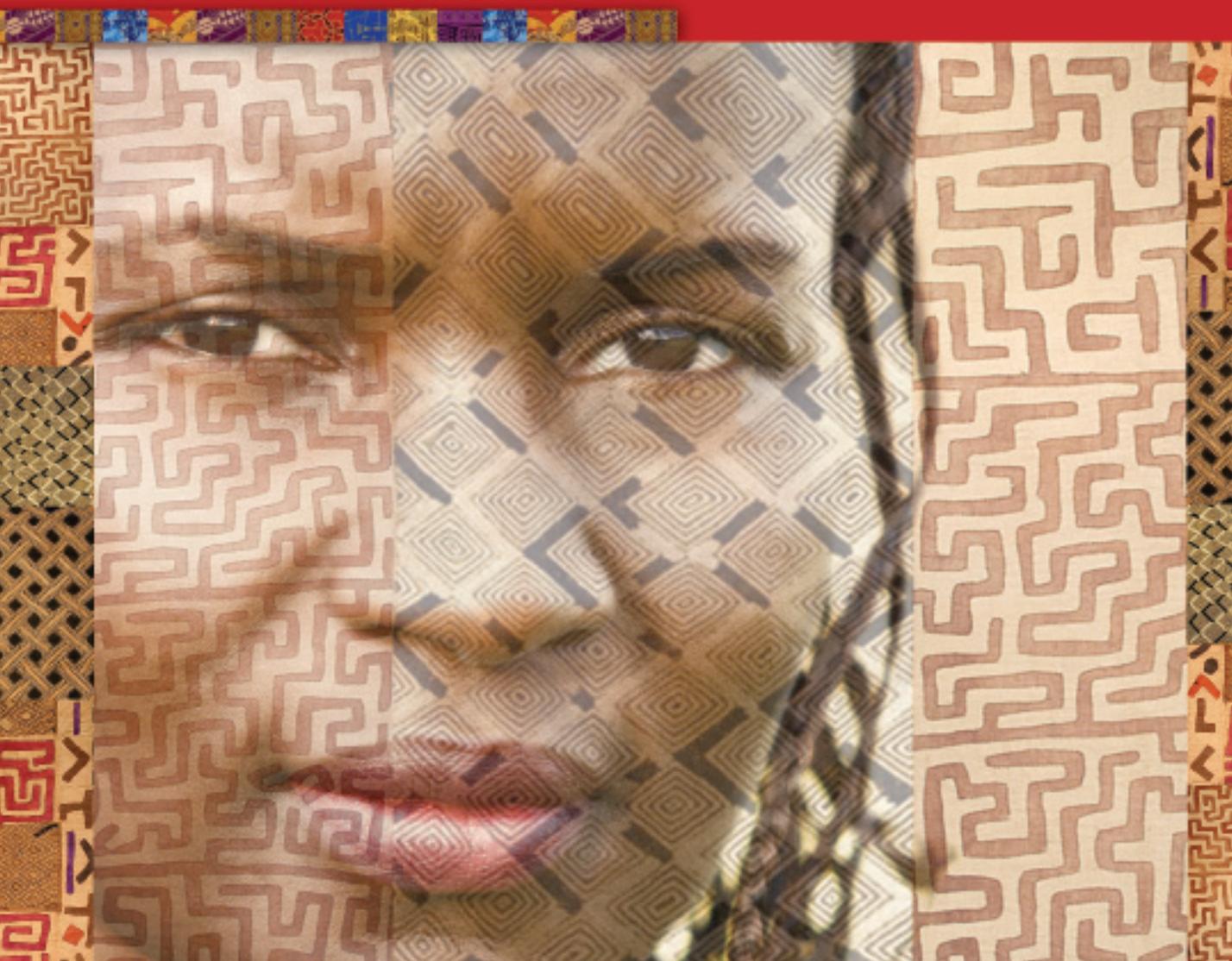


Women's Initiatives for Gender Justice



gender 2008 report card

on the International Criminal Court

The Women's Initiatives for Gender Justice is an international women's human rights organisation which advocates for gender justice through the International Criminal Court (ICC) and works with women most affected by the conflict situations under investigation by the ICC.

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gender 2008 report card

on the International Criminal Court

1 January – 12 December 2008

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Introduction

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This is the fourth *Gender Report Card* produced by the Women’s Initiatives for Gender Justice. Its purpose is to assess the implementation by the International Criminal Court (ICC) of the Rome Statute, Rules of Procedure and Evidence (RPE) and Elements of Crimes (EoC) and in particular the gender mandates they embody, in the more than six years since the Rome Statute came into force.¹

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

The Rome Statute is far-reaching and forward-looking in many aspects including in its gender integration in the following key areas:

- **Structures** – requirement for fair representation of female and male Judges and staff of the ICC, as well as fair regional representation; requirement for legal expertise in sexual and gender violence; requirement for expertise in trauma related to gender-based crimes; the unique establishment of the Trust Fund for Victims
- **Substantive Jurisdiction** – crimes of sexual violence, as well as definitions of crimes to include gender and sexual violence, as constituting genocide, crimes against humanity and/or war crimes; the principle of non-discrimination in the application and interpretation of law, including on the basis of gender
- **Procedures** – witness protection and support; rights of victims to participate; rights of victims to apply for reparations; special measures especially for victims/witnesses of crimes of sexual violence

While implementing the Rome Statute is a task we all share, it is the particular responsibility of the Assembly of States Parties (ASP) and the ICC. This *Gender Report Card* is an assessment of the progress to date in implementing the Statute and its related instruments in concrete and pragmatic ways to establish a Court that truly embodies the Statute upon which it is founded and is a mechanism capable of providing gender-inclusive justice.

The *Gender Report Card* analyses the work of the ICC in three sections, colour-coded as follows:

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

Within these sections, we review and assess the work of each organ of the Court from 1 January 2008 to 12 December 2008 and summarise the most important judicial decisions, the investigations, charges and prosecutions brought by the Office of the Prosecutor (OTP), and the work of the many sections of the Registry towards an accessible and administratively efficient Court.

The background of the slide features a complex, repeating maze pattern. The left portion of the slide is dominated by a dark blue color, while the right portion is a light tan or beige. The maze pattern is composed of thick, interconnected lines that form a series of irregular, winding paths. The text 'Structures & Institutional Development' is overlaid on the blue section in a white, sans-serif font.

Structures & Institutional Development

Structures

.....

The Rome Statute² creates the International Criminal Court (ICC) which is composed of four organs³:

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

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

The Judiciary The judicial functions of each Division of the Court are carried out by Chambers. The Appeals Chamber is composed of five Judges. There may be one or more Trial Chambers, and one or more Pre-Trial Chambers, depending on the workload of the Court. Each Trial Chamber and Pre-Trial Chamber is composed of three Judges. The functions of a Pre-Trial Chamber may be carried out by only one of its three Judges, referred to as the Single Judge.⁵ There are a total of 18 Judges in the Court's three divisions.

The Office of the Prosecutor (OTP) has responsibility for 'receiving referrals, and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court'.⁶

2 Footnote references in this section pertain to the Rome Statute of the International Criminal Court.
3 Article 34. The composition and administration of the Court are outlined in detail in Part IV of the Statute (at Articles 34-52).
4 Article 38.
5 Article 39.
6 Article 42(1).

The Registry is responsible for the ‘non-judicial aspects of the administration and servicing of the Court’.⁷ The Registry is headed by the Registrar. The Registrar is responsible for setting up a Victims and Witnesses Unit (VWU) within the Registry. The VWU is responsible for providing, in consultation with the OTP, ‘protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses’.⁸

Gender Equity

The Rome Statute requires that, in the selection of Judges, the need for a ‘fair representation of female and male judges’⁹ be taken into account. The same principle applies to the selection of staff in the Office of the Prosecutor (OTP) and in the Registry.¹⁰

Geographical Equity

The Rome Statute requires that, in the selection of Judges, the need for ‘equitable geographical representation’¹¹ be taken into account in the selection process. The same principle applies to the selection of staff in the OTP and in the Registry.¹²

7 Article 43(1).

8 Article 43(6).

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

10 Article 44(2).

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

12 Article 44(2).

Gender Expertise

Expertise in Trauma

The Registrar is required to appoint staff to the Victims and Witnesses Unit (VWU) with expertise in trauma, including trauma related to crimes of sexual violence.¹³

Legal Expertise in Violence Against Women

The Rome Statute requires that, in the selection of Judges and the recruitment of ICC staff, the need for legal expertise in violence against women or children must be taken into account.¹⁴

Rule 90(4) of the Rules of Procedure and Evidence (RPE) requires that, in the selection of common legal representatives for the List of Legal Counsel, the distinct interests of victims are represented. This includes the interests of victims of crimes involving sexual or gender violence and violence against children.¹⁵

Legal Advisers on Sexual and Gender Violence

The Prosecutor is required to appoint advisers with legal expertise on specific issues, including sexual and gender violence.¹⁶

Trust Fund for Victims

The Rome Statute requires the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and for their families.¹⁷

13 Article 43(6).

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

15 Article 68 (1).

16 Article 42(9).

17 Article 79; see also Rule 98 RPE.

ICC Staff

.....

Recruitment of ICC Staff¹⁸		<i>men</i>	<i>women</i>
Overall staff¹⁹ (<i>professional, general and elected officials</i>)		52%	48%
Overall professional posts²⁰ (<i>including elected officials</i>)		52%	48%
Judiciary	Judges ²¹	59%	41%
	Overall professional posts ²² (<i>excluding Judges</i>)	42%	58%
OTP overall professional posts²³		58%	42%
Registry overall professional posts²⁴		48%	52%
Executive Committee and Senior Management		<i>men</i>	<i>women</i>
Judiciary	Presidency	67%	33%
OTP	Executive Committee ²⁵	50%	50%
	Heads of Divisions ²⁶	33%	67%
	Heads of Sections ²⁷	79%	21%
Registry	Heads of Divisions ²⁸	100%	0%
	Heads of Sections ²⁹	53%	47%

18 Figures as of 31 July 2008. Information provided by the Human Resources Section of the ICC.

19 This overall figure represents a 2% increase in female appointments from 2007. The total number of overall staff (professional, general service and elected officials) at the ICC is 590.

20 There has been a 3% increase in female appointments to professional posts when compared with 2007. The total number of professional posts is 291 (49% of the overall staff).

21 During the 6th session of the Assembly of States Parties in 2007, elections were held to fill three judicial vacancies. Three out of five candidates were women, one woman was ultimately elected. With the resignation of Judge Navanethem Pillay on 31 August, the number of female Judges was reduced to 7. There are currently 17 Judges on the bench of the ICC.

22 This represents a 6% increase of women in professional posts in the Judiciary, when compared with 2007.

23 This represents a 4% increase from 2007 of women in professional posts in the OTP. There is a 16% difference between male and female appointments (24% in 2007). Despite this improvement, the male/female differential is still significant starting from the P3 level: P3 – 9 women and 25 men; P4 – 9 women and 14 men; P5 – 2 women and 8 men. It is only in the P1 level that women outnumber men with 11 women and 5 men. The P2 level has 22 women and 22 men.

24 This represents a 2% increase from 2007 of women in professional posts in the Registry. Appointments from P1 to P4 levels are balanced for men and women. However men outnumber women in senior positions, with more than double the number of men at the P5 level (3 women and 7 men) and twice as many at D1 level (1 woman and 2 men).

25 The Executive Committee is composed of the Prosecutor and the three Heads of Division in the OTP. Note that the Head of Division (Investigations) resigned in 2007. The post is filled by an acting Head of Division (male).

26 This figure is the same as 2007. The post of the Deputy Prosecutor (Investigations) is still vacant.

27 There were no women Heads of Section or equivalent posts in 2007. This figure represents a 21% increase from 2007. Last year 46% of Heads of Sections or equivalent posts were vacant. In 2008, all these posts are filled. Despite this, women are still underrepresented in senior positions within the OTP.

28 All three Divisions at the Registry are headed by men. The Head of the Division of Victims and Counsel was appointed Deputy Registrar on 9 September 2008 and continues to hold the post of Head of Division. The position of Deputy Registrar is a new post.

29 Out of 23 Heads of Sections and equivalent posts in the Registry, there are four vacant posts (17%). Of the 83% of posts filled, 53% are occupied by men and 47% by women.

ICC-related Bodies		<i>men</i>	<i>women</i>
Trust Fund for Victims	Board of Directors ³⁰	80%	20%
	Secretariat ³¹	27%	73%
ASP Bureau	Executive ³²	67%	33%
	Secretariat ³³	29%	71%
Investment Court Premises (1 person) ³⁴		100%	0%

Disciplinary Boards		<i>men</i>	<i>women</i>
Disciplinary Advisory Board ³⁵ (internal)		67%	33%
Appeals Board ³⁶ (internal)		67%	33%
Disciplinary Board for Counsel ³⁷		33%	67%
Disciplinary Appeals Board for Counsel ³⁸		100%	0%

30 ICC-ASP/5/28/Add.1.

31 Figure as of 21 August 2008. Information provided by the Secretariat of the Trust Fund for Victims.

32 Figure as of 1 October 2007.

33 Figure as of 31 October 2008. Information provided by the ASP Secretariat. Note that out of nine posts, two are vacant. Of the seven posts filled, five are occupied by female professionals and two, including the post of Director, by male professionals.

34 Figure as of 1 October 2007.

35 Figure as of 2 July 2008. Information provided by ICC Human Resources Section. The figure in the table represents the gender breakdown for the three members of the Board. Note that the Disciplinary Board has six supplementary members (three women and three men), a Secretary (female) and a supplementary Secretary (male).

36 Figure as of 2 July 2008. Information provided by ICC Human Resources Section. The figure in the table represents the gender breakdown for the three members of the Board. Note that the Appeals Board has six supplementary members (three women and three men), a Secretary (female) and a supplementary Secretary (male).

37 The Disciplinary Board for Counsel is composed of two permanent members, both female, and one male alternate member. Article 36 of the Code of Professional Conduct for Counsel outlines the composition and management of the Disciplinary Board.

38 The Disciplinary Appeals Board for Counsel is composed of two male permanent members and one male alternate.

Geographical and Gender Equity among Professional Staff³⁹

The 'Top 5' by Region and Gender and the 'Top 10' overall⁴⁰

(includes elected officials, excludes language staff)

WEOG⁴¹

58% overall (151 staff) 51% men (77) 49% women (74)

	'Top 5' countries in the region (range from 12 – 24 professionals)	'Top 5' countries by gender (range 5 – 15 female professionals)
Western European and Others Group	<ol style="list-style-type: none"> 1 France [24]⁴² 2 United Kingdom [20] 3 Germany [18] 4 The Netherlands [13] 5 Australia [12] 	<ol style="list-style-type: none"> 1 France [15]⁴³ 2 United Kingdom [9] 3 Germany [8] 4 Australia, Spain, United States of America [6] 5 Italy, The Netherlands [5]

Africa⁴⁴

18% overall (46 staff) 70% men (32) 30% women (14)

	'Top 5' countries in the region (range from 2 – 8 professionals)	'Top 3' countries by gender (range from 1 – 3 female professionals)
	<ol style="list-style-type: none"> 1 Nigeria [8] 2 Sierra Leone, South Africa [5] 3 Gambia [4] 4 Senegal [3] 5 DRC,⁴⁵ Egypt, Ghana, Kenya, Mali, United Republic of Tanzania [2] 	<ol style="list-style-type: none"> 1 Nigeria, Sierra Leone [3] 2 Gambia [2] 3 Kenya, South Africa, Sudan, Uganda, United Republic of Tanzania, Zambia [1]

GRULAC⁴⁶

11% overall (30 staff) 40% men (12) 60% women (18)

	'Top 5' countries in the region (range from 1 – 7 professionals)	'Top 4' countries by gender (range from 1 – 5 female professionals)
Group of Latin American & Caribbean Countries	<ol style="list-style-type: none"> 1 Colombia [7] 2 Argentina, Brazil, Trinidad & Tobago [4] 3 Costa Rica [3] 4 Ecuador, Peru [2] 5 Chile, Mexico, Saint Vincent and the Grenadines, Venezuela [1] 	<ol style="list-style-type: none"> 1 Colombia [5] 2 Costa Rica [3] 3 Argentina, Peru, Trinidad and Tobago [2] 4 Brazil, Ecuador, Mexico, Saint Vincent & Grenadines [1]

39 Figures as of 31 July 2008. Information provided by the Human Resources Section of the ICC. The ICC does not include Language Staff for the breakdown of geographical representation. Out of 590 overall staff, there are 261 professional posts excluding the Language Staff and including the Elected Officials, of which 141 are occupied by men (54%) and 120 by women (46%).

40 Note that it has not always been possible to establish a 'Top 5' for Region and/or Gender since for some regions there are not enough nationals or female nationals appointed to professional posts to arrive at a 'Top 5'. In those cases, a 'Top 4' or 'Top 3' was established. Similarly, as there have not been sufficient female national appointments to professional posts, instead of a 'Top 10' a 'Top 8' was established.

41 Western European and Others Group. This region accounts for 58% of the overall professional staff at ICC. This figure is the same as in 2007. In 2007, 42% were women and 58% were men. This year there are 49% women and 51% men.

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

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

44 Africa accounts for 18% of the overall professional staff at ICC (1% increase from 2007). However there were significantly more men appointed this year (70%) than last year (64%).

45 Democratic Republic of the Congo.

46 Group of Latin American and Caribbean Countries. This region accounts for 11% of the overall staff at the ICC. This figure represents a 1% decrease from 2007. There are 40% men and 60% women professionals from this region. GRULAC is the only region in which the overall number of women in professional posts is higher than the overall number of men, with an increase from 2007 (44% men and 56% women).

Eastern Europe⁴⁷ 7% overall (18 staff) 56% men (10) 44% women (8)

'Top 5' countries in the region

(range from 1 – 5 professionals)

- 1 Romania [5]
- 2 Croatia [4]
- 3 Serbia [3]
- 4 Bulgaria [2]
- 5 Albania, Belarus, Georgia, Ukraine [1]

'Top 3' countries by gender

(range from 1 – 3 female professionals)

- 1 Romania [3]
- 2 Croatia, Serbia [2]
- 3 Bulgaria [1]

Asia⁴⁸ 6% overall (16 staff) 62.5% men (10) 37.5% women (6)

'Top 4' countries in the region

(range 1 – 4 professionals)

- 1 Republic of Korea [4]
- 2 Islamic Republic of Iran, Japan [3]
- 3 Jordan [2]
- 4 Mongolia, Occupied Palestinian Territory, Philippines, Singapore [1]

'Top 2' countries by gender

(range 1 – 2 female professionals)

- 1 Japan [2]
- 2 Jordan, Philippines, Republic of Korea, Singapore [1]

Overall 'Top 10' – Region and Gender

'Top 10' countries

(range from 5 – 24 professionals)⁴⁹

- 1 France [24]
- 2 United Kingdom [20]
- 3 Germany [18]
- 4 The Netherlands [13]
- 5 Australia [12]
- 6 Spain [10]
- 7 Belgium, Canada, Italy [9]
- 8 Nigeria, United States of America [8]
- 9 Colombia [7]
- 10 Romania, Sierra Leone, South Africa [5]

'Top 8' countries by gender

(range from 1 – 15 female professionals)⁵⁰

- 1 France [15]
- 2 United Kingdom [9]
- 3 Germany [8]
- 4 Australia, Spain, United States of America [6]
- 5 Colombia, Italy, The Netherlands [5]
- 6 Canada, Costa Rica, New Zealand, Nigeria, Romania, Sierra Leone [3]
- 7 Argentina, Austria, Belgium, Croatia, Gambia, Japan, Peru, Serbia, Trinidad and Tobago [2]
- 8 Brazil, Bulgaria, Ecuador, Finland, Ireland, Jordan, Kenya, Mexico, Philippines, Portugal, Republic of Korea, Saint Vincent and the Grenadines, Singapore, South Africa, Sudan, Switzerland, Uganda, United Republic of Tanzania, Zambia [1]

47 Eastern Europe accounts for 7% of the overall professional staff at ICC. This figure represents a 1% decrease from 2007. The percentage of women professionals is higher this year (44%) than in 2007 (41%). Men are still the majority at 56% (59% in 2007).

48 As in 2007, Asia accounts for 6% of the overall professional staff at ICC. Two thirds of this small percentage is composed of men (62.5%). Last year, men represented 61.5%.

49 There are 15 countries in the 'Top 10' list in 2008. In 2007 this number was higher at 26. The 2007 range was from 3 to 20 professionals, whereas in 2008 the range is from 5 to 24. Out of these 15 countries, 10 or 2/3 are from WEOG region, occupying the first 8 places of the list. Last year, 13 countries out of 26, or 1/2 were from WEOG.

50 As in 2007, there are 43 countries in the 'Top 8' list. This year, the range is from 1 to 15 female professionals, whereas in 2007 it was from 0 to 10.

Legal Counsel

Appointments to the List of Legal Counsel ⁵¹	men	women
Overall (264 individuals on the List of Legal Counsel) ⁵² 'Top 5' ⁵³ 1 USA [35] 2 France [34] 3 UK [30] 4 DRC [24] 5 Belgium [18]	80%	20%
WEOG ⁵⁴ (68% of Counsel) 'Top 5' 1 USA [35] 2 France [34] 3 UK [30] 4 Belgium [18] 5 Canada [15]	79%	21%
Africa ⁵⁵ (26% of Counsel) 'Top 5' 1 DRC [24] 2 Mali [7] 3 Kenya [6] 4 Cameroon [5] 5 Morocco & Senegal [4]	83%	17%
Eastern Europe ⁵⁶ (3% of Counsel) Only seven appointments from Eastern Europe: Serbia and The Former Yugoslav Republic of Macedonia [2 appointees each], Croatia, Slovenia and Romania [1 appointee each]	57%	43%
Asia ⁵⁷ (2% of Counsel) Only five appointments from Asia: Malaysia [2], Japan, Singapore and Philippines [1 appointee each]	100%	0%
GRULAC ⁵⁸ (1% of Counsel) Only four appointments from GRULAC: Brazil, Trinidad and Tobago, Argentina and Mexico [1 appointee each]	100%	0%

51 Figures as of 21 November 2008.

52 Of the 420 individuals who applied to the List of Legal Counsel, 264 were appointed. Of the 264 appointed, only 53 are women (20%) and 211 are men (80%). This percentage does not represent a significant change from last year's figure (19% women and 81% men).

53 The number of appointees is reported in brackets.

54 As in 2007, WEOG represents 68% of the total Legal Counsel. Note that the country with the most number of appointments, not only in WEOG but across all regions, is USA with 35 Counsel. USA is not a State Party. As in 2007, appointments from the USA have been included in the calculation for the WEOG region. Meanwhile, the percentage of women appointed in WEOG saw a slight increase (21% compared to 19% in 2007).

55 As in 2007, Africa represents 28% of the total Legal Counsel. Appointments from Algeria, Cameroon, Mauritania, Morocco and Tunisia, which are not States Parties, have been included in the calculation for the African region. Note that from the four situations before the Court, only DRC, with 24 appointments, made it to the Top 5. There are only two appointees from Uganda, two from Central African Republic (CAR) and none from Sudan. Of the 28 appointments, only four are women (three from DRC and one from CAR).

56 As in 2007, Eastern Europe represents 3% of the total Legal Counsel. The gender breakdown in this region, 43% women and 57% men, is the same as last year.

57 Asia represented 1% of the total Legal Counsel in 2007. Appointments from Malaysia, Philippines and Singapore, which are not States Parties, have been included in the calculation for the Asian region. No woman Counsel has been appointed from this region.

58 GRULAC represented 2% of the total Legal Counsel in 2007. No woman is appointed within the GRULAC region.

Appointments to the List of Assistants to Counsel ⁵⁹	men	women
Overall (14 individuals on the List of Assistants to Counsel)	36%	64%
‘Top 3’		
1 Belgium (3 appointees)		
2 Canada, France, Italy, UK (2 appointees each)		
3 Australia, DRC, Germany (1 appointee each)		
WEOG – 13		
Africa – 1		
Rest – 0		

Professional Investigators

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Appointments to the List of Professional Investigators ⁶⁰	men	women
Overall (13 individuals on the List of Professional Investigators)	92%	8%
‘Top 3’		
1 Mali (8 appointees)		
2 UK (2 appointees)		
3 Brazil, Ghana and Poland (1 appointee each)		

59 Figure as of 24 October 2007.

60 Figure as of 24 October 2007.

Trust Fund for Victims⁶¹

The mission of the Trust Fund for Victims (TFV) is to support programmes aimed at addressing the harms suffered by victims as a consequence of crimes under the jurisdiction of the ICC through physical and psychological rehabilitation and material assistance. In accordance with Rule 98 of the RPE, the TFV fulfils two primary mandates:

- **to implement awards for reparations** ordered by the Court against the convicted person,⁶² and
- **to use the other resources for the benefit of victims** subject to the provisions of Article 79 of the Rome Statute.⁶³

The total TFV resources available for the first year of implementation in 2007/08 was €3,050,000. The TFV receives project proposals from organisations operating in the field and, if proposals are approved, transmits them to the TFV Board and to the relevant ICC Chambers for approval. The TFV's priorities are for engaging in community rehabilitation for and with the victims where the ICC has jurisdiction. The TFV grant-making process emphasises: *participation* by victims in programme planning, *sustainability* of community initiatives, *transparent* and *targeted* granting, and *accessibility* for applicants that have traditionally lacked access to funding, addressing the *special vulnerability of girls and women*, *strengthening capacity* of grantees and *coordinating* efforts to ensure that the selection and management of grants is strategic and coherent.⁶⁴

Out of 42 projects submitted to the TFV in 2007/2008, 34⁶⁵ were submitted to Chambers for approval amounting to approximately €1,400,000 of TFV funding.⁶⁶ It is expected that 380,000 victims will benefit from these projects deemed to have 'incorporated gender-specific interventions to support the special vulnerability of women and girls'.⁶⁷ A scaling up of these projects and the beginning of new projects in Central African Republic (CAR) and Sudan are planned in 2009.⁶⁸ The TFV allocated €650,000 for CAR and other activities in 2009.⁶⁹

61 Situation on 15 August 2008. Figures provided by the Trust Fund for Victims Secretariat.

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

63 Rule 98 (5) of the RPE.

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

65 16 projects in DRC and 18 projects in Northern Uganda.

66 Please note that this amount becomes €1,650,000 when intermediary matching resources are added; *Trust Fund for Victims Background Summary*, August 2008, page 9.

67 *Trust Fund for Victims Background Summary*, August 2008, page 7.

68 *Proposed Budget Programme for 2009 of the International Criminal Court*, ICC-ASP/7/9, 29 July 2008, pages 131-133.

69 *Trust Fund for Victims Background Summary*, August 2008, page 9.

TFV Projects 2008

Uganda	There are 18 projects approved for a total expenditure of €681,598, of which €601,566 is TFV funding. Three projects ⁷⁰ (16.6%) are focused on the direct support for women and girl victims/survivors. ⁷¹
DRC	There are 16 projects approved for a total expenditure of €953,519. The Trust Fund will contribute €789,677, with the balance to be provided by the intermediary organisations. Four projects ⁷² , representing 25% of those approved, provide direct support for women and girl victims/survivors. ⁷³
CAR	There were no projects in 2008.
Sudan	There were no projects in 2008.

ICC Budgetary Matters

	2006	2007	2008
Overall ICC budget	€80,871,800	€88,871,800	€90,382,000
Implementation rate	79.7% ⁷⁴	90.5% ⁷⁵	<i>not available</i>
Implementation rate 1st trimester	<i>not available</i>	21.4% ⁷⁶	23.7% ⁷⁷

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

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

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

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

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

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

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

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

Overview of Trends

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There is a 4% gap between the appointment of men and women to professional posts across the Court (52% men, 48% women). This represents a significant improvement from 2007 (10% gap). This year there has been a 3% increase in the overall number of women appointed to professional positions.

In the Registry, 52% of professional posts are held by women. This is a 2% increase from the figures for 2007. For two years in a row the Registry has the strongest gender statistics. While the appointments to P1–P4 levels are relatively gender balanced, the majority of those appointed to the most senior positions (P5 and D1) are men (nine men, four women).

Overall in the OTP, 42% of the professional posts are held by women. This is a 4% increase from the figures in 2007. However this represents a 16% gap overall in the appointments of men and women to professional positions (58% men, 42% women). There are still significantly more men than women appointed to mid-to-senior level positions (P3–P5) in the OTP.

In the Judiciary (excluding the Judges) there are 16% more female professionals than male (58% women, 42% men). This is an increase of 6% from 2007.

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

All three posts of Heads of Divisions in the Registry are held by men.

The new Registrar appointed by the Judges on 28 February is a woman.

.....

In 2007, there were no women as Heads of Sections or equivalent posts in the OTP. In 2008, there are three women out of 14 Heads of Sections or equivalent posts (21%). Overall, women continue to be under-represented in management and senior level positions in the OTP.

In the Registry, out of 23 Heads of Sections or equivalent, four are vacant. Of the 19 filled posts, nine are occupied by women (47%).

.....

Overall there are 590 staff (including professional and general service staff and elected officials) at the ICC, 291 of whom are professional staff (49.3%).

For the geographical breakdown, excluding language staff (as determined by the ICC), there are 261 professional staff representing 65 nationalities. The percentages per region are the following: WEOG 58%, Africa 18%, GRULAC 11%, Eastern Europe 7%, and Asia 6%. There is no significant difference in the figures for all regions when compared with figures in 2007.

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For the second year in a row, the only region for which the number of women in professional posts is higher than men is GRULAC with 18 women (60%) and 12 men (40%).

In all other regions, the overall percentage of men is higher than the overall percentage of women appointed to professional posts. For the African region, the gender gap is significant with 70% of appointments being men. For nationals from Asian countries the gender disparity is also very high (62.5% men). For both regions there has been an increase in the number of male professionals appointed during 2008.

For the other regions the figures are: WEOG – 51% men & 49% women, and Eastern Europe – 56% men & 44% women.

There has been a significant increase from 2007 in three out of five regions regarding the number of female nationals appointed to professional posts.

In WEOG there has been a 7% increase. In GRULAC there has been a 4% increase. Eastern Europe has had a 3% increase.

.....

With the exception of WEOG, it was not possible to come up with ‘Top 5’ countries by gender per region for lack of female nationals appointed to professional posts. In the case of GRULAC, a ‘Top 4’ with a range of 1–5 female professionals was established and, for Africa and Eastern Europe, a ‘Top 3’ with a range of 1–3 professionals. Asia only has ‘Top 2’ with a range of 1–2 female professionals underscoring the severe lack of female nationals appointed to the ICC.

Similarly, a ‘Top 10’ by gender overall could not be established. The ‘Top 8’ of gender ranges from 1–15 female professionals.

.....

Despite the high number of ratifications from African countries and all the situations before the Court being in Africa, only four professionals from the current situations before the Court have been appointed.⁷⁸ Of these, two are women.

In the Judiciary, only one senior elected position is held by an African⁷⁹. In both the Registry and the OTP, four senior posts are held by nationals from the Africa region. Only one national of an Eastern European country holds a senior post in the Registry and Asia is not represented at this level.⁸⁰

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

.....

All the members elected to the Disciplinary Board for Counsel (two permanent and one alternate) and the Disciplinary Appeals Board for Counsel (two permanent and one alternate) are from WEOG countries.

.....

As of 21 November 2008, there are 264 individuals on the List of Legal Counsel of which 53 are women (20%) and 211 are men (80%). This represents a 1% increase in the number of women appointed to the List of Counsel from 2007. There are four times more men than women recognised as Counsel on the List.

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

79 Judge Akua Kuenyehia, First Vice President.

80 Email communication from Human Resources Section of the ICC, 29 August 2008.

Overview of Trends CONTINUED

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Under Rule 90(4) of the Rules of Procedure and Evidence, the ICC is required to ‘take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of victims, particularly as provided in Article 68(1),⁸¹ are represented and that any conflict of interest is avoided’. This therefore requires the Court to ensure that the List of Legal Counsel includes individuals with expertise on sexual or gender violence. The Registry, in its coordination and oversight of the List of Counsel does not systematically consider this criterion when assessing the eligibility of applicants to the List, and does not actively seek information from applicants with regard to their experience in this area.

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The geographical breakdown in the List of Legal Counsel reflects the same situation as in 2007. The only variation is the 1% increase in appointments from Asia and the 1% decrease in appointments from GRULAC. Even though all the situations currently under investigation by the Court are in Africa, the percentage of individuals appointed from that region did not change from 2007 (26%).

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Of the 264 individuals on the List of Legal Counsel, there are only 28 appointees from the four situations before the Court: 24 from the DRC, two from Uganda, two from CAR and none from Sudan. Of these appointments, only four are women (three from DRC and one from CAR).

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

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

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

.....

Despite explicit mandates within the Rome Statute for legal expertise in relation to sexual and gender violence, and expertise in trauma also related to sexual and gender violence, not a single position has been recruited by the Court with this expertise as the *primary* criterion.⁸² Appointing ICC staff with legal expertise on violence against women or children recognises the significance of crimes against women, and the need for expertise at every level to ensure these crimes are prosecuted.

82 A vacancy of Associate Legal Officer (P2) with Chambers requiring knowledge of legal and gender issues, particularly in relation to crimes of sexual violence, was posted early 2007, but was later cancelled for unknown reasons.

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In a press release dated 26 November 2008,⁸³ the OTP announced the appointment of Professor Catharine MacKinnon as Special Gender Adviser to the Prosecutor. Given Professor MacKinnon's expertise, her appointment will undoubtedly enhance the gender capacity in the OTP and will specifically strengthen the presentation of charges for gender-based crimes. However, as it is a part-time position based outside The Hague, the ability of the post to influence and advise on the day-to-day decisions regarding investigation priorities, the selection of incidents and the construction of an overarching gender strategy will be extremely limited. As such, the OTP should complement this part-time position with the appointment of a Gender Legal Adviser established as a full-time post, based within the OTP in The Hague as advertised in December 2005. Despite the urgent need for the appointment of an internal Gender Legal Adviser, no-one has been interviewed or appointed for the position.

83 [http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/icc%20prosecutor%20appoints%20prof_%20catharine%20a.%20mackinnon%20as%20special%20adviser%20on%20gender%20crimes](http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/icc%20prosecutor%20appoints%20prof_%20catharine%20a.%20mackinnon%20as%20special%20adviser%20on%20gender%20crimes)

Overview of Trends CONTINUED

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During 2008, the TFV submitted 34 projects to the Chambers of the ICC, 18 projects in Uganda and 16 in DRC, amounting to €1,400,000. The total TFV resources available in 2008 amounts to €3,050,000. Of the 18 Ugandan projects, three (17%) focus on direct support to women and girl victims/survivors. Of the 16 projects in the DRC, four (25%) work directly with women and girl victims/survivors.

On the 10th of September 2008, the Board of Directors of the TFV launched a €10 million appeal to assist 1.7 million victims of sexual violence under the jurisdiction of the Court.

.....

One out of five members of the Board of Directors of the Trust Fund is a woman (20% women and 80% men) in breach of the gender equity requirement specified in Resolution ICC-ASP/1/Res 6, para 3 of 9 September 2002. Women are highly represented at the Secretariat of the Trust Fund for Victims where they constitute 73% of the staff. This represents an increase of 6% from 2007.

Institutional Development

Gender Training

Registry

The Victims and Witnesses Unit (VWU) in the Registry organised a lunchtime lecture on the impact of war on women and children in Darfur in October 2007. The support team of the Unit (seven people) participated in general training on trauma during the first half of the year.⁸⁴

Three support assistants participated in a university course on ‘Understanding and Responding to Sexual Violence’ in the UK in September 2008.⁸⁵ A lecture and training with a gender expert on conflict related sexual violence in Bosnia, Afghanistan and Sudan was scheduled to take place on 3 December 2008.

No other information on gender training by the Registry was available to the Women’s Initiatives for Gender Justice.

Office of the Prosecutor

Two staff of the OTP attended a seminar on ‘Prosecuting Sexual and Gender-based Crimes before Internationalized Criminal Courts’ in Washington on 14 October 2008.

On 27 October, the OTP held a lunchtime lecture with feminist scholar Professor Catharine MacKinnon on *The Recognition of Rape as an Act of Genocide – Prosecutor v. Akayesu*.

No other information on gender training by the OTP was available to the Women’s Initiatives for Gender Justice.

Judiciary

No information on gender training was available to the Women’s Initiatives for Gender Justice.

⁸⁴ According to VWU, there will be follow-up training specifically focused on gender-based violence on 21 November 2008.

⁸⁵ Situation as of 4 September 2008. Information provided by the Victims and Witnesses Unit.

Policies

Sexual Harassment Policy⁸⁶

Policy



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

Procedure



Procedures are not featured in the policy itself but are outlined in Chapter X of the Staff Rules. Formal complaints are forwarded to the Disciplinary Advisory Board⁸⁷ which hears the case with brief statements and rebuttals by the staff member who has allegedly violated the Policy, and if the staff member wishes, by a representative (who must be a staff member or a former staff member of his or her choosing). There is no indication in the Staff Rules of a right for complainants to participate in the proceedings nor their access to a representative. The Board must make a decision within 30 days and the staff member may appeal the decision to the Administrative Tribunal of the International Labour Organisation.

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

Training



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

⁸⁶ 'Sexual and Other Forms of Harassment', Administrative Instructions ICC. *Report on the activities of the Court*; ICC-ASP/4/16, 16 September 2005, para 12: http://www2.icc-cpi.int/NR/rdonlyres/264D7935-F9C6-41DD-9F00-E1BA2ACE4F38/278507/ICCASP416_English.pdf Sexual harassment is defined as 'any unwelcome sexual advance, request for sexual favour or other verbal, non-verbal or physical conduct of a sexual nature, which interferes with work, alters or is made a condition of employment, or creates an intimidating, degrading, humiliating, hostile or offensive work environment'.

⁸⁷ The Disciplinary Advisory Board is comprised of one member and two alternate members appointed by the Registrar (in consultation with the Presidency); one member and two alternate members appointed by the Prosecutor; and one member and two alternate members elected by the staff representative body, at least one of whom shall be a staff member of the OTP.

Sexual Harassment Policy continued

Focal point



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

Equal Opportunity Policy⁸⁸

Policy



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

Procedure



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

Training



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

Focal point



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

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

Parental Leave within the Staff Rules

Policy



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

Procedure



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

Training



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

Focal point



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

Compensation of Judges

Policy



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

Procedure



See Recommendations.

Training



See Recommendations.

Focal point



Assembly of States Parties.

Private Legal Obligation of Staff Members⁸⁹

Policy



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

Procedure



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

Training



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

Focal point



No focal point indicated.

⁸⁹ Administrative Instruction ICC/AI/2008/004, 15 August 2008.

Recommendations

Structures

Institutional Development



Structures

.....

- 1 **The Court**, particularly the senior elected officials in each organ, should prioritise cooperation with States Parties in 2009 to develop an effective and comprehensive, independent Oversight Mechanism for the prevention and investigation of acts of serious misconduct, including fraud, corruption, waste, sexual harassment, exploitation and abuse committed by ICC staff in the course of their duties.
- 2 **Urgently appoint** a Gender Legal Adviser to the OTP. This position is mandated by the Rome Statute but no appointments have been made since the establishment of the Court in 2002. This post should be included in the OTP budget for the next financial year.⁹⁰

Alongside the Prosecutor's decision to 'mainstream gender within the activities of the OTP', a 'two-track' approach, involving both gender mainstreaming and designating gender positions, including the Gender Legal Adviser post, across all organs of the Court, is vital for a gender competent Court.

- 3 **The OTP should** adopt internal benchmarks to assist its recruitment practices towards addressing the consistent under-representation of women in professional posts in the OTP, the over-representation of women at the P1 and P2 levels and the significant disparity in appointments in senior posts. At the P3 level there are almost three times as many men as women. At the P4 level there are 64% more men than women and at the P5 level, there are four times more men than women.
- 4 **Form an inter-organ** committee to prepare a three-year plan to address gender and geographical equity and gender competence at the Court. The three-year plan should encourage a proactive role for the Court and provide a common framework for the activities of each organ in recruitment, including specific objectives to guide the Court in its employment practices. The Plan should include indicators and markers to assess progress towards gender and geographical representation across all organs and related bodies, including the Trust Fund for Victims and the ASP Secretariat. The three-year plan could also be integrated into the Court's overall *Strategic Plan* as critical aspects of its strategic goals for 'quality of justice' and being 'a model of public administration'. While the Court's *Strategic Plan* is for the next 10 years, its particular emphasis is on the first three years of implementation. The 10-year plan is on its second year of implementation.
- 5 **As part of the** three-year plan, the Court should establish time-specific 'placement goals' for hiring women and staff from under-represented countries and regions. Placement goals are not quotas, but serve as reasonably attainable objectives or targets that are used to measure progress towards achieving equal employment opportunities, and enable the Court to identify 'problem areas' resulting in disparities in relation to the appointment, promotion or attrition of women or staff from under-represented countries.

⁹⁰ The fine imposed by the ILO on the ICC following the finding of wrongful dismissal of an employee by the Prosecutor (approximately €190,000), is equivalent to 2-3 years salary for a Gender Legal Adviser position.

- 6 **Establish a ceiling** on the number of staff from ‘over-subscribed’ regions, with the view that the ceiling is gender balanced and equitable in all career levels, and actively search, encourage and recruit staff from under-represented regions, with the view that the recruitment is proactive for women, is gender balanced and equitable in all career levels.
- 7 **Apply ‘best practices’** in the recruitment process encouraging those involved in recruitment to undergo training on potential discrimination, including unconscious and institutional gender and racial biases, which may be occurring (ie in relation to establishing criteria, advertising positions, reviewing CVs, recognising diverse expertise and interviewing).
- 8 **Establish ‘search committees’** for professional vacancies comprised of ICC staff, including women and staff from under-represented regions of the Court, especially those with a track record of promoting competence. Search committee members should be encouraged to also undertake training in relation to ‘best practices’ in the recruitment process. A search committee could review or oversee applications after the initial vetting process, participate in or conduct interviews, and participate in the decision concerning appointments.
- 9 **Place greater emphasis** on recruiting expertise (both legal and trauma) in relation to sexual and gender violence across all three organs of the Court. Seek candidates with a background in gender analysis, women’s human rights and/or in dealing with or representing victims of gender-based violence. Include these as primary criteria in new positions and indicate these preferences in job announcements, both on the website and on the *Personal History Form*.
- 10 **Diversify** the advertisement of ICC vacancies in media, email listserves or other means that are accessible to the larger audience:
 - (a) from ‘non-WEOG’; websites, listserves or newsletters of NGO networks, regional or national bar associations, and national or regional print media in countries under-represented among Court staff, and
 - (b) with a background in gender issues, such as websites or newsletters of national, regional and international women’s organisations and networks, national associations of women lawyers, women judges’ associations and women’s networks within other judicial associations such as the International Bar Association, the International Criminal Bar and the International Association of Prosecutors.
- 11 **Engage in proactive** informational outreach activities, such as disseminating information about ICC recruitment during scheduled outreach activities or from field offices, obtaining email listserves from professional associations or NGOs during outreach activities for the purposes of prospective advertisements and specifically inquiring about promising gender competent candidates.

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

- 12 **Develop** a ‘Frequently Asked Questions’ page on the ICC website to promote a better understanding of the application process (describing, for example, which section within the Court vets the applications, the composition of the ‘search committees’, and the average timeframe for a decision).
- 13 **Revisit the** current system of geographical representation of ICC staff and consider adopting a staggered approach to an alternative calculation of geographical representation, which places increasingly less emphasis on contribution and increasingly greater emphasis on membership each consecutive year until the targeted calculation is met.
- 14 **Strengthen** the Human Resources Section of the Court by providing a larger budget for increasing staff in this area. The Human Resources Section is vital for implementing the plans identified by the inter-organ Committee regarding gender and geographical representation.
- 15 **Human Resources** and managers should incorporate into the core training modules and orientation for all staff, gender training specific to the role and functions of the specific Unit, Division or Organ.
- 16 **Seek information** about candidates’ experience of representing victims of gender-based crimes on the application form for List of Legal Counsel. Explicitly encourage applications from lawyers with this experience on the ICC website and develop a ‘Frequently Asked Questions’ page on the ICC website to promote a better understanding of the application process.
- 17 **Increase** the number of women on the List of Legal Counsel and actively promote the List to women’s lawyers associations and within countries with situations before the ICC. Seek information regarding candidates’ experience representing or interviewing victims of gender-based crimes and explicitly encourage applications from lawyers and investigators with such experience (as above). Set time-specific targets to increase the number of women on the Lists of Assistants to Counsel and Professional Investigators (as above).
- 18 **Give consideration** to amending Article 112(3)(b) of the Statute, so that gender competence within the ASP Bureau is mandated, in addition to equitable geographical distribution and adequate representation of the principal legal systems of the world.
- 19 **The Board** and Secretariat of the Trust Fund for Victims should embark on a vigorous fundraising campaign. Currently there is only €3,055,000 in the Fund. More pledges need to be encouraged from States, and individual donors should be sought to contribute to the scheme.
- 20 **The ASP** in November 2008 should approve the request from the Victims and Witnesses Unit for a new position of Trauma Expert with Special Expertise in Gender Based Violence.

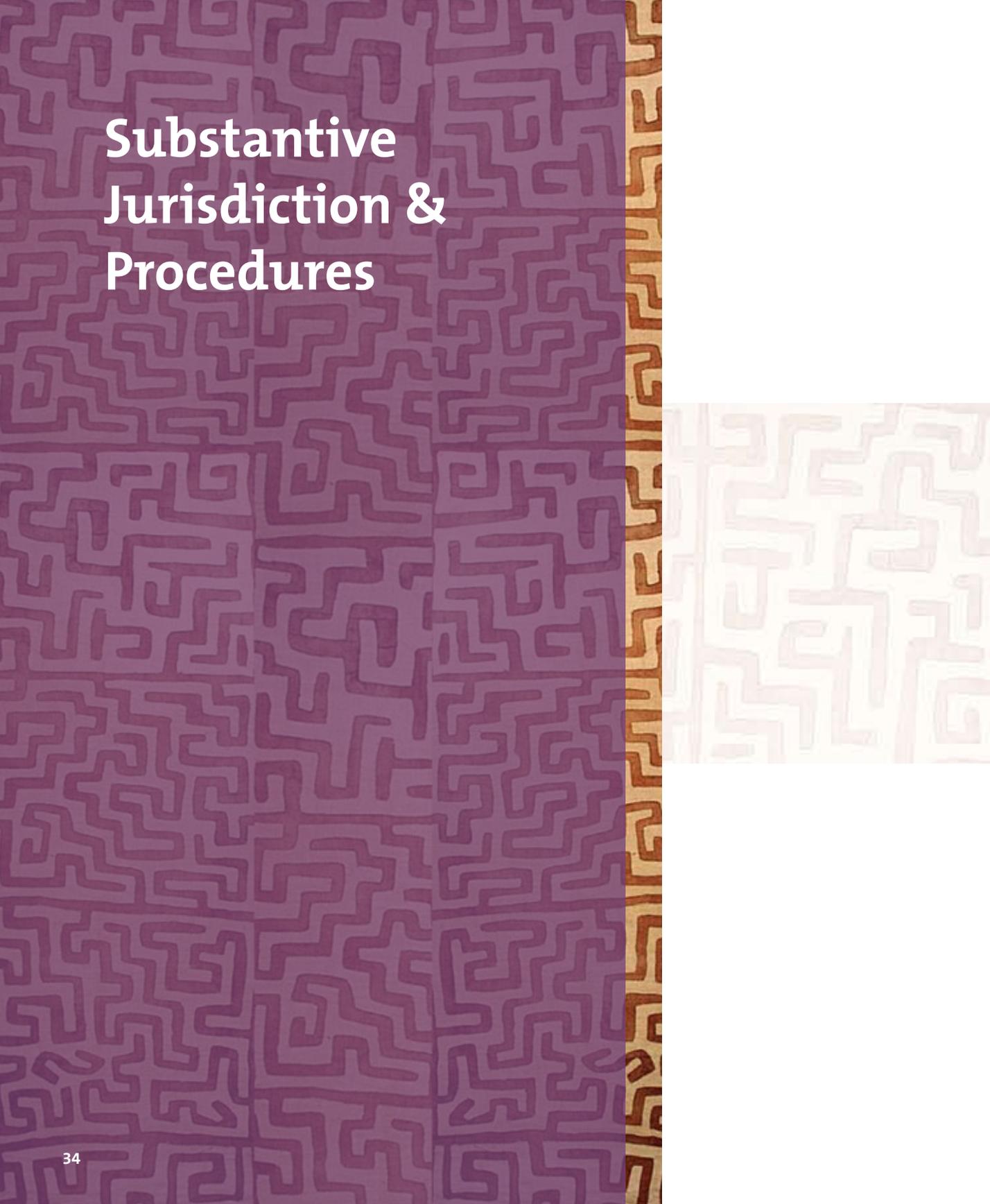
Institutional Development

- 21 **During 2009**, the Presidency of the ICC should oversee a sexual harassment audit of the Court. This should include each organ and be implemented at all levels of the institution. The results of the audit should be shared with the Bureau of the Assembly of States Parties. Recommendations to address any incidents or patterns of harassment should be developed to ensure the legal rights of employees are respected and to provide staff with a non-discriminatory, equality-based, human-rights respecting work environment.
- 22 **In light of** the well publicised decision by the Administrative Tribunal of the International Labour Organisation (ILO)⁹¹ against the Court as a result of the Prosecutor's unlawful termination of an employee following a complaint filed by that employee, it would be timely for the Registry to undertake a review of the Court's internal complaints procedures to ensure they are sufficiently robust, are transparent, provide adequate protection for staff, are effective mechanisms for accountability, uphold the rights of employees, and ensure the positive reputation and good standing of the Court as a whole.
- 23 **Prioritise** the need for ongoing gender training for staff of all organs of the Court and make attendance at gender training seminars mandatory. The President, Registrar and Prosecutor should ensure staff attendance for each organ of the Court.
- 24 **Prioritise** the need for training individuals on the List of Legal Counsel, the List of Assistants to Counsel and the List of Professional Investigators on interviewing/working with victims of rape and other forms of sexual violence and the gender provisions within the Rome Statute.
- 25 **Appoint advisers** with legal expertise on sexual and gender violence⁹² to enable focal points within each organ of the Court to organise and develop gender training.
- 26 **Designate focal points** for the Court's Sexual Harassment Policy and Equal Opportunity Policy, clarify and/or amend the procedure involved in making formal complaints (ie whether complainants have a right to participate in the proceedings before the Disciplinary Advisory Board or whether complainants have access to a representative) and conduct staff-wide orientation on the grievance procedures for both Policies.
- 27 **Implement training** for ICC staff on the grievance procedures for the Sexual Harassment and Equal Opportunity Policies.
- 28 **Develop and promote** a flexible employment policy, so that ICC staff are aware of, and not discouraged from, taking parental leave, modified work schedules or other accommodation as needed. This facilitates the recruitment of, and enables the ongoing employment of, staff members (primarily women) with family and other commitments.

91 *Palme v. ICC*, Judgment Number 2757, 105th Session, 2008, International Labour Organisation Administrative Tribunal.

92 Pursuant to Articles 42(9), 44(2) in combination with 36(8)(b), and 43(6) of the Rome Statute.

- 29 **Ensure adequate access** to and information about childcare resources or facilities, and encourage the Human Resources Section to include additional information on its Recruitment page indicating the ICC is responsive to the needs of those with family commitments.
- 30 **Establish a mentorship programme** for junior staff, particularly female staff and staff from under-represented regions, to support their potential advancement to decision-making and senior positions.
- 31 **Encourage senior personnel** at the Court to participate in training on ‘managing workplace diversity’ to facilitate a positive workplace environment for women and individuals from other under-represented groups and provide the necessary resources to carry this out.
- 32 **Review and amend** the current definition of ‘spouse’ in the Conditions of Service and Compensation of Judges of the ICC to include all domestic partnerships including same-sex partners, whether legally recognised or not under the law of the country of a Judge’s nationality.
- 33 **Develop and implement** sexuality based anti-discrimination training for the Judges and Bureau of the ASP.

The background of the slide is a complex, repeating maze pattern. The left side of the slide is a dark purple color with the maze pattern in a lighter shade. The right side of the slide is white, with a vertical strip of the maze pattern in a light tan color running down the center. The maze pattern consists of interconnected lines forming a series of small, irregular shapes.

Substantive Jurisdiction & Procedures

Substantive Jurisdiction⁹³

War Crimes and Crimes Against Humanity Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilisation and other Sexual Violence

The Rome Statute explicitly recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence as war crimes in international and non-international armed conflict as well as crimes against humanity.⁹⁴

Crimes Against Humanity Persecution and Trafficking

In addition to the crimes of sexual and gender violence discussed 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.⁹⁵

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.⁹⁶

Genocide Rape and Sexual Violence

The Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention.⁹⁷ The EoC specify that 'genocide by causing serious bodily or mental harm [may include] acts of torture, rape, sexual violence or inhuman or degrading treatment'.⁹⁸

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.⁹⁹

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

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

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

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

97 Article 6.

98 Article 6(b) EoC.

99 Article 21(3).

Procedures

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Measures during Investigation and Prosecution

The Prosecutor shall 'take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court and, in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children'.¹⁰⁰

Witness Protection

The Court has an overarching responsibility 'to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses', taking into account all relevant factors including age, gender, health and the nature of the crime, in particular sexual or gender-based crimes. The Prosecutor is required to take these concerns into account in both the investigative and the trial stage. The Court may take appropriate protective measures in the course of a trial, including *in camera* proceedings, allowing the presentation of evidence by electronic means and controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation. The latter measures shall, in particular, be implemented in the case of a victim of sexual violence or a child.¹⁰¹

The Rome Statute provides for the creation of a Victims and Witnesses Unit (VWU) within the Court's Registry. The VWU will provide protective measures, security arrangements, counselling and other appropriate assistance for victims and witnesses who appear before the Court, and others at risk on account of their testimony.¹⁰²

100 Article 54(1)(b).

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

102 Articles 43(6) and 68(4).

Evidence

The RPE provide special evidentiary rules with regard to crimes of sexual violence. Rules 70 ('PRINCIPLES of Evidence in Cases of Sexual Violence'), 71 ('EVIDENCE of Other Sexual Conduct') and 72 ('IN Camera Procedure to Consider Relevance or Admissibility of Evidence') of the RPE stipulate that questioning with regard to the victim's prior or subsequent sexual conduct or the victim's consent is restricted. In addition, Rule 63(4) of the RPE states that corroboration is not a legal requirement to prove any crime falling within the jurisdiction of the Court and in particular crimes of sexual violence.

Participation

The Rome Statute explicitly recognises the right of victims to participate in the justice process, directly or through legal representatives, by presenting their views and concerns at all stages which affect their personal interests.¹⁰³

Rule 90(4) of the RPE requires that there be legal representatives on the List of Legal Counsel with expertise on sexual and gender violence.

Rule 16(1)(d) of the RPE states that the Registrar shall take 'gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings'.

Reparations

The Rome Statute includes a provision enabling the Court to establish principles and, in certain cases, to award reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.¹⁰⁴ The Statute also requires the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and for their families.¹⁰⁵

¹⁰³ Article 68(3). See also Rules 89 – 93 RPE.

¹⁰⁴ Article 75. See also Rules 94 – 97 RPE.

¹⁰⁵ Article 79. See also Rule 98 RPE.

Substantive Work of the ICC and ASP

States Parties/ASP

Office of the Prosecutor

Judiciary

Registry

Trust Fund for Victims

States Parties / ASP

Budget for the ICC

At its 7th Session, 2008, the ASP approved a €96.2 million budget for the ICC, with the option of seeking additional supplements from the ASP if necessary. This approved budget is €5 million below the total budget recommended by the Committee on Budget and Finance (CBF) (€101.2 million) and €9 million below the total budget requested by the ICC (€105.2 million, including a supplement for activities arising from the Bemba case). The Court's requested budget would have represented a 16.32% increase over the 2008 level. The increase in funds requested by the Court was largely due to existing obligations and to the start of a second trial. The ASP has moved to undercut the recommendations of the CBF, the expert body which the Assembly has tasked with undertaking in-depth review of the Court's budget. Under-resourcing could hinder the Court's work in significant areas such as investigations, outreach and field operations, particularly in relation to the protection of witnesses, victims and intermediaries.

Oversight Mechanism

The ASP should urgently develop a comprehensive, independent Oversight Mechanism and staff rules to address serious issues of misconduct, including fraud, corruption, waste, sexual harassment, exploitation, and abuse committed by ICC staff in the course of their work, especially in the field. It should include the waiving of immunity and strict disciplinary accountability for staff that violate these rules, including termination of employment. 'Serious misconduct' should be defined to expressly include sexual violence/abuse and sexual harassment. All staff should be provided with training on these rules.

Oversight of Implementation of Gender Mandates

In 2008, the ASP Bureau again appointed a Facilitator for the issue of geographical representation and gender balance in the recruitment of staff of the Court. As noted previously in the section of the Report dealing with the Court's structures, there is a 4% discrepancy between male and female staff of the Court in professional posts. The 2008 Report of the Bureau¹⁰⁶ has also found that there is a higher incidence of resignations of female staff, and has recommended that steps be taken to understand and address this trend.

The ASP should continue to implement the detailed recommendations contained in the 2007 and 2008 reports of the Bureau on Geographical Representation and Gender Balance.

To assist States in their collective oversight of the implementation of the range of gender mandates within the Rome Statute, we again propose the formation of a Gender Sub-Committee of the ASP. This Gender Sub-Committee will incorporate the work on geographical and gender representation and monitoring implementation of the gender provisions more broadly.

The ICC should continue to implement its strategy for managing human resources to ensure they address imbalances in gender and geographical representation, create an institution supportive of staff learning and development, and provide a safe environment for employees, including an adequate and integrated internal justice system to deal with complaints, grievances, conflicts and disputes.

¹⁰⁶ ICC-ASP/7/21.

Implementing Legislation

States Parties continue to be slow to introduce implementing legislation, with fewer than 50% of the 108 State Parties having passed such legislation. To address this situation, the ASP adopted a resolution in 2007 to introduce a plan of action to achieve universality and full implementation of the Statute. Lack of implementation remains a serious problem, especially given that the Rome Statute anticipates States having the primary jurisdiction for the prosecution of crimes of genocide, war crimes and crimes against humanity committed within their territory.

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

Office of the Prosecutor

Investigation and Prosecution Strategy

During 2008, the Office of the Prosecutor (OTP) continued with investigations into Situations in four countries: Uganda, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR) and Sudan. Overall, the OTP has provided evidence supporting charges against 16 individuals from all four Situations. Three accused and one suspect are in the custody of the Court – Thomas Lubanga Dyilo (DRC)¹⁰⁷, Mathieu Ngudjolo Chui and Germain Katanga (DRC) and Jean Pierre Bemba (CAR).

This year charges were confirmed against Mathieu Ngudjolo Chui ('Ngudjolo') and Germain Katanga in relation to a joint attack on Bogoro, eastern DRC, in February 2003. Charges were confirmed against both suspects in September 2008 and the trial is anticipated to begin in June 2009. Jean Pierre Bemba was arrested in May 2008 in relation to crimes committed in CAR. His confirmation hearing is tentatively set to begin in January 2009. In July 2008, the Prosecutor presented evidence to the Court regarding crimes allegedly committed by President Omar Al Bashir, the current president of Sudan and the first head of state to be indicted by the ICC. In November 2008, the Prosecutor presented evidence to the Court regarding crimes allegedly committed by three unnamed rebel commanders in connection with an attack on UN peacekeepers in Darfur in September 2007.

The Office of the Prosecutor continued its ongoing analysis of the Situation in Colombia,¹⁰⁸ and in August 2008 announced that it was now analysing the Situation involving the recent conflict in Georgia.¹⁰⁹ The Prosecutor has also indicated that he is analysing Situations concerning Afghanistan, Cote d'Ivoire and Kenya.¹¹⁰

¹⁰⁷ Lubanga has been in the custody of the Court since March 2006.

¹⁰⁸ ICC-OTP-20080821-PR347.

¹⁰⁹ ICC-OTP-20080820-PR346.

¹¹⁰ ICC-PK_20081030, p 5.

The first trial before the ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, was due to begin 31 March 2008 but was delayed a number of times due to issues surrounding the disclosure of potentially exculpatory evidence and the use of information obtained through Article 54(3)(e) agreements, meaning information obtained on the condition of confidentiality. On 13 June 2008, before the trial had commenced, the proceedings against Lubanga were stayed after the Trial Chamber concluded that the right of the accused to a fair trial would be violated if the proceedings went forward as scheduled on 23 June. In July, the Chamber ordered the release of Lubanga. The Prosecutor immediately sought leave to appeal both decisions.

On 21 October 2008, the Appeals Chamber overturned the order for Lubanga's release but upheld the Trial Chamber's decision regarding the stay of proceedings. The Appeals Chamber then referred this issue back to the Trial Chamber following the submission by the OTP confirming the availability of the previously undisclosed evidence for review by the Trial Chamber and Appeals Chamber, if necessary. On 18 November 2008, the stay of proceedings was lifted and the trial is provisionally scheduled to begin 26 January 2009. These events are described in more detail later in this section, under the DRC heading.

Similar disclosure issues and the use of Article 54(3)(e) agreements have also featured in the case against Ngudjolo and Katanga, as have issues regarding the protection of witnesses in relation to sexual violence charges. With the major disclosure problems faced in the Lubanga case, however, it is hoped that the Prosecutor will be motivated to resolve similar problems in other cases in a more timely fashion.

On 23 September 2008, the Appeals Chamber made public a decision it issued more than two years ago¹¹¹ on the proper interpretation of the

¹¹¹ ICC-01/04 – 169. This decision was originally issued on 13 July 2006; it was reclassified as public on 23 September 2008 by decision ICC-01/04 – 538.

gravity requirement in Article 17(1)(d) of the Rome Statute. The issue arose in the context of the Prosecutor's application for warrants of arrest for Thomas Lubanga and Bosco Ntaganda in early 2006. Pre-Trial Chamber I granted the Prosecutor's request for a warrant of arrest for Lubanga, but not for Ntaganda. The Chamber found that the case the Prosecutor sought to bring against Ntaganda was not admissible because it was not of sufficient gravity. The charges sought against Ntaganda were identical to those sought against Lubanga; the sole difference was the alleged position of the two men in the hierarchy of their organisation. Lubanga is alleged to have been the President of *Union des patriotes congolais* (UPC) and the founder and Commander-in-Chief of its military wing, *Forces patriotiques pour la libération du Congo* (FPLC), while Ntaganda is alleged to have been the 'Deputy Chief of General Staff for Military Operations, ranked third in the hierarchy of the FPLC'.¹¹²

Pre-Trial Chamber I concluded that the crimes allegedly committed by Ntaganda were not of sufficient gravity because they had not caused 'social alarm' in the international community. It also concluded that Ntaganda did not 'fall within the category of most senior leaders suspected of being most responsible, considering:

- the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and
- the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant Situation'.¹¹³

¹¹² ICC-01/04-02/06.

¹¹³ ICC-01/04 – 169, para 56.

The Pre-Trial Chamber held that Ntaganda did not have *'de jure or de facto* authority to negotiate, sign and implement ceasefires or peace agreements, or participate in negotiations relating to controlling access of MONUC or other UN personnel to Bunia or other parts of the territory of Ituri in the hands of the UPC/FPLC during the second half of 2002 and in 2003'. As such, he could not be considered to be within the category of most senior leaders as defined above.¹¹⁴

The Appeals Chamber ruled that the test developed by Pre-Trial Chamber I for the issuance of an arrest warrant was incorrect. First, the Chamber ruled, the conduct that formed the basis of charges sought by the Prosecutor did not have to be 'large scale or systematic' and did not have to cause 'social alarm' in the international community. Second, there was no requirement that an accused before the Court be within the category of most senior leader. 'Had the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible,' the Chamber noted, 'they could have done so expressly'.¹¹⁵

Since 2003, the Prosecution has opened investigations in four Situations and found sufficient evidence to bring more than 110 charges against a total of 16 suspects. Seven currently face charges for gender-based crimes.¹¹⁶ In October 2005 the OTP announced charges against five Lord's Resistance Army (LRA) commanders including charges against the Leader and Deputy Leader for gender-based crimes in Uganda. As all five suspects were senior commanders they could all have been charged with these crimes given they were responsible for overseeing the attacks during which the sexual violence occurred.

114 ICC-01/04 – 169, paras 63-65.

115 ICC-01/04 – 169, para 79.

116 If the Prosecutor's application for a Warrant of Arrest for Al Bashir is approved, this will bring the number to eight.

The ICC charges for gender-based crimes continue to be weakest in the DRC, a country where the rate of sexual violence is among the highest in the world. No charges for sexual violence have been brought against Lubanga or Ntaganda. It wasn't until 2007 that gender-based crimes were charged in the DRC, with the confirmation in 2008 of five counts of sexual slavery, rape, and outrages upon personal dignity against both Katanga and Ngudjolo. In the Situation in CAR, gender-based crimes figure more prominently and for the first time at the ICC, rape has been charged as torture in the case against Jean Pierre Bemba. Finally, in the Situation in Darfur, both Harun and Kushayb face eight counts each of crimes of sexual and gender violence, and in July the Prosecutor submitted evidence for charges of genocide including rape as genocide in the case against the President Al Bashir of Sudan. Each of these cases is discussed in greater detail below.

Overall, gender-based crimes have now been charged in all four Situations under investigation and the charging strategy in 2008 is bolder than the previous charging pattern particularly with charges of rape as torture and genocide. This progress is also indicative of a greater determination in the investigation of gender-based crimes. The challenge in the next few years for the OTP is to be able to successfully prosecute these charges and in so doing address the purpose and impact of gender-based crimes and contribute to the deterrence of violence against women.

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

Uganda

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

*The Prosecutor v. Joseph Kony et al*¹¹⁷

The five alleged senior leaders of the Lord's Resistance Army (LRA) – Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen – were charged in 2005 with a total of 86 counts of war crimes and crimes against humanity.¹¹⁸ Only two of these five suspects – Joseph Kony and Vincent Otti – have been charged with gender-based crimes. Kony was charged with one count of sexual enslavement as a crime against humanity, one count of rape as a crime against humanity, and one count of inducing rape as a war crime.¹¹⁹ Otti was charged with one count of sexual enslavement as a crime against humanity and one count of inducing rape as a war crime.¹²⁰

Warrants of Arrest were initially issued for all five suspects. However, proceedings against Lukwiya were terminated after confirmation of his death in 2006.¹²¹ In September, the Office of the Prosecutor indicated it has confirmed the death of Vincent Otti as well, and is preparing to terminate proceedings against him.¹²²

Since the publication of the 2007 *Gender Report Card*, the Court has made two formal requests for cooperation to the Government of Uganda, partly in relation to the execution of the remaining Warrants of Arrest.¹²³ These requests are analysed in more detail in the section of this Report reviewing the activity of the Judiciary. Responses from the Government of

Uganda to those requests¹²⁴ indicate there has been no progress in executing these warrants. Uganda argues it is unable to execute the arrest warrants because the accused are no longer on Ugandan territory, but instead have 'for more than three years been based in Garamba National Park in the Democratic Republic of the Congo'.¹²⁵

On 6 October 2008, the Prosecutor issued a statement calling for 'renewed efforts to arrest [Kony] and his top commanders [in light of] serious and converging information on recent attacks by the LRA against civilians' in the Dungu region of the DRC.¹²⁶ On 21 October 2008, the Court made a further formal request for cooperation in this matter, this time not to the Government of Uganda, but to the DRC.¹²⁷ In its request, the Court notes that 'several recent media reports' concur with the statement of the Government of Uganda that the LRA is now based in Garamba National Park in the DRC. It was, the Court noted, 'of the utmost urgency' that the DRC provide the Court with 'a complete update on the status of the execution of the Warrants ... with a view to exercising its powers and fulfilling its duties' under the Rome Statute.

The Government of the DRC has yet to respond to the Court's request. The arrest warrants for Kony, Odhiambo, Otti and Ongwen remain outstanding.

There has been a ceasefire since July 2006 as the Government of Uganda and the LRA held peace talks to end the 22-year conflict. In March 2008, the Women's Initiatives for Gender Justice liaised with the ICC and the LRA civilian Negotiating Team for the Peace Talks to arrange a meeting between these two parties. On 10 March 2008, the LRA Delegation met with the Registry of the ICC – the first time a meeting between the Court and the LRA had been held.¹²⁸ The purpose of the meeting was to inform the Delegation on (1) the structure and process of the ICC as an international court; (2) the current status of the charges and the outstanding arrest warrants against the four LRA commanders; and (3) the procedures for filing motions before the ICC. Despite 15 months of negotiations, the final peace agreement, due to be signed on 10 April 2008, remains unsigned and the peace process appears to have stalled.

117 ICC-02/04-01/05.

118 Kony was charged with a total of 33 counts, Otti with 32, Lukwiya with 4, Odhiambo with 10 and Ongwen with 7. With the proceedings against Lukwiya now at an end, and those against Otti soon to be terminated, a total of 50 counts now remain.

119 ICC-02/04-01/05 – 53.

120 ICC-02/04-01/05 – 54.

121 ICC-02/04-01/05 – 248.

122 A third suspect, Dominic Ongwen, was at one point thought to be dead as well. However, information recently made public regarding DNA tests on a body previously identified as Ongwen's have shown that the body was in fact not his. See ICC-02/04-01/05 – 81, Annex 1.

123 ICC-02/04-01/05 – 274 and ICC-02/04-01/05 – 299.

124 ICC-02/04-01/05 – 286 and ICC-02/04-01/05 – 305.

125 ICC-02/04-01/05 – 305, Annex 2, p 3.

126 ICC-OTP-2008 1006-PR359.

127 ICC-02/04-01/05 – 321.

128 This was also the first time the ICC had met with any militia group or armed force whose leader had been indicted by the ICC.

On 21 October 2008, Pre-Trial Chamber I initiated proceedings, on its own motion, to determine whether the Court continues to have jurisdiction over the case against Joseph Kony and the other alleged senior leaders of the LRA.¹²⁹ An Annexure to the above-mentioned Peace Agreement provides for the establishment of a Special Division of the High Court of Uganda to try individuals alleged to have committed serious crimes during the conflict.¹³⁰ The Chamber noted that, in light of recent statements made by the Government of Uganda that it was now prepared to try Kony and his co-accused on Ugandan soil, it was necessary that the International Criminal Court make its own determination of admissibility in the case.¹³¹

Since 2004, the Women's Initiatives for Gender Justice, the Greater North Women's Voices for Peace Network, and other women's organisations in North and North Eastern Uganda have called on the OTP to investigate all parties to the conflict, specifically allegations of crimes committed by the Uganda People's Defence Force (UPDF) and other Government personnel. In 2008, these groups are still calling for broader investigations to be carried out by the ICC.

129 ICC-02/04-01/05 – 320. The Chamber initiated the proceedings under Article 19(1) of the Rome Statute, which provides that the Court shall satisfy itself that it has jurisdiction in any case brought before it.

130 The Annexure was signed by the Government of Uganda and the LRA on 19 February 2008. The Peace Agreement to which it is annexed has yet to be signed.

131 The Court operates on the principle of complementarity, which means it may only assume jurisdiction over a case if the State where the crime or crimes took place is unwilling or unable to genuinely prosecute the case. When the Government of Uganda initially referred the Situation in Uganda to the Court in 2003, implicit in that referral was the notion that Uganda was not able to prosecute Kony and other senior members of the LRA leadership on its own. The recent statements of the Government of Uganda, however, suggest this is no longer the case.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

The Prosecutor v. Bosco Ntaganda

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

The investigation into the Situation in the Democratic Republic of Congo (DRC) began in June 2004. In opening the investigation, the Prosecutor announced that he would 'investigate grave crimes allegedly committed on the territory of the ... DRC since 1 July 2002'. His announcement included mention of reports from States, international organisations and non-governmental organisations of 'thousands of deaths by mass murder and summary execution in the DRC since 2002'. He noted that the reports pointed to 'a pattern of rape, torture, forced displacement and the illegal use of child soldiers.'¹³²

The OTP investigation in the DRC to date has largely focused on crimes committed in the Ituri region. In September, the Prosecutor announced his intention to investigate crimes committed in North and South Kivu.

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

*The Prosecutor v. Thomas Lubanga Dyilo*¹³³

The first charges arising out of the Situation in the DRC are against Thomas Lubanga Dyilo, president of *Union des patriotes congolais* (UPC) and commander-in-chief of *Forces patriotiques pour la libération du Congo* (FPLC). A Warrant of Arrest issued for Lubanga in February 2006 contained six counts of war crimes arising out of the alleged policy/practice of enlisting and conscripting children under the age of fifteen years into the FPLC, and using those children to participate actively in hostilities.¹³⁴ These charges were

132 'The Office of the Prosecutor of the International Criminal Court opens its first investigation': Press release issued by the Court on 23 June 2004, ICC-OTP-200-40623 – 59.

133 *The Prosecutor v. Thomas Lubanga Dyilo*, case no. ICC-01/04-01/06.

134 Articles 8(2)(b)(xxvi) or Article 8(2)(e)(vi). These charges appear to cover the period from early to mid-September 2002, when Lubanga is alleged to have founded the FPLC and become its commander-in-chief, to the end of December 2003. The Warrant of Arrest for Lubanga can be read in its entirety at ICC-01/04-01/06 – 2.

confirmed by Pre-Trial Chamber I in January 2007.¹³⁵ Despite reports of gender-based crimes allegedly committed by the UPC, as documented by a range of United Nations agencies and NGOs, including the Women's Initiatives for Gender Justice, no gender-based crimes were included in the charges against Lubanga, the first accused to come before the Court.¹³⁶

On 13 June 2008, shortly before Lubanga's trial was scheduled to begin, all proceedings against him were indefinitely stayed by Trial Chamber I.¹³⁷ The Trial Chamber took this extraordinary step due to the failure of the Prosecution to disclose potentially exculpatory material to the Defence, or to make that material available to the Judges of the Chamber.¹³⁸ In arriving at its decision to stay the proceedings, the Trial Chamber weighed a number of factors including the interests of victims and the rights of the accused. Ultimately, the Chamber decided that the trial process had been 'ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial'.¹³⁹ The Chamber's decision was critical of the Prosecution's strategy in the collection and disclosure of evidence, which the judges found, 'constituted a wholesale and serious abuse, and a violation of an important provision of the Rome Statute'.¹⁴⁰

On 2 July 2008, the Trial Chamber granted the Prosecutor leave to appeal this decision. On the same day, the Trial Chamber also ordered that Lubanga be released unconditionally. Since all proceedings against him had been stayed, the Chamber held that Lubanga's detention was no longer necessary, either to ensure his appearance in Court or to protect the investigative process.¹⁴¹ On 7 July 2008, the Appeals Chamber suspended Lubanga's release until the Prosecutor's appeal against the stay of proceedings was decided.

135 ICC-01/04-01/06 – 803.

136 A list of the numerous UN and NGO reports documenting these crimes is set out in the 2006 *Gender Report Card*, p 22.

137 ICC-01/04-01/06 – 1401.

138 Under Article 67(2) of the Rome Statute, the Prosecutor is under an obligation to disclose to the Defence 'evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. Such evidence is referred to in the Decisions of the Court as exculpatory evidence'. The Prosecutor argued that, in the Lubanga case, his hands were tied because the evidence he had in his file was given to him (by the UN and various NGOs) on the strict condition that he keep it confidential and that he not disclose it to anyone, including the Defence.

139 ICC-01/04-01/06 – 1401, para 93.

140 ICC-01/04-01/06 – 1401, para 73.

141 ICC-01/04-01/06 – 1418.

On 21 October 2008, the Appeals Chamber ruled that the Trial Chamber had been correct to stay the proceedings against Lubanga, but had not been correct to order his release. The Appeals Chamber gave the Prosecutor time to come up with a workable solution regarding the disclosure of material, so that the proceedings against Lubanga could resume. On 18 November 2008, the Trial Chamber lifted the stay and set a provisional date of 26 January 2009 for the start of Lubanga's trial.

The Prosecutor v. Bosco Ntaganda ¹⁴²

The second set of charges arising out of the DRC investigation is against Bosco Ntaganda, another high-ranking member of the FPLC.¹⁴³ In August 2006, Pre-Trial Chamber I issued a Warrant of Arrest for Ntaganda,¹⁴⁴ containing six counts of war crimes for enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities.¹⁴⁵ Ntaganda is still at large. He is alleged to have joined forces with Laurent Nkunda, and is implicated in continuing war crimes, including crimes of sexual violence, committed in the North Kivu region of the DRC.¹⁴⁶

142 *The Prosecutor v. Bosco Ntaganda*, case no. 01/04-02/06.

143 The arrest warrant describes Ntaganda as having been, between July 2002 and December 2003, Deputy Chief of General Staff for Military Operations, ranked third in the hierarchy of the FPLC, subordinated only to Thomas Lubanga Dyilo, and to Floribert Kisembo, FPLC Chief of Staff and is also described as being the immediate superior of the FPLC sector commanders and as having both de jure and de facto authority over the FPLC training camp commanders and the FPLC commanders in the field.

144 ICC 01/04-02/06 – 2-Annex. The arrest warrant was originally issued under seal; it was not made public until 28 April 2008.

145 These are the same charges Lubanga faces.

146 It is believed that Ntaganda is currently Chief of Staff of the *Congrès national pour la défense du peuple* (CNDP). In April 2008, the Prosecutor issued a press release stating that the CNDP is one of the groups against which there are credible reports of serious crimes committed in the two Kivu provinces – including sexual crimes of unspeakable cruelty. In the press release, the Prosecutor alleges that, along with the CNDP, such crimes are being committed in the Kivus by FDLR forces, local armed groups and individual members of the regular army. See ICC-OTP-20080429-PR311.

*The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*¹⁴⁷

The third and fourth sets of charges arising out of the DRC investigation are against Germain Katanga and Mathieu Ngudjolo Chui. Katanga is described by Pre-Trial Chamber I as having been, at the time of the events leading to the charges, ‘the highest ranking ... commander’ of the *Force de résistance patriotique en Ituri* (FRPI).¹⁴⁸ In July 2007, the Chamber issued a Warrant for Katanga’s arrest to face charges of crimes against humanity and war crimes. Katanga was already in detention in the DRC at the time the arrest warrant was issued, and on 17 October 2007, the Congolese authorities surrendered him into the custody of the Court.

Mathieu Ngudjolo Chui (Ngudjolo) is described by Pre-Trial Chamber I as having been, at the time of the events leading to the charges, the ‘highest ranking ... commander’ of the *Front des nationalistes et intégrationnistes* (FNI). In July 2007, the Chamber issued a Warrant for Ngudjolo’s arrest to face charges of crimes against humanity and war crimes identical to those faced by Katanga. Ngudjolo was arrested in the DRC and transferred into the custody of the ICC in early February 2008.

On 10 March 2008, Pre-Trial Chamber I granted the Prosecutor’s motion to join the proceedings against Katanga and Ngudjolo.¹⁴⁹ The Chamber ruled that, since both suspects were facing identical charges arising out of the same attacks on Bogoro village in Ituri on 24 February 2003, joint proceedings were preferable for two reasons. First, the Chamber held, joinder of the two cases will enhance both the fairness and the judicial economy of the proceedings,¹⁵⁰ and second, it will minimise the potential impact on witnesses, and better facilitate the protection of their physical and mental well-being.

The charges against Katanga and Ngudjolo changed over the course of the preparations for the confirmation hearing, significantly with charges relating to sexual violence being dropped and later reinstated in a slightly expanded form. At

issue was the action taken by the Prosecutor in preventively relocating two witnesses who he believed faced ‘a concrete risk that they are exposed to as a consequence of their cooperation with the Prosecution’.¹⁵¹ Judge Steiner, Single Judge of Pre-Trial Chamber I, ordered that the evidence provided by these two witnesses – including statements, interview notes and interview transcripts – was inadmissible for the purposes of the confirmation hearing.¹⁵² Judge Steiner made this order as part of a decision that only the Registry has the power to relocate witnesses, and that the Prosecutor did not have the authority under the Statute to take the action he had taken with respect to the two witnesses. The Judge ruled that the exclusion of the evidence of these witnesses was the ‘appropriate remedy for the Prosecution’s unauthorised preventive relocation’. 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’.¹⁵³ Judge Steiner’s decision on 18 April 2008 and the judgement of the Appeals Chamber on 26 November 2008, on the Prosecutor’s appeal of the decision, are discussed in greater detail in the section of this Report dealing with protection issues.

The excluded evidence provided by the two preventively relocated witnesses underpinned the sexual violence charges in the case, which at that point were limited to sexual slavery as a war crime and as a crime against humanity. The Prosecution then decided on 21 April 2008 to drop the charges of sexual slavery from the list of charges to be confirmed.¹⁵⁴ 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. The Prosecution argued that without the evidence provided by the two witnesses, charges of sexual violence became ‘insufficiently substantiated’,¹⁵⁵ 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 is undermined’.¹⁵⁶

The issue regarding the charges was resolved when the two witnesses were admitted into the Court

147 *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, case no. ICC-01/04-01/07.

148 ICC-01/04-01/07 – 1.

149 ICC-01/04-01/07 – 307.

150 By avoiding the need for witnesses to testify more than once about the same events, and by reducing the expenses related to such double-testimony; by avoiding duplication of the evidence; and by avoiding inconsistency in the presentation of the evidence, thereby affording equal treatment to both accused: see ICC-01/04-01/07 – 307, p 8.

151 ICC-01/04-01/07 – 453 para 40.

152 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.

153 ICC-01/04-01/07 – 428, paras 39-40. The Prosecutor, in his appeal of this decision, argued that these witnesses had been penalised without any clear explanation of the rationale and scope of such penalisation. ICC-01/04-01/07 – 453 para 27.

154 ICC-01/04-01/07 – 422.

155 ICC-01/04-01/07 – 453 para 25.

156 ICC-01/04-01/07 – 453 para 30.

Witness protection Programme. New charges were then filed against both Katanga and Ngudjolo on 12 June 2008, including two counts of sexual slavery, two counts of rape, and one count of outrages upon personal dignity.¹⁵⁷ Pursuant to a Pre-Trial Chamber order requesting clarification of certain parts of the charges,¹⁵⁸ the final charges against the two suspects were filed by the Prosecution on 26 June 2008, again including five counts of sexual violence charges.¹⁵⁹

This episode raises two issues. Firstly, the need for more coordination and clarity about the distinct roles of the relevant parties (the VWU and the OTP) in ensuring protection for witnesses. Secondly, that the witness pool for the sexual violence charges is too small and needs to be strengthened and expanded to ensure the charges can be successfully prosecuted at trial.

The Confirmation of Charges hearing was held before Pre-Trial Chamber I from 27 June to 16 July 2008. On 30 September 2008, the Chamber issued a decision confirming charges against each accused for three counts of crimes against humanity and seven counts of war crimes.¹⁶⁰ The crimes against humanity confirmed by the Chamber include murder,¹⁶¹ rape¹⁶² and sexual slavery¹⁶³ and the war crimes confirmed include wilful killing,¹⁶⁴ sexual slavery,¹⁶⁵ rape,¹⁶⁶ using children under the age of fifteen years to participate actively in hostilities,¹⁶⁷ intentionally directing attacks against the civilian population of Bogoro village,¹⁶⁸ pillaging¹⁶⁹ and destruction of property.¹⁷⁰ The Chamber declined to confirm charges against either accused for inhumane acts as a crime against humanity,¹⁷¹ inhuman treatment as a war crime¹⁷² or outrages

157 ICC-01/04-01/07 – 584, Anx 1A and Anx 2A.

158 ICC-01/04-01/07 – 648.

159 ICC-01/04-01/07 – 649, Anx 1A and Anx 2A.

160 ICC-01/04-01/07 – 717.

161 Article 7(1)(a).

162 Article 7(1)(g).

163 Article 7(1)(g).

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

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

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

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

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

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

170 Article 8(2)(b)(xiii). This was not a charge originally pursued by the Prosecutor against either accused; it was in fact added only a short time before the confirmation hearing.

171 Article 7(1)(k).

172 Article 8(2)(a)(ii). There is a discussion of the objective and subjective elements of this charge at paragraphs 355-360 of the charge confirmation decision.

upon personal dignity as a war crime.¹⁷³ The charges against Katanga and Ngudjolo are the first arising out of the Situation in the DRC to include crimes of sexual and gender violence. In confirming the charges of rape and sexual slavery, the Chamber found that there were ‘substantial grounds to believe that [these crimes] were committed by FNI/FRPI members in the aftermath of the ... attack on the village of Bogoro.’¹⁷⁴

In declining to confirm the charges for inhuman treatment and outrages upon personal dignity, the Chamber found that there were substantial grounds to believe that these crimes were committed by FNI/FRPI members in the aftermath of the attack on the village. However, the Chamber found, the Prosecutor had not produced any evidence to show that the commission of these crimes was intended by Katanga and Ngudjolo ‘as part of the common plan to “wipe out” Bogoro Village’, nor sufficient evidence to show that, ‘as a result or part of the implementation of the common plan, these [crimes] would occur in the normal course of events’. The Chamber concluded that the crimes ‘appear to be crimes intended and committed incidentally by the soldiers, during and in the aftermath of the attack on Bogoro Village, without a link to the suspects’ mental element’.¹⁷⁵

Judge Ušacka took a different view from the majority of the Chamber on the confirmation of these charges. She wrote a partly dissenting opinion dealing with the charges for rape and sexual slavery. Concerning these charges, she noted that, although there were substantial grounds to believe these crimes had been committed by FNI/FRPI members in the aftermath of the attack on the village, the Prosecutor’s evidence was ‘insufficient to directly or closely link [the accused] to these crimes’.¹⁷⁶ Rather than declining to confirm the charges, however, Judge Ušacka noted that she would have adjourned the hearing pursuant to Article 61(7)(c)(1) and requested the Prosecutor to provide further evidence on these charges.

The Women’s Initiatives for Gender Justice has consistently emphasised the need for the investigations and charges in respect of the conflict in the eastern DRC to take into account the gender dimensions of this conflict. The Women’s Initiatives has documented 112 cases of rape, sexual enslavement, forced marriage, and other crimes committed primarily by the FRPI, FNI and UPC militia

173 Article 8(2)(b)(xxi). There is a discussion of the objective and subjective elements of this charge at paragraphs 365-372 of the charge confirmation decision.

174 ICC-01/04-01/07 – 717, paras 354, 436 and 444.

175 ICC-01/04-01/07 – 717, paras 377, 570 and 571.

176 ICC-01/04-01/07 – 717, Judge Ušacka’s analysis on this point is set out paras 13-29.

groups in the Ituri region. Our documentation, along with reports by the United Nations and other international and intergovernmental bodies, reveals the systemic nature of sexual violence committed in the context of armed conflict in eastern DRC.

Darfur, Sudan

Sudan is not a State Party to the Rome Statute. However, even where a State is not a State Party, the Statute permits the UN Security Council to refer a Situation to the Prosecutor where genocide, crimes against humanity and/or war crimes ‘appear to have been committed’ in that State.¹⁷⁷ On 31 March 2005, the Security Council referred the Situation in Darfur to the Prosecutor.¹⁷⁸

The Prosecutor opened an investigation on 6 June 2005,¹⁷⁹ and in February 2007, applied to Pre-Trial Chamber I for Warrants of Arrest against two suspects.¹⁸⁰ The Government of Sudan has repeatedly stated it does not recognise the ICC and will not send any suspects to The Hague to stand trial. The Arrest Warrants for Darfur were the first to include charges for crimes of gender and sexual violence. On 14 July 2008, the Prosecutor applied for a third Warrant of Arrest for President Omar Al Bashir of Sudan. On 20 November 2008, the Prosecutor applied for three further Warrants of Arrest against rebel commanders allegedly involved in an attack on UN peacekeepers.

*The Prosecutor v. Ahmad Harun and Ali Kushayb*¹⁸¹

Warrants of Arrest for Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) were issued in May 2007.

Each is charged with both crimes against humanity and war crimes, Harun with a total of 42 counts, and Kushayb with a total of 50. Each is charged with eight counts of crimes of sexual and gender violence. Each is charged with persecution by acts of rape constituting a crime against humanity, rape constituting a crime against humanity, rape constituting a war crime and committing outrages upon personal dignity constituting a war crime. Ali Kushayb, a senior Janjaweed commander, was arrested by the Sudanese Government in 2007 but was released after the Government found there was insufficient evidence to charge him. He was rearrested in October 2008, but the Sudanese Government has yet to turn him over to the ICC. Ahmad Harun is currently Sudan's Minister of State for Humanitarian Affairs, a post to which he was promoted in 2006.

On 14 July 2008, the Prosecutor applied to Pre-Trial Chamber I for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir, the current President of Sudan. The Prosecutor alleges that President Al Bashir is criminally responsible for three counts of genocide, five counts of crimes against humanity, and two counts of war crimes in Darfur. The Al Bashir case marks the first time a Head of State has been indicted by the ICC and the first time charges of genocide have been sought by the Prosecutor, for Al Bashir's complicity in killing members of the Fur, Masalit and Zaghawa ethnic groups,¹⁸² causing serious bodily or mental harm to members of those groups (including by rape)¹⁸³ and deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part.¹⁸⁴ The arrest warrant sought by the Prosecutor, if approved by the Pre-Trial Chamber, will also charge Al Bashir with committing five counts of crimes against humanity including acts of murder,¹⁸⁵ extermination,¹⁸⁶ forcible transfer of the population,¹⁸⁷ torture¹⁸⁸ and rape,¹⁸⁹ as part of a widespread and systematic attack against the civilian population, with knowledge of the attack, and finally with committing two counts of war crimes, for intentionally directing attacks against the civilian population as such, or against individual civilians not taking part in hostilities,¹⁹⁰ and for pillaging a town or place.¹⁹¹

177 Article 13(b).

178 UN Security Council Resolution 1593(S/Res/1593 2005). See also ICC-OTP-20050401-96.

179 ICC-OTP-0606-104.

180 The Warrants were issued by Pre-Trial Chamber I in April 2007; see ICC-02/05-01/07 – 2 and ICC-02/05-01/07 – 3.

181 *The Prosecutor v. Ahmad Muhammad Harun (‘Ahmad Harun’) and Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)* (ICC-02/05-01/07.)

182 Article 6(a).

183 Article 6(b).

184 Article 6(c).

185 Article 7(1)(a).

186 Article 7(1)(b).

187 Article 7(1)(d).

188 Article 7(1)(f).

189 Article 7(1)(g).

190 Article 8(2)(f).

191 Article 8(2)(xvi).

Two of the ten charges sought against Al Bashir are for the rape and sexual assault of women and girls:

- Count 2 for Genocide against the Fur, Masalit and Zaghawa ethnic groups by using the State apparatus, the Armed Forces and Militia/ Janjaweed, to cause serious bodily or mental harm through acts of rape, other forms of sexual violence, torture and forcible displacement, with intent to destroy the groups.
- Count 8 for Crime Against Humanity for rape of women and girls including but not limited to women and girls in Bindisi, Arawala, Shataya, Kailek, Silea, and Sirba and IDP camps.

On 1 October 2008, the Pre-Trial Chamber convened a hearing with the Prosecutor in closed session to receive additional information from him in relation to the Warrant of Arrest he seeks for Al Bashir.¹⁹² On 15 October 2008 the Chamber issued a decision ordering the Prosecutor to submit additional, itemised supporting materials relating to confidential aspects of his application for the Warrant of Arrest.¹⁹³ On 17 November 2008, the Prosecutor submitted this additional material.¹⁹⁴ At the time of publishing this Report, no decision had been issued regarding the Warrant.

On 20 November 2008, the Prosecutor returned to Pre-Trial Chamber I seeking warrants of arrest in a third case relating to the Situation in Darfur.¹⁹⁵ The case arises out of an attack by rebel forces on UN peacekeepers on 29 September 2007 (the 'Haskanita attack'). The charges sought by the Prosecutor against three rebel commanders¹⁹⁶ who allegedly led the attack are for war crimes including violence to life (murder and causing severe injury to peacekeepers),¹⁹⁷ intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission¹⁹⁸ and pillaging.¹⁹⁹ On 9 December 2008, Pre-Trial Chamber I issued a decision requesting that the Prosecutor provide the Chamber, before 26 January 2009, with additional information and supporting materials relating to this application. At the time of publishing this Report, this application remained under review by Pre-Trial Chamber I.

192 ICC-02/05 – 158.

193 ICC-02/05 – 160.

194 ICC-02/05 – 161.

195 ICC-02/05 – 162.

196 The names of the rebel commanders involved were not available on the public redacted version of the document.

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

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

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

CAR

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

The Prosecutor v. Jean-Pierre Bemba Gombo

On 23 May 2008, at the request of the Prosecutor, an 'urgent' Warrant of Arrest for Jean-Pierre Bemba Gombo was issued by Pre-Trial Chamber III.²⁰⁰ The Chamber reviewed the evidence of Bemba's alleged role in the conflict in CAR between October 2002 and March 2003, during which period Bemba is alleged to have been President and Commander-in-Chief of *Mouvement de libération du Congo* (MLC). The Chamber concluded there were reasonable grounds to believe that Bemba was 'criminally responsible, jointly with another person or through other persons', for crimes including rape as both a crime against humanity and a war crime; torture (including acts of rape) as both a crime against humanity and a war crime; and, outrages upon personal dignity, in particular humiliating and degrading treatment, as a war crime.

Bemba was arrested on 24 May 2008 by Belgian authorities acting on behalf of the ICC and was transferred to the Court on 3 July 2008.

On 10 June 2008, Pre-Trial Chamber III issued an amended Warrant of Arrest, adding two further charges against Bemba, one for murder as a crime against humanity, and the other for wilful killing as a war crime.²⁰¹ The Chamber also released a decision giving reasons for issuing the Arrest Warrant.²⁰² The decision contains a detailed discussion of the evidence presented by the Prosecutor to support the charges of rape and other forms of sexual violence.

200 ICC 01/05-01/08 – 1. The Warrant was issued under seal: neither the Warrant itself, nor the fact that it had been issued, were matters of public knowledge until after Bemba had been arrested.

201 ICC 01/05-01/08 – 15.

202 ICC-01/05-01/08 – 14.

With respect to crimes against humanity, the Chamber considered that there were reasonable grounds to believe that the attack directed against the civilian population of CAR was widespread and systematic, and that

a large number of children, women and men were raped under the pretext that they were sympathetic to the rebels and in order to humiliate them or demonstrate their powerlessness to protect their families.²⁰³

The Chamber noted the evidence from a 'medical charity'²⁰⁴ that documented 316 cases of rape in CAR and the evidence that the Prosecutor of the Republic, in Bangui, had received more than 300 reports of rape from the survivors. The Chamber noted that there were reasonable grounds to believe that rapes were committed systematically.

The Chamber noted the Prosecutor's allegation that

members of the MLC committed acts of torture constituting crimes against humanity by inflicting severe or mental pain or suffering through acts of rape or other forms of sexual violence upon civilian women, men and children in the CAR ...²⁰⁵

Concerning this allegation, the Chamber concluded that there were reasonable grounds to believe that acts of torture constituting crimes against humanity were committed.

With respect to war crimes, the Chamber considered that there were reasonable grounds to believe that 'a large number of crimes, such as rape, pillaging and murder were perpetrated by the MLC throughout their progression across the CAR'.²⁰⁶ The Chamber noted the Prosecutor's allegation that 'members of the MLC committed war crimes in the CAR by raping civilian women, men and children' and concluded there were reasonable grounds to believe these rapes had been committed.²⁰⁷

The Chamber also noted the Prosecutor's allegation that 'members of the MLC committed acts of torture constituting war crimes by inflicting severe physical or mental pain or suffering through acts of rape or other forms of sexual violence, upon civilian women, men and children in the CAR' and concluded there were reasonable grounds to believe that these acts of torture constituting war crimes had been committed.²⁰⁸

203 ICC-01/05-01/08 – 14, para 34.

204 ICC-01/05-01/08 – 14, para 34. The medical charity is not named in the decision.

205 ICC-01/05-01/08 – 14, para 41.

206 ICC-01/05-01/08 – 14, para 55.

207 ICC-01/05-01/08 – 14, paras 56-57.

208 ICC-01/05-01/08 – 14, paras 58-59.

Finally, the Chamber noted the Prosecutor's allegation that 'members of the MLC committed outrages upon personal dignity constituting war crimes by humiliating or degrading civilian women, men and children or violating their dignity in some other way, through acts of rape or other forms of sexual violence'. The Chamber concluded that there were reasonable grounds to believe these crimes had been committed.²⁰⁹

Bemba, a Congolese citizen, was one of four Vice Presidents in the transitional government that was in power from 2003-2006, and in 2007 was elected to the national Senate in the DRC. Jean Pierre Bemba is the most senior political figure to be arrested to date on behalf of the ICC. A hearing to confirm the charges against him was originally scheduled to begin in November 2008 but was postponed to allow the Defence more time to prepare.²¹⁰ It was rescheduled for 8-12 December 2008, but was again postponed, tentatively to January 2009, due to the temporary unavailability of one of the Judges.

209 ICC-01/05-01/08 – 14, paras 60-61.

210 ICC-01/05-01/08 – 170.

Judiciary

Key Decisions

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Victim Participation

In 2005, standard application forms were developed by the Victims' Participation and Reparations Section (VPRS) to facilitate victims' applications. A booklet, explaining the functions of the Court, victims' rights and how to complete the participation and reparation forms, was made available on the Court website along with the standard application forms.

In the last 12 months the Chambers have made a number of decisions clarifying further the requirements for victim participants, particularly the proof of identity of the victims. These are reviewed below.

The Court reported to the Assembly of States Parties in October 2008 that to date, it had received a total of 960 applications from persons seeking to participate as victims in ICC proceedings.²¹¹

211 This figure is taken from the *Report on the activities of the Court*, dated 29 October 2008. This document was prepared by the Court for the Assembly of States Parties and is available on the Court's website at ICC-ASP/7/25. However, consistent and accurate information on the numbers of victims applying and accepted to participate is not readily available. Analysis by Women's Initiatives has revealed inconsistencies and information gaps within and between the Court's own documents, and between the victim statistics quoted by different sections of the Court.

The Court is still in the process of defining what it means to have the ‘procedural status of victim’; the rights associated with this status are at issue in several appeals pending before the Appeals Chamber. At this point, the designation refers to victims in respect of whom a Pre-Trial Chamber has granted the right to participate in either the investigation phase of a Situation or the pre-trial stage of a case, or both.²¹² As such, the ‘procedural status of victim’ is distinct from the status a victim will have once accepted to participate in trial proceedings by a Trial Chamber.

At the time of publishing this Report, there are a total of 239 victims with the ‘procedural status of victim’. This number includes 171 victims from the DRC,²¹³ 57 from Uganda²¹⁴ and 11 from Darfur.²¹⁵ As of 1 November 2007, only 17 applicants had been granted the ‘procedural status of victim’ by the Court.²¹⁶ For the year 2008, to date, a total of 222 applicants have been authorised to participate in the proceedings.

212 See, eg ICC-01/04 – 101-tEN-Corr; ICC-02/05 – 110, para 2; and ICC-02/04 – 417, paras. 1-4.

213 Email from the VPRS dated 10 September 2008. On 15 December 2008, Trial Chamber I issued a decision granting 86 additional victims the right to participate in the Lubanga case. Significantly, at least a few of these victims were girl soldiers and victims of gender-based crimes. (See ICC-01/04-01/06 – 1556.) Prior to this decision, only four victims had been granted the right to participate in the case against Lubanga – and, as has been previously noted, none of the four were girls and none were victims of gender-based crimes. This decision will be fully analysed in the 2009 *Gender Report Card*.

214 This includes 17 victims authorised to participate in the Situation; 37 authorised to participate in the case against Kony. Five victims are authorised to participate in both the Situation and the case. See decisions ICC-02/04 – 101, ICC 02/04 – 125, ICC-02/04 – 170 and ICC-02/04 – 172.

215 All of these victims are authorised to participate in the Situation only. See the decision of Judge Kuenyehia at ICC-02/05 – 111.

216 Of these, nine were in the DRC Situation, four in the case against Lubanga, two in the Uganda Situation and six in the case against Kony. These numbers represent some overlap, as some applicants were granted status in both the Situation and the case.

Breakdown of Applications by Situation²¹⁷

Approximately 76% of the applications received relate to the Situation in the DRC and/or one of the three cases arising out of the Situation.²¹⁸ Approximately 18% relate to the Situation in Uganda and/or the case against Kony *et al.*²¹⁹ The Situations in Darfur²²⁰ and CAR²²¹ together account for less than 7% of the applications received by the Court to date.

On 3 October 2008, in the lead-up to the confirmation of charges hearing in the case of *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III received 24 applications from individuals seeking to participate as victims in the proceedings.²²² On 4 November 2008, the Chamber received another 34 applications from individuals seeking participatory status in the proceedings.²²³ The applications are being brought in respect of participation in both the Situation in CAR as well as in the Bemba case.

Breakdown of Applications by Gender²²⁴

Compared to 2007, there is a general decrease in applications by women in most Situations before the Court. This year, approximately 36% of the applications received by the Court are from women, down from 38% in 2007. In DRC, 35% of applicants are women, down from 37% last year. In Uganda, 41% of the applicants are women, the same percentage as last year and in Sudan, 26% of applicants are women from Darfur, down from 27% last year.²²⁵

217 These figures are accurate as of 10 September 2008.

218 The VPRS email indicates that around 625 applications relate to the DRC.

219 The VPRS email indicates that approximately 150 applications relate to Uganda.

220 The VPRS email indicates that 22 applications relate to Darfur.

221 The Court has received 24 applications relating to CAR: see ICC-01/05-01/08 – 184.

222 ICC-01/05-01/08 – 184.

223 ICC-01/05-01/08 – 226.

224 As of August 2008. Figures provided by the VPRS via email 10 September 2008.

225 A gender breakdown is not yet available for the CAR applicants.

In some cases, the gender of the applicant is evident only from the decisions of the Chambers. The Court does not have the complete gender breakdown of those applicants who have been granted the procedural status of victim.

In the case of *Prosecutor v. Mathieu Ngudjolo Chui and Germain Katanga, victims'* participation was significantly greater during the second confirmation of charges hearing, which was held for 11 days between 27 June and 16 July 2008. This is when compared to the limited participation of victims during the first confirmation hearing for the Lubanga case held in November 2006, in which only 4 victims participated. A total of 58 victims, represented by four legal representatives, were authorised to participate in the Katanga and Ngudjolo confirmation hearing. All but four participated anonymously.

In addition to being present in greater numbers, the victims who participated in the Katanga/ Ngudjolo confirmation hearing had at their disposal a much-expanded menu of modalities of participation.²²⁶ The victims in the Lubanga case were authorised to participate only to the extent of receiving notification of public documents contained in the record of the case; attending public sessions of the status conferences leading up to the confirmation hearing and public sessions of the confirmation hearing itself; making opening and closing statements at the confirmation hearing; and, making requests to intervene during the status conferences and the confirmation hearing, which requests would be decided on a case-by-case basis. Victims participating in the Lubanga confirmation hearing were specifically not authorised to adduce evidence or to question witnesses.

²²⁶ This expanded menu of modalities was only available to the non-anonymous victims. This is looked at in more detail in the discussion of the Katanga and Ngudjolo case, below.

Overview of Victims Granted Participation Rights at the ICC*

<i>Situation</i>	Applicants granted participation rights	
	<i>2008</i>	<i>Total to date</i>
Uganda	49	57
Democratic Republic of the Congo	162	171
Central African Republic	0	0
Darfur, Sudan	11	11
Total to date	222	239

* Figures taken from Women's Initiatives for Gender Justice review of publicly available filings, as of 12 December 2008.

The broader and more encompassing rights granted to non-anonymous victims²²⁷ participating in the Katanga/Ngudjolo confirmation hearing are discussed in greater detail under the DRC heading of this section. With one exception, victims' legal representatives made use of all of these expanded modalities at the confirmation hearing. As no witnesses were introduced by either the Prosecution or the Defence, however, the victims had no opportunity to exercise their right to examine such witnesses.

In 2008, the Chambers continued to refine the criteria for victim participation set out in the Rome Statute and the Rules of Procedure and Evidence (RPE). Under Rule 85(a):

- the victim must be a natural person;
- he or she must have suffered harm;
- the crime from which the harm ensued must be within the jurisdiction of the Court; and
- there must be a causal link between the crime and the harm suffered.

The Chambers have confirmed that the crime from which the harm ensued must be one of the four crimes over which the Court has jurisdiction (genocide, crimes against humanity, war crimes and aggression), must have been committed after the coming into force of the Rome Statute; and, must have been committed either on the territory of a State Party, or by one of its nationals.²²⁸

The Chambers also continued to refine the requirements for an application for participation to be considered complete. It is now clear that applications for the procedural status of victim must include, at a minimum, the following information:

- the identity of the applicant;
- the date(s) of crime(s);
- the location(s) of crime(s);
- a description of the harm suffered;
- proof of the applicant's identity; and
- the applicant's signature or thumbprint.

Beyond these requirements, the different Pre-Trial Chambers have each taken slightly different views concerning applications from minors, and proof of consent where the applicant is acting as guardian for or on behalf of another victim.

As noted above, the Chambers also refined and broadened the modalities of participation for victims taking part in confirmation hearings. In July 2008, the Appeals Chamber handed down an important decision concerning the right of victims at trial to both lead evidence of their own and challenge evidence led by the parties. For the most part, however, Chambers ruling on questions related to modalities of participation have made it clear that, rather than laying down hard and fast rules, they will continue to assess, on a case-by-case basis, whether proposed modalities of participation are consistent with Article 68(3) of the Statute. In other words, they will assess whether the personal interests of the victim are affected by the issue in which participation is sought, and whether the modality of participation proposed would be prejudicial to or inconsistent with the rights of the accused, or a fair and impartial trial.

The Chambers also issued a decision during 2008 dealing with the Situation where an individual before the Court has the dual status of victim and witness. This decision is detailed below, in the Lubanga case.

²²⁷ Victims participating anonymously in the Katanga and Ngudjolo confirmation hearing had only the limited modalities of participation available to the victims who participated in the Lubanga confirmation hearing in 2006.

²²⁸ ICC-02/05 – 111, paras 2-3.

Uganda

The Prosecutor v. Joseph Kony et al

On 19 December 2007, Pre-Trial Chamber II issued a decision on the Prosecutor's request for leave to appeal an earlier decision in which the Chamber had granted the procedural status of victim to a total of six victims who sought to participate at the investigation stage of the proceedings.²²⁹ The Prosecutor argued that allowing victims to participate at the investigation stage would have an adverse effect on his investigation, and could affect the fairness of the eventual trial. He argued that, if victims were allowed to participate, their participation should be strictly limited.

The OPCV, acting as Legal Representative for the victims, argued against the Prosecutor's position stating that victims' participation is in fact part of the concept of a fair trial because taking victims' interests into account is one of the things that contributes to the balance in the trial. The OPCV further argued that victims' participation at the investigation stage is all the more essential given that these investigations are about the serious violation of the victims' fundamental rights in the first place. Contrary to OTP's assertion that the participation of victims will have an adverse effect on investigations, the OPCV stated that the 'views and concerns of the victims, when allowed by the relevant Chamber, can help the said Chamber to establish the truth, in addition to the evidence gathered by the Prosecution.'²³⁰

Judge Politi, Single Judge of Pre-Trial Chamber II, agreed with these arguments and ruled that the notion of 'fairness of the proceedings' should apply to all participants in the proceedings, including victims. He held that the idea of a fair trial, as reflected in the Rome Statute, is not confined to trial proceedings but extends to pre-trial proceedings as well.²³¹

On 14 March 2008, Judge Politi issued a decision dealing with 41 new applications for the procedural status of victim. The decision deals, in part, with proof of an applicant's identity. The Judge accepted recommendations made by the VPRS on verifying the proof of identity of applicants.²³² He accepted that the lack of proper identification documents for people in Uganda, particularly people from rural areas, is a 'major problem' and that 'the majority of actual and

potential applicants in Northern Uganda are unable to meet the [current] requirements' for proving their identity as part of their application to participate. These requirements, Judge Politi concluded, 'must be lowered and adapted to the factual circumstances in the region'.²³³ He issued a more extensive list of the types of documents which Pre-Trial Chamber II would, from then on, accept as proof of the identity of an applicant.²³⁴ Where the application is made by someone other than the victim, Judge Politi specified that 'both the identity of the applicant and the identity of the person acting with his or her consent or on his or her behalf must be confirmed by one of the ... listed documents'.²³⁵

Judge Politi also ruled that an applicant was entitled to be granted the procedural status of victim if he or she had suffered mental or emotional harm as a result of a physical injury suffered by another person, even if the person who suffered the physical harm is entirely unrelated to the applicant.

After analysing each application, Judge Politi granted the procedural status of victim to 12 of the applicants.²³⁶

²²⁹ ICC 02/04 – 125, paras 4-6.

²³⁴ These include (1) passport, (2) voter card, (3) certificate of registration issued by the Electoral Commission, (4) driving permit, (5) graduated tax ticket, (6) short or long birth certificate, (7) birth notification card, (8) certificate of amnesty, (9) resident permit or card issued by a Local Council, (10) identification letter issued by a Local Council, (11) letter issued by a leader of an IDP Camp, (12) reunion letter issued by the Resident District Commissioner, (13) identity card issued by a workplace or an educational establishment, (14) camp registration card or card issued by humanitarian relief agencies, such as United Nations High Commissioner for Refugees or the World Food Programme, (15) baptism card, (16) letter issued by a Rehabilitation Centre.

²³⁵ ICC-02/04 – 125, para 7. Judge Politi also ruled that the link existing between a child applying for participation and the person acting on his or her behalf (kinship, guardianship, or legal guardianship) as well as the link existing between a disabled applicant and the person acting on his or her behalf (legal guardianship) should be confirmed by a document attached to the application.

²³⁶ Eight victims were granted the status of victim in the case of *The Prosecutor v. Joseph Kony et al*, and seven victims were granted the status of victims in the context of the Situation in Uganda. However, because three of the applicants were granted status in both the case and the Situation, the total number of applicants granted the status of victim was 12 overall.

²²⁹ ICC-02/04 – 112. This earlier decision was reviewed in the 2007 *Gender Report Card*, p 31.

²³⁰ ICC-02/04 – 112, para 14.

²³¹ ICC-02/04 – 112, paras 27-28.

²³² These recommendations are contained in a report prepared by VPRS at the Chamber's request; see ICC-02/04 – 125 Anx.

One applicant was not granted victim status²³⁷ and, for eight other applicants, Judge Politi requested VPRS to provide corroborating information regarding their applications including the dates of some of the events described.²³⁸ The remaining sixteen applications were deferred, pending receipt of documents verifying identity or the link between a child applicant and a person acting on his or her behalf. The question of legal representation for those who were granted the procedural status of victim in this Decision is dealt with in the section of this Report on Legal Representation for Victims.

On 2 June 2008, Judge Politi ruled that an appeal by the Defence of the above decision could proceed. He limited the appeal to the specific issue of

whether, in order to establish that he or she has suffered mental harm as a result of physical harm suffered by another person, the applicant should have to identify the person who suffered the physical harm, and the nature of the applicant's relationship with that person.

Two victims applied to participate in the appeal of this decision. However, only the victim who was claiming mental harm, having witnessed people being killed and injured, was granted the right to participate.²³⁹ At the time of publishing this Report, the Appeals Chamber had not yet handed down its decision.

On 17 November 2008, Pre-Trial Chamber II issued a decision concerning applications for participation from thirteen individuals.²⁴⁰ Judge Politi rejected five of these applications. Three were rejected because the events described by the applicants occurred before the coming into force of the Rome Statute, meaning that the Court had no jurisdiction over the alleged harms suffered by the applicants. The other two were rejected because of a lack of sufficient corroborating information. The remaining eight applicants were granted the procedural status of victim in the Situation in Uganda.²⁴¹

237 The reason for the denial of victim status was that the crimes this applicant was alleged to have been a victim of occurred between 1998 and 2001 and therefore did not fall within the temporal jurisdiction of the Court.

238 And specifically, whether the events occurred before or after 1 July 2002.

239 ICC-02/04 – 164.

240 ICC-02/04 – 170. Some of these applications had been before the Chamber on 14 March 2008 but had been deferred pending receipt of further information and/or documentation.

241 Due to the way the decision is written, and to the number of redactions made to the version of it which is publicly available, it is not possible to determine the gender of these eight victims.

On 21 November 2008, Pre-Trial Chamber II issued a decision concerning applications for participation from another 57 individuals.²⁴² Judge Politi granted three applicants the procedural status of victim in the Situation. Another 27 were granted procedural status in the Kony case. One applicant was granted procedural status in both the Situation and the case. Of the 30 applicants granted procedural status, 16 are women and 14 are men. Of the 16 women, only one is alleged to have been a victim of sexual violence. Judge Politi notes that this victim '... as well as other women abductees were subjected to rape and to being given to commanders as their wives, which resulted in her becoming pregnant' and also describes her as having been 'raped and forcibly made pregnant'.²⁴³ This decision brings to 57 the total number of victims authorised to participate in either the Situation in Uganda, the case against Kony *et al*, or both.

242 ICC-02/04 – 172.

243 ICC-02/04 – 172, paras 275-276.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

The Prosecutor v. Bosco Ntaganda

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

DRC Situation

On 7 December 2007, Pre-Trial Chamber I issued a decision concerning ‘the object and purpose of the application process’ for victim participation.²⁴⁴ Judge Steiner, Single Judge of the Chamber, confirmed that

- the stage of investigation into a Situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation as provided for in Article 68(3) of the Statute; and
- accordingly, there is a procedural status of victim in relation to Situation and case proceedings before the Pre-Trial Chamber.

Judge Steiner also confirmed that the fact that one or more persons may be entitled to the procedural status of victims is not *per se* prejudicial to the Defence.²⁴⁵ She held that that since the victim application process is not related to questions pertaining to the guilt or innocence of accused persons, or to the credibility of Prosecution witnesses, it ‘can be distinguished from criminal proceedings before the Court’, and that the process was also not related to the award of reparations. On that basis, she rejected a request from the Office of Public Counsel for the Defence (OPCD) for disclosure of information extrinsic to the applications.²⁴⁶ The OPCD argued that such extrinsic

244 This decision and the one immediately following are included in the 2008 *Gender Report Card* because, due to their release late in 2007, we were not able to include them in the 2007 *Gender Report Card*.

245 ICC-01/04 – 417, paras 1-4. The Single Judge also confirmed that the Statute grants the Pre-Trial Chamber discretion to determine the modalities of participation attached to any such procedural status.

246 Specifically, the OPCD wanted disclosure of information suggesting that the intensity of hostilities in the applicants’ villages did not meet the threshold for an armed conflict, that the villages may have been inhabited by persons affiliated with armed groups, that the applicants themselves may have had links to armed groups or may have committed criminal acts, and any other information impacting on the applicants’ credibility. The OPCD also requested disclosure of any information concerning applicants’ possible pre-existing medical conditions, as well as whether the applicants may have been investigated or convicted in any national proceedings, whether they have a relationship with persons who have previously filed applications with the Court (and if so what the relationship is), whether the

information ‘could contain information which could be exculpatory to a future, but as yet undetermined, accused’.²⁴⁷ The Judge ruled that none of the extrinsic information sought by the OPCD was necessary for the purposes of arriving at a decision on the applications for participation, and for that reason its disclosure could not be ordered. The OPCD has appealed this decision.²⁴⁸

On 24 December 2007, Pre-Trial Chamber I issued a decision granting the procedural status of victim to a total of 68 applicants, bringing to 77 the total number of victims authorised to participate in the DRC Situation as of the end of 2007.²⁴⁹

Judge Steiner, Single Judge of the Chamber, noted in making the decision that she can only assess applications once they are complete. She confirmed that applications are not complete if they do not contain: the identity of the applicant; the date and location of the crime(s); a description of the harm suffered as a result of the crime; proof of the applicant’s identity; the applicant’s signature or thumbprint ‘on the document, at the very least, on the last page of the application’; the express consent of the victim where the application is made by someone other than the victim; and, where the application is made by someone acting on behalf of the victim, proof of kinship or legal guardianship.²⁵⁰

Concerning the types of identity documents required, the Judge noted that the Chamber was aware that in regions ravaged by conflict, civil status records may be unavailable, or too difficult or expensive to obtain. She reiterated that the Chamber is willing to accept a range of documents not usually sufficient on their own for proof of identity.²⁵¹

interpreters or witnesses have any kind of relationship with the applicants, whether they themselves submitted a victim application, and finally information as to the qualifications of the interpreters.

247 ICC-01/04 – 417, para 10.

248 Leave to appeal was granted on 23 January 2008 by decision ICC-01/04 – 438. The OPCD filed its Appeal Brief on 4 February 2008; see ICC-01/04 – 440.

249 Pre-Trial Chamber I previously issued two decisions granting the procedural status of victim to applicants in the DRC Situation. Six applicants were granted victim status on 17 January 2006 (see ICC-01/04 – 101) and to a further three applicants were granted status on 31 July 2006 (see ICC-01/04 – 177).

250 ICC-01/04 – 423, para 14.

251 ICC-01/04 – 423, para 15. Allowable documents include national identity cards; passports; birth, death and marriage certificates; family registration booklets; wills; driving licences; cards from a humanitarian agency; voting cards; student or pupil identity cards; letters from

The Judge also rejected an argument made by the OPCD that applicants, to be successful, should have to prove they have not simultaneously submitted a claim before another body or court.²⁵²

On 3 July 2008, Pre-Trial Chamber I issued a decision on another 50 applications for participation in the Situation in the DRC.²⁵³ Judge Ušacka, Single Judge of the Chamber, granted the procedural status of victim to 32 applicants. This brought to 160 the total number granted procedural status as victims in either the DRC Situation or one of the cases arising out of the Situation by mid-2008.²⁵⁴ Of those applicants granted procedural status in this decision, eight were former child soldiers. Three of the eight were girls.²⁵⁵ The Judge found that there was evidence that each of the three had been forcibly recruited into the UPC at age 13 and ‘given as a wife’ to a UPC member. Two of the three had given birth to a child, and were unable to reintegrate into their communities after demobilisation.²⁵⁶

On 4 November 2008, Pre-Trial Chamber I issued a decision concerning another set of applications for the procedural status of victim in the proceedings of the Situation in the DRC.²⁵⁷ Judge Ušacka granted status to 30 of the applicants; 15 are women and two were victims of crimes of sexual violence.²⁵⁸ With the 30 victims granted status in this decision, there are, as of November 2008, a total of 190 victims authorised to participate in proceedings in either the Situation in the DRC or one of the cases arising out of that Situation, or both.

a local authority; camp registration cards; documents pertaining to medical treatment; employee identity cards; baptism cards; certificates attesting to loss of official documents; school documents; church membership cards; association and political membership cards; documents issued in rehabilitation centres for children associated with armed groups; certificates of nationality; and pension booklets. The Court will also allow a statement signed by two witnesses attesting to the identity of the applicant or the relationship between the alleged victim and the person acting on his or her behalf, provided that there is consistency between the statement and the application. The statement should be accompanied by proof of identity of the two witnesses.

252 ICC-01/04 – 423, para 8.

253 ICC-01/04 – 505.

254 This total includes 58 victims who were granted the right to participate in the Katanga and Ngudjolo case, and four authorised to participate in the Lubanga case. All of these victims are also authorised to participate in the DRC Situation.

255 Each of the three was still a minor at the time of her application being considered by the Chamber.

256 ICC-01/04 – 505, paras 91-94 and 97-98.

257 ICC-01/04 – 545.

258 ICC-01/04 – 545, paras 39-40 and 86-87.

The Prosecutor v. Thomas Lubanga Dyilo

On 18 January 2008, Trial Chamber I issued a decision on victim participation in the Lubanga case.²⁵⁹ This decision outlined victim participation at trial, including the criteria for participation, modalities of participation, and other related issues such as common legal representation and protection. The key points of this decision are summarised below. The 18 January decision was appealed, and on 26 February 2008, Trial Chamber I granted leave to appeal on limited issues.²⁶⁰ The subsequent Appeals Chamber decision, handed down on 11 July 2008, is also discussed in detail below.

According to the 18 January decision, in determining whether a victim can participate at trial, the Trial Chamber must consider whether the victim is a natural or legal person.²⁶¹ It will also consider any evidence that the applicant suffered harm ‘as a result of the commission of a crime within the jurisdiction of the Court’, noting that harm can be defined as physical or mental injury, emotional suffering, economic loss, or substantial impairment of his or her fundamental rights.²⁶² The Trial Chamber found that the right to participate during the trial stage is principally dependent on whether the victim’s personal interests are affected, and significantly found that the Rome Statute and the RPE do *not* provide that such participation is restricted to victims of crimes contained in the charges confirmed by the Pre-Trial Chamber.²⁶³ This was one of the key issues considered by the Appeals Chamber, which came to a different decision, as will be discussed below.

The Trial Chamber also made a number of important rulings on the modalities of victims’ participation at trial. Victims must file written applications describing how their personal interests are affected by each stage of the proceedings, and detailing their proposed intervention. The Trial Chamber must then determine whether participation would be appropriate, and ‘consistent with the rights of the defence to a fair and expeditious trial’.²⁶⁴ The Trial

259 ICC-01/04-01/06 – 1119, with a separate and dissenting opinion by Judge Blattman.

260 ICC-01/04-01/06 – 1191.

261 ICC-01/04-01/06 – 1119, paras 87-89. The Trial Chamber has set out a range of documents that a victim may use to establish identity, and alternatively stated that they will consider a signed statement by two credible witnesses under certain circumstances. In such instances the witnesses should be persons of standing in the community.

262 ICC-01/04-01/06 – 1119, paras 90-92.

263 ICC-01/04-01/06 – 1119, para 93.

264 ICC-01/04-01/06 – 1119, paras 103-104.

Chamber ruled that victims have the right to consult the record of the proceedings, and will have access to public filings, although access to confidential filings may be considered if victims can prove their material relevance.²⁶⁵ The Trial Chamber also ruled that victims participating in the proceedings have broad rights with respect to evidence before the Court, including the right to tender and examine evidence, 'if in the view of the Chamber it will assist in the determination of the truth', and the right to make submissions on matters of evidence.²⁶⁶ This ruling was also taken up on appeal and is discussed further below.

The decision further addresses victims' rights to participate in hearings and status conferences, including in certain circumstances, *ex-parte* proceedings,²⁶⁷ and the right to initiate procedures through filings and requests subject to Trial Chamber approval.²⁶⁸

With respect to evidence regarding reparations, the Trial Chamber decided to hear the evidence during the trial, rather than as a separate procedure after the trial, so as to ensure proceedings are expeditious and effective, and to avoid unnecessary hardship or unfairness to witnesses who might otherwise have to appear twice, and to guarantee the preservation of evidence. 'The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular phase.'²⁶⁹

The 18 January decision discusses some of the criteria the Trial Chamber may consider when exercising its powers to request victims or a group of victims to choose a common legal representative.²⁷⁰ It addresses protective and special measures for victims, recognising that children, elderly victims, victims with disabilities, and victims of sexual and gender violence will all have special needs that must be taken into account when participating in the proceedings.²⁷¹ The Trial Chamber also notes that anonymity for participating victims may be permitted under some circumstances, although it is an exceptional measure to be granted with extreme care and with reference to the fundamental guarantee for the accused of a fair trial.²⁷²

Finally, and significantly, the Trial Chamber found that Rome Statute Article 43(6) makes the Court's

265 ICC-01/04-01/06 – 1119, paras 105-106.

266 ICC-01/04-01/06 – 1119, paras 108-111.

267 ICC-01/04-01/06 – 1119, paras 112-117.

268 ICC-01/04-01/06 – 1119, para 118.

269 ICC-01/04-01/06 – 1119, paras 119-121.

270 ICC-01/04-01/06 – 1119, paras 123-126.

271 ICC-01/04-01/06 – 1119, paras 127-128.

272 ICC-01/04-01/06 – 1119, paras 130-131.

Victims and Witnesses Unit (VWU) responsible for the protection of victims who have applied to participate, from the moment at which the application form is received by the Court. 'Whilst the Chamber readily understands that considerable demands are made on the Victims and Witnesses Unit and there are undoubted limitations on the extent of the protective measures that can be provided, nonetheless to the extent that protection can realistically be provided by the Court during the application process, the responsibility for this rests with the Victims and Witnesses Unit, pursuant to Article 43(6).'273

In light of appeals filed from the Trial Chamber's 18 January decision, the Trial Chamber certified, on 26 February 2008, the limited issues for appeal, as follows:

- whether the notion of victim necessarily implies the existence of personal and direct harm;
- whether the harm alleged by a victim and the concept of 'personal interests' under Article 68 of the Statute must be linked with the charges against the accused; and
- whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.²⁷⁴

On 11 July 2008, the Appeals Chamber addressed the aspects of victim participation certified for appeal.²⁷⁵ On the first issue, the Appeals Chamber ruled that the harm suffered by an individual applying for victim status may be physical harm, psychological harm or material harm, but that it must have been personally suffered by the applicant, even though it may be suffered indirectly.²⁷⁶ Harm may be both individual and collective, as long as it is also personal to the individual victim.²⁷⁷

On the second issue, the Appeals Chamber ruled that only victims of the crimes charged may participate in proceedings. They reasoned that only these victims will be able to demonstrate that their personal interests are affected by the trial proceedings. 'Once the charges in a case against an accused have been confirmed, the subject matter of the proceedings in that case is defined by the crimes charged.'²⁷⁸

273 ICC-01/04-01/06 – 1119, paras 136-137.

274 ICC-01/04-01/06 – 1191, para 54.

275 ICC-01/04-01/06 – 1432, Judges Pikić and Kirsch issued partly dissenting opinions. Judge Pikić's dissenting opinion appears at pages 37-44 of the decision, and Judge Kirsch's appears in a separately filed annex (ICC-01/04-01/06 – 1432-Anx).

276 ICC-01/04-01/06 – 1432, paras 32 and 38.

277 ICC-01/04-01/06 – 1432, para 35.

278 ICC-01/04-01/06 – 1432, para 62.

Finally, the Appeals Chamber addressed the right of participating victims to lead evidence at trial or to challenge its admissibility or relevance. The Chamber underscored that ‘the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence’,²⁷⁹ but ruled that there was nothing in the Statute precluding victims from leading and challenging evidence in appropriate circumstances. The Appeals Chamber emphasised that victim participation in the proceedings must be meaningful and not merely symbolic. The Chamber noted that, without such modalities available to them, the right of victims to participate in the trial ‘would potentially become ineffectual’.²⁸⁰

The Appeals Chamber provided a list of examples of circumstances when victims might appropriately challenge evidence. These include circumstances where the presentation of the piece of evidence affects the personal interests of the victim because of the consequences it might have on their possible right to reparations, but also because it might be directly prejudicial to them in that:

- it violates the rules of confidentiality, in particular, if the confidentiality affects victim protection;
- it was obtained by a means which violates an internationally recognised human right of the victim or a family member;
- its presentation might be harmful to their security and safety or dignity;
- it would violate the principles set out in the Rules of Procedure and Evidence that are intended to protect victims of sexual violence²⁸¹; or
- it would violate an arrangement with the victim or a family member.²⁸²

The Appeals Chamber concluded that as long as appropriate safeguards were in place, the right of victims to lead evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of the evidence, is not inconsistent with either the Prosecutor’s burden of proof or with the rights of the accused.²⁸³

279 ICC-01/04-01/06 – 1432, para 93.

280 ICC-01/04-01/06 – 1432, para 97.

281 Rules 70, 71.

282 ICC-01/04-01/06 – 1432, para 103.

283 Para. 104. The appropriate safeguards envisaged by the Chamber include: (1) a discrete application; (2) notice to the parties; (3) demonstration of personal interests that are affected by the specific proceedings; (4) compliance with disclosure obligations and protection orders; (5) determination of appropriateness; and (6) consistency with the rights of the accused and a fair trial.

On 5 June 2008, the Trial Chamber issued a decision identifying the key principles to be applied to individuals with the dual status of victim *and* witness.²⁸⁴ These are:

- participation by an individual as a victim in the proceedings shall not compromise his or her security;
- the fact that an individual has dual status does not grant him or her rights in addition to those of someone who is only a victim or a witness; and
- communication between the different sections of the Registry, as the Court’s neutral body with principal responsibility for the protection of witnesses and victims, must be direct and continuous.

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

On 10 June 2008, Judge Kuenyehia, Single Judge of Pre-Trial Chamber I, issued a decision on the first set of applications for participatory status filed in the Katanga case. The Judge granted the procedural status of victim to a total of 51 applicants.²⁸⁵ Each of these victims was also granted procedural status in the Situation in the DRC.

On 13 May 2008, Pre-Trial Chamber I issued a decision setting out the modalities of participation available to victims who were authorised to participate either anonymously or non-anonymously in the confirmation of charges hearing.²⁸⁶ In the Katanga and Ngudjolo case, the anonymous victims were limited to the same procedural rights accorded to the victims in the Lubanga case. These included the rights to receive notification of public documents contained in the record of the case; attend public sessions of the status conferences leading up to the confirmation hearing and the public sessions of the confirmation hearing itself; make opening and closing statements at the confirmation hearing; and, make requests to intervene during the status conferences and the confirmation hearing, which requests would be decided on a case-by-case basis. Victims participating in the Lubanga confirmation hearing were specifically *not* authorised to adduce evidence or to question witnesses.

However, the Pre-Trial Chamber’s decision in Katanga/ Ngudjolo granted the non-anonymous victims the rights to have access to all filings and decisions contained in the record of the case, whether these are

284 ICC-01/04-01/06 – 1379.

285 ICC-01/04-01/07 – 579.

286 ICC-01/04-01/07 – 474.

classified as public or confidential;²⁸⁷ to be notified on the same basis as the Prosecution and the Defence of all decisions, requests, motions, responses and other procedural documents filed in the record of the case;²⁸⁸ to have access to the transcripts of hearings contained in the record of the case, whether classified as public or confidential;²⁸⁹ to be notified on the same basis as the Prosecution and the Defence of all proceedings before the Court, including public and closed session hearings;²⁹⁰ any postponement of those hearings, and the date of delivery of any decisions; to have access to the evidence proposed by the Prosecution and the Defence, and contained in the record of the case; to raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the confirmation hearing;²⁹¹ to attend all public and closed session hearings leading up to the confirmation hearing, as well as all public and closed sessions of the confirmation hearing itself; and, both in the lead up to and at the confirmation hearing, to participate by way of oral motions, responses and submissions, and to file written motions, responses and replies.²⁹²

Non-anonymous victims were accorded the rights to make opening and closing statements at the confirmation hearing; to make submissions on the admissibility or probative value of evidence on which the Prosecution and the Defence intend to rely; to examine such evidence; and, to examine any witness introduced by the Prosecution or the Defence.

287 But not to those classified as *'ex parte'*.

288 Except those classified as *'ex parte'*.

289 But not those classified as *'ex parte'*.

290 Including those held on an *'ex parte'* basis.

291 ICC-01/04-01/07 – 474, paras 124-143.

292 Except those held on an *'ex parte'* basis.

Darfur, Sudan

The Prosecutor v. Ahmad Harun and Ali Kushayb

On 3 December and 6 December 2007, Judge Kuenyehia, Single Judge of Pre-Trial Chamber I, issued two decisions concerning 21 applicants seeking the procedural status of victim in the Situation in Darfur.

The decision of 3 December 2007 dealt with a request by the OPCD²⁹³ to order the applicants to produce and provide copies of 'relevant supporting documentation', before the Chamber rules on such applications. The OPCD also argued that each applicant should prove that he or she had exhausted all domestic legal remedies available to them, before he or she could be granted the procedural status of victim. Also, the OPCD argued that the Prosecutor should be required to search for and disclose any exculpatory material in the victims' applications.

Judge Kuenyehia rejected all of these arguments. She reminded the parties that the object and purpose of the victim application process is only to determine whether the 'procedural status of victim' should be granted to applicants. Therefore, the application process 'can be distinguished from criminal proceedings before the Court'.²⁹⁴ The victim application process, Judge Kuenyehia recalled, only requires an applicant to demonstrate that there are 'grounds to believe' that the applicant is a 'victim' as this term is defined in the Court's Rules.²⁹⁵

Judge Kuenyehia also ruled that the exhaustion of domestic remedies is not a condition applicants must fulfil before they will be granted the procedural status of victim as it is for victims who wish to bring their cases before the European Court of Human Rights or the American Court of Human Rights.²⁹⁶

293 ICC-02/05 – 95.

294 ICC-02/05 – 110, paras 5-6.

295 ICC-02/05 – 110, para 8. This is the standard of proof where an applicant seeks to participate in the investigation stage of a Situation. If he or she seeks to participate in the pre-trial stage of a case, there must be 'reasonable grounds to believe' that he or she is a victim as defined in the Rules.

296 ICC-02/05 – 110, para 11. Victims seeking to bring their cases before either the European Court of Human Rights or the American Court of Human Rights must first show that they have exhausted all domestic remedies, and the OPCD argued that the same requirement should apply to those applying to participate in proceedings before the ICC.

On 6 December 2007, Judge Kuenyehia considered whether the 21 victim applications could be accepted. Pre-Trial Chamber I, she recalled, had already established the ‘core principles and requirements for victim participation at the Situation stage’. She ruled that it is not necessary for an applicant to show how his or her ‘personal interests’ are affected at this stage. This is because

the personal interests of victims are affected in general at the investigation stage, since the participation of victims can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for harm suffered.²⁹⁷

After examining each of the 21 applications, Judge Kuenyehia granted the procedural status of victim to 11 applicants. Two applicants were found to be dead, and as such are not ‘natural persons’ within the meaning of Rule 85(a). Eight applications were incomplete and rejected. Of the 11 applicants granted procedural status, only three are women.²⁹⁸

Appeals are currently underway in relation to both of Judge Kuenyehia’s December 2007 decisions. The OPCD is appealing from the decision of 3 December 2007,²⁹⁹ and both the Prosecutor and the OPCD are appealing from the decision of 6 December 2007.³⁰⁰ The Victims’ Legal Representatives applied for permission to participate in these appeals, and on 18 June 2008, the Appeals Chamber ruled that the victims would be permitted to participate.³⁰¹ Judge Pillay, Presiding Judge of the Appeals Chamber,³⁰² noted that the issues involved in the appeals, viewed collectively, ‘concern the manner in which applications by victims to participate at the investigation stage of a Situation and the pre-trial stage of a case should be addressed’.³⁰³

297 ICC-02/05 – 110, paras 10 and 11.

298 It is not possible to discern the gender of all ten of the applicants to whom status was denied, as the Judge uses gender-identifying language with respect to only some of them.

299 ICC-02/05 – 112.

300 ICC-02/05 – 113 and ICC-02/05 – 114.

301 ICC-02/05 – 138.

302 Judge Pillay resigned as the Presiding Judge of the Appeals Chamber effective 31 August 2008, and took up her new post as UN High Commissioner for Human Rights on 1 September 2008. She was replaced in the Appeals Chamber by Judge Daniel Nsereko of Uganda.

303 ICC-02/05 – 138, para 27.

Noting that the Appeals Chamber had already ruled that victims can participate in interlocutory appeals if it can be shown that their personal interests are affected by the issues on appeal,³⁰⁴ Judge Pillay ruled that these 11 victims had met that threshold. She ruled that it was desirable that the views of victims be heard in appeals of this nature.³⁰⁵

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

On 3 October 2008, Pre-Trial Chamber III received 24 applications from individuals seeking the procedural status of victim. These were the first applications for victim participation to be received in respect of either the CAR Situation or the Bemba case. On 4 November 2008, another 34 applications were received by the Chamber, bringing to 58 the total number of applicants in respect of the CAR Situation.³⁰⁶

On 2 December 2008, in light of the postponement of the confirmation hearing, the Pre-Trial Chamber decided that no further victim applications would be considered in the Bemba case until after the confirmation hearing.³⁰⁷

304 ICC-02/05 – 138, para 49.

305 ICC-02/05 – 138, paras 58 and 59. On 19 December 2008, the Appeals Chamber handed down its judgement on the substantive issues under appeal. The judgement, which will be fully analysed in the 2009 *Gender Report Card*, appears to represent a significant change of direction for the Court *vis-à-vis* victim participation at the investigation stage of a situation.

306 On 12 December 2008, Pre-Trial Chamber III issued a decision granting 54 of the 58 applicants the right to participate in the Bemba confirmation hearing. This decision, which also makes some significant rulings concerning the modalities of participation available to those 54 victims before and during the confirmation hearing, will be fully analysed in the 2009 *Gender Report Card*.

307 ICC-01/05-01/08 – 305.

Judiciary

Key Decisions CONTINUED

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Legal Representation for Victims

During 2008, the Judges of the Court have increasingly recognised and responded to the need for legal representation for victims at different stages of the proceedings. The Rules of Procedure and Evidence (RPE) contain detailed provisions for the appointment of legal representatives for victims, and their role in the proceedings once appointed. Under the Rules, the Registry has the task of ‘facilitating the coordination of victim representation’ by referring victims to its list of legal counsel, or by ‘suggesting one or more common legal representatives’.

The Rules also provide that the Chamber may request victims or groups of victims to choose a common legal representative, ‘for the purposes of ensuring the effectiveness of the proceedings’.³⁰⁸ If victims are unable to choose a common legal representative or representatives, the Court may request that the Registrar make the choice for them.³⁰⁹ The Chamber and the Registry must ‘take all reasonable steps to ensure that, in the selection of common legal representatives, the distinct interests of the victims ... are represented and that any conflict of interest is avoided’. The Rules clarify that these distinct interests include age, gender, health, and ‘the nature of the crime, particularly where the crime involves sexual or gender violence or violence against children’.³¹⁰

308 Rule 90(2)

309 Rule 90(2) and (3).

310 Rule 90(4), read together with Article 68(1).

The Women's Initiatives for Gender Justice urges the Registry to develop guidelines to ensure that the distinct interests of victims of crimes of gender or sexual violence, especially the women and children, are protected when groups of victims are represented by a common legal representative. Increasing the number of women on the List of Legal Counsel is a concrete step the Registry can take towards ensuring that these distinct interests are protected. As discussed previously, in the section of this Report dealing with the structures of the Court, the Registry should take steps to increase the number of women on this List.

In 2008, the Office of Public Counsel for Victims (OPCV) significantly increased its work as legal representative for victims before the Court, and the role of the office was further clarified by the Chambers in the decisions described below. The OPCV is an independent office of the Court. It was established for the purpose of providing support and assistance to victims and their legal representatives by providing legal research and advice, and, where appropriate, appearing before a Chamber in respect of specific issues. A Chamber may also appoint counsel from the OPCV to represent individual victims or groups of victims.³¹¹

In general, the role of the OPCV in representing victims has been limited by the Chambers to circumstances where an external legal representative has not yet been appointed. The Chambers have stressed the need for the OPCV to focus on its mandate of providing support and assistance to legal representatives for victims and to those applying to participate.

311 Regulations 80 and 81, Regulations of the Court.

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Uganda

The Prosecutor v. Joseph Kony et al

On 15 February 2008, Pre-Trial Chamber II appointed counsel from the OPCV to act as common legal representative for seven victims who had recently been granted procedural status. This appointment was made at the recommendation of the Registrar 'in light of the choice expressed by the victims, the limitations of the legal aid budget for 2008, and the current status of the proceedings'.³¹²

On 14 March 2008, Pre-Trial Chamber II held that, although legal representation for victims was 'not compulsory' at the pre-trial stage, the appointment of a legal representative 'might still be appropriate, as it will prevent an adverse effect on the expeditiousness of the proceedings'. Judge Politi, Single Judge of the Chamber, held that it appeared appropriate to appoint a common legal representative for all of the victims granted procedural status to date in the Kony case, since all 'claim to be victims of the same attack'. Concerning those victims granted procedural status in the Situation, he held that the appointment of a common legal representative would also be appropriate, since the victims' statements 'present many similarities as regards the type of crimes involved'. As to the victims granted procedural status in both the Situation and the case, the Judge ordered the Registrar to seek their views to determine whether they should be represented by the common legal representative of the case victims, or the common legal representative of the Situation victims 'with a view to providing them with one interlocutor only, and to secure their uniform representation'.³¹³

Judge Politi also noted that

in the present scenario in which a number of applicant victims are not yet assisted by a legal representative, it remains the task of the OPCV, as the office entrusted with providing applicant victims with any support and assistance which may be appropriate at this stage: (1) to inform victims 'having communicated with the Court' of their rights and prerogatives; (2) ... to continue to provide support and assistance to victims, legal representatives for victims and applicant victims within the limits of its mandate, and where necessary upon consultation with the VPRS and the Victims and Witnesses Unit.³¹⁴

On 4 April 2008, Judge Politi issued a decision on requests from the OPCV that its counsel be appointed legal representatives for victims recently granted procedural status in the Situation and in the Kony case. The OPCV sought this appointment only pending the appointment of an external common legal representative or representatives. The Judge granted the OPCV request, noting that it was in the interests of justice to provide these victims with a legal representative, in order to effectively exercise their rights.³¹⁵

On 17 September 2008, Judge Politi, dealing with a new set of applicants for the procedural status of victim, held that to ensure the fairness of the proceedings, the applicants are entitled to support and assistance from the OPCV, in the absence of other legal representation.

312 ICC-02/04 – 117, p 4.

313 ICC-02/04 – 125, para 192.

314 ICC-01/04 – 125, para 194.

315 ICC-02/04 – 132.

DRC

The Prosecutor v. Thomas Lubanga Dyilo
The Prosecutor v. Bosco Ntaganda
The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

On 27 November 2007, Trial Chamber I allowed the OPCV to file observations on behalf of victims on the issue of dual status of victims and witnesses. Noting that it had allowed this filing on an exceptional basis, the Chamber stated that the role of the OPCV needed further clarification and invited submissions on this issue.³¹⁶

Subsequently, on 6 March 2008, a Trial Chamber I decision held that the OPCV's 'core role' is to provide support and assistance to the legal representatives of victims and to the victims, in accordance with the *Regulations of the Court*.³¹⁷ The Chamber stressed that 'decisions on the role of the Office of necessity will be case specific'. The Chamber held that 'during this early stage in the Court's existence it is critical that the office concentrates its limited resources on the core functions' rather than on representing individual victims. However, the Trial Chamber noted that its decision was not intended to deter the OPCV from either representing individual victims prior to the appointment of an external legal representative, or appearing before the Chamber at the request of victims, their representatives, or the Chamber, to make submissions on specific issues.

The Chamber ordered that the OPCV continue to represent the victims it was currently representing until there was a decision on their applications to participate. Thereafter, the Registrar was to arrange for an independent legal representative to act for them 'unless there are specific reasons ... as to why this course may be detrimental to individual participating victims'.³¹⁸

During the confirmation hearing of the charges against Ngudjolo and Katanga, which took place in June and July 2008, an issue arose as to an apparent conflict of interest in relation to a legal representative for 11 victims. Defence counsel alleged that the legal representative had spoken to Ngudjolo by telephone and had accepted funds from him as a retainer in relation to charges Ngudjolo faced before the courts in the DRC. Upon hearing this allegation, Pre-Trial Chamber I asked the Registrar to investigate the conflict of interest allegation. It also took the step of provisionally separating the legal representative from his functions as legal representative for the victims.

On 23 July 2008, Pre-Trial Chamber I issued a decision declaring that there was no evidence of the existence

of any conflict of interest. It was uncertain, the Chamber ruled, whether there had been any contact between Ngudjolo and the legal representative at all, but to the extent there may have been, it was in relation to another murder with which Ngudjolo had been charged, unrelated to the attack on Bogoro village for which he was facing charges at the International Criminal Court. The Chamber revoked the provisional separation, and authorised the legal representative to resume representing the victims.³¹⁹

Darfur, Sudan

The Prosecutor v. Ahmad Harun and Ali Kushayb

There have been no judicial decisions concerning legal representation of victims, either in the Darfur Situation or in the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*. However, the Registry has issued decisions in respect of those victims' eligibility for legal aid. These decisions are reviewed in the 'Registry' section of this Report.

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

In a decision issued on 12 September 2008, Pre-Trial Chamber III dealt with a number of matters arising in anticipation of large numbers of individuals seeking to participate in the upcoming Bemba confirmation hearing. Judge Diarra, Single Judge of the Chamber, ordered the Registry to assist in the appointment of legal representatives for the CAR victims. She also authorised the OPCV to represent all victims from the date of application until there was an appointment of external legal representatives.³²⁰

316 ICC-01/04-01/06 – 1046, para 5.

317 ICC-01/04-01/06 – 1211.

318 ICC-01/04-01/06 – 1211, paras 31-33.

319 ICC-01/04-01/07 – 683.

320 ICC-01/05-01/08 – 103.

Judiciary

Key Decisions CONTINUED

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Protection

Article 68(1) of the Rome Statute requires the Court to ‘take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’ and, in doing so, to take into account all relevant factors, including age, gender, and health, as well as the nature of the crime, particularly where the crime involves sexual or gender violence or violence against children. The measures taken by the Court must not be ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.³²¹

³²¹ Rule 87(1) provides that such measures may also be taken to protect not only a victim or witness, but also ‘another person at risk on account of testimony given by a witness’.

During 2008, the Chambers issued decisions that may have an impact on the safety and security of witnesses and victims. A number of these decisions concern **redactions**³²² from documents such as witness statements, applications for the procedural status of victim, and arrest warrants. The Chambers articulated key principles and a test for redactions. Redactions will be granted by the Chambers only in exceptional circumstances, and only when non-redaction of the information could

- prejudice further or ongoing investigations by the Prosecution;
- affect the confidential character of the information under Articles 54, 72 and 93 of the Statute; or
- affect the safety of witnesses, victims or members of their families.³²³

Before redactions will be authorised, the Chamber must also be satisfied that: (1) the redactions sought are adequate to eliminate, or at least reduce, the identified risk; (2) there is no less intrusive alternative measure that could be taken to achieve the same goal; and (3) the redactions are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.³²⁴

The Appeals Chamber, in a decision addressing redactions in the Katanga case, found that Rule 81(4), governing the confidentiality of information otherwise subject to disclosure, should be read to include ‘persons at risk on account of the activities of the Court’, making

explicit, for the first time, the Court’s obligation to take measures to protect intermediaries.³²⁵ It is now up to the Court to implement this ruling in a meaningful way. This important development is discussed in greater detail below.

The Pre-Trial, Trial, and Appeals Chambers, in decisions on matters arising in the Lubanga case, further clarified the responsibilities of the different organs of the Court in relation to protection of witnesses and victims, particularly as regards the Court’s witness protection programme.

The subject of redactions, and the subject of the Court’s witness protection programme, presented below under separate headings, are nevertheless clearly interrelated. This was illustrated by Judge Steiner, Single Judge of Pre-Trial Chamber I, when she noted on 3 April 2008 that her ruling on redactions sought by the Prosecutor in the Katanga and Ngudjolo case would depend on ‘whether the relevant witnesses are accepted into the Court’s witness protection programme, and on the subsequent implementation of the protection measures, if any, accorded to them by the Registrar’.³²⁶

During 2008, the Chambers also issued a number of decisions on the **interim release of accused** before the Court.³²⁷ This is an issue with potentially serious implications for the safety and security of witnesses and victims, particularly where Court proceedings have led to their identities being revealed to those accused or their supporters.

322 ‘Redaction’ is the technical term used by the Court for the practice of removing identifying information about victims or witnesses from the publicly available versions of Court documents. Redactions to a document may only be made after an order of the Court, ie they are never ‘automatic’.

323 ICC-01/04-01/07 – 90, para 4. See also ICC-01/04-01/06 – 773.

324 ICC-01/04-01/07 – 90, para 4. See also ICC-01/04-01/06 – 773.

325 ICC-01/04-01/07 – 475

326 ICC-01/04-01/07 – 361, para 1.

327 ‘Interim release’ is the judicial term for the practice of releasing an accused from custody in the period between his or her initial arrest and the conclusion of trial proceedings against him or her.

Uganda

The Prosecutor v. Joseph Kony et al

On 17 September 2008, Pre-Trial Chamber II provided guidelines for redaction of applications by victims for procedural status.³²⁸ Judge Politi, Single Judge of the Chamber, confirmed that the main purpose of redactions from these applications is to protect the identities of the applicants. The Judge also confirmed that the identifying elements subject to redaction are:

- place of birth;
- languages spoken and understood;
- ethnic group/tribe and religion;
- occupation;
- marital status;
- the existence and number, if any, of dependants; and
- the specific features of the harm, damage, loss or injury suffered.

Judge Politi ruled that the possibility of redacting one or more of these elements from applications for participation will depend ‘on a case-by-case assessment of relevant factual circumstances’. In the case before him, involving applications for participation in the investigation stage of the Uganda Situation, he ruled that, given the security situation in Uganda, and given that Kony and his co-accused remain at large, ‘allegedly continuing to carry out acts of violence, and thus to pose a threat to the applicants and their families’, the redaction of all identifying information would be authorised.

328 ICC-02/04-01/05 – 312.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

The Prosecutor v. Bosco Ntaganda

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

Redactions

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

On 7 December 2007, Pre-Trial Chamber I authorised the Prosecutor to make redactions from the statements of seven witnesses in the Katanga case.³²⁹ In her decision, Judge Steiner, Single Judge of the Chamber, considered the volatile security situation in the regions of the DRC where the victims or witnesses, or their families, are currently located. She also noted the Prosecutor’s assertions that Katanga, although detained at that point in Kinshasa, maintained contact with supporters in those regions, and that Katanga and his associates had previously interfered with prosecution witnesses. She noted that the witnesses themselves, in their statements, reported having been threatened, and that they expressed fear for their own safety and security, and for the lives of their close relatives, if their names were disclosed to the Defence.

Judge Steiner ruled that the requests for redactions had to be assessed against the above-described backdrop. She granted the Prosecutor’s request that information as to the current whereabouts of the witnesses and their close family members³³⁰ be redacted from their statements, along with the names and identifying information of the family members of three of the witnesses. The Judge, however, refused to redact information identifying ‘innocent third parties’³³¹ or information identifying the place where the interviews were conducted, or the names, initials or signatures of the persons present when the witness statements were taken.

The Appeals Chamber took up parts of this decision, and on 13 May 2008, found that the Pre-Trial Chamber had erred in a number of important respects. It reversed the Pre-Trial Chamber decision not to authorise redactions for the protection of individuals other than ‘victims, current or prospective Prosecution witnesses or sources, or members of their families’ and

329 ICC-01/04-01/07 – 90. The seven witnesses who were the subject of the Prosecutor’s request had already been accepted into the protection programme of the Victims and Witnesses Unit.

330 Including, where the witnesses were minors, their guardians.

331 Defined as ‘persons who are not victims, current or prospective prosecution witnesses or sources, or members of their families’.

the locations of interviews of witnesses and identifying information of staff members of the Office of the Prosecutor and VWU present at those interviews.³³² Based on a review of other related articles of the Statute and the Rules, the Appeals Chamber found that it would be consistent with the intent of the drafters to read Rule 81(4) of the Rules to include the words ‘persons at risk on account of the activities of the Court’. The Appeals Chamber noted that:

the specific provisions of the Statute and the Rules for the protection not only of witnesses and victims and members of their families, but also of others at risk on account of the activities of the Court are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk though the activities of the Court.³³³

This principle would then be applied on a case-by-case basis, with ‘specific regard to the rights of the suspect’.³³⁴ In light of this clarification, the Court must now put in place practices and, where necessary, protective measures for victims, intermediaries and other ‘innocent third parties’.

In the same decision, the Appeals Chamber found that identifying information regarding the location of interviews and the identifying information of staff members may also be redacted, subject again to a case-by-case assessment by the Pre-Trial Chamber. Likewise, in a separate decision, also issued on 13 May 2008, the Appeals Chamber affirmed the Pre-Trial Chamber finding that potential prosecution witnesses, as part of the category of ‘innocent third parties’, may have their identities and identifying information redacted.³³⁵

On 21 December 2007, Judge Steiner authorised the Prosecutor to make redactions from the statement of another witness in the Katanga case.³³⁶ The redactions concerned identifying information for three alleged victims of sexual violence, including their current whereabouts. Judge Steiner noted that while these alleged victims were not connected to the charges against Katanga, they were still entitled to the

protection that the redactions would provide. The Judge ruled that the powers of the Pre-Trial Chamber to order redactions are not limited to the boundaries of the charges against an accused, particularly in this case which involved alleged victims of sexual violence. She noted that the drafters of the Rome Statute and its Rules of Procedure and Evidence ‘included a number of provisions specifically governing the protection of alleged victims of sexual offences as a result of crimes within the jurisdiction of the Court’ and that, under Article 68(1) of the Statute, the Court was ‘required to take appropriate measures to protect victims and witnesses, and to have regard to all relevant factors, *in particular, but not limited to where the crime involves sexual or gender violence or violence against children*’.³³⁷ Judge Steiner concluded that the drafters of the Statute and Rules placed particular emphasis on the protection of alleged victims of sexual offence resulting from crimes within the jurisdiction of the Court. Therefore, ‘on an exceptional basis’ and for the limited purpose of their protection, their names and identifying information could be redacted. She held that, in this particular and limited instance, ‘the notion of “victim” under [the Rules dealing with redactions] would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand’.³³⁸

Judge Steiner also decided that a proposed witness, who had since refused to participate in the Prosecution case, qualified for protective measures not as a witness, but as a victim, due to the harm he had suffered as a result of the attack on Bogoro village. The Judge authorised the Prosecutor to redact this witness’s name and other identifying information from his statement. The Judge also authorised the Prosecution to redact information on witnesses from the Warrant of Arrest. This decision was confirmed by the Appeals Chamber on 27 May 2008, but on the basis that the alleged victims of sexual violence, as well as the witness who was no longer cooperating with the Prosecutor, were all ‘persons at risk on account of the activities of the Court’ and entitled to protection as such.³³⁹

332 ICC-01/04-01/07 – 475.

333 ICC-01/04-01/07 – 475, para 54.

334 ICC-01/04-01/07 – 475, paras 1-2.

335 ICC-01/04-01/07-476. ‘Potential prosecution witnesses’ are defined as ‘individuals to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the Prosecutor or who the Prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become Prosecution witnesses’. *Ibid.*, para 21.

336 ICC-01/04-01/07 – 123. A public redacted version of this decision was issued on 23 January 2008.

337 ICC-01/04-01/07 – 123, para 17 [emphasis added]: The Judge also noted Rule 86, which requires a Chamber, in making any direction or order to *take into account the needs of all victims and witnesses in accordance with Article 68, in particular victims of gender or sexual violence*, Rule 88, which provides for the granting of *special protective measures to a traumatised victim, in particular victims of sexual violence* and Rule 70, which provides for very specific rules of evidence in cases of sexual violence.

338 ICC-01/04-01/07 – 123, para 19.

339 ICC 01/04-01/07 – 521.

The Prosecutor v. Thomas Lubanga Dyilo

On 6 May 2008, Trial Chamber I authorised the following redactions from the applications of individuals applying to participate as victims in the Lubanga trial:

- name of applicant;
- name of parents;
- place of birth;
- exact date of birth (but not year of birth);
- tribe or ethnic group;
- occupation;
- current address;
- phone number and email address;
- names of other victims of, or of witnesses to, the same incident;
- identifying features of injury, loss or harm allegedly suffered; and
- name and contact details of the intermediary assisting the victim in filing the application.³⁴⁰

This is a more comprehensive list of redactions than those authorised by the Pre-Trial Chambers to date. Particularly noteworthy is the inclusion of identifying information for intermediaries.

Court Protection Programme

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

On 18 April 2008, Judge Steiner, Single Judge of Pre-Trial Chamber I, issued a decision in the Katanga case dealing with witness protection in the context of the Prosecutor's practice of preventive relocation of prosecution witnesses.³⁴¹ This decision underscores problems which arose between the OTP and the Victims and Witnesses Unit (VWU) of the Registry concerning witness protection in the early part of 2008 – problems which threatened and compromised the safety and security of some witnesses.³⁴²

Judge Steiner agreed with the Prosecutor's basic premise that, under Article 68(1) of the Rome Statute, 'the Court, including the Prosecution, bears the responsibility to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. However, the Judge noted that, under the Statute and Rules, witness protection was primarily

the mandate of the Registry.³⁴³ She noted that the Statute and Rules establish 'a single ICC protection programme', run by the Registrar who 'has the competence to decide which witnesses are accepted into the programme and to implement the protective measures granted to such witnesses'.

The Judge found that the Prosecutor's role within the framework of this programme is limited to 'making applications to the Registrar for the inclusion of witnesses into the programme' and that he does not have the power to act independently to protect witnesses, either 'preventively' – ie before the Registrar makes a decision to accept them into the Court's Witness Protection programme – or 'reactively' – after the Registry has turned down their requests for acceptance into the programme.³⁴⁴ In implementing the practice of preventive relocation, the Prosecutor not only exceeded his mandate under the Statute and Rules, but also misused his mandate 'in order to *de facto* shift the power to decide on the relocation of a given witness from the Registry to the Prosecution'. The Judge also noted that the practice of preventive relocation 'constitutes an ineffective use of the limited resources of the Court'.³⁴⁵

The Registrar was also criticised for rejecting a witness's application for inclusion in the protection programme despite findings – by both the Single Judge and the Registrar himself – that there had been serious threats against the witness. The Judge stressed the importance of clear pre-determination and transparent application of the criteria for inclusion in the Court's witness protection programme. She also found that the Registrar's decision raised 'the issue of lack of compliance with the decisions of the [Court]' and that the Registrar was continuing to 'completely disregard the findings of the Single Judge on the seriousness of the threats received by [the witness]'.

343 Under Article 43(6), the Registrar 'shall set up a Victims and Witnesses Unit within the Registry. The Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses'. The responsibilities of the Registrar relating to victims and witnesses, the functions and responsibilities of the Unit, and the expertise required of the Unit's staff, are set out at Rules 16-19. The Registrar's specific responsibilities in relation to the Court's Witness Protection Programme are set out at regulation 96 of the *Regulations of the Registry*, available online at http://www.icc-cpi.int/NR/rdonlyres/A57F6A7F-4C20-4C11-A61F-759338A3B5D4/140143/ICCBD_030106Rev1_English.pdf

344 ICC-01/04-01/07 – 428, paras 22-25.

345 ICC-01/04-01/07 – 428, paras 32-33.

340 ICC-01/04-01/06 – 1308, para 28.

341 ICC-01/04-01/07 – 411. The publicly available version of this decision is dated 25 April 2008, and is available on the Court website under case number ICC-01/04-01/07 – 428.

342 ICC-01/04-01/07 – 428, paras 41 – 51.

The Judge expressed concern about the Registrar's behaviour in relation to the witness, 'which has created a serious risk for the witness's safety and has also created a further delay in the proceedings in the present case'.³⁴⁶

Judge Steiner acknowledged that 'there might be exceptional circumstances in which ... a witness on whom the Prosecutor intends to rely at the confirmation hearing, or even a potential witness, is facing a serious threat of imminent harm related to his or her cooperation with the Court'. The Judge noted that '[t]he Court as a whole must be in a position to respond immediately to these types of exceptional situations within the framework of the system of witness protection provided for in the Statute and Rules'.³⁴⁷ She strongly recommended that the Registrar establish a contingency plan for the urgent and provisional relocation of witnesses subjected to a serious threat of imminent harm related to the witnesses' cooperation with the Court.

On 2 June 2008, the Prosecutor was granted leave to appeal from Judge Steiner's decision,³⁴⁸ and on the same day, the Appeal Brief was filed with the Court.³⁴⁹

On 26 November 2008, the Appeals Chamber issued a long-awaited decision in the Katanga/Ngudjolo case on the preventive relocation of witnesses by the Prosecutor. The Chamber began by noting that relocation is a serious measure, and one that can have a 'dramatic impact' and 'serious effect' upon the life of the relocated person. It noted that removing a witness from their home and family ties may have long-term consequences, and may even increase the risks faced by the individual, by 'highlighting his or her involvement with the Court and making it more difficult for that individual to move back to the place from which he or she was relocated, even in circumstances where it was intended that the relocation should only be provisional'. The Appeals Chamber cautioned that witness relocation will 'involve careful and possibly long-term planning for the safety and well-being of the witness concerned'.³⁵⁰

The Appeals Chamber questioned the Prosecution's assertion that any 'preventative relocation' measures would 'necessarily always be capable of being merely provisional or temporary'.³⁵¹ After reviewing the relevant statutory provisions, the Chamber found that any disagreement between the VWU and the Prosecutor about the relocation of a witness should

be not be resolved by the 'unilateral and unchecked action' of the Prosecutor but should be decided by the Chamber dealing with the case.³⁵² The Prosecution, when it disagrees with the assessment of the VWU, can come before the Chamber to review that assessment. The Chamber can then seek the views of all those involved, including the party seeking relocation, the VWU, and other appropriate parties or participants.³⁵³ The Appeals Chamber stressed that decisions in relation to relocation must be taken expeditiously.³⁵⁴

The Appeals Chamber also noted that its ruling relates specifically to the protective measure of relocation, and was not meant to limit the Prosecutor's more general mandate in relation to protection matters under other provisions of the Rome Statute. As such the ruling is not intended to limit any 'general measures that ordinarily might be expected to arise on a day-to-day basis during the course of an investigation or prosecution with the aim of preventing harm from occurring to victims and witnesses'.³⁵⁵ However, the Appeals Chamber ruled that the general mandate of the Prosecutor does not extend as far as the unilateral preventive relocation of witnesses, 'either before the Registrar has decided whether a particular witness should be relocated or after the Registrar has decided whether an individual witness should not be relocated'.³⁵⁶

The Chamber did acknowledge that 'there might be exceptional circumstances in which a witness is facing a serious threat of imminent harm that requires an immediate response' and that in such cases, 'the protection of the individual concerned is necessarily paramount'. In such urgent situations, the Prosecution may request that the VWU take a 'temporary emergency measure' while the overall application is considered.³⁵⁷

The Chamber noted 'that there may be situations in which temporary emergency measures may have to be taken by the Prosecutor in relation to a person for whom relocation is sought, in a situation of urgency' but that

in the abstract and without a specific set of factual circumstances before it, the Appeals Chamber would not envisage such temporary measures to include the preventive relocation of a witness.³⁵⁸

346 ICC-01/04-01/07 – 428, paras 49-51.

347 ICC-01/04-01/07 – 428, paras 35-36.

348 ICC-01/04-01/07 – 484.

349 ICC-01/04-01/07 – 541.

350 ICC-01/04-01/07 – 776, para 66.

351 ICC-01/04-01/07 – 776, para 67.

352 ICC-01/04-01/07 – 776, para 93.

353 ICC-01/04-01/07 – 776, para 94.

354 ICC-01/04-01/07 – 776, para 96.

355 ICC-01/04-01/07 – 776, para 98.

356 ICC-01/04-01/07 – 776, para 99.

357 ICC-01/04-01/07 – 776, para 102.

358 ICC-01/04-01/07 – 776, para 103.

The Prosecutor v. Thomas Lubanga Dyilo

‘Reactive’ relocation of witnesses by the Prosecutor has also been considered by Trial Chamber I in the Lubanga case. In a decision dated 24 April 2008, the Chamber considered the issue of ‘the provision of protective measures for particular people who can supply information relevant to [the Lubanga] case’. The Chamber noted that, notwithstanding the lengthy history of the case, the Prosecutor and the VWU ‘regrettably have been unable to agree on the extent of their respective responsibilities for witnesses who may be at risk of harm’.³⁵⁹

The Chamber noted that, overall, the VWU’s approach to the witnesses in question had been correct, but noted that the ‘high likelihood of harm’ test applied by the VWU for acceptance into the protection programme should be interpreted ‘in a sufficiently flexible and purposive manner to ensure proper protection for any witness who, following careful investigation, faces an established danger of harm or death’.³⁶⁰

Interim release

Although a suspect or an accused detained by the Court has the right to request interim release,³⁶¹ decisions on the interim release obviously have potential implications on the safety and security of victims and witnesses. Once a Pre-Trial Chamber has made an initial decision, whether on the release or detention of the accused person, the Rome Statute requires that the Chamber ‘periodically review its ruling’ and also provides that the Chamber ‘may do so at any time on the request of the Prosecutor or the [accused] person’.³⁶² During 2008, the Court has issued decisions on interim release in respect of all three accused who are in the custody of the Court in cases arising out of the Situation in the DRC.

The Prosecutor v. Thomas Lubanga Dyilo

Thomas Lubanga first applied for interim release in September 2006.³⁶³ Pre-Trial Chamber I issued a decision on this application in October 2006. In deciding to reject the application, Judge Jorda, Single Judge of the Chamber, noted that Lubanga knew the identity of certain witnesses, and that, if released, there was a risk that ‘he would directly, or indirectly

with the help of others, exert pressure on the witnesses, thus obstructing or endangering the Court proceedings’. The Judge also noted that it appeared that ‘some witnesses, who appeared at the trials of middle- or high-ranking UPC members before the *Tribunal de Grande Instance* of Bunia,³⁶⁴ have been killed or threatened’.³⁶⁵

Lubanga appealed this decision and victims were granted the rights to participate in the appeal. The victims argued that Lubanga should continue to be detained because: (1) there was a real risk that he might ‘obstruct or endanger the investigation or Court proceedings, for instance, by contacting witnesses and even victims in order to influence them’; (2) he might be hostile to those victims participating in the proceedings and his interim release ‘might enable him to establish their identities and, thus, potentially pressure them into withdrawing their requests to participate or, even, seek revenge’; (3) Lubanga could resume the leadership of the UPC movement if he were granted interim release, which would create the risk that he might launch new recruitment campaigns for children under the age of 15, which could affect several children from families participating as victims in the proceedings; and (4) granting interim release might be interpreted by others as proof that the crimes set out in the Warrant of Arrest should not be viewed as very serious.³⁶⁶

In a decision issued in February 2007, the Appeals Chamber agreed with Judge Jorda that Lubanga should not be granted interim release. The Chamber noted that while it would have preferred more detail from Judge Jorda as to why Lubanga’s release would obstruct the proceedings of the Court or endanger witnesses, there were nonetheless sufficient grounds to justify Lubanga’s continued detention.

Pre-Trial Chamber I reviewed Lubanga’s detention on two occasions, in February and June 2007. On each occasion, the Chamber found that, since the charges against him had now been confirmed, there was an even greater risk that Lubanga would abscond if released. The Chamber also found that, since the identities of many witnesses had been disclosed to Lubanga during the confirmation hearings, and since the security Situation in the DRC remained volatile, Lubanga’s release ‘would lead to the grave endangerment of the security of victims and witnesses’.³⁶⁷

359 ICC-01/04-01/06 – 1311-Anx 2, para 77.

360 ICC-01/04-01/06 – 1311-Anx 2, para 79.

361 Article 60(2).

362 Article 60(3).

363 ICC-01/04-01/06 – 452.

364 The *Tribunal de Grande Instance* is the High Court for the Province of Ituri and sits in the province’s capital city of Bunia.

365 ICC-01/04-01/06 – 586, p 6.

366 ICC-01/04-01/06 – 824, para 57.

367 ICC 1/04-01/06 – 826, p 6, and ICC-01/04-01/06 – 924, p 6.

The Trial Chamber reviewed Lubanga's detention on three further occasions leading up to the scheduled start of his trial. The Chamber did not, in any of these reviews, discuss the issue of the safety or security of victims or witnesses should Lubanga be released; instead, it simply noted that Lubanga faced grave charges and that, if he were released, the Court would no longer be able to ensure his attendance at trial.³⁶⁸

As noted earlier in this Report, the Trial Chamber also considered and ordered the release of Lubanga in the context of the stay of the proceedings against him. The reasoning behind this order is distinct from the legal rationale that underlies a provisional release order. The Trial Chamber's order to release Lubanga, and the subsequent Appeals Chamber decision reversing this order, are discussed in the section of this report dealing with the investigation and prosecution strategy of the Office of the Prosecutor, above.

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

Mathieu Ngudjolo Chui applied for interim release on 13 February 2008.³⁶⁹ On 27 March 2008, Judge Kuenyehia, Single Judge of Pre-Trial Chamber I, rejected Ngudjolo's application. Judge Kuenyehia considered the gravity of the crime and the possibility of a long prison sentence, with the resultant risk that Ngudjolo would abscond if released. She also considered the 'security Situation and context in the DRC (and, in particular, in the Ituri and Kinshasa areas)'. The Judge noted that it appeared that Ngudjolo's supporters 'have the capability to interfere with ongoing and further Prosecution investigations and/or Prosecution witnesses, victims and members of their families' and that there had been 'several precedents of interference with Prosecution witnesses by FNI and/or FRPI members, some of them allegedly acting directly under the instructions of [Ngudjolo]'. She concluded that Ngudjolo's detention 'remains necessary to ensure that he will not obstruct or endanger the investigation or the Court proceedings'.³⁷⁰ Ngudjolo appealed this decision, and on 9 June 2008, the Appeals Chamber issued a judgement dismissing his appeal and confirming his continued detention.³⁷¹

Pre-Trial Chamber I made further reviews of Ngudjolo's detention. In its 23 July 2008 review, the Chamber ruled that his detention continued to be necessary to ensure that he would not obstruct or endanger the investigation or Court proceedings.

368 ICC-01/04-01/06 – 976, ICC-01/04-01/06 – 1151 and ICC-01/04-01/-6 – 1359.

369 ICC-01/04-01/07 – 280.

370 ICC-01/04-01/07 – 345, p 9.

371 ICC-01/04-01/07 – 572.

Important considerations for the Chamber included the fact that, for the purposes of the confirmation hearing, the identities of many witnesses have been disclosed to Ngudjolo. The Chamber concluded that, since the Situation in the DRC continued to be volatile, Ngudjolo's release would increase 'the risk of endangerment to the security of victims and witnesses'.³⁷² In its 19 November 2008 review, the Chamber concluded that there had been no significant change of circumstances which would justify Ngudjolo's release. The Chamber also considered that 'the risk of absconding has increased as a result of the confirmation of charges against [him] and that his continued detention is even more necessary to guarantee his appearance'. Finally, the Chamber recalled that the identities of many witnesses were disclosed to Ngudjolo during the confirmation hearings and that, given the continuing volatility of the security situation in Ituri, his release 'would seriously jeopardise the safety of the victims and witnesses and might obstruct the proceedings'.³⁷³

Germain Katanga applied for interim release on 7 February 2008, but withdrew the application on 18 February 2008.³⁷⁴ Notwithstanding this withdrawal, Judge Steiner, Single Judge of Pre-Trial Chamber I decided that the Chamber would proceed, on its own motion, with a review of Katanga's detention, and issued a decision on 21 April 2008. Judge Steiner noted it appeared that Katanga's supporters 'have the capability to interfere with ongoing and further Prosecution investigations and/or Prosecution witnesses, and with victims and members of their families' and that there were 'several recorded incidents of interference with Prosecution witnesses by FNI or FRPI members'. The Judge also found it appeared that Katanga 'still wields influence as a popular figure within the Ituri province, and in particular among current members of the FRPI'. She concluded that Katanga's detention remained necessary 'to ensure that he will not obstruct or endanger the investigation or the Court proceedings'.³⁷⁵

On 18 August 2008, Pre-Trial Chamber I again reviewed Katanga's detention. The Chamber noted that 'for the purposes of the confirmation hearing, the identities of many witnesses, and the whereabouts of some of them', had been disclosed to Katanga, and that 'the Situation in the DRC continues to appear volatile, which may thus lead to the grave endangerment of the security of victims and witnesses' and concluded that Katanga's continued detention 'is necessary to ensure that the suspect does not obstruct or endanger

372 ICC-01/04-01/07 – 694.

373 ICC-01/04-01/07 – 750, paras 13 and 15.

374 ICC-01/04-01/07 – 206-CONF and ICC-01/04-01/07 – 222.

375 ICC-01/04-01/07 – 426.

the Court proceedings'.³⁷⁶ On 13 November 2008, Trial Chamber II announced its intention to conduct a further review of Katanga's detention.³⁷⁷ At the time of publishing this Report, the Trial Chamber had not handed down its decision.

Prohibition of Communications between Co-Suspects

Finally, on 7 February 2008, the Court made an order prohibiting certain exchanges and communications between Katanga and Ngudjolo, both of whom were then being held in the same pre-trial detention facility in The Hague.³⁷⁸ The Prosecutor argued that a prohibition of contact was justified because there were reasonable grounds to believe that contact between these two accused³⁷⁹ could: (1) prejudice or otherwise affect the outcome of the proceedings against each accused; (2) adversely impact ongoing or further investigations; (3) harm victims or witnesses or any other person; or, (4) be used by the accused to breach an order for non-disclosure made by a Judge.

Five weeks after making this order, the Court revoked it, noting that the Prosecutor had 'not provided any concrete evidence to support his allegations that Katanga and Ngudjolo might discuss confidential materials for the purpose of threatening or harming witnesses and victims ...'. The Court also noted that, on the Prosecutor's own admission, the prohibition of contact between the two accused was 'a preventive action'. The Court concluded that the Prosecutor's allegations were 'purely speculative' and ruled that, especially given that the cases against Katanga and Ngudjolo had been joined by that point, communication between the two could not continue to be prohibited.

376 ICC-01/04-01/07 – 702, p 11.

377 ICC-01/04-01/07 – 748.

378 ICC-01/04-01/07 – 274. Judge Steiner, Single Judge of Pre-Trial Chamber I, ordered that the two suspects were prohibited from any exchange of case-related materials or any communication in relation to any public or confidential aspects of their respective cases.

379 Ngudjolo and Katanga were not yet co-suspects at this point. The order joining their two cases was made a few weeks later, on 10 March 2008.

Darfur, Sudan

The Prosecutor v. Ahmad Harun and Ali Kushayb

There were no decisions to date from any of the Chambers on any aspects of protection in relation to the Situation in Darfur. However, there are reports in November and December 2008 regarding the arrest, detention and alleged torture of human rights activists suspected by the Government of Sudan of providing information to the ICC or for cooperating with their investigations into the conflict in Darfur.³⁸⁰

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

On 10 June 2008, Pre-Trial Chamber III released written reasons for its earlier decision to issue the 'urgent' warrant for Bemba's arrest. The Chamber recalls that one of the criteria for issuing a warrant of arrest under Article 58(1) of the Rome Statute is that the arrest is necessary 'to ensure that the person does not obstruct or endanger the investigation or the Court proceedings'. In the CAR case, the Chamber notes,

many of the victims and witnesses are financially destitute and ... in view of their place of residence ... Bemba could easily locate them, and ... this places them at particular risk.

On 20 August 2008, Judge Kaul, Single Judge of Pre-Trial Chamber III, rejected Bemba's request for interim release pending trial. Judge Kaul ruled that the findings and conclusions which led the Chamber to issue the Warrant of Arrest for Bemba in the first place still existed, and that these supported his continuing detention.

In a decision issued on 12 September 2008, Pre-Trial Chamber III made a number of advance rulings in relation to victims' applications for participation in the Bemba case.³⁸¹ These advance rulings were made in light of a large number of applications being received by the Chamber in the short lead-up to the start of the confirmation of charges hearing. Concerning redactions, Judge Diarra, Single Judge of the Chamber, ruled that the VPRS, together with the Victims and Witnesses Unit of the Registry, should simply submit the applications with suggested redactions 'it believes may be necessary to protect the victims in question'.

In November 2008, Bemba filed a second application for interim release. At the time of publishing this Report, the Chamber has yet to rule on his application.

380 <http://news.bbc.co.uk/2/hi/africa/7752392.stm>

381 ICC-01/05-01/08 – 103.

Judiciary

Key Decisions CONTINUED

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Disclosure

The right of the accused to examine the evidence that the Prosecution will use to make its case is fundamental to the fairness of trial proceedings. The Rome Statute contains a number of provisions that set out the Prosecution's disclosure obligations. Under the Statute, the Trial Chamber is responsible for facilitating the 'fair and expeditious conduct of the proceedings', including ensuring that documents and information are disclosed 'sufficiently in advance of the commencement of the trial to enable adequate preparation for trial'.³⁸²

With respect to what must be disclosed, the Prosecutor is obligated to permit the Defence to inspect any books, documents, photographs or other tangible objects in her or his possession or control

which are material to the preparation of the Defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial ... or were obtained from or belonged to the person.³⁸³

³⁸² Article 64(3)(c).

³⁸³ Rule 77 RPE.

Under Article 54(1)(a) of the Rome Statute, the Prosecutor is required to investigate ‘in order to establish the truth’ and, in doing so, to ‘investigate incriminating and exonerating circumstances equally’. The accused has the explicit right to disclosure of any exculpatory evidence that the Prosecutor may have. The Rome Statute gives Prosecution the obligation,

as soon as practicable, [to] disclose to the Defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.³⁸⁴

These provisions are subject to other provisions of the Statute and Rules where applicable, including Article 54(3)(e) of the Statute, which allows the Prosecution to obtain evidence under the condition of confidentiality, for the limited purpose of generating new evidence. However, as the Chambers clarified in the proceedings discussed below, the right of the accused to a fair trial cannot be compromised. It is up to the Prosecutor to conduct investigations and obtain evidence in ways that will allow for the full realisation of the rights of the accused during pre-trial and trial proceedings.

³⁸⁴ Article 67(2).

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Uganda

The Prosecutor v. Joseph Kony et al

There have been no decisions to date on disclosure in relation to either the Situation in Uganda or the Kony case.

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DRC

The Prosecutor v. Thomas Lubanga Dyilo

The Prosecutor v. Bosco Ntaganda

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

The Prosecutor v Thomas Lubanga Dyilo

In 2008, as previously discussed in the section of this Report dealing with investigation and prosecution strategy, the Court faced a number of serious issues concerning disclosure in the context of the Lubanga case. At the heart of these was, on one hand, the failure of the Prosecutor to make full disclosure to the Defence, and on the other hand, the non-disclosure agreements he had entered into under Article 54(3)(e) with information providers.

In late 2007, the Prosecutor estimated that altogether he had ‘a little under 20,000 documents (about 74,000 pages) that required review within the framework of the case ...’ Of those, some 5,200 documents (about 8,500 pages) still remained to be reviewed. The Prosecutor had committed to complete the review of these remaining documents by the end of October 2007 but had not met this deadline. In addition, the Prosecutor advised the Court, in relation to disclosure of such documents, that his chief difficulty was that ‘approximately 50% of the Democratic Republic of Congo document collection has been obtained pursuant to agreements of confidentiality [made under Article 54(3)(e)] which do not allow for disclosure unless the information provider lifts the confidentiality requirement’.³⁸⁵

On 9 November 2007, Trial Chamber I set 31 March 2008 for the commencement of the Lubanga trial. In anticipation of that date, the Chamber ordered the Prosecution to ‘serve the entirety of their evidence’ to the Defence by 14 December 2007. The Chamber defined this as including ‘the incriminatory material in the form of witness statements and other material which the Prosecutor intends to rely upon at trial, and any exculpatory material’.³⁸⁶

³⁸⁵ ICC-01/04-01/06 – T-52, p 13.

³⁸⁶ ICC-01/04-01/06 – 1019, para 25.

The Chamber ruled that if the Prosecutor wished 'to serve any of this material in a redacted form, each proposed redaction must be explained and justified to the bench'.³⁸⁷ The Chamber also ruled that

[i]f the prosecution has in its possession any exculpatory material which it is unable to disclose and which may materially impact on the Court's determination of guilt or innocence, it will be under an obligation to withdraw any charges which the non-disclosed, exculpatory material impacts upon.³⁸⁸

The Prosecutor's disclosure deadline in respect of some of the evidence was extended to 17 December 2007,³⁸⁹ and then to 31 January 2008. The disclosure deadline was then suspended to allow time for the Court to convene an oral hearing to assess the Prosecutor's ongoing difficulties with meeting his disclosure requirements.³⁹⁰

In February and March 2008, Trial Chamber I held oral hearings to discuss, among other matters, whether the scheduled trial commencement date was still realistic given the Prosecutor's continuing failure to meet his disclosure obligations to the Defence.³⁹¹ It became apparent over the course of these hearings that 31 March 2008 was no longer a realistic starting date for the Lubanga trial. A revised starting date of 23 June 2008 was proposed, and the Prosecutor was given a further revised deadline of 28 March 2008 to complete disclosure. On 24 April 2008, the Chamber issued a decision confirming that the Lubanga trial would commence on 23 June 2008 'provided that the prosecution has discharged its disclosure obligations as regards potentially exculpatory and incriminatory materials'.³⁹²

Trial Chamber I held three more oral hearings in May and early June 2008.³⁹³ On 10 June 2008, the Prosecutor advised the Chamber that there were still a total of 156 documents containing potentially exculpatory materials that he remained unable to disclose to the Defence, due to confidentiality agreements. The Chamber 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. With the trial due to start in less than two weeks, and little progress having been made in negotiations between the Prosecutor and the information providers, the Chamber decided that the trial date would once again have to be postponed. During all of these hearings, the Trial Chamber consistently expressed the importance of the Prosecution's disclosure obligations and the Chamber's growing displeasure with the Prosecutor's failure to meet those obligations.

On 13 June 2008, Trial Chamber I, as a follow-up to the oral hearings, issued a decision staying the proceedings against Lubanga. This meant that, as the Chamber put it, 'the trial process in all respects is halted'. The Chamber took this exceptional step because it concluded that, as a result of the Prosecutor's failure to disclose potentially exculpatory material to the Defence, 'the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial'.³⁹⁴

The Prosecutor applied for leave to appeal this decision, and leave was granted in a decision issued by the Trial Chamber on 11 July 2008. The Prosecutor's negotiations with the information providers, primarily the United Nations and a small number of NGOs, continued until November 2008. As negotiations progressed, the Prosecutor returned to the Trial Chamber periodically to argue that the stay should be lifted.³⁹⁵ However, the Chamber continued to be of the view that the concessions made by the information providers were not sufficient to meet the disclosure mandated by the Statute. In its 3 September 2008 decision, the Chamber noted that, while responsibility for the continuing problems did not lie with the information providers, and while there had been some real developments in the position of the information providers, the Prosecutor's proposals still failed to meet the criteria set out by the Chamber for lifting the stay.³⁹⁶

387 ICC-01/04-01/06 – 1019, para 27.

388 ICC-01/04-01/06 – 1019, para 28.

389 ICC-01/04-01/06 – 1092, para 2.

390 ICC-01/04-01/06 – 1141, paras 3 and 4.

391 ICC-01/04-01/06 – T-75, ICC-01/04-01/06 – T-78 and ICC-01/04-01/06 – T-79.

392 ICC-01/04-01/06 – 1311, Anx 2, para 88.

393 ICC-01/04-01/06 – T-86, ICC-01/04-01/06 – T-88, ICC-01/04-01/06 – T-89 and ICC-01/04-01/06 – T-90.

394 ICC-01/04-01/06 – 1401, para 93.

395 The Prosecutor first attempted to make an application to lift the stay in the course of the oral hearing on 24 June 2008, but the Trial Chamber declined to hear it: ICC-01/04-01/06 – T-91. He then made a written application on 10 July 2008: ICC-01/04-01/06 – 1431, and filed supplementary information updating the application on 30 July 2008: ICC-01/04-01/06 – 1451, again on 8 August 2008: ICC-01/04-01/06 – 1454, and again on 22 August 2008: ICC-01/04-01/06 – 1462. After this application was rejected on 3 September 2008, the Prosecutor filed a new application on 14 October 2008: ICC-01/04-01/06 – 1478, and supplemented it with further information on 21 October 2008: ICC-01/04-01/06 – 1485.

396 ICC-01/04-01/06 – 1467.

On 21 October 2008, the Appeals Chamber issued its decision on the Prosecutor’s appeal of the stay. In dismissing the appeal, the Chamber ruled that the Prosecutor’s use of confidentiality agreements must not lead to breaches of his disclosure obligations to the Defence, and that whenever he relies on Article 54(3)(e) ‘he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial’. The Chamber also ruled that the final assessment as to whether the material subject to confidentiality agreements must be disclosed to the Defence rests with the Trial Chamber. Therefore, the Trial Chamber must receive the material, but ‘will have to respect the confidentiality agreement and cannot order the disclosure of the material to the Defence without the prior consent of the information provider’. Concerning the stay of proceedings, the Appeals Chamber ruled that

[a] conditional stay of the proceedings may be the appropriate remedy where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused person is of such a nature that a fair trial might become possible at a later stage because of a change in the Situation that led to the stay.

If obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay of proceedings may decide to lift the stay of proceedings in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons ...³⁹⁷

On 18 November 2008, Trial Chamber I made a decision to lift the stay of proceedings. A press release posted on the Court’s website on the same date reports that

[t]he decision of the Chamber is based on the conviction that the reasons for imposing a halt ‘have fallen away’.

The press release indicates that the Chamber’s ‘full reasoning will be explained in a written decision in due course’.³⁹⁸ The commencement of the Lubanga trial is tentatively set for 26 January 2009.

The Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui

In an effort to avoid similar disclosure problems in the case against Katanga and Ngudjolo, Pre-Trial Chamber I, in the lead-up to the confirmation hearings, took a proactive approach. On 2 June 2008, Judge Steiner, Single Judge of the Chamber, noted that at the last indication given by the Prosecutor, he had collected some 1,632 documents pursuant to Article 54(3)(e). The Judge was of the view that this number of documents indicated that the Prosecutor was ‘not resorting to Article 54(3)(e) of the Statute only in exceptional or limited circumstances, but rather is extensively gathering documents under such provision’. This practice, the Judge noted, was

[a]t the root of the problems that have arisen in the present case, as well as in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, with regard to the disclosure to the Defence of those materials identified as potentially exculpatory ... or otherwise material for the Defence’s preparation for the confirmation hearing ... and that have been collected under the conditions of confidentiality set forth in Article 54(3)(e) of the Statute.³⁹⁹

The Judge reminded the Prosecutor that from that point on, he must

- as soon as a suspect voluntarily appears before the Court or is surrendered to the Court, identify those Article 54(3)(e) documents which are potentially exculpatory or otherwise material to the Defence, and
- expedite the Prosecution’s internal procedures in order to request the provider’s consent as quickly as possible.⁴⁰⁰

397 ICC-01/04-01/06 – 1486, paras 1-5.

398 ICC-CPI-20081118-PR371. At the time of publishing this report, the decision has not yet been made public.

399 ICC-01/04-01/07 – 543, paras 10-11.

400 ICC-01/04-01/07 – 543, para 31.

Darfur, Sudan

The Prosecutor v. Ahmad Harun and Ali Kushayb

There were no decisions from any of the Chambers to date on any aspects of disclosure in relation to the Situation in Darfur or the case against Ahmad Harun and Ali Kushayb.

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

On 20 June 2008, Pre-Trial Chamber III ordered that a number of documents which had been, up to that point, ‘under seal’ – meaning that they were available only to the Prosecutor, the Chamber and the Registry – could now be made public. The Chamber weighed, on one hand, its ‘obligations to provide for the protection and privacy of victims and witnesses’ under Articles 57(3)(c) and 68(1) of the Statute, and ‘the rights of Bemba’ under Article 67. The Chamber also considered ‘the principle of public proceedings before the Court as enshrined in Article 67(1)’. The Chamber observed that ‘the documents concerned are either publicly available or they refer to events which have become public knowledge’ and therefore, they no longer need to be kept under seal.⁴⁰¹

These newly unsealed documents include a number of reports prepared by the United Nations and NGOs,⁴⁰² a number of copies of print media articles and transcripts of radio and television interviews.⁴⁰³

On 31 July 2008, Pre-Trial Chamber III issued a decision that set out both the evidence disclosure system and the timetable for disclosure in the period leading up to Bemba’s confirmation hearing.⁴⁰⁴

In this Decision, Judge Kaul, Single Judge of the Chamber, discussed the general principles applicable to the disclosure of evidence between the parties, and its communication to the Pre-Trial Chamber. He reviewed the roles of the Prosecutor, the Defence, the Chamber and the Registry *vis-à-vis* disclosure obligations, the modalities of disclosure, and the analysis he expected the party in possession of the document or other piece of evidence to undertake, prior to disclosing the evidence.

Judge Kaul’s Decision was issued in the wake of the stay of proceedings in the Lubanga case, an event caused by the Prosecutor’s failure to fulfil his disclosure obligations to the Defence. The Prosecutor’s application to appeal this Decision, arguing that the Judge overstepped his bounds in imposing a disclosure system on the parties, was rejected.⁴⁰⁵

401 ICC-01/05-01/08 – 20.

402 These include a report prepared by Amnesty International entitled *Central African Republic: Five Months of War Against Women*.

403 Copies of the unsealed documents are available at ICC-01/05-01/08 – 26 and ICC-01/05-01/08 – 29.

404 ICC 01/05-01/08 – 55.

405 ICC 01/05-01/08 – 63, ICC 01/05-01/08 – 75.

Judiciary

Key Decisions CONTINUED

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Witness-related Issues

During 2008, Chambers in the cases arising out of the Situation in the DRC have made a number of decisions on issues and procedures relating to witnesses who will give evidence before the Court, as well as to victims appearing before the Court as witnesses. These include the crucial distinctions between the familiarisation of witnesses and the practice of witness proofing, the use of expert witnesses, the protocol for interviewing witnesses, guidelines for dealing with the vulnerable or traumatised witness, and the considerations involved in deciding upon whether to hold proceedings *in situ*. The Chambers have attempted in these decisions to delineate the often overlapping areas of responsibility of the different organs of the Court which must interact with witnesses.

DRC

The Prosecutor v. Thomas Lubanga Dyilo
The Prosecutor v. Bosco Ntaganda
The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

The Prosecutor v. Thomas Lubanga Dyilo

In a decision issued on 30 November 2007, Trial Chamber I considered the practices used to prepare and familiarise witnesses for giving testimony at trial, and scrutinised the practice of ‘witness proofing’.⁴⁰⁶ The Chamber noted that the practice of familiarising witnesses with courtroom procedures was not particularly contentious among the parties and participants, and that it was used in many national and international contexts. The Chamber ordered that the VWU undertake the process of **witness familiarisation**, in consultation with the party introducing the witness, and specified that the process must include:

- assisting the witness to understand fully the Court’s proceedings, its participants and their respective roles;
- reassuring witnesses about their role in proceedings before the Court;
- ensuring that witnesses clearly understand that they are under a strict legal obligation to tell the truth when testifying;
- explaining to the witnesses the process of examination;
- discussing matters relating to the security and safety of witnesses in order to determine the necessity of applications for protective measures;
- providing witnesses with an opportunity to acquaint themselves with the people who may examine them in Court; and
- ‘walking witnesses through’ the courtroom and its procedure prior to the day of their testimony in order to acquaint them with the layout of the Court, and particularly where the various participants will be seated and the technology that will be used, in order to minimise any confusion or intimidation.⁴⁰⁷

406 ICC-01/04-01/06 – 1049.

407 ICC- 01/04-01/06 – 1049, para 53.

The Chamber also ordered that the VWU make available to the witness a copy of any statement the witness may have made, in order to refresh the witness’s memory. It also ordered the VWU to

take special care ... to ensure that vulnerable witnesses are treated in a sensitive manner which takes into account any special needs or vulnerabilities which an individual witness may have.⁴⁰⁸

The Chamber ruled that once the process of witness familiarisation has commenced ‘any further meeting between a party and its witness outside of Court is prohibited’.

The Chamber decided that **witness proofing** could not be used at the ICC, despite the fact that the practice was used in some national systems,⁴⁰⁹ as well as at the *ad hoc* tribunals.⁴¹⁰ ‘Witness proofing’ was defined by the Prosecutor for the Chamber as being

the practice whereby a meeting is held between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose of which is to re-examine the witness’s evidence to enable more accurate, complete and efficient testimony.⁴¹¹

Procedures such as witness proofing may be especially important for victims of sexual and gender-based violence, who have to deal with both trauma and an unfamiliar proceeding, including cross-examination on their testimony. In the absence of such procedures, it is essential that all other measures be taken to ensure that witnesses giving testimony on these matters have been given full access to the support mandated by the Statute, Rules and Chambers, as discussed later in this section.

On 10 December 2007, Trial Chamber I issued a decision concerning use of expert witnesses. Concerning the use of joint rather than separate expert witnesses by the parties and participants, the Chamber took the view that the interests of justice would best be served by the use of ‘a single, impartial and suitably qualified expert’ and that it favoured, wherever possible, the parties and/or participants providing joint, rather than separate instructions to the expert.

408 ICC-01/04-01/06 – 1049, para 54.

409 Including those of Australia, Canada, England and Wales and the United States.

410 ICC-01/04-01/06 – 1049, paras 56-57.

411 ICC-01/04-01/06 – 1049, para 7. The Prosecutor’s definition was taken from that used by the *ad hoc* tribunals, where ‘witness proofing’ is a common and accepted practice.

The Chamber ruled that, where the parties cannot come to an agreement on joint instructions, separate instructions could be provided, but that where a participant wished to provide separate instructions, the participant must first obtain the leave of the Chamber to do so.⁴¹² The Chamber ordered that the parties could 'only instruct separate experts after that proposed course has been raised with the Chamber, but that a participant could only do so with leave of the Chamber'.

Under the *Regulations of the Court*, the Registry is required to create and maintain a list of experts accessible at all times to all organs of the Court and to all participants in proceedings before the Court.⁴¹³ The Trial Chamber noted in this decision that the list to be maintained by the Registry 'should provide a wide selection of experts,' to assist the parties and the Court. However, the Chamber noted that at that date, the list comprised only 28 experts and as such was 'of limited value'. The Chamber noted that a more comprehensive list needed to be drawn up:

When completed, it should at the least provide useful guidance to the parties and participants when they are selecting expert witnesses. The Chamber reminds the Registrar that in the establishment of the list of experts he should have regard to equitable geographical representation and a fair representation of female and male experts, as well as experts with expertise in trauma, including trauma relating to crimes of sexual and gender violence, children, elderly, and persons with disabilities, among others.⁴¹⁴

As of 28 August 2008, an updated list of experts has been posted on the ICC website.⁴¹⁵ This list contains 75 experts, of whom 15 or 20% are women. However, as the qualifications are given in very general terms it is still not clear from the list which experts will be particularly able to address trauma relating to crimes of sexual and gender violence.

412 ICC-01/04-01/06 – 1069, paras 14-16.

413 Regulation 44, *Regulations of the Court*.

414 ICC-01/04-01/06 – 1069, para 24. The Chamber also ordered that where an expert who is not already on the list of experts is relied on, an application should be made to add his or her name to the list, and the Chamber should receive notification of the application.

415 The list of experts is available at <http://www.icc-cpi.int/NR/rdonlyres/045C6DC2-9E7E-4F20-A5CF-6C1F8959B908/279743/ICCExpertsListENG.pdf>

In a decision issued on 29 January 2008, Trial Chamber I gave general guidelines on matters relating to the testimony of witnesses during trial.⁴¹⁶ The Chamber ruled that a party may question a witness called by another party or participant about matters which go beyond the scope of the witness's initial evidence. The Chamber accepted the general principle that parties do not have an obligation to disclose their lines of questioning in advance, since the line of questioning a party takes with any witness 'will depend to a significant extent on the issues raised, and the answers given, during the evidence of the witness'. However, the Chamber appreciated that

exceptions may be necessary, particularly in order to protect traumatised or vulnerable witnesses and in these circumstances the Trial Chamber may order the parties and participants to disclose in advance the topics they seek to cover during their questioning.⁴¹⁷

The Trial Chamber also issued guidelines as to the manner in which traumatised and vulnerable witnesses shall present their evidence. It indicated that it will ensure, in overseeing the conduct of a trial, that

appropriate steps are taken to guarantee the protection of all victims and witnesses, and particularly those who have suffered trauma, or who are in a vulnerable situation.

The Chamber noted that, rather than trying to anticipate every situation in advance, it would rule on the merits of individual applications for protective or special measures, such as whether

- the testimony of vulnerable witnesses is to be treated as confidential and access to it limited to the parties and participants in the proceedings;
- evidence in appropriate circumstances can be given out of the direct sight of the accused or the public;
- a witness should be able to control his or her testimony and, if so, to what extent;
- breaks in the evidence should be allowed as and when requested; and
- a witness can require that a particular language is used.⁴¹⁸

416 ICC-01/04-01/06 – 1140.

417 ICC-01/04-01/06 – 1140, para 33.

418 ICC-01/04-01/06 – 1140, para 35.

The Trial Chamber encouraged all organs of the Court, but particularly the VWU, to raise with the Chamber early on 'any specific concerns regarding the integrity and well-being of a witness, especially those who may be traumatised or vulnerable'.⁴¹⁹ The Chamber also reiterated an earlier request to the VWU to prepare a protocol for witness familiarisation, and an earlier request to the Registry to submit, in advance of the Lubanga trial, a comprehensive list of professionals 'who are available to assist the relevant witnesses before, during and after their testimony, in addition to the support staff of the VWU'.

The list should include professionals with diverse relevant experience, including ... psychologists. The Registry should take all necessary steps to secure fair gender representation and the list should reflect the language and cultural background of the witnesses ...⁴²⁰

Finally, the Trial Chamber considered the question of live testimony via audio- or video-link technology. The Chamber noted that there was a presumption that witnesses will give evidence by way of live, in-court testimony, but ruled that it would authorise the use of audio- or video-link on a case-by-case basis 'whenever necessary', after first ensuring

that the venue chosen for the conduct of the audio- or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.⁴²¹

In the Lubanga case, Trial Chamber I explored the possibility of holding *in situ* proceedings. Article 62 of the Rome Statute provides that trial shall be held at the seat of the Court in The Hague. Rule 100(1) of the RPE provides that 'in a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit' elsewhere than in The Hague. In the Lubanga case, consideration had been given, from mid-2007 to April 2008, to the question of whether part of the trial should be held in the DRC, and Trial Chamber I had sought submissions from the parties and participants on the question. The Legal Representative for three of the victims submitted that, assuming security concerns could be addressed, holding hearings in the DRC would serve two purposes: it would make the trial more visible to the victims, and it would allow access to the trial for victims who would not otherwise have any hope of participating. The Prosecutor submitted that, although he was in favour of 'bringing the trial as close as possible to the

witnesses', he believed security concerns made an *in situ* trial highly problematic and perhaps unworkable in the Lubanga case. The Defence submitted that as long as the accused could be present, the technical hurdles surmounted, and there was no delay in the start of the trial, the case should be heard not only in the DRC, but in Ituri, where the crimes Lubanga had been charged with were alleged to have occurred, 'so that the community concerned may attend the trial'. The Chamber requested the OTP and the VWU to contact the witnesses, to obtain their views on the matter; the result was that over two-thirds of the witnesses did not wish to testify in the DRC.⁴²²

On 24 April 2008, the Chamber ruled that the entirety of the trial would be held in The Hague. The determining factor was a letter from the relevant authorities in the DRC that the location identified by the Chamber for a hearing in the DRC 'was inappropriate as it could lead to ethnic tensions in an area that had been recently pacified and is potentially unstable'. The Chamber noted that the location it had selected was the only one that satisfied all the criteria for a hearing in the DRC. Finally, it noted that 'moving a part of the proceedings to the [DRC] can only take place with the consent of the Government, which in the event has not been given'.⁴²³

In a decision issued on 23 May 2008, Trial Chamber I set out a protocol on the practices to be used by the VWU to prepare witnesses for trial. The Chamber also ruled that, in the absence of compelling reasons for doing so, witnesses need not be transported or accommodated separately.⁴²⁴

On 3 June 2008, Trial Chamber I ruled that a party or participant may interview witnesses called by another party or participant only after informing the party or participant calling the witness and obtaining the witness's consent. The Chamber also ruled that the VWU must be present during any such interview, and that the party or participant may also attend, unless the Chamber rules otherwise.⁴²⁵

There were no decisions in 2008 dealing with witness-related issues in the Situations under investigation by the Court in Uganda, Sudan or CAR, or in the cases arising out of those Situations. With Bemba now in custody in relation to the CAR Situation, and his confirmation hearing scheduled to commence in early 2009, it is expected that there may be witness-related issues coming to light in the near future upon which Pre-Trial Chamber III will be called to make rulings.

422 ICC-01/04-01/06 – 1311-Anx 2, paras 68-69.

423 ICC-01/04-01/06 – 1311-Anx 2, para 105. The selected location referred to in the decision was not identified.

424 ICC-01/04-01/06 – 1351.

425 ICC-01/04-01/06 – 1372.

419 ICC-01/04-01/06 – 1140, para 36.

420 ICC-01/04-01/06 – 1140, para 39.

421 ICC-01/04-01/06 – 1140, para 41. The Chamber here was quoting directly from Rule 67(3).

Judiciary

Key Decisions CONTINUED

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Amicus Curiae

Amicus curiae means ‘friend of the court’. In many legal systems of the world, and in most of the international courts and tribunals operating today, organisations or individuals may, with leave, submit observations to the court or tribunal as *amicus curiae* where such observations would assist the court or tribunal in the proper determination of a case. The Rules of Procedure and Evidence of the Rome Statute provide for the making of observations as *amicus curiae* ‘on any issue that the Chamber deems appropriate’.⁴²⁶

In 2006, the Women’s Initiatives for Gender Justice sought leave to submit observations as *amicus curiae* in both the DRC Situation and the Lubanga case. The Women’s Initiatives was the first NGO to seek *amicus* status before the Court, and, as Pre-Trial Chamber I noted in its decision, submitted the first ‘spontaneous’ application for *amicus* status.⁴²⁷

In 2008, four organisations requested leave to submit observations under this provision. Three of those four requests were granted, two in the Lubanga case, and the other in the Kony case.

⁴²⁶ Rule 103(1).

⁴²⁷ In the application, the Women’s Initiatives for Gender Justice sought leave to make observations on judicial oversight of prosecutorial discretion, and on the role and rights of victims under the Rome Statute. This application was ultimately declined because, as the Chamber noted, investigations in the DRC are ongoing and the Prosecutor has not taken any decision not to investigate or prosecute. This decision is reviewed in the 2007 *Gender Report Card*, p 38.

DRC

The Prosecutor v. Thomas Lubanga Dyilo
The Prosecutor v. Bosco Ntaganda
The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

The Prosecutor v. Thomas Lubanga Dyilo

On 7 December 2007, Radhika Coomaraswamy, the United Nations Special Representative on Children and Armed Conflict, requested leave to submit written observations to the Court in the Lubanga case, under the *amicus curiae* provisions of the Statute.⁴²⁸ The Special Representative requested leave to make observations on a total of six issues relating to the crimes of conscripting or enlisting children under the age of 15 years into national armed forces or armed groups, or using them to participate actively in hostilities.

The Prosecutor supported the Special Representative's request, recognising her 'unique insight and expertise' and submitted that her observations would be of assistance to the Court. The Defence opposed the request, arguing that the Special Representative appeared to be aiming to 'raise public awareness of the views and objectives of her organisation',⁴²⁹ rather than to assist the Court with a question of law or fact. The Legal Representative for the victims did not take any position for or against the request.

On 18 February 2008, Trial Chamber I issued a decision inviting observations from the Special Representative. The Chamber considered that, given her role on behalf of the Secretary-General of the United Nations, where her work focuses on 'the plight of children in armed conflict', and given 'that she works closely with competent international bodies to ensure the protection of children in these situations', she would be able to supply information and assistance of direct relevance on certain issues that otherwise will not be available to the Court.⁴³⁰

The Chamber, however, limited the Special Representative's observations to the following two issues:

- The definition of 'conscripting or enlisting' children and, bearing in mind a child's potential vulnerability, the manner in which any distinction between the two formulations (ie conscription or enlistment) should be approached; and
- The interpretation, focusing particularly on the role of girls in armed forces, of the term 'using them to participate actively in the hostilities'.⁴³¹

The Special Representative filed her observations on 18 March 2008.⁴³² She noted that her mandate as Special Representative 'encompasses advocacy to raise awareness about the plight of children in armed conflict' but also to 'work closely with competent international bodies to ensure protection of children in situations of armed conflict'. She noted that the UN General Assembly recognises the role of the Court 'in ending impunity for perpetrators of crimes against children', and as such, her mandate both authorised and compelled her to assist the Court as *amicus curiae*.⁴³³

On the definition of 'conscripting or enlisting' children, she noted that there is a high likelihood that children under the age of 15 will be conscripted or enlisted, due to the nature of contemporary armed conflicts, and that children are 'extremely vulnerable to military recruitment and being manipulated or enticed into joining' armed groups:

The risk of conscripting or enlisting children under the age of 15 is never low. In armed conflict zones, the impunity of the perpetrators, the need for more numbers in the ranks, and the vulnerability of children who are often orphaned, displaced, without family and community protection and fighting for survival, are amongst the aggravating factors that increase this risk.⁴³⁴

431 ICC-01/04-01/06 – 1175, para 11. The issues on which the Special Representative was not granted leave to submit observations include: (1) the problems relating to the voluntary nature of children joining armed groups or forces, and the defence of duress; (2) the objective elements of the charges under Article 25 of the Statute; (3) the mental element of the charges, and in particular the interpretation to be given to the word 'knowledge' in Article 30(3) of the Statute and (4) the Court's jurisdiction generally, along with issues of admissibility, particularly as regards crimes that are allegedly committed on a widespread basis and as part of a policy or plan.

432 ICC-01/04-01/06 – 1229-Anx 2.

433 ICC-01/04-01/06 – 1229-Anx 2, para 2.

434 ICC-01/04-01/06 – 1229-Anx 2, paras 5-7.

428 ICC-01/04-01/06 – 1105.

429 ICC-01/04-01/06 – 1175, para 3.

430 ICC-01/04-01/06 – 1175, para 7.

The Special Representative noted that recruitment of individual child soldiers by armed groups ‘may be characterised by elements of compulsion and voluntariness, rendering the task of categorising child soldiers under one or the other recruiting crime difficult’. The recruitment and enlisting of children in the DRC, she noted,

is not always based on abduction and the brute use of force. It also takes place in the context of poverty, ethnic rivalry and ideological motivation. Many children, especially orphans, join armed groups for survival to put food in their stomachs. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role models they know. They are sometimes encouraged by parents and elders and are seen as defenders of their family and community.

In most conditions of child recruitment even the most ‘voluntary’ of acts are taken in a desperate attempt to survive by children with a limited number of options. Children who ‘voluntarily’ join armed groups mostly come from families who were victims of killing and have lost some or all of their family or community protection during the armed conflict.⁴³⁵

The Special Representative concluded this section of her observations by stressing that a case-by-case determination of whether the crime was one of enlistment or conscription must include an examination of ‘the acts children are required to perform, the circumstances on how the child was enrolled and the circumstances surrounding the child’s separation from family and community’.⁴³⁶

On the interpretation of the term ‘using them to participate actively in the hostilities’, the Special Representative noted that children’s participation ‘takes numerous and varied forms and includes tasks and roles that are typically fulfilled by girls’.⁴³⁷ She noted that the confirmation of charges decision in the Lubanga case ‘placed an outer limit on the “participate actively” standard’, ruling that it does not apply when the contribution in question is ‘manifestly without connection to the hostilities’.

The Special Representative cautioned against such a ‘bright-line rule’ to determine which activities qualify under the ‘participate actively’ standard:

... this effort is ill-conceived and threatens to exclude a great number of child soldiers – particularly girl soldiers – from coverage under the ‘using’ crime.⁴³⁸

She stressed that the ‘participate actively’ inquiry requires a case-by-case approach, and that the relevant question for the Court in each case was whether the child’s participation ‘served an essential support function to the armed force or armed group during the period of conflict’.

A case-by-case approach is particularly apt and critical in the context of modern conflicts in which the nature of warfare differs from group to group and the children used in hostilities play multiple and changing roles ...

As a matter of guidance, children who serve essential support functions for armed forces and armed groups during the period of hostilities may function in any of the following roles over the course of their use, including but not limited to: cooks, porters, nurses, spies, messengers, administrators, translators, radio operators, medical assistants, public information workers, youth camp leaders, and girls or boys used for sexual exploitation.⁴³⁹

The Special Representative noted that the ‘exclusion of girls from the definition of child soldiers would represent an insupportable break from the well-established international consensus’. She urged the Court to

deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the ‘using’ crime.⁴⁴⁰

and underscored that ‘during war, the use of girl children in particular includes sexual violence’. She concluded her report by reminding the Court that girl combatants are often invisible:

Because they are also wives and domestic aides, they either slip away or are not brought forward for DDR programmes. Commanders prefer to ‘keep their women’, [and] often father their children, and even if the girls are combatants, they are not released with the rest. Their complicated status makes them particularly vulnerable. They are recruited as child soldiers and sex slaves but are invisible when it comes to the counting.⁴⁴¹

435 ICC-01/04-01/06 – 1229-Anx 2, paras 13-14.

436 ICC-01/04-01/06 – 1229-Anx 2, para 16.

437 ICC-01/04-01/06 – 1229-Anx 2, para 17.

438 ICC-01/04-01/06 – 1229-Anx 2, para 19.

439 ICC-01/04-01/06 – 1229-Anx 2, paras 21-23.

440 ICC-01/04-01/06 – 1229-Anx 2, para 25.

441 ICC-01/04-01/06 – 1229-Anx 2, para 26.

On 10 April 2008 in the Lubanga case, the International Criminal Bar submitted a request for leave to make observations as *amicus curiae* in an appeal brought by Lubanga from a decision of the Trial Chamber on disclosure. The specific issue on which the organisation requested leave was the meaning of the phrase ‘material to the preparation of the Defence’ and it noted that this issue had not been addressed by either the Prosecutor or the Defence in their submissions to the Appeals Chamber.⁴⁴² The organisation attached a copy of its proposed observations as an annex to its request.⁴⁴³ Neither the Prosecutor nor the Defence opposed the organisation’s request for leave to make observations.

On 22 April 2008, the Appeals Chamber issued a decision unanimously granting this request for leave and accepting the proposed observations. The Chamber noted that the parties were not opposed to the grant of leave, and ruled that the observations of the International Criminal Bar ‘may assist [it] in the proper determination of the case’.⁴⁴⁴

Uganda

The Prosecutor v. Joseph Kony et al

On 31 October 2008, two organisations submitted a joint request with Pre-Trial Chamber II to be granted leave to make observations concerning the admissibility of the case against Joseph Kony *et al.*⁴⁴⁵ The Uganda Victims’ Foundation and the Redress Trust advised the Chamber that they were ‘well placed to assist the Court in the proper determination of the issue of admissibility’ of the case, because both organisations

have experience in working on the issues of international crimes committed during the conflict in Northern Uganda, have followed closely the Juba Peace Agreement process from a victims’ rights perspective, and are following and closely monitoring the institutional developments that have been taking place pursuant to the Annexure to the Juba Peace Agreement.⁴⁴⁶

Both organisations also advised the Chamber that they were in regular contact with victims. They requested leave to submit observations concerning, firstly, the relationship between the investigations and prosecutions foreseen under the Annexure to the Peace Agreement and specifically

- the extent to which the investigations and prosecutions proposed under the Annexure satisfy Ugandan victims’ needs for justice, accountability and reconciliation;
- the state of advancement in the implementation of the Annexure, particularly in relation to the establishment of the Special Division of the High Court; and
- the extent to which the legal framework for the establishment of the Special Division complies with principles of accountability as espoused by the ICC Statute and other international treaties binding on Uganda and principles of general international law.

442 ICC-01/04-01/06 – 1273.

443 ICC-01/04-01/06 – 1273-Anx A.

444 ICC-01/04-01/06 – 1289, para 8.

445 ICC-02/04-01/05 – 330.

446 ICC-02/04-01/05 – 330, para 14.

And secondly, concerning

the experiences of victims of crimes within the jurisdiction of the ICC in obtaining justice in Ugandan domestic criminal jurisdictions and other forums, and the relationship with issues of admissibility under Article 17 of the Statute. Here, the Applicants propose to make observations on the tested capacity of the Ugandan judiciary to afford justice to victims of serious international crimes.⁴⁴⁷

On 5 November 2008, Pre-Trial Chamber II issued a decision granting leave to Uganda Victims' Foundation and Redress Trust to submit observations.⁴⁴⁸ The Chamber noted that the 'most desirable aspect of the proposed submissions of the Applicants consists of the factual information they may be in possession of' and ordered that the organisations confine their observations to the following:

- the state of implementation of the Annexure, with particular reference to the establishment of the Special Division of the High Court;
- the existence of any relevant legal texts relating to such establishment or to the Annexure; and
- the experiences of victims of crimes within the jurisdiction of the Court in seeking justice from Ugandan courts.

The Chamber ordered that the organisations refrain from 'providing information of a general nature as regards victims' issues and/or analysis of a legal nature'.⁴⁴⁹

On 7 November 2008, Amnesty International also requested leave to submit observations as *amicus curiae* on the admissibility of the Kony case. The organisation advised the Chamber that it was requesting leave to submit observations because

The issues raised are central to the effective implementation of the principle of complementarity, the bedrock principle on which the Court is founded and operates. The decision of the Chamber on admissibility in this case will have a significant impact upon all future cases, including cases relating to the Situation in Darfur, Sudan, and cases relating to the Situation in the Central African Republic. The decision of the Chamber will also be a crucial factor in future decisions by the Prosecutor whether to open investigations in other situations and to select cases within those situations for prosecution.⁴⁵⁰

447 ICC-02/04-01/05 – 330, para 15.

448 ICC-02/04-01/05 – 333.

449 ICC-02/04-01/05 – 333, paras 13-14.

450 ICC-02/04-01/05 – 335, para 10.

Amnesty International advised the Court that, if granted leave, it would limit its submissions to the legal criteria for determining whether the case is admissible under Article 17 of the Statute.⁴⁵¹

On 10 November 2008, Pre-Trial Chamber II issued a decision rejecting the organisation's request.⁴⁵² The Chamber noted that the request sought leave to make observations on legal criteria, which it had previously indicated it would not accept. The Chamber also noted that the request was 'too vague' for the Chamber to be able to establish whether the observations would include 'information of direct relevance on issues that otherwise may not be available to the Court'. The Chamber concluded that granting the organisation leave was 'neither desirable nor appropriate'.⁴⁵³

On 18 November 2008, the Uganda Victims' Foundation and the Redress Trust submitted their *amicus curiae* brief to the Court.⁴⁵⁴ The first part of the brief describes the state of implementation of the Annexure to the Peace Agreement, in particular the steps taken towards the establishment of the Special Division of the High Court of Uganda. It also describes the application of Uganda's Amnesty Act and other legislation in force in Uganda relevant to the investigation and prosecution of crimes allegedly perpetrated by members of the LRA. The second part of the brief deals with the experiences of victims of crimes within the jurisdiction of the Court in seeking justice from Ugandan courts.

The authors of the brief note that, to their knowledge, there have been no investigations and prosecutions into crimes within the jurisdiction of the Court allegedly perpetrated by members of the LRA and therefore impunity continues to be pervasive.⁴⁵⁵

The brief also notes that victims are frustrated in their attempts to seek justice in Ugandan courts both by a 'limited capacity to assert criminal jurisdiction' against LRA members as a result of the *Amnesty Act*, and by the lack of domestic incorporation of most international crimes.⁴⁵⁶ The brief notes that victims are reluctant to lodge complaints with the competent local bodies for a variety of reasons, including their lack of knowledge of and trust in the Ugandan judicial system, their lack of financial means to progress cases, and the 'quasi-impossibility' of obtaining reparations.⁴⁵⁷

451 ICC-02/04-01/05 – 335, para 11.

452 ICC-02/04-01/05 – 342.

453 ICC-02/04-01/05 – 342, paras 10-13.

454 ICC-02/04-01/05 – 353.

455 ICC-02/04-01/05 – 353, para 32.

456 ICC-02/04-01/05 – 353, paras 34-41.

457 ICC-02/04-01/05 – 353, para 42.

Judiciary

Requests for Cooperation

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Under Part IX of the Rome Statute, the Court has the authority to make requests to States Parties for cooperation. States Parties are obligated under the Statute to comply with such requests. In previous years, the Court has made several requests to States Parties for cooperation in executing arrest warrants. During 2008 the Court made requests for cooperation to the Governments of Uganda and the DRC concerning the outstanding arrest warrants for Joseph Kony and his co-suspects. The Court has also made requests to a number of European states in connection with the Bemba case. These requests are described below.

Uganda

The Prosecutor v. Joseph Kony et al

On 28 February 2008, Pre-Trial Chamber II issued a *Request for Information from the Republic of Uganda on the Status of Execution of Warrants of Arrest* concerning Joseph Kony and his co-suspects. On 28 March 2008, the Registrar delivered Uganda's response to the Chamber.⁴⁵⁸ The response describes steps Uganda either had taken or intended to take to implement the Annexure to the peace agreement it earlier signed with the LRA.⁴⁵⁹ It also details the 'national legal arrangements, consisting of formal and non-formal institutions and measures for ensuring justice and reconciliation with respect to the conflict'.

Among these formal measures is the establishment of a Special Division of the High Court of Uganda 'to try individuals who are alleged to have committed serious crimes during the conflict', which 'is not meant to supplant' the work of the ICC – rather, those individuals who have been indicted by the ICC would be brought to trial before the Special Division of the High Court for trial. However it should be noted, under provision 4.1 of the Agreement on Accountability and Reconciliation, that 'state actors shall be subjected to existing criminal justice processes and not to special justice processes under this Agreement'. This means that military personnel and other Government related individuals, alleged to have committed serious crimes during the conflict would be dealt with either through the Ugandan military tribunal or the existing criminal justice procedures.

As such the establishment of the Special Division of the High Court is essentially intended as a Court to try the LRA only. It is possible the Court may not be established to function at the highest level of international criminal justice ensuring rigorous investigations and impartial trials, safeguarding the rights of the accused, ensuring protection for witnesses and victims, and fair and reasonable sentencing. Neither the Ugandan ICC Bill nor the parliamentary act to establish the jurisdiction of the Special Division of the High Court has yet been passed.

The Government of Uganda informed the Chamber that the referral of the Situation in northern Uganda to the ICC was based on a lack of international cooperation in dealing with the LRA beyond Uganda's borders, and was not due to lack of capacity in its domestic judicial system. It also informed the Chamber that it expects that, 'once the peace agreement is signed and the [Lord's Resistance] Army submits to Ugandan jurisdiction as required, the perpetrators of the atrocities' in Northern Uganda 'shall be subjected to the full force of the law'. Uganda also advises the Court that it remains 'committed to executing [the arrest warrants] should the LRA leadership fail to subject themselves to the process of justice in Uganda' and also remains 'committed to and prepared to meet its obligations under the Rome Statute and under the bilateral agreements it has concluded with the [ICC]'.

On 18 June 2008, Pre-Trial Chamber II issued another formal request for cooperation, this time asking Uganda to provide detailed information on

- the impact of the latest developments on the cooperation provided by the Republic of Uganda in order to execute the Warrants of Arrest; and
- the steps currently taken by the Republic of Uganda with the view to executing the warrants.

The Chamber noted in this further request that since the last Response had been received, 'several developments have taken place, in particular the reported failure to sign the final peace agreement' and that, as a result of these developments, it was 'necessary for the Chamber to receive information from the Republic of Uganda on the impact of such latest developments on Uganda's cooperation with respect to the execution of the Warrants'.⁴⁶⁰

On 10 July 2008, the Registrar delivered Uganda's response to the Chamber. Concerning the impact of the latest developments on its cooperation in executing the Warrants of Arrest, Uganda reiterated its commitment to the objectives and mission of the Court, that its commitment was 'never vitiated by the involvement in the peace talks' and that 'Uganda's position remains that there must not be impunity for the perpetrators of the crimes in Northern Uganda'.

458 ICC-02/04-01/05 – 286, Anx 1, Anx 2.

459 *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Movement/Army*.

460 ICC-02/04-01/05 – 299.

Uganda notes that the peace agreement provided for the establishment of

a special division of the High Court of Uganda to try individuals responsible for the most serious crimes. This, however, was without prejudice to Uganda's commitments under the *Rome Statute of the International Criminal Court* and the *Cooperation Agreement between the Government of Uganda and the Office of the Prosecutor ...* Uganda remains committed to executing the Warrants of Arrest if the opportunity should arise, and is ready to be part of any coordinated efforts that may be undertaken by the Court and the international community to achieve this goal. Therefore, with or without the peace agreement, Uganda will continue to provide the Court with all the cooperation it requires.

As to steps currently being taken to execute the warrants, Uganda reminds the Court that the LRA has, for more than three years, been based in the DRC, 'beyond Uganda's territorial jurisdiction'. It would be a breach of international law, Uganda argues, if it were to attack the LRA in the DRC without the authorisation of the Government of the DRC.

The Government of Uganda continues to spare no effort in its attempts to secure the cooperation of the Government of the DRC and the United Nations Missions in the DRC (MONUC) in this endeavour.

The response concludes by urging the Court 'to request the Government of the DRC to earnestly cooperate in this regard'.

On 21 October 2008, Pre-Trial Chamber II sent a request to the Government of the DRC requesting them to provide 'detailed information on the measures taken for the execution of the warrants'.⁴⁶¹ The Government of the DRC responded on 14 November 2008.⁴⁶² In their reply, the Government stated that the situation had not changed since their letter to the Court in 2006. The *Procureur General* of the DRC also noted that he had transmitted a letter to the DRC's general prosecutors reminding them about the ICC warrants, and in particular drawing the attention of the prosecutor in Kisangani to the reports about the LRA's activities in Garamba National Park.

461 ICC-02/04-01/05 – 321.

462 ICC-02/04-01/05 – 348, Anx 1, Anx 2.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

The Prosecutor v. Bosco Ntaganda

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

During 2008 Pre-Trial Chamber I made a number of formal requests to the Government of the DRC for cooperation in matters relating to the arrest of suspects and their transfer to The Hague, and for the location and seizure of their assets. The Chamber also made formal requests to the Kingdom of the Netherlands and a number of other States for cooperation in relation to the proposed interim release of suspects and accused.

On 5 November 2007, Pre-Trial Chamber I ordered the Registrar to prepare requests, to be addressed to the competent DRC authorities, for cooperation in the arrest of Germain Katanga and his surrender to the Court, and for cooperation in the identification, location, freezing or seizing of Katanga's assets.⁴⁶³

On 14 November 2007, the Registrar, acting on a previous order of Pre-Trial Chamber I,⁴⁶⁴ issued a request to the Government of the DRC for cooperation in the arrest of Mathieu Ngudjolo and his surrender to the Court, and for cooperation in the identification, location, freezing or seizing of Ngudjolo's assets.⁴⁶⁵

On 27 February 2008, the Registrar reported to the Chamber that Ngudjolo was arrested on 6 February 2008 by Congolese authorities acting in response to this request for cooperation, and that he was surrendered to the Court the following day.⁴⁶⁶

On 14 February 2008, the Chamber ordered the Registrar to notify the relevant authorities of the Kingdom of Belgium, France, the UK and the Kingdom of the Netherlands on the application for interim release of Ngudjolo. The Registrar was ordered to provide them each with copies of Ngudjolo's Warrant of Arrest, along with the decision on which the warrant was based, and to invite each State to make observations on Ngudjolo's proposed interim release and on the conditions, if any, that would have to be met in order for the State to accept Ngudjolo's release on its territory.⁴⁶⁷ Responses made by the States to these invitations have not been made public.

463 ICC-01/04-01/07 – 54.

464 ICC-01/04-01/07 – 2.

465 ICC-01/04-01/07 – 265 and ICC-01/04-01/07 – 266.

466 ICC-01/04-01/07 – 303.

467 ICC-01/04-01/07 – 282.

On 22 February 2008, the Chamber ordered the Registrar to notify the relevant authorities of the Kingdom of the Netherlands of Katanga's application for interim release, to provide them with copies of Katanga's Warrant of Arrest, along with the decision on which the warrant was based and the observations of the parties on Katanga's application, and to invite the State to make observations on Katanga's proposed interim release and on the conditions, if any, that would have to be met in order for the State to accept Katanga's release on its territory.⁴⁶⁸

On 6 March 2008, the Registrar delivered to the Chamber the response of the relevant authorities of the Kingdom of the Netherlands to its 22 February request. In its response, the Netherlands advised the Chamber that, as Host State of the Court, it considered itself 'under an obligation to facilitate the transfer of persons granted interim release into a State other than the Netherlands'. However, it stressed that it was under no obligation 'to accept the entry into its territory of any person granted interim release by the [Court]' and was not prepared to do so.⁴⁶⁹

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Darfur, Sudan

The Prosecutor v. Ahmad Harun and Ali Kushayb

As Sudan is not a State Party, there have been no requests for cooperation to Sudan in respect of either the Situation in Darfur or the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*.

468 ICC-01/04-01/07 – 222.

469 ICC-01/04-01/07 – 251 and ICC-01/04-01/07 – 251-Anx-1.

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III made requests for cooperation to the Kingdom of Belgium and the Republic of Portugal for assistance to arrest Bemba and to freeze his assets, respectively. The Chamber, through the Registrar, also notified Belgium, Portugal, Switzerland and The Netherlands requesting their comments on Bemba's applications for interim release and proposed residence.⁴⁷⁰

On 23 May 2008, on the basis of information that Bemba was at that point in Belgium but was preparing to leave, Pre-Trial Chamber III issued a formal request, under seal, to the Kingdom of Belgium, for its cooperation in the arrest and detention of Bemba and his transfer to the Court.⁴⁷¹

On 27 May 2008, the Chamber issued a request for cooperation addressed to the Republic of Portugal to identify, trace, freeze and seize any property and assets of Bemba located on its territory.⁴⁷² This request was executed by the Republic of Portugal, and on 25 July 2008, the Chamber received information from the Portuguese authorities concerning the amount of Bemba's money frozen in Bemba's bank accounts in Portugal.⁴⁷³

On 4 August 2008, the Chamber issued three further formal requests, in connection with Bemba's first application for interim release pending trial. In his application, Bemba had advised the Chamber that, if he were to be granted interim release, he would 'wish to reside in principle in Belgium with his family ... in the alternative[,] under the protection of the Portuguese authorities in his residence in Portugal and as a second alternative[,] in Switzerland'.⁴⁷⁴ On that basis, the Chamber requested that the relevant authorities of Belgium, Portugal and Switzerland provide their observations concerning Bemba's proposed residence in those States. The Chamber also requested that the Netherlands provide its observations on Bemba's application for interim release.⁴⁷⁵ On 15 August 2008, the Registrar reported to the Chamber that she had received the observations

from all four of these States.⁴⁷⁶ However, the Chamber ultimately rejected Bemba's application without considering the observations of any of the four States. These observations have never been made public.

On 13 October 2008, Portuguese authorities informed the Chamber that 'a significantly lower amount of money' was available in Bemba's bank accounts in Portugal despite the accounts having been frozen, at the request of the Chamber, since June 2008.⁴⁷⁷

On 10 November 2008, Pre-Trial Chamber III ordered the Registrar to notify the relevant authorities of the Kingdom of Belgium, the Republic of Portugal and the Kingdom of the Netherlands of Bemba's second application for interim release, and to request that each of these States provide their observations on the application and on the conditions, if any, that would have to be met in order for the State to accept Bemba's release on its territory.⁴⁷⁸

On 17 November 2008, the Chamber noted with concern that

despite the seizure and freezing measures executed by the competent authorities of the Republic of Portugal at the request of the Chamber transmitted on 27 May 2008, a significant difference can be discerned between the amount of money in Mr Jean-Pierre Bemba's bank accounts in the Republic of Portugal reported as frozen on 25 July 2008 and the amount of money in the said bank accounts reported as frozen on 13 October 2008.

Pre-Trial Chamber III concluded that 'an important amount of money initially reported to be available in the said bank accounts allegedly disappeared' and that it was therefore necessary to request the competent judicial authorities of the Republic of Portugal to initiate an investigation into this alleged disappearance. The Chamber requested that the competent judicial authorities urgently initiate this investigation 'in order to determine if the alleged disappearance did indeed occur and under which circumstances'.⁴⁷⁹

470 23 May 2008: ICC 01/05-01/08 – 49, para 33, 10 June 2008: ICC 01/05-01/08 – 61.

471 ICC-01/05-01/08 – 3. On 10 June 2008, after amending the Warrant of Arrest, the Chamber then re-issued this formal request to the Kingdom of Belgium: ICC-01/05-01/08 – 16.

472 ICC-01/05-01/08 – 8.

473 ICC-01/05-01/08 – 254, paras 3 and 5.

474 ICC-01/05-01/08 – 49, para 33.

475 ICC-01/05-01/08 – 61.

476 ICC-01/05-01/08 – 71.

477 ICC-01/05-01/08 – 254, para 6.

478 ICC-01/05-01/08 – 238.

479 ICC-01/05-01/08 – 254, para 11 and page 5.

Registry

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Outreach

Outreach activities continued to increase in 2008, with a growing emphasis on the Court's presence in the field and on increasing use of accessible formats such as radio and audio-visual summaries.⁴⁸⁰ The majority of the outreach activities, however, have focused on the DRC and Uganda, and outreach has been generally insufficient in CAR and Darfur. Of the activities conducted this year, few are specifically with women and girls, as detailed below.

In 2009, the Court must continue to develop strategies to improve outreach in all four Situations and design strategies addressing needs of women and girls who may not have access to mass outreach events, or who may need safe and alternative forums to discuss gender-based crimes. In 2009, the Outreach Unit should also continue to focus on efficient recruitment of staff in the field and recognise the benefits of using local knowledge and practices regarding information dissemination to strengthen the Court's outreach work.

⁴⁸⁰ The information on outreach is taken from the Court's *Outreach Report 2008*, available at <http://www2.icc-cpi.int/menus/icc/structure%20of%20the%20court/outreach/outreach%20reports/icc%20outreach%20report%202008>

Uganda

The Prosecutor v. Joseph Kony et al

In 2008, the Court carried out 201 activities in Uganda, directly reaching 32,312 people. These activities included 22 interactive sessions, reaching 1,450 women, convened by the Court's 'Women's Outreach Programme'.⁴⁸¹

The Court states that it created the Women's Outreach Programme in July 2008 to address the endemic gender-based violence that characterises the conflict in northern Uganda, to address lower literacy levels in women, and address social and cultural factors that inhibit their participation at mixed-gender events.⁴⁸² Through this programme, the Court also reported to have facilitated four further interactive sessions with representatives of the Coalition of Women's Organisations, a coalition of 160 women's groups from the Gulu, Amuru and Soroti districts in the Acholi and Teso sub-regions of northern and north-eastern Uganda. The interactive sessions provide an introduction to the work of the Court, discussion on gender-based crimes, and victim participation (through participation by VPRS). These sessions also included an opportunity to ask questions that would be communicated to The Hague, with answers from The Hague delivered at subsequent meetings.

In general, outreach activities for women and girls in Uganda show improvement from 2007, when no specific meetings or workshops were held with women victims/survivors of the conflict. As no material about the methodology or impact of the programme was available, we were unable to critique and assess its efficacy. However, launching the programme has been a positive and proactive strategy to deliberately reach and inform women victims/survivors about the Court and the possibilities for accessing justice.

The Uganda Field Outreach Coordinator attended the **Justice for Women Forum** organised by the Women's Initiatives for Gender Justice held in Kampala on 6-8 October 2008. This Forum brought together 155 women's rights and peace activists mostly from the four Situations where the ICC is conducting its investigations, including over 35 women from the Greater North of Uganda.

⁴⁸¹ *Outreach Report 2008*, p 15. There is no detailed information available about the content or participants of these meetings.

⁴⁸² *Outreach Report 2008*, p 20.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

The Prosecutor v. Bosco Ntaganda

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

The Court's ability to communicate complex messages about its work was tested in 2008 by developments in the DRC Situation and cases, and in particular by the delay of the Lubanga trial and his possible release. The arrest of Bemba, a former vice-president of the DRC, in the CAR Situation, also created challenges for outreach in the DRC.

In the DRC, the Court developed a Quick Response System (QRS) intended to provide field staff with information to disseminate regarding significant developments in The Hague, such as arrests or decisions from the Court.⁴⁸³ The QRS involves a designated focal point in The Hague for each Situation, who is responsible for keeping field staff up to date, drafting press releases, as well as drafting responses and new messages, based on input from the field. The field staff is responsible for contacting local media, organising interactive sessions, and attempting to clarify any misconceptions. Regarding the stay in the Lubanga Trial, the ICC provided more than 50 radio and TV interviews, as well as a town hall meeting in Ituri and in Bunia organised in collaboration with MONUC.

As a result of the heightened insecurity in the DRC, the Court decreased its work on the ground and increased its radio and media presence in 2008. Although this may be effective as a short-term strategy, media coverage alone does not sufficiently replace efforts to conduct a range of outreach initiatives including community-based meetings on the ground.

In 2008, 79 activities were held in Ituri, 11 in the Kivus, and 73 in Kinshasa. The Court also held numerous media events, and distributed audio-visual summaries of Court proceedings, including the Katanga and Ngudjolo confirmation hearing, which were viewed both on national and local media, as well as at Court-sponsored screenings.

Given the extent of gender-based crimes in the DRC, outreach activities for women, and especially for victims of sexual violence in eastern DRC, particularly in Ituri and the Kivus, should be a priority in 2009.

⁴⁸³ *Outreach Report 2008*, p 36.

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Darfur, Sudan

The Prosecutor v. Ahmad Harun and Ali Kushayb

In 2008, the Court was still unable to perform outreach in Darfur for security reasons, and had to cancel many planned activities due to the prevailing security situation. Nevertheless, the Court conducted 16 interactive sessions with Sudanese refugees in eastern Chad, representatives of key social groups in Darfur and Khartoum, members of the Sudanese diaspora living in Europe and North America, and media representatives. Overall these activities involved 1,048 people. Of these 16 meetings, three were with women only. The Court also sent an Arabic-speaking outreach officer to the Women's Initiatives for Gender Justice **Justice for Women Forum** held in Kampala, Uganda, where 18 Sudanese and Darfurian women's rights activists participated in interactive information sessions about the Court and its work.

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CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

In the Central African Republic, outreach activities were limited, due in part to the slow recruitment process for field outreach positions. The Court held the following activities: four interactive workshops, three attended by around 10 people each, and one attended by 20 people; a three-day strategy workshop with 21 attendees; and five consultation meetings with heads of universities. In addition, a few briefings were held with local journalists, notably including a briefing during the Registrar's visit to CAR in July.

No activities were held specifically for women, although women did participate in some of the events held by the Outreach Office. Given the focus on gender-based crimes in the Bemba case, however, it is essential that a detailed information strategy is developed to reach women in CAR. This should be put in place as soon as possible.

Legal Aid for Indigent Victims

In 2008, a number of victims applied for legal aid in the context of their participation in the Court’s proceedings. The Rules of Procedure and Evidence provide that ‘a victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance’.⁴⁸⁴

The questions of how indigence shall be determined and what information shall be required from victims who are applying for legal aid are among the issues taken up in 2008. When victims apply for legal aid, the Registry examines their resources and makes a declaration that they are fully indigent, partially indigent, or not indigent. Victims who are fully or partially indigent are eligible to receive legal assistance from the Court.

The form to determine indigence for victims has not yet been approved. As a result, victims continue to have to use the indigence form designed for the suspects. Many victims find this offensive as the context and issues regarding indigence for victims is very different from issues of indigence for a suspect whose position and authority may make it likely that he/she holds assets which could disqualify him/her from legal aid and could be frozen, seized and transferred in respect of reparations.

484 Rule 90(5).

Victims applying for legal assistance, especially those who live in conflict situations or are internally displaced, often live in situations of extreme poverty and insecurity. While the Registry has indicated that it understands the difficult circumstances many victims face, it should also continue to examine what measures may be taken, such as a presumption of indigence for certain categories of victims, to lessen the burden of application on victims. As more victims are expected to apply to participate in 2009, these issues will continue to develop next year.

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Uganda

The Prosecutor v. Joseph Kony et al

During 2008 the Registry has not issued any decisions concerning payment of legal expenses for any of the recognised victims in either the Situation in Uganda or the case of *The Prosecutor v. Joseph Kony and others*.

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DRC

The Prosecutor v. Thomas Lubanga Dyilo

The Prosecutor v. Bosco Ntaganda

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

On 26 March 2008, in the DRC Situation, the Registry handed down a decision allowing an exception to the rule that applications for legal aid had to be signed by the victim. The Registry took into consideration the security situation in the place of residence of 17 applicants, and under exceptional circumstances accepted a declaration from their legal representative regarding their financial status.⁴⁸⁵ The Registrar decided that they shall be provisionally deemed to be wholly indigent under the Regulations of the Court, pending the outcome of the investigation into the property and assets of the applicants. On 14 April 2008, counsel for the victims applied to the Presidency for review of this decision. He recalled the description given to the Registry of the conditions in which the applicants live:

The acts of violence perpetrated there and the ensuing destruction of the social, economic and family fabric have resulted in the population living in extreme material destitution. The region has been the scene of massive population displacement, making living conditions highly insecure, and many victims have seen their homes destroyed and their belongings pillaged. Furthermore, according to figures from various international organisations, the DRC remains one of the countries worst hit by poverty. Thus, the World Bank estimated that in 2006 the average per capita income in the DRC was 130 US dollars per annum, in other words, well below an average of one dollar per person per day. Such poverty has an even greater impact on the residents of regions which suffered acts of violence.⁴⁸⁶

In light of these circumstances, the Legal Representative requested that the Presidency ask the Registry to set aside the requirements for additional information from these victims, and to review the Regulations of the Registry so that a full

485 ICC-01/04 – 490.

486 ICC-01/04 – 494, para 3.

and comprehensive presumption of indigence can be applied in favour of the victims applying for legal assistance.⁴⁸⁷

On 18 July 2008, the Presidency ordered the Registrar to confirm that its decision to grant indigent status to victims being contingent upon 'additional information' relates to information that was absent from the victims' application for assistance, and ordered the Registrar to file all documents relating to the application with the Presidency.⁴⁸⁸ On 29 July 2008, the Registry submitted the additional information requested by the Presidency.⁴⁸⁹

On 9 June 2008, in the Lubanga case, the Registrar provisionally deemed three victims to be wholly indigent, pending the outcome of the investigation into their property and assets. The Registrar decided that the extent of the legal assistance granted would be determined 'on a case-by-case basis in accordance with the modalities for their participation', and that the applicants are required to file an application for legal assistance 'whenever necessary in order to take any action required to preserve their interests in the proceedings'.⁴⁹⁰

On 18 June 2008, in the Katanga/Ngudjolo case, the Registrar provisionally deemed 16 victims⁴⁹¹ to be wholly indigent, pending the outcome of the investigation into their property and assets and pending receipt of signed statements from the applicants. The Registrar decided that the extent of the legal assistance granted would be determined 'on a case-by-case basis in accordance with the modalities for their participation', and that the applicants are required to file an application for legal assistance 'whenever necessary in order to take any action required to preserve their interests in the proceedings'.⁴⁹²

On 26 June 2008, in the Katanga/Ngudjolo case, the Registrar provisionally deemed a victim wholly indigent, again stating that the extent of the legal assistance would be determined on a case-by-case basis, and that applications should be filed when the victim desired to take action in the proceedings.⁴⁹³ In this case, however, because the victim is a minor, the Registrar found that 'it can reasonably be assumed that he does not have the means to pay for all or any of the costs associated with his legal representation'.

487 ICC-01/04 – 494, paras 43-44.

488 ICC-01/04 – 523.

489 ICC-01/04 – 530.

490 ICC-01/04-01/06 – 1383.

491 ICC-01/04-01/07 – 606 (5 victims); ICC-01/04-01/07 – 607-tENG (11 victims)

492 ICC-01/04-01/07 – 606.

493 ICC-01/04-01/07 – 652.

Based on the fact that the applicant was unemployed, did not own a house, and was supported by his family, the Registrar also noted that a preliminary assessment of the information suggests that he does not have the means to pay for legal representation. However, the applicant was still provisionally accepted 'pending the outcome of the investigation into the Applicant's property and assets'.

Darfur, Sudan

The Prosecutor v. Ahmad Harun and Ali Kushayb

On 13 August 2008, the Registrar made a decision concerning payment of the legal expenses of the 11 victims who have been granted procedural status in the investigation stage of the Situation in Darfur. The Registry accepted five of the applications for legal assistance on a provisional basis, pending the completion of investigations into their financial situation. The other six applications, however, were rejected, four because the documentation and authorisations they had produced were insufficient to allow the Registry to complete its inquiries into their financial situation, and the other two because they had not, despite repeated requests, provided any reliable documentation concerning their financial situation.⁴⁹⁴ On 8 September 2008, after receiving further information from five of the rejected applicants, the Registrar made a second decision accepting those five applicants on a provisional basis, pending completion of investigations into their financial situation.⁴⁹⁵

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

No victims have yet been recognised in relation to either the CAR Situation or the Bemba case. Hence, no victims have yet applied for legal assistance. With a decision due concerning the 58 victim applicants who have applied to participate in the upcoming Bemba confirmation hearing, it is anticipated that some of these victims will be applying for legal assistance in the near future.

494 ICC-02/05 – 153.

495 ICC-02/05 – 156.

Trust Fund for Victims

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As noted earlier in this report, the Trust Fund for Victims (TFV) was established for the benefit of victims of crimes within the jurisdiction of the Court. The TFV has defined a two-part mandate: first, to implement awards for reparations ordered against persons tried and convicted by the Court,⁴⁹⁶ and second, to use ‘other resources’ to undertake projects for the benefit of victims of crimes within the jurisdiction of the Court.⁴⁹⁷ As there has yet to be a conviction at the Court, there has been no order for reparations, and therefore the first part of the TFV’s mandate remains entirely unimplemented to date. 2008, however, saw increasing activity on the part of the TFV in relation to the second part of its mandate.

The projects and activities of the Fund in 2008, in relation to projects for the benefit of victims within the jurisdiction of the Court, are described in the section of this Report dealing with the structures of the Court. Of special significance is the launch, in September 2008, of an appeal for €10 million to assist 1.7 million victims of sexual violence in Situations under the Court’s jurisdiction.

The Fund is managed by an independent Secretariat and Board of Directors, and is attached to the ICC Registry for administrative purposes.⁴⁹⁸ The work of the Trust Fund is regulated by the *Regulations of the Trust Fund for Victims*. These Regulations require the approval of the Court before any funds can be disbursed in support of any project or activity selected by the TFV for the benefit of victims within the jurisdiction of the Court. The relevant Chamber must consider in particular whether the proposed activities would pre-determine any issue to be decided by the Court, including jurisdiction or admissibility, would violate the presumption of innocence, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁴⁹⁹ This section of the Report reviews the judicial activity of the Chambers in response to requests for approval to fund projects and activities selected by the Board.

496 Article 79(2); Rule 98 (2), (3), (4).

497 Rule 98(5).

498 ICC-ASP/1/Res.6, ICC-ASP/3/Res.7.

499 *Regulations of the Trust Fund*, Regulation 50. Regulation 50 of the Regulations of the Trust Fund for Victims requires the Trust Fund to inform Chambers before undertaking activities which will use resources for victims support and assistance outside of reparations for victims ordered by the Court upon conviction of an accused.

Uganda

The Prosecutor v. Joseph Kony et al

On 28 January 2008, Pre-Trial Chamber II received a Notification from the Board of Directors of the Trust Fund for Victims⁵⁰⁰ informing the Chamber of the activities and projects the Board intended to undertake in Uganda. On 19 March 2008, Judge Politi, Single Judge of the Chamber, having considered the views of all of the participants,⁵⁰¹ issued a Decision approving these activities and projects.⁵⁰² Judge Politi noted that the proposed activities concern Northern Uganda and are aimed at providing physical and psychological rehabilitation and material support to groups of victims who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. The Judge held that the activities were compatible with the Regulations because they were 'defined in general and non-discriminatory terms, without reference to any identified alleged perpetrator, specific crime or location or individually identified victim'.

As noted earlier in this Report, in the section on the Structures of the Court, there are now 18 projects approved for Uganda, for a total expenditure of €681,598, of which €601,566 is TFV funding. Three projects, or 16.6%, are focused on direct support for women and girls victims/survivors.

500 ICC-02/04 – 114.

501 The Chamber, upon receipt of this Notification, invited the views of the Prosecutor, the Office of Public Counsel for the Defence, and the Legal Representatives for Victims regarding the activities and projects the Board had identified.

502 ICC-02/04 – 120.

DRC

The Prosecutor v. Thomas Lubanga Dyilo

The Prosecutor v. Bosco Ntaganda

The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui

On 25 January 2008, in the DRC Situation, the Board of the Trust Fund for Victims notified Pre-Trial Chamber I of its intention to use funds for 'other resources' (other than reparations) for the benefit of victims in the DRC.

On 11 April 2008, in the DRC Situation, as in the Uganda Situation, Pre-Trial Chamber I found that the projects and activities proposed by the Trust Fund for Victims' Board were within the Court's jurisdiction and will not violate the presumption of innocence, prejudice the rights of the accused, or affect the fairness or impartiality of the proceedings.⁵⁰³ However, the Chamber also found that 'the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparations order pursuant to Article 75 of the Rome Statute' and that any other functions performed by the Trust Fund must ensure that sufficient funds remain available for reparations. The Pre-Trial Chamber strongly recommended that the Board of the Trust Fund undertake a study as to the expected resources that will be needed to fulfil the need for reparations at the end of a trial before 'resorting to any other activities or projects'.⁵⁰⁴

In the DRC, as noted earlier in this Report, in the section dealing with the Structures of the Court, there are 16 projects approved, for a total expenditure of €953,519. The Trust Fund will contribute €789,677 with the balance to be provided by the intermediary organisations. Four projects representing 25% of those approved provide direct support for women and girls victims/survivors.

Darfur, Sudan

The Prosecutor v. Ahmad Harun and Ali Kushayb

There have been no Trust Fund-related decisions to date in respect of either the Situation in Darfur or the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*.

CAR

The Prosecutor v. Jean-Pierre Bemba Gombo

There have been no Trust Fund-related decisions to date in respect of either the Situation in CAR or the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.

503 ICC-01/04 – 492.

504 ICC-01/04 – 492, p 7.

Recommendations

States Parties/ASP

Office of the Prosecutor

Judiciary

Registry

Trust Fund for Victims

States Parties / ASP

- 1 **Approval** of the annual Court budget should be based on the needs of the Court and expert assessments. In its annual review of the budget, the ASP should ensure the Court is sufficiently funded to effectively carry out its mandate, and that it exercises the most efficient use of resources for maximum impact. Under-resourcing in previous years has hindered the operational work in significant areas (ie investigation teams, outreach, field offices, protection for victims, witnesses and intermediaries, among others).
- 2 **The ASP should** progress, with urgency, the development of a comprehensive, independent Oversight Mechanism and staff rules, which should address serious issues of misconduct, including fraud, corruption, waste, sexual harassment, exploitation, and abuse committed by ICC staff in the course of their work, especially in the field, and should include the waiving of immunity and strict disciplinary accountability for staff that violate these rules (including termination of employment). Serious misconduct should be defined to expressly include sexual violence/abuse and sexual harassment. All staff should be provided with training on these rules. A concrete proposal for the mandate, function and budget for the Oversight Mechanism should be submitted to the 8th ASP in 2009 with a fully functional mechanism established in 2010.
- 3 **States should** undertake full and expansive implementation of the Rome Statute into domestic legislation ensuring the gender provisions are fully included, enacted and advanced in relevant legislation and judicial procedures.
- 4 **Pass a resolution** at the 8th session of the ASP in November 2009 that during 2010, the Bureau will undertake to study and develop a model for a Gender Sub-Committee of the ASP. Establish by the 9th ASP in 2010, a Gender Sub-Committee of States Parties to effectively monitor implementation of the gender mandates in the Rome Statute.
- 5 **Elect six new Judges** at the 7th resumed session of the ASP, taking into account equitable geographical representation, fair representation of male and female Judges, and the need for legal expertise on violence against women and children as mandated by the Statute in Articles 36(8)(a) and 36(8)(b).
- 6 **Encourage** the Board of Directors and Secretariat of the Trust Fund for Victims to be proactive in soliciting proposals explicitly from women's groups and organisations. In addition, the Secretariat should closely monitor the number of proposals submitted and funded to support women living in armed conflict situations. Benchmarks should be established to ensure that applications from women's organisations, for the purpose of benefiting women victims/survivors, are between 45-55% of the overall number of proposals received and funded.

- 7 **Ensure that** the Victims and Witnesses Unit has sufficient resources to enable them to fully address their mandate of providing support and protection not only to witnesses but also to victims and intermediaries whose lives may be at risk as a result of assisting ICC enquiries and investigations, or at risk as a result of testimony provided by a witness. These essential resources include the approval of the new post of Trauma Expert with Special Expertise in Gender-Based Violence.
- 8 **Ensure that** the Court has sufficient funds for a consistent and sustained field presence, and for producing materials, especially radio and audiovisual summaries, that will assist the Court in disseminating accurate information about its work in every situation.

Office of the Prosecutor

- 9 **Consistently display** a commitment to investigate, charge and prosecute gender-based crimes in every situation. Review the investigation and prosecution strategies in relation to gender-based crimes to ensure comprehensive charges are brought and sustained in every situation where there is evidence that crimes have occurred.
- 10 **All divisions** of the OTP should work with the Special Adviser on Gender Crimes, appointed by the Prosecutor in November 2008 as a consultant, to advance the investigation and charging of gender-based crimes in the Situations before the Court. This appointment undoubtedly enhances the gender capacity in the OTP and will assist in strengthening the presentation of charges for gender-based crimes. However, as it is a part-time position, based outside The Hague, the ability of the post to influence and advise on the day-to-day decisions regarding investigation priorities, the selection of incidents and the construction of an overarching gender strategy, will be extremely limited. As such, the OTP should complement this part-time position with the appointment of an internal Gender Legal Adviser to be established as a full-time post based within the OTP in The Hague.
- 11 **The OTP must** develop consistent and more effective relationships with local intermediaries with greater clarity of expectations, security issues and follow-up .
- 12 **With the Court's** first trial due to start in January 2009, the Prosecution and Defence must continue to be mindful of the manner of questioning of witnesses or victims, in particular victims of sexual violence, and must avoid aggressive, harassing and intimidating styles of questioning that have the effect of re-victimising these victims.
- 13 **Stronger coordination** is required between the OTP and the Victims and Witnesses Unit to ensure witnesses, including women witnesses, are safely supported and protected.

Judiciary

- 14 **Supervise** prosecutorial discretion, especially in cases where the Prosecutor decides not to include certain crimes in the charges brought against an individual, when there is evidence to the contrary. Narrow charges have a detrimental effect on victims' participation and outcomes for justice.
- 15 **Ensure that** Rule 90(4) of the Rules of Procedure and Evidence is respected in the appointment of common legal representatives for groups of victims, by ensuring that the distinct interests of individual victims, particularly the distinct interests of victims of sexual and gender violence and child victims, are represented and that any conflict of interest is avoided.
- 16 **Ensure that** victims participating in the proceedings can easily access the modalities that have been granted to them. Take steps to streamline the process whereby participating victims apply to participate at different phases of proceedings. Expanded, meaningful participation by victims need not be incompatible with the rights of the accused and a fair and impartial trial.
- 17 **The Victims' Form for Indigence** should be finalised and approved by the Judges as a matter of urgency. This has been pending approval since 2006. The form is the basis for assessing whether an individual qualifies for the Legal Aid Programme which will enable her or him to engage Counsel to represent his or her interests. For many victims, the Legal Aid Programme represents her or his only means to have representation before the ICC. The Indigence form must be accessible for victims and intermediaries to understand and must be handled with complete confidentiality to ensure the safety of both.
- 18 **Utilise** the special measures allowed for in the Rome Statute and the Rules of Procedure and Evidence to facilitate the testimony of victims of sexual violence.
- 19 **In 2009**, the Presidency of the ICC should oversee a sexual harassment audit of the Court. This should include each organ and be implemented at all levels of the institution. The results of the audit should be shared with the Bureau of the Assembly of States Parties. Among other areas, the audit should assess:
- the current 'Sexual and Other Harassment' policy to ensure it fully covers the relevant issues;
 - whether adequate training is provided for staff and managers about the policy;
 - whether appointments of focal points have been made for staff to report harassment; and
 - whether new staff are given adequate orientation to this and other policies of the ICC.

Recommendations to address any incidents or patterns of harassment should be developed to ensure that the legal rights of employees are respected, and to provide staff with a non-discriminatory, equality-based, human-rights respecting work environment.

- 20 **Review and amend** the current definition of ‘spouse’ in the *Conditions of Service and Compensation of Judges of the ICC* to include all domestic partnerships including same-sex partners, whether legally recognised or not under the law of the country of a Judge’s nationality.

Registry

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- 21 **Promote** the Lists of Counsel, Assistants to Counsel and Professional Investigators, and the List of Experts to women. Highlight the need for expertise on sexual and gender violence among all potential applicants and seek such information in the candidate application form. Keep updated and accurate lists publicly available on the Court’s website.
- 22 **Rule 90(4)** mandates that, when appointing common legal representatives for groups of victims, the distinct interests of individual victims are represented, and that conflicts of interest are avoided. The Registry must ensure that any appointments of common legal representatives remain faithful to this mandate, particularly when the group includes victims of sexual and gender violence and child victims.
- 23 **Increase promotion** of and access to the ICC Legal Aid system. Initiate a review of Regulation 132 of the Regulations of the Registry to allow for a presumption of indigence for victims in appropriate cases, including women, indigenous communities, those under 18 years of age, and those living in IDP camps. Streamline the process of applying for legal aid to minimise the burden for victims and their legal representatives. Currently legal counsel have to reapply for each intervention they wish to make for every proceeding.
- 24 **Increase resources**, and promotion of the process, for victims to apply for participant status in the proceedings of the Court. Given the low numbers of women among victims who have to date applied to participate, the Court must make it a priority to inform women in the four conflict Situations of both their right to participate and the application process.
- 25 **The Court should** enhance resources for ICC Field Offices in each of the four countries to support victims’ participation, to liaise with intermediaries regarding victims and potential witnesses, and to provide information to and communication with local NGOs including women’s groups and victims/survivors organisations.
- 26 **Recruit more** staff for the Outreach Unit, emphasising experience and expertise in community development and mobilisation and working with victims/survivors of gender-based crimes to ensure that effective programmes are developed to reach women and diverse sectors of communities in each of the four conflict Situations.

- 27 **In recruiting** field outreach staff and designing outreach programmes, recognise the benefits of using local knowledge and practices regarding information dissemination to strengthen the Court's outreach work.
- 28 **In all four Situations**, continue to develop outreach strategies addressing the needs of women and girls who may not have access to mass outreach events, or who may need safe and alternative forums to discuss gender-based crimes. Increase the activities of outreach programmes designed for women and girls in Uganda, and introduce programmes designed to reach women and girls in the DRC, CAR and Darfur.
- 29 **In 2009**, the Victims' Participation and Reparations Section (VPRS) should implement policies and practices for dealing with victims of sexual violence, children, elderly persons and persons with disabilities.
- 30 **The methodology** and safety practices of the VPRS country-based consultations regarding legal representation should be immediately reviewed and strengthened. The methodology should ensure victims are given the full information about the options for legal representation, security issues, and the protection support the ICC can/cannot provide. Victims should not feel pressured or forced into agreeing to a common legal representative and should be provided with accessible information about what options exist for selecting or being appointed a legal representative.
- 31 **The security practices** of VPRS community consultations should be enhanced, to not overly expose applicants, whether to each other, to the wider community or to NGOs who are not directly involved with the specific victims.
- 32 **In light of** the well-publicised decision by the Administrative Tribunal of the International Labour Organisation (ILO) against the Court as a result of the Prosecutor's unlawful termination of an employee following a complaint filed by that employee, it would be timely for the Registry to undertake a review of the Court's internal complaints procedures to ensure they are sufficiently robust, are transparent, provide adequate protection for staff, are effective mechanisms for accountability, uphold the rights of employees, and ensure the positive reputation and good standing of the Court as a whole.

Trust Fund for Victims

- 33 **Through promotion** of the Trust Fund and raising global awareness of the challenges faced by victims of war and armed conflict, the Secretariat should aim to leverage other resources in support of victims, beyond the scope of the Trust Fund itself.
- 34 **In addition to** the criteria for the ‘special vulnerability of women and girls to be addressed’ in projects, the Secretariat should adopt proactive strategies to solicit proposals explicitly from women’s groups and organisations. Benchmarks should be established to ensure that applications from women’s organisations, for the purpose of benefiting women victims/survivors, are between 45%-55% of the overall number of proposals received and funded.
- 35 **The Board and Secretariat** should consult victims and their families, as well as their legal representatives, and any competent expert or expert organisation on the situation of the potential beneficiaries and the ways to assist them (Regulation 49 of the *Regulations of the Trust Fund for Victims*). Such ‘experts’ should include those with expertise in working with women victims/survivors of gender-based crimes.
- 36 **The Trust Fund Board** and Secretariat should consult international and national women’s organisations which can help them to implement assistance projects, such as sexual and reproductive health clinics for treating victims of sexualised violence, hospitals, schools, and community-wide anti-violence programmes.

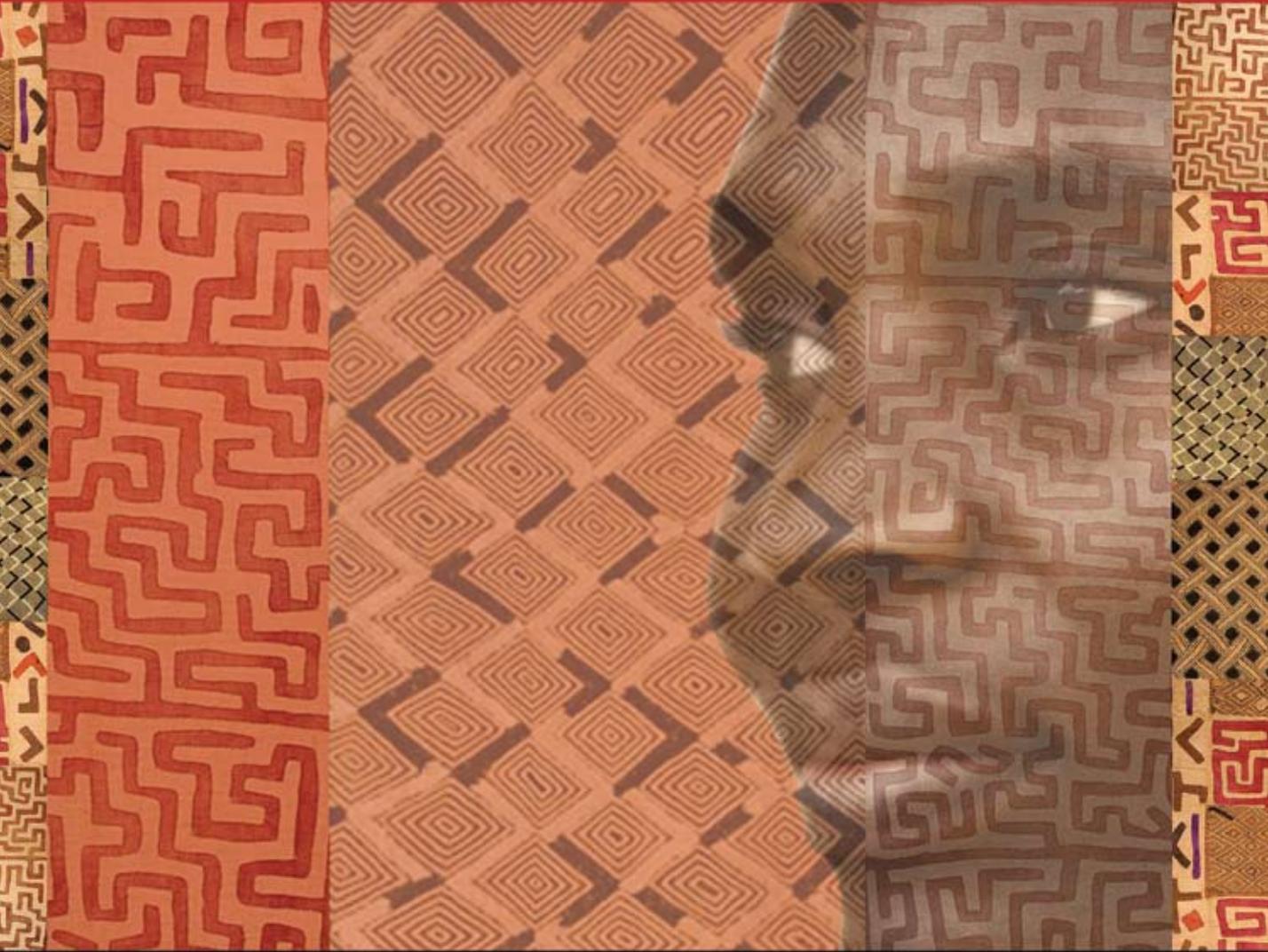
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