

Women's Initiatives for Gender Justice



gender 2009
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 the four 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 International Criminal Court and to date is the only women's rights organisation to have been granted *amicus curiae* status.

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Introduction

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This is the fifth *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 seven 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 the work of the ICC in three sections, colour-coded as follows:

- **Structures and Institutional Development**
- **Substantive Jurisdiction and Procedures**
- **Substantive Work of the ICC and ASP**

Within these sections, we review and assess the work of each organ of the Court from 1 January 2009 to 5 October 2009.² 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.

² The 'Substantive Work of the ICC and ASP' section of this report summarises judicial decisions and reviews the Office of the Prosecutor's investigations and prosecutions strategy during the time period 12 December 2008 to 11 September 2009.



Structures and Institutional Development

Structures

.....

The Rome Statute³ creates the International Criminal Court (ICC) which is composed of four organs:⁴

- **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'.⁵

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.⁶ There are a total of 18 Judges in the Court's three divisions.

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

3 Footnote references in this section pertain to the Rome Statute of the International Criminal Court.
4 Article 34. The composition and administration of the Court are outlined in detail in Part IV of the Statute (Articles 34-52).
5 Article 38.
6 Article 39.
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

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Recruitment of ICC Staff ¹⁹		<i>men</i>	<i>women</i>
Overall staff ²⁰ (703 including professional, general and elected officials)		53%	47%
Overall professional posts ²¹ (364 including elected officials)		50%	50%
Judiciary	Judges ²²	47%	53%
	Overall professional posts ²³ (excluding Judges)	44%	56%
OTP overall professional posts ²⁴		52%	48%
Registry overall professional posts ²⁵		48%	52%

19 Figures as of 31 July 2009. Information provided by the Human Resources Section of the ICC.

20 This overall figure represents a 1% decrease in female appointments from 2008. Overall the number of staff increased by 113 individuals from 2008.

21 There has been a 2% increase in female appointments to professional posts compared with 2008. For the first time, half of the professional posts at the Court are occupied by women. The total number of professional posts is 364 (52% of the overall staff). In both 2008 and 2007 this figure was 49% (respectively 291 and 249 professional posts).

22 During the resumed 7th session of the Assembly of States Parties in January 2009, elections were held to fill six judicial vacancies. Of the 21 candidates, 12 were women with four women ultimately elected to the Court. Article 36 of the Rome Statute provides for there to be 18 judges on the bench of the ICC. Two vacancies were created with the resignation of Judge Mohamed Shahabuddeen (Guyana) on 16 February 2009 and the passing away of Judge Fumiko Saiga (Japan) on 24 April 2009. Judge René Blattmann (Bolivia), whose term ended in March 2009, will remain on Trial Chamber I until it renders its decision in the Lubanga case. At the time of printing this publication there were 17 Judges on the bench of the ICC. Of the 17 Judges, nine are women, putting women in the majority on the bench of the ICC for the first time. Elections to fill the vacancies created by the resignation of Judge Shahabuddeen and the passing away of Judge Saiga will be held during the 8th session of the Assembly of States Parties, 18-26 November 2009.

23 This represents a 2% decrease of women in professional posts in the Judiciary compared with 2008.

24 This represents a 6% increase from 2008 of women in professional posts in the OTP. Last year, there was a 4% increase in female appointments from 2007. The difference between male and female appointments in 2009 is 4% overall which is a significant decrease from 2008 when it was 16%. These figures show a trend of increasing female representation in the OTP. There was also a decrease in the male/female differential in mid-to-senior positions from last year, however there are almost twice the number of male appointments (28) than female appointments (15) at the P3 level and almost three times the number of male appointees at the P5 level (3 women and 8 men). Men outnumber women also in P4 positions with five more male appointments (11 women and 16 men). As in 2008, women are the majority at the P1 and P2 levels (13 women and 7 men at the P1 level, and 28 women and 19 men at the P2 level).

25 This figure is the same as 2008 when there was a 2% increase in female appointments from 2007. Women are the majority of professional staff in the Registry for the second year in a row. Female appointees outnumber male appointees at the P1 (54%), P2 (60%) and P4 (54%) levels. However, men outnumber women in senior positions, with more than twice the number of men appointed at the P5 level (3 women and 7 men).

Executive Committee and Senior Management		<i>men</i>	<i>women</i>
Judiciary	Presidency	67%	33%
OTP	Executive Committee ²⁶	50%	50%
	Heads of Divisions ²⁷	33%	67%
	Heads of Sections ²⁸	83%	17%
Registry	Heads of Divisions ²⁹	100%	0%
	Heads of Sections ³⁰	50%	50%

26 This figure is the same as 2008. The Executive Committee is composed of the Prosecutor and the three Heads of Division (Prosecutions; Investigations; Jurisdiction Complementarity and Cooperation).

27 This figure is the same as 2008. Note that the post of the Deputy Prosecutor (Investigations) has been vacant since 2007. This post is currently filled by an Acting Head of Division (male).

28 Out of 12 Heads of Sections and equivalent posts in the OTP, only two (17%) are occupied by women. This figure represents a 4% decrease from 2008 when women represented 21% of filled posts. In 2007, women were not represented at the level of Heads of Sections or equivalent posts.

29 Out of the three posts of Heads of Divisions at the Registry, two are vacant (Common Administrative Services and Victims and Counsel). The post of Head of Division of Court Services is occupied by a male appointee. In 2008 all three positions were occupied by men.

30 Out of 22 Heads of Sections and equivalent posts in the Registry, two are vacant (9%). Women professionals occupy 50% of filled posts. In 2008, four out of 23 posts were vacant (17%) and women represented 47% of filled posts.

ICC-related Bodies		<i>men</i>	<i>women</i>
Trust Fund for Victims	Candidates to the Board of Directors ³¹	40%	60%
	Secretariat ³²	29%	71%
ASP Bureau	Executive ³³	100%	0%
	Secretariat ³⁴	43%	57%
Investment Court Premises³⁵		33%	67%
Disciplinary Boards		<i>men</i>	<i>women</i>
Disciplinary Advisory Board³⁶ (internal)		45%	55%
Appeals Board³⁷ (internal)		55%	45%
Disciplinary Board for Counsel³⁸		33%	67%
Disciplinary Appeals Board for Counsel³⁹		100%	0%

31 Figure as of 23 September 2009. Information at <<http://www.icc-cpi.int/Menus/ASP/Elections/Trust+Fund+for+Victims/2009/Alphabetical+order.htm>>. Please note that the election of the new Board of Directors will take place during the 8th Session of the Assembly of States Parties, 18 to 26 November 2009 in The Hague. The nomination period was extended three times, the last deadline for nominations closed on 22 September 2009. Each of the five regions presented a candidate. Nominees are from Kenya (Africa), Mongolia (Asia), Finland (WEOG), Colombia (GRULAC) and Latvia (Eastern Europe).

32 Figure as of 9 September 2009. Information provided by the Secretariat of the Trust Fund for Victims. Four posts out of 11 (36%) are vacant. The post of Executive Director has been vacant since 30 July 2009. The Senior Programme Officer (female) has been Officer-in-Charge of the Secretariat since 1 August 2009. In 2009, 71% of posts are occupied by female professionals compared with 73% of posts in 2008.

33 Figure as of 29 September 2009. Information provided by the Secretariat of the Assembly of States Parties. The Bureau of the Assembly consists of a President, two Vice-Presidents and 18 members. 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 the two Vice-Presidents (from Mexico and Kenya), the only members who are elected in their personal capacity. The other 18 members of the Bureau are States and are represented by country delegates.

34 Figure as of 29 September 2009. Information provided by the Secretariat of the Assembly of States Parties. Out of nine posts, two (22%) are vacant. The majority of the filled posts are occupied by women (57%). In 2008 women were also the majority in the ASP Secretariat with 71% of filled posts occupied by female appointees.

35 Figure as of 31 July 2009. Information provided by the Human Resources Section of the ICC.

36 Figure as of 9 September 2009. Information provided by the Human Resources Section of the ICC. The figure in the table represents the gender breakdown for the nine members of the Board, including the six supplementary members, but excluding the Secretary (female) and the alternate Secretary (male). Four out of nine members are from WEOG countries (Germany – two members; Belgium and The Netherlands – one each). Eastern Europe and Africa have two members each (Serbia and Croatia; and Sierra Leone and the Democratic Republic of the Congo (DRC)) and GRULAC has one (Brazil).

37 Figure as of 9 September 2009. Information provided by the Human Resources Section of the ICC. The figure in the table represents the gender breakdown for the nine members of the Board, including the six supplementary members, but excluding the Secretary (female) and the alternate Secretary (male). Five out of nine members are from WEOG countries (Australia – two members; United Kingdom, France and Germany – one each). Africa has two members (Senegal and DRC – one each) and Asia has one (Islamic Republic of Iran).

38 Figure as of 9 September 2009. 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. Members are all from WEOG countries. Article 36 of the Code of Professional Conduct for Counsel outlines the composition and management of the Disciplinary Board.

39 Figure as of 9 September 2009. 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. Members are all from WEOG countries.

Geographical and Gender Equity among Professional Staff⁴⁰

The 'Top 5' by Region and Gender and the 'Top 10' overall⁴¹

(includes elected officials, excludes language staff)

	WEOG⁴²	61% overall (185 staff)	45% men (83)	55% women (102)
<i>Western European and Others Group</i>	'Top 5' countries in the region (range from 12 – 41 professionals)	'Top 5' countries by gender (range 6 – 30 female professionals)		
	<ol style="list-style-type: none"> 1 France [41]⁴³ 2 United Kingdom [23] 3 Germany [17] 4 The Netherlands, Australia [14] 5 Belgium [12] 	<ol style="list-style-type: none"> 1 France [30]⁴⁴ 2 United Kingdom [9] 3 Germany, United States of America [8] 4 Spain, The Netherlands [7] 5 Australia [6] 		
	Africa⁴⁵	16% overall (48 staff)	73% men (35)	27% women (13)
	'Top 5' countries in the region (range from 2 – 8 professionals)	'Top 3' countries by gender (range from 1 – 3 female professionals)		
	<ol style="list-style-type: none"> 1 Nigeria [8] 2 South Africa [7] 3 Sierra Leone [4] 4 Senegal [3] 5 DRC, Ghana, Mali, Niger, Senegal United Republic of Tanzania [2] 	<ol style="list-style-type: none"> 1 Nigeria, Sierra Leone [3] 2 South Africa [2] 3 Gambia, Kenya, Tunisia, Uganda, United Republic of Tanzania [1] 		

40 Figures as of 31 July 2009. Information provided by the Human Resources Section of the ICC. The ICC does not include Language Staff for the breakdown of geographical representation. Out of 703 overall staff, there are 305 professional posts excluding the Language Staff and including the Elected Officials, of which 150 are occupied by men (49%) and 155 by women (51%). For the first time women occupy the majority of professional posts. Last year women represented 46% of total professional staff. In 2007 this figure was 42%.

41 Note that it has not 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', 'Top 3' or 'Top 2' has been established.

42 The WEOG region accounts for 61% of the overall professional staff at ICC. This figure represents an increase of 3% from 2008 and 2007. The appointment of French nationals has increased by 59% since 2008. The combined figures of the next two states (the United Kingdom with 23 and Germany with 17 appointees respectively) are less than the number of appointees from France alone. For the first time women professionals from this region are the majority (55%). In 2008, 49% were women and 51% were men. In 2007, women accounted for 42% of professionals appointed from this region. However, the increase in the number of female professionals is not evenly spread and is almost entirely a consequence of the increase in the number of French female professionals. While French females doubled in number in appointments to professional posts in 2009, the other countries in the 'Top 5' tier by gender either did not change or had very small changes in the number of appointees compared with 2008.

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

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

45 Africa accounts for 16% of the overall professional staff at ICC (2% decrease from 2008). The percentage of male appointees this year (73%) represents a 3% increase from 2008 (70%). In 2007, men accounted for 64% of professionals appointed from this region. The difference between male and female appointments is very high at 46%. Last year, the difference was 40% and in 2007 it was 28%. For the third year in a row, Africa is the region with the highest percentage of men appointed to professional positions and with the highest male/female differential in appointments. This region is also the only one to have a constant increase in appointments of male professionals during the last three years. Only one new state, Niger, joined the 'Top 5' tier of African countries with appointees at the Court.

GRULAC⁴⁶**9.5% overall (29 staff)****38% men (11)****62% women (18)**

<i>Group of Latin American & Caribbean Countries</i>	'Top 5' countries in the region <i>(range from 1 – 6 professionals)</i>	'Top 4' countries by gender <i>(range from 1 – 4 female professionals)</i>
	1 Colombia [6]	1 Colombia [4]
	2 Brazil, Trinidad & Tobago [4]	2 Costa Rica [3]
	3 Costa Rica, Peru [3]	3 Brazil, Mexico, Peru, Trinidad and Tobago [2]
	4 Argentina, Ecuador, Mexico, Venezuela [2]	4 Argentina, Ecuador, Mexico, Venezuela [1]
	5 Chile [1]	

Eastern Europe⁴⁷**7.5% overall (23 staff)****43.5% men (10)****56.5% women (13)**

	'Top 5' countries in the region <i>(range from 1 – 6 professionals)</i>	'Top 3' countries by gender <i>(range from 1 – 4 female professionals)</i>
	1 Romania [6]	1 Romania [3]
	2 Croatia [5]	2 Croatia [3]
	3 Serbia [3]	3 Serbia [2]
	4 Bulgaria [2]	4 BiH, Bulgaria, Russian Federation, FYROM [1]
	5 Albania, Belarus, BiH, ⁴⁸ Georgia, Russian Federation, FYROM, ⁴⁹ Ukraine [1]	

Asia⁵⁰**6% overall (20 staff)****55% men (11)****45% women (9)**

	'Top 5' countries in the region <i>(range 1 – 5 professionals)</i>	'Top 2' countries by gender <i>(range 1 – 5 female professionals)</i>
	1 Japan [5]	1 Japan [5]
	2 Islamic Republic of Iran [4]	2 Cyprus, Islamic Republic of Iran, Philippines, Singapore [1]
	3 Jordan, Republic of Korea [3]	
	4 Cyprus, Lebanon, Mongolia, Occupied Palestinian Territory, Philippines, Singapore, Sri Lanka [1]	

46 The GRULAC region accounts for 9.5% of the overall staff at the ICC, a 1.5% decrease from last year. Women represent the majority of staff appointed from this region for the third year in a row (62%). In 2008, women were 60% of appointed professionals from this region and in 2007 they were 56%. Peru is the only new state to have joined the 'Top 5' tier of GRULAC countries with appointees at the Court.

47 Eastern Europe accounts for 7.5% of the overall professional staff at the ICC. This figure represents a 0.5% increase from 2008, but is also 0.5% less than in 2007. For the first time in this region, the percentage of women professionals is higher than that of men (56.5% women and 43.5% men). Last year women represented 44% of the total staff from Eastern Europe (41% in 2007). Three new states joined the 'Top 5' tier of Eastern European countries with appointees at the Court (Bosnia and Herzegovina, the Russian Federation and the Former Yugoslav Republic of Macedonia).

48 Bosnia and Herzegovina.

49 The Former Yugoslav Republic of Macedonia.

50 Asia accounts for 6% of the overall professional staff at the ICC. Overall the number of staff from Asia did not increase in the last three years. Notwithstanding a 7.5% increase from 2008 in the percentage of women professionals, men are still the majority of the total number of professional staff from this region (55%). In 2007, men were 61.5% of professionals appointed from Asia. Three new states (Cyprus, Lebanon and Sri Lanka) joined the 'Top 5' tier of Asian countries with the most number of appointees at the Court.

Overall 'Top 10' – Region and Gender

'Top 10' countries

(range from 5 – 41 professionals)⁵¹

- 1 France [41]
- 2 United Kingdom [23]
- 3 Germany [17]
- 4 The Netherlands, Australia [14]
- 5 Belgium [12]
- 6 Italy, Spain [11]
- 7 Canada, United States of America [10]
- 8 Nigeria [8]
- 9 South Africa [7]
- 10 Romania, Colombia [6]

'Top 10' countries by gender

(range from 1 – 30 female professionals)⁵²

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

- 51 There are 14 countries in the 'Top 10' list in 2009. In 2008 this number was slightly higher at 15. In 2007 the 'Top 10' list included almost twice the number of countries (26). The 2008 range was from 5 to 24 professionals, whereas in 2009 the range is from 5 to 41. The difference in the overall number of staff between the first of the list, France, and the second, United Kingdom, is 18 professionals. Last year, France had only four professionals more than the United Kingdom. This year the number of French professionals appointed to the Court is higher than the number of professionals of the two next countries combined (the United Kingdom with 23 professionals and Germany with 17). Out of the 14 countries composing the 'Top 10', ten (71%) are from the WEOG region, occupying the first seven places on the list. Last year, 10 out of 15 (67%) were from the WEOG region. In 2007 half of the 'Top 10' list was composed of WEOG countries. In 2009 the first non-WEOG country in the 'Top 10' is Nigeria (Africa) with eight professionals, ranking number 8 on the list. Eastern Europe and GRULAC are each represented at number 10 on the list, respectively with Romania and Colombia (six professionals each). Asia is not represented in the 'Top 10' list by region. Overall the 'Top 10' countries with the highest numbers of appointees to the Court have not changed significantly in the last three years.
- 52 There are 47 countries in the 'Top 10' by gender list. In 2008, there were 43 countries included in a 'Top 8' list as there were not a sufficient number of female appointments to professional posts to establish a 'Top 10' list. This year, the range is from 1 to 30 female professional appointments. In 2008 the range was from 1 to 15 female appointments. In 2007, 43 countries composed a 'Top 8' list, with a range of 1 to 10 female professionals. This year France has twice the number of female professionals than last year (30 in 2009 and 15 in 2008). The first five places of the 'Top 10' list by gender are occupied by the same seven WEOG countries as in 2008. Last year, with a lower range, WEOG occupied the first four places of the 'Top 8' list. In 2009 the first non-WEOG country in the 'Top 10' list by gender is Japan (Asia) with five female professionals. In 2008 the first country from a region other than WEOG was Colombia (GRULAC), ranking fifth also with five female professionals.

Legal Counsel

Appointments to the List of Legal Counsel ⁵³	men	women
Overall (302 individuals on the List of Legal Counsel) ⁵⁴ 'Top 5' ⁵⁵ 1 USA [40], 2 UK [37], 3 France and DRC [36], 4 Belgium [21], 5 Canada [17]	81%	19%
WEOG ⁵⁶ (66.6% of Counsel) 'Top 5' 1 USA [40], 2 UK [37], 3 France [36], 4 Belgium [21], 5 Canada [17]	79%	21%
Africa ⁵⁷ (28% of Counsel) 'Top 5' 1 DRC [36], 2 Cameroon [8], 3 Mali [7], 4 Kenya [6], 5 Senegal [5]	85%	15%
Eastern Europe ⁵⁸ (2.3% of Counsel) Only seven appointments from Eastern Europe: Serbia and FYROM [2 appointees each], Croatia, Slovenia and Romania [1 appointee each]	57%	43%
Asia ⁵⁹ (2.3% of Counsel) Only seven appointments from Asia: Malaysia [2], Kuwait, Pakistan, Japan, Singapore and Philippines [1 appointee each]	100%	0%
GRULAC ⁶⁰ (1.7% of Counsel) Only four appointments from GRULAC: Brazil, Trinidad and Tobago, Argentina and Mexico [1 appointee each]	100%	0%

53 Figures as of 1 September 2009. Information provided by the Defence Support Section of the Registry.

54 In 2009 there are 302 individuals on the List of Legal Counsel. Of these, only 57 are women (19%) and 245 are men (81%). This figure does not differ significantly from 2008 (20% women and 80% men) and is the same figure for 2007. For the last three years, four times more men than women have been appointed to the List of Legal Counsel. These figures show a consistent underrepresentation of women on the List of Counsel.

55 The number of appointees is reported in brackets.

56 WEOG represents 66.6% of the total Legal Counsel. Last year this region represented 68% of the List. Note that the country with the most number of appointments, not only in WEOG but across all regions, is the USA with 40 Counsel. As in 2008, 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 is the same as in 2008 (21% women and 79% men). In 2007, women were 19% of individuals appointed to the List of Legal Counsel.

57 Africa represents 28% of the total Legal Counsel. This figure represents a 2% increase from 2008. Appointments from Algeria, Cameroon, Mauritania, Morocco, Rwanda and Tunisia, which are not States Parties, have been included in the calculation for the African region. 85% of appointees from Africa are men (84% in 2007). As in 2008, from the four situations before the Court, only DRC, with 36 appointments, made it to the 'Top 5' of appointees from Africa (there were 24 appointments from the DRC in 2008). There are only two appointees from Uganda, one from Central African Republic (CAR) and none from Sudan. Of the 39 appointments from the situations before the ICC, only four are women (three from DRC and one from CAR).

58 Eastern Europe represents 2.3% of the total Legal Counsel. This figure represents a slight decrease from 2008 (3%). The gender breakdown for this region, 43% women and 57% men, is the same as last year and for 2007. For the third year in a row, Eastern Europe has the lowest disparity between male and female appointments across all regions.

59 Asia represents 2.3% of the total Legal Counsel. This figure is a slight increase from 2008 (2%). Appointments from Malaysia, Philippines, Kuwait, Pakistan and Singapore, which are not States Parties, have been included in the calculation for the Asian region. As in 2008 and 2007, no women were appointed as Counsel from this region.

60 GRULAC represents 1.7% of the total Legal Counsel, a 0.6% increase from 2008. As in 2008 and 2007, no women were appointed from the GRULAC region.

Appointments to the List of Assistants to Counsel ⁶¹	<i>men</i>	<i>women</i>
Overall (14 individuals on the List of Assistants to Counsel)	36%	64%
'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		

Professional Investigators

Appointments to the List of Professional Investigators ⁶²	<i>men</i>	<i>women</i>
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)		

61 Figure as of 24 October 2007. At the time of publication, no new figures were available on the ICC website nor provided by the Division of Victims and Counsel.

62 Figure as of 24 October 2007. At the time of publication, no new figures were available on the ICC website nor provided by the Division of Victims and Counsel.

Trust Fund for Victims

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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 RPE, the TFV fulfils two primary mandates:

- **to implement awards for reparations** ordered by the Court against the convicted person,⁶³ and
- **to use the other resources for the benefit of victims** subject to the provisions of Article 79 of the Rome Statute.⁶⁴

The TFV receives project proposals from organisations operating in the field and, if proposals are approved, transmits them to the TFV Board and to the relevant ICC Chambers for approval. The TFV's priorities are for engaging in community rehabilitation for and with the victims where the ICC has jurisdiction. The TFV grant-making process emphasises: *participation* by victims in programme planning, *sustainability* of community initiatives, *transparent* and *targeted* granting, and *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.⁶⁵

At the end of June 2009, the total funds available to the TFV was €3,131,248. During the period from 1 July 2008 to 30 June 2009, the TFV received €868,301 from States Parties and €19,407 from institutions and individuals. In-kind and/or matching donations from implementing partners amounted to €267,700 in the same period and the interest income was €99,330.⁶⁶ The Government of Germany pledged €256,600 to support the expenses related to the position of Legal Officer (P4) for a period of two years starting in March 2010.⁶⁷

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

64 Rule 98 (5) of the RPE.

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

66 *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, page 5.

67 *Ibidem*.

Of the 34 projects approved by the Chambers, 30 were supported by the Fund between 1 July 2008 and 30 June 2009,⁶⁸ while the remaining four are still awaiting proposals. During this period the Fund spent €1,388,445 in cash and €267,700 in matching resources from partner organisations for a total amount of €1,655,145 on victims-related activities.⁶⁹

It is estimated that these projects will benefit, either directly or indirectly, 226,000 victims (72,000 in Uganda and 154,000 in DRC) by the end of 2009.⁷⁰

The Fund's priorities for 2010 are the continued support of the projects in DRC and Northern Uganda. The extension of the current projects until 2010 was approved by the Board of Directors on 3 June 2009. The Board also approved the expansion of the Trust Fund's activities to the Central African Republic (CAR).⁷¹ Projects in CAR, to be launched in 2010, will focus exclusively on support and assistance to victims of sexual violence.⁷²

In response to the global appeal launched on 10 September 2008 by the Board of Directors to assist 1.7 million victims of sexual violence under the jurisdiction of the Court over three years, earmarked donations amounting to €203,081 in total were received by the Government of Norway (€191,081) and the Principality of Andorra (€12,000). During 2009, Denmark pledged €499,400 towards the same appeal.⁷³ At present these funds are being used for approved activities in Uganda and DRC.⁷⁴

68 13 projects in Eastern DRC covering the provinces of North and South Kivu and the district of Ituri in Orientale Province and 17 projects in Northern Uganda covering Lango, Teso, Acholi sub-regions and Adjumani District; *Ibidem*, page 2.

69 Email exchange with the Secretariat of the Trust Fund for Victims, 30 September 2009.

70 *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, page 2. The total number of direct beneficiaries is 39,000 (14,000 in northern Uganda and 25,000 in DRC), while it is estimated that 187,000 persons (59,000 in northern Uganda and 128,000 in DRC) will benefit indirectly from the projects. 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. Please note that the number of total estimated beneficiaries decreased from last year's, when it was estimated at 380,000, as a consequence of an overestimation of the impact of a radio broadcasting project and of a training conducted with the field intermediaries on the definition of indirect recipients.

71 *Proposed Budget Programme for 2010 of the International Criminal Court*, ICC-ASP/8/10, 30 July 2009, pages 135-140.

72 CAR project tenders for victims of sexual violence were approved by the Board after submission on 3 June 2009. *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, page 5.

73 *Ibidem*, page 4.

74 TFV/UG/2007/R2/040 in Uganda and TFV/DRC/2007/R1/001 (awaiting proposal), TFV/DRC/2007/R1/021, TFV/DRC/2007/R1/022, TFV/DRC/2007/R2/036 in DRC. *Trust Fund for Victims Programme Progress Report 1 January-31 March 2009*, June 2009, page 5.

TFV Projects 2008-2009⁷⁵

Uganda

Of the 18 projects approved, two are awaiting proposals.⁷⁶ The total expenditure from 1 January 2009 to 31 December 2009 of the 17 ongoing projects, including the cost extensions of ongoing projects, new contracts for 2009 and projects that will be programmed before the end of the year, is €685,813.⁷⁷ Of the 18 approved projects, three⁷⁸ (16.6%) focus on the direct support for women and girl victims/survivors.⁷⁹ 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, two are in the final stages of proposal review.⁸⁰ The total expenditure from 1 January 2009 to 31 December 2009 for the 13 ongoing projects, including the cost extensions of ongoing projects, new contracts for 2009 and projects that will be programmed before the end of the year is €744,048.⁸¹ Eight projects,⁸² representing 50% of those approved, provide direct support for women and girl victims/survivors.⁸³ 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 3 June 2009 a request for proposals of projects for victims of sexual violence was approved by the Board of Directors of the TFV prior to submission of a filing to the Chambers as established by Rule 50 of the Regulations of the Trust Fund for Victims, ICC-ASP/4/32. If approved by Pre-Trial Chamber, it is estimated that an open tender process calling for proposals will be launched in early 2010.

Sudan

There were no projects in 2009.

75 As of 5 October 2009.

76 Project TFV/UG/2007/R1/023 on assistance to women victims of rapes and violence is still awaiting proposal.

77 Email communication with the Secretariat of the TFV, 24 September 2009.

78 TFV/UG/2007/R1/020 on the rehabilitation of girl soldiers; TFV/UG/2007/R1/023 on assistance to women victims of rapes and violence (awaiting proposal); and TFV/UG/2007/R2/40 on the support to survivors of sexual and gender-based violence.

79 Note that it is not possible to have a precise figure of the budget dedicated to gender-based projects as project TFV/UG/2007/R1/020 is integrated with project TFV/UG/2007/R1/003 which has a total budget of €278,917.03; and the budget of project TFV/UG/2007/R1/023 has still to be announced.

80 Project TFV/DRC/2007/R1/001 and TFV/DRC/2007/R2/036 on providing income generation activities to female victims is still awaiting proposal (note: these projects are integrated).

81 Email communication with the Secretariat of the TFV, 24 September 2009.

82 TFV/DRC/2007/R1/021 on providing psychological assistance to victims of sexual violence and facilitating their return to their families and communities; TFV/DRC/2007/R1/022 on providing psychological assistance and income-generating activities to victims of sexual violence to facilitate their economic and social reintegration; TFV/DRC/2007/R2/029 on providing psychological rehabilitation especially to former child soldiers (girl mothers); TFV/DRC/2007/R2/031, 033, and 043 on facilitating the reintegration of groups of victims of sexual violence through psychological counselling and micro-credit; TFV/DRC/2007/R1/001 and TFV/DRC/2007/R2/036 on providing income generation activities for female victims and empowering them in their communities (awaiting proposal).

83 Please note that it is not possible to have a precise figure of the budget allocated to all the projects dedicated to the support of women victims/survivors as project TFV/DRC/2007/R2/031 is integrated with project number TFV/DRC/2007/R1/026 which has a total budget of €409,854.

ICC Budgetary Matters

	2006	2007	2008	2009
Overall ICC budget	€80,871,800	€88,871,800	€90,382,000	€102,630,000
Implementation rate	79.7% ⁸⁴	90.5% ⁸⁵	93.3% ⁸⁶	<i>not available</i>
Implementation rate 1st trimester	<i>not available</i>	21.4% ⁸⁷	23.7% ⁸⁸	32.3%

84 *Report of the Committee on Budget and Finance on the work of its eighth session, 29 May 2007, ICC-ASP/6/2, pages 6-8.*

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

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

87 *Rate of implementation of the 2007 budget as of 31st March 2008, ICC-ASP/7/3.*

88 *Rate of implementation of the 2009 budget as of 31st March 2008, ICC-ASP/8/5.*

Overview of Trends

Appointments

There are currently 703 staff employed by the ICC (330 women and 373 men). This represents a 6% gender gap between the number of men and women appointed to posts across the Court (53% men, 47% women). In 2008 there was a slightly stronger gender balance with only a 4% gap in appointments.

Of the 703 staff, 364 are employed as 'professional staff'. For the first time women and men comprise 50% each of professional employees. This figure has been reached by a significant change in the gender composition of the Judiciary due to more women judges elected to the bench in 2009 and unexpected health issues among the judges.⁸⁹ In 2008 the gender breakdown of the Judiciary was 59% male and 41% female. In 2009 the breakdown is 47% male and 53% female. The 50% gender representation in professional posts was also achieved through the Registry maintaining their gender figures for the second year running (52% female and 48% male). In addition the number of women appointed to professional posts in the OTP finally increased in 2009 and is now 52% male, 48% female.

Among the Judicial staff (excluding the Judges) there are 12% more women than men (56% women, 44% men). This figure represents a 2% increase in the number of male professionals from 2008.

In the OTP, 48% of the overall professional posts are held by women. This is a significant improvement from 2008 when 42% of posts in the OTP were held by female professionals. The overall gender gap in the appointment of men and women to professional positions is 4%, a significant decrease from 2008 when there were 16% more men than women appointed to professional positions in the OTP. When compared to 2008, the male/female differential in mid-to-senior positions (P3-P5) also decreased slightly, but there are still significantly more men than women appointed to professional posts, particularly at the P5 level where almost three times more men than women have been appointed within the OTP.

In the Registry, 52% of professional posts are held by women. While women outnumber men at P1, P2 and P4 levels, there are more than twice as many men than women appointed to senior P5 positions (3 women and 7 men).

⁸⁹ Two vacancies were created with the resignation for health reasons of Judge Mohamed Shahabuddeen on 16 February 2009 and the passing away of Judge Fumiko Saiga on 24 April 2009. Elections to fill these vacancies will be held during the 8th session of the Assembly of States parties from 18 to 26 November 2009 in The Hague.

Overall there have been fewer women appointed to the Court, but 2% more women have been appointed to professional posts. Women continue to be appointed to the lower professional levels, with an over-concentration of women in P1-P3 positions. This is most evident in the Office of the Prosecutor where figures show the strongest disparity between male and female appointments as the positions become more senior. In the OTP, there are significantly more women than men appointees at the P1 and P2 levels. However for the P3 to P5 levels the gender disparity is grossly imbalanced with 30% more men appointed (P3), 18% more male appointments (P4) and 46% more men than women appointed (P5).

In the Registry, there are higher numbers of women appointed at the P1, P2 and P4 level posts. At the P3 level, men outnumber women with 29 male professionals appointed and 24 female. There are more than twice as many men than women in the most senior P5 posts and no women have ever been appointed to a Head of Division post within the Registry.

Executive Committee and Senior Management

Two out of three members of the Presidency are men.

Two out of three Heads of Divisions in the OTP are women.

Only two Sections out of 12 in the OTP are led by women.

The only filled position of a Head of Division in the Registry is held by a man. No women have ever been appointed to a Head of Division post within the Registry.

50% of Sections in the Registry are led by women.

For the first time in the Registry, women and men share 50% appointments as Heads of Sections (or equivalent). This represents a 3% increase in the number of female Heads of Sections since 2008.

Out of 22 Heads of Sections (or equivalent posts) in the Registry, two are vacant (9%). This year the vacancy rate for positions of Heads of Sections or equivalent (9%) decreased when compared to 2008 and 2007, when respectively 17% and 14% of posts were vacant.

Only two Heads of Sections (or equivalent) out of 12 in the OTP are women (17%). In 2008, there were three women out of 14 Heads of Sections or equivalent posts (21%). No female professionals were represented at this level in the OTP in 2007. The appointment of women to middle management posts continues to be low.

Overview of Trends CONTINUED

Geographical and Gender Equity among Professional Staff

According to ICC figures, there are 305 professional staff (261 in 2008), excluding language staff, representing 71 nationalities (65 nationalities were represented in 2008).

This year has seen an increase in the number of professional appointments from the WEOG region (61%). The figures were 58% in both 2007 and 2008. WEOG has the largest number of appointees with Africa having 16%, GRULAC 9.5%, Eastern Europe 7.5% and Asia trailing with 6%. This regional dominance has been consistent since the establishment of the Court, however the disparity between WEOG and the other regions dramatically expanded during 2009.

The overwhelmingly dominant national group to emerge within WEOG is France (41 appointments). For three years running France has had the highest number of nationals appointed to the Court. The distinguishing feature in the current composition of the Court is that over the past 12 months the number of appointments of French nationals has increased by 59%. The combined figures of the next two WEOG states (the United Kingdom with 23 and Germany with 17 appointees respectively) are less than the number of appointees from France alone.

For the first time, the number of women in professional posts is higher than men in three regions: WEOG (55% women and 45% men), GRULAC (62% women and 38% men) and Eastern Europe (56.5% women and 43.5% men).

Women represent the majority of professional staff from GRULAC for the third year in a row. In 2009 only one new state, Peru, joined the 'Top 5' tier of GRULAC countries with appointees at the Court.

In Africa and Asia, the overall percentage of men is higher than the overall percentage of women appointed to professional positions. The percentage of men appointed from Africa has consistently increased in the last three years – 64% in 2007, 70% in 2008 and 73% in 2009. For the third year in a row, this region has the highest percentage of male professionals. In 2009 only one new state, Niger, joined the 'Top 5' tier of African countries with appointees at the Court.

In Asia, the male/female differential was reduced with a 7.5% increase in the number of women appointed. In addition, three new states joined the 'Top 5' tier of Asian countries with the most number of appointees at the Court (Cyprus, Lebanon and Sri Lanka). Overall the number of staff from Asia has not increased in the last three years.

With the exception of WEOG, it was not possible to come up with 'Top 5' countries by gender per region for lack 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, and for Africa there is a 'Top 3' with a range of 1–3 female professionals. Asia only has a 'Top 2' of female professionals with a range of 1–5 appointees.

Overall the 'Top 10' countries with the highest numbers of appointees to the Court have not changed significantly in the last three years. No new countries joined the 'Top 10' list and the first six places are occupied by the same eight countries from the WEOG region as in 2008.

For the first time this year it was possible to establish a ‘Top 10’ based on ‘gender’. This year the range was 1-30 for female appointments. The first five places on the list are occupied by the same seven countries from the WEOG region as in 2008. Of the non-WEOG countries, Japan records the highest number of female appointees (all five Japanese appointees to professional posts at the Court are women). From GRULAC, Colombia has the highest number with four. For Africa, Sierra Leone and Nigeria are the highest ranking with three appointees, and for Eastern Europe, Serbia ranks highest with two female staff.

Despite the high number of ratifications from the African region and all four current situations before the Court being from Africa, only three professionals from the current situations have been appointed to the ICC, one less than last year.⁹⁰ Of these, only one is a woman.

In the OTP, only three senior posts are held by nationals from the African region. This represents a decrease from 2008, when four senior posts were held by professionals coming from Africa. In the Registry, three senior posts are held by Africans and one by an Eastern European. Asia is not represented at this level in the OTP nor in the Registry.⁹¹ In the Judiciary, Asia and Africa are represented in senior posts, respectively by the President and First Vice-President of the Court. GRULAC is also represented in the Presidency by the Second Vice-President of the ICC.

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.

90 DRC (2) and Uganda (1); CAR and Sudan are not represented by any professional staff at the Court.

91 Email communication from Human Resources Section of the ICC, 24 September 2009.

The majority of members of the Disciplinary Advisory Board and the Appeals Board are from WEOG (respectively four out of nine and five out of nine).

Legal Counsel

As of 1 September 2009, there are 302 individuals on the List of Legal Counsel, 57 of whom are women (19%) and 245 men (81%). This represents a 1% decrease in the number of women appointed to the List of Counsel from 2008. There are four times more men than women recognised as Counsel on the List. There has been a consistent underrepresentation of women on the List of Legal Counsel with few proactive steps taken by the Division of Victims and Counsel to address the gender imbalance.

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),⁹² 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 Registry, in its coordination and oversight of the List of 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.

92 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’.

Overview of Trends CONTINUED

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The geographical breakdown for the List of Legal Counsel reflects the same situation as in 2008 and 2007, with only small variations. Although all the Situations currently under investigation are in Africa, the percentage of individuals from the region appointed to the List of Counsel remains at 28%. This is a 2% increase since 2008.

Of the 302 individuals on the List of Legal Counsel, only 39 (13%) are from three out of the four Situations before the Court: 36 from the DRC, two from Uganda, one from CAR. No Sudanese have been appointed to the List of Counsel.⁹³ There are four women appointed as Counsel from the Situations: three from DRC and one from CAR.

Of the 302 members on the List of Legal Counsel 61 (20%) are from countries that are not States Parties. The United States, not a party to the Rome Statute, is the country with the most number of appointments with 40 Counsel. The other states represented in the list that are not parties to the Statute of the Court are Cameroon with eight appointments and Algeria, Mauritania, Morocco, Tunisia and Rwanda with one each. In Asia, appointees are from Malaysia with two appointees, and 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 the DRC. There are 28% more women than men on the List of Assistants to Counsel.

⁹³ 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.

Professional Investigators

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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

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In March 2009 the Victims and Witnesses Unit in the Registry hired a Trauma Expert with special expertise in gender violence. 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.

OTP Advisory Council

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In a press release dated 19 June 2009, the OTP announced the appointment of Juan Méndez as Special Adviser on Crime Prevention. His role is to advise the ICC Prosecutor on how to maximise the impact of the work of the Court towards the prevention of massive atrocities. Mr Méndez joins Professor Catharine MacKinnon, appointed Special Adviser on Gender Issues, as a member of the newly formed OTP Advisory Council. This Council will be composed of Special Advisers appointed by the Prosecutor to advise the Office on its policies, practices and legal submissions. The OTP has also indicated that members of the Advisory Council will also advise on the development of specific expertise within the office.

Trust Fund for Victims

Four out of 11 posts at the Trust Fund Secretariat are vacant. Women are highly represented and constitute more than two-thirds of the filled posts (71%). Women were the majority also in 2008 when 73% of filled posts at the Secretariat were occupied by female professionals.

Between 1 July 2008 and 30 June 2009, the TFV supported 30 projects out of the 34 approved by the Chambers for Northern Uganda and Eastern DRC. The remaining four projects are still awaiting proposals. The total expenditure of the ongoing projects, including the cost extensions of projects, new contracts for the current year and projects that will be programmed before the end of the year is €1,429,86. The financial resources available to the TFV as of 30 June 2009 was €3,131,248.

Of the 18 projects approved for Uganda, three (17%) focus on direct support for women and girls victims/survivors. Of the 16 projects approved in the DRC, eight (50%) work directly with women and girls victims/survivors.

TFV's activities in CAR will focus on support and rehabilitation of victims/survivors of sexual violence. A request to the Pre-Trial Chamber outlining proposed projects for CAR is expected to be filed for their consideration before the end of the year.

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 earmarked donations from Norway (€191,081) and the Principality of Andorra (€12,000). Denmark also pledged €499,400. Including pledges, the Sexual Violence Fund has €702,481 in committed funds.

A new Board of Directors of the TFV will be elected during the 8th session of the Assembly of States Parties from 18-26 November 2009 in The Hague. Each of the five regions nominated a candidate by the closing date of 22 September 2009. Nominees are from Mongolia (Asia), Kenya (Africa), Colombia (GRULAC), Finland (WEOG) and Latvia (Eastern Europe). Out of five nominees, 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.

Institutional Development

Gender Training

Registry

On 21 November 2008, the support team of the Victims and Witnesses Unit (VWU) in the Registry participated in training on Sexual and Gender-based Violence.⁹⁴

Three new staff of the Public Information and Documentation Section (PIDS) in the Registry received their training and induction during the year, including introduction and sensitisation to gender related issues.⁹⁵

PIDS staff participated in several workshops organised by the Court's Learning Unit. Although none of the workshops focused specifically on gender issues, the workshops did allow for discussions on how to improve the Section's activities towards tackling specific information needs for women.⁹⁶

The Victims Participation and Reparations Section (VPRS) in the Registry did not organise any specific training on sexual and gender-based violence.

Office of the Prosecutor⁹⁷

During 2009 the OTP participated in meetings related to gender-based violence and also engaged in internal discussions and training on these issues.

On 16 June 2009, the Prosecutor presented a Keynote Address to the 'Interdisciplinary Colloquium: Sexual Violence as International Crimes: Interdisciplinary Approaches to Evidence', organised by the Centre on Law and Globalisation in The Hague.

In the past 12 months the ICC Deputy Prosecutor, Fatou Bensouda, has participated in four gender related conferences. These were:

- The *Gender and Sustainable Development Conference on 'La Cour Pénale Internationale et la répression des violences faites à la femme'* ('The International Criminal Court and the Repression of Violence Against Women') organised by Forum International Mibeko in Brazzaville;

94 Situation as of 11 September 2009. Information provided by the Victims and Witnesses Unit, Registry. This training was a follow-up of a general training on trauma that took place in the first half of 2008.

95 Situation as of 22 September 2009. Information provided by the Public Information and Documentation Section.

96 Situation as of 22 September 2009. Information provided by the Public Information and Documentation Section.

97 Situation as of 5 October 2009. Information provided by the Jurisdiction, Complementarity and Cooperation Division, OTP.

- The *Gender Justice Forum II* organised by Africa Legal Aid (AFLA) in Dakar;
- *Gender mainstreaming in the African Union* organised by *Femme Africa Solidarité* in Addis Ababa; and
- The *International Colloquium on Women's Leadership, Empowerment, Peace and Security*, co-convened by President Ellen Johnson Sirleaf of Liberia and President Tarja Halonen of Finland, in Monrovia. The Deputy Prosecutor presented on 'Post-Conflict Justice for Women: International Standards on Judicial Accountability'.

On 9-11 June 2009, Professor Catharine MacKinnon, Special Adviser on Gender issues within the OTP, provided a three-day training on 'The trend of gender crimes in international law'. This was attended by 50 participants from different Divisions within the OTP. On 11 September 2009, during the 'Consultative Conference on International Criminal Justice' held at United Nations Headquarters in New York, Professor MacKinnon gave a Keynote Address on international jurisprudence for gender crimes.

On 16-17 June 2009, a two-day 'Training on Cultural Awareness (North and South Kivu Provinces)' was organised for 20 participants from different Divisions in the OTP. Participants received training on the gender dimension of the conflicts in the Kivus, the impact of culture on sexual and gender-based crimes and the stigma associated with these crimes and how to interview victims/survivors of sexual and gender-based violence.

Senior representatives of the OTP have participated in other gender-related meetings including:

- A conference organised by the European Union programme REJUSCO (*Restoration de la Justice à l'Est du Congo*) with the University of Goma and the *Université Libre des Pays des Grand Lacs*, on assisting sexual violence victims and how to prevent and prosecute sexual violence crimes in the DRC; and
- The third international Conference on 'Gender Equality and Economic development in Africa' organised by the Ronald Brown Institute for Sub-Saharan Africa (RBI) in Pretoria.

On 25 May 2009, Mr Joseph Kamara, Deputy Prosecutor of the Special Court for Sierra Leone (SCSL), gave a lecture for the OTP on 'The RUF Judgment and its Legacy'. This lecture focused on the historical decision regarding the SCSL convictions of forced marriage as an inhumane act constituting a crime against humanity and of sexual slavery as a crime against humanity.

Judiciary

No training on gender was organised by the Judiciary in 2009.

Policies

Sexual Harassment Policy⁹⁸

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 Board⁹⁹ 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*.

98 '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'.

99 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 Policy¹⁰⁰

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.

¹⁰⁰ 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 Members¹⁰¹

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.

¹⁰¹ Administrative Instruction ICC/AI/2008/004, 15 August 2008.

Recommendations

Structures and
Institutional Development

Oversight Mechanism

- **The Court** in cooperation with the Bureau of the Assembly of States parties should progress, with urgency, the development of a comprehensive, independent Oversight Mechanism. The Oversight Mechanism should address serious issues of misconduct, including fraud, corruption, waste, sexual harassment, exploitation, and abuse committed by ICC staff in the course of their work, especially in the field, and should include the waiving of immunity and strict disciplinary accountability for staff that violate these rules (including termination of employment). ‘Serious misconduct’ should be defined to expressly include sexual violence, rape, abuse and harassment.
- **The Oversight Mechanism** must address the interface between the Mechanism and national law enforcement agencies (in the Netherlands or the country in which the conduct occurs) regarding allegations of possible criminal misconduct on the part of a staff member, elected official, ICC consultants or contractors. The rules of the Oversight Mechanism should be explicit about the jurisdiction of each authority and the types of acts considered criminal, particularly in relation to sexual violence given the wide range of definitions within national jurisdictions regarding the definition of rape.
- **In light of** the nature of the challenges and administrative decisions against elected ICC officials in recent years, establishing the investigatory facilities of the Oversight Mechanism appear to be the priority. However, the Court and the Assembly should ensure the breadth of functions of the Oversight Mechanism including inspection and evaluation, as described in Article 112 (4) of the Rome Statute, are fully operationalised over the course of the next three years.

Victims and Witnesses

- **The Registrar** and the ASP should significantly increase the resources of 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.¹⁰² 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 2010** the Court should develop as a matter of urgency, a comprehensive security framework inclusive of witnesses, victims¹⁰³ and intermediaries¹⁰⁴ 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 recognised as ‘victims’ by the Court benefit from appropriate and effective protection procedures.

102 Rule 16 (2), Rome Statute.

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

104 With an emphasis on local intermediaries.

- **The methodology** and safety practices of the Victims Participation and Reparations Section (VPRS) country-based consultations regarding legal representation should be strengthened.¹⁰⁵ The methodology should ensure victims have the full range of information regarding the options for legal representation, security issues, and the protection the ICC can/cannot provide. Victims should not feel pressured or forced into agreeing to a common legal representative and should be provided with accessible information about all available options associated with legal representation.
- **The security** practices of the VPRS community consultations should ensure that applicants and victims are not overly exposed to each other, to the wider community, nor to NGOs who are not directly involved with the specific victims.

Legal Counsel

- **The Division** of Victims and Counsel (DVC) 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.
- **Since the opening** of the List of Legal Counsel, women have never constituted more than 20% of those appointed to the List. The DVC must address this consistent and exaggerated gender bias by actively promoting the List of Counsel to women lawyers associations and networks including within countries with situations before the ICC. The DVC should seek information regarding candidates' experience representing or interviewing victims of gender-based crimes and explicitly encourage applications from lawyers and investigators with such experience. The Registrar should set time-specific targets for the DVC to increase the number of women on the List of Counsel.
- **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.

Field Offices

- **The Registrar's** proposed changes for the Field Offices in 2010 should be adopted by the Court and supported by the ASP to strengthen their functionality, coordination and planning, management and control of field-related human and material resources, and provision of services. The total cost of the enhancement proposed by the Registrar is €150,200, a 6% increase from the budget for the Field Operation Sections approved in 2009.¹⁰⁶ The enhancement proposals, in particular the reclassification of posts and the establishment of 'Heads of Registry' for each field office, are vital for the efficiency and good standing of the Registry (and the Court). In these contexts, the Field Offices are the 'face' of the Court and need to perform a range of complex functions in a coordinated, reliable and efficient manner.

¹⁰⁵ Women's Initiatives for Gender Justice makes these recommendations regarding VPRS field consultations based on feedback from victims and partners in the situation countries.

¹⁰⁶ Report of the Court on the enhancement of the Registry's field operations for 2010, ICC-ASP/8/CBF.2/10, 30 July 2009, page 13.

Trust Fund for Victims

- **The Board** and Secretariat of the Trust Fund for Victims should embark on a vigorous fundraising campaign. As of 30 June 2009, there was €3,149,950 (€3,131,248 and US\$26,270) in the Fund. More pledges need to be encouraged from States and individual donors should be sought to contribute to the scheme. The elaboration of a new website to be completed later in 2009 offering payment facilities to donors mandated by the Board in its Report to the Court is a positive step towards increasing donations.¹⁰⁷
- **In addition** to the criteria for the 'special vulnerability of women and girls'¹⁰⁸ 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.
- **The Secretariat** and the ASP should encourage States to provide greater contributions to the Fund since the rehabilitation projects are underway and the Court is preparing for reparations orders. State contributions amounted to €868,301 according to the 2009 *Annual Report of the Board*.¹⁰⁹ Sufficient resourcing of the TFV is vital for ensuring support to victims, to ensure its stability as a structure and to inspire further contributions from a variety of public and private sector sources.
- **The earmarked** contributions received and pledged¹¹⁰ in response to the appeal launched last September for victims of sexual violence should be complemented by other substantive donations by States Parties. In 2010 the Board of the Trust Fund and the Secretariat should establish effective fundraising strategies for the Trust Fund as a matter of urgency. Through 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.
- **Considering** the TFV will be adding a third country for assistance to victims in 2010 (Central African Republic), the ASP should ensure funds for an adequate staffing structure and review the decision of the Committee on Budget and Finance to reduce the travel budget by 15% so that there is effective coverage for TFV field and programmatic operations.

107 For the period 1 July 2008 to 30 June 2009, cash contributions from individuals and institutions to the Trust Fund amounted to €19,407.

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

109 *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.

110 The TFV received €191,081 from the Government of Norway and €499,400 from the Principality of Andorra. The Government of Denmark pledged €499,400 for the special appeal.

Outreach

- **The post** of ICC Outreach Coordinator for Sudan should be based in Abeche, Chad. Outreach activities for Sudan in 2010 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. In addition to Sudanese living in The Netherlands, the Sudanese diaspora in other countries should also be included in ICC outreach activities.
- **In 2010**, 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 and potential support within the region for the Court's work and jurisdiction.

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 2010, more staff with gender expertise will be required to ensure the integration of gender issues within the heightened case load. These positions are essential to further strengthen the strategic impact of the Special Adviser on Gender 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 decrease in the overall male/female differential in appointments to the OTP, at the P3 level there are almost twice as many men than women appointed. For the third year in a row, two-thirds of the P4 level posts are occupied by men and almost three times more men than women have been appointed at the P5 level. The OTP should adopt internal benchmarks to assist its recruitment practices towards addressing the overrepresentation of women at the P1 and P2 levels and the significant 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, are 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'. While the Court's *Strategic Plan 2006-2016* is for the next 10 years, its particular emphasis has been on the first three years of implementation.¹¹¹
- **As part** of the next phase of the Strategic Plan, the Court should establish time-specific 'placement goals' for hiring women and staff from underrepresented 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 underrepresented countries.
- **The Court** should consider establishing a ceiling on the number of staff from 'over-subscribed' countries. For three years running France has had the most number of nationals appointed to the Court with a 59% increase in the appointment of French nationals over the past 12 months. Currently there are 41 professional posts filled by nationals of France. This is more than the combined number of appointees for the next two states (the United Kingdom with 23 and Germany with 17 appointees respectively). The ceiling to address 'overrepresentation' by one state within a region should be gender balanced and equitable at all career levels, and support the development of competence within the ICC. The Court should actively search, encourage and recruit staff from underrepresented regions, with the view that the recruitment is proactive for women.
- **The practices** which have given rise to the significant increase in appointments of French nationals should be reviewed to see how such an increase occurred, whether this reflects a policy decision or simply a change in 'practice' and whether this change significantly contributes to the efficacy and competence of the Court in the performance of its core functions and responsibilities.
- **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*.¹¹²

111 The 10-year plan is in its third year of implementation.

112 In March 2009 the Victims and Witnesses Unit in the Registry hired a Trauma Expert with Special Expertise in Gender Violence. This is the first time that expertise in trauma related to sexual and gender violence has been used as a primary recruitment criterion. The post was established as a General Temporary Assignment and has yet to be made into permanent post.

- **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 issues are sometimes incorporated into the training organised by the different organs and sections of the Court, including the induction training for new staff, greater attention should be given to 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 underrepresented 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 2010**, 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. 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.
- **Designate** focal points for the Court's Sexual Harassment Policy and Equal Opportunity Policy, clarify and/or amend the procedure involved in making formal complaints (ie whether complainants have a right to participate in the proceedings before the Disciplinary Advisory Board or whether complainants have access to a representative) and conduct staff-wide orientation on the grievance procedures for both policies.
- **Implement** training for ICC staff on the grievance procedures for the Sexual Harassment and Equal Opportunity Policies.
- **Develop** and promote a flexible employment policy, so that ICC staff are aware of, and not discouraged from, taking parental leave, modified work schedules or other accommodation as needed. This facilitates the recruitment, and enables the ongoing employment, of staff members (primarily women) with family and other commitments.
- **Ensure** adequate access to and information about childcare resources or facilities, and encourage the Human Resources Section to include additional information on its Recruitment page of the website thus indicating the ICC is responsive to the needs of those with family commitments.
- **Establish** a mentorship programme for staff, particularly female staff and staff from regions underrepresented in management positions, to support their potential advancement 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 underrepresented groups and provide the necessary resources to carry this out.
- **Give consideration** to amending Article 112(3)(b) of the Statute, so that gender competence within the ASP Bureau is mandated, in addition to equitable geographical distribution and adequate representation of the principal legal systems of the world.
- **Review** and amend the current definition of 'spouse' in the Conditions of Service and Compensation of Judges of the ICC to include all domestic partnerships including same-sex partners, whether legally recognised or not under the law of the country of a Judge's nationality. Same-sex unions have been legal in The Netherlands, the seat of the Court, since 1998.
- **Develop** and implement sexuality based anti-discrimination training for the Judges and Bureau of the ASP.

Substantive Jurisdiction and Procedures

Substantive Jurisdiction¹¹³

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.¹¹⁴

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.¹¹⁵

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.¹¹⁶

Genocide Rape and Sexual Violence

The Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention.¹¹⁷ 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'.¹¹⁸

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.¹¹⁹

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

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

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

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

117 Article 6.

118 Article 6(b) EoC.

119 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'.¹²⁰

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.¹²¹

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.¹²²

120 Article 54(1)(b).

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

122 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.¹²³

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.¹²⁴ 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.¹²⁵

123 See also Rules 89-93 RPE.

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

125 Article 79. See also Rule 98 RPE.

Substantive Work of the ICC and ASP

States Parties/ASP

Office of the Prosecutor

Judiciary

Registry

12 December 2008 —

11 September 2009

States Parties / ASP

Budget for the ICC

At its 12th Session in 2009, the Committee on Budget and Finance (CBF) of the Assembly of States Parties (ASP) proposed a €102.6 million budget for the ICC in 2010. The Court had proposed a 2010 budget of €102.98 million, representing an increase of €1.75 million, or 1.7 percent, over the ASP-approved budget for 2009. The €2.2 million in cuts the CBF recommended from the Court's proposed 2010 budget do not affect the additional €2.4 million the Court may seek for specific activities including the Review Conference (€1.4 million), establishing a liaison office at the African Union headquarters (€0.5 million), and the independent Oversight Mechanism (€0.5 million).

The Court faces increasing budgetary demands with four active cases in three Situations. It currently has two ongoing trials and is opening a new investigation in the Kivus region, bringing the total to three active investigations.¹²⁶ With the recent confirmation of charges against Jean-Pierre Bemba Gombo, another trial could begin in 2010. In addition, Bahr Idriss Abu Garda's confirmation of charges hearing will take place in October 2009. If charges against him are confirmed, another case may proceed to trial next year. Given the likelihood that several parallel trials could take place in the coming year, the fact that the 2010 budget 'was based on the assumption of up to three *consecutive* trials throughout the year'¹²⁷ may deprive the

Court of the resources it needs to conduct these trials. Also of concern are the recommended substantial cuts to the budget of the Registry, including in the areas of travel, legal aid for victims, and support for field offices. 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.

In light of the global economic crisis, accessing the Contingency Fund has been raised as a possibility to finance the regular activities of the Court. However, reliance on the Fund to support activities that are fully anticipated by the Court not only contradicts the purpose of the Fund but sets a dangerous precedent for future years. Replenishing the Contingency Fund and the Working Capital Fund should also be priorities for the ASP in 2010.

¹²⁶ The active investigations concern DRC 3 (Kivus), Darfur, and CAR. The investigative division is also engaged in trial support on DRC investigations 1 and 2 (Ituri) and residual activities on Uganda and Darfur.

¹²⁷ ICC-ASP/8/15, para 41 (emphasis added).

Oversight Mechanism

In 2009, progress has been made towards developing an independent Oversight Mechanism for the ICC, including the appointment of a facilitator in The Hague Working Group who has submitted a number of papers on the topic to the ASP. Debate continues about what type of institution should be established.

The ASP should urgently develop a comprehensive independent Oversight Mechanism with staff rules to address serious issues of misconduct including fraud, corruption, waste, sexual harassment, exploitation, and abuse committed by ICC staff in the course of their work, especially in the field. It should include the waiving of immunity and strict disciplinary accountability for staff that violate these rules, including termination of employment. ‘Serious misconduct’ should be defined to expressly include sexual violence, rape, abuse and harassment. All staff should be provided with training on these rules. In addition to the facilitator, there is need for a focal point on the Oversight Mechanism to be appointed within The Hague Working Group to co-ordinate its development.

Regardless of which Oversight Mechanism is adopted, it should be guided by the following principles:

- Protection and promotion of human and legal rights of ICC employees, those they work with and the rights of every individual in the communities within which the ICC is operating;
- Application of legal principles and the highest standards of due process in the conduct of its work;
- Attention to the causes and underlying systemic issues that may contribute to incidents or patterns of serious misconduct; and
- A clear mandate and scope for the Oversight Mechanism’s work.

Operational principles that should apply include: fairness, efficiency, integration, gender competence, transparency, and accountability.

The Committee on Budget and Finance recommended at its 13th session that the Oversight Mechanism be supported by the United Nations Office of Internal Oversight (OIOS).¹²⁸ If the ASP decides to move forward with this plan, rigorous safeguards must be established to ensure the independence of the Oversight Mechanism. A priority should be placed on improving institutional capacity within the OIOS Investigation Division given criticisms of its inefficiency and ineffectiveness.¹²⁹ See also the recommendations concerning the Oversight Mechanism following the **Structures and Institutional Development** section of this report.

¹²⁸ See ICC-ASP/8/15, para 121.

¹²⁹ See Michel Girodo, ‘A Culture Review of the Investigations Division of OIOS’, Consultant’s Report Submitted to Inga-Britt Ahlenius, Under-Secretary General, Office of Internal Oversight Services, 13 July 2007, <<http://www.hrw.org/pub/2008/un/Culture.Review.OIOS.Inv.Div.pdf>>

Oversight of Implementation of Gender Mandates

In 2009, the ASP Bureau again appointed a Facilitator for the issue of geographical representation and gender balance in the recruitment of staff of the Court. Although the Court is making progress towards gender equity and fair geographical representation, some troubling imbalances remain.

For the first year in the ICC's operation, the ratio of male and female professional posts, including elected officials, was equal. However, as noted previously in the **Structures and Institutional Development** section of this report, men on the Court's overall staff still outnumber women by 6%, constituting a 2% increase from 2008.

In addition, geographical representation in 2009 continues to heavily favour WEOG nationals, accounting for 61% of the overall staff at the ICC. Moreover, as noted in the section of this report on the **Structures of the Court**, for three years in a row France has had the highest number of nationals appointed to the Court, a number that has increased by 59% from 2008.

In light of these imbalances, it is critical that the ASP continues to implement the detailed recommendations contained in the 2007 and 2008 reports of the Bureau on Geographical Representation and Gender Balance.

The ICC should continue to implement its strategy for managing human resources to ensure they 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.

Implementing Legislation

States Parties continue to be slow to introduce implementing legislation, with fewer than 50% of the 110 State Parties having passed such legislation. To address this situation, the ASP adopted a resolution in 2007 to introduce a plan of action to achieve universality and full implementation of the Statute. Lack of implementation remains a serious problem, especially given that the Rome Statute anticipates States having the primary jurisdiction for the prosecution of crimes of genocide, war crimes and crimes against humanity committed within their territory.

Preliminary analysis conducted in 2007 by the Women's Initiatives for Gender Justice revealed that States were selectively excluding the gender provisions within the Rome Statute in their domestic implementing legislation. In some instances the enacted crimes legislation was only partly in conformity with ICC Statute standards and in a number of cases, the implementing crimes legislation simply excluded certain sexual violence crimes. States should advance implementing legislation that fully reflects the provisions and standards of the Rome Statute, including the gender provisions. They should further provide the ICC with a copy of the legislation to enable effective monitoring of standards and consistency in implementation.

Office of the Prosecutor

Investigation and Prosecution Strategy

As of October 2009, the Office of the Prosecutor (OTP) continued its investigations into Situations in three countries: the Democratic Republic of the Congo (DRC), the Central African Republic (CAR) and Sudan. Investigations in the Situation of Uganda are now limited to ‘residual activities’. Overall, the OTP has provided evidence supporting charges against 16 individuals from all four Situations.¹³⁰ At present, four accused are in the custody of the Court – Thomas Lubanga Dyilo (DRC), Mathieu Ngudjolo Chui and Germain Katanga (DRC) and Jean-Pierre Bemba Gombo (CAR).¹³¹ Eight individuals currently face charges for gender-based crimes.

In 2009, the ICC commenced its first trial against Thomas Lubanga Dyilo for alleged crimes committed in the DRC. The Prosecution concluded the presentation of its case-in-chief on 14 July 2009, and the Defence is expected to begin presenting its case in January 2010.

Charges were confirmed against Jean-Pierre Bemba Gombo for crimes allegedly committed in the Central African Republic, and trial is expected to begin in 2010.

Trial is set to begin on 24 November 2009 in the case against Mathieu Ngudjolo Chui and Germain Katanga in relation to a joint attack on Bogoro, eastern DRC, in February 2003.

¹³⁰ Two of these individuals, Vincent Otti and Raska Lukwiya, have since been confirmed to be deceased. Proceedings against Lukwiya were terminated in July 2007 and the Prosecutor has filed a request to terminate the proceedings against Vincent Otti.

¹³¹ In addition, one suspect, Bahr Idriss Abu Garda (Darfur), made a voluntary appearance before the Court in 2009.

The Court issued an arrest warrant for Sudanese President Al’Bashir in March 2009 for crimes committed in Darfur.

On 18 May 2009, rebel commander Abu Garda became the first suspect in the Darfur Situation to make an appearance at the Court.

The Office of the Prosecutor continued its ongoing analysis of the Situation of Colombia,¹³² and in August 2008 announced that it was now analysing the Situation involving the recent conflict in Georgia.¹³³ The Prosecutor has also stated that he is conducting an analysis of Situations concerning Afghanistan, Cote d’Ivoire, Kenya, Palestine, and Guinea.¹³⁴

In the Situation in Uganda, there were no developments with respect to investigating and charging gender-based crimes in 2009. In October 2005, The OTP announced charges against five Lord’s Resistance Army (LRA) commanders, which included charges for gender-based crimes against the Leader and Deputy Leader. As all five suspects were senior commanders, they could have been charged with these crimes on the theory of superior responsibility for overseeing the attacks during which the sexual violence occurred.

In 2009, developments in the Situation of the DRC have underscored the importance of thorough investigation and charging of gender-based crimes. As discussed in greater detail below, no sexual violence charges were brought in the Lubanga case, despite numerous reports of gender-based crimes in the context of the conflict in Ituri, and despite the fact that the rate of sexual violence in the DRC is among the highest in the world. However, significant evidence of rape and sexual slavery was introduced at the trial phase, prompting the participating victims and the Chamber to try to find ways to adapt the current proceedings to accommodate this evidence. The introduction of

this evidence after the trial has begun, without related charges having been introduced prior to trial, has created challenges for the Court, which must balance the testimony related to sexual violence in the context of its obligation to discover the truth, with its obligation to ensure a fair trial for the accused. In 2008, five counts of sexual slavery, rape, and outrages upon personal dignity were confirmed against both Katanga and Ngudjolo,¹³⁵ and the ICC will hear evidence of these crimes when the trial begins in late 2009.

In 2009, in the Situation in the Central African Republic, the Pre-Trial Chamber in the Bemba case declined to confirm all the charges of sexual violence requested by the Prosecution, including the first charges of rape as torture at the ICC. The Pre-Trial Chamber’s decision not to confirm charges of rape as torture resulted from its application of the legal concept of ‘cumulative charging’. Discussed in greater detail below, the Women’s Initiatives for Gender Justice filed an *amicus curiae* brief challenging the Pre-Trial Chamber’s interpretation and application of the cumulative charging principle. In particular, the *amicus* brief emphasised the disproportionate impact of this decision on victims of sexual and gender-based crimes. The Pre-Trial Chamber also declined to confirm a number of charges based on the Prosecution’s presentation of the evidence. It found the Prosecution failed to distinguish elements of rape from those of torture and for some charges failed to present sufficient evidence clearly in the charging document. A review of the Prosecution’s strategy for investigation and presentation of evidence of gender-based crimes in light of this decision appears urgent.

Finally, in March 2009, in the Situation of Darfur, Pre-Trial Chamber I issued an Arrest Warrant for President Al’Bashir of Sudan. In his request for

132 ICC-OTP-20080821-PR347.

133 ICC-OTP-20080820-PR346.

134 ICC-OTP-20080820-PR346; OTP Weekly Briefing, 24-30 November 2009, Issue #15.

135 These charges were confirmed by the majority of Pre-Trial Chamber I, Judge Ušacka dissenting. In her dissent, Judge Ušacka noted that she would have adjourned the Confirmation Hearing and asked the Prosecutor to provide further evidence on the rape and sexual slavery charges. See 2008 *Gender Report Card*, p 48.

the Arrest Warrant, the Prosecutor submitted evidence for charges of genocide, including rape as genocide. However, the majority of the Pre-Trial Chamber declined to include charges of genocide, including rape as genocide, in the arrest warrant on the basis that the evidence submitted by the Prosecutor was not sufficient with respect to this crime. The majority did include in the Arrest Warrant one count of rape as a crime against humanity. The Pre-Trial Chamber's decision to refuse to include charges of genocide is currently the subject of an appeal pending before the Appeals Chamber.

There are no charges of gender-based crimes in the case against Abu Garda, who is charged with crimes arising out of an attack on UN peacekeepers in Haskanita in 2007. Both Harun and Kushayb face eight counts each of crimes of sexual and gender-based violence.

In the 2008 *Gender Report Card*, the Women's Initiatives noted that gender-based crimes had been charged in all four Situations under investigation, and the charging strategy appeared to be bolder than the previous charging pattern, particularly with charges of rape as torture and genocide. However, the OTP continues to face challenges in its ability to successfully investigate and prosecute charges of sexual and gender-based violence. Limited investigations and consequently insufficient evidence gathered to support charges for gender-based crimes in the Lubanga case, combined with ongoing difficulties in presenting the charges in the manner requested by the judges, has created a number of problems at the arrest warrant, confirmation of charges, and trial phases. OTP strategies surrounding investigation and prosecution of gender-based crimes should aim to address the purpose and impact of gender-based crimes and contribute to the deterrence of violence against women.

Below follows a summary and analysis of the investigations and prosecutions in respect of each of the four Situations currently before the Court.

Uganda

The Situation in Uganda was referred to the Court by the Government of Uganda in January 2004. The Prosecutor opened an investigation into the Situation in July of that year. This was the second Situation to become the subject of an investigation by the Office of the Prosecutor.

The Prosecutor v. Joseph Kony et al

The five alleged senior leaders of the Lord's Resistance Army (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 was 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 was charged with one count of sexual enslavement as a crime against humanity and one count of inducing rape as a war crime.

Warrants of Arrest were initially issued for all five suspects. 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.

In 2008, the Court made a number of formal requests to the Governments of Uganda and DRC in relation to the execution of the outstanding Arrest Warrants for the suspects who, according to the Government of Uganda and media reports, had been in Garamba national park in the territory of the DRC for more than three years. At the time of publication of this report, neither Government has been successful in arresting Kony or the other suspects.

The Government of Uganda and the LRA established a ceasefire in July 2006 and began peace talks in August of that year. A series of agreements were signed as part of the peace process and relative stability slowly returned to the north.¹³⁶ However, at the time of the

¹³⁶ For an overview of the peace process in Northern Uganda, and the Women's Initiatives work on the peace process, see 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).

publication of this report, the final agreement remains unsigned. In April 2008, after an unsuccessful attempt to sign the final agreement, the peace process stalled for six months, before the LRA delegation initiated discussions again in November 2008. However, in December of 2008, the Governments of Uganda, Southern Sudan, and DRC commenced 'Operation Lightning Thunder', a three-month long joint armed offensive against the LRA, who were gathered near the assembly zone designated under the terms of the peace agreements. The Operation lasted until 15 March 2009, when, without having captured Joseph Kony or the other senior commanders, the Ugandan Army withdrew from eastern Congo.¹³⁷ As of May 2009, the LRA was reported to have continued its attacks on civilians in northeastern DRC and in Sudan.¹³⁸ As of August 2009, more than 125,000 civilians were reported to have been displaced by LRA attacks on villages and towns in southern Sudan, DRC, and CAR.¹³⁹ As of early September 2009, the LRA's military spokesman announced the suspension of the Juba peace process until further notice.¹⁴⁰

An Annexure to the above-mentioned Peace Agreement provides for the establishment of a Special Division of the High Court of Uganda to try individuals alleged to have committed serious crimes during the conflict. In light of statements made by the Government of Uganda that it was now prepared to try Kony and his co-accused on Ugandan soil, on 21 October 2008, Pre-Trial Chamber II initiated proceedings, on its own motion, to determine whether the Court continued to have jurisdiction over the case. The Chamber noted that, once having assumed jurisdiction, it was necessary that the International Criminal Court make its own determination of admissibility in the case. On 10 March 2009, it issued a decision finding that the case against Kony et al. remains admissible. This decision is discussed in detail in the **Challenges to Admissibility** section of this report.

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

137 Women's Initiatives for Gender Justice, "Operation Lightning Thunder" and the status of the peace process', *Women's Voices* E-Letter, May 2009, available at <http://www.iccwomen.org/news/docs/Womens_Voices_May_2009/WomVoices_May09.html>

138 Id.

139 Id.

140 Id.

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. In June 2009, the Women's Initiatives held the 'Women's Dialogue on Accountability and Reconciliation' in Soroti, Uganda, to provide the second phase of training on the implementation of the mechanisms on accountability and reconciliation contained in the peace agreement.¹⁴¹ At the conclusion of the Dialogue, we held a meeting with judges, lawyers, and investigators of the Special Division of the High Court of Uganda, one of the central mechanisms outlined in the peace agreement. While Kony, Ongwen, and Odhiambo remain at large, work on possible domestic processes continues, including explorations into traditional justice and truth-telling mechanisms. In addition, Uganda will host the Review Conference of the Rome Statute in late May through early June 2010, likely bringing increased attention to the Government of Uganda's cooperation with the Court.

141 This is the Women's Initiatives' second training in the Greater North on the Peace Agreement, the Agreement on Accountability and Reconciliation, and the Annex. See Women's Initiatives for Gender Justice, 'Women from the Greater North meet at the Women's Dialogue Workshop in Soroti' and 'Women meet with Special War Crimes Division of the High Court of Uganda', *Women's Voices* E-Letter, July 2009, available at <http://www.iccwomen.org/news/docs/WomVoices_July09/index.html>

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DRC

The investigation into the Situation of the Democratic Republic of Congo (DRC) began in June 2004. 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’.¹⁴² 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’.

While the OTP investigation in the DRC had largely focused on crimes committed in the Ituri region, in September 2008 the Prosecutor announced his intention to investigate crimes committed in North and South Kivu. The analysis of the Situation and investigations into crimes committed in the Kivus continued throughout 2009. In July 2009, the Prosecutor confirmed that Bosco Ntaganda, wanted for crimes committed in Ituri, was involved in commanding attacks in the Kivus where his forces allegedly committed ‘massive rapes’.¹⁴³ The status of the Ntaganda case is discussed in greater detail below.

In March 2009, a peace agreement was signed between the National Congress for the Defence of the People (CNDP) Militia and the DRC Government, which, according to the Women’s Initiatives, contains provisions that are in contravention of UN Security Council Resolutions 1325 and 1820.¹⁴⁴ Also in March, the Women’s

Initiatives for Gender Justice conducted two workshops in Kinshasa, DRC, involving 35 women’s rights activists from eastern DRC and from CAR. The first workshop, *Women Shaping Justice and Peace*, provided the participants with an introduction to the ICC, updates on the DRC and CAR cases before the Court, an opportunity to exchange strategies to advance accountability for violence against women, and training on the documentation of gender-based crimes in armed conflicts. The second workshop was a *Consultation and Strategy Meeting on the Peace Talks for the Kivus*, which brought together women’s rights and peace activists from North and South Kivu to exchange information, plan, and strategise for the participation and influence of women in the peace process for the Kivus.¹⁴⁵ In June 2009, following a workshop in Goma co-organised by local women’s rights and peace activists and the Women’s Initiatives, 20 women’s organisations from the Kivus and Ituri released the ‘Declaration from Women of the East’,¹⁴⁶ articulating their concerns about the peace agreement signed between the CNDP militia and the DRC government. The Women’s Initiatives continues to work closely with women from eastern DRC to monitor and document gender-based crimes in North and South Kivu and Ituri.

The ICC’s investigations to date in the DRC have led to charges being brought against four individuals in three separate cases.

142 ICC-OTP-20040623-59.

143 OTP Weekly Briefing, July 2009, available at <<http://www.icc-cpi.int/NR/rdonlyres/60098F77-DE52-43C9-85B8-594AEE2D93DB/280711/July2009.pdf>>

144 See ‘Open Letter to Secretary-General Ban Ki-moon’, 17 June 2009, signed by Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice, and supported by 65 NGOs from eastern DRC, representing over 180 Congolese organisations, available at <http://www.iccwomen.org/publications/Open_Letter.pdf>. See also, Women’s Initiatives for Gender Justice, ‘Peace Agreement signed between the CNDP and DRC Government – a breach of UN Security Council Resolutions?’, *Women’s Voices* E-Letter, May 2009.

145 Women’s Initiatives for Gender Justice, ‘Workshop and strategy meeting on Peace Talks’, *Women’s Voices* E-Letter, March 2009, available at <http://www.iccwomen.org/WomVoices_Mar09.html>

146 Women’s Initiatives for Gender Justice, ‘Declaration from Women of the East’, *Women’s Voices* E-Letter, July 2009.

The Prosecutor v. Thomas Lubanga Dyilo

The first charges arising out of the Situation of the DRC were brought against Thomas Lubanga Dyilo, President of *Union des patriotes congolais* (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. 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 for Gender Justice, no gender-based crimes were included in the charges against Lubanga, the first accused to come before the Court.

After the resolution of a number of disclosure-related issues in 2008, which prompted the Trial Chamber to stay the proceedings and to consider releasing the accused,¹⁴⁷ Lubanga's trial began on 26 January 2009. The Prosecution presented its case from 28 January–14 July, during which the Chamber heard significant testimony on gender-based crimes. This testimony, along with a request from the legal representatives of victims participating in the case, prompted the majority of the judges in the Trial Chamber to give notice to the parties and participants in the trial that the Chamber considered the legal characterisation of the facts of the case subject to change, under Regulation 55(2) of the Regulations of the Court, to include additional characterisations of cruel and/or inhuman treatment and sexual slavery. As of the publication of this report, an Appeals Chamber decision on Prosecution and Defence appeals of the majority decision is pending, and the presentation of the Defence case is postponed pending resolution of these issues. A full review of the trial proceedings and the issues relating to Regulation 55 can be found in the **Trial Proceedings** section of this report.

147 See 2008 *Gender Report Card*, pp 45-46.

The Prosecutor v. Bosco Ntaganda

The second set of charges arising out of the DRC investigation is against Bosco Ntaganda, alleged Deputy Chief of the General Staff of the *Forces Patriotiques pour la Libération du Congo* (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. Ntaganda, however, remains at large. In 2008, Ntaganda was alleged to have joined forces with Laurent Nkunda, and was implicated in continuing war crimes, including crimes of sexual violence, committed in the North Kivu region of the DRC.

In January 2009, Nkunda was unexpectedly taken into custody by the Rwandan armed forces upon fleeing from DRC to Rwanda. He is currently being held in an unknown location in Rwanda.¹⁴⁸ Since his 'arrest', the Congolese Government has requested his extradition to face trial for war crimes. The surprise detention of Nkunda came after an agreement between the Rwandan and Congolese governments on a joint operation against the Democratic Forces for the Liberation of Rwanda (FDLR), a Hutu militia group that fled into Eastern Congo immediately following the 1994 Rwandan genocide. After Nkunda's 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. As of May 2009, Ntaganda had been promoted to the rank of General within the Congolese Army, a move that distressed communities throughout eastern DRC. The DRC Government continues to refuse to hand over Ntaganda to the ICC.¹⁴⁹

148 Women's Initiatives for Gender Justice, 'DRC: A dramatic start to the year', *Women's Voices* E-Letter, March 2009.

149 Women's Initiatives for Gender Justice, 'Peace Agreement signed between the CNDP and DRC Government – a breach of UN Security Council Resolutions?', *Women's Voices* E-Letter, May 2009.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

The third and fourth sets of charges arising out of the DRC investigation are against Germain Katanga and Mathieu Ngudjolo Chui, the 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.¹⁵⁰ 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.¹⁵¹

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 are the first charges to include crimes of sexual and gender-based violence arising from the Situation of 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.¹⁵² The crimes against humanity charges include: murder,¹⁵³ rape¹⁵⁴ and sexual slavery.¹⁵⁵ The war crimes charges include: wilful killing,¹⁵⁶ sexual slavery,¹⁵⁷ rape,¹⁵⁸ using children under the

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

151 ICC-01/04-01/07-307. Specifically, joinder allows that the witnesses would not have to testify more than once about the same event. It would also reduce the costs related to double-testimony and avoid duplication and inconsistency in the presentation of the evidence, thereby affording equal treatment to each of the accused.

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

153 Article 7(1)(a).

154 Article 7(1)(g).

155 Article 7(1)(g).

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

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

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

age of 15 years to participate actively in hostilities,¹⁵⁹ intentionally directing attacks against the civilian population of Bogoro village,¹⁶⁰ pillaging¹⁶¹ and destruction of property.¹⁶² It declined to confirm the charges for inhuman acts as a crime against humanity,¹⁶³ inhuman treatment as a war crime,¹⁶⁴ and outrages upon personal dignity as a war crime.¹⁶⁵

The pre-trial phase in the Katanga-Ngudjolo case has been drawn-out, as the two accused were brought into the custody of the Court at the end of 2007 and early 2008, and the date established for the commencement of the trial is 24 November 2009. In their written submissions prior to the first status conference, the parties proposed setting the trial start date at 8 June 2009. However, due to unforeseen delays in the Katanga Defence investigation, they orally agreed to postpone it until the month of September.¹⁶⁶ In its decision setting the initial trial date, issued on 27 March 2009, the Chamber reviewed the status of the key issues that must be determined prior to commencing the proceedings. Issues requiring resolution prior to the commencement of trial included the full range of the Prosecution's disclosure obligations, the Katanga Defence motion challenging the admissibility of the case¹⁶⁷ and victims' applications to participate in the proceedings.¹⁶⁸ In considering the time necessary to realistically determine these matters, the Chamber set the date for the trial to commence on 24 September 2009.¹⁶⁹

On 31 August 2009, the Chamber decided to postpone the trial start date until 24 November 2009, again citing the necessity to resolve several critical issues before the trial could commence.¹⁷⁰ Principally, the Chamber mentioned the need for the Prosecution to modify the Table of Incriminating Evidence ordered by the Chamber from the Prosecution, as well as the Ngudjolo Defence challenge to the admissibility of 290 pieces of evidence, many of them listed therein.¹⁷¹ An ongoing issue of contention in the Katanga-Ngudjolo case, the Chamber ordered the Prosecution to produce an analytical Table of Incriminating Evidence with the aim of ensuring adequate time and facilities for the

159 Article 8(2)(b)(xxvi).

160 Article 8(2)(b)(i).

161 Article 8(2)(b)(xvi).

162 Article 8(2)(b)(xiii).

163 Article 7(1)(k).

164 Article 8(2)(a)(ii).

165 Article 8(2)(b)(xxi).

166 ICC-01/04-01/07-999, para 9.

167 ICC-01/04-01/07-949.

168 See the 'Victim Participation' section of this report.

169 ICC-01/04-01/07-999.

170 ICC-01/04-01/07-1442.

171 ICC-01/04-01/07-1375.

preparation of the defence. The Table was envisioned as a means of providing the accused with 'a clear and comprehensive overview of all incriminating evidence and how each item of evidence relates to the charges against them'.¹⁷²

Additional issues listed by the Chamber as requiring resolution before the commencement of the trial on the merits included the pending modification of protection measures for witnesses who also participated in the Lubanga case, which have yet to be decided by Trial Chamber I,¹⁷³ and the alleged illegality of Katanga's detention in the DRC, which was pleaded by the Defence.¹⁷⁴ In addition, the Chamber cited the necessity of holding a status conference in order to come to an agreement on the evidence related to the contextual elements of the alleged war crimes and crimes against humanity. It also noted the additional time required by the Parties to respond to the continued requests by the Prosecution for the disclosure of newly obtained evidence, although the Chamber specifically noted that this was not a reason for the postponement of the trial.¹⁷⁵

In an oral decision issued on 12 June 2009, followed by a 16 June written decision, the Trial Chamber rejected the Katanga Defence challenge to the admissibility of the case, which was based on the argument that the Prosecution had failed to communicate to the Pre-Trial Chamber information within its possession that Katanga was subject to an investigation by the authorities within the DRC.¹⁷⁶ On 22 June, the Defence filed an appeal,¹⁷⁷ but on 25 September 2009, the Appeals Chamber dismissed it,¹⁷⁸ agreeing with the Prosecution that questions of a State's unwillingness or inability to investigate or prosecute become relevant only where the case appears to be inadmissible due to past or ongoing investigations or prosecutions. Katanga's case was admissible because at the time of its admissibility challenge, and not at the time the Arrest Warrants were issued, there were no domestic

investigations or prosecutions. The Trial and Appeals Chamber decisions on the admissibility challenge are discussed in depth in the section on **Challenges to Admissibility**.

172 ICC-01/04-01/07-956, para 6.

173 See the discussion regarding redactions in the 'Protection' section of this report.

174 ICC-01/04-01/07-1442, paras 18-21. In addition, we note that as of the time of this decision, the Katanga Defence appeal of the Trial Chamber's denial of its motion challenging the admissibility of the case remained unresolved. See ICC-01/04-01/07-1234; ICC-01/04-01/07-1279. See also the section of this report on 'Admissibility Challenges'.

175 ICC-01/04-01/07-1336; see 'Late Disclosure' in the 'Disclosure' section of this report.

176 ICC-01/04-01/07-T-67-ENG; ICC-01/04-01/07-1213, para 60.

177 ICC-01/04-01/07-1234; ICC-01/04-01/07-1279.

178 ICC-01/04-01/07-1497.

Darfur, Sudan

Sudan is not a State Party to the Rome Statute. The Situation in Darfur is before the Court pursuant to Rome Statute Article 13(b), which permits the UN 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. On 31 March 2005, the Security Council referred the Situation of Darfur to the Prosecutor.

The Prosecutor opened an investigation on 6 June 2005, and in February 2007 applied to Pre-Trial Chamber I for Warrants of Arrest for Ahmad Harun and 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, as well as a summons to appear for Bahr Idriss Abu Garda (Abu Garda), a rebel commander wanted in connection with attacks on peacekeepers in Haskanita. Abu Garda voluntarily made his initial appearance in The Hague in May 2009. The other suspects remain at large, and the Government of Sudan has repeatedly stated it does not recognise the ICC and will not send any suspects to The Hague to stand trial.

The Prosecutor v. Ahmad Harun and Ali Kushayb

Warrants of Arrest for Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) were issued in May 2007. Both suspects are charged with crimes against humanity and war crimes, 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.

Kushayb, a senior Janjaweed commander, was arrested by the Sudanese Government in 2007 for alleged violations committed in the Darfur conflict in 2004,¹⁷⁹ but he was released after the Government found there was insufficient evidence to charge him. He was reportedly re-arrested in October 2008, but the Sudanese Government has yet to turn him over to the ICC. However, even if Kushayb is tried in Sudan, Sudanese law does not currently provide for punishment for genocide, war crimes, and crimes against humanity. While the Sudanese parliament is reported to be considering legislation to incorporate war crimes into the penal code, Sudanese law does not allow for retroactive prosecution of crimes committed before a law is adopted. Sudan appointed a special prosecutor for Darfur, Nimr Ibrahim Mohamed, in July 2008, after the ICC announced charges against Al’Bashir. The special prosecutor stated that as of March 2009, Kushayb remains in custody and there is ‘preliminary evidence’ to prosecute him.¹⁸⁰ As of May 2009, it was reported that investigations were ongoing and Kushayb continued to be detained.¹⁸¹ Many Sudanese groups, however, doubt Kushayb’s detention based on earlier contradictory statements of the government.

Ahmad Harun was previously Sudan’s Minister of State for Humanitarian Affairs, a post to which he was promoted in 2006. According to the state news agency

179 ‘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 25 September 2009.

180 ‘Sudan to incorporate war crimes into penal code per Arab request: official’, 16 March 2009, *Sudan Tribune*, available at <<http://www.sudantribune.com/spip.php?article31093>>, last visited 25 September 2009.

181 ‘Sudan says investigation underway with Darfur militia leader’, 7 May 2009, *Sudan Tribune*, available at <<http://www.sudantribune.com/spip.php?article30525>>, last visited 25 September 2009.

SUNA, 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 Al'Bashir. The province has very strategic location as the North-South border and is an oil-rich area. The South Kordofan province includes the border town of Abyei which was the site of clashes between the northern and southern armies, which were ongoing until the Permanent Court of Arbitration defined the borders of the contested area in July 2009. One result of the arbitral award was to give the Government of Sudan control of formerly contested land containing key oil fields.

The Prosecutor v. Omar Hassan Ahmad Al'Bashir

On 14 July 2008, the Prosecutor applied to Pre-Trial Chamber I for a Warrant of Arrest for Omar Hassan Ahmad Al'Bashir, the current President of Sudan.¹⁸² The Prosecutor alleged that Al'Bashir is criminally responsible for three counts of genocide, five counts of crimes against humanity, and two counts of war crimes in Darfur. The Al'Bashir case marked the first time that the ICC indicted a Head of State, and the first time that the Prosecutor has sought charges of genocide. The genocide charges pertain to Al'Bashir's complicity in killing members of the Fur, Masalit and Zaghawa ethnic groups, causing serious bodily or mental harm to members of those groups (including by rape) and deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction. The application for the Arrest Warrant also sought to charge Al'Bashir with committing five counts of crimes against humanity including acts of murder, extermination, forcible transfer of the population, torture and rape, as part of a widespread and systematic attack against the civilian population, with knowledge of the attack. It also included two counts of war crimes, for intentionally directing attacks against the civilian population as such, or against individual civilians not taking part in hostilities, and for pillaging.

In the original request for the Arrest Warrant, the Prosecutor had sought charges of genocide based on rape and sexual assault of women and girls. The Prosecutor alleged Al'Bashir used the State apparatus, the Armed Forces and Militia/Janjaweed, to cause serious bodily or mental harm through acts of rape, other forms of sexual violence, torture and forcible displacement, with intent to destroy the groups. He was also charged with rape as a crime against humanity for the rape of women and girls, including, but not limited to, women and girls in Bindisi, Arawala, Shataya, Kailek, Silea, and Sirba and IDP camps.

¹⁸² ICC-02/05-152.

The factual matrix behind the charges sought by the Prosecutor involves hundreds of unlawful attacks on towns and villages throughout the Darfur region inhabited by members of the Fur, Masalit and Zaghawa groups between 2003 and 2008. The Prosecutor submitted that these attacks took place in the context of 'a protracted armed conflict not of an international character', as defined in Article 8(2)(f) of the Statute.¹⁸³ The Prosecutor also submitted that the attacks were 'widespread' and 'systematic'.

On 4 March 2009, after requesting and receiving additional information from the Prosecutor, Pre-Trial Chamber I issued a Warrant of Arrest for the President of Sudan, Omar Hassan Ahmad Al'Bashir.¹⁸⁴ This is the third Warrant of Arrest issued in the Situation in Darfur. The Pre-Trial Chamber found, as required by Rome Statute Article 58, that there were reasonable grounds to believe that Al'Bashir committed crimes within the jurisdiction of the Court, namely five counts of crimes against humanity, including rape, and two counts of war crimes.

The Chamber ruled that the 'current position of Omar Al Bashir as Head of a state which is not a party to the Rome Statute has no effect on the Court's jurisdiction' in a case against him.¹⁸⁵ The Chamber noted that one of the core goals of the Statute is to put an end to impunity for the most serious crimes of concern to the international community as a whole, which according to the Rome Statute, 'must not go unpunished'.¹⁸⁶ The Chamber also noted that Article 27 of the Statute explicitly precludes immunity for Heads of State before the ICC.

The Chamber agreed with the Prosecutor that the attacks were 'widespread', 'systematic', 'large in scale', affecting 'hundreds of thousands of individuals', taking place in 'large swathes of the territory of the Darfur region' for 'well over five years' and 'followed, to a considerable extent, a similar pattern'.¹⁸⁷ The Chamber found that there were reasonable grounds to believe that thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were murdered, and that some of the murders amounted to 'acts of extermination' because of the large numbers of civilians killed at one time.¹⁸⁸ The Chamber also found that there were reasonable grounds to believe that hundreds of thousands of civilians had been subject to forcible transfer by

¹⁸³ ICC-02/05-01/09-3, para 70.

¹⁸⁴ ICC-02/05-01/09-3.

¹⁸⁵ ICC-02/05-01/09-3, para 41.

¹⁸⁶ ICC-02/05-01/09-3, para 42, citing the Preamble of the Rome Statute, paras 4 and 5.

¹⁸⁷ ICC-02/05-01/09-3, paras 76, 84, 85, 89, 193, 201.

¹⁸⁸ ICC-02/05-01/09-3, para 97.

Sudanese Government forces, that civilians from the Fur, Masalit and Zaghawa groups had been subjected to acts of torture in the aftermath of the attacks on the towns and villages, and that ‘thousands of civilian women belonging primarily to the [target] groups’ were raped by Sudanese Government forces and their allied Janjaweed Militia.¹⁸⁹ The Chamber further found that the attacks were a ‘core component’ of a counter-insurgency campaign pursued by the Government of Sudan, using the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese police forces, the National Intelligence and Security Service (NISS) and the Humanitarian Aid Commission (HAC).¹⁹⁰

The Chamber found that there were reasonable grounds to believe that ‘a common plan to carry out a counter-insurgency campaign against [Darfuri rebel groups] was agreed upon at the highest level of the Government of Sudan, by Omar Al’Bashir and other high-ranking Sudanese political and military leaders’ and that the unlawful attacks, forcible transfers and acts of murder, extermination, rape, torture and pillage were all part of this ‘common plan’.¹⁹¹ Further, the Chamber found that there were reasonable grounds to believe that Al’Bashir, as *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces, at all relevant times, ‘played an essential role in coordinating the design and implementation of the common plan’.¹⁹² As such, the Chamber concluded, there were reasonable grounds to believe that Al’Bashir is criminally responsible under Article 25(3)(a) of the Statute as either an indirect perpetrator or an indirect co-perpetrator of crimes against humanity and war crimes. Furthermore, and in the alternative, the Chamber held that there were reasonable grounds to believe that Al’Bashir played a role that went beyond coordinating the implementation of the common plan. It found that he was in full control of all branches of the ‘apparatus’ of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese police forces, the NISS and the HAC; and that he used such control to secure the implementation of the common plan.

The Chamber ruled that Al’Bashir’s arrest appeared to be necessary under Article 58(1)(b) of the Statute to ensure that (1) he will appear before the Court to answer the charges against him; (2) he will not obstruct or endanger the ongoing investigation into the crimes for which he is alleged to be responsible; and (3) he will not continue committing the above-mentioned crimes.

189 ICC-02/05-01/09-3, paras 108, 192.

190 ICC-02/05-01/09-3, para 76.

191 ICC-02/05-01/09-3, para 214.

192 ICC-02/05-01/09-3, para 221.

The majority of the Chamber, (Judge Ušacka dissenting), declined to charge Al’Bashir with genocide. It was not satisfied that the evidence submitted by the Prosecutor was sufficient to allow it to find reasonable grounds to believe that the Government of Sudan, with Al’Bashir at its helm, acted with a specific genocidal intent ‘to destroy in whole or in part the Fur, Masalit and Zaghawa groups’.¹⁹³

In a separate, partly dissenting opinion, Judge Ušacka concluded that she was satisfied that there were reasonable grounds to believe that Al’Bashir ‘possessed genocidal intent and is criminally responsible for genocide’.¹⁹⁴ The essence of her divergence with the majority of the Chamber concerns: first, the appropriate evidentiary burden on the Prosecutor at the stage of an Arrest Warrant application; and second, conclusions that can be drawn from an analysis of the evidence presented by the Prosecutor. In the view of Judge Ušacka, the majority of the Chamber misinterpreted the requirements of the Statute and held the Prosecutor to a higher evidentiary burden than was applicable at this preliminary stage of the proceedings.

Following the issuance of the Arrest Warrant for Al’Bashir, the Sudanese Government ordered 13 international humanitarian groups to leave the country, citing their alleged collaboration with the ICC. The expulsion created significant gaps in the provision of humanitarian services. According to Women’s Initiatives’ partners in Sudan, women suffered the most as a result of the expulsion due to the lack of organisations providing health services, psychosocial rehabilitation and legal aid services for victims/survivors of sexual and gender-based crimes.¹⁹⁵ Many women’s and human rights activists from Darfur and Khartoum were harassed and arrested after the Arrest Warrant was issued on the grounds that they had allegedly provided support to the ICC.¹⁹⁶

On 10 March 2009, the Prosecutor filed an application for leave to appeal the refusal of Pre-Trial Chamber I to include charges for genocide on the Arrest Warrant.¹⁹⁷ Following the reasoning of Judge Ušacka’s dissent, the Prosecutor argued that the majority decision of the Chamber ‘imposes an evidentiary burden that is inappropriate for this early procedural stage’ and that the majority of the Chamber had ‘(a) considered extraneous factors for the purposes of its determination as to whether the evidence

193 ICC-02/05-01/09-3, para 203.

194 ICC-02/05-01/09-3, Dissent, para 1.

195 Women’s Initiatives for Gender Justice, ‘The impact on the ground of the ICC warrant of arrest for President Al’Bashir of Sudan’, *Women’s Voices* E-Letter, May 2009.

196 *Id.*

197 ICC-02/05-01/09-12.

established reasonable grounds to believe that [Al’Bashir] had committed genocide; and (b) failed to properly consider, both separately and collectively, critical evidence adduced by the Prosecution’.¹⁹⁸ The Prosecutor submitted that the decision ‘contains fundamental errors that not only invalidate it, but will also unavoidably taint any subsequent assessment of fresh evidence brought by the Prosecution, thus affecting the fair and expeditious conduct of the proceedings’.¹⁹⁹

On 24 June 2009, leave to appeal was granted, but on the limited issue of ‘whether the correct standard of proof in the context of Article 58 requires that the *only* reasonable conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the ICC’.²⁰⁰

On 6 July 2009, the Prosecution filed its appeal against the decision, submitting that the majority applied the wrong legal test for determining ‘reasonable grounds’ under Article 58(1) concerning the issuance of a warrant to arrest or a summons to appear by the Pre-Trial Chamber.²⁰¹ The Prosecutor asserted that despite recognising that the applicable standard is one of ‘reasonable grounds to believe’, the majority applied a standard requiring the higher burden of ‘beyond reasonable doubt’. The Prosecutor further argued that despite finding that the inference of genocidal intent could be one reasonable conclusion drawn from the evidence, the majority concluded that the Prosecution had failed to meet its evidentiary burden because genocidal intent ‘is not the *only* reasonable conclusion to be drawn’.²⁰²

The Prosecution argued that the Chamber’s requirement that specific genocidal intent be the only reasonable inference to be drawn from the evidence exceeds the evidentiary burden the Prosecution is required to meet at the Article 58 stage. At the Warrant stage, an inference of genocidal intent need only be a reasonable one, and where several inferences are possible, the Prosecution need only establish reasonable grounds to believe a particular allegation is true. Thus, the Prosecution asserted that by stating that genocidal intent is not the only reasonable inference, the majority implicitly accepted it was in fact a reasonable inference. However, the Prosecutor noted, the majority dismissed the factors presented by the Prosecutor on the basis that there were a variety

of inferences that could also be drawn from Al’Bashir’s strategy of concealing crimes other than the desire to destroy the group.²⁰³

The Prosecution argued that in prior ICC jurisprudence and that of the *ad hoc* tribunals, as well as decisions by the European Court of Human Rights and national courts, Warrants have been issued based on an inference that the Accused acted with the requisite *mens rea* without requiring that this be the only reasonable inference. To require more evidence would not only place an impossible burden on the Prosecution at this early stage of the proceedings, but also force the Prosecution to disclose evidence that might impede the investigation while the person is still at large, or worse, ‘endanger the lives of prospective witnesses’.²⁰⁴ The Prosecution submits that an application of the correct standard ‘would have resulted in the issuance of a warrant for the genocide counts’.²⁰⁵

At the time of the publication of this report, the Appeals Chamber has not handed down its decision on the Prosecution appeal.

The Prosecutor v. Bahr Idriss Abu Garda

On 20 November 2008, the Prosecutor returned to Pre-Trial Chamber I, seeking Warrants of Arrest in a third case relating to the Situation of Darfur.²⁰⁶ The case arises out of an attack by rebel forces on UN peacekeepers on 29 September 2007 (the ‘Haskanita attack’). The charges sought by the Prosecutor against three rebel commanders who allegedly led the attack are for war crimes, including violence to life (murder and causing severe injury to peacekeepers), and intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission and pillaging.

In a heavily redacted filing dated 16 April 2009, the Prosecutor submitted further information to Pre-Trial Chamber I related to the 20 November 2008 application for Warrants of Arrest for three rebel commanders.²⁰⁷ In this filing, the Prosecutor also included an urgent request for expedited consideration of its original application ‘given the current real prospects of ensuring the appearance of [redacted] before the Court’.²⁰⁸ The Prosecutor requested that the Pre-Trial Chamber issue

198 ICC-02/05-01/09-12, paras 2, 3.

199 ICC-02/05-01/09-12, para 3.

200 ICC-02/05-01/09-21, p 5 (emphasis in original).

201 ICC-02/05-01/09-25.

202 ICC-02/05-01/09-25, para 33 (emphasis in original).

203 ICC-02/05-01/09-25, para 33.

204 ICC-02/05-01/09-25, para 46.

205 ICC-02/05-01/09-25, para 51.

206 ICC-02/05-162.

207 ICC-02/05-213.

208 ICC-02/05-213, para 14.

Summonses to Appear rather than Warrants of Arrest, should the Chamber decide to grant the application.²⁰⁹

On 7 May 2009, Pre-Trial Chamber I issued a Summons to Appear, under seal, for one of the three alleged rebel commanders, Bahr Idriss Abu Garda (Abu Garda).²¹⁰ This document was made public on 17 May 2009. In the decision accompanying the Summons, Pre-Trial Chamber I indicated that there are reasonable grounds to believe that Haskanita was attacked by a group of approximately 1000 persons armed with anti-aircraft guns, artillery guns and rocket-propelled grenade launchers on 29 September 2007. The Pre-Trial Chamber also found reasonable grounds to believe that splinter forces of the Justice and Equality Movement (JEM), under the command of Abu Garda, carried out the attack jointly with troops belonging to another armed group. It further found that the attack occurred in the context of, and was associated with, an armed conflict.

The Chamber also found reasonable grounds to believe that, the attackers killed 12 and severely wounded eight peacekeepers, as well as destroyed or appropriated communications installations, dormitories, vehicles and other materials belonging to the peacekeepers. The Chamber found that there were reasonable grounds to believe that war crimes had been committed by the rebel forces under the command of Abu Garda and other rebel commanders, as part of a common plan to attack the Haskanita Camp. These included: violence to life in the form of murder, whether committed or attempted,²¹¹ intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission;²¹² and pillaging.²¹³ The Chamber concluded that there were reasonable grounds to believe that Abu Garda bore joint criminal responsibility under Article 25(3)(a) (as a direct co-perpetrator), or alternatively under Article 25(3)(f) (as an indirect co-perpetrator) for the crimes that were committed during the attack.

209 Article 58(7) of the Rome Statute provides for the Pre-Trial Chamber to issue a Summons to Appear as an alternative to a Warrant of Arrest. A Summons to Appear may be issued at the request of the Prosecutor 'if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance'. The Summons may be issued 'with or without conditions restricting liberty (other than detention) if provided for by national law'.

210 ICC-02/05-02/09-15-AnxA.

211 Article 8(2)(c)(i).

212 Article 8(2)(e)(iii).

213 Article 8(2)(e)(v).

According to the Court, Abu Garda arrived in The Hague on a commercial flight on 17 May to make his initial appearance before the Court. He was held at an undisclosed location somewhere in The Hague that was, according to the Court's website, 'considered an extension of the Court's premises'.²¹⁴

The initial appearance, Single Judge Tarfusser presiding, took place on 18 May 2009. Speaking in Arabic, the suspect confirmed his identity and gave his profession as 'the commander of a resistance movement' and 'political commander'.²¹⁵ During the hearing, Abu Garda was reminded of the purpose of the hearing, the charges against him and the conditions of appearance that had been set by the Chamber. These conditions included that he refrain from making political statements while within the premises of the Court. The suspect was also informed of his rights under Article 67 of the Rome Statute.

Pursuant to Rule 121 of the Rules of Procedure and Evidence, the date for the confirmation of charges hearing was set for 12 October 2009. Abu Garda waived his right to attend in person any status conferences before the confirmation hearing, and instead was represented by counsel. On 11 September 2009, Single Judge Tarfusser postponed the hearing to confirm the charges against Abu Garda until 19 October 2009.²¹⁶

214 Press Release, 17 May 2009, Bahr Idriss Abu Garda arrives at the premises of the Court, ICC-CPI-20090517-PR413.

215 ICC-02/05-02/09-T-2-ENG ET WT 18-05-2009 1/11 NB PT, lines 15, 19.

216 ICC-02/05-02/09-98. The delay allows the Prosecutor an extension of time to file Arabic translations of witness transcripts and interviews. These translations were necessary to comply with the Chamber's 15 July 2009 'Second Decision on issues relating to disclosure' (ICC-02/05-02/09-35), which ordered the Prosecutor to disclose to the Defence, in a language that Abu Garda fully understands and speaks, (1) the names and statements of witnesses (with any authorised redactions) on which the Prosecution intends to rely at the hearing and (2) the Charging Document and List of Evidence. Despite noting his displeasure with the Prosecutor's late application to extend the time limit, Single Judge Tarfusser granted the request on the basis that disclosure of both the list of evidence and the witness statements is necessary to preserve the right of the accused 'to be informed promptly and in detail of the nature, cause and content of the charge'. Article 67(1)(a).

CAR

The investigation into the Situation in the Central African Republic (CAR) is the most recent investigation to be opened by the Office of the Prosecutor. The Government of CAR referred the Situation to the Court in early 2005, and the Prosecutor announced the opening of an investigation in May 2007.

The Prosecutor v. Jean-Pierre Bemba Gombo

Pursuant to an Arrest Warrant issued on 23 May 2008, Jean-Pierre Bemba Gombo was arrested in Belgium on 24 May 2008, and as of September 2009 faces trial on confirmed charges of five counts of war crimes and crimes against humanity. The charges arise out of his role in events in the Central African Republic (CAR) in late 2002 and early 2003, when members of the *Mouvement de libération du Congo* (MLC) entered CAR territory to assist the weakened forces which 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. The Prosecutor had originally charged eight counts of crimes against humanity and war crimes, including torture and outrages upon personal dignity, alleging that, as President and Commander-in-Chief of the MLC, Bemba is criminally responsible jointly with Patassé under Article 25(3)(a) of the Rome Statute for having committed these crimes.

Pre-Trial Chamber III held a confirmation of charges hearing in The Hague from 12-16 January 2009. During the hearing, the Prosecution presented evidence describing numerous attacks perpetrated by members of the MLC in the Central African Republic between October 2002 and March 2003. The attacks included rapes perpetrated on a mass scale, as well as killings and pillaging. The Prosecution argued that the rapes were not opportunistic events, but were strategically employed as a weapon of war, perpetrated as part of a widespread and systematic attack against the civilian population intended to punish those thought to be sympathetic to the rebels. The large number of rapes committed by members of the MLC outnumbered the killings and were committed with such extreme violence and cruelty as to amount to torture. The Prosecution told the Court that some rape victims suffered permanent injuries as a result of the rapes, others were impregnated and many were infected with HIV. Two Legal Representatives represented the 54 victims who were granted standing to participate in the confirmation hearing. Among these victims are women and girls who were raped,

including some who were infected with HIV and other sexually transmitted diseases and others who became pregnant as a result of being raped.

On the first day of the confirmation of charges hearing, some supporters of Bemba gathered in front of the ICC, creating security concerns for those attending the proceedings. Bemba's supporters were large in number and vocal, and the environment was described as 'tense' by women's rights activists from CAR attending the hearing. Reports of intimidation of CAR activists by Government officials and Bemba supporters also surfaced during the week-long proceedings.²¹⁷

On 3 March 2009, without either confirming or declining to confirm the charges against Bemba, the Chamber issued a decision adjourning the confirmation hearing proceedings pursuant to Article 61(7)(c)(ii), and invited the Prosecutor to consider amending the document containing the charges, specifically with respect to the mode of liability under which Bemba was charged.²¹⁸ Pre-Trial Chamber III 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 ('Amended DCC') which included Article 28 as an alternative, rather than substitute, mode of liability for Article 25(3)(a).²¹⁹

Upon the Presidency's decision to dissolve Pre-Trial Chamber III,²²⁰ Pre-Trial Chamber II delivered the confirmation of charges decision against Bemba on 15 June 2009.²²¹ In this decision, the Chamber determined that the case against Bemba falls within the jurisdiction of the Court and is admissible pursuant to Articles 17(1) and 19(1) of the Statute.

217 Women's Initiatives for Gender Justice, 'Bemba's Hearing and security concerns for victims/survivors', *Women's Voices* E-Letter, March 2009.

218 ICC-01/05-01/08-388.

219 ICC-01/05-01/08-395.

220 On 19 March 2009, the President decided to dissolve Pre-Trial Chamber III and reassign the Situation of the Central African Republic to Pre-Trial Chamber II. ICC-01/05-22.

221 ICC-01/05-01/08-424.

It also determined that Article 28(a), which provides for responsibility of military commanders or persons effectively acting as military commanders, was the most appropriate mode of liability. The Chamber found that there was sufficient evidence to establish substantial grounds to believe that Bemba 'at all times relevant to the charges, effectively acted as a military commander and had effective authority and control over the MLC troops'. The Chamber also addressed individual criminal responsibility under Article 25(3) (a). It found that because the subjective element of *mens rea* was not satisfied, there was insufficient evidence to establish substantial grounds to believe that Bemba committed the alleged crimes jointly as a co-perpetrator with Ange-Félix Patassé.

The Pre-Trial Chamber found sufficient evidence to confirm charges of murder²²² and rape,²²³ constituting crimes against humanity, and murder,²²⁴ rape,²²⁵ and pillaging²²⁶ constituting war crimes within the meaning of the Statute. With this decision, the Bemba case becomes the second case before the ICC where charges of sexual violence have been confirmed, the first being *Prosecutor v. Katanga and Ngudjolo* in the Situation of the DRC. However, the Pre-Trial Chamber declined to confirm all of the sexual violence charges put forward by the Prosecutor, in particular, 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.

With respect to crimes against humanity, the Chamber found that there was sufficient evidence to establish substantial grounds to believe that acts of murder and rape constituting crimes against humanity were committed as part of a widespread attack directed against the civilian population carried out in the CAR from on or about 26 October 2002 to 15 March 2003. The Chamber found that the 'MLC soldiers targeted primarily the CAR civilian population,'²²⁷ and that the attack was 'conducted pursuant to an organisational policy'.²²⁸

222 Article 7(1)(a).

223 Article 7(1)(g).

224 Article 8(2)(c)(i).

225 Article 8(2)(e)(vi).

226 Article 8(2)(e)(v).

227 ICC-01/05-01/08-424, para 98.

228 ICC-01/05-01/08-424, para 110.

In confirming the charges of rape as a crime against humanity, the Chamber reviewed the disclosed evidence, and relied in particular on the statements of eight direct witnesses. The Chamber found:

they consistently describe the multiple acts of rape they directly suffered from and detail the invasion of their body by the sexual organ of MLC soldiers, resulting in vaginal or anal penetration. The evidence shows that direct witnesses were raped by several MLC perpetrators in turn, that their clothes were ripped off by force, that they were pushed to the ground, immobilised by MLC soldiers standing on or holding them, raped at gunpoint, in public or in front of or near their family members. The element of force, threat of force or coercion was thus a prevailing factor.²²⁹

The Chamber dismissed as 'untenable' the Defence's contention that CAR women entered into sexual relations with soldiers on a voluntary basis.²³⁰ In its decision, the Chamber provided details of the testimonies of direct witnesses, describing 12 rapes of men, women, and children, including a 10-year-old girl. The testimonies describe rapes of multiple family members, often in the presence of each other, and often by multiple perpetrators.

With respect to war crimes, the Chamber addressed the characterisation of the armed conflict and found that the armed conflict was not of an international character. Finding that 'civilian men and women were raped from on or about 26 October 2002 to 15 March 2003 by MLC soldiers on the CAR territory,'²³¹ it confirmed the charges of rape as a war crime. The Chamber referred to its previous findings and analysis of the evidence with respect to the charges of rape as a crime against humanity. The Chamber also confirmed the charge of pillaging as a war crime. Four of the seven testimonies outlined by the Chamber also described rape taking place in the same time frame as the incidents of pillaging.

However, the Chamber declined to confirm that Bemba is criminally responsible for the charges of torture constituting a crime against humanity,²³² torture constituting a war crime,²³³ and outrages upon personal dignity constituting a war crime²³⁴ within the meaning of the Statute. These charges were brought to address the pain and suffering experienced by rape victims and by those forced to watch their family members being raped, as well as the humiliation experienced by rape victims due to the public nature of the rapes.

229 ICC-01/05-01/08-424, para 165.

230 ICC-01/05-01/08-424, para 168.

231 ICC-01/05-01/08-424, para 286.

232 Article 7(1)(f).

233 Article 8(2)(c)(i).

234 Article 8(2)(c)(ii).

As reasoned by the Pre-Trial Chamber, the decision not to confirm the charges of torture and outrages upon personal dignity resulted from the improper approach of the Prosecutor to engage in the practice of ‘cumulative charging’, and because the Prosecutor failed to provide adequate detail or sufficient facts in the Amended DCC with respect to these charges.

The Chamber reasoned that charging torture and outrages upon personal dignity was cumulative to the charge of rape and therefore prejudicial to the rights of the accused. It averred that:

The prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.²³⁵

The Chamber then reviewed the charges for crimes against humanity and noted that the charges for torture were based on the torture experienced by women who were raped. Applying the cumulative charging test, it observed:

the specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person, are also the inherent specific material elements of the act of rape. However, the act of rape requires the additional specific material element of penetration, which makes it the most appropriate legal characterisation in this case.²³⁶

Because the evidence presented by the Prosecutor regarding the charge of torture ‘reflects the same conduct which underlies the count of rape’, the Chamber found that ‘the act of torture is fully subsumed by the count of rape’. Similarly, it found that the charge of rape as a war crime was more appropriate than the charge of outrages upon personal dignity because the facts underlying the latter charge ‘reflect in essence the constitutive elements of force or coercion in the crime of rape, characterising this conduct, in the first place, as an act of rape’.²³⁷

235 ICC-01/05-01/08-424, para 202.

236 ICC-01/05-01/08-424, para 204.

237 ICC-01/05-01/08-424, para 310.

As a further rationale to support only the confirmation of the charge of rape, the Chamber recalled its reasoning from the confirmation of charges decision that Regulation 55 of the Regulations of the Court permitted a Trial Chamber to ‘re-characterise a crime to give it the most appropriate legal characterisation’.²³⁸ In the Chamber’s view, the use of Regulation 55 is preferable to the Prosecutor’s approach to cumulative charging, lest the Defence be forced to confront ‘all possible legal characterisations’ when responding to the charges.²³⁹

The Chamber also declined to confirm charges for alleged acts of torture other than rape, namely the act of forcing individuals to watch the rapes of their family members. It noted that in the Amended DCC, ‘the Prosecutor neither detailed the material facts of torture other than acts of rape nor the method of commission of the alleged acts of torture’.²⁴⁰ In the view of the Chamber, this put the Defence at an unjustifiable disadvantage.

The Chamber based its decision not to confirm the charge of torture as a war crime on a lack of precision in the Amended DCC ‘as to the specific purpose required for the commission of torture’.²⁴¹ The Chamber noted that the *mens rea* for torture as a war crime requires, among other things, that the pain and suffering must have been inflicted ‘for such purposes as obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind’.²⁴² Thus, the Chamber stressed that ‘the perpetrator’s intent to inflict the pain or suffering ... constitutes a specific intent, which has to be proven by the Prosecutor’.²⁴³ In this instance, the Chamber found that the Prosecutor failed to meet this specific intent requirement.

Finally, the Chamber declined to confirm charges of outrages upon personal dignity as a war crime, again rejecting what it saw as the cumulative charging approach of the Prosecutor. The Chamber again found that the Prosecutor again failed to specify in the Amended DCC the facts upon which he based the charge of outrages upon personal dignity.

238 ICC-01/05-01/08-424, para 203.

239 ICC-01/05-01/08-424, para 203.

240 ICC-01/05-01/08-424, para 209.

241 ICC-01/05-01/08-424, para 291.

242 ICC-01/05-01/08-424, para 293.

243 ICC-01/05-01/08-424, para 294.

On 22 June 2009, the Prosecution filed an application for leave to appeal the Confirmation Decision.²⁴⁴ The appeal posed two issues:

- 1 whether the Pre-Trial Chamber has the authority to decline to confirm two charges on the ground that they are cumulative of rape charges; and 'whether torture and outrages against dignity are, either objectively as a matter of law or in particular based on the facts alleged, wholly subsumed within rape charges;²⁴⁵ and
- 2 whether the Pre-Trial Chamber has the authority to decline to confirm two charges on the grounds that the accused lacked sufficient pre-confirmation notice of their basis.²⁴⁶

Regarding the first issue, the Prosecution argued that 'the Pre-Trial Chamber has misapplied the relevant principles: instead of analysing whether the offences *per se* each require a material legal element not contained in the other; the Chamber based its determination on whether "the evidence ... presented [in this particular instance] reflects the same conduct which underlies the count of rape"'.²⁴⁷ The Prosecutor argued, in contrast, that the elements of rape as a crime against humanity as set forth in the Rome Statute and Elements of Crimes are clearly different from those of torture as a crime against humanity. In its appeal, the Prosecution described the impact that the Pre-Trial Chamber's decision would have on victims applying to participate in the proceedings. It noted that they would be denied the chance to have the full range of their suffering and victimisation reflected in the charges, and in some cases, the charged would be excluded altogether, such as those who were forced to watch the rape of their family members.

As to the second issue on appeal, regarding the sufficiency of notice to the Defence about the factual basis for the charges, the Prosecution argued that the Chamber did not thoroughly review the full documentation it had presented. It argued that contrary to the Chamber's impression, the elements of torture and outrages upon personal dignity were adequately described in the Amended DCC and other documents analysing the evidence that were subsequently submitted to the Chamber.

Following the Prosecution's application for leave to appeal, the Women's Initiatives for Gender Justice requested leave to file, and subsequently filed, an *amicus curiae* brief (discussed in depth in the section on Central African Republic in the *Amicus Curiae*

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

245 ICC-01/05-01/08-427, para 8.

246 ICC-01/05-01/08-427, para 8.

247 ICC-01/05-01/08-427, para 17.

section) in which we argued that cumulative charging 'does not violate fair trial practices'.²⁴⁸ The *amicus* asserts 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.

On 18 September 2009, Pre-Trial Chamber II issued a decision denying the Prosecution's request for leave to appeal the confirmation decision, finding that neither of the two issues raised by the Prosecution met the 'restrictive approach' used for deciding whether an appeal should be granted at the interlocutory stage of the proceedings, pursuant to Article 82(1)(d).²⁴⁹

With respect to the first issue raised by the Prosecution, the Pre-Trial Chamber recalled that its role is to 'define the parameters of the trial' and in the execution of these duties, 'the Chamber's role cannot be that of merely accepting whatever charge is presented to it'.²⁵⁰ Rejecting the Prosecution's 'literal understanding' of the Pre-Trial Chamber's role 'to merely confirm or decline the charges', the Chamber asserted that its 'inherent powers' to confirm charges under Article 61(7) include taking steps to ensure the rights of the Defence when necessary.²⁵¹ Such steps may include dismissing charges 'in case the essence of the violation of the law underlying these charges is fully subsumed by one charge'.²⁵² The Chamber dismissed the charges of torture and outrages upon personal dignity because 'the Prosecutor relied on the same evidence pertaining to acts of rape to substantiate two or more legal characterisations' and because the elements of those two crimes were 'congruent with those of the crime of rape and therefore, fully subsumed by the count

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

249 ICC-01/05-01/08-532, para 12. Article 82(1)(d) of the Rome Statute provides that either party may appeal '[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial (&) Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.'

250 ICC-01/05-01/08-532, para 52.

251 ICC-01/05-01/08-532, para 52.

252 ICC-01/05-01/08-532, para 53.

of rape'.²⁵³ By contrast, had the evidence put forward by the Prosecution supported different elements not contained in the other crime, it could have supported the Prosecution's cumulative charging approach.²⁵⁴

The Chamber maintained that its decision not to confirm the two charges does not deprive the Trial Chamber of an opportunity to pronounce upon facts related to sexual violence that fall outside the scope of the charge of rape. To the contrary, '[a]ll facts pertaining to acts of rape, which the Prosecutor presented under more than one legal characterisation, have been retained in the 15 June 2009 Decision'.²⁵⁵ And while 'victims, who have suffered from acts of rape, have neither been excluded from the case nor have they been denied participatory rights in the present case', the Chamber also posited that the rights of victims cannot supersede the rights of the Defence.²⁵⁶

Importantly, in the Chamber's view, the confirmation of charges decision also left open the possibility that 'the Trial Chamber may address the issue of re-characterisation of facts anew'.²⁵⁷ The Chamber was referring to its reasoning in the confirmation of charges decision that Regulation 55 is a unique mechanism to the ICC that allows the Trial Chamber to change the legal characterisation of the facts after the charges have been confirmed. Rejecting the more restrictive interpretation of the appropriate use of Regulation 55 put forward by the Prosecution and in the Women's Initiatives' *amicus* filing, the Chamber called this mechanism an 'important development in international criminal law which pertains to the general powers of a Trial Chamber to effectively discharge its statutory functions in the interests of justice'.²⁵⁸ Therefore, because the confirmation of charges decision neither alters the scope of the facts for trial nor precludes the Trial Chamber from re-characterising the facts, the Pre-Trial Chamber found no issue that would affect the outcome of the trial pursuant to Article 82(1)(d).

253 ICC-01/05-01/08-532, para 54.

254 ICC-01/05-01/08-532, para 54. In its decision, the Pre-Trial Chamber briefly addressed the arguments put forward by the Women's Initiatives for Gender Justice as *amicus curiae*. Notwithstanding the brief's explanation of how the Chamber's decision would refuse to recognise the full extent of the harm suffered by these victims/survivors of sexual violence, the Chamber found the arguments therein too 'general' and not 'related to the issue *sub judice*'. ICC-01/05-01/08-532, paras 44, 47.

255 ICC-01/05-01/08-532, para 56.

256 ICC-01/05-01/08-532, para 59.

257 ICC-01/05-01/08-532, para 61.

258 ICC-01/05-01/08-532, para 57.

Addressing the second issue raised in the Prosecution's request for leave to appeal, whether the Pre-Trial Chamber has the authority to decline to confirm charges on the ground that the accused lacked adequate notice of the factual basis of the charges, the Chamber also did not find that this issue significantly affected the fair and expeditious conduct of the proceedings or the outcome of the trial. The Chamber recalled its role to ensure the rights of the Defence, including the right to receive notice of the charges and the material facts underlying the charges. In the Chamber's view, in the Amended DCC, the Prosecution did not specify the acts, other than rape, on which it intended to rely to support the charges of torture and outrages upon personal dignity. The Prosecution had argued in its request for leave to appeal that the charging document 'must be read as a whole and in a common sense manner',²⁵⁹ and that the links between each charge and its factual basis was provided to the Chamber in documents accompanying the Amended DCC. The Chamber rejected the Prosecution's holistic approach, which it said 'would give unprecedented leeway to arbitrariness, alien to this Statute'.²⁶⁰ Rather, it emphasised the importance of accurately stating the charges with their supporting factual basis in the Amended DCC.

While the Chamber conceded that its refusal to confirm three charges may affect the outcome of the trial, it rejected the suggestion that the effect was significant enough to constitute an appealable issue under Article 82(1)(d). Echoing the words of the Prosecution at the confirmation of charges hearing that '[t]he main physical acts underpinning the charges of rape, torture, and outrages upon personal dignity is rape in this case',²⁶¹ the Chamber found that by confirming charges of rape alone, the Chamber 'captured all main facts presented by the Prosecutor'.²⁶²

Under Article 61(8), 'where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence'. As of the time of publishing this report, no decision has been taken by the Prosecution to seek an amendment to the charges to include those not confirmed.

259 ICC-01/05-01/08-532, para 70.

260 ICC-01/05-01/08-532, para 83.

261 ICC-01/05-01/08-532, para 70.

262 ICC-01/05-01/08-532, para 86.

Trial Proceedings

The Prosecutor v. Thomas Lubanga Dyilo

Overview of the Lubanga Trial

In 2009, the ICC began its first trial proceedings with the commencement before Trial Chamber I of the trial of Thomas Lubanga Dyilo, President of the *Union des patriots Congolais* (UPC) and Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (FPLC). The opening of the trial was much anticipated and came after prolonged delays.²⁶³ Lubanga is charged with six counts of war crimes arising out of the alleged UPC practice of enlisting and conscripting children under the age of 15 years and using those children to participate actively in the hostilities.

The first phase of the case lasted 22 weeks, comprising 82 days of hearings, from 26 January through 14 July 2009. During this period, Trial Chamber I, composed of Presiding Judge Fulford and Judges Odio-Benito and Blattman, heard 74 days of testimony by 28 witnesses, including three experts called by the prosecution, and three days of testimony by two experts called by the Chamber. Three days of hearings were devoted to procedural matters. While the Defence was originally scheduled to present its case starting in October of 2009, as of 2 October, as discussed later in this section, the trial was suspended pending an Appeals Chamber decision on whether the legal characterisation of the facts may be subject to modification.

The need for interpretation in multiple languages posed practical and technical challenges for the Lubanga trial. All proceedings at the ICC are, at a minimum, simultaneously interpreted into English and French, the two official working languages of the Court. However, during the presentation of the Prosecution case in the Lubanga trial there was also Swahili, Lingala, and Spanish interpretation. Approximately 14 witnesses testified in French, 13 in Swahili, two in Lingala, one in English, and one in Spanish.

²⁶³ The background to the start of the Lubanga trial is outlined in the 2008 *Gender Report Card*.

At the start of the Lubanga trial, a total of 93 victims had been authorised to participate in the case.²⁶⁴ The victims were represented in the trial proceedings by seven Legal Representatives organised into two teams and by the Office of the Public Counsel for Victims (OPCV). Over the course of the Prosecution case, six further victims were authorised to participate in the case, bringing the total number of victims participating in the case to 103. The decisions authorising participation are discussed in the section of this report on **Victim Participation**.

Included among the participating victims are a small number of former girl soldiers. Since 2006, the Women's Initiatives for Gender Justice has been working with women victims/survivors and former girl soldiers to support their applications to the ICC to be formally recognised as victims. Some of these applicants are now recognised in the Lubanga case, and we have been working with their Legal Representatives to ensure the inclusion of gender-based crimes and the experiences of girl soldiers in their presentations to the Court.

As discussed in the section on **Investigation and Prosecution Strategy**, the Lubanga case marked an early failure by the Office of the Prosecutor to charge gender-based crimes. 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 for Gender Justice, no gender-based crimes were included in the Prosecution's case.

In the 2009 *Gender Report Card*, we highlight the statements and testimony from the Lubanga trial that describe the situation of girls and women in the context of the crimes charged. We do not give an exhaustive summary of all of the statements and testimony given. As the statements and testimony discussed below

plainly illustrate, the evidence would have supported additional charges of rape and other forms of sexual violence in the case against Lubanga.

Girl soldiers and gender-based crimes in the opening statements

On 26 and 27 January 2009, Trial Chamber I heard the opening statements of the Prosecution, the Legal Representatives of the Victims and the Defence.

The Prosecutor began by telling the Chamber that Lubanga 'systematically recruited children under the age of 15 as soldiers in his political military movement' and transported them to military camps under his control in Ituri district of the DRC.²⁶⁵ Also in his opening statement, the Prosecutor acknowledged, for the first time, the particular experiences of girls enlisted and conscripted by the UPC, telling the Chamber that 'in the camps child soldiers were exposed to the sexual violence perpetrated by Thomas Lubanga's men in unspeakable ways'.²⁶⁶ The Prosecutor described how child soldiers were encouraged to rape women as part of their training and that they were sent by their commanders to look for women and to bring them to the camp.²⁶⁷ Girl soldiers, some as young as 12 years, 'were the daily victims of rape by their commanders' and that they were used as

cooks and fighters, cleaners and spies, scouts and sexual slaves. One minute they will carry a gun, the next minute they will serve meals to the commanders, the next minute the commanders will rape them. They were killed if they refused to be raped. One soldier became severely traumatised after killing a girl who refused to have sex with the commander.

264 ICC-01/04-01/06-1556. For an analysis of this decision, see the Lubanga trial in the 'Victim Participation' section of this report.

265 ICC-01/04-01/06-T-107-ENG, p 4 lines 16-17, p 5, line 13.

266 ICC-01/04-01/06-T-107-ENG, p 11 lines 21-22.

267 ICC-01/04-01/06-T-107-ENG, p 10 lines 8-10

There were very little girls. You will hear that as soon as the girl's breasts started to grow, Thomas Lubanga's commanders could select them as their forced wife. 'Wife' is the wrong word. And they were sexual slaves, and transformed them into sexual slaves. One of our witnesses will describe how he observed daily examples of his commanders raping girl soldiers.²⁶⁸

During their opening statements, four Legal Representatives specifically referred to the sexual violence perpetrated upon the girl soldiers they represent. One Legal Representative with whom the Women's Initiatives has worked closely spoke at length about the experience and impact of sexual violence for girls recruited into the UPC, stating that some of the young girls she represents were recruited expressly for 'the purpose of sex and forced marriage'.²⁶⁹

Most of the girls recruited by the UPC, she noted, were very young, some as young as 12-14 years, and these girls were raped regularly.²⁷⁰ Rape and other forms of sexual violence, she told the Chamber, were an integral part of the process of enlisting and conscripting girls into the UPC, and all the girl soldiers were raped and exploited by their leaders, the soldiers in their units, and their comrades.²⁷¹

Based on our own documentation and analysis since 2006, the Women's Initiatives has advocated the position that rape and other forms of sexual violence were an integral part of the process of enlistment and conscription for girls, particularly during the initial abduction phase and period of military training by the UPC. Perpetrating sexual violence upon girl soldiers was an inherent feature of the UPC's enlistment and conscription practices.

268 ICC-01/04-01/06-T-107-ENG, p 11 lines 23-25, p 12 lines 1-12.

269 ICC-01/04-01/06-T-107-ENG, p 52 lines 18-20.

270 ICC-01/04-01/06-T-107-ENG, p 53 lines 6-9.

271 ICC-01/04-01/06-T-107-ENG, p 53 lines 9-12.

This was emphasised by the Legal Representative for Victims, who told the Court that for some of the former girl soldiers she represents,

rape began as soon as they were abducted and continued throughout their stay with the UPC. In fact, often the abuses were greatest in the initial stages of their abduction and in the training camps where they were trained to become militia soldiers.

Many of these girls, victims of rape, suffer from psychological trauma. Many girls have been tortured, abused or imprisoned for refusing the sexual advances of their superiors which they then underwent against their will.²⁷²

The Chamber heard of the devastating consequences of enlistment and recruitment for girls, including physical and psychological suffering, injuries both external and internal, unwanted pregnancies and rejection by their families and communities.²⁷³ Their vulnerability as girls was intentionally and systematically exploited, and as a result they have been 'denied the right to a childhood, to be schooled, a right to safety, a right to be protected, a right to physical integrity, a right to reproductive health and sexual autonomy'.²⁷⁴

Also during the opening statements, the Chamber was informed that some victims wished to reserve the right to request from the Chamber 'a classification of crime of sexual slavery' against Lubanga.²⁷⁵ This request was eventually formally made to the Chamber by the Legal Representatives of victims and is discussed below.

The Defence opening statements did not engage with the statements about crimes of sexual violence given by the Prosecution and

272 ICC-01/04-01/06-T-107-ENG, p 53 lines 13-21.

273 ICC-01/04-01/06-T-107-ENG, p 53-55.

274 ICC-01/04-01/06-T-107-ENG, p 54 lines 12-16.

275 ICC-01/04-01/06-T-107-ENG, p 57 lines 4-7.

Legal Representatives of the victims, except to note that the victim openings statements were problematic in requesting ‘new charges’, and that fair trial principles must be respected.²⁷⁶

Summaries of testimony on girl soldiers and gender-based crimes from OTP non-expert witnesses²⁷⁷

Based on a review of available transcripts of testimony given in open court, the majority of the prosecution witnesses, at least 21 out of 25, testified in open court about girl soldiers, and a significant number of prosecution witnesses, at least 15, also testified about gender-based crimes, in particular rape and sexual slavery, that took place within the context of the crimes charged against Lubanga. This information was at times volunteered by witnesses, and was also provided in response to questions put by the parties, legal representatives for victims, and the Chamber.

As summarised below, a number of witnesses testified that the young recruits all received the same training, were outfitted in the same uniforms and issued with the same weapons, and were sent into the battlefield to fight with no distinction made on the basis of either age or gender. Witnesses also testified that, in addition to their duties as soldiers, the girls were expected to cook for their commanders and to provide them with ‘sexual services’. Some of the witnesses referred to this latter role as ‘sleeping with’ the commander or being his ‘wife’, while others used the term ‘rape’ to describe what the young girls experienced. Those witnesses made it clear that the girls involved had no choice in the matter and could have been killed for refusing.

²⁷⁶ ICC-01/04-01/06-T-109-ENG, p 18 lines 8-25, p 19 lines 1-3.

²⁷⁷ In order not to recharacterise the events described by witnesses in their testimonies, we have made every attempt in this section to cite testimony directly or, when summarising testimony, to use the witnesses’ exact words.

One former child soldier testified to the remorse he felt after having, on his commander’s orders, killed a young girl who had refused to provide the commander with sexual services. Another former child soldier testified to having watched a young girl die trying to abort after becoming pregnant as a result of rape in a UPC training camp. This witness testified that a female recruit who was discovered to be pregnant would be chased out of the camp on the commander’s orders and that young girls in this position would often try to abort the pregnancy to avoid this fate.

The summaries below include relevant excerpts of witness testimony that was given in open session and that has been made available on the ICC’s website as of 29 September 2009.²⁷⁸ 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 summaries appear in the order that the witnesses testified.

²⁷⁸ As of the time of the publication of this report, the transcripts for the days of 3, 13, 24 and 26 February; 3 March; 26 and 28 May; and 3, 9, 10, 11, 12, 24, 25, 26, and 30 June were not available on the ICC website. Notwithstanding Court orders to review the transcripts for accuracy, the Court often declines to provide explanation for its failure to release transcripts in a timely manner. Delayed release of transcripts creates difficulties for accurate monitoring of trial proceedings. Where relevant 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 made 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 the summaries in the 2009 *Gender Report Card*.

Witness 0298 was a former UPC child soldier who was abducted during his fifth year of elementary school. He testified that girls were in the Bule camp, that the girls received the same training as the boys, the same beatings as the boys, and that girls also went to the battlefield. He testified that ‘when [girls] were taken to camp, they were raped. And they also worked for the older soldiers’.²⁷⁹

Witness 0038 was a former child soldier who joined the UPC at age 13 in 1997. He testified that there were both boys and girls in the camp.²⁸⁰ He testified that the girls in the camp served as bodyguards, prepared food, and were used for sexual services.²⁸¹ Regarding the frequency of the sexual services required, he testified that commanders would keep their bodyguards, including girls, with them for long periods of time, up to two weeks.²⁸² He witnessed the girls preparing food and testified that he heard girls crying in the night. He stated, ‘I sometimes heard the cries of girls with my own ears ... at night you could listen to the girls even saying, “I don’t want to”’.²⁸³ He testified that girls and boys received the same training,²⁸⁴ and that girls were also flogged, in one instance because they had spent the night in the houses of the trainers.²⁸⁵ He testified that the girls who were in the camp were of all ages, both under and over 15 years, and that there were some girls who volunteered to join the army.²⁸⁶

According to informal summaries prepared by CICC trial observers, Witness 0038 also testified that girls often volunteered to join the troops at recruitment drives in the villages. He affirmed that girls of all ages were taken when they finished training to cook and clean for commanders, as their ‘camp wives’.

279 ICC-01/04-01/06-T-123-ENG, p 32 lines 8-25, p 33 lines 1-2.

280 ICC-01/04-01/06-T-113-ENG, p 36 lines 15-17.

281 ICC-01/04-01/06-T-114-ENG, p 22 lines 16-19, p 82 lines 1-3.

282 ICC-01/04-01/06-T-114-ENG, p 23 lines 15-25 p 24 lines 1-4.

283 ICC-01/04-01/06-T-114-ENG, p 25 lines 24-25, p 26 lines 6-7.

284 ICC-01/04-01/06-T-114-ENG, p 81 lines 4-8.

285 ICC-01/04-01/06-T-114-ENG, p 82 lines 16-25, p 83 lines 1-2.

286 ICC-01/04-01/06-T-114-ENG, p 82 lines 7-15, p 83 lines 22-25.

Witness 0299 was a former member of the UPC and bodyguard for Lubanga until 2003, and father of witness 0298. He testified that of the 5,000 people at the Mandro training camp there were ‘women, young girls, and they were called PMF’. According to the witness, PMF ‘means girl soldier. It is a term which we used in the rebellion’.²⁸⁷ When asked about their role, he said ‘They were soldiers. What else can be said? A soldier is a soldier’.²⁸⁸ He later testified that Lubanga had one female bodyguard for a period of time, and women would follow commanders to their posts. He stated, ‘The PMF’s job was to take the commander’s bags, and their other job was to be their wives. There were women under each commander’.²⁸⁹ He further stated, ‘Under each commander their main job was to prepare food, to wash their commander’s clothes. And if the commander had to go to war, for instance, the PMF had to stay to guard their belongings. And when he would come back from war, food would be ready. And I would like to make it clear the PMF’s didn’t go to war. They didn’t go and fight. They were just the soldier’s wives’.²⁹⁰ He testified that there were women of all ages in the camp, from under 15 to 25.²⁹¹ Witness 0299 also testified that the rules prohibited stealing and being violent to women.²⁹²

Witness 0041 was a former commander of the UPC. He testified that there were both boys and girls serving as uniformed, armed bodyguards to Bosco Ntaganda and Kisembo.²⁹³

287 ICC-01/04-01/06-T-117-ENG, p 16 lines 20-25.

288 ICC-01/04-01/06-T-117-ENG p 17 lines 1-8.

289 ICC-01/04-01/06-T-122-ENG, p 26 lines 24-25.

290 ICC-01/04-01/06-T-122-ENG, p 27 lines 16-21.

291 ICC-01/04-01/06-T-117-ENG p 17 lines 1-8; 9 Feb. 09, p 26 lines 3-8.

292 ICC-01/04-01/06-T-117-ENG p 18, line 1.

293 ICC-01/04-01/06-T-125-ENG, p 64 lines 9-20. As discussed in the section on ‘Investigation and Prosecution Strategy’, Bosco Ntaganda is assistant to the Chief of Staff, and an immediate subordinate of Lubanga. He is also wanted by the ICC. Kisembo was the UPC’s Chief of Staff at the time of these events.

Witness 0030 was a former member of the UPC. He testified that during his visit to one of the camps he saw a lot of boys but not many girls, and that he estimated the youngest girls he saw to be 'perhaps 15 or more'.²⁹⁴

Witness 0213 was a former boy soldier abducted three times. He was last abducted during his fourth year of primary school. He testified that there were girls in both the Bule and Lopa camps, and that these girls underwent the same training as the boys.²⁹⁵ The witness described being sent to bring back girls from the river where the girls had been sent by soldiers to fetch water.²⁹⁶ The witness also testified that the officers in the training camps used to sleep with the girls.²⁹⁷

According to informal summaries prepared by CICC trial observers, Witness 0213 also told the Court that some commanders used girls as bodyguards, while others did not, but Bosco Ntaganda in particular did use girls as bodyguards. The witness also clarified that girls who slept with commanders in the camps did not have other duties, but they did undergo the same training as the others.²⁹⁸

Witness 0008 was a former boy soldier enlisted in July 2002. He testified that there were girls in Irumu camp, about his age and some older than him.²⁹⁹ According to the Judge's subsequent recounting of the witness's testimony given in closed session, the witness testified that the military leaders told everyone that they could take any woman and sleep with them, and that the girls were afraid but were obliged to do it by their military superiors.³⁰⁰ When asked by the Judge what happened to girls who refused

to sleep with soldiers or commanders, whether they were beaten or punished, he testified, 'Everyone did what they wanted, but I know that some of [the girls] were raped.'³⁰¹

Witness 0008 testified that, like the boys, the girls in the camp were given military uniforms and weapons after training.³⁰² He testified that girls took part in battles, but he did not see them in the Lipri battle.³⁰³ According to this witness, after the battles in Lipri and Barriere, he and the other soldiers were authorised by their commanders to loot and to rape the women and the girls of the community, and that the rapes happened in front of their parents and other members of the community. They were ordered by the commanders to take the girls from their parents, and take them to a place where they could rape them, and then set them free. According to this witness only girls, not boys, could be raped in this manner.³⁰⁴ He also testified that girls, both the same age and older than him, worked as bodyguards for commanders.³⁰⁵

Witness 0011 was a former boy soldier who testified under the pseudonym 'Patrick'. He testified that there were both women and girls at Bule camp.³⁰⁶ He testified that the girls served as cooks and as wives of the commanders.³⁰⁷ He testified that the officers would sleep with the women and girls who were their 'wives', and clarified that 'sleeping with these women' means 'to take her as a woman, that is do everything a man can do with a woman'.³⁰⁸

According to informal summaries prepared by CICC trial observers, Witness 0011 also testified that there were girls present at the military training and that the girls underwent the same

294 ICC-01/04-01/06-T-131-ENG, p 27 lines 11-17.

295 ICC-01/04-01/06-T-132-ENG, p 13 lines 12-14, 19-20; p 43 lines 23-24.

296 ICC-01/04-01/06-T-133-ENG, p 4 lines 2-7, p 66 lines 18-25.

297 ICC-01/04-01/06-T-133-ENG, p 4 lines 20-23.

298 CICC Informal Summary, 24 February 2009.

299 ICC-01/04-01/06-T-138-ENG, p 19 lines 12-17.

300 ICC-01/04-01/06-T-138-ENG, p 19 lines 18-25.

301 ICC-01/04-01/06-T-138-ENG, p 20 lines 1-6.

302 ICC-01/04-01/06-T-138-ENG, p 20 lines 7-15.

303 ICC-01/04-01/06-T-138-ENG, p 20 lines 16-22.

304 ICC-01/04-01/06-T-138-ENG, p 21 lines 7-25, p 22 line 1.

305 ICC-01/04-01/06-T-138-ENG, p 21 lines 2-6.

306 ICC-01/04-01/06-T-138-ENG, p 65 lines 13-18.

307 ICC-01/04-01/06-T-138-ENG, p 65 lines 23-25, p 66 line 1.

308 ICC-01/04-01/06-T-138-ENG, p 74 lines 2-11.

training as the boys save that they did not learn how to fight and make war, they were taught only to shoot and run. The witness also testified that girls did sometimes go out to fight but that this was not the case in the two battles about which he testified (at Barriere and Lipri).³⁰⁹

Witness 0010 was a former girl soldier abducted in 2002. A significant portion of her testimony was given in closed session and was framed by instructions from the court that ‘the particular circumstances of this witness must be treated with sympathy, that they are known to everyone in court, and we must all react with appropriate sensitivity’.³¹⁰ The OPCV made a discrete application to eliminate references to the gender of the witness in open court, and while the ruling on this application was given in private session, no reference to her gender was made on the first day of her testimony. On the second day of testimony, the pronouns ‘she’ and ‘her’ were used.

The witness was allowed to give her initial testimony as a narrative from her perspective. She told the court that she was abducted on the road to Beni while she and her parents were fleeing fighting in Bunia. She was 13 years old at the time. The witness told the Court that she was taken to Rwampara for training for two weeks, and then to Mandro for two weeks, and then back to Rwampara.³¹¹ Before the training began, the heads of the recruits were shaved with broken glass, and ‘some of us were wounded’.³¹² The recruits wore their civilian clothes throughout training.³¹³ The training was the same for boys and girls.³¹⁴

The witness described a typical day of training. It began at 4:00 in the morning with a run from Rwampara to the airport, a distance of about

eight kilometres. She stated, ‘After running we did push-ups. We would crawl. We would climb walls. We would go jumping, and we had to jump into holes.’³¹⁵ The training went into the night, followed by singing, which would end around 11:00. The recruits would eat three meals a day, porridge and maize cooked with beans without salt. The witness told the court the words of one song they sang: ‘We were 37 of us and we started shooting one by one, and they said, come young people to go chase away the enemy which is killing the population. We cannot spare the enemy.’³¹⁶ During the training, the recruits learned to use weapons—to open, cock, uncock, take apart, put back together, and shoot arms.³¹⁷

The witness gave the Court details of the name of the instructor and how the groups were formed in private session. She told the Court that girls were called ‘PMF’, while ‘kadogos’ referred to young boys.³¹⁸ She told the Court if someone refused to follow the orders, they would be killed or severely punished.³¹⁹ The witness was once punished for staying home and sleeping while the others were singing. She was made to roll in a puddle of water and do push-ups and roll over on stony terrain.³²⁰ She told the Court that recruits were punished for every little mistake, and that recruits were frequently whipped or beaten with sticks.³²¹

The boy and girl recruits would bathe together in the river three times a week, without soap, and that all the boys and girls slept together in one building. The girls would keep their underwear on while bathing, and had a separate bedroom in the building.³²² The witness told

315 ICC-01/04-01/06-T-144-ENG, p 22 lines 15-16.

316 ICC-01/04-01/06-T-144-ENG, p 23-24.

317 ICC-01/04-01/06-T-144-ENG, p 35 lines 15-20.

318 ICC-01/04-01/06-T-144-ENG, p 28 lines 6-10.

319 ICC-01/04-01/06-T-144-ENG, p 28 lines 22-25; p 29 lines 1-3.

320 ICC-01/04-01/06-T-144-ENG, p 29 lines 11-21.

321 ICC-01/04-01/06-T-144-ENG, p 30 lines 8-21.

322 ICC-01/04-01/06-T-144-ENG, p 31-33.

309 CICC Informal Summary, 3 March 2009.

310 ICC-01/04-01/06-T-144-ENG, p 3 lines 15-17.

311 ICC-01/04-01/06-T-144-ENG, p 14-15.

312 ICC-01/04-01/06-T-144-ENG, p 21 lines 20-23.

313 ICC-01/04-01/06-T-144-ENG, p 35 lines 1-6.

314 ICC-01/04-01/06-T-144-ENG, p 39 line 18.

the Court that the commanders ‘would take the women and sleep with them’.³²³ The witness remembered the names of the commanders Abelanga and Pepe, and told the court there were other commanders whose names she did not remember. In closed session, she gave the names of girls who were forced to sleep with the commanders. The witness told the court that during her training she learned that the leader of the UPC was ‘Mzee Thomas’ or Thomas Lubanga.³²⁴ In her testimony, the witness also frequently mentioned Bosco Ntaganda.³²⁵

The witness told the court that the first war she fought, along with other ‘PMF’ and ‘kadogos’ was in Libi, against the Lendu. In this battle, the witness shot and killed someone for the first time.³²⁶ The witness could not remember how many ‘kadogos’ and ‘PMF’ were killed in that battle. She stated, ‘I don’t know the number, but there were many dead bodies’³²⁷ and that a number were also injured.³²⁸ The witness went on to describe a second battle in Mbau, during which she was hit by a bullet in the leg.³²⁹ The witness was taken to a hospital in Djugu where she received treatment.³³⁰ The witness also described a battle, lasting a number of days, in Mongbwalu, ‘at the quarry where we extracted gold’.³³¹ The witness told the Court that ‘kadogos’ and ‘PMF’ died in the battle at Mongbwalu.³³² The witness also took part in battles in Tchomia and Mabanga, in Centrale against the French, and in Bunia against the Ugandans.³³³

323 ICC-01/04-01/06-T-144-ENG, p 36 lines 5-15.

324 ICC-01/04-01/06-T-144-ENG, p 39 lines 19-25; p 40 lines 1-3.

325 See, eg ICC-01/04-01/06-T-144-ENG, p 40 lines 1-6.

326 ICC-01/04-01/06-T-144-ENG, p 49-52.

327 ICC-01/04-01/06-T-144-ENG, p 53 lines 18-20.

328 ICC-01/04-01/06-T-144-ENG, p 54 lines 4-9.

329 ICC-01/04-01/06-T-144-ENG, p 55-57.

330 ICC-01/04-01/06-T-144-ENG, p 58-59.

331 ICC-01/04-01/06-T-144-ENG, p 60 lines 19-25.

332 ICC-01/04-01/06-T-144-ENG, p 62 lines 4-17.

333 ICC-01/04-01/06-T-144-ENG, p 63-64.

On the second day of the witness’s testimony, the OPCV asked her questions on the bodily and psychological consequences of her enlistment in the UPC. The witness told the Court that she still suffers acute pain in her feet and her bones due to her injury from battle.³³⁴ As to the psychological consequences, the witness testified, ‘My life is destroyed. My life is completely destroyed. I don’t know after this phase where I’ll go. My life is completely destroyed.’³³⁵ When asked if the fact that she was enlisted in the UPC had consequences on the development of her life, the witness responded:

Yes, because I was studying. If I could have managed to finish my study now, if I had finished my studies properly [sic]. I used to be a virgin before I entered the UPC, but they took my virginity away. I saw the blood everywhere that destroyed my life completely. I cry every day for that. I don’t have any parents, a mother or father. I am alone. I have no one to help me, and it’s hurting me a lot. When I think about it, I feel like killing myself.³³⁶

The OPCV made reference to testimony that the witness had given on the first day in closed session, when she told the court that she had been forced to have sexual intercourse with commanders while in a training camp. On being asked if that experience had made any lasting impact on her life, the witness told the Court:

Since my virginity was taken from me, after three weeks I started having pain in my lower abdomen and I still feel the pain today. There is nobody who can understand what I underwent because my virginity was taken in a very cruel way, and up until now I still have pain in my stomach.³³⁷

334 ICC-01/04-01/06-T-145-ENG, p 28 lines 18-25.

335 ICC-01/04-01/06-T-145-ENG, p 29 lines 12-14.

336 ICC-01/04-01/06-T-145-ENG, p 29 lines 15-25.

337 ICC-01/04-01/06-T-145-ENG, p 31 lines 5-9.

The witness told the Court that, since she left the UPC, she has not been able to talk to anybody about these events.

When questioned by a second Legal Representative for Victims, the witness told the Court about another song they sang before going to war:

A ... When we go to war, we sing this: 'Father and mother give birth to a new child because I don't know if I will come back. I don't know what day I will come back to my family to give birth to a new child.'

Q Did you all sing this?

A Yes.

Q And did everybody feel sad the way you did?

A Yes. Among us some were sad, but there was no way in expressing it.

Q And what happened if you expressed your sadness?

A It was very bad. They would say, 'You're afraid', that you're fearsome.

Q And what happened to those who are scared?

A Well, if they saw you were expressing your fear, you would be put on the front line of the battle.

Q And how could being on the front line of the battle be punishment for those who were afraid?

A Well, you were put on the front line to --- until you weren't afraid anymore.³³⁸

The Chamber put a few final questions to the witness about the sexual violence she described. The witness told the Court that it was only the girls, not the boys, who suffered sexual violence. The witness also told the Court that 'An ordinary soldier couldn't be raped, but when a commander had issued an order, it would be carried out because the commander had power.'³³⁹

338 ICC-01/04-01/06-T-145-ENG, p 38 lines 8-25; p 39 line 1.

339 ICC-01/04-01/06-T-145-ENG, p 79 lines 13-24.

Witness 0007 was a former UPC soldier arrested at the beginning of 2003 when he was 15 years old and in his second year of secondary school. He served as a bodyguard to a commander in the UPC. He testified that there were girls and women, but not many, present in the UPC group that arrested him,³⁴⁰ and that there were boys and girls present in the Irumu camp.³⁴¹ The witness testified that there were girls in his training group who were his age and older.³⁴² Most of the time girls prepared the food, girls received the same training as the boys, and boys and girls slept in the same place.³⁴³ The witness testified that boys and girls were beaten with pieces of wood if they were unable to do the training exercises, and it was 'especially the girls that suffered a lot'.³⁴⁴ The witness testified that 'commanders took girls who were recruits and said, "Today you will come and sleep with me",' and that the girls, who the witnesses estimated were ages 16 and 17, were not allowed to say no.³⁴⁵

Witness 0007 told the court that there were girls, 'PMF', fighting alongside the boys in Bogoro.³⁴⁶ There were also women fighting in the battle of Lipri.³⁴⁷ According to the witness, after a battle the treatment of the village would depend on whether it was the same ethnic group – for Bogoro, the same ethnic group as the UPC, when they won a battle they would bury the dead.³⁴⁸ For a Lendu village such as Lipri, if they won the battle they would loot everything, and 'after the end of the battles, the higher-ranking soldiers took the Lendu women and took them as spouses', meaning that 'They slept with

340 ICC-01/04-01/06-T-148-ENG, p 28 lines 16-17.

341 ICC-01/04-01/06-T-148-ENG p 32 line 3.

342 ICC-01/04-01/06-T-148-ENG p 36 lines 6-12.

343 ICC-01/04-01/06-T-148-ENG p 39 lines 24-25, p 40 lines 1-4, p 42, lines 19-22.

344 ICC-01/04-01/06-T-148-ENG p 44 lines 9-13, lines 22-24.

345 ICC-01/04-01/06-T-148-ENG p 49 lines 15-22.

346 ICC-01/04-01/06-T-149-ENG, p 14 lines 15-17.

347 ICC-01/04-01/06-T-149-ENG, p 19 lines 23-25, p 20 lines 1-2.

348 ICC-01/04-01/06-T-149-ENG, p 26 lines 12-16.

them. They did everything with them.³⁴⁹ The witness testified that women could not refuse to sleep with these commanders. He stated, 'For instance, they could come back from the market and a group of five soldiers would call them "you shouldn't refuse".'³⁵⁰ The witness testified that two or three soldiers would sleep with one girl and then send her home 'without even giving her money', and that the commanders knew that the highest ranking soldiers were taking Lendu women to sleep with at Lipri, that 'everybody knew about it', and that it would be reported afterwards by the population to the commander and could be punished by the commander.³⁵¹

The witness also gave testimony about pregnancy and forced abortions. The witness stated, 'The decision to have an abortion was made by the commanders. The commander would say if a girl gets pregnant, she should no longer stay in the camp. But if a girl saw she got pregnant, she had an abortion [so as] not to be chased out of the camp.'³⁵² The witness testified that 'there weren't any facilities at the camp where they could have abortions. They did things themselves. They took medicine, traditional medicine to have an abortion. They had abortions alone.'³⁵³ He described witnessing a young girl from the Gegere ethnic group who 'tried to have an abortion and then got problems and died of these'.³⁵⁴

Witness 0294 was a former UPC commander and trainer. He had completed his sixth year of primary school when he entered the military at the age of 10, in 2000. He was training other recruits when he was 10 and 11 years old. He testified that there were girls at Mandro camp, including some girls who were younger than

him, and that it was difficult to tell the age of girls.³⁵⁵ The witness testified that in the camp everybody wore trousers and the girls' heads were completely shaved with a razor blade, 'so there was no difference from that point of view between the men and the women'.³⁵⁶ The witness testified that there was a practice of whipping both old and young recruits. He stated, 'There was no distinction in the treatment. We were treated on the same level of equality, if you like. There was no talk of an adult or a child or a boy or a girl. There was no difference, no distinction.'³⁵⁷ According to the witness, both boys and girls were asked to smoke hemp by their trainers, because 'they told us that a soldier had to behave in that way'.³⁵⁸

The witness testified that there was one girl, who he thought was aged 17 or 18 years old, among the bodyguards of the commander he was assigned to, and that the commander had a sexual relationship with that girl, and would sleep with her in his room from time to time.³⁵⁹ The witness told the Court that one of his jobs was to get women for the commander. 'If, for instance, the commander wanted a woman, he sent me out to get her and that's what I did. ... If it was a woman he wanted and somebody knew where she lived, then that person had to go and get her.'³⁶⁰ The witness told the Court that these women went into the commander's bedroom and he slept with them.³⁶¹ He estimated that the girls ranged in age from 'around 15' to '20, 22, 30'.³⁶² The witness testified that some women went willingly, others were forced to go, but 'they couldn't really refuse. It was hard for them to do that.'³⁶³ The witness

349 ICC-01/04-01/06-T-149-ENG, p 26 lines 16-25.

350 ICC-01/04-01/06-T-149-ENG, p 27 lines 4-8.

351 ICC-01/04-01/06-T-149-ENG, p 27 lines 16-25, p 28 lines 1-5.

352 ICC-01/04-01/06-T-150-ENG, p 35 lines 16-25, p 36 lines 1-2.

353 ICC-01/04-01/06-T-150-ENG, p 36 lines 6-9.

354 ICC-01/04-01/06-T-150-ENG, p 36 lines 10-14.

355 ICC-01/04-01/06-T-150-ENG p 35 lines 4-15.

356 ICC-01/04-01/06-T-150-ENG p 74 lines 8-13.

357 ICC-01/04-01/06-T-150-ENG, p 76, lines 11-23.

358 ICC-01/04-01/06-T-150-ENG, p 76, lines 15-24.

359 ICC-01/04-01/06-T-151-ENG, p 4 lines 14-15, p 5, lines 14-25, p 6, lines 1-3.

360 ICC-01/04-01/06-T-151-ENG p 9 line 25, p 10 lines 1-4.

361 ICC-01/04-01/06-T-151-ENG, p 10 lines 6-7.

362 ICC-01/04-01/06-T-151-ENG, p 10 lines 10-11.

363 ICC-01/04-01/06-T-151-ENG, p 10 lines 19-22.

also testified that, according to what he heard from the bodyguards of other commanders, they were also asked to arrest girls.³⁶⁴ The witness described an incident when he refused to get a girl for the commander, and his friend was sent to get the girl, and the commander gave an order for the witness to be whipped. After the girl came, however, the witness acknowledged to the commander that he had made a mistake and was instead punished by being sent outside to stare straight into the sun.³⁶⁵

Witness 0294 also described being with a girl soldier on the battlefield at Sangolo, and being in Bunia in a battle where ‘many children, girls, women’ died.³⁶⁶

Witness 0293 was a female witness who gave her testimony almost entirely in private or closed session. In open session the witness identified photographs of herself and her husband, and an identity card that she was forced to use for travel because her card ‘had been burnt during the events that took place’.³⁶⁷

Witness 0017 was a former UPC soldier who joined in 2002. He testified that there were both men and women soldiers, adults and children, in Mandro camp at the time he was there.³⁶⁸ He estimated that the children he saw in the camp were between 12 and 15 years old, based on the girls’ physical development, and the behaviour of the boys, some of whom ‘would cry for their mother at night’ and play children’s games during the day, ‘even if they had their weapons next to them. ... Their voice hadn’t yet broken, so they were children, they were children still’.³⁶⁹ The witness told the court about a rumour in respect to the commander Abelanga, who had reportedly abused a young girl from Mandro,

364 ICC-01/04-01/06-T-151-ENG, p 10 lines 23-25, p 11 lines 1-3.

365 ICC-01/04-01/06-T-151-ENG, p 11 lines 4-25.

366 ICC-01/04-01/06-T-151-ENG, p 23 lines 20-22, p 38 line 8.

367 ICC-01/04-01/06-T-153-ENG, p 26 lines 8- 22.

368 ICC-01/04-01/06-T-154-ENG, p 29, lines 2-11.

369 ICC-01/04-01/06-T-154-ENG, p 41 lines 12-25.

who was one of his bodyguards. The witness testified that another commander found this ‘intolerable’, but that the girl remained part of Abelanga’s troops.³⁷⁰

The witness testified that the girls carried weapons once they were ‘in service’, and dressed in civilian clothes.³⁷¹ He told the Court that at Lalo and within the Salumu Brigade, some of the girls were under 15, and that all the girls he saw at Lalo were at the commander’s house, as uniformed bodyguards. He stated, ‘It was difficult to eat, it was difficult to find shelter at Lalo. The situation was difficult and they ended up with the commanders.’³⁷² The witness described a Kadogo unit created by the Chief of Staff in Mamedi, of a little less than 45 children under the age of 15, in which there were two girls at the beginning, one of whom was with the Chief of Staff, both of whom he estimated were 13 or 14 years old. He gave the girls’ names as ‘the little Mave’ and Francine.³⁷³

Witness 0012 was a former political leader/senior official with a political group in the Ituri region of DRC. He testified that during the battle for Bunia on 12 May 2002, children were at the front lines, including girls belonging to the UPC. He stated, ‘There were also young girls, young girls that were everywhere. When they entered the city they were there.’³⁷⁴

Witness Serge Kilo Ngabu was a social worker with SOS Grands Lacs, the Congolese children’s rights NGO that was sent to Bunia by UNICEF to assist in the demilitarisation and reintegration of 134 Congolese child soldiers from Tchaquanza in Uganda. He testified that in this group there were only two girls, and estimated that their ages were 12 to 15 years.³⁷⁵ The witness was

370 ICC-01/04-01/06-T-154-ENG, p 29 lines 18-23.

371 ICC-01/04-01/06-T-154-ENG, p 42, lines 3-7.

372 ICC-01/04-01/06-T-154-ENG, p 82 lines 5-17.

373 ICC-01/04-01/06-T-158-ENG, p 26 lines 6-21, p 27 lines 7-16.

374 ICC-01/04-01/06-T-168-ENG, p 77 lines 11-12.

375 ICC-01/04-01/06-T-170-ENG, p 65 lines 4-16, p 66 line 2.

unable to give further details about the role of girls within the armed group, due to his limited contact with them.

Witness 0055 was a former junior commander in the UPC. He testified that he saw girls, referred to as ‘PMF’, among more than 100 troops in one location, and that girls were recruited and present at a training camp.³⁷⁶ The witness did not provide any identifying information about this location or training camp in open testimony. The witness told the Court that with respect to training, ‘There was no difference between males and females. The training was the same.’³⁷⁷ The witness also told the court that the punishments were meted out without distinction. He stated, ‘I’ve never heard anything about different forms of punishment that depended on whether one was a child or not, on whether one was a woman.’³⁷⁸

According to informal summaries prepared by CICC trial observers, Witness 0055 went on to

testify that girls who were working as bodyguards for different UPC officers wore military uniforms and also carried weapons. Regarding the age of these girls, the witness stated he was unable to specify, but that they were of different ages. The witness explained that not all the girls served as bodyguards and that some helped commanders by carrying out ‘feminine tasks’ such as cooking and cleaning.³⁷⁹

The witness clarified that ‘feminine tasks’ also involved in the routine tasks within an army and that these girls could also participate in combat, serve as guards or carry out patrols. The witness told the Court that

while visiting training camps he had heard of sexual violence occurring against girl soldiers, such as rape, sexual slavery,

376 ICC-01/04-01/06-T-174-ENG, p 38 lines 9-17; ICC-01/04-01/06-T-175-ENG, p 74, lines 8-14.

377 ICC-01/04-01/06-T-176-ENG, p 28 lines 4-8.

378 ICC-01/04-01/06-T-176-ENG, p 35 lines 2-11.

379 CICC Informal Summary, 26 May 2009.

forced impregnation. The witness added, however, that although he did receive complaints along such lines, it did not mean that it was something that occurred frequently. The witness explained that sometimes soldiers would get married and sometimes there were relationships that would lead to pregnancy.³⁸⁰

Witness 0055 also testified about the ‘punishment of cooking’, stating ‘that this punishment had been given because cooking was a very difficult task in Africa’, and that girl soldiers would cook for small and large numbers of commanders and soldiers.³⁸¹

Witness 0157 was a male witness who was not identified in open session. He described being beaten with whips, along with all of the other new recruits, immediately upon their arrival at the Mandro training camp.³⁸² He saw both boys and girls singing and doing exercises when he arrived at the camp.³⁸³ Girls formed part of a group of recruits, including the witness, which was separated out from the other recruits after arrival. The witness testified that there were two girls his age and there were also two girls older than him.³⁸⁴ According to the witness, the training received by boys and girls at the camp was the same.³⁸⁵

Witness 0016 was not identified in public session and there are no transcripts available for his testimony at the time of the publication of this report. According to informal summaries prepared by CICC trial observers, Witness 0016 testified that there were girls under the age of 17 in the Mandro camp who carried out the duty of cooking in the morning and evening along with their regular duties. The witness also told the Court that the guards in the unit responsible

380 CICC Informal Summary, 26 May 2009.

381 CICC Informal Summary, 26 May 2009.

382 ICC-01/04-01/06-T-186-ENG, p 7 lines 16-25; p 8 lines 1-19.

383 ICC-01/04-01/06-T-186-ENG, p 9 line 1.

384 ICC-01/04-01/06-T-186-ENG, p 10 lines 3-9.

385 ICC-01/04-01/06-T-186-ENG, p 37, lines 23-25.

for guarding Lubanga included armed boys and girls aged 14 and 17.³⁸⁶ The witness testified that trainers would rape the recruits secretly in the training centre of Mandro. According to the summaries, 'He said he could not determine the age of the girls. He confirmed that it was a common practice in the camp among the high ranking staff and even instructors to use the young girls in their residences as domestic servants. He added that they [were] used for all purposes. He concluded by saying that the commander of the centre and some senior officers were aware that rapes were taking place.'³⁸⁷

Witness 0089 was a former UPC military trainer who received training in Uganda. He was arrested as a deserter at age 17 in 2002. He testified that he was arrested at Barriere, in a group that included only boys.³⁸⁸ He later acted as a trainer at the Mandro camp, training a group of 80 persons, again all boys.³⁸⁹ The witness described how his group diminished over time, from desertions, and in one instance because two mothers came and paid the centre commander to take two children from the group.³⁹⁰ The witness later testified that there were girls at the training centre, who, from what he noticed, 'did not undergo training like the others', but who did laundry and cooking for the commanders.³⁹¹ The witness told the court that there were commanders who 'liked girls'. He stated, 'There were commanders who took girls as women. They would get them pregnant, and these girls then had to leave the camp and go to the village.'³⁹² He recalled two commanders who got girls pregnant, one named Musiga Muleke who got a girl named Goretti pregnant, who subsequently had the child. The witness told the

386 CICC Informal Summary, 10 June 2009.

387 CICC Informal Summary, 12 June 2009.

388 ICC-01/04-01/06-T-195-ENG, p 16, lines 20-24.

389 ICC-01/04-01/06-T-195-ENG, p 36, lines 3-21.

390 ICC-01/04-01/06-T-195-ENG, p 37, lines 11-25; p 38, lines 1-16.

391 ICC-01/04-01/06-T-196-ENG, p 7, lines 11-21.

392 ICC-01/04-01/06-T-196-ENG, p 7, lines 23-24 ; p 8, lines 2-3.

Court that the girl was very young, under the age of 17.³⁹³ The witness testified that it 'had to be accepted' when a commander wanted a girl. He told the Court, 'You know, in the centre you had to obey orders whether you wanted to or not, because they said – well, the recruits weren't considered as human beings.'³⁹⁴

The witness estimated that there were girls both younger and older than himself in the camp, including some who were 14 or 15 years old.³⁹⁵ The witness told the Court that if a girl got pregnant, she had to leave the camp. He stated, 'I said that if a girl was pregnant, if a PMF was pregnant, well, what was there for her to do in the army?'³⁹⁶

Witness 0031, who was not identified in open court, testified for a number of days for which transcripts were not available at the time of publication of this report. According to informal summaries prepared by CICC trial observers, on a day that was held almost entirely in private session, the witness told the Court in open session that he saw a number of young girls in an unidentified camp.³⁹⁷ The witness also testified about difficulties reintegrating former child soldiers into their communities, and that communities would not always accept child soldiers who had committed crimes, such as rape.³⁹⁸ Witness 31 testified that 'children belonging to the UPC participated in crimes varying from acting as scouts to participating in murder and rape'.³⁹⁹

Witness 0031 did answer questions in open court from a legal representative for victims about the situation of children, and girls in particular, who were demobilised from armed groups. The witness told the court that

393 ICC-01/04-01/06-T-196-ENG, p 8, lines 6-16.

394 ICC-01/04-01/06-T-196-ENG, p 8, lines 21-25.

395 ICC-01/04-01/06-T-196-ENG, p 9, lines 7-22.

396 ICC-01/04-01/06-T-196-ENG, p 10, lines 3-7.

397 CICC Informal Summary, 25 June 2009.

398 CICC Informal Summary, 26 June 2009.

399 CICC Informal Summary, 30 June 2009.

Girls are the most vulnerable persons, the most vulnerable among the child soldiers. As I said some time ago, these girls, once they are enlisted into the armed groups they faced a lot of constraints. They were taken as concubines, used as the wives of their commanders. They were raped -- in fact, most of the girls were raped. Certain girls came back with babies. So their reintegration was not very easy. The shame that came with all of that, especially with respect to the child, the rejection by the community which tended to remind the girl of the situation she had gone through in the armed group. Even their behaviour, you know, most of the girls ended up being prostitutes within the society. Some girls returned with diseases, they returned with sexually transmittable infections. Every time we did medical tests we found girls with sexually transmittable infections. And so it was difficult, it was difficult for these girls to be easily reintegrated into the community, and they continue to face these constraints up to today.⁴⁰⁰

The witness estimated that six out of 10 girls would be rejected by their communities when they tried to reintegrate. Those six would become prostitutes to support themselves, and therefore become a 'problem for the community'.⁴⁰¹ The witness described how girls would have difficulty adapting to community life after life with a UPC armed group, where they had taken drugs. He told the Court that they would become 'arrogant' and 'rebellious' when they were unable to adapt.⁴⁰² The witness stated that girls with 'humility' who 'put their heads down' and remembered how to interact with their community and their parents had the greatest chance of success.⁴⁰³ The witness

400 ICC-01/04-01/06-T-202-ENG, p 10 lines 12-25, p 11 lines 1-3.

401 ICC-01/04-01/06-T-202-ENG, p 11 lines 9-18.

402 ICC-01/04-01/06-T-202-ENG, p 12.

403 ICC-01/04-01/06-T-202-ENG, p 12 lines 10-16.

also told the court that it was important to encourage girls not to focus on their past but to look to the future to increase their chances of success.⁴⁰⁴

Witness 0046 was Kristine Peduto, a former Child Protection Adviser for MONUC, who worked in Bunia and Ituri in 2002–2003. The majority of her testimony summarised here was given in response to questions put by M. Diakese, a Legal Representative for Victims. Based on her contact with and interviews of former child soldiers, the witness testified about the conditions experienced by girls with the armed groups:

Well, the condition the girls were in was worse than the condition the boys were in very often. Apart from the fact that they would often participate in all the activities that the boys participated in, they also had to cook, prepare food for the officers. They had to spend the night with them. So the situation the girls was [sic] in was a lot more worrying. It was terrible.⁴⁰⁵

The witness also testified that the transit centres where the children were sent on being released from the armed groups could suffer from tensions between children from different armed groups, and that in one centre a young girl was abused by one of the other children.⁴⁰⁶

With respect to the experience of young girls generally, Peduto testified that 'the sexual abuse perpetrated against young girls was quite prevalent'. She testified that she did not have testimony from boys who were sexually abused, while cautioning the Court that this did not mean that boys weren't sexually abused. The witness told the Court that one or two of the girls had told her that 'they had been protected by certain women who were present

404 ICC-01/04-01/06-T-202-ENG, p 13 lines 3-14.

405 ICC-01/04-01/06-T-207-ENG, p 21, lines 12-17.

406 ICC-01/04-01/06-T-207-ENG, p 28, lines 15-22.

in the camp', but that otherwise sexual abuse was experienced by all the girls with whom she worked. She stated:

A young girl told me that she was not sexually abused ... she feels that it was because there was an adult woman who was around. All the young girls stated they had been sexually abused by their commanders most often or sometimes by -- by other soldiers. Some of them had -- or got pregnant as a result of such intercourse. Some of them had abortions, voluntary or involuntary, and some of these abortions were due to poor living conditions. And the accounts of the boys and the girls made it clear that this was a systematic conduct. The girls had to systematically spend the night in a separate area, and they were forced to spend the night with the officers. Some of the young girls presented this as -- that they will present their first experience as a marriage. They would say -- they would think -- they would talk about their first companion or their first legitimate relationship. That's the way they perceived it. So they said that after they had that first contact which they thought was legitimate and then they were handed over to another commander, it was then that it dawned on them that this was not a legitimate relationship they had established with the first officer. So in the first instance they did not feel that this was sexual abuse. And the state of some of these young girls was quite terrible. I'm talking about their psychological and physical state which was quite catastrophic.⁴⁰⁷

Peduto told the Court that the victims were of all ages, and that the youngest girl she interviewed was subjected to sexual abuse at the age of 12.

⁴⁰⁷ ICC-01/04-01/06-T-207-ENG, p 30 lines 14- 25; p 31 lines 1-18.

She told the Court that it was 'perfectly possible' that there could have been girls under the age of 12 who might have been abused, but to whom she did not have access. She testified that 'the girls appear to be a lot more fragile, and their situation was a lot more delicate than the situation of the boys', and that therefore she would refer them to the appropriate care structure and not hold interviews with them.⁴⁰⁸ The witness testified that girls she encountered would need emergency medical care as a result of several abortions, or be undernourished as a result of not receiving adequate care during pregnancy during months or years with an armed group.⁴⁰⁹

Peduto testified that the details of the abortions were not within her mandate to discuss with the girls, but that they nonetheless told her about them. She stated:

One of them said that she sustained an abortion. It was involuntary. It stemmed from the difficult living conditions or difficult conditions under which they were living. Others said they had -- they had engaged in voluntary abortion. At least one of them did so, because the person who fathered the child had died. But personally, I did not go into details on how such abortions were committed. The social workers and the psychologists probably got into such details, but it wasn't my mandate to discuss such details.⁴¹⁰

When a girl who was with an armed group became pregnant, she would not get any 'maternity leave', but were sometimes 'thrown out'. She stated:

However, some of them said that they were then rejected within the group; that is, they were thrown out. That's the

⁴⁰⁸ ICC-01/04-01/06-T-207-ENG, p 35 lines 18-25 ; p 36 lines 1-8.

⁴⁰⁹ ICC-01/04-01/06-T-207-ENG, p 36 lines 13-20.

⁴¹⁰ ICC-01/04-01/06-T-207-ENG, p 36 line 25; p 37 lines 1-7.

expression they used. Some of them came away with the feeling that they were rejected. They said that they felt thrown out when they were no longer useful, useful for combat, and when they could no longer satisfy the sexual pleasures of those who were subjecting them to sexual abuse. So they did not view this as maternity leave as such. Others ended up in the streets of Bunia without feeling that they were, like, estranged from the movement. Some of them went to Bunia to be with their relatives, but they still felt a part of the UPC, and some of these girls were then taken into care, but they didn't talk about any mention of maternity leave or any support given to them. There was one case where a structure that received such girls was threatened, so the girl was reunited with her family through that structure, and the structure was threatened by the soldiers of the UPC because the girl had contacted the specialised structure in order to get some assistance, some support.⁴¹¹

The witness told the court that after giving birth or having an abortion, some of the girls would join the armed group again. She testified that there were difficulties reuniting girls with their families or reinserting them into their communities. She stated:

They were stigmatised. Often they had children whose fathers were not present. Frequently they had very low self-esteem, and there were families burdened with children. So re-inserting these girls was difficult. There was a lot of work that had to be done. A lot of mediation had to be provided so that not only the biological family but the community would accept them without stigmatising them in any particular way.⁴¹²

411 ICC-01/04-01/06-T-207-ENG, p 37 lines 12-25 ; p 38 lines 1-3.

412 ICC-01/04-01/06-T-207-ENG, p 39 lines 12-18.

In response to questions from the Chamber, Peduto explained that she uses the term 'child associated with armed groups' because the term 'child soldier' is too restrictive, and does not cover all the activities carried out by children when they are associated with armed groups. She mentioned such examples as: 'children who are used as informers, children who are used in logistical activities, used as drivers, as bodyguards, and children who are subjected to sexual abuse by the members of militia groups or armed groups'.⁴¹³ She told the Chamber that they obtained testimonies on all the armed groups that subjected young girls to sexual abuse and that 'most of those who were associated with the UPC were not only used for sexual purposes but also used in combat or in logistical activities'.⁴¹⁴ She testified, based on her interviews, that while girls received 'exactly the same type of training' as boys, they were also involved in cooking, and 'they had to spend the night with the commanders'.⁴¹⁵

Peduto told the Court about three cases of children who were eyewitnesses to their colleagues' executions for trying to escape or refusing to go into combat:

The third case was reported by a young girl aged 15 whom we interviewed at the end of 2003, who was recruited in the first half of 2002. She told us that one of her friends who escaped from the UPC was killed on the pretext that she did not obey the orders of the president. This child who was killed was aged 14. She was a young girl.⁴¹⁶

Witness 0116, an unidentified male, testified largely in closed session. In open session he testified about the transfer of 700 people from Bunia to Uganda, including approximately 165 children, for military training. The witness told the Court that, of these children, only two girls came back, but 'there were other girls who stayed in the Tchankwanzi camp, who did not have the opportunity to get out because they were hidden'.⁴¹⁷

413 ICC-01/04-01/06-T-209-ENG, p 9 lines 1-9.

414 ICC-01/04-01/06-T-209-ENG, p 9 lines 19-23.

415 ICC-01/04-01/06-T-209-ENG, p 10 lines 5-11.

416 ICC-01/04-01/06-T-209-ENG, p 28 lines 16-21.

417 ICC-01/04-01/06-T-209-ENG, p 76 lines 7-24.

Expert witnesses

Trial Chamber I heard testimony from five expert witnesses over the course of the Prosecution case: three called by the Prosecution, and two called by the Chamber. Expert witnesses were called pursuant to the 10 December 2007 order of the Trial Chamber, allowing the parties to instruct experts to provide reports and evidence.⁴¹⁸ Under Regulation 44 of the Regulations of the Court, the Chamber itself also has broad latitude to instruct experts, as well as to order the participants to jointly or separately instruct experts under Regulation 54(m).

G rard Prunier testified as an expert witness for the Prosecution on 26 and 27 March 2009. Prunier has a Ph.D in African history, researching East and Central Africa as well as the Great Lakes Region of Africa. In May 2008, he was requested by the Office of the Prosecutor to provide a report on the history, characteristics and features of the conflict in the Ituri region of the North-Eastern DRC. In June 2008, his report was completed and filed as evidence in the Lubanga case. Prunier appeared before the Chamber to answer questions arising from his report. Cross-examination highlighted the inter-state nature of the conflict in Ituri and the role played by neighbouring states — in particular Uganda and Rwanda — in backing the various militia groups fighting for control of Ituri. Prunier’s evidence also highlighted the frequent shifts between the militia groups, as well as between the groups and their foreign-state backers.

At the end of his testimony, in response to questions from the Chamber about girl soldiers, Prunier admitted that he did not know if there were girls involved in the conflict in Ituri.⁴¹⁹ The Chamber also questioned Prunier about the role of rape and sexual violence in the general context of the conflict in Ituri. Again the expert told the court that he would not be able to speak to this issue authoritatively, but that he did have an impression that there were cases of rape. The

expert told the Court that he ‘cannot imagine that you will have a war without rape’.⁴²⁰ However, the expert stressed that he did not know whether it was a systematic policy in the conflict in Ituri.⁴²¹

Dr Elisabeth Schauer testified as an expert witness for the Chamber on 7 April 2009. Schauer is a Clinical Psychologist with a focus on trauma treatment in crisis regions and specialising in the fields of psychotraumatology, women’s and children’s health, and violence and human rights. Her expert report on the psychological impact of child soldiering was completed and filed as evidence in the Lubanga case in February 2009 at the request of the Chamber.⁴²²

Schauer took the witness stand to answer questions arising from her report. Responding to questions from the Prosecution, Schauer told the Court that, in most populations worldwide, girls show higher overall rates of Post-Traumatic Stress Disorder (PTSD) than boys, and that this is because girls are exposed earlier and more frequently to the types of traumatic experiences most likely to trigger PTSD. She also testified that, in contrast to boys who develop PTSD, girls are more likely to internalise their suffering, leading to co-morbid depressive symptoms.⁴²³ Responding to questions from the Office of the Public Counsel for Victims, Schauer spoke of the difficulties experienced by child soldiers attempting to reintegrate into their communities after the conflict, stressing the particular difficulties of former girl soldiers returning to their communities with babies born as a result of forced ‘marriages’.⁴²⁴

Schauer’s report noted that almost 40 percent of child soldiers worldwide were girls.⁴²⁵ In response to questions from the Defence Counsel, she conceded that this figure was quoted from a specific source and that she did not know whether it was accurate for militia groups operating in the Eastern DRC during the relevant period.⁴²⁶ Schauer told the

418 ICC-01/04-01/06-1069.

419 ICC-01/04-01/06-T-157-ENG, p 36 lines 15-16.

420 ICC-01/04-01/06-T-157-ENG, p 37 line 6.

421 ICC-01/04-01/06-T-157-ENG, p 37 line 15-16.

422 ICC-01/04-01/06-1729.

423 ICC-01/04-01/06-T-166-ENG, p 48-49.

424 ICC-01/04-01/06-T-166-ENG, p 76-77.

425 ICC-01/04-01/06-T-166-ENG, p 12 lines 3-4.

426 ICC-01/04-01/06-T-166-ENG, p 84-85.

Court that girls who have been raped show very high rates of PTSD and that rape is among the most predictive events causing PTSD in girls.⁴²⁷ She confirmed that, in her opinion, a girl who is abducted by a militia group, and becomes a commander's 'wife' but never takes part in combat, can still by definition be considered a child soldier.⁴²⁸ Finally, she noted the lack of availability of appropriate PTSD therapy anywhere in Eastern DRC.⁴²⁹

Roberto Garretton, a Chilean Lawyer and former Special Rapporteur for the UNHCHR in Zaire (now DRC) testified as an expert witness for the Chamber on 17 and 19 June 2009. Garretton told the court that in his experience girls were also used as soldiers, but that he did not see them the few times he saw uniformed child soldiers. He stated that in reports they were 'usually mentioned as sexual objects'.⁴³⁰ He also recalled that girls were recruited 'for the officials'.⁴³¹ He clarified that this meant girls were 'recruited for the sexual benefit of those who had recruited them', and that 'essentially it was Ugandans doing this'.⁴³² Garretton testified that he was not there in wartime to see soldiers pick up women and children at the end of a battle, but that 'he knew that there was a lot of recruitment and a lot of violence against women'.⁴³³ He mentioned an incident where in another territory of the DRC women were burned or buried alive after being accused of witchcraft. He also told the court that he had received reports of Uganda knowingly sending soldiers infected with AIDS to the Congo in order to spread AIDS among Congolese women.⁴³⁴ When asked generally where his information came from, Garretton told the Court that his sources for his reports to the Human Rights Commission and UN General Assembly included interviews with women's organisations, human rights organisations, UN staff, UN

427 ICC-01/04-01/06-T-166-ENG, p 94-95.

428 ICC-01/04-01/06-T-166-ENG, p 95-96.

429 ICC-01/04-01/06-T-166-ENG, p 96 lines 21-25; p 97 lines 1-15.

430 ICC-01/04-01/06-T-193-ENG, p 75 lines 17-25.

431 ICC-01/04-01/06-T-193-ENG, p 76 line 2.

432 ICC-01/04-01/06-T-194-ENG, p 34 lines 6-12.

433 ICC-01/04-01/06-T-194-ENG, p 76 lines 9-10.

434 ICC-01/04-01/06-T-193-ENG, p 76-77.

agencies, general human rights associations and organisations, lawyers, bishops, priests, 'church fathers', and written reports.⁴³⁵

The Chamber asked Garretton to 'illustrate the scale of sexual violence exerted against women and girls during these conflicts'.⁴³⁶ He responded that it was very hard to do this, and that rapes of Congolese women were committed by Rwandan soldiers in the first war, and by the Zairian Armed Forces in both times of war and peace. He told the court of the 2005 rape of 200 women by 14 soldiers, who were then sentenced to 'ridiculous penalties' and served no time in jail because 'the doors to the cells were left open'.⁴³⁷ Garretton told the Court that 'this is a culture based on the needs of the military in Congo, ie the armed forces set up by Mobutu. Let's not forget this point. And they're the ones who committed such atrocious crimes. This occurred also in Ituri'.⁴³⁸

Professor Catherine Adamsbaum, a pediatric radiologist, testified as an age-determination expert for the Prosecution on 12 and 13 May 2009.⁴³⁹ Adamsbaum explained methods of assessing bone age through x-ray imagery. She then gave the Court evaluations of x-rays of the bones and teeth of a number of prosecution witnesses, and her assessment of their age at the time of the radiograph.

Dr Caroline Rey-Salmon, a pediatrician and forensic doctor, testified as an age-determination expert for the Prosecution on 13 May 2009.⁴⁴⁰ Rey-Salmon's testimony focused on methods of age-determination through dental x-rays. She also provided the Court with evaluations of the x-rays of a number of prosecution witnesses.⁴⁴¹

435 ICC-01/04-01/06-T-194-ENG, p 35-36.

436 ICC-01/04-01/06-T-194-ENG, p 46 lines 22-24.

437 ICC-01/04-01/06-T-194-ENG, p 47 lines 8-11.

438 ICC-01/04-01/06-T-194-ENG, p 46-47.

439 ICC-01/04-01/06-T-172-ENG; ICC-01/04-01/06-T-173-ENG.

440 ICC-01/04-01/06-T-173-ENG.

441 The question of age-determination for the witnesses is relevant because Lubanga is charged with the crime of enlisting and conscripting children under the age of 15 years and using those children to participate actively in the hostilities.

Notification that the legal characterisation of the facts may be subject to modification under Regulation 55

On 22 May 2009, Legal Representatives of Victims participating in the Lubanga trial requested that the Trial Chamber consider modifying the legal characterisation of facts presented by the Prosecution, adding inhuman and cruel treatment and sexual slavery to the existing characterisation.⁴⁴² The Legal Representatives' application requested the Chamber to use Regulation 55 of the Regulations of the Court, which provides that the Chamber may change the legal characterisation of the facts in its decision under Article 74 (its decision on the charges based on the evidence presented before it during the trial).⁴⁴³

442 In their filing, the Legal Representatives outlined a number of instances of witness testimony that they argued showed widespread and/or systematic inhuman and/or cruel treatment of recruits, among them the testimony of witness OTP 0007, describing 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 noted that the widespread and/or systematic practice of using girls, including girls under the age of 15, against their will, as wives or sexual slaves of commanders of the UPC/FPLC, had been confirmed to date by two former militia members, witnesses OTP 0299 and OTP 0017, and also by six former child soldiers, witnesses OTP 0038, OTP 0298, OTP 0010, OTP 0011, OTP 0007, and OTP 0294. They noted that the widespread and/or systematic practice by which soldiers from the UPC/FPLC, including child soldiers under 15 years, 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' had been confirmed to date by three former child soldiers, witnesses OTP 0213, OTP 0008, and OTP 0294. ICC-01/04-01/06-1891, paras 33-34.

443 The application was filed by the Legal Representatives after oral notice of plans for such a filing was provided to the Chamber, Prosecution and Defence in the 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.

The Trial Chamber requested and received observations from the parties and participants on the issues raised in the Legal Representatives' filing.⁴⁴⁴ The Prosecution allowed that the procedure requested by the Legal Representatives was possible at this early stage of the Trial, provided that in changing the legal characterisation of the facts, the Chamber did not exceed the facts and circumstances contained in the charges.⁴⁴⁵ The Prosecution also noted that, even if the Chamber did not add these charges, if it convicts Lubanga on the existing charges, the Chamber should consider the evidence regarding sexual slavery, cruel treatment, or inhuman treatment when determining the appropriate sentence. The Defence response put forward a more restrictive interpretation of Regulation 55, arguing that it exists for the sole purpose of allowing errors in the legal categorisation of the facts to be corrected and even in those cases would be limited to the substitution of a lesser charge for a more serious charge.⁴⁴⁶ Any other form of re-characterisation would require the amendment to the indictment prior to trial, in order to preserve the rights of the accused.

On 14 July 2009, Trial Chamber I issued a decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change (14 July Majority Decision).⁴⁴⁷ Judge Odio Benito and Judge Blattmann issued the decision; and a separate dissent by Judge Fulford followed on 17 July (discussed below). The majority opinion held that Regulation 55(2) grants the Trial Chamber the power to change the legal characterisation of facts at any time during the trial, as long as it provides proper notice to the parties and ensures appropriate safeguards

444 Prosecution initial response [ICC-01/04-01/06-1918] and further observations [ICC-01/04-01/06-1966]; Defence response [ICC-01/04-01/06-1975]; Legal Representatives response [ICC-01/04-01/06-1998; see also ICC-01/04-01/06-2049, para 21].

445 ICC-01/04-01/06-1966, para 17 (emphasis added).

446 ICC-01/04-01/06-1975.

447 ICC-01/04-01/06-2049.

in accordance with the rights of the accused to a fair trial. The Chamber was persuaded, based upon the submission by the Legal Representatives and the evidence heard to date at trial, that the legal characterisation of the facts in the Lubanga case may require change.

The majority reached its decision by severing the provisions of Regulation 55(1) from 55(2) and (3), finding that the Regulation ‘sets out the powers of the Chamber in relation to two distinct stages’.⁴⁴⁸ In its view, Regulation 55(1) describes the requirements for the Chamber’s *final* judgement, and this provision alone is subjected to the limitation that the power to change the legal characterisation of facts must be done ‘without exceeding the facts and circumstances described in the charges and any amendments to the charges’.⁴⁴⁹ In contrast, Regulation 55(2) ‘applies “at any time during the trial”’.⁴⁵⁰ Because the Regulation concerns two different stages of the proceedings, the latter provision is not subject to the limitation set forth in 55(1).

Under the majority’s interpretation, although the Chamber is free under Regulation 55(2) to modify the legal characterisation of facts, which may exceed the facts and circumstances described in the confirmed charges, it must ensure that the safeguards enumerated by Regulation 55(2) and 55(3) are respected. These include provision of adequate time and resources for the preparation of the defence and the opportunity to examine witnesses or present evidence in response to the new characterisation of facts. According to the majority, it is ‘self-evident’ why 55(2) has different requirements from 55(1), because the need to call witnesses or present evidence is only necessary when a new factual basis is presented during the trial phase, not when the Trial Chamber applies 55(1) to modify the legal characterisations contained within the charging documents.⁴⁵¹

448 ICC-01/04-01/06-2049, para 27.

449 ICC-01/04-01/06-2049, para 28, citing Article 74 and Regulation 55.

450 ICC-01/04-01/06-2049, para 28.

451 ICC-01/04-01/06-2049, para 30.

The Chamber found that the ‘trigger’ for providing notice to the parties under Regulation 55(2) is the ‘Chamber’s finding that the legal characterisation of the facts may be subject to change’.⁴⁵² It declined to establish a procedure for allowing oral or written submissions from the parties or participants, deferring this opportunity until ‘an appropriate stage of the proceedings’.⁴⁵³ Similarly, the Chamber determined that it would hold a hearing on possible modification ‘in due course’.⁴⁵⁴

On 17 July 2009, Judge Fulford issued a dissent to the 14 July Majority Decision.⁴⁵⁵ Judge Fulford’s view, based on an examination of Regulation 55 within the ‘overall context’ of the Rome Statute and the Rules, reflects an understanding of the provision as ‘an indivisible or singular process’.⁴⁵⁶ He concluded, based on a reading of Articles 74(2) (the requirement that the decision of the Trial Chamber shall not exceed the facts and circumstances described in the charges or amendments thereto) and 61(9) (the powers of the Pre-Trial Chamber to amend charges before trial and the Trial Chamber to withdraw charges), that the powers to frame and amend charges lie exclusively with the Pre-Trial Chamber. Consequently, ‘a modification to the legal characterisation of the facts under Regulation 55 must not constitute an amendment to the charges, an additional charge, a substitute charge or withdrawal of a charge, because these are each governed by Article 61(9)’.⁴⁵⁷ He questioned whether a modification of the legal characterisation of the facts was really possible without also amending the charges on which they were based. In his view, this was a question of fact, to be determined on a case-by-case basis.

452 ICC-01/04-01/06-2049, para 33.

453 ICC-01/04-01/06-2049, para 34.

454 ICC-01/04-01/06-2049, para 34.

455 ICC-01/04-01/06-2054. Subsequent decisions were issued correcting clerical errors in paras 6, 36, 40, 42, and 49 in the dissenting opinion: ICC-01/04-01/06-2061 and ICC-01/04-01/06-2069, with the final corrected dissenting opinion as ICC-01/04-01/06-2069-Anx1.

456 ICC-01/04-01/06-2054, paras 5, 53.

457 ICC-01/04-01/06-2054, para 17.

According to Judge Fulford, severing 55(1) from 55(2) would result in the failure to provide sufficient safeguards to the accused in the application of 55(2). Looking to the statutory provisions concerning the rights of the accused, he asserted that the majority's reading of Regulation 55 contradicts these core statutory protections, which 'tend towards finality and certainty as regards the charges, rather than to flexibility'.⁴⁵⁸ In his view, the safeguards set forth in Regulation 55(2) and (3) must also apply to sub-regulation (1) to ensure that the accused is informed promptly and in detail of the nature, cause and content of the charge as prescribed by Article 61(9).

The dissenting opinion concluded that the Legal Representatives did not seek a modification of the legal characterisation of the facts, but rather that 'the five proposals involve changes to the Document containing the charges of such a wide-ranging and fundamental nature that they constitute additional charges',⁴⁵⁹ some of which contain more serious offences and therefore threaten a longer criminal sentence. As such, he found that notice should not be issued under Regulation 55, but rather the Prosecutor should assess whether an amendment of the charges is appropriate, and if so, seek confirmation from the Pre-Trial Chamber. Judge Fulford disagreed with the majority's reading of 55(1) and 55(2) and (3) as separate provisions, and stated, 'it would be appropriate for the Appeals Chamber to consider an application for suspensive effect of the majority Decision to enable the trial to proceed on the basis of the current charges, as presently formulated, until any appeal is determined'.⁴⁶⁰

458 ICC-01/04-01/06-2054, para 24.

459 ICC-01/04-01/06-2054, para 43.

460 ICC-01/04-01/06-2054, para 54.

On 11 August 2009, the Defence filed its request to appeal the 14 July Majority Decision.⁴⁶¹ The next day, the Prosecution also filed its application for leave to appeal the decision,⁴⁶² and on 17 August 2009 it filed a response to the Defence application.⁴⁶³ The victims' legal representatives filed their response to the parties' request for leave to appeal on 17 August 2009.⁴⁶⁴

On 27 August 2009, Trial Chamber I issued a decision clarifying the 14 July Majority Decision⁴⁶⁵ In this decision, issued by a majority of the Chamber, Judges Odio-Benito and Blattmann clarified that '(1) the facts and circumstances indicated by the legal representative of the victims and (2) the legal characterisations proposed by them were the basis for triggering the proceedings prescribed in Regulation 55(2) and (3)'.⁴⁶⁶ Accordingly, the scope of the facts the Chamber decided to consider under the Regulation 55 procedure are those listed by the Legal Representatives in their 22 May application, which focus on acts of sexual violence perpetrated against girls who were forcibly recruited into the UPC/FPLC.⁴⁶⁷ Accordingly, the new legal characterisations of the facts include: sexual slavery as a crime against humanity⁴⁶⁸; sexual slavery as a war crime in the context of an international armed conflict⁴⁶⁹; sexual slavery as a war crime in the context of an internal armed conflict⁴⁷⁰; inhuman treatment as a war crime⁴⁷¹; and cruel treatment as a war crime.⁴⁷²

461 ICC-01/04-01/06-2073.

462 ICC-01/04-01/06-2074.

463 ICC-01/04-01/06-2080.

464 ICC-01/04-01/06-2079.

465 ICC-01/04-01/06-2093.

466 ICC-01/04-01/06-2093, para 7.

467 ICC-01/04-01/06-2093, para 7, citing ICC-01/04-01/06-1891.

468 Article 7(1)(g).

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

470 Article 2(e)(vi).

471 Article 8(2)(a)(ii).

472 Article 8(c)(1). ICC-01/04-01/06-2093, para 7.

Recalling the 14 July Majority Decision, the Chamber explained its reasons for applying the Regulation 55 procedure:

In the view of the Majority of the Chamber, Regulation 55 is a unique device, carefully drafted blending different legal traditions while at the same time remaining consistent with recent human rights jurisprudence regarding the defendant's rights to a fair trial and satisfying the particular demands of international criminal justice and the interest in the search of the truth Regulation 55 provides for a procedure that balances each of these concerns, thereby creating a unique procedural regime in accordance with the context of the Statute. As explained in the Majority Decision, Regulation 55(2) allows for the incorporation of additional facts and circumstances provided that notice to the participants is granted and an opportunity to make oral or written submissions concerning the proposed changes is afforded. Those 'additional facts' must in any event have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges.⁴⁷³

The Chamber then reiterated that in its previous decision it had called for a hearing for the purpose of raising issues relevant to the possible modification of facts, and stated that the hearing 'will take place in due course'.⁴⁷⁴ The Chamber also notified the parties that it would accept further filings on the clarification by 31 August. The Prosecution filed a response on that date.

In its response, the Prosecution submitted that the Chamber's Clarification informs the parties of the new facts and legal characterisations

that are subject to change, thereby satisfying the notice requirements of Regulation 55 and nullifying the Defence argument on appeal that the Chamber had provided insufficient notice to the Defence.⁴⁷⁵ However, it found that the Clarification 'does not affect' other issues raised by the parties in their applications to appeal the 14 July Majority Decision. To the contrary, it argued that the Majority's Clarification only confirms that 'whether Regulation 55 permits the Chamber to contemplate facts and circumstances beyond those described in the charging document, remains a live issue'.⁴⁷⁶ As described in its application to appeal, the Prosecution asserted that the Chamber's interpretation of its power to use Regulation 55 to add facts and circumstances to those described in the charging document impacts not only the fairness of the proceedings but also the Prosecutor's role to amend the charges where it sees fit.

On 3 September 2009, Trial Chamber I granted the parties' request for leave to appeal the 14 July Majority Decision.⁴⁷⁷ The Chamber merged the Prosecution and Defence formulations of the issue of whether Regulation 55 is 'an indivisible or singular' process or whether it sets out the Trial Chamber's powers in two phases. It found that without prompt resolution by the Appeals Chamber, the fair and expeditious conduct of the proceedings could be affected by the need to put forward different evidence, necessitating further time and resources for preparation. Therefore, the Chamber posed the first issue on appeal as:

Whether the Majority erred in their interpretation of Regulation 55, namely that it contains two distinct procedures for changing the legal characterisation of the facts, applicable at different stages of the trial (with each respectively

473 ICC-01/04-01/06-2095, para 3.

476 ICC-01/04-01/06-2095, para 5.

477 ICC-01/04-01/06-_. As of 15 October 2009, this public document was not yet available on the ICC website.

473 ICC-01/04-01/06-2093, para 8 (citations omitted).

474 ICC-01/04-01/06-2093, para 9.

subject to separate conditions), and whether under Regulation 55(2) and (3) a Trial Chamber may change the legal characterisation of the charges 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.⁴⁷⁸

For similar reasons, the Trial Chamber also granted the parties leave to appeal the issue of, ‘Whether the Majority of the Chamber erred in determining that the legal characterisation of the facts may be subject to change, viz. to include crimes under Articles 7(1)(g), 8(2)(b) (xxvi), 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute’.⁴⁷⁹

Following this decision, on 10 September⁴⁸⁰ and 14 September,⁴⁸¹ respectively, the Defence and the Prosecution filed for suspensive effect of the 14 July Majority Decision. The Chamber held a status conference on 17 September to discuss how appellate proceedings would impact the trial, which was scheduled to restart on 6 October.

On 2 October 2009, the Chamber issued its ‘Decision adjourning the evidence in the case and consideration of Regulation 55’, in which it granted suspensive effect to the 14 July Majority Decision.⁴⁸² Persuaded by the Defence arguments that the 14 July Majority Decision created a ‘situation of legal uncertainty’, and that ‘a necessary precondition for the “effective preparation” of the accused’s defence’ is that Lubanga should know whether the legal characterisation of facts will change to include charges of sexual slavery and inhuman and cruel treatment.⁴⁸³ The Chamber found that

at this stage in the trial, ‘the accused should have certainty as regards these issues’ lest the Defence be placed in an ‘unfair position’ of either presenting new evidence on sexual slavery and cruel and inhuman treatment which may later become irrelevant if the 14 July Majority Decision is overturned, or not presenting the evidence relating to gender-based crimes and later having to switch strategies if the decision is upheld.⁴⁸⁴ Accordingly, the Trial Chamber found ‘there is too great a risk that the defence will proceed, at least for trial, on a significantly false basis’.⁴⁸⁵ The Trial Chamber thus adjourned the trial and presentation of the evidence until the Appeals Chamber issues its decision, which is still pending at the time of publication of this report.

478 ICC-01/04-01/06-___, para 31.

479 ICC-01/04-01/06-___, para 34.

480 ICC-01/04-01/06-2112.

481 ICC-01/04-01/06-2120.

482 ICC-01/04-01/06-2143.

483 ICC-01/04-01/06-2143, para 21.

484 ICC-01/04-01/06-2143, para 21.

485 ICC-01/04-01/06-2143, para 21.

Judiciary

Key Decisions

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Challenges to Admissibility

In 2009, the Court issued decisions in two cases regarding admissibility: one in response to an admissibility challenge brought by the Defence, and another based on its own review of the Court’s jurisdiction in light of recent developments in national level prosecutions.

Under Article 17(1), 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 of the case to challenge the admissibility of a case, based on the criteria set forth in Article 17(1). Also, under Article 19(1), the Court may, on its own motion, initiate proceedings to determine whether a case continues to meet the criteria for admissibility.

Uganda

The Prosecutor v. Joseph Kony et al

On **10 March 2009**, Pre-Trial Chamber II issued a decision on the admissibility of the case against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen. This case, the only one to date arising from the Prosecutor's investigation into the conflict in Northern Uganda, began in September 2005 with the issuance of Warrants of Arrest for these four suspects.⁴⁸⁶ All of the suspects remain at large, and the Chamber's repeated Requests for Cooperation to the Government of Uganda, which initially referred the Situation to the Court, have resulted in little substantive response.

In October 2008, the Chamber initiated proceedings under Article 19(1) of the Rome Statute to determine whether the Court continued to have jurisdiction over the case.⁴⁸⁷ The Chamber's action was taken in the context of developments in Uganda involving the Agreement on Accountability and Reconciliation and Annexure negotiated as part of the Peace Talks between the Government of Uganda and the Lord's Resistance Army (LRA). These developments include steps towards the establishment of a Special Division of the High Court of Uganda designed to try individuals alleged to have committed serious crimes during the conflict, and more recent statements made by the Government of Uganda that it was now prepared to try Kony and the others on Ugandan soil.

However, it should be noted that under provision 4.1 of the Agreement on Accountability and Reconciliation, 'state actors shall be subjected to existing criminal justice processes and not to special justice processes under this Agreement'. This means that military personnel and possibly other Government-related individuals alleged to have committed serious crimes during the conflict would be dealt with either through the Ugandan military tribunal or the existing justice procedures. As such, it should be borne in mind that the Special Division of the High Court is essentially intended as a Court to try the LRA only.

Prior to determining the admissibility of the case, the Chamber appointed Defence Counsel for the suspects.⁴⁸⁸ It sought and received submissions from the Prosecutor, the Defence Counsel, the Government of Uganda, and the Office of Public Counsel for Victims (OPCV).⁴⁸⁹ It also accepted an *amicus curiae* brief from two organisations working with victims in Northern Uganda.⁴⁹⁰

The Pre-Trial Chamber found that the change of circumstances, namely contradictory statements by the Ugandan authorities as to who maintained jurisdiction over the suspects,⁴⁹¹ warranted an admissibility review in order to determine 'whether it is for a national jurisdiction or for the Court to proceed'.⁴⁹² It found that all of the legal and factual developments with respect to the establishment of a Special Division of the High Court remained dependent upon the signing of the final peace agreement.⁴⁹³ It thus concluded:

the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the [Arrest] Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage.⁴⁹⁴

In response to the Defence submissions that an admissibility determination in the suspects' absence might prejudice their rights to challenge the admissibility of the case at a later stage, the Pre-Trial Chamber clarified that the suspects' rights to challenge admissibility under Article 19(2) were not curtailed by the Chamber's exercise of its discretionary powers pursuant to Article 19(1). It further clarified that the appointment of a defence counsel with a limited mandate had 'become the established practice of the Court whenever the person sought in the case is absent and the interests of justice require that the defence be nevertheless represented in a specific phase of the proceedings'.⁴⁹⁵ On 10 March 2009, the Defence Counsel appealed.⁴⁹⁶

⁴⁸⁶ A fifth suspect in the case, Rasko Lukwiyo, was since confirmed dead, and the proceedings against him were discontinued in July 2007.

⁴⁸⁷ Article 19(1) enables the Court to determine admissibility upon its own motion.

⁴⁸⁸ ICC-02/04-01/05-320. Defence Counsel was appointed pursuant to Regulation 76(1) of the Regulations of the Court.

⁴⁸⁹ ICC-02/04-01/05-352; ICC-02/04-01/05-350; ICC-02/04-01/05-354-Anx2; ICC-02/04-01/05-349, respectively.

⁴⁹⁰ See, ICC-02/04-01/05-333; ICC-02/04-01/05-353.

⁴⁹¹ ICC-02/04-01/05-377, para 45.

⁴⁹² ICC-02/04-01/05-377, para 34.

⁴⁹³ ICC-02/04-01/05-377, para 48.

⁴⁹⁴ ICC-02/04-01/05-377, para 52.

⁴⁹⁵ ICC-02/04-01/05-377, para 32.

⁴⁹⁶ ICC-02/04-01/05-379.

In its decision, issued on **16 September 2009**, the Appeals Chamber affirmed the Pre-Trial Chamber's exercise of its discretion to rule on the admissibility of the case on its own motion.⁴⁹⁷ It further confirmed that the Defence Counsel's appointment for the purpose of the admissibility proceedings, and in the absence of the suspects, is distinct from an appointment to represent an individual. Given his limited mandate, Defence Counsel was not required to speak on the suspects' behalf for the purpose of their participation in the admissibility proceedings. It concluded that in the context of the proceedings in question, there was 'no indication that the Pre-Trial Chamber made any determination that could potentially prejudice a subsequent challenge to the admissibility of the case brought by any of the four suspects'.⁴⁹⁸

DRC

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

In a decision issued on **25 September 2009**, the Appeals Chamber dismissed the Defence for Germain Katanga's appeal of Trial Chamber II's denial of its motion challenging the admissibility of the case.⁴⁹⁹ The motion, the first of its kind at the ICC, had argued that Katanga's case was inadmissible based on the existence of proceedings against Katanga within the Democratic Republic of Congo (DRC) for crimes against humanity at the time of his surrender to the ICC by the DRC authorities.⁵⁰⁰ On 12 June, the Trial Chamber issued an oral decision, followed by a written decision, denying the motion.⁵⁰¹ It found that the DRC authorities had expressed a clear intention not to investigate nor prosecute Katanga's alleged participation in the attack on Bogoro on 24 February 2003, the subject of the proceedings before the Court. On 22 June 2009, the Katanga Defence filed an appeal,⁵⁰² followed by a Document in Support of the Appeal.⁵⁰³

497 ICC-02/04-01/05-408, para 80 (noting appellate interference to be possible only where the exercise of discretion is based on 'an erroneous interpretation of the law', on 'a patently incorrect conclusion of fact', or 'where the decision is so unfair and unreasonable as to constitute an abuse of discretion').

498 ICC-02/04-01/05-408, para 86.

499 ICC-01/04-01/07-1497.

500 ICC-01/04-01/07-891-Conf-Exp.

501 See ICC-01/04-01/07-T-67-ENG and ICC-01/04-01/07-1213-tENG, respectively.

502 ICC-01/04-01/07-1234.

503 ICC-01/04-01/07-1279.

The Defence based its inadmissibility claim, in part, on the Prosecution's failure to communicate to the Pre-Trial Chamber information within its possession that Katanga was subject to an investigation by State authorities at the time it requested a warrant for his arrest. The Defence maintained that the Pre-Trial Chamber would have found the case to be inadmissible if it had had knowledge of such information. To the contrary, the Appeals Chamber found that Article 17(1) requires issues of admissibility to be determined on the basis of the facts as they exist at the time of the proceedings on the admissibility challenge. It thus rejected the Defence assertion that the Trial Chamber should have determined the issue on the basis of the factual situation at the time Katanga's arrest warrant was issued.

However, the crux of the Defence appeal challenged the Trial Chamber's interpretation of the term 'unwillingness' in the context of Article 17(1) and the principle of complementarity. The Trial Chamber had found that a State's 'unwillingness' to carry out an investigation or prosecution included the situation in which a State is willing to cooperate with the ICC in conformance with the aims of the Statute, but is unable to carry out an investigation or prosecution for various reasons, and as a consequence defers the case to the Court.

In contrast, the Appeals Chamber found that questions of a State's unwillingness or inability, pursuant to Article 17(1), are not relevant to the present case because at the time of the Defence admissibility challenge there were no domestic investigations or prosecutions. Rather, the Appeals Chamber found the Katanga case to be admissible based on the State's inaction. It stated, 'in case of inaction, the question of unwillingness or inability does not arise'.⁵⁰⁴ The Appeals Chamber noted that the effect of the Defence's interpretation would be to render cases inadmissible where the State is theoretically willing and able to investigate but has no actual intention of doing so, resulting in unchecked impunity. Thus, as to the issue of complementarity, it stated, '[i]f States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in'.⁵⁰⁵

504 ICC-01/04-01/07-1497, para 78.

505 ICC-01/04-01/07-1497, para 85.

Judiciary

Key Decisions CONTINUED

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Victim Participation

Victim participation in proceedings at the ICC is provided for in 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.

Rules 85 and 89- 93 of the Rules of Procedure and Evidence define ‘victims’, and contain provisions governing the application to participate, the legal representation of victims, and the participation of those victims in the proceedings. Last year, as discussed in the 2008 *Gender Report Card*, a number of key decisions further defined the requirements for participating in a case and the modalities by which victims may participate.

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 has undertaken a review of these application forms in consultation with civil society. However, as of the publication of this report, no new forms have been adopted.

From 2005 to 2009, the Court received 1814 applications from persons seeking to participate as victims in ICC proceedings.⁵⁰⁶ Of those applications, 568, or almost one third (31%) of those applications, were received between 1 October 2008 and 30 September 2009. To date, approximately 43%, or 771, of the 1814 applicants have been accepted to participate. The rate of acceptance appears to be increasing. The figures show that 85%, or 484, out of the 568 applicants who applied in the period between 1 October 2008 and 30 September 2009 were accepted to participate in cases before the Court.

Breakdown of Participants by Situation⁵⁰⁷

Approximately 84% of the participants accepted to participate in proceedings relate to the Situation of the DRC and/or one of the three cases arising out of the Situation.⁵⁰⁸

Approximately 8% relate to the Situation of Uganda and/or the case against Kony et al.⁵⁰⁹

The Bemba case in the CAR Situation accounts for 7%,⁵¹⁰ and the Situation of Darfur accounts for 1%,⁵¹¹ of victims accepted to participate by the Court to date.

As discussed below, the Appeals Chamber handed down decisions in the Situations of DRC and Darfur in December 2008 and February 2009, respectively, that have effectively put an end to the ‘procedural status of victim’ during the investigation phase of the proceedings.⁵¹² These decisions are discussed in more depth in this section. While the possibility of participating more generally in a Situation, as

opposed to in a particular case, is not entirely foreclosed as a result of the Appeals Chamber decisions, no new victims have been accepted to participate in any Situation. However, those who had been admitted to participate prior to the decisions appear to have retained their status, according to figures provided by VPRS.

Breakdown of Participants by Gender

The Court has been unable to provide a gender breakdown of applicants and accepted victims, and there is insufficient public information available to estimate how many applicants and accepted victims are women.⁵¹³ However, figures provided by the Court in 2008 indicated an overall small decrease in applications by women in most Situations before the Court.⁵¹⁴

Significant developments in 2009 with respect to victim participation include the participation of 103 victims in the daily proceedings of the Lubanga trial. This represents a significant increase over the small number of victims — four, all former boy soldiers — who were accepted to participate at the time of the confirmation hearing in 2006, and who remained, up to December 2008, the only participating victims in the Lubanga trial. The decisions admitting new applicants, including many who experienced or witnessed sexual violence, are discussed below.

506 These figures were provided by the VPRS by email dated 29 September 2009 [hereinafter ‘VPRS email’].

507 These figures are accurate as of 30 September 2009.

508 The VPRS email indicates that 644 participants have been accepted in the DRC Situation and cases.

509 The VPRS email indicates that 62 participants have been accepted in the Uganda Situation and the Kony case.

510 The VPRS email indicates that 54 participants have been accepted in the Bemba case in the CAR Situation.

511 The VPRS email indicates that 11 participants have been accepted in the Darfur Situation.

512 The ‘procedural status of victim’ is discussed at p 53-54 of the 2008 *Gender Report Card*.

513 The VPRS staff reported that the Section has been in the process of installing a database that will allow the staff to disaggregate data contained in the victims’ applications, including data disaggregated by sex. All of the numbers provided by VPRS for the purposes of this report were calculated manually.

514 See 2008 *Gender Report Card*, p 53. In 2008, approximately 36% of the applications received by the Court were from women, down from 38% in 2007. In DRC, 35% of applicants were women, down from 37% in 2007. In Uganda, 41% of the applicants were women, the same percentage as 2007. In Darfur, Sudan, 26% of applicants were women, down from 27% the previous year.

Legal Representatives of participating Victims were present in the courtroom during each day of trial proceedings from the opening of the trial through the presentation of the Prosecution's case. Pursuant to Trial Chamber I's oral order, the 103 participating victims are divided into three groups. Two groups are represented by seven external counsel, acting as Common Legal Representatives, as allowed under Rule 90 of the Rules of Procedure and Evidence. A third group consisting of four victims is represented by the Office of Public Counsel for Victims.⁵¹⁵ The Legal Representatives of Victims in the Lubanga case are predominantly lawyers from the DRC, including one Congolese female lawyer.

The guidelines governing intervention by Victims Legal Representatives include Rule 91 of the Rules of Procedure and Evidence and two decisions, by Trial Chamber I and the Appeals Chamber.⁵¹⁶ Prior to each intervention, Victims' Legal Representatives must make a written request, which is subject to approval by the Trial Chamber. Victims' Legal Representatives are allowed to intervene in the proceedings to question witnesses and to lead evidence.⁵¹⁷ According to a review of the available transcripts of open sessions, Legal Representatives of Victims appear to have questioned approximately 13, or just under half, of the witnesses and experts who testified for the Prosecution and the Chamber.

Questioning by Legal Representatives elicited important evidence for the Court about the impact of the UPC/FPLC's alleged crimes on victims, and in particular about the gender-based crimes that have been committed in the context of the charges against Lubanga.

515 ICC-01/04-01/06-T-105-ENG, p 12 lines 23-25; p 13 lines 1-12.

516 ICC-01/04-01/06-1119 and ICC-01/04-01/06-1432, respectively. These decisions are reviewed in detail at pages 59-61 of the 2008 *Gender Report Card*.

517 See the 'Legal Representation' section of this report for more information about how victims are able to participate in the proceedings through their Legal Representatives.

Victims, through their Legal Representatives, also petitioned the Court to be allowed to testify in person, a request on which the Trial Chamber will take a final decision at a later stage, as discussed below. Importantly, on 22 May 2009 the Legal Representatives of the Victims participating in the Lubanga case requested that the Trial Chamber consider a legal re-characterisation of the facts under Regulation 55 of the Regulations of the Court to include additional characterisations of cruel and/or inhuman treatment and sexual slavery. This unprecedented request and the subsequent decisions of the Trial Chamber are discussed in the **Trial Proceedings** section, above.

In the Katanga and Ngudjolo case, with trial due to start on 24 November 2009, the numbers of victims accepted to participate are the highest of any case before the Court. Together, Trial Chamber II and Pre-Trial Chamber I received 443 applications to be granted the status of victim for the purpose of participating in the case. In a series of decisions, dated 19 May, 12 June and 31 July 2009, the Trial Chamber granted victim status to new applicants as well as those previously rejected by the Pre-Trial Chamber.⁵¹⁸ To date, a total of 345 applicants have been granted the status of victim to participate in the Katanga-Ngudjolo case.⁵¹⁹

For applications that are not accepted by the Court, the public decisions show that incomplete information in the applications to participate, in particular information about the age of the applicant and the time period of the harms that are alleged, continue to be a major basis for rejecting applications. Examples of such decisions are outlined in the section below.

This section also discusses other important developments in the jurisprudence on victim participation, including the Appeals Chamber decisions on the procedural status of victims, a Trial Chamber I decision on the participation of 'indirect victims' in the Lubanga case, and a decision on 'mental harm' in the Kony case.

518 ICC-01/04-01/07-1151; ICC-01/04-01/07-1206.

519 VRPS email of 29 September 2009.

Victim Participation at the ICC 2009¹

Number of victims who have applied between 1 October and 30 September 2009: **568**

Number of victims who have applied to date²: **1814**

<i>Situation or Case</i>	<i>Number of victim participants accepted between 1 October 2008 and 30 September 2009</i>	<i>Total number of victim participants accepted to date</i>
Uganda Situation only	12	21
<i>The Prosecutor v. Joseph Kony et al</i>	27	41
DRC Situation only	0	196
<i>The Prosecutor v. Thomas Lubanga Dyilo</i>	103³	103
<i>The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui</i>	288	345
CAR Situation only	0	0
<i>The Prosecutor v. Jean-Pierre Bemba Gombo</i>	54	54
Darfur Situation only	0	11
<i>The Prosecutor v. Ahmad Harun & Ali Kushayb</i>	0	0
<i>The Prosecutor v. Omar Hassan Ahmad Al'Bashir</i>	0	0
<i>The Prosecutor v. Bahr Idriss Abu Garda</i>	0	0
Total	484	771

1 Figures provided by the Victim Participation and Reparations Section by email 29 September 2009.

2 Since 2005, when the first applications to participate were received by the Court.

3 This figure includes the four victims who were accepted to participate by the Pre-Trial Chamber at the confirmation hearing and pre-trial stages of the case, and who are considered to have reapplied and been re-accepted to participate in the trial proceedings by the Trial Chamber I.

Uganda

The Prosecutor v. Joseph Kony et al

On **10 February 2009**, Single Judge Mauro Politi denied the Defence request for leave to appeal the Pre-Trial Chamber II's 21 November 2008 decision in which the Single Judge decided on 57 applications for victim participation.⁵²⁰ Judge Politi held that the Defence challenge was 'hypothetical' because no victim had yet submitted an application to participate in a specific activity in the proceedings.⁵²¹ He also found that, in the language of its appeal, the Defence merely expressed disagreement with the decision regarding victim participation at the pre-trial stage of the proceedings. As Judge Politi explained, such 'a conflict of opinion' does not amount to an appealable issue that significantly affects the fairness or expeditiousness of the proceedings, as required by Article 82(1)(d).⁵²²

Judge Politi rendered a second decision on victim participation on **10 March 2009**, in which he denied victim status to nine minor applicants on the grounds that, pursuant to Rule 89(3), the applications should have been presented by someone acting on the minors' behalf.⁵²³

On **23 February 2009**, the Appeals Chamber issued its judgement on the Defence appeal against Pre-Trial Chamber II's identical decisions on victim participation in the Situation in Uganda and the case against Joseph Kony et al issued on 14 March 2008.⁵²⁴ In those decisions, the Pre-Trial Chamber had granted victim status to four applicants who suffered emotional harm as a result of the death of their relatives arising from the alleged crimes under the jurisdiction of the Court.⁵²⁵ The Pre-Trial Chamber subsequently granted the Defence leave to appeal the single issue of whether, when establishing mental harm suffered as a result of another person's physical harm, to require proof of identity of the latter and of his or her relationship to the applicant.

In the 14 March decisions, the Pre-Trial Chamber had adapted the reasoning of its earlier decision on 10 August 2007, in which it analysed the elements required to meet the definition of 'victim' under Rule 85. With respect to proving identity, it found that

in certain conflict situations, victims are prevented from obtaining proof of identity due to obstacles to communication and travel. In such cases, it found that it had the discretion to accept 'indirect proof' of the victim's identity.⁵²⁶ Proof of identity would be accepted as long as the following basic requirements were met: that it (1) was issued by a recognised public authority, (2) stated the name and the date of birth of the holder, and (3) showed a photograph of the holder. In the decision of 14 March 2008, the Pre-Trial Chamber indicated it would accept a broader range of documents to establish victims' identities.

In its appeal, the Defence argued that the Pre-Trial Chamber erred by not requiring the applicant, in addition to proving his or her own identity, to also provide proof of the identities of the deceased family members and the applicants' relationship to those individuals. The Prosecution and Victims' Legal Representatives were in basic agreement. The Prosecution did not dispute that some evidence should be provided, but it submitted that 'this requirement must be interpreted in a "non-technical manner" and on a case-by-case basis'.⁵²⁷ The Victims' Legal Representatives agreed with the Prosecution and Defence that, when seeking to prove emotional harm, 'some level of proof of identity of the family member and of his or her relationship with the applicant may be required'.⁵²⁸ However, the Victims' Legal Representatives emphasised that the requirement should be interpreted flexibly rather than restrictively, so that victim participation in the proceedings would not be *de facto* prevented. They pointed out that the Victims Protection and Reparations Section had already recognised the fact that the practical realities in Northern Uganda 'may make the provision of certain documentary proof impossible'.⁵²⁹

In its 23 February opinion, the Appeals Chamber held that the Pre-Trial Chamber erred in finding that the four victims experienced emotional harm from the loss of a family member despite the fact that they had failed to submit any documentary evidence to substantiate the identities of their deceased family members or their relationship to them. It found such proof is required to meet the definition of 'victim' under Rule 85(a) as a person who has 'suffered harm

520 ICC-02/04-01/05-367. See 2008 *Gender Report Card*, p 57.

521 ICC-02/04-01/05-367, paras 21, 22.

522 ICC-02/04-01/05-367, para 20.

523 ICC-02/04-176, p 5.

524 ICC-02/04 OA and ICC-02/04-01/05-371 OA2. See 2008 *Gender Report Card*, p 56.

525 ICC-02/04-125 and ICC-02/04-01/05-367, public redacted versions.

526 ICC-02/04 OA and ICC-02/04-01/05-371 OA2, para 16 citing public redacted versions of ICC-02/04-101 and ICC-02/04-01/05-252.

527 ICC-02/04OA and ICC-02/04-01/05-371 OA2, para 26 citing ICC-02/04-147, para 18 and ICC-02/04-01/05-304, para 18.

528 ICC-02/04OA and ICC-02/04-01/05-371 OA2, para 29 citing ICC-02/04-166, para 22 and ICC-02/04-01/05-331, para 22.

529 ICC-02/04OA and ICC-02/04-01/05-371 OA2, para 29 citing ICC-02/04-166, para 27 and ICC-02/04-01/05-331, para 27.

as a result of the commission of any crime within the jurisdiction of the Court'. However, the Appeals Chamber disagreed with the Defence argument that the *same* evidentiary requirements should be established for the proof of identity of family members and their relationship to the applicant as those required to prove the identity of the applicant. It held that the level of required proof is a discretionary matter that 'must be assessed on a case-by-case basis and taking into account all relevant circumstances, including the context in which the Court operates'.⁵³⁰ Ultimately, the Appeals Chamber concluded that while the Pre-Trial Chamber erred in its decision to grant victim status based on emotional harm without the requisite evidentiary proof, such error was inconsequential to the final result because the decision was also based upon findings that each victim had suffered other forms of harm, including economic and physical harm.⁵³¹ It therefore dismissed the appeals.

DRC and Darfur Situations

In December 2008 and February 2009, the Appeals Chamber issued two important judgements concerning the participation of victims at the investigation stage of a Situation. These two judgements, the first issued on **19 December 2008**,⁵³² and the second on **2 February 2009**,⁵³³ dispose of appeals from four decisions made by Pre-Trial Chamber I in late 2007 concerning the participation of victims in the Situations under investigation in the DRC and Darfur, Sudan.⁵³⁴

Both Appeals Chamber judgements deal with the central question of whether there is authority under Article 68(3) of the Rome Statute to accord procedural status to victims, thereby allowing them to participate in the investigation stage of a Situation. The impugned decisions by the Pre-Trial Chamber granted victims procedural status at the investigation stage of a Situation, allowing them to express their views and concerns to the Chamber, even in the absence of specific proceedings.⁵³⁵ In each of its two judgements, the Appeals Chamber ruled that 'the decisions of the Pre-Trial Chamber acknowledging procedural status to victims [and] entitling them to participate generally in the investigation of a situation, are ill-founded and must be set aside'.⁵³⁶

The Appeals Chamber considered submissions from the OPCD, the Prosecutor, and three groups of victims. The victims argued that the Rome Statute and Rules of Procedure contemplate the right of victims to participate at the investigation phase, and the statutory framework, which permits their views and concerns to be considered when their personal interests are affected, does not define 'personal

530 ICC-02/04/OA and ICC-02/04-01/05-371 OA2, para 38.

531 ICC-02/04/OA and ICC-02/04-01/05-371 OA2, para 40.

532 ICC-01/04-556.

533 ICC-02/05-177.

534 The decisions of the Pre-Trial Chamber are analysed on pages 58-59 and 62-63 of the 2008 *Gender Report Card*.

535 ICC-01/04-556 and ICC-02/05-177, para 40.

536 ICC-01/04-556 and ICC-02/05-177, para 59.

interests’ to preclude participation at that phase. They also argued that the right of victims to participate at the investigation and pre-trial phase is supported by international human rights law, and does not prejudice the rights of the Defence. All victims advanced similar arguments that ‘victim procedural status can be acknowledged at the stage of investigations into a situation irrespective of personal interests being affected by distinct proceedings’.⁵³⁷

The Appeals Chamber disagreed, holding that victims cannot be granted the right to participate at the investigation stage of a Situation because, on a strict reading of Article 68(3), victim participation can only take place within the context of ‘judicial proceedings’, which is ‘a term denoting a judicial cause pending before a Chamber’.⁵³⁸ The Appeals Chamber found that an investigation, by contrast, is ‘an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible’.⁵³⁹ Based on the framework for victim participation set forth in Article 68(3) and the Rules pertaining to that provision, the Appeals Chamber concluded that the victims’ position cannot be supported.

The Appeals Chamber judgements also clarified that investigations should be the ‘exclusive province’ of the Prosecutor, and that allowing victim participation at this stage would compromise the ‘domain and powers’ of the Prosecutor under the Rome Statute.⁵⁴⁰ Although there is no formal role for victims in the investigation phase, the Appeals Chamber found that the Prosecutor’s power to initiate an investigation and to mount a prosecution necessarily takes into account the views and concerns of victims. It further found that, despite victims’ restricted role in this phase,

537 ICC-01/04-556 and ICC-02/05-177, para 32.

538 ICC-01/04-556 and ICC-02/05-177, para 45.

539 ICC-01/04-556 and ICC-02/05-177, para 45.

540 ICC-01/04-556 and ICC-02/05-177, paras 51-52.

‘[i]nformation that victims can provide to the Prosecutor about the scope of his investigations cannot but be welcome as it could provide nothing other than assistance’.⁵⁴¹

The Appeals Chamber limited the scope of its decisions by reserving for the Pre-Trial Chamber the possibility to grant status to victims to participate in the investigation phase where [‘the victims’] personal interests are affected by the issues arising for resolution’.⁵⁴² Therefore, where a victim does not seek to participate ‘generally’ in the investigation, and satisfies the requirements for participation under Article 68(3),⁵⁴³ the Pre-Trial Chamber may in the future ‘determine how best to rule upon applications for participation’.⁵⁴⁴

These decisions have effectively halted the acceptance of new participants at the Situation phase, although under certain circumstances victim participation in a Situation may still be possible. Importantly, those admitted to participate prior to the decision have not explicitly lost their status. According to VPRS, 196 victims have retained their status in the Situation of DRC, 21 in the Situation of Uganda, and 11 in the Situation of Darfur.

541 ICC-01/04-556 and ICC-02/05-177, para 54.

542 ICC-01/04-556 and ICC-02/05-177, para 56.

543 Under Article 68(3), a person has the right to participate in proceedings if: (a) he/she qualifies as a victim under the definition of this term provided by Rule 85 of the Rules; and (b) his/her personal interests are affected by the legal or factual issues raised in the proceedings.

544 ICC-01/04-556 and ICC-02/05-177, para 57.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

From the end of 2008 through September 2009, Trial Chamber I admitted 99 victims to participate in the Lubanga case. As described in more detail below, one important decision on victim participation delineated the right to participate for ‘indirect’ victims, or those who applied for victim status based on the harm suffered by another, such as a parent of a child who had been injured or killed as a result of the crimes under the jurisdiction of the Court. Notably, the Chamber admitted many applications by victims who alleged that in addition to suffering harm as a result of being recruited and used as child soldiers, they also suffered sexual violence in the UPC camps, including rape and sexual slavery. However, it rejected applications brought by other victims of sexual violence whose applications did not mention child soldiers explicitly, or referred to events outside of the timeframe of the charges (September 2002–13 August 2003).

On **15 December 2008**, Trial Chamber I issued a decision on 117 applications by victims to participate in the proceedings in accordance with Article 68.⁵⁴⁵ In this decision, the Trial Chamber applied the criteria set out in its prior decision on victim participation on 18 January 2008, modified by a decision of the Appeals Chamber issued 11 July 2008.⁵⁴⁶ Ninety-one applications for victim status were granted. The Trial Chamber divided the applicants into groups based on shared features:⁵⁴⁷

- 4 who are currently participating in the proceedings;
- 20 who appear to meet the criteria for participation;
- 22 applicants who have a person acting on their behalf and with their consent who is neither a relative, nor their legal guardian;

⁵⁴⁵ ICC-01/04-01/06-1556.

⁵⁴⁶ The Appeals Chamber upheld the portion of the Trial Chamber’s decision that: (1) while the harm suffered by victims has to be personal, it does not have to be ‘direct’; and (2) victims may present evidence on the guilt or innocence of the accused, and challenge the admissibility or relevance of evidence at trial. It reversed the Trial Chamber’s holding that the participation of victims is not limited to the investigation of the crimes contained in the confirmed charges. Rather, the Appeals Chamber held that there must be a link between harm alleged, personal interests, and the charges confirmed.

⁵⁴⁷ Some applicants have been categorised under more than one particular group.

- 19 applicants who were children when the application was originally filed, but who are now adults (or are close thereto);
- 28 applicants whose date of birth is uncertain or the demobilisation date is at issue;
- 8 applicants with inconsistencies in their application documents;
- 2 applicants under 18 whose application has not been made by a person acting on their behalf; and
- 2 other applicants.

Participation status was refused to 15 applicants whose forms were incomplete. It was also refused for 11 others who were victims of incidents falling outside the timeframe of the charges or who were older than 15 at the time of their alleged recruitment.

For the group of 22 applicants who have a person acting their behalf who is neither a relative, nor their legal guardian, the Trial Chamber found that Rule 89(3) to provide that ‘a person acting on behalf of a victim’ is ‘undefined and unrestricted’ and therefore does not have to be a relative or a legal guardian.⁵⁴⁸ This unrestrictive approach to the Rules is particularly significant for child victims in the DRC, many of whom have been separated from their parents after demobilisation and are being looked after by schoolteachers or other similar figures in the community.

Concerning the group who were minors when they applied for victim status and are now over, or approaching, 18 years old, the Trial Chamber found that it was more practical and in the interests of the victim to presume that the victim wished to continue being represented by the same person unless he or she expressed otherwise after turning 18. For those whose date of birth or demobilisation was uncertain, the Chamber was provided with sufficient evidence to prove the identity of the applicants, including demobilisation certificates, which indicated that the applicants were under the age of 18 years at the time of their demobilisation. It also found that with respect to the group of applicants with some inconsistencies between the information provided in their applications and the other documents regarding the year of their birth, such as student identity cards, birth certificates and election cards, the ‘differences do not, *ipso facto*, undermine the credibility of the applicants’ assertion as to his or her age in the application form’.⁵⁴⁹

For applicants over 15 years old, but under 18, the Chamber examined whether they were restricted from participating in proceedings if they had no ‘person

⁵⁴⁸ ICC-01/04-01/06-1556, para 67.

⁵⁴⁹ ICC-01/04-01/06-1556, para 89.

acting on their behalf'. It interpreted Rule 89(3) as permissive rather than mandatory, and found no other provision restricting children from applying to participate without intermediaries. Although the Chamber noted that it would 'normally' expect someone to act on the behalf of child applicants, the fact that the applicants in this group were close to the age of 18, and that there was no indication that the applicants were immature, provided the Chamber with sufficient basis to permit their continued participation in proceedings.

The Chamber also ruled on the victim status of applicant 0162, a former girl soldier. From the documentation provided, the Chamber concluded that she was eight-years-old at the time she was abducted and held by the UPC within the timeframe of the charges against the accused, and within the context of its campaign to conscript child soldiers. The Prosecution had submitted there was an 'insufficient casual link' between her alleged abduction and rape by UPC soldiers and the charges against the accused for the use and recruitment of child soldiers. The Chamber rejected this argument, finding that the context in which she was abducted made it 'reasonable to conclude, on a *prima facie* basis, that she suffered other crimes (*viz.* rape and threats to her life), as well as being a victim of the charges brought against the accused which the Chamber is considering'.⁵⁵⁰ Although it admitted her application, the Chamber declined to address the 'critical question' of 'whether the "use" of children for sexual purposes alone, and including forced marriage', falls within the scope of the charges against the accused for the unlawful use and conscription of child soldiers.⁵⁵¹

The Chamber referred to the Registrar the question of participation for parents acting on behalf of their children, who also wished to participate as a victim for the personal harm they suffered. For those applicants who alleged harm unrelated to the crimes charged, the Chamber concluded as a *prima facie* matter that the conscription, enlistment or use of child soldiers resulted in harm, whether or not the applicant specifies the type of harm in the application form.

Applying the same criteria set out in its 15 December 2008 decision, Trial Chamber I granted three more applications on **18 December 2008**.⁵⁵² On **8 May 2009**, Trial Chamber I ordered the issuance of public redacted versions of the annexes to these decisions.⁵⁵³

550 ICC-01/04-01/06-1556, para 102.

551 ICC-01/04-01/06-1556, para 103.

552 ICC-01/04-01/06-1562. These applications were part of a group of 15 that had been submitted by the Registrar on 21 November 2008.

553 ICC-01/-4-01/06-1861, ICC-01/-4-01/06-1861-AnxA1, ICC-01/-4-01/06-1861-AnxA2.

The public redacted versions included additional information on the applications from, submissions about, and decision on, these victim applicants. The applicants' age and identifying information was redacted from the public version of the decision.

Within the group of applicants who were granted status, a number had suffered, or had been forced to commit, rape and other forms of sexual violence. Applicant 0078 was a girl soldier who was raped, drugged and subjected to sexual slavery.⁵⁵⁴ Applicant 0056 submitted to the Court that he was forced to commit acts of torture, extortion and rape.⁵⁵⁵ Applicant 0047 referred to girls being raped before they were killed, in the context of atrocities committed by the UPC.⁵⁵⁶ The application of 0048 stated that during combat he was used to kill, mutilate, burn and loot villages, and to rape girls.⁵⁵⁷ Applicant 0057 described being ordered to loot and rape.⁵⁵⁸ Applicant 0063 stated that he was recruited by force by the UPC and that his [redacted] were raped on the day that he was recruited. He went on to participate in combat and to pillage and rape.⁵⁵⁹ Applicant 0124 and 0126 described being trained to kill and rape.⁵⁶⁰ Applicant 0059 stated that he was trained by the UPC in combat techniques and was forced to rape, kill and loot.⁵⁶¹ Applicant 0055 described being forced to participate in acts of rape.⁵⁶² Applicant 0058 referred to episodes of rape, extortion, killing, and torture.⁵⁶³ Applicant 0226 described being taught in a training camp how to use firearms, loot, rape young girls and kill and massacre the Lendu population.⁵⁶⁴ Applicant 0162, a girl, as discussed above, described being taken by force by the UPC and being 'raped continuously'.⁵⁶⁵ Finally, Applicant 0407 described being recruited by force, trained by the UPC, and participating in rapes and pillaging.⁵⁶⁶

554 ICC-01/04-01/06-1861-AnxA1, p 19.

555 ICC-01/04-01/06-1861-AnxA1, p 30.

556 ICC-01/04-01/06-1861-AnxA1, p 56.

557 ICC-01/04-01/06-1861-AnxA1, p 61.

558 ICC-01/04-01/06-1861-AnxA1, p 73.

559 ICC-01/04-01/06-1861-AnxA1, p 77.

560 ICC-01/04-01/06-1861-AnxA1, pp 84, 90.

561 ICC-01/04-01/06-1861-AnxA1, p 109.

562 ICC-01/04-01/06-1861-AnxA1, p 126.

563 ICC-01/04-01/06-1861-AnxA1, p 201.

564 ICC-01/04-01/06-1861-AnxA1, p 218.

565 ICC-01/04-01/06-1861-AnxA1, p 229.

566 ICC-01/04-01/06-1861-AnxA2, p 4-7. Despite the fact that the applicant was a minor who applied without the consent of a parent or guardian, the Trial Chamber accepted his application, with a declaration signed by a person who the Chamber found to be a *de facto* guardian. The Chamber noted the 'real possibility' that applicants who seek to participate in these proceedings will be living in circumstances where they cannot be represented by parents, other relatives or a legal guardian. It found this approach to be envisioned by the Rules.

Among the applications that were rejected was Applicant 0004, a woman whose husband and children were killed in an attack allegedly by the UPC, described being taken to a UPC camp and continually raped by the UPC militia for [redacted] months.⁵⁶⁷ Her application was rejected on the basis that the Trial Chamber found that it lacked sufficient information to conclude, *prima facie*, that the applicant had suffered personal harm as a result of crimes included in the charges brought against the accused, and that the events she described fell outside of the timeframe of the charges.⁵⁶⁸ Applicant 0077, another woman, stated that she was arrested by the UPC militia in 2002, and that during her detention she was raped every day, tortured and insulted on account of her ethnic origin.⁵⁶⁹ Her application was rejected on the grounds that the Chamber had not been provided with sufficient information to conclude, *prima facie*, that the applicant was under the age of 15 at the time of the alleged recruitment and during the period covered by the charges.⁵⁷⁰

On **8 April 2009**, Trial Chamber I delivered a decision on the participation of ‘indirect victims’ in the Lubanga case.⁵⁷¹ This decision was issued in response to a Registrar submission filed on 21 November 2008 seeking guidance on approximately 200 applicants requesting to participate in the trial. The Registrar sought the Trial Chamber’s guidance as to whether these applicants could be considered ‘indirect victims’, if the crimes they alleged were ‘committed by persons who had been conscripted or enlisted whilst under the age of 15 or used to participate actively in hostilities’.⁵⁷²

The Trial Chamber’s decision followed two prior decisions, issued 18 January and 11 July 2008 by the Trial and Appeals Chambers, respectively, outlining the criteria, procedures, and modalities of victim participation. In its decision of 11 July, the Appeals Chamber confirmed that, in order to participate, the harm suffered by a victim must be personal harm, but does not necessarily need to be direct harm.⁵⁷³ While the Appeals Chamber decision left open the possibility of indirect victims qualifying to participate in the proceedings, the criteria for their participation had yet to be fully determined.⁵⁷⁴

567 ICC-01/04-01/06-1861-AnxA1, p 280.

568 ICC-01/04-01/06-1861-AnxA1, p 282.

569 ICC-01/04-01/06-1861-AnxA1, p 282.

570 ICC-01/04-01/06-1861-AnxA1, p 284.

571 ICC-01/04-01/06-1813.

572 ICC-01/04-01/06-1501-Conf-Exp, para 4.

573 ICC-01/04-01/06-1432, para 39.

574 These decisions are analysed in the 2008 *Gender Report Card* on pages 59-61.

In its 8 April decision, the Trial Chamber answered the Registry’s question in the negative, determining that indirect victims ‘are restricted to those whose harm is linked to the harm of the affected children when the confirmed offences were committed, not those whose harm is linked to any subsequent conduct by the children, criminal or otherwise’.⁵⁷⁵ The decision of the Trial Chamber further clarified which victims will qualify to participate in the trial proceedings.

The decision analysed Rule 85 of the Rules of Procedure and Evidence, which defines victims, and the jurisprudence interpreting that provision. Based on its prior interpretations of the Rule as well as those by the Appeals Chamber, the Trial Chamber found that there are two categories of victims: direct victims, ‘those whose harm is the result of the commission of a crime within the jurisdiction of the Court’, and indirect victims, ‘those who suffer harm as a result of the harm suffered by direct victims’.⁵⁷⁶ It held, ‘a causal link must exist between the crimes charged and the harm alleged both for direct and indirect victims’.⁵⁷⁷

Citing the reasoning of the Appeals Chamber, the Trial Chamber found that for direct victims, this ‘causal link must exist between the crimes charged and the victim’s harm: the injury, loss, or damage suffered by natural persons must be a result of the crimes confirmed against Thomas Lubanga Dyilo’.⁵⁷⁸ It further clarified that, in this case, ‘the direct victims of these crimes are the children below 15 years of age who were allegedly conscripted, enlisted or used actively to participate in hostilities by the militias under the control of the accused within the time period confirmed by the Pre-Trial Chamber’.⁵⁷⁹

With respect to indirect victims, the Trial Chamber held that they ‘must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged’.⁵⁸⁰ It noted that the Appeals Chamber had determined that ‘close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims’.⁵⁸¹ Further, the Trial Chamber found that ‘the harm suffered by these indirect victims may include the

575 ICC-01/04-01/06-1813, para 52.

576 ICC-01/04-01/06-1813, para 44.

577 ICC-01/04-01/06-1813, para 45.

578 ICC-01/04-01/06-1813, para 47.

579 ICC-01/04-01/06-1813, para 47.

580 ICC-01/04-01/06-1813, para 49.

581 ICC-01/04-01/06-1813, para 50 citing ICC-01/04-01/06-1432 OA9, para 32.

psychological suffering experienced as a result of the sudden loss of a family member or the material deprivation that accompanies the loss of his or her contributions'.⁵⁸²

The Chamber allowed that, under certain circumstances, the loss, injury or damage suffered by a person intervening to prevent one of the crimes alleged against the accused may also serve as the basis for an application of an indirect victim, provided that the person's harm is sufficiently linked to the direct victim's harm. As noted above, the Trial Chamber explicitly excluded as indirect victims those who suffered harm as a result of the subsequent conduct of direct victims, in this case, child soldiers, stating that 'the person attacked by a child soldier is not an indirect victim for these purposes because his or her loss is not linked to the harm inflicted on the child when the offence was committed'.⁵⁸³

The Trial Chamber reviewed a representative sample of 19 redacted victim applications selected by the Registry, which are summarised in its decision. Based on the decision, none of these victims will be admitted to participate in the case. This includes many who were victims of sexual violence. Of the applications by 18 natural persons and one institution reviewed by the Trial Chamber, the summaries show that there are nine that do not mention child soldiers, two that do not fall within the time frame of being considered by the Court in the Lubanga trial, and four that are from persons forcibly recruited or enrolled in UPC/FPLC when they were over the age of 15. Seven of the 19 applications in the sample are from women, and five mention rape or sexual violence.

Applicant a/0016/06 claimed to have been raped by [redacted] members of the UPC militia, but did not mention child soldiers in her account. Applicant a/0076/06 submitted that she, along with at least one other girl, was beaten, tortured, raped and submitted to inhuman and degrading treatment by men under Lubanga's command. Her account also did not mention child soldiers. Applicant a/0080/06 claimed to have been detained by the UPC, during which time she and other women were allegedly raped, tortured, turned into sexual slaves and forcibly wed. She also did not mention child soldiers. Applicants a/0188/06 and a/0250/07 both reported the rape of young girls by the UPC in their villages.

On **26 June 2009**, Trial Chamber I issued a confidential decision granting the right of three victim applicants to participate by giving evidence in written form, with the possibility of providing testimony in person at a

582 ICC-01/04-01/06-1813, para 50.

583 ICC-01/04-01/06-1813, para 52.

later date.⁵⁸⁴ These individuals had applied on 2 April 2009, requesting anonymity due to security concerns. They requested the right to present their views and concerns in person, and to present evidence under oath regarding their individual histories in the context of the charges against the accused—recruitment, use or enlistment of child soldiers. In addition, they sought to provide testimony regarding: the harm they experienced; the Court's approach to reparations in light of facts not yet discussed at trial; and the issue and scope of child recruitment in [redacted] region.⁵⁸⁵

The Chamber found that their personal interests were affected and that their testimony may be relevant to the charges against the accused, as well as to the consideration of reparations. The Chamber found that two of the applicants could testify about their alleged recruitment by the UPC when they were under 15 and in a [redacted] region of Ituri district that was under the control of Lubanga during the timeframe of the charges. The Chamber rejected the Prosecution's argument that the testimony of these two former child soldiers would be repetitive. In contrast, it found that 'the account of each former child soldier is unique – none of their personal histories are the same'.⁵⁸⁶ Moreover, it found that they would be able to provide accounts of their experiences in an area not yet addressed by other witnesses. Likewise, the Court found that the third victim could provide evidence on the alleged recruitment of children in the same territory of Ituri district and his involvement in those events, as well as the harm resulting from those events.

The Trial Chamber deferred the decision as to whether the three victims would have an opportunity to present their views and concerns in person until after they had provided written testimony. While recognising the right of participating victims to present their views and concerns in person, the Chamber opined that after the victims had presented their evidence through other means, 'it may be more appropriate for any additional submissions (which may involve complex legal issues) to be advanced by their legal representatives'.⁵⁸⁷

On **21 July 2009**, Trial Chamber I issued another decision on victim participation for 21 victim applicants.⁵⁸⁸ The decision followed a report filed by the Registrar, providing supplementary information

584 ICC-01/04-01/06-2002-Conf. A public redacted version of the decision became available on 9 July 2009. ICC-01/04-01/06-2032.

585 ICC-01/04-01/06-2032, para 15.

586 ICC-01/04-01/06-2032, para 37.

587 ICC-01/04-01/06-2032, para 40.

588 ICC-01/04-01/06-2063.

on four groups of victim applicants whom the Trial Chamber had previously identified in its 15 December 2008 decision on victim participation: (1) victims currently participating in the proceedings who were children at the time they filed their applications but are now adults; (2) parents of applicants who alleged personal harm as a result of their children's recruitment; (3) those whose applications were incomplete; and (4) applicants and victims who were originally rejected and did not provide additional information.

In its 15 December 2008 decision, the Trial Chamber had inferred that those applicants who had applied as children but who have since become adults consented to the person acting in their behalf. It held that if this were not the case, the applicant bore the responsibility to inform the Chamber. Upon receiving supplemental information that victims from this group wish to participate on their own behalf, in the 21 July decision, the Chamber granted the request.

Also in its 15 December decision, the Chamber had referred the question to the Registrar as to 'whether these parents wish to participate on their own behalf for the personal harm they have allegedly suffered', in addition to participating on behalf of their children who were granted status to participate in the proceedings.⁵⁸⁹ The Registrar's report answered in the affirmative that all parents wished to act on their own behalf as well. The Chamber thus granted the request for the parents to participate as indirect victims, pursuant to the criteria for indirect victims established in Appeals Chamber judgement of 11 July 2009 and the Trial Chamber decision of 8 April 2009.

Of the three victims in Group Three who had provided incomplete information in their original applications, the Trial Chamber decided on the basis of the supplementary information provided by the Registry to admit two of the applicants but reject one. Applicant a/0255/07 had not provided sufficient proof of his age in his identity documents to determine whether he was under the age of 15 at the time of his alleged recruitment. In the time since the 15 December decision, the Registry was unable to provide further proof of the victim's age. Finding 'no substantive additional information has been provided to prove *prima facie* that the applicant was under the age of 15 at the time of the alleged recruitment', the Trial Chamber rejected the application. The other two applicants are siblings whose father has acted on their behalf, but those applicants were not admitted in the 15 December decision because the Trial Chamber found insufficient information to establish that their alleged recruitment took place with the timeframe of

the charges. Based on the supplementary information provided by the Registry, but not disclosed in the decision, the Trial Chamber found that there was in fact enough information to establish the applicants experienced personal harm during that time period.

Finally, the Trial Chamber rejected the applications of those whom it had previously rejected on the basis of lack of sufficient information. In the interim time period, the Registry was unable to locate some applicants or was unable to provide sufficient information for others.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

The Katanga case has received the highest number of applications to participate in the proceedings, 345 of which have been accepted to date. This year the Trial Chamber focused on the criteria for proving the identity of victim applicants who may lack accurate documentation. It also handed down a significant decision on the organisation of victims for the purposes of common legal representation, discussed in the section **Legal Representation**.

On **26 February 2009**, Trial Chamber II issued a decision concerning victims' applications to participate in the proceedings.⁵⁹⁰ The decision followed a confidential report presented by the Registrar, which detailed the status of applications to participate in the proceedings and for reparations.⁵⁹¹

Chiefly, the decision established the criteria to be used for registering victims' applications for participation in the present proceedings. The Chamber held that the VPRS should submit to the Chamber those applications that: (1) make reference to the facts as established in the confirmation of charges decision, namely the attack on Bogoro on the 24 February 2003; and (2) make reference to the *Front des nationalistes et intégrationnistes* (FNI) and the *Force de résistance patriotique en Ituri* (FRPI). The Chamber indicated that it would allow a margin of appreciation concerning the commission of crimes within the immediate periphery of the village.⁵⁹²

The Chamber specifically requested that the VPRS include those cases that clearly reference the facts as established in the confirmation of charges decision, but which do not specifically reference a date. It also called the Registrar's attention to those crimes that cannot be circumscribed to a single day, such as pillaging, the use of child soldiers and sexual slavery.⁵⁹³

590 ICC-01/04-01/07-933.

591 ICC-01/04-01/07-796-Conf.

592 ICC-01/04-01/07-933, para 21.

593 ICC-01/04-01/07-933, para 22.

589 ICC-01/04-01/06-1556, para 78.

The Chamber held that an application to participate in the proceedings will be considered complete when it contains the following information:

- 1 the identity of the applicant;
- 2 the date on which the crimes were committed;
- 3 the place where the crimes were committed;
- 4 a description of the harm suffered by a crime that falls within the competence of the Court;
- 5 proof of identity;
- 6 if the application is presented by a person acting with the consent of the victim, proof of the victim's consent;
- 7 if the application is presented by a person acting on behalf of a child victim, proof of a parental link or of guardianship, or if the application is presented by a person acting on behalf of a disabled person, proof of guardianship;⁵⁹⁴ and
- 8 a signature or thumb print of the applicant, at a minimum on the last page of the application.⁵⁹⁵

The Chamber held that the following documents were valid to establish the applicant's identity:

- 1 national identity card, passport, birth certificate, death certificate, marriage certificate, family book, a will, driver's licence, a card issued by a humanitarian agency;
- 2 voting card, student card, primary school student card, a letter by a local authority, camp residency card, documents related to medical treatment, employee identity card, baptism card;
- 3 certificate of loss, scholarly documents, church membership card, membership card for an association or political party, documents from centres for the reinsertion of children associated with armed groups, certificate of nationality, pension book; or
- 4 statements signed by two credible witnesses attesting to the identity of the applicant, or of the link between the victim and the person acting on his or her behalf, and accompanied by proof of the identity of the two witnesses.⁵⁹⁶

594 The Chamber also noted that in the absence of any document proving guardianship or parental ties, such can be established by the statement of two credible witnesses.

595 ICC-01/04-01/07-933, para 28.

596 ICC-01/04-01/07-933, para 30.

The Chamber held that, excepting flagrant contradictions, applications should be accepted despite differences between the identity documents and the information on the application form as long as (1) the discrepancies do not call into question the credibility of the applicant, and (2) the identity and age of the applicant is clear.⁵⁹⁷ In addition, it recognised the capability of both minors and disabled persons to represent themselves, depending on their capacity for discernment and, in the case of the former, their maturity.⁵⁹⁸

With respect to the process, the Trial Chamber ordered all new applications for participation in the proceedings to be sent to the VPRS, which must then transmit them to the Chamber, accompanied by a report.⁵⁹⁹ The Trial Chamber held that the 57 victims who received prior authorisation to participate in the process by Pre-Trial Chamber I⁶⁰⁰ should be automatically authorised to participate in later stages of the proceedings without being required to reapply.⁶⁰¹ It stated that it will consider those applications rejected by Pre-Trial Chamber I that are completed in conformity with the criteria set forth in the present decision. It ordered the Registrar to appoint the Office of Public Counsel for Victims to legally represent victim applicants on a provisional basis while they await the Chamber's decision on their status.⁶⁰² Finally, the Chamber ordered the VPRS to register applications for reparations, but held that the applicants' status as victims must be determined prior to their applications for reparations.⁶⁰³

597 ICC-01/04-01/07-933, para 34.

598 ICC-01/04-01/07-933, paras 39, 40.

599 ICC-01/04-01/07-933, para 16.

600 ICC-01/04-01/07-357; ICC-01/04-01/07-632; ICC-01/04-01/07-579.

601 ICC-01/04-01/07-933, paras 10, 13.

602 ICC-01/04-01/07-933, para 45.

603 ICC-01/04-01/07-933, para 56.

Darfur, Sudan

The Situation in Darfur accounts for the smallest number of victims granted participation status before the Court (1%), comprised of 11 individuals, none of whom are living in Sudan. Based on the information received from VPRS, no victims had been accepted to participate in any of the cases in the Darfur Situation as of 30 September 2009.⁶⁰⁴

The Prosecutor v. Omar Hassan Ahmad Al’Bashir

On **27 August 2009**, Judge Monageng issued a Decision on the ‘Legal Representative’s Request to Expedite the Consideration of Applications for Victim Status’.⁶⁰⁵ The decision followed a confidential and *ex parte* report filed by VPRS on 14 August concerning eight victim applications to participate in the pre-trial phase of the proceedings, and a request filed 27 August by the Legal Representatives of those victims to expedite a decision on their status. In the 27 August decision, the Single Judge ordered the Prosecution and Defence, through the Office of the Public Counsel for the Defence (as no Defence counsel has yet been appointed), to respond within three weeks with their observations on the applications. No decision has issued on this matter to date.

The Prosecutor v. Bahr Idriss Abu Garda

In an effort to offer assistance to those who may face difficulties filling out victim application forms, which are not printed in Arabic, the VPRS requested that the Chamber allow it to transmit victims applications directly to the OPCV. This request, prompted by OPCV’s communications with the VPRS, sought permission for OPCV to provide legal assistance to the applicants, or to appoint the OPCV as the applicants’ legal representative until the Chamber rules on their status. Concerned by the fact that all the applicants lacked legal representatives and had limited understanding

of the legal proceedings, the Registry argued that it would be a more efficient use of the Court’s resources to have OPCV meet the applicants and finalise their applications prior to sending them to the Registry.

On **12 June 2009**, Judge Cuno Tarfusser, Single Judge of Pre-Trial Chamber I, denied the VPRS request.⁶⁰⁶ Judge Tarfusser reasoned that the OPCV’s function is triggered only after the victim is recognised by the Court, and he expressed concern about ‘unduly blurring the difference between the Registry, on the one side, and the Office, on the other side’.⁶⁰⁷

On **19 August 2009**, Pre-Trial Chamber I designated Judge Sanji Mmasenono Monageng as Single Judge responsible for all issues related to applications by victims to participate in the proceedings.⁶⁰⁸ In that same decision, the Pre-Trial Chamber also ordered the VPRS to submit its report by 11 September 2009 on the applications of those victims wishing to participate in the confirmation of charges proceedings. The Registry filed its ‘Report on applications to participate in the proceedings’ on 26 August 2009 in which it submitted 34 victim applications.⁶⁰⁹ Judge Monageng ordered the parties to respond to the victim applications by 12 September and ordered the Registry to provide the applications to the Prosecution with redactions of ‘names, addresses and other sensitive information which could lead to the Applicants’ identification’.⁶¹⁰

Having received 52 victim applications prior to the deadline for filing applications on 11 September, Single Judge Monageng issued a decision on **16 September 2009** ordering the parties to submit their observations on these applications.⁶¹¹ Six applications were incomplete due to difficulties faced by the legal representatives of the victims when trying to secure both the signatures and proof of identity of their clients residing in Sudan. Therefore, the Judge granted an extension of time for the Registry to provide supplemental information until 16 September and for the parties to respond to the applications by 30 September.

604 In a decision that was not made public prior to the cut-off date for this report, on 25 September 2009 Pre-Trial Chamber 1 admitted 34 applicants to participate in the confirmation of charges proceedings. The Chamber admitted another 44 applicants in a decision issued on 9 October 2009, bringing the total number of victims recognised to participate at the pre-trial stage of the case to 78. The two decisions will be analysed in the 2010 *Gender Report Card*.

605 ICC-02/05-01/09-36.

606 ICC-02/05-02/09-20.

607 ICC-02/05-02/09-20, p 5.

608 ICC-02/05-02/09-55.

609 ICC-02/05-02/09-64-Conf-Exp; ICC-02/05-02/09-64-Conf-Exp, Anx 1-34.

610 ICC-02/05-02/09-68.

611 ICC-02/05-02/09-106.

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

Fifty-four victims have been accepted to participate in the Bemba case to date, constituting 7% of the victims currently admitted to participate before the Court. This year, Judge Kaul, Single Judge of Pre-Trial III with respect to victims' issues in the Bemba case, issued three important decisions on victim participation. The Fourth and Sixth decisions on victims' participation are discussed in this section, while the Fifth decision is addressed in the section on **Legal Representation**.

On **12 December 2008**, Judge Kaul handed down his 'Fourth Decision on Victims' Participation'.⁶¹² He approved 54 out of 58 applications on behalf of victims seeking to participate in the hearings on the confirmation of charges, rejected three applicants, and deferred a decision on one until missing information is provided.

In reviewing the requirements to meet the definition of a victim, the Single Judge elaborated on what kind of information is sufficient for the applicant to show he or she is a 'natural person' as required by Rule 85. In CAR for example, some victims may have lost identity documents due to the impact of conflict, may be unable to produce official copies due to burdensome administrative procedures, or may never have possessed them at all because they live in rural areas. In light of these considerations, Judge Kaul held it was appropriate for the Court to adopt 'a flexible approach which is adapted to the realities in the individual situation country'.⁶¹³

Next, the Single Judge described the type of information victims must present at the pre-trial phase in order to prove they are victims of a crime within the jurisdiction of the court. The Court has jurisdiction over the crimes of genocide, crimes against humanity and war crimes, but a victim applicant must show the link between the incident causing him or her harm and the present case.⁶¹⁴ In the pre-trial stage of the proceedings, prior to the confirmation of charges against Bemba, 'it is those facts contained in the document containing the charges which define and delineate the scope of the present proceedings'.⁶¹⁵ The Single Judge, who determines the legal characterisation of facts based on evidence presented at the confirmation hearing, must 'determine whether the alleged incidents described may be regarded as crimes within the jurisdiction of the Court'.⁶¹⁶

612 ICC-01/05-01/08-320.

613 ICC-01/05-01/08-320, para 34.

614 ICC-01/05-01/08-320, para 61.

615 ICC-01/05-01/08-320, para 63.

616 ICC-01/05-01/08-320, para 64.

Third, the victim applicant must show he or she has suffered harm. In the case of individuals, the Appeals Chamber has held the harm must be harm suffered personally by the victim.⁶¹⁷ The Single Judge held that 'emotional suffering may be claimed by immediate family members and dependants, as long as the relationship has been sufficiently established'.⁶¹⁸ In addition, to satisfy the requirement that harm must be 'as a result' of the alleged crime, Judge Kaul held that the alleged crime 'need not have played a substantial part or be the predominant cause' as long as it 'contributed to the harm allegedly suffered'.⁶¹⁹

Finally, the Single Judge examined whether the 'personal interests' of the victims are affected, as required by Article 68(3), in order to grant participatory rights to victims at the pre-trial phase of the proceedings. After weighing all the interests involved, the Single Judge concluded that the participation of victims in the confirmation hearing was appropriate because the victims had shown they were affected by incidents in CAR that form the basis of the confirmation hearing. In addition, they demonstrated a personal interest in seeing the charges confirmed because they held 'genuine wish to see justice being rendered'.⁶²⁰ Mindful of the rights of the accused and the need for an expeditious hearing, Judge Kaul recognised that participatory rights of victims should be limited to include: (1) the right, through their legal representatives, to attend the public parts of the confirmation hearings and give a brief opening and closing statement; (2) the right to access public decisions and documents; (3) the right to access public evidence; (4) the right to access transcripts of the public parts of hearings; (5) the right to notification of public decisions and filings; and (6) the right to make succinct oral submissions on issues of law and fact during the hearing.

In his **8 January 2009** 'Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of the Public Counsel for Victims',⁶²¹ Judge Kaul ruled on a request by the OPCV to be granted expanded participatory rights during the confirmation hearing.⁶²² The Single Judge recalled his Fourth Decision on victims' issues issued on 12 December 2008, where he granted certain participatory rights to victims for purposes of the confirmation hearing, including *inter alia* the right to attend the public parts of the confirmation hearing through their legal

617 ICC-01/04-01/06-1432, para 32.

618 ICC-01/05-01/08-320, para 72.

619 ICC-01/05-01/08-320, para 77.

620 ICC-01/05-01/08-320, para 90.

621 ICC-01/05-01/08-349.

622 ICC-01/05-01/08-347.

representatives; to access public decisions, documents, and evidence; and to make an oral submission at the hearing through the legal representatives.

The OPCV raised three issues in its request. The first, to intervene in the hearing on questions of jurisdiction and admissibility, was rejected because these questions are not under judicial review at this stage of the proceedings.

Judge Kaul also rejected the second request to order the Registry to notify the OPCV before the confirmation hearing of any confidential written submissions on points of fact and/or law made by the Prosecutor or Defence, as no such filings had been made. Similarly, the request to receive a list of evidence the parties plan to present at the confirmation hearing was ruled premature because no list yet existed, although if it is later created, it could be shared with OPCV.

Finally, Judge Kaul rejected the third request to access witness statements of victims who are represented by OPCV, holding that ‘all information necessary for the proper preparation of the OPCV to present the views and concerns of those victims is contained, in principle, in the relevant victim applications’⁶²³ or could be obtained by asking the victims themselves. Furthermore, the Chamber did not find it appropriate to grant OPCV access to statements that were made in a different capacity and are filed on a confidential basis.

The Judge also denied the OPCV’s request to attend closed sessions during which those witness statements are discussed and referred to his Fourth Decision on victim participation, in which he delineates the rights of victims to attend public hearings and access public documents.

623 ICC-01/05-01/08-349, para 9.

Judiciary

Key Decisions CONTINUED

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Legal Representation for Victims

During 2009, the Court issued notable decisions on the organisation of victims for the purpose of providing for their common legal representation and the criteria to be used when selecting a legal representative.

The Rules of Procedure and Evidence (RPE) contain detailed provisions for the appointment of legal representatives for victims, and their role in the proceedings once appointed. Under the Rules, the Registry has the task of ‘facilitating the coordination of victim representation’ by referring victims to its list of legal counsel, or by ‘suggesting one or more common legal representatives’.

The Rules also provide that the Chamber may request victims or groups of victims to choose a common legal representative, ‘for the purposes of ensuring the effectiveness of the proceedings’.⁶²⁴ If victims are unable to choose a common legal representative or representatives, the Court may request that the Registrar make the choice for them.⁶²⁵ The Chamber and the Registry must ‘take all reasonable steps to ensure that, in the selection of common legal representatives, the distinct interests of the victims ... are represented and that any conflict of interest is avoided’. The Rules clarify that these distinct interests include age, gender, health, and ‘the nature of the crime, particularly where the crime involves sexual or gender violence or violence against children’.⁶²⁶

⁶²⁴ Rule 90(2).

⁶²⁵ Rule 90(2) and (3).

⁶²⁶ Rule 90(4), read together with Article 68(1).

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. Providing 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.⁶²⁷

In 2009, the Office of Public Counsel for Victims (OPCV) continued to function as legal representative for victims before the Court, as well as to provide support for external legal representatives. The OPCV is an independent office of the Court. It was established for the purpose of providing support and assistance to victims and their legal representatives by providing legal research and advice, and, where appropriate, appearing before a Chamber in respect of specific issues. A Chamber may also appoint counsel from the OPCV to represent individual victims or groups of victims.⁶²⁸ As of September 2009, the OPCV reports that it is assisting a total of 438 victims: 137 in the DRC Situation and related cases, 237 in the Uganda Situation and the Kony case, 35 in the CAR and the Bemba case, and 29 in the Darfur Situation and related cases.⁶²⁹ The Office is also assisting 21 legal representatives in the DRC, CAR and Darfur Situations and their related cases.⁶³⁰

The funding of legal representation for participating victims is discussed in the **Legal Aid for Indigent Victims** section of this report. The ASP is currently considering proposals for revisions to the funding of legal representation

for victims. Among the structures being considered are fully internalising victim representation (meaning only representation by the OPCV), fully externalising victim representation through only using outside counsel, and using both internal and external counsel in different configurations. However, the use of external counsel provides a number of benefits that would be lost with a full internalisation of victim representation, including:

- allowing the freedom of choice of counsel as required by Rule 90(1);
- allowing for counsel who have local knowledge (of the culture and context, language, conflict);
- allowing for the participation of the local bar and capacity-building in the domestic legal profession;
- ensuring that independent judgement of counsel is represented in the proceedings, allowing for the fullest development of the issues at hand;
- helping to avoid conflicts of interest between victims/victim groups; and
- allowing for victims, especially victims of sexual violence, to choose a female counsel who may have expertise important to them.

With respect to external (list) counsel, generally, the Court has thus far failed to use proactive strategies to promote the list to women in order to address the significant gender disparity on the current list, which is composed of 81% men and 19% women. The Court is required under Rule 90(4) of the RPE to implement mechanisms to ensure the List includes Counsel capable of representing the distinct interests of victims, including victims of sexual and gender-based violence.

⁶²⁷ As discussed previously, in the section of this report dealing with the structures of the Court, the Registry should take steps to increase the number of women on this List.

⁶²⁸ Regulations 80 and 81, Regulations of the Court.

⁶²⁹ 'Update on activities of the OPCV', paper prepared by the OPCV for the ICC-NGOs Roundtable held from 8-9 October 2009 at the International Criminal Court, p 2.

⁶³⁰ Id.

Uganda

The Prosecutor v. Joseph Kony et al

On **9 February 2009**, Single Judge Politi issued a decision on legal representation of victims in the case of Kony et al. and in the Uganda Situation. He accepted the 28 November 2008 proposal from the OPCV, which suggested appointing two counsel from the OPCV to each act on behalf of a separate group of victims. Judge Politi agreed that the appointment of separate legal counsel was necessary to “prevent any conflict of interest from arising from the victims’, as well as enable ‘a legal representation taking into account the specificities’ of the two categories” of victims—those admitted to participate in the Case and those victims admitted in the Situation.⁶³¹ He refrained from dividing the groups between former child soldiers and the other victims, as proposed by the OPCV, claiming that the proposed formulation ‘does not seem to accurately encompass the personal circumstances of all applicants granted the status of victim in the context of the Situation’.⁶³²

In the same decision, Judge Politi refrained from making a determination on the status of four applicants until their views on legal representation were solicited from the Registrar. Finally, with a view towards ‘ensuring continuity in the legal representation of victims’, the Judge revoked the appointment of an external counsel as legal representative for one group of victims and appointed two legal counsel from the OPCV, each to represent one group of victims in the Uganda Situation and in the Kony et al case respectively.⁶³³

631 ICC-02/04-176, para 13.

632 ICC-02/04-176, para 15.

633 ICC-02/04-176, para 22.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

In its **15 December 2008** decision on victim participation,⁶³⁴ Trial Chamber I instructed the VPRS to consult with the legal representatives of the victims before 7 January to make a proposal on common legal representation in accordance with Rule 90(2). Victims wishing to participate in person at any stage of the trial proceedings were required to apply in writing to the Chamber before 9 January 2009. As discussed in the section on **Victim Participation**, Trial Chamber I handed down an oral order on **22 January 2009**, according to which the participating victims were to be represented in two groups by seven external counsel, acting as common legal representatives, as allowed under Rule 90 of the Rules of Procedure and Evidence. Four victims were to be represented by the OPCV outside of those two teams.⁶³⁵

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

On **22 July 2009**, in the case of *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II issued an ‘Order on the organisation of common legal representatives of victims’ (‘Order’).⁶³⁶ In this Order, the Chamber approved a plan for both the organisation of victims and the legal representation of victims who have been accepted to participate in the trial proceedings. Specifically, it ordered the Registry to: (1) group victims into two categories, one group of former child soldiers and one group of all other victims, and (2) assist the victims in choosing a common legal representative for each group.⁶³⁷

The Order followed the submission of proposals, upon request of the Chamber,⁶³⁸ by the Registry and Legal Representatives for different groups of victims, to resolve questions about how to organise the victims for the purpose of their legal representation. While all parties accepted that the large number of victim applicants (including 57 victims already authorised to participate and 345 applications pending at the time the Order was issued) made it impractical for victims to present their views and concerns individually, views differed on the criteria that should be used to group them. The Chamber ordered the Legal Representatives and Registry to work together to develop a plan for organising the victims into groups and providing for their common legal representation.⁶³⁹

634 ICC-01/04-01/06-1556.

635 ICC-01/04-01/06-T-105-ENG, p 12 lines 23-25; p 13 lines 1-12.

636 ICC-01/04-01/07-1328.

637 ICC-01/04-01/07-1328, para 13.

638 ICC-01/04-01/07-747-t-ENG, para 5.

639 ICC-01/04-01/07-788-t-ENG.

The Legal Representatives submitted a joint proposal on 6 February 2009 in which they proposed grouping the victims into three ‘teams’ in order to avoid potential conflicts of interest, particularly between the group of former child soldiers who could be seen as perpetrators and the other victims. However, the Registry considered that there was no potential conflict among the victims with the exception of the group of former child soldiers, whom the other victims could perceive as perpetrators. Therefore, the Registry proposed grouping the victims into two categories – the former child soldiers and all other victims of the Bogoro attack.

The Legal Representatives also proposed putting a rotation system in place so each team would have only one representative for the duration of the trial. The Registry endorsed the plan to have a rotating representative except in exceptional circumstances, where all counsel could address the Chamber jointly. Since the time these proposals were submitted, a large number of victims have applied, and been accepted, to participate in the proceedings, as discussed below.

In its order of 22 July, the Chamber considered the proposals by the Registry and the Legal Representatives, and based its decision on several factors.⁶⁴⁰ The first factor, and the one of ‘greatest importance’, was how to ensure that victim participation be ‘as meaningful as possible as opposed to being purely symbolic’.⁶⁴¹ The second concern was for preserving the efficiency of the proceedings, and to therefore ‘guard against any unnecessary repetition or multiplication of similar arguments and submissions’.⁶⁴² Third, the Chamber considered the potential burden on the Defence of responding to victims. The Chamber noted that while victims have the freedom to choose a personal legal representative, this right is qualified by rule 90(2), which allows the Court to appoint a common legal representative in cases where there is a large number of victims. Victims’ right to choose a representative is ‘subject to the inherent and express powers of the Chamber to take all measures necessary if the interests of justice so require’.⁶⁴³

Considering the large number of victim applicants, the Chamber found ‘it would be entirely unfeasible for each of them to be represented individually’.⁶⁴⁴ It accepted the Registry’s assessment that aside from the small number of former child soldier victims, no other tensions appear to exist among victims of the Bogoro attack. These factors convinced the Chamber that it was ‘both necessary and appropriate’ to accept the Registry’s proposal and, with the exception of the former child soldiers, group all other victims ‘into one group represented by one common legal representative’.⁶⁴⁵

The Trial Chamber’s Order makes each representative responsible for representing the common interests of his or her group of victims and for acting on behalf of specific victims when their individual interests are at stake.⁶⁴⁶ The Chamber explained that in case a conflict arises between the victims and their representative, the victims may petition the Registry, who may in turn inform the Chamber if the issue cannot be resolved.

The Chamber established criteria to ensure high quality representation, including that the common legal representative ‘be fully available’ to the victims throughout the proceedings and be present at the Court for the duration of proceedings. Strong local connections to the region affected are also desirable. The Chamber also addressed how to resolve potential conflicts of interest among victims who are commonly represented. In case instructions conflict to the point that views are irreconcilable, the legal representative may inform the Chamber, who may take measures such as appointing the OPCV to represent one of the groups. The Chamber further ordered the Registry to devise, in collaboration with the common legal representative, a support structure ‘in order to provide the common legal representative with the necessary legal and administrative support, both at the seat of the Court *and* in the field’.⁶⁴⁷ It then set out criteria for that support structure and instructed the Registry to rely on resources available to it at the Court or in the conflict situations.⁶⁴⁸

640 ICC-01/04-01/07-1328, para 10.

641 ICC-01/04-01/07-1328, para 10.

642 ICC-01/04-01/07-1328, para 10.

643 ICC-01/04-01/07-1328, para 11.

644 ICC-01/04-01/07-1328, para 12.

645 ICC-01/04-01/07-1328, para 13.

646 ICC-01/04-01/07-1328, para 13.

647 ICC-01/04-01/07-1328, para 17.

648 ICC-01/04-01/07-1328, paras 17-18.

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CAR

On 9 January 2009, the Registry issued its ‘Report on legal representation of victims for whom the Office of the Public Council for Victims had been appointed as Legal Representative’ concerning victims admitted for the CAR Situation.⁶⁴⁹ In the Pre-Trial Chamber III’s ‘Fifth Decision on Victim Participation’,⁶⁵⁰ the Chamber appointed the Principal Counsel of the OPCV to represent the victims who objected to being represented by the common legal representative from the CAR. Subsequently, the Registry appointed a common legal representative for all victims except those represented by the OPCV, then began contacting victims represented by the OPCV to determine whether they agreed or objected to being represented by the new common legal representative. All of the victims expressed their wish to continue to be represented by the OPCV.

The Prosecutor v. Jean-Pierre Bemba Gombo

Judge Kaul, Single Judge of Pre-Trial Chamber III designated to address victims’ issues in the Bemba case, issued the ‘Fifth Decision on Victims’ Issues Concerning Common Legal Representation of Victims’ on **16 December 2008**.⁶⁵¹ In this decision concerning victim participation at the pre-trial phase, Judge Kaul found it appropriate that the views and concerns of those recognised as victims in the case be presented by their legal representatives. However, given the large number of victims in the case, he held that a single common legal representative chosen to present their views ‘is deemed appropriate in order to ensure effectiveness of pre-trial proceedings’.⁶⁵²

Judge Kaul then set forth the criteria to be used to appoint a common legal representative, ensuring that the ‘distinct interests’ of the victims are taken into consideration pursuant to Rule 90(4). These criteria include: (1) the language spoken by victims; (2) links between them provided by time, place and circumstances; (3) the specific crimes of which they allege to be victims; (4) the views of victims; and (5) respect of local traditions.⁶⁵³ In the case of CAR, where victims in the case suffered similar crimes allegedly committed by the same perpetrators, the Single Judge held that a common legal representative from CAR should be chosen by all the recognised victims. The Registry should assist the selection and, in case the victims do not agree, make the selection instead. In the case that some victims do not agree to representation by a counsel from CAR, or a conflict of interest arises, the Single Judge appointed the OPCV to continue to represent those victims, as provided in a previous decision of the Chamber.⁶⁵⁴

649 ICC-01/05-01/08-357.

650 ICC-01/05-01/08-322.

651 ICC-01/05-01/08-322.

652 ICC-01/05-01/08-322, para 7. Rule 90(2) grants the Pre-Trial Chamber the power to choose a common legal representative ‘for the purpose of ensuring the effectiveness of the proceedings’ where there are a large number of victims.

653 ICC-01/05-01/08-322, para 9.

654 ICC-01/05-01/08-103-tENG-Corr. Pre-Trial Chamber III had appointed the OPCV to represent those victims who had not been able to organise their timely representation.

Judiciary

Key Decisions CONTINUED

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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’ and, in doing so, to 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’.⁶⁵⁵

In 2009, the Lubanga Trial Chamber addressed tension between the Registry and Office of the Prosecutor concerning which organ of the Court is responsible for making decisions on **protective measures** for witnesses. In two decisions, the Chamber affirmed that the Victim and Witnesses Unit, not the Office of the Prosecutor, holds primary responsibility for providing victims and witnesses with appropriate protective measures.

Positive developments regarding protection in 2009 include regular meetings between the Victims and Witnesses Unit and the Office of the Prosecutor to identify the protection needs for witnesses and to take into account the specific needs of groups including women, children, and victims of sexual and gender-based violence. The Unit’s strategy for victim protection has increased its emphasis on ‘middle-ground measures’ for victim protection, such as resettlement within the victim’s country of origin rather than international resettlement, in order to meet a broader range of victims’ needs.

⁶⁵⁵ Rule 87(1) provides that such measures may also be taken to protect not only a victim or witness, but also ‘another person at risk on account of testimony given by a witness’.

During 2009, the Chambers issued a large number of decisions that may have an impact on the safety and security of witnesses and victims. A significant proportion of these decisions concerned **redactions**⁶⁵⁶ from a wide range of documents such as witness statements and applications for victim participation, communications between the Prosecution and witnesses, and internal work product of the Prosecution.

According to the Rules of Procedure and Evidence, redactions are exceptional measures that may be undertaken only when disclosure of information could prejudice further or ongoing investigations or threaten the security of witnesses, victims or their family members. A determination of whether redactions are necessary requires balancing competing principles: the right of the accused to a fair trial, the Chamber's duty to protect the safety and well-being, dignity and privacy of victims and witnesses, and the Prosecution's obligation to disclose exculpatory material to the Defence.

This year the Court issued decisions concerning the redaction of identifying information of witnesses, victims and their family members; 'innocent third parties', meaning individuals not involved with the Court but who may be placed at risk as a result of the Court's activities; and the Court's field staff, particularly investigators whose security may be compromised if their identities are discovered. Decisions also frequently addressed the proportionality of the measures taken to address the risk to the information provider's security and whether alternative, less restrictive measures may be appropriate to address the security concerns without compromising the rights of the accused to access all the evidence necessary to prepare a Defence.

656 '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'.

During 2009, the Court also issued a number of decisions on the **interim release of accused** before the Court.⁶⁵⁷ 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 those 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 are that, first, 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 the continued detention of the person appears necessary to ensure his or her appearance at trial and that the person does not obstruct or endanger the investigation or proceedings, and to prevent the accused from committing the same or related crimes of which he or she is accused. Pursuant to Article 60(2), if either of these conditions is not met, the Chamber must release the person, with or without conditions.

657 '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.

Protective Measures

DRC

The Prosecutor v. Thomas Lubanga Dyilo

During the presentation of the prosecution case in the trial of Lubanga, a number of protective measures were granted to witnesses who testified. Those protective measures included image distortion and voice distortion (with respect to the public), and use of a pseudonym. However, at all times the Defence knew the names of the witnesses. According to the Office of the Prosecutor, 19 of the 28 witnesses who testified for the Prosecution have been included in the ICC Protection Programme.⁶⁵⁸

Witnesses also frequently gave testimony in private session (visible but not audible to the public) and in closed session (neither visible nor audible to the public). The ICC courtroom is designed so that curtains can be drawn and the audio feed to the public gallery can be cut off to allow the court to go into and come out of private and closed sessions quickly and easily. Certain witnesses were also granted a screen so that Lubanga could see them but they would not be able to see him while they testified, in order to minimise the intimidation that witnesses might experience testifying in full view of Lubanga. Generally, the protective measures for each witness were dealt with in an oral ruling by the Chamber before the witness took the stand.

Also underlying these protective measures were a number of decisions that came in the period leading up to the trial, some of which are reviewed below. Additional decisions pertaining to witnesses are discussed in the section **Witness Related Issues**.

Trial Chamber I's **15 December 2008** decision focusing on victim participation⁶⁵⁹ also contained a ruling on protective measures for victims. The Chamber found that general information regarding the lack of security in the DRC was insufficient to make a determination about the individual protection needs of each victim. Accordingly, it requested the VWU to assess the individual risk faced by each participating victim, bearing in mind less restrictive measures than anonymity, so that the Chamber can provide 'a fact-sensitive decision'⁶⁶⁰ on the range of issues

concerning each victim's participation at each stage of trial, including a determination on whether the victim can remain anonymous without infringing the rights of the accused. The Chamber deferred a decision on whether any victims can be active participants and yet remain anonymous.

Two decisions issued during the month of December 2008 dealt with the issue of whether the OTP or the Registry was the appropriate organ of the Court to make decisions related to protective measures.

On **9 December 2008**, Trial Chamber I issued a 'Decision on the prosecution's oral request regarding applications for protective measures'.⁶⁶¹ The decision sought to resolve questions that arose following the Chamber's 30 November 2007 decision on witness familiarisation as to whether Rule 87 envisions that the responsibility to file applications for protective measures falls on the parties, as argued by the Prosecution, or on the Victims and Witnesses Unit, as submitted by the Defence. In this instance, the Prosecution sought leave to speak to witnesses upon their arrival in The Hague and prior to their appearance in court about whether they require the filing of protective measures.

The Chamber affirmed that 'pursuant to Rule 87 of the Rules, the responsibility for filing applications for protective measures lies primarily with the party calling a witness'.⁶⁶² However, it also reminded the parties that Rule 87(1) provides that the Chamber may consult with the VWU before protective measures are ordered. As for dealing with witnesses once they are in The Hague, the Chamber emphasised the need for close cooperation between the VWU and the Prosecution, but it 'remains of the view that the Victims and Witnesses Unit is the only organ of the Court which should deal with witnesses upon their arrival in The Hague, including reviewing their security'.⁶⁶³

On **16 December 2008**, Trial Chamber I issued a decision⁶⁶⁴ on the proper allocation of responsibility for decisions on protective measures.⁶⁶⁵ The decision denied both the Defence and Prosecution requests to appeal a 24 April 2008 decision by the majority of the Trial Chamber on this issue.

661 ICC-01/04-01/06-1547.

662 ICC-01/04-01/06-1547, para 6.

663 ICC-01/04-01/06-1547, para 5.

664 ICC-01/04-01/06-1557.

665 ICC-01/04-01/06-1295-US-Exp, and ICC-01/04-01/06-1295-US-Exp-Anxl. A separate dissent by Judge Blattmann was issued on 28 April 2008. A public redacted version of the decision followed on 8 May 2008, ICC-01/04-01/06-1311, with confidential Annex I and public Annexes 2 and 3.

658 Speech of the Deputy Prosecutor at the Consultative Conference on International Justice, United Nations Headquarters, New York, 9-11 September 2009. Statistic cited with the permission of the Office of the Prosecutor.

659 ICC-01/04-01/06-1556. See also the analysis of this decision in the section on 'Victim Participation'.

660 ICC-01/04-01/06-1556, para 131.

The Prosecution argued, in essence, that the 24 April decision had imposed too high a starting point for protective measures, contravening the Rome Statute’s framework for providing witness protection and the Court’s practice of striving to provide maximum security for all witnesses. In its view, this higher standard would result in increased exposure to harm for the witnesses and inhibit the Prosecution’s ability to: provide for the protection of witnesses under Article 68, conduct investigations respecting the rights of witnesses and victims, and prepare for and present cases at trial. In particular, the Prosecution suggested that the Chamber’s threshold of ‘high likelihood of harm’ only countenances a high risk of physical harm, thereby potentially denying protection to witnesses who have been subjected to serious psychological pressure and intimidation.⁶⁶⁶ Witnesses may also be less likely to cooperate with the Court. Finally, the Prosecution asserted that the Chamber’s decision, which affirmed the VWU’s discretion to assess applications for protective measures, stripped the Prosecution of its role to make determinations about the standard used to assess the risks faced by witnesses, making it impossible for the Prosecution to ‘take measures or request measures’ for individuals’ protection.⁶⁶⁷

The Chamber rejected the Prosecution’s grounds for appeal. First, it disagreed with the Prosecutor that it had, in its decision, limited the concept of harm to physical harm. ‘[F]or the avoidance of doubt, an established danger of harm can include physical as well as psychological harm, and evidence of intimidation – depending on the circumstances – may be powerful evidence of the existence of a danger of harm.’⁶⁶⁸ On the second issue as to which organ of the Court is responsible for making decisions on protective measures, the Trial Chamber recalled the finding of the Appeals Chamber that ‘[t]he function of the VWU is to provide, *inter alia*, appropriate protective measures and security arrangements, respecting the interests of the witness and acting impartially’;⁶⁶⁹ and ‘that if the Prosecutor disagrees with a decision of the VWU, the Chamber is to resolve the issue.’⁶⁷⁰ Given this decision affirming the general ‘responsibility’ of the VWU in matters of protection, the Chamber held the second issue was not one that ‘significantly affect[s] the fair and expeditious conduct of the proceedings or the outcome of the trial’.⁶⁷¹

666 ICC-01/04-01/06-1557, para 6.

667 ICC-01/04-01/06-1557, para 11.

668 ICC-01/04-01/06-1557, para 29.

669 ICC-01/04-01/06-1557, para 32, citing ICC-01/04-01/07-776, para 92.

670 ICC-01/04-01/06-1557, para 32.

671 ICC-01/04-01/06-1557, para 32.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

In its **26 February 2009** decision on victim participation, discussed above in the section on **Victim Participation**, Trial Chamber II also addressed protective measures. The Chamber requested that the Registrar include in its reports on victims’ applications information pertaining to the applicants’ security concerns. It also requested persons assisting applicants in filling out the form to draw applicants’ attention to security issues when providing information pertaining to their identity.⁶⁷²

Redactions

Uganda

The Prosecutor v. Joseph Kony et al

Judge Politi, Single Judge sitting for Pre-Trial Chamber II, issued a decision on **10 March 2009**⁶⁷³ regarding redactions of victim identifying information in their applications to participate in the proceedings. Judge Politi identified information about victims that could be redacted from applications for the purpose of protecting victims while also emphasising the importance of a case-by-case review of the relevant factual circumstances. In consideration of ‘persisting instability of the security situation in Uganda, as well as the act that all persons against whom warrants of arrest have been issued in the Situation still remain at large and may therefore pose a threat to the applicants and their families’, the Judge found that ‘the redaction of the applications remains the appropriate measure to be taken and does not amount to an unnecessary restriction of the rights of the Defence’.⁶⁷⁴ He recalled that such measures to protect the safety and well-being of victims are within the powers of the Court as set out in Articles 68(1) and 57(3)(c). He therefore ordered the victims applications to be transmitted to the parties in redacted form.

672 ICC-01/04-01/07-933, para 6.

673 ICC-02/04-176, p 5.

674 ICC-02/04-176, pp 5-6.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

On **21 January 2009**, the Trial Chamber issued a decision responding to a defence request for disclosure of non-redacted victims' applications submitted by those victims who will be called as Prosecution witnesses at trial.⁶⁷⁵ The Registry had provided the victims' applications to the Defence with redactions of any identifying information because of security risks in disclosing this information to the Defence.

As the Legal Representative for some of the victims, the OPCV submitted observations, stating that the security and privacy of the victims were implicated by the Defence application and that the Chamber should reject the Defence request because, in part, Rule 76 imposes a duty on the Prosecution alone with respect to disclosure of witness statements. The Prosecution responded that although it possesses non-redacted victim applications for those victims who are also Prosecution witnesses, the Registrar is the organ of the Court responsible for providing the Defence with any relevant documents. Also, the Prosecution does not treat the victims with dual status any differently than other victims, and that victims' applications should be considered as prior witness statements under Rule 76. The Defence countered that the Chamber has the mandate to order the Registry to disclose documents that will assist in the preparation of the Defence and that disclosure would not jeopardise victims' security because the Defence already knows the identify of those individuals. The Prosecution requested the Chamber to order the Registry to reclassify the applications of victims with dual status to a level that gives the Defence sufficient access.

The Chamber's decision focuses on the 'inter-relationship' of three principles: the right of the accused to a fair hearing, 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. It found that 'the Prosecution is in a position to disclose all exculpatory material relevant to this application, and it is the body which is subject to positive disclosure obligations'.⁶⁷⁶ Consequently, with respect to disclosure to the Defence, the Prosecution is obligated to treat non-redacted witness statements in the same manner as other exculpatory evidence, except that it should seek the views of the Legal Representatives of the victims with dual status before disclosing their statements. If objections are raised, the Chamber must be notified immediately to decide the matter.

675 ICC-01/04-01/06-1637.

676 ICC-01/04-01/06-1637, para 13.

On **2 June 2009**, Trial Chamber I released a decision on the 5 December 2008 request by the Prosecution for non-disclosure of the identity of 25 witnesses, on the grounds that the witnesses would be at risk if their identities were revealed.⁶⁷⁷ The decision followed an Appeals Chamber judgement of 11 July 2008⁶⁷⁸ which held that the Trial Chamber will have to rule on whether the Defence has the right to access entire witness statements containing information on the general use of child soldiers in the DRC. At a hearing called by the Trial Chamber on 25 November 2008, the parties addressed the issue of the Prosecution's obligation to disclose *tu quoque* (literally, 'you, also') information, which in this context referred to information regarding the recruitment and use of child soldiers by groups other than the UPC/FPLC. The Prosecution sought to protect the identity of 43 witnesses who could provide such evidence. It proposed a variety of alternatives to full disclosure of their witness statements, but this proposal was rejected by the Defence. The Prosecution agreed to disclose to the Defence the identities and non-redacted statements of 18 witnesses who provide *tu quoque* information as well as two who provide Rule 77 information,⁶⁷⁹ but it sought to withhold the identities of 25 out of the 43 witnesses. With respect to these witnesses, the Prosecution sought alternatives to full disclosure, including redactions or summaries of their witness statements, proposed admissions of fact, and alternate sources of *tu quoque* information. The Defence again objected, prompting the Trial Chamber to request that the Prosecution review its proposals for redactions for each witness. The Prosecution provided more detailed information on 19 January 2009. Although three witnesses had agreed to reveal their identities, the Prosecution reiterated its request for non-disclosure of the identities of 22 witnesses, including redactions of identifying information for those witnesses.⁶⁸⁰ It argued that any *tu quoque* information provided by these witnesses was minimal and would not prejudice the Defence.

677 ICC-01/04-01/06-1924.

678 ICC-01/04-01/06-1433, paras 82, 86.

679 Rule 77 (Inspection of material in possession or control of the Prosecutor) provides: 'The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.'

680 The Prosecution sought to redact data including names, date and place of birth of the witnesses, identities of their parents and siblings, and well as other material that might disclose their identities such as 'unusual injuries, discrete functions they have undertaken, or their involvement in particular incidents, as well as anything that might identify a witness a source of information'. ICC-01/04-01/06-1924, para 29.

In the 2 June decision, the Chamber granted all proposals by the Prosecution for redactions and alternative forms of disclosure of the evidence. It applied the test established by the Appeals Chamber to determine whether the proposed protective measures were consistent with the rights of the accused, 'addressing whether the witness may be endangered if his or her identity is disclosed to the defence, examining the availability of alternative protective measures, and evaluating the impact of the protective measures on the rights of the accused'.⁶⁸¹ First, it found that redactions of identities and identifying information was necessary to protect witness's security. In addition, it authorised redactions of 'internal work products' of the Prosecution, such as locations of interviews, identity of intermediaries and those present during interviews, sources, and names of relatives of victims or witnesses. The Chamber, 'satisfied that the disclosure of this information may impede current investigations', recalled that its responsibility to protect witnesses and victims also extends to 'the protection of other persons at risk on account of the activities of the Court'.⁶⁸² Importantly, it found that these materials were also 'wholly irrelevant' to the issues raised in the case, and therefore nondisclosure of the materials did not risk prejudicing the accused.⁶⁸³

It also found the proposed summaries and admission of fact were the 'least restrictive' alternatives available to the Prosecution in light of the security risk to the witnesses. Finally, it surveyed the proposed alternative evidence, such as UN and NGO reports, witness statements, press releases from militias, and press articles, to determine its 'replacement value' for the non-disclosed information. The Trial Chamber found that the alternative evidence sufficiently 'covers all the *tu quoque* evidence provided by the relevant witnesses, sometimes supplying far greater detail than that covered in the witness statements or the investigators' notes that are the subject of this decision'.⁶⁸⁴ In conclusion, the proposed redactions and alternative evidence submitted by the Prosecution were sufficient to replace the information for which the Prosecution sought to prevent disclosure, and the Defence would not be disadvantaged as a result.

681 ICC-01/04-01/06-1924, para 26.

682 ICC-01/04-01/06-1924, para 34.

683 ICC-01/04-01/06-1924, para 33.

684 ICC-01/04-01/06-1924, para 53.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

On **12 January 2009**, Trial Chamber II (Chamber) issued a 'Decision on the Redaction Process', in which it announced a new procedure for reviewing requests for redactions that would involve 'strict judicial supervision'.⁶⁸⁵ The Chamber first ordered the Prosecution to immediately cease redacting exonerating evidence on its own initiative,⁶⁸⁶ as it had been authorised to do during the pre-trial phase.⁶⁸⁷ Although it offered the parties an opportunity to come to an agreement between themselves on the necessary redactions, in a subsequent decision the Chamber ultimately rejected the process they had agreed upon, as it proposed judicial review of only those redactions on which the parties disagreed. The Chamber found that 'the judges alone are authorised to determine whether the planned redactions may prejudice the rights of the accused'.⁶⁸⁸ Rather, 'all requests for redactions must be carefully scrutinised on a case-by-case basis, even if the Defence has raised no objection thereto'.⁶⁸⁹

In the approximately 20 decisions issued to date on the issue, the Chamber reiterated the criteria as established by the Appeals Chamber for justifying redactions: (1) the existence of an objectively justifiable risk to the security of the person concerned or prejudicing current or future investigations; (2) the existence of a link between the source of the risk and the accused; (3) the impossibility or insufficiency of imposing less restrictive measures; (4) an examination of the prejudice posed by the proposed measures to the Defence's right to a fair and impartial trial; and (5) the obligation to periodically re-examine the decision authorising the redactions if the situation changes.⁶⁹⁰

The Chamber's 12 January decision ordered the Prosecution to justify each request for redactions pursuant to these criteria (excepting the fourth) within an evidentiary table, divided into incriminating evidence, exonerating evidence, material evidence, and an 'other' category.⁶⁹¹ The Chamber noted that it would

685 ICC-01/04-01/07-819.

686 ICC-01/04-01/07-819, para 7.

687 ICC-01/04-01/07-411-Conf-Exp.

688 ICC-01/04-01/07-839, para 2.

689 ICC-01/04-01/07-819, para 5.

690 See ICC-01/04-01/07-475, paras 71, 73, 97; ICC-01/04-01/07-568, para 37; ICC-01/04-01/07-773, para 33.

691 ICC-01/04-01/07-819, paras 8-9. The Prosecutor did not always comply with this request. See, ICC-01/04-01/07-1393, para 16. The Chamber also ordered an exceptional variation of the procedure. ICC-01/04-01/07-1434, para 17.

‘show particular vigilance’ in examining redactions appearing in exonerating and material evidence.⁶⁹² The Chamber further ordered the Prosecution to justify the redactions made in the 47 documents that had been disclosed to the Defence since the pre-trial phase, along with those redactions previously authorised in eight decisions issued by the Pre-Trial Chamber, according to the new process.⁶⁹³ This resulted in several requests to restore previously redacted material.⁶⁹⁴

In a series of decisions on requests for redactions,⁶⁹⁵ the Chamber reiterated the applicable standards. First, any non-disclosure of evidence to the Defence ‘must be supported by sufficient reasoning, particularly in view of the submissions advanced by the Prosecutor’.⁶⁹⁶ The Chamber underscored its obligation to balance the interests set forth in Rule 81, and to safeguard the rights of the accused in compliance with ‘the requirements of adversarial proceedings and the principle of equality of arms’.⁶⁹⁷ Specifically, the redactions must not render the document unreadable, incomprehensible or unusable by the Defence.

In several of its decisions on redactions, the Chamber recognised ‘an objectively justifiable risk’ resulting from the overall security situation in Ituri and more generally in the DRC.⁶⁹⁸ In one decision, it made note of the fact that pressure had already been exerted against witnesses, leading the Registrar to impose surveillance on the telephone communications of the accused.⁶⁹⁹

The Chamber noted in this regard that the Prosecution arguments concerning the existence of a real, objectively justifiable risk were the same for his

requests for redactions pursuant to Rule 81(2) as for Rule 81(4), protecting investigations and victims, witnesses and their families, respectively.⁷⁰⁰ Similarly, the Prosecution simultaneously invoked the need to protect its intermediaries and the Court’s employees in the field, as well as their families, as necessary for both the persons involved and the investigations.

Under Rule 81(2), permitting restrictions on disclosure where it would prejudice current or further investigations, the Chamber repeatedly authorised redactions of the names of specific interview locations,⁷⁰¹ the means used to contact witnesses,⁷⁰² the names of the Court’s employees in the field,⁷⁰³ and the names and identifying information of the Prosecution’s intermediaries, including NGOs, and interpreters.⁷⁰⁴ This practice explicitly conforms to the 13 May 2008 Appeals Chamber decision in the Katanga-Ngudjolo case, recognising these categories of people and information as entitled to protection, being ‘persons at risk on account of the activities of the Court’.⁷⁰⁵

The Chamber noted that the Prosecution had identified one village in the province of Ituri in which it was safe to collect witness statements, the disclosure of which would impede investigations.⁷⁰⁶ It authorised the redaction of information pertaining to the means of communication between the Prosecution and witnesses, in order to protect the Prosecution’s investigative techniques as well as the location of the witnesses.⁷⁰⁷ With respect to the Prosecution’s intermediaries in the field, the Chamber explicitly recognised their critical role in identifying and contacting witnesses, and in the overall progress of the investigation. It recognised that disclosing their identities would increase the threat to their security, and that redactions were therefore necessary for assuring the protection of ‘potential witnesses’.⁷⁰⁸ The Chamber also acknowledged the importance, and difficulty, of securing qualified interpreters in the field.⁷⁰⁹

692 ICC-01/04-01/07-819, para 9.

693 ICC-01/04-01/07-819, para 11.

694 ICC-01/04-01/07-1034; ICC-01/04-01/07-1097. Some of the reasons for the reinstatement of information included that: the documents had become public; the absence of security risk after a witness’s relocation; the information was not specific enough to lead to the identification of the witness’s family members; the document was disclosed to the Defence; and there no longer existed an objectively justifiable risk. ICC-01/04-01/07-1034, para 54.

695 See, eg, ICC-01/04-01/07-1096; ICC-01/04-01/07-1097; ICC-01/04-01/07-1098; ICC-01/04-01/07-1099; ICC-01/04-01/07-1100; ICC-01/04-01/07-1101; ICC-01/04-01/07-1396; ICC-01/04-01/07-1398; ICC-01/04-01/07-1395; ICC-01/04-01/07-1394; ICC-01/04-01/07-1393; ICC-01/04-01/07-1392.

696 See, eg, ICC-01/04-01/07-989, para 3.

697 See, eg, ICC-01/04-01/07-989, para 3.

698 See, eg, ICC-01/04-01/07-1096, para 10; ICC-01/04-01/07-1097, para 8; ICC-01/04-01/07-1034, para 10.

699 ICC-01/04-01/07-1034, para 11.

700 See, eg, ICC-01/04-01/07-1096, para 8.

701 See, eg, ICC-01/04-01/07-1098; ICC-01/04-01/07-1100.

702 See, eg, ICC-01/04-01/07-1034; ICC-01/04-01/07-1101.

703 See, eg, ICC-01/04-01/07-1100.

704 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.

705 ICC-01/04-01/07-475, para 54.

706 ICC-01/04-01/07-1034, para 18; ICC-01/04-01/07-1101, para 16.

707 ICC-01/04-01/07-1034, para 39; ICC-01/04-01/07-1101, para 30 (authorising the means of communication under both Rule 81(2) and (4)).

708 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.

709 See, eg, ICC-01/04-01/07-1098, para 22.

The Chamber consistently recognised the security risks posed to victims, witnesses and their family members, particularly those living in Ituri. It authorised redactions of their names, locations and other identifying information pursuant to Rule 81(4), permitting restrictions on disclosure in order to protect the safety of victims and witnesses. The Katanga Defence asserted that measures of protection should not be applied to witnesses' family members as they are not participants in the case, and thus do not face any greater risk of security than any other resident of Ituri.⁷¹⁰ However, the Chamber found that while not actual participants in the case, family members may be at risk because they could be used to exert influence over the witnesses in the case.⁷¹¹

In conformance with the 13 May 2008 Appeals Chamber decision,⁷¹² the Chamber authorised redactions to protect 'innocent third parties'.⁷¹³ For example, it authorised the facial distortion of a photograph of a Congolese Red Cross employee pursuant to Rule 81(4).⁷¹⁴ It further authorised redactions of identifying information and the image of persons whom the Prosecution could either not locate, or could not identify.⁷¹⁵

In most instances, the Chamber authorised redactions, explicitly recognising the threat to members of witnesses' families, particularly in those cases where they were not beneficiaries of the Court's Protection Programme. It permitted the permanent redaction of information related to the relocation of witnesses and their families under the Court's Protection Programme.⁷¹⁶ It also authorised the permanent redaction of witnesses' telephone numbers and email addresses as pertaining to their right to private life and thus protected by numerous international human rights treaties.⁷¹⁷ In accordance with an Appeals Chamber decision, it ordered the permanent distortion of other 'innocent third parties' appearing in videos, including children.⁷¹⁸

710 ICC-01/04-01/07-1096, para 36; ICC-01/04-01/07-1097, para 14; ICC-01/04-01/07-1098, para 30.

711 See, eg, ICC-01/04-01/07-1096, para 37; ICC-01/04-01/07-1097, para 15.

712 ICC-01/04-01/07-475, paras 43, 55, 56.

713 ICC-01/04-01/07-1099, paras 39-42.

714 ICC-01/04-01/07-1398.

715 ICC-01/04-01/07-1249; ICC-01/04-01/07-989.

716 See, eg, ICC-01/04-01/07-1393, para 7; ICC-01/04-01/07-1096, para 39; ICC-01/04-01/07-1034, para 46; ICC-01/04-01/07-1281, para 27.

717 See, eg, ICC-01/04-01/07-1099, para 30; ICC-01/04-01/07-1100; ICC-01/04-01/07-1097, para 21; ICC-01/04-01/07-1098, para 32.

718 ICC-01/04-01/07-1394, paras 17, 21.

The Chamber also authorised redactions of evaluations of witness security, including assessments regarding entry into the Court's Protection Programme. On several such occasions, it rejected the Prosecution's original request, ordering it to consult with the Victims and Witnesses Unit in order to hone what it considered an excessive number of redactions to only those that were strictly necessary.⁷¹⁹ In one instance, it subsequently authorised the revised request until 30 days prior to trial.⁷²⁰

The Chamber accepted favourably the Prosecution practice of replacing redacted information with a description of the missing information, such as 'intermediary of the Prosecution',⁷²¹ 'family residence',⁷²² 'witness's father' and 'witness's spouse'.⁷²³

In most cases, the Chamber authorised the redactions only temporarily, until 30 days prior to the commencement of trial. For each temporary redaction granted under Rule 81(4), the Chamber granted the Prosecution leave to apply 45 days before the start of trial to maintain the redaction. The Chamber denied the Prosecution's application to appeal the decision ordering the disclosure of identifying information of witnesses' family members and two of the Prosecution's intermediaries 30 days prior to trial.⁷²⁴ In rejecting the Prosecution's request that the redactions be maintained for the duration of the trial, the Chamber said the issue of temporary redactions would not significantly affect the fair and expeditious conduct of the proceedings because the Prosecution could apply 45 days prior to trial to maintain the redactions.

In addition to those redactions requested by the Prosecution, the Chamber also authorised redactions to the applications for victims' participation in the proceedings.⁷²⁵ In response to an order by the Chamber, the Victims Participation and Reparations Section proposed the redactions to be made, in consultation with the Victims and Witnesses Unit.⁷²⁶ The Chamber found the redaction of information

719 ICC-01/04-01/07-1098, para 35; ICC-01/04-01/07-1096, para 41; ICC-01/04-01/07-1097, para 22; ICC-01/04-01/07-1034, para 51; ICC-01/04-01/07-1101, para 44.

720 ICC-01/04-01/07-1393.

721 See, eg, ICC-01/04-01/07-1096, para 23.

722 See, eg, ICC-01/04-01/07-1096, para 35.

723 See, eg, ICC-01/04-01/07-1034, para 45.

724 ICC-01/04-01/07-946.

725 ICC-01/04-01/07-1129; ICC-01/04-01/07-1151; ICC-01/04-01/07-1206.

726 ICC-01/04-01/07-933. Suggested redactions included, eg, the applicant's name, place and date of birth, domicile, tribe or ethnic group, telephone number and email.

leading to the identification of applicants to be a necessary measure pursuant to its statutory obligation ‘to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’.⁷²⁷ Having examined each proposed redaction, the Chamber assured that they satisfied the principles of proportionality. It thus authorised the non-disclosure of the applicants’ identities until it pronounced on their status as participants in the case.⁷²⁸

For those witnesses also participating in the Lubanga case,⁷²⁹ the protective measures authorised in that case apply automatically to their participation in the Katanga-Ngudjolo case, pursuant to Regulation 42 of the Regulations of the Court. Accordingly, Trial Chamber II did not express any opposition to disclosing witness statements with the redactions authorised by the Trial Chamber I in the Lubanga case.⁷³⁰

At the same time, Regulation 42(3) requires any modifications to previously authorised protective measures to be made by the original Chamber, in this instance by Trial Chamber I.⁷³¹ As the Prosecution filed requests to both lift and add redactions in order to adapt documents submitted in the Lubanga case for use in the Katanga-Ngudjolo case, the Chamber authorised Trial Chamber I access to all of the relevant files in order to facilitate its evaluation of the protective measures at issue in the context of the latter case.⁷³² Trial Chamber II also offered its observations to Trial Chamber I, concluding for almost all of the witnesses at issue that the Prosecution could not demonstrate any actual security risk.⁷³³

Notably, on one occasion, the identity of a witness was disclosed to the Defence in the Katanga-Ngudjolo case despite the fact that the Lubanga trial chamber had ordered the disclosure of summaries and admissions of fact in order to protect the same witness’s identity.⁷³⁴ Trial Chamber II attributed the error to the failure of the Prosecution to keep each of the Chambers informed about the protective status of the witness.⁷³⁵ It found, however, that due to the implementation of ‘considerable additional protective measures’ the security of the witness was not at risk.⁷³⁶

727 Article 68(1), Rome Statute.

728 ICC-01/04-01/07-1129, para 7.

729 See, eg, ICC-01/04-01/07-1099.

730 ICC-01/04-01/07-1099, para 29.

731 Regulation 42(3), Regulations of the Court. The pending decision of Trial Chamber I on modifications to protective measures for witnesses participating in both cases was cited as one of the reasons for the postponement of the start date of the trial in the Katanga-Ngudjolo case.

732 ICC-01/04-01/07-1332, para 16.

733 ICC-01/04-01/07-1332.

734 ICC-01/04-01/07-1434, paras 8, 11.

735 ICC-01/04-01/07-1434, paras 9, 10.

736 ICC-01/04-01/07-1434, para 12.

In those instances where the number of redactions rendered documents unreadable or not exploitable by the Defence, alternative measures have included admissions of fact, the provision of analogous information⁷³⁷ and summaries of witnesses’ statements.⁷³⁸ The Chamber authorised such measures over objections by the Defence that analogous information does not have the same weight or credibility as the evidence it is meant to replace.⁷³⁹ The Defence also argued that the use of summaries has no statutory basis⁷⁴⁰ and is prejudicial, as the exact nature of the statements remain concealed.⁷⁴¹ The Defence also objected to the use of admissions of facts given that specific facts are omitted, which impedes an effective evaluation of the evidence.⁷⁴² Conversely, the Chamber rejected the use of admissions of fact and ordered disclosure of the identities of five witnesses for whom the Prosecution could not demonstrate a real, objective risk to their security and who opposed the disclosure of their identity, refused further cooperation with the Court or could not be located.⁷⁴³

Other alternative measures have included preventing the disclosure of medical reports to third parties or the general public, which detailed the health concerns and harm suffered by three witnesses.⁷⁴⁴ Similarly, in addition to precluding disclosure to the general public, the transcripts of medical reports were disclosed to Defence lawyers and legal assistants, excluding investigators.⁷⁴⁵ The Chamber authorised the deferred disclosure of several witnesses’ identities until 45 days prior to trial, or prior to the date of their testimony.⁷⁴⁶ It also authorised voice and image distortion in videos to protect anonymous persons and innocent third parties.⁷⁴⁷

Trial Chamber II also addressed redactions in its **26 February 2009** decision on victim participation. Given that the majority of the applicants considered in that decision indicated that they did not want to divulge their identities, the Chamber requested that the VPRS, in collaboration with the Victims and Witnesses Unit, propose necessary redactions of identifying information, including: the applicant’s name, parents’ names, place and date of birth, tribe or ethnic group, profession, domicile, telephone and

737 ICC-01/04-01/07-1282. Analogous information was often provided for evidence obtained pursuant to Article 54(3)(e).

738 ICC-01/04-01/07-1179.

739 ICC-01/04-01/07-1028.

740 ICC-01/04-01/07-1014.

741 ICC-01/04-01/07-1016.

742 ICC-01/04-01/07-1014.

743 ICC-01/04-01/07-1332.

744 ICC-01/04-01/07-988.

745 ICC-01/04-01/07-1281.

746 ICC-01/04-01/07-1179.

747 ICC-01/04-01/07-989.

email address, and names and coordinates of persons assisting the applicant with the application process.⁷⁴⁸ With the aim of developing a more individualised approach, the Chamber ordered the Registrar to evaluate on a case-by-case basis whether to propose also redacting the following additional types of information:

- 1 the names of the victims and/or witnesses in the facts described;
- 2 characteristics leading to the identification of the applicant based on his or her injuries or harm suffered; and
- 3 any other information that could unequivocally lead to the identification of the applicant.

It further ordered the VPRS to provide an accompanying report indicating precisely its reasons for redacting the above-listed information.⁷⁴⁹ However, it noted that all redactions would be subject to review before the Registrar communicated the applications to the parties for their observations, in order for the Chamber to ensure that the proposed redactions do not compromise the rights of the accused.⁷⁵⁰ In subsequent decisions authorising the redacted applications, the Chamber held that the redactions were necessary because they constituted the only measure available to assure the right to respect for the applicants' private lives and right to physical security.⁷⁵¹ It authorised the non-disclosure of the applicants' identities temporarily, until it pronounced on their status as participants in the case.⁷⁵²

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Darfur, Sudan

The Prosecutor v. Bahr Idriss Abu Garda

On **30 July 2009**, in anticipation of the confirmation hearing against Abu Garda, Single Judge Steiner issued a 'Decision ordering the Prosecutor to submit a report on witnesses' security risk assessment'.⁷⁵³ The Prosecution had asked the Chamber to issue an order granting redaction of identifying information for the witnesses on whom it intends to rely at the confirmation hearing. The Single Judge recalled her duty under Articles 57(3)(c) and 68(1) to ensure the protection and respect for the privacy of victims and witnesses, and under Rule 81(4) to take appropriate

748 ICC-01/04-01/07-933, para 49.

749 ICC-01/04-01/07-933, para 51.

750 ICC-01/04-01/07-933, para 52.

751 ICC-01/04-01/07-1129; ICC-01/04-01/07-1151; ICC-01/04-01/07-1206.

752 ICC-01/04-01/07-1129, para 7.

753 ICC-02/05-02/09-41.

measures to protect the safety of victims and witnesses and members of their families, including the redaction of their identities prior to the commencement of trial. She noted that determining whether procedural protective measures are necessary is a case-by-case determination that depends on a finding of 'an objectively justifiable risk to a witness's safety arising from the disclosure of the identifying information to the Defence'.⁷⁵⁴ The Prosecution claimed to have already carried out such a security risk assessment of each witness. The Single Judge ordered it to provide this assessment to the Chamber by 4 August, and requested the Victims and Witnesses Unit to submit its views and observations on the Prosecution's report, including proposals for alternative or supplemental protective measures which may be necessary.

On **14 August 2009**, Judge Sylvia Steiner issued a 'First Decision on the Prosecution's Request for Redactions'.⁷⁵⁵ The Prosecution had requested redactions of a range of documents, including witnesses' statements and attached materials, transcripts of witnesses' interviews, and video material and transcripts thereof, but the decision focused only on the witnesses' statements and the materials attached thereto. The Single Judge began by noting that the lack of accuracy exercised by the Prosecution in its submissions was cause for 'regret and concern' because it placed an 'inordinate burden' on the Chamber to review the work, affecting the fairness and expeditiousness of the proceedings.⁷⁵⁶ She noted that 'consequences of an even more serious nature' could result, such as witnesses being wrongly identified or third parties placed at risk.⁷⁵⁷

Citing the need to ensure the safety of investigators in the field, the Single Judge granted authorisation to redact the names and signatures of OTP staff members present when the interview is conducted. Even though she noted the OTP did not identify an objectively identifiable risk, it was reasonable to believe the presence of OTP investigators in the field would be easily traced, thus incurring risk. In addition, she granted the request to redact names and identifying information about the family members of witnesses because 'no less intrusive alternative measures can be taken to achieve [the] goal'⁷⁵⁸ of protecting the physical safety and well-being of family members, given the high risks they face from disclosure. The Single Judge reasoned that withholding information

754 ICC-02/05-02/09-41, p 4.

755 The public version of the decision was released six days later. ICC-02/05-02/09-58.

756 ICC-02/05-02/09-58, para 8.

757 ICC-02/05-02/09-58, para 8.

758 ICC-02/05-02/09-58, para 20.

poses no risk of unfairness to the Defence, as these people are not involved in the proceedings. Although the Prosecution had requested these redactions only for some family members, the Single Judge ordered the redaction to apply to all of them, then ordered further redactions pertaining to witnesses' and their families' whereabouts or current place of residence.

The Single Judge expressed dissatisfaction with the Prosecution's request for redactions of information related to 'innocent third parties', meaning those who might be put at risk but who are not directly or indirectly related to the issues before the Court. She called the submissions 'irremediably flawed' because of the 'blatant inconsistencies' in the proffered reasons why redactions were necessary.⁷⁵⁹ While noting that the Court has taken an expansive approach to redactions in order to minimise the number of people placed at risk through activities of the Court, the Single Judge ordered *proprio motu* that the Prosecution redact information before disclosing to the Defence. She reminded the Prosecution that it bears the burden of providing information to the Chamber in order for it to properly assess the appropriateness of redactions and other disclosure issues.

Following Single Judge Steiner's 14 August decision, the Prosecutor sought non-disclosure of any witness-identifying information that may be contained in the interview transcripts or the summaries thereof for six witnesses, claiming that disclosure of their identities or personal circumstances, and those of their family members, would put them at grave security risk.

In a **31 August** decision, Single Judge Tarfusser issued a decision on the anonymity of these victims.⁷⁶⁰ He applied three criteria to assess the appropriateness of non-disclosure of witness identity:

- 1 the existence of a danger caused by disclosure of their identity and, by the same token, the fact that non-disclosure could reduce that danger;
- 2 the necessity of the non-disclosure, including whether it is the least intrusive measure necessary to protect the witnesses and their family members; and
- 3 the proportionality of non-disclosure in view of the prejudice caused to the rights of the suspect and a fair and impartial trial.⁷⁶¹

⁷⁵⁹ ICC-02/05-02/09-58, paras 25-26.

⁷⁶⁰ ICC-02/05-02/09-74. The same day, Judge Tarfusser issued another decision granting a subsequent request by the Prosecutor to authorise non-disclosure of the identity for witness DAR-OTP-WWWW-0433. The Judge granted this request as well, applying the same criteria as in the decision on the anonymity of the six witnesses. ICC-02/05-02/09-77.

⁷⁶¹ ICC-02/05-02/09-74, para 5.

For the first prong of the test, Single Judge Tarfusser clarified that the risk of disclosure of identity must be 'an objectively justifiable risk to the safety of the person concerned' that arises from the disclosure of the witness identity to the Defence rather than the public at large. The Single Judge expressed doubt that Abu Garda himself had the intent to harm witnesses or that disclosure of the witness information to the Defence would fall into the hands of others who wished to harm the witnesses. However, the Single Judge noted that leaks could occur, and considering that Abu Garda is not currently detained, any leaked information about witnesses could be used by Abu Garda's supporters to carry out retaliatory attacks against the witnesses or their families. He therefore found that 'disclosing the names of the witnesses to the Defence would pose an unjustifiable risk to their safety and/or physical and psychological well-being'.⁷⁶²

Second, the Single Judge found that anonymity of the victims was the least intrusive measure that could be taken to protect their safety. This assessment was based on the VWU's submission that more robust protective measures were needed to protect witnesses living in Sudan or Chad than elsewhere, since 'the Court's ability to operate effective protective measures in Chad or Sudan is at best extremely limited'.⁷⁶³

Finally, the Single Judge reviewed the proportionality of the protective measures sought by the Prosecutor against the potential damage to the rights of the accused. Considering the Appeals Chamber's judgement that non-disclosure at the pre-trial phase of the proceedings does not pose the same risk to the rights of the accused as during trial, and the overall security situation of the witnesses, Judge Tarfusser found the requested measures proportional. He therefore ordered non-disclosure of summaries of information in the six witness transcripts, redactions of the signatures of one witness and the OTP investigator in photographs included in the summary of one witness's interview transcript, and the use of numbers to refer to the six witnesses during the confirmation hearings.

⁷⁶² ICC-02/05-02/09-74, para 11.

⁷⁶³ ICC-02/05-02/09-74, para 12.

Interim Release

DRC

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

From the end of 2008 through 2009, Trial Chamber II issued a total of five decisions on the interim release of the accused, Germain Katanga and Mathieu Ngudjolo Chui. After receiving the parties' observations and convening a public hearing, the Chamber conducted periodic reviews of previous rulings on their detention 'in order to ascertain whether the circumstances bearing on the subject have changed, and if so, whether they warrant the termination of detention'.⁷⁶⁴ In each instance, the Chamber declined interim release of the accused after finding that the circumstances requiring their detention had not changed, and concluding that they had not been 'detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor'.⁷⁶⁵

In its third and fourth decisions reviewing the conditions of Ngudjolo's detention, issued **17 March** and **10 July 2009**, respectively,⁷⁶⁶ the Chamber found that the circumstances had not changed significantly since the first pre-trial decision by Single Judge Akua Kuenyehia.⁷⁶⁷ On 27 March 2008, Judge Kuenyehia found that there were still reasonable grounds to believe that Ngudjolo had committed crimes within the jurisdiction of the Court pursuant to Article 58(1) (a) of the Rome Statute, and that the gravity of the crimes and the possibility of a long prison sentence created a risk of his absconding.⁷⁶⁸ She noted that Ngudjolo had escaped from the Makala prison in the DRC before a verdict was reached by a military court in Kinshasa on war crimes committed in the town of Tchomia. She also found that there were reasons to believe that Ngudjolo was the highest military commander of the *Front des nationalistes et intégrationnistes* (FNI) in Zombe during the relevant period, that he wielded power and influence and maintained national and international contacts that could provide him with the means to flee. In response to Ngudjolo's appeal of that decision, the Appeals

764 ICC-01/04-01/07-573 OA 4, para 14, citing Rule 118(2), Rules of Procedure and Evidence (requiring periodic reviews of detention every 120 days).

765 Article 60(3)-(4), Rome Statute.

766 ICC-01/04-01/07-965; ICC-01/04-01/07-1288.

767 ICC-01/04-01/07-345.

768 ICC-01/04-01/07-345.

Chamber affirmed the Single Judge's decision denying interim release in order to ensure his appearance at trial.⁷⁶⁹

In response to the Ngudjolo request for discretionary interim release in the DRC under strict conditions,⁷⁷⁰ the Trial Chamber found that Ngudjolo's presence at trial could not be guaranteed should he be provisionally released.⁷⁷¹ It also stated that 'releasing the accused would only compromise the safety of the victims and witnesses whose identity had been disclosed, and would thus impede the smooth running of the proceedings'.⁷⁷² It further found that Ngudjolo had not been detained for an unreasonable period given the activity in the case.⁷⁷³

In its second, third and fourth decisions reviewing the conditions of Katanga's detention, issued **12 December 2008**, and **6 April** and **21 July 2009**, respectively, the Trial Chamber found that there had been no substantial change of circumstances warranting interim release.⁷⁷⁴ It found continued reasonable grounds to believe that Katanga had committed crimes within the jurisdiction of the Court, and that detention remained necessary to ensure that he would not obstruct the investigation or the proceedings.⁷⁷⁵ Specifically, the Chamber found that Katanga's release could pose a threat to the victims and witnesses participating in the proceedings as: he maintained influence in the region as a high-level military commander; the identities of many witnesses had been disclosed for the purpose of the confirmation of charges hearing; and the security situation in the region remained volatile.⁷⁷⁶ Further, it found that in light of the gravity of the crimes alleged, he could flee the jurisdiction of the Court if he were to be released. It decided to maintain his detention given proximity of the trial start date, and 'the absolute necessity to ensure his appearance at trial and to ensure the protection of victims and witnesses'.⁷⁷⁷ Pursuant to

769 ICC-01/04-01/07-572, para 26. The Appeals Chamber found the second basis for the Single Judge's decision, that Ngudjolo had the capacity to interfere with ongoing or further investigations, to be ill-founded as it was based on the findings of another Single Judge in other proceedings.

770 ICC-01/04-01/07-935; ICC-01/04-01/07-T-61-ENG, p 23, lines 16-25; p 24, lines 1-11.

771 ICC-01/04-01/07-965, paras 4, 8.

772 ICC-01/04-01/07-965, para 8.

773 ICC-01/04-01/07-965; ICC-01/04-01/07-1288. Ngudjolo was brought into the custody of the Court in February 2008.

774 ICC-01/04-01/07-794; ICC-01/04-01/07-1043; ICC-01/04-01/07-1325.

775 Article 58(1)(b)(i),(iii), Rome Statute.

776 ICC-01/04-01/07-794, para 13.

777 ICC-01/04-01/07-794, para 16.

Article 60(4) of the Statute, it found that Katanga had not been detained for an unreasonable amount of time.⁷⁷⁸

Adopting a ‘realistic and practical’ approach, the Katanga Defence declined to request release at any of these detention reviews.⁷⁷⁹ In the third review, the Chamber noted the absence of any mechanism permitting the provisional release of the accused in the Netherlands, despite prior discussions between the Registrar and the host State.⁷⁸⁰

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

Since Pre-Trial Chamber III issued an arrest warrant for Bemba on 23 May 2008, his Defence has submitted four applications for Bemba’s interim release. On **16 December 2008**, Judge Trendafilova issued a decision denying the second request for provisional release, finding no change in circumstances under Article 58(1) since the prior decision on interim release issued by Judge Kaul on 20 August 2008. Judge Trendafilova found that the number and gravity of the charges amounted to the possibility of a lengthy sentence, thereby increasing the likelihood that Bemba would flee if conditionally released. Factors that further contributed to this risk were his substantial financial resources, ongoing ties to supporters and international contacts, and his political position.⁷⁸¹ She also found persuasive the reasoning raised in the first decision on interim release, namely that Bemba maintains the ‘authority and influence to locate and reach victims’ and that if released, ‘the risk to [victims]’ safety would increase’.⁷⁸² The Judge also considered whether the length of Bemba’s pre-trial detention was unreasonable. She weighed the liberty rights of the accused against both the security of the victims and witnesses and the public interest to ensure Bemba’s appearance at trial, and concluded that Bemba’s detention for five months and 12 days was not unreasonable.⁷⁸³

Judge Trendafilova relied on much the same reasoning when denying the third Defence application for interim release on **14 April 2009**.⁷⁸⁴ Regarding

the conditions under Article 58(1)(b), ‘the risk of absconding remains a valid possibility’ because the factors such as his ties, international contacts and political position remain unchanged.⁷⁸⁵ She also dismissed the Defence argument that Bemba was preparing for his defence prior to his arrest, showing he lacked the intention to remain at large; in contrast, she wrote, ‘the risk of absconding increases after arrest, especially when the applicant learns about the charges he is facing and the possible sentence that may result if found guilty’.⁷⁸⁶ Finally, the Single Judge cited to the fact that no countries were ready to accept Bemba onto their territory nor guarantee any conditions to ensure his appearance at trial. Because the Court relies on the cooperation of states to secure the presence of the Accused, the Judge decided to take a ‘cautious approach’ to interim release.⁷⁸⁷

However, on **14 August 2009**, Judge Ekaterina Trendafilova granted the fourth Defence request for conditional release of Bemba.⁷⁸⁸ The decision followed a hearing on 29 June 2009 on the issue of Bemba’s continued detention, at which time the Defence requested the interim release of Bemba to Belgium, France, and Portugal, and later added Germany, Italy, and South Africa.

In this application for interim release, the Defence claimed that several ‘changed circumstances’ warranted the Chamber’s reconsideration of Bemba’s continued pre-trial detention, principally the confirmation of charges decision on 15 June. ‘[A] significant reduction in the charges’, based on the Chamber’s determination that Bemba was criminally responsible as a superior under Article 28 rather than as an individual as originally alleged, created—in the view of the Defence—the possibility of a lighter sentence, and therefore a diminished likelihood that Bemba would abscond. The Prosecution disputed this contention, maintaining that the possibility remained high that Bemba would abscond given the gravity of the charges confirmed, and suggested that Bemba may in fact face a heavier sentence under the characterisation of command responsibility.

While Judge Trendafilova found the conditions of Article 58(1)(a) continued to be met, she agreed with the Defence that ‘a substantial change in circumstances’ since the previous application for interim release made the detention of the accused no longer necessary under Article 58(1)(b).⁷⁸⁹ While he still faces the possibility of a long sentence, this

778 Katanga was surrendered to the custody of the Court in October 2007.

779 ICC-01/04-01/07-794, para 3; ICC-01/04-01/07-780; ICC-01/04-01/07-1043, paras 3, 8; ICC-01/04-01/07-1325.

780 ICC-01/04-01/07-1043, para 5.

781 ICC-01/05-01/08-321, para 36.

782 ICC-01/05-01/08-321, paras 38, 40.

783 ICC-01/05-01/08-321.

784 ICC-01/05-01/08-403.

785 ICC-01/05-01/08-403, para 45.

786 ICC-01/05-01/08-403, para 47.

787 ICC-01/05-01/08-403, para 49.

788 ICC-01/05-01/08-475.

789 ICC-01/05-01/08-475, para 69.

factor alone cannot justify his continued detention. She considered that Bemba's good behaviour while in detention, as well as his cooperation with the Court and willingness to appear at trial voluntarily, suggested he would cooperate with the Court if granted interim release. In addition, she pointed to his political aspirations and his strong family ties as factors that minimised his flight risk.⁷⁹⁰ Although the Judge 'remains of the view' from her previous decisions that Bemba 'maintains his political and professional position' and 'benefits from international contacts and ties',⁷⁹¹ she found these factors alone were not enough to justify continued detention.⁷⁹²

However, Judge Tendaflilova expressed her concern about the safety and well-being of victims and witnesses and insisted she was 'fully aware that the conditional release of Mr. Jean-Pierre Bemba may bring about concerns, in particular from the witnesses and victims, in the local communities in the CAR and the DRC'.⁷⁹³ Nevertheless, she found the possibility of interference with victims and witnesses unlikely based on the fact that most identities of victims have not been disclosed to the Defence, and Bemba has not tried to contact any of the 21 witnesses known to him while he has been in detention. Similarly, she found it unlikely that Bemba would interfere with witnesses or victims in CAR, as the situation there is 'stable' and there is no specific information indicating that his release would be disruptive.⁷⁹⁴ However, she ordered the Prosecutor to consult with the VWU to monitor any evolving safety risks to the victims and witnesses, requested the legal representatives to inform their clients of the decision, and recalled her powers to issue a warrant of arrest to secure Bemba's presence at the Court should he be released into another State.

Though she granted the interim release, Judge Tendaflilova did not decide on the state to which he would be released or the conditions governing the release.⁷⁹⁵ She decided instead to defer a decision on these matters until she solicited the views of the Prosecutor, the victims, the accused, and the states to which Bemba had requested release. She scheduled hearings with these parties and participants for 7-14 September 2009. A discussion of Judge Tendaflilova's

790 ICC-01/05-01/08-475, para 68.

791 ICC-01/05-01/08-475, para 58.

792 ICC-01/05-01/08-475, para 69.

793 ICC-01/05-01/08-475, para 99.

794 ICC-01/05-01/08-475, para 76.

795 Rule 119 provides examples of the type of conditions that a Judge may set, including, *inter alia*: restrictions on travel, limits on association with designated persons, bans on contact with witnesses or victims, a ban on engaging in certain professional activities, and surrender of a passport and/or other identity documents.

requests for cooperation from the seven states to which Bemba sought release is discussed in the section of this report **Requests for Cooperation**.

The Prosecution immediately filed its appeal of the Pre-Trial Chamber's decision to grant Bemba's interim release, taking the issue directly to the Appeals Chamber and seeking both a reversal of the Pre-Trial Chamber's decision and suspension of its enforcement pending the Appeal Chamber's determination of the issue, in accordance with Article 82.⁷⁹⁶ The Prosecution's argument on appeal was twofold: first, that the Single Judge erred in finding 'a substantial change in the circumstances' in the case since the last Defence application for appeal so to justify release under Article 60(3), and second, in ordering the conditional release of Bemba without deciding on the necessary conditions for his release nor on a State that is willing to accept him and impose those conditions.

On **3 September 2009**, the Appeals Chamber granted the Prosecutor's request for suspensive effect.⁷⁹⁷ It disagreed with the Defence, which had responded to the Prosecution's appeal with the argument that suspensive effect is 'premature' pending a determination of the State that will accept Bemba and the conditions that will apply.⁷⁹⁸ Judge Kuenyehia found that because the release of Bemba is the 'essential issue' in the appeal of the Pre-Trial Chamber's decision on interim release, the Prosecutor's request was appropriate. However, the Single Judge limited the scope of suspensive effect only to the portion of the decision covering the release, thereby not including the Prosecutor's second ground of appeal that '[t]he Single Judge erred in ordering conditional release without also deciding the conditions, knowing to which State the Accused will be released, and determining that the State is competent to enforce the conditions'.⁷⁹⁹ Immediately following the Appeals Chamber decision, on **4 September 2009**, Judge Tendaflilova decided to postpone the public hearings pending the Appeals Chamber's resolution of the issue.⁸⁰⁰ As of the time of publication, an Appeals Chamber decision on the merits of the Pre-Trial Chamber's decision has not been issued.

796 ICC-01/05-01/08-485. Article 82(1)(b) provides an automatic right of appeal for decisions concerning the release of a person being prosecuted at the ICC. Article 82(3) states that '[a]n appeal shall not itself have suspensive effect unless the Appeals Chamber so orders, upon request.'

797 ICC-01/05-01/08-499.

798 ICC-01/05-01/08-499, para 13.

799 ICC-01/05-01/08-499, para 15.

800 ICC-01/05-01/08-502.

Judiciary

Key Decisions CONTINUED

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Disclosure

The right of the accused to examine the evidence that the Prosecution will use to make its case is fundamental to the fairness of trial proceedings. The Rome Statute contains a number of provisions that set out the Prosecution's disclosure obligations. Under the Statute, the Trial Chamber is responsible for facilitating the 'fair and expeditious conduct of the proceedings', including ensuring that documents and information are disclosed 'sufficiently in advance of the commencement of the trial to enable adequate preparation for trial'.⁸⁰¹

With respect to what must be disclosed, the Prosecutor is obligated to permit the Defence to inspect any books, documents, photographs or other tangible objects in her or his possession or control 'which are material to the preparation of the Defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial ... or were obtained from or belonged to the person'.⁸⁰²

801 Article 64(3)(c).

802 Rule 77 RPE.

Under Article 54(1)(a) of the Rome Statute, the Prosecutor is required to investigate ‘in order to establish the truth’ and, in doing so, to ‘investigate incriminating and exonerating circumstances equally’. The accused has the explicit right to disclosure of any exculpatory evidence that the Prosecutor may have. The Rome Statute gives the Prosecution the obligation ‘as soon as practicable, [to] disclose to the Defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence’.⁸⁰³

In 2009, the disclosure of information obtained pursuant to confidentiality agreements under Article 54(3)(e) of the Rome Statute has remained a contested issue in the Lubanga and Katanga/Ngudjolo cases. Article 54(3)(e) permits the Prosecutor to ‘agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents’. At issue is the potential use of the provision to avoid disclosing material and exonerating evidence necessary for the preparation of the defence in violation of the rights of the accused.

The crux of the process for disclosing evidence obtained pursuant to Article 54(3)(e) was set forth by the Appeals Chamber regarding the Lubanga case in its decision of 21 October 2008, a decision that has guided Trial Chambers I and II in their weighing of the disclosure responsibilities for Article 54(3)(e) material. The Appeals Chamber stated:

where the material in question was obtained on the condition of confidentiality, the Trial Chamber ... will have to respect the confidentiality

⁸⁰³ Article 67(2).

agreement concluded by the Prosecutor under article 54(3)(e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider. Instead, the Chamber will have to determine, in *ex parte* proceedings open only to the Prosecutor, whether the material would have had to be disclosed to the defence, had it not been obtained under article 54(3)(e) of the Statute. If the Chamber concludes that this is the case, the Prosecutor should seek the consent of the information provider, advising the provider of the ruling of the Chamber. If the provider of the material does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information.⁸⁰⁴

Therefore, the Appeals Chamber explained that it remains incumbent upon the Trial Chamber to resolve any conflicts that arise between the need to protect the confidentiality agreements on the one hand, and the rights of the accused to a fair trial pursuant to international human rights standards on the other.⁸⁰⁵ However, it remains the duty of the Prosecutor in the first instance to conduct investigations and obtain evidence in ways that will allow for the full realisation of the rights of the accused during pre-trial and trial proceedings.

⁸⁰⁴ ICC-01/04-01/06-1486, para 48.

⁸⁰⁵ ICC-01/04-01/06-1486, para 44; ICC-01/04-01/07-1392, para 9.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

On 13 June 2008, Trial Chamber I issued a stay of the proceedings against Lubanga because it concluded that, as a result of the Prosecutor's failure to disclose potentially exculpatory material to the Defence, 'the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial'.⁸⁰⁶ The Appeals Chamber denied the Prosecutor's request to appeal this decision, but as explained in the introduction to this section, it held that the final decision on whether to continue or lift the stay rests with the Trial Chamber, which must review its decision periodically to resolve whether conditions have changed enough to allow a fair trial to proceed. The Prosecutor submitted its application for review of the decision to stay the proceedings on 14 October 2008. In the application, the Prosecution provided—after having obtained the consent of the information providers—the 93 non-redacted documents obtained under Article 54(3)(e) agreements with the UN and NGOs. The Prosecution also proposed alternative formulations that would allow disclosure of the evidence to the Defence.⁸⁰⁷ On 18 November 2008, Trial Chamber I made an oral decision to lift the stay of the proceedings because, according to an ICC press statement issued that day, 'the reasons for imposing a halt "have fallen away"'.⁸⁰⁸ As part of the order, the Chamber instructed the Prosecution to disclose to the Defence within 12 days all the evidence that was the subject of the stay of proceedings. These events are described in more detail in the 2008 *Gender Report Card*.

On **23 January 2009**, the Trial Chamber issued its reasons for the decision to lift the stay.⁸⁰⁹ The Chamber reviewed its obligations under the Rome Statute to provide for the protection of victims and witnesses 'so long as [the Trial Chamber's rulings] do not undermine the fairness of the proceedings and they do not prejudice the defence'.⁸¹⁰ In light of the 13 May 2008 Appeals Chamber judgement on disclosure, which found non-disclosure was justified only where disclosure 'would pose a danger to the particular person',⁸¹¹ the Trial Chamber analysed the risks of disclosure to all the individuals and organisations that

provided information to the Prosecution. For material not disclosed to the Defence, it assessed whether the Prosecution's proposals were in fact effective 'counterbalancing measures' that would offer some protection to the rights of the accused, notwithstanding non-disclosure. The Prosecution had proposed the following alternatives to full non-disclosure of the evidence: (1) non-disclosure of the identity of certain individuals; (2) redactions of the name of the employee employed by the UN or NGO who merely reports on what others in the DRC have said to him or her; (3) redactions to parts of documents that do not contain exculpatory material; and (4) admission of certain facts. The Trial Chamber's assessment revealed that 'the protective measures throughout were ... necessary, and did not significantly affect the rights of the accused'.⁸¹² Concluding that 'the reasons for imposing the stay of proceedings had now been sufficiently addressed', the Trial Chamber decided it was 'in the interest of justice' to lift the stay.⁸¹³

On **23 March 2009**, the Trial Chamber issued an annex to its 23 January decision.⁸¹⁴ Following the decision to lift the stay, the Chamber had asked the Prosecution to review the requested redactions in light of the decision to issue both private and public versions of the annexes. It also asked the Prosecution to consult the information providers to determine their views on disclosing the information to the Legal Representatives of the victims. The UN and NGOs agreed that the information could be disclosed to the Legal Representatives but not to the victims they represent. The Chamber decided, however, that if the annex could not be shown to the victims, it should also remain confidential from the Legal Representatives because the latter appear on behalf of the victims.

Trial Chamber I issued a decision on **16 December 2008**⁸¹⁵ that addressed the scope of the Prosecution's duty to disclose exculpatory material to the Defence, the Prosecution's requests for redactions, and the disclosure of potentially exculpatory information. The Defence had argued that anything short of full disclosure of potentially exculpatory material would fail to satisfy the rights of the accused to rely on such evidence at trial, and thereby to prepare an effective defence. In its decision, the Trial Chamber relied upon the judgement by the Appeals Chamber on the Prosecution's obligations of disclosure in the context of his use of information obtained under Article 54(3)(e).⁸¹⁶ The Trial Chamber found that 'if it is impossible to order disclosure of items of evidence

806 ICC-01/04-01/06-1401, para 93.

807 These included disclosure of non-redacted versions, redacted versions, summaries of relevant material, disclosure of alternative evidence or admissions of fact by the Prosecution.

808 ICC-CPI-20081118-PR371.

809 ICC-01/04-01/06-1644.

810 ICC-01/04-01/06-1644, para 43.

811 ICC-01/04-01/07-475, para 71.

812 ICC-01/04-01/06-1644, para 46.

813 ICC-01/04-01/06-1644, para 59.

814 ICC-01/04-01/06-1803.

815 ICC-01/04-01/06-1557.

816 ICC-01/04-01/06-1486.

which are potentially exculpatory, it may be possible for the proceedings to continue by ensuring that appropriate counter-balancing measures are taken'.⁸¹⁷ Hence, the Trial Chamber explained that the Court's obligation to protect victims and witnesses arises in two circumstances, with different consequences: (1) where redactions are necessary but the material is potentially exculpatory, 'the Court will need to decide if alternative means are available to fill the evidentiary gap';⁸¹⁸ (2) where the redacted material is irrelevant to the charges, redacted material can be provided to the Defence, upon review of the Chamber to ensure the redactions are not unclear or burdensome that they threaten the fairness of the proceedings.

The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui

Given the problems that arose in the Lubanga case concerning the Prosecution's disclosure obligations with respect to material obtained under confidentiality agreements pursuant to Article 54(3)(e),⁸¹⁹ Trial Chamber II closely observed the disclosure of Article 54(3)(e) material in the Katanga-Ngudjolo case.

Most of the Article 54(3)(e) evidence in the Katanga-Ngudjolo case was obtained pursuant to confidentiality agreements with the United Nations Mission in the Democratic Republic of Congo (MONUC).⁸²⁰ Many of the documents are daily, weekly and expert reports on the military, political, civil, security, human rights and child protection situation in the region. Others address the demobilisation and disarmament process, the illegal exploitation of natural resources, and descriptions of major events, including massacres. The Prosecution also obtained Article 54(3)(e) evidence pursuant to agreements with NGOs.⁸²¹ For several documents, the UN consented to the disclosure of information to the Defence and the victims' legal representatives contingent upon the implementation of additional protective measures.⁸²²

817 ICC-01/04-01/06-1557, para 37.

818 ICC-01/04-01/06-1557, para 38.

819 This conflict was discussed at length in the 2008 *Gender Report Card*, pp 78-80.

820 ICC-01/04-01/07-1392; ICC-01/04-01/07-1249.

821 ICC-01/04-01/07-1099.

822 The protective measures included: prohibiting the disclosure of the previously redacted information to third parties; making only redacted versions available to the public; ensuring all citations and analyses of relevant passages are made *in camera*; using pseudonyms in public hearings for redacted names; and providing measures of protection, namely re-localisation, for the information providers and their families. ICC-01/04-01/07-1392, para 75; ICC-01/04-01/07-1249, para 18.

At the very outset of the process, in a decision issued on **10 December 2008**, the Chamber ordered the Prosecution to submit a comprehensive report on evidentiary materials obtained pursuant to Article 54(3)(e).⁸²³ With respect to the redactions of Article 54(3)(e) evidence, Trial Chamber II ordered the Prosecutor to submit all documents to the Chamber for review *prior to* disclosing them to the Defence in order to ensure that documents remained readable, comprehensible and exploitable by the Defence.⁸²⁴ It is important to recall that it is the information providers that impose the redactions of Article 54(3)(e) evidence, and that the Chamber cannot order the Prosecution to disclose the information. Trial Chamber II thus elaborated standards for evaluating the redacted material with respect to protecting the rights of the accused. Principally, the Chamber increased its scrutiny of exonerating and material evidence as defined by Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence, respectively.⁸²⁵

While recognising that the redaction of the names of persons and organisations providing information remains necessary for their security, the Chamber recalled that such information could be relevant for the preparation of the defence, as it identified persons whom the Defence might want to contact for additional information, to call as witnesses or to contest their truthfulness.⁸²⁶ For names that are pertinent to the Defence, the Chamber held that the disclosure of alternative evidence containing the same information constituted a compensatory measure to ensure that the rights of the Defence are not violated.⁸²⁷

823 The report was to contain: (1) a complete list of the material for which the providers had agreed to lift confidentiality and the manner in which this material had been communicated to the Defence; (2) a list of material for which negotiations concerning the lifting of confidentiality remained in progress; and (3) a list of material for which the lifting of confidentiality had been denied. ICC-01/04-01/07-788.

824 ICC-01/04-01/07-931. See also 'Redactions' in the section on 'Protection'.

825 See, eg, ICC-01/04-01/07-1392, para 15.

826 See, eg, ICC-01/04-01/07-1392, paras 12, 13.

827 See, eg, ICC-01/04-01/07-1392, paras 16, 78; ICC-01/04-01/07-1282, paras 11, 13.

On several occasions, the Chamber authorised redactions to maintain the confidentiality of material obtained through agreements pursuant to Article 54(3)(e).⁸²⁸ In one instance, involving the disclosure of information found within the screening notes of a witness interview, the Chamber found that the redacted information—entailing the names of the information provider and the witness, and covering five full paragraphs related to the source of the information provider as well as to the Prosecution’s investigation into another case—was relevant to the Defence. Unable to impose disclosure, it limited itself to ensuring that the redacted passages did not contain material or exonerating evidence and that the document remained readable, comprehensible and exploitable by the Defence.⁸²⁹

Ultimately, the review process for redacted Article 54(3)(e) evidence in the Katanga-Ngudjolo case required the Prosecution to resubmit the same material multiple times. In a decision issued on **21 January 2009**, the Chamber called the Prosecution’s attention to the fact that it had disclosed numerous documents in redacted or summary form directly to the Defence, containing material and exonerating evidence and obtained pursuant to Article 54(3)(e), without first submitting them to the Chamber for review.⁸³⁰ It demanded an explanation for the Prosecution’s failure to follow the procedure established by the Appeals Chamber, above.⁸³¹

In its response, the Prosecution asserted that, absent conflict, disclosure should remain a process that takes place between the parties, without the involvement of the Chamber.⁸³² On **26 February 2009**, the Chamber issued a clear decision to the contrary.⁸³³ It ordered the Prosecution to submit all of such documents that had already been communicated to the Defence in redacted form.⁸³⁴ The Prosecution submitted 53 such redacted documents to the Chamber in their original format.⁸³⁵ It also submitted 13 documents not yet disclosed to the Defence.⁸³⁶

828 ICC-01/04-01/07-1099; ICC-01/04-01/07-1096; ICC-01/04-01/07-1282.

829 ICC-01/04-01/07-1282.

830 ICC-01/04-01/07-839. The Chamber further criticised the Prosecution for apparent inconsistencies between its 5 January report on disclosure and the information as detailed in the disclosure notes.

831 ICC-01/04-01/07-839, para 5.

832 ICC-01/04-01/07-852. See also ‘Redaction’s in section on ‘Protection’.

833 ICC-01/04-01/07-931.

834 ICC-01/04-01/07-931.

835 ICC-01/04-01/07-941.

836 ICC-01/04-01/07-1392, para 2.

At a closed hearing on **16 March 2009**, the Chamber ordered the Prosecution to resubmit the documents accompanied by additional information related to the information provider and its reasons for requesting redactions, in order to facilitate its assessment of the material.⁸³⁷ Upon their re-submission, the Chamber once again ordered the Prosecution to resubmit the material, highlighting the passages relevant to incriminating, exonerating and material evidence.⁸³⁸ The Prosecution complied.⁸³⁹ The Chamber retained questions concerning 26 of the documents; the Prosecution has responded to the request for five of the 26 documents to date.⁸⁴⁰

Late Disclosure

In an order issued on **23 January 2009**, Trial Chamber II established time limits for requesting redactions pursuant to the Prosecution’s obligation to disclose material and exonerating evidence.⁸⁴¹ The Chamber ordered the Prosecution to submit all requests for redactions of incriminating evidence by 30 January 2009, and 16 February for exculpatory and material evidence.⁸⁴² The deadline for submitting exonerating and material evidence was set for 27 February.

Pursuant to Regulation 35(2) of the Regulations of the Court, extensions of time limits can be granted when ‘good cause’ is shown. After the time limit has lapsed, an extension may be granted only by demonstrating an inability to meet the time limit for ‘reasons outside his or her control’.⁸⁴³ The Chamber was compelled to call the Prosecution’s attention to the fact that several of its requests failed to distinguish between the two provisions.⁸⁴⁴

In general, when examining the Prosecution’s requests for a time limit extension, in consideration of the rights of the Defence, the Chamber considered the volume of the material as well as whether it raised any new issues.⁸⁴⁵ The Chamber granted several extensions for the late disclosure of evidence upon

837 See, ICC-01/04-01/07-1392, para 5.

838 ICC-01/04-01/07-1193-Conf-Exp.

839 ICC-01/04-01/07-1236-Conf-Exp.

840 ICC-01/04-01/07-1392, para 7.

841 See, Rule 77 of the Rules of Procedure and Evidence, and Article 67(2) of the Rome Statute, on the requirements for disclosing material and exonerating evidence, respectively.

842 ICC-01/04-01/07-846. The Chamber granted the Prosecution a three-week extension to submit redactions requests for material and exonerating evidence. See, ICC-01/04-01/07-999, para 5. It granted a second extension for requests for redactions of the statements of seven witnesses. ICC-01/04-01/07-978.

843 Regulation 35(2), Regulations of the Court.

844 ICC-01/04-01/07-1135; ICC-01/04-01/07-1336.

845 ICC-01/04-01/07-1135.

finding that the Prosecution demonstrated the requirements of Regulation 35(2).⁸⁴⁶ However, the Chamber also granted extensions on occasions in which the Prosecution failed to meet the deadlines because of an oversight, upon finding that the evidence would be useful for the Defence,⁸⁴⁷ as well as when the Prosecution failed to request an extension.⁸⁴⁸ In fact, the Chamber rarely denied the Prosecution's request for late disclosure of evidence.⁸⁴⁹

For example, the Chamber granted an extension for the disclosure of transcriptions and translations of previously disclosed videos, despite the Prosecution's failure to show cause. It did so, finding that the transcriptions and translations formed an integral part of the video and thus constituted the same piece of evidence. The Chamber thus allowed the submission of the transcriptions and translations because it needed them in order to understand the videos, already on the List of Incriminating Evidence.⁸⁵⁰

The Prosecution submitted several late disclosure requests, as required by the Chamber, in cases concerning the reclassification of the evidence.⁸⁵¹ It also requested three time limit extensions to complete the Table of Incriminating Evidence.⁸⁵² However, as the Chamber noted in a decision issued on **27 July 2009**, most of the Prosecution requests resulted from the development of its case in light of its ongoing investigation.⁸⁵³

While recalling that the Appeals Chamber expressly authorised continuing investigations after the confirmation of charges, given the possibility of obtaining better, more compelling evidence, the Chamber found that 'there is no unlimited right to submit newly discovered material'.⁸⁵⁴ It held that newly discovered material will be admitted on a case-by-case basis, and will depend upon whether the evidence is exonerating or incriminating. The late disclosure of exonerating evidence will trump

the time limits imposed by the Chamber. For incriminating evidence, the Prosecutor must convince the Chamber that it is more compelling than evidence already disclosed or that it brings to light previously unknown facts. The Chamber further required that the Prosecution explain how the evidence relates to its overall evidentiary case, and propose how it will be entered into evidence at trial.⁸⁵⁵

Significantly, in a decision issued **31 August 2009**, the Chamber included the continuing requests by the Prosecution to disclose and redact new evidence, which requires additional time for consideration by all of the parties, as a factor in its decision to postpone the start date of the trial.⁸⁵⁶

846 ICC-01/04-01/07-978; ICC-01/04-01/07-1281; ICC-01/04-01/07-1364, paras 12, 13 (finding uncertainty as to protective measures for a witness to be 'outside of [the Prosecution's] control', and difficulty in finding a security solution for a witness to constitute 'good cause'); ICC-01/04-01/07-1394.

847 See, eg, ICC-01/04-01/07-1135.

848 ICC-01/04-01/07-1101, para 2.

849 See, eg, ICC-01/04-01/07-1336 (denying the disclosure of additional video footage).

850 ICC-01/04-01/07-1336.

851 ICC-01/04-01/07-1336.

852 ICC-01/04-01/07-969; ICC-01/04-01/07-1080; ICC-01/04-01/07-1090.

853 ICC-01/04-01/07-1336.

854 ICC-01/04-01/07-1336, para 28.

855 ICC-01/04-01/07-1336.

856 ICC-01/04-01/07-1442.

Darfur, Sudan

The Prosecutor v. Bahr Idriss Abu Garda

On **30 May 2009**, Single Judge Tarfusser issued a decision scheduling a hearing prior to the confirmation of charges hearing on 12 October 2009 in order to ensure that the disclosure of evidence by both parties ‘takes place under satisfactory conditions, that is to say in a manner which is transparent, efficient and expeditious’.⁸⁵⁷ The closed session hearing, attended by the Prosecutor, Defence, and Registrar and scheduled for 9 June 2009, was held ‘with a view to preventing sensitive information from being disclosed to the public’.⁸⁵⁸ The purpose was to determine all matters related to disclosure with an emphasis on the scope, modalities, and time frame of disclosure.

After the hearing, on **15 July 2009**, Pre-Trial Chamber I issued a ‘Second decision on issues relating to Disclosure’,⁸⁵⁹ with Judge Tarfusser dissenting in part. The Chamber found that during the closed session hearing and in a subsequent *ex parte* hearing requested by the Prosecutor, no evidence was presented that the Chamber found so sensitive as to overrule the principle of publicity of proceedings. Hence, the Chamber ordered that transcripts of the hearing be made public.

In the same 15 July decision, the Chamber also established a system governing disclosure for the confirmation hearing. The majority found that disclosure of evidence pertains only to ‘all filing of the evidence to be presented at the confirmation hearing in the record of the case’.⁸⁶⁰ Therefore, this would not include materials they do not intend to rely on at the hearing, including those ‘of potentially exculpatory nature’ or others necessary for the preparation of the Defence. The Prosecution is obliged to disclose those materials to the Defence prior to the confirmation hearing in accordance with Article 67(1)(b) and (2). In this way, the Majority essentially followed the practice regarding disclosure set out by the Court in the Lubanga and Katanga/Ngudjolo cases:

the Chamber’s role is ‘limited to distinguish those cases that should go to trial from those that should not’ ... [therefore] it would be contrary to the role of the Pre-Trial Chamber to have potentially exculpatory and other materials disclosed by the Prosecution before the hearing filed in the record of the case and presented at the confirmation hearing, if neither party intends to rely on those materials at the hearing.⁸⁶¹

857 ICC-02/05-02/09-18, para 2.

858 ICC-02/05-02/09-35, para 2.

859 ICC-02/05-02/09-35.

860 ICC-02/05-02/09-35, para 8.

861 ICC-02/05-02/09-35, para 10.

The Chamber decided to convene a status conference with the parties and the Registrar to ‘address the disclosure process, the filing of the evidence in the record of the case, the disclosure process of potentially exculpatory evidence covered by confidentiality obligations and any related issues that the parties would like to raise’.⁸⁶² The conference was later set for 26 August 2009.⁸⁶³

Judge Tarfusser dissented with this portion of the decision. In his view, Rule 121(2)(c), which requires that ‘All evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber’, extends to material of an exculpatory nature. In the confirmation hearing, because ‘it is the soundness of the case brought by the Prosecutor that is at stake’,⁸⁶⁴ the Pre-Trial Chamber must have access to all information disclosed between the parties in order to serve as a ‘filter’ between the Prosecutor and the trial. The Chamber, not the parties, should be in the position to assess the evidence, lest the judges be ‘wrongly deprived of the knowledge of material which, had it been known to the Chamber, might have influenced its decision as to whether the case should proceed to trial’.⁸⁶⁵ Such a procedure could compromise the Pre-Trial Chamber’s important ‘filter’ role.

862 ICC-02/05-02/09-35, p 19.

863 ICC-02/05-02/09-56.

864 ICC-02/05-02/09-35, dissent, para 8.

865 ICC-02/05-02/09-35, dissent, para 11.

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

On **1 December 2008**, Pre-Trial Chamber III issued an order⁸⁶⁶ to unseal and re-classify certain documents prior to the hearing on the confirmation of charges against Jean-Pierre Bemba scheduled for 8-12 December. The order followed a decision issued by the Chamber on 17 November 2008 in which it requested the Prosecutor, Victims and Witnesses Unit (VWU), and the Registry to submit proposals regarding the communication to the Defence of a list of documents not previously available to the Defence. The Prosecutor, in consultation with the VWU and Registry, filed Observations on 24 November regarding the confidentiality of the documents and the need for redactions prior to disclosing the information to the Defence.

Single Judge Trendafilova balanced the competing needs for protection and privacy of victims and witnesses against the rights of the Accused, in particular the right to adequately prepare a Defence and the right to a fair hearing. She also considered the principle of publicity of proceedings. With respect to photographs of Bemba, NGO reports, and other documents available on the internet, the Single Judge found that the basis of their initial status as ‘confidential’ or ‘under seal’ no longer exists, and they should be made public. The six redacted documents pertained, *inter alia*, to the Prosecution’s Application for an Arrest Warrant, and the Prosecutor’s Position regarding Disclosure of Additional Witnesses for Referral to VWU.

However, the Judge re-classified as confidential—and therefore made available to the Defence—other documents and transcripts of an *ex parte* hearing filed either by the Prosecution or the Registry. The Single Judge found that such a re-classification to a lower level of security was appropriate because the information (1) does not reveal identifying information of victims or witnesses, (2) is relevant for the preparation of the Defence prior to the confirmation hearings, and (3) is already known by the Defence through the disclosure process.⁸⁶⁷ However, she found that ‘in limited instances’ certain information in these documents should be redacted because, if known to the Defence, it ‘would reveal the identity or identifying information of protected victims and witnesses and of persons at risk on account of the activities of the Court or would give indications as to the modalities of their

protection’.⁸⁶⁸ She therefore ordered the Prosecutor to provide confidential redacted versions of six documents, following his proposals for redaction.

Finally, the Single Judge reserved her power to make further decisions on reclassification and unsealing of documents in the situation and case to ensure the rights of the Accused are properly balanced against the principle of publicity of proceedings. The Prosecution adhered to the Order by communicating the confidential redacted documents to the Defence on 8 December 2008.⁸⁶⁹

866 ICC-01/05-01/08-301.

867 ICC-01/05-01/08-301, para 8.

868 ICC-01/05-01/08-301, para 10.

869 ICC-01/05-01/08-312.

Judiciary

Key Decisions CONTINUED

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Witness-related Issues

During 2009, Chambers in the cases arising out of the Situation of the DRC have continued to build the jurisprudence on issues and procedures relating to witnesses who will give evidence before the Court. Key issues addressed include the presentation of evidence by written statement, witness familiarisation, and the provision of in-court assistance.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

Trial Chamber I has issued three important decisions on preparing witnesses to testify at trial, the first on 30 November 2007, a second on 29 January 2008, and a third on 23 May 2008. In the first of these decisions, the Chamber held that prior to the witness testifying, a process of ‘witness familiarisation’ is appropriate but the practice of ‘witness proofing’ shall not be allowed at the Court.⁸⁷⁰ Witness familiarisation involves a process that must include, *inter alia*, assisting the witness to understand fully the Court’s proceedings, its participants and their respective roles, reassuring witnesses about their role in the proceedings, and explaining the process of examination and their legal obligation to tell the truth when testifying.⁸⁷¹ In addition to familiarisation, the ‘Victims and Witnesses Unit shall make available to the witness a copy of any witness statement they may have made in order to refresh their memory.’⁸⁷² The second decision issued general guidelines on matters relating to the testimony of witnesses during trial. In the third, the Chamber held that advisers to witnesses should also receive documentation of witness statements but may only be permitted to watch, not to communicate with the witness, during the familiarisation process. It also ordered that ‘[t]he Protocol used to prepare and familiarise witnesses and, if it is reasonably practicable, the Registry’s familiarisation film should be altered to reflect the Chamber’s decisions of 30 November 2007, 29 January 2008, and the present decision.’⁸⁷³

870 The impact of the decision by Trial Chamber I not to allow witness proofing is difficult to quantify. However, some observers have speculated that problems encountered by the Court might have been avoided had witness proofing been allowed. For example, the first witness to testify before the Court, witness 0298, recanted his evidence on his first day of testimony, although he later returned to testify successfully at a later stage. It is possible that had the witness been ‘proofed’ rather than merely ‘familiarised’, he would have been in a better position to give his testimony. However, it should also be noted that a number of other factors were different during his second appearance. For example, during his second appearance the witness was allowed to testify in an unbroken narrative (rather than in response to Prosecution questions) and was screened off from Lubanga so that the witness could not see him. See ICC-01/04-01/06-T-110-ENG; ICC-01/04-01/06-T-111-ENG; ICC-01/04-01/06-T-123-ENG.

871 ICC-01/04-01/06-1049, para 53.

872 ICC-01/04-01/06-1049, para 55.

873 ICC-01/04-01/06-1351, para 43.

On 31 December 2008, the Registry issued its report on the policies and practices used to familiarise witnesses at trial, in accordance with the Trial Chamber’s three decisions.⁸⁷⁴

On the first issue regarding when the familiarisation process commences, thus preventing contact between the witness and a party, the VWU took the view that clear demarcation was essential. Therefore ‘the starting point of the familiarisation process is when the witness arrives in the Netherlands prior to giving evidence at the Court.’⁸⁷⁵

Second, the VWU set in a place a procedure whereby the witness can receive his or her witness statement in a confidential, secure setting on the VWU premises, but such statements may not leave the premises.

Third, the VWU expressed ‘concerns in relation to the high number of persons that may be present during the reading of the statements’,⁸⁷⁶ including potentially the representatives of the parties and participants, the legal representative if the witness is also a victim, and the person reading the statement if the witness is illiterate. The heart of the concerns was that the environment may exude pressure on the witness and prevent him or her from communicating freely or requesting support from VWU. In light of this, the VWU ‘recommend[ed] restricting the number of silent observers during the rereading process to a maximum of three’.⁸⁷⁷

Fourth, the VWU put in place procedures for providing witnesses with a copy of their statement upon request, including witnesses with dual status as victim and witness, witnesses without legal representation, witnesses in the Court’s Protection Programme (ICCPP) and those not participating in the ICCPP. Finally, the VWU proposed changes to the film used by the VWU to familiarise witnesses in order to correct omissions on the role of legal representatives in the process, as well as an explanation of the prohibition on the party calling the witness to meet with the witness after the familiarisation process begins. The VWU proposed interim changes to the film until time and resources permit them to make final alternations, which would not be possible for the Lubanga trial.

874 ICC-01/04-01/06-1578.

875 ICC-01/04-01/06-1578, para 4.

876 ICC-01/04-01/06-1578, para 9.

877 ICC-01/04-01/06-1578, para 11. The VWU suggested having one representative of the prosecution, defence, and legal representatives. The Support Witnesses, while on call to attend to the witness’s psychological and physical well-being, may not be in the room at all times because of the need to preserve professional boundaries and ‘be in a position to provide neutral support to the witness’. ICC-01/04-01/06-1578, para 12.

In a decision of **15 January 2009**, in response to a request by the Prosecution, Trial Chamber I ruled that the evidence of two witnesses could be presented to the Court in the form of written statements, supplemented by necessary questioning.⁸⁷⁸ The Chamber found that both Article 68(2) of the Statute and Rule 68 of the Rules of Procedure and Evidence allow for evidence to be presented in the form of prior recorded testimony that can replace, in full or in part, live testimony. The Chamber noted that Article 68(2) is specifically directed at protecting victims, witnesses, and the accused, and that it enables the court, when necessary, to use appropriate special means, including reading all or part of a witness statement in open court or in private, 'so long as these steps do not detract from the fairness of the proceedings'.⁸⁷⁹ Rule 68, on the other hand, is 'a general provision for the introduction of prior recorded testimony, subject to specific safeguards'.⁸⁸⁰ The Chamber found that under Rule 68(b), put forward by the Prosecution, determinations must be made on a fact-specific basis. Considering that the Prosecution request concerned two witnesses who would be present in court for defence examination, who were providing background evidence not materially in dispute and not central to the core issues of the case, the Chamber found that the Prosecution's proposal to introduce written statements was 'the most efficient means of receiving this evidence, without prejudicing the rights of the defence'.⁸⁸¹ The Chamber also ruled that the defence will be permitted to question the witnesses as necessary, but that this questioning must be relevant and focussed on the issues in the case.

On 17 February 2009, the Prosecution filed an application to Trial Chamber I⁸⁸² seeking admissibility of certain documents into evidence 'from the bar table', an expression that refers to the submission of documents directly by counsel rather than introducing documents referred to by a witness during his or her testimony. Over 70 of these documents were obtained during the process of a search and seizure by Congolese authorities in Bunia as part of an exercise directed by the Prosecutor, and in the presence of one of the OTP's investigators. In the decision to confirm the charges against Lubanga, the Pre-Trial Chamber identified the Prosecutor's application to submit this evidence as one of the key procedural issues in the case because of questions surrounding the legality of how the evidence was obtained.⁸⁸³ On **24 June 2009**, the Trial Chamber rendered its decision on the Prosecutor's application to use this evidence.⁸⁸⁴

878 ICC-01/04-01/06-1603.

879 ICC-01/04-01/06-1603, para 17.

880 ICC-01/04-01/06-1603, para 20

881 ICC-01/04-01/06-1603, para 24

882 ICC-01/04-01/06-1703.

883 ICC-01/04-01/06-803-tEN, para 62.

884 ICC-01/04-01/06-1981.

The Prosecution sought to introduce these documents on the basis that they were relevant and probative, and that pursuant to Article 69(7), the method of their procurement does not affect the reliability of the evidence or the integrity of the proceedings. During the pre-trial phase, the Defence had challenged their admissibility partly on the grounds that the search violated the owner's privacy because it was carried out without a legal or factual basis and the invasiveness was disproportionate to the object of the search. As such, the evidence 'had the capacity seriously to damage the integrity of the proceedings, such as to warrant is exclusion under Article 69(7)'.⁸⁸⁵ At the trial level, the Defence did not contest the admissibility of the documents on the grounds that they were obtained through an illegal search, but the Chamber nevertheless chose to address it 'in order to ensure that its final decision is based only on admissible evidence'.⁸⁸⁶ The victims' legal representatives supported admissibility because 'the determining factor is not the method used to tender a document, but its underlying admissibility'.⁸⁸⁷

The Trial Chamber confirmed the Pre-Trial Chamber's finding 'that the infringement of the principle of proportionality resulted in a violation of the internationally recognised human right to privacy'.⁸⁸⁸ The Chamber surveyed international human rights jurisprudence on exclusionary rules, which favors admissibility of evidence where exclusion 'would constitute an obstacle to the administration of justice'.⁸⁸⁹ It found that the Rome Statute allows for the admissibility of evidence that was obtained in violation of the Statute or international human rights, unless the evidence is unreliable or would seriously damage the proceedings. Because neither was the case here, the Chamber found that admissibility of the 'bar table' documents was appropriate despite the breach of the owner's fundamental right to privacy.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

In a decision issued on **14 May 2009**, Trial Chamber II addressed a number of witness-related procedural issues raised by the Registrar to ensure 'the smooth functioning of the proceedings'.⁸⁹⁰ They included, among other issues: witness familiarisation, the provision of in-court assistance, contacting witnesses called by other participants, and witness testimony.⁸⁹¹

885 ICC-01/04-01/06-1981, para 13.

886 ICC-01/04-01/06-1981, para 8.

887 ICC-01/04-01/06-1981, para 9.

888 ICC-01/04-01/06-1981, para 19.

889 ICC-01/04-01/06-1981, para 20 (citing ICC-01/04-01/06-803-tEN, para 88).

890 ICC-01/04-01/07-1134, para 6.

891 See also, ICC-01/04-01/07-788, para 14.

The Chamber held that when special measures are required for certain witnesses, such as closed hearings, the party should petition the Chamber ‘well in advance of the scheduled date of the testimony in order to allow it to consult with the VWU and to decide on the request.’⁸⁹² It further determined that the party calling the witness is responsible for providing the Chamber with the necessary information to make the determination.⁸⁹³

Noting the decisions of Trial Chamber I on the issue⁸⁹⁴ and a confidential ‘Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial’, dated **16 January 2009**,⁸⁹⁵ the Chamber decided that the party calling the witness ‘must provide an accurate estimation of the time required by the witness to read his or her previous statements’ at least 35 days prior to their scheduled arrival at the Court.⁸⁹⁶

The Chamber expressed its view that ‘in principle witnesses are expected to testify without assistance’, and that it must be informed in advance in the event assistance is required, of the type thereof and of the identity of the person to provide it. The Chamber took note that the Registrar maintains at its disposal ‘all the necessary qualified personnel to provide psychological assistance to traumatised, or otherwise vulnerable witnesses.’⁸⁹⁷ It further declared that the party calling the witness must inform the Victims and Witness Unit (‘VWU’) of ‘any specific vulnerability’ at least 35 days prior to the arrival of the witness at The Hague.⁸⁹⁸

The Chamber decided that, in contrast with the practice of Trial Chamber I, witnesses who are not in the ICC Protection Programme and who do not request assistance can be interviewed by counsel of another party without the automatic presence of a representative from the VWU.⁸⁹⁹ For vulnerable witnesses, the Chamber held, it remains the responsibility of the party calling the witness to contact the VWU ‘well in advance of the scheduled interview in order to arrange for an assessment of the need for assistance by a VWU representative during the interview.’⁹⁰⁰

892 ICC-01/04-01/07-1134, para 8.

893 ICC-01/04-01/07-1134, para 8.

894 ICC-01/04-01/06-1049; ICC-01/04-01/06-1351.

895 ICC-01/04-01/07-842-Conf-Anx.

896 ICC-01/04-01/07-1134, para 18.

897 ICC-01/04-01/07-1134, para 20.

898 ICC-01/04-01/07-1134, para 22.

899 ICC-01/04-01/07-1134, para 26.

900 ICC-01/04-01/07-1134, para 27.

In conformance with the practice of Trial Chamber I, the Chamber held that the party calling the witness is entitled to have a representative present during the interview. If the interviewing party objects, they must apply to the Chamber for a ruling on the issue. The Chamber further noted that if the witness prefers that the interview take place without a representative of the party calling him/her, there is not need to apply to the Chamber for a ruling. It reiterated:

interviews can only take place if the witness him or herself consents. The consent must be given voluntarily. The party calling the witness is prohibited from trying to influence the witness’s decision as to whether or not to agree to be interviewed by Counsel of another party.⁹⁰¹

Also in contrast to Trial Chamber I, the Chamber decided that the party calling the witness will be responsible for making the practical arrangements for the interview, not the VWU. In this regard, it recalled that Defence teams cannot enter directly into contact with Prosecution witnesses. As the witness may not have had prior contact with the VWU, the Chamber decided that the party calling the witness shall be responsible for introducing the VWU to the witness and in liaising between them.⁹⁰² Finally, the Chamber decided that the VWU shall be responsible for selecting ‘an appropriate and neutral venue’ for the interview in coordination with the interviewing party. The VWU shall also be responsible for transporting and accompanying the witness to the interview location.⁹⁰³

The Chamber indicated that it will rule on specific requests for remote testimony on a case-by-case basis, with the precondition that ‘the technology permits the witnesses to be examined by the parties and the Chamber at the same time the witness testifies.’⁹⁰⁴ It stated that it will order necessary measures ‘to ensure the rights of the accused to examine witnesses against them under the same conditions of the Prosecution’ in accordance with Article 67(1)(e) of the Statute.⁹⁰⁵ It further held that the parties must request authorisation to introduce live witness testimony from outside the courtroom at least 35 days before the witness is scheduled to appear.

The Chamber has not yet ruled on the issues related to the dual status of victims and witnesses at the time of the publication of this report.

901 ICC-01/04-01/07-1134, para 28.

902 ICC-01/04-01/07-1134, para 30.

903 ICC-01/04-01/07-1134, para 31.

904 ICC-01/04-01/07-1134, para 36.

905 ICC-01/04-01/07-1134, para 36.

Judiciary

Key Decisions CONTINUED

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Amicus Curiae

***Amicus curiae* means ‘friend of the court’. In many legal systems of the world, and in most of the international courts and tribunals operating today, organisations or individuals may, with leave, submit observations to the court or tribunal as *amicus curiae* where such observations would assist the court or tribunal in the proper determination of a case. The Rules of Procedure and Evidence of the Rome Statute provide for the making of observations as *amicus curiae* ‘on any issue that the Chamber deems appropriate’.⁹⁰⁶**

In 2009, the Women’s Initiatives sought, and was granted, leave to submit observations as *amicus curiae* in the Bemba case on the issue of the Pre-Trial Chamber’s dismissal of two charges of sexual violence. The Women’s Initiatives is one of only five organisations or bodies to be granted *amicus curiae* status before the Court and the only international women’s rights organisation to be granted such status. In 2006, the Women’s Initiatives for Gender Justice became the first NGO to seek *amicus* status before the Court when we submitted a series of filings in the Lubanga case.

This year, five groups submitted requests to file *amicus* observations pursuant to Rule 103, and some of the groups submitted multiple applications. At the time of publication, the requests by three groups, including the Women’s Initiatives, had been granted, three requests were rejected, and a decision on one request was pending.

⁹⁰⁶ Rule 103(1).

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

Women’s Initiatives for Gender Justice

On 13 July 2009, the Women’s Initiatives for Gender Justice filed a ‘Request for leave to submit *Amicus Curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence’.⁹⁰⁷ The request was filed in response to the failure on the part of the Pre-Trial Chamber to confirm all of the sexual violence charges submitted by the Prosecution, and in support of the Prosecution’s request for leave to appeal this decision under Article 82(1)(d). According to this provision, a request for leave to appeal may be granted if the decision in question ‘involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings’. The Women’s Initiatives proposed to brief the Court on (1) cumulative charging in light of the due process rights of the accused and (2) cumulative charging in light of Article 21 of the Rome Statute, both issues of first impression before the ICC and the Chamber.

On **17 July 2009**, Judge Ekaterina Trendafilova, Single Judge of Pre-Trial Chamber II, granted leave to the Women’s Initiatives for Gender Justice to file observations as *amicus curiae* under Rule 103.⁹⁰⁸ The Single Judge noted that ‘the proposed *amicus curiae* brief tends to provide legal information that the Chamber may find useful in the context of the present case’ and that granting the request is ‘both desirable and appropriate for the proper determination of the case’, therefore meeting the requirements for Rule 103.⁹⁰⁹ The Single Judge invited the Prosecution and Defence to file responses within 10 days of the submission of the *amicus* observations.

On 14 July 2009, the Defence filed a request to submit a response to the *amicus curiae* brief of the Women’s Initiatives after it had received a French translation of the Confirmation Decision and the Prosecution’s Appeal of the Decision.⁹¹⁰

On July 21, the Office for the Public Council of Victims (OPCV) sought leave of the Pre-Trial Chamber to respond to the *amicus curiae* submission of the Women’s Initiatives.⁹¹¹ On 24 July, Single Judge Hans-Peter Kaul denied the OPCV’s request.⁹¹² According to the Single Judge, victims have the right to provide written submissions only where the Court is satisfied that they have proven in their application that their interests are affected by the issue under examination and the Chamber finds the submissions appropriate. In the present case, the OPCV did not provide sufficient facts to prove to the Single Judge that the personal interests of the victims are affected. Moreover, the OPCV has had an opportunity to provide its observations on the Prosecutor’s request for leave to appeal the Confirmation Decision. The Single Judge found that this prior submission provided ‘sufficient information’ for the Pre-Trial Chamber to make its decision on whether to grant the Prosecution’s request.⁹¹³

The Women’s Initiatives for Gender Justice filed its *amicus* brief on 31 July.⁹¹⁴ The brief addressed the issue of cumulative charging as an issue of general interest to the Court and in reference to this specific case. As many of the issues raised were *de novo* and would impact future cases before the Court, including but not limited to issues surrounding gender-based crimes, the brief argued that they are of significant importance to the Appeals Chamber to warrant review pursuant to Article 82(1)(d).

First, the brief argued that, in its Confirmation Decision, the Pre-Trial Chamber improperly dismissed crimes of torture and outrages upon personal dignity on the grounds that cumulative charging was detrimental to the rights of the accused. While the Chamber used the appropriate test for cumulative charging as set forth by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in *Prosecutor v. Delalic*, it did not properly apply the test to the facts in this case. In national courts and international tribunals, cumulative charging has never been posited as violating the rights of the accused. Cumulative charging is distinct from charges lacking in evidence and as such ‘is not inimical to the due process rights of the accused; they remain safeguarded throughout the trial. Upon a finding of guilt, cumulative convictions are impermissible, but at the charging stage, whether charges are cumulative or not, their inclusion in the indictment does not violate fair trial practices’.⁹¹⁵

907 ICC-01/05-01/08-447.

908 ICC-01/05-01/08-451.

909 ICC-01/05-01/08-451, para 12.

910 ICC-01/05-01/08.

911 ICC-01/05-01/08-455.

912 ICC-01/05-01/08-462.

913 ICC-01/05-01/08-462, para 10.

914 ICC-01/05-01/08-466; available at <<http://www.iccwomen.org/publications/briefs/index.php>>

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

Second, the brief argues that the Chamber's application of the cumulative charging test was too narrow, at least with respect to three categories of victims. For example, the Chamber held that the victims who were raped *and* who witnessed their family members being raped were not also tortured. This holding is at odds with precedent established by the ICTY Trial Chamber in the case of *Prosecutor v. Furundzija*, which recognised the torture, and therefore the broader victimisation, of those who watched their relatives being raped.

Third, the Pre-Trial Chamber's reliance on the possibility under Regulation 55 to later re-characterise the evidence of torture and outrages upon personal dignity as rape contravenes the hierarchy of law set forth in Article 21 of the Rome Statute, which establishes the Statute and Rules — not Regulations — as applicable sources of law. When the Chamber stated *after* this re-characterisation of the evidence that the Prosecution had not presented sufficient evidence to support the charges of outrages upon personal dignity and torture, the Chamber did not make clear which evidence is part of the rape counts and which evidence has been dismissed. The brief argues that the Chamber's lack of clarity raises the important question, 'What facts and circumstances can the sexual assault witnesses base their testimony upon, now, other than rape?'⁹¹⁶

Fourth, the brief argued that under Article 21, the Chamber is required to take into consideration evidence of gender-based violence, as incorporated into the Rome Statute, and as derived from international and regional treaties and their interpretation. Article 21(3) requires that:

The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds *such as gender* as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. [*emphasis added*]

International human rights treaties, particularly the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, 'intend that crimes that occur against women and children during armed conflict are assiduously and fairly pursued'.⁹¹⁷ Under Article 21, the Court is obligated to pursue justice in a non-discriminatory manner. The Chamber's narrow application of the cumulative charging test and re-characterisation of the evidence could 'diminish

the effective access of victims to justice even in the absence of infringement on the due process rights of the accused',⁹¹⁸ and thereby contravene Article 21.

On 6 August 2009, the Prosecution issued a response to the Women's Initiatives' *amicus curiae* observations.⁹¹⁹ The Prosecution welcomed the arguments regarding the Court's obligation to pursue a justice that does not discriminate on the basis of gender. It further concurred that '“the Chamber's too narrow restriction of rape and torture” charges, through its interpretation of doctrines of cumulative charging and re-characterisation in the Confirmation Decision in this case, “diminish the effective access of victims to justice”'.⁹²⁰ In summary, it agreed with the *amicus* that the Chamber's rejection of the Prosecution's cumulative charging approach, and the potential impact on victims' access to justice, are significant issues warranting review by the Appeals Chamber. The Prosecution reserved the right to discuss the *amicus* views on the merits of the Confirmation Decision once the Chamber grants the Prosecutor's Application for Leave to Appeal.

On 28 August 2009, the International Women's Human Rights Law Clinic filed a request for leave to file *amicus curiae* observations on 'the negotiating history and applicability of key provisions of the Rome Statute and Elements of Crimes as well as developments in international law which compel the cumulative charging of rape and torture'.⁹²¹ The applicants proposed to 'echo, though not duplicate or repeat in detail' the arguments presented by the Women's Initiatives and the Office of the Prosecutor, with respect to cumulative charging, and concurred with the conclusion that 'the charging of both torture and rape are correct under cumulative charging rules, which were misapplied in this case'.⁹²² This request, supported by UN torture and women's human rights experts, and human rights advocates, was denied by the Pre-Trial Chamber on 4 September 2009.⁹²³ Single Judge Trendafilova ruled that, while the proposed brief may provide information useful to the Chamber, granting the request would cause unnecessary delay in the proceedings, given the right of the parties to respond to the observations.⁹²⁴

918 ICC-01/05-01/08-466, para 39.

919 ICC-01/05-01/08-469.

920 ICC-01/05-01/08-469, para 6.

921 ICC-01/05-01/08-488.

922 ICC-01/05-01/08-488, para 11.

923 At the time of publication of this report, this public filing had still not been posted to the ICC's website, again creating difficulties for accurately monitoring the work of the Court. It is available at <<http://ccrjustice.org/files/09.09.04%20Bemba%20Amicus%20Application%20Dismissal.pdf>>

924 *Id.*, para 8.

916 ICC-01/05-01/08-466, para 32.

917 ICC-01/05-01/08-466, para 36.

On **18 September 2009**, Pre-Trial Chamber II issued a decision denying the Prosecution's request for leave to appeal the confirmation decision.⁹²⁵ Although it had granted the Women's Initiatives leave to appeal on the *sub judice* issue of cumulative charging and the rights of the accused, the Chamber declared that it 'shall not revisit its findings on cumulative charging in the 15 June 2009 Decision or re-evaluate the disclosed evidence'.⁹²⁶ Despite the brief's analysis of the impact of the Chamber's cumulative charging holding on three categories of witnesses in the present case, the Chamber noted that 'the *amicus* contends in a general fashion that the issue of cumulative charging significantly affects the fair and expeditious conduct of the proceedings, without providing any further substantiation to the issue *sub judice*'.⁹²⁷ It later reiterated that 'it does not entertain the arguments of the Prosecutor, the OPCV and the *amicus* pertaining to proper interpretation of the constitutive elements of the crimes concerned and the assessment of the evidence of the case as both issues fall outside the scope of a decision granting (or not) leave to appeal under Article 82(1)(d) of the Statute'.⁹²⁸ A complete analysis of this decision is found in discussion of the Bemba case in the section on **Investigation and Prosecution Strategy**.

925 ICC-01/05-01/08-532, para 12.

926 ICC-01/05-01/08-532, para 44.

927 ICC-01/05-01/08-532, para 47.

928 ICC-01/05-01/08-532, para 50.

Aprodec absl

On 25 May 2009, Aprodec absl, self-described as an independent, non-profit organisation based in Belgium with the purpose of defending the interests and the rights of the Democratic Republic of the Congo, the Congolese people, and people of Congolese origin, filed a request under Rule 103 to submit observations on the issue of superior responsibility under Article 28 of the Rome Statute.⁹²⁹ No decision was issued on this application. Aprodec sought leave again on 15 July to file observations on the issues of the relevance, probative value and admissibility of the evidence as determined by the Chamber, and the question of the inadmissibility of the case according to Article 17(1)(d).⁹³⁰ On **17 July 2009**, Pre-Trial Chamber II denied the second request of Aprodec to submit observations in the Bemba case.⁹³¹ Judge Tendaflilova, Single Judge, found that the issues were not 'desirable for the proper determination of the case' as prescribed under Rule 103.⁹³² She explained that neither the prosecutorial policy regarding the selection of cases, nor the issue of admissibility with respect to sufficient gravity, are before the Court at this stage of the proceedings.

Amnesty International

On 6 April 2009, Amnesty International submitted a request for leave to file *amicus curiae* observations under Rule 103 on aspects of superior responsibility under Article 28 of the Rome Statute.⁹³³ The request was granted on **9 April** by Judge Tendaflilova, Single Judge presiding in Pre-Trial Chamber II.⁹³⁴ The decision sought observations from Amnesty on three issues: (i) the requisite mental element for military commanders; (ii) liability for the failure to punish as applied to non-state actors and; (iii) whether causation is an element of superior responsibility.⁹³⁵ Amnesty International submitted its observations on these issues on 20 April 2009.

929 ICC-01/05-01/08-420, para 3. The description provided is an informal translation from the original French: *L'association pour la promotion de la démocratie et du développement de la République démocratique du Congo, Aprodec asbl, est une association sans but lucratif de droit belge qui a pour but principal de défendre les intérêts et les droits de la République démocratique du Congo, des Congolais et des personnes d'origines congolaises conformément à ses Statuts.*

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

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

932 ICC-01/05-01/08-453, para 9.

933 ICC-01/05-01/08-399.

934 ICC-01/05-01/08-401.

935 ICC-01/05-01/08-401, p 6.

With respect to the *mens rea* element of military commanders, the *amicus* filing explains that Article 28(a)(i) of the Rome Statute imposes criminal responsibility on a commander who ‘should have known’ of the crimes of his or her subordinates. This standard contrasts with the passive standard of customary international law, as reflected in the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, which holds a commander liable only if he or she had actual notice of the crimes and failed to act. In this way, the Rome Statute imposes on commanders a negligence standard that ‘impels commanders to ensure that such mechanisms are in fact in place and are functioning correctly.’⁹³⁶ Therefore, this standard requires them to stay informed about subordinates’ activities, and where necessary to seek information in order to prevent and punish subordinates’ crimes.

On the second issue, the *amicus* submitted that Article 28’s duty to punish imposes certain practical requirements on superiors. These responsibilities differ, however, depending on the superior’s *de jure* or *de facto* authority over subordinates. ‘Consequently, if a superior does not have the legal authority to punish a subordinate for the crime, he or she must submit the matter to an authority competent to do so.’⁹³⁷ Hence, whether a superior has met the duty to take ‘all necessary and reasonable measures’ to respond to crimes should be assessed on a case-by-case basis. With respect to superior responsibility for non-state actors under Article 28, the following principles should apply:

- (1) superiors affiliated with non-state groups have a duty to submit matters involving international crimes committed by subordinates to competent state or international authorities for investigation and prosecution, and may not discharge this duty through internal disciplinary measures or prosecutions; and (2) submission of a matter to the competent authorities does not absolve a superior of responsibility for a prior failure to prevent or repress.⁹³⁸

Finally, Amnesty International argued that, as reflected under customary international law, superior responsibility under Article 28 does not contain a causation element, meaning there is no requirement that the superior’s failure to act directly caused the subordinate’s crime. This element is ‘captured through

the requirement of effective control’⁹³⁹ by the superior over the subordinate. In the alternative, if Article 28 is read to require causation, the Court should impose an ‘increased risk’ standard of liability on superiors, which imposes liability only where the actions of the superior increased the risk that subordinates committed certain crimes. The standard would be satisfied by proof of (i) a specific, isolated omission related to the crime in question; or (ii) a general, continuing series of omissions to exercise control properly.⁹⁴⁰ In the views of Amnesty International, the goals of the Rome Statute are best served by not requiring a prosecutor to show causation, but rather ‘an atmosphere of impunity and lawlessness created by a failure of command.’⁹⁴¹

The Prosecution agreed with the observations of the *amicus*, and in particular the argument that Article 28 does not impose an element of causation.⁹⁴² The Defence disagreed, arguing that causation is in fact an element of superior responsibility under international law. In addition, the Defence asserted that Amnesty International’s observations were not relevant except from a theoretical perspective and that the views on superior responsibility misinterpret the doctrine and jurisprudence on that topic.⁹⁴³ The Legal Representatives of Victims also sought leave to express their views and concerns on the Amnesty International submission, but Judge Kaul denied their request,⁹⁴⁴ stating that the right of victims to express their views and concerns under Article 68(3) do not extend to the right to respond to *amicus curiae* observations. Moreover, the victims already provided the Chamber with sufficient information on their views of superior responsibility under Article 28 in a previous submission on 9 April.⁹⁴⁵

936 ICC-01/05-01/08-406, para 8.

937 ICC-01/05-01/08-406, para 18.

938 ICC-01/05-01/08-406, para 20.

939 ICC-01/05-01/08-406, para 30. ‘Effective control’ refers to the material ability of the superior to affect the subordinate’s conduct. *Id.*; see also Article 28(b).

940 ICC-01/05-01/08-406, paras 45-46.

941 ICC-01/05-01/08-406, para 47.

942 ICC-01/05-01/08-412, para 4.

943 ICC-01/05-01/08-411.

944 ICC-01/05-01/08-408.

945 See ICC-01/05-01/08-400.

DRC

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

On 30 June 2009, Queen's University Belfast Human Rights Centre (QUB Human Rights Centre) submitted a request to file an *amicus curiae* brief under Rule 103 regarding issues related to sexual slavery, as the Katanga/Ngudjolo case is the first before the Court where crimes of sexual slavery have been charged.⁹⁴⁶ The brief proposed to examine common Element 1 of the Elements of Crimes of sexual slavery and its relationship to the definition of enslavement. It argued that the Rome Statute limits the definition of sexual slavery to that found within the 1926 Slavery Convention, requiring 'the exercise of the powers attaching to the right of ownership', in contrast to its wider scope as recognised under international customary law. QUB Human Rights Centre argued that any broader reading of the definition of the term sexual slavery renders the Elements of Crimes inconsistent with the Rome Statute in violation of Article 9(3). According to the request, this narrow reading of the term sexual slavery also ensures that the Court exercises its jurisdiction only over the most serious crimes. At the time of publication, the Court has not issued a decision granting or denying the request to file.

946 ICC-01/04-01/07-1257 and ICC-01/04-01/07-1257-ANX.

Darfur, Sudan

The Prosecutor v. Omar Hassan Ahmad Al'Bashir

Beginning in January 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed two *amicus curiae* applications, and numerous other submissions, to Pre-Trial Chamber I in both the Situation of Darfur, Sudan and the case of the *Prosecutor v. Omar Hassan Ahmad Al'Bashir*. On 11 January 2009, the two groups filed an *amicus curiae* application, requesting that the Court not issue arrest warrants for Omar Al'Bashir or the three rebel commanders allegedly involved in the attack on the Haskanita peacekeepers.⁹⁴⁷ The application alleged that issuance of the warrants would have 'grave implications for the peace building process in Sudan', and that they would not serve the interests of justice.⁹⁴⁸

The two groups claimed to represent the interests of millions of Sudanese workers and citizens, and that they were supported in bringing the application by 'various national organisations in Sudan'.⁹⁴⁹ However, according to Sudanese partners of the Women's Initiatives for Gender Justice, who are well-established Sudanese NGOs, many of the organisations listed are either not known, or are known supporters of and/or were created by the current Government of Sudan.

On **4 February 2009**, Pre-Trial Chamber I denied the *amicus* application as unrelated to any issue currently before it.⁹⁵⁰ It thus declined to consider the applicants' observations, and rejected their request for an oral hearing on their application. The Chamber noted that 'the issue of whether the interests of justice are a factor to be considered by the Chamber prior to the initiation of a case' goes to the heart of the division of responsibilities between the Prosecution and the Chamber.⁹⁵¹ It found that Article 53(2) of the Rome Statute includes 'matters relating to the interests of justice' to be an additional factor to be considered by the Prosecutor in concluding whether there is a sufficient basis for prosecution.⁹⁵² Finding that pursuant to Article 53(3)(b) the Chamber can review on its own motion any decision by the Prosecution not

947 ICC-02/05-170.

948 ICC-02/05-170 para 8.

949 ICC-02/05-170, para 6 (listing: the National Federation of Sudanese Youth, the Sudanese Farmers' General Union, the Sudanese Women's General Union, the General Sudanese Students' Union, the General Sudanese Pastoralist Union, and the Sudanese Journalists Union).

950 ICC-02/05-185, para 32.

951 ICC-02/05-185, para 11.

952 ICC-02/05-185, para 16.

to proceed solely based on the interests of justice,⁹⁵³ it concluded that it ‘neither has the power to review, nor is it responsible for, the Prosecution’s assessment that, under the current circumstances in Sudan, the initiation of a case against Omar Al’Bashir and three alleged commanders of organised armed groups would not be detrimental to the interests of justice’.⁹⁵⁴

On 11 February 2009, the applicants sought leave to appeal this decision pursuant to Article 82(1)(d) of the Statute.⁹⁵⁵ On **19 February**, the Pre-Trial Chamber denied leave to appeal because the applicants were not parties to the case and thus had no procedural standing to appeal the decision.⁹⁵⁶

On 24 April 2009, the applicants filed another request that the Pre-Trial Chamber clarify the record in light of the Registrar’s refusal to file for the record Annex 4 of its 11 January *amicus* application.⁹⁵⁷ The Annex referenced 1.8 million signatures of Sudanese citizens urging the Court not to issue arrest warrants, but did not actually include the signature sheets.⁹⁵⁸ The signature sheets were delivered to the Registrar on 9 February, after the Chamber’s decision denying the *amicus* application. On 15 May 2009, the applicants filed a request for leave to reply to the Registrar.⁹⁵⁹ On **18 May**, the Pre-Trial Chamber ordered the Registrar to file the petitions as Annex 4 to the 11 January *amicus* application.⁹⁶⁰

On **18 September 2009**, the Appeals Chamber granted the same two applicants’ request for leave to submit an *amicus curiae* brief in the Al’Bashir case on the issue of ‘whether the Pre-Trial Chamber applied the correct legal test under Article 58 of the Statute to determine whether there are reasonable grounds to believe that Omar Hassan Ahmad Al’Bashir is criminally responsible for genocide’.⁹⁶¹ The Sudan Workers Trade Unions Federation and the Sudan International Defence Group had filed a second application to submit an *amicus curiae* brief on 21 July 2009⁹⁶² on the Prosecution’s appeal⁹⁶³ of the Pre-Trial Chamber’s decision not to include charges of genocide in the warrant for the arrest of Al’Bashir.⁹⁶⁴

On 11 August 2009, the Prosecution requested that the application be dismissed.⁹⁶⁵ On 24 August 2009, the Applicants sought leave to reply to the Prosecution’s response.⁹⁶⁶ The Appeals Chamber rejected their application for leave to reply to the Prosecution.⁹⁶⁷

953 ICC-02/05-185, paras 20, 21.

954 ICC-02/05-185, para 29.

955 ICC-02/05-187.

956 ICC-02/05-192.

957 ICC-02/05-222.

958 ICC-02/05-220, n.4.

959 ICC-02/05-223.

960 ICC-02/05-224.

961 ICC-02/05-01/09-43, para 1.

962 ICC-02/05-01/09-27.

963 ICC-02/05-01/09-12.

964 ICC-02/05-01/09-3.

965 ICC-02/05-01/09-29.

966 ICC-02/05-01/09-33, paras 3-4.

967 ICC-02/05-01/09-43, para 3.

Judiciary

Requests for Cooperation

Under Part IX of the Rome Statute, the Court has the authority to make requests to States Parties for cooperation. States Parties are obligated under the Statute to comply with such requests. In previous years, the Court has made several requests to States Parties for cooperation in executing arrest warrants. During 2009 the Court made one such request for cooperation to the Government of Sudan to secure the arrest of Al’Bashir. The Court has also made requests to a number of European states in connection with the Bemba case.

Darfur, Sudan

The Prosecutor v. Omar Hassan Ahmad Al’Bashir

On **4 March 2009**, Pre-Trial Chamber I issued a Warrant of Arrest for the President of Sudan, Omar Hassan Ahmad Al’Bashir,⁹⁶⁸ the third Warrant of Arrest issued in the Situation of Darfur. An analysis of the Prosecutor’s application for an arrest warrant and the Chamber’s decision to issue it can be found in the section on the Al’Bashir case in the section **Investigation and Prosecution Strategy**.

Subsequent to the issue of the Arrest Warrant against Al’Bashir and on the instructions of the Chamber, the Registrar prepared and transmitted three Requests for Cooperation in the arrest and surrender of Al’Bashir. The first of these, dated **5 March 2009**, is addressed to the Republic of Sudan.⁹⁶⁹ In it, the Registrar recalls that the Situation in Darfur had originally been referred to the Court in 2005 as a result of a UN Security Council resolution (Resolution 1593), paragraph 2 of which ‘urges all states ... to cooperate fully’ with the Court. The second request,⁹⁷⁰ dated **6 March 2009**, addressed to ‘All States Parties to the Rome Statute’, reminds States Parties of their statutory obligation to comply with all Requests for Cooperation. The third request,⁹⁷¹ also dated **6 March 2009**, is addressed to ‘All United Nations Security Council members who are not States Parties to the Rome Statute’ — a group which includes three of the five permanent members of the Security Council (China, Russia and the United States) as well as three of the ten current non-permanent members (Libya, Turkey and Vietnam). In the request, these UN Security Council members are reminded of Resolution 1593 and, in particular, of paragraph 2 of the Resolution.

968 ICC-02/05-01/09-1.

969 ICC-02/05-01/09-5.

970 ICC-02/05-01/09-7.

971 ICC-02/05-01/09-8.

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

On 14 August 2009, Single Judge Trendafilova granted Jean-Pierre Bemba’s fourth request for interim release even though no state had agreed to accept him on its territory or to enforce any conditions that would attach to his release.⁹⁷² A thorough discussion of that decision is in the discussion on Central African Republic in the **Protection** section of this report.

At a hearing regarding Bemba’s application for interim release on **29 June 2009**, Single Judge Trendafilova issued requests to the Kingdom of Belgium, the Republic of France, the Republic of Portugal, and the Kingdom of the Netherlands to submit observations on the issue of whether the states would be willing to accept Bemba and on their views regarding conditions that would need to be imposed upon him. On **10 July 2009**, following a request from the Defence to add the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa to the list of States to which Bemba sought release, the Single Judge requested these three States to submit observations as well.

All States submitted observations in which they ‘in principle expressed objections or concerns to host Mr. Jean-Pierre Bemba on their territory, if released’.⁹⁷³ However, the Single Judge decided to solicit further observations from the States because

[t]he reasoning of the States’ position varies considerably. The Single Judge cannot, however, infer from the said observations that these States would *in any event* reject his presence on their territory. Equally, the Single Judge cannot deduce from those observations that these States would not, *under any circumstances*, provide guarantees or agree that conditions be imposed on Mr. Jean-Pierre Bemba.⁹⁷⁴

In her decision, she notified the States that she would seek their observations on the issue of Bemba’s release, any conditions the State may impose if it agreed to accept Bemba, and the applicability of Bemba’s 20 ‘personal guarantees’ he submitted at the hearing on his interim release on 29 June, and ‘any other condition available under the national laws of the States concerned that could be imposed’ on Bemba as well as ‘any related difficulties in the practical implementation of such condition’.⁹⁷⁵ She scheduled

972 ICC-01/05-01/08-475.

973 ICC-01/05-01/08-475, para 90.

974 ICC-01/05-01/08-475, para 90.

975 ICC-01/05-01/08-475, para 95.

public hearings from 7-14 September 2009 in order to solicit the views of the states, as well as those of the Prosecutor, victims, and the accused himself.

Immediately after the 14 August decision granting Bemba's interim release, the Prosecutor appealed the decision and asked for suspensive effect.⁹⁷⁶ On 31 August 2009, the Registrar filed transmissions from five of the six states to which Bemba had sought release, asking the Chamber to postpone the hearings with States on the topic of Bemba's interim release until after the Appeals Chamber issued its decision.⁹⁷⁷ In light of the Appeals Chamber's decision on 3 September granting the Prosecutor's request to appeal,⁹⁷⁸ and also granting suspensive effect to the portion of the decision covering the release, Single Judge Trendafilova decided to postpone the public hearings until the decision on appeal is issued.⁹⁷⁹ At the time of publication, the Appeals Chamber had not delivered its decision on the merits of the appeal.

976 ICC-01/05-01/08-485.

977 ICC-01/05-01/08-494.

978 ICC-01/05-01/08-499.

979 ICC-01/05-01/08-502.

Judiciary

Staffing Requirements

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During 2009, several issues arose over judicial staffing at the ICC. Article 36(1) of the Rome Statute currently provides that ‘there shall be 18 judges of the Court’, but the President has the discretionary authority to propose an increase in this number. The Appeals Chamber of the ICC is composed of the all the judges in the Appeals Division, which include the President and four other judges.⁹⁸⁰ There are seven judges currently assigned to the Trial Division and five to the Pre-Trial Division.

In January 2009, six judges, including four women, were elected to nine-year terms on the bench of the ICC. The results of this election put women in the majority of ICC judges for the first time in the history of the Court, with 10 of 18 judges being women.⁹⁸¹ One of the newly-elected judges, Mohamed Shahabuddeen, resigned for health reasons in February. The five remaining judges were sworn in, and were assigned to judicial divisions, at the plenary meeting in March. Judge Fumiko Saiga passed away unexpectedly in April. Judge René Blattman, whose six-year term has been completed, remains on the bench as part of Trial Chamber I until the completion of the Lubanga trial.⁹⁸²

980 See Articles 39(2)(b)(i) and 39(1).

981 See Statement of Women’s Initiatives on the Judicial Election, ‘Profile of Judicial Candidates for January 2009 Election; Six Judges Elected’, available at <http://www.iccwomen.org/news/docs/Election_of_Judges_January_2009_Information_Sheet.pdf>

982 Article 36(10) provides that judges shall continue in office to complete any trial or appeal hearing which has already commenced before that chamber.

The passing of Judge Saiga and the resignation of Judge Shahabuddeen created two unanticipated vacancies on the Court, substantially increasing the workload of the remaining judges. In addition, the Court faced the problem of ‘contamination’⁹⁸³ of the Appeals Chamber, necessitating that judges who sat on decisions at the pre-trial or trial levels be excused from decisions regarding those cases at the Appeals level. Article 40 of the Rome Statute permits the Presidency to, upon request of a judge, excuse that judge from participating in any case when ‘his or her impartiality might reasonably be doubted upon any ground’. The grounds for excusing a judge include the previous involvement of that judge in the same case before the Court. However, the recusal of judges can threaten the efficiency of proceedings, as fewer judges must carry a heavier burden of cases.

983 The ‘contamination’ of judges refers to the problem created when judges who were involved in decisions at the pre-trial or trial phase are thereafter assigned to the Appeals Division and expected to hear appeals involving the same case, thereby calling into question the Judge’s impartiality. The Assembly of States Parties and the Committee on Budget and Finance have expressed concerns regarding ‘contamination’ and have requested more information from the Presidency on the procedure for composing the Appeals Division and the impact of the judicial staffing structure. See ICC-ASP/8/5, paras 107-08.

At present the ICC has no system for ensuring that the Court’s judicial staffing requirements are met promptly, with a minimum of impact to the proceedings before the Court. In contrast, the International Criminal Tribunals for the former Yugoslavia and Rwanda have a system for the appointment of *ad litem* judges to fill judicial vacancies which may arise.⁹⁸⁴ The creation of a new system for managing the potential shortage of judges should be undertaken with the consultation of stakeholders including NGOs. Any system that is adopted should maintain the minimum requirements for a fair gender and equitable geographical distribution of judges and take into account judges with legal expertise on violence against women and children pursuant to Article 36(8). Should the system adopt a plan to fill vacancies with *ad litem* judges, similar to the International Criminal Tribunals for Yugoslavia and Rwanda, the minimum gender and geographical requirements should also apply.

984 Statute of the International Criminal Tribunal for the Former Yugoslavia, annexed to Resolution 827, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/927 (1993) (ICTY Statute), Art. 13 *ter*; Statute of the International Criminal Tribunal for Rwanda, annexed to Resolution 955, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (1994) (ICTR Statute), Art. 12 *ter*. In addition, the ICTY, ICTR, and the Special Court for Sierra Leone only allow judges to sit on the chambers to which they were appointed, thereby avoiding the problem of contamination altogether. ICTY Statute, Annex I, Art. 14(6); ICTR Statute, Art. 13(2); Statute of the Special Court for Sierra Leone (2002), Art. 12(2).

DRC

The Prosecutor v. Thomas Lubanga Dyilo

The Presidency temporarily replaced another judge on the Appeals Chamber on **23 September 2009**.⁹⁸⁵ Considering the Trial Chamber's 3 September decision to grant the parties' leave to appeal the 'Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', Judge Kuenyehia requested to be excused from the Appeal given her previous involvement with the case at the pre-trial phase. President Song granted the request on 15 September,⁹⁸⁶ and replaced Judge Christine Van den Wyngaert to serve on the Appeals Chamber for the purpose of the Lubanga appeal.

The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

On **4 August 2009**, the Presidency shuffled the Appeals Chamber in the Katanga/Ngudjolo case.⁹⁸⁷ This action was prompted by a request⁹⁸⁸ from two judges, Judge Kuenyehia and Judge Ušacka, to be excused from hearing the Defence appeal⁹⁸⁹ of the admissibility decision on the basis of their involvement in the decision to confirm the charges against Katanga and Ngudjolo during the pre-trial phase of the proceedings. President Song granted the request and decided to 'temporarily attach' Judge Trendafilova and Judge Aluoch to the Appeals Chamber 'for the purpose of the appeal'.⁹⁹⁰

985 ICC-01/04-01/06-2138.

986 ICC-01/04-01/06-2138-Anx II.

987 ICC-01/04-01/07-1350.

988 ICC-01/04-01/07-1350-Anx1.

989 ICC-01/04-01/07-1279.

990 ICC-01/04-01/07-1350.

Darfur, Sudan

The Prosecutor v. Omar Hassan Ahmad Al'Bashir

On **3 July 2009**, the Presidency decided to recuse two of the five judges in the Appeals Chamber, Judge Anita Ušacka and Judge Akua Kuenyehia, from the decision of the Prosecutor to appeal the Pre-Trial Chamber I's decision to issue an arrest warrant against Sudan President Al'Bashir.⁹⁹¹ The decision of the Presidency⁹⁹² followed a written request by the two judges to be excused from sitting on the appeal in its entirety on the grounds that they had previously participated in the pre-trial phase of the proceedings.⁹⁹³

President Song ordered Judges Ekaterina Trendafilova and Joyce Aluoch, both assigned to the Trial Division, to serve as temporary replacements for Judges Kuenyehia and Ušacka for purposes of the appeal against the confirmation of the arrest warrant.⁹⁹⁴ The judges confidentially submitted their request for recusal, but they noted they would not object if the President disclosed them when issuing his decision.⁹⁹⁵ President Song decided to attach the requests to his decision to excuse them and replace them with the two Trial Chamber judges.

991 The Prosecution filed an appeal of the Pre-Trial Chamber's decision to issue a warrant of arrest against Al'Bashir on the grounds that the Chamber applied an incorrect standard of proof that led it to improperly exclude charges of genocide. CITE.

992 ICC-02/05-01/09-23-Anx2.

993 ICC-02/05-01/09-23-Anx1.

994 ICC-02/05-01/09-23.

995 ICC-02/05-01/09-23-Anx1.

Registry

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Legal Aid for Indigent Victims

In 2009, a number of victims applied for legal aid in the context of their participation in the Court's proceedings. The Rules of Procedure and Evidence provide that 'a victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance'.⁹⁹⁶

⁹⁹⁶ Rule 90(5).

When victims apply for legal aid, the Registry examines their resources and makes a declaration that they are fully indigent, partially indigent, or not indigent. Victims who are fully or partially indigent are eligible to receive legal assistance from the Court.

The form to determine indigence for victims has not yet been approved. As a result, victims continue to have to use the indigence form designed for the suspects. Many victims find this offensive as the context and issues regarding indigence for victims is very different from issues of indigence for a suspect whose position and authority may make it likely that he/she holds assets which could disqualify him/her from legal aid and could be frozen, seized and transferred in respect of reparations.

Victims applying for legal assistance, especially those who live in conflict situations or are internally displaced, often live in situations of extreme poverty and insecurity. While the Registry has indicated that it understands the difficult circumstances many victims face, it should also continue to examine what measures may be taken, such as a presumption of indigence for certain categories of victims, to lessen the burden of application on victims. With 771 victims now accepted to participate in Cases and Situations before the Court, these issues should be urgently addressed,

The ASP is currently considering proposals to revise the structure of funding for legal aid, specifically with respect to the use of internal or external counsel, as discussed above in the section **Legal Representation for Victims**.

Registry decisions

DRC

On **17 December 2008**, the Presidency issued a decision dismissing a request brought by Mr Keta, a Legal Representative in the DRC Situation, for judicial review of the 28 March 2008 Registry decision⁹⁹⁷ which provisionally accepted that the victims were indigent, pending an investigation of their property and assets, and granted legal assistance on a temporary basis subject to the receipt of (1) a sworn statement by the victims that the information provided is correct and authorising the Registrar to take any action without consulting them and to inform the Registrar of any change in their financial status and (ii) additional information concerning the victims' current financial situation. In his request to the Presidency, the legal representative sought to set aside these requirements and order the Registry to 'apply a presumption of indigence in favour of victims'.⁹⁹⁸ He argued this was presumption would ease the administrative burden on the Court in managing the legal assistance scheme and make the procedure more accessible for victims without burdening the rights of the Accused. The Presidency dismissed the request, after noting that the Registry is currently assessing the criteria for determining the indigence of victims and assigning them legal assistance.

Soon after, on **18 February 2009**, the Presidency separately issued its reasons underlying the decision of 17 December.⁹⁹⁹ President Philippe Kirsch explained that 'the requirements imposed by the Decision of 28 March 2008 are compatible with the current legal assistance scheme' as set forth in the Rome Statute, Rules of Procedure and Evidence, Regulations of the

997 Regulation 85(3) allows an applicant to apply for judicial review of Registry decisions.

998 ICC-01/04-555, p 3, citing ICC-01/04-494-tENG, paras 8, 43, 44.

999 ICC-01/04-559.

Court, and Regulations of the Registry.¹⁰⁰⁰ First, the requirement that the person requiring legal assistance submit a declaration is 'central to the administration of [a legal assistance] scheme'¹⁰⁰¹ because it confirms the person's consent that the Registrar can verify his or her personal financial information and provide notice to the person of any consequences that flow from providing inaccurate information. The second requirement authorising the Registrar to seek additional information concerning the victim's financial status is also expressly provided for in Regulation 131(2) and essential for a determination of the victim's eligibility for financial assistance, and therefore a reasonable one. Therefore, the Presidency found no errors in the Registry's decision. While the applicant's request for a full presumption of indigence on the part of victims from the DRC would contradict the clear framework for legal assistance established by Regulations of the Court and Regulations of the Registry, the 'rebuttable presumption of indigence' scheme applied by the Registry does not.

The Prosecutor v. Thomas Lubanga Dyilo

From late December 2008 through September 2009, the Registry declared 19 victims in the Lubanga case wholly indigent pending an investigation into the victims' property and assets, and therefore provisionally eligible for legal assistance to be determined by the Court based on the modalities of each victim's participation in the case.

On **22 December 2008**, the Registrar declared one victim, a/0007/08, wholly indigent under Regulation 85(1).

In a decision issued **9 January 2009**,¹⁰⁰² the Registrar declared three more applicants wholly indigent. Although these applicants had not submitted the standard application for legal assistance, they had granted the Registrar authorisation to enquire with their financial institutions and access to all financial account information. Based on this initial information and their willingness to cooperate, the Registrar had enough information to make a preliminary assessment of their indigence. In contrast, four applicants who neither submitted the form nor provided access or authorisation to the Registry were denied assistance, even though the information contained in their applications suggested that they lacked the means to pay for legal representation. The Registrar invited them to file an application for legal assistance when necessary to preserve their interests in the case.

On **19 January 2009**, the Registrar issued another decision declaring 15 victims wholly indigent.¹⁰⁰³ These victims had been granted status to participate in the hearings on 15 December 2008, and had both provided sufficient information in their applications regarding their financial status and granted authorisation to the Registrar to verify this information with their financial institutions.

1000 ICC-01/04-559, paras 21-24, citing Article 68(3); Rule 16(1)(b), Rule 90(5); Regulations of the Court, Reg. 84, 85; Regulations of the Registry, Reg. 113, 131, 132.

1001 ICC-01/04-559, para 24.

1002 ICC-01/04-01/06-1597-ENG.

1003 ICC-01/04-01/06-1627-ENG.

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CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

On **7 January 2009**, the Registrar issued a decision on the indigence of 34 victims in the Bemba case.¹⁰⁰⁴ In a decision of 12 December 2008, Pre-Trial Chamber III had authorised these victims to participate in the proceedings relating to the confirmation hearing against Bemba.¹⁰⁰⁵ With the exception of four victims who had yet to provide to the Registry information on their assets, dependents, and occupation or to authorise the Registry to access their financial institutions, all other victims were declared ‘wholly indigent’ under Regulation 85(1), pending the outcome of the investigation into their property and assets.

1004 ICC-01/05-01/08-348-tENG.

1005 ICC-01/05-01/08-320.

Recommendations

States Parties/ASP

Office of the Prosecutor

Judiciary

Registry

States Parties / ASP

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- **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.
- **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 2010.
- **The ASP** should progress, with urgency, the development of a comprehensive, independent Oversight Mechanism and staff rules, which should address serious issues of misconduct, including fraud, corruption, waste, sexual harassment, exploitation, and abuse committed by ICC staff in the course of their work, especially in the field, and should include the waiving of immunity and strict disciplinary accountability for staff members who violate these rules (including termination of employment). Serious misconduct should be defined to expressly include sexual violence/abuse and sexual harassment.
- **States** should undertake full 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.
- **Elect** two new Judges at the 8th session of the ASP, taking into account equitable geographical representation, fair representation of male and female Judges, and the need for legal expertise on violence against women and children as mandated by the Statute in Articles 36(8)(a) and 36(8)(b).
- **The Secretariat** and the ASP should encourage States to provide greater contributions to the Trust Fund for Victims since the rehabilitation projects are underway and the Court is preparing for reparations orders. State contributions amounted to €868,301 according to the 2009 *Annual Report of the Board*. Sufficient resources for the TFV are vital to ensure support to victims and its stability as a structure, and to inspire further contributions from a variety of public and private sector sources.

- **Ensure** that the Victims and Witnesses Unit 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 enquiries and investigations or due to testimony provided by a witness.
- **Ensure** that the Court has sufficient funds for a consistent and sustained field presence, and for producing materials, especially radio and audiovisual summaries, that will assist the Court in disseminating accurate information about its work in every Situation.

Judiciary

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- **In consultation** with stakeholders, including NGOs, explore models for ensuring that the Court's judicial staffing requirements are met promptly, with a minimum of impact to the proceedings before the Court. Ensure that any system that is adopted maintains the minimum requirements for a fair gender and equitable geographical distribution of judges and takes into account judges with legal expertise on violence against women and children pursuant to Article 36(8). Should the system adopt a plan to fill vacancies with *ad litem* judges, similar to the International Criminal Tribunals for Yugoslavia and Rwanda, the minimum gender and geographical requirements should also apply.
- **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. Take steps to streamline the process whereby participating victims apply to participate at different phases of proceedings. Expanded, meaningful participation by victims need not be incompatible with the rights of the accused and a fair and impartial trial.
- **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.

- **Utilise** the special measures allowed for in the Rome Statute and the Rules of Procedure and Evidence to facilitate the testimony of victims of sexual violence.
- **In 2010**, 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. Recommendations to address any incidents or patterns of harassment should be developed to ensure that the legal rights of employees are respected, and to provide staff with a non-discriminatory, equality-based, human-rights respecting work environment.
- **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 or not they are legally recognised by the country of a Judge’s nationality. Same-sex unions have been legal in the Netherlands, the seat of the Court, since 1998.

Office of the Prosecutor

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- **Consistently** display a commitment to investigate, charge, and prosecute gender-based crimes in every Situation. Review the investigation and prosecution strategies in relation to gender-based crimes to ensure comprehensive charges are brought and sustained in every Situation where there is evidence that crimes have occurred.
- **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.
- **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 2010, more staff with gender expertise will be required to ensure the integration of gender issues within the heightened case load. These positions are essential to further strengthen the strategic impact of the Special Adviser on Gender 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 consistent and more effective relationships with local intermediaries with greater clarity of expectations, security issues and follow-up.

- **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.
- **Continue** and strengthen coordination between the OTP and the Victims and Witnesses Unit to ensure that witnesses, including women, minors, and victims of sexual and gender-based crimes, are safely supported and protected.

Registry

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- **Promote** the Lists of Counsel, Assistants to Counsel and Professional Investigators, and the List of Experts to women. Highlight the need for expertise on sexual and gender-based violence among all potential applicants and seek such information in the candidate application form. 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. When groups of victims are represented by a common legal representative, develop guidelines for ensuring that the needs of sub-groups of victims, including women, children, and victims of sexual and gender-based violence, are specifically addressed.
- **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 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 four conflict Situations of both their right to participate and the application process. Accelerate the issuance of the revised victim application form that incorporates suggestions from NGOs about how to make the form more respectful of victims and accessible to victim applicants.

- **Develop** a tool to provide civil society and members of the public 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 own work, planning, and internal evaluation of how accessible the victim participation process is to all 'categories' of victims.
- **The Court** should enhance resources for ICC Field Offices in each of the four countries to support victims' participation, to liaise with intermediaries regarding victims and potential witnesses, and to provide information to and communication with local NGOs including women's groups and victims/survivors organisations.
- **In 2010**, the Victims' Participation and Reparations Section (VPRS) should implement policies and practices for dealing with victims of sexual violence, children, elderly persons and persons with disabilities.
- **The methodology** and safety practices of the VPRS country-based consultations regarding legal representation should be immediately reviewed and strengthened. The methodology should ensure victims are given the full information about the options for legal representation, security issues, and the protection support the ICC can/cannot provide. Victims should not feel pressured or forced into agreeing to a common legal representative and should be provided with accessible information about what options exist for selecting or being appointed a legal representative.
- **The security** practices of VPRS community consultations should be enhanced, to not overly expose applicants, whether to each other, to the wider community or to NGOs who are not directly involved with the specific victims.
- **Recruit** more staff for the Outreach Unit, emphasising 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 four conflict Situations.
- **In recruiting** field outreach staff and designing outreach programmes, recognise the benefits of using local knowledge and practices regarding information dissemination to strengthen the Court's outreach work.
- **In all four** Situations, continue to develop outreach strategies addressing the needs of women and girls who may not have access to mass outreach events, or who may need safe and alternative forums to discuss gender-based crimes.



Visit our website www.iccwomen.org to subscribe to the Women's Initiatives' two regular e-letters, *Women's Voices* and *Legal Eye on the ICC*.

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