Women's Initiatives for Gender Justice

gender 2010 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 four of the five ICC Situation countries: Uganda, the Democratic Republic of the Congo, Sudan and the Central African Republic.

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.

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The Women's Initiatives for Gender Justice dedicates the *Gender Report Card on the International Criminal Court 2010* to our friends and colleagues, **Rhonda Copelon** and **Paula Escarameia** who passed away this year. We warmly acknowledge their work as advocates for women's human rights and honour their intellects, determination and contributions to the field of gender justice.

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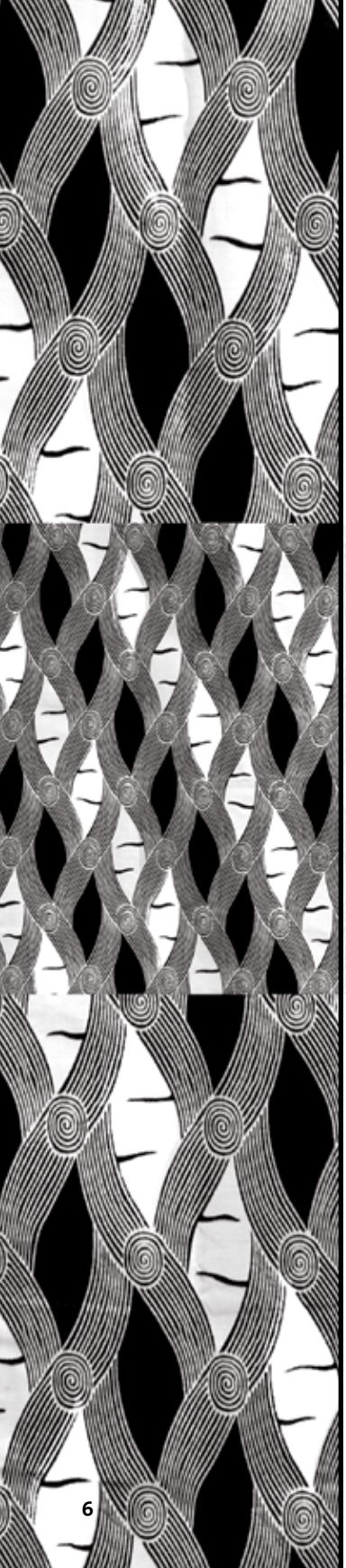

Introduction

This is the sixth *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 more than eight years since the Rome Statute came into force.[1]

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

The Rome Statute is far-reaching and forward-looking in many 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 12 September 2009 to 17 September 2010. 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 January 2010—

1 October 2010

Structures

The Rome Statute[2] creates the International Criminal Court (ICC) which is composed of four organs:[3]

- **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'.[4]

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.[5] There is a total of 19 judges in the Court's three divisions.[6]

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'.[7]

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'.[8] 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'.[9]

Gender Equity

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

Geographical Equity

The Rome Statute requires that, in the selection of judges, the need for 'equitable geographical representation'[12] be taken into account in the selection process. The same principle applies to the selection of staff in the OTP and in the Registry.[13]

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.[14]

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.[15]

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.[16]

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.[17]

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.[18]

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[19]		men	women
Overall staff[20] *(697 including professional, general & elected officials, excluding judges)*		53%	47%
Overall professional posts[21] *(359 including elected officials, excluding judges)*		50%	50%
Judiciary	Judges[22]	42%	58%
	Overall professional posts[23] *(excluding judges)*	42%	58%
OTP overall professional posts[24]		51%	49%
Registry overall professional posts[25]		51%	49%

19 Figures as of 31 July 2010. Information provided by the Human Resources Section of the ICC.

20 The overall number of staff decreased by six individuals compared with 2009 figures, however the percentage of female and male staff remained the same as last year. Please note, this year the judges are not included in the figure for the overall number of staff.

21 For the second year in a row, half of the professional posts at the Court are occupied by women. The total number of professional posts, including elected officials, but excluding judges, is 359 or 51.5% of the overall staff.

22 There are currently 19 judges on the bench of the ICC of which 11 (58%) are women and eight (42%) are men. Women are the majority on the bench of the ICC for the second year in a row. 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. The two vacancies created in 2009 with the resignation of Judge Mohamed Shahabuddeen (Guyana) and the passing away of Judge Fumiko Saiga (Japan) were filled by judicial elections held during the 8th session of the Assembly of States Parties in November 2009. Both posts were filled by female judges (Judge Silvia Alejandra Fernández de Gurmendi from Argentina and Judge Kuniko Okazi from Japan).

23 Compared with 2009, there is a 2% increase in the number of women appointed to professional posts in the Judiciary.

24 Compared with 2009, there is a 1% increase in the number of women appointed to professional posts in the OTP. Last year, there was a 6% increase in female appointments compared with 2008. The female/male differential remains high in 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). At the P3 level there are 17 (44%) female appointees and 22 (56%) male appointees. In 2010, there are 12 women and seven men at the P1 level, and 27 women and 19 men at the P2 level.

25 The recruitment statistics for the Registry have been around this year's level, 51% male and 49% female appointees, for the past four years. However, with the exception of the P4 (56% women) and P2 (61% women) levels, all other grades show significantly more male than female appointments. At the P3 level there are 22% more male professionals appointed compared to 10% more in 2009. Men continue to outnumber women in senior positions, with six women and nine men at the P5 level and three times more men than women in posts at the D1 level (one woman and three men). Women continue to be over-represented at the P2 level (61%).

Executive Committee and Senior Management		*men*	*women*
Judiciary	Presidency	**67%**	**33%**
	Heads of Sections or equivalent posts[26]	**33%**	**67%**
OTP	Executive Committee[27]	**67%**	**33%**
	Heads of Divisions[28]	**50%**	**50%**
	Heads of Sections[29]	**68%**	**32%**
Registry	Heads of Divisions[30]	**100%**	**0%**
	Heads of Sections[31]	**53%**	**47%**

26 There are three Heads of Sections or equivalent posts in the Judiciary: the Chef de Cabinet, the Head of the New York Liaison Office and the Senior Legal Adviser to the Chambers. Of these, two are held by women (67%).

27 The Executive Committee is composed of the Prosecutor and the three Heads of Division (Prosecutions; Investigations; Jurisdiction, Complementarity and Cooperation). The post of the Head of the Jurisdiction, Complementarity and Cooperation Division has been vacant since 31 May 2010. Two out of the three filled executive posts are occupied by men. Although the post of Head of the Investigation Division is filled, the elected position of Deputy Prosecutor (Investigations) has not been replaced since it became vacant in 2007.

28 The post of the Head of the Jurisdiction, Complementarity and Cooperation Division has been vacant since 31 May 2010. Of the two filled posts, one is occupied by a man and one by a woman.

29 Compared to 2009, seven new Heads of Sections and equivalent posts were created in the OTP during the last 12 months. Of these positions, one, Head of the Investigation Team for DRC, is under recruitment. Women currently occupy 32% of the filled positions.

30 Since 2009, one of the three Divisions of the Registry has been dissolved and the areas of authority reallocated to other sections of administrative operations. 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 these divisions are men.

31 Out of 22 Heads of Sections and equivalent posts in the Registry, three are vacant (14%). This year's figure, 47%, represents a 3% decrease in female professionals appointed to Heads of Sections or equivalent posts in the Registry compared with 2009.

Field Offices[32]	men	women
Overall field staff[33] *(101 including professional and general staff)*	77%	23%
Overall field staff per country[34] *(including professional and general staff)*		
Central African Republic (CAR)	85%	15%
Chad – Darfur	92%	8%
Democratic Republic of Congo (DRC)	74.5%	25.5%
Uganda	68%	32%
Overall field staff per section[35] *(including professional and general staff)*		
Field Operations Section [37][36]	89%	11%
Information Technology and Communication [3]	100%	0%
Outreach Unit [13]	54%	46%
Planning and Operations Section [9]	89%	11%
Security and Safety Section [6]	100%	0%
Victims and Witnesses Unit [25]	64%	36%
Victims' Participation and Reparations Section [5]	60%	40%
Secretariat of the Trust Fund for Victims [3]	67%	33%

32 Figures as of 31 July 2010. Information provided by the Human Resources Section of the ICC.

33 The Court has field offices in four out of the five Situations currently under investigation (CAR, DRC, Chad for Darfur, and Uganda). Out of 101 posts in the field offices, 24 (24%) are professional positions with 16 (67%) 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.

34 The field office with the highest gender differential is Chad with 84% more men than women appointed, followed by CAR with a 70% male/female differential, DRC with 49% and finally Uganda with 36%.

35 The Section/Unit with the highest presence in field offices is the Field Operations Section with 37 staff (36.5% of overall field staff) across the country-based offices. The Victims and Witnesses Unit follows with 25 staff members (24.5%) divided between the four field offices. The third Section/Unit with the highest number of staff at the country-level is Outreach with 13 (13%) representatives across three field offices (CAR, DRC and Uganda). The only Sections/Units that are represented in each of the four offices are the Field Operations Section, the Security and Safety Section and the Victims and Witnesses Unit. The Secretariat of the Trust Fund for Victims has representatives in two out of the four offices (DRC and Uganda). The male/female differential is high across all Sections/Units represented in the field offices, with the Information Technology and Communication and the Security and Safety Sections having 100% male employees. The Outreach Unit has the strongest gender balance in the field offices with 54% men and 46% women.

36 Total number of staff per section in brackets.

Field Offices *continued*	*men*	*women*
Overall professional staff[37] *(24 professional posts excluding language staff)*	**67%**	**33%**
Overall professional staff per country[38] *(professional posts excluding language staff)*		
Central African Republic (CAR)	**50%**	**50%**
Chad – Darfur	**100%**	**0%**
Democratic Republic of Congo (DRC)	**64%**	**36%**
Uganda	**71.5%**	**28.5%**

37 Out of 101 overall posts in field offices, 24 (24%) are occupied by professional staff, excluding language staff. The majority of professional posts are occupied by men (67%). The field office with the highest number of staff deployed is the DRC office with 46% of the total professional field staff, followed by Uganda (29%), CAR (17%) and Chad (8%). Professional staff in field offices are all at P2 and P3 level. There are twice as many P3 staff members as P2 staff (respectively 16 and eight). Women professionals are in the majority at the P2 level (62.5%), but only three out of 16 P3 grade posts are occupied by women (19%). Half of the professional posts are occupied by individuals from the Western European and Others Group (WEOG) region. Professional appointees from the Africa region make up 42% of the total, followed by Asia and the Group of Latin American and Caribbean Countries (GRULAC) both at 4%. Eastern Europe is not represented in the field offices. A total of 15 countries are represented in the field offices. French nationals are the highest number of staff members from a single country assigned to field offices (seven), followed by Sierra Leone, the United States of America and Niger (two professionals each). The remaining states have one professional each.

38 Half of the staff of the CAR field office are female professionals. In the DRC, women are 36% of the professional staff while in Uganda 28.5% of the staff are female professionals. In Chad, all of the professional posts are occupied by men.

ICC-related Bodies		*men*	*women*
Trust Fund for Victims	Board of Directors[39]	**40%**	**60%**
	Secretariat[40]	**43%**	**57%**
ASP Bureau	Executive[41]	**100%**	**0%**
	Secretariat[42]	**44.5%**	**55.5%**
	Committee on Budget and Finance[43]	**75%**	**25%**
Project Office for the Permanent Premises – Director's Office[44]		**50%**	**50%**
Independent Oversight Mechanism[45]		**–**	**100%**

39 Figure as of 28 July 2010. 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 8th Session of the Assembly of States Parties in The Hague in November 2009.

40 Figure as of 7 July 2010. Information provided by the Secretariat of the Trust Fund for Victims. Three posts out of 10 (30%) are vacant. The post of Executive Director was under recruitment from 30 July 2009 and the Acting Executive Director post was filled by a woman. The appointment of Executive Director was made on 1 September 2010 with the post now held by a male. Of the filled positions, 57% are occupied by female professionals compared with 71% in 2009 and 73% in 2008.

41 Figure as of 28 October 2010. Information at <http://www.icc-cpi.int/Menus/ASP/Bureau/Decisions/2010/2010.htm>. 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 and Vice-Presidents. 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 7th session of the ASP on 14 November 2008. Please note that the figure only includes the President (from Liechtenstein) and one Vice-President (from Mexico) as the other Vice-President (from Kenya) resigned on 27 August 2010. The delegation of South Africa has been appointed by the Bureau to lead the consultations within the African Group to identify a successor to serve for the remainder of the term of the former Vice-President.

42 Figure as of 30 June 2010. Information provided by the Secretariat of the Assembly of States Parties. Women represent the majority at the Secretariat of the Assembly of States Parties (55.5% women and 44.5% men). Women were also the majority in the ASP Secretariat in 2009 (57%) and 2008 (71%).

43 Figure as of 17 May 2010, *Nominations for Members of the Committee on Budget and Finance*, Note Verbale of 17 May 2010, ICC-ASP/9/S/CBF/10. 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 majority, four (33%), are from the WEOG region. Africa, GRULAC, Asia and Eastern Europe have two members each. The term of office for six of the 12 members will expire on 20 April 2011. The six new members of the Committee will be elected during the ninth session of the Assembly of States Parties from 6-10 December 2010. The nomination period for the new members was open from 7 June to 30 August 2010. The six members whose term of office expires on 20 April 2011 come from Eastern Europe (one member), Africa (one member), GRULAC (one member) and WEOG (three members).

44 Figure as of 31 July 2010. Information provided by the Human Resources Section of the ICC.

45 In its 7th 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). The Temporary Head took office on 19 July 2010. A P2 post is currently under recruitment.

Disciplinary Boards	*men*	*women*
Disciplinary Advisory Board[46] *(internal)*	**45%**	**55%**
Appeals Board[47] *(internal)*	**45%**	**55%**
Disciplinary Board for Counsel[48]	**33%**	**67%**
Disciplinary Appeals Board for Counsel[49]	**100%**	**0%**

46 Figure as of 8 September 2010. 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, but excluding the Secretary (female) and the alternate Secretary (female). Seven out of nine staff members are from WEOG countries (Belgium – two members; France – two members; Spain, Germany, Ireland – one each). There is one staff member each from Eastern Europe and Africa (respectively Serbia and South Africa).

47 Figure as of 8 September 2010. Information provided by the Human Resources Section of the ICC. The figure in the table represents the gender breakdown of the nine members of the Appeals Board, but excluding the Secretary (female) and the alternate Secretary (female). Four out of nine members are from WEOG countries (Australia, United Kingdom, United States of America and Italy – one member each). Three members of the Board are from Africa (Ghana, Senegal and Kenya) and two members are from GRULAC (Colombia and Venezuela).

48 Figure as of 8 September 2010. Information provided by the Human Resources Section of the ICC. The Disciplinary Board for Counsel is composed of two permanent members, both female, and one male alternate member. All members are from WEOG countries (France, two members and Spain, one member). Article 36 of the Code of Professional Conduct for Counsel outlines the composition and management of the Disciplinary Board.

49 Figure as of 8 September 2010. Information provided by the Human Resources Section of the ICC. The Disciplinary Appeals Board for Counsel is composed of two male permanent members and one male alternate. All members are from WEOG countries (Belgium, Canada and United States).

Geographical and Gender Equity among Professional Staff[50]

The 'Top 5' by Region and Gender and the 'Top 10' overall[51]

(includes elected officials, excludes language staff)

WEOG[52] — 61% overall (198 staff) — 46% men (92) — 54% women (106)

Western European and Others Group

'Top 5' countries in the region
(range from 12 – 44 professionals)

1 France [44][53]
2 United Kingdom [25]
3 The Netherlands [19]
4 Australia, Germany [17]
5 Canada, United States of America [12]

'Top 5' countries by gender
(range from 6 – 32 female professionals)

1 France [32][54]
2 Australia, Germany, United Kingdom [9]
3 The Netherlands [8]
4 United States of America [7]
5 Canada, Spain [6]

Africa[55] — 16% overall (52 staff) — 75% men (39) — 25% women (13)

'Top 5' countries in the region
(range from 2 – 8 professionals)

1 South Africa [8]
2 Nigeria [7]
3 Gambia, Senegal, Sierra Leone [4]
4 Arab Republic of Egypt, Kenya [3]
5 DRC, Ghana, Mali, Niger, United Republic of Tanzania [2]

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

1 Sierra Leone [3]
2 Gambia, South Africa [2]
3 Nigeria, Kenya, Tunisia, Rwanda, Uganda, United Republic of Tanzania [1]

50 Figures as of 31 July 2010. Information provided by the Human Resources Section of the ICC. The ICC excludes Language Staff and includes Elected Officials for the breakdown of geographical representation. Out of 697 overall staff (excluding judges), there are 324 professional posts, excluding Language Staff, half of which are occupied by women (162).

51 Note that it has not always been possible to establish a 'Top 5' for Gender since for some regions there are not enough female nationals appointed to professional posts to arrive at a 'Top 5'. In those cases, a 'Top 4' or 'Top 3' list has been established.

52 Western European and Others Group. For the second year in a row this region accounts for 61% of the overall professional staff at the ICC. Since 2007, France has had the highest number of professional appointees. This year 22% (44 individuals) of the WEOG professionals are French nationals. This figure equals the combined numbers of the next two states (the United Kingdom with 25 and the Netherlands with 19 appointees, respectively). This year Canada and the United States of America joined the top five countries within WEOG for the total number of professional appointments. Women are the majority of appointees from WEOG (54% in 2010 and 55% in 2009). In 2008, 49% were women and 51% were men from this region.

53 The number of staff per country is reported in brackets.

54 The number of female staff per country is reported in brackets.

55 Africa accounts for 16% of the overall number of professional staff at the ICC. This figure is the same as in 2009. For the fourth 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 2010, men represent 75% of the overall number of appointees from this region, a 2% increase from last year. In 2008 this figure was 70% and in 2007 it was 64%. Three new States, Arab Republic of Egypt, Gambia and Kenya, are represented in the 'Top 5' tier of African countries with appointees at the Court. One new country, Rwanda, joined the 'Top 3' countries by gender (one female professional).

GRULAC[56] — 9% overall (30 staff) — 37% men (11) — 63% women (19)

Group of Latin American & Caribbean Countries

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

1 Argentina, Colombia [5]
2 Trinidad & Tobago [4]
3 Brazil, Costa Rica, Peru [3]
4 Ecuador, Mexico, Venezuela [2]
5 Chile [1]

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

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

Eastern Europe[57] — 7% overall (22 staff) — 41% men (9) — 59% women (13)

'Top 4'countries in the region
(range from 1 – 6 professionals)

1 Romania [6]
2 Croatia [5]
3 Serbia [3]
4 Albania, Belarus, BiH,[58] FYROM,[59] Georgia, Poland, Russian Federation, Ukraine [1]

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

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

Asia[60] — 7% overall (22 staff) — 50% men (11) — 50% women (11)

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

1 Japan [5]
2 Islamic Republic of Iran [4]
3 Singapore [3]
4 Lebanon, Republic of Korea [2]
5 Cyprus, Mongolia, Jordan, Occupied Palestinian Territory, Philippines, Sri Lanka [1]

'Top 3' countries by gender
(range from 1 – 5 female professionals)

1 Japan [5]
2 Singapore [2]
3 Cyprus, Islamic Republic of Iran, Philippines, Lebanon [1]

56 Group of Latin American and Caribbean Countries. This region accounts for 9% of the overall staff at the ICC, 0.5% less than last year. For the fourth year in a row, women represent the majority of staff appointed from this region (63%), 1% more than last year (62%). In 2008, women were 60% of appointed professionals from this region and in 2007 they were 56%. No new state joined the 'Top 5' tier of GRULAC countries with appointees at the Court nor the 'Top 4' tier of countries by gender.

57 Eastern Europe accounts for 7% of the overall professional staff at ICC, a 0.5% decrease from 2009. Representation of staff from this region has been static at around 7% for the last three years. The percentage of women professionals from this region (59%) increased by 2.5% from 2009 (56.5%). This year it was not possible to establish a 'Top 5' for the region as there were not enough nationals appointed to arrive to a 'Top 5' list. One new state, Poland, joined the 'Top 4' tier of Eastern European countries with appointees at the Court. No new state is represented in the 'Top 4' countries by gender.

58 Bosnia and Herzegovina.

59 The Former Yugoslav Republic of Macedonia.

60 Asia accounts for 7% of the overall professional staff at ICC compared with 6% in 2009. This is the first increase in the percentage of staff from the Asia region in the last four years. In addition, the number of women appointed from this region increased by 5%. Female professionals are now half of the total of professional appointees from Asia. For the first time, this year it has been possible to establish a 'Top 5' tier of Asian countries with the highest number of appointees. It was also possible to establish a 'Top 3' by gender for the first time since 2007. No new state joined the 'Top 5' tier of Asian countries with appointees at the Court. One new country, Lebanon, joined the 'Top 3' countries by gender.

Overall 'Top 10' – Region and Gender

'Top 10'countries

(range from 6 – 44 professionals)[61]

1 France [44]
2 United Kingdom [25]
3 The Netherlands [19]
4 Australia, Germany [17]
5 Canada, United States of America [12]
6 Italy [11]
7 Belgium, Spain [9]
8 South Africa [8]
9 Nigeria [7]
10 Romania [6]

'Top 10' countries by gender

(range from 1 – 32 female professionals)[62]

1 France [32]
2 Australia, Germany, United Kingdom [9]
3 The Netherlands [8]
4 United States of America [7]
5 Canada, Spain [6]
6 Italy, Japan [5]
7 Belgium, Colombia, Romania [4]
8 Austria, Costa Rica, Croatia, Sierra Leone [3]
9 Argentina, Brazil, Mexico, New Zealand, Gambia, Greece, Peru, Serbia, Singapore, South Africa, Trinidad, Tobago [2]
10 BiH, Bulgaria, Cyprus, Ecuador, FYROM, Islamic Republic of Iran, Ireland, Lebanon, Nigeria, Kenya, Philippines, Portugal, Russian Federation, Rwanda, Sweden, Switzerland, Tunisia, Uganda, United Republic of Tanzania, Venezuela [1]

61 There are 13 countries in the 'Top 10' list in 2010 compared to 14 in 2009. The range, from 6 to 44 professionals, did not change significantly from last year (5 to 41). France is again the country with the highest number of professionals (44), three more than last year. Ten of the 13 countries composing the 'Top 10' are from the WEOG region (77%). Last year, ten out of 14 countries were from WEOG (71%). In 2008 this figure was 67%. As in 2009, WEOG countries occupy the first seven places on the list. The first non-WEOG country in the 'Top 10' is South Africa (Africa) with eight professionals, followed by Nigeria (Africa – seven professionals) and Romania (Eastern Europe – six professionals). While last year GRULAC was represented by Colombia at number ten on the list, this year the Latin American and Caribbean region is not represented. Asia is also not represented in the list for the third year running. Overall, the 'Top 10' countries with the highest numbers of appointees to the Court have not changed significantly in the last four years.

62 There are 48 countries in the 'Top 10' list by gender. Last year, 47 countries were included in the list. This is only the second year that a 'Top 10' list by gender could be established. In 2008, there were 43 countries included in a 'Top 8' list as there was not a sufficient number of female appointments to professional posts to establish a 'Top 10' list. The range in 2010 is 1 to 32, with the highest side of the range two points higher than in 2009. In 2008 the range was from 1 to 15 female appointments. This is the fourth year in a row that France has ranked highest with 32 female professionals appointed to the Court. From 2007 to 2010 the number of French female professionals employed increased by 22, with the highest increase taking place in 2009 when their number doubled from 2008 (30 French female professionals in 2009 and 15 in 2008). WEOG countries occupy the first five places of the 'Top 10' list by gender. As in 2009, the first non-WEOG country in the list is Japan (Asia – five female professionals) ranking number six on the list with Italy (WEOG). The first five places on the list this year are occupied by eight countries with Canada being the only new addition from 2009 and 2008. The countries included in the 'Top 10' by gender did not change significantly from last year, with the exception of the exclusion of Finland (WEOG) and the inclusion of Lebanon (Asia) and Rwanda (Africa).

Legal Counsel

Appointments to the List of Legal Counsel[63]	*men*	*women*
Overall *(340 individuals on the List of Legal Counsel)*[64] **'Top 5'**[65] 1 USA [44], 2 DRC [42], 3 France, UK [39], 4 Belgium [23], 5 Canada [20]	**82%**	**18%**
WEOG[66] *(64.5% of Counsel)* **'Top 5'** 1 USA [44], 2 France [39], 3 Belgium [23], 4 Canada [20], 5 Germany [17]	**78.5%**	**21.5%**
Africa[67] *(30% of Counsel)* **'Top 5'** 1 DRC [42], 2 Cameroon [9], 3 Mali, Kenya, Senegal [8], 4 CAR, Morocco, Nigeria [3], 5 Chad, South Africa, Uganda [5]	**88%**	**12%**
Eastern Europe[68] *(2% of Counsel)* Only eight appointments from Eastern Europe: Serbia [3], FYROM [2], Croatia, Slovenia, Romania [1 appointee each]	**62.5%**	**37.5%**

continues overleaf

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

64 In 2010, 340 individuals are on the List of Legal Counsel. Of these, 62 are women (18%) and 278 are men (82%). Women were 19% of the List of Legal Counsel in 2009 and 20% in 2008. For the third year in a row the percentage of female professionals appointed to the List of Legal Counsel has decreased slightly. Since 2006, four times more men than women have been appointed to the List of Legal Counsel.

65 The number of appointees is reported in brackets.

66 WEOG represents 64.5% of appointees to the List of Legal Counsel. In 2009, this region represented 66.6% and in 2008 it was 68%. The country with the highest number of appointees, not only in WEOG but across all regions, is the USA with 44 appointees. As in previous years, appointments from the USA, which is not a State Party, have been included in the calculation for the WEOG region. The percentage of women appointed from WEOG countries (21.5%) did not change substantially from 2009, when it was 21%. This figure has been static for the last four years (21% in 2008 and 19% in 2007).

67 Africa represents 30% of appointees to the List of Legal Counsel. For the second year in a row, the percentage of individuals appointed from this region increased by 2% (26% in 2008 and 28% in 2009). Appointments from Algeria, Cameroon, Arab Republic of Egypt, Mauritania, Morocco, Rwanda and Tunisia, which are not States Parties, have been included in the calculation for the Africa region. Overwhelmingly appointees from Africa are men (88%). As in the previous years, from the five Situations before the Court, only the DRC, with 42 appointments, made it to the 'Top 5' of appointees from Africa (appointments from DRC were 36 in 2009 and 24 in 2008). There are eight appointees from Kenya, three from CAR, two from Uganda, and none from Sudan for a total of 55 appointees from the Situations before the ICC. Of these, only five are women (three from DRC, one from Kenya and one from CAR).

68 Eastern Europe represents 2% of appointees to the List of Legal Counsel. This figure represents a slight decrease from 2009 (2.3%). From 2008, the percentage of individuals appointed from this region decreased by one point. Female professionals appointed to the List of Legal Counsel are 37.5% of the total from the region. Although this figure represents a decrease from 2009 (43%), for the fourth year in a row Eastern Europe has the highest proportion of women on the List of Legal Counsel.

Legal Counsel CONTINUED

Appointments to the List of Legal Counsel *continued*	men	women
Asia[69] *(2.3% of Counsel)* Only seven appointments from Asia: Malaysia [2], Kuwait, Pakistan, Japan, Singapore and Philippines [1 appointee each]	100%	0%
GRULAC[70] *(1.5% of Counsel)* Only five appointments from GRULAC: Argentina [2] Brazil, Mexico, Trinidad, Tobago [1 appointee each]	100%	0%

Appointments to the List of Assistants to Counsel[71]	men	women
Overall *(14 individuals on the List of Assistants to Counsel)* **'Top 3'** 1 Belgium (3 appointees) 2 Canada, France, Italy, UK (2 appointees each) 3 Australia, DRC, Germany (1 appointee each) **WEOG** – 13 **Africa** – 1 **Rest** – 0	36%	64%

69 Asia represents 2% of appointees to the List of Legal Counsel. This figure is a slight decrease from 2009 (2.3%) and is the same as in 2008. Appointees from Malaysia, Philippines, Kuwait, Pakistan and Singapore, which are not States Parties, have been included in the calculation for the Asian region. There continue to be no women lawyers from the Asian region appointed to the List of Legal Counsel.

70 GRULAC represents 1.5% of appointees to the List of Legal Counsel, a slight decrease from 2009 (1.7%). There continue to be no women lawyers from the GRULAC region appointed to the List of Legal Counsel.

71 Figure as of 24 October 2007. At the time of publication, no new figures were available on the ICC website nor provided by the Counsel Support Section in response to repeated requests in 2010 for updated information.

Professional Investigators

Appointments to the List of Professional Investigators[72]	*men*	*women*
Overall *(13 individuals on the List of Professional Investigators)*	92%	8%

'Top 3'

1 Mali (8 appointees)
2 UK (2 appointees)
3 Brazil, Ghana and Poland (1 appointee each)

72 Figure as of 24 October 2007. At the time of publication, no new figures were available on the ICC website nor provided by the Counsel Support Section in response to repeated requests in 2010 for updated information.

Trust Fund for Victims

The mission of the Trust Fund for Victims (TFV) is to support programmes aimed at addressing the harms suffered by victims as a consequence of crimes under the jurisdiction of the ICC through physical and psychological rehabilitation and material assistance. 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,[73] and
- **to use the other resources for the benefit of victims** subject to the provisions of Article 79 of the Rome Statute.[74]

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.

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.

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 special vulnerability of girls and women, strengthening capacity of grantees and coordinating efforts to ensure that the selection and management of grants is strategic and coherent.[75]

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

The total amount of funds available to the TFV as of 30 June 2010 was €3,760,527.15.[76] During the period from 1 July 2009 to 30 June 2010, the TFV received €1,826,043.16 from States Parties and €6,433.83 from institutions and individuals. In-kind and/or matching donations from implementing partners amounted to €362,962 in the same period and the income from interest was €13,866.44.[77] The contributions received by the Fund from States Parties during this period are more than twice the amount reported for the same time last year.[78]

The total funds obligated for grants in the Democratic Republic of the Congo (DRC) and northern Uganda since 2007/2008 amount to approximately €2,300,000. In addition, €600,000 has been allocated to activities in the Central African Republic (CAR), which will follow the issuance of the call for proposals supporting victims of sexual and gender-based violence subject to approval by Pre-Trial Chamber II. The Fund has a current reserve of €750,000 to supplement any potential order for reparations from the Court.[79]

The TFV has 34 approved projects, of which 29 are currently active in the DRC and northern Uganda.[80]

The projects currently implemented by the TFV reached an estimated 59,385 direct beneficiaries in both northern Ugandan and the DRC.[81] As of 1 March 2010, there were 182,000 indirect beneficiaries.[82] The category of the direct beneficiaries also includes 'community peacebuilders' defined by the TFV 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'.[83] The total estimated number of 'community peacebuilders' reached by the TFV in the past year is 33,095 (20,825 in the DRC and 12,270 in northern Uganda).

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 of this appeal,

76 *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 2009 to 30 June 2010*, ICC-ASP/9/2, 28 July 2010, p 7. This amount does not include the balance of the USD account (31,093.95).

77 Ibidem.

78 €868,301. *Report of the Court on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2008 to 30 June 2009*, ICC-ASP/8/18, 29 July 2009, p 5.

79 *Recognising Victims and Building Capacity in Transitional Societies, Spring 2010 Programme Progress Record*, April 2010, p 31.

80 13 in DRC and 16 in Northern Uganda. Of the inactive projects, one is expecting proposal (Uganda, TFV/UG/2007/R1/017), one is about to start the procurement phase (Uganda, TFV/UG/2007/R1/023) and 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). Email communication with the Trust Fund Secretariat, 14 September 2010.

81 *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 2009 to 30 June 2010*, ICC-ASP/9/2, 28 July 2010, p 2-3.

82 *Recognising Victims and Building Capacity in Transitional Societies, Spring 2010 Programme Progress Record*, April 2010, p 6. The TFV defines direct beneficiaries as the primary recipients of physical and psychological rehabilitation and material support, and indirect beneficiaries as these direct recipients' families and communities.

83 Ibidem, p 7.

earmarked donations amounting to €1,136,100 were received from the Principality of Andorra, Finland, Norway and Denmark.[84] As of 30 June 2010, nine Sexual and Gender Based Violence (SGBV) projects, eight in DRC and one in Uganda, are being supported by the earmarked funding.[85] The estimated number of beneficiaries reached by earmarked SGBV projects is 17,795 (13,380 in Northern Uganda and 4,415 in DRC). The majority of the beneficiaries reached in northern Uganda are 'community peacebuilders' (11,900), followed by victims of SGBV (1,180) and children sensitised to SGBV (300). In DRC, it is estimated that 475 beneficiaries belong to the category of the 'community peacebuilders', while the majority of individuals directly benefiting from earmarked SGBV projects are victims of SGBV (2,800), followed by children of SGBV victims (740) and former child soldiers (400).[86]

In addition to the funds received in response to the September 2008 appeal to assist victims of sexual violence, the Netherlands pledged $57,000 for a project focused on child soldiers and Germany pledged €310,000 to support a Legal Advisor to assist with preparing for administering reparations.

A notification according to Regulation 50 of the Regulations of the Trust Fund for Victims on proposed activities to be implemented in CAR was presented to Pre-Trial Chamber II on 30 October 2009. Activities in CAR will focus on victims of sexual violence and their families, who were identified by the Fund as among the most vulnerable and under-supported populations. On 16 November 2009, the Pre-Trial Chamber asked the Board of Directors to formally advise the Pre-Trial Chamber when the selection of specific projects has been made. Once the project procurement process has been completed a new project-related filing will be initiated with the Pre-Trial Chamber for their approval.

At the beginning of 2010, the TFV initiated a longitudinal evaluation of approximately 2,600 victims who are receiving support (of which 1,700 are from northern Uganda and 900 from the DRC) in order to better understand the impact of the TFV's assistance to affected communities throughout northern Uganda and the DRC. The findings will be made available in a report launched at the ninth session of the Assembly of States Parties in New York, 6-10 December 2010.[87]

The Trust Fund has identified its priorities for 2011 as increasing its fundraising efforts, conducting an assessment of the Kenyan Situation, initiating activities in CAR, and an evaluation of activities in the DRC and northern Uganda.[88]

84 Email communication with the Trust Fund Secretariat, 13 September 2010. More specifically, the Principality of Andorra donated €24,000 split between 2008 and 2009; Denmark contributed €497,200 in 2009; Finland donated €170,000 in 2010; and Norway contributed €191,100 in 2008 and €253,800 in 2010.

85 *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 2009 to 30 June 2010*, ICC-ASP/9/2, 28 July 2010, p 2.

86 Ibidem, p 3.

87 Ibidem, p 4.

88 *Proposed Budget Programme for 2011 of the International Criminal Court*, ICC-ASP/9/10, Advance Version, 16 July 2010, p 129.

TFV Projects 2009-2010[89]

Northern Uganda	Of the 18 projects approved, one is awaiting proposal and one is entering the procurement phase.[90] The total expenditure from the beginning of 2010 to the end of the year for ongoing projects amounts to €617,805.[91] Out of the 18 approved projects, one uses SGBV earmarked funds[92] and two are projects funded through 'common basket' funds whose beneficiaries include SGBV victims/survivors.[93] The remaining projects are providing psychological and physical rehabilitation and material support to adults and children, including women and girls, as an integrated response.
DRC	There are 16 projects approved, of which 13 are active. The total expenditure from the beginning of 2010 to the end of the year for ongoing projects amounts to €1,060,918.[94] Eight projects,[95] representing 50% of those approved, use SGBV earmarked funding. The remaining projects are providing psychological and physical rehabilitation and material support to adults and children, including women and girls, as an integrated response.
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 has been made. A call for proposals is expected to be released before the end of 2010. Activities in CAR will focus on support to victims of SGBV and their families who were identified as the most vulnerable category in the CAR Situation.
Darfur	There were no projects in 2010.
Kenya	There were no projects in 2010.

89 As of 13 September 2010.
90 Respectively projects TFV/UG/2007/R1/017 and TFV/UG/2007/R1/023.
91 Email communication with the Secretariat of the TFV, 13 September 2010. Please note that the amount indicated will be disbursed to the TFV partners by 31 December 2010 for activities to be implemented in both 2010 and 2011.
92 Project TFV/UG/2007/R2/040.
93 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.
94 Email communication with the Secretariat of the TFV, 13 September 2010. Please note that the amount indicated will be disbursed to the TFV partners by 31 December 2010 for activities to be implemented in both 2010 and 2011.
95 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.

Outreach Programme

The ICC defines outreach as one of its three external communication functions, the other two being external relations and public information. All of these functions are carried out by the Public Information and Documentation Section (PIDS) of the Court. 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)[96] 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.'[97]

According to the Outreach Unit, messages delivered during face-to-face sessions or through media and other supports always include a gender perspective. When outreach activities are specifically conducted for women, messages focused on explaining charges of interest to this group, namely sexual and gender-based violence, are included.[98]

In 2008, the Unit developed guidelines for Outreach officers on how to speak about gender-based crimes particularly in the DRC and CAR.[99] 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.'[100]

96 *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>
97 Ibidem, p 3.
98 Email communication with the Outreach Unit, 22 September 2009.
99 Ibidem.
100 Ibidem.

No information was provided to the Women's Initiatives for Gender Justice on the modalities in which these guidelines are used, nor on the elaboration of similar guidelines for the other situations in which the Unit operates.

Based on information received from the Outreach Unit, the only country in which a gender outreach programme was developed is Uganda where a gender outreach programme started in 2009 following the results obtained by mainstreaming gender and youth issues into outreach activities during 2008.[101]

No further information on the organisation of this programme and its functioning was made available to the Women's Initiatives for Gender Justice.

According to the ICC, from 1 October 2009 to 1 October 2010, the Outreach Unit held 422 interactive meetings in connection with the five Situations under investigation by the ICC.[102] The meetings reached a total of 46,499 people, of which 11,605 were women (25%).[103] Last year, 353 activities were carried out in four Situations, reaching a total of 36,645 people. Of the total activities, 25 (7%) were directed exclusively to women.[104]

As in 2008 and 2009, outreach activities focused on the DRC and Uganda where 355 outreach activities (84%) out of the total 422 were carried out. In relation to the Darfur Situation, 55 sessions were held for refugees of which 12 were carried out in eastern Chad. The remaining sessions in relation to the Darfur Situation were addressed to members of the Sudanese diaspora in Europe. In CAR, 53 sessions were carried out in the period under consideration while in Kenya, the Outreach unit organised 14 sessions since December 2009.[105]

The Unit estimates that, from 1 October 2009 to 1 October 2010, 70 million people were potentially exposed to information on the Court through radio and television programmes, the majority of whom are in the DRC (30 million). The Court produced 375 programmes for radio and television to inform audiences about the proceedings, in particular the affected communities. Videos were also made available to global audiences through the Court's YouTube channel which had a total of 50,000 views in the period under consideration. This is 20,000 more than in 2009.[106]

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, will run until December 2010. The aim of the campaign is to reach out to female lawyers in the Africa region and inform them about the List of Legal Counsel by organising specific meetings in different African and European countries.

101 Ibidem.
102 Email communication with the Outreach Unit, 30 September 2010. Women's Initiatives for Gender Justice calculated that, based on this figure received from the Outreach Unit, an average of 35 events were organised every month, seven for each of the five Situations currently under investigation by the ICC.
103 Ibidem.
104 Email communication with the Outreach Unit, 22 September 2009. Please note that this year the Women's Initiatives for Gender Justice was not given information about the number of activities specifically directed at women.
105 Email communication with the Outreach Unit, 30 September 2010.
106 Ibidem.

Outreach activities 2009-2010[107]

Uganda	The four staff members of the Outreach field office in Uganda organised 165 interactive activities in the period under consideration. The meetings were attended by a total of 22,984 people. According to the Outreach Unit, almost three times more women than in the previous year were reached by activities carried out through the gender outreach programme (2,397 in 2010 and 837 in 2009).[108] Despite this increase, women still constitute only 10% of the total participants to outreach activities. A potential audience of 8 million was reached by radio and television programmes produced by the Court.
DRC	The six staff members of the Outreach field office organised a total of 190 interactive sessions in the period under consideration. According to the Unit, activities were mainly directed at the rural population and held in Lingala and Swahili. A total of 16,990 people participated in these meetings, of whom 40% (6,796) were women. [109] Last year the Unit organised five meetings exclusively directed at women[110] reaching out to 1,969 women. It is estimated that the Court was able to reach out to a potential audience of 30 million people by means of television and radio programmes.
CAR	The three staff members based in CAR organised a total of 53 interactive sessions attended by 4,773 people. Of these, 46% were women.[111] In 2009, according to a Unit's internal evaluation, 42% of those they reached in CAR were women.[112] It is estimated that a potential audience of 800,000 people were reached by information on the Court through local radio programmes. According to information provided by the Unit, outreach activities reached out in particular to the affected community living outside of Bangui and increased its communication skills in Sango, the local language, both by hiring a native Sango-speaker and producing a radio programme in that language.[113]

107 From 1 October 2009 to 1 October 2010. Email communication with the Outreach Unit, 30 September 2010.
108 Email communication with the Outreach Unit, 30 September 2010; and email communication with the Outreach Unit, 22 September 2009.
109 Email communication with the Outreach Unit, 30 September 2010.
110 Email communication with the Outreach Unit, 22 September 2009. Please note that this year the Women's Initiatives for Gender Justice was not given information about the number of activities specifically directed at women carried out in the DRC.
111 Email communication with the Outreach Unit, 30 September 2010.
112 Email communication with the Outreach Unit, 22 September 2009. Please note that this year the Women's Initiatives for Gender Justice was not given information about the number of activities specifically directed at women carried out in CAR.
113 Email communication with the Outreach Unit, 30 September 2010.

Sudan

The Outreach Unit does not have any staff based in Chad.[114] Activities directed at the Sudanese affected community were organised by one Hague-based staff member. According to the Unit, a total of 1,650 refugees was reached by the 55 interactive sessions organised in the period under consideration of which 12 held in eastern Chad (22%) and the rest in European countries with the Sudanese diaspora.[115] Of the total number of refugees attending outreach meetings, only 10% (177) were women (154 in eastern Chad and 23 in Europe).[116] Radio programmes produced by the Court reached a potential audience of 10 million people both outside and inside Sudan. According to the information provided by the Court, particular efforts were made to contact Sudanese lawyers to explain them the functioning and application process related to the List of Legal Counsel.[117]

Kenya

Outreach activities in Kenya began in December 2009. The Unit temporarily assigned one Hague-based staff person to the Kenya Situation. A total of 14 interactive sessions were carried out with a total attendance of 192 people of whom 77 were women (40%).[118] The Unit organised a training on the Court for 87 professional journalists to improve the accuracy of ICC-related news in the media. It is estimated that a potential audience of 20 million people were informed about the Court with the publication of a 'Frequently Asked Questions' factsheet on the Court's activities in Kenya and the distribution of the booklet *Understanding the ICC* with one of the main national newspapers in August.

114 Due to the security and political situation in Sudan, the Court does not have a field office in Sudan. The field office dealing with the Darfur Situation is located in Chad. The Outreach Unit is recruiting one staff person that will be based in Chad.

115 Meetings were held in the Netherlands, Switzerland, United Kingdom, Germany, France and Belgium. Email communication with the Outreach Unit, 30 September 2010.

116 Ibidem.

117 Ibidem. No Sudanese lawyers are in the ICC List of Legal Counsel.

118 Ibidem.

Office of the Public Counsel for Victims[119]

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[120] 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.[121] 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.

119 Further information about victims' participation can be found in the Victim Participation and Legal Representation Section of this Report.
120 Regulations of the Court, ICC-BD/01-01-04, adopted on 26 May 2004.
121 Reg. 81(4)(a)and (b).

In the five years of its work, the OPCV has assisted around 2,000 victims and presented 300 submissions in different proceedings before the Court. It has also supported 30 external legal representatives providing almost 600 legal advices.[122] The number of victims directly assisted by OPCV Counsel has gradually increased since its operations began. Between January and July 2010, the OPCV recorded a 62% increase in the number of victims to whom they are providing assistance.

When appointed as legal representative by a Chamber or requested by a victim, the OPCV is in direct contact with the victim. From the beginning of its activities to September 2010, the OPCV has held face-to-face meetings with 90% of all victims it represents. According to the OPCV they try to maintain regular communication with their clients and have contact with each client every five to six weeks on average.[123]

The OPCV has 10 professional posts of which nine are currently filled. Of the filled posts, 55.5% are occupied by women and 45.5% by men. Female professionals hold all P4 (two) and P5 (one) positions. Of the two P3 posts, one is vacant and the other is occupied by a male professional. 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). All regions are represented in the Office, with a majority of professionals coming from the WEOG region (three).

Victims represented by the OPCV per Situation[124]		*men*	*women*
Overall[125]	[1,252][126]	**62%**	**38%**
CAR[127]	84% of total victims [1,051]	**61%**	**39%**
Uganda[128]	9% of total victims [116]	**68%**	**32%**
DRC[129]	5% of total victims [63]	**56%**	**44%**
Sudan[130]	2% of total victims [21]	**86%**	**14%**
Kenya[131]	0% of total victims [1]	**100%**	**0%**

122 Email communication with the Office of Public Council for Victims, 7 September 2010.
123 Ibidem.
124 Figures as of 5 August 2010. Figures include both applicants and victims formally recognised by the Court. Email communication with the Office of Public Counsel for Victims, 6 August 2010.
125 The total number of victims represented and assisted by the OPCV as of 5 August 2010 is 1,252. Of these, the majority is in the CAR Situation (1,051). Out of the total number of victims, 773 are men (62%) and 479 are women (38%).
126 The total number of victims is reported in brackets.
127 Out of 1,051 victims represented and assisted by the OPCV in CAR, 640 are men and 411 women. CAR has the majority of victims represented by the OPCV across all Situations constituting 84% of the total. 70% of female victims in the CAR Situation reported gender crimes.
128 In Uganda the OPCV is assisting 116 victims of which 79 are men and 37 women. Ugandan victims constitute 9% of the total. In Uganda 10% of the female victims represented and assisted by the OPCV reported gender crimes.
129 Out of 63 victims represented by the OPCV in DRC, 35 are men and 28 are women. DRC has 5% of the total victims represented and assisted by the OPCV. The 10% of female victims in DRC reported gender crimes.
130 There are 21 Sudanese victims assisted by the OPCV, with 18 male victims and three female. Sudan constitutes 2% of the total victims represented by the OPCV.
131 As of 5 August 2010, OPCV was assisting only one victim from the Situation in Kenya (male).

Crimes reported by victims represented by the OPCV per Situation[132]	*% of the total (no gender breakdown available)*
Sexual Crimes (rape, sexual violence, sexual slavery)	**92%**
Pillaging	**83%**
Enlistment and conscription of children under the age of 15	**70%**
Use of children under the age of 15 in hostilities	**70%**
Murder	**20%**
Inhuman treatment and torture	**15%**

Victims represented by the OPCV per case[133]		*men*	*women*
Overall[134]	[96][135]	**58%**	**42%**
Bemba[136]	53% of total victims [51]	**55%**	**45%**
Kony *et al*[137]	43% of total victims [41]	**61%**	**39%**
Lubanga[138]	4% of total victims [4]	**75%**	**25%**

132 Figures as of 5 August 2010. Email communication with the Office of Public Counsel for Victims, 7 September 2010. A very high percentage of the victims represented and assisted by the Office by Situation reported having suffered from SGBV (92%). The second most common crime reported by victims per Situation is pillaging (83%), followed by the enlistment and conscription of children under the age of 15 (70%) and the use of children under the age of 15 in hostilities (70%). 20% of victims reported the crime of murder and 15% denounced inhuman treatment and torture.

133 Figures as of 5 August 2010. Figures include only victims formally recognised by the Court and authorised to participate at trial. Email communication with the Office of Public Counsel for Victims, 7 September 2010.

134 The total number of recognised victims represented and assisted by the OPCV as of 5 August 2010 is 96. Out of the total number of victims, 56 are men (58%) and 40 are women (42%). The case with the highest number of recognised victims represented by the OPCV is Bemba (53%), followed by Kony *et al* (43%) and Lubanga (4%).

135 The total number of victims is reported in brackets.

136 Out of 51 victims represented in the Bemba case, 23 are women and 28 are men. The Bemba case has the majority of recognised victims represented by the OPCV (53%).

137 The OPCV is assisting 41 recognised victims in the case of Kony *et al* of which 25 are men and 16 are women. Ugandan victims constitute 43% of the total number of recognised victims currently assisted by the OPCV.

138 In the Lubanga case, four victims are represented by the OPCV and of these, one is a woman. This case has 4% of the total recognised victims currently assisted by the OPCV.

Crimes reported by victims represented by the OPCV per case[139]	*% of the total* *(no gender breakdown available)*
Sexual Crimes (rape, sexual violence, sexual slavery)	**90%**
Pillaging	**87%**
Enlistment and conscription of children under the age of 15	**70%**
Use of children under the age of 15 in hostilities	**70%**
Murder	**15%**
Inhuman treatment and torture	**5%**

139 Figures as of 5 August 2010. Email communication with the Office of Public Counsel for Victims, 7 September 2010. The percentages of crimes reported by victims assisted by the OPCV by case reflect those reported by the recognised victims assisted by Situation, with the highest percentage of victims reporting having suffered SGBV (90%). Pillaging is the second most common crime reported by these victims (87%), followed by the enlistment and conscription of children under the age of 15 (70%) and the use of children under the age of 15 in hostilities (70%). 15% of victims reported the crime of murder and 5% reported inhuman treatment and torture.

ICC Budgetary Matters

	2006	2007	2008	2009	2010
Overall ICC budget	€80,871,800	€88,871,800	€90,382,000	€102,230,000	€103,623,300
Implementation rate	79.7%[140]	90.5%[141]	93.3%[142]	92.5%[143]	*not available*
Implementation rate 1st trimester	*not available*	21.4%[144]	23.7%[145]	30.0%[146]	30.7%[147]

140 *Report of the Committee on Budget and Finance on the work of its eighth session*, 29 May 2007, ICC-ASP/6/2, p 6-8.
141 *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.
142 *Report of the Committee on Budget and Finance on the work of its twelfth session*, 13 May 2009, ICC-ASP/8/5, p 5.
143 *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.
144 *Rate of implementation of the 2007 budget as of 31st March 2007*, ICC-ASP/6/2.
145 *Rate of implementation of the 2008 budget as of 31st March 2008*, ICC-ASP/7/3.
146 *Rate of implementation of the 2009 budget as of 31st March 2009*, ICC-ASP/8/5.
147 *Rate of implementation of the 2010 budget as of 31st March 2010*, ICC-ASP/8/6.

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, but excluding judges, is 697. Of these, 53% are men and 47% are women. This figure is the same as last year.

This is the first year where the overall number of staff did not change significantly from the previous year (in 2009 there were 703 staff, including the judges). As the Court is in its sixth year of institutionalisation, the stability in the overall number of staff may signal a slowing down in the growth of the Court as its establishment phase draws to an end.

Despite a slight reduction in the numbers of both overall staff and professional appointees (excluding judges), the gender figures (50%) remained the same as in 2009. Similarly, the figures for the appointments of women to mid-to-senior professional levels did not change significantly. The majority of female professionals continue to be appointed to the lower professional levels (P1-P3) and men are still outnumbering women, in some sections by 45%, at all senior levels within the Registry and the OTP.

In 2010, there are 324 professional staff, excluding the judges and language staff, representing 72 nationalities. For the last four years, France has had the highest number of nationals appointed to the Court. Since 2008 there has been an 83% increase in the number of French nationals appointed to professional posts within the ICC.

Of the overall number of employees, 359 (51.5%) are employed as 'professional staff', including language staff. This is the second year in a row where women and men comprise 50% each of the professional employees. This overall figure has been maintained despite slight fluctuations across all organs of the Court.

There are 13 women appointed to P5 posts, out of a total of 30 such posts across the ICC. Of these, 60% of the women appointed at the P5 level are within the Registry and the Independent Bodies (The Trust Fund for Victims, the Office of the Public Counsel for Victims and the Independent Oversight Mechanism).

The number of women judges on the bench increased by 5% during 2010. Of the 19 judges currently serving at ICC, 11 are women. This increase is due to the election of two women judges during the 8th session of the Assembly of States Parties in November 2009. The two newly elected judges are Judge Silvia Alejandra Fernández de Gurmendi from Argentina and Judge Kuniko Ozaki from Japan.

Among the judicial staff there are currently 16% more women than men (58% women, 42% men). This is an increase of 2% from last year.

The number of women employed in professional posts within the OTP remained substantially the same as last year with 49% of the overall professional posts held by women compared to 48% in 2009.

While the overall figures within the OTP look positive, the male/female differential is more accurately assessed when each professional level is considered. Since the beginning of the

Overview of Trends CONTINUED

OTP's recruitment activities, women have been consistently over-represented in the P1 to P3 levels. In 2010, there are 12 women and seven men at the P1 level, and 27 women and 19 men at the P2 level. The appointments of women to professional posts tapers off from the P3 level upwards where there are 17 (44%) female appointees and 22 (56%) male appointees.

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 level remains exaggerated and 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.

In the Registry, 49% of professional posts are held by women. The statistics for the Registry have stabilised at around this figure for the past four years. There are more women than men in the P4 (56%) and P2 (61%) levels. The male/female differential at the P3 level increased from 2009 with 22% more male professionals appointed to this level. For the first time male appointees are also the majority at the P1 level (54%).

Within the Registry, there are 20% more men than women appointed at the P5 level (six women and nine men). The number of women appointed to P5 positions in the Registry doubled this year compared with 2009, when three women and seven men held posts at the P5 level. This year, for the first time, a woman has been appointed to a D1 position within the Registry, however overall there are three times more men than women at the D1 level (one woman and three men).

There are currently two Divisions in the Registry: the Common Administrative Services Division and the Division of Court Services. The Division of Victims and Counsel consisting of the Office of the Head of Division, the Defence Support Section, the Victims' Participation and Reparations Section (VPRS), the Office of Public Counsel for the Defence (OPCD) and the Office of Public Counsel for Victims (OPCV), has been dissolved. The Office of the Head of Division and the Defence Support Section have been merged into the Counsel Support Section (CSS) and moved to the Office of the Registrar. The OPCD and the OPCV are now also within the CSS. The VPRS has been moved to the Division of Court Services. This change is explained as a strategy to develop a more cohesive approach to victims' issues by having both VPRS and the Victims and Witness Unit (VWU) reporting to the same Director.[148]

148 See the *Proposed Programme Budget for 2011 of the International Criminal Court*, ICC-ASP/9/10, Advance version, 16 July 2010, p 59.

Executive Committee and Senior Management

Two out of three members of the ICC Presidency are men.[149]

The Executive Committee of the OTP is comprised of one woman and two men. Of the two filled Head of Division posts within the OTP, one is occupied by a man and one by a woman. 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 has been vacant since 31 May 2010. The Prosecutor is the acting interim Head of Division. In August the post was advertised as both a GTA position and a permanent post. In October the GTA post was withdrawn with no clarification from the OTP as to the original intention of the dual postings for this position.

The Registrar is the only female head of an organ at the ICC.[150]

The two Head of Division posts in the Registry are held by men. No women have ever been appointed as a Head of Division within the Registry. This year a woman was appointed to a D1 position for the first time.[151]

Among the non-judicial staff within the Judiciary, two out of three Head of Section or equivalent posts are held by women.

In the OTP, seven more Head of Section or equivalent posts were created during the last 12 months. Of the 19 positions, one is vacant. There are twice as many Sections led by men than women (respectively 13 [68%] and six [32%]). This figure represents a 15% increase in the number of Heads of Sections or equivalent posts held by women from 2009 when women occupied two such posts (17%).

Out of 22 Head of Section or equivalent posts in the Registry, three are vacant (14%). This represents a 5% increase in the vacancy rate from 2009. The percentage of Head of Section or equivalent posts held by women in the Registry decreased from 50% (2009) to 47% (2010). For the past three years the gender balance has been stable with 2-3% fluctuations in the gender statistics for Heads of Sections.

149 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).
150 Ms Silvana Arbia (Italy).
151 Head of the Internal Audit, an Independent Body.

Overview of Trends CONTINUED

Field Offices

The ICC has field offices in four out of the five Situations currently under investigation by the ICC (CAR, DRC, Chad [for Darfur] and Uganda). During 2010, the Registrar began negotiations with the Government of Kenya regarding the possibility of an ICC staff presence within the country. On 3 September 2010, the Kenyan Government gave its approval for the opening of an ICC field office.

The total number of staff deployed in the four existing field offices, including professional and general staff, is 101. Of these, 24 (24%) are professional staff (excluding language staff).

The overwhelming majority of the field staff are men with 78 men compared with 23 women in field offices. The Chad office has the highest male/female differential with 84% more men than women appointed. Uganda is the field office with the lowest gender differential (36% more men). The male/female gap in the DRC is 49% and in CAR is 70%.

There are twice as many men as women assigned to professional posts in field offices (16 men and eight women). The only field office with a gender balance in the staff is CAR with men and women each occupying half (50%) of the four posts. In the DRC, women professionals occupy four out of 11 positions (36%) and in Uganda two posts out of seven are occupied by female professionals (28.5%). Both professional posts in Chad are occupied by men.

Women are the majority at the P2 level (62.5%). There are five times more male professionals than women at the P3 level. 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 42% (43) of overall field staff and 46% (11) of the total number of professional staff. The Uganda office has 25% of overall staff and 29% of professional staff, the CAR office has 20% and 17%, and the Chad office has 13% and 8%.

In total, seven Sections and Units are represented at field level, of which six belong to the Registry and one to the Office of the Prosecutor.[152] The Secretariat of the Trust Fund for Victims also has a presence at field level in the DRC and Uganda.

The Field Operations Section has the highest presence in the field offices with 37 (36.5%) staff across all country-based offices. The Victims and Witnesses Unit follows with 25 (24.5%) staff members divided between the four field offices. The Section/Unit with the third highest number of staff at field level is Outreach with 13 (13%) representatives across three out of four field offices. The only Sections/Units that are represented in all the four offices are the Field Operations Section, the Security and Safety Section and the Victims and Witnesses Unit. The male/female differential is high across all Sections/Units represented at field level, with the Information Technology and Communication and the Security and Safety Sections having only male appointees in the field offices. The Outreach Unit has the lowest gender gap among field staff, with 54% men and 46% women deployed in three out of the four country-based offices.

152 The Registry is represented by the Field Operations Section, the Information Technology and Communication Section, the Outreach Unit, the Security and Safety Section, the Victims and Witnesses Unit, and the Victims Participation and Reparation Section. The only Section belonging to the Office of the Prosecutor is the Planning and Operations Section.

Currently, all professional staff in the field offices are recruited internationally. There are no national staff hired at a professional grade in any of the field offices. During 2010 inter-organ consultations were held to discuss the creation of the National Professional Officer and the Field Service categories.[153]

Professionals from the WEOG region comprise 50% of the total number of field staff. African appointees comprise 42% and Asia and GRULAC share the remaining posts with 4% each. Eastern Europe is not represented at the field office level. Of the 15 countries with nationals in field offices, France has the highest number of appointees (seven professionals), followed by Sierra Leone, the United States of America and Niger, all of which have two appointees each. Female professional staff members come from only four countries out of the 15 represented. Four women have been appointed from France, two from Sierra Leone and one each from Cyprus and Argentina.

153 *Report of the Court on human resources management*, ICC-ASP/9/8, 30 July 2010, p 7-8.

Geographical and Gender Equity among Professional Staff

According to ICC figures, there are 324 professional staff, excluding language staff, representing 72 nationalities. In 2009, 305 staff represented 71 nationalities and in 2008 a total of 261 professional staff from 65 nationalities were working at the ICC.

The WEOG region has the largest number of appointees (61%) of professional staff. WEOG is followed by the Africa region with 16% appointees, GRULAC with 9%, and Eastern Europe and Asia both with 7%. These figures are either the same or only slightly different from 2009 (WEOG 61%; Africa 16%; GRULAC 9.5%; Eastern Europe 7.5%; and Asia 6%). There continues to be a significant disparity between WEOG and the other regions.

For four years running, France has the highest number of nationals appointed to the Court. Since 2008 there has been an 83% increase in the number of French nationals appointed to professional posts within the ICC.

To date, there are 44 French nationals appointed to professional posts, three more than in 2009. French nationals employed by the Court are 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. The desirable range for France is between 16.02 and 21.68 nationals.[154] This year, the combined figures of the next two WEOG states (the United Kingdom with 25 and the Netherlands with 19 appointees respectively)

154 *Report of the Committee on Budget and Finance on the work of its fourteenth session*, ICC-ASP/9/5, 6 July 2010, p 29.

Overview of Trends CONTINUED

equal the number of French nationals appointed to professional positions. When compared to the region with the next highest number of professional staff, there are 36 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 12 months to address the over-representation of French nationals at the Court, first highlighted in the *Gender Report Card on the ICC 2009*, produced by the Women's Initiatives for Gender Justice.

To date, there are 19 Dutch nationals appointed to professional posts within the ICC. In 2009 there were 14 and in 2008 there were 13 professional appointees from the Netherlands. Although these increases are not dramatic, the overall number of professional staff from the Netherlands is 171% more than the top end of the desirable range identified by the CBF.[155]

Within the WEOG region, some States Parties for which the CBF identified desirable ranges of representation in professional posts within the Court are either not represented or 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 number of professional staff currently employed by the Court (16).[156]

As in 2009, the number of women in professional posts is higher than men in three regions: WEOG (54% women and 46 % men), GRULAC (63% women and 37% men) and Eastern Europe (59% women and 41% men). For the first time, men and women professionals share 50% of positions for the Asian region.

155 Ibidem
156 Ibidem

Women professionals are the majority in the WEOG region for the second year running. As in 2009, France is the country with the highest number of women (32 individuals) appointed from the WEOG region. This year there are 23 more female professionals from France than from the three countries with the next highest number of female appointees – Australia, Germany and the United Kingdom with nine female appointees each. No new state joined the 'Top 5' tier of WEOG countries with women appointees at the Court.

Africa has the second highest number of staff at the ICC and is the only region that has had a consistent increase in male appointees in the last four years. In 2010, the Africa region has the lowest percentage of women appointed to the Court compared with the overall number appointed from the region. For the fourth year, the percentage of male professionals appointed from Africa has increased – 64% in 2007, 70% in 2008, 73% in 2009 and 75% in 2010. The Arab Republic of Egypt, Gambia and Kenya joined the 'Top 5' tier of African countries with appointees at the Court, and Rwanda joined the 'Top 3' by gender with one female professional.

For the fourth year in a row, GRULAC has more women than men appointed to professional posts within the Court. In addition, this region has the highest number of women appointees proportional to the overall number of appointments from the region. No new state joined the 'Top 5' tier of GRULAC countries with women appointees at the Court.

For the second year in a row, Eastern Europe has more women than men appointed to the Court. While last year it was possible to establish a 'Top 5' by country for this region, this year the number of professionals from this region was sufficient only to establish a 'Top 4'. One new country, Poland, joined this list.

For the first year, men and women share 50% of professional positions within the Asia region. This is also the first time since 2007 that the number of staff from Asia reaches a level where it is possible to create a 'Top 5' list by country. As in 2009, Japan is the country with the highest number of appointees (five). All of the Japanese professionals appointed to the Court are women. This year, no new country joined the 'Top 5' list by country.

With the exception of WEOG, it was not possible to come up with 'Top 5' 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; Africa and Asia have a 'Top 3' with a range respectively of 1-3 and 1-5 female professionals.

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 three years with only WEOG countries occupying the first seven places of the list. This year the first non-WEOG country to appear in the list is South Africa, ranking number eight, followed by Nigeria and Romania. No new countries joined the 'Top 10' list, but one, Colombia, is no longer included, meaning that the GRULAC region is excluded from the list this year. Asia is again not represented in the 'Top 10' list by country.

For the second year, it was possible to establish a 'Top 10' based on 'gender' by country (not region) with a range of 1-32 for female appointments. The first five places on the list were occupied by the same seven countries from the WEOG group as in 2008 and 2009, joined by Canada this year. Japan is again the first non-WEOG country represented on the list, ranking 6th with five female appointees. Colombia is the country from GRULAC with the highest number of women professionals with four appointees and ranks number seven with Romania, the first Eastern European country to appear in the list. Sierra Leone is the highest ranking for the Africa region with three female appointees.

The number of professionals from the current Situations before the Court increased from 2009 due to the opening of investigations in Kenya. There are three appointees from this country. The number of appointees from the DRC and Uganda did not change from last year (respectively two and one). CAR and Sudan are not represented by any professionals at the Court. Out of the six appointees from Situations currently under investigation at the ICC, only two are women (one from Kenya and one from Uganda).

In the OTP, four senior posts (P5 level), are held by nationals from the Africa region. Asia and GRULAC have one senior post each. This represents an increase from 2009, when only three senior posts were held by professionals coming from Africa and none were held by professionals coming from Asian or GRULAC countries. In the Registry, three senior posts (P5 level) are held by nationals from Africa, one by a national from Eastern Europe and one by a national from Asia. Last year Asia was not represented at this level in the Registry. The position of Deputy Registrar (D1) is held by a professional coming from the Africa region. GRULAC is not represented at a senior level in the Registry.[157]

157 Figures as of 31 July 2010. Information provided by the Human Resources Section of the ICC.

Overview of Trends CONTINUED

In the Judiciary, Asia, Africa and WEOG are represented in senior posts, respectively by the President and two Vice-Presidents of the Court.

None of the Heads of the OTP, Registry, ASP Bureau, ASP Secretariat, and Secretariat of the TFV are from Africa, Asia or Eastern Europe.

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 of such missions was carried out in December 2009 in Estonia. [158] More missions in Eastern European countries were planned for the first half of 2010, but did not take place due to a lack of resources.

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 (two members) and Spain and from Belgium, the United States and Canada.

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, is composed by non-WEOG members – two from GRULAC (Venezuela and Colombia), and three from Africa (Senegal, Ghana and Kenya).

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

Legal Counsel

As of 30 June 2010, there are 340 individuals on the List of Legal Counsel of whom 62 are women (18%) and 278 are men (82%). For the third year in a row, the overall percentage of women appointed to the List of Counsel decreased. Since 2007, four times more men than women have been appointed to the List of Legal Counsel. These figures indicate a consistent underrepresentation of women appointed to the List of Legal Counsel.

The geographical breakdown of the List of Legal Counsel reflects the same pattern as the past three years, with only small variations. The percentage of individuals from the Africa region appointed to the Legal Counsel has increased by 2% since 2009 and 4% since 2008. Despite this increase, individuals appointed from Africa are still only a third of the total number of Legal Counsel (30%) although all the Situations currently under investigation are in this region.

On 12 May 2010 the ICC, specifically the Registry's Public Information and Documentation Section and Counsel Support Section, launched, in cooperation with the International Bar Association, the 'Calling African Female Lawyers' campaign. The purpose of the campaign, which will run until the end of the year, is 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 October 2010, 15 special events took place in 14 different countries, including in three out of five Situation countries (DRC, CAR and Kenya). Of these 15

events, 11 were conducted in African countries[159] and three in WEOG countries.[160] It is too early to assess whether there has been an increase in the number of applications from women from the Africa region in response to the campaign.

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),[161] are represented and that any 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.

Of the 340 individuals on the List of Legal Counsel, only 55 (16%) are from four out of the five Situations before the Court: 42 from the DRC, eight from Kenya, three from CAR, and two from Uganda. This figure represents a 3% increase from 2009. No Sudanese lawyers have been appointed to the List of Counsel.[162] There are only five women (1.5%) appointed to the List of Legal Counsel from the Situations: three from DRC, one from Kenya and one from CAR.

Of the 340 members on the List of Legal Counsel, 67 (20%) are from countries that are not States Parties. This is the same figure as in 2009. The United States of America has the highest number of appointees (44) for the fourth year in a row. In the Africa region, states represented on the List that are not parties to the Rome Statute are Cameroon with nine appointments, Morocco with three appointees, and Algeria, Arab Republic of Egypt, Mauritania, Tunisia and Rwanda with one 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 two appointees and the Philippines, Kuwait, Pakistan and Singapore with one each).

There are 14 individuals on the List of Assistants to Counsel, 13 from WEOG and one from Africa (the DRC). There are 28% more women than men on the List of Assistants to Counsel.

159 Uganda, CAR, South Africa, Mali, Kenya, DRC, Nigeria (two events), Tanzania, Ghana and Botswana. An event is planned on 22 November 2010 in Senegal. Information at <http://femalecounsel.icc-cpi.info/events_en.htm>

160 The Netherlands, England and Paris. Information at <http://femalecounsel.icc-cpi.info/events_en.htm>

161 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'.

162 No information is available about the number of applications from Sudanese lawyers to the List of Counsel. It is therefore unclear whether any lawyers from Sudan have applied to be considered for appointment to the List.

Overview of Trends CONTINUED

Professional Investigators

There are 13 individuals on the List of Professional Investigators: nine from Africa, three from WEOG, one from Eastern Europe and one from GRULAC. There is one woman on the List of Professional Investigators.

Staff Expertise in Sexual and Gender-based Violence

In March 2009 the Victims and Witnesses Unit (VWU) in the Registry hired a Trauma Expert with special expertise in gender violence with a GTA contract. This is the first time that expertise in trauma related to sexual and gender violence has been used as a primary criterion for recruiting a position at the Court. The position of Trauma Expert is still a temporary position. No specific appointments in relation to gender expertise were made in 2010.

While there are individuals with gender competence within the ICC and its independent bodies, only the Trauma Expert position within the VWU specified expertise in gender violence (or associated expertise) within the job description, recruitment process and in the substantive work of this position.

Special Advisers to the Prosecutor

In the last 12 months, two new Special Advisers to the Prosecutor were appointed: Professor Tim McCormack of Melbourne Law School, appointed Special Adviser on International Humanitarian Law in March 2010; and Professor José Alvarez of NYU Law Faculty, appointed Special Adviser on International Law in April 2010. Professor McCormack and Professor Alvarez joined Mr Méndez, Special Adviser on Crime Prevention since June 2009, and Professor MacKinnon, Special Adviser on Gender Issues since November 2008.

The group of Special Advisers to the Prosecutor 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.[163] 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 Mr Benjamin Ferencz was appointed Special Counsel to the OTP and honorary member of the OTP Advisory Council. In May 2010, Judge Baltasar Garzón was requested to act as special consultant to the OTP for a period of seven months to improve the Office's investigative methods. Judge Garzón had previously been involved in the OTP's preliminary examination of Colombia.

163 Article 42(9) of the Rome Statute of the International Criminal Court.

Trust Fund for Victims (TFV)

Three out of 10 posts at the Trust Fund Secretariat are vacant. Women occupy the majority of the filled positions (57% women and 43% men). This figure represents a 14% decrease with respect to 2009 and a 16% decrease with respect to 2008. A new (male) Executive Director of the Trust Fund was appointed on 1 September at a D1 level. The Acting Head of the Trust Fund from July 2009 to 31 August 2010 was a woman who has since resumed her substantive post as Senior Programme Officer (P5).

Out of the 34 TFV projects approved by the Chambers, of which 18 are in northern Uganda and 16 in eastern DRC, 29 are active. Of the five inactive projects, one is awaiting proposal, one is entering the procurement phase (both of these relate to Uganda) and three have been closed and their beneficiaries transferred to other projects (DRC). The total estimated expenditure of the ongoing projects from 1 January 2010 to 31 December 2010 is €1,678,723, almost €250,000 more than in 2009. This estimated disbursement will support activities implemented both in the last months of 2010 and in 2011. The TFV resources available as of 30 June 2010 was €3,760,527.15. Last year the TFV had €3,131,248 available as of the end of June.

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 Voilence (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.

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 €1,136,100 as earmarked donations from the Principality of Andorra, Denmark, Finland and Norway.

There are 241,385 estimated beneficiaries of the TFV active projects. Of these, 59,385 are direct and 182,000 are indirect beneficiaries. This year a new category of direct beneficiaries, 'community peacebuilders', was added. 'Community peacebuilders' are 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'.[164] Of the total estimated direct beneficiaries, 56% belong to this category.

The estimated number of individuals directly benefiting from projects supported by earmarked donations from the Sexual Violence Fund is 17,795, 30% of the total number of direct beneficiaries. Of this, 75% are in northern Uganda and 25% in eastern DRC. The overwhelming majority of direct beneficiaries in northern Uganda are described as 'community peacebuilders' (89%). Victims/survivors constitute 9% of direct beneficiaries of earmarked projects. The remaining 2% is composed of children sensitised to SGBV. In eastern DRC the majority of direct beneficiaries are victims/survivors of SGBV (63%), followed by children of SGBV victims (17%), 'community peacebuilders' (11%) and former child soldiers (9%).

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

Overview of Trends CONTINUED

A new Board of Directors of the TFV was elected during the 8th session of the Assembly of States Parties from 18 -26 November 2009 in The Hague. Members are from Mongolia (Asia), Kenya (Africa), Colombia (GRULAC), Finland (WEOG) and Latvia (Eastern Europe). Out of five members, three (60%) are women. The gender and geographical breakdown of the nominees achieves the requirement of 'equitable gender distribution and equitable representation of the principal legal systems of the world' as specified by Resolution ICC-ASP/1/Res 6, para 3 of 9 September 2002.

Outreach Programme

From 1 October 2009 to 1 October 2010, a total of 422 Outreach interactive sessions were organised in relation to the five Situations currently under investigation by the ICC. These sessions directly addressed 46,499 people of whom one fourth were women (11,605).

As in the past years, outreach activities focused on Uganda and DRC with 165 and 190 sessions respectively. There were 55 activities directed to Sudanese affected communities. In CAR, a total of 53 interactive sessions were carried out in the period under consideration. During the ten months within which activities were held in Kenya, 14 interactive meetings were carried out.

Considering the sexual violence crimes committed and charged in the CAR Situation, CAR has the highest percentage of women attending interactive sessions (46%). In both the DRC and Kenya, women constitute 40% of the total number of participants at Outreach meetings. In Sudan and Uganda, 11% and 10% respectively of the participants are women.

Although there are three times more women participating in Outreach activities than last year, Uganda still has a small percentage of women attending interactive sessions. Considering that Uganda is the country with the highest attendance at Outreach meetings (22,894), this data shows the need for a more intense campaign and specific strategies to reach out to affected women in the Greater North.

During the past year, 375 radio and television programmes, 153 more than during 2009, were prepared by the Court to inform both local and global audiences about the ICC's proceedings, mandate and work. Videos were made available at national, regional and local media and published on the Court's YouTube channel that had more than twice the number of views than last year (50,000 compared to 20,000 in 2009).

Office of Public Counsel for Victims

As of 5 August 2010, the Office of the Public Counsel for Victims (OPCV) assisted 1,252 applicants and victims admitted by the Chambers to participate in proceedings. Victims from CAR constitute the overwhelming majority of those represented or assisted by the OPCV (1,051) and are almost ten times the number of victims from Uganda (116), who are the second highest number of victims from a Situation before the ICC. Victims in the DRC and Darfur Situations are respectively 5% and 2% of the total. As of 5 August 2010, one victim from Kenya was assisted by the OPCV.

Overall, across all Situations male victims are the majority of those represented or assisted by the OPCV (62% of the total). Men are also the majority of applicants and recognised victims in every Situation. Excluding Kenya where the only victim represented by the OPCV is a male, Sudan has the highest male/female differential (72% difference) and DRC the lowest (12% difference). 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.

There are 96 victims represented by the OPCV in specific cases. Of these, 53% are in the Bemba case, 43% in Kony *et al* and 4% in the Lubanga case. The highest male/female differential of victims represented by the OPCV by case is in the Lubanga case (50% gender difference), followed by Kony *et al* (22%) and Bemba (10%).

Gender-based crimes, including rape, sexual violence and sexual slavery, are the crimes most commonly reported by victims with whom the OPCV works, both by Situation (92%) and by case (90%). This reflects the Situation and case figures of the OPCV where the majority of victims they represent are from the CAR Situation (84%) and the Bemba case (53%). Charges for gender-based crimes, including rape as a war crime and a crime against humanity, are included in the case against Jean-Pierre Bemba, President and Commander-in-Chief of the *Mouvement de libération du Congo* (MLC). To date, this is the sole CAR case before the ICC. It is well documented that in the political and armed unrest within CAR in the 2002 and 2003 period, rape and other forms of sexual violence were widely committed by the MLC and other forces. In addition, the OPCV has visited CAR on numerous occasions and actively reached out to victims groups and communities, thus becoming known and trusted as their legal representative before the ICC.

There are 10 professional posts within the OPCV, of which nine are filled. Women comprise the majority of staff and occupy all the three senior posts (one P5 and two P4). All regions are represented in the Office, with 30% of appointed staff from WEOG (three out of nine).

Institutional Development

Gender Training

Registry

Due to the workload created by two simultaneous trials, the VWU in the Registry was unable to participate in any gender training or other activity in the last 12 months. However, the support team continues to have professional external supervision on a regular basis where issues such as violence, including gender-based violence, are addressed to improve the professional skills of staff dealing with these issues.[165]

On 20-21 May 2010, 21 female staff, including nine from the OTP and 12 from the Registry, attended a training on Security Awareness for Female Travellers.[166]

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

Office of the Prosecutor[167]

On 12 December 2009, an OTP staff member participated in a training session on 'Gender Perspective and the Rome Statute' as part of an outreach activity organised by the ICC in cooperation with a women's group of the Sudanese Democratic Forum in The Hague.

In March 2010, OTP staff participated in the following gender-related training:

- On 11-12 March an OTP representative participated in the 'Understanding Wartime Rape: Some Current Research Questions' organised by the Bonn International Centre for Conversion (BICC);
- On 15-19 March, OTP staff members participated in a Sexual and Gender Based Violence training on criminal investigation organised by the NGO REJUSCO in Goma, North Kivu;
- On 18-19 March, two external consultants conducted a 'Pre-Deployment Awareness Raising' training for investigators and other OTP staff involved in the investigation in Kenya. Training topics included the community attitude towards women, interactions between genders, the role of women in society, and issues related to the investigation of sexual violence cases; and
- On 19-20 March, a representative of the OTP participated in a training for human and women's rights activists in the MENA region on 'ICC and Gender Crimes' organised by the NGO Justice Without Frontiers in Beirut.

165 Situation as of 6 July 2010. Information provided by the VWU, Registry.

166 Situation as of 26 July 2010. Information provided by the HR Learning and Development Unit, Registry.

167 Situation as of 27July 2010. Information provided by the Jurisdiction, Complementarity and Cooperation Division, OTP.

On 9 August, the Prosecutor gave a key-note speech on 'Gender and Justice in International Law' during a seminar on 'Reflections on international criminal law and gender issues, with the perspective of the judicial process for the human rights violations committed during the last military dictatorship in Argentina' organised in Buenos Aires by the Centre of Legal and Social Studies, ICTJ and Women's Link Worldwide.

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

- The 'Millennium Goal 3: Gender Equality' conference, organised by the National Committee for International Cooperation and Sustainable Development and the African Diaspora Policy Centre on 19 October 2009 in The Hague;
- The 'Gender Based Violence and Access to Justice in Conflict and Post-Conflict Areas' inaugural conference of the Avon Global Centre for Women and Justice organised on 12 March 2010 in Washington DC;
- The 'International Gender Justice Dialogue' organised by the Women's Initiatives for Gender Justice on 20-21 April 2010 in Puerto Vallarta, Mexico. The Deputy Prosecutor addressed the conference in a video statement. Professor Catharine MacKinnon, Special Gender Adviser, also addressed the participants via video. During the Dialogue, the Assistant to the Special Adviser gave an introduction on the work of the OTP; and
- The 'International Forum on the Role of Leadership in Promoting, Accelerating and Sustaining Gender Equality and Women's Empowerment' organised by the Ministry of Foreign Affairs and Cooperation of Rwanda on 17-18 May 2010 in Kigali.

Other OTP senior staff attended the following events:

- A roundtable on sexual violence in developing countries organised by the Cabinet of the European Commissioner for Development and Humanitarian Aid on 23 November 2009 in Strasbourg;
- The 'Women in Conflict and Post-Conflict Areas' conference organised by the Dutch Ministries of Foreign Affairs and Defence, the Swedish Institute and the Women Peace Makers Programme in The Hague on 3 December 2009;
- The 15th Pre-Summit Consultative Meeting on Gender Mainstreaming in the African Union (AU) organised by the Gender Is My Agenda Campaign Network and coordinated by Femmes Afrique Solidarité on 21-22 January 2010 in Addis Ababa; and
- A meeting on the progress made since January 2010 in mainstreaming gender in the AU on 21-22 July in Kampala.

Judiciary

No training on gender issues was organised by the Judiciary in 2010.

Policies[168]

Sexual Harassment Policy[169]

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[170] 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*.

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

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

170 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[171]

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.

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

Parental Leave within the Staff Rules

Policy ☑ ☐

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

Procedure ☑ ☐

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

Training ☐ ☒

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

Focal point ☑ ☐

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

Compensation of Judges

Policy ☑ ☐

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

Procedure ☑ ☐

See Recommendations.

Training ☐ ☒

See Recommendations.

Focal point ☑ ☐

Assembly of States Parties.

Private Legal Obligation of Staff Members[172]

Policy

☑ ☐

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

Procedure

☑ ☒

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

Training

☐ ☒

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

Focal point

☐ ☒

No focal point indicated.

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

Recommendations

Structures and Institutional Development

Victims and Witnesses

- **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.[173] 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 2011** the Court should develop, as a matter of urgency, a comprehensive security framework inclusive of witnesses, victims[174] and intermediaries[175] 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.

- **During 2011**, the Victims Participation and Reparations 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 the five 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 skills audit of the Section; 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.[176] The audit should identify the reasons for the backlog of over 900 victims' applications and instigate immediate remedies to this problem. The Registry should also develop strategies for long term changes within VPRS to avoid a repetition of this limited functionality.

- **The safety** practices adopted by the VPRS in their country-based consultations should be strengthened[177] 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.

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173 Rule 16 (2), Rome Statute.

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

175 With an emphasis on local intermediaries.

176 ICC-01/05-01/08-875, paras 3,5. According to Pre-Trial Chamber III, 900 victims applications in relation to the *The Prosecutor v. Jean-Pierre Bemba* have not yet been processed by the VPRS. This accounts for almost 50% of the total number of victims applications received by the VPRS between 31 September 2009 and 30 August 2010.

177 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.

- **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

- **The Counsel Support Section** (CSS)[178] should seek information about candidates' experience of representing victims of gender-based crimes on the application form for the List of Legal Counsel. The Registry should encourage applications from lawyers with this experience on the ICC website and develop a 'Frequently Asked Questions' page on the ICC website 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. Since the List was opened, women have not constituted more than 20% of those appointed. Currently 340 individuals have been appointed to the List of which 278 are men and 62 are women. During the 6-month campaign African female lawyers applying to be appointed to the List will be given priority over other applicants.

- **The impact** of the campaign should be evaluated at the end of 2010 and extended until October 2011, thus providing enough time for the CSS to report to the 10th session of the ASP on the impact of the campaign and their proposed strategies for further promoting the List of Legal Counsel to women lawyers.

- **In addition** to the online promotion of the campaign, other events, workshops and information seminars for lawyers should be held within the targeted region. In addition, the campaign should develop specific outreach strategies to women lawyers associations, women jurists and academics to broaden the reach of the campaign and enhance its success. The campaign must be linked to broader, integrated strategies to reverse the trend of underrepresentation of women lawyers and to ensure 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 seek information from the legal applicants regarding their experience representing or interviewing victims of gender-based crimes in the application form. Lawyers with this experience are not yet explicitly encouraged to apply.

- **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.

178 Please note that following an internal re-organisation, the Division of Victims and Counsel was dissolved. The Counsel Support Section is now in charge of the management of the List of Counsel.

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

Field Offices

- **The Registrar's** proposed changes for the Field Offices contained in the *Report of the Court on the enhancement of the Registry's field operations for 2010*[179] issued in 2009 should be adopted by the ASP to strengthen the functionality, coordination and planning, management and control of field-related human and material resources, and provision of services. While the Committee on Budget and Finance, in its thirteenth session, recommended to the ASP the approval of the headquarters-related enhancements, in its fifteenth session it rejected the reclassification of the four Field office managers (P3) to Registry field coordinators (P4). The Committee justified this recommendation based on the fact that not all field offices share the same needs and that the strategy for the field offices is not yet developed enough to justify a major increase in the staff-related expenses.[180] The Committee also expressed doubts about the relationship between the level of coordination and the level of professional post.[181]

- **The field-related** enhancements, in particular the reclassification of posts and the establishment of Registry field coordinators for each field office, are vital for the efficiency of the offices and good standing of the Court. The Field Offices are the 'face' of the Court to communities in the conflict Situations under investigation by the ICC. The Field Offices have the most direct contact with victimised communities and need to perform a range of complex functions in a coordinated, reliable and efficient manner. The ASP should support the establishment of co-ordination roles in each field office at the appropriate level (P4) giving the Coordinators the structural authority needed for other field staff and Hague-based colleagues to cooperate in efforts for greater effectiveness in the conflict Situations.

- **Measures** should be taken to address the significant gap between the number of women and men appointed to field office positions. Currently, only 23% of the overall field staff are women and there are 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.

179 *Report of the Court on the enhancement of the Registry's field operations for 2010*, ICC-ASP/8/CBF.2/10, 30 July 2009, p 13.
180 The Committee found that the cost related to the reclassifications was underestimated in the proposed budget (€15,000 instead of €80,000).
181 *Report of the Committee on Budget and Finance on the work of its fifteenth session*, ICC-ASP/9/15, 27 September 2010, p 19-20.

Trust Fund for Victims

- **The Board** and Secretariat of the Trust Fund for Victims (TFV) should embark on a vigorous fundraising campaign. As of 30 June 2010, there was €3,760,527.15 in the Fund. More pledges need to be encouraged from States and individual donors should be sought to contribute to the scheme. It is unclear what impact the online payment facility for donations, operative since 2009, has had on the amount of funds raised from private donors and institutions.[182]

- **In addition** to the criteria for the 'special vulnerability of women and girls'[183] to be addressed in projects, the Secretariat should adopt proactive strategies to solicit proposals explicitly from women's groups and organisations. Benchmarks should 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.

- **According** to the *2010 Annual Report* of the Board, State contributions amounted to €1,826,043.16[184] as of 30 June 2010, which is almost €1 million more than last year in the same period. This increase shows the positive impact of the Secretariat's fundraising activities in the past years. Nonetheless, considering in particular that the Court is preparing for reparation orders, the Secretariat and the ASP should encourage States to provide greater contributions to the Fund. 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.

- **The Fund** received a total of €1,136,100[185] as earmarked contributions in response to the appeal launched in September 2008 for victims of sexual violence. Although this constitutes a consistent increase from last year when earmarked contributions, excluding pledges, amounted to €203,081, the Board of the Trust Fund and the Secretariat should establish effective fundraising strategies for the Trust Fund as a matter of urgency. Considering that this is the second year of the three-year appeal, the objective of reaching €10 million in earmarked contributions will be difficult to achieve if donations continue at this pace. 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, which detracts much needed resources from victims-related projects and reparations.

182 While for the period 1 July 2008 to 30 June 2009, cash contributions from individuals and institutions to the Trust Fund amounted to €19,407, as of end of June 2010 these donations amounted to €6,433.83, three times less than last year.

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

184 *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 2009 to 30 June 2010*, ICC-ASP/9/2, 28 July 2010, p 7.

185 The Principality of Andorra donated €24,000 split between 2008 and 2009; Denmark contributed with €497,200 in 2009; Finland donated €170,000 in 2010; and finally Norway contributed with €191,100 in 2008 and €253,800 in 2010.

- **Many of** the TFV's direct beneficiaries in the DRC belong to the category of the 'community peace-builders'.[186] While recognising the importance of strengthening the role of affected communities in the Fund's reconciliation efforts, counting them as direct beneficiaries of rehabilitation support can be confusing. Therefore, the Secretariat could consider creating a third category of beneficiaries to clearly identify 'community peace-builders' separately from direct and indirect beneficiaries. This would help to strengthen the reporting on the support directly reaching victims in each of the Situations.

Outreach

- **In 2011**, the Court should continue to develop strategies for outreach in all five Situations with specific attention given to women and girls who may not have access to mass outreach events and may need safe and alternative forums to discuss gender-based crimes. This year, women were only 25% of the total number of participants at interactive sessions, although this was a significant increase from previous years. Activities solely directed at women should be increased in all Situations. The momentum established by the Unit this year in reaching more women should be continued and expanded.

- **The use** of the guidelines developed in 2008 on how to speak about gender-based violence in DRC and CAR should be further developed and extended also to northern Uganda, Darfur and Kenya, and their contents fine-tuned based on the specific aspects of the conflict in each Situation. In 2011, the Court should invest in increasing the number of women reached in Uganda and Sudan as these two Situations have the lowest percentage of women participating in interactive sessions (11% and 10%, respectively).

- **The Outreach Unit** should add greater transparency to their data collection methodology and provide a better 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.

- **More staff** should be recruited for the Outreach Unit, with an emphasis on experience and expertise in 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 five conflict Situations. The benefits of using local knowledge and practices regarding information dissemination to strengthen the Court's outreach work should be taken into account when recruiting Outreach staff.

- **The post** of ICC Outreach Coordinator for Sudan should be based in Chad instead of in The Hague. Outreach activities for Sudan in 2011 should focus on women victims/survivors and women's groups. Alternative educational tools, such as radio drama in all four Darfuri languages already developed by the Outreach staff, should be broadcast more widely.

186 The TFV defines community peacebuilders 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.

- **In 2011**, the Public Information and Dissemination Section (PIDS) should reach out to journalists and NGO members from the Middle East and North Africa region (MENA) to inform them of the proceedings of the Court. Information about the Court in this region is essential to increase the understanding within the region of the Court's functions and jurisdiction. The legal community should also be addressed so to facilitate the appointment of Sudanese and MENA lawyers to the List of Counsel.

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 by the OPCV, an increase in staff is required. As of 5 August 2010, the OPCV recorded a 62% increase in the number of victims to whom it provided assistance between January and July 2010. An increase in professional posts within the OPCV is urgently needed to respond to the growing demands on its role. The ASP should support the request by the OPCV for a P3 position in 2010 with the role of liaising with victims in the field.
- **With the** introduction of their 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 working with victims. Currently the OPCV has a staff of 10 working with over 1,252 applicants. The ASP should support a growth in the capacity of the OPCV to 15 full time staff by January 2013.

Appointments and Recruitment

- **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 anticipated in 2011, more staff with gender expertise will be required to ensure the integration of gender issues within the heightened case load expected for 2011 which includes five active investigations, maintenance of seven residual investigations and three trials. 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 prosecution strategy.
- **Despite** a significant decrease in the male/female differential at the P3 level in the OTP, the 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. Women are still the majority at P1 and P2 level. The OTP should adopt benchmarks to assist its recruitment practices towards addressing the overrepresentation of women at the P1 and P2 levels and the gender disparity in appointments in mid-to-senior level posts.
- **The ICC** should continue to implement its strategy for managing human resources to ensure they monitor and address imbalances in gender and geographical representation, create an institution supportive of staff learning and development, and provide a safe environment for employees, including an adequate and integrated internal justice system to deal with complaints, grievances, conflicts and disputes.

- **The Court** must ensure that its internal complaints procedures are sufficiently robust, transparent, provide adequate protection for staff, 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.

- **The Court** should form an inter-organ committee to prepare a three-year plan to ensure gender and geographical equity and gender competence at the Court. The three-year plan should encourage 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. The plan should include indicators and markers to assess progress in organisational competence across all organs and related bodies, including the Trust Fund for Victims and the ASP Secretariat. The three-year plan could also be integrated into the Court's overall Strategic Plan as critical aspects of its strategic goals for 'quality of justice' and being 'a model of public administration'.

- **As part of** the next phase of the Strategic Plan, the Court should establish time-specific 'placement goals' for hiring women and staff from under-represented countries and regions. Placement goals serve as reasonably attainable objectives or targets that are used to measure progress towards achieving equal employment opportunities, and enable the Court to identify 'problem areas' resulting in disparities in relation to the appointment, promotion or attrition of women or staff from under-represented countries.

- **For four years** running France has the highest number of nationals appointed to the Court. Since 2008, there has been an 83% 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 and 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 change significantly contributes to the efficacy and competence of the Court in the performance of its core functions and responsibilities and could therefore be justified.

- **The Court** should actively search, encourage and recruit staff from under-represented regions, with the view that the recruitment is proactive for women. The two-year plan to conduct recruitment missions in under-represented countries elaborated by the Human Resources Section, as suggested by the Committee on Budget and Finance at its twelfth session, April 2009, should be amended to include gender-specific strategies to address the underrepresentation of women in a number of regions. In order to effectively implement this plan and to carry out its ongoing tasks, additional resources should be made available to the Human Resources Section to carry out these missions. To date, one mission was held in December 2009.[187] The other missions planned in 2010 were postponed due to lack of funds.[188]

187 In Estonia. The Court also participated in Information fairs organised by the London School of Economics and the German Ministry of Foreign Affairs.

188 All the missions planned were in the Eastern European region.

- **The ICC** should place greater emphasis on recruiting expertise (in relation to investigations, prosecutions, analysis and trauma) for sexual and gender violence across all three organs of the Court. The Court should seek candidates with a background in gender analysis, women's human rights and/or in dealing with or representing victims of gender-based violence. This criteria should be included in all new job announcements, both on the ICC website and on the Personal History Form.

- **Prioritise** the need for ongoing gender training for staff of each organ of the Court and make attendance at 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 the organisation of 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.

- **Diversify** the advertisement of ICC vacancies in media, email listserves or other means that are accessible to a larger audience:

  (a) from 'non-WEOG' – websites, listserves or newsletters of NGO networks, regional or national bar associations, and national or regional print media in countries under-represented among Court staff, and

  (b) with a background in gender issues, such as websites or newsletters of national, regional and international women's organisations and networks, national associations of women lawyers, women judges' associations and women's networks within other judicial associations such as the International Bar Association, the International Criminal Bar and the International Association of Prosecutors.

- **Actively** collect Curricula Vitae of gender competent women professionals from under-represented countries, even when there are no job openings, and keep them as active files for future hiring processes.

- **Building on** the Guidelines for Application section on the ICC website, the Court could develop a 'Frequently Asked Questions' page to promote a better understanding of the application process (describing which section within the Court vets the applications, the composition of the 'search committees', and the average timeframe for a decision).

- **Strengthen** the Human Resources Section of the Court by providing a larger budget for increasing staff in this area. The Human Resources Section is vital for implementing the plans identified by the inter-organ Committee regarding gender and geographical representation.

Policies and Internal Audits

- **During 2011**, 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.[189] 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 (i.e. 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 to 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 partnerships.

189 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[181]

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.[182]

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.[183]

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.[184]

Genocide

Rape and Sexual Violence

The Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention.[185] 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'.[186]

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.[187]

181 Footnote references in this section pertain to the Rome Statute of the International Criminal Court.
182 Articles 8(2)(b)(xxii), 8(2; (e)(vi) and 7(1)(g). See also corresponding Articles in the Elements of Crimes (EoC).
183 Articles 7(1)(h), 7(2)(g) and 7(3). See also Article 7(1)(h) EoC.
184 Articles 7(1)(c) and 7(2)(c). See also Article 7(1)(c) EoC.
185 Article 6.
186 Article 6(b) EoC.
187 Article 21(3).

Procedures

Measures during Investigation and Prosecution

The Prosecutor shall 'take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court and, in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children'.[188]

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.[189]

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.[190]

188 Article 54(1)(b).
189 Article 68. See also Rules 87 and 88 RPE.
190 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.[191]

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.[192] 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.[193]

191 See also Rules 89-93 RPE.
192 Article 75. See also Rules 94 – 97 RPE.
193 Article 79. See also Rule 98 RPE.

States Parties/ASP

1 January 2010—

4 November 2010

Independent Oversight Mechanism

By virtue of Article 112 paragraphs 2(b) and 4[194] of the Rome Statute, at its 7th plenary session on 26 November 2009, the ASP adopted Resolution ICC-ASP/8/Res.1 by consensus, thereby establishing an Independent Oversight Mechanism (IOM). The Resolution outlined the terms of reference for the IOM including its scope and functions, issues pertaining to jurisdiction and immunities, as well as the co-location of the IOM with the ICC Office of Internal Audit at the seat of the Court, in The Hague. The Resolution also established the IOM as a new Major Programme in the ICC's annual budget and approved a start-up budget for 2010 of €341,600 to cover initial and continuing maintenance costs.

On 19 July 2010, a P5 secondment from the UN Office of Internal Oversight was appointed as the Temporary Head of the IOM whose work has focused on operationalising the IOM's investigative functions, as prioritised by the ASP resolution in November 2009.

The purpose of the IOM is to ensure effective and meaningful oversight of the Court through its investigation of reports of misconduct[195] or serious misconduct, including possible unlawful acts by a judge, the Prosecutor, a Deputy Prosecutor, the Registrar and the Deputy Registrar of the Court, all staff subject to the Staff and Financial Regulations and Rules of the Court and all contractors and/or consultants retained by the Court and working on its behalf.

194 Article 4 of the Rome Statute addresses the legal status and powers of the Court. It provides that the Court shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. It also provides that the Court may exercise its functions and powers, as provided in the Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

195 Misconduct, also described in the ICC Staff Rules as 'unsatisfactory conduct', includes any act or omission by elected officials, staff members or contractors in violation of their obligations to the Court pursuant to the Rome Statute and its implementing instruments, Staff and Financial Regulations and Rules, relevant administrative issuances and contractual agreements, as appropriate.

The IOM shall exercise operational independence under the authority of the President of the Assembly of States Parties and will have *proprio motu* powers and incorporate whistle blower procedures and protections.[196] In the conduct of its duties, and in accordance with Article 112(4) of the Rome Statute, 'the office shall have the authority to initiate on a reasonable basis, carry out and report on any action which it considers necessary to fulfil its responsibilities with regard to investigations without any hindrance or need for prior clearance, and as set forth in the present resolution'.[197]

On 4 November 2010, the Hague Working Group recommended adoption of the Annex (to the Draft Resolution), containing the IOM Operational Mandate, at the forthcoming 9th session of the Assembly of States Parties, 6–10 December 2010.

Detailed recommendations for the development of the IOM are contained in the **ASP Recommendations** section of the *Gender Report Card 2010*.

196 ICC-ASP/8/Res.1.

197 Annex (to the Draft Resolution) containing the IOM Operational Mandate, 4 November 2010, para 12.

The 10-year Review Conference of the Rome Statute and the International Criminal Court

The 10-year Review Conference of the Rome Statute and the International Criminal Court (ICC), from 31 May – 11 June in Kampala, hosted by the Government of Uganda, was attended by 86 States Parties to the Rome Statute and 33 observer states. Over 1200 members of civil society also participated in the official meeting and in side events held throughout the two weeks of the Conference. The Review Conference was the first global meeting on the Rome Statute since the 1998 Rome Conference, which adopted the Statute and laid the groundwork for the first permanent international criminal court with global jurisdiction for genocide, war crimes and crimes against humanity.

The two-track agenda for the Review Conference included a 'stocktaking exercise' held in the first week of the Conference, to evaluate the impact and progress of the Court since it came into existence in 2002, and the consideration of amendments to the Rome Statute, held in the second week of the Review process. Four priority themes were identified for the stocktaking exercise: (1) the impact of the Rome Statute system on victims and affected communities; (2) complementarity, or national efforts towards accountability; (3) state cooperation with the Court; and (4) peace and justice.[198]

States Parties also considered several proposals to amend the Rome Statute, including (1) to delete Article 124 from the Statute,[199] (2) to adopt a definition of the crime of aggression,[200] and (3) to amend the Statute to include in the list of war crimes not of an international character (Article 8(2)(e)) similar prohibitions as found in Article 8(2)(b) in relation to conflicts of an international character, namely the use of certain poisons, gases, and expanding bullets.[201]

198 RC/1/Add.1, 'Annotated list of items included in the provisional agenda', 12 May 2010, p 4.
199 RC/WGOA/2, 'Draft resolution on article 124', 9 June 2010.
200 RC/WGCA/1/Rev.2, 'Conference Room Paper on the Crime of Aggression', 7 June 2010.
201 RC/WGOA/1/Rev.2, 'Draft resolution amending article 8 of the Rome Statute', 4 June 2010.

The Women's Initiatives for Gender Justice brought to the Conference a delegation of 35 women's rights and peace activists from ICC Situation countries (Democratic Republic of the Congo [DRC], Uganda, and Central African Republic [CAR]). This was the largest civil society delegation to participate in the Review Conference.[202] Activists from Darfur were also expected to join the delegation, however, due to last minute threats from the Government of Sudan to Sudanese activists planning to attend the Review Conference, they were unable to travel to Kampala. During the two weeks of the conference, the Women's Initiatives for Gender Justice organised a series of events including the Women's Court,[203] two press conferences,[204] the launch of a declaration, *Advancing Gender Justice – A Call to Action*, and a reception celebrating the release of the new publication, *In Pursuit of Peace – A la poursuite de la paix*.[205] In addition, the Executive Director of the Women's Initiatives for Gender Justice delivered a speech to the Assembly of States Parties during the opening plenary of the Review Conference.[206]

202 For more information about the Women's Initiatives delegation and events at the Review Conference, see <http://www.iccwomen.org/news/berichtdetail.php?we_objectID=74>.

203 For more information about the Women's Court, see <http://www.iccwomen.org/news/berichtdetail.php?we_objectID=78>. The Programme of the Women's Court is available at <http://www.iccwomen.org/documents/WC-PROGRAM-Final.pdf>.

204 For more information on the Press Conference, see <http://www.iccwomen.org/news/berichtdetail.php?we_objectID=76>. The Press Statement by Executive Director Brigid Inder is available at <http://www.iccwomen.org/documents/Womens-Initiatives-Press-Statement-31-May.pdf>.

205 Available at <http://www.iccwomen.org/documents/Pursuit-ENG-4-10-web.pdf>.

206 'Gender Justice and the ICC', Brigid Inder, Women's Initiatives for Gender Justice to the General Debate, 1 June 2010, available at <http://www.iccwomen.org/documents/Womens-Initiatives-Statement-GeneralDebate.pdf>.

The Women's Court

On 1 June, the Women's Initiatives for Gender Justice held an all-day Women's Court. This followed in the footsteps of the 1993 Vienna Tribunal on Women's Human Rights and the 2000 Tokyo Women's Tribunal. These tribunals, with their compelling testimony by women victims/survivors of armed conflict, helped pave the way for international tribunals to prosecute gender-based crimes as international crimes. Like its predecessors, the aim of the Women's Court was to draw attention to the particular harms women and girls experience during armed conflict and to promote greater attention to these crimes by the ICC and national authorities. Rather than making a determination of guilt or delivering a formal 'judgement', the purpose of the Women's Court was to provide a space for women advocates and victims/survivors from four conflict Situations before the ICC to express their views and experiences as part of the Review Conference.

The Women's Court was comprised of four panels[207] relating to the conflict Situations under investigation by the ICC and involved 12 presenters who shared their experience and analysis of the conflict in their countries and its impact on women.

Each session was moderated by international peace and justice advocates, including Nobel Peace Laureate Wangari Maathai; Silvana Arbia, Registrar of the International Criminal Court; Bukeni Waruzi, Lead Campaign for Gender-based Violence at Witness; and Elisabeth Rehn, Chairperson for the Board of Directors for the ICC Trust Fund for Victims.

Judge Sang-Hyun Song, President of the International Criminal Court, also attended the Women's Court and in his remarks, recognised the important contributions that women's advocates have made to the implementation of the Rome Statute, stating that 'the Court and the ASP must continue to build on and live up to the legacy you have created... Nobody has suffered more as innocent victims of conflict, and your voices should be heard.'[208]

207 The four panels were on Uganda, DRC, Sudan and CAR.

208 Remarks of Judge Sang-Hyun Song, President of the International Criminal Court, available at <http://www.iccwomen.org/documents/Pres_Song_remarks_at_Womens_Court.pdf>, last visited on 5 November 2010.

Advancing Gender Justice – A Call to Action

At the press conference held on 31 May 2010, the Women's Initiatives for Gender Justice released *Advancing Gender Justice – A Call to Action*.[209] The *Call to Action* outlines priorities for advancing gender justice through the ICC, as well as regional and national judicial systems, and through peace processes and mechanisms to end armed conflicts. These priorities emerged from six years of work by the Women's Initiatives in country-based programmes and partnerships, advocacy initiatives with the ICC, legal filings, expert consultations and two key events[210] held as part of the organisation's preparation for the 10-Year Review Conference.

The priorities and strategies identified in *Advancing Gender Justice – A Call to Action* include:

- Enhancing the institutional gender capacity of judicial bodies through the appointment of Gender Legal Advisers to senior positions within the ICC, the regional human rights courts and commissions, and national supreme courts;
- Implementation, by states, of the Rome Statute and complementarity strategies for its domestication inclusive of the gender provisions contained within the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence;
- Domestic prosecutions of crimes potentially within the jurisdiction of the ICC should be frequent and must comply with the standards of justice outlined in the Rome Statute and its related documents. National accountability processes and their compliance with international criminal justice standards are necessary if prosecutions are to act as a deterrent to the future commission of genocide, war crimes and crimes against humanity;
- Enhancing mechanisms to ensure victims' participation at the ICC is meaningful, including development of a more accessible legal aid scheme, policies which are responsive to the participation of victims of sexual violence among other marginalised groups, and a comprehensive security framework inclusive of victims and intermediaries;
- Increase resources and voluntary contributions to the ICC Trust Fund for Victims as it develops gender-inclusive, victim-centred guidelines for case-based reparations;
- Stronger and more consistent jurisprudence on gender-based crimes from international and hybrid criminal tribunals;
- The adoption of an amendment policy by the ICC to allow the prosecutorial process to be able to correct itself when initial indictments exclude charges for which sound evidence exists;
- Greater state cooperation in their responsibilities as to assist the ICC with arrests of suspects, freezing and seizing of assets, and promotion of universal ratification of the Rome Statute.

209 Available at <http://www.iccwomen.org/documents/Advancing-Gender-Justice-A-Call-to-Action-FINAL.pdf>

210 The 'International Justice for Women Forum', 6-8 October 2008, Kampala, Uganda, organised by the Women's Initiatives, brought together 155 women's rights and peace activists, predominantly from the conflict Situations under investigation by the ICC. This meeting provided the opportunity for women directly affected by the conflict Situations before the ICC to reflect on the work of the Court in providing accountability, contributing to local expectations of justice and an end to conflict and impunity. The 'International Gender Justice Dialogue', organised by the Women's Initiatives in collaboration with the Nobel Women's Initiative, 19-21 April 2010, Puerto Vallarta, Mexico, assembled more than 50 advocates and leaders from current or recent armed conflicts as well as leaders from the fields of international criminal law, Nobel Peace Laureates, representatives of the ICC, peace mediators, women's rights advocates, United Nations personnel, academics, communications specialists and donors to contribute to discussions about the future of gender justice and the need for a global agenda to advance this work.

The *Call to Action* paper also addresses priorities for advancing gender justice through peace processes, agreements and their subsequent implementation.

These priorities include:

- The development of benchmarks for the appointment of Chief Mediators by the United Nations (UN) with no more than 45% and no less than 55% of either gender appointed as mediators or Special Envoys over a two-year cycle.[211]
- Peace processes and their agreements must comply with international law and UN Security Council Resolutions on women, peace and security.[212]
- Greater attention and resources should be provided towards building the capacity and supporting the participation of women's organisations and advocates within peace talks and in the implementation of peace agreements.

211 To date, no women have ever been appointed as Chief Mediators to UN sponsored or cosponsored peace-processes.

212 Resolutions 1325, 1820, 1888 and 1889.

Outcomes of the Review Conference

Upon conclusion of the Review Conference, States Parties adopted two declarations and six resolutions. The high level declaration known as the 'Kampala Declaration', adopted by consensus, reaffirmed the commitment of States Parties to the Rome Statute and the role of the Court in promoting peace and ending impunity. It also called for full and effective domestic implementation of the Statute, universal adherence to the Statute, and enhanced state cooperation. The Declaration recognised that 'justice is a fundamental building block of sustainable peace',[213] and it expressed the resolve of States Parties to 'continue and strengthen our efforts to promote victims' rights under the Rome Statute, including their right to participate in judicial proceedings and claim for reparations, and to protect victims and affected communities'.[214] Finally, the Declaration acknowledges 17 July as the Day of International Criminal Justice in recognition of the adoption of the Rome Statute on that day in 1998.[215]

Stocktaking

The stocktaking exercise took place from 2–3 June and addressed two of the four stocktaking themes per day.[216] The sessions involved panel discussions with presentations on each of the topics and allowed a question/answer session between the panellists, States Parties and civil society. Two resolutions and one declaration emerged from the stocktaking process. Expert papers prepared in advance and facilitators' summaries of the panel discussions were also produced on several of the stocktaking topics.

213 RC/Decl.2, 'Kampala Declaration', 1 June 2010, para 3.

214 RC/Decl.2, para 4.

215 RC/Decl.2, para 12.

216 Review Conference Provisional Work Programme, available at <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-provisionalworkprogramme.pdf>, last visited on 3 November 2010.

Prior to the stocktaking exercise, a civil society run 'International Symposium on Stocktaking Themes' was held over two days in Kampala, to produce a civil society communiqué to States Parties on the stocktaking topics.

Unfortunately, while this Symposium purported to address the key issues at stake in the stocktaking exercise from a civil society perspective, the organisers of the Symposium did not include women's rights activists in the programme or integrate gender issues within the methodology or analysis for reviewing the stocktaking themes. During the planning stages of this event, the Women's Initiatives for Gender Justice encouraged the organisers to incorporate gender issues and specifically to include speakers on women's rights and conflict issues, providing constructive assistance about the programme including the names of women who could provide gender expertise. While some members of the Women's Initiatives Delegation attended the meeting and participated in the workshops, the organisers declined to address gender justice issues and did not invite any women's rights activists to provide presentations. Subsequently, gender issues were ignored in the programme and were not addressed in the final communiqué presented to States Parties.

Disturbed by this process, women's rights and peace activists prepared a letter critiquing the Symposium and its process and questioned the validity of the communiqué, given the exclusion of gender justice issues from its outcomes. The letter was signed by more than 40 organisations including women's rights networks from Uganda, Sudan, the DRC and the CAR. Given the impact of armed conflict on women and the high rates of sexual violence committed in each of the Situations under investigation by the ICC, the purposeful inclusion of women's rights and peace activists in the Symposium could have contributed in substantive ways to the quality and validity of the civil society process.

Victims and Affected Communities

The stocktaking session on 'Victims and Affected Communities' focused on three themes: victim participation and reparations, including protection of victims and witnesses; the role of outreach; and the role of the Trust Fund for Victims.[217] Keynote Speaker Radhika Coomaraswamy, Under-Secretary-General and Special Representative of the Secretary-General of the UN for Children and Armed Conflict, praised the clarity provided by the Rome Statute that rape and other forms of sexual violence are war crimes.[218] She spoke of the calls for justice from rape victims she met on a recent visit to CAR, and the need to improve on circumstances for courtroom testimony on sexual violence, based on the difficult experiences of victims/survivors testifying at the International Criminal Tribunal for Rwanda. Under-Secretary-General Coomaraswamy called for the Court to be sensitive to the needs of victims/survivors of sexual violence, and for gender-sensitive programming in the rehabilitation of former girl-soldiers. Of the six panellists and Moderator, five were women, of whom two directly addressed gender issues – Radhika Coomaraswamy and Justine Masika Bihamba, co-founder and coordinator of *Synergie des Femmes pour les Victimes des Violences Sexuelles* in the DRC, who discussed the importance of engaging women's organisations and victim/survivor groups in the justice and reparative processes.

The Resolution that emerged from the session called for the implementation of Rome Statute provisions on victims and witnesses at the

217 RC/ST/V/1, 'Stocktaking of international criminal justice – Impact of the Rome Statute system on victims and affected communities: Draft informal summary by the focal points', 10 June 2010, para 8.

218 'Statement by Ms Radhika Coomaraswamy, Special Representative of the Secretary-General of the UN for Children and Armed Conflict', available at <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-Victims-VoiceOfVictims-UNSG-ENG.pdf>, last visited on 3 November 2010.

national level; discussed the need for optimising outreach and the Court's Strategy in relation to victims; and urged States to strengthen the Trust Fund for Victims through increased pledges, visibility, and transparency.[219] The Resolution includes two statements regarding the responsibility of governments and civil society to sensitise communities on the rights of victims under the Rome Statute, paying particular attention to the rights of victims of sexual violence, as well as encouraging the Court to improve the way in which it addresses the concerns of victims and affected communities, with special attention to the needs of women and children.[220]

Peace and Justice

The stocktaking session on 'Peace and Justice' included a Moderator and four presenters of whom one was a woman, Yasmin Sooka, who spoke in detail about gender issues in relation to Truth and Reconciliation Commissions.

Although the session did not result in a resolution or declaration, the Moderator produced a summary of the discussion in which he extracted some short- and long-term 'lessons learned' regarding peace and justice.[221] These included, for example, the acknowledgement that justice and peace are no longer mutually exclusive;[222] the recognition that justice, though sometimes prolonging war or conflict in the short term, in the long run prevents wars;[223] the recognition that justice alone is often not sufficient but that post-conflict reconciliation efforts should internalise both judicial and non-judicial mechanisms;[224] and the recognition that the demands of victims shift over time, 'with an immediate goal for peace followed by a quest for justice'.[225] The summary did not include any 'lessons learned' regarding gender justice issues, the differential impact of armed conflict on women and the distinct demands of women victims/survivors, nor did it propose strategies for integrating gender provisions within formal and informal mechanisms for justice and peace.

Complementarity

The panel on 'Complementarity' addressed the practical application of complementarity under the Rome Statute system and outlined various concepts of positive complementarity and the practical considerations regarding implementation of these ideas. In addition to the Moderator, there were five speakers on the panel of whom two were women, Navanethem Pillay, UN High Commissioner for Human Rights, and Geraldine Fraser-Moleketi, Director of United Nations Governance Group. Following the panel, ICC President Judge Song and the Prosecutor, Luis Moreno-Ocampo, also addressed the panel and participants regarding their views on complementarity.

The Resolution on complementarity reaffirmed 'the primary responsibility of States to investigate and prosecute the most serious crimes of international concern'.[226] It calls for additional measures to assist implementation of the Rome Statute provisions at the national level and for states to 'assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level'.[227] To that end, States Parties also requested the Secretariat of the ASP to serve as the facilitator of the exchange of information between States Parties, the Court, and other stakeholders. The Resolution did not include any gender provisions on this issue nor were such issues raised by the panel.

219 RC/Res.2, Advance version, 'The impact of the Rome Statute system on victims and affected communities', 8 June 2010.
220 RC/Res.2 Advance version , paras 4 and 2.
221 RC/ST/PJ/1/Rev.1, Advance version, 'Moderator's Summary', 22 June 2010.
222 RC/ST/PJ/1/Rev.1, Advance version, para 29.
223 RC/ST/PJ/1/Rev.1, Advance version, para 32.
224 RC/ST/PJ/1/Rev.1, Advance version, para 33.
225 RC/ST/PJ/1/Rev.1, Advance version, para 34.
226 RC/Res.1, Advance version, 'Complementarity', 8 June 2010: para 1.
227 RC/Res.1, Advance version, para 5.

Cooperation

The panel on 'Cooperation' addressed the need for individual States Parties to introduce implementing legislation; the challenges faced by States in relation to requests for cooperation and how to overcome these; and cooperation with the United Nations and intergovernmental bodies. In addition to the Moderator, there were six speakers on the panel of whom two were women: H.E. Amina Mohammed, Permanent Secretary in the Ministry of Justice, National Cohesion and Constitutional Affairs in Kenya and H.E. Patricia O'Brien, United Nations Under-Secretary-General for Legal Affairs.

A Declaration on cooperation reaffirmed the importance of state cooperation with the Court in passing implementing legislation, executing arrests, complying with other requests from the Court, and making financial pledges to support the Court.[228] It also called on all stakeholders to share experiences and provide assistance using innovative methods to enhance cooperation. The Declaration did not address gender provisions in relation to this issue nor were such issues raised by the panel.

Finally, the States Parties adopted another Resolution aimed at strengthening international cooperation regarding the enforcement of sentences.[229]

Overall, 43% of panellists and speakers who presented during the stocktaking sessions were women. Just over 38% of panellists referred to gender issues in some manner, mostly in brief references, with only 14% addressing gender issues in a substantive way. One Declaration included a reference to gender issues within the stocktaking themes.[230]

228 RC/Decl.2, Advance version, 'Declaration on Cooperation', 8 June 2010.

229 RC/Res.3, Advance version, 'Strengthening the enforcement of sentences', 8 June 2010.

230 Victims and Affected Communities Stocktaking Theme. RC/Res.2, Advance version, para 4.

Amendments

Crime of Aggression

The most high-profile and controversial item on the agenda at the Review Conference was the adoption of a definition of the crime of aggression. The crime of aggression was included in the jurisdiction of the Court in Article 5 of the Rome Statute in 1998, with the provision that the jurisdiction could only be exercised once the crime had been defined and conditions set out.[231] Leading up to the Review Conference, the ASP had convened a Special Working Group on the Crime of Aggression (SWGCA), chaired by Ambassador Christian Wenaweser (Liechtenstein), President of the ASP, and engaged in discussions on the definition and conditions for the exercise of jurisdiction over this crime.[232]

Since 2005, the SWGCA has held seven meetings and has produced reports subsequent to each session.[233] The SWGCA also convened three inter-sessional meetings[234] chaired by Ambassador Wenaweser.[235] Pursuant to the recommendation of the 7th ASP meeting that the time between the conclusion of the work of the SWGCA[236] and the Review Conference should be used for further consultations,[237] a fourth inter-sessional meeting on the crime of aggression was convened in June 2009. H.R.H. Prince Zeid

231 Rome Statute Article 5(2).

232 For more information see <http://www.icc-cpi.int/Menus/ASP/Crime+of+Aggression/>.

233 December 2005, November 2006, February 2007, December 2007, June 2008, November 2008, February 2009.

234 The Inter-sessional Meetings were held at the Liechtenstein Institute on Self Determination, Woodrow Wilson School, Princeton University, New Jersey, United States.

235 The Inter-sessional meetings were held on 13–15 June 2005, 8–11 June 2006 and 11–14 June 2007.

236 The ASP at its 6th session had decided that the Special Working Group on the Crime of Aggression was to conclude its work at least 12 months prior to the Review Conference, making the 2007 inter-sessional meeting the last meeting of the SWGCA. ICC-ASP/6/SWGCA/INF.1, p 16.

237 ICC-ASP/7/20, para 42.

Ra'ad Zeid Al-Hussein (Jordan) chaired this meeting. The Working Group on the Crime of Aggression at the Review Conference in Kampala was also chaired by H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein.

In Kampala, after more than a week of final negotiations, States Parties amended the Rome Statute to include a definition and elements of the crime of aggression as well as conditions under which the ICC would be able to exercise its jurisdiction for this crime. States based the definition of the crime of aggression on United Nations General Assembly Resolution 3314 (14 December 1974), which criminalises conduct by individuals in positions of political or military leadership who plan or execute an act of aggression against another state. According to the final definition, the crime of aggression means:

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[238]

An act of aggression 'means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'.[239] The amendment to Article 8 includes a number of enumerated acts that qualify as an act of aggression, such as the invasion or attack by the armed forces of a State on the territory of another State, or a blockade of another State's ports.[240]

The amendment to Article 15 provides for the Court's exercise of jurisdiction over the crime of aggression (i) in the case of state referral, (ii) on the basis of the Prosecutor's exercise of his *proprio motu* powers, or (iii) through a referral from the Security Council.[241] However, the conditions that apply to the Court's exercise of jurisdiction differ depending on which trigger mechanism applies. The States Parties placed two limitations on the exercise of jurisdiction when the investigation is triggered by the Prosecutor or referred by a State. First, the Court may not exercise its jurisdiction over the crime of aggression that occurred on the territory of or was committed by nationals from non-State Parties to the Statute.[242] Therefore, the crime of aggression applies only to acts of aggression that occur between States Parties. Second, the States Parties have inserted an opt-out clause: if State Parties have lodged a declaration with the Registrar refusing to accept the Court's jurisdiction over the crime of aggression committed on its territory or by its nationals, the Court may not proceed with an investigation.[243] These limitations do not apply in the case of UN Security Council referrals of the crime of aggression to the ICC; Article 15ter states that in this case, the same conditions apply to the crime of aggression as to other crimes, in accordance with Article 13(b).[244]

Furthermore, the States Parties put in place a Security Council 'filter' on the initiation of an investigation of aggression by the Office of the Prosecutor *proprio motu* or on the basis of a state referral. In such a case, when the Prosecutor decides to proceed with an investigation, he or she shall first determine whether the Security Council has made a determination as to the existence of an act of aggression.[245]

238 Rome Statute Article 8bis, as stated in RC/Res.6, 'The Crime of Aggression', 11 June 2010.
239 RC/Res.6, Advance version, 11 June 2010, Annex 1 'Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression'; See also Resolution 3314, 'Definition of Aggression', UNGA, 29th session, 2319th mtg, A/RES/29/3314, 14 December 1974.
240 RC/Res.6, Advance version, Annex 1.
241 RC/Res.6, Advance version, Annex 1, paras 3-4: Article 15*bis* (on state referral and *proprio motu* investigations) and Article 15*ter* (on Security Council referral).
242 RC/Res.6, Advance version, Annex 1, para 3: Article 15bis(5).
243 RC/Res.6, Advance version, Annex 1, para 3: Article 15bis(4).
244 RC/Res.6, Advance version, Annex 1, para 4: Article 15ter(1).
245 RC/Res.6, Advance version, Annex 1, para 3: Article 15bis(6).

If the Security Council has made an affirmative determination, the Prosecutor may proceed with his or her investigation.[246] In case the Security Council has *not* made such a determination within six months after having been notified of the Prosecutor's intentions, the Prosecutor shall seek the authorisation of the Pre-Trial Division pursuant to Article 15.[247] The Security Council may still halt the investigations where it deems necessary under Article 16.[248] Such determination of aggression by either the Security Council or the Pre-Trial Division will not prejudice the Court's own findings of aggression.[249]

There are two preconditions on the exercise of the Court's jurisdiction over the crime of aggression in the amendment to Article 15 that are distinct from the preconditions required for other crimes under Article 12 of the Rome Statute. First, there is a one-year waiting period after the ratification of the amendments by States Parties before the Court may exercise its jurisdiction over the crime of aggression. Second, the Court may only exercise its jurisdiction over aggression after the States Parties decide to activate the jurisdictional regime they agreed to at the Review Conference by the same majority (two-thirds majority or consensus) at a meeting after 1 January 2017. Both conditions must be met before the Court will be able to exercise its jurisdiction over aggression.

In addition, the States Parties included numerous 'Understandings' in the Resolution adopting the crime of aggression, including an understandingthat the Security Council must consider the three components of 'character, gravity and scale', when it debates whether an act of aggression has occurred.[250]

Prior to the unanimous adoption of the Crime of Aggression, the Japanese Delegation read a statement expressing their concerns regarding the 'legal integrity of the amendment', in particular that the resolution 'unjustifiably solidifies blanket and automatic impunity of nationals of non-state parties: a clear departure from the basic tenet of Article 12 of the Statute'.[251] However, Japan stated that it would not stand in the way of consensus if all other delegations were prepared to support the proposed draft resolution.

246 RC/Res.6, Advance version, Annex 1, para 3: Article 15bis(7).
247 RC/Res.6, Advance version, Annex 1, para 3: Article 15bis(8).
248 RC/Res.6, Advance version, Annex 1, para 3: Article 15bis(8).
249 RC/Res.6, Advance version, Annex 1, para 3: Article 15bis(9).
250 RC/Res.6, Advance version, Annex 3, para 7.

Other amendments

Article 124 is a controversial provision in the Rome Statute that allows a State to declare at the time of ratification that it does not accept the jurisdiction of the Court with respect to certain war crimes committed by its nationals or on its territory for a period of seven years. This provision was included as a compromise measure in the Rome Statute, with a clause stating that its provisions shall be reconsidered at the Review Conference. In Kampala, States Parties decided to retain Article 124 in order to increase ratifications of the Rome Statute, but they placed a 'sunset' provision on it to be revisited at the 14th meeting of the ASP.[252]

States Parties approved without controversy the Belgian proposal to extend the jurisdiction of the Court over crimes not of an international character to include certain crimes already included in Article 8 with respect to crimes of an international character.[253] These include the war crimes of: employing poison or poisoned weapons (Article 8(2)(b)(xvii)); employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices (Article 8(2)(b)(xviii)); and employing bullets which expand or flatten easily in the human body (Article 8(2)(b)(xix)).

251 Statement presented by H.E. Ichiro Komatsu, Head of the Delegation of Japan to the ICC Review Conference, 11 June 2010, available at <http://www.mofa.go.jp/policy/i_crime/icc/pdfs/before_adoption_1006.pdf>, last visited on 5 November 2010.
252 RC/Res.4, Advance version, 'Article 124', 10 June 2010.
253 ICC-ASP/8/Res.9/Annex.VIII-ENG.

Budget for the ICC

At its 15th Session in 2010, the Committee on Budget and Finance (CBF) of the Assembly of States Parties (ASP) proposed a budget of €103.99 million for the ICC in 2011.[254] The Court had proposed a 2011 budget of €107.02 million, representing an increase of €4.77 million, or 4.7 percent, over the ASP-approved budget for 2010. The Court explained the increase as mainly due to the cost of running simultaneous trials, the increased costs of detention, certain capital investments and reclassification of posts.[255] At the 9th Session of the ASP in December 2010, 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.

In 2011, the Court will have five Situations, and at least three trials (Lubanga, Katanga/Ngudjolo, and Bemba) with the possibility of two further trials starting (Banda/Jerbo and Mbarushimana). The Court based its budget requests on the assumption that simultaneous trials will continue for six months in 2011, and possibly for a longer period. In addition, the Court's budget is based on the assumption that the Prosecutor will conduct six active investigations in four Situations and will maintain seven residual investigations. Eight other potential situations will be monitored.

The CBF's report underscores the critical importance of the Court adequately presenting and justifying its funding needs in its proposed budget. In reviewing the Court's proposed 2011 budget, the CBF expressed concern about errors and inconsistencies in the Court's budget document, and set out a list of 16 separate errors and inconsistencies in an Annex.[256] It also stated that it took the general approach to recommend non-funding of positions that were not properly identified or justified. 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 by 10%, which could have an impact on both

254 ICC-ASP/9/15-Annex V, Advance version, Table I.
255 ICC-ASP/9/10, para 3.
256 ICC-ASP/9/15, Advance version, paras 45–50, Annex IV.

outreach and investigations.[257] In addition, the CBF called for the Registry to present legal aid for defence and victims as distinct budget items, which is important for accurately assessing the cost to the Court of these separate functions.[258]

Structural Changes

Of concern in both the Court's proposed budget and the CBF's report are proposed structural changes to the Office of the Prosecutor (OTP). In the OTP's proposed budget, the Prosecutor proposes abolishing the post of Deputy Prosecutor for Investigations, which has been vacant for more than three years, in light of its assessment that the way investigations are currently managed, and the current structure of the division, is adequate.[259] However, the CBF notes that this is an ASP decision, as the Deputy Prosecutor for Investigations is an elected official.[260]

Investigations

The OTP also proposes no new posts in the investigation teams, intending to meet all investigation needs for the new situations through using existing resources, namely the rotation of investigation teams. Specifically, the Prosecutor proposes transferring investigation staff from CAR to Kenya and the new DRC investigation.[261] At the same time, the OTP proposes the reduction of mission days by almost 50%.[262] In light of the OTP's forecast of five active investigations and maintenance of seven residual investigations, including support to three trials, the proposed cuts in investigations appear to be conflicting with the real needs of the OTP and will likely pose significant operational challenges to the work of the Court. In addition, the proposed reduction in the number of mission days contradicts the efficacy of the OTP's investigative strategies to date, which are wholly determined by the Executive Committee. Several judicial decisions have questioned the quality and sufficiency of evidence submitted by the OTP and in some instances this paucity has led to the deletion of significant charges for lack of evidence at the application for the arrest warrant phase,[263] as well as in judicial decisions regarding confirmation of charges.[264]

On several occasions, Pre-Trial Chambers have raised concerns about the quality of the filings and the availability of evidence. In two instances, Trial Chamber I has ordered a stay of proceedings in the Lubanga case for issues related to practices adopted by investigation

257 ICC-ASP/9/15, Advance version, para 75.
258 ICC-ASP/9/15, Advance version, para 110.
259 ICC-ASP/9/10, para 134.
260 ICC-ASP/9/15, Advance version, para 93.
261 ICC-ASP/9/10, para 172.
262 ICC-ASP/9/10, para 180.

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

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

teams, as determined by the Executive Committee, regarding firstly, confidentiality agreements with sources[265] and secondly, the investigation team's oversight and management of intermediaries liaising with OTP witnesses.[266] It would appear that more investigation days, a different approach to investigations by the Executive Committee, and greater strategic capacity, are desirable.

In addition, the cuts proposed by the OTP raise particular concerns for the investigation of gender-based crimes, for which 40% of charges for these crimes have been declined by Pre-Trial Chambers I and II due to insufficient evidence in the two cases inclusive of gender-based charges for which confirmation hearings have been held.

Election of a new Prosecutor

In light of the upcoming election of the Prosecutor in 2011, the request in the proposed budget to reclassify the post of Prosecution Coordinator from P5 to D1 is also of concern. With this change, the structural integrity of the OTP would be diminished. Under this model the OTP would consist of the Prosecutor, a single Deputy Prosecutor [for Prosecutions], and three D1s for the three main areas of competence (cooperation, investigations, and prosecution). Although the CBF recommends approving this reclassification,[267] as it noted earlier the post of Deputy Prosecutor for Investigations is an elected position, and it would require ASP action to abolish the post. It therefore recommends the approval of the reclassification subject to the ASP abolishing the position of Deputy Prosecutor for Investigations.[268] Indeed the upcoming election presents an opportunity to elect at least two key positions: the Prosecutor, and a Deputy Prosecutor. In addition, as the CBF points out, the salary for Deputy Prosecutor for Investigations was not included in the 2010 budget or the 2011 proposed budget, so it was not taken into account in the budget assessment.[269]

Maintaining the structural possibility of electing a Deputy Prosecutor for Investigations is important for the future leadership of the Office. In addition, any contracts offered during 2011 to appointees for D1 posts within the OTP should not be for more than a one-year term. As a new Prosecutor is to be elected in 2011, it is essential that she or he be able to appoint her or his own team at the senior leadership level. In this scenario it would be advisable and cost effective at this stage to not make any appointments to the proposed D1 Prosecution Coordinator next year. The position of Head of Jurisdiction, Complementarity and Cooperation, vacant since 31 May 2010, but for which applications have closed and an appointment is expected within the next 12 months, should be appointed on a one-year contract. The next Prosecutor must be enabled by the ASP to make all D1 senior leadership appointments and be able to select the candidates she or he submits to the ASP for election of the post of Deputy Prosecutor.

265 ICC-01/04-01/06-1401; *Gender Report Card 2008* p 45-46.
266 ICC-01/04-01/06-2517-Red; see also Trial Proceedings Section of the *Gender Report Card 2010*.
267 ICC-ASP/9/15, Advance version, para 95.
268 ICC-ASP/9/15, Advance version, para 95.
269 ICC-ASP/9/15, Advance version, para 93.

Kenya and Field Offices

With respect to the new Situation in Kenya, in its proposed budget the Court is proposing to cover many of its operations in Kenya within existing resources, including redeployment of staff from field offices in Abeche (Chad) and Kampala (Uganda) to Kenya,[270] and transferring existing investigation staff from CAR to Kenya as noted above. The Court has proposed closing the field office in Abeche and maintaining minimal support resources in N'Djamena and Abeche to deal with residual issues relating to the Situation in Darfur.[271] In Uganda, it is important for the Court to maintain an effective presence, even and especially in the absence of judicial proceedings, so that victims/survivors remain accurately informed of the Court's activities.

In the proposed budget, the Registry does allow an additional €0.5 million for witness protection in Kenya, which is essential in light of threats that have already been reported, and may not be sufficient as the Court's activities increase. The Registry itself notes that 'it cannot be excluded that future situations, or increased activity in existing situations, may result in the need for further funds'.[272] Last year the Court for the first time sought to access the Contingency Fund to cover the costs for unforeseen activities, namely parallel trials and the investigation in Kenya.[273] In its report, the CBF cautioned the Court to ensure that 'it did not underestimate its requirements as part of its proposed regular programme budget with a view to accessing the Contingency Fund, as such a practice could undermine the integrity of the budgeting process'.[274]

270 ICC-ASP/9/10, paras 11, 207, 265-270.
271 ICC-ASP/9/10, para 208.
272 ICC-ASP/9/10, para 207.
273 ICC-ASP/9/15, Advance version, para 35.
274 ICC-ASP/9/15, Advance version, para 42.

Substantive Work of the ICC

Office of the Prosecutor

Trial Proceedings

Judiciary – Key Decisions

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Office of the Prosecutor

Investigation and Prosecution Strategy

Since the publication of the *Gender Report Card 2009*, the Office of the Prosecutor has opened an investigation in Kenya, the first new investigation since 2007. In the Situation of the Democratic Republic of the Congo (DRC), it continued with its first trial in the case against Thomas Lubanga Dyilo, and on 24 November 2009, commenced its second trial in the Katanga/Ngudjolo case. Also in the DRC Situation, a fourth suspect, Callixte Mbarushimana, was arrested by the French authorities on 11 October 2010 pursuant to an ICC Arrest Warrant issued on 28 September 2010. Finally, preparations continue for commencing the ICC's third trial, that of Jean Pierre Bemba Gombo in the Situation of the Central African Republic (CAR).[275]

In the Darfur Situation, two rebel commanders voluntarily appeared before the Court in response to Summonses to Appear. For the first time, a Pre-Trial Chamber declined to confirm charges against a third rebel commander in the Abu Garda case. Three other suspects remain at large in the Darfur Situation: President Al'Bashir of Sudan, who now also faces charges of genocide, and Ahmad Harun and Ali Kushayb. Three suspects also remain at large in the Situation of Uganda, including Joseph Kony, leader of the Lord's Resistance Army. All of these developments are discussed in detail below.

During 2010, the Office of the Prosecutor came under scrutiny by the judges in a number of cases. In making decisions to issue arrest warrants and to confirm charges, judges have examined the quality of the information provided at the pre-trial stage against the standards of proof required by the Rome Statute. As discussed below, in the Al'Bashir case, Pre-Trial Chamber I again examined the evidence put forward by the Prosecutor to support the inclusion of charges of genocide in the Arrest Warrant, using the correct standard of proof of 'reasonable grounds to believe' as directed by the Appeals Chamber, and found that the charges could be included. These are the first charges of genocide, and of genocide including acts of gender-based crimes, to be brought at the ICC. In the

275 As of the publication of this Report, the trial was due to commence on 22 November 2010.

Abu Garda case, however, using the higher standard of proof of 'substantial grounds to believe' applicable at the confirmation stage of the proceedings, Pre-Trial Chamber I found that there was insufficient evidence provided to establish Abu Garda's culpability for an attack against UN peacekeepers in Haskanita and declined to confirm any charges against him.

The investigation practices, and in particular the use of intermediaries by the Office of the Prosecutor, surfaced as major issues in the two ongoing trials in the DRC Situation. Intermediaries have played a critical role in assisting the Office of the Prosecutor in identifying and contacting witnesses, and in the overall progress of investigations. As described in greater detail in the section on **Trial Proceedings**, allegations that Prosecution intermediaries improperly influenced witnesses to falsify testimony led Trial Chamber I to issue an important decision on intermediaries. It ordered the Prosecution to call its investigators and intermediaries to testify and to disclose the identity of one of its intermediaries to the Defence. The Prosecutor's subsequent failure to disclose the intermediary's identity resulted in a stay of the proceedings. Trial Chamber I's disapproval of the actions of the Prosecutor in the Lubanga case were reflected in an earlier decision condemning a press interview with an Office of the Prosecutor representative on the role of intermediaries. Its criticisms were further echoed by the Appeals Chamber in its judgement reversing the stay, which underscored the Prosecutor's obligation to comply with judicial orders. In addition, in three separate cases the Defence filed objections to public statements by the Prosecutor and his high-level staff, arguing that they were prejudicial to the accused. In the Lubanga case, Trial Chamber I agreed with the Defence and issued a decision censuring the Office of the Prosecutor, as mentioned above and discussed in the **Trial Proceedings** section.

Charges and prosecution of gender-based crimes

The Prosecutor has now sought charges for gender-based crimes in all four Situations in which charges have been brought: Uganda, DRC, CAR and Darfur. No charges have yet been publicly requested in the fifth Situation, Kenya. However, the substantial evidence of gender-based crimes gathered by other sources and submitted by the Prosecutor in support of his request to open the investigation suggests that this will be an important part of the Kenya investigation, and that gender-based crimes should be included among the charges to be brought in the Kenya Situation.

With respect to the cases, charges of gender-based crimes have now been brought in six of the 10 cases currently before the Court. There are charges of gender-based crimes in the Kony case in the Uganda Situation; in the Katanga/Ngudjolo and Mbarushimana cases in the DRC Situation; in the Bemba case in the CAR Situation; and, in the Al'Bashir and Harun/Kushayb cases in the Darfur Situation. No charges of gender-based crimes were brought in the Lubanga and Ntaganda cases in the DRC Situation, nor in the Abu Garda and Banda/Jerbo cases in the Darfur Situation. The specific charges in each case are discussed in detail below.

The recent charges brought against Mbarushimana reflect a new effort by the Office of the Prosecutor to charging a wider range of gender-based crimes at the arrest warrant stage of the proceedings. The charges against Mbarushimana include: rape and rape as torture as both a war crime and crime against humanity; inhumane acts and persecution based on gender as crimes against humanity, and inhuman treatment as a war crime.

In the ongoing cases, the failure on the part of the Prosecutor to fully investigate and charge gender-based crimes in all cases in which there was evidence of such crimes continues to have repercussions, including increased litigation at the trial phase. In the Lubanga case, the accused stands trial on charges limited to the enlistment and conscription of child soldiers, despite the substantial documentation available to the Office of the Prosecutor, including that submitted to it by the Women's Initiatives for Gender Justice, of gender-based crimes committed by the *Union des patriotes Congolais* (UPC). As discussed in the *Gender Report Card 2009*, Victims' Legal Representatives jointly sought to change the legal characterisation of the facts using Regulation 55 of the Regulations of the Court based on the extensive evidence of sexual slavery heard during the Prosecution case. While Trial Chamber I was divided on the appropriate use of Regulation 55, the Appeals Chamber ruled that Regulation 55 'may not be used to exceed the facts and circumstances described in the charges'.[276]

Other obstacles to the inclusion of charges for gender-based crimes have included the Prosecution's apparent difficulty in presenting evidence robust enough to survive the confirmation stage of the proceedings.[277] Likewise, Pre-Trial Chamber II's interpretation of the law of cumulative charging resulted in the charges of gender-based crimes being reduced by more than half in the Bemba case. These issues, including Women's Initiatives' amicus curiae brief challenging this decision, were discussed at length in the *Gender Report Card 2009*. The pre-trial phase of the Bemba case is discussed below.

276 ICC-01/04-01/06-2205, para 1.

277 For more information, see the discussion of the Bemba case in the *Gender Report Card 2009*, p 63-67, 142-144; and the discussion of the Katanga/Ngudjolo case in the *Gender Report Card 2008*, p 47-48.

Situations under preliminary examination

The Office of the Prosecutor is also engaged in preliminary examinations in Cote d'Ivoire, Colombia, Afghanistan, Georgia, Guinea and the Palestinian Territory.[278] 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.[279] 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 of the Rome Statute;[280] a referral from a State Party or the Security Council; or a declaration by a non-State Party pursuant to Article 12(3) of the Statute.

Since October 2003, the Court has had jurisdiction over Cote d'Ivoire, pursuant to a declaration submitted to the Court under Article 12(3) of the Statute, which allows non-States Parties to voluntarily accept the jurisdiction of the Court. The preliminary examination in Cote d'Ivoire focuses on crimes committed between 2002 – 2005, including crimes of sexual violence. 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

278 For the most current information on Situations under preliminary examination, see the Weekly Briefings of the Office of the Prosecutor, at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Weekly+Briefings/>.

279 '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 2010.

280 Article 15 provides that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

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 Office of the Prosecutor has also initiated a preliminary examination of crimes within the jurisdiction of the Court by all actors in Afghanistan 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. 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.

The Office of the Prosecutor continues to receive communications under Article 15 of the Statute. As of 4 October 2009, the Office reported that it had received 8,874 communications, of which 4,002 were manifestly outside the jurisdiction of the Court.[281]

281 <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/weekly%20briefings/otp%20weekly%20briefing%20_%2028%20september%20-%204%20october%202010>, last visited on 25 October 2010.

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. The Situation in Uganda was the second to become the subject of an investigation by the Office of the Prosecutor. As of the publication of 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 case to date, but 2010 saw a number of significant developments in the legal framework of Uganda and with respect to the LRA. As discussed in the **Assembly of States Parties** section, above, Uganda hosted the ICC Review Conference of the Rome Statute from 31 May – 11 June 2010. On 25 May 2010, immediately prior to the opening of the ICC Review Conference in Kampala, and after many years of delay, the International Criminal Court Act 2010 (ICC Act) was passed in Uganda. It became law when it was published on 25 June. The ICC Act gives the force of law to the Rome Statute in Uganda; makes provisions within the domestic law of Uganda for the punishment of international crimes of genocide, crimes against humanity, and war crimes; provides for Uganda to cooperate with the ICC in the performance of its functions; provides for the arrest and surrender to the ICC of persons alleged to have committed crimes within its jurisdiction; provides for various forms of request for assistance to the ICC; enables Ugandan courts to try, convict and sentence persons who have committed crimes referred to in the Statute; enables the ICC to conduct proceedings in Uganda; and provides for the enforcement of sentences and orders imposed by the ICC.[282] Significantly, the jurisdiction of Ugandan courts is limited to those crimes committed after 25 June 2010.

282 The International Criminal Court Act 2010, Part 1, Clause 2.

While the substantive definitions of crimes and certain other key provisions are incorporated by reference, the ICC Act fails to include other important provisions, in particular gender provisions, which are contained in the Rome Statute and/or the ICC Rules of Procedure and Evidence. It fails to include, or make explicit, provisions ensuring a gender balance and gender competence in the relevant institutions, victim and witness protection, and the fair trial rights of the accused. Such gaps render the process vulnerable to 'watering-down'. Furthermore, should domestic prosecutions go forward under this law, women, and in particular women victims/survivors of gender based crimes, may be deprived of the opportunity to obtain justice and accountability for these crimes through a process equivalent to that contained in the Rome Statute system.

At the same time, the Government of Uganda is moving ahead with domestic criminal proceedings against the LRA. The War Crimes Court (WCC) of Uganda was established pursuant to the Agreement on Accountability and Reconciliation, signed on 29 June 2007 as part of the Juba Peace Talks. Three Ugandan judges were appointed to the WCC in 2008, along with a Registrar, Prosecutor, and investigators. A fourth judge was since added, bringing the total to four, of whom three are men, and one a woman. The entry into force of the ICC Act in June 2010 gave Ugandan courts jurisdiction over international crimes and enabled the WCC to begin prosecutions. The WCC is now preparing for its first trial, against Thomas Kwoyelo, a former commander of the LRA. Kwoyelo has been in custody in Gulu since March 2009, and has been charged with 12 counts of kidnapping with intent to murder.[283] Prosecutions by the WCC will rely on the Geneva Convention of 1949, which was adopted by Uganda in 1964.

283 'Uganda Set for First War Crimes Trial', *Institute for War and Peace Reporting* (*IWPR*), 14 July 2010, available at <http://iwpr.net/report-news/uganda-set-first-war-crimes-trial>, last visited on 25 October 2010.

Together with the governments of neighbouring countries and the United States, the Government of Uganda continues to consider military action against the LRA. However, previous military operations have not been successful. Operation Lightning Thunder was a joint Ugandan, Congolese and southern Sudanese military operation against the LRA, with US intelligence and technical and logistical support, that started on 15 December 2008. The Operation is cited by two UN reports as the trigger to the splintering of the LRA into different, smaller and extremely mobile units acting in the DRC and South Sudan as well as in the CAR.[284] The report casts doubts on the effectiveness of the operation, whether the additional suffering caused to civilians is proportional to the military objectives and results achieved, and suggests that the suffering caused would have been avoided through better planning and better logistical support.

The LRA continues to move between the DRC, the CAR and Southern Sudan, and has been involved in a number of serious attacks since late 2008. As Women's Initiatives has reported,[285] in the CAR, our partners, eyewitnesses and humanitarian agencies have reported that on 18 November 2009, 40 LRA militiamen attacked the area surrounding Djemah, in the Upper Mbomou prefecture in eastern CAR. The rebels, armed with guns, machetes and clubs, surrounded and attacked the village of Djemah from three different directions. At least 11 people were killed and 24 kidnapped. Attacks

284 Women's Initiatives for Gender Justice, 'UN issues reports on the LRA attacks in the DRC and South Sudan', *Women's Voices E-Letter*, March 2010, available at <http://www.iccwomen.org/Womens-Voices-3-10/WomVoices3-10.html>, last visited on 25 October 2010.

285 Women's Initiatives for Gender Justice, 'UN issues reports on the LRA attacks in the DRC and South Sudan', *Women's Voices E-Letter*, March 2010, available at <http://www.iccwomen.org/Womens-Voices-3-10/WomVoices3-10.html>; 'Lord's Resistance Army destabilises the region', *Women's Voices E-Letter*, December 2009, available at <http://www.iccwomen.org/news/docs/Womens_Voices_Dec2009/Womens_Voices_Dec2009.html>, last visited on 25 October 2010.

were reportedly very violent and included murders, abductions, pillaging, torture and enslavement, particularly of children and young women and men. According to one report, the LRA has abducted more than 697 adults and children in CAR and the Bas Uele district of northern DRC since early 2009.[286]

On 21 December 2009, the Office of the High Commissioner for Human Rights released two reports detailing the LRA's activities in eastern DRC and South Sudan between the end of 2008 and the first months of 2009. The report on the DRC focuses on attacks perpetrated by the LRA in Orientale province between September 2008 and June 2009. According to the report, attacks always followed the same pattern, which included abductions, killings, rapes and destruction of property. Attacks were extremely brutal against communities that were thought to be supporting military operations against the LRA and/or the United Nations Stabilisation Mission (MONUC's) efforts towards the demobilisation of LRA fighters. Provisional figures included in the report show that the toll of these attacks is estimated to be extremely high, with 1200 civilians killed, 1400 abductions including at least 630 children and 400 women, and thousands of public buildings and private houses destroyed. It is estimated that over 200,000 people were displaced in Orientale province as a consequence of the LRA's activities in the area.

In South Sudan, the UN reported 30 LRA attacks against the civilian population of the Western and Central Equatoria States that took place between 15 December 2008 and 10 March 2009. The report documents the killing of at least 81 civilians and the abduction of 74, of whom 18 were children. The number of rapes, although unknown, is presumed to be very high. The attacks were consistently brutal and were carried out on both women and men of all ages and ethnicities. It is estimated that at least 38,391 people were displaced as a result of these attacks.

The Women's Initiatives has been calling for the ICC Prosecutor to investigate the LRA's crimes in CAR, DRC, and South Sudan since November 2009, specifically regarding 'their commission of murder, abduction, pillaging, torture, rape and enslavement, particularly of children and young women and men'.[287] The Women's Initiatives, and *Jeunesse unie pour l'environnement el le développement communautaire* (JUPEDEC), a partner organisation based in eastern CAR, are collaborating on a research project to interview returned LRA abductees to gather information about their experience while held by the LRA, the factors surrounding their release or escape, and the process of returning to their communities. The project will look in particular at factors inhibiting mid-ranking LRA commanders, and those for whom they are responsible, from returning or escaping and the community mechanisms for receptivity, reconciliation and rehabilitation.

286 '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/cardr-congo-lra-conducts-massive-abduction-campaign>, last visited on 25 October 2010.

287 Women's Initiatives for Gender Justice, 'Statement from Women, Peace, Justice, Power Workshop', 6 November 2009, p 30, in *In Pursuit of Peace/À la poursuite de la paix*, available at <http://www.iccwomen.org/documents/Pursuit-ENG-4-10-web.pdf>, last visited on 25 October 2010.

In May 2009, a number of US senators proposed the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act.[288] The Act enjoyed broad bipartisan support, and was signed into law by President Barack Obama on 24 May 2010. The Act aims to 'support stabilisation and lasting peace in northern Uganda and areas affected by the Lord's Resistance Army'.[289] It creates a legal basis for a US-led military operation against the LRA as well as a humanitarian and reconstruction mandate for LRA-affected countries. The Act states a US policy to work for a resolution to the conflict, among other means by apprehending or otherwise removing Joseph Kony and his top commanders from the battlefield, and by disarming and demobilising LRA fighters. Appropriations are authorised in the amount of $10 million for 2010 for humanitarian assistance for LRA-affected areas, and $10 million per year from 2010 – 2012 as assistance for reconciliation and transitional justice in Northern Uganda. Under the terms of the Act, the United States is obliged to define a strategy by 24 November 2010.

288 *Lord's Resistance Army Disarmament and Northern Uganda Recovery Act, 2009*, H.R.2478.IH.

289 *Lord's Resistance Army Disarmament and Northern Uganda Recovery Act, 2009*, H.R.2478.IH.

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 2010, 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 suspects from the ICC to the Governments of Uganda and DRC in previous years.[290] However, neither government has been successful in arresting Kony or the other suspects. The President of CAR has also publicly stated a commitment to arrest Kony, with help from Uganda, the United States, and France.[291]

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 Uganda People's Defence Force (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 international and domestic efforts for accountability and reconciliation.[292]

290 See *Gender Report Card 2008*, p 92-93.

291 'C. Africa pledges to arrest Uganda rebel chief', *AFP*, 18 August 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5j_55rv2787FAvhPaN3lLSe8IYysA>, last visited on 25 October 2010.

292 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).

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'.[293] 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'.

Two trials are underway in the DRC Situation, against Thomas Lubanga Dyilo, and against Germain Katanga and Mathieu Ngudjolo Chui. Developments in those cases and details of the trial proceedings are discussed below and in the section on **Trial Proceedings**. The Prosecutor is also continuing investigations in the DRC, focusing on the region of Kivus.

293 ICC-OTP-20040623-59.

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 charges against Mbarushimana include gender-based crimes, in particular rape and rape as torture as both a war crime and crime against humanity, inhumane acts and persecution as crimes against humanity, and inhuman treatment as a war crime.

In the decision on the Prosecutor's application for the Arrest Warrant, issued on 28 September and reclassified as public on **11 October 2010**, Pre-Trial Chamber I found that the case against Mbarushimana fell within the jurisdiction of the Court and was admissible.[294] The Chamber found that there were reasonable grounds to believe that Mbarushimana, as the alleged Executive Secretary of the *Forces démocratiques pour la libération du Rwanda* (FDLR) since July 2007,[295] on or about 20 January 2009 'agreed to a common plan of conducting attacks against the civilian population in order to create a "humanitarian catastrophe"'.[296] This common plan was allegedly agreed upon with Ignace Murwanashyaka, President of the High Command of the FDLR, and Sylvestre Mudacumura, Commander of the Army.[297] The Chamber found that there were reasonable grounds to believe that throughout 2009 war crimes and crimes against humanity were committed as a result of or in furtherance of this common plan. The Chamber also was satisfied that there were reasonable grounds to believe that there was an international campaign aimed at concealing the FDLR's involvement in these crimes, and publicly shifting responsibility onto the DRC and Rwandan armed forces, in order to ultimately extort concessions of political power from these governments.[298] The Chamber found reasonable grounds to believe that this international campaign 'contributed to the commission of the alleged crimes in that it was motivational for and provided encouragement to the FLDR troops on the ground'.[299]

294 ICC-01/04-01/10-1, paras 4-9.
295 ICC-01/04-01/10-1, para 29.
296 ICC-01/04-01/10-1, para 32.
297 ICC-01/04-01/10-1, paras 29, 32.
298 ICC-01/04-01/10-1, para 33.
299 ICC-01/04-01/10-1, para 33.

The Chamber found that there were reasonable grounds to believe that Mbarushimana personally contributed to the common plan, organised and conducted the international campaign through international and local media channels, and was in regular contact with other FDLR 'steering committee' members.[300] However, it did not find reasonable grounds to believe that Mbarushimana's contribution was essential and that he could be charged as a co-perpetrator or indirect co-perpetrator under Article 25(3)(a) of the Statute.[301] Instead, the Chamber found that Mbarushimana could be charged as contributing to the crimes under Article 25(3)(d), and noted that there were reasonable grounds to believe that his contribution was intentional and that it was made with knowledge of the FDLR's intention to commit war crimes and crimes against humanity, and with the aim of furthering the criminal activity or criminal purpose of the FDLR.[302]

Pre-Trial Chamber I found reasonable grounds to believe that FDLR members committed 11 Counts of war crimes and crimes against humanity, during two periods in 2009: from late January to late February, and from 2 March to mid-September.[303] Seven of the 11 counts are for gender-based crimes. Mbarushimana is charged with the following gender-based crimes:

- Torture constituting a war crime, perpetrated by the FDLR upon members of the civilian population of Busurungi, DRC, inflicted through rape, at various locations in North and South Kivu Provinces, DRC (Count 5);[304]
- Torture constituting a crime against humanity, perpetrated by the FDLR upon members of the civilian population of Busurungi, DRC, inflicted through rape at various locations in North and South Kivu Provinces, DRC, and through the mutilation of their genitals at Busurungi, on or about 10 May 2009 (Count 6);[305]
- Rape constituting a war crime, in the form of rape of civilian women at various locations of North and South Kivu, DRC, including, but not limited to Busheke, Pinga, Miriki, Remeka, Busurungi and surrounding villages, Manje, and Malembe (Count 7);[306]
- Rape constituting a crime against humanity, namely rape of women at various locations of North and South Kivu, DRC, including, but not limited to Busheke, Pinga, Miriki, Remeka, Busurungi, Manje, and Malembe (Count 8);[307]
- Inhumane acts constituting crimes against humanity, namely inhumane acts perpetrated by the FDLR upon male members of the civilian population of various locations of North and South Kivu, DRC, including, but not limited to Miriki, who were forced to rape women, as well as upon women who were mutilated on 28 April and 5 May 2009, and pregnant women who had their stomachs cut open and their foetuses forcibly removed at Busurungi on 10 May 2009 (Count 9);[308]
- Inhuman treatment constituting war crimes, in the form of inhuman treatment perpetrated by the FDLR upon male members of the civilian population of various locations of North and South Kivu, DRC, including, but not limited to Miriki, who were forced to rape women, as well as upon women who were mutilated on 28 April and 5 May 2009, and pregnant women who had their stomachs cut open and their foetuses forcibly removed on 10 May 2009 at Busurungi (Count 10);[309]
- Persecution constituting a crime against humanity, by intentionally and in a discriminatory manner targeting women and men seen to be affiliated with the *Forces Armées de la République Démocratique du Congo* (FARDC) on the basis of their gender, through torture, rape, inhumane acts and inhuman treatment, in various locations in North and South Kivu Provinces, DRC (Count 11).[310]

Charges were also brought for:

- Attacks against the civilian population constituting war crimes (Count 1);[311]
- Destruction of property constituting war crimes (Count 2);[312]
- Murders or wilful killings constituting war crimes (Count 3);[313] and
- Murders constituting crimes against humanity (Count 4).[314]

300 ICC-01/04-01/10-1, para 34.
301 ICC-01/04-01/10-1, paras 36-37.
302 ICC-01/04-01/10-1, paras 38-44.
303 ICC-01/04-01/10-1, para 15.
304 Article 8(2)(a)(ii) or Article 8(2)(c)(i).
305 Article 7(l)(f).
306 Article 8(2)(b)(xxii) or Article 8(2)(e)(vi).
307 Article 7(l)(g).
308 Article 7(l)(k).
309 Article 8(2)(a)(ii).
310 Article 7(l)(h).
311 Article 8(2)(b)(i) or Article 8(2)(e)(i).
312 Article 8(2)(a)(iv) or Article 8(2)(e)(xii).
313 Article 8(2)(a)(i) or Article 8(2)(c)(i).
314 Article 7(l)(a).

While in his application the Prosecutor sought charges covering the period from on or about 20 January 2009 to the date of the application (20 August 2010), as noted above the Pre-Trial Chamber focused on the narrower time frame of January – September 2009.[315] The Chamber also set out the particular incidents which it found reasonable grounds to believe were committed by FDLR troops, including:

- in late January 2009, an attack on the village of Busheke, in Kalehe territory, South Kivu, in which 14 civilians were killed, including 12 women and girls whom they raped before killing;
- in mid-February 2009, after they had come into contact with some Rwandan Defence Forces ('RDF') troops, the perpetration of 28 rapes and killing of a local chief around the village of Pinga, Masisi territory, North Kivu;
- in February 2009 in Miriki, Lubero territory, North Kivu, stopping a group of six young people, and forcing the three boys to rape the three girls who were with them;
- in late February 2009, the abduction from Remeka village, Ufamandu groupement, Walikale territory, of at least a dozen women and girls and the killing of nine of them when they resisted attempts to rape them;
- nearby Busurungi, Walikale territory, North Kivu, the rape, killing and mutilation of three women who on 28 April 2009 were found tied up, with sticks in their vaginas, cuts on their bodies and crushed skulls, and, in the same locations, on 5 May 2009, the rape and mutilation of three other women;
- on the night of 9–10 May 2009, carrying out a thoroughly planned attack, the initial target of which was an FARDC battalion, and which was directed to the village of Busurungi, Walikale territory, North Kivu and the nearby settlements; in the course of that attack at least 60 civilians were killed, female residents of the village raped and in some instances their wombs cut open and foetuses removed from their bodies, and over 700 lodgings were destroyed;
- on the night of 20–21 July 2009, attacking the village of Manje, Masisi, North Kivu, accusing the villagers of being collaborators of the Congolese army, and killing at least 16 civilians, setting on fire over 180 houses and raping at least 10 women.[316]

315 ICC-01/04-01/10-1, para 11.
316 ICC-01/04-01/10-1, para 12.

The Pre-Trial Chamber further noted that between February and October 2009, the available information indicated that attacks by the FDLR on civilians resulted in at least 384 deaths, 135 cases of sexual violence, 521 abductions, 38 cases of torture, and 5 cases of mutilation.[317]

Based on its assessment of a number of factors, the Pre-Trial Chamber determined that an arrest warrant was necessary to ensure his appearance at trial.[318] It first considered Mbarushimana's French residency and ability to travel freely within the EU, the FDLR's international support network, and that he has the necessary means to flee.[319] It also considered that many witnesses and potential witnesses reside in areas of the DRC under control and influence of the FDLR and other armed groups, and that Mbarushimana could have access to those witnesses through FDLR supporters in the field. It found that he was therefore in a position to interfere with the Prosecutor's investigation by fostering an atmosphere of intimidation against FDLR victims and ICC witnesses or potential witnesses.[320] Finally, the Pre-Trial Chamber noted Mbarushimana's current position as temporary leader of the FDLR, and that in this capacity he continues to contribute to the commission of crimes alleged in the Prosecutor's application.[321] The Chamber issued the Arrest Warrant as a separate, self-executing document.[322]

The FDLR is a Rwandan Hutu militia group that operates in eastern DRC, and includes a significant number of former *génocidaires* who fled from Rwanda into the DRC after the Rwandan genocide of 1994. The FDLR since its establishment has launched attacks on Rwanda from the DRC, with the aim of removing the current Rwandan government through its campaign of violence. Since 2002, the FDLR has also committed atrocities against civilians, including murders and mass sexual violence. The organisation was characterised as a threat to the peace and security of the Great Lakes region by the United Nations Security Council.[323] The Congolese Government has been accused of fighting a proxy war against Tutsi militia groups and other foreign forces within Congolese borders through the FDLR. This accusation consistently created tension between DRC and Rwanda until March

317 ICC-01/04-01/10-1, para 25.
318 ICC-01/04-01/10-1, para 50.
319 ICC-01/04-01/10-1, para 47.
320 ICC-01/04-01/10-1, para 48.
321 ICC-01/04-01/10-1, para 49.
322 ICC-01/04-01/10-2.
323 'Factsheet: Situation in the Democratic Republic of the Congo: Callixte Mbarushimana', ICC, 11 October 2010, available at < http://www.icc-cpi.int/NR/rdonlyres/D3C7C7EF-AFE7-41B9-A370-041FA6F16F56/282525/FactsheetENG2.pdf>, last visited on 25 October 2010.

2009, when the Congolese Government announced the launch of 'Kimia II', a military operation aimed at disarming FDLR forces and carried out in cooperation with the Rwandan army.

Both Kimia II and its successor, operation 'Amani Leo', have been criticised and are considered to have been ineffective in disarming the FDLR. Moreover, the civilian population has suffered due to the FDLR's retaliations. As of December 2009, the Congo Advocacy Coalition calculated that 'for every rebel combatant disarmed during the operation, one civilian has been killed, seven women and girls have been raped, six houses burned and destroyed, and 900 people have been forced to flee their homes'.[324] The FDLR's members are also suspected to have been among the perpetrators of mass rapes that took place in Luvungi and nearby villages in the Walikale territory, North Kivu, between 31 July and 2 August 2010.

Mbarushimana was previously linked to crimes committed during the Rwandan genocide of 1994. He worked as a computer technician at the United Nations Development Program in Rwanda, and was accused by a United Nations war crimes investigator of organising the murder of 33 of his UN colleagues, all Rwandan Tutsis.[325] However, due to a number of technical issues, an indictment was never issued.[326] Mbarushimana continued to be employed by the UN for a number of years, working in Angola and Kosovo.[327] He was living in Paris, France until his recent arrest. Mbarushimana's arrest was preceded by the arrests of Ignace Murwanashyaka and Straton Musoni, also senior FDLR figures, by German authorities in November 2009. Mbarushimana's arrest was the result of joint efforts between the ICC Office of the Prosecutor and states such as France, Germany, the DRC and Rwanda.

324 'DR Congo: Civilian Cost of Military Operation is Unacceptable,' *Human Rights Watch*, 13 October 2009, available at <http://www.hrw.org/en/news/2009/10/12/dr-congo-civilian-cost-military-operation-unacceptable>, last visited on 25 October 2010.

325 'Accused genocide leader safe in Paris, giving orders', *The Washington Times*, 28 January 2010, available at <http://www.washingtontimes.com/news/2010/jan/28/accused-genocide-leader-safe-in-paris-giving-order/?page=1>, last visited on 25 October 2010.

326 'Rwandan Accused in Genocide Wins Suit for U.N. Pay', *The New York Times*, 8 August 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9904EEDB103CF93BA3575BC0A9629C8B63&pagewanted=2>, last visited on 25 October 2010.

327 'Accused genocide leader safe in Paris, giving orders', *The Washington Times*, 28 January 2010, available at <http://www.washingtontimes.com/news/2010/jan/28/accused-genocide-leader-safe-in-paris-giving-order/?page=1>, last visited on 25 October 2010.

In 2009 the Women's Initiatives for Gender Justice established an internal monitoring programme to record and analyse current information about attacks, incidents, injuries and crimes – specifically gender-based crimes – committed in eastern DRC, with a particular focus on the Kivus. Between June 2009 and June 2010 the Women's Initiatives carried out a Documentation Programme on gender-based crimes committed in the Kivus. The documentation gathered to date provides information relating to 25 attacks against the civilian population in the Kivus by militia groups (predominantly the FDLR – 65%) and the Congolese Army (FARDC – 19%).[328]

The Prosecutor v. Thomas Lubanga Dyilo

Thomas Lubanga Dyilo is the alleged former President of the UPC and Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (FPLC). A Warrant of Arrest issued for Lubanga in February 2006 contained 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. These charges were confirmed by Pre-Trial Chamber I in January 2007.

On 16 August 2006, the Women's Initiatives for Gender Justice submitted a confidential report and a letter to the Office of the Prosecutor describing 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.[329] 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.[330] In these requests, the Women's Initiatives requested the judges to review the Prosecutor's exercise of discretion in the selection of charges and to determine whether broader charges could be considered. Despite reports of gender-based crimes allegedly committed by the UPC, as documented by a range of United Nations agencies and NGOs, including the Women's Initiatives, no gender-based crimes were included in the charges against Lubanga.

As of 29 January 2009, Lubanga became the first accused to stand trial at the ICC, after lengthy delays. The first delay was attributed to Trial Chamber I's

328 This documentation has not yet been published.

329 The Redacted Report is available at <http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>.

330 The Requests for Leave are available in <http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf>.

decision to stay the proceedings for the Prosecution's failure to disclose documents to the Defence. As explained in greater detail in *Gender Report Card 2008* and *2009*, the Prosecution had obtained the documents through confidentiality agreements, pursuant to Article 54(3)(e) of the Rome Statute.

The Prosecution presented its case from 28 January – 14 July 2009. The trial was again delayed prior to the presentation of the Defence case. The second delay arose from a motion filed by the Legal Representatives of victims participating in the case.[331] Prompted in part by the extensive testimony from witnesses in the Prosecution case of both sexual violence and cruel and inhuman treatment,[332] the Legal Representatives requested that the Trial Chamber consider changing the legal characterisation of the facts to include sexual slavery and cruel and/or inhuman treatment, using Regulation 55 of the Regulations of the Court. The majority of the judges in Trial Chamber I considered the legal characterisation of the facts to be subject to change. However, its decision was overruled by the Appeals Chamber in a judgement described in greater detail in the **Trial Proceedings** section.

The proceedings were formally stayed a second time on 8 July 2010, during the Defence case, which commenced on 27 January 2010. This time, the stay of proceedings concerned the Prosecution's refusal to disclose the identity of an intermediary to the Defence. The Defence case and the issues surrounding the second stay of proceedings are discussed in depth in the **Trial Proceedings** section, below.

331 The motion filed by victims' Legal Representatives is discussed below and in the *Gender Report Card 2009*.

332 Testimony from the Prosecution case pertaining to gender-based crimes is summarised in detail in the Trial Proceedings Section of the *Gender Report Card 2009*.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

Germain Katanga and Mathieu Ngudjolo Chui 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.

Because the two accused face identical charges arising out of an attack on Bogoro village in the district of Ituri on 24 February 2003, the Prosecution requested that the two cases be joined.[333] The Pre-Trial Chamber joined their cases, noting the Prosecution's joint application for Arrest Warrants, and the fact that the Warrants are for their co-responsibility in committing the alleged crimes. It also found that joinder serves the interests of fairness and judicial economy, while minimising the potential impact on witnesses and facilitating their protection.[334]

The Prosecution filed a total of 13 charges, including five counts of sexual violence: two counts of sexual slavery, two counts of rape and one count of outrages upon personal dignity. These were the first charges to include crimes of sexual and gender-based violence arising from the Situation in the DRC. On 30 September 2008, the Pre-Trial Chamber confirmed the charges against the accused, entailing three counts of crimes against humanity and seven counts of war crimes.[335] The crimes against humanity charges include: murder,[336] rape[337] and sexual slavery.[338] The war crimes charges include: wilful killing,[339] sexual slavery,[340] rape,[341] using children under the

333 ICC-01/04-01/07-195.

334 ICC-01/04-01/07-307. Specifically, joinder precludes the witnesses from having to testify more than once about the same event. It also reduces the costs related to double-testimony, and avoids duplication and inconsistency in the presentation of the evidence, thereby affording equal treatment to each of the accused.

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

336 Article 7(1)(a).

337 Article 7(1)(g).

338 Article 7(1)(g).

339 Article 8(2)(a)(i).

340 Article 8(2)(b)(xxii).

341 Article 8(2)(b)(xxii).

age of 15 years to participate actively in hostilities,[342] intentionally directing attacks against the civilian population of Bogoro village,[343] pillaging[344] and destruction of property.[345] It declined to confirm the charges for inhumane acts as a crime against humanity,[346] inhuman treatment as a war crime,[347] and outrages upon personal dignity as a war crime.[348]

The Katanga-Ngudjolo trial on the merits began on 24 November 2009. The opening statements and evidence presented so far in the Prosecution case are outlined in depth in the **Trial Proceedings** section below.

The Prosecutor v. Bosco Ntaganda

Bosco Ntaganda is the alleged Deputy Chief of the General Staff of the FPLC and alleged Chief of Staff of the *Congrès national pour la défense du peuple* (CNDP) armed group. 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.

The CNDP was created in 2006 by Laurent Nkunda, a former senior officer of the rebel group Congolese Rally for Democracy. Nkunda formed the CNDP claiming that it was necessary to protect the Tutsi people in the Congo from attacks by the Hutus operating in eastern DRC following the Rwandan genocide. However, many consider this to be a cover for Nkunda's real interest – control over part of the resources of eastern Congo which includes diamonds, gold and coltan, a mineral used in the production of mobile phones, laptops and Play Stations.[349] CNDP forces are allegedly responsible for rapes, sexual violence, torture and killings against the civilian population of North Kivu, in particular the Masisi and Rutshuru areas. On 22 January 2009, General Nkunda was unexpectedly taken into custody by the Rwandan armed forces while he fled from DRC to Rwanda. The surprise detention of Nkunda came after an agreement between the Rwandan and Congolese governments on a joint operation against the FDLR.

342 Article 8(2)(b)(xxvi).
343 Article 8(2)(b)(i).
344 Article 8(2)(b)(xvi).
345 Article 8(2)(b)(xiii).
346 Article 7(1)(k).
347 Article 8(2)(a)(ii).
348 Article 8(2)(b)(xxi).
349 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>, last visited on 2 November 2010.

General Bosco Ntaganda, who served as chief-of-staff of the CNDP troops under Nkunda, 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. On 23 March 2009 the CNDP and the Congolese Government signed a peace agreement which included provisions on the integration of former CNDP militia men in the regular army creating mixed brigades. The Women's Initiatives, together with 65 NGOs from eastern DRC representing over 180 Congolese organisations, raised concerns about this peace agreement and the integration of troops in an Open Letter to UN Secretary-General Ban Ki Moon in June 2009.[350] The 'mixed' brigades of the FARDC are often blamed for attacks on the civilian population, including rapes and sexual violence. Despite the Arrest Warrant against him, Bosco Ntaganda continues to hold a high ranking position within the Congolese army. In a June 2010 Report on the DRC, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, condemned Ntaganda's impunity, and in particular his role in Operation Kimia II. The Report stated that his continued leadership role 'sends a clear message to all soldiers that power and violence will outweigh the rule of law and respect for human rights', and called for his arrest.[351]

However, as of the publication of this Report, Ntaganda remains at large in the DRC. As of February 2010, the President of the DRC publicly stated that cooperation with Ntaganda is too important to the Congolese Government for the peace process to actively seize him. President Kabila is quoted as saying 'Why do we choose to work with Mr Bosco, a person sought by the ICC? Because we want peace now. In Congo, peace must come before justice.'[352] In August 2010, Ntaganda was seen in Goma, the capital of North Kivu, at a meeting

350 Women's Initiatives for Gender Justice, 'Open Letter to UNSG Ban Ki Moon', 17 July 2009, available at <http://www.iccwomen.org/publications/Open_Letter.pdf>, last visited on 1 November 2010>.
351 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum , Mission to the Democratic Republic of the Congo', Advance Unedited Version, A/HRC/14/24/Add.3, 1 June 2010, available at <http://www.extrajudicialexecutions.org/application/media/14%20HRC%20Mission%20to%20DRC%20%28A.HRC.14.24.Add3%29.pdf>, last visited on 1 November 2010.
352 'Congo conflict: The Terminator lives in luxury while peacekeepers look on', *The Guardian*, 5 February 2010, available at <http://www.guardian.co.uk/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc>, last visited on 25 October 2010.

with President Kabila and the Provincial Governor.[353] He was also seen playing tennis at Hotel Karibu, Lake Kivu, a few months prior to this meeting.[354] Despite the ICC Arrest Warrant against him, Ntaganda leads an open life in the DRC. Desire Kamanzi, a senior CNDP official, has told IRIN[355] that '[Ntaganda] doesn't fear the ICC at all, he has a lot to do for his people and the community at large. He's not ready to surrender himself because of pressure from international activists.'[356]

On 30 July 2010, a group of 52 Congolese human rights activists issued an *Open Letter to His Excellency, the President of DRC, Commander-in-Chief of the Armed Forces and Head of State in Kinshasa* calling for the arrest of Ntaganda. It has since been reported that several human rights activists in DRC have suffered intimidation, abduction and severe abuse, with their abductors in some cases citing their public calls for Ntaganda's arrest as the reason. The activist Sylvestre Bwira Kyahi was abducted on 24 August 2010 and found alive on 31 August in Goma, showing signs of severe abuse and torture. One of the main signatories to the Open Letter, Kyahi has stated that he feels compelled to reconsider his work as a human rights defender.[357] The fate of his fellow human rights defender Basili Kapumba, abducted on 27 August, remains unknown.[358] Floribert Chebeya, a human rights activist who worked for Voice of the Voiceless in Kinshasa, was reportedly assassinated on June 2.[359] The increase in threats to, and intimidation of, human rights defenders points to an alarming trend of 'utter disdain'[360] for the work of Congolese human rights defenders and increased insecurity, leading many of them to question whether they should continue their work.

Partners of Women's Initiatives for Gender Justice in the Kivus have also reported that Ntaganda and CNDP troops were seen in the Walikale region in September 2010.[361]

353 'Bosco Ntaganda: "wanted" mais pas trop...' *Blog Esprit de Justice*, 2 September 2010, available at <http://justice-inter.blog.lemonde.fr/2010/09/02/bosco-ntaganda-wanted-mais-pas-trop%E2%80%A6/>, last visited on 25 October 2010.

354 'Congo conflict: The Terminator lives in luxury while peacekeepers look on', *The Guardian*, 5 February 2010, available at <http://www.guardian.co.uk/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc>, last visited on 25 October 2010.

355 Integrated Regional Information Networks.

356 'DRC: International Justice Denied?', *IRIN*, 12 August 2010, available at <http://www.irinnews.org/Report.aspx? ReportId =90140>, last visited on 25 October 2010.

357 'DRC Rights Defenders Face Mounting Threats', *IWPR*, 14 September 2010, available at <http://iwpr.net/report-news/drc-rights-defenders-face-mounting-threats>, last visited on 25 October 2010; OTP Weekly Briefing, 31 August – 6 September 2010, Issue #53.

358 OTP Weekly Briefing, 31 August – 6 September 2010, #53

359 'DRC Rights Defenders Face Mounting Threats', *IWPR*, 14 September 2010, available at <http://iwpr.net/report-news/drc-rights-defenders-face-mounting-threats>, last visited on 25 October 2010.

360 Godalène Kitwa, in 'DRC Rights Defenders Face Mounting Threats', *IWPR*, 14 September 2010, available at <http://iwpr.net/report-news/drc-rights-defenders-face-mounting-threats>, last visited on 25 October 2010.

361 The Women's Initiatives for Gender Justice works with a network of over 155 organisational and individual partners and members in Uganda, DRC, CAR, and Sudan. For security reasons, in our published reports we do not name partners who provide us with information unless explicit permission is given.

Darfur

The Situation in Darfur was referred to the ICC on 31 March 2005 by the United Nations Security Council (UNSC), 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.[362] Sudan is not a State Party to the Rome Statute, and has not cooperated with the ICC's investigations since 2007.[363] 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 (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb). 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. This second Arrest Warrant includes the crime of genocide, and is discussed in detail below.

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

363 Prosecutor of the International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)', New York, 11 June 2010, para 11, available at <http://www.icc-cpi.int/NR/rdonlyres/9AE1D7E1-4083-4D19-9FB8-46EADDB42D83/282156/FinalformattedspeechUNSC_11062010postdeliveryclean.pdf>, last visited on 25 October 2010.

Also in 2009, the Prosecutor 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. This decision is discussed in detail, below. 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 confirmation hearing.

Cooperation

Despite the outstanding arrest warrants issued against them, President Al'Bashir, Harun, and Kushayb remain at large. Sudan's failure to cooperate with the Court, and indeed its open disregard for the warrants and orders of the Court, has been a major issue over the course of 2010. President Al'Bashir and the Government of Sudan have garnered increasing support from a number of African States, due to regional political dynamics. The African Union (AU) went as far as to issue a decision on 27 July 2010, explicitly calling on AU member states not to cooperate with the ICC in the arrest

and surrender of President Al'Bashir.[364] In the meantime, President Al'Bashir, who was re-elected as President in May 2010 in a vote widely criticised for irregularities,[365] has publicly flouted the ICC's arrest warrants by travelling internationally, including to ICC States Parties: Chad in July 2010, and Kenya in August 2010. Despite international outcries surrounding these trips, both States refused to arrest President Al'Bashir, citing among other things their responsibilities to the AU.[366] They thus failed to implement their obligations as signatories to the Rome Statute. The Security Council is also being petitioned by the AU to suspend the case. On 27 July, when the AU issued its decision that AU member states should not cooperate with the ICC in President Al'Bashir's arrest and surrender, it also requested that the Security Council defer the ICC's case against President Al'Bashir for one year, pursuant to Rome Statute Article 16.

President Al'Bashir's visit to Chad on 21 July 2010, to attend the summit of the Community of Sahel-Saharan States (CENSAD), signifies an improved political relationship between the two Governments. Chad has previously been accused of supporting rebel groups in Darfur against the Sudanese Government, while the Sudanese government has been accused of supporting Chadian rebel movements. In particular, the Sudanese Government is thought to have supported the Chadian rebel groups who attacked the capital, N'Djamena, on 2 February 2008. The rebel groups were initially successful in taking parts of the city, but were unable to capture the Presidential Palace, and after two days were forced to retreat by Chadian Government troops. During this attack, it was also reported that some rebel groups from Darfur left their base in eastern Chad, along the border with Sudan, to reinforce Chadian Government troops. However, Chad not only hosted the visit from President Al'Bashir in July of this year, but also in May 2010 banned Khalil Ibrahim, the leader of the Darfurian rebel group, the Justice and Equality Movement (JEM), from entering Chad.[367] One day before President Al'Bashir's trip, Sudan also expelled three top Chadian rebel chiefs.[368] None of the Darfur rebel movements have clearly condemned the Chadian Government for accepting President Al'Bashir's visit, in a possible move to maintain future support.

On 27 August 2010, the day that President Al'Bashir travelled to Kenya to attend ceremonies marking the adoption of the new Constitution, Pre-Trial Chamber I formally issued decisions informing the UNSC about President Al'Bashir's visits to Chad and Kenya. It noted the States Parties' clear obligation to arrest President Al'Bashir, and invited the Security Council to take 'any action they may deem appropriate'.[369] Two days later, Kenya's Ministry of Foreign Affairs (MFA) publicly expressed concern over the Pre-Trial Chamber's decision, as well as regret over a letter issued on 27 August by the President of

364 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>, last visited on 25 October 2010.

365 See Women's Initiatives for Gender Justice, 'Voter registration raises concerns', *Women's Voices E-Letter*, December 2009, available at <http://www.iccwomen.org/news/docs/Womens_Voices_Dec2009/Womens_Voices_Dec2009.html>, last visited on 25 October 2010.

366 'Bashir receives African backing in ICC row, EU calls on Chad to carry out arrest', *Sudan Tribune*, 23 July 2010, available at <http://www.sudantribune.com/spip.php?article35742>, last visited on 25 October 2010; 'Kenya's PM party distances itself from Bashir's visit as more details emerge on trip', *Sudan Tribune*, 29 August 2010, available at <http://www.sudantribune.com/spip.php?article36107>, last visited on 25 October 2010.

367 <http://www.bbc.co.uk/news/10126796>

368 'Bashir receives African backing in ICC row, EU calls on Chad to carry out arrest', *Sudan Tribune*, 23 July 2010, available at <http://www.sudantribune.com/spip.php?article35742>, last visited on 25 October 2010.

369 ICC-02/05-01/09-107; ICC-02/05-01/09-109.

the Assembly of States Parties (ASP),[370] raising concern over Kenya's failure to arrest President Al'Bashir.[371] In its press release, the MFA reaffirmed Kenya's commitment to cooperate with the ICC, but also defended its invitation to President Al'Bashir, claiming 'a legitimate and strategic interest in ensuring peace and stability in the sub-region and promoting peace, justice and reconciliation in Sudan'. It noted that all neighbouring countries were invited, including the President of the Government of Sudan and the Vice President of the Republic of Sudan. It expressed a desire to take advantage of the 'new momentum for peace' in the sub-region and the implementation of the Comprehensive Peace Agreement. It further noted that three high-level UN officials attended President Al'Bashir's recent inauguration, while many 'western partners also maintain high level representation and contacts with Sudan'.[372] Kenya also referenced its AU obligations, which the ICC report to the UNSC failed to mention. It expressed its regret that the Article 16 request to temporarily defer the Al'Bashir case had never been acted upon.

On 28 August 2010, Prime Minister Raila Odinga claimed he had not been informed of the plans to invite the Sudanese President. His party, the Orange Democratic Movement (ODM), stated that it was 'a very unfortunate visit that could put into question the commitment of the government to implement the Constitution of the second republic in letter and spirit'.[373] The President of the ASP later met with the Minister of Foreign Affairs on 17 September 2010, where the parties exchanged views and agreed to continue the dialogue on cooperation.[374] At this meeting the ASP President 'underscored his view that the obligation to cooperate in accordance with the Rome Statute could not legally be suspended by a decision of the African Union'.[375] Some activists speculate that as President Kibaki of Kenya personally extended the invitation to President Al'Bashir, the Government is going to seek support from Sudan if/when ICC arrest warrants are issued in relation to the Kenya Situation.

Prior to the two decisions issued on 27 August 2010, Pre-Trial Chamber I had informed the UNSC of Sudan's failure to cooperate on two occasions: 25 May 2010 and 11 June 2010. In the context of the outstanding Arrest Warrants against Harun and Kushayb, the Pre-Trial Chamber issued a decision informing the Security Council that 'after taking all possible measures to ensure the cooperation of the Republic of Sudan, the Chamber concludes that the Republic of Sudan is failing to comply with its cooperation obligations stemming from Resolution 1593'. It requested that the Security Council take any action it deemed appropriate.[376] In his remarks to the Security Council in June 2010, the Prosecutor also informed it of the 'public and consistent refusal to cooperate and

370 Letter from ASP President Christian Wenaweser to H.E. Mr Moses Masika Wetangula, 28 August 2010, Reference ASP/2010/378.

371 'Press Release on Kenya's Response to the Decision of the Pre-Trial Chamber of the ICC,' Ministry of Foreign Affairs of Kenya, 29 August 2010, available at <http://www.mfa.go.ke/mfacms/index.php?option=com_content&task=view&id=413&Itemid=2>, last visited on 26 October 2010.

372 'Press Release on Kenya's Response to the Decision of the Pre-Trial Chamber of the ICC,' *Ministry of Foreign Affairs of Kenya*, 29 August 2010, available at <http://www.mfa.go.ke/mfacms/index.php?option=com_content&task=view&id=413&Itemid=2>, last visited on 26 October 2010.

373 'Kenya's PM party distances itself from Bashir's visit as more details emerge on trip,' *Sudan Tribune*, 29 August 2010, available at available at <http://www.sudantribune.com/spip.php?article36107>, last visited on 25 October 2010.

374 'President of the Assembly meets Minister of Foreign Affairs of Kenya,' 21 September 2010, ICC-ASP-20100921-PR575.

375 'President of the Assembly meets Minister of Foreign Affairs of Kenya,' 21 September 2010, ICC-ASP-20100921-PR575.

376 ICC-02/05-01/07-57, p 7-8.

to comply with Resolution 1593'.[377] He noted, however, that cooperation was forthcoming from other actors. At that time, states such as South Africa, France, Uganda and Botswana publicly stated that they would abide by their obligations under Resolution 1593, and made efforts to discourage President Al'Bashir from travelling to their countries or to avoid high-level meetings with him. In his report, the Prosecutor also updated the Security Council on the ongoing crimes against civilians in Darfur. He emphasised that 'gender crimes remain unabated in Darfur',[378] and that victims are increasingly discouraged from reporting rape and sexual violence, having lost faith that any remedial action will be taken.[379] The Prosecutor referenced Security Council Resolutions 1325 and 1820 in his Report,[380] noting that the 10 year anniversary of Resolution 1325 presents an opportunity for the Security Council 'to implement its groundbreaking resolutions on gender violence in specific situations where crimes are ongoing'.[381]

377 '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, Prosecutor of the International Criminal Court, available at <http://www.icc-cpi.int/NR/rdonlyres/9AE1D7E1-4083-4D19-9FB8-46EADDB42D83/282156/FinalformattedspeechUNSC_11062010postdeliveryclean.pdf>, last visited on 25 October 2010; (hereinafter Statement by the Prosecutor to the UNSC, 11 June 2010).

378 Statement by the Prosecutor to the UNSC, 11 June 2010, para 36.

379 Statement by the Prosecutor to the UNSC, 11 June 2010, para 37.

380 Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), paras 90-94, available at <http://www.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf>, last visited on 25 October 2010.

381 Statement by the Prosecutor to the UNSC, 11 June 2010, para 39.

Continued conflict in Darfur

In recent months, the peace talks in Doha have led to a wide range of violence in Darfur, specifically in south and east Darfur between the pro- and anti-Doha internally displaced persons (IDPs). Anti-Doha IDPs consider the supporters of the peace talks to be allied with the Government, and object to them representing all IDPs at the negotiation table.

This dynamic compounds an already difficult situation in the IDP camps. Since December 2008, the Women's Initiatives has conducted regular consultations with our partners, including those working with IDPs, to continue developing a stronger assessment of the security and day-to-day situation within the camps. Our partners confirmed that, with the absence of basic services in IDP camps such as food, health facilities and the means to sustain their livelihood, women and girls have become more vulnerable. In particular, women and girls, especially young girls, are more vulnerable to sexual abuse while looking for paid work both in populated and unpopulated areas. No income generating activities are provided in the camps due to the lack of centres for women, which would provide an adequate place for such activities. The Government of Sudan denied humanitarian workers access to affected areas in August 2010, so humanitarian agencies have a limited capacity to provide essential services. Their capacity is also restricted by insecurity, with an increase in carjacking and kidnapping of international staff in all states of Darfur. The Situation in Darfur is even worse than in 2003 and 2004.

Meanwhile, despite the attempts of women's groups to influence the peace talks in Doha, their position has not been clearly represented. In addition, two major rebel movements have boycotted the talks, leaving the Liberation and Justice Movement (LJM) as the only participating rebel group in the negotiations with the Sudanese Government. The LJM is composed of many groups that unified on 23 February 2010 at the Doha talks to strengthen their positions at the negotiating

table. The situation in Doha has begun to have a negative impact on the stability inside the IDP camps within Darfur.

Kalma camp is the largest camp in Darfur, with approximately 100,000 IDPs. Kalma camp has been the site of tensions between those supportive of the peace talks in Doha, and those opposed to them. On 29 July 2010, around 7,000 IDPs in Kalma camp demonstrated against the Doha talks. While on their way to submit a petition to the United Nations Mission in Darfur (UNAMID) centre, they were attacked by a group supportive of the Doha talks. Many were injured and between 3 and 7 persons were reported to have been killed. The pro-Doha group support El-Tijani El-Sissi, head of the LJM. The IDPs opposed to the Doha talks considered the pro-Doha group of IDPs to be the 'eyes of the Government', planted to sow discord among the IDPs and to attract support for the Doha talks.

The Women's Initiatives for Gender Justice's partners and media reports indicate that six IDP leaders, including one woman, who do not support the Doha talks requested UNAMID protection when they heard that the Government was seeking to arrest them, allegedly on charges of instigating violence, including murder, in Kalma camp. For six weeks UNAMID refused to hand them in, resulting in the Government taking a stronger position against Kalma camp. The Sudanese Government has said that large numbers of IDPs within the camps are armed. The Governor of South Darfur has said he will consider Kalma camp as a military base, which therefore needs to be removed. In August, the Government further restricted humanitarian access to the camp, creating a significant gap in the daily services provided by international NGOs. This, in turn, has had a negative impact on camp residents, especially women and children. At least four women are reported to have given birth on the roads. The situation in the camp has also been worsened by the internal clashes and by heavy rains.

As of 1 September 2010, UNAMID reportedly agreed to hand the six IDP delegates over to the Government.[382] The UN required a number of guarantees be attached to the handover, including assurances of their protection and safety, that they will be granted a fair trial, not subjected to torture, nor given a death sentence. However, such guarantees on the part of the Sudanese Government have not in the past protected people from torture or guaranteed them a fair trial. The IDP leaders are reported to be in a bad psychological condition. Women's Initiatives' partners have met with the woman leader who has been arrested and reported that she is strong but suffering because her fate is unknown.

On 4 September 2010, another clash occurred between pro- and anti-Doha factions, this time in the Hamidya camp near Zalingi in west Darfur. At least six people were killed. IDPs blame the Government for the attack, while the Government claims that the attack was carried out by the rebel group Sudan Liberation Army (SLA) against those supporting the Doha peace talks. The attack was reported to have taken place two days after the SLA said pro-Government fighters had killed up to 54 people at a market in North Darfur's Tabarat village.[383] Most of the reported victims were residents of a nearby refugee camp. The increase in attacks in different parts of the Darfur region contributes to the continuing deterioration of the security and humanitarian situation in the region.

382 'UNAMID agreed to hand over six IDPs delegates from Kalma camp in Darfur-Sudan,' *Sudan Tribune*, 2 September 2010, available at <http://www.sudantribune.com/spip.php?article36155>, last visited on 25 October 2010.

383 'Exclusive: Darfur Attack Survivors tell of Brutal Killings', *Reuters*, 17 September 2010, available at <http://www.alertnet.org/thenews/newsdesk/MCD733783.htm> , last visited on 25 October 2010.

The Prosecutor v. Omar Hassan Ahmad Al'Bashir

There are now two outstanding Arrest Warrants for the President of Sudan, Omar Hassan Ahmad Al'Bashir. The first was issued on 4 March 2009 by Pre-Trial Chamber I,[384] in response to the Prosecutor's application of 14 July 2008.[385] 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.[386] In its appeal, it submitted that the majority applied the wrong legal test in relation to inferences for determining 'reasonable grounds' under Article 58(1). Although the majority decision of the Pre-Trial Chamber acknowledged that the applicable standard of proof is one of 'reasonable grounds to believe', the Prosecution argued that the majority nonetheless applied a standard requiring a higher burden of proof, namely, 'beyond a reasonable doubt'. Further, the Prosecution objected to the majority's conclusion that the Prosecution failed to meet its evidentiary burden because genocidal intent 'is not the only reasonable conclusion to be drawn', even while the majority acknowledged that the inference of genocidal intent could be one reasonable conclusion drawn from the evidence.[387]

In its appeal, the Prosecution sought a finding from the Appeal Chamber to either direct the Pre-Trial Chamber to add the charges of genocide to the Warrant of Arrest, or to reverse the Pre-Trial Chamber's decision and set out the proper standard for an inference of genocidal intent under Article 58, and remanding the case to the Pre-Trial Chamber.[388]

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.[389] The Appeals Chamber agreed with the Prosecution that the Pre-Trial Chamber had applied an erroneous standard of proof. Based on a review of the Pre-Trial Chamber's reasoning with respect to the evidence presented by the Prosecution, the Appeals Chamber concluded that:

> the Pre-Trial Chamber would be satisfied that there were reasonable grounds to believe that [President Al'Bashir] acted with genocidal intent only if the existence of such intent was the only reasonable conclusion. The Appeals Chamber finds that, although the Pre-Trial Chamber appreciated the appropriate standard to be 'reasonable grounds to believe', it applied this standard erroneously. The standard it developed and applied in relation to 'proof by inference' was higher and more demanding than what is required under article 58(1)(a) of the Statute. This amounted to an error of law.[390]

The Appeals Chamber chose to remand the matter to the Pre-Trial Chamber for a new decision on the genocide charge using the correct standard of proof. It declined to go as far as to direct the Pre-Trial Chamber to issue a Warrant of Arrest on the three counts of genocide.

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,[391] and a second Warrant of Arrest for President Al'Bashir.[392] Significantly, this second Warrant of Arrest includes the crime of genocide. This is the first time the Court has issued an arrest warrant for this crime. In its decision, the Pre-Trial Chamber stated that its re-examination of the Prosecution application would be limited to the application of the correct standard of proof, as defined by the Appeals Chamber. On this basis, the Pre-Trial Chamber then examined whether there were reasonable grounds to believe that President Al'Bashir acted with specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa ethnic groups; whether

384 ICC-02/05-01/09-3. See also the *Gender Report Card 2009*, p 59-61, and the March 2009 and May 2009 Issues of *Legal Eye on the ICC*.
385 ICC-02/05-01/09-152.
386 ICC-02/05-01/09-25.
387 ICC-02/05-01/09-25, para 3.
388 ICC-02/05-01/09-12. See *Gender Report Card 2009*, p 59-61; and *Legal Eye on the ICC*, September 2009.
389 ICC-02/05-01/09-73.
390 ICC-02/05-01/09-73, para 39.
391 ICC-02/05-01/09-94.
392 ICC-02/05-01/09-95.

the remaining elements of the counts of genocide were fulfilled; and whether there were reasonable grounds to believe that President Al'Bashir was criminally responsible for these crimes.

The Chamber first found that there were reasonable grounds to believe that President Al'Bashir acted with specific intent to destroy in whole or in part the Fur, Masalit, and Zaghawa ethnic groups. In making this finding it recalled that in its first decision, it stated that the existence of reasonable grounds to believe was one, albeit not the only, reasonable conclusion that could be drawn from the Prosecutor's application. It therefore reaffirmed this finding from its first decision. With respect to the remaining elements of the counts of genocide, the Pre-Trial Chamber examined whether there were reasonable grounds to believe that the victims of the alleged acts belong to the Fur, Masalit, and Zaghawa ethnic groups, and found that this material element was fulfilled. Based on the submissions of the Prosecution, the Chamber was satisfied that unlawful attacks on these ethnic groups were a 'core component of the [Government of Sudan] counter-insurgency campaign, and consequently a [Government of Sudan] policy', and that the villages and towns targeted were selected on the basis of their ethnic composition.[393]

The Chamber next examined the contextual element of the crime, namely that the conduct 'must have taken place in the context of a manifest pattern of similar conduct directed against the target group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group'.[394] Again citing its observations in its first decision, in which it found that the attacks against a part of the Fur, Masalit, and Zaghawa groups were large in scale, systematic, and followed a similar pattern, the Pre-Trial Chamber was satisfied that there were reasonable grounds to believe that this contextual element was fulfilled.

The Chamber then turned to the specific elements of each of the counts of genocide – genocide by killing; by causing serious bodily or mental harm; and by deliberately inflicting conditions of life calculated to bring about physical destruction. With respect to genocide by killing, the Pre-Trial Chamber found that the specific material element requiring that the perpetrator killed one or more persons was fulfilled. In this regard, it recalled its findings with respect to crimes against humanity, and noted that the underlying act was identical. In examining the second count, genocide by causing serious bodily or mental harm, the Chamber noted that the Prosecution listed acts of rape and other forms of sexual violence, torture, and forcible displacement of members of the targeted groups. With respect to these allegations, the Chamber again relied on its findings with respect to the material elements of crimes against humanity, and was again satisfied that there were reasonable grounds to believe that the material element was fulfilled. The Chamber cited its holding in its first decision on the Prosecution application for the Arrest Warrant, in which it found that there were reasonable grounds to believe that 'thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of rape by [Government of Sudan] forces'.[395]

The Chamber then turned to the third count, genocide by deliberately inflicting conditions of life calculated to bring about physical destruction. Here, the Chamber noted that the Prosecution must show that the relevant acts were committed, and that they were calculated to bring about the physical destruction of the targeted group, in whole or in part. The Prosecution had alleged that methods of destruction, including

> (i) subjecting the group to destruction of their means of survival in their homeland; (ii) systematic displacement from their homes into inhospitable terrain where some died as a result of thirst, starvation and disease; (iii) usurpation of the land; and (iv) denial and hindrance of medical and other humanitarian assistance needed to sustain life in IDP camps

were an 'integral and prominent part' of President Al'Bashir's genocidal plan.[396] Relying in part on its findings in the first decision with respect to the crime against humanity of extermination, the Pre-Trial Chamber found that there were reasonable grounds to believe that the elements for this crime were fulfilled. In particular, the Pre-Trial Chamber cited acts such as the contamination of water pumps and forcible transfer coupled with resettlement by members of other tribes, and concluded that there were reasonable grounds to believe that these acts were committed in furtherance of genocidal policy.

Finally, the Chamber reaffirmed its findings from its first decision with respect to President Al'Bashir's role in agreeing upon a common plan to unlawfully attack part of the civilian population of Darfur as part of a Government counter-insurgency campaign, subjecting civilians to attacks, forcible transfers, acts

393 ICC-02/05-01/09-94, paras 10-11.

394 ICC-02/05-01/09-3, para 123, as cited in ICC-02/05-01/09-94, para 13.

395 ICC-02/05-01/09-3, para 108, as cited in ICC-02/05-01/09-94, para 29.

396 ICC-02/05-01/09-94, para 34.

of murder, extermination, rape, torture and pillage by Government forces. In its first decision, the Chamber had found that there were reasonable grounds to believe that President Al'Bashir not only agreed to this common plan, but also, together with other Sudanese political and military leaders, directed branches of the state apparatus in order to jointly implement the plan. It had further found that he played an essential role as President of Sudan and Commander-in-Chief of the Armed Forces in coordinating, designing, and implementing the plan, and at all times was in full control of the state apparatus of Sudan, which he used to implement the common plan. It reaffirmed these findings and therefore found that there was sufficient evidence to establish reasonable grounds to believe that President Al'Bashir was criminally responsible under Article 25(3)(a) as an indirect perpetrator, or as an indirect co-perpetrator, for genocide as alleged by the Prosecution.

The Chamber issued its second Warrant of Arrest for President Al'Bashir as a separate document listing only the charges of genocide,[397] specifying that the first Arrest Warrant listing the other charges would also remain in force. It directed the Registry to prepare requests for cooperation seeking the arrest and surrender of President Al'Bashir for the counts in both indictments, and to transmit them to the Sudanese authorities, States Parties, and UN Security Council members that are not States Parties.

Women's Initiatives' partners, especially those based in Darfur, have expressed a very positive response to the addition of genocide to President Al'Bashir's Arrest Warrant. Partners have also reported that the affected communities in IDP camps are happy with the result. However, they are unable to express this publicly, as in the past such expressions have resulted in increased Government aggression towards them. Women's Initiatives' partners report that the affected communities maintain their call for justice, stressing that an end to calls for justice does not mean an end to the violence.

While large numbers of Sudanese organisations are supportive of the charges against President Al'Bashir, two organisations thought to be created or supported by the Sudanese Government[398] have been actively opposing the advancing of charges against the Sudanese President, represented by high-profile international lawyers. The Sudan Workers Trade Unions Federation (SWTUF)[399] and the Sudan International Defence Group (SIDG)[400] have together filed numerous requests to participate as *amicus curiae* in relation to the case against President Al'Bashir, pursuant to Rule 103 of the Rules of Procedure and Evidence. The two organisations claim that 'issuing an arrest warrant for the President of Sudan and any individual on any side of the Darfur conflict at this stage will bring great danger to the region as a whole and for Darfur and Sudan in particular'.[401] As described in the *Gender Report Card 2009*, [402] these groups filed their first application in January 2009,[403] which was rejected by Pre-Trial Chamber I in February,[404] as was their request for leave to appeal.[405] On 20 July 2009, the applicants again filed under Rule 103, requesting to submit observations in respect of the Prosecution appeal against the decision on the Arrest Warrant. They were granted leave to submit observations on 18 September 2009 by the Appeals Chamber.[406] The two lawyers representing the applicants also filed an application to participate in the proceedings on behalf of eight victims, assisted by these same organisations as intermediaries.[407] In its observations on this application, the Prosecution asserted that 'persons who dispute that crimes were committed as charged cannot at the same time present and support the interests of purported victims of that crime. The connection between SIDG and SWTUF, the applicants, and the Legal Representatives

397 ICC-02/05-01/09-95.

398 See *Gender Report Card 2009*, p 146-147.

399 The SWTUF describes itself as 'the union of all trade unions of Sudan with affiliates from 25 state unions and 22 professional federations. Its affiliates include the State Trade Unions for the whole of Darfur. The SWTUF's membership covers the vast majority of the organised working people of Sudan comprising about two million citizens from the government, private and informal sector (...).' ICC-02/05-170, para 2.

400 The SIDG describes itself as 'a non-governmental committee of Sudanese citizens established out of concern for the negative effects that ICC arrest warrants could have at this time for the peace process in Sudan and for the ordinary people of this country. The aims and initiatives of the committee are supported by many Sudanese NGOs and by the association that co-ordinates Sudanese NGOs.' ICC-02/05-170, para 3.

401 ICC-02/05-170, 11 January 2009, para 9.

402 *Gender Report Card 2009*, p 146-147.

403 ICC-02/05-170.

404 ICC-02/05-185.

405 ICC-02/05-192.

406 As of the publication of this Report, these observations, submitted on 25 September 2009, are not available on the Court's website.

407 ICC-02/05-01/09-82-Conf-Exp; supplemented on 26 May 2010 by ICC-02/05-01/09-84-Conf-Exp; ICC-02/05-01/09-84-Conf-Exp-Anxl, as cited in ICC-02/05-01/09-93.

provides further basis to the Prosecutor's position to reject the applications.'[408] On 9 July 2010, the Pre-Trial Chamber rejected these applications on the grounds that they had not shown a sufficient link between the harm they suffered and the crimes alleged in the Warrant of Arrest. In particular, none of the applicants alleged that their harm was caused by the armed forces of the Government of Sudan mentioned in the Arrest Warrant, and at least 4 of the 8 applicants stated that the Government of Sudan provided security or restored order after the alleged attacks.[409]

In fact, there appears to be an increase in new Government-supported and -created NGOs that present strong support for President Al'Bashir, such as the newly-established Al'Bashir International Institution for Peace and Development, which claims to have 3 million youth members. The membership files complaints under the African Charter for Human and People's Rights against persons who have 'offended' President Al'Bashir, thus lending itself as a tool to threaten media and journalists. Popular Sudanese web discussion boards indicated that complaints have already been filed against one journalist. However, no official notice was served on the person against whom the complaints were allegedly filed. No direct information, official document, or website is available about this organisation.

408 ICC-02/05-01/09-93, para 19.
409 ICC-02/05-01/09-93.

The Prosecutor v. Bahar Idriss Abu Garda

In 2010, there were several important developments in the Darfur Situation with respect to those charged in the 2007 attack against African Union peacekeepers in Haskanita. The Prosecution charged three suspects with war crimes in connection to that attack, and as of 17 June 2010, all three had voluntarily appeared before the Court. The first, Bahar Idriss Abu Garda, made a voluntary initial appearance before the Court on 18 May 2009, and his confirmation of charges hearing was held from 19 – 29 October 2009.

Decision on confirmation of charges

On **8 February 2010**, Pre-Trial Chamber I handed down a decision on the confirmation of charges.[410] The case against Abu Garda arises out of an attack by rebel forces on UN peacekeepers on 29 September 2007 (the 'Haskanita attack'). The Prosecution sought charges against Abu Garda for war crimes, namely, violence to life (murder and causing severe injury to peacekeepers) (Count 1);[411] intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission (Count 2);[412] and pillaging (Count 3).[413] The Prosecution alleged that Abu Garda was individually criminally responsible as a co-perpetrator or as an indirect co-perpetrator for these crimes.[414] After analysing the evidence presented by the Prosecution both at the confirmation of charges hearing and in written submissions, the Chamber declined to confirm any of the charges. This is the first time an ICC Pre-Trial Chamber has declined to confirm any of the charges against an accused.

In reaching this decision, the Chamber examined the admissibility of the case, and found that the case was not being acted on by national authorities and was of sufficient gravity, and was therefore admissible before the Court. The Chamber was also satisfied that there were substantial grounds to believe that a non-international armed conflict existed in Darfur at the time relevant to the charges. The Chamber started its analysis with Count 2, in light of the fact that its findings on that Count would have legal consequences for its consideration of the other charges. The Chamber then examined the law applicable to a peacekeeping mission and the requisite *mens rea* of the perpetrator. With respect to the objective elements of the crime alleged, the Chamber applied the law to the facts in the case before it and was satisfied both that there was

410 ICC-02/05-02/09-243-Red. For further background on the Abu Garda case, see the *Gender Report Card 2009*, p 61-62.
411 Article 8(2)(c)(i).
412 Article 8(2)(e)(iii).
413 Article 8(2)(e)(v).
414 Article 25(3)(a).

an attack directed against Haskanita on 29 September 2007, and that the peacekeeping mission there retained a protected status at the time of the attack.

The Chamber then turned to whether there was sufficient evidence to establish substantial grounds to believe that Abu Garda was a direct or indirect co-perpetrator of the attack as alleged in Count 2. In this regard, 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.[415] While the Chamber was satisfied that the first meeting took place, they found that the Prosecution did not provide sufficient evidence regarding Abu Garda's alleged participation in the meeting, noting that the evidence is 'weak and unreliable due to the many inconsistencies'.[416] The Chamber was not however 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 grounds to believe that [Abu Garda] participated in any meeting in which a common plan to attack [Haskanita] was agreed upon'.[417]

The Chamber then examined whether the existence of a common plan could be inferred from Abu Garda's alleged conduct, either by issuing orders to the forces and commanders, or by personally leading and directly participating in the attack. The Chamber examined the evidence provided by a number of witnesses with respect to Abu Garda's relationship to, and position in, the rebel group JEM at the time of the attack. They found that the evidence presented did not support the conclusion that Abu Garda exercised control over at least one of the rebel groups alleged to have carried out the attack. JEM is alleged to have committed the attack together with the Sudan Liberation Army – Unity (SLA-Unity) forces.

With respect to evidence of Abu Garda personally leading and directly participating in the attack, the Chamber first noted that the Prosecution had claimed both that he directly participated in the attack and that he did not. The Chamber then went on to analyse the evidence presented, and found that 'the evidence tendered by the Prosecution, far from establishing [Abu Garda's] participation in the attack, seems to concur with the submissions made by the Defence to the effect that [Abu Garda] did not personally participate in the attack on Haskanita'.[418] The Chamber concluded that

> the evidence brought by the Prosecution is not sufficient to establish substantial grounds to believe that the existence of a common plan to attack the MGS Haskanita can be inferred from any of the conducts listed by the Prosecution as the alleged essential contribution of Abu Garda to the implementation of a common plan.[419]

The Chamber found it unnecessary to analyse the evidence with respect to Counts 1 and 3, and declined to confirm any of the charges against Abu Garda.

Judge Tarfusser filed a separate opinion, fully concurring with the decision but taking issue with the reasoning. In particular, Judge Tarfusser noted that 'the lacunae and shortcomings exposed by the mere factual assessment of the evidence are so basic and fundamental that the Chamber need not conduct a detailed analysis of the legal issues pertaining to the merits of the case'.[420] He felt that the Chamber should have refrained from legally characterising the historical events of the attack on Haskanita, 'in the ascertained absence of a link between the events as charged and [Abu Garda]'.[421]

Denial of the Prosecution request to appeal the confirmation decision

The Prosecution filed a request for leave to appeal the decision on the confirmation of charges on 15 March 2010,[422] raising three issues discussed below. Three days later, the Legal Representatives of Victims filed an application in support of the Prosecutor's request.[423] On 23 April 2010, Pre-Trial Chamber I issued a decision, denying the request to appeal.[424]

The Prosecution's first assignment of error was that the Chamber applied a higher evidentiary threshold than the standard required at the confirmation stage of the proceedings. The Prosecution argued that the standard applied by the Chamber — 'an in-depth assessment of the evidence' — was appropriate for the *trial phase*, but for the *confirmation phase* 'the Pre-Trial Chamber should accept as reliable the Prosecution's evidence (so long as it is relevant and

415 ICC-02/05-02/09-243-Red, para 166.
416 ICC-02/05-02/09-243-Red, para 173.
417 ICC-02/05-02/09-243-Red, para 179.
418 ICC-02/05-02/09-243-Red, para 228.
419 ICC-02/05-02/09-243-Red, para 231.
420 ICC-02/05-02/09-243-Red, Separate Opinion of Judge Cuno Tarfusser, para 3.
421 ICC-02/05-02/09-243-Red, Separate Opinion of Judge Cuno Tarfusser, para 6.
422 ICC-02/05-02/09-252-Red.
423 ICC-02/05-02/09-257-Conf.
424 ICC-02/05-02/09-267.

admissible)'.[425] The Pre-Trial Chamber found no merit to the argument that evidence is to be assessed differently at the pre-trial and trial phases. Rather, the difference between the phases is the standard of proof applied. The Chamber found that at the pre-trial phase, the Prosecution must show 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged', while at the trial phase the Prosecution must prove the guilt of the accused 'beyond a reasonable doubt'.[426] The Chamber thus found this issue to constitute a disagreement with the Chamber's assessment of the evidence rather than an appealable issue under Article 82(1)(d).

Second, the Prosecution alleged that the Pre-Trial Chamber applied incorrect criteria in determining the existence of an organised armed group under the control of Abu Garda and whether Abu Garda exercised 'effective control', leading the Chamber to ignore relevant facts that would have supported confirmation. The Chamber explained that it first analysed whether a common plan existed, and finding none, did not proceed to examine evidence regarding the mode of liability.

Third, the Prosecution contended that the Chamber failed to consider evidence of orders Abu Garda gave in preparation for the attack or other evidence that pointed to the existence of a common plan, such as Abu Garda's movements with the rebels, a meeting with the attackers, and events that followed the attack. As with the first issue, the Chamber found that the Prosecutor merely disagreed with the Chamber's assessment of the evidence and did not present an appealable issue.

425 ICC-02/05-02/09-252-Red, para 18.
426 ICC-02/05-02/09-267, para 9.

The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Summonses to appear were also issued for Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo), two other rebel commanders, in connection with the same Haskanita attack. The Summonses were issued under seal on 27 August 2009, and were unsealed on 15 June 2010.[427] In its second decision[428] on the Prosecutor's application under Article 58 (the first being the decision issuing the Summons for Abu Garda), Pre-Trial Chamber I found that there were reasonable grounds to believe that both are criminally responsible as perpetrators or indirect co-perpetrators under Article 25(3)(a) of the Statute for the war crimes of murder,[429] attacking personnel or objects involved in a peacekeeping mission,[430] and pillaging.[431] Banda was the former military commander of the JEM, and together with Abu Garda was alleged to have formed a splinter group, JEM Collective Leadership (JEM-CL), which he is alleged to have commanded in the Haskanita attack. Jerbo was the former Chief of Staff of the SLA splinter group SLA-Unity, which had broken away from the Sudanese Liberation Movement/Army (SLM/A). SLA-Unity troops, together with troops from JEM-CL, are alleged to have committed the attack on Haskanita together.

On 17 June 2010, Banda and Jerbo voluntarily appeared before the Court for their initial appearance. The purpose of the hearing was to inform the two accused of the charges against them and their rights under the Rome Statute, and to schedule a confirmation of charges hearing. Pre-Trial Chamber I, the same Chamber that heard evidence against Abu Garda, scheduled the confirmation of charges hearing for 22 November 2010, however this was later pushed back until 8 December 2010, due to developments that occurred in the Chamber's composition[432] and the Court schedule. Banda and Jerbo were permitted to remain at liberty in Sudan pending their confirmation hearing.

The voluntary appearance of the three rebel leaders stands in contrast to the lack of cooperation by the Government of Sudan and the individual suspects, President Al'Bashir, Harun, and Kushayb. According

427 ICC-02/05-03/09-2 (Jerbo); ICC-02/05-03/09-3 (Banda).
428 ICC-02/05-03/09-1.
429 Article 8(2)(c)(i).
430 Article 8(2)(e)(iii).
431 Article 8(2)(e)(v).
432 ICC-02/05-03/09-85. This decision appoints Judge Monageng to serve as Single Judge in the event of the unavailability of Judge Tarfusser. Both judges remain appointed to Pre-Trial Chamber I and the composition of the Chamber appears to otherwise remain the same.

to a representative of a rebel group who has spoken with Women's Initiatives, rebel leaders are voluntarily appearing before the ICC because it is one of the forms of accountability that they support, and because they believe that it would bring justice to Darfur. In addition, they assert that they have not committed any crimes as their actions were intended to protect their people, and that their targets are Government military and their affiliated militias and never civilians. There is therefore high-level support and coordination among rebel groups for the voluntary surrender of any rebel commanders wanted by the ICC. Likewise, the rebel groups call for President Al'Bashir to surrender. This cooperation may further be linked to the fact that rebel groups strategically need to cooperate with the ICC due to their lack of regional political weight and the changing political relationships between Sudan and neighbouring States. However, when President Al'Bashir visited Chad and Kenya, no official statement or press releases condemning these visits were issued by any of the Darfur rebel movements.

The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman

Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali 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. Both are charged with persecution by acts of rape constituting a crime against humanity, rape constituting a crime against humanity, rape constituting a war crime and committing outrages upon personal dignity constituting a war crime.

The Prosecutor, in his report to the Security Council, highlighted that Kushayb, a tribal leader, is 'still exercising power in his own area in South Darfur and is a vivid example to other Janjaweed that they can continue committing crimes, there is impunity'.[433] Kushayb is a senior Janjaweed commander. He was arrested by the Sudanese Government in 2007 for alleged 'violations' committed in the Darfur conflict in 2004,[434] but was released for insufficient evidence. Although he was reportedly re-arrested in October 2008, he was never turned over to the ICC, and Women's Initiatives' partners report that he is in fact no longer in custody, but remains at large in Darfur.

Ahmad Harun is the Governor of the South Kordofan province, a key strategic province located in the centre of Sudan. South Kordofan province borders both Darfur and Abyei, an oil-rich and disputed area between north and south Sudan. The province is home to the Nuba ethnic group, and the Arab Baggara from the Misseriya and Hawazma tribes. Harun was previously Sudan's Minister of State for Humanitarian Affairs, a post to which he was promoted in 2006. Prior to that, he was the Minister of State for the Interior. President Al'Bashir appointed Harun to be the Governor of the province of South Kordofan on 7 May 2009, after the Arrest Warrant was issued against President Al'Bashir. The ICC Prosecutor has called for the UNSC to consider requesting his immediate removal from his position as Governor, which with his eventual arrest would 'have a chilling effect on the militias he works with, and help prevent a recurrence of massive crime', as well as 'serve to undermine the sense of impunity of those committing crimes in the Sudan'.[435]

433 Statement by the Prosecutor to the UNSC, 11 June 2010, para 42.

434 'Sudan may file charges against militia leader indicted by ICC', *Sudan Tribune*, 12 August 2008, available at <http://www.sudantribune.com/spip.php?article28238>, last visited on 25 September 2009.

435 OTP Weekly Briefing, 14-20 September 2010, p 5, available at <http://www.icc-cpi.int/NR/rdonlyres/4459A77A-D5A8-4622-89BB-EED7F9E270E9/282490/WBENG.pdf>, last visited on 25 October 2010.

CAR

The Situation in the CAR was referred to the Court in December 2004 by the Government of CAR.[436] 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 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.[437]

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 CAR in 2003, at which time Bozizé seized power. He remains President. Patassé, who is named in the Bemba Arrest Warrant as having formed an agreement with Bemba to maintain his own power,[438] has since returned to CAR twice, in both 2008 and 2009. He has expressed his intention to run for President in the next election.

CAR continues to be affected by crimes committed in the north of the country involving numerous rebel groups and the Government. However, the Government of CAR has made formal attempts to prevent ICC investigations into these crimes. On 18 December 2004, the Government of CAR requested that the OTP initiate investigations into the crimes against humanity and war crimes committed by Patassé.[439] On 1 August 2008, Bozizé submitted a letter to the Secretary General requesting that the United Nations use its authority under Article 16 to intervene in any investigation into the crimes in the North of CAR.[440] In the letter to the UN, President Bozizé advocates for CAR to maintain jurisdiction over the events that occurred during the period covered by the amnesty laws.[441] In the context of a challenge to the admissibility of the Bemba case, discussed below in the **Judiciary – Key Decisions** section, the Bemba Defence has argued this letter is an attempt to prevent investigations where the current Government, namely President Bozizé, would face potential prosecution. The Defence also submitted that this letter highlights the dubious nature of CAR's claim that it could not prosecute the accused and makes clear that the national courts are capable of maintaining jurisdiction over the crimes.[442]

In addition, human rights groups in 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 east of CAR, as discussed in the **Uganda** section, above.

436 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.

437 Background: Situation in the Central African Republic, ICC-OTP-BN-20070522-220-A_EN.

438 ICC-01/05-01/08-15-tENG, para 20.

439 ICC-01/05-01/08-704-Red3, para 36.

440 'Quand François Bozizé veut s'assurer à lui-même et à ses sbires une impunité totale', *L'Independent CF*, 01 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>; ICC-01/05-01/08-704-Red3, para 57.

441 ICC-01/05-01/08-704-Red3, para 113.

442 ICC-01/05-01/08-704-Red3, para 114.

The Prosecutor v. Jean-Pierre Bemba Gombo

The Prosecution had originally charged Bemba with eight counts of crimes against humanity and war crimes, including torture and outrages upon personal dignity. It alleged that, as President and Commander-in-Chief of the MLC, Bemba was criminally responsible jointly with Patassé under Article 25(3)(a) of the Rome Statute for having committed these crimes. In June 2009, charges were confirmed against Bemba under Article 28(a) of the Statute (command responsibility), including charges of rape as both a war crime and crime against humanity.[443] In its decision confirming the charges, the Pre-Trial Chamber declined to confirm charges of other gender-based crimes, including 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. The Pre-Trial Chamber based this decision on its findings that the Prosecutor had improperly engaged in the practice of 'cumulative charging', and because the Prosecutor failed to provide adequate detail or sufficient facts in the amended document containing the charges with respect to certain charges. For a detailed discussion of this decision, see the *Gender Report Card 2009*.[444]

The Prosecution requested leave to appeal this decision.[445] On 13 July 2009, 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 Women's Initiatives was granted *amicus curiae* status on 17 July 2009, and on 31 July filed an *amicus curiae* brief. As discussed at length in the *Gender Report Card 2009,*[446] the Women's Initiatives, working with the eminent scholar and practitioner Patricia Viseur-Sellers, argued that cumulative charging 'does not violate fair trial practices'.[447] 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.[448] The *amicus* asserted that the Chamber applied the cumulative charging test too narrowly with respect to at least three categories of witnesses (a ten-year-old child, the brother of a rape victim who was beaten while his sister was raped, and the persons who watched the sexual assault of their relatives) who experienced pain and suffering as captured by the charge of torture, or humiliation, as captured by the charge of outrages upon personal dignity. As a result of the Chamber's dismissal of these two charges, the full extent of the harm suffered by these categories of victims—that is, harm *in addition* to the penetrative act of rape—will not be addressed at trial. However, on 18 September 2009, the Pre-Trial Chamber denied the Prosecution's request for leave to appeal.[449]

Proceedings before Trial Chamber III

The Bemba case was then assigned to Trial Chamber III, and an initial trial date was set for 27 April 2010.[450] At a status conference on 8 March,[451] the trial date was postponed to 5 July. On 25 June 2010 the Chamber again postponed the commencement of the trial to 14 July 2010, 'for administrative reasons, in particular the likely change in the composition of the Bench, and to facilitate necessary preparation for the commencement of the trial'.[452] On 7 July 2010, the trial date was again postponed, pending the resolution of the Defence request to the Appeals Chamber for suspensive effect of its appeal of the Trial Chamber's decision on the admissibility of the case.[453] In the meantime, on 21 July 2010, the Presidency excused Judges Odio Benito and Fulford from Trial Chamber III and appointed Judges Steiner (presiding) and Ozaki in

443 On 3 March 2009, without either confirming or declining to confirm the charges against Bemba, Pre-Trial Chamber III issued a decision, adjourning the confirmation of charges hearing, pursuant to Article 61(7)(c)(ii). It invited the Prosecution to consider amending the document containing the charges, specifically with respect to the mode of liability under which Bemba was charged. The Pre-Trial Chamber questioned whether Bemba should face charges under Article 25 of the Statute ('individual criminal responsibility'), or whether, alternatively, he should face charges under Article 28 ('the responsibility of commanders and other superiors'). While both modes of liability were raised and treated as potential outcomes by the parties during the confirmation hearing proceedings, the Arrest Warrant application filed by the Prosecution in May 2008, along with the document containing the charges filed subsequent to Bemba's arrest and transfer to The Hague, contemplated Bemba's liability only under Article 25. In response, on 30 March 2009, the Prosecution filed an amended document containing the charges, which included Article 28 as an alternative, rather than substitute, mode of liability for Article 25(3)(a).

444 *Gender Report Card 2009*, p 63-67.

445 ICC-01/05-01/08-427.

446 *Gender Report Card 2009*, p 142-144.

447 ICC-01/05-01/08-466, para 22.

448 ICC-01/05-01/08-466, para 22.

449 ICC-01/05-01/08-532.

450 ICC-01/05-01/08-598.

451 ICC-01/05-01/08-T-20-Red.

452 ICC-01/05-01/08-803.

453 ICC-01/05-01/08-811.

their place, to form the new Bench for Trial Chamber III, together with Judge Aluoch. At a status conference on 30 August 2010, Trial Chamber III heard submissions on a proposed date for commencing the trial, with the Prosecution and Victims' Legal Representatives stating that they would be ready to begin in October or November 2010. As of 21 October 2010, the trial date was set for 22 November 2010.[454] In a status conference held on 24 September, the Trial Chamber reviewed the amount of time anticipated to present the Prosecution's case, based on the submissions of the Prosecution, and also acknowledged the extra time needed to review 900 applications for victim participation in the trial.[455]

On 10 June 2010, the Prosecution submitted an initial outline of its case.[456] According to this outline, the Prosecution will be calling 37 witnesses, including four experts. On 7 July 2010, the Prosecution submitted an updated order of witnesses;[457] and, on 21 September, it submitted an updated list of witnesses, bringing the number of witnesses it intends to call to 40.[458]

In its 10 June filing, the OTP submitted that it would present its witnesses in thematic groupings: overview witnesses, who would testify on historical context, background, and national investigations into the events in the CAR from October 2002 to March 2003; victims of rape and sexual violence, and experts on gender crimes; overview witnesses regarding the movements of the MLC troops, crimes committed generally in the CAR, and a linguistic expert; crime-based witnesses (victims of pillaging); CAR and MLC insiders and a military expert witness; and a final witness who will 'provide direct testimony on all counts charged'. The Prosecution submitted that it grouped victims and witnesses to rapes and experts on gender-related crimes because of the nexus between the charges of rape and the expertise on gender crimes, sexual violence and Post Traumatic Stress Disorder ('PTSD'). The testimony of the expert witnesses, when heard together with the accounts of victimisation by these victims and witnesses, would assist the Chamber and the participants to appreciate the context and circumstances in which the alleged crimes were committed.[459]

According to its original filing, 12 of the 33 regular witnesses and two of the four expert witnesses will testify directly on rape and sexual violence. The OTP had originally submitted Binaifer Nowrojee,[460] as an expert testifying on sexual violence as a tool of war, and Adeyinka M. Akinsulure-Smith,[461] as an expert testifying on gender crime and PTSD. Dr Nowrojee had been approved as an expert by the Trial Chamber, over the objections of the Defence. The Defence had objected to her proposed testimony, arguing that determining whether sexual violence is a foreseeable consequence of war and issues relating to command and control are issues of fact that the Chamber should determine as the arbitrator of facts, and that an expert would merely offer speculation.[462] The Defence noted that, although Dr Nowrojee has testified as an expert before the International Criminal Tribunals, the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber III in *Prosecutor v. Karemera et al* rejected the Prosecution's application to call Dr Nowrojee as an expert. The Chamber in Karemera reasoned that determining whether sexual violence is a foreseeable consequence

454 In a status conference held on 21 October 2010, the Trial Chamber rendered an oral decision setting the date for the commencement of the trial. ICC-01/05-01/08-T-30-ENG, p 4 lines 11-20.

455 Women's Initiatives for Gender Justice Informal Summary of the Status Conference of 24 September 2010. As of the date of the publication of this report, no official transcript was available for this status conference. The figure of 900 outstanding applications for victim participation is taken from a decision of Trial Chamber III in the Bemba case from 7 September 2010, which stated that the Chamber was in the process of examining 192 applications for victim participation, while another 900 applications had been received by VPRS but had not yet been transmitted to the Chamber. ICC-01/05-01/08-875, paras 3, 5.

456 ICC-01/05-01/08-793.

457 ICC-01/05-01/08-812.

458 ICC-01/05-01/08-891.

459 ICC-01/05-01/08-793, para 6.

460 Dr Binaifer Nowrojee is the Regional Director for East Africa of the Open Society Institute (OSI). She was an expert witness in *The Prosecutor v. Bizimungu et al* at the ICTR on the basis of her experience as an investigator of human rights violations and her publications on issues of sexual violence, among which is the Human Rights Watch Report 'Shattered Lives' (1996). See *The Prosecutor v. Bizimungu et al*, Case No. ICTR-99-50-T, 'Decision on the Admissibility of the Expert Testimony of Dr Binaifer Nowrojee' (2005): para 9.

461 Dr Akinsulure-Smith is a licensed psychologist specialised in working with war trauma survivors, refugees, asylees and asylum seekers, survivors of sexual violence, persons afflicted with HIV/AIDS and culturally diverse populations. She was involved with Physicians for Human Rights and the Human Rights Division of the UN Mission in Sierra Leone. For further information, see <http://www.survivorsoftorture.org/who-we-are/staff/adeyinka-akinsulure-smith-phd>.

462 ICC-01/05-01/08-706, para 15.

of war-time delinquency is a factual matter.[463] While the Bemba Defence did not dispute Dr Nowrojee's expertise on sexual violence, it contended that Dr Nowrojee's expert testimony would be of a 'speculative nature' and that she would not be an impartial witness.[464] The Defence cited several remarks attributed to Dr Nowrojee in which she advocated for a more stringent approach to the prosecution of sexual violence.[465] These statements led the Defence to conclude that 'Dr Binaifar Nowrojee has a particular agenda and is unsuitable for the task of assisting the Chamber in a neutral and impartial manner.'[466]

In a status conference on 29 March 2010,[467] however, the Trial Chamber found Dr Nowrojee to be an acknowledged expert on the use of sexual violence as a tool of war and noted that this kind of evidence has been given in other war crimes trials. The Chamber determined that evidence of sexual violence as a tool of war will assist it in 'arriving at a full understanding of the relevant factual matrix of this case and to an understanding of the nature of the ... charges'.[468] The Chamber further found that Dr Nowrojee's previous experience as a Prosecution witness did not suggest a lack of neutrality or independence; and that her published comments regarding the need to prosecute sexual crimes when there is supporting evidence did not suggest she is a partial or biased witness. The Chamber stated that, 'her comments on this issue and her evidence in previous trials do not lead to the conclusion that she will give evidence that lacks objectivity and balance'.[469]

On 8 September 2010, in a letter to the Prosecution, Dr Nowrojee declined her appointment as expert witness.[470] In its filing of 23 September 2010[471] the OTP requested that the Chamber to approve Dr André Tabo[472] as the new expert on sexual violence as a tool of war, whose appointment was subsequently approved by Trial Chamber III on 8 October 2010.[473]

In a status conference held on 24 September 2010, Trial Chamber III noted that the Prosecution planned to call 12 witnesses with respect to the rape charges. It requested that the Prosecution consider whether it would be possible to reduce the number of witnesses to avoid overly repetitive evidence.[474] The Prosecution was requested to submit its observations on this issue by 4 October. On 1 October, the Prosecution filed an updated order of witnesses at trial, in which it addressed the Trial Chamber's request.[475] The Prosecution stated that it had carefully considered the request, but that 'the witnesses chosen are essential to reflect the exemplary crimes committed throughout the Central African Republic'.[476] With respect to rape, the Prosecution stated that 'the witnesses will demonstrate the aggravating circumstances under which the acts were committed, including rape by multiple perpetrators, rape of infants, rape in front of family members and rape in public to humiliate the victims and intimidate the civilian population'.[477] The Prosecution also proposed calling the experts on issues related to sexual violence and gender crimes after the relevant factual testimony 'to enable the expert evidence to be considered not in the abstract but in the context of the facts of the case'.[478]

The Prosecution also noted during the status conference that it would be calling numerous vulnerable witnesses, and would thus need sufficient time and support for them. All 12 witnesses testifying about sexual violence will testify in Sango, the primary language spoken in CAR. In addition, the Registry was asked to confirm the availability of in-house specialists on sexual violence, and stated that communication with them would be important.

463 ICC-01/05-01/08-706, para 14. The decision by the ICTR referred to by the Defence is *Prosecutor v. Karemera*, Decision on Prosecution Prospective Experts Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee, 25 October 2007.
464 ICC-01/05-01/08-T-21-ENG, p 6, lines 21-23.
465 ICC-01/05-01/08-706, para 16.
466 ICC-01/05-01/08-706, para 17.
467 ICC-01/05-01/08-T-21-ENG.
468 ICC-01/05-01/08-T-21-ENG, p 21 lines 21-23.
469 ICC-01/05-01/08-T-21-ENG, p 22 lines 20-22.
470 In her brief letter, Dr Nowrojee stated that upon reflection, she believed that her 'qualifications do not squarely fit the expertise that the court is seeking'. ICC-01/05-01/08-896-AnxA.
471 ICC-01/05-01/08-928.
472 Dr Tabo completed his general medicine degree in Bangui and studied psychiatry in Benin and France. He has worked as a consultant for the World Health Organisation and assisted in the identification of victims of the conflict in CAR in 2002-2003. Since 2006, he has been treating women suffering from psychiatric and psychopathologic problems as a result of the sexual violence suffered during the conflict. ICC-01/05-01/08-896, para 3.
473 ICC-01/05-01/08-896, para 15.
474 Women's Initiatives for Gender Justice, Informal Summary of the Status Conference of 24 September 2010.
475 ICC-01/05-01/08-918.
476 ICC-01/05-01/08-918, para 7.
477 ICC-01/05-01/08-918, para 7.
478 ICC-01/05-01/08-918, para 12.

Bemba's challenges to the document containing the charges

On **20 July 2010**, Trial Chamber III issued a decision in response to Bemba's application for corrections to the document containing the charges (DCC) and requested that the Prosecution file a second amended DCC.[479] Essentially, the Defence claimed that the Prosecution impermissibly exceeded the scope of the facts and added allegations not confirmed by the Pre-Trial Chamber in its decision confirming the charges (confirmation decision).[480] Challenging the content of the DCC, sentence-by-sentence, the Defence requested that the Trial Chamber order the Prosecution to submit a revised DCC, using the exact language and terminology of the Pre-Trial Chamber in the confirmation decision.[481]

As discussed in greater detail in the *Gender Report Card 2009*, in March 2009, the Pre-Trial Chamber had adjourned the confirmation hearing proceedings and had requested that the Prosecution amend the DCC specifically with respect to the mode of liability with which Bemba was charged. The Pre-Trial Chamber found that Bemba should be charged pursuant to Article 28(a) of the Statute ('the responsibility of commanders and other superiors'), rather than under Article 25(3) ('individual criminal responsibility').[482] Subsequently, based on the amended DCC, the Pre-Trial Chamber found sufficient evidence to confirm the charges of murder and rape as war crimes and as crimes against humanity, and pillaging as a war crime.[483]

Before proceeding to a sentence-by-sentence analysis of the second amended DCC, Trial Chamber III adopted Trial Chamber II's conclusion in the Katanga and Ngudjolo case that the confirmation decision should serve as the only reference document during trial.[484] It also explicitly referenced an Appeals Chamber decision in the Lubanga case, which found that Regulation 55 of the Regulations of the Court permits changes to the legal characterisation of the facts, but not to the statement of the facts.[485] Trial Chamber III thus held that 'the Second Amended DDC filed following the Confirmation Decision must describe the charges by reference to the "statement of facts" underlying the charges confirmed by the Pre-Trial Chamber—its precise factual findings'.[486] It noted that the Prosecution's ability to introduce additional evidence to support existing factual allegations would be determined on a case-by-case basis.[487]

In its decision, the Trial Chamber addressed the breaches alleged by the Defence. It dismissed most of them as permissible background information, evidential detail and superficial differences in language. It thus found that in most instances, the Prosecution's descriptions of the allegations did not modify the charges. At the same time, the Chamber did instruct the Prosecution to remove several sentences and paragraphs that were either not relied upon, or were explicitly rejected by the Pre-Trial Chamber. For example, the Trial Chamber ordered the Prosecution to remove all references to allegations that related to Article 25(3)(a) of the Statute, which the Pre-Trial Chamber had declined to confirm, such as the prior behaviour of MLC troops in the CAR in 2001 and in the DRC in 2002.[488]

The Trial Chamber further required the Prosecution to amend the language of the second amended DCC, by removing reference to the 'systematic', rather than 'widespread', commission of crimes, as only the latter had been found by the Pre-Trial Chamber.[489] It ordered the deletion of references to the phrase 'should have known', as the Pre-Trial Chamber had found *mens rea* only on the basis of 'knew'.[490] It also found that the Prosecution misconstrued several of the Pre-Trial Chamber's findings, such as implying that an announcement on *Radio France Internationale* was made by Bemba personally, and that Bemba maintained direct and regular contacts with Ange-Félix Patassé, President of CAR, during the relevant period.[491]

479 ICC-01/05-01/08-836.
480 ICC-01/05-01/08-424.
481 ICC-01/05-01/08-694.
482 *Gender Report Card 2009*, p 63.
483 ICC-01/05-01/08-424. During a status conference in October 2009, the Trial Chamber requested that the Prosecution file a second amended DCC in order to better reflect the charges as the Pre-Trial Chamber described them in the confirmation decision. The Prosecution filed a second amended DCC on 4 November 2009. ICC-01/05-01/08-593.
484 ICC-01/05-01/08-836, para 37.
485 ICC-01/04-01/06-2205, paras 91, 97.
486 ICC-01/05-01/08-836, para 35.
487 ICC-01/05-01/08-836, para 215.
488 ICC-01/05-01/08-836, paras 73, 161, 204.
489 ICC-01/05-01/08-836, paras 94, 98.
490 ICC-01/05-01/08-836, paras 121, 169, 216.
491 ICC-01/05-01/08-836, paras 177, 198. With respect to contacts between Bemba and Patassé, the Pre-Trial Chamber found that, although there was evidence that they had at least two telephone conversations, the witness statements did not support the inference that Bemba received information about the commission of crimes *through* Patassé. ICC-01/05-01/08-424, para 397.

The Trial Chamber specifically permitted reference to allegations concerning the rape of unidentified victims 1-35, noting that the Pre-Trial Chamber had found that the uncorroborated witness statement concerning the rapes had low probative value, but that it did not rule against including these allegations in the charges.[492] It also found, for example, that although not explicitly in the confirmation decision, the reference to Witness 29 having contracted HIV as a result of her rape by three MLC soldiers was contained in her statement, incorporated into the confirmation decision by reference, and thus did not constitute a modification of the charges.[493]

Finally, with one exception, the Trial Chamber found that the Prosecution had properly drafted each of the charges. As described above, it permitted reference to unidentified victims with respect to the charges of rape as a crime against humanity and as a war crime. Concerning the latter, the Trial Chamber expressly found the rape of children to be included in the charge, although not specifically mentioned by the Pre-Trial Chamber. It ordered the Prosecution to delete the reference to unidentified victim 36 in the murder as a war crime charge, as the evidence was provided by an anonymous witness and was not corroborated.

On 18 July 2010, the Prosecution filed a revised second amended DCC accordingly.[494]

492 ICC-01/05-01/08-836, para 110 (noting that it might review the issue 'in due course').
493 ICC-01/05-01/08-836, para 113.
494 ICC-01/05-01/08-856-AnxA-Red.

Kenya

The Situation in Kenya arises out of the violence surrounding the Kenyan national elections held on 27 December 2007. It is the most recent Situation to come before the ICC, and is the first Situation 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.

As discussed below, the Pre-Trial Chamber approved the request to open an investigation after a prolonged engagement by the Prosecutor with the Kenyan authorities, including a formal recommendation that the ICC be involved from the Kenyan Commission of Inquiry into the Post-election Violence.[495] Finally, on 26 November 2009[496] the Prosecution submitted a request to Pre-Trial Chamber II for authorisation to initiate an investigation. On 18 February 2010, the Pre-Trial Chamber requested further clarification from the Prosecutor,[497] which was submitted on 3 March 2010.[498] On 31 March 2010,[499] the Pre-Trial Chamber handed down a decision, with Judge Kaul dissenting, authorising the Office of the Prosecutor to proceed with an investigation

495 The Waki Commission, named for Kenyan Judge Philip Waki who served as Chair, was a non-judicial body composed of two international members and one Kenyan citizen. Set up on 23 May 2007, its mandate was: to investigate the facts and circumstances surrounding the violence between 28 December 2007 and 28 February 2008; to investigate the conduct of State security agencies in their handling of it; and, to 'recommend measures with regard to bringing to justice those persons responsible for criminal acts'. The Commission began work on 3 June 2008. ICC-01/09-3, para 26.
496 ICC-01/09-3.
497 ICC-01/09-15.
498 ICC-01/09-16.
499 ICC-01/09-19.

in Kenya. The decision of the Pre-Trial Chamber and the dissent are analysed in detail, below.

Since the decision granting permission to open the investigation, the ICC has conducted missions in Kenya, and is making preparations to open a field office, having secured permission from the Kenyan Government to do so. In addition, on 21 September 2010 the Prosecutor reiterated his intention to present two cases before the end of 2010, against four to six individuals.[500] Although a Kenyan newspaper has reported that the Prosecutor will issue sealed arrest warrants,[501] sources from the Office of the Prosecutor suggest that unsealed arrest warrants are also being considered. While Kenya has publicly stated its intention to cooperate with ICC investigations, recent developments, such as the visit of Sudanese President Al'Bashir discussed above, call into question whether Kenya has the political will to genuinely cooperate.

Witness protection has arisen as a significant issue for both domestic and ICC prosecution of post-election violence. Many witnesses to crimes committed during the post-election violence of 2007 have reportedly been threatened and physically attacked. In February 2010, Kenyan human rights groups stated that 22 witnesses reported harassment.[502] Attempts to kill witnesses who have testified before the Waki Commission, and who are also expected to be called by the ICC, have also been reported.[503] There are concerns, furthermore, that the country's witness protection provisions may not meet international standards.[504] The ICC has revealed that it is currently protecting an unspecified number of Kenyan witnesses,[505] and has stated that it will not rely on domestic protection mechanisms to protect ICC witnesses.

500 'Statement by ICC Prosecutor Luis Moreno Ocampo on the Situation in Kenya', 21 September 2010, available at <http://www.icc-cpi.int/NR/rdonlyres/3B2D9447-5BC0-44F7-8816-EBB0BA4C52C7/282485/StatetmentonKenyaENG.pdf>, last visited on 27 October 2010.

501 'Kenya: Ocampo to Issue Sealed Warrants', *allAfrica.com*, 31 August 2010, available at <http://allafrica.com/stories/201009010023.html>, last visited on 27 October 2010.

502 'Under Pressure, Kenya Cabinet Approves Witness Protection Plan', *VOA News*, 5 February 2010, available at <http://www.voanews.com/english/news/africa/Under-Pressure-Kenya-Cabinet-Approves-Witness-Protection-Plan-83667372.html>, last visited on 27 October 2010.

503 'One step closer to witness protection in Kenya', *United Nations Office on Drugs and Crimes (UNDOC)*, 14 January 2010, available at <http://www.unodc.org/unodc/en/frontpage/2010/January/one-step-closer-to-witness-protection-in-kenya.html>, last visited on 4 October 2010; 'Kenya: Ocampo Witnesses Escape Death', *allAfrica.com*, 5 January 2010 <http://allafrica.com/stories/201001050912.html>, last visited on 27 October 2010.

504 Kenya's Witness Protection Act 2006 contained provisions for a witness protection programme. However, following the post-election violence, the programme was described as 'inadequate' by Attorney General Amos Wako, due largely to its lack of statutory independence. The 2006 Act was amended by the Witness Protection (Amendment) Bill, 2010, which passed into law in April 2010. The new Witness Protection (Amendment) Act, which was welcomed by the ICC Registrar, contains provisions for an independent Witness Protection Agency. So far, at least 20 Kenyans are reported to have applied to the newly created Agency for protection. However, serious concerns have been raised that the Agency's funding may be inadequate, to date amounting to Sh35 Million (approx. 315,700 EUR). See: '400 post-poll chaos victims apply to join Hague trials', Daily Nation, 2 September 2010, available at <http://www.nation.co.ke/News/400%20victims%20apply%20to%20join%20Hague%20trials%20/-/1056/1002768/-/9lkjb4z/-/index.html>; 'Kenya seeks to strengthen protection law', Daily Nation, 12 November 2009, available at <http://www.nation.co.ke/News/-/1056/685398/-/uonuyi/-/index.html>; 'One step closer to witness protection in Kenya', United Nations Office on Drugs and Crimes (UNDOC), 14 January 2010, available at <http://www.unodc.org/unodc/en/frontpage/2010/January/one-step-closer-to-witness-protection-in-kenya.html>; '20 Kenyans seek witness protection', Capital News, 11 September 2010, available at <http://www.capitalfm.co.ke/news/Kenyanews/20-Kenyans-seek-witness-protection-9773.html>; 'Witness agency to protect 20 people', Daily Nation, 13 September 2010, available at < http://www.nation.co.ke/News/Witness%20agency%20approves%20protection%20for%2020%20people/-/1056/1009800/-/6mriq1/-/index.html>. All websites last visited on 28 October 2010.

505 'One step closer to witness protection in Kenya', *United Nations Office on Drugs and Crimes (UNDOC)*, 14 January 2010, available at <http://www.unodc.org/unodc/en/frontpage/2010/January/one-step-closer-to-witness-protection-in-kenya.html>, last visited on 27 October 2010.

Significant numbers of gender-based crimes were committed during the post-election violence in Kenya. In its submissions, the Prosecution highlighted the commission of rape and other forms of sexual violence as the basis for requesting the authorisation to investigate. It relied on information about these crimes collected by a number of sources, including Kenyan and international organisations. The Office of the Prosecutor is now conducting its own investigations in Kenya, including into gender-based crimes.

Victims were also invited to present their opinion to the Court as to whether the investigation in Kenya should proceed. On 23 November 2009, under Rule 50 of the Rules of Procedure and Evidence, the Prosecution issued public notice that it intended to request authorisation from Pre-Trial Chamber II to open the investigation. It specifically invited comments from victims regarding whether the investigation should be opened, to be sent directly to the Pre-Trial Chamber.[506] Pre-Trial Chamber II then requested the ICC Victim Participation and Reparations Section (VPRS) to collect the victims' responses, pursuant to Article 15(3) of the Statute.[507] VPRS submissions summarising the representations from Kenyan victims are also described in more detail, below.

Background and procedural history

Kenya obtained political independence in 1963, and up until 1991 was governed by a single-party system. The first multi-party elections were held in 1992. Kenya has since had a history of violence around its elections. The violence following the December 2007 election was the worst to date. While elections may trigger outbreaks of violence, entrenched problems such as government corruption and misuse of political power, impunity, longstanding ethnic tensions and grievances over land all contribute to make such outbreaks bitter, widespread and difficult to resolve.[508]

Incumbent President Mwai Kibaki, leader of the National Rainbow Coalition (NaRC) came to power in 2002, and ran again in the December 2007 general election, this time as a candidate for the Party of National Unity (PNU). He 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, reportedly resulting in 200 deaths and up to 70,000 people being displaced.[509] Ethnic characterisations were used by both sides in their campaigns, and tension continued to build. On 27 December 2007, while Odinga and the ODM appeared to be leading at the polls, and had earlier taken the majority of Parliamentary seats, in the final results Kibaki won the Presidential election by a small majority. The results were publicly denounced as fraudulent by five electoral commissioners, international observers, and by Odinga. However, on 30 December Kibaki was sworn into office. The Government then ordered the suspension of live broadcasts, and a ban on public demonstrations.[510] The violence that broke out subsequent to the Presidential election was characterised by brutal attacks, including sexual violence against both women and men, which appeared to be both coordinated and spontaneous. The police also are reported to have engaged in excessive use of force and extrajudicial killings.[511]

506 ICC-01/09-3-Annex 1F.

507 Article 15(3) states that victims may make representations to the Pre-Trial Chamber when the Prosecutor has submitted a request for authorisation of an investigation.

508 For an account of the context of the post-election violence, as well as events leading up and subsequent to the election see 'Ballots to Bullets: Organised Political Violence and Kenya's Crisis of Governance', *Human Rights Watch*, March 2008, available at <http://www.hrw.org/en/reports/2008/03/16/ballots-bullets-0>, last visited on 3 November 2010; and as ICC-01/09-3-Annex 3.

509 'Ballots to Bullets: Organised Political Violence and Kenya's Crisis of Governance', *Human Rights Watch*, March 2008, p 19.

510 'Ballots to Bullets: Organised Political Violence and Kenya's Crisis of Governance', *Human Rights Watch*, March 2008.

511 ICC-01/09-3/Annex 5, p 417-420.

In early January 2008, Kibaki stated that he would accept a court-ordered re-election or would form a government of national unity, an offer which was at that time rejected by the ODM. Kibaki went on to appoint cabinet ministers, triggering more violent protests. Parliament was convened on 15 January 2008, with the ODM holding the majority of the seats. On 24 January, Kibaki and Odinga were brought together for their first meeting since the beginning of the crisis by former UN Secretary-General Kofi Annan, mediating as Chair of the AU Panel of Eminent African Personalities. On 28 February, they signed an agreement on power sharing, which Kibaki signed as President and Odinga as Prime Minister. Under this agreement, three commissions were established: the Commission of Inquiry on Post-Election Violence (known as CIPEV or the Waki Commission); the Truth, Justice and Reconciliation Commission; and the Independent Review Commission on the General Elections held in Kenya on 27 December 2007.

On 15 October 2008, the Waki Commission published its final report, which included a recommendation for the creation of a Special Tribunal 'to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya'.[512] The Commission also recommended, in the event that the Special Tribunal was not established, that a list containing names of those suspected of bearing the greatest responsibility for the crimes be forwarded to the ICC Prosecutor. On 16 December 2008, Kibaki and Odinga agreed to implement the Commission's recommendations, including preparing and submitting a bill to establish the Special Tribunal. Although attempts have been made to pass this legislation, to date it has been unsuccessful and no Special Tribunal has been established.[513]

The Situation in Kenya has been under preliminary examination by the ICC since the eruption of violence after the election. On 5 February 2008, the Prosecutor issued a brief public statement, recalling that Kenya is a State Party to the Rome Statute and stating the Office of the Prosecutor's intention to 'carefully consider all information relating to alleged crimes within its jurisdiction committed on the territory of States Parties or by nationals of States Parties, regardless of the individuals or group alleged to have committed the crime'.[514] Subsequent to the signing of the power-sharing agreement, the Prosecutor requested and received reports from the Government of Kenya, the Kenya Human Rights Commission, the Kenya National Commission on Human Rights, the ODM, and the Waki Commission relating to the post-2007 election violence pursuant to Article 15(2) of the Rome Statute. He also met with Kenyan officials on numerous occasions to discuss the 'preliminary examination of the crimes committed'.[515] On 16 July 2009, the Prosecutor received from the AU Panel of Eminent African Personalities a sealed envelope containing the list of persons allegedly implicated in the post-election violence.

512 ICC-01/09-03, para 9. The full report of the Waki Commission is available at ICC-01/09-03-Annex 5.

513 On 12 February 2009, the Kenyan Parliament failed to adopt the Constitutional Amendment Bill, necessary to ensure that the Special Tribunal would be in accordance with the Constitution, effectively preventing the passage of the bill establishing the Special Tribunal. In August 2009, another bill was gazetted that would provide for the ICC to prosecute those bearing the greatest responsibility and a Special Tribunal for Kenya to prosecute lower-level perpetrators. However, on two successive occasions in 2009, this bill could not be debated in Parliament due to the lack of a quorum. ICC-01/09-3, para 22. Although a new Constitution was approved in August 2010, it remains unclear whether this will have any direct impact on the plans for a Special Tribunal.

514 ICC-01/09-3, para 5.

515 ICC-01/09-3, para 20.

In September 2009, the Prosecutor met with representatives from Kenyan civil society in The Hague.

Finally, the Prosecutor wrote to Kenyan authorities on 27 October 2009, informing them that his preliminary examination revealed that acts constituting crimes against humanity might have been committed, that there were no relevant national judicial inquiries, and that the crimes reached the required gravity threshold established by the Rome Statute. He informed the Government that there were two options for initiating an investigation, either by referral from Kenya or by an independent decision of the Prosecutor to request authorisation from the Pre-Trial Chamber to start an investigation.[516] The Prosecutor met with President Kibaki and Prime Minister Odinga on 5 November 2009, informed them that it was his duty to open an investigation, and requested the cooperation of the Kenyan authorities.[517] The Kenyan Government issued a statement noting 'that it remains fully committed to discharge its responsibility in accordance with the Rome Statute to establish a local judicial mechanism to deal with the perpetrators of the post-election violence, and that it remains committed to cooperate with the ICC within the framework of the Rome Statute and the Kenyan International Crimes Act'.[518] The same day, the Prosecutor notified the President of the Court of his intention to commence an investigation into the election violence in Kenya. The Presidency assigned the Situation in Kenya to Pre-Trial Chamber II on 6 November 2009.

516 ICC-01/09-3, para 20.
517 ICC-01/09-3, para 21.
518 ICC-01/09-3, para 21.

The Prosecutor's submissions to the Pre-Trial Chamber

On 26 November 2009, the Office of the Prosecutor submitted a 'Request for authorisation of an investigation pursuant to Article 15'[519] of the Rome Statute in relation to the Situation in Kenya. The Prosecution stated that 'there is a reasonable basis to believe that crimes against humanity within the jurisdiction of the Court were committed in the context of the post-election violence of 2007-2008, in particular crimes of murder, rape and other forms of sexual violence, deportation or forcible transfer of population and other inhumane acts'.[520] The Prosecution would later also submit the 'Prosecution's Response to Decision Requesting Clarification and Additional Information',[521] as discussed below.

In its initial submission, the Prosecution addressed the requirements for the Court to be seized of jurisdiction, and the criteria for the case to be considered admissible under Article 17 of the Rome Statute. The Prosecution also informed the Pre-Trial Chamber of the 'reliable and publicly available reports' on crimes committed in Kenya that were evaluated for the filing, with a brief outline of their contents.[522] Of the 11 reports evaluated, four make specific mention of gender-based crimes.

Chapter six of the Waki Commission Report focuses on sexual violence against both women and men that occurred after the 2007 election.[523] The Commission, assisted by existing local and international groups working on sexual violence, two experienced female investigators, and a psychologist, took testimony or received statements from three expert witnesses and 31 women victims/survivors of sexual violence.[524] Of the statements:

519 ICC-01/09-3.
520 ICC-01/09-3, p 3.
521 ICC-01/09-16.
522 The majority of the reports were included as Annexes 3-12 to the filing. The Prosecution evaluated reports by the Waki Commission, the Kenyan National Commission on Human Rights, the Office of the High Commissioner for Human Rights, the Office for the Coordination of Humanitarian Affairs, UNICEF, UNFPA, UNIFEM and Christian Children's Fund, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, the Oscar Foundation; the Federation of Women Lawyers, the Centre for Rights Education and Awareness, Human Rights Watch, and the International Crisis Group.
523 ICC-01/09-3-Annex 5.
524 While the Commission heard second-hand reports of sexual violence against men, no men came forward to testify. The Commission noted that, while what it had heard seems 'broadly indicative of what happened', the sample of 31 statements is not statistically representative. Throughout the Report, the Commission notes the difficulties in finding people willing to testify about gender-based crimes.

> Eighteen of the women interviewed were attacked in their homes, seven while fleeing from violence, three while looking for food or children lost as a result of the prevailing mayhem in their neighbourhoods, one while being dragged out of her house by someone she knew, with the remaining suffering other experiences. Twenty-four of the thirty victims who gave statements to the Commission or to its investigators were gang raped. Seventeen rapes were committed by civilians involving two to 12 individuals while seven were committed by state security agents involving four by the GSU [General Service Unit], two by Administrative Police, and one by the Kenya police. The gang rapes perpetrated by the GSU involved two to four officers, three to seven in the case of the Administrative Police (AP) and two in the cases of the Kenya Police. Six other cases of rape were committed by individuals rather than gangs, with four cases involving civilians and another two officers from the GSU and one who was an AP. Only one case involved forced circumcision. In Nairobi, six of the twelve cases of sexual violence were HIV positive before being attacked, two were infected after being raped, one was infected with an STD during the attack, while the remaining three had not been tested and did not know their status. Seven of these same individuals had been gang raped, five of which were committed by GSU officers. ... the majority of the victims of sexual violence were either unable or did not seek out medical care.[525]

The Commission noted that in some areas, 'sexual violence was a means used to pressure people to leave their homes, to retaliate against them for having voted for the wrong candidate, tribe, or party and in tandem with that to dominate, humiliate, and degrade them and their communities into a pit of powerlessness'.[526] However, it found that sexual violence committed during this period was also 'an opportunistic act played out against a background of lawlessness and a vacuum of power that created disorder bordering on anarchy'.[527] Sexual violence was also used 'to coerce and control helpless IDPs who traded sex unwillingly for basic needs with the perpetrators being individuals in the camps, individuals from surrounding communities (eg when women went to collect food and water), or security personnel, and humanitarian workers in the camps...'.[528]

525 ICC-01/09-3-Anx5, p 251-252.
526 ICC-01/09-3-Anx5, p 252.
527 ICC-01/09-3-Anx5, p 253.
528 ICC-01/09-3-Anx5, p 253.

The report of the Federation of Women Lawyers (FIDA-K) submitted to the Waki Commission on behalf of the Inter Agency Gender Based Violence Sub-Cluster, stated that 'women bore the brunt of the post election violence'.[529] They note widespread sexual violence, in which women were sexually assaulted, gang raped, and sodomised, in many cases in the presence of their spouses, children, or parents. Both the Commission and FIDA-K reported that, of the few women who attempted to report these incidents to the police, many 'were told to choose between reporting cases of destruction or property or cases of sexual violence which, in any event, according to police officers to whom they attempted to make the reports, were "over" '.[530] The Police Commissioner reported that his office had no data on cases of sexual violence. Based on the available information, FIDA-K reports that hospitals treated at least 1171 victims of sexual violence arising from the post-election violence.[531] Multiple reports noted that such statistics represent only a small percentage of the actual crimes, and that some hospitals actually treated fewer cases during the peak of the violence, most likely due to the victims' inability to seek treatment during the chaos, or their fear of doing so.[532] Men who suffered sexual violence, including forced male circumcision and castration, were especially likely not to seek treatment, and were even less likely to report it to the authorities. Nairobi Women's Hospital reported treating 22 men and 37 boys who had suffered rape or defilement.[533] The Centre for Rights Education and Awareness (CREAW) reported that 82% of victims/survivors interviewed did not report the crime to the police.[534] Finally, the Prosecution also included reports from UNICEF, UNFPA, UNIFEM and Christian Children's Fund on the ongoing sexual violence that took place in IDP camps during this period, to which hundreds of thousands had fled.[535]

The Prosecution submission detailed the alleged crimes within the jurisdiction of the Court, as required by Regulation 49 of the Regulations of the Court, noting that what initially appeared to be spontaneous violence was in fact planned against specifically targeted groups by political leaders, businessmen, and others, who enlisted 'criminal elements and ordinary people' to carry out these crimes.[536] With respect to murder as a crime against humanity, at least 1,220

529 ICC-01/09-3-Anx8, p 1.
530 ICC-01/09-3-Anx8, p 2.
531 ICC-01/09-3-Anx8, p 4.
532 ICC-01/09-3-Anx8, p 5.
533 ICC-01/09-3-Anx8, p 6.
534 ICC-01/09-3-Anx10, p 33-34.
535 ICC-01/09-3-Anx9.
536 ICC-01/09-3, para 63.

people were killed; 'the majority of killings were reportedly due to injuries caused by arrows, machetes and traditional weapons used during attacks/raids on villages ... and burning of people alive'.[537] Between 123 and 405 people were thought to have been shot by the police.[538] Rape and other forms of sexual violence were reported both where the attacks occurred and in IDP camps, according to the submission. The Prosecution noted that three hospitals reported 524, 286, and 184 cases of rape, respectively, but also noted the 'significant under-reporting in the occurrence of sexual violence'.[539] With respect to deportation or forcible transfer of population, approximately 350,000 people were internally displaced within Kenya, and the Prosecution found a reasonable basis to believe that these widespread displacements were coercive, accomplished by 'threats, lootings and burnings of houses, killings and sexual violence'.[540] Finally, other inhumane acts resulted in at least 3,561 persons injured, the majority by 'sharp objects or gun and arrow shots', and others by 'particularly brutal conduct such as traumatic circumcisions'.[541]

The submission identified three main regions affected by post-election violence: the slum districts of Nairobi, the Rift Valley province, and the Western and Nyanza provinces. The time periods identified were a first wave of violence from 29 December 2007 – 18 January 2008, and a second wave from 24–28 January 2008. 'Gangs of young men armed with traditional weapons' were alleged to have committed most offences, but the Prosecution noted that persons in positions of power, including political leaders from Kibaki's PNU and ODM, 'appear to have been involved in the organisation, enticement and/or financing of violence targeting specific groups'.[542] Security services were also implicated.

537 ICC-01/09-3, para 64.
538 ICC-01/09-3, para 64. The Kenyan Government officially acknowledged that a total of 1,220 people killed, including 123 by the police. However, other reports attributed 405 deaths to gun shots by the police.
539 ICC-01/09-3, para 66.
540 ICC-01/09-3, para 68.
541 ICC-01/09-3, para 70.
542 ICC-01/09-3, paras 74-75.

Request for clarification

On 18 February 2010, Pre-Trial Chamber II requested additional information from the Prosecution regarding its request for authorisation to investigate the Situation in Kenya, pursuant to Rule 50(4) and Regulation 28(1).[543] Under Article 7(2)(a), acts must be 'pursuant to or in furtherance of a State or organisational policy' in order to constitute a crime against humanity. Accordingly, the Chamber requested additional information on the link between a State or organisational policy and the events, persons involved, and acts of violence in Kenya. Additionally, pursuant to regulation 49(2)(c) of the Regulations of the Court and Regulations 33 and 34 of the Regulations of the Office of the Prosecutor, the Chamber requested additional information on admissibility in the context of Kenya. In particular, the Prosecution was asked to specify the incidents and groups of persons on which the investigation would likely focus for the purpose of identifying potential cases. The Chamber also requested further information regarding any domestic investigation into these potential cases.

On 3 March 2010,[544] the Prosecution responded to the Chamber's request for additional information. Regarding the State and/or organisational policy that encouraged the commission of crimes against humanity, the Prosecutor clarified that 'the policy pursuant to or in furtherance of which attacks were allegedly committed appears to relate primarily to the policy of senior political and business leaders of the ruling PNU party and the opposition ODM'.[545] Gangs of youth were recruited and transported to strategic points, and leaders held frequent meetings to 'organise, direct, and facilitate the violence'.[546] Members of regional political and business establishments allegedly funded transportation and paid the youths. These acts, implemented through a consistent set of methods in different incidents and regions, resulted in 'killings of civilians, acts of rape and other forms of sexual violence, internal displacement, and acts causing serious injury, affecting hundreds of thousands'.[547] Leaders used the following methods to implement their policy: public incitement, warnings against rival groups, planning meetings, financing attacks, hiring gangs, providing

543 ICC-01/09-15. Rule 50(4) allows the Pre-Trial Chamber to request additional information from the Prosecutor with respect to a request to authorise an investigation. Regulation 28(1) allows a Chamber to order participants to clarify or provide additional details related to any document.
544 ICC-01/09-16.
545 ICC-01/09-16, para 16.
546 ICC-01/09-16, para 18.
547 ICC-01/09-16, para 19.

transportation for attackers, creating road blocks, selectively targeting civilians based on their perceived tribal identity, and using the media to broadcast derogatory messages and instructions to coordinate attacks. The Prosecution further alleged that PNU leaders used Government institutions to carry out crimes, and that in particular the police were allegedly responsible for hundreds of deaths through excessive use of fire arms, as well as for failing to intervene, or for directly participating, in violent acts, including 'looting, arson, rapes, beatings, and derision'.[548]

The Prosecution also responded to the Chamber's request to provide further information regarding the incidents and groups of persons on which the investigation would likely focus by submitting a list of the most serious criminal incidents and a preliminary list of 20 political and business leaders who appear to bear the greatest responsibility for the most serious crimes, as confidential annexes 1 and 2, respectively.[549] The Prosecution confirmed the absence of national proceedings in relation to the persons listed in Annex 2, and to the incidents identified in Annex 1 as linked to the persons listed in Annex 2. The Prosecution further noted that the Kenyan Parliament failed to establish a Special Tribunal to prosecute those responsible for the post-election violence, and reiterated that it would continually assess the existence of national proceedings throughout the investigation.

Report on victims' representations

The Prosecution submission requesting authorisation to investigate included a notice to victims, calling for them to present their views on ICC involvement to the Pre-Trial Chamber. On 10 December 2009, Pre-Trial Chamber II ordered[550] that all victims' communications should be forwarded to the VPRS. The VPRS presented the representations of the victims to the Chamber on 29 March 2010.[551] The report, presented in a public redacted version, set out information about the victims who submitted observations to the Chamber; summarised and provided excerpts from the views of victims who made representations; and made recommendations to the Chamber regarding confidentiality and protection.

A total of 406 representations were received and 396 met the requirements to be forwarded to the Pre-Trial Chamber under Rule 85 of the Rules of Procedure and Evidence.[552] Seventy-six were made by representatives of victim communities and 320 were made by individual victims, of whom 192 were men (60%) and 128 were women (40%).[553] The significant majority of victim representations received by the Court (383) supported an ICC investigation for the following reasons: to deter future violence, particularly around the upcoming 2012 election cycle; a lack of faith in the Kenyan justice system; a general desire for justice to be done; to know the truth about what happened and who the perpetrators are; to end the culture of impunity in Kenya; to punish the perpetrators; because the ICC is trustworthy; to help victims recover property or compensation; and, to address inter-ethnic conflict.

Many victims expressed the need for the temporal scope of the investigation to cover time periods before and after the 2007-2008 post-election violence.[554] Victims also expressed that the subject-matter scope of the investigation should include: killings, sexual violence, forced displacement, torture, and other inhumane acts, as well as destruction or theft of property.[555] Of the individual representations 176 mention an act of sexual violence, and 61 of the collective representations mention an act of sexual violence.[556]

The VPRS reiterated concern regarding the significant security risks faced by victim communities as well as those assisting the VPRS. It recommended that the Chamber maintain the confidentiality of any information that may expose a person to risk and further advised against providing access to the representations to the OTP.

548 ICC-01/09-16, 25-28.
549 ICC-01/09-16, Confidential Annexes 1 and 2.
550 ICC-01/09-4.
551 ICC-01/09-17-Corr-Red.
552 Rule 85 sets out the definition and general principle relating to victims.
553 ICC-01/09-17-Corr-Red, paras 2, 23, 29, 41, 48. (noting 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'.)
554 ICC-01/09-17-Corr-Red, paras 100-105.
555 ICC-01/09-17-Corr-Red, paras 109-112.
556 ICC-01/09-17-Corr-Red, para 112.

Pre-Trial Chamber II's decision authorising the investigation

On **31 March 2010**, Pre-Trial Chamber II issued its decision authorising the Prosecution's investigation in Kenya, pursuant to Article 15(4) of the Rome Statute.[557] The Chamber's decision examined the criteria for the authorisation: whether there is a reasonable basis to believe that crimes against humanity within the jurisdiction of the Court have been committed, whether the case is admissible under Article 17, and determining the scope of the authorised investigation.

Reasonable basis to proceed

The Pre-Trial Chamber began by setting out the applicable law, noting at the outset that Article 15 'is one of the most delicate provisions of the Statute',[558] as by empowering the Prosecutor to trigger the jurisdiction of the Court, the provision might endow the Prosecutor with excessive powers that could be abused, and therefore politicise the Court. Therefore, a balanced approach was sought in the final statutory provision, namely, that the Pre-Trial Chamber would, at a very early stage of the proceedings, review the Prosecutor's conclusion that there was a reasonable basis to proceed with an investigation. The Chamber noted that 'reasonable basis' is the lowest standard within the Rome Statute. In particular, it stated that the 'standard should be construed and applied against the underlying purpose of the procedure in Article 15(4) of the Statute, which is to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility'.[559]

Jurisdiction

The Pre-Trial Chamber then examined whether the requisite criteria had been met by the Prosecution application. Beginning with jurisdiction, the Chamber found that the information available supported the finding that there existed a reasonable basis to believe that a crime within the jurisdiction of the Court was committed, namely, that crimes against humanity appear to have been committed on Kenyan territory.[560] Based on the available information, the Chamber agreed that murder, rape and other forms of sexual violence, forcible transfer of population, and other inhumane acts had been committed in Kenya within the time frame in question. The Chamber identified three general categories of attacks: attacks initiated by groups associated with the ODM party and directed against perceived PNU party supporters; retaliatory attacks conducted by members of the groups targeted by the initial attacks and directed against members of groups deemed responsible for the initial violence; and 'a large number of violent acts committed by the police'.[561] While the Chamber noted that some of the crimes were spontaneous or opportunistic, it took the view that 'the violence was not a mere accumulation of spontaneous or isolated acts. Rather, a number of the attacks were planned, directed or organised by various groups including local leaders, businessmen and politicians associated with the two leading political parties, as well as by members of the police force.'[562] The Chamber also considered that the available information showed that the attacks victimised a large number of civilians.

The Chamber found that the available information substantiated the Prosecution's allegations of rape and other forms of sexual violence committed against men and women. It noted that the Nairobi Women's Hospital's Gender Violence Recovery Centre treated 443 survivors between 27 January 2007 and 29 February 2008, and together with its partner hospitals received a further 900 cases of sexual violence between January and March 2008. The Chamber noted the 'high number of reported gang rapes, including rapes by a group of over 20 men, and the brutality, characterised in particular by the cutting of the victims or the insertion of crude weapon[s] and other objects in the victim's vagina'.[563] While acknowledging that some rapes may be qualified as opportunistic acts, the Chamber found that there were 'instances of sexual violence encompassing an ethnic dimension and targeting specific ethnic groups'.[564] It further noted that police or security agents were alleged to have committed many acts of rape and other forms of sexual violence. With respect to the crime of other inhumane acts, the Pre-Trial Chamber also found that the Prosecution's allegations were substantiated by the available information, observing in particular recurrent forms of physical violence, including forced circumcision and genital amputation.

The Pre-Trial Chamber concurred with the Prosecution that the alleged crimes appeared to fall within the temporal jurisdiction of the Court and satisfied jurisdiction *ratione loci*, as they occurred on the territory of Kenya, a State Party to the Rome Statute.

557 ICC-01/09-19.
558 ICC-01/09-19, para 17.
559 ICC-01/09-19, para 32.
560 ICC-01/09-19, paras 73 and 102.
561 ICC-01/09-19, paras 104-106.
562 ICC-01/09-19, para 117.
563 ICC-01/09-19, para 154.
564 ICC-01/09-19, para 155.

Admissibility

At the outset, the Chamber reiterated that 'the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a "situation"'.[565] A potential case is comprised of groups of persons involved that are likely to be the object of an investigation, together with the alleged crimes within the jurisdiction of the Court that are likely to be the focus of an investigation. Pursuant to Article 17 of the Rome Statute, based on the information provided by the Prosecution, the Chamber must assess whether Kenya or any third State is conducting or has conducted national proceedings in relation to the Court's potential cases. With respect to national proceedings, the Chamber found that the available information supported the Prosecution's conclusion that there was a lack of proceedings in Kenya or a third State. It also noted that the plans to establish a Special Tribunal had stalled, and that 'the available information shows some inadequacies or reluctance from the national authorities to generally address the election violence'.[566]

With respect to the criteria of gravity, the Chamber again noted that it should be examined against the backdrop of a potential case and found that the submissions met the gravity threshold. It examined the Prosecution submissions, which it observed concerned the assessment of gravity of the entire situation, finding that they appeared to be substantiated in terms of scale of the violence. It specifically noted that the Prosecution made submissions concerning the brutality of the violence, in particular the rapes and other forms of sexual violence, as well as submissions concerning the psychological trauma, social stigma, abandonment, and infection with HIV/AIDS, suffered by victims of sexual violence.

Scope of the Prosecution investigation

The Pre-Trial Chamber observed that the time frame for which the Prosecution requested authorisation to investigate was not clearly defined, the scope having been articulated as both crimes committed 'during the post-election period, including but not limited to the time period between 27 December 2007 and 28 February 2008' and crimes committed 'in the Republic of Kenya in relation to the post-election violence of 2007-2008'.[567] In its decision, the Chamber decided to specify the temporal scope of investigation. Based on the available information, including on the representations of victims, the Chamber found that violence occurred prior to 2007 and after 2008. A limitation on the investigation to events taking place between December 2007 and February 2008 'would be inconsistent with (i) the purpose behind investigating an entire situation as opposed to subjectively selected crimes and; (ii) the Prosecutor's duty to establish the truth by extending the investigation to cover all facts and evidence pursuant to article 54(1) of the Statute'.[568] The Chamber accordingly defined the scope of the investigation as events that took place between 1 June 2005, the date of the Statute's entry into force for Kenya, and 26 November 2009, the date of the filing of the Prosecutor's request. Finally, the Chamber further defined the scope of the investigation by limiting it to crimes of humanity, and to events which allegedly occurred on the territory of the Republic of Kenya.

Judge Kaul's dissent

Judge Kaul issued a Dissent to the Pre-Trial Chamber's decision, also on 31 March 2010, concluding that the Pre-Trial Chamber should not authorise the commencement of the Prosecution's investigation into the Situation in Kenya.[569] In his view, the evidence presented by the Prosecution and the supporting material, including the victims' representations, did not support a conclusion that the acts that occurred in Kenya qualified as crimes against humanity within the jurisdiction of the ICC. He concluded 'in particular that there is no reasonable basis to believe that crimes, such as murder, rape and other serious crimes, were committed in an "attack against any civilian population" "pursuant to or in furtherance of a State or organisational policy to commit such attack", as required by article 7(2)(a) of the Statute'.[570] Judge Kaul stressed, however, that his dissent did not preclude or prejudice any other finding on individual criminal responsibility for crimes committed in Kenya under customary law or national law. While he did not question whether the crimes had happened, his dissent focused on whether the ICC is the right forum to investigate and prosecute those crimes.

565 ICC-01/09-19, para 182.
566 ICC-01/09-19, para 186.
567 ICC-01/09-19, para 202, citing ICC-01/06-16, paras 93, 114.
568 ICC-01/09-19, para 205.
569 ICC-01/09-19. The dissent follows the decision of the Pre-Trial Chamber and thus has the same document number, hereinafter 'dissent'.
570 Dissent, para 4.

Trial Proceedings

In 2010, the ICC had two ongoing trial proceedings, both in the DRC Situation. The first, against Thomas Lubanga Dyilo, began in January 2009. The second, against Germain Katanga and Mathieu Ngudjolo Chui, began in November 2009. Developments in both of these trial proceedings are covered in detail in this section.

Specifically, this section reviews the jurisprudence in the Lubanga case related to the possibility of changing the legal characterisation of the facts pursuant to Regulation 55. It also explores selected witness testimony, including the expert testimony of Radhika Coomaraswamy, Under-Secretary-General and Special Representative of the Secretary-General of the UN for Children and Armed Conflict. Finally, it extensively covers the full range of issues related to the Prosecution's use of intermediaries and the resultant stay of proceedings in the Lubanga trial are covered extensively.

With respect to the Katanga and Ngudjolo case, this section reviews the commencement of the trial from the opening statements through the testimony of the witnesses who were called by the Prosecution up until 17 September 2010. The Section includes detailed summaries of three female witnesses and their testimony as victims/survivors of sexual violence.

The Prosecutor v. Thomas Lubanga Dyilo

Appeals Chamber decision on Regulation 55

As described thoroughly in the *Gender Report Card 2009*, in May 2009, Legal Representatives of Victims participating in the trial against Lubanga filed a joint submission, requesting that the Trial Chamber consider modifying the legal characterisation of the facts presented by the Prosecution, in order to add the crimes of inhuman and cruel treatment and sexual slavery to the existing characterisation. The filing came after the Trial Chamber had heard a significant amount of testimony about crimes of sexual violence from Prosecution witnesses. This testimony is summarised in the Trial Proceedings section of the *Gender Report Card 2009*.[571]

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. This included the testimony of a Prosecution witness[572] that described girls, including girls under the age of 15, who had become pregnant as a result of being raped. With respect to sexual slavery, the Legal Representatives underscored that the widespread and/or systematic practice of using girls, including girls under the age of 15, against their will, as the wives or sexual slaves of commanders of the *Union des patriotes Congolais* (UPC)/*Forces patriotique pour la libération du Congo* (FPLC) had been confirmed to date by two former militia members, witnesses,[573] and also by six former child soldiers.[574] They noted that the widespread and/or systematic practice by which soldiers from the UPC/FPLC, including child soldiers under 15 years old, were asked to find girls, including girls under the age of 15, for the 'sexual needs' of their commanders and for their own 'sexual needs'[575] had been confirmed to date by three former child soldiers.[576]

571 *Gender Report Card 2009*, p 68-85.
572 Prosecution Witness 0007.
573 Prosecution Witnesses 0299 and 0017.
574 Prosecution Witnesses 0038, 0298, 0010, 0011, 0007, and 0294.
575 ICC-01/04-01/06-1891, paras 33-34.
576 Prosecution Witnesses 0213, 0008, and 0294.

The Legal Representatives' application requested that the Chamber use Regulation 55 of the Regulations of the Court.[577] Article 55 provides that the Chamber may change the legal characterisation of the facts in its final decision on the merits based on the evidence presented before it during the trial.

As described in greater detail in the *Gender Report Card 2009*,[578] in a majority opinion issued on **14 July 2009**, Judge Odio Benito and Judge Blattmann of Trial Chamber I gave notice to the parties and participants that the legal characterisation of the facts might be subject to change.[579] A separate dissent by Judge Fulford followed. In the 14 July decision, the majority 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. It reached this conclusion by severing subsection (1) from subsections (2) and (3), finding that the Regulation 'sets out the powers of the Chamber in relation to two distinct stages'.[580] In its view, Regulation 55(1) set forth the requirements for the Chamber's *final* judgement, and therefore this provision alone was subject to the limitation that any change to the legal characterisation of facts must not 'exceed ... the facts and circumstances described in the charges and any amendments to the charges'.[581] In contrast, according to the majority, Regulation 55(2) applied 'at any time during the trial'[582] and was therefore not subject to the limitation in 55(1).

On 17 July 2009, Judge Fulford issued a dissent[583] in which he argued that the majority's reading of Regulation 55 as two separate provisions was flawed, with significant negative consequences for the rights of the accused.

577 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, and after making reference to the forthcoming request in one of the Legal Representative's opening statements. See ICC-01/04-01/06-T-167-ENG ET at p 26 lines 24-25, p 27 lines 1-7; and ICC-01/04-01/06-T-107-ENG, p 57 lines 4-7, respectively.
578 *Gender Report Card 2009*, p 86-90.
579 ICC-01/04-01/06-2049.
580 ICC-01/04-01/06-2049, para 27.
581 ICC-01/04-01/06-2049, para 28, citing Article 74 and Regulation 55.
582 ICC-01/04-01/06-2049, para 28.
583 ICC-01/04-01/06-2054.

In mid-August 2009, both the Prosecution and the Defence appealed the majority decision.[584] Prior to deciding whether to grant the parties' request to appeal, on 27 August 2009, Trial Chamber I issued a clarification of its decision of 14 July.[585] Judges Odio Benito and Blattmann explained that the application by the Legal Representatives of Victims asking the Chamber to consider the additional legal characterisations of sexual slavery, inhuman treatment and cruel treatment based on the extensive testimony about sexual violence at trial triggered this procedure.[586] The majority qualified that it would consider additional facts and circumstances that 'build a procedural unity' with those in the charges and amendments 'and are established by the evidence at trial'.[587]

On 3 September 2009, Trial Chamber I granted the parties' request for leave to appeal the 14 July majority decision.[588] Following requests by both parties, on 2 October 2009, the Chamber then granted suspensive effect to the 14 July decision, adjourning the trial and presentation of the evidence, pending the resolution of the issue by the Appeals Chamber.[589] In mid-September, Legal Representatives of three groups of victims filed applications to participate in the parties' appeals.[590] On 20 October 2009, the Appeals Chamber granted the request of 27 victims to participate in the appeal.[591]

584 ICC-01/04-01/06-2073; ICC-01/04-01/06-2074.
585 ICC-01/04-01/06-2093.
586 ICC-01/04-01/06-1891, as cited in ICC-01/04-01/06-2093, para 7.
587 ICC-01/04-01/06-2205, para 88 (citing ICC-01/04-01/06-2107, para 41).
588 ICC-01/04-01/06-2107.
589 ICC-01/04-01/06-2143.
590 ICC-01/04-01/-06-2121-tENG; ICC-01/04-01/-06-2122-tENG; ICC-01/04-01/-06-2134-tENG.
591 ICC-01/04-01/06-2168. The Appeals Chamber included its reasons for its decision on victim participation in its 8 December 2009 decision on the appeal (ICC-01/04-01/06-2205, paras 28-36). The Appeals Chamber considered that all the victims had been recognised as victims in the case, and their personal interests were affected because all claimed to be children enlisted in a militia who had suffered sexual slavery, inhuman treatment and/or cruel treatment. Consequently, the Chamber found the applicants' participation was appropriate in the form of written submissions of their views and concerns. (ICC-01/04-01/0-2205, para 36.) Judge Song and Judge Van den Wyngaert issued a separate opinion on this issue in which they argued that the victims should have been granted an automatic right to participate in interlocutory appeals, and thus did not need to apply for participation again at this stage. In their view, '... the victims have a right to make their submissions ... because they participated in the proceedings that gave rise to the present appeals'. (Separate opinion of Judge Song and Judge Van den Wyngaert, ICC-01/04-01/06-2205.)

On **8 December 2009**, the Appeals Chamber delivered its decision,[592] reversing the Trial Chamber's decision and holding that it had erred in its interpretation of Regulation 55. As described below, 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'.[593]

In its decision, the Appeals Chamber addressed two issues on appeal, as determined by the Trial Chamber:

- Whether the majority erred in its interpretation of Regulation 55 as a severable provision that allows the Trial Chamber to change the legal characterisation of the charges based on facts and circumstances not contained in the charges;[594]
- Whether the majority erred in determining that the legal characterisation of facts may be subject to change to include the crimes of sexual slavery as a crime against humanity (Article 7(1)(g)) and as a war crime (Article 8(2)(xxii) or 8(2)(d)(vi)), inhuman treatment as a war crime (Article 8(2)(a)(ii) and cruel treatment as a war crime (Article 8(2)(c)(i)).[595]

First issue on appeal

Addressing the first issue on appeal, the Appeals Chamber held that the Trial Chamber erred as a matter of law when it interpreted Regulation 55 as contemplating two separate procedures where Regulation 55(2) and (3) allowed the Trial Chamber to change the legal characterisation of facts to include additional facts and circumstances not contained in the charges or amendments to the charges. In its view, the Trial Chamber's interpretation of this provision undermined the integrity of the Rome Statute's framework.

The Appeals Chamber held that the Trial Chamber's interpretation of Regulation 55, which allowed the Trial Chamber to change the legal characterisation 'based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial' was erroneous.[596] The Appeals Chamber specifically held that 'Regulation 55(2) and (3) may not be used to exceed the facts and circumstances described in the charges or any amendment thereto'.[597]

592 ICC-01/04-01/06-2205.
593 ICC-01/04-01/06-2205, para 1.
594 ICC-01/04-01/06-2107, para 41.
595 ICC-01/04-01/06-2107, para 41.
596 ICC-01/04-01/06-2205, para 88 (citing ICC-01/04-01/06-2107, para 41).
597 ICC-01/04-01/06-2205, para 88.

The Appeals Chamber found that the Trial Chamber's interpretation of Regulation 55 contradicted Articles 74(2) and 61(9) of the Rome Statute. Article 74(2) states, 'any decision [on the merits] shall not exceed the facts and circumstances described in the charges and any amendments to the charges'. In the Appeals Chamber's view, Article 74(2) precludes the Trial Chamber from introducing additional facts through a change in their legal characterisation. Rather, it found that 'the term "facts" refers to the factual allegations which *support each of the legal elements* of the crime charged.'[598] Citing the Statute's drafting history, the Appeals Chamber found that 'the purpose of [Article 74(2)] was to bind the Chamber to the factual allegations in the charges'.[599] It thus reasoned that for Regulation 55 to be consistent with Article 74(2), it must bind the Trial Chamber 'only to the facts and circumstances described in the charges or any amendment thereto'.[600] However, it also found that, 'it follows *a contrario* that article 74(2) of the Statute does not rule out a modification of the legal characterisation of the facts and circumstances'.[601]

The Appeals Chamber further held that additional facts and circumstances can only be added according to the procedure set forth in Article 61(9). This provision gives the Prosecutor, not the Trial Chamber, the power to introduce new facts and circumstances. Allowing the Trial Chamber to circumvent this procedure by using Regulation 55 would not only 'alter the fundamental scope of the trial' but would also 'be contrary to the distribution of powers under the Statute'.[602] Despite the Defence's urging, however, the Appeals Chamber declined to specify the limits of the Trial Chamber's ability to modify the legal characterisation of the facts. It did however state that while 'the particular circumstances of the case will have to be taken into account', 'the change in the re-characterisation must not lead to an unfair trial'.[603]

598 ICC-01/04-01/06-2205, para 90, n. 163 (emphasis added).
599 ICC-01/04-01/06-2205, para 91.
600 ICC-01/04-01/06-2205, para 93.
601 ICC-01/04-01/06-2205, para 93.
602 ICC-01/04-01/06-2205, para 94.
603 ICC-01/04-01/06-2205, para 100.

Second issue on appeal

Concerning the second issue on appeal — whether based on its interpretation of Regulation 55, the Trial Chamber erred in determining that the legal characterisations of the facts may be subject to change — the Appeals Chamber found that it would be premature to address whether the modification of the facts proposed by the Trial Chamber would constitute an impermissible amendment to the charges. In this regard, it described the Trial Chamber's explanations in the impugned decision and the ensuing clarification as 'extremely thin'.[604] It stated, 'the Trial Chamber neither provided any details as to the elements of the offenses the inclusion of which it contemplated, nor did it consider how these elements were covered by the facts and circumstances described in the charges'.[605] It thus concluded that to rule on the issue without more from the Trial Chamber would potentially harm the rights of the accused by depriving him of an avenue of review.

It is significant to note that the Appeals Chamber rejected arguments by the Defence that Regulation 55 contradicts general principles of international law, and that the modification of the legal characterisation of the facts without a formal amendment to the charges would violate the rights of the accused, as set forth in Article 67(1). Rather, it found that ensuring the rights of the accused, including through the use of additional safeguards depends 'on the circumstances of the case'.[606] Further, it declined to address the Defence's contention concerning the second issue on appeal, that the facts and circumstances did not establish the elements of the crimes of sexual slavery, inhuman and cruel treatment in this case.

Second submission by the Legal Representatives of Victims

On 15 December 2009, the Legal Representatives for Victims again submitted joint observations to the Trial Chamber, arguing that the Appeals Chamber's judgement had not closed the door to the Trial Chamber using Regulation 55 to modify the legal characterisation of the facts in the instant case. They noted that while the Appeals Chamber had found the Trial Chamber's interpretation of Regulation 55 to be erroneous, it had also declined to address the second issue on appeal, namely its application to the present case. Specifically, they argued that the facts relating to sexual slavery and inhuman and cruel treatment demonstrate the manner in which the crimes were committed, pursuant to Rule 145(1)(c)

604 ICC-01/04-01/06-2205, para 100.
605 ICC-01/04-01/06-2205, para 109.
606 ICC-01/04-01/06-2205, paras 85, 86.

of the Rules of Procedure and Evidence. Rule 145(1)(c) requires the Chamber to consider 'the circumstances of manner, time and location' in which the crimes were committed for the purpose of sentencing. In their view, the 'circumstances described in the charges' could be interpreted broadly to include 'circumstances of manner, time and location'.[607] In addition, they argued that the 'manner' in which the crimes were committed spoke to the gravity of the offences, and should thus also be considered as aggravating factors, pursuant to Rule 145(1)(b). They asserted that qualifying the crimes correctly was important in the struggle against impunity as it underscored the unacceptable nature of the crimes and as such constituted one form of satisfaction for the victims.

The Trial Chamber refused the application. In a decision handed down on 8 January 2010, it found that the manner in which the crimes were committed, while potentially relevant for purposes of determining aggravating factors for sentencing, was 'an entirely different task to that of modifying the legal characterisation of the facts as regards the charges the accused faces ...'[608] It found the factual allegations for the crimes of inhuman and cruel treatment were not sufficiently supported by the Pre-Trial Chamber's confirmation of charges decision, and that the facts related to sexual slavery did not appear at all. According to the Trial Chamber:

> It follows that these modifications to the legal characterisation of facts could only be proved by reference to evidence (i) not referred to by the Pre-Trial Chamber in the Decision on the Confirmation of Charges and (ii) not referred to by the Pre-Trial Chamber in that Decision as supporting the legal elements of the crimes charged. In the result, the proposed modifications would infringe the Appeals Chamber's interpretation of Regulation 55 of the Regulations of the Court.[609]

Decision on judicial questioning

In an attempt to further circumscribe the presentation of evidence that it considered to be outside of the scope of the charges, Lubanga's Defence filed a motion on 18 January 2010, focusing on the appropriateness of questions put by the judges to witnesses called by the Prosecutor, the Chamber, and participating victims.[610] Specifically, the Defence requested that the Chamber determine the principles applicable to questions posed by judges and outline the rights of the Defence with respect to those questions.[611] The Defence motion made clear reference to questions concerning sexual violence posed by Judge Odio Benito as the trigger to its request.

The Defence raised three areas of concern: the subject matter of the questions; the form of the questions; and, the rights of the Defence in relation to those questions. With respect to the subject matter of the questions, the Defence argued that judges may not raise, by way of questions, criminal acts which are outside the scope of the charges. With respect to the form of the questions, the Defence argued that judges must not ask leading questions and should show the utmost impartiality. The Defence specifically contended that 107 of 133 questions put by Judge Odio Benito during the prosecution phase concerned sexual violence and the presence of girls and women in the armed forces, thereby demonstrating the Judge's own opinion.[612] With respect to the rights of the Defence, the Defence asked for the opportunity to object to questions posed by the judges that might contravene any governing principles.

607 ICC-01/04-01/06-2211, para 21.
608 ICC-01/04-01/06-2223, para 32.
609 ICC-01/04-01/06-2223, para 37.
610 ICC-01/04-01/06-2252.
611 ICC-01/04-01/06-2252, para 3.
612 ICC-01/04-01/06-2252, para 7.

The Prosecution submitted that the Chamber should be allowed to ask leading questions that 'clarify or focus on matters of special interest'.[613] The Prosecution agreed with the Defence that the Parties should be allowed to object to the Chamber's questions. Noting that Chambers may elicit evidence relevant to sentencing at trial, the Prosecution disagreed with the Defence that the Chamber cannot ask questions that exceed the facts and circumstances of the charges. With respect to questions regarding sexual violence, the Prosecution noted that 'it has been the Prosecution's position from the outset that the harm suffered by the children as a result of their conscription and enlistment, including the sexual violence and cruel treatment, is relevant to the determination of the sentence and to reparations'.[614] The Legal Representatives for Victims argued that judicial questioning should not be limited in any way.[615]

On **18 March 2010**, Trial Chamber I issued its decision. With respect to the subject matter of the questions, Trial Chamber I recalled that it can hear evidence during the trial which is relevant to a possible sentencing stage, as well as to reparations. The Chamber also noted that it 'will inevitably receive evidence relating to other alleged criminality' in establishing the context and background of the facts and circumstances described in the charges.[616] It noted that there is no basis in the Rome Statutory 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', and that the Chamber 'is entitled to request the submission of all evidence that it considers necessary for the determination of the truth'.[617] The Chamber also recalled its previous holding that the judges can ask questions at any time they feel it appropriate, subject to ensuring both adequate protection of Defence rights and that the parties having an opportunity to explore any new issues to the extent that is necessary.[618]

Addressing the form of questioning, the Chamber held that the judges may use any form that they feel is appropriate, including leading questions. It further observed that the Defence had 'materially misdescribed the nature of the judicial questions to date'.[619] In contrast, the Chamber found that the questions had been framed in an open manner.

The Chamber rejected the Defence argument that parties and participants are entitled to challenge the form or content of judicial questions. In circumstances where a question is clearly put on the basis of a mistake, 'counsel should appropriately bring this to the attention of the judges'.[620] The Chamber concluded that it would 'continue to question witnesses in the manner it determines appropriate'.[621]

613 ICC-01/04-01/06-2265, para 10.
614 ICC-01/04-01/06-2265, para 8.
615 ICC-01/04-01/06-2264.
616 ICC-01/04-01/06-2360, para 40.
617 ICC-01/04-01/06-2360, para 41.
618 ICC-01/04-01/06-2360, para 42, citing ICC-01/04-01/06-T-104-ENG, p 37 line 25 *et seq*.
619 ICC-01/04-01/06-2360, para 47.
620 ICC-01/04-01/06-2360, para 48.
621 ICC-01/04-01/06-2360, para 49.

Restriction on witness testimony of gender-based crimes

Although the Trial Chamber affirmed its ability to question witnesses as it deemed appropriate, after the extensive litigation on Regulation 55, Trial Chamber I subsequently appeared to take a more restrictive approach to hearing questions on gender-based crimes posed by the Prosecution. As described below, on one occasion, the Chamber underscored that such restrictions on the subject matter of testimony are a result of the Prosecution's choice not to charge crimes of gender-based violence, and consequently that testimony at trial should be restricted to the charges.

On 29 April 2010, Jean Claude Chonga appeared as the thirteenth witness for the Defence. Chonga, a former UPC child soldier, gave testimony regarding the activities and use of child soldiers by UPC forces. However, the Chamber prevented him from testifying about sexual violence.

Under cross-examination by the Prosecution, Chonga stated that while FNI soldiers more frequently killed and attacked civilians, the UPC were more involved in raping women and young girls.[622] He specifically indicated upon further questioning by the Prosecution that he knew of one particular incident when UPC soldiers had raped young girls. At this point, Presiding Judge Fulford intervened, stating that 'the accused has been charged by the Prosecution with enlisting, conscribing or using child soldiers. Now, why are we investigating this?'[623] The Prosecution replied that the testimony would serve to corroborate the testimony of Witness 270, and further that it would serve to shed light on the environment in which UPC child soldiers were forced to operate.[624] Judge Fulford, however, rejected the Prosecution's arguments, stating,

> the Prosecution made a choice with the charges that were brought against this accused, which do not include allegations against him that he is responsible in some way criminally for the suggestion that young women were raped by UPC soldiers. At the very least, for reasons of trial economy, you will please move on to another subject.[625]

Thus, the Chamber prohibited the Prosecution from questioning Chonga any further on this matter, regarding the alleged sexual violence perpetrated by UPC soldiers as irrelevant. Chonga did later state of his own accord, however, that 'when the girls went for military service, they were married directly'.[626]

Witness testimony

The Lubanga trial recommenced on 7 January 2010 with the testimony of expert witness Radhika Coomaraswamy, as outlined below. From 10 January to 15 July 2010, Trial Chamber I, composed of Presiding Judge Fulford and Judges Odio Benito and Blattmann, heard 54 days of testimony by 25 witnesses: two witnesses, including one expert witness, called by the Prosecution who testified for a total of seven days; one Prosecution witness who was called for re-examination (four days); 18 witnesses called by the Defence who testified for a total of 33 days; three participating victims, two of whom were later recalled by the Defence, who testified for a total of nine days; and one former Prosecution witness who testified for one day. This witness was called by the Judges so that a fresh statement could be taken. The Chamber further heard two days of testimony by two experts called by the Chamber. Twelve days of hearings were devoted to procedural matters. Three female witnesses called by the Defence have testified before the Court: one of

622 ICC-01/04-01/06-T-276-Red-ENG, p 71 lines 2-4.
623 ICC-01/04-01/06-T-276-Red-ENG, p 71 lines 12-15.
624 ICC-01/04-01/06-T-276-Red-ENG, p 72 lines 1-7.
625 ICC-01/04-01/06-T-276-Red-ENG, p 72 lines 9-15.
626 ICC-01/04-01/06-T-276-Red-ENG, p 77, p 13-14.

whom testified exclusively in closed session (the 10th Defence witness), and two of whom were mothers of alleged former child soldiers (the 12th and 15th Defence witnesses, with the 15th Defence witness testifying by video-link).

Expert witnesses

Radhika Coomaraswamy testified as an expert on 7 January 2010. Coomaraswamy has served as Under-Secretary-General and Special Representative of the Secretary-General of the UN for Children and Armed Conflict since April 2006. From 1994 to 2003, she was the UN Special Rapporteur on Violence against Women.

On 4 January 2008, Coomaraswamy requested leave to submit written observations in the Lubanga case as *amicus curiae*. In a decision issued on 18 February 2009, Trial Chamber I limited her intervention to two issues: (1) the definition of 'conscripting or enlisting' children; and, given a child's potential vulnerability, approaches to distinguishing between the two; and, (2) the interpretation of the term 'using girls to participate actively in the hostilities'.[627] She submitted a report on 17 March 2008. Upon her request, on 19 May 2009, her role in the case changed from *amicus* to an expert witness; her testimony remained limited to the same two issues, as addressed in her report.

Coomaraswamy first underscored her role as 'an independent moral voice' for children in armed conflict 'within the UN and the wider international community',[628] and the fact that the Lubanga case was the first international case in history to define the crime related to conscripting, enlisting and using children in armed conflict. She emphasised the changing nature of war in the recent conflicts in Africa, characterised by the 'proliferation of small arms, [and] the recruitment of large numbers of children, both boys and girls'.[629] She stated, 'children often have multiple roles in these wars. There is no clear distinction between those on the front line and those in rear bases as they are drawn in traditional armies. It is important that the Court address the issue of how to protect children in such a context of multiple roles.'[630] She further argued that doubts about a child's age creates a due diligence duty on the part of the recruiter to verify it.

Addressing the two questions posed by the Chamber, Coomaraswamy urged caution when applying the distinction between conscription (compulsory) and enlistment (voluntary), as set forth in the written commentary of the Rome Conference, to the context of children and the changing nature of warfare. She asserted that the distinction 'should be a case-by-case determination based on the actual circumstances surrounding enlistment and the circumstances relating to the separation of the child from family and community'.[631]

With respect to the issue of using girls to actively participate in conflict, Coomaraswamy highlighted that large numbers of girls are being recruited in the recent African conflicts, in which they play multiple roles, including: combat, scouting and portering, as well as sexual slavery and forced marriage. She advised that 'the central abuse perpetrated against girls during their association with armed groups after they have been recruited or enlisted, regardless of whether or not they mostly engaged in direct combat functions during conflict' should not be ignored.[632]

To a question by the Office of Public Counsel for Victims (OPCV) regarding the extent of the use of girls for sexual purposes as both an objective and consequence of their recruitment, Coomaraswamy responded:

627 ICC-01/04-01/06-1175.
628 ICC-01/04-01/06-T-223-ENG, p 8 lines 16-17.
629 ICC-01/04-01/06-T-223-ENG, p 10 lines 6-7.
630 ICC-01/04-01/06-T-223-ENG, p 10 lines 9-12.
631 ICC-01/04-01/06-T-223-ENG, p 12 lines 19-21.
632 ICC-01/04-01/06-T-223-ENG, p 15 line 25, p 16 lines 1-2.

> there is not one objective when a child is recruited. They are forced to play multiple roles ... they will be combatants one minute. They may be, especially girls, sex slaves another minute. They may be scouts ... It is a different notion of an armed group. Though some are mainly combatants, others may be mainly sex slaves, but they have all been recruited and enlisted into this group, but those who are sex slaves will also at some point do some military work. So I think the blurring of these lines, that is why we are arguing for a case-by-case determination and an attention to the facts.[633]

In response to a question from the OPCV concerning the forms of sexual exploitation faced by girls and boys integrated into armed groups, Coomaraswamy responded:

> first they suffer rape. This happens to girls on a regular basis. Then they suffer forced marriage. They are often given as bush wives. Then some of them, such as Eva who I met in the DRC, was just kept in the camp, in the FDLR camp in a state of forced nudity. She had to be just nude whilst she is in the camp ... there would be sexual harassment also. So there is a whole host of sexual activities that do take place in some of the armed groups, and at the same time some of the girls that I met in Sierra Leone would – would have this and then the next minute they are sent in to combat, to fight and it is – I think for girls of [sic] particularly horrendous experience.[634]

633 ICC-01/04-01/06-T-223-ENG, p 30 lines 11-19.
634 ICC-01/04-01/06-T-223-ENG, p 30 line 25 to p 31 line 9.

Kambayi Bwatshia testified as an expert on Congolese names for the Chamber on 7 and 8 January 2010. On 30 June 2009, subsequent to a request from the Chamber on 5 June 2009,[635] Bwatshia filed a report on the use of Congolese names and other social conventions in the DRC.[636] In its request, the Chamber noted that 'the circumstances in which names are used in the DRC has emerged as a potentially important issue in the case', and noted that the Defence had highlighted differences in the names used by Prosecution witnesses, with the possible aim of using these discrepancies to cast doubt on their credibility.[637] Bwatshia appeared before the Court to answer questions arising from his report. He testified in particular about the processes by which new-borns are given names and about how these names are subject to change during the course of one's life. He also discussed dates of birth. Bwatshia explained that names in the DRC situate an individual *vis-à-vis* oneself and others: 'the name is given at birth and reflects the place, circumstances, events, or significant moments in the life of ... the family. The name sums up, or rather condenses and expresses what the person is or has become, what he or she aspires to become, or achieve.'[638]

As a consequence, many names may be added later in life. One issue in particular upon which Bwatshia was asked to shed some light was the question of name multiplicity and the resulting confusion. [639] Names in the DRC, especially in rural and oral traditions, are not static and are subject to change. Bwatshia explained that the gaps between written and customary law in the DRC, and the frequent use of nicknames – especially by vulnerable children, such as

635 ICC-01/04-01/06-1934.
636 The document was filed under number 2024 but does not appear to be part of the public record.
637 ICC-01/04-01/06-1934, para 12.
638 ICC-01/04-01/06-T-223-ENG, p 53 lines 4-8.
639 Bwatshia discussed at several points during his expert testimony the possibility of having multiple names. See eg ICC-01/04-01/06-T-223-ENG, p 55-58,70; ICC-01/04-01/06-T-224-ENG p 2-3.

street children, children born out of wedlock or abandoned children – also contribute to discrepancies in names.[640] He also gave evidence specifically on the patriarchal tradition of naming in the Ituri region.[641]

Testimony of three participating victims

In January 2010, for the first time at the ICC, three participating victims were given the opportunity to testify as witnesses in the proceedings. In a decision on the modalities of victim participation in 2008, the Appeals Chamber had ruled that victims did not have a right to provide evidence on the guilt or innocence of the accused. It stressed, however, that the Rules do not preclude the possibility of victims providing evidence at trial.[642] To that effect, the Appeals Chamber noted that the Trial Chamber has the authority under Article 69(3) to request the submission of all evidence that it considers necessary for the determination of the truth.[643] The Appeals Chamber subsequently established six requirements that need to be satisfied to permit victims to tender and examine evidence during trial. These requirements include a demonstration that the personal interests of the victims are affected by the proceedings, and consistency with the rights of the accused and a fair trial.[644]

As discussed in the *Gender Report Card 2009,*[645] in April 2009, the Legal Representative for Victims a/0225/06, a/0229/06 and a/0270/07 requested the opportunity to participate in person in the proceedings and give evidence under oath.[646] On 26 June 2009 Trial Chamber I granted all three applications of the participating victims to give evidence.[647] The Chamber initially requested the victims to provide evidence only in written form, but stated that after the submission of written evidence it would determine, 'if relevant, when and by whom any views and concerns are to be presented, bearing in mind the situation of the victims and the need to ensure that the trial of the accused is fair'.[648] The subsequent decision to also grant the victims the right to present their evidence in person does not appear to be part of the public record. All participating victims who testified were granted protective measures in the form of image and voice distortion. The victim/witnesses were questioned by the Legal Representatives for Victims, the Prosecution, the Defence, and in some cases also by the Chamber.

Witness 270 was the first to testify, on 12 January 2010. Witness 270 identified himself as a teacher and the head of a school that was seized by the UPC during clashes with the *Front de nationalistes et integrationnistes* (FNI) in the Mahagi territory in early January 2003.[649] He began by explaining the reasons for

640 ICC-01/04-01/06-T-223-ENG, p 58-59 ; ICC-01/04-01/06-T-224-ENG, p 11-12.
641 ICC-01/04-01/06-T-223-ENG, p 58-59; ICC-01/04-01/06-T-224-ENG, p 7-9.
642 ICC-01/04-01/06-1432, paras 93, 94. The issue of the double status of witness/participating victim was also discussed in *Prosecutor v. Katanga/Ngudjolo*, where a witness requested to become a participating victim in the proceedings. For a detailed discussion of the decisions relating to this issue, see the section on Victim Participation, below.
643 ICC-01/04-01/06-1432, para 93-99.
644 ICC-01/04-01/06-1432, para 4.
645 *Gender Report Card 2009*, p 104.
646 Requête soumise par le représentant légal des victimes représentées, sur le désir des victimes A/0225/06, A/0229/06 et A/270/07 de participer en personne à la procédure, 2 April 2009 (notified on 3 April 2009), ICC-01/04-01/06-1812-Conf as cited in ICC-01/04-01/06-2032-Anx, para 14. Note: this filing by the Legal Representative for Victims is not publicly available but a reference to the content of the document was made by the Trial Chamber in its decision of 26 June 2009.
647 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.
648 ICC-01/04-01/06-2032-Anx, para 40.
649 ICC-01/04-01/06-T-225-Red-ENG, p 51 lines 1-5.

his decision to come to the Court to testify. He explained that because the Mahagi territory was 'forgotten' and 'did not constitute the subject of a serious investigation by the [ICC] ... this was an opportunity for us to be able to say to the world what happened in Mahagi territory and to ask for reparations, if possible ...'[650]

Witness 270 said that the charges against Lubanga were insignificant as they did not reflect the murders, killings, sexual violence and sexual slavery that people had experienced in that region. He wanted to testify 'to state these elements of the truth'.[651] He testified that the UPC had abducted pupils of his school, but that none of the girls at his school, aged between 12 and 15, had been abducted. However, he did hear of many other institutes where girls had been forcibly enlisted.[652]

Witness 225 was a former boy soldier abducted by the UPC in February 2002. He testified about his capture, about the camps to which he was brought by the UPC and about the torture he suffered there. He also testified that there were girl soldiers in the camp, whom he thought might have been 13 or 14 years of age. He stated that most of the girls were wives of the commanders.[653] He described how the commanders had ordered him to find young beautiful girls and bring these girls to them.[654] He said that he did not know why they wanted him to find girls or what happened to the girls once they had been brought to the commanders.[655] Witness 225 testified that girls also participated as soldiers in the battle at Bogoro and that, while most of them were transporting ammunition, some also handled weapons.[656]

On account of the victim/witness' emotional stress, and at the request of his Legal Representative, Presiding Judge Fulford ruled that Witness 225 could meet with Witness 270, who is said to have been Witness 225's tutor. The meetings were to take place under the supervision of the Victims and Witnesses Unit (VWU) and with the stipulation that the evidence would not be discussed during these meetings and that the witnesses would speak in a language that the VWU understands.[657] Judge Fulford explained that, although they did not normally allow such social encounters between witnesses in the process of giving evidence, the Chamber was 'persuaded – not least because what we have seen in Court – that some measure of social exchange is necessary for the well-being of this witness'.[658] Judge Fulford denied a request for a meeting between Witness 229 and 270, but stated that were Witness 229 to experience similar emotional distress, the same conditions would apply to him.[659]

Both Witness 270 and Witness 225 were recalled at the request of the Defence following the presentation of documents by a Victims' Legal Representative and the Prosecution, which allowed the Defence to question these witnesses on issues that had 'self-evidently arisen' during the questioning of Witness 229.[660] This testimony took place in closed session.

650 ICC-01/04-01/06-T-225-Red-ENG, p 31 lines 5, 6, 9-14.
651 ICC-01/04-01/06-T-225-Red-ENG, p 31 lines 17.
652 ICC-01/04-01/06-T-226-Red-ENG, p 64 lines 5-8. Note: This transcript is also identified as ICC-01/04-01/06-T-205-Red-ENG.
653 ICC-01/04-01/06-T-227-Red-ENG, p 61 lines 8-10.
654 ICC-01/04-01/06-T-228-Red-ENG, p 7 lines 3-7.
655 ICC-01/04-01/06-T-228-Red-ENG, p 7 lines 9-12, p 8 line 7.
656 ICC-01/04-01/06-T-228-Red-ENG, p 22 lines 20-25, p 23 lines 3-4.
657 ICC-01/04-01/06-T-228-Red-ENG, p 61 lines 22-25, p 62 lines 1-10.
658 ICC-01/04-01/06-T-228-Red-ENG, p 61 lines 19-20.
659 ICC-01/04-01/06-T-228-Red-ENG, p 62 lines 11-19.
660 'Two Victims Called Back at Defence's Bidding', *Lubangatrial.org*, 25 January 2010, available at <http://www.lubangatrial.org/2010/01/25/two-victims-called-back-at-defence's-bidding/>, last visited on 25 October 2010. Note: this decision appears to have been taken in closed session.

Witness 229 was a former child soldier who was abducted by the UPC on his way home from school and brought to a camp near the town of Bule. He testified about his abduction and training, his involvement in the Bunia and Mongalu battles and about how he fled the UPC to return home. He testified that there were girls in the camp but that he could not tell their age.[661] Upon further questions posed by the Chamber about the role of the girls in the camp, he described how most girls did not wear military uniforms and were 'partners' of soldiers.[662] Witness 229 had only seen two of the girls fighting in battles.[663] He testified that the UPC never asked his age and that recruits were punished regardless of their age or gender.[664] He testified that both girls and boys were given cannabis to give them courage in the fighting.[665]

Witness 229 explained that, upon returning home after having escaped the UPC he found that his parents had been taken away by militiamen of the FNI. He stated that he still does not know whether they are alive.[666] He explained that he had come to the Court to ask for help in resuming his education.[667]

661 ICC-01/04-01/06-T-230-Red-ENG, p 42 lines 2-5.
662 ICC-01/04-01/06-T-234-Red-ENG, p 11 lines 13-22.
663 ICC-01/04-01/06-T-234-Red-ENG, p 11 line 25.
664 ICC-01/04-01/06-T-230-Red-ENG, p 51 lines 2-5.
665 ICC-01/04-01/06-T-230-Red-ENG, p 60 lines 22-25, p 61 line 1.
666 ICC-01/04-01/06-T-230-Red-ENG, p 39 lines 14-19.
667 ICC-01/04-01/06-T-230-Red-ENG, p 46 line 10.

Intermediaries

Role of intermediaries in the Prosecution's investigations

As expressed by Trial Chamber I, 'the precise role of the intermediaries (together with the manner in which they discharged their functions) has become an issue of major importance in [the Lubanga] trial'.[668] The Court has consistently recognised the fundamental role played by intermediaries in assisting the Prosecution as well as other bodies of the Court, including the OPCV, and the Victim Participation and Reparations Section (VPRS) within the Registry. Intermediaries have facilitated the Prosecution's contact with witnesses and the identification of incriminating material and exculpatory evidence.[669] The Prosecution's reliance on intermediaries working in the field was clearly illustrated in the Lubanga case, in which it used seven intermediaries to contact approximately half of the 26 witnesses that testified against the accused.[670] These seven intermediaries were among 23 individuals or organisations that contacted or introduced potential incriminating witnesses or individuals on behalf of the Prosecution.[671]

Given their importance to the Prosecution's 'further and ongoing investigations',[672] and the potential risks to their security 'on account of the activities of the Court',[673] Trial Chambers I and II both ordered the redactions of intermediaries' names and identifying information in the Lubanga and Katanga/Ngudjolo trials, respectively. Although the Chambers differed significantly in their underlying approach to the issue, pursuant to Regulation 42, each

668 ICC-01/04-01/06-2434-Red2, para 135.
669 ICC-01/04-01/06-2434-Red2, para 3.
670 ICC-01/04-01/06-2434-Red2, para 2.
671 ICC-01/04-01/06-2434-Red2, para 3.
672 Rule 81(2).
673 Rule 81(4); ICC-01/04-01/07-475, paras 1-2; ICC-01/04-01/06-2582, p 21, n.17.

consistently maintained the protective measures ordered by the other.[674] (See section on **Divergent approaches**, below).

During the preparatory phase leading up to the trial, Trial Chamber I initially found that for the purpose of disclosure, intermediaries' identities were irrelevant to the case. Yet, upon the commencement of the Prosecution case, its use of intermediaries emerged as a live issue. The role of three intermediaries in particular—143, 316 and 321—was called into question by the statements of those witnesses with whom they had contact.

On 28 January 2009, the Prosecution's first witness[675] recanted his testimony, stating 'what he had said that morning did not come from him but from someone else'.[676] He went on to state that his earlier testimony about being abducted by UPC soldiers on his way home from school was not true, and that he had been given an ID and an address by an NGO for troubled children, which promised him clothing and other things.[677] He indicated that he had not gone to a training camp, but had been taught to say that.

The Prosecution requested a break, and then additional time to investigate the security of the witness. Recommencing his testimony two weeks later, the witness testified about his abduction into the UPC army, and the time he spent in training camps and on the battlefield. He also mentioned his contact with intermediary 321. His final position was that of his original account, 'and that he had not been persuaded to tell lies'.[678]

After the testimony of this witness, during an *ex parte* status conference on 5 March, the Defence requested authorisation 'to explore the possibility that certain people have participated in preparing false evidence for alleged former child soldiers and in this case that [intermediary 143] helped the witness to invent a false story or a false identity or both'.[679] However, the Chamber found that no evidentiary basis had as yet been established to support this 'speculative' line of questioning, nor the disclosure of the intermediary's identity, which would expose him to security risks.

Yet, this was not an isolated incident. On 16 June 2009, another of the Prosecution's witnesses[680] made allegations against intermediary 316. He stated:

> My name is REDACTED. This is contrary to the statement given to the OTP and that's why I wanted to make the statement and explain why I came here. That's why I met the OTP's intermediary who told me the following. He said, You have to change your name, you have to change your identity. Don't give the true story that took place; in other words, there was a story that they were telling to the witnesses ... Well, instead of letting me tell the true story of what took place and instead of letting me describe all of the events that I lived through, they are inventing statements in order to manipulate the investigation.[681]

674 See, eg ICC-01/04-01/06-2190-Red, para. 25; ICC-01/04-01/06-2179-Red2, para 18; ICC-01/04-01/07-1817, para 19.
675 Prosecution Witness 298.
676 ICC-01/04-01/06-2434-Red2, para 7, citing ICC-01/04-01/06-T-110-CONF-ENG, p 40 line 10.
677 ICC-01/04-01/06-2434-Red2, para 7.
678 ICC-01/04-01/06-2434-Red2, paras 8-10.
679 ICC-01/04-01/06-2434-Red2, para 16, citing ICC-01/04-01/06-T-146-CONF-EXP-ENG, p 3 lines 11-18.
680 Prosecution Witness 15.
681 ICC-01/04-01/06-2434-Red2, para 21, citing ICC-01/04-01/06-T-192-CONF-ENG, p 6 lines 7-18.

On 27 January 2010, the Defence opened its case on this very issue: the fabrication of evidence and its implications regarding the Defence's right to a fair trial.[682] It stated:

> First of all, the Defence intend to prove to the Chamber that many of the Prosecution's witnesses came before the Court and testified knowing that they would be giving inaccurate information to the Court. The Defence also intend to show that some of this false testimony was fabricated with the assistance of intermediaries who collaborated with the Office of the Prosecutor.
>
> ...
>
> Today, the Defence intend to provide the Chamber with the results of our inquiries, in particular, we intend to demonstrate that all the individuals who were presented as child soldiers, as well as their parents in some cases, deliberately lied before this Court. The Defence intend to show that six of them were never child soldiers. The seventh lied about his age and the conditions in which he enrolled and the eighth never belonged to the UPC.
>
> Furthermore, the Defence intends to show that the witnesses were encouraged to lie on a number of very specific points. In particular, their name, the names of their parents. The schools that they said that they had attended, and this was done so it would be more difficult to verify the information relating to them. They were encouraged to lie about their age and the fact that, allegedly, they belonged to an armed group so as to qualify for the charges against Mr Lubanga. The fact that their parents were dead, where in actual fact they apparently are still alive, the fact that they were subjected to cruel treatment, and that they were abducted, and this was done to make their accounts even more dramatic. They were also asked to claim that they could not read and that they did not remember specific details so as to make any possible verifications or comparisons extremely sensitive and difficult to carry out. In our view, this situation is of the most grave concern.[683]

The Defence then called a series of witnesses to demonstrate that the false testimony was fabricated. One Defence witness[684] stated that intermediary 321 had said to him, 'you must ask the child to accept that he was a child soldier, and you must say that the child's mother is deceased. With a view to getting money, you need to use all the means at your disposal.'[685] He also stated that intermediary 321 had given him a false name. Regarding intermediary 321, he stated:

> When he arrived at the family, he explained to everyone. He talked about money. He told them that they would be given money. He said that the child had to claim to have served as a child soldier in order to get money. He went all over the town recruiting children, and he would tell you what you had to say. He told the children to claim that they had served as child soldiers, but I knew that the child had never been a child soldier.[686]

682 The other major line of the Defence case relates to Lubanga's actual involvement in actively recruiting child soldiers. See ICC-01/04-01/06-T-236-Red-ENG, p 24, lines 10-25.

683 ICC-01/04-01/06-2434-Red2, para 25, citing ICC-01/04-01/06-T-236-CONF-ENG ET, p 20 line 19 to p 22 line 18.

684 Defence Witness 3, Joseph Maki Dhera.

685 ICC-01/04-01/06-2434-Red2, para 27, citing ICC-01/04-01/06-T-239-CONF-ENG ET, p 31 lines 19-22.

686 ICC-01/04-01/06-2434-Red2, para 28, citing ICC-01/04-01/06-T-239-CONF-ENG, p 34 lines 2-4.

Finally, the Defence witness said that 'many of those he spoke with knew he was lying: it was a plan that "we" had agreed on and "we" were told what to say'.[687]

As described by the Chamber, on 9 February, a second Defence witness[688] said that intermediary 321:

> told him that if he agreed to say that he had been a child soldier, he could earn money and would be able to obtain training in any profession he chose ... that intermediary 321 told him and a number of other young people that they would be meeting with officials and that they must tell these officials that they were child soldiers and that Thomas Lubanga had forcibly enlisted them into the army. Intermediary 321 knew that none of these young people had been child soldiers, but he assigned some of them false names, told them to lie about their ages, and told them to talk to the officials about the battles in which they should claim to have fought. The witness said that intermediary 321 gave him a false name and that REDACTED obtained a student identity card in this false name; everything else on the card, including the witness's age and place of birth, was also false.[689]

On the same day, the Prosecution disclosed to the Defence an interview with intermediary 321, approximately 60 pages in length, conducted on 21 and 22 of January 2010. The interview concerned the individuals that the intermediary had put in touch with the Prosecution. The following day, 10 February 2010, the Chamber determined that 'what had once been unsubstantiated allegations about the behaviour of the intermediaries was now supported by the evidence, although the judges had not formed any conclusions on that evidence'.[690]

Beginning on 8 March 2010, another Defence witness[691] testified that 'he had never been a child soldier, but that he met extensively with intermediary 316 in order to plan false statements concerning his own alleged enrolment by Thomas Lubanga in the UPC's armed forces, as well as the enrolment of other children he knew'.[692] As summarised by the Chamber, the Defence witness testified that the preparations involved intermediary 316:

> teaching the witness the names of certain army members. The witness alleged that whilst he was being interviewed by OTP investigators in Kampala, intermediary 316 was responsible for taking him to and from the interviews. He and intermediary 316 also stayed in the same hotel in Kampala, and every night after his interviews, intermediary 316 told the witness what questions would be asked of him the next day and instructed him on how to answer. In the mornings before the interviews, intermediary 316 would refresh the witness's memory concerning the lies he was to tell in that day's interview. When asked why he agreed to lie to investigators, the witness responded that intermediary 316 gave him money. The witness also testified that intermediary 316 drafted a fake threatening letter, falsely signing it in Dieudonné Mbuna's name, and told the witness to give the letter to an investigator so that ICC officials would help him to move out of REDACTED.[693]

687 ICC-01/04-01/06-2434-Red2, para 29, citing ICC-01/04-01/06-T-239-CONF-ENG, p 36 line 19 to p 37 line 7.
688 Defence Witness 4, Claude Ndjango Nyeke.
689 ICC-01/04-01/06-2434-Red2, para 36, citing ICC-01/04-01/06-T-242-CONF-ENG, p 6 line 22 to p 7 line 1 and p 21, line 9 to p 22, line 8; ICC-01/04-01/06-T-243-CONF-ENG, p 14, lines 4-7; ICC-01/04-01/06-T-245-CONF-ENG, p 57 lines 21-22 and p 58 lines 8-18.
690 ICC-01/04-01/06-2434-Red2, para. 37, citing ICC-01/04-01/06-T-243-CONF, p 1 line 13 to p 3 line 13 and p 5 lines 3-13.
691 Defence Witness 16.
692 ICC-01/04-01/06-2434-Red2, para 38, citing ICC-01/04-01/06-T-256-CONF-ENG, p 12 line 2 to p 14 line 17.
693 ICC-01/04-01/06-2434-Red2, para 38, citing ICC-01/04-01/06-T-256-CONF-ENG, p 15 line 22 to p 16 line 8; p 27, lines 17-20; p 28, lines 8-11; p 16, lines 9-16; ICC-01/04-01/06-T-257-CONF-ENG, p 29 line 21 to p 32 line 13; ICC-01/04-01/06-T-258-CONF-ENG, p 12 lines 7-13.

On 18 March 2010, one of the Prosecution witnesses[694] was recalled. He testified that intermediary 316 'instructed him to lie about his true identity and the identity of his family in order to make it very difficult for the Prosecutor to be able to conduct investigations into his origins and past. He confirmed that his statement to the OTP investigators in 2005 contains some lies.'[695] His testimony is described by the Chamber:

> In the mornings before he met with the investigators, the witness would first meet with intermediary 316 who told him everything that he was supposed to say; intermediary 316 gave the witness the general idea and the witness was allowed to add a few details. REDACTED. The witness read a newspaper account, and he had to repeat the things that he had read in the newspaper to the investigator. The witness testified that during a meeting with OTP investigator REDACTED in a hotel room in Kampala in 2005, he was alone for a while on the balcony with intermediary 316, who spoke to him in Lingala and told him that he should only talk to the investigator about the things that he had read beforehand in a document prepared by intermediary 316. The witness testified that there were other intermediaries who were in touch with witnesses, and that these intermediaries knew each other and collaborated.[696]

694 Prosecution Witness 15.

695 ICC-01/04-01/06-2434-Red2, para 39 citing ICC-01/04-01/06-T-265-CONF-Red-ENG, p 22 lines 15-25.

696 ICC-01/04-01/06-2434-Red2, para 39 citing ICC-01/04-01/06-T-265-CONF-Red-ENG, p 22 lines 14-18 and p 9 lines 12-14 and p 4 line 9 to p 5 line 24 and p 51 lines 23-25.

In response to questioning by the Defence outside of court, another Prosecution witness[697] said of intermediary 321: 'he said that if we testify against Thomas Lubanga, and if he is condemned we will have money'.[698]

The Defence also called the parents of alleged child soldiers as witnesses, further seeking to establish that Prosecution witnesses gave false testimony. One was of particular importance to the Defence, given that she was the alleged mother of a Prosecution witness who had testified that he was certain his mother was dead.[699] Significantly, two of these witnesses,[700] mothers of alleged child soldiers, presented as very vulnerable. Both of them testified in closed session. One testified via video link from the Ituri region of the DRC, as the Defence had argued that travelling to The Hague would be a traumatic experience for her.[701] Judge Fulford issued specific instructions to the parties regarding the sensitive treatment of each witness.[702]

In addition to the direct testimony related to the manipulation of witnesses by intermediaries, the Trial Chamber recalled in a decision on Intermediaries (discussed in greater detail below) several instances of discrepancies in the testimonies of Prosecution witnesses called as

697 Prosecution Witness 297.

698 ICC-01/04-01/06-2434-Red2, para 75 citing ICC-01/04-01/06-2315-Conf, para 20.

699 'Lubanga Witness Testifies From Congo Via Video Link', *Lubangatrial.org*, 30 March 2010, available at <http://www.lubangatrial.org/2010/03/30/lubanga-witness-testifies-from-congo-via-video-link/>, last visited on 25 October 2010.

700 Defence Witnesses 12, 15.

701 The Victims' Legal Representatives argued that permitting testimony via video link should be based on the witness' inability to travel, rather than her alleged vulnerability. 'Lubanga Witness Testifies From Congo Via Video Link', *Lubangatrial.org*, 30 March 2010

702 See Section on Protection for a more detailed discussion on the treatment of vulnerable witnesses in the proceedings.

child soldiers,[703] and contradictions between the testimonies of Prosecution witnesses and that of Defence witnesses.[704]

On 5 May 2010, the Defence informed the Chamber that it intended to file an application on abuse of process.[705]

The Defence case

As outlined above, a central argument of the Defence case is the alleged improprieties in the role of intermediaries in the Prosecution's case, including, but not limited to, their manipulation of witnesses. According to the Defence, witnesses who claim to be former child soldiers have benefited from various protection programs, providing help to them and their families, including schooling, health and finance – creating an incentive for the witnesses to lie.[706]

More specifically, the Defence has asserted that the Prosecution delegated the task of identifying potential witnesses to intermediaries who were at the same time employed by private organisations that provide assistance and legal representation to participating victims.[707] Both in this context and with respect to the services provided to alleged child soldiers, the Defence has raised concerns regarding financial impropriety on the part of intermediaries.[708] The Defence further questioned 'the intermediaries' commitment to the integrity of the judicial process'[709] given that they were simultaneously dependent on individuals who have 'a direct interest in the conviction of the accused'.[710]

The Prosecution has argued that specific allegations have arisen only with respect to two intermediaries, namely 316 and 321, and that there was no evidence 'to impugn the integrity of intermediaries on a wholesale basis'.[711] Victims' Legal Representatives have also objected to the Defence's allegations, asserting that the individuals in question 'never worked in any capacity for the legal representatives'.[712]

While recognising the potential security risks to intermediaries and 'possible adverse implications as regards their future usefulness', Trial Chamber I, in its decision on intermediaries issued on **31 May 2010**, reversed its prior ruling and found 'a real basis for concern as to the system employed by the prosecution for identifying potential witnesses'.[713] It found that the evidence suggested that the intermediaries had an extensive opportunity to influence witnesses, and did so. It thus concluded that it would be unfair to deny the Defence the opportunity to investigate the issue where the evidence so justified.[714]

The Chamber ordered the Prosecution to call intermediaries 321 and 316 to testify regarding: 'the criticisms that have been levelled against them'; the conflicts in the evidence that emerged during trial; and, contacts between intermediaries.[715] It further ordered the Prosecution to disclose intermediary 143's name and other necessary identifying information to the Defence upon implementation of

703 Although similar contradictions in witness testimony have not arisen in the context of the Katanga/Ngudjolo case, Trial Chamber II held that the role of intermediary 143 in the Lubanga case 'cannot be artificially dissociated from his role in the Katanga/Ngudjolo case'. ICC-01/04-01/07-T-150-Red-ENG, p 8 lines 2-4.
704 ICC-01/04-01/06-2434-Red2, paras 43-45, 47.
705 ICC-01/04-01/06-2434-Red2, para 54, citing an email communication.
706 ICC-01/04-01/06-2315-Conf, para 27, as cited in ICC-01/04-01/06-2434-Red2 para 79 and n 202.
707 ICC-01/04-01/06-2364-Conf, para 5, as cited in ICC-01/04-01/06-2434-Red2, para 96.
708 ICC-01/04-01/06-2364-Conf, paras 12-14 as cited ICC-01/04-01/06-2434-Red2, paras 101, 103; ICC-01/04-01/06-2315-Conf, paras 23, 27, as cited in ICC-01/04-01/06-2434-Red2, paras 77-79.
709 ICC-01/04-01/06-2315-Conf, para 32, as cited in ICC-01/04-01/06-2434-Red2 para 82.
710 ICC-01/04-01/06-2364-Conf, paras 20-25, as cited in ICC-01/04-01/06-2434-Red2, paras 108-111.
711 ICC-01/04-01/06-2310-Red, para 23.
712 See, ICC-01/04-01/06-2434-Red2, paras 118-125.
713 ICC-01/04-01/06-2434-Red2, para 138.
714 ICC-01/04-01/06-2434-Red2, para138.
715 ICC-01/04-01/06-2434-Red2, para 141.

the necessary security measures. It also ordered the Prosecution to call an appropriate representative from the Office of the Prosecutor related to the abuse of process allegation; and, to furnish a schedule of contacts between the 23 intermediaries, between the intermediaries and witnesses, and between the witnesses.[716] On 2 June 2010, the Chamber denied the Prosecution leave to appeal this decision. [717] The Prosecution had sought leave to appeal solely with respect to the order to disclose the identity of intermediary 143.

The Prosecution's subsequent failure to implement the Trial Chamber's orders to disclose the identity of intermediary 143 led to a stay of proceedings.[718] (See section on **Stay of proceedings**, below). Thus, what had once been described as 'a confined, but significant, issue'[719] — the role of the intermediaries — ultimately resulted in a stay of the entire process.

The Prosecution has consistently maintained that the disclosure of intermediaries' identities, especially intermediary 143, would cause severe prejudice to its investigations, and would pose a serious security threat to the intermediaries. For example, the Prosecution stated:

> Beyond the obligation to protect these intermediaries and witnesses [who may have interacted with them], it is essential to the success of the ICC that intermediaries not be revealed unless there is the most pressing reason. The Prosecutor's mandate to investigate and prosecute the world's most serious offences cannot succeed without the use of trusted and reliable intermediaries; any action by the Court that chills the ability of the Prosecution to protect their identities and securities will chill the Prosecution's ability to obtain assistance by other intermediaries in future cases.[720]

In contrast, the Defence has underscored Trial Chamber II's distinct underlying approach: that the Defence should be provided access to intermediaries' identities as a matter of principle.[721] (See section on **Divergent approaches**, below). It has also criticised the Prosecution for the late disclosure of materials related to this issue, hampering its ability to question witnesses about the contents.[722]

716 ICC-01/04-01/06-2434-Red2, para 150. The schedule of intermediaries and witnesses was first ordered in an email to the Prosecution and addressed at a hearing on 8 February 2010. See, ICC-01/04-01/06-T-240-CONF-ENG, p 2 lines 3-22, as cited in ICC-01/04-01/06-2434-Red2, paras 30, 34.

717 ICC-01/04-01/06-2463.

718 ICC-01/04-01/06-2517-Red, para 31.

719 ICC-01/04-01/06-2517-Red, para 20.

720 ICC-01/04-01/06-2310-Red, p 4-5, as cited in ICC-01/04-01/06-2434-Red2, para 54. The identities of intermediaries 321 and 316 were inadvertently revealed to the Defence during the Prosecution case.

721 ICC-01/04-01/07-1817, para 16, as cited in ICC-01/04-01/06-2315-Conf, para 3. The public redacted version of this document became available on 25 March 2010, ICC-01/04-01/06-2315-Red.

722 ICC-01/04-01/06-2315-Conf, paras 37-39. The public redacted version of this document became available on 25 March 2010, ICC-01/04-01/06-2315-Red; see also ICC-01/04-01/06-2416-Conf.

Office of the Prosecutor representative: Field Operations Liaison Coordinator

As noted above, in its decision on intermediaries, Trial Chamber I ordered the Prosecution to 'call the appropriate representative (*viz* the lead investigator) following the defence witnesses relevant to the abuse of process application'.[723] From 14 June to 17 June 2010, the Prosecution called a **Field Operations Liaison Coordinator** from the Office of the Prosecutor working in Bunia as a witness. It is significant to note that the Prosecution did not call the lead investigator to testify on this occasion as specifically instructed by the Chamber, but rather the Field Operations Liaison Coordinator, who works in the field upon the instructions of the investigators.

The Field Operations Liaison Coordinator testified concerning the contact he had with four intermediaries, referred to as Mr X, Mr Y, Mr Z and intermediary 143. He testified at length concerning his role in providing intermediaries 'with the material and logistical support for the accomplishment of the tasks which are entrusted to them by the investigators'.[724] For example, he effectuated payments to intermediaries for expenses related to travel and accommodation and for security-related relocations. He indicated that all disbursements were made only with the approval of his supervisors in The Hague.

The Field Operations Liaison Coordinator further explained that his role was to screen potential witnesses and then refer them to investigators who would then interview them at length. In this capacity, he also engaged with intermediaries, who put him into contact with the children. He testified that, 'all these children were being assisted by [an intermediary's] NGO, which is well-known in Bunia'.[725] He stated that he was unaware of the criteria used for selecting the children, which was decided by the investigators. He noted that on one occasion there was a discrepancy between their lists, that the intermediary's list was longer than his. On this occasion, his superiors agreed on a final list in discussion with the intermediary.

Regarding the content of the investigators' interviews with potential witnesses, the witness stated, 'it was not my remit to know what type of questions the investigators were going to put to them, and the substance of their meeting was unknown to me. I did not know anything about it'.[726] In this regard, he was responsible for organising the transportation of the children and their guardians, and for providing financial and logistical support to intermediaries who put these children in contact with Prosecution staff. Specifically, he provided the family with 'the money required for the return bus journey and possibly some airtime for their telephone so that we might remain in contact and so that I might monitor their movements until they reached their destination'.[727] He testified that the families were not provided with compensation for their time during the two-to-three day interview process.

The witness further explained that during the screening process, he asked questions that were prepared by his superiors, and that he did not believe that the intermediaries had access to the content of the questionnaire. He stated that child soldiers who testified for the Prosecution were never advised, or given any incentives, to provide incriminating evidence. He testified that on no occasion did any children indicate that they had lied in their answers to the questions, nor did the intermediaries mention any fabrication of the truth. He stated, 'no child told me that he was preparing to tell lies to the investigators'.[728]

723 ICC-01/04-01/06-2434-Red2, para 150.
724 ICC-01/04-01/06-T-302-Red-ENG, pa 23 lines 23-25.
725 ICC-01/04-01/06-T-301-Red-ENG, p 76 lines 6-7.
726 ICC-01/04-01/06-T-301-Red-ENG, p 26 lines 13-16.
727 ICC-01/04-01/06-T-301-Red-ENG, p 29 lines 4-8.
728 ICC-01/04-01/06-T-301-Red-ENG, p 27 lines 11-12.

Significantly, he testified that it was his responsibility to verify the children's identity. He stated that the children regularly informed him that their identification documents were lost or burnt during the conflict. When questioned by the Defence as to whether he had verified the absence of identification papers, the witness testified that he did so by asking the intermediary about it. He stated:

> Mr X indeed stated that the children did not have any identification papers. But he knew them, he knew where they came from, he knew about their past, he knew their families and it was on the basis of what Mr X told us – it was on the basis of his replies that we carried out our work.[729]

When further questioned about the fact that the children had spent a number of years in a centre managed by the intermediary, Mr X, the Field Operations Liaison Coordinator responded that he had not been specifically instructed to request documentation.[730]

Also during cross-examination, the Defence underscored that during the screening process, the children 'did not understand that they were addressing a judicial institution'.[731] The Field Operations Liaison Coordinator explained that upon instruction by his superiors, he had told the children and their parents or guardians that he worked for an NGO, 'somebody who was seeking to ascertain their past as child soldiers'.[732] He did not tell them that he worked for the Office of the Prosecutor of the ICC. Similarly, he affirmed upon questioning that prior to their interviews by Prosecution investigators neither the children nor their parents or guardians were aware that they would be meeting with ICC staff. He stated:

> When they left to meet the colleagues from the OTP, what the parents knew was that they were going to meet people who were interested in their situation; their past situation as child soldiers. This is what the parents and the children were aware of. I cannot tell you whether they knew anything more than that, but they did know that detail. That is what we had told them.[733]

Stay of the proceedings for abuse of process

Given the Chamber's order that the Prosecution disclose intermediary 143's identity to the Defence, throughout June 2010, the Prosecution, the VWU and intermediary 143 entered into discussions regarding protective measures. On 16 June 2010 in the course of the closed-session witness testimony with the Prosecution's Field Operations Liaison Coordinator, intermediary 143's name (or a name very close to it) was inadvertently revealed in court.[734] Intermediary 143 was informed of this incident but, as stated by the Chamber, did not express any increased security concerns.[735]

On 6 July 2010, the VWU informed Trial Chamber I that after weeks of discussion, intermediary 143 was no longer satisfied with the proposed protective measures, and that 'a significant financial component had been raised'.[736] At issue was the possible need to divide the cross-examination of intermediary 321 into two stages, in order to wait approximately two weeks for the implementation of protective measures for 143—a plan that the Defence found 'unworkable'.[737] After hearing submissions from both parties, the Chamber ordered the limited disclosure of intermediary 143's identity on a strictly confidential basis to the core Defence

729 ICC-01/04-01/06-T-301-Red-ENG, p 82 lines 11-14.
730 ICC-01/04-01/07-T-301-Red-ENG, p 83 lines 19-25, p 84 lines 1-5.
731 ICC-01/04-01/06-T-301-Red-ENG, p 86 lines 18-20.
732 ICC-01/04-01/06-T-301-Red-ENG, p 86 lines 23-24.
733 ICC-01/04-01/06-T-301-Red-ENG, p 87 lines 7-13.
734 ICC-01/04-01/06-2517-Red, para 4.
735 ICC-01/04-01/06-2517-Red, para 5.
736 ICC-01/04-01/06-2517-Red, para 6.
737 ICC-01/04-01/06-2517-Red, para 10.

team, the accused, and the Defence's Resource Person based in the Democratic Republic of the Congo.[738] The Chamber imposed an 'absolute embargo' on the communication of this information outside of the immediate Defence team, and ordered that no investigative steps be taken in relation to the information.[739]

The next day, 7 July, the Prosecution indicated its intention to file for leave to appeal the Chamber's order on disclosure. The Chamber indicated that it would only suspend the order if there was evidence 'that it would enhance or increase the security risk for 143', and not for the purpose of the Prosecution's application for leave to appeal.[740] The Chamber thus ordered at 10:30 am that disclosure was to be effected within one half-hour.[741]

The Prosecution informed the Chamber by email that afternoon that it had not disclosed intermediary 143's identity and that it requested the issue to be re-examined.[742] During the afternoon session on 7 July, the Prosecution requested that the Chamber use its 'inherent powers' to reconsider the disclosure order,[743] as no such procedure is contemplated by the Statute. It stressed the potential risks to the safety of intermediary 143 as he would be perceived as a traitor by the Hema community.[744] The Prosecution also raised concerns about the Defence's Resource Person in the DRC. Noting no evidence of misbehaviour in relation to any member of the Defence team, the Chamber found that any allegation that the Defence was likely to deliberately or inadvertently disclose the intermediary's identity in defiance of a direct order by the Chamber was unsubstantiated.[745]

738 ICC-01/04-01/06-2517-Red, para 8.
739 ICC-01/04-01/06-2517-Red, para 8.
740 ICC-01/04-01/06-2517-Red, para 10.
741 ICC-01/04-01/06-T-312-ENG, p 15 line 23-25.
742 ICC-01/04-01/06-T-312-ENG, p 16 line 1-5.
743 ICC-01/04-01/06-T-312-ENG, p 3 line 2-17.
744 ICC-01/04-01/06-T-312-ENG, p 5 line 23 to p 6, line 3.
745 ICC-01/04-01/06-T-312-ENG, p 9 line 17 to p10 line 11 and p 20 line 19-23.

The Chamber ordered the confidential disclosure of the intermediary's identity to the Defence by 16:30 that afternoon, finding that such limited disclosure would not pose security risks to intermediary 143.[746]

The Prosecution again failed to implement the Chamber's order. Rather, it filed an urgent motion seeking an extension of the time limit for disclosure. Significantly, the motion was filed out-of-time, as the deadline for complying with the order had already passed. The Prosecution acknowledged that it had an obligation to follow the Chamber's orders, but claimed to also be bound by 'autonomous statutory duties of protection'.[747] In an additional filing the same day,[748] the Prosecution again acknowledged its duty to comply with the Chamber's instructions, but argued that:

> it also has an independent statutory obligation to protect persons put at risk on account of the Prosecution's actions. It should not comply, or be asked to comply, with an Order that may require it to violate its separate statutory obligation by subjecting the person to a foreseeable risk. The Prosecutor accordingly has made a determination that the Prosecution would rather face adverse consequences in its litigation than expose a person to risk on account of prior interaction with this Office. This is not a challenge to the authority of the Chamber, it is instead a reflection of the Prosecution's own legal duty under the Statute.[749]

746 ICC-01/04-01/06-T-312-ENG, p 20 line 3-20.
747 ICC-01/04-01/06-2515, para 3.
748 ICC-01/04-01/06-2516.
749 ICC-01/04-01/06-2516, para 6.

On 8 July 2010, the VWU confirmed that the disclosure of Intermediary 143's identity under the restrictive conditions ordered by the Chamber would not pose a threat to his safety.[750]

Despite the Prosecution's disavowal, on **8 July 2010**, the Chamber issued a decision staying the proceedings for abuse of process. The Chamber found that a fair trial would not be possible under the circumstances, 'not least because the judges will have lost control of a significant aspect of the trial proceedings as provided under the Rome Statute'.[751]

Referring primarily to the Prosecutor, rather than the Prosecution generally, the Chamber expressed its 'profound and enduring concern' that the Prosecutor's filings and refusal to implement its orders 'revealed that he does not consider that he is bound to comply with judicial decisions that relate to a fundamental aspect of trial proceedings, namely the protection of those who have been affected by their interaction with the Court'.[752] Although the Chamber acknowledged that the Prosecutor is subject to a number of positive protection obligations under the Statute, it stressed that 'those responsibilities do not give him licence, or discretion, or autonomy to disregard judicial orders because he considers the Chamber's decision is inconsistent with his interpretation of his obligations'.[753] It further emphasised that 'it is not for the prosecution to seek to determine … what constitutes fairness for an accused'.[754]

The Chamber further explained, 'no criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations' and that, 'the Prosecutor now claims a separate authority which can defeat the orders of the Court, and which thereby involves a profound, unacceptable and unjustified intrusion into the role of the judiciary'.[755] Finally, the Chamber warned that the Prosecutor 'cannot be allowed to continue with this prosecution if he seeks to reserve to himself the right to avoid the Court's orders whenever he decides that they are inconsistent with his interpretation of his other obligations'.[756]

Significantly, the stay of the proceedings effectively froze the presentation of the Defence's positive case.

Warning of sanctions

After imposing the stay of proceedings, in an oral hearing with the parties, the Chamber reiterated that it considered the events of 7 July to constitute 'a deliberate refusal to comply with our directions for the purposes of Article 71 of the Statute'.[757] Article 71 of the Statute permits the Chamber to issue sanctions against an individual for misconduct, including a deliberate refusal to comply with an order of the Trial Chamber. Rule 171 of the Rules of Procedure and Evidence requires the issuance of an oral or written warning of the disciplinary consequences for continued non-compliance to the party in question prior to the imposition of sanctions, which can take the form of removal from proceedings for a fixed period or a fine.[758]

Thus, during the 8 July oral hearing, the Chamber informed Deputy Prosecutor Fatou Bensouda that it was required to issue a warning before considering the issue of sanctions. It stated that 'it would be unfair, if not unkind' to direct the warning to lower-level counsel, 'who are, in all likelihood, not in reality responsible for any of the overarching decisions which were taken on 7 July'.[759] The Chamber had

750 ICC-01/04-01/06-2517-Red, para 17.
751 ICC-01/04-01/06-2517-Red, para 31.
752 ICC-01/04-01/06-2517-Red, para 21.
753 ICC-01/04-01/06-2517-Red, para 24
754 ICC-01/04-01/06-2517-Red, para 24.
755 ICC-01/04-01/06-2517-Red, para 27.
756 ICC-01/04-01/06-2517-Red, para 28.
757 ICC-01/04-01/06-T-313-ENG, p 2 line 18-24.
758 Rule 171(1), (4) of the Rules of Procedure and Evidence.
759 ICC-01/04-01/06-T-313-ENG, p 3 line 6-10.

requested that the Deputy Prosecutor attend the hearing for the purpose of asking her to identify the individual to whom the warning should be directed. Prosecutor Luis Moreno-Ocampo was not present at the hearing. At the Deputy Prosecutor's suggestion, the Chamber concluded that the most appropriate candidates for the sanctions warning were Deputy Prosecutor Bensouda and Chief Prosecutor Moreno-Ocampo.[760] However, in a status conference held 11 October 2010, the Trial Chamber declined to impose sanctions, in light of the fact that, at that time, the Prosecutor's non-compliance with the Chamber's order had been fully considered by the Appeals Chamber, as described in greater detail, below.[761]

Appeal of the stay and order to release Lubanga

On 14 July 2010, the Prosecutor sought leave to appeal the stay,[762] which the Chamber granted in an oral hearing the next day. In doing so, the Chamber rejected the Prosecution's formulation of the issue on appeal: 'whether the Prosecution has to disclose the identity of a person who is at risk and who has not yet received protective measures which have been assessed as necessary by the Prosecution'.[763] The Chamber noted that the application for leave to appeal the stay of proceedings was unopposed by the Defence save for the precise formulation of the issues on appeal,[764] and that the requirements of Article 82(1)(d) of the Statute on interlocutory appeals had been satisfied.[765] The Chamber reformulated the issues to be presented on appeal: (i) the material non-compliance of the Prosecution with the Trial Chamber's orders on disclosure; and, (ii) 'the Prosecutor's clearly evinced intention not to implement the Chamber's orders that are made in an Article 68 context, if he considers they conflict with his interpretation of the prosecution's other obligations'.[766]

Because the trial had been stayed due to fair trial concerns, Trial Chamber I found that Lubanga could not be held in preventative custody given: the unconditional stay of proceedings, the degree of uncertainty surrounding the future of the case, and the length of time Lubanga had already spent in custody.[767] The Chamber therefore ordered, for the second time,[768] Lubanga's 'unconditional release,' reasoning that anything other than unrestricted release would be unfair.[769]

As noted above, Trial Chamber I had issued an oral warning to Luis-Moreno Ocampo and Fatou Bensouda regarding sanctions for misconduct.[770] The Chamber rebuked the Prosecutor during the hearing, emphasising that '[if] there is an order of the Court, the rule of law means that it must be obeyed and not avoided. If the Prosecutor considers that it is a disproportionate order, his remedy is to appeal it'.[771] The Chamber clearly linked the stay of proceedings to the Prosecution's challenge to its authority:

> [This] Chamber was not prepared to contemplate proceedings in which the Prosecutor had indicated that he considered that, certainly in a particular and critical area of the work of this Court, he had the option of not complying with the decisions, orders and judgments and rulings of this Chamber.[772]

760 ICC-01/04-01/06-T-313-ENG, p 3 line 10-16.
761 ICC-01/04-01/06-T-316-ENG, p 21 lines 13-18.
762 ICC-01/04-01/06-2520-Red.
763 ICC-01/04-01/06-T-314-ENG, p 16 line 1-4.
764 ICC-01/04-01/06-T-314-ENG, p 14 line 22-25.
765 ICC-01/04-01/06-T-314-ENG, p 15 line 1-20.
766 ICC-01/04-01/06-T-314-ENG, p 31 lines 22-25.
767 ICC-01/04-01/06-T-314-ENG, p 21 line 19-23.
768 ICC-01/04-01/06-1401.
769 ICC-01/04-01/06-T-314-ENG, p 14 line 3 to page 22 line 8.
770 ICC-01/04-01/06-T-314-ENG, p 22 line 15-20. It appears that the Prosector and Deputy Prosecutor were not present at this hearing, but were represented by members of the Office of the Prosecutor.
771 ICC-01/04-01/06-T-314-ENG, p 17 line 3-5.
772 ICC-01/04-01/06-T-314-ENG, p 11 line 1-5.

Significantly, the Chamber noted that the Prosecutor had applied for leave to appeal the stay, rather than request that the Chamber lift it. It stated, 'this is not a conditional stay. It is a stay which could have led to an application by the Prosecution to lift it if the Prosecution was prepared to follow the Chamber's orders. The Prosecution has not taken that route'.[773] The Chamber later emphasised that 'the Prosecution has not applied to lift the stay, but instead has elected to exercise its appellate rights … the future of the case will depend *inter alia* on the eventual decision of the Appeals Chamber and potentially on the attitude of the Prosecution thereafter'.[774]

On 16 July 2010, the Prosecution filed an appeal against the stay and requested that the Appeals Chamber suspend the release of the accused.[775] On 23 July, the Appeals Chamber granted the Prosecution request for suspensive effect, thus preventing Lubanga's release from detention pending resolution of the appeal against the stay of proceedings.[776] The Appeals Chamber considered a range of factors, including that: this was the second stay of proceedings in the case; the Trial Chamber had characterised the stay as unconditional; Lubanga had been in detention for more than four years; the Prosecution had closed its case; and, Lubanga was the subject of a UN Security Council travel ban and did not have any travel documents. However, it concluded that none of those factors outweighed 'the potential impact on the proceedings'. It held that 'an immediate implementation of the order to release him could render the resumption of the trial uncertain, should the Appeals Chamber later find in favour of the Prosecutor's appeals'.[777]

773 ICC-01/04-01/06-T-314-ENG, p 10 line 4-7.
774 ICC-01/04-01/06-T-314-ENG, p 20 line 25 to page 21 line 5.
775 ICC-01/04-01/06-2522.
776 ICC-01/04-01/06-2536, para 12.
777 ICC-01/04-01/06-2536, para 11.

Press interview with Beatrice Le Fraper du Hellen

Prior to the events giving rise to the stay of proceedings, tension between Trial Chamber I and the Office of the Prosecutor had already occurred in relation to the issue of intermediaries. In March 2010, Beatrice Le Fraper du Hellen, Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor,[778] gave an interview to the lubangatrial.org website, which included a number of statements vigorously defending the use of intermediaries by the Prosecution.[779] Le Fraper du Hellen stated, as paraphrased by the Chamber, 'that they are fantastic, committed people, who support international justice, and that they are admired by the prosecution'.[780]

Noting that 'none of these assessments are supported by evidence that has been given in the trial', the Chamber found the comments inappropriate as the role of Prosecution intermediaries had become a 'live' issue in the case, one 'that the Chamber will resolve in due course'.[781] Moreover, it found that Le Fraper du Hellen:

> seriously intruded on the role of the Chamber in her unequivocally expressed conclusions — before the end of the evidence, the submissions of counsel and any decisions on the part of the Bench — that there has been no abuse of the process by the prosecution; that the defence argument is 'just talk'; that the

778 Beatrice Le Fraper du Hellen subsequently resigned from her post.
779 'Interview: ICC Prosecutors will Refute Allegations that intermediaries Manipulated Evidence in Lubanga Case',15 March 2010, available at <http://www.lubangatrial.org/2010/03/15/interview-icc-prosecutors-will-refute-allegations-that-intermediaries-manipulated-evidence-in-lubanga-case/>, last visited on 25 October 2010.
780 ICC-01/04-01/06-2433, para 41.
781 ICC-01/04-01/06-2433, para 41.

> Chamber will reject the defence submissions ('nothing is going to happen'); and that the accused will be convicted, and this will be followed by a long sentence ('Mr Lubanga is going away for a long time').[782]

Although deciding not to take any concrete action against Le Fraper du Hellen beyond expressing its 'strongest disapproval' of the interview, the Chamber summarised its stance:

> The Chamber is wholly uninfluenced by these misleading and inaccurate remarks, but it deprecates the prosecution's use of a public interview, first, to misrepresent the evidence and to comment on its merits and weight, and including by way of remarks on the credibility of its own witnesses in the context of a trial where much of the evidence has been heard in closed session with the public excluded; second, to express views on matters that are awaiting resolution by the Chamber, thereby intruding on the latter's role; third, to criticise the accused without foundation; and finally, to purport to announce how the Chamber will resolve the submission on the abuse of process application, and moreover, that the accused will be convicted in due course and sentenced to lengthy imprisonment at the end of the case.[783]

The Chamber also warned that 'if objectionable public statements of this kind are repeated the Chamber will not hesitate to take appropriate action against the party responsible'.[784]

Beyond the Lubanga trial, in two other cases the Office of the Prosecutor, and the Prosecutor himself, have been further criticised by Defence counsel for questionable statements made to the press that potentially violate the right to a fair trial and the presumption of innocence. Most recently, the Defence for Callixte Mbarushimana submitted a 'Request for an Order to Preserve the Impartiality of the Proceedings',[785] calling for Pre-Trial Chamber I to order the Prosecution to retract statements issued in a press release issued on 18 October 2010, concerning Mbarushimana's arrest. The request, which objects to the entirety of the press release, contends in particular that the press release refers to Mbarushimana as a former *'génocidaire'*, although he is not charged with the crime of genocide.

Earlier this year, the *ad hoc* Defence counsel assigned to President Omar Al'Bashir and two NGOs, the Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG), submitted separate requests to Pre-Trial Chamber I to review statements made by the Prosecutor in an editorial to The Guardian on 15 July 2010. The SWTUF/SIDG request asserted that statements concerning the commission of genocide by the suspect, 'require judicial consideration, particularly in light of the recent decision by Trial Chamber I in the Lubanga case, "Decision on the press interview with Ms Le Fraper du Hellen" of 12 May 2010'.[786] The Pre-Trial Chamber rejected the request as falling outside of the ambit of Rule 103 of the Rules of Procedure and Evidence.[787] The *ad hoc* Defence counsel's request was also rejected as the Chamber found that the submission fell outside the scope of her mandate.[788]

782 ICC-01/04-01/06-2433, para 49. See ICC-01/04-01/06-T-264-CONF-ENG, p 3 line 12 to p 4 line 10. Note: This transcript is also identified as ICC-01/04-01/06-T-264-Red-ENG.
783 ICC-01/04-01/06-2433, para 52.
784 ICC-01/04-01/06-2433, para 53.
785 ICC-01/04-01/10-14.
786 ICC-02/05-01/09-102, para 4.
787 ICC-02/05-01/09-105.
788 ICC-02/05-01/09-106.

Distinct approach to the protection of intermediaries

As noted above, the Court has consistently recognised the significant role intermediaries have played in its operations. Given their importance to the Prosecution's investigations, the Appeals Chamber interpreted Article 54(3)(f) and Rule 81(4) as encompassing intermediaries as 'persons at risk on account of the activities of the Court' for the purposes of applying protective measures.[789] As such, both Trial Chambers I and II consistently authorised redactions to the names and identifying information for intermediaries in the Lubanga and Katanga/Ngudjolo cases, respectively.[790] They differed significantly in their underlying approach to the issue, however.

An examination of the Trial Chambers' divergent approaches to the disclosure of information related to intermediaries sheds light on the underlying issues in the events leading up to the stay of the proceedings. In addition to underscoring differences between the Chambers related to their relative leniency or strictness, the decisions by both Trial Chambers over the last year further reveal a changing basis for the non-disclosure of intermediaries' identities. Specifically, the early decisions to redact intermediaries' identities tend to be based primarily on Rule 81(2) of the Rules of Procedure and Evidence to avoid prejudice to the Prosecution's further and ongoing investigations. The Prosecution's increased emphasis on the security risk to intermediary 143 correlates to the time period in which the role of intermediaries becomes a live issue in the case and the Trial Chambers order disclosure.

In general terms, the Trial Chambers took distinct approaches to the relevance of intermediaries' identities to the respective cases for the purposes of non-disclosure: one tending towards permissiveness; the other, strict judicial review. In the Lubanga case, during the pre-trial phase, Trial Chamber I's 'core approach was that disclosure of the identities of the intermediaries was unnecessary because this information was irrelevant to the issues in the case, as known at that stage'.[791] For example, in a decision issued on 11 November 2009 Trial Chamber I stated:

> The Trial Chamber has previously authorised permanent redactions to the names of those who have been referred to as 'third parties', intermediaries, sources or NGOs (together with their field staff) when, *inter alia*, the information was irrelevant to the known issues in the case, so long as this course did not render the document in any way unintelligible or unusable.[792]

In contrast, Trial Chamber II established a rigorous review process for redaction requests, emphasising that redactions would be 'the exception'.[793] The Chamber explicitly recognised the critical role of intermediaries in identifying and contacting witnesses, and in the overall progress of the investigation. It thus authorised the redactions on the basis of Rule 81(2), permitting restrictions on disclosure where it would prejudice further or ongoing investigations. It also recognised during the pre-trial phase that disclosing intermediaries' identities would increase the threat to their security, and that redactions were therefore necessary for assuring the protection of

789 ICC-01/04-01/07-475, paras 1-2.
790 See, eg for the Katanga/Ngudjolo case: ICC-01/04-01/07-1240; ICC-01/04-01/07-1100; ICC-01/04-01/07-1393, paras 14, 18; ICC-01/04-01/07-1396; ICC-01/04-01/07-1099; ICC-01/04-01/07-1101.
791 ICC-01/04-01/06-2434-Red2, para 6.
792 ICC-01/04-01/06-2179-Red2, para 18.
793 ICC-01/04-01/07-839, para 1; see also ICC-01/04-01/07-819 (where the Chamber employs 'strict judicial supervision').

'potential witnesses'.[794] Trial Chamber II thus repeatedly authorised redactions to the names and identifying information of Prosecution intermediaries.[795] Maintaining its underlying approach that the Defence was entitled to know the identities of Prosecution intermediaries, it refused to authorise the redactions permanently, but rather only until 30 days before trial.[796]

Intermediary 143's role was first raised as an issue during an *ex parte* status conference in the Lubanga case on 5 March 2009. The Prosecution arguments for withholding his identity were based on his importance for continuing investigations, not security concerns.[797] Yet, in response to the Defence's allegations regarding the manipulation of witness testimony, on 13 March 2009, Trial Chamber I found that the Defence's speculations did not justify putting intermediary 143 at risk of harm.[798] It thus refused to disclose his identity on the basis of its duty to protect those at risk on account of the Court's activities pursuant to Article 68(1) of the Statute. The Chamber later revised its reasoning, stating that although it had made reference to the need to protect those at risk on account of the activities of the Court:

> the applications to withhold 143's identity have been made, essentially, on the basis that revealing his identity would prejudice ongoing and future investigations, and that the suggested line of questioning was purely speculative, without any identified foundation.[799]

Intermediary 143 had also been used to contact witnesses in the Katanga/Ngudjolo case, and the disclosure of his identity became an issue in that case a few months later, in August 2009.[800] In contrast to Trial Chamber I's approach, in a decision issued on 18 September 2009, Trial Chamber II recognised the Defence's 'general interest' in obtaining the names of Prosecution intermediaries 'as a matter of fairness'.[801] It found that intermediary 143 had contact with a large number of Prosecution witnesses, and thus that the Defence interest in obtaining his identity was becoming necessary for the purpose of completing its investigations.[802] Echoing the revised basis for Trial Chamber I's March decision, Trial Chamber II noted that the Prosecution had neither 'invoked the existence of an objectively justifiable risk to the security of that person,' nor relied on Rule 81(4) of the Rules of Evidence and Procedure, in its submissions on the issue.[803] It indicated that it would permit application by the Defence during trial to request lifting the redactions to avoid prejudice.[804] Yet, it ruled that the protective measures applied by Trial Chamber I, as the first chamber to rule on the issue, applied *mutatis mutandis* in all other cases pursuant to Regulation 42. It invited the Defence to submit a request directly to Trial Chamber I to lift the redactions, pursuant to Regulation 42(3).[805]

794 See, eg ICC-01/04-01/07-1096, para 26; ICC-01/04-01/07-1098, para 16; ICC-01/04-01/07-1099, para 17.

795 See, eg ICC-01/04-01/07-1240; ICC-01/04-01/07-1100; ICC-01/04-01/07-1393, paras 14, 18; ICC-01/04-01/07-1396; ICC-01/04-01/07-1099; ICC-01/04-01/07-1101.

796 See, eg ICC-01/04-01/07-1034. Trial Chamber II further rejected the Prosecution's application to appeal its order to disclose the redacted information 30 days prior to trial. See ICC-01/04-01/07-946.

797 ICC-01/04-01/06-T-143-CONF-EXP ENG, p 1 lines 13-17, as cited in ICC-01/04-01/06-2190-Red, para 7.

798 ICC-01/04-01/06-T-146-CONF-EXP ENG, p 6 line 19 to p 7 line 13, as cited in ICC-01/04-01/06-2190-Red, para 10.

799 ICC-01/04-01/06-2190-Red, para 12.

800 ICC-01/04-01/07-1376 and ICC-01/04-01/07-1402.

801 ICC-01/04-01/07-1817, para 16.

802 ICC-01/04-01/07-1483-Red2, para 21, as cited in ICC-01/04-01/07-1817.

803 ICC-01/04-01/07-1483-Conf-Exp, para 21. The public redacted version was released 30 August 2010, ICC-01/04-01/07-1483-Red2.

804 ICC-01/04-01/07-1483-Conf-Exp, paras 24-25. The public redacted version was released 30 August 2010, ICC-01/04-01/07-1483-Red2.

805 ICC-01/04-01/07-1483-Conf-Exp, paras 21, 22 (also noting the Katanga Defence's insistence regarding the disclosure of the names of the Prosecution's intermediaries). The public redacted version was released 30 August 2010, ICC-01/04-01/07-1483-Red2.

In its decision on the Katanga/Ngudjolo Defence applications, issued in November 2009, Trial Chamber I explicitly addressed the divergent approaches between the Trial Chambers regarding the disclosure of intermediary 143's identity. Specifically, it made reference to Trial Chamber II's findings regarding the 'interests' of the Defence in intermediary 143's identity at an advanced stage of the proceedings, as a fairness and equality of arms issue.[806] Yet, it found that while 'clearly able to make a decision on whether it is necessary and appropriate to disclose the identity of [intermediary 143], in the context of the Lubanga trial, it is realistically unable to undertake the same exercise of judgment for Trial Chamber II'.[807] It held that under such circumstances, the two Chambers must draw their own separate conclusions as to whether the protective measures should be varied.

Trial Chamber I thus declined to vary its original order not to disclose intermediary 143's identity, finding no evidentiary basis for concluding that his identity was an issue in the case, and that disclosure would prejudice the Prosecution's further and ongoing investigations.[808] Significantly, Trial Chamber I found it 'unnecessary' to base its finding on the security risks to intermediary 143. Having made the decision not to vary its own order, it left the decision to Trial Chamber II as to whether, in the context of the Katanga/Ngudjolo case, it 'must' disclose intermediary 143's identity.[809]

In light of Trial Chamber I's finding that cogent reasons remained to continue protective measures for intermediary 143, Trial Chamber II maintained the redactions. Yet, it also maintained 'its initial analysis of the general right of the Defence to have access to the identity of the Prosecution's intermediary'.[810] It considered Trial Chamber I's finding that intermediary 143 would face a real risk upon disclosing his identity to be a 'new element' for consideration, placing the relevant redactions within the ambit of Rule 81(4) and requiring the Chamber to balance concrete security risks against the needs of the Defence. However, as noted above, Trial Chamber I had explicitly declined to base its decision on the security risks posed to intermediary 143.

As described above, approximately one year after it was first raised as an issue in the case, on 15 March 2010 in its decision on intermediaries, Trial Chamber I found that it *was* necessary to disclose intermediary 143's identity to the Defence.[811] (See section on **Stay of the proceedings**, above).

The Prosecution appealed the Chamber's ruling solely with regard to the disclosure of intermediary 143's identity, asserting that it would require his relocation and would thus both prejudice ongoing investigations and deter future intermediaries from collaborating with the Office of the Prosecutor.[812] In its decision denying leave to appeal, issued 2 June 2010, Trial Chamber I found that intermediary 143's absence at this stage in the case would not significantly affect the fairness and expeditiousness of the proceedings pursuant to Article 82(1)(d) of the Statute. It further ruled that the Prosecution had not provided any details as to how the loss of intermediary 143 would affect the relevant investigations.[813]

A few days later, on 6 June 2010, Trial Chamber II orally ordered the Prosecutor to disclose intermediary 143's identity to the Defence in the Katanga/Ngudjolo case once the protective

806 ICC-01/04-01/06-2190-Red, para 25.
807 ICC-01/04-01/06-2190-Red, para 26.
808 ICC-01/04-01/06-2190-Red, para 31.
809 ICC-01/04-01/06-2190-Red, paras 25, 32, (underscoring the word 'must' as it appears in Rule 81(2)).
810 ICC-01/04-01/07-1817, para 19, referring to the decision issued in September 2009, ICC-01/04-01/06-2190, para 32.
811 ICC-01/04-01/06-2434-Red2.
812 ICC-01/04-01/06-2453- Red.
813 ICC-01/04-01/06-2463, paras 31-32.

measures ordered by Trial Chamber I in the Lubanga case were in place.[814] The Chamber found that although the contradictions in the examination of witnesses that gave rise to the disclosure order in the Lubanga case had not occurred in the Katanga/Ngudjolo case, intermediary 143's role in the Lubanga case could not be 'artificially dissociated from his role in the Katanga/Ngudjolo case'.[815] The Prosecutor did not appeal that decision.

As detailed extensively, above, on the following day, 7 July, the Prosecution failed to disclose intermediary 143's identity primarily on the basis of security risks, despite multiple orders by Trial Chamber I to do so. Furthermore, as of August 2010, the VWU had been unable to come to an agreement with intermediary 143 regarding the implementation of appropriate protection measures.[816]

Comparison with the 2008 stay of proceedings

For the second time in two years, the Chamber in the Lubanga trial imposed a stay of proceedings and ordered the accused's release on the grounds that a fair trial was no longer possible under the circumstances of the case. The first stay of proceedings in 2008 related to the Prosecution's failure to disclose exculpatory material to the Defence.[817] The documents had been obtained by means of confidentiality agreements with the information providers that precluded the Prosecution from disclosing the evidence without their consent. The situation was resolved after months of protracted negotiations regarding the degree of disclosure allowed by the information providers, primarily the UN, that would also satisfy the Trial Chamber.

The most recent impasse in the Lubanga trial also relates to disclosure, but with important distinctions. First, the information that the Prosecution failed to disclose did not derive from an external source. Rather, the refusal to disclose was based on an internal decision in direct contravention of the Trial Chamber's orders. In other words, the stay of proceedings in 2008 was imposed on the grounds that the Prosecution was *unable* to release the relevant exculpatory evidence to the Defence, without which the Trial Chamber believed a fair trial would not be possible. At the same time, the Trial Chamber found the Prosecution strategy of using material obtained through confidentiality agreements pursuant to Article 54(3)(e) of the Statute to constitute an abuse of the statutory provision.[818] The recent stay of proceedings was imposed for the Prosecution's wilful failure to disclose the information in question. Finally, the content of the relevant evidence in 2008 was not known to the Defence. In the instant case, the identity of intermediary 143 had already been inadvertently revealed during witness testimony.

814 ICC-01/04-01/07-T-150-Red-ENG, p 8 lines 14-17.
815 ICC-01/04-01/07-T-150-Red-ENG, p 7 line 23 to p 8 line 4.
816 ICC-01/04-01/06-2551, para 14.
817 See *Gender Report Card 2008*, p 42, 46.
818 See *Gender Report Card 2008*, p 42, 46.

Victim participation in the appeals process

Three separate applications were submitted on behalf of victims to participate in the appeals concerning the stay of proceedings and the order for Lubanga's release.[819] On **17 August 2010**, the Appeals Chamber granted 24 victims the right to participate in the appeal, to present their views and concerns in writing.[820] Notably, the Chamber rejected the OPCV's argument that participating victims should have an automatic right to participate in interlocutory appeals, as it had already established in prior decisions that participating victims must seek leave to participate in each appeal. Consistent with his dissent in 2007[821] Judge Sang-Hyun Song again dissented, arguing that participating victims should have an automatic right to participate in interlocutory appeals.

In their observations, the Victims' Legal Representatives submitted that the Trial Chamber's order to stay the proceedings was 'disproportionate, premature and unjustified'.[822] They further asserted that a permanent stay of the proceedings would violate the victims' right to access to justice. The victims also alleged that witnesses had been threatened, including pressure exerted by the Defence's Resource Person in the DRC.

On 11 August 2010, the Registrar also submitted additional information relevant to the Prosecution appeal. In this filing, the Registrar noted that as of the date of the filing, the VWU had been unable to come to an agreement with intermediary 143 regarding protective measures following Trial Chamber II's order to disclose intermediary 143's identity for the purposes of the Katanga/Ngudjolo case. It also offered to submit additional observations regarding the practical implications of the Prosecution's submissions regarding its independent statutory duties of protection on the current system of protection, as well as on 'the extent that [such protection] may not be accessible equally to other parties and participants'.[823] As discussed below, the Appeals Chamber declined to address the merits of the Trial Chamber's first and second disclosure order, which the Prosecution had integrated into the arguments of its submissions. It consequently found that the Registrar's submission was not relevant to the merits of the appeal.

819 Applications to participate were presented from: Legal Representatives Paul Kabong Tshibangu and Carine Bapita Buyangandu on behalf of one victim (ICC-01/04-01/06-2517; ICC-01/04-01/06-2533-Red); victims represented by Legal Representative Luc Walleyn (ICC-01/04-01/06-2541); and, an application by the Office of Public Counsel for Victims (OPCV) (ICC-01/04-01/06-2535).

820 ICC-01/04-01/06-2555.

821 ICC-01/04-01/06-824.

822 ICC-01/04-01/06-2582, para 41.

823 ICC-01/04-01/06-2551, para 14.

Appeals Chamber decisions reversing Trial Chamber I

On **8 October 2010**, the Appeals Chamber issued two judgements, reversing both the stay of proceedings and the order to release Lubanga.[824]

The judgement reversing the stay of proceedings was based on three key holdings. First, the Appeals Chamber held that the orders issued by Chambers are binding. Second, in the event of 'a conflict between the orders of a Chamber and the Prosecutor's perception of his duties, the Prosecutor is obliged to comply with the orders of the Chamber'.[825] Finally, it found sanctions, rather than a stay of proceedings, to be the appropriate mechanism for a Trial Chamber to maintain control over the proceedings when faced with a party's deliberate refusal to comply with an order.

Limiting itself to the issues of whether the Prosecutor refused to comply with Trial Chamber I's orders and the propriety of the latter's decision to impose a stay of proceedings, the Appeals Chamber first found that the Prosecution's non-compliance was 'deliberate'. It referred to the Prosecution's arguments otherwise in its document in support of the appeal as:

> at best, disingenuous. At worst, it is an expression of what the Trial Chamber correctly described as 'a more profound and enduring concern', namely that the Prosecutor may decide whether or not to implement the Trial Chamber's orders depending on his interpretation of his obligations under the Statute.[826]

Specifically with respect to the Prosecution arguments regarding an independent statutory duty of protection, the Appeals Chamber read Article 68(1) of the Statute together with the Trial Chamber's duty to ensure a fair trial under Article 64. It noted that pursuant to Article 68(1), protective measures 'shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.[827] Conversely, it underscored that Article 64(2) of the Statute not only ensures a fair trial for the accused, 'but also that the trial is conducted with "due regard for the protection of victims and witnesses"'.[828] The Appeals Chamber thus rejected the Prosecution's arguments, and reaffirmed 'the authority of the Chambers over the Prosecutor in relation to matters of protection'.[829] In sum, it found that the Trial Chamber did not err in finding that the Prosecutor failed to comply with its orders, and that the Prosecutor remained obliged to comply.

Regarding Trial Chamber I's decision to stay the proceedings, the Appeals Chamber first characterised it as 'a drastic' and 'an exceptional' remedy.[830] While it noted that a Trial Chamber imposing a stay of proceedings enjoys a margin of appreciation, the Appeals Chamber found that in this instance 'the Trial Chamber had not yet lost control of the proceedings'.[831] Thus, it noted the use of sanctions, pursuant to Rule 171(4) of the Rules of Procedure and Evidence, as a more appropriate tool for bringing about compliance by the parties (as well as a means to punish the offending party). It thus held that a Trial Chamber should first attempt to bring about compliance through the imposition of sanctions, prior to resorting to a stay of the proceedings. It found that the use of sanctions in such cases, rather than the more drastic remedy of staying the proceedings, is in the interests of the accused, the victims and the international community.

824 ICC-01/04-01/06-2582; ICC-01/04-01/06-2583.
825 ICC-01/04-01/06-2582, para 2.
826 ICC-01/04-01/06-2582, para 46.
827 ICC-01/04-01/06-2582, para 50, n.17 (citing Article 68(1) and noting the application of protection measures to intermediaries, who are neither victims nor witnesses, pursuant to a prior decision in the Katanga/Ngudjolo case. ICC-01/04-01/07-465.).
828 ICC-01/04-01/06-2582, para 50.
829 ICC-01/04-01/06-2582, para 51.
830 ICC-01/04-01/06-2582, para 55.
831 ICC-01/04-01/06-2582, para 59.

In light of the fact that it had reversed Trial Chamber I's decision to stay the proceedings, 'on which the decision to release Mr Lubanga Dyilo was predicated',[832] the Appeals Chamber found it necessary to reverse the decision to release the accused.

At the outset, the Appeals Chamber noted that the Trial Chamber's order to release the accused was based on: 1) the unconditional stay of proceedings; 2) the uncertainty of the future resumption of the trial; and, 3) the length of time Lubanga had spent in detention. It agreed with the Prosecution's arguments that 'the stay of proceedings was the essential element underpinning the decision to release Mr Lubanga Dyilo'.[833] While not overlooking the significance attached to the length of time in detention as a factor in the Trial Chamber's decision, it found that the Trial Chamber had failed to examine the accused's continued detention under Articles 58 and 60(2), (3) of the Statute. It thus held that 'it would be inappropriate for the Appeals Chamber to enter findings for the Trial Chamber on these points'.[834]

The Prosecution disclosed the identity of intermediary 143 on 8 October, 2010, the day the Appeals Chamber issued its judgement.

832 ICC-01/04-01/06-2583, para 1.
833 ICC-01/04-01/06-2583, para 24.
834 ICC-01/04-01/06-2583, para 25.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

The ICC's second trial, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, commenced on 24 November 2009. The case is being heard by Trial Chamber II, composed of Presiding Judge Cotte and Judges Diarra and Van den Wyngaert. This is the second trial arising out of the DRC Situation and the first trial at the Court to include charges for gender-based crimes. The case involves an attack carried out on 24 February 2003, by the FNI and *Force de resistance patriotique en Ituri* (FRPI) on the village of Bogoro in Ituri. At the time of the attack, Katanga was the alleged commander of the FRPI and Ngudjolo was the alleged commander of the FNI.[835]

Both Katanga and Ngudjolo are charged with seven counts of war crimes, including rape, sexual slavery, using children under the age of 15 to take active part in hostilities, directing an attack against a civilian population, wilful killings, destruction of property, and pillaging. They are charged with three counts of crimes against humanity, including rape, sexual slavery and murder. In its decision confirming the charges of 30 September 2008,[836] the Pre-Trial Chamber declined to confirm charges for the war crime of 'torture or inhuman treatment',[837] the war crime of 'outrages upon personal dignity',[838] 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'.[839]

The events at issue in the Katanga/Ngudjolo case are at least partially 'representative' of the types of attacks, crimes, violence against women and victims of the FRPI and FNI.[840] However, while this case does include charges of rape and sexual slavery, the charges that have been brought for gender-based crimes are not comprehensive. Based on the Women's Initiatives' documentation of gender-based crimes in eastern DRC, many other forms of sexual violence were alleged to have been committed in the Bogoro attack. In 2006 and 2007, the Women's Initiatives interviewed 112 women survivors of sexual violence in eastern DRC, who described horrific attacks of individual rapes, gang rapes and sexual slavery.[841] Almost thirty of these interviews related to gender-based crimes allegedly committed by the FNI and FRPI. The Women's Initiatives described this documentation in a Press Statement delivered at the ICC prior to the opening of the Katanga/Ngudjolo trial:

> Many of the women were raped in front of family members, including their children. Several we interviewed reported losing consciousness as a result of rape, and some became pregnant. Women who were pregnant prior to the rape lost their children,

835 As the charges and surrounding facts relating to the cases of both Germain Katanga and Mathieu Ngudjolo Chui are identical, their cases were joined. See ICC-01/04-01/07-307.

836 ICC-01/04-01/07-717. The public redacted version of this decision became available on 1 October 2008.

837 Rome Statute of the International Criminal Court, Article 8(2)(a)(ii).

838 Rome Statute, Article 8(2)(b)(xxxi).

839 Rome Statute, Article 7(1)(k). The confirmation of charges and pre-trial phase of the Katanga/Ngudjolo case are covered in detail in the *Gender Report Card 2009* and *2008*.

840 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', CICC Press Conference, 23 November 2009, available at: <http://www.iccwomen.org/news/docs/Katanga-Statement.pdf>. Read more about the Women's Initiatives documentation in DRC and our statements on the Katanga and Ngudjolo case in Making a Statement Second Edition, available at: <http://www.iccwomen.org/publications/articles/docs/MaS2_10-10_web.pdf>.

841 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', 23 November 2009.

and many had severe physical and psychological injuries as a result of the sexual violence. Many women were attacked in their homes. Many were abducted and enslaved particularly in camps run by the FNI. Women we interviewed told us that in addition to domestic work in the camps, women were raped by militiamen and commanding officers and assigned to them as 'wives'. Those who tried to escape were killed.[842]

Opening statements

In his opening statement, the Prosecutor described the attack on the village of Bogoro as 'part of a widespread and systemic attack against the civilian population of Ituri'.[843] He alleged that the plan of Katanga and Ngudjolo was to wipe out the village of Bogoro, and that they attacked in 'successive waves of violence' from 5.30 in the morning on 24 February 2003.[844] The Prosecutor described civilians scattering and seeking shelter in the bush, where attackers followed them. In the words of one witness quoted by the Prosecutor, the witness could see 'that each time the attackers came across someone, they will kill him and cut him up in pieces. They kill everyone. They did not make any distinction between men, women, children and the elderly.'[845]

The Prosecutor drew attention to the sexual violence committed during the attacks, during which women were raped and then killed. He stated that the defendants 'used children as child soldiers ..., raped women, girls and elderly ... and transformed women into sexual slaves'.[846] He quoted testimony describing acts of sexual violence from child soldiers who had been involved in the attack.[847] The Prosecutor also addressed the fate of women captured by the FNI and FRPI. He described how Hema women captured by the troops hid their identity to save their lives, as those later revealed as Hema were killed, while other women were raped and forced into marriage or detained to serve as sexual slaves by FNI and FRPI soldiers. The Prosecutor stated that 'all these women were victimised on the basis of their gender. They were attacked in particular because they were women.'[848]

In her opening remarks, Deputy Prosecutor Fatou Bensouda spoke about the context of the attack on Bogoro. She said that 'an ongoing armed conflict existed in the territory of Ituri involving several organised armed groups, including Lubanga's UPC, the FNI, the FRPI as well as the Ugandan army'.[849] She addressed the history of conflict between armed groups in the region. The Deputy Prosecutor stated that 'during the Ituri conflict, Lendu and Ngiti militia abducted and raped women of all tribes, including their own women, women they considered to be *butin de guerre*'.[850] She described earlier attacks in which 'young women were abducted and forced to become wives of combatants',[851] and used to carry goods looted from the camps. She told the Court that 'they were raped and deprived of their identity and of their liberty. Their existence, Mr President, was reduced to being the forced wives or sexual slaves of soldiers.'[852]

Two Legal Representatives for Victims gave opening statements on behalf of the 345 victims who were accepted to participate in the trial. Pursuant to an order of the Trial Chamber, these victim participants were grouped into two categories: former child

842 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', 23 November 2009.
843 ICC-01/04-01/07-T-80-ENG, p 22 lines 7-8.
844 ICC-01/04-01/07-T-80-ENG, p 23 lines 21-25.
845 ICC-01/04-01/07-T-80-ENG, p 24 lines 21-24.
846 ICC-01/04-01/07-T-80-ENG, p 25 lines 1-3.
847 ICC-01/04-01/07-T-80-ENG, p 25 lines 7-10.
848 ICC-01/04-01/07-T-80-ENG, p 25 lines 20-25.
849 ICC-01/04-01/07-T-80-ENG, p 26 lines 15- 17.
850 ICC-01/04-01/07-T-80-ENG, p 30 lines 8- 10. *Butin de guerre* roughly translates as 'spoils of war'.
851 ICC-01/04-01/07-T-80-ENG, p 30 line 11.
852 ICC-01/04-01/07-T-80-ENG, p 30 lines 14- 17.

soldiers and the residents of Bogoro village.[853] The Legal Representative of the group of former child soldiers noted in his opening statement that the 'victims, for more than six years, have been waiting for justice to be served'.[854] He also described the brutal nature of the attack on Bogoro, in particular how women and girls were raped and 'reduced to the state of sexual slaves'.[855] Many of these victims had their childhoods 'brutally interrupted ... [as] they found themselves in hell, from one day to the next'.[856]

The two Defence teams also gave opening statements on 24 November. The Katanga Defence made a short statement, emphasising that the burden of proof would be on the Prosecution to prove the charges. It suggested to the Trial Chamber that the roles of the Ugandan, Rwandan, and the DRC Governments in the Ituri conflict should be examined. It also stressed that Katanga – aged 24 at the time of the attack – was too young and inexperienced to have planned the attack on Bogoro.[857] The Ngudjolo Defence also emphasised the roles of other actors in the region and conflict in its opening statement.[858]

After five days of hearings, on 2 December 2009 the trial was postponed until 26 January 2010 due to the unavailability of one of the judges. Based on a review of available public transcripts, as of 17 September 2010, Trial Chamber II has heard 94 days of testimony by 17 witnesses, including two experts called by the Prosecution, and two days of testimony by two experts called by the Chamber. Seven days of hearings were devoted to procedural matters. In this time period, three female witnesses testified before the Court (Witnesses 132, 279 and 287).

853 ICC-01/04-01/07-1328. See also the September 2009 issue of the *Legal Eye*.
854 ICC-01/04-01/07-T-80-ENG, p 39 lines 12-14.
855 ICC-01/04-01/07-T-80-ENG, p 41 lines 21-22.
856 ICC-01/04-01/07-T-80-ENG, p 39 lines 23-25.
857 ICC-01/04-01/07-T-80-ENG, p 49-55.
858 Id ICC-01/04-01/07-T-80-ENG p 55-72.

In-court protective measures and the accessibility of the proceedings

As provided in the Rome Statute, the Trial Chamber has granted in-court protective measures to testifying witnesses, which have been determined on a case-by-case basis, based on an assessment by the VWU of the Court. The protective measures granted to date have included the use of a pseudonym, face and voice distortion of the public video feed, a screen to prevent the witness from being seen by or seeing the accused (although witnesses can see and be seen by Defence counsel), and the presence of a resource person or psychologist during their testimony. Over the course of the trial, witness testimony has also frequently been given in private or closed session, so that the public is unable to hear, and in closed session also see, the proceedings. Vulnerable witnesses have also been able to take breaks in their testimony about difficult subjects.

The extent to which the closed and private sessions have been used thus far in the trial was the subject of a filing by the Katanga Defence, which expressed concern over the number of private sessions, and requested that the Chamber 'review the position and ... mitigate the effect of such a practice'.[859] While accepting that some private sessions are necessary, the Defence objected to the number of private sessions based on the right of the accused to a public trial. It cited the role the public might play in identifying false testimony, and the role of public hearings in guaranteeing a fair trial. It suggested that a review of private session transcripts be established, so that the fullest possible version of the testimony could eventually be made public. In the alternative, it suggested that following each private session, the party who called the witness would summarise the testimony in open session. Although the Chamber invited

859 ICC-01/04-01/07-2153, para 1.

observations on this issue,[860] it remains unclear from the public record to what extent the Defence or other suggestions were adopted.

Although the opening of the trial was scheduled to be streamed live in Ituri, it did not take place as planned. The Registry later explained that this was due to the unavailability of a satellite.[861] In place of the live stream, the Court provided summaries to local radio and television in Ituri.[862] This interruption in the Court's plans for streaming the opening of the trial proceedings underscores the challenges faced by the ICC in making proceedings accessible to affected communities. During the opening of the Lubanga trial, on 26 January 2009, the live transmission of the Defence opening statements to communities in Ituri was also disrupted. In that instance, the disruptions were due to the security concerns created by the large crowds, including Lubanga's supporters, at the site of the screening in Bunia.[863]

Witness testimony

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 17 September 2010.[864] As noted above, extensive testimony was given in closed or private session, and in many cases the identifying details of the witnesses were also given in closed or private session. For these reasons, the descriptions of the witnesses and their testimonies are necessarily limited. The section focuses primarily on the direct testimony of the witnesses called by the Prosecution, with summaries of issues raised by the Defence teams and Legal Representatives for Victims included only where relevant. The Defence teams' arguments will be reviewed more thoroughly once they have presented their cases at a later stage of the proceedings, along with the positions of the Legal Representatives for Victims.

On 25 November 2009, at the request of the Court, the head of the Prosecution investigation team for Bogoro was called as the first witness to testify about the conditions under which the investigation took place and to describe the methods used to investigate exonerating evidence. The witness testified with protective measures, including face and voice distortion. During her brief one-hour testimony, the witness explained the challenges presented by the

860 The Chamber, in an oral decision, invited observations on 7 June 2010 (ICC-01/04-01/07-T-150-Red-ENG, p 3 lines 1-6) and it received observations, on 21 and 22 June from the Prosecution (ICC-01/04-01/07-2207 and ICC-01/04-01/07-2208) and Legal Representatives for Victims (ICC-01/04-01/07-2210), respectively.

861 ICC-01/04-01/07-T-83-Red-ENG, p 46 lines 4-14.

862 On 31 March 2010, the ICC also launched a YouTube channel on which it posts weekly 10-15 minute video summaries of trial proceedings. ICC-CPI-20100331-PR511; <http://www.youtube.com/user/IntlCriminalCourt>.

863 'DRC: ICC trial screening turns sour in Bunia', IRIN News Report, 27 January 2009, available at <http://www.irinnews.org/Report.aspx?ReportId=82586>, last visited on 25 October 2010.

864 As of the time of the publication of this report, the transcripts for a number of days, including the days of 3-6 May 2010 (Witness 249), were not available on the ICC website. Delayed release of transcripts creates difficulties in accurately monitoring trial proceedings. Where testimony was given on the days on which no transcript was released, this report relies on information gathered by the Coalition for the International Criminal Court (CICC) in informal summaries drafted by observers who attended the hearings. The CICC notes that any inaccuracies that may be contained in these summaries are unverifiable without comparison to the official transcripts. The Women's Initiatives for Gender Justice thanks the CICC for their permission to use portions of these summaries in the *Gender Report Card 2010*.

delicate security situation on the ground and the need to ensure adequate witness protection. With regard to victims of sexual violence, she stated that these victims 'not only fear being branded in their own societies, but they also fear retaliation from their perpetrators or groups close to them'.[865] She admitted that the security threats made it 'enormously challenging' to find victims willing to be interviewed by the Office of the Prosecutor, and that those who decided to be interviewed 'clearly need to be commended for their courage to do so'.[866]

The Women's Initiatives previously expressed its concern about the sufficiency of the evidence gathered by the Prosecution to support the charges of rape and sexual slavery.[867] Evidence of gender-based crimes was not fully presented at the confirmation hearing, and one of the judges issued a partly dissenting opinion, casting doubt on the sufficiency of the evidence presented with respect to gender-based crimes at the pre-trial stage.[868] The witness testimony intended to prove charges of sexual violence in the Katanga/Ngudjolo case, outlined below, has been the first such testimony given at the ICC, as these charges are the first charges of gender-based violence that have actually been brought to trial. As the Women's Initiatives recalled in its Press Statement prior to the start of trial,[869] an October 2009 decision of the Trial Chamber ruled out the possibility of the Prosecution presenting new facts during the trial that come to light as a result of ongoing investigations.[870] The decision held that the Prosecution is bound by the 'facts and circumstances' as set forth in the confirmed charges and is therefore forced to rely on facts presented only during the pre-trial phase. While it remains to be seen whether this will have an impact on the strength of the Prosecution's case regarding gender-based crimes, the Women's Initiatives notes that the evidence presented thus far, in particular by male witnesses, has been limited.

Apart from the testimony of female witnesses, summarised in detail below, a number of male witnesses for the Prosecution testified that women and girls played multiple roles during the attack. Women and girls served as wives to the soldiers in military camps;[871] as 'female military personnel' or PMFs fighting with weapons;[872] as labour to help loot and transport

865 ICC-01/04-01/07-T-80-ENG, p 11 lines 6-8.

866 ICC-01/04-01/07-T-80-ENG, p 11 lines 10-11.

867 The Prosecution also sought to bring charges of outrages upon personal dignity based on the evidence provided by Witness 287 but these charges were not confirmed by the Pre-Trial Chamber. Despite having initially found that there were substantial grounds to believe that the war crime of outrage upon personal dignity was committed by the FNI/FRPI (para 377), the Chamber held that the Prosecution had not provided evidence to connect Katanga and Ngudjolo to the commission of these crimes. It found that the Prosecution had not brought 'sufficient evidence to establish substantial grounds to believe' that the commission of these outrages was intended by Katanga and Ngudjolo as part of the 'common plan', or that these crimes 'would occur in the ordinary course of events' (paras 570-571). The crimes instead seem to have been committed incidentally by soldiers and cannot be connected to the suspects' mental element (para 571). The Chamber thus declined to confirm the charge of outrage upon personal dignity. Nonetheless, the Prosecution called Witness 287 as a witness and her testimony is described below in this section. ICC-01/04-01/07-717.

868 ICC-01/04-01/07-717, Dissenting Opinion of Judge Ušacka.

869 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', 23 November 2009.

870 ICC-01/04-01/07-1547.

871 The following witnesses made reference in open session to women and girls serving as wives to soldiers: Witness 233, ICC-01/04-01/07-T-85-Red-ENG, p 9 lines 1-6; ICC-01/04-01/07-T-86-Red-ENG, p 27 lines 11-14; Witness 279 (CICC informal summary); Witness 280, ICC-01/04-01/07-T-158-Red-ENG, p 58-60; Witness 267, ICC-01/04-01/07-T-166-Red-ENG, p 27-28, ICC-01/04-01/07-T-170-Red-ENG, p 32-34.

872 The following witnesses made reference in open session to women and girls fighting or serving as PMF: Witness 250, ICC-01/04-01/07-T-98-Red-ENG, p 32 lines 23-25, p 33 lines 1-3; Witness 250, ICC-01/04-01/07-T-107-Red-ENG, p 62 lines 13-14; ICC-01/04-01/07-T-108-Red-ENG, p 47 lines 16-18; Witness 161, ICC-01/04-01/07-T-111-Red-ENG, p 13 lines 12-15; Witness 267, ICC-01/04-01/07-T-166-Red-ENG, p 26-27.

looted property;[873] and were often described as victims in testimony about those killed in the attack.[874] Based on the public record, only two male witnesses testified in open session about rape, and did so in general terms.[875]

Testimony by female witnesses and victims/survivors of gender-based crimes

The first female witness to testify was **Witness 287**. Prior to her testimony, Presiding Judge Cotte explained that she would benefit from the following protective measures: the use of a pseudonym, as well as voice and face distortion. The witness would also enter and exit the courtroom in closed session, and a curtain would be drawn around the witness to avoid all visual contact between the witness and the two accused.[876] The Judge further pointed to the possibility of having a psychologist from the VWU present in the courtroom should the need arise. Judge Cotte emphasised that these measures had been put in place based on the observations of the VWU, and on a request made by the witness herself. He further noted that these measures were provided for by the Trial Chamber in a previous decision.[877] Judge Cotte stressed that in order to ascertain the truth, witnesses 'have to testify in the best conditions possible, particularly psychological conditions'.[878]

On direct examination, Witness 287 described being awoken in her house with her husband and two daughters when the attack commenced at 4.00 am.[879] They were woken by gunfire and her husband went out to see what was happening. When her husband did not return, the witness left the house with her two daughters and ran for the UPC camp, where she was told to hide in one of the civilian houses because the fighting was getting more intense. Later in her testimony, the witness described what she saw during her flight: many enemy soldiers, dressed in both uniforms and civilian clothes, and some with leaves around their bodies, who were armed with spears and bows and rifles. She stated that she saw civilians who had been hit by bullets, some of whom were unable to reach a school where people were hiding.[880] The witness also reported that some of the soldiers she saw were children, age 12 or over.[881] She testified that she saw women carrying weapons on the day of the attack, both in uniform and in civilian clothing. She reported seeing women looting and carrying looted items away.[882]

Witness 287 testified that she and her daughters hid under the bed, where eventually they were found by assailants searching the house, one of whom stuck his lance under the bed causing her daughter to cry out. The soldiers then started firing under the bed. At this point in her testimony the witness became upset and the Court took a break, allowing the witness

873 The following witnesses made reference in open session to women and girls looting and transporting property: Witness 250, ICC-01/04-01/07-T-107-Red-ENG, p 26 lines 16-18; ICC-01/04-01/07-T-107-Red-ENG, p 64 lines 5-6; ICC-01/04-01/07-T-107-Red-ENG, p 45-48, p 60; ICC-01/04-01/07-T-108-Red-ENG, p 27, lines 6-9; Witness 161, ICC-01/04-01/07-T-111-Red-ENG, p 13 lines 12-15, p 52, lines 17-21, p 53 lines 14-15, Witness 363, ICC-01/04-01/07-T-117-Red-ENG, p 63 lines 7-9; Witness 159, ICC-01/04-01/07-T-120-Red-ENG, p 28 lines 19-21.

874 The following witnesses made reference in open session to women and girls as victims killed in the attack: Witness 250, ICC-01/04-01/07-T-107-Red-ENG, p 18 lines 5-9, p 19 lines 1-3; Witness 250, ICC-01/04-01/07-T-107-Red-ENG, p 45-48, p 60; ICC-01/04-01/07-T-108-Red-ENG, p 81 lines 23-25; Witness 161, ICC-01/04-01/07-T-109-Red-ENG, p 53; Witness 159, ICC-01/04-01/07-T-120-Red-ENG, p 7 lines 14-17; Witness 279 (CICC informal summary).

875 Witness 279, ICC-01/04-01/07-T-148-Red-ENG, p 21-23; ICC-01/04-01/07-T-153-Red-ENG, p 5-6; Witness 267, ICC-01/04-01/07-T-170-Red-ENG, p 35-37; see also Witness 233, ICC-01/04-01/07-T-86-Red-ENG, p 12 (witness' reply in private session).

876 ICC-01/04-01/07-T-129-Red-ENG, p 8 lines 23-25.

877 ICC-01/04-01/07-1667-Red, para 14.

878 ICC-01/04-01/07-T-129-Red-ENG, p 9 lines 13-14.

879 ICC-01/04-01/07-T-129-Red-ENG, p 20-24.

880 ICC-01/04-01/07-T-129-Red-ENG, p 37-38.

881 ICC-01/04-01/07-T-129-Red-ENG, p 48-49.

882 ICC-01/04-01/07-T-130-Red-ENG, p 19-20.

to leave the courtroom for ten minutes before continuing her testimony.[883] The witness then gave further testimony in private session. On return to public session, the witness described being questioned by the assailants, who were dressed in both military and civilian clothes, about whether she was the wife of a soldier.[884] While some of the soldiers said that she should be killed, others wanted to keep her alive and make her take them to the armoury in Bogoro. When she tried to take her children with her, they told her 'leave the children here. We are going to kill them here. And you yourself, you are going to be killed ... with the guns that we are going to find in the depot.'[885] The witness told the Court that she was holding the children in her arms, but let them go when one of the attackers hit her on the back with a machete, and when she left to go with the soldiers to the armoury she heard gunshots.[886] The witness testified, 'I do not know whether it was at that time that they were killed, but I know and I am sure that they were killed.'[887]

Witness 287 told the Court that the assailants had undressed her when she came out from under the bed, ripping off her skirt with a knife, and that when they left the house she was only wearing briefs and a blouse, having already lost her wrap running from her house in the morning.[888] When she left the house with the group of assailants, the witness reported seeing a 'Kunzi' or, leader of the enemy soldiers, coming into the town with his bodyguards.[889]

Witness 287 told the Court that she did not know where the armoury was in Bogoro, and that as a tactic to try to save herself she took the assailants in the direction of the centre of the town, where there was a large store.[890] The assailants forced her to break down the door, telling her that they were going to kill her with the guns and ammunition inside. Once the door was broken down, the soldiers looted the goods in the store, and reported that while some wanted to kill her, others wanted to keep her alive to carry the goods.[891] However, the witness found an opportunity to escape when the assailants went to loot a nearby house and to arrest the civilians hiding there.[892] The assailants searched the bush for the witness, calling for her to come out, but she remained hidden until nightfall, when she tried to find a way to Bunia. Later, she gave up and remained hidden in the bush. The witness told the Court that she had pain in her knee, and 'there was gunfire coming from all directions, houses and bushes were being set on fire'.[893] After hiding for three days, on the third night the witness stated that she was able to walk to Lengabo, where she met a man she knew and his wife who gave her a loincloth.[894] She was then able to get a ride on a motorbike and meet her parents who took her for medical treatment for her knee.[895] The Court heard testimony from the witness about her injured knee, and saw pictures of the scar and pictures that the witness identified as herself receiving medical treatment. The Court later heard testimony from a forensic expert about the wound.[896]

Witness 287 was eventually reunited with her husband, who lived through the attack. She reported that his parents were killed in the attack.[897] The Legal Representatives of participating victims questioned the witness on some of the details of her story, specifically

883 ICC-01/04-01/07-T-129-Red-ENG, p 24-25.
884 ICC-01/04-01/07-T-129-Red-ENG, p 31-32.
885 ICC-01/04-01/07-T-129-Red-ENG, p 32 lines 3-5.
886 ICC-01/04-01/07-T-129-Red-ENG, p 32 lines 11-25.
887 ICC-01/04-01/07-T-129-Red-ENG, p 32 lines 17-19.
888 ICC-01/04-01/07-T-129-Red-ENG, p 41 lines 1-16.
889 ICC-01/04-01/07-T-129-Red-ENG, p 39-41.
890 ICC-01/04-01/07-T-129-Red-ENG, p 33 lines 13-25.
891 ICC-01/04-01/07-T-129-Red-ENG, p 43-44.
892 ICC-01/04-01/07-T-129-Red-ENG, p 44-45.
893 ICC-01/04-01/07-T-129-Red-ENG, p 52 lines 6-7.
894 ICC-01/04-01/07-T-129-Red-ENG, p 57.
895 ICC-01/04-01/07-T-129-Red-ENG, p 58-60.
896 ICC-01/04-01/07-T-129-Red-ENG, p 60-69; ICC-01/04-01/07-T-131-Red-ENG, p 45-74.
897 ICC-01/04-01/07-T-130-Red-ENG, p 3-4.

as to whether she knew who owned any of the goods she saw looted, and whether she saw child soldiers among the assailants.[898]

The next female witness to testify was **Witness 249**. Much of this witness' direct testimony took place in closed session.[899] From information available in the public record, Witness 249 was also granted protective measures, namely the use of a pseudonym, as well as voice and image distortion.[900]

According to observers who were present during the testimony that did take place in open session, Witness 249 was in Bogoro during the attack, when she was shot in the leg.[901] She crawled to a wooded area and spent the night there. While she tried to flee the next morning, she was caught and raped by six soldiers. She was then taken to their superior, who she identified as 'Mr Yuda'. She reported seeing many civilian corpses along the road.

A portion of the witness' direct testimony was included in an ICC video summary:

> I told them to please leave me alone, I am tired and they said: 'If you don't want, we will kill you in this wood.' I told them that they could kill me, it was not a problem. Thereafter, they dragged me but I refused and they put me again ... they threw me on the ground and they raped me once again and once again and once again. I was very weak, very afflicted and I had a lot of pain. I felt that my legs couldn't hold anymore. Then, we left this place. People drove me to their superior and there were a lot of bodies laying down on the ground. I was even afraid of walking in this road. They told me to keep going ahead them. I was mentally tired. The militaries were there. They started to beat me. And there was a small house nearby and they started to rape me once again. I told them that they would kill me. I suggested that they kill me instead of treating me like an animal. The militaries said that they could kill me if they wanted or ill-treat me. I told them that they should do what they want. My leg was starting to swell. I couldn't walk anymore.[902]

898 ICC-01/04-01/07-T-130-Red-ENG, p 25-34.

899 The available public transcripts containing the testimony of 3 May 2010 have been expunged; see ICC-01/04-01/07-T-133-Red-ENG and ICC-01/04-01/07-T-134-Red-ENG. No transcript was available for the testimony of 4 May 2010, as of 26 October 2010.

900 ICC Video Summary 'Affaire Katanga et Ngudjolo Chui: procès, témoins, 3-21 mai 2010,' 1:57-3:45, available at <http://www.youtube.com/user/IntlCriminalCourt#p/c/BF83D291B0382424/19/O_QpnklvnTs>, last visited on 8 October 2010.

901 Coalition for the ICC (CICC) Informal Weekly Summary, 03-07 May 2010.

902 Informal translation by Women's Initiatives for Gender Justice of ICC Video Summary 'Affaire Katanga et Ngudjolo Chui: procès, témoins, 3-21 mai 2010,' 1:57-3:45, available at <http://www.youtube.com/user/IntlCriminalCourt#p/c/BF83D291B0382424/19/O_QpnklvnTs> last visited on 8 October 2010.
Original testimony as transcribed by Women's Initiatives for Gender Justice: 'Je leur ai dit s'il-vous-plait, laissez moi tranquille, je suis fatiguée et ils ont dit ceci : "si tu ne veux pas, on va te tuer dans ce bois". Je leur ai dit qu'ils pouvaient me tuer, que je n'avais pas de problème. Par la suite, ils m'ont trainé mais j'ai refusé et ils m'ont mis encore une fois... ils m'ont jeté par terre et ils m'ont violé encore une fois et encore une fois et encore une fois. J'étais très faible, très affaiblie et j'avais beaucoup de douleurs. Je sentais que mes jambes ne tenaient plus. Apres cela, nous avons quitté ce lieu. Des gens m'ont conduit chez leur supérieur et il y avait beaucoup de cadavres qui gisaient à même le sol. J'avais même peur de me déplacer sur cette route. Ils m'ont dit d'avancer devant eux. J'étais mentalement fatiguée. Les militaires étaient sur place. Ils ont commencé à me frapper. Et il y avait une maisonnette à coté. Et ils ont commencé à me violer encore une fois. Je leur ai dit qu'ils allaient me tuer. Je leur ai suggéré de me tuer au lieu de me traiter ainsi, comme un animal. Les militaires ont dit que ils pouvaient me tuer si ils voulaient ou me maltraiter. Je leur ai dit qu'il fallait qu'ils fassent ce qu'ils veulent. Ma jambe avait commencé à enfler. Je ne pouvais plus marcher.'

According to observers at the trial, Witness 249 also told the Court that any differences between her current testimony and former statements are due to her having been ashamed of what happened to her, and not being ready to tell it all.[903]

On the third day of her testimony, at the Prosecution's request, Witness 249 acknowledged that she met people working for the ICC in December 2006 and she identified photographs taken of her wounds at that time.[904] The witness was also questioned by the Legal Representatives for Victims. In answer to their questions, she stated among other things that she did see children participating in the assault on Bogoro, and that she did not receive psychological treatment with her initial medical treatment.[905] The witness reiterated that she did not speak about the rape at that time because she was ashamed.[906]

The Presiding Judge asked Witness 249 to clarify some points of her direct testimony. From her clarifications it appeared that she had arrived in Bogoro to sell goods at the market, not having received any warnings about the attack, which started a few hours later. She spent the night at the depot where they kept their goods, and didn't go to the village itself. Once the fighting started, she fled to the bush not far from Bogoro where she hid and did not witness what happened in Bogoro.[907] She heard songs and the beating of drums, but could not understand the words of the songs. The next morning she left the bush and met people on the road who captured her and undressed her.[908]

> I left the hiding-place and I was coming back. Everything was calm. I heard some noises from the direction from which I had come, and that is when I left the bush, after hearing those noises. That is when I met those people moving on the road, on the path, inside the bush. They captured me. I was about to run away, but unfortunately they called out to me. They told me, they said that I was an enemy. I said no, I was not an enemy, but they told me to take off my clothes. I had slippers on my feet, but they took even the jacket that I was wearing. They undressed me.[909]

The witness clarified that the first time she was raped was during the day.[910] It appears from the testimony in open session that the witness was then taken to a camp where she was imprisoned, and that she saw other women there, but they left once she arrived.[911]

The Katanga Defence asked the witness how she came to be in contact with, and a witness at, the ICC. The witness responded:

> I was a witness because I experienced a situation. There were events which I endured which made me suffer, and it is because of these events that I experienced and which made me suffer enormously that I am here to come and testify. I therefore came to testify, above all, as to the fact that I have suffered very, very much in my life because of these events.[912]

The Defence acknowledged the 'terrible indignities' suffered by the witness, and the Court moved into private session to discuss both the intermediary who contacted her as well as her personal details.[913] After returning to open session, the Defence drew the Court's

903 CICC Informal Weekly Summary, 03-07 May 2010.
904 ICC-01/04-01/07-T-136-Red-ENG, p 55-60.
905 ICC-01/04-01/07-T-136-Red-ENG, p 65-70.
906 ICC-01/04-01/07-T-136-Red-ENG, p 70 lines 3-4.
907 ICC-01/04-01/07-T-136-Red-ENG, p 71-73.
908 ICC-01/04-01/07-T-136-Red-ENG, p 74-75.
909 ICC-01/04-01/07-T-136-Red-ENG, p 75 lines 11-19.
910 ICC-01/04-01/07-T-136-Red-ENG, p 75 lines 20-24.
911 ICC-01/04-01/07-T-136-Red-ENG, p 78 lines 15-25.
912 ICC-01/04-01/07-T-137-Red-ENG, p 11 lines 10-15.
913 ICC-01/04-01/07-T-137-Red-ENG, p 11-13.

attention to a 'substantially different story'[914] given by the witness in previous statements. The Defence stated that 'there's a question mark over the reliability and even credibility of this witness'.[915] The inconsistency concerned whether the witness lived with her family in Bogoro as she said in a 2006 statement or came from outside of Bogoro, as she testified at trial. Under cross-examination from the Katanga Defence, the witness maintained that she did not live in Bogoro.[916] The cross-examination upset the witness. She stated that the Defence was trying to confuse her and tell lies. The Chamber intervened to calm her and restated the question, inviting her to explain why there are differences in her statements. [917] The responses to this and further questions were given in private session.

The third female witness called by the Prosecution was **Witness 132**. Prior to her appearance in the courtroom, the Presiding Judge reviewed the extensive protective measures provided. Witness 132 was granted use of a pseudonym, and voice and image distortion. She entered and left the courtroom during closed session; a curtain was drawn so that there would be no direct visual contact between the witness and the accused (although the accused could see her face on their screens); a female, Swahili-speaking resource person from the VWU was seated beside her in the witness box, and a psychologist from the VWU was seated in the courtroom.[918] The Presiding Judge also reminded the parties and participants of their ruling of November 2009 pertaining to vulnerable witnesses,[919] and of Rule 88 of the Rules of Procedure and Evidence, allowing for special measures for traumatised witnesses, in particular victims of sexual violence.[920] The Presiding Judge informed the Court of the VWU's assessment that Witness 132 'is still very traumatised by the events that she lived through and is particularly vulnerable'.[921] Since the witness 'may have been the victim of rape or other forms of sexual violence and may have seen a number of events that were extremely violent ... the witness should be questioned with all necessary respect and sensitivity'.[922]

In addition to the provision of in-court protection measures, it is significant to note that Witness 132 was also granted out-of-court measures of protection. Her husband travelled with her upon the recommendation of the VWU for psychological support.[923] The witness was also preventively relocated by the Office of the Prosecutor together with her family on 14 April 2008. The VWU accepted Witness 132 in the ICC Protection Programme on 19 May, 2008.[924]

After addressing some initial questions in private session, the Prosecution asked Witness 132 to tell the Court what happened on the day of the attack on Bogoro. The witness told the Court that they slept until 5 am, when they heard gunshots. They came out of the house to find Bogoro already surrounded, and people running in all directions. The witness described seeing people having their throats slit with machetes, and others being shot, or having their limbs cut off.[925] She said the attackers were Lendu, with leaves on their bodies and wearing animal skins, and Ngiti people. The attackers were carrying arrows, spears, and axes, but the witness could not identify other weapons because it was the first time she had seen such weapons.[926] The witness specified that the

914 ICC-01/04-01/07-T-137-Red-ENG, p 41 line 23.
915 ICC-01/04-01/07-T-137-Red-ENG, p 43 lines 15-16.
916 ICC-01/04-01/07-T-137-Red-ENG, p 55 lines 1-14.
917 ICC-01/04-01/07-T-137-Red-ENG, p 55-57.
918 ICC-01/04-01/07-T-138-Red-ENG, p 16-17.
919 ICC-01/04-01/07-1667-Red.
920 ICC-01/04-01/07-T-138-Red-ENG, p 16 lines 13-21.
921 ICC-01/04-01/07-T-138-Red-ENG, p 16 lines 23-25.
922 ICC-01/04-01/07-T-138-Red-ENG, p 17 lines 14-18.
923 ICC-01/04-01/07-T-142-Red-ENG, p 1-4. Upon the request of the Ngudjolo Defence, the Chamber reminded the witness of the importance of not discussing matters raised in the courtroom with anybody.
924 ICC-01/04-01/07-T-141-Red-ENG, p 67 lines 21-25.
925 ICC-01/04-01/07-T-138-Red-ENG, p 75-76.
926 ICC-01/04-01/07-T-138-Red-ENG, p 77-78.

corpses she saw while she fled were civilians, in particular four women.[927] As she fled she saw the attackers destroying the village:

> They were burning the houses. They were looting the possessions of people, everything, everything was taken. Nothing remained. Even houses were burnt down. Nothing remained. Everything was looted and burnt, outside maybe excrement. Everything was looted. Everything of value was taken, and we remained orphaned -- orphans like that. War is truly hard.[928]

On the second day of her testimony, Witness 132 told the Court that she fled in the direction of Waka, and she was hit by a bullet on her right shoulder during the flight. She spent a day and night hiding in the bush, and she could hear houses being destroyed as well as attackers searching for other people hidden in the bush, and killing them when they came out.[929] The witness was discovered in the forest, and pleaded with the attackers not to kill her, telling them she was not Hema.[930] She described the attackers as dressed in both military uniforms and clothing, some of them carrying knives, rifles, and spears. She identified them as Lendus because they had small bottles and some of them were dressed in leaves.[931] The witness then told the Court first that she was 'mistreated',[932] and then acknowledged on further questioning that she was raped.[933] At this point in her testimony the witness became very upset, and the Court took a recess.[934] When the Court returned, the witness said:

> I would like to apologise to you. When I want to cry, it's because I'm very emotional. I remember the violence that I was subjected to and I remember when I was raped, and a lot of women are suffering now. They have husbands who don't want them anymore, even if they already have children, but there are marriages that break up. In fact, it is surprising that my husband still accepts me. I see all of the violence that occurred and it is because when I think — because of all that and when I think of it that I cry. And I'd like to apologise for that.[935]

The Presiding Judge acknowledged the witness' statement, saying there was no need to apologise and that the Court 'fully understands that you are in a lot of pain and you have suffered a lot'.[936] The Presiding Judge reminded the witness that she could request breaks in her testimony when she needed them. The Prosecution then proceeded to ask the witness about the rapes.

Q All right, Madam Witness, I know it is difficult for you to speak about this topic, but I must ask you some additional questions on the rapes that you referred to. You mentioned that among them, among those people who found you, there were some who had raped you. How many of those people raped you that day?

A There were the three people who raped me, and then after that, when we left, we went to the camp with other people. We went to Kagaba camp.

Q Could you tell us under what circumstances those rapes occurred?

A It is difficult for me to answer that question.

927 ICC-01/04-01/07-T-138-Red-ENG, p 78 lines 23-25, p 79 line 1.
928 ICC-01/04-01/07-T-138-Red-ENG, p 80 lines 6-11.
929 ICC-01/04-01/07-T-139-Red-ENG, p 9-11.
930 ICC-01/04-01/07-T-139-Red-ENG, p 11-12.
931 ICC-01/04-01/07-T-139-Red-ENG, p 13.
932 ICC-01/04-01/07-T-139-Red-ENG, p 13 lines 16-18.
933 ICC-01/04-01/07-T-139-Red-ENG, p 14 line 1.
934 ICC-01/04-01/07-T-139-Red-ENG, p 13-16.
935 ICC-01/04-01/07-T-139-Red-ENG, p 17 lines 10-18.
936 ICC-01/04-01/07-T-139-Red-ENG, p 17 lines 21-22.

Q If you don't mind, Madam Witness, we will proceed slowly. If I follow you, those people found you, they found you where you were hiding. Did the rapes occur where you were found or did they occur afterwards at the place where they took you to?

A The same place when they found me in the bush that day.

Q Were there any rapes while you were moving to a different place?

A No. On the way there were no rapes.

Q As far as the first rape is concerned, could you give us further details on how that happened that first day?

A For the first rape it is where they found me. Everybody raped me. When the first one was finished, it was another person. Everybody was raping me. I had nothing to say. I was just being quiet. I knew I was already dead, but God protected me. That's the way it was. That is why I was saying to myself I've become their woman. Now that I've become their woman we have to go to the camp. That is what they told me at the time.

Q So if I understand correctly, it's the people who raped you who said that you were now their woman or their so-called wife?

A Yes. It was the same day that they told me that. So I kept quiet because I was scared. I said, well, they can do whatever they please. It's all up to them. I did not want to talk to them.

Q While these rapes were going on, did those people – either the people who were raping you or were around them – did those people say anything?

A They were saying other things, but I wasn't interested, I didn't want to follow, because I was saying I was already dead. I don't know what those people were saying, I was not following.

Q Were you injured during those rapes?

A Injured? My body hurt. I didn't feel too well, my stomach hurt. And because I didn't have any medication, I ached.

Q Did you bleed?

A Yes.

Q Where were you bleeding?

A My body was injured and that is where I was bleeding from.

Q Are you referring just to the wound that you had in your right shoulder or were you bleeding elsewhere as well?

A Yes. Blood was coming from my female parts, that's where the blood was coming from.[937]

Witness 132 told the Court that she was taken to Kagaba camp, a military camp, where she was questioned and then imprisoned. She was asked by camp authorities in military uniform who she was and how she got to Bogoro, and asked whether she was Hema or Nande. The witness responded that she was Nande.[938] At the end of the interrogation, the witness was imprisoned in a square pit, big enough for a person to sit in, and with a ladder to get out. The pit was covered by planks and stones during the day. The witness described being pushed in, and that there were another woman and an elderly man already in the pit, with other people coming over time.[939] She described the woman as young, 11 or 12 years old, and said the woman told her about

937 ICC-01/04-01/07-T-139-Red-ENG, p 19 lines 2-25, p 20 lines 1-24.
938 ICC-01/04-01/07-T-139-Red-ENG, p 21-26.
939 ICC-01/04-01/07-T-139-Red-ENG, p 27-29.

what happened in Bogoro and about how she had been taken hostage.[940] The witness spent the night in the pit, and the next day was taken out for interrogation.[941] The witness was kept in the pit for an extensive period of time, with people being taken in and out to do chores, such as sweeping the yard and doing dishes.[942] She stated that although she didn't count the days, 'I know that we spent weeks there because we had to wait for the authority to leave.'[943]

Witness 132 testified that she was raped numerous times during her detention. From the transcripts it is clear that the witness became very emotional during this portion of her testimony and the Court took breaks to allow her to continue. The Prosecution and the Presiding Judge went over her answers regarding the rapes a number of times. While it was clear that the witness was raped multiple times and by multiple perpetrators, the exact sequence and details of events remained unclear.

Witness 132 told the Court that boys of Ngiti ethnic origin, wearing military uniforms armed with weapons, would enter the prison and rape them at night. She believed these were people who lived in the camp.[944] From a later clarification requested by the Presiding Judge, it appears these were soldiers from the camp who were put into the hole, some of whom were drunk or had taken drugs.[945] At that time, she also told the Court that she did not know if other women besides herself and the girl with whom she was imprisoned were taken hostage and raped during her time in the camp.[946] She did not know if the soldiers were put into the hole voluntarily, so that they could rape them, or whether they were put in for having committed a crime. She clarified that it was only soldiers in uniform who raped her while she was in prison, and not civilians.[947]

940 ICC-01/04-01/07-T-139-Red-ENG, p 40 lines 22-25.
941 ICC-01/04-01/07-T-139-Red-ENG, p 31.
942 ICC-01/04-01/07-T-139-Red-ENG, p 45; p 59 lines 5-10.
943 ICC-01/04-01/07-T-139-Red-ENG, p 51 lines 10-13.
944 ICC-01/04-01/07-T-139-Red-ENG, p 46-47.
945 ICC-01/04-01/07-T-141-Red-ENG, p 38-39.
946 ICC-01/04-01/07-T-141-Red-ENG, p 38.
947 ICC-01/04-01/07-T-141-Red-ENG, p 40-41.

In response to the Prosecution's question of approximately how often they raped her, the witness said:

A With regard to rapes, well, you know, when you are kidnapped or imprisoned and they take the men and they put them with you, they can do whatever they want. There were rapes. With everything that we saw, with all of the suffering going on — well, they raped me. They raped me that night as well. They raped me even after raping me at first, and even the woman who was there, she told us that they did the same thing to her. That is what we were subject to in that camp.

Q Madam Witness, are you able to tell us when that happened for the first time, that people were brought and they raped you?

A The first time those things happened I was wearing some briefs and a skirt, and the young man lift up the skirt and took off my undergarments and raped me. And then there was another person. When he was finished, then someone else did, someone else raped me. That's not what I wanted, of course, but I didn't have any strength. I could not refuse because I was there and you're scared and you know that you're already dead. That's the way it is — that's the way it was.[948]

The Presiding Judge tried to clarify whether the witness was raped on a number of occasions, or once or twice. The witness responded, 'at night I was raped twice. Even the other woman, the other woman was raped in the same way because she was crying.'[949] When the Presiding Judge asked again whether it was on a number of days and nights, the witness answered:

948 ICC-01/04-01/07-T-139-Red-ENG, p 48 lines 6-23.
949 ICC-01/04-01/07-T-139-Red-ENG, p 50 lines 7-9.

That night they raped me twice, because in the prison we spent quite a lot of time. It is when the soldiers came, there were some people — some soldiers who came quite drunk, those types of things. So once they were there, they would touch my body and make us do things we did not want to do. Those are the things that happened there. But rape happened. Yes, they -- there were rapes.[950]

The Prosecution continued to question the witness on the regularity of the rapes, and although the witness did not answer directly, her responses suggest that rapes by multiple perpetrators were a regular occurrence.

Q Madam Witness, we're going to get back to that part of your story a little later. And during the time that you were detained there, I know you can't tell us exactly how many days, but I was wondering whether you were raped often, did it happen every evening, sometimes? Could you shed some light on this, please?

A Well, we slept well when men were not brought in, then we would sleep because we didn't have men touching us. But when they brought men, those men were brought to us just to rape us.

Q Did that happen often, that they would bring men into the prison?

A Those people were brought in because we saw those people sleep one day and then the next day they would leave, those types of things.

Q Madam Witness, are you able to tell us approximately how many people raped you while you were kept in that prison?

A Well, I was raped many times. I was raped many times. I can't tell you how many times, because even when I was in the camp there were other people that took advantage of the situation. They would hold us and do awful things. They said, 'If you don't do this, we will kill you.' And they said that if I told on them, they would do such and such a thing. So I didn't want to say anything. Rapes happened all the time. I'm telling the truth because I was not able to refuse. I couldn't say, 'Listen, you don't have any authority to do that.' I was not in a position to do that. I had to do everything that I was told to do. There was no way to refuse.

Q And the rapes that occurred outside of the prison, under what circumstances did they occur? What would you do?

A There was no way to do anything else. They would take the body and they would do things to the body — like, they would do things like pour water on us or whatever. Those are the types of things that happened. I didn't want to do this, obviously. I was scared and I couldn't say anything, but that's what they did. I certainly didn't enjoy it. And in all of those things — through all of that, I got sick and I've suffered a lot from that illness up until the time that I got the vaccination, the medication. That's when I finally got cured. After the war, after the rapes — well, that's how I got this illness.[951]

Witness 132 also told the Court that she was raped outside the prison, at least six times, but that 'what was happening outside, there was what was going on inside, but what was going on outside was — it was different. Someone could just grab you, go —bring you into the

950 ICC-01/04-01/07-T-139-Red-ENG, p 50 lines 16-22.

951 ICC-01/04-01/07-T-139-Red-ENG, p 51 lines 17-25, p 52 lines 1-25.

bush, and do some awful things. But we couldn't say anything, we were scared to say anything, because we were scared of dying.'[952] The witness also told the Court that the young girl who was imprisoned with her was also raped, that she heard her crying and saw the blood on her underwear.[953]

The Court then took a break to allow the witness to rest, and the Prosecution suggested that the remaining testimony be given in shorter sessions, due to the vulnerable nature of the witness and how upset she was becoming during her testimony. The Court appeared to accept this suggestion.[954]

Witness 132 said that she was imprisoned until she could be interrogated by the commander, 'Yuda', who eventually arrived at the camp and questioned her again about her story and her ethnicity.[955] The witness told the Prosecution that she did not tell the commander about the rapes, because she was afraid. She stated, 'I thought it better not to tell him about it. This is because if I did that, other people would have turned against me. That is why I decided not to tell him about it.'[956] Yuda told her that she was to stay in the camp, and from that point she was allowed to stay outside of the prison.[957] The witness also reported seeing other leaders, whom she identified as Katanga, and 'Cobra,' come through the camp.[958] She testified that Katanga came through the camp three times, and was well received.[959] The witness met Katanga on his first visit, and told the Court that the wife of the superior told her that other women in the camp had told Katanga about her 'problem', but the witness herself was too afraid to speak to Katanga.[960]

952 ICC-01/04-01/07-T-139-Red-ENG, p 53 lines 7-12.
953 ICC-01/04-01/07-T-139-Red-ENG, p 53-54.
954 ICC-01/04-01/07-T-139-Red-ENG, p 55-57.
955 ICC-01/04-01/07-T-139-Red-ENG, p 60-64.
956 ICC-01/04-01/07-T-139-Red-ENG, p 63 lines 6-8.
957 ICC-01/04-01/07-T-139-Red-ENG, p 64.
958 ICC-01/04-01/07-T-140-Red-ENG, p 5.
959 ICC-01/04-01/07-T-140-Red-ENG, p 10-11.
960 ICC-01/04-01/07-T-140-Red-ENG, p 12-14.

After Witness 132 met with Yuda, she spent the night in his house, in the kitchen, and was responsible for cleaning and fetching water.[961] When the Presiding Judge later asked for clarification, she told the Court that she was raped while she was staying at the commander's house.[962] She was then taken by another man into what the Presiding Judge later characterised as a 'forced marriage', and was also raped during this period.[963]

She said that at some point while she was living in the commander's house a man came who wanted to rape her, and she refused.[964]

> And he said he was going to marry me and said he would take me away, and I kept quiet. And that gentleman said he was going to marry me. I said I wanted to leave and he said that I was his wife. I don't know whether the authority gave the order for him to marry me, but I was forced to become that man's wife. And that man took me away for me to live with him, but I didn't want to. I was scared. He could take me wherever he wanted. That's how I came to leave the camp, to leave Yuda's house, and I went to live with that man. And then I managed to get away.[965]

Later in her testimony, Witness 132 told the Court that the rest of her family was killed in the attack.[966] The witness also took questions from the Legal Representatives for participating victims. In the questions answered in open session, the witness stated that she did not recognise the bodies she saw on her flight from Bogoro, but could say that they were civilians,

961 ICC-01/04-01/07-T-140-Red-ENG, p 17.
962 ICC-01/04-01/07-T-141-Red-ENG, p 42.
963 ICC-01/04-01/07-T-141-Red-ENG, p 41 lines 22-23, p 42 lines 4, 15.
964 ICC-01/04-01/07-T-140-Red-ENG, p 17 line 24.
965 ICC-01/04-01/07-T-140-Red-ENG, p 17 line 25; p 18 lines 1-7.
966 ICC-01/04-01/07-T-140-Red-ENG, p 40-41.

and that she saw looting.[967] She also testified that she saw child soldiers among the attackers in Bogoro, as well as in the camp.[968]

Before the Defence cross-examined Witness 132, the Presiding Judge asked for some clarification on points from her previous testimony. In the course of answering a question about the rapes while she was imprisoned, the witness became upset:

> My body was affected. My God, I was very ashamed. Now I have become useless. That is something that I do not believe anyone could be subjected to in life, that is to totally destroy someone's body. You become totally useless. You no longer have any value. When somebody sees you, they do not value you any longer, and they look down on you.[969]

In response to this outburst the Chamber conferred and Judge Diarra addressed the witness directly.

> Madam Witness, I am one of the Judges who have to determine the responsibilities for the acts that were perpetrated. I'm not going to talk here about those who are responsible, but what you have said, that a woman who is raped is a woman who has no value, she has to be ashamed, she is totally useless, that is not true. Women, children, and all the citizens of the world have to be protected by the family, by the society, by the governments and by the international organisations, and when those duties of protection are not carried out, when women such as yourself and the young girl who was with you are subject to such treatment, when the men are in the cars, they have all the weapons in the world and they are in their palaces, the shame here is the shame of the entire world. This is dishonour for humanity. You should not be ashamed. You are brave. You are courageous. What you are doing today is going to help society to realise that they are not doing their job correctly. Please do not consider yourself as useless. You are not. You are respectable. Generally speaking, I respect women. After my mother, you are the woman that I respect most in this world. Thank you.[970]

Presiding Judge Cotte added:

> A short while ago you said that you're useless, and the Court is telling you that that is not true at all. You are not useless. You had the courage to come and testify, and everyone here thanks you, because everyone here is trying to better understand the events, the way they happened to be able to ascertain the truth. You are not useless. You suffered. And as we have told you from the very beginning of your testimony, you have the right to cry because we are asking you questions that are difficult and even painful, but it is important for us to ask you those questions.[971]

Once the Judges had received the requested clarifications, the Defence for Katanga began cross-examination. A significant amount of the Defence questioning took place in private session. From what is available in public transcripts, the Katanga Defence focused first on identity cards that the witness had obtained in different names.[972] They also questioned her

967 ICC-01/04-01/07-T-140-Red-ENG, p 53-54.
968 ICC-01/04-01/07-T-141-Red-ENG, p 23-27.
969 ICC-01/04-01/07-T-141-Red-ENG, p 39 lines 3-8.
970 ICC-01/04-01/07-T-141-Red-ENG, p 39 lines 13-25, p 40 lines 1-6.
971 ICC-01/04-01/07-T-141-Red-ENG, p 40 lines 8-16.
972 ICC-01/04-01/07-T-141-Red-ENG, p 69-78; ICC-01/04-01/07-T-142-Red-ENG, p 8-19.

on the amount of time that elapsed between her arrival in the camp, Yuda's arrival, and her questioning by him. The Defence suggested that only one or two days had elapsed, but the witness maintained that it was more than that but she could not remember the exact amount of time.[973] The Defence asked her to identify a photograph of a man, which the witness identified as Yuda, and asked her the name of Yuda's wife, which the witness said was 'Mama Leki', also known as 'Mama Kunzi'.[974]

When the Katanga Defence resumed questioning the next day, the Presiding Judge spoke to the witness directly, acknowledging her difficulties in answering some of the questions and emphasising the importance of her continuing to do so even when the questions seemed repetitive.[975] The majority of the Katanga Defence questioning was then conducted in closed session. The small segments conducted in open session suggested that the witness was asked to identify photographs of people.[976]

Testimony about fetishes and battle practices

During the Katanga/Ngudjolo trial, 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 commit rape.

Witness 279, a young Ngiti man and alleged child soldier, testified as the thirteenth witness for the Prosecution between 20 May 2010 and 11 June 2010. On 27 May 2010, he explained a fetish as follows: 'it was a powder, a balm, and some bush meat – or rather, the skin of a wild animal'.[977] He explained that the soldiers would apply the mixture onto their faces and bodies before going into battle.

When asked if the soldiers would feel any different after they had applied the fetish, the witness replied 'yes, we would feel different. When we were going to fight, we were not afraid of anything we came across on our way.'[978] The witness further elaborated, explaining: 'There were times when we were so affected by this drug that we thought that everything was normal. It was only after the fact, after the events, that we would realise that the situation was abnormal.'[979]

Jean-Louis Gilissen, a Legal Representative for participating victims, noted with interest the witness' comparison between the experience of receiving fetishes and that of taking drugs. The witness stated that the fetishes were mixed and administered by special doctors, who allegedly were inhabited by spirits. These doctors gave the soldiers certain instructions or conditions. Witness 279 stated: 'For example, when we were going off to battle we had to fight only and to do other things after the battle.'[980] When asked

973 ICC-01/04-01/07-T-142-Red-ENG, p 27-32.
974 ICC-01/04-01/07-T-142-Red-ENG, p 35-36.
975 ICC-01/04-01/07-T-143-Red-ENG, p 10-12.
976 ICC-01/04-01/07-T-143-Red-ENG, p 13-66.
977 ICC-01/04-01/07-T-148-Red-ENG, p 14 lines 16-17.
978 ICC-01/04-01/07-T-148-Red-ENG, p 15, 5-6.
979 ICC-01/04-01/07-T-148-Red-ENG, p 15, 11-14.
980 ICC-01/04-01/07-T-148-Red-ENG, p 32, 1-4.

to give an example of 'other things', the witness suggested the practice of looting.

On 28 May 2010, Witness 279 was cross-examined by the Katanga Defence:

Q Am I right in saying that fetich (sic) only works if you observe the Ten Commandments? Isn't that what the feticher (sic) instructs people who want to use it? You have to fight and observe the Ten Commandments, isn't that right?

A Yes.

Q And, for example, when you're fighting, you mustn't rape, must you?

A Yes.[981]

Witness 280, the fourteenth witness for the Prosecution and former FNI soldier, began his testimony before the Court on 14 June 2010. He confirmed the information supplied by Witness 279 about the use of fetishes, adding that often the fetishes were applied through small cuts in the body. He also supplied information on another warfare tradition, that of employing '*animateurs*' or animators. These were described as women, men and children who served to animate or liven up the soldiers before going into battle. The witness stated: 'They were there to give life to the battle.'[982] He testified that the animators did this by beating drums, screaming and singing. He also added: 'I think this is something that can be done in lots of different ways.'[983]

On 16 June 2010, Witness 280 also testified about the conditions attached to the proper use of fetishes. He testified that he was given particular instructions as to how to use the fetishes, and that he was told, 'first of all, you mustn't take a woman by force. Secondly, you must not pillage others' property.'[984] However, Witness 280 later stated that the conditions attached to the use of fetishes only applied in certain circumstances. He explained that in cases where the soldiers were fighting solely against Hemas, the conditions did not apply. In such cases, he said that the soldiers were told '... to do whatever we wanted. We had permission to do anything.'[985]

When the Katanga Defence asked Witness 280 whether he meant that in such cases the soldiers then had complete free rein, and were entitled to kill and harm civilians as they wished, the witness replied: 'Yes.'[986]

981 ICC-01/04-01/07-T-149-Red-ENG, p 14 lines 7-14.
982 ICC-01/04-01/07-T-160-Red-ENG, p 11 lines 24-25.
983 ICC-01/04-01/07-T-160-Red-ENG, p 12 lines 18-19.
984 ICC-01/04-01/07-T-157-Red-ENG, p 8 lines 8-13.
985 ICC-01/04-01/07-T-157-Red-ENG, p 19 lines 1-2.
986 ICC-01/04-01/07-T-157-Red-ENG, p 19 lines 5-7.

Expert witnesses

Zoran Lesic testified as an expert witness for the Prosecution on 26 January 2010. Lesic worked as the ICTY visual technician and was asked to answer questions about his 360-degree presentation of the Bogoro Institute and its vicinity.[987] Lesic explained that he visited Bogoro on the 28th, 29th and 31st of March 2009[988] and took pictures of the place, by satellite and personally.[989] He further answered some questions about the geographical details of the area and about what could be seen in the different photographs.[990]

Eric Baccard, Co-ordinator of the Medical Legal Activities of the Office of the Prosecutor, testified as a forensic expert witness for the Prosecution for four non-consecutive days (30 March, 21 April, 22 April and 9 July 2010). Baccard has previously testified as an expert witness for the International Criminal Tribunal for the former Yugoslavia (ICTY). Baccard was asked to testify specifically about the forensic reports concerning Witnesses 132, 249 and 287 (the female witnesses who had testified to date). He verified that he had examined the witnesses and drafted the subsequent reports regarding their wounds himself.[991] Upon being questioned about Witness 287's knee injury, Baccard affirmed that it would be possible for her to walk for a period of four days with a bullet in her knee.[992] Upon the presentation of additional x-ray material, he further affirmed that the injury was caused by a projectile.[993] Similarly, Baccard confirmed that both Witness 132's injury in her shoulder and Witness 249's injury were consistent with a bullet wound.[994]

Constance Kutsch Lojenga testified as an Ngiti-language expert witness for the Chamber on 22 June 2010. Lojenga appeared before the Chamber to answer questions arising from her report.[995] She was asked specifically to clarify the translation of two phrases which one witness reported having heard during the attack. The two phrases in question were: 'Today's the day. Today they will see', and 'Do not leave the Hemas alive. Kill the Hemas.'[996]

987 Zoran Lesic submitted a report about his 360-degree presentation of the investigation in Bogoro, which was admitted as evidence in the Katanga/Ngudjolo case on 26 January 2010, Document number: EVD-OTP-00019. ICC-01/04-01/07-T-90-ENG, p 21.
988 ICC-01/04-01/07-T-90-ENG, p 22 lines 1-3.
989 ICC-01/04-01/07-T-90-ENG, p 23-25.
990 ICC-01/04-01/07-T-90-ENG, p 34-37, 42-45, 47, 51-53.
991 CICC Informal Summary 30 March 2010.
992 ICC-01/04-01/07-T-131-Red-ENG, p 72 lines 14-25, p 73 lines 1-5.
993 ICC-01/04-01/07-T-132-Red-ENG, p 70-73; ICC-01/04-01/07-T-167-ENG, p 7-12, p 19, p 31 lines 13-24.
994 ICC-01/04-01/07-T-132-Red-ENG, p 23 lines 21-25, p 24 lines 1-6, p 50-55.
995 ICC-01/04-01/07-T-159-Red-ENG. The report was filed as a confidential annex by the Registrar on 6 April 2010, ICC-01/04-01/07-2021.
996 As recounted by Presiding Judge Cotte: ICC-01/04-01/07-T-159-Red-ENG, p 4 lines 14-19.

Judiciary
Key Decisions

Admissibility

Between November 2009 and July 2010, the Court issued five decisions responding to challenges of admissibility and unlawful arrest and detention. Trial Chamber III rejected the Defence's admissibility challenge in *The Prosecutor v. Jean-Pierre Bemba Gombo*, in a decision that the Appeals Chamber confirmed. In *The Prosecutor v. Katanga/Ngudjolo*, a majority of the Appeals Chamber upheld Trial Chamber II's dismissal of a motion filed by the Katanga Defence, challenging his unlawful arrest and detention in the DRC prior to his surrender to the Court.

In both cases, the Appeals and Trial Chambers sent clear messages to the respective Defence counsel regarding the appropriateness of their strategies. In the Bemba case, Trial Chamber III dismissed the Defence's multiple abuse of process arguments as speculative and without foundation. At the same time, it censured the Defence for abuse of process for filing motions to reopen proceedings in the CAR in April 2010, after the confirmation of charges decision. The Appeals Chamber also conveyed its disapproval to the Defence concerning both the form and content of its appeal. In the Katanga/Ngudjolo case, both Trial Chamber II and the Appeals Chamber signalled clear limits to Defence discretion in organising its strategy by dismissing a motion for unlawful arrest and detention in the DRC filed at an advanced stage of the proceedings.

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 19 allows the Defence, or a State that has jurisdiction over a case, to challenge its admissibility 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.

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

On 25 February 2010, eight months after the charges were confirmed by Pre-Trial Chamber II,[997] Defence counsel for Bemba challenged the admissibility of the case, asserting the principles of complementarity, *ne bis in idem* (one shall not be charged twice for the same offence), and the lack of gravity.[998] The Defence also alleged abuse of process for, *inter alia*, material non-disclosure by the Prosecution and irregularities in his arrest and transfer to the Court.

Evaluating Defence claims that the charges against Bemba before the national courts rendered the case inadmissible at the ICC requires a brief overview of the national proceedings. An investigation into the charges against Bemba was first commenced in the CAR in June 2003; he was charged in September 2003.[999] In September 2004, the Investigating Judge of the *Tribunal de Grande Instance* dismissed the charges, finding that as Vice-President of the DRC, Bemba enjoyed diplomatic immunity. It also found insufficient incriminating evidence.[1000] The decision was appealed to the *Cour d'Appel de Bangui* (Bangui Court of Appeal), where, on 24 November 2004, the Public Prosecutor requested that the trial for the *crimes de sang* (blood crimes) be transferred to the ICC. This request was followed by a letter issued on behalf of President Bozizé to the Bangui Court of Appeal, proposing a severance of the proceedings in which the war crimes be referred to the ICC. The letter also suggested that the ICC Prosecutor initiate an investigation, using means unavailable to the CAR. On 16 December 2004, the Indictment Chamber of the Bangui Court of Appeal issued a judgement finding that the war crimes fell within the jurisdiction of the ICC. The decision was appealed in a *pourvoi en cassation* (appeal on points of law) to the *Cour de Cassation* (Court of Cassation), which on 11 April 2006 confirmed the judgement of the Bangui Court of Appeal. It found that recourse to international justice was the only means of preventing impunity for the crimes committed by Bemba, his troops and others, and that the CAR judiciary was 'clearly unable to investigate or prosecute the alleged perpetrators'.[1001]

Meanwhile, on 10 June 2008, Pre-Trial Chamber III issued a Warrant of Arrest for Bemba. Regarding admissibility, the Chamber stated:

> there is no reason to conclude that Mr Jean-Pierre Bemba's case is not admissible, particularly since there is nothing to indicate that he is already being prosecuted at national level for the crimes referred to in the Prosecutor's Application. On the contrary, it would appear that the CAR judicial authorities abandoned any attempt to prosecute Mr Jean-Pierre Bemba for the crimes referred to in the Prosecutor's Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC.[1002]

997 ICC-01/05-01/08-390.
998 ICC-01/05-01/08-704-Red3, (pursuant to Article 17(1)(b), (c) and (d) of the Statute). A corrigendum was filed on 1 March 2010.
999 ICC-01/05-01/08-802, paras 2-3.
1000 ICC-01/05-01/08-802, para 6.
1001 ICC-01/05-01/08-802, paras 10-15.
1002 ICC-01/05-01/08-14-tENG, para 21.

On 15 June 2009, Pre-Trial Chamber II confirmed the charges against Bemba, finding no change of circumstances regarding admissibility.[1003] The Defence filed an admissibility challenge on 25 February 2010.[1004] Shortly thereafter, in April and May 2010, Bemba's counsel in Bangui filed several motions and a brief in support of the *pourvoi* to the *Cour de Cassation* in the CAR.

On **24 June 2010**, Trial Chamber III issued its decision on Bemba's admissibility challenge, finding that the case against Bemba was admissible and that his allegations concerning abuse of process were without merit.[1005] As a preliminary matter, it held that the burden of proof in both the admissibility and abuse of process challenges lies with the Defence, and that the applicable standard of proof is the civil law 'balance of probabilities'.[1006]

Several aspects of the Trial Chamber's decision relied and expanded upon the Court's prior jurisprudence in the Katanga/Ngudjolo case, the first admissibility challenge before the ICC last year. For example, it noted conflicting jurisprudence between Trial Chambers I and II regarding when a trial commences for the purposes of Article 19(4) of the Statute, which requires admissibility challenges to be made prior to, or at, the commencement of the trial. It adopted the approach taken by Trial Chamber I, finding that a trial commences when the opening statements are made. It thus concluded that the Defence's application was timely and could be considered on the merits.[1007]

Regarding the merits of the admissibility challenge, Trial Chamber III first noted that Article 17(1)(b) is comprised of two cumulative elements: 1) the case was investigated; and, 2) the State decided not to prosecute. It found that the State had conducted an investigation into the alleged crimes. Yet, citing an Appeals Chamber decision in the Katanga/Ngudjolo case, it found that the State's decision to refer the case to the ICC did not constitute a decision 'not to prosecute' for the purpose of the Statute. According to the Appeals Chamber:

> If the decision of a State to close an investigation because of the suspect's surrender to the Court were considered to be a 'decision not to prosecute', the peculiar, if not absurd, result would be that because of the surrender of a suspect to the Court, the case would become inadmissible ... Thus, a 'decision not to prosecute' in terms of article 17(1)(b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC.[1008]

Furthermore, the Chamber rejected the Defence's arguments that the recent motions filed before the *Cour de Cassation* in April 2010 had a suspensive effect on the ICC proceedings. As 'no sufficient explanation has been provided for these extremely late filings', the Chamber found this tactic to constitute 'an abuse of this court's process'.[1009]

The Chamber found Article 17(1)(c) to be inapplicable as the accused was not tried, nor was there a decision on the merits for the conduct in question before the national courts. It further rejected the Defence's argument that the crimes were not sufficiently grave pursuant to Article 17(1)(d). The Chamber indicated that an inherent aspect of the Pre-Trial Chamber's confirmation of charges decision was that the charges met the gravity threshold. It noted in this regard that the Defence did not appeal the confirmation of charges decision.[1010]

The Chamber wholly rejected the Defence's abuse of process allegations. First, it dismissed the Defence's complaints regarding the Prosecution's material non-disclosure of correspondence with CAR officials related to admissibility as 'essentially speculative'.[1011] Second, it found that the Defence's assertions that the judicial process was used for political purposes 'entirely lacks a credible or sufficient evidential foundation'.[1012] Finally, the Chamber found no irregularity in the process by which the accused was detained in Belgium and transferred to the Court.

The Defence appealed the Trial Chamber's decision,[1013] and in a separate submission seven days later requested that the appeal have suspensive effect on the trial.[1014] On 9 July 2010, the Appeals Chamber denied the Defence request for suspensive effect on both procedural and substantive grounds.[1015] First, it observed that the Defence request for suspensive effect was not made as part of its appeal as required

1003 ICC-01/05-01/08-424, para 26.
1004 A corrigendum was filed on 1 March 2010, ICC-01/05-01/08-704-Conf-Corr.
1005 ICC-01/05-01/08-802.
1006 ICC-01/05-01/08-802, para 203.
1007 ICC-01/05-01/08-802, para 210.
1008 ICC-01/04-01/07-1497, para 83.
1009 ICC-01/05-01/08-802, para 231.
1010 ICC-01/05-01/08-802, paras 248-249.
1011 ICC-01/05-01/08-802, paras 215-216.
1012 ICC-01/05-01/08-802, para 256, (noting that the Defence failed to apply for leave to rely on secondary reports as documentary evidence, which otherwise carried little evidentiary weight).
1013 ICC-01/05-01/08-804-Corr2.
1014 ICC-01/05-01/08-809.
1015 ICC-01/05-01/08-817, paras 7, 12.

by Rule 156(5), and that it was filed out of time.[1016] Second, the Appeals Chamber found that the Defence did not assert any arguments suggesting that the continuance of the proceedings would 'lead to an irreversible situation or could potentially defeat the purpose of the appeal'.[1017]

The Appeals Chamber issued a judgement on the merits of the Defence appeal on **19 October 2010**. As noted above, it expressed disapproval both as to the form and content of the appeal. For example, at the outset of the judgement, it expressed clear disapprobation of the Defence request for a time limit extension in a footnote in its response to another party's filing. It also censured the Defence for filing a response to a Prosecution response, as 'a response may not be filed to any document which is itself a response'.[1018] Regarding the substantive merits of the appeal, the Appeals Chamber dismissed three out of four of the Defence's grounds for appeal *in limine*, for its failure to assert how the alleged errors affected the impugned decision.

The first ground of appeal asserted that the September decision of the Senior Investigating Judge in the CAR dismissing the charges against Bemba 'was not a final decision **not** to prosecute' for the purposes of Article 17(1)(b) of the Statute.[1019] According to the Defence, the decision by the Senior Investigating Judge constituted a final determination on the merits, the appeal of which was not valid. It argued that the Trial Chamber erred in finding that the appeals to the Bangui Court of Appeal and subsequently to the Court of Cassation, CAR's highest court of law, were *prima facie* valid.

The Appeals Chamber held that 'when a Trial Chamber must determine the status of domestic judicial proceedings, it should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise'.[1020] Thus, it held that the Trial Chamber did not err in its reliance on the judgements of the Court of Appeal of Bangui and the Court of Cassation in finding that there was no decision not to prosecute within the meaning of Article 17(1)(b) of the Statute.

The Appeals Chamber further rejected the Defence's additional arguments, including that Bemba was not specifically named in the Notice of Appeal, and that the Trial Chamber failed to consider the *Notes d'Audience*, a document summarising the Public Prosecutor's Office oral submission at the Court of Appeal of Bangui. Rather, it found that none of the suspects were named in the Notice of Appeal. It also found that the Trial Chamber had access to the Public Prosecutor's written submissions before the Bangui Court of Appeal, and that the *Notes d'Audience* were therefore not determinative.

The Defence's second ground of appeal argued that the Trial Chamber committed a procedural error in dismissing its application to present an expert in the law of the CAR. The Trial Chamber had rejected the Defence application during a status conference on 27 April 2010 on the basis, *inter alia*, that the interpretation of criminal procedural law in the CAR did not necessitate calling an expert witness, and that the Defence had failed to submit material detailing the kind of evidence that the expert would present.

In dismissing the Defence's second ground of appeal *in limine*, the Appeals Chamber noted that an appellant is obliged to both set out the alleged error, and to indicate with 'sufficient precision, how this error would have materially affected the impugned decision'.[1021] It found that the Defence failed to meet the minimum requirements for consideration of the merits of this ground of appeal as it failed to indicate 'how the proposed expert evidence would have deviated from the Trial Chamber's purportedly erroneous reading of the relevant provisions of CAR law'.[1022] It also found that the Defence failed to indicate how the Trial Chamber would have reached a different conclusion had it considered the expert testimony.

The Appeals Chamber also rejected the Defence's third ground of appeal, namely that the Trial Chamber erred in determining that the State was unable to prosecute for the purposes of Article 17(1)(b). Relying on its prior jurisprudence, the Appeals Chamber held that questions regarding a State's unwillingness or inability to prosecute arise only after it has been established that there was a decision not to prosecute. As expressed in its judgement on the admissibility of the Katanga/Ngudjolo case, 'to do so otherwise would be to put the cart before the horse'.[1023] As it had already determined in the first ground of the appeal that there had been no decision not to prosecute, the Appeals Chamber found that it did not have to analyse the merits of this ground of appeal.

The Defence's fourth ground of appeal asserted that the Trial Chamber had erred in considering the Defence's recent submissions to the Court of Appeal of Bangui and the Court of Cassation as an 'abuse of

1016 ICC-01/05-01/08-817, para 10.
1017 ICC-01/05-01/08-817, para 11.
1018 ICC-01/05-01/08-962, para 34.
1019 ICC-01/05-01/08-962, para 35. (Emphasis in original).
1020 ICC-01/05-01/08-962, para 66.
1021 ICC-02/04-01/05-408, para 48, as cited in ICC-01/05-01/08-962, para 102.
1022 ICC-01/05-01/08-962, para 103.
1023 ICC-01/04-01/07-1497, para 78.

this court's process'.[1024] While noting that the Trial Chamber failed to elaborate on the concept of an abuse of process and on what basis it was applied, it found that the Defence failed to 'connect the alleged error to the Trial Chamber's decision on the admissibility of the case'.[1025] It thus again found that the Defence had failed to meet the minimum requirement for consideration of the merits of its fourth ground of appeal.

DRC

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

On **12 July 2010**, in a majority opinion, the Appeals Chamber confirmed Trial Chamber II's decision to dismiss the Katanga Defence motion challenging the lawfulness of his arrest and detention in the DRC prior to his surrender to the Court.[1026] In its decision, issued on 20 November 2009, the Trial Chamber held that challenges to the lawfulness of the arrest or detention of the accused must be filed during the initial stages of the proceedings, preferably during the pre-trial phase.[1027] It found that the Defence had had numerous opportunities to raise the issue during status conferences, and rejected as unsubstantiated the Defence's claims to have received new information in June 2010. It thus dismissed the motion as untimely.

The Appeals Chamber upheld the Trial Chamber's discretion to determine the timeliness of a motion in the absence of applicable statutory provisions.[1028] It found that it was within the Trial Chamber's discretion to control the parties' conduct and to prevent undue delays in the proceedings, pursuant to Article 64(2), and that it had correctly based its decision on considerations of efficiency and judicial economy. It stated, 'in the view of the Appeals Chamber, any party to proceedings who claims to have an enforceable right must exercise due diligence in asserting such a right'.[1029]

The Appeals Chamber rejected the Defence argument that the Trial Chamber decision constituted a retroactive time limit. Rather, it found that the Trial Chamber had addressed the specific extenuating circumstances in this case, namely, potentially misleading statements by the Pre-Trial Chamber, and had considered when the motion might have been properly considered during the trial phase. Thus, it found that the Trial Chamber had not retroactively applied a generalised time limit rule. Specifically, the Appeals Chamber found that the Defence was put on notice that it should raise the issue during the initial status conference before Trial Chamber II, and that its failure to raise the issue during detention reviews under Article 60 of the Statute was a relevant factor for the Trial Chamber's decision to dismiss the motion. Finally, the Appeals Chamber affirmed the Trial Chamber's finding that the purportedly new information was available during the pre-trial phase.

On 28 July 2010, Judges Erkki Kourula and Ekaterina Trendafilova of the Appeals Chamber issued a dissenting opinion, finding that Trial Chamber II erred in: (1) ruling on the time limits for filing motions on unlawful arrest and detention, and in the exercise of its discretion; (2) applying a retroactive time limit; and, (3) not considering the Defence motion on its merits.[1030]

The dissenting Judges found that absent specific statutory provisions regulating such motions, they should be considered *sui generis*. It critiqued the Trial Chamber for elevating a preference for filing such motions during the pre-trial phase to a requirement, and for its failure to be more specific regarding the applicable time limits. In contrast to the majority, the dissent found that the Defence was not on notice regarding the requirement to raise the issue during the pre-trial phase, and thus was retroactively penalised for not doing so. The dissenting Judges critiqued Trial Chamber II for failing to clarify that the timing of the motion would be determinative, resulting in extensive filings by the parties over several months focused solely on the merits.

The dissent found that the Trial Chamber erred in the exercise of its discretion by according more weight to expeditiousness than to the fair trial rights of the accused, which it concluded were violated in the instant case. In this regard, it emphasised that the right to be heard and the right to liberty are fundamental human rights, of which the right of detainees to have the lawfulness of their arrest and detention be reviewed by a court is an integral component. The dissent thus concluded that the Trial Chamber erred in its failure to attribute sufficient weight to the fundamental rights in question, requiring that the matter be considered on the merits.

1024 ICC-01/05-01/08-802, para 231, as cited in ICC-01/05-01/08-962, para 110.
1025 ICC-01/05-01/08-962, para 134.
1026 ICC-01/04-01/07-2259.
1027 ICC-01/04-01/07-166-Conf-Exp-tENG. The public redacted version of this decision became available on 3 December 2009, ICC-01/04-01/07-Red-tENG.
1028 ICC-01/04-01/07-2259, para 53.
1029 ICC-01/04-01/07-2259, para 54.
1030 ICC-01/04-01/07-2297.

Judiciary
Key Decisions CONTINUED

Victim Participation and Legal Representation

The concept of victim participation in proceedings before the ICC is based on Article 68(3) of the Rome Statute, which states that:

> **where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused.**

There are also a number of important provisions in the Rules of Procedure and Evidence – particularly Rules 85 and 89-93 – which provide a definition of 'victim' for the purposes of the Statute, address 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 Victims' Participation and Reparations Section (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 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 have recently become available on the ICC's website.[1031] 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 fill in. The new form also combines the applications for victim participation and victim reparations into one document. However, it remains to be seen in practice what degree of difficulty applicants for victim participation will encounter in completing the new forms.

From 2005 until the end of August 2010, the Court received a total of 3579 applications from persons seeking to participate as victims in proceedings before the Court.[1032] Of those applications, 1765 – almost half of the total – were received between 30 September 2009 and 30 August 2010. To date, 974 applicants – approximately 27% of the total number of applications – have been permitted to participate in the proceedings. Only 11.5% of the 1765 applications submitted between 30 September 2009 and 30 August 2010 have been accepted to date, exhibiting a marked decrease from last year, when 85% of the applications received between 1 October 2008 and 30 September 2009 had been accepted.[1033] The most immediate explanation for this apparent drop in acceptance rates of new victim participants appears to be the backlog within the VPRS in processing applications for victim participation in the case against Jean-Pierre Bemba Gombo. On 7 September 2010, Trial Chamber III noted that although it was currently addressing 192 applications for victim participation in that case, there were a further 900 applications which the VPRS has not yet transmitted to the parties.[1034] Those 900 applications account for over 50% of all those received in the period covered by this *Gender Report Card*.

Significant developments in 2010 with respect to victim participation include a substantial increase in the number of applications for victim participation from the CAR. Trial Chamber III noted that there are currently over 1000 applications for victim participation awaiting determination in the case against Jean-Pierre Bemba Gombo.[1035] The Legal Representative of Victims in the DRC Situation filed a motion before the Pre-Trial Chamber requesting it to exercise its discretionary powers to review the Prosecution's failure to investigate Bemba for crimes (including sexual violence) allegedly committed by troops under his control in

1031 'Forms', available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Forms.htm>, last visited on 26 October 2010.

1032 These figures were provided by the VPRS in an email dated 2 September 2010, and include information on the number of victim participation applications received as of 31 August 2010 and the number of applicants authorised to participate in proceedings as of 30 August 2010 (hereinafter 'VPRS email'). All the figures and percentages used in this report have been calculated on the basis of data provided by the VPRS. Where one individual has been accepted to participate in both a Situation and a specific case (or accepted as a victim participant in more than one case) they are included in both sets of figures for victim participation.

1033 The VPRS email indicates that 203 of the 1765 new applications for victim participation were accepted by the Court as of 30 August 2010. During the period covered by the *Gender Report Card 2009*, 484 of the 568 applications received between 1 October 2008 and 30 September 2009 were authorised to participate.

1034 ICC-01/05-01/08-875, paras 3, 5.

1035 ICC-01/05-01/08-875, paras 3, 5. This figure includes 900 applications for victim participation in the Bemba case which have been received by the VPRS but not yet transmitted to the parties, and 192 applications for victim participation that are currently under consideration by Trial Chamber III in the case.

the Ituri region of the DRC.[1036] The Pre-Trial Chamber ultimately declined to exercise its power of review on the basis that no explicit decision had been taken by the Prosecutor to not investigate crimes allegedly committed by troops under Bemba's control in Ituri on 'interests of justice' grounds, and that there was therefore no decision capable of triggering a review by the Pre-Trial Chamber under Article 53(3)(b).[1037] The Trial Chamber in the Katanga/Ngudjolo case issued a significant decision on the modalities of victim participation at trial,[1038] which was upheld by the Appeals Chamber.[1039] Both decisions upheld the possibility of victims introducing evidence in the case under Article 69(3) of the Statute, which allows the Trial Chamber to hear all evidence it deems necessary for the determination of the truth. The Katanga Trial Chamber's decision also provided more comprehensive details on the modalities of victim participation at trial.

Review of major decisions confirming modalities of victim participation at trial

Article 68(3) of the Rome Statute sets out the basic right of victims to present their views and concerns, but does not provide a great degree of detail on how victim participation is to work in practice. As the main statutory provision on victim participation, Article 68(3) leaves many issues to be determined at a later date, such as the various stages of the proceedings during which victim participation will be permitted and when exactly the Court will deem it 'appropriate' for the legal representatives of victims to present their views and concerns. Some modalities of victim participation are expressly provided for in the Rules of Procedure and Evidence, such as permitting the legal representative of victims to make opening and closing statements;[1040] to participate in hearings;[1041] to make written or oral submissions during a hearing;[1042] to question a witness, expert or the accused following an application to the Chamber;[1043] and to be notified by the Registry of hearings, decisions, and submissions or motions.[1044] The Rules also address the issue of access by the legal representative of victims to the record of proceedings.[1045] Beyond these provisions of the Statute and Rules, it has largely been left to the judges to prescribe the practical and procedural details of how victim participation will operate in their courtroom.

Over the last two years, a number of decisions from the Trial and Appeals Chambers have attempted to enumerate the modalities of victim participation during the trial phase of cases before the ICC. Some modalities had already been established at the pre-trial phase and continued to be permitted during the trial phase of proceedings. The pre-trial modalities tend to correspond closely to the forms of victim participation contemplated in the Rules of Procedure and Evidence, such as making opening and closing statements;[1046] attendance and participation in hearings;[1047] and questioning witnesses, experts or the accused with the permission of the Chamber.[1048] These modalities have all been upheld as applicable during the trial phase by the Trial Chambers in the Lubanga[1049] and Katanga/Ngudjolo[1050] cases, while the Bemba Trial Chamber, as with the the Lubanga and Katanga/Ngudjolo trials, has

1036 ICC-01/04-564.
1037 ICC-01/04-582, p 4-5.
1038 ICC-01/04-01/07-1788-tENG.
1039 ICC-01/04-01/07-2288.
1040 Rule 89(1) of the Rules of Procedure and Evidence.
1041 Rule 91(2) of the Rules of Procedure and Evidence.
1042 Rule 91(2) of the Rules of Procedure and Evidence.
1043 Rule 91(3)(a) of the Rules of Procedure and Evidence.
1044 Rule 92(5) of the Rules of Procedure and Evidence.
1045 Rule 121(10) and Rule 131(2) of the Rules of Procedure and Evidence.
1046 See eg: ICC-02/05-02/09-136, para 19; ICC-01/05-01/08-320, para 102; ICC-01/04-01/-06-462-tEN, p 6.
1047 See eg: ICC-02/05-02/09-136, paras 17-18; ICC-01/05-01/08-320, para 101.
1048 See eg: ICC-02/05-02/09-136, paras 22-23.
1049 ICC-01/04-01/06-1119, paras 108, 113, 117; ICC-01/04-01/06-2127, paras 24-30; ICC-01/04-01/06-2340, paras 35-39.
1050 ICC-01/04-01/07-1788-tENG, paras 68-78; ICC-01/04-01/07-1665, paras 14-48 and 90-91.

also confirmed that the legal representative of victims may question a witness, expert or the accused when so permitted by the Chamber.[1051]

Some modalities have been made more expansive at the trial phase than at the pre-trial phase. For example, while the legal representative of victims may access the public case record at the pre-trial phase,[1052] the Lubanga,[1053] Katanga/Ngudjolo[1054] and Bemba[1055] Trial Chambers have all gone further and permitted the legal representative of victims to have access to confidential documents and evidence in the case record during the trial phase. The Trial Chambers in the Lubanga and Katanga/Ngudjolo cases have been most active in addressing the modalities of victim participation at trial. Both Trial Chambers have approved the participation of the legal representative of victims in the witness familiarisation process[1056] and the permissibility of holding the dual status of victim participant and witness for the Prosecution or Defence.[1057] Both Trial Chambers have also permitted the legal representative of victims to challenge the admissibility of evidence,[1058] which was upheld on appeal.[1059]

The most substantial advance in the modalities of victim participation relates to the tendering of incriminating or exonerating evidence in the possession of the victims. The legal representative of victims does not have an automatic right to introduce evidence, but can make a written application to be permitted to do so by the Chamber under the provisions of Article 69(3) of the Statute, which allows a Chamber to request the submission of all evidence which it believes is 'necessary for the determination of the truth'. The submission of evidence by the victims under this procedure has been approved by the Lubanga,[1060] Katanga/Ngudjolo[1061] and Bemba[1062] Trial Chambers and has twice been upheld by the Appeals Chamber,[1063] making it the most universally judicially-approved modality of victim participation at the trial phase. The Trial Chamber in Katanga/Ngudjolo has provided the most detail on the scope of this modality, including the possibility of the legal representative of victims calling victims or other witnesses to testify,[1064] tendering documentary evidence,[1065] and conducting investigations.[1066] The Katanga/Ngudjolo Trial Chamber and the Appeals Chamber did address the issue of the disclosure of such evidence to the Defence, but stopped short of imposing a general disclosure obligation on participating victims.[1067]

1051 ICC-01/05-01/08-807, paras 38-40.
1052 See eg: ICC-02/05-02/09-136, para 13; ICC-01/05-01/08-320, para 103; ICC-01/04-01/-06-462-tEN, p 6.
1053 ICC-01/04-01/06-1119, para 106.
1054 ICC-01/04-01/07-1788-tENG, paras 122-125; ICC-01/04-01/07-1665, para 103; ICC-01/04-01/07-T-86-Red-ENG, p 1-2.
1055 ICC-01/05-01/08-807, para 47.
1056 ICC-01/04-01/06-1351, para 39; ICC-01/04-01/07-1788-tENG, paras 79-80.
1057 ICC-01/04-01/06-1119, paras 132-135 and ICC-01/04-01/06-1379, paras. 52-78; ICC-01/04-01/07-1788-tENG, para 108-117. The Trial Chamber in Bemba has also approved this: ICC-01/05-01/08-807, paras 50-54.
1058 ICC-01/04-01/06-1119, para. 109 and ICC-01/04-01/07-1788-tENG, para 104. The Katanga/Ngudjolo Trial Chamber stated that the possibility of victims challenging the admissibility of evidence under Article 69(4) 'cannot be completely ruled out'.
1059 ICC-01/04-01/06-1432, paras 4, 93-94, 101-103.
1060 ICC-01/04-01/06-1119, paras 96, 108.
1061 ICC-01/04-01/07-1788-tENG, paras 86-103.
1062 ICC-01/05-01/08-807, paras 29-37.
1063 This modality has been upheld by the Appeals Chamber in the Lubanga case (ICC-01/04-01/06-1432, paras 4, 93-94, 97-100) and in the Katanga/Ngudjolo case (ICC-01/04-01/07-2288, paras 37, 44-45, 114).
1064 ICC-01/04-01/07-1788-tENG, paras 86-97.
1065 ICC-01/04-01/07-1788-tENG, paras 98-101.
1066 ICC-01/04-01/07-1788-tENG, paras 102-103. The Chamber emphasised that the legal representative of victims was not entitled to conduct investigations into the guilt of the accused, as this would make them tantamount to assistant prosecutors, but they may conduct investigations into 'the existence, nature and extent of the harm suffered by their clients'.
1067 ICC-01/04-01/07-1788-tENG, paras 105-107. The Trial Chamber did not find a requirement for a general disclosure obligation on the victims, but if they were to apply to present evidence under Article 69(3), the Chamber would then make an appropriate order for disclosure. This was upheld on appeal: ICC-01/04-01/07-2288, paras 42-45.

Breakdown of participants by Situation[1068]

As discussed in the *Gender Report Card 2009*, two Appeals Chamber decisions, handed down in the DRC Situation in December 2008 and the Darfur Situation in February 2009, respectively,[1069] effectively put an end to the granting of the procedural status of victim during the investigation phase of the proceedings. As a result, no new victims have been accepted to participate in any Situation since last year. However, those who had been admitted to participate prior to the Appeals Chamber decisions appear to have retained their status.[1070] As of the publication of this Report, there has not yet been a ruling on the 59 applications to participate in the Kenya Situation which have been lodged since 30 September 2009.[1071]

The majority of the accepted applications for victim participation before the Court, approximately 68%, relate to the DRC Situation or one of the three cases arising from it.[1072] There has been no increase in the number of victim participants accepted in the Uganda Situation or in the case against Joseph Kony. As a result, the Uganda Situation now accounts for a little over 6% of the total number of victim participants, down from 8% last year.[1073] Although there are currently no accepted victim participants in the CAR Situation, the Bemba case accounts for almost 14% of all victim participants, double the percentage at this time last year.[1074] Likewise, the Darfur Situation and the associated cases account for almost 12% of the total accepted applications for victim participation, a marked increase from 1.5% last year.[1075]

1068 These figures are accurate as of 30 August 2010.
1069 ICC-01/04/556 and ICC-02/05-177.
1070 The VPRS email indicates that the number of victim participants in the DRC, Darfur, and Uganda Situations have remained the same since 30 September 2009. No victim participants have been accepted in the Central African Republic Situation to date.
1071 According to figures received from the VPRS by email dated 2 September 2010.
1072 The VPRS email indicates that 661 of the 974 accepted applications to participate (67.86%) relate to the Situation in the DRC and the three cases arising from it. Last year the DRC Situation and cases accounted for almost 85% of victim participation (644 of the 771 victim participants or 83.5%).
1073 The VPRS email indicates that a total of 62 applicants have been accepted to participate in the Uganda Situation and the Kony case since 2005. This amounts to 6.36% of the 974 accepted victim participants.
1074 The VPRS email indicates that 135 or 13.86% of the 974 victim applicants were permitted to participate in the case against Jean Pierre Bemba Gombo, up from 54 of the 771 applicants or 7% as of 30 September 2009.
1075 The VPRS email indicates that 116 or 11.9% of victim participants relate to the Darfur Situation and the four cases associated with it. As of 30 September 2009, only 11 of the 771 accepted victim participants related to the Darfur Situation or cases.

Breakdown by Situation of victims who have been formally accepted to participate in proceedings[1076]

Situation or Case	*Number of victim participants as of 30 Aug 2010*	*% of victim participants as of 30 Aug 2010*[1077]	*Number of victim participants as of 30 Sept 2009*	*% of victim participants as of 30 Sept 2009*[1078]
DRC Situation and cases	**661**	**67.86%**	**644**	**83.5%**
Uganda Situation and cases	**62**	**6.36%**	**62**	**8%**
Darfur Situation and cases	**116**	**11.9%**	**11**	**1.43%**
CAR Situation and cases	**135**	**13.86%**	**54**	**7%**
Kenya Situation	**0**	**0%**	**-**	**-**
Total	**974**		**771**	

1076 All figures in this table are based on information provided by the VPRS by email dated 2 September 2010 and relate only to victims who have been accepted to participate in proceedings, rather than all applicants for victim participation to date.

1077 The VPRS email indicates that 974 applications to participate have been accepted as of 30 August 2010.

1078 According to VPRS figures for last year, 771 applications to participate in proceedings had been accepted as of 30 September 2009.

Breakdown of participants by gender

During the period covered by the *Gender Report Card 2009*, no figures were available on the gender breakdown of the applications for victim participation.[1079] This year, the VPRS did not provide a gender breakdown of the applicants for victim participation, but did provide figures on the gender of those who have been formally accepted to participate in proceedings. According to figures provided by the VPRS this year, approximately one third of victim participants before the Court are women. Female applicants account for 327 of the 974 victim participants,[1080] while 642 are men and 4 are institutions or organisations. In some cases, including in the proceedings against President Al'Bashir and Harun and Kushayb, all of the victim participants are men,[1081] while in the Lubanga case 87% of victim participants are male.[1082] The highest percentage of female victim participants was found in the Abu Garda case, where women made up 48% of the victim participants.[1083] Of the cases which currently include sexual violence charges, only Bemba and Kony come close to an equal representation of men and women among the victim participants.[1084]

1079 See *Gender Report Card 2009*, p 95. The *Gender Report Card 2008* included some information on the gender breakdown of applicants for victim participation, but the VPRS did not provide a gender breakdown of those who had been accepted to participate. See *Gender Report Card 2008*, p 53.

1080 Constituting 33.6% of the total.

1081 The VPRS email indicates that all 12 victim applicants accepted to participate in the proceedings against President Al'Bashir are male, as are the six victim applicants authorised to participate in the case against Harun and Kushayb.

1082 The VPRS email indicates that 90 of the 103 accepted victim participants in the Lubanga case are male.

1083 The VPRS email indicates that 42 of the 87 victim participants in the Abu Garda case were women, while 45 were men. Forty-seven percent of victim participants (63 of 135) in the Bemba case and 46% (19 of 41) of those accepted to participate in the case against Joseph Kony are women.

1084 According to the figures provided in the VPRS email, 47% and 46% of the victim participants in the cases against Bemba and Kony, respectively, are women. The percentage is lower in the Katanga case (32%), while there are no women currently accepted to participate as victims in the cases against Harun and Kushayb, and President Al'Bashir.

Gender breakdown by Situation/Case of victims who have been formally accepted to participate in proceedings[1085]

Situation or Case	*% of male participants*	*% of female participants*	*Number of male participants*	*Number of female participants*	*Institution+ organisation participants*	*Total*
DRC Situation	66%	32.6%	130	64	2	196
Prosecutor v. Lubanga	87%	13%	90	13	-	103
Prosecutor v. Katanga & Ngudjolo	67.6%	32%	245	116	1	362
Uganda Situation	67%	33%	14	7	-	21
Prosecutor v. Kony et al	54%	46%	22	19	-	41
Darfur Situation	72.7%	27%	8	3	-	11
Prosecutor v. Abu Garda	51.7%	48%	45	42	-	87
Prosecutor v. Harun & Kushayb	100%	0%	6	0	-	6
Prosecutor v. Al'Bashir	100%	0%	12	0	-	12
CAR Situation	-	-	0	0	-	0
Prosecutor v. Bemba	52%	47%	70	64	1	135
Total	65.9%	33.6%	642	327	4	974

1085 All figures in this table are based on information provided by the VPRS by email dated 2 September 2010 and relate only to victims who have been accepted to participate in proceedings, rather than all applicants for victim participation to date.

Legal representation for victims

The Rules of Procedure and Evidence (RPE) contain detailed provisions for the appointment of legal representatives for the victims, and outline their role in the proceedings once appointed. Under the Rules, the Registry has the task of 'facilitating the coordination of victim participation' by referring victims to its list of legal counsel or by suggesting 'one or more common representatives'.[1086] Under the Rules, the Chamber may also request victims or groups of victims to choose a common legal representative 'for the purposes of ensuring the effectiveness of the proceedings'.[1087] If the victims are unable to choose a common legal representative or representatives, the Chamber may request that the Registrar make the choice for them.[1088] The Chamber and the Registry are obliged, when selecting common legal representatives, to take all reasonable steps to ensure that the distinct interests of the victims are represented and that any potential conflicts of interest are avoided.[1089] The 'distinct interests of the victims' are defined in Article 68(1) of the Rome Statute as including: age, gender, health and the nature of the crime, particularly if the crime involves sexual or gender violence or violence against children.[1090]

The Office of Public Counsel for Victims (OPCV) continues to function as legal representative for victims before the Court, and to provide support for external legal representatives.[1091] The OPCV is an independent office of the Court established for the purpose of providing support and assistance to victims and their legal representatives, providing legal research and advice and, where appropriate, appearing before the Chambers on specific issues. The Chamber may also appoint counsel from the OPCV to represent individual victims or groups of victims.[1092] According to information provided by the OPCV in September 2010, it has assisted approximately 2000 victims since its inception in September 2005, and has filed approximately 300 submissions in various proceedings before the Court.[1093] It has also provided assistance to 30 external legal representatives of victims, and has supplied almost 600 pieces of legal advice and/or research.[1094] The OPCV noted that, since 2009, an increasing number of victims have chosen the OPCV to act as their legal representative.[1095] The OPCV now represents a total of 1252 victims (including both applicants and victims formally accepted to participate in proceedings), the overwhelming majority of which are victims in the CAR Situation.[1096]

1086 Rule 90(2) of the Rules of Procedure and Evidence. For more information on the gender and nationality breakdown of the lawyers currently included in the List of Legal Counsel, see the discussion of Appointments to the List of Legal Counsel under 'Structures and Institutional Development' above.
1087 Rule 90(2).
1088 Rule 90(3).
1089 Rule 90(4).
1090 Rule 90(4), read together with Article 68(1) of the Rome Statute.

1091 See the discussion of the OPCV under 'Structures and Institutional Development' above.
1092 Regulations 80-81, Regulations of the Court.
1093 According to information provided by the OPCV by email dated 7 September 2010.
1094 According to information provided by the OPCV by email dated 7 September 2010.
1095 OPCV email, 7 September 2010.
1096 According to information provided by the OPCV by email dated 6 August 2010. The email indicates that 1051 victim applicants and participants in the CAR Situation are represented by the OPCV, constituting 84% of the total number of victims who are currently represented by the OPCV. For a fuller breakdown of these figures, see the discussion of the OPCV under 'Structures and Institutional Development' above.

Victim participation at the ICC in 2010[1097]

Number of victims who have applied to participate between 30 September 2009 and 30 August 2010: **1765**
Number of victims who have applied to participate since 2005: **3579**
Percentage of total number of applicants permitted to participate to date: **27.21%**[1098]
Percentage of applicants between 1 October 2009 and 30 August 2010 permitted to participate: **11.5%**[1099]

Situation or case	*Number of victim participants accepted between 30 Sept 2009 and 30 August 2010*	*Total number of victim participants accepted as of 30 August 2010*
DRC Situation	**0**	**196**
Prosecutor v. Lubanga	**0**	**103**
Prosecutor v. Katanga & Ngudjolo	**17**	**362**
Prosecutor v. Ntaganda	**0**	**0**
Prosecutor v. Mbarushimana[1100]	**0**	**0**
Uganda Situation	**0**	**21**
Prosecutor v. Kony et al	**0**	**41**
Darfur Situation	**0**	**11**
Prosecutor v. Abu Garda	**87**	**87**
Prosecutor v. Harun & Kushayb	**6**	**6**
Prosecutor v. Al'Bashir	**12**	**12**
Prosecutor v. Banda & Jerbo	**0**	**0**
CAR Situation	**0**	**0**
Prosecutor v. Bemba	**81**	**135**
Total	**203**	**974**

1097 Based on figures provided by the VPRS by email dated 2 September 2010. All the figures and percentages used in this report have been calculated on the basis of data provided by the VPRS. Where one individual has been accepted to participate in both a Situation and a specific case (or accepted as a victim participant in more than one case), they will be included in both sets of figures for victim participation.

1098 According to the figures provided by the VPRS, a little over one quarter (974) of the 3579 applications received since 2005 have been accepted by the Court. This is a marked decrease from last year, when 42.5% of the applications received (771 of 1814 applications) had been accepted.

1099 Only 203 or 11.5% of the 1765 applications received since 30 September 2009 were accepted to participate as of 30 August 2010. During the period covered by the *Gender Report Card 2009* (1 October 2008 to 30 September 2009), 484 or 85% of the 568 applications received by the Court were permitted to participate.

1100 At the time the victim participation figures were provided by the VPRS, the Arrest Warrant against Callixte Mbarushimana had not yet been issued and he had not yet been arrested by the French authorities.

Uganda

The Prosecutor v. Joseph Kony et al

There have been no decisions issued in the Uganda Situation or the case against Joseph Kony since last year's *Gender Report Card*, and no new victim applicants have been admitted to participate since September 2009. A total of 747 applications to participate have been received since 2005 in relation to the Uganda Situation and/or the case against Joseph Kony. 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.[1101] This amounts to an acceptance rate of a little over 8% of the total applications for victim participation in that Situation.[1102] The VPRS confirmed that the other applications for victim participation that have been received by the Court in relation to the Situation in Uganda or the case against Joseph Kony are still pending.[1103]

1101 According to figures provided by the VPRS by email dated 2 September 2010.

1102 According to figures provided by the VPRS by email, a total of 62 victim participants have been accepted in the Uganda Situation and the case against Joseph Kony, amounting to 8.29% of the 747 applications received.

1103 According to email communication with the VPRS dated 2 November 2010.

DRC

DRC Situation

As discussed above, no new victim participants have been accepted in the DRC Situation since the two Appeals Chamber decisions that effectively ended the procedural status of victims during the investigation phase of proceedings. However, the 196 applicants who had already been granted the status of victim participant in the DRC Situation prior to those decisions appear to have retained that status according to the figures provided by the VPRS. The DRC Situation and cases account for the highest percentage of victim participants before the Court, representing over two-thirds of all victim participants.[1104] A total of 1055 applications to participate in the DRC Situation or associated cases have been received since 2005, 661 of which have been authorised to participate in proceedings. This is the highest rate of acceptance for any Situation before the Court.[1105] No victims have been accepted to participate in the case against Bosco Ntaganda to date, which is due to the fact that he is not in the custody of the Court and therefore there is currently no trial or ongoing 'judicial proceeding' ongoing in relation to Ntaganda that would allow for victim participation.[1106]

On 28 June 2010, the Legal Representative of Victims VPRS 3 and VPRS 6 filed a motion before Pre-Trial Chamber I requesting the Chamber to exercise its independent statutory power under Article 53(3)(b) of the Rome Statute, which permits the Chamber to conduct a review of a decision by the Prosecutor not to prosecute a case in the interests of justice.[1107] The motion urged the Pre-Trial Chamber to examine the Prosecution's decision not to investigate Jean-Pierre Bemba in his capacity as a military commander for crimes allegedly committed by his troops in the Ituri region of the DRC. The Legal Representative of the Victims noted that, during the hearing on the confirmation of charges against Bemba in January 2009, the Prosecution presented evidence that

1104 The VPRS email indicates that 661 of the 974 victim participants at the ICC have been accepted to participate in the DRC Situation or the cases against Thomas Lubanga or Germain Katanga and Mathieu Ngudjolo Chui, which amounts to 67.86% of the total number of victim participants who have been accepted since 2005.

1105 The VPRS email indicates that 62.65% of all victim participation applications received since 2005 in relation to the DRC Situation or cases have been accepted by the Court.

1106 According to figures provided by the VPRS by email dated 2 September 2010.

1107 ICC-01/04-564.

Mouvement de libération du Congo (MLC) troops under Bemba's control were implicated in atrocities committed in the north of the DRC during the war in 2005, including summary executions, murder, rape, sexual abuse, pillage, systematic torture and looting.[1108] There had been a number of public statements from the Office of the Prosecutor stating that it had completed the first phase of its investigations in Ituri, and would move on to focus its investigations on crimes (particularly sexual violence) committed in North and South Kivu.[1109] The victims' motion argued that the Prosecutor had clearly decided not to pursue any further investigation into the crimes committed by Bemba's forces in the DRC, and that both this decision and the lack of transparency surrounding it had gravely prejudiced the victims of the crimes and their rights to access to justice and to know the truth. The Legal Representative of the Victims urged the Pre-Trial Chamber to exercise its inherent power under Article 53(3)(b) to review the decision of the Prosecutor not to prosecute Bemba for the crimes his forces committed in Ituri, and to order the Prosecutor to remedy the failure to investigate.

On 15 July 2010, the Office of Public Counsel for the Defence (OPCD) filed its response to the application by the legal representative of the victims,[1110] in which it claimed that VPRS 3 and VPRS 6 no longer had any right to participate in the investigation phase of the DRC Situation. The Defence argued that the Appeals Chamber decision on victim participation from 19 December 2008[1111] had removed the right of victims to participate at the investigation stage of proceedings, and that the victims therefore had no legal basis for their application. The Defence also urged the Pre-Trial Chamber to dismiss the victims' application on the grounds that they had failed to identify specific judicial proceedings affecting their personal interests for the purposes of Article 68(3) of the Statute, and that Prosecution investigations could not be considered as 'judicial proceedings' under Article 68(3). On 16 August 2010, the Pre-Trial Chamber ordered the Prosecution to file observations in response to the application from the Legal Representative of VPRS 3 and VPRS 6.[1112] The Chamber requested that the Prosecution should include in its response observations on the submissions of the victims on the investigation of alleged crimes in Ituri and the alleged decision of the Prosecutor not to charge Bemba with any crimes in relation to those events. It also requested the Prosecution to respond to the issue raised by the submissions of the OPCD regarding whether the victims had sufficient standing to file the request before the Pre-Trial Chamber.

The Prosecution was ordered by the Pre-Trial Chamber to file observations on the victims' request by 15 September 2010, but this deadline passed without any submissions from the Office of the Prosecutor. On 24 September 2010, Single Judge Monageng filed an order setting a new time limit for observations.[1113] Judge Monageng chastised the Prosecutor for failing to comply with an order from the Chamber, and in language that echoed the criticisms of Trial Chamber I in the Lubanga case, noted that 'a "deliberate refusal to comply with [the Court's] directions"' constitutes misconduct capable of giving rise to sanctions under the terms of Article 71 of the Statute and Rule 171 of the Rules of Procedure and Evidence.[1114] Judge Monageng went on to issue a warning to the Prosecutor for misconduct along with a notification that sanctions could be applied in the event of a breach of the second order to file observations.[1115] This marked the second time in a three-month period that a warning for misconduct was issued against the Prosecutor.[1116] Judge Monageng ordered the Prosecutor to file the observations by 29 September and to detail the reasons for the failure to comply with the initial order.[1117]

On 29 September 2010, the Prosecution filed its observations.[1118] The Prosecution 'acknowledge[d] and deeply regret[ted]' its failure to comply with the time limit set by Judge Monageng, and claimed that this was due to an unintentional oversight and internal miscommunication between the DRC and CAR trial teams, each of whom assumed that the other team would respond to Judge Monageng's order.[1119] The Prosecutor stated that the failure to respond was unintentional and 'resulted from a lack of coordination and proper reaction'.[1120] In relation to the merits of the victims' application, the Prosecution argued that the victims lacked standing to file their application due to the Appeals Chamber's findings that victims are not entitled to participate at the investigation stage of proceedings, as well as the lack of a judicial

1108 ICC-01/04-564, p 4-7.
1109 ICC-01/04-564, p 8-11.
1110 ICC-01/04-566.
1111 ICC-01/04-556.
1112 ICC-01/04-572.
1113 ICC-01/04-580.
1114 ICC-01/04-580, p 3-4.
1115 ICC-01/04-580, p 3-4.
1116 The first warning was issued to the Prosecutor and the Deputy Prosecutor by Trial Chamber I in July 2010 in relation to the Prosecution's failure to comply with that Trial Chamber's orders to disclose the identity of Intermediary 143.
1117 ICC-01/04-580, p 4.
1118 ICC-01/04-581.
1119 ICC-01/04-581, para 1 and 12.
1120 ICC-01/04-581, para 12.

proceeding capable of affecting the interests of victims under Article 68(3).[1121] The Prosecution also argued that Article 53(3)(b) only permits a review of a decision by the Prosecutor not to proceed with an investigation or prosecution in the interests of justice, and noted that no such decision had been taken in this case.[1122] The Prosecution cited two decisions of the Pre-Trial Chamber to support its argument that 'an affirmative decision by the Prosecutor to prosecute an individual for particular charges ... cannot be interpreted as a tacit decision under Article 53(3) not to prosecute other persons or other crimes', and therefore the procedural grounds which could trigger the Pre-Trial Chamber's authority to review a decision under Article 53(3)(b) were not present in this case.[1123]

On **25 October 2010**, the Pre-Trial Chamber rejected the victims' request.[1124] The Pre-Trial Chamber noted, but did not specifically address, the arguments raised in the parties' filings regarding the question of whether VPRS 3 and VPRS 6 had legal standing to submit their request. The Chamber merely stated that, 'irrespective of whether VPRS 3 and VPRS 6 have *locus standi*, the Chamber may review the alleged decision of the Prosecutor on its own initiative' under Article 53(3)(b).[1125] Article 53(3)(b) permits a Chamber to review a decision by the Prosecutor not to proceed with an investigation or prosecution if that decision is taken on the grounds that it would not be in the interests of justice to do so. The Pre-Trial Chamber noted that the Prosecutor maintained in his submissions that no decision has been taken on 'interests of justice' grounds not to proceed with an investigation or prosecution of Bemba for crimes allegedly committed by troops under his control in Ituri, and further noted that the Chamber had 'no reason to disbelieve' the Prosecutor's declaration.[1126] There was therefore 'no decision for the Chamber to review' and no basis for the Chamber to invoke or exercise its review powers under Article 53(3)(b).[1127]

1121 ICC-01/04-581, paras 13-15.
1122 ICC-01/04-581, paras 16-18.
1123 ICC-01/04-581, paras 18.
1124 ICC-01/04-582.
1125 ICC-01/04-582, p 4.
1126 ICC-01/04-582, p 4.
1127 ICC-01/04-582, p 5.

The Prosecutor v. Thomas Lubanga Dyilo

No new victim participants were accepted in the Lubanga case between 30 September 2009 and the imposition of the stay of proceedings on 8 July 2010.[1128] On **26 January 2010**, the Trial Chamber issued a decision rejecting two applications for victim participation.[1129] One victim had not provided sufficient clarifying information in response to the Chamber's requests and his/her application was therefore rejected.[1130] The other victim applicant had indicated to the Registry that he no longer wished to participate in the proceedings. In response, the Trial Chamber noted that 'there is no possibility of "compulsory" participation by victims in the proceedings before the ICC', and that a prerequisite of the Chamber exercising its power to accept or reject applications for victim participation was that the victim (or an individual acting on their behalf or with their consent) should have applied to participate.[1131] Given that the individual in question no longer wished to participate, the Chamber made no further order on his application.

On **17** and **18 August 2010**, the Appeals Chamber issued two decisions permitting victim participation in the Prosecution appeals against the stay of proceedings and the order for Thomas Lubanga's release.[1132] The Legal Representatives of the Victims argued that the stay of proceedings and the decision to release Lubanga could potentially put the victims at risk, particularly those who are not subject to protective measures and whose identity is known to Lubanga, and would also make the victims less enthusiastic about presenting their views and opinions if the trial were to resume.[1133] Judge Song submitted a separate opinion in both Appeals Chamber decisions reiterating his consistently-held view that a victim who has been permitted to participate in proceedings giving rise to an appeal should have an automatic right to file a response to that appeal. In Judge Song's view, there should be no need for victim participants to file an application to participate in the appeal or for the Appeals Chamber to rule on such applications.[1134]

1128 According to figures provided by the VPRS by email dated 2 September 2010.
1129 ICC-01/04-01/06-2207.
1130 ICC-01/04-01/06-2207, para 15-17.
1131 ICC-01/04-01/06-2207, para 14.
1132 ICC-01/04-01/06-2555 and ICC-01/04-01/06-2556. Twenty-four victims were permitted to participate in the appeal against the order for release and 20 victims were permitted to participate in the appeal against the stay of proceedings. On 20 October 2009, the Appeals Chamber issued a similar decision permitting 27 victims to participate in the joint appeal against the Trial Chamber's decision of 14 July 2009 on the legal re-characterisation of the facts in the case against Thomas Lubanga; ICC-01/04-01/06-2168.
1133 ICC-01/04-01/06-2555, para 4 and ICC-01/04-01/06-2556, para 3.
1134 Separate Opinion of Judge Sang-Hyun Song, ICC-01/04-01/06-2555 and ICC-01/04-01/06-2556.

The Legal Representatives of the Victims in the Lubanga case have taken an active role over the past 12 months, which is reflected in a number of decisions. On 8 January 2010, the Trial Chamber issued its decision on the legal recharacterisation of facts in the case,[1135] following the Appeals Chamber decision on the same issue of 8 December 2009.[1136] The original application to recharacterise the facts in the case to include charges of sexual slavery and inhuman or cruel treatment had been filed by the Legal Representative of 27 victims in May 2009.[1137] In a status conference following the Appeals Chamber decision, one of the victims' Legal Representatives asked the Trial Chamber to clarify the consequences of that decision.[1138] The legal representatives then filed joint submissions requesting again that the Trial Chamber should recharacterise the facts in the case to treat evidence of inhuman or cruel treatment and sexual slavery as separate offences rather than merely aggravating factors to the existing charges against Lubanga. This request was later denied by the Trial Chamber.[1139] Another application by the Legal Representative of 15 victims sought to introduce the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the DRC as documentary evidence.[1140] The Trial Chamber ultimately rejected the application on the grounds that its probative value was outweighed by its potential prejudicial effect, particularly since the authors of the report would not be available for cross-examination.[1141]

On **16 September 2009**, the Trial Chamber issued a decision on the legal representative of victims' manner of questioning witnesses.[1142] The Chamber noted that the legal representatives of the victims were participants in the proceedings, quite distinct from the parties, and as a result it was unhelpful to try to describe their questioning with reference to the concepts of 'examination in chief', 'cross-examination' or 're-examination'.[1143] The Chamber advised that the legal representatives should follow a neutral form of questioning for the most part, as they were 'less likely than the parties to need to resort to the more combative techniques of "cross-examination"', but acknowledged that it may sometimes be necessary for a victims' legal representative to press, challenge or discredit a witness.[1144] In those circumstances, it would be acceptable for the legal representative of the victims to pose closed, leading or challenging questions. The Chamber advised that they should make an oral request to the Bench before departing from the neutral style of questioning.[1145]

On **11 March 2010**, the Trial Chamber rejected two defence applications relating to the possibility of victims' legal representatives to question witnesses.[1146] It had previously held that, in order to participate in the examination of a witness, a victim 'will be required to show, in a discrete written application, the reasons why his or her interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek'.[1147] This ruling was upheld by the Appeals Chamber.[1148] The Trial Chamber rejected the Defence submission that a stricter interpretation of 'personal interests' should be applied to permit victim questioning of a defence witness.[1149] It held that the same criteria applies to requests by victims to question witnesses during the presentation of the Defence case.[1150] The Chamber also rejected a Defence request that Legal Representatives of Victims who have not applied to question a particular defence witness should be excluded from court during closed session hearings. The Trial Chamber noted that the Legal Representatives had unequivocally undertaken not to disclose any information (such as the identity of protected witnesses) to their clients. The Chamber held that the presence of the legal representatives of participating victims during closed-session testimony of defence witnesses 'is an essential part of their right to participate in the proceedings, unless it is demonstrated that this will be inconsistent with the rights of the accused and a fair and expeditious trial'.[1151] It found that their absence from the court room could undermine their ability to discharge their professional obligations to their clients as they would be unaware of potentially important evidence given in closed-session hearings. The Trial Chamber emphasised, however, that the parties and participants were entitled to raise discrete concerns regarding the participation or presence of particular legal representatives at any stage in the proceedings.[1152]

1135 ICC-01/04-01/06-2223.
1136 ICC-01/04-01/06-2205.
1137 ICC-01/04-01/06-1891-tENG.
1138 ICC-01/04-01/06-2223, para 14.
1139 ICC-01/04-01/06-2223, paras 38-39.
1140 ICC-01/04-01/06-2029.
1141 ICC-01/04-01/06-2135.
1142 ICC-01/04-01/06-2127.
1143 ICC-01/04-01/06-2127, para 24.
1144 ICC-01/04-01/06-2127, para 28.
1145 ICC-01/04-01/06-2127, para 30.
1146 ICC-01/04-01/06-2340.
1147 ICC-01/04-01/06-1119, para 96.
1148 ICC-01/04-01/06-1432, para 104.
1149 ICC-01/04-01/06-2340, paras 28 and 35.
1150 ICC-01/04-01/06-2340, para 37.
1151 ICC-01/04-01/06-2340, para 39.
1152 ICC-01/04-01/06-2340, para 39.

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

Since 30 September 2009, 17 new victim participants have been accepted in the Katanga/Ngudjolo case.[1153] The Trial Chamber had handed down a decision on **23 September 2009**, accepting 288 individuals as victim participants.[1154] The decision provided some clarification on a previous holding by the Appeals Chamber related to applicants who have suffered harm from the death of a family member, requiring that both the identity of the deceased person and their family relationship to the applicant must be established.[1155] The Trial Chamber held that, given the difficulties associated with obtaining official documents in Ituri, certificates of death or family ties signed by two credible witnesses, or any other document demonstrating that the statements in the application for participation are true would satisfy the requirement established by the Appeals Chamber.[1156] The Trial Chamber further observed that the role of intermediaries is to assist applicants, particularly those with lower literacy levels, to fill out the victim participation forms. It ordered the Registry to remind the intermediaries that they should not seek to influence applicants on the content of their applications, especially in relation to information on the crimes alleged or the harm suffered by the applicant.[1157] The Chamber held that relatives of deceased victims may only submit an application for participation in their own name on the basis of the moral or material harm they have suffered as a result of the death of their relative.[1158] Judge Kaul submitted a partially dissenting opinion reiterating that in his opinion, relatives of a deceased person should have the right to participate to represent the interests of the deceased person as well as their own.[1159]

On **22 January 2010**, Trial Chamber II issued a decision on the modalities of victim participation at trial.[1160] Throughout the decision, the Chamber drew on existing jurisprudence on victim participation, including a decision issued on 1 December 2009 on the conduct of proceedings and testimony under Rule 140 (decision on Rule 140),[1161] and decisions by Trial Chamber I and the Appeals Chamber in the Lubanga case issued on 18 January 2008 and 11 July 2008, respectively.[1162] The Chamber determined that each Trial Chamber has the discretion to determine the modalities of victim participation under the circumstances of the case. In so doing, it must take into account: (i) the nature and scope of the charges; (ii) the number of victims; (iii) the degree of congruity between their respective interests; and (iv) the manner in which the victims are represented.[1163]

The Trial Chamber noted at the outset that the relevant prior jurisprudence granted victim participants the possibility – rather than the right – to apply to present evidence. It then proceeded to address a number of issues regarding the modalities of victim participation. For example, it found that the legal representatives of victims are permitted to conduct investigations for the purpose of gathering information to establish the nature and extent of the harm suffered by their clients. They are not, however, authorised to conduct investigations concerning the guilt of the accused.[1164] It found that the Statute imposes no obligations on victims to disclose exonerating or incriminating information. The Chamber reasoned that, as victims have no right to present evidence, they should not be obliged to disclose information within their possession.[1165] It found that contesting the admissibility and relevance of evidence constituted a means for the victims to express their 'views and concerns', and would further assist the Chamber in assessing the evidence.[1166] It determined numerous other issues as follows:

1153 According to figures provided by the VPRS by email dated 2 September 2010. See also ICC-01/04-01/07-1737 and ICC-01/04-01/07-1967.
1154 ICC-01/04-01/07-1491-Red.
1155 ICC-02/04-179.
1156 ICC-01/04-01/07-1491-Red, paras 37-39.
1157 ICC-01/04-01/07-1491-Red, paras 40-43.
1158 ICC-01/04-01/07-1491-Red, paras 55-56.
1159 Partly Dissenting Opinion of Judge Kaul, ICC-01/04-01/06-1491-Red, para 5.
1160 ICC-01/04-01/07-1788-tENG, para 7, noting that the Chamber had previously divided the victim participants in the Katanga/Ngudjolo case into two categories: eight former child soldiers (represented by Jean-Louis Gilissen as the Common Legal Representative) and all other victim participants (represented by Fidel Nsita Luvengika as the Common Legal Representative).
1161 ICC-01/04-01/07-1655-Corr.
1162 ICC-01/04-01/06-1119 and ICC-01/04-01/06-1432.
1163 ICC-01/04-01/07-1788-tENG, paras 53-54.
1164 ICC-01/04-01/07-1788-tENG, paras 102-103.
1165 ICC-01/04-01/07-1788-tENG, para 105. The Katanga Defence requested that victims be obliged to disclose all exonerating information within their possession. ICC-01/04-01/07-1618, para 30; ICC-01/04-01/07-1788, para 29.
1166 ICC-01/04-01/07-1788-tENG, para 104.

- **Opening and closing statements**
  Rule 89(1) of the Rules of Procedure and Evidence expressly provides for the possibility of victims' legal representative making opening and closing statements at trial. The Trial Chamber had expressly authorised the victims to do so in this case during a status conference in November 2009.[1167] The victims made an opening statement in the Katanga/Ngudjolo case and will be given the opportunity to make a closing statement at the end of the trial, after the Prosecution and before the Defence.[1168]

- **Attendance and participation in the proceedings**
  Rule 91(2) grants legal representatives of victims the right to attend and participate in the hearings. The Chamber authorised victims' legal representatives to attend and participate in both public and closed-session hearings. The Chamber will decide on a case-by-case basis whether they will be allowed to participate in *ex parte* hearings.[1169]

- **Questioning witnesses, experts and the accused**
  The Chamber noted that victims' legal representatives can question witnesses called by the parties, as long as it does not prejudice the accused, and that victim intervention can assist the Chamber to better understand the social and cultural context of the case.[1170] In its decision on Rule 140, the Chamber had established the order in which the parties and participants can question witnesses, experts and the accused, as well as the exact modalities in which the victims' legal representatives can engage in questioning.[1171] In that decision, it determined that victims' legal representatives can question witnesses after Prosecution questioning or after the prosecution's cross-examination of Defence witnesses. In the instant decision, it held that written requests must set forth the intended relevance of the questioning as it pertains to the issues at trial, in conformance with the process established by the Chamber in its decision on Rule 140.[1172] Finally, it held that the questioning should be limited to clarifying points at issue or completing the evidence, and should be conducted in a neutral style.[1173]

1167 ICC-01/04-01/07-T-76-CONF-ENG, p 26.
1168 ICC-01/04-01/07-1788-tENG, para 68.
1169 ICC-01/04-01/07-1788-tENG, para 71.
1170 ICC-01/04-01/07-1788-tENG, paras 74-75. The Chamber had granted victims' legal representatives the right to question witnesses that will be heard during trial at a status conference held on 2 November 2009. ICC-01/04-01/07-T-74-RED-FRA, p 59.
1171 Decision on Rule 140, ICC-01/04-01/07-1665-Corr., paras 14, 48, 90, 91.
1172 Decision on Rule 140, ICC-01/04-01/07-1665-Corr., paras 18, 37, 42, 84, 86-88.
1173 ICC-01/04-01/07-1788-tENG, paras 77-78.

- **Participation in the witness familiarisation process**
  The Chamber found that victims' legal representatives may be present during the witness familiarisation process, given that they may have the opportunity to question witnesses. Their participation in the procedure will be regulated by a protocol established by the Victims and Witnesses Unit (VWU), which the Chamber will apply in the Katanga/Ngudjolo case.[1174]

- **Producing incriminating and exonerating evidence**
  The Chamber noted that the Rome Statute does not expressly provide victims with the possibility of calling witnesses to appear, nor of presenting documentary evidence. However, the Appeals Chamber held in its decision on this issue that the Trial Chamber can request all evidence necessary to establish the truth.[1175] The Trial Chamber therefore held that, in order to guarantee the victims meaningful participation in the process, it can authorise their presentation of evidence upon request. The Chamber can authorise victims' legal representatives to present the evidence themselves.[1176] The decision on Rule 140 also foresees victims' legal representatives calling victims and other witnesses to testify upon the request of the Chamber.[1177] To do so, the victims' legal representatives must submit a written request, setting forth how the evidence will contribute to the establishment of truth. The Chamber will authorise those requests that do not pose any prejudice to the Defence.[1178]

  (a) **Victim witnesses**
  Victims' legal representatives are authorised to call victims to testify under oath, after the Prosecution's presentation of the evidence. Where victims' testimony concerns the crimes allegedly committed by the accused, the Defence should have the

1174 ICC-01/04-01/07-1788-tENG, paras 79-80. The Chamber approvingly referenced a decision of 23 May 2008 in the Lubanga trial, which stated that the Prosecution, the Defence and the legal representative of victims are permitted to be present during the witness familiarisation process, but are not permitted to speak to the witnesses about the evidence and can only watch the familiarisation process. ICC-01/04-01/06-1351, para 39.
1175 ICC-01/04-01/06-1432, paras 86-105. Article 69(3) of the Rome Statute reads: 'the parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth'.
1176 ICC-01/04-01/07-1788-tENG, para 81.
1177 Decision on Rule 140, ICC-01/04-01/07-1665-Corr., paras 7, 19-32, 45-48.
1178 ICC-01/04-01/07-1788-tENG, para 84.

possibility to present its case once all of the victims of the alleged crimes have been heard, including those called by victims' legal representatives.[1179] The written requests for their appearance must specify the information to be elicited, its role in the case, and how it will aid the Chamber in better understanding the facts. The requests must be made before the end of the Prosecution's case and in conformity with the procedures set forth in the decision on Rule 140.[1180] A potential witness' status as a participating victim will not preclude him/her from testifying before the Court.[1181]

In order to ensure that having the double status of victim/witness does not compromise the probative value of the testimony, the Chamber will invite the parties' observations prior to ruling on any request for a particular victim to testify in person. It will deny the testimony if there are doubts concerning its trustworthiness, in addition to assessing its relevance and admissibility.[1182] The Chamber will not authorise anonymous victims to testify, although they can participate. If they are called to appear, their anonymity will be lifted.[1183]

(b) **Other witnesses**

The Chamber did not exclude the possibility of victims' legal representatives calling its attention to witnesses bearing useful information related to victims' interests. This can occur after the Defence has presented its case, when the Chamber examines supplementary evidence and witnesses in addition to those called by the parties.[1184] The Chamber divided the trial process into two phases: (i) the Prosecution case, after which victims can request to testify in person; and (ii) the Defence case, after which the Chamber can call additional witnesses, including if requested by the victims' legal representatives.[1185] The Chamber held that requests to call witnesses must conform to the prescriptions set forth in the decision on Rule 140.[1186] Victims' legal representatives must explain how the proposed testimony relates to the questions at issue at trial. The Chamber will call the witnesses if they can provide new information. The Chamber may authorise victims' legal representatives to conduct questioning, either before or after the Chamber questions the witness.[1187]

- **Presenting documentary evidence**
  The Chamber authorised the presentation of documentary evidence by the legal representative of victims subject to the following procedure. Victims' legal representatives must submit a written request, establishing how the documents are relevant and contribute to the establishment of truth. The document in question should be attached to the request and submitted to the Chamber, the parties and other participants. If the evidence is related to the statement of a witness, the request should be formulated sufficiently prior to his or her appearance. If not, the requests should follow the Defence case.[1188]

- **Victims testifying for the parties**
  Two victims in the Katanga/Ngudjolo case, Witnesses 161 and 166, have dual status as Prosecution witnesses and victim participants. Both applied to participate as victims after having made statements to the Prosecution. Neither the Statute nor Rule 85 of the Rules of Procedure and Evidence preclude the recognition of a witness as a victim participant, or the testimony of a victim participant as a witness. The Chamber agreed with the restrictions placed on victims and their legal representatives by Pre-Trial Chamber I in its May 2008 decision on the limitations of the set of procedural rights for non-anonymous victims.[1189] That decision made a clear distinction between victims and their legal representatives, denying the former access to confidential documents from the case file and the evidence contained therein. The Chamber accordingly held that Witnesses 161 and 166 should not have access to the statements of other witnesses for the Prosecution, nor to other evidence.[1190]

- **Victims' access to confidential documents and evidence in the case**
  In order to promote their effective participation, the Chamber authorised the legal representatives of the victims to consult both public and confidential documents in the case file, excluding *ex parte* filings.[1191] With respect to evidence, the

1179 ICC-01/04-01/07-1788-tENG, para 86.
1180 Decision on Rule 140, ICC-01/04-01/07-1665-Corr., paras 24-29.
1181 ICC-01/04-01/07-1788-tENG, para 88.
1182 ICC-01/04-01/07-1788-tENG, paras 88-91.
1183 ICC-01/04-01/07-1788-tENG, paras 92-93.
1184 ICC-01/04-01/07-1788-tENG, para 94.
1185 ICC-01/04-01/07-1788-tENG, para 95. The Chamber may order the production of additional evidence to complement that presented by the parties pursuant to Articles 64(6)(d) and 69(3) of the Statute.
1186 Decision on Rule 140, ICC-01/04-01/07-1665-Corr., paras 45-48.
1187 ICC-01/04-01/07-1788-tENG, paras 96-97.
1188 ICC-01/04-01/07-1788-tENG, paras 99-100.
1189 ICC-01/04-01/07-537, p 12-13.
1190 ICC-01/04-01/07-1788-tENG, paras 110-114.
1191 This was decided at a status conference on 1 October 2009. ICC-01/04-01/07-T-71-RED-FRA, p 5 and 6.

legal representatives are permitted to consult the evidence produced by the parties at least three days prior to the corresponding testimony.[1192] The Chamber granted the victims' legal representatives access to confidential information in the case file although the victims themselves were not granted access to that information.[1193]

The Katanga Defence sought leave to appeal the Trial Chamber's decision on modalities, which was granted on 19 April 2010.[1194] The Katanga Defence was granted leave to appeal on three grounds: (1) 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; (2) 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 (3) 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. The Appeals Chamber issued a decision on **16 July 2010** confirming the findings of the Trial Chamber and dismissing all three grounds of appeal.[1195]

The Appeals Chamber decision emphasised that victim participants are not parties to the proceedings. Under Article 68(3), they may only present their 'views and concerns', and only then if their personal interests have been affected. They thus do not have a general right to present evidence during the trial. The possibility of their doing so is contingent on their satisfying numerous conditions. First, victims must show that their personal interests were affected by the relevant evidence. Second, their request must not exceed the scope of the Trial Chamber's powers under Article 69(3). Finally, the Trial Chamber must ensure that the trial is conducted in a fair and expeditious manner with full respect for the rights of the accused, including the right to adequate time and facilities for the preparation of the defence.[1196]

The Appeals Chamber concluded that the Trial Chamber had not erred in holding that the victims may submit evidence, including incriminating evidence, in the course of the trial, even though such evidence was not disclosed to the accused prior to the commencement of the trial.[1197] Victim participants may bring evidence to the Trial Chamber that it considers is 'necessary for the determination of the truth' under Article 69(3). The Chamber may only exercise its discretionary powers under Article 69(3) to allow the introduction of such evidence if it is persuaded that the requirements of Article 68(3) – particularly the requirement that the personal interests of the victims be affected – have been met. Once the Chamber decides that the evidence should be submitted, it may decide on the appropriate measures that must be taken to protect the right of the accused under Article 67(1)(b) to have 'adequate time and facilities for the preparation of the defence'.[1198]

The Appeals Chamber further concluded that the Trial Chamber had not erred in failing to impose a general obligation on the victims to disclose all evidence in their possession, whether incriminating or exculpatory. However, it noted that there may be specific instances where the Trial Chamber may require victims to disclose exculpatory evidence in their possession to the accused, when the Trial Chamber is made aware by a party or participant that such evidence exists and when it considers that the information is necessary for the determination of the truth.[1199] Neither the disclosure regime in the Statute and Rules of Procedure and Evidence, nor the requirements of a fair trial imposed a general obligation on the victims to disclose exculpatory information to the accused.[1200] The Appeals Chamber suggested that the obligation of the Prosecutor to investigate incriminating and exonerating circumstances equally could give rise to a requirement to scrutinise applications for victim participation for indications that a victim may possess exculpatory evidence.[1201] Elsewhere in the judgement, the Appeals Chamber stated that the Prosecutor's general disclosure obligations do not apply to evidence submitted at the request of the Trial Chamber under Article 69(3).[1202] However, the Appeals Chamber also suggested the Prosecution may be required to disclose exculpatory information it has obtained following an investigation of the victims' applications to participate.[1203]

The Appeals Chamber upheld the Trial Chamber's decision that, where victims have been permitted to testify under Article 69(3), their testimony may include matters relating to the role of the accused in the crimes charged.[1204] In the Lubanga case, the Appeals Chamber concluded that victims did not have a right to present evidence on the guilt of the accused; rather,

1192 ICC-01/04-01/07-1788-tENG, paras 121-122.
1193 ICC-01/04-01/07-1788-tENG, paras 122-123.
1194 ICC-01/04-01/07-2032.
1195 ICC-01/04-01/07-2288.
1196 ICC-01/04-01/07-2288, para 48.
1197 ICC-01/04-01/07-2288, paras 37, 44-45.
1198 ICC-01/04-01/07-2288, para 40.
1199 ICC-01/04-01/07-2288, para 71.
1200 ICC-01/04-01/07-2288, paras 72-83.
1201 ICC-01/04-01/07-2288, para 81.
1202 ICC-01/04-01/07-2288, para 45.
1203 ICC-01/04-01/07-2288, para 81.
1204 ICC-01/04-01/07-2288, para 110.

the Trial Chamber has the authority under Article 69(3) to request the submission of all evidence which it considers necessary for the determination of the truth.[1205] The Appeals Chamber in this decision held that nothing in the Court's legal framework restricts the submission of evidence on the conduct of the accused solely to the Prosecutor, and therefore the Trial Chamber may request that victims testify on the role of the accused if it is satisfied that such testimony is necessary for the determination of the truth.[1206] The rights of the accused and the conduct of a fair trial are not inconsistent *per se* with the possibility, based on the Trial Chamber's authority to request evidence necessary for the determination of the truth, of victims testifying on the role of the accused in the crimes charged. However, the Trial Chamber must ensure on a case-by-case basis that the right to a fair trial is respected. The Trial Chamber may only permit a victim to testify regarding the conduct of the accused based on the following assessment: (i) whether the personal interests of the victim are affected by the testimony; (ii) whether the testimony is relevant to the issues in the case; (iii) whether the Trial Chamber believes that the testimony will contribute to the determination of the truth; and (iv) whether the testimony is consistent with the rights of the accused, particularly the right to have adequate time and facilities to prepare the defence, and the right to a fair and impartial trial.[1207]

1205 ICC-01/04-01/06-1432, paras 93-99.
1206 ICC-01/04-01/07-2288, para 112.
1207 ICC-01/04-01/07-2288, para 114.

Darfur, Sudan

As with the other Situations before the Court, no new victim participants have been accepted in the Darfur Situation since 30 September 2009.[1208] A total of 11 victim participants who had already been accepted to participate in the Darfur Situation retain their status.[1209] More than half of the victim participants recognised by the Court since 30 September 2009 have been accepted to participate in one of the cases in the Darfur Situation.[1210] In the *Gender Report Card 2009*, victim participants in the Darfur Situation and cases amounted to only 1% of the total number of victim participants before the Court.[1211] This year, the Darfur Situation and cases account for almost 12% of all victim participants.[1212] The Darfur Situation has one of the highest acceptance rates for victim participation before the Court, with almost 60% of all applicants for victim participation in that Situation and its associated cases being authorised to participate.[1213]

1208 According to figures provided by the VPRS by email dated 2 September 2010.
1209 According to figures provided by the VPRS by email dated 2 September 2010.
1210 105 victim participants were accepted in the last year across the three cases in the Darfur Situation, amounting to 51.7% of the total of 203 victim participants who have been accepted since 30 September 2009.
1211 11 of 771 victim participants were accepted in the Darfur Situation as of 30 September 2009, amounting to 1.43%.
1212 116 of the 974 victim participants accepted as of 30 August 2010 relate to the Darfur Situation or associated cases, amounting to 11.9% of the total.
1213 A total of 116 of the 197 applicants for victim participation in the Darfur Situation and cases have been accepted as of 30 August 2010, amounting to 58.88%.

The Prosecutor v. Ahmad Mohammad Harun & Ali Kushayb

Six applications for victim participation in this case have been accepted since 30 September 2009, all from male applicants.[1214] In its decision of **17 June 2010**,[1215] the Pre-Trial Chamber noted that all six applicants for victim participation had previously been authorised to participate at the pre-trial phase of the case against President Al'Bashir.[1216] Having examined their applications, Single Judge Monageng was satisfied that the applicants met the criteria of 'victims'. Judge Monageng was also satisfied that the personal interests of the applicants were affected by the outcome of the pre-trial proceedings. As a result, all six applicants were accepted to participate as victims in the pre-trial stage of the proceedings against Harun and Kushayb.[1217]

The Prosecutor v. Bahar Idriss Abu Garda

Eighty-seven victim participants have been accepted in the case against Abu Garda since the period covered by the *Gender Report Card 2009*.[1218] Five of the applicants accepted as victim participants were also on the list of witnesses the Prosecution intended to call during the confirmation hearing.[1219] Single Judge Monageng noted that she had held in a previous decision at the pre-trial phase in the Katanga/Ngudjolo case had held that 'the status of victims in any given case must be granted whenever the four conditions provided for in rule 85 of the Rules [of Procedure and Evidence] are met, regardless of whether the applicant [...] is also a witness in the case'.[1220] However, in the interests of the fairness of proceedings, the Single Judge held that the dual status of these victim applicants should be notified to the Defence.[1221] The Pre-Trial Chamber appointed a legal representative for seven applicants who had been granted victim participation status, in order to enable them to participate until a legal representative of their own choosing and who met the necessary requirements could be appointed.[1222]

1214 According to figures provided by the VPRS by email dated 2 September 2010.
1215 ICC-02/05-01/07-58.
1216 ICC-02/05-01/09-62.
1217 ICC-02/05-01/07-58, para 16.
1218 According to figures provided by the VPRS by email dated 2 September 2010. It appears from an examination of the Pre-Trial Chamber's decisions that 34 of the 87 victim participants were actually accepted to participate on 25 September 2009.
1219 ICC-02/05-02/09-121, para 102 and ICC-02/05-02/09-147-Red, para 143.
1220 ICC-01/04-01/07-632, para 22.
1221 ICC-02/05-02/09-121, para 102 and ICC-02/05-02/09-147-Red, para 143.
1222 ICC-02/05-02/09-255, para 33.

On **6 October 2009**, the Pre-Trial Chamber issued its decision on the modalities of victim participation at the pre-trial phase of the case. It held that legal representatives of victims authorised to participate at the pre-trial stage of the case have the right to:

- have access to all public filings and public decisions contained in the case record;
- be notified on the same basis as the Prosecution and the Defence of all public requests, submissions, motions, responses and other procedural documents which are filed as public in the case record;
- be notified of the decisions of the Chamber in the proceedings;
- have access to the transcripts of hearings held in public sessions;
- be notified on the same basis as the Prosecution and the Defence of all public proceedings before the Court, including the date of hearings, any postponements, and the date of delivery of the decision; and
- have access to the public evidence filed by the Prosecution and the Defence pursuant to Rule 121 of the Rules and contained in the case record, although limited to the format in which the evidence was made available.[1223]

The Chamber held that the legal representatives of victims had the right to attend all public hearings leading up to and including the confirmation of charges hearing. The victims' representatives were also granted the right to participate through oral motions, responses and submissions in all the hearings they are entitled to attend, as well as all other matters other than those where victims' intervention is prohibited by the Statute or the Rules of Procedure and Evidence.[1224] The legal representatives were entitled to make opening and closing statements at the confirmation of charges hearing.[1225] The Chamber held that it would decide on the attendance of the legal representatives of victims at closed-session or *ex parte* hearings on a case-by-case basis.[1226] Victims who have been granted anonymity during the pre-trial phase would not be permitted to examine witnesses due to the principle of prohibiting anonymous accusations. If any of the legal representatives wished to question any of the witnesses at the confirmation hearing, they were required to make an application to the Chamber.[1227]

1223 ICC-02/05-02/09-136, para 13.
1224 ICC-02/05-02/09-136, paras 17-18.
1225 ICC-02/05-02/09-136, para 19.
1226 ICC-02/05-02/09-136, para 20.
1227 ICC-02/05-02/09-136, paras 22-23.

The Chamber would then decide on the procedure to be followed, taking into account 'the stage of the proceedings, the rights of the suspect, the interests of the witnesses, the need for a fair, impartial and expeditious trial and the requirements under Article 68(3) of the Statute'.[1228] The legal representatives of the victims were also entitled to file motions, responses and replies on all matters for which the Statute and Rules did not exclude their participation, either on their own initiative or at the request of the parties, the Registry or any other participants.[1229]

The Prosecutor v. Omar Hassan Ahmad Al'Bashir

Twelve victim participants – all male – were authorised to participate in the case against President Al'Bashir.[1230] These applicants were accepted in a decision issued on **10 December 2009**.[1231] The Pre-Trial Chamber, similarly to the Trial Chamber decision of 23 September 2009 in the Katanga/Ngudjolo case, took a flexible approach to which documents could be accepted as proof of identity, kinship or guardianship in light of the difficulties faced by applicants from conflict regions in attempting to gain access to official civil records.[1232] In another decision issued on **9 July 2010**, the Pre-Trial Chamber rejected eight applications for victim participation status, again all from male applicants, on the grounds that they had not shown a sufficient link between the harm they suffered and the crimes alleged in the Warrant of Arrest.[1233] Although the case against President Al'Bashir includes sexual violence charges, none of the victim applicants dealt with by the Pre-Trial Chamber to date have been women and none have explicitly included sexual violence (including against family members) in their account of the harm they suffered.[1234]

The Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus

The Pre-Trial Chamber is currently examining 95 applications for victim participation in this case and has requested observations from the parties.[1235] Eighty-seven of the applicants had already been accepted to participate in the case against Abu Garda.[1236] At the time of writing, no decision has been issued on their applications.

1228 ICC-02/05-02/09-136, para 24.
1229 ICC-02/05-02/09-136, para 25.
1230 According to figures provided by the VPRS by email dated 2 September 2010.
1231 ICC-02/05-01/09-62.
1232 ICC-02/05-01/09-62, para 9.
1233 ICC-02/05-01/09-93.
1234 According to the summary of the applications for victim participation provided in the two decisions of the Pre-Trial Chamber. ICC-02/05-01/09-62, paras 30-65; ICC-02/05-01/09-93 paras 7-22.
1235 ICC-02/05-03/09-56 (relating to 87 applications for victim participation) and ICC-02/05-03/09-65 (relating to 8 applications for victim participation). These applicants do not appear to be included in the figures provided by the VPRS of the Court, according to figures provided by the VPRS by email dated 2 September 2010.
1236 ICC-02/05-03/09-56, p 3.

Central African Republic

No victim participants have been accepted to participate in the CAR Situation.[1237] No victim participants had been accepted prior to the two Appeals Chamber decisions described in the *Gender Report Card 2009*, which put an end to the procedural status of victim at the investigation stage of the proceedings,[1238] As with the other Situations before the Court, no new applicants have been accepted since those decisions. However, the CAR Situation and the Bemba case have given rise to a large number of applications for victim participation in the last year. There have been 1521 victim applications to participate in the CAR Situation and the case against Jean-Pierre Bemba Gombo, amounting to 42% of the total number of applications for victim participation received by the Court since 2005.[1239] Although no gender breakdown of these applications is available, 47% of those accepted as victim participants in the Bemba case are women.[1240] The CAR Situation and cases now account for almost 14% of all victim participants before the Court, double last year's percentage.[1241] This figure is likely to continue to increase as the backlog of applications is processed. Slightly less than 9% of the applicants to date have been accepted to participate.[1242] At this point, this appears to be more a function of the rapid increase in the number of applications over the last year than a clear pattern of rejecting applicants for victim participation in this Situation.

1237 According to figures provided by the VPRS by email dated 2 September 2010.
1238 ICC-01/04/556 and ICC-02/05-177.
1239 According to figures provided by the VPRS by email dated 2 September 2010, 1521 or 42.5% of the 3579 applications for victim participation received since 2005 relate to the CAR Situation and cases.
1240 According to figures provided by the VPRS by email dated 2 September 2010, 63 of the 135 victims accepted to participate in the Bemba case are women.
1241 Of the 974 victim participants accepted since 2005, 135 relate to the Bemba case, amounting to 13.86% of the total. Whereas, last year only 54, or 7%, of the 771 victim participants accepted as of 30 September 2009 related to the Bemba case. Figures provided by the VPRS by email, 2 September 2010.
1242 According to figures provided by the VPRS Section by email dated 2 September 2010, only 135 or 8.87% of the 1521 applications relating to the CAR Situation and Bemba case had been accepted as of 30 August 2010.

The Prosecutor v. Jean-Pierre Bemba Gombo

Eighty-one new victim participants have been accepted in the Bemba case since 30 September 2009.[1243] The Trial Chamber issued a decision on **22 February 2010**, granting the 54 victims who had previously been accepted to participate at the pre-trial phase of proceedings continued participatory status.[1244] The Chamber noted Rule 86(8) of the Court's Rules of Procedure and Evidence, namely that 'a decision on an application to participate is to apply throughout the proceedings in the same case'.[1245] Thus, the Chamber considered that the Rome Statute confirms that a decision on victim participation taken at the pre-trial stage should continue to apply at the trial stage. The Chamber noted that it was then 'open to the parties to object to the continued participation of any victim' for 'good cause based on new material that has emerged since the original decision'.[1246] The Chamber highlighted one exception to this practice, namely that victim participation should discontinue if 'the harm allegedly suffered was not, *prima facie*, the result of the commission of at least one [of the confirmed charges]'.[1247] As no new evidence was placed before the Trial Chamber, the victims were automatically permitted to participate at the trial stage. This now appears to be standard practice across the various Trial Chambers, as can be seen in the section on modalities above.

On **9 December 2009**, the Chamber issued a decision on victims' legal representation.[1248] Of the 54 victim participants accepted at that point in proceedings, 29 had been represented by Goungaye Wanfiyo, a Legal Representative from the CAR. Following the death of Wanfiyo on 27 December 2008, the other Legal Representative of Victims from CAR took over as the Common Legal Representative of the majority of those victims. By the time of the confirmation of charges hearing, 20 victim participants were represented by the OPCV, while the remaining 34 victim participants were represented by the Legal Representative. The Chamber ordered the OPCV to continue acting on

1243 VPRS email, 2 September 2010.
1244 ICC-01/05-01/08-699.
1245 ICC-01/05-01/08-699, para 17.
1246 ICC-01/05-01/08-699, para 39.
1247 ICC-01/05-01/08-699, para 19.
1248 ICC-01/05-01/08-651.

behalf of the victim applicants it currently represented until a decision was made on their participation in the proceedings. It ordered the VPRS to submit a report on the victim participants who had been originally represented by Wanfiyo, pending a further decision on common legal representation.[1249]

Trial Chamber III issued a decision on **30 June 2010** accepting 81 of 86 applications for victim participation.[1250] The Chamber adopted the modalities on victim participation set out in the decision of Trial Chamber I in the Lubanga case, dated 18 January 2008.[1251] Trial Chamber III specifically retained the right of victims to introduce evidence and rejected the Prosecution argument that they should only be permitted to do so under 'exceptional circumstances'.[1252] The Trial Chamber also agreed with a number of the findings on the modalities of victim participation set out by Trial Chamber II in the Katanga/Ngudjolo case in its decision of 22 January 2010.[1253] Trial Chamber III approved the following modalities at trial: the possibility of victims introducing evidence under Article 69(3) following a written application to the Chamber;[1254] the questioning of witnesses by the legal representative of victims;[1255] limited access to confidential documents in the case record through the legal representatives;[1256] contact between 'dual status' victims (individuals who are both a victim participant and a witness in the case) and other parties or participants only through the Victims and Witnesses Unit;[1257] the participation of anonymous victims, subject to certain limitations;[1258] and protective measures for victim participants.[1259] The Chamber went on to grant victim participant status to 81 victims,[1260] 20 of whom alleged harm on the basis of crimes including rape.[1261] The Trial Chamber explicitly set out the gender breakdown of the accepted applications for victim participation, as well as providing information on the number of applicants who were victims of specific crimes such as rape, murder and pillage.

On **7 September 2010**, the Trial Chamber imposed a time limit for the submission of new applications for victim participation in the Bemba case.[1262] The Chamber noted that it was in the process of reviewing the 192 applications for victim participation of which it had already been notified by the Registry; but, there were a further 900 applications, which had been received by the Registry but not yet transmitted to the Chamber.[1263] Therefore, the Chamber ruled that any new applications for victim participation were to be submitted to the Registry by 15 September 2010.[1264] However, the Chamber held that 'any applications that are received after the deadline date may still be considered for the purpose of allowing victims to participate in further stages of the trial proceedings', and that the exact form of participation would be decided by the Chamber on an 'application by application basis'.[1265]

1249 ICC-01/05-01/08-651, para 18.
1250 ICC-01/05-01/08-807.
1251 ICC-01/05-01/08-807, paras 27-30, quoting ICC-01/04-01/06-1119, paras 108-122.
1252 ICC-01/05-01/08-807, paras 32-36.
1253 ICC-01/04-01/07-1788- tENG.
1254 ICC-01/05-01/08-807, paras 29-37.
1255 ICC-01/05-01/08-807, paras 38-40.
1256 ICC-01/05-01/08-807, para 47.
1257 ICC-01/05-01/08-807, paras 50-54.
1258 ICC-01/05-01/08-807, paras 65-69.
1259 ICC-01/05-01/08-807, paras 70-73.
1260 Forty of the victims were women, 37 were men, 1 was a legal person, 2 women were permitted to participate on behalf of a deceased male victim, and 2 men were permitted to participate on behalf of a deceased female victim. ICC-01/05-01/08-807, para 102(a).
1261 ICC-01/05-01/08-807, para 102(a).
1262 ICC-01/05-01/08-875.
1263 ICC-01/05-01/08-875, paras 3, 5.
1264 ICC-01/05-01/08-875, para 9.
1265 ICC-01/05-01/08-875, para 8.

Protection

Article 68(1) of the Rome Statute requires the Court to '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 crime, particularly where the crime involves sexual or gender violence or violence against children. The measures taken by the Court must not be 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.

To this end, the Registry of the Court established the VWU, pursuant to Article 43(6). The VWU provides protective measures and security arrangements, counselling and other assistance to victims, witnesses and others that may be at risk on account of testimony before the Court.[1266] As a neutral body, the VWU provides services to the Prosecution and the Defence during the pre-trial/investigation phase, at trial and post-trial.

Victim and witness protection at the ICC encompasses a number of practices, including in-court and out-of-court protection measures, the redaction and non-disclosure of identifying information to the Defence, and the interim release of the accused.

1266 <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm>, last visited on 25 October 2010.

Extensive in-court and out-of-court protection measures were provided for vulnerable witnesses in the Katanga/Ngudjolo case, the first case to include crimes of gender-based violence. As described in the **Trial Proceedings** section, above, three female witnesses for the Prosecution, all victims of sexual violence, were provided with a range of **in-court protection measures**, including: pseudonyms, voice and image distortion, entering and leaving the courtroom during closed session, drawing a curtain to impede visual contact between the witness and the accused; the presence of a resource person from the VWU seated beside the witness (and able to speak in the witness' native language), and a psychologist from the VWU seated in the courtroom.

Based on the public record, on one occasion, Witness 132 in the Katanga/Ndugjolo case was repeatedly questioned by the Prosecution and the Court regarding the frequency of her being raped while imprisoned in a military camp. She was invited by the Chamber to take breaks during this difficult testimony, and was offered its encouragement for her courage in testifying.[1267]

It is also noteworthy that two of the vulnerable witnesses who testified before the Court this year were called by the Defence: mothers of alleged child soldiers in the Lubanga case. Both witnesses required in-court protection measures. Both testified in closed-session hearings, and one testified via video link from the Ituri region of the DRC.

According to the Rules of Procedure and Evidence, **redactions**[1268] 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 and 'innocent third parties'.[1269]

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. The *Gender Report Card 2008* and *2009* extensively covered decisions concerning the redaction and non-disclosure of information leading to the identity of victims and witnesses as they appeared in witness statements, victims' applications to participate in the proceedings, communications between the Prosecution and witnesses, and the Prosecution's internal work product.[1270]

While the Court had seemed to come to a settled practice regarding the process and legal basis for redacting identifying information, a conflict between Trial Chamber I and the Prosecution's interpretation of its statutory duty to protect its intermediaries as 'person[s] at risk on account of the activities of the Court'[1271] resulted in the second stay in the proceedings in the Lubanga case for fair trial concerns. At issue was the Prosecution's failure to implement the Trial Chamber's order to disclose the identity of an intermediary to the Defence based on security risks. As described in greater detail in the section on **Trial Proceedings**, given the uncertainty as to the length of the stay, the Trial Chamber further ordered the 'unconditional' release of the accused, posing further security concerns for the victims and witnesses whose identities had already been revealed to the Defence.

1267 Witnesses 132 was also provided with out-of-court protection measures, including being accompanied by her spouse while travelling to The Hague to testify, as well as preventive relocation together with her husband.

1268 ICC-01/05-01/08-631-Red. 'Redaction' is the technical term used by the Court for the practice of removing identifying information about victims or witnesses from the publicly available versions of Court documents. Redactions to a document may only be made after an order of the Court, ie they are never automatic.

1269 Individuals who may be placed at risk on account of the Court's activities, such as investigators and intermediaries. See ICC-01/04-01/07-475, paras 1-2.

1270 See *Gender Report Card 2009*, p 115-128.

1271 ICC-01/04-01/07-475, paras 1-2.

On 8 October 2010, the Appeals Chamber reversed both the stay and the order to release Lubanga. Given that Article 68(1) requires that the protection measures 'not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial', it held that 'it is clear that the Prosecutor's duties are subordinate to the authority of the Trial Chamber'.[1272]

During 2010, the Court issued a number of decisions on the **interim release of the accused**.[1273] 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.

1272 ICC-01/04-01/06-2583, para 50.

1273 '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.

CAR

Jean-Pierre Bemba Gombo

Appeals Chamber decision on interim release

On **2 December 2009**, the Appeals Chamber reversed Pre-Trial Chamber II's decision granting Bemba conditional interim release based on a series of factual errors.[1274] It found that the Pre-Trial Chamber erred in granting conditional release without establishing the specific conditions of release, identifying the State to which to release the accused, or making a determination as to whether the State could enforce the imposed conditions.

Pre-Trial Chamber II had issued its fourth decision on interim release on 14 August 2009, granting Bemba conditional release, the implementation of which was to be deferred.[1275] The decision hinged on Article 58(1)(b) of the Rome Statute, requiring the Chamber to determine whether continued detention remains necessary: (i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or, (iii) to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court.

The Prosecution appealed on two grounds, and requested that the appeal have suspensive effect.[1276] First, the Prosecution claimed that of the nine factors considered by the Pre-Trial Chamber, only two were actually new. Second, the Prosecution submitted that the Pre-Trial Chamber erred in granting conditional release without simultaneously determining which conditions to impose and to which State to release Bemba, and without determining whether the State was able to enforce the conditions imposed.

Significantly, Victims' Legal Representatives filed observations, requesting permission to participate in the interlocutory appeal,[1277] which the

1274 ICC-01/05-01/08-631-Red.

1275 ICC-01/05-01/08-475. Bemba's first three applications for interim release were denied by Pre-Trial Chambers II and III. See ICC-01/05-01/08-49 (confirmed by the Appeals Chamber, ICC-01/05-01/08-323), ICC-01/05-01/08-321, and ICC-01/05-01/08-403.

1276 ICC-01/05-01/08-476 (appeal); ICC-01/05-01/08-485 (public redacted version of document in support of the appeal). The Appeals Chamber granted suspensive effect. ICC-01/05-01/08-499.

1277 ICC-01/05-01/08-479.

Appeals Chamber granted.[1278] The Victims' Legal Representatives submitted that in its decision granting conditional release, the Pre-Trial Chamber failed to adequately assess the risks to victims and witnesses. They further asserted that the Chamber is required to consult those victims who may be placed at risk as a result of the release, or the imposed conditions of release, prior to issuing any determination, pursuant to Rule 119(3) of the Rules of Procedure and Evidence. Finally, they submitted that victims must have an opportunity to present their observations prior to the issuance of a decision on release.[1279]

As a preliminary matter, the Appeals Chamber noted that decisions concerning detention or release pursuant to Articles 60(2) and 58(1) of the Statute are not discretionary. Rather, if the conditions of Article 58(1) are met, the person 'shall be' detained or released. It thus found that the Appeals Chamber can only intervene where there are clear errors of law, fact or procedure.

In sum, the Appeals Chamber agreed with the Prosecution's claim that the Pre-Trial Chamber both misappreciated and disregarded relevant facts in reaching its conclusion that there had been a 'substantial change of circumstances', warranting Bemba's conditional release. In doing so, the Appeals Chamber reviewed each of the factors relied upon by the Pre-Trial Chamber.

The gravity of the confirmed charges and length of the potential sentence; Bemba's political and professional position and his international contacts and ties; the accused's financial situation and resources; Bemba's offer to surrender prior to his arrest and his willingness to cooperate; his political aspirations; and, the accused's family ties had all constituted bases for the accused's continued detention in the prior three rulings of the Pre-Trial Chamber.

With regard to its reliance on each of these in its decision to release Bemba, the Appeals Chamber found that the Pre-Trial Chamber had failed to address or explain all of the relevant factors. For example, the Appeals Chamber noted that in its earlier detention reviews, the Pre-Trial Chamber had found that Bemba's position as national president of the MLC weighed in favour of his continued detention. In contrast, this factor was considered as a changed circumstance in the impugned decision, without further explanation. It further found that the impugned decision did not explain why Bemba's strong family ties would make it more difficult for him to abscond. More specifically, it found that the Pre-Trial Chamber neglected to assess whether Bemba possessed the financial means to abscond with his family.

Two additional factors considered by Pre-Trial Chamber II included Bemba's good behaviour in detention and during his authorised attendance at his father's funeral. With regard to his good behaviour in detention, the Appeals Chamber considered that a detainee's behaviour while awaiting trial is a relevant factor for applications for interim release, to be assessed on a case-by-case basis. In this instance, it held that the Pre-Trial Chamber's finding of good behaviour was based on the Registry's monitoring of Bemba's non-privileged communications and visits from 3 July 2008 to 19 January 2009, and disregarded relevant facts.[1280] It thus held that the Pre-Trial Chamber's finding of 'good behaviour' was erroneous.

The Appeals Chamber also considered cooperation with Court orders to be a germane factor in assessing interim release on a case-by-case basis. However, it found that in the instant case, the Pre-Trial Chamber failed to consider all of the relevant facts related to Bemba's compliance during his 24-hour release. In contrast with the Pre-Trial Chamber, the Appeals Chamber concluded that Bemba had no choice but to comply with the Court's order, and thus that the Pre-Trial Chamber had disregarded relevant facts regarding how much weight to attach to this factor.

Regarding the second ground of the appeal, the Appeals Chamber held that a decision granting conditional release requires a 'two-tiered examination' resulting in 'a single unseverable decision that grants conditional release on the basis of specific and enforceable conditions'.[1281] It found the impugned decision to be flawed for failing to specify the conditions that made Bemba's release feasible. It further held that the identification of a State willing to accept the accused and able to enforce the imposed conditions constitutes a prerequisite to issuing a decision granting conditional release. It noted in this regard that without the cooperation of States Parties, conditional release would be ineffective.

On 28 July 2010, Trial Chamber III issued a fifth decision reviewing Bemba's continued detention and found no material change of circumstances warranting interim release.[1282] The Defence had argued that the postponement of trial to an undetermined date, the absence of a valid document containing the charges and inexcusable delays by the Prosecution all

1278 ICC-01/05-01/08-500 and ICC-01/05-01/08-566 (the Appeals Chamber's decision granting the request and the reasons for the decision, respectively).

1279 ICC-01/05-01/08-507, paras 15, 17-19.

1280 ICC-01/05-01/08-631-Red, paras 79-81. The relevant facts are redacted in the public version of the decision.

1281 ICC-01/05-01/08-631-Red, para 105.

1282 ICC-01/05-01/08-843.

constituted a substantial change in circumstances.[1283] The Trial Chamber rejected the Defence arguments, finding neither a temporary postponement of trial, nor the re-filing of a second amended document containing the charges sufficient to justify release.

Both the Prosecution and Victims' Legal Representatives had further submitted that the accused's continued detention remains both necessary to ensure his appearance at trial and to prevent any risks to the safety of, and intimidation to, victims and witnesses.

Victims/survivors and CAR activists call attention to threats inherent in Bemba's provisional release

As described above, the Legal Representatives of Victims filed observations requesting permission to participate in the appeal on behalf of participating victims in the case, which the Appeals Chamber granted.[1284] The submissions argued that the Pre-Trial Chamber had failed to adequately assess the risks to victims and witnesses in the event Bemba was released. They further asserted that pursuant to Rule 119(3) of the Rules of Procedure and Evidence, the Chamber must consult those victims who may be placed at risk as a result of the release, or the imposed conditions of release, prior to issuing a determination.

The threats to, and fear of, victims/survivors raised by the possibility of Bemba's provisional release were emphasised by women's rights activists and victims/survivors at the 'Women, Peace, Justice, Power' workshop held by the Women's Initiatives for Gender Justice and the CAR-based NGO, *Organisation pour la compassion et le développement des familles en détresse* (OCODEFAD), from 2-5 November 2009, in Bangui, CAR.

During the workshop, victims/survivors expressed their confusion about why the Court would consider the release of the only person currently in custody for the atrocities committed in CAR in 2002 and 2003.[1285] They voiced particular concern for their own safety, given that in their view Bemba was arrested due largely to the demands of women and victims calling for justice and being willing to testify as witnesses. Bemba supporters had previously threatened women activists during his confirmation hearing in The Hague.[1286] Both victims and activists who demanded accountability reported threats to themselves, their children and family members by Bemba's supporters.[1287] Workshop participants expressed their concern that, should Bemba be released, his supporters could assist him in threatening victims and potential witnesses to intimidate them from testifying against him. In a statement released following the workshop in Bangui, the Women's Initiatives joined activists and victims/survivors in strongly opposing any provisional release for Bemba, and called for his trial to begin.[1288]

Women's rights activists and victims/survivors came out strongly against Bemba's provisional release in their public statements. They opposed it in a Declaration[1289] issued at the close of the workshop and in a Memorandum[1290] presented to the Secretary-General's Representative and Head of the United Nations Peace-building Office in CAR (BONUCA) during a march of over 2,000 women through Bangui on 4 November 2009.[1291]

1283 ICC-01/05-10/08-840.

1284 ICC-01/05-01/08-479 (request by the Legal Representatives of Victims); ICC-01/05-01/08-500 and ICC-01/05-01/08-566 (the Appeals Chamber's decision granting the request and the reasons for the decision, respectively). The Legal Representatives subsequently filed a submission (ICC-01/05-01/08-507) and a corrigendum (ICC-01/05-01/08-507-Corr-Anx). The Appeals Chamber rejected the corrigendum, as it contained an additional sentence and a footnote, and did not merely correct typographical errors.

1285 *Statement from Women, Peace, Justice, Power Workshop*, Women's Initiatives for Gender Justice, 6 November 2009, in *In Pursuit of Peace/ À la poursuite de la paix*, April 2010, available at <http://www.iccwomen.org/documents/Pursuit-ENG-4-10-web.pdf>, last visited on 25 October 2010.

1286 *Women's Voices*, March 2009 issue, available at <http://www.iccwomen.org/news/docs/Womens_Voices_Mar2009/WomVoices_Mar09.html>, last on visited 25 October 2010.

1287 *Women's Voices*, October 2009 issue, available at <http://www.iccwomen.org/news/docs/Womens_Voices_1009/WomVoices1009.html>, last visited on 25 October 2010.

1288 *Statement from Women, Peace, Justice, Power Workshop*, Women's Initiatives for Gender Justice, 6 November 2009 in *In Pursuit of Peace/ À la poursuite de la paix*, April 2010.

1289 *Declaration by Women Leaders, Victims and Human Rights Activists*, 5 November 2009, in *In Pursuit of Peace/ À la poursuite de la paix*, April 2010, available at <http://www.iccwomen.org/documents/Pursuit-ENG-4-10-web.pdf>, last visited on 25 October 2010.

1290 *Women's Memorandum on Justice and Peace in the Central African Republic*, 4 November 2009, in *In Pursuit of Peace/ À la poursuite de la paix*, April 2010, available at <http://www.iccwomen.org/documents/Pursuit-ENG-4-10-web.pdf>, last visited on 25 October 2010.

1291 Women's Initiatives for Gender Justice, 'Workshop – 'Women, Peace, Justice, Power', *Women's Voices E-Letter*, December 2009, available at <http://www.iccwomen.org/news/docs/Womens_Voices_Dec2009/Womens_Voices_Dec2009.html>, last visited on 3 November 2010.

DRC

At the close of 2009, Trial Chamber II conducted the fifth pre-trial detention reviews for Germain Katanga and Mathieu Ngudjolo Chui. In each instance, the Chamber declined interim release after finding that the circumstances requiring their detention had not substantially changed, and concluding that they had not been detained for an unreasonable period, pursuant to Article 60(3),(4), of the Rome Statute. The impending trial on the merits set to commence on 24 November 2009 was a significant factor in both decisions.

Germain Katanga

Trial Chamber II's fifth review of Katanga's pre-trial detention was issued on **19 November 2009**, five days before the trial on the merits was set to begin. Consistent with prior detention reviews, the Defence for Katanga did not seek release 'given the refusal of the host state to offer assistance in guaranteeing his provisional release by accepting him on its territory'.[1292]

Katanga was originally remanded into custody during the pre-trial phase based on: the fact that there were reasonable grounds to believe that he had committed crimes within the jurisdiction of the Court, pursuant to Article 58(1)(a) of the Statute; that he was the highest ranking commander of the *Forces de résistance patriotiques en Ituri* (FRPI) at the time referred to in the charges; and that he still wielded influence as a powerful figure in Ituri, particularly among members of the FRPI. The basis for his continued pre-trial detention was maintained during four subsequent reviews.

The Trial Chamber found no significant change in circumstances since its previous ruling on the matter, and a real risk that Katanga could abscond from the jurisdiction of the Court if he were to be released. It further found his detention 'all the more necessary' given the proximity of the trial.[1293] Finally, the Chamber found that the length of Katanga's detention had not been unreasonable, as confirmed by the observations of the parties and the fact that the Defence did not raise this issue in its observations.[1294]

As noted by the Prosecution and Victims' Legal Representatives, Katanga's release would also pose a threat to the safety of victims and witnesses. In this regard, the Prosecution noted that Katanga supporters maintain the capability of interfering with Prosecution witnesses and their families, and that members of the *Front de nationalistes et integrationistes* (FNI) and FRPI had already done so in the past, allegedly under the instructions of Katanga.[1295] Victims' Legal Representatives further noted the deterioration in the security situation in Ituri since Katanga's last detention review, and a security incident affecting a team member of a Legal Representative working in Bunia.[1296] The Chamber, however, did not make any specific finding with respect to victim and witness security.

1292 ICC-01/04-01/07-1651, para 8.
1293 ICC-01/04-01/07-1651, paras 25, 26.
1294 ICC-01/04-01/07-1651, para 31.
1295 ICC-01/04-01/07-1651, para 21.
1296 ICC-01/04-01/07-1651, para 22.

Mathieu Ngudjolo Chui

Trial Chamber II conducted its fifth pre-trial detention review for Ngudjolo on **17 June 2010**.[1297] It found no appreciable change in the circumstances that served as the original grounds for placing and maintaining the accused in detention. In this regard, the Chamber recalled the basis for the pre-trial decision to maintain Ngudjolo in detention. On 27 March 2008, the Single Judge found that: there remained reasonable grounds to believe that Ngudjolo had committed crimes within the jurisdiction of the Court; the gravity of the crimes and the potentially long prison sentence created a risk that he would abscond from the Court's jurisdiction; Ngudjolo had escaped from Makala prison in the DRC before a military tribunal had reached a verdict on war crimes allegedly committed in Tchomia; Ngudjolo was the highest ranking commander of the FNI in Zumbe during the relevant period; he still wielded significant power within the DRC, and had numerous national and international contacts that could provide him with the means to flee; and, Ngudjolo supporters had the means to interfere with the Prosecution's investigation and witnesses, of which there were several precedents.[1298]

Pursuant to standard procedure, the Chamber invited the parties' observations for the fifth pre-trial detention review. The Prosecution submitted observations, emphasising the risk to victims and witnesses, whose identities have mostly been disclosed to the Defence. It also highlighted that the Chamber had sanctioned the accused for allegedly exerting pressure on Prosecution witnesses.[1299] The Defence filed a response in which it requested Ngudjolo's release in The Hague under strict conditions.[1300]

As noted above, the Chamber found no change in circumstances, nor did it find that Ngudjolo had been detained for an unreasonable period. Placing emphasis on 'the absolute necessity of guaranteeing his appearance at trial and of ensuring the protection of victims and witnesses',[1301] the Chamber denied interim release.

1297 ICC-01/04-01/07-1593-Red-tENG.
1298 ICC-01/04-01/07-345. The Defence appealed the 27 March 2008 decision; ICC-01/04-01/07-356. The Appeals Chamber upheld the decision; ICC-01/04-01/07-359.
1299 ICC-01/04-01/07-1523-Conf-Exp, as cited in ICC-01/04-01/07-1593-Red-tENG, n 8.
1300 ICC-01/04-01/07-1538-Conf-Exp, as cited in ICC-01/04-01/07-1593-Red-tENG, n 9.
1301 ICC-01/04-01/07-1593-Red-tENG, para 14.

Thomas Lubanga Dyilo

On **8 July 2010**, Trial Chamber I stayed the proceedings in the Lubanga case, and ordered the 'unconditional' release of the accused.[1302] Trial Chamber I held that Lubanga could not be maintained in preventative custody given the unconditional stay of the proceedings, the degree of uncertainty surrounding the future of the case, and the length of time Lubanga had already spent in custody.[1303]

On 16 July 2010, the Prosecution appealed the stay and requested that the Appeals Chamber suspend the release of the accused.[1304] On **23 July 2010**, the Appeals Chamber granted the Prosecution request for suspensive effect, precluding Lubanga's release from detention pending resolution of the appeal.[1305] The Appeals Chamber duly considered the fact that this was the second stay of proceedings for fair trial concerns in this case. It also noted that the Trial Chamber had characterised the stay as 'unconditional', and that Lubanga had already been in detention for more than four years. It further took into consideration that Lubanga was the subject of a UN Security Council travel ban and did not have any travel documents.

The Appeals Chamber concluded that none of the above-mentioned factors outweighed 'the potential impact on the proceedings'.[1306] Specifically, it found that 'an immediate implementation of the order to release him could render the resumption of the trial uncertain, should the Appeals Chamber later find in favour of the Prosecutor's appeals'.[1307] The stay of proceedings and related decisions of the Trial Chamber and Appeals Chamber are discussed in detail in the **Trial Proceedings** section above.

1302 ICC-01/04-01/06-2517-Red, para 31; ICC-01/04-01/06-T-314-ENG, p 14 line 3 to p 22 line 8.
1303 ICC-01/04-01/06-T-314-ENG, p 21 line 19-23.
1304 ICC-01/04-01/06-2522.
1305 ICC-01/04-01/06-2536, para 12; ICC-01/04-01/06-T-314-ENG, p 14 line 3 to p 22 line 8.
1306 ICC-01/04-01/06-2536, para 11.
1307 ICC-01/04-01/06-2536, para 11.

Recommendations

States Parties/ASP

Judiciary

Office of the Prosecutor

Registry

States Parties / ASP

Independent Oversight Mechanism

- **Prioritise** development of the full breadth of functions of the Independent Oversight Mechanism (IOM) over the next 12 months, including inspection and evaluation facilities, as described in Article 112 (4) of the Rome Statute.
- **Harmonise** within the IOM the functions and roles currently carried out by a range of other ICC bodies including the Internal Auditor, the External Auditor, the Committee on Budget and Finance and the Audit Committee.
- **Enable** the IOM to fully operationalise its *proprio motu* investigative powers 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. The insistence by the Office of the Prosecutor that investigations of its staff should start only after consulting the Prosecutor and receiving his approval[1308] should not be included in the IOM Operational Mandate 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.
- **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.
- **Appoint** the Head of the IOM at 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.
- **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.

1308 Concerns of the Prosecution on the Mandate of the IOM, Letter to Mr. Vladimir Cvetkovic, 21 September 2010; OTP Weekly Briefing, 21-27 September 2010, #56.

- **Ensure**, as recommended in the Bureau report,[1309] 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 staff members found to have committed criminal offences or other serious misconduct (including, if appropriate, termination of employment). 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 considered 'criminal' in the country within which they have occurred, but may be considered criminal by 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 type of allegations and complaints, the type of 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 of conduct by particular divisions or specific individuals. This ensures a systemic rather than incident-based approach to preventing and addressing serious misconduct.

1309 ICC-ASP/8/2, para 47.

Budget

- **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 ensure that outreach posts are maintained both for Uganda, in the Uganda field office, as well as for Kenya.
- **Ensure** that the Victims and Witnesses Unit (VWU) has sufficient resources to enable it to fully address its mandate of providing support and protection, not only to witnesses but also to victims and intermediaries whose lives may be at risk as a result of assisting ICC inquiries and investigations or due to testimony provided by a witness.
- **Adopt** the Registrar's proposed changes for the Field Offices contained in the Report of the Court on the enhancement of the Registry's field operations for 2010[1310] issued in 2009. These proposals would strengthen the functionality, coordination and planning, management and control of field-related human and material resources, and provision of services. See the **Structures and Institutional Development Recommendations** on page 59.
- **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. Make replenishment of the Contingency Fund and the Working Capital Fund priorities for the ASP in 2011.

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.

1310 Report of the Court on the enhancement of the Registry's field operations for 2010, ICC-ASP/8/CBF.2/10, 30 July 2009, p 13.

Election of the ICC Prosecutor

- **The ASP** should ensure the procedure for the upcoming election of the Prosecutor in 2011 is transparent and encourages nominations of candidates who have suitable competencies for such an important post, including experience and expertise on gender-based crimes and the prosecution thereof.

- **Maintain** the post of Deputy Prosecutor for Investigations in 2011. This would entail not approving the reclassification of the post of Prosecution Coordinator from P5 to D1, and not abolishing the post of Deputy Prosecutor for Investigations as proposed by the Prosecutor. Maintaining this position as an elected post is important for the future leadership of the Office of the Prosecutor (OTP).

- **At this time**, any contracts offered to appointees to senior leadership posts within the OTP should not be for more than a one-year term. As a new Prosecutor is to be elected in 2011, it is essential that she or he is able to appoint her or his own team at the senior leadership level. As such, it is advisable and most cost-effective at this stage to not make any appointment to the newly proposed D1 post of Prosecution Coordinator next year. The position of Head of Jurisdiction, Complementarity and Cooperation, vacant since 31 May 2010, but for which applications have closed and an appointment is expected within the next 12 months, should be appointed for a period of one year. The next Prosecutor must be enabled by the ASP to make all D1 senior leadership appointments once she or he is in office.

Judiciary

- **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 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 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 will 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 and II reflect the importance and necessity of such measures.

- **In 2011**, 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** on page 65.

- **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 confirmed.[1311]

- **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.

1311 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.

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, 40% of charges for gender-based crimes brought by the OTP have been declined by Pre-Trial Chambers from the two cases where such charges have been included and for which confirmation hearings have been held.

- **Urgently review** the Prosecution's strategy for 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 anticipated in 2011, 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 five active investigations, maintenance of seven residual investigations and at least three trials. 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 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.

- **In courtroom** proceedings, the Prosecution and Defence must continue to be mindful of the manner of questioning of 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.

- **Ensure** sufficient oversight of and coordination between trial teams and situation teams so that all orders of the Chambers are responded to in a timely manner.

- **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.

Registry

- **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. Keep updated and accurate lists publicly available on the Court's website. Offer annual training on representing victims of sexual and gender-based violence to all external counsel on the List of Counsel.

- **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 any appointments of common legal representatives remain faithful to this mandate, particularly when the group includes victims of sexual and gender-based violence and child victims.

- **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 counsel are required to re-apply for each intervention they wish to make for every proceeding.

- **Increase** resources, and 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 participation of women when seeking input from victims at the situation phase,[1312] 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.

1312 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. Identifying trends in the number of victims applying to participate in the Court is critical in order to understand any barriers faced by certain groups of victims and for purposes 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 skills audit of the Section; 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 victims application forms.[1313] The audit should identify the reasons for the backlog of over 900 victim applications and implement immediate remedies to this problem. The Registry should also develop strategies for long term changes within VPRS to avoid repetition of limited functionality.

1313 ICC-01/05-01/08-875, paras 3, 5. According to Pre-Trial Chamber III, 900 victims' applications in relation to *The Prosecutor v. Jean-Pierre Bemba Gombo* have not yet been processed by the VPRS. This accounts for almost 50% of the total number of victims' applications received by the VPRS between 30 September 2009 and 30 August 2010.

Acronyms used in the *Gender Report Card 2010*

AP	Administrative Police
ASP	Assembly of States Parties
AU	African Union
BiH	Bosnia and Herzegovina
BONUCA	*Bureau d'appui des Nations Unies pour la consolidation de la paix en République Centrafricaine*
CAR	Central African Republic
CBF	Committee on Budget and Finance
CENSAD	Community of Sahel-Saharan States
CIPEV	Commission of Inquiry on Post-Election Violence ('Waki Commission')
CNDP	*Congrès national pour la défense du peuple*
CREAW	Centre for Rights Education and Awareness
DCC	Document Containing Charges
DRC	Democratic Republic of Congo
FARDC	*Forces armées de la Republique Démocratique du Congo*
FDLR	*Forces démocratiques pour la libération du Rwanda*
FIDA-K	Federation of Women's Lawyers
FNI	*Front de nationalistes et integrationnistes*
FPLC	*Forces patriotique pour la libération du Congo*
FRPI	*Force de resistance patriotique en Ituri*
FYROM	Former Yugoslavian Republic of Macedonia
GRULAC	Group of Latin American and Caribbean Countries
GSU	General Service Unit
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP(s)	Internally Displaced Person(s)
IOM	Independent Oversight Mechanism
JEM	Justice and Equality Movement
JEM-CL	JEM Collective Leadership (splinter group JEM)
JUPEDEC	*Jeunesse unie pour l'environnement et le développement communautaire*
LJM	Liberation and Justice Movement
LRA	Lord's Resistance Army
MENA	Middle East and North Africa Region
MFA	Ministry of Foreign Affairs
MLC	*Mouvement de libération du Congo*
MONUC	*Mission de l'organisation des Nations Unies en République Démocratique du Congo*
NaRC	National Rainbow Coalition
NGO	Non-Governmental Organisation
OCODEFAD	*Organisation pour la compassion et le développement des familles en détresse*
ODM	Orange Democratic Movement
OIOS	Office of Internal Oversight
OPCD	Office of Public Counsel for Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PIDS	Public Information and Documentation Section
PNU	Party of National Unity
PTSD	Post-Traumatic Stress Disorder
RDF	Rwandan Defence Forces
RPE	Rules of Procedure and Evidence
SGBV	Sexual and Gender-Based Violence
SIDG	Sudan International Defence Group
SLA	Sudanese Liberation Army
SLA-Unity	Splinter group of SLA
SLM/A	Sudanese Liberation Movement/Army
SWGCA	Special Working Group on the Crime of Aggression
SWTUF	Sudan Workers Trade Unions Federation
TFV	Trust Fund for Victims
UNAMID	United Nations Mission in Darfur
UNFDA	United Nations Populations Fund
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UPC	*Union des patriotes Congolais*
UPDF	Uganda People's Defence Force
UNSC	United Nations Security Council
VPRS	Victim Participation and Reparation Scheme
VWU	Victims and Witnesses Unit
WCC	War Crimes Court, Uganda
WEOG	Western European and Others Group

Publications by the Women's Initiatives for Gender Justice

- *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, June 2009

- *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

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