

The Compendium

An overview of Situations
and cases before the International
Criminal Court

Women's Initiatives for Gender Justice





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Introduction

The Compendium is a compilation of current data and information on the Situations before the International Criminal Court (ICC), including those under preliminary examination as well as an overview of every case brought before the ICC, with a particular focus on cases inclusive of sexual and gender-based crimes.

The Compendium is an easy-to-access and concise anatomical review of the history of the Court's casework and includes detailed overviews of: the status of each case; an analysis of sexual and gender-based crimes with reference to the Articles of the Rome Statute for these crimes; an overview of individual criminal responsibility with respect to charges for sexual and gender-based crimes; and comparative charts on Sentencing decisions and Reparations Orders in the cases to date.

The detailed case summaries reveal the trajectory of a number of issues over time and in multiple cases, including: the use of Regulation 55 for the legal recharacterisation of the facts and the individual criminal liability of the accused; the progression of charging strategies by the Office of the Prosecutor (OTP) with respect to sexual and gender-based crimes; victim's participation modalities; the regular practice by the OTP of charging individuals under multiple forms of criminal liability even for the same charge; and, more recently, reparations proceedings and orders.

This publication is a helpful companion for those invested in the ongoing evolution of international justice and the progress of the Court and specifically of the OTP in meeting its positive obligation to investigate and prosecute sexual and gender-based crimes.

It is a useful resource for States Parties and those within the ICC who are dedicated to a single case

or other areas of the Court's functions but who are not necessarily aware of concurrent developments across the Court in a number of cases or who may not know the background of key issues in specific cases. The publication is also a helpful resource for those wanting to illicit 'fast facts' on the Court, including the statistical profile of ICC cases and important external indicators of its work such as cases completed, vacated and dismissed, amongst other data on the work of the ICC.

The Compendium has two primary sections: an overview of Situations under preliminary examination; and a detailed summary of all of the cases brought before the ICC.

Our most recent annual *Gender Report Card on the ICC* (2014) reviewed the Court's work on Situations and cases for the period of 1 September 2013 to 15 August 2014. The Compendium's review of Situations under preliminary examination picks up from there and is for the period from 16 August 2014 to 31 October 2017. The overview of all of the cases and the current status of each case brought before the ICC is from the beginning of the Court's prosecutorial work up to 31 July 2017.

The Compendium complements our other publications, including the annual *Gender Report Card on the ICC* (2004-2014), the Modes of Liability Expert Paper (2013), our *amicus curiae* filings (2006-2016) and *Legal Eye on the ICC* eletters (2008-2016).

Substantive Jurisdiction for Sexual and Gender-Based Crimes

War Crimes and Crimes Against Humanity

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of 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.¹

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.²

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.³

Genocide

Rape and sexual violence

The Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention.⁴ The Elements of Crimes specify that 'genocide by causing serious bodily or mental harm [may include] acts of torture, rape, sexual violence or inhuman or degrading treatment'.⁵

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.⁶

1 Articles 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g), Rome Statute. See also corresponding Articles in the EoC.

2 Article 7(1)(h), 7(2)(g) and 7(3), Rome Statute. See also Article 7(1)(h), EoC.

3 Article 7(1)(c) and 7(2)(c), Rome Statute. See also Article 7(1)(c), EoC.

4 Article 6, Rome Statute.

5 Article 6(b), EoC.

6 Article 21(3), Rome Statute.

Status of ICC Cases⁷

The chart below outlines the current status of all cases brought before the Court to date. For the purposes of this chart, a case is counted as completed when a Trial Judgment has been rendered. However, some ICC cases have been dismissed, vacated or declared inadmissible before ever having reached completion. A case is considered to be dismissed when the Chamber declines to confirm all charges against an accused, and a case is considered as vacated when all charges have been withdrawn or vacated. Considering that some cases involve multiple individuals, a case may be listed under several categories.

Total ICC cases	25
<i>ICC cases relating to crimes under Article 5 of the Statute</i>	22
<i>ICC cases relating to offenses under Article 70 of the Statute⁸</i>	3
ICC cases completed ⁹	6
Convictions ¹⁰	5
Acquittals ¹¹	1
ICC cases currently at trial ¹²	3
ICC cases vacated ¹³	2
ICC cases dismissed ¹⁴	4
Cases declared inadmissible before the ICC ¹⁵	1
ICC cases with outstanding arrest warrants ¹⁶	12

- 7 Although the reporting period for the review of ICC cases in this publication is from the beginning of the Court's prosecutorial work up to 31 July 2017, the Al-Werfalli Arrest Warrant of 15 August 2017 has been included in the data reflected in this chart.
- 8 The three Article 70 cases before the ICC are: the Bemba *et al*; Barasa; and Gicheru and Bett cases.
- 9 The following six ICC cases have been completed: the Lubanga; Ngudjolo; Katanga; Bemba; Al Mahdi; and Bemba *et al* cases.
- 10 The ICC has rendered nine convictions in five cases, namely in: the Lubanga; Katanga; Bemba; Al Mahdi; and Bemba *et al* cases. The Trial Judgments and Sentencing decisions in the Bemba and Bemba *et al* cases are currently on appeal.
- 11 The ICC has thus far acquitted one individual, namely Ngudjolo; as well as partially acquitted another, namely Katanga. For the purposes of this chart, Katanga is listed under convictions.
- 12 The following three ICC cases are currently at trial: the Ntaganda; Laurent Gbagbo and Blé Goudé; and Ongwen cases.
- 13 The following two cases have been vacated at the ICC: the Ruto and Sang (the charges were vacated against Ruto and Sang); and Kenyatta (the charges were withdrawn against Kenyatta and Muthaura) cases.
- 14 The following four ICC cases have been dismissed: the Mbarushimana; Abu Garda; Kosgey (co-accused in the Ruto and Sang case); and Ali (co-accused in the Kenyatta case) cases.
- 15 One case has been declared as inadmissible before the Court, namely that against Al-Senussi (co-accused in the Gaddafi case).
- 16 16 arrest warrants remain outstanding for 15 individuals in 12 cases, namely for: Kony; Otti; Mudacumura; Harun; Kushayb; Al Bashir (two arrest warrants); Hussein; Banda; Barasa; Gicheru; Bett; Gaddafi; Al-Tuhamy; Al-Werfalli; and Simone Gbagbo.

Overview of ICC Situations and Cases

Pursuant to Article 13 of the Rome Statute, the ICC may exercise jurisdiction over a Situation when: (a) the Situation has been referred to the ICC Prosecutor by a State Party; (b) the United Nations (UN) Security Council, acting under Chapter VII of the UN Charter, refers a Situation to the Prosecutor; or (c) the Prosecutor initiates an investigation into a Situation *proprio motu* (on her/his own initiative).

The Prosecutor may initiate *proprio motu* investigations on the basis of information received on crimes within the jurisdiction of the Court. Any person or organisation may submit such information, known as a ‘communication’, to the Prosecutor under Article 15 of the Statute. Non-States Parties may also lodge a declaration accepting the ICC’s jurisdiction under Article 12(3) of the Statute. The initiation of an investigation subsequent to such a declaration is also considered a *proprio motu* investigation by the Prosecutor. *Proprio motu* investigations initiated either under Article 12(3) or Article 15 of the Statute are subject to authorisation by an ICC Pre-Trial Chamber.

To date, the OTP lists ten Situations under investigation before the Court, including: the Democratic Republic of the Congo (DRC), Uganda, the Central African Republic (CAR), CAR II, Kenya, Darfur (Sudan), Libya, Mali, Côte d’Ivoire and Georgia.¹⁷ Five of these – Uganda, DRC, CAR, CAR II and Mali – were referred by the Governments of the respective countries in their capacities as ICC States Parties. By contrast, the ICC obtained jurisdiction over the Situations in Darfur (Sudan) and Libya, both non-States Parties, following UN Security Council referrals.¹⁸ Finally, the Prosecutor initiated an investigation *proprio motu* into Kenya, Côte d’Ivoire and Georgia on the basis of information on crimes reported to have been committed within these territories.¹⁹ While Kenya and Georgia are States Parties and thus automatically subject to ICC jurisdiction under Article 15 of the Statute, the Prosecutor initiated the Côte d’Ivoire investigation *proprio motu* following an Article 12(3) declaration by the Côte d’Ivoire Government,²⁰ which was not a State Party at the time. On 15 February 2013, Côte d’Ivoire ratified the Rome Statute, becoming the 122nd State Party to the ICC and the 34th State Party from the Africa region.²¹

Between 16 August 2014 and 31 October 2017, two new Situations under investigation were opened: CAR II and Georgia. The CAR II Situation was opened on 24 September 2014, following a second referral by the Central African Government on 30 May 2014, requesting an investigation into alleged crimes since 1 August 2012.²² This second Situation in the

17 ‘Situations under investigation’, *ICC website*, available at <<https://www.icc-cpi.int/pages/situations.aspx?ln=en>>.

18 UN Security Council, ‘Resolution 1593 (2005)’, 31 March 2005, S/Res/1593 (2005), para 1; UN Security Council, ‘Resolution 1970 (2011)’, 26 February 2011, S/Res/1970 (2011), para 4.

19 ‘Situations under investigation’, *ICC website*, available at <<https://www.icc-cpi.int/pages/situations.aspx?ln=en>>.

20 The Government of Côte d’Ivoire initially accepted the ICC’s jurisdiction by way of an Article 12(3) declaration in 2003 for crimes committed on its territory from 19 September 2002. Following the intensification of violence in 2010, it reaffirmed its acceptance of the Court’s jurisdiction in December 2010 and again in May 2011.

21 ‘Côte d’Ivoire ratifies the Rome Statute’, *ICC Press Release*, ICC-ASP-20130218-PR873, 18 February 2013, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr873>>.

22 ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic’, *OTP Press Release*, ICC-OTP-20140924-PR1043, 24 September 2014, available at <http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx>.

CAR constitutes a separate Situation to the one referred to the ICC in 2004.²³ The most recent opening of an investigation into a new Situation was that of Georgia, following Pre-Trial Chamber I's decision of 27 January 2016, authorising Prosecutor Fatou Bensouda to proceed with an investigation into that Situation.²⁴

To date, within the ten ICC Situations under investigation, 25 cases have been brought before the ICC, including 22 cases relating to crimes under Article 5 and three cases relating to offenses against the administration of justice under Article 70 of the Statute.²⁵ Overall, 15 cases (60%) have included charges of crimes for or based upon the commission of sexual and gender-based violence.

23 For more information on the CAR II Situation, see the *Central African Republic II* sub-section of this publication.

24 ICC-01/15-12. See also 'ICC Pre-Trial Chamber I authorises the Prosecutor to open an investigation into the situation in Georgia', *ICC Press Release*, ICC-CPI-20160127-PR1183, 27 January 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1183>>. For more information on the Georgia Situation, see the *Georgia* sub-section of this publication.

25 'Cases', *ICC website*, available at <<https://www.icc-cpi.int/cases>>.





ICC Situations under Preliminary Examination

(16 August 2014 – 31 October 2017)

Prior to opening an investigation into a Situation, the ICC Prosecutor carries out a Preliminary Examination to determine whether a Situation meets the legal criteria established by the Rome Statute to warrant investigation by the ICC.²⁶ The Preliminary Examination takes into account jurisdiction, admissibility and the interests of justice.²⁷ A Preliminary Examination can be initiated by a decision of the Prosecutor, on the basis of information received on crimes within the jurisdiction of the ICC pursuant to Article 15; a referral from a State Party or the UN Security Council pursuant to Article 13(a) or (b), respectively; or a declaration by a non-State Party pursuant to Article 12(3) of the Statute. There is no specified time within which the Prosecutor must reach a decision about whether to open an investigation, and Situations can remain under preliminary examination for several years before a decision is made as to whether or not the legal requirements for formal investigation have been met.

In November 2013, the OTP issued a Policy Paper on Preliminary Examinations, in which it described its policy and practice in the conduct of Preliminary Examinations.²⁸ According to the OTP, a Situation under preliminary examination goes through four consecutive phases: (1) an initial assessment of all communications received under Article 15 of the Statute;²⁹ (2) an analysis of all information on alleged crimes received or collected to determine whether the preconditions for jurisdiction have been met and whether there is a reasonable basis to believe the crimes fall under the subject-matter jurisdiction of the Court; (3) an analysis of admissibility, including complementarity and gravity; and (4) an examination of the interests of justice consideration before submitting a 'final recommendation to the Prosecutor on whether there is a reasonable basis to initiate an investigation'.³⁰

Currently, the OTP lists ten Situations as under preliminary examination. Ukraine (since 2014); Iraq/UK (since 2014); Palestine (since 2015); Burundi (since 2016); and Gabon (since 2016) are all listed as being in phase two of the examination process (subject-matter

26 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 1, available at <<https://www.icc-cpi.int/pages/item.aspx?name=161114-otp-rep-PE>>.

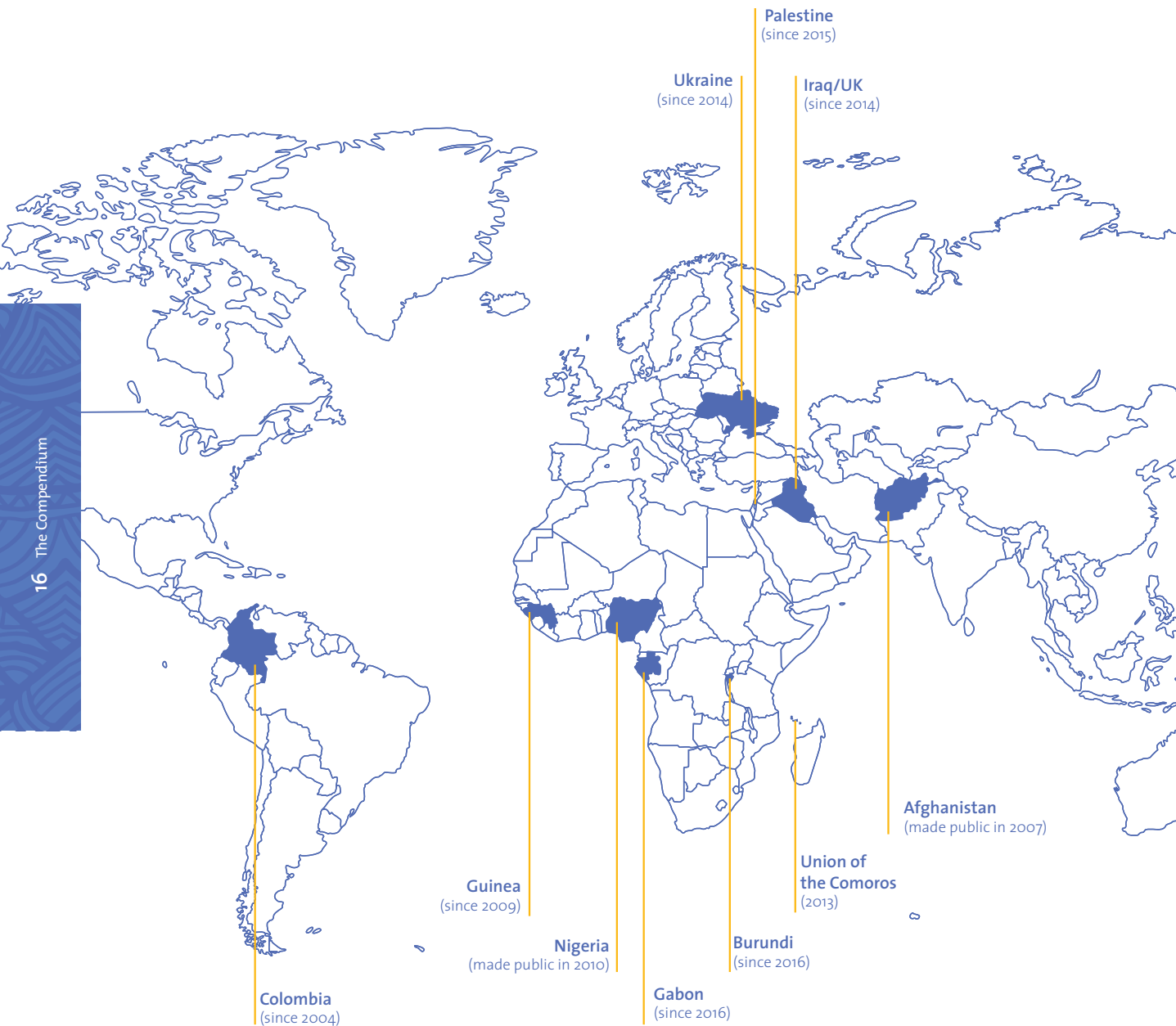
27 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 3, available at <<https://www.icc-cpi.int/pages/item.aspx?name=161114-otp-rep-PE>>.

28 'Policy Paper on Preliminary Examinations', *OTP*, 1 November 2013, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11_2013>.

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

30 'Policy Paper on Preliminary Examinations', *OTP*, 1 November 2013, paras 77-83, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-pe-11_2013>. See also 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 15, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

The OTP lists ten Situations
as under preliminary
examination



jurisdiction).³¹ In addition, Colombia (since 2004), Afghanistan (made public in 2007), Guinea (since 2009) and Nigeria (made public in 2010) are all in phase three of the examination process (analysis of admissibility).³² Finally, the Preliminary Examination of the Situation referred to the ICC by the Union of the Comoros (the Comoros) in 2013 is currently listed as a Preliminary Examination ‘under reconsideration’.³³ Of these ten Preliminary Examinations, seven contain allegations of sexual and gender-based crimes, namely Afghanistan, Colombia, Burundi, Iraq, Ukraine, Nigeria and Guinea.³⁴

Between 16 August 2014 and 31 October 2017, three new Preliminary Examinations (Palestine, Gabon and Burundi) were opened, while one (Honduras) was closed and two (CAR II and Georgia) became Situations under investigation. On 6 November 2014, the ICC Prosecutor decided to close another Preliminary Examination (the Comoros); however, this decision has been ‘under reconsideration’ since 6 November 2015.³⁵ According to the OTP’s 2016 Report on Preliminary Examination Activities released in November of that year, the Office was ‘nearing completion’ of its review of the Comoros referral and ‘preparing to issue the Prosecutor’s final decision [...] in the near future’.³⁶ The OTP also indicated in its 2016 Report on Preliminary Examination Activities that it would ‘make a final decision’ regarding the Situation in Afghanistan ‘imminently’.³⁷ To date, no decisions have been made public regarding the Situations in either the Comoros or Afghanistan.

New Preliminary Examinations

Between 16 August 2014 and 31 October 2017, three new Preliminary Examinations were opened before the ICC, namely Palestine, Gabon and Burundi.

Palestine

On 1 January 2015, the Government of Palestine lodged an Article 12(3) declaration accepting the jurisdiction of the ICC over alleged crimes committed ‘in the occupied Palestinian

31 ‘Report on Preliminary Examination Activities 2016’, *OTP*, 14 November 2016, p 1, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

32 ‘Report on Preliminary Examination Activities 2016’, *OTP*, 14 November 2016, paras 22, 61, 75, 109, 146, 192, 231, 264, 284 and p 1, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

33 ‘Report on Preliminary Examination Activities 2016’, *OTP*, 14 November 2016, paras 308–331, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

34 ‘Report on Preliminary Examination Activities 2016’, *OTP*, 14 November 2016, paras 36, 50, 91, 93–94, 174, 183, 206, 209, 211, 232, 237–238, 240, 249–251, 267–268, 270, 292–295, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

35 ‘Report on Preliminary Examination Activities 2016’, *OTP*, 14 November 2016, paras 309–313, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

36 ‘Report on Preliminary Examination Activities 2016’, *OTP*, 14 November 2016, para 331, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>. See also ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, issues her annual Report on Preliminary Examination Activities (2016)’, *OTP Press Release*, ICC-CPI-20161114-PR1252, 14 November 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1252>>.

37 ‘Report on Preliminary Examination Activities 2016’, *OTP*, 14 November 2016, para 230, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>. See also ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, issues her annual Report on Preliminary Examination Activities (2016)’, *OTP Press Release*, ICC-CPI-20161114-PR1252, 14 November 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1252>>.

territory, including East Jerusalem', since 13 June 2014.³⁸ On 2 January 2015, the Government of Palestine acceded to the Rome Statute, becoming the 123rd State Party to the ICC.³⁹ The Statute entered into force for the State of Palestine on 1 April 2015.⁴⁰ On 16 January 2015, the Prosecutor opened a Preliminary Examination into the Situation in Palestine, relating to alleged crimes committed since 13 June 2014.⁴¹ According to the OTP Report on Preliminary Examination Activities 2016, the ICC is considering crimes allegedly committed by the Israel Defense Forces (IDF) and Palestinian armed groups including: attacks against civilians, civilian objects and infrastructure, medical facilities and personnel, and schools run by the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA); use of protected persons as shields; ill-treatment; settlement activities; and incitement to violence.⁴²

The OTP had previously conducted a Preliminary Examination into the Situation in Palestine since 1 July 2002, upon receiving an Article 12(3) declaration lodged by the Palestinian National Authority on 22 January 2009.⁴³ One of the issues arising from this declaration was whether the Palestinian National Authority qualified as a 'State' under the Rome Statute and therefore whether it was able to accept the ICC's jurisdiction under Article 12(3) of the Statute.⁴⁴ On 3 April 2012, the OTP concluded that only the relevant UN bodies or the Assembly of States Parties (ASP) to the ICC could make a determination regarding the statehood of Palestine.⁴⁵ The OTP observed that the status granted to Palestine by the UN General Assembly at the time was that of 'observer' and not that of 'non-member State'.⁴⁶ Therefore, the OTP explained that it could consider allegations of crimes committed in Palestine in the future, if competent UN bodies, or eventually the ASP, resolved this legal issue; or if the UN Security Council, in accordance with Article 13(b) of the Statute, made

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- 38 'Declaration Accepting the Jurisdiction of the International Criminal Court', 31 December 2014, available at <https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf>. See also 'Palestine declares acceptance of ICC jurisdiction since 13 June 2014', *ICC Press Release*, ICC-CPI-20150105-PR1080, 5 January 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1080>>; 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, paras 112-134, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.
- 39 'The State of Palestine accedes to the Rome Statute', *ICC Press Release*, ICC-ASP-20150107-PR1082, 7 January 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1082_2>.
- 40 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 111, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>. See also 'The State of Palestine accedes to the Rome Statute', *ICC Press Release*, ICC-ASP-20150107-PR1082, 7 January 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1082_2>.
- 41 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine', *OTP Press Release*, ICC-OTP-20150116-PR1083, 16 January 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>>.
- 42 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, paras 109-110, 123-134, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.
- 43 'Situation in Palestine', *OTP*, 3 April 2012, para 2, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>.
- 44 'Declaration recognizing the Jurisdiction of the International Criminal Court', *Palestinian National Authority*, 21 January 2009, available at <<https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>>; 'Situation in Palestine', *OTP*, 3 April 2012, paras 1, 4-5, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>.
- 45 'Situation in Palestine', *OTP*, 3 April 2012, para 6, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>.
- 46 'Situation in Palestine', *OTP*, 3 April 2012, para 7, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>.

a referral granting jurisdiction to the ICC.⁴⁷ Palestine was thus not able to accede to the Rome Statute at the time and the OTP considered the Article 12(3) declaration lodged to be 'invalid'.⁴⁸

On 29 November 2012, the UN General Assembly granted Palestine the status of 'non-member observer State' at the UN,⁴⁹ after which the Government of Palestine lodged another Article 12(3) declaration with the ICC on 1 January 2015, and deposited its instrument of accession to the Rome Statute the next day.⁵⁰ Subsequently, the OTP opened its current Preliminary Examination on 16 January 2015.⁵¹

Gabon

On 21 September 2016, the OTP received a referral from the Government of Gabon, regarding the Situation in the country since May 2016.⁵² Following the receipt of the letter, ICC Prosecutor Fatou Bensouda instructed her Office on 29 September 2016 to initiate a Preliminary Examination into the Situation in Gabon.⁵³ The Preliminary Examination focuses on the alleged crimes committed in Gabon since May 2016 in the context of the presidential elections which took place on 27 August 2016.⁵⁴ The referral alleges in particular that the leaders and/or supporters of the opposition incited to commit genocide and resorted to various acts of violence, amounting to crimes against humanity.⁵⁵ At the

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- 47 'Situation in Palestine', *OTP*, 3 April 2012, paras 4, 6, 8, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>. See also Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 96-97, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.
- 48 'Situation in Palestine', *OTP*, 3 April 2012, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>. See also 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine', *OTP Press Release*, ICC-OTP-20150116-PR1083, 16 January 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>>. For a detailed report on Palestine's Article 12(3) declaration of January 2009 and the Prosecution's conclusions, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 96-97, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.
- 49 UN General Assembly, 'Resolution adopted by the General Assembly on 29 November 2012', 4 December 2012, A/RES/67/19, para 2. See also 'General Assembly grants Palestine non-member observer State status at UN', *UN News Centre*, 29 November 2012, available at <<https://www.un.org/apps/news/story.asp?NewsID=43640#.WcENrsbuKM8>>.
- 50 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 111, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.
- 51 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine', *OTP Press Release*, ICC-OTP-20150116-PR1083, 16 January 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>>. The press release specified that upon receipt of a 'valid' declaration pursuant to Article 12(3) of the Statute, the Prosecutor may open a Preliminary Examination into the Situation in question.
- 52 'Requête aux fins de renvoi d'une situation par un État Partie auprès du Procureur de la Cour Pénale Internationale', *Gabonese Republic*, 20 September 2016, available at <<https://www.icc-cpi.int/iccdocs/otp/Referral-Gabon.pdf>>. See also 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic', *OTP Press Statement*, 29 September 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=160929-otp-stat-gabon>>.
- 53 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic', *OTP Press Statement*, 29 September 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=160929-otp-stat-gabon>>; 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 19, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.
- 54 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 70, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.
- 55 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 70, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

time of writing this publication, a decision as to whether an investigation will be opened had not been made public.

Burundi

Prior to opening a Preliminary Examination in April 2016, the ICC Prosecutor had issued two statements expressing concern regarding violence in Burundi ahead of the legislative and presidential elections. On 8 May 2015, a statement was issued in which the Prosecutor said she was concerned about the growing tensions in Burundi and of violence potentially escalating ahead of the elections and leading to the commission of serious crimes falling within the jurisdiction of the Court.⁵⁶ The Prosecutor stated that any actor who incited or engaged in acts of mass violence is 'liable to prosecution' before the ICC.⁵⁷ On 6 November 2015, the Prosecutor issued a second statement, noting the 'increasing risk of violence' in the country, as well as reports of use of 'inflammatory language by political leaders and other actors' in Burundi.⁵⁸ The Prosecutor reiterated that any person in Burundi inciting or engaging in acts of mass violence would be 'liable to prosecution' before the Court.⁵⁹

On 25 April 2016, the OTP opened a Preliminary Examination into the Situation in Burundi since April 2015.⁶⁰ At the time of the opening of the Preliminary Examination, Prosecutor Bensouda announced that her Office had 'reviewed a number of communications and reports detailing acts of killing, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced disappearances'.⁶¹

On 12 October 2016, Burundi's Parliament voted in support of a plan to withdraw from the Rome Statute and it officially notified the UN Secretary-General thereof on 27 October 2016.⁶² The Situation in Burundi since April 2015 remains under preliminary examination. In November 2016, the OTP stated that 'the preliminary examination may also include any other crimes within the same Situation that could be committed in Burundi until the withdrawal becomes effective, namely one year after the withdrawal's notification to the UN Secretary-General'.⁶³

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- 56 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the recent pre-election violence in Burundi', *OTP Press Statement*, 8 May 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=OTP-STAT-150508>>.
- 57 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the recent pre-election violence in Burundi', *OTP Press Statement*, 8 May 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=OTP-STAT-150508>>.
- 58 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening security situation in Burundi', *OTP Press Statement*, 6 November 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-06-11-2015>>.
- 59 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening security situation in Burundi', *OTP Press Statement*, 6 November 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-06-11-2015>>.
- 60 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi', *OTP Press Statement*, 25 April 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016>>.
- 61 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi', *OTP Press Statement*, 25 April 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016>>.
- 62 'Burundi Notice of Withdrawal', UN, C.N.805.2016.TREATIES-XVIII.10, 28 October 2016, available at <<https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf>>.
- 63 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 60, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-pe>>.

On 27 October 2017, Burundi became the first State Party to withdraw from the ICC.⁶⁴

Closed Preliminary Examinations

After having conducted Preliminary Examinations, the OTP concluded that the information provided did not constitute a reasonable basis for an investigation on six occasions: Iraq (February 2006),⁶⁵ Venezuela (February 2006),⁶⁶ Palestine (April 2012),⁶⁷ Republic of Korea (June 2014),⁶⁸ the Comoros (November 2014)⁶⁹ and Honduras (October 2015).⁷⁰

Although the OTP had initially declined in April 2012 to proceed with an investigation into the Situation in Palestine since 1 July 2002, as discussed in the **New Preliminary Examinations** sub-section of this publication, it subsequently opened a Preliminary Examination in January 2015 into the Situation since 13 June 2014.⁷¹

Between 16 August 2014 and 31 October 2017, the OTP closed two Preliminary Examinations: those into the Situations in the Comoros and in Honduras. However, as discussed in the **Preliminary Examinations under Reconsideration** sub-section of this publication, the ICC Prosecutor's decision of November 2014 to close the Preliminary Examination into the Situation referred by the Comoros, which also relates to Palestine, is currently under reconsideration.⁷² Therefore, the Preliminary Examination into the Situation in Honduras is the only one which was and has remained closed during the period under review by this publication.

64 See 'Déclaration du Gouvernement sur son retrait de la Cour Pénale Internationale (CPI)', *Government of Burundi*, 15 November 2017, available at <<https://www.presidence.gov.bi/2017/11/17/declaration-du-gouvernement-sur-son-retrait-de-la-cour-penale-internationale/>>. On 9 November 2017, Pre-Trial Chamber III issued a public redacted version of its decision authorising the opening of an investigation into the Burundi Situation. The decision was first issued under seal on 25 October 2017. ICC-01/17-9-Red.

65 'OTP response to communications received concerning Iraq', *OTP*, 9 February 2006, p 9, available at <http://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61DoB5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>. See further Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 96, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

66 'OTP response to communications received concerning Venezuela', *OTP*, 9 February 2006, p 4, available at <http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf>. See further Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 96, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

67 'Situation in Palestine', *OTP*, 3 April 2012, paras 4, 6, 8, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>. See also Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 96-97, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

68 'Situation in the Republic of Korea: Article 5 Report', *OTP*, June 2014, para 82, available at <<http://icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf>>. See further Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 70, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

69 ICC-01/13-6-AnxA, para 151. See also 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: "Rome Statute legal requirements have not been met"', *OTP Press Statement*, 6 November 2014, available at <<https://www.icc-cpi.int/legalAidConsultations?name=otp-statement-06-11-2014>>.

70 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination into the situation in Honduras', *OTP Press Statement*, 28 October 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-28-10-2015>>.

71 For more information on the Palestine Preliminary Examination, see the *New Preliminary Examinations* sub-section of this publication.

72 For more information, see the *Preliminary Examinations under Reconsideration* sub-section of this publication.

Honduras

On 18 November 2010, the OTP opened a Preliminary Examination into the Situation in Honduras, linked to alleged human rights violations committed during the *coup d'état* of 28 June 2009 against former President Manuel Zelaya and in the post-coup period until the inauguration of former President Porfirio Lobo on 27 January 2010.⁷³ This Preliminary Examination initially focused on alleged crimes against humanity 'attributable to the authorities which had seized power in the coup', including imprisonment, killings, torture, rape and sexual violence, deportation, and persecution.⁷⁴ In November 2013, the OTP concluded that these violations did not constitute crimes against humanity within the meaning of the Rome Statute.⁷⁵

Nonetheless, in light of further information received, the OTP continued and expanded the focus of its Preliminary Examination to include alleged crimes against humanity committed in the post-election period between 27 January 2010 and September 2014, and in the Bajo Aguán region of Honduras.⁷⁶ However, on 28 October 2015, the OTP concluded that there was no reasonable basis to proceed with an investigation into this Situation.⁷⁷

Preliminary Examinations under Reconsideration

In addition to the Preliminary Examination into alleged crimes committed in the State of Palestine since 13 June 2014, the OTP is currently reconsidering its decision of 6 November 2014 to close another Palestine-related Preliminary Examination. This latter Preliminary Examination relates to alleged crimes committed by the IDF on and after 31 May 2010 on vessels registered in ICC States Parties namely the Comoros, Greece and Cambodia, which were a part of a flotilla sailing to the Gaza Strip.

Registered vessels of the Comoros, Greece and Cambodia

On 14 May 2013, the OTP opened a Preliminary Examination into the Situation referred on that same day by the Government of the Comoros 'with respect to the 31 May 2010

- 73 'Report on Preliminary Examination activities', *OTP*, 13 December 2011, paras 31, 33-34, available at <<https://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf>>; 'Article 5 Report on the Situation in Honduras', *OTP*, October 2015, paras 11-12, available at <https://www.icc-cpi.int/iccdocs/otp/SAS-HON-Article_5_Report-Oct2015-ENG.PDF>.
- 74 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination into the situation in Honduras', *OTP Press Statement*, 28 October 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-28-10-2015>>; 'Report on Preliminary Examination activities', *OTP*, 13 December 2011, paras 33-41, available at <<https://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf>>.
- 75 'Article 5 Report on the Situation in Honduras', *OTP*, October 2015, para 23, available at <https://www.icc-cpi.int/iccdocs/otp/SAS-HON-Article_5_Report-Oct2015-ENG.PDF>. See also 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination into the situation in Honduras', *OTP Press Statement*, 28 October 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-28-10-2015>>.
- 76 'Article 5 Report on the Situation in Honduras', *OTP*, October 2015, paras 18, 24, available at <https://www.icc-cpi.int/iccdocs/otp/SAS-HON-Article_5_Report-Oct2015-ENG.PDF>. See also 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination into the situation in Honduras', *OTP Press Statement*, 28 October 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-28-10-2015>>.
- 77 'Article 5 Report on the Situation in Honduras', *OTP*, October 2015, paras 15, 23, 30-31, available at <https://www.icc-cpi.int/iccdocs/otp/SAS-HON-Article_5_Report-Oct2015-ENG.PDF>; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination into the situation in Honduras', *OTP Press Statement*, 28 October 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-28-10-2015>>.

Israeli raid on the Humanitarian Aid Flotilla', the *Gaza Freedom Flotilla* organised by the Free Gaza Movement, headed for the Gaza Strip.⁷⁸ The Comoros indicated in its referral that the majority of the crimes committed during the 31 May 2010 raid took place on board the Mavi Marmara, a vessel registered in the Comoros, and that it thus had 'a relevant interest in this matter'.⁷⁹ However, on 21 June 2013, the Comoros clarified that the territorial scope of the referral was not limited to the Mavi Marmara but also extended to other vessels in the flotilla which were also registered in an ICC State Party, and that while the temporal scope began on 31 May 2010, it encompassed all alleged crimes flowing from the interception of the flotilla by the IDF, including the related interception of another vessel – the Rachel Corrie, registered in Cambodia – on 5 June 2010.⁸⁰

According to the OTP Report on Preliminary Examination Activities 2016, 'the Free Gaza Movement was formed to challenge the blockade. It organised the "Gaza Freedom Flotilla", an eight-boat flotilla with over 700 passengers from approximately 40 countries, with the stated intentions to deliver aid to Gaza, break the Israeli blockade, and draw international attention to the situation in Gaza and the effects of the blockade'.⁸¹ The flotilla included three vessels registered in ICC States Parties, namely in the Comoros (Mavi Marmara), Cambodia (Rachel Corrie) and Greece (Eleftheri Mesogios or Sofia).⁸² The flotilla departed from Turkey and met in international waters on 28 May 2010 and set out for Gaza on 30 May 2010.⁸³ However, one of the vessels had previously 'withdrawn due to mechanical difficulties' and the Rachel Corrie was 'delayed in its departure' and only continued towards Gaza separately at a later date.⁸⁴ The six remaining vessels were 'boarded and taken over' by the IDF on 31 May 2010 in international waters, resulting in the deaths of ten passengers

78 'Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation', *Elmadağ Law Firm on behalf of the Union of the Comoros*, 14 May 2013, paras 1, 4 and p 1, available at <<https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>; 'ICC Prosecutor receives referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel "MAVI MARMARA"', *OTP Press Release*, 14 May 2013, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-14-05-2013>>; 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, paras 308, 314–315, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

79 'Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation', *Elmadağ Law Firm on behalf of the Union of the Comoros*, 14 May 2013, paras 3–4, 8, 15, available at <<https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>.

80 'Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia', *OTP*, 6 November 2014, p 11 (para 7), available at <[https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf)>; 'Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation', *Elmadağ Law Firm on behalf of the Government of the Union of the Comoros*, 14 May 2013, para 15, available at <<https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>.

81 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 318, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

82 'Report on Preliminary Examination Activities 2016', *OTP*, 14 November 2016, para 314, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.

83 'Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation', *Elmadağ Law Firm on behalf of the Union of the Comoros*, 14 May 2013, paras 32, 35, available at <<https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>.

84 'Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia', *OTP*, 6 November 2014, p 4 (para 12), 13 (para 18), available at <[https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf)>; 'Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation', *Elmadağ Law Firm on behalf of the Union of the Comoros*, 14 May 2013, para 35, available at <<https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>.

on the Mavi Marmara and in the serious injury of at least 20 others.⁸⁵ On 5 June 2010, the delayed Rachel Corrie was intercepted by the IDF, which, according to the OTP, seemed to have occurred ‘without incident’.⁸⁶ On 6 November 2014, the Prosecutor announced that the requirements for opening an investigation into the Situation referred by the Government of the Comoros had not been met, and that the Preliminary Examination had been closed.⁸⁷

On 29 January 2015, the Government of the Comoros applied for a review of the Prosecutor’s decision not to proceed with an investigation into the Situation.⁸⁸ Granting this application, Pre-Trial Chamber I,⁸⁹ by majority, requested the Prosecutor on 16 July 2015 to reconsider her decision to close the Preliminary Examination into the Situation referred by the Comoros.⁹⁰ On 27 July 2015, the Prosecutor appealed the Pre-Trial Chamber’s request for reconsideration,⁹¹ which the Appeals Chamber,⁹² by majority, dismissed as inadmissible on 6 November 2015.⁹³

On 14 November 2016, the OTP indicated it was ‘nearing completion of its review’ and preparing to issue a final decision ‘in the near future’ as to whether or not to open an investigation into the Situation referred by the Comoros.⁹⁴ At the time of writing this publication, no such decision had been made public.

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- 85 ‘Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia’, *OTP*, 6 November 2014, p 12 (para 13), 21 (para 38), 56 (para 138), available at <[https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-o6Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-o6Nov2014Eng.pdf)>. Nine of those killed were Turkish nationals and one had Turkish and American dual nationality. ‘Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia’, *OTP*, 6 November 2014, p 12 (para 13), available at <[https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-o6Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-o6Nov2014Eng.pdf)>.
- 86 ‘Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia’, *OTP*, 6 November 2014, p 38 (para 81), available at <[https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-o6Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-o6Nov2014Eng.pdf)>; ‘Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation’, *Elmadaj Law Firm on behalf of the Government of the Union of the Comoros*, 14 May 2013, para 15, available at <<https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>.
- 87 ICC-01/13-6-AnxA, para 151. See also ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: “Rome Statute legal requirements have not been met”’, *OTP Press Statement*, 6 November 2014, available at <<https://www.icc-cpi.int/legalAidConsultations?name=otp-statement-o6-11-2014>>.
- 88 ICC-01/13-3-Red, para 142. See also ‘ICC Pre-Trial Chamber I requests Prosecutor to reconsider decision not to investigate situation referred by Union of Comoros’, *ICC Press Release*, ICC-CPI-20150716-PR1133, 16 July 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1133>>.
- 89 At this stage of proceedings, Pre-Trial Chamber I was composed of Presiding Judge Joyce Aluoch (Kenya), Judge Cuno Tarfusser (Italy) and Judge Péter Kovács (Hungary).
- 90 ICC-01/13-34, p 26. Judge Kovács appended a partly dissenting opinion. ICC-01/13-34-Anx-Corr. See also ‘ICC Pre-Trial Chamber I requests Prosecutor to reconsider decision not to investigate situation referred by Union of Comoros’, *ICC Press Release*, ICC-CPI-20150716-PR1133, 16 July 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1133>>.
- 91 ICC-01/13-35, para 31.
- 92 The Appeals Chamber was composed of Presiding Judge Christine Van den Wyngaert (Belgium), Judge Silvia Fernández de Gurmendi (Argentina), Judge Sanji Mmasenono Monageng (Botswana), Judge Howard Morrison (United Kingdom) and Judge Piotr Hofmański (Poland).
- 93 ICC-01/13-51, paras 66-67. Judge Fernández de Gurmendi and Judge Van den Wyngaert appended a joint dissenting opinion. ICC-01/13-51-Anx. See further ‘Comoros situation: Dismissal of the Prosecutor’s appeal against decision requesting reconsideration of the decision not to initiate an investigation’, *ICC Press Release*, ICC-CPI-20151106-PR1170, 6 November 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1170>>.
- 94 ‘Report on Preliminary Examination Activities 2016’, *OTP*, 14 November 2016, para 331, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE>>.





Sexual and Gender-Based Crimes Charges – highlights

At the time of writing this publication, charges of sexual and gender-based crimes have been brought in seven of the ten Situations under investigation by the ICC, specifically; Uganda, the DRC, the CAR, Darfur, Kenya, Côte d'Ivoire, and Libya. No sexual and gender-based crimes charges have yet been brought in the Mali Situation,⁹⁵ and no arrest warrants or summonses to appear have yet been made public in the CAR II⁹⁶ and Georgia⁹⁷ Situations.

Sexual and gender-based crimes charges have been brought in 15 of the 25 ICC cases (60%).⁹⁸ Specifically, such charges have been included in: the Kony and Otti, and Ongwen cases in the Uganda Situation; the Katanga, Ngudjolo, Ntaganda, Mbarushimana, and Mudacumura cases in the DRC Situation; the Bemba case in the CAR Situation; the Al Bashir, Harun and Kushayb, and Hussein cases in the Darfur Situation; the Kenyatta case in the Kenya Situation; the Al-Tuhamy case⁹⁹ in the Libya Situation; and the Laurent Gbagbo and Blé Goudé, and Simone Gbagbo cases in the Côte d'Ivoire Situation.

Charges of sexual and gender-based crimes were not included in the Lubanga case in the DRC Situation; the Bemba *et al* case in the CAR Situation; the Abu Garda and Banda cases in the Darfur Situation; the Ruto and Sang, Barasa, and Gicheru and Bett cases in the Kenya Situation; the Gaddafi (Muammar Gaddafi), Gaddafi and Al-Senussi, and Al-Werfalli cases in the Libya Situation; and the Al Mahdi case in the Mali Situation.

95 Although the Prosecutor had indicated at the opening of the investigation into the Situation in Mali that there was a reasonable basis to believe that the war crimes of rape, mutilation, cruel treatment and torture had been committed in the country since January 2012, the only case arising from this Situation thus far did not include sexual and gender-based crimes charges. 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"', *OTP Press Statement*, ICC-OTP-20130116-PR869, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx>.

96 Prosecutor Bensouda indicated at the opening of the investigation into the CAR II Situation that there was a reasonable basis to believe that crimes against humanity and war crimes including rape and persecution had been committed in the country since 2012. 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic', *OTP Press Release*, ICC-OTP-20140924-PR1043, 24 September 2014, available at <http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx>.

97 In her request for authorisation to open an investigation, Prosecutor Bensouda stated that her Office had gathered information on a limited number of reports of sexual and gender-based violence, including rape, but that no clear information had emerged at the time on the alleged perpetrators or the link between these crimes and the armed conflict or wider context. ICC-01/15-4, para 4. On this point, the Chamber noted in its decision authorising the Prosecution request to open the investigation into this Situation that these allegations could be included in the investigation. ICC-01/15-12, para 35.

98 There are currently 22 cases relating to crimes under Article 5 of the Statute and three cases relating to offenses against the administration of justice under Article 70 of the Statute.

99 While the Arrest Warrant for Al-Tuhamy identified acts of sexual violence and rape, as well as threats of rape, as underlying acts of crimes against humanity charges brought against him, it did not specify under which concrete charges these acts fall. ICC-01/11-01-13-1, paras 7-8. Al-Tuhamy faces the charges of imprisonment, torture, other inhumane acts, and persecution as crimes against humanity. ICC-01/11-01-13-1, para 8 and p 6-7.

Of the 41 individual suspects and accused against whom charges have been brought before the ICC either under Article 5 or Article 70 of the Statute, 20 have been charged with sexual and gender-based crimes (49%). Of the 34 individuals who have been charged under Article 5 of the Statute,¹⁰⁰ 59% (20) have faced charges of sexual and gender-based crimes.

Since 2013, 12 new arrest warrants have been issued in seven cases. Of these, four relate to Article 5 cases, namely those for Al-Tuhamy, Banda, Al Mahdi, and Al-Werfalli; and eight relate to Article 70 cases, namely those for Barasa, Bemba *et al*, and Gicheru and Bett.

Although no new arrest warrants have included explicit charges for crimes of sexual and gender-based violence since 2012, important amendments to existing Arrest Warrants for such charges in two cases, those for Ntaganda (2012, 2014) and Ongwen (2015), have significantly expanded the scope of the sexual and gender-based crimes being prosecuted before the ICC.¹⁰¹

Sexual and gender-based violence has been charged by the ICC as an act of genocide, a crime against humanity and a war crime at the ICC. Specific charges have included: causing serious bodily or mental harm; rape; sexual slavery; forced pregnancy; other forms of sexual violence; torture; enslavement; persecution; other inhumane acts, including forced marriage; cruel or inhuman treatment; mutilation; and outrages upon personal dignity.

Arrest warrants in which the majority of charges have related to sexual and gender-based crimes have been issued against eight individuals: Bemba, Mbarushimana, Kenyatta, Muthaura, Ali, Laurent Gbagbo, Blé Goudé, and Ntaganda (second Arrest Warrant).¹⁰² The highest number of charges for sexual and gender-based crimes included in an original arrest warrant for any one individual was in the Mbarushimana case, with seven charges.¹⁰³ The highest number and broadest range of sexual and gender-based crimes presented at the confirmation of charges stage of proceedings was in the Ongwen case, with 19 of 70 counts relating to sexual and gender-based crimes, comprised of 11 distinct charges for these crimes.¹⁰⁴

The Confirmation of Charges decision in the Ntaganda case, issued on 9 June 2014, was the first time that all charges of sexual and gender-based crimes were unanimously confirmed by an ICC Chamber.¹⁰⁵ Significantly, this case also included historic charges, confirmed and upheld on appeal, of rape and sexual slavery committed against children

¹⁰⁰ The remaining seven individuals have been indicted solely for offences against the administration of justice under Article 70 of the Statute.

¹⁰¹ ICC-01/04-02/06-36-Red, paras 17, 37-44, 56-57, 61 and p 36; ICC-02/04-01/15-305-Red3, p 10-11, 13-16, 18-19, 21, 24-25, 30-32, 35-36.

¹⁰² Summonses to appear were issued instead of arrest warrants for Kenyatta, Muthaura and Ali.

¹⁰³ ICC-01/04-01/10-2-tENG, para 10. While seven sexual and gender-based crimes charges were included in the Arrest Warrant for Mbarushimana, the Document Containing the Charges added the charge of mutilation as a war crime, bringing the total number of sexual and gender-based crimes charges brought against Mbarushimana to eight. ICC-01/04-01/10-311-AnxA-Red, p 42.

¹⁰⁴ All sexual and gender-based crimes charges in this case were brought in the Prosecution Notice of Intended Charges. ICC-02/04-01/15-375-AnxA-Red2, p 12-14, 18-21, 25-28, 32-34, 47-51, 54-56, 58-59. The less redacted version was filed on 25 May 2016.

¹⁰⁵ ICC-01/04-02/06-309, p 63 and paras 12, 36, 74, 97. This is also the first time under international criminal law that a senior military figure faces charges of sexual and gender-based crimes allegedly committed against child soldiers within his own militia group.

within Ntaganda's own militia group.¹⁰⁶ All sexual and gender-based crimes charges were also unanimously confirmed in the Blé Goudé¹⁰⁷ and Ongwen cases.

The first, and so far only, ICC conviction of sexual and gender-based crimes, specifically of rape as a crime against humanity and a war crime, was rendered in March 2016 in the case against Bemba.¹⁰⁸ This was also the first case in which acts of rape were taken into account as aggravating circumstances at the time of the Sentencing Decision.¹⁰⁹

Sexual and gender-based crimes charges were also brought in the Katanga and Ngudjolo cases. While Katanga was convicted, by majority, of murder as a crime against humanity and war crime, and directing an attack against a civilian population, pillaging, and destruction of property as war crimes, he was unanimously acquitted of all sexual and gender-based crimes charges, namely rape and sexual slavery as crimes against humanity and war crimes, as well as of the war crime of using child soldiers.¹¹⁰ Ngudjolo faced the charges of wilful killing, rape, sexual slavery, directing an attack against a civilian population, destruction of property, pillaging, and using child soldiers as war crimes and murder, rape and sexual slavery as crimes against humanity. On 18 December 2012, Ngudjolo was unanimously acquitted of all charges.¹¹¹

In June 2014, the OTP adopted and launched its Policy Paper on Sexual and Gender-Based Crimes.¹¹² At the time of not seeking a renewal of her mandate as the Special Advisor on Gender to the Prosecutor of the ICC (2012-2016), Brigid Inder identified four areas to further strengthen the implementation of the Policy and the work of the OTP with respect to the prosecution of sexual and gender-based crimes.¹¹³

These areas are:

- Strengthening the presentation of evidence of sexual and gender-based crimes;
- Identifying gender aspects within non-sexual violence crimes and the context within which these crimes occur;
- Persuasively arguing individual criminal liability for sexual and gender-based crimes beyond direct perpetrators of these crimes; and
- Being attentive to gender issues in every case and every policy.

¹⁰⁶ ICC-01/04-02/06-309, paras 74, 76-82 and p 63; ICC-01/04-02/06-1962, paras 1-2, 71 and p 3. See also Women's Initiatives for Gender Justice, 'Historic ICC Decision on the war crimes of rape and sexual slavery', 19 June 2017, available at <<http://4genderjustice.org/historic-war-crimes-decision/>>.

¹⁰⁷ All sexual and gender-based crimes charges against Laurent Gbagbo were also confirmed, albeit by majority. The cases against Laurent Gbagbo and Blé Goudé were joined on 11 March 2015, after the respective Confirmation of Charges decisions.

¹⁰⁸ ICC-01/05-01/08-3343, para 752; ICC-01/05-01/08-3399, paras 95, 97. See also Women's Initiatives for Gender Justice, 'ICC first conviction for acts of sexual violence', 21 March 2016, available at <<http://4genderjustice.org/icc-first-conviction-acts-sexual-violence/>>.

¹⁰⁹ ICC-01/05-01/08-3399, para 93. See also Women's Initiatives for Gender Justice, 'Bemba Sentenced to 18 Years by the ICC', 21 June 2016, available at <<http://4genderjustice.org/bemba-sentenced-18-years-icc/>>.

¹¹⁰ ICC-01/04-01/07-3436-tENG, p 658-659.

¹¹¹ ICC-01/04-02/12-3-tENG, p 197.

¹¹² 'Policy Paper on Sexual and Gender-Based Crimes', OTP, 20 June 2014, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=policy-paper-on-sexual-and-gender-based-crimes-05-06-2014>>.

¹¹³ Women's Initiatives for Gender Justice, 'Special Adviser on Gender completes her mandate', 26 August 2016, available at <<http://4genderjustice.org/special-adviser-on-gender-completes-her-mandate/>>.

Status of Sexual and Gender-Based Crimes Charges across ICC Cases

The chart below lists the 15 out of 25 ICC cases (60%) in which sexual and gender-based crimes charges have been brought, at the time of writing this publication.

Case ¹¹⁴	Stage of proceedings	Sexual and gender-based crimes charges ¹¹⁵
<i>The Prosecutor v. Germain Katanga</i>	Katanga was unanimously acquitted of all charges of sexual and gender-based crimes in March 2014.	Charges against Katanga: ¹¹⁶ <ul style="list-style-type: none"> • Rape as a crime against humanity; • Sexual slavery as a crime against humanity; • Rape as a war crime; and • Sexual slavery as a war crime.
<i>The Prosecutor v. Mathieu Ngudjolo Chui</i>	Ngudjolo was unanimously acquitted of all charges in December 2012.	Charges against Ngudjolo: ¹¹⁷ <ul style="list-style-type: none"> • Rape as a crime against humanity; • Sexual slavery as a crime against humanity; • Rape as a war crime; and • Sexual slavery as a war crime.
<i>The Prosecutor v. Bosco Ntaganda</i>	All charges against Ntaganda were unanimously confirmed in June 2014, including all charges of sexual and gender-based crimes. This case is currently at trial.	Charges against Ntaganda: ¹¹⁸ <ul style="list-style-type: none"> • Rape of civilians as a crime against humanity; • Sexual slavery of civilians as a crime against humanity; • Persecution (including acts of rape and sexual slavery) as a crime against humanity; • Rape of civilians as a war crime; • Sexual slavery of civilians as a war crime; • Rape of child soldiers as a war crime; and • Sexual slavery of child soldiers as a war crime.
<i>The Prosecutor v. Callixte Mbarushimana</i>	No charges were confirmed against Mbarushimana in December 2011.	Charges against Mbarushimana: ¹¹⁹ <ul style="list-style-type: none"> • Torture as a crime against humanity; • Rape as a crime against humanity; • Other inhumane acts (including acts of rape and mutilation of women) as a crime against humanity; • Persecution as a crime against humanity; • Torture as a war crime; • Rape as a war crime; • Cruel treatment (including acts of rape and mutilation of women) as a war crime; and • Mutilation as a war crime.

114 The case name reflects the most up-to-date case name, excluding those accused against whom proceedings have been terminated.

115 Depending on the stage of proceedings, the charges of sexual and gender-based crimes listed reflect those sought in the Arrest Warrant, Notice of Intended Charges, the Document Containing the Charges or the Confirmation of Charges decision.

116 In the Document Containing the Charges, the Prosecution also brought the charge of outrages upon personal dignity as a war crime against Katanga; however, Pre-Trial Chamber I declined to confirm this charge.

117 In the Document Containing the Charges, the Prosecution also brought the charge of outrages upon personal dignity as a war crime against Ngudjolo; however, Pre-Trial Chamber I declined to confirm this charge.

118 The first five charges of sexual and gender-based crimes were brought against Ntaganda in his second Arrest Warrant (13 July 2012), namely: rape of civilians, sexual slavery of civilians, and persecution (by means of rape and sexual slavery) as crimes against humanity; and rape of civilians and sexual slavery of civilians as war crimes. The Document Containing the Charges included important new charges of sexual and gender-based crimes, namely: rape of child soldiers and sexual slavery of child soldiers as war crimes.

119 The Document Containing the Charges added the charge of mutilation as a war crime to the other sexual and gender-based crimes charges already brought in the Arrest Warrant.

<i>The Prosecutor v. Sylvestre Mudacumura</i>	An arrest warrant was issued for Mudacumura in July 2012. The execution of this Arrest Warrant is pending.	Charges against Mudacumura: ¹²⁰ <ul style="list-style-type: none"> • Rape as a war crime; • Torture as a war crime; and • Mutilation as a war crime.
<i>The Prosecutor v. Joseph Kony and Vincent Otti</i>	An arrest warrant was issued for Kony in July 2005. The execution of this Arrest Warrant is pending.	Charges against Kony: <ul style="list-style-type: none"> • Sexual slavery as a crime against humanity; • Rape as a crime against humanity; and • Inducing rape as a war crime.
	An arrest warrant was issued for Otti in July 2005. The execution of this Arrest Warrant is pending.	Charges against Otti: <ul style="list-style-type: none"> • Sexual slavery as a crime against humanity; and • Inducing rape as a war crime.
<i>The Prosecutor v. Dominic Ongwen</i>	All charges of sexual and gender-based crimes against Ongwen were unanimously confirmed in March 2016. This case is currently at trial.	Charges against Ongwen: ¹²¹ <ul style="list-style-type: none"> • Forced marriage as a crime against humanity (2 counts); • Torture as a crime against humanity (2 counts); • Rape as a crime against humanity (2 counts); • Sexual slavery as a crime against humanity (2 counts); • Enslavement as a crime against humanity (2 counts); • Forced pregnancy as a crime against humanity (1 count); • Rape as a war crime (2 counts); • Torture as a war crime (2 counts); • Sexual slavery as a war crime (2 counts); • Forced pregnancy as a war crime (1 count); and • Outrages upon personal dignity as a war crime (1 count).
<i>The Prosecutor v. Jean-Pierre Bemba Gombo</i>	Bemba was unanimously convicted and sentenced for all charges of sexual and gender-based crimes in March 2016.	Charges against Bemba: ¹²² <ul style="list-style-type: none"> • Rape as a crime against humanity; and • Rape as a war crime.
<i>The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Kushayb)</i>	An arrest warrant was issued for Harun in April 2007. The execution of this Arrest Warrant is pending.	Charges against Harun: <ul style="list-style-type: none"> • Rape as a crime against humanity (2 counts); • Persecution by means of sexual violence as a crime against humanity (2 counts); • Rape as a war crime (2 counts); • Outrages upon personal dignity as a war crime (1 count).
	An arrest warrant was issued for Kushayb in April 2007. The execution of this Arrest Warrant is pending.	Charges against Kushayb: <ul style="list-style-type: none"> • Rape as a crime against humanity (2 counts); • Persecution by means of sexual violence as a crime against humanity (2 counts); • Rape as a war crime (1 count); • Outrages upon personal dignity as a war crime (2 counts).
<i>The Prosecutor v. Oman Hassan Ahmad Al Bashir</i>	Arrest warrants were issued for Al Bashir in March 2009 and July 2010. The execution of these Arrest Warrants is pending.	Charges against Al Bashir: <ul style="list-style-type: none"> • Rape as a crime against humanity; • Causing serious bodily or mental harm (including through acts of rape) as an act of genocide.

120 Mudacumura also faces the charge of outrages upon personal dignity, which could be based on acts of sexual and gender-based violence subject to the availability of further information regarding the acts underlying the charge. The application is redacted and thus the factual basis for the charge is unclear. However, the Women's Initiatives for Gender Justice notes that, in other cases, the Prosecution has frequently charged outrages upon personal dignity arising out of sexual violence.

121 Although no charges of sexual and gender-based crimes were brought at the arrest warrant stage, the Prosecution included 19 counts in the Notice of Intended Charges, relating to 11 different sexual and gender-based crimes.

122 The Prosecution originally brought seven charges of sexual and gender-based crimes against Bemba, namely: rape, other forms of sexual violence, and torture by means of rape as crimes against humanity; and rape, other forms of sexual violence, torture by means of rape, and outrages upon personal dignity as war crimes. In issuing the first Arrest Warrant for Bemba, Pre-Trial Chamber III declined to include the charges of other forms of sexual violence as a crime against humanity and war crime. In the Confirmation of Charges decision, the Chamber declined to confirm the charges of torture by means of rape as a crime against humanity, as well as torture by means of rape and outrages upon personal dignity as war crimes.

<i>The Prosecutor v. Abdel Raheem Muhammad Hussein</i>	An arrest warrant was issued for Hussein in March 2012. The execution of this Arrest Warrant is pending.	Charges against Hussein: <ul style="list-style-type: none"> • Persecution (including acts of sexual violence) as a crime against humanity; • Rape as a crime against humanity; • Rape as a war crime; and • Outrages upon personal dignity as a war crime.
<i>The Prosecutor v. Uhuru Muigai Kenyatta</i>	<p>The Prosecution withdrew all charges against Kenyatta in December 2014 after the confirmation of charges. The case was subsequently terminated in March 2015.</p> <p>The Prosecution withdrew all charges against Muthaura in March 2013 after the confirmation of charges. The case was subsequently terminated the same month.</p> <p>No charges against Ali were confirmed in January 2012.</p>	<p>Charges against Kenyatta:¹²³</p> <ul style="list-style-type: none"> • Rape as a crime against humanity; • Other inhumane acts as a crime against humanity; and • Persecution (by means of rape and other inhumane acts) as a crime against humanity. <p>Charges against Muthaura:¹²⁴</p> <ul style="list-style-type: none"> • Rape as a crime against humanity; • Other inhumane acts as a crime against humanity; and • Persecution (by means of rape and other inhumane acts) as a crime against humanity. <p>Charges against Ali:</p> <ul style="list-style-type: none"> • Rape as a crime against humanity; • Other inhumane acts as a crime against humanity; and • Persecution (by means of rape and other inhumane acts) as a crime against humanity.
<i>The Prosecutor v. Al-Tuhamy Mohamed Khaled</i>	An arrest warrant was issued for Al-Tuhamy in April 2013. The execution of this Arrest Warrant is pending.	<p>Charges against Al-Tuhamy:</p> <p>It is unclear from the Arrest Warrant which specific charges are inclusive of acts of sexual violence and rape. According to the decision issuing the Arrest Warrant, 'the Chamber finds reasonable grounds to believe that between 15 February 2011 and 24 August 2011, members of the Internal Security Agency (the "ISA") and of other Security Forces arrested and detained persons perceived to be opponents of the Gaddafi regime, who were subjected to various forms of mistreatment, including severe beatings, electrocution, acts of sexual violence and rape, solitary confinement, deprivation of food and water, inhumane conditions of detention, mock executions, threats of killing and rape in various locations throughout Libya.'¹²⁵</p> <p>'The Chamber finds reasonable grounds to believe that these acts constitute the crimes against humanity of imprisonment under article 7(1)(e) of the Statute, torture under article 7(1)(f) of the Statute, other inhumane acts under article 7(1)(k) of the Statute and persecution under article 7(1)(h) of the Statute from 15 February 2011 until 24 August 2011.'¹²⁶</p>

¹²³ In the Confirmation of Charges decision, Pre-Trial Chamber II, by majority, declined to confirm the charge of other forms of sexual violence as a crime against humanity against Kenyatta.

¹²⁴ In the Confirmation of Charges decision, Pre-Trial Chamber II, by majority, declined to confirm the charge of other forms of sexual violence as a crime against humanity against Muthaura.

¹²⁵ ICC-01/11-01-13-1, para 7.

¹²⁶ ICC-01/11-01-13-1, para 8.

<i>The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé</i>	All charges against Laurent Gbagbo were confirmed, by majority, in June 2014. This case is currently at trial.	Charges against Laurent Gbagbo: <ul style="list-style-type: none"> • Rape as a crime against humanity;¹²⁷ and • Persecution (including acts of rape) as a crime against humanity.
	All charges against Blé Goudé were unanimously confirmed in December 2014. This case is currently at trial.	Charges against Blé Goudé: <ul style="list-style-type: none"> • Rape as a crime against humanity;¹²⁸ and • Persecution (including acts of rape) as a crime against humanity.
<i>The Prosecutor v. Simone Gbagbo</i>	An arrest warrant was issued for Simone Gbagbo in February 2012. The execution of this Arrest Warrant is pending.	Charge against Simone Gbagbo: ¹²⁹ <ul style="list-style-type: none"> • Rape and other forms of sexual violence as a crime against humanity.

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- 127 While in the Arrest Warrant Laurent Gbagbo had faced charges of rape and other forms of sexual violence as crimes against humanity, the Document Containing the Charges, as well as the Confirmation of Charges decision, refer only to the charge of rape.
- 128 While in the Arrest Warrant Blé Goudé had faced charges of rape and other forms of sexual violence as crimes against humanity, the Document Containing the Charges, as well as the Confirmation of Charges decision, refer only to the charge of rape.
- 129 Based on a comparison of the Arrest Warrant for Simone Gbagbo with the Arrest Warrants for Laurent Gbagbo and Blé Goudé, which are substantially similar, the charge of persecution as a crime against humanity could be based on sexual and gender-based violence subject to the availability of further information regarding the acts underlying the crime. Laurent Gbagbo and Blé Goudé are charged with persecution as a crime against humanity, which includes acts of rape, as clarified in the Confirmation of Charges decision for Laurent Gbagbo and the Document Containing the Charges for Blé Goudé.

Charges of Sexual and Gender-Based Crimes Brought Before the ICC – Articles of the Rome Statute

The chart below outlines all sexual and gender-based crimes under the Rome Statute, and whether charges thereof have been brought before the Court, at the time of writing this publication.

Sexual and gender-based crimes under the Rome Statute	ICC cases including sexual and gender-based crimes ¹³⁰
Genocide (Article 6 of the Statute):	
Killing members of the group <i>Article 6(a)</i>	✗
Causing serious bodily or mental harm to members of the group <i>Article 6(b)</i>	✓ <i>The Prosecutor v. Oman Hassan Ahmad Al Bashir</i> – outstanding arrest warrant. The crime was allegedly committed ‘through acts of rape, other forms of sexual violence, torture and forcible displacement of members of [the targeted ethnic] groups’. ¹³¹
Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part <i>Article 6(c)</i>	✗
Imposing measures intended to prevent births within the group <i>Article 6(d)</i>	✗
Forcibly transferring children of the group to another group <i>Article 6(e)</i>	✗
Crimes against humanity (Article 7 of the Statute):	
Rape <i>Article 7(1)(g)</i>	<ul style="list-style-type: none"> ✓ <i>The Prosecutor v. Germain Katanga</i> – acquitted. ✓ <i>The Prosecutor v. Mathieu Ngudjolo Chui</i> – acquitted. ✓ <i>The Prosecutor v. Bosco Ntaganda</i> – confirmed. ✓ <i>The Prosecutor v. Callixte Mbarushimana</i> – not confirmed. ✓ <i>The Prosecutor v. Joseph Kony and Vincent Otti</i> – outstanding arrest warrants.¹³² ✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed. ✓ <i>The Prosecutor v. Jean-Pierre Bemba Gombo</i> – convicted. ✓ <i>The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Kushayb)</i> – outstanding arrest warrants. ✓ <i>The Prosecutor v. Oman Hassan Ahmad Al Bashir</i> – outstanding arrest warrant. ✓ <i>The Prosecutor v. Abdel Raheem Muhammad Hussein</i> – outstanding arrest warrant. ✓ <i>The Prosecutor v. Uhuru Muigai Kenyatta</i> – charges withdrawn for Kenyatta and Muthaura, not confirmed for Ali. ✓ <i>The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé</i> – confirmed. ✓ <i>The Prosecutor v. Simone Gbagbo</i> – outstanding arrest warrant.
Sexual slavery <i>Article 7(1)(g)</i>	<ul style="list-style-type: none"> ✓ <i>The Prosecutor v. Germain Katanga</i> – acquitted. ✓ <i>The Prosecutor v. Mathieu Ngudjolo Chui</i> – acquitted. ✓ <i>The Prosecutor v. Bosco Ntaganda</i> – confirmed. ✓ <i>The Prosecutor v. Joseph Kony and Vincent Otti</i> – outstanding arrest warrants. ✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed.

¹³⁰ The case name reflects the most up-to-date case name, excluding those accused against whom proceedings have been terminated. The case of *The Prosecutor v. Al-Tuhamy Mohamed Khaled* is not included in this chart because, although the Arrest Warrant identified acts of sexual violence and rape, as well as threats of rape, as underlying acts of the crimes against humanity charges brought against him, it did not specify under which specific charge(s) these acts fall. Al-Tuhamy faces charges of imprisonment, torture, other inhumane acts and persecution as crimes against humanity.

¹³¹ ICC-02/05-01/09-94, paras 25, 30–31.

¹³² Only Kony faces the charge of rape as a crime against humanity.

Enforced prostitution <i>Article 7(1)(g)</i>	✗
Forced pregnancy <i>Article 7(1)(g)</i>	✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed.
Enforced sterilisation <i>Article 7(1)(g)</i>	✗
Other forms of sexual violence <i>Article 7(1)(g)</i>	✓ <i>The Prosecutor v. Jean-Pierre Bemba Gombo</i> – declined to include in the Arrest Warrant. ✓ <i>The Prosecutor v. Uhuru Muigai Kenyatta</i> – charges not confirmed against Kenyatta, Muthaura and Ali. ✓ <i>The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé</i> – included in the Arrest Warrants but not in the Documents Containing the Charges or Confirmation of Charges decisions. ✓ <i>The Prosecutor v. Simone Gbagbo</i> – outstanding arrest warrant.
Forced marriage ¹³³ <i>Article 7(1)(k)</i>	✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed.
Persecution <i>Article 7(1)(h)</i>	✓ <i>The Prosecutor v. Bosco Ntaganda</i> – confirmed. ✓ <i>The Prosecutor v. Callixte Mbarushimana</i> – not confirmed. ✓ <i>The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Kushayb)</i> – outstanding arrest warrants. ✓ <i>The Prosecutor v. Abdel Raheem Muhammad Hussein</i> – outstanding arrest warrant. ✓ <i>The Prosecutor v. Uhuru Muigai Kenyatta</i> – charges withdrawn for Kenyatta and Muthaura, not confirmed for Ali. ✓ <i>The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé</i> – confirmed.
Other inhumane acts <i>Article 7(1)(k)</i>	✓ <i>The Prosecutor v. Callixte Mbarushimana</i> – not confirmed. ✓ <i>The Prosecutor v. Uhuru Muigai Kenyatta</i> – charges withdrawn for Kenyatta and Muthaura, not confirmed against Ali.
Enslavement <i>Article 7(1)(c)</i> 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children. ¹³⁴	✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed.
Torture <i>Article 7(1)(f)</i>	✓ <i>The Prosecutor v. Callixte Mbarushimana</i> – not confirmed. ✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed. ✓ <i>The Prosecutor v. Jean-Pierre Bemba Gombo</i> – not confirmed.
Deportation or forcible transfer of population ¹³⁵ <i>Article 7(1)(d)</i>	✗
Murder ¹³⁶ <i>Article 7(1)(a)</i>	✗

133 In the Document Containing the Charges in the Ongwen case, the Prosecution characterised forced marriage as 'an inhumane act of a character similar to the acts set out in article 7(1) (a)-(j), as a crime against humanity pursuant to articles 7(1) (k) and 25(3) (a)'. ICC-02/04-01/15-375-AnxA-Red2, p 47-48, 54-55. In the Confirmation of Charges decision, the Chamber stated that '[t]he Statute does not explicitly include "forced marriage" as a crime within the jurisdiction of the Court' and analysed 'whether the conduct attributed to Dominic Ongwen (i.e. to have forced women to serve as "conjugal partners" to himself and other LRA fighters in the Sinia brigade) constitute[d] an other inhumane act of a character similar to the acts set out in article 7(1) (a) to (j) intentionally causing great suffering, or serious injury to body or to mental or physical health'. The Chamber concluded that '[the conduct under consideration] constitute[d] the crime of an other inhumane act within the meaning of article 7(1)(k) of the Statute in the form of forced marriage, which differs from the other crimes with which Dominic Ongwen [was] charged, and accordingly warrant[ed] a specific separate charge, as presented by the Prosecutor'. ICC-02/04-01/15-422-Red, paras 88, 95.

134 Article 7(2)(c), Rome Statute.

135 Deportation or forcible transfer of population was listed as a sexual and gender-based crime in the OTP Policy Paper on Sexual and Gender-Based Crimes.

136 Murder as a crime against humanity was listed as a sexual and gender-based crime in the OTP Policy Paper on Sexual and Gender-Based Crimes.

War crimes (Article 8 of the Statute):

Rape Article 8(2)(b)(xxii) or 8(2)(e)(vi)	<ul style="list-style-type: none"> ✓ <i>The Prosecutor v. Germain Katanga</i> – acquitted. ✓ <i>The Prosecutor v. Mathieu Ngudjolo Chui</i> – acquitted. ✓ <i>The Prosecutor v. Bosco Ntaganda</i> – confirmed.¹³⁷ ✓ <i>The Prosecutor v. Callixte Mbarushimana</i> – not confirmed. ✓ <i>The Prosecutor v. Sylvestre Mudacumura</i> – outstanding arrest warrant. ✓ <i>The Prosecutor v. Joseph Kony and Vincent Otti</i> – outstanding arrest warrants.¹³⁸ ✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed. ✓ <i>The Prosecutor v. Jean-Pierre Bemba Gombo</i> – convicted. ✓ <i>The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Kushayb)</i> – outstanding arrest warrants. ✓ <i>The Prosecutor v. Abdel Raheem Muhammad Hussein</i> – outstanding arrest warrant.
Sexual slavery Article 8(2)(b)(xxii) or 8(2)(e)(vi)	<ul style="list-style-type: none"> ✓ <i>The Prosecutor v. Germain Katanga</i> – acquitted. ✓ <i>The Prosecutor v. Mathieu Ngudjolo Chui</i> – acquitted. ✓ <i>The Prosecutor v. Bosco Ntaganda</i> – confirmed.¹³⁹ ✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed.
Enforced prostitution Article 8(2)(b)(xxii) or 8(2)(e)(vi)	✗
Forced pregnancy Article 8(2)(b)(xxii) or 8(2)(e)(vi)	✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed.
Enforced sterilisation Article 8(2)(b)(xxii) or 8(2)(e)(vi)	✗
Other forms of sexual violence Article 8(2)(b)(xxii) or 8(2)(e)(vi)	✓ <i>The Prosecutor v. Jean-Pierre Bemba Gombo</i> – declined to include in the Arrest Warrant.
Outrages upon personal dignity, in particular humiliating and degrading treatment Article 8(2)(b)(xxi) or 8(2)(c)(iii)	<ul style="list-style-type: none"> ✓ <i>The Prosecutor v. Germain Katanga</i> – not confirmed. ✓ <i>The Prosecutor v. Mathieu Ngudjolo Chui</i> – not confirmed. ✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed. ✓ <i>The Prosecutor v. Jean-Pierre Bemba Gombo</i> – not confirmed. ✓ <i>The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Kushayb)</i> – outstanding arrest warrants. ✓ <i>The Prosecutor v. Abdel Raheem Muhammad Hussein</i> – outstanding arrest warrant.
Torture Article 8(2)(a)(ii) or 8(2)(c)(i)	<ul style="list-style-type: none"> ✓ <i>The Prosecutor v. Callixte Mbarushimana</i> – not confirmed. ✓ <i>The Prosecutor v. Sylvestre Mudacumura</i> – outstanding arrest warrant. ✓ <i>The Prosecutor v. Dominic Ongwen</i> – confirmed. ✓ <i>The Prosecutor v. Jean-Pierre Bemba Gombo</i> – not confirmed.
Cruel treatment Article 8(2)(c)(i) of the Statute	✓ <i>The Prosecutor v. Callixte Mbarushimana</i> – not confirmed.
Mutilation Article 8(2)(c)(i) or 8(2)(e)(xi)	<ul style="list-style-type: none"> ✓ <i>The Prosecutor v. Callixte Mbarushimana</i> – not confirmed. ✓ <i>The Prosecutor v. Sylvestre Mudacumura</i> – outstanding arrest warrant.
Intentionally directing attacks against the civilian population ¹⁴⁰ Article 8(2)(b)(i) or 8(2)(e)(i)	✗
Recruitment of child soldiers ¹⁴¹ Article 8(2)(b)(xxvi) or 8(2)(e)(vii)	✗

137 Ntaganda is charged with committing rape as a war crime against both civilians and child soldiers within his own militia group and under his command.

138 Kony and Otti face the charge of inducing rape as a war crime.

139 Ntaganda is charged with committing sexual slavery as a war crime against both civilians and child soldiers within his own militia group and under his command.

140 Intentionally directing attacks against the civilian population was listed as a sexual and gender-based crime in the OTP Policy Paper on Sexual and Gender-Based Crimes.

141 The recruitment of child soldiers was listed as a sexual and gender-based crime in the OTP Policy Paper on Sexual and Gender-Based Crimes.

Modes of Liability for Sexual and Gender-Based Crimes Charges

The Rome Statute provides jurisdiction over individuals for the crimes of genocide, crimes against humanity and war crimes.¹⁴² The various modes of individual criminal responsibility, understood as the grounds upon which a person can be held criminally liable for committing a crime within the jurisdiction of the ICC, are regulated primarily by Articles 25 and 28 of the Statute. The Statute provides two main categories of liability: individual criminal responsibility (Article 25), and the responsibility of commanders and other superiors (Article 28). This articulation of individual criminal responsibility within the Statute, also referred to as the 'mode of liability', lies at the core of a case, providing the legal theory connecting the alleged perpetrator to the crimes charged.¹⁴³

Article 25 of the Statute, regarding individual criminal responsibility, states:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

¹⁴² Article 5, Rome Statute. An amendment to the Rome Statute for the crime of aggression was adopted on 11 June 2010 at the 10-year Review Conference of the Rome Statute and the International Criminal Court. RC/Res.6, Annex 1. The Amendment addresses the definition, elements of the crime and conditions within which the ICC can exercise its jurisdiction for the crime of aggression.

¹⁴³ For a more in depth analysis on the modes of liability before the ICC, see further 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
- 3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.
- 4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 28 of the Statute, regarding responsibility of commanders and other superiors, states:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.



Overview of the modes of liability for each charge of sexual and gender-based crimes

The chart below reflects the different modes of liability under which sexual and gender-based crimes charges have been brought before the Court.¹⁴⁴

Sexual and gender-based crimes under the Rome Statute					
Genocide (Article 6 of the Statute)					
	Article 25(3)(a)	Article 25(3)(b)	Article 25(3)(c)	Article 25(3)(d)	Article 25(3)(e) Article 28
Causing serious bodily or mental harm to members of the group <i>Article 6(b)</i>	✓ Omar Hassan Ahmad Al Bashir (outstanding arrest warrant)	✗	✗	✗	✗
Crimes against humanity (Article 7 of the Statute)					
Enslavement <i>Article 7(f)(c)</i>	✓ Dominic Ongwen (confirmed) ¹⁴⁵	✓ Dominic Ongwen (confirmed)	✗	✓ Dominic Ongwen (confirmed)	✗ ✓ Dominic Ongwen (confirmed)
Torture <i>Article 7(f)(f)</i>	✓ Dominic Ongwen (confirmed) ¹⁴⁶	✓ Dominic Ongwen (confirmed)	✗	✓ Calixte Mbarushimana (not confirmed) ✓ Dominic Ongwen (confirmed)	✓ Dominic Ongwen (confirmed) ✓ Jean-Pierre Bemba Gombo (not confirmed)
Rape <i>Article 7(f)(g)</i>	<ul style="list-style-type: none"> ✓ Mathieu Ngudjolo Chui (acquitted) ✓ Bosco Ntaganda (confirmed) ✓ Joseph Kony (outstanding arrest warrant)¹⁴⁷ ✓ Dominic Ongwen (confirmed)¹⁴⁸ ✓ Ali Muhammad Ali Abd-Al-Rahman 'Kushayb' (outstanding arrest warrant) ✓ Omar Hassan Ahmad Al Bashir (outstanding arrest warrant) ✓ Abdel Raheem Muhammad Hussein (outstanding arrest warrant) ✓ Uhuru Muigai Kenyatta (withdrawn) ✓ Francis Kirimi Muthaura (withdrawn) ✓ Laurent Gbagbo (confirmed) ✓ Charles Blé Goudé (confirmed) ✓ Simone Gbagbo (outstanding arrest warrant) 	<ul style="list-style-type: none"> ✓ Bosco Ntaganda (confirmed) ✓ Dominic Ongwen (confirmed) ✓ Ahmad Muhammad Harun (outstanding arrest warrant) ✓ Laurent Gbagbo (confirmed) ✓ Charles Blé Goudé (confirmed) 	<ul style="list-style-type: none"> ✓ Charles Blé Goudé (confirmed) 	<ul style="list-style-type: none"> ✓ Germain Katanga (acquitted)¹⁴⁹ ✓ Bosco Ntaganda (confirmed) ✓ Calixte Mbarushimana (not confirmed) ✓ Dominic Ongwen (confirmed) ✓ Ahmad Muhammad Harun (outstanding arrest warrant) ✓ Ali Muhammad Ali Abd-Al-Rahman 'Kushayb' (outstanding arrest warrant) ✓ Mohammed Hussein Ali (not confirmed) ✓ Laurent Gbagbo (confirmed) ✓ Charles Blé Goudé (confirmed) 	<ul style="list-style-type: none"> ✓ Bosco Ntaganda (confirmed) ✓ Dominic Ongwen (confirmed) ✓ Jean-Pierre Bemba Gombo (convicted)

Sexual slavery <i>Article 7(1)(g)</i>	✓ Mathieu Ngudjolo Chui (acquitted)	✓ Bosco Ntaganda (confirmed)	✓ Joseph Kony (outstanding arrest warrant)	✓ Vincent Otti (outstanding arrest warrant)	✓ Dominic Ongwen (confirmed)	✓ Germain Katanga (acquitted) ¹⁴⁵	✓ Bosco Ntaganda (confirmed)	✓ Dominic Ongwen (confirmed)	✓ Bosco Ntaganda (confirmed)	✓ Dominic Ongwen (confirmed)
Forced pregnancy <i>Article 7(1)(g)</i>	✓ Dominic Ongwen (confirmed)	✗	✗	✗	✗	✗	✗	✗	✗	✗
Other forms of sexual violence <i>Article 7(1)(g)</i>	✓ Jean-Pierre Bemba Gombo (declined to include in the Arrest Warrant)	✗	✗	✗	✗	✓ Mohammed Hussein Ali (not confirmed)	✗	✗	✗	✗
	✓ Uhuru Muigai Kenyatta (not confirmed)									
	✓ Francis Kirimi Muthaura (not confirmed)									
	✓ Laurent Gbagbo (not included in the Document Containing the Charges nor Confirmation of Charges decision)									

144 Please note that the case of *The Prosecutor v. Al-Tuhamy Mohamed Khaled* is not included in this chart because, although the Arrest Warrant identified acts of sexual violence and rape, as well as threats of rape, as underlying acts of the crimes against humanity charges brought against him, it did not specify under which specific charge(s) these acts fall. Al-Tuhamy faces charges of imprisonment, torture, other inhumane acts and persecution as crimes against humanity.

145 Ongwen is charged as exclusively responsible under Article 25(3)(a) of the Statute for one of the two counts. Regarding the other count, he is charged alternatively under the four modes of liability listed in this chart.

146 Ongwen is charged as exclusively responsible under Article 25(3)(a) of the Statute for one of the two counts. Regarding the other count, he is charged alternatively under the four modes of liability listed in this chart.

147 In the Arrest Warrant, Kony's liability for this crime is redacted. For all other crimes, Kony is liable under Article 25(3)(b). However, according to the ICC case information sheet, he is also liable under Article 25(3)(a). As the charge of rape is the only charge that is redacted, it is possible that he is liable under Article 25(3)(a) of the Statute for this charge.

148 Ongwen is charged as exclusively responsible under Article 25(3)(a) of the Statute for one of the two counts. Regarding the other count, he is charged alternatively under the four modes of liability listed in this chart.

149 In the Confirmation of Charges decision, Katanga was charged under Article 25(3)(a) of the Statute. The mode of liability was recharacterised in the Conviction decision.

150 Ongwen is charged as exclusively responsible under Article 25(3)(a) of the Statute for one of the two counts. Regarding the other count, he is charged alternatively under the four modes of liability listed in this chart.

151 In the Confirmation of Charges decision, Katanga was charged under Article 25(3)(a) of the Statute. The mode of liability was recharacterised in the Conviction decision.

<ul style="list-style-type: none"> ✓ Charles Blé Goudé (not included in the Document Containing the Charges nor Confirmation of Charges decision) ✓ Simone Cbagbo (outstanding arrest warrant) 						
Persecution <i>Article 7(i)(h)</i>	<ul style="list-style-type: none"> ✓ Bosco Ntaganda (confirmed) ✓ Ali Muhammad Ali Abd-Al-Rahman 'Kushayb' (outstanding arrest warrant) ✓ Abdel Raheem Muhammad Hussein (outstanding arrest warrant) ✓ Uhuru Muigai Kenyatta (withdrawn) ✓ Francis Kirimi Muthaura (withdrawn) ✓ Laurent Cbagbo (confirmed) ✓ Charles Blé Goudé (confirmed) 	<ul style="list-style-type: none"> ✓ Bosco Ntaganda (confirmed) ✓ Ahmad Muhammad Harun (outstanding arrest warrant) ✓ Laurent Cbagbo (confirmed) ✓ Charles Blé Goudé (confirmed) 	<ul style="list-style-type: none"> ✓ Charles Blé Goudé (confirmed) 	<ul style="list-style-type: none"> ✓ Bosco Ntaganda (confirmed) ✓ Callixte Mbarushimana (not confirmed) ✓ Ahmad Muhammad Harun (outstanding arrest warrant) ✓ Ali Muhammad Ali Abd-Al-Rahman 'Kushayb' (outstanding arrest warrant) ✓ Mohammed Hussein Ali (not confirmed) ✓ Laurent Gbagbo (confirmed) ✓ Charles Blé Goudé (confirmed) 	<ul style="list-style-type: none"> ✗ ✗ ✗ ✗ ✗ ✗ ✗ 	<ul style="list-style-type: none"> ✓ Bosco Ntaganda (confirmed)
Other inhumane acts <i>Article 7(i)(k)</i>	<ul style="list-style-type: none"> ✓ Uhuru Muigai Kenyatta (withdrawn) ✓ Francis Kirimi Muthaura (withdrawn) 	<ul style="list-style-type: none"> ✗ 	<ul style="list-style-type: none"> ✗ 	<ul style="list-style-type: none"> ✓ Callixte Mbarushimana (not confirmed) ✓ Mohammed Hussein Ali (not confirmed) 	<ul style="list-style-type: none"> ✗ ✗ 	<ul style="list-style-type: none"> ✗
Forced marriage ¹³² <i>Article 7(i)(k)</i>	<ul style="list-style-type: none"> ✓ Dominic Ongwen (confirmed)¹³³ 	<ul style="list-style-type: none"> ✓ Dominic Ongwen (confirmed) 	<ul style="list-style-type: none"> ✗ 	<ul style="list-style-type: none"> ✓ Dominic Ongwen (confirmed) 	<ul style="list-style-type: none"> ✗ 	<ul style="list-style-type: none"> ✓ Dominic Ongwen (confirmed)
War crimes (Article 8 of the Statute)						
Torture <i>Article 8(2)(a)(i)(ii) or 8(2)(c)(i)</i>	<ul style="list-style-type: none"> ✓ Dominic Ongwen (confirmed)¹³⁴ 	<ul style="list-style-type: none"> ✓ Sylvestre Mudacumura (outstanding arrest warrant) ✓ Dominic Ongwen (confirmed) 	<ul style="list-style-type: none"> ✗ 	<ul style="list-style-type: none"> ✓ Callixte Mbarushimana (not confirmed) ✓ Dominic Ongwen (confirmed) 	<ul style="list-style-type: none"> ✗ 	<ul style="list-style-type: none"> ✓ Dominic Ongwen (confirmed) ✓ Jean-Pierre Bemba Gombo (not confirmed)
Outrages upon personal dignity <i>Article 8(2)(b)(xxi) or 8(2)(c)(ii)</i>	<ul style="list-style-type: none"> ✓ Germain Katanga (not confirmed) ✓ Mathieu Ngudjolo Chui (not confirmed) ✓ Dominic Ongwen (confirmed) ✓ Ali Muhammad Ali Abd-Al-Rahman 'Kushayb' (outstanding arrest warrant) ✓ Abdel Raheem Muhammad Hussein (outstanding arrest warrant) 	<ul style="list-style-type: none"> ✓ Germain Katanga (not confirmed) ✓ Mathieu Ngudjolo Chui (not confirmed) ✓ Ahmad Muhammad Harun (outstanding arrest warrant) 	<ul style="list-style-type: none"> ✗ 	<ul style="list-style-type: none"> ✓ Ahmad Muhammad Harun (outstanding arrest warrant) ✓ Ali Muhammad Ali Abd-Al-Rahman 'Kushayb' (outstanding arrest warrant) 	<ul style="list-style-type: none"> ✗ 	<ul style="list-style-type: none"> ✓ Jean-Pierre Bemba Gombo (not confirmed)

Rape Article 8(2)(b)(xxii) or 8(2)(e)(vi)	✓ Mathieu Ngudjolo Chui (acquitted)	✓ Bosco Ntaganda (confirmed) ¹⁵⁶	✗	✓ Germain Katanga (acquitted) ¹⁵⁹	✗	✓ Bosco Ntaganda (confirmed)	✓ Bosco Ntaganda (confirmed)
	✓ Bosco Ntaganda (confirmed)	✓ Sylvestre Mudacumura (outstanding arrest warrant)		✓ Bosco Ntaganda (confirmed)		✓ Jean-Pierre Bemba Gombo (convicted)	
	✓ Dominic Ongwen (confirmed) ¹⁵⁵	✓ Ali Muhammad Ali Abd-Al- Rahman 'Kushayb' (outstanding arrest warrant)		✓ Calixte Mbarushimana (not confirmed)			
	✓ Abdel Raheem Muhammad Hussein (outstanding arrest warrant)	✓ Joseph Kony (outstanding arrest warrant) ¹⁵⁷		✓ Dominic Ongwen (confirmed)			
		✓ Vincent Otti (outstanding arrest warrant) ¹⁵⁸		✓ Ahmad Muhammad Harun (outstanding arrest warrant)			
		✓ Dominic Ongwen (confirmed)		✓ Ali Muhammad Ali Abd- Al-Rahman 'Kushayb' (outstanding arrest warrant)			
		✓ Ahmad Muhammad Harun (outstanding arrest warrant)					

¹⁵² At the time of writing, the charge of forced marriage as a crime against humanity has only been brought in the Ongwen case. In the Ongwen Document Containing the Charges, the Prosecution characterised forced marriage as 'an inhumane act of a character similar to the acts set out in article 7(1)(a)-(j), as a crime against humanity pursuant to articles 7(1)(k) and 25(3)(a)'. ICC-02/04-01/15-375-AnxA-Red2, p 47-48, 54-55. In the Confirmation of Charges decision, the Chamber stated that '[t]he Statute does not explicitly include 'forced marriage' as a crime within the jurisdiction of the Court' and analysed 'whether the conduct attributed to Dominic Ongwen (i.e. to have forced women to serve as "conjugal partners" to himself and other LRA fighters in the Sinia brigade) constituted an other inhumane act of a character similar to the acts set out in article 7(1)(a) to (j) intentionally causing great suffering, or serious injury to body or to mental or physical health'. The Chamber concluded that '[the conduct under consideration] constitute[d] the crime of an other inhumane act within the meaning of article 7(1)(k) of the Statute in the form of forced marriage, which differs from the other crimes with which Dominic Ongwen [was] charged, and accordingly warrant[ed] a specific separate charge, as presented by the Prosecutor'. ICC-02/04-01/15-422-Red, paras 88, 95.

¹⁵³ Ongwen is charged as exclusively responsible under Article 25(3)(a) of the Statute for one of the two counts. Regarding the other count, he is charged alternatively under the four modes of liability listed in this chart.

¹⁵⁴ Ongwen is charged as exclusively responsible under Article 25(3)(a) of the Statute for one of the two counts. Regarding the other count, he is charged alternatively under the four modes of liability listed in this chart.

¹⁵⁵ Ongwen is charged as exclusively responsible under Article 25(3)(a) of the Statute for one of the two counts. Regarding the other count, he is charged alternatively under the four modes of liability listed in this chart.

¹⁵⁶ Regarding the charge of rape against child soldiers as a war crime, Ntaganda is not charged under Article 25(3)(b) of the Statute.

¹⁵⁷ Kony faces the charge of inducing rape as a war crime.

¹⁵⁸ Otti faces the charge of inducing rape as a war crime.

¹⁵⁹ In the Confirmation of Charges decision, Katanga was charged under Article 25(3)(a) of the Statute. The mode of liability was recharacterised in the Conviction decision.

Sexual slavery Article 8(2)(b)(xxii) or 8(2)(e)(vi)	✓ Mathieu Ngudjolo Chui (acquitted) ✓ Bosco Ntaganda (confirmed) ✓ Dominic Ongwen (confirmed) ¹⁶⁰	✓ Bosco Ntaganda (confirmed) ¹⁶¹ ✓ Dominic Ongwen (confirmed)	✗	✓ Germain Katanga (acquitted) ¹⁶² ✓ Bosco Ntaganda (confirmed) ✓ Dominic Ongwen (confirmed)	✗	✗	✓ Bosco Ntaganda (confirmed) ✓ Dominic Ongwen (confirmed)
Forced pregnancy Article 8(2)(b)(xxii) or 8(2)(e)(vi)	✓ Dominic Ongwen (confirmed)	✗	✗	✗	✗	✗	✗
Other forms of sexual violence Article 8(2)(b)(xxii) or 8(2)(e)(vi)	✓ Jean-Pierre Bemba Gombo (declined to include in the Arrest Warrant)	✗	✗	✗	✗	✗	✗
Cruel treatment Article 8(2)(c)(i)	✗	✗	✗	✓ Callixte Mbarushimana (not confirmed)	✗	✗	✗
Mutilation Article 8(2)(c)(i) or 8(2)(e)(xi)	✗	✓ Sylvestre Mudacumura (outstanding arrest warrant)	✗	✓ Callixte Mbarushimana (not confirmed)	✗	✗	✗

¹⁶⁰ Ongwen is charged as exclusively responsible under Article 25(3)(a) of the Statute for one of the two counts. Regarding the other count, he is charged alternatively under the four modes of liability listed in this chart.

¹⁶¹ Regarding the charge of sexual slavery against child soldiers as a war crime, Ntaganda is not charged under Article 25(3)(b) of the Statute.

¹⁶² In the Confirmation of Charges decision, Katanga was charged under Article 25(3)(a) of the Statute. The mode of liability was recharacterised in the Conviction decision.





ICC Situations under Investigation and Cases

(16 August 2014 – 31 July 2017)

Democratic Republic of the Congo

The Situation in the DRC was the first to be investigated by the ICC, following the DRC Government's referral in March 2004.¹⁶³ In June 2004, the OTP formally opened its investigation into crimes allegedly committed within the territory since 1 July 2002.¹⁶⁴ Four of the six cases arising out of this Situation have focused on crimes committed within the Ituri district of the DRC.¹⁶⁵ In 2008, former ICC Prosecutor Luis Moreno-Ocampo indicated that his Office had started to look into the alleged commission of crimes in the North Kivu and South Kivu provinces.¹⁶⁶ The Kivus have constituted the focus of the OTP's investigations since 2008.¹⁶⁷

To date, six public arrest warrants have been issued by Pre-Trial Chamber I in the DRC Situation.¹⁶⁸ Five of these Arrest Warrants have been executed, resulting in the arrest or surrender of the following individuals into ICC custody: Thomas Lubanga Dyilo (Lubanga), Germain Katanga (Katanga), Mathieu Ngudjolo Chui (Ngudjolo), Bosco Ntaganda (Ntaganda) and Callixte Mbarushimana (Mbarushimana). The Arrest Warrant for Sylvestre Mudacumura (Mudacumura) remains outstanding. The DRC Situation was also the first in which trial proceedings were initiated, and it is the first Situation in which the Court completed trial processes, issuing a total of two convictions and one acquittal in this Situation thus far.

The Prosecutor v. Thomas Lubanga Dyilo

Lubanga, a Congolese national, was one of the founding members and President of the *Union des patriotes congolais* (UPC), a political movement operating in the Ituri district of eastern DRC, and Commander-in-Chief of its armed wing, the *Forces patriotiques pour*

¹⁶³ 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', *OTP Press Release*, ICC-OTP-20040623-59, 23 June 2004, available at <<https://www.icc-cpi.int/pages/item.aspx?name=the+office+of+the+prosecutor+of+the+international+criminal+court+opens+its+first+investigation>>.

¹⁶⁴ 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', *OTP Press Release*, ICC-OTP-20040623-59, 23 June 2004, available at <<https://www.icc-cpi.int/pages/item.aspx?name=the+office+of+the+prosecutor+of+the+international+criminal+court+opens+its+first+investigation>>.

¹⁶⁵ The four cases focusing on crimes committed in Ituri are those against Lubanga, Katanga, Ngudjolo and Ntaganda.

¹⁶⁶ 'ICC Prosecutor recalls ICC has jurisdiction over crimes against the civilian population in the Kivus', *OTP Press Release*, ICC-OTP-20081104-PR369, 4 November 2008, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=icc%20prosecutor%20recalls%20icc%20has%20jurisdiction%20over%20crimes%20against%20the%20civilian%20pop>>. See also ICC-01/04-577, para 10.

¹⁶⁷ 'Report of the International Criminal Court to the United Nations for 2008/09', 17 September 2009, A/64/356, paras 28-31.

¹⁶⁸ ICC-01/04-01/06-2-tENG; ICC-01/04-01/07-1-tENG; ICC-01/04-01/07-260-tENG; ICC-01/04-01/12-1-Red; ICC-01/04-02/06-2-Anx-tENG; ICC-01/04-01/10-2-tENG.

la libération du Congo (FPLC).¹⁶⁹ Lubanga was the first suspect to be arrested and the first accused to stand trial before the Court. The proceedings against him led to the first verdict and conviction issued by an ICC Trial Chamber on 14 March 2012.¹⁷⁰ The Lubanga case is the first case in which the implementation of reparations was ordered.¹⁷¹ At the time of writing this publication, an order for symbolic reparations had been issued and implementation by the Trust Fund for Victims (TFV) was underway.¹⁷² A number of issues remain to be determined regarding the non-symbolic forms of collective reparations in this case, specifically those relating to restitution, rehabilitation and compensation. Outstanding issues include: the approval of the collective reparations projects; determination of the status of the 442 victims who have applied for reparations; and the process for determining the eligibility of future victims who apply for reparations in this case.

Scope of charges

Crimes allegedly committed in the Ituri district of the DRC between early September 2002 and 13 August 2003.¹⁷³

Arrest warrant

Pre-Trial Chamber I¹⁷⁴ issued a warrant of arrest for Lubanga, under seal, on 10 February 2006.¹⁷⁵ The Arrest Warrant was unsealed on 17 March 2006.¹⁷⁶

Transfer to ICC custody

Lubanga was arrested by the DRC authorities, surrendered to the Court and transferred to the ICC Detention Centre on 16 and 17 March 2006.¹⁷⁷

Confirmation of charges

The Confirmation of Charges hearing was held from 9 to 28 November 2006.¹⁷⁸

Prior to this hearing, four applicants were authorised to participate as victims in the confirmation of charges proceedings.¹⁷⁹

In the lead up to the hearing, on 7 September 2006, the Women's Initiatives for Gender Justice applied for leave to submit *amicus curiae* observations in the context of the confirmation of charges proceedings.¹⁸⁰ It raised important questions regarding the role of the Pre-Trial Chamber with respect to the confirmation of charges proceedings and the power conferred upon it under Article 61(7) of the Statute. Specifically, it addressed the power pursuant to Article 61(7)(c), which provides an option for the Chamber, in the process of determining the sufficiency of evidence to confirm the charges, to adjourn the proceedings with a view to requesting the Prosecutor to consider amending a charge or

169 ICC-01/04-01/06-2842, paras 81, 1142, 1356.

170 ICC-01/04-01/06-2842.

171 ICC-01/04-01/06-3251, paras 14, 17 and p 9. See also 'Lubanga case: ICC judges approve plan on symbolic reparations', *ICC Press Release*, ICC-CPI-20161021-PR1247, 21 October 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1247>>.

172 ICC-01/04-01/06-3251, paras 14, 17 and p 9.

173 ICC-01/04-01/06-803-tEN, p 156-157. See also ICC-01/04-01/06-1573-Anx1, para 6.

174 Pre-Trial Chamber I was composed of Presiding Judge Claude Jorda (France), Judge Akua Kuenyehia (Ghana) and Judge Sylvia Steiner (Brazil).

175 ICC-01/04-01/06-2-tEN, p 5.

176 ICC-01/04-01/06-803-tEN, fn 15.

177 ICC-01/04-01/06-803-tEN, para 16.

178 ICC-01/04-01/06-803-tEN, para 30.

179 On 28 July 2006, three applicants were granted victim status, of whom two not only represented themselves, but also three additional victims, as Applicant a/0001/06 represented herself and two children, and Applicant a/0002/06 represented himself and his minor son. ICC-01/04-01/06-228-tEN, p 10, 12, 16. On 20 October 2006, another applicant, representing only him/herself, was granted victim status. ICC-01/04-01/06-601-tEN, p 13.

180 ICC-01/04-01/06-403.

providing further evidence and conducting further investigation with respect to a particular charge.¹⁸¹ The Women's Initiatives raised its concerns about the absence of charges of sexual and gender-based crimes in this case and the implications for victims of these crimes.¹⁸² It urged the Pre-Trial Chamber to satisfy itself that the Prosecutor's decision on the charges was an appropriate exercise of his discretion, particularly in light of the publicly available information on sexual and gender-based crimes and the multiple statements made by the Prosecutor about these crimes and their commission in eastern DRC and this specific investigation.¹⁸³ This was the first filing by an NGO before the ICC.¹⁸⁴

On 29 January 2007, Pre-Trial Chamber I unanimously confirmed all charges against Lubanga, as a co-perpetrator under Article 25(3)(a) of the Statute, for the war crimes of enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities.¹⁸⁵ Sexual and gender-based crimes were not among the charges included in the Prosecution's case.¹⁸⁶

Before the opening of the trial, Trial Chamber I¹⁸⁷ reconfirmed the victim status of those who had already been granted leave to participate in the confirmation of charges proceedings in this case,¹⁸⁸ and granted victim status to 93 additional applicants to participate in the trial proceedings,¹⁸⁹ amounting to a total of 97 applicants.¹⁹⁰ On 22 January 2009, Trial Chamber I issued an oral order, according to which the participating victims were to be represented in two groups (Vo1 and Vo2).¹⁹¹

Trial proceedings

During preparation for the trial, on 10 June 2008, the Prosecutor informed the Chamber that there were 156 documents from the UN containing potentially exculpatory materials that he remained unable to disclose to the Defence, due to confidentiality agreements under Article 54(3)(e) of the Statute.¹⁹² The Chamber stated that it was concerned that, under the confidentiality agreements, even the Chamber itself was excluded from reviewing these potentially exculpatory documents and that the Prosecution had failed to negotiate a remedy with the information providers for this situation.¹⁹³ On 13 June 2008, Trial Chamber I decided to stay the proceedings due to the non-disclosure of potentially exculpatory evidence by the Prosecution¹⁹⁴ and stated that as a result of the failure to disclose this material to the Defence, 'the trial process ha[d] been ruptured to such a degree that it [was] now impossible to piece together the constituent elements of a fair trial'.¹⁹⁵ The Prosecution began negotiations with those with whom it had entered into Article 54(3)(e) confidentiality agreements and, subsequently, on 14 October 2008, it submitted to the Chamber the undisclosed evidence, having received the consent from the information providers.¹⁹⁶ The Chamber conducted a review of these documents and, at a status conference on 18 November 2008, lifted the stay of proceedings and ordered the Prosecution

181 ICC-01/04-01/06-403, paras 4-8.

182 ICC-01/04-01/06-403, paras 9-19.

183 ICC-01/04-01/06-403, paras 20-21.

184 The Women's Initiatives for Gender Justice filed two requests for leave to participate as *amicus curiae* in the Article 61 confirmation of charges proceedings. Additionally, it filed on three occasions during the reparations stage of the case, and subsequently provided an oral presentation to the Chamber at the first public hearing on reparations held by the ICC. See ICC-01/04-01/06-403; ICC-01/04-313; ICC-01/04-313-Anx1; ICC-01/04-01/06-2853; ICC-01/04-01/06-2876; ICC-01/04-01/06-2993; ICC-01/04-01/06-3240-Anx14; 'Presentation to Trial Chamber II', 11 October 2016, available at <<http://4genderjustice.org/presentation-first-reparations-hearing/>>.

185 ICC-01/04-01/06-803-tEN, p 156-157.

186 ICC-01/04-01/06-1573-Anx1, p 28-29.

187 Trial Chamber I was composed of Presiding Judge Adrian Fulford (United Kingdom), Judge Elizabeth Odio Benito (Costa Rica) and Judge René Blattmann (Bolivia).

188 ICC-01/04-01/06-1556, paras 54-59.

189 91 applicants were granted victim status on 15 December 2008; another applicant was granted victim status on 18 December 2008; and one more applicant was granted victim status on 13 January 2009. ICC-01/04-01/06-1556, p 39; ICC-01/04-01/06-1562, para 13; ICC-01/04-01/06-1556-Corr, paras 2-3. It is unclear whether all 93 applicants represented only themselves in the proceedings.

190 It is unclear how many of these victims were ultimately represented by the 97 applicants.

191 ICC-01/04-01/06-T-105-ENG, p 12 lines 23-25, p 13 lines 1-12.

192 ICC-01/04-01/06-T-89-ENG, p 5 lines 8-11.

193 ICC-01/04-01/06-T-89-ENG, p 6 line 5 to p 7 line 17, p 10 lines 6-11, p 26 lines 5-12.

194 ICC-01/04-01/06-1401, paras 92-94.

195 ICC-01/04-01/06-1401, para 93.

196 ICC-01/04-01/06-1478. See also ICC-01/04-01/06-1644, paras 13, 17.

to disclose these items to the Defence.¹⁹⁷ The Prosecution complied with the order on 21 November 2008.¹⁹⁸

The trial commenced on 26 January 2009.¹⁹⁹ The Prosecution's presentation of evidence concluded on 14 July 2009 and the Defence case started on 27 January 2010 and concluded on 20 May 2011.²⁰⁰

On 22 May 2009, the Legal Representatives of Victims submitted a filing in which they requested Trial Chamber I to consider modifying the legal characterisation of the facts presented by the Prosecution, in order to add the crimes of inhuman and cruel treatment and sexual slavery to the existing characterisation.²⁰¹ The filing was prompted by the significant amount of witness testimony with respect to acts of sexual violence which had been presented to the Court. The Legal Representatives requested the Trial Chamber to utilise 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 74.²⁰² On 14 July 2009, Trial Chamber I, by majority,²⁰³ notified the parties and participants that the legal characterisation of the facts may be subject to change.²⁰⁴ After having been granted leave on 3 September 2009,²⁰⁵ the Defence and the Prosecution submitted their respective appeals against the decision on 10 and 14 September 2009.²⁰⁶ On 8 December 2009, the Appeals Chamber delivered its decision reversing the Trial Chamber decision with respect to a recharacterisation of the facts under Regulation 55.²⁰⁷

Following several instances of discrepancies and contradictions in the testimonies of former child soldier witnesses called by the Prosecution, the Defence alleged the possibility of improper conduct by intermediaries working for the Prosecution including, but not limited to, their manipulation of witnesses.²⁰⁸ On 12 May 2010, the Chamber ordered the Prosecution to disclose to the Defence, upon implementation of the necessary security measures, the name and other necessary identifying information of Intermediary 143, allegedly involved in attempting to persuade certain Prosecution witnesses to give false evidence.²⁰⁹ In this decision, the Chamber found that 'the defence [was] entitled to research whether the allegedly untrue testimony that ha[d] been given was influenced by untoward behaviour' of Intermediary 143 and, therefore, the Intermediary's identity became part of the 'material to the preparation of the defence'.²¹⁰ On 19 May 2010, the Prosecution sought leave to appeal the Chamber's ruling,²¹¹ however, this was denied by the Chamber on 2 June 2010.²¹² Subsequently, after hearing further submissions by the parties, on 6 July 2010, the Chamber ordered anew the disclosure to the Defence of the relevant information.²¹³ On 7 July 2010, the Chamber, in an oral ruling, set the deadline of the disclosure for that same day, despite the Prosecution's notification

197 ICC-01/04-01/06-1644, para 22. See also ICC-01/04-01/06-T-98-ENG, p 1 lines 9-10, p 3 line 25 to p 4 line 1.

198 ICC-01/04-01/06-1644, para 30.

199 ICC-01/04-01/06-2842, para 10(i).

200 ICC-01/04-01/06-2842, paras 10(ii), 11.

201 ICC-01/04-01/06-1891.

202 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, p 26 lines 24-25, p 27 lines 1-7; ICC-01/04-01/06-T-107-ENG, p 57 lines 4-7.

203 Judge Fulford issued a dissenting opinion on 31 July 2009. ICC-01/04-01/06-2069-Anx1.

204 ICC-01/04-01/06-2049. For more information regarding this issue, see Women's Initiatives for Gender Justice, *Gender Report Card 2009*, p 86-90, available at <http://iccwomen.org/news/docs/GRC09_web-2-10.pdf>.

205 ICC-01/04-01/06-2107, para 41.

206 ICC-01/04-01/06-2112-tENG; ICC-01/04-01/06-2120.

207 ICC-01/04-01/06-2205. For more information regarding this decision by the Appeals Chamber, see Women's Initiatives for Gender Justice, *Gender Report Card 2010*, p 129-132, available at <http://iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf>.

208 ICC-01/04-01/06-2434-Red2, paras 25, 43-45, 47.

209 ICC-01/04-01/06-2434-Conf-Exp. A public redacted version was issued on 31 May 2010. ICC-01/04-01/06-2434-Red2, paras 139, 143, 150.

210 ICC-01/04-01/06-2434-Red2, para 143.

211 ICC-01/04-01/06-2453-Conf-Exp. A public redacted version was filed on 8 June 2010. ICC-01/04-01/06-2453-Red. The Prosecution stated that the disclosure of the identity of the Intermediary would pose security risks to the person and cause severe prejudice to its investigations. ICC-01/04-01/06-2453-Red, paras 34, 40-41.

212 ICC-01/04-01/06-2463.

213 ICC-01/04-01/06-T-310-Red2-ENG, p 63 line to p 65 line 4. See also ICC-01/04-01/06-2517-Red, para 8.

of its intention to appeal.²¹⁴ The order was not complied with and on 8 July 2010, the Chamber decided to stay the proceedings for a second time due to the Prosecution's 'clearly evinced intention not to implement' the Chamber's orders, particularly regarding the confidential disclosure of the identity of Intermediary 143 to the Defence.²¹⁵ The Chamber found that, under the circumstances, a fair trial would not be possible, 'not least because the judges will have lost control of a significant aspect of the trial proceedings as provided under the Rome Statute'.²¹⁶

After imposing the stay of proceedings, the Chamber reiterated that the Prosecution's actions constituted 'a deliberate refusal to comply with [its] directions', and notified the parties of an upcoming warning of sanctions for misconduct against the Prosecutor and Deputy Prosecutor.²¹⁷

The Prosecution filed its Notice of Appeal against the decision to stay the proceedings on 14 July 2010,²¹⁸ and its Document in Support of Appeal on 30 July 2010.²¹⁹ On 8 October 2010, the Appeals Chamber²²⁰ unanimously reversed the Trial Chamber's decision and lifted the stay of proceedings.²²¹ Although the Appeals Chamber agreed with the Trial Chamber's finding that the Prosecutor had failed to comply with its orders, it found that the Trial Chamber had 'exceeded its margin of appreciation' as, according to the Appeals Chamber, the Trial Chamber 'had not yet lost control of the proceedings'. In the Appeals Chamber's view, the Trial Chamber should have imposed sanctions against the Prosecution before ordering a 'drastic' and 'exceptional' remedy such as the stay of proceedings, and that doing so would have been in the interests of the accused, the victims and the international community.²²² On the same day, the Prosecution disclosed the identity of Intermediary 143 to the Defence.²²³

Despite the warning of sanctions in July 2010, during a status conference held on 11 October 2010, the Trial Chamber declined to impose sanctions against the Prosecutor and Deputy Prosecutor in light of the fact that the Prosecution's non-compliance had been 'fully considered and resolved' by the Appeals Chamber.²²⁴

Throughout the trial, the Chamber heard 67 witnesses and sat for 204 days.²²⁵ Closing oral statements were held from 25 to 26 August 2011.²²⁶

214 ICC-01/04-01/06-T-311-Red-ENG, p 13 lines 17-25. The Chamber reasoned that 'extensive proposals were put together in order to ensure that intermediary 143 is properly and sufficiently protected'. ICC-01/04-01/06-T-311-Red-ENG, p 10 lines 23-35. The Prosecution notified the Chamber of its intention to file an application for leave to appeal at the hearing on 6 July 2010. ICC-01/04-01/06-T-310-Red2-ENG, p 8g lines 2-18.

215 ICC-01/04-01/06-2517-Red, paras 12-13, 31.

216 ICC-01/04-01/06-2517-Red, para 31. For a detailed summary of these issues, see Women's Initiatives for Gender Justice, *Gender Report Card 2010*, p 139-149, available at <http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf>.

217 ICC-01/04-01/06-T-313-ENG, p 2 lines 18-24, p 3 lines 6-16, p 4 lines 23-24. For a detailed summary of the warning of sanctions, see Women's Initiatives for Gender Justice, *Gender Report Card 2010*, p 149-150, available at <http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf>.

218 ICC-01/04-01/06-2520-Red.

219 ICC-01/04-01/06-2544-Red.

220 The Appeals Chamber was composed of Presiding Judge Sang-Hyun Song (Republic of Korea), Judge Erkki Kourula (Finland), Judge Anita Ušacka (Latvia), Judge Daniel David Ntanda Nsereko (Uganda) and Judge Sanji Mmasenono Monageng (Botswana).

221 ICC-01/04-01/06-2582, para 62.

222 ICC-01/04-01/06-2582, paras 54-55, 59-62.

223 ICC-01/04-01/06-T-316-ENG, p 2 lines 19-21. For a detailed summary of the Prosecution appeal and the Appeals Chamber's decision, see Women's Initiatives for Gender Justice, *Gender Report Card 2010*, p 150-159, available at <http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf>.

224 ICC-01/04-01/06-T-316-ENG, p 21 lines 12-18.

225 ICC-01/04-01/06-2842, para 11.

226 ICC-01/04-01/06-2842, para 11. See further Women's Initiatives for Gender Justice, 'DRC: Summary of the closing statements in *The Prosecutor v. Thomas Lubanga Dyilo*', *Legal Eye on the ICC eLetter*, October 2011, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-october-2011/>>; Women's Initiatives for Gender Justice, 'Reflection: Gender Issues and Child Soldiers – the case of *Prosecutor v Thomas Lubanga Dyilo*', 25 August 2011, available at <<http://4genderjustice.org/gender-issues-and-child-soldiers-prosecutor-v-thomas-lubanga-dyilo/>>.

On 10 July 2009, the Chamber granted victim status to another 26 applicants to participate in the trial proceedings.²²⁷ This was in addition to the 97 individuals previously granted victim status prior to the commencement of the trial. Overall, 123 applicants, involving a total of 129 victims, were authorised to participate in the trial proceedings.²²⁸ At the time of the Trial Judgment, the Chamber withdrew victim status of nine individuals due to issues of credibility.²²⁹ This reduced the overall number of participating victims to 120.

On 14 March 2012, Trial Chamber I issued a unanimous verdict convicting Lubanga, as a co-perpetrator under Article 25(3)(a) of the Statute, of the war crimes of conscripting and enlisting children under the age of 15 years into the FPLC and using them to participate actively in hostilities from early September 2002 to 13 August 2003.²³⁰

The Defence filed its Notice of Appeal against the Trial Judgment on 3 October 2012,²³¹ and its Document in Support of Appeal on 3 December 2012.²³²

The Appeals Chamber²³³ subsequently granted leave to the 120 victims who had participated in the trial proceedings,²³⁴ as well as 31 additional victims,²³⁵ to participate in the appeals proceedings against the Conviction decision, bringing the total of participating victims to 151.²³⁶

227 On 10 July 2009, six applicants, each representing only himself/herself, were granted victim status. ICC-01/04-01/06-2035, paras 30-31, 34. On 8 February 2011, 15 applicants, each representing only himself/herself, were granted victim status. ICC-01/04-01/06-2659-Corr-Red, para 41. On 25 July 2011, five applicants, each representing only himself/herself, were granted victim status. ICC-01/04-01/06-2764-Red, para 30.

228 ICC-01/04-01/06-2842, para 15 and fn 51. In the case of six victims, one of their parents, who was authorised to participate, received the same reference number as the primary victim. Three of these six victims were already identified in the confirmation of charges stage of proceedings in this case. The other three were not specified by the Chamber. See also ICC-01/04-01/06-2842, fn 53.

229 The Chamber withdrew the victim status of nine victims, of whom three were participating victims who gave testimony in court (a/0225/06, a/0229/06, a/0270/07) and six had dual status and were thus also Prosecution witnesses (P-0007, P-0008, P-0010, P-0011, P-0298 and P0299). Their victim status was withdrawn due to 'inconsistencies within and between the accounts' of the participating victims, and 'internal inconsistencies which undermine[d] th[e] credibility' of the dual status victims, including 'a real possibility' that two of them 'stole the identities' of two Defence witnesses. ICC-01/04-01/06-2842, paras 478, 499, 502, 1362-1363. For a detailed summary of the credibility of these nine victims, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 145-146, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

230 ICC-01/04-01/06-2842, para 1358. Although the verdict was rendered unanimously, Judge Fulford and Judge Odio Benito appended separate and dissenting opinions on 'particular discrete issues'. ICC-01/04-01/06-2842, para 1364. For a detailed summary of the Trial Judgment, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 132-163, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>. See also Women's Initiatives for Gender Justice, 'First Conviction by the ICC – *The Prosecutor v. Thomas Lubanga Dyilo*', 14 March 2012, available at <<http://4genderjustice.org/first-icc-conviction/>>. For a more detailed description of the Lubanga Trial Judgment, see Women's Initiatives for Gender Justice, 'DRC: Trial Chamber I convicts Lubanga of war crimes', *Legal Eye on the ICC eLetter*, March 2012, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-march-2012/>>; Women's Initiatives for Gender Justice, 'DRC: Trial Chamber I issues first trial Judgement of the ICC — Analysis of sexual violence in the Judgement', *Legal Eye on the ICC eLetter*, May 2012, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2012-first-special-issue-on-lubanga-judgement/>>; Women's Initiatives for Gender Justice, 'DRC: Lubanga Judgement — Lubanga's individual criminal responsibility', *Legal Eye on the ICC eLetter*, June 2012, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-june-2012-second-special-issue-on-lubanga-judgement/>>; Women's Initiatives for Gender Justice, 'DRC: Lubanga Judgement — the Prosecution's investigation and use of intermediaries', *Legal Eye on the ICC eLetter*, August 2012, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-august-2012-third-special-issue-on-lubanga-judgement/>>.

231 ICC-01/04-01/06-2934-tENG, para 4 and p 4.

232 ICC-01/04-01/06-2948-Red-tENG.

233 At this stage of proceedings, the Appeals Chamber was composed of Presiding Judge Erkki Kourula (Finland), Judge Sang-Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana), Judge Anita Ušacka (Latvia) and Judge Ekaterina Trendafilova (Bulgaria).

234 On 13 December 2012, the Appeals Chamber accepted the 120 victims who had participated in the trial proceedings and whose right to participate in the proceedings was not withdrawn. ICC-01/04-01/06-2951, paras 2-4 and p 3.

235 30 additional victims were granted victim status on 27 August 2013. ICC-01/04-01/06-3045-Red2, para 164 and p 3. One additional victim was granted victim status on 3 October 2013. ICC-01/04-01/06-3052-Red, p 3. It is unclear whether all 31 applicants represented only themselves in the proceedings.

236 ICC-01/04-01/06-3121-Anx3, paras 7, 15.

On 1 December 2014, the Appeals Chamber, by majority, rejected the Defence appeal and confirmed Lubanga's conviction.²³⁷

Sentencing

Trial Chamber I, by majority, sentenced Lubanga to 14 years' imprisonment on 10 July 2012.²³⁸ In total, six years and four months were deducted from his sentence for the time already spent in detention since his arrest on 16 March 2006.²³⁹

The Prosecution and Defence filed their respective Notices of Appeal against the Sentencing decision on 3 October 2012,²⁴⁰ and their respective Documents in Support of Appeal on 3 December 2012.²⁴¹

The Appeals Chamber²⁴² subsequently granted leave to the 120 victims who had participated in the trial proceedings and were recognised by the Chamber at the time of the Judgment,²⁴³ as well as 31 additional victims, to participate in these appeals proceedings.²⁴⁴ Overall, this allowed 151 victims to participate in the appeals proceedings against the Sentencing decision.

On 1 December 2014, the Appeals Chamber, by majority, dismissed all the grounds of appeal brought forward by the Prosecution and the Defence, and confirmed the Sentencing decision.²⁴⁵

Reparations

On 14 March 2012, Trial Chamber I issued a scheduling order establishing the timetable for reparations in which it invited the parties and participants, as well as other individuals or interested parties, to file submissions on reparations.²⁴⁶ Pursuant to this order, on 28 March 2012, the Office of Public Counsel for Victims (OPCV)²⁴⁷ and interested organisations, including the Women's Initiatives for Gender Justice, requested leave to submit observations.²⁴⁸

On 18 April 2012, the OPCV, the Legal Representatives of Victims Vo1 and Vo2, the Registry, the Defence and the Prosecution submitted their observations on reparations.²⁴⁹ After having been granted

237 ICC-01/04-01/06-3121-Red, para 529. Judge Song appended a partly dissenting opinion. ICC-01/04-01/06-3121-Anx1. Judge Ušacka appended a dissenting opinion. ICC-01/04-01/06-3121-Anx2. See also Women's Initiatives for Gender Justice, 'ICC Judges uphold conviction of Lubanga', 1 December 2014, available at <<http://4genderjustice.org/icc-judges-uphold-conviction-of-lubanga/>>.

238 ICC-01/04-01/06-2901, para 107. Judge Odio Benito appended a dissenting opinion. ICC-01/04-01/06-2901, para 110. See further Women's Initiatives for Gender Justice, 'First Sentencing Judgement by the ICC', 11 July 2012, available at <<http://4genderjustice.org/first-icc-sentencing-judgement/>>.

239 ICC-01/04-01/06-2901, para 108. For a more detailed description of the Lubanga Sentencing decision, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 198-205, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

240 ICC-01/04-01/06-2933; ICC-01/04-01/06-2935-tENG.

241 ICC-01/04-01/06-2950; ICC-01/04-01/06-2949-tENG.

242 At this stage of proceedings, the Appeals Chamber was still composed of Presiding Judge Erkki Kourula (Finland), Judge Sang-Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana), Judge Anita Ušacka (Latvia) and Judge Ekaterina Trendafilova (Bulgaria).

243 On 13 December 2012, the Appeals Chamber accepted the 120 victims who had participated in the trial proceedings and whose right to participate in the proceedings was not withdrawn. ICC-01/04-01/06-2951, paras 2-4 and p 3. See also ICC-01/04-01/06-3122, para 8.

244 30 additional victims were granted victim status on 27 August 2013. ICC-01/04-01/06-3045-Red2, para 164 and p 3. One additional victim was granted victim status on 3 October 2013. ICC-01/04-01/06-3052-Red, p 3. It is unclear whether all 31 applicants represented only themselves in the proceedings.

245 ICC-01/04-01/06-3122, para 119. Judge Song appended a partly dissenting opinion. ICC-01/04-01/06-3122-Anx1. In her dissent regarding the Appeals Chamber Judgment on the Defence appeal against the Conviction decision, Judge Ušacka also dissented with respect to this Judgment. ICC-01/04-01/06-3121-Anx2.

246 ICC-01/04-01/06-2844, paras 8-10.

247 ICC-01/04-01/06-2848.

248 ICC-01/04-01/06-2853. The other organisations that requested leave to file were: the International Center for Transitional Justice; the UN Children's Fund (UNICEF); *Fondation Congolaise pour la Promotion des Droits humains et la Paix* (FOCDP) jointly with the DRC Coalition for the ICC; and *Avocats Sans Frontières* (ASF) jointly with *Justice Plus, Terre des Enfants, Centre Pélican—Training For Peace and Justice/Journalistes en Action pour la Paix, Fédération des Jeunes pour la Paix Mondial*. ICC-01/04-01/06-2854; ICC-01/04-01/06-2855-Anx1-tENG; ICC-01/04-01/06-2855-Anx3; ICC-01/04-01/06-2855-Anx2-tENG.

249 ICC-01/04-01/06-2863; ICC-01/04-01/06-2864; ICC-01/04-01/06-2869; ICC-01/04-01/06-2865; ICC-01/04-01/06-2866; ICC-01/04-01/06-2867.

leave,²⁵⁰ the Women's Initiatives for Gender Justice and other organisations filed their observations on 10 May 2012.²⁵¹

On 7 August 2012, Trial Chamber I issued its decision on the principles and procedures to be applied to reparations.²⁵² The Legal Representatives of Victims Vo2 and the OPCV jointly appealed this decision on 24 August 2012;²⁵³ the Legal Representative of Victims Vo1 also appealed on 3 September 2012;²⁵⁴ and the Defence appealed the decision on 6 September 2012.²⁵⁵

On 3 March 2015, the Appeals Chamber rendered its Judgment on the appeals against the decision on the principles and procedures to be applied to reparations,²⁵⁶ and amended the Trial Chamber's decision (amended Order for Reparations) in an annex.²⁵⁷

On 3 November 2015, the TFV submitted its Filing on Reparations and the Draft Implementation Plan for collective reparations as requested by the Appeals Chamber.²⁵⁸

On 9 February 2016, a newly constituted Trial Chamber II²⁵⁹ issued a decision in which it decided to defer its approval of the Draft Implementation Plan considering it 'incomplete' and that it did 'not comply' with the instructions of the Trial and Appeals Chambers.²⁶⁰ The Chamber expressed its awareness regarding the difficulties associated with identifying potentially eligible victims for reparations and the repercussions for these victims, and 'generally consider[ed]' the TFV's proposals to be 'in line with the modalities of reparations ordered by the Appeals Chamber'.²⁶¹ However, the Chamber required additional information and instructed the TFV to: (1) initiate the victims' identification process and prepare a file for each potential victim containing identification documents, the interviews, and the TFV's conclusions on their status as victims, the extent of the harm suffered and other relevant factors, to be transmitted to the Chamber;²⁶² (2) submit proposals regarding the anticipated monetary amount of Lubanga's liability and the necessary amount the TFV intends to advance to remedy the

²⁵⁰ ICC-01/04-01/06-2870, para 22.

²⁵¹ ICC-01/04-01/06-2876; ICC-01/04-01/06-2877-tENG; ICC-01/04-01/06-2878; ICC-01/04-01/06-2879. For more information on the *amicus curiae* observations by the Women's Initiatives for Gender Justice, see 'DRC: Lubanga Judgement — the Women's Initiatives submits observations in reparations proceedings in the Lubanga case', *Legal Eye on the ICC eLetter*, December 2012, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-december-2012-fourth-special-issue-on-lubanga-judgement/>>.

²⁵² ICC-01/04-01/06-2904. See also Women's Initiatives for Gender Justice, 'Statement on the first Reparations Decision by the ICC', 10 August 2012, available at <<http://4genderjustice.org/first-icc-reparations-decision-premiere-decision-de-la-cpi-sur-les-reparations/>>. For a more detailed description of the Lubanga Reparations decision, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 206-223, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

²⁵³ ICC-01/04-01/06-2909-tENG.

²⁵⁴ ICC-01/04-01/06-2914-tENG.

²⁵⁵ ICC-01/04-01/06-2917-tENG.

²⁵⁶ ICC-01/04-01/06-3129.

²⁵⁷ ICC-01/04-01/06-3129-AnxA. See also Women's Initiatives for Gender Justice, 'ICC issues first appeal judgment on reparations', 3 March 2015, available at <<http://4genderjustice.org/icc-issues-first-appeal-judgment-on-reparations-in-the-lubanga-case/>>; Women's Initiatives for Gender Justice, 'DRC: Appeals Chamber Decision on Reparations in the Lubanga case', *Legal Eye on the ICC eLetter*, June 2015, available at <<http://4genderjustice.org/publications/eletters/june-2015-issue-of-legal-eye-on-the-icc/>>. On 8 March 2013, the Women's Initiatives, as well as four other organisations, had requested leave to submit *amicus curiae* observations on the issues arising out of the appeals against the Trial Chamber's decision of 7 August 2012. ICC-01/04-01/06-2993; ICC-01/04-01/06-2994-tENG. The Appeals Chamber denied the requests from all these organisations to submit observations. ICC-01/04-01/06-3129, paras 248-251.

²⁵⁸ ICC-01/04-01/06-3177-Red; ICC-01/04-01/06-3177-AnxA.

²⁵⁹ On 17 March 2015, following the Appeals Chamber's Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations', according to which 'a newly constituted Chamber will have the authority to approve the draft implementation plan', the ICC Presidency referred the case to Trial Chamber II, composed of Presiding Judge Marc Perrin de Brichambaut (France), Judge Olga Herrera Carbuca (Dominican Republic) and Judge Péter Kovács (Hungary). ICC-01/04-01/06-3131, p 3; ICC-01/04-01/06-3129, para 240.

²⁶⁰ ICC-01/04-01/06-3198-tENG, para 10.

²⁶¹ ICC-01/04-01/06-3198-tENG, paras 13, 20, 25.

²⁶² ICC-01/04-01/06-3198, paras 15, 17. The TFV was instructed to submit the files of potentially eligible victims in three batches: the first one on 31 March 2016 (this deadline was extended to 31 May 2016), the second on 15 July 2016 and the third list on 31 December 2016, at the latest. ICC-01/04-01/06-3198, para 18 and p 12; ICC-01/04-01/06-3205-tENG.

harm caused;²⁶³ and (3) propose a set of collective reparations programmes, as well as the specific terms of reference of each programme, including a precise cost evaluation.²⁶⁴ The Chamber indicated it would examine the proposed collective reparations programmes 'once it ha[d] considered the first batch of files' regarding potentially eligible victims, and reserved the right to approve the most appropriate and balanced programmes.²⁶⁵

On 7 June 2016, the TFV submitted additional information regarding the development and implementation of its proposed collective reparations programmes, indicating that it had 'worked as diligently and efficiently as possible to obtain and provide the Trial Chamber with the requested additional information'.²⁶⁶ However, the TFV noted that its 'ability to provide the degree of detail requested [was] necessarily limited by certain procedural and operational realities from which the Trust Fund [could not] deviate'.²⁶⁷

Specifically, the TFV considered that the 'individualised victim eligibility approach' set out by the Trial Chamber 'fundamentally affect[ed] a key component of collective reparations programming' and 'fundamentally undermin[ed] the viability of the Draft Implementation Plan as presented on 3 November 2015'.²⁶⁸ In the TFV's view, linking the approval of the collective reparations programmes to the individual victim eligibility outcome resulted in 'programmatically uncertainty' and negatively affected the TFV's ability to provide the information to the degree specified by the Chamber's order.²⁶⁹ Moreover, the TFV expressed concern regarding other consequences of the Chamber's approach, namely: (1) that few potential victims are willing to consent to revealing their identity to the convicted person due to security concerns and, consequently, will not be eligible to benefit from collective reparations;²⁷⁰ (2) that a negative impact on victim participation is caused by the 'requirement to conduct an upfront harm assessment outside of a safe counselling setting', the 'lack of an approved plan to present to the victims', and the 'disruption to the victims' lives caused by completing the entirety of the protracted process';²⁷¹ and (3) that more time will be needed 'to accumulate different programming information, such as the number of victims, types of injuries, victim locations, and other information'.²⁷² The TFV also stated that the Trial Chamber had 'thus far [...] not addressed its position regarding symbolic interventions and programs aimed at promoting reconciliation and non-repetition'.²⁷³

The OPCV, the Legal Representatives of Victims Vo1 and Vo2 and the Defence submitted observations on the additional information provided by the TFV on 1 July 2016.²⁷⁴

On 15 July 2016, noting that the TFV had 'refrained from providing the Chamber with concrete information about particular projects concerning symbolic reparations', and highlighting that it had not ruled out the possibility of approving such reparations, Trial Chamber II requested the TFV to 'study the feasibility of developing a concrete project aiming at providing prompt symbolic reparations' and to submit concrete information regarding: (1) the estimated costs of such a project; (2) the timeframe

263 ICC-01/04-01/06-3198, para 25.

264 ICC-01/04-01/06-3198, paras 21-22. The TFV was to submit the set of programmes by 7 May 2016, which, according to the Chamber, must be designed to allow the participation of as many victims as possible and must be geared towards the direct and indirect victims of the crimes for which Lubanga was convicted, placing a particular emphasis on the gender-specific consequences of these crimes. ICC-01/04-01/06-3198, para 21.

265 ICC-01/04-01/06-3198, para 23.

266 ICC-01/04-01/06-3209, paras 7-8.

267 ICC-01/04-01/06-3209, para 9.

268 ICC-01/04-01/06-3209, paras 6, 16-17.

269 ICC-01/04-01/06-3209, para 9. Amongst the information requested by the Chamber, the TFV was not able to propose any 'realistic further detail of programme design, planning and implementation' nor to provide the information on the 'specific terms of reference for potential programme elements and on the "precise evaluation" of the cost of each proposed programme element or time limits for their implementation'. ICC-01/04-01/06-3209, paras 24, 29.

270 ICC-01/04-01/06-3209, para 25.

271 ICC-01/04-01/06-3209, para 25. The TFV expressed concern regarding the 'significantly lower number of victims' who would be able to benefit from reparations compared to the number that the TFV had estimated at the time of the Draft Implementation Plan, including the possible exclusion of 'particular vulnerable victims such as female victims or victims who are still stigmatized today because of the harm they suffered'. ICC-01/04-01/06-3209, para 17.

272 ICC-01/04-01/06-3209, para 27.

273 ICC-01/04-01/06-3209, para 65.

274 ICC-01/04-01/06-3212; ICC-01/04-01/06-3213; ICC-01/04-01/06-3214; ICC-01/04-01/06-3211-Corr.

for its completion; and (3) any concrete proposal(s) related to this matter.²⁷⁵ In compliance with the request, on 19 September 2016, the TFV submitted the requested information aimed at providing symbolic reparations in the Lubanga case.²⁷⁶

Also on 15 July 2016, in order to be able to determine the types of reparation projects to be implemented in this case, the Chamber invited 'States concerned, as well as any organisations which so wish[ed]', to file submissions 'in writing and, where applicable, at [a] public hearing'.²⁷⁷ Between 26 September and 3 October 2016, several organisations, including the Women's Initiatives for Gender Justice, submitted *amicus curiae* observations on reparations in the Lubanga case.²⁷⁸

On 11 and 13 October 2016, the Chamber held the ICC's first public hearing on reparations, in the presence of the parties, the TFV and the Registry.²⁷⁹ The Women's Initiatives for Gender Justice was one of only two organisations granted leave to appear before the Chamber during this hearing, along with Child Soldiers International.²⁸⁰

On 21 October 2016, the Chamber approved and ordered the commencement of the implementation of the plan for symbolic reparations.²⁸¹ On 8 December 2016, the Chamber further ordered the TFV to submit information regarding collective reparations,²⁸² for non-symbolic reparations. Subject to receiving more information, the Chamber stated that it was willing to consider the 'two-stage process for collective reparations awards' proposed by the TFV during the October 2016 hearing on reparations.²⁸³ The TFV was thus instructed to file written submissions regarding the first stage proposed, particularly concrete and sufficient information on the projects for collective reparations in terms of timeframe, project components, method of implementation and draft proposals.²⁸⁴

On 13 February 2017, the TFV responded to the Order and submitted information to the Chamber regarding how it intends to allocate € 1 million as set aside by its Board of Directors for reparations in

275 ICC-01/04-01/06-3219, paras 10, 12 and p 8.

276 ICC-01/04-01/06-3223-Red.

277 ICC-01/04-01/06-3217-tENG, paras 6-8 and p 7.

278 ICC-01/04-01/06-3240-Anx14. The other *amicus curiae* observations were submitted by: *Fédération des Jeunes pour la Paix Mondiale* (ICC-01/04-01/06-3240-Anx1); *Association pour la réconciliation et la paix en Ituri* (ICC-01/04-01/06-3240-Anx2); *Réseau des Associations des Droits de l'Homme de l'Ituri* (ICC-01/04-01/06-3240-Anx3); *Ligue pour la Paix et les Droits de l'Homme* (LIPADHO) (ICC-01/04-01/06-3240-Anx4); *Actions Féminines pour la Défense des Droits de l'Homme* (ICC-01/04-01/06-3240-Anx5); the Bunia chapter of LIPADHO (ICC-01/04-01/06-3240-Anx6); *Terre des Enfants* (ICC-01/04-01/06-3240-Anx7); Dr Shannon Golden (Center for Victims of Torture), Mr Craig Higson-Smith (Center for Victims of Torture), Professor Fionnuala Ní Aoláin (University of Minnesota) and Dr Norbert Wühler (World Intellectual Property Organization Appeal Board) (ICC-01/04-01/06-3240-Anx9); Child Soldiers International (ICC-01/04-01/06-3240-Anx10); a non-specified individual (ICC-01/04-01/06-3240-Anx11); a non-specified source (ICC-01/04-01/06-3240-Anx12); another non-specified individual (ICC-01/04-01/06-3240-Anx13-Red); and the UN Organization Stabilization Mission in the DRC (MONUSCO) (ICC-01/04-01/06-3240-Anx15). See ICC-01/04-01/06-3240-tENG, paras 5-11, 13; ICC-01/04-01/06-3245-tENG, para 3.

279 ICC-01/04-01/06-3245-tENG, p 6-8.

280 ICC-01/04-01/06-3240-Anx14, para 41; ICC-01/04-01/06-3245-tENG, para 5 and p 6, 8. The Women's Initiatives presented its views on reparations issues and the harm caused to victims of the crimes for which Lubanga was convicted. The Women's Initiatives also proposed specific symbolic, transformative and preventative forms of reparations relevant to this case and context. The presentation strongly focused on the significant security concerns expressed by victims with respect to participating in the reparations process. To read the presentation by the Women's Initiatives for Gender Justice, see 'Presentation to Trial Chamber II', 11 October 2016, available at <<http://4genderjustice.org/presentation-first-reparations-hearing/>>. For a video summary of the reparations hearing, see 'Video of ICC Reparations Hearing in Lubanga case', 18 October 2016, available at <<http://4genderjustice.org/video-icc-reparations-hearing-lubanga-case/>>.

281 ICC-01/04-01/06-3251, paras 14, 17 and p 9. See also 'Lubanga case: ICC judges approve plan on symbolic reparations', *ICC Press Release*, ICC-CPI-20161021-PR1247, 21 October 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1247>>.

282 ICC-01/04-01/06-3262.

283 ICC-01/04-01/06-3262, paras 12-13. During the Reparations hearing on 13 October 2016, the TFV proposed a two-stage approval process for collective reparations. The first stage entailed the Draft Implementation Plan, containing the overall programmatic framework and a detailed set of project frameworks along the lines developed by the TFV for the symbolic reparations plan. The second stage consists of the actual awards, in the form of projects resulting from the procurement procedure managed by the TFV, and might include fine-tuning of successful projects to make them responsive to the overall plan. ICC-01/04-01/06-T-368-Red-ENG, p 27 lines 11-23.

284 ICC-01/04-01/06-3262, para 13 and p 7.

the Lubanga case over three years.²⁸⁵ The TFV proposed to allocate € 100,000 to the contracting services in support of victim identification and harm assessment, and € 170,000 to the implementation of the symbolic reparations component. The remaining € 730,000 is for the implementation of the service-based components of the collective reparations programme: € 292,000 for psychological rehabilitation, € 146,000 for physical rehabilitation and € 292,000 for socio-economic measures.²⁸⁶

By 15 June 2017, the Registry had received 386 victims' reparations forms from the OPCV and 56 from the TFV, which it transmitted to the Chamber for it to decide on victim participation in the reparations proceedings.²⁸⁷

At the time of writing this publication, no decision had been made on Lubanga's financial liability. In addition, decisions from the Chamber approving the collective reparations projects, determining the status of the 442 victims who have applied for reparations, and determining the eligibility of victims who are still to apply for reparations are still pending.²⁸⁸

Status of proceedings

On 19 December 2015, Lubanga was transferred to a prison facility in the DRC to serve his sentence of imprisonment.²⁸⁹

At the time of writing this publication, the case is at the reparations stage.

The Prosecutor v. Germain Katanga

Katanga, a Congolese national, was the President of the Ituri-based Ngiti militia from Walendu-Bindi, also known at the time of the crimes as the *Force de résistance patriotique en Ituri* (FRPI), at least from early February 2003. He also bore the title of Commander or Chief of Aveda.²⁹⁰ This case was joined with that against Ngudjolo prior to the Confirmation of Charges hearing²⁹¹ and subsequently severed prior to the Trial Judgment.²⁹² The joint case against Katanga and Ngudjolo constituted the ICC's second case and led to the second trial arising from the DRC Situation. This was the first case in which charges of sexual and gender-based crimes, specifically rape and sexual slavery, were confirmed. This was also the first case in which an accused was partially acquitted for charges at the time of the Judgment, specifically relating to the allegations of sexual violence. The Katanga case is the first case for which a reparations order, inclusive of both collective and individual reparations, was issued.²⁹³

²⁸⁵ ICC-01/04-01/06-3273.

²⁸⁶ ICC-01/04-01/06-3273, paras 69-73. In its presentation to the Chamber during the public hearing on reparations in the Lubanga case, the Women's Initiatives for Gender Justice advocated for a budget of € 200,000 to € 300,000 per year for three to five years for symbolic reparations and € 1.3 to € 1.5 million per year for non-symbolic reparations programmes to be implemented over a five-year period. For the transcript of the hearing, see ICC-01/04-01/06-T-367-ENG, p 22 lines 20-25, p 23 lines 1-8. See also, Women's Initiatives for Gender Justice, 'Presentation to Trial Chamber II', 11 October 2016, p 16-17, available at <<http://4genderjustice.org/presentation-first-reparations-hearing/>>.

²⁸⁷ ICC-01/04-01/06-3329, paras 23-24.

²⁸⁸ ICC-PIDS-CIS-DRC-01-015/16_Eng.

²⁸⁹ 'Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment', *ICC Press Release*, ICC-CPI-20151219-PR1181, 19 December 2015, available at <<https://www.icc-cpi.int/pages/item.aspx?name=PR1181>>.

²⁹⁰ ICC-01/04-01/07-3436-tENG, paras 1334, 1359-1361, 1365. See also ICC-01/04-01/07-3484-tENG, para 66.

²⁹¹ ICC-01/04-01/07-307, p 11.

²⁹² ICC-01/04-01/07-3319-tENG/FRA, p 30.

²⁹³ ICC-01/04-01/07-3728-tENG, para 168 and p 118.

Scope of charges

Crimes allegedly committed during and in the aftermath of the 24 February 2003 attack on the village of Bogoro in the Ituri district, DRC.²⁹⁴

Arrest warrant

Pre-Trial Chamber I²⁹⁵ issued an arrest warrant for Katanga, under seal, on 2 July 2007. The Arrest Warrant was unsealed on 18 October 2007.²⁹⁶

Transfer to ICC custody

Katanga was surrendered to the Court by the Congolese authorities and was transferred to the ICC Detention Centre on 17 October 2007.²⁹⁷

Confirmation of charges

Considering Katanga's and Ngudjolo's alleged co-responsibility for the alleged crimes and that all supporting materials and evidence related to both accused, on 10 March 2008, Pre-Trial Chamber I joined the cases against Katanga and Ngudjolo.²⁹⁸

Prior to the start of the confirmation of charges proceedings, the charges against Katanga and Ngudjolo changed with charges relating to sexual violence being withdrawn and later reinstated in an expanded form.²⁹⁹ At issue was the action taken by the Prosecution in 'preventively relocating' two witnesses whom it believed faced a 'concrete risk that they are exposed to as a consequence of their cooperation with the Prosecution'.³⁰⁰ On 21 April 2008, the Single Judge of Pre-Trial Chamber I³⁰¹ ordered that the evidence provided by these two witnesses, which significantly underpinned the sexual violence charges in this case, specifically sexual slavery as a war crime and as a crime against humanity, was inadmissible.³⁰² This order was issued as part of a decision concluding that only the Registry had the power to relocate witnesses, and that the Prosecution did not have the authority under the Statute to take the action it had taken with respect to the two witnesses.³⁰³ The Single Judge ruled that the exclusion of the evidence regarding these witnesses was the 'appropriate remedy for the Prosecution's unauthorised preventive relocation'.³⁰⁴ She also ordered that the two witnesses 'shall immediately be put under the supervision of the Registrar, who will decide upon the appropriate protective measures to be taken in relation to them'.³⁰⁵

The Prosecution subsequently decided to withdraw the sexual slavery charges from the list of charges to be confirmed.³⁰⁶ The Prosecution argued that, without the evidence provided by the two witnesses, charges of sexual violence became 'insufficiently substantiated',³⁰⁷ and that the 'possibility of the crimes of sexual slavery, rape and outrages upon personal dignity forming part of the proper scope of the trial [was] undermined'.³⁰⁸

294 ICC-01/04-01/07-717, paras 263, 284, 307, 326, 338, 354, 364, 377, 576, 578-580.

295 Pre-Trial Chamber I was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Anita Ušacka (Latvia) and Judge Sylvia Steiner (Brazil).

296 ICC-01/04-01/07-1-tENG, p 7.

297 ICC-01/04-01/07-717, para 42. See also 'Statement by the Women's Initiatives for Gender Justice on the Arrest of Germain Katanga', 20 October 2007, available at <<http://4genderjustice.org/democratic-republic-of-the-congo-arrest-of-germain-katanga/>>.

298 ICC-01/04-01/07-307, p 6, 11.

299 For more information on this issue, see Women's Initiatives for Gender Justice, *Gender Report Card 2008*, p 47-48, available at <http://iccwomen.org/news/docs/GRC08_web4-09_v3.pdf>.

300 ICC-01/04-01/07-453, para 40.

301 The Single Judge, acting on behalf of Pre-Trial Chamber I, was Judge Sylvia Steiner (Brazil).

302 ICC-01/04-01/07-411. The publicly available version of this decision is dated 25 April 2008, and is numbered ICC-01/04-01/07-428, p 55.

303 ICC-01/04-01/07-428, para 32.

304 ICC-01/04-01/07-428, para 39.

305 ICC-01/04-01/07-428, para 40.

306 ICC-01/04-01/07-422, paras 5-6. If the sexual violence charges had not been confirmed following the Confirmation of Charges hearing, the Prosecution would not have been able to proceed with them at trial.

307 ICC-01/04-01/07-453, para 25.

308 ICC-01/04-01/07-453, para 30.

The issue was resolved when the two witnesses were admitted into the Court's witness protection programme. New charges were then filed by the Prosecution against both Katanga and Ngudjolo in an Amended Document Containing the Charges on 12 June 2008, including two counts of sexual slavery, two counts of rape, and one count of outrages upon personal dignity.³⁰⁹ Pursuant to a Pre-Trial Chamber order requesting clarification of certain parts of the charges,³¹⁰ the final charges against the two suspects were filed by the Prosecution on 26 June 2008, including five counts of sexual and gender-based violence charges.³¹¹

The Confirmation of Charges hearing was held from 27 June to 16 July 2008.³¹²

Prior to this hearing, the Chamber granted victim status to 57 applicants to participate in the pre-trial proceedings.³¹³

On 30 September 2008, Pre-Trial Chamber I confirmed seven counts of war crimes (wilful killing, sexual slavery, rape, intentionally directing an attack against a civilian population, destroying the enemy's property, pillaging, and using children under the age of 15 years to participate actively in hostilities) and three counts of crimes against humanity (murder, sexual slavery, and rape) against Katanga and Ngudjolo. This was the first time that charges of sexual and gender-based crimes were confirmed by an ICC Pre-Trial Chamber. Of the charges confirmed, all were confirmed unanimously, except for the charges of rape and sexual slavery as war crimes and crimes against humanity, which were confirmed by the majority of the Chamber.³¹⁴

The Chamber, by majority, declined to confirm the charge of other inhumane acts as a crime against humanity,³¹⁵ and unanimously declined to confirm the charges of inhuman treatment and outrages upon personal dignity as war crimes.³¹⁶ Both accused were charged as direct co-perpetrators under Article 25(3)(a) for the crime of using children to participate actively in hostilities, and as indirect co-perpetrators under Article 25(3)(a) of the Statute for all other crimes.³¹⁷

On 26 February 2009, Trial Chamber II³¹⁸ authorised the victims who had participated at the pre-trial stage to also participate in the trial proceedings.³¹⁹ Prior to the start of the trial, 302 additional applicants

309 ICC-01/04-01/07-584; ICC-01/04-01/07-584-Anx1A.

310 ICC-01/04-01/07-648.

311 ICC-01/04-01/07-649; ICC-01/04-01/07-649-Anx1A.

312 ICC-01/04-01/07-717, para 59.

313 ICC-01/04-01/07-1788-tENG, para 1. On 2 April 2008, five applicants were granted leave to participate as victims in the pre-trial proceedings. ICC-01/04-01/07-357, p 13. On 10 June 2008, 51 applicants were granted leave to participate as victims in the pre-trial proceedings. ICC-01/04-01/07-579, p 51-52; ICC-01/04-01/07-589. On 23 June 2008, one additional applicant was granted leave to participate as victim in the pre-trial proceedings. ICC-01/04-01/07-632, p 14.

314 ICC-01/04-01/07-717, p 209-212. Judge Ušacka appended a partly dissenting opinion. ICC-01/04-01/07-717, p 214-226. For a detailed description of the modes of liability charged at this stage of proceedings in this case, see 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 29-58, 60-73, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

315 ICC-01/04-01/07-717, p 212. Judge Ušacka appended a partly dissenting opinion. ICC-01/04-01/07-717, p 224-226.

316 ICC-01/04-01/07-717, p 211-212. The charge of outrages upon personal dignity was based on allegations that militia members attacked and forced a partially dressed woman to walk through the centre of Bogoro. ICC-01/04-01/07-717, paras 373-377. For a detailed description of the modes of liability charged at this stage of proceedings in this case, see 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 29-58, 60-73, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

317 ICC-01/04-01/07-717, paras 489-492, 519, 574-576, 579-580 and p 209-212. For more information on direct and indirect co-perpetration as part of the four modes of liability under Article 25(3)(a) of the Statute, see 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 29-58, 60-73, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

318 At this stage of proceedings, Trial Chamber II was composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Fumiko Saiga (Japan).

319 ICC-01/04-01/07-933-tENG, p 23.

were authorised to participate in the trial proceedings,³²⁰ bringing the number of participating victims to 359.³²¹

On 22 July 2009, the Chamber issued an order on the common legal representation of victims, establishing two groups: a principal group of victims and a group of child soldier victims.³²²

Trial proceedings

The trial commenced on 24 November 2009.³²³ The Prosecution's presentation of evidence started on 25 November 2009 and concluded on 8 December 2010.³²⁴ The overall presentation of evidence by the Defence commenced on 24 March 2011 and concluded on 11 November of that year.³²⁵ The presentation of evidence was declared officially closed on 7 February 2012, after the Chamber conducted a judicial site visit to the DRC on 18 and 19 January 2012.³²⁶

Overall, 54 witnesses were heard and the Trial Chamber sat for 265 days.³²⁷ Significantly, both accused testified under oath during the trial.³²⁸ The closing statements, including unsworn oral statements by Katanga and Ngudjolo, were held from 15 to 23 May 2012.³²⁹

During the course of the trial, seven additional applicants were authorised to participate as victims in the trial proceedings,³³⁰ bringing the total number of participating victims to 366.³³¹ However, victim status was withdrawn from two individuals on 7 July 2011,³³² thereby reducing the number of victims participating in the trial proceedings to 364.

On 21 November 2012, Trial Chamber II unanimously severed the case against Katanga and Ngudjolo, based on the Chamber's intention to possibly recharacterise the mode of liability only with respect to Katanga, which would prolong the proceedings and potentially cause 'serious prejudice' to Ngudjolo.³³³ The Chamber also ruled that participating victims were authorised to continue participating in both of the severed proceedings.³³⁴

320 ICC-01/04-01/07-1788-tENG, paras 8, 12. On 31 July 2009, 288 applicants were authorised to participate as victims in the trial proceedings. ICC-01/04-01/07-1347-Corr-tENG, p 5-7. On 23 November 2009, 14 additional victims were authorised to participate in the trial proceedings. ICC-01/04-01/07-1669-tENG, p 6.

321 See ICC-01/04-01/07-1788-tENG, para 42.

322 ICC-01/04-01/07-1328, p 13; ICC-01/04-01/07-1488, p 5.

323 ICC-PIDS-CIS-DRC-03-014/17_Eng. See also 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', *ICC Press Conference*, 23 November 2009, available at <<http://4genderjustice.org/statement-by-the-womens-initiatives-for-gender-justice-on-the-opening-of-the-icc-trial-of-katanga-and-ngudjolo/>>; Women's Initiatives for Gender Justice, 'DRC: ICC's second trial opens against Germain Katanga and Mathieu Ngudjolo Chui', *Legal Eye on the ICC eLetter*, May 2010, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2010/>>.

324 ICC-01/04-01/07-3436-tENG, para 20; ICC-01/04-01/07-T-230-ENG, p 69 lines 12-16.

325 ICC-01/04-01/07-T-240-Red-ENG, p 3 lines 5-6; ICC-01/04-01/07-3436-tENG, para 20. The Katanga Defence team called its witnesses between 24 March and 12 July 2011. ICC-01/04-01/07-T-240-Red-ENG, p 3 lines 5-6; ICC-01/04-01/07-T-290-Red-ENG, p 67 lines 14-15, p 71 lines 12-22. The Ngudjolo Defence team called its witnesses between 15 August and 16 September 2011. ICC-01/04-01/07-T-290-Red-ENG, p 72 lines 1-4; ICC-01/04-01/07-T-313-ENG, p 28 lines 19-22.

326 ICC-01/04-01/07-3235-tENG, para 3 and p 4.

327 ICC-01/04-01/07-3436-tENG, para 21.

328 Katanga testified over the course of ten hearings between 27 September and 19 October 2011, and Ngudjolo testified over the course of seven hearings between 27 October and 11 November 2011. ICC-01/04-01/07-3436-tENG, fn 47.

329 ICC-01/04-01/07-3436-tENG, para 23; ICC-01/04-02/12-3-tENG, para 25.

330 On 17 March 2010, the Chamber authorised three applicants to participate as victims in the trial proceedings. ICC-01/04-01/07-2516-tENG. On 8 November 2010, two more applicants were authorised. ICC-01/04-01/07-2516-tENG. On 9 February 2011, another two applicants were authorised to participate. ICC-01/04-01/07-2693.

331 ICC-01/04-01/07-3436-tENG, para 36.

332 ICC-01/04-01/07-3064-tENG, p 22. Following interviews with the two victims, the Legal Representative decided to remove them from the list of victims authorised to appear before the Trial Chamber, indicating 'serious doubts as to the veracity of their accounts'. ICC-01/04-01/07-3064-tENG, paras 42-45.

333 ICC-01/04-01/07-3319-tENG/FRA, paras 59-63 and p 30.

334 ICC-01/04-01/07-3319-tENG/FRA, para 64.

On 7 March 2014, Trial Chamber II,³³⁵ by majority, convicted Katanga as an accessory under Article 25(3)(d) of: murder, directing an attack against a civilian population, pillaging, destruction of property as war crimes; and murder as a crime against humanity.³³⁶ However, he was unanimously acquitted as an accessory under Article 25(3)(d) for rape and sexual slavery as war crimes and crimes against humanity. He was also unanimously acquitted as a direct co-perpetrator under Article 25(3)(a) of the Statute for the war crime of using children under the age of 15 years to participate actively in hostilities.³³⁷

In this decision, the Chamber took the unprecedented step of using Regulation 55 of the Regulations of the Court to modify the legal characterisation of the facts such as: (1) that the armed conflict connected to the charges was not of an international character at the time of the Bogoro attack; and (2) the mode of liability under which Katanga was charged.³³⁸

Katanga was initially charged under Article 25(3)(a) as a direct co-perpetrator for the crime of using child soldiers and as an indirect co-perpetrator for all other crimes. However, the majority of the Chamber changed the mode of liability to accessory under Article 25(3)(d) for all crimes except the use of children under the age of 15 years to actively participate in hostilities.³³⁹

Both the Prosecution and the Defence filed their Notices of Appeal against the Trial Judgment on 9 April 2014.³⁴⁰ While the Defence intended to appeal the decision in its entirety,³⁴¹ the Prosecution's appeal focused on Katanga's acquittal for the charges of rape and sexual slavery as war crimes and crimes against humanity, as well as the legal, procedural and factual findings that led to those acquittals.³⁴² As later noted by the Legal Representative of the child soldier Victims, the Prosecution did not appeal Katanga's acquittal for the charge of using children under the age of 15 years to participate

335 At the time of the delivery of the Trial Judgment, Trial Chamber II was still composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Christine Van den Wyngaert (Belgium).

336 ICC-01/04-01/07-3436-tENG, p 658-659. Judge Van den Wyngaert appended a partially dissenting opinion. ICC-01/04-01/07-3436-AnxI. Judge Diarra and Judge Cotte appended a concurring opinion. ICC-01/04-01/07-3436-AnxII-tENG.

337 ICC-01/04-01/07-3436-tENG, p 658-659. See also Women's Initiatives for Gender Justice, 'Partial Conviction of Katanga by ICC', 7 March 2014, available at <<http://4genderjustice.org/katanga-partial-conviction-acquittal-for-sexual-violence>>. For more information on Katanga's Trial Judgment, in particular his acquittal of sexual and gender-based crimes, see Women's Initiatives for Gender Justice presentation at panel discussion on 'First Reflections on the ICC Katanga Judgement', 12 March 2014, T.M.C. Asser Institute (The Hague); Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, speech at expert panel on 'Prosecuting Sexual Violence in Conflict', 11 June 2014, Global Summit to End Sexual Violence in Conflict (London), available at <<http://www.iccwomen.org/documents/Global-Summit-Speech.pdf>>; Women's Initiatives for Gender Justice, 'DRC: ICC partially convicts Katanga in third Trial Judgement, acquitting Katanga of rape and sexual slavery', *Legal Eye on the ICC eLetter*, May 2014, available at <<http://iccwomen.org/WI-LegalEye5-14/LegalEye5-14.html>>; Women's Initiatives for Gender Justice, 'DRC: Katanga's criminal responsibility as an accessory, his acquittal for sexual and gender-based crimes and the Dissenting Opinion of Judge Van den Wyngaert', *Legal Eye on the ICC eLetter*, May 2015, available at <<http://4genderjustice.org/publications/eletters/may-2015-issue-of-legal-eye-on-the-icc/>>. See further Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 158-193, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>; Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 92-104, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>; Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 224-247, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>; Women's Initiatives for Gender Justice, *Gender Report Card 2011*, p 225-233, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2011.pdf>>.

338 ICC-01/04-01/07-3436-tENG, p 658-659. The Chamber had given notice to the parties and participants on 17 December 2012 that it planned to invoke Regulation 55 of the Regulations of the Court concerning a possible legal recharacterisation of Katanga's mode of liability from Article 25(3)(a) to common purpose liability under Article 25(3)(d) of the Statute. ICC-01/04-01/07-3319-tENG/FRA, p 29. See further 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 77-78, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

339 ICC-01/04-01/07-3436-tENG, p 658. See also Women's Initiatives for Gender Justice, 'DRC: Trial Chamber II's findings on Katanga's liability as an indirect co-perpetrator and interpretation of indirect perpetration and accessory liability', *Legal Eye on the ICC eLetter*, April 2015, available at <<http://4genderjustice.org/publications/eletters/march-2015-issue-of-legal-eye-on-the-icc/>>.

340 ICC-01/04-01/07-3462; ICC-01/04-01/07-3459.

341 ICC-01/04-01/07-3459, para 4.

342 ICC-01/04-01/07-3462, para 3.

actively in hostilities, which it described as a 'catastrophe that has left [the child soldier victims] with a genuine feeling of abandonment'.³⁴³

On 25 June 2014, both the Defence and the Prosecution discontinued their appeals against the Trial Judgment.³⁴⁴ The Defence indicated that Katanga accepted the conviction and that it would not be appealing the 12-year sentence imposed by the Trial Chamber.³⁴⁵ An annex to the filing contained a brief statement by Katanga in which he confirmed acceptance of the Judgment and Sentence and expressed his 'sincere regrets' to those who suffered as a result of his conduct, including the victims of Bogoro.³⁴⁶ The Prosecution subsequently informed the Appeals Chamber that, based on Katanga's 'acceptance of the conclusions reached' in the Judgment and 'expression of sincere regret', it also discontinued its appeal against the Trial Judgment regarding Katanga's acquittal for the crimes of rape and sexual slavery.³⁴⁷

On 26 June 2014, the Legal Representative of the principal group of Victims conveyed the victims' 'surprise, disappointment, confusion and disagreement' with the Prosecutor's decision to withdraw the appeal.³⁴⁸ In a letter sent to the Prosecution on 30 June 2014, the Legal Representative of the child soldier Victims also expressed concerns about the discontinuance and the Prosecution's communication about this decision.³⁴⁹

In a statement released on 26 June 2014, the Women's Initiatives for Gender Justice said that it was 'extremely concerned and disappointed' by the Prosecution's decision to drop its appeal against the acquittals for the sexual violence crimes.³⁵⁰ It observed that it was unclear why the Prosecution made this decision when it had no obligation to discontinue its appeal in response to the discontinuance of the Defence appeal, and when this decision would have a 'significant impact [...] on the victims of these crimes in the Katanga case, as well as [...] serious implications for the ICC, international justice and jurisprudence on crimes of sexual violence'.³⁵¹

Sentencing

Trial Chamber II,³⁵² by majority, sentenced Katanga to a total of 12 years' imprisonment on 23 May 2014. In total, six years and eight months were deducted from his sentence for the time already spent in detention since 18 September 2007.³⁵³

On 25 June 2014, both the Defence and the Prosecution informed the Chamber that they would not appeal the Sentencing decision.³⁵⁴

343 ICC-01/04-01/07-3501-Anx, p 2; See also Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 231-232, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

344 ICC-01/04-01/07-3497; ICC-01/04-01/07-3498.

345 ICC-01/04-01/07-3497-AnxA.

346 ICC-01/04-01/07-3497-AnxA.

347 ICC-01/04-01/07-3498; 'Defence and Prosecution discontinue respective appeals against judgment in Katanga case', *ICC Press Release*, ICC-CPI-20140625-PR1021, 25 June 2014, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1021>>. See also Women's Initiatives for Gender Justice, 'Appeals Withdrawn by Prosecution and Defence', 26 June 2014, available at <<http://4genderjustice.org/rape-and-sexual-slavery-appeals-withdrawn-in-katanga-case/>>.

348 ICC-01/04-01/07-3499, para 5.

349 ICC-01/04-01/07-3501-Anx.

350 Women's Initiatives for Gender Justice, 'Appeals Withdrawn by Prosecution and Defence', 26 June 2014, available at <<http://4genderjustice.org/rape-and-sexual-slavery-appeals-withdrawn-in-katanga-case/>>.

351 Women's Initiatives for Gender Justice, 'Appeals Withdrawn by Prosecution and Defence', 26 June 2014, available at <<http://4genderjustice.org/rape-and-sexual-slavery-appeals-withdrawn-in-katanga-case/>>.

352 At the time of the delivery of the Sentencing decision, Trial Chamber II was still composed of Presiding Judge Brune Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Christine Van den Wyngaert (Belgium).

353 ICC-01/04-01/07-3484-tENG, paras 170-171. Judge Van den Wyngaert appended a dissenting opinion. ICC-01/04-01/07-3484-Anx1. See also Women's Initiatives for Gender Justice, 'Katanga Sentenced to 12 Years by ICC', 23 May 2014, available at <<http://4genderjustice.org/statement-on-katanga-sentencing/>>.

354 ICC-01/04-01/07-3497; ICC-01/04-01/07-3497-AnxA; 'Defence and Prosecution discontinue respective appeals against judgment in Katanga case', *ICC Press Release*, ICC-CPI-20140625-PR1021, 25 June 2014, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1021>>.

On 13 November 2015, during a sentence review conducted shortly after Katanga had completed two thirds of his sentence, a panel of three Appeals Chamber Judges³⁵⁵ reduced Katanga's sentence by three years and eight months, and set the date for the completion of his sentence to 18 January 2016.³⁵⁶ On 19 December 2015, Katanga was transferred to a prison facility in the DRC to serve the remainder of his sentence of imprisonment.³⁵⁷

Reparations

On 27 August 2014, a newly constituted Trial Chamber II³⁵⁸ issued an order instructing the Registry to report on applications for reparations in the Katanga case.³⁵⁹ The Registry complied with this order on 15 December 2014.³⁶⁰

On 21 January 2015, the Chamber invited 'interested States and other interested persons' to apply for leave to submit observations on reparations.³⁶¹ Subsequently, on 1 April 2015, the Chamber³⁶² invited parties and participants to submit observations on reparations in this case.³⁶³ In May 2015, after having sought³⁶⁴ and been granted³⁶⁵ leave by the Chamber, interested organisations submitted *amicus curiae* observations on reparations.³⁶⁶ During the same time period, the Defence, Common Legal Representative of Victims, Registry, TFV and Prosecution submitted their observations on reparations in this case.³⁶⁷

355 For the purpose of the sentence review, the Appeals Chamber was composed of a panel of three judges: Presiding Judge Piotr Hofmański (Poland), Judge Sanji Mmasenono Monageng (Botswana) and Judge Christine Van den Wyngaert (Belgium).

356 ICC-01/04-01/07-3615, paras 15, 116. See also 'Germain Katanga's sentence reduced and to be completed on 18 January 2016', *ICC Press Release*, ICC-CPI-20151113-PR1174, 13 November 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1174>>. The panel of Judges found that the following factors were present pursuant to Article 110(4) of the Statute and Rule 223 of the RPE: (1) an early and continuing willingness by Katanga to cooperate with the Court in its investigations and prosecutions; (2) a genuine dissociation from his crimes demonstrated by Katanga's conduct while in detention; (3) the prospect of resocialisation and successful resettlement of Katanga; (4) the prospect that Katanga's early release would give rise to some level of social instability in the DRC, though not to the level of 'significant'; and (5) the individual circumstance of an increase in familial responsibilities due to recent deaths in Katanga's family. ICC-01/04-01/07-3615, paras 110-111.

357 'Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment', *ICC Press Release*, ICC-CPI-20151219-PR1181, 19 December 2015, available at <<https://www.icc-cpi.int/pages/item.aspx?name=PR1181>>.

358 Trial Chamber II was recomposed by the ICC Presidency on 16 April 2014, following requests by Judge Cotte and Judge Diarra that their extended terms come to an end after the Sentencing decision in this case. As of this date, Trial Chamber II was thus composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Christine Van den Wyngaert (Belgium) and Judge Olga Herrera Carbuca (Dominican Republic). ICC-01/04-01/07-3468-AnxI; ICC-01/04-01/07-3468, p 3.

359 ICC-01/04-01/07-3508. In its order, the Chamber requested the Registry to file a report with additional up-to-date information setting out the number of victims, the crime as a result of which the victims suffered harm, the harm suffered and the type and modalities of the reparations requested. ICC-01/04-01/07-3508, paras 7-8 and p 6.

360 ICC-01/04-01/07-3512; ICC-01/04-01/07-3512-AnxI-Red2. See also Women's Initiatives for Gender Justice, 'Change in Chambers' Approach to Reparations', 1 September 2014, available at <<http://4genderjustice.org/change-in-chambers-approach-to-reparations-in-katanga-case/>>.

361 ICC-01/04-01/07-3516, paras 9-10 and p 3.

362 With an *interim* Chamber having dealt with reparations since 16 April 2014, ultimately, on 17 March 2015, Trial Chamber II was recomposed once more with the following composition of judges: Presiding Judge Marc Perrin de Brichambaut (France), Judge Olga Herrera Carbuca (Dominican Republic) and Judge Péter Kovács (Hungary) for the reparations phase. ICC-01/04-01/07-3530, p 3.

363 ICC-01/04-01/07-3532-tENG, para 10 and p 7.

364 ICC-01/04-01/07-3517; ICC-01/04-01/07-3519; ICC-01/04-01/07-3521-Conf; ICC-01/04-01/07-3523.

365 ICC-01/04-01/07-3533-tENG, p 7.

366 Observations were filed by: the Redress Trust; the Queen's University Belfast Human Rights Centre jointly with the University of Ulster's Transitional Justice Institute; *La Ligue pour la Paix, les Droits de l'Homme et la Justice* (LIPADHOJ); and the UN (joint submission by the MONUSCO, OHCHR, UN Women and the UN Special Representative of the Secretary-General for Sexual Violence in Conflict (SRSG-SVC)). ICC-01/04-01/07-3554; ICC-01/04-01/07-3551; ICC-01/04-01/07-3552-Red; ICC-01/04-01/07-3550.

367 ICC-01/04-01/07-3549; ICC-01/04-01/07-3555-tENG; ICC-01/04-01/07-3553; ICC-01/04-01/07-3548; ICC-01/04-01/07-3544.

On 24 March 2017, Trial Chamber II unanimously issued its Reparations Order awarding both individual and collective reparations to 297 victims of the crimes committed by Katanga, the first such order by the ICC.³⁶⁸ The Chamber concluded that the cost of the physical, material and psychological harm suffered by victims recognised for reparations was approximately US\$ 3,752,620,³⁶⁹ and that Katanga's liability amounted to US\$ 1 million.³⁷⁰

The Trial Chamber ordered that each of the 297 victims recognised in this case was to be awarded US\$ 250.³⁷¹ In addition to individual reparations, the Chamber also considered that collective reparations aimed at the communities of the victims could have a positive impact on the overall situation of affected communities and should aim to benefit each victim identified by the Chamber in this case.³⁷² As such, the Chamber awarded collective reparations in the form of support for housing, income-generating activities, education aid and psychological support.³⁷³

Due to Katanga's indigence, the Chamber invited the TFV to consider using its 'other resources' for the funding and implementation of the reparations and to prepare a draft implementation plan.³⁷⁴ It further invited the TFV, under its assistance mandate, to take into account, whenever possible, the harm – and in particular sexual violence – suffered by victims during the attack on Bogoro, but excluded these crimes from the scope of the Katanga case.³⁷⁵

On 17 May 2017, the TFV notified the Chamber of the decision by its Board of Directors to complement the payment of both the collective and individual reparation awards ordered against Katanga to the amount of US\$ 1 million.³⁷⁶

On 25 and 26 April 2017, the Defence, OPCV and Legal Representative of Victims filed their respective Notices of Appeal against the Reparations Order.³⁷⁷ Their Documents in Support of Appeal were subsequently filed on 27 and 29 June 2017, respectively.³⁷⁸

At the time of writing this publication, the Appeals Chamber had not rendered a decision on these appeals.

On 25 July 2017, the TFV submitted its Draft Implementation Plan.³⁷⁹

Status of proceedings

At the time of writing this publication, the case is at the reparations stage. After having completed his ICC sentence on 18 January 2016, Katanga was not released from custody in the DRC and, instead, domestic proceedings were initiated against him on 3 February 2016 for war crimes and crimes against humanity other than those for which he was convicted or acquitted by the ICC.³⁸⁰

368 ICC-01/04-01/07-3728-tENG, para 168 and p 118. The individual analysis of the victim applications is set out in a confidential Annex II to this Reparations Order.

369 ICC-01/04-01/07-3728-tENG, paras 237, 239 and p 118.

370 ICC-01/04-01/07-3728-tENG, para 264 and p 118.

371 ICC-01/04-01/07-3728-tENG, paras 300, 306 and p 118. The Chamber stated that 297 eligible victims is a number which allows the granting of individual reparations. By comparison with other cases, this is a very small number of victims to consider for the reparations process and as such the Chamber concluded that individual reparative awards are to be granted to victims in the Katanga case. ICC-01/04-01/07-3728-tENG, para 287.

372 ICC-01/04-01/07-3728-tENG, paras 290, 294, 303.

373 ICC-01/04-01/07-3728-tENG, paras 304, 306 and p 118.

374 ICC-01/04-01/07-3728-tENG, para 342 and p 118-119.

375 ICC-01/04-01/07-3728-tENG, paras 343-344 and p 119.

376 ICC-01/04-01/07-3740, paras 48, 50.

377 The Defence appealed part of the Reparations Order. ICC-01/04-01/07-3738, p 4. The OPCV appealed the entirety of the Reparations Order and its confidential Annex II. ICC-01/04-01/07-3739, paras 4-5. The Legal Representative of Victims appealed part of the Reparations Order and its confidential Annex II. ICC-01/04-01/07-3737-tENG, para 5.

378 ICC-01/04-01/07-3747-Red; ICC-01/04-01/07-3746-Red; ICC-01/04-01/07-3745-tENG.

379 ICC-01/04-01/07-3751-Red.

380 ICC-01/04-01/07-3679, paras 6, 25, 32; 'DR Congo: War crimes hearing for ICC convict', *Human Rights Watch*, 3 February 2016, available at <<http://reliefweb.int/report/democratic-republic-congo/dr-congo-war-crimes-hearing-icc-convict>>; 'Trial of Congolese war lord Germain Katanga opens in Kinshasa', *Africa News*, 3 February 2016, available at <<http://www.africanews.com/2016/02/03/trial-of-congolese-war-lord-germain-katanga-opens-in-kinshasa/>>.

The Prosecutor v. Mathieu Ngudjolo Chui

Ngudjolo, a Congolese national, was allegedly the leader and supreme commander of the Lendu combatants from Bedu-Ezekere, later known as the *Front des nationalistes et intégrationnistes* (FNI) at the time of the crimes.³⁸¹ This case was joined with that against Katanga prior to the Confirmation of Charges hearing³⁸² and subsequently severed prior to the Trial Judgment.³⁸³ The joint case against Katanga and Ngudjolo constituted the ICC's second case and led to the second trial arising from the DRC Situation. This was the first case in which charges of sexual and gender-based crimes, specifically rape and sexual slavery, were confirmed. The Ngudjolo case was also the first ICC case in which the accused was acquitted of all charges during the trial proceedings.

Scope of charges

Crimes allegedly committed during and in the aftermath of the 24 February 2003 attack on the village of Bogoro in the Ituri district, DRC.³⁸⁴

Arrest warrant

Pre-Trial Chamber I³⁸⁵ issued an arrest warrant for Ngudjolo, under seal, on 6 July 2007. The Arrest Warrant was unsealed on 7 February 2008.³⁸⁶

Transfer to ICC custody

Ngudjolo was arrested and surrendered to the Court by the Congolese authorities on 6 February 2008.³⁸⁷ He was transferred to the ICC Detention Centre the following day.³⁸⁸

Confirmation of charges

Considering Katanga's and Ngudjolo's alleged co-responsibility for the alleged crimes and the fact that all supporting materials and evidence related to both accused, on 10 March 2008, Pre-Trial Chamber I joined the cases against Katanga and Ngudjolo.³⁸⁹

Prior to the start of the confirmation of charges proceedings, the charges against Katanga and Ngudjolo changed with charges relating to sexual violence being withdrawn and later reinstated in an expanded form.³⁹⁰ At issue was the action taken by the Prosecution in 'preventively relocating' two witnesses whom it believed faced a 'concrete risk that they are exposed to as a consequence of their cooperation with the Prosecution'.³⁹¹ On 21 April 2008, the Single Judge of Pre-Trial Chamber I³⁹² ordered that the evidence provided by these two witnesses, which significantly underpinned the sexual violence charges in this case, specifically sexual slavery as a war crime and as a crime against humanity, was inadmissible.³⁹³ This order was issued as part of a decision concluding that only the Registry had the power to relocate witnesses, and that the Prosecution did not have the authority under the Statute to take the action it had taken with respect to the two witnesses.³⁹⁴ The Single

381 ICC-01/04-01/07-717, paras 9, 12, 541, 560.

382 ICC-01/04-01/07-307, p 11.

383 ICC-01/04-01/07-3319-tENG/FRA, p 30.

384 ICC-01/04-01/07-717, paras 263, 284, 307, 326, 338, 354, 364, 377, 576, 578-580.

385 Pre-Trial Chamber I was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Anita Ušacka (Latvia) and Judge Sylvia Steiner (Brazil).

386 ICC-01/04-01/07-260-tENG, p 7.

387 ICC-01/04-01/07-717, para 45.

388 ICC-PIDS-CIS-DRC2-06-006/15_Eng.

389 ICC-01/04-01/07-307, p 6, 11.

390 For more information on this issue, see Women's Initiatives for Gender Justice, *Gender Report Card 2008*, p 47-48, available at <http://iccwomen.org/news/docs/GRC08_web4-09_v3.pdf>.

391 ICC-01/04-01/07-453, para 40.

392 The Single Judge, acting on behalf of Pre-Trial Chamber I, was Judge Sylvia Steiner (Brazil).

393 ICC-01/04-01/07-411. The publicly available version of this decision is dated 25 April 2008, and is numbered ICC-01/04-01/07-428, p 55.

394 ICC-01/04-01/07-428, para 32.

Judge ruled that the exclusion of the evidence regarding these witnesses was the ‘appropriate remedy for the Prosecution’s unauthorised preventive relocation’.³⁹⁵ She also ordered that the two witnesses ‘shall immediately be put under the supervision of the Registrar, who will decide upon the appropriate protective measures to be taken in relation to them’.³⁹⁶

The Prosecution subsequently decided to withdraw the sexual slavery charges from the list of charges to be confirmed.³⁹⁷ The Prosecution argued that, without the evidence provided by the two witnesses, charges of sexual violence became ‘insufficiently substantiated’,³⁹⁸ and that the ‘possibility of the crimes of sexual slavery, rape and outrages upon personal dignity forming part of the proper scope of the trial [was] undermined’.³⁹⁹

This issue was resolved when the two witnesses were admitted into the Court’s witness protection programme. New charges were then filed by the Prosecution against both Katanga and Ngudjolo in an Amended Document Containing the Charges on 12 June 2008, including two counts of sexual slavery, two counts of rape, and one count of outrages upon personal dignity.⁴⁰⁰ Pursuant to a Pre-Trial Chamber order requesting clarification of certain parts of the charges,⁴⁰¹ the final charges against the two suspects were filed by the Prosecution on 26 June 2008, including five counts of sexual violence charges.⁴⁰²

The Confirmation of Charges hearing was held from 27 June to 16 July 2008.⁴⁰³

Prior to this hearing, Pre-Trial Chamber I granted victim status to 57 applicants to participate in the pre-trial proceedings.⁴⁰⁴

On 30 September 2008, Pre-Trial Chamber I confirmed seven counts of war crimes (wilful killing, sexual slavery, rape, intentionally directing an attack against a civilian population, destroying the enemy’s property, pillaging, and using children under the age of 15 years to participate actively in hostilities) and three counts of crimes against humanity (murder, sexual slavery, and rape) against Katanga and Ngudjolo. This was the first time that charges of sexual and gender-based crimes were confirmed by an ICC Pre-Trial Chamber. Of the charges confirmed, all were confirmed unanimously, except for the charges of rape and sexual slavery as war crimes and crimes against humanity, which were confirmed by the majority of the Chamber.⁴⁰⁵

The Chamber, by majority, declined to confirm the charge of other inhumane acts as a crime against humanity,⁴⁰⁶ and unanimously declined to confirm the charges of inhuman treatment and outrages upon personal dignity as war crimes.⁴⁰⁷ Both accused were charged as direct co-perpetrators under

395 ICC-01/04-01/07-428, para 39.

396 ICC-01/04-01/07-428, para 40.

397 ICC-01/04-01/07-422, paras 5-6. If the sexual violence charges had not been confirmed following the Confirmation of Charges hearing, the Prosecution would not have been able to proceed with them at trial.

398 ICC-01/04-01/07-453, para 25.

399 ICC-01/04-01/07-453, para 30.

400 ICC-01/04-01/07-584; ICC-01/04-01/07-584-Anx1A.

401 ICC-01/04-01/07-648.

402 ICC-01/04-01/07-649; ICC-01/04-01/07-649-Anx1A.

403 ICC-01/04-01/07-717, para 59.

404 ICC-01/04-01/07-1788-tENG, para 1. On 2 April 2008, five applicants were granted leave to participate as victims in the pre-trial proceedings. ICC-01/04-01/07-357, p 13. On 10 June 2008, 51 applicants were granted leave to participate as victims in the pre-trial proceedings. ICC-01/04-01/07-579, p 51-52. On 23 June 2008, one additional applicant was granted leave to participate as victim in the pre-trial proceedings. ICC-01/04-01/07-632, p 14.

405 ICC-01/04-01/07-717, p 209-212. Judge Ušacka appended a partly dissenting opinion. ICC-01/04-01/07-717, p 214-226. For a detailed description of the modes of liability charged at this stage of proceedings in this case, see ‘Modes of Liability: a review of the International Criminal Court’s jurisprudence and practice’, *Women’s Initiatives for Gender Justice*, Expert Paper, November 2013, p 29-58, 60-73, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

406 ICC-01/04-01/07-717, p 212. Judge Ušacka appended a partly dissenting opinion. ICC-01/04-01/07-717, p 224-226.

407 ICC-01/04-01/07-717, p 211-212. The charge of outrages upon personal dignity was based on allegations that militia members attacked and forced a partially dressed woman to walk through the centre of Bogoro. ICC-01/04-01/07-717, paras 373-377. For a detailed description of the modes of liability charged at this stage of proceedings in this case, see ‘Modes of Liability: a review of the International Criminal Court’s jurisprudence and practice’, *Women’s Initiatives for Gender Justice*, Expert Paper, November 2013, p 29-58, 60-73, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

Article 25(3)(a) for the crime of using children to participate actively in hostilities, and as indirect co-perpetrators under Article 25(3)(a) of the Statute for all other crimes.⁴⁰⁸

On 26 February 2009, Trial Chamber II⁴⁰⁹ authorised the victims who had participated in the pre-trial stage to also participate in the trial proceedings.⁴¹⁰ Prior to the start of the trial, 302 additional applicants were authorised to participate as victims in the trial proceedings,⁴¹¹ bringing the number of participating victims to 359.⁴¹²

On 22 July 2009, the Chamber issued an order on the common legal representation of victims, establishing two groups: a principal group of victims and a group of child soldier victims.⁴¹³

Trial proceedings

The trial commenced on 24 November 2009.⁴¹⁴ The Prosecution's presentation of evidence started on 25 November 2009 and concluded on 8 December 2010.⁴¹⁵ The overall presentation of evidence by the Defence commenced on 24 March 2011 and concluded on 11 November of that year.⁴¹⁶ The presentation of evidence was declared officially closed on 7 February 2012, after the Chamber conducted a judicial site visit to the DRC on 18 and 19 January 2012.⁴¹⁷

Overall, 54 witnesses were heard and the Trial Chamber sat for 265 days.⁴¹⁸ Significantly, both accused testified under oath during the trial.⁴¹⁹ The closing statements, including unsworn oral statements by Katanga and Ngudjolo, were held from 15 to 23 May 2012.⁴²⁰

During the course of the trial, seven additional applicants were authorised to participate as victims in the trial proceedings,⁴²¹ amounting to a total of 366 participating victims.⁴²² However, victim status was withdrawn from two individuals on 7 July 2011,⁴²³ thereby reducing the number of victims participating in the trial proceedings to 364.

408 ICC-01/04-01/07-717, paras 489-492, 519, 574-576, 579-580 and p 209-212. For more information on indirect co-perpetration as one of the four modes of liability under Article 25(3)(a) of the Statute, see 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 29-30, 60-73, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

409 At this stage of proceedings, Trial Chamber II was composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Fumiko Saiga (Japan).

410 ICC-01/04-01/07-933-tENG, p 23.

411 ICC-01/04-01/07-1788-tENG, paras 8, 12. On 31 July 2009, 288 applicants were authorised to participate as victims in the trial proceedings. ICC-01/04-01/07-1347-Corr-tENG, p 5-7. On 23 November 2009, 14 additional victims were authorised to participate in the trial proceedings. ICC-01/04-01/07-1669-tENG, p 6.

412 See also ICC-01/04-01/07-1788-tENG, para 42.

413 ICC-01/04-01/07-1328, p 13; ICC-01/04-01/07-1488, p 5.

414 ICC-PI/DS-CIS-DRC2-06-006/15 Eng. See also 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', *ICC Press Conference*, 23 November 2009, available at <<http://4genderjustice.org/statement-by-the-womens-initiatives-for-gender-justice-on-the-opening-of-the-icc-trial-of-katanga-and-ngudjolo/>>; Women's Initiatives for Gender Justice, 'DRC: ICC's second trial opens against Germain Katanga and Mathieu Ngudjolo Chui', *Legal Eye on the ICC eLetter*, May 2010, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2010/>>.

415 ICC-01/04-02/12-3-tENG, para 22; ICC-01/04-01/07-T-230-ENG, p 69 lines 12-16.

416 ICC-01/04-01/07-T-240-Red-ENG, p 3 lines 5-6; ICC-01/04-02/12-3-tENG, para 22. The Katanga Defence team called its witnesses between 24 March and 12 July 2011. ICC-01/04-01/07-T-240-Red-ENG, p 3 lines 5-6; ICC-01/04-01/07-T-290-Red-ENG, p 67 lines 14-15, p 71 lines 12-22. The Ngudjolo Defence team called its witnesses between 15 August and 16 September 2011. ICC-01/04-01/07-T-290-Red-ENG, p 72 lines 1-4; ICC-01/04-01/07-T-313-ENG, p 28 lines 19-22.

417 ICC-01/04-01/07-3235-tENG, para 3 and p 4.

418 ICC-01/04-02/12-3-tENG, para 23.

419 Katanga testified over the course of ten hearings between 27 September and 19 October 2011, and Ngudjolo testified over the course of seven hearings between 27 October and 11 November 2011. ICC-01/04-02/12-3-tENG, fn 48.

420 ICC-01/04-02/12-3-tENG, para 25; ICC-01/04-01/07-3436-tENG, para 23.

421 On 17 March 2010, the Chamber authorised three applicants to participate as victims in the trial proceedings. ICC-01/04-01/07-2516-tENG. On 8 November 2010, two more applicants were authorised. ICC-01/04-01/07-2516-tENG. On 9 February 2011, another two applicants were authorised to participate. ICC-01/04-01/07-2693.

422 ICC-01/04-02/12-3-tENG, para 32.

423 ICC-01/04-01/07-3064-tENG, p 22. Following interviews with the two victims, the Legal Representative decided to remove them from the list of victims authorised to appear before the Trial Chamber, indicating 'serious doubts as to the veracity of their accounts'. ICC-01/04-01/07-3064-tENG, paras 42-45.

On 21 November 2012, Trial Chamber II unanimously severed the case against Katanga and Ngudjolo, based on the Chamber's intention to possibly recharacterise the mode of liability only with respect to Katanga, which would prolong the proceedings and potentially cause 'serious prejudice' to Ngudjolo.⁴²⁴ The Chamber also ruled that participating victims were authorised to continue participating in both of the severed proceedings.⁴²⁵

On 18 December 2012, based on the absence of sufficient evidence to prove his criminal responsibility beyond a reasonable doubt, Trial Chamber II⁴²⁶ unanimously acquitted Ngudjolo as a direct and indirect co-perpetrator under Article 25(3)(a) of the Statute⁴²⁷ of all charges relating to seven war crimes (wilful killing, attacks against a civilian population, destroying the enemy's property, pillaging, sexual slavery, rape, and using children under the age of 15 years to participate actively in hostilities) and three crimes against humanity (murder, sexual slavery, and rape).⁴²⁸

While the Chamber affirmed that the events as alleged, including the crimes, had taken place,⁴²⁹ it concluded that, in the absence of sufficient evidence, it could not find beyond reasonable doubt that Ngudjolo was the supreme commander of the Lendu combatants from Bedu-Ezekere at the time of the Bogoro attack, as charged by the Prosecution.⁴³⁰ The Chamber accordingly ordered the Registrar to take the necessary measures for his immediate release.⁴³¹

The Prosecution filed its Notice of Appeal against the Trial Judgment on 20 December 2012,⁴³² and its Document in Support of Appeal on 19 March 2013.⁴³³ In its appeal, the Prosecution requested the

424 ICC-01/04-01/07-3319-tENG/FRA, paras 59-63 and p 30.

425 ICC-01/04-01/07-3319-tENG/FRA, para 64.

426 At the time of the delivery of the Trial Judgment, Trial Chamber II was still composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Demebele Diarra (Mali) and Judge Christine Van den Wyngaert (Belgium).

427 Ngudjolo had been charged as a direct co-perpetrator (Article 25(3)(a) of the Statute) for the crime of using children to participate actively in hostilities, and as an indirect co-perpetrator (Article 25(3)(a) of the Statute) for all other crimes. ICC-01/04-02/12-3-tENG, para 107.

428 ICC-01/04-02/12-3-tENG, p 197. Judge Van den Wyngaert appended a concurring opinion on the interpretation of Article 25(3)(a) of the Statute. ICC-01/04-02/12-4. See further Women's Initiatives for Gender Justice, 'First acquittal by the ICC', 18 December 2012, available at <<http://4genderjustice.org/first-acquittal-by-the-icc/>>; Women's Initiatives for Gender Justice, 'DRC: Trial Chamber II acquits Ngudjolo in second trial judgement at the ICC', *Legal Eye on the ICC eLetter*, February 2013, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-february-2013-first-special-issue-on-ngudjolo-judgement/>>.

429 Specifically concerning the sexual violence charges, the Chamber had found, as a factual matter, that there was extensive evidence attesting to the commission of rape and sexual enslavement. ICC-01/04-02/12-3-tENG, para 338. See also 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', *ICC Press Conference*, 23 November 2009, available at <<http://4genderjustice.org/statement-by-the-womens-initiatives-for-gender-justice-on-the-opening-of-the-icc-trial-of-katanga-and-ngudjolo/>>.

430 ICC-01/04-02/12-3-tENG, paras 499, 503.

431 ICC-01/04-02/12-3-tENG, p 197. For more information on the Ngudjolo Trial Judgment and trial proceedings, see Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 89-91, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>; Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 224-247, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>; Women's Initiatives for Gender Justice, *Gender Report Card 2011*, p 225-233, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2011.pdf>>. See also Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 89-91, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>. For more information on Ngudjolo's release, see Women's Initiatives for Gender Justice, 'DRC: Ngudjolo's immediate release and request for protective measures and asylum', *Legal Eye on the ICC eLetter*, April 2013, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-april-2013-second-special-issue-on-ngudjolo-judgement/>>.

432 ICC-01/04-02/12-10, paras 2-3. See further Women's Initiatives for Gender Justice, 'Prosecution appeals Trial Chamber II's judgement acquitting Ngudjolo', *Legal Eye on the ICC eLetter*, January 2014, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-january-2014-third-special-issue-on-ngudjolo-judgement/>>; Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 170-171, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>.

433 The Document in Support of Appeal was initially filed on 19 March 2013 as confidential *ex parte*, asserting three grounds of appeal. On 20 October 2014, the Prosecution filed a public redacted version of the Document in Support of Appeal. ICC-01/04-02/12-39-Red4.

reversal of the Trial Judgment, a factual finding by the Appeals Chamber concerning Ngudjolo's position of authority, and a full or partial retrial.⁴³⁴

On 6 March 2013, the Appeals Chamber⁴³⁵ confirmed the right of the 364 victims who had already participated in the trial proceedings, and whose victim status was not revoked, to also participate in the appeals proceedings.⁴³⁶ According to the Registry's submission of a confidential list of participating victims of 28 March 2013, and an updated confidential list dated 25 October 2013, eight victims had passed away and were thus excluded from the proceedings.⁴³⁷

Following a Prosecution request of 29 August 2014,⁴³⁸ final submissions on the appeal were heard during an oral hearing on 21 October 2014.⁴³⁹ The Appeals Chamber, by majority, rejected the appeal and confirmed the acquittal on 27 February 2015.⁴⁴⁰

Status of proceedings

Ngudjolo was released from ICC custody on 21 December 2012.⁴⁴¹ On 14 August 2015, the Defence requested compensation of € 906,346, pursuant to Article 85 of the Statute, for the material and moral damage suffered through his arrest and detention, and an alleged manifest miscarriage of justice.⁴⁴² On 16 December 2015, having found that the Defence failed to establish that Ngudjolo 'suffered a grave and manifest miscarriage of justice', Trial Chamber II⁴⁴³ rejected the request for compensation.⁴⁴⁴

The Prosecutor v. Bosco Ntaganda

Ntaganda, born in Rwanda, is allegedly the former Deputy Chief of Staff in charge of operations of the FPLC armed group.⁴⁴⁵ Two separate Arrest Warrants were issued for Ntaganda: one on 22 August 2006, including three war crimes charges; and a second arrest warrant on 13 July 2012, adding nine new war crimes and crimes against humanity

434 ICC-01/04-02/12-39-Red4, paras 231-233. See further Women's Initiatives for Gender Justice, 'DRC: Prosecution appeals Trial Chamber II's judgement acquitting Ngudjolo', *Legal Eye on the ICC eLetter*, January 2014, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-january-2014-third-special-issue-on-ngudjolo-judgement/>>.

435 The Appeals Chamber was composed of Presiding Judge Sanji Mmasenono Monageng (Botswana), Judge Sang-Hyun Song (Republic of Korea), Judge Cuno Tarfusser (Italy), Judge Erkki Kourula (Finland) and Judge Ekaterina Trendafilova (Bulgaria).

436 ICC-01/04-02/12-30, p 3.

437 ICC-01/04-02/12-55; ICC-01/04-02/12-146, p 4 and fn 8. The list of victims was submitted in confidential annexes. Subsequent to this decision, the Legal Representative of the principal group of Victims and the Legal Representative of child soldier Victims filed observations supporting the Prosecution appeal on 18 and 22 July 2013, respectively. ICC-01/04-02/12-124-Corr-Red, paras 194, 198 and p 69; ICC-01/04-02/12-125-Corr-Red, p 63.

438 ICC-01/04-02/12-193-Red, para 23.

439 ICC-01/04-02/12-199; ICC-01/04-02/12-T-4-Red2-ENG; ICC-01/04-02/12-271, para 17.

440 ICC-01/04-02/12-271, para 296. Judge Tarfusser and Judge Trendafilova appended a joint dissenting opinion. ICC-01/04-02/12-271-AnxA. See also 'Ngudjolo Chui case: ICC Appeals Chamber confirms the acquittal decision', *ICC Press Release*, ICC-CPI-20150227-PR1089, 27 February 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1089>>.

441 ICC-PIDS-CIS-DRC2-06-006/15_Eng.

442 ICC-01/04-02/12-290, paras 41, 158-160 and p 49.

443 At the time of this decision, Trial Chamber II was composed of Presiding Judge Marc Perrin de Brichambaut (France), Judge Olga Herrera Carbuca (Dominican Republic) and Judge Péter Kovács (Hungary).

444 ICC-01/04-02/12-301-tENG, para 69 and p 27.

445 ICC-01/04-02/06-309, para 15.

charges, including sexual and gender-based crimes.⁴⁴⁶ Following the issuance of the Arrest Warrants, Ntaganda became the first suspect to voluntarily surrender into the Court's custody on 22 March 2013.⁴⁴⁷ This is the first case in which all sexual and gender-based crimes charges brought against an accused were unanimously confirmed by an ICC Pre-Trial Chamber. This is also the first time that a senior military figure has been charged in international criminal law with rape and sexual slavery committed against child soldiers within his own militia group.

Scope of charges

Crimes allegedly committed in the Ituri district, DRC, between on or about 6 August 2002 and on or about 27 May 2003.⁴⁴⁸

Arrest warrants

Pre-Trial Chamber I⁴⁴⁹ issued an arrest warrant for Ntaganda, under seal, on 22 August 2006. The Arrest Warrant was unsealed on 28 April 2008.⁴⁵⁰

Pre-Trial Chamber II⁴⁵¹ issued a second arrest warrant on 13 July 2012, adding nine additional charges, including rape and sexual slavery committed against civilians as war crimes and crimes against humanity, as well as persecution (including by means of rape and sexual slavery) as a crime against humanity, amongst other charges.⁴⁵²

Transfer to ICC custody

Ntaganda voluntarily surrendered to the Court and was transferred to the ICC's custody on 22 March 2013.⁴⁵³

446 In the first Arrest Warrant, Ntaganda faced the charges of enlistment, conscription and use of children under the age of 15 years to participate actively in hostilities as war crimes. ICC-01/04-02/06-2-Anx-tENG, p 4-5. The second Arrest Warrant charged Ntaganda with: murder, rape of civilians, sexual slavery of civilians, attacks against the civilian population, and pillaging as war crimes; and murder, rape of civilians, sexual slavery of civilians, and persecution (by means including rape and sexual slavery) as crimes against humanity. ICC-01/04-02/06-36-Red, paras 17, 42-44, 60-61 and p 36. The Document Containing the Charges included important new charges of sexual and gender-based crimes, namely: rape of child soldiers, and sexual slavery of child soldiers as war crimes, which were not included in the earlier Arrest Warrants. ICC-01/04-02/06-203-AnxA, p 56-60. For a detailed summary of the two Arrest Warrants and the Document Containing the Charges in the Ntaganda case, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 114-115, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>; Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 110-111, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

447 ICC-01/04-02/06-309, para 2.

448 ICC-01/04-02/06-309, paras 12, 31, 36, 74, 97 and p 63.

449 Pre-Trial Chamber I was composed of Presiding Judge Claude Jorda (France), Judge Akua Kuenyehia (Ghana) and Judge Sylvia Steiner (Brazil).

450 In the first Arrest Warrant, Ntaganda faced charges of three counts of war crimes, including enlistment, conscription, and use of children under the age of 15 years to participate actively in hostilities. ICC-01/04-02/06-2-Anx-tENG, p 4-5. For a detailed summary of the two Arrest Warrants for Ntaganda, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 114-115, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

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

452 The second Arrest Warrant also charged Ntaganda with murder as a crime against humanity, as well as murder, attacks against the civilian population and pillaging as war crimes. ICC-01/04-02/06-36-Red, paras 17, 42-44, 60-61 and p 36. See also 'DRC situation: ICC issues a second arrest warrant for Bosco Ntaganda', *ICC Press Release*, ICC-CPI-20120713-PR828, 13 July 2012, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr828>>. For a detailed summary of the Document Containing the Charges in the Ntaganda case, see Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 110-111, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

453 ICC-01/04-02/06-309, para 2. See also Women's Initiatives for Gender Justice, 'Statement on surrender by Bosco Ntaganda', 21 March 2013, available at <<http://4genderjustice.org/civil-society-statements-on-surrender-by-bosco-ntaganda-declarations-sur-la-reddition-de-bosco-ntaganda/>>.

Confirmation of charges

The Prosecution filed its Document Containing the Charges on 10 January 2014, containing important new charges of rape and sexual slavery as war crimes against UPC/FPLC child soldiers, which were not included in either of the two earlier Arrest Warrants.⁴⁵⁴

The Confirmation of Charges hearing was held from 10 to 14 February 2014.⁴⁵⁵

Prior to this hearing, on 2 December 2013, the Single Judge of Pre-Trial Chamber II⁴⁵⁶ issued an order on the common legal representation of victims, establishing two groups: a group of victims of UPC/FPLC attacks and a group of child soldier victims.⁴⁵⁷ On 15 January and 7 February 2014, 1,119 applicants were recognised to participate as victims in the confirmation of charges proceedings,⁴⁵⁸ of whom 140 victims were assigned to the group of child soldier victims and 979 to the group of victims of UPC/FPLC attacks.⁴⁵⁹

On 9 June 2014, Pre-Trial Chamber II⁴⁶⁰ unanimously confirmed all charges against Ntaganda, including: 13 counts of war crimes (murder and attempted murder, attacks against the civilian population, rape of civilians, sexual slavery of civilians, rape of UPC/FPLC child soldiers, sexual slavery of UPC/FPLC child soldiers, pillaging, displacement of civilians, attacks against protected objects, destruction of property, and the enlistment, conscription and use of children under the age of 15 years to participate actively in hostilities) and five counts of crimes against humanity (murder and attempted murder, rape of civilians, sexual slavery of civilians, persecution, and forcible transfer of population).⁴⁶¹

Ntaganda is charged under the alternative modes of liability of direct perpetration and indirect co-perpetration under Article 25(3)(a); ordering or inducing under Article 25(3)(b); contributing to the commission or attempted commission in any other way under Article 25(3)(d) of the Statute; and acting as a military commander under Article 28 of the Statute.⁴⁶²

This marks the first time that a senior military figure has been charged in international criminal law with acts of sexual violence committed against child soldiers within his own militia group.⁴⁶³

On 16 June 2014, the Defence sought leave to appeal the Confirmation of Charges decision.⁴⁶⁴ On 4 July 2014, the Pre-Trial Chamber rejected the Defence application on the basis that the arguments presented did not constitute appealable issues under Article 82(1)(d) of the Statute.⁴⁶⁵

454 ICC-01/04-02/06-203-AnxA, p 56-60.

455 ICC-01/04-02/06-309, para 5. See also Women's Initiatives for Gender Justice, 'ICC Commencement of the Confirmation of Charges Hearing', 10 February 2014, available at <<http://4genderjustice.org/statement-on-icc-commencement-of-confirmation-of-charges-hearing-in-bosco-ntaganda-case/>>.

456 The Single Judge, acting on behalf of Pre-Trial Chamber II, was Presiding Judge Ekaterina Trendafilova (Bulgaria).

457 ICC-01/04-02/06-160, paras 10, 20-21, 23 and p 11.

458 On 1 January 2014, 922 applicants were granted leave to participate as victims in the confirmation of charges proceedings. ICC-01/04-02/06-211, p 37; ICC-01/04-02/06-211-AnxC. On 7 February 2014, 198 applicants were granted leave to participate as victims in the confirmation of charges proceedings, and the status of one previously admitted victim was modified and deferred. ICC-01/04-02/06-251, p 19-20.

459 See ICC-01/04-02/06-449, para 1.

460 At the time of the Confirmation of Charges decision, Pre-Trial Chamber II was still composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Hans-Peter Kaul (Germany) and Judge Cuno Tarfusser (Italy).

461 ICC-01/04-02/06-309, paras 36, 74 and p 63. For a detailed summary of the charges confirmed against Ntaganda, see Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 112-116, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

462 ICC-01/04-02/06-309, para 97 and p 63. For a detailed summary of the modes of liability confirmed against Ntaganda, see Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 117-118, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

463 For a detailed description of the Ntaganda Confirmation of Charges decision, see Women's Initiatives for Gender Justice, 'DRC: In the Ntaganda case, ICC unanimously confirms, for the first time, all sexual and gender-based crimes charges sought by the Prosecution', *Legal Eye on the ICC eLetter*, September 2014, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-september-2014-special-issue-ntaganda-confirmation-of-charges/>>; Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 112-118, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>; Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 69-71, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>.

464 ICC-01/04-02/06-312, p 13.

465 ICC-01/04-02/06-322, paras 29, 33 and p 14.

On 1 September 2015, the day before the start of the trial, the Defence challenged the jurisdiction of the Court with respect to the charges of rape and sexual slavery of UPC/FPLC child soldiers under Counts 6 and 9 of the Document Containing the Charges.⁴⁶⁶ The Defence argued that child soldiers cannot be victims of rape and sexual slavery as war crimes under the laws and customs of war applicable to non-international armed conflicts.⁴⁶⁷ The trial commenced on 2 September 2015 with these issues still under consideration.

On 9 October 2015, Trial Chamber VI⁴⁶⁸ rejected the Defence challenge stating that substantive law questions are to be addressed during trial, in the framework of the assessment of whether the Prosecution has proven the crimes charged.⁴⁶⁹

The Defence appealed this decision by the Trial Chamber on 19 October 2015, requesting the Appeals Chamber to reverse the decision and to find that the Court does not have jurisdiction over rape and sexual slavery of child soldiers as war crimes.⁴⁷⁰ On 22 March 2016, the Appeals Chamber⁴⁷¹ found that 'the question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature' and 'should be resolved as early as possible in the proceedings'. Therefore, the Chamber unanimously remanded the matter to Trial Chamber VI for it to address in accordance with Article 19(4) of the Statute.⁴⁷²

On 4 January 2017, Trial Chamber VI reaffirmed its jurisdiction over the charges of rape and sexual slavery of child soldiers as war crimes, finding that 'limiting the scope of protection in the manner proposed by the Defence is contrary to the rationale of international humanitarian law', and upheld that members of the same armed force are not as such excluded as potential victims of war crimes of rape and sexual slavery.⁴⁷³ The Defence appealed this second decision by the Trial Chamber on 26 January 2017, arguing that it constituted a 'substantial and unjustified extension of war crimes law', and requested the Appeals Chamber to reverse the decision.⁴⁷⁴

A final decision on this matter was rendered on 15 June 2017 by the Appeals Chamber,⁴⁷⁵ unanimously confirming the Trial Chamber's decision and the Court's jurisdiction over the war crimes of rape and sexual slavery of child soldiers (Counts 6 and 9).⁴⁷⁶ The Appeals Chamber found that neither the Rome Statute nor the established framework of international law expressly provide that victims of rape or sexual slavery must be 'protected persons' in terms of the Geneva Conventions or 'persons taking no active part in the hostilities' pursuant to Common Article 3 of the Geneva Conventions for the war crimes of rape and sexual slavery.⁴⁷⁷ With respect to the crimes of rape and sexual slavery, the Chamber observed that the 'prohibitions on rape and sexual slavery are well established under international humanitarian law' and concluded that there were no limits under this law regarding who may be victims of such conduct.⁴⁷⁸ The Chamber further concluded that it was the nexus requirement

466 ICC-01/04-02/06-804, p 12.

467 ICC-01/04-02/06-804, paras 44-46.

468 At this stage of proceedings, Trial Chamber VI was composed of Presiding Judge Robert Fremr (Czech Republic), Judge Kuniko Ozaki (Japan) and Judge Chang-ho Chung (Republic of Korea).

469 ICC-01/04-02/06-892, para 28 and p 12.

470 ICC-01/04-02/06-909, p 4-5.

471 The Appeals Chamber was composed of Presiding Judge Christine Van den Wyngaert (Belgium), Judge Sanji Mmasenono Monageng (Botswana), Judge Howard Morrison (United Kingdom), Judge Piotr Hofmański (Poland) and Judge Raul Cano Pangalangan (Philippines).

472 ICC-01/04-02/06-1225, paras 40-43 and p 3.

473 ICC-01/04-02/06-1707, paras 48-49, 54 and p 30. See also 'Ntaganda case: ICC Trial Chamber VI rejects challenge to jurisdiction over two war crimes counts', *ICC Press Release*, ICC-CPI-20170104-PR1267, 4 January 2017, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1267>>.

474 ICC-01/04-02/06-1754, paras 1-2, 83.

475 At this stage of proceedings, the Appeals Chamber was composed of Presiding Judge Sanji Mmasenono Monageng (Botswana), Judge Christine Van den Wyngaert (Belgium), Judge Howard Morrison (United Kingdom), Judge Piotr Hofmański (Poland) and Judge Raul Cano Pangalangan (Philippines).

476 ICC-01/04-02/06-1962, paras 57, 70-71 and p 3; 'Ntaganda case: ICC Appeals Chamber confirms the Court's jurisdiction over two war crimes counts', *ICC Press Release*, ICC-CPI-20170615-PR1313, 15 June 2017, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1313>>. See also Women's Initiatives for Gender Justice, 'Historic ICC Decision on the war crimes of rape and sexual slavery', 19 June 2017, available at <<http://4genderjustice.org/historic-war-crimes-decision/>>.

477 ICC-01/04-02/06-1962, paras 46, 50-51, 55, 66-67.

478 ICC-01/04-02/06-1962, para 64.

– that the conduct took place in the context of and was associated with an armed conflict – and ‘not the purported Status Requirement, that sufficiently and appropriately delineates war crimes from ordinary crimes’.⁴⁷⁹ According to the Appeals Chamber, international humanitarian law ‘not only governs the actions of parties to the conflict in relation to each other but also concerns itself with protecting vulnerable persons during armed conflict and assuring fundamental guarantees to persons not taking active part in the hostilities’.⁴⁸⁰ As such, the Appeals Chamber held that international humanitarian law does not contain a general rule categorically excluding members of an armed group from protection against crimes committed by members of the same armed group.⁴⁸¹

Prior to the commencement of the trial, on 16 June 2015, 1,070 applicants, of whom at least 1,001 victims had already participated in the pre-trial proceedings, were granted leave to participate as victims in the trial proceedings.⁴⁸² Subsequently, 1,089 additional victims were admitted, amounting to a total of 2,159 participating victims.⁴⁸³ Of these, 297 were assigned to the group of child soldier victims and 1,862 to the group of victims of UPC/FPLC attacks.⁴⁸⁴

Trial proceedings

The trial commenced on 2 September 2015.⁴⁸⁵ The Prosecution’s presentation of evidence started on 15 September 2015, and on 29 March 2017 it notified the Chamber that it rested its case-in-chief against Ntaganda.⁴⁸⁶ After the Prosecution called its final witness, nine victims of the alleged crimes were given an opportunity to present their views and concerns to the Chamber.⁴⁸⁷

The Defence’s presentation of evidence started on 29 May 2017.⁴⁸⁸ The Defence called Ntaganda as its second witness, and his testimony began on 14 June 2017, which was expected to last until 21 July 2017.⁴⁸⁹ On 19 June 2017, the Defence requested additional time to complete Ntaganda’s testimony,⁴⁹⁰ which the Chamber granted in an oral ruling of 3 July 2017, by providing both the Defence and the Prosecution with an additional 15 hours.⁴⁹¹ The Defence concluded its questioning on 12 July 2017,⁴⁹² and the Prosecution started cross-examining Ntaganda on 13 July 2017.⁴⁹³

479 ICC-01/04-02/06-1962, para 68.

480 ICC-01/04-02/06-1962, para 57.

481 ICC-01/04-02/06-1962, para 63.

482 On 6 February 2015, the Registry was tasked to assess victim applications for participation in the trial proceedings. By 16 June 2015, the Registry had transmitted 1,092 applications to the Chamber, of whom 1,070 applicants were recognised as victims by the Chamber and were granted leave to participate in the trial proceedings. ICC-01/04-02/06-650, paras 1-2, 10, 15 and p 13; ICC-01/04-02/06-650-AnxA. See further ICC-01/04-02/06-449, para 24. According to the Registry, 1,001 applicants had also participated as victims in the pre-trial proceedings. ICC-01/04-02/06-518, para 1.

483 On 2 July 2015, 1,079 additional applicants were granted leave to participate as victims in the trial proceedings. ICC-01/04-02/06-696, para 4; ICC-01/04-02/06-696-AnxA. On 1 September 2015, a further 13 additional applicants were granted leave to participate in the trial proceedings, while the victim status of two deceased individuals was terminated and one duplicate application was identified. ICC-01/04-02/06-805, paras 14-15 and p 8-9.

484 ICC-01/04-02/06-805, fn 29.

485 ICC-PIDS-CIS-DRC-02/011/15_ENG; ‘Ntaganda trial opens at International Criminal Court’, *ICC Press Release*, ICC-CPI-20150902-PR1143, 2 September 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1143>>. See also Women’s Initiatives for Gender Justice, ‘Commencement of the Trial – *The Prosecutor vs. Bosco Ntaganda*’, 1 September 2015, available at <<http://4genderjustice.org/opening-of-icc-trial-against-bosco-ntaganda/>>.

486 ICC-01/04-02/06-1839.

487 ICC-01/04-02/06-1780-Red, p 20-21.

488 ICC-01/04-02/06-1914, paras 5, 9 and p 12.

489 ICC-01/04-02/06-1914, para 9. See also ‘Ntaganda’s Defense Case Opens Next Week’, *International Justice Monitor*, 26 May 2017, available at <<https://www.ijmonitor.org/2017/05/ntagandas-defense-case-opens-next-week/>>.

490 ICC-01/04-02/06-1915.

491 ICC-01/04-02/06-T-217-Red-ENG, p 62 lines 3-25. See also ‘Ntaganda’s Testimony at The ICC to Last More Than Six Weeks’, *International Justice Monitor*, 4 July 2017, available at <<https://www.ijmonitor.org/2017/07/ntagandas-testimony-at-the-icc-to-last-more-than-six-weeks/>>.

492 ICC-01/04-02/06-T-223-Red-ENG, p 50 lines 17-18.

493 ICC-01/04-02/06-1997, para 1; ICC-01/04-02/06-T-224-Red-ENG, p 9, lines 6-14. At the time of writing this publication, the Prosecution was still conducting its cross-examination of Ntaganda.

At the time of writing this publication, 2,144 victims had been recognised to participate in the trial proceedings.⁴⁹⁴

Status of proceedings

At the time of writing this publication, the trial is ongoing and Ntaganda remains in ICC custody.

The Prosecutor v. Callixte Mbarushimana

Mbarushimana, a Rwandan national, was alleged to have been the former Executive Secretary of the armed group *Forces démocratiques de libération du Rwanda* (FDLR) and member of the FDLR's Executive Committee and Steering Committee.⁴⁹⁵ This was the first case to arise from investigations in the North Kivu and South Kivu provinces. At the time of the Arrest Warrant, this case had the highest number and broadest range of sexual and gender-based crimes charges included in an ICC arrest warrant for any one individual.⁴⁹⁶ However, as the Court subsequently declined to confirm any of the charges against Mbarushimana,⁴⁹⁷ the case did not proceed to trial. This was the second case before the ICC to be dismissed at the confirmation of charges stage of proceedings.

Scope of charges

Crimes allegedly committed during the armed conflict in North Kivu and South Kivu, DRC, between about 20 January 2009 and 31 December 2009.⁴⁹⁸

Arrest warrant

Pre-Trial Chamber I⁴⁹⁹ issued an arrest warrant for Mbarushimana, under seal, on 28 September 2010, which was unsealed on 11 October 2010.⁵⁰⁰ At the time of its issue, the Arrest Warrant for Mbarushimana contained the highest number and broadest range of sexual and gender-based crimes charges included in an ICC arrest warrant for any one individual.⁵⁰¹

Transfer to ICC custody

Mbarushimana was arrested in Paris by the French authorities on 11 October 2010 and was transferred to the ICC Detention Centre on 25 January 2011.⁵⁰²

494 On 16 November 2015, the victim status of 12 individuals was terminated and three duplicate applications were identified. ICC-01/04-02/06-1011, paras 2-4 and p 5. On 17 December 2015, one additional victim was admitted to participate in the trial proceedings. ICC-01/04-02/06-1059, para 9 and p 6. On 20 June 2017, one previously admitted victim withdrew his/her application. ICC-01/04-02/06-1970, para 5 and p 5.

495 ICC-01/04-01/10-330-AnxA-Red, paras 1-2, 130-131; ICC-01/04-01/10-465-Red, paras 1, 295.

496 For more information on the sexual and gender-based crimes charges that had been brought before the ICC in this case at the time, see Women's Initiatives for Gender Justice, *Gender Report Card 2011*, p 121-124, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2011.pdf>>.

497 ICC-01/04-01/10-465-Red, p 149.

498 ICC-01/04-01/10-330-AnxA-Red, p 36-43.

499 Pre-Trial Chamber I was composed of Presiding Judge Cuno Tarfusser (Italy), Judge Sylvia Steiner (Brazil) and Judge Sanji Mmasenono Monageng (Botswana).

500 ICC-01/04-01/10-2-tENG, p 8; ICC-01/04-01/10-7, p 4-5. For a more detailed analysis of the Mbarushimana Arrest Warrant, see Women's Initiatives for Gender Justice, *Gender Report Card 2010*, p 94-97, available at <http://iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf>.

501 At this stage, Mbarushimana faced 11 charges overall, including seven sexual and gender-based crimes charges, namely: murder, torture (through rape), rape, inhumane acts (through rape and other forms of sexual violence), and persecution (on the grounds of gender) as crimes against humanity; and attacks against the civilian population, acts of destruction of property, murder, torture (through rape), rape, and acts of inhuman treatment (through rape and other forms of sexual violence) as war crimes. ICC-01/04-01/10-2-tENG, para 10.

502 ICC-01/04-01/10-465-Red, para 15.

Confirmation of charges

On 15 July 2011, the Prosecution submitted its Document Containing the Charges, in which it added two additional charges, namely mutilation and pillaging as war crimes, to the earlier Arrest Warrant, bringing the total number of charges brought against Mbarushimana to 13, and the total number of sexual and gender-based crimes charges to eight.⁵⁰³

The Confirmation of Charges hearing was held from 16 to 21 September 2011.⁵⁰⁴

Prior to this hearing, 132 applicants were authorised to participate as victims in the confirmation of charges proceedings.⁵⁰⁵

On 16 December 2011, Pre-Trial Chamber I,⁵⁰⁶ by majority, declined to confirm all charges against Mbarushimana, including: eight counts of war crimes (attacks against a civilian population, murder, mutilation, cruel treatment, rape, torture, destruction of property, and pillaging) and five counts of crimes against humanity (murder, inhumane acts, rape, torture, and persecution).⁵⁰⁷ Mbarushimana was alleged to be responsible for contributing to the commission of these crimes in any other way pursuant to Article 25(3)(d) of the Statute.⁵⁰⁸

With respect to the war crimes charges, although the Pre-Trial Chamber found substantial grounds to believe that certain war crimes had been committed by the FDLR,⁵⁰⁹ the Chamber did not find there were substantial grounds to believe that Mbarushimana was individually criminally responsible for the alleged crimes.⁵¹⁰

Regarding the charges of crimes against humanity, the Chamber noted that 'the core of the Prosecution's submission [was] the existence of an order to create a 'humanitarian catastrophe' by directing attacks on the civilian population, emanating from the leadership of the FDLR in early 2009'.⁵¹¹ However, the Chamber did not find substantial grounds to believe that the FDLR pursued a policy of attacking the civilian population and, in the absence of such policy, the majority did not find substantial grounds to believe that any of the alleged crimes against humanity had been committed.⁵¹² For these reasons, the Chamber declined to confirm all charges against Mbarushimana and ordered the Registry to make the necessary arrangements for his release.⁵¹³

⁵⁰³ ICC-01/04-01/10-311-AnxA-Red, p 40-47.

⁵⁰⁴ ICC-01/04-01/10-465-Red, para 32.

⁵⁰⁵ On 11 August 2011, 130 victims were authorised to participate. ICC-01/04-01/10-351, p 18-21. On 23 September 2011, two more applicants were also authorised to participate. ICC-01/04-01/10-441, p 4. See also ICC-01/04-01/10-494-tENG, para 11.

⁵⁰⁶ At the time of the Confirmation of Charges decision, Pre-Trial Chamber I was composed of Presiding Judge Sanji Mmasenono Monageng (Botswana), Judge Sylvia Steiner (Brazil) and Judge Cuno Tarfusser (Italy).

⁵⁰⁷ ICC-01/04-01/10-465-Red, paras 108, 242 and p 149. Judge Monageng appended a dissenting opinion. ICC-01/04-01/10-465-Red. For a more detailed description of the Mbarushimana Confirmation of Charges hearing and decision, see Women's Initiatives for Gender Justice, 'DRC: Pre-Trial Chamber I declines to confirm charges against Mbarushimana and orders his release', *Legal Eye on the ICC eLetter*, March 2012, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-march-2012/>>; Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 116-123, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>; Women's Initiatives for Gender Justice, *Gender Report Card 2011*, p 150-155, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2011.pdf>>.

⁵⁰⁸ ICC-01/04-01/10-465-Red, paras 8, 290.

⁵⁰⁹ The Chamber found substantial grounds to believe the following war crimes had been committed by the FDLR, most of which were limited geographically to only five of the 25 incidents referred to by the Prosecution, and some were limited even further: (1) attacks against civilians; (2) murder; (3) mutilation; (4) rape; (5) cruel treatment; (6) destruction of property; and (7) pillaging. ICC-01/04-01/10-465-Red, paras 133, 151, 160, 164, 168, 175, 178, 191-192, 196, 203, 208, 225, 291. The Chamber did not find substantial grounds to believe torture as a war crime had been committed by the FDLR, citing insufficiency of evidence submitted by the Prosecution. ICC-01/04-01/10-465-Red, para 169. The Chamber expressed concern 'that the charges and the statements of facts in the [Document Containing the Charges] had been articulated in such vague terms that the Chamber had serious difficulties in determining, or could not determine at all, the factual ambit of a number of the charges'. ICC-01/04-01/10-465-Red, para 110.

⁵¹⁰ ICC-01/04-01/10-465-Red, paras 276, 283, 303, 340.

⁵¹¹ ICC-01/04-01/10-465-Red, para 245.

⁵¹² ICC-01/04-01/10-465-Red, paras 266-267.

⁵¹³ ICC-01/04-01/10-465-Red, p 149. For a detailed description of the Confirmation of Charges decision in the Mbarushimana case, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 116-120, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

The Prosecution applied for leave to appeal the Confirmation of Charges decision on 27 December 2011⁵¹⁴ and, once granted,⁵¹⁵ filed its Document in Support of Appeal on 12 March 2012⁵¹⁶ and a corrected version thereof the next day.⁵¹⁷

On 2 April 2012, the Appeals Chamber⁵¹⁸ granted 95 applicants, who had already participated as victims in the confirmation of charges proceedings, the right to present, in writing, their views and concerns with respect to their personal interests regarding the issues on appeal.⁵¹⁹

On 30 May 2012, the Appeals Chamber unanimously dismissed the Prosecution appeal against the Confirmation of Charges decision.⁵²⁰

Status of proceedings

Mbarushimana was released from ICC custody on 23 December 2011.⁵²¹ The case against Mbarushimana is currently considered closed before the Court, unless and until the Prosecutor presents additional evidence in this case.⁵²²

The Prosecutor v. Sylvestre Mudacumura

Mudacumura was born in Rwanda and is alleged to be the Supreme Commander of the Army of the FDLR militia group.⁵²³ Following the Mbarushimana case, this is the second case to arise from investigations in North Kivu and South Kivu, DRC, both of which relate to the FDLR.

Scope of charges

Crimes allegedly committed during an armed conflict in the North Kivu and South Kivu provinces of the DRC, between 20 January 2009 and the end of September 2010.⁵²⁴

Arrest warrant

On 31 May 2012, Pre-Trial Chamber II⁵²⁵ initially declined to issue an arrest warrant for Mudacumura due to lack of specificity in the Prosecution request.⁵²⁶ Following the submission of a second request by the Prosecution,⁵²⁷ Pre-Trial Chamber II issued an arrest warrant on 13 July 2012 for Mudacumura for his alleged responsibility under Article 25(3)(b) of the Statute for ordering, soliciting or inducing nine

514 ICC-01/04-01/10-480, paras 2, 48.

515 ICC-01/04-01/10-487, para 44 and p 16.

516 ICC-01/04-01/10-499.

517 ICC-01/04-01/10-499-Corr.

518 The Appeals Chamber was composed of Presiding Judge Erkki Kourula (Finland), Judge Sang-Hyun Song (Republic of Korea), Judge Akua Kuenyehia (Ghana), Judge Anita Ušacka (Latvia) and Judge Silvia Fernández de Gurmendi (Argentina).

519 ICC-01/04-01/10-509, para 12 and p 3.

520 ICC-01/04-01/10-514, paras 69-70. Judge Fernández de Gurmendi appended a separate opinion. ICC-01/04-01/10-514, p 30-34. For more information on the Prosecution appeal, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 121-123, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

521 ICC-PIDS-CIS-DRC-04-003/12_Eng.

522 'Mbarushimana case: ICC Appeals Chamber rejects the Prosecution's appeal', 30 May 2012, <<https://www.icc-cpi.int/Pages/item.aspx?name=pr798>>; 'Mbarushimana Case', *ICC website*, available at <<https://www.icc-cpi.int/drc/mbarushimana>>.

523 ICC-01/04-01/12-1-Red, p 29.

524 ICC-01/04-01/12-1-Red, p 28.

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

526 ICC-01/04-613, paras 4, 6, 8 and p 5.

527 ICC-01/04-616-Red. A second public redacted version of the application was filed on 5 July 2012. ICC-01/04-616-Red2.

counts of war crimes, namely murder, mutilation, cruel treatment, torture, outrages upon personal dignity, attacks against the civilian population, pillaging, rape, and destruction of property.⁵²⁸

Status of proceedings

At the time of writing this publication, the execution of the Arrest Warrant is pending and Mudacumura remains at large.

⁵²⁸ ICC-01/04-01/12-1-Red, para 7 and p 28-29. For a more detailed analysis of the Mudacumura Arrest Warrant, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 123-128, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

Uganda

The Situation in Uganda was referred to the ICC by the Ugandan Government in December 2003, resulting in the first referral by a State Party to the Rome Statute to be received by the Court.⁵²⁹ A formal investigation was subsequently opened on 29 July 2004, which has focused primarily on the activities of an armed group, the Lord's Resistance Army (LRA).⁵³⁰

There are currently two cases before the ICC within the Uganda Situation. In 2005, investigations by the Prosecution prompted the Court to issue arrest warrants against the following five individuals: Joseph Kony (Kony), Vincent Otti (Otti), Raska Lukwiya (Lukwiya), Okot Odhiambo (Odhiambo) and Dominic Ongwen (Ongwen). At the time of writing this publication, only Ongwen is in ICC custody, facing trial.

The Prosecutor v. Joseph Kony and Vincent Otti

Originally, this case involved five suspects, all Ugandan nationals believed to hold or to have held senior leadership positions within the LRA: Kony, Otti, Lukwiya, Odhiambo and Ongwen. However, proceedings against Lukwiya were terminated on 11 July 2007,⁵³¹ and against Odhiambo on 10 September 2015,⁵³² following confirmation of their deaths. The case against Ongwen was severed on 6 February 2015, following his voluntary surrender in January 2015.⁵³³ Consequently, this case currently includes two accused: Kony and Otti. Kony is the alleged Chairman and Commander-in-Chief of the LRA,⁵³⁴ while Otti is the alleged Vice-Chairman and Second-in-Command of the LRA.⁵³⁵ This is the first case in which an arrest warrant was issued by the ICC, as well as the first ICC case in which sexual and gender-based crimes charges were brought by the OTP.

529 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', *ICC Press Release*, ICC-20040129-44, 29 January 2004, available at <https://www.icc-cpi.int/legalAidConsultations?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+_lra_+to+the+icc>.

530 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda', *OTP Press Release*, ICC-OTP-20040729-65, 29 July 2004, available at <<https://www.icc-cpi.int/pages/item.aspx?name=prosecutor+of+the+international+criminal+court+opens+an+investigation+into+nothern+uganda>>.

531 ICC-02/04-01/05-248, p 4.

532 ICC-02/04-01/05-431, p 4. See also 'ICC terminates proceedings against Okot Odhiambo following forensic confirmation of his passing', *ICC Press Release*, ICC-CPI-20150910-PR1147, 10 September 2015, available at <<https://www.icc-cpi.int/pages/item.aspx?name=PR1147>>.

533 ICC-02/04-01/05-424, paras 2, 7-9 and p 7.

534 ICC-02/04-01/05-53, paras 7, 48.

535 ICC-02/04-01/05-54, paras 8, 48. On 8 November 2007, the OTP also notified Pre-Trial Chamber II of information it had received suggesting Otti's death. However, the ICC has not confirmed this information and the ICC website currently continues to treat Otti as a suspect at large.

Scope of charges

Crimes allegedly committed in northern Uganda by members of the LRA from July 2002 to 2004.⁵³⁶

Arrest warrants

On 8 July 2005, Pre-Trial Chamber II⁵³⁷ issued arrest warrants, under seal, for Kony, Otti, Odhiambo and Lukwiya. The Arrest Warrants were unsealed on 13 October 2005.⁵³⁸

According to the Arrest Warrant, Kony is allegedly responsible for 33 counts relating to 11 different crimes. Specifically, he faces 12 counts of crimes against humanity (murder, enslavement, sexual enslavement, rape, and inhumane acts of inflicting serious bodily injury and suffering) and 21 counts of war crimes (murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, inducing rape, and forced enlistment of children).⁵³⁹

Otti is allegedly responsible for 32 counts relating to 10 different crimes. Specifically, he faces 11 counts of crimes against humanity (murder, enslavement, sexual enslavement, and inhumane acts of inflicting serious bodily injury and suffering) and 21 counts of war crimes (murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, inducing rape, and forced enlistment of children).⁵⁴⁰

Odhiambo was allegedly responsible for ten counts relating to six different crimes. Specifically, he faced three counts of crimes against humanity (murder and enslavement) and seven counts of war crimes (murder, forced enlistment of children, intentionally directing an attack against a civilian population, and pillaging).⁵⁴¹

Lukwiya was allegedly responsible for four counts relating to four different crimes. Specifically, he faced one count of crime against humanity (enslavement) and three counts of war crimes (cruel treatment, intentionally directing an attack against a civilian population, and pillaging).⁵⁴²

All four accused were allegedly responsible by means of ordering or inducing the commission of the crimes under Article 25(3)(b) of the Statute.⁵⁴³ Additionally, Kony is alleged to be responsible as a direct perpetrator under Article 25(3)(a) of the Statute.⁵⁴⁴ Kony and Otti are alleged to be responsible for sexual slavery as a crime against humanity and inducing rape as a war crime. Additionally, Kony is alleged to be responsible for the crime of rape as a crime against humanity.⁵⁴⁵

To date, Pre-Trial Chamber II has authorised 41 victims to participate in the pre-trial proceedings.⁵⁴⁶

Status of proceedings

The proceedings against Lukwiya were terminated on 11 July 2007,⁵⁴⁷ and against Odhiambo on 10 September 2015,⁵⁴⁸ following confirmation of their deaths.

⁵³⁶ ICC-02/04-01/05-53, paras 10, 14 and p 12-19; ICC-02/04-01/05-54, paras 11, 15 and p 12-20.

⁵³⁷ Pre-Trial Chamber II was composed of Presiding Judge Tuiloma Neroni Slade (Samoa), Judge Mauro Politi (Italy) and Judge Fatoumata Demele Diarra (Mali).

⁵³⁸ ICC-02/04-01/05-53; ICC-02/04-01/05-54; ICC-02/04-01/05-56; ICC-02/04-01/05-55. The Arrest Warrant for Ongwen was issued and unsealed on the same dates as the other accused. For information on Ongwen's Arrest Warrant, see the sub-section of *The Prosecutor v. Dominic Ongwen* below.

⁵³⁹ ICC-02/04-01/05-53, p 12-19.

⁵⁴⁰ ICC-02/04-01/05-54, p 12-20.

⁵⁴¹ ICC-02/04-01/05-56, p 10-12.

⁵⁴² ICC-02/04-01/05-55, p 9-10.

⁵⁴³ ICC-02/04-01/05-53, p 12-19; ICC-02/04-01/05-54, p 12-20; ICC-02/04-01/05-56, p 10-12; ICC-02/04-01/05-55, p 9-10.

⁵⁴⁴ ICC-PIDS-CIS-UGA-001-005/15_Eng. Kony's mode of liability for rape as a crime against humanity (Count 2) was redacted in the Arrest Warrant. ICC-02/04-01/05-53, p 12.

⁵⁴⁵ ICC-02/04-01/05-53, p 12-13; ICC-02/04-01/05-54, p 12-13.

⁵⁴⁶ On 10 August 2007, six victims were granted leave to participate in the pre-trial proceedings. ICC-02/04-01/05-252, p 61. On 14 March 2008, eight victims were granted leave to participate. ICC-02/04-01/05-282, p 70. A further 27 victims were granted leave to participate on 21 November 2008. ICC-02/04-01/05-356, p 66-67.

⁵⁴⁷ ICC-02/04-01/05-248, p 4. At this stage of proceedings, Pre-Trial Chamber II was composed of Presiding Judge Mauro Politi (Italy), Judge Fatoumata Demele Diarra (Mali) and Judge Ekaterina Trendafilova (Bulgaria).

⁵⁴⁸ ICC-02/04-01/05-431, p 4. See also 'ICC terminates proceedings against Okot Odhiambo following forensic confirmation of his passing', *ICC Press Release*, ICC-CPI-20150910-PR1147, 10 September 2015, available at <<https://www.icc-cpi.int/pages/item.aspx?name=PR1147>>. At this stage of proceedings, Pre-Trial Chamber II was composed of Presiding Judge Cuno Tarfusser (Italy), Marc Perrin de Brichambaut (France) and Chang-ho Chung (Republic of Korea).

At the time of writing this publication, the execution of the Arrest Warrants for Kony and Otti is pending and they remain at large. On 8 November 2007, the OTP notified Pre-Trial Chamber II of information it had received suggesting Otti's death.⁵⁴⁹ However, the ICC has not confirmed this information and the ICC website continues to treat Otti as a suspect at large.

The Prosecutor v. Dominic Ongwen

Ongwen is alleged to have been the Commander of the LRA Oka Battalion since at least August 2002, the Second in Command of the LRA Sinia Brigade since September 2003 and its Brigade Commander since March 2004.⁵⁵⁰ Ongwen is charged with 70 counts of war crimes and crimes against humanity, of which a significant number relate to sexual and gender-based crimes, making it the case with the highest number of counts before the ICC as well as the highest number of counts of sexual and gender-based crimes charges to date.⁵⁵¹ The case against Ongwen was severed from the Kony *et al* case on 6 February 2015,⁵⁵² following his surrender in January 2015.⁵⁵³ Ongwen is the second ICC indictee to voluntarily surrender to the Court.

Scope of charges

Crimes allegedly committed during a widespread or systematic attack directed against the civilian population of northern Uganda from at least 1 July 2002 to 31 December 2005.⁵⁵⁴ Most of the crimes were allegedly committed in the context of attacks on four internally displaced persons' (IDP) camps in Pajule (on or about 10 October 2003), Odek (on or about 29 April 2004), Lukodi (on or about 19 May 2004) and Abok (on or about 8 June 2004).⁵⁵⁵

Arrest warrant

Pre-Trial Chamber II⁵⁵⁶ issued an arrest warrant for Ongwen, under seal, on 8 July 2005. The Arrest Warrant was unsealed on 13 October 2005.⁵⁵⁷ According to this Arrest Warrant, Ongwen faced seven counts of crimes against humanity and war crimes, none of which included sexual and gender-based crimes.⁵⁵⁸

Transfer to ICC custody

Ongwen was surrendered to the Court by the CAR authorities on 16 January 2015.⁵⁵⁹

⁵⁴⁹ ICC-02/04-01/05-258, para 1.

⁵⁵⁰ ICC-02/04-01/15-422-Red, para 58.

⁵⁵¹ ICC-02/04-01/15-422-Red, p 71-104. See also Women's Initiatives for Gender Justice, 'First ICC Trial in the Uganda Situation', 5 December 2016, available at <<http://www.4genderjustice.org/pub/First-ICC-Trial-in-Uganda-Situation-Statement.pdf>>.

⁵⁵² ICC-02/04-01/05-424, p 7.

⁵⁵³ ICC-02/04-01/05-419; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the surrender and transfer of top LRA Commander Dominic Ongwen', *OTP Press Statement*, 21 January 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-21-01-2015>>. See also Women's Initiatives for Gender Justice, 'First Ugandan suspect, LRA Commander Dominic Ongwen, transferred to the ICC in The Hague', 21 January 2015, available at <<http://4genderjustice.org/statement-on-transfer-of-lra-commander-to-the-icc/>>.

⁵⁵⁴ ICC-02/04-01/15-422-Red, p 71-104.

⁵⁵⁵ ICC-02/04-01/15-422-Red, p 71-89.

⁵⁵⁶ Pre-Trial Chamber II was composed of Presiding Judge Tuiloma Neroni Slade (Samoa), Judge Mauro Politi (Italy) and Judge Fatoumata Dembele Diarra (Mali).

⁵⁵⁷ ICC-02/04-01/05-57. On 28 January 2015, the non-redacted Arrest Warrant for Ongwen was reclassified as public pursuant to an instruction by Pre-Trial Chamber II, ICC-02/04-01/05-10.

⁵⁵⁸ ICC-02/04-01/05-10, p 9-10. At the time of his Arrest Warrant, Ongwen faced three counts of crimes against humanity (murder, enslavement, and inhumane acts of inflicting bodily injury and suffering) and four counts of war crimes (murder, cruel treatment, attack against the civilian population, and pillaging).

⁵⁵⁹ ICC-02/04-01/15-422-Red, para 5; ICC-02/04-01/15-189, paras 3-4. See also Women's Initiatives for Gender Justice, 'First Ugandan suspect, LRA Commander Dominic Ongwen, transferred to the ICC in The Hague', 21 January 2015, available at <<http://4genderjustice.org/statement-on-transfer-of-lra-commander-to-the-icc/>>.

Confirmation of charges

On 6 February 2015, the Single Judge of Pre-Trial Chamber II⁵⁶⁰ severed the proceedings against Ongwen from the Kony *et al* case.⁵⁶¹

On 18 September 2015, the Prosecution filed its Notice of Intended Charges against Ongwen, raising the number of counts from the seven listed in the Arrest Warrant to 67, including 19 counts of sexual and gender-based crimes.⁵⁶² The Prosecution filed its Document Containing the Charges on 21 December 2015, in which it amended the charges against Ongwen to include 70 counts in total.⁵⁶³

The Confirmation of Charges hearing was held from 21 to 27 January 2016.⁵⁶⁴

Prior to this hearing, 2,026 victims were admitted to participate in the confirmation of charges proceedings.⁵⁶⁵

On 23 March 2016, Pre-Trial Chamber II⁵⁶⁶ unanimously confirmed all 70 counts against Ongwen, relating to 23 different crimes.⁵⁶⁷ Specifically, Ongwen is charged with 34 counts relating to 10 crimes against humanity, namely murder (four counts), attempted murder (three counts), torture (six counts, of which two of are based on acts of sexual violence), other inhumane acts (four counts), enslavement (six counts, of which two of are based on acts of sexual violence), persecution (four counts), forced marriage (two counts), rape (two counts), sexual slavery (two counts), and forced pregnancy (one count).

He is also charged with 36 counts relating to 13 war crimes, namely attacks against the civilian population (four counts), murder (four counts), attempted murder (three counts), torture (six counts, of which two of are based on acts of sexual violence), cruel treatment (four counts), pillaging (four counts), outrages upon personal dignity (two counts, of which one is based on acts of sexual violence), destruction of property (two counts), rape (two counts), sexual slavery (two counts), forced pregnancy (one count), conscription of children under the age of 15 years (one count), and use of children under the age of 15 years to actively participate in hostilities (one count).⁵⁶⁸

This case includes the highest number of sexual and gender-based crimes charges confirmed by an ICC Pre-Trial Chamber to date.⁵⁶⁹ Additionally, this is the first time that forced marriage, charged as an inhumane act of a character similar to the acts set out in Article 7(1)(a)-(j) of the Statute, is being prosecuted by the ICC, and the first time that the crime of forced pregnancy is being prosecuted by an international court.⁵⁷⁰

⁵⁶⁰ The Single Judge, acting on behalf of Pre-Trial Chamber II, was Judge Ekaterina Trendafilova (Bulgaria). ICC-02/04-01/05-415. At this time of the proceedings, Pre-Trial Chamber II was composed of Presiding Judge Cuno Tarfusser (Italy), Judge Trendafilova and Judge Christine Van den Wyngaert (Belgium).

⁵⁶¹ ICC-02/04-01/05-424, p 7.

⁵⁶² ICC-02/04-01/15-305-Red3, p 10-11, 13-16, 18-19, 21, 24-25, 30-32, 35-36. The redacted version was filed on 27 May 2016.

⁵⁶³ ICC-02/04-01/15-375-AnxA-Red2, p 12-14, 18-21, 25-28, 32-34, 47-51, 54-56, 58-59. The less redacted version was filed on 25 May 2016.

⁵⁶⁴ ICC-02/04-01/15-422-Red, para 11. See also Women's Initiatives for Gender Justice, 'Statement on commencement of first ICC confirmation of charges hearing in the Uganda Situation', 20 January 2016, available at <<http://4genderjustice.org/first-icc-confirmation-of-charges-hearing-in-the-uganda-situation/>>.

⁵⁶⁵ On 5 October 2015, 198 victims were admitted to participate in the pre-trial proceedings. ICC-02/04-01/15-350, para 6. On 11 November 2015, another 322 were admitted to participate. ICC-02/04-01/15-350, para 7. On 27 November 2015, a further 25 were admitted to participate. ICC-02/04-01/15-350, p 19. On 18 December 2015, 660 victims were admitted to participate. ICC-02/04-01/15-384, para 5. On 23 December 2015, a further 815 were admitted. ICC-02/04-01/15-384, para 6. On 24 December 2015, another six victims were authorised to participate in the pre-trial proceedings. ICC-02/04-01/15-384, p 20. See also, ICC-02/04-01/15-614, para 2.

⁵⁶⁶ At the time of the Confirmation of Charges decision, Pre-Trial Chamber II was composed of Presiding Judge Cuno Tarfusser (Italy), Judge Marc Perrin de Brichambaut (France) and Judge Chang-ho Chung (Republic of Korea).

⁵⁶⁷ ICC-02/04-01/15-422-Red, p 71-104. Judge Perrin de Brichambaut appended a separate opinion. ICC-02/04-01/15-422-Anx-tENG.

⁵⁶⁸ ICC-02/04-01/15-422-Red, p 71-104.

⁵⁶⁹ A total of 19 counts, relating to 11 sexual and gender-based crimes, were confirmed. All counts of sexual and gender-based crimes charged were allegedly committed both directly and indirectly by Ongwen, with the exception of outrages upon personal dignity as a war crime and forced pregnancy as a crime against humanity and war crime, which were only committed directly by him. ICC-02/04-01/15-422-Red, p 90-102.

⁵⁷⁰ See also Women's Initiatives for Gender Justice, 'First ICC Trial in the Uganda Situation', 5 December 2016, available at <<http://www.4genderjustice.org/pub/First-ICC-Trial-in-Uganda-Situation-Statement.pdf>>.

Ongwen is charged as a direct and indirect perpetrator (Article 25(3)(a)), an indirect co-perpetrator (Article 25(3)(a)), for ordering (Article 25(3)(b)), for aiding, abetting or otherwise assisting (Article 25(3)(c)), as an accessory (Article 25(3)(d)(i) and (ii)), for attempting the commission of the crimes (Article 25(3)(f)); or as a commander (Article 28(a) of the Statute).⁵⁷¹

In its Confirmation of Charges decision, the Chamber authorised the 2,026 victims who had already participated in the pre-trial proceedings to also participate in the trial proceedings.⁵⁷² Prior to the trial, 2,087 additional victims were granted leave to participate in the trial proceedings, amounting to 4,113 participating victims in total.⁵⁷³

Trial Proceedings

The trial commenced on 6 December 2016 before Trial Chamber IX.⁵⁷⁴ The Prosecution began its presentation of evidence on 16 January 2017,⁵⁷⁵ which is currently ongoing. At the time of writing, the total number of victims participating in the trial proceedings had decreased to 4,107 since the start of the trial.⁵⁷⁶

Status of proceedings

At the time of writing this publication, the trial is ongoing and Ongwen remains in ICC custody.

⁵⁷¹ ICC-02/04-01/15-422-Red, p 71-104.

⁵⁷² ICC-02/04-01/15-422-Red, para 159; ICC-02/04-01/15-422-Anx1.

⁵⁷³ The Chamber admitted 300 applicants as of 19 September 2016, 610 applicants as of 11 October 2016, 1,176 applicants as of 24 October 2016, and one additional applicant on 4 November 2016 to participate in the trial proceedings. ICC-02/04-01/15-543, para 6; ICC-02/04-01/15-586, paras 7, 10, 14 and p 8. See also ICC-02/04-01/15-614, para 3.

⁵⁷⁴ ICC-02/04-01/15-449, para 12 and p 7. Trial Chamber IX was composed of Presiding Judge Bertram Schmitt (Germany), Judge Péter Kovács (Hungary) and Judge Raul Cano Pangalangan (Philippines). For more information on the start of the Ongwen trial, see Women's Initiatives for Gender Justice, 'First ICC Trial in the Uganda Situation', 5 December 2016, available at <<http://www.4genderjustice.org/pub/First-ICC-Trial-in-Uganda-Situation-Statement.pdf>>.

⁵⁷⁵ ICC-PIDS-CIS-UGA-02-012/16_Eng.

⁵⁷⁶ Out of the 4,113 victims admitted to participate in the trial proceedings, the Registry submitted on 30 November 2016 that six applications had been duplicate applications. ICC-02/04-01/15-614, para 13. See also ICC-02/04-01/15-652, para 6.

Central African Republic

Following the outbreak of violence between 2002 and 2003, the Government of the CAR referred the Situation on its territory to the ICC on 21 December 2004.⁵⁷⁷ On 22 May 2007, the Prosecutor announced the decision to open a formal investigation into the commission of serious crimes during this period, which included a high incidence of rape, reported at the peak of the violence.⁵⁷⁸ The OTP continued to monitor allegations of crimes committed on the territory since 2005, particularly in the northern part of the country.⁵⁷⁹

On 24 September 2014, the Prosecutor announced the opening of a second Situation in the CAR (CAR II), with respect to war crimes and crimes against humanity allegedly committed since 2012 by both the Séléka and anti-Balaka groups.⁵⁸⁰ This Situation is described in greater detail in the **Central African Republic II** sub-section of this publication.

There are currently two cases before the ICC arising from the 2004 CAR Situation. The main case relates directly to the OTP's investigations of the 2002-2003 violence, which led to an arrest warrant issued against the accused, Jean-Pierre Bemba Gombo (Bemba). As his trial progressed, a new set of allegations was brought against Bemba, along with four individuals associated with his defence, under Article 70 of the Statute. These allegations relate to the commission of offences against the administration of justice, including corruptly influencing witnesses before the ICC and knowingly presenting false or forged evidence.⁵⁸¹ Conviction and Sentencing decisions have been rendered in both cases, which are currently at the appeals stage.

The Prosecutor v. Jean-Pierre Bemba Gombo

Bemba, a Congolese national, is the founder and former President of the political group *Mouvement de libération du Congo* (MLC) and Commander-in-Chief of the MLC's military branch, the *Armée de libération du Congo* (ALC).⁵⁸² He is the first individual convicted and sentenced by the ICC for crimes of sexual violence, as well as under the doctrine of command responsibility pursuant to Article 28(a) of the Statute.⁵⁸³ This is the first case

577 'Prosecutor receives referral concerning Central African Republic', *OTP Press Release*, ICC-OTP-20050107-86, 7 January 2005, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp+prosecutor+receives+referral+concerning+central+african+republic>>. See also ICC-01/05-1, p 2.

578 'Prosecutor opens investigation in the Central African Republic', *OTP Press Statement*, 22 May 2007, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor+opens+investigation+in+the+central+african+republic>>. See also Women's Initiatives for Gender Justice, 'Investigation of Rape and Sexual Violence in CAR', 22 May 2007, available at <<http://4genderjustice.org/investigation-of-rape-and-sexual-violence-in-the-central-african-republic/>>.

579 ICC-OTP-BN-20070522-220-A_EN. See also 'Prosecutor opens investigation in the Central African Republic', *OTP Press Statement*, 22 May 2007, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=prosecutor+opens+investigation+in+the+central+african+republic>>.

580 For more information on the CAR II Situation, see the *Central African Republic II* sub-section of this publication.

581 'Bemba case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo', *ICC Press Release*, ICC-CPI-20131124-PR962, 24 November 2013, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr962.aspx>.

582 ICC-01/05-01/08-3343, para 1.

583 ICC-01/05-01/08-3343, para 752; ICC-01/05-01/08-3399, paras 95, 97. See also Women's Initiatives for Gender Justice, 'ICC first conviction for acts of sexual violence', 21 March 2016, available at <<http://4genderjustice.org/icc-first-conviction-acts-sexual-violence/>>. For a detailed description of the Court's approach to Article 28 in this case, see 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 88-96, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

in which the majority of charges in the Arrest Warrant were for sexual and gender-based crimes.⁵⁸⁴ This is also the first case in which sexual violence was taken into account as an aggravating factor at the time of the Sentencing decision.⁵⁸⁵ Bemba was sentenced to 18 years' imprisonment, the highest sentence imposed by the ICC to date.⁵⁸⁶

Scope of charges

Crimes allegedly committed by MLC soldiers in the CAR from on or about 26 October 2002 to 15 March 2003, including acts of sexual and gender-based violence.⁵⁸⁷ The Prosecution originally sought a broader range of charges of these crimes;⁵⁸⁸ however, the Pre-Trial Chamber narrowed the sexual violence charges at both the arrest warrant and confirmation of charges stages.

Arrest warrant

Pre-Trial Chamber III⁵⁸⁹ issued an arrest warrant for Bemba, under seal, on 23 May 2008,⁵⁹⁰ which was unsealed the next day.⁵⁹¹ In issuing this Arrest Warrant, the Chamber declined to include the charges of other forms of sexual violence as a crime against humanity⁵⁹² and war crime.⁵⁹³

Following the submission of additional information by the Prosecution, on 10 June 2008, the Chamber issued a new arrest warrant replacing the one previously issued, adding two new charges against Bemba, namely murder as a crime against humanity and as a war crime.⁵⁹⁴

Transfer to ICC custody

Bemba was arrested by the Belgian authorities on 24 May 2008.⁵⁹⁵ He was surrendered to the Court and transferred to the ICC Detention Centre on 3 July 2008.⁵⁹⁶

Confirmation of charges

On 1 October 2008, the Prosecution filed its Document Containing the Charges,⁵⁹⁷ followed by an amended version on 17 October 2008, charging Bemba with criminal responsibility under Article 25(3) (a) of the Statute for crimes against humanity and war crimes.⁵⁹⁸

⁵⁸⁴ ICC-01/05-01/08-15-tENG.

⁵⁸⁵ ICC-01/05-01/08-3399, para 93. See also Women's Initiatives for Gender Justice, 'Bemba Sentenced to 18 Years by the ICC', 21 June 2016, available at <<http://4genderjustice.org/bemba-sentenced-18-years-icc/>>.

⁵⁸⁶ ICC-01/05-01/08-3399, paras 95, 97. See also Women's Initiatives for Gender Justice, 'Bemba Sentenced to 18 Years by the ICC', 21 June 2016, available at <<http://4genderjustice.org/bemba-sentenced-18-years-icc/>>.

⁵⁸⁷ ICC-01/05-01/08-424, p 184-185.

⁵⁸⁸ ICC-01/05-01/08-26-Red, p 8-11. In the Prosecution application for an arrest warrant for Bemba, seven out of ten charges related to sexual and gender-based crimes. The seven sexual and gender-based crimes charges sought by the Prosecution were: rape, other forms of sexual violence, torture as crimes against humanity; and rape, other forms of sexual violence, torture and outrages upon personal dignity as war crimes.

⁵⁸⁹ Pre-Trial Chamber III was composed of Presiding Judge Fatoumata Dembele Diarra (Mali), Judge Hans-Peter Kaul (Germany) and Judge Ekaterina Trendafilova (Bulgaria).

⁵⁹⁰ ICC-01/05-01/08-1-tENG-Corr, p 8.

⁵⁹¹ ICC-01/05-01/08-5-tENG, p 4.

⁵⁹² ICC-01/05-01/08-14-tENG, para 40. The Chamber held that the fact submitted by the Prosecutor were not of comparable gravity to those listed in Article 7(1)(g) of the Statute, which includes the crimes against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity.

⁵⁹³ ICC-01/05-01/08-14-tENG, paras 62-63. The Chamber found that the act of 'order[ing] people to remove their clothes in public to humiliate them' could also be characterised as outrages upon personal dignity as a war crime, and, thus considered it unnecessary to address the Prosecution's allegations under other forms of sexual violence. ICC-01/05-01/08-14-tENG, paras 60-63.

⁵⁹⁴ ICC-01/05-01/08-15-tENG, paras 8-10, 24, p 9-10. The other charges included in the Arrest Warrant were: rape and torture as crimes against humanity; and rape, torture, outrages upon personal dignity and pillaging as war crimes.

⁵⁹⁵ ICC-01/05-01/08-424, para 2. See also 'Statement by the Women's Initiatives for Gender Justice on the Arrest of Jean-Pierre Bemba Gombo', 13 June 2008, available at <<http://4genderjustice.org/central-african-republic-arrest-of-jean-pierre-bemba-gombo/>>.

⁵⁹⁶ ICC-01/05-01/08-424, para 4.

⁵⁹⁷ ICC-01/05-01/08-129. The Document Containing the Charges was submitted in a confidential Annex 2A.

⁵⁹⁸ ICC-01/05-01/08-169-Anx3A, para 57 and p 38-43.

The Confirmation of Charges hearing was held from 12 to 15 January 2009.⁵⁹⁹

Prior to this hearing, on 12 December 2008, 54 applicants were recognised as victims to participate in the confirmation of charges proceedings.⁶⁰⁰

On 3 March 2009, Pre-Trial Chamber III,⁶⁰¹ noting that the evidence appeared to establish a mode of liability other than co-perpetration under Article 25(3)(a) of the Statute, adjourned the confirmation of charges hearing proceedings pursuant to Article 61(7)(c)(ii) and requested the Prosecution to consider amending the Document Containing the Charges, specifically to address Article 28 of the Statute as a possible mode of liability.⁶⁰² The Prosecution did so on 30 March 2009, charging Bemba with criminal responsibility as a co-perpetrator under Article 25(3)(a) or, in the alternative, as a military commander or person effectively acting as a military commander or superior under Article 28(a) or (b) of the Statute.⁶⁰³

On 15 June 2009, a newly constituted Pre-Trial Chamber II⁶⁰⁴ unanimously confirmed the following charges against Bemba: murder, rape and pillaging as war crimes; and murder and rape as crimes against humanity. He was charged as a military commander under Article 28(a) of the Statute,⁶⁰⁵ with the Chamber finding 'sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba knew that the MLC troops were committing or were about to commit the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging in the CAR from on or about 26 October 2002 to 15 March 2003.'⁶⁰⁶

In this decision, the Chamber declined to confirm the charges of torture by means of rape as a crime against humanity and war crime and outrages upon personal dignity as a war crime, reasoning that these charges were cumulative to the charges of rape and, therefore, impermissible. According to the Chamber, there was also insufficient evidence or imprecise pleading to substantiate some of the

599 ICC-01/05-01/08-424, para 12. For more information on the Confirmation of Charges hearing in the Bemba case, see Women's Initiatives for Gender Justice, 'Bemba Confirmation Hearing', *Legal Eye on the ICC eLetter*, March 2009, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-march-2009/>>.

600 ICC-01/05-01/08-320, p 36-37; ICC-01/05-01/08-424, para 6.

601 At this stage of proceedings, Pre-Trial Chamber III was composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Hans-Peter Kaul (Germany) and Judge Mauro Politi (Italy).

602 ICC-01/05-01/08-388, paras 46, 48-49 and p 19. See also Women's Initiatives for Gender Justice, 'CAR: Adjournment of Bemba confirmation hearing proceedings', *Legal Eye on the ICC eLetter*, May 2009, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2009/>>; 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 88-96, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

603 ICC-01/05-01/08-395-Anx3, para 57 and p 33-37. For a detailed description of the Court's approach to Article 28 in this case, see 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 88-96, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

604 On 19 March 2009, the ICC Presidency dissolved Pre-Trial Chamber III and reconstituted Pre-Trial Chamber II, which was then composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Hans-Peter Kaul (Germany) and Judge Fumiko Saiga (Japan). ICC-01/05-01/08-390, p 3-4. On 29 April 2009, the Presidency reconstituted Pre-Trial Chamber II once more, following the passing of Judge Saiga. ICC-01/05-01/08-414, p 3. At the time of the Confirmation of Charges decision, Pre-Trial Chamber II was thus composed of Presiding Judge Trendafilova, Judge Kaul and Judge Cuno Tarfusser (Italy).

605 ICC-01/05-01/08-424, p 184-185. For a detailed description of the Court's approach to Article 28 in this case, see 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 88-96, available at <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

606 ICC-01/05-01/08-424, para 478.

charges, including torture by means of rape as a crime against humanity and war crime, as well as outrages upon personal dignity as a war crime.⁶⁰⁷

On 22 June 2009, the Prosecution applied for leave to appeal the Confirmation of Charges decision, outlining 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'; 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'; and 'whether the Document Containing the Charges and the In-Depth Analytical Chart gave the Accused sufficient notice of the charges and the supporting facts'.⁶⁰⁸

On 13 July 2009, the Women's Initiatives for Gender Justice requested leave to file *amicus curiae* observations on the issues of cumulative charging raised in the Confirmation of Charges decision.⁶⁰⁹ The Pre-Trial Chamber granted leave to the Women's Initiatives on 17 July 2009,⁶¹⁰ and the brief was filed on 31 July 2009, in which it agreed that the Pre-Trial Chamber had applied the correct test with respect to cumulative charging but suggested that the test had been improperly and too narrowly applied to three categories of witnesses and to the facts of the alleged crimes of sexual violence committed against them.⁶¹¹ The Women's Initiatives observed that in recharacterising the evidence of torture and outrages upon personal dignity as 'rape', the Chamber may have inadvertently contravened Article 21(3) which requires that the application and interpretation of the law must be without adverse distinction on grounds such as gender.⁶¹²

On 18 September 2009, the Pre-Trial Chamber issued a decision denying the Prosecution application.⁶¹³ 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'.⁶¹⁴ It further noted that, 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.⁶¹⁵ Regarding the second issue, although 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

607 ICC-01/05-01/08-424, paras 72, 190, 302, 312 and p 185. On 13 July 2009, the Women's Initiatives for Gender Justice filed a request for leave to submit *amicus curiae* observations in relation to the Confirmation of Charges decision in this case, which it then filed on 31 July 2009. ICC-01/05-01/08-447; ICC-01/05-01/08-466. See also Women's Initiatives for Gender Justice, 'CAR: Amicus Curiae filing by the Women's Initiatives for Gender Justice in the case against Jean-Pierre Bemba Gombo', *Legal Eye on the ICC eLetter*, August 2009, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-august-2009-special-issue-on-amicus-curiae-filing/>>; Women's Initiatives for Gender Justice, *Gender Report Card 2009*, p 142-144, available at <http://iccwomen.org/news/docs/GRC09_web-2-10.pdf>. For more information on the Confirmation of Charges decision in this case, see Women's Initiatives for Gender Justice, 'CAR: Charges confirmed against Jean-Pierre Bemba Gombo', *Legal Eye on the ICC eLetter*, July 2009, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-july-2009/>>; Women's Initiatives for Gender Justice, *Gender Report Card 2009*, p 63-67, available at <http://iccwomen.org/news/docs/GRC09_web-2-10.pdf>; Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 194-195, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

608 ICC-01/05-01/08-427, para 8. For a detailed description of the Prosecution request for leave to appeal the Confirmation of Charges decision, see Women's Initiatives for Gender Justice, *Gender Report Card 2009*, p 66, available at <http://iccwomen.org/news/docs/GRC09_web-2-10.pdf>.

609 ICC-01/05-01/08-447.

610 ICC-01/05-01/08-451, p 6.

611 ICC-01/05-01/08-466, paras 25-30. The Women's Initiatives for Gender Justice filed a corrigendum to its *amicus curiae* observations on 3 August 2009. ICC-01/05-01/08-466-Corr.

612 ICC-01/05-01/08-466, para 40, see also paras 33-39.

613 ICC-01/05-01/08-532, p 31.

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

615 ICC-01/05-01/08-532, para 54. Importantly, in the Chamber's view, the Confirmation of Charges decision also left open the possibility for 'the Trial Chamber [to] address the issue of recharacterisation of facts anew'. ICC-01/05-01/08-532, para 61.

issue under Article 82(1)(d) of the Statute.⁶¹⁶ 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', the Chamber found that by confirming charges of rape alone, the Chamber 'captured all main facts presented by the Prosecutor'.⁶¹⁷

On 22 February 2010, Trial Chamber III⁶¹⁸ ordered that the 54 victims who participated in the confirmation of charges proceedings shall also participate in the trial proceedings.⁶¹⁹ In the months prior to the commencement of the trial, the Chamber granted leave to 705 additional applicants to participate as victims in the trial proceedings, bringing the number of participating victims to 759.⁶²⁰

Trial proceedings

The trial commenced on 22 November 2010 before Trial Chamber III.⁶²¹ The Prosecution's presentation of evidence commenced the next day and concluded on 20 March 2012.⁶²² The presentation of the Defence's case started on 14 August 2012 and the testimony of the last Defence witness concluded on 14 November 2013.⁶²³

Prior to the start of the trial, on 25 August 2008, the Registry established that Bemba was not indigent and that he would thus not be provided with full or partial legal assistance paid by the Court.⁶²⁴ However, on 26 November 2008, the Pre-Trial Chamber ordered the Registry to advance the required funds, as Bemba was facing temporary difficulties in accessing funds to cover his legal fees.⁶²⁵ On 17 December 2014, the ASP decided that an amount of € 2,067,982.25, which had been previously recovered from one of Bemba's bank accounts,⁶²⁶ would be treated as 'miscellaneous income to be returned to States Parties'.⁶²⁷ At the time, none of the recovered funds were set aside for potential future reparations in this case.

In September 2012, the Trial Chamber gave notice that Bemba's mode of liability may be subject to change,⁶²⁸ and on 13 December 2012 decided to temporarily suspend the trial to give the Defence time

616 ICC-01/05-01/08-532, para 86. Article 82(1)(d) of the 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 or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.'

617 ICC-01/05-01/08-532, para 86. For a detailed description of the Chamber's decision declining the Prosecution request for leave to appeal the Confirmation of Charges decision, see Women's Initiatives for Gender Justice, *Gender Report Card 2009*, p 66-67, available at <http://iccwomen.org/news/docs/GRC09_web-2-10.pdf>.

618 Trial Chamber III was composed of Presiding Judge Adrian Fulford (United Kingdom), Judge Elizabeth Odio Benito (Costa Rica) and Judge Joyce Aluoch (Kenya).

619 ICC-01/05-01/08-699, para 39(i).

620 81 applicants were authorised to participate on 30 June 2010. ICC-01/05-01/08-807, para 102. 624 applicants were authorised to participate on 18 November 2010. ICC-01/05-01/08-1017, para 63. At the time of the latter decision, Trial Chamber III was composed of Presiding Judge Sylvia Steiner (Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan).

621 ICC-01/05-01/08-3343, para 10. See also 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo', *ICC Press Conference*, 22 November 2010, available at <<http://4genderjustice.org/statement-by-the-womens-initiatives-at-the-opening-of-the-trial-of-jean-pierre-bemba-gombo/>>; Women's Initiatives for Gender Justice, 'CAR: Start of the Bemba trial', *Legal Eye on the ICC eLetter*, March 2011, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-march-2011/>>.

622 ICC-01/05-01/08-3343, para 10; ICC-01/05-01/08-T-218-Red2-ENG, p 82 lines 7-12. See also Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 252-261, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

623 ICC-01/05-01/08-3343, paras 10, 12.

624 ICC-01/05-01/08-76-tENG, p 8.

625 ICC-01/05-01/08-567-Red, paras 3, 5 and p 36.

626 Committee on Budget and Finance, 'Statement of the Chair of the Committee on Budget and Finance to the Assembly at its thirteenth session in New York, 8-12 December 2014', available at <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/ASP13-BG-Statement-CBFChair-ENG.pdf>, 12 December 2014, para 16. On 18 September 2014, the Registry requested the ASP to approve the creation of a special account into which those funds would have been transferred and used to finance the 'continued advance of legal aid funds' to Bemba in both cases in which he is a defendant 'as of 1 January 2015'. ICC-ASP/13/10, Annex VIII.

627 ICC-ASP/13/20, p 18-19.

628 ICC-01/05-01/08-2324, para 5.

to investigate and prepare for the possible change.⁶²⁹ The Trial Chamber gave notice in its decision that, upon having heard all the evidence, the Chamber may modify the legal characterisation of the facts to consider, pursuant to Regulation 55(2) of the Regulations of the Court, the 'should have known' alternate form of knowledge contained in Article 28(a)(i) of the Statute.⁶³⁰ Upon receiving submissions from the parties and participants regarding the potential effects that a possible modification of the legal characterisation of the charges would create, considering the need to strike a balance between the obligation to ensure a fair and expeditious trial with the duty to ensure the right of the accused to have adequate time to prepare its defence, the Trial Chamber temporarily suspended the trial proceedings until 4 March 2013.⁶³¹ However, the trial resumed on 25 February 2013, after the Trial Chamber granted the Defence motion to vacate the suspension decision and decided to lift the temporary suspension.⁶³²

Overall, the Chamber heard the testimony of 77 witnesses,⁶³³ and the Chamber sat for 330 days.⁶³⁴ On 7 April 2014, the Chamber declared the presentation of evidence closed and closing statements were heard on 12 and 13 November 2014.⁶³⁵

During the course of the trial, the Chamber granted leave to 4,470 additional applicants to participate as victims in the trial proceedings.⁶³⁶ Overall, 5,229 victims were authorised to participate in the trial proceedings,⁶³⁷ including those who had participated at the pre-trial stage.⁶³⁸ Dual victim/witness status was granted to 18 individuals as they also appeared as witnesses before the Chamber.⁶³⁹ To date, this case has the highest number of victims recognised to participate at the trial stage.

On 21 March 2016, Trial Chamber III unanimously convicted Bemba, as a military commander under Article 28(a) of the Statute, of all charges, namely: murder and rape as crimes against humanity; and murder, rape and pillaging as war crimes.⁶⁴⁰ This is the first conviction before the ICC for crimes of

629 ICC-01/05-01/08-2480. In its decision giving notice of a possible recharacterisation of the facts, the Trial Chamber explained that Pre-Trial Chamber II, in its Confirmation of Charges decision, had found that there were sufficient grounds to establish Bemba's knowledge that MLC troops were committing or about to commit crimes, but did not consider the 'should have known' standard set out as an alternative in Article 28(a)(i) of the Statute.

630 ICC-01/05-01/08-2324, para 5.

631 ICC-01/05-01/08-2480, para 22.

632 ICC-01/05-01/08-2500. The Defence had argued that 'absent a formal decision to amend the charges accordingly or to render a decision that Regulation 55 is in fact being relied upon in the proceedings for that purpose, the Trial Chamber has no lawful authority to prosecute the accused under this theory of liability'. Therefore, the Defence informed the Chamber that it would not be requesting to re-call any Prosecution witnesses or seeking to call any additional evidence. It would further decline to conduct any additional investigation and requested the trial to re-commence as soon as possible. See also Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 106, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>.

633 ICC-01/05-01/08-3343, paras 17, 221.

634 ICC-PIDS-CIS-CAR-01-016/16_Eng.

635 ICC-01/05-01/08-3343, para 16. See also Women's Initiatives for Gender Justice, 'Ground-breaking case for the ICC reaches closing stages – Closing Oral Statements in the ICC Trial of Jean-Pierre Bemba Gombo', 11 November 2014, available at <<http://4genderjustice.org/ground-breaking-case-for-the-icc-reaches-closing-stages/>>.

636 553 applicants were recognised as victims on 23 December 2010. ICC-01/05-01/08-1091, para 37. 307 applicants were recognised as victims on 8 July 2011. ICC-01/05-01/08-1590, para 38. 264 applicants were recognised as victims on 25 October 2011. ICC-01/05-01/08-1862, para 34. 404 applicants were recognised as victims on 15 December 2011. ICC-01/05-01/08-2011, para 22. 457 applicants were recognised as victims on 9 March 2012. ICC-01/05-01/08-2162, para 19. 1,377 applicants were recognised as victims on 21 May 2012. ICC-01/05-01/08-2219, para 20. 331 applicants were recognised as victims on 19 July 2012. ICC-01/05-01/08-2247-Red, para 39. 777 applicants were recognised as victims on 5 November 2012. ICC-01/05-01/08-2401, para 27.

637 ICC-01/05-01/08-3343, para 18.

638 ICC-01/05-01/08-3343, para 19.

639 ICC-01/05-01/08-3343, para 21.

640 ICC-01/05-01/08-3343, para 752. Judge Steiner and Judge Ozaki appended separate opinions. ICC-01/05-01/08-3343-AnxI; ICC-01/05-01/08-3343-AnxII. See also 'ICC Trial Chamber III declares Jean-Pierre Bemba Gombo guilty of war crimes and crimes against humanity', *ICC Press Release*, ICC-CPI-20160621-PR1200, 21 March 2016, <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1200>>.

sexual violence as well as the first conviction of an individual charged with command responsibility, under Article 28 of the Statute.⁶⁴¹

In its Judgment, the Chamber considered that a recharacterisation of the facts to include a 'should have known' mental element was not 'warranted',⁶⁴² given that 'Bemba knew that MLC forces under his effective authority and control were committing or about to commit' the crimes he was convicted of.⁶⁴³

The Defence filed its Notice of Appeal against the Trial Judgment on 4 April 2016,⁶⁴⁴ and its Document in Support of Appeal on 19 September 2016.⁶⁴⁵

On 15 April 2016, the Appeals Chamber⁶⁴⁶ granted the victims who participated in the trial proceedings against Bemba the possibility to participate in the appeals proceedings against the Trial Judgment.⁶⁴⁷ At the time of writing this publication, no judgment on the appeals had been rendered.

Sentencing

Trial Chamber III unanimously sentenced Bemba to 18 years' imprisonment on 21 June 2016.⁶⁴⁸ The Chamber did not identify any mitigating factors in this case and established that the crimes of rape and pillaging acted as aggravating circumstances.⁶⁴⁹ In total, eight years and one month were deducted from Bemba's sentence for the time already spent in detention since his arrest on 24 May 2008.⁶⁵⁰ This is the highest sentence imposed by the ICC to date. This is also the first ICC Sentencing decision for an individual convicted of crimes of sexual violence as well as the first sentence issued for an individual charged with command responsibility.⁶⁵¹

On 22 July 2016, the Defence and the Prosecution notified the Chamber of their intention to appeal the Sentencing decision,⁶⁵² and both filed their respective Documents in Support of Appeal on 21 October 2016.⁶⁵³

On 1 September 2016, the Appeals Chamber granted the victims who participated in the trial and sentencing proceedings against Bemba the possibility to also participate in the appeals proceedings against the Sentencing decision.⁶⁵⁴

At the time of writing this publication, no judgment on the appeals had been rendered.

641 See Women's Initiatives for Gender Justice, 'ICC first conviction for acts of sexual violence', 21 March 2016, available at <<http://4genderjustice.org/icc-first-conviction-acts-sexual-violence/>>.

642 ICC-01/05-01/08-3343, para 718.

643 ICC-01/05-01/08-3343, paras 717-718.

644 ICC-01/05-01/08-3348.

645 ICC-01/05-01/08-3434. A public redacted version was filed on 28 September 2016. ICC-01/05-01/08-3434-Red. See also ICC-01/05-01/08-3464, para 1.

646 The Appeals Chamber was composed of Presiding Judge Christine Van den Wyngaert (Belgium), Judge Sanji Mmasenono Monageng (Botswana), Judge Howard Morrison (United Kingdom), Judge Chile Eboe-Osui (Nigeria) and Judge Piotr Hofmański (Poland).

647 ICC-01/05-01/08-3369, p 3.

648 ICC-01/05-01/08-3399, para 97. Judge Ozaki appended a separate opinion. ICC-01/05-01/08-3399-Anxl.

649 ICC-01/05-01/08-3399, para 93. The Chamber found that two aggravating circumstances applied to the crimes of rape in this case, as it was committed (1) against particularly defenceless victims, and (2) with particular cruelty.

650 ICC-01/05-01/08-3399, paras 96-97. See also 'ICC Trial Chamber III sentences Jean-Pierre Bemba Gombo to 18 years' imprisonment for war crimes and crimes against humanity committed in the Central African Republic in 2002-2003', *ICC Press Release*, ICC-CPI-20160621-PR1223, 21 June 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1223>>.

651 See Women's Initiatives for Gender Justice, 'Bemba Sentenced to 18 Years by the ICC', 21 June 2016, available at <<http://4genderjustice.org/bemba-sentenced-18-years-icc/>>.

652 ICC-01/05-01/08-3412; ICC-01/05-01/08-3411.

653 ICC-01/05-01/08-3450-Conf; ICC-01/05-01/08-3451. The public redacted version of the Defence appeal on the Sentencing Decision was published on 26 October 2016. ICC-01/05-01/08-3450-Red. See also ICC-01/05-01/08-3513, para 11.

654 ICC-01/05-01/08-3432, p 3.

Reparations

On 22 July 2016, the recomposed Trial Chamber III⁶⁵⁵ issued an order requesting submissions relevant to reparations, as well as for the Registry to provide a list of experts on reparations in this case.⁶⁵⁶

In October 2016, submissions on reparations were filed by the Prosecution, Defence, OPCV, TFV and Registry,⁶⁵⁷ as well as by interested organisations.⁶⁵⁸ On 2 November 2016, the Registry launched a call for experts⁶⁵⁹ and subsequently submitted on 22 December 2016 a list of 27 proposed experts relevant to the reparations in this case.⁶⁶⁰ On 2 June 2017, the Chamber appointed four experts to assist it on issues relevant to reparations.⁶⁶¹

On 3 April 2017, the Defence requested the Chamber to suspend the reparations proceedings until the Judgment on the appeals against the Conviction and Sentencing decisions are delivered.⁶⁶² On 5 May 2017, the Chamber rejected this request, noting that reparations proceedings may commence in parallel to a pending appeal and that it is established practice at the ICC that preparatory steps to facilitate and expedite the reparations proceedings commence following the conviction.⁶⁶³ The Chamber further highlighted that it is only the implementation of the Reparations Order that requires a final Conviction decision.⁶⁶⁴

On 2 June 2017, the Chamber requested the Legal Representatives of Victims, the OPCV and the Defence to submit any additional information they wish to be considered in the Reparations Order by 15 September 2017.⁶⁶⁵

At the time of writing this publication, there was no indication of the number of victims benefitting from reparations in this case.

Status of proceedings

The case is currently at the appeals and reparations stages and Bemba is serving his sentence. At the time of writing this publication, the Appeals Chamber had not yet rendered its Judgments on the appeals against the Conviction and Sentencing decisions, and the Trial Chamber had not issued a reparations order in this case.

655 Trial Chamber III was recomposed by the ICC Presidency on 6 July 2016, prior to the start of the reparations proceedings. This followed requests by Judge Steiner and Judge Ozaki to be excused from the reparations proceedings in this case. The Presidency noted that although, ideally, the judges who conducted the trial proceedings and rendered the Conviction and Sentencing decisions would 'also address reparations to victims, as those judges have extensive knowledge of the case and its context', it granted, on an exceptional basis, the Judges' requests 'in light of the particular circumstances of the case'. ICC-01/05-01/08-3403, p 3-4; ICC-01/05-01/08-3403-AnxI; ICC-01/05-01/08-3403-AnxII; ICC-01/05-01/08-3404, paras 2-3. For the reparations proceedings, Trial Chamber III is thus currently composed of Presiding Judge Joyce Aluoch (Kenya), Judge Geoffrey Henderson (Trinidad and Tobago) and Judge Chang-ho Chung (Republic of Korea).

656 ICC-01/05-01/08-3410, paras 7-9 and p 6.

657 ICC-01/05-01/08-3454; ICC-01/05-01/08-3458-Red; ICC-01/05-01/08-3455; ICC-01/05-01/08-3457; ICC-01/05-01/08-3460.

658 The organisations filing *amicus curiae* observations on reparations in this case were the Queen's University Belfast Human Rights Centre, the Redress Trust, the UN (joint submission by the OHCHR, UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), UN Women and SRSG-SVC), and the International Organization for Migration. ICC-01/05-01/08-3444; ICC-01/05-01/08-3448; ICC-01/05-01/08-3449; ICC-01/05-01/08-3447.

659 'Call by the Registry of the ICC for experts on reparations for victims within the framework of reparations proceedings in the case of The Prosecutor v. Jean-Pierre Bemba Gombo', *Registry Press Release*, 2 November 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=161102callForExperts>>.

660 ICC-01/05-01/08-3487, paras 6(6)-7.

661 ICC-01/05-01/08-3532-Red, para 11 and p 8.

662 ICC-01/05-01/08-3513, para 3 and p 11.

663 ICC-01/05-01/08-3522, paras 14-15. See also ICC-01/05-01/08-3522, para 16.

664 ICC-01/05-01/08-3522, para 15 and p 8.

665 ICC-01/05-01/08-3532-Red, para 15 and p 8.

The Prosecutor v. Jean-Pierre Bemba Gombo et al

Several charges for offences against the administration of justice⁶⁶⁶ in connection with the main Bemba case were brought against Bemba and the following four individuals: Defence Team Lead Attorney, Aimé Kilolo-Musamba (Kilolo); Defence Team Case Manager, Jean-Jacques Mangenda Kabongo (Mangenda); Congolese Member of Parliament, Fidèle Babala Wandu (Babala); and Defence Team Witness, Narcisse Arido (Arido).⁶⁶⁷ This was the second Article 70 case brought before the ICC. At the time of writing this publication, three Article 70 cases had been brought before the Court.⁶⁶⁸

Scope of charges

Offences allegedly committed against the administration of justice, under Article 70 of the Statute, between the end of 2011 and 14 November 2013 in connection with the main Bemba trial. The alleged offences were committed in various locations, including the Netherlands, Belgium, Sweden, Portugal, the Republic of the Congo, the DRC and Cameroon.⁶⁶⁹

Arrest warrant

The Single Judge of Pre-Trial Chamber II⁶⁷⁰ issued an arrest warrant, under seal, for Bemba, Kilolo, Mangenda, Babala and Arido on 20 November 2013. The Arrest Warrant was unsealed on 28 November 2013.⁶⁷¹

Transfer to ICC custody

While Bemba was served the Arrest Warrant in the ICC Detention Centre where he was already detained, the remaining four individuals were arrested by the authorities of Belgium, the Netherlands, the DRC and France, respectively, between 23 and 24 November 2013.⁶⁷² Babala and Kilolo were surrendered to the Court's custody and transferred to the ICC Detention Centre on 25 November 2013. Mangenda was transferred to the Court on 4 December 2013, while Arido was transferred on 18 March 2014.⁶⁷³

Prior to the Confirmation of Charges decision in this case, all suspects, apart from Bemba, who was already detained in the ICC detention centre in connection with ongoing proceedings in the main case against him, were granted *interim* release from ICC custody on 21 October 2014.⁶⁷⁴

Confirmation of charges

The parties submitted written submissions on 30 July 2014 *in lieu* of a Confirmation of Charges hearing.⁶⁷⁵

On 11 November 2014, Pre-Trial Chamber II⁶⁷⁶ unanimously partially confirmed the charges of offences against the administration of justice brought against the five suspects and committed them to

666 Article 70, Rome Statute.

667 ICC-01/05-01/13-1989-Red, paras 8-12.

668 The other two Article 70 cases arise out of the Kenya Situation.

669 ICC-01/05-01/13-1989-Red, para 13.

670 The Single Judge, acting on behalf of Pre-Trial Chamber II, was Judge Cuno Tarfusser (Italy).

671 ICC-01/05-01/13-1-ENG, p 16; ICC-PIDS-CIS-CAR-02-011/16_Eng.

672 ICC-01/05-01/13-1989-Red, para 2.

673 ICC-PIDS-CIS-CAR-02-011/16_Eng.

674 ICC-01/05-01/13-703, p 4, 6. See also 'Bemba, Kilolo *et al.* case: ICC Pre-Trial Chamber II grants *interim* release to four suspects', *ICC Press Release*, ICC-CPI-20141021-PR1053, 21 October 2014, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1053>>. For more information on the Bemba *et al* case up to the *interim* release of the four accused, see Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 196-200, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

675 ICC-01/05-01/13-749, para 6.

676 At this stage of proceedings, Pre-Trial Chamber II was composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Cuno Tarfusser (Italy) and Judge Christine Van den Wyngaert (Belgium).

trial.⁶⁷⁷ All of the accused were charged with corruptly influencing witnesses under Article 70(1)(c); presenting false evidence with regard to witnesses under Article 70(1)(b); and soliciting witnesses to give false testimony under Article 70(1)(a) of the Statute.⁶⁷⁸

Bemba and Kilolo were charged as co-perpetrators under Article 25(3)(a) and for ordering and instigating the offences under Article 25(3)(b). Mangenda, as a co-perpetrator, and Arido, as a perpetrator, were charged under Article 25(3)(a) and for aiding and abetting the commission of the offences under Article 25(3)(c). Babala was charged for aiding and abetting the commission of the offences under Article 25(3)(c) of the Statute.⁶⁷⁹

Trial proceedings

The trial started on 29 September 2015.⁶⁸⁰ The closing oral statements took place from 31 May to 1 June 2016.⁶⁸¹ The trial lasted 46 days,⁶⁸² hearing a total of 19 witnesses.⁶⁸³

On 19 October 2016, Trial Chamber VII⁶⁸⁴ unanimously delivered its Trial Judgment against the five accused, finding them guilty of offences against the administration of justice pursuant to Article 70 of the Statute, relating to the false testimonies of Defence witnesses in the main case against Bemba.⁶⁸⁵

Bemba, Kilolo and Mangenda were found guilty, as co-perpetrators under Article 25(3)(a), for having jointly committed the offences of intentionally corruptly influencing 14 Defence witnesses, and presenting their false evidence in Court.⁶⁸⁶ Bemba was also found guilty of soliciting under Article 25(3)(b) the giving of false testimony by the 14 Defence witnesses;⁶⁸⁷ Kilolo of inducing under Article 25(3)(b) the giving of false testimony by the 14 witnesses;⁶⁸⁸ and Mangenda of aiding under Article 25(3)(c) the giving of false testimony by two Defence witnesses and abetting or otherwise assisting in the giving of false testimony by seven witnesses.⁶⁸⁹ Babala was found guilty of aiding under Article 25(3)(c) the corrupt influencing of two Defence witnesses;⁶⁹⁰ and Arido was found guilty under Article 25(3)(a) of the Statute of corruptly influencing four Defence witnesses.⁶⁹¹

677 ICC-01/05-01/13-749, p 47-55. See also 'Bemba, Kilolo et al. case: Pre-Trial Chamber II commits five suspects to trial', *ICC Press Release*, ICC-CPI-20141111-PR1062, 11 November 2014, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1062>>.

678 ICC-01/05-01/13-749, p 47-54.

679 ICC-01/05-01/13-749, p 47-54. The Chamber declined to confirm all charges against Bemba, Kilolo and Mangenda as indirect co-perpetrators under Article 25(3)(a) and for contributing in any other way under Article 25(3)(d). The charges against Babala as a direct and indirect co-perpetrator under Article 25(3)(a) and for contributing in any other way under Article 25(3)(d) were also not confirmed. With regards to Arido, the Chamber declined to confirm the charges of corruptly influencing ten out of 14 witnesses under Article 70(1)(c); presenting their false evidence under Article 70(1)(b); and soliciting them to give false testimony under Article 70(1)(a) of the Statute (Counts 1-9 and 19-39). With regard to the remaining four witnesses (Counts 10-18 and 40-42), the Chamber declined to confirm his mode of liability as a direct and indirect co-perpetrator under Article 25(3)(a), for soliciting under Article 25(3)(b), and for contributing in any other way under Article 23(3)(d) of the Statute. The Chamber further declined to confirm the charge of presenting false or forged documentary evidence (Count 43) for Bemba, Kilolo, Mangenda and Arido. ICC-01/05-01/13-749, p 54-55. See also ICC-01/05-01/13-526-AnxB1-Red2, p 53-78.

680 ICC-01/05-01/13-1989-Red, para 7; ICC-01/05-01/13-T-10-Red-ENG. See also Women's Initiatives for Gender Justice, 'First ICC Trial involving allegations of witness tampering and forgery of evidence', 28 September 2015, available at <<http://4genderjustice.org/first-icc-trial-involving-allegations-of-witness-tampering-and-forgery-of-evidence-2/>>.

681 ICC-01/05-01/13-1989-Red, para 7.

682 ICC-PIDS-CIS-CAR-02-011/16_Eng.

683 Of the 19 witnesses, 13 were called by the Prosecution and six by the Defence. ICC-01/05-01/13-1989-Red, fn 11.

684 At this stage of proceedings, Trial Chamber VII was composed of Presiding Judge Bertram Schmitt (Germany), Judge Marc Perrin de Brichambaut (France) and Raul Cano Pangalangan (Philippines).

685 ICC-01/05-01/13-1989-Red, p 455-457. See also 'Bemba et al. case: ICC Trial Chamber VII finds five accused guilty of offences against the administration of justice', *ICC Press Release*, ICC-CPI-20161019-PR1245, 19 October 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1245>>.

686 ICC-01/05-01/13-1989-Red, p 455-456.

687 ICC-01/05-01/13-1989-Red, p 455.

688 ICC-01/05-01/13-1989-Red, p 455.

689 ICC-01/05-01/13-1989-Red, p 456.

690 ICC-01/05-01/13-1989-Red, p 456.

691 ICC-01/05-01/13-1989-Red, p 457.

The Chamber acquitted Mangenda of aiding, abetting or otherwise assisting under Article 25(3)(c) in the giving of false testimony by five witnesses. Babala was also acquitted of aiding, abetting or otherwise assisting under Article 25(3)(c) in the giving of false testimony by 14 witnesses, in the presentation of their false evidence to the Court, and in the corrupt influencing of 12 witnesses. Lastly, Arido was acquitted of aiding, abetting or otherwise assisting under Article 25(3)(c) of the Statute in the presentation of false evidence by the four witnesses, and in the giving of their false testimony to the Court.⁶⁹²

Between 31 October and 7 November 2016, Arido, Babala, Mangenda, Bemba and Kilolo all filed their respective Notices of Appeal against the Conviction decision,⁶⁹³ and their respective Documents in Support of Appeal between 24 and 25 April 2017.⁶⁹⁴ At the time of writing this publication, no judgment on the appeals had been rendered.

Sentencing

On 22 March 2017, the Chamber unanimously delivered its Sentencing decision against the five accused.⁶⁹⁵ Bemba was sentenced to one additional year of imprisonment, which will be served consecutively to Bemba's existing sentence in the main case. No deduction of time previously spent in detention was ordered.⁶⁹⁶ Additionally, Bemba was fined € 300,000 to be paid to the Court and ultimately transferred to the TFV.⁶⁹⁷

Kilolo was sentenced to two years and six months of imprisonment, and a fine of € 30,000 to also be paid to the Court and ultimately transferred to the TFV.⁶⁹⁸ Mangenda was sentenced to two years of imprisonment.⁶⁹⁹ However, the Chamber conditionally suspended the execution of the prison sentence for both Kilolo and Mangenda during the upcoming three years.⁷⁰⁰ Arido was sentenced to 11 months⁷⁰¹ and Babala to six months⁷⁰² of imprisonment; however, by deducting previous time spent in custody, the Chamber considered the sentences as served.⁷⁰³ No fines were imposed upon Mangenda, Arido and Balala.

In April 2017, the Prosecution, Babala, Bemba and Arido appealed the Sentencing decision.⁷⁰⁴ At the time of writing this publication, no judgment on the appeals had been rendered.

Status of proceedings

This case is currently at the appeals stage. At the time of writing this publication, the Appeals Chamber had yet to render its Judgment on the appeals against the Conviction and Sentencing decisions.

692 ICC-01/05-01/13-1989-Red, p 456-457.

693 ICC-01/05-01/13-1995; ICC-01/05-01/13-1999-tENG; ICC-01/05-01/13-2006; ICC-01/05-01/13-2012; ICC-01/05-01/13-2015.

694 ICC-01/05-01/13-2145-Corr-Red; ICC-01/05-01/13-2147-Corr-Red; ICC-01/05-01/13-2143-Red; ICC-01/05-01/13-2144-Red; ICC-01/05-01/13-2148-Corr2-Red2. The public redacted versions were filed between May and July 2017. See also ICC-01/05-01/13-2197, para 3.

695 ICC-01/05-01/13-2123-Corr. See also 'Bemba et al. case: Trial Chamber VII issues sentences for five convicted persons', *ICC Press Release*, ICC-CPI-20170322-PR1287, 22 March 2017, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1287>>. Judge Pangalangan appended a separate opinion to this decision. ICC-01/05-01/13-2123-Anx.

696 ICC-01/05-01/13-2123-Corr, paras 249-260, 263 and p 99.

697 ICC-01/05-01/13-2123-Corr, paras 261-263 and p 99.

698 ICC-01/05-01/13-2123-Corr, paras 194-195, 198-199 and p 99.

699 ICC-01/05-01/13-2123-Corr, paras 146-147 and p 98.

700 ICC-01/05-01/13-2123-Corr, paras 149, 197 and p 98-99.

701 ICC-01/05-01/13-2123-Corr, para 97 and p 98.

702 ICC-01/05-01/13-2123-Corr, para 67 and p 98.

703 ICC-01/05-01/13-2123-Corr, paras 68, 98 and p 98.

704 The Prosecution filed its Notice of Appeal on 24 April and its Document in Support of Appeal on 21 June 2017. ICC-01/05-01/13-2146; ICC-01/05-01/13-2168-Red. Babala filed his Notice of Appeal on 13 April 2017, while his Document in Support of Appeal is not available on the ICC website. ICC-01/05-01/13-2139. While Bemba's Notice of Appeal is not available on the ICC website, his Document in Support of Appeal was filed on 28 June 2017. ICC-01/05-01/13-2167-Red. Arido's Notice of Appeal and Document in Support of Appeal are not available on the ICC website. See ICC-01/05-01/13-2208, para 1.

Central African Republic II

Following escalating violence in the CAR, former President Samba Panza sent a letter to the ICC Prosecutor on 30 May 2014, referring a new Situation on the territory to the ICC and requesting an investigation into alleged crimes since 1 August 2012.⁷⁰⁵ Upon receiving the referral, the Prosecutor stated that the existing Preliminary Examination into the Situation would remain ongoing at the time, and that the referral would 'enable the process to be sped up, where appropriate'.⁷⁰⁶

On 24 September 2014, the Prosecutor announced the opening of a second Situation in the country (CAR II), separate from the Situation referred to the ICC in 2004, regarding war crimes and crimes against humanity allegedly committed by both the Séléka and anti-Balaka groups since 2012, including murder, rape, forced displacement, persecution, pillaging, attacks against humanitarian missions and the use of children under 15 years in combat.⁷⁰⁷ There are currently no cases arising from this second Situation.

705 'Letter of referral to the ICC, Government of the Central African Republic', *ICC website*, 30 May 2014, available at <<http://icc-cpi.int/iccdocs/otp/2014-05-30-CAR-referral.pdf>>. See also 'Statement by the ICC Prosecutor, Fatou Bensouda, on the referral of the situation since 1 August 2012 in the Central African Republic', *OTP Press Statement*, 12 June 2014, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-12-06-2014>>.

706 'Statement by the ICC Prosecutor, Fatou Bensouda, on the referral of the situation since 1 August 2012 in the Central African Republic', *OTP Press Statement*, 12 June 2014, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-12-06-2014>>.

707 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic', *OTP Press Release*, ICC-OTP-20140924-PR1043, 24 September 2014, available at <http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx>.

Darfur, Sudan

Taking note of a report by the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, the UN Security Council determined that the conflict in Darfur, Sudan, posed ‘a threat to international peace and security’.⁷⁰⁸ Acting under Chapter VII of the UN Charter and pursuant to Article 13(b) of the Statute, the Security Council consequently referred the Situation in Darfur since 1 July 2002 to the ICC Prosecutor on 31 March 2005.⁷⁰⁹ Upon receipt of the referral, the Prosecutor opened a formal investigation into the Situation in Darfur on 6 June 2005.⁷¹⁰ This was the first UN Security Council referral of a Situation to the ICC and the first formal investigation into a Situation on the territory of a non-State Party.⁷¹¹

There are currently five cases before the ICC arising from the Darfur Situation, involving seven individuals. The Court has issued summonses to appear for the following three individuals: Bahar Idriss Abu Garda (Abu Garda); Abdallah Banda Abakaer Nourain (Banda); and Saleh Mohammed Jerbo Jamus (Jerbo).⁷¹² At the time of the summonses, these suspects were senior leaders in the United Resistance Front (URF) armed group, the Justice and Equality Movement (JEM) and the Sudanese Liberation Army (SLA)-Unity, respectively. Each of the suspects responded to his respective summons and voluntarily appeared before the Court. Proceedings against Jerbo, however, were subsequently terminated in October 2013, following evidence suggesting his death.⁷¹³ Additionally, the Court has issued public arrest warrants for the following four individuals: Ahmad Muhammed Harun (Harun); Ali Muhammad Ali Abd-Al-Rahman (Kushayb); President Omar Hassan Ahmad Al Bashir (Al Bashir); and Abdel Raheem Muhammad Hussein (Hussein).⁷¹⁴ In addition to President Al Bashir, at the time of the issuance of the Arrest Warrants, all of these suspects were senior government Ministers or members of the government-aligned Janjaweed militia group. In September 2014, the ICC issued a warrant for Banda’s arrest, replacing the Summons to Appear.⁷¹⁵ At the time of writing this publication, each of these Arrest Warrants remains outstanding.⁷¹⁶

On 12 December 2014, during her statement and related report to the UN Security Council on the Situation in Darfur, Prosecutor Bensouda informed the Council of her decision to ‘hibernate investigative activities in Darfur, as [she] shift[ed] resources to other urgent

708 UN Security Council, ‘Resolution 1593 (2005)’, 31 March 2005, S/Res/1593 (2005), p 1.

709 UN Security Council, ‘Resolution 1593 (2005)’, 31 March 2005, S/Res/1593 (2005), para 1.

710 ‘The Prosecutor of the ICC opens investigation in Darfur’, *OTP Press Release*, ICC-OTP-0606-104, 6 June 2005, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp%20the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur>>.

711 The Security Council has so far referred a total of two Situations to the ICC: Darfur (2005) and Libya (2011), both non-States Parties to the ICC.

712 ICC-02/05-02/09-2; ICC-02/05-03/09-3; ICC-02/05-03/09-2.

713 ICC-02/05-03/09-512-Red, paras 22-24 and p 12.

714 ICC-02/05-01/07-2; ICC-02/05-01/07-3-Corr; ICC-02/05-01/09-1; ICC-02/05-01/09-95; ICC-02/05-01/12-2.

715 ICC-02/05-03/09-606, para 26(iii); ICC-PIDS-CIS-SUD-04-006/15_Eng.

716 For more information on the issue of outstanding arrest warrants and non-cooperation in the Darfur Situation, see Women’s Initiatives for Gender Justice, *Gender Report Card 2011*, p 156-159, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2011.pdf>>; Women’s Initiatives for Gender Justice, *Gender Report Card 2012*, p 179-187, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

cases, especially those in which trial [was] approaching'.⁷¹⁷ According to the Prosecutor, the OTP's 'limited' and 'already overstretched' resources for investigations and the UN Security Council's 'lack of oversight' left her with 'no choice but to hibernate the investigations', especially in light of the difficulties in bringing the accused individuals to justice and that 'some of them continu[ed] to be implicated in atrocities against innocent civilians'.⁷¹⁸ The Prosecutor added that the fact that the OTP would not be, for the time being, conducting 'active investigations' into this Situation 'should in no way be construed as the Office abandoning the cases in the Darfur situation' and that the Arrest Warrants 'remain[ed] in place and must be executed'.⁷¹⁹

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

Harun, a Sudanese national, has held several senior government positions. Between about April 2003 and about September 2005, he was the Minister of State for the Interior of the Government of Sudan, and, from 2006 to 2009, he served as the Minister of State for Humanitarian Affairs of Sudan.⁷²⁰ Kushayb, also a Sudanese national, is alleged to be one of the top commanders of the Janjaweed Militia.⁷²¹ This is the first case in the Sudan Situation in which charges of sexual and gender-based crimes were brought.

Scope of charges

Crimes allegedly committed in Darfur, Sudan, between August 2003 and March 2004.⁷²²

Arrest warrants

Pre-Trial Chamber I⁷²³ issued arrest warrants for Harun and Kushayb on 27 April 2007.⁷²⁴ Harun is allegedly criminally responsible for ordering, soliciting or inducing under Article 25(3)(b) and for contributing in any other way within the meaning of Article 25(3)(d) of the Statute to the commission of 22 counts

717 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', *OTP Press Statement*, 12 December 2014, para 4, available at <<https://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf>>. See also 'Twenty First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', *OTP*, 29 June 2015, para 9, available at <https://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Darfur_%20Sudan.pdf>.

718 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', *OTP Press Statement*, 12 December 2014, paras 2, 4, available at <<https://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf>>. See also 'Twenty First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', *OTP*, 29 June 2015, paras 7-9, available at <https://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Darfur_%20Sudan.pdf>. The Prosecutor emphasised that 'sexual and gender-based violence remains a pervasive feature of the conflict in Darfur' and highlighted the recent allegations of rape of approximately 200 women and girls in Tabit. 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', *OTP Press Statement*, 12 December 2014, paras 5, 9, available at <<https://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf>>; 'Twenty First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', *OTP*, 29 June 2015, para 23, available at <https://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Darfur_%20Sudan.pdf>.

719 'Twenty First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', *OTP*, 29 June 2015, paras 8-9, available at <https://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Darfur_%20Sudan.pdf>.

720 ICC-02/05-01/07-2, p 16.

721 ICC-02/05-01/07-3-Corr, p 17.

722 ICC-02/05-01/07-2, p 3; ICC-02/05-01/07-3-Corr, p 5-6.

723 Pre-Trial Chamber I was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Claude Jorda (France) and Judge Sylvia Steiner (Brazil).

724 ICC-02/05-01/07-2; ICC-02/05-01/07-3-Corr.

of war crimes (murder, attacks against the civilian population, destruction of property, rape, pillaging, and outrages upon personal dignity) and 20 counts of crimes against humanity (persecution, torture, murder, forcible transfer, rape, inhumane acts, and imprisonment or severe deprivation of liberty).⁷²⁵

Kushayb is allegedly criminally responsible as a co-perpetrator under Article 25(3)(a) and as part of a group of persons acting with a common purpose under Article 25(3)(d) of the Statute for 28 counts of war crimes (murder, attacks against the civilian population, destruction of property, pillaging, rape, and outrages upon personal dignity) and 22 counts of crimes against humanity (persecution, murder, forcible transfer, rape, inhumane acts, torture, and imprisonment or severe deprivation of liberty).⁷²⁶

On 17 June 2010, the Single Judge of Pre-Trial Chamber I⁷²⁷ authorised six victims to participate in the pre-trial proceedings of this case.⁷²⁸

Status of proceedings

At the time of writing this publication, the execution of the Arrest Warrants is pending and Harun and Kushayb remain at large.

The Prosecutor v. Omar Hassan Ahmad Al Bashir

Al Bashir, a Sudanese national, has been the President of Sudan since 16 October 1993 and is the first sitting Head of State for whom an arrest warrant was issued by the ICC.⁷²⁹ This was also the first case referred by the UN Security Council to the ICC, under Article 13(b) of the Statute.

Scope of charges

Crimes allegedly committed in Darfur, Sudan, between 2003 and 2008.⁷³⁰

Arrest warrant

On 4 March 2009, Pre-Trial Chamber I⁷³¹ issued its first Arrest Warrant for Al Bashir for war crimes and crimes against humanity.⁷³²

In issuing this Arrest Warrant, the Chamber declined to include the crime of genocide, noting that the Prosecution may request an amendment to the Arrest Warrant in future to include the crime of genocide as a result of ongoing investigations.⁷³³

725 ICC-02/05-01/07-2, p 6-15. Sexual violence was among the underlying acts of persecution and outrages upon personal dignity in this case. In relation to each crime charged, the Prosecution included a count corresponding to each location in which the crime allegedly occurred. This accounts for the large number of counts represented in the Arrest Warrant.

726 ICC-02/05-01/07-3-Corr, p 6-16. Sexual violence was among the underlying acts of persecution and outrages upon personal dignity in this case. In relation to each crime charged, the Prosecution included a count corresponding to each location in which the crime allegedly occurred. This accounts for the large number of counts represented in the Arrest Warrant.

727 Pre-Trial Chamber I was recomposed on 19 March 2009, and was subsequently composed of Presiding Judge Sylvia Steiner (Brazil), Judge Sanji Mmasenono Monageng (Botswana) and Judge Cuno Tarfusser (Italy). ICC-02/05-01/07-42, p 3-4; ICC-02/05-01/07-40, p 4. On 19 August 2009, Judge Monageng was appointed as the Single Judge responsible for all issues related to victims' applications to be authorised to participate in this case. ICC-02/05-01/07-46, p 4.

728 ICC-02/05-01/07-58, p 11. These six victims were also authorised to participate also in the Al Bashir pre-trial proceedings. ICC-02/05-01/07-58, p 3.

729 ICC-02/05-01/09-95, p 9.

730 ICC-02/05-01/09-1, p 6-8; ICC-02/05-01/09-95, p 8.

731 Pre-Trial Chamber I was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Anita Ušacka (Latvia) and Judge Sylvia Steiner (Brazil).

732 ICC-02/05-01/09-1, p 7-8.

733 ICC-02/05-01/09-3, paras 206-207. Judge Ušacka appended a separate and partly dissenting opinion. ICC-02/05-01/09-3, p 96-146. For more information on the first Arrest Warrant for Al Bashir, see Women's Initiatives for Gender Justice, 'Darfur: Update on Arrest Warrant proceedings', *Legal Eye on the ICC*, May 2009, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2009/>>.

The Prosecution subsequently sought leave to appeal this decision on 10 March 2009,⁷³⁴ and filed its Document in Support of Appeal on 6 July 2009.⁷³⁵ The Appeals Chamber⁷³⁶ rendered its unanimous Judgment on the Prosecution appeal on 3 February 2010, in which it reversed the Pre-Trial Chamber's decision not to issue an arrest warrant regarding the crime of genocide 'in view of an erroneous standard of proof' and remanded the matter to the Pre-Trial Chamber to decide anew whether an arrest warrant for this crime should be issued.⁷³⁷

On 12 July 2010, Pre-Trial Chamber I⁷³⁸ issued a second warrant for Al Bashir's arrest, this time for the crime of genocide.⁷³⁹ Overall, Al Bashir is allegedly criminally responsible as an indirect perpetrator or indirect co-perpetrator under Article 25(3)(a) of the Statute for two counts of war crimes (attacks against a civilian population, and pillaging) and five counts of crimes against humanity (murder, extermination, forcible transfer, torture, and rape), as well as three counts of genocide, including by killing, causing serious bodily or mental harm (including through acts of rape),⁷⁴⁰ and deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction.⁷⁴¹

On 10 December 2009, the Single Judge of Pre Trial Chamber I authorised 12 victims to participate in the pre-trial proceedings in this case.⁷⁴² However, noting the inability to proceed with the prosecution of Al Bashir since 2009 and the Prosecutor's decision to suspend 'active' investigations into the Darfur Situation in December 2014, eight victims withdrew their participation on 19 October 2015.⁷⁴³

..... Status of proceedings

At the time of writing this publication, the execution of the Arrest Warrants is pending and Al Bashir remains at large.

734 ICC-02/05-01/09-12, paras 2-3, 52.

735 ICC-02/05-01/09-25. For more information on the Prosecution's appeal on the Chamber's decision declining to include the crime of genocide in the first Arrest Warrant, see Women's Initiatives for Gender Justice, 'Darfur: Prosecution files appeal on Pre-Trial Chamber I's decision on the arrest warrant for Al Bashir', *Legal Eye on the ICC eLetter*, September 2009, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-september-2009/>>.

736 The Appeals Chamber was composed of Presiding Judge Erkki Kourula (Finland), Judge Sang-Hyun Song (Republic of Korea), Judge Ekaterina Trendafilova (Bulgaria), Judge Daniel David Ntanda Nsereko (Uganda) and Judge Joyce Aluoch (Kenya).

737 ICC-02/05-01/09-73, paras 41-42 and p 3. See also Women's Initiatives for Gender Justice, 'Darfur: Appeals Chamber directs Pre-Trial Chamber I to reconsider issuing Warrant of Arrest for charge of genocide against President Al-Bashir', *Legal Eye on the ICC eLetter*, May 2010, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2010/>>.

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

739 ICC-02/05-01/09-95, p 8-9. This second Arrest Warrant did not replace or revoke in any respect the first Arrest Warrant, which remained in effect. ICC-02/05-01/09-94, p 28.

740 ICC-02/05-01/09-94, paras 29-31.

741 ICC-02/05-01/09-1, p 7-8; ICC-02/05-01/09-95, p 8.

742 ICC-02/05-01/09-62, p 25. The Single Judge, acting on behalf of Pre-Trial Chamber I, was Judge Sanji Mmasenono Monageng (Botswana).

743 ICC-02/05-01/09-250, p 3. See also 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', *OTP Press Statement*, 12 December 2014, para 4, available at <<https://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf>>; 'Twenty First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', *OTP*, 29 June 2015, paras 7-9, available at <https://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Darfur_%20Sudan.pdf>. Six of these eight victims had also been authorised on 17 June 2010 to participate in the Harun and Kushayb pre-trial proceedings. ICC-02/05-01/07-58, p 11.

The Prosecutor v. Bahar Idriss Abu Garda

Abu Garda, a Sudanese national, is alleged to have been the Chairman and General Coordinator of Military Operations of the URF armed group.⁷⁴⁴ He had previously allegedly served as Vice President, the second-in-command and the Secretary General of the JEM.⁷⁴⁵ On 8 February 2010, the Court declined to confirm all charges against Abu Garda and the case did not proceed to trial.⁷⁴⁶ This was the first case before the ICC in which all charges were dismissed at the confirmation of charges stage of proceedings.

Scope of charges

Crimes allegedly committed during an attack carried out on 29 September 2007, against the African Union Mission in Sudan (AMIS) at the Military Group Site Haskanita in the locality of Um Kadada, North Darfur, Sudan.⁷⁴⁷

Summons to appear

Pre-Trial Chamber I⁷⁴⁸ issued a summons to appear for Abu Garda, under seal, on 7 May 2009.⁷⁴⁹ The Summons to Appear was unsealed on 17 May 2009.⁷⁵⁰

Transfer to ICC custody

Abu Garda voluntarily appeared before the Court on 18 May 2009.⁷⁵¹

Confirmation of charges

The Confirmation of Charges hearing was held from 19 to 30 October 2009.⁷⁵²

Prior to this hearing, 78 victims were authorised to participate in the pre-trial proceedings.⁷⁵³

On 8 February 2010, Pre-Trial Chamber I unanimously declined to confirm all charges against Abu Garda, due to insufficient evidence provided to establish his criminal responsibility for the attack against AMIS at the Military Group Site Haskanita.⁷⁵⁴

He faced charges as a co-perpetrator or indirect co-perpetrator under Article 25(3)(a) for three counts of war crimes, including: violence to life in the form of murder; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission; and pillaging.⁷⁵⁵ He was also allegedly responsible under Article 25(3)(f) of the Statute for attempting to commit the war crime of violence to life in the form of murder.⁷⁵⁶

744 ICC-02/05-02/09-2, p 9.

745 ICC-02/05-02/09-243-Red, para 2.

746 ICC-02/05-02/09-243-Red, p 97.

747 ICC-02/05-02/09-91-Red, para 31 and p 32-33; ICC-02/05-02/09-243-Red, para 21.

748 Pre-Trial Chamber I was composed of Presiding Judge Sylvia Steiner (Brazil), Judge Sanji Mmasenono Monageng (Botswana) and Judge Cuno Tarfusser (Italy).

749 ICC-02/05-02/09-2, p 9.

750 ICC-PIDS-CIS-SUD-03-002/12_Eng.

751 ICC-02/05-02/09-243-Red, para 5.

752 ICC-02/05-02/09-243-Red, para 13.

753 On 25 September 2009, 34 victims were authorised to participate in the proceedings. ICC-02/05-02/09-121, p 31. On 9 October 2009, a further 44 victims were authorised to participate. ICC-02/05-02/09-147-Red, p 41.

754 ICC-02/05-02/09-243-Red, paras 233-236 and p 97. Judge Tarfusser appended a separate opinion. ICC-02/05-02/09-243-Red, p 99-103.

755 ICC-02/05-02/09-243-Red, para 21 and p 97. For a more detailed analysis of the Abu Garda Confirmation of Charges decision, see Women's Initiatives for Gender Justice, *Gender Report Card 2010*, p 109-111, available at <http://iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf>.

756 ICC-02/05-02/09-243-Red, para 1. For more information on the Chamber's decision declining to confirm the charges against Abu Garda, see Women's Initiatives for Gender Justice, 'Darfur: Pre-Trial Chamber I declines to confirm charges against Abu Garda', *Legal Eye on the ICC eLetter*, July 2010, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-july-2010/>>.

On 15 March 2010, the Prosecution sought leave to appeal the Confirmation of Charges decision.⁷⁵⁷ In light of this appeal, on 19 March 2010, nine additional victims were authorised to participate in the pre-trial stage proceedings.⁷⁵⁸ Overall, 87 victims participated in the pre-trial proceedings.

On 23 April 2010, Pre-Trial Chamber I declined the Prosecution request for leave to appeal the Confirmation of Charges decision, finding that the issues raised by the Prosecution were not appealable and/or fell within the Chamber's discretionary powers.⁷⁵⁹

Status of proceedings

The case against Abu Garda is currently considered closed before the Court, unless and until the Prosecutor presents additional evidence in this case.⁷⁶⁰

The Prosecutor v. Abdallah Banda Abakaer Nourain

Banda, a Sudanese national, is alleged to have been the military Commander of the JEM, one of the components of the URF.⁷⁶¹ Following the Abu Garda case, this is the second case arising from the investigations into the September 2007 attacks against AMIS. This case initially included another individual, namely Jerbo, who was allegedly the Chief of Staff of the SLA-Unity at the time of the crimes, and was later integrated into the JEM.⁷⁶² However, the proceedings against Jerbo were terminated on 4 October 2013, following evidence suggesting his death.⁷⁶³

Scope of charges

Crimes allegedly committed during an attack carried out on 29 September 2007 against AMIS at the Military Group Site Haskanita in the locality of Um Kadada, North Darfur, Sudan.⁷⁶⁴

Summons to appear and arrest warrant

Pre-Trial Chamber I⁷⁶⁵ issued summonses to appear for Banda and Jerbo, under seal, on 27 August 2009. The Summonses to Appear were unsealed on 15 June 2010.⁷⁶⁶

On 11 September 2014, finding that the Summons to Appear was 'no longer sufficient' to ensure Banda's appearance at trial, Trial Chamber IV,⁷⁶⁷ by majority, issued an arrest warrant for Banda, replacing the Summons to Appear.⁷⁶⁸

The Defence applied for leave to appeal or, in the alternative, request the reconsideration of the Chamber's decision to issue the Arrest Warrant on 18 September 2014.⁷⁶⁹

⁷⁵⁷ ICC-02/05-02/09-252-Red, para 70.

⁷⁵⁸ ICC-02/05-02/09-255, para 3 and p 17.

⁷⁵⁹ ICC-02/05-02/09-267, paras 11-12, 18, 24-25 and p 15.

⁷⁶⁰ ICC-02/05-02/09-243-Red; 'Abu Garda Case', *ICC website*, available at <<https://www.icc-cpi.int/darfur/abugarda>>.

⁷⁶¹ ICC-02/05-03/09-3, para 17.

⁷⁶² ICC-02/05-03/09-2, para 17 and p 8.

⁷⁶³ ICC-02/05-03/09-512-Red, paras 22-24 and p 12.

⁷⁶⁴ ICC-02/05-03/09-121-Corr-Red, p 4-5.

⁷⁶⁵ Pre-Trial Chamber I was composed of Presiding Judge Sylvia Steiner (Brazil), Judge Sanji Mmasenono Monageng (Botswana) and Judge Cuno Tarfusser (Italy).

⁷⁶⁶ ICC-02/05-03/09-3, p 8; ICC-02/05-03/09-2, p 8.

⁷⁶⁷ Trial Chamber IV was composed of Presiding Judge Joyce Aluoch (Kenya), Judge Silvia Fernández de Gurmendi (Argentina) and Judge Chile Eboe-Osuji (Nigeria).

⁷⁶⁸ ICC-02/05-03/09-606, para 26; ICC-PIDS-CIS-SUD-04-006/15_Eng. Judge Eboe-Osuji appended a dissenting opinion. ICC-02/05-03/09-606-Anx.

⁷⁶⁹ ICC-02/05-03/09-608-Red, paras 38-39.

The Trial Chamber, by majority, rejected the request for reconsideration and granted the Defence leave to appeal on 19 December 2014.⁷⁷⁰ The Defence subsequently submitted its Document in Support of Appeal on 19 January 2015.⁷⁷¹ On 3 March 2015, the Appeals Chamber⁷⁷² unanimously rejected the Defence appeal and confirmed the Trial Chamber's decision to issue the Arrest Warrant.⁷⁷³

Transfer to ICC custody

Banda and Jerbo voluntarily appeared before the Court on 17 June 2010.⁷⁷⁴

Confirmation of charges

The Confirmation of Charges hearing was held on 8 December 2010.⁷⁷⁵

Prior to this hearing, on 29 October 2010, 89 victims, including 87 who participated in the Abu Garda case, were authorised to participate in the confirmation of charges proceedings in this case.⁷⁷⁶

On 7 March 2011, the Single Judge of Pre-Trial Chamber I⁷⁷⁷ unanimously confirmed all charges against Banda and Jerbo. They were charged as direct co-perpetrators under Article 25(3)(a) with three counts of war crimes, including: violence to life in the form of murder; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission; and pillaging.⁷⁷⁸ They were also allegedly responsible under Article 25(3)(f) of the Statute for attempting to commit the war crime of violence to life in the form of murder.⁷⁷⁹

Trial proceedings

Trial Chamber IV terminated the proceedings against Jerbo on 4 October 2013, following evidence suggesting his death.⁷⁸⁰

On 17 October 2011, Trial Chamber IV decided that the 89 victims authorised to participate in the confirmation of charges proceedings were also authorised to participate in the trial proceedings.⁷⁸¹ On 12 December 2013, Trial Chamber IV authorised an additional 14 victims to participate in the trial proceedings,⁷⁸² thus raising the number of participating victims to 103.

The trial against Banda was initially set to commence on 5 May 2014.⁷⁸³ However, on 15 April 2014, the Prosecution filed a submission proposing not to start its preparations to bring its witnesses to The Hague until such time as there was confirmation that the accused would appear for his trial.⁷⁸⁴ On the same day, the Defence requested that: (1) the trial start date of 5 May 2014 be vacated; (2) a status conference be scheduled for September 2014; and (3) a trial start date be set for March 2015.⁷⁸⁵ On 16 April 2014, finding that this date was 'clearly not feasible' due to the logistical difficulties encountered

770 ICC-02/05-03/09-619-Red, para 59. Judge Eboe-Osui appended a partly dissenting opinion. ICC-02/05-03/09-619-Anx-Red.

771 ICC-02/05-03/09-625-Red.

772 The Appeals Chamber was composed of Presiding Judge Sang-Hyun Song (Republic of Korea), Judge Akua Kuenyehia (Ghana), Judge Erkki Kourula (Finland), Judge Anita Ušacka (Latvia) and Judge Christine Van den Wyngaert (Belgium).

773 ICC-02/05-03/09-632-Red, para 36 and p 3.

774 ICC-02/05-03/09-121-Corr-Red, para 13.

775 ICC-02/05-03/09-121-Corr-Red, para 21.

776 ICC-02/05-03/09-89, para 10 and p 23.

777 The Single Judge, acting on behalf of Pre-Trial Chamber I, was Judge Cuno Tarfusser (Italy).

778 ICC-02/05-03/09-121-Corr-Red, paras 5, 162-163 and p 74.

779 ICC-02/05-03/09-121-Corr-Red, paras 5, 163 and p 74. For more information on this Confirmation of Charges decision, see Women's Initiatives for Gender Justice, 'Darfur: Confirmation of charges decision in Banda and Jerbo case', *Legal Eye on the ICC eLetter*, May 2011, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2011/>>.

780 ICC-02/05-03/09-512-Red, paras 22-24 and p 12.

781 ICC-02/05-03/09-231, p 16. A corrected version was issued on 28 October 2011. ICC-02/05-03/09-231-Corr.

782 ICC-02/05-03/09-528, p 19.

783 ICC-02/05-03/09-455, para 25(ii).

784 ICC-02/05-03/09-562-Conf. A public redacted version was filed on 23 October 2014. ICC-02/05-03/09-562-Red, para 4.

785 ICC-02/05-03/09-563-Conf-Red. A public redacted version was filed on 9 November 2014. ICC-02/05-03/09-563-Red2, para 17.

by the Registry, the Chamber vacated the start date.⁷⁸⁶ On 14 July 2014, the Chamber set the trial commencement date for 18 November 2014,⁷⁸⁷ which was also vacated with the issuance of the new Arrest Warrant for Banda on 11 September 2014.⁷⁸⁸

Status of proceedings

The trial start date has been vacated and all preparatory measures for the trial are suspended until Banda's arrest or voluntary appearance.⁷⁸⁹

At the time of writing this publication, the execution of the Arrest Warrant is pending and Banda remains at large.

The Prosecutor v. Abdel Raheem Muhammad Hussein

Hussein, a Sudanese national, is alleged to have committed crimes in his capacity as Minister of the Interior and Special Representative of the President in Darfur and as an influential member of the Government of Sudan.⁷⁹⁰

Scope of charges

Crimes allegedly committed in Darfur in 2003 and 2004.⁷⁹¹

Arrest warrant

Pre-Trial Chamber I⁷⁹² issued an arrest warrant for Hussein on 1 March 2012.

He is allegedly responsible as an indirect perpetrator or indirect co-perpetrator under Article 25(3)(a) of the Statute for six counts of war crimes (murder, attack against a civilian population, destruction of property, rape, pillaging, and outrages upon personal dignity), as well as seven counts of crimes against humanity (persecution, murder, forcible transfer, rape, other inhumane acts, imprisonment or severe deprivation of liberty, and torture).⁷⁹³

Status of proceedings

At the time of writing this publication, the execution of the Arrest Warrant is pending and Hussein remains at large.

⁷⁸⁶ ICC-02/05-03/09-564-Red, paras 11, 13(i).

⁷⁸⁷ ICC-02/05-03/09-590-Red, paras 24, 37(a).

⁷⁸⁸ ICC-02/05-03/09-606, paras 25-26(vii).

⁷⁸⁹ ICC-02/05-03/09-606, paras 25-26(vii).

⁷⁹⁰ ICC-02/05-01/12-2, p 6.

⁷⁹¹ ICC-02/05-01/12-2, p 6-10.

⁷⁹² Pre-Trial Chamber I was composed of Presiding Judge Sanji Mmasenono Monageng (Botswana), Judge Sylvia Steiner (Brazil) and Judge Cuno Tarfusser (Italy).

⁷⁹³ ICC-02/05-01/12-2, p 6-10.

Kenya

In the aftermath of the violence surrounding the highly contested national elections of December 2007, the Prosecutor requested authorisation to open an investigation into the Kenya Situation. The request for authorisation was submitted to Pre-Trial Chamber II⁷⁹⁴ on 26 November 2009 and marked the first time that the ICC Prosecutor had utilised his *proprio motu* powers to initiate an investigation, pursuant to Article 15 of the Statute.⁷⁹⁵ On 31 March 2010, the Chamber, by majority,⁷⁹⁶ granted authorisation to proceed,⁷⁹⁷ and the investigation was subsequently opened.⁷⁹⁸ The investigation has since focused on crimes allegedly committed between 1 June 2005 and 26 November 2009 in the context of the post-election violence.

On 8 March 2011, Pre-Trial Chamber II, by majority,⁷⁹⁹ issued summonses to appear for a total of six suspects in two cases: William Samoei Ruto (Ruto), Joshua Arap Sang (Sang), Henri Kiprono Kosgey (Kosgey), Uhuru Muigai Kenyatta (Kenyatta), Francis Kirimi Muthaura (Muthaura) and Mohammed Hussein Ali (Ali).⁸⁰⁰ All suspects voluntarily appeared before the Court. However, at the time of writing this publication, the two cases involving charges arising out of the post-election violence have been terminated and all six accused have been discharged, following the charges not being confirmed against two (Kosgey and Ali), the charges being withdrawn against another two (Muthaura and Kenyatta), and the charges being vacated against the remaining two (Ruto and Sang). Charges of sexual and gender-based crimes were only brought in the Kenyatta case.⁸⁰¹

Additionally, on 2 October 2013, an arrest warrant was unsealed for Kenyan journalist Walter Barasa (Barasa) for offences against the administration of justice under Article 70 of the Statute, relating to his alleged role in corruptly influencing witnesses in the Ruto and Sang case. Two further arrest warrants were unsealed on 10 September 2015 for lawyer Paul Gicheru (Gicheru) and Philip Kipkoech Bett (Bett), also for offences against the administration of justice consisting in corruptly influencing witnesses in the context of

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

795 ICC-01/09-3, para 114.

796 Judge Kaul appended a dissenting opinion. ICC-01/09-19-Corr.

797 ICC-01/09-19-Corr, p 83.

798 See 'OTP Press Conference on Kenya, Prosecutor Moreno-Ocampo's Statement, 1 April 2010', *OTP Statement*, 1 April 2010, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=20100401>>.

799 Judge Kaul appended dissenting opinions on the issuance of Summonses to Appear in both cases. ICC-01/09-01/11-2; ICC-01/09-02/11-3.

800 ICC-01/09-01/11-1; ICC-01/09-02/11-1. For more information on these Summonses to Appear, see Women's Initiatives for Gender Justice, 'Kenya: Pre-Trial Chamber II issues Summonses to Appear for six individuals', *Legal Eye on the ICC eLetter*, July 2011, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-july-2011/>>.

801 While there were significant reports of sexual violence taking place in the context of the post-election violence, including materials presented by the Prosecution in the request to open an investigation in Kenya, the Prosecution only sought charges of sexual and gender-based crimes in the Kenyatta case. The charges were confirmed in relation to the commission of rape in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008. Along with charges of rape, the Prosecution also presented evidence of forcible circumcision and penile amputation to support the charge of 'other forms of sexual violence'. However, in the decision issuing the Summons to Appear as well as in the Confirmation of Charges decision, the Pre-Trial Chamber recharacterised this evidence as 'other inhumane acts'. See Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 117, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>; Women's Initiatives for Gender Justice, *Gender Report Card 2010*, p 122-124, available at <http://iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf>.

cases in the Kenya Situation.⁸⁰² To date, Barasa, Gicheru and Bett have not been arrested and remain at large.⁸⁰³

The Prosecutor v. William Samoei Ruto and Joshua Arap Sang

Ruto and Sang are both Kenyan nationals. At the time of the post-election violence, both accused were allegedly aligned with the Orange Democratic Movement (ODM). Ruto was a Member of Parliament and one of the founders and prominent leaders of the ODM, the strongest opposition party to the Party of National Unity (PNU).⁸⁰⁴ Since 2013, Ruto has served as the Deputy President of Kenya. Sang was a radio broadcaster on Kass FM, and a vocal supporter of the ODM.⁸⁰⁵ Originally, this case also included Kosgey, former Minister of Industrialisation of the Republic of Kenya and Chairman of the ODM.⁸⁰⁶ However, the charges against Kosgey were not confirmed in January 2012.⁸⁰⁷ The case against Ruto and Sang was terminated in April 2016.⁸⁰⁸ This was the second ICC case to be terminated at the trial stage of proceedings. The Trial Chamber in this case introduced a new procedure for victim participation which involved a two-pronged application process.

Scope of charges

Crimes allegedly committed during attacks in Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills, Kenya, between 30 December 2007 and 16 January 2008.⁸⁰⁹

Summons to appear

Pre-Trial Chamber II,⁸¹⁰ by majority,⁸¹¹ issued a summons to appear for Ruto, Kosgey and Sang on 8 March 2011.⁸¹²

Transfer to ICC custody

Ruto, Kosgey and Sang voluntarily appeared before the Court on 7 April 2011.⁸¹³

Confirmation of charges

The Confirmation of Charges hearing was held from 1 to 8 September 2011.⁸¹⁴

Prior to this hearing, on 5 August 2011, 327 victims were granted leave to participate in the confirmation of charges proceedings.⁸¹⁵

802 ICC-01/09-01/15-1-Red; ICC-01/09-01/15-11.

803 See 'Barasa Case', ICC website, available at <<https://www.icc-cpi.int/kenya/barasa>>; 'Gicheru and Bett Case', ICC website, available at <<https://www.icc-cpi.int/kenya/gicheru-bett>>.

804 ICC-01/09-01/11-448-AnxA, paras 6, 9-10.

805 ICC-01/09-01/11-448-AnxA, paras 13, 19.

806 ICC-01/09-01/11-1, p 23.

807 ICC-01/09-01/11-373, p 138.

808 ICC-01/09-01/11-2027-Red-Corr, p 1; 'Ruto and Sang case: ICC Trial Chamber V(A) terminates the case without prejudice to re-prosecution in future', ICC Press Release, ICC-CPI-20160405-PR1205, 5 April 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1205>>.

809 ICC-01/09-01/11-373, paras 349, 367.

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

811 Judge Kaul appended a dissenting opinion. ICC-01/09-01/11-2.

812 ICC-01/09-01/11-1, p 22-23.

813 ICC-01/09-01/11-373, para 4.

814 ICC-01/09-01/11-373, para 18.

815 ICC-01/09-01/11-249, p 46-48. See also ICC-01/09-01/11-373, para 12.

On 23 January 2012, Pre-Trial Chamber II, by majority,⁸¹⁶ confirmed three counts of crimes against humanity against both Ruto and Sang, including murder, deportation or forcible transfer of population, and persecution.⁸¹⁷ Ruto was charged as an indirect co-perpetrator under Article 25(3)(a) of the Statute and Sang was charged with contributing to the commission of the crimes in any other way within the meaning of Article 25(3)(d) of the Statute. The Court declined to confirm the charges against Kosgey.⁸¹⁸ The Chamber considered that the evidence presented by the Prosecution regarding his alleged responsibility for the crimes against humanity of murder, deportation or forcible transfer of population, and persecution was insufficient.⁸¹⁹ Given the absence or insufficiency of corroborating evidence, the Prosecution did not meet the necessary evidentiary standard required to confirm the charges against Kosgey.⁸²⁰

Prior to the start of the trial, on 3 October 2012, Trial Chamber V⁸²¹ introduced a differentiated procedure for victim participation, which was similarly applied in the Kenyatta case.⁸²² The registration system in the Kenya cases introduced the creation of a two-pronged approach to the victim participation application process. Victims who sought to appear individually before the Court were required to follow the established application procedure foreseen by Rule 89(1) of the Rules of Procedure and Evidence (RPE), whereas victims who did not seek to appear individually before the Court followed a new procedure, in which they registered with the Registry through the Court appointed Common Legal Representative in order for their views and concerns to be expressed. Victims who were registered through the new system were not subject to an individual assessment by the Trial Chamber.⁸²³

Furthermore, the victims who had been authorised to participate at the confirmation of charges stage were considered as having registered through the Common Legal Representative of Victims to participate in the trial, provided they still fell within the scope of the case.⁸²⁴

By 23 September 2013, 175 victims had been registered to participate in the trial proceedings.⁸²⁵

Trial proceedings

The trial commenced on 10 September 2013.⁸²⁶ The presentation of the Prosecution's case started on 17 September 2013 and was completed on 10 September 2015.⁸²⁷

On 5 December 2013, the Prosecution requested Trial Chamber V(A)⁸²⁸ to 'exercise its powers under Article 64(6)(b) to "require the attendance and testimony" of seven of its witnesses, who, according to the Prosecution, 'ha[d] provided highly relevant evidence about the crimes charged' but 'either refuse[d] to continue to communicate with the Prosecution' or informed that they were 'no longer

816 Judge Kaul appended a dissenting opinion. ICC-01/09-01/11-373.

817 ICC-01/09-01/11-373, paras 349, 367 and p 138.

818 ICC-01/09-01/11-373, para 22 and p 138.

819 ICC-01/09-01/11-373, para 293.

820 ICC-01/09-01/11-373, para 297. For further information on the Confirmation of Charges decision in the Ruto and Sang case, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 128-130, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

821 At this stage of proceedings, Trial Chamber V was composed of the Presiding Judge Kuniko Ozaki (Japan), Judge Christine Van den Wyngaert (Belgium) and Judge Chile Eboe-Osuji (Nigeria).

822 ICC-01/09-01/11-460, paras 40-62. An identical decision was issued in the Kenyatta case. ICC-01/09-02/11-498. See also Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 193, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>.

823 For a detailed summary of the new victim registration system in the Kenya cases, see Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 192-214, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>.

824 ICC-01/09-01/11-460, para 62.

825 On 25 March 2013, the VPRS stated that '[t]he total number of victims remaining within the scope of the case from those authorised to participate at the confirmation hearing' was 120, and that 149 applicants were considered as falling outside of the scope, while 58 applications were still being considered. ICC-01/09-01/11-661-Anx, paras 7-8. However, on 23 September 2013, the Common Legal Representative of Victims confirmed that the total number of victims registered, until that date, had risen to 175. ICC-01/09-01/11-980-AnxA, para 1. It is unclear whether all 175 victims had also participated in the confirmation of charges proceedings.

826 ICC-01/09-01/11-2027-Red-Corr, para 4.

827 ICC-01/09-01/11-2027-Red-Corr, paras 4, 7.

828 At this stage of proceedings, Trial Chamber V(A) was composed of Presiding Judge Chile Eboe-Osuji (Nigeria), Judge Olga Herrera Carbuca (Dominican Republic) and Judge Robert Fremr (Czech Republic).

willing to testify'.⁸²⁹ It further requested the Chamber to seek assistance from the Government of Kenya 'in compelling and ensuring the appearance of the summoned witnesses for testimony before the Court'.⁸³⁰ On 17 April 2014, the Chamber, by majority,⁸³¹ rendered its decision on the Prosecution requests, finding that: (1) the Court 'has the power to compel the testimony of witnesses'; (2) it can, through requests for cooperation, oblige Kenya 'both to serve summonses and to assist in compelling the attendance of the witnesses' summonsed; (3) there are no provisions in Kenyan domestic law that prohibit such a cooperation request; and (4) the Prosecution has justified the issuance of the summonses.⁸³²

After being granted leave to appeal this decision,⁸³³ the Ruto and Sang Defence teams filed their respective appeals on 5 June 2014.⁸³⁴ On 9 October 2014, the Appeals Chamber⁸³⁵ unanimously confirmed the decision by Trial Chamber V(A) restating that, under Article 64(6)(b), the Trial Chamber has 'the power to compel witnesses to appear before it' and that under Article 93(1)(b) of the Statute, it 'may request a State Party to compel witnesses to appear before the Court'.⁸³⁶ The Appeals Chamber thus found that 'Kenya [was] under an obligation to assist in compelling the witnesses to appear before the Court sitting *in situ* or by way of video-link'.⁸³⁷

After the completion of the presentation of evidence by the Prosecution, on 23 and 26 October 2015, both Defence teams, respectively, requested the Chamber to find that there was 'no case to answer', dismiss the charges and acquit both accused.⁸³⁸ Opposing responses to these requests were filed by the Prosecution on 20 November 2015,⁸³⁹ and by the Common Legal Representative of Victims on 27 November 2015.⁸⁴⁰ A subsequent status conference was held from 12 to 15 January 2016 during which oral arguments from the parties were heard.⁸⁴¹

On 5 April 2016, Trial Chamber V(A), by majority, concluded that the Prosecution had not presented sufficient evidence on which a reasonable Trial Chamber could convict Ruto and Sang. The Chamber subsequently vacated the charges against them and discharged Ruto and Sang 'without prejudice to their prosecution afresh in future'. The majority also found that there was no reason to recharacterise the charges.⁸⁴²

829 ICC-01/09-01/11-1120-Red2-Corr, paras 1, 5.

830 ICC-01/09-01/11-1120-Red2-Corr, para 100.

831 Judge Herrera Carbuca appended a dissenting opinion. ICC-01/09-01/11-1274-Anx.

832 ICC-01/09-01/11-1274-Corr2, para 193.

833 ICC-01/09-01/11-1313, p 24.

834 ICC-01/09-01/11-1345; ICC-01/09-01/11-1344-Corr.

835 The Appeals Chamber was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Sang-Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana), Judge Erkki Kourula (Finland) and Judge Anita Ušacka (Latvia).

836 ICC-01/09-01/11-1598, paras 1-2 and p 3.

837 ICC-01/09-01/11-1598, para 132.

838 ICC-01/09-01/11-1991-Red, paras 209-210; ICC-01/09-01/11-1990-Corr-Red, paras 1, 228.

839 ICC-01/09-01/11-2000-Red2.

840 ICC-01/09-01/11-2005-Red. The public redacted version was dated 29 January 2016.

841 ICC-01/09-01/11-2027-Red-Corr, para 15.

842 ICC-01/09-01/11-2027-Red-Corr, p 1. Presiding Judge Eboe-Osuji and Judge Fremr, as the majority, provided separate reasons for this decision. Judge Fremr found that there was no case for the accused to answer based on an assessment of the Prosecution's evidence. In his view, the Prosecution did not present sufficient evidence on which a 'reasonable' Trial Chamber could convict the accused; and that, accordingly, there was no reason to call the Defence to present its case or to prolong the proceedings any further. ICC-01/09-01/11-2027-Red-Corr, p 3 (para 1), 49 (para 131). Judge Eboe-Osuji, concurred with Judge Fremr's evidential assessment, but declared a mistrial in the case due to a 'troubling incidence of witness interference and intolerable political meddling that was reasonably likely to intimidate witnesses'. ICC-01/09-01/11-2027-Red-Corr, p 58 (para 1), 254 (para 464). Judge Herrera Carbuca appended a dissenting opinion. In her view, the charges against both accused should not be vacated in the present case. She considered that the Prosecution's case had not 'broken down' and concluded that there was sufficient evidence upon which, if accepted, a reasonable Trial Chamber could convict the accused. ICC-01/09-01/11-2027-AnxI, paras 1-2. See also 'Ruto and Sang case: ICC Trial Chamber V(A) terminates the case without prejudice to re-prosecution in future', *ICC Press Release*, ICC-CPI-20160405-PR1205, 5 April 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1205>>.

At the time of the termination of this case, the trial had lasted 157 days and 30 Prosecution witnesses had been heard.⁸⁴³ Overall, a total of 954 individuals had been verified as victims by the Common Legal Representative of Victims and had participated in the trial proceedings.⁸⁴⁴

On 15 June 2016, despite the termination of the case, the Legal Representative of Victims requested the Chamber to find that the Kenyan Government was obliged to provide reparations to all victims of the 2007-2008 post-election violence for the harms suffered; and to invite the TFV to 'urgently look into ways and means of initiating and providing assistance' to these victims.⁸⁴⁵ The Chamber rejected this request on 1 July 2016, reminding the Common Legal Representative that the case had been terminated and that 'a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place' and the accused has been found guilty of these crimes.⁸⁴⁶

Status of proceedings

The case was terminated in April 2016 and Ruto and Sang were discharged.

The Prosecutor v. Uhuru Muigai Kenyatta

Kenyatta, a Kenyan national, was allegedly aligned with the PNU, serving as Minister for Local Government at the time of the post-election violence.⁸⁴⁷ Following his success in the presidential election of March 2013, he became the first ICC suspect facing trial to be subsequently elected to the position of Head of State. Originally, this case also included two other accused: Muthaura and Ali. During the post-election violence, Muthaura, a Kenyan national, held the post of Chairman of the National Security and Advisory Committee, and Ali, also a Kenyan national, was Commissioner of the Kenyan Police.⁸⁴⁸ The charges against Ali were not confirmed in January 2012,⁸⁴⁹ and the charges against Muthaura were withdrawn in March 2013.⁸⁵⁰ The charges against Kenyatta were also withdrawn

843 ICC-01/09-01/11-2027-AnxA, p 1.

844 According to the latest report by the Registry of 23 March 2016 on the general situation of victims in this case and the activities of the VPRS and the Common Legal Representative in the field, the total number of victims verified was 954. ICC-01/09-01/11-2026, para 1. On 23 January 2014, the total number of victims assessed as falling within the scope of the case was 210. ICC-01/09-01/11-1157-AnxA, para 8. By 24 March 2014, the total number of victims assessed had risen to 437. ICC-01/09-01/11-1226-AnxA, para 2. By 23 May 2014, the total number of victims assessed had risen to 506, while the total number of victims registered by the VPRS was 437. ICC-01/09-01/11-1316-AnxA, para 1. By 23 July 2014, the total number of victims assessed had risen to 522, while the total number of victims registered was 489. ICC-01/09-01/11-1444-AnxA, para 1. By 23 September 2014, the total number of victims assessed had risen to 680, while the total number of victims registered was 577. ICC-01/09-01/11-1537-AnxA, para 1. By 24 November 2014, the total number of victims assessed had risen to 799. ICC-01/09-01/11-1693-AnxA, para 1. By 23 January 2015, the total number of victims assessed had risen to 800. ICC-01/09-01/11-1792-AnxA, para 1. By 23 March 2015, the total number of victims assessed had risen to 807. ICC-01/09-01/11-1847-Anx, para 1. By 25 May 2015, the total number of victims assessed had risen to 901. ICC-01/09-01/11-1890-AnxA, para 1. By 23 July 2015, the total number of victims assessed had risen to 949. ICC-01/09-01/11-1933-AnxA, para 1. By 24 September 2015, the total number of victims assessed had risen to 953. ICC-01/09-01/11-1973-AnxA, para 1. By 25 January 2016, the total number of victims assessed had risen to 954. ICC-01/09-01/11-2021, p 4.

845 ICC-01/09-01/11-2035, para 54.

846 ICC-01/09-01/11-2038, paras 6-7 and p 6. Judge Eboe-Osuji appended a dissenting opinion. ICC-01/09-01/11-2038-Anx.

847 ICC-01/09-02/11-257-AnxA, para 9.

848 ICC-01/09-02/11-257-AnxA, paras 4, 13.

849 ICC-01/09-02/11-382-Red, para 430 and p 154.

850 ICC-01/09-02/11-687, para 12; ICC-01/09-02/11-696, p 8. The decision to withdraw the charges against Muthaura is discussed in greater detail in Women's Initiatives for Gender Justice, 'Kenya: Prosecution withdraws all charges against Francis Kirimi Muthaura', *Legal Eye on the ICC eLetter*, June 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye6-13-FULL/LegalEye6-13.html#1>>.

in December 2014,⁸⁵¹ and the case was subsequently terminated in March 2015.⁸⁵² This is the first case before the ICC to be terminated at the trial stage. This is the only case in the Kenya Situation in which charges of sexual and gender-based crimes were brought. The Trial Chamber in this case introduced a new procedure for victim participation which involved a two-pronged application process.

Scope of charges

Crimes allegedly committed in attacks in or around Nakuru and Naivasha, Kenya, between 24 and 28 January 2008.⁸⁵³

Summons to appear

Pre-Trial Chamber II,⁸⁵⁴ by majority,⁸⁵⁵ issued a summons to appear for Kenyatta, Muthaura and Ali on 8 March 2011.⁸⁵⁶

Transfer to ICC custody

Kenyatta, Muthaura and Ali voluntarily appeared before the Court on 8 April 2011.⁸⁵⁷

Confirmation of charges

The Confirmation of Charges hearing was held from 21 September to 5 October 2011.⁸⁵⁸

Prior to this hearing, on 26 August 2011, 233 victims were authorised to participate in the confirmation of charges proceedings.⁸⁵⁹

On 23 January 2012, Pre-Trial Chamber II, by majority, confirmed five counts of crimes against humanity against Kenyatta and Muthaura, as indirect co-perpetrators under Article 25(3)(a) of the Statute, including murder, deportation or forcible transfer of population, rape, other inhumane acts, and persecution (including by means of rape and other inhumane acts).⁸⁶⁰ The Chamber declined to confirm the charge of other forms of sexual violence as a crime against humanity against Kenyatta and Muthaura.⁸⁶¹ Additionally, the Chamber found that there was not enough evidence to establish substantial grounds to believe that Ali was individually criminally responsible under Article 25(3)(d) of the Statute for the crimes charged and, therefore, declined to confirm all charges against Ali, namely murder, deportation or forcible transfer of population, rape, other inhumane acts, and persecution.⁸⁶²

Prior to the start of the trial, on 3 October 2012, Trial Chamber V⁸⁶³ introduced a differentiated procedure for victim participation, which was similarly applied in the Ruto and Sang case.⁸⁶⁴ The registration system in the Kenya cases introduced the creation of a two-pronged approach to the victim

851 ICC-01/09-02/11-983.

852 ICC-01/09-02/11-1005, p 6.

853 ICC-01/09-02/11-382-Red, para 428.

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

855 Judge Kaul appended a dissenting opinion. ICC-01/09-02/11-3.

856 ICC-01/09-02/11-1, p 23.

857 ICC-01/09-02/11-382-Red, para 4.

858 ICC-01/09-02/11-382-Red, para 16.

859 ICC-01/09-02/11-267, p 45-46. See also, ICC-01/09-02/11-382-Red, para 12.

860 ICC-01/09-02/11-382-Red, paras 428-429 and p 154. Judge Kaul appended a dissenting opinion. ICC-01/09-02/11-382-Red.

861 ICC-01/09-02/11-382-Red, p 154. The charge of other forms of sexual violence was brought together with the charge of rape under Count 5. ICC-01/09-02/11-280-AnxA, p 40.

862 ICC-01/09-02/11-382-Red, paras 21, 423-427, 430 and p 154. For further information on the Confirmation of Charges decision in the Kenyatta case, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 128-130, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

863 At this stage of proceedings, Trial Chamber V was composed of the Presiding Judge Kuniko Ozaki (Japan), Judge Christine Van den Wyngaert (Belgium) and Judge Chile Eboe-Osuji (Nigeria).

864 ICC-01/09-02/11-498, paras 39-61. An identical decision was issued in the Ruto and Sang case. ICC-01/09-01/11-460. See also Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 193, available at <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>.

participation application process. Victims who sought to appear individually before the Court were required to follow the established application procedure foreseen by Rule 89(1) of the RPE, whereas victims who did not seek to appear individually before the Court followed a new procedure, in which they registered with the Registry through the Court appointed Common Legal Representative in order for their views and concerns to be expressed. Victims who were registered through the new system were not subject to an individual assessment by the Trial Chamber.⁸⁶⁵

Furthermore, the victims who had been authorised to participate at the confirmation of charges stage were considered as having registered through the Common Legal Representative of Victims to participate in the trial, provided they still fell within the scope of the case.⁸⁶⁶

Pursuant to this decision, the Victims Participation and Reparations Section (VPRS) considered that 208 of the 233 victims who had participated in the confirmation of charges proceedings fell within the scope of the case and could continue to participate in the trial proceedings.⁸⁶⁷

On 11 March 2013, the Prosecutor notified the Chamber of its intention to withdraw the charges against Muthaura due to insufficient evidence to secure a conviction.⁸⁶⁸ On 18 March 2013, Trial Chamber V, by majority, granted the Prosecution permission to withdraw the charges against Muthaura and terminated the proceedings against him.⁸⁶⁹ This was the first time at the ICC that the Prosecution withdrew the charges against an accused.

Trial proceedings

Although the start of the trial against Kenyatta had initially been scheduled for 11 April 2013, this date was vacated four times before finally being set for 7 October 2014.⁸⁷⁰

On 29 November 2013, the Prosecution requested the Chamber to find that the Kenyan Government had failed to comply with a request of April 2012 to produce records relating to Kenyatta's finances, and to refer the matter to the ASP.⁸⁷¹ Oral submissions, including by the Kenyan Government, were heard regarding this issue at a status conference on 13 February 2014,⁸⁷² and, on 31 March 2014, Trial Chamber V(B)⁸⁷³ instructed the Prosecution to provide the Kenyan Government with an updated and revised version of the records request, and the Kenyan Government to file submissions on the progress of the execution of the request.⁸⁷⁴

Another status conference with the Prosecution and the Government of Kenya was held on 9 July 2014, during which both the Prosecution and the Kenyan Government were instructed to file further

865 For a detailed summary of the new victim registration system in the Kenya cases, see Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 192-214, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>.

866 ICC-01/09-02/11-498, para 61.

867 ICC-01/09-02/11-701-Anx, para 2.

868 ICC-01/09-02/11-687, para 12.

869 ICC-01/09-02/11-696, p 8. Judge Ozaki appended a partial dissenting opinion and Judge Eboe-Osuji appended a concurring separate opinion. ICC-01/09-02/11-698. The decision to withdraw the charges against Muthaura is discussed in greater detail in Women's Initiatives for Gender Justice, 'Kenya: Prosecution withdraws all charges against Francis Kirimi Muthaura', *Legal Eye on the ICC eLetter*, June 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye6-13-FULL/LegalEye6-13.html#1>>.

870 On 9 July 2012, the Chamber set the trial start date for 11 April 2013. ICC-01/09-02/11-451, para 25. Following adjournment requests from both the Kenyatta and Muthaura Defence teams, the Chamber vacated this date on 7 March 2013 and provisionally set a new trial start date for 9 July 2013. ICC-01/09-02/11-677, para 10 and p 7. On 20 June 2013, the Chamber vacated this trial date due to the Prosecution's failure to disclose significant volumes of evidence until the very last moment, and set a new trial start date for 12 November 2013. ICC-01/09-02/11-763-Red, paras 4, 38, 40 and p 15-16. The Chamber further vacated this date on 31 October 2013 and provisionally set a new trial start date for 5 February 2014, in order to grant the Prosecution request for additional investigative time. ICC-01/09-02/11-847, paras 5-6 and p 5. Following a Prosecution request, the Chamber vacated this trial start date on 23 January 2014 and scheduled a status conference on 5 February 2014 instead. ICC-01/09-02/11-886, para 2 and p 5. On 31 March 2014, the Chamber adjourned the provisional trial start date to 7 October 2014. ICC-01/09-02/11-908, p 46.

871 ICC-01/09-02/11-866, paras 6, 21-22, 28-31.

872 ICC-01/09-02/11-T-28-ENG, p 1 lines 13-14, p 3 lines 1-4.

873 Trial Chamber V(B) was composed of Presiding Judge Kuniko Ozaki (Japan), Judge Robert Fremr (Czech Republic) and Judge Geoffrey Henderson (Trinidad and Tobago).

874 ICC-01/09-02/11-908, p 46.

written submissions.⁸⁷⁵ The Prosecution and the Government of Kenya complied with the Chamber's order on 11 and 16 July 2014, respectively.⁸⁷⁶

The Prosecution indicated on 5 September 2014 that it would not be in a position to proceed to trial on that date due to insufficient available evidence, and requested to further adjourn the proceedings until the Kenyan Government fully executed the Prosecution cooperation request.⁸⁷⁷ Based on this request, the Chamber vacated the trial start date once more on 19 September 2014 and, instead, scheduled status conferences on 7 and 8 October 2014.⁸⁷⁸

On 3 December 2014, the Chamber unanimously declined the Prosecution request for a further adjournment, noting that granting such a request would be contrary to the interests of justice under the circumstances, and directed the Prosecution to indicate either (1) its withdrawal of the charges against Kenyatta, or (2) that 'the evidentiary basis has improved to a degree which would justify proceeding to trial'.⁸⁷⁹ Additionally, despite expressing 'serious concerns' regarding the Kenyan Government's approach and the allegations of non-cooperation,⁸⁸⁰ the Chamber unanimously rejected the Prosecution application of 29 November 2013, stating that it was not persuaded that a referral to the ASP would facilitate a fair trial, was in the interests of justice or was otherwise appropriate in the particular circumstances.⁸⁸¹

On 5 December 2014, the Prosecution withdrew the charges against Kenyatta 'without prejudice to the possibility of bringing new charges' against him at a later date, 'based on the same or similar factual circumstances should [it] obtain sufficient evidence to do support such a course of action'.⁸⁸² According to the Prosecution, 'the evidence ha[d] not improved to such an extent that Mr Kenyatta's alleged criminal responsibility [could] be proven beyond reasonable doubt' and withdrew the charges 'in light of the Trial Chamber's rejection of the Prosecution's request for an adjournment until the Government of Kenya complies with its co-operation obligations under the Rome Statute'.⁸⁸³

On 13 March 2015, Trial Chamber V(B) terminated the proceedings in the Kenyatta case.⁸⁸⁴

875 ICC-01/09-02/11-908, p 46; ICC-01/09-02/11-T-29-Red-ENG; ICC-01/09-02/11-T-30-ENG, p 2 lines 11-14. See also ICC-01/09-02/11-908, paras 10-11.

876 ICC-01/09-02/11-933; ICC-01/09-02/11-934-Red. The public redacted version of the Kenyan Government's submission was dated 18 August 2014.

877 ICC-01/09-02/11-944, paras 1-2, 4, 6.

878 ICC-01/09-02/11-954, p 8. At the status conference on 8 October 2014, the Prosecution submitted: 'There is no middle way. Either, Madam President, you refuse any further adjournment and therefore require the Prosecution effectively to withdraw, or you permit an indefinite adjournment conditioned on the eventual compliance of the Government of Kenya with its duties. Any other course will simply be ineffective.' ICC-01/09-02/11-T-32-ENG, p 34 lines 7-11; ICC-01/09-02/11-981, paras 19, 62.

879 ICC-01/09-02/11-981, p 26. See also 'Kenyatta case: ICC Trial Chamber rejects request for further adjournment and directs the Prosecution to indicate either its withdrawal of charges or readiness to proceed to trial', *ICC Press Release*, ICC-CPI-20141203-PR1071, 3 December 2014, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1071>>.

880 See ICC-01/09-02/11-944, paras 3-6.

881 ICC-01/09-02/11-982, paras 82, 88-90 and p 46. See also 'Kenyatta case: ICC Trial Chamber rejects request for further adjournment and directs the Prosecution to indicate either its withdrawal of charges or readiness to proceed to trial', *ICC Press Release*, ICC-CPI-20141203-PR1071, 3 December 2014, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1071>>. For more information on the Chamber's decisions on the Prosecution's adjournment and finding of non-cooperation requests, see Women's initiatives for Gender Justice, 'Trial Chamber's decisions on the Prosecution's adjournment and finding of non-cooperation requests', *Legal Eye on the ICC eLetter*, December 2015, available at <<http://4genderjustice.org/publications/eletters/december-2015-issue-of-legal-eye-on-the-icc/>>.

882 ICC-01/09-02/11-983, para 3.

883 ICC-01/09-02/11-983, para 2.

884 ICC-01/09-02/11-1005, p 6. See also 'Kenyatta case: Trial Chamber V(B) terminates the proceedings', *ICC Press Release*, ICC-CPI-20150313-PR1099, 13 March 2015, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1099>>. For more information on the withdrawal of the charges against Kenyatta and the termination of the case, see Women's Initiatives for Gender Justice, 'Prosecution's decision to withdraw the charges against Kenyatta and Trial Chamber's decision to terminate the case', *Legal Eye on the ICC eLetter*, December 2015, available at <<http://4genderjustice.org/publications/eletters/december-2015-issue-of-legal-eye-on-the-icc/>>.

Prior to the termination of the case, by 21 November 2014, a total of 839 individuals had been verified as victims within the scope of this case and participated in the trial proceedings.⁸⁸⁵

On 20 March 2015, the Prosecution appealed the Chamber's decision of 3 December 2014 rejecting its application for a finding of non-compliance against the Kenyan Government.⁸⁸⁶

On 24 April 2015, the 839 victims who participated in the trial proceedings were granted leave to also participate in the appeals proceedings.⁸⁸⁷

On 19 August 2015, questioning whether the Trial Chamber made a proper determination of the alleged failure to cooperate, the Appeals Chamber⁸⁸⁸ remanded the matter to the Trial Chamber, stating that if the Chamber finds that the Government of Kenya had indeed failed to cooperate, the Chamber should assess whether a referral to the ASP would be appropriate to address this issue.⁸⁸⁹

Pursuant to this Appeals Chamber decision, Trial Chamber V(B) rendered its second decision on the Prosecution's application for a finding of non-compliance on 19 September 2016.⁸⁹⁰ The Chamber found that the Government of Kenya had failed to comply with its obligations under the Rome Statute and to take 'all reasonable steps to execute a request for cooperation from the Court'.⁸⁹¹ Furthermore, it referred the matter to the ASP, as it would be 'best placed to address the lack of cooperation, in order to provide an incentive for the Kenyan Government to cooperate with the Court'.⁸⁹²

Status of proceedings

The Kenyatta case was terminated, without precluding the possibility of bringing new charges against Kenyatta at a later date based on the same or similar factual circumstances, and the Summons to Appear was vacated.⁸⁹³

The Prosecutor v. Walter Osapiri Barasa

Barasa is a Kenyan national, a journalist and, according to the Arrest Warrant, a former Prosecution intermediary in the context of the investigation in the Kenya Situation.⁸⁹⁴ He faces charges of offences against the administration of justice under Article 70 of the Statute, relating to his alleged role in corruptly influencing or in attempting to corruptly influence Prosecution witnesses in the Ruto and Sang case, by allegedly offering bribes in exchange for withdrawing as ICC Prosecution witnesses.⁸⁹⁵ The Barasa case is the first of two Article 70 cases in the Kenya Situation,⁸⁹⁶ and marks the first time that a public ICC

885 ICC-01/09-02/11-998-AnxA, para 1. By 21 March 2014, a total of 706 victims had been verified and registered in this case. ICC-01/09-02/11-907-AnxA, para 1. By 22 September 2014, this number had risen as a total of 725 victims had been verified as falling within the scope of the case. ICC-01/09-02/11-955-AnxA, para 1. By 21 November 2014, the total number rose again, as 839 victims had been verified as falling within the scope of the case. ICC-01/09-02/11-978-AnxA, para 1.

886 ICC-01/09-02/11-1006, paras 36-38.

887 ICC-01/09-02/11-1015, para 10 and p 3.

888 The Appeals Chamber was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Sanji Mmasenono Monageng (Botswana), Judge Howard Morrison (United Kingdom), Judge Piotr Hofmański (Poland) and Judge Bertram Schmitt (Germany).

889 ICC-01/09-02/11-1032, paras 80-82, 94, 96, 98.

890 ICC-01/09-02/11-1037.

891 ICC-01/09-02/11-1037, p 18.

892 ICC-01/09-02/11-1037, paras 27, 38 and p 18. See also 'ICC Trial Chamber V(B) refers non-cooperation of the Kenyan Government to the Assembly of States Parties to the Rome Statute', *ICC Press Release*, 19 September 2016, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1239>>.

893 ICC-01/09-02/11-1005, p 6.

894 ICC-01/09-01/13-1-Red2, para 7.

895 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Warrant of Arrest issued against Walter Barasa', *OTP Statement*, 2 October 2013, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=statement-OTP-02-10-2013>>.

896 The second Article 70 case in this Situation is that against Gicheru and Bett.

arrest warrant was issued for offences against the administration of justice. At the time of writing this publication, three Article 70 cases had been brought before the Court.

Scope of charges

Offences allegedly committed against the administration of justice under Article 70 of the Statute between May and July 2013 in connection with the Ruto and Sang case.⁸⁹⁷

Arrest warrant

The Single Judge of Pre-Trial Chamber II⁸⁹⁸ issued an arrest warrant for Barasa, under seal, on 2 August 2013. The Arrest Warrant was unsealed on 2 October 2013.⁸⁹⁹

Barasa is allegedly criminally responsible for two counts of offences against the administration of justice consisting in corruptly influencing two Prosecution witnesses as a direct perpetrator under Article 25(3)(a) or, alternatively, in attempting to corruptly influence these witnesses under Article 25(3)(f) of the Statute. He is also allegedly responsible for a third count of offences against the administration of justice consisting in attempting to corruptly influence another Prosecution witness under Article 25(3)(f) of the Statute.⁹⁰⁰

On 21 August 2015, the Defence challenged the validity of the Arrest Warrant pursuant to Rule 117(3) of the RPE, and requested the Chamber to replace the Arrest Warrant with a summons to appear.⁹⁰¹ Pre-Trial Chamber II dismissed this challenge on 10 September 2015.⁹⁰² The Defence subsequently sought leave to appeal this decision on 15 September 2015,⁹⁰³ which was also rejected on 29 October 2015, finding that a decision on a challenge under Rule 117(3) of the RPE is not appealable under Article 82 of the Statute.⁹⁰⁴

Status of proceedings

At the time of writing this publication, the execution of the Arrest Warrant is pending and Barasa remains at large.⁹⁰⁵

The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett

According to the Arrest Warrant, Gicheru, a lawyer based in Kenya, and Bett, also known as 'Kipseng'erya' and originating from and residing in Kenya, were allegedly involved in an 'organised and systematic criminal scheme' aimed at bribing and otherwise inducing Prosecution witnesses to withdraw as witnesses and/or retract their prior statements to the Prosecution.⁹⁰⁶ This case is the second of two Article 70 cases in the Kenya Situation.⁹⁰⁷ At the time of writing this publication, three Article 70 cases had been brought before the Court.

897 ICC-01/09-01/13-1-Red2, p 3-5; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Warrant of Arrest issued against Walter Barasa', *OTP Statement*, 2 October 2013, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=statement-OTP-02-10-2013>>.

898 The Single Judge, acting on behalf of Pre-Trial Chamber II, was Judge Cuno Tarfusser (Italy). Pre-Trial Chamber II was composed of Presiding Judge Tarfusser, Judge Marc Perrin de Brichambaut (France) and Judge Chang-ho Chung (Republic of Korea).

899 ICC-01/09-01/13-1-Red2. See also 'Arrest Warrant Unsealed in Kenya situation: Walter Barasa suspected of corruptly influencing witnesses', *ICC Press Release*, ICC-CPI-20131002-PR948, 2 October 2013, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr948>>.

900 ICC-01/09-01/13-1-Red2, p 3-5, 17.

901 ICC-01/09-01/13-31, p 3.

902 ICC-01/09-01/13-35, para 2 and p 4.

903 ICC-01/09-01/13-37, paras 2, 8.

904 ICC-01/09-01/13-41, para 8 and p 5.

905 For more information about the Barasa Article 70 case, see Women's Initiatives for Gender Justice, *Gender Report Card 2013*, p 232-234, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>>.

906 ICC-01/09-01/15-1-Red, p 14, 16; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation', *OTP Press Release*, 10 September 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-10-09-2015-2>>.

907 The first Article 70 case in this Situation is that against Barasa.

Scope of charges

Offences allegedly committed against the administration of justice under Article 70 of the Statute in connection with the cases in the Kenya Situation.⁹⁰⁸

Arrest warrant

Pre-Trial Chamber II⁹⁰⁹ issued two respective arrest warrants for Gicheru and Bett, under seal, on 10 March 2015. The Arrest Warrants were unsealed on 10 September 2015.⁹¹⁰

Gicheru and Bett are allegedly criminally responsible for six and four counts, respectively, of offences against the administration of justice consisting in corruptly influencing a total of six Prosecution witnesses regarding cases in the Kenya Situation.⁹¹¹ The charges were brought against Gicheru as a direct co-perpetrator under Article 25(3)(a) or, alternatively, for soliciting or inducing under Article 25(3)(b); and against Bett as a direct co-perpetrator under Article 25(3)(a) or, alternatively, for contributing in any other way under Article 25(3)(d) or for aiding, abetting or otherwise assisting under Article 25(3)(c) of the Statute.⁹¹²

Status of proceedings

Gicheru and Bett were arrested by the Kenyan police on 30 July 2015 in Nairobi and were brought before the High Court of Kenya.⁹¹³ According to media reports, they both appear to have been released on bail.⁹¹⁴ At the time of writing this publication, the execution of the ICC Arrest Warrants is pending.

908 ICC-01/09-01/15-1-Red, para 9 and p 14-18; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation', *OTP Press Release*, 10 September 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-10-09-2015-2>>.

909 Pre-Trial Chamber II was composed of Presiding Judge Cuno Tarfusser (Italy), Judge Marc Perrin de Brichambaut (France) and Judge Chang-ho Chung (Republic of Korea).

910 ICC-01/09-01/15-1-Red; ICC-01/09-01/15-11. See also 'Situation in Kenya: ICC Judges unseal an arrest warrant against Paul Gicheru and Philip Kipkoech Bett', *ICC Press Release*, ICC-CPI-20150910-PR1149, 10 September 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1149>>; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation', *OTP Press Release*, 10 September 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-10-09-2015-2>>.

911 Gicheru faces six counts, while Bett faces four of the same counts. ICC-01/09-01/15-1-Red, para 9 and p 14-18; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation', *OTP Press Release*, 10 September 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-10-09-2015-2>>.

912 ICC-01/09-01/15-1-Red, para 9 and p 14-18.

913 'Situation in Kenya: ICC Judges unseal an arrest warrant against Paul Gicheru and Philip Kipkoech Bett', *ICC Press Release*, ICC-CPI-20150910-PR1149, 10 September 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1149>>.

914 'Senior Prosecutor Says Kenya Unwilling to Prosecute Two Kenyans Wanted by ICC', *International Justice Monitor*, 28 July 2017, available at <<https://www.ijmonitor.org/2017/07/senior-prosecutor-says-kenya-unwilling-to-prosecute-two-kenyans-wanted-by-icc/>>.

Libya

The Situation in Libya was the second Situation referred to the OTP by the UN Security Council. On 26 February 2011, the UN Security Council issued Resolution 1970, giving the ICC jurisdiction over the Situation in Libya, which is not an ICC State Party.⁹¹⁵ The referral followed the ‘repression of peaceful demonstrators’ that began on 15 February 2011, demanding an end to the dictatorship regime of Muammar Mohammed Abu Minyar Gaddafi (Muammar Gaddafi).⁹¹⁶ A formal investigation into the Situation was subsequently opened by the OTP on 3 March 2011.⁹¹⁷

On 25 July 2014, Prosecutor Bensouda publicly expressed her ‘great concern’ regarding the increasing violence within the Libya Situation, particularly in light of reports of alleged attacks against the civilian population and civilian objects in Tripoli and Benghazi.⁹¹⁸ On 8 May 2017, the Prosecutor reported to the UN Security Council that the security situation had further deteriorated in the country, risking the return to widespread conflict and precluding her Office from conducting *in situ* investigations.⁹¹⁹ Nonetheless, the Prosecutor stated that the OTP ‘continues to investigate and prepare new warrants of arrest against potential suspects in relation to crimes committed in Libya since 15 February 2011’.⁹²⁰ The Prosecutor further reported that her Office was also collecting information regarding ‘serious and widespread crimes allegedly committed against migrants’, including women and children, attempting to transit through Libya, and was analysing whether alleged crimes fell within the jurisdiction of the Court and whether an investigation on the matter could be initiated.⁹²¹

At the time of writing this publication, the Court had issued five arrest warrants within the Libya Situation. Three were simultaneously issued in June 2011 for the following individuals: Muammar Gaddafi, Saif Al-Islam Gaddafi (Gaddafi)⁹²² and Abdullah Al-Senussi

915 UN Security Council, ‘Resolution 1970 (2011)’, 26 February 2011, S/Res/1970 (2011), para 4. See also ‘Statement by the Women’s Initiatives for Gender Justice on the Referral of the Situation in Libya to the International Criminal Court’, 28 February 2011, available at <<http://4genderjustice.org/statement-by-the-womens-initiatives-for-gender-justice-on-the-referral-of-the-libya-situation-to-the-icc/>>. For more information on the referral of the Libya Situation to the ICC, see Women’s Initiatives for Gender Justice, ‘Libya: Referral of the Situation to the ICC’, *Legal Eye on the ICC eLetter*, May 2011, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-may-2011/>>.

916 UN Security Council, ‘Resolution 1970 (2011)’, 26 February 2011, S/Res/1970 (2011), p 1.

917 ‘ICC Prosecutor to open an investigation in Libya’, *OTP Press Statement*, 2 March 2011, available at <<https://www.icc-cpi.int/pages/item.aspx?name=statement+020311>>.

918 ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to the escalating violence in the Situation in Libya’, *OTP Press Statement*, 25 July 2014, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-25-07-2014>>.

919 ‘Statement of ICC Prosecutor to the UNSC on the Situation in Libya’, *OTP Press Statement*, 9 May 2017, paras 2-3, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>>; ‘Thirteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970(2011)’, *OTP*, 8 May 2017, para 16, available at <<https://www.icc-cpi.int/iccdocs/otp/otp-rep-unsclib-05-2017-ENG.pdf>>.

920 ‘Thirteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970(2011)’, *OTP*, 8 May 2017, para 16, available at <<https://www.icc-cpi.int/iccdocs/otp/otp-rep-unsclib-05-2017-ENG.pdf>>.

921 ‘Statement of ICC Prosecutor to the UNSC on the Situation in Libya’, *OTP Press Statement*, 9 May 2017, para 25, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib>>; ‘Thirteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970(2011)’, *OTP*, 8 May 2017, paras 22-26, available at <<https://www.icc-cpi.int/iccdocs/otp/otp-rep-unsclib-05-2017-ENG.pdf>>.

922 Following the termination of proceedings against Muammar Gaddafi in November 2011, the ICC refers to Saif Al-Islam Gaddafi as ‘Gaddafi’. For the sake of consistency, this publication also refers to Saif Al-Islam Gaddafi as ‘Gaddafi’.

(Al-Senussi).⁹²³ Two further arrest warrants were issued in April 2013 and August 2017 for Al-Tuhamy Mohamed Khaled (Al-Tuhamy)⁹²⁴ and Mahmoud Mustafa Busayf Al-Werfalli (Al-Werfalli), respectively.⁹²⁵

The Prosecutor v. Saif Al-Islam Gaddafi

This case initially included three individuals: Muammar Gaddafi, Gaddafi and Al-Senussi. Muammar Gaddafi was the former Libyan Head of State and Commander of the Libyan Armed Forces.⁹²⁶ His son, Gaddafi, was allegedly part of Muammar Gaddafi's inner circle. Although he formally held the role of honorary chairman of the Gaddafi International Charity and Development Foundation, an international NGO headquartered in Tripoli, Gaddafi is alleged to also have assumed the role of *de facto* Libyan Prime Minister.⁹²⁷ Al-Senussi was, at the time of the issuance of his Arrest Warrant, a Colonel in the Libyan Armed Forces and Head of the Libyan Military Intelligence.⁹²⁸

In November 2011, the proceedings against Muammar Gaddafi were terminated, following the confirmation of his death.⁹²⁹ The proceedings against Al-Senussi were also terminated in October 2013, following a successful admissibility challenge by the Libyan Government.⁹³⁰ This is the first and so far only case found to be inadmissible before the ICC.

Scope of charges

Crimes allegedly committed by Security Forces under the control of Muammar Gaddafi and Gaddafi in various localities in Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 until at least 28 February 2011;⁹³¹ as well as crimes allegedly committed by armed forces under the control of Al-Senussi in Benghazi from 15 February 2011 until at least 20 February 2011.⁹³²

Arrest warrants

On 27 June 2011, Pre-Trial Chamber I⁹³³ issued arrest warrants, under seal, for Muammar Gaddafi, Gaddafi and Al-Senussi. The Arrest Warrants were unsealed on 30 June 2011.⁹³⁴

923 ICC-01/11-01/11-2, p 7; ICC-01/11-01/11-3, p 7; ICC-01/11-01/11-4, p 7. See also, 'Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi', *ICC Press Release*, ICC-CPI-20110627-PR689, 27 June 2011, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pre_trial%20chamber%20i%20issues%20three%20warrants%20of%20arrest%20for%20muammar%20gaddafi_%20saif%20al>.

924 While the Arrest Warrant and the ICC press release refer to the accused as 'Al-Tuhamy', the ICC website refers to him as 'Khaled'. For the sake of consistency, this publication refers to Al-Tuhamy Mohamed Khaled as 'Al-Tuhamy'.

925 ICC-01/11-01/13-1, p 6-7; ICC-01/11-01/17-2, p 16.

926 ICC-01/11-01/11-2, p 7.

927 ICC-01/11-01/11-3, p 5, 7.

928 ICC-01/11-01/11-4, p 7.

929 ICC-01/11-01/11-28, p 5.

930 ICC-01/11-01/11-466-Red; ICC-01/11-01/11-565; ICC-01/11-01/11-567.

931 ICC-01/11-01/11-2, p 6; ICC-01/11-01/11-3, p 6.

932 ICC-01/11-01/11-4, p 6.

933 Pre-Trial Chamber I was composed of Presiding Judge Sanji Mmasenono Monageng (Botswana), Judge Sylvia Steiner (Brazil) and Judge Cuno Tarfusser (Italy).

934 ICC-01/11-01/11-2, p 6; ICC-01/11-01/11-3, p 6; ICC-01/11-01/11-4, p 6. See also, 'Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi', *ICC Press Release*, ICC-CPI-20110627-PR689, 27 June 2011, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pre_trial%20chamber%20i%20issues%20three%20warrants%20of%20arrest%20for%20muammar%20gaddafi_%20saif%20al>.

The charges brought against Muammar Gaddafi and Gaddafi as indirect co-perpetrators under Article 25(3)(a) and against Al-Senussi as an indirect perpetrator under Article 25(3)(a) of the Statute related to murder and persecution as crimes against humanity.⁹³⁵

A request for cooperation was transmitted to the Libyan authorities on 4 July 2011, seeking the arrest and surrender of the three indictees to the Court.⁹³⁶

On 22 November 2011, the case against Muammar Gaddafi was terminated, following confirmation of his death, thus rendering the Arrest Warrant and other relevant documents against him without effect.⁹³⁷

Admissibility proceedings

The Government of Libya notified Pre-Trial Chamber I⁹³⁸ on 22 March 2012 of its intention to challenge the admissibility of the case against Gaddafi.⁹³⁹ On 1 May 2012, the Libyan Government filed its admissibility challenge to the Gaddafi case, claiming that the crimes in question were already being investigated by its national judicial system,⁹⁴⁰ and requesting the postponement of the execution of the request for surrender pending a determination of the admissibility challenge.⁹⁴¹

On 1 June 2012, the Chamber decided that Libya may postpone the execution of the request for surrender of Gaddafi until a decision on the admissibility challenge had been rendered.⁹⁴²

For the admissibility proceedings, the Chamber appointed the OPCV to represent the victims who had 'already communicated' with the Court in relation to this case.⁹⁴³

On 31 May 2013, Pre-Trial Chamber I found the case against Gaddafi to be admissible before the ICC.⁹⁴⁴ The Government of Libya appealed this decision on 7 June 2013,⁹⁴⁵ and submitted its Document in Support of Appeal on 24 June 2013.⁹⁴⁶

On 16 July 2013, the victims who had been allowed to submit observations in the admissibility proceedings were authorised to also participate in the subsequent appeals proceedings.⁹⁴⁷ The OPCV made use of this right on 21 August 2013 by filing observations on the Libyan Government's appeal against the decision on the admissibility of the case against Gaddafi,⁹⁴⁸ outlining victims' opposition towards the appeal.⁹⁴⁹ In particular, the OPCV supported the Pre-Trial Chamber's finding that the 'Libyan national judicial authorities [were] not able to investigate' the case against Gaddafi.⁹⁵⁰

The Appeals Chamber,⁹⁵¹ by majority, confirmed the admissibility decision on 21 May 2014.⁹⁵²

935 ICC-01/11-01/11-2, p 6; ICC-01/11-01/11-3, p 6; ICC-01/11-01/11-4, p 6.

936 ICC-01/11-01/11-5, p 4-5; ICC-01/11-01/11-1, p 41-42.

937 ICC-01/11-01/11-28, p 4-5.

938 At this stage of proceedings, Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Hans-Peter Kaul (Germany) and Judge Christine van den Wyngaert (Belgium).

939 ICC-01/11-01/11-82, paras 2-3.

940 ICC-01/11-01/11-130-Red, paras 1, 73-74.

941 ICC-01/11-01/11-130-Red, paras 107-108.

942 ICC-01/11-01/11-163, p 16.

943 ICC-01/11-01/11-134, para 13 and p 7. The Chamber did not indicate the number of victims represented.

944 ICC-01/11-01/11-344-Red, p 91.

945 ICC-01/11-01/11-350.

946 ICC-01/11-01/11-370-Red3.

947 ICC-01/11-01/11-383, p 3.

948 ICC-01/11-01/11-411-Red.

949 ICC-01/11-01/11-411-Red, para 18.

950 ICC-01/11-01/11-411-Red, para 85.

951 The Appeals Chamber was composed of Presiding Judge Erkki Kourula (Finland), Judge Sang-Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana), Judge Akua Kuenyehia (Ghana) and Judge Anita Ušacka (Latvia).

952 ICC-01/11-01/11-547-Red, para 215 and p 3. Judge Song appended a separate opinion. ICC-01/11-01/11-547-Anx1. Judge Ušacka appended a dissenting opinion. ICC-01/11-01/11-547-Anx2. For more information on the admissibility challenge in the case against Gaddafi, see Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 138-147, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

The Libyan Government also challenged the admissibility of the case against Al-Senussi on 2 April 2013, postponing the execution of the surrender request pending a determination on the admissibility challenge.⁹⁵³

For these admissibility proceedings, the Chamber also appointed the OPCV to represent the victims who had ‘already communicated’ with the Court in relation to this case.⁹⁵⁴

On 11 October 2013, Pre-Trial Chamber I found that the case against Al-Senussi was inadmissible before the Court and that he should instead be tried before Libyan courts.⁹⁵⁵ This is the first and so far only case found to be inadmissible before the ICC.

The Defence appealed this decision on 17 October 2013,⁹⁵⁶ and submitted its Document in Support of Appeal on 4 November 2013.⁹⁵⁷ The Defence outlined three grounds of appeal: (1) that the Pre-Trial Chamber ‘abused its discretion in finding that Libya [was] not unwilling and unable genuinely to carry out the proceedings against Mr Al-Senussi’; (2) that the Appeals Chamber should consider new evidence, ‘concerning the mistreatment of Mr. Al-Senussi in detention and the conduct of the national proceedings [...] as it further demonstrates that Libya is not willing and able to carry out genuine proceedings in Libya’; and (3) that the Pre-Trial Chamber erred ‘in law and fact in finding that Libya was investigating and prosecuting the same case as the case before the ICC’.⁹⁵⁸

On 22 November 2013, the victims who had been allowed to submit observations in the admissibility proceedings were authorised to also participate in the subsequent appeals proceedings.⁹⁵⁹ On 20 December 2013, the OPCV filed observations on the Defence appeal, expressing agreement with the first and third grounds of appeal, and opposing the second ground of appeal.⁹⁶⁰

On 24 July 2014, the Appeals Chamber,⁹⁶¹ unanimously, dismissed the Defence appeal and confirmed the Pre-Trial Chamber’s admissibility decision regarding Al-Senussi.⁹⁶²

On 7 August 2014, the Single Judge of Pre-Trial Chamber I⁹⁶³ ordered the case to henceforth be referred to as *The Prosecutor v. Saif Al-Islam Gaddafi*.⁹⁶⁴

953 ICC-01/11-01/11-307-Red2, paras 1, 206.

954 ICC-01/11-01/11-325, paras 12-13 and p 7. The Chamber provided no indication as to the number of victims represented.

955 ICC-01/11-01/11-466-Red, para 311 and p 152. Judge Van den Wyngaert appended a declaration. ICC-01/11-01/11-466-Anx.

956 ICC-01/11-01/11-468-Red.

957 ICC-01/11-01/11-474.

958 ICC-01/11-01/11-474, para 3.

959 ICC-01/11-01/11-481, p 3.

960 ICC-01/11-01/11-494, para 6. The OPCV argued that ‘the first and third grounds of appeal demonstrate[d] that the Chamber committed a series of legal errors and adopted a patently wrong interpretation of the law, which in turn resulted in the erroneous finding that Libya ha[d] shown “that it is investigating the same case”’. Furthermore, the OPCV agreed with the Defence that the Chamber’s decision was ‘inherently inconsistent and entirely unreasonable in light of the information and evidence presented by the parties and participants to the Chamber throughout the proceedings’ and therefore ha[d] to be ‘invalidated’. Regarding its opposition to the Defence request for submission of new evidence (second ground of appeal), the OPCV argued that the Appeals Chamber’s review must be limited to the facts and information available at the time of the Trial Chamber’s decision. ICC-01/11-01/11-494, paras 7-8, 40.

961 At this stage of proceedings, the Appeals Chamber was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Sang-Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana), Judge Erkki Kourula (Finland) and Judge Anita Ušacka (Latvia).

962 ICC-01/11-01/11-565, para 299. Judge Song and Judge Ušacka appended separate opinions. ICC-01/11-01/11-565-Anx1; ICC-01/11-01/11-565-Anx2.

963 The Single Judge, acting on behalf of Pre-Trial Chamber I, was Presiding Judge Silvia Fernández de Gurmendi (Argentina).

964 ICC-01/11-01/11-567, p 5. For more information on the admissibility challenge in the case against Al-Senussi, see Women’s Initiatives for Gender Justice, *Gender Report Card 2014*, p 147-156, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

Status of proceedings

On 10 December 2014, Pre-Trial Chamber I found that the Government of Libya had failed to comply with the Court with respect to two requests for cooperation, including the request to surrender Gaddafi to the Court, and referred the matter to the UN Security Council.⁹⁶⁵

Gaddafi was held in the custody of the Abu-Bakr al-Siddiq Brigade of Zintan, Libya, from 18 November 2011 to 9 June 2017.⁹⁶⁶ During his detention, on 24 March 2014, domestic trial proceedings commenced before the Tripoli Court of Assize against Gaddafi, Al-Senussi and 35 other alleged senior leaders of the Gaddafi regime.⁹⁶⁷ Gaddafi was tried *in absentia* for charges which, according to the UN Support Mission in Libya (UNSMIL) and the UN Office of the High Commissioner for Human Rights (OHCHR), were mostly 'vague or political in nature', including war crimes and crimes against humanity allegedly committed in 2011 during the Libyan uprising.⁹⁶⁸ The trial was criticised by human rights groups for not meeting international fair trial standards.⁹⁶⁹ On 28 July 2015, Gaddafi and Al-Senussi were convicted and sentenced to death by firing squad.⁹⁷⁰

In April 2016, the *interim* Government of Libya, based in Tobruk, ordered Gaddafi's release on the basis of a new Libyan amnesty law passed in November 2015.⁹⁷¹ Gaddafi was allegedly subsequently released from detention in Zintan on 9 June 2017.⁹⁷² His whereabouts, however, are currently unknown.⁹⁷³

At the time of writing this publication, the execution of the ICC Arrest Warrant for Gaddafi is pending.

- 965 ICC-01/11-01/11-577, p 16. See also 'Saif Al-Islam Gaddafi Case: ICC Pre-Trial Chamber I issues non-compliance finding for Libyan Government and refers matter to UN Security Council', *ICC Press Release*, ICC-CPI-20141210-PR1074, 10 December 2014, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1074>>. Regarding the other request for cooperation, the Chamber found that the Government of Libya 'ha[d] failed to comply with the request by the Court to return to the Defence of Saif Al-Islam Gaddafi the originals of the documents that were seized in Zintan by the Libyan authorities from the former Defence counsel for Saif Al-Islam Gaddafi and destroy any copies thereof'. ICC-01/11-01/11-577, p 16.
- 966 'Saif Al-Islam Gaddafi', *Trial International*, available at <<https://trialinternational.org/latest-post/saif-al-islam-gaddafi/>>; 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', *UN Support Mission in Libya and Office of the UN High Commissioner for Human Rights*, 21 February 2017, p 52, available at <http://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf>.
- 967 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', *UN Support Mission in Libya and Office of the UN High Commissioner for Human Rights*, 21 February 2017, p 1, 19, 22, available at <http://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf>.
- 968 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', *UN Support Mission in Libya and Office of the High Commissioner for Human Rights*, 21 February 2017, p 19-20, 46-48, available at <http://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf>; 'Saif Al-Islam Gaddafi', *Trial International*, available at <<https://trialinternational.org/latest-post/saif-al-islam-gaddafi/>>.
- 969 'Libya: Flawed Trial of Gaddafi Officials', *Human Rights Watch*, 28 July 2015, available at <<https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials>>; 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', *UN Support Mission in Libya and Office of the UN High Commissioner for Human Rights*, 21 February 2017, p 22-47, available at <http://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf>.
- 970 Overall, nine accused were sentenced to death by firing squad, eight accused were sentenced to life imprisonment, 15 accused were handed prison sentences ranging from five to 12 years, four accused were acquitted of all charges, and the prosecution of one accused was suspended and he was placed in a mental health facility. A total of six accused were tried *in absentia*. 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', *UN Support Mission in Libya and Office of the UN High Commissioner for Human Rights*, 21 February 2017, p 47-48, 57-60, available at <http://www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf>.
- 971 'Saif Al-Islam Gaddafi', *Trial International*, available at <<https://trialinternational.org/latest-post/saif-al-islam-gaddafi/>>; 'Al-Thanni government calls for release of Zintan-detained Gaddafi's son', *The Libya Observer*, 29 June 2016, available at <<https://www.libyaobserver.ly/news/al-thanni-government-calls-release-zintan-detained-gaddafi%E2%80%99s-son>>. See also 'Libya: Surrender Saif al-Islam Gaddafi to ICC - Brigade Holding Ex-Leader's Son Alleges He's Free', *Human Rights Watch*, 15 June 2017, available at <<https://www.hrw.org/news/2017/06/15/libya-surrender-saif-al-islam-gaddafi-icc>>.
- 972 See 'ICC Prosecutor calls for the immediate arrest and surrender of the suspects, Msrs Saif Al-Islam Gaddafi and Al-Tuhamy Mohamed Khaled to the Court', *OTP Press Statement*, 14 June 2017, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=170614-otp-stat>>; 'Libya: Surrender Saif al-Islam Gaddafi to ICC - Brigade Holding Ex-Leader's Son Alleges He's Free', *Human Rights Watch*, 15 June 2017, available at <<https://www.hrw.org/news/2017/06/15/libya-surrender-saif-al-islam-gaddafi-icc>>.
- 973 'Gaddafi's son Saif freed in Libya, whereabouts unclear: lawyer', *Reuters*, 11 June 2017, available at <<https://www.reuters.com/article/us-libya-security-saif-idUSKBN192092>>.

The Prosecutor v. Al-Tuhamy Mohamed Khaled

Al-Tuhamy, a Libyan national, is the alleged former Lieutenant General of the Libyan Army and former Head of the Libyan Internal Security Agency (ISA).⁹⁷⁴

Scope of charges

Crimes allegedly committed in Libya from 15 February 2011 to 24 August 2011.⁹⁷⁵

Arrest warrant

Pre-Trial Chamber I⁹⁷⁶ issued an arrest warrant for Al-Tuhamy, under seal, on 18 April 2013.⁹⁷⁷ The Arrest Warrant was unsealed on 24 April 2017.⁹⁷⁸

Al-Tuhamy is alleged to be criminally responsible as a direct perpetrator, an indirect perpetrator or an indirect co-perpetrator under Article 25(3)(a), or in the alternative as an accessory to the crimes under Article 25(3)(d) or as a superior under Article 28(b) of the Statute, for four crimes against humanity (imprisonment, torture, persecution, and other inhumane acts) allegedly committed between 15 February 2011 and 24 August 2011; and three war crimes (torture, cruel treatment, and outrages upon personal dignity) allegedly committed between early March 2011 and 24 August 2011.⁹⁷⁹

According to the Arrest Warrant, some of the charges are based on underlying acts of sexual violence and rape, as well as threats of killing and rape.⁹⁸⁰

Status of proceedings

At the time of writing this publication, the execution of the Arrest Warrant is pending and Al-Tuhamy remains at large.

The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli⁹⁸¹

Al-Werfalli, a Libyan national, is alleged to be a commander of the Al-Saiqa Brigade, a revolutionary armed group part of Operation Dignity, since at least December 2015 and to have authority over at least one of its detention centres.⁹⁸² This is the first Libyan case relating to crimes committed after the Libyan uprising in 2011, and Al-Werfalli is the first ICC accused in the Libya Situation who is not affiliated with the Gaddafi regime or armed forces at the time of crimes.

⁹⁷⁴ ICC-01/11-01/13-1, p 6.

⁹⁷⁵ ICC-01/11-01/13-1, paras 2, 5, 7-8, 10, 12 and p 6-7.

⁹⁷⁶ Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Hans-Peter Kaul (Germany) and Judge Christine van den Wyngaert (Belgium).

⁹⁷⁷ ICC-01/11-01/13-1, p 6-7.

⁹⁷⁸ ICC-01/11-01/13-18, p 4. See also 'Situation in Libya: ICC Pre-Trial Chamber I unseals a warrant of arrest for Al-Tuhamy Mohamed Khaled charged with war crimes and crimes against humanity', *ICC Press Release*, ICC-CPI-20170424-PR1298, 24 April 2017, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1298>>.

⁹⁷⁹ ICC-01/11-01/13-1, paras 2, 12 and p 6-7.

⁹⁸⁰ ICC-01/11-01/13-1, paras 7-8.

⁹⁸¹ Although the reporting period of this section is from 16 August 2014 to 31 July 2017, the Al-Werfalli Arrest Warrant of 15 August 2017 has been included.

⁹⁸² ICC-01/11-01/17-2, paras 7-9 and p 16.

Scope of charges

Crimes allegedly committed in Benghazi or surrounding areas, in Libya, from on or before 3 June 2016 until on or around 17 July 2017 during the course of seven incidents constituting separate rounds of executions of a total of 33 persons who were either detainees, civilians or persons *hors de combat*.⁹⁸³

Arrest warrant

On 15 August 2017, Pre-Trial Chamber I⁹⁸⁴ issued an arrest warrant for Al-Werfalli.⁹⁸⁵ He is alleged to be criminally responsible, as a direct perpetrator under Article 25(3)(a) or for ordering under Article 25(3)(b), for the war crime of murder under Article 8(2)(c)(i) of the Statute.⁹⁸⁶

A request for cooperation was transmitted to the Libyan authorities on 21 August 2017, seeking Al-Werfalli's arrest and surrender to the Court.⁹⁸⁷

Status of proceedings

The execution of the ICC Arrest Warrant is pending. According to media reports, on 2 August 2017, Al-Werfalli was allegedly arrested by the Libyan National Army (LNA) as part of the ongoing domestic investigations.⁹⁸⁸ At the time of writing this publication, the LNA had not handed Al-Werfalli over to the ICC.⁹⁸⁹

983 ICC-01/11-01/17-2, paras 10-22 and p 16; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the issuance of a warrant of arrest for Mr Mahmoud Mustafa Busayf al-Werfalli', *OTP Press Statement*, 15 August 2017, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=17o815-otp-stat>>.

984 Pre-Trial Chamber I was composed of Presiding Judge Joyce Aluoch (Kenya), Judge Cuno Tarfusser (Italy) and Judge Péter Kovács (Hungary).

985 ICC-01/11-01/17-2, p 16.

986 ICC-01/11-01/17-2, para 28 and p 16.

987 ICC-01/11-01/17-3, p 4.

988 'War crimes suspect Mahmoud Warfali arrested on Haftar's orders', *Libya Herald*, 17 August 2017, available at <<https://www.libyaherald.com/2017/08/17/war-crimes-suspect-mahmoud-warfali-arrested-on-hafters-orders/>>.

989 'Libya: Khalifa Haftar ally Mahmoud al-Werfalli arrested', *Al Jazeera*, 18 August 2017, available at <<http://www.aljazeera.com/news/2017/08/libya-khalifa-haftar-ally-mahmoud-al-werfalli-arrested-170818075333510.html>>.

Côte d'Ivoire

The Situation in Côte d'Ivoire marked the first investigation opened following an Article 12(3) declaration by a non-State Party to the Rome Statute accepting the Court's jurisdiction.⁹⁹⁰ It arose from the post-election violence in Côte d'Ivoire between 2010 and 2011, which broke out after former President Laurent Gbagbo refused to accept the result of the November 2010 Presidential election and to transfer power to Alassane Ouattara, the internationally recognised President-elect. Laurent Gbagbo and members of his inner circle allegedly conceived a plan, which led to the commission of crimes against humanity.

On 23 June 2011, the ICC Prosecutor requested authorisation to initiate investigations into the Situation in Côte d'Ivoire,⁹⁹¹ which was granted by Pre-Trial Chamber III⁹⁹² on 3 October 2011.⁹⁹³

At the time of writing, the Pre-Trial Chamber has issued arrest warrants for three individuals in the Côte d'Ivoire Situation.⁹⁹⁴ Two of these Warrants have been executed, resulting in the arrest of Laurent Gbagbo and Charles Blé Goudé (Blé Goudé), who are currently on trial before the ICC. The third Arrest Warrant, for the former First Lady of Côte d'Ivoire, Simone Gbagbo, the wife of Laurent Gbagbo, remains outstanding.

The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé

Laurent Gbagbo is an Ivorian national and the former President of Côte d'Ivoire.⁹⁹⁵ With his arrest and transfer in 2011, he became the first former Head of State to be transferred into the Court's custody. Blé Goudé is also an Ivorian national and is alleged to have been a member of Laurent Gbagbo's inner circle and leader of the Pro-Gbagbo Youth, involved in the commission of crimes related to the post-election violence in November 2010.⁹⁹⁶ Originally, the cases were brought separately against the two accused and were joined on 11 March 2015, after the completion of the respective confirmation of charges proceedings.⁹⁹⁷

Scope of charges

Crimes allegedly committed between 16 December 2010 and on or around 12 April 2011 during the course of four incidents: a pro-Ouattara march on the *Radiodiffusion Télévision ivoirienne* (RTI)

990 Pursuant to Article 12(3) of the Statute, a non-State Party can lodge a declaration accepting the jurisdiction of the Court. Following such a declaration, it is up to the Prosecutor to decide *proprio motu* whether to request authorisation from the Pre-Trial Chamber to initiate investigations. The Government of Côte d'Ivoire, which had initially accepted the Court's jurisdiction by way of an Article 12(3) declaration in 2003, following the intensification of violence in 2010, reaffirmed its acceptance of the Court's jurisdiction in December 2010 and again in May 2011. On 23 June 2011, the Prosecutor requested authorisation to initiate investigations into the Situation in Côte d'Ivoire, which was granted by the Pre-Trial Chamber on 3 October 2011. ICC-02/11-14, para 212. On 15 February 2013, Côte d'Ivoire ratified the Rome Statute, thereby becoming the 122nd State Party, and the 34th African State Party. 'Côte d'Ivoire ratifies the Rome Statute', *ICC Press Release*, ICC-ASP-20130218-PR873, 18 February 2013, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr873>>.

991 ICC-02/11-3, paras 1, 181.

992 Pre-Trial Chamber III was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Elizabeth Odio Benito (Costa Rica) and Judge Adrian Fulford (United Kingdom).

993 ICC-02/11-14, para 212.

994 ICC-02/11-01/11-1; ICC-02/11-02/11-1; ICC-02/11-01/12-1.

995 ICC-02/11-01/11-656-Red, para 96.

996 ICC-02/11-02/11-186, paras 58-60.

997 ICC-02/11-01/15-1.

headquarters from 16 to 19 December 2010; a women's demonstration in Abobo on 3 March 2011; the shelling of Abobo market on 17 March 2011; and the attack in Yopougon on 12 April 2011.⁹⁹⁸

Blé Goudé is also charged with crimes allegedly committed during a fifth incident: an attack by the pro-Gbagbo youth on Yopougon from 25 to 28 February 2011.⁹⁹⁹

Arrest warrant

Pre-Trial Chamber III¹⁰⁰⁰ issued an arrest warrant for Laurent Gbagbo, under seal, on 23 November 2011, which was unsealed on 30 November 2011.¹⁰⁰¹ The same Chamber issued an arrest warrant for Blé Goudé, under seal, on 21 December 2011, which was unsealed on 30 September 2013.¹⁰⁰² In the Arrest Warrants, both accused faced crimes against humanity charges, including sexual and gender-based crimes, namely rape and other forms of sexual violence, as well as persecution through acts of rape, as indirect co-perpetrators under Article 25(3)(a) of the Statute.¹⁰⁰³

Transfer to ICC custody

Laurent Gbagbo was transferred to ICC custody by the Ivorian authorities on 30 November 2011.¹⁰⁰⁴ Blé Goudé was arrested by the authorities in Ghana and transferred by the Ivorian authorities to the ICC Detention Centre on 22 March 2014.¹⁰⁰⁵

Confirmation of charges

The hearing on the confirmation of charges against Laurent Gbagbo was held from 19 to 28 February 2013;¹⁰⁰⁶ and that against Blé Goudé was held from 29 September to 2 October 2014.¹⁰⁰⁷

Prior to the first hearing, 199 applicants were admitted to participate as victims in the confirmation of charges proceedings against Laurent Gbagbo.¹⁰⁰⁸ Before the second hearing, the same 199 applicants, of whom the status of one victim was later terminated following his/her passing, as well

998 ICC-02/11-01/11-656-Red, paras 271-274, 278; ICC-02/11-02/11-186, paras 187-189; ICC-02/11-01/15-1, para 53.

999 ICC-02/11-02/11-186, paras 187(b), 189(b); ICC-02/11-01/15-1, para 54.

1000 Pre-Trial Chamber III was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Elizabeth Odio Benito (Costa Rica) and Judge Adrian Fulford (United Kingdom).

1001 ICC-02/11-01/11-1, p 7. Although Laurent Gbagbo faced the charges of both rape and other forms of sexual violence as crimes against humanity at the arrest warrant stage, the Document Containing the Charges, as well as the Confirmation of Charges decision, only refer to the charge of rape. ICC-02/11-01/11-592-Anx2-Corr2-Red, para 233; ICC-02/11-01/11-656-Red, p 130. The Arrest Warrant also does not specify that the charge of persecution as a crime against humanity was committed through acts of rape; however, this information became available in the Confirmation of Charges decision. ICC-02/11-01/11-656-Red, para 204. For more information on the Laurent Gbagbo Arrest Warrant, see Women's Initiatives for Gender Justice, *Gender Report Card 2012*, p 130-131, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>>.

1002 ICC-02/11-02/11-1, p 8. Although Blé Goudé faced the charges of both rape and other forms of sexual violence as crimes against humanity at the arrest warrant stage, the Document Containing the Charges, as well as the Confirmation of Charges decision, only refer to the charge of rape. ICC-02/11-02/11-124-Anx1, p 125-126; ICC-02/11-02/11-186, para 194. The Arrest Warrant also does not specify that the charge of persecution as a crime against humanity was committed through acts of rape; however, this information became available in the Confirmation of Charges decision. ICC-02/11-02/11-186, para 122.

1003 ICC-02/11-01/11-1, paras 8, 10; ICC-02/11-02/11-1, paras 7, 9.

1004 ICC-PIDS-CIS-CI-04-03/16_Eng; ICC-02/11-01/11-656-Red, para 3.

1005 ICC-02/11-02/11-T-3-Red-ENG, p 11 line 20; ICC-02/11-02/11-46, para 2.

1006 ICC-02/11-01/11-656-Red, para 8. See also Women's Initiatives for Gender Justice, 'ICC to hold first confirmation hearing in case against former head of state involving charges of gender-based crimes', 19 February 2013, available at <<http://4genderjustice.org/statement-on-confirmation-of-charges-hearing-in-gbagbo-case/>>.

1007 ICC-02/11-02/11-186, para 8. See also Women's Initiatives for Gender Justice, 'ICC Commencement of the Confirmation of Charges Hearing – *The Prosecutor vs. Charles Blé Goudé*', 29 September 2014, available at <<http://4genderjustice.org/statement-on-icc-commencement-of-confirmation-of-charges-hearing-in-charles-ble-goudé-case/>>.

1008 On 4 June 2012, 139 applicants were granted victim status to participate in the confirmation of charges proceedings against Laurent Gbagbo. ICC-02/11-01/11-138, p 25. On 6 February 2013, a further 60 applicants were granted victim status to participate. ICC-02/11-01/11-384-Corr, p 22-23.

as 272 additional applicants, were admitted to participate as victims in the confirmation of charges proceedings against Blé Goudé.¹⁰⁰⁹

Pre-Trial Chamber I,¹⁰¹⁰ by majority, rendered the Confirmation of Charges decision against Laurent Gbagbo on 12 June 2014;¹⁰¹¹ and, unanimously, against Blé Goudé on 11 December 2014.¹⁰¹² The same charges were confirmed for both accused, namely four counts of crimes against humanity: murder, rape, other inhumane acts or, in the alternative, attempted murder, and persecution.¹⁰¹³

Laurent Gbagbo and Blé Goudé are charged as indirect co-perpetrators under Article 25(3)(a) or, in the alternative, for ordering, soliciting or inducing the commission of the crimes under Article 25(3)(b) or, in the alternative, for contributing in any other way to the commission of the crimes under Article 25(3)(d).¹⁰¹⁴ Blé Goudé is also alternatively charged for aiding, abetting or otherwise assisting the commission of the crimes under Article 25(3)(c) of the Statute.¹⁰¹⁵

Prior to the start of the trial, on 6 March 2015, Trial Chamber I¹⁰¹⁶ authorised 198 victims who had participated in the confirmation of charges proceedings against Laurent Gbagbo and Blé Goudé,¹⁰¹⁷ as well as 270 of the additional victims who had participated in the confirmation of charges proceedings against Blé Goudé,¹⁰¹⁸ to participate in the trial proceedings.¹⁰¹⁹ On 7 January 2016, the Chamber granted victim status to 258 additional applicants to participate in the trial proceedings, amounting to 726 participating victims in total.¹⁰²⁰

Trial proceedings

The originally separate cases against Laurent Gbagbo and Blé Goudé were joined on 11 March 2015.¹⁰²¹

¹⁰⁰⁹ On 11 June 2014, the same 199 victims participating in the confirmation of charges proceedings against Laurent Gbagbo were admitted to also participate in the confirmation of charges proceedings against Blé Goudé. ICC-02/11-02/11-83, para 10 and p 19-20. On 1 August 2014, a further 272 applicants were granted victim status to participate, and the victim status of one previously admitted victim (a/20163/12), who had since then passed away, was terminated. ICC-02/11-02/11-111, p 13-16. For more information, see also Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 254-255, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

¹⁰¹⁰ At the time of the Confirmation of Charges decision against Laurent Gbagbo, Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Hans-Peter Kaul (Germany) and Judge Christine Van den Wyngaert (Belgium).

¹⁰¹¹ ICC-02/11-01/11-656-Red. Judge Van den Wyngaert appended a dissenting opinion. ICC-02/11-01/11-656-Anx.

¹⁰¹² ICC-02/11-02/11-186. Judge Van den Wyngaert appended a partly dissenting opinion. ICC-02/11-02/11-186-Anx. At the time of the Confirmation of Charges decision against Blé Goudé, Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Ekaterina Trendafilova (Bulgaria) and Judge Christine Van den Wyngaert (Belgium).

¹⁰¹³ ICC-02/11-01/11-656-Red, para 278 and p 131; ICC-02/11-02/11-186, para 194 and p 90.

¹⁰¹⁴ ICC-02/11-01/11-656-Red, para 278; ICC-02/11-02/11-186, para 194.

¹⁰¹⁵ ICC-02/11-02/11-186, para 194.

¹⁰¹⁶ Trial Chamber I was composed of Presiding Judge Geoffrey Henderson (Trinidad and Tobago), Judge Cuno Tarfusser (Italy) and Judge Olga Herrera Carbuca (Dominican Republic).

¹⁰¹⁷ As mentioned above, the status of one of the 199 victims (a/20163/12) who had participated in the confirmation of charges proceedings against Laurent Gbagbo and Blé Goudé was terminated in August 2014 after his/her passing. ICC-02/11-01/11-800, para 40; ICC-02/11-02/11-111, p 16.

¹⁰¹⁸ One of the additional 272 victims (a/10201/14) who had participated in the confirmation of charges proceedings against Blé Goudé passed away in August 2014, lowering the number to 271. ICC-02/11-01/11-800, para 42 and fn 70. However, according to information received via email from the VPRS on 27 October 2017, there were 271 victim codes, but only 270 participants. The Single Judge in this case specified that a number of applicants submitted two application forms, thereby receiving two victim codes. ICC-02/11-02/11-111, para 11.

¹⁰¹⁹ ICC-02/11-01/11-800, paras 40-47 and p 24.

¹⁰²⁰ ICC-02/11-01/15-379, para 6 and p 23.

¹⁰²¹ ICC-02/11-01/15-1. See also 'ICC Trial Chamber I joins the cases concerning Laurent Gbagbo and Charles Blé Goudé', *ICC Press Release*, ICC-CPI-20150311-PR1097, 11 March 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1097>>.

The joint trial against both accused commenced on 28 January 2016 before Trial Chamber I,¹⁰²² and the Prosecution started its presentation of evidence on 3 February 2016, which is currently ongoing.¹⁰²³ So far, 726 victims have been authorised to participate in the trial proceedings.¹⁰²⁴

Status of proceedings

At the time of writing this publication, the trial is ongoing. Laurent Gbagbo and Blé Goudé remain in ICC custody.

The Prosecutor v. Simone Gbagbo

Simone Gbagbo, an Ivorian national, is the former First Lady of Côte d'Ivoire and wife of Laurent Gbagbo. She is the only woman to date for whom an arrest warrant has been publicly issued by the ICC. Simone Gbagbo is one of three former First Ladies to have been charged by competent courts with international crimes, including the commission of sexual and gender-based violence.¹⁰²⁵ She was charged in her capacity as a member of her husband and former President of Côte d'Ivoire Laurent Gbagbo's inner circle, allegedly 'act[ing] as an *alter ego* for her husband, exercising the power to make State decisions'.¹⁰²⁶

Scope of charges

Crimes allegedly committed in Côte d'Ivoire between 16 December 2010 and 12 April 2011.¹⁰²⁷

Arrest warrant

Pre-Trial Chamber III¹⁰²⁸ issued an arrest warrant for Simone Gbagbo, under seal, on 29 February 2012. The Arrest Warrant was unsealed on 22 November 2012.¹⁰²⁹ Simone Gbagbo is allegedly criminally responsible, as an indirect co-perpetrator under Article 25(3)(a) of the Statute, for four counts of crimes against humanity, including murder, rape and other forms of sexual violence, other inhumane acts, and persecution.¹⁰³⁰

Admissibility proceedings

On 30 September 2013, the Government of Côte d'Ivoire filed a legal challenge to the admissibility of the case, arguing that it was actively investigating or prosecuting the case and was neither unwilling nor unable to carry out the proceedings genuinely.¹⁰³¹

¹⁰²² 'Trial of Laurent Gbagbo and Charles Blé Goudé opens at International Criminal Court', *ICC Press Release*, ICC-CPI-20160128-PR1184, 28 January 2016, available at <<https://www.icc-cpi.int/pages/item.aspx?name=PR1184>>. See also Women's Initiatives for Gender Justice, 'First ICC Trial in the Côte d'Ivoire Situation', 27 January 2016, available at <<http://4genderjustice.org/first-icc-trial-in-the-cote-divoire-situation/>>.

¹⁰²³ ICC-02/11-01/15-T-13-Red3-ENG, p 3 line 19.

¹⁰²⁴ See the *Confirmation of Charges* stage of this case.

¹⁰²⁵ Others include: Agnes Taylor (former First Lady of Liberia, charged with torture) and Agathe Habyarimana (former First Lady of Rwanda, charged with genocide and crimes against humanity). 'Ex-wife of former Liberian president charged with torture', *The Guardian*, 2 June 2017, available at <<https://www.theguardian.com/world/2017/jun/02/ex-wife-of-former-liberian-president-charged-with-torture>>; Agathe Kanziga Habyarimana', *Trial International*, 27 September 2016, available at <<https://trialinternational.org/latest-post/agate-kanziga-habyarimana/>>.

¹⁰²⁶ ICC-02/11-01/12-1, para 10 (italics in original).

¹⁰²⁷ ICC-02/11-01/12-1, p 8.

¹⁰²⁸ Pre-Trial Chamber III was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Elizabeth Odio Benito (Costa Rica) and Judge Adrian Fulford (United Kingdom).

¹⁰²⁹ ICC-02/11-01/12-1, p 8.

¹⁰³⁰ ICC-02/11-01/12-1, para 9 and p 8.

¹⁰³¹ ICC-02/11-01/12-1-Red, paras 23, 38, 46, 56 and p 23. For more information on Côte d'Ivoire's admissibility challenge in the Simone Gbagbo case, see Women's Initiatives for Gender Justice, *Gender Report Card 2014*, p 131-137, available at <<http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

On 15 November 2013, the Chamber determined that victims who had ‘already communicated’ with the Court in relation to this case were able to submit observations, through the OPCV, on the admissibility proceedings.¹⁰³²

On 11 December 2014, finding that Côte d’Ivoire failed to demonstrate that ‘concrete, tangible and progressive steps’ were being undertaken aimed at ascertaining Simone Gbagbo’s criminal responsibility for the same conduct that is alleged in the case before the Court, Pre-Trial Chamber I¹⁰³³ rejected Côte d’Ivoire’s admissibility challenge and reminded Côte d’Ivoire of its obligation to surrender Simone Gbagbo to the Court ‘without delay’.¹⁰³⁴

Côte d’Ivoire appealed this decision on 17 December 2014,¹⁰³⁵ and submitted its Document in Support of Appeal on 9 January 2015, requesting the reversal of the decision and for the Chamber to determine that the case against Simone Gbagbo is inadmissible before the Court.¹⁰³⁶

The victims who were allowed to submit observations in the admissibility proceedings were also able to do so in the subsequent appeals proceedings.¹⁰³⁷

On 27 May 2015, the Appeals Chamber¹⁰³⁸ rejected Côte d’Ivoire’s appeal and confirmed the admissibility of the case before the Court.¹⁰³⁹

Status of proceedings

At the time of writing this publication, the execution of the ICC Arrest Warrant is pending.

Simone Gbagbo is currently serving a 20-year sentence in Côte d’Ivoire, following a domestic trial and conviction in March 2015 for offenses against the State committed during the 2010-2011 post-election violence.¹⁰⁴⁰ In 2016, she faced a second domestic trial for crimes against humanity and war crimes, which was marked by fair trial concerns, deferrals and suspensions. She was acquitted of these crimes in March 2017.¹⁰⁴¹ In June 2016, Simone Gbagbo alleged that there had been an attempt to rape her whilst in she was in detention.¹⁰⁴²

¹⁰³² ICC-02/11-01/12-15, paras 9-10 and p 9. The Chamber did not indicate the number of victims represented.

¹⁰³³ Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Ekaterina Trendafilova (Bulgaria) and Judge Christine Van den Wyngaert (Belgium).

¹⁰³⁴ ICC-02/11-01/12-47-Red, paras 65, 78 and p 38; ‘Simone Gbagbo case: ICC Pre-Trial Chamber I rejects Côte d’Ivoire’s challenge to the admissibility of the case and reminds the Government of its obligation to surrender Simone Gbagbo’, *ICC Press Release*, ICC-CPI-20141209-PR1075, 11 December 2014, available at <<https://www.icc-cpi.int/legalAidConsultations?name=pr1075>>.

¹⁰³⁵ ICC-02/11-01/12-48-tENG, paras 3, 8, 17 and p 8.

¹⁰³⁶ ICC-02/11-01/12-54-Red, para 125.

¹⁰³⁷ ICC-02/11-01/12-55, p 3.

¹⁰³⁸ The Appeals Chamber was composed of Presiding Judge Piotr Hofmański (Poland), Judge Sanji Mmasenono Monageng (Botswana), Judge Howard Morrison (United Kingdom), Judge Marc Perrin de Brichambaut (France) and Judge Chang-ho Chung (Republic of Korea).

¹⁰³⁹ ICC-02/11-01/12-75-Red, paras 80, 140-141 and p 3-4.

¹⁰⁴⁰ ‘Ivory Coast’s former first lady Simone Gbagbo jailed’, *BBC*, 10 March 2015, available at <<http://www.bbc.com/news/world-africa-31809073>>.

¹⁰⁴¹ ‘Côte d’Ivoire: Simone Gbagbo Acquitted After Flawed War Crimes Trial’, *Human Rights Watch*, 29 March 2017, available at <<https://www.hrw.org/news/2017/03/29/cote-divoire-simone-gbagbo-acquitted-after-flawed-war-crimes-trial>>.

¹⁰⁴² ‘Ivory Coast ex-first lady claims she suffered rape attempt’, *News 24*, 2 June 2016, available at <<http://www.news24.com/Africa/News/ivory-coast-ex-first-lady-claims-she-suffered-rape-attempt-20160602>>.

Mali

In July 2012, the Prosecutor received a letter from the Government of Mali, referring the Situation in the country since January 2012 to the ICC.¹⁰⁴³ Following the referral, the Prosecutor decided to open a Preliminary Examination into the Situation in Mali, highlighting instances of killings, abductions, rapes and conscription of children committed in the country.¹⁰⁴⁴

On 16 January 2013, the Prosecutor announced the opening of an investigation into alleged crimes committed in Mali since January 2012,¹⁰⁴⁵ focusing on crimes committed in the three northern regions of Mali, including Gao, Timbuktu and Kidal.¹⁰⁴⁶ Jointly with the announcement of the opening of the investigation, the Prosecutor publicly released her Article 53(1) Report on the Situation in Mali.¹⁰⁴⁷ The report indicated that the Situation in Mali is marked by two main events: (1) the emergence of a rebellion in the north of Mali on or around 17 January 2012, resulting in the seizure of northern Mali by armed groups; and (2) a *coup d'état* by a military *junta* on 22 March 2012, leading to the removal of President Touré shortly before scheduled presidential elections.¹⁰⁴⁸ The report identified the main actors to the conflict as government forces, the *Mouvement national de libération de l'Anzawad* (MNLA), al-Qaeda in the Islamic Maghreb (AQIM), *Ansar Dine*, and the *Mouvement pour l'unité et le jihad en Afrique de l'Ouest* (MUJAO).¹⁰⁴⁹

In her announcement, the Prosecutor determined that, following an assessment of the evidence, there was a reasonable basis to believe that the following war crimes had been committed in Mali since January 2012: murder; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court; mutilation, cruel treatment and torture; intentionally directing attacks against protected

¹⁰⁴³ Government of Mali, 'Referral Letter', ICC website, 13 July 2012, available at <<http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/o/ReferralLetterMali130712.pdf>>.

¹⁰⁴⁴ 'ICC Prosecutor Fatou Bensouda on the Malian State Referral of the Situation in Mali since January 2012', *OTP Press Release*, ICC-OTP-20120718-PR829, 18 July 2012, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr829.aspx>. The Prosecutor's statement refers to reports of 'instances of killings, abductions, rapes and conscription of children'.

¹⁰⁴⁵ 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"', *OTP Press Statement*, ICC-OTP-20130116-PR869, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx>. See further Women's Initiatives for Gender Justice, 'Mali: Office of the Prosecutor announces opening of investigations in ICC's eighth Situation', *Legal Eye on the ICC eLetter*, February 2013, available at <<http://4genderjustice.org/publications/eletters/legal-eye-on-the-icc-february-2013-first-special-issue-on-ngudjolo-judgement/>>.

¹⁰⁴⁶ 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"', *OTP Press Statement*, ICC-OTP-20130116-PR869, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx>.

¹⁰⁴⁷ 'Article 53(1) Report on the Situation in Mali', *OTP*, 16 January 2013, available at <https://www.icc-cpi.int/itemsDocuments/SAMaliArticle53_1PublicReportENG16Jan2013.pdf>. While the OTP is not required to make public its report when acting pursuant to a referral under Article 53(1) of the Statute, the Prosecutor indicated that her Office 'decided to do so in the interests of promoting clarity with respect to its statutory activities and decisions'.

¹⁰⁴⁸ 'Article 53(1) Report on the Situation in Mali', *OTP*, 16 January 2013, para 25, available at <https://www.icc-cpi.int/itemsDocuments/SAMaliArticle53_1PublicReportENG16Jan2013.pdf>.

¹⁰⁴⁹ 'Article 53(1) Report on the Situation in Mali', *OTP*, 16 January 2013, paras 30-33, available at <https://www.icc-cpi.int/itemsDocuments/SAMaliArticle53_1PublicReportENG16Jan2013.pdf>.

objects; pillaging; and rape.¹⁰⁵⁰ Furthermore, the OTP indicated that it would continue to investigate allegations relating to the use, conscription, and enlistment of children.¹⁰⁵¹ Although the OTP did not find a reasonable basis to believe that crimes against humanity had been committed, it indicated that this assessment could be revisited in the future following further analysis and investigation.¹⁰⁵²

At the time of writing this publication, one arrest warrant had been issued in this Situation, leading to the arrest of Ahmad Al Faqi Al Mahdi (Al Mahdi) in September 2015. Al Mahdi was found guilty in September 2016 for the war crime of intentionally directing attacks against religious and historic buildings in Timbuktu, Mali, in June and July 2012,¹⁰⁵³ in the shortest ICC trial to date.¹⁰⁵⁴

The Prosecutor v. Ahmad Al Faqi Al Mahdi

Al Mahdi, a Malian national, was a former member of the *Ansar Dine* movement associated with AQIM, the Head of the *Hesbah* morality brigade from April to September 2012, and associated with the work of the Islamic Court of Timbuktu.¹⁰⁵⁵ Al Mahdi is the first, and so far only, indictee to plead guilty before the Court, and this is the first ICC trial focused on the destruction of historical and religious monuments.¹⁰⁵⁶ This is also the first case in which individual, collective and symbolic reparations have been ordered by the ICC.¹⁰⁵⁷

Scope of charges

Crime allegedly committed in Timbuktu, Mali, between around 30 June and 11 July 2012.¹⁰⁵⁸

Arrest warrant

The Single Judge of Pre-Trial Chamber I issued an arrest warrant, under seal, for Al Mahdi on 18 September 2015. The Arrest Warrant was unsealed ten days later.¹⁰⁵⁹

¹⁰⁵⁰ ‘ICC Prosecutor opens investigation into war crimes in Mali: “The legal requirements have been met. We will investigate”’, *OTP Press Statement*, ICC-OTP-20130116-PR869, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx>.

¹⁰⁵¹ ‘Article 53(1) Report on the Situation in Mali’, *OTP*, 16 January 2013, paras 120-124, available at <https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf>.

¹⁰⁵² ‘Article 53(1) Report on the Situation in Mali’, *OTP*, 16 January 2013, para 132, available at <https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf>.

¹⁰⁵³ ICC-01/12-01/15-171.

¹⁰⁵⁴ See also Women’s Initiatives for Gender Justice, ‘First ICC Trial in the Mali Situation’, 22 August 2016, available at <<http://4genderjustice.org/first-icc-trial-on-mali/>>.

¹⁰⁵⁵ ICC-01/12-01/15-171, paras 9, 31-33.

¹⁰⁵⁶ See ICC-01/12-01/15-171, para 30; ‘Al Mahdi case: accused makes an admission of guilt at trial opening’, *ICC Press Release*, ICC-CPI-20160822-PR1236, 22 August 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1236>>.

¹⁰⁵⁷ ICC-01/12-01/15-236, p 60. See also ‘Al Mahdi case: ICC Trial Chamber VIII issues reparations order’, *ICC Press Release*, ICC-CPI-20170817-PR1329, 17 August 2017, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1329>>.

¹⁰⁵⁸ ICC-01/12-01/15-84-Red, para 2 and p 22.

¹⁰⁵⁹ ICC-01/12-01/15-1-Red. The Single Judge, acting on behalf of Pre-Trial Chamber I, was Judge Cuno Tarfusser (Italy).

Transfer to ICC custody

Al Mahdi was surrendered to the Court by the authorities of Niger and transferred to the ICC Detention Centre on 26 September 2015.¹⁰⁶⁰

Confirmation of charges

The Confirmation of Charges hearing was held on 1 March 2016.¹⁰⁶¹

No victims participated in the confirmation of charges proceedings in this case.¹⁰⁶²

On 24 March 2016, Pre-Trial Chamber I¹⁰⁶³ unanimously issued its Confirmation of Charges decision, confirming the war crime charge of destruction of historical and religious monuments against Al Mahdi.¹⁰⁶⁴ He was charged as a direct perpetrator and co-perpetrator under Article 25(3)(a), for soliciting or inducing the commission of the crime under Article 25(3)(b), for aiding, abetting or otherwise assisting the commission of the crime under Article 25(3)(c), and for contributing in any other way to the commission of the crime under Article 25(3)(d) of the Statute.¹⁰⁶⁵

Prior to the commencement of the trial, nine victims, of whom one withdrew his/her application, were authorised to participate in the trial proceedings.¹⁰⁶⁶

Trial proceedings

The trial took place from 22 to 24 August 2016, the shortest trial before the ICC to date, hearing the testimony of three witnesses.¹⁰⁶⁷ At the opening of the trial, Al Mahdi pleaded guilty to the war crime of destruction of historical and religious monuments.¹⁰⁶⁸ In total, eight victims participated in the trial proceedings.¹⁰⁶⁹

On 27 September 2016, Trial Chamber VIII,¹⁰⁷⁰ unanimously, convicted Al Mahdi as a direct co-perpetrator under Article 25(3)(a) for the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion under Article 8(2)(e)(iv) of the Statute, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012.¹⁰⁷¹

¹⁰⁶⁰ ICC-01/12-01/15-84-Red, para 5. See also 'Situation in Mali: Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu', *ICC Press Release*, ICC-CPI-20150926-PR1154, 26 September 2015, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1154&ln=en>>.

¹⁰⁶¹ ICC-01/12-01/15-84-Red, para 12.

¹⁰⁶² This information was obtained via email from the VPRS on 27 October 2017.

¹⁰⁶³ Pre-Trial Chamber I was composed of Presiding Judge Joyce Aluoch (Kenya), Judge Cuno Tarfusser (Italy) and Judge Péter Kovács (Hungary).

¹⁰⁶⁴ ICC-01/12-01/15-84-Red, p 22-27. Judge Kovács appended a separate opinion. ICC-01/12-01/15-84-Anx.

¹⁰⁶⁵ ICC-01/12-01/15-84-Red, p 26-27.

¹⁰⁶⁶ On 8 June 2016, three victims were authorised to participate. ICC-01/12-01/15-97-Red, p 15. On 12 August 2016, six victims were authorised to participate. ICC-01/12-01/15-156-Red, p 7. On 19 August 2016, one of the victims admitted on 12 August (a/35008/16) requested his/her application to be withdrawn. ICC-01/12-01/15-159, para 2.

¹⁰⁶⁷ ICC-01/12-01/15-171, para 7. See also Women's Initiatives for Gender Justice, 'First ICC Trial in the Mali Situation', 22 August 2016, available at <<http://4genderjustice.org/first-icc-trial-on-mali/>>.

¹⁰⁶⁸ ICC-01/12-01/15-171, paras 7, 11, 30, 42-43, 62, 98-100. See also 'Al Mahdi case: accused makes an admission of guilt at trial opening', *ICC Press Release*, ICC-CPI-20160822-PR1236, 22 August 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1236>>.

¹⁰⁶⁹ All participating victims were authorised to participate prior to the commencement of the trial. For more information, see the *Confirmation of Charges* stage of this case. See also ICC-01/12-01/15-171, para 6.

¹⁰⁷⁰ Trial Chamber VIII was composed of Presiding Judge Raul Cano Pangalangan (Philippines), Judge Antoine Kesia-Mbe Mindua (DRC) and Judge Bertram Schmitt (Germany).

¹⁰⁷¹ ICC-01/12-01/15-171, paras 62-63 and p 49. See also 'ICC Trial Chamber VIII declares Mr Al Mahdi guilty of the war crime of attacking historic and religious buildings in Timbuktu and sentences him to nine years' imprisonment', *ICC Press Release*, ICC-CPI-20160927-PR1242, 27 September 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1242>>.

Sentencing

On 27 September 2016, Al Mahdi was sentenced to nine years' imprisonment.¹⁰⁷² One year was deducted from his sentence for the time already spent in detention since his arrest.¹⁰⁷³

Reparations

On 29 September 2016, Trial Chamber VIII¹⁰⁷⁴ issued its Reparations Phase Calendar and invited the Legal Representative of Victims, Prosecution, Defence, Registry, TFV, and the Malian authorities to make general submissions on reparations.¹⁰⁷⁵ Interested organisations were also invited to request leave to submit *amicus curiae* observations on reparations related issues.¹⁰⁷⁶ In December 2016 and January 2017, the Legal Representative of Victims, TFV, Prosecution, Defence, Registry and several organisations submitted their observations on reparations in the Al Mahdi case.¹⁰⁷⁷ On 19 January 2017, the Chamber appointed four experts for the reparations proceedings in this case.¹⁰⁷⁸

On 17 August 2017,¹⁰⁷⁹ the Chamber unanimously rendered its Reparations Order in this case, awarding individual, collective and symbolic reparations to the community of Timbuktu.¹⁰⁸⁰ The Chamber found Al Mahdi to be liable for € 2.7 million in expenses for reparations.¹⁰⁸¹

The Chamber identified three categories of harm in this case, namely damage to the protected buildings,¹⁰⁸² consequential economic loss,¹⁰⁸³ and moral harm.¹⁰⁸⁴ The Chamber ordered individual reparations, in the form of compensation, for the victims whose livelihoods exclusively depended upon the protected buildings and whose ancestral burial sites were damaged in the attack.¹⁰⁸⁵ Collective reparations were ordered for the rehabilitation of the protected sites and for the community of Timbuktu as a whole.¹⁰⁸⁶

Additionally, having found Al Mahdi's apology to be 'genuine, categorical and empathetic', the Chamber ordered the Registry to produce a video excerpt of Al Mahdi's apology to be posted on the ICC website as a symbolic measure and to ensure victims' access to the apology.¹⁰⁸⁷

Although the Chamber limited its assessment only to the community of Timbuktu, the Chamber also awarded nominal damages, in the form of one euro, as a symbolic gesture for the damages suffered to

¹⁰⁷² ICC-01/12-01/15-171, para 109 and p 49.

¹⁰⁷³ ICC-01/12-01/15-171, para 111 and p 49.

¹⁰⁷⁴ At this stage of proceedings, Trial Chamber VIII was still composed of Presiding Judge Raul Cano Pangalangan (Philippines), Judge Antoine Kesia-Mbe Mindua (DRC) and Judge Bertram Schmitt (Germany).

¹⁰⁷⁵ ICC-01/12-01/15-172, para 2.

¹⁰⁷⁶ ICC-01/12-01/15-172, para 2 and p 5.

¹⁰⁷⁷ ICC-01/12-01/15-190-Red-tENG; ICC-01/12-01/15-187; ICC-01/12-01/15-192-Red; ICC-01/12-01/15-191-tENG; ICC-01/12-01/15-193. The following organisations submitted observations in this case: the Queen's University Belfast Human Rights Centre jointly with the Redress Trust; *Fédération internationale des ligues des droits de l'Homme* (FIDH) jointly with *Association malienne des droits de l'Homme* (AMDH); and UNESCO. ICC-01/12-01/15-188; ICC-01/12-01/15-189-tENG; ICC-01/12-01/15-194.

¹⁰⁷⁸ ICC-01/12-01/15-203-Red, p 6.

¹⁰⁷⁹ Although the reporting period of this section is from 16 August 2014 to 31 July 2017, the Al Mahdi Reparations Order of 17 August 2017 is included due to its significance.

¹⁰⁸⁰ ICC-01/12-01/15-236, p 60. See also 'Al Mahdi case: ICC Trial Chamber VIII issues reparations order', *ICC Press Release*, ICC-CPI-20170817-PR1329, 17 August 2017, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1329>>.

¹⁰⁸¹ ICC-01/12-01/15-236, paras 134-135 and p 60.

¹⁰⁸² ICC-01/12-01/15-236, paras 60-67, 104.

¹⁰⁸³ ICC-01/12-01/15-236, paras 72-83, 104.

¹⁰⁸⁴ ICC-01/12-01/15-236, paras 84-92, 104.

¹⁰⁸⁵ ICC-01/12-01/15-236, paras 83, 90 and p 60. The Chamber defined compensation as 'something, typically money, awarded to one or more victims in recognition of the harm they suffered'. ICC-01/12-01/15-236, para 47.

¹⁰⁸⁶ ICC-01/12-01/15-236, paras 67, 83, 90 and p 60. According to the Chamber, rehabilitation is 'aimed at restoring the victims and their communities to their former condition'. ICC-01/12-01/15-236, para 48. Collective reparations in this case were ordered to address the financial loss, economic harm and emotional distress suffered as a result of the attack and may include: community-based educational and awareness-raising programmes in order to promote Timbuktu's unique and important cultural heritage, return/resettlement programmes, a 'micro-edit system' to assist the population to generate income, or other cash assistance programmes aimed at restoring some of Timbuktu's lost economic activity; as well as symbolic measures, such as a memorial, commemoration or forgiveness ceremony. ICC-01/12-01/15-236, paras 83, 90.

¹⁰⁸⁷ ICC-01/12-01/15-236, paras 70-71 and p 60.

the State of Mali and the international community, best represented by the UN Educational, Scientific and Cultural Organization (UNESCO) given the specific nature of the Al Mahdi case.¹⁰⁸⁸

Noting Al Mahdi's indigence, the Chamber encouraged the TFV to complement the individual and collective awards 'to the extent possible' and to engage in fundraising efforts 'to the extent necessary'.¹⁰⁸⁹ It was further encouraged to complement the reparations award with general assistance beyond the narrow scope of this case to a wider range of human rights violations alleged to have occurred in Timbuktu and elsewhere throughout Mali.¹⁰⁹⁰

Currently, 139 reparations applications, including 137 individuals and two organisations, are being considered by the Chamber.¹⁰⁹¹

Status of proceedings

At the time of writing this publication, the case is at the reparations stage and Al Mahdi is serving his sentence. The TFV is to submit its Draft Implementation Plan on reparations in this case by 16 February 2018.¹⁰⁹²

¹⁰⁸⁸ICC-01/12-01/15-236, paras 106-107 and p 60.

¹⁰⁸⁹ICC-01/12-01/15-236, paras 114-115, 134-135, 138 and p 60.

¹⁰⁹⁰ICC-01/12-01/15-236, para 108 and p 60.

¹⁰⁹¹On 16 December 2016, the Registry transmitted to the Chamber 135 applications for reparations. ICC-01/12-01/15-200, para 1. On 24 March 2017, another four applications for reparations were transmitted by the Registry. ICC-01/12-01/15-211, para 1. See also ICC-01/12-01/15-236, paras 5, 141.

¹⁰⁹²ICC-01/12-01/15-236, para 136 and p 60.

Georgia

After having conducted a Preliminary Examination into the Situation in Georgia since August 2008, the ICC Prosecutor requested authorisation from Pre-Trial Chamber I¹⁰⁹³ on 13 October 2015 to open an investigation into this Situation.¹⁰⁹⁴ The request was based on information her Office had gathered on alleged crimes attributed to the three parties involved in the armed conflict: the Georgian armed forces, the South Ossetian forces and the Russian armed forces.¹⁰⁹⁵

On 27 January 2016, the Chamber authorised the Prosecutor to proceed with an investigation into crimes within the ICC's jurisdiction committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008.¹⁰⁹⁶ It found that there was a reasonable basis to believe that such crimes had been committed, including: murder, deportation or forcible transfer of population, and persecution as crimes against humanity; and attacks against the civilian population, wilful killing, intentionally directing attacks against peacekeepers, destruction of property, and pillaging as war crimes.¹⁰⁹⁷

In her request for authorisation to open an investigation, the Prosecutor had stated that her Office had also gathered information on a limited number of reports of sexual and gender-based violence, including rape, but that no clear information had yet emerged at the time on the alleged perpetrators or the link between these crimes and the armed conflict or wider context.¹⁰⁹⁸ On this point, the Chamber noted that these allegations could be included in the investigation.¹⁰⁹⁹ At the time of writing this publication, no cases have been made public in this Situation.

¹⁰⁹³Pre-Trial Chamber I was composed of Presiding Judge Joyce Aluoch (Kenya), Judge Cuno Tarfusser (Italy) and Judge Péter Kovács (Hungary).

¹⁰⁹⁴ICC-01/15-4, paras 1-2, 349.

¹⁰⁹⁵ICC-01/15-4, paras 2, 9.

¹⁰⁹⁶ICC-01/15-12, p 26. Judge Kovács appended a separate concurring opinion. ICC-01/15-12-Anx1. See also 'ICC Pre-Trial Chamber I authorises the Prosecutor to open an investigation into the situation in Georgia', *ICC Press Release*, ICC-CPI-20160127-PR1183, 27 January 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1183>>.

¹⁰⁹⁷ICC-01/15-12, paras 7, 29, 31, 61. See also 'ICC Pre-Trial Chamber I authorises the Prosecutor to open an investigation into the situation in Georgia', *ICC Press Release*, ICC-CPI-20160127-PR1183, 27 January 2016, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1183>>.

¹⁰⁹⁸ICC-01/15-4, para 4.

¹⁰⁹⁹ICC-01/15-12, para 35.

Sentences Rendered by the ICC

At the time of writing this publication, the ICC has rendered sentences in five cases, namely in those against Lubanga, Katanga, Bemba, Bemba *et al*, and Al Mahdi.

ICC case ¹¹⁰⁰	Conviction	Sentence	Time deducted from the sentence
The Prosecutor v. Thomas Lubanga Dyilo	War crimes: • Conscripting and enlisting children under the age of 15 years and using them to participate actively in the hostilities – Article 8(2)(e)(vii).	14 years of imprisonment	Six years and four months, reflecting the time already spent in detention (from 16 March 2006 to 10 July 2012)
The Prosecutor v. Germain Katanga	Crime against humanity: • Murder – Article 7(1)(a). War crimes: • Murder – Article 8(2)(c)(i); • Attack against a civilian population – Article 8(2)(e)(i); • Pillaging – Article 8(2)(e)(v); and • Destruction of property – Article 8(2)(e)(xii).	12 years of imprisonment ¹¹⁰¹	Six years and eight months, reflecting the time already spent in detention (from 18 September 2007 to 23 May 2014)
The Prosecutor v. Jean-Pierre Bemba Gombo	Crimes against humanity: • Murder – Article 7(1)(a); • Rape – Article 7(1)(g). War crimes: • Murder – Article 8(2)(c)(i); • Rape – Article 8(2)(e)(vi); and • Pillaging – Article 8(2)(e)(v).	18 years of imprisonment	Eight years and one month, reflecting the time already spent in detention (from 24 May 2008 to 21 June 2016)
Jean-Pierre Bemba Gombo			
	Offences against the administration of justice: • Soliciting the giving of false testimony by 14 witnesses – Article 70(1)(a); and • Corruptly influencing 14 witnesses and presenting their false evidence – Article 70(1)(b) and (c).	One year of imprisonment € 300,000 fine	No deduction
Aimé Kilolo Musamba			
The Prosecutor v. Jean-Pierre Bemba Gombo et al	Offences against the administration of justice: • Inducing the giving of false testimony by 14 witnesses – Article 70(1)(a); and • Corruptly influencing 14 witnesses and presenting their false evidence – Article 70(1)(b) and (c).	Two years and six months of imprisonment ¹¹⁰² € 30,000 fine	11 months, reflecting the time already spent in detention (from 23 November 2013 to 22 October 2014)
Jean-Jacques Mangenda Kabongo			
	Offences against the administration of justice: • Aiding in the giving of false testimony by two witnesses and abetting in the giving of false testimony by seven witnesses – Article 70(1)(a); and • Corruptly influencing 14 witnesses and presenting their false evidence – Article 70(1)(b) and (c).	Two years of imprisonment ¹¹⁰³	11 months and eight days, reflecting the time already spent in detention (from 23 November 2013 to 31 October 2014)

¹¹⁰⁰ The case name reflects the most up-to-date case name, excluding those accused against whom proceedings have been terminated.

¹¹⁰¹ Katanga's sentence was reviewed on 13 November 2015 and reduced by three years and eight months.

¹¹⁰² The time that Kilolo previously spent in detention was deducted and Trial Chamber VII ordered the suspension of the remaining term of imprisonment for a period of three years.

¹¹⁰³ The time that Mangenda previously spent in detention was deducted and Trial Chamber VII ordered the suspension of the remaining term of imprisonment for a period of three years.

Narcisse Arido			
Offence against the administration of justice: • Corruptly influencing four witnesses – Article 70(1)(c).		11 months ¹¹⁰⁴	11 months, reflecting the time already spent in detention (from 23 November 2013 to 22 October 2014)
Fidèle Babala Wandu			
Offence against the administration of justice: • Aiding in the commission by Bemba, Kilolo and Mangenda of the offence of corruptly influencing two witnesses – Article 70(1)(c).		Six months ¹¹⁰⁵	11 months, reflecting the time already spent in detention (from 24 November 2013 to 23 October 2014)
<i>The Prosecutor v. Ahmad Al Faqi Al Mahdi</i>	War crime: • Intentionally attacking protected objects – Article 8(2)(e)(iv).	Nine years of imprisonment	One year, reflecting the time already spent in detention (from 26 September 2015 to 27 September 2016)

¹¹⁰⁴ The time Arido previously spent in detention was deducted and, considering that the imposed sentence was equivalent to the period that he spent in custody, Trial Chamber VII considered the sentence of imprisonment as served.

¹¹⁰⁵ The time Babala previously spent in detention was deducted, since the imposed sentence was less than the period of time he spent in custody, Trial Chamber VII considered the sentence of imprisonment as served.

ICC Reparations Proceedings¹¹⁰⁶

At the time of writing this publication, four cases have reached the reparations stage at the ICC, namely those against Lubanga, Katanga, Bemba, and Al Mahdi. However, the chart below only lists the cases in which a Reparations Order has been issued by the Court to date. Although the Bemba case is also at the reparations stage, a Reparations Order has yet to be issued in this case.

ICC case ¹¹⁰⁷	Individual reparations	Collective reparations	Symbolic reparations	(Potentially) eligible victims	Amount indicated by the Chamber	Financial liability of the convicted person	Amount indicated provided by the TFV
<i>The Prosecutor v. Thomas Lubanga Dyilo</i>	✗	✓	✓	442 ¹¹⁰⁸	TBD	TBD ¹¹⁰⁹	€ 1 million: <ul style="list-style-type: none"> ◦ € 100,000 for services in support of victim identification and harm assessment ◦ € 170,000 for the implementation of the symbolic reparations ◦ € 730,000 for the implementation of the service-based components of the collective reparations programme: <ul style="list-style-type: none"> • Psychological rehabilitation: € 292,000 • Physical rehabilitation: € 146,000 • Socio-economic measures: € 292,000
<i>The Prosecutor v. Germain Katanga</i>	US\$ 250 for each victim (total of US\$ 74,250)	✓	✗	297	US\$ 3,752,620: (monetary value of the extent of the harm suffered by the 297 victims)	US\$ 1 million	US\$ 1 million
<i>The Prosecutor v. Ahmad Al Faqi Al Mahdi</i>	✓	✓	✓	139 ¹¹¹⁰	€ 2.7 million	€ 2.7 million	TBD ¹¹¹¹

¹¹⁰⁶ Although the reporting period for the review of ICC cases is from 16 August 2014 to 31 July 2017, the Al Mahdi Reparations Order of 17 August 2017 has been included in this chart.

¹¹⁰⁷ The case name reflects the most up-to-date case name, excluding those accused against whom proceedings have been terminated.

¹¹⁰⁸ To date, and upon request of the Trial Chamber for a sample of victims, a total of 442 individual victim's reparations applications/dossiers have been submitted to the Chamber by the TFV and the OPCV. As of 15 June 2017, the Registry sent to the Chamber a total of 386 reparations forms received from the OPCV and a total of 56 reparations forms received from the TFV. ICC-01/04-01/06-3329, paras 23-24. In its Draft Implementation Plan of 3 November 2015, the TFV estimated the number of potentially eligible victims to be 3,000. ICC-01/04-01/06-3177-Red, para 253; ICC-01/04-01/06-3177-AnxA, para 28.

¹¹⁰⁹ At the time of writing this publication, the Chamber had not rendered a decision on Lubanga's indigence with respect to reparations.

¹¹¹⁰ This number is composed of 137 individuals and two organisations. ICC-01/12-01/15-236, para 5.

¹¹¹¹ At the time of writing this publication, the TFV had not indicated an amount it could make available from its resources for the implementation of reparations in this case. Noting Al Mahdi's indigence, the Chamber appreciated that it is within the TFV's 'discretion to complement any individual or collective reparations'. The Chamber thus encouraged the TFV to complement the individual and collective awards 'to the extent possible', and to 'engage in fundraising efforts to the extent necessary to complement the totality of the award'. ICC-01/12-01/15-236, para 138.



Acronyms Used in this Publication

ALC	<i>Armée de libération du Congo</i>	MLC	<i>Mouvement de libération du Congo</i>
AMDH	<i>Association malienne des droits de l'Homme</i>	MNLA	<i>Mouvement national de libération de l'Anzawad</i>
AMIS	African Union Mission in Sudan	MONUSCO	UN Organization Stabilization Mission in the DRC
AQIM	al-Qaeda in the Islamic Maghreb	MUJAO	<i>Mouvement pour l'unicité et le jihad en Afrique de l'Ouest</i>
ASF	<i>Avocats Sans Frontières</i>	NGO	Non-governmental organisation
ASP	Assembly of States Parties	ODM	Orange Democratic Movement
CAR	Central African Republic	OHCHR	UN Office of the High Commissioner for Human Rights
DRC	Democratic Republic of the Congo	OPCV	Office of Public Counsel for Victims
EoC	Elements of Crimes	OTP	Office of the Prosecutor
FDLR	<i>Forces démocratiques de libération du Rwanda</i>	PNU	Party of National Unity
FIDH	<i>Fédération internationale des ligues des droits de l'Homme</i>	RPE	Rules of Procedure and Evidence
FNI	<i>Front des nationalistes et intégrationnistes</i>	RTI	<i>Radiodiffusion Télévision ivoirienne</i>
FOCDP	<i>Fondation Congolaise pour la Promotion des Droits humains et la Paix</i>	SLA-Unity	Sudanese Liberation Army – Unity
FPLC	<i>Forces patriotiques pour la libération du Congo</i>	SRSg-SVC	UN Special Representative of the Secretary-General on Sexual Violence in Conflict
FRPI	<i>Force de résistance patriotique en Ituri</i>	TBD	To be determined
ICC	International Criminal Court	TFV	Trust Fund for Victims
IDF	Israel Defense Forces	UK	United Kingdom of Great Britain and Northern Ireland
IDP	Internally Displaced Persons	UN	United Nations
ISA	Internal Security Agency	UNESCO	UN Educational, Scientific and Cultural Organization
JEM	Justice and Equality Movement	UNICEF	UN Children's Fund
LIPADHO	<i>Ligue pour la Paix et les Droits de l'Homme</i>	UNRWA	UN Relief and Works Agency for Palestine Refugees in the Near East
LIPADHOJ	<i>Ligue pour la Paix, les Droits de l'Homme et la Justice</i>	UNSMIL	UN Support Mission in Libya
LNA	Libyan National Army	UPC	<i>Union des patriotes congolais</i>
LRA	Lord's Resistance Army	URF	United Resistance Front
MINUSCA	UN Multidimensional Integrated Stabilization Mission in the Central African Republic	VPRS	Victims Participation and Reparations Section

Publications by the Women's Initiatives for Gender Justice

- *Gender Report Card on the International Criminal Court* 2014
 - *Gender Report Card on the International Criminal Court* 2013
 - *Gender Report Card on the International Criminal Court* 2012
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 - *Advance Preliminary Report: Structures and Institutional Development of the International Criminal Court*, October 2008
 - *Gender Report Card on the International Criminal Court* 2007
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- Expert paper, *Modes of Liability: A review of the International Criminal Court's current jurisprudence and practice*, November 2013
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- *Women's Voices/Dwan Mon/Eporoto Lo Angor/Dwon Mon: A Call for Peace, Accountability and Reconciliation for the Greater North of Uganda*, Second Edition, May 2009, reprinted July 2009, September 2011 and July 2014

- *In Pursuit of Peace – À la Poursuite de la Paix*, April 2010
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