The Compendium

An overview of Situations and cases before the International Criminal Court

Women's Initiatives for Gender Justice
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An overview of Situations and cases before the International Criminal Court
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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.

**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

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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 Cases

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.

<table>
<thead>
<tr>
<th>Total ICC cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC cases relating to crimes under Article 5 of the Statute</td>
</tr>
<tr>
<td>ICC cases relating to offenses under Article 70 of the Statute</td>
</tr>
<tr>
<td>ICC cases completed</td>
</tr>
<tr>
<td>Convictions</td>
</tr>
<tr>
<td>Acquittals</td>
</tr>
<tr>
<td>ICC cases currently at trial</td>
</tr>
<tr>
<td>ICC cases vacated</td>
</tr>
<tr>
<td>ICC cases dismissed</td>
</tr>
<tr>
<td>Cases declared inadmissible before the ICC</td>
</tr>
<tr>
<td>ICC cases with outstanding arrest warrants</td>
</tr>
</tbody>
</table>

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

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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.


CAR constitutes a separate Situation to the one referred to the ICC in 2004. 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.

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. Overall, 15 cases (60%) have included charges of crimes for or based upon the commission of sexual and gender-based violence.

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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.

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

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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.
The OTP lists ten Situations as under preliminary examination.
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). 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’.

Of these ten Preliminary Examinations, seven contain allegations of sexual and gender-based crimes, namely Afghanistan, Colombia, Burundi, Iraq, Ukraine, Nigeria and Guinea.

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. 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’. 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’. 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...
territory, including East Jerusalem’, since 13 June 2014.\(^3\) On 2 January 2015, the Government of Palestine acceded to the Rome Statute, becoming the 123rd State Party to the ICC.\(^3\)

The Statute entered into force for the State of Palestine on 1 April 2015.\(^4\) On 16 January 2015, the Prosecutor opened a Preliminary Examination into the Situation in Palestine, relating to alleged crimes committed since 13 June 2014.\(^4\) 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.\(^4\)

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.\(^5\) 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.\(^5\) 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.\(^5\) 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’.\(^6\) 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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a referral granting jurisdiction to the ICC.\textsuperscript{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’.\textsuperscript{48}

On 29 November 2012, the UN General Assembly granted Palestine the status of ‘non-member observer State’ at the UN,\textsuperscript{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.\textsuperscript{50} Subsequently, the OTP opened its current Preliminary Examination on 16 January 2015.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{55} At the


\textsuperscript{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-PRto83, 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.


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. The Prosecutor stated that any actor who incited or engaged in acts of mass violence is ‘liable to prosecution’ before the ICC. 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. The Prosecutor reiterated that any person in Burundi inciting or engaging in acts of mass violence would be ‘liable to prosecution’ before the Court.

On 25 April 2016, the OTP opened a Preliminary Examination into the Situation in Burundi since April 2015. 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’.

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. 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’.

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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.


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>.


71 For more information on the Palestine Preliminary Examination, see the New Preliminary Examinations subsection 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. 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. In November 2013, the OTP concluded that these violations did not constitute crimes against humanity within the meaning of the Rome Statute.

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. However, on 28 October 2015, the OTP concluded that there was no reasonable basis to proceed with an investigation into this Situation.

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...
Israeli raid on the Humanitarian Aid Flotilla, the *Gaza Freedom Flotilla* organised by the Free Gaza Movement, headed for the Gaza Strip. 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’. 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.

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.’ 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). The flotilla departed from Turkey and met in international waters on 28 May 2010 and set out for Gaza on 30 May 2010. 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. 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...
on the Mavi Marmara and in the serious injury of at least 20 others. On 5 June 2010, the delayed Rachel Corrie was intercepted by the IDF, which, according to the OTP, seemed to have occurred ‘without incident’. 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.

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. Granting this application, Pre-Trial Chamber I, 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. On 27 July 2015, the Prosecutor appealed the Pre-Trial Chamber’s request for reconsideration, which the Appeals Chamber, by majority, dismissed as inadmissible on 6 November 2015.

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. At the time of writing this publication, no such decision had been made public.
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, and no arrest warrants or summonses to appear have yet been made public in the CAR II and Georgia Situations.

Sexual and gender-based crimes charges have been brought in 15 of the 25 ICC cases (60%). 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 case 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>.


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, 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.

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). 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. 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.

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. Significantly, this case also included historic charges, confirmed and upheld on appeal, of rape and sexual slavery committed against children.
within Ntaganda’s own militia group. All sexual and gender-based crimes charges were also unanimously confirmed in the Blé Goudé 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. 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.

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. 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.

In June 2014, the OTP adopted and launched its Policy Paper on Sexual and Gender-Based Crimes. 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.

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.

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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.
110 ICC-01/04-01/07-3436-TENG, p 658-659.
111 ICC-01/04-02/12-3-TENG, p 197.
# 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.

<table>
<thead>
<tr>
<th>Case</th>
<th>Stage of proceedings</th>
<th>Sexual and gender-based crimes charges</th>
</tr>
</thead>
</table>
| The Prosecutor v. Germain Katanga | Katanga was unanimously acquitted of all charges of sexual and gender-based crimes in March 2014. | Charges against Katanga: 
• 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. |
| The Prosecutor v. Mathieu Ngudjolo Chui | Ngudjolo was unanimously acquitted of all charges in December 2012. | Charges against Ngudjolo: 
• 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. |
| The Prosecutor v. Bosco Ntaganda | 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: 
• 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. |
| The Prosecutor v. Callixte Mbarushimana | No charges were confirmed against Mbarushimana in December 2011. | Charges against Mbarushimana: 
• 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. |

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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.
The Compendium

The Prosecutor v. Sylvestre Mudacumura

An arrest warrant was issued for Mudacumura in July 2012. The execution of this Arrest Warrant is pending.

Charges against Mudacumura: 120
• Rape as a war crime;
• Torture as a war crime; and
• Mutilation as a war crime.

The Prosecutor v. Joseph Kony and Vincent Otti

An arrest warrant was issued for Kony in July 2005. The execution of this Arrest Warrant is pending.

Charges against Kony:
• 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:
• Sexual slavery as a crime against humanity; and
• Inducing rape as a war crime.

The Prosecutor v. Dominic Ongwen

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
• 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).

The Prosecutor v. Jean-Pierre Bemba Gombo

Bemba was unanimously convicted and sentenced for all charges of sexual and gender-based crimes in March 2016.

Charges against Bemba: 122
• Rape as a crime against humanity; and
• Rape as a war crime.

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

An arrest warrant was issued for Harun in April 2007. The execution of this Arrest Warrant is pending.

Charges against Harun:
• 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:
• 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).

The Prosecutor v. Oman Hassan Ahmad Al Bashir

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:
• 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.
**The Prosecutor v. Abdel Raheem Muhammad Hussein**
An arrest warrant was issued for Hussein in March 2012. The execution of this Arrest Warrant is pending.

Charges against Hussein:
- 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.

**The Prosecutor v. Uhuru Muigai Kenyatta**
The Prosecution withdrew all charges against Kenyatta in December 2014 after the confirmation of charges. The case was subsequently terminated in March 2015.

Charges against Kenyatta:123
- 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.

The Prosecution withdrew all charges against Muthaura in March 2013 after the confirmation of charges. The case was subsequently terminated the same month.

Charges against Muthaura:124
- 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.

No charges against Ali were confirmed in January 2012.

Charges against Ali:
- 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.

**The Prosecutor v. Al-Tuhamy Mohamed Khaled**
An arrest warrant was issued for Al-Tuhamy in April 2013. The execution of this Arrest Warrant is pending.

Charges against Al-Tuhamy:
- 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

'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

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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.
| The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé | All charges against Laurent Gbagbo were confirmed, by majority, in June 2014. This case is currently at trial. | Charges against Laurent Gbagbo:  
- 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:  
- Rape as a crime against humanity;\(^{128}\) and  
- Persecution (including acts of rape) as a crime against humanity. |
| The Prosecutor v. Simone Gbagbo | An arrest warrant was issued for Simone Gbagbo in February 2012. The execution of this Arrest Warrant is pending. | Charge against Simone Gbagbo:\(^{129}\)  
- 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.

<table>
<thead>
<tr>
<th>Sexual and gender-based crimes under the Rome Statute</th>
<th>ICC cases including sexual and gender-based crimes¹³⁰</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Genocide (Article 6 of the Statute):</strong></td>
<td></td>
</tr>
<tr>
<td>Killing members of the group</td>
<td></td>
</tr>
<tr>
<td>Article 6(a)</td>
<td>X</td>
</tr>
<tr>
<td>Causing serious bodily or mental harm to members of the group</td>
<td>✓ The Prosecutor v. Oman Hassan Ahmad Al Bashir – 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</td>
</tr>
<tr>
<td>Article 6(b)</td>
<td></td>
</tr>
<tr>
<td>Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part</td>
<td>X</td>
</tr>
<tr>
<td>Article 6(c)</td>
<td></td>
</tr>
<tr>
<td>Imposing measures intended to prevent births within the group</td>
<td>X</td>
</tr>
<tr>
<td>Article 6(d)</td>
<td></td>
</tr>
<tr>
<td>Forcibly transferring children of the group to another group</td>
<td>X</td>
</tr>
<tr>
<td>Article 6(e)</td>
<td></td>
</tr>
<tr>
<td><strong>Crimes against humanity (Article 7 of the Statute):</strong></td>
<td></td>
</tr>
<tr>
<td>Rape</td>
<td>✓ The Prosecutor v. Germain Katanga – acquitted.</td>
</tr>
<tr>
<td>Article 7(1)(g)</td>
<td>✓ The Prosecutor v. Mathieu Ngudjolo Chui – acquitted.</td>
</tr>
<tr>
<td></td>
<td>✓ The Prosecutor v. Bosco Ntaganda – confirmed.</td>
</tr>
<tr>
<td></td>
<td>✓ The Prosecutor v. Calixte Mbarushimana – not confirmed.</td>
</tr>
<tr>
<td></td>
<td>✓ The Prosecutor v. Joseph Kony and Vincent Otti – outstanding arrest warrants.¹³²</td>
</tr>
<tr>
<td></td>
<td>✓ The Prosecutor v. Dominic Ongwen – confirmed.</td>
</tr>
<tr>
<td></td>
<td>✓ The Prosecutor v. Oman Hassan Ahmad Al Bashir – outstanding arrest warrant.</td>
</tr>
<tr>
<td></td>
<td>✓ The Prosecutor v. Abdel Raheem Muhammad Hussein – outstanding arrest warrant.</td>
</tr>
<tr>
<td></td>
<td>✓ The Prosecutor v. Laurent Gbagbo and Charles Blé Gouédé – confirmed.</td>
</tr>
<tr>
<td>Article 7(1)(g)</td>
<td>✓ The Prosecutor v. Mathieu Ngudjolo Chui – acquitted.</td>
</tr>
<tr>
<td></td>
<td>✓ The Prosecutor v. Bosco Ntaganda – confirmed.</td>
</tr>
<tr>
<td></td>
<td>✓ The Prosecutor v. Dominic Ongwen – confirmed.</td>
</tr>
</tbody>
</table>

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.


¹³² Only Kony faces the charge of rape as a crime against humanity.
<table>
<thead>
<tr>
<th>Crime Type</th>
<th>Procedural Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforced prostitution</td>
<td>✗</td>
</tr>
<tr>
<td>Enforced sterilisation</td>
<td>✗</td>
</tr>
<tr>
<td>Forced marriage</td>
<td>✔️ The Prosecutor v. Dominic Ongwen – confirmed.</td>
</tr>
<tr>
<td>Other inhumane acts</td>
<td>✗</td>
</tr>
<tr>
<td>Enslavement</td>
<td>✔️ The Prosecutor v. Dominic Ongwen – confirmed.</td>
</tr>
<tr>
<td>'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.</td>
<td>134&lt;br&gt;Article 7(2)(c), Rome Statute.</td>
</tr>
<tr>
<td>Deportation or forcible transfer of population</td>
<td>✗</td>
</tr>
<tr>
<td>Murder</td>
<td>✗</td>
</tr>
</tbody>
</table>

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 Sinaia 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 ‘[t]he 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):

<table>
<thead>
<tr>
<th>Crime</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The Prosecutor v. Mathieu Ngudjolo Chui – acquitted.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Bosco Ntaganda – confirmed.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Callixte Mbarushimana – not confirmed.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Joseph Kony and Vincent Otti – outstanding arrest</td>
</tr>
<tr>
<td></td>
<td>warrants.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Dominic Ongwen – confirmed.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-</td>
</tr>
<tr>
<td></td>
<td>Rahman (Kushayb) – outstanding arrest warrants.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Abdel Raheem Muhammad Hussein – outstanding arrest</td>
</tr>
<tr>
<td></td>
<td>warrant.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Mathieu Ngudjolo Chui – acquitted.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Bosco Ntaganda – confirmed.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Dominic Ongwen – confirmed.</td>
</tr>
<tr>
<td><strong>Enforced prostitution</strong> Article 8(2)(b)(xxii) or 8(2)(e)(vi)</td>
<td>×</td>
</tr>
<tr>
<td><strong>Forced pregnancy</strong> Article 8(2)(b)(xxii) or 8(2)(e)(vi)</td>
<td>×</td>
</tr>
<tr>
<td><strong>Enforced sterilisation</strong> Article 8(2)(b)(xxii) or 8(2)(e)(vi)</td>
<td>×</td>
</tr>
<tr>
<td><strong>Other forms of sexual violence</strong> Article 8(2)(b)(xxii) or 8(2)(e)(vi)</td>
<td>×</td>
</tr>
<tr>
<td><strong>Outrages upon personal dignity</strong> Article 8(2)(b)(xxx) or 8(2)(c)(iii)</td>
<td>The Prosecutor v. Jean-Pierre Bemba Gombo – declined to include in the</td>
</tr>
<tr>
<td></td>
<td>Arrest Warrant.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Mathieu Ngudjolo Chui – not confirmed.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Dominic Ongwen – confirmed.</td>
</tr>
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<td></td>
<td>The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-</td>
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<td></td>
<td>Rahman (Kushayb) – outstanding arrest warrants.</td>
</tr>
<tr>
<td></td>
<td>The Prosecutor v. Abdel Raheem Muhammad Hussein – outstanding arrest</td>
</tr>
<tr>
<td></td>
<td>warrant.</td>
</tr>
<tr>
<td><strong>Cruel treatment</strong> Article 8(2)(c)(i) of the Statute</td>
<td>The Prosecutor v. Callixte Mbarushimana – not confirmed.</td>
</tr>
<tr>
<td><strong>Mutilation</strong> Article 8(2)(c)(i) or 8(2)(e)(xi)</td>
<td>The Prosecutor v. Callixte Mbarushimana – not confirmed.</td>
</tr>
<tr>
<td><strong>Intentionally directing attacks against the civilian population</strong> Article 8(2)(b)(i) or 8(2)(e)(i)</td>
<td>×</td>
</tr>
<tr>
<td><strong>Recruitment of child soldiers</strong> Article 8(2)(b)(xxvi) or 8(2)(e)(vii)</td>
<td>×</td>
</tr>
</tbody>
</table>

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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;

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\(^{142}\) 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.

(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.\textsuperscript{144}

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<td><strong>Genocide (Article 6 of the Statute)</strong></td>
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<td>Causing serious bodily or mental harm to members of the group Article 6(b)</td>
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<td>X</td>
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<td><strong>Crimes against humanity (Article 7 of the Statute)</strong></td>
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<td>Enslavement Article 7(1)(c)</td>
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<td>✓ Dominic Ongwen (confirmed)</td>
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<td>✓ Dominic Ongwen (confirmed)</td>
<td>✓</td>
<td>X</td>
<td>✓ Dominic Ongwen (confirmed)</td>
</tr>
<tr>
<td>Torture Article 7(1)(f)</td>
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<td>✓ Dominic Ongwen (confirmed)</td>
<td>X</td>
<td>✓ Callixte Mbarushimana (not confirmed)</td>
<td>✓</td>
<td>X</td>
<td>✓ Dominic Ongwen (confirmed)</td>
</tr>
<tr>
<td><strong>Rape Article 7(1)(g)</strong></td>
<td>✓ Mathieu Ngudjolo Chui (acquitted)</td>
<td>✓ Bosco Ntaganda (confirmed)</td>
<td>✓ Dominic Ongwen (confirmed)</td>
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<td>✓</td>
<td>✓ Bosco Ntaganda (confirmed)</td>
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<td></td>
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<td></td>
<td>✓ Ali Muhammad Ali Abd-Al-Rahman ‘Kushayb’ (outstanding arrest warrant)</td>
<td>✓</td>
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<tr>
<td></td>
<td>✓ Omar Hassan Ahmad Al Bashir (outstanding arrest warrant)</td>
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<td>✓ Abdel Raheem Muhammad Hussein (outstanding arrest warrant)</td>
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<td>✓ Laurent Gbagbo (confirmed)</td>
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<td>✓ Charles Blé Goudé (confirmed)</td>
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<td>✓ Callixte Mbarushimana (not confirmed)</td>
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<td>Sexual slavery</td>
<td>Mathieu Ngudjolo Chui (acquitted)</td>
<td>Bosco Ntaganda (confirmed)</td>
<td>Josephant Kony (outstanding arrest warrant)</td>
<td>Vincent Otti (outstanding arrest warrant)</td>
<td>Dominic Ongwen (confirmed)</td>
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<td>Forced pregnancy</td>
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<td>×</td>
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<tr>
<td>Other forms of sexual violence</td>
<td>Jean-Pierre Bemba Gombo (declined to include in the Arrest Warrant)</td>
<td>×</td>
<td>×</td>
<td>×</td>
<td>Mohammed Hussein Ali (not confirmed)</td>
<td>×</td>
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</tbody>
</table>

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.
<table>
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<tr>
<th>Crime Description</th>
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<th>Withdrawn</th>
<th>Not Confirmed</th>
<th>Outstanding Arrest Warrant</th>
<th>Not Included in Document Containing Charges nor Confirmation of Charges Decision</th>
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<td>Persecution Article 7(1)(h)</td>
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<tr>
<td>War crimes (Article 8 of the Statute)</td>
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<tr>
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<td></td>
<td>Dominic Ongwen (confirmed)</td>
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<tr>
<td></td>
<td>Mathieu Ngudjolo Chui (not confirmed)</td>
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<td>Ali Muhammad Ali Abd-Al-Rahman 'Kushayb' (outstanding arrest warrant)</td>
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<td>Abdel Raheem Muhammad Hussein (outstanding arrest warrant)</td>
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</table>
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) 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.

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.

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

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

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

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)* | ✗ | ✓ Germain Katanga (acquitted)*  
✓ 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 Mbarušimana (not confirmed) | ✗ | ✗ | ✗ |

| Mutilation  
Article 8(2)(c)(i) or 8(2)(e)(xi) | ✗ | ✓ Sylvestre Mudacumura (outstanding arrest warrant) | ✗ | ✓ Callixte Mbarušimana (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. In June 2004, the OTP formally opened its investigation into crimes allegedly committed within the territory since 1 July 2002. Four of the six cases arising out of this Situation have focused on crimes committed within the Ituri district of the DRC. 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. The Kivus have constituted the focus of the OTP’s investigations since 2008.

To date, six public arrest warrants have been issued by Pre-Trial Chamber I in the DRC Situation. 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...
la libération du Congo (FPLC). 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. The Lubanga case is the first case in which the implementation of reparations was ordered. 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**


**Arrest warrant**

Pre-Trial Chamber issued a warrant of arrest for Lubanga, under seal, on 10 February 2006. The Arrest Warrant was unsealed on 17 March 2006.

**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.

**Confirmation of charges**

The Confirmation of Charges hearing was held from 9 to 28 November 2006. Prior to this hearing, four applicants were authorised to participate as victims in the confirmation of charges proceedings. 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. 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

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169 ICC-01/04-01/06-2842, paras 81, 1142, 1356.
170 ICC-01/04-01/06-2842.
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.\[^{184}\] 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 I\[^{187}\] 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.\[^{189}\] On 22 January 2009, Trial Chamber I issued an oral order, according to which the participating victims were to be represented in two groups (V01 and V02).\[^{191}\]

### 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 Prosecution\[^{194}\] 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

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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 I’, 11 October 2016, available at <http://4genderjustice.org/presentation-first-reparations-hearing/>.
185 ICC-01/04-01/06-803-1EN, 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 5 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.\textsuperscript{197} The Prosecution complied with the order on 21 November 2008.\textsuperscript{198}

The trial commenced on 26 January 2009.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{202}

On 14 July 2009, Trial Chamber I, by majority,\textsuperscript{203} notified the parties and participants that the legal characterisation of the facts may be subject to change.\textsuperscript{204} After having been granted leave on 3 September 2009,\textsuperscript{205} the Defence and the Prosecution submitted their respective appeals against the decision on 10 and 14 September 2009.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{210} On 19 May 2010, the Prosecution sought leave to appeal the Chamber’s ruling,\textsuperscript{211} however, this was denied by the Chamber on 2 June 2010.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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.
\textsuperscript{198} ICC-01/04-01/06-1644, para 30.
\textsuperscript{199} ICC-01/04-01/06-2842, para 10(i).
\textsuperscript{200} ICC-01/04-01/06-2842, paras 10(ii), 11.
\textsuperscript{201} ICC-01/04-01/06-1891.
\textsuperscript{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.
\textsuperscript{203} Judge Fulford issued a dissenting opinion on 31 July 2009. ICC-01/04-01/06-2069-Annex.
\textsuperscript{205} ICC-01/04-01/06-2107, para 41.
\textsuperscript{206} ICC-01/04-01/06-2112-ENG; ICC-01/04-01/06-2120.
\textsuperscript{208} ICC-01/04-01/06-2434-Red2, paras 25, 43-45, 47.
\textsuperscript{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.
\textsuperscript{210} ICC-01/04-01/06-2434-Red2, para 143.
\textsuperscript{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.
\textsuperscript{212} ICC-01/04-01/06-2463.
\textsuperscript{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. 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. 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’. 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.

The Prosecution filed its Notice of Appeal against the decision to stay the proceedings on 14 July 2010, and its Document in Support of Appeal on 30 July 2010. On 8 October 2010, the Appeals Chamber unanimously reversed the Trial Chamber’s decision and lifted the stay of proceedings. 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.

On the same day, the Prosecution disclosed the identity of Intermediary 143 to the Defence.

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.

Throughout the trial, the Chamber heard 67 witnesses and sat for 204 days. Closing oral statements were held from 25 to 26 August 2011.

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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 89 lines 2-18.


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 Nserek (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.

On 10 July 2009, the Chamber granted victim status to another 26 applicants to participate in the trial proceedings. 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. At the time of the Trial Judgment, the Chamber withdrew victim status of nine individuals due to issues of credibility. 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.

The Defence filed its Notice of Appeal against the Trial Judgment on 3 October 2012, and its Document in Support of Appeal on 3 December 2012. The Appeals Chamber subsequently granted leave to the 120 victims who had participated in the trial proceedings, as well as 31 additional victims, to participate in the appeals proceedings against the Conviction decision, bringing the total of participating victims to 151.

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] the[ir] 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.


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 Usäcka (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.\textsuperscript{237}

**Sentencing**

Trial Chamber I, by majority, sentenced Lubanga to 14 years’ imprisonment on 10 July 2012.\textsuperscript{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.\textsuperscript{239}

The Prosecution and Defence filed their respective Notices of Appeal against the Sentencing decision on 3 October 2012,\textsuperscript{240} and their respective Documents in Support of Appeal on 3 December 2012.\textsuperscript{241}

The Appeals Chamber\textsuperscript{242} 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,\textsuperscript{243} as well as 31 additional victims, to participate in these appeals proceedings.\textsuperscript{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.\textsuperscript{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.\textsuperscript{246} Pursuant to this order, on 28 March 2012, the Office of Public Counsel for Victims (OPCV)\textsuperscript{247} and interested organisations, including the Women’s Initiatives for Gender Justice, requested leave to submit observations.\textsuperscript{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.\textsuperscript{249} After having been granted


\textsuperscript{240} ICC-01/04-01/06-2933; ICC-01/04-01/06-2935-ENG.

\textsuperscript{241} ICC-01/04-01/06-2950; ICC-01/04-01/06-2949-ENG.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{246} ICC-01/04-01/06-2844, paras 8-10.

\textsuperscript{247} ICC-01/04-01/06-2848.

\textsuperscript{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-ENG; ICC-01/04-01/06-2855-Anx3; ICC-01/04-01/06-2855-Anx2-ENG.

\textsuperscript{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.
On 7 August 2012, Trial Chamber I issued its decision on the principles and procedures to be applied to reparations. The Legal Representatives of Victims V02 and the OPCV jointly appealed this decision on 24 August 2012; the Legal Representative of Victims V01 also appealed on 3 September 2012, and the Defence appealed the decision on 6 September 2012.

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, and amended the Trial Chamber’s decision (amended Order for Reparations) in an annex.

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.

On 9 February 2016, a newly constituted Trial Chamber II 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. 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’. 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 additional information and instructed the TFV to: (2) submit proposals regarding the anticipated monetary amount of Lubanga’s liability and the necessary amount the TFV intends to advance to remedy the

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250 ICC-01/04-01/06-2870, para 22.
251 ICC-01/04-01/06-2876; ICC-01/04-01/06-2877; 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://agenderjustice.org/publications/eletters/legal-eye-on-the-icc-december-2012-fourth-special-issue-on-lubanga-judgement/>.
253 ICC-01/04-01/06-2909-ENG.
254 ICC-01/04-01/06-2914-ENG.
255 ICC-01/04-01/06-2917-ENG.
256 ICC-01/04-01/06-3129.
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 Carbuccia (Dominican Republic) and Judge Péter Kovács (Hungary). ICC-01/04-01/06-3131, p 3; ICC-01/04-01/06-3129, paras 240.
260 ICC-01/04-01/06-3198-ENG, para 10.
261 ICC-01/04-01/06-3198-ENG, 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.
harm caused; 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. 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.

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’. 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’.

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 underm[ined] the viability of the Draft Implementation Plan as presented on 3 November 2015’. In the TFV’s view, linking the approval of the collective reparations programmes to the individual victim eligibility outcome resulted in ‘programmatic uncertainty’ and negatively affected the TFV’s ability to provide the information to the degree specified by the Chamber’s order. 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; (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’; 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’. 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’.

The OPCV, the Legal Representatives of Victims V01 and V02 and the Defence submitted observations on the additional information provided by the TFV on 1 July 2016.

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

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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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{277} Between 26 September and 3 October 2016, several organisations, including the Women’s Initiatives for Gender Justice, submitted \textit{amicus curiae} observations on reparations in the Lubanga case.\textsuperscript{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.\textsuperscript{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.\textsuperscript{280}

On 21 October 2016, the Chamber approved and ordered the commencement of the implementation of the plan for symbolic reparations.\textsuperscript{281} On 8 December 2016, the Chamber further ordered the TFV to submit information regarding collective reparations,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{275} ICC-01/04-01/06-3219, paras 10, 12 and p 8.
\textsuperscript{276} ICC-01/04-01/06-3223-Red.
\textsuperscript{277} ICC-01/04-01/06-3217-ENG, paras 6-8 and p 7.
\textsuperscript{278} ICC-01/04-01/06-3240-Anx14. The other \textit{amicus curiae} observations were submitted by: \textit{Fédération des Jeunes pour la Paix Mondiale} (ICC-01/04-01/06-3240-Anx1); \textit{Association pour la réconciliation et la paix en Ituri} (ICC-01/04-01/06-3240-Anx2); \textit{Réseau des Associations des Droits de l’Homme de l’Ituri} (ICC-01/04-01/06-3240-Anx3); \textit{Ligue pour la Paix et les Droits de l’Homme} (LIPADHO) (ICC-01/04-01/06-3240-Anx4); \textit{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); \textit{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-01/04-01/06-3245-ENG, paras 5-11, 13; ICC-01/04-01/06-3245-ENG, para 3.
\textsuperscript{279} ICC-01/04-01/06-3245-ENG, p 6-8.
\textsuperscript{280} ICC-01/04-01/06-3240-Anx14, para 41; ICC-01/04-01/06-3245-ENG, 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/>.
\textsuperscript{282} ICC-01/04-01/06-3262.
\textsuperscript{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-ENG, p 27 lines 11-23.
\textsuperscript{284} ICC-01/04-01/06-3262, para 13 and p 7.
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the Lubanga case over three years.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{288}

\textbf{Status of proceedings}

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

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

\textbf{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 \textit{Force de résistance patriotique en Ituri} (FRPI), at least from early February 2003. He also bore the title of Commander or Chief of Aveba.\textsuperscript{290} This case was joined with that against Ngudjolo prior to the Confirmation of Charges hearing\textsuperscript{291} and subsequently severed prior to the Trial Judgment.\textsuperscript{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.\textsuperscript{293}

\begin{itemize}
\item \textsuperscript{285} ICC-01/04-01/06-3273.
\item \textsuperscript{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://agenderjustice.org/presentation-first-reparations-hearing/>.
\item \textsuperscript{287} ICC-01/04-01/06-3329, paras 23-24.
\item \textsuperscript{288} ICC-PIDS-CIS-DRC-01-015/16_Eng.
\item \textsuperscript{290} ICC-01/04-01/07-3436-ENG, paras 1334, 1359-1361, 1365. See also ICC-01/04-01/07-3484-ENG, para 66.
\item \textsuperscript{291} ICC-01/04-01/07-307, p 11.
\item \textsuperscript{292} ICC-01/04-01/07-3319-ENG/FRA, p 30.
\item \textsuperscript{293} ICC-01/04-01/07-3728-ENG, para 168 and p 118.
\end{itemize}
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.\textsuperscript{294}

Arrest warrant
Pre-Trial Chamber \textsuperscript{295} issued an arrest warrant for Katanga, under seal, on 2 July 2007. The Arrest Warrant was unsealed on 18 October 2007.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{300} On 21 April 2008, the Single Judge of Pre-Trial Chamber I\textsuperscript{301} 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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{305}

The Prosecution subsequently decided to withdraw the sexual slavery charges from the list of charges to be confirmed.\textsuperscript{306} The Prosecution argued that, without the evidence provided by the two witnesses, charges of sexual violence became ‘insufficiently substantiated’,\textsuperscript{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’.\textsuperscript{308}

\textsuperscript{295} Pre-Trial Chamber I was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Anita Ušacka (Latvia) and Judge Sylvia Steiner (Brazil).
\textsuperscript{296} ICC-01/04-01/07-1-tENG, p 7.
\textsuperscript{298} ICC-01/04-01/07-307, p 6, 11.
\textsuperscript{300} ICC-01/04-01/07-453, para 40.
\textsuperscript{301} The Single Judge, acting on behalf of Pre-Trial Chamber I, was Judge Sylvia Steiner (Brazil).
\textsuperscript{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.
\textsuperscript{303} ICC-01/04-01/07-428, para 32.
\textsuperscript{304} ICC-01/04-01/07-428, para 39.
\textsuperscript{305} ICC-01/04-01/07-428, para 40.
\textsuperscript{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.
\textsuperscript{307} ICC-01/04-01/07-453, para 25.
\textsuperscript{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. Pursuant to a Pre-Trial Chamber order requesting clarification of certain parts of the charges, 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.

The Confirmation of Charges hearing was held from 27 June to 16 July 2008. Prior to this hearing, the Chamber granted victim status to 57 applicants to participate in the pre-trial proceedings.

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.

The Chamber, by majority, declined to confirm the charge of other inhumane acts as a crime against humanity, and unanimously declined to confirm the charges of inhuman treatment and outrages upon personal dignity as war crimes. 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.

On 26 February 2009, Trial Chamber II authorised the victims who had participated at the pre-trial stage to also participate in the trial proceedings. 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 11. 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.
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>.
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, bringing the number of participating victims to 359.320

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.321

**Trial proceedings**

The trial commenced on 24 November 2009.322 The Prosecution’s presentation of evidence started on 25 November 2009 and concluded on 8 December 2010.323 The overall presentation of evidence by the Defence commenced on 24 March 2011 and concluded on 11 November of that year.324 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 2012.325

Overall, 54 witnesses were heard and the Trial Chamber sat for 265 days.326 Significantly, both accused testified under oath during the trial.327 The closing statements, including unsworn oral statements by Katanga and Ngudjolo, were held from 15 to 23 May 2012.328

During the course of the trial, seven additional applicants were authorised to participate as victims in the trial proceedings,329 bringing the total number of participating victims to 366.330 However, victim status was withdrawn from two individuals on 7 July 2011,331 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.332 The Chamber also ruled that participating victims were authorised to continue participating in both of the severed proceedings.333

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

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\(^{335}\) 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-ENG, 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-ENG.


\(^{340}\) 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

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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.
348 ICC-01/04-01/07-3499, para 5.
349 ICC-01/04-01/07-3501-Anx.
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).
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 Judges reduced Katanga’s sentence by three years and eight months, and set the date for the completion of his sentence to 18 January 2016. On 19 December 2015, Katanga was transferred to a prison facility in the DRC to serve the remainder of his sentence of imprisonment.

Reparations

On 27 August 2014, a newly constituted Trial Chamber II issued an order instructing the Registry to report on applications for reparations in the Katanga case. The Registry compiled with this order on 15 December 2014. Subsequently, on 1 April 2015, the Chamber invited parties and participants to submit observations on reparations in this case. In May 2015, after having sought and been granted leave by the Chamber, interested organisations submitted amicus curiae observations on reparations. During the same period, the Defence, Common Legal Representative of Victims, Registry, TFV and Prosecution submitted their observations on reparations in this case.

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).

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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.


358 Trial Chamber II was reconstituted 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 Carbuccia (Dominican Republic). ICC-01/04-01/07-3616-Anx1; ICC-01/04-01/07-3468-Anx1; 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.


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 reconstituted once more with the following composition of judges: Presiding Judge Marc Perrin de Brichambaut (France), Judge Olga Herrera Carbuccia (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-ENG, 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-ENG, 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-01/04-01/07-3555; ICC-01/04-01/07-3555-Red; ICC-01/04-01/07-3550.

367 ICC-01/04-01/07-3549; ICC-01/04-01/07-3555-ENG; 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.\textsuperscript{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,\textsuperscript{369} and that Katanga’s liability amounted to US$ 1 million.\textsuperscript{370}

The Trial Chamber ordered that each of the 297 victims recognised in this case was to be awarded US$ 250.\textsuperscript{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.\textsuperscript{372} As such, the Chamber awarded collective reparations in the form of support for housing, income-generating activities, education aid and psychological support.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{377} Their Documents in Support of Appeal were subsequently filed on 27 and 29 June 2017, respectively.\textsuperscript{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.\textsuperscript{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.\textsuperscript{380}

\textsuperscript{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.

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

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

\textsuperscript{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.

\textsuperscript{372} ICC-01/04-01/07-3728-tENG, paras 290, 294, 303.

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

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

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

\textsuperscript{376} ICC-01/04-01/07-3740, paras 48, 50.

\textsuperscript{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.

\textsuperscript{378} ICC-01/04-01/07-3747-Red; ICC-01/04-01/07-3746-Red; ICC-01/04-01/07-3745-tENG.

\textsuperscript{379} ICC-01/04-01/07-3751-Red.

**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 hearing\(^{382}\) 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 I\(^{385}\) 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 I\(^{392}\) 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

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

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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-01/04-01/07-548.
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.
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.

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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-ENG, p 23.

411 ICC-01/04-01/07-1788-ENG, paras 8, 12. On 31 July 2009, 288 applicants were authorised to participate as victims in the trial proceedings. ICC-01/04-01/07-1047-Corr-ENG, p 5-7. On 23 November 2009, 14 additional victims were authorised to participate in the trial proceedings. ICC-01/04-01/07-1669-ENG, p 6.

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

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


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


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

418 ICC-01/04-02-12-3-ENG, 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-ENG, fn 48.

420 ICC-01/04-02-12-3-ENG, para 25; ICC-01/04-01/07-3436-ENG, 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-ENG. On 8 November 2010, two more applicants were authorised. ICC-01/04-01/07-2516-ENG. On 9 February 2011, another two applicants were authorised to participate. ICC-01/04-01/07-2693.

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

423 ICC-01/04-01/07-3064-ENG, 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-ENG, 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 II\(^{426}\) unanimously acquitted Ngudjolo as a direct and indirect co-perpetrator under Article 25(3)(a) of the Statute\(^{427}\) 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 Dembele 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.


\(^{430}\) ICC-01/04-02/12-3-TENG, paras 499, 503.


\(^{433}\) 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.\footnote{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://agenderjustice.org/publications/letters/legal-eye-on-the-icc-january-2014-third-special-issue-on-
ngudjolo-judgement/>.}

On 6 March 2013, the Appeals Chamber\footnote{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).} 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.\footnote{ICC-01/04-02/12-30, p 3.} 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.\footnote{ICC-01/04-02/12-30-30, para 23.}

Following a Prosecution request of 29 August 2014,\footnote{ICC-01/04-02/12-193-Red, para 23.} final submissions on the appeal were heard
during an oral hearing on 21 October 2014.\footnote{ICC-01/04-02/12-199; ICC-01/04-02/12-T-4-Red2-ENG; ICC-01/04-02/12-271, para 17.} The Appeals Chamber, by majority, rejected the appeal
and confirmed the acquittal on 27 February 2015.\footnote{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’,
asp?name=pr1089>.}

\section*{Status of proceedings}

Ngudjolo was released from ICC custody on 21 December 2012.\footnote{ICC-PIDS-CIS-DRC2-06-006/15_Eng.} 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.\footnote{ICC-01/04-02/12-194, 198 and p 63; ICC-01/04-02/12-125-Corr-
Red, p 69.}

On 16 December 2015, having found that the Defence failed to establish that Ngudjolo ‘suffered a
grave and manifest miscarriage of justice’, Trial Chamber II\footnote{At the time of this decision, Trial Chamber II was composed of Presiding Judge Marc Perrin de Brichambaut
(France), Judge Olga Herrera Carbuccia (Dominican Republic) and Judge Péter Kovács (Hungary).} rejected the request for compensation.\footnote{ICC-01/04-02/12-125-Corr-
Red, para 23.}

\section*{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.\footnote{ICC-01/04-02/12-199; ICC-01/04-02/12-T-4-Red2-ENG, ICC-01/04-02/12-271, para 17.} 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

\footnote{ICC-01/04-02/12-301-tENG, para 69 and p 27.}
charges, including sexual and gender-based crimes. Following the issuance of the Arrest Warrants, Ntaganda became the first suspect to voluntarily surrender into the Court’s custody on 22 March 2013. This is the first case in which all sexual and gender-based crimes 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.

Arrest warrants
Pre-Trial Chamber I issued an arrest warrant for Ntaganda, under seal, on 22 August 2006. The Arrest Warrant was unsealed on 28 April 2008.

Pre-Trial Chamber II 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.

Transfer to ICC custody
Ntaganda voluntarily surrendered to the Court and was transferred to the ICC’s custody on 22 March 2013.


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 II 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.456 On 15 January and 7 February 2014, 1,119 applicants were recognised to participate as victims in the confirmation of charges proceedings,457 of whom 140 victims were assigned to the group of child soldier victims and 979 to the group of victims of UPC/FPLC attacks.458

On 9 June 2014, Pre-Trial Chamber II 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).459

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.460

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.461

On 16 June 2014, the Defence sought leave to appeal the Confirmation of Charges decision.462 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.463

454 ICC-01/04-02/06-203-AnxA, p 56-60.
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).
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.\(^\text{466}\) 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.\(^\text{465}\) The trial commenced on 2 September 2015 with these issues still under consideration.

On 9 October 2015, Trial Chamber VI\(^\text{468}\) 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.\(^\text{469}\)

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.\(^\text{470}\) On 22 March 2016, the Appeals Chamber\(^\text{471}\) 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.\(^\text{472}\)

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.\(^\text{473}\) 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.\(^\text{474}\)

A final decision on this matter was rendered on 15 June 2017 by the Appeals Chamber,\(^\text{475}\) 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).\(^\text{476}\) 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.\(^\text{477}\) 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.\(^\text{478}\) 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, paras 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.


\(^{474}\) 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).


\(^{477}\) 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

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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-01/04-02/06-816, 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.
486 ICC-01/04-02/06-1839.
488 ICC-01/04-02/06-1914, paras 5, 9 and p 12.
490 ICC-01/04-02/06-1915.
492 ICC-01/04-02/06-T-223-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.\textsuperscript{494}

**Status of proceedings**

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

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**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.\textsuperscript{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.\textsuperscript{496} However, as the Court subsequently declined to confirm any of the charges against Mbarushimana,\textsuperscript{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.\textsuperscript{498}

**Arrest warrant**

Pre-Trial Chamber \textsuperscript{499} issued an arrest warrant for Mbarushimana, under seal, on 28 September 2010, which was unsealed on 11 October 2010.\textsuperscript{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.\textsuperscript{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.\textsuperscript{502}

\textsuperscript{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.

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

\textsuperscript{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>.

\textsuperscript{497} ICC-01/04-01/10-465-Red, p 149.

\textsuperscript{498} ICC-01/04-01/10-330-AnxA-Red, p 36-43.

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


\textsuperscript{501} At this stage, Mbarushimana faced 11 charges overall, including seven sexual and gender-based crimes charges, namely: murder, torture (through rape), rape, inhuman 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.

\textsuperscript{502} ICC-01/04-01/10-465-Red, para 15.
The Compendium

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.\(^{513}\)

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\(^{503}\) 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).


\(^{508}\) 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.

The Prosecution applied for leave to appeal the Confirmation of Charges decision on 27 December 2011\textsuperscript{514} and, once granted,\textsuperscript{515} filed its Document in Support of Appeal on 12 March 2012\textsuperscript{516} and a corrected version thereof the next day.\textsuperscript{517}

On 2 April 2012, the Appeals Chamber\textsuperscript{518} 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.\textsuperscript{519}

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

\textbf{Status of proceedings}

Mbarushimana was released from ICC custody on 23 December 2011.\textsuperscript{521} The case against Mbarushimana is currently considered closed before the Court, unless and until the Prosecutor presents additional evidence in this case.\textsuperscript{522}

\textbf{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.\textsuperscript{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.

\textbf{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.\textsuperscript{524}

\textbf{Arrest warrant}

On 31 May 2012, Pre-Trial Chamber II\textsuperscript{525} initially declined to issue an arrest warrant for Mudacumura due to lack of specificity in the Prosecution request.\textsuperscript{526} Following the submission of a second request by the Prosecution,\textsuperscript{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

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\textsuperscript{514} ICC-01/04-01/10-480, paras 2, 48.
\textsuperscript{515} ICC-01/04-01/10-487, para 44 and p 16.
\textsuperscript{516} ICC-01/04-01/10-499.
\textsuperscript{517} ICC-01/04-01/10-499-Corr.
\textsuperscript{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 Usacka (Latvia) and Judge Silvia Fernández de Gurmendi (Argentina).
\textsuperscript{519} ICC-01/04-01/10-509, para 12 and p 3.
\textsuperscript{521} ICC-PIDS-CIS-DRC-04-003/12_Eng.
\textsuperscript{523} ICC-01/04-01/12-1-Red, p 29.
\textsuperscript{524} ICC-01/04-01/12-1-Red, p 28.
\textsuperscript{525} Pre-Trial Chamber II was composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Hans-Peter Kaul (Germany) and Judge Cuno Tarfusser (Italy).
\textsuperscript{526} ICC-01/04-613, paras 4, 6, 8 and p 5.
\textsuperscript{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.
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\section*{Status of proceedings}

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

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 and against Odhiambo on 10 September 2015 following confirmation of their deaths. The case against Ongwen was severed on 6 February 2015, following his voluntary surrender in January 2015. Consequently, this case currently includes two accused: Kony and Otti. Kony is the alleged Chairman and Commander-in-Chief of the LRA while Otti is the alleged Vice-Chairman and Second-in-Command of the LRA. 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.

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531 ICC-02/04-01/05-248, p 4.
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 II\(^{537}\) 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 (crucial 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 Dembele 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.


\(^{546}\) 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 Dembele Diarra (Mali) and Judge Ekaterina Trendafilova (Bulgaria).

\(^{548}\) ICC-02/04-01/05-431, p 4. See also 1ICC 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. 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. 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. The case against Ongwen was severed from the Kony et al case on 6 February 2015, following his surrender in January 2015. 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. 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).

**Arrest warrant**

Pre-Trial Chamber II issued an arrest warrant for Ongwen, under seal, on 8 July 2005. The Arrest Warrant was unsealed on 13 October 2005. 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.

**Transfer to ICC custody**

Ongwen was surrendered to the Court by the CAR authorities on 16 January 2015.

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549 ICC-02/04-01/05-258, para 1.  
552 ICC-02/04-01/05-442, p 7.  
554 ICC-02/04-01/15-422-Red, p 71-104.  
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).  
Confirmation of charges

On 6 February 2015, the Single Judge of Pre-Trial Chamber II\textsuperscript{560} severed the proceedings against Ongwen from the Kony \textit{et al} case.\textsuperscript{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.\textsuperscript{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.\textsuperscript{563}

The Confirmation of Charges hearing was held from 21 to 27 January 2016.\textsuperscript{564}

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

On 23 March 2016, Pre-Trial Chamber II\textsuperscript{566} unanimously confirmed all 70 counts against Ongwen, relating to 23 different crimes.\textsuperscript{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 inhuman 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).\textsuperscript{568}

This case includes the highest number of sexual and gender-based crimes charges confirmed by an ICC Pre-Trial Chamber to date.\textsuperscript{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.\textsuperscript{570}

\textsuperscript{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).

\textsuperscript{561} ICC-02/04-01/05-424, p 7.

\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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-ENG.

\textsuperscript{568} ICC-02/04-01/15-422-Red, p 71-104.

\textsuperscript{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.

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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{573}

\textbf{Trial Proceedings}

The trial commenced on 6 December 2016 before Trial Chamber IX.\textsuperscript{574} The Prosecution began its presentation of evidence on 16 January 2017,\textsuperscript{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.\textsuperscript{576}

\textbf{Status of proceedings}

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

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\textsuperscript{571} ICC-02/04-01/15-422-Red, p 71-104.
\textsuperscript{572} ICC-02/04-01/15-422-Red, para 159; ICC-02/04-01/15-422-Anx1.
\textsuperscript{573} The Chamber admitted 300 applicants as of 19 September 2016, 610 applicants as of 11 October 2016, 1,776 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.
\textsuperscript{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>.
\textsuperscript{575} ICC-PIDS-CIS-UGA-02-012/16_Eng.
\textsuperscript{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. 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. The OTP continued to monitor allegations of crimes committed on the territory since 2005, particularly in the northern part of the country.

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. 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. 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). 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. This is the first case

580 For more information on the CAR II Situation, see the Central African Republic II sub-section of this publication.
582 ICC-01/05-01/08-3343, para 1.
in which the majority of charges in the Arrest Warrant were for sexual and gender-based crimes.\textsuperscript{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.\textsuperscript{585} Bemba was sentenced to 18 years’ imprisonment, the highest sentence imposed by the ICC to date.\textsuperscript{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.\textsuperscript{587} The Prosecution originally sought a broader range of charges of these crimes;\textsuperscript{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 III\textsuperscript{589} issued an arrest warrant for Bemba, under seal, on 23 May 2008,\textsuperscript{590} which was unsealed the next day.\textsuperscript{591} In issuing this Arrest Warrant, the Chamber declined to include the charges of other forms of sexual violence as a crime against humanity\textsuperscript{592} and war crime.\textsuperscript{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.\textsuperscript{594}

**Transfer to ICC custody**

Bemba was arrested by the Belgian authorities on 24 May 2008.\textsuperscript{595} He was surrendered to the Court and transferred to the ICC Detention Centre on 3 July 2008.\textsuperscript{596}

**Confirmation of charges**

On 1 October 2008, the Prosecution filed its Document Containing the Charges;\textsuperscript{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.\textsuperscript{598}

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\textsuperscript{584} ICC-01/05-01/08-15-tENG.
\textsuperscript{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/>.
\textsuperscript{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/>.
\textsuperscript{587} ICC-01/05-01/08-424, p 184-185.
\textsuperscript{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.
\textsuperscript{589} Pre-Trial Chamber III was composed of Presiding Judge Fatoumata Dembele Diarra (Mali), Judge Hans-Peter Kaul (Germany) and Judge Ekaterina Trendafilova (Bulgaria).
\textsuperscript{590} ICC-01/05-01/08-1-tENG-Corr, p 8.
\textsuperscript{591} ICC-01/05-01/08-5-tENG, p 4.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{596} ICC-01/05-01/08-424, para 4.
\textsuperscript{597} ICC-01/05-01/08-129. The Document Containing the Charges was submitted in a confidential Annex 2A.
\textsuperscript{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.\textsuperscript{599} Prior to this hearing, on 12 December 2008, 54 applicants were recognised as victims to participate in the confirmation of charges proceedings.\textsuperscript{600}

On 3 March 2009, Pre-Trial Chamber III,\textsuperscript{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.\textsuperscript{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.\textsuperscript{603}

On 15 June 2009, a newly constituted Pre-Trial Chamber II\textsuperscript{604} 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,\textsuperscript{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.’\textsuperscript{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


\textsuperscript{600} ICC-01/05-01/08-320, p 36-37; ICC-01/05-01/08-424, para 6.

\textsuperscript{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).


\textsuperscript{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).


\textsuperscript{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.  

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 (2) 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.  

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. The Pre-Trial Chamber granted leave to the Women’s Initiatives on 17 July 2009, 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. 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.  

On 18 September 2009, the Pre-Trial Chamber issued a decision denying the Prosecution application. 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’. 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. 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
issue under Article 82(1)(d) of the Statute.\footnote{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.’} 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’.\footnote{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>.

On 22 February 2010, Trial Chamber III\footnote{Trial Chamber III was composed of Presiding Judge Adrian Fulford (United Kingdom), Judge Elizabeth Odio Benito (Costa Rica) and Judge Joyce Aluoch (Kenya).} ordered that the 54 victims who participated in the confirmation of charges proceedings shall also participate in the trial proceedings.\footnote{ICC-01/05-01/08-699, para 39(i).} 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.\footnote{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).

\textbf{Trial proceedings}


\footnote{ICC-01/05-01/08-3343, paras 10, 12.}

\footnote{ICC-01/05-01/08-76-tENG, p 8.

\footnote{ICC-01/05-01/08-567-Red, paras 3, 5 and p 36.

\footnote{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/ASPI3/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.

\footnote{ICC-ASP/13/10, p 18-19.

\footnote{ICC-01/05-01/08-2324, para 5.}}}}
to investigate and prepare for the possible change. 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. 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. 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.

Overall, the Chamber heard the testimony of 77 witnesses, and the Chamber sat for 330 days. On 7 April 2014, the Chamber declared the presentation of evidence closed and closing statements were heard on 12 and 13 November 2014.

During the course of the trial, the Chamber granted leave to 4,470 additional applicants to participate as victims in the trial proceedings. Overall, 5,229 victims were authorised to participate in the trial proceedings, including those who had participated at the pre-trial stage. Dual victim/witness status was granted to 18 individuals as they also appeared as witnesses before the Chamber. 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. 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.


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.

sexual violence as well as the first conviction of an individual charged with command responsibility, under Article 28 of the Statute.\textsuperscript{641}

In its Judgment, the Chamber considered that a recharacterisation of the facts to include a ‘should have known’ mental element was not ‘warranted’\textsuperscript{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.\textsuperscript{643}

The Defence filed its Notice of Appeal against the Trial Judgment on 4 April 2016,\textsuperscript{644} and its Document in Support of Appeal on 19 September 2016.\textsuperscript{645}

On 15 April 2016, the Appeals Chamber\textsuperscript{646} granted the victims who participated in the trial proceedings against Bemba the possibility to participate in the appeals proceedings against the Trial Judgment.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{651}

On 22 July 2016, the Defence and the Prosecution notified the Chamber of their intention to appeal the Sentencing decision,\textsuperscript{652} and both filed their respective Documents in Support of Appeal on 21 October 2016.\textsuperscript{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.\textsuperscript{654} At the time of writing this publication, no judgment on the appeals had been rendered.


\textsuperscript{642} ICC-01/05-01/08-3343, para 718.

\textsuperscript{643} ICC-01/05-01/08-3343, paras 717-718.

\textsuperscript{644} ICC-01/05-01/08-3348.

\textsuperscript{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.

\textsuperscript{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-Osuji (Nigeria) and Judge Piotr Hofmański (Poland).

\textsuperscript{647} ICC-01/05-01/08-3369, p 3.

\textsuperscript{648} ICC-01/05-01/08-3399, para 97. Judge Ozaki appended a separate opinion. ICC-01/05-01/08-3399-AnxI.

\textsuperscript{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.


\textsuperscript{652} ICC-01/05-01/08-3412; ICC-01/05-01/08-3411.

\textsuperscript{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.

\textsuperscript{654} ICC-01/05-01/08-3432, p 3.
Reparations

On 22 July 2016, the recomposed Trial Chamber III\(^{655}\) 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 experts\(^{659}\) 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-Anxl; 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.


\(^{660}\) 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 justice\(^{666}\) 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 II\(^ {670}\) 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 II\(^ {676}\) unanimously partially confirmed the charges of offences against the administration of justice brought against the five suspects and committed them to

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\(^{666}\) 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.


\(^{670}\) The Single Judge, acting on behalf of Pre-Trial Chamber II, was Judge Cuno Tarfusser (Italy).

\(^{671}\) ICC-01/05-01/13-1-1ENG, 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.


\(^{675}\) 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).
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.

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.

**Trial proceedings**

The trial started on 29 September 2015. The closing oral statements took place from 31 May to 1 June 2016. The trial lasted 46 days, hearing a total of 19 witnesses.

On 19 October 2016, Trial Chamber VII 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.

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. Bemba was also found guilty of soliciting under Article 25(3)(b) the giving of false testimony by the 14 Defence witnesses; Kilolo of inducing under Article 25(3)(b) the giving of false testimony by the 14 witnesses; 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. Babala was found guilty of aiding under Article 25(3)(c) the corrupt influencing of two Defence witnesses; and Arido was found guilty under Article 25(3)(a) of the Statute of corruptly influencing four Defence witnesses.
The Compendium

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 Babala.

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.

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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-01/05-01/13-2147, para 3.
699 ICC-01/05-01/13-2123-Corr, paras 146-147 and p 98.
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.
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. 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’. 

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. There are currently no cases arising from this second Situation.


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’. 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. Upon receipt of the referral, the Prosecutor opened a formal investigation into the Situation in Darfur on 6 June 2005. 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.

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). 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. 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). 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. At the time of writing this publication, each of these Arrest Warrants remains outstanding.

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

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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-02/05-03/09-2; 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.
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\(^{723}\) 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.


\(^{720}\) 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). 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).

On 17 June 2010, the Single Judge of Pre-Trial Chamber I authorized six victims to participate in the pre-trial proceedings of this case.

**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. 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.

**Arrest warrant**

On 4 March 2009, Pre-Trial Chamber I issued its first Arrest Warrant for Al Bashir for war crimes and crimes against humanity.

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.

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**Notes**

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.

The Prosecution subsequently sought leave to appeal this decision on 10 March 2009, and filed its Document in Support of Appeal on 6 July 2009. The Appeals Chamber 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.

On 12 July 2010, Pre-Trial Chamber I issued a second warrant for Al Bashir’s arrest, this time for the crime of genocide. Overall, Al Bashir is alleged to be 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) and deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction.

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. 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.

**Status of proceedings**

At the time of writing this publication, the execution of the Arrest Warrants is pending and Al Bashir remains at large.

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734 ICC-02/05-01/09-12, paras 2-3, 52.
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).
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.
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).
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. He had previously allegedly served as Vice President, the second-in-command and the Secretary General of the JEM. On 8 February 2010, the Court declined to confirm all charges against Abu Garda and the case did not proceed to trial. 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.

Summons to appear
Pre-Trial Chamber I issued a summons to appear for Abu Garda, under seal, on 7 May 2009. The Summons to Appear was unsealed on 17 May 2009.

Transfer to ICC custody
Abu Garda voluntarily appeared before the Court on 18 May 2009.

Confirmation of charges
The Confirmation of Charges hearing was held from 19 to 30 October 2009. Prior to this hearing, 78 victims were authorised to participate in the pre-trial proceedings. 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.

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. 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.

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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.
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.
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.
On 15 March 2010, the Prosecution sought leave to appeal the Confirmation of Charges decision. In light of this appeal, on 19 March 2010, nine additional victims were authorised to participate in the pre-trial stage proceedings. 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.

**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.

**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. 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. However, the proceedings against Jerbo were terminated on 4 October 2013, following evidence suggesting his death.

**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.

**Summons to appear and arrest warrant**

Pre-Trial Chamber I issued summonses to appear for Banda and Jerbo, under seal, on 27 August 2009. The Summonses to Appear were unsealed on 15 June 2010.

On 11 September 2014, finding that the Summons to Appear was ‘no longer sufficient’ to ensure Banda’s appearance at trial, Trial Chamber IV, by majority, issued an arrest warrant for Banda, replacing the Summons to Appear.

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.
The Trial Chamber, by majority, rejected the request for reconsideration and granted the Defence leave to appeal on 19 December 2014.\textsuperscript{770} The Defence subsequently submitted its Document in Support of Appeal on 19 January 2015.\textsuperscript{771} On 3 March 2015, the Appeals Chamber\textsuperscript{772} unanimously rejected the Defence appeal and confirmed the Trial Chamber’s decision to issue the Arrest Warrant.\textsuperscript{773}

**Transfer to ICC custody**

Banda and Jerbo voluntarily appeared before the Court on 17 June 2010.\textsuperscript{774}

**Confirmation of charges**

The Confirmation of Charges hearing was held on 8 December 2010.\textsuperscript{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.\textsuperscript{776} On 7 March 2011, the Single Judge of Pre-Trial Chamber \textsuperscript{777}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.\textsuperscript{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.\textsuperscript{779}

**Trial proceedings**

Trial Chamber IV terminated the proceedings against Jerbo on 4 October 2013, following evidence suggesting his death.\textsuperscript{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.\textsuperscript{781} On 12 December 2013, Trial Chamber IV authorised an additional 14 victims to participate in the trial proceedings,\textsuperscript{782} thus raising the number of participating victims to 103.

The trial against Banda was initially set to commence on 5 May 2014.\textsuperscript{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.\textsuperscript{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.\textsuperscript{785} On 16 April 2014, finding that this date was ‘clearly not feasible’ due to the logistical difficulties encountered

\textsuperscript{770} ICC-02/05-03/09-619-Red, para 59. Judge Eboe-Osuji appended a partly dissenting opinion. ICC-02/05-03/09-619-Anx-Red.

\textsuperscript{771} ICC-02/05-03/09-625-Red.

\textsuperscript{772} The Appeals Chamber was composed of Presiding Judge Sang-Hyun Song (Republic of Korea), Judge Akua Kuenyea (Ghana), Judge Erkki Kourula (Finland), Judge Anita Ušacka (Latvia) and Judge Christine Van den Wyngaert (Belgium).

\textsuperscript{773} ICC-02/05-03/09-632-Red, para 36 and p 3.

\textsuperscript{774} ICC-02/05-03/09-121-Corr-Red, para 13.

\textsuperscript{775} ICC-02/05-03/09-121-Corr-Red, para 21.

\textsuperscript{776} ICC-02/05-03/09-121-Corr-Red, para 10 and p 23.

\textsuperscript{777} The Single Judge, acting on behalf of Pre-Trial Chamber I, was Judge Cuno Tarfusser (Italy).

\textsuperscript{778} ICC-02/05-03/09-121-Corr-Red, paras 5, 162-163 and p 74.


\textsuperscript{780} ICC-02/05-03/09-512-Red, paras 22-24 and p 12.

\textsuperscript{781} ICC-02/05-03/09-231-Corr, p 16. A corrected version was issued on 28 October 2011. ICC-02/05-03/09-231-Corr.

\textsuperscript{782} ICC-02/05-03/09-528, p 19.

\textsuperscript{783} ICC-02/05-03/09-455-Corr, para 25(i).

\textsuperscript{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.

\textsuperscript{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.\textsuperscript{786} On 14 July 2014, the Chamber set the trial commencement date for 18 November 2014,\textsuperscript{787} which was also vacated with the issuance of the new Arrest Warrant for Banda on 11 September 2014.\textsuperscript{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.\textsuperscript{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.\textsuperscript{790}

**Scope of charges**

Crimes allegedly committed in Darfur in 2003 and 2004.\textsuperscript{791}

**Arrest warrant**

Pre-Trial Chamber I\textsuperscript{792} 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).\textsuperscript{793}

**Status of proceedings**

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

\begin{itemize}
  \item \textsuperscript{786} ICC-02/05-09-564-Red, paras 11, 13(i).
  \item \textsuperscript{787} ICC-02/05-09-590-Red, paras 24, 37(a).
  \item \textsuperscript{788} ICC-02/05-09-606, paras 25-26(vii).
  \item \textsuperscript{789} ICC-02/05-09-606, paras 25-26(vii).
  \item \textsuperscript{790} ICC-02/05-01/12-2, p 6.
  \item \textsuperscript{791} ICC-02/05-01/12-2, p 6-10.
  \item \textsuperscript{792} Pre-Trial Chamber I was composed of Presiding Judge Sanji Mmasenono Monageng (Botswana), Judge Sylvia Steiner (Brazil) and Judge Cuno Tarfusser (Italy).
  \item \textsuperscript{793} ICC-02/05-01/12-2, p 6-10.
\end{itemize}
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 II 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. On 31 March 2010, the Chamber, by majority, granted authorisation to proceed and the investigation was subsequently opened. 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, 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). 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.

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

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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.
797 ICC-01/09-19-Corr, p 83.
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.
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 Summonses 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](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](http://iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf).
cases in the Kenya Situation. To date, Barasa, Gicheru and Bett have not been arrested and remain at large.

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). 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. Originally, this case also included Kosgey, former Minister of Industrialisation of the Republic of Kenya and Chairman of the ODM. However, the charges against Kosgey were not confirmed in January 2012. The case against Ruto and Sang was terminated in April 2016. 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

Summons to appear
Pre-Trial Chamber II, by majority, issued a summons to appear for Ruto, Kosgey and Sang on 8 March 2011.

Transfer to ICC custody
Ruto, Kosgey and Sang voluntarily appeared before the Court on 7 April 2011.

Confirmation of charges
The Confirmation of Charges hearing was held from 1 to 8 September 2011.

Prior to this hearing, on 5 August 2011, 327 victims were granted leave to participate in the confirmation of charges proceedings.

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804 ICC-01/09-01/11-448-AnxA, paras 6, 9-10.
806 ICC-01/09-01/11-1, p 23.
807 ICC-01/09-01/11-373, p 138.
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, confirmed three counts of crimes against humanity against both Ruto and Sang, including murder, deportation or forcible transfer of population, and persecution. 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. 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. Given the absence or insufficiency of corroborating evidence, the Prosecution did not meet the necessary evidentiary standard required to confirm the charges against Kosgey.

Prior to the start of the trial, on 3 October 2012, Trial Chamber V introduced a differentiated procedure for victim participation, which was similarly applied in the Kenyatta case. 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. 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. By 23 September 2013, 175 victims had been registered to participate in the trial proceedings.

**Trial proceedings**

The trial commenced on 10 September 2013 and was completed on 10 September 2015. On 5 December 2013, the Prosecution requested Trial Chamber V(A) 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, “had provided highly relevant evidence about the crimes charged” but either refused to continue to communicate with the Prosecution’ or informed that they were ‘no longer willing to testify’. 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).


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. 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. It is unclear whether all 175 victims had also participated in the confirmation of charges proceedings. At this stage of proceedings, Trial Chamber V(A) was composed of Presiding Judge Chile Eboe-Osuji (Nigeria), Judge Olga Herrera Carbuccia (Dominican Republic) and Judge Robert Fremr (Czech Republic).
willing to testify’. 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’. On 17 April 2014, the Chamber, by majority, 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’ summoned; (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.

After being granted leave to appeal this decision, the Ruto and Sang Defence teams filed their respective appeals on 5 June 2014. On 9 October 2014, the Appeals Chamber 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’. 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.’

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. Opposing responses to these requests were filed by the Prosecution on 20 November 2015 and by the Common Legal Representative of Victims on 27 November 2015. A subsequent status conference was held from 12 to 15 January 2016 during which oral arguments from the parties were heard.

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.
At the time of the termination of this case, the trial had lasted 157 days and 30 Prosecution witnesses had been heard.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{848} The charges against Ali were not confirmed in January 2012,\textsuperscript{849} and the charges against Muthaura were withdrawn in March 2013.\textsuperscript{850} The charges against Kenyatta were also withdrawn.

\textsuperscript{843} ICC-01/09-01/11-2027-AnxA, p 1.
\textsuperscript{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-AnxA, 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-01/09-01/11-2011, p 4.
\textsuperscript{845} ICC-01/09-01/11-2035, para 54.
\textsuperscript{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.
\textsuperscript{847} ICC-01/09-02/11-257-AnxA, para 9.
\textsuperscript{848} ICC-01/09-02/11-257-AnxA, paras 4, 13.
\textsuperscript{849} ICC-01/09-02/11-382-Red, para 430 and p 154.
in December 2014, and the case was subsequently terminated in March 2015. 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.

**Summons to appear**

Pre-Trial Chamber II, by majority, issued a summons to appear for Kenyatta, Muthaura and Ali on 8 March 2011.

**Transfer to ICC custody**

Kenyatta, Muthaura and Ali voluntarily appeared before the Court on 8 April 2011.

**Confirmation of charges**

The Confirmation of Charges hearing was held from 21 September to 5 October 2011. Prior to this hearing, on 26 August 2011, 233 victims were authorised to participate in the confirmation of charges proceedings.

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). The Chamber declined to confirm the charge of other forms of sexual violence as a crime against humanity against Kenyatta and Muthaura. 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.

Prior to the start of the trial, on 3 October 2012, Trial Chamber V introduced a differentiated procedure for victim participation, which was similarly applied in the Ruto and Sang case. The registration system in the Kenya cases introduced the creation of a two-pronged approach to the victim participation process.
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

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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-01/09-02/11-698, 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 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.

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.


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.
The Prosecution and the Government of Kenya complied with the Chamber’s order on 11 and 16 July 2014, respectively.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{879} Additionally, despite expressing ‘serious concerns’ regarding the Kenyan Government’s approach and the allegations of non-cooperation,\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{883}

On 13 March 2015, Trial Chamber V(B) terminated the proceedings in the Kenyatta case.\textsuperscript{884}

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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.
880 See ICC-01/09-02/11-944, paras 3-6.
882 ICC-01/09-02/11-983, para 3.
883 ICC-01/09-02/11-983, para 2.
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 Osapir 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

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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.
893 ICC-01/09-02/11-1005, p 6.
894 ICC-01/09-01/13-1-Red2, para 7.
896 The second Article 70 case in this Situation is that against Gicheru and Bett.
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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 II issued an arrest warrant for Barasa, under seal, on 2 August 2013. The Arrest Warrant was unsealed on 2 October 2013. 898

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. 899

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. 900

Pre-Trial Chamber II dismissed this challenge on 10 September 2015. 901 The Defence subsequently sought leave to appeal this decision on 15 September 2015, 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. 902

Status of proceedings

At the time of writing this publication, the execution of the Arrest Warrant is pending and Barasa remains at large. 903

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. 904 This case is the second of two Article 70 cases in the Kenya Situation. 905 At the time of writing this publication, three Article 70 cases had been brought before the Court.


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).


900 ICC-01/09-01/13-1-Red2, p 3-5, 17.

901 ICC-01/09-01/13-31, p 3.


903 ICC-01/09-01/13-37, paras 2, 8.

904 ICC-01/09-01/13-41, para 8 and p 5.


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 II\(^ {909}\) 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.

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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).


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. 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). A formal investigation into the Situation was subsequently opened by the OTP on 3 March 2011.

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. 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. 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’. 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.

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) and Abdullah Al-Senussi.

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921 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’.

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’.
Two further arrest warrants were issued in April 2013 and August 2017 for Al-Tuhamy Mohamed Khaled (Al-Tuhamy) and Mahmoud Mustafa Busayf Al-Werfalli (Al-Werfalli), respectively.

**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. 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. 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.

In November 2011, the proceedings against Muammar Gaddafi were terminated, following the confirmation of his death. The proceedings against Al-Senussi were also terminated in October 2013, following a successful admissibility challenge by the Libyan Government. 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, 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.

**Arrest warrants**

On 27 June 2011, Pre-Trial Chamber issued arrest warrants, under seal, for Muammar Gaddafi, Gaddafi and Al-Senussi. The Arrest Warrants were unsealed on 30 June 2011.

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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-01/11-01/11-12, p 6-7; ICC-01/11-01/11-17-2, p 16.  
926 ICC-01/11-01/11-2, p 7.  
927 ICC-01/11-01/11-3, p 5.  
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-01/11-01/11-12, 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).  
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.\footnote{ICC-01/11-01/11-2, p 6; ICC-01/11-01/11-3, p 6; ICC-01/11-01/11-4, p 6.}

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.\footnote{ICC-01/11-01/11-5, p 4-5; ICC-01/11-01/11-1, p 41-42.}

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.\footnote{ICC-01/11-01/11-28, p 4-5.}

\section*{Admissibility proceedings}

The Government of Libya notified Pre-Trial Chamber\footnote{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).} on 22 March 2012 of its intention to challenge the admissibility of the case against Gaddafi.\footnote{ICC-01/11-01/11-82, paras 2-3.} 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,\footnote{ICC-01/11-01/11-130-Red, paras 1, 73-74.} and requesting the postponement of the execution of the request for surrender pending a determination of the admissibility challenge.\footnote{ICC-01/11-01/11-130-Red, paras 107-108.}

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.\footnote{ICC-01/11-01/11-163, p 16.}

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.\footnote{ICC-01/11-01/11-134, para 13 and p 7. The Chamber did not indicate the number of victims represented.}

On 31 May 2013, Pre-Trial Chamber I found the case against Gaddafi to be admissible before the ICC.\footnote{ICC-01/11-01/11-344-Red, p 91.} The Government of Libya appealed this decision on 7 June 2013,\footnote{ICC-01/11-01/11-350.} and submitted its Document in Support of Appeal on 24 June 2013.\footnote{ICC-01/11-01/11-370-Red3.}

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.\footnote{ICC-01/11-01/11-383, p 3.} 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,\footnote{ICC-01/11-01/11-411-Red.} outlining victims’ opposition towards the appeal.\footnote{ICC-01/11-01/11-411-Red, para 18.} 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.\footnote{ICC-01/11-01/11-411-Red, para 85.}

The Appeals Chamber\footnote{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 Usacka (Latvia).} by majority, confirmed the admissibility decision on 21 May 2014.\footnote{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 Usacka 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: (i) 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 963 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.
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 had showed “that it is investigating the same case”.

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 Usacka (Latvia).
963 The Single Judge, acting on behalf of Pre-Trial Chamber I, was Presiding Judge Silvia Fernández de Gurmendi (Argentina).


\textbf{Status of proceedings}

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 \textit{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>.’

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**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).  

### Scope of charges

Crimes allegedly committed in Libya from 15 February 2011 to 24 August 2011.  

### Arrest warrant

Pre-Trial Chamber I[^976] issued an arrest warrant for Al-Tuhamy, under seal, on 18 April 2013. 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.

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[^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.
[^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.
**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

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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.


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.\textsuperscript{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,\textsuperscript{991} which was granted by Pre-Trial Chamber III\textsuperscript{992} on 3 October 2011.\textsuperscript{993}

At the time of writing, the Pre-Trial Chamber has issued arrest warrants for three individuals in the Côte d’Ivoire Situation.\textsuperscript{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.

\textbf{The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé}

Laurent Gbagbo is an Ivorian national and the former President of Côte d’Ivoire.\textsuperscript{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.\textsuperscript{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.\textsuperscript{997}

\textbf{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 \textit{Radiodiffusion Télévision ivoirienne} (RTI)

\textsuperscript{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 \textit{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>.

\textsuperscript{991} ICC-02/11-3, paras 1, 181.

\textsuperscript{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).

\textsuperscript{993} ICC-02/11-14, para 212.

\textsuperscript{994} ICC-02/11-01/11-1; ICC-02/11-02/11-1; ICC-02/11-01/12-1.

\textsuperscript{995} ICC-02/11-01/11-656-Red, para 96.

\textsuperscript{996} ICC-02/11-02/11-186, paras 58-60.

\textsuperscript{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. 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.

**Arrest warrant**

Pre-Trial Chamber III issued an arrest warrant for Laurent Gbagbo, under seal, on 23 November 2011, which was unsealed on 30 November 2011. The same Chamber issued an arrest warrant for Blé Goudé, under seal, on 21 December 2011, which was unsealed on 30 September 2013. 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.

**Transfer to ICC custody**

Laurent Gbagbo was transferred to ICC custody by the Ivorian authorities on 30 November 2011. Blé Goudé was arrested by the authorities in Ghana and transferred by the Ivorian authorities to the ICC Detention Centre on 22 March 2014.

**Confirmation of charges**

The hearing on the confirmation of charges against Laurent Gbagbo was held from 19 to 28 February 2013, and that against Blé Goudé was held from 29 September to 2 October 2014.

Prior to the first hearing, 199 applicants were admitted to participate as victims in the confirmation of charges proceedings against Laurent Gbagbo. Before the second hearing, the same 199 applicants, of whom the status of one victim was later terminated following his/her passing, as well

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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.
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 though acts of rape; however, this information became available in the Confirmation of Charges decision.
1003 ICC-02/11-02/11-1, paras 8, 10; ICC-02/11-02/11-1, paras 7, 9.
1004 ICC-PIDS-CIS-C1-04-03/16_Eng; ICC-02/11-01/11-656-Red, para 3.
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.\textsuperscript{1009}

Pre-Trial Chamber I,\textsuperscript{1010} by majority, rendered the Confirmation of Charges decision against Laurent Gbagbo on 12 June 2014,\textsuperscript{1011} and, unanimously, against Blé Goudé on 11 December 2014.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{1015}

Prior to the start of the trial, on 6 March 2015, Trial Chamber I\textsuperscript{1016} authorised 198 victims who had participated in the confirmation of charges proceedings against Laurent Gbagbo and Blé Goudé,\textsuperscript{1017} as well as 270 of the additional victims who had participated in the confirmation of charges proceedings against Blé Goudé,\textsuperscript{1018} to participate in the trial proceedings.\textsuperscript{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.\textsuperscript{1020}

**Trial proceedings**

The originally separate cases against Laurent Gbagbo and Blé Goudé were joined on 11 March 2015.\textsuperscript{1021}

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\textsuperscript{1009} On 11 June 2014, the same 199 victims participating in the confirmation of charges proceedings against Laurent Gbagbo were admitted to 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>.

\textsuperscript{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).


\textsuperscript{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).

\textsuperscript{1013} ICC-02/11-01/11-656-Red, para 278 and p 131; ICC-02/11-02/11-186, para 194 and p 90.

\textsuperscript{1014} ICC-02/11-01/11-656-Red, para 278; ICC-02/11-02/11-186, para 194.

\textsuperscript{1015} ICC-02/11-02/11-186, para 194.

\textsuperscript{1016} Trial Chamber I was composed of Presiding Judge Geoffrey Henderson (Trinidad and Tobago), Judge Cuno Tarfusser (Italy) and Judge Olga Herrera Carbuccia (Dominican Republic).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{1019} ICC-02/11-01/11-800, paras 40-47 and p 24.

\textsuperscript{1020} ICC-02/11-01/11-379, para 6 and p 23.

The joint trial against both accused commenced on 28 January 2016 before Trial Chamber I, and the Prosecution started its presentation of evidence on 3 February 2016, which is currently ongoing. So far, 726 victims have been authorised to participate in the trial proceedings.

**Status of proceedings**

At the time of writing this publication, the trial is ongoing. Laurent Gbagbo and Blé Goudé remain in ICC custody.

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**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. 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’.

**Scope of charges**

Crimes allegedly committed in Côte d’Ivoire between 16 December 2010 and 12 April 2011.

**Arrest warrant**

Pre-Trial Chamber II issued an arrest warrant for Simone Gbagbo, under seal, on 29 February 2012. The Arrest Warrant was unsealed on 22 November 2012. 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.

**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.

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1024 See the Confirmation of Charges stage of this case.


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.

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 I ¹⁰³³ 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

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**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

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¹⁰³²ICC-02/11-01/12-15, paras 9-10 and p 9. The Chamber did not indicate the number of victims represented.
¹⁰³³Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Ekaterina Trendaflova (Bulgaria) and Judge Christine Van den Wyngaert (Belgium).
¹⁰³⁵ICC-02/11-01/12-48-tENG, paras 3, 8, 17 and p 8.
¹⁰³⁶ICC-02/11-01/12-54-Red, para 125.
¹⁰³⁷ICC-02/11-01-12-55, p 3.
¹⁰³⁸The 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).
¹⁰³⁹ICC-02/11-01/12-75-Red, paras 80, 140-141 and p 3-4.
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’Azawad (MNLA), al-Qaeda in the Islamic Maghreb (AQIM), Ansar Dine, and the Mouvement pour l’unicité 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

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1047 Article 53(1) Report on the Situation in Mali, OTP, 16 January 2013, available at <https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG6Jan2013.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’.


objects; pillaging; and rape.\textsuperscript{1050} Furthermore, the OTP indicated that it would continue to investigate allegations relating to the use, conscription, and enlistment of children.\textsuperscript{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.\textsuperscript{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,\textsuperscript{1053} in the shortest ICC trial to date.\textsuperscript{1054}

\textbf{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.\textsuperscript{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.\textsuperscript{1056} This is also the first case in which individual, collective and symbolic reparations have been ordered by the ICC.\textsuperscript{1057}

\textbf{Scope of charges}

Crime allegedly committed in Timbuktu, Mali, between around 30 June and 11 July 2012.\textsuperscript{1058}

\textbf{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.\textsuperscript{1059}


\textsuperscript{1053}ICC-01/12-01/15-171.

\textsuperscript{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/>.

\textsuperscript{1055}ICC-01/12-01/15-171, paras 9, 31-33.


\textsuperscript{1058}ICC-01/12-01/15-84-Red, para 2 and p 22.

\textsuperscript{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


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).


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. 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/>.


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 (DR Congo) and Judge Bertram Schmitt (Germany).

Sentencing

On 27 September 2016, Al Mahdi was sentenced to nine years’ imprisonment. One year was deducted from his sentence for the time already spent in detention since his arrest.

Reparations

On 29 September 2016, Trial Chamber VIII 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. Interested organisations were also invited to request leave to submit amicus curiae observations on reparations related issues. 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. On 19 January 2017, the Chamber appointed four experts for the reparations proceedings in this case.

On 17 August 2017, the Chamber unanimously rendered its Reparations Order in this case, awarding individual, collective and symbolic reparations to the community of Timbuktu. The Chamber found Al Mahdi to be liable for €2.7 million in expenses for reparations.

The Chamber identified three categories of harm in this case, namely damage to the protected buildings, consequential economic loss, and moral harm. 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. Collective reparations were ordered for the rehabilitation of the protected sites and for the community of Timbuktu as a whole.

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.

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

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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-ENg; ICC-01/12-01/15-187; ICC-01/12-01/15-192-Red; ICC-01/12-01/15-191-ENg; 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-ENg; 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.
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.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{1090}

Currently, 139 reparations applications, including 137 individuals and two organisations, are being considered by the Chamber.\textsuperscript{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.\textsuperscript{1092}

\begin{itemize}
\item \textsuperscript{1088}ICC-01/12-01/15-236, paras 106-107 and p 60.
\item \textsuperscript{1089}ICC-01/12-01/15-236, paras 114-115, 134-135, 138 and p 60.
\item \textsuperscript{1090}ICC-01/12-01/15-236, para 108 and p 60.
\item \textsuperscript{1091}On 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.
\item \textsuperscript{1092}ICC-01/12-01/15-236, para 136 and p 60.
\end{itemize}
Georgia

After having conducted a Preliminary Examination into the Situation in Georgia since August 2008, the ICC Prosecutor requested authorisation from Pre-Trial Chamber I on 13 October 2015 to open an investigation into this Situation. 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.

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. 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.

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. On this point, the Chamber noted that these allegations could be included in the investigation. At the time of writing this publication, no cases have been made public in this Situation.

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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.
1098ICC-01/15-4, para 4.
1099 ICC-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.

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<td>Offences against the administration of justice:</td>
<td>Two years and six months of imprisonment</td>
<td>11 months, reflecting the time already spent in detention (from 23 November 2013 to 22 October 2014)</td>
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<td></td>
<td>- Inducing the giving of false testimony by 14 witnesses – Article 70(1)(a); and</td>
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<td>- Corruptly influencing 14 witnesses and presenting their false evidence – Article 70(1)(b) and (c).</td>
<td>€30,000 fine</td>
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<td><strong>Jean-Jacques Mangenda Kabongo</strong></td>
<td>Offences against the administration of justice:</td>
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<td>11 months and eight days, reflecting the time already spent in detention (from 23 November 2013 to 31 October 2014)</td>
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<td>- 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</td>
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<td>- Corruptly influencing 14 witnesses and presenting their false evidence – Article 70(1)(b) and (c).</td>
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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.
<table>
<thead>
<tr>
<th><strong>Narcisse Arido</strong></th>
<th>Offence against the administration of justice:</th>
<th>11 months(^\text{1104})</th>
<th>11 months, reflecting the time already spent in detention (from 23 November 2013 to 22 October 2014)</th>
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<tr>
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<td>• Corruptly influencing four witnesses – Article 70(1)(c).</td>
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<td><strong>Fidèle Babala Wandu</strong></td>
<td>Offence against the administration of justice:</td>
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<td>11 months, reflecting the time already spent in detention (from 24 November 2013 to 23 October 2014)</td>
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<td>• Aiding in the commission by Bemba, Kilolo and Mangenda of the offence of corruptly influencing two witnesses – Article 70(1)(c).</td>
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<td><strong>The Prosecutor v. Ahmad Al Faqi Al Mahdi</strong></td>
<td>War crime:</td>
<td>Nine years of imprisonment</td>
<td>One year, reflecting the time already spent in detention (from 26 September 2015 to 27 September 2016)</td>
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<td>• Intentionally attacking protected objects – Article 8(2)(e)(iv).</td>
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\(^{1104}\) 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.
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 Reparations Proceedings

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.

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

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 OPCR. As of 15 June 2017, the Registry sent to the Chamber a total of 386 reparations forms received from the OPCR 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.

At the time of writing this publication, the Chamber had not rendered a decision on Lubanga’s indigence with respect to reparations.

This number is composed of 137 individuals and two organisations. ICC-01/12-01/15-236, para 5.

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.

<table>
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<tr>
<th>ICC case</th>
<th>Individual reparations</th>
<th>Collective reparations</th>
<th>Symbolic reparations</th>
<th>(Potentially) eligible victims</th>
<th>Amount indicated by the Chamber</th>
<th>Financial liability of the convicted person</th>
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<td><strong>The Prosecutor v. Thomas Lubanga Dyilo</strong></td>
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<td>• Socio-economic measures: $ 292,000</td>
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<td><strong>The Prosecutor v. Germain Katanga</strong></td>
<td>US$ 250 for each victim (total of US$ 74,250)</td>
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<td>US$ 3,752,620: (monetary value of the extent of the harm suffered by the 297 victims)</td>
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<td><strong>The Prosecutor v. Ahmad Al Faqi Al Mahdi</strong></td>
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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*
- *Gender Report Card on the International Criminal Court 2011*
- *Gender Report Card on the International Criminal Court 2010*
- *Gender Report Card on the International Criminal Court 2009*
- *Gender Report Card on the International Criminal Court 2008*
- *Advance Preliminary Report: Structures and Institutional Development of the International Criminal Court, October 2008*
- *Gender Report Card on the International Criminal Court 2007*
- *Gender Report Card on the International Criminal Court 2005*

- *Amicus Curiae Briefs: [http://4genderjustice.org/publications/amicus-briefs/]*

- *Expert paper, Modes of Liability: A review of the International Criminal Court’s current jurisprudence and practice, November 2013*


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Legal Eye on the ICC / Panorama légal de la CPI

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Authors:
Brigid Inder
María Elvira Mingo Jaramillo
Samantha Addens
Priska Anna Babuin

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Moby Dick Studio