducing rape as a war crime. Otti is charged with one count of sexual enslavement as a crime against humanity and one count of inducing rape as a war crime.

The ICC has issued Arrest Warrants for all five suspects, but as of 2011, it is believed that only Kony, Odhiambo, and Ongwen remain at large. Proceedings against Lukwiya were terminated after confirmation of his death in 2006. In September 2008, the Office of the Prosecutor indicated it had confirmed the death of Vincent Otti as well, and was preparing to terminate proceedings against him. However, the Court's public documents continue to treat Otti as a suspect at large.

There have been a number of formal requests for information pertaining to the ICC suspects from the Court to the Governments of Uganda and the DRC in previous years.<sup>567</sup> However, neither Government has been successful in arresting Kony or the other suspects. The President of the CAR has also publicly stated a commitment to arrest Kony, with help from Uganda, the USA, and France.<sup>568</sup>

In May 2011, a joint UN assessment mission was dispatched to the region, led by the Department of Political Affairs (DPA) and the Department of Peacekeeping Operations (DPKO).<sup>569</sup> The mission met with officials from the LRA-affected areas as well as with officials from the African Union (AU). In June 2011, the CAR, the DRC, Uganda and South Sudan Defence and Security Ministers met under the auspices of the AU to discuss the establishment of a Regional Task Force and a Joint Coordination Mechanism to coordinate their activities in their fight against the

567 See *Gender Report Card 2008*, p 92-93.

568 'C. Africa pledges to arrest Uganda rebel chief', *AFP*, 18 August 2010, available at <[http://www.google.com/hostednews/afp/article/ALeqM5j\\_55rv2787FAvhPaN3lLse8lYysA](http://www.google.com/hostednews/afp/article/ALeqM5j_55rv2787FAvhPaN3lLse8lYysA)>, last visited on 25 October 2011.

569 'Lord's Resistance Army', *Security Council Report*, July 2011, available at <[http://www.securitycouncilreport.org/site/c.gkWLLeMTIsG/b.7535741/k.21A8/July\\_2011brLords\\_Resistance\\_Army.htm](http://www.securitycouncilreport.org/site/c.gkWLLeMTIsG/b.7535741/k.21A8/July_2011brLords_Resistance_Army.htm)>, last visited on 25 October 2011.

LRA.<sup>570</sup> Further, on 28 June 2011, for the first time in two years, the UN Security Council (UNSC) met to discuss the LRA as a stand-alone issue. The resolution adopted following this meeting renewed the mandate of the UN Stabilisation Mission in the DRC (MONUSCO) until 30 June 2012.<sup>571</sup> In the resolution, the UNSC also demanded 'that all armed groups, in particular the [FDLR] and the [LRA], immediately cease all forms of violence and human rights abuses against the civilian population in the [DRC], in particular against women and children, including rape and other forms of sexual abuse, and demobilise'.<sup>572</sup> In addition, the resolution took note

of the respective initiatives taken by the United Nations and the African Union to facilitate regional action against the LRA and to protect civilians, reiterate[d] the need to enhance cooperation of all relevant parties to help address the threat to civilians posed by the LRA, welcome[d] the steps taken by MONUSCO to enhance information sharing and coordination with those conducting military operations against the LRA and encourage[d] MONUSCO to continue to keep close contacts with LRA-affected communities and keep under review the deployment of its available resources to ensure maximum effect.<sup>573</sup>

In a press release issued after the meeting, the UNSC welcomed the initiatives for concerted efforts by the countries affected by the LRA, reiterated its call for an immediate end to all attacks on civilians by the LRA, and urged all LRA elements to surrender and disarm. In particular, the UNSC called on all States to cooperate with the Ugandan authorities and the ICC to implement the outstanding Arrest Warrants for LRA commanders and to bring those responsible to

justice.<sup>574</sup> In August 2011, the UNSC again reiterated its concern about the continuing LRA attacks in Central Africa and encouraged the UN Office for Central Africa (UNOCA) to coordinate its activities with regional and AU initiatives in the region.<sup>575</sup>

In May 2009, a number of US senators proposed the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act.<sup>576</sup> The Act enjoyed broad bipartisan support, and was signed into law by President Barack Obama on 24 May 2010. The Act creates a legal basis for a US-led military operation against the LRA, as well as a limited humanitarian and reconstruction mandate for LRA-affected countries. On 24 November 2010, the Obama administration adopted its strategy pursuant to the Act, which includes the following four objectives: (i) increase the protection of civilians in LRA-affected areas; (ii) apprehend or remove Kony and other top commanders from the battlefield; (iii) promote the defection, disarmament, demobilisation and reintegration of former LRA combatants; and (iv) ensuring humanitarian access and increase support for affected communities.<sup>577</sup> On 31 July 2011, the US Government pledged to join the hunt for Kony and other senior LRA combatants by providing logistical and surveillance support to the Ugandan, Congolese and Central African Republic military.<sup>578</sup> Subsequently, on 14 October 2011, in a letter sent to Congress, President Obama authorised the deployment of approximately 100 troops to Uganda, to be deployed during the month of October, which 'will act as advisors to partner forces that have the goal of removing from the battlefield

570 'Press Release on the 2nd Regional Ministerial Meeting on the Lord's Resistance Army (LRA)', Addis Ababa, Ethiopia, 6-8 June 2011, available at <<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/LRA%20Press%20Release%20ENGLISH%208%20June%202011%20V1.pdf>>, last visited on 25 October 2011.

571 UNSC Resolution 1991 (2011), adopted at its 6568th meeting on 28 June 2011, available at <<http://www.un.org/News/Press/docs//2011/sc10299.doc.htm>>, last visited on 25 October 2011.

572 UNSC Resolution 1991 (2011), para 13.

573 UNSC Resolution 1991 (2011), para 14.

574 UNSC Press Release, SC/10335, available at <<http://www.un.org/News/Press/docs/2011/sc10335.doc.htm>>, last visited on 25 October 2011.

575 'Security Council calls for concerted efforts to enhance stability in Central Africa', *UN News Service*, 18 August 2011, available at <<http://www.unhcr.org/refworld/docid/4e5383084.html>>, last visited on 25 October 2011.

576 *Lord's Resistance Army Disarmament and Northern Uganda Recovery Act (2009)*, H.R.2478.IH.

577 'Strategy to Support the Disarmament of the Lord's Resistance Army', *The White House*, Washington, 24 November 2010, available at <[http://pulitzercenter.org/sites/default/files/WhiteHouseLRAstrategy\\_opt.pdf](http://pulitzercenter.org/sites/default/files/WhiteHouseLRAstrategy_opt.pdf)>, last visited on 25 October 2011.

578 'US military to take part in hunt for Kony', *Daily Monitor*, 31 July 2011, available at <<http://www.monitor.co.ug/News/National/-/688334/1210440/-/bkkgtgwz/-/index.html>>, last visited on 25 October 2011.

Joseph Kony and other senior leadership of the LRA'.<sup>579</sup> Although President Obama made clear that the US troops are to provide information, assistance and advice only, and that they will use force only when strictly necessary for self-defence, the deployment has been described by some as a 'kill or capture' policy.<sup>580</sup> Subject to approval by each respective host state, the US forces will deploy into Uganda, South Sudan, the CAR and the DRC.

## DRC

The Situation of the DRC was referred by the Government of the DRC in March 2004, and a formal investigation was opened in June of that year. In opening the investigation, the Prosecutor announced that he would 'investigate grave crimes allegedly committed on the territory of the [...] DRC since 1 July 2002'.<sup>581</sup> His announcement included mention of 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 the reports pointed to 'a pattern of rape, torture, forced displacement and the illegal use of child soldiers'.

The first trial in the DRC Situation, against Thomas Lubanga Dyilo, concluded in August 2011 and is currently awaiting judgement by the Trial Chamber. The second trial, against Germain Katanga and Mathieu Ngudjolo Chui, is currently under way. Developments in those cases and details of the trial proceedings are discussed below and in the section on **Trial Proceedings**. A fourth suspect, Callixte Mbarushimana, is in custody of the Court and awaiting the decision on the confirmation of charges. The fifth suspect in the DRC situation, Bosco Ntaganda, remains at large. As described in more detail below, despite the ICC Arrest Warrant against him, Ntaganda leads an open life in the DRC and is protected by the Government. The Prosecutor is continuing investigations in the DRC, focusing on North and South Kivu.

579 'Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord's Resistance Army', *The White House Office of the Press Secretary*, 14 October 2011, available at <<http://www.whitehouse.gov/the-press-office/2011/10/14/letter-president-speaker-house-representatives-and-president-pro-tempore>>, last visited on 25 October 2011.

580 See for instance 'US to send troops to Uganda to help fight LRA rebels', *BBC News*, 14 October 2011, available at <<http://www.bbc.co.uk/news/world-africa-15317684>>, last visited on 25 October 2011; 'Armed U.S. Advisers to Help Fight African Renegade Group', *The New York Times*, 14 October 2011, available at <<http://www.nytimes.com/2011/10/15/world/africa/barack-obama-sending-100-armed-advisers-to-africa-to-help-fight-lords-resistance-army.html>>, last visited on 25 October 2011.

581 ICC-OTP-20040623-59.

## Continued conflict and sexual violence in South Kivu

A number of incidents of mass rape have taken place in 2010-2011 in South Kivu, and while some limited measures to combat impunity have been implemented domestically, prosecutions for sexual violence remain the exception in the DRC.<sup>582</sup> Coordinated attacks took place between 30 July and 2 August 2010, against 13 villages located on the Kibua-Mpopo road in the Walikale territory, North Kivu. The Walikale territory, situated between Bukavu, South Kivu, and the Maniema Province, is rich in minerals, particularly cassiterite, and has a high concentration of rebel groups fighting for control of the mines. During these attacks at least 303 civilians were raped, of whom 235 were women, 52 were girls, 13 were men, and three were boys. The villages of Luvungi and Lubonga were the most affected. A coalition of 200 soldiers from the FDLR, the Mai Mai Cheka and elements led by Colonel Emmanuel Nsengiyumva, an army deserter and former *Congrès national pour la défense du peuple* (CNDP) member, are alleged to be responsible for the attacks.<sup>583</sup> The majority of rapes were committed by two to six armed men. It is also reported that victims were often raped in front of their families. Moreover, several victims said they were beaten and subjected to

genital searches before the sexual assault took place. Apart from mass rapes, witnesses also reported pillaging, beatings and abductions. The rebels prevented the villagers from requesting help by cutting off all the roads and means of communication.<sup>584</sup>

On 6 January 2011, the humanitarian organisation *Médecins sans Frontières* (MSF) announced that its medical team in Fizi territory, South Kivu treated 33 women who had been raped in a coordinated attack on 1 January in and around the town of Fizi.<sup>585</sup> Rapes, including gang rapes by up to four men, were accompanied by beatings, and houses and shops were looted during the attack, which was allegedly carried out by members of the regular Congolese army (the *Forces armées de la République démocratique du Congo* [FARDC]). In the days following the attack, the count of women victims/survivors of this attack increased to over 60. It is reported that from mid-January to mid-February 2011, 147 further rape cases were examined by medical personnel in the western area of Fizi only.<sup>586</sup> MONUSCO has been heavily criticised for its inability to protect civilians and to prevent the mass rapes.

582 For a detailed analysis of the attacks and the responses of Women's Initiatives' partners in the Kivus, see Women's Initiatives for Gender Justice, 'Commanding officer convicted of mass rape in Fizi', *Women's Voices e-letter*, April 2011, available at <<http://www.iccwomen.org/WI-WomVoices0411/WomVoices0411.html#2>>; and Women's Initiatives for Gender Justice, 'The Women's Initiatives for Gender Justice participates in the World March of Women in Bukavu, South Kivu', *Women's Voices e-letter*, April 2011, available at <[http://www.iccwomen.org/news/docs/Womens\\_Voices\\_Jan11/WomVoices1-11.html#6](http://www.iccwomen.org/news/docs/Womens_Voices_Jan11/WomVoices1-11.html#6)>.

583 According to witnesses of the attack interviewed by the UN Joint Human Rights Office (UNJHRO) during its mission in the affected areas from 25 August to 2 September 2010, the mass rapes in the Walikale territory were planned in retaliation for support given by the local population to the government forces. Rape was chosen as a form of punishment to forever mark the victims and to humiliate the entire community.

584 The attacks only became known on 5 August, when the first victims started arriving at a medical centre managed by the International Medical Corps (IMC) in Walikale. According to the IMC, only two survivors arrived at the medical centre within 72 hours and could therefore be administered the post-exposure prophylaxis for HIV. Women who reached the centre within 120 hours after having been raped were provided with emergency contraception.

585 'MSF treats victims of mass rape on New Year's Day in DRC', *MSF*, 6 January 2011, available at <<http://www.msf.org/msf/articles/2011/01/msf-treats-victims-of-mass-rape-on-new-years-day-in-democratic-republic-of-congo.cfm>>, last visited on 31 October 2011.

586 Women's Initiatives for Gender Justice, 'Commanding officer convicted of mass rape in Fizi', *Women's Voices e-letter*, April 2011, available at <<http://www.iccwomen.org/WI-WomVoices0411/WomVoices0411.html#2>>.

On 21 February 2011, a special mobile gender justice court convened by the Government of the DRC<sup>587</sup> sentenced Lieutenant-Colonel Mutware Daniel Kibibi of the FARDC to 20 years in prison for mass rape as a crime against humanity in relation to the New Year's Day attack in Fizi, South Kivu, during which more than 60 women were raped. During the trial held in the town of Baraka, South Kivu, from 10 to 20 February, 49 victims/survivors came forward to testify about the rapes and other forms of sexual violence committed during the attack.

While this is not the first trial in which members of the Congolese army have been convicted for rape and other forms of sexual violence,<sup>588</sup> Lieutenant-Colonel Kibibi is the first FARDC commanding officer and the first military figure within the DRC to have been charged with crimes against humanity for sexual violence acts. During the same trial, ten other FARDC soldiers were tried for rape as a crime against humanity, of whom three were sentenced to 20 years imprisonment and five were sentenced to 10 to 15 years. One soldier was acquitted and one, a minor, was referred to a juvenile court.

587 Funded by the Open Society Initiative for Southern Africa (OSISA) and the Open Society Justice Initiative (OSJI), and implemented by the American Bar Association Rule of Law Initiative, the special mobile gender justice court aims at making justice accessible to victims/survivors living in remote areas of South Kivu, eastern DRC, and complement ICC prosecutions of sexual and gender-based crimes in the province. The special mobile gender court focuses on cases of rape and sexual violence but can also try other crimes. According to OSJI, since the beginning of the project in October 2009, 186 cases have been heard, of which 115 were rape cases. Of these, 94 resulted in convictions. See 'Trial of DRC soldiers accused of mass rape in Fizi opens tomorrow in special mobile gender court', *OSISA Media Advisory*, 9 February 2011, available at <<http://allafrica.com/stories/201102091000.html>>, last visited on 31 October 2011.

588 For example, in October 2010, 13 FARDC soldiers were sentenced for rape in the Walungu area, South Kivu, by a military court. 'DRC Mobile Court a Sign of Hope', *IPS*, 8 March 2011, available at <<http://ipsnews.net/news.asp?idnews=54753>>, last visited on 25 October 2011.

According to a Women's Initiatives' partner in South Kivu, the state's attorney had requested the judges to sentence five of the defendants to death and the remaining six to 30 years imprisonment. Although the last death sentence in the DRC was carried out in January 2003,<sup>589</sup> the death penalty is still provided for by the Congolese justice system under which the mobile gender justice courts operate. This has raised concerns amongst some groups regarding compliance with international human rights standards. However, it should be noted that the death penalty has not been utilised in any of the sentencing decisions of the mobile gender courts. It has also been reported that each of the victims in the case will receive 10,000 USD as compensation from the DRC Government, although to date there has not been any indication from the Government about the timing or mode of payment.

Kibibi was a former member of the CNDP,<sup>590</sup> a rebel group integrated into the Congolese Army (FARDC) following the signing of the 23 March 2009 Goma Agreement between the Congolese Government and the CNDP. The UN co-sponsored peace agreement called for the integration of CNDP militia members into the FARDC without specifying a vetting mechanism, nor ensuring the necessary retraining of the former rebels prior to their integration into the regular army.

589 'DRC Death Penalty Debate', *IWPR*, 31 January 2011, available at <<http://iwpr.net/report-news/drc-death-penalty-debate>>, last visited on 25 October 2011.

590 The CNDP was created in 2006 by Laurent Nkunda, a former senior officer of the rebel group Congolese Rally for Democracy. Nkunda has been in the custody of the Rwandan armed forces since January 2009. General Bosco Ntaganda, for whom there is an outstanding ICC Arrest Warrant as discussed below, served as chief-of-staff of the CNDP troops under Nkunda. He split with Nkunda prior to his arrest. Ntaganda declared that the CNDP faction now under his control would fight together with the Congolese regular army (FARDC) and the Rwandan Army against the Hutu FDLR militia. Ntaganda continues to hold a high-ranking position within the FARDC. See Women's Initiatives for Gender Justice, 'A dramatic start to the year', *Women's Voices e-Letter*, March 2009, available at <[http://www.iccwomen.org/news/docs/Womens\\_Voices\\_Mar2009/WomVoices\\_Mar09.html](http://www.iccwomen.org/news/docs/Womens_Voices_Mar2009/WomVoices_Mar09.html)>.

After the signing of the Goma Agreement, the Women's Initiatives for Gender Justice expressed concern to the Secretary General of the UN about specific aspects of the Agreement namely: the lack of a vetting mechanism for combatants prior to integration into the Army; the absence of provisions in the Agreement requiring formal retraining of CNDP police and combatants; and the amnesty provision within the Goma Agreement with the CNDP. The absence of such measures and the possibility of amnesty could contribute to the repeated perpetration of gender-based crimes by CNDP personnel, especially by those who had committed these crimes in the past.<sup>591</sup> These concerns were conveyed to the UN Secretary General in June 2009 in an Open Letter from the Women's Initiatives, signed by 65 partners in Eastern DRC, representing over 180 local women's and human rights organisations. This analysis of the Goma Agreement was confirmed in October 2009 by Professor Philip Alston, UN Special Rapporteur on extra-judicial killings, who stated that attacks on civilians by the FARDC had escalated due, in his opinion, to the lack of training and the failure to fully integrate former armed group members belonging to the CNDP.<sup>592</sup> According to Professor Alston, human rights violations committed by the FARDC usually go unpunished, including those committed by former CNDP members, for fear of the possible reaction of other CNDP members also within the FARDC.

591 See the May 2009 issue of *Women's Voices e-letter*, available at <[http://www.iccwomen.org/news/docs/Womens\\_Voices\\_May\\_2009/WomVoices\\_May09.html](http://www.iccwomen.org/news/docs/Womens_Voices_May_2009/WomVoices_May09.html)>.

592 'Press statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions. Mission to the Democratic Republic of the Congo, 5-15 October 2009', *OHCHR*, 15 October 2009, available at <[http://www2.ohchr.org/english/issues/executions/docs/PressStatement\\_SumEx\\_DRC.pdf](http://www2.ohchr.org/english/issues/executions/docs/PressStatement_SumEx_DRC.pdf)>, last visited on 25 October 2011. See also the December 2009 issue of *Women's Voices e-letter*, available at <[http://www.iccwomen.org/news/docs/Womens\\_Voices\\_Dec2009/Womens\\_Voices\\_Dec2009.html](http://www.iccwomen.org/news/docs/Womens_Voices_Dec2009/Womens_Voices_Dec2009.html)>.

Almost two years after the signing of the Goma Peace Agreement, the concerns have been further confirmed by the Fizi events and by the convictions of members of the regular army, led by a former CNDP member, for rape as a crime against humanity. While the convictions are a welcome development, the crimes themselves are emblematic of a Peace Agreement negotiated, signed and implemented without the participation of gender justice advocates and gender experts, and without conforming to UN Security Council resolutions on women, peace and security. UN Security Council Resolution 1820 explicitly refers to appropriate mechanisms to protect civilians from sexual violence including training of military troops regarding the prohibition of such acts and vetting armed and security forces.<sup>593</sup> Resolution 1820 also stresses the exclusion of sexual violence crimes in amnesty provisions in the context of conflict-resolution processes.<sup>594</sup>

Following the New Year's Day atrocities,<sup>595</sup> local women's rights advocates in the Fizi territory organised an emergency meeting with 24 local NGOs. Participants in the meeting decided to send investigators to the areas where victims/

593 Resolution 1820, UNSC, 5916th meeting, S/RES/1820 (2008), 19 June 2008, para 3, available at <<http://www.unhcr.org/refworld/docid/485bbca72.html>>, last visited on 25 October 2011.

594 Resolution 1820, UNSC, 5916th meeting, S/RES/1820 (2008), 19 June 2008, para 4, available at <<http://www.unhcr.org/refworld/docid/485bbca72.html>>, last visited on 25 October 2011.

595 On New Year's Day 2011, the town of Fizi was attacked and many women were reportedly raped. On 6 January, the humanitarian organisation MSF announced that its medical team in Fizi treated 33 women who had been raped in a coordinated attack on New Year's Day in and around the town of Fizi. Rapes, including gang rapes by up to four men, were accompanied by beatings, and houses and shops were looted during the attack, which was allegedly carried out by members of the regular Congolese army (FARDC). For more information see Women's Initiatives for Gender Justice, 'More mass rape reported in the Kivus after the incidents in the Walikale Territory', *Women's Voices e-letter*, January 2011, available at <[http://www.iccwomen.org/news/docs/Womens\\_Voices\\_Jan11/WomVoices1-11.html#1](http://www.iccwomen.org/news/docs/Womens_Voices_Jan11/WomVoices1-11.html#1)>.

survivors of the attack had been displaced and demanded justice for the victims/survivors of the mass rape.

From 13 to 17 October 2010, the Women's Initiatives for Gender Justice and many local partners participated in the World March of Women, an international feminist movement working to connect grass-roots groups and organising actions aimed at eliminating the causes of violence against women, in Bukavu, South Kivu. The Women's Initiatives' delegation included 13 women's rights and peace activists from eastern DRC. On 15 October, the delegation held a Women's Court in Bukavu, which was attended by 113 participants from different countries and organisations. The Women's Court was intended to amplify the voices of women and victims/survivors of the conflict in eastern DRC, and was organised around the testimonies of three advocates for gender justice, each of them reporting about the situation of women's rights and peace and security issues in three different provinces of eastern DRC – North Kivu, South Kivu and Province Orientale.<sup>596</sup>

### *The Prosecutor v. Thomas Lubanga Dyilo*

Thomas Lubanga Dyilo (Lubanga) is the alleged former President of the UPC and Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (FPLC). Lubanga has been in the custody of the ICC since 2006. His trial, on charges of six counts of war crimes arising out of the alleged policy/practice of enlisting and conscripting children under the age of 15 years into the FPLC, and using those children to participate actively in hostilities, concluded in August 2011. The closing of the trial is discussed in the **Trial Proceedings** section, below. A full discussion of the trial proceedings against Lubanga can also be found in the *Gender Report Card 2008, 2009, and 2010*.

<sup>596</sup> The testimonies from the Women's Court are available at <<http://www.iccwomen.org/documents/Womens-Court-Testimonies-FINAL.pdf>>; the statement to the Women's Court from Women's Initiatives' Executive Director Brigid Inder is available at <<http://www.iccwomen.org/documents/Brigid-Inder-Statement---Womens-Court---15-Oct-2010.pdf>>.

### *The Prosecutor v. Bosco Ntaganda*

Bosco Ntaganda (Ntaganda) is the alleged Deputy Chief of the General Staff of the FPLC and alleged Chief of Staff of the CNDP armed group. Following the Goma Peace Agreements signed between the DRC Government and the CNDP, Ntaganda was absorbed into the Congolese Army (FARDC) and currently retains the rank of General. In August 2006, Pre-Trial Chamber I issued a Warrant of Arrest for Ntaganda, containing six counts of war crimes for enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.

In her annual report to the UN Human Rights Council on the situation of human rights and the activities of her Office in the DRC, the UN High Commissioner for Human Rights, Navanethem Pillay, welcomed the DRC Government's efforts to incorporate the Rome Statute into domestic legislation, but expressed concern about the many obstacles undermining the fight against impunity in the country. Specifically, she referred to the case of Ntaganda as 'a classic case of impunity'. She added that:

although the International Criminal Court has issued an arrest warrant for him and the DRC is cooperating with the Court, Ntaganda is not only still at large but also continues to play an important role in the armed forces. Moreover, during the universal periodic review the Government did not accept the recommendations that it should uphold its treaty obligations by arresting Ntaganda and transferring him to the International Criminal Court in The Hague.<sup>597</sup>

Ntaganda has been implicated in at least eight politically motivated killings, arbitrary arrests and temporary detentions, and abductions and disappearances targeted against CNDP members loyal to Nkunda, according to the US State Department Human Rights Report 2010.<sup>598</sup> In March 2011, Ntaganda was implicated in a gold smuggling deal, according to media reports. After \$6.5 million in

<sup>597</sup> 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo', *UNHCHR*, sixteenth session of the Human Rights Council, A/HRC/16/27, 10 January 2011, para 51, available at <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.27.pdf>>, last visited on 25 October 2011.

<sup>598</sup> US State Department Human Rights Report 2010, 'Democratic Republic of the Congo', 8 April 2011, p 3, available at <<http://www.state.gov/documents/organisation/160453.pdf>>, last visited on 25 October 2011.

cash was allegedly transferred from an airplane to Ntaganda's premises on 3 February 2011, his men reportedly transported more than 450 kilos of gold to the plane. Later, the Congolese authorities seized this gold and arrested four passengers, from Nigeria, France and the USA. Ntaganda later denied any wrongful conduct and maintained he had actually tried to stop a gold smuggling deal.<sup>599</sup> It is reported to be highly unlikely that anyone will further investigate the smuggling affair or search his premises because Ntaganda is too powerful. It has been reported that he has been accumulating wealth in the Kivus and maintains the rank of general in the Congolese army. The DRC government has continued to refuse to arrest Ntaganda, claiming that he is a crucial figure in the peace process. In August 2011, Ntaganda was seen dining at the Le Chalet restaurant and playing tennis at the Hotel Caribou. He is allegedly the co-owner of a Goma nightclub.<sup>600</sup> Ntaganda has been referred to as 'the most powerful man in eastern Congo'.<sup>601</sup>

On 12 May 2011, 77 Congolese, American and International Organisations sent a letter to US Secretary of State Hillary Clinton urging her and the USA government to appoint a new Special Envoy for the Great Lakes region and to increase diplomatic pressure on the DRC Government to arrest Ntaganda.<sup>602</sup> Despite various attempts by NGOs and civil society activists to motivate States and the UN to increase political pressure on the DRC to fulfil its obligations under international law and hand Ntaganda over to the ICC, at the time of writing this Report he remains at large.

599 'Bosco Ntaganda: The Terminator's golden business', *The International Justice Tribune*, 2 March 2011, available at <<http://editions-sources-du-nil.over-blog.com/article-bosco-ntaganda-the-terminator-s-golden-business-68467370.html>>, last visited on 25 October 2011; 'Congo's east: Still smuggling', *The Economist*, 10 February 2011, available at <<http://www.economist.com/node/18119207>>, last visited on 31 October 2011.

600 'Eastern Congo is a prisoner of the state of nature', *The Daily Star*, 27 August 2011, available at <<http://www.dailystar.com.lb/Opinion/Commentary/2011/Aug-27/Eastern-Congo-is-a-prisoner-of-the-state-of-nature.ashx#axzz1Y1zLl8B6>>, last visited on 25 October 2011.

601 'Eastern Congo is a prisoner of the state of nature', *The Daily Star*, 27 August 2011, available at <<http://www.dailystar.com.lb/Opinion/Commentary/2011/Aug-27/Eastern-Congo-is-a-prisoner-of-the-state-of-nature.ashx#axzz1Y1zLl8B6>>, last visited on 25 October 2011.

602 'ATS: Letter to Secretary Clinton from Coalition of 77 Organizations', *A Thousand Sisters*, 14 May 2011, available at <<http://athousandsisters.org/2011/05/14/ats-letter-to-secretary-clinton-from-coalition-of-77-organizations>>, last visited on 25 October 2011.

### *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*

Germain Katanga (Katanga) and Mathieu Ngudjolo Chui (Ngudjolo) are the alleged highest military commanders of the *Force de resistance patriotique en Ituri* (FRPI) and the *Front de nationalistes et integrationnistes* (FNI), respectively. In July 2007, Pre-Trial Chamber I issued a Warrant for the Arrest of both Katanga and Ngudjolo for charges of crimes against humanity and war crimes. Katanga, who was already in detention in the DRC at the time the Arrest Warrant was issued, was surrendered to the custody of the Court on 17 October 2007. Ngudjolo was arrested in the DRC and transferred into the custody of the Court in February 2008.

Katanga and Ngudjolo face identical charges arising out of an attack on Bogoro village in the district of Ituri on 24 February 2003. The cases were joined by the Pre-Trial Chamber on 11 March 2008. Trial proceedings in the case began on 24 November 2009. A full discussion of the case can be found in the *Gender Report Card 2008, 2009 and 2010*, and recent developments in the case are discussed in the **Trial Proceedings** section, below.

### *The Prosecutor v. Callixte Mbarushimana*

The most recent case in the DRC Situation, and the first case arising out of the Kivus investigation, is *The Prosecutor v. Callixte Mbarushimana*. Mbarushimana is the fourth person to be arrested by the ICC in relation to the DRC Situation. He was arrested in Paris, France on 11 October 2010, in accordance with a sealed Arrest Warrant issued by the ICC on 28 September 2010, for suspected involvement in crimes against humanity and war crimes committed in the eastern Kivus region of the DRC. Significantly, the Arrest Warrant against Mbarushimana included the broadest range of charges of gender-based crimes against any ICC suspect to date, including rape, torture, mutilation, cruel treatment, other inhumane acts and persecution.<sup>603</sup>

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



### *Pre-trial disclosure and language issues*

Mbarushimana was surrendered into the Court's custody by the French authorities on 25 January 2011,<sup>604</sup> and made his initial appearance before Pre-Trial Chamber I<sup>605</sup> on 28 January. During the initial appearance, the Pre-Trial Chamber set a date of 4 July 2011 for the confirmation of charges hearing.<sup>606</sup> In the course of pre-trial litigation over disclosure issues, the Defence claimed that certain devices seized from Mbarushimana's residence by the French authorities, as well as certain intercepted communications, contained material that was potentially privileged under Rule 73 of the Rules of Procedure and Evidence.<sup>607</sup> Pre-Trial Chamber I issued a number of decisions on the matter, ordering the Registry to conduct a review of the potentially privileged information and suspending the Prosecution's access to the documents and devices in question until the issue of whether they contained privileged material had been resolved.<sup>608</sup>

However, a number of technical and procedural issues gave rise to delays in reviewing the potentially privileged material, which had a resultant effect on the Prosecution's ability to disclose all relevant incriminating and exculpatory evidence in accordance with the initial deadline set by the Pre-Trial Chamber.

Consequently, the Chamber issued a decision on 31 May 2011 granting the Prosecution's request for a postponement of the confirmation of charges hearing, which had been initially scheduled for 4 July.<sup>609</sup> The Chamber noted that the review of the potentially privileged material was delayed by various technical problems, including problems with software and the processing of specific faulty and encrypted devices, and was therefore outside of the Prosecution's control. The Chamber also noted that some of the material may contain potentially exculpatory information, which could be material to the preparation of the Defence.<sup>610</sup> The Chamber was thus required to balance the adversely affected ability of the Prosecutor to comply with the evidentiary requirements of Article 54(1)(a) and Article 61(5) against Mbarushimana's right to be tried without undue delay, and concluded that the confirmation hearing should be postponed, but only for a short period of time, to enable the review of the remaining material by the Prosecution.<sup>611</sup> The Chamber therefore postponed the confirmation hearing until 17 August 2011.<sup>612</sup>

The confirmation of charges hearing was postponed a second time, only one day before it was scheduled to begin, due to issues of disclosure and language proficiency. On 12 May 2011, the Single Judge had issued a decision on the language proficiency of the accused, finding that Mbarushimana did not understand English well enough for the Prosecutor to satisfy his disclosure obligations without a French or Kinyarwanda translation of the relevant documents.<sup>613</sup> On 1 June, the Prosecution disclosed thirteen witness interviews to the Defence, some of which were only disclosed in English, although the Prosecution indicated that the Kinyarwanda translations would be provided 'in due course'. When the translations had not been provided by 28 June, the Defence contacted the Prosecution by email, and the Prosecution's response made clear that it did not intend to disclose any additional translations or corresponding audio files for the interviews in question before the confirmation hearing.<sup>614</sup> On 8 August, the Defence filed a request for the exclusion from the confirmation hearing of certain incriminating evidence drawn from witness interviews for which either only transcripts or only audio files, not both, had been made available in the relevant languages to the Defence. A total of 2,856 pages of witness interviews had been provided in the form of English and Kinyarwanda transcripts, but without

604 ICC-01/04-01/10-43.

605 Pre-Trial Chamber I is composed of Presiding Judge Cuno Tarfusser (Italy), Judge Sylvia Steiner (Brazil) and Judge Sanji Mmasenono Monageng (Botswana).

606 ICC-01/04-01/10-T-1-ENG, p 10, lines 4-9.

607 Rule 73(3) states: '[T]he Court shall give particular regard to recognising as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor, in particular those related to or involving victims, or between a person and a member of a religious clergy; and in the latter case, the Court shall recognise as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.' Rule 73(2) clarifies that, in order to be treated as privileged, communications made in the context of these categories of professional relationship should take place 'in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure' and under circumstances where '[c]onfidentiality is essential to the nature and type of relationship between the person and the confidant'.

608 ICC-01/04-01/10-67; ICC-01/04-01/10-80; ICC-01/04-01/10-88; ICC-01/04-01/10-105; ICC-01/04-01/10-126; ICC-01/04-01/10-129; ICC-01/04-01/10-143; ICC-01/04-01/10-150; ICC-01/04-01/10-158; ICC-01/04-01/10-184 and ICC-01/04-01/10-185.

609 ICC-01/04-01/10-207.

610 ICC-01/04-01/10-207, p 8.

611 ICC-01/04-01/10-207, p 9.

612 ICC-01/04-01/10-207, p 10.

613 ICC-01/04-01/10-145.

614 ICC-01/04-01/10-378, para 9.

accompanying audio files, while 2,681 pages of witness interviews had been provided as audio files, but with the accompanying translation only in English.<sup>615</sup>

On 16 August 2011, Pre-Trial Chamber I issued a decision postponing the confirmation of charges hearing until 16 September 2011 on its own motion.<sup>616</sup> The Chamber expressed its ‘profound dissatisfaction with the way both parties have behaved regarding these disclosure issues’, finding that it was inexcusable that the disclosure issue had not been brought to the Chamber’s attention in sufficient time for it to be handled properly before the confirmation hearing, despite the fact that the Chamber had been ‘bombarDED’ with filings by the Defence on comparatively minor issues during the relevant period.<sup>617</sup> The Chamber held that it was compelled to postpone the confirmation hearing ‘in the wake of both parties’ failure to handle their pre-trial obligations in a manner befitting the professionalism demanded when litigating before the International Criminal Court’.<sup>618</sup>

The Chamber noted that the insufficient disclosure by the Prosecution was known to the Defence as early as 28 June (if not 1 June when the initial disclosure was made), but the Defence request to exclude the documents was not filed until nine days before the confirmation hearing - two months after the initial disclosure, and more than a month after it became ‘abundantly clear’ that the Prosecutor was unlikely to provide the documents in the requested format and language in sufficient time to adequately prepare for the confirmation hearing.<sup>619</sup> The Chamber held that this prolonged lack of reaction from the Defence could legitimately be interpreted by the Prosecution as tacit approval of the form of disclosure, and made it impossible for the Chamber to intervene in a manner that would have enabled the Prosecution to provide the required transcripts or translations before the confirmation hearing. The Chamber thus held that the Defence had failed to exercise due diligence in asserting its rights, and that its request for disclosure had not been filed in a timely manner.<sup>620</sup>

However, the Chamber also held that the Prosecution could not ‘satisfy its disclosure obligations by turning over significant portions of the evidence in a way which is unmanageable for the Defence’.<sup>621</sup> By not providing the full French or Kinyarwanda transcripts,

615 ICC-01/04-01/10-378, para 13.

616 ICC-01/04-01/10-374 and ICC-01/04-01/10-378.

617 ICC-01/04-01/10-378, para 15.

618 ICC-01/04-01/10-378, para 15.

619 ICC-01/04-01/10-378, para 17.

620 ICC-01/04-01/10-378, paras 18-19.

621 ICC-01/04-01/10-378, para 20.

the Prosecutor forced the Defence to work within a situation where Mbarushimana and his counsel could not meaningfully discuss the content of over 60 hours of recorded witness interviews, which were allegedly important to the case. The Chamber found that, given the length of the interviews, their alleged importance to the Prosecution case, the purpose of the confirmation hearing, the difficulty in processing audio recordings rather than written transcripts, and the Chamber’s decision of 12 May on language proficiency,<sup>622</sup> the Prosecution had an obligation to provide Kinyarwanda or French transcripts for all interviews. The Chamber did not find that it was necessary for the Prosecution to provide the audio files for interviews for which the French or Kinyarwanda transcripts had already been disclosed.<sup>623</sup> Language issues also arose in the Banda & Jerbo case, discussed below, and in the Katanga & Ngudjolo case, discussed further in **Trial Proceedings**.

### *Defence challenge to jurisdiction*

Along with the challenge to the validity of the Arrest Warrant against Mbarushimana, discussed in more detail in the **Admissibility** section of this Report, the Defence filed a motion on 19 July 2011 challenging the jurisdiction of the Court.<sup>624</sup> The Defence challenge centred on three main arguments: (i) that the ‘situation of crisis’ which triggered the referral of the Situation in the DRC to the Court in 2004 did not envisage the events in North and South Kivu but was intended to encompass only the events in Ituri; (ii) that, even if the Chamber were to find that the referral of the Situation did encompass the Kivus, the Prosecution had not shown that the FDLR had committed crimes prior to 3 March 2004 which could have contributed to the ‘situation of crisis’ triggering the referral; and (iii) that, given the above arguments, an insufficient nexus existed between the charges against Mbarushimana and the scope of the Situation in the DRC.<sup>625</sup> The Prosecution dismissed the challenge to jurisdiction as baseless, and argued that the DRC had not limited the temporal or geographic scope of the referral and was in fact cooperating with ongoing Prosecution investigations in the Kivus, and that the case fell ‘squarely within the jurisdiction of the Court’.<sup>626</sup> In confidential observations on the Defence challenge submitted to the Chamber, representatives of the Government of the DRC confirmed that the referral gave the ICC jurisdiction ‘over any and all crimes committed in the territory of the DRC, including

622 ICC-01/04-01/10-145.

623 ICC-01/04-01/10-378, paras 20-22.

624 ICC-01/04-01/10-290.

625 ICC-01/04-01/10-451, para 6.

626 ICC-01/04-01/10-320, paras 1-4.

those allegedly committed by Mr Mbarushimana.<sup>627</sup> In a decision on 26 October 2011, Pre-Trial Chamber I dismissed all three grounds for the Defence challenge to jurisdiction, finding that '[b]y its very nature, the link required for an event to be encompassed in the scope of a situation can stretch over a number of years; accordingly, it cannot be required that the person targeted by the Prosecutor's investigation be active throughout the duration of the relevant time-frame'.<sup>628</sup>

### **Confirmation of charges hearing**

The confirmation of charges hearing in the Mbarushimana case took place from 16 to 21 September 2011. The Prosecution sought the confirmation of thirteen charges against Mbarushimana: intentionally directing attacks against a civilian population as a war crime;<sup>629</sup> murder as a crime against humanity;<sup>630</sup> murder as a war crime;<sup>631</sup> mutilation as a war crime;<sup>632</sup> other inhumane acts as a crime against humanity;<sup>633</sup> cruel treatment as a war crime;<sup>634</sup> rape as a crime against humanity;<sup>635</sup> rape as a war crime;<sup>636</sup> torture as a crime against humanity;<sup>637</sup> torture as a war crime;<sup>638</sup> destruction of property as a war crime;<sup>639</sup> pillage as a war crime;<sup>640</sup> and persecution as a crime against humanity.<sup>641</sup> The Prosecution was almost denied permission to file its Document Containing the Charges and List of Evidence for the confirmation hearing due to its failure to comply with various time limits and formatting requirements, but Single Judge Tarfusser held that to exclude the Document Containing the Charges and List of Evidence entirely would be disproportionate.<sup>642</sup>

In its oral and written submissions for the confirmation hearing, the Prosecution set out its theory of Mbarushimana's criminal responsibility

627 As cited in ICC-01/04-01/10-451, para 15.

628 ICC-01/04-01/10-451, para 50.

629 Article 8(2)(e)(i).

630 Article 7(1)(a).

631 Article 8(2)(c)(i).

632 Article 8(2)(c)(i) or 8 (2)(e)(xi).

633 Article 7(1)(k).

634 Article 8(2)(c)(i).

635 Article 7(1)(g).

636 Article 8(2)(e)(vi).

637 Article 7(1)(f).

638 Article 8(2)(c)(i).

639 Article 8(2)(e)(xii).

640 Article 8(2)(e)(v).

641 Article 7(1)(h). The charges of mutilation and pillage as a war crime were not included in the Prosecution's original application for a Warrant of Arrest against Mbarushimana, but were added at a later stage of the proceedings and included in the Document Containing the Charges.

642 ICC-01/04-01/10-306.

for the crimes against humanity committed by the FDLR in the Kivus.<sup>643</sup> The Prosecution claimed that the FDLR committed widespread attacks against the civilian population as part of a common plan to create a 'humanitarian catastrophe' in the eastern DRC, with the aim of forcing the international community to intervene and to put pressure on the governments of the DRC and Rwanda to negotiate a political settlement with FDLR leaders allowing for their return to Rwanda. The Prosecution alleged that Mbarushimana was one of the leaders of the political wing of the FDLR, based in Europe, as distinct from the military wing of the FDLR operating in the DRC. They claimed that Mbarushimana's contribution to the group's common plan involved his role on the FDLR's Steering Committee and his direction of the FDLR's media campaign from his base in Paris, issuing 'extortive negotiation demands' on behalf of the FDLR and 'publicly, immediately, repeatedly, vehemently and falsely deny[ing] the FDLR's direct involvement in the crimes'.<sup>644</sup>

In the course of the confirmation hearing, Deputy Prosecutor Fatou Bensouda spoke on behalf of the Office of the Prosecutor, arguing that Mbarushimana 'represented the respectable public face of the FDLR',<sup>645</sup> but in fact 'played [a] leading role in the FDLR's extortive international campaign'.<sup>646</sup> The Deputy Prosecutor emphasised the gender dimension of the conflict in her oral submissions, stating:

Raped women or castrated men were assaulted and injured, not only physically and psychologically, but also in their identities as men and women in society. In this way, these types of crimes seek to destroy the identities of individuals, the cohesion of families and the social structure of communities.<sup>647</sup>

The Prosecution later expanded on these submissions, arguing that the sexual violence committed by the FDLR was a crucial component of their plan to terrorise the civilian population and to destroy the physical integrity and social identities of civilians. The Prosecution stated:

Women whose fetuses were extracted from their wombs were attacked in a way that can affect only women. They were deprived of being able to give birth and be mothers.

643 ICC-01/04-01/10-T-6-Red2-ENG, ICC-01/04-01/10-T-7-Red-ENG and ICC-01/04-01/10-448-Red.

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

645 ICC-01/04-01/10-T-6-Red2-ENG, p 33, line 23.

646 ICC-01/04-01/10-T-6-Red2-ENG, p 34, lines 20-21.

647 ICC-01/04-01/10-T-6-Red2-ENG, p 33, lines 9-14.

Women who were victims of rape were humiliated and broken down as both women and spouses. Men who ... were castrated before the people, their families, were deprived of their masculinity, as it is defined socially, or else as they identify with it. The effect of this is to vilify them before their families. A man whose penis had been cut off by the soldiers of the FDLR later on asked his wife about this, and I quote him: "Who am I today," he said, "and on this earth?"<sup>648</sup>

On the opening day of the confirmation hearing, the Defence raised a number of challenges to the content of the Document Containing the Charges, including an alleged lack of specificity due to defective pleading of the mode of liability with which Mbarushimana was charged.<sup>649</sup> However, the most substantial challenge raised by the Defence related to the issue of cumulative charging. During the confirmation of charges hearing in the Bemba case, the Pre-Trial Chamber had held that the practice of cumulative charging was unfair to the Defence, and had refused to confirm charges of torture and outrages on personal dignity relating to sexual violence on the basis that the conduct underlying those charges was subsumed within the charge of rape.<sup>650</sup> As described above, following that decision, the Women's Initiatives filed an *amicus curiae* brief before the Pre-Trial Chamber arguing that cumulative charging did not violate fair trial practices, was a well-established practice in numerous national and international courts, and that, as a result of the Chamber's decision not to confirm the charges, the full extent of the harm suffered by victims would not be properly addressed at trial. However, the Pre-Trial Chamber denied the Prosecution leave to appeal its decision on the confirmation of charges, and the issue was therefore not addressed at the appellate level.<sup>651</sup>

At the Mbarushimana confirmation hearing, the Defence cited the decision of the Pre-Trial Chamber in the Bemba case to challenge what it portrayed as 'superfluous characterisation' of multiple charges

648 ICC-01/04-01/10-T-7-Red-ENG, p 17, lines 13-23.

649 ICC-01/04-01/10-T-6-Red-ENG, p 13-16.

650 ICC-01/05-01/08-424. See further *Gender Report Card 2009*, p 63-65.

651 ICC-01/05-01/08-532. For more information on the intervention of Women's Initiatives for Gender Justice in the Bemba case, see further *Gender Report Card 2009*, p 66-67, ICC-01/05-01/08-466 and *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/LegalFilings-web-2-10.pdf>>.

relating to the same mode of behaviour.<sup>652</sup> The Defence argued that the charges of other inhumane acts and cruel treatment should be subsumed into the charges of torture, as torture was the most specific characterisation of the underlying facts.<sup>653</sup> The Defence went on to claim that 'mutilation and rape are more specific means of inflicting forms of torture',<sup>654</sup> and argued that the Chamber should therefore dismiss the two charges of torture (as well as other inhumane acts and cruel treatment) as 'only a distinct crime could justify a distinct characterisation'.<sup>655</sup> The Defence also alleged that, since the charges of inhumane acts, cruel treatment, torture and rape were based on the same modes of behaviour in the alleged facts, charging them as both a war crime and crime against humanity was an 'irrelevant multiplication' that would place an undue burden on the Defence.<sup>656</sup> Counsel for the Defence offered no legal authority for this proposition during the hearing.

In its final written submissions on the confirmation of charges, the Prosecution responded to the challenges to cumulative charging raised by the Defence.<sup>657</sup> The Prosecution noted that nothing in the Statute authorises a Pre-Trial Chamber to decline to confirm charges if it considers that they may be unnecessary or unduly burdensome to the Defence, only to decline to confirm a charge for which insufficient evidence has been advanced.<sup>658</sup> The Prosecution argued that the decision in the Bemba case cited by the Defence had erroneously declined to confirm the charges for torture and outrages on personal dignity due to a misapplication of a decision from the Yugoslavia Tribunal which related to impermissible cumulative convictions, rather than cumulative charging.<sup>659</sup>

The Prosecution also challenged the failure of the Pre-Trial Chamber in the Bemba case to cite any legal authority prohibiting or limiting the practice of cumulative charging at the charging phase of a case, rather than at the final judgement phase of proceedings, while simultaneously acknowledging that both national and international criminal jurisdictions permit cumulative charging.<sup>660</sup> The

652 ICC-01/04-01/10-T-6-Red-ENG, p 18, lines 4-12.

653 ICC-01/04-01/10-T-6-Red-ENG, p 18, lines 13-22.

654 ICC-01/04-01/10-T-6-Red-ENG, p 18, lines 23-24.

655 ICC-01/04-01/10-T-6-Red-ENG, p 19, lines 8-9.

656 ICC-01/04-01/10-T-6-Red-ENG, p 19-20.

657 ICC-01/04-01/10-448-Red.

658 ICC-01/04-01/10-448-Red, paras 42-43.

659 ICC-01/04-01/10-448-Red, para 44, citing the Pre-Trial Chamber's reliance on the judgement from the Appeals Chamber in the Čelibići case at the ICTY. See ICC-01/05-01/08-424, fn 270, citing *Prosecutor v. Delalić*, IT-96-21, Appeals Judgement, 20 February 2001.

660 ICC-01/04-01/10-448-Red, para 45.

Prosecution rejected the assertion of the Pre-Trial Chamber in the Bemba case that cumulative charging was unnecessary due to the possibility for the Trial Chamber to recharacterise a charge under Regulation 55 to allow for the most effective legal characterisation of facts, arguing that Regulation 55 may not always be applicable at a later stage of the case and that it would in fact be more burdensome to the parties, particularly the effective preparation of the defence case, to have to invoke Regulation 55 to resurrect charges not confirmed by the Pre-Trial Chamber.<sup>661</sup>

The Prosecution dealt with the specific complaints of the Defence in relation to individual charges in the case, including rape, torture, mutilation, persecution, other inhumane acts and cruel treatment, and argued that each of the charges in question contained specific elements which did not form part of the other offences.<sup>662</sup> In addition, the Prosecution emphasised that characterising the acts in question as distinct crimes protected separate but equally important interests and allowed for the greatest degree of victim participation and reparations, by acknowledging the full extent and nature of the crimes committed and the victimisation suffered.<sup>663</sup> The Prosecution concluded that 'where facts are capable of establishing more than one type of criminal conduct and responsibility, the Chamber is obliged – and it is appropriate – to confirm all the established charges in order to encompass the entire scope of criminality committed, and injury suffered'.<sup>664</sup>

At the time of writing this Report, no decision on the confirmation of charges has been issued.

661 ICC-01/04-01/10-448-Red, paras 46-47.

662 ICC-01/04-01/10-448-Red, paras 48-49.

663 ICC-01/04-01/10-448-Red, paras 50-51.

664 ICC-01/04-01/10-448-Red, para 50.

## Darfur

The Situation in Darfur was referred to the ICC on 31 March 2005 by the UN Security Council, pursuant to Rome Statute Article 13(b), which permits the Security Council to refer a Situation to the Prosecutor where genocide, crimes against humanity and/or war crimes 'appear to have been committed' in that State.<sup>665</sup> Sudan is not a State Party to the Rome Statute, and has not cooperated with the ICC's investigations since 2007.<sup>666</sup> There are currently four cases in the Situation in Darfur, Sudan: *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali-Al-Rahman*, *The Prosecutor v. Omar Hassan Ahmad Al'Bashir*, *The Prosecutor v. Bahar Idriss Abu Garda*, and, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*.

On 6 June 2005, the Prosecutor formally opened an investigation, and in February 2007 applied to Pre-Trial Chamber I for Warrants of Arrest for Ahmad Muhammad Harun (Harun) and Ali Muhammad Ali Abd-Al-Rahman (Kushayb), which were issued on 27 April 2007. These Arrest Warrants were the first at the ICC to include charges for crimes of sexual and gender-based violence. In 2009, the ICC issued an Arrest Warrant for Sudanese President Omar Hassan Ahmad Al'Bashir (President Al'Bashir). On 12 July 2010, Pre-Trial Chamber I issued a second Arrest Warrant for President Al'Bashir, pursuant to a judgement of the Appeals Chamber, requiring the Pre-Trial Chamber to revisit its original decision not to include the crime of genocide.

665 Resolution 1593, UNSC, 5158th meeting, S/Res/1593 (2005), 31 March 2005. Amira Khair, Sudan Programme Officer for the Women's Initiatives for Gender Justice provided information and feedback for the section on Darfur.

666 Prosecutor of the International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)', New York, 11 June 2010, para 11, available at <[http://www.icc-cpi.int/NR/rdonlyres/9AE1D7E1-4083-4D19-9FB8-46EADDB42D83/282156/FinalformattedspeechUNSC\\_11062010postdeliveryclean.pdf](http://www.icc-cpi.int/NR/rdonlyres/9AE1D7E1-4083-4D19-9FB8-46EADDB42D83/282156/FinalformattedspeechUNSC_11062010postdeliveryclean.pdf)>, last visited on 26 October 2010.

This second Arrest Warrant included the crime of genocide, and is discussed in more detail in the *Gender Report Card 2010*.<sup>667</sup>

Also in 2009, the ICC issued a Summons to Appear for Bahar Idriss Abu Garda (Abu Garda), a rebel commander wanted in connection with attacks on peacekeepers in Haskanita. The Summons was issued under seal on 7 May 2009, unsealed on 17 May 2009, and Abu Garda voluntarily made his initial appearance in The Hague on 18 May 2009. On 8 February 2010, Pre-Trial Chamber I issued a decision, declining to confirm any charges against Abu Garda.<sup>668</sup> Summonses to Appear were also issued for two other rebel commanders in connection with the same Haskanita attack, for Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo). The Summonses were issued under seal on 27 August 2009, unsealed on 15 June 2010, and Banda and Jerbo made their initial appearances before the Court on 17 June 2010. Their confirmation of charges hearing took place in December 2010. Banda and Jerbo have been permitted to remain at liberty in Sudan pending their trial. The decision confirming the charges against Banda and Jerbo was issued on 7 March 2011 and is discussed in detail, below.

## Cooperation on Arrest Warrants

Three Arrest Warrants remain outstanding in the Situation in Darfur, for President Al’Bashir, Harun and Kushayb, and underscore the challenges the ICC is facing with respect to cooperation in implementing Arrest Warrants. Sudan’s failure to cooperate with the Court remains a major issue, and President Al’Bashir and the Government of Sudan continue to enjoy support from a number of African States, including States Parties to the Rome Statute, as well as the AU<sup>669</sup> in their refusal to comply with the orders of the ICC.

The ICC continues to remind States Parties of their obligations under the Statute to assist with the execution of Arrest Warrants. Following indications that President Al’Bashir was invited to attend the Inter-governmental Authority for Development (IGAD)<sup>670</sup> summit in Kenya on 30 October 2010, on 25 October 2010 the Pre-Trial Chamber issued a decision, requesting observations from the Republic of Kenya about any problem that may impede the arrest and surrender to the ICC of President Al’Bashir should he arrive on Kenyan territory.<sup>671</sup> In a response on 29 October 2010, the Kenyan Government informed the Chamber that the IGAD meeting was not taking place in Kenya and that it was unaware of any impending visit by President Al’Bashir to the country.<sup>672</sup> In its

667 *Gender Report Card 2010*, p 106-109.

668 This decision is discussed in detail in *Gender Report Card 2010*, p 109-111.

669 On 27 July 2010, the AU issued a declaration explicitly calling on AU Members not to cooperate with the ICC. Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/10(XV), adopted by the Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda, available at <[http://www.africa-union.org/root/ar/index/Assembly%20AU%20Dec%20289-330%20%28XV%29%20\\_E.pdf](http://www.africa-union.org/root/ar/index/Assembly%20AU%20Dec%20289-330%20%28XV%29%20_E.pdf)>, last visited on 26 October 2011. For a more information see also *Gender Report Card 2010*, p 101-104.

670 The IGAD is composed of Kenya, Uganda, Sudan, Ethiopia, Djibouti and Eritrea.

671 ICC-02/05-01/09-117.

672 ICC-02/05-01/09-119.

response, the Kenyan Ministry of Foreign Affairs renewed the ICC 'the assurances of its highest consideration'.<sup>673</sup>

Similarly, following media reports of possible travel by President Al'Bashir to the CAR,<sup>674</sup> on 1 December 2010 Pre-Trial Chamber I requested the CAR to adopt all necessary measures to arrest and surrender President Al'Bashir to the ICC, if and when he arrived on its territory.<sup>675</sup> President Al'Bashir had been invited to attend the CAR's Golden Jubilee Independence Day celebrations. However, the CAR withdrew the invitation and he did not attend. While there are no official explanations for his absence, it has been reported that this was due to the diplomatic pressure asserted on the CAR Government to withdraw the invitation.<sup>676</sup> CAR's withdrawal of the invitation came only days after Libya, a long-standing ally of Sudan in its position against the ICC, asked President Al'Bashir not to attend the third Africa-EU Summit to avoid a mass walk-out by the European countries objecting to his attendance.<sup>677</sup>

Following a report submitted to it by the Registry that there were indications that President Al'Bashir had attended the inauguration ceremony of Djibouti's President Ismael Omar Guelleh on 8 May 2011, Pre-Trial Chamber I formally issued a decision on 12 May informing the UN Security Council and the ICC Assembly of States Parties (ASP) about his recent visit

to Djibouti. It requested the UNSC to take any action it deemed necessary.

On 18 August 2011, following a report by the Registry that President Al'Bashir went to Chad on 7 and 8 August 2011 to attend the inauguration ceremony of the Chadian Head of State Idriss Deby Itno, Pre-Trial Chamber I again reminded the Republic of Chad of its obligations as a State Party to the Rome Statute to execute the outstanding Arrest Warrant against Sudanese President Al'Bashir.<sup>678</sup> The Pre-Trial Chamber noted that, if the report from the Registry is confirmed, this is the second time that the Republic of Chad allowed President Al'Bashir into its territory without arresting him. The Pre-Trial Chamber invited the Republic of Chad to submit observations on its alleged failure to comply with the cooperation requests by the Court. At the time of writing this Report, these observations are not yet publicly available.

On 13 October 2011, President Al'Bashir reportedly travelled to Malawi, another ICC State Party, to attend a 19-member Common Market for Eastern and Southern Africa (COMESA) Summit on 14 October 2011.<sup>679</sup> President Al'Bashir travelled with a 25-member delegation and was welcomed with traditional dances and a Malawian honour guard. Commenting on President Al'Bashir's visit, Deputy Foreign Minister of Malawi, Kondwani Nankhumwa told the media: 'Malawi believes in brotherly coexistence between COMESA states and beyond so we will not arrest him. He is a free person in Malawi'.<sup>680</sup> On 19 October 2011, Pre-Trial Chamber I invited the Republic of Malawi to

673 ICC-02/05-01/09-120-Anx1.

674 'Sudan's Bashir heading to Central African Republic on Wednesday: report', *Sudan Tribune*, 30 November 2010, available at <<http://www.sudantribune.com/Sudan-s-Bashir-heading-to-Central,37113>>, last visited on 26 October 2011.

675 ICC-02/05-01/09-121.

676 'Central African Republic Convinces Bashir President to Stay Away', *AllAfrica.com*, 1 December 2010, available at <<http://allafrica.com/stories/201012070603.html>>, last visited on 26 October 2011.

677 'Sudan: Government Outraged After Libya Asks Bashir to Skip Africa-EU Summit', *AllAfrica.com*, 29 November 2010, available at <<http://allafrica.com/stories/201011290166.html>>, last visited on 26 October 2011.

678 ICC-02/05-01/09-132.

679 'Sudan's Bashir lands in Malawi, defying war crimes warrant', *Agence France-Presse*, 13 October 2011, available at <<http://www.france24.com/en/20111013-sudans-bashir-lands-malawi-defying-war-crimes-warrant>>, last visited on 26 October 2011.

680 'Malawi to allow Sudan's Bashir in for summit', *Reuters*, 13 October 2011, available at <<http://af.reuters.com/article/topNews/idAFJOE79C08K20111013>>, last visited on 25 October 2011.

provide the Chamber with observations as to its alleged failure to comply with its cooperation obligations under the Rome Statute.<sup>681</sup> At the time of writing, Malawi had not yet publicly responded to this request. Following Kenya, Chad and Djibouti, Malawi is the fourth ICC State Party to prompt action from the Pre-Trial Chamber for publicly defying the Arrest Warrant against Sudanese President Al’Bashir.

On 8 December 2010<sup>682</sup> and 10 January 2011,<sup>683</sup> the Prosecutor informed the Pre-Trial Chamber of President Al’Bashir’s possible travel to Senegal and Zambia, and to Chad, all States Parties. Although President Al’Bashir did travel to Chad later in 2011, as discussed above, he does not appear to have travelled to either Senegal or Zambia.<sup>684</sup> Following these reports by the Prosecutor, in January 2011, the AU again reiterated its disapproval of the Arrest Warrant against President Al’Bashir, and reaffirmed its position that Chad and Kenya were implementing various AU decisions by receiving President Al’Bashir.<sup>685</sup> Similarly, as discussed in more detail in the **OTP – Libya** section, the issuance of Arrest Warrants against Muammar Mohammed Abu Minyar Gaddafi (Gaddafi), his son Saif Al-Islam Gaddafi (Saif Al-Islam) and his brother-in-law Abdullah Al-Senussi (Al-Senussi) has triggered similar responses by the AU, with the AU issuing a declaration again calling upon its Member States not to cooperate with the ICC.<sup>686</sup> Unlike the AU, however, for the first

681 ICC-02/05-01/09-137.

682 ICC-02/05-01/09-122.

683 ICC-02/05-01/09-125.

684 ‘Sudanese president will not attend regional summit in Zambia’, *Sudan Tribune*, 13 December 2010, available at <<http://www.sudantribune.com/Sudanese-president-will-not-attend,37255>>, last visited on 26 October 2011;

685 Resolution Assembly/AU/Dec.334(XVI), adopted at the sixteenth ordinary session, 30-31 January 2011, Addis Ababa, Ethiopia.

686 Decision adopted during the 17<sup>th</sup> African Union Summit, African Union, 1 July 2011, available at <<http://au.int/en/summit/17thsummit/news/decisions-adopted-during-17th-african-union-summit>>, last visited on 26 October 2011.

time in nearly two years, the Gulf Cooperation Council (GCC)<sup>687</sup> in their final *communiqué* removed a reference to the ICC Arrest Warrant against President Al’Bashir. Since 2009, the GCC statements had included a paragraph expressing solidarity with the Government of Sudan and rejecting the ICC Arrest Warrant against its President.<sup>688</sup> As discussed in more detail below, Harun and Kushayb also remain at large, despite outstanding Arrest Warrants against them.

In his report to the Security Council in June 2011,<sup>689</sup> the Prosecutor expressed his concern about the continued non-cooperation by the Government of Sudan and the continuation of the commission of crimes. He noted that President Al’Bashir is threatening ‘the international community with retaliation and yet more crimes’.<sup>690</sup> The Prosecutor stressed that the Government of Sudan’s announcements of national efforts to investigate the crimes, without actually taking action, are part of its policy to cover up the crimes and avoid international scrutiny.<sup>691</sup> In his report, the Prosecutor also updated the Security Council on the ongoing crimes against civilians in Darfur. Referring to the 8 March 2011 report by the UN Panel of Experts on the Sudan, he emphasised that ‘sexual and gender-based violence has been one of the most persistent human rights violations

687 The GCC includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

688 ‘Arab Gulf states drop condemnation of ICC warrant against Sudan’s Bashir’, *Sudan Tribune*, 14 June 2011, available at <<http://www.sudantribune.com/Arab-Gulf-states-drop-condemnation,39224>>, last visited on 26 October 2011.

689 Prosecutor of the International Criminal Court, ‘Thirteenth Report by the Prosecutor of the International Criminal Court to the UNSC pursuant to UNSCR 1593(2005)’, New York, 8 June 2011, available at <<http://www.amicc.org/docs/UNSC%20report%20Darfur%20June%202011-%20ENG%20final.pdf>>, last visited on 26 October 2011, (hereinafter ‘Report by the Prosecutor to the UNSC, 8 June 2011’).

690 Report by the Prosecutor to the UNSC, 8 June 2011, para 82.

691 Report by the Prosecutor to the UNSC, 8 June 2011, para 68.



in the context of the Darfur conflict'.<sup>692</sup> He also noted that underreporting of sexual violence is highly prevalent in Darfur and that victims are increasingly discouraged from reporting rape and sexual violence out of fear of retaliation.<sup>693</sup>

### Crisis in Darfur IDP camps

The Women's Initiatives continues to closely monitor the situation of women internally displaced persons (IDPs) in Darfur.<sup>694</sup> Darfuri IDPs, particularly women, are very concerned about the Sudanese Government's attempts to evacuate camps in Darfur. In particular, IDPs interviewed by Women's Initiatives' partners expressed concern about the implementation of the new government strategy for Darfur that was officially ratified on 16 September 2010, focusing on security, reconciliation, development and resettlement of the IDPs and refugees. This new strategy was drafted without consulting other stakeholders, including the negotiating parties of the Doha peace talks. IDPs perceive this strategy as a move to destroy the camps and force the IDPs to flee. Many IDPs informed Women's Initiatives' partners that they heard about this strategy from the media and think that the evacuation of the IDPs camps will bring about the departure of the international humanitarian organisations, thus dramatically reducing access to information on the real conditions faced by IDPs in South Darfur, and creating a dramatic gap in the provision of basic services.

692 Report by the Prosecutor to the UNSC, 8 June 2011, para 42.

693 Report by the Prosecutor to the UNSC, 8 June 2011, paras 44-45.

694 Women's Initiatives for Gender Justice, 'Displaced women urge the international community to focus on Darfur', *Women's Voices e-letter*, April 2011, available at <<http://www.iccwomen.org/WI-WomVoices0411/WomVoices0411.html#3>>; and Women's Initiatives for Gender Justice, 'Women in Darfur IDP camps suffer from deteriorating security and humanitarian conditions', *Women's Voices e-letter*, April 2011, available at <<http://www.iccwomen.org/news/docs/WI-WomVoices7-11/WomVoices7-11.html#4>>.

On 10 and 11 October 2010, a UN Security Council delegation visited North Darfur, led by British Ambassador to the UN Mark Lyall Grant, and including US Ambassador to the UN, Susan Rice, and Ugandan Ambassador to the UN, Ruhakana Rugunda. The delegation met with government officials, community representatives, including IDPs, and the UN. Some IDP women leaders were able to meet with the delegation and deliver a petition in which they voiced their concerns about the humanitarian conditions in which IDPs are living in North Darfur.<sup>695</sup>

In the petition, women called for practical solutions and decried the lack of implementation of the more than 17 Security Council resolutions with regard to Darfur, calling this 'a sign of the complete inability to face the events that lasted for a period of eight years of hardship, accompanied by difficulties and crimes that continue to occur, including forcible displacement, assassination, rape, kidnapping, murder and arbitrary arrest, in addition to all kinds of inhumane practices and brutal treatment'.

The petition said that the lack of implementation of the Security Council resolutions encouraged the Government of Sudan and its allies to commit crimes against humanity in Darfur. The petition called attention to the deterioration of the security and humanitarian conditions in the camps, and called upon the international community to take urgent action to put an end to the Darfur conflict, including through the implementation of the Security Council resolutions and the prosecution of all those who committed crimes against humanity in Darfur. According to Women's Initiatives' partners in the IDP camps of North Darfur, those who met with the

695 The petition is available at <<http://www.iccwomen.org/documents/ENGLISH-Petition-presented-by-the-displaced-women-in-North-Darfur-to-the-UN-Security-Council-delegat>>.

Security Council delegation faced threats by the Sudanese Government and had to go into hiding as a consequence of speaking out about conditions in the IDP camps.

In March 2011, in a message to international humanitarian bodies, women in IDP camps in North Darfur called on the UN and the international community as a whole, including humanitarian organisations, for recognition of the ongoing conflict and for humanitarian assistance.<sup>696</sup> The message named 34 villages that had been besieged and destroyed as part of the new government strategy in Sudan. It also called attention to the arrest and detention of activists by security forces, rape, killing, torture, looting and destruction of property committed by the Government, all of which 'took place before the eyes of the United Nations Mission in Darfur (UNAMID)'. The message called, among other things, on the UN to protect IDPs, for a Security Council resolution to place Darfur under international protection and put an end to the violence, and for the Sudanese Government to be denied access to IDP camps.

### Signing of Doha Peace Document

On 14 July 2011, the Sudanese Government and the Liberation and Justice Movement (LJM) signed a peace document in Doha.<sup>697</sup> During the preceding negotiations, the Women's Initiatives conducted a fact-finding mission in Doha, the capital of Qatar, from 28 May to 2 June 2011. The mission's aim was to gather information regarding the negotiations taking place and to meet with key stakeholders to discuss the participation of women in the talks. During the fact-finding mission, information was collected about the position of women at the

696 This message was sent to the Women's Initiatives for distribution, and is available at <[http://www.iccwomen.org/documents/Message-from-the-IDPs-of-North-Darfur\\_FINAL.pdf](http://www.iccwomen.org/documents/Message-from-the-IDPs-of-North-Darfur_FINAL.pdf)>.

697 'Sudan and LJM rebels sign a Darfur peace agreement in Doha', *Sudan Tribune*, 14 July 2011, available at <<http://www.sudantribune.com/Sudan-and-LJM-rebels-sign-a-Darfur,39539>>, last visited on 26 October 2011.

negotiating table and about the challenges for the implementation of UNSC Resolutions 1325 and 1820. Qatar was chosen as the location for the Darfur peace negotiations in a resolution adopted by the Arab League on 9 September 2008. This resolution was welcomed by the AU, the UN and the EU.

From 27 to 31 May 2011, the Darfur Stakeholders' Conference took place in Doha. It was attended by over 500 representatives from different states of Darfur and the diasporas (including civil society organisations, tribal leaders, native administration leaders, IDPs, refugees, parliament members, state parliament members, governors [walis] of the three states, and main political party leaders), who endorsed the Doha draft document as the basis for reaching a permanent ceasefire, a comprehensive and inclusive peace settlement, and sustainable peace and stability in Darfur.<sup>698</sup>

However, key Darfur movement organisations have told the Women's Initiatives that they did not consider the *communiqué* that came out of the Conference to be binding for them. They argued that 75% of the participants of the Conference were affiliates of the National Congress Party, which forms the Government of Sudan. On the other hand, key Darfur movement organisations did not deny that the Conference has achieved several of its objectives, and that some of its outcomes may be taken into consideration in their negotiations. In addition, many IDPs told the Women's Initiatives that those who participated in the Conference were not representing them, and had been selected by the government to support their own agenda during the Conference. They also questioned how the stakeholders could understand and endorse documents that had been the result

698 'Darfur conference endorses Doha draft document', *Gulf Times*, 1 June 2011, available at <[http://www.gulf-times.com/site/topics/article.asp?cu\\_no=2&item\\_no=438235&version=1&template\\_id=36&parent\\_id=16](http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=438235&version=1&template_id=36&parent_id=16)>, last visited on 26 October 2011.

of negotiations more than a year earlier, which they had seen for the first time during this five day conference. IDP women said that their real leaders were either in detention or left camps, due to serious threats to their life.

### South Sudan Independence

On 7 February 2011, electoral officials confirmed that 99% of voters in the referendum on South Sudan were in favour of independence. The new state of South Sudan officially came into existence on 9 July 2011. Key states, including Austria, Brazil, Canada, Germany and India, as well as the permanent members of the UN Security Council, quickly recognised the new state.<sup>699</sup> At least 15 states have recognised South Sudan as of 10 July 2011.<sup>700</sup> On 31 August 2011, the Parliament of South Sudan, in accordance with the transitional constitution of the Republic of South Sudan, approved its first cabinet although some of the states of South Sudan claimed to be under-represented and some members of Parliament had reservations. Women activists also raised concerns that women were underrepresented in the cabinet, with five female national ministers of a total of 29, and with ten female deputies out of a total of 27. The interim constitution of South Sudan, in force from 2005 to 2011 when it was amended by the transitional constitution of the Republic of South Sudan, had provided that women hold a share of at least 25% in any structural

arrangement including the cabinet positions.<sup>701</sup> At the end of September 2011, President Salva Kiir attended a UN General Assembly meeting on behalf of South Sudan for the first time.<sup>702</sup>

### *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*

Ahmad Muhammad Harun (Harun) and Ali Muhammad Ali Abd-Al-Rahman (Kushayb) have been wanted by the ICC since May 2007. Both suspects are charged with crimes against humanity and war crimes committed during the period of August 2003 to March 2004; Harun with a total of 42 counts, and Kushayb with a total of 50. Harun is charged with seven counts and Kushayb is charged with eight counts of sexual and gender-based crimes.<sup>703</sup> Both are charged with persecution by means of acts of rape as a crime against humanity, rape as a crime against humanity, rape as a war crime, and outrages upon personal dignity as a war crime.

701 'South Sudan parliament approves new cabinet amid reservations', *Sudan Tribune*, 31 August 2011, available at <<http://www.sudantribune.com/South-Sudan-parliament-approves,40009>>, last visited on 26 October 2011. Article 20(4)(a) of the interim constitution of South Sudan provides: 'All levels of government in Southern Sudan shall (a) promote women participation in public life and their representation in the legislative and executive organs by at least twenty-five per cent as an affirmative action to redress imbalances created by history, customs and traditions'. Similarly, Article 58(1) (b) provides that women shall constitute at least 25% of the total membership of the Legislative Assembly; Article 112(3) provides that at least 25% of the members of the Council of Ministers shall be women; Article 146(3) sets out that 'the Government of Southern Sudan shall ensure that at least twenty-five percent of the aggregate membership of all [independent] institutions and commissions shall be women'. Article 168(6) also provides that 'women shall be allocated at least twenty-five per cent of the seats and positions in each legislative and each executive organ of each state, without prejudice to their right to compete for the remaining seats and positions in such organs'.

702 'Salva Kiir to attend UN General Assembly meeting for the first time', *Sudan Tribune*, 18 September 2011, available at <<http://www.sudantribune.com/Salva-Kiir-to-attend-UN-General,40189>>, last visited on 26 October 2011.

703 For a more detailed overview of the gender-based crimes charges against Harun and Kushayb, see the section on *OTP – Charges and prosecution of gender-based crimes*, above.

699 'Fact Box, South Sudan receives international recognition', *Sudan Tribune*, 9 July 2011, available at <<http://www.sudantribune.com/FACTBOX-South-Sudan-receives,39486>>, last visited on 26 October 2011.

700 'Nations Move to Recognize South Sudan', *Voice of America*, 10 July 2010, available at <<http://www.voanews.com/english/news/Nations-Move-to-Recognize-South-Sudan-125287568.html>>, last visited on 26 October 2011.

Kushayb, a senior Janjaweed commander, was arrested by the Government of Sudan in 2007 and re-arrested in 2008. However, he was released on both occasions, never turned over to the ICC, and remains at large. Harun was the Minister of State for the Interior until 2006, when he was appointed Sudan's Minister of State for Humanitarian Affairs. On 7 May 2009, President Al' Bashir appointed him Governor of the South Kordofan province. South Kordofan is a key strategic and oil-rich province located in the centre of Sudan, bordering both Darfur and Abyei, and disputed between north and south Sudan.

According to the Prosecutor's report to the UN Security Council on the Situation in Darfur, on 11 January and 7 March 2011, despite the outstanding ICC Arrest Warrant against him, Harun was reportedly transported by the UN to attend a meeting in Abyei to prevent further escalation of tensions between the different ethnic groups on the north-south border region of South Kordofan.<sup>704</sup> UN spokesman Martin Nesirky defended the decision to transport Harun without arresting him: 'As you know, there have been clashes in Abyei, and these clashes were actually threatening to escalate into a wider war. And so Governor [Harun] was critical to bringing the Misseria leaders in southern Kordofan to a peace meeting in Abyei to stop further clashes and killings.'<sup>705</sup> The French Government protested against the decision.

During a UN Security Council Meeting on Sudan on 8 June 2011, the Prosecutor reiterated his concerns regarding the Situation in Darfur and Harun's continued position as Governor of South Kordofan.<sup>706</sup> He also recalled Harun's use of local militia in the 1990s to attack civilians in the Nuba province, and his role in coordinating attacks against civilians while holding office as Minister of State for the Interior between 2003 and 2005.

704 Report by the Prosecutor to the UNSC, 8 June 2011; See also 'France protests to the UN over transporting of Sudanese war crime suspect', *Sudan Tribune*, 24 January 2011, available at <<http://www.sudantribune.com/France-protests-to-the-UN-over,37744>>, last visited on 26 October 2011.

705 'France protests to the UN over transporting of Sudanese war crime suspect', *Sudan Tribune*, 24 January 2011, available at <<http://www.sudantribune.com/France-protests-to-the-UN-over,37744>>, last visited on 26 October 2011.

706 'The President of Sudan has learned to defy Security Council, says Chief Prosecutor, stressing that genocide, crimes against humanity "continue unabated" in Darfur', *Reliefweb*, 8 June 2011, available at <<http://reliefweb.int/node/406709>>, last visited 26 October 2011.

Violence broke out in South Kordofan in June 2011, after the delayed elections for Governor and State Assembly in the state of South Kordofan, of which Harun as the National Congress Party (NCP) candidate was declared the winner on 15 May 2011.<sup>707</sup> The main opposition party, the Sudan Peoples' Liberation Movement (SPLM), claimed that the NCP and the National Electoral Commission had committed fraud.<sup>708</sup> The SPLM stated that it would not accept the election results and would not take part in the elected government. The fighting occurred between Sudan's Armed Forces (SAF) and Sudan Peoples' Liberation Movement – North (SPLM-N), with both parties allegedly committing crimes. The SAF is alleged to have committed crimes on a large scale, including aerial bombings, attacks on civilians, arbitrary arrests and detentions, looting and destruction of property, and persecution of residents and SPLM-N members. These human rights violations in South Kordofan and Blue Nile States resulted in the displacement of thousands of persons.

In August 2011, a report published by the Office of the High Commissioner for Human Rights (OHCHR) found that the human rights violations occurred in South Kordofan in June 2011, and if they can be substantiated, amount to crimes against humanity and war crimes.<sup>709</sup> On 23 August 2011, President Al' Bashir announced a unilateral ceasefire in South Kordofan.<sup>710</sup> Despite the ceasefire, violence such as

707 'Continuing Violations of Human Rights in South Kordofan and Blue Nile States: 24 August – 8 September 2011', *African Centre for Justice and Peace Studies*, p 1, available at <<http://www.acjps.org/Publications/Reports/2011/26-09-11%20Continuing%20Violations%20of%20Human%20Rights%20in%20South%20Kordofan%20and%20Blue%20Nile%20States.pdf>>, last visited on 26 October 2011.

708 In 2005, a Comprehensive Peace Agreement between the Government of Sudan and the SPLM had been concluded.

709 'Thirteenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: Preliminary report on violations of international human rights and humanitarian law in Southern Kordofan from 5 to 30 June 2011', *Office of the High Commissioner for Human Rights*, August 2011, paras 57, 58, available at <[http://www.ohchr.org/Documents/Countries/13thSouth\\_Kordofan\\_report.doc](http://www.ohchr.org/Documents/Countries/13thSouth_Kordofan_report.doc)>, last visited on 26 October 2011.

710 Continuing Violations of Human Rights in South Kordofan and Blue Nile States: 24 August – 8 September 2011', *African Centre for Justice and Peace Studies*, p 4, available at <<http://www.acjps.org/Publications/Reports/2011/26-09-11%20Continuing%20Violations%20of%20Human%20Rights%20in%20South%20Kordofan%20and%20Blue%20Nile%20States.pdf>>, last visited on 26 October 2011.

killings, bombings, arbitrary arrests and detentions, torture, and looting continued. On 2 September 2011, President Al'Bashir declared a state of emergency in Blue Nile, suspended the Interim Constitution and replaced the Governor with a military commander. On 12 September 2011, the National Assembly of Sudan endorsed the extension of the state of emergency in Blue Nile, supporting the continuance of the Government's military campaign against SPLM-N.<sup>711</sup> In its 23 - 29 September 2011 weekly bulletin report the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) reported that the ongoing insecurity in the region as well as the movement restrictions imposed upon humanitarian organisations continue to affect humanitarian operations in South Kordofan; humanitarian organisations are not permitted to enter areas of conflict.<sup>712</sup>

### **The Prosecutor v. Omar Hassan Ahmad Al'Bashir**

There are two outstanding Arrest Warrants for the President of Sudan, President Al'Bashir. The first was issued on 4 March 2009 by Pre-Trial Chamber I,<sup>713</sup> in response to the Prosecutor's application of 14 July 2008.<sup>714</sup> In its decision issuing the Arrest Warrant, the Pre-Trial Chamber found, as required by Rome Statute Article 58, that there were 'reasonable grounds to believe' that President Al'Bashir has committed crimes within the jurisdiction of the Court, namely five counts of crimes against humanity, including rape, and two counts of war crimes. However, the two-judge majority declined to include the crime of genocide in the Arrest Warrant, despite the Prosecution's assertion that there were reasonable grounds to believe that President Al'Bashir bears criminal responsibility for three counts of genocide. The genocide charges sought by the Prosecutor included charges of gender-based crimes, namely causing serious bodily or mental harm

to members of the Fur, Masalit, and Zaghawa ethnic groups, including through displacement, torture, rape and other forms of sexual violence. Judge Ušacka dissented from this decision, finding that there were reasonable grounds to believe that President Al'Bashir possessed genocidal intent and was criminally responsible for genocide.

On 6 July 2009, the Prosecution filed an appeal against the decision.<sup>715</sup> On 3 February 2010, the Appeals Chamber handed down a unanimous decision reversing Pre-Trial Chamber I's finding that it had been provided with insufficient evidence to issue a Warrant of Arrest for the crime of genocide.<sup>716</sup> The Appeals Chamber agreed with the Prosecution that the Pre-Trial Chamber had applied an erroneous standard of proof. The Appeals Chamber remanded the matter to the Pre-Trial Chamber for a new decision on the genocide charge, using the correct standard of proof. On 12 July 2010, Pre-Trial Chamber I issued both a second decision on the Prosecution's application for an Arrest Warrant for President Al'Bashir,<sup>717</sup> and a second Warrant of Arrest for President Al'Bashir, including the crime of genocide.<sup>718</sup> For a detailed analysis of the Warrants of Arrest for President Al'Bashir, see the *Gender Report Card 2009* and *2010*.

### **The Prosecutor v. Bahar Idriss Abu Garda**

Bahar Idriss Abu Garda (Abu Garda) was one of three suspects charged with war crimes in connection to an attack against AU peacekeepers in 2007. On 7 May 2009, Pre-Trial Chamber I issued a Summons to Appear for Abu Garda,<sup>719</sup> and he made his voluntary initial appearance before the Court on 18 May of that year. Following the confirmation of charges hearing against Abu Garda from 19-29 October 2009, the Pre-Trial Chamber issued its decision on the confirmation of charges in February 2010.<sup>720</sup> The Pre-Trial Chamber declined to confirm any of the charges against Abu Garda, on the basis that the Prosecution had not submitted sufficient evidence to establish substantial grounds to believe that he was individually criminally responsible as a direct or indirect co-perpetrator for the attack on the Haskanita Military Group Site (MGS Haskanita).<sup>721</sup> This marked the first time in the Court's history that a Pre-Trial Chamber had declined to confirm any charges against an accused. The decision is analysed in detail in the *Gender Report Card 2010*.<sup>722</sup>

711 Continuing Violations of Human Rights in South Kordofan and Blue Nile States: 24 August – 8 September 2011', *African Centre for Justice and Peace Studies*, p 7, available at <<http://www.acjps.org/Publications/Reports/2011/26-09-11%20Continuing%20Violations%20of%20Human%20Rights%20in%20South%20Kordofan%20and%20Blue%20Nile%20States.pdf>>, last visited on 26 October 2011.

712 'Sudan: Blue Nile and South Kordofan Situation Report No. 21', *UNOCHA*, 3 October 2011, p 2, available at <[http://reliefweb.int/sites/reliefweb.int/files/resources/F\\_R\\_332.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/F_R_332.pdf)>, last visited on 31 October 2011.

713 ICC-02/05-01/09-3. See also *Gender Report Card 2009*, p 59-61, and the March 2009 and May 2009 Issues of *Legal Eye on the ICC e-letter*.

714 ICC-02/05-152.

715 ICC-02/05-01/09-25.

716 ICC-02/05-01/09-73.

717 ICC-02/05-01/09-94.

718 ICC-02/05-01/09-95.

719 ICC-02/05-02/09-2.

720 ICC-02/05-02/09-243-Red.

721 ICC-02/05-02/09-243-Red, paras 228-231.

722 See *Gender Report Card 2010*, p 109-111.

The Chamber noted that the Prosecution had submitted evidence ‘purporting to demonstrate’ that two meetings had taken place, that Abu Garda had participated in these meetings, and that the subject matter of the meetings was planning the attack on Haskanita. While the Chamber was satisfied that the first meeting took place, they found the Prosecution did not provide sufficient evidence regarding Abu Garda’s alleged participation in the meeting, noting that the evidence was ‘weak and unreliable due to the many inconsistencies.’<sup>723</sup> Further, the Chamber was not satisfied that the second meeting took place as alleged by the Prosecution. As to both meetings, the Chamber concluded that the evidence is ‘so scant and unreliable that the Chamber is unable to be satisfied that there are substantial ground to believe that [Abu Garda] participated in any meeting in which a common plan to attack [Haskanita] was agreed upon.’<sup>724</sup>

On 15 March 2010,<sup>725</sup> the Prosecution filed a request for leave to appeal the decision on the confirmation charges, a request that was supported by the Legal Representatives of Victims.<sup>726</sup> This request for appeal was later denied by Pre-Trial Chamber I.<sup>727</sup> Although the ICC’s website now lists the case against Abu Garda as closed,<sup>728</sup> the Prosecution has indicated that it will present additional evidence in this case.<sup>729</sup> The Prosecution did not, however, indicate when such evidence would be brought. In declining to confirm the charges against Abu Garda, the Pre-Trial Chamber noted that this decision did not preclude the Prosecutor from requesting the confirmation of charges against him, ‘if such request is supported by additional evidence, in accordance with Article 61(8) of the Statute.’<sup>730</sup> At the time of writing of this Report, the Prosecutor has not yet brought additional evidence.

723 ICC-02/05-02/09-243-Red, para 173.

724 ICC-02/05-02/09-243-Red, para 179.

725 ICC-02/05-02/09-257-Conf, as cited in ICC-02/05-02/09-267.

726 ICC-02/05-02/09-267.

727 ICC-02/05-02/09-267. For a more detailed discussion of the decision on the confirmation of charges in Abu Garda, see *Gender Report Card 2010*, p 109-111.

728 See <<http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/icc02050209>>.

729 OTP Weekly Briefing, Issue #99, 5-13 September 2011.

730 ICC-02/05-02/09-243-Red, para 236.

### *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*

Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo) are Sudanese citizens of Zaghawa ethnicity.<sup>731</sup> Banda was the former military commander of the Justice and Equality Movement (JEM), before establishing a splinter group, the JEM Collective Leadership, along with Bahar Idriss Abu Garda (Abu Garda).<sup>732</sup> Jerbo was the Chief of Staff of the splinter group the Sudanese Liberation Army Unity (SLA-Unity), which had broken away from the Sudanese Liberation Movement Army.<sup>733</sup> Banda and Jerbo were each charged with three counts of war crimes in connection with an attack in September 2007 against the African Union Mission in Sudan (AMIS) peacekeeping mission based at the MGS Haskanita. Banda and Jerbo were charged with the war crimes of: (i) violence to life and attempted violence to life;<sup>734</sup> (ii) intentionally directing attacks against personnel, installations, material, units and vehicles involved in a peacekeeping mission;<sup>735</sup> and (iii) pillaging.<sup>736</sup> No charges for gender-based crimes have been sought against any of the rebel leaders alleged to have been involved in the Haskanita attack. Both Banda and Jerbo were charged as co-perpetrators or indirect co-perpetrators under Article 25(3)(a) and or Article 25(3)(f).<sup>737</sup> Both suspects voluntarily made their first appearance before the Court on 17 June 2010 in response to a Summons to Appear, which was initially issued under seal on 27 August 2009, but made public on 15 June 2010.<sup>738</sup> They currently remain at liberty, pending their trial proceedings.

731 ICC-02/05-03/09-121-Corr-Red, paras 6-7.

732 ICC-02/05-03/09-3, paras 9-10.

733 ICC-02/05-03/09-2, para 17.

734 Article 8(2)(c)(i).

735 Article 8(2)(e)(iii).

736 Article 8(2)(e)(v).

737 Article 25(3) provides the following: ‘In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that 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; [...] (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.’

738 ICC-02/05-03/09-1.

This is the second case arising from the attack against the MGS Haskanita to reach the confirmation of charges stage, the first being the case against Abu Garda, discussed above.

### **Decision on the confirmation of charges**

Following the issuance of Summonses to Appear and the suspects' voluntary appearance before the Court on 17 June 2010,<sup>739</sup> on 8 December 2010, Pre-Trial Chamber I held the confirmation of charges hearing in the case against Banda and Jerbo. Both suspects waived their right to be present at the hearing, thus enabling the Court to conduct the hearing in English, without the need for Zaghawa interpretation.

On 7 March 2011, Pre-Trial Chamber I issued its decision on the confirmation of charges.<sup>740</sup> In the confirmation of charges decision, the Pre-Trial Chamber had to decide whether the Prosecution had provided sufficient evidence to establish substantial grounds to believe both: (i) that the crimes had been committed; and (ii) that Banda and Jerbo were individually criminally responsible for those acts.<sup>741</sup> The Pre-Trial Chamber examined the role played by the AMIS peacekeeping mission, and concluded that there were substantial grounds to believe that AMIS troops were involved in a peacekeeping mission, that they were impartial in their dealings with all parties to the conflict and were not permitted to use force except in self-defence.<sup>742</sup> As a result, the Pre-Trial Chamber held that there were substantial grounds to believe that members of the peacekeeping mission took no direct part in hostilities and were therefore entitled to the protections afforded to civilians under international humanitarian law.<sup>743</sup> Having examined the objective and subjective elements of the offence of intentionally directing attacks against peacekeepers under Article 8(2)(e)(iii) of the Statute, the Pre-Trial Chamber concluded that the Prosecution had presented sufficient evidence to establish substantial grounds to believe that this crime had been committed.<sup>744</sup>

In relation to the war crime of violence to life, the Chamber was satisfied that there were substantial grounds to believe that both the objective elements of the crime (the killing of twelve AMIS personnel and attempted killing and serious injury of an additional eight AMIS personnel) and the subjective element of intent to cause death or serious injury had been proven

for the purposes of confirming the charge against Banda and Jerbo.<sup>745</sup> The final charge of pillaging was also confirmed by the Pre-Trial Chamber.<sup>746</sup> The Chamber held that there were substantial grounds to believe that Banda and Jerbo were individually criminally responsible for these three crimes as co-perpetrators under Article 25(3)(a) of the Statute,<sup>747</sup> which made it unnecessary to analyse whether they were also responsible as indirect co-perpetrators for having committed the crimes through their troops. The Pre-Trial Chamber also confirmed that the injuries caused to the eight AMIS personnel who were not killed qualified as attempted murders within the meaning of Article 25(3)(f).<sup>748</sup> 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).

### **Defence strategy**

Banda and Jerbo have elected to be represented by the same Defence counsel, who had also represented Abu Garda. In the context of the confirmation of charges hearing, the Defence did not contest any of the material facts alleged in the document containing the charges,<sup>749</sup> and both suspects voluntarily waived their right to be present at the confirmation of charges hearing.<sup>750</sup> During the confirmation of charges hearing, which was held on 8 December 2010, the Defence did not present any evidence and did not challenge the evidence presented by the Prosecutor.<sup>751</sup> The Defence also chose not to lodge an appeal against the confirmation of charges decision.<sup>752</sup> On 16 May 2011, the Defence and Prosecution filed a joint submission on the agreed facts in the case.<sup>753</sup> In that submission, the Prosecution and Defence agreed that the accused would only contest three specific issues at trial: (i) whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; (ii) if the attack is deemed 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 UN.<sup>754</sup> The Defence emphasised that these issues were fully contested and would have to be

745 ICC-02/05-03/09-121-Corr-Red, paras 95-109.

746 ICC-02/05-03/09-121-Corr-Red, paras 117-123.

747 ICC-02/05-03/09-121-Corr-Red, paras 151-162.

748 ICC-02/05-03/09-121-Corr-Red, paras 95-99.

749 ICC-02/05-03/09-80.

750 ICC-02/05-03/09-80 and ICC-02/05-03/09-93.

751 ICC-02/05-03/09-121-Corr-Red, para 21.

752 ICC-02/05-03/09-122, noting that neither party had filed a request for leave to appeal the decision on the confirmation of charges within the statutory time limit.

753 ICC-02/05-03/09-148.

754 ICC-02/05-03/09-148, para 3.

739 For more information about the earlier procedural stages in this case, see *Gender Report Card 2010*, p 111-112.

740 ICC-02/05-03/09-121-Corr-Red.

741 Article 61(7).

742 ICC-02/05-03/09-121-Corr-Red, para 63.

743 ICC-02/05-03/09-121-Corr-Red, para 63.

744 ICC-02/05-03/09-121-Corr-Red, para 87.

proven by the Prosecution at trial beyond a reasonable doubt. However, the Defence indicated that, if the Trial Chamber determines that these three issues have been proven, 'the Accused persons will plead guilty to the charges preferred against them without prejudice to their right to appeal the Chamber's decision'.<sup>755</sup>

Both parties also agreed not to submit any additional evidence or make any additional submissions regarding the guilt or innocence of the accused unless the Chamber deemed it necessary. The parties claimed that this approach would 'significantly shorten the trial proceedings by focusing the trial only on those issues that are contested between the Parties', and would promote 'an efficient and cost-effective trial' while still preserving the right of victims to participate and the right of the accused to a fair and expeditious trial.<sup>756</sup> This is the first time at the ICC that a Defence team has indicated its willingness to enter a guilty plea if certain facts are proven. On 28 September 2011, Trial Chamber IV issued a decision on the joint submission on agreed facts in the case.<sup>757</sup> The Legal Representative of Victims had objected to the Prosecution and Defence submission on the grounds that the proposed restriction of the facts and evidence would cause serious prejudice to victims' participation rights by limiting the factual issues examined at trial and thereby infringing on the victims' right to know the full facts of what occurred at the MGS Haskanita and the full extent of the responsibility of the two accused.<sup>758</sup> However, the Chamber held that the procedures proposed in the joint submission would 'facilitate the fair and expeditious conduct of the proceedings' and that 'a more complete presentation of the alleged facts in the case [was] not required in the interests of justice'.<sup>759</sup> Therefore, without limiting its powers to request additional evidence, the Chamber agreed that the trial would proceed only on the basis of the contentious issues outlined in the joint submission, and that the parties would not present evidence or make submissions on any other issues.<sup>760</sup>

### *Translation issues*

On 16 March 2011, Trial Chamber IV<sup>761</sup> was constituted to hear the case against Banda & Jerbo.<sup>762</sup> This is the second Trial Chamber composed exclusively of female judges, along with Trial Chamber III,<sup>763</sup> which is presiding over the Bemba trial. At the time of writing this Report, a date for the start of trial has not been set due to translation problems. Pursuant to Article 67(f) of the Rome Statute, the accused has a 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 speak Zaghawa, a local Sudanese (non-written) language. However, the ICC currently does not have interpreters competent to translate documents and proceedings from Zaghawa into either French or English, the two working languages of the Court. Given the need to set a date for the commencement of trial within a reasonable time, on 1 July 2011 the Chamber ordered that preparations for provision of interpretation for the accused 'be undertaken immediately', and instructed the Registry to begin any necessary training of Zaghawa interpreters.<sup>764</sup> The Chamber deferred its decision on whether the interpretation used at trial should be simultaneous or consecutive, but said it would rule on it in due course. At the time of writing, no decision has yet been issued on the matter. Language issues also arose in the Mbarushimana case, discussed above, and in the Katanga & Ngudjolo case, discussed further in **Trial Proceedings**.

755 ICC-02/05-03/09-148, para 5.

756 ICC-02/05-03/09-148, para 8.

757 ICC-02/05-03/09-227.

758 ICC-02/05-03/09-190-tENG.

759 ICC-02/05-03/09-227, paras 44-45.

760 ICC-02/05-03/09-227, para 46.

761 Trial Chamber IV is composed of Presiding Judge Joyce Aluoch (Kenya), Judge Fatoumata Dembele Diarra (Mali) and Judge Silvia Fernández de Gurmendi (Argentina).

762 ICC-02/05-03/09-124 and ICC-02/05-03/09-126.

763 Trial Chamber III is composed of Presiding Judge Sylvia Steiner (Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan).

764 ICC-02/05-03/09-172.



## CAR

The Situation in the CAR was referred to the Court in December 2004 by the Government of the CAR.<sup>765</sup> The Prosecutor announced the opening of an investigation in May 2007. The investigation has focused on the serious crimes committed during a peak of violence in 2002-2003, while continuing to monitor crimes committed since 2005, in particular in the north of the CAR. In announcing the investigation, the Prosecutor noted an exceptionally high number of rapes reported during the peak of violence, at least 600 in a period of five months.<sup>766</sup>

To date in the CAR Situation, charges have only been issued against Jean-Pierre Bemba Gombo (Bemba), President and Commander-in-Chief of the *Mouvement de libération du Congo* (MLC) during the relevant period. The MLC allegedly entered CAR territory 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. He remains President. Patassé, who was named in the Bemba Arrest Warrant as having formed an agreement with Bemba to maintain his own power,<sup>767</sup> returned to the CAR in both 2008 and 2009. Although Patassé had expressed his intention to run for President again, he died on 5 April 2011.<sup>768</sup> The trial against Bemba started on 22 November 2010.

The CAR continues to be affected by crimes committed in the north of the country, involving numerous rebel groups and the Government. In particular, the northern and eastern parts of the country continue to experience a heightened degree of violence with clashes between different military groups, in particular between the *Convention des patriotes pour la justice et la paix* (CPJP),<sup>769</sup> and the *Forces armées centrafricaines* (FACA) and the *Union des forces démocratiques pour le rassemblement* (UFDR).<sup>770</sup> In September 2011, the situation in the north-east further deteriorated.<sup>771</sup> The increase in violence in the region has resulted in an unconfirmed number of civilian casualties and significant destruction of properties, while also increasing tensions between different ethnic groups.<sup>772</sup> Humanitarian access is reportedly difficult in the north-east of the CAR due to the frequent clashes between the different militias, and the human rights situation in the region remains particularly fragile.<sup>773</sup>

Despite the continuation of the commission of crimes in the north by different groups, the Government of the CAR has made formal attempts to prevent ICC investigations into these crimes. On 18 December 2004, the Government of the CAR requested that the OTP initiate investigations into the crimes against humanity and war crimes committed by Patassé.<sup>774</sup> On 1 August 2008, Bozizé submitted a letter to the Secretary General requesting that the UN use its authority under Article 16 to intervene in any investigation into the crimes in the North of the

765 ICC/01/05-1, p 1; ICC-01/05-01/08-14, para 1. The referral was publicly announced by the Prosecution in early 2005: ICC-OTP-20050107-86.

766 Background: Situation in the Central African Republic, ICC-OTP-BN-20070522-220-A\_EN.

767 ICC-01/05-01/08-15-tENG, para 20.

768 'Report of the Secretary-General on the situation in the Central African Republic and on the activities of the United Nations Integrated Peacebuilding Office in that country', Document number S/2011/311, 16 May 2011, para 7 (hereinafter 'Report of the UNSG on the CAR, May 2011'), available at < <http://www.un.org/Docs/sc/sgrep11.htm>>.

769 The CPJP is the only politico-military group that did not sign the 2008 Libreville peace accords. Report of the UNSG on the CAR, May 2011, para 5.

770 Report of the UNSG on the CAR, May 2011, para 32.

771 'Central African Republic, Information Bulletin No. 178', UNOCHA, 13 – 27 September 2011, available at <<http://reliefweb.int/sites/reliefweb.int/files/resources/HDPT%20CAR%20Info%20Bulletin%20English%20178.pdf>>, last visited on 27 October 2011.

772 Report of the UNSG on the CAR, May 2011, para 34.

773 Report of the UNSG on the CAR, May 2011, paras 41, 52.

774 ICC-01/05-01/08-704-Red3, para 36.

CAR.<sup>775</sup> In the letter to the UN, President Bozizé advocated for the CAR to maintain jurisdiction over the events that occurred during the period covered by the amnesty laws.<sup>776</sup>

In addition, human rights groups in the CAR and internationally, including the Women's Initiatives for Gender Justice, are calling for the ICC to investigate crimes committed by the LRA in the southeast of CAR, as discussed in the **OTP – Uganda** section, above.

### *The Prosecutor v. Jean-Pierre Bemba Gombo*

The trial against Bemba — the ICC's third trial and the second to include charges for gender-based crimes — commenced on 22 November 2010. Bemba faces two counts of crimes against humanity (murder<sup>777</sup> and rape<sup>778</sup>) and three counts of war crimes (murder,<sup>779</sup> rape<sup>780</sup> and pillaging<sup>781</sup>) for his alleged responsibility, as military commander, for crimes committed by the MLC in the CAR.

The Bemba trial, the only trial to date arising from the CAR Situation, is the ICC's first against a high-profile political and military figure, and in which the accused is charged with command responsibility, including for gender-based crimes. His trial began on 22 November 2010, and is discussed in detail in the **Trial Proceedings** section, below.<sup>782</sup> Extensive background on the case is available in the *Gender Report Card 2008, 2009 and 2010*.

775 'Quand François Bozizé veut s'assurer à lui-même et à ses sbires une impunité totale', *L'Indépendant CF*, 1 August 2008, available at <[http://www.lindependant-cf.com/Quand-Francois-Bozize-veut-s-assurer-a-lui-meme-et-a-ses-sbires-une-impunite-totale\\_a414.html](http://www.lindependant-cf.com/Quand-Francois-Bozize-veut-s-assurer-a-lui-meme-et-a-ses-sbires-une-impunite-totale_a414.html)>, last visited on 27 October 2011; ICC-01/05-01/08-704-Red3, para 57.

776 ICC-01/05-01/08-704-Red3, para 113.

777 Article 7(1)(a).

778 Article 7(1)(g).

779 Article 8(2)(c)(i).

780 Article 8(2)(e)(vi).

781 Article 8(2)(e)(v).

782 'Bemba Opens in the Hague', *Coalition for the International Criminal Court Press Release*, 22 November 2010, available at <[http://coalitionfortheicc.org/documents/Opening\\_of\\_Bemba\\_Trial\\_CICC\\_22Nov10\\_EN.pdf](http://coalitionfortheicc.org/documents/Opening_of_Bemba_Trial_CICC_22Nov10_EN.pdf)>, last visited on 27 October 2011. See also Women's Initiatives for Gender Justice, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo', 22 November 2010, available at <[http://www.iccwomen.org/documents/Bemba\\_Opening\\_Statement.pdf](http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf)>.

## Kenya

The Situation in Kenya arose out of the violence surrounding the Kenyan national elections held on 27 December 2007. It is the first Situation before the ICC in which the Prosecutor has used his *proprio motu* powers under Article 15 of the Rome Statute to start an investigation on his own initiative. Article 15 allows the Prosecutor to initiate investigations on the basis of information of crimes within the jurisdiction of the Court, after analysing the seriousness of the information and submitting a request for authorisation to the Pre-Trial Chamber. The Pre-Trial Chamber, with Judge Kaul dissenting, authorised the Prosecutor on 31 March 2010 to proceed with an investigation in Kenya.<sup>783</sup>

The post-election violence in Kenya in December 2007 followed a disputed national election in which incumbent President Mwai Kibaki<sup>784</sup> of the Party of National Unity (PNU) faced a challenge from opposition candidate Raila Odinga, leader of the Orange Democratic Movement (ODM). In the lead-up to the election, certain areas of the country experienced violent outbreaks between different ethnic groups supporting different candidates.<sup>785</sup> Ethnic characterisations were used by both sides in their campaigns. On the one side, the Kalenjin (and Luo) ethnic group predominantly supported the ODM; on the other side, support for the PNU was particularly strong among the Kikuyu population.<sup>786</sup> Following the disputed results that

783 ICC-01/09-19. For a detailed discussion of the filings relating to the authorisation decision of 31 March 2010, see *Gender Report Card 2010*, p 118-127.

784 Kibaki came to power in 2002 as leader of the National Rainbow Coalition (NaRC). He ran again in the December 2007 elections, this time as candidate for the Party of National Unity (PNU).

785 For more information about the ethnic dimensions of the Kenya Situation, please see 'Ballots to Bullets: Organised Political Violence and Kenya's Crisis of Governance', *Human Rights Watch*, March 2008, p 19, available at <<http://www.hrw.org/sites/default/files/reports/kenya0308web.pdf>>, last visited on 27 October 2011.

786 'Ballots to Bullets: Organised Political Violence and Kenya's Crisis of Governance', *Human Rights Watch*, March 2008, p 36, available at <<http://www.hrw.org/sites/default/files/reports/kenya0308web.pdf>>, last visited on 27 October 2011.

declared Kibaki the winner of the Presidential elections, violence broke out throughout the country. The violence was characterised by brutal attacks that appeared to be both coordinated and spontaneous, and included sexual violence against both women and men. Victims were primarily targeted on the basis of their ethnicity, which was tied specifically to their (perceived) support for a particular political party, in particular the ODM or PNU.<sup>787</sup> The police are also alleged to have engaged in excessive use of force and extrajudicial killings.<sup>788</sup> Despite the disputed results, on 30 December 2008, Kibaki was sworn in as President; the ODM, however, held the majority of seats in Parliament. Extensive negotiations took place between the ODM and the PNU, led by former UN Secretary-General Kofi Annan, who mediated as Chair of the AU Panel of Eminent African Personalities. On 28 February 2008, the two parties signed an agreement on power sharing, which Kibaki signed as President and Odinga as Prime Minister, thereby establishing a coalition government between the ODM and PNU.<sup>789</sup>

On 15 December 2010, the Prosecutor filed two requests for Summonses to Appear, for six suspects. The first request named William Samoei Ruto (Ruto), Henry Kiprono Kosgey (Kosgey), and Joshua Arap Sang (Sang).<sup>790</sup> Ruto, Kosgey and Sang are associated with the ODM. Ruto is a suspended Minister of Higher Education, Science and Technology; Kosgey is Minister of Industrialisation and Chairman of the ODM; and Sang is the head of operations at a Kenyan radio station, Kass FM. The second request named Francis Kirimi Muthaura (Muthaura), Uhuru Muigai Kenyatta (Kenyatta) and Mohammed Hussein Ali (Ali).<sup>791</sup> These three

individuals are aligned with the PNU. Muthaura is the Head of the Public Service and Secretary to the Cabinet of Kenya; Kenyatta is the Deputy Prime Minister and Minister for Finance; and Ali is currently the Chief Executive of the Kenyan Postal Corporation and was the Commissioner of Police during the post-election violence. Together these two sets of cases represent leadership positions of both sides of the coalition Government. On 4 October 2011, the Prosecutor is reported to have said that he will not bring any new charges against other individuals for the post-election violence.<sup>792</sup>

Despite there being significant evidence that gender-based crimes were committed, including in the materials presented by the Prosecutor in his request to open an investigation,<sup>793</sup> as the cases move towards trial the existing charges of gender-based crimes fail to reflect this. Only one set of charges put forward by the Prosecutor – that against Muthaura, Kenyatta and Ali – included charges of gender-based crimes, namely rape and other forms of sexual violence<sup>794</sup> and other inhumane acts.<sup>795</sup> In its decision to issue the Summonses to Appear, however, the Pre-Trial Chamber significantly limited the geographical scope of the charges, by holding that the Prosecutor failed to provide any evidence substantiating the claim that rape was committed as part of the attack in Naivasha, and dismissing in its entirety the charges for events in Kisumu and Kibera, including charges of rape, because of a lack of evidence of the criminal responsibility of the individuals.<sup>796</sup> Moreover, as discussed below, the Chamber further reduced the charges of sexual violence in the Summonses. The Prosecutor had requested a charge of other forms of sexual violence, based

787 ICC-01/09-19-Corr, para 110.

788 ICC-01/09-3/Annex 5, p 417-420.

789 For a more detailed discussion of the political developments both prior, and subsequent to the signing of the power sharing agreement between the ODM and the PNU, see *Gender Report Card 2010*, p 120-122.

790 ICC-01/09-30-RED.

791 ICC-01/09-31-RED.

792 'I won't file charges against new suspects: Ocampo', *Daily Nation*, 4 October 2011, available at <<http://www.nation.co.ke/News/politics/-/1064/1248148/-/8b080c/-/index.html>>, last visited on 27 October 2011.

793 *Gender Report Card 2010*, p 122-124.

794 Article 7(1)(g).

795 Article 7(1)(k).

796 ICC-01/09-02/11-1, paras 26 and 32.

on acts of forcible circumcision of Luo men, in the case against Muthaura, Kenyatta and Ali. In a worrying interpretation, the Chamber did not consider these acts to be of a ‘sexual nature’, and found that these should in fact be classified as ‘other inhumane acts’.<sup>797</sup> The Chamber thus not only reduced the charges for gender-based crimes by location, but also by the types of acts covered by the charges. The decision issuing the Summonses to Appear is discussed in more detail, below.

On 16 February 2011,<sup>798</sup> Pre-Trial Chamber II requested the Prosecutor to submit all witness statements upon which he relied in his applications, which were received by the Chamber confidentially on 23 February 2011.<sup>799</sup> On 8 March 2011, Pre-Trial Chamber II handed down two decisions issuing the Summonses.<sup>800</sup> Judge Kaul dissented on the issuance of both Summonses to Appear.<sup>801</sup> The initial appearance

797 ICC-01/09-02/11-1, para 27.

798 ICC-01/09-01/11-1 and ICC-01/09-02/11-1 citing ICC-01/09-45-Conf-Exp.

799 ICC-01/09-01/11-1 and ICC-01/09-02/11-1 citing ICC-01/09-48-Conf-Exp and Annexes.

800 ICC-01/09-01/11-1; ICC-01/09-02/11-1.

801 ICC-01/09-01/11-2; ICC-01/09-02/11-3. Following his earlier dissent on the 31 March 2010 decision authorising the Prosecutor’s initiation of an investigation in the Kenya Situation (ICC-01/09-19), Judge Kaul disagreed with the majority decision to issue the Summonses to Appear against the six individuals because he believed that the ICC lacked jurisdiction *ratione materiae*. Although he was satisfied that the crimes for which Ruto, Kosgey and Sang were allegedly criminally responsible, were planned and organised, Judge Kaul did not believe the alleged crimes were committed ‘pursuant to the policy of a *state-like organisation*, which is an indispensable element and inherent characteristic of crimes against humanity under Article 7 of the Statute’ (ICC-01/09-01/11-2, para 50, emphasis in original). Similarly, recalling his understanding of the essential characteristics of an ‘organisation’ in his dissent to the 31 March 2010 decision, Judge Kaul also failed to see an ‘organisation’ in the Prosecutor’s application for Summonses to Appear for Muthaura, Kenyatta and Ali (ICC-01/09-02/11-3, para 27). Instead, Judge Kaul classified the cooperation between the Mungiki and the Kenyan Police Forces as ‘a limited partnership of convenience’ (para 31).

of Ruto, Kosgey and Sang was held on 7 April 2011; that of Muthaura, Kenyatta and Ali on 8 April 2011. The confirmation hearings in both cases took place on 1-8 September and 12 September – 5 October, respectively. These filings, decisions and hearings are discussed in detail, below.

## Developments in Kenya

The Situation in Kenya has become one of the more contested situations before the Court, with resistance to the Court’s jurisdiction by the Kenyan Government and the suspects playing out on a number of fields. For the first time before the ICC, a State Party challenged the admissibility of cases, although the Kenyan Government was eventually unsuccessful in this challenge, as described in the Admissibility section below. The Kenyan Government has also actively petitioned the AU for support for an Article 16 suspension of the proceedings by the UN Security Council, resulting in an AU Resolution calling for deferral of the cases. Domestically, the Government has also continued to take some measures to prepare for domestic proceedings, and has channelled the ICC’s investigations through the Kenyan legal system, resulting in additional procedures and delays for the ICC’s investigation. In addition, both sets of suspects have raised a number of legal challenges to the Summonses and the cases themselves.

The Kenyan Government has taken a number of high-profile measures in efforts to prevent the ICC cases from proceeding. In an immediate reaction to the issuance of Summonses to Appear, the Government indicated that it would seek to withdraw from the Rome Statute.<sup>802</sup> It subsequently launched a high-level lobbying

802 ‘Kenya can bring justice home; ICC’s part of the answer’, *The East African*, 17 January 2011, available at <<http://www.theeastafrican.co.ke/news/Kenya%20can%20bring%20justice%20home%20ICCs%20part%20of%20the%20answer/-/2558/1090424/-/item/0/-/k1vtem/-/index.html>>, last visited on 27 October 2011.

mission in an attempt to defer the proceedings against the six suspects, arguing that with the New Constitution in place, as discussed below, Kenya was better placed than the ICC to try the individuals responsible for the post-election violence.<sup>803</sup> The lobbying mission, led by Vice President Musyoka, aimed to garner support amongst key African states for an Article 16 deferral by the UNSC. Pursuant to Article 16, the UNSC, acting under Chapter VII of the UN Charter, may defer investigations or prosecutions for a period of 12 months. The request may be renewed by the UNSC under the same conditions. In a resolution adopted by the AU at its sixteenth session in January 2011, the Assembly supported and endorsed Kenya's request for a deferral of the ICC cases. The AU requested the UNSC 'to accede to this request in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence'.<sup>804</sup> Similarly, the IGAD, composed of Kenya, Uganda, Sudan, Ethiopia, Djibouti and Eritrea, also supported Kenya's bid for an Article 16 deferral.<sup>805</sup>

The quest for an Article 16 deferral has also given rise to tensions within the Kenyan coalition Government. On 26 February, Prime Minister Odinga is reported to have disowned the shuttle diplomacy undertaken by Vice-President Musyoka.<sup>806</sup> In a letter issued on 11 March

2011, sent to the UNSC on behalf of the ODM and Prime Minister Odinga, Anyang' Nyong'o, Secretary General of the ODM, stressed that 'the ongoing ICC process is the best and only means of securing justice to the innocent victims of Kenya's post election violence'.<sup>807</sup> Ruto and others are said to have dissociated themselves from this letter, claiming it does not represent a unanimous ODM position.<sup>808</sup> These discrepancies in position between the two coalition partners and within the parties have weakened Kenya's bid for a deferral. Although it appears that the Kenyan request was tabled at the UNSC twice, it was met with opposition from many of its members, and to date it has not resulted in a deferral.

Following the unsuccessful attempts to defer the proceedings under Article 16, on 30 March 2011 Kenya moved to file before the ICC, challenging the admissibility of the two cases pursuant to Article 19.<sup>809</sup> Article 19 allows the Defence, or a state that has jurisdiction over a case, to challenge the admissibility of a case when the case has been or is being investigated genuinely by the state of jurisdiction. Pre-Trial Chamber II rejected the admissibility challenge on 30 May 2011,<sup>810</sup> and this decision was upheld by the Appeals Chamber on 30 August 2011.<sup>811</sup> Contrary to the Government's application, the Chamber was not convinced that investigations into the same six individuals for substantially the same conduct were currently ongoing in Kenya. The application by the Kenyan Government and

803 'Kenya lobbying African nations to support delaying ICC cases after postelection violence', *AP*, 19 January 2011, available at <<http://www.trurodaily.com/News/Canada%20-%20World/Society/2011-01-19/article-2133013/Kenya-lobbying-African-nations-to-support-delaying-ICC-cases-after-postelection-violence/1>>, last visited on 27 October 2011.

804 Resolution Assembly/AU/Dec.334(XVI), adopted at the sixteenth ordinary session, 30-31 January 2011, Addis Ababa, Ethiopia, para 6.

805 'Igad States back bid to defer ICC cases by one year', *The Standard*, 30 January 2011, available at <<http://www.standardmedia.co.ke/InsidePage.php?id=2000027907&cid=4>>, last visited on 27 October 2011.

806 'Raila disowns Kalonzo shuttle to block Hague', *Daily Nation*, 26 January 2011, available at <<http://www.nation.co.ke/News/politics/-/1064/1096540/-/7av5ho/-/index.html>>, last visited on 27 October 2011.

807 'Letter submitted by the ODM', *Capital FM*, 11 March 2011, available at <<http://www.capitalfm.co.ke/eblog/2011/03/14/petition-to-un-security-council-regarding-kenyan-cases-at-the-icc/>>, last visited on 27 October 2011.

808 'Ruto allies slam ODM letter to Security Council', *Capital News*, 14 March 2011, available at <<http://www.capitalfm.co.ke/news/2011/03/ruto-allies-slam-odm-letter-to-security-council/>>, last visited on 27 October 2011.

809 ICC-01/09-01/11-01 and ICC-01/09-02/11-01.

810 ICC-01/09-01/11-101 and ICC-01/09-02/11-96.

811 ICC-01/09-01/11-307 and ICC-01/09-02/11-342.

the Pre-Trial and Appeals Chamber decisions, rejecting the challenge are discussed in greater detail in the section on **Admissibility**, below.

The Kenyan Government has argued that developments in its domestic law, principally the adoption of a new constitution, now place it in a better position to try the ICC cases. On 27 August 2010, President Kibaki signed into law the New Constitution of Kenya, after it was overwhelmingly approved in a referendum on 4 August 2010.<sup>812</sup> The ceremony on 27 August marking the adoption of the New Constitution was attended by President Al’Bashir of Sudan, against whom there is an outstanding ICC Arrest Warrant.<sup>813</sup> The New Constitution provides for significant changes to Kenya’s political and judicial institutions and is intended to enable important reforms to the country’s governmental system. The reforms provided for under the New Constitution include, amongst others, the enactment of the Supreme Court Act, the appointment of Supreme Court Judges, the appointment of a new Chief Justice, a Deputy Chief Justice and a Director of Public Prosecutions, the enactment of the Vetting of Judges and Magistrates Act, the Judicial Services Law and the Constitution Implementation Law. However, according to a June 2011 report by the Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, in practise ‘there has been limited progress in some areas such as reforming the police, national cohesion and reconciliation, and the fight against impunity in general’.<sup>814</sup>

812 ‘Kenya President ratifies new constitution’, *BBC News*, 27 August 2010, available at <<http://www.bbc.co.uk/news/world-africa-11106558>>, last visited on 27 October 2011.

813 See *Gender Report Card 2010*, p 102-103.

814 ‘The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project’, *Review Report June 2011*, June 2011, para 3, available at <<http://www.dialoguekenya.org/docs/June2011ReviewReport.pdf>>, last visited on 27 October 2011.

ICC investigations have also met with legal barriers within the Kenyan justice system. The Office of the Prosecutor had indicated that they intended to question senior government officials in Kenya as part of their investigations. However, the senior government officials invited to testify by Prosecution investigators objected to being questioned; as such their statements are considered involuntary and must be taken before a judge. The ICC investigations with respect to these testimonies were therefore delayed while a process was put in place to facilitate the interviews. On 5 October 2010, Lady Justice Rawal of the Kenyan High Court was appointed to preside over the statement-taking,<sup>815</sup> and on 22 October President Kibaki officially signed into law the rules and regulations pertaining to taking statements from state officials. However, in December 2010, following the Article 58 application by the Prosecutor, nine persons to be questioned by the Office of the Prosecutor, allegedly senior security and government officials,<sup>816</sup> filed with the ICC Pre-Trial Chamber, objecting to being questioned and seeking certain assurances from the ICC. The applicants requested the Pre-Trial Chamber: (i) to provide assurances that they will not be prosecuted on the basis of the information they will voluntarily provide during the requested interviews; (ii) to issue a declaration that they cannot be compelled to testify; (iii) to issue an order suspending the process, pending their application before the Pre-Trial Chamber; (iv) to issue a request to the Kenyan authorities to suspend the evidence-taking pending their application; and (v) to issue a declaration that

815 ‘Judge Rawal picked to aid Hague probe’, *Daily Nation*, 5 October 2010, available at <<http://www.nation.co.ke/News/politics/Judge%20Rawal%20picked%20to%20aid%20Hague%20probe%20/-/1064/1026918/-/10150r0z/-/index.html/>>, last visited on 27 October 2011.

816 It has been reported that the request to the Pre-Trial Chamber concerns five provincial commissioners and four police chiefs. See ‘Judge puts off ICC process again’, *Capital News*, 18 January 2011, available at <<http://www.capitalfm.co.ke/news/2011/01/judge-puts-off-icc-process-again/>>, last visited on 27 October 2011.

any determination on the pending issues by the Pre-Trial Chamber supersedes the decisions of a municipal court.<sup>817</sup> On 31 January 2011, the Pre-Trial Chamber rejected their requests.<sup>818</sup>

It has also been reported that in January 2011, two businessmen<sup>819</sup> filed suit with the Kenyan High Court seeking to suspend the questioning of the senior government officials. Following their application and pending the 21 December 2010 application of the security chiefs before the ICC, on 18 January 2011, Justice Rawal suspended the taking of statements until 24 February 2011.<sup>820</sup> Following the issuance of the ICC Summonses to Appear for the six suspects on 8 March 2011, on 14 March the High Court rejected an application filed by the same two businessmen, requesting an order to block the Attorney General from receiving these Summonses as they argued these were unconstitutional.<sup>821</sup> At the time of writing this report, it remains unclear whether the statement-taking has commenced.

Following the Prosecutor's application for Summonses to Appear, Ruto,<sup>822</sup> Sang<sup>823</sup> and Ali<sup>824</sup>

817 ICC-01/09-33-Conf as cited in ICC-01/09-39, para 5.

818 ICC-01/09-39.

819 Jackson Mwangi and James Ndirangu Kuria filed the suit, arguing that the case is one of 'public interest' and that, by virtue of the New Constitution, any person can reinforce rights notwithstanding the absence of the affected party. The senior security and government officials have reiterated that they are not in any way linked to the filing with the Kenyan High Court. See 'Security chiefs "not party" to ICC statements suit', *The Standard*, 17 January 2011, available at <<http://www.standardmedia.co.ke/InsidePage.php?id=2000026966&cid=159&>>, last visited on 27 October 2011.

820 'Judge puts off ICC process again', *Capital News*, 18 January 2011, available at <<http://www.capitalfm.co.ke/news/2011/01/judge-puts-off-icc-process-again/>>, last visited on 27 October 2011.

821 'Court declines to block Ocampo summonses', *Capital News*, 14 March 2011, available at <<http://www.capitalfm.co.ke/news/2011/03/court-declines-to-block-ocampo-summonses/>>, last visited on 27 October 2011.

822 ICC-01/09-32-AnxA.

823 ICC-01/09-44-Anx.

824 ICC-01/09-37-AnxA.

have also tried to intervene in the Article 58 proceedings as amicus curiae, arguing that as suspects they should be accorded a chance to be heard prior to the issuance of Summonses to Appear. However, Judge Trendafilova, acting as Single Judge of Pre-Trial Chamber II, rejected these applications on the basis that the applicants did not have standing to intervene in Article 58 proceedings.<sup>825</sup> The Single Judge stressed that the proceedings under Article 58 are restricted to communications between the Pre-Trial Chamber and the Prosecutor only.

### Defence challenges to jurisdiction

With the exception of Muthaura, all of the suspects have challenged the ICC's jurisdiction. Relying heavily on the dissenting opinion by Judge Kaul to the 31 March 2010 decision authorising the Prosecutor to initiate his investigations, Ruto and Sang filed jointly on 30 August 2011<sup>826</sup> arguing that the definition of 'organisational policy' adopted by the majority of Pre-Trial Chamber II was too liberal and too wide. Ruto and Sang agreed with and fully adopted Judge Kaul's view that an 'organisation' under Article 7(2)(a) must have some elements of a state or state-like organisation and that it excludes groups, mobs and gangs without stability in membership and a certain degree of structure and level to set up a policy.<sup>827</sup> Furthermore, even if the Chamber was not persuaded by their submission on the law, Ruto and Sang asserted that there was insufficient evidence to support the Prosecution's assertion concerning the existence of an organisation that satisfied the requirements of Article 7.<sup>828</sup> In particular, according to Ruto and Sang, the Prosecution failed to provide evidence

825 ICC-01/09-35; ICC-01/09-42; ICC-01/09-47.

826 ICC-01/09-01/11-305.

827 ICC-01/09-01/11-305, para 32. For a detailed discussion of Judge Kaul's dissenting opinion to the 31 March 2010 decision see *Gender Report Card 2010*, p 127. For a discussion of his dissent to the 8 March 2011 decision, issuing the Summonses to Appear and putting forth similar arguments regarding jurisdiction, see the section on *OTP – Kenya*, above.

828 ICC-01/09-01/11-305, para 64.

substantiating any link, coordination or hierarchy between the different branches of the alleged 'network'.<sup>829</sup>

Kosgey also filed a jurisdictional challenge on 30 August 2011, asserting substantially similar arguments to Ruto and Sang, and also adopting the position set out in the dissenting opinion by Judge Kaul. Kosgey argued that the wide definition of 'organisation' adopted by the majority of Pre-Trial Chamber II risks extending ICC jurisdiction to 'any situation in which mass atrocities have taken place'.<sup>830</sup> Kosgey postulated that the inclusion of the requirement of 'organisational policy' in Article 7 of the Rome Statute stemmed from a desire to ensure that the threshold 'widespread or systematic' was not extended to include widespread national crimes, as well as to ensure the Statute upheld state sovereignty.<sup>831</sup> Kosgey argued that customary international law provides that organisations without state-like characteristics, such as *de facto* territorial control or formal hierarchy are not adjudicated under international law.<sup>832</sup> In addition, similar to the Ruto and Sang challenge to jurisdiction, Kosgey submitted that the Prosecution had not provided sufficient evidence to establish that an organisation existed within the meaning of Article 7(2)(a). In filing the jurisdictional challenge, Kosgey requested the Pre-Trial Chamber to consider the issue of jurisdiction anew, taking into account the argument that the proper definition of an 'organisation' is that provided by the dissenting opinion of Judge Kaul.

Kenyatta<sup>833</sup> and Ali<sup>834</sup> also filed challenges to jurisdiction on 19 September 2011, prior to the confirmation of charges hearing in that case. In line with the Ruto, Kosgey and Sang challenges to jurisdiction, Kenyatta argued

829 ICC-01/09-01/11-305, para 75.

830 ICC-01/09-01/11-306, para 4.

831 ICC-01/09-01/11-306, paras 50-51.

832 ICC-01/09-01/11-306, paras 62-64.

833 ICC-01/09-02/11-339.

834 ICC-01/09-02/11-338.

that the majority's interpretation of the chapeau elements of Article 7, in particular its interpretation of 'state or organisational policy' was incorrect and ran contrary to the intention of the drafters of the Rome Statute. Instead, Kenyatta postulated that the interpretation provided in the dissenting opinion of Judge Kaul, namely that an organisation must portray state-like characteristics, is correct. Kenyatta further stressed that even if the Pre-Trial Chamber was not convinced that an organisation under Article 7 must possess state-like characteristics, the ICC does not have jurisdiction because the Prosecutor failed to provide evidence substantiating any organisational policy to commit the alleged crimes.<sup>835</sup>

Ali pursued a slightly different argument on jurisdiction than the other Defence teams, asserting that the Prosecution not only failed to substantiate the requirements of Article 7, but also failed to meet the requisite elements of Article 25(3)(d), thereby depriving the Court of personal jurisdiction. He also argued that the alleged charges fail to meet the gravity threshold under Article 17(1)(d) of the Rome Statute.

First, Ali postulated that 'the Prosecution has not demonstrated any reasonable grounds to believe that General Ali, the Mungiki, Muthaura, Kenyatta, the Kenya Police, PNU businessmen and politicians, and pro-PNU youth were all a part of a single, cognisable, hierarchical structure featuring various levels of command and a division of duties in the command structure'.<sup>836</sup> In addition to failing to prove the existence of any organisation, Ali also argued that the Prosecution failed to demonstrate the existence of any organisational policy, and in particular, not one in which Ali was involved.

835 ICC-01/09-02/11-339, para 59.

836 ICC-01/09-02/11-338, para 23. It should be noted that at the confirmation stage of proceedings, the requisite standard of proof is substantial grounds to believe, as opposed to 'reasonable grounds to believe' as cited in Ali's jurisdictional challenge.



The second part of Ali's jurisdictional challenge related to personal jurisdiction, arguing that the Prosecution failed to substantiate its argument that Ali 'contributed' to the alleged crimes under Article 25(3)(d). More fundamentally, Ali argued that the Prosecution failed to give the Defence adequate notice of the mode of liability with which Ali was charged. Article 25(3)(d) covers the criminal responsibility of individuals who contribute 'in any other way ... to the commission or attempted commission of such a crime by a group of persons acting with a common purpose'. It provides that such contribution shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (ii) be made in the knowledge of the intention of the group to commit the crime. Ali argued that the Prosecution failed to specify the necessary sub-element of Article 25(3)(d) in the charges.

Third, Ali argued that the gravity threshold provided in Article 17(1)(d) constituted a requirement 'above and beyond' those of jurisdiction, and that this gravity threshold was not satisfied by the evidence provided by the Prosecution.<sup>837</sup> Ali postulated that the crimes alleged did not rise to the gravity threshold of Article 17(1)(d), nor did Ali fall within the category of 'those most responsible'.<sup>838</sup> Ali also argued that the Prosecution failed to discharge its duty to investigate exculpatory and incriminating evidence equally, contrary to the provisions of Article 54(1). Ultimately, Ali asserted that the alleged crimes 'were the product of transitory violence of the sort that has always fallen within the sovereign jurisdiction of the member states' and that as such the ICC lacks jurisdiction.<sup>839</sup>

At the time of writing this Report, no decisions had been handed down on any of the Defence challenges to jurisdiction.

837 ICC-01/09-02/11-338, para 56.

838 ICC-01/09-02/11-338, para 71.

839 ICC-01/09-02/11-338, para 85.

## Witness protection

Witness protection continues to be a significant issue in the Kenya Situation. In May 2011, the Office of the Prosecutor was in Kenya to discuss the issue of witness protection with the Kenyan authorities. In a statement on 29 May 2011, the Prosecutor asserted that the Government of Kenya's continuing non-cooperation and opposition to the ICC process is 'promoting a growing climate of fear that is intimidating potential witnesses and ultimately undermining national and international investigations'.<sup>840</sup> He had previously expressed his concern that both Muthaura and Kenyatta, following the issuance of Summonses to Appear, remained in their respective positions as Chair of the National Security Advisory Committee (Muthaura) and as member of the Witness Protection Advisory Board (Kenyatta). In addition, it has been reported in the Kenyan press that fourteen Prosecution witnesses, along with 56 members of their families, 'have been put on "life-time" protection and will not return home to Kenya after the trials'.<sup>841</sup> It is not possible to verify these numbers against official ICC data, as the ICC does not release figures about the number of witnesses who have been included in its Protection Programme or about witness relocations. Ruto has allegedly been in contact with some of these witnesses, causing them to recant their statements.<sup>842</sup> During the confirmation hearing in the case of Ruto *et al*, held from 1 to 8 September, the

840 'Statement of the Prosecutor on the Situation in Kenya', Prosecutor of the International Criminal Court, 29 May 2011, available at <<http://www.icc-cpi.int/NR/rdonlyres/FBD99010-563A-497E-95FD-B3BCDDB08D09/283377/StatementICCProsecutoronsituationinKenya1.pdf>>, last visited on 27 October 2011.

841 'Kenya: ICC Gives 14 Witnesses Lifetime Protection', *Nairobi Star*, 11 July 2011, available at <<http://allafrica.com/stories/201107120011.html>>, last visited on 27 October 2011.

842 'Prosecutor warns Kenyans against disobeying court', *The Washington Post*, 14 March 2011, available at <<http://www.washingtonpost.com/wp-dyn/content/article/2011/03/14/AR2011031401779.html>>, last visited on 27 October 2011.

Victims' Common Legal Representative Sureta Chana informed the Chamber on 8 September that two days earlier, a Kenyan Member of Parliament, Charles Keter (a member of the ODM), who had attended the confirmation hearings in The Hague, was heard on the radio station Kass FM, stating that the identity of anonymous prosecution witnesses was known and that these 'traitors' would 'face unspecified consequences'.<sup>843</sup> These protection issues are discussed in more detail in the section on **Protection**, below.

### *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*

In his 15 December 2010 application, the Prosecutor had sought charges against Ruto, Kosgey and Sang for four counts of crimes against humanity, namely: murder,<sup>844</sup> deportation or forcible transfer of population,<sup>845</sup> torture,<sup>846</sup> and persecution on political grounds.<sup>847</sup> The charges were all linked to acts committed in specific locations from 30 December 2007 until the end of January 2008, including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts. Having analysed the information submitted to it by the Prosecutor, the Chamber found that there were reasonable grounds to believe that Ruto, Kosgey and Sang established a network of perpetrators that had the capability to perform acts that infringed on 'basic human values' and that possessed the means to carry out such widespread and systematic attacks against the civilian population.<sup>848</sup> It also found that this network qualified as an 'organisation' within the meaning of Article 7(2)(a), and that there were reasonable grounds to believe that this network organised several preparatory meetings at which important issues crucial for the implementation of the policy were discussed.<sup>849</sup> As such, the Chamber concluded that the contextual elements for crimes against humanity were satisfied.

843 ICC-01/09-01/11-T-12-ENG, p 28 lines 2-6.

844 Article 7(1)(a).

845 Article 7(1)(d).

846 Article 7(1)(f).

847 Article 7(1)(h).

848 ICC-01/09-01/11-1, paras 22-24.

849 ICC-01/09-01/11-1, paras 27-28.

With regards to the specific charges sought by the Prosecutor, Pre-Trial Chamber II found that there were reasonable grounds to believe murder, deportation or forcible transfer of population and persecution as crimes against humanity were committed.<sup>850</sup> The Chamber was not satisfied that there were reasonable grounds to believe torture as a crime against humanity was committed.<sup>851</sup>

The Chamber found there were reasonable grounds to believe that Ruto and Kosgey were criminally responsible as indirect co-perpetrators under Article 25(3)(a). However, it did not find there were reasonable grounds to believe that Sang was criminally responsible as a principal perpetrator with Ruto and Kosgey. Noting its decision in Bemba that co-perpetration must go together with a notion of 'control over the crime',<sup>852</sup> the Chamber found that there were reasonable grounds to believe that Sang was criminally responsible under Article 25(3)(d).<sup>853</sup> Accordingly, Ruto, Kosgey and Sang are charged with murder as a crime against humanity, forcible transfer of population as a crime against humanity, and persecution<sup>854</sup> as a crime against humanity.<sup>855</sup>

Based on the Prosecutor's application, the Chamber was satisfied that there was no significant risk of flight, and that the three were unlikely not to cooperate if summoned to appear.<sup>856</sup> Accordingly, the Chamber was satisfied that issuing Summonses to Appear would ensure Ruto, Kosgey and Sang's appearance before the Court. The Chamber issued the Summonses, imposing several conditions on the suspects.<sup>857</sup> Should Ruto, Kosgey and Sang fail to appear or fail to comply with the conditions set by the Chamber, it reserved

850 ICC-01/09-01/11-1, paras 30-32.

851 ICC-01/09-01/11-1, para 33.

852 ICC-01/05-01/08-424.

853 ICC-01/09-01/11-1, paras 37-39.

854 The Chamber noted that acts of murder and forcible transfer of population were committed primarily on political grounds, on the basis of victims' perceived support for the PNU, thus constituting persecution.

855 ICC-01/09-01/11-1, para 57.

856 ICC-01/09-01/11-1, para 56.

857 The Summons conditions require the suspects to: refrain from having contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which Ruto, Kosgey and Sang have been summoned; refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence; refrain from committing crime(s) set forth in the Statute; and attend all required hearings at the ICC. ICC-01/09-01/11-1, p 23.

the right to replace the Summonses with arrest warrants. For further discussion of the conditions for the Summonses, please see the section on **Protection**, below.

On 15 August 2011, the Victims' Common Legal Representative Chana filed a request<sup>858</sup> with the Pre-Trial Chamber for authorisation to submit observations on specific issues of law and/or fact, relating to the exclusion of acts of destruction and/or burning of property in the charges against Ruto, Kosgey and Sang. She noted that the Prosecution's Document Containing the Charges and the Annex thereto, filed on 1 August,<sup>859</sup> both referred explicitly to evidence of destruction and burning of property but failed to expressly include such acts in the charge of persecution.<sup>860</sup> She stressed that almost all of the 327 victims accepted to participate in the case have suffered loss as a direct result of destruction and/or burning of property and that they all would seek reparations for this loss. In view of the fact that the evidence relied upon by the Prosecutor in support of the charges clearly included evidence of destruction and/or burning of property, the Legal Representative emphasised that 'it must be a matter of most serious concern that destruction and/or burning of property has not been clearly included in the charges proposed to be brought by the Prosecutor'.<sup>861</sup> She noted that these concerns about the Prosecution's failure to adequately base its charges on the evidence collected, related also to its failure to include charges based on evidence of infliction of injuries and looting.<sup>862</sup> She thus requested authorisation to submit observations on the following questions:

- whether acts of destruction and/or burning of property, infliction of injuries and looting can amount to persecution under Article 7(1)(h) of the Statute;
- whether acts of destruction and/or burning of property, infliction of injuries and looting can amount to other inhumane acts of a similar character to intentionally causing great suffering, or serious injury to body or mental or physical health under to Article 7(1)(k) of the Statute;

- whether under Article 61<sup>863</sup> the Pre-Trial Chamber has the power, on its own motion, on a motion of a party, or at the request of a victim's representative: (i) to confirm a charge additional to the charges specified by the Prosecutor where there is sufficient evidence to support an additional charge; (ii) when confirming a charge that has been specified by the Prosecutor, to confirm or clarify that the charge includes acts in addition to those specified by the Prosecutor; or (iii) to order, direct, request or invite the Prosecutor to add additional charges, or to include additional acts within the scope of an existing charge; and
- whether, if the PTC has these powers, such powers should be exercised.<sup>864</sup>

In a decision on 19 August 2011, Judge Trendafilova, acting as Single Judge of Pre-Trial Chamber II, rejected the request.<sup>865</sup> The Single Judge noted that the Pre-Trial Chamber did not have the authority to modify the charges brought by the Prosecutor or to confirm charges that were not brought against the suspects.<sup>866</sup> However, she noted that Article 61(7)(c)(ii) did permit the Chamber, on the basis of the confirmation hearing, to adjourn the hearing and request the Prosecutor to consider amending a charge. Judge Trendafilova found that, because the confirmation hearing had yet to take place, the request by the Legal Representative was premature and was therefore rejected.<sup>867</sup> The Single Judge stressed that this rejection was without prejudice to the Chamber entertaining the arguments put forth by the Legal Representative at a later stage in the proceedings.<sup>868</sup>

Following the end of the confirmation hearing on 8 September, on 16 September the Legal Representative filed a new request to submit observations on the above-listed questions.<sup>869</sup> She observed that, in addition to the references to evidence of destruction and/or burning of property in the DCC and Annex, in the course of the confirmation hearing, statements were made repeatedly referring to widespread acts of

858 ICC-01/09-01/11-263.

859 ICC-01/09-01/11-242 and ICC-01/09-01/11-242-AnxA.

860 ICC-01/09-01/11-263, para 11.

861 ICC-01/09-01/11-263, para 13.

862 ICC-01/09-01/11-263, para 14.

863 Article 61 addresses the procedures in preparation, for and during, the confirmation of charges hearing, and sets out the requirements for the confirmation of charges. It also provides that the Pre-Trial Chamber can adjourn the confirmation hearing and request the Prosecutor to submit additional evidence or amend a charge because the evidence submitted appears to establish a different crime.

864 ICC-01/09-01/11-263, para 15.

865 ICC-01/09-01/11-274.

866 ICC-01/09-01/11-274, para 7.

867 ICC-01/09-01/11-274, para 9.

868 ICC-01/09-01/11-274, para 10.

869 ICC-01/09-01/11-333.

destruction of property and looting, as well as to the infliction of injuries.<sup>870</sup> She stressed that even Defence witnesses spoke about such widespread acts taking place. Fundamentally, she emphasised that allegations of acts of burning and destruction of property as well as looting featured prominently and centrally in the presentation of the Prosecution's case.<sup>871</sup>

Legal Representative Chana argued that in Article 61(7)(c)(ii)<sup>872</sup> 'different' included the sense of 'additional', and that this allowed the Pre-Trial Chamber to request the Prosecutor to amend the charge 'to include additional charges or to include additional criminal conduct within an existing charge'.<sup>873</sup> She stressed that the victims are concerned that acts of destruction/ burning of property, looting or infliction of property were not necessarily excluded in the charges, but rather that such acts were not clearly and expressly included therein.<sup>874</sup> The Legal Representative thus submitted that the Pre-Trial Chamber should exercise its powers under Article 61(7)(c)(ii) to expressly include acts of destruction of property and looting in Count 5 and 6 (persecution), as well as to add counts of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health (Article 7(1)(k)), regarding acts of destruction of property, looting and the infliction of personal injuries to the charges against Ruto, Kosgey and Sang.<sup>875</sup>

On 22 September 2011, the Pre-Trial Chamber granted the request and directed the Legal Representative to include her observations in her final written submissions.<sup>876</sup> These were filed on 30 September 2011.<sup>877</sup> In her final written submissions, Common Legal Representative Chana reiterated her previous arguments, regarding the inclusion of acts of destruction of property, looting and the infliction of personal injury within the charges and the Chamber's powers under Article 61(7)(c)(ii). Referring to the Appeals Chamber decision in the Lubanga case concerning the applicability of Regulation 55, she stressed 'there is no reason in principle why the Pre-Trial Chamber should have no corresponding power at the pre-trial stage'.<sup>878</sup>

870 ICC-01/09-01/11-333, para 12.

871 ICC-01/09-01/11-333, paras 13-15.

872 Article 61(7)(c)(ii) provides that the Pre-Trial Chamber may 'adjourn the [confirmation of charges] hearing and request the Prosecutor to consider amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court'.

873 ICC-01/09-01/11-333, paras 18, 22.

874 ICC-01/09-01/11-333, para 19.

875 ICC-01/09-01/11-333, para 27.

876 ICC-01/09-01/11-338.

877 ICC-01/09-01/11-344.

878 ICC-01/09-01/11-344, para 20.

Similarly, in his opening statement at the start of the confirmation of charges hearing on 21 September 2011, Victims' Common Legal Representative Morris Anyah, representing participating victims in the second case in the Kenya Situation, spoke about the legal characterisation of the facts. He stated that 'at the end of these hearings as you listen to the evidence an issue may arise if the Prosecution is able to sustain its burden and to establish the facts alleged, which include allegations about destruction of property, whether or not acts of burning and destruction of property may be charged as a crime against humanity of either persecution or forcible transfer of population'.<sup>879</sup> He stressed, however, that this issue would become applicable only at the end of the confirmation hearings. As of the time of writing this Report, submissions on the legal characterisation of the facts have not yet been filed by the Legal Representative in the public record of the Muthaura *et al* case.

879 ICC-01/09-02/11-T-4-ENG, p 68 lines 13-18.

### *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, Mohammed Hussein Ali*

In his 15 December 2010 application, the Prosecutor sought charges against Muthaura, Kenyatta and Ali for five counts of crimes against humanity, namely: murder;<sup>880</sup> deportation or forcible transfer of population;<sup>881</sup> rape and other forms of sexual violence;<sup>882</sup> other inhumane acts;<sup>883</sup> and persecution on political grounds.<sup>884</sup> In his application, the Prosecutor linked the crimes to attacks in specific locations, in particular: Naivasha, Nakuru, Kisumu and Kibera. Having analysed the information submitted to it by the Prosecutor, in its 8 March 2011 decision issuing Summonses to Appear for Muthaura, Kenyatta and Ali, Pre-Trial Chamber II found there were reasonable grounds to believe that murder and forcible transfer of population as crimes against humanity were committed. The Chamber also found there were reasonable grounds to believe that rape as a crime against humanity was committed as part of the Nakuru attack. However, it found that the Prosecutor failed to provide any evidence substantiating the claim that rape was committed as part of the attack in Naivasha.<sup>885</sup> The Chamber also found there were reasonable grounds to believe that persecution as a crime against humanity was committed.<sup>886</sup>

The charge of other forms of sexual violence in the Prosecutor's application for Summonses to Appear was based on acts of forcible circumcision of Luo men. In a worrisome interpretation, the Chamber did not consider these acts to be of a 'sexual nature', and found that they should in fact be classified as 'other inhumane acts'.<sup>887</sup> This issue is discussed in more detail, below.

Furthermore, with regard to the alleged inactivity of the Kenyan Police Forces during the attack on Nakuru and Naivasha, the Chamber noted, without elaborating on or providing any detailed legal reasoning for its findings, that the Prosecutor submitted that these acts were committed pursuant to an 'organisational' policy, without alleging the existence of 'a State policy by abstention'.<sup>888</sup> Similarly, although it found there were reasonable grounds to believe deaths, injuries

and rapes were committed in Kisumu and Kibera, the Chamber found that the Prosecutor 'failed to provide an accurate factual and legal submission ... to examine whether the acts of violence were part of an attack pursuant to or in furtherance of a State policy'.<sup>889</sup> While the Chamber may simply have intended to highlight the defects in the Prosecution's pleading, due to the lack of detailed discussion or legal reasoning in the decision as it was drafted, the findings of the Chamber could be construed as adopting a restrictive interpretation of the background requirements for crimes against humanity, essentially holding that, in order to find state actors responsible for crimes against humanity, the crimes must be committed pursuant to or in furtherance of a state plan or policy, rather than an organisation plan or policy. The implications of this are not immediately obvious but are potentially very far-reaching. If a general in the national armed forces of a country were to launch a coup against the government by means of a widespread or systematic attack against a civilian population, this would ordinarily give rise to responsibility for crimes against humanity committed pursuant to an organisational plan or policy (namely installing the military general as the new head of state). Applying the logic of the Pre-Trial Chamber to this hypothetical situation, as both the military general and the troops under his command are considered to be state actors, the Prosecution would have to provide evidence of a plan or policy, explicitly or by abstention, on the part of the state (namely the government being targeted by the coup) to commit the crimes against humanity in question in order to hold the general or troops criminally responsible.

In addition, the Chamber found that the Prosecutor failed to provide material to establish that there were reasonable grounds to believe that the events in Kisumu and/or Kibera could be attributed to Muthaura, Kenyatta and/or Ali.<sup>890</sup> The Chamber thus geographically limited the charges to Nakuru and Naivasha only. Following the Chamber's interpretation of the *chapeau* requirements of crimes against humanity as set out in its 8 March decision issuing Summonses for all six individuals, organisational actors cannot commit crimes according to a state policy, nor can state actors commit acts pursuant to an organisational policy. This reading of Article 7 of the Rome Statute potentially removes a whole range of acts from the Court's jurisdiction, seeming to conflict with the intention of the drafters of the Rome Statute. It also appears to contradict the literal significance of the wording of Article 7(2)(a), which states that crimes against humanity involve the commission of

880 Article 7(1)(a).

881 Article 7(1)(d).

882 Article 7(1)(g).

883 Article 7(1)(k).

884 Article 7(1)(h).

885 ICC-01/09-02/11-1, para 26.

886 ICC-01/09-02/11-1, para 28.

887 ICC-01/09-02/11-1, para 27.

888 ICC-01/09-02/11-1, para 24.

889 ICC-01/09-02/11-1, para 31.

890 ICC-01/09-02/11-1, para 32.

acts against any civilian population ‘pursuant to or in furtherance of a State or organisational policy to commit such attack’ (emphasis added).

The Chamber found that there were reasonable grounds to believe that Kenyatta and Muthaura were criminally responsible as indirect co-perpetrators under Article 25(3)(a) and that Ali contributed ‘in any other way’ under Article 25(3)(d).<sup>891</sup>

Accordingly, the Chamber issued Summonses to Appear for Muthaura, Kenyatta and Ali for the following charges:

- Murder as a crime against humanity, but only with respect to the murder committed in Nakuru and Naivasha;
- Forcible transfer of population as a crime against humanity, but only with respect to the forcible transfer committed in Nakuru and Naivasha;
- Rape as a crime against humanity, but only with respect to rape committed in Nakuru;
- Other inhumane acts as crimes against humanity, but only with respect to the acts committed in Nakuru and Naivasha; and,
- Persecution as a crime against humanity, but only with respect to those acts committed in Nakuru and Naivasha.<sup>892</sup>

The Chamber declined to issue Summonses to Appear for the alleged crimes committed in Kisumu and Kibera.

Satisfied that the issuance of Arrest Warrants was unnecessary, and that issuing summonses instead was sufficient to ensure their appearance before the Court, the Chamber issued the Summonses with conditions identical to the Ruto, Kosgey and Sang conditions, and reserved its right to replace them with arrest warrants should Muthaura, Kenyatta and Ali fail to comply with these conditions. For further information on the conditions for the Summonses, see the section on **Protection**, below.

On 14 March 2011, the Prosecutor sought leave to appeal two issues in the Pre-Trial Chamber’s decision issuing Summonses to Appear for Muthaura, Kenyatta and Ali. The first issue related to the Chamber’s interpretation of the organisational requirement of crimes against humanity. The other issue related to the Chamber’s finding that forcible circumcision of adult males does not constitute ‘other forms of sexual violence’.<sup>893</sup> On 1 April 2011,<sup>894</sup> Single Judge

Trendafilova rejected the Prosecutor’s request for leave to appeal on the grounds that neither issue constituted an ‘appealable issue’. With regards to the crime of forcible circumcision, the Single Judge noted, however, that this does not preclude the Prosecutor from bringing charges of other forms of sexual violence at a later point in the proceedings.<sup>895</sup> Pursuant to Article 61(4), the Prosecutor may amend or withdraw charges prior to the confirmation of charges hearing. In the Document Containing the Charges (DCC) filed on 19 August 2011,<sup>896</sup> the Prosecutor indeed again charged Muthaura, Kenyatta and Ali with rape and other forms of sexual violence as crimes against humanity.

### *Reclassification of charges of other forms of sexual violence*

The Pre-Trial Chamber’s statement that it considered forced circumcision not to be an act of a sexual nature, without further elaborating on its finding,<sup>897</sup> and its denial of appeal on this point, represents a problematic precedent for the ICC’s interpretation of the law regarding gender-based crimes. In an interview with IRIN on 25 April 2011, Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice expressed concern about the Chamber’s reclassification of charges of forcible circumcision:

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 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.<sup>898</sup>

895 ICC-01/09-02/11-27, para 29.

896 ICC-01/09-02/11-257-AnxA.

897 ICC-01/09-02/11-1, para 27. In a single paragraph, the Chamber stated: ‘In the Chamber’s view, however, the acts of forcible circumcision cannot be considered acts of a “sexual nature” as required by the Elements of Crimes but are to be more properly qualified as “other inhumane acts” within the meaning of Article 7(1)(k) of the Statute. The Chamber reaches this conclusion in light of the serious injury to body that the forcible circumcision causes and in view of its character, similar to other underlying acts constituting crimes against humanity.’

898 ‘Kenya: Plea to ICC over forced male circumcision’, *IRIN News*, 25 April 2011, available at <<http://www.irinnews.org/report.aspx?ReportId=92564>>, last visited on 27 October 2011.

891 ICC-01/09-02/11-1, paras 45-51.

892 ICC-01/09-02/11-1, para 56.

893 ICC-01/09-02/11-2-Red, para 5.

894 ICC-01/09-02/11-27.

Although the Chamber, in reclassifying acts of forcible circumcision as other inhumane acts, overlooked this broader context of the crimes, the Office of 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. The Women's Initiatives has called on the Prosecutor to properly argue the case for charging forced circumcision as a form of sexual violence.

Two of the three Judges of Pre-Trial Chamber II, Judge Trendafilova and Judge Kaul, have previously contributed to jurisprudence on the crime of other forms of sexual violence, holding in the Bemba case that forced nudity did not constitute this crime on the grounds that it was not of comparable gravity to the other crimes enumerated under Article 7(1)(g) of the Rome Statute.<sup>899</sup>

## Confirmation of charges hearings

On 3 June 2011, the Chamber requested observations from all parties and participants in both cases on the possibility and feasibility of conducting the confirmation of charges hearings in Kenya, rather than at the seat of the Court in The Hague.<sup>900</sup> As described in greater detail in the **Protection** section, in a decision on 29 June 2011 in the Ruto *et al* case, and in a decision on 19 July 2011 in the Muthaura *et al* case, in preparation for the confirmation hearings, the Single Judge indicated that the Chamber would not consider further the option of holding confirmation hearings in Kenya because of security concerns.<sup>901</sup>

In preparation for the confirmation hearing, the document containing the charges in the case of Ruto *et al* was filed by the Prosecution on 1 August 2011,<sup>902</sup> and an amended version, providing small corrections, on 15 August 2011.<sup>903</sup> The document containing the charges in the case of Muthaura *et al* was filed on 19 August 2011,<sup>904</sup> and an amended version, providing small corrections, on 2 September 2011.<sup>905</sup>

The confirmation of charges hearing in the case of Ruto *et al* was held before Pre-Trial Chamber II from 1 September – 8 September 2011.<sup>906</sup> The Chamber authorised 327 victims – 146 female and 181 male victims – to participate in the proceedings, represented by Common Legal Representative Sureta Chana. The Pre-Trial Chamber had not handed down a decision on the confirmation of charges as of the writing of this Report.

In its opening statement, the Prosecution argued that the evidence presented by the Prosecution should lead the Pre-Trial Chamber to confirm the charges against Ruto, Kosgey and Sang and to commit them to trial. The Victims' Legal Representative explained that the victims 'have a longing to see justice done in relation to what happened to them and to obtain reparation for their losses.'<sup>907</sup> With the continuing reign of impunity in Kenya, the victims expressed the belief that the ICC process finally presented them with some measure of hope. The three Defence

900 ICC-01/09-01/11-106; ICC-01/09-02/11-103.

901 ICC-01/09-01/11-153, para 14; ICC-01/09-02/11-181, para 14.

902 ICC-01/09-01/11-242-AnxA.

903 ICC-01/09-01/11-261.

904 ICC-01/09-02/11-257-AnxA.

905 ICC-01/09-02/11-280.

906 Transcripts of the hearings: ICC-01/09-01/11-T-5-ENG; ICC-01/09-01/11-T-6-Red-ENG; ICC-01/09-01/11-T-7-Red-ENG; ICC-01/09-01/11-T-8-Red-ENG; ICC-01/09-01/11-T-9-Red-ENG; ICC-01/09-01/11-T-10-Red-ENG; ICC-01/09-01/11-T-11-Red-ENG; and ICC-01/09-01/11-T-12-ENG.

907 ICC-01/09-01/11-T-5-ENG, p 79 lines 17-19.

899 ICC-01/05-01/08-14-tENG, para 40.

teams made similar statements arguing that the Prosecution's investigations were flawed and that it failed to investigate incriminating and exonerating material equally. David Hooper QC, principal counsel for the Ruto Defence, stressed that this could amount to an abuse of process by the Prosecution and that the Defence might at a later point in time request a stay of proceedings on the basis thereof. They all stressed that neither Ruto, nor Kosgey, nor Sang were in any way involved in the post-election violence.

In addition to the opening statements by the parties and participants, both Ruto and Sang made an unsworn statement in their own defence. In his statement, Ruto described himself as a well-respected politician, a peace-maker and someone who has been living with many different tribes for most of his life. He emphasised in particular the cosmopolitan nature of his life, thereby arguing that the person standing before the Court, was very different than that being investigated by the Prosecutor.<sup>908</sup> Similarly, in his statement, Sang stated that he had not been involved in the post-election violence and underlined that his radio programme actually provided the different tribes with a platform to debate the issues to the benefit of his listeners.<sup>909</sup>

The confirmation of charges hearing in the case of Muthaura *et al* was held before Pre-Trial Chamber II from 12 September – 5 October 2011. A total of 233 victims – 139 female victims and 94 male victims – were authorised to participate in the confirmation hearing; they were represented by one Common Legal Representative, Morris Anyah. At the time of writing of this Report, no decision had been handed down by the Pre-Trial Chamber on the confirmation of charges.

In its opening statement, the Prosecution argued that the evidence presented should lead the Pre-Trial Chamber to confirm the charges against Muthaura, Kenyatta and Ali, and to commit them to trial. The Victims' Legal Representative explained that his clients 'are determined to see that justice is done. All of them have had their lives changed forever and they will not be silenced during the course of these proceedings.'<sup>910</sup> He indicated that for the victims, the ICC process was a search for truth: 'they want a full airing of the facts in this case.'<sup>911</sup> The Victims' Legal Representative also stressed that many of his clients expressed security concerns about their situation and their participation in the proceedings given that their communities often do not understand the difference between witnesses and victims at the ICC.<sup>912</sup>

908 ICC-01/09-01/11-T-5-ENG, p 97 lines 10-12.

909 ICC-01/09-01/11-T-5-ENG, p 114 lines 14-17.

910 ICC-01/09-02/11-T-4-ENG, p 60 line 25; p 61 lines 1-2.

911 ICC-01/09-02/11-T-4-ENG, p 62 lines 15-19.

912 ICC-01/09-02/11-T-4-ENG, p 66 lines 7-20.

In their opening statements, the three Defence teams for Muthaura, Kenyatta and Ali all stressed that there was no reason for their clients to be suspects before the ICC, and that the Pre-Trial Chamber should not confirm any of the charges against them. Further, the Defence for Muthaura argued that the Prosecution's investigations contained 'profound, concerning, and systemic failings'.<sup>913</sup> In particular, the Defence stressed that the Prosecution failed to question Muthaura about his alleged responsibility and had not given him a chance to present evidence in his defence prior to the issuance of the Summonses to Appear. The Defence for Kenyatta placed all responsibility for the post-election violence with Prime Minister Odinga, stressing that no-one else was responsible for the violence. The Ali Defence portrayed Ali as 'a dedicated public servant with a lifelong career of devoted commitment to his country and to his fellow man' and that during the post-election violence 'he worked tirelessly' to enforce the rule of law.<sup>914</sup>

In addition to the opening statements by the parties and participants, Muthaura made an unsworn statement in his own defence. In his statement, Muthaura described himself as an advocate for human rights and the rule of law, outlining the various positions he has held within different UN and State institutions.<sup>915</sup> He emphasised that he is 'a person of integrity', and that he was not in any way involved in the post-election violence.<sup>916</sup> He appealed to the Court 'with all due respect and all humility [...] to separate facts from lies and ensure that justice is applied to me'.<sup>917</sup>

913 ICC-01/09-02/11-T-4-ENG, p 79 line 22.

914 ICC-01/09-02/11-T-4-ENG, p 107 lines 22-25; p 108 line 1.

915 ICC-01/09-02/11-T-4-ENG, p 70-72.

916 ICC-01/09-02/11-T-4-ENG, p 72 line 15.

917 ICC-01/09-02/11-T-4-ENG, p 76 lines 4-6.



## Libya

On 26 February 2011, following the violent repression of the demonstrations that began on 15 February 2011, demanding an end to the regime and dictatorship of Muammar Gaddafi (Gaddafi Regime) in the Libyan Arab Jamahiriya (Libya),<sup>918</sup> the UN Security Council, acting under Chapter VII of the UN Charter, unanimously decided to refer the Situation in Libya to the ICC Prosecutor.<sup>919</sup> The referral was made pursuant to Article 13(b) of the Rome Statute, which permits the Security Council to refer a situation to the ICC Prosecutor where genocide, crimes against humanity and/or war crimes ‘appear to have been committed’ in that state. Security Council Resolution 1970 gave the ICC jurisdiction over the Situation in Libya, which is not a State

918 The Libya referral by the Security Council was issued 11 days after the first report of alleged unlawful attacks by state security forces of the Gaddafi Regime on anti-government protestors. Prior to the start of the demonstrations, on 15 January 2011, Gaddafi had appeared on television warning the Libyan population against following in the footsteps of neighbouring Tunisia and Egypt by staging protests and demonstrations. After mass demonstrations commenced regardless, the Gaddafi Regime sent messages to all mobile phones in the Libyan system warning citizens against partaking in demonstrations. Saif Al-Islam Gaddafi began making public appearances on the Libyan state television, refusing to recognise the Libyan populations’ demands, and blaming the unrest on foreign agents, while threatening the country with civil war, see ‘Gaddafi’s son in civil war warning’, *Al Jazeera English*, 21 February 2011, available at <<http://english.aljazeera.net/news/africa/2011/02/2011220232725966251.html>>, last visited on 27 October 2011.

919 Resolution 1970, UNSC, 6491<sup>st</sup> meeting, S/Res/1970 (2011), 26 February 2011. Along with the referral, Resolution 1970 imposed an arms embargo, froze assets and imposed a travel ban on Gaddafi, his family members and close aides. Significantly, paragraph six exempts nationals, current or former officials or personnel from a state other than Libya which is not a state party to the Rome Statute from the jurisdiction of the ICC, unless the exemption is expressly waived. Another limitation is set forth in paragraph 8, which underscores that none of the expenses incurred in connection with the referral, the subsequent investigation, or potential prosecutions shall be borne by the United Nations.

Party to the Rome Statute. The Libya referral is the second referral of a Situation to the ICC Prosecutor by the Security Council; the first was the referral of the Situation in Darfur in March 2005.<sup>920</sup>

On 25 February 2011, one day before the UNSC referral, the UN Human Rights Council (UNHRC) had decided to dispatch a Commission of Inquiry to Libya and recommended to the UN General Assembly (UNGA) to suspend Libya’s membership from the UNHRC.<sup>921</sup> On 1 March 2011, the UNGA suspended Libya’s membership on the UNHRC.<sup>922</sup>

On 28 February 2011, the Women’s Initiatives for Gender Justice issued a statement concerning the referral of the Situation in Libya.<sup>923</sup> In the Statement, the Women’s Initiatives welcomed the Resolution ‘as a positive signal that the Security Council will not accept gross and systemic violations of human rights in Libya and that they believe Colonel Gaddafi and others alleged to have ordered or committed these acts should be held accountable’. The Women’s Initiatives also urged the international community not to leave behind other countries and territories where people are similarly affected by violence such as Chechnya, Afghanistan, Burma and Palestine.<sup>924</sup>

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

921 ‘UN Human Rights Council recommends suspension of Libya’, *News and Events on the UN OHCHR website*, available at <<http://www.ohchr.org/EN/NewsEvents/Pages/HRCSpecialSessionLibya.aspx>>, last visited on 27 October 2011.

922 ‘UN Suspends Libya From Human Rights Council’, *The Wall Street Journal*, 2 March 2011, available at <<http://online.wsj.com/article/SB10001424052748703559604576174843798774416.html>>, last visited on 27 October 2011; ‘General Assembly Suspends Libya From Human Rights Council’, *UN website*, available at <<http://www.un.org/News/Press/docs/2011/ga11050.doc.htm>>, last visited on 27 October 2011.

923 Women’s Initiatives for Gender Justice, ‘Statement by the Women’s Initiatives for Gender Justice on the Referral of the Situation in Libya to the International Criminal Court’, February 2011, available at <<http://www.iccwomen.org/documents/Press-Statement-by-Womens-Initiatives-on-Libya-Referral.pdf>>.

924 The Women’s Initiatives continues to monitor the events in Libya, including possible human rights violations committed by all parties.

On 3 March 2011, the Prosecutor held a press conference in The Hague, announcing that he was opening an investigation into allegations of crimes against humanity in the Situation in Libya.<sup>925</sup> The Prosecutor identified as potential suspects authorities with control over the security forces, such as Muammar Gaddafi and his inner circle, including some of his sons, as well as other persons with *de facto* and formal authority.<sup>926</sup> The Prosecutor stated that if forces under their command and control commit crimes, these authorities could be held criminally responsible under the Rome Statute. He also reiterated the Court's impartiality, indicating that the actions of opposition forces would also be closely examined during the investigation.<sup>927</sup> On 4 March 2011, the Situation in Libya was assigned to Pre-Trial Chamber I, composed of Presiding Judge Cuno Tarfusser (Italy), Judge Sylvia Steiner (Brazil), and Judge Sanji Mmasenono Monageng (Botswana).<sup>928</sup>

On 5 March 2011, the National Transitional Council (NTC) announced its official establishment in the city of Benghazi and stated its aim to relocate its headquarters to Tripoli. The NTC, which described itself as being born out of the revolutionary movement of 15 February 2011, set up local councils in various cities in Libya, and then decided to create the national council.<sup>929</sup> The NTC stated on its official website that it was 'strongly committed' to the democratic process and that it would be working

only for an interim period, until a freely-elected government had been established.<sup>930</sup>

On 17 March 2011, the Security Council issued Resolution 1973, approving a no-fly zone over Libya, and authorising 'all necessary measures' to protect civilians while 'excluding a foreign occupation force of any form on any part of Libyan territory'.<sup>931</sup> This was agreed upon by a vote of ten in favour with five abstentions.<sup>932</sup> On 24 March 2011, an 'unprecedented coalition of [North Atlantic Treaty Organisation (NATO)] Allies and non-NATO contributors' began to intervene in Libya, stating its aim as protecting civilians and enforcing the arms embargo.<sup>933</sup> Following the success of the African Union in getting Gaddafi to agree to negotiate, a delegation led by South African President Jacob Zuma made a series of visits to Tripoli and the rebel stronghold of Benghazi in an attempt to broker peace.<sup>934</sup> The mediation attempts were unsuccessful, however, as Gaddafi would agree only to a ceasefire but would not step down, and the ceasefire was therefore rejected by the rebel forces.<sup>935</sup>

925 Women's Initiatives for Gender Justice's informal summary of the Press Conference of the Office of the Prosecutor of 3 March 2011.

926 Women's Initiatives for Gender Justice's informal summary of the Press Conference of the Office of the Prosecutor of 3 March 2011.

927 Women's Initiatives for Gender Justice's informal summary of the Press Conference of the Office of the Prosecutor of 3 March 2011.

928 ICC-01/11-1.

929 *Transitional National Council website*, available at <<http://www.ntclibya.com/InnerPage.aspx?SSID=32&ParentID=3&LangID=1>>, last visited on 30 October 2011.

930 'Q&A, *Transitional National Council website*, available at <<http://www.ntclibya.com>>, last visited on 27 October 2011.

931 Resolution 1973, UNSC, 6498th meeting, S/Res/1973 (2011), 17 March 2011, para 4.

932 Brazil, China, Germany, India and the Russian Federation abstained. Following the death of Gaddafi, the Security Council passed another resolution terminating the provisions of Resolution 1973 and lifting the no-fly zone as of 31 October 2011. See Resolution 2016, UNSC, 6640th meeting, S/Res/2016 (2011), 27 October 2011.

933 'NATO and Libya', *North Atlantic Treaty Organization*, last updated on 22 September 2011, available at <<http://www.nato.int/cps/en/natolive/71679.htm>>, last visited on 27 October 2011.

934 'Can African Union broker a Libya peace plan?', *CNN*, 11 April 2011, available at <[http://articles.cnn.com/2011-04-11/world/libya.war.african.union\\_1\\_moammar-gadhafi-african-union-arab-league?\\_s=PM:WORLD](http://articles.cnn.com/2011-04-11/world/libya.war.african.union_1_moammar-gadhafi-african-union-arab-league?_s=PM:WORLD)>, last visited on 30 October 2011.

935 'Libya: Zuma says Gaddafi will not quit', *BBC News*, 31 May 2011, available at <<http://www.bbc.co.uk/news/world-africa-13597702>>, last visited on 17 November 2011.

On 16 May 2011, the ICC Prosecutor applied for Arrest Warrants against Muammar Mohammed Abu Minyar Gaddafi (Gaddafi), his son Saif Al-Islam Gaddafi (Saif Al-Islam) and his brother-in-law Abdullah Al-Senussi (Al-Senussi).<sup>936</sup> On 27 June 2011, Pre-Trial Chamber I decided to issue Arrest Warrants against Gaddafi, Saif Al-Islam and Al-Senussi for crimes against humanity.<sup>937</sup> The Prosecutor's application and the decision issuing the Arrest Warrants are discussed in detail, below.

Despite not including charges for rape and other forms of sexual violence in his application for Arrest Warrants, the Prosecutor has made numerous public statements about rape. On 17 May 2011, he told reporters that 'there's some information with Viagra. So, it's like a machete, [...] It's new. Viagra is a tool of massive rape. So we are investigating.'<sup>938</sup> He confirmed that the investigations into allegations of rape were ongoing, but that it was difficult to know how widespread the occurrence of rape was.<sup>939</sup> On 8 June 2011, the Prosecutor was interviewed by the BBC, and reiterated that there was evidence that Gaddafi ordered military agents to punish women with rape in order to spread terror.<sup>940</sup> The Prosecutor again said that some witnesses had confirmed that the Gaddafi Regime had bought containers of Viagra-type drugs to carry out the

policy and to 'enhance the possibility of rape'.<sup>941</sup> He indicated that the charge of rape might be added to the case following the issuance of Arrest Warrants.

On 29 June 2011, the Prosecutor and the Head of the Executive Council of the Interim National Council (INC) in Libya, Mahmoud Jibril, met in The Hague.<sup>942</sup> The Prosecutor stressed the importance of implementing Security Council Resolution 1970 and executing the Arrest Warrants against Gaddafi, Al-Islam and Al-Senussi. The arrest of Saif Al-Islam by the NTC was widely reported in August 2011, and on 22 August the Prosecutor publicly confirmed that his transfer to The Hague was being discussed.<sup>943</sup> However, on 23 August Saif Al-Islam made a public appearance in Tripoli surrounded by supporters, and reportedly said 'screw the criminal court' when asked about the ICC arrest warrants.<sup>944</sup> The ICC then retracted the Prosecutor's prior statements and said that it had never received confirmation of his arrest.<sup>945</sup>

936 ICC-01/11-4-RED.

937 ICC-01/11-12; ICC-01/11-13; ICC-01/11-14; and ICC-01/11-15.

938 'ICC to investigate reports of Viagra-fueled gang-rapes in Libya', *CNN*, 17 May 2011, available at <[http://articles.cnn.com/2011-05-17/world/libya.rapes.icc\\_1\\_rapes-viagra-pills-libyan-leader-moammar-gadhafi?s=PM:WORLD](http://articles.cnn.com/2011-05-17/world/libya.rapes.icc_1_rapes-viagra-pills-libyan-leader-moammar-gadhafi?s=PM:WORLD)>, last visited on 2 November 2011.

939 'Libya: Gaddafi investigated over use of rape as weapon', *BBC News*, 8 June 2011, available at <<http://www.bbc.co.uk/news/world-africa-13705854>>, last visited on 27 October 2011.

940 'Libya: Gaddafi investigated over use of rape as weapon', *BBC News*, 8 June 2011, available at <<http://www.bbc.co.uk/news/world-africa-13705854>>, last visited on 27 October 2011.

941 'Libya: Gaddafi investigated over use of rape as weapon', *BBC News*, 8 June 2011, available at <<http://www.bbc.co.uk/news/world-africa-13705854>>, last visited on 27 October 2011.

942 'Head of the Executive Committee of the INC-Libya Mahmoud Jibril meets with the ICC Prosecutor', *Press Release ICC Website*, available at <[http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/head%20of%20the%20executive%20committee%20of%20the%20inc\\_libya%20mahmoud%20jibril%20meets%20with%20the%20icc%20prosecutor](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/head%20of%20the%20executive%20committee%20of%20the%20inc_libya%20mahmoud%20jibril%20meets%20with%20the%20icc%20prosecutor)>, last visited on 27 October 2011.

943 'ICC confirms that Saif Al-Islam Gaddafi has been arrested in Libya', *Hague Justice Portal*, 22 August 2011, available at <<http://www.haguejusticeportal.net/eCache/DEF/12/892.TGFuZz1FTg.html>>, last visited on 17 November 2011.

944 'Gaddafi's son Saif al-Islam is free', *The Guardian*, 23 August 2011, available at <<http://www.guardian.co.uk/world/2011/aug/23/saif-al-islam-gaddafi-son-free>>, last visited on 17 November 2011.

945 'After public appearance, ICC says Saif al-Islam's "arrest" was never confirmed', *Al Arabiya News*, 23 August 2011, available at <<http://www.alarabiya.net/articles/2011/08/23/163611.html>>, last visited on 17 November 2011. The ICC's public statements regarding the reported arrest of Saif Al-Islam are no longer publicly available on the ICC's website, as of 17 November 2011.

On 8 September 2011, the Prosecutor requested INTERPOL to issue a Red Notice to arrest Gaddafi, Saif Al-Islam and Al-Senussi.<sup>946</sup> The Red Notice seeks the arrest or provisional arrest of wanted persons with a view to extradition based on an arrest warrant or a court decision, but is not an international arrest warrant itself. INTERPOL will assist national police forces in identifying or locating the persons wanted by national jurisdictions or international criminal tribunals with a view to their arrest and extradition. These Red Notices allow the warrant to be circulated worldwide with the request that the wanted person be arrested with a view to extradition.<sup>947</sup>

On 15 September 2011, British Prime Minister David Cameron and French President Nicolas Sarkozy visited Libya and met with NTC leaders in Tripoli.<sup>948</sup> Mustafa Abdul Jalil, Chief of the NTC, thanked Cameron and Sarkozy for the political, economic and military support provided. Cameron and Sarkozy reaffirmed that they will support the NTC to establish a democratic state and to find Gaddafi. Many UN countries have recognised NTC as the legitimate authority of Libya.<sup>949</sup>

946 'ICC Prosecutor seeks Interpol red notice warrant for Gaddafi', *Reuters Africa*, 8 September 2011, available at <<http://af.reuters.com/article/topNews/idAFJ0E7870K520110908>>, last visited on 27 October 2011.

947 'Notices', *INTERPOL*, available at <<http://www.interpol.int/INTERPOL-expertise/Notices>>, last visited on 27 October 2011.

948 'Libya conflict: Cameron and Sarkozy visit Tripoli', *BBC News*, 15 September 2011, available at <<http://www.bbc.co.uk/news/world-africa-14926308>>, last visited on 27 October 2011.

949 'Factbox: Countries that recognize Libya's NTC', *Reuters*, 23 September 2011, available at <<http://www.reuters.com/article/2011/09/23/us-libya-rebels-recognition-idUSTRE78M4D020110923>>, last visited on 27 October 2011; '77 countries have so far recognized Libya's NTC', *Yalibnan*, 2 September 2011, available at <<http://www.yalibnan.com/2011/09/02/77-countries-have-so-far-recognized-libyas-ntc/>>, last visited on 27 October 2011.

## Cooperation

Despite the outstanding ICC Arrest Warrants issued against them, Saif Al-Islam and Al-Senussi remain at large at the time of writing this Report. Under the Gaddafi Regime, Libya had not become a State Party to the Rome Statute, and the Gaddafi Regime refused to accept the ICC's decision to issue Arrest Warrants against Gaddafi, Saif Al-Islam and Al-Senussi, adding further that Gaddafi and his son Saif Al-Islam did not hold official positions in Libya and therefore 'have no connection to the claims of the ICC against them'.<sup>950</sup> In contrast to the Gaddafi Regime's position, the NTC had expressed a positive response to the issuance of the Arrest Warrants, and was, in particular 'extremely happy that the whole world has united in prosecuting Gaddafi for the crimes he has committed'.<sup>951</sup> It was also pleased to see that Gaddafi was finally regarded as a war criminal.<sup>952</sup> The NTC had promised to cooperate with the ICC and to assemble a special commando unit to arrest Gaddafi.<sup>953</sup>

The AU, during the 17th AU Summit, held in Equatorial Guinea from 23 June 2011 to 1 July 2011, objected to the issuance of the Arrest Warrants, and adopted a declaration calling upon its member states not to cooperate in the execution of the Arrest Warrants against

950 'Libya rejects UCC arrest warrant for Muammar Gaddafi', *BBC News*, 27 June 2011, available at <<http://www.bbc.co.uk/news/world-africa-13937034>>, last visited on 27 October 2011.

951 'Int'l court issues arrest warrant for Gaddafi', *Reuters*, 27 June 2011, available at <<http://in.reuters.com/article/2011/06/27/idINIndia-57943620110627>>, last visited on 27 October 2011.

952 'Int'l court issues arrest warrant for Gaddafi', *Reuters*, 27 June 2011, available at <<http://in.reuters.com/article/2011/06/27/idINIndia-57943620110627>>, last visited on 27 October 2011.

953 'A Political Court: The ICC and Libyan War Crimes', *Hudson New York*, 8 August 2011, available at <<http://www.hudson-ny.org/2323/icc-libyan-war-crimes>>, last visited on 27 October 2011.

Gaddafi, Saif Al-Islam and Al-Senussi.<sup>954</sup> It further requested the UNSC to defer the ICC process in the Situation in Libya, under Article 16 of the Rome Statute, in favour of an AU-controlled political negotiation in the interest of peace and justice in the region. Botswana, an AU member, later expressed its disagreement with the AU decision and fully endorsed the ICC's decision to issue Arrest Warrants in this case, vowing to arrest any indictees that enter its territory.<sup>955</sup>

On 20 October 2011, Gaddafi was killed in his hometown of Sirte, under circumstances still under investigation at the time of the writing of this Report.<sup>956</sup> His convoy, which included his son, Mutassim, and army chief, Abu Bakr Younis Jabr, both of whom were also killed, was hit by NATO strikes, after which the men escaped on foot. Gaddafi's death was the result of bullet wounds inflicted by unknown parties following his capture in a drainage pipe in which he had taken refuge. When announcing Gaddafi's death, NTC Prime Minister Mahmoud Jibril stated that the 'forensic report' could not determine whether the bullet wounds had been inflicted by Gaddafi's own forces or by rebels when the car carrying him was caught in crossfire.<sup>957</sup>

Video footage of the moments after his capture, however, appears to show Gaddafi injured and pleading for his life.<sup>958</sup> Other eyewitnesses stated they saw Gaddafi shot in the abdomen after his capture, after which his body was dragged through the streets.<sup>959</sup> Other extremely graphic footage depicts a soldier sodomising Gaddafi with either the knife on the end of a machine gun, an instrument Libyans call a *bicketti*, or some kind of stick, as he was dragged from the drainpipe.<sup>960</sup> Human rights groups have expressed increasing concern over reprisal killings and abuses committed by anti-Gaddafi forces, in particular the apparent execution of 53 Gaddafi supporters at the Mahiri Hotel in Sirte.<sup>961</sup> On 24 October 2011, the NTC, bowing to 'international pressure', announced that it would investigate the circumstances surrounding the killing.<sup>962</sup> On 25 October, Gaddafi was buried in an unmarked grave in the desert in an attempt to avoid the creation of a

954 Decision adopted during the 17<sup>th</sup> African Union Summit, African Union, 1 July 2011, available at <<http://au.int/en/summit/17thsummit/news/decisions-adopted-during-17th-african-union-summit>>, last visited on 27 October 2011.

955 'Botswana breaks ranks with AU over Kadhafi warrant', *Times Live*, 6 July 2011, available at <<http://www.timeslive.co.za/africa/2011/07/06/botswana-breaks-ranks-with-au-over-kadhafi-warrant>>, last visited on 27 October 2011.

956 'Muammar Gaddafi: How He Died', *BBC News*, 24 October 2011, available at <<http://www.bbc.co.uk/news/world-africa-15390980>>, last visited on 30 October 2011.

957 'Muammar Gaddafi: How He Died', *BBC News*, 24 October 2011, available at <<http://www.bbc.co.uk/news/world-africa-15390980>>, last visited on 30 October 2011.

958 'Gaddafi's death: growing revulsion at the treatment of the dictator's body', *The Guardian*, 22 October 2011, available at <<http://www.guardian.co.uk/world/2011/oct/22/libya-gaddafi-dead-body-treatment>>, last visited on 30 October 2011.

959 'Muammar Gaddafi: How He Died', *BBC News*, 24 October 2011, available at <<http://www.bbc.co.uk/news/world-africa-15390980>>, last visited on 30 October 2011.

960 'Gaddafi sodomized: Video shows abuse frame by frame (Graphic)', *globalpost.com*, 24 October 2011, available at <<http://www.globalpost.com/dispatch/news/regions/middle-east/111024/gaddafi-sodomized-video-gaddafi-sodomy>>, last visited on 30 October 2011.

961 'Qaddafi Son Maintains Innocence as Criminal Court Cites Indirect Talks', *New York Times*, 28 October 2011, available at <[http://www.nytimes.com/2011/10/29/world/africa/criminal-court-qaddafi-son.html?\\_r=1&ref=middleeast](http://www.nytimes.com/2011/10/29/world/africa/criminal-court-qaddafi-son.html?_r=1&ref=middleeast)>, last visited on 1 November 2011; 'Libya: Apparent Execution of 53 Gaddafi Supporters', *Human Rights Watch*, 24 October 2011, available at <<http://www.hrw.org/news/2011/10/24/libya-apparent-execution-53-gaddafi-supporters>>, last visited on 1 November 2011.

962 'Libya bows to calls for investigation into Gaddafi death', *The Guardian*, 24 October 2011, available at <<http://www.guardian.co.uk/world/2011/oct/24/libya-investigation-gaddafi-death>>, last visited on 30 October 2011.

shrine.<sup>963</sup> While the NTC has announced that it will investigate the circumstances of Gaddafi's death, questions have been raised about their willingness to investigate other crimes allegedly committed by rebel forces, including killings and looting.<sup>964</sup>

On 2 November 2011, Chief Prosecutor Moreno-Ocampo informed the Security Council that the Registry was following formal procedures to obtain official documentary confirmation of Gaddafi's death from the new Libyan Government, and stated that the Pre-Trial Chamber could, on receipt of the documents, withdraw the arrest warrant and formally end the case against him.<sup>965</sup> At the time of writing this Report, the Pre-Trial Chamber has not yet taken such steps.

On 30 August 2011, the media had reported that Al-Senussi had allegedly been killed together with Gaddafi's son Khamis,<sup>966</sup> however, at the time of writing this Report, media outlets quoted officials in Niger as stating that Al-Senussi was

963 'Gaddafi buried in unmarked grave in Libya desert to avoid creating shrine', *The Guardian*, 25 October 2011, available at <<http://www.guardian.co.uk/world/2011/oct/25/gaddafi-buried-in-unmarked-grave>>, last visited on 30 October 2011.

964 'In Libya, Massacre Site is Cleaned Up, Not Investigated', *New York Times*, 24 October 2011, available at <<http://www.nytimes.com/2011/10/25/world/middleeast/libyas-interim-leaders-to-investigate-qaddafi-killing.html>>, last visited on 1 November 2011.

965 'Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)', Prosecutor of the International Criminal Court, 2 November 2011, para 8, available at <<http://www.icc-cpi.int/NR/rdonlyres/815C21D1-7756-49BE-A80F-627B5A779104/283927/StatementICCProsecutorLibyaReporttoUNSC021113.pdf>>, last visited on 3 November 2011.

966 'Rebels believe Gaddafi intelligence chief is dead', *ahramonline*, 30 August 2011, available at <<http://english.ahram.org.eg/NewsContent/2/8/20038/World/Region/Rebels-believe-Gaddafi-intelligence-chief-is-dead.aspx>>, last visited on 25 October 2011.

in exile in northern Mali.<sup>967</sup> Mali is a State Party of the ICC and would be obliged to enforce the arrest warrant against Al-Senussi.<sup>968</sup>

Following the confirmation of Gaddafi's death by the NTC, the Chief Prosecutor of the ICC and INTERPOL have called on Saif Al-Islam, Gaddafi's son, to turn himself in. In a joint statement on 20 October, they state that 'both institutions will coordinate with INTERPOL member countries to provide safe passage to The Hague'.<sup>969</sup> In addition, the Prosecutor reported that he has been in 'indirect' contact with Saif Al-Islam, through intermediaries, about the possibility of turning himself in to the Court.<sup>970</sup> Saif Al-Islam has been a fugitive since August; as of the writing of this Report, accounts place him in exile in various African nations including Niger and Mali, both States Parties of the ICC.<sup>971</sup>

On 29 October, the NTC renounced its prior support for the ICC Arrest Warrant and now claims that Saif Al-Islam should be tried in Libya. Its spokesman Colonel Ahmed Bani asserted: 'This is where he must face the consequences of what he has done ... Libya has its rights and its

967 'Al Senussi, Gaddafi's intelligence chief, in Mali: Reports', *Global Post*, 27 October 2011, available at <<http://www.globalpost.com/dispatch/news/regions/africa/111027/al-senussi-gaddafis-intelligence-chief-mali>>, last visited on 1 November 2011.

968 See <<http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Mali.htm>>.

969 *OTP Weekly Briefing*, Issue #102, 18-24 October 2011.

970 'Qaddafi Son Maintains Innocence as Criminal Court Cites Indirect Talks', *New York Times*, 28 October 2011, available at <<http://www.nytimes.com/2011/10/29/africa/criminal-court-qaddafi-son.html>>, last visited on 30 October 2011. The ICC issued an Arrest Warrant against Saif Al-Islam on 27 June 2011 alleging crimes against humanity.

971 'Qaddafi Son Maintains Innocence as Criminal Court Cites Indirect Talks', *New York Times*, 28 October 2011, available at <<http://www.nytimes.com/2011/10/29/africa/criminal-court-qaddafi-son.html>>, last visited on 30 October 2011; 'ICC in talks with Gaddafi's fugitive son', *Al Jazeera*, 28 October 2011, available at <<http://www.aljazeera.com/news/africa/2011/10/2011102883856248887.html>>, last visited on 1 November 2011.

sovereignty and we will exercise them'.<sup>972</sup> Bani also stated that the Libyan interim government fears that Saif Al-Islam will spend the cash and gold he is alleged to be carrying to fund passage into exile in a nation that does not recognise the jurisdiction of the ICC.<sup>973</sup> In his statement to the Security Council on 2 November 2011, the Prosecutor noted that, should the Libyan authorities wish to prosecute Saif Al-Islam or Al-Senussi for the same crimes as were being investigated by the ICC, 'they should submit an admissibility challenge and it will be for the ICC Judges to decide'.<sup>974</sup>

### Rape and other sexual violence allegations

In March 2011, doctors in Libya were reported to have found Viagra tablets and condoms in the pockets of soldiers of the Gaddafi Regime.<sup>975</sup> On 26 March 2011, Eman al-Obeidi, a 28-year-old Libyan postgraduate law student, entered the restaurant of the Rixos hotel in Tripoli and told international journalists there that she had been beaten and gang-raped by fifteen of Colonel

Gaddafi's militiamen.<sup>976</sup> She was arrested in the restaurant and detained by the Gaddafi Regime, and after her release fled to Tunisia in early May and then to Qatar. The Qatari Government then deported her to Libya against her will, and in violation of international law.<sup>977</sup> On 27 July 2011, she arrived in the USA where she was granted asylum.<sup>978</sup> Media reports since the incident have also alleged that mass rape and other forms of sexual violence have taken place in the context of the violence in Libya. On 29 April 2011, Susan Rice, US Ambassador to the UN, claimed at the UN Security Council that Viagra-type drugs may have been used for the purpose of mass rape.<sup>979</sup> International organisations have also noted unconfirmed reports of widespread sexual violence. On 23 April 2011, Save the Children stated that it had received accounts of allegations of rape and sexual abuse from 200 children and 40 adults who had left areas of conflict in Libya. The group also claimed that, although the allegations were consistent in four different camps, with persons displaying signs of physical and emotional stress, it has

972 'Libya insists Saif al-Islam Gaddafi should be tried at home', *The Guardian*, 29 October 2011, available at <<http://www.guardian.co.uk/world/2011/oct/29/libya-said-gaddafi-justice>>, last visited on 30 October 2011.

973 'Libya insists Saif al-Islam Gaddafi should be tried at home', *The Guardian*, 29 October 2011, available at <<http://www.guardian.co.uk/world/2011/oct/29/libya-said-gaddafi-justice>>, last visited on 30 October 2011.

974 'Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011); Prosecutor of the International Criminal Court, 2 November 2011, paras 19-22, available at <<http://www.icc-cpi.int/NR/rdonlyres/815C21D1-7756-49BE-A80F-627B5A779104/283927/StatementICCProsecutorLibyaReporttoUNSC021113.pdf>>, last visited on 3 November 2011.

975 'Gaddafi "supplies troops with Viagra to encourage mass rape", claims diplomat', *The Guardian*, 29 April 2011, available at <<http://www.guardian.co.uk/world/2011/apr/29/diplomat-gaddafi-troops-viagra-mass-rape>>, last visited on 27 October 2011; 'Rape used "as a weapon" in Libya', *Al-Jazeera English*, 28 March 2011, available at <<http://english.aljazeera.net/video/africa/2011/03/201132845516144204.html>>, last visited on 27 October 2011.

976 'Libyan Woman Struggles to Tell Media of Her Rape', *The New York Times*, 26 March 2011, available at <[http://www.nytimes.com/2011/03/27/world/middleeast/27tripoli.html?\\_r=3&hp](http://www.nytimes.com/2011/03/27/world/middleeast/27tripoli.html?_r=3&hp)>, last visited on 27 October 2011.

977 'Qatar deportation of Eman al-Obeidi violates international law', *Amnesty International*, 3 June 2011, available at <<http://www.amnesty.org/en/news-and-updates/qatars-deportation-eman-al-obeidi-violates-international-law-2011-06-03>>, last visited on 27 October 2011.

978 'Alleged Libyan rape victim comes to U.S. to stay', *CNN*, 29 July 2011, available at <<http://www.cnn.com/2011/US/07/29/us.libya.al.obeidy.relocates/>>, last visited on 27 October 2011.

979 'Gaddafi "supplies troops with Viagra to encourage mass rape", claims diplomat', *The Guardian*, 29 April 2011, available at <<http://www.guardian.co.uk/world/2011/apr/29/diplomat-gaddafi-troops-viagra-mass-rape>>, last visited on 27 October 2011; 'Rape used "as a weapon" in Libya', *Al-Jazeera English*, 28 March 2011, available at <<http://english.aljazeera.net/video/africa/2011/03/201132845516144204.html>>, last visited on 27 October 2011.

yet to confirm the reports of sexual violence.<sup>980</sup> Similarly, the UN Commission of Inquiry that was dispatched to Libya could not confirm findings of systematic sexual violence in its report. The report, which was released on 1 June 2011, stated that although it had received individual accounts of rape, it was unable to verify these accounts.<sup>981</sup> Nonetheless, the Commission found enough evidence to warrant further investigation into claims of sexual violence. The report included accounts of rape by armed civilians as well as forces of the Gaddafi Regime, and alleged that war crimes were committed by both sides to the conflict during the fighting.<sup>982</sup> Al-Jazeera's 'People & Power' programme, in which both the Prosecutor and Cherif Bassiouni, chairman of a UN commission investigating human rights violations in Libya, appeared, also aired an investigative piece on the use of rape as a weapon in Libya. Similarly it indicated that though incidences of rape are well-known, exact details surrounding the victims and systematic occurrences of rape are difficult to uncover.<sup>983</sup>

980 'Libyan children suffering rape, aid agency reports', *The Guardian*, 23 April 2011, available at <<http://www.guardian.co.uk/world/2011/apr/23/libyan-children-suffering-rape>>, last visited on 27 October 2011.

981 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya', *UN Human Rights Council*, (A/HRC/17/44), 1 June 2011, available at <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44\\_AUV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf)>, last visited on 27 October 2011.

982 'Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya', *UN Human Rights Council*, (A/HRC/17/44), 1 June 2011, p 71-74, available at <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44\\_AUV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf)>, last visited on 27 October 2011.

983 'Libya: war and rape?', *Al-Jazeera*, 29 June 2011, available at <<http://english.aljazeera.net/programmes/peopleandpower/2011/06/201162964345738600.html>>, last visited on 27 October 2011.

Despite the Prosecutor's numerous public statements and the widespread media reports suggesting that rape and other forms of sexual violence had been committed in the conflict, the Prosecutor's application for Warrants of Arrest for Gaddafi, Saif Al-Islam and Al-Senussi did not include any charges of rape or sexual violence.<sup>984</sup> As of the writing of this Report, he has not sought to amend the Arrest Warrants to add sexual violence charges. However, in his statement to the Security Council, the Prosecutor outlined the continuing efforts of the Prosecution investigators, with the cooperation of the NTC, to investigate allegations of sexual violence committed during the conflict in Libya. He stated that, due to the potential for retaliation or 'honour-based violence' against rape victims, the Prosecution had adopted a strategy of minimising the exposure of victims by obtaining 'alternate evidence and identifying avenues of investigation which support charges without the need for multiple victim statements', although a limited number of victims had been interviewed directly.<sup>985</sup> The Prosecutor concluded by suggesting that the capability of the OTP to carry out further investigations into sexual violence would be dependent on the budget allocated to the Office by the Assembly of States Parties.<sup>986</sup>

984 ICC-01/11-4-RED.

985 'Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)', Prosecutor of the International Criminal Court, 2 November 2011, paras 14-17, available at <<http://www.icc-cpi.int/NR/rdonlyres/815C21D1-7756-49BE-A80F-627B5A779104/283927/StatementICCProsecutorLibyaReporttoUNSC021113.pdf>>, last visited on 3 November 2011.

986 'Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)', Prosecutor of the International Criminal Court, 2 November 2011, para 22, available at <<http://www.icc-cpi.int/NR/rdonlyres/815C21D1-7756-49BE-A80F-627B5A779104/283927/StatementICCProsecutorLibyaReporttoUNSC021113.pdf>>, last visited on 3 November 2011.



### ***The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi***

On 16 May 2011, the Prosecutor filed an application under Article 58 of the Rome Statute requesting Arrest Warrants against Gaddafi, Saif Al-Islam and Al-Senussi.<sup>987</sup> In his application, the Prosecutor stated that Gaddafi authorised and directed his son, Saif Al-Islam, and his brother-in-law, Al-Senussi, to crack down on dissidents and civilian protestors and 'discipline' them by means of killings and destruction of their property. The Prosecutor's application charged Gaddafi, as indirect perpetrator, and Saif Al-Islam and Al-Senussi, as indirect co-perpetrators, with murder constituting a crime against humanity<sup>988</sup> and with persecution,<sup>989</sup> but did not include any charges for rape or other gender-based crimes.<sup>990</sup> In June 2011, the Prosecutor, however, indicated that new charges may be added following further investigation, and he has publicly stated that he is investigating claims of rape and other forms of sexual violence perpetrated during the conflict in Libya after 'strong indications that hundreds of women had been raped in Libyan government clampdown'.<sup>991</sup> The Prosecutor at the same time claimed to have evidence that the Gaddafi Regime had handed out doses of Viagra to soldiers to encourage sexual attacks, and that rape was being used as punishment by the Gaddafi Regime.

On 27 June 2011, Pre-Trial Chamber I issued Arrest Warrants for Gaddafi, Saif Al-Islam and Al-Senussi for murder and persecution on political grounds as crimes against humanity.<sup>992</sup> The Chamber found that there were reasonable grounds to believe that murder as a crime against humanity was committed from 15 February 2011 (the date established in the UN Security Council referral) until at least 25 February 2011 and that persecution on political grounds as a crime against humanity was committed from 15 February 2011 until at least 28 February 2011 by security forces of the Gaddafi Regime as part of the attack against the civilian population.<sup>993</sup> The Chamber found reasonable grounds to believe that Gaddafi and Saif Al-Islam were mutually responsible as indirect co-perpetrators

under Article 25(3)(a) of the Rome Statute, and that Al-Senussi was responsible as an indirect perpetrator under Article 25(3)(a).<sup>994</sup>

The Chamber further found reasonable grounds to believe that the Gaddafi Regime, through its security forces, comprised of the military, intelligence, police and *ad hoc* militias, and through its nationalised media outlets and its punitive legal system, was capable of deterring dissidence and restricting the freedoms of its citizens.<sup>995</sup> The Chamber also found reasonable grounds to believe that Gaddafi, as head of this State apparatus, organised and exercised control as a means of sustaining his regime. The Chamber referred to public speeches made by Gaddafi that linked him to efforts to suppress the demonstrations that occurred in February 2011. These efforts included ordering security forces to 'discipline' demonstrators, and the use of the legal system in Libya to dissuade and punish any forms of dissidence. Similarly, telecommunications were censored by punishing journalists, blocking satellite transmission from outside channels, and disrupting internet and other services. The conduct of dissidents was closely monitored by the Gaddafi Regime's security forces. Ultimately, the Chamber found reasonable grounds to believe that such attacks as part of a state policy were widespread and systematic, and aimed at 'deterring and quelling the February 2011 demonstrations by any means, including by the use of lethal force'.<sup>996</sup>

The Chamber also found reasonable grounds to believe that the specific elements of the alleged crimes against humanity of murder and persecution had been met. In relation to the crime against humanity of murder the Chamber found reasonable grounds to believe that, in Benghazi between 16 and 20 February 2011, several civilians were shot dead by the security forces of the Gaddafi Regime during demonstrations and funeral processions, as well as outside of mosques after prayer, with some victims as young as 11 or 12 years old. The Chamber cited similar incidents occurring during the same time period, in other smaller cities such as Al-Bayda, Derna, Tobruk and Ajdabiya, as well as in Tripoli and Misrata, to support its finding that there were reasonable grounds to believe that the crime against humanity of murder was committed by security forces under Gaddafi's command. In respect of the crime against humanity of persecution, the Chamber found reasonable grounds to believe that security forces had 'abducted, arrested and tortured dissidents to Gaddafi's regime' throughout Libya on multiple occasions in response to the demonstrations by the

987 ICC-01/11-4-RED.

988 Article 7(1)(a) and Article 25(3)(a) of the Rome Statute.

989 Article 7(1)(h) and Article 25(3)(a) of the Rome Statute.

990 ICC-01/11-4-RED, p 16.

991 'Gaddafi faces new ICC charges for using rape as a weapon in conflict', *The Guardian*, 9 June 2011, available at <<http://www.guardian.co.uk/world/2011/jun/08/gaddafi-forces-libya-britain-nato>>, last visited on 27 October 2011.

992 ICC-01/11-12; ICC-01/11-13; ICC-01/11-14; ICC-01/11-15.

993 ICC-01/11-12, para 41, 65.

994 ICC-01/11-12, para 83.

995 ICC-01/11-12, para 24.

996 ICC-01/11-12, para 31.

civilian population.<sup>997</sup> The Chamber found reasonable grounds to believe that these acts constituted persecution as a crime against humanity, and were committed on political grounds in furtherance of the Gaddafi Regime's (state) policy of repression.

In its decision issuing the Arrest Warrants, the Chamber found that even though Gaddafi did not hold an official title, there were reasonable grounds to believe he was 'the *de facto* head of the Libyan State'.<sup>998</sup> The Chamber found that that there were grounds to believe that Gaddafi, as *de facto* head of state, and his son, Saif Al-Islam, were indirect co-perpetrators and criminally responsible for attacks against civilians and the crimes against humanity of murder and persecution. The Chamber further found reasonable grounds to believe that Al-Senussi was an indirect perpetrator and criminally responsible for the crimes against humanity of murder and persecution. The Chamber expressly acknowledged the Prosecutor's submission in regard to Saif Al-Islam's position as Gaddafi's 'unspoken successor and most influential person within his inner circle', and the fact that he exercised the powers and control over the state apparatus as 'a *de facto* Prime Minister'.<sup>999</sup> The contributions of both Gaddafi and his son were found by the Chamber to have been 'paramount' to the implementation of their plans to suppress information regarding the events occurring in Libya from leaking.<sup>1000</sup> The Chamber found reasonable grounds to believe that they designed and executed orders to implement plans, including instructions to publicly incite the population to attack dissidents. Further, the Chamber found reasonable grounds to believe that Al-Senussi as head of the military intelligence, exercised control over armed forces that were ordered to suppress civilian demonstrations.<sup>1001</sup>

As described above, Pre-Trial Chamber I issued Warrants of Arrest for Gaddafi, Saif Al-Islam and Al-Senussi for murder as a crime against humanity<sup>1002</sup> and persecution as a crime against humanity.<sup>1003</sup> Gaddafi and Al-Islam were charged as indirect co-perpetrators under Article 25(3)(a); Al-Senussi was charged as indirect perpetrator under Article 25(3)(a).

997 ICC-01/11-12, para 42.  
 998 ICC-01/11-12, para 17.  
 999 ICC-01/11-12, para 96.  
 1000 ICC-01/11-12, para 79.  
 1001 ICC-01/11-12, para 84.  
 1002 Article 7(1)(a).  
 1003 Article 7(1)(h).

## Côte d'Ivoire

In November 2010, following the presidential election in Côte d'Ivoire, violence broke out which has been described as the worst humanitarian and human rights crisis for the region since the *de facto* separation of the country in September 2002.<sup>1004</sup> Incumbent President Laurent Gbagbo contested the victory in the election of his rival Alassane Ouattara, and refused to transfer power. Pro-Gbagbo forces, including security forces, youth leaders, militia and Liberian mercenaries, launched several attacks involving heavy weaponry against civilians in neighbourhoods perceived to be supporting the newly-elected President Ouattara.<sup>1005</sup> In late February 2011, violence intensified between pro-Gbagbo and pro-Ouattara forces and rebel forces that supported both sides. On 25 March 2011, the UN Human Rights Council sent an independent, international commission of inquiry to investigate allegations of serious human rights abuses committed during the post-election period. Their final report concluded that acts amounting to crimes against humanity and war crimes may have been committed.<sup>1006</sup> On 30 March 2011, the UNSC also condemned the violence that took place in Côte d'Ivoire in Resolution 1975.<sup>1007</sup>

Reports of sexual violence began circulating soon after the outbreak of the post-election violence. Several reports alleged that gang-rapes of women, abductions and sexual slavery, as well as the burning of hundreds of homes, extrajudicial executions, disappearances and other violence had been committed in the commercial capital Abidjan and the west of

1004 'Côte d'Ivoire: six months of post-electoral violence: Summary', *Amnesty International*, 25 May 2011, available at <<http://www.amnesty.org/en/library/info/AFR31/003/2011/en>>, last visited on 27 October 2011.  
 1005 ICC-02/11-3, para 3.  
 1006 Human Rights Council, 16th Ordinary Session, 18 March 2011, A/HRC/RES/16/25.  
 1007 Resolution 1975, UNSC, 6508<sup>th</sup> meeting, S/Res/1975 (2011), 30 March 2011.

the country.<sup>1008</sup> The reports indicated that attacks were being carried out based on victims' ethnicity and/or political affiliations. Margot Wallström, the Special Representative of the Secretary General for Sexual Violence in Armed Conflict, condemned the use of 'sexual violence as a means to political ends', stating that it was apparent from their preliminary investigations in January that such attacks followed specific political targets.<sup>1009</sup>

The Situation in Côte d'Ivoire had been under preliminary examination by the ICC since 1 October 2003, following Côte d'Ivoire's declaration in accordance with Article 12(3) of the Rome Statute to accept the ICC's jurisdiction over violence that erupted on 19 September 2002.<sup>1010</sup> The Government of Côte d'Ivoire reaffirmed its acceptance of the ICC's jurisdiction on 14 December 2010 by a letter from the newly-elected President Alassane Ouattara.<sup>1011</sup>

In a second letter, dated 3 May 2011, President Ouattara requested the Prosecutor to conduct

investigations into the post-election violence.<sup>1012</sup> By letter of 19 May 2011, the Prosecutor informed the President of the ICC of his intention to request the authorisation of the Pre-Trial Chamber to open an investigation into the Situation in Côte d'Ivoire since 28 November 2010. On 22 June 2011, the Situation was assigned to Pre-Trial Chamber III, composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Elizabeth Odio-Benito (Costa Rica) and Judge Sir Adrian Fulford (UK).<sup>1013</sup>

On 23 June 2011, pursuant to Article 15(3) of the Rome Statute, the Prosecutor requested authorisation from the Pre-Trial Chamber to commence an investigation into the Situation in Côte d'Ivoire, focusing on events occurring since 28 November 2010.<sup>1014</sup> In his request, the Prosecutor highlighted the time periods of post-election violence, and the main incidents and groups involved in these attacks. He stated that the violence in Côte d'Ivoire had reached 'unprecedented levels' and that there was 'a reasonable basis to believe that at least 3000 persons were killed, 72 persons disappeared, 520 persons were subject to arbitrary arrest and detentions and there are over 100 reported cases of rape'.<sup>1015</sup> The Prosecutor stated that 'pro-Gbagbo forces allegedly committed crimes against humanity, including murder, rape, other forms of sexual violence, imprisonment and enforced disappearance'.<sup>1016</sup> The request further stated that there was a reasonable basis to believe that both pro-Gbagbo and pro-Ouattara forces 'committed war crimes on a large scale, including murder, rape, attacking civilians and attacking buildings dedicated to religion'.<sup>1017</sup> The request included two confidential annexes,

1008 Côte d'Ivoire Mission Report (AFR 31/001/2011), *Amnesty International*, 22 February 2011, available at <<http://www.amnesty.org/en/library/asset/AFR31/001/2011/en/0e4b411c-047a-4a71-8901-da5c50edf80b/af310012011en.pdf>>, last visited on 27 October 2011; 'In Ivory Coast, when conflict starts women become targets', *The Guardian*, 13 April 2011, available at <<http://www.guardian.co.uk/global-development/poverty-matters/2011/apr/13/ivory-coast-women-targets-of-rape>>, last visited 27 October 2011.

1009 'UN envoy urges protection from sexual violence amid Côte d'Ivoire crisis', *UN News Service*, 27 January 2011, available at <<http://www.un.org/apps/news/story.asp?NewsID=37395&Cr=ivoire&Cr1=>>, last visited on 27 October 2011.

1010 Côte d'Ivoire is not a State Party to the ICC, and on 18 April 2003 lodged a declaration accepting the jurisdiction of the ICC, available at <<http://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf>>. 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.

1011 The letter of 14 December 2010 is available at <<http://www.icc-cpi.int/NR/rdonlyres/7DA08D8E-FF5E-40C8-92D7-F058D5B032F3/283211/OuattaraICCConfirmationLetter141211.pdf>>.

1012 The letter of 3 May 2011 is available at <<http://www.icc-cpi.int/NR/rdonlyres/7DA08D8E-FF5E-40C8-92D7-F058D5B032F3/283315/LetterOuattaratoOTP030511.PDF>>.

1013 ICC-02/11-2.

1014 ICC-02/11-3.

1015 ICC-02/11-3, para 2.

1016 ICC-02/11-3, para 3.

1017 ICC-02/11-3, para 4.

containing preliminary lists of persons from both the pro-Gbagbo and pro-Ouattara sides that appeared to bear the greatest responsibility, ‘including those who ordered, financed and otherwise organi[s]ed the alleged crimes’.<sup>1018</sup>

The Prosecutor’s request for authorisation to open an investigation detailed several incidents of rape and sexual violence experienced by the civilian population. The Prosecutor stated that there were at least 100 reported cases of rape but that he expected the total number of rape incidents to be higher.<sup>1019</sup> In particular, the Prosecutor asserted that sexual violence was most prevalent along ethnic and/or political lines, and that victims were often told by their aggressors that they were being punished for their ethnicity and/or political affiliations.

The Prosecutor’s request stated that the elements of admissibility and interests of justice were satisfied in this case.<sup>1020</sup> In regards to complementarity, the Prosecutor acknowledged that domestic investigations were being conducted into crimes in Côte d’Ivoire, but asserted that there were no domestic investigations or proceedings pending against those persons bearing the greatest responsibility for the post-election crimes that fall within the jurisdiction of the ICC.<sup>1021</sup> The Prosecutor cited the letter of President Ouattara to him, dated 3 May 2011, setting forth that ‘the Ivorian judiciary is not at this stage in the best position to address the most serious of the crimes’ that have been committed since 28 November 2010, and ‘any attempt at trying the most responsible

individuals may face multiple obstacles’.<sup>1022</sup> Significantly, the Justice Minister, after the announcement of preliminary investigations by President Ouattara on 27 April 2011, specified that the investigation excluded crimes falling within the jurisdiction of the ICC.<sup>1023</sup>

On 6 July 2011, Pre-Trial Chamber III issued an order to the Victims Participation and Reparation Section (VPRS)<sup>1024</sup> concerning victims’ representations pursuant to Article 15(3) of the Statute.<sup>1025</sup> The Chamber requested the VPRS to provide a report of the representations received from victims. The Chamber emphasised that in order to have the Article 15 proceedings carried out efficiently, the VPRS should undertake an initial *prima facie* assessment ‘to ensure that only those representations emanating from sources who are potentially victims within the meaning of Rule 85 of the Rules [of Procedure and Evidence] are sent to the Chamber for consideration, within the context of the Prosecution’s present application’.<sup>1026</sup>

On 29 August 2011, after the request for an extension of time had been granted, the Registry submitted the consolidated report on representations received from victims from Côte d’Ivoire.<sup>1027</sup> The report gave an overview of the 1038 representations received by the

1018 ICC-02/11-3, para 46.

1019 ‘ICC Prosecutor requests judges for authorisation to open an investigation in Côte d’Ivoire’, Press release, *Office of the Prosecutor*, 23 June 2011, available at <<http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/icc%20prosecutor%20requests%20judges%20for%20authorization%20to%20open%20an%20investigation%20in%20côte%20d%27ivoire>>, last visited on 27 October 2011.

1020 ICC-02/11-3, paras 7, 44.

1021 ICC-02/11-3, paras 45-53.

1022 ICC-02/11-3, para 49.

1023 ICC-02/11-3, para 49.

1024 The VPRS is located in the Registry of the Court.

1025 ICC-02/11-6.

1026 ICC-02/11-6, para 10. The Chamber, however, stated that this was only relevant to the current application and that subsequent applications regarding participation in the proceedings would be considered separately and in due course. Rule 85 of the Rules of Procedure and Evidence provides: ‘For the purposes of the Statute and the Rules of Procedure and Evidence: (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’

1027 ICC-02/11-11-RED.

20 July 2011 deadline and the types of materials submitted. It summed up the ethnic and regional origins, age and sex of the victims, as well as the crimes and time periods of the crimes they reported. The report also gave the victims' views on what they expected from the ICC proceedings. The report further outlined various problems faced by the VPRS regarding the sources, the number of representations and their content. The Registry stated that significant efforts were required to assist victims, and expressed its willingness to assist the Chamber in providing such help.

On 15 and 16 October 2011, the Office of the Prosecutor conducted an official visit to Côte d'Ivoire and in a statement on 14 October the Prosecutor stated that his office is 'closely monitoring election-related developments'.<sup>1028</sup> He said that he will meet with victims in order to listen to their views and concerns. The Office will also meet with members of the opposition and the Truth, Dialogue and Reconciliation Commission.

### Authorisation to open an investigation

On 3 October 2011, Pre-Trial Chamber III issued a decision granting the Prosecutor's request for authorisation to commence an investigation in Côte d'Ivoire, making it the seventh Situation before the ICC.<sup>1029</sup>

The Pre-Trial Chamber examined Côte d'Ivoire's Declaration of Acceptance, dated 18 April 2003, and the letters from President Ouattara of December 2010 and May 2011. It concluded that the Court has jurisdiction over crimes allegedly committed in Côte d'Ivoire since 19 September 2002.<sup>1030</sup> The Pre-Trial Chamber took into account the criteria outlined in Article 53(1)(a) to (c) of the Statute and examined whether (i) the information available to the Prosecutor provided a reasonable basis to believe that crimes within the ICC jurisdiction were committed; (ii) the case would be admissible under Article 17; and (iii) the investigation was in the interest of justice. With respect to the reasonable basis threshold, the Chamber noted that this is the 'lowest evidential standard provided by the Statute'.<sup>1031</sup>

Throughout its decision granting the Prosecutor's request to open an investigation, the Chamber also noted multiple instances of 'other underlying acts not presented by the Prosecutor'. In essence the Pre-Trial Chamber, in examining the Prosecutor's evidence, found that the information indicated reasonable grounds to believe that various additional crimes, including gender-based crimes, had been committed in addition to those specified in the Prosecutor's request. In four instances in its decision, the Pre-Trial Chamber expanded on the crimes cited by the Prosecutor, adding torture and other inhumane acts as a crime against humanity<sup>1032</sup> as well as rape and sexual violence,<sup>1033</sup> pillage,<sup>1034</sup> and cruel treatment and torture<sup>1035</sup> as war crimes amounting to an expanded and corrected version of the crimes brought by the Prosecutor in his original request. The Chamber thus seemed to have engaged in the work of a classic investigative chamber, not previously demonstrated by other Pre-Trial Chambers. As discussed below, Presiding Judge Fernández de Gurmendi disagreed with this course of action by the majority of the Pre-Trial Chamber, in a partially dissenting opinion.

<sup>1028</sup> 'Statement by ICC Prosecutor Luis Moreno-Ocampo on official visit to Côte d'Ivoire, October 15-16', Press Release, *Office of the Prosecutor*, 14 October 2011, available at <<http://www.icc-cpi.int/NR/exeres/D6787F71-EC65-4DB9-9320-16ED7FBE3C1F.htm>>, last visited on 27 October 2011.

<sup>1029</sup> ICC-02/11-14.

<sup>1030</sup> ICC-02/11-14, para 15.

<sup>1031</sup> ICC-02/11-14, para 24.

<sup>1032</sup> ICC-02/11-14, paras 83-86.

<sup>1033</sup> ICC-02/11-14, paras 144-148.

<sup>1034</sup> ICC-02/11-14, paras 162-165.

<sup>1035</sup> ICC-02/11-14, paras 166-169.

### Crimes against humanity

The Chamber first examined the acts allegedly committed by pro-Gbagbo forces. It considered the evidence submitted by the Prosecutor and concluded that the available information substantiated 'that there is a reasonable basis to believe that in the aftermath of the presidential elections in Côte d'Ivoire an attack was committed by pro-Gbagbo loyalists against the civilian population in Abidjan and in the west of the country, from 28 November 2011 onwards'.<sup>1036</sup> The Chamber further came to the conclusion that there was a reasonable basis to believe that the attack was based on an organisational policy under the leadership of former President Gbagbo<sup>1037</sup> against his political opponents.<sup>1038</sup> The Chamber concluded that the material submitted by the Prosecutor and the victims' representations provided a reasonable basis to believe that the attack was widespread and systematic.<sup>1039</sup> With respect to the underlying acts constituting crimes against humanity, the Chamber found that based on the available information there was a reasonable basis to believe that murders,<sup>1040</sup> rapes,<sup>1041</sup> imprisonment or other severe deprivation of physical liberty,<sup>1042</sup> and enforced disappearances<sup>1043</sup> had been committed by pro-Gbagbo forces during the period of post-election violence, starting on 28 November 2010.<sup>1044</sup> The Chamber saw the alleged crimes not as isolated acts, but as part of an attack, and 'thus constituting crimes against humanity'.<sup>1045</sup>

Under the heading 'other underlying acts not presented by the Prosecutor', the Chamber considered the crime against humanity of torture and other inhumane acts, and stated – despite the absence of a submission by the Prosecutor with respect to these crimes – that the material and information presented by the Prosecutor 'indicates that acts of torture and other inhumane acts were committed by pro-Gbagbo forces', and that there was a reasonable basis to believe that torture and other inhumane acts were committed from 28 November 2010.<sup>1046</sup>

1036 ICC-02/11-14, para 41.

1037 Also after the election, President Gbagbo controlled large parts of Côte d'Ivoire.

1038 ICC-02/11-14, paras 47, 51.

1039 ICC-02/11-14, para 62.

1040 ICC-02/11-14, paras 63-67.

1041 ICC-02/11-14, paras 68-72.

1042 ICC-02/11-14, paras 73-76.

1043 ICC-02/11-14, paras 77-82.

1044 ICC-02/11-14, paras 89-91.

1045 ICC-02/11-14, para 90.

1046 ICC-02/11-14, paras 83-86.

The Chamber took note of the Prosecutor's submission that the available information had not established a reasonable basis to believe that crimes against humanity were committed by Pro-Ouattara forces, and that he would further investigate whether pro-Ouattara forces had committed such crimes in the event he obtained authorisation from the Chamber.<sup>1047</sup> The Chamber concluded that based on the available information there was a reasonable basis to believe that pro-Ouattara forces committed attacks against civilians belonging to specific ethnic communities and suspected to be supporters of Laurent Gbagbo, in the west of Côte d'Ivoire.<sup>1048</sup> The Chamber thus disagreed with the Prosecutor's submission that the current available information did not establish a reasonable basis to believe that crimes against humanity were committed by pro-Ouattara forces. The Chamber further found that these acts were committed in a manner strongly suggesting 'the existence of an organisational policy' and were also widespread and systematic.<sup>1049</sup> As to the underlying acts constituting crimes against humanity, the Chamber concluded that based on the available information there was a reasonable basis to believe that murders,<sup>1050</sup> rape,<sup>1051</sup> and imprisonment or other severe deprivation of liberty<sup>1052</sup> were committed by the *Forces républicaines de Côte d'Ivoire* (FRCI) and other pro-Ouattara forces, not as isolated acts but as part of an attack and thus constituted crimes against humanity, in the west of Côte d'Ivoire in March 2011, and in other parts of the country, over a wider time period, respectively.<sup>1053</sup>

1047 ICC-02/11-14, paras 93. However, the Prosecutor submitted that one attack by the FRCI on the 'Carrefour' neighbourhood of Duekoue was committed in a systematic way.

1048 ICC-02/11-14, para 95.

1049 ICC-02/11-14, paras 100, 101, 105.

1050 ICC-02/11-14, paras 106-108.

1051 ICC-02/11-14, paras 109-111.

1052 ICC-02/11-14, paras 112-114.

1053 ICC-02/11-14, para 116.

### War crimes

With respect to war crimes committed by both pro-Gbagbo forces and pro-Ouattara forces, based on the submitted material, the Chamber found that there was a reasonable basis to believe that an armed conflict of a non-international nature took place between pro-Gbagbo and pro-Ouattara forces between 25 February and 6 May 2011.<sup>1054</sup> With respect to the underlying acts committed by the Pro-Gbagbo forces, the Chamber found that there was a reasonable basis to believe that the war crimes of murder<sup>1055</sup> and intentionally directing attacks against civilians<sup>1056</sup> had been committed between 25 February and 6 May 2011.<sup>1057</sup> The Chamber further concluded that on the basis of the available information there was a reasonable basis to believe that attacks intentionally directed against UN Operation in Côte d'Ivoire (UNOCI) personnel, equipment, and installations involved in a humanitarian assistance or peacekeeping mission<sup>1058</sup> were committed by pro-Gbagbo forces between 27 February 2011 and 2 April 2011.<sup>1059</sup> The Chamber further came to the conclusion that there was a reasonable basis to believe that intentionally directed attacks against buildings dedicated to religion<sup>1060</sup> were committed by pro-Gbagbo forces between 25 February 2011 and 6 May 2011.<sup>1061</sup>

The Chamber, under the heading 'Other underlying acts not presented by the Prosecutor' found that there was a reasonable basis to believe that pro-Gbagbo forces committed acts constituting rape and sexual violence<sup>1062</sup> between 25 February 2011 and 6 May 2011.<sup>1063</sup> The Chamber came to this conclusion despite the fact that the Prosecutor in his request had not submitted that the crimes of rape and sexual violence were committed, although his evidence would have supported such an argument. The Chamber stated that there was a reasonable basis to believe that the committed crimes 'were closely related to the existence of an armed conflict between the pro-Gbagbo and the pro-Ouattara forces'.<sup>1064</sup>

With respect to acts allegedly committed by pro-Ouattara forces, the Chamber concluded that there was a reasonable basis to believe that they were responsible for murder and intentionally directing attacks against civilians, as well as rape, between 25

February 2011 and 6 May 2011.<sup>1065</sup> Under the heading 'other underlying acts not presented by the Prosecutor (pillaging)' the Chamber again found— despite the absence of a submission by the Prosecutor with respect to the crime of pillage— that the available information presented a reasonable basis to believe that pro-Ouattara forces committed the war crime of pillage<sup>1066</sup> between 25 February 2011 and 6 May 2011.<sup>1067</sup> With respect to 'Other underlying acts not presented by the Prosecutor (cruel treatment and torture)', the Chamber found a reasonable basis to believe that the FRCI and other pro-Ouattara forces committed acts of torture and cruel treatment between 25 February and 6 May 2011.<sup>1068</sup> The Chamber concluded that there was a reasonable basis to believe that the crimes committed by the pro-Ouattara forces 'were closely related to the existence of an armed conflict between the pro-Gbagbo and pro-Ouattara forces'.<sup>1069</sup>

### Gender-based crimes

With respect to gender-based crimes, the Prosecutor had submitted that there were reasonable grounds to believe that rape as a crime against humanity had been committed by pro-Gbagbo forces against supporters of President Ouattara, or persons regarded as pro-Ouattara, on the basis of their ethnicity. The Pre-Trial Chamber considered the materials submitted by the Prosecutor and the victims' representations, and concluded that there was 'a reasonable basis to believe that acts of rape were committed by pro-Gbagbo forces during the period of post-election violence from 28 November 2010 onwards'.<sup>1070</sup> Under the heading 'other underlying acts not presented by the Prosecutor', the Pre-Trial Chamber examined the war crimes of rape and sexual violence (Article 8(2)(e)(vi)). The Chamber considered the evidence presented by the Prosecutor, and found that it indicated widespread acts of rape, along with other forms of sexual violence against female and male Ouattara supporters. The Chamber came to this conclusion despite the fact that the Prosecutor himself had, in his request for authorisation to investigate, not put forth that rape and sexual violence as war crimes were committed.<sup>1071</sup> The Chamber also took note of the victims' representations, and concluded that there was 'a reasonable basis to believe that acts constituting rape and sexual violence were committed by pro-Gbagbo forces during the period from 25 February 2011 and 6 May 2011'.<sup>1072</sup>

1054 ICC-02/11-14, paras 125-127.

1055 Article 8(2)(c)(i).

1056 Article 8(2)(e)(i).

1057 ICC-02/11-14, paras 129-134.

1058 Article 8(2)(e)(iii).

1059 ICC-02/11-14, paras 135-139.

1060 Article 8(2)(e)(iv).

1061 ICC-02/11-14, paras 140-143.

1062 Article 8(2)(e)(vi).

1063 ICC-02/11-14, paras 144-148.

1064 ICC-02/11-14, para 153.

1065 ICC-02/11-14, paras 154-161.

1066 Article 8(2)(e)(v).

1067 ICC-02/11-14, paras 162-165.

1068 ICC-02/11-14, paras 166-169.

1069 ICC-02/11-14, para 172.

1070 ICC-02/11-14, para 72.

1071 ICC-02/11-14, para 146.

1072 ICC-02/11-14, para 148.

With regard to crimes against humanity committed by the pro-Ouattara forces, the Pre-Trial Chamber – despite the absence of a submission by the Prosecutor – nevertheless considered the material presented by the Prosecutor as well as the victims’ representations, and came to the conclusion that there was ‘a reasonable basis to believe that offences of rape were committed by the FRCI and other pro-Ouattara forces’,<sup>1073</sup> in particular in the west of Côte d’Ivoire in March 2011.<sup>1074</sup> These crimes were submitted by the Prosecutor as war crimes,<sup>1075</sup> and the Chamber concluded that the available information substantiated that there was a reasonable basis to believe that in the period between 25 February 2011 and 6 May 2011, pro-Ouattara forces had committed crimes of rape in the west of Côte d’Ivoire and in Abidjan.<sup>1076</sup>

**Temporal scope of the investigation, jurisdiction, and admissibility**

In determining the temporal scope of the Prosecutor’s investigation, the Chamber noted that the Prosecutor had requested authorisation to open an investigation focusing on the period beginning 28 November 2010, but had also suggested that the Chamber might ‘conclude that the temporal scope of the investigation should be broadened to encompass events that occurred between 19 September 2002 and the date of the filing of the Request, ie 23 June 2011’.<sup>1077</sup> With respect to the end date of the investigation authorisation, the Chamber, referring to the decision of Pre-Trial Chamber I on the Arrest Warrant for Mbarushimana, stated that the authorisation shall cover investigations into ‘continuing crimes’, ie also into crimes occurring after the date of the Prosecutor’s request for authorisation, if the actors and the contextual elements of the crimes after 23 June 2011 were the same as of the crimes committed before such date.<sup>1078</sup> As to the start date of the authorisation, the Chamber stated that due to the Prosecutor’s insufficient information and supporting material regarding specific events before 28 November 2010, the Chamber was not in a position ‘to determine whether the reasonable basis threshold has been met with regard to any specific crimes’.<sup>1079</sup> The Chamber, pursuant to Rule 50(4) of the Rules of Procedure and Evidence, thus requested the Prosecutor to revert to the Chamber with any additional information on ‘potentially relevant crimes committed between 2002 and 2010’.<sup>1080</sup>

1073 ICC-02/11-14, para 111.  
 1074 ICC-02/11-14, paras 109-111.  
 1075 ICC-02/11-14, paras 158-159.  
 1076 ICC-02/11-14, para 161.  
 1077 ICC-02/11-14, para 175.  
 1078 ICC-02/11-14, paras 178-179.  
 1079 ICC-02/11-14, para 184.  
 1080 ICC-02/11-14, para 185.

As regards the jurisdiction of the ICC, the Chamber concluded that the alleged crimes were committed on the territory of Côte d’Ivoire, and that the ICC has jurisdiction *ratione loci* under Article 12(2)(a) of the Statute. Hence, it did not need to examine jurisdiction *ratione personae* under Article 12(2)(b) of the Statute.<sup>1081</sup>

The Chamber, in accordance with Article 17 of the Statute, examined whether the case would be admissible based on the available information, ie whether there was a reasonable basis to proceed to investigate. The Chamber, with respect to the ‘complementarity’ element of Article 17, found that there were no national proceedings pending against the persons who seemed to bear the responsibility for the crimes and, in regard to the gravity of the acts, found that there were potential cases that would be admissible in the Situation in Côte d’Ivoire, if the Chamber authorised such an investigation.<sup>1082</sup> The Chamber finally concluded that there were no substantial reasons, and no indication in the victims’ representations, to believe that an investigation would not serve the interests of justice.<sup>1083</sup> The Chamber thus authorised an investigation into the Situation of Côte d’Ivoire ‘with respect to crimes within the jurisdiction of the Court committed since 28 November 2010’. The Chamber also authorised investigation into continuing crimes committed in the future as long as they were part of the context of the ongoing Situation in Côte d’Ivoire.<sup>1084</sup> The Chamber requested the Prosecutor to revert within one month with additional information with respect to potentially relevant crimes committed in the time period from 2002 to 2010.<sup>1085</sup> At the time of writing, the Prosecutor has not yet publicly submitted additional information.

1081 ICC-02/11-14, para 188.  
 1082 ICC-02/11-14, para 206.  
 1083 ICC-02/11-14, para 208.  
 1084 ICC-02/11-14, para 212.  
 1085 ICC-02/11-14, para 213.



## Dissenting opinion of Judge Fernández de Gurmendi

Presiding Judge Fernández de Gurmendi, in a separate and partially dissenting opinion, agreed with the majority of the Chamber on the decision to authorise the commencement of the investigation, but disagreed with the majority with respect to the analysis on jurisdiction and the temporal scope of the authorised investigation.<sup>1086</sup>

Judge Fernández de Gurmendi stated that Article 15 of the Rome Statute provided for the Prosecutor to request the Pre-Trial Chamber's authorisation to start an investigation, thus granting a supervisory role to the Pre-Trial Chamber, intended as 'a judicial safeguard against frivolous or politically-motivated charges'.<sup>1087</sup> Judge Fernández de Gurmendi pointed out that the Chamber's examination of the requirements of Article 53(1)<sup>1088</sup> 'should not become a duplication of the preliminary examination conducted by the Prosecutor',<sup>1089</sup> but rather a review of the Prosecutor's request and material presented.<sup>1090</sup> Judge Fernández de Gurmendi found that the Pre-Trial Chamber was not an investigative chamber,<sup>1091</sup> but rather functioned to ascertain the Prosecutor's 'accuracy of the statement of facts and reasons of law [...] with regard to crimes and incidents identified in his own request', and then decided whether the requirements of Article 53 of the Statute were fulfilled.<sup>1092</sup> She thus disagreed with the Chamber's own establishing of facts and acts as well as its further conclusions on criminal responsibility.<sup>1093</sup> She stated that 'through a search of the material accompanying the request', the Chamber for example identified incidents of torture and inhumane treatment under the heading 'other underlying acts not presented by the Prosecutor'<sup>1094</sup> or other war crimes, such as rape and sexual violence, not presented by the Prosecutor.<sup>1095</sup> Judge Fernández de Gurmendi concluded that the Pre-Trial Chamber had exceeded its supervisory role under Article 15 of the Statute and acted contrary to its neutrality role to 'maintain with regard to the selection by the Prosecutor of persons and acts to be

addressed in the investigation'.<sup>1096</sup> With respect to victims' representations, she disagreed 'with the "non-restrictive manner" in which the majority decided to consider the victims' submissions' and with its use of specific submissions 'as a source to identify alleged criminal acts and suspects'.<sup>1097</sup>

As to the temporal scope of the investigation, Judge Fernández de Gurmendi stated that the starting date of the investigation should have been expanded to crimes committed since 2002, and disagreed with the Chamber's order to the Prosecutor to present it with additional information within a month.<sup>1098</sup> With respect to the end date of the investigation, the dissent stated that 'the limitation of jurisdiction to "continuing crimes" has no statutory basis and may unduly restrict the ability of the Prosecutor to conduct investigations into future crimes arising from the same ongoing situation of crisis' in Côte d'Ivoire'.<sup>1099</sup>

1086 ICC-02/11-15-Corr, paras 5-6.

1087 ICC-02/11-15-Corr, para 16.

1088 The Chamber must consider if the requirements set forth in Article 53(1)(a)-(c) of the Statute are fulfilled and therefore has to examine the material available to it before authorising an investigation, see ICC-02/11-14, para 21 and ICC-02/11-15-Corr, paras 13-14.

1089 ICC-02/11-15-Corr, para 15.

1090 ICC-02/11-15-Corr, para 16.

1091 ICC-02/11-15-Corr, para 20.

1092 ICC-02/11-15-Corr, para 28.

1093 ICC-02/11-15-Corr, para 38.

1094 ICC-02/11-15-Corr, paras 38-39.

1095 ICC-02/11-15-Corr, para 40.

1096 ICC-02/11-15-Corr, para 45.

1097 ICC-02/11-15-Corr, para 52.

1098 ICC-02/11-15-Corr, paras 6, 56, 58.

1099 ICC-02/11-15-Corr, paras 6, 62-73.

## Composition of Chambers as of 16 September 2011

<i>Chamber</i>	<i>Case and/or Situation</i>	<i>Stage of proceedings</i>
<b>Pre-Trial Division</b>		
<b>Pre-Trial Chamber I</b>		
Presiding Judge Cuno Tarfusser (Italy)	<b>DRC Situation</b>	
Judge Sanji Mmasenono Monageng (Botswana)	<i>Prosecutor v. Ntaganda</i>	Pending arrest and surrender of suspect
Judge Sylvia Steiner (Brazil)	<i>Prosecutor v. Mbarushimana</i>	Awaiting decision on confirmation of charges
	<b>Darfur Situation</b>	
	<i>Prosecutor v. Al’Bashir</i>	Pending arrest and surrender of suspect
	<i>Prosecutor v. Harun &amp; Kushayb</i>	Pending arrest and surrender of suspects
	<i>Prosecutor v. Abu Garda</i>	Charges not confirmed
	<b>Libya Situation</b>	
	<i>Prosecutor v. Gaddafi et al</i>	Pending arrest and surrender of suspects
<b>Pre-Trial Chamber II</b>		
Presiding Judge Ekaterina Trendafilova (Bulgaria)	<b>Uganda Situation</b>	
Judge Hans-Peter Kaul (Germany)	<i>Prosecutor v. Kony et al</i>	Pending arrest and surrender of suspect
Judge Cuno Tarfusser (Italy)		
	<b>CAR Situation</b>	
	<b>Kenya Situation</b>	
	<i>Prosecutor v. Ruto et al</i>	Awaiting decision on confirmation of charges
	<i>Prosecutor v. Muthaura et al</i>	Awaiting decision on confirmation of charges
<b>Pre-Trial Chamber III</b>		
Presiding Judge Silvia Fernández de Gurmendi (Argentina)	<b>Côte d’Ivoire Situation</b>	Investigation
Judge Elizabeth Odio-Benito (Costa Rica)		
Judge Sir Adrian Fulford (UK)		

<i>Chamber</i>	<i>Case and/or Situation</i>	<i>Stage of proceedings</i>
<b>Trial Division</b>		
<b><i>Trial Chamber I</i></b>		
Presiding Judge Sir Adrian Fulford (UK) Judge Elizabeth Odio-Benito (Costa Rica) Judge René Blattmann (Bolivia)	<i>Prosecutor v. Lubanga</i>	Awaiting trial judgement
<b><i>Trial Chamber II</i></b>		
Presiding Judge Bruno Cotte (France) Judge Fatoumata Demele Diarra (Mali) Judge Christine Van den Wyngaert (Belgium)	<i>Prosecutor v. Katanga &amp; Ngudjolo</i>	At trial
<b><i>Trial Chamber III</i></b>		
Presiding Judge Sylvia Steiner (Brazil) Judge Joyce Aluoch (Kenya) Judge Kuniko Ozaki (Japan)	<i>Prosecutor v. Bemba</i>	At trial
<b><i>Trial Chamber IV</i></b>		
Presiding Judge Joyce Aluoch (Kenya) Judge Fatoumata Demele Diarra (Mali) Judge Silvia Fernández de Gurmendi (Argentina)	<i>Prosecutor v. Banda &amp; Jerbo</i>	Pending a decision on the start of trial
<b>Appeals Division</b>		
<b><i>Appeals Chamber</i></b>		
Judge Anita Ušacka (Latvia) Judge Sang-Hyun Song (Republic of Korea) Judge Akue Kuenyehia (Ghana) Judge Erkki Kourula (Finland) Judge Daniel David Ntanda Nsereko (Uganda)	N/A	N/A

# Trial Proceedings

**In 2011, the ICC had three ongoing trial proceedings, two in the DRC Situation and one in the CAR Situation. The first, against Thomas Lubanga Dyilo, began in January 2009 and concluded in August 2011. The second, against Germain Katanga and Mathieu Ngudjolo Chui, began in November 2009. The third, against Jean-Pierre Bemba Gombo began in November 2010. Developments in all three trials are covered in detail in this section.**

Specifically, this section analyses in detail the closing arguments in the Lubanga case, which took place in August 2011, and provides a detailed account of the closing statements made by the Prosecution, the Legal Representative of Victims and the Defence. It also explores the issue of a potential breach of Article 70 regarding offenses against the administration of justice. Finally, it extensively covers the issues related to the Defence abuse of process filing that built on issues related to the Prosecution's use of intermediaries, which led to a stay of proceedings in 2010.

With respect to the Katanga & Ngudjolo case, this section presents an account of the final witnesses who testified for the Prosecution and provides an analysis of the Defence cases to date. For the first time before the ICC, in the case against Katanga & Ngudjolo, both accused will take the stand. This section includes an account of the testimony of Katanga, the first accused to testify, as of the writing of this Report.

The section on the Bemba case reviews the commencement of the trial from the opening statements through the testimony of Prosecution witnesses through 16 September 2011. The section includes detailed summaries of the twelve crime-based witnesses called by the Prosecution to substantiate charges of rape.

Lastly, this section includes a review of the use of in-person testimony in ICC proceedings in light of the recent Appeals Chamber affirmation of the principle of orality.

## *The Prosecutor v. Thomas Lubanga Dyilo*

Thomas Lubanga Dyilo (Lubanga) is the first accused to stand trial before the ICC. He was arrested on 16 March 2006. The trial commenced on 26 January 2009, and the presentation of evidence stage officially closed on 20 May 2011. On 25 and 26 August 2011, Trial Chamber I<sup>1100</sup> heard closing statements by the Prosecution, the Legal Representatives of Victims,<sup>1101</sup> and the Defence. Lubanga is a Congolese national of Hema ethnicity, born in 1960 in the DRC. He is the alleged founder and president of the UPC, and is charged with war crimes consisting of enlisting and conscripting of children under the age of 15 years into the FPLC, and using them to participate actively in hostilities between September 2002 and August 2003.

According to information provided by the Court at the closing of the Lubanga case, over the course of 220 hearings, Trial Chamber I heard 36 witnesses called by the Prosecution, including three experts, 19 Defence witnesses, 3 witnesses called by the Legal Representatives of Victims, and four other expert witnesses called by the Chamber.<sup>1102</sup> The Prosecution witnesses included seven former members of the UPC militia<sup>1103</sup> and nine former child soldiers.<sup>1104</sup> One Defence witness, Witness 19, has applied for asylum with the Dutch authorities. The applications remain pending at the time of writing this Report.<sup>1105</sup>

1100 Trial Chamber I is composed of Presiding Judge Sir Adrian Fulford (United Kingdom), Judge Elizabeth Odio-Benito (Costa Rica), and Judge René Blattmann (Bolivia).

1101 As of 25 July 2011, 123 victims had been granted leave to participate in the proceedings.

1102 'Trial Chamber I to deliberate on the case against Thomas Lubanga Dyilo', *Press Release*, ICC-CPI-20110826-PR714, 26 August 2011, available at <<http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/trial%20chamber%20to%20deliberate%20on%20the%20case%20against%20thomas%20lubanga%20dyilo>>, last visited on 28 October 2011.

1103 ICC-01/04-01/06-T-356-ENG, p 4 line 12.

1104 ICC-01/04-01/06-T-356-ENG, p 5 line 2.

1105 For a detailed discussion of the asylum proceedings, see the *Protection* section of this Report.

### Summary of the closing arguments in the Lubanga case

Charges for gender-based crimes were not included in the case against Lubanga, despite the availability of numerous documents, UN and NGO reports, including reports from the Women's Initiatives for Gender Justice, indicating that the UPC committed such crimes. Since the early stages of the case, the Women's Initiatives has advocated for further investigation and re-examination of the charges. It was also the first NGO to submit filings before the ICC regarding the inclusion of gender-based crimes in the charges,<sup>1106</sup> and has monitored and analysed the filings, jurisprudence, and witness testimony throughout the trial,<sup>1107</sup> in particular regarding girl soldiers and gender-based crimes.<sup>1108</sup>

Lubanga was arrested and surrendered to the Court on 16 March 2006, and his trial

1106 See *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/LegalFilings-web-2-10.pdf>>.

1107 See, for instance, the following issues of *Legal Eye on the ICC*: July 2011, available at <<http://www.iccwomen.org/news/docs/LegalEye7-11/LegalEye7-11.html>>, May 2011, available at <<http://www.iccwomen.org/WI-LegalEye0511/WI-LegalEye0511/LegalEye0511.html>>, May 2010, available at <[http://www.iccwomen.org/news/docs/LegalEye\\_May10/index.html](http://www.iccwomen.org/news/docs/LegalEye_May10/index.html)>, September 2009, available at <<http://www.iccwomen.org/news/docs/LegalEye0909/LegalEye0909.html>>, June 2009, available at <[http://www.iccwomen.org/news/docs/LegalEye\\_Jun09/index.html](http://www.iccwomen.org/news/docs/LegalEye_Jun09/index.html)>, May 2009, available at <[http://www.iccwomen.org/news/docs/LegalEye\\_May09/index.html](http://www.iccwomen.org/news/docs/LegalEye_May09/index.html)>, and March 2009, available at <[http://www.iccwomen.org/news/docs/LegalEye\\_Mar09/index.html](http://www.iccwomen.org/news/docs/LegalEye_Mar09/index.html)>.

1108 See, Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, 'Reflection: Gender Issues and Child Soldiers in the case of *Prosecutor v. Thomas Lubanga Dyilo*', 25 August 2011, available at <<http://www.iccwomen.org/documents/Gender-Issues-and-Child-Soldiers.pdf>>.

commenced on 26 January 2009.<sup>1109</sup> The trial has been stayed twice by the Chamber: in 2008, immediately prior to the scheduled commencement of the trial, due to issues concerning the Prosecution's failure to disclose evidence to the Defence; and in 2010, due to the Prosecution's failure to comply with the Trial Chamber's order to disclose the identity of a prosecution intermediary to the Defence.<sup>1110</sup> On 20 May 2011, Trial Chamber I ordered the closing of the presentation of evidence stage.<sup>1111</sup> On 25 and 26 August 2011, Trial Chamber I heard the closing statements from the parties and participants in the case, after which the Trial Chamber began deliberations on the proceedings and, within a reasonable period as required by Article 74,<sup>1112</sup> will pronounce

1109 More detailed information about the Lubanga case is available in the *Gender Report Card 2008, 2009 and 2010*, available at <<http://www.iccwomen.org/publications/index.php>>.

1110 For more information about these issues, see *Gender Report Card 2008*, p 42, 46, and *Gender Report Card 2010*, p 139-159.

1111 'Trial of Thomas Lubanga Dyilo: The presentation of evidence stage is closed', *ICC Press Release*, ICC-CPI-20110520-PR671, 20 May 2011, available at <<http://www.icc-cpi.int/NR/exeres/90F8E443-D740-4932-99F1-37A05A11088F.htm>>, last visited on 28 October 2011.

1112 Article 74 provides that: '(1) All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending. (2) The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial. (3) The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges. (4) The deliberations of the Trial Chamber shall remain secret. (5) The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.'

its judgement. At the time of writing this Report, the Trial Chamber has not yet issued its judgement on the case.

On 17 June 2011, Jean-Chrysostome Mulamba Nsokoloni, one of the common legal representatives of victims in the Lubanga case, passed away. At the start of the closing arguments, Trial Chamber I observed a moment of silence 'in tribute to the life and work of Maitre Jean Mulamba'.<sup>1113</sup> Mulamba was admitted to the ICC's List of Legal Counsel in 2006 and has been a legal representative of victims in the Lubanga case since 2008. Presiding Judge Fulford showed appreciation for Mulamba's work as a legal representative stating that

his submissions were always clear, concise, to the point, and of real assistance to the Chamber. He was a distinguished member of the legal profession of the DRC, and he provided valuable service to this Court. I am sure, therefore, that I speak on behalf not only of the Bench but also the bar and the court as a whole when I say that his significant contribution will be missed, and his untimely passing is greatly to be regretted.<sup>1114</sup>

1113 ICC-01/04-01/06-T-356-ENG, p 2 lines 8-9.

1114 ICC-01/04-01/06-T-356-ENG, p 1 line 25; p 2 lines 1-7.

## Closing statements of the Office of the Prosecutor

Deputy Prosecutor Fatou Bensouda commenced the Prosecution closing statements, stating that the evidence had proven, 'not just beyond reasonable doubt but beyond any possible doubt',<sup>1115</sup> that Lubanga was guilty of the war crimes charged against him by means of having systematically recruited children under the age of 15 as soldiers in his movement known as the UPC/FPLC, and having used them in hostilities. Bensouda argued that the Chamber had ensured that the accused had received a fair trial in every respect, and asked the Chamber to convict him for the commission of war crimes in order to send the clear message that there will be no impunity for those who recruit children into an armed group. She drew the Chamber's attention to one piece of evidence of particular importance for the Prosecution: a video showing Lubanga at Rwampara, a UPC/FPLC training camp, 'in his role as supreme commander of his militia addressing recruits and inspiring them to fight'.<sup>1116</sup> The video showed Lubanga addressing the recruited soldiers, saying 'It is the second time I come here'.<sup>1117</sup> The Prosecution argued that this statement showed that supervising his troops was a regular and normal activity for Lubanga,<sup>1118</sup> and that the video was a voluntary, public and taped confession of Lubanga's crimes. Bensouda then described the harsh daily training camp life of child soldiers, who were beaten, learned how to fight and kill and lived in constant fear.<sup>1119</sup>

Trial lawyer for the Prosecution, Nicole Samson, summarised the testimonies and documents that were presented as evidence in the case. She stated that recruitment took place across a

<sup>1115</sup> ICC-01/04-01/06-T-356-ENG, p 3 line 25; p 4 line 1.

<sup>1116</sup> ICC-01/04-01/06-T-356-ENG, p 7 lines 8-9.

<sup>1117</sup> ICC-01/04-01/06-T-356-ENG, p 7 line 16.

<sup>1118</sup> ICC-01/04-01/06-T-356-ENG, p 7 lines 15-18; ICC-01/04-01/06-2748-Red, paras 250-285.

<sup>1119</sup> ICC-01/04-01/06-T-356-ENG, p 9 lines 14-21; ICC-01/04-01/06-2748-Red, paras 185-206, 198, 200, 202, 204.

wide region of UPC-controlled territory between September 2002 and August 2003, and was part of a deliberate and clearly conceived plan.<sup>1120</sup>

The Prosecution argued that most child soldiers were victims of coercive recruitment campaigns or their parents were forced to give them up, both of which were presented as evidence of the crime of conscription; children were conscripted, abducted and trained to be ready to participate actively in hostilities.<sup>1121</sup> Samson explained that according to the Prosecution, active participation in hostilities not only meant direct participation in combat, but also combat-related activities such as scouting, spying, being a messenger, guarding military check-points, military objectives or a military commander, and sending out soldiers to procure girls so that the commander could sleep with them.<sup>1122</sup> To prove the age of the children, the Prosecution put forward statements of witnesses who were former child soldiers, as well as eye-witness testimony, videos, and forensic scientific assessments of their bone and dental growth. With respect to witness credibility, Samson emphasised that the broad range of witnesses (soldiers, commanders, political officers, and neutral observers such as NGO and UN employees) all described in detail that the UPC/FPLC recruited children under the age of 15, and argued that there is no credible evidence suggesting that the testimonies of all these witnesses was 'one big, organised plot'.<sup>1123</sup>

<sup>1120</sup> ICC-01/04-01/06-T-356-ENG, p 11 lines 11-13, 19-24; ICC-01/04-01/06-2748-Red, para 170.

<sup>1121</sup> ICC-01/04-01/06-T-356-ENG, p 12 lines 19-22; p 13 lines 2-5; ICC-01/04-01/06-2748-Red, paras 171-183.

<sup>1122</sup> ICC-01/04-01/06-T-356-ENG, p 15 lines 17-20; p 16 lines 1-4; ICC-01/04-01/06-2748-Red, paras 139-143.

<sup>1123</sup> ICC-01/04-01/06-T-356-ENG, p 21 lines 23-24; ICC-01/04-01/06-2748-Red, para 153. Concerning witness credibility, the Prosecution's final written conclusions dedicated a section addressing the credibility of each child soldier witness.

***Gendered aspects of recruitment and enlistment***

With respect to the harm committed specifically against girls, Bensouda argued that girl soldiers – in addition to the tasks that they performed identically to boy soldiers – were subject to specific abuse such as rape by fellow soldiers, serving as sex slaves to Lubanga’s commanders, and being forced ‘wives’ of commanders.<sup>1124</sup> She stated that children were used ‘to kill, rape, and pillage’.<sup>1125</sup> She maintained that the enlistment and conscription of children under the age of 15 ‘is a crime of continuous nature committed as long as the child remains in the armed group or is underage. The crime encompasses all the acts suffered by the child during the training and during the time they were forced to be a soldier. This interpretation is particularly relevant to capture the gender abuse, a crucial part of the recruitment of girls.’<sup>1126</sup> Bensouda urged the Chamber to make clear that the girls forced into marriage with commanders are not the wives of commanders but victims of recruitment, and should be particularly protected by demobilisation programmes and by the ICC.<sup>1127</sup>

Despite the well-publicised lack of charges for gender-based violence in the Lubanga case, the Prosecution adopted a strategy of encouraging the Trial Chamber to consider evidence of sexual and gender-based violence as an integral element of both the recruitment and use of child soldiers. Specific questions from the judges during the closing arguments regarding how to include or characterise evidence of gender-based violence, which could have allowed for productive Prosecution submissions on the issue, instead gave rise to a series of tense exchanges between the Chamber and the Prosecutor. In the first such exchange, Presiding Judge

1124 ICC-01/04-01/06-T-356-ENG, p 9 lines 22-25; ICC-01/04-01/06-2748-Red, paras 139-143.

1125 ICC-01/04-01/06-T-356-ENG, p 4 lines 5-6; ICC-01/04-01/06-2748-Red, paras 211-218.

1126 ICC-01/04-01/06-T-356-ENG, p 10 lines 1-7; ICC-01/04-01/06-2748-Red, para 138.

1127 ICC-01/04-01/06-T-356-ENG, p 10 lines 8-11; ICC-01/04-01/06-2748-Red, paras 139, 227-234, 385.

Fulford asked for clarification regarding the Prosecution’s position in relation to the assertion ‘that if an individual is sent out to select women, young women, for commanders to sleep with, that falls on the side of the dividing line of participating actively in hostilities’.<sup>1128</sup> Samson explained the Prosecution’s position by referring to Witness 294 who had participated directly in combat, but had also been a bodyguard to a commander, so he ‘was actively participating in hostilities in the sense that he was in a noncombat, sometimes combat, related activity but one that is protected’.<sup>1129</sup> Chief Prosecutor Luis Moreno-Ocampo, who was observing the closing statements from the back of the courtroom, then requested leave to intervene, which prompted the following exchange:

Moreno-Ocampo:

Your Honour, if I may.

Judge Fulford:

In a moment, Mr Ocampo. I’m just asking some questions of Ms Samson at the moment.

Moreno-Ocampo:

Yes, she represents my office.

Judge Fulford:

Really, I don’t think counsel should be receiving e-mails during the course of closing submissions, Mr. Ocampo.<sup>1130</sup>

Judge Fulford then resumed questioning Samson, saying ‘this may be something of importance... am I right in understanding you are, in fact, not saying that selecting young women by itself constitutes participating in hostilities, but you have to look at the position in the round. Is that right?’<sup>1131</sup> Samson answered that this was correct.<sup>1132</sup> Trial observers noted

1128 ICC-01/04-01/06-T-356-ENG, p 22 lines 16-19.

1129 ICC-01/04-01/06-T-356-ENG, p 22 lines 20-25; p 23 lines 1-3.

1130 ICC-01/04-01/06-T-356-ENG, p 23 lines 4-9.

1131 ICC-01/04-01/06-T-356-ENG, p 23 lines 13-17.

1132 ICC-01/04-01/06-T-356-ENG, p 23 line 18.



that the Chief Prosecutor appeared to be attempting to instruct Samson on how to answer, loudly saying ‘Samson, say yes’. Moreno-Ocampo then attempted to intervene a second time:

Moreno-Ocampo:  
If I may, your –

Judge Fulford:  
Mr Ocampo, really, can we please have some order to how the submissions are advanced. You have selected six advocates to address the Court. Can we remain with them. I’m sure that messages can be passed forward if there’s something else that needs to be said at some stage.

Moreno-Ocampo:  
I’m sorry, your Honour, if I may, the Office of the Prosecutor is represented by me here also and I’d like to answer your question if I may.

Judge Fulford:  
Mr Ocampo, no, not at the moment. In due course, if there are supplementary matters that need to be dealt with, we will ask for your assistance, but I’m not going to have different people jumping up and intervening during what needs to be a very tightly controlled hearing, because at the moment both Prosecution advocates have overrun by ten minutes from the original time estimates we were given.

Moreno-Ocampo:  
Yeah, I –

Judge Fulford:  
Thank you very much, Ms Samson.<sup>1133</sup>

1133 ICC-01/04-01/06-T-356-ENG, p 23 lines 20-25; p 24 lines 1-12.

Press coverage of the hearing noted the ‘friction’ and ‘simmering tensions between prosecutors and judges’.<sup>1134</sup>

Significantly, in its closing brief, consistent with the document containing the charges, the Prosecution did not explicitly raise any arguments concerning gender-based crimes. Witness summaries included in the Prosecution’s closing brief, however, did indicate evidence of such crimes. For example, it described the testimony of Witness 10, who had stated that she was 13 years old when she was forcibly conscripted in late 2002, and that her life was ‘destroyed . . . completely destroyed’ following ‘tremendous difficulty and sexual abuse’ during her time in UPC forces.<sup>1135</sup> The Prosecution’s closing brief also mentioned that one witness had admitted that he had raped a girl during a battle, and that his commanders had ordered him and other recruits to obtain girls for them by force in order to rape them.<sup>1136</sup> A short section of the brief entitled ‘Use of girl child soldiers in the UPC/FPLC’ also summarised the evidence of rape of girl recruits.<sup>1137</sup>

After the closing statements of the Prosecution, Judge Odio-Benito underscored that, despite information on sexual violence being included in the Prosecution final brief and closing arguments, charges of sexual violence had not been included in the document containing the charges, nor included within the charges

1134 ‘Lawyers wrap up International Court’s first trial’, *Associated Press*, 25 August 2011, available at <<http://news.yahoo.com/lawyers-wrap-intl-courts-first-trial-130641717.html>>, last visited 31 October 2011.

1135 ICC-01/04-01/06-2748-Red, paras 398-405.

1136 ICC-01/04-01/06-2748-Red, para 427.

1137 ICC-01/04-01/06-2748-Red, paras 227-234.

confirmed by the Pre-Trial Chamber.<sup>1138</sup> Making reference to Article 74 of the Statute,<sup>1139</sup> Judge Odio-Benito asked: ‘How is sexual violence relevant to this case, and how does the Prosecution expect the Trial Chamber to refer to the sexual violence allegedly suffered by girls if this was not in the facts and circumstances described in the charges against Mr Lubanga Dyilo?’<sup>1140</sup> Although the question was directed towards Deputy Prosecutor Bensouda, she indicated that Chief Prosecutor Moreno-Ocampo would respond to this question. Having been granted permission by the Chamber to answer this question, the Prosecutor stated:

We believe the facts are that the girls were abused, used as sexual slaves and raped. We believe this suffering is part of the suffering of the conscription. We did not allege and will not present evidence linking Thomas Lubanga with rapes. We allege that he linked it with the conscription and he knows the harsh conditions. So what we believe in this case is a different way to present the gender crimes. It presents the gender crimes not specific as rapes. Gender crimes were committed as part of the conscription of girls in -- in the militias. And it is important to have the charge as confined to the inscription, because if not – and that’s the point

1138 For more information on the gender issues in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and the Women’s Initiatives for Gender Justice’s advocacy to include gender-based crimes in the charges, see the article by Brigid Inder, Executive Director, ‘Reflection: Gender Issues and Child Soldiers in the case of *Prosecutor v Thomas Lubanga Dyilo*’, 25 August 2011, available at <<http://www.iccwomen.org/documents/Gender-Issues-and-Child-Soldiers.pdf>>. See also the *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/LegalFilings-web-2-10.pdf>>.

1139 Article 74 provides that the decision shall not exceed the facts and circumstances described in the charges and any amendment to the charges.

1140 ICC-01/04-01/06-T-356-ENG, p 53 lines 23-25; p 54 line 1.

that Ms Coomaraswamy<sup>1141</sup> did here – if not, the girls are considered wife and ignored as people to be protected and demobilised and cared. That is why the Prosecutor decided to confine the charges -- to present the suffering and the sexual abuse and the gender crime suffered by the girls in the camps just as conscription, showing this gender aspect of the crime.<sup>1142</sup>

According to trial observers, Moreno-Ocampo then sat down. Judge Fulford thanked him for his submission and began to address the Legal Representatives of Victims, to which Moreno-Ocampo responded ‘I think I have one minute’.<sup>1143</sup> This led to another exchange between the Prosecutor and Judge Fulford:

Judge Fulford:

Sorry, Mr Ocampo, I thought you’d finished.

Moreno-Ocampo:

No, I’d like to answer the previous question properly because I think your question was very important. I’d like to answer properly in a few seconds –

Judge Fulford:

Well, I thought you’d finished your submission.

Moreno-Ocampo:

No, I never said that.<sup>1144</sup>

With Judge Fulford’s permission, Moreno-Ocampo continued his reply to Judge Odio-Benito’s question:

1141 UN Under-Secretary General and Special Representative of the Secretary General of the UN for Children and Armed Conflict Radhika Coomaraswamy acted both as *amicus curiae* and expert witness in the case. See *Gender Report Card 2008*, p 87-89 and *Gender Report Card 2010*, p 135-136.

1142 ICC-01/04-01/06-T-356-ENG, p 54 lines 8-22.

1143 ICC-01/04-01/06-T-356-ENG, p 54 lines 23-25.

1144 ICC-01/04-01/06-T-356-ENG, p 55 lines 1-8.

Moreno-Ocampo:

I think your question was very important, the (\*indiscernible) submission of the Prosecutor is very important on this point. I have to be clear. We agree with the Chamber idea: their act, they are not used in hostility. However, factually we believe when a commander is ordered to abduct girls to use them as sexual slaves or rape them, this order is using the children in hostility. That is the submission we are doing. So to summarise, we agree with the Chamber that there is a line, there's a border between hostilities and no hostilities, and cooking could be a good example, maybe, but ordering to abduct girls in order to rape them is an order to – and use children in hostilities. Thank you.<sup>1145</sup>

After Moreno-Ocampo had once again taken his seat, Judge Fulford said: 'That's very clear. I'm not sure if it's the same as the submission given by Ms Samson, but nonetheless, your position is clear, Mr Ocampo'.<sup>1146</sup> Moreno-Ocampo replied: 'Yes, because I am the Prosecutor, I think the Chamber should take my word as the position of the office'.<sup>1147</sup> After a pause, Judge Fulford said, 'I'm going to ignore that last remark'.<sup>1148</sup>

### **Lubanga's alleged individual criminal responsibility**

Trial lawyer for the Prosecution, Manoj Sachdeva, subsequently provided an overview of the evidence that was intended to prove the knowledge, intention and individual criminal responsibility of Lubanga. He argued that Lubanga was President and Commander-in-Chief of the UPC, and made final decisions and dictated the strategy and policy of the hierarchical UPC and its military wing, the FPLC.

1145 ICC-01/04-01/06-T-356-ENG, p 55 lines 11-21.

1146 ICC-01/04-01/06-T-356-ENG, p 55 lines 22-24.

1147 ICC-01/04-01/06-T-356-ENG, p 55 line 55; p 56 line 1.

1148 ICC-01/04-01/06-T-356-ENG, p 56 lines 2-4.

The Prosecution thus argued that he had both functional and *de facto* control over all levels of the organisation,<sup>1149</sup> therefore proving his 'essential contribution' to the commission of the crimes charged pursuant to Article 25(3)(a) of the Rome Statute.<sup>1150</sup> The Prosecution argued that the crimes were committed with Lubanga's direct intention and his knowledge: Lubanga was regularly put on notice of the crimes committed and was in a position to order their cessation.<sup>1151</sup> The Prosecution noted that: he had children in his own personal protection unit; he took charge of recruitment activities; he went to Rwampara training camp, where he addressed and encouraged soldiers; he was responsible for military appointments and the planning of military operations; and, he had regular military meetings with commanders and his Chief and Deputy Chief of Staff. Furthermore, the Prosecution argued that the supposed demobilisation decrees, which it claimed were intended to provide a cover-up for the crimes being committed, proved Lubanga's knowledge of the presence of child soldiers within his military.<sup>1152</sup>

In its closing brief, the Prosecution also set forth the legal criteria and evidence to support its theory of co-perpetration. The objective element of the crime of co-perpetration is the existence of a common plan over which the accused had functional control. Subjectively, the crime requires that the accused acted with intent and had the requisite knowledge to do so. The Prosecution argued that, the accused 'exercised functional control over the crimes

1149 ICC-01/04-01/06-T-356-ENG, p 27 lines 8-14; ICC-01/04-01/06-2748-Red, paras 250-285.

1150 Article 25(3)(a) provides: 'In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that 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.'

1151 ICC-01/04-01/06-T-356-ENG, p 27 lines 19-25.

1152 ICC-01/04-01/06-T-356-ENG, p 32 lines 6-16; ICC-01/04-01/06-2748-Red, paras 286-348.

as a result of the role assigned to him in the implementation of the common plan and that he made an essential contribution' to it.<sup>1153</sup> According to the Prosecution, the accused need not have 'physically perpetrated' the elements of the crime.<sup>1154</sup> The Prosecution asserted that as acknowledged President and Commander-in-Chief of the UPC, the accused 'sat at the helm of the political and military structure'.<sup>1155</sup>

Trial lawyer for the Prosecution, Olivia Struyven, presented a summary of the video evidence in the case, including the much-cited video of the visit to the Rwampara training camp. She argued that it showed the ultimate authority of Lubanga over the UPC/FPLC, the recruitment and use of children under 15 by Lubanga's militia and his knowledge, approval and participation in the crime.<sup>1156</sup> She highlighted Lubanga's statement to the children in the training camp while he picked up a Kalashnikov: 'And that's why I would like to ask you and all the young people, I ask all our young people, don't fall asleep, don't fall asleep'.<sup>1157</sup>

### Statements by Special Adviser and Special Counsel to the Prosecutor

Professor Tim McCormack, Special Adviser to the Prosecutor on International Humanitarian Law, presented the Prosecution's position on the nature and legal character of the armed conflict in which the UPC/FPLC was engaged. The charges that were initially confirmed against Lubanga by the Pre-Trial Chamber in January 2007 included the recruitment and use of child soldiers in both

1153 ICC-01/04-01/06-2748-Red, para 61.

1154 ICC-01/04-01/06-2748-Red, paras 61-66.

1155 ICC-01/04-01/06-2748-Red, para 131.

1156 ICC-01/04-01/06-T-356-ENG, p 38 lines 11-16.

1157 ICC-01/04-01/06-T-356-ENG, p 40 lines 18-20. Judge Fulford noted that, during the portion of the Rwampara training camp video shown by the Prosecution, there was no English translation of Lubanga's statement, and asked the Prosecution to ensure that there was an accurate English transcript already included in the evidence in the case to enable the Judges to take the video evidence into consideration. ICC-01/04-01/06-T-356-ENG, p 42 lines 11-20.

international and non-international armed conflict.<sup>1158</sup> However, the Prosecution argued in its closing statement that the conflict was most properly described as a non-international armed conflict. It asserted that an international armed conflict only existed where the armed forces of two or more states were engaged in military hostilities against each other.<sup>1159</sup> McCormack urged the Chamber to re-characterise the conflict as non-international on the basis of Regulation 55(2), as the Chamber itself had previously suggested.<sup>1160</sup> Specifically, McCormack argued that the conflict in which the UPC/FPLC was engaged was a non-international armed conflict because:

- the involvement of Rwanda, Uganda and the Congolese Governments did not render the conflict international, as there was no evidence of either direct or indirect military hostilities between states as is required by Common Article 2<sup>1161</sup> of the Geneva Conventions;<sup>1162</sup>

1158 Lubanga was charged under Article 8(2)(b)(xxvi), which relates to war crimes committed in international armed conflict, and Article 8(2)(e)(vii), which contains an almost identical provision relating to the same crime committed during non-international armed conflict. If the Chamber were to recharacterise the facts to hold that the conflict in which the UPC/FPLC was engaged at the time relevant to the indictment was a non-international armed conflict, it would only be possible to convict Lubanga for the crimes charged under Article 8(2)(e)(vii).

1159 ICC-01/04-01/06-T-356-ENG, p 43 lines 22-23; ICC-01/04-01/06-2748-Red, para 32.

1160 ICC-01/04-01/06-T-356-ENG, p 43 lines 9-14; ICC-01/04-01/06-2748-Red, para 60.

1161 Article 2 common to the Geneva Conventions of 1949 provides that 'the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'.

1162 ICC-01/04-01/06-T-356-ENG, p 43 lines 20-25; p 44 lines 1-6; ICC-01/04-01/06-2748-Red, paras 22, 44-55.

- Uganda's occupation of territory in Bunia had no consequence for the legal characterisation of the conflict, as the existence of occupation does not automatically determine the legal character of an armed conflict, and a military occupation does not *ipso facto* equal an armed conflict;<sup>1163</sup> and
- Uganda's occupation was limited to the area of the Bunia airport and parts of Bunia city – one ten-thousandth of the territory of Ituri – and Uganda did not exercise effective authority over Ituri outside the airport and parts of Bunia city. Furthermore, its involvement did not, and could not have, affected the characterisation of a separate armed conflict affecting a much wider geographic area.<sup>1164</sup>

McCormack further maintained that the non-international armed conflict involving the UPC/FPLC did not end in May 2003 when Uganda withdrew its forces from the DRC, but continued up to, and beyond, the end of the period covered by the charges.<sup>1165</sup>

In its closing brief,<sup>1166</sup> the Prosecution argued this issue at length, noting that the Chamber specifically invited the parties to present evidence on this issue, and that its determination could result in a modification of the first group of charges.<sup>1167</sup> The Prosecution opened its brief with the argument that the nature of the conflict over the entire period included in the charges was of a non-international character, and was 'most often characterised an inter-ethnic conflict between the Hema and the Lendu'.<sup>1168</sup> Relying

on international war crimes jurisprudence and favourable law review critiques,<sup>1169</sup> the Prosecution asserted that, while the presence of Ugandan forces in Ituri may render the conflict an international one, there was a contemporaneous non-international conflict, and it is this latter conflict 'to which Lubanga's militia was a party during the relevant times'.<sup>1170</sup> The Prosecution further argued that the conflict was not internationalised under a theory of direct intervention, in which two States oppose each other; nor was there indirect intervention as a result of the establishment of overall control.<sup>1171</sup>

Finally, Benjamin Ferencz, a former Nuremberg Prosecutor and Special Counsel to the Office of the Prosecutor, stressed the historical significance of the trial and pointed out the gravity of the harm caused by the recruitment and use of child soldiers. He again referenced the special vulnerability of girls, stating that 'all of the girls recruited could expect to be sexually violated'.<sup>1172</sup> He cited the drafting of the Rome Statute as authority for the assertion that recruiting children into armed forces and forcing them to participate in hostilities were 'among the most serious crimes of concern for the international community as a whole'.<sup>1173</sup> He also highlighted how the Court performs a distinctive function in deterring 'crimes before they take place by letting wrong-doers know in advance that they will be called to account'.<sup>1174</sup>

1163 ICC-01/04-01/06-T-356-ENG, p 45 lines 22-25; ICC-01/04-01/06-2748-Red, paras 34-37, 38-43.

1164 ICC-01/04-01/06-T-356-ENG, p 46 lines 20-24; p 48 lines 8-21; ICC-01/04-01/06-2748-Red, paras 34-43, 47.

1165 ICC-01/04-01/06-T-356-ENG, p 49 lines 10-14, 24-25; p 50 lines 1-5; ICC-01/04-01/06-2748-Red, para 31.

1166 ICC-01/04-01/06-2748-Red.

1167 ICC-01/04-01/06-1084.

1168 ICC-01/04-01/06-2748-Red, para 22.

1169 ICC-01/04/01/06-2748-Red, fn 92.

1170 ICC-01/04-01/06-2748-Red, para 31.

1171 ICC-01/04-01/06-2748-Red, paras 34-37, 38-43.

1172 ICC-01/04-01/06-T-356-ENG, p 52 line 16.

1173 ICC-01/04-01/06-T-356-ENG, p 51 lines 15-16.

1174 ICC-01/04-01/06-T-356-ENG, p 51 lines 18-20.

## Closing statements of the Legal Representatives of Victims

Paolina Massidda, Principal Counsel of the OPCV,<sup>1175</sup> stated that the trial was historical for thousands of victims hoping for justice, and praised the extensive participatory rights that had been granted to victims by the Chamber. She emphasised that victims were not the assistants, but the allies, of the Prosecution, and had expressed themselves independently.<sup>1176</sup> She noted that the victims in this case, through their legal representatives, had taken a number of initiatives that went beyond the Prosecution request, including taking initiatives regarding the modification of the legal characterisation of facts in the case against Lubanga pursuant to Regulation 55.<sup>1177</sup> In its written closing brief, the OPCV asserted that the factual elements related to the crime were undertaken through cruel and/or inhuman acts and treatment.<sup>1178</sup> It asserted that these factual elements were of a nature to be considered as ‘circumstances of manner’ pursuant to Rule 145(1)(c) of the Rules of Procedure and Evidence, or as ‘aggravating

1175 The OPCV was the legal representative of four victims: a/0047/06, a/0048/06, a/0050/06 and a/0052/06.

1176 ICC-01/04-01/06-T-356-ENG, p 58 lines 8-10; p 59 lines 3-5.

1177 Pursuant to Regulation 55 of the Regulations of the Court, ‘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’. In May 2009, the Legal Representatives of Victims requested the Trial Chamber to consider modifying the legal characterisation of facts in the Lubanga case to include cruel and inhuman treatment and sexual slavery. In July 2009, the Trial Chamber issued a majority decision (with Judge Fulford dissenting) giving notice to the parties that the legal characterisation of facts in the case may be subject to change, but this decision was overturned by the Appeals Chamber in December 2009. For more information, see *Gender Report Card 2009*, p 86-90, and *Gender Report Card 2010*, p 129-132.

1178 ICC-01/04-01/06-2744-Red.

circumstances’ pursuant to Rule 145(2)(b), and should thus be taken into account in sentencing.<sup>1179</sup>

The OPCV also requested the Chamber to find Lubanga guilty as a direct perpetrator, in addition to the co-perpetrator liability proposed by the Prosecution.<sup>1180</sup> Massidda stressed that, although the harm caused to victims could never be fully repaired by a conviction or reparations,<sup>1181</sup> the main concern of the victims participating in this trial was the establishment of the truth and the punishment of the individuals who were the cause of their victimisation.<sup>1182</sup> She also acknowledged that protective measures can sometimes impose restrictions on victims and their families, and that despite the protective measures applied by the Chamber, some victims were still subject to threats or persecution for having testified against the accused.<sup>1183</sup>

Legal Representative of Victims Carine Bapita Buyangandu outlined the historical context of the conflict and described the ill-treatment of children in the training camps. She noted that children in training camps were beaten and sometimes killed, were given poor food, inadequate training and no access to medical care, and that ‘they raped and they were raped’.<sup>1184</sup> Bapita also explained the specific abuse of girl child soldiers in the training camps, who – in addition to receiving the same training and treatment as boy child soldiers – were also used as sexual slaves, became pregnant, had unwanted children, performed household chores and were used to actively participate in

1179 Rule 145 of the Rules of Procedure and Evidence sets out the guidelines for the Court in its determination of a sentence following a trial judgement in a case, the mitigating circumstances and aggravating factors the Chamber should take into consideration.

1180 ICC-01/04-01/06-T-356-ENG, p 58 lines 18-25; p 59 lines 1-2.

1181 ICC-01/04-01/06-T-356-ENG, p 61 lines 14-21.

1182 ICC-01/04-01/06-T-356-ENG, p 62 lines 2-8.

1183 ICC-01/04-01/06-T-356-ENG, p 64 lines 5-15.

1184 ICC-01/04-01/06-T-356-ENG, p 70 lines 3-18.

hostilities by means of scouting, looting, killing and fighting.<sup>1185</sup> She suggested to the Chamber that these criminal acts against girls should be considered as aggravating circumstances to the crimes of enlistment and conscription of child soldiers under the age of 15 and using them to participate actively in hostilities.<sup>1186</sup>

Legal Representative of Victims Paul Kabongo Tshibangu focused on the recruitment of children and ‘their participation in combat as cannon fodder’.<sup>1187</sup> He discussed the material legal elements of the war crimes of recruitment and use of child soldiers.<sup>1188</sup> He cited a Human Rights Watch report that quoted a school headmaster who said that at the end of November 2002 half of his pupils had disappeared.<sup>1189</sup> Kabongo further stressed that active participation in combat not only related to direct participation in fighting but also covered ‘other aspects related to combat such as reconnaissance, espionage, sabotage’, body-guarding, and transporting ammunition.<sup>1190</sup>

Legal Representative of Victims Joseph Keta Orwinyo spoke about victim participation in the trial proceedings. He also discussed the Defence allegations of identity theft against three of the victims he represented in the proceedings, and noted that, contrary to Defence allegations, their identities had since been proven by means of finger-print analysis.<sup>1191</sup>

1185 ICC-01/04-01/06-T-356-ENG, p 70 lines 22-25; p 71 lines 1-6.

1186 ICC-01/04-01/06-T-356-ENG, p 71 lines 7-10.

1187 ICC-01/04-01/06-T-356-ENG, p 72 lines 12-13.

1188 ICC-01/04-01/06-T-356-ENG, p 73 lines 2-15; p 76 lines 9-20.

1189 ICC-01/04-01/06-T-356-ENG, p 74 lines 15-17.

1190 ICC-01/04-01/06-T-356-ENG, p 76 lines 9-14.

1191 ICC-01/04-01/06-T-356-ENG, p 80 lines 2-20.

Legal Representative of Victims Franck Mulenda commented on the problems related to civil status registration in the DRC, which he described as in an advanced stage of degradation.<sup>1192</sup> Mulenda noted previous jurisprudence from the Court, establishing civil status records were the best, but not the only way of proving the age of an individual.<sup>1193</sup> He also discussed protective measures, and noted that the victims relocated by the Court missed their homes in Ituri.<sup>1194</sup>

Finally, Legal Representative of Victims Luc Walleyn stressed the centrality of Lubanga’s criminal responsibility. He rejected the Defence portrayal of Lubanga as someone who took up arms only to resist oppression, noting that his clients had ‘never known Thomas Lubanga as a human rights activist’.<sup>1195</sup> He argued that the UPC militia had done nothing to provide order or protect civilians, but rather had committed crimes of increasing cruelty against the civilian population.<sup>1196</sup> Walleyn noted the leadership role played by Lubanga, his authority within the military and his powerful charisma, which had caused him to be seen as a ‘semi-god’<sup>1197</sup> by some child soldiers, and had contributed to some conflicts of loyalty among certain witnesses.<sup>1198</sup> Walleyn urged the Chamber to convict Lubanga as co-perpetrator.<sup>1199</sup>

1192 ICC-01/04-01/06-T-356-ENG, p 82 lines 2-5.

1193 ICC-01/04-01/06-T-356-ENG, p 84 lines 4-11.

1194 ICC-01/04-01/06-T-356-ENG, p 85 lines 2-11.

1195 ICC-01/04-01/06-T-356-ENG, p 86 lines 23-24.

1196 ICC-01/04-01/06-T-356-ENG, p 87 lines 13-21.

1197 ICC-01/04-01/06-T-356-ENG, p 88 line 6.

1198 ICC-01/04-01/06-T-356-ENG, p 88 lines 1-15.

1199 ICC-01/04-01/06-T-356-ENG, p 89 lines 8-23.

## Closing statements of the Defence

Catherine Mabilie, Lead Counsel for the Defence, began the Defence closing arguments by challenging the reliability of the evidence against Lubanga, arguing that the existence of the crimes charged against him had not been proven beyond a reasonable doubt.<sup>1200</sup> Mabilie underscored that Lubanga had been in detention at the Court for five and a half years, and that the proceedings against him had been very long and ‘characterised ... by serious dysfunction’, including the ‘exceptional circumstance’ of the imposition of two stays of proceedings that were imposed as a result of violations or shortcomings occasioned by the Office of the Prosecutor.<sup>1201</sup>

### Fabrication of witness testimony

Mabilie argued that all of the Prosecution witnesses who had testified as former child soldiers, without exception, had lied to the Chamber.<sup>1202</sup> She argued that this was demonstrated by inconsistencies between their testimonies and Defence investigations into their school records, ages and family situations. The Defence’s closing brief further suggested that questions concerning the reliability of witness testimony tainted the totality of the evidence, precluding a finding of guilt.<sup>1203</sup> The Defence maintained that there must have been ‘certain individuals protected by the seal of anonymity’ who had organised this false testimony.<sup>1204</sup> She argued that certain intermediaries<sup>1205</sup> working for the Office of the Prosecutor had prepared witnesses to give false testimony before the Court, which constituted

manipulation of the evidence.<sup>1206</sup> She highlighted the evidence from both Prosecution and Defence witnesses regarding false testimony and witnesses’ interactions with Prosecution Intermediaries 316, 321 and 143. Specifically, the Defence argued that the intermediaries had offered financial inducement to individuals to encourage them to testify about certain facts that they had not experienced. Mabilie noted that the Chamber had called Intermediaries 316 and 321 as witnesses in light of the Defence allegations, and that the Prosecutor’s refusal to obey an order from the Chamber to disclose the identity of Intermediary 143 had led to the second stay of proceedings in the trial.<sup>1207</sup> Mabilie pointed out that Intermediary 143 and Intermediary 321, in addition to working as intermediaries for the Office of the Prosecutor, had also worked on behalf of the Legal Representatives of Victims.<sup>1208</sup> She argued that, although it had been proven that intermediaries had encouraged witnesses to lie before the Court, the Prosecutor had completely denied their involvement, as exemplified by the press interview given in March 2010 by Beatrice le Fraper du Hellen, at the time head of the Jurisdiction, Complementarity and Cooperation Division (JCCD) of the Office of the Prosecutor.<sup>1209</sup> During trial hearings, the Defence submitted

1200 ICC-01/04-01/06-T-357-ENG, p 3 lines 1-6.

1201 ICC-01/04-01/06-T-357-ENG, p 2 lines 1-15.

1202 ICC-01/04-01/06-T-357-ENG, p 3 lines 15-18.

1203 ICC-01/04-01/06-2773-Red, para 9.

1204 ICC-01/04-01/06-T-357-ENG, p 6 lines 8-13.

1205 An intermediary is a person who facilitates the Prosecution’s contact with witnesses and the identification of incriminating material and exculpatory evidence. See ICC-01/04-01/06-2434-Red2, para 3.

1206 ICC-01/04-01/06-T-357-ENG, p 7 lines 9-16. Described in more detail below, on 10 December 2010, the Defence submitted a filing claiming an abuse of process concerning alleged improprieties committed by Prosecution intermediaries, and challenging the reliability of the evidence. ICC-01/04-01/06-2657. In its closing brief, the Defence drew heavily from the arguments set forth in its abuse of process filing.

1207 ICC-01/04-01/06-T-357-ENG, p 10 lines 19-25; p 11 line 1.

1208 ICC-01/04-01/06-T-357-ENG, p 12 lines 6-8.

1209 ICC-01/04-01/06-T-357-ENG, p 12 lines 9-17. In March 2010, Beatrice le Fraper du Hellen gave an interview to the [lubangatrial.org](http://lubangatrial.org) website, which included a number of statements defending the use of intermediaries by the Prosecution. In May 2010, the Trial Chamber issued a decision criticising the statements of Beatrice le Fraper du Hellen. The Chamber found her comments inappropriate, as the role of Prosecution intermediaries had become a ‘live issue’ in the case. See ICC-01/04-01/06-2433. For a detailed discussion of this issue, see *Gender Report Card 2010*, p 151-152.



oral objections to the interview's content and to the Office of the Prosecutor's failure to respect its obligations of impartiality.<sup>1210</sup>

Mabille alleged that the Office of the Prosecutor had been 'instrumentalised' by certain state powers, specifically the Congolese Government. She clarified: 'We do not allege that the Prosecutor intentionally served the interests of one of these powers, but it has been shown that the Congolese government in many ways intervened, directly or indirectly, in the investigations as well as in the judiciary process [sic].'<sup>1211</sup> She noted that Intermediary 316 'was a person in a high level of authority in a governmental agency directly related to the central power, directly related to President Kabila', and further that he was not the only Prosecution intermediary to have worked for that agency simultaneously with his work for the Office of the Prosecutor.<sup>1212</sup> She went on to argue that the Prosecutor was aware of both the sensitive role played by Intermediary 316 on behalf of the Congolese Government and the allegations that he had behaved in a 'suspicious way' with certain witnesses.<sup>1213</sup> Mabille argued that the clearly falsified evidence presented to the Court was attributable to the Prosecutor's failure to carry out proper investigations.<sup>1214</sup> She pointed out the Prosecutor's statutory obligation to investigate incriminating and exculpatory evidence equally. She contrasted this with the statement of Bernard Lavigne, the head of investigations at the Office of the Prosecutor until 2007, who testified in closed session in November 2010, that the verification

of Prosecution evidence had been entrusted to intermediaries due to security concerns, and that Prosecution investigators had never contacted the families of alleged child soldiers, local schools or chiefs of collectivities to verify the information they had provided.<sup>1215</sup> Mabille questioned how the Chamber could consider as satisfied the requirement of proof beyond a reasonable doubt when there had been no investigations to verify the statements made by the individuals called to testify, despite the Prosecution assertion in its response to the Defence abuse of process application in early 2011 that there was no reason to doubt their testimony.<sup>1216</sup> Mabille argued that the entirety of the evidence in the case had been tainted by the methods used in the Prosecutor's investigations.<sup>1217</sup>

In the absence of credible witness testimony, Mabille argued that visual evidence alone was not sufficient to prove the age of an individual beyond a reasonable doubt.<sup>1218</sup> Mabille argued that NGO and UN documentation regarding child soldiers had not been independently verified by the Prosecution, leaving her to conclude that '[a]gain, the Prosecution is rolling the dice but not very lucky'.<sup>1219</sup> As a result, the Defence argued, the Prosecutor had not provided adequate evidence to prove beyond a reasonable doubt that children under the age of fifteen years were recruited into the UPC/FPLC.<sup>1220</sup>

1210 ICC-01/04-01/06-T-268-Red-ENG, p 40 line 24 to p 43 line 8.

1211 ICC-01/04-01/06-T-357-ENG, p 12 lines 22-25; p 13 lines 1-4; ICC-01/04-01/06-T-2773-Red, paras 10-12; ICC-01/04-01/06-T-2786-Red, para 111.

1212 ICC-01/04-01/06-T-357-ENG, p 13 lines 7-14.

1213 ICC-01/04-01/06-T-357-ENG, p 13 lines 15-20.

1214 ICC-01/04-01/06-T-357-ENG, p 15 lines 18-22; ICC-01/04-01/06-T-2773-Red, paras 13-18. The Defence also made this argument in its abuse of process filing; see ICC-01/04-01/06-2657.

1215 ICC-01/04-01/06-T-357-ENG, p 16 lines 3-7, p 17 lines 7-23; p 18 lines 1-9.

1216 ICC-01/04-01/06-T-357-ENG, p 18 lines 11-13, 17-22. In its closing briefs, the Defence relied extensively on the arguments set forth in its abuse of process challenge concerning the role of intermediaries in the fabrication of evidence.

1217 ICC-01/04-01/06-T-357-ENG, p 19 lines 7-24; ICC-01/04-01/06-T-2773-Red, para 9.

1218 ICC-01/04-01/06-T-357-ENG, p 20 lines 5-8, 18-21.

1219 ICC-01/04-01/06-T-357-ENG, p 21 lines 2-13.

1220 ICC-01/04-01/06-T-357-ENG, p 22 lines 3-8 ICC-01/04-01/06-T-2773-Red, paras 86-89.

## Alleged individual criminal responsibility of Lubanga

Counsel for the Defence, Jean-Marie Biju-Duval, addressed the individual criminal responsibility of Lubanga alleged by the Prosecution, including the alleged common plan, the alleged role of Lubanga in that common plan, and his alleged contribution to the recruitment policy of the UPC/FPLC. Biju-Duval questioned the foundation of the accusations against Lubanga – namely, the theory of criminal co-perpetration – and the choices made by the Prosecutor in exercising his power to prosecute.<sup>1221</sup> He noted the ‘judicial paradox’ of a case charged as co-perpetration, which by definition requires several perpetrators, but with only one accused.<sup>1222</sup> Biju-Duval noted that one of Lubanga’s alleged co-perpetrators, Floribert Kisembo, Chief of Staff of the FPLC, had never been the subject of criminal proceedings before the ICC, and suggested that this may have been due to Kisembo’s loyalty to President Kabila and the Congolese Government.<sup>1223</sup>

Biju-Duval claimed that the absence of Lubanga’s involvement in the military activities of the armed force that would become the UPC/FPLC prior to September 2002 proved that his contribution was not necessary to establish the armed force, recruit military personnel, or carry out military operations. Instead, Biju-Duval argued that Lubanga’s only essential contribution was to act as a political leader.<sup>1224</sup> Biju-Duval claimed that no orders were issued by Lubanga relating to the recruitment or training of soldiers because he did not intervene in military affairs on recruitment or military

1221 ICC-01/04-01/06-T-357-ENG, p 25 lines 5-10; ICC-01/04-01/06-2773-Red, paras 52-53, noting that none of the parties requested a modification pursuant to Regulation 55.

1222 ICC-01/04-01/06-T-357-ENG, p 25 lines 11-13; ICC-01/04-01/06-2773-Red, paras 52-53, para 57; ICC-01/04-01/06-2786-Red, paras 21-30.

1223 ICC-01/04-01/06-T-357-ENG, p 25 lines 11-25; p 26, lines 1-18.

1224 ICC-01/04-01/06-T-357-ENG, p 29 line 14-25; ICC-01/04-01/06-2773-Red, paras 63, 792, 795.

operations.<sup>1225</sup> He underscored that the only instructions issued by Lubanga related to the prohibition of child soldier recruitment and provisions for demobilisation.<sup>1226</sup> He went on to argue that Lubanga did not issue orders to the civilian population regarding the recruitment of child soldiers, and that any public statements made by Lubanga were political in nature and designed only to encourage support for his movement among the civilian population.<sup>1227</sup> Biju-Duval dismissed the Prosecutor’s argument that the responsibility of Lubanga was based on the fact that he exercised effective control over the FPLC commanders responsible for recruitment, as this mode of criminal responsibility had been dismissed by the Pre-Trial Chamber and had not been charged in the case.<sup>1228</sup> Biju-Duval claimed that Lubanga ‘did not have the effective power to impose his will on the military leadership’, and that this was proven by the establishment of breakaway military movements by former commanders and the defection of Floribert Kisembo as Chief of Staff in December 2003.<sup>1229</sup>

Biju-Duval acknowledged that there was a risk that children under the age of fifteen would attempt to enlist in the FPLC,<sup>1230</sup> but argued that the mode of criminal responsibility charged required awareness on the part of the accused that his conduct would lead to the commission of the crimes charged ‘in the normal course of events’.<sup>1231</sup> Biju-Duval referenced existing ICC jurisprudence from the Bemba and Katanga & Ngudjolo cases, and interpreted this requirement to require that ‘the crime has to

1225 ICC-01/04-01/06-T-357-ENG, p 31 lines 1-4; ICC-01/04-01/06-2773-Red, para 72.

1226 ICC-01/04-01/06-T-357-ENG, p 31 lines 5-18; ICC-01/04-01/06-2786-Red, para 22.

1227 ICC-01/04-01/06-T-357-ENG, p 32 lines 1-8; ICC-01/04-01/06-2773-Red, para 72, citing a confidential filing.

1228 ICC-01/04-01/06-T-357-ENG, p 32 lines 13-20.

1229 ICC-01/04-01/06-T-357-ENG, p 33 lines 1-22.

1230 ICC-01/04-01/06-T-357-ENG, p 35 lines 2-10.

1231 ICC-01/04-01/06-T-357-ENG, p 36 lines 10-13; ICC-01/04-01/06-2773-Red, paras 74-83.

appear to be the virtually certain consequence of the conduct of the accused', rather than a possible risk.<sup>1232</sup> The Defence argued that, rather than accepting or encouraging the recruitment of minors, the evidence showed that Lubanga had done everything possible to prevent the commission of such crimes.<sup>1233</sup> It alleged that he had issued orders prohibiting the recruitment of children under the age of eighteen and had attempted to ensure these orders were enforced.<sup>1234</sup>

Biju-Duval then addressed the video of Lubanga visiting the Rwampara training camp. He rejected the Prosecution argument that Lubanga's uniform reflected his absolute military authority over the FPLC, pointing out that Bosco Ntaganda, assistant Chief of Staff and Commander of Operations in the FPLC, was wearing civilian clothes.<sup>1235</sup> Biju-Duval also disagreed with the Prosecution's interpretation of Lubanga's statement in the video. According to the Defence, his statement: 'This is the second time I am coming here' was not evidence that he regularly visited and supervised his troops. The Defence argued that the full quote in the video actually indicated that Lubanga said he had been detained in the Rwampara camp by the Ugandans in September 2000, and that his mention of the 'second time' he had visited the camp was in reference to his visit as a detainee several years previously.<sup>1236</sup> Biju-Duval criticised the 'deliberate misrepresentation' of this evidence by the Prosecutor in order to secure the conviction of Lubanga at all costs, and questioned whether this behaviour fulfilled the Prosecutor's obligations of impartiality in pursuit of the truth.<sup>1237</sup> Biju-Duval listed the various orders and communications

1232 ICC-01/04-01/06-T-357-ENG, p 36 lines 13-22; ICC-01/04-01/06-2773-Red, paras 79-83.

1233 ICC-01/04-01/06-T-357-ENG, p 37 lines 1-6.

1234 ICC-01/04-01/06-T-357-ENG, p 39 lines 13-24.

1235 ICC-01/04-01/06-T-357-ENG, p 41 lines 12-17.

1236 ICC-01/04-01/06-T-357-ENG, p 41 lines 18-25; p 42 lines 1-16.

1237 ICC-01/04-01/06-T-357-ENG, p 42 lines 17-24.

from Lubanga that appeared to prohibit the recruitment or use of child soldiers, and rejected the Prosecution argument that these documents had been made solely for public relations purposes.<sup>1238</sup> He concluded that nothing could be attributed to Lubanga that proved he was responsible for the crimes charged, and therefore urged the Chamber to acquit.<sup>1239</sup>

### Unsworn statement by Lubanga

At the conclusion of the Defence case, the accused, Thomas Lubanga Dyilo, made a short, unsworn statement pursuant to Article 67(1)(h).<sup>1240</sup> He stated that he had not been able to recognise himself on the basis of the actions ascribed to him or the intentions attributed to him in the course of the trial.<sup>1241</sup> Lubanga claimed that he had only assumed certain responsibilities in Ituri with the consent of other citizens and with the purpose of combating the inhumane treatment<sup>1242</sup> of Congolese citizens in Ituri and saving lives.<sup>1243</sup> Lubanga stated that the convictions and values he had received through his education guided him in all his actions, particularly the actions he had taken against the recruitment of minors, and he did not feel that he had failed or acted inconsistently with those values.<sup>1244</sup>

1238 ICC-01/04-01/06-T-357-ENG, p 47 lines 15-22. In contrast, the Defence argued that other documents produced by the accused and relied upon by the Prosecution did constitute propaganda and these should not be relied upon by the Court. ICC-01/04-01/06-2773-Red, para 380.

1239 ICC-01/04-01/06-T-357-ENG, p 47 lines 23-25; p 48 lines 1-9.

1240 Article 67(1)(h) provides that the accused has the right 'to make an unsworn oral or written statement in his or her defence'.

1241 ICC-01/04-01/06-T-357-ENG, p 48 lines 23-25.

1242 In French, Lubanga said the following: *Je l'ai fait juste dans le but de lutter contre l'humanité... l'inhumanité dévastatrice dont souffraient à cette époque toutes les communautés congolaises de Ituri*. ICC-01/04-01/06-T-357-FRA, p 42 line 28; p 43 line 1.

1243 ICC-01/04-01/06-T-357-ENG, p 49 lines 2-7.

1244 ICC-01/04-01/06-T-357-ENG, p 49 lines 8-18.

Judge Fulford closed the proceedings by thanking the interpreters, stenographers and counsel for their efforts in the course of the hearing. He noted that the Chamber would now deliberate, pursuant to Rule 142(1),<sup>1245</sup> and would return with a verdict pursuant to Article 74 ‘within a reasonable period of time’.<sup>1246</sup>

## Abuse of process

The Lubanga Defence first noted its intention to file an abuse of process claim in May 2010, and filed its application confidentially on 10 December 2010.<sup>1247</sup> Its primary allegation in the abuse of process filing involved the role of intermediaries who, acting on behalf of the Prosecution, were alleged to have encouraged witnesses to fabricate testimony regarding their identities and their military involvement, resulting in serious breaches of the accused’s right to a fair trial. Intermediaries are individuals who have acted on behalf of the Court, in this instance, by assisting in contacting potential witnesses for the Prosecution.

The role of intermediaries has been at issue in the Lubanga trial since the opening of the Prosecution case in January 2009, when its first witness, an alleged former child soldier,<sup>1248</sup> recanted his testimony and stated that he had been instructed on the contents of his testimony by an NGO for troubled children, specifically referencing Intermediary 321.<sup>1249</sup> Later, he again reversed his testimony, stating that ‘he had not been persuaded to tell lies’.<sup>1250</sup> Another

1245 Rule 142(1) of the Rules of Procedure and Evidence states: ‘After the closing statements, the Trial Chamber shall retire to deliberate, in camera. The Trial Chamber shall inform all those who participated in the proceedings of the date on which the Trial Chamber will pronounce its decision. The pronouncement shall be made within a reasonable period of time after the Trial Chamber has retired to deliberate.’

1246 ICC-01/04-01/06-T-357-ENG, p 50 lines 9-19.

1247 ICC-01/04-01/06-2657.

1248 Witness 298.

1249 *Gender Report Card 2010*, p 140.

1250 ICC-01/04-01/06-2434-Red2, paras 8-10.

Prosecution witness, also an alleged former child soldier, made similar allegations while testifying in June 2009, this time referring to Intermediary 316.<sup>1251</sup> In January 2010, the Defence opened its case with allegations of fabrication of the evidence by Intermediaries 321 and 316. In May 2010, the Defence indicated to Trial Chamber I that it intended to file an application on abuse of process.<sup>1252</sup>

In its abuse of process application,<sup>1253</sup> the Defence argued for a permanent stay of proceedings and immediate release of the accused as a fair trial had ‘been rendered impossible’.<sup>1254</sup> Its claim was based on five allegations: (i) the improper role of four intermediaries who acted for the Prosecution; (ii) the Prosecutor’s negligence in failing to appropriately investigate and verify the evidence he introduced at trial; (iii) the Prosecution’s purposeful failure to discharge its disclosure obligations; (iv) corroboration between participating victim-witnesses in falsifying evidence; and (v) failure by the Prosecution to act fairly and impartially.<sup>1255</sup> Challenging the reliability of the evidence, particularly the testimony of former child soldier witnesses, the Defence continued to draw heavily from these assertions in its closing arguments, as described above.

On 2 March 2011, Trial Chamber I issued a lengthy decision, refusing to grant a permanent stay of the proceedings for abuse of process. Citing the Appeals Chamber’s decision on Lubanga’s jurisdictional challenge,<sup>1256</sup> Trial Chamber I found that either of two standards must be met before determining that the Defence claim reached the high threshold

1251 ICC-01/04-01/06-2434-Red2, para 21, citing ICC-01/04-01/06-T-192-CONF-ENG, p 6.

1252 ICC-01/04-01/06-2434-Red2, para 54, citing an email communication.

1253 ICC-01/04-01/06-2657-Red.

1254 ICC-01/04-01/06-2690-Red2, para 23.

1255 ICC-01/04-01/06-2657-Red.

1256 ICC-01/04-01/06-772.

required: (i) it would be ‘odious’ or ‘repugnant’ to the administration of justice to allow the proceedings to continue; or (ii) the accused’s rights have been breached to the extent that a fair trial has been rendered impossible.<sup>1257</sup> On each of the Defence’s five allegations, Trial Chamber I ruled that the threshold was not reached, and therefore that no stay was required.

As described by the Chamber in its decision, the role of intermediaries in manipulating witnesses and fabricating evidence was the central line of the Defence argument. The Defence claimed that Intermediaries 316, 321, 143, and 31 encouraged witnesses to fabricate their identities and their alleged military involvement, and that the Prosecution knew, or should have known, that the intermediaries were doing so, but continued to work with them.<sup>1258</sup> The Chamber underscored that, as concerns regarding the role of Prosecution intermediaries had been central to the accused’s defence since January 2010, it had issued several comprehensive decisions in which it ensured the Defence an opportunity to adequately address the issue during trial.<sup>1259</sup> Under these circumstances, the Chamber found that it had provided the Defence with sufficient opportunities to address the evidence, and that therefore the accused’s right to a fair trial had not been breached.<sup>1260</sup> Trial Chamber I thus found that it would be neither odious, nor repugnant to continue the trial. Echoing the Appeals Chamber decision on the

most recent stay of proceedings,<sup>1261</sup> it found that even if claims of prosecutorial misconduct were substantiated, a stay would constitute a disproportionate remedy.<sup>1262</sup>

The Defence further claimed that the Prosecution was negligent in its investigations, refusing to pursue indications of fabricated evidence or to verify the identities and statuses of its witnesses.<sup>1263</sup> In its response, the Prosecution attributed its decision to rely on intermediaries for contacting potential witnesses to the difficult circumstances it faced in conducting investigations in the DRC, and in Ituri in particular.<sup>1264</sup> The Chamber found that even considering the Defence’s factual submissions at their highest, none of the conduct attributed to the Prosecution could be characterised as illegal or as conduct that would render it odious or repugnant to continue the trial.<sup>1265</sup> Significantly, the Chamber determined that, if proven, the Prosecution’s failure to ensure that the Chamber received reliable evidence, and specifically that it ‘deliberately avoided the process of verification’,<sup>1266</sup> may affect the Chamber’s subsequent ruling on that evidence.

1257 As noted above, while both standards were set forth in the Appeals Chamber’s decision, Trial Chamber III used only the latter; Trial Chamber I used both.

1258 ICC-01/04-01/06-2690-Red, paras 190-193.

1259 For instance, the ‘Decision on Intermediaries’, ICC-01/04-01/06-2434-Red2.

1260 ICC-01/04-01/06-2690-Red2, para 188.

1261 On 8 October 2010, the Appeals Chamber issued a decision, overturning Trial Chamber I’s decision, which had permanently stayed the proceedings for the Prosecution’s failure to implement the Chamber’s order to disclose the identity of Intermediary 143. The Appeals Chamber held that a permanent stay of the proceedings was too ‘drastic’ a remedy, and that sanctions would have been more appropriate. ICC-01/04-01/06-2582; see also *Gender Report Card 2010*, p 139 – 144.

1262 ICC-01/04-01/06-2690-Red2, para 189.

1263 ICC-01/04-01/06-2690-Red2, para 200.

1264 ICC-01/04-01/06-2678-Conf, paras 1-13, as cited in ICC-01/04-01/06-2690-Red2.

1265 ICC-01/04-01/06-2678-Conf, para 204, as cited in ICC-01/04-01/06-2690-Red2.

1266 ICC-01/04-01/06-2678-Conf, as cited in ICC-01/04-01/06-2690-Red2.

The Prosecution's disclosure irregularities have long been an issue in this case,<sup>1267</sup> and the Defence included them as an allegation in its abuse of process application. Trial Chamber I referred to its many decisions on this issue,<sup>1268</sup> including its 'Decision on Intermediaries', to hold that the Prosecution's disclosure irregularities did not render the continuation of the trial odious or repugnant, and that individual breaches of the accused's right to disclosure did not constitute an unfair trial. Recalling the Appeals Chamber ruling on the previous stay of proceedings, the Chamber reserved its right to impose sanctions if deliberate late disclosure on the part of the Prosecutor is proven.<sup>1269</sup>

Trial Chamber I also held it 'wholly untenable' to find that a conspiracy between victims, even with respect to the alleged fabrication of false evidence and the use of false identities, would render continuation of the trial odious, repugnant, or constitute any abrogation of the accused's rights.<sup>1270</sup>

The Defence further alleged a lack of impartiality on the part of the Prosecution, relying on the statements made in a March 2010 interview by Ms Le Fraper du Hellen with [lubangatrial.org](http://lubangatrial.org), and a novel written by a former consultant for the Office of the Prosecutor.<sup>1271</sup> The Chamber noted that it had already issued a decision on the propriety of out-of-court statements.<sup>1272</sup> It held that neither incident played any role in its determination of the substantive issues in the case, and therefore did not meet the threshold for imposing a stay of the proceedings.<sup>1273</sup>

Significantly, Trial Chamber I's decision rejecting the Defence's abuse of process allegations and request for a permanent stay followed an Appeal Chamber's decision overturning the Trial Chamber's prior decision to permanently stay the proceedings due to the Prosecution's failure to obey its order and disclose the name of intermediary 143.<sup>1274</sup> In its decision overruling the stay, the Appeals Chamber characterised a stay of proceedings as a 'drastic' remedy. Both the language of the Appeals Chamber's decision, and its holding, were echoed in the Trial Chamber's decision not to stay the proceedings for abuse of process. Throughout its decision, Trial Chamber I closely adhered to the Appeal's Chamber decision by consistently concluding that the alleged irregularities did not warrant a 'drastic' remedy. In response to each of the five Defence contentions, Trial Chamber I came to the same conclusion, with minor variations on the following language:

1267 The first stay of proceedings in the Lubanga trial, in June 2008, was the result of the Prosecution's non-disclosure of potentially exculpatory evidence (ICC-01/04-01/06-1401); the second stay was for its failure to disclose the identity of an intermediary in contravention of the Chamber's order (ICC-01/04-01/06-2517-Red). The Prosecution has also been repeatedly criticised for late disclosure. The Defence sought to portray in its abuse of process application as deliberate. (See, ICC-01/04-01/06-2690-Red2, para 212). For a more detailed discussion of these issues, see *Gender Report Card 2010*, p 147-159.

1268 ICC-01/04-01/06-2434-Red2; ICC-01/04-01/06-2585; ICC-01/04-01/06-2656-Red.

1269 ICC-01/04-01/06-2690-Red2, para 212.

1270 ICC-01/04-01/06-2690-Red2, paras 217-218. The witnesses included in this allegation were victims a/0225/06, a/0229/06, and a/0270/07.

1271 For a more detailed discussion of these issues, see *Gender Report Card 2010*, p 151-152.

1272 ICC-01/04-01/06-2433.

1273 ICC-01/04-01/06-2690-Red2, para 222.

1274 ICC-01/04-01/06-2582.

Accordingly, here it is also unnecessary, at this point, for the Chamber to reach any decision as to the various factual issues raised on this aspect of the application: accepting, for the sake of argument, the defence submissions at their highest, this is not a situation in which, as an exercise of judgment, a stay of proceedings is called for. The alleged failings on the part of the prosecution can be addressed as part of the ongoing trial process.<sup>1275</sup>

The Trial Chamber repeatedly reasserted its right to reserve judgement on the factual allegations set forth in the Defence submissions, all of which would be determined upon further examination of the evidence. Thus, the Trial Chamber's decision denying the requested stay of proceedings constituted a limited ruling that reaffirms the Appeals Chamber's characterisation of as the use of stays as both 'drastic' and 'exceptional'. It also left the door open to future rulings on the allegedly fabricated evidence proffered by the Prosecution.<sup>1276</sup>

<sup>1275</sup> ICC-01/04-01/06-2690-Red2, para 205; see also paras 213 and 218 with almost identical language.

<sup>1276</sup> Significantly, it noted that in its analysis, it considered only those facts set forth by the Defence to prove its contentions, and not facts otherwise known to it from other evidence presented during trial.

## Abuse of process claims: comparing Bemba and Lubanga

To date, both Trial Chambers I and III have decided upon abuse of process claims by the Lubanga and Bemba Defence teams, respectively, alleging that actions taken by the Prosecution amounted to an abuse of process and that a fair trial was impossible as a result of these actions. In both proceedings, the Trial Chambers rejected Defence claims. Although the same standards<sup>1277</sup> were essentially used for evaluating the abuse of process claims, the decisions can be distinguished by the distinct contexts in which the Defences' claims arose, as well as by their underlying legitimacy.

Last year, in June 2010, Trial Chamber III rejected the Defence abuse of process claim in *The Prosecutor v. Jean-Pierre Bemba Gombo*.<sup>1278</sup> The Defence claim was part of a broader admissibility challenge that argued that the Court did not have jurisdiction over the accused, who at the time of the confirmation of charges was Vice-President of the DRC. Charges against him had been pursued by the CAR authorities since 2003, with a final determination of ICC jurisdiction in 2006.

In its decision, Trial Chamber III dismissed all of Bemba's assertions as lacking in credibility. The Chamber relied on one of the two standards as set forth by the Appeals Chamber to determine that it 'should stay the proceedings if a violation of the accused's rights render a fair trial impossible'.<sup>1279</sup> First, it found the

<sup>1277</sup> Both Trial Chambers applied the holding of the Appeals Chamber as set forth in ICC-01/04-01/06-772.

<sup>1278</sup> This decision is summarised more fully in the Admissibility section of *Gender Report Card 2010*, p 180-183. The Chamber's finding is mirrored in other decisions concerning unsubstantiated claims by the Bemba Defence. See, eg ICC-01/05-01/08-1010; ICC-01/05-01/08-980.

<sup>1279</sup> ICC-01/04-01/06-772, para 253. As noted above, while two standards were set forth in the Appeals Chamber's decision, Trial Chamber III used only the latter; Trial Chamber I used both. ICC-01/05-01/08-802, para 253.

Prosecution's alleged material non-disclosure of correspondence with authorities of the CAR 'essentially speculative'.<sup>1280</sup> Second, it found that the Defence argument that the judicial process was used for political purposes had no 'credible or sufficient evidential foundation'.<sup>1281</sup> Third, Trial Chamber III found no irregularity in the process through which the accused was detained in Belgium and transferred to the Court. In rejecting the Defence claims in their entirety, the Chamber's dismissive language made clear its view of the unsubstantiated nature of the allegations. Moreover, the Chamber issued a clear critique of the Defence strategy, and found an abuse of process by the Defence.

As noted above, the CAR authorities had pursued charges against the accused for several years prior to his arrest and surrender to the ICC. In 2006, the *Cour de Cassation* (Court of Cassation) in Bangui confirmed the judgement of the lower court that the war crimes with which Bemba was accused fell within the jurisdiction of the ICC. Following the confirmation of charges against him by the ICC, the accused filed additional motions to the *Cour de Cassation* in April and May 2010. Trial Chamber III stated, 'no sufficient explanation has been provided for these extremely late filings', and that this obvious strategy constituted 'an abuse of this court's process'.<sup>1282</sup>

The Defence appealed the decision, but only as to the Trial Chamber's finding that the Defence's recent submissions to the *Cour de Cassation* in the CAR constituted an abuse of process.<sup>1283</sup> In October 2010, the Appeals Chamber rejected the Defence appeal, finding that although Trial Chamber III did not sufficiently elaborate on its

1280 ICC-01/05-01/08-802, paras 215-216.

1281 ICC-01/05-01/08-802, para 256.

1282 ICC-01/05-01/08-802, para 231.

1283 ICC-01/05-01/08-804-Corr. The Defence did not appeal the Trial Chamber's holdings related to its underlying claims regarding prosecutorial non-disclosure and improper judicial process and detention. See *Gender Report Card 2010*, p 182.

ruling, the Defence had 'failed to connect the alleged error to the Trial Chamber's decision on the admissibility of the case', and had therefore failed to meet the minimum requirement for consideration of the merits on appeal.<sup>1284</sup>

Trial Chamber I's approach to Defence allegations of abuse of process in *The Prosecutor v. Thomas Lubanga Dyilo* arose through procedures and a context distinct from that of Bemba, described above. In contrast with Bemba's unsubstantiated claims and his abuse of the Court's process, Trial Chamber I accorded greater seriousness to Lubanga's claims of prosecutorial misconduct, which arose, in part, out of concerns over the longstanding issue regarding the improper influence of Prosecution intermediaries.

Significantly, following its abuse of process filing, but prior to its ruling, Trial Chamber I issued four decisions on the admissibility of evidence between December 2010 and March 2011, all of which required that the Prosecution provide additional evidence or delete redactions from some previously disclosed evidence. Trial Chamber I found that much of the information was now relevant in light of the Defence abuse of process claim.<sup>1285</sup> What the Prosecution termed an 'ever-expanding' defence, also raised possible implications for victim and witness security. Both the VPRS and the OPCV objected to lifting redactions due to the security concerns of victims and witnesses, not only for those who had been identified, but also for those who participated anonymously in the Lubanga case as well as those participating in the proceedings before Trial Chamber II in the Katanga & Ngudjolo case.<sup>1286</sup>

1284 ICC-10/05-01/08-962, para 134.

1285 ICC-01/04-01/06-2586-Red; ICC-01/04-01/06-2597-Red; ICC-01/04-01/06-2656-Red; ICC-01/04-01/06-2662.

1286 ICC-01/04-01/06-2586-Red. This decision lifted redactions from the application forms of victims a/0225/06, a/0229/06 and a/0270/07. For more information, see the *Protection* section of this Report.



As described above, the Defence's application for a permanent stay of the proceedings based on an abuse of process by the Prosecution followed the Appeals Chamber's reversal of the Trial Chamber's order for a permanent stay based on the Prosecution's failure to comply with its order to disclose the name of one of the Prosecution's intermediaries.<sup>1287</sup> The Appeals Chamber's decision may have increased the Trial Chamber's reluctance to permanently stay the proceedings even in the face of serious fair trial concerns.

In contrast to the abuse of process claims in Bemba, although Trial Chamber I refused to order a stay, it found that many of the issues raised by the Defence may affect its subsequent rulings on the evidence. Additionally, the Chamber reserved its right to impose sanctions if deliberate late disclosure on the part of the Prosecutor is proven. Thus, despite Trial Chamber I's refusal to grant a permanent stay of proceedings, the allegations made by the Defence may still hold major implications for, and could direct the outcome of, the trial.

## Article 70 offences against the administration of justice in Lubanga case

On 29 March 2011, in *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I requested observations from the parties and participants on the procedure to be adopted for initiating an investigation pursuant to Article 70 of the Rome Statute.<sup>1288</sup> Article 70 addresses intentional offences against the administration of justice. In particular, subsection (1)(c) covers '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'.<sup>1289</sup> The Chamber's request followed an inquiry by the Victims and Witnesses Unit (VWU) concerning the issue of direct and indirect threats by victims against defence witnesses in the proceedings. Details of the VWU inquiry have not been made public. The Chamber ordered the parties and participants to submit observations on the appropriate organ of the Court, or external body, to conduct an Article 70 investigation. This is the first time Article 70 has been engaged in a proceeding at the ICC. As of the writing of this Report, no decisions have been made public concerning the Article 70 investigation, nor any additional details of the underlying circumstances that led to the VWU's inquiry.

The Legal Representatives of Victims (LRV) filed comprehensive observations, outlining the options available to the Chamber.<sup>1290</sup> They noted that the Chamber may exercise jurisdiction over the matter, or refer it to an appropriate

<sup>1287</sup> These events are described in greater detail in *Gender Report Card 2010*, p 139-144.

<sup>1288</sup> ICC-01/04-01/06-2716, fn 1; the request for observations was made by email.

<sup>1289</sup> Article 70(1)(c) of the Statute. Article 70(1) provides an exhaustive list of violations that fall within the scope of the Court's jurisdiction, with an emphasis on violations that were committed intentionally.

<sup>1290</sup> ICC-01/04-01/06-2714.

State Party, taking into consideration the latter's competence and experience in investigating breaches of this kind. Should the Chamber decide to delegate its authority over the matter to the State Party, the filing suggested that it should carefully consider the factors contained in Rule 162(2),<sup>1291</sup> as well as the potential impact of such delegation on victims and witnesses, of particular importance in this matter due to the nature of the breach. The LRVs observations recognised that no statutory provision indicated that the investigation and prosecution of such offences should be assigned to any body other than that of the Office of the Prosecutor. They noted that, in contrast, the statutory frameworks of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) provided for the possibility of using an *ad hoc* investigator in the event of a conflict of interest by the Prosecution. By analogy, they asserted that if the Chamber found there was a conflict of interest in assigning an investigation pursuant to Article 70 to the Office of the Prosecutor, it could request that the Registry submit an *amicus curiae* brief as to whether rationale exists for opening an independent investigation led by an entity unaffiliated with the Court.

In its observations,<sup>1292</sup> the Prosecution asserted that it fell within the sole discretion of the Office to investigate offences against the administration of justice pursuant to Article 70 of the Statute, as explicitly foreseen in Rule 165 of the Rules of Procedure and Evidence.<sup>1293</sup> Regarding any role to be played by the

1291 Factors to consider in Rule 162(2) include: the availability and effectiveness of prosecution in a State Party; the seriousness of the offence; possible joinder of charges under Article 70 with charges under Articles 5 to 8; the need to expedite proceedings; links with an ongoing investigation or trial before the Court; and evidentiary considerations.

1292 ICC-01/04-01/06-2716.

1293 Rule 165(1) provides: 'The Prosecutor may initiate and conduct investigations with respect to the offences defined in Article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.'

Registry, the Prosecution emphasised that its responsibilities were limited to 'non-judicial aspects of the administration and servicing of the Court'.<sup>1294</sup> It also asserted that should the Chamber find a conflict of interest, the Prosecution could create internal divisions within its Office for the purpose of conducting the Article 70 investigation.

The Defence explicitly requested that the Chamber retain an independent investigator for the Article 70 investigation.<sup>1295</sup> While recognising that conducting investigations, including those into offences against the administration of justice, fell within the competence of the Office of the Prosecutor, it asserted that the Chamber should not refrain from derogating from this Rule in the interests of a fair trial. Specifically, the Defence noted the inherent conflict of interest as the Prosecution would be required to question Defence witnesses, to whose position it remained opposed, as part of any probe into the circumstances surrounding the alleged Article 70 breach. The Defence also suggested the possibility of the Chamber utilising by analogy the statutory framework for the ICTY and ICTR to request *amicus curiae* by the Registry.

As of the writing of this Report, Trial Chamber I had not yet made any determination with respect to an investigation into an alleged Article 70 breach.

1294 ICC-01/04-01/06-2716 para 4, referencing Article 43(1).

1295 ICC-01/04-01/06-2715.

## *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*

The ICC's second trial, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, commenced on 24 November 2009. This is the second trial resulting from the DRC Situation, and the first trial before the Court to include charges for gender-based crimes.<sup>1296</sup> The case centres on an attack carried out on 24 February 2003 on the village of Bogoro in Ituri by the FNI and the FRPI. At the time of the attack, Katanga was the alleged commander of the FRPI and Ngudjolo was the alleged commander of the FNI. Both Katanga and Ngudjolo are charged with seven counts of war crimes,<sup>1297</sup> including rape,<sup>1298</sup> sexual slavery,<sup>1299</sup> using children under the age of 15 to take active part in hostilities,<sup>1300</sup> directing an attack against a civilian population,<sup>1301</sup> wilful killings,<sup>1302</sup> destruction of property,<sup>1303</sup> and pillaging.<sup>1304</sup> They are additionally charged with three counts of crimes against humanity, including rape,<sup>1305</sup> sexual slavery<sup>1306</sup> and murder. In its 30 September 2008 decision confirming the charges,<sup>1307</sup> Pre-Trial Chamber I declined to confirm charges for the war crime of torture or inhuman treatment,<sup>1308</sup> the war crime of outrages upon personal dignity,<sup>1309</sup> and the

crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>1310</sup>

Based on an analysis of the public transcripts, between 22 September 2010 and 16 September 2011, Trial Chamber II<sup>1311</sup> heard testimony by 33 witnesses, including eight witnesses called by the Prosecution, 17 by the Katanga Defence and eight witnesses called by the Ngudjolo Defence. The Prosecution formally closed its case on 8 December 2010 with the testimony of Sonia Bakar, a staff member for the special investigation unit of the MONUC human rights section between 2002 and 2004, who testified over three days about her involvement in investigations at Bogoro.<sup>1312</sup>

In addition, as described in more detail in the **Victim Participation** section of this Report, the Chamber heard testimony by two participating victims (both are Hema women). This is the second time a Trial Chamber granted participating victims the opportunity to testify as witnesses in the proceedings. The first time participating victims were allowed to testify was in the Lubanga case in January 2010.<sup>1313</sup> The two participating victims who were granted the opportunity to testify in the Katanga & Ngudjolo

1296 For a more detailed explanation of the charges against the accused, see *Gender Report Card 2010*, p 160.

1297 The Pre-Trial Chamber confirmed alternate charges under both subsection (b) for crimes committed in international armed conflict and subsection (e) for crimes committed in armed conflict not of an international character.

1298 Article 8(2)(b)(xxii).

1299 Article 8(2)(b)(xxii).

1300 Article 8(2)(b)(xxvi).

1301 Article 8(2)(b)(i).

1302 Article 8(2)(a)(i).

1303 Article 8(2)(b)(xiii).

1304 Article 8(2)(b)(xvi).

1305 Article 7(1)(g).

1306 Article 7(1)(g).

1307 ICC-01/04-01/07-717.

1308 Article 8(2)(a)(ii).

1309 Article 8(2)(b)(xxi).

1310 Article 7(1)(k). The confirmation of charges and pre-trial phases of the proceedings are covered in detail in the *Gender Report Card 2008* and *2009*.

1311 Trial Chamber II is composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Christine Van den Wyngaert (Belgium).

1312 ICC-01/04-01/07-T-228-ENG, ICC-01/04-01/07-T-229-ENG, and ICC-01/04-01/07-T-230-ENG.

1313 For a detailed account of their testimony, see *Gender Report Card 2010*, p 137-139.

case testified in February 2011.<sup>1314</sup> These two participating victims do not appear to have testified about sexual violence in open court.

The first witness for the Katanga Defence, the accused's younger brother, testified on 24 March 2011.<sup>1315</sup> Significantly, three of the Katanga Defence witnesses have sought asylum in the Netherlands, as detailed in the **Protection** section of this Report. The Katanga Defence called its final witness on 12 July 2011; the Ngudjolo Defence commenced its defence on 15 August 2011. Both of the accused are testifying on their own behalf during the proceedings. After having requested translation into Lingala due to his inability to follow the proceedings in French, starting on 27 September 2011, Germain Katanga testified in French, resulting in the Chamber's order to the Registry to cease Lingala translation.<sup>1316</sup> Katanga's testimony, as of the writing of this Report, is summarised below. Ngudjolo is scheduled to testify in late October 2011.

1314 ICC-01/04-01/07-T-231-Red2-ENG; ICC-01/04-01/07-T-232-Red-ENG; ICC-01/04-01/07-T-233-Red-ENG; ICC-01/04-01/07-T-234-Red-ENG; and ICC-01/04-01/07-T-235-Red-ENG.

1315 ICC-01/04-01/07-T-240-Red-ENG.

1316 ICC-01/04-01/07-T-315-ENG, p 10 line 23.

## Witness testimony on sexual violence

Because the majority of Prosecution witnesses who testified about sexual violence did so during the period covered by the *Gender Report Card 2010*,<sup>1317</sup> the description of witness testimony on sexual violence covered by this year's *Gender Report Card* is necessarily limited. Over the course of the Prosecution case in 2010, three female witnesses testified on sexual violence.<sup>1318</sup> Two of them testified about having been raped by several soldiers and on several occasions; one of them stated that some of the soldiers subsequently told her that she was now their wife. One of the witnesses was brought to and kept in a camp prison where she was regularly raped by multiple perpetrators, and was later forced into marriage with a man who came to the camp to rape her. Apart from the testimony of female witnesses, a number of male witnesses for the Prosecution also testified about the multiple roles women and girls played during the attack. Two male witnesses testified about rape in general terms. A more detailed summary of these witnesses' testimonies is available in the *Gender Report Card 2010*.<sup>1319</sup>

Although the testimony of Prosecution witnesses covered by this year's *Gender Report Card* centred primarily on the use of child soldiers, and not specifically on sexual violence, several witnesses of both the Prosecution and the Defence did provide testimony related to gender-based crimes.<sup>1320</sup> A number of male witnesses for the Prosecution testified that women were abducted, taken hostage, used as sexual slaves and forced into marriage. **Witness 12** testified that women were abducted and taken to Zombe

1317 For a detailed account of their testimony, see *Gender Report Card 2010*, p 160-178.

1318 Witness 287, 249 and 132.

1319 *Gender Report Card 2010*, p 165-176.

1320 This section includes selected information from witness testimonies that were given in open session and that were made available on the ICC's website as of 16 September 2011.

during the attack on Kasenyi, and that they never returned.<sup>1321</sup> The witness explained that during one of the consultation meetings for armed groups, at which both the witness and Ngudjolo were present, when the witness asked about these women, several leaders confirmed that ‘whatever the case may be, they’re already married, some of them already have children’.<sup>1322</sup> In addition, the witness stated that one of the leaders, Lobo Justin, had said to him ‘in view of the fact that the Hemas do not like to give us their daughters, well, then we had to serve ourselves’.<sup>1323</sup> Witness 12 also testified that something similar happened at Lac Albert, where Colonel Lugubamba abducted women and used them as sexual slaves.<sup>1324</sup> Witness 12 added: ‘We call them sexual slaves, when you go and abduct women and you use them against their will.’<sup>1325</sup> He confirmed that these women were abducted for the purpose of being sexual slaves.<sup>1326</sup>

**Witness 219** also testified that women were forced into marriage; he specifically mentioned two women who had been forcibly married to Ngiti soldiers.<sup>1327</sup> He did not know with certainty of what ethnicity these women were. Witness 219 also testified about a system called *gilet*, which involved the mutilation and killing of men and women and which was put into practice during the attack on the school in Bogoro.<sup>1328</sup> The witness testified that ‘no woman survived’ the attack on the school and that ‘those parts of the women were cut off ... [n]o woman could stay alive beyond a period of 45 minutes there’.<sup>1329</sup> He mentioned in particular a soldier named Akufaka ‘who was moving about and wearing a woman’s genitalia on his wrist like a bracelet’.<sup>1330</sup>

1321 ICC-01/04-01/07-T-196-Red-ENG, p 33 lines 5-8.

1322 ICC-01/04-01/07-T-196-Red-ENG, p 33 lines 15-17.

1323 ICC-01/04-01/07-T-196-Red-ENG, p 33 lines 22-24.

1324 ICC-01/04-01/07-T-196-Red-ENG, p 34 lines 3-23.

1325 ICC-01/04-01/07-T-196-Red-ENG, p 34 lines 5-7.

1326 ICC-01/04-01/07-T-196-Red-ENG, p 34 lines 19-23.

1327 ICC-01/04-01/07-T-206-Red-ENG, p 43 lines 4-23.

1328 ICC-01/04-01/07-T-206-Red-ENG, p 17 lines 14-21.

1329 ICC-01/04-01/07-T-206-Red-ENG, p 17 lines 14-15, 19-21.

1330 ICC-01/04-01/07-T-206-Red-ENG, p 17 lines 16-17.

The witness explained that under this so-called *gilet* system, ‘the genitalia of the women were cut off. Even the men’s sexual organs were cut off’.<sup>1331</sup> He added that it could also involve cutting someone’s head off, or opening his chest ‘as if one was opening a Bible to read it’.<sup>1332</sup> Mutilation was not included in the charges against Katanga & Ngudjolo.

As described in the *Gender Report Card 2010*, two Prosecution witnesses, Witness 279 and Witness 280, testified about the use of ‘fetishes’ in warfare and alluded to the conditions involved in such use, one of which is the rule that soldiers must not rape.<sup>1333</sup> During the period covered by this year’s *Gender Report Card* a further two witnesses, one Prosecution witness and one Defence witness, also spoke about these fetishes and battle practices.

**Witness 28**, the 22nd Prosecution witness and a former FRPI child soldier, stated that female hostages were taken to the Kagaba camp.<sup>1334</sup> The witness distinguished between what happened to women and men during the attack on Bogoro; women were taken hostage, while men were killed.<sup>1335</sup> He added that he did not know whether the women were taken hostage to work or to become combatants’ wives.<sup>1336</sup> Witness 28 also stated that, because of their fetishist rituals, ‘we were not supposed to have sexual relations before we went into battle or during the battle. That was forbidden. It was contrary to the use of the rituals or the various fetish items that we had’.<sup>1337</sup> He explained that raping a woman would be breaking a prohibition of these fetishist rituals.<sup>1338</sup> When asked by Presiding Judge Cotte whether, under these fetishist

1331 ICC-01/04-01/07-T-206-Red-ENG, p 17 lines 17-19.

1332 ICC-01/04-01/07-T-206-Red-ENG, p 18 lines 4-8.

1333 For a detailed account of their testimony see *Gender Report Card 2010*, p 176-177.

1334 ICC-01/04-01/07-T-218-Red-ENG, p 25 lines 1-16.

1335 ICC-01/04-01/07-T-218-Red-ENG, p 25 lines 6-9.

1336 ICC-01/04-01/07-T-218-Red-ENG, p 25 lines 9-10.

1337 ICC-01/04-01/07-T-218-Red-ENG, p 65 lines 20-24.

1338 ICC-01/04-01/07-T-218-Red-ENG, p 65 lines 24-25.

rituals, when the camp had been taken and the enemy driven out, it was possible for combatants to have sexual relations ‘that we should call or describe as forcible with the civilian population that was still on location’,<sup>1339</sup> Witness 28 responded that he did not see a combatant sleeping with a woman, but that combatants are individuals who might commit such acts despite these fetishist rituals.<sup>1340</sup>

**Witness 148**, the 14th Katanga Defence witness and a combatant who had participated in the Bogoro attack, also testified about the conditions of these fetishist rituals. Upon cross-examination by the Prosecution, he stated that the fetish conditions still applied after battle, but that certain persons violated these conditions.<sup>1341</sup>

## Overview of the Defence cases

Witnesses for the Katanga Defence began testifying on 23 March 2011.<sup>1342</sup> Both Defence teams had rejected the order of the witnesses originally proposed by the Chamber, which grouped the witnesses according to the issues about which they would testify, rotating back and forth between the witnesses scheduled for each defence. Although both defence counsels reiterated the need to present their separate defence, they agreed to rotate questioning for three common witnesses. On 22 March 2011, the Chamber ruled that the trial could accommodate the successive presentation of each defence and ordered defence counsel to submit new witness lists, emphasising the need for coherence and the importance of the issues: challenging the credibility of the Prosecution’s witnesses and the criminal responsibility of both accused.<sup>1343</sup> The Chamber also ruled that the Katanga and Ngudjolo Defence teams must reduce the number of hours of questioning from 120 and 200 hours, respectively, to 85 hours and 65 hours, which represented 4 hours for each witness. As of 16 September 2011, Trial Chamber II heard testimony from 18 witnesses called by the Katanga Defence and from eight witnesses called by the Ngudjolo Defence.

Defence teams for both accused, particularly the Ngudjolo Defence, appeared to be utilising a strategy intended to demonstrate their lack of culpability by introducing documentary and testimonial evidence of the Congolese Government’s management and planning role in the attacks on Bogoro. On 30 June 2011, Trial Chamber II granted<sup>1344</sup> the Ngudjolo Defence’s request<sup>1345</sup> that it officially seek from Radio France International (RFI) a copy of an interview with the former Congolese Minister of Human Rights, Ntumba Luaba, concerning the attacks

<sup>1339</sup> ICC-01/04-01/07-T-218-Red-ENG, p 66 lines 16-22.

<sup>1340</sup> ICC-01/04-01/07-T-218-Red-ENG, p 66 lines 23-25, p 67 lines 1-2.

**228** <sup>1341</sup> ICC-01/04-01/07-T-280-Red-ENG, p 37 line 25, p 38 line 1.

<sup>1342</sup> ICC-01/04-01/07-2775-t-ENG.

<sup>1343</sup> ICC-01/04-01/07-2775-t-ENG.

<sup>1344</sup> ICC-01/04-01/07-3076.

<sup>1345</sup> ICC-01/04-01/07-2957.

on Bogoro, which had aired within the first three days after the attack. Reference was made to the radio interview by one of the detained Defence witnesses,<sup>1346</sup> Floribert Ndjabu Ngabu, during a hearing on 6 April 2011. Similarly, Trial Chamber II granted the Ngudjolo Defence team's request to assist it in obtaining from Voice of America (VOA) a recorded statement by Thomas Lubanga Dyilo while he was President of the UPC in the days following the Bogoro attack, also mentioned by Ngabu during the 6 April hearing. The Chamber noted that it was a public statement that addressed the thesis of the Ngudjolo Defence, namely that he did not plan and orchestrate the Bogoro attack. The Chamber agreed to assist the Defence based on Article 57(3)(b) of the Statute<sup>1347</sup> and its obligation to ensure equality of arms in the preparation of the Defence.

## Testimony of Germain Katanga

On 27 September 2011, Germain Katanga commenced his testimony in French, as discussed in more detail below, by describing his family and his upbringing. The accused declared himself to be of Ngiti ethnicity.<sup>1348</sup> He denied any knowledge of the timing of the crimes, or of their commission. He denied any participation in the 24 February 2003 attack on Bogoro.<sup>1349</sup> He testified that on the day of the attack, he heard the explosions from his father's home 90 kilometres away and rode a motorbike to the health centre to learn information on the situation in Kagaba. He stated that once there, he learned of the early-morning attack on Bogoro. The accused also testified about his understanding of the word 'rape'. He stated: 'That was taboo. When you do that, you die, completely. You die ... the word 'rape' itself, I did not know it before.'<sup>1350</sup> This testimony directly refuted the Prosecution's charges against him, which are based on his role as commander of the FRPI and include charges of rape.<sup>1351</sup> At the time of writing this Report, Katanga had not yet finished testifying.

<sup>1346</sup> As described in more detail in the *Protection* section of this Report, three detained witnesses applied for asylum in the Netherlands.

<sup>1347</sup> Article 57(3)(b) provides that the Pre-Trial Chamber may 'upon the request of a person who has been arrested or has appeared pursuant to a summons under Article 58, issue such orders, including measures such as those described in Article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence'.

<sup>1348</sup> ICC-01/04-01/07-T-314-ENG, p 23 lines 20-21.

<sup>1349</sup> ICC-01/04-01/07-T-318-ENG, p 5 line 6; p 30 line 21.

<sup>1350</sup> ICC-01/04-01/07-T-316-ENG, p 45 lines 14-17.

<sup>1351</sup> ICC-01/04-01/07-717.

## Witness issues

### Withdrawal of dual-status victim-witnesses

As explained in greater detail in the **Victim Participation** section of this Report, on 31 January and 21 February, Trial Chamber II issued two decisions, granting the withdrawal of three victims it had previously authorised to testify as witnesses in the case upon the request of their Legal Representative due to concerns regarding their veracity.<sup>1352</sup> The Chamber had authorised their appearance and granted protective measures to all four victims,<sup>1353</sup> Hema women who lived in Bogoro at the time of the attack. Public filings do not explicitly indicate whether the withdrawn witnesses retained their victim status in the proceedings, but the Chamber issued no decision revoking the acceptance of their applications to participate as victims, and no party requested that such a decision be made.

### Defence witnesses request asylum from Dutch authorities

As explained in greater detail in the **Protection** section of this Report, three witnesses called by the Katanga Defence submitted asylum applications to the Dutch authorities, which were still pending at the time of writing this Report. On 9 June 2011, Trial Chamber II issued the first in a series of decisions, suspending their immediate return to the DRC, pending their political asylum applications.<sup>1354</sup> All three had been detained in the Makala prison in Kinshasa and were transferred to The Hague to testify pursuant to Article 93 of the Rome

Statute, Rule 192 of the Rules of Procedure and Evidence and a cooperation agreement between the Registry and Congolese authorities.<sup>1355</sup> This was the first time a witness before the ICC has applied for asylum.

### Renunciation of witness testimony

On 24 December 2010, the Prosecution informed Trial Chamber II that it would no longer rely on testimony given by witness P-159. Following this notice, which was not opposed by either Defence team, the Katanga Defence requested that the Chamber confirm that it would not rely on the witness or related evidence in its final judgement.<sup>1356</sup> On 24 February 2011, the Chamber informed the parties that it would not give evidentiary weight to the testimony of the witness, nor to exhibits introduced during his testimony, despite a finding that 'there are no legal provisions in the Statute, Rules or Regulations of the Court, which provide a procedure for dealing with the present situation'.<sup>1357</sup> The witness testified before the Chamber between 17 and 29 March 2010.

The issue of the witness' credibility was the result of conflicting testimony provided by his alleged father and sister regarding his participation during the attack on Bogoro.<sup>1358</sup> While the Prosecution 'took no position on P-159's alleged mendacity',<sup>1359</sup> both Defence teams asserted that the family relationships were suspect as well as the witness' claim that

1352 ICC-01/04-01/07-2674-tENG; ICC-01/04-01/07-2699-Red. As explained in the section on *Victim Participation*, the Chamber withdrew victims a/0381/09 and a/0363/09, as well as a/0363/09's representative pan/0363/09. The two remaining victims a/0081/09 and a/0191/08 testified in February 2011.

1353 ICC-01/04-01/07-2517.

1354 ICC-01/04-01/07-3003.

1355 These regulations create a procedural framework that directs the Registrar to manage the transfer and custody of detained witnesses and to return them following their testimony. Article 93(7) requires that the transferred person shall remain in custody until the purposes of the transfer have been fulfilled, at which time the Court shall return the person without delay to the requested State; Rule 192 delegates responsibilities under the Article to the Registrar.

1356 ICC-01/04-01/07-2731, paras 2, 4.

1357 ICC-01/04-01/07-2731, para 11.

1358 ICC-01/04-01/07-2731, para 4.

1359 ICC-01/04-01/07-2731, para 17.



he was in Bogoro during the attack.<sup>1360</sup> The Chamber determined, however, that ‘there is no need to delete the transcript of P-159’s testimony or any of the exhibits that were admitted during his testimony from the record’.<sup>1361</sup> The Ngudjolo Defence requested that the Chamber prosecute the witness for perjury. The Chamber deferred the initiation of that investigation to the Office of the Prosecutor, which is vested with such authority pursuant to the Statute and the Rules. The Chamber noted that if the Prosecution did not choose to exercise this authority, it could request that the DRC submit the case to its appropriate authorities.<sup>1362</sup> At the time of writing this Report, no action had been indicated by the Prosecution.

## Language of choice for Katanga testimony

At a hearing on 28 September, Trial Chamber II issued a decision,<sup>1363</sup> at the request of the Registry,<sup>1364</sup> to cease translation into Lingala for the accused based on his successful testimony in French on the previous day. The testimony of the accused had commenced in French on 27 September, following a 22 September e-mail from his counsel to the Court Officer, stating that he would testify in that language.<sup>1365</sup> In its request to stop further Lingala translation, the Registry deemed this language of choice for the testimony ‘a total surprise taking into consideration all arguments presented on this issue’.<sup>1366</sup> The Registry’s filing detailed ‘a selection of submissions of the [Katanga] Defence concluding that [the accused] was not able to fully defend himself in French’.<sup>1367</sup> The Registry sought authorisation to immediately stop translation into Lingala of the proceedings, ‘which now seems to have become a waste of resource both human and financial’, and outlined the measures that it had provided regarding the translation, including recruitment and training of interpreters and associated costs.<sup>1368</sup> The Registry estimated the total cost of the provision of translation during the proceedings to total €482,000, plus an additional €276,000 for use of Swahili-speaking staff or freelancers.

The language to be used in the courtroom in the Katanga & Ngudjolo proceedings has also been the subject of decisions by both Pre-Trial Chamber I<sup>1369</sup> and the Appeals Chamber<sup>1370</sup> since the Katanga Defence submitted its first observations on this issue on 23 November

<sup>1360</sup> ICC-01/04-01/07-2731, para 4.

<sup>1361</sup> ICC-01/04-01/07-2731, para 16.

<sup>1362</sup> ICC-01/04-01/07-2731, para 17-18.

<sup>1363</sup> ICC-01/04-01/07-T-315-ENG, p 10 line 23-25.

<sup>1364</sup> ICC-01/04-01/07-3173.

<sup>1365</sup> ICC-01/04-01/07-3173, p 6.

<sup>1366</sup> ICC-01/04-01/07-3173, para 1.

<sup>1367</sup> ICC-01/04-01/07-3173, para 4.

<sup>1368</sup> ICC-01/04-01/07-3173, para 5.

<sup>1369</sup> ICC-01/04-01/07-127; ICC-01/04-01/07-539.

<sup>1370</sup> ICC-01/04-01/07-522.

2007.<sup>1371</sup> Throughout the proceedings, Katanga had argued that his French was not proficient to allow him to participate in the proceedings without a Lingala interpreter present in the courtroom and the translation of court documents. He later withdrew his request for the translation of documents.<sup>1372</sup>

In its decision, the Chamber explicitly noted that the costs of translation were justifiable when deemed necessary 'because Article 67 of the Statute stipulates that a language should be used that is understood and spoken by the suspect'.<sup>1373</sup> The Chamber requested that when putting questions to the accused for the remainder of the proceedings, they 'should be short and phrased in simple language. ... The French used should be easily accessible' to him.<sup>1374</sup>

At the conclusion of its observations during the hearing, the Ngudjolo Defence team stated that its client would testify in Lingala.<sup>1375</sup> Language issues also arose in the Mbarushimana case and the Banda & Jerbo case, discussed further in the **OTP** section of this Report.

1371 ICC-01/04-01/07-78.

1372 ICC-01/04-01/07-522, para 19.

1373 ICC-01/04-01/07-T-315-ENG, p 10 lines 2-3.

1374 ICC-01/04-01/07-T-315-ENG, p 9 lines 16-18.

1375 ICC-01/04-01/07-T-315-ENG, p 6 line 1.

## Judicial site visit

On 26 August 2011, the Chamber requested the parties and participants to confirm their wish to make a judicial site visit to Bogoro.<sup>1376</sup> The parties were asked to submit detailed observations regarding: the specific locations to be visited; the precise points of interest at these locations; what unresolved issue such a visit would assist in clarifying; the timing of a site visit; and, any procedural matters to be addressed. The Chamber noted in its request that the proposed site visit would necessarily be of a limited duration and 'must make a meaningful contribution to the fact-finding process', urging the parties to reply with precision.<sup>1377</sup>

The issue of a potential site visit was first raised on 13 November 2008, when the Chamber, in preparation for its first status conference, invited the parties and participants to make written observations on such a visit.<sup>1378</sup> The Chamber explained that travel to the DRC was intended 'to gain better knowledge of the situation which should enable us to clarify certain points that have been held in abeyance during the presentation of the case'.<sup>1379</sup> The Chamber had requested observations on the proposed location, whether the participants believed a judicial site visit to Bogoro 'could afford [the Court] a greater understanding of the case', and if such a visit was sought, whether it would be more appropriate prior to or during the hearing on the merits.

All participants had responded in the affirmative. The Prosecution initially expressed support for the proposed site visit, having argued during a 29 November 2010 status conference that a judicial site visit would allow the Chamber to understand not only the geography but also the cultural and social

1376 ICC-01/04-01/07-3131.

1377 ICC-01/04-01/07-3131, para 11.

1378 ICC-01/04-01/07-747-ENG, para 13(3).

1379 ICC-01/04-01/07-3131, para 8. The Chamber did not note what those 'certain points' regarded.

contexts of the issues in the case.<sup>1380</sup> One of the Legal Representatives of Victims argued that a site visit would only be appropriate if specific protective measures were implemented to ensure the safety of victims and their counsel.<sup>1381</sup>

The Katanga Defence had expressed strong support for the site visit, and suggested that it include other locations in Ituri. It asserted that such a visit would be most useful at a later stage of the proceedings as the Chamber would then be best able to identify the issues on which it needed clarification.<sup>1382</sup> The Ngudjolo Defence also submitted that the site visit was necessary, and that specific sites to visit included: Bunia, Dele, Zumbe, Kambutso, Likoni, Lagura and Bogoro.<sup>1383</sup> The parties and participants continued to express their agreement to a judicial site visit throughout 2010.<sup>1384</sup> During a 9 July 2010 status conference, the Katanga Defence reiterated its support for a judicial site visit, asserting that as the proceedings progressed ‘it became more apparent that a judicial site visit was essential’.<sup>1385</sup>

In a reversal of its earlier position, on 12 September 2011, the Prosecution contended that such a visit had become unnecessary ‘given that the evidence tendered by the Prosecution regarding the geographical features and landscape of Bogoro and surrounding areas is substantial, clear and uncontested’.<sup>1386</sup> Without explicitly explaining the renunciation of its prior support for the visit, the Prosecution underscored that the geographic evidence it had presented through witness testimony had not been challenged by either Defence team,

and that neither Defence team appeared to be using the relevant geography as a strategy of its defence.<sup>1387</sup> The Prosecution also noted that ‘security concerns would be substantial and at this stage outweigh the need for a site visit’.<sup>1388</sup> At the time of writing this Report, the Chamber has not issued a final ruling on the proposed visit to Bogoro.

## Protection measures applied to representatives of deceased participating victims

As described in greater detail in the **Protection** section, in April 2011, Trial Chamber II applied protection measures to the representatives of deceased participating victims. The Chamber held that the protective measures granted to participating victims also applied to those participating in the name of deceased victims, including anonymity vis-à-vis the public.<sup>1389</sup> At the same time, the Chamber noted that participating victims have progressively consented to disclose their identities to the parties.

<sup>1380</sup> ICC-01/04-01/07-T-224-ENG, p 44 lines 23-24.

<sup>1381</sup> ICC-01/04-01/07-761, p 5.

<sup>1382</sup> ICC-01/04-01/07-763, p 7.

<sup>1383</sup> ICC-01/04-01/07-3141, para 7.

<sup>1384</sup> Dates of the status conferences at which the participants continued to support a judicial site visit are 27-28 November 2008, 9 July 2010, and 29 November 2010. ICC-01/04-01/07-3131, paras 3-7.

<sup>1385</sup> ICC-01/04-01/07-3131, para 5.

<sup>1386</sup> ICC-01/04-01/07-3142, para 2.

<sup>1387</sup> ICC-01/04-01/07-3142, paras 4-6.

<sup>1388</sup> ICC-01/04-01/07-3142, para 8.

<sup>1389</sup> ICC-01/04-01/07-2827.

## The Prosecutor v. Jean-Pierre Bemba Gombo

The ICC's third trial, *The Prosecutor v. Jean-Pierre Bemba Gombo*, commenced on 22 November 2010 before Trial Chamber III.<sup>1390</sup> The trial against Jean-Pierre Bemba Gombo (Bemba), the only trial to date arising from the CAR Situation, is the first against a high-profile political and military figure, and the first in which the accused is charged with command responsibility under Article 28(a) of the Rome Statute, including for gender-based crimes. Bemba faces two counts of crimes against humanity (murder<sup>1391</sup> and rape<sup>1392</sup>) and three counts of war crimes (murder,<sup>1393</sup> rape<sup>1394</sup> and pillaging<sup>1395</sup>) for his alleged responsibility, as military commander, for crimes committed by the MLC in the CAR.

Bemba, reportedly one of the wealthiest men in Congo, is a Congolese national and a well-known political figure who served as one of four Vice Presidents of the DRC in its transitional government from 2003–2006. Bemba ran in the 2006 Presidential election in the DRC, but came second, behind incumbent President Joseph Kabila.<sup>1396</sup> Bemba is the founder and former President and Commander-in-Chief of the MLC.

In 2002, CAR President Ange-Félix Patassé invited the MLC into the CAR to help him suppress an attempted coup by a rebel movement led by François Bozizé, former Chief-of-Staff of the CAR armed forces. It was in this context that the MLC forces were alleged to have entered the CAR in October 2002 and launched a campaign of rape, pillaging and murder against the civilian population.

1390 Trial Chamber III is composed of Presiding Judge Sylvia Steiner (Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan).

1391 Article 7(1)(a).

1392 Article 7(1)(g).

1393 Article 8(2)(c)(i).

1394 Article 8(2)(e)(vi).

1395 Article 8(2)(e)(v).

1396 Carayannis, T. 'Elections in the DRC: The Bemba Surprise', *United States Institute of Peace*, Special Report 200, February 2008, available at <<http://www.usip.org/files/resources/sr200.pdf>>, last visited on 3 November 2011.

The trial of Jean-Pierre Bemba Gombo breaks new ground for the ICC, with evidence of sexual violence and charges for gender-based crimes comprising a significant part of the Prosecution's case. This trial also involves the largest number of witnesses for sexual violence in any case before the ICC to date, with 14 out of 40 prosecution witnesses, including two expert witnesses,<sup>1397</sup> set to testify about rape and other forms of sexual violence committed by the MLC militia. As stated by Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, upon the commencement of the trial: 'The Bemba trial presents an opportunity for the Court to say firstly to women, that crimes of sexual violence are important enough to prosecute those who commit such acts; and secondly to leaders of armed forces and militias, that should they fail to prevent or punish subordinates for gender-based crimes, they will be held accountable.'<sup>1398</sup> In addition, the Bemba case includes the highest number of victim participants in any case before the Court to date. As described in more detail in the **Victim Participation** section of this Report, a total of 1,619 victims have been accepted to participate in this case to date, amounting to more than 50% of all victim participants accepted across all Situations and cases since 2005.<sup>1399</sup>

In the request for Bemba's Arrest Warrant,<sup>1400</sup> the Prosecution sought a broad range of charges of gender-based crimes. Charges were originally

1397 ICC-01/05-01/08-793; ICC-01/05-01/08-812; ICC-01/05-01/08-891; see also *Gender Report Card 2010*, p 115.

1398 '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.pdf](http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf.pdf)>.

1399 According to figures provided by the VPRS by email dated 14 September 2011.

1400 ICC-01/05-01/08-26.

sought for rape as a crime against humanity and a war crime; rape as torture as a crime against humanity and a war crime; outrages upon personal dignity as a war crime; and other forms of sexual violence as a war crime and a crime against humanity.<sup>1401</sup> These charges as originally formulated would have addressed not only the rapes themselves, but also the pain and suffering experienced by victims/survivors of rape and those forced to watch their family members being raped, as well as the humiliation experienced by victims/survivors who were raped publicly or forced to undress publicly. Unfortunately, as discussed in more detail in the **OTP** section, in the Bemba case there has been a narrowing of charges at both the arrest warrant and confirmation of charges stages of the proceedings, due to problems with both the evidence presented and the Pre-Trial Chamber's reasoning. Because of the narrowing of the charges, the Chamber is limited to hearing testimony about rape, and will not hear testimony from witnesses about these wider aspects of the crimes.<sup>1402</sup>

In addition, both the Defence and the Chamber have intervened during the testimony of at least five witnesses of sexual violence, limiting their ability to testify about their experiences in full. In at least one instance,<sup>1403</sup> the Defence intervened at the start of the witness' testimony, arguing that for the wellbeing of the witness, and because it agreed with the Prosecution as to the existence of the rape, there was no need to enter into the details of the attack. The Prosecution conceded to the Defence, and proceeded to question the witness about more circumstantial matters, rather than about her experience of the rape. However, in a filing on

1401 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).

1402 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](http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf)>.

1403 Witness 22.

2 December 2010, the Defence retracted its declaration, stating it withdrew its 'procedural concession' and that it intended to question the witness in relation to the same facts to cover all details.<sup>1404</sup>

Similarly, on at least four occasions, the Chamber directed the Prosecution not to pursue a line of questioning about the details of the rape, which resulted in the Prosecution abandoning this line of questioning, again focusing only on more circumstantial questions.<sup>1405</sup> Furthermore, analysis of the available information indicated that the Prosecution pursued a very clinical line of questioning in relation to rape and did not allow for sufficient testimony regarding the extent of the harm and suffering, material relevant for future reparations orders as well as for a possible reclassification of the charges to once again include rape as torture.<sup>1406</sup>

1404 ICC-01/05-01/08-1069. See also ICC-01/05-01/08-T-42-Red-ENG, p 4 lines 22-25; p 5 lines 1-4.

1405 Specifically, in the case of Witness 23, Presiding Judge Steiner intervened during the Prosecution examination-in-chief, and told the Prosecution that the Chamber was satisfied with the physical details of the attack. In the case of Witness 82, Presiding Judge Steiner also intervened in the Prosecution examination-in-chief saying that the Chamber had heard 'enough'. In the case of Witness 80, Presiding Judge Steiner intervened in the Prosecution examination-in-chief indicating that the Prosecution was asking questions that might even offend the witness in relation to the exact details of the rape. She intervened again when the Prosecution proceeded to ask the witness whether she resisted the rape. Judge Steiner correctly reminded the Prosecution that it was not required to prove lack of resistance in the face of threats. In the case of Witness 29, Presiding Judge Steiner intervened to inform the Prosecution that the Chamber was satisfied with the physical details of the attack. When the Prosecution decided to question the witness about one additional detail, the Presiding Judge strongly reminded the Prosecution not to ask embarrassing or intrusive questions.

1406 See further 'Presentation by Brigid Inder to the UNHCHR Expert Meeting on Gender and Witness and Victim Protection', *UN High Commissioner for Human Rights*, Geneva, 26-27 May 2011.

## Command responsibility

The Bemba case is the ICC's first trial in which the accused is charged with command responsibility under Article 28(a) of the Rome Statute. Article 28 requires that a military commander has 'effective command and control' over the forces that directly perpetrated the crimes. The Prosecution must prove that the commander either knew, or should have known, that the forces were committing the crimes. It further requires that he failed to take all necessary and reasonable measures within his power to prevent or repress their commission, or to submit the matter to the competent authorities for investigation and prosecution. According to the Prosecution, Bemba enjoyed immediate and direct control of the MLC and failed to prevent them from committing crimes. It stated: '... as commander-in-chief of the MLC, [he] is criminally responsible by his affirmative decisions and failures for thousands of serious crimes committed against innocent civilian non-combatants'.<sup>1407</sup>

Two witnesses testified as to their knowledge of the command responsibility of the accused. Firmin Feindiro, Prosecutor-General of the CAR, testified in April 2011 about his investigations into the war crimes committed during the 2002-2003 conflict, and indicated that the conclusions of those investigations that Bemba's MLC troops were responsible.<sup>1408</sup> Feindiro and the examining CAR judge had concluded that Bemba, as Leader of the MLC, and Patassé, as President of the CAR, were both criminally responsible as co-perpetrators for the crimes of pillaging and rape. However, Bemba as then-Vice-President of the DRC had acquired immunity from prosecution at the time the CAR authorities had concluded their investigations.<sup>1409</sup> In May 2011, Pamphile Oradimo, Senior Judge of the Regional Court in

1407 ICC-01/05-01/08-T-32-ENG, p 23 lines 11-13.

1408 ICC-01/05-01/08-T-95-Red-ENG.

1409 ICC-01/05-01/08-T-96-Red-ENG, p 9 lines 22-25; p 10 lines 1-2.

Bangui, testified about his investigations into those responsible, including Bemba and Patassé, for the crimes committed in the 2002-2003 conflict in the CAR.<sup>1410</sup>

## Victim participation

As described in greater detail in the **Victim Participation** section of this Report, an unprecedented number of victims have been authorised to participate in the Bemba trial proceedings. Specifically, as of 8 September 2011, the Chamber had accepted a total of 1,619 victim participants.

Although the high number of accepted victim participants shows an improvement in outreach to the affected communities, in particular by the OPCV, concerns remain regarding the principles by which the victims have been organised into groups. In a decision on 10 November 2010, twelve days before the start of the trial, the Trial Chamber ruled that participating victims, until then represented by the OPCV, would be organised into two groups according to the geographical location of the crimes, each represented by a common legal representative.<sup>1411</sup> The Chamber later designated Marie Edith Douzima Lawson and Assingambi Zarambaud, both CAR nationals, as said representatives. The OPCV continued to represent the victims whose applications are still pending, and to provide support for the Legal Representatives.

As Brigid Inder stated at the opening of the trial, 'organising the legal representation into only two groups may not be in the best interests of victims given the large number of individuals the two legal representatives will have responsibility for during the trial'.<sup>1412</sup> She added

1410 ICC-01/05-01/08-T-104-Red-ENG.

1411 ICC-01/05-01/08-1005.

1412 '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](http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf)>.

that arranging victims into groups according to geographical location, rather than according to the nature of the crimes committed against them, may not serve the victims' interests, particularly given the large number of victims of rape and other forms of sexual violence participating in the case.

## Decision on LRVs questioning of an 'insider' witness

On 9 September 2011, Trial Chamber III granted the Victims' Legal Representatives' confidential applications of 26 May<sup>1413</sup> and 29 August 2011<sup>1414</sup> to question what the Defence termed an 'insider witness'.<sup>1415</sup> Several specific questions were rejected due to relevance or security reasons.<sup>1416</sup> In its ruling, the Chamber found that the Legal Representatives of Victims had provided sufficient reasons to demonstrate the personal interests of the victims in putting questions to the witness, who the Defence had indicated would testify on 'the alleged mode of liability of the accused and on the alleged crime of pillage in the Central African Republic'.<sup>1417</sup> While the Defence urged the Chamber to limit the questioning of the legal representatives on the grounds that the witness' testimony did not impact the personal interest of the victims, the Chamber explicitly noted that the issues to which the witness planned to testify 'according to the victim application forms received by the Chamber [appeared] to have directly affected a significant number of victims'.<sup>1418</sup> The Prosecution supported the Legal Representatives' applications.<sup>1419</sup> The Chamber thus granted the Victims' Legal Representatives' request to question Defence Witness 33, who is expected to testify during the Defence case in late 2011 or early 2012.<sup>1420</sup>

1413 ICC-01/05-01/08-1458-Conf.

1414 ICC-01/05-01/08-1669-Conf.

1415 ICC-01/05-01/08-1729, para 8.

1416 ICC-01/05-01/08-1729, para 17.

1417 ICC-01/05-01/08-1729, para 16.

1418 ICC-01/05-01/08-1729, para 16.

1419 ICC-01/05-01/08-1712-Conf.

1420 ICC-01/05-01/08-1729.

## Applications for release

As described in greater detail in the **Protection** section of this Report, the accused filed numerous applications for interim and provisional release in late 2010 and 2011.<sup>1421</sup> During the period covered by this report, all applications for release were denied.

## Opening statements

Throughout its opening statement on 22 November 2010, the Prosecution stressed the widespread and devastating nature of the mass rape perpetrated by MLC forces in the CAR. The Prosecutor noted that men as well as women were raped, in particular men in positions of authority, in order to humiliate them and damage their standing in the community. He alleged that 'the massive rapes were not just sexually motivated; as gender crimes, they were crimes of domination and humiliation directed against women, but also directed against men with authority ...'<sup>1422</sup> He stated that 'women were raped systematically to assert dominance and to shatter resistance. Men were raped in public to destroy their authority, their capacity to lead'.<sup>1423</sup> The Prosecutor argued that it was not because of alleged orders that Bemba was responsible for these crimes, but rather that he was responsible for these crimes by virtue of knowingly failing to control his troops, by failing to prevent, repress and punish these crimes.

In the words of one witness quoted by the Prosecutor, Bemba told his troops: 'You are going to the Central African Republic which is not your country. In that country, there are no parents, or big brothers or little brothers, or any of your family. When you get there, do the job that I'm asking you to do. Anyone, anyone you encounter in the combat zone will be an enemy ... because

1421 ICC-01/05-01/08-1387-Conf; ICC-01/05-01/08-1479-Conf; ICC-01/05-01/08-1501-Conf; and ICC-01/05-01/08-1639-Conf.

1422 ICC-01/05-01/08-T-32-ENG, p 10 lines 14-16.

1423 ICC-01/05-01/08-T-32-ENG, p 10 lines 18-19.

I received information that the enemy is wearing civilian clothing'.<sup>1424</sup> The Prosecutor alleged that Bemba was in regular communication with his army commanders and despite having received information about the commission of crimes from various sources, failed to follow up on these reports.

In her opening remarks, Deputy Prosecutor Fatou Bensouda spoke about the widespread nature of the crimes and about their victims. She underscored that the victims of the crimes were not soldiers, but civilians, including: children, the elderly, persons in their homes, local government leaders, women, men, and families.<sup>1425</sup> She noted that the crimes 'were not confined to a single location; they occurred whenever MLC soldiers progressed, and they had the official blessing of the MLC hierarchy. Soldiers raped civilians in front of MLC commanders'.<sup>1426</sup>

Senior trial lawyer for the Prosecution Petra Kneuer spoke at length about the crimes themselves. She described that the MLC specifically targeted rebel-held territories, and went from house-to-house to attack their inhabitants and to rape, pillage and kill civilians. She outlined that the MLC used rape as a military tactic.<sup>1427</sup> Kneuer alleged that, 'they committed rape anywhere, any time, against women, girls or elderly people, as well as against men with authority. They did it at night, or in broad daylight, in homes, in compounds, on the streets, in the fields, in public and in private'.<sup>1428</sup> She emphasised that the rapes 'were designed to dominate and humiliate, to destroy people and families and communities'.<sup>1429</sup>

1424 ICC-01/05-01/08-T-32-ENG, p 13 lines 11-16.

1425 ICC-01/05-01/08-T-32-ENG, p 15 lines 16-25; p 16 lines 1-5.

1426 ICC-01/05-01/08-T-32-ENG, p 18 lines 3-6.

1427 ICC-01/05-01/08-T-32-ENG, p 29 lines 1-2.

1428 ICC-01/05-01/08-T-32-ENG, p 29 lines 5-7.

1429 ICC-01/05-01/08-T-32-ENG, p 33 lines 2-3.

Two Legal Representatives of Victims gave opening statements on behalf of the 1,312 victims who had been accepted to participate in the trial at that stage in the proceedings. Pursuant to Trial Chamber III's order, the OPCV was also authorised to make opening statements on behalf of those victims whose applications for participations were still pending with the Chamber.<sup>1430</sup> Legal Representative Zarambaud stressed the importance of the impending trial against Bemba, arguing that he had no doubt the Court would 'render justice to the people who were the victims of those horrible acts, and you will make it possible not only for those people to rebuild their lives ... but you will make it possible to humanity, and specifically Africa, to make sure that those who want to continue in this path should know that impunity is no longer allowed ...'.<sup>1431</sup> Legal Representative Douzima-Lawson highlighted in particular the stigmatisation and trauma experienced by the victims of rape. She said that some of them had even committed suicide as a result.<sup>1432</sup> Paolina Massidda, Principal Counsel for the OPCV, said that the victims she represented wanted to 'break the silence'. She stressed that silence was an obstacle to justice, and that having a voice was considered the first step towards establishing the truth and gaining access to justice.<sup>1433</sup> She emphasised that the victim community extended far beyond those accepted to participate: 'there are hundreds of children, women and men who have expectations and who are following the development of these proceedings very carefully'.<sup>1434</sup>

The Defence also made an opening statement on 22 November. The Defence argued that the charges against Bemba had no basis as the investigation by the Prosecution was 'botched'

1430 ICC-01/05-01/08-1020.

1431 ICC-01/05-01/08-T-32-ENG, p 39 lines 13-18.

1432 ICC-01/05-01/08-T-32-ENG, p 41 lines 23-25.

1433 ICC-01/05-01/08-T-32-ENG, p 44 lines 9-22.

1434 ICC-01/05-01/08-T-32-ENG, p 49 lines 19-21.



and 'partial'.<sup>1435</sup> The Defence suggested that Bemba did not enjoy effective control and command over the troops, and expressed surprise at the absence of any charges against those who did, including President Patassé and General Miskine.<sup>1436</sup> The Defence concluded by requesting the Trial Chamber to acquit Bemba.

## Witness testimony

From the start of trial on 22 November 2010 until 16 September 2011, Trial Chamber III heard approximately 220 days of testimony by 28 witnesses, including three expert witnesses called by the Prosecution, who testified for a total of nine days. Among these 28 witnesses, 14 witnesses, including two expert witnesses, were called to testify directly about sexual violence.<sup>1437</sup> A further eight witnesses also mentioned rape in their testimony.<sup>1438</sup> Witnesses also testified on the use of child soldiers and on looting by soldiers of ransacked areas. In this time period, ten female witnesses testified before the Court, eight of whom were direct victims of sexual violence.

1435 ICC-01/05-01/08-T-32-ENG, p 51 lines 13-25; p 52 lines 1-21.

1436 ICC-01/05-01/08-T-32-ENG, p 52-55.

1437 The Prosecution called twelve crime-based witnesses (Witnesses 22, 87, 68, 23, 81, 82, 80, 79, 29, 119, 42 and 73) and two expert witnesses (Witness 221, Dr Adeyinka Akinsulure-Smith, and Witness 229, Dr André Tabo) to testify directly about sexual violence.

1438 Apart from the 14 witnesses who were called by the Prosecution to testify directly about sexual violence, the following eight witnesses also mentioned rape in their testimony: Witness 38, ICC-01/05-01/08-T-33-Red-ENG, p 39, 53-55, ICC-01/05-01/08-T-34-Red-ENG, p 9-13, 40, 52; ICC-01/05-01/08-T-35-Red-ENG, p 54 lines 19-25, p 55 line 1, ICC-01/05-01/08-T-36-Red-ENG, p 29-32 and ICC-01/05-01/08-T-37-Red-ENG, p 14-16, 17, 25, 32; Witness 63, ICC-01/05-01/08-T-110-Red-ENG, p 4-6, 17 and ICC-01/05-01/08-T-113-Red-ENG, p 36 lines 19-25; Witness 209, ICC-01/05-01/08-T-122-Red-ENG, p 29-31, 36; Witness 112, ICC-01/05-01/08-T-129-Red-ENG, p 47 lines 4-22, p 49 lines 10-21; Witness 108, ICC-01/05-01/08-T-132-Red-ENG, p 41 lines 8-14; Witness 173, ICC-01/05-01/08-T-144-Red-ENG, p 56-57 and ICC-01/05-01/08-T-145-Red-ENG, p 29 line 11, p 38; Witness 178, ICC-01/05-01/08-T-152-Red-ENG, p 30-32; and Witness 33, ICC-01/05-01/08-T-159-Red-ENG, p 40 lines 17-19.

This section includes selected witness testimonies given in open session and made available on the ICC's website as of 16 September 2011. Extensive testimony was given in closed or private session, and the identifying details of many of the witnesses were also given in closed or private session. Three witnesses testified almost entirely in closed session (Witness 75, Witness 63 and Witness 169). For these reasons, the descriptions of the witnesses and their testimonies are necessarily limited. The section focuses primarily on the direct testimony of witnesses called by the Prosecution, with summaries of issues raised by the Defence teams and Legal Representatives of Victims included only where relevant. The Defence team's arguments will be reviewed more thoroughly once it has presented its case at a later stage of the proceedings, along with the positions of the Legal Representatives of Victims.

The section focuses in particular on the testimony given by witnesses about the sexual violence committed by the MLC soldiers, often referred to as the Banyamulengue. The Prosecution called twelve crime-based witnesses who testified directly about sexual violence; at least nine of them were direct victims of sexual violence. Ten witnesses testified about gang-rape and multiple rapes. At least nine witnesses testified that the Banyamulengue were armed while committing rape and threatened their victims with their weapons. A number of witnesses testified that the MLC soldiers did not say anything during the rapes. At least ten witnesses testified about the profound social impact of the rapes, and told the Court that they felt embarrassed about what happened. Some also spoke about the stigma attached to the crime, which caused their communities to ostracise them. At least four witnesses spoke about being abandoned by their families as a consequence of the rape. Five witnesses testified that they continue to suffer from depression. At least seven witnesses testified about the rape of children.

## Testimony about gang rape/rape by multiple perpetrators

Of the twelve Prosecution witnesses called to testify specifically about sexual violence, at least nine testified that they were gang-raped,<sup>1439</sup> and at least one witness<sup>1440</sup> testified about being a witness to the gang-rape of others.

**Witness 22** testified that she was raped by three MLC soldiers. She also testified that one of her uncle's wives was forced to undress in front of the family, that they beat her paralysed uncle and threatened to kill another uncle. She told the Court that Patassé had sent the Banyamulengue to her neighbourhood after Bozizé's rebels had captured it.<sup>1441</sup> She later added that she had heard that Bozizé's men had retreated by the time the Banyamulengue arrived.<sup>1442</sup> She stated that her uncles, who were able to leave the house, told her that 'they [the Banyamulengue] were carrying out atrocities ... They were raping people. They were doing whatever they wanted to do.'<sup>1443</sup>

When the Banyamulengue came to her house, she and her family were asleep. Witness 22 testified that 'several of them came into the bedroom and others went out and six stayed inside the bedroom'.<sup>1444</sup> They took the rest of her family into the living room and demanded that the witness stay in the bedroom. When they demanded money, which the witness didn't have, they raped her. Witness 22 recounted what happened:

One said to me, he said to me, 'Yaka', which means 'Give me money', and I said I didn't have any. And then they asked me to lie down on my bed and I said, 'I beg your pardon?' I didn't want to. I had a small pair of shorts, a jacket and I had a wrap around me. He pointed his weapon at me. He threw me on the bed and pointed the weapon at my neck. He pulled out a small knife, tore off my shorts and my underwear and threw it away, then he forcibly spread my legs and then he slept with me. While he was sleeping with me, the others were also in the room. Some of them were searching cupboards. They were taking the clothes and everything else in the room. When the one who had been sleeping with me finished, he stood up and left. Another replaced him and slept with me. After him, there was another one who slept with me. So out of the six men who had entered my room, three of them slept with me.<sup>1445</sup>

She added:

So after sleeping with me they took me out to join the others who were in the sitting room, and in front of me in the sitting room one of them asked one of my uncle's wives to undress so that he could sleep with her. My uncle's wife undressed herself, but since she had a skin condition all over her body – that is scabies – they felt that she was dirty and so they didn't want to sleep with her.<sup>1446</sup>

1439 Witness 22, Witness 87, Witness 68, Witness 23, Witness 81, Witness 82, Witness 80, Witness 79, and Witness 29.

1440 Witness 119.

1441 ICC-01/05-01/08-T-40-Red-ENG, p 18 line 10.

1442 ICC-01/05-01/08-T-40-Red-ENG, p 23 lines 3-4; ICC-01/05-01/08-T-41-Red-ENG, p 5 lines 19-21, p 9 lines 16-18.

1443 ICC-01/05-01/08-T-40-Red-ENG, p 18 lines 20-22.

1444 ICC-01/05-01/08-T-40-Red-ENG, p 19 lines 8-9.

1445 ICC-01/05-01/08-T-40-Red-ENG, p 19 lines 9-21.

1446 ICC-01/05-01/08-T-40-Red-ENG, p 19 lines 24-25; p 20 lines 1-3.

Witness 22 confirmed that none of the men who raped her used a condom, and that all of them ejaculated into her.<sup>1447</sup> She said that when she resisted, the first man threw her down on her bed and pressed his weapon against her neck. The weapon remained there when the other two men raped her.<sup>1448</sup> She added that the soldiers did not speak to her while raping her. When the Prosecution asked the witness how she felt during the assaults, the witness stated: 'The day in my mind, when they brutalised me, after I got up and I found my entire family and we fled that day, I wanted to commit suicide.'<sup>1449</sup>

During questioning by the Legal Representatives of Victims, Witness 22 testified that she had a fiancé, but that he left her after the rape; the break-up was linked to the rape.<sup>1450</sup> She added that she knew of more women in her community who had been raped, but could not say whether they had been abandoned by their partners as well.<sup>1451</sup>

**Witness 87** was described as a very vulnerable witness and, prior to her testimony, Presiding Judge Steiner outlined the in-court protective measures granted to this witness, which included the use of a pseudonym, and face and voice distortion. A large portion of her testimony was given in private session. She was accompanied by a support person from the VWU during testimony as well as the presence of a psychologist in Court. The witness had also been accompanied by a support person during her travel to The Hague. Presiding Judge Steiner reminded the parties to ask short, simple and open-ended questions, and not to pose embarrassing or unnecessarily intrusive questions.<sup>1452</sup> She also reminded the Defence not to use the terminology 'cross-examination', but instead to refer to its questioning simply as an 'examination'.<sup>1453</sup>

1447 ICC-01/05-01/08-T-41-Red-ENG, p 13 lines 8-20.

1448 ICC-01/05-01/08-T-41-Red-ENG, p 13 line 25, p 14 lines 1-10; p 18 lines 13-19.

1449 ICC-01/05-01/08-T-41-Red-ENG, p 17 lines 14-15.

1450 ICC-01/04-01/08-T-42-Red-ENG, p 17 lines 6-9.

1451 ICC-01/04-01/08-T-42-Red-ENG, p 20 lines 9-15.

1452 ICC-01/05-01/08-T-44-Red-ENG, p 3 lines 21-24.

1453 ICC-01/05-01/08-T-45-Red-ENG, p 12 lines 12-18.

Witness 87 testified that Congolese soldiers looted their house and that they raped her and killed her brother. She told the Court that they dragged her behind the house to rape her and did not speak to her.<sup>1454</sup> She testified that she was gang-raped by three soldiers.

Q What part of your body did the first perpetrator penetrate?

A I had a wrap wrapped around my waist and I was wearing underwear under that. I was wearing a T-shirt. When they took me behind the house, they took off the wrap-around, they took off my underwear on one side of my legs. He opened up his zipper, or the button of his pants, and he did that with his left hand. After he opened the zipper, he brought out his penis and he put it in my vagina. That is the part of the body that he penetrated my body with.

[...]

Q While this first perpetrator was sleeping with you, where was his gun?

A The first person had his weapon in his right hand. They had the flashlight in the left hand, but he put the flashlight down on the ground.

Q Where did the perpetrator put the gun while he was raping you?

A When he raped me, he put the weapon on the ground and he protected the hand -- well, he had his hand on the weapon which was on the ground.

Q When the first Banyamulengue raped you, Madam Witness, in which position were you?

A I was down on the ground and I had my two hands behind my head when he was sleeping with me.

1454 ICC-01/05-01/08-T-44-Red-ENG, p 38 lines 11-25.

Q How did it happen that you were on the ground?

A He dragged me behind the house deliberately and threw me to the ground to sleep with me.<sup>1455</sup>

The Prosecution proceeded to ask similar questions about the second and third man that raped her.<sup>1456</sup> The witness confirmed that they did the same as the first man. During Defence questioning, Witness 87 confirmed that her uncle, a policeman, had filed a complaint about the attack on her and her brother, but that this complaint did not refer to her rape. Witness 87 stated it did not mention her rape because 'it was rather shameful to talk about this'.<sup>1457</sup>

**Witness 68** testified that she was gang-raped by two men in October 2002. She also testified that she is HIV-positive, but could not say with certainty whether this was as a consequence of the rapes. She testified that her sister-in-law was also raped.

It was along the way. That is when we came across them. There was a group of them. They stopped us. They spoke to one another. One of them grabbed me by the hand, the other one grabbed my sister-in-law by the hand and they grabbed us. Two followed. Another one grabbed the possessions that I had in a bag. He grabbed those possessions. There was a compound along the way as we were going towards the Miskine lycée. There were some houses there with fences and they brought a vehicle out from one of these compounds. They brought me into the compound. They sexually assaulted me. They forced me to take my clothes off. They

brandished a weapon. They threw me to the ground, they took my clothes off and they slept with me.<sup>1458</sup>

She later clarified that two Banyamulengue raped her and that the third stood on her arms to prevent her from resisting. He also threatened her with his weapon.

Q Did you lose your consciousness?

A I could no longer have any awareness of my body. They pointed at me with a weapon and I had already lost consciousness. It was as if I was facing something absolutely awful that could cause people -- cause someone to faint. That's what happened to me.

Q Were you able to recognise what was happening to you?

A Understand what?

Q Was it possible for you to recognise that you were raped twice?

A Yes, I realised that these were human beings that were assaulting me. That was at the beginning, when I lost consciousness, and then I could feel the pain of what they were doing to me.<sup>1459</sup>

The Prosecution proceeded to ask the witness how she felt about the rapes. Witness 87 answered 'When I think about that, it hurts me a lot and it makes me cry'.<sup>1460</sup> She added that she still suffers from the rapes, both physically and mentally. She had to go to hospital because she was in incredible pain. The ultrasound examinations showed that her spleen had swelled up as a consequence of the violent act.<sup>1461</sup> Witness 87 added that her spirits and mental state are very poor. She stated: 'I have

1455 ICC-01/05-01/08-T-44-Red-ENG, p 39 lines 5-25; p 40 lines 1-3.

1456 ICC-01/05-01/08-T-44-Red-ENG, p 40-42.

1457 ICC-01/05-01/08-T-45-Red-ENG, p 18 line 18.

1458 ICC-01/05-01/08-T-48-Red-ENG, p 18 lines 10-19.

1459 ICC-01/05-01/08-T-49-Red-ENG, p 14 lines 6-22; p 15 lines 1-8.

1460 ICC-01/05-01/08-T-48-Red-ENG, p 27 lines 17-25.

1461 ICC-01/05-01/08-T-48-Red-ENG, p 38 lines 3-7.

a tendency to depression, and when I see a soldier, or a man with a weapon, I'm afraid. Even on public transit I am very, very afraid even today. [...] At first I had nightmares. I would re-experience the events and I slept poorly. After that, things did get better.<sup>1462</sup>

**Witness 81** testified that she was gang-raped by four MLC soldiers one week after giving birth. She said the fifth soldier had to stop raping her because she was bleeding.<sup>1463</sup> She stated that five MLC soldiers, two of whom were commanders, entered her house. She gave their names in private session.

Q Can you explain to the Court what they did to you when they entered your house?

A When they arrived, I was getting ready to prepare tea. When they arrived, my husband took the baby. They said that they wanted a woman, and my husband said that I was his wife and I had a baby, and they said that wasn't a problem. They said they just wanted a woman, and I was a woman.

Q Continue, Madam Witness. Then what happened next?

A They said to him that I was the mother of children, and they said it wasn't their problem and they continued to undress me. And then I was -- I was trying to continue to prepare the tea. The one, the tallest one, the most tall and slender one, he -- he forced me to take off my clothes. He was the first one to sleep with me.

The interpreter:

Correction from the interpreter: The witness also said that the person threatened her with his weapon.

1462 ICC-01/05-01/08-T-48-Red-ENG, p 40 lines 16-23.

1463 ICC-01/05-01/08-T-55-Red-ENG, p 6 lines 7-10.

Prosecution:

Q Thank you, Madam Witness. You have just mentioned that he slept with you. Which part of your body did he sleep with?

A He put his penis into my body, into the female part of my body.

Q Thank you, Madam Witness. Does the female part of your body have a name?

A In Sango, we say dondö.

The interpreter:

And the Sango interpreter points out that this word means 'vagina'.

Prosecution:

Q Thank you. And that was the first one. What about -- sorry. My question is: How many of them slept with you?

A There were four of them, but -- there were five of them, but only four of them slept with me. The fifth one also wanted to, but since I was bleeding he didn't continue.

Q Thank you, Madam Witness. Now, you've told the Court that the first one who slept with you put his penis into your vagina. Is that what the other four did, as well?

A Yes, they did the same thing.

Q Thank you, Madam Witness. While one was raping you, where was the weapon of that particular Banyamulengue who was raping you?

A He gave his weapon to one of the members of the group.

Q Thank you, Madam Witness. And while one was raping you, where were the other members of the group?

A The others were there; they were helping with the rape.

The interpreter:

Correction: They were present during the rape.

Prosecution:

Q Thank you, Madam Witness. For how long did the Banyamulengue rape you?

A I don't know.

Q Thank you. And did you consent to any of them?

A I did not give my consent. I gave birth to a child one week before then, one week before they raped me.

The interpreter:

Correction: One -- it was one week after.

Prosecution:

Q Thank you, Madam Witness. And I would like you to clarify. You've just said you had given birth. Was it before they had raped you or after they had raped you?

A I had already given birth. I had the baby when they slept with me.

Q And did you tell them that you had recently given birth?

A Since I didn't speak Lingala, but my husband told them that I had a baby, he was -- the child had just been born.

Q Thank you, Madam Witness. Did you sustain any injury as a result of the rape?

A Yes, of course. I had just given birth. They slept with me and I bled.

Q Madam Witness, how did you feel while these Banyamulengue were raping you?

A My pelvis hurt after the injuries of giving birth because I just -- I was powerless. I just had two hands on my head and they did what they wanted to do.

The interpreter:

Correction: The two hands underneath the head.<sup>1464</sup>

1464 ICC-01/05-01/08-T-55-Red-ENG, p 10-12.

The witness stated that her husband tried to intervene by speaking to the Banyamulengue in French, but that he remained silent after they threatened him. She said, 'they told him that if he tried anything they would kill him, and he therefore had to remain outside and be present during the event'.<sup>1465</sup> She also stated that her children, her paralysed mother and her brother were in the house while she was raped. She told the Court that when her brother tried to intervene, they threw him on the ground and beat him.<sup>1466</sup> She stated that also her father, mother and sisters had been raped.<sup>1467</sup> The witness also recalled that her husband had rounded up her children the day after she was raped, left the house without giving a reason and never returned. She stated: 'He said that he wanted to go away and not return'.<sup>1468</sup> Although her husband did not give a reason for his departure, the witness stated that she thought this was because she was raped. She stated: 'He thought that the Banyamulengue had sullied me'.<sup>1469</sup>

1465 ICC-01/05-01/08-T-55-Red-ENG, p 13 lines 6-17.

1466 ICC-01/05-01/08-T-55-Red-ENG, p 14 lines 22-25; p 15 lines 1, 8-9.

1467 ICC-01/05-01/08-T-55-Red-ENG, p 14 line 3.

1468 ICC-01/05-01/08-T-55-Red-ENG, p 16 lines 8-19.

1469 ICC-01/05-01/08-T-55-Red-ENG, p 16 line 19.

## Testimony about rape of children

A great number of Prosecution witnesses, at least eight, testified about the rape of children, sometimes as young as eight years old. Of these, at least five witnesses testified that their young daughters were raped and deflowered by the Banyamulengue.<sup>1470</sup> Two witnesses testified about having been witness to the rape of young girls.

The first witness to testify, **Witness 38**, a context witness, testified to the Court that the parents of an eight-year-old girl came to him with their daughter who had been raped.<sup>1471</sup> He told the Court that he knew of more young girls who were raped.<sup>1472</sup> **Witness 119** also testified that she witnessed two girls being gang-raped by the MLC. She told the Court that when she sat down beside a canal, she heard some girls calling out in the canal.<sup>1473</sup> She described that she saw a group of Banyamulengue standing around the girls: 'What I saw was that they took two of the girls and they put the head of one against the other, and then after that I saw a column of Banyamulengue, who were standing one behind another, and two were on the girls sleeping with them, and the girls screamed out which alerted me and so I went to see all of that.'<sup>1474</sup>

She latter added that the Banyamulengue had pulled the girls' dresses over their faces to hide their face while they were sleeping with them. She saw the girls were bleeding from their vaginas and that there was blood all over their clothes.<sup>1475</sup> Witness 119 explained that she later spoke to the girls who told her they had fled their respective neighbourhoods, and that it was during their flight that they had been captured by the Banyamulengue. One of the girls told the witness that her sisters and mother had also

been raped.<sup>1476</sup> When asked by the Prosecution whether these girls told her anything about whether they actually consented to having sexual relations with the Banyamulengue, Witness 119 responded: 'These girls were 12/13 years old. They were virgins. The Banyamulengue took them by force. The girls did not consent.'<sup>1477</sup>

**Witness 82** was herself still a child when she was gang-raped by two MLC soldiers; she was 12 years old at the time of the attack. She testified that also her sisters and her grandmother were also gang-raped. She stated: 'They raped me after having made me assume a curved position. Later, I had many difficulties.'<sup>1478</sup> When asked by the Prosecution what she means when she says she was 'raped', Witness 82 responded:

A I was still a virgin and they deprived me of my virginity.

Q Thank you, Madam Witness. Which parts of their body did they use to deprive you of your virginity?

A They used the male part of their body.

Q Thank you, Madam Witness. And does it have a name?

A Yes, I can give you the name. They used their penises to sleep with me.

Q Thank you, Madam Witness. And which part of your body did they sleep with?

A With the female part of my body.

[...]

Q What was the name of your female part of your body that the Banyamulengue slept with?

A It was my vagina.<sup>1479</sup>

1470 Witness 23, Witness 80, Witness 42, Witness 73 and Witness 79.

1471 ICC-01/05-01/08-T-33-Red-ENG, p 53 lines 1-8.

1472 ICC-01/05-01/08-T-34-Red-ENG, p 40 lines 1-22.

1473 ICC-01/05-01/08-T-82-Red-ENG, p 39 lines 14-17.

1474 ICC-01/05-01/08-T-82-Red-ENG, p 39 lines 18-23.

1475 ICC-01/05-01/08-T-82-Red-ENG, p 42 lines 5-13.

1476 ICC-01/05-01/08-T-82-Red-ENG, p 44 lines 1-2.

1477 ICC-01/05-01/08-T-82-Red-ENG, p 44 lines 18-19.

1478 ICC-01/05-01/08-T-58-Red-ENG, p 14 lines 23-24.

1479 ICC-01/05-01/08-T-58-Red-ENG, p 15 lines 7-19; p 16 lines 3-5.

Witness 82 stated that the two soldiers made her lie down on the ground in order to rape her. She stated that one of them seized her and the other bent her over in order to take her virginity.<sup>1480</sup> She told the Court that the Banyamulengue who raped her were carrying rifles and arrows and when her father attempted to intervene, they threatened him with their weapons.<sup>1481</sup> She said her grandmother was pregnant at the time of the attack and that she lost her baby shortly afterwards.<sup>1482</sup> She stated the soldiers hit her brother and her grandfather with their weapons; her brother died as a result.<sup>1483</sup> Witness 82 confirmed that she knew other people in her neighbourhood had also been raped, including her cousins and her neighbours.<sup>1484</sup>

The Prosecution then proceeded to ask her more specific questions about the injuries she sustained as a result of the rape.

Q Were you injured as a result of the rape?

A I had a lot of injuries in my vagina. I had serious injuries in my vagina, and my aunt and my grandfather tried to treat it with -- by having me sit in a liquid.

Q Thank you, Madam Witness. What caused these injuries in your vagina?

A When they took me, they really assaulted me sexually very violently. They took me by force and they put my arms behind me, they bent me over and they did these horrific things to me and that's the reason why I ended up with these terrible injuries.<sup>1485</sup>

1480 ICC-01/05-01/08-T-58-Red-ENG, p 17 lines 20-25; p 18 lines 1-2.

1481 ICC-01/05-01/08-T-58-Red-ENG, p 18 lines 24-25; p 19 line 1; ICC-01/05-01/08-T-60-Red-ENG, p 12 lines 15-21.

1482 ICC-01/05-01/08-T-58-Red-ENG, p 19 lines 20-25; p 20 lines 1-3.

1483 ICC-01/05-01/08-T-58-Red-ENG, p 19 lines 16-18; p 20 line 22.

1484 ICC-01/05-01/08-T-58-Red-ENG, p 21 lines 1-7.

1485 ICC-01/05-01/08-T-58-Red-ENG, p 21 lines 9-16.

Witness 82 added that she continues to suffer from the events in 2002/2003. She told the Court that she was no longer able to associate with other girls because 'everybody makes fun of me'.<sup>1486</sup> She explained that her first partner abandoned her because of all of these experiences. During cross-examination by the Defence, the witness became very upset and indicated at several points in her testimony that she did not understand the questions posed by the Defence. Subsequently, Judge Steiner recommended to the Defence to keep in mind the witness' age at the time of the attack (Witness 82 was eleven years old when she was raped). Judge Steiner suggested that the Defence in its questioning should 'take into account ... how old she was in 2002/2003' and accordingly 'to ask questions an 11-year old would be able to understand'.<sup>1487</sup>

1486 ICC-01/05-01/08-T-58-Red-ENG, p 26 lines 24-25; p 27 lines 1-3.

1487 ICC-01/05-01/08-T-59-Red-ENG, p 31 lines 21-25.



**Witness 80** testified that she, her husband and her four children were raped by MLC soldiers. She told the Court that she was raped by three soldiers. They forced her on the ground, and while the first soldier raped her, the two others threatened her by pointing their weapons at her.<sup>1488</sup> She confirmed that once the first soldier had finished raping her, the other two did the same thing. She added that the third soldier had to stop raping her because she had started to bleed.<sup>1489</sup> Witness 80 confirmed that after the baby she had been holding in her hands was thrown on the ground by the Banyamulengue, her baby started to have convulsions and diarrhoea. She stated that they took him to the hospital, but that he died there.<sup>1490</sup> The Prosecution then asked the witness whether the Banyamulengue spoke to her while they were raping her. Witness 80 replied: 'When I wanted to speak, one spoke to me and one of them told me that if I tried to resist he was going to sleep with me 50 times without stopping.'<sup>1491</sup> Witness 80 also told the Court that when her husband tried to intervene, the Banyamulengue raped him too.<sup>1492</sup> When asked to explain what happened to her family, she stated that also her four children were raped:

I wanted to speak about my first daughter whose name I wanted to give. She was raped and now she has problems to conceive. Another as well was 11 at the time that she was deflowered. Another was 14 at the time that she was raped, and all four of them, they almost had the same age when they were raped. Another was pregnant when she was raped, and she spoke to me about that.<sup>1493</sup>

She told the Court that she knew of other women and girls in her community who had been raped and suffered similar problems.<sup>1494</sup>

1488 ICC-01/05-01/08-T-61-Red-ENG, p 6 lines 12-22.

1489 ICC-01/05-01/08-T-61-Red-ENG, p 8 lines 7-16.

1490 ICC-01/05-01/08-T-61-Red-ENG, p 8 lines 22-24.

1491 ICC-01/05-01/08-T-61-Red-ENG, p 9 lines 2-3.

1492 ICC-01/05-01/08-T-61-Red-ENG, p 9 lines 10-13.

1493 ICC-01/05-01/08-T-61-Red-ENG, p 11 lines 19-24.

1494 ICC-01/05-01/08-T-61-Red-ENG, p 17 lines 22-25.

**Witness 42** testified that his daughter and his neighbour's daughter were raped by Banyamulengue. His daughter was ten years old at the time of the attack. He stated that when the soldiers entered his house, one of them threw him on the ground and put his feet on his neck.<sup>1495</sup> While the witness was facing down, he heard his daughter cry out: 'Papa, they are undressing me. They are undressing me.'<sup>1496</sup> The witness stated that after the rape, he did not have the courage to go to his daughter and asked his wife to go.<sup>1497</sup> His wife realised their daughter had been raped because 'there were obvious traces of blood'.<sup>1498</sup>

Witness 42 explained that as a result of the rape, and the subsequent stigmatisation, his daughter dropped out of school:

As you know, my daughter was ten years old. She could no longer go to school, because she was stigmatised at the school. The other pupils were making fun of her – that is, the Banyamulengue's wife, and so on and so forth – so she dropped out of school because of that. I could not do anything. I allowed her to continue like that. So I am very disappointed. I'm very upset. If she had continued with her studies, maybe she could have become an authority. Maybe she could have become someone important today. So she cannot do anything because she had dropped out of school.<sup>1499</sup>

1495 ICC-01/05-01/08-T-64-Red-ENG, p 17 lines 22-25.

1496 ICC-01/05-01/08-T-64-Red-ENG, p 18 lines 7-8.

1497 ICC-01/05-01/08-T-64-Red-ENG, p 21 lines 1-2.

1498 ICC-01/05-01/08-T-64-Red-ENG, p 48 lines 16-25; p 49 lines 1-8.

1499 ICC-01/05-01/08-T-64-Red-ENG, p 21 lines 7-14.

Also **Witness 73** testified that his daughter and his neighbour's daughter were raped.<sup>1500</sup> During his testimony, issues arose concerning his credibility, which remain unresolved at the time of writing this Report. From an analysis of the available public transcripts of his testimony, the account provided by the witness about his daughter's rape does not appear to have been consistent. In particular, it does not become clear whether he stands by his statement that she was raped or whether he considers it to have been a consensual relationship.<sup>1501</sup> There was also confusion as to the age of his daughter that had been raped.

1500 ICC-01/05-01/08-T-70-Red-ENG; ICC-01/05-01/08-T-71-Red-ENG; ICC-01/05-01/08-T-72-Red-ENG; ICC-01/05-01/08-T-73-Red-ENG; ICC-01/05-01/08-T-74-Red-ENG; ICC-01/05-01/08-T-76-Red-ENG.

1501 On 22 February 2011, Witness 73 told the Court: 'Where it concerns my daughter, what happened to her, was difficult. Well it was difficult because we didn't know who to turn to in order to complain, to request legal intervention. They seized my daughter inside the house in order to deflower her, but that's not the problem. This was my fourth daughter who had already a child. Where her attackers were, they were there and they sent my daughter to go and buy them cakes. You know, when she left, everything happened there, neither my wife nor myself could be aware of what could have happened to her there. Then, everybody should obey them and one of them ended up sleeping with my daughter. This person visits us frequently, brought spices, other condiments, which he took from people and one day he even asked me if I would accept that he marry my daughter. Well, first of all, he addressed my wife and it was my wife who told me this. And we thought that he was still having relations with with – well, no, that he was still dealing with our daughter but hadn't – or rather he was courting our daughter, but that he hadn't actually slept with her at that time. It was my wife who gave me this information. When my wife told me all that, I thought, well, what can I do? These are people who have no concerns. If they deflower small girls without any scruples, without a care, that means they can do whatever they want with my daughter. ... When they took her, you know, there wasn't two or three. What I wanted to add was that this man came one day to say that he wanted the hand of our daughter. He was ready to provide a dowry of more than 500.000 Francs and I said, jokingly, that I did not refuse, you could take my daughter. Perhaps this would be an opportunity for me to visit your country, to see what happens there. I said to my wife, ah, so it is in this way that he often brings us spices and other condiments. Is it he who deflowered our daughter? In fact, we have no power. We have no power. We can't do anything. And I said to my wife, to not get annoyed, but to remain calm because we were powerless faced with this episode. This is what happened to my daughter.' (ICC-01/05-01/08-T-71-Red-ENG, p 7 lines 2-20; p 8 lines 6-16).

**Witness 79** told the Court that she and her daughter were raped by the Banyamulengue. She stated that her husband was not at home when the soldiers arrived in her neighbourhood, and that as soon as she heard the shelling and explosions, she put her children in a safe place in her house.<sup>1502</sup> She told the Court that her husband was at PK13 during the events and that he was killed there. She explained that a Central African man had come running up to her saying that Miskine and his men had killed all the Muslims at the cattle market at PK13.<sup>1503</sup> Witness 79 proceeded to explain that when the soldiers came to her neighbourhood, she and her daughters were raped:

They pulled me from the bed and threw me down to the ground, and they threw me on the ground and then they undressed me. One of them first slept with me; the other one had his gun pointed at my temple. And the first one, after he'd slept with me got up and then left. Then a second man took his place. And two others entered the bedroom where one of my daughters was sleeping. She was 11 years old. She was deflowered; she was raped. This girl who was underage was raped. The other children who were in the bedroom wanted to shout, to cry and shout out, and the soldiers said, 'Don't make noise or we will shoot you.' So they did their evil deed and then when they left they looted our house.<sup>1504</sup>

Witness 79 clarified that five Banyamulengue entered her house, two of whom raped her, two of whom raped her daughter. She said they didn't speak to her when they entered her house.<sup>1505</sup> The last Banyamulengue had his gun

1502 ICC-01/05-01/08-T-76-Red-ENG, p 54 lines 8-15.

1503 ICC-01/05-01/08-T-77-Red-ENG, p 8 lines 4-17.

1504 ICC-01/05-01/08-T-77-Red-ENG, p 9 lines 6-14.

1505 ICC-01/05-01/08-T-77-Red-ENG, p 10 lines 11-14.

pointed to her. She told the Court that she did not speak about what happened to her daughter with anyone. She stated: ‘With regards to my daughter, I spoke to nobody because, you know, with the Muslims, such news, when an underage daughter is deflowered, it runs counter to our customs. I couldn’t talk about it. I just massaged her with a mixture. And if I were to tell people about what happened, it would be very, very difficult for that girl to find a husband, and that is why I preferred to keep the news of her rape a secret’.<sup>1506</sup>

Witness 79 later added that also her elder sister and her mother, who were living in their own houses, were raped by the Banyamulengue. She stated that she did not know the details of these attacks.<sup>1507</sup>

### Testimony about the rape of high standing members of communities

In its opening statement, the Prosecution alleged that rape was used by the MLC as a tactic, directed specifically at men in positions of authority to assert dominance and shatter resistance. In its opening statement, the Prosecution specifically mentioned Witness 23. **Witness 23**, a male sexual violence victim and a community leader who identified himself to the MLC soldiers as the representative of his village, testified that he was raped by three MLC soldiers in front of his wives and children. He also stated that over a period of four days the soldiers repeatedly raped his wives and daughters – one of whom was only 11 years old at the time of the attack. He stated that one of his wives was killed by the Banyamulengue, and that another lost a baby as a result of the attack. Witness 23 stated that he had gone to talk to the MLC soldiers to try to intervene in their commission of crimes, and that this was the reason why he was attacked. He told the Court

1506 ICC-01/05-01/08-T-77-Red-ENG, p 17 lines 20-25; p 18 lines 1-25; p 19 lines 1-2.

1507 ICC-01/05-01/08-T-77-Red-ENG, p 23 lines 6-15.

that the Banyamulengue considered him to be an instigator of the rebellion against President Patassé.<sup>1508</sup>

At the start of his testimony about the crimes committed against him and his family, Witness 23 stated that the acts that the Banyamulengue carried out against him and his family made him feel like a dead man.<sup>1509</sup> He later added: ‘You see, somebody like me, a man lying with me, that’s why I considered myself to be dead because a man cannot sleep with another man. With what they did to me, I knew that I was dead.’<sup>1510</sup> At this point the witness got very emotional and the Court took a break. After the break, the witness apologised for this, stating: ‘this event offended me greatly and so I cried earlier’.<sup>1511</sup>

Upon the resumption of the examination-in-chief, Witness 23 stated that he was raped by three Banyamulengue: ‘They sodomised me. They treated me as if I were a woman and -- as even if I were a woman. The way they brutalised me, even if I were a woman, I would be entitled to some rest, but the abuse was severe.’<sup>1512</sup> The Prosecution then proceeded to ask the witness about the rapes.

Q Sir, how many Banyamulengue raped you?

A There were three Banyamulengue who slept with me forcibly.

Q Did they rape you in turns, or all together?

A The first one slept with me and he ejaculated in me. Then the second one came to do the same thing. He ejaculated in me. And, finally, the third one did the same thing as the two earlier ones had done.

1508 ICC-01/05-01/08-T-51-Red-ENG, p 31 lines 18-25.

1509 ICC-01/05-01/08-T-51-Red-ENG, p 31 lines 17-18.

1510 ICC-01/05-01/08-T-51-Red-ENG, p 32 lines 7-9.

1511 ICC-01/05-01/08-T-51-Red-ENG, p 35 lines 1-2.

1512 ICC-01/05-01/08-T-51-Red-ENG, p 35 lines 4-14.

Q Sir, while one was raping you, where were the others?

A They were standing at the corner of the house and they were waiting their turn, generally speaking, as people do when they wait to sleep with the same woman, and the house -- the house was -- the distance was like from here to that wall.

Q And at this time that -- while one of them was raping you, where were their weapons?

A One put down his weapon beside his brothers, and after sleeping with me he picked up his weapon again, and the second one came and that is how he did what he did.<sup>1513</sup>

Witness 23 explained that his third wife had left him because of the attack he had suffered. He stated: 'Once they had sodomised me, she said to me, "You are no longer a man. You are a woman like myself, so I cannot live with you. I have to leave you."<sup>1514</sup>

Witness 23 also spoke to the Court about the consequences of having been raped. He said that he received different reactions from his community.

A These people were aware of what had happened to me. It was serious. It's true that there are some people who would mock me, but others support me and denounce what happened to me, speak out against what happened to me.

Q Has this affected you in your discharge of your duties?

A (Expunged)

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1513 ICC-01/05-01/08-T-51-Red-ENG, p 36 lines 4-22.

1514 ICC-01/05-01/08-T-51-Red-ENG, p 41 line 25; p 41 lines 1-2.

Q Do they view you the same or has it affected you in any way?

A Yes. Amongst the population, there are some people who respect me. There are others who make fun of me. It's because of this population -- well, if it hadn't been for that, I wouldn't have been raped, but (Expunged) and that is why I was raped. Now I suffer. Others don't take this into consideration, but there are some who do mock me, but this doesn't matter. We are acting in the national interest, Mr Prosecutor.

Q Sir, has your rape affected -- sorry, I will repeat my question. Has your rape affected your family in any way?

A Yes, the rape did have consequences for my family. You know, the dowry one gives to one's in-laws, the money, the dowry that I gave for my second wife, in spite of all of that, in spite of that fact, she left. And my wife gave birth to a child and God didn't want bad blood to create this. There were many problems in my family. There were people who died. There were cases of separation. Mr Prosecutor, your Honour, I really don't know what else to say.<sup>1515</sup>

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1515 ICC-01/05-01/08-T-52-Red-ENG, p 34 lines 20-25; p 35 lines 1-15.

## Testimony about HIV as a consequence of the rapes

One of the sexual violence witnesses, **Witness 29**, testified that she contracted HIV as a result of having been raped. Another witness testified that she is also HIV-positive, but could not say for certain whether this was as a direct consequence of having been raped.<sup>1516</sup> Witness 29 testified that she was gang-raped by three MLC soldiers. She told the Court that when she was in Mongoumba, on 5 March, people in the neighbourhood started screaming: 'flee, flee, the soldiers are coming. ... It's the Banyamulengue coming, flee, flee.'<sup>1517</sup> Witness 29 explained that she told her sister, mother and father to hide in the bush, while she stayed behind to gather their things. It was then that the MLC soldiers entered her house and told her to lie on the floor. When the witness refused, they forced her on the floor and raped her. The witness recounted what happened:

I didn't want to obey these men. They asked me to lie down on the ground. I said nothing and I made it look as though I didn't understand what was being said to me.

All of a sudden, he kicked me and I fell onto the ground, and the largest of them ripped off my cloth that I had. He didn't touch the shirt that I had, but he just took off the banya, the cloth that I had attached to me or wrap. He also ripped off my underwear and I wanted to get up, but I was faced with a man who was stronger than me. He pushed my legs apart and started to penetrate me. It hurt. I felt the pain. I cried, but they just carried on as if they had heard nothing. They continued to sleep with me and the two others who were standing up were speaking

in their language. I didn't understand what they were saying, and after having ejaculated he got up. He wasn't totally undressed. He had just dropped or undid his flies and slept with me and having ejaculated he got up and then he closed his fly again, and it was only afterwards that the second threw himself on me and started to sleep with me. I was crying, but they didn't care, and then the others were speaking in their language that I didn't understand and I didn't understand what they were saying between them.

The second slept with me and after got back up and he also closed his fly, and the third also threw himself on me to sleep with me and thereafter got up and when he wanted to get dressed again there was an explosion. It was the first explosion and after that explosion he was afraid and they left, and after they left I stayed in the house.

I was crying with very hot tears, and a voice was saying, 'Well, if I continue crying the others are going to come. They are going to find me in the house and they are going to do the same thing to me.' I had to get up and I brushed away the liquid from their bodies that was running between my legs. I got back up and I took my wrap. I attached it to myself and I made efforts in order to close the door again.<sup>1518</sup>

<sup>1516</sup> Witness 68.

<sup>1517</sup> ICC-01/05-01/08-T-80-Red-ENG, p 17 lines 23-24.

<sup>1518</sup> ICC-01/05-01/08-T-80-Red-ENG, p 21-22.

Witness 29 told the Court that while the first man was raping her, the others were watching.<sup>1519</sup> When asked by the Prosecution whether all three men did the same thing to her, Witness 29 confirmed that they did.

A I told you that all three of them did the same thing. The first man slept with me, he stood up and then the second one came and slept with me, he stood up also and then the third one came and slept with me before fleeing after the gunshot.

Q I have one last question in relation to the incident in your house. In relation to the first man that was sleeping with you, who -- you said that he ejaculated in you. Did all three men do this, madam?

A All of them ejaculated in me.<sup>1520</sup>

The Prosecution then proceeded to ask the witness specifically about the consequences of the rape. Witness 29 explained that approximately seven or eight months after the violent attack, she began to get sick and have fevers all the time.<sup>1521</sup> She decided to see a doctor and to ask for an HIV test. She told the Court that she did not inform the doctor that she had been raped. Witness 29 said that she was not surprised when she received the results, which showed that she was indeed HIV-positive. She stated: 'When you're raped by three men that you have never met before, men that aren't even worthwhile men, who used no protection, no condom, how could I identify the person who infected me? Might it have been the first one, the second one or the third?'<sup>1522</sup>

1519 ICC-01/05-01/08-T-80-Red-ENG, p 32 lines 9-25; p 33 lines 1-12.

1520 ICC-01/05-01/08-T-80-Red-ENG, p 39 lines 7-15.

1521 ICC-01/05-01/08-T-80-Red-ENG, p 48 lines 4-18.

1522 ICC-01/05-01/08-T-80-Red-ENG, p 48 lines 4-18.

Witness 29 explained that she did not tell the doctor she was raped because she was ashamed. She also did not tell anyone in her community about what had happened to her, except for her eldest son and his wife. She said: 'After what I had suffered, I did not have the courage to tell the Mongoumba doctors about it because it was shameful and humiliating to tell anyone what had happened to me. So, frankly, I did not have that courage.'<sup>1523</sup>

## Expert witnesses

**Dr Adeyinka Akinsulure-Smith**, a counselling psychologist from the US who conducted clinical and psychological assessments of victims of sexual violence in the CAR, testified on 29 and 30 November 2010 as an expert witness for the Prosecution on trauma patterns among victims of sexual violence.<sup>1524</sup> Her expert report submitted to the Chamber was based on her experience at the Bellevue NYU programme for survivors of torture, with whom she has worked as a supervising psychologist since 1999, on materials sent to her by the Court, psychological literature and, lastly, interviews conducted with survivors of sexual violence in Bangui.<sup>1525</sup> She

1523 ICC-01/05-01/08-T-81-Red-ENG, p 6 lines 13-15.

1524 Dr Akinsulure-Smith had been requested by the Prosecution and the Legal Representatives of Victims to submit an expert report on 'the impact of sexual violence on people during armed conflict' (ICC-01/05-01/08-T-38-ENG, p 22 line 23). Over the course of her testimony an issue arose concerning the admissibility of parts of her conclusions. Although all expert documents were submitted to the Chamber confidentially, from the public record of the case it appears that, in addition to her expert report, Dr Akinsulure-Smith also submitted supplemental documents to the Chamber, including her assessment of the three victims. However, this second report had been deemed inadmissible by Trial Chamber III and as such will not be used by the Chamber as evidence. Although it appears that the inadmissible document concerns, amongst other things, the psychological assessment she carried out of the three victims, it is not possible to determine from the public record of the case what the exact content of the admissible report is. See ICC-01/05-01/08-T-ENG, p 29-31.

1525 ICC-01/05-01/08-T-38-ENG, p 23 lines 1-5.

explained that she assessed three victims in the CAR and conducted psychological assessments as part of her research.<sup>1526</sup> She stated that physical effects among victims in the CAR included tissue tears in the vaginal, bladder and rectum areas, and injuries to the reproductive system, including complications associated with miscarriages.<sup>1527</sup> She also outlined the grave psychological consequences among the same victims, including PTSD, depressive symptoms and anxiety-related symptoms. She underscored the stigma attached to these victims.<sup>1528</sup>

**Professor William Samarin**, a retired linguistics professor from the University of Toronto, who specialises in Baya languages, with a specific concentration on Sango, testified as an expert witness for the Prosecution on 24, 25, 28 and 29 March 2011. Samarin testified specifically about the differences between Lingala and Sango. He confirmed the conclusion set out in his report that the average person in the CAR would be able to recognise Lingala when it was spoken by a Congolese person and that Central Africans are able to identify the military force in the CAR as the MLC because they spoke Lingala. He also explained that victims of rape would recognise Lingala more accurately than the average Central African because ‘people in trauma are sensitive to the linguistic clues around them, so when a poor woman is being violated ... and somebody says something in Lingala, she’s going to be stabbed with that linguistic pronunciation, whether it be several words or not’.<sup>1529</sup>

**Dr André Tabo**, a specialist in adult psychiatry and a psychiatric expert for the CAR judiciary, testified as an expert witness for the Prosecution on 12-14 April 2011 about the use of rape as a

tool of war.<sup>1530</sup> He defined ‘sexual violence as a tool of war’, as rape with the use of weapons to force a person to engage in a sexual act. He stated that sexual violence was used in particular against women and young girls, and that committing sexual violence in front of family members was also a way to humiliate those forced to watch. Dr Tabo testified that in his work, he had determined four motivations for sexual violence: (i) booty-of-war; (ii) punishment of women for their alleged support of the enemy; (iii) destabilisation of enemy troops and a proclamation of victory over the opposition;<sup>1531</sup> and (iv) the need for sexual release. He stated, ‘the soldiers were out-of-control and able to do whatever they wanted’.<sup>1532</sup>

1526 ICC-01/05-01/08-T-38-ENG, p 29 lines 7-12.

1527 ICC-01/05-01/08-T-38-ENG, p 24 lines 16-22.

1528 ICC-01/05-01/08-T-38-ENG, p 24 lines 23-25; p 25 lines 1-4; ICC-01/05-01/08-T-39-ENG, p 5-17.

1529 ICC-01/05-01/08-T-90-Red-ENG, p 6 lines 18-25.

1530 ICC-01/05-01/08-T-100-ENG. The Office of the Prosecutor had originally submitted Dr Binaifar Nowrojee, Regional Director for East Africa of the Open Society Initiative, as an expert testifying on sexual violence as a tool of war. She had been approved as an expert by the Pre-Trial Chamber over the objections of the Defence. Citing to the ICTR’s refusal of Dr Nowrojee as an expert witness, the Defence alleged that her testimony about whether sexual violence is a foreseeable consequence of war would be of a ‘speculative nature’ and would not be impartial (ICC-01/05-01/08-T-31-ENG, p 6 lines 21-23). The Chamber approved Dr Nowrojee as expert witness on 29 March 2010. In a letter sent to the Prosecution on 8 September 2010, however, Dr Nowrojee declined her appointment as expert witness because she believed that her ‘qualifications do not squarely fit the expertise that the court is seeking’ (ICC-01/05-01/08-896-AnxA). Dr André Tabo was subsequently approved on 8 October 2010 (ICC-01/05-01/08-896). For more information about this issue, see *Gender Report Card 2010*, p 115-116.

1531 ICC-01/05-01/08-T-100-ENG, p 4 lines 16-25; p 5 lines 1-17.

1532 ICC-01/05-01/08-T-100-ENG, p 8 lines 4-9.

## Expert witnesses who have testified before the ICC as of 16 September 2011

Name	Gender	Calling party	Dates of testimony	Type of expertise
<b><i>The Prosecutor v. Thomas Lubanga Dyilo</i></b> <sup>1533</sup>				
<b>G�rard Prunier</b> Historian and political scientist, specialised in African history, University of Paris	Male	Prosecution	26-27 March 2009	History, characteristics and features of the conflict in the Ituri region of the North-Eastern DRC
<b>Dr Elisabeth Schauer</b> Public mental health professional, specialised in the field of psycho-traumatology, women and children's health and violence and human rights	Female	Chamber	7 April 2009	The psychological impact of child soldiering
<b>Roberto Garreton</b> Chilean lawyer and former Special Rapporteur for the UNHCHR in Zaire (DRC) (1994-2001)	Male	Chamber	17 and 19 June 2009	The background and context of the charges, including: (i) the situation in Ituri: the recent history of the region extending from 1996 up until August 2003, with reference to its people and its place in the DRC, and (ii) the conflict in Ituri: the reasons for the conflict and the role of any actors involved therein, including the Government of the DRC, other countries in the region and non-state actors, including international organisations and the corporate sector
<b>Prof Catherine Adamsbaum</b> Pediatric radiologist, expert for the Court of Appeals, Paris	Female	Prosecution	12-13 May 2009	Age-determination
<b>Prof Caroline Rey-Salmon</b> Pediatrician and forensic doctor, consultant Supreme Court, France	Female	Prosecution	13 May 2009	Age-determination
<b>Radhika Coomaraswamy</b> Under Secretary General and Special Representative of the UN Secretary General for Children and Armed Conflict	Female	Chamber	7 January 2010	(i) The definition of 'conscripting or enlisting' children and, given a child's potential vulnerability, approaches to distinguishing between the two; (ii) the interpretation of 'using girls to participate actively in hostilities'
<b>Prof Kambaya Bwatshia</b> Professor at <i>Universit� P�dagogique Nationale</i> , DRC	Male	Chamber	7-8 January 2010	The use of Congolese names and other social conventions in the DRC, including civil status and registration with relevant offices, family and dates of birth

1533 For a more detailed description of the expert testimony in the Lubanga case, see *Gender Report Card 2009*, p 84-85 and *Gender Report Card 2010*, p 135-137.



<i>Name</i>	<i>Gender</i>	<i>Calling party</i>	<i>Dates of testimony</i>	<i>Type of expertise</i>
<b><i>The Prosecutor v. Germain Katanga &amp; Mathieu Ngudjolo Chui</i></b> <sup>1534</sup>				
<b>Zoran Lesic</b> Photographer, specialised in interactive war crime scene presentations	Male	Prosecution	26 January 2010	360-degree presentation of the Bogoro Institute and its vicinity
<b>Eric Baccard</b> Coordinator of the Medical Legal Activities of the OTP	Male	Prosecution	30 March, 21 April, 22 April and 9 July 2010	Forensic reports concerning Witness 132, 249 and 287 (female witnesses)
<b>Constance Kutsch Lojenga</b> Linguist, Leiden University	Female	Chamber	22 June 2010	Ngiti language expert
<b><i>The Prosecutor v. Jean-Pierre Bemba Gombo</i></b> <sup>1535</sup>				
<b>Dr Adeyinka Akinsulure-Smith</b> Counselling psychologist, assistant professor of psychology, City College of New York	Female	Prosecution	29-30 November 2010	Trauma patterns among victims of sexual violence
<b>Prof William Samarin</b> Retired professor of linguistics and anthropology, University of Toronto, Canada	Male	Prosecution	24, 25, 28 and 29 March 2011	Baya languages expert
<b>Dr André Tabo</b> Specialist in adult psychiatry and psychiatric expert for the CAR judiciary	Male	Prosecution	12-14 April 2011	The use of rape as a tool of war

1534 For a more detailed description of the expert testimony in the Katanga & Ngudjolo case, see *Gender Report Card 2010*, p 178.

1535 For a more detailed description of the expert testimony in the Bemba case, see the *Trial Proceedings* section of this Report.

## The role of in-person witness testimony in ICC proceedings

At the ICC, both the Prosecution and the Defence have the right to call in-person witnesses and to cross examine witnesses called by the other party.<sup>1536</sup> The Prosecution and Defence determine how many and which witnesses to call to testify to support the charges or the defence case. Since the first confirmation of charges hearing was held in the Lubanga case, the trend has been towards shorter hearings with fewer in-person witness testimony, particularly by the Prosecution.<sup>1537</sup> The practice of the Prosecution with respect to calling witnesses is continuing to emerge. The Prosecutor has stated that in his view an ideal scenario for the Prosecution

would be to present cases without witnesses, without victims: 'Our goal is a case with no witnesses, no victims. We want to use methods ... such as statistical analysis'.<sup>1538</sup> Nonetheless, as of 16 September 2011, the ICC has heard from approximately 144 witnesses in 3 trials.<sup>1539</sup> While only two of these three trials included charges of gender-based crimes, and only 14 crime-based witnesses, or 0.1% of the total number of witnesses, have been called specifically to substantiate charges of gender-based crimes,<sup>1540</sup> witnesses have testified about gender-based crimes in all three trials.

1536 Rule 140(2) provides: 'In all cases, subject to article 64, paragraphs 8 (b) and 9, article 69, paragraph 4, and rule 88, sub-rule 5, a witness may be questioned as follows: (a) A party that submits evidence in accordance with article 69, paragraph 3, by way of a witness, has the right to question that witness; (b) The prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters; (c) The Trial Chamber has the right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2 (a) or (b); (d) The defence shall have the right to be the last to examine a witness.' In addition, Article 67 sets forth the specific rights of the accused with regard to the questioning of witnesses. Pursuant to Article 67(1)(e), the accused has the right 'to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.'

1537 The confirmation hearings in the Lubanga and Katanga & Ngudjolo cases lasted approximately three weeks (8 – 29 November 2006 and 27 June – 18 July 2008, respectively). The Bemba confirmation hearing took place over the time span of only five days (12 – 15 January 2009). The Abu Garda confirmation hearing lasted approximately 10 days (19 – 29 October 2009) and the confirmation hearing in Banda & Jerbo took only one day (8 December 2010). The Mbarushimana confirmation hearing lasted three days (16, 19 – 20 September 2011). The confirmation hearing in the first case in the Kenya Situation, against Ruto, Kosgey and Sang, took place during six days (1 – 8 September 2011). In contrast, the confirmation hearing in the case against Muthaura, Kenyatta and Ali took approximately three weeks (12 September – 4 October 2011).

1538 'Hague Conference: Social Science Research Seen to Play Key Role in Building Institutions of International Criminal Law: Innovations in evidence gathering can help hold leaders accountable for sexual violence and genocide', *Centre on Law & Globalization Press Release*, p 2-3, available at <[http://lexglobal.org/files/CLG.press\\_release\\_june22.pdf](http://lexglobal.org/files/CLG.press_release_june22.pdf)>, last visited on 31 October 2011.

1539 This figure includes all witnesses called by all parties, including expert witnesses, witnesses called by the Legal Representatives of Victims and witnesses called by the Chamber. The figure is based on the public record of the three cases currently at trial (Lubanga, Katanga & Ngudjolo and Bemba). Since the start of the Lubanga case in January 2009 until 16 September 2011, the Prosecution called a total of 89 witnesses in the three trials, including eight expert witnesses; the Defence called a total of 44 witnesses; five participating victims were authorised to testify; and the Chamber called six expert witnesses. For a more detailed overview of the number of witnesses called in each trial, see the *Trial Proceedings* section of the *Gender Report Card 2009, 2010 and 2011*.

1540 The Prosecution called a total of 14 non-expert witnesses to substantiate charges of sexual and gender-based violence (SGBV) in the two trials in which the accused have been charged with gender-based crimes (Katanga & Ngudjolo and Bemba). In Katanga & Ngudjolo, the Prosecution called two (female) witnesses to testify directly on sexual violence; in Bemba the Prosecution called 12 non-expert witnesses, nine of whom were female, to testify directly on sexual violence. For a more detailed overview of the witness testimony on sexual violence in the Katanga & Ngudjolo case, see *Gender Report Card 2010*, p 163-178; for a more detailed overview of the witness testimony on sexual violence in the Bemba case, see the *Trial Proceedings* section of this Report, above.

Appearing in-person before a trial chamber, as opposed to providing a written statement, provides witnesses with the opportunity to tell their story in an international forum. It also provides an opportunity for judges to question witnesses and interact with them. For example, in the Lubanga case, the Judges drew out further testimony concerning gender-based crimes and the situation of girl soldiers, which then became a part of the record of the case, despite the fact that no gender-based crimes were charged.<sup>1541</sup> In the same case, in a decision on 18 March 2010, Trial Chamber I affirmed the importance of the Chamber being able to interact with witnesses.<sup>1542</sup> In the Katanga & Ngudjolo case, the Judges chose to directly address and encourage one of the victims/survivors of rape and sexual slavery who was having difficulty testifying.<sup>1543</sup> In the Bemba case, as described above, the Judges took a more interventionist

role and on occasion may have circumscribed what could have been a fuller testimony about the victims/survivors' experience. Nonetheless, the ICC practice to date with respect to witness testimony at trials has tended to favour calling witnesses to appear in person before the Chamber, and as discussed below, there has been judicial support for hearing evidence directly in the form of witness testimony. In fact, even expert witnesses who submit lengthy written reports are called to testify in person to give the parties and the Chamber an opportunity to question them about their reports.

In-person witness testimony presents challenges. Substantively, witnesses may recant (for example the first Prosecution witness called in Lubanga),<sup>1544</sup> or may give testimony that departs from previous statements given to investigators. In the Lubanga case, the Trial Chamber set down rules about witness familiarisation in a number of decisions on 30 November 2007, 29 January 2008 and 23 May 2008, deciding not to allow the practice of 'witness proofing',<sup>1545</sup> which is widely used at other international tribunals. Witness familiarisation involves, *inter alia*: assisting the witness to fully understand the proceedings and their role within them, process of testifying and the requirement to tell the truth; and discussions regarding security concerns and the necessity of protective measures. A VWU Unified Protocol for the familiarisation of witnesses, which 'reflects the relevant jurisprudence of the Court as well as the various substantive achievements made over the years through

1541 For an overview of the sexual violence testimony provided by witnesses in the Lubanga case, see *Gender Report Card 2009*, p 71-83.

1542 ICC-01/04-01/06-2360. This decision was made in response to a filing by the Defence. In January 2010, the Defence filed a motion focusing on the appropriateness of questions put by the Judges to witnesses called to testify. In its 18 March decision, Trial Chamber I noted that there is no basis in the Rome Statute framework or jurisprudence 'for the suggestion that the Bench is unable to ask questions about facts and issues that have been ignored, or inadequately dealt with, by counsel' (ICC-01/04-01/06-2360, para 41). The Chamber also held that the judges may use any form that they feel is appropriate, including leading questions. For a more detailed discussion of this decision and the related filings, see *Gender Report Card 2010*, p 132-133.

1543 At various moments while testifying before Trial Chamber II, Witness 132 became very upset and the Judges subsequently directly addressed the witness. For instance, when Witness 132, after having taken a break from testifying, apologised to the Chamber for crying, Presiding Judge Cotte acknowledged her statement, saying there was no need to apologise and that the Court 'fully understands that you are in a lot of pain and that you have suffered a lot' (ICC-01/04-01/07-T-139-Red-ENG, p 17 lines 21-22). For a more detailed account of Witness 132's testimony, as well as the words of encouragement provided by the Judges during her testimony, see *Gender Report Card 2010*, p 169-176.

1544 On 26 January 2009, the Prosecution's first witness, Witness 298, recanted his testimony stating 'what he had said that morning did not come from him but from someone else' (ICC-01/04-01/06-2434-Red2, para 7 citing ICC-01/04-01/06-T-110-CONF-ENG, p 40 line 10). See *Gender Report Card 2010*, p 140-143.

1545 Witness proofing involves holding a meeting between the party calling the witness and the witness in order to solidify the witness' forthcoming testimony. For more information see *Gender Report Card 2009*, p 138 and *Gender Report Card 2008*, p 85.

experience',<sup>1546</sup> has subsequently been adopted and endorsed by a number of Pre-Trial and Trial Chambers.<sup>1547</sup>

Logistically, having witnesses appear in person before the ICC presents the difficulty of assisting them to travel to The Hague, including obtaining visas and taking into account their situation in their country of origin. As discussed in the **Protection** section, recently, four defence witnesses appearing before the Trial Chamber in the Lubanga and Katanga & Ngudjolo cases have applied for asylum in the Netherlands. While the result of these applications has yet to be settled, the fact that they were brought by the ICC to the Netherlands to testify and subsequently sought protection from the Host State has raised several issues impacting upon the effective cooperation between the Netherlands, as Host State, and the ICC. As also discussed in the **Protection** section, serious issues arise in assuring protection for witnesses who have contact with the Court and travel to The Hague to testify. Indeed, the protection concerns increase significantly for in-person witnesses, who, despite the application of both in-court and out-of-court protective measures, remain exposed to threats to their physical and mental well-being by persons acting in the interests of the defence in and out of the courtroom. Furthermore, their participation in the proceedings, and the application of protective measures enabling them to do so, entail significant disruptions to their private and family lives.

1546 ICC-01/05-01/08-1016, para 1.

1547 On 18 November 2010, Trial Chamber III in the Bemba case adopted the VWU's unified protocol (ICC-01/05-01/08-1016). The VWU also filed its unified protocol before Pre-Trial Chamber II for the purposes of the confirmation hearings in the case against Ruto *et al.* (ICC-01/09-01/11-259) and the case against Muthaura *et al.* (ICC-01/09-02/11-260-Anx). The order from Pre-Trial Chamber II to the VWU to file the unified protocol in these cases was given by email.

## Judicial perspectives and rulings on in-person witness testimony

Based on his experience presiding over the Lubanga trial, Judge Fulford offered some reflections on trial proceedings in a speech delivered at the ninth Assembly of States Parties in December 2010. In his remarks, Judge Fulford raised a number of proposals that, if implemented, would impact upon the number of witnesses called and the manner in which they were called. In particular, Judge Fulford suggested that trial proceedings could be made significantly more efficient by reserving in-court live testimony for only crucial aspects of the evidence, such as material that significantly implicates or exonerates an accused. First, Judge Fulford proposed that the reliance on court-appointed expert witnesses, who would provide reports and observations on substantial areas of evidence, such as background, context and general circumstances of events, could significantly decrease the need to call a host of individual witnesses. Second, he observed that in the Lubanga case, Trial Chamber I successfully relied upon evidence taken by deposition,<sup>1548</sup> either *in situ* or at the seat of the Court, again for less central areas of evidence. He noted that allowing evidence to be taken by deposition increases the efficiency of hearing testimony because evidence can be collected at different places at the same time. In addition, Judge Fulford encouraged the use of testimony via video-link, which could reduce the resources needed for protective measures and witnesses' travel to The Hague. It would also reduce the risks for witnesses by not having to explain an extended period of absence to their families or local communities. Judge Fulford stressed, however, that whatever steps are taken to

1548 Testimony by deposition involves taking statements from witnesses before a Judge or legal officer of the Trial Chamber in the presence of all parties and participants. The deposition transcript is recorded and included in the trial record of the case.

ensure the efficiency of trial proceedings by diverting from the principle of orality under Article 69(2),<sup>1549</sup> trials should not be ‘vitiating because illegal steps have been taken, however useful the ideas may have been’.<sup>1550</sup> He also underscored the fundamental importance of live testimony in criminal proceedings to present crucial aspects of the evidence to the Trial Chambers. He thus reiterated Trial Chamber I’s determination that live witness testimony carries with it ‘material advantages’, most importantly the fact that ‘the evidence can be fully investigated and tested by questioning, and the Court is able to assess its accuracy, reliability and honesty, in part by observing the conduct and demeanour of the witness’.<sup>1551</sup>

A recent decision in the Bemba case concerning the admissibility of written witness statements bears significantly on the use of in-person witness testimony at the ICC in the future. On 3 May 2011, the Appeals Chamber reversed Trial Chamber III’s decision authorising the wholesale admission into evidence of all witness statements, without a case-by-case analysis of the need for such inclusion, finding that it contravened the principle of orality provided for under Article 69(2). In doing so, the Appeals Chamber confirmed the primacy of the principle of orality and that witnesses’ written statements can be admitted only in exceptional circumstances. In doing so the Appeals Chamber agreed with Judge Ozaki’s dissent of the impugned decision by Trial Chamber III on the matter, as described in greater detail, below. This Appeals Chamber decision confirms the primacy

of oral witness testimony as a fundamental characteristic of criminal trials before the ICC, for which other types of evidence cannot always be substituted.

In the impugned decision, issued 19 November 2010,<sup>1552</sup> Trial Chamber III *prima facie* admitted all items of evidence on the Prosecution’s list of evidence<sup>1553</sup> and revised list of evidence without conducting an item-by-item analysis, using the discretion accorded under Rule 63(2) of the Rules of Procedure and Evidence. In particular, it found that although Article 69(2) provided that ‘the testimony of a witness at trial shall be given in person ...’ this constituted a mere presumption in favour of oral testimony, rather than an actual requirement for the prevalence of orality on the whole.<sup>1554</sup> Furthermore, the Chamber noted that the *prima facie* admission of documents did not preclude oral testimony.<sup>1555</sup> It attached significant weight to the expeditiousness of proceedings, and found that the *prima facie* admission of evidence would ‘shorten the length of questioning by the parties in court and contribute to the accused being tried without undue delay’.<sup>1556</sup> The Trial Chamber also found that it would ‘allow for more coherence between the pre-trial and trial stages of proceedings’.<sup>1557</sup> The majority further noted that it favoured the submission of the entirety of the witnesses’ statement(s), rather than excerpts.<sup>1558</sup> Where a party chose not to submit the statement(s) of a witness called to testify, the majority found that the Chamber had the authority to request the submission of any statement(s) it deemed necessary for the determination of the truth.<sup>1559</sup>

1549 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 [...]’.

1550 ‘Reflections of a Trial Judge’, Speech by Judge Sir Adrian Fulford to the Assembly of States Parties, December 2010, New York, para 14, available at <[http://www.coalitionfortheicc.org/documents/Reflections\\_of\\_a\\_Trial\\_Judge\\_ASP\\_New\\_York\\_6\\_December\\_2010.pdf](http://www.coalitionfortheicc.org/documents/Reflections_of_a_Trial_Judge_ASP_New_York_6_December_2010.pdf)>, last visited on 30 October 2011.

1551 ICC-01/04-01/06-1603, para 21.

1552 ICC-01/05-01/08-1022.

1553 ICC-01/05-01/08-595-Conf-AnxB.

1554 ICC-01/05-01/08-1022, para 14.

1555 ICC-01/05-01/08-1022, para 20.

1556 ICC-01/05-01/08-1022, para 23.

1557 ICC-01/05-01/08-1022, para 27.

1558 ICC-01/05-01/08-1470, para 11.

1559 ICC-01/05-01/08-1470, para 12.

Judge Ozaki filed a dissenting opinion to the 19 November decision.<sup>1560</sup> In contrast to the majority, she found that the principle of the primacy of orality constituted ‘one of the corner-stones of the proceedings under the Rome Statute’, and that the wholesale *prima facie* admission of evidence without prior assessment as to the admissibility of each item constituted ‘an infringement of the principle of orality’.<sup>1561</sup> She stressed that all international criminal trials have, in principle, relied on the oral testimony of witnesses, with written statements only admitted on a case-by-case basis. Judge Ozaki underscored the significant benefits to the presentation of oral testimony. She stated that, ‘it is only possible to evaluate a witness’ credibility during live, oral testimony, which enables the judges to observe a witness and hear what he/she has to say. The reading of a statement can never be a substitute to such observations and live evaluations’.<sup>1562</sup> Judge Ozaki further disputed the majority’s contention that the admission into evidence of witnesses’ written statements would improve the expediency of proceedings. On the contrary, she noted that ‘increasing the amount of documentation in the case record may create potential problems caused by the sheer volume and possible incompatibility of the material’s content, thereby increasing the risk of confusion in the drafting of the judgement in the case’.<sup>1563</sup>

Judge Ozaki further observed that the majority failed to fully appreciate that Rule 68(b) specifically provided that the submission of written statements *in lieu* of oral testimony was to be an exception to the principle of orality.<sup>1564</sup> In particular, she expressed doubts about the majority’s reliance on its discretionary powers to request the submission of written statements. She stated that ‘paragraph 12

of the Order implies that the Chamber will request the submission of the statements even when parties have no intention to do so’, and that the majority failed to explain under what exceptional circumstances it would do so.<sup>1565</sup> Judge Ozaki argued that ‘the establishment of a separate rule in favour of the admission of the entirety of witness statements is unfounded and inappropriately binds the Chamber’.<sup>1566</sup> She underlined that the admission of the entirety of witness statements should be the exception, and should be strictly assessed on a case-by-case basis.<sup>1567</sup>

As noted above, on 3 May 2011, the Appeals Chamber reversed Trial Chamber III’s decision, which both parties had appealed.<sup>1568</sup> It held that the Trial Chamber’s wholesale admission into evidence of the written witness statements without a case-by-case analysis contravened the principle of orality established by Article 69(2) of the Rome Statute.<sup>1569</sup>

The Appeals Chamber based its ruling on four key findings. First, it held that the Trial Chamber admitted evidence that had not actually been ‘submitted’ by the Prosecution, as required by Article 74(2) of the Statute and Rule 64(1) of the Rules of Procedure and Evidence, and that the Trial Chamber was therefore statutorily prohibited from ruling on their admission.<sup>1570</sup> Second, the Appeals Chamber found that the Trial Chamber erred in admitting items of evidence wholesale, without an item-by-item review of their admissibility as required by Article 69(4) and (7) and Rule 71 of the Rules of Procedure and Evidence. The Appeals Chamber acknowledged that ‘expeditiousness is an important component of a fair trial’, but noted that this ‘cannot justify a deviation from

1560 ICC-01/05-01/08-1028.

1561 ICC-01/05-01/08-1028, para 8.

1562 ICC-01/05-01/08-1028, para 23.

1563 ICC-01/05-01/08-1028, para 28.

1564 ICC-01/05-01/08-1471, para 4.

1565 ICC-01/05-01/08-1471, para 6.

1566 ICC-01/05-01/08-1471, para 7.

1567 ICC-01/05-01/08-1471, para 11.

1568 ICC-01/05-01/08-1386.

1569 ICC-01/05-01/08-1386, para 3.

1570 ICC-01/05-01/08-1386, para 44.

statutory requirements'.<sup>1571</sup> Third, the Appeals Chamber held that the Trial Chamber was required to provide reasoning in its rulings on evidentiary matters, pursuant to Rule 64(2), which it failed to do in the impugned decision.<sup>1572</sup> Lastly, and most importantly, the Appeals Chamber found that the Trial Chamber's decision, without a cautious item-by-item analysis, was incompatible with the principle of primacy of orality enshrined in Article 69(2). In particular, the Appeals Chamber stated:

The direct import of the first sentence of [Article 69(2)] is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality. This importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded.<sup>1573</sup>

The Appeals Chamber noted that although Article 69(2) accorded the Chamber the discretion to receive witness testimony in a manner other than live, in-court testimony, this discretion is subject to strict conditions, in particular those provided under Rule 68 of the Rules of Procedure and Evidence.<sup>1574</sup> The Appeals Chamber emphasised that the Trial Chamber must carry out a cautious assessment of the need for such deviation, taking into account the following factors: (i) whether the evidence related to issues not materially in dispute; (ii) whether the evidence was not central to core issues in the case, but only provided relevant background information; and (iii) whether the evidence was corroborative of other evidence.<sup>1575</sup> In reviewing the Trial Chamber's decision, the Appeals Chamber found that its indiscriminate acceptance of all witness statements, and the failure to assess each statement individually, 'resulted in the Chamber paying little or no regard to the principle of orality, to the rights of the accused, or to trial fairness generally'.<sup>1576</sup>

1571 ICC-01/05-01/08-1386, para 55.

1572 ICC-01/05-01/08-1386, paras 58-60.

1573 ICC-01/05-01/08-1386, para 76.

1574 Rule 68 provides that, 'the Trial Chamber may ... allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documents evidence of such testimony, provided that: (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or (b) If 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'.

1575 ICC-01/05-01/08-1386, para 78.

1576 ICC-01/05-01/08-1386, para 79.

Subsequently, in a decision issued on 31 May 2011, Trial Chamber III ordered the implementation of the Appeals Chamber's decision, setting forth the procedure for the submission of evidence and rendering all prior applications regarding the admissibility of evidence moot.<sup>1577</sup> Retrospectively, parties were to identify material included in their lists of documents and in the questioning of witnesses that they wished to submit as evidence. Going forward, the parties were to identify the specific material they intended to submit as evidence during the questioning of each witness. It ordered objections to the admissibility of evidence to be submitted to the opposing party and the Chamber as soon as was practicable prior to the hearing at which the document was to be admitted. If no objections were made, the item of evidence would be admitted following review by the Chamber. Participating victims were instructed to file a written application, setting out their personal interests, after which the Chamber could authorise their submission of evidence.<sup>1578</sup>

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1577 ICC-01/05-01/08-1470. Judge Ozaki filed a partially dissenting opinion: ICC-01/05-01/08-1471.

1578 ICC-01/05-01/08-1470, paras 13-14.



# Judiciary

## Key Decisions

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### Admissibility

Under Article 17(1) of the Rome Statute:

**the Court shall determine a case inadmissible where (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3; (d) the case is not of sufficient gravity to justify further action by the Court.**

Article 17(1) encapsulates the principle of complementarity, one of the key principles of the Rome Statute. Pursuant to this principle, the ICC can only exercise jurisdiction over a case if the State Party in question is unable or unwilling to genuinely prosecute the crimes in question. To determine a State's unwillingness, the Court must consider whether the domestic proceedings are being undertaken to shield the person concerned from criminal responsibility, whether there is an unjustified delay or whether the proceedings are not being conducted independently or impartially.<sup>1579</sup> A finding of inability is based on an assessment as to whether, due to a complete or substantial collapse or unavailability of the national judicial system, the State is unable to carry out proceedings and the collection of evidence.<sup>1580</sup>

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1579 Article 17(2).

1580 Article 17(3).

The Appeals Chamber has previously held that questions of a State's unwillingness or inability were not relevant in case of complete inaction on the part of the State. In a decision on 25 September 2009 in the Katanga & Ngudjolo case it stated that 'if States do not or cannot investigate and, where necessary, prosecute, the ICC must be able to step in'.<sup>1581</sup>

Article 19 allows the Defence, or a State that has jurisdiction over a case, to challenge the admissibility of a case based on the criteria set forth in Article 17(1). Also, under Article 19(1), the Court may, on its own motion, initiate proceedings to determine whether a case continues to meet the criteria for admissibility.

The burden of proof in an admissibility challenge always lies on the party raising the challenge,<sup>1582</sup> meaning that it is their responsibility to prove that a state has or will investigate and prosecute a case, rather than for the Prosecution to affirmatively prove that the state is inactive, unable or unwilling to do so. Three challenges to admissibility have been raised by the defence to date, in the Bemba, Katanga and Mbarushimana cases; one has been initiated by the Pre-Trial Chamber on its own motion, in the Uganda Situation; and only one has so far been lodged by a state, in the Kenya Situation.

The first challenge to admissibility before the ICC came from the Defence in the Katanga case in 2009,<sup>1583</sup> who argued that the case against Katanga was inadmissible due to the existence of criminal proceedings against him in the DRC at the time of his surrender to the ICC. This argument was rejected by both the Trial Chamber<sup>1584</sup> and the Appeals Chamber<sup>1585</sup> on the basis that the DRC authorities were not investigating or prosecuting Katanga for his

1581 ICC-01/04-01/07-1497, para 85.

1582 ICC-01/05-01/08-802, para 203.

1583 ICC-01/04-01/07-891-Conf-Exp.

1584 ICC-01/04-01/07-1213-tENG.

1585 ICC-01/04-01/07-1497.

involvement in the attack on Bogoro, which was the subject of the case against him at the ICC, and that in order to render a case inadmissible, national criminal proceedings must involve both the same person and same conduct as the proceedings at the ICC.<sup>1586</sup>

In 2009, the Pre-Trial Chamber also undertook a review of the question of admissibility in the Kony *et al* case on its own initiative.<sup>1587</sup> The reasons behind this decision were the contradictory statements being made by the Ugandan government regarding who had jurisdiction over the suspects and the developments within the country to establish a Special Division of the High Court to deal with war crimes. However, the Chamber found that, in factual terms, nothing had changed in terms of admissibility since the issuance of the Arrest Warrants against the accused in that case in 2005, and in practice, the national authorities could still be described as 'inactive' for the purposes of Article 17, meaning that the case remained admissible.<sup>1588</sup>

In the Bemba case in 2010, the Defence sought to challenge the admissibility of the case, on the grounds that the existence of national proceedings against Bemba in the Central African Republic made the case inadmissible.<sup>1589</sup> This argument was again rejected by both the Trial and Appeals Chambers,<sup>1590</sup> on the basis that, although criminal proceedings had been initiated against Bemba, they were first dismissed on the basis of Bemba's diplomatic immunity as Vice-President of the DRC and then dropped in favour of transferring the case to the ICC, which left no obstacle to his prosecution before the Court on the basis of complementarity.<sup>1591</sup>

1586 See further *Gender Report Card 2009*, p 93.

1587 ICC-02/04-01/05-377.

1588 See further *Gender Report Card 2009*, p 92-93.

1589 ICC-01/05-01/08-704-Conf-Corr; public redacted version: ICC-01/05-01/08-704-Red3-tENG.

1590 ICC-01/05-01/08-802 and ICC-01/05-01/08-962-Corr, respectively.

1591 See further *Gender Report Card 2010*, p 180-183.

In 2011, for the first time a State Party, rather than the Defence, challenged the admissibility of two cases in the Situation in Kenya. Significantly, the Prosecutor’s investigation into the Situation in Kenya was the first in which he exercised his *proprio motu* powers to conduct an investigation without a referral from the State Party. On 31 May 2011, Pre-Trial Chamber II rejected the Kenyan Government’s admissibility challenge in both *The Prosecutor v. Ruto, Kosgey and Sang*, and *The Prosecutor v. Muthaura, Kenyatta and Ali*, a decision that was confirmed upon appeal on 30 August 2011.

As outlined below, in Mbarushimana, the Defence filed an indirect admissibility challenge, arguing not that the case was inadmissible but that the Warrant of Arrest against Mbarushimana was invalid, as the Prosecutor had failed to inform the Trial Chamber of the existence of criminal proceedings against Mbarushimana in Germany at the time he applied for the Warrant.<sup>1592</sup> However, due to procedural reasons, as well as the fact that Mbarushimana was not being prosecuted by the German authorities but was merely a suspect at the time and in light of the willingness of the German authorities to cooperate with the ICC Prosecutor and respect his jurisdiction, the challenge was also unsuccessful.<sup>1593</sup>

1592 ICC-01/04-01/10-32.

1593 ICC-01/04-01/10-50.

## Kenya

*The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang and*

*The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*

Following the issuance of Summonses to Appear for Ruto, Kosgey and Sang, and for Muthaura, Kenyatta and Ali by Pre-Trial Chamber II on 8 March 2011,<sup>1594</sup> on 30 March 2011, the Kenyan Government filed a legal challenge to the admissibility of both cases under Article 19 of the Statute.<sup>1595</sup> The admissibility challenge by the Kenyan Government is the first such challenge made under Article 19 by a State Party before the ICC.

In its filing, the Kenyan Government claimed that the cases should be ruled inadmissible as it had recently implemented and continued to implement substantial judicial and constitutional reforms, and as it intended to carry out its own investigations into the post-election violence that occurred in 2007 and 2008.<sup>1596</sup> The Government asserted that all reforms are expected to be concluded by September 2011.<sup>1597</sup> For a more detailed discussion of the reforms in Kenya see the **OTP** section, above. The Government acknowledged that no national proceedings were currently under way against the six individuals named as suspects by the ICC, but explained that its strategy was to follow a ‘bottom-up’ approach by concentrating its initial investigations and prosecutions on lower-level perpetrators first, before moving on to higher-level suspects.<sup>1598</sup> The Government stated that it would submit an updated report to the Pre-Trial Chamber by July 2011 on the progress of its investigations and how these extend upwards to the highest levels, including to those presently before the ICC. Additional reports would be submitted in August and September 2011.<sup>1599</sup>

1594 ICC-01/09-01/11-01 and ICC-01/09-02/11-01.

1595 ICC-01/09-01/11-19 and ICC-01/09-02/11-26.

1596 These judicial and constitutional reforms follow the adoption of the New Constitution, which was promulgated on 27 August 2010, and include the appointment of a Chief Justice and Deputy Chief Justice, the appointment of High Court and Court of Appeal Judges, the appointment of a new Director of Public Prosecutions, the passing of the Supreme Court Bill, the appointment of the Vetting Board, the enactment of the Police Reform Bills as well as the appointment of the Inspector General.

1597 ICC-01/09-01/11-19 and ICC-01/09-02/11-26, para 13.

1598 ICC-01/09-01/11-19 and ICC-01/09-02/11-26, para 71.

1599 ICC-01/09-01/11-19 and ICC-01/09-02/11-26, para 71.

On 21 April 2011, the Government of Kenya submitted 22 annexes to its application,<sup>1600</sup> as evidence that proceedings were underway. One of these annexes is a letter of instruction dated 14 April 2011 from Attorney-General Amos Wako, instructing the Commissioner of Police ‘to ensure that all the cases pending investigations are concluded expeditiously ... and to investigate all other persons against whom there may be allegations of participation in the Post-Elections Violence, including the six persons who are the subject of the proceedings currently before the International Criminal Court’.<sup>1601</sup> However, as the response by the OPCV to the admissibility challenge noted, the timing of this letter warranted careful scrutiny as it was dated two weeks after the filing of the admissibility challenge.<sup>1602</sup> The Defence and Prosecutor also submitted responses to the Government’s admissibility challenge. The Prosecution submitted that, although welcoming the stated commitment of the Kenyan Government to investigate the post-election violence,<sup>1603</sup> the application by the Government did not provide any indication that the Government is currently conducting or has conducted such investigations or prosecutions.<sup>1604</sup> The Defence in both cases filed independent, though similar, submissions on the admissibility challenge by the Kenyan Government.<sup>1605</sup> The submissions underscored that the Defence did not oppose the challenge by the Kenyan Government, but reserved the right to file submissions on admissibility independently at a later stage of the proceedings. On 13 May 2011, the Government submitted a reply to the responses of the Prosecutor, the Defence and OPCV, including a further seven annexes, reiterating its previously expressed views that the cases are inadmissible.<sup>1606</sup>

As part of its admissibility challenge, the Government requested the Chamber to schedule a public oral hearing, so as to enable the Government to address the Pre-Trial Chamber in relation to its application.<sup>1607</sup> The Government further requested that it be granted an opportunity to be heard during one or both of the initial appearances of the suspects on 7 and 8 April

1600 ICC-01/09-01/11-64 and ICC-01/09-02/11-67, including public annexes 1-22.

1601 ICC-01/09-01/11-64-Anx1 and ICC-01/09-02/11-67-Anx1.

1602 ICC-01/09-01/11-70 and ICC-01/09-02/11-74, para 16.

1603 ICC-01/09-01/11-69 and ICC-01/09-02/11-71, para 2.

1604 ICC-01/09-01/11-69 and ICC-01/09-02/11-71, para 12.

1605 ICC-01/09-01/11-67 (Kosgey); ICC-01/09-01/11-68 (Ruto and Sang); ICC-01/09-02/11-70 (Ali); ICC-01/09-02/11-72 (Muthaura and Kenyatta).

1606 ICC-01/09-01/11-89 and ICC-01/09-02/11-91.

1607 ICC-01/09-01/11-19 and ICC-01/09-02/11-26, paras 20-21, 81.

2011.<sup>1608</sup> In two identical decisions filed on 4 April 2011 in both cases on the conduct of proceedings following the Government’s admissibility challenge, Pre-Trial Chamber II rejected the Government’s request to participate in those hearings, reiterating the limited purpose of the initial appearances.<sup>1609</sup> On 17 May 2011, the Government filed a second application reiterating its request for an oral hearing,<sup>1610</sup> which was again rejected by the Pre-Trial Chamber on the grounds that this was essentially a request for reconsideration, and not provided for in the Court’s statutory provisions.<sup>1611</sup>

On 21 April 2011, the Government of Kenya filed a formal request for assistance to the ICC under Article 93(10).<sup>1612</sup> Kenya asserted that the Prosecutor may be in possession of critical evidence ‘unavailable to or not yet found by’ the Government, which could significantly advance its national investigations and thus impact upon its admissibility challenge before the Court.<sup>1613</sup> The Government requested the Court to submit all statements, documents and other types of evidence in possession of the Prosecutor and the Court to enable it to advance and complete its national investigations.<sup>1614</sup>

The Prosecutor filed a response to the request for assistance on 10 May 2011, asserting that the transmission of evidence would raise significant concerns for the security of victims, witnesses, potential witnesses and their families.<sup>1615</sup> The Prosecutor also stressed that Kenya had not provided convincing evidence that investigations were actually ongoing, which could warrant the communication of evidence.

On **30 May 2011**, Pre-Trial Chamber II handed down a decision rejecting the Kenyan Government’s challenge to the admissibility of the two cases.<sup>1616</sup> The Chamber welcomed the judicial reforms introduced by the

1608 ICC-01/09-01/11-19 and ICC-01/09-02/11-26, paras 22, 82.

1609 ICC-01/09-01/11-31 and ICC-01/09-02/11-40, para 11.

1610 ICC-01/09-01/11-94 and ICC-01/09-02/11-92.

1611 ICC-01/09-01/11-101, para 42 and ICC-01/09-02/11-96, para 38.

1612 Article 93(10) provides that the Court may, upon request, cooperate with and provide assistance to a State Party conducting investigations into Rome Statute crimes. Such assistance shall include the transmission of statements, documents and other evidence obtained in the course of an investigation or trial conducted by the ICC.

1613 ICC-01/09-58, para 6.

1614 ICC-01/09-58, paras 3-4.

1615 ICC-01/09-01/11-83-Corr and ICC-01/09-02/11-86-Corr, para 17.

1616 ICC-01/09-01/11-101 and ICC-01/09-02/11-96.

Government and the State's apparent willingness to substantively investigate the post-election violence. However, Pre-Trial Chamber I had previously held in the Lubanga case in the context of its decision on the issuance of an arrest warrant that to render a case inadmissible the national proceedings must encompass the same conduct committed by the same person or persons as the proceedings before the ICC (the 'same person/same conduct' test).<sup>1617</sup> In the present instance, Pre-Trial Chamber II found that the Kenyan Government had erred by applying the admissibility test as set forth in its 31 March 2010 decision, which the Chamber clarified, related to the Situation stage of proceedings, not the case stage of proceedings. In its 31 March 2010 decision authorising the investigation into the Situation, the Pre-Trial Chamber had stated that 'national investigations must [...] cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC' and the Kenyan Government argued that as such it would be sufficient to investigate persons at the same level in the hierarchy.<sup>1618</sup> In its subsequent 30 May decision regarding the issuance of summonses to appear, the Pre-Trial Chamber clarified the test for admissibility at the situation stage of proceedings as compared to the case stage. In line with previous ICC jurisprudence,<sup>1619</sup> the Chamber reiterated that at the case stage of proceedings the admissibility of a case must be assessed against domestic proceedings involving the same identified individuals (ie the 'same person/same conduct' test).<sup>1620</sup>

The Pre-Trial Chamber further held that the Government's erroneous interpretation of the admissibility test actually cast doubt upon its willingness to genuinely investigate the six individuals. It found that the acknowledgement by the Kenyan Government that its ongoing investigations were focused on lower-level perpetrators was a clear indication that there were in fact no proceedings currently underway against the six suspects before the Court.<sup>1621</sup>

The Pre-Trial Chamber questioned the updated reports that the Government of Kenya planned to submit in order to demonstrate that proceedings were ongoing, and stressed that if proceedings were indeed currently underway, there was no compelling reason to wait to submit these reports until July 2011.<sup>1622</sup>

1617 ICC-01/04-01/06-8-Corr, paras 31 and 37-39.

1618 ICC-01/09-01/11-19 and ICC-01/09-02/11-26, para 32.

1619 ICC-01/04-01/06-8-Corr (Lubanga).

1620 ICC-01/09-01/11-101, para 54 and ICC-01/09-02/11-96, para 50.

1621 ICC-01/09-01/11-101, para 62 and ICC-01/09-02/11-96, para 58.

1622 ICC-01/09-01/11-101, para 63 and ICC-01/09-02/11-96, para 59.

The Chamber also found that of the 29 annexes submitted to it by the Government, only three related to some extent to the investigative processes. Yet it noted that neither of these provided substantiating evidence that proceedings were ongoing. The Chamber also dismissed the 14 April letter by the Attorney-General, noting that the letter was dated two weeks after the filing of the admissibility challenge. It thus considered the letter to be a clear indication that at the time of the filing of the challenge, proceedings were not actually ongoing.<sup>1623</sup> It also found that the Government had failed to provide evidence as to the conduct, crimes or incidents upon which these alleged national proceedings were based.<sup>1624</sup> Citing the Appeals Chamber's determination in Katanga & Ngudjolo that admissibility must be determined 'on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge',<sup>1625</sup> the Chamber concluded that the inactivity on the part of the Kenyan Government in relation to the investigation or prosecution of these six individuals rendered the two cases admissible.<sup>1626</sup>

In the decision on admissibility, the Chamber also briefly addressed the Government's request for assistance, again expressing doubt about the timing of the Government's filing. The Chamber noted that the request for cooperation was made three weeks after the admissibility challenge, thus casting doubt upon the necessity of the sharing of evidence for the admissibility challenge. The Chamber handed down a separate decision on the Government's request for cooperation on 29 June 2011.<sup>1627</sup>

In the 29 June decision, the Pre-Trial Chamber noted that it could only decide upon the possible transmission of evidence already submitted to it by the Prosecutor. It was for the Prosecutor himself to decide upon the transmission of any other evidence in the possession of the Prosecutor not yet transmitted to the Chamber.<sup>1628</sup> Stressing that the key requirement of Article 93(10) was the existence of ongoing or completed national investigations, the Chamber did not find that the cooperation request provided any documentary evidence to establish the existence of such proceedings and as such denied the request for cooperation.

1623 ICC-01/09-01/11-101, para 66 and ICC-01/09-02/11-96, para 62.

1624 ICC-01/09-01/11-101, para 69 and ICC-01/09-02/11-96, para 65.

1625 ICC-01/04-01/07-1497, para 56.

1626 ICC-01/09-01/11-101, para 70 and ICC-01/09-02/11-96, para 66.

1627 ICC-01/09-63.

1628 ICC-01/09-63, paras 30-31.

## The Government's appeals

On 6 June 2011, the Kenyan Government filed an appeal against the admissibility decision of the Pre-Trial Chamber.<sup>1629</sup> It filed its document in support of the appeal on 20 June 2011.<sup>1630</sup> Article 82(1)(a) and Rule 154(1) provide for an automatic right to appeal decisions with respect to admissibility. At the same time, the Government requested the Pre-Trial Chamber leave to appeal what it saw as a procedural error in the Pre-Trial Chamber's decision on admissibility, arguing that the Chamber had erred in finding that it did not have to rule on the State's request for assistance before ruling on the admissibility challenge.

Asserting that the cooperation decision of 29 June also pertained to admissibility and as such was subject to an automatic right to appeal, on 4 July 2011 the Government of Kenya also appealed the decision on cooperation.<sup>1631</sup> The Government submitted that the Pre-Trial Chamber erred in fact by finding that there was no documentary proof of the existence of investigations and that it erred in law in its finding that it could not order the Prosecutor to transmit evidence. In the event that the Appeals Chamber not accept the automatic appeal, the Government also filed a request for leave to appeal with the Pre-Trial Chamber.<sup>1632</sup>

In the 6 June appeal of the 30 May decision on the admissibility challenge the Government of Kenya argued that the Pre-Trial Chamber erred in procedure, in its factual findings and in law. It contested the Pre-Trial Chamber's finding that Kenya was unwilling to conduct investigations and asserted that it was actually unable to carry out these investigations, for lack of evidence. The Government submitted that the Pre-Trial Chamber erred procedurally by refusing the Government request for a status conference and/or oral hearing. The Government argued that the Chamber's failure to rule on its request for assistance before issuing its decision on the admissibility left it without evidence 'that might be of great importance to its investigations. The Government of Kenya is thus less able – through no fault of its own – to support its admissibility arguments.'<sup>1633</sup>

The Government also submitted that the Chamber erred in fact, postulating that 'there is a "universe" of evidence about the Post-Election Violence in Kenya but that only part of that "universe" may be available to Kenya and only part – almost certainly a *different*

part – available to the Prosecutor of the ICC' (emphasis in original).<sup>1634</sup> The Government argued that any determination on the evidence presented must be done with the recognition of these two 'universes'. In addition, the Government postulated that '*as a matter of law*, the Government of Kenya cannot be expected to investigate those against whom it may have no evidence, especially when the Prosecutor, who has evidence it appears, has declined to make his evidence available to the Government of Kenya' (emphasis in original).<sup>1635</sup>

Overall, the Kenyan Government asserted that the Pre-Trial Chamber erred in finding that there were at present no investigations against the six individuals. The Government stressed that the Chamber too hastily rejected the admissibility challenge without taking into account the additional information the Government intended to submit during an oral hearing. The Government also argued that the Chamber failed to address the legal arguments put forward by the Government in its admissibility challenge regarding the correctness of the 'same person, same conduct' test as applied by the Pre-Trial Chamber.

On 4 July 2011, as indicated in its admissibility challenge, the Government of Kenya submitted its first updated investigation report, as further evidence in support of its appeal that investigations were ongoing.<sup>1636</sup> The report explained that an investigation team, composed of ten senior police officers, was appointed shortly after the naming of the six individuals by the Prosecutor and was currently conducting investigations on the ground. The team had interviewed at least 35 witnesses, but was still experiencing difficulties in locating witnesses it wished to interview. According to the Government, the ongoing investigations by this team have not as yet produced any evidence linking the six ICC suspects to the crimes alleged. With this submission, Kenya attempted to substantiate its assertion that it was unable to carry out proceedings against the six persons because of the unavailability of evidence, not because of unwillingness on the part of the State to carry out such investigations.

On **30 August 2011** the Appeals Chamber, by majority decision, confirmed the Pre-Trial Chamber's decision rejecting the admissibility challenge.<sup>1637</sup> Judge Ušacka issued a dissenting opinion, dissenting from the entire decision. The dissenting opinion and the majority decision are discussed in detail below.

1629 ICC-01/09-01/11-109 and ICC-01/09-02/11-104.

1630 ICC-01/09-01/11-135 and ICC-01/09-02/11-130.

1631 ICC-01/09-70.

1632 ICC-01/09-71.

1633 ICC-01/09-01/11-109 and ICC-01/09-02/11-104, para 27.

1634 ICC-01/09-01/11-109 and ICC-01/09-02/11-104, para 29.

1635 ICC-01/09-01/11-109 and ICC-01/09-02/11-104, para 36.

1636 ICC-01/09-01/11-159-Anx1 and ICC-01/09-02/11-153-Anx1.

1637 ICC-01/09-01/11-307 and ICC-01/09-02/11-274.

## Appeals Chamber decision rejecting Kenyan admissibility challenge

In its appeal of the Pre-Trial Chamber's decision rejecting the admissibility challenge, the Kenyan Government alleged one legal error, two factual errors and three procedural errors.

The first ground of appeal was the correctness of the 'same person/same conduct' -test. The majority underlined that, although the Appeals Chamber had previously ruled on questions of admissibility, it had not yet issued a definitive ruling on the correctness of the 'same person/same conduct test'. In its decision, the majority explicitly distinguished *preliminary* admissibility rulings under Article 18 of the Statute from rulings on the admissibility of a concrete case pursuant to Article 19, the tests for which are very different. Moreover, the majority stressed that the meaning of 'case is being investigated' in Article 17(1)(a) must be considered in the context to which it is applied.<sup>1638</sup> Noting that the admissibility appeal was brought by the Kenyan Government pursuant to Article 19(2)(b), the majority found that the case can only be found inadmissible 'if the same suspects are being investigated by Kenya for substantially the same conduct'.<sup>1639</sup> The majority underlined that 'is being investigated' in this context means the 'taking of steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses' (emphasis in original).<sup>1640</sup> The majority reiterated that the mere preparedness to initiate investigative steps against other suspects is not sufficient. 'At this stage of the proceedings, where summonses to appear have been issued, the question is no longer whether suspects at the same hierarchical level are being investigated by Kenya, but whether the *same suspects* are the subject of investigation by both jurisdictions for substantially the *same conduct* (emphasis added)'.<sup>1641</sup>

The majority found no merit in Kenya's assertion that the principle of complementarity dictated a presumption in favour of domestic jurisdictions. The majority found that Article 17 only allows for domestic primacy when the state in question is actually, or has been, investigating and/or prosecuting at the national

level.<sup>1642</sup> The majority also found that the meaning of 'at the earliest opportunity' in Article 19(5) is that a state must bring admissibility challenges 'as soon as possible once it is in a position to actually assert a conflict of jurisdictions'.<sup>1643</sup> As such, the majority found that Kenya's claim that it had to issue the challenge directly after the issuance of summonses to appear, and that it could therefore not be in a position to prepare its challenge in full before that date, was without merit. The majority concluded that, given the specific stage of the proceedings, the 'same person/same conduct' test as applied by the Pre-Trial Chamber was correct and that the Chamber had not made any error of law.<sup>1644</sup>

With regard to the alleged factual errors, the majority noted that the Appeals Chamber's review is corrective, and not *de novo*. Citing the previous determination by the Appeals Chamber in the Bemba case, the majority stressed that, unless the Pre-Trial Chamber committed a clear error, ie 'misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts', the Appeals Chamber would refrain from interfering with the Pre-Trial Chamber's evaluation of the facts.<sup>1645</sup>

Kenya's second ground of appeal was that the Pre-Trial Chamber erred in finding that there were at present no ongoing national investigations. In its decision, the majority underlined that to substantiate an admissibility challenge, 'the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case'.<sup>1646</sup> The majority found that the Government of Kenya did not provide information showing that concrete investigative steps had been taken against the six accused at the national level. As such, the majority held that there was no clear factual error in the Pre-Trial Chamber's finding that the annexes filed by the Government of Kenya to substantiate its admissibility challenge did not provide details about the asserted, current investigative steps undertaken. The Pre-Trial Chamber thus did not commit a factual error in determining that there was no evidence of ongoing national investigations against the six accused.<sup>1647</sup>

1638 ICC-01/09-01/11-307, para 38 and ICC-01/09-02/11-274, para 37.

1639 ICC-01/09-01/11-307, para 41 and ICC-01/09-02/11-274, para 40.

1640 ICC-01/09-01/11-307, para 41 and ICC-01/09-02/11-274, para 40.

1641 ICC-01/09-01/11-307, para 42 and ICC-01/09-02/11-274, para 41.

1642 ICC-01/09-01/11-307, para 44 and ICC-01/09-02/11-274, para 43.

1643 ICC-01/09-01/11-307, para 46 and ICC-01/09-02/11-274, para 45.

1644 ICC-01/09-01/11-307, para 47 and ICC-01/09-02/11-274, para 46.

1645 ICC-01/09-01/11-307, para 56 and ICC-01/09-02/11-274, para 55.

1646 ICC-01/09-01/11-307, para 62 and ICC-01/09-02/11-274, para 61.

1647 ICC-01/09-01/11-307, para 70 and ICC-01/09-02/11-274, para 69.

Similarly, the Appeals Chamber held that the Pre-Trial Chamber did not err in finding that the proposal by Kenya to submit additional investigation reports was an acknowledgement that such investigations were not at present ongoing. The Appeals Chamber did not find any error in the Pre-Trial Chamber's treatment of these reports, nor could it be said that the Pre-Trial Chamber had been 'biased' in its deliberations, as alleged by Kenya.<sup>1648</sup>

The Kenyan Government also alleged three procedural errors, namely (i) the refusal to permit the filing of the updated investigation reports; (ii) the refusal to hold an oral hearing; and (iii) the refusal to decide on the request for assistance before determining the admissibility challenge. Recalling that Rule 58 of the Rules of Procedure and Evidence (RPE) designates a great deal of discretion to the Pre-Trial Chamber to regulate the proceedings related to the admissibility challenge, the majority of the Appeals Chamber underlined that the question at hand was not to resolve what the Pre-Trial Chamber could have done, but rather to determine whether the Pre-Trial Chamber erred in what it did.<sup>1649</sup> The majority stressed that, while the Pre-Trial Chamber could have allowed the submission of additional evidence, it was within its own discretion to deny the submission thereof. The majority also reiterated that the burden was on the Government of Kenya to ensure its admissibility application was substantiated by sufficient evidence in the first place.<sup>1650</sup> The majority of the Appeals Chamber underlined that 'the State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge prematurely'.<sup>1651</sup> The majority did not find that the Pre-Trial Chamber abused its discretion in determining that Kenya could not submit the additional reports. Similarly, the majority did not find that the Pre-Trial Chamber abused its discretion when it refused to schedule an oral hearing or status conference pursuant to Kenya's request.<sup>1652</sup> Lastly, with respect to the alleged error by the Pre-Trial Chamber to rule on the admissibility challenge without having ruled on Kenya's request for assistance, the majority underscored that the Pre-Trial Chamber enjoyed a broad discretion and had not exceeded that discretion. The majority thus found that the Pre-Trial Chamber did not err procedurally.

1648 ICC-01/09-01/11-307, para 84 and ICC-01/09-02/11-274, para 82.

1649 ICC-01/09-01/11-307, para 98 and ICC-01/09-02/11-274, para 96.

1650 ICC-01/09-01/11-307, para 98 and ICC-01/09-02/11-274, para 96.

1651 ICC-01/09-01/11-307, para 100 and ICC-01/09-02/11-274, para 98.

1652 ICC-01/09-01/11-307, para 113 and ICC-01/09-02/11-274, para 111.

Having determined that the Pre-Trial Chamber did not err in law, fact or procedure, the majority of the Appeals Chamber confirmed the Pre-Trial Chamber decision rejecting the admissibility challenge and, accordingly, dismissed the appeal.

## Dissenting opinion by Judge Ušacka

Judge Ušacka dissented in full from the majority decision, arguing that the Pre-Trial Chamber erred in the way it conducted the proceedings. Her dissent was included in the public record of the case on 20 September 2011.<sup>1653</sup> She reiterated that pursuant to Rule 58(2) of the Rules of Procedure and Evidence, the Chamber enjoys a broad discretion to take all necessary measure in terms of the conduct of proceedings, including requesting additional information or extending the time to allow the State to submit additional evidence.<sup>1654</sup> In her view, Rule 58 also allows the Chamber the power 'to adapt the procedure to the needs of the proceedings at hand by balancing all interests at stake, including the sovereign rights of the State'.<sup>1655</sup> Judge Ušacka found that the Pre-Trial Chamber 'did not fully appreciate the scope of its discretionary powers and, in consequence, did not consider that it could take the steps necessary to adapt the admissibility proceedings to the needs of the specific proceedings, not only at the beginning but throughout the admissibility proceedings'.<sup>1656</sup> By rejecting all requests to add to the procedure, for instance by rejecting Kenya's proposal to submit additional information or by dismissing the request for an oral hearing, the Pre-Trial Chamber failed to give due effect to the fact that it was the first State challenge to the admissibility of a case and that as such, there are many legal and factual issues before the Pre-Trial Chamber that had not yet been resolved by previous ICC jurisprudence on admissibility.<sup>1657</sup> In Judge Ušacka's view, the Pre-Trial Chamber should have requested specific observations from the parties and participants on these issues, including on the question of the definition of 'investigation' and 'prosecution', the requisite standard of proof and the type of evidence required.<sup>1658</sup> In addition, Judge Ušacka held that to be able to fully evaluate the extent of the national investigations and/or prosecutions, the Pre-Trial Chamber 'need to be made aware of and be provided with documentation on the national criminal justice system of the State in question'.<sup>1659</sup>

Judge Ušacka argued that in examining complementarity, a clear distinction should be made between 'inactivity' and 'unwillingness/inability' on the part of a State to investigate/prosecute. Although the Rome Statute

1653 ICC-01/09-01/11-336 and ICC-01/09-02/11-342.

1654 ICC-01/09-01/11-336 and ICC-01/09-02/11-342, para 26.

1655 ICC-01/09-01/11-336 and ICC-01/09-02/11-342, para 22.

1656 ICC-01/09-01/11-336 and ICC-01/09-02/11-342, para 24.

1657 ICC-01/09-01/11-336 and ICC-01/09-02/11-342, para 25.

1658 ICC-01/09-01/11-336 and ICC-01/09-02/11-342, para 25.

1659 ICC-01/09-01/11-336 and ICC-01/09-02/11-342, para 27.



encapsulated a high threshold for unwillingness and inability, Judge Ušacka held that ‘the Court should not circumvent this threshold created by unwillingness or inability by requiring a State to prove, eg the existence of a full-fledged investigation or prosecution of a case in order to establish that there is no situation of inactivity’.<sup>1660</sup> She stressed that in its determination of inactivity, the Chamber should adhere to the spirit of the Statute. With regards to the case at hand, Judge Ušacka held that the Pre-Trial Chamber failed to give sufficient weight to the sovereign rights of Kenya.<sup>1661</sup> She found that the Pre-Trial Chamber failed to appreciate that it should have employed its discretion to adapt the proceedings to the current case and should have accepted the submission of additional information by Kenya. She held that ‘more importantly, though, the Pre-Trial Chamber did not fully consider this matter in light of the fact that, within a short period of time, Kenya would reach the level of an investigation that would satisfy the standards of the Pre-Trial Chamber’.<sup>1662</sup>

Fundamentally, Judge Ušacka held that the Pre-Trial Chamber decision rejecting the admissibility challenge should be reversed. In her opinion, the Pre-Trial Chamber should reconsider the admissibility challenge and the matters arising from it after conducting the proceedings in a way that fully balances all relevant interests as required by the principle of complementarity.

## DRC

### *The Prosecutor v. Callixte Mbarushimana*

On 10 January 2011, the Defence challenged the validity of the Arrest Warrant against Callixte Mbarushimana,<sup>1663</sup> This was not a direct challenge to the admissibility of the case against Mbarushimana, and the Defence acknowledged that a determination of admissibility was not necessarily a prerequisite for the issuance of an arrest warrant. However, it cited an Appeals Chamber decision from the DRC Situation to the effect that a Pre-Trial Chamber should exercise its discretion to issue an arrest warrant only when appropriate to circumstances of the case, circumstances that could include the issue of admissibility.<sup>1664</sup>

The Defence argument rested on the Prosecutor’s responsibility to provide ‘all decisive information’ to the Chamber to enable it to exercise its discretion, including ‘uncontested facts that render a case clearly

inadmissible’.<sup>1665</sup> When submitting his application for an Arrest Warrant against Mbarushimana under Article 58 in August 2010, the Prosecutor informed the Pre-Trial Chamber that the criminal acts alleged against Mbarushimana were not the subject of an investigation or prosecution in any state.<sup>1666</sup> The Prosecution claimed that Mbarushimana had been no more than a potential suspect in the investigations undertaken by the German criminal authorities,<sup>1667</sup> and went on to emphasise that no investigation or prosecution was being undertaken against Mbarushimana for the same conduct in any national jurisdiction, including the DRC, Rwanda, France or Germany.<sup>1668</sup> When issuing the Arrest Warrant, the Pre-Trial Chamber stated that it was satisfied that there was no reason for it to exercise its discretion to conduct a *proprio motu* determination of admissibility in the case.<sup>1669</sup>

The Defence claimed that, contrary to the Prosecutor’s assertion in August 2010, Mbarushimana was under investigation by the German authorities at the time of the issuance of an Arrest Warrant against him.<sup>1670</sup> According to documents cited by the Defence, the German investigative proceedings against Mbarushimana were only terminated on 3 December 2010, in order to facilitate his prosecution before the International Criminal Court.<sup>1671</sup> The Defence claimed that, by allegedly withholding this ‘decisive information’ from the Pre-Trial Chamber, the Prosecutor had prevented the Chamber from exercising its discretion to rule on admissibility, a ruling which the Defence believed would have held the case to be inadmissible. The Defence requested that the Arrest Warrant be rendered void, since it was sought and issued at a time when the case against the accused was inadmissible, and that Mbarushimana should be released from detention immediately.<sup>1672</sup> On 28 January 2011, the Defence challenge was rejected by the Pre-Trial Chamber on procedural grounds, as it was not a valid challenge to the validity of an Arrest Warrant under Rule 117(3).<sup>1673</sup> Rule 117(3) provides that ‘a challenge as to whether the warrant of arrest was properly issued in accordance with article 58(1)(a) and (b), shall be made in writing to the Pre-Trial Chamber’. In the view of the Chamber and in accordance with established case law of the Court, issues relating to the admissibility of a case do not qualify as issues relevant to determine ‘whether an arrest warrant was properly issued’ within the meaning of Rule 117(3).<sup>1674</sup>

1665 ICC-01/04-169, para 52.

1666 ICC-01/04-01/10-11-Red, para 166.

1667 ICC-01/04-01/10-11-Red, paras 172-173.

1668 ICC-01/04-01/10-11-Red, para 174.

1669 ICC-01/04-01/10-1, para 9.

1670 ICC-01/04-01/10-32, paras 11-13.

1671 ICC-01/04-01/10-32, paras 14.

1672 ICC-01/04-01/10-32, paras 18.

1673 ICC-01/04-01/10-50.

1674 ICC-01/04-01/10-50, para 11.

1660 ICC-01/09-01/11-336 and ICC-01/09-02/11-342, para 27.

1661 ICC-01/09-01/11-336 and ICC-01/09-02/11-342, para 28.

1662 ICC-01/09-01/11-336 and ICC-01/09-02/11-342, para 28.

1663 ICC-01/04-01/10-32.

1664 ICC-01/04-169, para 52.

# Judiciary

## Key Decisions CONTINUED

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### Victim Participation

The concept of victim participation in proceedings before the ICC is based on Article 68(3) of the Rome Statute, which states that:

where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused.

There are also a number of important provisions in the Rules of Procedure and Evidence – particularly Rules 85 and 89-93 – which provide a definition of ‘victim’ for the purposes of the Statute, deal with legal representation for victims, and set out the procedure to be followed in applications to participate and the format of participation in proceedings.

In 2005, standard application forms were developed by the VPRS to facilitate victims' applications. A booklet explaining the functions of the Court, victims' rights and how to complete the participation and reparations forms was made available on the Court's website, along with the standard application forms. In 2009, the Court undertook a review of these application forms in consultation with civil society. The new forms were introduced on 3 September 2010 and are available on the ICC's website.<sup>1675</sup> They are considerably shorter than the original form, having been reduced from 17 pages to 7, and appear to have been made simpler and clearer to complete. The new form also combines the applications for victim participation and victim reparations into one document. However, it remains to be seen in practice whether applicants for victim participation will encounter difficulties in completing the new forms.

From 2005 until the end of August 2011, the Court has received a total of 6,156 applications from persons seeking to participate as victims in proceedings before the Court.<sup>1676</sup> This is a noticeable increase on previous years and shows a concerted trend of continuous increases in applications for victim participation at the Court. Between 30 August 2010 and 1 September 2011, the Court received 2,577 applications for participation.<sup>1677</sup> Between 1 October 2009 and 30 August 2010, the Court received 1,765 applications for victim participation,<sup>1678</sup> while the total number of applications for participation received between

2005 and 30 September 2009 was 1,814.<sup>1679</sup> Of the 6,156 applications for participation which have been received by the Court, 3,182 have been accepted as participating victims as of 1 September 2011, a total of just under 52%.<sup>1680</sup> The figure of 3,182 participating victims is a significant increase on previous years. As of 30 August 2010, only 974 victims had been granted the right to participate in proceedings – in the subsequent 12 months, the Court has granted victim participant status to a further 2,295 applicants, more than double the previous total of all accepted applications since 2005.<sup>1681</sup>

Given the evolution of the work of the Court and the consistent increase in the number of Situations and cases under investigation by the Court, and with it the immense increase of victims applying to participate in proceedings, the Court has been faced with challenges in attempting to strike a balance between the efficient conduct of proceedings, the rights of the accused to a fair and expeditious trial, and the rights of victims to have their views and concerns represented in the proceedings. Facilitating the process by which victims, through their participation before the Court, can provide testimony, 'tell their story' and have a recognised voice in the proceedings, is a vital part of the justice process and a crucial component of the accessibility of the justice experience for victims/survivors. For several years there have been significant challenges, both practical and procedural, for the VPRS in managing the application process for victim participation, as well as its methodology for consulting with victims and the strategies to inform victims of their rights. In addition, the body responsible for general outreach, the Outreach Unit within the Public Information

1675 'Forms', available at <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Forms.htm>>, last visited on 26 October 2010.

1676 These figures were provided by the VPRS by email dated 14 September 2011, and include information on the number of victim participation applications received as of 1 September 2011 and the number of applicants authorised to participate in proceedings as of 1 September 2011 (hereinafter 'VPRS email').

1677 Based on figures provided by the VPRS by email dated 14 September 2011.

1678 See *Gender Report Card 2010*, p 185.

1679 See *Gender Report Card 2009*, p 95.

1680 Based on figures provided by the VPRS by email dated 14 September 2011.

1681 Based on figures provided by the VPRS by email dated 14 September 2011. See also *Gender Report Card 2010*, p 189.

and Documentation Section (PIDS) of the Court, has fallen short of adequately reaching out to female victims and victims of sexual or gender-based violence.<sup>1682</sup> The cumulative impact of this work has resulted in a significant under-representation of women applying to be recognised as victims by the ICC, and therefore a disconnection between the profile of victims in reality and the demographics of ‘victims’ for the purposes of accessing justice at the ICC.<sup>1683</sup>

Despite this gender disparity, there has been a consistent and exponential increase in the number of applications for victim participation received by the Court over the last number of years. However, the volume of applications for victim participation, particularly in specific cases and Situations such as the Bemba case, has outstripped the capacity of the VPRS to process them in a timely manner and has led to a significant backlog in the number of unprocessed applications. For example, in late August 2011, the Registry indicated to the Trial Chamber in the Bemba case that almost 3,000 applications for victim participation in those proceedings are still being processed by the VPRS.<sup>1684</sup> In May 2011 in the Mbarushimana case, the Registry reported receiving almost 800 applications for victim participation which it had not been able to process or transmit to the Chamber in advance of the filing deadline for

participation in the confirmation of charges hearing.<sup>1685</sup> Likewise, in the Muthaura *et al* case in August 2011, the Registry acknowledged receiving approximately 2,600 applications for victim participation in the Kenya Situation and cases in addition to the 643 applications for participation, which it had already transmitted to the Chamber.<sup>1686</sup> These filings indicate that the VPRS is working its way through a backlog of over 6,000 applications for victim participation, a significantly higher figure than the 2,577 applications listed as registered by the VPRS between 30 August 2010 and 1 September 2011. This figure is also higher than the total number of applications for participation registered by the VPRS since the beginning of the victim participation process in 2005.<sup>1687</sup>

The consequences of this backlog of applications is having an impact on all parties and participants before the Court. In some instances, victim applicants are facing long delays in having their application transmitted to the Chamber and for a decision on their participatory status to be reached, but in some cases the delay in processing the applications can deny victims the opportunity to have their views and concerns presented in relation to certain judicial proceedings. For example, in the Mbarushimana case, the VPRS was unable to transmit almost 800 applications for participation to the Chamber by a particular deadline, leading to those applicants being denied judicial consideration of their applications and the right to participate in the confirmation of charges hearing. As discussed

1682 This is discussed further in the *Structures and Institutional Development* section above under the headings ‘Outreach Programme’ and ‘Overview of Trends – Outreach’.

1683 The breakdown of victim participants by gender is discussed further below. See also *Gender Report Card 2010*, p 191 and *Gender Report Card 2009*, p 95; See also, the speech at the launch of the *Gender Report Card on the International Criminal Court 2010*, Brigid Inder, p 7-8, available at <[http://www.iccwomen.org/documents/GRCLaunch2010-Speech\\_2.pdf](http://www.iccwomen.org/documents/GRCLaunch2010-Speech_2.pdf)>

1684 ICC-01/05-01/08-1726, para 3. See also ‘Thousands more apply to join Bemba’s trial as victims’, *Bemba trial.org*, 30 September 2011, available at <<http://www.bemba-trial.org/2011/09/thousands-more-apply-to-join-bemba%E2%80%99s-trial-as-victims/>>, last visited on 25 October 2011, citing a figure of 2830 unprocessed applications.

1685 ICC-01/04-01/10-213, para 1, citing an exact figure of 783 applications.

1686 ICC-01/09-02/11-213, p 3-4.

1687 The figures provided by the VPRS by email dated 14 September 2011 indicate a total of 2,577 applications for participation have been registered by the VPRS in the last year and a total of 6,156 applications for participation received since 2005. The total number of applications not yet processed and/or transmitted to Chambers referenced in filings of the VPRS discussed above amounts to approximately 6,213.

further below, the Registry acknowledged this issue by filing a proposal for an ‘alternative approach’ to victim participation at the confirmation hearing,<sup>1688</sup> whereby the views and concerns of unprocessed applicants for victim participation could be submitted to the Chamber under the category of ‘other victims’, taken from the language of Rule 93 of the Rules of Procedure and Evidence.<sup>1689</sup> In response to the Registry’s filing, Pre-Trial Chamber I held that Rule 93, although technically applicable, was inappropriate in the circumstances and would only allow for a limited form of participation for the applicants in question.<sup>1690</sup> Likewise, the volume of unprocessed applications for participation have led to complaints from the parties to the case, particularly the Defence, regarding the burden placed on the parties when hundreds of applications for participation are transmitted (and therefore require analysis and observations) at once, and must be dealt with alongside other pressing legal issues such as witness preparation or pre-trial procedural filings.<sup>1691</sup>

1688 ICC-01/04-01/10-213, paras 7-15.

1689 Rule 93 states the following: ‘A Chamber may seek the views of victims or their legal representatives participating pursuant to 89 to 91 on any issue... In addition, a Chamber may seek the views of other victims, as appropriate.’

1690 ICC-01/04-01/10-229.

1691 See for example the May 2011 Defence successful motion in the Mbarushimana case that the Chamber should refuse to allow the Registry to transmit any further applications for victim participation outside the initial deadline but prior to the confirmation of charges hearing (ICC-01/04-01/10-169) and the Defence objections filed in the Bemba case in relation to the burden caused to the parties by the timing and volume of the transmission of applications for participation by the VPRS (ICC-01/05-01/08-1413). Trial Chamber III’s decision on the transmission of applications for victim participation by the VPRS in the Bemba case is discussed in greater detail below.

## Breakdown of participants by Situation<sup>1692</sup>

Pursuant to Article 68 of the Rome Statute, victims may apply for and be granted the right to participate at all stages of proceedings before the Court, including the pre-trial, trial and appeal phases, but, in practice, the Court’s jurisprudence has limited the potential for victims to enjoy a general right to participate at the Situation stage of proceedings. In December 2008 and February 2009, the Appeals Chamber issued two important decisions in the DRC and Darfur Situations rejecting 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.<sup>1693</sup> 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. This year, decisions in the DRC, CAR and Kenya Situations, discussed in more detail below, 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. 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.<sup>1694</sup>

1692 These figures are accurate as of 30 August 2011.

1693 ICC-01/04-556 and ICC-02/05-177. See further *Gender Report Card 2009*, p 99-100.

1694 See <<http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Victims/Participation/Booklet.htm>>.

There has been a noted change in the relative percentages of victim participants accepted in each of the Situations before the Court. During the period of time covered by the *Gender Report Card 2010*, the DRC Situation and associated cases accounted for the overwhelming majority (almost 70%) of victims accepted to participate before the Court.<sup>1695</sup> Due to the substantial increase in the number of victim participants in the CAR Situation in the last year, specifically in the Bemba case, the DRC Situation and associated cases now represent a little over one quarter of the total number of victim participants,<sup>1696</sup> while the Bemba case (and by extension the CAR Situation) now accounts for just over half of the total number of participating victims before the Court.<sup>1697</sup> There has been no increase in the number of victim participants accepted in the Uganda Situation or the case against Joseph Kony, although the total number of participating victims before the Court has risen substantially. As a result, the Uganda Situation now accounts for a little under 2% of the victim participants, down

from 6% last year.<sup>1698</sup> Although there has been only a negligible increase in the number of victim participants in the Darfur Situation and associated cases, it represents a significantly smaller percentage of the total number of participating victims, down from 12% last year to less than 4% this year.<sup>1699</sup> No victim participants had been accepted in the Kenya Situation or cases during the period covered by the *Gender Report Card 2010*, but it now accounts for over 17% of the total number of participating victims, the third highest percentage by Situation behind the DRC and the CAR.<sup>1700</sup>

1695 See further *Gender Report Card 2010*, p 189. As of 30 August 2010, 661 of the 974 accepted applications to participate (67.86%) related to the Situation in the DRC and the three cases then arising from it. As of 30 September 2009, the DRC Situation and cases accounted for almost 85% of victim participation (644 of 771 victim participants or 83.5%).

1696 According to figures provided by the VPRS, 823 (or 25.86%) of the 3,182 victims granted the right to participate are participating in proceedings relating to the DRC situation and cases.

1697 According to figures provided by the VPRS, 1,619 of the 3,182 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 50.87% of the total number of participating victims before the Court. As of 30 August 2010, the CAR Situation and cases amounted to less than 14% of the total number of participating victims (135 of 975 in total).

1698 The VPRS email indicates that a total of 62 applicants have been accepted to participate in the Uganda Situation and the Kony *et al* case since 2005. This amounts to 1.95% of the 3,182 accepted victim participants.

1699 The VPRS email indicates that 116 or 3.71% of the 3,182 victim participants relate to the Darfur Situation and the three cases associated with it. The 87 victims who had been granted victim participant status in the Abu Garda case have not been included in these figures.

1700 According to figures provided by the VPRS, the Kenya Situation and cases represent 560 of the 3,182 participating victims at the Court, which amounts to 17.6% of the total.

## Breakdown by Situation of victims who have been formally accepted to participate in proceedings<sup>1701</sup>

<i>Situation or Case</i>	<i>Number of victim participants as of 1 Sept 2011</i>	<i>% of victim participants as of 1 Sept 2011<sup>1702</sup></i>	<i>Number of victim participants as of 30 Aug 2010</i>	<i>% of victim participants as of 30 Aug 2010<sup>1703</sup></i>
DRC Situation and cases	<b>823</b>	<b>25.86%</b>	<b>661</b>	<b>67.86%</b>
Uganda Situation and cases	<b>62</b>	<b>1.95%</b>	<b>62</b>	<b>6.36%</b>
Darfur Situation and cases	<b>118</b>	<b>3.71%</b>	<b>116</b>	<b>11.9%</b>
CAR Situation and cases	<b>1,619</b>	<b>51%</b>	<b>135</b>	<b>13.86%</b>
Kenya Situation and cases	<b>560</b>	<b>17.6%</b>	<b>0</b>	<b>0%</b>
Libya Situation and cases	<b>0</b>	<b>0%</b>	<b>–</b>	<b>–</b>
Côte d'Ivoire Situation	<b>0</b>	<b>0%</b>	<b>–</b>	<b>–</b>
<b>Totals</b>	<b>3,182</b>		<b>974</b>	

1701 All figures in this table are based on information provided by the VPRS by email dated 14 September 2011 and relate only to victims who have been accepted to participate in proceedings, rather than all applicants for victim participation to date.

1702 The VPRS email indicates that 3,182 applications to participate have been accepted as of 1 September 2011.

1703 According to VPRS figures for last year, 974 applications to participate in proceedings had been accepted as of 30 August 2010. See further *Gender Report Card 2010*, p 193.

## Breakdown of participants by gender

During the period covered by the *Gender Report Card 2010*, the VPRS did not provide a gender breakdown of the applicants for victim participation, but did provide figures on the gender of those who had been formally accepted to participate in proceedings.<sup>1704</sup> This year, the VPRS provided no gender breakdown of victims who had been accepted to participate, but did provide some limited information on the gender of the applicants for participation.<sup>1705</sup> According to the VPRS, due to the amount of applications received and the time allocated to process them, the VPRS sometimes decides to enter only limited or basic data in the database and to go back over those entries and complete the missing information when the proceedings so allow.<sup>1706</sup> However, despite the fact that the application form for victim participation specifically requires the applicant to indicate his or her sex, the VPRS does not consistently include this information as ‘basic data’. As a result, for more than one-quarter of the applications registered by the VPRS between 30 August 2010 and 1 September 2011, the sex of the applicant is listed as ‘unknown’.<sup>1707</sup>

The VPRS statistics and information relate only to the number of applications *registered* by the VPRS, and do not take into account the applications for participation which have been *received* but not registered by the VPRS.<sup>1708</sup> This means that the actual number of applications submitted by victims wishing to participate in the proceedings may be much higher than the figures provided by the VPRS and discussed in this Report.

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1704 See *Gender Report Card 2010*, p 190-191.

1705 Based on figures provided by the VPRS by email dated 14 September 2011.

1706 Explanation provided by the VPRS by email dated 15 September 2011.

1707 The information provided by email from the VPRS states that a total of 2,577 applications for victim participation were registered by the VPRS during this time period. The gender of 658 applicants (or 25.53%) is listed as unknown.

1708 Explanation provided by the VPRS by email dated 14 September 2011.



## Gender breakdown by Situation of victims who have applied for participation in proceedings<sup>1709</sup>

<i>Situation</i>	<i>Number of male applicants</i>	<i>% of male applicants</i>	<i>Number of female applicants</i>	<i>% of female applicants</i>	<i>Number of applicants where gender is not registered</i>	<i>% of applicants where gender is not registered</i>	<i>Total</i>
DRC	<b>289</b>	<b>47.2%</b>	<b>302</b>	<b>49.3%</b>	<b>21</b>	<b>3.5%</b>	<b>612</b>
Uganda	<b>33</b>	<b>29.7%</b>	<b>70</b>	<b>63.1%</b>	<b>8</b>	<b>7.2%</b>	<b>111</b>
CAR	<b>413</b>	<b>34%</b>	<b>354</b>	<b>29.2%</b>	<b>447</b>	<b>36.8%</b>	<b>1214</b>
Darfur	–	–	–	–	<b>69</b>	<b>100%</b>	<b>69</b>
Kenya	<b>245</b>	<b>42.9%</b>	<b>213</b>	<b>37.3%</b>	<b>113</b>	<b>19.8%</b>	<b>571</b>
<b>Totals</b>	<b>980</b>	<b>38%</b>	<b>939</b>	<b>36.5%</b>	<b>658</b>	<b>25.5%</b>	<b>2,577</b>

<sup>1709</sup> All figures in this table are based on information provided by the VPRS by email dated 14 September 2011 and relate only to applications for participation registered by the VPRS, rather than all victim participation applications received. None of the figures relate to the victims who have already been accepted to participate in proceedings.

## Victim participation at the ICC in 2011<sup>1710</sup>

Number of victims who have applied to participate between 30 August 2010 and September 2011: **2,577**<sup>1711</sup>

Number of victims who have applied to participate since 2005: **6,156**

Percentage of total number of applicants permitted to participate to date: **53.14%**<sup>1712</sup>

<i>Situation or case</i>	<i>Number of victim participants accepted between 30 Aug 2010 and 1 September 2011</i>	<i>Total number of victim participants accepted as of 1 September 2011</i>
<b>DRC Situation</b>	<b>8</b>	<b>204</b>
<i>Prosecutor v. Lubanga</i>	<b>20</b>	<b>123</b>
<i>Prosecutor v. Katanga &amp; Ngudjolo</i>	<b>4</b>	<b>366</b>
<i>Prosecutor v. Ntaganda</i>	<b>0</b>	<b>0</b>
<i>Prosecutor v. Mbarushimana</i>	<b>130</b>	<b>130</b>
<b>Uganda Situation</b>	<b>0</b>	<b>21</b>
<i>Prosecutor v. Kony et al</i>	<b>0</b>	<b>41</b>
<b>Darfur Situation</b>	<b>0</b>	<b>11</b>
<i>Prosecutor v. Abu Garda</i> <sup>1713</sup>	<b>0</b>	<b>0</b>
<i>Prosecutor v. Harun &amp; Kushayb</i>	<b>0</b>	<b>6</b>
<i>Prosecutor v. Al'Bashir</i>	<b>0</b>	<b>12</b>
<i>Prosecutor v. Banda &amp; Jerbo</i>	<b>89</b>	<b>89</b>
<b>CAR Situation</b>	<b>0</b>	<b>0</b>
<i>Prosecutor v. Bemba</i>	<b>1,484</b>	<b>1,619</b>
<b>Kenya Situation</b>	<b>0</b>	<b>0</b>
<i>Prosecutor v. Ruto et al</i>	<b>327</b>	<b>327</b>
<i>Prosecutor v. Muthaura et al</i>	<b>233</b>	<b>233</b>
<b>Libya Situation</b>	<b>0</b>	<b>0</b>
<i>Prosecutor v. Gaddafi</i>	<b>0</b>	<b>0</b>
<b>Côte d'Ivoire Situation</b>	<b>0</b>	<b>0</b>
<b>Totals</b>	<b>2,295</b>	<b>3,182</b>

1710 All information is based on figures provided by the VPRS by email dated 14 September 2011.

1711 The VPRS has specified that the figures provided in their email of 14 September correspond with the number of applications *registered* by the VPRS, but do not take into account the applications *received* and not registered by the VPRS.

1712 This is a marked increase since last year, when only 27% (974 of 3,579) of applications to participate had been accepted. .

1713 The ICC website lists the case against Abu Garda as closed. Although no public decision has been issued regarding the status of the 87 victims who had been granted the right to participate in that case, all 87 victims re-applied for, and were granted, participatory status in the Banda & Jerbo case. The VPRS no longer includes the 87 victim participants in the Abu Garda case in its victim participation figures, and they have not been included in the figures used in this Report.

## Uganda

### *The Prosecutor v. Joseph Kony et al*

There have been no decisions issued in the Uganda Situation or the case against Joseph Kony *et al* since last year's *Gender Report Card*, and no new victim applicants have been admitted to participate since September 2010, although 111 new applications to participate have been received.<sup>1714</sup> A total of 858 applications to participate have been received since 2005 in relation to the Uganda Situation and/or the case against Joseph Kony *et al*. As it stands, 21 victims have been accepted to participate in the Uganda Situation and 41 victim participants have been accepted in the case against Joseph Kony *et al*.<sup>1715</sup> Of the victims accepted to participate in the Uganda Situation, 14 are men and 7 are women, while 22 of the participating victims in the Kony *et al* case are men and 19 are women.<sup>1716</sup> Significantly, no new victim participants have been accepted in either the Uganda Situation or the Kony *et al* case since 2009, although applications for participation continue to be received. This amounts to an acceptance rate of a little over 7% of the total applications for victim participation in that Situation.<sup>1717</sup>

## DRC

A total of 204 applicants have been accepted to participate in the DRC Situation since 2005.<sup>1718</sup> No gender breakdown of the current participating victims is available. As discussed in the *Gender Report Card 2009*, two Appeals Chamber decisions (which were handed down in the DRC Situation in December 2008 and the Darfur Situation in February 2009 respectively)<sup>1719</sup> effectively put an end to the granting of a procedural status of victim during the investigation phase of the proceedings. However, on **11 April 2011**, Pre-Trial Chamber I in the DRC Situation issued a decision which set out a new substantive and procedural framework for victims' participation in the

DRC Situation.<sup>1720</sup> The Appeals Chamber had previously held that victims cannot be granted a general right to participate at the investigation stage of the DRC Situation, and that victims can only participate at the Situation stage in the context of specific judicial proceedings.<sup>1721</sup> The Pre-Trial Chamber acknowledged the principle outlined by the Appeals Chamber regarding the absence of a general right to participate, but noted that both the Statute and the Rules envisage various judicial proceedings which can be conducted at the Situation stage, including: 'proceedings regarding a review by the Pre-Trial Chamber of a decision by the Prosecutor not to proceed with an investigation or prosecution pursuant to Article 53 of the Statute; proceedings concerning the preservation of evidence or the protection and privacy of victims and witnesses pursuant to Article 57(3)(c) of the Statute; and proceedings concerning preservation of evidence in the context of a unique investigative opportunity pursuant to Article 56(3) of the Statute'.<sup>1722</sup> The Pre-Trial Chamber held that victims can participate in such proceedings if they can demonstrate that their personal interests are affected.

The Chamber directed the VPRS to hold those applications that are received when there are no judicial proceedings, and to transmit them to the Chamber only at a relevant time or upon order by the Chamber. The VPRS was to conduct an initial examination of the applications and to report to the Chamber every three months on the applications it has received.<sup>1723</sup> The Chamber also noted the decision on victim participation in the Kenya Situation,<sup>1724</sup> discussed in greater detail below, which set out specific instructions to the VPRS regarding the handling of applications for victim participation, and applied the same principles to the DRC Situation.<sup>1725</sup>

On **15 July 2011**, Single Judge Monageng issued a decision on 13 applications for victim participation at the Situation stage of proceedings.<sup>1726</sup> Judge Monageng noted the Pre-Trial Chamber's decision of 11 April 2011 regarding victim participation, which had established that a decision on whether the applications for victim participation met the requirements of Rule 85 would be made at this stage, rather than at the time a judicial proceeding in the DRC Situation is conducted before the Pre-Trial Chamber.

1714 Based on figures provided by the VPRS by email dated 14 September 2011.

1715 See *Gender Report Card 2010*, p 193.

1716 See *Gender Report Card 2010*, p 191.

1717 According to figures provided by the VPRS, a total of 62 victim participants have been accepted in the Uganda Situation and the case against Joseph Kony *et al*, amounting to 7.23% of the 858 applications received.

1718 Based on figures provided by the VPRS by email dated 14 September 2011.

1719 ICC-01/04/556 and ICC-02/05-177. See further *Gender Report Card 2009*, p 99-100.

1720 ICC-01/04-593.

1721 ICC-01/04-556.

1722 ICC-01/04-593, para 10.

1723 ICC-01/04-593, paras 11-13.

1724 ICC-01/09-24.

1725 ICC-01/04-593, para 13.

1726 A public redacted version of this decision was made available on 18 August 2011. See ICC-01/04-597-RED.

Judge Monageng granted victim participant status to eight applicants, including one non-profit organisation. The seven individuals granted victim participant status were all male. Some applicants were held to have provided insufficient information regarding the identity of deceased relatives to prove emotional harm as a basis for participation, but had provided sufficient evidence to prove economic harm. An application for victim participation made by an abbot on behalf of a parish was rejected on the grounds that the abbot had not provided sufficient evidence of his identity. Four additional applications were not accepted, on the grounds of a disparity between the dates of birth or ages provided in the applications for participation and the dates of birth contained on the applicants' voting cards, which meant that their identity was not sufficiently established. These four applicants could, however, submit new applications for participation in the future. The Single Judge deferred consideration of these four applicants (and one additional application on behalf of a parish) pending the submission of additional information.

### *The Prosecutor v. Thomas Lubanga Dyilo*

A total of 123 victims have been accepted to participate in the Lubanga case,<sup>1727</sup> including 20 applications for participation accepted since 30 August 2010. 15 victims were accepted to participate in proceedings in a decision of **8 February 2011**,<sup>1728</sup> while an additional five were accepted on **25 July 2011**, only a month before the closing arguments in the case.<sup>1729</sup> No gender breakdown of the current participating victims is available.

A major issue which arose in the case related to potential offences against the administration of justice under Article 70. The Chamber sought the views of the parties and participants in the case on the correct application of Article 70 'in the context of an inquiry by VWU regarding whether, after they had testified, defence witnesses were subjected to pressure or direct or indirect threats by a person recognised as a victim in these proceedings'.<sup>1730</sup> At the time of writing, no public proceedings under Article 70 have been initiated against any of the victim participants in the case. The filings related to the Article 70 proceedings are discussed in greater detail in the **Trial Proceedings** section of this Report.

1727 Based on figures provided by the VPRS by email dated 14 September 2011.

1728 ICC-01/04-01/06-2659-Corr-Red.

1729 ICC-01/04-01/06-2764-Red.

1730 The request for observations was made by email on 29 March 2011, as cited in ICC-01/04-01/06-2716, fn 1.

The Trial Chamber issued a decision on **4 February 2011** ordering the disclosure of previously redacted information regarding the applications for victim participation for a number of victims who had testified in the case.<sup>1731</sup> The Defence sought disclosure of material from the application forms of three victim participants, each of whom had testified in the case. Although the information from the victims' applications had been appropriately withheld earlier in the trial, once evidence was introduced before the Chamber indicating that false identities of participating witnesses was an issue in the case, the information contained in these forms became disclosable to the Defence under both its right to exculpatory evidence under Article 67(2) of the Statute and its right to inspect material in the possession or control of the Prosecution that is relevant for preparation of the Defence under Rule 77 of the Rules of Procedure and Evidence. The Defence specifically sought information from the parts of the victims' application forms in which the victims referred to (i) individuals or organisations with whom they had spoken about their security concerns; (ii) the name of the individual who witnessed the signature on the forms; (iii) the names of those from whom relevant information was received; (iv) the names of those who assisted in filling out the forms; (v) other victims referred to in the forms; and (vi) in one instance, the name of an individual the victim tried to assist.

Generally, Trial Chamber I held that those names contained in the applications that had been previously revealed, either in court or in private sessions with the Legal Representative, were now disclosable. The Chamber held that the names of people and organisations which had not previously been disclosed could now be disclosed if they were well-known and would suffer no greater security risk as a result of the disclosure. Where the Defence sought information as to the identity of people that had not been disclosed, the VRPS was to contact those individuals to determine their views on the Defence being informed of their identities and report back to the Chamber.<sup>1732</sup>

1731 ICC-01/04-01/06-2586-Red.

1732 ICC-01/04-01/06-2586-Red, para 51.

### *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*

A total of 366 victims have been accepted to participate in the case against Germain Katanga and Mathieu Ngudjolo Chui.<sup>1733</sup> Only four applicants were granted victim participant status since 30 August 2010.<sup>1734</sup> No gender breakdown of the current participating victims is available.

Trial Chamber II first established principles with regard to victims' participation in a decision issued as early as 1 December 2009.<sup>1735</sup> On 22 January 2010, the Chamber issued a decision on the general modalities of participation by victims at the trial stage, holding that victim participants are not parties to the proceedings, and that their participation is a possibility, rather than a general right, contingent on their satisfying conditions related to their personal interest, the scope of their request, and the burden it places on the Defence. The Chamber found that, as a rule, victims satisfying these conditions could participate in the proceedings through their legal representatives in a variety of ways, including: testifying, making opening and closing statements, attending and participating in the proceedings, questioning witnesses, presenting documentary evidence, and participating in the witness familiarisation process.<sup>1736</sup> This decision followed the first authorisation of victims to appear as witnesses by Trial Chamber I in the Lubanga case in June 2009.<sup>1737</sup> The three victim-witnesses in the Lubanga case subsequently testified in January 2010. They were also granted protective measures in the form of image and voice distortion. A detailed discussion of their testimony is provided in the *Gender Report Card 2010*.<sup>1738</sup>

The Katanga Defence appealed Trial Chamber II's 22 January decision on the general modalities for victim participation on three grounds,<sup>1739</sup> all of which were rejected by the Appeals Chamber in a 16 July 2010 decision, confirming the findings of the Trial Chamber and affirming the opportunity for victims to participate in the proceedings.<sup>1740</sup> Trial Chamber II set a deadline of 15 September 2010 for requests for the appearance of participating victims as witnesses. This request was filed confidentially by the Legal Representative on 15 September 2010.<sup>1741</sup>

On **9 November 2010**, Trial Chamber II issued a lengthy decision on the Legal Representative's request, authorising the appearance of four participating victims as witnesses in the Katanga & Ngudjolo case (victims a/0381/09, a/0018/09, a/0191/08 and pan/0363/09 acting on behalf of victim a/0363/09, who is a minor, and on her own behalf).<sup>1742</sup> All four victims were Hema women who lived in Bogoro at the time of the attack. The Chamber found that the victims' testimony would: clarify the social context, living conditions and atmosphere both before and after the Bogoro attack, the unfolding of the attack itself, the reasons for seeking refuge at the Bogoro Institute, the ethnic nature of the attack and the harm suffered.<sup>1743</sup> The Chamber also found that the proposed testimony would cover the material and emotional consequences of the attack on civilians, detailed information on the unfolding of events at the Bogoro Institute preceding the attack, the action taken by the Red Cross after the attack, and the distinction made between Hemas and non-Hemas by the attackers. The Chamber found that the testimony of the four victims would contribute to the Court's truth seeking function, and that each of the victims had the required personal interest. The Chamber found the

1733 Based on figures provided by the VPRS by email dated 14 September 2011.

1734 ICC-01/04-01/07-2516 and ICC-01/04-01/07-2693.

1735 ICC-01/04-01/07-1665-Corr.

1736 For a more detailed description of this decision, see *Gender Report Card 2010*, p 198-202.

1737 ICC-01/04-01/06-2002-Conf, as cited in ICC-01/04-01/06-2032-Anx, para 39. A public redacted version of the decision became available on 9 July 2009, ICC-01/04-01/06-2032. For more information on this decision, see *Gender Report Card 2010*, p 137.

1738 *Gender Report Card 2010*, p 137-139.

1739 The Katanga Defence was granted leave to appeal on three grounds: (i) whether it was possible for the legal representative of the victims to lead evidence and call victims to testify, including incriminating evidence and testimony, without disclosing it to the Defence prior to trial; (ii) whether every item of evidence in the possession of the legal representative of the victims, either incriminating or exculpatory, must be communicated to the parties; and (iii) whether it was possible for the legal representative of victims to call victims to testify on matters including the role of the accused in crimes charged against them. *Gender Report Card 2010*, p 201.

1740 ICC-01/04-01/07-2288. For more on this issue see *Gender Report Card 2010*, p 201.

1741 ICC-01/04-01/07-2393-Conf, as cited in ICC-01/04-01/07-2401.

1742 ICC-01/04-01/07-2517.

1743 ICC-01/04-01/07-2517.

proposed testimony of each witness to be relevant. On 1 December 2010, Trial Chamber II indicated that the four victims' testimony would start on 21 February 2011, in the order to be determined by the Legal Representative in consultation with the VWU.<sup>1744</sup>

On **27 January 2011**, the Chamber issued a confidential decision affirming the use of protective measures for the four participating victims. A public redacted version of this decision was issued on 22 February 2011.<sup>1745</sup> The Chamber found that the victims were likely to present incriminating evidence and thus be objects of reprisal by those supporting the accused. It noted that, in particular, the minor victim was unaware that her biological parents were killed during the attack, justifying the maintenance of her and her representative's anonymity. The Chamber thus authorised voice and image distortion, partial *in camera* hearings and the maintenance of their anonymity for all four of the victims authorised to testify. However, in a number of filings subsequent to this decision, the Legal Representative requested the withdrawal of two of the victims, as described below.

Despite the lengths to which the Chamber went to ensure their meaningful participation,<sup>1746</sup> on **31 January** and **21 February 2011**, it subsequently authorised the withdrawal of victim a/0381/09 and victim a/0363/09 upon the request of their legal representative due to questions concerning their veracity.<sup>1747</sup> In the 21 February decision, the Chamber also determined that victim pan/0363/09, the representative of minor participating victim a/0363/09, would no longer be heard as a witness. Victims a/0018/09 and a/0191/08 subsequently testified on 21-25 February 2011.

In what was originally an *ex parte* confidential filing before the Chamber, but was subsequently made public on 17 August 2011, on 31 January 2011 the legal representative requested to withdraw victim a/0381/09 from the list of victims scheduled to testify due to questions about the veracity of her statements.<sup>1748</sup> The Legal Representative explained that he was engaged in follow-up investigations,

1744 ICC-01/04-01/07-2602.

1745 ICC-01/04-01/07-2663-Red. The protective measures are described in detail in the *Protection* section of this Report.

1746 For a more detailed description of the protective measures, see the *Protection* section of this Report.

1747 ICC-01/04-01/07-2674; ICC-01/04-01/07-2699-Red.

1748 ICC-01/04-01/07-2669. The reasons for his request to withdraw this victim from the list of witnesses were filed on the same day in a separate, confidential filing *ex parte* available to the Chamber only, ICC-01/04-01/07-2668-Conf-Exp. A public redacted version of this filing was issued on 17 August 2011: ICC-01/04-01/07-2668-Red2.

which were delicate as the victim did not know that the veracity of her statements was under scrutiny, and because she lives in community with numerous other victims. The LRV did not want to inform the parties of his investigation in order not to call into question the veracity of victim testimony in general. The Chamber authorised the LRV's request on 31 January 2011, and ordered the Registry to reclassify the filings as public with the necessary redactions.<sup>1749</sup>

In his explanation regarding the withdrawal of the victim-witnesses, the Legal Representative of Victims clarified that, after the Appeals Chamber had affirmed the appearance of victims, in mid-July, the Trial Chamber had set the deadline for requests for victims to testify at 15 September, and had denied the Legal Representative's request for additional time. Given the demands required by the presentation of the Prosecution's case, the LRV had minimal time to choose among the 354 participating victims, and to go to the field to interview them.<sup>1750</sup>

On 10 February 2011, the Legal Representative requested to withdraw the minor victim (victim a/0363/09) from the list of victims scheduled to appear as witnesses as well.<sup>1751</sup> Regarding the reasons for her withdrawal, the LRV explained that among the proof furnished to him by the victim's representative, pan/0363/09, was a photograph of dead bodies alleged to be the parents of the minor victim taken by pan/0363/09's companion shortly after the attack on Bogoro. Upon disclosing the photograph to the parties, the Prosecution informally contacted the LRV to inform him that the photo actually depicted the aftermath of the June 2003 attack on the village of Kasenyi; the relevant footage in the photo can be seen in several portions of a video disclosed by the Prosecution as incriminating evidence on 29 January 2009.<sup>1752</sup> The LRV contacted pan/0363/09 and her companion, who failed to provide an appropriate explanation of the alleged discrepancy. In a decision on 21 February 2011, the Chamber authorised the withdrawal of both the minor witness and her representative, whom the Chamber had authorised to appear as its own witness.<sup>1753</sup> The remaining two victims each testified for 2.5 days between 21 and 25 February 2011, with protective measures as authorised by the Chamber on 27 January 2011.<sup>1754</sup>

1749 ICC-01/04-01/07-2674-tENG.

1750 ICC-01/04-01/07-2695, paras 10-11.

1751 ICC-01/04-01/07-2695-Conf. The filing was subsequently made public on 16 August 2011: ICC-01/04-01/07-2695.

1752 ICC-01/04-01/07-2688-Conf, which was subsequently made public on 16 August 2011: ICC-01/04-01/07-2688.

1753 ICC-01/04-01/07-2699-Red.

1754 ICC-01/04-01/07-T-231-Red2-ENG, ICC-01/04-01/07-T-232-Red-ENG, ICC-01/04-01/07-T-233-Red-ENG, ICC-01/04-01/07-T-234-Red-ENG, and ICC-01/04-01/07-T-235-Red-ENG.

### *The Prosecutor v. Callixte Mbarushimana*

A total of 130 victims have been accepted to participate in the case against Callixte Mbarushimana.<sup>1755</sup> All 130 victim participants were recognised in a decision of **11 August 2011**.<sup>1756</sup> No gender breakdown of the current participating victims is available.

On **15 March 2011**, Judge Monageng issued an order requiring the VPRS to submit all complete applications for victim participation to the Trial Chamber no later than 45 days before the commencement of the confirmation hearing.<sup>1757</sup> The Registry submitted a report on 20 May transmitting 14 completed applications and indicating the receipt of an additional 783, at least 530 of which appeared to be complete but which could not be processed and transmitted to the Chamber before the deadline.<sup>1758</sup> In its decision on the postponement of the confirmation hearing of 31 May, the Chamber ordered the VPRS to transmit any additional completed applications by 30 June.<sup>1759</sup> On 6 June, the Registry informed the Chamber that it would not be in a position to transmit all the completed applications by this revised deadline, and that a partial transmission of applications would put an undue burden on the parties to review and submit their observations on the applications, which could result in some applications being excluded.<sup>1760</sup> The Registry submitted a proposal to circumvent the usual system of victim participation and to allow the Chamber to consider the views of the unprocessed applicants for victim participation under the heading of 'other victims' under Rule 93,<sup>1761</sup> in addition to limited participation rights to reflect the limited scrutiny their applications had received. On 9 June, the OPCV submitted a request to appear before the Chamber, and argued that the proposal would undermine the meaningful role of victims and their substantial impact on the proceedings.<sup>1762</sup>

1755 Based on figures provided by the VPRS by email dated 14 September 2011.

1756 ICC-01/04-01/10-351. An additional two victim participants were accepted in a decision of 23 September 2011, but this fell outside the time period for inclusion in the figures discussed in this Report.

1757 ICC-01/04-01/10-78.

1758 ICC-01/04-01/10-168-Conf-Exp, cited in ICC-01/04-01/10-229.

1759 ICC-01/04-01/10-207.

1760 ICC-01/04-01/10-213.

1761 Rule 93 provides that 'A Chamber may seek the views of victims or their legal representatives participating pursuant to Rules 89 to 91 on any issues, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.'

1762 ICC-01/04-01/10-226.

In a decision of **10 June 2011**,<sup>1763</sup> the Chamber found that, although Rule 93 would allow for the Chamber to hear the views of the applicants, its application in the circumstances would inappropriately circumvent the system of victim participation and create a more limited form of participation for the applicants in question. The Chamber held that the revised deadline of 30 June remained, and that in principle, any applicants whose applications were not submitted by that date would not be permitted to participate in the confirmation hearing. Further observations from the OPCV were therefore unnecessary.

On 30 June, pursuant to the time limit set out by Judge Monageng in the decision of 10 June 2011, the Registry transmitted 124 completed applications for victim participation at the pre-trial phase of the case to the Chamber and stated it was prepared to submit a redacted version of those applications to the parties.<sup>1764</sup> The Registry also stated that it had received an additional 470 applications prior to 30 June and requested instructions from the Chamber in relation to those applications.

In a decision of **4 July 2011**, Single Judge Tarfusser noted that the 124 applications for victim participation had been submitted prior to the deadline, and that in light of field security considerations, any identifying information relating to the identity of the applicants should be redacted prior to the transmission of the applications to the Defence.<sup>1765</sup> Judge Tarfusser held that, although the Chamber would not examine the outstanding 470 applications, the Registry should assess them with a view to presenting them to the Chamber in relation to later proceedings in which the applicants could participate.

1763 ICC-01/04-01/10-229.

1764 ICC-01/04-01/10-261.

1765 ICC-01/04-01/10-265.

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## Darfur

No new victim participants have been accepted in the Darfur Situation since 30 September 2009.<sup>1766</sup> Although an additional 69 applications for victim participation in the Darfur Situation and associated cases have been received since 30 August 2010,<sup>1767</sup> no victims have been accepted to participate in the Situation or any associated case (with the exception of the Banda & Jerbo case, discussed below) during the period covered by this Report. It is unclear from the public record whether any of the applications for participation at the Situation stage of proceedings have been transmitted to the Chamber. The Darfur Situation and cases account for less than 4% of the total victims accepted to participate in proceedings before the Court,<sup>1768</sup> the second lowest total of any Situation behind Uganda. Of the 11 victims accepted to participate in the Darfur Situation prior to September 2009, eight were men and three were women.<sup>1769</sup>

### *The Prosecutor v. Ahmed Mohammed Harun & Ali Muhammed Ali Abd-Al-Rahman ('Kushayb')*

No new victims have been accepted to participate in the Harun & Kushayb case during the period covered by this Report.<sup>1770</sup> Only 6 victim participants have been accepted in the case to date, all of whom were male.<sup>1771</sup> These 6 victims had initially been accepted to participate at the pre-trial phase of the case against President Al’Bashir.<sup>1772</sup> No information is available on the breakdown of the number of applications for participation in the Harun & Kushayb case registered by the VPRS since 30 August 2010.<sup>1773</sup>

### *The Prosecutor v. Omar Hassan Ahmad Al’Bashir*

No new victims have been accepted to participate in the Al’Bashir case during the period covered by this Report.<sup>1774</sup> Only 12 victim participants have been accepted in the case to date, all of whom were male,<sup>1775</sup> and no new victim participants have been accepted in the case since 10 December 2009.<sup>1776</sup> No information is available on the breakdown of the number of applications for participation in the Al’Bashir case registered by the VPRS since 30 August 2010.<sup>1777</sup>

### *The Prosecutor v. Bahar Idriss Abu Garda*

A total of 87 victims were accepted to participate in the proceedings against Abu Garda; 45 were men and 42 were women.<sup>1778</sup> However, following the confirmation of charges hearing in that case, Pre-Trial Chamber I declined to confirm any charges against Abu Garda in its decision of 8 February 2010.<sup>1779</sup> Although the ICC website lists the case against Abu Garda as closed, no official public decision has been issued regarding the current status of the 87 participating victims in the case.<sup>1780</sup> However, as will be discussed further immediately below, all 87 victim participants have re-applied for participation in the Banda & Jerbo case and were accepted to participate in a decision of 29 October 2010.<sup>1781</sup> The Abu Garda and Banda & Jerbo cases relate to the same incident (the attack on UN peacekeepers at the MGS Haskanita base) and involve the same charges, thus victims who have satisfied the requirements for participation in relation to one case would have no difficulty satisfying the same requirements in relation to the other.

1766 According to figures provided by the VPRS by email dated 14 September 2011.

1767 According to figures provided by the VPRS by email dated 14 September 2011.

1768 Only 118 of the 3,182 victim participants accepted by the Court to date relate to the Darfur Situation or associated cases, a total of 3.71%.

1769 See *Gender Report Card 2010*, p 191.

1770 According to figures provided by the VPRS by email dated 14 September 2011.

1771 See *Gender Report Card 2010*, p 191.

1772 See further *Gender Report Card 2010*, p 203.

1773 According to figures provided by the VPRS by email dated 14 September 2011.

1774 According to figures provided by the VPRS by email dated 14 September 2011.

1775 See *Gender Report Card 2010*, p 191.

1776 See further *Gender Report Card 2010*, p 204.

1777 According to figures provided by the VPRS by email dated 14 September 2011.

1778 See *Gender Report Card 2010*, p 191, 203.

1779 ICC-02/05-02/09-243-Red. See also *Gender Report Card 2010*, p 109-110.

1780 The information provided by the VPRS by email dated 14 September 2011 did not include these 87 victim participants in its figures, nor have they been included in the figures analysed in this Report.

1781 ICC-02/05-03/09-89.



### *The Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*

A total of 89 victims have been accepted to participate in the Banda & Jerbo case.<sup>1782</sup> All 89 victims were accepted to participate in a decision of **29 October 2010**.<sup>1783</sup> The Pre-Trial Chamber received two sets of applications for victim participation: a group of 87 applications for participation submitted by victims who had been granted the right to participate in the proceedings against Abu Garda; and a group of 8 applications submitted by victims not accepted to participate in the Abu Garda case. 3 of the latter group had previously applied to participate in the Abu Garda case but had been rejected. The Chamber was satisfied that all 87 applicants in the first group fulfilled the criteria for victim participation set out in Rule 85(a) and granted them participatory status in the case. With regard to the second set of applicants, the Chamber only granted victims a/1646/10 and a/1647/10 the right to participate.<sup>1784</sup> The Chamber found that the other victims had failed to provide sufficient evidence to connect their alleged suffering to the crimes charged. The Chamber further noted that seven of the participating victims were also to be called as witnesses by the Prosecutor in the confirmation of charges hearing (victims a/0434/09, a/0435/09, a/0436/09, a/0569/09, a/0570/09, a/0655/09 and a/0656/09). 47 of the victim participants in the case are men and 42 are women.<sup>1785</sup>

Hélène Cissé was appointed by the Chamber as the Legal Representative of Victims with Jens Dieckmann as her associate counsel.<sup>1786</sup> The Chamber subsequently set out the rights of legal representatives, holding that ‘the victims’ legal representatives [had] the right to attend all public hearings convened in the proceedings leading to the confirmation hearing, as well as all public sessions of the confirmation hearing’ while reserving the right to decide upon the right to attend closed or private sessions on a case-by-case basis.<sup>1787</sup> The victims’ legal representative was also granted the right to make oral submissions at the confirmation hearing and to have access to the Document Containing the Charges. There has been some controversy about the consultation process by the Registry leading up to the appointment of common legal representation in this case, which is discussed further in the **Legal Representation** section, below.

1782 According to figures provided by the VPRS by email dated 14 September 2011.

1783 ICC-02/05-03/09-89.

1784 Victims a/1646/10 and a/1647/10 are, to date, the only victims living in Darfur to have been accepted to participate in this case. See further the discussion of their legal representation by Geoffrey Nice and Rodney Dixon in the *Legal Representation* section below.

1785 See the gender breakdown of victims accepted to participate in the Abu Garda case discussed above. The decision of 29 October 2010 accepting victims a/1646/10 and a/1647/10 refers to their gender as male. See ICC-02/05-03/09-89, paras 27-28.

1786 ICC-02/05-03/09-215.

1787 ICC-02/05-03/09-89, paras 64-65.

## Central African Republic

No victims have been accepted to participate in the proceedings in the CAR Situation.<sup>1788</sup> On **11 November 2010**, just eight days after the decision on the procedural framework for victim participation in the Kenya Situation which is discussed in greater detail below,<sup>1789</sup> Single Judge Kaul issued a decision adopting the principles set out in the decision of Pre-Trial Chamber II and applying them to the CAR Situation.<sup>1790</sup> Judge Kaul held that, for the purposes of Rule 85, a victim applying to participate in the Situation stage of proceedings in the CAR Situation must demonstrate that he or she has suffered harm as a result of a crime falling within the jurisdiction of the Court, committed on the territory of the Central African Republic since 1 July 2002.<sup>1791</sup> Judge Kaul held that the findings of Pre-Trial Chamber II regarding the substantive and procedural framework for victim participation at the Situation stage of proceedings applied equally to the context of the CAR Situation, and ordered the VPRS to comply with the instructions set out in the same decision in its handling of applications for participation at the Situation stage of proceedings in the CAR Situation.<sup>1792</sup>

### *The Prosecutor v. Jean-Pierre Bemba Gombo*

A total of 1,619 victims have been accepted to participate in the Bemba case to date.<sup>1793</sup> No gender breakdown of the current participating victims is available. 1,484 of the 1,619 victim participants were accepted since 30 August 2010: 624 applicants were accepted to participate on **18 November 2010**,<sup>1794</sup> 553 were granted victim participant status in a decision of **23 December 2010**,<sup>1795</sup> while an additional 307 were accepted to participate in a decision issued on **8 July 2011**.<sup>1796</sup> As described in more detail in the section on **Legal Representation**, below, in a decision on 10 November 2010,<sup>1797</sup> twelve days before the start of trial, the Chamber issued that the victims accepted to participate in the case, until that time represented by the OPCV, would be represented by two external common legal representatives, on the basis that the legal representatives were from the country of origin of

the victims. The victims were divided into two groups on the basis of geographical locations; one group relating to victims from Bangui and around PK12, and the other incorporating victims from Damara, Sibut, Boali, Bossembélé, Bossangoa, Bozoum and Mongoumba.<sup>1798</sup> The Chamber later designated Marie Edith Douzima Lawson (LRV Douzima Lawson) and Assingambi Zarambaud (LRV Zarambaud), both CAR nationals, as said representatives. This decision, as well as the concerns raised by victims and by the Women's Initiatives for Gender Justice in a press statement at the start of the Bemba trial, is discussed in more detail below.

The Bemba case includes the highest number of victim participants in any case before the Court. This case accounts for almost 65% of all applications for victim participation accepted during the period covered by this Report,<sup>1799</sup> and more than 50% of all victim participants accepted across all Situations and cases since 2005.<sup>1800</sup> The Bemba case also accounts for more than 1,200 or almost half of the total number of applications for participation registered by the VPRS since 30 August 2010.<sup>1801</sup> As acknowledged in the Trial Chamber's decision of 8 July 2011,<sup>1802</sup> a substantial number of applications for participation in the Bemba case have been received by the VPRS but not yet transmitted to the Chamber for consideration. The Registry confirmed by email on 26 August 2011 that 2,830 additional applications for participation were expected to be filed in the subsequent months.<sup>1803</sup>

In its decision of **8 July 2011**, the Trial Chamber discussed the observations submitted by the parties on the 401 applications for participation under consideration in that decision.<sup>1804</sup> The Defence had argued that the volume and infrequency of the Registry's transmission of applications for participation had given rise to disruption to the

1788 According to figures provided by the VPRS by email dated 14 September 2011.

1789 ICC-01/09-24.

1790 ICC-01/05-31.

1791 ICC-01/05-31, para 3.

1792 ICC-01/05-31, p 4.

1793 According to figures provided by the VPRS by email dated 14 September 2011.

1794 ICC-01/05-01/08-1017.

1795 ICC-01/05-01/08-1091.

1796 ICC-01/05-01/08-1590.

1797 ICC-01/05-01/08-1005.

1798 ICC-01/05-01/08-1005, paras 18-21.

1799 According to information provided by the VPRS by email dated 14 September 2011, a total of 2,295 victims were accepted to participate between 30 August 2010 and 1 September 2011. 1,484 or 64.66% of these were accepted to participate in the Bemba case.

1800 According to the figures provided by the VPRS, a total of 3,182 victim participants have been accepted by the Court since 2005. 1,619 or 50.87% of these are participating in the case against Bemba.

1801 According to the VPRS figures, a total of 2,577 applications for participation were registered by the VPRS between 30 August 2010 and 1 September 2011. 1,214 of these related to the CAR Situation and the Bemba case.

1802 ICC-01/05-01/08-1590, para 25.

1803 ICC-01/05-01/08-1726, para 3.

1804 ICC-01/05-01/08-1590, paras 9-22.

Defence's preparations for trial, as the most recent batch of applications had been transmitted to the parties in the middle of the prosecution's case at trial.<sup>1805</sup> In particular, the Defence argued that the delay in transmitting the ninth batch of applications for participation which were the subject of the present decision had prevented the Defence from asking pertinent questions of the first 20 prosecution witnesses, relating to the information and allegations contained in the applications for participation.<sup>1806</sup> Acknowledging the 'heavy burden' on the parties caused by the transmission of significant numbers of applications, the Chamber put in place a schedule for the filing of future applications and set 16 September 2011 as the final deadline for the submission to the Registry of any new applications for victim participation in the case.<sup>1807</sup>

The Defence also challenged the role of intermediaries in assisting with the completion of application forms for victim participation in light of the testimony of Witness 73, who had testified that a particular individual was working with a team of people carrying documents with the ICC logo, causing the witness to believe that these people were ICC officials. Witness 73 had alleged that the individual in question had encouraged applicants to fabricate or exaggerate the value of pillaged items and to lie about the crimes committed against them.<sup>1808</sup> The Chamber agreed with the Defence's assertion that Witness 73's testimony had cast doubt on the extent of that intermediary's involvement in the application process, and therefore deferred consideration of the applications completed with that intermediary's assistance pending its receipt of further information under Regulation 86(7).<sup>1809</sup>

1805 ICC-01/05-01/08-1413, as cited in ICC-01/05-01/08-1590, para 14.

1806 ICC-01/05-01/08-1413, as cited in ICC-01/05-01/08-1590, para 15.

1807 ICC-01/05-01/08-1590, paras 24-25.

1808 ICC-01/05-01/08-1590, para 16.

1809 ICC-01/05-01/08-1590, paras 26-27.

## Kenya

No victims have been accepted to participate at the Situation stage of proceedings in the Kenya Situation. Pre-Trial Chamber II issued a decision on **3 November 2010** regarding the framework for victim participation at the Situation stage of proceedings.<sup>1810</sup> The Chamber held that Article 68(3) provides the normative framework for victim participation in the absence of more specific provisions in the Statute. Before deciding on applications for participation, a Chamber must first determine whether and to what extent the Situation stage may qualify as a 'stage of the proceedings' for the purposes of Article 68(3), and must then determine (i) whether the relevant stage is 'appropriate' for the purposes of victim participation, and (ii) whether the personal interests of the victims are affected.<sup>1811</sup> The Chamber will only consider these two criteria on a case-by-case basis and only when an issue requiring judicial determination has arisen.<sup>1812</sup> The Chamber noted the Appeals Chamber jurisprudence which had held that victims do not have a general right to participate at the investigation stage of a Situation, but acknowledged that victims could be permitted to participate in judicial proceedings at the Situation stage.<sup>1813</sup> Pre-Trial Chamber II therefore held that victim participation at the Situation stage can occur only when an issue arises which may require judicial determination. The Chamber provided a number of examples of issues requiring judicial determination which may arise at the Situation stage of proceedings, including but not limited to the power of the Chamber to review a decision by the Prosecutor not to proceed with an investigation or prosecution under Article 53, the preservation of evidence in the context of a unique investigative opportunity under Article 56(3), issues of victims' protection or privacy or the preservation of evidence arising under Article 57(3)(c), or the power of the Chamber to seek the views of victims or their legal representatives on any issue under Rule 93.<sup>1814</sup>

Pre-Trial Chamber II noted that the Appeals Chamber decision of 19 December 2008<sup>1815</sup> had explicitly left open the question of how applications for victim participation at the Situation stage should be dealt with in the future. The Chamber therefore sought to define the procedural framework for victim participation at the Situation stage. The Chamber identified three hypotheses which would lead a

1810 ICC-01/09-24.

1811 ICC-01/09-24, para 8.

1812 ICC-01/09-24, para 10.

1813 ICC-01/09-24, para 9.

1814 ICC-01/09-24, para 11.

1815 ICC-01/04-556. See further *Gender Report Card 2009*, p 99-100.

Chamber to decide on the merits of applications for victim participation at the Situation stage of proceedings: (i) the Chamber becomes seized of a request which is not submitted by victims of the Situation; (ii) the Chamber decides to act on its own initiative; or (iii) the Chamber becomes seized of a request from victims of the Situation who have filed an application for participation in the proceedings with the Registry.<sup>1816</sup> The decision clarified that ‘victims of the Situation’ applies to both individuals who have already been granted the right to participate as victims in the proceedings and those who have applied to participate in the proceedings. In any of the three hypotheses identified by Pre-Trial Chamber II, a Chamber would initially determine whether judicial proceedings are likely to take place, and would then assess the applications for victim participation which are linked to the issue under judicial consideration to determine if the victim applicants satisfy the requirements of Rule 85 regarding victim participation.<sup>1817</sup> In the first and second hypotheses, the Chamber would assess the victims whose applications are linked to the issue at stake, while in the third hypothesis, the Chamber would examine only the applications of the victims who had submitted a request to the Chamber.<sup>1818</sup> After conducting an examination of the applications for victim participation against the requirements of Rule 85, the Chamber would then assess whether the personal interests of victims are affected by the issue under judicial determination.

Pre-Trial Chamber II provided specific instructions to the VPRS regarding the proper handling of applications for participation at the Situation stage of proceedings. The VPRS should first distinguish between those victims applying for participation in the proceedings and those applying for reparations only. In the absence of explicit indication that victims wish to participate in proceedings, the VPRS should treat these applications as relating only to reparations.<sup>1819</sup> The VPRS must assess whether applications are complete within 60 days of their receipt and request additional information from applicants if necessary. The VPRS should then prepare proposals for redactions of complete applications for participation in preparation for their transmission to the parties.<sup>1820</sup> The Chamber instructed the VPRS to carry out an assessment of the applications for participation against the requirements of Rule 85 in line with the decision on victim participation in the Bemba case which spelled out these requirements,<sup>1821</sup> namely:

(i) the victim is a natural person or organisation; (ii) a crime within the jurisdiction of the Court appears to have been committed; (iii) the victim has suffered harm; and (iv) the harm arose as a result of the alleged crime within the jurisdiction of the Court.<sup>1822</sup> The VPRS must then prepare a report for submission to the Chamber including a preliminary assessment of which applications may be accepted, rejected or give rise to difficult issues and a one-paragraph summary for each victim applicant of the information contained in the application for the purposes of Rule 85, including concise information on the location, time and specific alleged events giving rise to the harm suffered by the victim.<sup>1823</sup> This report will be submitted along with the applications for participation when the Chamber determines that an issue giving rise to judicial proceedings has occurred.

The Chamber stressed the importance of the VPRS’ readiness and ability to present complete applications for participation, together with the necessary assessment and reports, as soon as an issue requiring judicial determination arises before the Chamber.<sup>1824</sup> The Chamber also held that the VPRS should endeavour to group victims when assessing their applications for participation, bearing in mind the possibility that such groups of victims may be represented by common legal representatives. To ensure appropriate representation for the victims and continuous consultation between the victims and their legal representatives, the Chamber held that the VPRS should engage as soon as possible with counsel from the Kenyan legal community who may represent victims before the Court, with a view to both providing a practical solution to common legal representation at the time judicial proceedings may arise before the Chamber and identifying potential training requirements.<sup>1825</sup> The Chamber ordered the VPRS to report to the Chamber periodically (every three months) regarding the applications received and the progress made by the VPRS on the assessment of these applications, as well as information on the issue of common legal representation.<sup>1826</sup>

As discussed above, this decision of Pre-Trial Chamber II has been endorsed and applied at the Situation stage of proceedings in both the DRC and CAR Situations.<sup>1827</sup> However, unlike the DRC Situation, no applications for participation at the Situation stage of proceedings have been considered or accepted by Pre-Trial Chamber II in the Kenya Situation.

1816 ICC-01/09-24, para 15.

1817 ICC-01/09-24, para 16.

1818 ICC-01/09-24, para 16.

1819 ICC-01/09-24, para 18.

1820 ICC-01/09-24, para 18.

1821 ICC-01/05-01/08-320.

1822 ICC-01/09-24, para 19.

1823 ICC-01/09-24, para 20.

1824 ICC-01/09-24, para 21.

1825 ICC-01/09-24, para 22.

1826 ICC-01/09-24, para 23.

1827 ICC-01/04-593 and ICC-01/05-31.

### *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*

A total of 327 victims have been accepted to participate in the Ruto case.<sup>1828</sup> 181 of these victims are men, while 146 are women.<sup>1829</sup> The 327 victim participants were accepted in a decision issued on **5 August 2011**,<sup>1830</sup> which also established Sureta Chana as the common legal representative of victims in that case. The issues regarding common legal representation and the efforts of the Legal Representative of Victims to expand the charges against the suspects in this case are discussed in greater detail in the **Legal Representation** section below and the **OTP** section above.

On **8 July 2011**, Pre-Trial Chamber II issued a decision on two Defence requests relating to applications for victim participation.<sup>1831</sup> The Chamber granted the first Defence request, which sought an order for the Registry to transmit the unredacted versions of victims' applications for participation to the Prosecutor to enable him to fully discharge his disclosure obligations under Article 54 and Article 67(2) of the Statute.<sup>1832</sup> The Chamber held that providing redacted versions of the applications for participation to the Prosecution was not necessary in light of the autonomous duty of the Prosecutor to protect victims and in order to facilitate the proper discharge of the Prosecutor's obligations to disclose potentially exculpatory information to the Defence.<sup>1833</sup> The Chamber rejected the second Defence request, which had sought to restrict the Single Judge's analysis of the applications for victim participation to the information contained in the redacted versions of the applications transmitted to the parties by the Registry.<sup>1834</sup> The Chamber noted that nothing in the Statute or Rules prevented the Chamber from taking into consideration information that has been redacted vis-à-vis the parties in order to protect the applicants' safety, and that information contained in applications for victim participation is not considered as evidence for the purposes of disclosure.<sup>1835</sup> The Chamber was also satisfied that the redactions applied to applications for victim participation were strictly necessary in light of the security situation in Kenya and the applicants' safety, and did not unnecessarily restrict the rights of the Defence.<sup>1836</sup>

1828 According to figures provided by the VPRS by email dated 14 September 2011.

1829 ICC-01/09-01/11-T-5-ENG, p 73, lines 1-2.

1830 CC-01/09-01/11-249.

1831 ICC-01/09-01/11-169.

1832 ICC-01/09-01/11-169, paras 8-16.

1833 ICC-01/09-01/11-169, paras 15-16.

1834 ICC-01/09-01/11-169, paras 17-24.

1835 ICC-01/09-01/11-169, para 18.

1836 ICC-01/09-01/11-169, para 23.

### *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*

A total of 233 victims have been accepted to participate in the Muthaura case.<sup>1837</sup> 139 of these victims are women and 94 are men.<sup>1838</sup> The 233 victim participants were accepted in a decision issued on **26 August 2011**.<sup>1839</sup> As discussed further in the section on **Legal Representation** below, Morris Azuma Anyah was appointed as the common legal representative of victims in that case.

On **8 July 2011**, Pre-Trial Chamber II issued a decision on two Defence requests relating to applications for victim participation.<sup>1840</sup> The Chamber issued identical filings to the decision of 8 July on the same issue in the Ruto *et al* case discussed above. On 1 July 2011, the Pre-Trial Chamber issued a decision on a request by the OPCV, acting as interim legal representative for four unrepresented applicants for victim participation, seeking to submit a response to the Defence observations on the applications for participation submitted by the four applicants.<sup>1841</sup> The OPCV had sought to respond to the Defence observations to assist the Chamber's deliberations on a matter – namely whether or not to grant victim participant status – which 'vital[ly] affect[ed] [the four applicants'] personal interests'.<sup>1842</sup> The Chamber noted that only the Prosecutor and Defence are statutorily entitled to submit observations on applications for victim participation, and that no reference is made anywhere in the statutory provisions of the Court to the submission of a response by an applicant's legal representative to the parties' observations on the application for participation.<sup>1843</sup> As no decision on whether the applicants in question should be permitted to participate in proceedings had yet been taken, the Chamber concluded that their legal representative should not be permitted to submit any response to the observations filed by the parties.<sup>1844</sup>

1837 According to figures provided by the VPRS by email dated 14 September 2011.

1838 ICC-01/09-02/11-T-4-ENG, p 59, lines 22-25; p 60, line 1.

1839 ICC-01/09-02/11-267.

1840 ICC-01/09-02/11-164.

1841 ICC-01/09-02/11-147.

1842 ICC-01/09-02/11-147, para 4.

1843 ICC-01/09-02/11-147, para 6-7.

1844 ICC-01/09-02/11-147, para 8.

# Judiciary

## Key Decisions CONTINUED

### Legal Representation

#### Counsel for Victims

#### Victims’ Legal Representatives per case/Situation as of 16 September 2011<sup>1845</sup>

Total number of Legal Representatives of Victims: **22**

Number of female counsel: **5 (22.7%)**

Number of male counsel: **17 (77.3%)**

Geographic distribution of counsel: **10 from WEOG; 8 from African States; 3 of dual nationality between a WEOG State and African State<sup>1846</sup>**

<i>Case</i>	<i>Legal Representative(s) of Victims</i>	<i>Nationality of counsel</i>
<b>Uganda Situation</b>		
Situation	Office of Public Counsel for Victims	
Kony <i>et al</i>	Office of Public Counsel for Victims	
<b>DRC Situation</b>		
Situation	Office of Public Counsel for Victims	
	Emmanuel Daoud	France
	Patrick Baudouin	France
Lubanga <sup>1847</sup>	Carine Bapita Buyangandu	DRC
	Michael Verhaeghe	Belgium
	Joseph Keta Orwinyo	DRC
	Paul Kabongo Tshibangu	DRC
	Luc Walley	Belgium
	Franck Mulenda	DRC

1845 The information in this chart was drawn from the public record of the cases, from the public list of counsel admitted to practise before the ICC, as well as from information provided to the Women’s Initiatives for Gender Justice by the Counsel Support Section (CSS) by email dated 21 and 26 October 2011.

1846 WEOG: two from France, four from Belgium, two from the USA, one from Germany and one with dual nationality UK/Israel. African States: five from the DRC, two from the CAR, one from Kenya. The three with dual nationality between a WEOG State and an African State come from DRC/USA, Senegal/France and USA/Nigeria. The nationality of one counsel is not listed in the Court’s public documents.

1847 As described above in the *Trial Proceedings* section, one of the Victims’ Legal Representatives, Jean Chrysostome Mulamba Nsokolon, passed away on 17 June 2011.

<i>Accused</i>	<i>Defence counsel</i>	<i>Nationality of counsel</i>
<b>DRC Situation</b> <i>continued</i>		
Katanga & Ngudjolo	Jean-Louis Gilissen Fidel Nsita Luvengika Joseph Keta Orwinyo	Belgium Belgium DRC
Ntaganda	No victims accepted to participate to date.	
Mbarushimana	Kassongo Mayombo Ghislain Mabanga	DRC DRC
<b>Darfur Situation</b>		
Situation	Office of Public Counsel for Victims	
Abu Garda	Wanda M. Akin Raymond M. Brown	USA USA
Banda & Jerbo	Helene Cissé Jens Dieckmann	Senegal Germany
Harun & Kushayb	Wanda M. Akin Raymond M. Brown	USA USA
Al'Bashir	Nicholas Kaufman Wanda M. Akin Raymond M. Brown	Israel/UK USA USA
<b>CAR Situation</b>		
Situation	No victims accepted to participate to date.	
Bemba	Marie Edith Douzima-Lawson Assingambi Zarambaud	CAR CAR
<b>Kenya Situation</b>		
Situation	No victims accepted to participate to date.	
Ruto, Kosgey and Sang	Sureta Chana James Mawira <sup>1848</sup> Morris Anyah	Kenya USA/Nigeria
Muthaura, Kenyatta and Ali	Morris Anyah	USA/Nigeria
<b>Libya Situation</b>		
No victims accepted to participate to date.		
<b>Côte d'Ivoire Situation</b>		
No victims accepted to participate to date.		

<sup>1848</sup> Information about nationality not provided by the CSS by email dated 26 October 2011. In addition, James Mawira is not named on the List of Counsel or the List of Assistants to Counsel made available by the CSS on 26 July 2011.

## Decisions on Victims' Legal Representation

In order to act as the legal representative of victims, an individual must comply with the requirements of the Rules of Procedure and Evidence and the Regulations relating to legal counsel. Regulation 67 requires at least ten years necessary relevant experience as counsel, and also provides that 'counsel should not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court'.<sup>1849</sup> To be included on the List of Counsel maintained by the Registry, an individual must provide proof of specific relevant information, including a certificate from the Bar association or relevant administrative authority the individual is registered with confirming that person's qualifications, right to practise, and the existence (if any) of any disciplinary sanctions or ongoing disciplinary proceedings against them, as well as a certificate from the relevant State authority confirming the existence (if any) of any criminal convictions against that person.<sup>1850</sup> The individual seeking to be admitted as counsel has an obligation to inform the Registry about any changes to the information they have provided regarding their qualifications as counsel,<sup>1851</sup> including the initiation of any criminal or disciplinary proceedings against them.<sup>1852</sup>

An important aspect in creating a system of victim participation that is, above all, meaningful for victims, is ensuring that the interests and concerns of victims are adequately represented at trial by their legal representative. Due to the concerted trend of increases in applications for victim participation at the

1849 Regulation 67(2).

1850 Regulations 69(2) and 70.

1851 Regulation 69(3).

1852 For more information about the ICC's List of Legal Counsel, see the *Structures and Institutional Development* section of this Report, as well as the *Structures and Institutional Development* section's recommendations.

Court, as described in more detail in the section on **Victim Participation** of this Report, the Court has been faced with challenges in balancing the efficient conduct of proceedings, the rights of the accused to an expeditious and fair trial and the rights of victims to have their views and concerns represented in the proceedings. This has presented particular challenges for the organisation of victims' legal representation.

Pursuant to Rule 90(1) of the Rules of Procedure and Evidence 'a victim shall be free to choose a legal representative'. Trial Chamber II in the Katanga & Ngudjolo case, in a decision on common legal representation of 22 July 2009, reaffirmed victims' right to choose a legal representative, but stressed that this was subject to the Chamber's discretion with a view to guaranteeing the efficient conduct of proceedings. The Chamber ruled that:

Although victims are free to choose a legal representative this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court. Common legal representation is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible. The Chamber considers, therefore, that the freedom to choose a personal legal representative, set out in rule 90(1) is qualified by rule 90(2) and subject to the inherent and express powers of the Chamber to take all measures necessary if the interests of justice so require.<sup>1853</sup>

1853 ICC-01/04-01/07-1328, para 11.



As described below, other Chambers have followed suit in appointing common legal representation for victims.

The responsibility for organising a proposal for common legal representation lies with the Registry, specifically with the VPRS, although the decision to appoint common legal representatives for participating victims is taken by the Chamber. Rule 90(4) of the Rules of Procedure and Evidence mandates that, when appointing common legal representatives, the Chamber should take all reasonable steps to ensure that the distinct interests of individual victims are represented, in particular where the crime involves sexual or gender-based violence, and that conflicts of interests are avoided. When victim participants are grouped for the purposes of common legal representation on the basis of geographic location (as occurred in the Bemba case), the risk of conflicts of interest increases, particularly given the very large numbers of participating victims assigned to each representative and the attendant difficulties in coherently representing the views and concerns of a disparate group of individuals. In addition, arranging victims into groups according to geographical location, rather than according to the nature of the crimes committed against them, may not serve the victims' interests, particularly given the large number of victims of rape and other forms of sexual violence participating in the Bemba case.<sup>1854</sup>

The question of a conflict of interest between victims for the purposes of common legal representation arose in the Katanga & Ngudjolo case, where the participating victims included both former child soldiers and victims of the crimes committed during the attack on Bogoro. The approach of Trial Chamber II in that case was to provide for separate common legal representation for the former child soldiers and for the other participating victims, rather than assigning common legal representation on the basis of geography, language, or any other objective factor.<sup>1855</sup> The proposals for common legal representation submitted by the Registry in the two Kenyan cases and the Banda & Jerbo case, discussed in greater detail below, have shown that the VPRS acknowledges the need for a systematic approach to common legal representation but has failed to follow its own identified best practices, often due to resource or time constraints. Of greater concern is the consistent trend towards the appointment of common legal representation at a very late stage in proceedings, and the failure of the VPRS to adequately consult participating victims to ascertain their views and wishes in relation to legal representation, rather than the imposition of common legal representatives solely on the Registry's recommendations.

<sup>1854</sup> Women's Initiatives for Gender Justice, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo', 22 November 2011, available at <[http://www.iccwomen.org/documents/Bemba\\_Opening\\_Statement.pdf](http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf)>.

<sup>1855</sup> ICC-ICC-01/04-01/07-1328. See further *Gender Report Card 2009*, p 112-113.

## Disbarment of a legal representative in Mbarushimana and Lubanga

In a decision of 11 August 2011 in the Mbarushimana case, 130 victims were granted participatory status in the proceedings.<sup>1856</sup> Only 48 of the 130 victim participants had legal representation, which necessitated common legal representation for the remaining 82 victim participants. Due to the security situation in the Kivus, the Registry believed that consultation with these victim participants regarding their preferred legal representation would not be possible within the short time-frame prior to the confirmation of charges hearing in that case, initially scheduled to take place on 16 August 2011. Single Judge Monageng therefore ordered that the Registry should assign legal representation for the purposes of the confirmation hearing to the unrepresented victim participants from one or more of the legal representatives already recognised, namely Hervé Daikiese (LRV Daikiese), Mayombo Kassongo (LRV Kassongo) and Ghislain Mabanga (LRV Mabanga).<sup>1857</sup> LRV Daikiese had been included on the List of Counsel since February 2007 and had also acted as one of the legal representatives of victims in the Lubanga case. The Registry divided the 82 unrepresented victims into three groups, principally based on their geographic locations, and assigned one of the three legal representatives in the case to each of the groups.<sup>1858</sup>

However, in a decision of **19 August 2011**, the Registrar removed LRV Daikiese from the List of Counsel.<sup>1859</sup> The Registry received a letter from the President of the National Bar of the DRC dated 25 July 2011, informing them that Daikiese had been disbarred pursuant to a decision of 10 March by the National Bar Council of the DRC.<sup>1860</sup> The Registrar noted that ‘in matters of ethics and professional conduct, disbarment on the grounds of a breach of professional ethics is generally the most serious disciplinary measure which may be imposed on a lawyer’, but went on to note that a decision to disbar an individual ‘in order to be credible and justified, must be ... founded at least on concrete facts, devoid of obvious errors or flaws, and issued pursuant to legal provisions ... or within a legal system affording minimum safeguards of compliance with fair trial principles’.<sup>1861</sup> However, the Registrar went on to note that LRV Daikiese’s admission to the List of Counsel had been based on his status as a lawyer at the Bar of Bas/Congo and that his disbarment had fundamentally changed this status.

1856 ICC-01/04-01/10-351. A gender breakdown of these victims is not currently available.

1857 ICC-01/04-01/10-351, paras 45-48.

1858 ICC-01/04-01/10-387, para 3.

1859 ICC-01/04-01/10-385-AnxII-tEng.

1860 ICC-01/04-01/06-2791.

1861 ICC-01/04-01/10-385-AnxII-tEng, p 3.

In light of the requirement that all counsel included on the List of Counsel – and particularly those assigned a mandate by the Court – must comply with the high standards of ethics and professional conduct imposed by the Code of Professional Conduct, the Registrar concluded that the disbarment of LRV Daikiese constituted a serious offence ‘considered to be incompatible with the nature of the office of counsel before the Court’ for the purposes of Regulation 67(2). Regulation 71 also states that the Registrar shall remove an individual from the List of Counsel when that person no longer meets the criteria for inclusion.<sup>1862</sup> LRV Daikiese was therefore removed from the List of Counsel. He applied to the President of the Court for review of the Registrar’s decision,<sup>1863</sup> but this request was denied.<sup>1864</sup>

LRV Daikiese represented 30 victims in the Mbarushimana case and also acted as a legal representative of victims in the Lubanga case.<sup>1865</sup> In the Mbarushimana case, the Registry recommended that, for the purposes of the confirmation hearing, LRV Mabanga should take over the legal representation of the 30 victim participants formerly represented by LRV Daikiese. This recommendation was again based primarily on the geographic location of the victims and the Registry’s assessment that LRV Mabanga was best placed to effectively represent the victims in that particular geographic area.<sup>1866</sup> On 9 September, Single Judge Tarfusser ordered the appointment of LRV Mabanga as the legal representative for the 30 victim participants previously represented by LRV Daikiese.<sup>1867</sup> Common legal representation for the confirmation hearing in the Mbarushimana case was therefore organised as follows: LRV Mabanga represented 93 victims (31 who nominated him in their application and 62 designated by the Registry) while LRV Kassongo represented 37 victims (13 who nominated him in their applications and 24 designated by the Registry).<sup>1868</sup>

In the Lubanga case, despite Daikiese’s removal from the List of Counsel and the unfortunate passing of Legal Representative of Victims Jean Chrysostome Mulamba Nsokolon (LRV Mulamba), no change in the common legal representation of victims was necessary as LRV Daikiese and LRV Mulamba acted as common legal representatives within a team.<sup>1869</sup>

1862 Regulation 71(1)(a).

1863 ICC-01/04-01/10-388.

1864 ICC-RoC72-01/11-4.

1865 ICC-01/04-01/10-387, para 4.

1866 ICC-01/04-01/10-387, para 5.

1867 ICC-01/04-01/10-409.

1868 ICC-01/04-01/10-387, para 6. A gender breakdown of these victims is not currently available.

1869 ICC-01/04-01/06-2771.

## Objection to victims' legal representative in the Banda & Jerbo case

As described in more detail in the section on **Victim Participation**, above, a total number of 89 victims have been accepted to participate in the Banda & Jerbo case.<sup>1870</sup> All 89 victims were accepted to participate in a decision of 29 October 2010.<sup>1871</sup> As of 14 September 2011, all are represented by H el ene Ciss e, with Jens Dieckmann as her associate counsel.<sup>1872</sup> However, prior to the confirmation of charges hearing, there were a number of legal representatives acting in the case.

An objection to victims' legal representation was filed by both the Prosecution and Defence in the Banda & Jerbo case in December 2010, immediately before the confirmation of charges hearing. The Prosecution objected to the representation of participating victims a/1646/10 and a/1647/10 by Legal Representatives of Victims Geoffrey Nice (LRV Nice) and Rodney Dixon (LRV Dixon) in the confirmation hearing and any subsequent proceedings.<sup>1873</sup> The Prosecution argued that these two victims were actively supported in their participation by the Sudan International Defence Group (SIDG) and the Sudan Workers Trade Unions Federation (SWTUF), two organisations, which were acting as proxy for the Sudanese Government and President Al' Bashir.<sup>1874</sup> The SIDG and SWTUF were allegedly acting as intermediaries for the two participating victims represented by LRV Nice and LRV Dixon. The Prosecution expressed concern that the continued representation of these two victims by LRV Nice and LRV Dixon would significantly compromise the trial, and argued that 'the entities and counsel [had] previously tried several times to inject themselves into the court's proceedings to make their political statements against its jurisdiction, speaking ultimately on behalf of President Al' Bashir'.<sup>1875</sup> The Prosecution went on to argue that 'President Al' Bashir is using his authority to support and promote the participation of Messrs Nice and Dixon in the representation of these victims'.<sup>1876</sup> The Prosecution called on the Pre-Trial Chamber to exercise its 'inherent duty to protect the integrity of its proceedings and proper administration of justice to and to prevent actions that will lead to an abuse of process' and requested the Chamber to substitute the victims' legal representatives.<sup>1877</sup>

1870 According to figures provided by the VPRS by email dated 14 September 2011.

1871 ICC-02/05-03/09-89.

1872 ICC-02/05-03/09-215.

1873 ICC-02/05-03/09-110.

1874 ICC-02/05-03/09-110. For more information on the involvement of the SIDG and SWTUF, see further *Gender Report Card 2010*, p 108-109 and *Gender Report Card 2009*, p 146-147.

1875 ICC-02/05-03/09-110, paras 4 and 27.

1876 ICC-02/05-03/09-110, para 28.

1877 ICC-02/05-03/09-110, para 30.

The Defence also expressed serious concerns about the involvement of the intermediaries (SIDG and SWTUF) and their legal representatives (LRV Nice and LRV Dixon) in this case.<sup>1878</sup> The Defence alleged that the legal representatives intended to make submissions beyond the proper scope of confirmation and the personal interests of their clients,<sup>1879</sup> and emphasised that it was imperative for the orderly and fair progress of the case that victims' participation achieved what it was intended to, and that victims do not become surrogates or pawns for other parties in the court room in a bid to advance other goals.<sup>1880</sup> The Defence argued that there was every reason to be concerned about whether the victims would feel confident or even able to safely articulate any concerns they may have to intermediaries that are so closely allied to the State.<sup>1881</sup> Furthermore, the Defence argued that there had been a violation of the Code of Professional Conduct due to the lack of written consent from the participating victims to their legal representation and the payment of legal fees to LRV Nice and LRV Dixon by the SIDG and SWTUF. Agreeing with the Prosecution's filing, the Defence argued that the original clients of LRV Nice and LRV Dixon (namely the SIDG and SWTUF) were now using victim participation as a device to allow them to intervene in proceedings 'to pursue the same goals and raise the same points that they [had] sought to raise in other cases arising out of the Situation',<sup>1882</sup> and requested that the legal representatives should be prevented from participating any further in the proceedings.

In response, LRV Nice and LRV Dixon argued that no conflict of interest of any kind had been identified by them, nor was one forecasted.<sup>1883</sup> They acknowledged that they were subject to the Court's Rules and Code of Conduct as legal representatives, but asserted that they would comply with all requirements of confidentiality in the case.<sup>1884</sup> They noted that victims a/1646/10 and a/1647/10 were the only two participating victims in the proceedings who were currently living in Darfur, that they had witnessed the attack on the Haskanita base and that, although in their application for participation the victims had questioned the appropriateness of the involvement of an international court and the legitimacy and true motivations of the proceedings, they merely wished to inform the ICC judges of their concerns and for the

1878 ICC-02/05-03/09-113.

1879 ICC-02/05-03/09-113, para 7.

1880 ICC-02/05-03/09-113, para 18.

1881 ICC-02/05-03/09-113, para 23.

1882 ICC-02/05-03/09-113, para 29.

1883 ICC-02/05-03/09-115, para 7.

1884 ICC-02/05-03/09-115, para 9.

truth to be known.<sup>1885</sup> LRV Nice and LRV Dixon also challenged the ‘inappropriate’ and ‘unsupported’ assertions of the Prosecution and Defence regarding their motivations and loyalties.<sup>1886</sup> They went on to argue that

[n]egative views about the ICC or about the prosecution of this case are quite without significance to the issue of whether someone qualifies as and can and should be represented at the trial as a victim. It is easy enough to contemplate a possible conflict where an NGO wholly favourable to the prosecution identifies those who share its views as potential witnesses or victims for participation in the trial. That process of identification in no way disqualifies the people concerned from being involved... Here there is no suggestion of any impropriety and the process of identification of victims is without basis for complaint.<sup>1887</sup>

They thus requested the Chamber to reject the requests made by the Prosecution and Defence.

On **8 December 2010**, in an oral decision at the start of the confirmation hearing, the Pre-Trial Chamber denied the Prosecution and Defence objections to the continued representation of victims a/1646/10 and a/1647/10 by LRV Nice and LRV Dixon.<sup>1888</sup> The Chamber noted that victims a/1646/10 and a/1647/10 had been granted the right to participate in the proceedings on 29 October 2010, but no objections to their legal representation had been raised by either of the parties to the case until 48 hours before the confirmation of charges hearing. The Chamber found that no concrete evidence of a conflict of interest had been presented and therefore rejected the request regarding termination of representation.

## Common legal representation in the Banda & Jerbo case

On **21 April 2011**, the Trial Chamber ordered the Registry to consult with the 89 participating victims in the Banda & Jerbo case regarding common legal representation.<sup>1889</sup> The Registry held consultations with all the legal representatives of victims at the ICC on 20 May 2011. At this meeting, LRV Nice and LRV Dixon advanced arguments for the separate representation of the Darfuri victim participants in the Banda & Jerbo case, which was followed up with a written submission on 30 July setting out the reasons justifying separate legal representation. On 21 June, the Registry filed a report with the Trial Chamber on its progress in implementing the Chamber’s decision on common legal representation.<sup>1890</sup> The Registry noted that it had not yet consulted directly with the participating victims, and acknowledged that the preferences and interests of victims ‘should be the paramount consideration in organising common legal representation’,<sup>1891</sup> but concluded that ‘conducting further meetings with the victims at this stage will not in practice enable the victims themselves, as a group, to choose common legal representatives’.<sup>1892</sup> The Registry recognised the potential necessity of grouping the Darfuri victims under a separate legal representation team, but concluded that it required more information to assess whether there was a sufficient justification for this course of action. The Chamber ordered the Registry to finalise its consultations and to inform the Chamber of the common legal representatives chosen by the participating victims (or, if the victims were unable to choose, the Registry’s recommendations on common legal representation) by 15 August 2011.

On 18 July, the legal representatives of all of the victims in the case filed joint observations on the procedure being followed by the Registry in relation to the appointment of common legal representation, expressing concern that the Registry had disregarded the Chamber’s order, which required consultation with the victims first, and arguing that it would violate both the Chamber’s order and Rule 90 of the Rules of Procedure and Evidence for the Registry to select a new legal representative and to ‘impose such a person(s) on the victims without consulting them or giving effect to their agreement as to legal representation’.<sup>1893</sup> On 5 August, the Registry submitted an additional report to the Chamber, claiming to have been unable to meet

1885 ICC-02/05-03/09-115, paras 12-14.

1886 ICC-02/05-03/09-115, paras 17-22.

1887 ICC-02/05-03/09-115, para 26.

1888 ICC-02/05-03/09-T-9-Red-ENG, p 3 – p 7.

1889 ICC-02/05-03/09-138.

1890 ICC-02/05-03/09-164-Red.

1891 ICC-02/05-03/09-164-Red, para 10.

1892 ICC-02/05-03/09-164-Red, para 14.

1893 ICC-02/05-03/09-182, para 12.

directly with the participating victims in the case.<sup>1894</sup> The Registry argued that its ‘ability ... to assist victims to make their own choice ... is highly dependent on resources and time, both of which were regrettably limited in the present instance’ and ‘[f]or these reasons the Registry considers that the victims in the present case have been unable to choose a common legal representative’.<sup>1895</sup> The Registry also sought to dismiss the objections raised by LRV Nice and LRV Dixon on the basis that the objections had been raised by the victims’ legal representatives and not the victims themselves, despite the obvious fact that victims can only express their views and concerns through their legal representatives.<sup>1896</sup>

On 22 August, the legal representatives of all of the victims in the case again filed joint observations, noting that their previous filing of 18 July had been based on the express instructions of the victims themselves, and arguing that ‘the Registry is entitled to provide “assistance” to the victims “if necessary”, but not to oppose the victim’s choice of counsel and impose different counsel’.<sup>1897</sup> On 25 August, the Registry filed a proposal for common legal representation in which it claimed to have not been made aware of ‘any significantly distinct interest or other factor that would require victims to be grouped separately for representation in the present case’, therefore leaving ‘no reason why all participating victims could not be represented by a single legal team’.<sup>1898</sup> The Registry recommended the appointment of Helene Cissé (LRV Cissé) as principal counsel and Jens Dieckmann (LRV Dieckmann) as associate counsel for all 89 participating victims in the case. Pursuant to the Chamber’s decision of 6 September noting the Registry’s recommendation on common legal representation,<sup>1899</sup> LRV Cissé and LRV Dieckmann were appointed as the legal representatives of victims by the Registry on 14 September 2011.<sup>1900</sup> Victims a/1646/10 and a/1647/10 (represented by LRV Nice and LRV Dixon) filed a request on 30 September 2011 seeking reconsideration of the Registrar’s appointment of common legal representatives by the Trial Chamber pursuant to Regulation 79(3), but at the time of writing this Report no decision has been issued.

1894 ICC-02/05-03/09-187.

1895 ICC-02/05-03/09-187, paras 3-4.

1896 ICC-02/05-03/09-187, para 5.

1897 ICC-02/05-03/09-200, para 5.

1898 ICC-02/05-03/09-203, paras 7-8.

1899 ICC-02/05-03/09-209.

1900 ICC-02/05-03/09-215.

## Common legal representation in the Kenyan cases

On 1 August 2011 the Registry (VPRS) filed its proposal for common legal representation in the case of Ruto *et al.*<sup>1901</sup> An identical filing was made in the Muthaura *et al* case on 5 August 2011.<sup>1902</sup> In its proposal for common legal representation of victims, the Registry set out the steps taken and the arrangements proposed for the common legal representation. The Registry noted that common legal representation had previously been organised and applied in the Lubanga, Katanga & Ngudjolo and Bemba cases.<sup>1903</sup> The Registry acknowledged that common legal representation had previously been arranged at a late stage in proceedings, with participating victims being represented either by counsel appointed by the victims, without the Registry’s involvement, or by the OPCV up until that point. The Registry noted, however, that the organisation of common legal representation had tended to minimally interfere with the role of existing counsel, either by permitting counsel to form teams and work together (as occurred in the Lubanga case) or by appointing one or more of the existing counsel as the common legal representative.<sup>1904</sup>

The Registry argued that the approach of selecting common legal representatives from among existing counsel had encouraged the practice among counsel of ‘fishing’ for clients by proactively approaching participating victims or potential applicants for victim participation, either directly or through the intermediaries assisting applicants.<sup>1905</sup> The Registry concluded that an approach to common legal representation under Rule 90(3)<sup>1906</sup> which prioritises the appointment of counsel already representing victims in the case risked ‘unduly rewarding the practice of “fishing” by making an ability and

1901 ICC-01/09-01/11-243.

1902 ICC-01/09-02/11-214.

1903 ICC-01/09-01/11-243-Anx1 and ICC-01/09-02/11-214-Anx1, para 7, noting that common legal representation had been put in place immediately before trial proceedings began in the Lubanga, Katanga & Ngudjolo and Bemba cases, as well as prior to the confirmation of charges hearing in the Bemba case. As discussed above, subsequent to this filing by the Registry, it also provided recommendations for common legal representation of participating victims in the Banda & Jerbo case.

1904 ICC-01/09-01/11-243-Anx1 and ICC-01/09-02/11-214-Anx1, para 7.

1905 ICC-01/09-01/11-243-Anx1 and ICC-01/09-02/11-214-Anx1, paras 8-10.

1906 Rule 90(3) permits the Registry to choose a common legal representative or representatives if the victims have been unable to do so during the period of time determined by the Chamber.

willingness to engage in client solicitation a more significant factor' than other criteria.<sup>1907</sup> However, the Registry also acknowledged that appointing existing counsel as common legal representative allowed for continuity of representation, which is all the more important when common legal representation is applied late in proceedings, as participating victims may have established long-standing relationships with their legal representatives, making the imposition of new counsel 'disorienting and upsetting for the victims'.<sup>1908</sup>

In its filing, the Registry noted that it has commenced a process of establishing a 'systematic approach' to common legal representation, which incorporates the following principles: (i) early action on common legal representation; (ii) meaningful consultation with victims; and (iii) an open, transparent and objective selection process.<sup>1909</sup> The Registry did note, however, that in the present case it had 'yet to fully realise this approach'.<sup>1910</sup> The filing set out the general criteria to be applied by the Registry in selecting common legal representatives, including the following factors: a relationship of trust with the victims; a demonstrated commitment to working with vulnerable persons; a familiarity or connection to the Situation country; relevant litigation experience; sufficient availability; and basic information technology skills.<sup>1911</sup> In particular, the Registry emphasised that gender would be a relevant criterion in assessing the potential of counsel to establish a relationship of trust with the participating victim, specifically where the Registry believes that the gender of counsel would enable victims to speak frankly about the crimes experienced by them, especially in relation to sexual crimes.<sup>1912</sup> Surprisingly, the Registry did not explicitly set admittance to the ICC's List of Legal Counsel as one of the criteria for selecting common legal representation.

The Registry outlined that it had taken the following steps in relation to organising common legal representation in the Kenya cases:

- Victim grouping had been determined taking into account the views and information provided by victims and intermediaries;

1907 ICC-01/09-01/11-243-Anx1 and ICC-01/09-02/11-214-Anx1, para 10.

1908 ICC-01/09-01/11-243-Anx1 and ICC-01/09-02/11-214-Anx1, para 11.

1909 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 3.

1910 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 4.

1911 ICC-01/09-01/11-243-Anx3 and ICC-01/09-02/11-214-Anx3.

1912 ICC-01/09-01/11-243-Anx3 and ICC-01/09-02/11-214-Anx3, para 4.

- Selection criteria and the respective weight accorded to them had been established, again taking into account the views and information provided by victims and intermediaries as well as the Registry's previous experience;
- An invitation had been sent out to the List of Legal Counsel to elicit expressions of interest to represent victims in the Kenya cases;<sup>1913</sup> and
- The Registry had taken into consideration the work performed by legal representatives in the case to date.

Acknowledging its statutory obligations to consult with victims about the appointment of their counsel, the Registry noted with concern that it had not been able to consult with all victims in the present case.<sup>1914</sup> The Registry also acknowledged that when common legal representation is decided upon prior to the acceptance of victims in the proceedings, as is the case in the present proceedings,<sup>1915</sup> 'there is a risk that victims' views may be sidelined'.<sup>1916</sup> To solve this issue, the Registry explained that it had sought to consult with members of various victim communities throughout Kenya to seek their views on the issue of legal representation. The Registry noted that 'while this approach has its limitations, the Registry considers that it has been able to establish an understanding of victims' preferences regarding their legal representation'.<sup>1917</sup> The Registry acknowledged that consultations with existing legal representatives concerning the issue of common legal representation, which has been the Registry's approach in previous cases, would have provided it with a wealth of information about victims' views and concerns in the Kenya cases, but rightly stressed that 'their input cannot replace direct consultations with victims'.<sup>1918</sup> Unfortunately, however, the Registry has not been able to conduct a 'tailored and specific consultation' with victims on the issue of common legal representation. In an attempt to explain its lack

1913 The Registry noted that this was the first time such a step had been taken in the process of recommending victims' representation. ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 4(c).

1914 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 5.

1915 At the time of filing the proposal for common legal representation, no victims had yet been accepted to participate in the proceedings. A decision was issued three days after the submission of the Registry's proposal accepting 327 victims as victim participants. This decision is discussed in detail in the section on *Victim Participation* in this Report.

1916 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 6.

1917 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 6.

1918 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 7.

of consultation, similar to its filing in the Banda & Jerbo case concerning common legal representation, discussed above, the Registry again cited time and resource constraints.<sup>1919</sup>

In view of the efficient conduct of proceedings and an effective, economical use of resources, the Registry noted that the best option would be to constitute only one group of victims, represented by one legal team. Also finding no conflict of interest between the different victims that would preclude their joint representation, the Registry recommended the Chamber to appoint a single legal team to represent the victims in this case.<sup>1920</sup> The Registry noted, however, that the issue of a potential conflict of interest between victims should be kept under constant review, particularly given the historical context and the political dimensions in the Rift Valley.<sup>1921</sup> In an annex to the filing, the Registry discussed the ethnic and political basis to the charges and noted it as a potential source of conflicts of interests among victims of different ethnicities, but concluded that 'no clear and significant distinct interests can be identified at the present time'.<sup>1922</sup>

In addition to the criteria set out by the Rome Statute, the Registry noted that, in consultation with affected communities, in presenting its recommendations it had taken into account that Kenyan victims are wary of domestic lawyers and prefer lawyers with international legal experience, and that they expressed caution regarding ethnically partisan lawyers.<sup>1923</sup> Despite acknowledging the benefits of continuity of legal representation, the Registry did not find that these benefits provided the existing legal representatives with a material advantage over other candidates. In particular, the Registry did not find 'that the current legal representatives have established meaningful relationships of trust with a significant number of their clients'.<sup>1924</sup> Following the submission of the Registry's proposal for common legal representation on 1 August 2011, on **5 August 2011** Pre-Trial Chamber II issued a decision on victim participation in the Ruto *et al* case, in which it admitted 327 victim participants in the confirmation hearing in the case and appointed Sureta Chana (LRV Chana) as the Common Legal Representative of

these victims.<sup>1925</sup> In a decision on **28 August 2011**, Pre-Trial Chamber II issued a decision on victim participation in the case of Muthaura *et al*, granting 233 victims participatory status and appointing Morris Azuma Anyah (LRV Anyah) as their Common Legal Representative.<sup>1926</sup>

The recommendation for common legal representation in the Kenyan cases was submitted to the Chamber only weeks before the confirmation hearing. The Registry expressed regret about this late appointment and acknowledged 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'.<sup>1927</sup> The Women's Initiatives has previously expressed concern about the timing of decisions regarding common legal representation, in addition to concerns about the principles by which victims have been divided into groups.<sup>1928</sup> For instance in the Bemba case, on 10 November 2010,<sup>1929</sup> twelve days before the start of the trial, the Chamber issued a decision that the victims accepted to participate in the case, until that time represented by the OPCV, would be represented by two external common legal representatives, on the basis that the legal representatives were from the country of origin of the victims. The victims were divided into two groups on the basis of geographical locations; one group relating to victims from Bangui and around PK12, and the other incorporating victims from Damara, Sibut, Boali, Bossembélé, Bossangoa, Bozoum and Mongoumba.<sup>1930</sup> The Trial Chamber declined to appoint counsel from the OPCV as common legal representatives on the grounds that the OPCV's role is primarily to assist the legal representatives of victims, and therefore it should not, in principle, act on behalf of individual victims other than on an exceptional basis, such as occurred with the dual status victim/witnesses represented by the OPCV in the Lubanga case.<sup>1931</sup>

1919 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 8.

1920 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, paras 9-13.

1921 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 12.

1922 ICC-01/09-01/11-243-Anx2 and ICC-01/09-02/11-214-Anx2.

1923 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 19.

1924 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 22(i).

1925 ICC-01/09-01/11-249. Although information from the CSS indicates that victims in the case of Ruto *et al* are also represented by James Mawira and Morris Anyah (as outlined in the chart of legal representatives above), their appointments were not made through the Chamber's decision appointing a common legal representative.

1926 ICC-01/09-02/11-267.

1927 ICC-01/09-01/11-243 and ICC-01/09-02/11-214, para 42.

1928 Women's Initiatives for Gender Justice, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo', 22 November 2010, available at <[http://www.iccwomen.org/documents/Bemba\\_Opening\\_Statement.pdf.pdf](http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf.pdf)>.

1929 ICC-01/05-01/08-1005.

1930 ICC-01/05-01/08-1005, paras 18-21.

1931 ICC-01/05-01/08-1005, paras 28-30.

The Chamber later designated Marie Edith Douzima Lawson (LRV Douzima Lawson) and Assingambi Zarambaud (LRV Zarambaud), both CAR nationals, as said representatives. Understandably, the victims were distressed and upset by this decision as, until that time, they had relied on the bond previously established with representatives of the OPCV with whom a relationship of trust had been formed. Victims expressed their concern to the Women's Initiatives that their interests and the particularities of each of their experiences may not be well represented given the new legal representatives did not know them, their circumstances, the crimes committed against them and the impact of these acts. Five victims in the Kenya case have also objected the appointment of LRV Chana as their legal representative, citing similar concerns. Their filing is discussed in detail, below. From the public record of the case at the time of writing this Report, victims in the case of Muthaura *et al* do not appear to have objected to LRV Anyah's appointment.

### Objections to legal representation by victims in the case of Ruto *et al*

Following the 5 August 2011 decision by Pre-Trial Chamber II in the Ruto *et al* case on common legal representation for victims, which appointed Sureta Chana as the Victims' Common Legal Representative for the 327 victims accepted to participate, on 31 August 2011 four victims (a/0041/10, a/0045/10, a/0051/10 and a/0056/10) filed a motion with the Pre-Trial Chamber objecting to her appointment as their legal representative.<sup>1932</sup> In a separate, confidential, filing on 5 September 2011, another victim (victim a/0061/11) requested to join the previous request.<sup>1933</sup>

The victims expressed 'serious concern' about the appointment of LRV Chana as their legal representative and about the procedure followed in respect of this appointment.<sup>1934</sup> The motion was submitted on behalf of the victims by the legal representatives with whom they have worked for almost four years.<sup>1935</sup> In their motion, the victims indicated that they felt that LRV Chana had been imposed upon them by the Chamber, and stressed that the legal representation agreement of 2008 between them and their previous legal representatives had not yet been terminated.<sup>1936</sup> The victims argued that the Registrar's selection procedure contained 'serious errors' and 'violations of law' and that, as a result, their rights as victims under the Rome Statute had been violated.

In particular, the victims raised a number of errors in the Registrar's selection procedure.<sup>1937</sup> First, the victims stated they had not been involved in the procedure regarding the appointment of the common legal representative. Second, according to the victims, the Registrar did not give any consideration to their views in the matter. Third, the victims were not afforded an opportunity to organise themselves to arrange (common) legal representation themselves. The victims also noted that they did not know LRV Chana and expressed concern that the timing of her appointment – three weeks prior to the confirmation hearing – precluded the construction of a meaningful relationship with the appointed common legal representative. They also raised concerns about the high number of victims represented by one legal representative (327) which 'makes a meaningful

1932 ICC-01/09-01/11-314.

1933 The Registry submitted the filing as a confidential annex on 6 September 2011, ICC-01/09-02/11-322.

1934 ICC-01/09-01/11-314, para 4.

1935 The motion was submitted by Liesbeth Zegveld, Wambui Njogu, Göran Sluiter and Arthur Igeria.

1936 ICC-01/09-01/11-314, paras 6, 8.

1937 ICC-01/09-01/11-314, para 13.



representation impossible'.<sup>1938</sup> Lastly, the victims stated that the legal representatives with whom they have been working for the last four years had not been consulted by the Registry upon the selection of the common legal representative.

In addition, the victims also argued that their right under Regulation 79(3), pursuant to which victims have 30 days to review the Registrar's choice of a common legal representative, 'has been rendered ineffective and inapplicable by the Chamber's decision', which was rendered four days after the Registry's proposal for common legal representation, discussed above.

On 5 September 2011, the Registry submitted additional information relating to the victims' motion.<sup>1939</sup> Having already set out the steps taken to incorporate the views of the victims regarding participation in its proposal for common legal representation of 5 August 2011, the Registry submitted information to the Chamber relating to the former legal representation of the four victims. The Registry observed that in November/December 2009, these four victims submitted applications for reparations through their legal representatives Liesbeth Zegveld (LRV Zegveld), Mbuthi Gathenji (LRV Gathenji), Arthur Igeria (LRV Igeria) and Boniface Njiru (LRV Njiru). It was only in June 2011 that three of the four victims produced new powers of attorney indicating that LRV Gathenji and LRV Njiru intended to withdraw their representation and that LRV Zegveld, LRV Igeria, Göran Sluiter (LRV Sluiter) and Mary Rambui Njogu (LRV Njogu) continued to represent them.<sup>1940</sup> LRV Gathenji and LRV Njiru, however, did not file a request under Regulation 82 to withdraw their representation. In light of these observations, the Registry noted that, contrary to the motion, the lawyers have not represented these victims 'for the last nearly four years' as the power of attorney was only submitted in June 2011, one of the victims never actually submitted a power of attorney appointing LRV Njogu and LRV Sluiter, and – pending the request for withdrawal from LRV Gathenji and LRV Njiru – the legal representation of victims a/0041/10, a/0045/10 and a/0051/10 remained unclear prior to LRV Chana's appointment.<sup>1941</sup> The Registry also brought to the attention of the Chamber the fact that two of the four victims (a/0041/10 and a/0056/10) had actually met with LRV Chana and the Registry on 24 August in Nairobi. The contentions by these victims that they have 'never spoken to her' are thus moot.<sup>1942</sup> The

1938 ICC-01/09-01/11-314, para 13.

1939 ICC-01/09-01/11-320.

1940 ICC-01/09-01/11-320, para 4.

1941 ICC-01/09-01/11-320, para 5.

1942 ICC-01/09-01/11-320, para 8.

Registry stressed that the victims also did not object to LRV Chana's representation at this meeting.<sup>1943</sup>

In a decision on **9 September 2011**, Judge Trendafilova, acting as Single Judge of Pre-Trial Chamber II, recalled a previous decision concerning a request for reconsideration by the Defence, in which she rejected the approach of reconsideration of previous judicial rulings, in particular when the Chamber 'has ruled on the issue *sub judice* in good faith and considering the information available to it as correct and reliable'.<sup>1944</sup> The Single Judge noted that the victims' motion is again a motion for reconsideration and as such must be rejected.

However, given the sensitivity of the issues raised, the Single Judge did provide some considerations and clarifications on the issues raised by the victims. First, the Single Judge noted that her decision appointing LRV Chana as the victims' Common Legal Representative was not made pursuant to Regulation 79(3), as argued by the victims, but was rendered under Regulation 80(1), pursuant to which 'the Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require'. In those circumstances, the Single Judge noted that there had thus been no violation of the victims' right under Regulation 79(3). The Single Judge also observed that the fact that victims a/0041/10 and a/0056/10 signed a declaration that they did not know LRV Chana while having met her in August 2011 was 'incorrect and misleading'.<sup>1945</sup> The Single Judge noted that this 'undermine[d] the credibility of the Applicants' submissions'.<sup>1946</sup>

The Single Judge also recalled Article 28 of the Code of Professional Conduct, pursuant to which 'counsel shall not address directly the client of another counsel except through or with the permission of that counsel'. Since the victims at the time of the filing were already represented by LRV Chana, the Single Judge noted that she 'does not find it appropriate that the Applicants did not bring the matter of the victims' alleged discontent with regard to their common legal representation to the attention of Ms Chana, before pursuing any further steps'.<sup>1947</sup> The Single Judge concluded by reaffirming that LRV Chana 'is and remains' the legal representative of the 327 victims in the case.<sup>1948</sup>

1943 ICC-01/09-01/11-320, para 10.

1944 ICC-01/09-01/11-330, para 11 citing ICC-01/09-01/11-301 para 18.

1945 ICC-01/09-01/11-330, para 16.

1946 ICC-01/09-01/11-330, para 16.

1947 ICC-01/09-01/11-330, para 17.

1948 ICC-01/09-01/11-330, para 18.

## Counsel for Defence

### Defence Counsel of individuals who have appeared before the Court as of 16 September 2011<sup>1949</sup>

Total number of Defence counsel: **35**

Number of female counsel: **7 (20%)**

Number of male counsel: **28 (80%)**

Geographic distribution of counsel: **18 from WEOG; 16 from African States**<sup>1950</sup>

Number of QCs: **3**<sup>1951</sup>

Number of counsel representing more than one suspect: **5**<sup>1952</sup>

Number of counsel who previously worked for the Prosecution: **3**<sup>1953</sup>

<i>Accused</i>	<i>Defence counsel</i>	<i>Nationality of counsel</i>
<b>Uganda Situation</b>		
No suspects have appeared before the Court.		
<b>DRC Situation</b>		
Lubanga	Catherine Mabilie Jean-Marie Biju-Duval Marc Desalliers Caroline Buteau	France France Canada Canada
Katanga	David Hooper, QC Andreas O'Shea	UK UK
Ngudjolo	Jean-Pierre Kilenda Kakengi Basila Prof Jean-Pierre Fofé Djofia Malewa	Belgium DRC
Mbarushimana	Nicholas Kaufman Yaël Vias-Gvirsman	Israel/UK Israel/France

<sup>1949</sup> The information in this chart was drawn from the public record of the cases, from the public list of counsel admitted to practise before the ICC, as well as from information provided to the Women's Initiatives for Gender Justice by the CSS by email dated 21 and 26 October 2011. Where counsels' nationality is not noted, this information was not at present available from the CSS. Lawyers who wish to practise before the ICC, either as counsel or as assistant to counsel, must meet the criteria of admission to the List of Counsel; to be admitted, candidates must satisfy the minimum quality assurance requirements set out in Rule 22 of the Rules of Procedure and Evidence, and Regulation 67 of the Regulations of the Court. Without ICC accreditation, lawyers cannot practise before the ICC. Some of the individuals in the chart (noted in *italics*) do not appear on the ICC's List of Legal Counsel or List of Assistants to Counsel, made available by the CSS on 26 July 2011. In an email to the Women's Initiatives for Gender Justice, dated 26 October 2011, the CSS clarified that these individuals may work on a 'pro bono' basis, as case managers, as resources persons or as professional investigators, for which the ICC Statute does not require accreditation.

<sup>1950</sup> WEOG: two from France, three from Canada, five from the UK, two from Belgium, three from the USA, one from the Netherlands and two with dual nationality (Israel/UK and Israel/France); African States: two from the DRC, one from South-Africa, one from Sierra Leone, eleven from Kenya and one from The Gambia. The nationality of one counsel is unknown.

<sup>1951</sup> David Hooper QC, Karim A. A. Khan QC and Steven Kay QC. The Award of Queen's Counsel (QC) 'is made to experienced advocates, both barristers and solicitors, who have higher rights of audience in the higher courts of England and Wales and have demonstrated the competencies in the Competency Framework to a standard of excellence. 'Advocacy' includes both oral and written advocacy before the higher courts, arbitrations and tribunals and equivalent bodies.' See <[http://www.qcappointments.org/?page\\_id=16](http://www.qcappointments.org/?page_id=16)>.

<sup>1952</sup> Karim A.A. Khan QC (representing four suspects), Andrew J. Burrow (representing two suspects), Nicholas Koumjian (representing two suspects), David Hooper QC (representing two suspects), and Joseph Kipchumba Kigen-Katwa (representing two suspects).

<sup>1953</sup> Essa Faal, Nicholas Kaufman and Ibrahim Yillah.

<i>Accused</i>	<i>Defence counsel</i>	<i>Nationality of counsel</i>
<b>Darfur Situation</b>		
Abu Garda	Karim A. A. Khan, QC Andrew J. Burrow	UK South Africa
Banda	Karim A. A. Khan, QC Nicholas Koumjian Andrew J. Burrow	UK USA South Africa
Jerbo	Karim A. A. Khan, QC Nicholas Koumjian Ibrahim Yillah	UK USA Sierra Leone
<b>CAR Situation</b>		
Bemba	Nkwebe Liriss Aimé Kilolo Musamba	DRC Belgium
<b>Kenya Situation</b>		
Ruto	David Hooper, QC Joseph Kipchumba Kigen-Katwa Kioko Kilukumi Musau Abraham Kithure Kindiki Caroline Buisman	UK Kenya Kenya Kenya Netherlands
Kosgey	George Odinga Oraro Julius Kemboi Allan Kibet Kosgey <i>Liane Aronchick</i> <sup>1954</sup>	Kenya Kenya Kenya
Sang	Joseph Kipchumba Kigen-Katwa Joel Kimutai Bosek Philemon Koech Busieni Logan Christi Hambrick	Kenya Kenya Kenya USA
Muthaura	Karim A.A. Khan, QC Essa Faal Kennedy Ogetto	UK Gambia Kenya
Kenyatta	Steven Kay, QC Gillian Higgins	UK UK
Ali	John Philpott <i>Gregory Kehoe</i> Evans Monari <i>Gershon Otachi</i>	Canada USA Kenya Kenya

**Libya Situation**

No suspects have appeared before the Court.

**Côte d'Ivoire Situation**

No suspects have appeared before the Court.

<sup>1954</sup> Information about nationality was not provided by the CSS by email dated 26 October 2011. In addition, Liane Aronchick is not named on the List of Counsel or the List of Assistants to Counsel made available by the CSS on 26 July 2011.

## Invalidation of Legal Counsel

In the last two years, an issue has emerged in the Court's jurisprudence across a number of different cases pertaining to former Prosecution lawyers joining different Defence teams relatively soon after ceasing to hold office within the Office of the Prosecutor. The Prosecution has twice requested the Chamber to invalidate the appointment of these counsels on the grounds of a conflict of interest, in the Bemba and Banda & Jerbo cases. The Chamber also carried out an assessment of the possible invalidation of the appointment of counsel previously employed by the Office of the Prosecutor on its own initiative in the case of Muthaura, Kenyatta and Ali. Although Chambers have been sensitive to the concerns expressed by the Prosecution, they have consistently held, however, that there were not enough reasons to invalidate their appointment. Two of the matters are currently pending before the Appeals Chamber.

Conduct by legal counsel before the ICC is governed by the Code of Professional Conduct for Counsel.<sup>1955</sup> In particular, Articles 12<sup>1956</sup> and 16<sup>1957</sup> provide that counsel may not assume duties where there is a conflict of interest. By virtue of Article 1, the Code of Conduct applies to all 'defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives of victims and witnesses practising at the ICC'. As such, Prosecution counsel is excluded from the applicability of the Code of Conduct; however, from the moment they join a Defence team the Code of Conduct does apply to them. Although pursuant to the Code of Conduct it is counsel's primary responsibility to ensure no conflict of interest arises due to his/her appointment to a particular team, in case of a dispute Chambers have the power under Article 64(2)<sup>1958</sup> of the Rome Statute to resolve matters that may cause unfairness to the proceedings.

1955 The Code of Professional Conduct was adopted by consensus by the Assembly of States Parties in December 2005. ICC-ASP/4/Res.1, Annex, 2 December 2005, available at <[http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf)>, last visited on 14 October 2011.

1956 Article 12(b) of the Code of Conduct provides that 'Counsel shall not represent a client in a case: (b) in which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.'

1957 Article 16 of the Code of Conduct deals with a potential conflict of interest in the appointment of counsel and provides that 'where a conflict of interest arises, counsel shall at once inform all potentially affected clients of the existence of the conflict and either: (a) withdraw from the representation of one or more clients with the prior consent of the Chamber; or (b) seek the full and informed consent in writing of all potentially affected clients to continue representation.'

1958 Article 64(2) provides that 'the Trial Chamber 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'.

## CAR

*The Prosecutor v. Jean-Pierre Bemba Gombo*

The first time an issue was raised concerning the appointment of a counsel by a Defence team, was in January 2010 in the Bemba case when the Prosecution raised concerns with Trial Chamber III about the appointment of Nicholas Kaufman as a legal consultant to the Defence team.<sup>1959</sup> From 5 May 2008 until 4 May 2009, Kaufman had worked as a P-4 Trial Lawyer for the Prosecution, focusing particularly on the DRC and Uganda Situations. On 18 November 2009, Lead Defence Counsel Nkwebe Liriss informed the Office of the Prosecutor of the appointment of Kaufman as a legal consultant to the Defence team.<sup>1960</sup> The Prosecution objected to the appointment of Kaufman, stating that in his position as trial lawyer, Kaufman had been accorded 'full access to confidential and under seal information in all cases and situations', including information about the Bemba case that is not accessible to the accused and his counsel.<sup>1961</sup>

Following the formalisation of his appointment as legal consultant on 12 January 2010, on 18 January 2010 the Prosecution filed a request with the Chamber to invalidate this appointment on the basis of a conflict of interest under Articles 12 and 16 of the Code of Professional Conduct for Counsel.<sup>1962</sup> The Prosecution argued that Kaufman had knowledge of the strengths and weaknesses of the Prosecution case, as well as its strategy in the case against Bemba. The Prosecution cited in particular to his regular interaction with Massimo Scaliotti, one of the Prosecution trial lawyers in the Bemba case, with whom Kaufman had shared an office, and his participation in Division meetings in which prosecutorial strategies for the different cases were discussed. In addition, the Prosecution outlined that, for the purpose of preparing a task in relation to the Lubanga case, Kaufman had been given access to an under seal document (the application for a Warrant of Arrest against Bemba) which was not yet available to the Defence in unredacted form.<sup>1963</sup> Finally, the Prosecution stated that Kaufman himself acted in contravention of Article 24(1) of the Code of Conduct, which requires counsel to 'take all necessary steps to ensure that his actions or those of other members of the team are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute'.

1959 ICC-01/05-01/08-670-Conf, cited in ICC-01/05-01/08-769. A public redacted version of the filing was later made available: ICC-01/05-01/08-670-Red.

1960 ICC-01/05-01/08-670-Red, citing ICC-01/05-01/08-670-Conf-AnxA.

1961 ICC-01/05-01/08-769, para 4 citing ICC-01/05-01/08-670-Conf-AnxB.

1962 ICC-01/05-01/08-670-Conf, cited in ICC-01/05-01/08-769. A public redacted version of the filing was later made available: ICC-01/05-01/08-670-Red.

1963 ICC-01/05-01/08-670-Red, para 17.

On 7 May 2010 Trial Chamber III issued a decision rejecting the Prosecution request.<sup>1964</sup> The Chamber found that by virtue of being a 'legal consultant', rather than a counsel for the Defence, Kaufman is not subject to a representation agreement, cannot make oral submissions on behalf of the accused and as such cannot be considered to be 'practising before the ICC' for the purposes of the Code of Conduct. As such, the Chamber found that the Code of Conduct does not apply to Kaufman as a legal consultant. However, Defence counsel is subject to the Code and cannot appoint a member to its team if that appointment creates a conflict of interest or is otherwise prejudicial to the ongoing proceedings. The Chamber stressed that 'the determinative issue is whether Mr Kaufman, whilst working for the prosecution, became aware of more than *de minimis* confidential information relevant to the case, which a member of the defence team should not possess'.<sup>1965</sup> Having analysed the information submitted to it by the Prosecution, the Chamber was not convinced that Kaufman was indeed privy to more than *de minimis* confidential information. The Chamber stated that the Prosecution merely hinted at the possibility, rather than providing conclusive evidence of the existence of the alleged conflict of interest.<sup>1966</sup> Taken together with Kaufman's 'unequivocal assertions' that he is unaware of any relevant confidential information, the Chamber rejected the Prosecution's request and granted Kaufman full access to the case record.<sup>1967</sup> However, during a trial hearing on 25 November 2010, the Trial Chamber clarified that Kaufman could not make any oral interventions during the trial proceedings, by virtue of his status as a legal consultant.<sup>1968</sup>

In a trial hearing on 29 November 2010, the Prosecution again raised concerns with the Trial Chamber about Kaufman's position when it had been informed that his status had changed from consultant to associate counsel for the Defence.<sup>1969</sup> The Trial Chamber advised the Prosecution that in its previous decision it determined that, although the Code of Conduct did not apply to Kaufman as a legal consultant, it had not found any conflict of interest to warrant the invalidation of his appointment even if the Code would have applied to him.<sup>1970</sup> The Chamber noted, however, that the Prosecution was free to raise the issue in a written filing, which

1964 ICC-01/05-01/08-769.

1965 ICC-01/05-01/08-769, para 42.

1966 ICC-01/05-01/08-769, para 43.

1967 ICC-01/05-01/08-769, paras 45-47.

1968 ICC-01/05-01/08-T-35-Red-ENG, p 2 lines 19-24.

1969 ICC-01/05-01/08-T-37-Red-ENG, p 3 lines 1-2.

1970 ICC-01/05-01/08-T-37-Red-ENG, p 3 lines 6-20.

was subsequently filed on 30 November 2010.<sup>1971</sup> In its filing the Prosecution reiterated its previously expressed concerns about Kaufman's prior position within the Office of the Prosecutor and the alleged conflict of interest. The Prosecution cited in specific to internal memos of the Executive Committee which it argued indicated that as a P-4 Trial Lawyer Kaufman had been involved in a discussion on 10 September 2008 pertaining to issues surrounding Bemba's mode of liability. In an oral decision on **2 December 2010**, Trial Chamber III again rejected the Prosecution request to invalidate Kaufman's appointment to the Bemba's Defence team. The Chamber found that 'the internal memos referred to by the Prosecution in its most recent filing, do not take the matter any further or provide new or different evidence as to the extent of Kaufman's involvement in the Bemba case such as to merit the Chamber's reconsideration of the matter'.<sup>1972</sup> The Chamber thus confirmed his appointment as co-counsel to the Defence. From the public record of the case, the Prosecution does not seem to have sought leave to appeal the issue.

It should be noted, however, that in a filing submitted on 7 September 2011 in a different case, reclassified as public on 19 January 2011, the Prosecution notified the Chamber that it had received a letter from Nicholas Kaufman on 2 September 2010 informing the Prosecution that he will be representing Mbarushimana pursuant to a power of attorney signed 30 August 2010.<sup>1973</sup> Although the Prosecution does not appear to have challenged his appointment as counsel in this case, despite his apparent prior involvement as a P-4 Trial Lawyer for the Prosecution in the DRC investigation, it is not clear from the public documentation in the case how Mbarushimana knew in early September that he needed counsel before the ICC when the Arrest Warrant against him was issued under seal on 28 September 2010 and was only unsealed upon his arrest by the French authorities on 11 October 2010.

1971 ICC-01/05-01/08-1066.

1972 ICC-01/05-01/08-T-42-Red-ENG, p 3 lines 15-18.

1973 ICC-01/04-01/10-37.

## Darfur

### *The Prosecutor v. Adhalla Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*

On 26 May 2011, Ibrahim Yillah was appointed as associate defence counsel in the Banda & Jerbo case. Yillah had, until 19 April 2011, been employed by the Office of the Prosecutor, first as an Associate Trial Lawyer (P-2), later as a Trial Lawyer (P-3), working primarily on the Uganda Situation, and the cases against Katanga & Ngudjolo and Bemba.

On 9 June 2011, the Prosecution filed a motion requesting the Chamber to invalidate the appointment of Yillah as defence counsel on the grounds that his very recent employment by the Office of the Prosecutor created a conflict of interest.<sup>1974</sup> Although Yillah did not work on the Banda & Jerbo case, the Prosecution argued that he could have been exposed (either formally or informally) to confidential Prosecution information regarding the case.<sup>1975</sup> The Prosecution argued that lawyers who work for the Office of the Prosecutor have a *per se* conflict of interest and should be barred for a period of one year from taking up any employment on a Defence team before the ICC.<sup>1976</sup> The Prosecution also argued that the Code of Professional Conduct for Counsel would bar Yillah from taking a role on a defence team.<sup>1977</sup> The Defence responded on 15 June, claiming the Prosecution request was unfounded and without merit and requesting consideration of this issue from the Chamber as a matter of priority to minimise any impact on the defence preparations for trial.<sup>1978</sup> Yillah contended he was in possession of no confidential information, either direct or indirect, and had been party to no discussions, formal or informal, relating to this case.

The Chamber issued its decision on the Prosecution request on **30 June 2011**.<sup>1979</sup> The Chamber noted that, although the Registry facilitated the appointment of 'persons who assist Counsel', it did not possess the authority to bar the appointment of such persons.<sup>1980</sup> As associate legal counsel, the Chamber found that

1974 ICC-02/05-03/09-160.

1975 ICC-02/05-03/09-160, para 2.

1976 ICC-02/05-03/09-160, para 3.

1977 ICC-02/05-03/09-160, para 4.

1978 ICC-02/05-03/09-163.

1979 ICC-02/05-03/09-168.

1980 In its confidential submission to the Chamber, 'the Registry stated that they cannot *proprio motu* bar or act as an impediment to the appointment of counsel or a team member if counsel with carriage over the matter, and who has the sole authority to make such appointments, insists on the appointment' (ICC-02/05-03/09-160-Conf-Exp-AnxC, cited in ICC-02/05-03/09-168, fn 15).

Yillah can be considered 'defence counsel [...] practising at the [...] Court' for the purposes of the Code of Conduct and that as such, he was subject to that Code. However, the Chamber also noted that, pursuant to Article 16(1) of the Code of Conduct, the primary responsibility for avoiding or addressing a conflict of interest lies with individual counsel, although in case of a dispute the Chamber has the responsibility of resolving the matter in order to facilitate the fair conduct of proceedings.<sup>1981</sup>

Article 12(1)(b) of the Code of Conduct states that appointment of counsel shall be barred if counsel was (i) involved or (ii) privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The Chamber noted that the first alternative provided herein does not apply to the current instance, as the Prosecution acknowledged Yillah was not involved in the Banda & Jerbo case during his employment with the OTP.<sup>1982</sup> The Chamber then examined the second issue, holding that substantial confidential information was not necessary to satisfy this requirement and that the appropriate test was whether Yillah has knowledge of more than de minimis confidential information of relevance to the case which a member of the defence team should not possess. The Chamber noted that the Prosecution's claims regarding Yillah's access to confidential information were general and not based on any specific evidence or supporting material. Although Yillah's employment with the OTP may have given him an insight into the functioning of that office, the Prosecution had done nothing more than suggest he had any knowledge or confidential information relating to this specific case.<sup>1983</sup> In the absence of any reason to doubt Yillah's integrity, the Chamber was entitled to rely on his clear assertions. Therefore, the Chamber concluded that there were no persuasive indications that a conflict of interest existed in the present case or that Yillah's appointment would be prejudicial to the proceedings. The Prosecution's motion to invalidate his appointment was therefore denied.

1981 ICC-02/05-03/09-168, paras 11-12.

1982 ICC-02/05-03/09-168, para 14.

1983 ICC-02/05-03/09-168, para 21.

On 6 July, the Prosecution filed for leave to appeal this decision on the following two grounds:<sup>1984</sup>

- whether, as a matter of law, prosecution lawyers may join a defence team for a case which was open at the time that person worked for the OTP, or whether they should be barred from taking up employment with the defence for a period of time no less than a year (given that the Prosecution argued all former prosecution lawyers have a conflict of interest *per se*); and
- whether the Chamber had properly considered and weighed the prosecution's claim that Yillah was privy to confidential prosecution information against Yillah's assertion that he was unaware of any confidential information relating to the Banda & Jerbo case.

The defence responded on 8 July 2011, opposing leave to appeal and arguing that the Prosecution application did not satisfy the standard for an appealable issue under Article 82(1)(d).<sup>1985</sup> On 13 July 2011, the Chamber granted the Prosecution leave to appeal only the first issue, which it considered to satisfy the requirements for an 'appealable issue' under Article 82(1)(d).<sup>1986</sup> As regards the Prosecution's second proposed ground of appeal, the Chamber held that the Prosecution's disagreement with the Chamber's conclusion on this matter did not give rise to an appealable issue under Article 82(1)(d), as the Appeals Chamber had previously held that an appealable issue is not merely one over which there is disagreement or conflicting opinions. The Prosecution was therefore granted leave to appeal the first issue, but not the second. At the time of writing, no decision has yet been issued on this appeal.

1984 ICC-02/05-03/09-173.

1985 ICC-02/05-03/09-175.

1986 ICC-02/05-03/09-179.

## Kenya

### *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*

When it became aware that Essa Faal, previously employed by the Office of the Prosecutor, had been appointed to the Muthaura Defence team, Pre-Trial Chamber II on its own motion initiated proceedings to examine the possible invalidation of his appointment in June 2011. The Chamber stated that this assessment was ‘driven by the fact that the Chamber is keen to preserve the integrity of the proceedings to the effect that they are conducted in a fair and transparent manner, respecting the rights of both parties involved’.<sup>1987</sup> Accordingly, on 28 June, the Chamber requested the Prosecutor, the Defence for Muthaura and the Registrar to submit observations on a possible impediment to Faal’s appointment as counsel for the Defence.<sup>1988</sup> On 1 July the Prosecutor confidentially submitted information regarding the existence of a conflict of interest.<sup>1989</sup> The Registry also filed confidential observations on 1 July.<sup>1990</sup> On 8 July 2011 the Defence requested the Chamber to dismiss the objections.<sup>1991</sup> On 14 July, after having been granted leave to reply on 12 July, the Prosecutor reiterated to the Chamber the request to invalidate Faal’s appointment.<sup>1992</sup>

Before joining the Muthaura Defence team, Faal held an important leadership position within the Office of the Prosecutor as Investigations Team Leader of the Darfur Team, and enjoyed a rapid promotion within two years to a P-5 Senior Trial Lawyer in charge of the Darfur cases, a position he held until 31 March 2011. Three weeks later, on 22 April, he informed the Deputy Prosecutor that he had joined the Muthaura Defence team. On 26 May 2011, less than six weeks after having left the Office of the Prosecutor, he was officially appointed to the Defence team by the CSS despite the Prosecution’s objections. Faal is the most senior lawyer to leave the Office of the Prosecutor and join an ICC Defence team. As a member of the Muthaura Defence team (Kenya Situation) Faal works for a Defence team in a different Situation than the Situation he

was responsible for in his previous position within the Office of the Prosecutor (the Darfur Situation). However, in his current capacity on the Muthaura Defence team he works closely with Karim A.A. Khan, QC, who is the Lead Defence Counsel in two ICC Darfur-related cases (Abu Garda and Banda & Jerbo).

On **20 July 2011**, Single Judge Tendaflilova issued the decision on the question of the possible invalidation of Faal’s appointment.<sup>1993</sup> At the outset, the Single Judge reiterated Article 12(1)(b) of the Code of Conduct which provides that a counsel shall not represent a client in a case, where he/she ‘was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear’. Although no definition is provided in the Code of Conduct for ‘privy to confidential information’, following the previous decisions by Trial Chamber III in Bemba and Trial Chamber IV in Banda & Jerbo (discussed above), the Single Judge observed that to warrant the invalidation of an appointment of counsel, counsel must have ‘became aware of more than *de minimis* confidential information’, ie he/she must have been aware of confidential information of some significance to the case *sub judice*.<sup>1994</sup>

Having analysed the submissions from the parties and the Registry, the Single Judge was not persuaded by the Prosecutor’s submission that Faal ‘had ongoing access to confidential ex-parte information [...] to which the Defence Team was excluded’<sup>1995</sup> because it failed to present the Chamber with sufficient proof that Faal was aware of confidential information concerning the case against Muthaura *et al.*<sup>1996</sup> The Single Judge also found that the Prosecutor’s submission also failed to prove that Faal was aware of more than the *de minimis* confidential information.<sup>1997</sup> The Single Judge emphasised that the assertion by the Prosecution that because of Faal’s position and his relationship with colleagues he was inevitably exposed to, and consulted on, confidential material rested on speculation rather than actual proof.<sup>1998</sup>

The Single Judge also considered that there is no general rule under the Court’s statutory provisions prohibiting a staff member from the Office of the Prosecutor to join a Defence team, or setting a time bar for such involvement.<sup>1999</sup> The Single Judge also noted that her conclusion that Faal was not aware of

1987 ICC-01/09-02/11-185, para 11.

1988 ICC-01/09-02/11-138-Conf, cited in ICC-01/09-02/11-185.

1989 ICC-01/09-02/11-150-Conf, cited in ICC-01/09-02/11-185.

1990 ICC-01/09-02/11-149-Conf, cited in ICC-01/09-02/11-185.

1991 ICC-01/09-02/11-163-Conf-Exp, cited in ICC-01/09-02/11-185.

1992 ICC-01/09-02/11-172-Conf-Exp, cited in ICC-01/09-02/11-185.

1993 ICC-01/09-02/11-185.

1994 ICC-01/09-02/11-185, para 17.

1995 ICC-01/09-02/11-185, para 18 citing ICC-01/09-02/11-150-Conf, paras 2, 7, 10.

1996 ICC-01/09-02/11-185, paras 19-20.

1997 ICC-01/09-02/11-185, para 21.

1998 ICC-01/09-02/11-185, para 23.

1999 ICC-01/09-02/11-185, para 27.



more than the *de minimis* confidential information is supported by the Registry's Report. Nonetheless, the Single Judge cautioned the Defence that, although Faal is entitled to continue his representation, the Chamber shall keep the issue under continuing review.<sup>2000</sup> Should it become clear throughout the proceedings that Faal is indeed aware of substantial confidential information, the Chamber 'shall not hesitate to invalidate his appointment'.<sup>2001</sup>

On 26 July 2011, the Prosecution requested leave to appeal two specific issues arising from the Single Judge's decision: (i) whether as a matter of law, prosecution lawyers may join a defence team in a case that was open at the time when the person worked for the prosecution; and (ii) whether the correct test to determine that person is 'privity to confidential information' under Article 12(1)(b) [of the Code of Professional Conduct] is whether that person has become aware of more than *de minimis* confidential information related to the relevant case.<sup>2002</sup> The Prosecution submitted that the matter should be sent to the Appeals Chamber for immediate resolution given the potentially irreparable impact on the fairness and integrity of the proceedings.<sup>2003</sup> In its request for leave to appeal, the Prosecution reiterated that 'because of the size and the operational methods of the Office of the Prosecution (and in particular the Prosecution Division), any lawyer working there will be unavoidably exposed to information of a privileged nature in all ongoing cases, including facts, strategy issues, internal concerns, and legal issues'.<sup>2004</sup> In addition, because of the seniority of his position within the Office of the Prosecutor, many of the OTP's more junior staff relied upon his expertise and sought his advice on various matters. Leave to appeal was granted on 18 August 2011.<sup>2005</sup> At the time of writing, the Appeals Chamber has not yet issued a decision on this appeal.

## Legal aid for Defence in the Lubanga case

As discussed in the section on the **ASP – Budget** above, pursuant to Regulations 83, 84 and 85 of the Regulations of the Court and Regulations 113 and 130-139 of the Regulations of the Registry, the Registry shall provide legal assistance to all persons with insufficient means to pay for their legal counsel. Regulation 83 of the Regulations of the Court provides that legal aid for the defence 'shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances'.<sup>2006</sup> On 31 March 2006, the Registry provisionally found Lubanga fully indigent under Regulation 85(1)<sup>2007</sup> of the Rules and Regulations of the Court, and determined that the cost of his defence were to be born by the Court's legal aid scheme.<sup>2008</sup>

On 22 July 2011, the Registry communicated a decision by letter to the Defence team of Lubanga substantially reducing the resources available to the Lubanga Defence following the closing arguments in the case at the end of August 2011.<sup>2009</sup> The Registry proposed to cease all payments to the Lubanga Defence as of 30 August 2011, save for those of lead Defence counsel Mabilile, and requested the team to vacate one of their offices at the Court, leaving the Defence team with only one office. In case an appeal is filed by one

2000 ICC-01/09-02/11-185, para 30.

2001 ICC-01/09-02/11-185, para 30.

2002 ICC-01/09-02/11-195.

2003 ICC-01/09-02/11-195, para 3.

2004 ICC-01/09-02/11-195, para 16.

2005 ICC-01/09-02/11-253.

2006 Regulation 83(1), Regulations of the Court.

2007 Regulation 85(1) of the Regulations of the Court provides that 'the Registrar shall decide within one month of the submission of an application or, within one month of expiry of a time limit set in accordance with the Regulations of the Registry, whether legal assistance should be paid by the Court. The decision shall be notified to the applicant together with the reasons for the decision and instructions on how to apply for review. The Registrar may, in appropriate circumstances, make a provisional decision to grant payment of legal assistance.'

2008 ICC-01/04-01/06-63.

2009 ICC-01/04-01/06-2790-Anx1-tENG.

of the parties to the proceedings, the Registry limited Lubanga’s legal assistance to one lead counsel, a legal assistant and a case manager.<sup>2010</sup> The Registry indicated that the services of the OPCD would remain at the disposal of the Lubanga Defence.

The Defence notified the Chamber of the Registrar’s decision on 5 August and, pursuant to Regulation 135(2) of the Regulations of the Registry,<sup>2011</sup> filed a request for review of that decision on 19 August 2011.<sup>2012</sup> The Defence submitted that the decision by the Registry was in violation of Article 67(1) of the Rome Statute. The Defence reiterated that the Court’s legal aid system is premised on equality of arms, objectivity, transparency, continuity and economic need. Under these principles, the Defence argued that the ‘trial’ begins when the case has been transmitted to a Trial Chamber and concludes only with the final judgement by that Trial Chamber, not with the closing arguments by the parties and participants.<sup>2013</sup> The Defence stated that the Registry’s decision of 22 July in effect dissolves the Defence team before the end of trial.<sup>2014</sup> Taking note that the Office of the Prosecutor’s team is not subject to similar cuts, Lead Defence Counsel Mabilille requested that a reduced team, consisting of a lead counsel, an associate counsel and two legal assistants remains in place for the remainder of the trial.<sup>2015</sup>

On **30 August 2011**, Trial Chamber I rejected the Registry’s decision of 22 July 2011.<sup>2016</sup> The Chamber confirmed the Defence submission that the trial ‘only comes to an end when the Article 74, 75 and 76 decisions<sup>2017</sup> have been delivered’. The Chamber confirmed that the accused enjoys his full rights under Article 67 of the Rome Statute at least until the end of that phase, including his right to legal assistance. The Chamber noted that ‘the overarching consideration in this context is the accused’s right to a fair trial under Article 67 of the Statute’ rather than, as the Registrar contends, the maintenance of the Court’s limited resources.<sup>2018</sup> The Chamber also noted that ‘if the accused’s right to an effective defence is infringed, a fair trial for the accused is no longer possible.’<sup>2019</sup> Accordingly, the Chamber instructed the Registry to retain the Defence team of lead counsel, associate counsel and two legal assistants until the Chamber has rendered its Article 74, 75 and 76 decisions; to ensure that the members of the defence team continue to have electronic access to their own files and evidence; reappraise the team’s office space requirements; and ensure that the defence team has access to the accused.<sup>2020</sup>

2010 ICC-01/04-01/06-2790-Anx1-tENG, p 3.

2011 Regulation 135(2) provides that ‘within 15 calendar days of notification, counsel may request the Chamber to review any decision taken under sub-regulation 1’.

2012 ICC-01/04-01/06-2790-tENG.

2013 ICC-01/04-01/06-2790-tENG, para 18.

2014 ICC-01/04-01/06-2790-tENG, paras 22-24.

2015 ICC-01/04-01/06-2790-tENG, para 32.

2016 ICC-01/04-01/06-2800.

2017 Article 74 relates to the requirements for the final decision in a trial by a Trial Chamber; Article 75 deals with reparations for victims; Article 76 sets out the requirements for sentencing.

2018 ICC-01/04-01/06-2800, paras 53-54.

2019 ICC-01/04-01/06-2800, para 54.

2020 ICC-01/04-01/06-2800, para 63.

## Counsel for Witnesses

Although the Rome Statute itself does not include provisions regarding the potentially self-incriminating statements by witnesses, Rule 74(10) of the Rules of Procedure and Evidence provides that if a witness is at risk of self-incrimination, ‘the Chamber shall suspend the taking of the testimony and provide the witness with an opportunity to obtain legal advice if he or she so requests for the purpose of the application of the rule’. In addition, Rule 74 sets out specific guarantees the Chamber is at discretion to offer to these witnesses to ensure their continued testimony. For the first time in June 2009, in the Lubanga case Trial Chamber I stated that Prosecution Witness 15<sup>2021</sup> was entitled to full and proper legal advice regarding self-incrimination.<sup>2022</sup>

In 2011, the issue of counsel for witnesses arose in the case of Ruto, Kosgey and Sang in the Kenya Situation. The Ruto and Sang Defence each called two witnesses to testify during the confirmation of charges hearing. Two of these witnesses were at risk of self-incrimination and the Chamber accordingly ordered the Registry to appoint independent legal counsel to assist these witnesses and to provide them with legal advice as to their testimony and their rights under the Rome Statute.

On 12 August 2011, the VWU submitted to the Chamber the ‘Victims and Witnesses Unit’s Unified Protocol on the practises used to prepare and familiarise witnesses for giving testimony’.<sup>2023</sup> This Protocol set out that it is the responsibility of the Registry to arrange independent legal advice from a

qualified lawyer once it has been made aware that the witness may make self-incriminating statements. It is the responsibility of the party calling the witness to identify witnesses at risk of self-incrimination and to notify the VWU accordingly.<sup>2024</sup> The VWU subsequently notifies the CSS within the Registry, who will appoint a duty counsel from the Court’s List of Legal Counsel. The VWU, in turn, is responsible for facilitating the contact between the witness and his/her appointed duty counsel. The responsibility of the duty counsel is strictly limited to issues arising from self-incrimination and he/she cannot discuss other aspects of the witness’ testimony.<sup>2025</sup>

In the decision on the schedule for the confirmation hearings of 25 August, the Single Judge stated that ‘should one or more of the witnesses desire to be assisted by way of legal advice, the Registrar shall arrange for the legal adviser to provide the necessary support for the witnesses from outside the courtroom’.<sup>2026</sup> On 30 August 2011 the Chamber received the ‘Victims and Witnesses Unit’s information report on the preparation and familiarisation of *viva voce* witnesses in the field’,<sup>2027</sup> in which the Ruto and Sang Defence teams indicated that they want to request legal assistance for the benefit of witnesses KEN-D09-0001 and KEN-D11-P-0001, pursuant to Rule 74<sup>2028</sup> of the Rules of Procedure and Evidence.

In a decision on **30 August 2011**, Single Judge Trendafilova, recalling Rule 74 of the Rules of Procedure and Evidence, ordered the Registrar to provide witnesses KEN-D09-0001 and KEN-D11-P-0001 with independent legal advice from a qualified lawyer, before the start of the courtroom session when the witnesses are expected to testify and also during any break in the course of the confirmation of charges hearing, and ordered the Registrar to arrange the necessary facilities for consultation between witnesses and legal adviser.<sup>2029</sup> The Single Judge also instructed the Registrar to be ready to provide independent legal advice, under identical conditions set out in paragraph 10 and the Unified Protocol, to any other witnesses who may require it in the present case.<sup>2030</sup>

2021 Witness 15 testified on 16 June 2009 and made allegations against a Prosecution intermediary (Intermediary 316). He claimed that the statement he gave to Prosecution investigators was incorrect and that he had been persuaded by Intermediary 316 to tell lies. Several other witnesses also claimed interference from intermediaries in their testimony and the use of intermediaries emerged as a live issue in the Lubanga case. For a more detailed discussion of these issues, see *Gender Report Card 2010*, p 139-144.

2022 ICC-01/04-01/06-T-192-Red-ENG, p 13 lines 2-19.

2023 ICC-01/09-01/11-259. The same protocol was filed in the case against Muthaura *et al* (ICC-01/09-02/11-260-Anx), however no witnesses appear to have been at risk of self-incrimination in this case.

2024 ICC-01/09-02/11-260-Anx, para 56.

2025 ICC-01/09-02/11-260-Anx, para 63.

2026 ICC-01/09-01/11-294, para 22.

2027 ICC-01/09-01/11-303-Conf-Exp, this filing does not appear to be part of the public record of the case.

2028 Rule 74 deals with potential self-incrimination by witnesses.

2029 ICC-01/09-01/11-304, para 10.

2030 ICC-01/09-01/11-304, para 11.

# Judiciary

## Key Decisions CONTINUED

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### Protection and Protective Measures

**Article 68(1) of the Rome Statute requires that the Court ‘take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’. In doing so, it must take into account all relevant factors, including age, gender, and health, as well as the nature of the alleged crime, particularly where that crime involves sexual or gender violence or violence against children.<sup>2031</sup> The Court’s actions must not be ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.**

Pursuant to Article 43(6), the Registry of the Court established the VWU to meet this obligation. The VWU develops protective measures and security arrangements and provides counselling and other assistance to victims, witnesses and others that may be at risk as a result of their testimony before the Court. As a neutral organ of the Court, the VWU provides resources to both the Prosecution and the Defence during all phases of the trial proceedings.

The protection of victims and witnesses at the ICC involves a variety of practices. Of crucial importance are in-court protective measures, including voice and image distortion and *in camera* hearings,<sup>2032</sup> which protect the anonymity of witnesses during their testimony. The temporary and permanent redaction and non-disclosure of identifying information of victims, witnesses, sources of information and intermediaries to the Defence or to the wider public are also aimed to protect

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2031 Article 68(1) of the Rome Statute.

2032 These measures are provided under Article 68(2) of the Rome Statute and Rules 87(3) and 88(2) of the Rules of Procedure and Evidence.

those associated with the Court's activities. Out-of-court protection measures can include relocation and placement in a safe house, support in remaining in the location they reside in, as well as the manner in which victims are contacted and questioned in preparation for trial. The periodic consideration of the interim release of an accused, required by the Rome Statute, also raises protection issues throughout a trial's proceedings.

### In-court measures

In the three trials currently underway, two of which include charges and therefore victims and witnesses addressing to sexual violence, all the Chambers have utilised protective measures. Protective measures are thus in place to protect vulnerable witnesses, including witnesses of sexual violence, to testify with confidence in their physical and psychological safety.<sup>2033</sup> Greater use of in-court protective measures by the ICC reflects the judicial exercise of statutory obligations outlined in the Rules of Procedure and Evidence of the Rome Statute, particularly Rules 70, 71, 72, 87 and 88, concerning, *inter alia*, *in camera* hearings and the use of special measures. As noted by Brigid Inder in a presentation at UNHCHR in May 2011:

This may reflect a change in legal practice towards more compassionate and effective soliciting of testimony; it may also reflect greater understanding and legal evolution in international criminal law regarding issues of consent in coercive environments such as armed conflicts, which makes combative challenges along these lines redundant.

2033 'Presentation by Brigid Inder to the UNHCHR Expert Meeting on Gender and Witness and Victim Protection', *UN High Commissioner for Human Rights*, Geneva, 26-27 May 2011.

Information from the Registry indicates that as of June 2010, 12 of the 15 (80%) Prosecution witnesses (including expert witnesses) who have testified in the Katanga & Ngudjolo case, the first case to include crimes of gender-based violence, have benefited from some degree of in-court protective measures.<sup>2034</sup> Similarly, according to the International Bar Association (IBA), 22 of 28 witnesses in the Lubanga trial testified subject to protective measures and either partially or entirely in closed session.<sup>2035</sup> In fact, the extensive use of *in camera* hearings resulted in a 2010 Defence request in the Katanga & Ngudjolo case that the Trial Chamber review its high use of closed and private sessions, and to take steps to mitigate their effect.<sup>2036</sup>

2034 ICC-01/04-01/07-2255.

2035 'The ICC's Trials: An Examination of Key Judicial Developments at the International Criminal Court between November 2009 and April 2010', *International Bar Association ICC Programme Report*, International Bar Association's Human Rights Institute, May 2010, p 10, available at <[http://www.ibanet.org/Human\\_Rights\\_Institute/ICC\\_Outreach\\_Monitoring/ICC\\_IBA\\_Publications.aspx](http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx)>, last visited on 31 October 2011.

2036 ICC-01/04-01/07-215. For more information about this challenge, see *Gender Report Card 2010*, p 162-163.

### *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*

As explained in greater detail in the **Victim Participation** section, Trial Chamber II took steps to ensure crucial in-court protection measures to victims authorised to testify as witnesses in the Katanga & Ngudjolo case. This decision followed the first authorisation of victims to appear as witnesses by Trial Chamber I in the Lubanga case in June 2009, after the issuance of a 2008 Appeals Chamber decision on the modalities of victim participation.<sup>2037</sup> The three victim-witnesses were granted protective measures in the form of image and voice distortion. In the Katanga & Ngudjolo case, on 27 January 2011, as part of a lengthy decision authorising four participating victims to testify as witnesses, Trial Chamber II affirmed the use of protective measures, including voice and image distortion, partial *in camera* hearings and the maintenance of their anonymity.<sup>2038</sup> The Chamber found that the victims, all Hema women who lived in Bogoro at the time of the attack, were likely to present incriminating evidence and thus be objects of reprisal by those supporting the accused. These witnesses expressed fears of intimidation if the fact of their testimony before the ICC became known to members of their family or community, compromising their ability to speak with the necessary freedom before the Court.

Despite the lengths to which the Chamber went to ensure their meaningful participation in the trial and their security, upon the request of their legal representative, it later authorised the withdrawal from the list of witnesses of three victims included in the decision for lack of credibility.<sup>2039</sup> The minor victim, who had been called to testify by the Prosecution, and her representative, who had also been called as a Chamber witness to testify regarding questions beyond the personal interest of the minor, were withdrawn as a result of contradictions in the representative's statements, and concerns about the

2037 ICC-01/04-01/06-2002-Conf, as cited in ICC-01/04-01/06-2032-Anx, para 39. A public redacted version of the decision became available on 9 July 2009, ICC-0/04-01. For more information on this decision, see *Gender Report Card 2010*, p 137.

2038 The initial decision was filed confidentially. A public redacted version of this decision was issued on 22 February 2011: ICC-01/04-01/07-2663-Red.

2039 ICC-01/04-01/07-2699-Red; ICC-01/04-01/07-2674-tENG. As described in greater detail in the section on *Victim Participation*, the Chamber authorised the withdrawal of victims a/0381/09 and a/0363/09 (who is a minor) and also withdrew a/0363/09's representative pan/0363/09. The remaining two victims a/0018/09 and a/0191/08 testified on 21 – 25 February 2011.

veracity of the photograph of the victim's allegedly deceased parents attached to her application to participate.<sup>2040</sup> After its disclosure by the Victim's Legal Representative, the Prosecution provided information that the photo allegedly taken during the 24 February Bogoro attack depicting the dead bodies of the family members of the victim, actually depicted the aftermath of the June 2003 attack on the village of Kasenyi. The relevant footage in the photo can be seen in several portions of a video disclosed by the Prosecution as incriminating evidence on 29 January 2009.<sup>2041</sup> In addition to the withdrawal of the minor victim-witness, her representative who had been called as a witness of the Chamber was also withdrawn.<sup>2042</sup> The other victim was withdrawn from the list of witnesses, for reasons kept confidential in the Court filings.<sup>2043</sup> The Chamber requested that the LRV and the Prosecution appropriately redact all of the filings related to these two victims to ensure their accessibility to the public.<sup>2044</sup>

### *The Prosecutor v. Jean-Pierre Bemba Gombo*

Vulnerable witnesses in the Bemba case were accorded a combination of in-court protective measures. They received face and voice distortion, use of a pseudonym and were afforded the presence of a support person from the VWU as well as the presence of a psychologist to assess the witness during testimony. Trial Chamber III authorised closed-session testimony on an exceptional basis<sup>2045</sup> and three witnesses testified almost completely in closed session.<sup>2046</sup> In addition, Presiding Judge Steiner reminded the parties several times to ask short, simple and open-ended questions so as not to unnecessarily upset or re-traumatise the witnesses. These issues are described in more detail in the **Trial Proceedings** section of this Report.

2040 ICC-01/04-01/07-2699-Red.

2041 ICC-01/04-01/07-2688-Conf.

2042 ICC-01/04-01/07-2699-Red.

2043 ICC-01/04-01/07-2674-tENG.

2044 The Prosecution and the Legal Representative of Victims complied with this order in February 2011.

2045 ICC-01/05-01/08-T-33-Red-ENG; see also ICC-01/05-01/08-1023.

2046 Witnesses 75, 63 and 169.

## Disclosure of identifying information

The redaction or non-disclosure of identifying information has been used extensively by all Chambers as a measure of protection for victims, witnesses, sources, intermediaries and persons at risk on account of the activities of the Court. According to the Rules of Procedure and Evidence, redactions are exceptional measures that may be undertaken only when disclosure of information could prejudice further or ongoing investigations or threaten the security of witnesses, victims or their family members. A determination of whether redactions are necessary requires balancing competing principles: the right of the accused to a fair trial, the Chamber's duty to protect the safety and well-being, dignity and privacy of victims and witnesses, and the Prosecution's obligation to disclose exculpatory material to the Defence.

Trial Chambers I and II's use of redactions to protect victims and witnesses was described extensively in the *Gender Report Card 2009*.<sup>2047</sup> Since that time, the standards for the use of redactions had seemed somewhat settled. However, the application and lifting of redactions in the unfolding jurisprudence of the Court continue to have important implications for protection.

### *The Prosecutor v. Thomas Lubanga Dyilo*

#### *The disclosure of previously redacted information*

As described in the **Trial Proceedings** section of this Report, the abuse of process claim<sup>2048</sup> filed by the Lubanga Defence resulted in Trial Chamber I issuing a series of decisions between December 2010 and March 2011 that required the Prosecution to delete redactions from previously disclosed evidence.<sup>2049</sup> Although the Chamber cautioned that this information should not be disclosed beyond the core Defence team, the decision led to the names of victims, witnesses, and their families being disclosed to the Defence.<sup>2050</sup> Where possible, the parties or the VPRS met with victims to determine their views on the disclosure of their identities.<sup>2051</sup> The OPCV objected to the disclosures because of security concerns not only for the victims identified, but also for those participating anonymously, including victims participating in the Katanga & Ngudjolo proceedings before Trial Chamber II.<sup>2052</sup> Subsequently, in June 2011, Trial Chamber I ruled that the previously-redacted names of four victims must be disclosed to the Defence as they were necessary for the preparation of its defence, despite the fact that the VWU had been unable to locate them to discuss this possibility.<sup>2053</sup>

### *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*

#### *Anonymity maintained for the representatives of deceased victims*

In April 2011, Trial Chamber II applied protection measures to representatives of deceased participating victims in the Katanga & Ngudjolo case. The Chamber held that the protective measures granted to participating victims also applied to those participating in the name of deceased victims, including anonymity *vis-à-vis* the public.<sup>2054</sup> At the same time, the Chamber noted that participating victims have progressively consented to disclose their identities to the parties.

Prior to issuing this decision, the Chamber had maintained the anonymity of the deceased victims *vis-à-vis* the parties until their relations had decided whether to pursue their claims. It had also ordered

2048 ICC-01/04-01/06-2690-Red.

2049 ICC-01/04-01/06-2586-Red; ICC-01/04-01/06-2597; ICC-01/04-01/06-2656; ICC-01/04-01/06-2662.

2050 ICC-01/04-01/06-2597-Red.

2051 ICC-01/04-01/06-2586-Red.

2052 ICC-01/04-01/06-2586-Red.

2053 ICC-01/04-01/06-2750.

2054 ICC-01/04-01/07-2827.

2047 *Gender Report Card 2009*, p 118 – 125.

their legal representatives to indicate whether their families agreed to disclose the deceased victims' identities to the parties, and whether they planned to request protective measures.<sup>2055</sup> Following agreement by the family representatives of the deceased victims to disclose both their own and the victims' identities to the parties, the Chamber authorised the representatives designated by the families of two of the deceased victims to resume the victims' actions, and ordered the Registry to disclose their identities to the parties.<sup>2056</sup> It reserved its decision regarding the other two victims, pending the provision of additional information.

***Prosecution's appeal on the Protocol on investigations in relation to witnesses benefiting from protective measures rejected***

In September 2010, Trial Chamber II rejected the Prosecution's request to appeal its April 2010 order to implement the Protocol on investigations in relation to witnesses benefiting from protective measures.<sup>2057</sup> The Protocol provides for the non-disclosure of the names of protected witnesses to third parties during the course of investigations. In April 2010, the Chamber had approved the Protocol,<sup>2058</sup> developed by the VWU in consultation with the Defence teams and legal representatives of victims. As described by the Chamber, the 'language of the Protocol places sufficient emphasis on the fact that the names of protected witnesses should be disclosed only in exceptional circumstances' and 'prohibits disclosure to a third party of the fact that a protected witness is a witness or is involved with the Court'.<sup>2059</sup> In its approval, the Chamber expanded application of the Protocol as drafted from protected witnesses to include protected victims as well.<sup>2060</sup>

In its request to appeal the decision, the Prosecution had argued that the Protocol did not provide sufficient protection for witnesses because it was not preceded by a case-by-case evaluation of the risks to them.<sup>2061</sup> While determining that the procedure set forth in the Protocol properly balanced the need to secure the protection of witnesses with the rights of the Defence, in its decision to reject the application to appeal, the Chamber expressly noted that the Prosecution was free to follow more stringent guidelines. In denying its application to appeal, the Chamber did not address the Prosecution's arguments, instead basing its ruling

on the fact that its decision to implement the Protocol was well within its discretion and that the Protocol had been developed with extensive reliance on the expertise of the VWU.<sup>2062</sup>

***Redactions applied to Defence sources of information***

Redactions were also used to protect Defence sources in the Katanga & Ngudjolo trial. Trial Chamber II authorised the permanent redaction of the source of three items of evidence introduced by the Katanga Defence after finding that no less restrictive measures would suffice.<sup>2063</sup> The Chamber found the source to be a person 'at risk on account of the activities of the Court', who provided the items of evidence 'in violation of strict confidentiality obligations' after the Defence was unable to obtain the documents from the DRC authorities.

2055 ICC-01/04-01/07-T-104-Red-FRA, p 33-34.

2056 ICC-01/04-01/07-3018.

2057 ICC-01/04-01/07-2375.

2058 ICC-01/04-01/07-2047-TENG.

2059 ICC-01/04-01/07-2047-TENG, paras 10-11.

2060 ICC-01/04-01/07-2047-TENG, para 15.

2061 ICC-01/04-01/07-2047-TENG.

2062 ICC-01/04-01/07-2375.

2063 ICC-01/04-01/07-3057.



### *The Prosecutor v. Callixte Mbarushimana*

On 23 August 2011, Single Judge Monageng partially rejected a Defence request for disclosure of certain information regarding alleged victims of sexual violence.<sup>2064</sup> The Defence had requested information on the age of Witness 694, the details of those present during the interview with that witness, and all psycho-social assessments or similar pre-interview materials relating to victims or witnesses of sexual violence whose evidence was to be relied on during the confirmation of charges hearing. Judge Monageng held that disclosing the age of Witness 694 could, if considered in the context of the events and details described in her statement, lead to her identification, which the Pre-Trial Chamber had previously held would entail an unjustifiable risk to her safety.<sup>2065</sup> It also found that the Defence could raise concerns about any connection between her reliability and her age without exact reference to the latter. In its reply to the Defence request for disclosure, the Prosecution surprisingly did not object as a matter of principle to the disclosure of the identities of Prosecution staff for the interview of Witness 694. It did, however, contest the relevance and the late submission of the Defence request, and asserted that the Defence did not proffer any justification. The Prosecution's submission was silent as to the disclosure of the identities of other persons present in the interview. Single Judge Monageng therefore authorised the disclosure of the names and functions of Prosecution staff present at the interview, and ordered the Prosecution to either submit a request to redact information pertaining to identities of the other persons present, or to disclose it to the Defence.<sup>2066</sup> None of the subsequent, related filings have been made public as of the writing of this Report. The disclosure of the identities of OTP Staff present during witness interviews to the Defence at this stage of proceedings and as a result of a request by the Defence for such information, is a first before the ICC.

However, in relation to the question of access to psycho-social assessments of victims and witnesses of sexual violence, which the Defence had requested in order to identify any inconsistencies between the version of events related by the victim or witness to a psychologist or counsellor and the version provided to Prosecution investigators, the Judge found that the Defence request was predicated on a 'biased assumption'.<sup>2067</sup> Judge Monageng held that this request, 'aimed at exploiting the psycho-social assessments of vulnerable witnesses and using

these assessments to contest the credibility of these witnesses [was] entirely inappropriate and, if granted, would tend to subvert the necessary purpose served by the carrying out of such assessments'.<sup>2068</sup> The Judge therefore rejected the Defence request for disclosure of this information. In a decision of 27 September 2011, the Defence application for leave to appeal this issue was rejected by the Pre-Trial Chamber.<sup>2069</sup>

### *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*

In the proceedings against Ruto, Kosgey and Sang, on 5 August 2011, Pre-Trial Chamber II issued a decision, appointing a common legal representative for all victims accepted to participate<sup>2070</sup> and directing her to consult with her clients about the possible disclosure of their identity to the Defence. On 25 August 2011, the Common Legal Representative of Victims, Sureta Chana, filed her observations.<sup>2071</sup> LRV Chana submitted that a total of 98 victims were consulted and that all declared that they did not want their identities to be disclosed to the Defence.<sup>2072</sup> All victims expressed grave concerns about their security situation, citing especially both the upcoming General Elections in 2012 and the Chamber's impending decision on the confirmation of charges. Fifty-five of the consulted victims stressed that they were still 'living amongst the enemy' and lived in constant fear of being targeted for cooperating with the ICC.<sup>2073</sup>

2064 ICC-01/04-01/10-386.

2065 ICC-01/04-01/10-386, p 4, and ICC-01/04-01/10-268.

2066 ICC-01/04-01/10-386, p 5.

2067 ICC-01/04-01/10-386, p 6.

2068 ICC-01/04-01/10-386, p 6.

2069 ICC-01/04-01/10-443.

2070 ICC-01/09-01/11-249.

2071 ICC-01/09-01/11-292.

2072 ICC-01/09-01/11-292, para 5.

2073 ICC-01/09-01/11-292, para 7.

Crucially, 58 victims consulted informed the LRV that many people in their communities do not understand the difference between witnesses and victims and that as such, they risk being seen as materially aiding the Prosecution's case against the three individuals.<sup>2074</sup> The LRV further observed that 60 victims did not state any security concerns regarding the disclosure of their identities. She noted that after consulting with 21 of these victims, it was clear that these responses stemmed from a reckless disregard for their personal safety, or from an essential misunderstanding of the question and/or the need for disclosure. Many victims indicated that they thought disclosure to be a necessary component for participation and/or reparation.<sup>2075</sup> This suggests that insufficient or incomplete outreach conducted by the Court through the VPRS and the PIDS can significantly and directly increase security concerns for victims participating in the ICC trials. The Court should ensure that its 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.

LRV Chana noted that she had not been able to contact all victims within the time schedule proposed by the Chamber because of security concerns. She stressed that she had been informed by her local intermediaries that there are people in Kenya purporting to be ICC staff for the purposes of collecting information or spreading misinformation.<sup>2076</sup> This has resulted in the development of a climate of mistrust, which made it difficult to contact victims through the regular modes of communication such as email or telephone. Therefore, the LRV submitted that she has to meet individually with all of the victims she represents out of caution.<sup>2077</sup> Citing the above-mentioned security concerns, the LRV suggested that the identity of those victims with whom she had not yet consulted remain undisclosed to the public and the Defence until such time as they indicate their identities can be disclosed.<sup>2078</sup>

On 8 September 2011, LRV Chana spoke before the Pre-Trial Chamber regarding 'attempts [that] may be underway to create a climate of intimidation in Kenya towards those involved in proceedings before this court, especially Kalenjin and Nandi victims and indeed witnesses'.<sup>2079</sup> Reading from an e-mail she received from a field worker in Kenya, LRV Chana stated that Charles Keter, a Kenyan Member of Parliament who attended the hearings in The Hague, had threatened witnesses on a Kenyan radio station, notably Kass FM, by asserting that the case against the accused is 'pure falsehood hatched by PNU supporters'<sup>2080</sup> and that both those who have testified before the Court, whose identities he claimed to know, and those 'traitors' who remain at home 'will face unspecified consequences'.<sup>2081</sup> He named the 'traitors' as the Nandi, a subgroup of the Kalenjin ethnic group to which Ruto, Kosgey and Sang belong. According to a report made by one of the victims, Keter pronounced 'It is you Nandi people who are traitors of our people ... We will give them the treatment deserving of traitors'.<sup>2082</sup> LRV Chana noted that her clients were before the Court to 'make their contribution to the future of the communities but they look to the support mechanisms of the court to assist them to do so'.<sup>2083</sup>

2074 ICC-01/09-01/11-292, para 8.

2075 ICC-01/09-01/11-292, para 12.

2076 ICC-01/09-01/11-292, para 17.

2077 ICC-01/09-01/11-292, para 18.

2078 ICC-01/09-01/11-292, para 20.

2079 ICC-01/09-01/11-T-12-ENG, p 27 lines 1-3; and p 27-29.

2080 ICC-01/09-01/11-T-12-ENG, p 27 line 17.

2081 ICC-01/09-01/11-T-12-ENG, p 27 lines 22-25; p 28 lines 1-6.

2082 ICC-01/09-01/11-T-12-ENG, p 28 lines 14-25; p29 lines 1-4.

2083 ICC-01/09-01/11-T-12-ENG, p 29 lines 15-17.

### ***The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali***

On 12 September 2011 the Common Legal Representatives of Victims in the Muthaura, Kenyatta and Ali case submitted his observations on disclosure of the identity of his 233 clients after consultation with them. Similar to the submission by LRV Chana in the Ruto *et al* case, LRV Anyah stressed that many of his clients evidenced an ‘appreciable degree of anxiety regarding the security situation in Kenya and also expressed concerns about their personal security’.<sup>2084</sup> The LRV managed to consult with 94 of the 233 victims and none of them wished their identity to be disclosed to the Defence. The reason for this varies, but includes the current circumstances of many victims, who are IDPs facing critical needs for daily survival.<sup>2085</sup> Of those 139 victims with whom he did not consult, LRV Anyah recommended that the *status quo ante* be maintained, ie non-disclosure of their identity to the Defence.<sup>2086</sup> The LRV endeavoured to travel to Kenya after the confirmation hearing to consult with the remaining 139 victims and to inform the Chamber about their preferences by 31 October 2011.

Consistent with the Court’s prior jurisprudence, Pre-Trial Chamber II, in the early stage of the Muthaura *et al* and Ruto *et al* cases, requested an assessment by the VWU<sup>2087</sup> ‘with respect to the existence of an objectively justifiable risk to the safety of a witness and/or a family member of his, arising from the disclosure of identifying information to the Defence’.<sup>2088</sup>

### ***The Prosecutor v. Jean-Pierre Bemba Gombo***

In November 2010, Trial Chamber III issued directions on, *inter alia*, redactions to documentary evidence, to be decided on a case-by-case basis.<sup>2089</sup> In January 2011, the Chamber evaluated a request by the Prosecution to lift redactions from previously confidential information in witness statements related to the names of family members of witnesses or individuals who may have contributed to the Prosecution’s investigations.<sup>2090</sup> The Chamber analysed this request on a case-by-case basis by determining both ‘whether or not there is a risk to the security of the third parties concerned and whether or not they may benefit from protective measures other than redactions’.<sup>2091</sup>

2084 ICC-01/09-02/11-314, para 4.

2085 ICC-01/09-02/11-314, para 3.

2086 ICC-01/09-02/11-314, para 6.

2087 ICC-01/09-2/11-106; ICC-01/-09-01/11-103.

2088 ICC-01/09-02/11-106, para 5; ICC-01/-09-01/11-103, para 5.

2089 ICC-01/05-01/08-1023.

2090 ICC-01/05-01/08-977-Red.

2091 ICC-01/05-01/08-977-Red, para 9.

## Out-of-court protective measures

### Kenya Situation

#### Decisions on location of confirmation of charges hearings

The inability to ensure adequate protective measures was the basis for Pre-Trial Chamber II's decision not to hold the confirmation of charges hearings in situ in Kenya in both the Ruto, Kosgey and Sang,<sup>2092</sup> and Muthaura, Kenyatta and Ali<sup>2093</sup> cases. In both proceedings, the Chamber requested observations from all parties and participants on the possibility and feasibility of conducting the confirmation of charges hearing in Kenya, rather than at the seat of the Court in The Hague.<sup>2094</sup> Pursuant to Article 3(3) of the Statute<sup>2095</sup> and Regulation 100(1) of the Regulations of the Court,<sup>2096</sup> a Chamber may decide to sit elsewhere if it considers this to be in the interests of justice. This is the second time that the ICC has openly considered conducting proceedings in a State other than the Host State.<sup>2097</sup> In the Ruto, Kosgey and Sang proceedings, the Defence<sup>2098</sup> (with the exception of Kosgey<sup>2099</sup>), the Prosecution<sup>2100</sup> and the OPCV<sup>2101</sup> on behalf of the victim applicants all opposed the holding of confirmation hearings in Kenya, expressing concern about the security situation of victims and witnesses, and citing the inability of the Kenyan authorities to provide adequate assistance to conduct the hearings in Kenya. Similarly, in the Muthaura, Kenyatta and

2092 ICC-01/09-01/11-153.

2093 ICC-01/09-02/11-181.

2094 ICC-01/09-01/11-106 and ICC-01/09-02/11-102.

2095 Article 3 provides that the seat of the Court shall be in The Hague, the Netherlands. Subparagraph (3) provides that 'the Court may sit elsewhere, whenever it considers it desirable, as provided for in this Statute'.

2096 Rule 100(1) provides that 'in a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State'.

2097 In 2007, the Judges of Trial Chamber I examined the possibility of holding the trial against Lubanga in the DRC. See 'The ICC considers holding Lubanga trial hearing in DRC', *CICC*, 6 September 2007, available at <<http://www.iccnw.org/?mod=newsdetail&news=2025>>, last visited on 31 October 2011.

2098 ICC-01/09-01/11-122.

2099 ICC-01/09-01/11-121.

2100 ICC-01/09-01/11-127.

2101 ICC-01/09-01/11-126.

Ali proceedings, the Defence,<sup>2102</sup> the Prosecution<sup>2103</sup> and the OPCV,<sup>2104</sup> on behalf of the victim applicants, opposed the holding of confirmation hearings in Kenya, expressing the same security concerns. The Muthaura Defence suggested that the Court instead look into holding the confirmation hearing in other venues within the region, in particular on the premises of the International Criminal Tribunal for Rwanda (ICTR) in Tanzania, a neighbouring country.<sup>2105</sup> In a decision on 29 June 2011 in the Ruto *et al* case, and in a decision on 19 July 2011 in the Muthaura *et al* case, in preparation for the confirmation hearings, the Single Judge indicated that the Chamber will not consider further the option of holding confirmation hearings in Kenya.<sup>2106</sup>

### The Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui

#### Protocol for entering into contact with victims and potential witnesses

In light of the parties' and participants' inability to come to an agreement on a proposed Protocol for entering into contact with victims with legal representation, on 23 November 2010, Trial Chamber II set forth several modalities for contacting and questioning victims, and the disclosure of related documents.<sup>2107</sup> On 17 December 2009, Trial Chamber II had instructed the parties and participants to come to an agreement on the modalities of entering into contact with represented victims. However, the parties were unable to come to an agreement.

The proposed Protocol<sup>2108</sup> was based on Articles 15(1) and 28 of the Code of Professional Conduct for Counsel. Effectively, the Chamber's Decision on the modalities of entering into contact with victims contains all of the provisions of the proposed Protocol, except one. The Chamber apparently rejected paragraph 16 of the proposed Protocol, requiring the party meeting with the represented victim to furnish the legal representative with the victim's statement, transcripts of the interview and all documents obtained from the victim as a matter of course, except in cases where a refusal is based on *prima facie* just motives, such as prejudice to the investigation.<sup>2109</sup>

2102 ICC-01/09-02/11-119; ICC-01/09-02/11-120; and ICC-01/09-02/11-121.

2103 ICC-01/09-02/11-122.

2104 ICC-01/09-02/11-123.

2105 ICC-01/09-02/11-120, para 14.

2106 ICC-01/09-01/11-153, para 14; ICC-01/09-02/11-181.

2107 ICC-01/04-01/07-2571.

2108 ICC-01/04-01/07-2202-Anx1.

2109 ICC-01/04-01/07-2202-Anx1, para 16.

As summarised by the Chamber, the Prosecution did not object to the Protocol. Its observations were limited to emphasising the physical and psychological well-being of vulnerable victims in those cases in which the VWU is requested to perform an evaluation on the victim.<sup>2110</sup> The Katanga Defence requested that the Chamber reject the Protocol, asserting that the Defence should enter into direct contact with the victims themselves, rather than through their legal representatives, to set up interviews for questioning. It contended that the Code of Professional Conduct for Counsel should not apply to the legal representatives of victims. It also asserted that LRVs should not be present during the questioning of the victims, nor should the Defence be required to disclose related documents.<sup>2111</sup> The Ngudjolo Defence requested a delimiting of the rights and obligations of LRVs, who should not attempt to influence their clients in responding to the parties' questions.<sup>2112</sup>

The LRVs asserted that the Code of Professional Conduct for Counsel does apply to them, and that their obligations as counsel are not limited to seeking reparations, but apply at all stages of the proceedings. Specifically, they invoked Articles 15(1) and 28 of the Code of Professional Conduct for Counsel. Article 15(1) states: 'Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation'. Article 28 provides: 'Counsel shall not address directly the client of another counsel except through or with the permission of that counsel'. The Chamber noted that the VWU submitted recommendations, *inter alia*, that parties wishing to contact victims must respect recognised good practices in order to minimise the risk to victims.

At the outset of its analysis, Trial Chamber II found that pursuant to Article 1 of the Code of Professional Conduct for Counsel, it applies to legal representatives of victims. With respect to Article 28 of the Code, it noted that it has held on numerous occasions that contact with victims must be made through their counsel in order that the latter fully exercise their mandate to represent the victim's interests.<sup>2113</sup> The Chamber further agreed with the legal representatives of victims that their assistance and counsel is not limited to seeking reparations for damages, but concerns all stages of the proceedings and must be effective.

2110 ICC-01/04-01/07-2201.

2111 ICC-01/04-01/07-2251.

2112 ICC-01/04-01/07-2245.

2113 ICC-01/04-01/07-1731; ICC-01/04-01/07-T-104-Red-FRA, p 33-34; ICC-01/04-01/07-T-138-Red-FRA, p 8-9; ICC-01/04-01/07-T-141-Red-FRA, p 5-6 and 12-13.

The Chamber found that the Code of Professional Conduct for Counsel must be read in light of the Rome Statute and Rules. Victim participation must not be prejudicial to the accused, and as such legal representatives of victims must not act in any way prejudicial to the establishment of the truth and the right to a fair trial. Specifically, victim participation must not harm the Defence's right to silence or to conduct investigations with equality of arms. In this regard it highlighted Article 68(3) of the Statute, Rules 89-93 of the Rules of Procedure and Evidence, and its prior Decision on the modalities of victim participation.<sup>2114</sup> The Chamber called attention to its prior decisions on parties contacting witnesses not participating in the Court's Witness Protection Programme,<sup>2115</sup> the disclosure obligations imposed on the Defence,<sup>2116</sup> (the application of which should not be prejudiced by this decision), and to related decisions issued by Trial Chamber I in the Lubanga case.<sup>2117</sup> It found that imposing disclosure obligations on the Defence for related documents could harm its ability to conduct investigations and prepare its defence.

The Trial Chamber held that the party wishing to contact the victim must first notify the legal representative of victims, who must inform his/her client without delay. The legal representative must provide the victim with the necessary advice and assistance, pursuant to Article 15(1) of the Code of Professional Conduct for Counsel, in order to enable him or her to make decisions concerning potential questioning by the Defence or appearing before the Court as an exonerating witness. The legal representative must, pursuant to the Code, not adopt a prejudicial attitude in the discharge of his/her duties. The Chamber held that victims shall decide whether their legal representatives shall be present during questioning by the parties. Upon being informed by his/her client that the latter intends to consent to be questioned by a party, the legal representative must communicate his/her client's decision without delay to the party.

2114 ICC-01/04-01/07-1788.

2115 ICC-01/04-01/07-1134.

2116 ICC-01/04-01/07-2388.

2117 ICC-01/04-01/06-1372, para 14 (holding that '[a] party or a participant wishing to interview a witness whom the other party or a participant intends to call, shall first inform the party or the participant of the proposal, setting out the suggested time and location of the interview. If the witness consents, the party or participant shall make such contact through the Victims and Witnesses Unit, which shall make the necessary arrangements for the interview. A representative of the Victims and Witnesses Unit shall be present during the interview and the party or participant intending to call the witness may also attend the interview, unless the Chamber has, on an application, ruled otherwise'); ICC-01/04-01/06-1379.

In cases involving a vulnerable witness or a serious security concern, the legal representative must inform the VWU and the requesting party without delay in order that they may take all appropriate measures. Specifically, this will require an evaluation by the VWU of the victim's physical and psychological well-being, of the conditions of the proposed questioning and the need for the presence of a representative of the VWU during said questioning.

The party wishing to contact the victim must inform the legal representative, and in the case of a vulnerable witness, the VWU, of the time, place and date of the proposed interview at least one week prior. If the victim, legal representative or the VWU do not agree to the proposed location, the VWU shall be charged with identifying an alternative neutral and appropriate location, in agreement with the party. If necessary, and exceptionally, the VWU shall be responsible for transporting the victim to and from the proposed interview, and accompanying him/her during questioning. In cases in which the victim is participating in the Court's Protection Programme, the VWU shall organise all practical modalities for the requested interview with the victim.

Parties shall not question a victim without the latter's full and informed consent. Prior to questioning, the party must explain the subject and purpose of the questioning, and explain that all statements will be used before the Court and that the Court may call the victim to appear as an exonerating witness. In the event the legal representative does not attend the questioning, he/she can request that the victim communicate all relevant information and the content of the questions, if it would be useful. If the legal representative is present during the interview, he/she must not impede the questioning, nor attempt to influence the victim's response.

If the legal representative cannot attend, and must be replaced, he/she can send a member of his/her team or can request that a representative be sent from the list of counsel with the Registry. The name and contact information of the representative must be communicated to the parties. The representative will remain under all applicable ethical obligations. If the party fails to, as a preliminary matter, notify the victim's legal representative, it must do so immediately afterwards. In such instances, if the legal representative cannot obtain either a copy of the victim's statement or its content orally from the victim, it can request to receive this information confidentially from the party. The party must disclose material related to the interview in order to rectify its failure to inform the legal representative. The party can provide the related materials either with redactions or in a summarised form if necessary. The legal representative must respect the confidentiality of such documents.

In violation of criteria set forth in the proposed protocol, in early 2010, the Katanga Defence contacted a victim directly, rather than through his legal representative despite the LRV's specific request that it do so,<sup>2118</sup> which was granted by the Chamber.<sup>2119</sup> According to the victim's legal representative, the Defence team presented themselves as individuals who worked for the Court in order to take the victim's statement. Because the victim, who is unable to read or write, was incapable of conveying to the legal representative with any precision the content of his statement to the Katanga Defence, the LRV requested a copy of the statement from the Katanga Defence, which did not furnish a copy even after the Chamber's oral request that it do so on two occasions.<sup>2120</sup>

2118 ICC-01/04-01/07-1671.

2119 ICC-01/04-01/07-1731.

2120 ICC-01/04-01/07-2416, para 3, 4.

**The Prosecutor v.  
Francis Kirimi Muthaura,  
Uhuru Muigai Kenyatta and Mohammed  
Hussein Ali**

**Modalities for contacting potential witnesses**

Pre-Trial Chamber II also ruled on the issue of the modalities for contacting potential witnesses in the Muthaura, Kenyatta and Ali proceedings in the context of Summons conditions. Following the issuance of Summonses to Appear for Muthaura, Kenyatta and Ali, and the accompanying conditions set by the Chamber, the Defence filed a request to the Chamber on 23 March 2011,<sup>2121</sup> asking it to clarify the first condition.<sup>2122</sup> Specifically, the Defence requested the Chamber to specify that the individuals are not to contact *prosecution* witnesses, claiming that the current order prevents them from contacting defence witnesses and disproportionately interferes with the Defence's right to adequately prepare for trial.<sup>2123</sup> On 28 March 2011, the Prosecution filed its response, arguing that at this stage of proceedings, the Defence did not have legal standing to make requests to the Chamber, and that such requests should instead be dealt with at the initial hearing.<sup>2124</sup>

On 4 April 2011, Judge Trendafilova, acting as Single Judge of Pre-Trial Chamber II, issued a decision rejecting the Defence request. The Single Judge did note that, contrary to Prosecution assertions, the accused do enjoy *locus standi*, or standing. She reiterated that by virtue of having been summoned to appear, they have attained procedural standing and as such benefit from the rights of the accused guaranteed under Article 67.<sup>2125</sup> Regarding the modalities of complying with the Summons conditions, the Single Judge noted that, by virtue of benefiting from all 'minimum guarantees' under Article 67, the Defence 'may approach, in principle, any person willing to give his or her account of the events in relation to this case'.<sup>2126</sup> However, she emphasised that the VWU shall be timely notified of any such contact, and shall be consulted about whether or not this will put the person at risk and/or which security arrangements will need to be made. In the case that a security risk arises, the VWU shall notify the Single Judge immediately.

On 11 April 2011, the Defence requested the Chamber to vary the modalities established to enable the Defence to contact (potential) defence witnesses without contacting the VWU in advance, where it is not feasible to do so.<sup>2127</sup> The Defence also submitted that the modalities set out by the Chamber should apply to all parties. In the alternative, the Defence requested leave to appeal the 4 April decision.

On **12 May 2011**, Judge Trendafilova, acting as Single Judge of Pre-Trial Chamber II, issued a decision rejecting the Defence request. The Single Judge was not convinced that there was a need to reconsider the 4 April decision in which the Judge ruled that the VWU shall be timely notified of any contact between the Defence and (potential) witnesses and shall be consulted about whether or not this will put the person at risk and/or which security arrangements will need to be made. The Single Judge considered that 'the established modalities of Defence contact with witnesses equally ensure on the one hand the protection of witnesses, victims and other persons at risk and on the other hand the respect for the rights of the suspects, in particular the right to prepare their defence and the right to liberty'.<sup>2128</sup> The Single Judge also noted that the issues do not affect the fair and expeditious conduct of proceedings and as such are not 'appealable' issues. The Defence request to appeal the 4 April decision was also rejected.

2121 ICC-01/09-02/11-13.

2122 The first condition iterates that Muthaura, Kenyatta and Ali are to 'refrain from having contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which Muthaura, Kenyatta and Ali have been summoned'.

2123 ICC-01/09-02/11-13, para 8-10.

2124 ICC-01/09-02/11-19-Corr.

2125 ICC-01/09-02/11-38, para 11.

2126 ICC-01/09-02/11-38, para 15.

2127 ICC-01/09-02/11-52.

2128 ICC-01/09-02/11-89, para 24.

*The Prosecutor v.  
William Samoei Ruto,  
Henry Kiprono Kosgey and  
Joshua Arap Sang*

**Modalities for contacting potential witnesses**

Following the decision on the 23 March Defence request for a variation of the Summons conditions in the Muthaura *et al* case, on **6 April 2011** Single Judge Trendafilova issued an identical decision in the case of Ruto *et al*, adopting the same interpretation of the first condition set out in the Summons.<sup>2129</sup> The Single Judge noted that by virtue of benefiting from all ‘minimum guarantees’ under Article 67, the Defence ‘may approach, in principle, any person willing to give his or her account of the events in relation to this case’.<sup>2130</sup> However, she emphasised that the VWU must be timely notified of any such contact, and must be consulted about whether or not this would put the person at risk and/or which security arrangements would need to be made. In the case a security risk arises, the VWU must notify the Single Judge immediately.

On 6 April 2011, the Prosecution requested a further four conditions to be added to the Summonses to Appear. Specifically, it requested the Chamber to order the accused: (i) to provide the Chamber with all residential and office addresses, email addresses and telephone numbers; (ii) to submit complete financial information; (iii) to not make any public statements that contain or can be construed as containing an open or veiled threat to actual or prospective witnesses or victims; and, (iv) to appear in person before the Chamber at least once every six months and certify before the Chamber, under oath, that they have complied in full with all the conditions.<sup>2131</sup> This request was denied by the Chamber on 20 April 2011 on the basis that there were no substantial changes in circumstances since the issuance of the Summonses to warrant a change in conditions.<sup>2132</sup>

Following the rejection of a variation of summons conditions on 6 April 2011, on 14 April 2011, the Defence in the Ruto *et al* proceedings again requested the Chamber to review and vary the modalities to comply with the Summons conditions. In the alternative, the Defence requested leave to appeal the 6 April decision on the variation of Summons conditions. In particular, the Defence requested the

Chamber to review its holding that the Defence’s contact with potential witnesses should be arranged in cooperation with the VWU. The Defence postulated that the decision may prevent Defence counsel from contacting potential witnesses and thus has the potential to create obstacles to the preparation of the defence.<sup>2133</sup> The Defence also requested the Chamber to reiterate that these conditions apply to all parties concerned, including to the Prosecution. The Defence request was rejected in a decision on 12 May 2011. The Chamber held that ‘the established modalities of Defence contact with witnesses equally ensure on the one hand the protection of witnesses, victims and other persons at risk and, on the other hand, the respect for the rights of the suspects, in particular the right to prepare their defence and the right to liberty’.<sup>2134</sup> As the Chamber found that the issues did not constitute ‘appealable issues’, the Defence request for leave to appeal the Chamber’s decision on the variation of Summons conditions was also rejected.

2129 The first condition set out in the Summons to Appear provides that Ruto, Kosgey and Sang must refrain from having contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which Ruto, Kosgey and Sang have been summoned. ICC-01/09-01/11-1.

2130 ICC-01/09-01/11-38-Corr, para 14.

2131 ICC-01/09-01/11-41.

2132 ICC-01/09-01/11-63.

2133 ICC-01/09-01/11-47-Corr2, para 2.

2134 ICC-01/09-01/11-86, para 20.



## Protection measures for the Defence

### Detained defence witnesses seek asylum in the Katanga & Ngudjolo and Lubanga cases

An increasing number of decisions have concerned protective measures related to the Defence. Described in detail in the **Trial Proceedings** section of this Report, Trial Chambers I and II issued significant rulings concerning detained Defence witnesses in the Katanga & Ngudjolo and Lubanga cases as a result of their asylum applications to the Dutch authorities.<sup>2135</sup> It was the first time that witnesses before the ICC applied for asylum.

### *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*

On **9 June 2011**, Trial Chamber II issued the first in a series of decisions suspending the immediate return of three detained Defence witnesses in the Katanga & Ngudjolo case to the DRC, pending their political asylum applications in the Netherlands.<sup>2136</sup> All three had been detained in the Makala prison in Kinshasa and were transferred to The Hague to testify pursuant to Article 93 of the Rome Statute, Rule 192 of the Rules of Procedure and Evidence and a cooperation agreement between the Registry and Congolese authorities.<sup>2137</sup> This was the first time a witness before the ICC has applied for asylum.

Counsel for the detained witnesses claimed that if they were returned to the DRC, their lives and those of their families would be in danger as a result of their knowledge of the Government's role, specifically that of 'the most senior authorities', in the attack on Bogoro.<sup>2138</sup> In support of this allegation, on 26 May, counsel for the three witnesses sent an urgent communication to the Trial Chamber regarding the status of Colonel Richard Beiza Bamuhiga (Congolese), who was brutally assaulted by Ugandan security forces, following the revocation of his refugee status based on an agreement between Congolese and Ugandan authorities.<sup>2139</sup>

In its decision, the Trial Chamber II addressed both its obligations regarding witness protection and the witnesses' asylum claims. It drew a clear distinction between the scope of its duty to protect witnesses under Article 68 of the Rome Statute and its duty to protect them against human rights violations more generally.<sup>2140</sup> Specifically, it found that Article 68 imposed only a narrow mandate to 'prevent the risk witnesses incur *on account of their cooperation with the Court*'.<sup>2141</sup> In contrast, the Chamber concluded that it did not have a mandate to protect witnesses more generally from human rights violations by the

2136 ICC-01/04-01/07-3003.

2137 These regulations create a procedural framework that directs the Registrar to manage the transfer and custody of detained witnesses and return them following their testimony. Article 93(7) requires that the transferred person shall remain in custody until the purposes of the transfer have been fulfilled, upon which the Court shall return the person without delay to the requested State; Rule 192 delegates responsibilities under the article to the Registrar.

2138 ICC-01/04-01/07-T-258-FRA, p 17 lines 17-25; p 18 lines 1-25; p 19 lines 1-19.

2139 ICC-01/04-01/07-2963.

2140 ICC-01/04-01/07-3003, para 59.

2141 ICC-01/04-01/07-3003, para 61 (emphasis added).

2135 ICC-01/04-01/07-3003; ICC-01/04-01/07-3033; ICC-01/04-01/07-3128.

authorities of their country of origin.<sup>2142</sup> However, it acknowledged its obligation under internationally recognised human rights laws to honour the detained witnesses' right to seek asylum, and concluded that it could not interfere with that right, nor with the principle of *non-refoulement*.<sup>2143</sup>

The Chamber also held that it was not under any obligation to assess the risks of persecution faced by witnesses seeking asylum; nor was *non-refoulement* strictly applicable as the Court had no territory in which to maintain jurisdiction over witnesses. The Chamber thus rejected the application by the witnesses' counsel to file an *amicus curiae* brief on the asylum issue. Because the application for asylum was already before the Dutch authorities, the Chamber did not find that an *amicus* brief would be 'useful' in its determination of any facts.<sup>2144</sup>

Finding that it could not disregard human rights law that provided for open recourse to asylum proceedings, the Chamber ordered the Registry to authorise contact between the detained witnesses and their Dutch asylum counsel as soon as possible.<sup>2145</sup> The Registry had prohibited their contact with counsel pursuant to the pre-existing agreement with the Congolese authorities, from whom prior authorisation was needed for all contact with individuals outside the detention centre.<sup>2146</sup> The Chamber also instructed the Registry to inform the UN Security Council of the situation regarding Witness 236, on whom the Security Council has imposed a travel ban.<sup>2147</sup>

Significantly, in the 9 June decision, the Chamber refrained from ruling on whether proper protective measures could be implemented prior to the return of the witnesses, noting that if it were satisfied with protective measures in place in the DRC, 'there would in principle be no reason for the Court to delay the witnesses' return to the DRC any further'.<sup>2148</sup> In an earlier risk assessment, the VWU had determined that as a consequence of their status as witnesses before the ICC, there appeared to be no increased risk of

2142 ICC-01/04-01/07-3003, para 62.

2143 The protection of refugees from being returned to a place in which their lives or freedoms could be threatened. ICC-01/04-01/07-3003, paras 67-69.

2144 ICC-01/04-01/07-3003, paras 53-54.

2145 ICC-01/04-01/07-3003, paras 63-64.

2146 ICC-01/04-01/07-3003, para 75.

2147 The witness, Floribert Ngabu Njabu, former President of the FNI, was arrested and placed under house arrest in Kinshasa in March 2005 for human rights abuses. Both accused are also subject to a travel ban. See, List of individuals and entities subject to the measures imposed by paragraphs 13 and 15 of Security Council Resolution 1596 (2005), as renewed by paragraph 3 of Resolution 1952 (2010).

2148 ICC-01/04-01/07-3003, para 85.

harm.<sup>2149</sup> The VWU did note, however, that it would be difficult to implement appropriate protective measures for detained witnesses within a prison system.<sup>2150</sup>

In a subsequent decision, issued on 22 June, after the Registry filed observations regarding the efficacy of proposed protective measures on 7 June,<sup>2151</sup> the Chamber determined that the implementation of the proposed protective measures would meet its requirements and allow for the return of the detained witnesses. These proposed measures included: placement of the witnesses in a maximum protection facility, with specially-trained guards and security from co-detainees, and visits from members of the VWU twice weekly as well as during any proceedings against them.<sup>2152</sup> Yet, in an apparent reversal, the Chamber deferred the witnesses' return, pending resolution of the asylum proceedings. It stated:

in principle, therefore, the detained witnesses can be returned as soon as the VWU confirms that the DRC has accepted to cooperate with the Court in this matter and all necessary preparation has been accomplished. However, the Chamber reminds the DRC that even if the above measures are in place, the Court will only be able to return the detained witnesses if their request for asylum has been rejected by the Dutch authorities.<sup>2153</sup>

### *The issues on appeal*

The Office of the Prosecutor, the Government of the Kingdom of the Netherlands and the DRC all filed applications for leave to appeal the Chamber's decision of 9 June.<sup>2154</sup>

In their application for leave to appeal,<sup>2155</sup> the DRC authorities underscored their continued verbal assurances and 'stellar' cooperation with the Court on all matters, and indicated that the Chamber's decision to suspend the immediate return of the witnesses was in violation of their cooperation

2149 ICC-01/04-01/07-2799-Conf cited in ICC-01/04-01/07-2952, paras 26, 32.

2150 ICC-01/04-01/07-2952, paras 12, 33.

2151 ICC-01/04-01/07-2989. This report is disputed by counsel for the witnesses.

2152 ICC-01/04-01/07-3033, para 41. It remains unclear whether a facility that can guarantee these requirements currently exists in the DRC and how the Registry will ascertain compliance with these conditions.

2153 ICC-01/04-01/07-3033, para 42.

2154 ICC-01/04-01/07-3021, ICC-01/04-01/07-3020, and ICC-01/04-01/07-3023, respectively.

2155 ICC-01/04-01/07-3023.

agreement with the Registry. The Congolese authorities expressed assurances regarding the security of the witnesses pursuant to the measures proposed by the Registry. They noted that after continued, protracted negotiations for their return and under the proposed ongoing monitoring, it was unlikely that the DRC authorities would pose threats or risks to the witnesses, as the witnesses and their counsel have argued.

In its application to appeal, the Prosecution argued that refusing to return the witnesses as required under Article 93 of the Rome Statute could affect this trial as well as future cases in that it could impact upon the DRC's willingness to cooperate with the Court given the lack of legal certainty.<sup>2156</sup> The Dutch authorities requested authorisation to appeal the 9 June decision on the issues of whether Article 68 of the Rome Statute prevents only the risks witnesses incur on account of their cooperation with the Court, and whether the Chamber is required to evaluate risks of violations of their human rights, including violation of the principle of *non-refoulement*.<sup>2157</sup> In this regard, they noted that the Chamber's position on these issues ran 'contrary to said expectations of the Netherlands'. They argued that the Netherlands honoured the principle of *non-refoulement*. Thus, a conflict between the Court's and the Netherlands' positions could be problematic in cases in which the Dutch authorities would refuse to return a refugee, although the Chamber could require it to do so under Article 44 of the Headquarters Agreement, which obliges a Host State to transport a detained witness to the point of departure.<sup>2158</sup>

On 14 July, Trial Chamber II held that it did not have the authority to grant the requests to appeal submitted by the parties and the Host State.<sup>2159</sup> The Chamber based its holding on a strict reading of Article 82(1)(d) of the Rome Statute, pursuant to which the Chamber can only authorise interlocutory or intermediary appeals, whose immediate determination is necessary for the continuation of the proceedings. It found that the present applications to appeal were not necessary for the continuance of trial proceedings, particularly as they involved the asylum applications of witnesses, an issue external to the parties to the case. Trial Chamber II noted that the parties can appeal the issue directly to the Appeals Chamber at the time of the final judgement in the case.

Immediately following the Chamber's decision, the Netherlands filed an urgent request for directions to the Appeals Chamber, in which it noted 'the

unprecedented nature' of the decision, 'the lack of relevant provisions in the legal framework', and the upcoming judicial recess.<sup>2160</sup> The Dutch authorities sought urgent directions regarding the procedure to be followed by the Appeals Chamber concerning an appeal against the Trial Chamber's decision. The Prosecution supported the Netherlands' request.<sup>2161</sup>

On **26 August, 2011**, the Appeals Chamber rejected the Dutch authorities' urgent request *in limine*.<sup>2162</sup> It determined that the request for directions fell outside of its jurisdiction,<sup>2163</sup> 'clearly and exhaustively defined' in the Rome Statute and in the Rules of Procedure and Evidence. The Appeals Chamber noted that it had previously rejected similar requests 'on the grounds that such requests had no foundation in the Court's legal instruments'.<sup>2164</sup>

The appearance of the detained witnesses first arose as an issue in the Katanga & Ngudjolo case when the Katanga Defence sought to meet with them at the ICC penitentiary facility prior to their testimony. This request was rejected by the Trial Chamber, which held that the Protocol on Witness Familiarisation prohibited such contact. Rather, the Chamber authorised counsel for Katanga to hold urgent meetings with witnesses in an administrative area of the penitentiary facility in the DRC.<sup>2165</sup> Defence counsel then requested that the witnesses visit the accused in prison following their testimony at the ICC.<sup>2166</sup> As of the writing of this Report, the Trial Chamber has not yet ruled on this request. However, as described in more detail, below, it has tacitly ruled on the issue by prohibiting their contact with the accused in the detention facility.

Framed as an issue of the conditions of the detention, on 7 June, Katanga Defence counsel requested that the Chamber vary from the principle of non-contact to allow the three witnesses to communicate with the accused.<sup>2167</sup> The Katanga Defence observed that as a result of the detained witnesses and both accused being housed in the same unit and their restriction on contact, all are kept to their cells for as long as

2160 ICC-01/04-01/07-3077.

2161 ICC-01/04-01/07-3080.

2162 ICC-01/04-01/07-3132.

2163 The Appeals Chamber maintains jurisdiction to rule upon: (1) appeals under Articles 81 and 82; (2) the revision of a conviction or sentence under Article 84; (3) the disqualification of the Prosecutor or a Deputy Prosecutor under Article 42(8); and (4) review concerning reduction of sentence under Article 110. ICC-01/04-01/07-3132, para 6.

2164 ICC-01/04-01/07-3132, para 7.

2165 ICC-01/04-01/07-2755.

2166 ICC-01/04-01/07-2773.

2167 ICC-01/04-01/07-2988.

2156 ICC-01/04-01/07-3021, para 14.

2157 ICC-01/04-01/07-3020, para 18.

2158 ICC-01/04-01/07-3020, paras 10, 12.

2159 ICC-01/04-01/07-3073.

eighteen hours a day and deprived of group contact. On 15 July, Trial Chamber II issued an order to improve the conditions of the detained witnesses, specifically to reduce their periods of isolation and to increase their contact with those outside the detention centre.<sup>2168</sup> The Chamber suggested that the detained witnesses have access to the sports field when it is not being used by those detained for the ICTY. Given the size of the field, they can be released at the same time as the accused, as long as someone can ensure there is no verbal communication between them. The Chamber also allowed the detained witnesses to spend time in each others' cells and have meals together, effective immediately. In addition, the Chamber ordered the Registry to contact the DRC to determine if it were possible to expand the list of telephone contacts for humanitarian reasons for two of the witnesses, as well as the number of contacts for the third witness, who notably has only one. It noted that, according to their counsel, the restriction on outside contact impeded their ability to obtain the necessary evidence for their asylum claims.

### *The Prosecutor v. Thomas Lubanga Dyilo*

Trial Chamber I also considered the circumstance of a detained witness in the Lubanga proceedings. The detained witness in Lubanga was transferred to The Hague together with the three other detained witnesses who appeared in the Katanga & Ngudjolo case and also filed an asylum application with the Dutch authorities.<sup>2169</sup> In contrast to the series of public filings and a public status conference in the Katanga & Ngudjolo case, the issue was considered through a series of confidential filings and an *ex parte* hearing in the Lubanga case, and was made public only upon the issuance of a decision by the Trial Chamber on **5 August 2011**.<sup>2170</sup>

Despite not having requested protective measures prior to testifying, on the last day of his appearance before Trial Chamber I on 7 April, the detained witness described being covertly filmed upon boarding the plane to Europe. He also mentioned threats against him in 2004. On 1 June 2011, he requested special protective measures pursuant to Rule 88(1) of the Rules of Procedure and Evidence, specifically to stay his removal to the DRC and to facilitate his asylum application.<sup>2171</sup> The request asserted that the witness had 'seriously challenged' individuals within the current Congolese government, which have the capacity to endanger his and his family's security. The special protective measures were requested pursuant to Article 68(1), alleging that the measures applied by the VWU were ineffective given his status as a detainee. Trial Chamber I stayed the removal, and like Trial Chamber II, it ordered the Registry to ensure that the detained witness had access to the lawyers representing him for the purpose of his asylum claim.<sup>2172</sup>

Trial Chamber I further requested observations by the parties and the Registry as to an assessment of the risks posed to the witness should he be returned to the DRC, and whether he is entitled to file an application for asylum. The Defence supported the witness' right to seek asylum, asserting that Article 93(7) of the Statute, providing for the temporary transfer of a witness to the Court, must be read in light of Article 21(3), requiring all provisions to be interpreted in accordance with international human rights norms. Both the Prosecution and the Registry expressed doubt about the witness' security concerns. The Prosecution noted his voluntary appearance before the Court and the

2168 ICC-01/04-01/07-3078.

2169 The filing does not appear to be part of the public record of the case, but is discussed in ICC-01/04-01/06-2766-Red.

2170 ICC-01/04-01/06-2766-Red, paras 7, 8.

2171 ICC-01/04-01/06-2745-Conf, cited in ICC-01/04-01/06-2766-Red.

2172 ICC-01/04-01/06-2766-Red, para 14.

fact that protective measures were not requested in advance of his testimony. The Prosecution also asserted that an asylum application should be submitted only after an assessment is made by the VVU and a finding by the Court concerning identifiable security risks. The Registry noted that the witness had not reported any incidence of violence or intimidation while in detention, and that it did 'not accept the witness's own assessment that he poses a threat to the DRC government as a political opponent'.<sup>2173</sup> It highlighted the DRC's commitment to cooperate with the Court, and that the extent of international attention given to the witness' situation was a deterrent to security threats. Finally, it suggested that the measures proposed by the VVU would be sufficient to ensure the witness' security upon his return.

In addition to the parties, the DRC<sup>2174</sup> and the Netherlands<sup>2175</sup> also filed observations. The DRC asserted that the failure to implement its agreement with the Registry concerning the return transfer of the witness 'would call into question the principle of complementarity; and it would send a negative signal to the States Parties, because of the suggested lack of confidence'.<sup>2176</sup> Notably, the Netherlands argued that the security concerns of the witness arising out of his testimony should be resolved by the ICC's procedures, and that the VVU is uniquely equipped to assess the fears expressed by the witness. It also asserted that the Netherlands lacked jurisdiction over individuals in temporary custody of the Court.

In contrast to Trial Chamber II's decision in the Katanga & Ngudjolo case, Trial Chamber I did not make a distinction between its mandate to ensure the security of witnesses pursuant to Article 68, and protection from human rights violations more generally. Rather, it 'concluded that any risks that may exist for defence Witness 19 will have arisen solely on account of his evidence before the Court'.<sup>2177</sup> It rejected the Prosecution's argument that his voluntary testimony before the Court should *ipso facto* undermine his claims for protection, as the Chamber seeks to encourage public testimony. However, it did take into consideration the VVU's assessment, as the specialised body regarding protection issues. Specifically, it noted that '[t]he VVU has concluded that following his return to the DRC, defence Witness 19 would not be exposed to any additional risk to his security or

psychological or physical well-being as a result of his testimony before the Court'.<sup>2178</sup> It further noted that the Registry had been engaged with the Congolese authorities on additional protective measures that could be implemented in the Makala detention centre, such as reinforced cell doors, increased surveillance and continued VVU monitoring.

Yet, for the purposes of returning the detained witness to the DRC, Trial Chamber I held that Article 21(3) of the Statute required an inquiry as to whether any international human rights would be violated upon his return, leading it to address the asylum application. The Chamber rejected the Netherlands' argument that it did not have jurisdiction over the detained witness, given that the Dutch authorities were charged with his physical transport, and that he is *de facto* on Dutch territory, although in the Court's custody. Acknowledging the overlap between the security assessment performed pursuant to Article 68, and the merits of an asylum application, the Chamber left it to the Host State to determine the merits of the latter. The Chamber concluded, that despite the tension between the Court's obligation to return the witness and the asylum application, it 'should not seek to limit the opportunity of the Host State to assess an asylum claim, not least given the terms of Article 21(3) of the Statute'.<sup>2179</sup> It thus ordered the Registry to submit a report regarding 'the procedure that needs to be followed in order for the Host State to be able to discharge its obligations pursuant to this asylum request'.<sup>2180</sup> Upon a determination by the Dutch authorities on the merits of the asylum application, the Court would immediately transfer custody of the witness.

Despite the Appeals Chamber's decision in the Katanga & Ngudjolo case rejecting its appeal, the Netherlands sought to appeal the decision of Trial Chamber I to stay the return of Witness 19 to the DRC.<sup>2181</sup> In its second application to appeal it elaborated more extensive arguments than in its appeal of Trial Chamber II's decision in the Katanga & Ngudjolo case. The Government argued that it had 'become a party to this subset of the proceedings', and that the Trial Chamber's decision had 'broad implications for the relationship between the Netherlands and the Court, and consequently for the functioning of the Court in the Netherlands'.<sup>2182</sup> Underscoring an Appeals Chamber decision in Lubanga, which held that human rights underpin every aspect of the Statute,<sup>2183</sup> the

2173 ICC-01/04-01/06-2754-Conf, para 5, as cited in ICC-01/04-01/06-2766-Red, para 43.

2174 ICC-01/04-01/06-2751-Conf, as cited in ICC-01/04-01/06-2766-Red, paras 19-22.

2175 ICC-01/04-01/06-2754-Conf-Anx2, as cited in ICC-01/04-01/06-2766-Red, paras 33-41.

2176 ICC-01/04-01/06-2766-Red, para 22.

2177 ICC-01/04-01/06-2766-Red, para 66.

2178 ICC-01/04-01/06-2766-Red, para 63.

2179 ICC-01/04-01/06-2766-Red, para 84.

2180 ICC-01/04-01/06-2766-Red, para 89.

2181 ICC-01/04-01/06-2768.

2182 ICC-01/04-01/06-2768, para 10.

2183 ICC-01/04-01/06-772, para 37.

Host State argued that the right to *non-refoulement* must be observed not only by States, but also by international organisations, such as the ICC.

Specifically, the Netherlands contested the Trial Chamber's conclusion that its role was merely to defer the asylum claim to the Netherlands as a 'safety net'.<sup>2184</sup> Challenging Trial Chamber II's holding on the issue, it asserted that the Chamber is required to consider all potential human rights violations in ruling whether to return a witness under Article 93(7), not just those related to the witness' contact with the Court, under Article 68. It further argued that the Court, especially the VWU, is uniquely positioned to assess *refoulement* risks. For the purposes of the appeal, the Netherlands argued that the issue significantly affects the fairness of the proceedings pursuant to Article 82(1)(d). Specifically, it asserted that the Trial Chamber's decision caused prejudice to the Netherlands. It also argued that the accused must be able to call witnesses, the appearance of which necessitates protection in accordance with Article 21(3). At the time of writing this Report, no decision has been issued on the Netherlands' application to appeal.

## Article 70 breach in the Lubanga proceedings

As described in the **Trial Proceedings** section of this Report, protection issues also surfaced in the context of a potential breach of Article 70 of the Rome Statute, which covers intentional offences against the administration of justice, including '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'.<sup>2185</sup>

On 29 March 2011, Trial Chamber I requested observations from the parties and participants on the procedure to be adopted for initiating an investigation pursuant to Article 70.<sup>2186</sup> The Chamber's request followed an inquiry by the VWU concerning the issue of direct and indirect threats by victims against Defence witnesses in the proceedings. The precise details of the inquiry remain confidential.

At issue in the filings submitted by the parties and participants was which organ of the Court had competence over an Article 70 investigation in the event there was a conflict of interest with the Office of the Prosecutor. As the parties' observations indicated, the statutory framework assigns all investigatory functions to the Office of the Prosecutor, including Article 70 investigations, while also permitting the Chamber to request that the investigation be conducted by the relevant State Party. The legal representatives of victims underscored the security concerns for victims raised by delegating an Article 70 investigation to the State Party, in this case the DRC.<sup>2187</sup> Given the absence of any statutory provision addressing a conflict of interest, both the Defence and the legal representatives of victims suggested that the Chamber adopt the practice used by the *ad hoc* tribunals, which can request an *amicus curiae* submission by the Registry as to whether the rationale exists for opening an independent investigation led by an entity unaffiliated with the Court.<sup>2188</sup> As of the writing of this Report, the Court has not publicly issued any findings about the future investigation of the Article 70 breach.

2185 Article 70(1)(c) of the Statute. Article 70(1) provides an exhaustive list of violations that fall within the scope of the Court's jurisdiction, with emphasis on violations that were committed intentionally.

2186 ICC-01/04-01/06-2716, fn 1; the request for observations was made by email.

2187 ICC-01/04-01/06-2714.

2188 ICC-01/04-01/06-2714, ICC-01/04-01/06-2715.

2184 ICC-01/04-01/06-2768, para 15.

## Interim release

During 2011, the Court issued several decisions on the interim release of the accused in the Bemba and Mbarushimana cases.<sup>2189</sup> This is an issue with potentially serious implications for the safety and security of witnesses and victims, particularly where Court proceedings have led to their identities being revealed to the accused or their supporters.

The Pre-Trial Chamber has the authority to grant the interim release of an accused under Article 60(3). This provision requires the Chamber to periodically review the detention of the accused and to alter its decision(s) on continued detention if 'changed circumstances so require'. However, a person shall continue to be detained for as long as the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58(1) are met. These conditions include that the Chamber must continue to find reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. Second, the Chamber must find that the continued detention of the person appears necessary to ensure his or her appearance at trial, to preclude the obstruction or endangerment of the investigation or proceedings, and to prevent the accused from committing the same or crimes related to those for which he is accused. Pursuant to Article 60(2), if one of these conditions is not met, the Chamber must release the person, with or without conditions.

2189 'Interim release' is the judicial term for the practice of releasing an accused from custody in the period between his or her initial arrest and the conclusion of trial proceedings against him or her.

## *The Prosecutor v. Jean-Pierre Bemba Gombo*

On 7 July 2010, noting that Bemba's detention was due to be reviewed before 30 July, the Trial Chamber ordered the Prosecution, the participating victims and the Defence to submit observations on the review of Bemba's detention. These submissions were filed on 15 July 2010 by the Prosecution<sup>2190</sup> and the participating victims<sup>2191</sup> and on 22 July 2010 by the Defence.<sup>2192</sup> On 28 July 2010 Trial Chamber III rendered a decision on its review of Bemba's detention, ordering his continued detention.<sup>2193</sup> This decision was appealed by the Defence on 29 July 2010.<sup>2194</sup> On 19 November 2010, the Appeals Chamber issued its decision on the appeal, directing Trial Chamber III to carry out a new review of Bemba's detention and possible interim release under Article 60(3).<sup>2195</sup> It determined that the Chamber did not adequately set forth its reasoning for rejecting Bemba's request for interim release, and that it improperly restricted its considerations to only the arguments put forth by Bemba. The Appeals Chamber reversed Trial Chamber III's decision and ordered it to conduct a new review of Bemba's detention.

In again rejecting Bemba's request for interim release pursuant to the Appeals Chamber order, on **17 December 2010**, Trial Chamber III found that there had been no change in circumstances that warranted release. Rather, it found that the only two changed circumstances (the commencement of trial and the affirmation of admissibility) favoured continued detention and did not mitigate in favour of his release.<sup>2196</sup> Bemba was released very briefly in January 2011 to attend his stepmother's funeral in Belgium, subject to strict conditions.<sup>2197</sup>

Between 3 May and 10 June 2011, the Bemba Defence confidentially filed three applications for release of the accused: one interim,<sup>2198</sup> one provisional,<sup>2199</sup> and one 'to leave detention' to travel to the DRC in order to register for the upcoming elections.<sup>2200</sup> In its decision of **16 August 2011** rejecting all three applications, Trial Chamber III reviewed, as a threshold issue, whether

2190 ICC-01/05-01/08-828-Conf-Exp, a public redacted version was filed simultaneously as ICC-01/05-01/08-828-Red.

2191 ICC-01/05-01/08-825.

2192 ICC-01/05-01/08-840-tENG.

2193 ICC-01/05-01/08-843.

2194 ICC-01/05-01/08-844-tENG. A document in support of appeal was submitted on 4 August 2010 (ICC-01/05-01/08-847-tENG-Corr).

2195 ICC-01/05-01/08-1019.

2196 ICC-01/05-01/08-1088.

2197 ICC-01/05-01/08-1099-Red.

2198 ICC-01/05-01/08-1565-Red.

2199 ICC-01/05-01/08-1565-Red.

2200 ICC-01/05-01/08-1565-Red.

‘there is a proper legal basis for the accused to seek provisional release at the trial stage of proceedings’.<sup>2201</sup> The Chamber determined that Article 60 of the Rome Statute gives the Pre-Trial Chamber the authority to consider release before the commencement of trial, and that Article 61(11) provides that the Trial Chamber may exercise any function of the Pre-Trial Chamber during the trial phase. Accordingly, it found that it could hear the accused’s request for release ‘at any time’, as specified by both Article 60(3) and Rule 118(2) of the Rules of Procedure and Evidence.

Pursuant to Article 60(3), the Chamber can modify its prior order on detention only ‘if it is satisfied that changed circumstances so require’. The Chamber found that the accused had the financial resources, the personal connections, and the motive to abscond, and that no change in circumstances negated this flight risk when considered in the context of the factors bearing on continued detention.

The Chamber also considered the security situation of victims and witnesses if the accused were released under any of the three applications to find that ‘releasing the accused for any meaningful period would increase his ability to interfere with witnesses’, particularly as two witnesses who had not yet testified were placed in the ICC Protection Programme as the result of the Court’s threat assessment.<sup>2202</sup>

On 24 August, the Defence filed another application for provisional release to the DRC prior to 5 September to allow the accused to obtain his voting card and to file his candidacy for the upcoming presidential and parliamentary elections.<sup>2203</sup> The Chamber again found no change in circumstances requiring release. In addition, the Chamber ordered the Defence to submit a public redacted version of the Request for Provisional Release, as there was no sufficient basis for its confidential treatment. On 1 September, the Defence filed an urgent appeal of this decision to the Appeals Chamber pursuant to Article 82(1)(b).<sup>2204</sup>

2201 ICC-01/05-01/08-1565-Red.

2202 ICC-01/05-01/08-1565-Red, paras 63-65.

2203 ICC-01/05-01/08-1672, para 1.

2204 ICC-01/05-01/08-1690.

On **12 September 2011**, a majority of the Appeals Chamber, with Judge Ušacka partially dissenting, reversed the decision of the Trial Chamber as to the accused’s second request for interim release and directed it to reconsider his request.<sup>2205</sup> The Appeals Chamber based its reasoning primarily on the first ground of appeal as set forth by the Defence, which claimed that the Trial Chamber misappreciated the assurances provided in the letter and observations submitted by the potential host State (the name of which was redacted this decision and all related filings) in reaching its determination that it did not provide sufficient guarantees against his flight.

At the outset of its decision, the Appeals Chamber set forth the appropriate standard of review: ‘where clear errors of law, fact or procedure are shown to exist’, it must reverse.<sup>2206</sup> Existing jurisprudence holds that a Chamber commits clear error ‘if it misappreciates facts ...’<sup>2207</sup> Using this standard, the Appeals Chamber held that the Trial Chamber misappreciated the letter and observations from the potential host State ‘because it did not read them in context with Mr Bemba’s Letter.’<sup>2208</sup> Read as a response to the questions posed by the Bemba Defence in its letter to the State, the Appeals Chamber found that the documents did in fact provide the guarantees sought by the Trial Chamber as to the State’s ability to ensure the accused’s return to the Court. In addition, the Appeals Chamber found clear error in the Trial Chamber’s determination that the State, and not itself, was charged with imposing conditions upon the State’s custody of the accused; under Rule 119(1) this authority resides with the Court.<sup>2209</sup> Lastly, the Appeals Chamber determined that in a situation in which a State has indicated a general willingness to accept a detained person and enforce any imposed conditions, the Trial Chamber must ‘seek further information from the State if it finds that the State’s observations are insufficient to enable the Chamber to make an informed decision’.<sup>2210</sup>

In its filing, the Defence had also argued that the Trial Chamber’s determination that interim release of the accused would interfere with the proceedings of the Court was in error.<sup>2211</sup> The Appeals Chamber agreed with the Defence, finding that the starting point for a Chamber’s review of detention under Article 60(3) was the immediately prior decision on detention. In this instance, the most recent ruling on the accused’s

2205 ICC-01/05-01/08-1626-Red.

2206 ICC-01/05-01/08-1626-Red, para 44.

2207 ICC-01/05-01/08-1626-Red, para 45.

2208 ICC-01/05-01/08-1626-Red, para 51.

2209 ICC-01/05-01/08-1626-Red, para 53.

2210 ICC-01/05-01/08-1626-Red, para 55.

2211 ICC-01/05-01/08-1626-Red, para 63.



continued detention was based on the need to ensure his appearance at trial, rather than the need to ensure that he did not obstruct or interfere with court proceedings.<sup>2212</sup> The Appeals Chamber therefore found that the Trial Chamber erred 'by entering an additional legal basis for Mr Bemba's detention under article 58(1)(b)(ii) without showing changed circumstances, as required by article 60(3)'.<sup>2213</sup>

Judge Ušacka dissented to that part of the Appeals Chamber's majority opinion finding that the Trial Chamber misappreciated the facts related to the accused's first ground of appeal. She favourably cited the Appeals Chamber ruling in the Mbarushimana case, in which it held that '[it] will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will only interfere in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it'.<sup>2214</sup> Judge Ušacka stated that she could discern the Trial Chamber's reasoning and therefore could not find clear error as required by the applicable standard of review.

On **26 September 2011**, Trial Chamber III issued a decision in light of the Appeals Chamber's decision, again rejecting the Defence application for interim release.<sup>2215</sup> As directed by the Appeals Chamber, Trial Chamber III reconsidered the application as well as two letters with additional information from the potential Host State that had arrived while the appeal was pending.<sup>2216</sup> The Trial Chamber determined that, because it received the letters, it was not required to seek further observations from the potential Host state pursuant to the Appeals Chamber's ruling.<sup>2217</sup> In rejecting the application for conditional release, the Trial Chamber found that the security 'measures proposed by [REDACTED] are not designed to prevent the accused from absconding'.<sup>2218</sup> The Trial Chamber also reviewed the application in light of its decision of 17 December 2010, the previous decision on detention, to hold that its reasoning still held and that the accused's detention remained necessary to ensure his appearance at trial.<sup>2219</sup> The Trial Chamber's reliance on Article 58(1)(b)(ii) of the Statute to maintain the accused's detention, which the Appeals Chamber had determined to be an error, was remedied by applying

2212 ICC-01/05-01/08-1626-Red, paras 71-72.

2213 ICC-01/05-01/08-1626-Red, para 74.

2214 ICC-01/05-01/08-1626-Red, para 11 (dissenting opinion), citing ICC-01/04-01/10-283, paras 1, 17.

2215 ICC-01/05-01/08-1789-Red.

2216 ICC-01/05-01/08-1789-Red, para 11.

2217 ICC-01/05-01/08-1789-Red, paras 15-17.

2218 ICC-01/05-01/08-1789-Red, para 38.

2219 ICC-01/05-01/08-1789-Red, para 26.

the Appeals Chamber's reasoning that it 'must also consider any other new information which has a bearing on the subject'.<sup>2220</sup>

The Trial Chamber stated it had been informed by the Prosecution in a confidential *ex parte* filing of several recent instances since July 2011 in which threats have been made against prosecution witnesses and their families in connection with their testimony before the Court.<sup>2221</sup> The Chamber noted that this suggests that the identities of prosecution witnesses were revealed despite the granting of protective measures to these witnesses.<sup>2222</sup> In at least one instance, a witness who testified completely in closed session informed the Chamber of having received death threats as a result of his cooperation with the Court.<sup>2223</sup> Although the Chamber is not in a position to ascertain where the threats to witnesses originate from, 'it is a reasonable inference, however, that some may have originated from individuals who support the accused'.<sup>2224</sup> The Chamber thus concluded that the 'possibility' of witness interference existed and therefore constituted an alternate basis for the continued detention of the accused.<sup>2225</sup>

2220 ICC-01/05-01/08-1019, para 52.

2221 ICC-01/05-01/08-1789-Red, para 29.

2222 ICC-01/05-01/08-1789-Red, para 30.

2223 ICC-01/05-01/08-1789-Red, para 30.

2224 ICC-01/05-01/08-1789-Red, para 31.

2225 ICC-01/05-01/08-1789-Red, paras 29-32.

### *The Prosecutor v. Callixte Mbarushimana*

On 30 March 2011, the Defence counsel filed its first request for interim release to the accused's French residence.<sup>2226</sup> The Pre-Trial Chamber requested observations from the Prosecution and from the French and Dutch Governments. Specifically, the French authorities were to address whether there would be any legal impediment to Mbarushimana's return to French territory if his interim release was granted, and whether the French authorities would be in a position to impose one or more of the conditions set out in Rule 119 should the Chamber order Mbarushimana's conditional release.<sup>2227</sup> The Prosecution responded that the interim release should be rejected as: (i) the conditions justifying Mbarushimana's detention under Article 58(1) were still in effect; and (ii) there had been no unreasonable delay on the part of the Prosecution and the accused had not been detained for an unreasonable period within the terms of Article 60(4).<sup>2228</sup>

On **19 May 2011**, Pre-Trial Chamber I rejected the Defence request for interim release.<sup>2229</sup> The Chamber noted the presumption of innocence and the requirement under international human rights law that deprivation of liberty should be the exception and not the rule, and repeated its finding that 'pre-trial detention shall only be resorted to when the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58(1) of the Statute are met'.<sup>2230</sup> Following previous Appeals Chamber jurisprudence, the Chamber noted that the gravity of the crimes charged and related severity of the threatened sentence are legitimate factors to assess the risk that an accused person may abscond, as are past and present political position, international contacts and financial resources. An expressed willingness to cooperate with the Court is not sufficient in and of itself to justify interim release.

In relation to the first requirement of Article 58(1), the Chamber noted that the severity of Mbarushimana's alleged crimes and the resulting sentence rendered him more likely to abscond. The Chamber was not satisfied that Mbarushimana's family and professional links to France were a sufficient guarantee that he would remain in France if released, and that due to the lack of travel restrictions in the Schengen area, his release to France would make it easier for him to flee. The Chamber also noted the advanced stage of the disclosure process in the proceedings prior to the

confirmation of charges hearing, posing potential security concerns to the victims and witnesses whose identity was disclosed. It concluded that the continued detention of Mbarushimana was necessary to ensure his appearance at trial.

Finally, the Chamber also held that the risk of Mbarushimana continuing to participate in the commission of crimes within the jurisdiction of the Court and detailed in the Arrest Warrant 'by organising and conducting an international campaign through media channels' continued to exist, particularly in light of the accused's information technology experience and ability to gain phone and internet access in ways which could not be easily monitored or controlled.

The Defence filed for leave to appeal the Pre-Trial Chamber's decision, arguing that the Chamber had failed to give the correct weight or interpretation to the evidence before it relating to the grounds for continued detention under Article 58(1)(b).<sup>2231</sup> Leave to appeal was granted and proceedings to secure the accused's interim release then began before the Appeals Chamber. On **14 July 2011**, the Appeals Chamber rejected the Defence appeal.<sup>2232</sup> It emphasised at the outset that it would not substitute its own decision for that of the Pre-Trial Chamber and would defer to the Pre-Trial Chamber's findings unless they were clearly erroneous. The Appeals Chamber found that the Defence had, at most, identified a disagreement between itself and the Pre-Trial Chamber regarding the correct weight to give to various factors, including the likelihood of Mbarushimana absconding, but had not identified any clear error in the impugned decision. It found that the Chamber had meticulously addressed each of the Defence arguments in its decision. The Appeals Chamber reiterated that the test was not whether a Chamber could have reached other conclusions; the test was whether any reasonable Chamber could have reached the conclusions that it did based on the available evidence.

The Appeals Chamber upheld the Pre-Trial Chamber's findings in relation to each of the grounds for continued detention under Article 58(1)(b), namely to ensure the accused's appearance at trial, to prevent the obstruction or endangerment of investigations, and to prevent the continued commission of crimes within the jurisdiction of the Court. The Appeals Chamber concluded that, in relation to assessing the necessity of continued detention to ensure no continued or further commission of crimes, the determinative factor was the possibility, not the inevitability, of future occurrence.

2226 ICC-01/04-01/10-86.

2227 ICC-01/04-01/10-89.

2228 ICC-01/04-01/10-101.

2229 ICC-01/04-01/10-163.

2230 ICC-01/04-01/10-163, para 33.

2231 ICC-01/04-01/10-170.

2232 ICC-01/04-01/10-283.

Counsel for the accused filed a second request for interim release on 20 July.<sup>2233</sup> The request argued that: (i) the Chamber should order the interim release of the accused if it finds that the case against him was inadmissible at the time his arrest was ordered due to contemporaneous German criminal proceedings; (ii) the Chamber had so far declined to rule on the question of whether there was an ongoing investigation in Germany at the time of the Prosecution's application for a warrant of arrest; (iii) the second request was designed to persuade the Chamber to reconsider legitimate Defence submissions on admissibility on their merits; and (iv) the inadmissibility of the case against Mbarushimana at the time of his arrest constitutes a 'changed circumstance' for the purpose of Article 60(3). This request was rejected on 28 July by the Pre-Trial Chamber, which noted that the Defence had admitted its filing primarily sought reconsideration of matters which had already been examined by the Chamber in its previous rulings.<sup>2234</sup> The Chamber found that there was no statutory basis for such reconsideration in the absence of exceptional circumstances not present in this case. The Defence again appealed this ruling;<sup>2235</sup> and, at the time of writing, the decision is pending before the Appeals Chamber.

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2233 ICC-01/04-01/10-294.

2234 ICC-01/04-01/10-319.

2235 ICC-01/04-01/10-321.

# Recommendations

**States Parties/ASP**

**Judiciary**

**Office of the Prosecutor**

**Registry**

# States Parties / ASP

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## Independent Oversight Mechanism

- **Prioritise** development of the full breadth of functions of the IOM by 2013, including inspection and evaluation facilities, as described in Article 112(4) of the Rome Statute. The UNOIOS recommendation in the assurance mapping study that inspection and evaluation could be carried out by the Office of Internal Audit<sup>2236</sup> runs contrary to the intention of Article 112(4) which provides that the IOM shall have ‘inspection, evaluation and investigation’ functions. Any potential duplication in the current oversight functions being carried out by the Office of Internal Audit should be harmonised within the IOM.
- **Harmonise** within the IOM the functions and roles currently carried out by a range of other ICC bodies, including the Internal Auditor, the External Auditor, the Committee on Budget and Finance, the Office of Internal Audit and the Audit Committee.
- **Enable** the IOM to fully operationalise its powers to investigate consistently across all organs and areas of the Court. This is essential to ensure the integrity of the Court, and to demonstrate the necessary level of independence and accountability. Imperative to an effective oversight mechanism, and to establishing and maintaining the credibility of the Court, no elected officials, including those in leadership positions within organs of the Court, should have the right to exercise a veto power regarding the initiation of an investigation. Elected officials should not have the authority to amend the final IOM reports once released, or to directly participate in IOM-related investigations, except by the explicit invitation of the IOM.
- **Provide** a clear definition of the IOM’s powers to initiate investigations, ensuring that the IOM retains the power to start investigations following the receipt of information, by Organ Heads and by others, and the discovery of information. The insistence by the Office of the Prosecutor that any investigation initiated by the IOM without a referral from an Organ Head constitutes an investigation ‘on its own motion’ and is thus subject to potential third party review should not be included in the IOM Procedural Manual and is counter to the best interests of the Office of the Prosecutor, its staff, the Court as a whole and each of its organs. This interpretation risks significant third party intervention in the IOM’s duties and would inhibit the IOM in its functions.
- **Make** the IOM accountable only to the ASP, in compliance with the intentions contained within the Rome Statute, and fully independent from every organ of the Court, its officers and divisions.
- **Reclassify** the Head of the IOM to a D1 level to underscore the importance given to this function by States Parties, to reflect the seriousness of the issues the IOM will deal with, and to provide the IOM with the necessary structural authority to implement the mandate conferred to it by States Parties.<sup>2237</sup>

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2236 ‘Report on the assurance mapping study in the International Criminal Court’, *Office of Internal Oversight Services, United Nations*, 25 May 2011.

2237 Currently, the post of Head of the IOM is classified at a P4 level.

- **Define**, with urgency, a definition of ‘serious misconduct’, expressly including sexual violence, rape, abuse and harassment.
- **Make explicit** the need for a gender-competent IOM in the composition of its staff and operational scope.
- **Ensure** that the IOM develops procedures to refer cases to jurisdictions regarding allegations of suspected criminal misconduct and to cooperate with national authorities to investigate and prosecute such conduct. Particular attention should be paid to alleged cases of sexual violence, given the variations in national jurisdictions regarding the definition of rape and other forms of sexual violence, including sexual harassment.
- **Elaborate** an outreach programme for the IOM to Court staff so that they are properly informed of the IOM’s role, mandate and proceedings. The need for a continuous outreach activity within the Court’s organs has been identified by the IOM Temporary Head following her preliminary meetings with Court personnel.
- **Approve** rules for the IOM that hold accountable (including, if appropriate, by termination of employment) staff members found to have committed criminal offences or other serious misconduct. The Staff Rules and the Staff Regulations should therefore ensure that all staff are provided with training, including training of ICC personnel on the Court’s position on sexual exploitation and abuse, so that there can be no misunderstanding regarding conduct that is not acceptable and the potential consequences of such misconduct. ‘Serious misconduct’ in this regard should be defined in applicable rules and regulations to expressly include, but not be limited to, sexual violence, rape, abuse and harassment, and should result in automatically waiving immunity for ICC staff. All staff should be provided with training on these rules.
- **Relying** solely on national laws and authorities may not be sufficient in circumstances where certain acts are not criminalised in the country within which they have occurred, but may be criminalised by international law and laws applicable to a majority of States Parties and where the alleged criminality is consistent with the definitions in the Rome Statute. In such instances, particularly in relation to rape and other forms of sexual violence where national variations exist in the definitions of rape, there should be a procedure for the IOM to be able to conduct an investigation, reach its own determination and advise on the appropriate response to the allegations.
- **Request** the IOM to provide an annual report to the ASP, outlining the number and types of allegations and complaints, the source (external, internal) and the number of allegations relating to each division of the Court. In this way the IOM will be able to track patterns of misconduct, waste or mismanagement within the Court and provide recommendations to the Court for interventions to address the repetition of such conduct by particular divisions or specific individuals. This ensures a systemic rather than incident-based approach to preventing and addressing serious misconduct.
- **Ensure** that the IOM Manual of Procedures includes provisions on whistleblower protection and protection from retaliation.

## Governance

- **Strengthen** the Court's institutional framework and existing management structure to support the increasing work of the Court.
- **The ASP** should ensure that the bodies within the court responsible for compliance, including compliance with rules and regulations, are working and that quality management procedures are in place. The ASP, as part of their governance duties, should actively review reports of the respective bodies, while leaving actual management to the appropriate bodies.
- **The Court** should strengthen quality management procedures to ensure that they meet professional standards.
- **The ASP Study Group on Governance (SGG)** should seriously consider the relevant issues for the OTP within each cluster group.

## Budget

### To the ASP

- **Approval** of the annual Court budget should be based on the needs of the Court and expert assessments. In its annual review of the budget, the ASP should ensure the Court is sufficiently funded to effectively carry out its mandate, and that it exercises the most efficient use of resources for maximum impact. Under-resourcing could hinder the Court's work in significant areas, such as investigations, 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.
- **The ASP** should significantly increase the resources available to the Victims and Witnesses Unit (VWU) to enable them to address their full mandate to provide support and protection, not only to witnesses but also to victims and intermediaries whose lives may be at risk as a result of engaging with, or assisting ICC enquiries and investigations or at risk as a result of testimony provided by a witness.<sup>2238</sup> Currently victims and intermediaries are excluded from the security provisions of the Court and as such participate or assist the ICC at great risk to themselves, their families and their communities. In its proposed budget, the VWU reduced the number of areas budgeted for in the Initial Response System and the number of witness relocations in the Kenya Situation and plans to reduce the cost of local protective measures in the CAR, the DRC and the Kenya Situations.<sup>2239</sup> This is problematic considering the continuous reports of growing security concerns for many victims in particular in the Kenya Situation. Consultations with victims by the two Legal Representatives in both Kenyan cases illustrated that many victims expressed grave concern about their personal security situation as a result of having applied as a victim before the ICC.<sup>2240</sup>

<sup>2238</sup> Rule 16(2).

<sup>2239</sup> ICC-ASP/10/10, p 124-128.

<sup>2240</sup> ICC-01/09-01/11-292; ICC-01/09-02/11-267.

- **Finance** the regular activities of the Court through the regular budget, avoiding the use of the Contingency Fund to support activities that are fully anticipated by 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 2012.
- **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. The Registry should urgently request, and the ASP should immediately provide, the necessary funds for the position of Psychologist/Trauma Expert within the VWU to be upgraded to an established post. This position has been categorised as a GTA since 2009. Such expertise is mandated by Article 43(6) of the Rome Statute and as such this position should be securely integrated within the structure of the VWU as an established post. Likewise the OPCV will be hiring a new P-3 Legal Officer for six months. While this temporary post will be beneficial to legal assistance to victims, the volume of work managed by the OPCV would justify the appointment of a permanent Legal Officer.
- **The review** of the legal aid system should not be solely driven by a concern for the costs of the system of legal aid mandated by the Court's basic documents, but should rather be based on the effectiveness of the system. It is imperative that such revision not impede the right to a fair trial, and the right to adequate representation and participation of victims.
- **In reviewing** the legal aid system, the ASP should examine the context of the costs of the proceedings as a whole, and examine other factors that may contribute to prolonging proceedings and therefore driving up costs of trials, including costs of legal aid.<sup>2241</sup> According to the CBF, the costs incurred by the Court for the first two cases in the DRC Situation (Lubanga and Katanga & Ngudjolo) have so far amounted to €41,585,800, not including legal aid to the defence in the amount of €6,638,500 and for victims in the amount of €2,802,400, and also not including possible appeals and reparations phases.<sup>2242</sup>

2241 For instance, the Lubanga trial started three years after Lubanga was arrested and surrendered to the ICC in March 2006, and his trial concluded almost 5½ years after his initial appearance. An analysis of the time span of the Lubanga trial shows that of the 5½ years that he has been in ICC custody, effectively only a little over 12 months involved the presentation of evidence by the Prosecution and the Defence. The delays in the Lubanga case were due to a variety of issues, including the pre-trial delay, two stays of proceedings, the Regulation 55 procedure following the submission by Victims' Legal Representatives, the Defence abuse of process filing, and other procedural delays. See the *Gender Report Card 2007, 2008, 2009, and 2010* for further information. The Lubanga trial has one defendant, and limited charges arising out of the alleged policy/practice of enlisting and conscripting children under the age of 15 years into the FPLC, and using those children to participate actively in hostilities. By comparison, the trial judgement in the first trial at the ICTY against Dusko Tadic, involving one defendant and 34 counts of crimes against humanity and war crimes, was issued in May 1997, approximately two years after he came into the custody of the ICTY in April 1995; the Appeal Judgement followed in July 1999, and the final Appeal Judgement on sentencing was issued in January 2000. Similarly, the ICTR rendered its trial judgement in the case against Jean-Paul Akayesu, involving a single defendant and 15 counts of genocide and crimes against humanity in September 1998, 2 years and 4 months after he was taken into custody in May 1996; the Appeal Judgement followed in June 2001. By comparison, the ICC took 3 years to prepare its first case, and took 5½ years to reach the deliberation stage of proceedings. Both ICTY and ICTR had already reached the trial judgement stage in their respective first cases in three years, and in 5½ years, both the ICTY and ICTR had completed their first cases through the appeals stage of proceedings.

2242 ICC-ASP/10/15, Advance version, Annex III. No cost breakdowns are provided for these figures. The costs incurred for the defence and for victims are for the period of 2005 – 23 August 2011.



- **In reviewing** the system of legal aid to victims, ensure that the right of victims to choose their legal representative, as set out in Rule 90(1), is respected. Of particular concern in the CBF's recommendations for a revision of the system of legal aid is the suggestion to internalise victims' legal representation. While the right of victims to choose their legal representative is subject to the Chamber's prerogative to manage the proceedings, victims should not feel pressured into agreeing to a common legal representative and should be provided with accessible information about all available options associated with legal representation and their rights as applicants before the ICC. 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 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.
- **Approve** the post of Financial Officer requested by the Trust Fund for Victims. In addition, the TFV is adding three new GTA positions: one Legal Adviser, one Financial Officer and one Field Programme Assistant. While the CBF recommends that the position of Financial Officer not be approved and that the assistance to the TFV on financial matters be made a priority task for the Senior Executive in the Immediate Office of the Registrar,<sup>2243</sup> the three posts are justified on the basis of ensuring financial and legal expertise within the TFV and in turn develop its credibility in administering reparations.
- **Maintain** the role of the CBF as an expert body and refrain from further reducing the budget beyond the recommendations of the CBF. States have an opportunity to query the budget during the CBF process and can participate in the review of the budget. Once the CBF report and recommendations are completed, it is not advisable or productive for States to second-guess the detailed review and consideration given to the budget by the CBF.
- **Ensure** that the Court's budget remains demand-driven, and not resource-driven as suggested by a number of States. A resource-driven budget would stand in stark contrast with the Court's criminal justice mandate, which is essentially demand-driven. Appreciating the current economic situation, States should remember the importance of providing sufficient funds for the ICC to carry out its mandate as a criminal court.

## To the Court

- **The Court** should accurately and with specificity present its budget proposals to the CBF. The Court must prioritise improvements in its budget process as well as embark on longer term financial planning. This year the Committee on Budget and Finance (CBF) noted a number of budget issues, including the unprecedented number of potential expenses which were not contained in the 2012 proposed budget.<sup>2244</sup> They also noted the significantly higher expenses in the Judiciary which had been miscalculated in the 2012 budget submitted by this organ to the CBF.<sup>2245</sup> The Presidency had not accurately considered the number of the newly elected judges required for the expected cases in 2012, amounting to an additional expense of approximately €1 million.

<sup>2243</sup> ICC-ASP/10/15, para 140.

<sup>2244</sup> ICC-ASP/10/15, Advance version, p 8.

<sup>2245</sup> ICC-ASP/10/15, Advance version, p 7.

- **The OTP** should include sufficient funds in its budget request to fund the forecasted seven active investigations in six Situations and to maintain nine residual investigations,<sup>2246</sup> the monitoring of at least eight potential situations and a potential six trial proceedings in 2012.<sup>2247</sup> Failure to request sufficient funds is in conflict with the real needs of the OTP and will likely pose significant operational challenges to the work of the Court.

## 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.

## Elections

- **Review** the election process for the position of Chief Prosecutor.
- **Elect a new Chief Prosecutor** at the tenth session of the ASP, taking into account the requirement that the Prosecutor 'shall be [a person] of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases [and] have excellent knowledge of and be fluent in at least one of the working languages of the Court' as provided for in Article 42(3) of the Rome Statute.
- **Elect six new Judges** at the tenth 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).
- **Ensure** that the new Chief Prosecutor, to be elected in December 2011, is able to appoint her or his own team at the senior leadership level. The next Prosecutor must be enabled by the ASP to make all D1 senior leadership appointments once she or he is in office.

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2246 ICC-ASP/10/10, para 14.

2247 Estimate of the Women's Initiatives for Gender Justice based on ongoing trial proceedings in the Katanga & Ngudjolo and Bemba cases; commencement of trial proceedings in the Banda & Jerbo case subject to the resolution of interpretation issues; and commencement of trial proceedings in the Ruto *et al*, Muthaura *et al*, and Mbarushimana cases subject to charges being confirmed.

# Judiciary

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- **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 the input from victims to ascertain their views and wishes in relation to legal representation.<sup>2248</sup>
- **Ensure** that victims participating in the proceedings can easily 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.
- **The Victims' Form for Indigence** should be finalised and approved by the judges as a matter of urgency. This has been pending approval since 2006. The form is the basis for assessing whether an individual qualifies for the Legal Aid Programme, which would enable her or him to engage Counsel to represent his or her interests. For many victims, the Legal Aid Programme represents her or his only means to have representation before the ICC. The *Victims' Form for Indigence* must be accessible for victims and intermediaries to understand and must be handled with complete confidentiality to ensure the safety of both.
- **Continue utilisation** of the special measures provided in the Rome Statute and the Rules of Procedure and Evidence to facilitate the testimony of victims of sexual violence. The effective use of these provisions this year by Trial Chambers I, II and III reflect the importance and necessity of such measures.

2248 Although common legal representation in the Banda & Jerbo case was arranged well in advance of the trial date, the proposal for common legal representation was submitted months after the confirmation hearing took place. Of similar concern is the decision by Trial Chamber III twelve days before the start of the Bemba trial, in which the Chamber decided that the victim participants, until that time represented by the OPCV, would be represented by two external common legal representatives. The victims were distressed and upset by this decision as, until that time, they had relied on the bond previously established with representatives of the OPCV with whom a relationship of trust had been formed. Victims expressed to us their concern that their interests and the particularities of each of their experiences may not be well represented given the new legal representatives did not know them, their circumstances, the crimes committed against them and the impact of these acts.

- **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.’<sup>2249</sup> Minimise interventions in such testimony, while taking necessary measures to preventing re-traumatisation of witnesses in consultation with the VWU.
- **In 2012**, the Presidency of the ICC should oversee a sexual harassment audit of the Court. This should include each organ and be implemented at all levels of the institution. The results of the audit should be shared with the Bureau of the Assembly of States Parties. See the **Structures and Institutional Development Recommendations**.
- **The Presidency** should consider organising a legal seminar for all judges on the existing jurisprudence from the *ad hoc* tribunals in relation to gender-based crimes. Judicial decisions at the ICC have at times departed from existing jurisprudence, and misapplied established tests, with the result that charges have not been included in summonses to appear, arrest warrants, or confirmed in confirmation of charges proceedings.<sup>2250</sup> 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.

2249 ‘Presentation by Brigid Inder to the UNHCHR Expert Meeting on Gender and Witness and Victim Protection’, *UN High Commissioner for Human Rights*, Geneva, 26-27 May 2011.

2250 See eg the decision on confirmation of charges in *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, in which Pre-Trial Chamber II used the appropriate test for cumulative charging as set forth by the International Criminal Tribunal for the former Yugoslavia Appeals Chamber in *Prosecutor v. Delalic*, 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. In a single paragraph, the Chamber stated: ‘In the Chamber’s view, however, the acts of forcible circumcision cannot be considered acts of a “sexual nature” as required by the Elements of Crimes but are to be more properly qualified as “other inhumane acts” within the meaning of Article 7(1)(k) of the Statute. The Chamber reaches this conclusion in light of the serious injury to body that the forcible circumcision causes and in view of its character, similar to other underlying acts constituting crimes against humanity.’ 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.

# Office of the Prosecutor

- **Strengthen the investigatory strategies** developed and overseen by the Executive Committee to ensure sufficient evidence is collected to be able to sustain charges for gender-based crimes. Currently, the Pre-Trial Chamber refused to confirm 33% of all charges of gender-based crimes sought by the Prosecution.<sup>2251</sup>
- **Urgently review** the Prosecution's strategy for the investigation and presentation of evidence of gender-based crimes. For example, ensure that all documents presented to Chambers clearly specify the links between the facts and the elements of each crime alleged, thereby demonstrating the need to charge distinct crimes for the purpose of addressing different types of harm experienced by the victims.
- **The OTP**, in particular the Prosecutor, should demonstrate willingness to comply with Court orders to ensure trials and other proceedings fulfil the highest standards of international criminal law. Adherence to judicial orders is essential for effective management, by judges, of legal proceedings.
- **In addition** to the Special Adviser on Gender Issues, the OTP should appoint full-time internal gender experts in both the Investigation and Prosecution Divisions. Given the increase in cases and investigations, more staff with gender expertise will be required to ensure the integration of gender issues within the heightened case load expected next year; this includes seven active investigations, maintenance of nine residual investigations, monitoring of at least eight potential Situations,<sup>2252</sup> and a potential six trials.<sup>2253</sup> Gender expertise within the OTP is essential to further strengthen the strategic impact of the Special Adviser, to support institutional capacity on these issues, and to enhance the integration of gender issues in the discussions and decisions regarding investigations, the construction of case hypotheses, the selection of cases and the prosecution strategy.
- **The OTP** must develop the procedures for, and more effectively manage, the engagement of credible local intermediaries in relation to their work with the Office in locating and liaising with potential and actual witnesses.

2251 Ten out of fifteen *charges* (66.6%) of gender-based crimes were confirmed in the Bemba and Katanga & Ngudjolo cases. Two charges of outrages on personal dignity were not confirmed in the Katanga & Ngudjolo case (eight charges of rape and sexual slavery went forward to trial), while two counts of torture and one count of outrages on personal dignity were not confirmed in the Bemba case (two charges of rape were confirmed against Bemba). 40% of gender-based *crimes* (6 out of 10) were not successfully confirmed in these two cases. The offences of rape as a crime against humanity and rape as a war crime were confirmed in the Bemba case, while torture as a war crime, torture as a crime against humanity and outrages on personal dignity as a war crime were not confirmed. In the Katanga & Ngudjolo case, the crimes of rape as a crime against humanity, rape as a war crime, sexual slavery as a crime against humanity and sexual slavery as a war crime were confirmed, but the crime of outrages on personal dignity as a war crime was not confirmed.

2252 ICC-ASP/10/10, p 3. Please note that the figure related to the seven active investigations includes the Situation in Côte d'Ivoire, for which investigations were authorised by Pre-Trial Chamber III on 3 October 2011, after the 2012 Proposed Programme Budget was prepared.

2253 Estimate of the Women's Initiatives for Gender Justice based on ongoing trial proceedings in the Katanga & Ngudjolo and Bemba cases; commencement of trial proceedings in the Banda & Jerbo case subject to the resolution of interpretation issues; and commencement of trial proceedings in the Ruto *et al*, Muthaura *et al*, and Mbarushimana cases subject to charges being confirmed.

- **In courtroom** proceedings, the Prosecution and Defence must continue to be mindful of the manner of questioning witnesses or victims, in particular victims of sexual violence, and must avoid aggressive, harassing and intimidating styles of questioning that have the effect of re-victimising these victims.
- **Continue** and strengthen coordination between the OTP and the VWU to ensure that witnesses, including women, minors, and victims of sexual and gender-based crimes, are safely supported and protected.
- **Draft** a code of conduct for counsel applicable to Prosecution counsel. The current Code of Professional Conduct for counsel only applies to 'defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the International Criminal Court'.<sup>2254</sup>

## Registry

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- **Promote** the Lists of Counsel, Assistants to Counsel and Professional Investigators, and the List of Experts to women. Highlight the need for expertise on sexual and gender-based violence among all potential applicants, and seek such information in the candidate application form. Currently, lawyers with this specialised expertise are not yet explicitly encouraged to apply. The Registry should encourage applications from lawyers with this experience on the ICC website and develop a 'Frequently Asked Questions' page to promote a better understanding of the application process. The CSS should keep updated and accurate lists publicly available on the Court's website.
- **Prioritise** the need for training individuals on the List of Legal Counsel and the List of Assistants to Counsel on the gender provisions of the Rome Statute and interviewing/working with victims of rape and other forms of sexual violence.
- **Rule 90(4)** mandates that when appointing common legal representatives for groups of victims, 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.<sup>2255</sup>

2254 Article 1, Code of Professional Conduct for counsel, ICC-ASP/4/Res.1.

2255 In this regard, we note with particular concern the decision by Trial Chamber III, twelve days before the start of the Bemba trial, in which victims were grouped into only two groups, on the basis of geographical location. Organising the legal representation into only two groups may not be in the best interests of victims given the large number of individuals the two legal representatives will have responsibility for during the trial. A total of 1,619 victims have been accepted to participate in the Bemba case to date, who are represented by two common legal representatives (source: figures provided by the VPRS by email dated 14 September 2011). In addition, arranging victims into groups according to geographical location, rather than according to the nature of the crimes committed against them, may not serve the victims' best interests, particularly given the large number of victims of rape and other forms of sexual violence participating in the case. See '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.pdf](http://www.iccwomen.org/documents/Bemba_Opening_Statement_pdf.pdf)>.

- **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. Develop a systematic approach to common legal representation, including adequate consultation with participating victims. Take into account the resources and time needed for such consultation, and ensure that best practices are adhered to.
- **Ensure** that proposals for common legal representation are presented to the Chambers in a timely manner, and not only weeks before a confirmation hearing or the start of trial. There has been a consistent trend towards the appointment of common legal representation at a very late stage in proceedings, as acknowledged by the Registry in its proposal for common legal representation in the two Kenyan cases.
- **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. Streamline the process of applying for legal aid to minimise the burden for victims and their legal representatives. Currently, legal counsels are required to re-apply for each intervention they wish to make for every proceeding.
- **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 five 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,<sup>2256</sup> and put in place safeguards to address security concerns, including ensuring that victim representations made under Article 15(3) remain confidential and are not accessible to the Prosecution.

2256 In the Kenya Situation, despite the significant number of gender-based crimes reported in the post-election violence, under half (40%) of individual victim representations received under Article 15(3) were from women. The VPRS, which managed the process of gathering victim representations, noted that 'despite conscious efforts by the VPRS to include as many women as possible in the meetings organised with community representatives, this was not always easy to achieve, and in any event women were always free to decide not to submit a representation'. ICC-01/09-17-Corr-Red, para 48.

- **Develop** a tool to provide the ASP and civil society with gender disaggregated data on victim applicants. Despite the fact that the application form for victim participation specifically requires the applicant to indicate his or her sex, the VPRS does not consistently include this information as ‘basic data’. As a result, for more than one-quarter of the applications registered by the VPRS between 30 August 2010 and 1 September 2011, the sex of the applicant is listed as ‘unknown’.<sup>2257</sup> 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 senior management processes and oversight of the Section within the Division of Court Services; conducting a skills audit of the Section staff; reviewing performance and roles; introducing a stronger data collection function; and creating a more effective mechanism and response strategy to address the large backlog of unprocessed victim application forms.
- **The Registrar** should urgently initiate an audit to identify the reasons for the current backlog of over 6,000 victims’ applications and instigate immediate remedies to address this problem. In October 2010, there were 900 unprocessed victims’ applications. In the intervening period, no action has been taken by the Division of Court Services to identify the cause of the backlog and to take steps to immediately stem the growing number of unprocessed victims’ applications. During 2012, the Division should develop strategies for long term changes within VPRS to avoid a repetition of such limited functionality.
- **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.<sup>2258</sup>
- **Review** the code of conduct for counsel, in particular to 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’. Trial Chamber III indeed found that the code does not apply to legal consultants working for a defence team.<sup>2259</sup>

2257 The information provided by email from the VPRS states that a total of 2,577 applications for victim participation were registered by the VPRS during this time period. The gender of 658 applicants (or 25.53%) is listed as unknown.

2258 For instance, the common Legal Representative of Victims in *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* indicated that many of her clients expressed that people in their communities did not understand the difference between witnesses and victims and that as such they risk being seen as materially aiding the Prosecution’s case against the three individuals. They expressed serious concerns about their security as a result (ICC-01/09-01/11-292, para 8).

2259 ICC-01/05-01/08-769.



## Acronyms used in the Gender Report Card 2011

AMIS	African Union Mission in Sudan	MENA	Middle East and North Africa Region
ASP	Assembly of States Parties	MGS Haskanita	Haskanita Military Group Site
AU	African Union	MLC	<i>Mouvement de libération du Congo</i>
BiH	Bosnia and Herzegovina	MONUSCO	<i>Mission de l'Organisation des Nations Unies pour la stabilisation en République démocratique du Congo</i>
CAR	Central African Republic	MSF	<i>Médecins sans Frontières</i>
CBF	Committee on Budget and Finance	NATO	North Atlantic Treaty Organisation
CNDP	<i>Congrès national pour la défense du peuple</i>	NCP	National Congress Party (Sudan)
COMESA	Common Market for Eastern and Southern Africa	NGO	Non-Governmental Organisation
CPJP	<i>Convention des patriotes pour la justice et la paix</i>	NTC	National Transitional Council (Libya)
CSS	Counsel Support Section	ODM	Orange Democratic Movement (Kenya)
DPA	UN Department of Political Affairs	OHCHR	Office of the High Commissioner for Human Rights
DPKO	UN Department of Peacekeeping Operations	OPCD	Office of Public Counsel for Defence
DRC	Democratic Republic of Congo	OPCV	Office of Public Counsel for Victims
FACA	<i>Forces armées centrafricaines</i>	OPCW	Organisation for the Prohibition of Chemical Weapons
FARDC	<i>Forces armées de la République démocratique du Congo</i> (the Congolese Army)	OSISA	Open Society Initiative of Southern Africa
FCRI	<i>Forces républicaines de Côte d'Ivoire</i>	OSJI	Open Society Justice Initiative
FDLR	<i>Forces démocratiques pour la libération du Rwanda</i>	OTP	Office of the Prosecutor
FNI	<i>Front de nationalistes et intégrationnistes</i>	PIDS	Public Information and Documentation Section
FPLC	<i>Forces patriotiques pour la libération du Congo</i>	PNU	Party of National Unity (Kenya)
FRPI	<i>Force de résistance patriotique en Ituri</i>	RFI	Radio France International
FYROM	Former Yugoslavian Republic of Macedonia	RPE	Rules of Procedure and Evidence
GCC	Gulf Cooperation Council	SAF	Sudan's Armed Forces
GNWVPN	Greater North Women's Voices for Peace Network	SGBV	Sexual and Gender-Based Violence
GRULAC	Group of Latin American and Caribbean Countries	SGG	Study Group on Governance
IBA	International Bar Association	SIDG	Sudan International Defence Group
ICC	International Criminal Court	SLA-Unity	Sudanese Liberation Army Unity
ICD	International Crimes Division (Uganda)	SNAP	Survivor's Network of those Abused by Priests
ICTR	International Criminal Tribunal for Rwanda	SPML-N	Sudan Peoples' Liberation Movement – North
ICTY	International Criminal Tribunal for the Former Yugoslavia	SWTUF	Sudan Workers Trade Unions Federation
IDP(s)	Internally Displaced Person(s)	TFV	Trust Fund for Victims
IGAD	Inter-Governmental Authority for Development	UFDR	<i>Union des forces démocratiques pour le rassemblement</i>
IMC	International Medical Corps	UN	United Nations
IOM	Independent Oversight Mechanism	UNGA	UN General Assembly
JCCD	Jurisdiction, Complementarity and Cooperation Division	UNHCR	UN High Commissioner for Refugees
JEM	Justice and Equality Movement (Sudan)	UNHRC	UN Human Rights Council
JUPEDEC	<i>Jeunesse Unie pour la Protection de l'Environnement et le Développement Communautaire</i>	UNJHRO	UN Joint Human Rights Office
KNDR	Kenya National Dialogue and Reconciliation	UNOCA	UN Office for Central Africa
LJM	Sudanese Liberation and Justice Movement	UNOCHA	UN Office for the Coordination of Humanitarian Affairs
LRA	Lord's Resistance Army	UNOCI	UN Operation in Côte d'Ivoire
LRV	Legal Representative of Victims	UNOIOS	UN Office of Internal Oversight
		UNSC	United Nations Security Council
		UPC	<i>Union des patriotes congolais</i>
		UPDF	Ugandan People's Defence Force
		USA / US	United States of America
		VOA	Voice of America
		VPRS	Victims Participation and Reparation Section
		VWU	Victims and Witnesses Unit
		WCD	War Crimes Division (Uganda)
		WEOG	Western European and Others Group

## Publications by the Women's Initiatives for Gender Justice

- 
- *Gender Report Card on the International Criminal Court 2011*
  - *Gender Report Card on the International Criminal Court 2010*
  - *Gender Report Card on the International Criminal Court 2009*
  - *Gender Report Card on the International Criminal Court 2008*
  - *Rapport Genre sur la Cour Pénale Internationale 2008*  
(*Gender Report Card on the International Criminal Court 2008*, French Edition)
  - *Advance Preliminary Report: Structures and Institutional Development of the International Criminal Court*, October 2008
- 
- *In Pursuit of Peace – À la Poursuite de la Paix*, April 2010
- 
- *Making a Statement*, Second Edition, February 2010, reprinted October 2010
  - *Prendre Position (Making a Statement, French Edition)*, Deuxième édition, février 2010
- 
- *Legal Filings Submitted by the Women's Initiatives for Gender Justice to the International Criminal Court: The Prosecutor v. Jean-Pierre Bemba Gombo and The Prosecutor v. Thomas Lubanga Dyilo*, February 2010
- 
- *Women's Voices/Dwan Mon/Eporoto Lo Angor/Dwon Mon: A Call for Peace, Accountability and Reconciliation for the Greater North of Uganda*, Second Edition, May 2009, reprinted July 2009 and September 2011
- 
- *Profile of Judicial Candidates*, Election November 2009
  - *Profile of Judicial Candidates*, Election January 2009
  - *Profile of Judicial Candidates*, Election November 2007
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- *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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*Authors* Brigid Inder, Katharine Orlovsky, Vanina Serra, Dieneke de Vos, Lori Mann, Niamh Hayes

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## Women's Initiatives for Gender Justice

Noordwal 10  
2513 EA The Hague  
The Netherlands

Tel +31 (0)70 302 9911  
Fax +31 (0)70 392 5270

info@iccwomen.org  
www.iccwomen.org