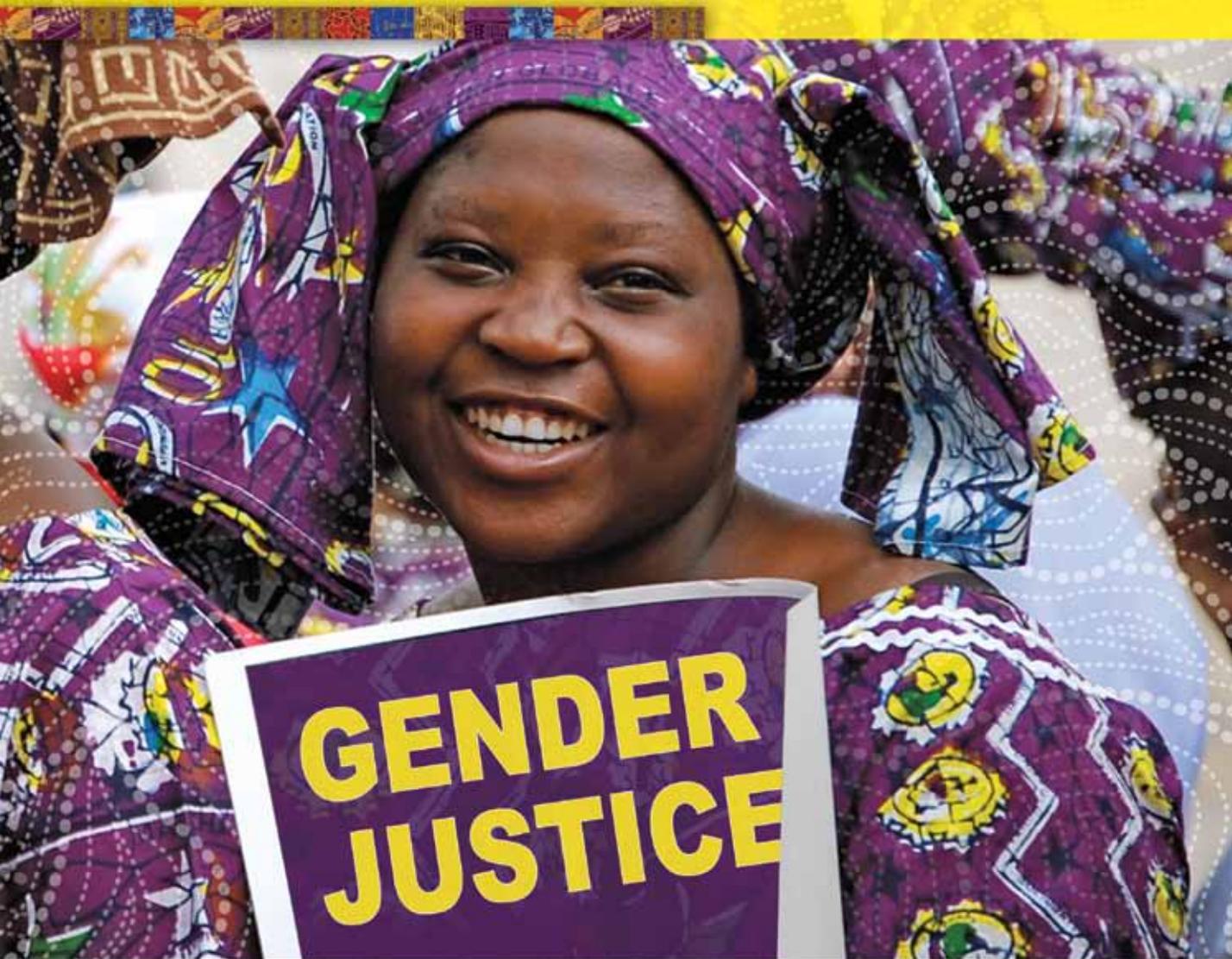


Women's Initiatives for Gender Justice



gender 2014 Anniversary Edition
report card
on the International Criminal Court

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

The Women's Initiatives for Gender Justice has country-based programmes with local and/or regional partners in Uganda, the Democratic Republic of the Congo, Sudan and Libya and a legal monitoring programme for all ICC Situation countries: Uganda, the Democratic Republic of the Congo, Sudan, the Central African Republic (Situations I and II), Kenya, Libya, the Côte d'Ivoire and Mali.

The strategic programme areas for the Women's Initiatives include:

- Political, institutional and legal monitoring and advocacy for accountability and prosecution of sexual and gender-based crimes before the ICC and domestic courts and other transitional justice mechanisms
- Capacity and movement building initiatives with women in armed and post-conflicts situations
- Conflict-resolution and integration of gender issues within the negotiations and implementation of Peace Agreements (Uganda, DRC, Darfur)

- Documentation and data collection in relation to the commission of sexual and gender-based crimes in armed conflicts
- Victims' participation before the ICC
- Training of activists, lawyers and judges on the Rome Statute and international jurisprudence regarding sexual and gender-based crimes
- Advocacy for assistance and reparations for female victims/survivors of armed conflicts

The Women's Initiatives for Gender Justice was the first NGO to file before the ICC and is the only international women's human rights organisation to have been recognised with *amicus curiae* status by the Court. To date, the organisation has filed before the ICC on seven occasions, most recently on gender and reparations issues in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.

The Women's Initiatives for Gender Justice works with more than 6,000 grassroots partners, associates and members across multiple armed conflicts and has in-country focal points and offices in strategic locations to support our country-based programmes.

Women's Initiatives for Gender Justice



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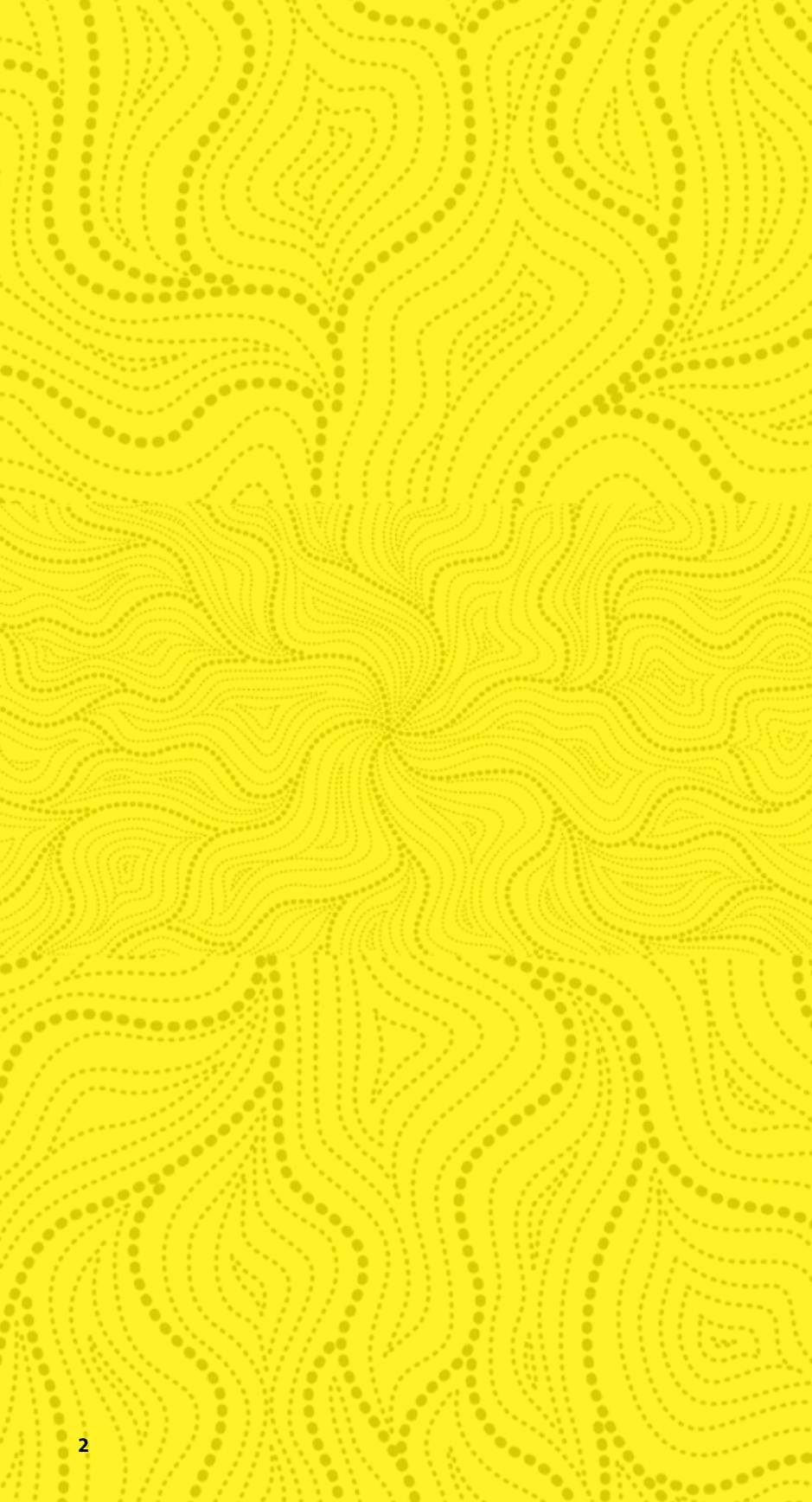
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- Her Majesty's Government's Foreign and Commonwealth Office, Ministry of Defence, and the Department for International Development
- Open Society Foundations
- Oxfam Novib
- The Sigrid Rausing Trust
- The United Nations Trust Fund to End Violence against Women

The views expressed in this publication are those of the Women's Initiatives for Gender Justice and do not necessarily represent the views of our donors, nor any of their affiliated organisations.

Gender Report Card on the International Criminal Court 2014

© Women's Initiatives for Gender Justice, December 2014
ISBN 978-94-90766-13-9

gender 2014
Anniversary Edition
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on the International Criminal Court



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Introduction

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This is the tenth *Gender Report Card on the International Criminal Court*, corresponding with the ten year anniversary of the Women's Initiatives for Gender Justice. The purpose of the *Gender Report Card* 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, and in particular the gender mandates they embody, in the twelve 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, in relevant part, 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 respects, 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-based 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 the 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* highlights the most significant developments which have occurred over the course of a year in relation to the work of the ICC and the ASP. The *Gender Report Card 2014* focuses on the following areas:

- **States Parties/ASP**
- **Substantive Work of the ICC**

Within these sections, we review and assess the work of each organ of the Court between 1 September 2013 and 15 August 2014. Selected important events and decisions have also been included through October 2014.

This edition of the *Gender Report Card* contains an update on important developments relating to the ASP, including the ongoing recruitment for the Head of the Court's Independent Oversight Mechanism (IOM); the promulgation of the Court's Whistleblower and Anti-Fraud Policies; amendment proposals to the Rome Statute and RPE; and the elections of six ICC Judges, as well as the ASP President, Vice-Presidents, Bureau, and seven Committee on Budget and Finance (CBF) members. We provide a comprehensive overview of all Situations and cases before the Court, as well as a review of all charges for gender-based crimes, including a summary and analysis of decisions on these charges that took place in the reporting period. Among these decisions, we highlight the Pre-Trial Chamber's decision on the Confirmation of Charges in the case against Bosco Ntaganda, which unanimously confirmed, for the first time before the ICC, all charges for sexual and gender-based crimes. We cover important decisions on the admissibility of cases, including the first case to have been found inadmissible before the Court, that of Abdullah Al-Senussi, and we summarise the most significant developments within the trial and appeal proceedings before the Court. This includes the Trial Judgment in the Katanga case, in which the accused was acquitted of all sexual and gender-based crimes charged, as well as the simultaneous withdrawal of the appeals against the Judgement by the Defence and Prosecution. It also includes an update on the Bemba trial and related Article 70 proceedings, in which Bemba and individuals associated with his defence face charges for offences against the administration of justice, along with the Kenyatta trial, which faced further setbacks due to the Prosecution's difficulty in retaining witnesses and securing evidence requested from the Government of Kenya. Additionally, the *Gender Report Card 2014* contains a section on reparation proceedings pending before the Court. As in previous years, it also includes an overview and statistical analysis of victim applications to participate and applicants accepted to participate in proceedings before the Court, as well as a section on developments in the Court's victim participation and legal representation system.

As in every *Gender Report Card*, this year we have also included a section outlining the **Substantive Jurisdiction and Procedures** of the ICC. Furthermore, the *Gender Report Card 2014* includes a detailed **Recommendations** section, addressing the substantive work of both the Court and the ASP.

Substantive Jurisdiction and Procedures



Substantive Jurisdiction²

.....

War crimes and crimes against humanity

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

The Rome Statute explicitly recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence as war crimes in international and non-international armed conflict as well as crimes against humanity.³

Crimes against humanity

Persecution and trafficking

In addition to the crimes of sexual and gender-based violence listed above, persecution is included in the Rome Statute as a crime against humanity and specifically includes for the first time the recognition of gender as a basis for persecution.⁴

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.⁵

Genocide

Rape and sexual violence

The Rome Statute adopts the definition of genocide as accepted in the 1948 Genocide Convention.⁶ 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'.⁷

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.⁸

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

Procedures

.....

Measures during investigation and prosecution

The Prosecutor shall ‘take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court and, in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children’.⁹

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.¹⁰

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.¹¹

9 Article 54(1)(b).

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

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

Evidence

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

Participation

Article 68(3) of the Rome Statute explicitly recognises the right of victims to participate in the justice process, directly or through legal representatives, by presenting their views and concerns at all stages which affect their personal interests.¹²

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

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

Reparations

The Rome Statute includes a provision enabling the Court to establish principles and, in certain cases, to award reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.¹³ 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.¹⁴

12 See also Rules 89-93 RPE.

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

14 Article 79. See also Rule 98 RPE.

States Parties/ASP

1 September 2013 — 15 August 2014*

* The *Gender Report Card 2014* includes a review of developments and judicial decisions up to 15 August 2014. Selected important events and decisions have also been included through October 2014.

States Parties to the Rome Statute as of 15 August 2014¹⁵

.....

Total number of ICC States Parties: **122**

Total number of ASP Bureau members: **21**¹⁶

President of the ASP: **Ambassador Tiina Intelmann (Estonia)**¹⁷

Vice-Presidents: **Ambassador Markus Börlin (Switzerland)** and **Ambassador Ken Kanda (Ghana)**¹⁸

<i>Regional Group</i>	<i>Number of States Parties</i>	<i>% of States Parties</i>	<i>Number of Bureau members</i>	<i>% of Bureau members</i>
African States	34	27.9%	5	23.8%
Asia-Pacific States	18	14.8%	3	14.3%
Eastern European States	18	14.8%	4	19.05%
Group of Latin American and Caribbean States (GRULAC)	27	22.1%	4	19.05%
Western European and Others Group (WEOG)	25	20.5%	5	23.8%

15 Information as adapted from the ICC website. See 'The States Parties to the Rome Statute', *ICC website*, available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.

16 The Bureau of the ASP, which assists the ASP in the discharge of its functions, is composed of a President, two Vice-Presidents and 18 members, elected by the ASP for three-year terms. The only members of the Bureau who are elected in their personal capacity are the President and the two Vice-Presidents. The other 18 members of the Bureau are States and are represented by country delegates. As of 15 August 2014, the other members of the Bureau are: Argentina, Belgium, Brazil, Canada, Chile, Czech Republic, Gabon, Finland, Hungary, Japan, Nigeria, Portugal, the Republic of Korea, Samoa, Slovakia, South Africa, Trinidad and Tobago and Uganda. See 'Bureau of the Assembly', *ICC website*, available at <http://www.icc-cpi.int/en_menus/asp/bureau/Pages/bureau%20of%20the%20assembly.aspx>. The current Bureau assumed its functions at the beginning of the 10th session of the ASP on 12 December 2011. New candidates will be elected at the opening of the 13th session of the ASP on 8 December 2014. See ASP/2014/007, p 1.

17 Ambassador Intelmann was elected for a term of office running from 12 December 2011 to 8 December 2014, serving from the 10th to the 12th sessions of the ASP. On 18 September 2014, the Bureau endorsed HE Mr Sidiki Kaba (Senegal) for the position of President of the ASP for the 13th to 16th sessions and recommended to the ASP that he is elected at the beginning of the next session of the ASP on 8 December 2014. ICC-ASP/12/27, p 2.

18 Ambassador Börlin and Ambassador Kanda were elected for terms of office running from 12 December 2011 to 8 December 2014, serving from the 10th to the 12th sessions of the ASP. 'Bureau of the Assembly', *ICC website*, 27 March 2014, available at <http://www.icc-cpi.int/en_menus/asp/bureau/Pages/bureau%20of%20the%20assembly.aspx>.

African States (34)

Benin (22 January 2002), Botswana (8 September 2000), Burkina Faso (30 November 1998), Burundi (21 September 2004), CAR (3 October 2001), Cape Verde (11 October 2011), Chad (1 January 2007), Comoros (18 August 2006), Congo (3 May 2004), Côte d'Ivoire (15 February 2013), DRC (11 April 2002), Djibouti (5 November 2002), Gabon (20 September 2000), Gambia (28 June 2002), Ghana (20 December 1999), Guinea (14 July 2003), Kenya (15 March 2005), Lesotho (6 September 2000), Liberia (22 September 2004), Madagascar (14 March 2008), Malawi (19 September 2002), Mali (16 August 2000), Mauritius (5 March 2002), Namibia (20 June 2002), Niger (11 April 2002), Nigeria (27 September 2001), Senegal (2 February 1999), Sierra Leone (15 September 2000), Seychelles (10 August 2010), South Africa (27 November 2000), Tunisia (22 June 2011), Uganda (14 June 2002), United Republic of Tanzania (20 August 2002) and Zambia (13 November 2002).

Asia-Pacific States (18)

Afghanistan (10 February 2003), Bangladesh (23 March 2010), Cambodia (11 April 2002), Cook Islands (18 July 2008), Cyprus (7 March 2002), Fiji (29 November 1999), Japan (17 July 2007), Jordan (11 April 2002), Maldives (21 September 2011), Mongolia (11 April 2002), Marshall Islands (7 December 2000), Nauru (12 November 2001), Philippines (30 August 2011), the Republic of Korea (13 November 2002), Samoa (16 September 2002), Tajikistan (5 May 2000), Timor-Leste (6 September 2002) and Vanuatu (2 December 2011).

Eastern European States (18)

Albania (31 January 2003), Bosnia and Herzegovina (11 April 2002), Bulgaria (11 April 2002), Croatia (21 May 2001), Czech Republic (21 July 2009), Estonia (30 January 2002), the Former Yugoslav Republic of Macedonia (6 March 2002), Georgia (5 September 2003), Hungary (30 November 2001), Latvia (28 June 2002), Lithuania (12 May 2003), Montenegro (3 June 2006), Poland (12 November 2001), Republic of Moldova (12 October 2010), Romania (11 April 2002), Serbia (6 September 2001), Slovakia (11 April 2002) and Slovenia (31 December 2001).

GRULAC States (27)

Antigua and Barbuda (18 June 2001), Argentina (8 February 2001), Barbados (10 December 2002), Brazil (20 June 2002), Belize (5 April 2000), Bolivia (27 June 2002), Chile (29 June 2009), Colombia (5 August 2002), Costa Rica (30 January 2001), Dominica (12 February 2001), Dominican Republic (12 May 2005), Ecuador (5 February 2002), Grenada (19 May 2011), Guatemala (2 April 2012), Guyana (24 September 2004), Honduras (1 July 2002), Mexico (28 October 2005), Panama (21 March 2002), Paraguay (14 May 2001), Peru (10 November 2001), Saint Kitts and Nevis (22 August 2006), Saint Lucia (18 August 2010), Saint Vincent and the Grenadines (3 December 2002), Suriname (15 July 2008), Trinidad and Tobago (6 April 1999), Uruguay (28 June 2002) and Venezuela (7 June 2000).

WEOG States (25)

Andorra (30 April 2001), Australia (1 July 2002), Austria (28 December 2000), Belgium (28 June 2000), Canada (7 July 2000), Denmark (21 June 2001), France (9 June 2000), Finland (29 December 2000), Germany (11 December 2000), Greece (15 May 2002), Iceland (25 May 2000), Ireland (11 April 2002), Italy (26 July 1999), Liechtenstein (2 October 2001), Luxembourg (8 September 2000), Malta (29 November 2002), the Netherlands (17 July 2001), New Zealand (7 September 2000), Norway (16 February 2000), San Marino (13 May 1999), Spain (24 October 2000), Sweden (28 January 2001), Switzerland (12 October 2001), Portugal (5 February 2002) and the United Kingdom (4 October 2001).

Independent Oversight Mechanism

Article 112(4) of the Statute provides that '[t]he Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy'. At its Fourth Session in 2005, the ASP invited States Parties and the Court to submit proposals on the establishment of an independent oversight mechanism and appointed Prince Zeid Ra'ad Zeid Al-Hussein, the outgoing ASP President and former Special Advisor to the UN Secretary-General on sexual exploitation and abuse in UN peacekeeping operations, as the ASP facilitator on this issue. Since 2006, the Women's Initiatives has advocated for the establishment of the IOM, providing detailed recommendations to States Parties in relation to its scope, role and functions.¹⁹ On 26 November 2009, the ASP established the IOM with the adoption by consensus of Resolution ICC-ASP/8/Res.1 (2009 Resolution).²⁰

The 2009 Resolution contained an annex, addressing the IOM's scope, function, and jurisdiction. The Resolution specified that the IOM's investigative capacity would be implemented immediately, while its inspection and evaluation functions would be operationalised at a later date.²¹ In 2010, the ASP adopted Resolution ICC-ASP/9/Res.5, which set out the mode of operation of the IOM's investigative function (2010 Operational Mandate). Finally, in November 2013, following extensive discussions within the ASP, as well as with the heads of organs of the ICC, the ASP adopted Resolution ICC-ASP/12/Res.6 at its 12th Session, which fully operationalised the IOM, including its investigation, inspection and evaluation functions (2013 Operational Mandate). A detailed review of the 2013 Operational Mandate, including a comparison of its provisions with the 2010 Operational Mandate and 2009 Resolution, is included in the *Gender Report Card 2013*.²²

19 See eg *Position Paper on the Oversight Mechanism*, 2007, Women's Initiatives for Gender Justice, on file with the Women's Initiatives for Gender Justice; *Gender Report Card 2013*, *Gender Report Card 2012*, *Gender Report Card 2011*, *Gender Report Card 2010*, *Gender Report Card 2009*, *Gender Report Card 2008*, *Gender Report Card 2007*, *Gender Report Card 2006*, recommendations to States Parties/ASP. See also *Recommendations* section of this Report.

20 The IOM was set up as a 'separate and distinct new major programme' in the ICC's annual budget, to 'recognise and ensure its operational independence'. ICC-ASP/8/Res.1, para 3; ICC-ASP/12/Res.6, Annex, para 55.

21 ICC-ASP/8/Res.1, Annex, para 6(a).

22 *Gender Report Card 2013*, p 17-24.

Outstanding issues relating to the IOM's investigative function

Following the full operationalisation of the IOM in 2013, outstanding issues remain in relation to its investigative function. First, the 2013 Operational Mandate does not include an express provision regarding the authority of the IOM to start investigations *proprio motu*. By contrast, the 2009 Resolution envisaged that the IOM's investigative unit would have '*proprio motu* investigative powers',²³ while the 2010 Operational Mandate stipulated that the IOM would 'have the authority to initiate on a reasonable basis, carry out and report on any action which it considers necessary to fulfil its responsibilities with regard to investigations without any hindrance or need for prior clearance'.²⁴ Viewing the ability of the IOM to start investigations on its own motion as essential to ensure the integrity of the Court, the Women's Initiatives has repeatedly called for the IOM to be enabled to fully operationalise its *proprio motu* investigative powers consistently across all organs and areas of the Court.²⁵

Second, both the 2010 and 2013 Operational Mandates provide that IOM investigations cover 'misconduct and serious misconduct, including possible unlawful acts' by the Court's elected officials, staff and contractors.²⁶ While the Women's Initiatives, since 2006, has been calling for the IOM to include a definition of

'serious misconduct' that expressly includes sexual violence, rape, abuse and harassment, the 2010 Operational Mandate did not define 'serious misconduct'.²⁷ Furthermore, the 2013 Operational Mandate defines 'serious misconduct' by reference to the Court's definition contained in Rule 24(1)(b) of the RPE. This provision does not expressly include sexual violence, rape, abuse or harassment within the definition of serious misconduct.²⁸

Finally, while under the 2010 Operational Mandate, the IOM could recommend to the relevant elected officials of the Court that privileges and immunities be waived in accordance with Article 48(5) of the Statute,²⁹ the 2013 Operational Mandate does not include such a provision and does not explicitly provide for the waiving of privileges and immunities.

In the 2010 Operational Mandate, the ASP invited 'the Temporary Head and, once appointed, the Head of the [IOM], to continue to work on the development of functions, regulations, rules, protocols and procedures of the [IOM's] investigative function'.³⁰ In November 2011, the Hague Working Group of the ASP indicated that the Temporary Head of the IOM had drafted, in consultation with representatives from the Court's three organs and the Staff Union Council, an IOM Manual of Procedures setting out 'guidelines on the technical aspects of investigations'. The Hague Working Group indicated that some areas, including 'definitions on sexual exploitation and sexual abuse,

23 ICC-ASP/8/Res.1, Annex, para 6(b).

24 ICC-ASP/9/Res.5, Annex, para 13. The authority set forth in the 2010 Operational Mandate was, however, subject to an external third party review process in case of an objection by a head of organ that a *proprio motu* investigation would 'undermine judicial or prosecutorial independence of that organ'. ICC-ASP/9/Res.5, Annex, paras 21-24. See also *Gender Report Card 2013*, p 18.

25 *Gender Report Card 2010*, p 215; *Gender Report Card 2011*, p 339; *Gender Report Card 2012*, p 285; *Gender Report Card 2013*, p 243.

26 ICC-ASP/9/Res.5, Annex, para 2; ICC-ASP/12/Res.6, Annex, para 28.

27 ICC-ASP/9/Res.5, Annex, para 2. See also *Gender Report Card 2012*, p 286; *Gender Report Card 2013*, p 243.

28 ICC-ASP/12/Res.6, Annex, para 28 and fn 5.

29 ICC-ASP/9/Res.5, Annex, para 32. Article 48(5) of the Statute addresses the waiver of the privileges and immunities. It provides that: 'The privileges and immunities of: A Judge or the Prosecutor may be waived by an absolute majority of the judges; The Registrar may be waived by the Presidency; The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor; The Deputy Registrar and staff of the Registry may be waived by the Registrar.'

30 ICC-ASP/9/Res.5, para 3.

harassment, [and] discrimination’, as well as the meaning of the IOM’s ability to initiate an investigation ‘on its own motion’, had not yet been unanimously agreed upon.³¹

In the absence of consensus, it was decided that it would not be advisable to submit the Manual of Procedures to the 10th session of the ASP in 2011, and instead, the Hague Working Group invited the Temporary Head of the IOM, and the Head when appointed, to continue to work on the Manual of Procedures with a view to obtaining consensus as quickly as possible.³² In 2013, the Bureau submitted to the ASP the Hague Working Group’s recommendation that ‘the Temporary Head of the IOM, and the Head when recruited, shall prepare operational manuals for the mechanism and submit this draft to the Bureau.’³³ It was also recommended that the IOM’s quarterly reports refer to the progress achieved in the preparation of the manuals, and that the manuals be annexed to the IOM’s first annual report to the ASP.³⁴ At the time of writing this Report, there was no further publicly available information regarding the number of manuals being developed or the issues to be addressed by these documents.³⁵

31 ICC-ASP/10/27, paras 11-13.

32 ICC-ASP/10/27, para 18.

33 ICC-ASP/12/27, para 18.

34 ICC-ASP/12/27, paras 19-20.

35 On 22 November 2011, the HWG referred to a ‘Manual of Procedures’ which includes ‘guidelines on the technical aspects of investigations’. ICC-ASP/10/27, paras 11-20. On 1 November 2012, the HWG referred as part of a ‘tentative programme of work’ for 2013 to the Temporary IOM Head finalising an ‘investigations manual’ and drafting an ‘evaluations manual’ and their ‘guidance documents (instructions and standard operation procedures)’. ICC-ASP/11/27, Annex I, paras 4-5. On 15 October 2013, the HWG referred to ‘operational manuals’ without further description. ICC-ASP/12/27, paras 18-21.

Recruitment of the Head of the IOM

According to the 2013 Operational Mandate, the IOM will consist of four staff members: the Head of Office at the P-5 level, an evaluation officer at the P-4 level, a professional staff member at the P-2 level, and administrative support at the general service level.³⁶ The Head of the IOM is to be selected by the Bureau of the ASP³⁷ for an initial two-year period, with the possibility of extension.³⁸ Since 2010, the IOM has been staffed by a Temporary Head, seconded from the UN Office of Internal Oversight Services. In its meeting on 15 August 2014, the ASP Bureau took note that upon request from the UN, the loan contract of the current Temporary Head had been extended until the end of September 2014.³⁹

36 ICC/ASP/12/27, para 4.

37 ICC-ASP/9/Res.6, Annex, para 51.

38 Head of the IOM Vacancy Announcement, on file with the Women’s Initiatives for Gender Justice.

39 ‘Seventh meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions’, *ICC website*, 15 August 2014, p 4, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-07-15-08-2014.pdf>. The first Temporary Head of the IOM, Beverley Mulley, had been appointed on 12 April 2010, and served in that position from 19 July 2010 to 18 July 2011. ICC/ASP/10/27, para 6. Since a Permanent Head was not appointed by the time of her departure, the ASP President requested the Registrar to proceed with the recruitment of Kristina Carey, also seconded from UNOIOS, who formally started her role as Temporary Head in November 2011. ICC/ASP/11/27, para 8. Following two requests from the Bureau, which in 2012 decided to defer the recruitment of the Head of the IOM until questions relating to the operationalisation of the investigation, evaluation and inspection functions were decided. ‘Seventh ICC-ASP Bureau Meeting: Agenda and Decisions’, *ICC website*, 28 February 2012, para 3, available at <http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2012-Bureau-7-D-28Feb2012.pdf>. Kristina Carey’s secondment was first extended until 2013 and again until 31 May 2014. ‘Seventh ICC-ASP Bureau Meeting’, 28 February 2012, para 3, available at <http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2012-Bureau-7-D-28Feb2012.pdf>. See also ‘First Meeting of the Bureau of the Assembly of States Parties’, *ICC website*, 12 February 2013, para 6(g), available at <http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2013-Bureau-01-12-02-22013.pdf>.

Recruitment panel and process

At its meeting in January 2014, the ASP Bureau assigned the mandate for the recruitment of the Head of the IOM to the Hague Working Group. The Hague Working Group was tasked with proposing to the Bureau a Chair of the Recruitment Panel, who would prepare for the Bureau's approval proposals on the composition of the Panel, taking into account equitable geographical representation, as well as terms of reference for the Panel's work.⁴⁰ In February 2014, the Bureau appointed Ambassador Jorge Urbina Ortega (Costa Rica) as Chair of the Recruitment Panel.⁴¹

In its meeting on 17 March 2014, the Bureau considered draft terms of reference for the Recruitment Panel,⁴² while at its 16 April meeting, the ASP President indicated that the terms of reference had been adopted and stressed the urgency of the appointment of the permanent Head of the IOM.⁴³ In July 2014, Ambassador Urbina Ortega completed his assignment in the Netherlands, and the Bureau appointed Ambassador Jorge Lemcke Arévalo (Guatemala) to Chair the Recruitment Panel as of 8 July.⁴⁴ On 15 July, the Bureau appointed the following additional members to the Panel:

- Ambassador James Lambert (Canada)
- Ambassador Nikola Ivanov Kolev (Bulgaria)
- Ambassador Jaime Victor B. Ledda (Philippines)
- Ambassador Rose Makena Muchiri (Kenya)⁴⁵

The Recruitment Panel held its first meeting on 18 July 2014.⁴⁶ Thereafter, at the Bureau's 15 August meeting, the Recruitment Panel informed the Bureau that it would endeavour to present its recommendation for the Head of the IOM at the end of the month.⁴⁷ At the same meeting, the ASP President informed the Bureau that it would decide upon the recommendation by silence procedure. The Bureau appointed Belgium to conduct any necessary informal consultations on the matter to expedite the decision process.⁴⁸

In July 2014, the Women's Initiatives for Gender Justice met with the Chair of the Recruitment Panel, followed by email communication in August advocating for the competencies required for the person appointed to lead the IOM in this 'critical role'. In particular, the Women's Initiatives emphasised that the Head of the IOM should be 'a seasoned practitioner with extensive experience investigating the areas within the IOM's mandate', as well as have 'senior level experience in hiring, managing and leading staff; the ability to ensure

40 'First Meeting of the Bureau of the Assembly of States Parties', *ICC website*, 24 January 2014, p 2, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-01-24-01-2014.pdf>.

41 'Agenda and Decisions of the Bureau of the Assembly of States Parties', *ICC website*, 18 February 2014, p 2, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-01-Add-18-02-2014.pdf>.

42 'Second Meeting of the Bureau of the Assembly of States Parties', *ICC website*, 14 March 2014, p 1, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-02-17-03-2014.pdf>.

43 'Third Meeting of the Bureau of the Assembly of States Parties', *ICC website*, 16 April 2014, p 2, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-03-16-04-2014.pdf>.

44 'Sixth meeting of the Bureau of the Assembly of States Parties', *ICC website*, 18 July 2014, p 3, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-06-18-07-2014.pdf>.

45 'Sixth meeting of the Bureau of the Assembly of States Parties', *ICC website*, 18 July 2014, p 3, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-06-18-07-2014.pdf>.

46 'Sixth meeting of the Bureau of the Assembly of States Parties', *ICC website*, 18 July 2014, p 3, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-06-18-07-2014.pdf>.

47 'Seventh meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions', *ICC website*, 15 August 2014, p 4, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-07-15-08-2014.pdf>.

48 'Seventh meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions', *ICC website*, 15 August 2014, p 4, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-07-15-08-2014.pdf>.

independence in the functions of the IOM whilst also developing appropriate relationships within the ICC; and robust legal acuity and political acumen as a senior practitioner'.⁴⁹

On 18 August 2014, the CICC sent a letter to the Chair and Members of the Recruitment Panel, expressing its support to the Panel and offering some considerations for the recruitment process.⁵⁰ The IOM letter, spearheaded by the Women's Initiatives for Gender Justice, noted appreciation of the urgent need to put in place the permanent Head of the IOM but nonetheless urged the Panel 'to take sufficient time to ensure that this is a rigorous, transparent, thorough, and merit-based recruitment process, and to identify the most qualified candidate for the position'. The letter 'encourage[d] the Panel to adopt practices to ensure sufficient rigor and to ensure a technical, non-political process conducted wholly independently from any Court organ, office or staff, any State Parties, or any other external actor'. The letter also indicated that it would support the re-advertisement of the position should the initial recruitment fail to yield a candidate meeting the necessary qualifications.

The IOM Letter addressed the role of the Court in the recruitment process, noting the Registry's undertaking that the function of the Human Resources section would be purely administrative, while 'in all other respects the process will be conducted independently of the Court'. It emphasised that 'this approach is essential for the credibility of the process and the IOM' and encouraged the Panel 'to ensure that the role of the Human Resources Section in the recruitment process is fully transparent'.

At its 18 September 2014 meeting, the ASP President informed the Bureau that the Recruitment Panel had shortlisted eight candidates for interviews. The candidates represented the following geographic regions: two from Africa, one from the Asia-Pacific, and five from WEOG. Six of the candidates were male, while two were female. After the interviews, the Recruitment Panel was to rank and shortlist three candidates to the Bureau for its decision.⁵¹ As of 30 October, the Panel had submitted a unanimous recommendation for a candidate to the Bureau. However, as the silence procedure for the adoption of the recommendation was broken by several Bureau members, the Belgian delegation was asked to lead discussions to find a solution for the appointment of the Head of the IOM. At the time of writing this Report, the recruitment process remained ongoing.

IOM Head vacancy announcement and qualifications

The vacancy announcement for the Head of the IOM was advertised via the ICC's online recruitment system for a four-week period that commenced on 29 May 2014 and closed on 26 June 2014.⁵² The vacancy announcement specified that the position required a minimum of ten years of relevant professional experience and qualifications, including 'advanced knowledge and understanding of theories, concepts and approaches relevant to administrative and/or criminal investigations', as well as the 'demonstrated ability to conduct and lead complex investigation, inspection, and evaluation assignments'. The qualifications also included analytical skills, demonstrated

49 Email to Ambassador Jorge Lemcke Arévalo, Chair of the Recruitment Panel for the Head of the IOM, 6 August 2014, on file with the Women's Initiatives for Gender Justice.

50 Letter from the CICC to Ambassador Jorge Lemcke Arévalo and the additional Members of the Recruitment Panel for the Head of the IOM, 18 August 2014, on file with the Women's Initiatives for Gender Justice.

51 'Eighth Meeting of the Bureau of the Assembly of States Parties', *ICC website*, 18 September 2014, p 3, available at <http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-08-18Sep2014.pdf>.

52 'Fourth Meeting of the Bureau of the Assembly of States Parties', *ICC website*, 4 June 2014, p 2, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-04-04-06-2014.pdf>.

management knowledge and experience, excellent communication and negotiation skills, strong demonstrated writing skills, and the ability to network and build effective working relationships with internal and external stakeholders.⁵³

In the CICC letter regarding the IOM, the Coalition outlined the qualities and competencies that civil society considered essential for the position, in addition to those set out in the job description, and encouraged the Panel to take them into account.⁵⁴ Noting that the Head of the IOM would be responsible for leading and directing the inspection, evaluation and investigation functions of the IOM, as well as the management and administration of the IOM, the letter highlighted the need for ‘advanced communication skills’, as well as ‘the ability to act independently and to withstand institutional pressure’, in light of the highly sensitive issues that may come before the IOM and place ‘immense internal and external pressure’ on the staff and Head of the IOM.

The letter emphasised that the IOM will be required to ‘receive and investigate reports of misconduct or serious misconduct, including possible unlawful acts’ by elected officials, staff and contractors. It therefore suggested that the Panel ‘anticipate what types of alleged misconduct are more likely to require investigation going forward and should develop questions to probe these areas of expertise and experience’, including in relation to sexual violence. The letter expressed the surprise of Coalition members that ‘given the challenges already faced by the ICC’, the job description did not specify ‘advanced investigative skills in relation to sexual violence issues’. It accordingly urged the Panel to specifically seek

53 Vacancy announcement for the Head of the IOM, No 4045EE-RE, post number 9948, on file with the Women’s Initiatives for Gender Justice.

54 Letter from the CICC to Ambassador Jorge Lemcke Arévalo and the additional Members of the Recruitment Panel for the Head of the IOM, 18 August 2014, on file with the Women’s Initiatives for Gender Justice.

candidates with ‘expertise in investigating sexual and gender-based exploitation, abuse and harassment, as well as other forms of sexual violence’. It further identified ‘demonstrated gender competence’ as an essential attribute to ‘ensure that the IOM fully integrates the necessary gender measures in its policies, procedures, and operations’ and called on the IOM to ‘achieve a fair representation of women and men in its composition and require gender expertise among its staff, including providing any needed training and support’.⁵⁵

In the letter, the Coalition observed that the Head of the IOM will be required to ‘draft operational guidance, including procedures and protocols utilized by the IOM pursuant to recognized best practices and jurisprudence’, which would entail completing and addressing any gaps in the legal framework for the IOM. In this regard, it noted with concern the omission of an explicit provision for waiver of privileges and immunities, in accordance with Article 48(5) of the Rome Statute, in the IOM’s 2013 Operational Mandate. It also noted the omission in the 2013 Operational Mandate of ‘rape and other forms of sexual violence, including sexual abuse and harassment, within the definition of serious misconduct’. It expressed concern that ‘despite the recent and publicly acknowledged internal and external investigations into the alleged rape and sexual violence committed by ICC staff against witnesses/victims within the ICC witness protection programme, these two important substantive areas were overlooked in the drafting of the ASP resolution in 2013’. The letter emphasised that the Head of the IOM must be ‘someone with the legal acuity and political acumen to recognize such critical and obvious gaps in a timely manner and accordingly able to assist the [ASP] as it strives to prevent and is seen to address serious challenges, should they arise

55 Letter from the CICC to Ambassador Jorge Lemcke Arévalo and the additional Members of the Recruitment Panel for the Head of the IOM, 18 August 2014, on file with the Women’s Initiatives for Gender Justice.

in the future'. It accordingly advised the Panel 'to seek a candidate with the legal expertise, sound judgment, drafting experience and explicit track record demonstrating the ability to fulfil these requirements'. Finally, the letter urged the Panel 'to seek a candidate who understands the IOM's role in representing the interests of all stakeholders, including the public, States Parties, and the Court, and who is dedicated to ensuring the ICC both is, and is perceived as, an ethical and credible public institution'.

Whistleblower and Anti-Fraud Policies

The 2009 Resolution foresaw the incorporation of whistleblower procedures and protections into the IOM investigative unit.⁵⁶ In August 2011, the ASP's CBF recommended that the Court develop an anti-fraud policy, including whistleblowing provisions, 'as a matter of priority'.⁵⁷ Subsequently, at its 10th session in December 2011, the ASP invited the IOM to develop an anti-retaliation/whistleblower policy, in close consultation with Court organs, the Staff Union Council, and States Parties, for adoption by the Court 'at the earliest time possible'.⁵⁸ In this regard, in 2013, the Court reported on its development of two policy statements, including a policy on fraud and fraud prevention and a policy on whistleblowers and the protection of whistleblowers.⁵⁹ The Court explained that these policies would be supported by 'Administrative Instructions' on how to implement the policies and enacted as Presidential Directives in the near future.⁶⁰ The Court also noted that the policies and the Administrative Instructions 'will further enhance the Court's existing system of internal

controls and will form an integral part of the Court's risk management system'.⁶¹

The Anti-Fraud Policy was promulgated by a Presidential Directive on 13 May 2014.⁶² The Policy emphasises the Court's 'zero tolerance attitude towards fraud', which 'applies to all activities and operations of the ICC and all persons and entities affiliated with the ICC', as well as the need 'to maintain the highest standards of prevention, detection and remediation'.⁶³ The Policy sets forth obligations for raising awareness and preventing fraud, as well as reporting fraud and fraud remediation.⁶⁴ It defines fraud as 'any act or omission, including any misrepresentation that knowingly misleads or attempts to mislead, a party in order to obtain any financial or other benefit, to cause a loss or to avoid any obligation'.⁶⁵ It further states that it 'shall be translated into relevant administrative issuances so as to ensure a comprehensive system combating fraud, in particular policies regarding whistleblowers and their protection and a financial disclosure program'.⁶⁶

The Court indicated that, '[i]n tandem with the anti-fraud policy, and as a key element of the Court's fraud prevention system, the Court is also finalizing a system for conflict of interest and financial disclosure (financial disclosure program)'.⁶⁷ The Court reported that the financial disclosure programme is being finalised in cooperation with and with guidance from external entities such as the UN Ethics Office, which will also have a role in evaluating information collected from the Court's staff through the programme.⁶⁸ The programme will also involve the implementation of 'IPSAS 20

56 ICC-ASP/8/Res.1, Annex, para 6(b).

57 ICC-ASP/12/8, para 1. See also ICC-ASP/10/15, para 41.

58 ICC-ASP/10/Res.5, para 67.

59 ICC/ASP/12/8, para 5.

60 ICC/ASP/12/8, para 6.

61 ICC/ASP/12/8, para 8. See also *Gender Report Card 2013*, p 23-24.

62 ICC/PRESG/2014/002.

63 ICC/PRESG/2014/002, para 1.1.

64 ICC/PRESG/2014/002, paras 1.2, 3.1-5.4.

65 ICC/PRESG/2014/002, para 2.1.

66 ICC/PRESG/2014/002, para 6.1.

67 ICC-ASP/13/9, para 35.

68 ICC-ASP/13/9, para 35.

Related Parties Disclosures’, whereby ‘[k]ey managers will be required to disclose their transactions with the Court as well as the transactions of their close family members and their related parties.’⁶⁹ This information is ‘required for accountability purposes and to facilitate a better understanding of the financial performance and position of the Court’.⁷⁰

In May 2014, the Court reported to the ASP that the Whistleblower Policy had been developed ‘in close consultation with the IOM, the organs of the Court, and the Staff Union Council’.⁷¹ The Court explained that the Policy: (i) defines a whistleblower; (ii) establishes the responsibility of staff and elected officials ‘to blow the whistle if and when something relevant⁷² comes to their attention’; (iii) explains whistleblowing procedures; (iv) sets forth, as part of the Court’s ‘zero tolerance position’, measures adopted to prevent retaliation against whistleblowers; (v) provides a system for protection of individuals affected by retaliation and to address the retaliation; and (vi) ‘sets out the Court’s commitment to recover, whenever possible, the costs for any remedy which is required (from those who undertake acts of retaliation)’. Finally, the Court indicated that the Policy ‘fully incorporates the IOM [...] into the whistleblowing processes, including provisions for protecting whistleblowers and investigating any complaints of retaliation’.⁷³

The ‘ICC Whistleblowing and Whistleblower Policy’ (ICC Policy)⁷⁴ was promulgated by ICC President Sang-Hyun Song on 8 October 2014

69 ICC-ASP/13/9, para 36.

70 ICC-ASP/13/9, para 36.

71 ICC-ASP/13/9, para 37.

72 In its report, the Court did not indicate what would be considered ‘something relevant’ for the purposes of triggering the responsibility of staff and elected officials to ‘blow the whistle’.

73 ICC-ASP/13/9, paras 38-40.

74 ICC/PRESG/2014/003.

as a Presidential Directive.⁷⁵ The ICC Policy addresses similar issues to those within the comparable UN policy governing the *ad hoc* tribunals, entitled, ‘Protection against retaliation for reporting misconduct and for cooperating with duly authorised audits or investigations’ which entered into force on 1 January 2006 (UN Policy).⁷⁶

Both policies define the duties of ‘whistleblowers’⁷⁷ to report suspected misconduct. The ICC Policy specifically defines whistleblowers and their duty as ‘individuals who for the benefit of the ICC fulfil their responsibility by reporting in good faith, suspected misconduct, as defined in the Operational Mandate of the [IOM]’.⁷⁸ It is unclear from the text whether the ‘suspected misconduct’ described in the ICC Policy includes serious misconduct. As noted above, the 2013 Operational Mandate differentiates between misconduct and serious misconduct with references to Rules 25(1)(b) and 24(1)(b) respectively, of the RPE. It is unclear whether both forms of misconduct are intended to be included in the term ‘suspected misconduct’ as the ICC Policy does not include references to the RPE and/or the Operational Mandate of the IOM where these terms have been defined. To date, ‘serious misconduct’ at the ICC has not been defined to explicitly include sexual violence, rape, abuse or harassment.⁷⁹ The UN Policy, with its primary focus on protection and retaliation issues, does not define whistleblowers *per se*, but states that ‘[i]t is the duty of staff members

75 The Whistleblower Policy will be made public. At the time of writing this Report, the ICC Policy had not yet been posted on the ICC website, however an advance copy was made available to the Women’s Initiatives for Gender Justice.

76 ST/SGB/2005/21.

77 The UN Policy does not use the term ‘whistleblower’ but rather refers to ‘individuals who report misconduct’. ST/SGB/2005/21, p 1.

78 ICC/PRESG/2014/003, para 2.1.

79 ICC-ASP/12/Res.6, Annex, para 28 and fn 5.

to report any breach of the Organization's regulations and rules'.⁸⁰

Both policies identify those protected under the respective policies. The ICC Policy applies to 'elected officials, staff members, and other persons serving the [ICC] such as counsel, contractors, consultants, visiting professionals, interns and vendors',⁸¹ and the UN Policy identifies 'any staff member [...] intern, or [UN] volunteer' as falling under the scope of its application.⁸²

The ICC Policy provides that a whistleblower may either report misconduct to the head of her or his respective body or organ, or if for any reason this is 'not appropriate', to the IOM.⁸³ In addition, the ICC Policy also states that '[t]he heads of organs of the ICC shall designate additional persons who are authorised to receive relevant information from whistleblowers, as well as complaints of retaliation'.⁸⁴ At the time of writing this Report, it does not appear that any individuals had been designated with this authority by any of the organs of the Court.

The UN Policy provides for the reporting of misconduct through 'established internal mechanisms', including through the Office of Internal Oversight, the ASG for Human Resource Management, the head of department or office concerned. The UN Policy also provides for reporting misconduct 'through external mechanisms' where specific criteria are satisfied.⁸⁵ These criteria include that reporting externally is necessary to avoid '(i) A significant threat to public health and safety; or (ii) Substantive damage to the Organisation's operations; or (iii) Violations of national or international law'.⁸⁶ According to the UN Policy,

the external mechanisms can also be accessed if use of the internal mechanisms is not possible because:

- 1 At the time the report is made, the individual has grounds to believe that he/she will be subjected to retaliation by the person(s) he/she should report to pursuant to the established internal mechanism; or
- 2 It is likely that evidence relating to the misconduct will be concealed or destroyed if the individual reports to the person(s) he/she should report to pursuant to the established internal mechanisms; or
- 3 The individual has previously reported the same information through the established internal mechanisms, and the Organization has failed to inform the individual in writing of the status of the matter within six months of such a report.⁸⁷

The UN Policy also states that in utilising the external mechanisms, the individual reporting misconduct should 'not accept payment or any other benefit from any party for such report'. The ICC Policy does not provide for an external reporting mechanism and at this time all reporting options are exclusively internal.⁸⁸

Both policies define what constitutes 'retaliation' against whistleblowers. According to the ICC Policy, '[r]etaliation means any direct or indirect detrimental actions recommended, threatened or taken because an individual engaged in an activity protected in the present policy' and considers such retaliation itself to be misconduct.⁸⁹ The ICC Policy also identifies what should not be considered as retaliation, particularly feedback in performance reviews and 'the mere expression of disagreement, admonishment, or criticism regarding work performance [...] unless these are exercised

80 ST/SGB/2005/21, para 1.1.

81 ICC/PRESG/G/2014/003, para 4.1.

82 ST/SGB/2005/21, para 2.1.

83 ICC/PRESG/G/2014/003, paras 3.1-3.2.

84 ICC/PRESG/G/2014/003, para 3.3.

85 ST/SGB/2005/21, section 4.

86 ST/SGB/2005/21, section 4.

87 ST/SGB/2005/21, section 4.

88 ICC/PRESG/G/2014/003, p 2-3.

89 ICC/PRESG/G/2014/003, para 4.1 and 4.3.

in bad faith'.⁹⁰ In this respect, the ICC Policy states that performance-related feedback 'shall not be used as a means to demean or harass an individual or as retaliation for reporting suspected misconduct'.⁹¹ The UN Policy provides an almost identical definition of retaliation, including the performance feedback exclusion, stating specifically that '[t]he present bulletin is without prejudice to the legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performance, non-extension or termination of appointment'.⁹²

While the ICC Policy provides that whistleblowers 'who believe in good faith that they are being subjected to retaliation should document the relevant events as soon as possible and report them',⁹³ the UN Policy includes a statute of limitation, whereby in order to receive protection as a whistleblower, a 'report should be made as soon as possible and not later than six years after the individual becomes aware of the misconduct'.⁹⁴

The ICC Policy states that '[t]he ICC has zero tolerance for retaliation against whistleblowers'⁹⁵ and is committed to conducting a 'professional, prompt and confidential investigation of any suspected retaliation' and to taking appropriate action against those responsible through its internal disciplinary procedures.⁹⁶ These important principles are not expanded upon in the policy in terms of specific procedures for reporting alleged retaliation at the ICC or identifying the body which will assess whether retaliation has occurred. In this regard, the UN

90 ICC/PRESG/G/2014/003, para 4.2.

91 ICC/PRESG/G/2014/003, para 4.2.

92 According to the UN Policy, '[r]etaliatiion means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy. When established, retaliation is by itself misconduct.' ST/SGB/2005/21, paras 1.4 and 2.2.

93 ICC/PRESG/G/2014/003, para 4.6.

94 ST/SGB/2005/21, para 2.1(a).

95 ICC/PRESG/G/2014/003, para 4.1.

96 ICC/PRESG/G/2014/003, para 4.4.

Policy includes a special procedure in a section on 'Reporting retaliation to the Ethics Office' for 'individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation'.⁹⁷ Individuals who 'believe retaliatory action has been taken against them because they have reported misconduct' can submit information and documentation to the Ethics Office.⁹⁸

This office can receive complaints of alleged retaliation or threats of retaliation, and conducts a preliminary review within 45 days of receiving such complaints.⁹⁹ The UN Policy also outlines other relevant tasks of the Ethics Office such as ensuring: that complaints are fully investigated; that the interests of the complainant are safeguarded; that complainants are informed of the outcome of the investigation; and that any managerial problems or conflicts of interest are addressed.¹⁰⁰ Importantly, the UN Policy states that, '[a]ll offices and staff members shall cooperate with the Ethics Office and provide access to all records and documents requested by the Ethics Office, except for medical records that are not available without the express consent of the staff member concerned and OIOS records that are subject to confidentiality requirements'.¹⁰¹

According to the ICC Policy if there is a finding of retaliation, 'the ICC will, to the extent possible mitigate the impact of the retaliation on the whistleblower' and if possible 'recover the costs of any remedy from the persons responsible for the retaliation'.¹⁰² In contrast, the UN Policy outlines specific responses to a finding of retaliation outlined in the section on the 'Protection of the person who suffered retaliation' wherein the Ethics Office may

97 ST/SGB/2005/21, para 5.1.

98 ST/SGB/2005/21, para 5.1.

99 ST/SGB/2005/21, paras 5.2-5.3.

100 ST/SGB/2005/21, paras 5.5-5.10.

101 ST/SGB/2005/21, para 5.5.

102 ICC/PRESG/G/2014/003, paras 2.2 and 4.8.

‘recommend to the head of department or office concerned appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action’, which might include ‘the rescission of the retaliatory decision, including reinstatement, or, if requested by the individual, transfer to another office or function for which the individual is qualified, independently of the person who engaged in retaliation’.¹⁰³

Under the ICC Policy, ‘[t]he ICC will take prompt action against anyone found to have retaliated against a whistleblower’, and the Court is ‘committed to the professional, prompt and confidential investigation of any suspected retaliation’.¹⁰⁴ In the UN Policy, there is a section on ‘Action against the person who engaged in retaliation’ wherein if retaliation amounting to misconduct is established, this ‘will lead to disciplinary action and/or transfer to other functions in the same or a different office’.¹⁰⁵

While both policies protect whistleblowers from retaliation, the UN Policy additionally provides that the distribution ‘of unsubstantiated rumours is not a protected activity. Making a report or providing information that is intentionally false or misleading constitutes misconduct and may result in disciplinary or other appropriate action’.¹⁰⁶ The ICC Policy does not have a similar provision for false claims.

A final provision of the ICC Policy provides that it ‘shall be translated into relevant administrative issuances so as to ensure a comprehensive system for the encouragement and protection of whistleblowers’.¹⁰⁷ While such administrative issuances may provide further technical details on the operation of the ICC Policy, at the time of writing this Report they had not been publically issued.

103 ST/SGB/2005/21, para 6.1.

104 ICC/PRES/D/G/2014/003, paras 4.3-4.4.

105 ST/SGB/2005/21, p 4-5.

106 ST/SGB/2005/21, para 2.3.

107 ICC/PRES/D/G/2014/003, para 5.1.

IOM reporting obligations

In accordance with the 2010 and 2013 Operational Mandates, the IOM is required to submit quarterly activity reports to the Bureau and a consolidated annual report on its operations to the ASP. All reports are to respect the confidentiality of staff members, elected officials and contractors.¹⁰⁸ The 2013 Mandate specifies that the annual report is to include ‘a comprehensive section on the internal evaluations carried out by the Court during that year’. Furthermore, prior to the submission of the annual report, the draft report is to be circulated for comment to the Presidency, Prosecutor and Registrar. The IOM must consider the comments and inform the relevant organ of any disagreement.¹⁰⁹

To date, the only publicly available report from the IOM on its activities is a brief ‘consolidated report’ issued in November 2013.¹¹⁰ The report indicated that the IOM had ‘remained in a pre-operational state’ pending the ASP’s final determination of the IOM’s mandate.¹¹¹ It also noted that during 2013, the Temporary Head of the IOM had ‘provided technical guidance and support’ to the Hague Working Group regarding the development of the IOM’s comprehensive mandate; worked closely with the Court on the development of the Anti-Fraud and Whistleblower Policies; and ‘provided coordination and logistical support for the external and independent post-incident review of allegations of sexual crimes [committed by ICC staff] against four individuals who were participants in the Court’s Protection Programme’. The Temporary Head noted that ‘[t]his review process is on-going as of the time of this report’.¹¹²

108 ICC-ASP/9/Res.5, Annex, para 33; ICC-ASP/12/Res.6, Annex, para 46.

109 ICC-ASP/9/Res.5, Annex, para 34; ICC-ASP/12/Res.6, Annex, para 48. For details regarding the difference in the reporting requirements set forth in the 2010 and 2013 Operational Mandates, see *Gender Report Card 2013*, p 23.

110 ICC-ASP/12/55.

111 ICC-ASP/12/55, para 1.

112 ICC-ASP/12/55, paras 1-4. See also ‘The external independent review submits its report on alleged sexual abuses in DRC’, *ICC Press Release*, ICC-CPI-20131220-PR977, 20 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr977.aspx>.

Governance

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The ICC's internal governance framework is outlined in the Rome Statute¹¹³ and has been further developed through the adoption of resolutions by the ASP as well as the Court's practices. Following governance evaluations and risk assessments undertaken by different organs of the Court, which were consolidated in a Court-wide Corporate Governance Report in 2010,¹¹⁴ and upon the recommendation of the CBF, at the ninth session of the ASP in December 2010, the ASP adopted Resolution ICC-ASP/9/Res.2, establishing a SGG to engage in a 'structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficacy and effectiveness of the Court'.¹¹⁵ Initially established for one year, the SGG's mandate was successively extended at the following three ASP sessions.¹¹⁶

Study Group on Governance

Throughout its first year of work, the SGG focused its discussions within three clusters of issues, namely: the relationship between the Court and the ASP; strengthening the institutional framework within the Court; and increasing the efficiency of the criminal process.¹¹⁷ During its second year, in 2012, the SGG focused on two clusters: expediting the criminal process; and enhancing the transparency and predictability of the budgetary process.¹¹⁸ In 2013, the SGG continued its discussion in relation to these two clusters of issues. The SGG's discussions in relation to its previous years of work are reviewed in greater detail in the *Gender Report Cards 2011, 2012, and 2013*.

113 Part four of the Statute contains provisions on the composition and administration of the Court.

114 ICC-ASP/9/34.

115 ICC-ASP/9/Res.2, paras 1-2.

116 ICC-ASP/10/Res.5, para 37; ICC-ASP/11/Res.8, Advance Version, para 40; ICC-ASP/12/Res.8, Annex I, para 7.

117 ICC-ASP/10/30, para 3.

118 ICC-ASP/11/31, para 5.

On 18 February 2014, the Bureau reported that it had appointed Ambassador Håkan Emsgård (Sweden) as Chair of the SGG. Furthermore, focal points for two clusters were appointed. Within Cluster I, the SGG has continued its focus on 'Increasing the efficiency of the criminal process'. Shehzad Charania (United Kingdom) and Thomas Henquet (The Netherlands) were initially appointed as the co-focal points of Cluster I, and on 5 May 2014, following the departure of Thomas Henquet, the Bureau appointed Nobuyuki Murai (Japan) as a new co-focal point for Cluster I. Within Cluster II, the SGG considered the issue of 'Intermediaries'. The focal point for Cluster II is Klaus Keller (Germany). From February 2014 and throughout the reporting period, the SGG held several regular meetings, in addition to informal meetings by the focal points and States Parties and the organs of the Court.¹¹⁹

This section provides an overview of the main issues addressed by the SGG during the period under review.¹²⁰ Recommendations for the development of the Court's governance structure are contained in the **Recommendations** section of this Report.

Cluster I: Increasing the efficiency of the criminal process

As in previous years, the first cluster of topics considered by the SGG in 2014 related to expediting the criminal process. Within this cluster, the SGG considered amendments to the RPE proposed by the WGLL in relation to 'Language Issues' and 'Organizational Matters', engaged with the Court on issues related to 'Pre-trial and trial relationship and common issues', and held a seminar of experts entitled

'Increasing the Efficiency of the Criminal Process, while Preserving Individual Rights'.¹²¹

Proposed amendments to the RPE

On 28 February 2014, in accordance with the revised 'Roadmap on Reviewing the Criminal Procedures of the ICC' (Roadmap),¹²² the WGLL introduced two reports to the SGG, recommending amendments to the RPE in relation to two clusters of issues: 'Language Issues' and 'Organizational Matters'.¹²³ These clusters of issues were included among the nine clusters that the Court had identified in a 2012 report on lessons learnt as requiring discussion with a view to expediting proceedings and enhancing their quality.¹²⁴

Concerning Language Issues, the WGLL proposed amendments to Rules 76(3), 101 and 144(2)(b) of the RPE, relating to translations of documents into a language an accused fully understands. In

121 SGG, '[Draft] Report of the Study Group on Governance', 28 October 2014, paras 8, 10-11, 15.

122 In 2012, within Cluster I on expediting the criminal process, it was agreed that a substantive review of the Court's criminal procedures was warranted, in particular in the areas of pre-trial and trial, and that the review should initially focus on amendments to the RPE. For this purpose, the SGG drafted the Roadmap on Reviewing the Criminal Procedures of the ICC, which was endorsed by the ASP in November 2012 and amended in November 2013 (Roadmap). In October 2012, the SGG also established the WGLL, composed of ICC Judges. Pursuant to the Roadmap, the role of the WGLL is to consider recommendations on proposals to amend the RPE. Recommendations that receive the support of at least five judges are then submitted to the SGG and the ACLT for their consideration. ICC-ASP/11/31, paras 5-6, 10, 11.

123 SGG, '[Draft] Report of the Study Group on Governance', 28 October 2014, para 8.

124 In October 2012, following an invitation by the SGG 'to take stock of lessons learnt in its ten years of operation and to reflect upon measures that could be envisaged in order to expedite the judicial proceedings and enhance their efficiency, including amendments to the legal framework', the Court submitted its first report on lessons learnt to the ASP. In the report, the Court identified the following nine clusters of issues as meriting consideration: (i) Pre-trial; (ii) Pre-trial and trial relationship and common issues; (iii) Trial; (iv) Victims' participation and reparations; (v) Appeals; (vi) Interim release; (vii) Seat of the Court; (viii) Language Issues; and (ix) Organizational Matters. ICC-ASP/11/31/Add.1, paras 1-3 and Annex; ICC-ASP/12/37/Add.1, para 2.

119 SGG, '[Draft] Report of the Study Group on Governance', 28 October 2014, available at paras 4-5.

120 For a more detailed overview of the ICC's corporate governance framework and the past work of the SGG, see *Gender Report Card 2011*, p 93-100; *Gender Report Card 2012*, p 70-75; *Gender Report Card 2013*, p 25-27.

relation to ‘Organizational Matters’, the WGLL recommended a new Rule 140*bis* of the RPE, which covers procedures to be followed in the event of the temporary absence of a judge of the Trial Chamber.¹²⁵ The proposed amendments are discussed in more detail in the **Amendments** section of this Report.

Pre-trial and trial relationship and common issues

The matter of ‘pre-trial and trial relationship and common issues’ was also included among the nine clusters of issues identified by the Court in 2012 as meriting discussion.¹²⁶ In 2014, the Chair of the SGG requested the Court to hold additional meetings regarding these issues, in order ‘to identify the most important “bottlenecks” affecting the Court’s work, and to propose measures to deal with them’.¹²⁷

Although no amendments to the RPE were considered in relation to these issues, the WGLL reported that Pre-Trial Chambers have implemented important changes to their practices, which are aimed at strengthening the efficiency and effectiveness of the pre-trial and trial process.¹²⁸ These include: (1) ‘the clarification of facts and circumstances that are confirmed by Pre-Trial Chambers’; (2) ‘the flexibility that Pre-Trial Chambers are incorporating into their legal characterization of those facts’; (3) ‘the means by which evidence is presented by the Prosecutor’; and (4) ‘the expediting of the redactions process’.¹²⁹

The WGLL noted that the first measure was taken to address difficulties that had been experienced by Trial Chambers resulting from the failure of Pre-Trial Chamber decisions to identify the facts

125 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 8.

126 ICC-ASP/11/31/Add.1, Annex, p 4.

127 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 18.

128 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 20.

129 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 20.

and circumstances underlying the charges, as opposed to other information contained in the DCC, with sufficient clarity. The WGLL explained that as a result, Trial Chambers had determined that they were unable to rely upon confirmation decisions or the Prosecution’s DCC as a basis for trial and instead were required to request an amended DCC. According to the WGLL, to address this issue, both Pre-Trial Chambers had ‘modified the content and format of their Confirmation Decisions, with a view to achieving more clarity with regard to the facts and circumstances of the charges that are confirmed by the Chamber and more flexibility in relation to their legal characterization’. The WGLL reported that this measure had been implemented in the Confirmation of Charges decisions in the Ntaganda and Laurent Gbagbo cases.¹³⁰

Regarding the second measure, the WGLL explained that ‘[a] lack of sufficient flexibility in Confirmation Decisions in previous cases led to the recurrent recourse to Regulation 55 at different phases of the trial proceedings, including shortly after the outcome of the confirmation proceedings’. It further explained that ‘[i]t appears that earlier identification of potential alternative legal characterisations of the same facts may limit the recourse to modifications pursuant to Regulation 55, expedite the trial proceedings and provide better protection to the rights of the accused by providing earlier notification to the Defence’. The WGLL noted that this ‘more flexible approach’ had also been adopted in the Ntaganda and Laurent Gbagbo Confirmation of Charges decisions.¹³¹ These decisions are described in detail in the **Charges for Gender-based Crimes** section of this Report.

Concerning the remaining two measures, the WGLL explained that the Pre-Trial Chambers have endorsed ‘an innovation initiated by the Prosecutor’ in the Gbagbo case, whereby footnotes include hyperlinks to evidence supporting the charges

130 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex II, paras 7-19.

131 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex II, paras 20-23.

as a means of enhancing ease of access to the evidence. Furthermore, Pre-Trial Chamber I has adopted a procedure whereby redactions ‘are proposed and implemented directly by the Prosecutor and the Chamber is only seized of the matter where no agreement is reached among the parties’. According to the WGLL, this measure ‘reduces the time spent by the Pre-Trial Chamber in considering the approval of each and every redaction prior to a party’s disclosure of the material’.¹³²

Seminar on ‘Increasing the Efficiency of the Criminal Process, while Preserving Individual Rights’

On 9 July 2014, Sweden, the United Kingdom, and Japan, in conjunction with The Hague Institute for Global Justice, held a seminar which brought together experts from the ICC and the *ad hoc* tribunals; States; civil society, including the Women’s Initiatives for Gender Justice; academics; and legal professionals. The seminar, entitled ‘Increasing the Efficiency of the Criminal Process, while Preserving Individual Rights’, aimed to build on the work of the WGLL by providing substantive content for some of the clusters identified in the Court’s 2012 lessons learnt report. Accordingly, the following topics were examined: (i) ‘The Role of the Pre-Trial Chamber’; (ii) ‘How new technology can assist in expediting trials’; (iii) ‘Pre-trial and trial relationship and common issues’; and (iv) ‘Interests of victims: increasing the efficiency of the victims’ participation mechanism in accordance with Article 68(3) of the Rome Statute’.¹³³

132 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex II, paras 26-29.

133 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, paras 11-16. See also ‘Seminar: Increasing the Efficiency of the Criminal Process, While Preserving Individual Rights’, *The Hague Institute for Global Justice*, available at <http://thehagueinstituteforglobaljustice.org/index.php?page=Events-Events-Events-Seminar:_Increasing_the_Efficiency_of_the_Criminal_Process_at_the_ICC_While_Preserving_Individual_Rights&pid=166&id=194>.

Cluster II: Intermediaries

In its 2013 report on the SGG, the Bureau of the ASP agreed that work under Cluster II on enhancing the transparency and predictability of the budgetary process should be discontinued.¹³⁴ At the 12th session of the ASP in November 2013, States Parties requested the Bureau to further consider the issue of intermediaries, which the Bureau subsequently assigned to the HWG.¹³⁵ On 17 March 2014, the Court adopted the following policy documents on intermediaries,¹³⁶ which then constituted the textual basis for discussions within Cluster II:¹³⁷ the Guidelines Governing the Relations between the Court and Intermediaries (Guidelines);¹³⁸ the Code of Conduct for Intermediaries;¹³⁹ and the Model Contract for Intermediaries.¹⁴⁰ These documents formalise procedures for the Court’s practice of working with intermediaries, defined by the Guidelines as ‘someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more

134 ICC-ASP/12/37, para 7.

135 ‘First Meeting of the Bureau of the Assembly of States Parties’, *ICC website*, 24 January 2014, p 2, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-01-24-01-2014.pdf>.

136 ‘ICC adopts Guidelines on Intermediaries’, *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Pages/default.aspx>.

137 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 35.

138 ‘Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries’, *ICC website*, March 2014, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

139 ‘Code of Conduct for Intermediaries’, *ICC website*, March 2014, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/CCI-Eng.pdf>.

140 ‘Model Contract for Intermediaries’, *ICC website*, March 2014, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/MCI-Eng.pdf>.

broadly on the other'.¹⁴¹ Various organs and units of the Court and Counsel may interact with intermediaries, who perform a variety of functions, including to:

- a Assist with outreach and public information activities in the field;
- b Assist a party or participant to conduct investigations by identifying evidentiary leads and/or witnesses and facilitating contact with potential witnesses;
- c Assist (potential) victims in relation to submission of an application, request for supplementary information and/or notification of decisions concerning representation, participation or reparations;
- d Communicate with a victim/witness in situations in which direct communication with the Court could endanger the safety of the victim/witness;
- e Liaise between Legal Representatives and victims for the purposes of victim participation/reparations; and
- f Assist the TFV both in its mandate related to reparations ordered by the Court against a convicted person and in using other resources for the benefit of victims subject to the provisions of article 79 of the Rome Statute.¹⁴²

141 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', *ICC website*, March 2014, p 5, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

142 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', *ICC website*, March 2014, p 6, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>. A summary of the main tasks conducted by intermediaries, by function or unit/organ, is provided in the form of a table in Annex I to the Guidelines.

According to the Court, the Guidelines were developed 'to fill the gap in its policy framework' given that '[r]elations with intermediaries are not regulated in the Court's legal texts, with one exception in the Regulations of the Trust Fund for Victims'.¹⁴³ The Guidelines are not legally binding but represent best practice and guidance for Court staff in their interactions with intermediaries.¹⁴⁴ Since the diverse functions performed by intermediaries make Court-wide standardisation difficult, the Guidelines aim to provide a framework with common standards and procedures, and envision that specialised policies may be adopted by organs or units of the Court to complement the Guidelines. The Guidelines specifically aim 'to preserve the integrity of the judicial process to the maximum extent possible; to provide guidance to staff of the Court and improve efficiency of the Court's operations; to provide transparency and clarity for third parties who may interact with the organs or units of the Court or Counsel; and to provide guidance on the relationship between the Court and intermediaries'.¹⁴⁵

The Guidelines contain the following six sections: defining intermediaries and their functions; identifying and selecting intermediaries; formalizing intermediary relationships; supporting intermediary duties; providing security and protection; and the monitoring of the Guidelines. The Guidelines present three different categories of intermediaries to whom different conditions apply: (1) contracted intermediaries to whom all provisions in the Guidelines apply; (2) intermediaries approved

143 SGG, '[Draft] Report of the Study Group on Governance', 28 October 2014, para 36.

144 'ICC adopts Guidelines on Intermediaries', *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Pages/default.aspx>.

145 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', *ICC website*, March 2014, p 3, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

by the Court by way of an affidavit, to whom all provisions apply unless otherwise stated; and (3) unapproved intermediaries who are 'self-appointed' or are 'one-off', to whom the application of the Guidelines are decided on a case-by-case basis.¹⁴⁶

The Guidelines incorporate several important provisions. For example, Court organs/units or Counsel must consider three criteria when screening potential intermediaries. One of these criteria, '[a]dherence to confidentiality and respect for dignity', includes that a prospective intermediary should 'demonstrate respect for diversity and for the dignity, well-being and privacy of victims/witnesses/accused'. The fourth selection criteria provided in the Guidelines under '[c]apacity knowledge and experience', includes a sub-section on 'cultural, social and linguistic proximity to affected communities' within which the required capacity includes the 'ability to ensure gender-specific strategies'. Under the sub-section on 'Experience working with victims' the Guidelines also specify '[e]xperience in applying gender-specific strategies'.¹⁴⁷

The Guidelines also provide that when specific intermediaries require 'increased knowledge or capacity to perform required tasks', they may be given training on a variety of topics. Such training efforts 'should in particular be made when it concerns individuals or organisations with the ability to ensure gender-specific strategies in their work, or when this effort would lead to involving women to respond to, for example, the victimisation of women and

girls'.¹⁴⁸ The Guidelines elaborate on types of training that may be offered to intermediaries, 'in cooperation with relevant organs and units of the Court and Counsel', which cover topics such as 'Knowledge of international justice', including the 'role and rights of victims in Court proceedings' and the '(non-)disclosure of identities for victims, witnesses and persons who are at risk on account of giving testimony or on account of any other activity of the Court'. Another topic, 'Field-based training', covers issues including 'Gender sensitivity and best practices for working with traumatised or particularly vulnerable victims'; and 'Awareness and prevention of secondary traumatization'.¹⁴⁹

Furthermore, the Code of Conduct for Intermediaries, which applies to intermediaries 'either individuals or organisations, acting at the request of an organ or unit of the Court or Counsel' when carrying out their functions under the Guidelines, includes the following provision:

An Intermediary shall not abuse or misuse his/her/its relationship with the Court while carrying out his/her/its Functions, including, but not limited to:

(a) Any deliberate conduct jeopardizing the safety, physical or psychological well-being, dignity or privacy of persons, especially women and children; or

(b) Any abusiveness, coercion or threats to any person with whom the Intermediary has dealings in the course of his/her/its Functions.¹⁵⁰

146 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', ICC website, March 2014, p 10, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

147 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', ICC website, March 2014, p 8-9, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

148 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', ICC website, March 2014, p 8, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

149 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', ICC website, March 2014, p 14, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

150 'Code of Conduct for Intermediaries', ICC website, March 2014, para 3.4, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

The SGG held one informal meeting within Cluster II on 19 June 2014, during which the Court organs made presentations on the issue of intermediaries and the recently adopted policy documents described above.¹⁵¹ In its presentation to the SGG, the OTP clarified that the ‘sole function of Prosecution intermediaries is to assist the Office, where necessary and appropriate, in identifying and establishing contact with potential witnesses’ and that intermediaries are ‘never used for the purpose of performing investigative activities, which is a responsibility solely of the [OTP]’.¹⁵² The OTP differentiates between two types of intermediaries with whom it works: contracted intermediaries, who are paid for their time; and voluntary intermediaries, who offer to assist the Court and are only reimbursed for expenses incurred.¹⁵³

The SGG further reported that following problems faced with intermediaries in the Lubanga case,¹⁵⁴ the OTP explained it had:

adopted measures to avoid such issues in the future, such as vetting of the intermediaries, testing of the intermediaries at an early stage of the process, close monitoring and avoiding the use of individual intermediaries for a large number of potential witnesses or sources of information. Further measures aimed at mitigating the risk associated with the use of intermediaries include closely reporting and monitoring; limiting the number of witnesses that an intermediary comes into contact with; providing information to intermediaries strictly on a need-to-know basis as well as asking witnesses about the approach of individual intermediaries.¹⁵⁵

151 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 34.

152 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 39.

153 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 41.

154 ICC-01/04-01/06-2842, paras 178-484. See in particular para 482.

155 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 40.

The SGG reported that these measures were ‘codified in the Operations Manual on Intermediaries’, which is confidential and sets forth standard operating procedures followed by the OTP.¹⁵⁶ While at the time of writing, there is no further public information on this document, the OTP referred in its 2012-2015 Strategic Plan to an ‘Operations Manual’, which has been in place since 2009¹⁵⁷ and appears to cover, among other things, standards on intermediaries, which were drawn from the ‘issues [that] surfaced during the first trials and through lessons learned’.¹⁵⁸ Additionally, intermediaries were addressed in the OTP’s 2014 Policy Paper on Sexual and Gender-Based Crimes¹⁵⁹ in which it is explained that the ‘selection, tasking, and supervision of intermediaries are regulated in detail in the Operations Manual’.¹⁶⁰ Given the confidential nature of the document(s), at the time of writing this Report,¹⁶¹ it was not possible to assess the provisions or measures reportedly adopted.

156 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 40.

157 An updated version was developed in 2011. ‘OTP Strategic Plan’, June 2012-2015, para 42.

158 ‘OTP Strategic Plan’, June 2012-2015, para 42.

159 The Policy Paper explains that: ‘The Office will identify individuals who may be selected as intermediaries in order to support the conduct of effective investigations. All such intermediaries who are likely to engage with victims and witnesses of sexual and gender-based crimes will be specifically briefed to ensure that they have an understanding of the possible effects of trauma in relation to both these particular crimes and to the investigative process. The Office will continuously monitor and evaluate the performance of intermediaries. Where the performance of intermediaries is unsatisfactory, or where the integrity of intermediaries is called into question, the team will immediately reconsider their continued engagement, and take any other necessary action, as appropriate.’ OTP Policy Paper on Sexual and Gender-Based Crimes, June 2014, para 56.

160 OTP Policy Paper on Sexual and Gender-Based Crimes, June 2014, para 56.

161 While the OTP had previously indicated that a ‘public version of the Operational Manual will be disseminated’ in their Prosecutorial Strategy 2009-2012, in the Strategic Plan for 2013-2015, there is no indication that it will be made public. ‘Prosecutorial Strategy’, 1 February 2010, fn 1, *ICC website*, available at <<http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>>.

At the 19 June 2014 meeting, the monitoring of the Guidelines was also discussed. The Guidelines provide that for the first two years they will be monitored by the Working Group on Intermediaries, which will meet biannually, and 'by a permanent observation mechanism for receiving recommendations and the exchange of experience and information'.¹⁶² The Court informed the SGG that the Working Group had recently met and had assigned the Immediate Office of the Registrar as the focal point for the permanent observation mechanism, which will consist of all organs of the Court. Furthermore, 'a detailed review [will] take place in September 2015 and, meanwhile, individual organs and sections [will] monitor the implementation of the Guidelines'.¹⁶³ As described in the Guidelines, this detailed review 'will assess implementation and overall effectiveness at the policy and practice level, across the different organs and units of the Court and Counsel and with selected intermediaries and other participants in the process' and specifically 'will apply geographic and gender-specific strategies and a child-friendly approach'.¹⁶⁴

The OTP further informed the SGG of the steps that were taken following the suggestion of the Trial Chamber in the Lubanga Judgment that the Prosecution consider launching an Article 70¹⁶⁵ investigation into offences against the administration of justice. The OTP explained that it 'engaged an expert to review in-house information relevant to the allegations. On the basis of the report produced by the expert and the Prosecutor's own assessment of all the relevant information before her, she decided not to formally investigate the allegations'.¹⁶⁶

At the meeting, States raised concerns over a number of issues, including: how the practice of using intermediaries may impact the sovereignty of the State in which the intermediaries operate; the budgetary implications of using intermediaries; the 'grey areas surrounding the use of intermediaries' regarding 'when and in what process they would be used'; and the confidential nature of the OTP's Operations Manual on Intermediaries.¹⁶⁷

162 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', *ICC website*, March 2014, para 6.1, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

163 SGG, '[Draft] Report of the Study Group on Governance', 28 October 2014, para 38.

164 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', *ICC website*, March 2014, para 6.1, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

165 Article 70, Rome Statute.

166 SGG, '[Draft] Report of the Study Group on Governance', 28 October 2014, para 46.

167 SGG, '[Draft] Report of the Study Group on Governance', 28 October 2014, paras 45-46.

Amendments

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Amendment proposals to the Rome Statute and RPE

Article 121(1) of the Statute provides that '[a]fter the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto', by submitting a text to the UN Secretary-General, for circulation to all States Parties.¹⁶⁸ A proposed amendment shall be considered no sooner than three months after such a notification, at the next meeting of the ASP, which can decide to take up the proposal directly or convene a Review Conference to consider the proposal.¹⁶⁹ A two-thirds majority is required to adopt an amendment, in the event that consensus cannot be reached.¹⁷⁰

Pursuant to Article 51(2) of the Statute, amendments to the RPE may be proposed by any State Party, the judges acting by an absolute majority, or the Prosecutor. The same provision provides that such amendments shall enter into force upon adoption by a two-thirds majority of the members of the ASP. The RPE, and any amendment thereto, must be consistent with the Statute and, in the event of conflict between the Statute and the RPE, the Statute shall prevail.¹⁷¹

Amendments to both the Rome Statute and the RPE were proposed during the period under review. Amendments to the Statute were proposed by Kenya in a submission to the UN Secretary General on 22 November 2013,¹⁷² during the 12th session of the ASP from 20 to 28 November, when negotiations on RPE amendments were underway. The proposed statutory amendments include a change that would exempt serving Heads of State and other senior officials from ICC prosecution. This issue had been raised at the 12th ASP session in 2013,¹⁷³ as well as in the context of the proposed criminal jurisdiction of the African Court of Justice and Human and Peoples' Rights. Proposals to amend Rules 76(3), 101 and 144(2)(b) of the RPE

168 The Rome Statute entered into force on 1 July 2002.

169 Article 121(2), Rome Statute.

170 Article 121(3), Rome Statute.

171 Article 51(4) and (5), Rome Statute.

172 Depository notifications conveyed to States Parties by the Secretary-General are available online at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en>.

173 See *Gender Report Card 2013*, p 28-29.

were submitted to the SGG by the WGLL. The proposals to amend the Rome Statute and the RPE, as well as the proposed jurisdictional changes to the African Court, are further discussed below. At the time of writing this Report, none of the amendment proposals had been formally put forward for consideration at the 13th session of the ASP in December 2014.

Proposed amendments to the Rome Statute¹⁷⁴

As discussed in the *Gender Report Card 2013*, in early November 2013, Kenya proposed that a number of provisions in the Rome Statute be amended. These proposed changes to the Statute were discussed in the context of the 12th session of the ASP held in November 2013.¹⁷⁵ However, since Kenya had not made a notification according to Article 121(1) and (2) of the Statute, which makes it clear that amendments to the Statute can be decided upon no sooner than three months from the date of notification, no amendments of the Rome Statute were formally considered at the 12th session of the ASP. On 14 March 2014, the UN Treaty Section announced that the Secretary-General had received, on 22 November 2013, a depositary notification from Kenya proposing amendments to the Statute.¹⁷⁶

The proposals have been made in the context of a wide-ranging set of interventions by Kenya seeking to delay or end the prosecutions of President Kenyatta and Deputy President Ruto at the ICC. Together with other African States and the AU, the Kenyan Government

has, unsuccessfully, requested the UN Security Council to defer as well as to terminate the proceedings against President Kenyatta and Deputy President Ruto,¹⁷⁷ and has lobbied African States and the AU to make decisions aimed at ending their prosecution.¹⁷⁸ The AU Decision on Africa's Relationship with the ICC, adopted in October 2013, contained a provision calling for African States Parties to 'propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute'.¹⁷⁹ The Kenyan Parliament in addition passed a motion for the country's withdrawal from the Rome Statute,¹⁸⁰ and the Kenyan Government has also, without success, challenged the admissibility of the cases before the ICC.¹⁸¹

174 Depositary notifications conveyed to States Parties by the Secretary-General are available online at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en>.

175 See further *Gender Report Card 2013*, p 28-29.

176 UN, 'Kenya: Proposal of Amendments', C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), available at <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>>.

177 These requests were made in 2011 as well as in May and October 2013. See *Gender Report Card 2011*, p 170-173; 'Letter Kenya Sent to UN in May 2013 to Stop the ICC Cases', 2 May 2013, available at <<http://www.docstoc.com/docs/156046087/Letter-Kenya-Sent-to-UN-in-May-2013-to-Stop-the-ICC-Cases>>; 'UN rejects Africa bid to halt Kenya leaders' ICC trials', *BBC*, 15 November 2013, available at <<http://www.bbc.co.uk/news/world-africa-24961169>>.

178 See eg 'Decision on Africa's Relationship with the International Criminal Court (ICC)', AU, Ext/Assembly/AU/Dec.1, October 2013, p 2-3, available at <http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf>.

179 'Decision on Africa's Relationship with the International Criminal Court (ICC)', p 2, AU, Ext/Assembly/AU/Dec.1, October 2013, available at <http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf>.

180 On 5 September 2013, Kenya's National Assembly passed a motion resolving 'to introduce a Bill within the next thirty days to repeal the International Crimes Act (No 16 of 2008) and that the Government urgently undertakes measures to immediately withdraw from the Rome Statute of the [ICC]'. 'National Assembly Official Report', *Eye of Kenyan Parliament*, 5 September 2013, p 2, available at <http://info.mzalendo.com/hansard/sitting/national_assembly/2013-09-05-14-30-00>. On its own, this motion has no legal effect, as Kenya's Treaty Making and Ratification Act of 2012 makes it clear that it is the prerogative of the executive branch of the Government to initiate ratification as well as denunciation of international instruments.

181 See *Gender Report Card 2011*, p 265-271.

The proposed amendments to the Rome Statute filed with the UN Secretary-General are identical to those Kenya had suggested in the context of the 12th session of the ASP. The amendment proposal concerns four provisions in the Statute: Article 27, entitled 'Irrelevance of official capacity'; Article 63, entitled 'Trial in the presence of the accused'; and Article 70, entitled 'Offences against administration of justice'. Kenya has also made a proposal regarding Article 112, entitled 'Assembly of States Parties', in relation to the implementation of the IOM. Additionally, Kenya proposed an amendment to the Preamble of the Statute. In its submission to the UN, Kenya set out the proposed additional text or changes to the existing text of these Articles and the Preamble, as described below.

Proposed amendment to Article 27: 'Irrelevance of official capacity'

Article 27 of the Statute provides that:

- 1 This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
- 2 Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Kenya proposed that Article 27 be amended by adding a third paragraph, with the following text:

Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is [*sic*] entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions'.¹⁸²

Notably, the Kenyan Constitution does not provide immunity for the Head of State for crimes under international law. Article 143(4) of the Kenyan Constitution reads as follows: 'The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity'.¹⁸³

In a letter from the CICC to States Parties regarding the WGA meeting on 24 June 2014, the CICC expressed the concerns of its members regarding the proposal to amend Article 27. The CICC observed that:

This amendment proposal fundamentally undermines the integrity of the Rome Statute. One of the paramount achievements of the ICC's founders and of the Rome Statute treaty was to enshrine the fundamental principle that accountability for the worst crimes under international law applies to all persons. The founding governments of the Rome Statute were also adamant in their conviction that the Rome Statute could not allow for reservations and that there could be no immunity for any individual, in any circumstances, regardless of position or office.¹⁸⁴

182 UN, 'Kenya: Proposal of Amendments', C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), Annex, para 2, available at <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>>.

183 Constitution of Kenya, Revised Edition 2010, available at <<https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>>.

184 See 'Letter from the CICC to the WGA', 23 June 2014, available at <http://www.iccnw.org/documents/CICC_letter_on_the_Working_Group_on_Amendments.pdf>.

Proposed amendment to Article 63: 'Trial in the presence of the accused'

Article 63 of the Statute provides that:

- 1 The accused shall be present during the trial.
- 2 If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Kenya submitted that Article 63(2) of the Statute 'envisages a trial in absence of the Accused in exceptional circumstances', but that the Statute 'does not define the term exceptional circumstances and neither are there case laws [sic] to guide the Court on the same'. Kenya also observed that Article 63(2) 'provides other caveats in granting such trials in circumstances where other reasonable alternatives have provided [sic] to be inadequate and for a strictly required duration'.¹⁸⁵

For these reasons, Kenya recommended the following amendment to Article 63(2):

- 1 Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists [sic], alternative measures have been put in place and considered, including

¹⁸⁵ UN, 'Kenya: Proposal of Amendments', C.N.1026.2013. TREATIES-XVIII.10 (Depositary Notification), Annex, para 1, available at <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>>.

but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel.

- 2 Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.
- 3 The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial.¹⁸⁶

Proposed amendment to Article 70: 'Offences against the administration of justice'

Article 70(1) of the Statute provides that:

The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally: (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth; (b) Presenting evidence that the party knows is false or forged; (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence; (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform,

¹⁸⁶ UN, 'Kenya: Proposal of Amendments', C.N.1026.2013. TREATIES-XVIII.10 (Depositary Notification), Annex, para 1, available at <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>>.

or to perform improperly, his or her duties; (e) Retaliating against an official of the Court on account of duties performed by that or another official; (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

Kenya stated that Article 70 of the Statute presumes that offences against the administration of justice, save for under Article 70(1)(f), can be committed ‘only against the Court’. Kenya proposed that this Article should be amended to ‘include offences by the Court Officials so that it’s clear that either party to the proceedings can approach the Court when such offences are committed’. Accordingly, Kenya proposed that Article 70(1) of the Statute be amended as follows: ‘The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally by any person.’¹⁸⁷ Although the proposal did not include a rationale for the amendment, it did take note of ‘the current situation in the Kenyan cases especially Trial Chamber V(b)’.¹⁸⁸ At the time of writing this Report, Trial Chamber V(b) was presiding over the Kenyatta trial.

Proposal regarding Article 112: ‘Implementation of IOM’

Article 112(4) of the Statute provides that:

The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

187 UN, ‘Kenya: Proposal of Amendments’, C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), Annex, para 3, available at <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>>.

188 UN, ‘Kenya: Proposal of Amendments’, C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), Annex, para 3, available at <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>>.

While Kenya did not explicitly request that Article 112(4) of the Statute be amended, it proposed that the ‘IOM be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court’.¹⁸⁹ As a rationale for this proposal, Kenya stated that ‘[t]here is a conflict of powers between the OTP and the IOM that is continuously present in the ASP’ and that therefore the mandate of the IOM should include ‘the conduct of officers/procedure/code of ethics in the [OTP]’. Kenya submitted that ‘[t]he [OTP] has historically opposed the scope of authority of the IOM’; and that under Article 42(1) and (2) ‘the Prosecutor has power to act independently as a separate organ of the Court with full authority over the management and administration of the office’.¹⁹⁰

Notably, the IOM was fully operationalised by the ASP in its 12th session in November 2013. The 2013 Operational Mandate of the IOM is discussed in detail in the *Gender Report Card 2013*,¹⁹¹ and an update on developments within the IOM is provided in the IOM sub-section of this Report.

Proposed amendment of the Preamble of the Rome Statute addressing complementarity

Paragraph 10 of the Preamble of the Rome Statute:

[e]mphasis[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions [...]

189 UN, ‘Kenya: Proposal of Amendments’, C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), Annex, para 4, available at <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>>.

190 UN, ‘Kenya: Proposal of Amendments’, C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), Annex, para 4, available at <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>>.

191 *Gender Report Card 2013*, p 17-24.

Kenya submitted that in accordance with an African Union resolution, this text should be amended to include recognition of regional judicial mechanisms as follows: ‘Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.’¹⁹² The African Union resolution to which Kenya refers, which would expand the jurisdiction of the African Court of Justice and Human and Peoples’ Rights to include jurisdiction over international crimes, is discussed further below.

Proposed amendments of the RPE

As noted in the Governance sub-section, at the time of writing this Report, discussions have been ongoing within the SGG and WGLL regarding two sets of amendments to the RPE, which the WGLL had proposed on 28 February 2014. The first covers amendments to Rules 76(3), 101¹⁹³ and 144(2)(b) of the RPE, identified under the ‘Language Issues’ cluster,¹⁹⁴ and the second covers a new rule 140*bis*, identified under the ‘Organizational Matters’ cluster.¹⁹⁵ The SGG met with the Court several times to discuss and clarify these proposals between February and September 2014.¹⁹⁶ In accordance with the Roadmap, the SGG should present to the WGA, where possible 60 days before the ASP’s next session, final recommendations on proposals to amend the RPE.

First, regarding the proposed amendments to the RPE under the ‘Language Issues’ cluster, the suggested amendments would allow Chambers to authorise partial translations of witness statements, under Rule 76(3), and decisions, in accordance with Rule 144(2)(b) of the RPE, when such partial versions are determined to be sufficient to meet the requirements of fairness, including the right to translations and the right to be tried without undue delay.¹⁹⁷ The Court explained to the SGG that the proposal to amend Rule 76(3) was in ‘response to circumstances where full translations of prosecution witness statements have proven unwieldy and resulted in considerable delays to Court proceedings.’ The amendment would therefore ‘afford Chambers greater flexibility in making decisions that would balance both considerations of fairness and expediency’.¹⁹⁸ The Court also explained to the SGG that the proposed Rule 144(2)(b) amendment ‘arose out of ambiguity as to whether a Trial Chamber could authorise partial translations of certain decisions’ and that the amendment would clarify this ambiguity and be subject to the rights of the accused to translations as necessary to meet the requirements of fairness.¹⁹⁹

Additionally, under the ‘Language Issues’ cluster, a third sub-paragraph has been proposed that would amend Rule 101 (Rule 101(3)) of the RPE, permitting a Chamber to delay the commencement of time limits regarding certain decisions from the date of notification of their translation, or parts thereof.²⁰⁰ The Court clarified that the suggested new sub-paragraph was ‘in response to the ad hoc practice of Chambers extending time limits where translations of certain decisions had been deemed necessary’.²⁰¹

192 UN, ‘Kenya: Proposal of Amendments’, C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification), Annex, para 5, available at <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>>.

193 Although the amendment to this provision of the RPE has been represented as an amendment to Rule 101(3), it is actually a proposal for a new, third subparagraph to Rule 101, which would amend the Rule as a whole.

194 ICC-ASP/11/31/Add.1, Annex, p 6.

195 ICC-ASP/11/31/Add.1, Annex, p 6.

196 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, para 10 and Annex I, para 3.

197 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex I, paras 4-5.

198 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex I, para 5.

199 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex I, para 6.

200 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex I, para 4.

201 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex I, para 7.

Second, under the ‘Organizational Matters’ cluster, the WGLL has proposed a new Rule 140*bis* concerning the temporary absence of a judge in trial proceedings. The new Rule would create the possibility that, under exceptional circumstances, when a judge is ill or due to ‘other unforeseen and urgent reasons’, Trial Chamber proceedings may continue in the temporary absence of a judge, ‘provided that such continuation is in the interests of justice and the parties consent’.²⁰² This is notwithstanding Article 39(2)(b)(ii) of the Statute, which provides that ‘[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division’, and that Article 74(1) of the Statute provides that ‘[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations.’ The Court explained to the SGG ‘that the proposed rule arose in response to several situations where a single judge was temporarily absent and that absence resulted in delays to Court proceedings [and] that the proposed rule would contribute to the efficient management of the work of Trial Chambers’ while respecting the rights of the accused.²⁰³

202 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex I, para 13.

203 SGG, ‘[Draft] Report of the Study Group on Governance’, 28 October 2014, Annex I, para 14.

Amendment proposals for the pending African Court of Justice and Human and Peoples’ Rights

The African Court on Human and Peoples’ Rights is ‘a continental court established by African countries to ensure the protection of human and peoples’ rights in Africa’. The African Court, which was established in 2006, ‘complements and reinforces the functions of the African Commission on Human and Peoples’ Rights’.²⁰⁴ The African Court on Human and Peoples’ Rights has competence to decide all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples’ Rights, its protocols and any other relevant human rights instrument ratified by the States concerned, and to provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument. In June 2008, the AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights to merge the African Court on Human and Peoples’ Rights with the Court of Justice of the African Union.²⁰⁵

During its meeting from 15 to 16 May 2014, in Addis Ababa, the Member States of the AU, within the framework of the Specialized Technical Committee on Justice and Legal Affairs, agreed to adopt amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.²⁰⁶ In essence, the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Draft Protocol) facilitates an expansion of the African

204 ‘African Court on Human and Peoples’ Rights’, available at <<http://www.au.int/en/organs/cj>>.

205 See Articles 1-3, Protocol on the Statute of the African Court of Justice and Human and Peoples’ Rights. See also Max du Plessis, ‘Implications of the AU decision to give the African Court jurisdiction over international crimes’, *Institute for Security Studies* (paper no 235), June 2012.

206 AU Specialized Technical Committee on Justice and Legal Affairs, ‘Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights’, 15-16 May 2014, EX.CL/846(XXV), STC/Legal/Min/7(I) Rev. 1, Annex 5, p 2.

Court to include jurisdiction over international crimes, including genocide, war crimes, crimes against humanity and the crime of aggression, and various other crimes, such as ‘the crime of unconstitutional change of government’, piracy and terrorism.²⁰⁷ As discussed above, Kenya has also proposed that the Preamble of the Rome Statute be amended to state that the jurisdiction of the ICC is complementary to national as well as regional jurisdictions.

Significantly, the Draft Protocol contains a provision for Head of State and senior official immunity, in contravention of the existing international norm as set forth under Article 27 of the Statute.²⁰⁸ Specifically, Article 46 A *bis* of the Draft Protocol states that: ‘[n]o charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.’

During its 25th ordinary session from 20 to 24 June 2014 held in Malabo in Equatorial Guinea,

207 AU Specialized Technical Committee on Justice and Legal Affairs, ‘Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights’, 15-16 May 2014, EX.CL/846(XXV), STC/Legal/Min/7(I) Rev. 1, Annex 5. Article 28 A of the Draft Protocol lists the following crimes under jurisdiction: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.

208 Article 27 of the Statute provides that: ‘(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.’

the Executive Council of the AU considered the Draft Protocol.²⁰⁹ The Executive Council noted that in introducing the Draft Protocol, the Legal Counsel had highlighted the two outstanding articles to be considered by the meeting, namely Article 28 E concerning ‘the crime of unconstitutional change of government’ and Article 46 A *bis* concerning immunities.²¹⁰

Concerning the proposed immunity provisions in Article 46 A *bis* of the Draft Protocol, it was noted that delegations expressed concern regarding whether the extension of immunities to senior State officials would be in line with international law, the domestic laws of Member States and jurisprudence. Delegations emphasised the challenges in ‘widening immunities’, in particular given the lack of a common definition of ‘senior state official’, as well as the ambiguity regarding which individuals fall into this category.²¹¹ It was noted, however, that ‘some senior state officials are entitled to functional immunities by virtue of their functions.’²¹² Accordingly, the text of Article 46 A *bis*, as cited above, was maintained.²¹³ At the end of the deliberations, the ‘[Specialized Technical Committee] on Justice and Legal Affairs adopted the draft Protocol on the Statute of the African Court of Justice and Human and Peoples’

209 The purpose of the meeting was to finalise seven draft legal instruments prior to their submission to and adoption by the policy organs, including the mentioned Draft Protocol. AU, ‘The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs’, 20-24 June 2014, EX.CL/846(XXV), para 4.

210 The meeting also considered ‘the minor technical improvements that the Commission had made to the Draft Protocol and Statute, which had been endorsed by the Meeting of Experts’. AU Executive Council, ‘Report’, 15-16 May 2014, STC/Legal/Min/Rpt., para 21.

211 AU Executive Council, ‘Report’, 15-16 May 2014, STC/Legal/Min/Rpt., para 25.

212 The meeting further resolved that interpretation of the term ‘senior state official’ would be determined by the Court ‘on a case-by-case basis taking their functions into account in accordance with international law’. AU Executive Council, ‘Report’, 15-16 May 2014, STC/Legal/Min/Rpt., para 26.

213 AU Executive Council, ‘Report’, 15-16 May 2014, STC/Legal/Min/Rpt., para 26.

Rights and recommended it for consideration by the Assembly through the Executive Council'.²¹⁴

During its 23rd ordinary session held from 26 to 27 June 2014 in Malabo in Equatorial Guinea, the Assembly of the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights and called on AU Member States to sign and ratify the Protocol 'as expeditiously as possible so as to enable them to enter into force'.²¹⁵ Of the 54 AU Member States, fifteen ratifications (or 28%) are needed for the Protocol to enter into force.²¹⁶

The inclusion of a provision for the immunity of Heads of State and other state officials within the AU protocol was met with widespread criticism. The Executive Director of the Southern African Litigation Centre noted that the inclusion of the immunity provision 'places the AU in direct conflict with the Rome Statute of the [ICC], which provides that the ICC rules "shall apply equally to all persons without any distinction based on official capacity."' ²¹⁷ In a press statement, the International Bar Association and the Southern African Litigation Centre stated that '[t]he provision generates perverse incentives for abusive leaders to remain in power so that they are shielded from prosecution.'²¹⁸

214 AU Executive Council, 'Report', 15-16 May 2014, STC/Legal/Min/Rpt., para 27.

215 AU Assembly, 'Decision on the Draft Legal Documents', 26-27 June 2014, Assembly/AU/Dec.529(XXIII), Doc. Assembly/AU/8(XXIII), para 2.

216 Donald Deya, Chief Executive Officer at the Pan African Lawyers Union has noted that: '[T]he hard work of procuring ratifications, one member state at a time, begins now. This will take a number of years, maybe even up to five years to get 15 ratifications'. Abdullahi Boru, 'The African criminal court, a dream comes closer', *International Justice Tribune* (No. 163), 9 July 2014.

217 Nicole Fritz, Executive Director of the Southern Africa Litigation Centre, 'African Union gives immunity to heads of state by subterfuge', *Business Day*, 15 July 2014, available at <<http://www.bdlive.co.za/opinion/2014/07/15/african-union-gives-immunity-to-heads-of-state-by-subterfuge>>.

218 'IBA and SALC express alarm at AU's endorsement of immunity for heads of state', 9 July 2014, available at <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f0c41e45-693d-4712-98c8-3da28c2b949d>>.

Together with 47 other civil society organisations working in Africa, the Women's Initiatives for Gender Justice signed a joint letter to African Justice Ministers and Attorneys General in advance of their May 2014 meeting, calling immunity for sitting Heads of State and other senior officials 'a major retreat' from the AU's 'unequivocal rejection of impunity', and 'inconsistent with the spirit of the AU Constitutive Act'. The letter enumerated the international legal instruments which have established the irrelevance of official capacity, and urged the Justice Ministers and Attorneys General not to include the immunity provisions.²¹⁹ The Women's Initiatives for Gender Justice also joined a statement in August 2014, signed by 141 civil society organisations working in Africa, expressing 'deep dismay and opposition' to the provision in the Draft Protocol that would preclude the African Court from trying sitting Heads of State and government, as well as certain other senior State officials, for serious crimes committed in violation of international law. The statement observed that the immunity provision 'is a regrettable departure from the spirit and letter of the AU's Constitutive Act, which promotes respect for human rights and the rejection of impunity under article 4 of the act'; that '[v]ictims cannot be protected if those at the highest levels of power are above the law'; and that '[i]mmunity indirectly legitimizes the chronic disease of impunity, as it takes away the prospect of securing accountability before the African Court for persons who may be responsible for serious crimes'.²²⁰

219 'Joint Civil Society Letter on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court on Justice and Human Rights', 12 May 2014, available at <<http://www.hrw.org/news/2014/05/12/joint-civil-society-letter-draft-protocol-amendments-protocol-statute-african-court->>.

220 'Call for African States to Reject Immunity for Serious Crimes', *African Civil Society Organisations and International Organisations with a presence in Africa*, August 2014, available at <<http://www.amnesty.org/en/library/info/IOR63/001/2014/en>>.

Budget

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The Court's initial proposed programme budget requested for 2015 was €135.39 million, representing an increase of €13.74 million, or 11.3%, over the 2014 ASP approved budget of €121.66 million.²²¹ According to the Court, the primary cost drivers for this increase are staff costs and non-staff costs within the OTP (€6.78 and €1.67 million respectively); Judges' costs, including the arrival of seven new judges at the Court in 2015 (€1.67 million); victims and witnesses related costs (€1.57 million); interest on the Court's permanent premises (€1.51 million); field operations (€1.06 million); and judges' pensions (€1.00 million).²²² On 3 October 2014, in response to the Prosecutor's decision to open a second investigation in the CAR on 24 September 2014, the Court submitted a supplementary budget proposal requesting an additional €3,629,800.²²³ At the 13th session of the ASP in December 2014, the ASP will decide upon the Court's proposed budget and supplementary budget, taking into consideration the recommendations of the CBF. The CBF met in October 2014 to consider and prepare recommendations on the 2015 proposed budget. At the time of writing this Report, the CBF's recommendations were not yet publicly available.

221 ICC-ASP/13/10, paras 1-3, 37. See also ICC-ASP/12/Res.1, para 1.

222 ICC-ASP/13/10, paras 3, 37 and Table 3. Additional 'main cost drivers' under €1 million are listed as requirements of the Secretariat of the ASP (€ 0.52 million); detention-related costs (€0.42 million); requirements of the Secretariat of the TFV (€0.35 million); and 'miscellaneous (premises, IOM)' (€0.28 million). A reduction by the Registry is also noted in the amount of -€3.09 million.

223 ICC-ASP/13/10/Add.1, paras 3-5.

The proposed programme budget for 2015

The 2015 proposed budget reflects assumptions developed and agreed upon by the organs of the Court as of June 2014, which are based on the anticipated judicial and prosecutorial activities of the following year.²²⁴ These activities include four active investigations, two Article 70 investigations, preservation of evidence in nine ‘hibernated’ investigations, trial preparation in two cases,²²⁵ and trial hearings in five cases.²²⁶ It also includes a final appeal, as well as sentencing and reparation proceedings, in the Bemba case.²²⁷ Resources for the OTP accounted for approximately €8.45 million out of the €13.74 million requested increase.²²⁸ The Judiciary requested an increase of approximately €2.67 million, while the Registry indicated a decrease in funds needed of 0.1% (€35,700). According to the Registry, the savings of €35,700 were achieved as a result of ‘careful allocation, redeployment and reprioritization of resources’. As stated by the Registry, ‘[i]f it had not been for the substantial increase in budget assumptions and service requests’, the Registry would have achieved greater savings.²²⁹

Reduction by Court of resources initially identified for proposed budget

In December 2011, the ASP passed a resolution requiring any proposed increase of the budget for 2013 to be compensated by proposed reductions elsewhere, in order to bring the budget in line with the level of the 2012 approved budget (so-called ‘zero-growth

224 ICC-ASP/13/10, para 21.

225 Ntaganda and Laurent Gbagbo.

226 Ntaganda, Laurent Gbagbo, Kenyatta, Ruto and Sang, and Banda.

227 ICC-ASP/13/10, para 22.

228 ICC-ASP/13/10, Table 4.

229 ICC-ASP/13/10, para 259.

budget’).²³⁰ During the 2012 ASP, the Assembly used the Court’s paper assessing the impact of measures to bring the level of the 2013 budget in line with the level of the approved budget for 2012 as a reference to understand the Court’s options in terms of budgetary reductions. The Assembly invited the Court to prepare such a report again and to submit it in conjunction with its submission of the 2014 proposed programme budget.²³¹ The Assembly did not formally request the Court to produce such a report for the 2015 proposed budget. However, in the Court’s Executive Summary of the Proposed Programme Budget, released in July 2014, it indicated that prior to proposing the 2015 budget to the CBF, it had conducted ‘a stringent, thorough-going internal review, which included harsh reductions and reprioritization of activities, as well as a decrease in the number of active investigations and redeployment of resources’.²³² This review resulted in the Court reducing €12.76 million from the initially identified total figure of €148.16 million.²³³ Thus, absent the savings identified in this review, the Court would have requested a €26.50 million increase from the 2014 approved budget, rather than the €13.74 million ultimately requested.²³⁴

Investigations and prosecutions

The proposed budget for the OTP for 2015 (€41.67 million) represents a 25.4% increase (€8.45 million) from the 2014 approved budget of €33.22 million.²³⁵ The OTP indicated that this increase is due to the need for ‘further investments in quality’, in particular investment in ‘staff skill development and new technologies’, and that the requested increase represents ‘the minimum resources required to achieve

230 ICC-ASP/12/11, para 1. See also *Gender Report Card 2012*, p 88.

231 ICC-ASP/12/11, para 2.

232 ICC-ASP/13/11, para 3.

233 ICC-ASP/13/11, paras 1-3.

234 ICC-ASP/13/11, para 2.

235 ICC-ASP/13/10, para 137; Table 4.

the 2015 assumptions' of its Strategic Plan.²³⁶ The OTP noted that it is 'requesting only the resources required to perform the work that is certain for 2015' and that '[a]ny decrease in this amount will result in core activities having to be put on hold and the performance of the Office being undermined'.²³⁷ The requested resources would allow the OTP to conduct four parallel investigations in 2015, specifically in Kenya, Mali, the CAR and Cote d'Ivoire²³⁸, which the OTP noted 'is not in line with the growing demands, most notably from States Parties, for the Office's intervention', stating also that '[a] number of investigations which the Office should be undertaking now have had to be postponed'.²³⁹

The OTP indicated that the proposed budget increase is consistent with its 2012-2015 Strategic Plan, which has been 'fully endorsed' by the States Parties.²⁴⁰ Without the allocation of the increased funds, the OTP states it will not be able to adequately perform its responsibilities as provided in the Strategic Plan, running 'the risk that the credibility of the Court as a whole and its capacity to deter the commission of mass atrocities will be eroded'.²⁴¹

The resources requested for the OTP's investigation division amount to €17.02 million, an increase of €2.69 million, or 18.7%, over the 2014 approved budget, with staff making up 90% of the total costs.²⁴² In line with its Strategic Plan,²⁴³ the OTP noted a change in its prosecutorial strategy, whereby it 'undertakes open-ended, in-depth investigations; prosecutes those most responsible if needed via a strategy of working upwards from lower ranked individuals; and seeks to be trial-ready as

early as possible in the proceedings'.²⁴⁴ Based on the requirements for these 'more intensive' investigations, the OTP explained that the 'rotational model', whereby resources are shifted to cases with the greatest need²⁴⁵ 'is no longer effective on account of more intensive investigations'.²⁴⁶ Rather, the OTP stated that all activities must be undertaken in parallel.²⁴⁷

In its proposed budget, the OTP specified a minimum requirement of 17 staff from the investigations division per investigative team, resulting in 68 staff persons from the investigations division needed for four active investigations.²⁴⁸ According to the OTP, each active investigation requires an additional 7.5 staff members from the Prosecution Division and one International Cooperation Advisor.²⁴⁹ With respect to Prosecution teams, once a case has passed the charging stage and is either at the pre-trial or trial stage, a minimum of 14 staff members is required, including two investigators and one International Cooperation Advisor.²⁵⁰ At both the investigation and prosecution stages, teams are led by an experienced Senior Trial Lawyer.²⁵¹ The Prosecution noted that '[c]ompared to team staffing levels at the UN international criminal tribunals and special courts, or to the investigation and prosecution of serious crime by domestic authorities, these staffing levels are extremely modest'.²⁵²

The proposed increase in the budget for the investigations division results from 'an increase in the number of missions by investigators, due to having all investigator positions filled for a full year'; 'forensic operations for each active investigation'; and an increase in 'support

236 ICC-ASP/13/10, para 134.

237 ICC-ASP/13/10, para 134.

238 ICC-ASP/13/10, para 198.

239 ICC-ASP/13/10, para 139.

240 ICC-ASP/13/10, para 135.

241 ICC-ASP/13/10, para 135.

242 ICC-ASP/13/10, para 209.

243 'OTP Strategic Plan', June 2012, para 4(a).

244 ICC-ASP/13/10, para 211.

245 'OTP strategic plan', June 2012, para 15.

246 ICC-ASP/13/10, para 220.

247 ICC-ASP/13/10, paras 218-220.

248 ICC-ASP/13/10, paras 218-220.

249 ICC-ASP/13/10, para 248; ICC-ASP/13/11, para 23.

250 ICC-ASP/13/10, para 249; ICC-ASP/13/11, para 23.

251 ICC-ASP/13/10, paras 248-249.

252 ICC-ASP/13/11, para 23.

missions by victims experts and staff responsible for operational assessment' to ensure that staff, witnesses, or other persons are not exposed to risk through investigations.²⁵³

Supplementary budget proposal in relation to the CAR II Situation

On 3 October 2014, in addition to the proposed programme budget submitted on 22 August 2014, the Court proposed to the ASP a supplementary budget amounting to €3.63 million.²⁵⁴ This was in response to the Prosecutor's decision to open a second investigation in the CAR on 24 September 2014, which will focus on crimes against humanity and war crimes allegedly committed since 2012, by both the Séléka and the anti-Balaka groups.²⁵⁵ The new CAR Situation constitutes the ninth Situation before the Court.

The proposed supplementary budget is to be distributed as follows: €2.73 million to the OTP, and €900,000 to the Registry.²⁵⁶ The main cost drivers of the additional budget include, 'general temporary assistance, travel and general operating expenses (including witness relocation)'.²⁵⁷ The request is based on the assumption that two investigations will be conducted simultaneously in the CAR, in order to investigate both the Séléka and anti-Balaka groups.²⁵⁸ However, the amount requested is for one rather than two investigative teams, as a result of the OTP's plan to integrate its staff and reprioritise its resources.²⁵⁹

253 ICC-ASP/13/10, para 238.

254 Pursuant to Regulations 3.6 and 3.7 of the Financial Regulations and Rules; ICC-ASP/13/10/Add.1, para 5.

255 ICC-ASP/13/10/Add.1, para 3.

256 ICC-ASP/13/10/Add.1, para 10.

257 ICC-ASP/13/10/Add.1, para 11.

258 ICC-ASP/13/10/Add.1, para 7.

259 ICC-ASP/13/10/Add.1, para 7.

The Registry

The proposed budget for the Registry for 2015 (€66.26 million) represents a decrease of €35,700, or 0.1%, from the 2014 approved budget (€66.29 million).²⁶⁰ The Registry reported that while the level of required Registry support has substantially increased for 2015, particularly in the areas of field operations, witness protection and detention, overall savings were possible due to the Registry's 'careful allocation, redeployment and reprioritization of resources'.²⁶¹ Had it not been for the increased budget assumptions and service requests particularly in these three areas, the Registry indicated that it would have been able to achieve additional savings of approximately €3 million.²⁶²

The Registry also noted the seizure of €2,067,982.25 from accused Jean-Pierre Bemba Gombo's (Bemba's) bank account, and requested States Parties to approve the creation of a special account into which those funds would be transferred and used to finance the 'continued advance of legal aid funds' to Bemba in both cases in which he is a defendant 'as of 1 January 2015'.²⁶³ The Registry noted that, should States disagree with this proposal, the Registry's 2015 budget would increase by €573,000.²⁶⁴ By December 2014, the Court will have advanced a total of €2,799,380.94 in legal aid to Bemba.²⁶⁵

Field Offices

In the 2015 proposed budget, the Registry reported that the field offices will need to support an appreciable increase in field-based OTP staff.²⁶⁶ In addition to existing locations in Kinshasa and Bunia, DRC; Kampala, Uganda; Nairobi, Kenya; and Abidjan, Côte d'Ivoire; ²⁶⁷ the Registry's Field Operations Section plans to re-establish a field presence in the CAR and also recommends the establishment of a small field

260 ICC-ASP/13/10, para 259.

261 ICC-ASP/13/10, para 259.

262 ICC-ASP/13/10, para 259.

263 ICC-ASP/13/10, para 271 and Annex VIII.

264 ICC-ASP/13/10, para 271.

265 ICC-ASP/13/10, Annex VIII.

266 ICC-ASP/13/10, para 413.

267 ICC-PIDS-TCT-01-056/14_Eng.

office in Mali.²⁶⁸ The Field Operations Section also requested three new General Temporary Assistance positions ‘in light of the anticipated increase in field activities, in particular in relation to the situations in Mali, Cote d’Ivoire and the DRC (due to a significant increase in requests from the OTP in each of these situations and in TFV activities)’.²⁶⁹

Legal aid

In the past, legal aid has been identified by the CBF as one of the main cost drivers of the Court’s budget.²⁷⁰ The Court’s legal aid system was revised by the ASP Bureau in 2012 based on a proposal submitted by the Registrar and developed following a process inviting submissions on the issue from civil society and other interested stakeholders. The revised remuneration scheme applicable to victims and Defence counsels was implemented in accordance with recommendations issued by the Hague Working Group.²⁷¹

At its 21st session in September 2013, the CBF requested the Registry to ‘conduct a study, based on key judicial decisions already rendered, to identify common themes in the various judgments’ and to submit a report identifying ‘ways to improve existing [legal aid] procedures’.²⁷² The report was submitted on 22 May 2014²⁷³ and was considered by the CBF at its 22nd session. During this session, the CBF also considered the Registry’s fourth quarterly report on legal aid for 2013 and first quarterly report for 2014.²⁷⁴

In relation to the fourth quarterly report for 2013 and first quarterly report for 2014, the CBF ‘noted with satisfaction that the new legal aid

mechanism met the needs of the various users and was based on the principle of a balance between the resources and means of the accused and those of the Prosecutor’s Office’. While stating that, ‘it was premature to make a general assessment of the system before the end of a full judicial cycle’, the CBF ‘felt that the new system was already generating savings’.²⁷⁵ According to the Registry’s first quarterly report of 2014, savings of over €300,000 had been made between 1 January and 31 March 2014.²⁷⁶ While the Registry was ‘continuing to evaluate and monitor the legal aid procedure in light of ongoing cases, taking into account the jurisprudence of the Chambers’, the CBF noted that going forward, ‘savings would be made at different stages of the procedure and representation of the accused and victims, demonstrating again the benefits of the reform carried out since 2012’.²⁷⁷ The CBF also recommended that the Registry begin to submit reports on the development of the legal aid system on a half-yearly, rather than quarterly, basis.²⁷⁸

In its 2014 report on ways to improve the legal aid procedures, the Registry focused on ‘streamlin[ing] administrative procedures in the legal aid system whilst maintaining its approach to maximise the savings achievable in this area’.²⁷⁹ The Registry’s approach took into account ‘the demands of a fair trial, for which legal aid paid for by the Court is a fundamental aspect, and in particular the principles of the equality of arms, objectiveness, transparency, continuity and savings’, as well as flexibility.²⁸⁰ It noted its review of Court and Registry decisions impacting legal aid either directly or indirectly and which ‘highlight the fact that teams must be available to work, even if capability has to be reduced, at any time during a case’.²⁸¹

268 ICC-ASP/13/10, para 413.

269 ICC-ASP/13/10, para 419.

270 See *Gender Report Card 2013*, p 44; *Gender Report Card 2012*, p 91; *Gender Report Card 2011*, p 115.

271 See *Gender Report Card 2012*, p 91-92.

272 ICC-ASP/12/15, para 137. See also *Gender Report Card 2013*, p 44.

273 ICC-ASP/13/6.

274 ICC-ASP/13/2; ICC-ASP/13/17; ICC-ASP/13/5, para 70.

275 ICC-ASP/13/5, para 70.

276 ICC-ASP/13/17, para 46; ICC-ASP/13/5, para 71.

277 ICC-ASP/13/5, para 71.

278 ICC-ASP/13/5, para 74.

279 ICC-ASP/13/6, para 3.

280 ICC-ASP/13/6, para 3.

281 ICC-ASP/13/6, para 2.

The streamlining proposals from the Registry included simplifying and streamlining the payment of legal aid fees based on an action plan rather than on the basis of monthly time sheets submitted by each team member.²⁸² The Registry also proposed paying the standard remuneration for full-time team members only during the trial phase and to reduce the standard amount paid at other stages of the proceedings.²⁸³ Additionally, the Registry recommended simplifying the reimbursement system for expenditures such as travel costs, which currently involves a significant workload in terms of administration and verification by the Registry, by allocating a monthly lump sum which would cover both fees and expenditure, to be paid in a single payment.²⁸⁴ The Registry also proposed the introduction of a resource-person in Defence teams, who would be present in the field for the duration of the case, and who would be paid a 'monthly amount determined in advance, to include fees and travel within the region for the team'.²⁸⁵ With respect to legal assistance for victims, the Registry suggested the possibility of covering the costs of a legal assistant, also preferably based in the field, which would allow the legal representatives to respond to the needs of the cases more effectively.²⁸⁶

At its 22nd meeting, the CBF raised reservations about the Registry's proposals in its report. For example, the CBF noted that while the payment of a lump sum may simplify the administrative process, it was concerned over the lack of 'a priori control', as well as means to recover amounts unduly paid. The CBF also expressed concern about changing payment structures for victims teams whose team members were remunerated on the basis of hours worked.²⁸⁷ However, considering that 'essential preparatory work

had been carried out', which would be the subject of Registry discussions with representatives of counsel, the CBF requested an update from the Registry on the progress made regarding these issues at its 23rd session.²⁸⁸

In the 2015 proposed budget, the Registry's CSS, which manages the Court's programme of legal aid for indigent defendants and victims, indicated decreases in the amounts requested for both Defence and victims' counsel. With respect to counsel for the Defence, the requested amount of €2,207.2 thousand decreased by €659.2 thousand (23%), while for victims' counsel, the requested amount of €2,114.7 thousand decreased by €886.0 thousand (29.5%). The CSS identified these savings as resulting from the application of the Court's 2012 revised legal aid system to the assumptions on which the budget is based.²⁸⁹

OPCD

The OPCD is itemised in the 2015 proposed budget as a sub-programme of the Division of Court Services under the auspices of the Registry. The Office represents the rights of ICC suspects and accused in the initial stages of a case and may be 'called upon by Chambers to appear before the Court or prepare work for a specific situation or suspect'.²⁹⁰ The OPCD also assists Defence teams with legal research and case management and collates the Court's jurisprudence for the Defence. The requested amount for the OPCD in 2015 is €533,900 to be distributed as follows: €511,400 for staff resources; and €22,600 for non-staff resources necessary for travel, and contractual services which includes training seminars in affected countries for potential Defence counsel and 'duty counsel'.²⁹¹ The total requested amount for the OPCD represents a decrease of €15,500 (or 2.8%) from 2014, which is possible 'through significant efforts to make savings in non-staff costs'.²⁹²

282 ICC-ASP/13/6, paras 6-8.

283 ICC-ASP/13/6, paras 14-17.

284 ICC-ASP/13/6, paras 6-7.

285 ICC-ASP/13/6, paras 11-13.

286 ICC-ASP/13/6, paras 18-19.

287 ICC-ASP/13/5, para 73.

288 ICC-ASP/13/5, para 74.

289 ICC-ASP/13/10, paras 554-555.

290 ICC-ASP/13/10, para 557.

291 ICC-ASP/13/10, paras 558, 564.

292 ICC-ASP/13/10, paras 558, 559, 562.

OPCV

The OPCV also falls under the Registry as a sub-programme of the Division of Court Services. The Office assists victims to be represented in Court proceedings, represents victims and supports external counsel, and appears before Chambers.²⁹³ According to the 2015 proposed budget:

As of May 2014, OPCV had been appointed legal representative of around 5,000 victims in the various situations and cases before the Court. Moreover, the Office represents the interests of victims who have communicated with the Court in all of the admissibility proceedings under article 19 of the Rome Statute. The Office supports and assists 35 external legal representatives in all situations and cases before the Court through the provision of legal advice and research.²⁹⁴

The requested amount for the OPCV in 2015 is €1.53 million to be distributed as follows: €1,385,400 for staff resources; and €142,500 for non-staff resources required for travel, contractual services and general operating expenses.²⁹⁵ The total requested amount for OPCV represents an increase of €289,200 (or 23.3%) from 2014. This is largely due to the request for additional staff resources including ‘a new GTA position and [...] a need for consultants in relation to the situations in Côte d’Ivoire and the DRC deriving from the designation of the OPCV as common legal representative in Gbagbo and Ntaganda.’²⁹⁶

The proposed non-staff resources have also increased from last year. First, the amount requested for travel is €96,500, an increase of €11,400 (or 13.4%), ‘required for field missions, which are an essential element of the Office’s work, and face-to-face meetings with victims, which are indispensable for providing meaningful assistance, support and representation in the

293 ICC-ASP/13/10, para 565.

294 ICC-ASP/13/10, para 566.

295 ICC-ASP/13/10, paras 567, 568, 576.

296 ICC-ASP/13/10, para 567 (emphasis in original).

proceedings’.²⁹⁷ Next, €35,000 is requested for contractual services, an increase of €5,000 (or 16.7%), ‘required for the transportation of victims from their places of residence to the safe location where they are met by counsel’.²⁹⁸ Finally, €11,000 is requested for general operating expenses, an increase of €5,000 thousand (or 83.3%), which is ‘required for the rental of premises where victims can be met safely, in a manner which preserves the privileged relationship between counsel and client’.²⁹⁹

Secretariat of the TFV

One of the stand-alone areas within the Major Programmes section of the 2015 proposed budget is the Secretariat of the TFV. While structurally independent, the Secretariat of the TFV falls under the Registry’s administrative structure for management purposes.³⁰⁰ Established in 2002, the TFV supports activities which address the harm resulting from crimes under the jurisdiction of the Court by assisting victims through two mandates: ‘(1) administering reparations ordered by the Court against a convicted person, and (2) using other resources for the benefit of victims in accordance with the provisions of article 79 of the Rome Statute’.³⁰¹

The requested amount in the 2015 proposed budget for the Secretariat of the TFV is €1,931,000, an increase from 2014 of €345,200 (or 21.8%).³⁰² The increase is based on the draft TFV Strategic Plan (2014-2017) and the related budget drivers for the Secretariat, resulting in additional staffing, including GTA and consultants. According to the Court documents, non-staff resources will decrease.³⁰³ The proposed 2015 budget describes the ‘following priorities and foreseeable activities’ of the TFV:

297 ICC-ASP/13/10, para 577.

298 ICC-ASP/13/10, para 578.

299 ICC-ASP/13/10, para 579.

300 ICC-ASP/13/10, para 261.

301 ICC-ASP/13/10, para 659.

302 ICC-ASP/13/10, para 666.

303 ICC-ASP/13/10, para 666.

- a Under the assistance mandate, strengthening and extending activities in northern Uganda, the DRC, the CAR (security permitting), and commencement of activities in Kenya and Cote d'Ivoire;
- b Under the reparations mandate, the final reparations decision by the Appeals Chamber in Lubanga is pending and reparations proceedings in Katanga are to commence in the second semester of 2014.³⁰⁴ In view of these developments, the TFV needs to ensure the minimum delivery structure for reparations awards in order to provide a timely and responsive follow-up to the Court's (final) reparations orders, which are anticipated to be forthcoming in 2015. The TFV reparations delivery structure is field-based and will require dedicated coordination capacity at the Bunia Field Office to oversee the complexity of design and implementation of awards, as ordered by the Court, while administering activities under the assistance mandate;
- c With regard to fundraising and visibility, the TFV intends to strengthen its organisational capacity in order to consolidate and further diversify voluntary contributions and to create a meaningful and sustainable revenue stream from private institutional donors in the European and US markets; and
- d Furthermore, the TFV Secretariat will strengthen its systems for monitoring and evaluating activities funded under both mandates, including creating and operating a management information system (MIS) linking operational inputs and results to strategic goals and objectives.³⁰⁵

Contingency Fund

The establishment of a Contingency Fund in the amount of €10 million was approved by the ASP in 2004. The purpose of the Fund is to enable the Court to meet the '[c]osts associated with an unforeseen situation following a decision by the Prosecutor to open an investigation'; 'Unavoidable expenses for developments in existing situations that could not be foreseen or could not be accurately estimated at the time of adoption of the budget'; or 'Costs associated with an unforeseen meeting of the [ASP]'.³⁰⁶ On 15 August 2014, the Bureau of the ASP indicated that in 2014, notifications from the Court on the need to access the Contingency Fund amounted to €4,754,900.³⁰⁷ In a draft ASP resolution annexed to the 2015 proposed budget, it was proposed that the ASP note that 'the current level of the Fund is €7.5 million' and decide 'to maintain the Contingency Fund at a level consistent with the €7 million threshold for 2015'. It was further proposed that if the fund were to fall below €7 million by the end of the year, the ASP will 'decide on its replenishment up to an amount considered appropriate, but to no less than €7 million'.³⁰⁸

304 In the Katanga case, in an order issued on 27 August 2014, Trial Chamber II requested a report on reparations from the Registry and instructed the Registry to consult with individual victim 'applicants' regarding 'the harm suffered as a result of the crimes', as well as reparations sought. The Chamber directed the Registry to contact the applicants, in collaboration with the Legal Representative of Victims, with a view to submitting a detailed report to Chambers, which is to include the victims' application number, documents establishing the victims' identity, the harm suffered, and the type and modality of reparations requested. Unlike the earlier reparations decision in the Lubanga case in which the TFV was recognised as being responsible for implementing reparations and consulting with applicants, the Katanga order prescribed a limited role for the TFV in the Katanga reparations proceedings. The Katanga Chamber ordered the Registry to consult with the TFV solely in relation to presenting victims 'with examples of measures which might be viable means for reparations'. ICC-01/04-01/07-3508 and see Women's Initiatives for Gender Justice, 'Change in Chambers' Approach to Reparations', 1 September 2014, available at <<http://iccwomen.org/documents/Katanga-Reparation-Order-Statement.pdf>>. The change in the Trial Chambers' approach to reparations from the proceedings in Lubanga to that of Katanga is discussed in more detail in the *Reparations* section of this Report.

305 ICC-ASP/13/10, para 665.

306 ICC-ASP/3/Res.4, para 1.

307 'Seventh meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions', *ICC website*, 15 August 2014, p 4, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-07-15-08-2014.pdf>.

308 ICC-ASP/13/10, Annex I, para F (emphasis in original).

Elections

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During its 13th session, from 8 to 17 December 2014, the ASP will hold elections for a new ASP President and Bureau, six members of the CBF, and six ICC judges.

Election of ASP President, Vice-Presidents and Bureau

The Rome Statute provides that the ASP will have a Bureau to assist it in the discharge of its duties, composed of a President, two Vice-Presidents, and 18 members, elected by the ASP for three-year terms.³⁰⁹ In December 2014, the terms of office expire for the current ASP President, Ambassador Tiina Intelmann (Estonia); Vice-Presidents Ambassador Markus Börlin (Switzerland) and Ambassador Ken Kanda (Ghana); and the 18 Bureau members who were elected in 2011.³¹⁰

With respect to the election of the ASP President, at the Bureau's third meeting on 16 April 2014, ASP Vice-President Ambassador Kanda informed the Bureau that three African States Parties, namely Botswana, Senegal, and Sierra Leone, had indicated interest in the position. Vice President Kanda 'expressed confidence that a candidate would emerge from among African States Parties who could be endorsed by the Bureau by 30 June 2014 and elected by the Assembly by consensus'.³¹¹ At the Bureau's fourth meeting, on 4 June 2014, Vice President Kanda informed the Bureau of the candidacies of H.E. Ms Attaliah Molokomme, Attorney General of Botswana; H.E. Mr Sidiki Kaba, Minister of Justice of Senegal; and H.E. Mr Vandi Chidi Minah, Permanent Representative of Sierra Leone to the United Nations. He further informed the Bureau that the next stage of the process towards selecting a consensus candidate would take place in the margins of the AU Summit in June.³¹²

309 Article 112(3), Rome Statute.

310 The current Bureau assumed its functions on 12 December 2011. The 18 members were representatives from Argentina, Belgium, Brazil, Canada, Chile, Czech Republic, Gabon, Finland, Hungary, Japan, Nigeria, Portugal, the Republic of Korea, Samoa, Slovakia, South Africa, Trinidad and Tobago and Uganda. 'Bureau of the Assembly', *ICC website*, 27 March 2014, available at <http://www.icc-cpi.int/en_menus/asp/bureau/Pages/bureau%20of%20the%20assembly.aspx>.

311 'Third Meeting of the Bureau of the Assembly of States Parties', *ICC website*, 16 April 2014, p 1, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-03-16-04-2014.pdf>.

312 'Fourth Meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions', *ICC website*, 4 June 2014, p 2, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-04-04-06-2014.pdf>.

Following the summit, the AU did not endorse a candidate but requested Senegal, Sierra Leone, and Botswana to continue with consultations ‘with a view to designating a single candidate for Africa.’³¹³ At the Bureau’s seventh meeting in August 2014, the ASP President reported that consensus had not yet been reached within the ASP. As to the way forward, the President indicated that candidate countries were divided, with two favouring ongoing consultations, and in case these did not produce a result, to conduct an indicative vote among African States Parties, to allow the African group to present a joint candidate. The third candidate country favoured presenting the candidates for a vote at the 13th session of the ASP in December.³¹⁴

At its eighth meeting in September 2014, the ASP Bureau was informed that on 28 August, African States Parties had decided to present H.E. Mr. Sidiki Kaba, Minister of Justice of Senegal, as the African candidate for ASP President. The Bureau decided to endorse Mr. Kaba as the candidate for the position of ASP President for the thirteenth to sixteenth sessions and to recommend to the ASP his election at the 13th session of the ASP on 8 December 2014.³¹⁵

In terms of the election of the ASP Vice-Presidents, in March 2014, the ASP President requested that States which are candidates to the Bureau for these positions submit expressions of interest to her.³¹⁶ At the time of writing this Report, no list of candidates for Vice-President of the Bureau had been made public.

313 ‘Decision on African Candidatures within the International System’, EX.CL/Dec.848(XXV), Doc. EX.CL/852(XXV), p 3, available at <[http://summits.au.int/en/sites/default/files/EX%20CL%20Dec%20813%20-%20850%20\(XXV\)%20_E.pdf](http://summits.au.int/en/sites/default/files/EX%20CL%20Dec%20813%20-%20850%20(XXV)%20_E.pdf)>.

314 ‘Seventh meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions’, *ICC website*, 15 August 2014, p 2, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-07-15-08-2014.pdf>.

315 ‘Eighth meeting of the Bureau of the Assembly of States Parties’, *ICC website*, 18 September 2014, p 1, available at <http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-08-18Sep2014.pdf>.

316 ASP/2014/007, p 2.

In advance of the 13th session of the ASP, regional focal points also conducted consultations within their respective groups to identify candidates for the 18-member Bureau, with an initial deadline of 30 June 2014.³¹⁷ On 18 July 2014, the Bureau identified the following States Parties to recommend to the Assembly as members of the incoming Bureau: from the Asia-Pacific Group, Japan, Republic of Korea and Samoa; from the Eastern European Group, the Czech Republic, Hungary, Romania and Slovenia; from the African Group, Ghana, Nigeria, South Africa and Uganda, and one seat reserved for the country of the next President of the ASP; and from WEOG, Germany, Italy, the Netherlands, Sweden and the United Kingdom.³¹⁸ On 15 August 2014, the Bureau endorsed Argentina, Colombia, Costa Rica, and Uruguay from the Group of Latin American and Caribbean States and noted that the group intended to have Chile replace Argentina midway through the three-year mandate, due to Argentina’s intent to step down at that point.³¹⁹

Election of seven CBF members

At the 13th session of the ASP, six members will be elected to the CBF, to fill the vacancies of the CBF members whose terms of office expire on 20 April 2015.³²⁰ The CBF is the ASP’s designated body for ‘budgetary and financial review and monitoring of the resources of the [ICC]’, including review of the ICC’s annual proposed programme budget.³²¹

317 ASP/2014/007, p 2.

318 ‘Sixth meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions’, *ICC website*, 18 July 2014, p 1, available at <http://www.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-06-18-07-2014.pdf>.

319 ‘Seventh meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions’, *ICC website*, 15 August 2014, p 2, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-07-15-08-2014.pdf>.

320 The terms of office of the following six CBF members are due to expire on 20 April 2015: Mr Hugh Adsett (Canada); Mr Fawzi A. Gharaibeh (Jordan); Mr Samuel P.O. Itam (Sierra Leone); Ms Mónica Sánchez Izquierdo (Ecuador); Ms Elena Sopková (Slovakia); and Mr Masatoshi Suguria (Japan).

321 ICC-ASP/1/Res.4, p 337 and Annex para 3.

The CBF makes recommendations to the ASP on the proposed programme budget and is 'responsible for the technical examination of any document submitted to the [ASP] that contains financial or budgetary implications or any other matters of a financial, budgetary, or administrative nature', as requested by the ASP.³²² The 12 members serving on the CBF are required to be experts in financial matters at the international level.³²³ They are elected from ICC States parties for three year terms and may be re-elected.³²⁴ No two members of the CBF may be of the same nationality, and members are to be elected on the basis of equitable geographical distribution from the five regional groups.³²⁵ The nomination period for CBF candidates was set for 9 June to 31 August 2014.³²⁶ As of 17 September 2014, seven candidates had been nominated for the election, from the following countries: Canada, Jordan, the Republic of Korea, Japan, Madagascar, Ecuador and Slovakia.³²⁷

A seventh member of the CBF will be elected to fill a vacancy due to the resignation of the CBF member from France on 30 July 2014, whose term of office was to expire on 20 April 2017.³²⁸ The candidate for this position, also from France, was nominated on 13 October 2014.³²⁹

Election of six judges

In December 2014, the ASP will hold an election for six judges, to fill the remaining vacancies by judges whose terms conclude in 2015.³³⁰ According to the Rome Statute, there are to be 18 ICC judges who are elected for nine year terms.³³¹ The Statute additionally provides that a judge's term may be extended to complete ongoing trial or appeal proceedings.³³² At the time of writing this Report, this provision applied to the term of Judge Sylvia Steiner (Brazil), Presiding Judge of Trial Chamber III, which is hearing the Bemba case.³³³

Nomination of candidates

Candidates for ICC judicial office are nominated by ICC States Parties.³³⁴ The Statute requires candidates to be 'persons of high moral character, impartiality, and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices'.³³⁵ Candidates are required to have competence and professional experience in either criminal law and procedure, referred to as 'List A' candidates, or in relevant areas of international law such as international humanitarian law or human rights, referred to as 'List B' candidates.³³⁶ States Parties are also required to take into account 'the need, within the membership of the Court, for:

322 ICC-ASP/1/Res.4, Annex, para 3.

323 ICC-ASP/1/Res.4, Annex, para 2.

324 ICC-ASP/1/Res.4, Annex, para 2.

325 ICC-ASP/1/Res.4, Annex, para 2.

326 ICC-ASP/13/SP/07, p 1.

327 See '2014 – CBF Nominations – Alphabetical Listings', *ICC website*, 17 September 2013, available at <http://www.icc-cpi.int/en_menus/asp/elections/committee%20on%20budget%20and%20finance/2014/Pages/2014-CBF-Nomination.aspx>.

328 'Seventh meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions', *ICC website*, 15 August 2014, p 3, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-07-15-08-2014.pdf>.

329 See '2014 – CBF Nominations – Alphabetical Listings', *ICC website*, 17 September 2013, available at <http://www.icc-cpi.int/en_menus/asp/elections/committee%20on%20budget%20and%20finance/2014/Pages/2014-CBF-Nomination.aspx>.

330 President Sang-Hyun Song (Republic of Korea), Judge Akua Kuenyehia (Ghana), Judge Erkki Kourula (Finland), Judge Anita Ušacka (Latvia) and Judge Ekaterina Trendafilova (Bulgaria). The term of Judge Hans-Peter Kaul (Germany), whose resignation from the Court took effect on 1 July 2014 due to a serious illness, was also to expire in 2015. On 22 July 2014, the Court announced the passing of former Judge Kaul.

331 Article 36(1) and (9)(a), Rome Statute.

332 Article 36(10), Rome Statute.

333 During the reporting period, the term of two other judges, namely Judge Fatoumata Dembele Diarra (Mali) and Judge Bruno Cotte (France), had also expired. They continued in office until completion of the Katanga Trial.

334 Article 36(4)(a), Rome Statute.

335 Article 36(3), Rome Statute.

336 Article 36(3)(b) and (5), Rome Statute.

(i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges', as well as the need to include judges with legal expertise on specific issues including violence against women and children.³³⁷

With the aim of facilitating the election of a bench fulfilling these compositional requirements, the ASP has put in place a system of 'minimum voting requirements regarding lists A and B, regional groups and gender'.³³⁸ The minimum voting requirements are set for each election based on the composition of the judges remaining in office and the formulas established by the ASP.³³⁹ States Parties are then required to vote for a minimum number of candidates in accordance with these requirements. Once a minimum voting requirement has been met, that requirement is discontinued for any subsequent rounds of voting.³⁴⁰ For the December 2014 judicial election, the ASP established the following minimum voting requirements: two candidates from 'List B'; one candidate from the Asia/Pacific regional group; two candidates from the Eastern Europe regional group; and one male candidate.³⁴¹

The initial nomination period for the December 2014 judicial election was set for 28 April to 20 July 2014,³⁴² with the possibility of a maximum of three extensions, each for two weeks, by the ASP President.³⁴³ The President may extend the nomination period only if 'any regional or gender minimum voting requirement is not matched with at least twice the number of candidates fulfilling that requirement'.³⁴⁴ On 21 July 2014, with sixteen candidates nominated,

the ASP announced that the minimum nomination requirements had not yet been met, and extended the deadline for nominations to 3 August 2014.³⁴⁵ On 4 August 2014, the ASP announced that as of 3 August, all minimum requirements for nominations had been met and that the nomination period was closed.³⁴⁶ In total, 17 candidates were nominated, including five women and 12 men. Eight candidates were nominated under 'List A' and nine under 'List B'. The regional distribution of the candidates was: five from the African States; two from Asia-Pacific States; six from Eastern European States; one from GRULAC; and three from WEOG.³⁴⁷

The Advisory Committee on Nominations of Judges

The Rome Statute provides that the ASP may decide to establish an ACN,³⁴⁸ and in 2012 the ASP took steps to create this body. The ACN is composed of nine members designated by consensus by the ASP.³⁴⁹ The ASP specified that ACN members should be 'eminent interested and willing persons of a high moral character, who have established competence and experience in criminal or international law', and that the committee should be balanced in terms of geographical and gender representation, and in representing the principal legal systems of the world.³⁵⁰

The ACN's mandate is to facilitate the appointment of 'the highest-qualified individuals' as judges of the ICC.³⁵¹ The members of the current ACN include former judges

337 Article 36(8), Rome Statute.

338 ICC-ASP/3/Res.6, para 20.

339 ICC-ASP/3/Res.6, paras 20-25.

340 ICC-ASP/3/Res.6, paras 20-25.

341 ICC-ASP/13/SP/06, Annex II.

342 ICC-ASP/13/SP/06, p 1.

343 ICC-ASP/3/Res.6, para 11.

344 ICC-ASP/3/Res.6, para 11.

345 ICC-ASP/13/SP/48.

346 ICC-ASP/13/SP/55.

347 For a full list of judicial candidates for the December 2014 election, see 'Nominations', *ICC website*, available at <http://icc-cpi.int/EN_Menu/asp/elections/judges/2014/nominations/pages/default.aspx>. See also ICC-ASP/11/47, p 3.

348 Article 36(4)(c), Rome Statute.

349 ICC-ASP/11/S/07, Annex, para 1.

350 ICC-ASP/11/S/07, paras 1-2 and Annex paras 1-2.

351 ICC-ASP/11/S/07, Annex, para 5.

from the ICC, ICTY, ICJ, current judges from domestic high courts, as well as distinguished academics. The members of the ACN, appointed by consensus by the ASP in November 2012, are: Mr Hiroshi Fukuda (Japan); Mr Philippe Kirsch, Chair (Canada); Mr Daniel David Ntanda Nsereko (Uganda); Mr Ernest Petrič (Slovenia); Ms Mónica Pinto (Argentina); Mr Bruno Simma (Germany); and Mr Raymond Claudius Sock (Gambia).³⁵² Mr Leonardo Nemer Caldeira Brant (Brazil) was also appointed to the ACN in 2012 but resigned by letter to the President of the ASP dated 18 June 2014, in light of the decision by the Government of Brazil to nominate him as a candidate for judge of the ICC in the December 2014 election.³⁵³ Mr Árpád Prandler (Hungary) was also appointed to the ACN in November 2012 but passed away on 4 February 2014.³⁵⁴ Notwithstanding the requirement for gender representation, eight of the original nine members appointed to the ACN in 2012 were male.³⁵⁵ Currently six out of seven ACN members are male. Similarly, in 2011, all five members appointed to the search committee for the nomination and election of the ICC Prosecutor were male.³⁵⁶

Following the close of the nomination period for the six new ICC judges, the ACN conducted a thorough assessment of candidates, based on

interviews with the candidates as well as the supporting documentation for each candidate. The ACN was then to issue a report to ‘infor[m] the decision-making of States in casting their votes for the best candidates to serve on the bench of the ICC.’³⁵⁷ The ACN issued its report on 29 September 2014, following its meeting from 8 to 12 September in New York.³⁵⁸

Composition of Chambers

The six judges, once elected in December 2014, will be assigned to the Pre-Trial, Trial, and Appeals Chambers. The judges will elect the President and Vice-Presidents of the Court at the annual plenary meeting of judges in 2015.³⁵⁹ The assignments to divisions are to be made ‘based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law’.³⁶⁰ The Rome Statute specifies that the Appeals Division is to be composed of the ICC President and four judges, while the Trial and Pre-Trial Divisions are to be composed of not less than six judges each and should include predominantly judges with criminal trial experience.³⁶¹

In light of the current assignments of the judges completing their terms in 2015, the Appeals Chamber will be most affected, with four of its five members completing their terms, including ICC President Judge Sang-Hyun Song (Republic of Korea).³⁶² The terms of two judges from the Pre-Trial Division will expire, while no judges

352 ‘Advisory Committee on nominations of judges of the International Criminal Court’, *ICC website*, 29 September 2014, available at <http://icc-cpi.int/en_menus/asp/ACN/Pages/default.aspx>.

353 ‘Fifth Meeting of the Bureau of the Assembly of States Parties’, *ICC website*, 30 June 2014, p 2, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-05-30-06-2014.pdf>.

354 ‘Second Meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions’, *ICC website*, 17 March 2014, p 1, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-02-17-03-2014.pdf>.

355 ‘Results of the 2012 Election of the Advisory Committee on Nominations’, *ICC website*, 27 November 2012, available at <http://www.icc-cpi.int/en_menus/asp/elections/advisorycommitteemominations/Pages/election%20acn-%202012.aspx>.

356 *Gender Report Card 2013*, p 102.

357 ASP/2014/001.

358 ICC-ASP/13/22.

359 Rule 4(1)(a), RPE.

360 Article 39(1), Rome Statute.

361 Article 39(1), Rome Statute.

362 In the Appeals Chamber, in addition to President Song, Judge Akua Kuenyehia (Ghana), Judge Erkki Kourula (Finland) and Judge Anita Ušacka (Latvia) are completing their terms in 2015.

will be stepping down from the Trial Division.³⁶³ In terms of gender composition, at the time of writing this Report, the ICC bench was composed of ten women and eight men. Taking into account the judges who will be completing their terms, the composition of the remaining judges will be seven women and five men.³⁶⁴

In addition to the six judges who will have completed their terms at the ICC, on 3 June 2014, Senator Miriam Defensor Santiago (Philippines) submitted her resignation to the ICC for medical reasons.³⁶⁵ Senator Defensor Santiago had been elected for a nine-year term by the ASP in December 2011, but was not sworn in and did not take up her functions at the Court. In August 2014, the Bureau concluded that 'within the existing legal framework', it was not possible to schedule the election for this vacancy during the 13th ASP session and decided to refer the matter to the ASP, with the recommendation to consider scheduling the election to fill this post in 2015.³⁶⁶

On 22 July 2014, the Court announced the passing of former Judge Hans-Peter Kaul (Germany), whose resignation from the Court took effect on 1 July 2014 due to a serious illness.³⁶⁷ The Court's press release included a statement from ICC President Judge Sang-Hyung Song, who commemorated Judge

Kaul's 'relentless commitment and extensive contributions to international justice' and called him a 'driving force in the creation of the Rome Statute'.³⁶⁸ The press release also included a statement from ASP President Tiina Intelmann who recalled Judge Kaul's vital contribution to the establishment of the Rome Statute system and praised his 'important legacy of contributions to the jurisprudence of the Court'.³⁶⁹ At the June meeting of the ASP Bureau, it was decided not to fill the vacancy of Judge Kaul through an interim election as his term of office would have concluded in March 2015 and an election would only allow the elected judge to serve in office for just over two months.³⁷⁰

363 In the Pre-Trial Division, the terms of Judge Hans-Peter Kaul, President of the Pre-Trial Division (Germany), and Judge Ekaterina Trendafilova (Bulgaria), expire in 2015.

364 ICC-ASP/13/SP/06, Annex II, Table 1.

365 'Seventh meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions', *ICC website*, 15 August 2014, p 1, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-07-15-08-2014.pdf>.

366 'Seventh meeting of the Bureau of the Assembly of States Parties: Agenda and Decisions', *ICC website*, 15 August 2014, p 1, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-07-15-08-2014.pdf>.

367 'Passing of former ICC Judge Hans-Peter Kaul', *ICC Press Release*, ICC-CPI-20140722-PR1032, 22 July 2014, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1032.aspx>.

368 'Passing of former ICC Judge Hans-Peter Kaul', *ICC Press Release*, ICC-CPI-20140722-PR1032, 22 July 2014, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1032.aspx>.

369 'Passing of former ICC Judge Hans-Peter Kaul', *ICC Press Release*, ICC-CPI-20140722-PR1032, 22 July 2014, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1032.aspx>.

370 'Fifth Meeting of the Bureau of the Assembly of States Parties', *ICC website*, 30 June 2014, p 1, available at <http://icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2014-Bureau-05-30-06-2014.pdf>.

Judges of the International Criminal Court as of 15 August 2014

<i>Judge</i>	<i>Country/Group</i>	<i>List</i>	<i>Gender</i>	<i>Year of election</i>	<i>Current term length</i>	<i>Year current term expires</i>
Appeals Division						
Sanji Mmasenono Monageng First Vice President of the Court (as of March 2012) President of the Appeals Division	Botswana/African	B	F	2009	9	2018
Sang-Hyun Song President of the Court (2009-2015)	Republic of Korea/Asian	A	M	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Akua Kuenyehia	Ghana/African	B	F	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Erkki Kourula	Finland/WEOG	B	M	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Anita Ušacka	Latvia/Eastern European	B	F	Elected 2003 for 3 year term, re-elected 2006 for 9 year term	9	2015
Trial Division						
Robert Fremr President of the Trial Division	Czech Republic/Eastern European	A	M	2012	9	2021
Joyce Aluoch	Kenya/African	A	F	2009	9	2018
Kuniko Ozaki	Japan/Asian	B	F	2010	8 years 2 months	2018
Howard Morrison	United Kingdom/WEOG	A	M	2012	9	2021
Chile Eboe-Osuji	Nigeria/African	A	M	2012	9	2021
Geoffrey A Henderson	Trinidad and Tobago/GRULAC	A	M	2014	7	2021
Sylvia Steiner ³⁷¹	Brazil/GRULAC	A	F	2003	9	2012/end of Bemba trial
Christine Van den Wyngaert ³⁷²	Belgium/WEOG	A	F	2009	9	2018

371 Judge Sylvia Steiner's term has expired; however pursuant to Article 36(10) of the Statute, she is continuing in office to complete the trial in *The Prosecutor v. Jean-Pierre Bemba Gombo*.

372 Judge Van den Wyngaert is assigned to Chambers in two Divisions: Pre-Trial Chamber I and Pre-Trial Chamber II, as well as Trial Chamber II.

Judges of the International Criminal Court as of 15 August 2014 *continued*

<i>Judge</i>	<i>Country/Group</i>	<i>List</i>	<i>Gender</i>	<i>Year of election</i>	<i>Current term length</i>	<i>Year current term expires</i>
Pre-Trial Division ³⁷³						
Ekaterina Trendafilova	Bulgaria/Eastern European	A	F	2006	9	2015
Christine Van den Wyngaert	Belgium/WEOG	A	F	2009	9	2018
Cuno Tarfusser Second Vice President of the Court (as of March 2012)	Italy/WEOG	A	M	2009	9	2018
Silvia Fernández de Gurmendi	Argentina/GRULAC	A	F	2010	8 years 2 months	2018
Olga Herrera Carbuccion	Dominican Republic/ GRULAC	A	F	2012	9	2021

373 As of 15 August 2015, the ICC website does not indicate a President of the Pre-Trial Division. See 'Pre-Trial Division', *ICC website*, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/Pages/pre%20trial%20division.aspx>.

Composition of Chambers as of 15 August 2014

<i>Chamber</i>	<i>Situation(s) and/or case</i> ³⁷⁴	<i>Stage of proceedings</i>
Pre-Trial Division ³⁷⁵		
Pre-Trial Chamber I		
<ul style="list-style-type: none"> ■ Presiding Judge Silvia Fernández de Gurmendi (Argentina) ■ Judge Hans-Peter Kaul (Germany) ■ Judge Christine Van den Wyngaert (Belgium) 	<p>Libya Situation <i>Prosecutor v. Gaddafi and Al-Senussi</i></p> <p>Côte-d'Ivoire Situation <i>Prosecutor v. Laurent Gbagbo</i> <i>Prosecutor v. Simone Gbagbo</i> <i>Prosecutor v. Blé Goudé</i></p> <p>Registered Vessels of Comoros, Greece and Cambodia Situation³⁷⁶</p>	<p>Appeals Chamber confirmed Pre-Trial Chamber I decision that the case against Al-Senussi is inadmissible; Appeals Chamber confirmed Pre-Trial Chamber I decision that case against Gaddafi is inadmissible; ICC Arrest Warrant for Gaddafi outstanding</p> <p>Charges confirmed Arrest Warrant outstanding Confirmation of charges hearing scheduled for 29 September 2014</p>
Pre-Trial Chamber II		
<ul style="list-style-type: none"> ■ Presiding Judge Ekaterina Trendafilova (Bulgaria) ■ Judge Christine Van den Wyngaert (Belgium) ■ Judge Cuno Tarfusser (Italy) 	<p>Uganda Situation <i>Prosecutor v. Kony et al</i></p> <p>DRC Situation <i>Prosecutor v. Ntaganda</i> <i>Prosecutor v. Mudacumura</i></p> <p>Darfur Situation <i>Prosecutor v. Al Bashir</i> <i>Prosecutor v. Harun and Kushayb</i> <i>Prosecutor v. Hussein</i></p> <p>CAR Situation <i>Prosecutor v. Bemba et al</i> (Article 70)</p> <p>CAR II Situation <i>Prosecutor v. Barasa</i> (Article 70)</p> <p>Mali Situation</p>	<p>Investigation ongoing Arrest Warrants outstanding</p> <p>Investigation ongoing Charges confirmed Arrest Warrant outstanding</p> <p>Investigation ongoing Arrest Warrant outstanding Arrest Warrants outstanding Arrest Warrant outstanding</p> <p>Investigation ongoing Pre-Trial stage; Confirmation of charges proceedings are ongoing via written submissions</p> <p>Investigation ongoing Arrest Warrant outstanding</p> <p>Investigation ongoing</p>

³⁷⁴ In respect of a Situation, a Pre-Trial Chamber's responsibilities principally concern the first phase of judicial proceedings, in particular the opening of an investigation, issuance of arrest warrants and summonses to appear, and confirmation of charges proceedings. Cases that have reached the trial phase and been assigned to a Trial Chamber are listed under the respective Trial Chamber.

³⁷⁵ On 3 July 2014, the Presidency reconstituted the Pre-Trial Chambers, following the effective resignation of Judge Hans-Peter Kaul (Germany) on 1 July 2014. See ICC-01/04-627, p 3; ICC-01/05-76, p 3; ICC-02/04-205, p 3; ICC-02/05-243, p 3; ICC-01/09-132, p 3; ICC-01/11-39, p 3; ICC-02/11-43, p 3; ICC-01/12-14, p 3.

³⁷⁶ While the Registered Vessels of Comoros, Greece and Cambodia is referred to as a 'Situation' which was assigned to Pre-Trial Chamber I on 5 July 2013, the ICC website does not include this as one of the Court's nine Situations, at the time of writing this Report. See ICC-01/13-1, p 4.

Composition of Chambers as of 15 August 2014 *continued*

<i>Chamber</i>	<i>Situation(s) and/or case</i>	<i>Stage of proceedings</i>
Trial Division		
Trial Chamber II ³⁷⁷		
<ul style="list-style-type: none"> ■ Presiding Judge Silvia Fernández de Gurmendi (Argentina)³⁷⁸ ■ Judge Christine Van den Wyngaert (Belgium) ■ Judge Olga Herrera Carbuccion (Dominican Republic) 	<i>Prosecutor v. Katanga</i>	Katanga Trial Judgment (conviction) and Sentencing decision issued; Reparations
Trial Chamber III		
<ul style="list-style-type: none"> ■ Presiding Judge Sylvia Steiner (Brazil) ■ Judge Joyce Aluoch (Kenya) ■ Judge Kuniko Ozaki (Japan) 	<i>Prosecutor v. Bemba</i>	At trial
Trial Chamber IV		
<ul style="list-style-type: none"> ■ Presiding Judge Joyce Aluoch (Kenya) ■ Judge Silvia Fernández de Gurmendi (Argentina) ■ Judge Chile Eboe-Osuji (Nigeria) 	<i>Prosecutor v. Banda</i>	Scheduled trial start date of 18 November 2014 vacated; Arrest warrant outstanding
Trial Chamber V(a)		
<ul style="list-style-type: none"> ■ Presiding Judge Chile Eboe-Osuji (Nigeria) ■ Judge Olga Herrera Carbuccion (Dominican Republic) ■ Judge Robert Fremr (Czech Republic) 	<i>Prosecutor v. Ruto and Sang</i>	At trial
Trial Chamber V(b) ³⁷⁹		
<ul style="list-style-type: none"> ■ Presiding Judge Kuniko Ozaki (Japan) ■ Judge Robert Fremr (Czech Republic) ■ Judge Geoffrey A Henderson (Trinidad and Tobago) 	<i>Prosecutor v. Kenyatta</i>	Scheduled trial start date of 7 October 2014 vacated

377 On 16 April 2014, the Presidency assigned Judge Silvia Fernández de Gurmendi (Argentina) and Judge Olga Herrera Carbuccion (Dominican Republic) to Trial Chamber II to replace Judge Bruno Cotte (France) and Judge Fatoumata Dembele Diarra (Mali), effective on the date of the issuance of the Katanga Article 76 Sentencing decision on 23 May 2014. ICC-01/04-01/07-3468, p 3.

378 On 3 July 2014, Trial Chamber II elected Judge Silvia Fernández de Gurmendi (Argentina) as Presiding Judge. ICC-01/04-01/07-3503, p 3.

379 On 30 January 2014, the Presidency reconstituted Trial Chamber V(b) with Judge Geoffrey Henderson (Trinidad and Tobago) replacing Judge Chile Eboe-Osuji (Nigeria), effective 1 February 2014. ICC-01/09-02/11-890, p 3.

Composition of Chambers as of 15 August 2014 *continued*

<i>Chamber</i>	<i>Situation(s) and/or case</i>	<i>Stage of proceedings</i>
Trial Division <i>continued</i>		
Trial Chamber VI ³⁸⁰		
<ul style="list-style-type: none"> ■ Presiding Judge Robert Fremr (Czech Republic) ■ Judge Kuniko Ozaki (Japan) ■ Judge Geoffrey A Henderson (Trinidad and Tobago) 	<i>Prosecutor v. Ntaganda</i>	Trial start date scheduled for 2 June 2015
Appeals Division		
Appeals Chamber		
<ul style="list-style-type: none"> ■ Presiding Judge Sanji Mmasenono Monageng (Botswana) ■ Judge Sang-Hyun Song (Republic of Korea) ■ Judge Akua Kuenyehia (Ghana) ■ Judge Erkki Kourula (Finland) ■ Judge Anita Ušacka (Latvia) 	<i>Prosecutor v. Lubanga</i> <i>Prosecutor v. Ngudjolo</i>	Appeal against Trial Judgment, Sentencing and Reparations decisions Appeal against Trial Judgment

³⁸⁰ On 18 July 2014, the Presidency constituted Trial Chamber VI and referred to it the case of *The Prosecutor v. Bosco Ntaganda*. ICC-01/04-02/06-337, p 4.

Substantive Work of the ICC

1 September 2013 — 15 August 2014*

** The Gender Report Card 2014* includes a review of developments and judicial decisions up to 15 August 2014. Selected important events and decisions have also been included through October 2014.

Overview of cases and Situations

Pursuant to Article 13 of the Rome Statute, the ICC may exercise jurisdiction over a Situation when: (a) the Situation has been referred to the ICC Prosecutor by a State Party; (b) the UN Security Council, acting under Chapter VII of the UN Charter, refers a Situation to the Prosecutor; or (c) the Prosecutor initiates an investigation into a Situation *proprio motu* (on her own initiative). The Prosecutor may initiate *proprio motu* investigations on the basis of information received on crimes within the jurisdiction of the Court. Any person or organisation may submit such information, known as a ‘communication’, to the Prosecutor under Article 15 of the Statute.³⁸¹ Non-States Parties may also lodge a declaration accepting the ICC’s jurisdiction under Article 12(3) of the Statute. The initiation of an investigation subsequent to such a declaration is also considered a *proprio motu* investigation by the Prosecutor. *Proprio motu* investigations initiated either under Article 12(3) or Article 15 of the Statute are subject to authorisation by the Pre-Trial Chamber.

On 24 September 2014, Prosecutor Fatou Bensouda announced the opening of a new Situation in the CAR (the CAR II), separate from the Situation referred to the ICC in 2004 (the CAR). As such, since the publication of the *Gender Report Card 2013*, the number of Situations under investigation before the Court has increased to nine, including: Uganda, the DRC, the CAR, the CAR II, Kenya, Sudan (Darfur), Libya, Mali and Côte d’Ivoire. Five of these – Uganda, the DRC, the CAR, the CAR II and Mali – were referred by the Governments of the respective countries in their capacities as ICC States Parties. By contrast, the ICC obtained jurisdiction over the Situations in Sudan and Libya, both non-States

381 The Prosecution continues to receive communications pursuant to Article 15 of the Statute. The latest public information indicates that by the end of 2013, the OTP had received 10,470 communications under Article 15 of the Statute. See ‘Preliminary Examinations’, *ICC website*, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx>.

Parties, following a referral by the UN Security Council. Finally, the Prosecutor initiated an investigation *proprio motu* in Kenya and Côte d'Ivoire on the basis of information about crimes reported to have been committed within these territories.³⁸² While Kenya is a State Party and thus automatically subject to ICC jurisdiction under Article 15 of the Statute, the Prosecutor initiated the Côte d'Ivoire investigation *proprio motu* following an Article 12(3) declaration by the Côte d'Ivoire Government,³⁸³ which was not a State Party at the time. On 15 February 2013, Côte d'Ivoire ratified the Rome Statute, becoming the 122nd State Party to the ICC.

Situations under preliminary examination

Prior to opening an investigation into a Situation, the Prosecutor carries out a preliminary examination to determine whether a Situation meets the legal criteria established by the Rome Statute to warrant investigation by the ICC.³⁸⁴ The preliminary examination takes into account jurisdiction, admissibility and the interests of justice. A preliminary examination can be initiated by a decision of the Prosecutor, on the basis of information received on crimes within the jurisdiction of the ICC pursuant to Article 15; a referral from a State Party or the UN Security Council pursuant to Article 13(a) or (b), respectively; or a declaration by a non-State Party pursuant to Article 12(3) of the Statute. There is no specified time within which the Prosecutor must reach a decision about whether to open an investigation, and Situations can remain under preliminary examination for several years before a decision is made as to whether or not the legal requirements for formal investigation have been met.

In November 2013, the OTP issued a Policy Paper on Preliminary Examinations, in which it described the OTP's policy and practice in the conduct of preliminary examinations.³⁸⁵ According to the OTP, a Situation under preliminary examination goes through four consecutive phases: (i) an initial assessment of all communications received under Article 15 of

382 'Situations and cases', *ICC website*, available at <http://icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>.

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

384 'Report on Preliminary Examination Activities 2013', *OTP*, November 2013, para 1, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF>.

385 'Policy Paper on Preliminary Examinations', *OTP*, November 2013, paras 19, 78-83, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf>.

the Statute;³⁸⁶ (ii) an analysis of all information on alleged crimes received or collected to determine whether the preconditions for jurisdiction have been met and whether there is a reasonable basis to believe the crimes fall under the subject-matter jurisdiction of the Court; (iii) an analysis of admissibility, including complementarity and gravity; and (iv) following a determination that a Situation is ‘facially admissible’, an examination of the interests of justice.³⁸⁷

During the reporting period, the Prosecution listed ten countries as under preliminary examination; however, as described further below, one of these preliminary examinations – that in the CAR – became a Situation (the CAR II). Thus, currently there are nine countries under preliminary examination. Honduras (made public in 2010), Comoros (since 2013), Ukraine (since 2014) and Iraq (since 2014) are listed as under phase two (subject-matter jurisdiction). Colombia (since 2004), Afghanistan (made public in 2007), Georgia (made public in 2008), Guinea (made public in 2009) and Nigeria (made public in 2010) are in phase three (analysis of admissibility). Of these nine preliminary examinations, four contain allegations of sexual

and gender-based violence, namely Afghanistan, Colombia, Guinea and Honduras.³⁸⁸

During the reporting period, three new preliminary examinations were made public (the CAR, Ukraine and Iraq), while one (Republic of Korea) was closed.

New preliminary examinations

Central African Republic

The Prosecutor opened an investigation into the Situation in the CAR in 2007, relating to serious crimes committed during the violence between 2002 and 2003. Following the December 2012 outbreak of hostilities in the CAR, the ICC Prosecutor issued statements in March, April, August, and December 2013, in relation to the escalating violence in the country. In her 9 December 2013 statement, the Prosecutor expressed concern over ‘reports of serious on-going crimes’ and ‘call[ed] upon all parties involved in the conflict, (including former Séléka elements and other militia groups, such as the anti-Balaka), to stop attacking civilians and

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

387 ‘Policy Paper on Preliminary Examinations’, *OTP*, November 2013, paras 77-83, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20202013.pdf>. See also ‘Report on Preliminary Examination Activities 2013’, *OTP*, November 2013, para 14, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF>.

388 ‘Report on Preliminary Examination Activities 2013’, *OTP*, November 2013, paras 25, 28, 67, 72-73, 124-125, 127, 183, 186, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF>. See also ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic’, *OTP Press Statement*, 7 February 2014, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-07-02-2014.aspx>; ‘Situation in Colombia - Interim Report’, *OTP*, November 2012, paras 4-6, 10, 78-91, 141-143, 151, available at <<http://icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>>.

committing crimes, or risk being investigated and prosecuted by [her] Office'.³⁸⁹

On 7 February 2014, the Prosecutor announced that her Office was opening a new preliminary examination in the CAR, noting that allegations of crimes committed in the CAR 'include hundreds of killings, acts of rape and sexual slavery, destruction of property, pillaging, torture, forced displacement and recruitment and use of children in hostilities'.³⁹⁰ The Prosecutor stated that these recent allegations fall under a new Situation, separate from the Situation referred to the ICC in 2004, covering crimes committed from September 2012 onwards. She stated that, in coordination with the AU and the UN, her Office was focusing on 'gathering and analysing all the information necessary to determine whether there is a reasonable basis to proceed with an investigation into this new situation' while at the same time 'engaging with the CAR authorities with a view to discussing ways and means to bring perpetrators to account, including at the national level'.³⁹¹

389 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to the escalating violence in the Central African Republic', *OTP Press Statement*, 9 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-car-09-12-2013.aspx>.

390 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic', *OTP Press Statement*, 7 February 2014, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-07-02-2014.aspx>.

391 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic', *OTP Press Statement*, 7 February 2014, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-07-02-2014.aspx>.

In May 2014, the Prosecution made its first investigative visit to the CAR since opening the preliminary examination.³⁹² On 30 May, the CAR President Samba-Panza sent a letter to the ICC Prosecutor, referring the Situation to the ICC and requesting an investigation into alleged crimes since 1 August 2012.³⁹³ Upon receiving the referral, the Prosecutor stated that the preliminary examination remained ongoing, and that the referral 'will enable the process to be sped up, where appropriate'.³⁹⁴ On 24 September 2014, the Prosecutor announced the opening of a second Situation in the CAR 'with respect to crimes allegedly committed since 2012'.³⁹⁵

392 'ICC team arrives on first mission to Central Africa', 8 May 2014, *ReliefWeb*, available at <<http://reliefweb.int/report/central-african-republic/icc-team-arrives-first-mission-central-africa>>.

393 'Letter of referral to the ICC, Government of the Central African Republic', *ICC website*, 30 May 2014, available at <<http://icc-cpi.int/iccdocs/otp/2014-05-30-CAR-referral.pdf>>. See also 'Statement by the ICC Prosecutor, Fatou Bensouda, on the referral of the situation since 1 August 2012 in the Central African Republic', *OTP Press Statement*, 12 June 2014, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-12-06-2014.aspx>.

394 'Statement by the ICC Prosecutor, Fatou Bensouda, on the referral of the situation since 1 August 2012 in the Central African Republic', *OTP Press Statement*, 12 June 2014, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-12-06-2014.aspx>.

395 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic', *OTP Press Release*, ICC-OTP-20140924-PR1043, 24 September 2014, available at <http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx>. For more information regarding this Situation, see Women's Initiatives for Gender Justice, 'Special Issue #1 on the Central African Republic', *Women's Voices eLetter*, July 2014, available at <<http://www.iccwomen.org/news/docs/WI-WomVoices7-14/WomVoices7-14.html>>; Women's Initiatives for Gender Justice, 'Special Issue #2 on the Central African Republic', *Women's Voices eLetter*, August 2014, available at <<http://www.iccwomen.org/news/docs/WI-WomVoices8-14/WomVoices8-14.html>>.

Ukraine

On 9 April 2014, the Ukrainian authorities lodged an Article 12(3) declaration, 'recogniz[ing] the jurisdiction of the [ICC] for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on [its territory] within the period 21 November 2013 – 22 February 2014'.³⁹⁶ Upon receipt of this declaration, the Prosecutor decided to open a preliminary examination into the Situation in Ukraine.³⁹⁷

Iraq

On 9 February 2006, the ICC Prosecution concluded the preliminary examination of the Situation in Iraq, indicating that 'at this stage, the Statute requirements to seek authorization to initiate an investigation [...] have not been satisfied'. In particular, it noted that the gravity threshold had not been met.³⁹⁸ However, on 13 May 2014, in light of new evidence obtained on 10 January 2014 through further Article 15 communications, the Prosecutor announced the re-opening of the preliminary examination of the Situation in Iraq.³⁹⁹ The new information submitted to the Prosecution by the European Centre for Constitutional and Human Rights, together with the Public Interest Lawyers law

firm, claims the responsibility of United Kingdom officials for war crimes, particularly systematic detainee abuse, committed between 2003 and 2008 by United Kingdom armed forces deployed in Iraq. This information was not available to the Prosecution in 2006.⁴⁰⁰

Although Iraq is not a State Party, the ICC can nevertheless investigate and prosecute crimes allegedly committed by nationals of States Parties. The United Kingdom ratified the Rome Statute in 2001, thus granting the ICC jurisdiction over Article 5 crimes committed by nationals of the United Kingdom on the territory of other States since 1 July 2002, the date of entry into force of the Rome Statute.⁴⁰¹

396 'Declaration by Ukraine lodged under Article 12(3) of the Rome Statute', *ICC website*, 9 April 2013, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationRecognitionJurisdiction09-04-2014.pdf>.

397 'Ukraine', *ICC website*, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx>.

398 'OTP response to communications received concerning Iraq', *OTP*, 9 February 2006, p 9, available at <http://icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>.

399 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq', *OTP Press Statement*, 13 May 2014, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx>.

400 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq', *OTP Press Statement*, 13 May 2014, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx>.

401 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq', *OTP Press Statement*, 13 May 2014, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx>.

Closed preliminary examinations

After having conducted preliminary examinations, on four occasions, the Prosecution concluded that the information provided did not constitute a reasonable basis for an investigation. In 2006, it decided not to proceed with formal investigations in Iraq and Venezuela,⁴⁰² and in April 2012, it declined to proceed in Palestine.⁴⁰³ Furthermore, as described below, in June 2014, it found that there was no reasonable basis to proceed with a formal investigation in the Republic of Korea.⁴⁰⁴

Republic of Korea

One preliminary examination was closed during the reporting period, that concerning the Republic of Korea. This examination, which was initiated in 2010, concerned two incidents: (1) the shelling by North Korea of the Republic of Korea's Yeonpyeong island on 23 November 2010, allegedly resulting in the killing of two civilians and two marines, the injury of 50 civilians and 16 marines, and the large-scale destruction of civilian and military facilities; and (2) the sinking of the Cheonan, a South Korean warship, by a torpedo allegedly fired from a North Korean submarine on 26 March 2010, which resulted in the death of 46 sailors.⁴⁰⁵

Regarding the former incident, the Prosecution reasoned that while military objects and personnel are legitimate military targets, it was necessary to look at the impact of the alleged crimes on civilians to determine whether their targeting was intentional or resulted in 'excessive incidental death, injury or damage'. It decided that although the shelling resulted in regrettable civilian deaths, available information did not provide a reasonable basis to believe that the civilian population or civilian objects were intentionally targeted pursuant to Article 8(2)(b)(i) or (ii) of the Statute, or that the anticipated civilian impact would have been clearly excessive vis-à-vis the anticipated military advantage pursuant to Article 8(2)(b)(iv) of the Statute.⁴⁰⁶

Concerning the latter incident, the Prosecution considered that it was unable to conclude that the attack on the Cheonan met the definition of the war crime of killing or wounding treacherously under Article 8(2)(b)(xi) of the Statute in light of 'the current internationally accepted definition' of this crime, as well as 'the circumstances of the incident in question'.⁴⁰⁷ The Prosecution concluded that there was no reasonable basis to initiate an investigation and closed the examination on 23 June 2014.⁴⁰⁸

402 'OTP response to communications received concerning Iraq', *OTP*, 9 February 2006, p 9, available at <http://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>; 'OTP response to communications received concerning Venezuela', *OTP*, 9 February 2006, p 4, available at <http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf>. See further *Gender Report Card 2012*, p 96.

403 'Update on Situation in Palestine', *OTP*, 3 April 2012, paras 4, 6, 8, available at <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>. See further *Gender Report Card 2012*, p 96-97.

404 'Situation in the Republic of Korea: Article 5 Report', *OTP*, June 2014, para 82, available at <<http://icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf>>.

405 'Situation in the Republic of Korea: Article 5 Report', *OTP*, June 2014, paras 2, 6-7, available at <<http://icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf>>. See also *Gender Report Card 2011*, p 136.

406 'Situation in the Republic of Korea: Article 5 Report', *OTP*, June 2014, paras 17-27, available at <<http://icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf>>.

407 'Situation in the Republic of Korea: Article 5 Report', *OTP*, June 2014, paras 13-16, available at <<http://icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf>>.

408 'Situation in the Republic of Korea: Article 5 Report', *OTP*, June 2014, para 82, available at <<http://icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf>>; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in the Republic of Korea', *OTP Press Release*, ICC-OTP-20140623-PR1019, 23 June 2014, available at <http://icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdn/korea/Pages/pr1019.aspx>.

ICC Situations and cases⁴⁰⁹

Democratic Republic of the Congo

The Situation in the DRC was the first to be investigated by the ICC, following the Government's referral in March 2004.⁴¹⁰ In June 2004, the Prosecution formally opened its investigation into crimes allegedly committed within the territory since 1 July 2002.⁴¹¹ Four of the six cases arising out of this Situation have focused on crimes committed within the Ituri region of the DRC. In 2008, the Prosecutor indicated that his Office had started to look into the alleged commission of crimes in the North and South Kivu provinces.⁴¹² The Kivus have constituted the focus of the Prosecution's investigations since 2008.⁴¹³

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

409 In this section, the scope of charges reflects the charges contained in the confirmation of charges decision, DCC or arrest warrant, depending on the current stage of the proceedings.

410 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', *OTP Press Release*, ICC-OTP-20040623-59, 23 June 2004, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx>.

411 'The Office of the Prosecutor of the International Criminal Court opens its first investigation', *OTP Press Release*, ICC-OTP-20040623-59, 23 June 2004, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx>.

412 'ICC Prosecutor recalls ICC has jurisdiction over crimes against the civilian population in the Kivus', *OTP Press Release*, ICC-OTP-20081104-PR-369, 4 November 2008, available at <[http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/Pages/icc%20prosecutor%20recalls%20icc%20has%20jurisdiction%20over%20crimes%20against%20the%20civilian%20pop.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/Pages/icc%20prosecutor%20recalls%20icc%20has%20jurisdiction%20over%20crimes%20against%20the%20civilian%20pop.aspx)>.

413 'Report of the International Criminal Court', 17 September 2009, A/64/356, para 28.

The Prosecutor v. Thomas Lubanga Dyilo

Lubanga, a Congolese national, was alleged to be one of the founding members and former President of the UPC and Commander in Chief of the FPLC. Lubanga was the first suspect to be arrested and the first accused to stand trial before the Court. The proceedings against him led to the first verdict issued by an ICC Trial Chamber on 14 March 2012.

Scope of charges	Crimes allegedly committed in the Ituri district of the DRC between early September 2002 and 13 August 2003. ⁴¹⁴
Arrest warrant	Pre-Trial Chamber I issued a warrant of arrest for Lubanga, under seal, on 10 February 2006. Warrant unsealed on 17 March 2006. ⁴¹⁵
Transfer to ICC custody	Arrested by the Congolese authorities, surrendered to the Court and transferred to the ICC Detention Centre on 16 and 17 March 2006. ⁴¹⁶
Confirmation of charges	Three counts of war crimes were confirmed against Lubanga by Pre-Trial Chamber I on 29 January 2007. ⁴¹⁷ Sexual violence and gender-based crimes were not among the charges included in the Prosecution case. ⁴¹⁸
Trial proceedings	Trial commenced on 26 January 2009. ⁴¹⁹ On 14 March 2012, Trial Chamber I issued a unanimous verdict convicting Lubanga, as a co-perpetrator under Article 25(3)(a) of the Statute, of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities from early September 2002 to 13 August 2003. ⁴²⁰
Sentencing and reparations	Trial Chamber I sentenced Lubanga to a total of 14 years' imprisonment on 10 July 2012. Six years and four months were deducted from this sentence for the time already spent in detention since his surrender to the Court in March 2006. ⁴²¹ Trial Chamber I issued its Decision on the Principles to be Applied to Reparations for Victims on 7 August 2012. ⁴²²
Status of proceedings	Judgment, Sentence and Reparations decisions are all currently on appeal. At the time of writing this Report, the Appeals Chamber had not yet issued decisions on these appeals. ⁴²³ The appeals proceedings are discussed in detail in the Appeals Proceedings and Reparations sections of this Report. Lubanga remains in ICC custody.

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

415 ICC-01/04-01/06-2, p 5.

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

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

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

419 ICC-PIDS-CIS-DRC-01-011/14_Eng.

420 ICC-01/04-01/06-2842, para 1358. While the Trial Chamber delivered a unanimous verdict, two judges appended separate and dissenting opinions. ICC-01/04-01/06-2842, para 1364. For a more detailed description of the Lubanga Trial Judgment, see *Gender Report Card 2012*, p 132-163.

421 ICC-01/04-01/06-2901, paras 107-108. For a more detailed description of the Lubanga Sentencing decision, see *Gender Report Card 2012*, p 198-205.

422 ICC-01/04-01/06-2904. For a more detailed description of the Lubanga Reparations decision, see *Gender Report Card 2012*, p 206-223.

423 For more information about the Lubanga appeals proceedings, see *Gender Report Card 2013*, p 164-169.

The Prosecutor v. Germain Katanga

Katanga, a Congolese national, was alleged to be a former commander of the Ituri-based Ngiti militia from Walendu-Bindi, also known at the time of the alleged crimes as the FRPI. Originally, this case was joined with that of Ngudjolo. The case against Katanga and Ngudjolo constituted the ICC's second case and led to the second trial arising from the DRC Situation.

Scope of charges	Crimes allegedly committed during and in the aftermath of a 24 February 2003 attack on the village of Bogoro in the Ituri district, DRC. ⁴²⁴
Arrest warrant	Pre-Trial Chamber I issued an arrest warrant for Katanga, under seal, on 2 July 2007. Warrant unsealed on 18 October 2007. ⁴²⁵
Transfer to ICC custody	Surrendered to the Court by the Congolese authorities and transferred to the ICC Detention Centre on 17 October 2007. ⁴²⁶
Confirmation of charges	On 10 March 2008, Pre-Trial Chamber I joined the cases against Katanga and Ngudjolo. ⁴²⁷ Seven counts of war crimes and three counts of crimes against humanity were confirmed against Katanga and Ngudjolo by Pre-Trial Chamber I on 30 September 2008. ⁴²⁸ This was the first time that charges for sexual and gender-based crimes were confirmed by an ICC Pre-Trial Chamber.
Trial proceedings	Trial commenced on 24 November 2009. ⁴²⁹ On 21 November 2012, Trial Chamber II issued a unanimous decision, severing the case against Ngudjolo and Katanga. ⁴³⁰ On 7 March 2014, a majority of Trial Chamber II issued a verdict, convicting Katanga as an accessory under Article 25(3)(d) of the Statute for the war crimes of directing an attack against a civilian population, pillaging, destruction of property, as well as murder as both a war crime and a crime against humanity. Katanga was unanimously acquitted as an accessory under Article 25(3)(d) of the Statute for rape and sexual slavery as war crimes and crimes against humanity. He was also acquitted as a direct co-perpetrator under Article 25(3)(a) of the Statute for the war crime of using child soldiers. ⁴³¹ The Trial Judgment is discussed in detail in the Trial Proceedings section of this Report.

case continues next page

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

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

426 ICC-01/04-01/07-717, para 42.

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

428 ICC-01/04-01/07-717, p 209-212.

429 ICC-PIDS-CIS-DRC-03-010/14_Eng.

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

431 ICC-01/04-01/07-3436, p 709-710. For more information about the Katanga trial proceedings, see *Gender Report Card 2012*, p 224-247; *Gender Report Card 2011*, p 225-233. See also *Gender Report Card 2013*, p 92-104.

The Prosecutor v. Germain Katanga continued

Sentencing and reparations Trial Chamber II sentenced Katanga to a total of 12 years' imprisonment on 23 May 2014. Six years and eight months were deducted from his sentence for the time already spent in detention since 18 September 2007.⁴³² The Sentencing decision is discussed in detail in the **Trial Proceedings** section of this Report. On 27 August 2014, a newly constituted Trial Chamber issued the first order relating to reparations in the case. An update on the reparations proceedings is provided in the **Reparations** section of this Report.

Status of proceedings On 25 June 2014, the Prosecution and Defence filed notices discontinuing their respective appeals of the Judgment.⁴³³ Case currently in the reparations phase. Katanga remains in ICC custody.

432 ICC-01/04-01/07-3484, paras 170-170 [sic].

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

The Prosecutor v. Mathieu Ngudjolo Chui

Ngudjolo, a Congolese national, was alleged to be a former commander of the Lendu combatants from Bedu-Ezekere, later known as the FNI. Originally, this case was joined with that of Katanga. The case against Katanga and Ngudjolo constituted the ICC's second case and led to the second trial arising from the DRC Situation.

Scope of charges	Crimes allegedly committed during and in the aftermath of a 24 February 2003 attack on the village of Bogoro in the Ituri district, DRC. ⁴³⁴
Arrest warrant	Pre-Trial Chamber I issued an arrest warrant, under seal, for Ngudjolo on 6 July 2007. Warrant unsealed on 7 February 2008. ⁴³⁵
Transfer to ICC custody	Arrested and surrendered to the Court by the Congolese authorities on 6 February 2008. ⁴³⁶ Transferred to the ICC Detention Centre the following day. ⁴³⁷
Confirmation of charges	On 10 March 2008, Pre-Trial Chamber I joined the cases against Katanga and Ngudjolo. ⁴³⁸ Seven counts of war crimes and three counts of crimes against humanity were confirmed against Katanga and Ngudjolo by Pre-Trial Chamber I on 26 September 2008. ⁴³⁹ This was the first time that charges for sexual and gender-based crimes were confirmed by an ICC Pre-Trial Chamber.
Trial proceedings	Trial commenced on 24 November 2009. ⁴⁴⁰ On 21 November 2012, Trial Chamber II issued a unanimous decision severing the cases against Ngudjolo and Katanga. ⁴⁴¹ On 18 December 2012, Trial Chamber II acquitted Ngudjolo, as an indirect co-perpetrator under Article 25(3)(a) of the Statute, for the war crimes of wilful killings, attacks against a civilian population, destruction of property, pillaging, sexual slavery, rape, and use of child soldiers, as well as of the crimes against humanity of sexual slavery and rape. The Chamber accordingly ordered the Registrar to take the necessary measures for his immediate release. ⁴⁴²
Status of proceedings	Ngudjolo was released from ICC custody on 21 December 2012. Judgment is currently on appeal. ⁴⁴³

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

435 ICC-01/04-02/07-1-tENG, p 7.

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

437 ICC-PIDS-CIS-DRC2-06-003/14_Eng.

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

439 ICC-01/04-01/07-717, p 209-212.

440 ICC-PIDS-CIS-DRC2-06-003/14_Eng.

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

442 ICC-01/04-02/12-3-tENG, p 197. For more information about the Ngudjolo trial proceedings, see *Gender Report Card 2012*, p 224-247; *Gender Report Card 2011*, p 225-233. See also *Gender Report Card 2013*, p 89-91.

443 For more information about the Ngudjolo appeals proceedings, see *Gender Report Card 2013*, p 170-171.

The Prosecutor v. Bosco Ntaganda

Born in Rwanda, Ntaganda is allegedly the former Deputy Chief of Staff and Commander of Operations of the FPLC armed group.⁴⁴⁴ Following the issuance of his arrest warrant, he became the first suspect to voluntarily surrender into the Court's custody.

Scope of charges	Crimes allegedly committed in the Ituri district, DRC between on or about 6 August 2002 and 27 May 2003. ⁴⁴⁵
Arrest warrants	Pre-Trial Chamber I issued a warrant of arrest for Ntaganda, under seal, on 22 August 2006. Warrant unsealed on 28 April 2008. ⁴⁴⁶ Pre-Trial Chamber II issued a second arrest warrant on 13 July 2012. ⁴⁴⁷
Transfer to ICC custody	Voluntarily surrendered to the Court on 22 March 2013. ⁴⁴⁸
Confirmation of charges	Pre-Trial Chamber II confirmed all charges against Ntaganda on 9 June 2014, including: 13 counts of war crimes (murder and attempted murder; attacking civilians; rape and sexual slavery of civilians and child soldiers; pillaging; displacement of civilians; attacking protected objects; destruction of property; and the enlistment, conscription and use of child soldiers under the age of 15 years to participate actively in hostilities) and five counts of crimes against humanity (murder and attempted murder; rape and sexual slavery of civilians; persecution; and forcible transfer of population). Ntaganda is charged under the alternative modes of liability of direct perpetration and indirect co-perpetration under Article 25(3)(a) of the Statute; ordering or inducing under Article 25(3)(b) of the Statute; contributing to the commission or attempted commission in any other way under Article 25(3)(d) of the Statute; and acting as a military commander under Article 28 of the Statute. ⁴⁴⁹ This marks the first time in international criminal law that acts of sexual violence committed by a senior military figure against child soldiers in his own militia group and under his command have been confirmed. The Confirmation of Charges decision against Ntaganda is analysed in the Charges for Gender-based Crimes section of this Report.
Status of proceedings	Defence sought leave to appeal the Confirmation of Charges decision. ⁴⁵⁰ On 4 July 2014, the Pre-Trial Chamber rejected the Defence application requesting leave to appeal. ⁴⁵¹ At the time of writing this Report, the commencement of trial was scheduled for 2 June 2015. ⁴⁵² Ntaganda remains in ICC custody.

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

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

446 ICC-01/04-02/06-2-Anx-tENG, p 5.

447 ICC-01/04-02/06-36-Red, p 37.

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

449 ICC-01/04-02/06-309, paras 12, 31, 36, 74, 97 and p 63. For more information about the development of the Ntaganda case and charges for gender-based crimes, see *Gender Report Card 2013*, p 69-71.

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

451 ICC-01/04-02/06-322, p 14.

452 ICC-01/04-02/06-382, p 9.

The Prosecutor v. Callixte Mbarushimana

Mbarushimana, a Rwandan national, was alleged to have been the former Executive Secretary of the armed group FDLR and member of the FDLR's Executive Committee and Steering Committee.⁴⁵³ This was the first case to arise from investigations in the North and South Kivu provinces. However, as the Court subsequently declined to confirm the charges against Mbarushimana, the case never proceeded to trial.

Scope of charges	Crimes allegedly committed during the armed conflict in North and South Kivu, DRC, between about 20 January 2009 and 31 December 2009. ⁴⁵⁴
Arrest warrant	Pre-Trial Chamber I issued a warrant of arrest for Mbarushimana, under seal, on 28 September 2010. Warrant unsealed on 11 October 2010. ⁴⁵⁵
Transfer to ICC custody	Arrested in Paris on 11 October 2010 and transferred to the ICC Detention Centre on 25 January 2011. ⁴⁵⁶
Confirmation of charges	On 16 December 2011, the majority of Pre-Trial Chamber I declined to confirm all charges against Mbarushimana, including: eight counts of war crimes (attack against a civilian population; murder; mutilation; cruel treatment; rape; torture; destruction of property and pillaging) and five counts of crimes against humanity (murder; inhumane acts; rape; torture and persecution). It also ordered the Registry to make the necessary arrangements for his release. ⁴⁵⁷ Mbarushimana was alleged to be responsible for contributing to the commission of the crimes in any other way pursuant to Article 25(3)(d) of the Statute. ⁴⁵⁸ Gender-based crimes constituted eight out of the 13 charges. ⁴⁵⁹
Status of proceedings	Released on 23 December 2011. ⁴⁶⁰ On 5 May 2012, the Appeals Chamber dismissed the Prosecution appeal of the Confirmation of Charges decision. ⁴⁶¹

453 ICC-01/04-01/10-311-AnxA-Red, paras 1-2, 131. ICC-01/04-01/10-465-Red, para 295.

454 ICC-01/04-01/10-311-AnxA-Red, p 43-48

455 ICC-01/04-01/10-2, p 8. For a more detailed analysis of the Mbarushimana Arrest Warrant, see *Gender Report Card 2010*, p 94-97.

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

457 ICC-01/04-01/10-465-Red, paras 108, 242 and p 149.

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

459 For a more detailed description of the Mbarushimana Confirmation of Charges decision and hearing, see *Gender Report Card 2012*, p 116-123; *Gender Report Card 2011*, p 150-155.

460 ICC-PIDS-CIS-DRC-04-003/11_Eng.

461 ICC-01/04-01/10-514, para 69.

The Prosecutor v. Sylvestre Mudacumura

Mudacumura was born in Rwanda and is alleged to be the Supreme Commander of the Army for the FDLR armed group.⁴⁶² Following the Mbarushimana case, this is the second case to arise from investigations in the Kivus.

Scope of charges	Crimes allegedly committed during an armed conflict in the North and South Kivu provinces of the DRC, between 20 January 2009 and end of September 2010. ⁴⁶³
Arrest warrant	On 31 May 2012, Pre-Trial Chamber II initially declined to issue an arrest warrant for Mudacumura due to lack of specificity in the Prosecution request. ⁴⁶⁴ Following the submission of a second request by the Prosecution, Pre-Trial Chamber II issued an arrest warrant on 13 July 2012 against Mudacumura for his alleged responsibility under Article 25(3) (b) of the Statute for ordering, soliciting or inducing nine counts of war crimes, namely: murder; mutilation; cruel treatment; torture; outrages upon personal dignity; attacks against the civilian population; pillaging; rape; and destruction of property. ⁴⁶⁵
Status of proceedings	Execution of the Arrest Warrant is still pending. Mbarushimana remains at large.

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

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

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

465 ICC-01/04-01/12-1-Red, p 28-29. For a more detailed analysis of the Mudacumura Arrest Warrant, see *Gender Report Card 2012*, p 123-128.

Uganda

The Situation in Uganda was referred to the ICC by the Ugandan Government in December 2003, resulting in the first referral by a State Party to the Rome Statute to be received by the Court.⁴⁶⁶ A formal investigation was subsequently opened on 29 July 2004, which has focused primarily on the activities of the armed group, the LRA.⁴⁶⁷

There is currently one case before the ICC within the Uganda Situation. In 2005, investigations by the Prosecution prompted the Court to issue arrest warrants against the following five individuals: Joseph Kony (Kony), Vincent Otti (Otti), Raska Lukwiya (Lukwiya), Okot Odhiambo (Odhiambo) and Dominic Ongwen (Ongwen). Pending the arrest or surrender of these suspects, however, proceedings within the Situation remain relatively inactive.

466 'ICC - President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', *ICC Press Release*, ICC-20040129-44, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx>.

467 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda', *OTP Press Release*, ICC-OTP-20040729-65, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20nothern%20uganda.aspx>.

The Prosecutor v. Joseph Kony et al

The five suspects in this case are Ugandan nationals, believed to hold or to have held senior leadership positions within the LRA. They are alleged to be responsible for a total of 86 counts of war crimes and crimes against humanity.

While LRA activity has decreased within the territory, attempts to locate and capture Kony or the other four ICC suspects have been unsuccessful. Credible sources suggest that Kony and other senior LRA commanders have recently returned to seek refuge in the Sudanese-controlled areas of the Kafia Kingi enclave, on the border between the CAR, South Sudan and Sudan. The Government of Sudan, however, has denied these allegations.⁴⁶⁸ Recent reports by Ugandan military officials have also advised that Kony may have turned over command of the armed group to one of his sons, Salim Saleh.⁴⁶⁹

Scope of charges	Crimes allegedly committed by members of the LRA from July 2002 to 2004. ⁴⁷⁰
Arrest warrants	On 8 July 2005, Pre-Trial Chamber II issued warrants of arrest, under seal, for Kony, Otti, Odhiambo, Ongwen and Lukwiya. The Warrants were unsealed on 13 October 2005. ⁴⁷¹ The suspects are alleged to be responsible for 33, 32, ten, seven and four counts of war crimes and crimes against humanity, respectively, by means of ordering or inducing the commission of the crimes, under Article 25(3)(b) of the Statute. Kony is also alleged to be responsible as a direct perpetrator under Article 25(3)(a) of the Statute. ⁴⁷² Kony and Otti are alleged to be responsible for sexual slavery as a war crime and crime against humanity and rape as a war crime. Additionally, Kony is alleged to be responsible for the crime of rape as a crime against humanity. ⁴⁷³
Status of proceedings	The execution of the Arrest Warrants for Kony and Ongwen are pending, and both suspects remain at large. On 11 July 2007, proceedings against Lukwiya were terminated following confirmation of his death. ⁴⁷⁴ Later that year, the OTP also notified Pre-Trial Chamber II of information it had received suggesting Otti's death. ⁴⁷⁵ Most recently, media and other sources have reported that Odhiambo may have succumbed to injuries and died in late 2013. ⁴⁷⁶ However, the ICC has not confirmed this information. At the time of writing this Report, the ICC website continues to treat both Otti and Odhiambo as suspects at large.

468 UN, 'Report of the Secretary-General on the activities of the United Nations Regional Office for Central Africa and on the Lord's Resistance Army-affected areas', 6 May 2014, S/2014/319, para 52.

469 'African warlord Kony makes son his deputy', *Associated Press*, 20 May 2014, available at <<https://news.yahoo.com/african-warlord-kony-makes-son-deputy-103009383.html%3E>>.

470 ICC-02/04-01/05-53, para 10.

471 ICC-02/04-01/05-53; ICC-02/04-01/05-54; ICC-02/04-01/05-56; ICC-02/04-01/05-57; ICC-02/04-01/05-55.

472 ICC-PIDS-CIS-UGA-001-002/14_Eng.

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

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

475 ICC-02/04-01/05-258, para 1.

476 'Ugandan military says senior LRA commander may have been killed', *Reuters*, 17 February 2014, available at <<http://www.trust.org/item/20140217174359-r2pxb/?source=search>>. See also UN, 'Statement by the President of the Security Council', 12 May 2014, S/PRST/2014/8, p 2.

Central African Republic

Following an outbreak of violence between 2002 and 2003, the Government of the CAR referred the Situation on its territory to the ICC on 21 December 2004.⁴⁷⁷ On 22 May 2007, the Prosecutor made public the decision to open a formal investigation into the commission of serious crimes during this period, which included a high incidence of rape, reported at the peak of the violence.⁴⁷⁸ The OTP has also continued to monitor crimes committed on the territory since 2005, particularly in the northern part of the country.⁴⁷⁹

As discussed above in the Preliminary Examinations sub-section of this Report, on 24 September 2014, the Prosecutor announced the opening of a new Situation in the CAR (the CAR II), with respect to war crimes and crimes against humanity allegedly committed since 2012 by both the Séléka and anti-Balaka groups.⁴⁸⁰

There are currently two cases before the ICC arising from the 2004 CAR Situation. The main case relates directly to the Prosecution investigations of the 2002-2003 violence, which led to an arrest warrant issued against the accused, Jean-Pierre Bemba Gombo (Bemba). As his trial progressed, a new set of allegations were brought against Bemba, along with four individuals associated with his defence, under Article 70 of the Statute. These allegations relate to the commission of offences against the administration of justice, including corruptly influencing witnesses before the ICC and knowingly presenting false or forged evidence.⁴⁸¹ Proceedings in both cases are ongoing and progressing concurrently.

477 'Prosecutor receives referral concerning Central African Republic', *OTP Press Release*, ICC-OTP-20050107-86, 2005, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx>. See also ICC-01/05-1, p 1.

478 'Prosecutor opens investigation in the Central African Republic', *OTP Press Statement*, ICC-OTP-20070522-220, 22 May 2007, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2007/Pages/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic.aspx>.

479 OTP, 'Background information on the situation in Central African Republic', 22 May 2007, ICC-OTP-BN-20070522-220-A_EN.

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

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

The Prosecutor v. Jean-Pierre Bemba Gombo

Bemba, a Congolese national, is alleged to be the President of the armed group MLC and Commander-in-Chief of the MLC's military wing, the ALC.⁴⁸² He is also the first accused before the ICC to be charged under the doctrine of command responsibility, pursuant to Article 28(a) of the Statute.

Scope of charges	Crimes allegedly committed by MLC soldiers in the CAR from approximately 26 October 2002 to 15 March 2003. ⁴⁸³
Arrest warrant	Pre-Trial Chamber III issued a warrant of arrest against Bemba, under seal, on 23 May 2008. ⁴⁸⁴ Warrant unsealed on 24 May 2008. On 10 June 2008, a new arrest warrant was issued to replace the one previously issued. ⁴⁸⁵
Transfer to ICC custody	Bemba was arrested by the Belgian authorities on 24 May 2008. He was surrendered to the Court and transferred to the ICC Detention Centre on 3 July 2008. ⁴⁸⁶
Confirmation of charges	On 15 June 2009, Pre-Trial Chamber II unanimously confirmed the following charges: three counts of war crimes (murder; rape and pillaging) and two counts of crimes against humanity (murder and rape). Bemba was charged as a military commander under Article 28 of the Statute. ⁴⁸⁷
Trial proceedings	Trial commenced on 22 November 2010 before Trial Chamber III. ⁴⁸⁸ In March 2012, the Prosecution called its final witness in the case. The Defence case began in August 2012 and concluded in November 2013. ⁴⁸⁹
Status of proceedings	At the time of writing this Report, oral closing arguments were scheduled to begin during the week of 10 November 2014. ⁴⁹⁰ Bemba remains in ICC custody.

482 ICC-01/05-01/08-424, paras 455-458.

483 ICC-01/05-01/08-424, para 478.

484 ICC-01/05-01/08-1-tENG, p 8.

485 ICC-01/05-01/08-15-tENG, p 9-10.

486 ICC-01/05-01/08-424, paras 2, 4.

487 ICC-01/05-01/08-424, p 184-185.

488 'The Prosecutor v. Jean-Pierre Bemba Gombo', ICC website, available at <http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/Pages/case%20the%20prosecutor%20v%20jean-pierre%20bemba%20gombo.aspx>.

489 For a detailed description of the Bemba case and trial proceedings, including witness testimony, see *Gender Report Card 2011*, p 234-253; *Gender Report Card 2012*, p 252-261; *Gender Report Card 2013*, p 105-115.

490 'Bemba case: Trial Chamber III to hear witness P-169; closing oral statements in November 2014', ICC Press Release, ICC-CPI-20141002-PR1046, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1046.aspx>.

The Prosecutor v. Jean-Pierre Bemba Gombo et al

Several charges for offences against the administration of justice were brought against Bemba and the following four individuals: Defence Team Lead Attorney, Aimé Kilolo-Musamba (Kilolo); Defence Team Case Manager, Jean-Jacques Mangenda Kabongo (Mangenda); Congolese Parliament Member, Fidèle Babala Wandu (Babala); and Defence Team Witness, Narcisse Arido (Arido). This case represents one of the two Article 70 cases currently before the Court.⁴⁹¹ All five suspects are nationals of the DRC and are currently in ICC custody.

Scope of charges	Offences allegedly committed against the administration of justice, under Article 70 of the Statute, between January 2012 and November 2013 in connection with the Bemba trial. ⁴⁹²
Arrest warrant	Pre-Trial Chamber II issued an arrest warrant, under seal, for Bemba, Kilolo, Mangenda, Babala and Arido on 20 November 2013. ⁴⁹³ Warrant made public on 28 November 2013.
Transfer to ICC custody	While Bemba was served the Arrest Warrant in the ICC Detention Centre where he was already detained, the remaining four individuals were arrested by the authorities of Belgium, the Netherlands, the DRC and France, respectively between 23 and 24 November 2013. ⁴⁹⁴ Babala and Kilolo were surrendered to the Court's custody and transferred to the ICC Detention Centre on 25 November 2013. On 4 December 2013, Mangenda was transferred to ICC custody, while Arido was transferred on 18 March 2014. ⁴⁹⁵
Status of proceedings	On 30 June 2014 the Prosecution filed the DCC against the five individuals, along with the LoE. ⁴⁹⁶ All suspects, apart from Bemba, were granted interim release from ICC custody in October 2014. An update on the Article 70 proceedings, including an analysis of the DCC, is included in the Trial Proceedings section of this Report.

491 The other Article 70 case is that against Walter Barasa in the Kenya Situation.

492 ICC-01/05-01/13-526-AnxB1-Red, paras 20, 147.

493 ICC-01/05-01/13-1-Red2-tENG, p 15.

494 ICC-01/05-01/13-526-AnxB1-Red, para 5.

495 'The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido', *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/Pages/default.aspx>.

496 ICC-01/05-01/13-526.

Darfur, Sudan

Taking note of a report by the International Commission of Inquiry on Violations of International and Humanitarian Law and Human Rights Law in Darfur, the UN Security Council determined that the conflict in Darfur, Sudan posed ‘a threat to international peace and security’.⁴⁹⁷ Acting under Chapter VII of the UN Charter and pursuant to Article 13(b) of the Statute, the Security Council consequently referred the Situation in Darfur to the ICC Prosecutor on 31 March 2005.⁴⁹⁸ Upon receipt of the referral, the Prosecutor opened a formal investigation into the Situation in Darfur on 6 June 2005.⁴⁹⁹ This was the first Security Council referral of a Situation to the ICC and the first formal investigation into a Situation on the territory of a non-State Party.⁵⁰⁰

There are currently five cases before the ICC in the Darfur Situation, involving seven individuals. The Court has issued summonses to appear for the following three individuals: Bahar Idriss Abu Garda (Abu Garda); Abdallah Banda Abakaer Nourain (Banda); and Saleh Mohammed Jerbo Jamus (Jerbo). Each of these suspects responded to his respective summons and voluntarily appeared before the Court. Proceedings against Jerbo, however, were subsequently terminated in October 2013, following evidence suggesting his death.

Additionally, the Court issued public warrants of arrest for the following four individuals: Ahmad Muhammed Harun (Harun); Ali Muhammad Ali Abd-Al-Rahman (Kushayb); President Omar Hassan Ahmad Al Bashir (Al Bashir); and Abdel Raheem Muhammad Hussein (Hussein). At the time of writing this Report, each of these warrants remains outstanding.⁵⁰¹

497 UN Security Council, ‘Resolution 1593 (2005)’, 31 March 2005, S/Res/1593 (2005), p 1.

498 UN Security Council, ‘Resolution 1593 (2005)’, 31 March 2005, S/Res/1593 (2005), para 1.

499 ‘The Prosecutor of the ICC opens investigation in Darfur’, *OTP Press Release*, ICC-OTP-0606-104, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur.aspx>.

500 Regarding Security Council referrals, the Security Council has so far referred a total of two Situations to the ICC: Darfur (2005) and Libya (2011), both non-States Parties to the ICC.

501 For more information on the issue of outstanding arrest warrants and non-cooperation in the Darfur Situation, see *Gender Report Card 2011*, p 156-159; *Gender Report Card 2012*, p 179-187.

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

Harun is a Sudanese national, who has held several senior government positions. Between about April 2003 to about September 2005, he was the Minister of State for the Interior of the Government of Sudan, and since 2006, he has served as the Minister of State for Humanitarian Affairs of Sudan.⁵⁰² Kushayb is also a Sudanese national and alleged to be one of the top commanders of the Janjaweed Militia.⁵⁰³

Scope of charges	Crimes allegedly committed in Darfur, Sudan between August 2003 and March 2004. ⁵⁰⁴
Arrest warrants	Pre-Trial Chamber I issued arrest warrants for Harun and Kushayb on 27 April 2007. Harun is allegedly criminally responsible for ordering, soliciting or inducing under Article 25(3)(b) of the Statute and for contributing in any other way within the meaning of Article 25(3)(d) of the Statute to the commission of 22 counts of war crimes and 20 counts of crimes against humanity. Kushayb is allegedly criminally responsible under Articles 25(3)(a) and 25(3)(d) of the Statute for 28 counts of war crimes and 22 counts of crimes against humanity. ⁵⁰⁵ Among these charges, both suspects are alleged to have committed gender-based crimes, including rape as a war crime and crime against humanity, as well as outrages upon personal dignity and persecution by means of sexual violence as crimes against humanity. ⁵⁰⁶
Status of proceedings	Execution of the Arrest Warrants are pending. Harun and Kushayb remain at large.

502 ICC-02/05-01/07-2, p 16.

503 ICC-02/05-01/07-3-Corr, p 17.

504 ICC-02/05-01/07-2, p 3; ICC-02/05-01/07-3-Corr, p 5-6.

505 In this case, in relation to each crime charged, the Prosecution included a count corresponding to each location in which the crime allegedly occurred. This accounts for the large number of counts represented in the Arrest Warrant.

506 ICC-02/05-01/07-2, p 6-15; ICC-02/05-01/07-3-Corr, p 6-16.

The Prosecutor v. Omar Hassan Ahmad Al Bashir

Al Bashir, a Sudanese national, has been the President of Sudan since 16 October 1993 and is the first sitting Head of State against whom an arrest warrant was issued by the ICC.⁵⁰⁷

Scope of charges	Crimes allegedly committed in Darfur, Sudan between 2003 and 2008. ⁵⁰⁸
Arrest warrant	Pre-Trial Chamber I issued its first arrest warrant for Al Bashir on 4 March 2009. A second warrant was issued on 12 July 2010. ⁵⁰⁹ Al Bashir is allegedly criminally responsible as an indirect perpetrator or indirect co-perpetrator under Article 25(3)(a) of the Statute for two counts of war crimes (attacks against a civilian population and pillaging) and five counts of crimes against humanity (murder; extermination; forcible transfer; torture and rape), as well as three counts of genocide, including by killing, causing serious bodily or mental harm and deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction. ⁵¹⁰
Status of proceedings	Execution of Arrest Warrant is pending. Al Bashir remains at large.

507 ICC-02/05-01/09-95, p 9.

508 ICC-02/05-01/09-1, p 6-7; ICC-02/05-01/09-95, p 8.

509 ICC-02/05-01/09-1, p 8; ICC-02/05-01/09-95, p 9.

510 ICC-02/05-01/09-1, p 7-8; ICC-02/05-01/09-95, p 8.

The Prosecutor v. Bahar Idriss Abu Garda

Abu Garda, a Sudanese national, is alleged to have been the Chairman and General Coordinator of Military Operations of the armed group URF since January 2008.⁵¹¹ Prior to this, he allegedly served as Vice President, the second-in-command, and the Secretary General of the JEM.⁵¹²

Scope of charges	Crimes allegedly committed during an attack carried out on 29 September 2007, against the AMIS at the MGS Haskanita in the locality of Um Kadada, North Darfur, Sudan. ⁵¹³
Summons to appear	Pre-Trial Chamber I issued a summons to appear, under seal, for Abu Garda on 7 May 2009. ⁵¹⁴ Summons to Appear unsealed on 17 May 2009. ⁵¹⁵
Transfer to ICC custody	Abu Garda voluntarily appeared before the Court on 18 May 2009. ⁵¹⁶
Confirmation of charges	On 8 February 2010, Pre-Trial Chamber I declined to confirm all charges against Abu Garda. He was allegedly responsible as a co-perpetrator or indirect co-perpetrator under Article 25(3)(a) of the Statute for three counts of war crimes, including violence to life in the form of murder; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission and pillaging. ⁵¹⁷
Status of proceedings	On 23 April 2010, Pre-Trial Chamber I declined the Prosecution application for leave to appeal the Confirmation of Charges decision. ⁵¹⁸

511 ICC-02/05-02/09-2, p 9. ICC-02/05-02/09-91-Red, para 92.

512 ICC-02/05-02/09-243-Red, para 2.

513 ICC-02/05-02/09-91-Red, para 21 and p 32-33.

514 ICC-02/05-02/09-2, p 9.

515 'The Prosecutor v. Bahar Idriss Abu Garda', *ICC website*, available at <http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/Pages/icc02050209.aspx>.

516 ICC-02/05-02/09-243-Red, para 5.

517 ICC-02/05-02/09-243-Red, para 21 and p 97. For a more detailed analysis of the Abu Garda Confirmation of Charges decision, see *Gender Report Card 2010*, p 109-111.

518 ICC-02/05-02/09-267, p 15.

The Prosecutor v. Abdallah Banda Abakaer Nourain

Banda, a Sudanese national, was alleged to be the military Commander of the JEM Collective Leadership, one of the components of the URF.⁵¹⁹ Following Abu Garda, this is the second case arising from the investigations into the September 2007 attacks against AMIS.

Scope of charges	Crimes allegedly committed during an attack carried out on 29 September 2007, against AMIS at the MGS Haskanita in the locality of Um Kadada, North Darfur, Sudan. ⁵²⁰
Summons to appear	Pre-Trial Chamber I issued a summons to appear, under seal, for Banda on 27 August 2009. Summons to appear unsealed on 15 June 2010. ⁵²¹ On 11 September 2014, Trial Chamber IV issued a warrant for Banda's arrest. ⁵²²
Transfer to ICC custody	Banda voluntarily appeared before the Court on 17 June 2010. ⁵²³
Confirmation of charges	On 7 March 2011, Pre-Trial Chamber I unanimously confirmed the charges against Banda. He was charged as a direct co-perpetrator under Article 25(3)(a) of the Statute with three counts of war crimes, including violence to life in the form of murder; intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission and pillaging. ⁵²⁴
Trial proceedings	The case was initially joined with the proceedings against Jerbo. However, Trial Chamber IV terminated the proceedings against Jerbo on 4 October 2013, following evidence suggesting his death. ⁵²⁵ Trial proceedings against Banda were set to commence on 5 May 2014 but the trial date was vacated. ⁵²⁶
Status of proceedings	Banda remains at large, pending the start of trial proceedings. At the time of writing this Report, the trial start date was scheduled for 18 November 2014. ⁵²⁷

519 ICC-02/05-03/09-3, para 17.

520 ICC-02/05-03/09-121-Corr-Red, p 4-5.

521 ICC-02/05-03/09-3, p 8.

522 ICC-02/05-03/09-606, para 26(iii).

523 ICC-02/05-03/09-121-Corr-Red, para 13.

524 ICC-02/05-03/09-121-Corr-Red, paras 5, 162-163 and p 74.

525 ICC-02/05-03/09-512-Red, p 12.

526 ICC-02/05-03/09-564-Red, paras 1, 13(i).

527 ICC-02/05-03/09-590-Red, para 37(a).

The Prosecutor v. Abdel Raheem Muhammad Hussein

Hussein is a Sudanese national and the current Minister of National Defence. He is alleged to have committed crimes in his capacity as Minister of the Interior and Special Representative of the President in Darfur and as an influential member of the Government of Sudan.⁵²⁸

Scope of charges	Crimes allegedly committed in Darfur in 2003 and 2004. ⁵²⁹
Arrest warrant	Pre-Trial Chamber I issued an arrest warrant for Hussein on 1 March 2012. He is allegedly responsible as an indirect perpetrator or indirect co-perpetrator under Article 25(3)(a) of the Statute for six counts of war crimes (murder; attack against a civilian population; destruction of property; rape; pillaging; and outrages upon personal dignity), as well as seven counts of crimes against humanity (persecution; murder; forcible transfer; rape; other inhumane acts; imprisonment or severe deprivation of liberty; and torture). ⁵³⁰
Status of proceedings	Execution of the Arrest Warrant is pending. Hussein remains at large.

528 ICC-02/05-01/12-2, p 6; ICC-PIDS-CIS-SUD-05-002/14_Eng.

529 ICC-02/05-01/12-2, p 6-10.

530 ICC-02/05-01/12-2, p 6-10.

Kenya

In the aftermath of the violence surrounding the highly contested national elections of December 2007, the Prosecutor requested authorisation to open an investigation into the Kenya Situation. The request for authorisation was submitted to Pre-Trial Chamber II on 26 November 2009 and marked the first time that the Prosecutor used his *proprio motu* powers to initiate an investigation, pursuant to Article 15 of the Statute.⁵³¹ On 31 March 2010, the authorisation to proceed was granted, and the investigation was opened.⁵³² The investigation has since focused on crimes allegedly committed between 1 June 2005 and 26 November 2009 in the context of the PEV.

Pre-Trial Chamber II issued summonses to appear for a total of six suspects in two cases in March 2011. All suspects voluntarily appeared before the Court. However, the Pre-Trial Chamber confirmed charges against four of the six individuals.⁵³³ As discussed in the *Gender Report Card 2013*, the charges were later withdrawn against one accused, Francis Kirimi Muthaura (Muthaura).⁵³⁴ The charges were not confirmed against two suspects, Henri Kiprono Kosgey (Kosgey) and Mohammed Hussein Ali (Ali). At the time of writing this Report, three individuals in the two cases face charges arising out of the PEV, namely: Deputy President William Samoei Ruto (Ruto) and Joshua Arap Sang (Sang), both aligned with the ODM at the time of the PEV; and President Uhuru Muigai Kenyatta (Kenyatta), aligned with the PNU at the relevant time. Charges for gender-based crimes have only been brought in the case against Kenyatta.⁵³⁵ Additionally, on 2 October 2013, an arrest warrant was unsealed for Kenyan Journalist Walter Barasa (Barasa) for offences against the administration of justice under Article 70 of the Statute, relating to his alleged role in corruptly influencing witnesses in the Ruto and Sang case. According to the Arrest Warrant, Barasa is a former Prosecution intermediary in the context of the investigation in the Kenya Situation.⁵³⁶

531 ICC-01/09-3, para 114.

532 ICC-01/09-19-Corr, p 83.

533 The Pre-Trial Chamber did not confirm the charges against Kosgey and Ali. ICC-01/09-01/11-373, p 138; ICC-01/09-02/11-382-Red, para 427 and p 154.

534 *Gender Report Card 2013*, p 120-122.

535 While there were significant reports of sexual violence taking place in the context of the PEV, including materials presented by the Prosecution in the request to open an investigation in Kenya, the Prosecution only sought charges for gender-based crimes in the Kenyatta case. The charges were confirmed in relation to the commission of rape in or around Nakuru between 24 and 27 January 2008 and in or around Naivasha between 27 and 28 January 2008. Along with charges of rape, the Prosecution also presented evidence of forcible circumcision and penile amputation to support the charge of 'other forms of sexual violence'. However, in the decision issuing the Summons to Appear as well as in the Confirmation of Charges decision, the Pre-Trial Chamber recharacterised this evidence as 'other inhumane acts'. See *Gender Report Card 2013*, p 117; *Gender Report Card 2010*, p 122-124.

536 ICC-01/09-01/13-1-Red2, para 7.

The Prosecutor v. William Samoei Ruto and Joshua Arap Sang

Ruto and Sang are both Kenyan nationals. In 2013, Ruto was elected as Deputy President of Kenya. Sang is the Head of Operations at Kass FM, a Kenyan radio station.⁵³⁷ Both accused were allegedly aligned with the ODM at the time of the PEV. This case initially also included Kosgey.⁵³⁸

Scope of charges	Crimes allegedly committed during attacks in Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills between 30 December 2007 and 16 January 2008. ⁵³⁹
Summons to appear	Pre-Trial Chamber II issued a summons to appear for Ruto, Kosgey and Sang on 8 March 2011. ⁵⁴⁰
Transfer to ICC custody	Ruto, Kosgey and Sang voluntarily appeared before the Court on 7 April 2011. ⁵⁴¹
Confirmation of charges	On 23 January 2012, Pre-Trial Chamber II, by majority, confirmed three counts of crimes against humanity against both Ruto and Sang, including: murder; deportation or forcible transfer of population; and persecution. ⁵⁴² Ruto was charged as an indirect co-perpetrator under Article 25(3)(a) of the Statute and Sang was charged for having contributed to the commission of the crimes in any other way within the meaning of Article 25(3)(d) of the Statute. The Court declined to confirm the charges against Kosgey. ⁵⁴³
Trial proceedings	Trial commenced on 10 September 2013. ⁵⁴⁴
Status of proceedings	Trial hearings ongoing. ⁵⁴⁵ Ruto and Sang remain at liberty.

537 ICC-PIDS-CIS-KEN-01-012/13_Eng.

538 ICC-01/09-01/11-373, p 138.

539 ICC-01/09-01/11-373, paras 349, 367.

540 ICC-01/09-01/11-01, p 22-23.

541 ICC-01/09-01/11-373, para 4.

542 ICC-01/09-01/11-373, paras 349, 367 and p 138.

543 ICC-01/09-01/11-373, p 138.

544 ICC-PIDS-CIS-KEN-01-012/13_Eng.

545 For more information on the Ruto and Sang trial proceedings, see *Gender Report Card 2013*, p 130-135.

The Prosecutor v. Uhuru Muigai Kenyatta

Kenyatta, a Kenyan national, was allegedly aligned with the PNU at the time of the PEV. Following his success in the presidential election of March 2013, he became the first ICC suspect facing trial to be elected to the position of Head of State.

Scope of charges	Crimes allegedly committed in attacks in or around Nakuru and Naivasha between 24 and 28 January 2008. ⁵⁴⁶
Summons to appear	Pre-Trial Chamber II issued a summons to appear for Kenyatta, Muthaura and Ali on 8 March 2011. ⁵⁴⁷
Transfer to ICC custody	Kenyatta, Muthaura and Ali voluntarily appeared before the Court on 8 April 2011. ⁵⁴⁸
Confirmation of charges	On 23 January 2012, Pre-Trial Chamber II confirmed five counts of crimes against humanity against Kenyatta, including: murder; deportation or forcible transfer of population; rape; other inhumane acts; and persecution, including by means of rape and other inhumane acts. Kenyatta was charged as an indirect co-perpetrator under Article 25(3) (a) of the Statute. ⁵⁴⁹ Initially, Muthaura and Ali were also alleged to have committed crimes, but charges against Ali were not confirmed and charges against Muthaura were withdrawn. ⁵⁵⁰
Status of proceedings	On 18 March 2013, Trial Chamber V, by majority, granted the Prosecution request to withdraw the charges against Muthaura and ordered that the proceedings against him be terminated. ⁵⁵¹ This was the first time the Prosecution has withdrawn charges against an accused. At the time of writing this Report, the trial start date in the Kenyatta case, which had been scheduled for 7 October 2014, had been vacated. ⁵⁵² No new trial commencement date has been set. Kenyatta remains at liberty.

546 ICC-01/09-02/11-382-Red, para 428.

547 ICC-01/09-02/11-01, p 23.

548 ICC-01/09-02/11-382-Red, para 4.

549 ICC-01/09-02/11-382-Red, paras 428-429 and p 154.

550 ICC-01/09-02/11-382-Red, para 430 and p 154; ICC-01/09-02/11-687, para 12.

551 ICC-01/09-02/11-696, p 8. The decision to withdraw the charges against Muthaura is discussed in greater detail in Women's Initiatives for Gender Justice, *Legal Eye on the ICC eLetter*, June 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye6-13-FULL/LegalEye6-13.html#1>>.

552 ICC-01/09-02/11-954, p 8.

The Prosecutor v. Walter Osapiri Barasa

Barasa is a Kenyan national and a journalist. The case against him is the first of two Article 70 cases currently before the Court,⁵⁵³ and marks the first time that a public arrest warrant has been issued for offences against the administration of justice. The Arrest Warrant alleges that Barasa is a former intermediary for the Office of the Prosecutor in the context of the investigation in the Kenya Situation.⁵⁵⁴ At the time of writing this Report, the arrest warrant against Barasa remains outstanding.

Scope of charges	Offences allegedly committed against the administration of justice under Article 70 of the Statute between May and July 2013 in connection with the Ruto and Sang trial. ⁵⁵⁵
Arrest warrant	Pre-Trial Chamber II issued a warrant of arrest for Barasa, under seal, on 2 August 2013. Unsealed on 2 October 2013. Barasa is allegedly criminally responsible as a direct perpetrator for two counts of offences against the administration of justice for corruptly influencing two witnesses and alternatively, for attempting to corruptly influence these witnesses under Article 25(3)(f) of the Statute. He is also allegedly responsible for a third count of offences against the administration of justice for attempting to corruptly influence another witness under Article 25(3)(f) of the Statute. ⁵⁵⁶
Status of proceedings	Execution of the arrest warrant is pending. Barasa remains at large. ⁵⁵⁷

553 The second Article 70 case is that against Bemba *et al* in the CAR Situation.

554 ICC-01/09-01/13-1-Red2, para 7.

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

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

557 For more information about the Barasa Article 70 case, see *Gender Report Card 2013*, p 232-234.

National proceedings relating to sexual and gender-based violence

While only a limited number of criminal cases have been brought against alleged perpetrators of the PEV in national courts, civil society organisations have filed civil suits aimed at obtaining redress for the violations that took place during this period. One such suit has been filed on behalf of all victims of sexual and gender-based crimes committed during the violence. Specifically, on 20 February 2013, the Coalition on Violence Against Women, Independent Medico-Legal Unit, the Kenyan Section of the International Commission of Jurists, Physicians for Human Rights and eight victims of sexual violence filed a case in the High Court of Nairobi.⁵⁵⁸ The litigants have accused State agencies of failing to properly train and prepare police to protect civilians from sexual violence during the PEV, and the police in particular for refusing to document and investigate sexual violence claims, leading to obstruction and a miscarriage of justice.⁵⁵⁹

The first hearing in the case took place on 25 March 2014 in the High Court of Kenya in Nairobi, during which former Truth, Justice and Reconciliation Commission (TJRC) Chief Executive Officer, Patricia Nyaundi, testified as the first witness in the case. Nyaundi, who testified over a seven-day period, recalled that while working with the Federation of Women Lawyers in Kenya, women in distress called her during and immediately after the PEV and informed her that they had been raped by civilians and police officers and that they were unable to access medical care. She stated that the victims, through their testimonies, will demonstrate that as a result of sexual violence, they have contracted HIV, suffered permanent damage to their genitals and have been deserted by their spouses. She also stated that public reports from the Waki Commission, Human Rights Watch, TJRC, and the Kenya National Commission on Human Rights showed that the ‘response from the state organs was uncoordinated’ and ‘[t]he security organs were deployed, but did not offer security and instead perpetrated the violence’.⁵⁶⁰ Nyaundi testified that security organs had failed to document and preserve evidence, especially on sexual and gender-based violence during the chaos, and that the State had failed to offer reparations to the victims. She explained that several task forces had been set up to address the PEV, but that they have largely focused on arson and forceful evictions rather than sexual and gender-based violence. She noted that the multi-agency task force established by the office of the Director of Public Prosecutions had stated that there was insufficient evidence to undertake prosecutions of PEV cases. Nyaundi expressed

558 The Attorney General, Githu Muigai, and the Director of Public Prosecutions, Keriako Tobiko, opposed the case. In their separate responses filed at the High Court, they both submitted that the petition is ‘premised on generalities of exertions and does not specify factual happenings’. The Attorney General further stated that ‘many victims sought refuge and were offered protection and those who needed medical attention were attended to’, while the Director of Public Prosecution stated that ‘the petitioners have never filed any report to any police station, and their names do not appear among the 381 sexual offences reported and investigated’. ‘Githu, Tobiko oppose PEV case by 8 women’, *The Star*, 23 January 2014, available at <<http://www.the-star.co.ke/news/article-152025/githu-tobiko-oppose-pev-case-8-women>>.

559 The respondents in the case include the Independent Policing Oversight Authority, the Inspector General of the National Police Service, Ministers for Medical Services, the Attorney General and the Director of Public Prosecutions. See ‘Hearing of the PEV Sexual and Gender Based Violence case begins in Court’, *ICJ-Kenya*, 26 March 2014, available at <http://www.icj-kenya.org/index.php/media-centre/news/596-hearing-of-the-pev-sexual-gender-based-violence-case-begins-in-court?utm_source=CICC+Newsletters&utm_campaign=c3b951d5f2-3_28_14_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-c3b951d5f2-356530561&ct=t%283_28_14_GlobalJustice_Weekly%29>.

560 ‘Hearing of the PEV Sexual and Gender Based Violence case begins in Court’, *ICJ-Kenya*, April 2014, available at <http://www.icj-kenya.org/index.php/media-centre/news/596-hearing-of-the-pev-sexual-gender-based-violence-case-begins-in-court?utm_source=CICC+Newsletters&utm_campaign=c3b951d5f2-3_28_14_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-c3b951d5f2-356530561&ct=t%283_28_14_GlobalJustice_Weekly%29>.

shock that none of the officers who undertook incomplete investigations had to date been held to account for failing to perform their duties.⁵⁶¹

The Kenyan Government began its cross-examination of Nyaundi on 14 May 2014. During the cross-examination, lawyers questioned the strength of the Waki Commission's methods and findings and Nyaundi's views on Kenya's obligations to victims of sexual and gender-based violence under national and international law.⁵⁶²

Libya

The Situation in Libya was the second Situation referred to the Office of the Prosecutor by the UN Security Council. On 26 February 2011, the UN Security Council issued Resolution 1970,⁵⁶³ giving the ICC jurisdiction over the Situation in Libya, which is not an ICC State Party. The referral followed the 'repression of peaceful demonstrators' that began on 15 February 2011, demanding an end to the dictatorship regime of Muammar Mohammed Abu Minyar Gaddafi (Muammar Gaddafi). A formal investigation into the Situation was subsequently opened by the Prosecution on 3 March 2011.⁵⁶⁴

On 25 July 2014, Prosecutor Bensouda publicly expressed her 'great concern' regarding the increasing violence within the Libya Situation, particularly in light of recent reports of alleged attacks against the civilian population and civilian objects in Tripoli and Benghazi. In her statement, the Prosecutor reminded all parties involved of the ICC's jurisdiction over Libya and of the OTP policy to investigate and prosecute those who commit crimes within the territory, 'irrespective of their official status or affiliation'.⁵⁶⁵

At the time of writing this Report, the Court has issued arrests warrants for the following three individuals within the Libya Situation: Muammar Gaddafi, Saif Al-Islam Gaddafi (Gaddafi)⁵⁶⁶ and Abdullah Al-Senussi (Al-Senussi). In November 2011, the proceedings against Muammar Gaddafi were terminated, following the confirmation of his death.⁵⁶⁷

561 'Hearing of the PEV Sexual and Gender Based Violence case begins in Court', *ICJ-Kenya*, April 2014, available at <http://www.icj-kenya.org/index.php/media-centre/news/596-hearing-of-the-pev-sexual-gender-based-violence-case-begins-in-court?utm_source=CICC+Newsletters&utm_campaign=c3b951d5f2-3_28_14_GlobalJustice_Weekly&utm_medium=email&utm_term=0_68df9c5182-c3b951d5f2-356530561&ct=t%283_28_14_GlobalJustice_Weekly%29>.

562 'Expert Witness Says Kenyan Government Failed to Protect Victims of Sexual Violence', *OSJI Trial Monitor (Kenya)*, 19 August 2014, available at <http://www.ijmonitor.org/2014/08/expert-witness-says-kenyan-government-failed-to-protect-victims-of-sexual-violence/?utm_source=rss&utm_medium=rss&utm_campaign=expert-witness-says-kenyan-government-failed-to-protect-victims-of-sexual-violence&utm_source=International+Justice+Monitor&utm_campaign=6db151b405-kenya-monitor-rss&utm_medium=email&utm_term=0_f42ffeffb9-6db151b405-49202497>.

563 UN Security Council, 'Resolution 1970 (2011)', 26 February 2011, *S/Res/1970* (2011).

564 'ICC Prosecutor to open an investigation in Libya', *OTP Press Statement*, 2 March 2011, available at <http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/press%20releases/Pages/statement%20020311.aspx>.

565 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to the escalating violence in the Situation in Libya', *OTP Press Statement*, 25 July 2014, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-25-07-2014.aspx>.

566 Following the termination of proceedings against Muammar Gaddafi in November 2011, the ICC refers to Saif Al-Islam as 'Gaddafi'. For the sake of consistency, we also refer to Saif Al-Islam Gaddafi as 'Gaddafi' in this Report.

567 ICC-01/11-01/11-28, p 5.

The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi

Gaddafi is the son of former Libyan leader Muammar Gaddafi and was allegedly part of his father's inner circle. Although he formally held the role of honorary chairman of the Gaddafi International Charity and Development Foundation, an international NGO headquartered in Tripoli, he is alleged to have also assumed the role of *de facto* Libyan Prime Minister.⁵⁶⁸ Al-Senussi was, at the time of the issuance of his Arrest Warrant, Head of the Libyan Military Intelligence.⁵⁶⁹

Scope of charges

Gaddafi faces charges for crimes allegedly committed 'by Security Forces under his control in various localities of the Libyan territory, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities, from 15 February 2011 until at least 28 February 2011'.⁵⁷⁰ Al-Senussi faced charges for crimes allegedly committed in Benghazi by armed forces under his control, from 15 February 2011 until at least 20 February 2011.⁵⁷¹

Arrest warrants

Pre-Trial Chamber I issued arrest warrants for Gaddafi and Al-Senussi on 27 June 2011,⁵⁷² alleging their criminal responsibility as indirect co-perpetrators under Article 25(3)(a) of the Statute for two counts of crimes against humanity, including murder and persecution.⁵⁷³

Status of proceedings

The Libyan Government challenged the admissibility of the case against Gaddafi in May 2012.⁵⁷⁴ On 31 May 2013, Pre-Trial Chamber I found the case to be admissible before the ICC,⁵⁷⁵ and the Appeals Chamber affirmed this decision on 21 May 2014.⁵⁷⁶

The Government also challenged the admissibility of the case against Al-Senussi in April 2013.⁵⁷⁷ On 11 October 2013, Pre-Trial Chamber I found that the case against Al-Senussi was inadmissible and that he should instead be tried before Libyan courts.⁵⁷⁸ The Appeals Chamber confirmed the Pre-Trial Chamber's decision on 24 July 2014.⁵⁷⁹ On 7 August 2014, Pre-Trial Chamber I ordered the case to be henceforth referred to as *The Prosecutor v. Saif Al-Islam Gaddafi*.⁵⁸⁰

The execution of the Arrest Warrant against Gaddafi is still pending. The Arrest Warrant against Al-Senussi is no longer in effect.⁵⁸¹

The Admissibility decisions in the Gaddafi and Al-Senussi cases are covered in detail in the **Admissibility** section of this Report.

568 ICC-01/11-14, p 7.

569 ICC-01/11-01/11-4, p 7.

570 ICC-01/11-14, p 6.

571 ICC-01/11-01/11-4, p 6.

572 ICC-01/11-14, p 7; ICC-01/11-01/11-4, p 7.

573 ICC-01/11-14, p 6; ICC-01/11-01/11-4, p 6.

574 ICC-01/11-01/11-130-Red, paras 1, 108.

575 ICC-01/11-01/11-344-Red, p 91.

576 ICC-01/11-01/11-547-Red, para 215.

577 ICC-01/11-01/11-307-Red2, paras 1, 206.

578 ICC-01/11-01/11-466-Red, para 311 and p 152.

579 ICC-01/11-01/11-565, para 299.

580 ICC-01/11-01/11-567, p 5.

581 ICC-01/11-01/11-567, p 5.

Côte d'Ivoire

The Situation in Côte d'Ivoire marked the first investigation opened following an Article 12(3) declaration by a non-State Party to the Rome Statute to accept the Court's jurisdiction.⁵⁸² It arose from the PEV in Côte d'Ivoire between 2010 and 2011, which broke out after former President Laurent Gbagbo refused to accept the result of the November 2010 Presidential election and to transfer power to Alassane Ouattara, the internationally recognised President-elect. Laurent Gbagbo and members of his inner circle allegedly conceived a plan, which led to the commission of crimes against humanity. On 23 June 2011, the Prosecutor requested authorisation to initiate investigations into the Situation in Côte d'Ivoire,⁵⁸³ which was granted by the Pre-Trial Chamber on 3 October 2011.⁵⁸⁴

At the time of writing of this Report, Pre-Trial Chamber III had issued arrest warrants against three individuals in the Côte d'Ivoire Situation. Two of these warrants have been executed, resulting in the arrests of Laurent Gbagbo and Charles Blé Goudé (Blé Goudé). The third arrest warrant, against former Côte d'Ivoire First Lady Simone Gbagbo, the wife of Laurent Gbagbo, remains outstanding.

582 Pursuant to Article 12(3) of the Statute, a non-State Party can lodge a declaration accepting the jurisdiction of the Court. Following such a declaration, it is up to the Prosecutor to decide *proprio motu* whether to request authorisation from the Pre-Trial Chamber to initiate investigations. The Government of Côte d'Ivoire, which had initially accepted the Court's jurisdiction by way of an Article 12(3) declaration in 2003, following the intensification of violence in 2010, reaffirmed its acceptance of the Court's jurisdiction in December 2010 and again in May 2011. On 23 June 2011, the Prosecutor requested authorisation to initiate investigations into the Situation in Côte d'Ivoire, which was granted by the Pre-Trial Chamber on 3 October 2011. ICC-02/11-14, para 212. On 15 February 2013, Côte d'Ivoire ratified the Rome Statute, thereby becoming the 122nd State Party, and the 33rd African State.

583 ICC-02/11-3, paras 1, 181.

584 ICC-02/11-14, para 212.

The Prosecutor v. Laurent Gbagbo

Laurent Gbagbo is an Ivorian national and the former President of Côte d'Ivoire. With his arrest and transfer in 2011, he became the first former Head of State to be transferred into the Court's custody.

Scope of charges	Crimes allegedly committed between 16 December 2010 and on or around 12 April 2011 during the course of four incidents: a pro-Ouattara march on the RTI headquarters (16-19 December 2010); a women's demonstration in Abobo (3 March 2011); the shelling of Abobo market (17 March 2011); and the attack in Yopougon (12 April 2011). ⁵⁸⁵
Arrest warrant	Pre-Trial Chamber III issued a warrant of arrest for Laurent Gbagbo, under seal, on 23 November 2011. Warrant unsealed on 30 November 2011. ⁵⁸⁶
Transfer to ICC custody	Laurent Gbagbo was transferred to ICC custody on 30 November 2011. ⁵⁸⁷
Confirmation of charges	On 12 June 2014, Pre-Trial Chamber I confirmed, by majority, four counts of crimes against humanity, including murder, rape, other inhumane acts or, in the alternative, attempted murder and persecution. Laurent Gbagbo is charged as an indirect co-perpetrator under Article 25(3)(a) of the Statute, or in the alternative, for instigating under Article 25(3)(b) of the Statute or contributing in any other way to the commission of the crimes under Article 25(3)(d) of the Statute. ⁵⁸⁸
Status of proceedings	On 11 September 2014, Pre-Trial Chamber I rejected the Defence request for leave to appeal the Confirmation of Charges decision. ⁵⁸⁹ Laurent Gbagbo remains in ICC custody. The Confirmation of Charges decision is discussed in detail in the Charges for Gender-based Crimes section of this Report.

585 ICC-02/11-01/11-656-Red, paras 271-274, 278.

586 ICC-02/11-01/11-1, p 7. For more information on the Laurent Gbagbo Arrest Warrant, see *Gender Report Card 2012*, p 130-131.

587 ICC-02/11-01/11-656-Red, para 3.

588 ICC-02/11-01/11-656-Red, para 278 and p 131. For more information on the Laurent Gbagbo confirmation of charges hearing, see *Gender Report Card 2013*, p 73-87.

589 ICC-02/11-01/11-676-Red, p 44; ICC-02/11-01/11-680, p 23.

The Prosecutor v. Simone Gbagbo

Simone Gbagbo, an Ivorian national, is the former First Lady of Côte d'Ivoire and wife of Laurent Gbagbo. She is the only woman for whom an arrest warrant has been publicly issued by the ICC. Simone Gbagbo is also one of the few women in international law to face charges for gender-based crimes. She was charged in her capacity as a member of her husband and former President of Côte d'Ivoire Laurent Gbagbo's inner circle, allegedly 'act[ing] as an *alter ego* for her husband, exercising the power to make State decisions'.⁵⁹⁰

Scope of charges	Crimes allegedly committed between 16 December 2010 and 12 April 2011. ⁵⁹¹
Arrest warrant	Pre-Trial Chamber III issued a warrant of arrest for Simone Gbagbo, under seal, on 29 February 2012. Warrant unsealed on 22 November 2012. ⁵⁹² Simone Gbagbo is allegedly criminally responsible, as an indirect co-perpetrator under Article 25(3)(a) of the Statute, for four counts of crimes against humanity, including murder, rape, other inhumane acts and persecution. ⁵⁹³
Status of proceedings	On 30 September 2013, the Government of Côte d'Ivoire filed a legal challenge to the admissibility of the case, arguing that it was actively investigating or prosecuting the case, and was neither unable nor unwilling to carry out the proceedings genuinely. ⁵⁹⁴ The Pre-Trial Chamber granted Côte d'Ivoire's request to postpone the execution of the request for surrender until a decision on admissibility is rendered, and the decision remains pending. ⁵⁹⁵ The submissions related to the admissibility challenge are covered in detail in the Admissibility section of this Report.

590 ICC-02/11-01/12-1, para 10.

591 ICC-02/11-01/12-1, p 8.

592 ICC-02/11-01/12-1, p 8.

593 ICC-02/11-01/12-1, para 9 and p 8.

594 ICC-02/11-01/12-11-Red, paras 23, 38, 46, 56 and p 23.

595 ICC-02/11-01/12-15, p 9.

The Prosecutor v. Charles Blé Goudé

A national of Côte d'Ivoire, Blé Goudé is alleged to have been a member of Laurent Gbagbo's inner circle and leader of the Pro-Gbagbo Youth, involved in the commission of crimes related to the PEV in November 2010.

Scope of charges	Crimes allegedly committed between 16 December 2010 and 12 April 2011 during the course of five incidents: a pro-Ouattara march on the RTI headquarters (16-19 December 2010); an attack by the pro-Gbagbo youth on Yopougon (25-28 February 2011); a women's demonstration in Abobo (3 March 2011); the shelling of Abobo market (17 March 2011); and the attack in Yopougon (12 April 2011). ⁵⁹⁶
Arrest warrant	Pre-Trial Chamber III issued an arrest warrant for Blé Goudé, under seal, on 21 December 2011. Warrant unsealed on 30 September 2013. ⁵⁹⁷
Transfer to ICC custody	Blé Goudé was arrested by the authorities in Ghana and transferred by the Ivorian authorities to the ICC Detention Centre on 22 March 2014. ⁵⁹⁸
Status of proceedings	DCC issued on 27 August 2014. Blé Goudé is allegedly criminally responsible for four counts of crimes against humanity, including murder, rape, other inhumane acts or in the alternative, attempted murder and persecution. He faces charges as: an indirect co-perpetrator under Article 25(3)(a) of the Statute, or in the alternative, for ordering, soliciting or inducing the crimes under Article 25(3)(b) of the Statute, aiding or abetting the commission of the crimes under Article 25(3)(c) of the Statute, and as an accessory to the crimes under Article 25(3)(d) of the Statute. ⁵⁹⁹ For an analysis of the charges faced by Blé Goudé as set forth in the DCC, see the Charges for Gender-based Crimes section of this Report. At the time of writing this Report, the hearing on the confirmation of charges was scheduled for 29 September 2014. ⁶⁰⁰ Blé Goudé remains in ICC custody.

596 ICC-02/11-02/11-124-Anx1-Corr, paras 127-170.

597 ICC-02/11-02/11-1, p 8.

598 ICC-02/11-02/11-T-3-Red-ENG, p 11 line 20; ICC-02/11-02/11-46, para 2.

599 ICC-02/11-02/11-124-Anx1-Corr, para 322 and p 125-127.

600 ICC-02/11-02/11-165, para 1.

Mali

In July 2012, the Prosecutor received a letter from the Government of Mali, referring the Situation in the country since January 2012 to the ICC.⁶⁰¹ Following the receipt of the letter, the Prosecutor instructed her Office to initiate a preliminary examination into the Situation in Mali. The Prosecutor's statement on the referral of the Situation highlighted reports of sexual violence, among other crimes.⁶⁰²

On 16 January 2013, the Prosecutor announced that, pursuant to Article 53(1) of the Statute, her Office had formally opened an investigation into alleged crimes committed in Mali since January 2012.⁶⁰³ The Prosecutor indicated that the investigation will focus on crimes committed in the three northern regions of Mali, including Gao, Timbuktu and Kidal.⁶⁰⁴ Jointly with the announcement opening the investigation, the Prosecutor publicly released her Article 53(1) Report on the Situation in Mali.⁶⁰⁵ The report indicated that the Situation in Mali is marked by two main events: first, the emergence of a rebellion in the North on or around 17 January 2012, which resulted in Northern Mali being seized by armed groups; and second, a *coup d'état* by a military junta on 22 March 2012, which led to the removal of President Touré shortly before the scheduled presidential elections.⁶⁰⁶ The report identifies the main actors to the conflict as government forces, the MNLA, AQIM, Ansar Dine, and the MUJAO.⁶⁰⁷

The Prosecutor announced that, following an assessment of the evidence, her Office had concluded that there was a reasonable basis to believe that the following war crimes had been committed in Mali since January 2012: murder;⁶⁰⁸ the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court;⁶⁰⁹ mutilation, cruel treatment and torture;⁶¹⁰ intentionally directing attacks against protected

601 Government of Mali, 'Referral Letter', *ICC website*, 13 July 2012, available at <<http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>>.

602 'ICC Prosecutor Fatou Bensouda on the Malian State Referral of the Situation in Mali since January 2012', *OTP Press Release*, OTP-20120718-PR829, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr829.aspx>. The Prosecutor's statement refers to reports of 'instances of killings, abductions, rapes and conscription of children'.

603 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"', *OTP Press Statement*, ICC-OTP-20130116-PR869, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx>.

604 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"', *OTP Press Statement*, ICC-OTP-20130116-PR869, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx>.

605 'Article 53(1) Report on the Situation in Mali', *OTP*, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf>. While the Office of the Prosecutor is not required to make public its report when acting pursuant to a referral under Article 53(1) of the Statute, the Prosecutor indicated that her Office 'decided to do so in the interests of promoting clarity with respect to its statutory activities and decisions'.

606 'Article 53(1) Report on the Situation in Mali', *OTP*, 16 January 2013, para 25, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf>.

607 'Article 53(1) Report on the Situation in Mali', *OTP*, 16 January 2013, paras 30-33, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf>.

608 Article 8(2)(e)(i), Rome Statute.

609 Article 8(2)(c)(iv), Rome Statute.

610 Article 8(2)(c)(i), Rome Statute.

objects;⁶¹¹ pillaging;⁶¹² and rape.⁶¹³ The Prosecution indicated that it would continue to investigate allegations relating to the use, conscription, and enlistment of children.⁶¹⁴ The Prosecution did not find a reasonable basis to believe that crimes against humanity under Article 7 had been committed, but indicated that this assessment could be revisited in the future following further analysis and investigation.⁶¹⁵

At the time of writing this Report, no arrest warrants or summonses to appear have been issued with respect to the Mali Situation.

611 Article 8(2)(e)(iv), Rome Statute.

612 Article 8(2)(e)(v), Rome Statute.

613 Article 8(2)(e)(vi), Rome Statute; 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"', *OTP Press Statement*, ICC-OTP-20130116-PR869, 16 January 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx>.

614 Article 8(2)(e)(vii), Rome Statute; 'Article 53(1) Report on the Situation in Mali', *OTP*, 16 January 2013, paras 120-124, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf>.

615 'Article 53(1) Report on the Situation in Mali', *OTP*, 16 January 2013, para 132, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf>.

Charges for gender-based crimes

At the time of writing this Report, charges for gender-based crimes have been brought in six of the nine Situations under investigation by the ICC: Uganda, the DRC, the CAR, Darfur, Kenya and Côte d'Ivoire. No charges for gender-based crimes have yet been brought in the Libya Situation⁶¹⁶ and no public arrest warrants or summonses to appear have yet been sought in the Mali or the CAR II Situations.

⁶¹⁶ In her fourth and fifth reports to the UN Security Council regarding the Situation in Libya, issued on 7 November 2012 and 8 May 2013, the Prosecutor recalled that her Office had confirmed to the Security Council in May 2012 that it was proceeding with a second case relating to gender-based crimes that had been committed during the 2011 uprising. The Prosecutor indicated that her Office was continuing to analyse information gathered to determine whether crimes within the jurisdiction of the ICC had occurred. However, the Prosecutor noted in her fourth report that her Office was facing 'many challenges in the collection of evidence to prove the commission of sexual and gender based crimes' and that it was 'mindful of the seriousness and the sensitivity of the crime of rape in Libya for victims, their families and for Libyan society'. Given these concerns, the Prosecutor indicated that her Office was also assessing whether the protection of victims and witnesses could be assured if a case relating to sexual and gender-based crimes were to be pursued. Notably, in her fifth and sixth reports to the Security Council issued on 14 November 2013, the Prosecutor indicated that her Office continued to proceed with its investigation in relation to the second case but no longer mentioned gender-based crimes as among the allegations under investigation. The Prosecutor did, however, indicate that her Office 'welcome[d] reports of a new draft law that would make rape during armed conflict a war crime, for which those convicted could receive a life sentence and the victims could receive compensation from the State, although the Office strongly encourage[d] Libyan authorities to ensure that the draft include[d] male as well as female victims'. The Prosecutor further stated that her Office '[stood] ready to support national prosecutions of sexual crimes in any way it [could]'. See 'Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)', *ICC website*, 7 November 2012, paras 21-22, available at <http://www.icc-cpi.int/iccdocs/otp/UNSCreportLibyaNov2012_english5.pdf>; 'Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)', *ICC website*, 8 May 2013, para 21, available at <<http://www.icc-cpi.int/iccdocs/otp/UNSC-report-Libya-May2013-Eng.pdf>>; 'Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)', *ICC website*, 14 November 2013, paras 21-26, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Report%20to%20UNSC%20Nov2013EN.pdf>.

Charges for gender-based crimes have now been brought in 14 of the 19 ICC cases involving crimes under Article 5⁶¹⁷ of the Rome Statute, a proportion of 74%. Specifically, such charges have been included in: the Kony *et al* case in the Uganda Situation; the Katanga, Ngudjolo, Ntaganda, Mbarushimana and Mudacumura cases in the DRC Situation; the Bemba case in the CAR Situation; the Al Bashir, Harun and Kushayb, and Hussein cases in the Darfur Situation; the Kenyatta case in the Kenya Situation; and the Laurent Gbagbo, Simone Gbagbo, and Blé Goudé cases in the Côte d'Ivoire Situation. No charges for gender-based crimes were included in the Lubanga case in the DRC Situation, the Abu Garda and Banda and Jerbo cases in the Darfur Situation, the Ruto and Sang case in the Kenya Situation, and the Gaddafi *et al* case in the Libya Situation. Of the 31 individual suspects and accused who have faced charges in these cases, 18 have faced charges for gender-based crimes, a proportion of 58%.

Sexual violence has been charged as a war crime, a crime against humanity and an act of genocide at the ICC. Specific charges have included causing serious bodily or mental harm, rape, sexual slavery, other forms of sexual violence, torture, persecution, other inhumane acts, cruel or inhuman treatment and outrages upon personal dignity. The applications for arrest warrants for Jean-Pierre Bemba Gombo (Bemba)

617 In analysing the charges for gender-based crimes, the Women's Initiatives for Gender Justice follows the distinction made in the Rome Statute between crimes listed in Article 5 (which limits the jurisdiction of the Court to 'the most serious crimes of concern to the international community as a whole', specifically genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8) and the crime of aggression (Article 8bis)) and the lesser category of crimes included as offenses against the administration of justice listed in Article 70 of the Statute. 2013 was the first year in which arrest warrants for offenses against the administration of justice were publicly issued. These statistics therefore do not include: the case against Barasa in the Kenya Situation; and against Bemba, Kilolo, Mangenda, Babala and Arido in the CAR Situation.

and Callixte Mbarushimana (Mbarushimana) are the only publicly available applications for which the majority of crimes charged related to acts of sexual and gender-based violence. The highest number of gender-based charges included in an arrest warrant for any one individual was for Mbarushimana, with eight charges. However, the Pre-Trial Chamber, by majority, Judge Monageng dissenting, did not confirm any of the charges, including for gender-based crimes, against Mbarushimana.⁶¹⁸ Nonetheless, the Arrest Warrant against him contained the broadest range of gender-based crimes that had been sought by the Prosecutor, suggesting efforts to make greater use of the explicit codification of sexual and gender-based crimes included in the Rome Statute. Furthermore, at the time of writing this Report, Simone Gbagbo was the only woman for whom a public arrest warrant had been issued by the ICC. The Arrest Warrant includes allegations of rape and other forms of sexual violence.⁶¹⁹ In September 2013, the Côte d'Ivoire government challenged the admissibility of the case against Simone Gbagbo, and the decision on the challenge remains pending, as described further in the **Admissibility** section of this Report.

During the period under review, the Ntaganda Confirmation of Charges decision included the highest number of charges for gender-based crimes confirmed by a Pre-Trial Chamber to

618 The majority found substantial grounds to believe that seven out of the eight war crimes alleged had been committed by the FDLR but did not find substantial grounds to believe that Mbarushimana was individually criminally responsible for these alleged crimes. Furthermore, the majority did not find substantial grounds to believe that any of the five alleged crimes against humanity had been committed. See *Gender Report Card 2012*, p 116-123.

619 Simone Gbagbo is also charged with persecution as a crime against humanity. As noted in the table entitled 'Status of all gender-based charges across each case as of 15 August 2014' of this Report, it is unclear whether the underlying acts of persecution include gender-based crimes, since information regarding these acts is not available.

date. Additionally, it was the first time that a Chamber had unanimously confirmed all charges for gender-based crimes.⁶²⁰ All charges for gender-based crimes were also confirmed in the case against Laurent Gbagbo, albeit by majority. In that case, Judge Christine Van den Wyngaert considered that there was not sufficient evidence to support any of the crimes alleged under the modes of liability confirmed by the Chamber. Furthermore, a DCC was filed in the case against Charles Blé Goudé (Blé Goudé) arising from the Côte d'Ivoire Situation, in which half of the charges against him are for gender-based crimes.⁶²¹ These developments are discussed in detail below.

As noted in the *Gender Report Card 2013*, the OTP released its Strategic Plan for 2012-2015 in October 2013.⁶²² The Strategic Plan contains six goals, one of which focuses on gender issues. Specifically, 'Strategic Goal 3' is '[t]o enhance the integration of a gender perspective into all areas of our work and to continue to pay particular attention to sexual and gender-based crimes and crimes against children'. Under this Strategic Goal, one of the two objectives listed is 'to have the [Sexual and Gender-Based Crimes] policy fully implemented'. In the Court's 2015 proposed budget, two targets are listed for 2015 with respect to this objective, specifically '≥80 percent of the improvements implemented as planned', and an '[e]xpert panel finds systematic OTP focus on [sexual and gender-based crimes]'.⁶²³

This section contains an update on the status of charges for gender-based crimes in each case involving crimes under Article 5 of the Statute, and against each individual. It also includes a discussion on new developments in cases involving gender-based crime charges, along with a discussion of the OTP's Policy Paper on Sexual and Gender-Based Crimes.

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

621 Blé Goudé is alleged to be responsible for the crimes of murder, rape, other inhumane acts or, in the alternative, attempted murder, and persecution including by means of rape as crimes against humanity. ICC-02/11-02/11-124-Anx1-Corr.

622 See *Gender Report Card 2013*, p 68-69.

623 ICC-ASP/13/10, Table 16.

Status of all gender-based charges across each case as of 15 August 2014

This chart lists the 14 cases and 18 individuals against whom charges for gender-based crimes have been sought by the Prosecution.⁶²⁴

<i>Case</i>	<i>Stage of proceedings</i>	<i>Charges for gender-based crimes</i>
<i>Prosecutor v. Ngudjolo</i>	Acquitted of all charges in December 2012; on appeal	Charges against Ngudjolo: <ul style="list-style-type: none"> • Rape as a crime against humanity • Rape as a war crime • Sexual slavery as a crime against humanity • Sexual slavery as a war crime
<i>Prosecutor v. Katanga</i>	Acquitted of all gender-based charges in March 2014; reparations	Charges against Katanga: <ul style="list-style-type: none"> • Rape as a crime against humanity • Rape as a war crime • Sexual slavery as a crime against humanity • Sexual slavery as a war crime
<i>Prosecutor v. Bemba</i>	At trial	Charges against Bemba: <ul style="list-style-type: none"> • Rape as a crime against humanity • Rape as a war crime
<i>Prosecutor v. Kenyatta</i>	7 October 2014 trial start date vacated; no new start date has been set	Charges against Kenyatta: <ul style="list-style-type: none"> • Rape as a crime against humanity • Other inhumane acts as a crime against humanity • Persecution (by means of rape and other inhumane acts) as a crime against humanity
	All charges against Muthaura were withdrawn by the Prosecution in March 2013, including all charges for gender-based crimes	Charges against Muthaura: <ul style="list-style-type: none"> • Rape as a crime against humanity • Other inhumane acts as a crime against humanity • Persecution (by means of rape and other inhumane acts) as a crime against humanity
	No charges against Ali were confirmed in January 2012	Charges against Ali: <ul style="list-style-type: none"> • Rape as a crime against humanity • Other inhumane acts as a crime against humanity • Persecution (by means of rape and other inhumane acts) as a crime against humanity
<i>Prosecutor v. Laurent Gbagbo</i>	All charges confirmed in June 2014, including all charges for gender-based crimes	Charges against Laurent Gbagbo: <ul style="list-style-type: none"> • Rape⁶²⁵ as a crime against humanity • Persecution (including acts of rape) as a crime against humanity

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624 Depending on the stage of the proceedings, the charges listed reflect those sought in the arrest warrant or the DCC.

625 While in the DCC Laurent Gbagbo faces charges of rape, in the Arrest Warrant he had faced charges of rape and other forms of sexual violence.

<i>Case</i>	<i>Stage of proceedings</i>	<i>Charges currently included</i>
<i>Prosecutor v. Ntaganda</i>	All charges confirmed in June 2014, including all charges for gender-based crimes	Charges against Ntaganda: ⁶²⁶ <ul style="list-style-type: none"> • Rape of civilians as a crime against humanity • Rape of civilians as a war crime • Rape of child soldiers as a war crime • Sexual slavery of civilians as a crime against humanity • Sexual slavery of civilians as a war crime • Sexual slavery of child soldiers as a war crime • Persecution (including acts of rape and sexual slavery) as a crime against humanity
<i>Prosecutor v. Mbarushimana</i>	No charges confirmed for trial, suspect released from custody in December 2011	Charges against Mbarushimana: <ul style="list-style-type: none"> • Torture as a crime against humanity • Torture as a war crime • Rape as a crime against humanity • Rape as a war crime • Other inhumane acts (including acts of rape and mutilation of women) as a crime against humanity • Inhuman treatment (including acts of rape and mutilation of women) as a war crime • Persecution (based on gender) as a crime against humanity • Mutilation as a war crime
<i>Prosecutor v. Simone Gbagbo</i>	Arrest warrant issued, no suspect in custody	Charges against Simone Gbagbo: <ul style="list-style-type: none"> • Rape and other forms of sexual violence as a crime against humanity • [Persecution as a crime against humanity]⁶²⁷
<i>Prosecutor v. Blé Goudé</i>	Confirmation of charges hearing scheduled for 29 September 2014	Charges against Blé Goudé: <ul style="list-style-type: none"> • Rape⁶²⁸ as a crime against humanity • Persecution as a crime against humanity
<i>Prosecutor v. Mudacumura</i>	Arrest warrant issued, no suspect in custody	Charges against Mudacumura: <ul style="list-style-type: none"> • Rape as a war crime • Torture as a war crime • Mutilation as a war crime • [Outrages upon personal dignity as a war crime]⁶²⁹

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626 In the application for the Arrest Warrant by the Prosecution and the decision on the Arrest Warrant by the Pre-Trial Chamber, rape and sexual slavery charges are referred to as a single count.

627 The charge of persecution as a crime against humanity is provisionally included as a gender-based crime subject to the availability of further information regarding the acts underlying the crime, and based on a comparison of the Arrest Warrant for Simone Gbagbo with the Arrest Warrants for Laurent Gbagbo and Blé Goudé, which are substantially similar. Laurent Gbagbo and Blé Goudé are charged with persecution as a crime against humanity, which includes acts of rape, as clarified in the Confirmation of Charges decision for Laurent Gbagbo and the DCC for Blé Goudé. ICC-02/11-01/11-656-Red, paras 204-205 and p 130; ICC-02/11-02/11-124-Anx1-Corr, p 127 and para 328.

628 While in the DCC Blé Goudé faces charges for rape, in the Arrest Warrant he had faced charges of rape and other forms of sexual violence.

629 This charge of outrages upon personal dignity is provisionally included as a gender-based crime charge subject to the availability of further information regarding the acts underlying the charge. The application is redacted and thus the factual basis for the charge is unclear. However, the Women's Initiatives for Gender Justice notes that in other cases the Prosecution has frequently charged outrages upon personal dignity arising out of sexual violence.

Status of all gender-based charges across each case as of 15 August 2014 *continued*

<i>Case</i>	<i>Stage of proceedings</i>	<i>Charges currently included</i>
<i>Prosecutor v. Hussein</i>	Arrest warrant issued; no suspect in custody	Charges against Hussein: <ul style="list-style-type: none"> • Persecution (including acts of sexual violence) as a crime against humanity • Rape as a crime against humanity • Rape as a war crime • Outrages upon personal dignity as a war crime
<i>Prosecutor v. Al Bashir</i>	Arrest warrant issued, no suspect in custody	Charges against Al Bashir: <ul style="list-style-type: none"> • Sexual violence causing serious bodily or mental harm as an act of genocide • Rape as a crime against humanity
<i>Prosecutor v. Harun and Kushayb</i>	Arrest warrants issued, no suspects in custody	Charges against Harun: <ul style="list-style-type: none"> • Rape as a crime against humanity (2 counts) • Rape as a war crime (2 counts) • Outrages on personal dignity as a war crime • Persecution by means of sexual violence as a crime against humanity (2 counts) Charges against Kushayb: <ul style="list-style-type: none"> • Rape as a crime against humanity (2 counts) • Rape as a war crime (2 counts) • Outrages upon personal dignity as a war crime (2 counts) • Persecution by means of sexual violence as a crime against humanity (2 counts)
<i>Prosecutor v. Kony et al</i>	Arrest warrants issued, no suspects in custody	Charges against Kony: <ul style="list-style-type: none"> • Sexual slavery as a crime against humanity • Rape as a crime against humanity • Rape as a war crime Charges against Otti [believed to be deceased]: <ul style="list-style-type: none"> • Sexual slavery as a crime against humanity • Rape as a war crime

OTP Policy Paper on Sexual and Gender-Based Crimes

On 5 June 2014, the Prosecutor announced the publication of the OTP Policy Paper on Sexual and Gender-Based Crimes (Policy Paper), the first such policy to be produced by an international court or tribunal.⁶³⁰ The Policy Paper was developed through an extensive drafting process involving staff within the OTP and the Special Advisor on Gender, as well as internal consultations with every division of the OTP, including its specialist units, and a review of the challenges and progress towards prosecuting gender-based crimes. These stages were followed by external consultations on the draft Policy Paper, involving a wide range of stakeholders, including States Parties, international and national organisations, UN agencies, regional institutions, practitioners, academics and victim/survivor advocacy groups.

Since early 2012, while still Prosecutor-elect, as well as since taking office in June 2012, the development of a Sexual and Gender-Based Crimes Policy for the OTP had been a priority of Prosecutor Bensouda.⁶³¹ This aim was reflected in the OTP's Strategic Plan 2012-2015, which

includes as one of its six strategic goals to '[e]nhance the integration of a gender perspective in all areas of [the Prosecution's] work and continue to pay particular attention to sexual and gender-based crimes and crimes against children'.⁶³² Finalisation of the Policy, by 2013, was listed as an objective within that strategic goal.⁶³³ The OTP accordingly began work on the Policy, together with the Special Advisor on Gender, in December 2012.

Notably, in the Policy Paper, the OTP 'recognises that sexual and gender-based crimes are amongst the gravest under the Statute'.⁶³⁴ The Office thus commits to 'integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their families and communities'. It also undertakes to 'increasingly seek opportunities for effective and appropriate consultation with victims' groups and their representatives to take into account the interests of victims'.⁶³⁵

630 'Policy Paper on Sexual and Gender-Based Crimes', OTP, June 2014, available at <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf>>.

631 'Statement Prosecutor Elect of the International Criminal Court at Sydney Conference: Gender Justice and the ICC: Progress and Reflections', OTP, 14 February 2012, p 6, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement%20prosecutor%E2%80%90elect%20of%20the%20international%20criminal%20court%20at%20sydney%20confere.aspx>; 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to mark the International Day for the Elimination of Violence Against Women', OTP, 25 November 2013, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/Prosecutor-Elimination-Violence-Women.aspx>.

632 'OTP Strategic Plan June 2012-2015', OTP, 11 October 2013, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf>.

633 'OTP Strategic Plan June 2012-2015', OTP, 11 October 2013, p 27, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf>.

634 'OTP Strategic Plan June 2012-2015', OTP, 11 October 2013, para 3, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf>.

635 'OTP Strategic Plan June 2012-2015', OTP, 11 October 2013, para 2, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf>.

The Policy Paper has five stated objectives, namely to:

- 1 Affirm the commitment of the Office to paying particular attention to sexual and gender-based crimes in line with Statutory provisions;
- 2 Guide the implementation and utilisation of the provisions of the Statute and the RPE, so as to ensure the effective investigation and prosecution of sexual and gender-based crimes from preliminary examination through to appeal;
- 3 Provide clarity and direction on issues pertaining to sexual and gender-based crimes in all aspects of operations;
- 4 Contribute to advancing a culture of best practice in relation to the investigation and prosecution of sexual and gender-based crimes; and
- 5 Contribute, through its implementation, to the ongoing development of international jurisprudence regarding sexual and gender-based crimes.⁶³⁶

In publishing the historic Policy Paper, Prosecutor Bensouda said: '[t]he message to perpetrators and would-be perpetrators must be clear: sexual violence and gender-based crimes in conflict will neither be tolerated nor ignored by the ICC'. The Prosecutor further noted that '[i]t is hoped that the Policy will also serve as a guide to national authorities in the exercise of their primary jurisdiction to hold perpetrators accountable for these crimes. United in our efforts, we can end the silence that has surrounded sexual and gender-based crimes for far too long and give victims the ultimate tool in combating such crimes: a voice backed by the force of law'.⁶³⁷

636 'Policy Paper on Sexual and Gender-Based Crimes', *OTP*, June 2014, para 6, available at <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>>.

637 'The Prosecutor of the International Criminal Court, Fatou Bensouda, publishes comprehensive Policy Paper on Sexual and Gender-Based Crimes', *OTP*, 5 June 2014, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1011.aspx>. See also Women's Initiatives for Gender Justice, 'ICC Prosecutor publishes comprehensive Policy Paper on Sexual and Gender-Based Crimes', 5 June 2014, available at <http://www.iccwomen.org/news/berichtdetail.php?we_objectID=228>.

New developments in cases including gender-based crime charges

According to publicly available information, during the period under review, charges for gender-based crimes have been sought in one new case, that against Charles Blé Goudé (Blé Goudé). The Warrant for his arrest, initially issued in 2011, was unsealed on 30 September 2013, and the Prosecutor filed the DCC against him on 22 August 2014, charging him with crimes including rape, and persecution by means of rape, as crimes against humanity. At the time of writing this Report, the confirmation of charges hearing in his case was scheduled for 29 September.

In the Ntaganda case, the DCC filed on 10 January 2014 contained important new charges for gender-based crimes. Significantly, the initial Arrest Warrant for Bosco Ntaganda (Ntaganda), issued by Pre-Trial Chamber I on 22 August 2006, did not include such charges.⁶³⁸ On 13 July 2012, Pre-Trial Chamber II issued a second Arrest Warrant, adding nine additional charges, including rape and sexual slavery committed against civilians as war crimes and as crimes against humanity, as well as persecution by means including rape and sexual slavery.⁶³⁹ The DCC, in addition to charging Ntaganda with rape and sexual slavery of civilians as war crimes and crimes against humanity, added the charges of rape and sexual slavery as war crimes against UPC/FPLC child soldiers.⁶⁴⁰ This is the first time in international criminal law that a senior military figure faces charges for sexual violence crimes against child soldiers within his own militia group and under his command. The confirmation of charges hearing took place from 10 to 14 February 2014 before Pre-Trial Chamber II, and the Chamber

638 In the Arrest Warrant, which was unsealed on 28 August 2008, Ntaganda faced charges of three counts of war crimes, including enlistment, conscription, and use of children under the age of 15 to participate actively in hostilities, as punishable under Articles 8(2)(b)(xxvi) or 8(2)(e)(vii) of the Statute. ICC-01/04-02/06-2-Anx-tENG.

639 ICC-01/04-02/06-36-Red, paras 17, 37-42, 44, 56-57. The Arrest Warrant also charged Ntaganda with murder as a crime against humanity, as well as murder, attacks against the civilian population and pillaging as war crimes. ICC-01/04-02/06-36-Red, paras 17, 34-36, 44, 52-59.

640 ICC-01/04-02/06-203-AnxA, p 57-60.

rendered its decision on 9 June 2014, unanimously confirming all charges. Notably, the decision on the Confirmation of Charges in the Ntaganda case represents the first and only time to date in which an ICC Pre-Trial Chamber has unanimously confirmed all charges for sexual and gender-based crimes sought by the Prosecution.⁶⁴¹ Furthermore, the Ntaganda decision also marks the first time a Pre-Trial Chamber has authorised alternate modes of liability at the confirmation of charges stage.⁶⁴²

641 To date, a total of seven ICC cases involving sexual and gender-based crimes have reached the confirmation of charges stage of the proceedings. In the Katanga and Ngudjolo case (the DRC), only a majority of the Pre-Trial Chamber confirmed all gender-based crime charges. In the case against Bemba (the CAR), the Pre-Trial Chamber declined to confirm some of the gender-based crime charges. The majority of the Pre-Trial Chamber declined to confirm any of the charges against Mbarushimana (the DRC). In the Muthaura, Kenyatta and Ali case (Kenya), a majority of the Pre-Trial Chamber recharacterised the charge of 'other forms of sexual violence' to 'other inhumane acts' before confirming all charges against Muthaura and Kenyatta, which also included rape and persecution (by means of rape and other inhumane acts). Notably, although the Prosecutor had linked the crime of rape to attacks in three locations, namely, in Naivasha, Nakuru and Kibera, in its decision issuing summonses to appear, the Pre-Trial Chamber limited the charge of rape to incidents occurring in Nakuru. Finally, in the case against Laurent Gbagbo (Côte d'Ivoire), following the Ntaganda Confirmation of Charges decision, only a majority of the Pre-Trial Chamber confirmed all charges, including those involving gender-based crimes.

642 See 'Modes of Liability: A review of the International Criminal Court's current jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 102, 127-128; 01/04- 01/07-3363, Dissenting Opinion of Judge Tarfusser, para 21. Judge Tarfusser's Dissenting Opinion to the Appeals Chamber's Judgment, upholding the Trial Chamber's decision to implement Regulation 55 of the Regulations of the Court in the Katanga case: 'I am also mindful that a restrictive interpretation of regulation 55 [...] may have an impact on the practice so far established before the Pre-Trial Chambers, where it has become customary, whether for the purposes of the issuance of warrants of arrest or summonses to appear, or for the purposes of the confirmation of charges, not to address alternative modes of liability which were brought forward by the Prosecutor. In some instances, reference has been made to regulation 55 [...] as an available remedy for any changes which might prove necessary at a later stage of the trial.'

Three days after the Ntaganda Confirmation of Charges decision, on 12 June 2014, Pre-Trial Chamber I rendered its Confirmation of Charges decision in the case against Laurent Gbagbo. While the majority of the Chamber confirmed for trial all sexual violence charges sought by the Prosecution, Judge Van den Wyngaert dissented, finding that none of the charges sought by the Prosecution were sufficiently supported to proceed to trial under the modes of liability confirmed by the Chamber. This decision marked the second time that a Pre-Trial Chamber has confirmed charges on the basis of alternate modes of liability. While only the majority of the Pre-Trial Chamber in the Laurent Gbagbo case confirmed alternate modes of liability, in the Ntaganda case, the decision was unanimous.

The Women's Initiatives has repeatedly noted that charges for sexual and gender-based crimes are particularly susceptible, relative to charges for other crimes, to being dismissed or recharacterised in the early stages of the proceedings, particularly at the arrest warrant, summonses to appear, or confirmation of charges phases.⁶⁴³ The Ntaganda and Laurent

643 Research and analysis conducted by the Women's Initiatives across nine cases before the ICC has shown that only seven charges out of a total of 204 sought by the Prosecution had not been included in the arrest warrants or summonses to appear, five of which were charges for sexual or gender-based violence. Research on file with the Women's Initiatives for Gender Justice. See also, Speech by Brigid Inder, Women's Initiatives for Gender Justice Executive Director, 'Launch of the Gender Report Card on the ICC 2010', 6 December 2010, p 6-7, available at <http://www.iccwomen.org/documents/GRCLaunch2010-Speech_2.pdf>; Statement by the Women's Initiatives for Gender Justice, 'Statement to the UN Commission on the Status of Women', March 2011; Speech by Brigid Inder, Women's Initiatives for Gender Justice Executive Director, 'Gender Justice – Holding the ICC and the UN to Account', Precarious Progress Conference, October 2011; Speech by Brigid Inder, Women's Initiatives for Gender Justice Executive Director, 'Justice for All? Conference, February 2012'; Speech by Brigid Inder, Women's Initiatives for Gender Justice Executive Director, 'NATO Gender Perspectives Committee', May 2013. All speeches are on file with the Women's Initiatives for Gender Justice. See also, *Gender Report Card 2010*, p 89; *Gender Report Card 2011*, p 125; *Gender Report Card 2012*, p 106; *Gender Report Card 2013*, p 66; Brigid Inder, 'Partners for Gender Justice', in: Anne-Marie de Brouwer *et al*, *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Series on Transitional Justice, Cambridge Intersentia, Volume 12, 2013, p 336-337.

Gbagbo decisions, however, represent a positive shift in this trend. Prior to these decisions, the Women's Initiatives reported that in the five Confirmation of Charges decisions that had been rendered, namely, in the Bemba, Katanga, Ngudjolo, Mbarushimana and Kenyatta cases, the Pre-Trial Chamber had declined to confirm 16 of the 32 total charges for gender-based crimes sought by the Prosecution, representing a 50% dismissal of charges for these crimes.⁶⁴⁴ Following the Confirmation of Charges decisions in the Ntaganda and Laurent Gbagbo cases, however, the proportion of gender-based crime charges confirmed has increased by 11%. Specifically, 25 out of 41 total charges for gender-based crimes sought by the Prosecution have been confirmed, representing 61% of all charges.

The Confirmation of Charges decisions in the cases against Ntaganda and Laurent Gbagbo, as well as the DCC filed by the Prosecutor in the case against Blé Goudé, are discussed in depth below.

644 *Gender Report Card 2013*, p 66 and fn 291; *Gender Report Card 2012*, p 106-107 and fn 406.

DRC: Confirmation of Charges decision in the case against Bosco Ntaganda

On 9 June 2014, ICC Pre-Trial Chamber II⁶⁴⁵ unanimously confirmed all charges brought against Bosco Ntaganda (Ntaganda), committing his case to trial.⁶⁴⁶ Specifically, the Chamber confirmed 13 counts of war crimes, including murder and attempted murder of civilians; attacks against the civilian population; rape and sexual slavery of civilians; rape and sexual slavery of UPC/FPLC⁶⁴⁷ child soldiers; pillaging; displacement of civilians; attacks against protected objects; destruction of property; and the enlistment, conscription and use of child soldiers under the age of fifteen years to participate actively in hostilities.⁶⁴⁸ It further confirmed five counts of crimes against humanity, including murder and attempted murder of civilians; rape and sexual slavery of civilians; persecution; and forcible transfer of the population.⁶⁴⁹ The Chamber confirmed the charges against Ntaganda in his alleged capacity as Deputy Chief of General Staff for Military Operations in the UPC/FPLC.⁶⁵⁰ Charges against Ntaganda were confirmed under the following modes of liability: indirect co-perpetration and direct perpetration (Article 25(3)(a) of the Statute), ordering and inducing (Article 25(3)(b) of the Statute), contributing in any other way (Article 25(3)(d) of the Statute) and acting as a military commander (Article 28 of the Statute).⁶⁵¹

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

646 ICC-01/04-02/06-309.

647 The FPLC is the military wing of the UPC. ICC-01/04-02/06-309, para 15.

648 ICC-01/04-02/06-309, paras 12, 31.

649 ICC-01/04-02/06-309, paras 36, 74.

650 ICC-01/04-02/06-309, paras 15, 106, 120. See also ICC-01/04-02/06-203-AnxA, para 6; ICC-01/04-02/06-2-Anx-tENG, p 3; ICC-01/04-02/06-36-Red, para 72.

651 ICC-01/04-02/06-309, para 98.

The Chamber found that Ntaganda was allegedly part of a common plan together with members of the UPC/FPLC to gain military and political control over Ituri. The common plan involved the accused and others seeking to take over non-Hema dominated areas and expel the non-Hema civilian population, particularly the Lendu, from Ituri.⁶⁵²

The Defence sought leave to appeal the Confirmation of Charges decision on 16 June 2014.⁶⁵³ However, on 4 July 2014, the Pre-Trial Chamber dismissed the Defence application on the basis that the arguments presented did not constitute appealable issues under Article 82(1) (d) of the Statute.⁶⁵⁴

The Ntaganda case is the third to arise from the DRC Situation and the second of these cases to include charges for sexual and gender-based crimes.⁶⁵⁵ As noted above, it is also the first and only ICC case in which a Pre-Trial Chamber has unanimously confirmed all charges for sexual and gender-based crimes sought by the Prosecution.

The confirmation of charges hearing was held from 10 to 14 February 2014.⁶⁵⁶ At the commencement of the hearing, the Women's Initiatives for Gender Justice issued a statement, emphasising the significance of the case given that 'for the first time in international criminal law, the ICC has charged a senior military figure with acts of rape and sexual slavery committed against child soldiers within his own militia

group and under his command'.⁶⁵⁷ In this regard, it was noted that '[a]ccording to documentation missions conducted by the Women's Initiatives for Gender Justice in 2006 and 2007 in Ituri, the rape of girls and women occurred not only between warring tribes and militias but also *within* militias and ethnic groups'.⁶⁵⁸ It was further noted that '[i]n the case of girl soldiers conscripted, enlisted and used by the FPLC, their vulnerability as children and as girls appears to have been exploited and violated purposefully and systematically as part of the routine internal management of this militia'.⁶⁵⁹

Charges for gender-based crimes

The Pre-Trial Chamber found substantial grounds to believe that Ntaganda is criminally responsible for the rape and sexual slavery of both civilians and UPC/FPLC child soldiers under three modes of liability, namely: indirect co-perpetration, under Article 25(3)(a); contributing to the commission or attempted commission by a group of persons acting with a common purpose under Article 25(3)(d); and as a military commander, under Article 28(a) of the Statute.⁶⁶⁰ It also found substantial grounds to believe that Ntaganda is criminally responsible for ordering and inducing the crimes of rape and sexual slavery of civilians, under Article 25(3)(b) of the Statute.⁶⁶¹

652 ICC-01/04-02/06-309, para 105.

653 ICC-01/04-02/06-312.

654 ICC-01/04-02/06-322, paras 29, 33.

655 The first case to arise out of the DRC Situation was that against Lubanga, which did not include charges for sexual and gender-based crimes. The second case was that against Katanga and Ngudjolo, which included charges of rape and sexual slavery as war crimes and crimes against humanity.

656 'Pre-Trial Chamber II commits Bosco Ntaganda to trial', *ICC Press Release*, ICC-CPI-20140609-PR1013, 9 June 2014, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1013.aspx>.

657 Women's Initiatives for Gender Justice, 'ICC Commencement of the Confirmation of Charges Hearing; *The Prosecutor vs. Bosco Ntaganda*', 10 February 2014, available at <<http://www.iccwomen.org/documents/Ntaganda-Press-Statement-February-2014.pdf>>.

658 Women's Initiatives for Gender Justice, 'ICC Commencement of the Confirmation of Charges Hearing; *The Prosecutor vs. Bosco Ntaganda*', 10 February 2014 (emphasis in original), available at <<http://www.iccwomen.org/documents/Ntaganda-Press-Statement-February-2014.pdf>>.

659 Women's Initiatives for Gender Justice, 'ICC Commencement of the Confirmation of Charges Hearing; *The Prosecutor vs. Bosco Ntaganda*', 10 February 2014 (emphasis in original), available at <<http://www.iccwomen.org/documents/Ntaganda-Press-Statement-February-2014.pdf>>.

660 ICC-01/04-02/06-309, paras 101-135, 164-175.

661 ICC-01/04-02/06-309, para 97.

In addition to confirming all of the charges for sexual and gender-based crimes sought by the Prosecution, the Chamber addressed the sexual violence aspects of other crimes charged and confirmed, including: count three – attacks against civilians; and count 10 – persecution. The Chamber’s findings in relation to these charges, including its findings on the contextual elements of the crimes, are discussed in depth below.

Contextual elements of crimes against humanity and war crimes

In confirming the charges for crimes against humanity, the Pre-Trial Chamber found that there were substantial grounds to believe that, pursuant to a policy to attack the non-Hema civilian population and expel them from Ituri Province in the DRC, from approximately 6 August 2002 to 27 May 2003, the UPC/FPLC perpetrated a widespread and systematic attack against the non-Hema civilian population in several locations in Ituri.⁶⁶² With respect to war crimes, the Chamber found substantial grounds to believe that the UPC/FPLC constituted an organised armed group and that between around 6 August 2002 to 31 December 2003, it engaged in a non-international armed conflict in Ituri against other organised armed groups.⁶⁶³ It further found that UPC/FPLC soldiers and/or Ntaganda himself committed the crimes charged as part of the widespread and systematic attack and/or in the context of the non-international armed conflict.⁶⁶⁴

The Chamber determined that the crimes against child soldiers were committed in various parts of Ituri throughout the non-international armed conflict.⁶⁶⁵ It found that the remaining crimes were committed in the context of two attacks. The first attack occurred in villages in

662 ICC-01/04-02/06-309, paras 12-30.

663 ICC-01/04-02/06-309, paras 31-34.

664 ICC-01/04-02/06-309, paras 36, 74.

665 ICC-01/04-02/06-309, para 35; ICC-01/04-02/06-203-AnxA, paras 4-5.

the Banyali-Kilo collectivité from approximately 20 November 2002 to 6 December 2002 (First Attack), while the second attack occurred in villages in the Walendu-Djatsi collectivité from about 12 February 2003 to 27 February 2003 (Second Attack).⁶⁶⁶

Counts four and five – rape of civilians as war crimes and crimes against humanity

The Pre-Trial Chamber confirmed the charges for rape of civilians based on evidence demonstrating numerous acts of rape by UPC/FPLC soldiers, as well as civilians accompanying them, during the First and Second Attacks.⁶⁶⁷

In the context of the First Attack, during and in the aftermath of the takeover of Mongbwalu and Sayo, the Chamber noted that a 20 year-old woman was taken to a military camp and raped by a UPC/FPLC soldier, and that Ntaganda and his bodyguards arrested three nuns and took them to Ntaganda’s camp, where they were raped. It also noted that during an attack on Kilo, UPC/FPLC soldiers ordered male detainees to ‘sleep with the women’, after which one detainee inserted his fist into the genitals of Witness P-0022.⁶⁶⁸ With regard to the Second Attack, the Chamber determined that during attacks on Lipri, Kobu, Bambu and Sangi villages, UPC/FPLC soldiers raped more than 16 women and girls, including one woman who was subsequently killed. The Chamber also cited evidence that soldiers raped three men who had been arrested in Kobu; forced prisoners to ‘sleep together’; and raped and executed women who were part of a Lendu delegation to a peacebuilding meeting in Kobu.⁶⁶⁹

Counts seven and eight – sexual slavery of civilians as war crimes and crimes against humanity

Although the Prosecution had charged Ntaganda for sexual slavery of civilians in the context of

666 ICC-01/04-02/06-309, paras 29, 35.

667 ICC-01/04-02/06-309, paras 49-52.

668 ICC-01/04-02/06-309, paras 49-50.

669 ICC-01/04-02/06-309, paras 51-52.

both the First and Second Attack,⁶⁷⁰ the Pre-Trial Chamber only found substantial grounds to believe that UPC/FPLC soldiers committed sexual slavery in relation to the Second Attack. In drawing this conclusion, the Chamber reasoned that the evidence presented in relation to the First Attack did not satisfy the element of sexual slavery requiring that ‘the perpetrator exercised powers attaching to the right of ownership over the victim’.⁶⁷¹ It found that this deficiency in evidence became particularly apparent when compared to evidence regarding the Second Attack. It also emphasised that ‘in the absence of other factors, mere imprisonment or its duration’ is not sufficient to satisfy this element.⁶⁷² In determining whether the requisite relationship existed between the perpetrator and the victim, the Chamber relied upon the indicia of sexual slavery enunciated by the ICTY Appeals Chamber in the Kunarac Judgment, including not only the imprisonment of the victim and the duration of the imprisonment, but also restrictions on the victim’s freedom of movement; measures taken to prevent escape; the use of force, threat of force or coercion; and the personal circumstances of the victim, including her or his level of vulnerability.⁶⁷³

In concluding that sexual slavery had been committed in the Second Attack, the Chamber relied on evidence pertaining to four victims. It noted that one female was arrested by a group of UPC/FPLC soldiers, forced to carry pillaged goods, raped repeatedly by a UPC/FPLC commander, and held captive for about two days. Another was captured and detained for about one day, forced to carry pillaged goods with other prisoners, and repeatedly raped and beaten by UPC/FPLC soldiers. A third was captured, forced to carry pillaged goods and cook for UPC/FPLC commanders, and held captive

for about two days ‘under death threats’ in the house of a UPC/FPLC commander, where she was repeatedly raped by UPC/FPLC soldiers. Finally, the Chamber noted that a Lendu girl of approximately 12 years of age was taken prisoner by a UPC/FPLC soldier and raped repeatedly until she managed to escape after a few weeks’ time.⁶⁷⁴

Counts six and nine – rape and sexual slavery of child soldiers as war crimes

In considering the charges for rape and sexual slavery of UPC/FPLC child soldiers, the Pre-Trial Chamber first addressed whether it had jurisdiction over such crimes committed by members of the UPC/FPLC. The Defence had argued that these crimes ‘are not foreseen by the Statute’,⁶⁷⁵ as ‘International Humanitarian Law is not intended to protect combatants from crimes committed by combatants within the same group’.⁶⁷⁶

The Pre-Trial Chamber concluded that UPC/FPLC child soldiers under the age of 15 enjoy protection from acts of rape and sexual slavery under IHL and that it accordingly had jurisdiction over the crimes. The Chamber reasoned that the presence of children under the age of 15 years in an armed group is proscribed under international law, and ‘to hold that children under the age of 15 years lose the protection afforded to them by IHL merely by joining an armed group, whether as a result of coercion or other circumstances, would contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities’.⁶⁷⁷ It further reasoned that children under the age of 15 only lose protection under

670 ICC-01/04-02/06-203-AnxA, paras 67, 72, 74, 77-79, 84, 89, 162 and p 58.

671 ICC-01/04-02/06-309, para 53.

672 ICC-01/04-02/06-309, para 53.

673 ICC-01/04-02/06-309, para 53 and fn 209.

674 ICC-01/04-02/06-309, paras 54-57.

675 ICC-01/04-02/06-309, para 76.

676 ICC-01/04-02/06-T-10-Red-ENG, p 27 lines 22-23.

677 In making this determination, the Chamber was guided by the prohibition against the recruitment and use of children under the age of 15 years to take part in hostilities under Article 4(3)(c) of Protocol Additional II to the Geneva Conventions of 1949, as reflected in Article 8(2)(e)(vii) of the Statute. ICC-01/04-02/06-309, para 78.

IHL during their direct participation in hostilities, and that ‘those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of a sexual nature, including rape’.⁶⁷⁸ In this regard, the Chamber explained that ‘[t]he sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time’.⁶⁷⁹

The Pre-Trial Chamber confirmed these charges on the basis of several findings, including that UPC/FPLC soldiers abducted a 13 year-old girl in about July or August 2002 and raped her over a three-month period, while she underwent training in a UPC/FPLC camp. It found that two other girls, aged 9 and 13, were also raped in the camp during that period. It noted that women and girls in UPC/FPLC camps were likened to a large cooking pot known as a ‘guduria’, which indicated that ‘any soldiers could sleep with them at any time’.⁶⁸⁰ It also noted that from about August to September 2002, young girls under the age of 15 were raped in ‘Mandro camp’, where they served as domestic servants and ‘combined cooking and love services’.⁶⁸¹ It further found that a UPC/FPLC soldier raped a girl under the age of 15, who was serving as his bodyguard for at least four months, and that a 13 year-old girl was recruited by the UPC/FPLC and ‘continuously raped’ by a UPC/FPLC soldier ‘until he was killed in Mongbwalu’.⁶⁸²

Count three – attacking civilians as a war crime

The Pre-Trial Chamber found that ‘to be held criminally responsible for the war crime of attacking civilians, the perpetrator must direct one or more acts of violence (an “attack”) against civilians not taking direct part in the hostilities,

678 ICC-01/04-02/06-309, para 79.

679 ICC-01/04-02/06-309, para 79.

680 ICC-01/04-02/06-309, para 81.

681 ICC-01/04-02/06-309, para 82.

682 ICC-01/04-02/06-309, para 82.

before the civilians have fallen into the hands of the attacking party’.⁶⁸³ The Chamber held that rape, along with other enumerated acts, ‘may constitute an act of violence for the purpose of the war crime of attacking civilians, provided that the perpetrator resorts to this conduct as a method of warfare, and thus that there exists a sufficiently close link to the conduct of hostilities’.⁶⁸⁴ The Chamber emphasised that the requisite link between the act of violence underlying the attack and the conduct of hostilities does not exist when the act is committed far from the combat area, such as in a detention camp or a location that has fallen under the control of the attacking party following combat. To illustrate this point, the Chamber cited, among others, its findings under counts four and five regarding rapes committed by UPC/FPLC soldiers after the takeover of Mongbwalu.⁶⁸⁵ Considering these factors, the Chamber concluded that the following crimes each constituted the underlying conduct of the war crime of attacking civilians: rape of civilians; murder and attempted murder; pillaging; attacking protected objects; and destroying the enemy’s property.⁶⁸⁶

Count ten – persecution as a crime against humanity

The Pre-Trial Chamber confirmed the crime of persecution based on its findings regarding crimes described in other charges. It found that the crimes of rape and sexual slavery of civilians, as well as murder and attempted murder, attacking civilians, pillaging, displacing civilians, and attacking protected objects, were perpetrated against non-Hema civilians during the First and Second Attacks on account of their ethnic origin. It further found that these crimes ‘constituted severe deprivations of fundamental rights’, including the right to life, to be free from torture and cruel, inhuman or degrading treatment, and the right to private property’.⁶⁸⁷

683 ICC-01/04-02/06-309, para 45.

684 ICC-01/04-02/06-309, para 46. Other acts noted by the Chamber included ‘shelling, sniping, murder, [...] pillage, attacks on protected objects and destruction of property’.

685 ICC-01/04-02/06-309, para 47 and fn 175.

686 ICC-01/04-02/06-309, para 48.

687 ICC-01/04-02/06-309, para 58.

Modes of liability⁶⁸⁸

The Chamber found that there are substantial grounds to believe that Ntaganda bears individual criminal responsibility pursuant to different modes of liability, specifically: direct perpetration, indirect co-perpetration (Article 25(3)(a) of the Statute); ordering, inducing (Article 25(3)(b) of the Statute); any other contribution to the commission of crimes (Article 25(3)(d) of the Statute); or as a military commander for crimes committed by his subordinates (Article 28(a) of the Statute).⁶⁸⁹ As noted above, this marks the first time at the ICC that a Pre-Trial Chamber has confirmed alternate modes of liability in a Confirmation of Charges decision. The Chart below, which is annexed to the Confirmation of Charges decision, illustrates the crimes for which Ntaganda is allegedly responsible and under which particular mode(s) of responsibility.⁶⁹⁰

	<i>First attack</i>	<i>Second attack</i>	<i>Non-international armed conflict</i>
Indirect co-perpetration Article 25(3)(a) of the Statute	Counts 1 to 5, 10 to 13, 17 and 18	Counts 1 to 5, 7-8, 10 to 13 and 18	Counts 6, 9 and 14 to 16
Direct co-perpetration Article 25(3)(a) of the Statute	Counts 1 to 3, 10-11 and 17 (as described in paras 138-142 of the decision)		Counts 15-16 (as described in para 143 of the decision)
Ordering Article 25(3)(b) of the Statute	Counts 1 to 5, 10 to 13 and 17	Counts 1 to 5, 7-8, 10 and 11	Counts 16
Inducing Article 25(3)(b) of the Statute	Counts 1 to 5, 10 to 13 and 17	Counts 1 to 5, 7-8, 10 and 11	Counts 16
Contributing in any other way Article 25(3)(d) of the Statute	Counts 1 to 5, 10 to 13, 17 and 18	Counts 1 to 5, 7-8, 10 to 13, 17 and 18	Counts 6, 9 and 14 to 16
Acting as a Military Commander Article 25(3)(a) of the Statute	Counts 1 to 5, 10 to 13, 17 and 18	Counts 1 to 5, 7-8, 10 to 13, 17 and 18	Counts 6, 9 and 14 to 16

Ntaganda's responsibility for sexual violence crimes

Article 25(3)(a) of the Statute

Concerning the sexual violence charges, the Pre-Trial Chamber found substantial grounds to believe that Ntaganda contributed to the common plan, as an indirect co-perpetrator based on Article 25(3)(a) of the Statute, when at a parade before the First Attack he allegedly 'used the expression "piga na kuchaji", which was taught to UPC/FPLC troops during training'.⁶⁹¹ According to the Confirmation of Charges decision, this expression means that the troops should 'fight and take any goods encountered, including women', and that the fighters were then 'free to determine what to do with these women'.⁶⁹² Furthermore, Ntaganda allegedly 'sent his bodyguards to rape three Lendu nuns who were held in his apartment in Kilo-Moto'.⁶⁹³ The Chamber also found that the evidence showed that Ntaganda provided an essential contribution during the non-international armed conflict because he oversaw the recruitment,

688 See further 'Modes of Liability: A review of the International Criminal Court's current jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

689 ICC-01/04-02/06-309, para 97.

690 ICC-01/04-02/06-309-Anx. See also ICC-01/04-02/06-309, para 98.

691 ICC-01/04-02/06-309, para 111.

692 ICC-01/04-02/06-309, para 111.

693 ICC-01/04-02/06-309, para 112.

training and deployment of troops and had to know that there were 'girls below the age of 15 years', who were placed in the camps under the authority of male soldiers,⁶⁹⁴ implicating the accused in the rape, sexual slavery, conscription, enlistment and use of child soldiers. With regard to the mental element of indirect co-perpetration, the Chamber found that the accused acted with *dolus directus* in the second degree concerning rape and sexual slavery.⁶⁹⁵ This is based on the allegation that Ntaganda was aware that the commission of these crimes would be 'the almost inevitable outcome of the implementation of the common plan' to gain military and political control over Ituri, 'since girls below the age of 15 years were placed in UPC/FPLC camps with male commanders and fighters', despite the fact that the accused 'was in possession of information of sexual violence committed against young girls' by soldiers.⁶⁹⁶

Article 25(3)(b) of the Statute

With regard to the mode of liability of ordering pursuant to Article 25(3)(b) of the Statute, the Chamber found that there were substantial grounds to believe that Ntaganda ordered his troops to rape and to engage in sexual slavery against civilians.⁶⁹⁷ However, the Chamber did not find that sufficient evidence had been provided to show that Ntaganda had ordered rape or sexual slavery of child soldiers as alleged under counts six and nine of the DCC.⁶⁹⁸ Under Article 25(3)(b) of the Statute, the mode of liability of inducing rape and sexual violence was found by the Chamber to be substantially supported by the evidence, specifically because the accused, 'created an environment in which crimes against the Lendu in particular were encouraged or officially approved'.⁶⁹⁹

Article 25(3)(d) of the Statute

All crimes of sexual violence charged by the Prosecution were confirmed under Article 25(3)(d) of the Statute – contributing in any other way – with the Chamber concluding that Ntaganda's alleged contribution was intentional and that it was made with the knowledge of the intent of the group to commit the crimes set forth in the charges.⁷⁰⁰

Article 28 of the Statute

In confirming the final mode of liability charged, command responsibility pursuant to Article 28(a) of the Statute, the Chamber made specific findings on counts six and nine, which address the alleged rape and sexual enslavement of child soldiers.⁷⁰¹ The Chamber found substantial grounds to believe that Ntaganda specifically knew of sexual violence against UPC/FPLC child soldiers and 'he was, in particular, aware of the rape of a 12 or 13 year-old girl from his escort by his chief of security'.⁷⁰² Further, the Chamber found that Ntaganda protected his chief of security after learning of the rape.⁷⁰³

694 ICC-01/04-02/06-309, para 116. See also para 117.

695 ICC-01/04-02/06-309, para 134.

696 ICC-01/04-02/06-309, para 134. See also para 105.

697 ICC-01/04-02/06-309, para 148.

698 ICC-01/04-02/06-309, para 152.

699 ICC-01/04-02/06-309, para 155.

700 ICC-01/04-02/06-309, paras 159, 162. See also para 97.

701 ICC-01/04-02/06-309, paras 165, 170.

702 ICC-01/04-02/06-309, para 170.

703 ICC-01/04-02/06-309, para 172.

Côte d'Ivoire: Charges for gender-based crimes in the Laurent Gbagbo and Charles Blé Goudé cases

As further described in the **Overview of Situations and Cases** section of this Report, the Situation in Côte d'Ivoire marked the first investigation opened following an Article 12(3) declaration by a non-State Party to the Rome Statute to accept the Court's jurisdiction.⁷⁰⁴ It arose from the post-election violence between November 2010 and May 2011, which broke out after former President Laurent Gbagbo refused to accept the result of the November 2010 Presidential election and refused to transfer power to Alassane Ouattara, the internationally recognised President-elect.⁷⁰⁵ According to the Prosecution, Laurent Gbagbo and members of his inner circle allegedly conceived a plan which led to the commission of crimes against humanity.

At the time of writing this Report, three individuals face charges before the ICC in relation to the Côte d'Ivoire Situation, including: Laurent Gbagbo; Charles Blé Goudé (Blé Goudé), in his alleged capacity as a member of Laurent Gbagbo's inner circle and leader of the Pro-Gbagbo Youth; and Simone Gbagbo, former First Lady of Côte d'Ivoire, in her capacity as a member

of her husband Laurent Gbagbo's inner circle.⁷⁰⁶ In the Arrest Warrants issued against them, they were charged as indirect co-perpetrators with four counts of crimes against humanity; namely, murder, rape and other forms of sexual violence, other inhumane acts and persecution committed in Côte d'Ivoire between 16 December 2010 and 12 April 2012.⁷⁰⁷ Simone Gbagbo remains in Côte d'Ivoire, and Côte d'Ivoire's challenge to the admissibility of her case is pending a decision by Pre-Trial Chamber I.⁷⁰⁸ Laurent Gbagbo and Blé Goudé were both transferred into ICC custody on 30 November 2011 and 22 March 2014, respectively.⁷⁰⁹ A decision confirming the charges was rendered in the Laurent Gbagbo case on 12 June 2014, while the Prosecution filed the DCC against Blé Goudé on 27 August 2014, and at the time of writing this Report, the hearing on the confirmation of charges in his case was scheduled to commence before Pre-Trial Chamber I on 29 September 2014. The Confirmation of Charges decision in the Laurent Gbagbo case and the DCC against Blé Goudé are described in detail below.

In the DCCs filed against Laurent Gbagbo and Blé Goudé, the Prosecution argued that the suspects were criminally responsible for the crimes against humanity of murder, rape, other inhumane acts or, in the alternative, attempted murder and persecution committed by pro-Gbagbo forces⁷¹⁰ in Abidjan, Côte d'Ivoire during the period of post-

704 Pursuant to Article 12(3) of the Statute, a non-State Party can lodge a declaration accepting the jurisdiction of the Court. Following such a declaration, it is up to the Prosecutor to decide *proprio motu* whether to request authorisation from the Pre-Trial Chamber to initiate investigations. The Government of Côte d'Ivoire, which initially accepted the Court's jurisdiction by way of an Article 12(3) declaration in 2003, following the intensification of violence in 2010, reaffirmed its acceptance of the Court's jurisdiction in December 2010 and again in May 2011. On 23 June 2011, the ICC Prosecutor requested authorisation to initiate investigations into the Situation in Côte d'Ivoire, which was granted by the Pre-Trial Chamber on 3 October 2011. ICC-02/11-14. On 15 February 2013, Côte d'Ivoire ratified the Rome Statute, thereby becoming the 122nd State Party to the Rome Statute, and the 33rd African State.

705 A/65/583/Rev.1, paras 7-11; A/65/PV.73, p 1.

706 ICC-02/11-01/11-656-Red, paras 79-80, 84. See also ICC-02/11-02/11-124-Anx1-Corr, para 324.

707 ICC-02/11-01/11-1, p 7; ICC-02/11-02/11-1, p 8; ICC-02/11-01/12-1, p 8.

708 For more information about the admissibility proceedings in the case against Simone Gbagbo, see the *Admissibility* section of this Report.

709 Côte d'Ivoire Situation, *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/Pages/situation%20index.aspx>.

710 The pro-Gbagbo forces were composed of the FDS, mercenaries, militias and the Pro-Gbagbo Youth. The Prosecution argued that they were jointly controlled by Laurent Gbagbo and his inner circle, including Blé Goudé. ICC-02/11-01/11-592-Anx2-Corr2-Red, paras 132, 158; ICC-02/11-02/11-124-Anx1-Corr, paras 174, 206. See also ICC-02/11-01/11-656-Red, paras 87, 233-234.

election violence.⁷¹¹ Blé Goudé faces charges as an indirect co-perpetrator under Article 25(3)(a) of the Statute, or in the alternative, for ordering, soliciting or inducing the crimes, aiding or abetting the commission of the crimes, and as an accessory to the crimes, under Articles 25(3)(b), (c) and (d) of the Statute, respectively.⁷¹² Laurent Gbagbo faces charges as an indirect co-perpetrator under Article 25(3)(a), or in the alternative, for ordering, soliciting or inducing the crimes, as an accessory to the crimes, and under the doctrine of command responsibility under Articles 25(3)(b), (d) and 28 of the Statute, respectively.⁷¹³

The Prosecution claimed that when Laurent Gbagbo's political opponent, Ouattara won the election, Gbagbo supporters reacted with violence and orchestrated targeted attacks on civilians known or perceived to be Ouattara supporters. The Prosecution asserted that the crimes of murder, rape and other inhumane acts constituted persecution on 'political, national, ethnic or religious grounds'.⁷¹⁴

The Prosecution claimed that the crimes for which Laurent Gbagbo and Blé Goudé are allegedly responsible were committed in the context of the following incidents: (1) attacks linked to the demonstrations by Ouattara supporters in front of the RTI building between 16 and 19 December 2010 (First Incident); (2) an attack organised during a women's march in Abobo on 3 March 2011 (Second Incident); (3) the shelling of the Abobo market and its surroundings on 17 March 2011 (Third Incident); and (4) an attack on Yopougon on or about 12 April 2011 (Fourth Incident).⁷¹⁵ Furthermore, the Prosecution claimed that the crimes for which Blé Goudé is alleged

to be responsible were also committed within the context of an additional incident; namely, an attack by the Pro-Gbagbo Youth on Yopougon against 'any foreign person' between 25 and 28 February 2011 (Fifth Incident).⁷¹⁶

Concerning the charges for gender-based crimes, in the Arrest Warrants against Laurent Gbagbo and Blé Goudé, each suspect was alleged to have committed 'rape and other forms of sexual violence' as crimes against humanity.⁷¹⁷ However, in the DCC against each suspect, although the respective sections describing the facts underlying the charges referred to the commission of acts of 'other forms of sexual violence' by the pro-Gbagbo forces,⁷¹⁸ Laurent Gbagbo and Blé Goudé were solely accused of 'rape as a crime against humanity'.⁷¹⁹ It is unclear whether the difference between the Arrest Warrants and the DCCs in the respective cases result from a lack of precision in the documents or whether acts constituting other forms of sexual violence represented in the Arrest Warrants are no longer being pursued by the Prosecution.

Confirmation of Charges decision – Laurent Gbagbo

As of 12 June 2014, Laurent Gbagbo faces trial for four counts of crimes against humanity, including rape and persecution by means of rape. To date, the Laurent Gbagbo case is the sixth ICC case in which charges of sexual violence crimes have been confirmed for trial.⁷²⁰ The confirmation of charges hearing took place between 19 and 28 February 2013. On 3 June 2013, Pre-Trial Chamber I, Judge Fernández de Gurmendi dissenting, issued a decision adjourning the hearing and requesting

711 ICC-02/11-01/11-592-Anx2-Corr2-Red, paras 211, 217-220; ICC-02/11-02/11-124-Anx1-Corr, paras 1, 69, 322.

712 ICC-02/11-02/11-124-Anx1-Corr, para 322.

713 ICC-02/11-01/11-592-Anx2-Corr2-Red, para 211.

714 ICC-02/11-01/11-592-Anx2-Corr2-Red, para 220; ICC-02/11-02/11-124-Anx1-Corr, para 330.

715 ICC-02/11-01/11-592-Anx2-Corr2-Red, p 65-89; ICC-02/11-02/11-124-Anx1-Corr, p 50-64, paras 327-329. For more details on the four Incidents, see *Gender Report Card 2013*, p 74.

716 ICC-02/11-02/11-124-Anx1-Corr, p 58-60 and paras 327-329.

717 ICC-02/11-01/11-1, p 7; ICC-02/11-02/11-1, p 8.

718 ICC-02/11-01/11-592-Anx2-Corr2-Red, para 114; ICC-02/11-02/11-124-Anx1-Corr, para 144.

719 ICC-02/11-01/11-592-Anx2-Corr2-Red, para 233; ICC-02/11-02/11-124-Anx1-Corr, p 125-126.

720 The other cases in which charges of sexual violence crimes have been confirmed for trial are: Bemba, Katanga, Ngudjolo, Ntaganda and Kenyatta.

the Prosecution to provide further evidence or conduct further investigations with respect to all charges and to submit an amended DCC by 15 November.⁷²¹ Following a request from the Prosecution, Pre-Trial Chamber I extended the deadline to submit the amended DCC to 13 January.⁷²² The decision adjourning the hearing clarified that forensic, other material evidence and testimonial evidence based on the ‘first-hand and personal observations of the witness’ were preferred to documentary evidence such as press articles and NGO reports upon which the Prosecution had ‘relied heavily’.⁷²³ On 13 January 2014, the Prosecution filed an amended DCC⁷²⁴ to which the Defence responded on 4 April 2014.⁷²⁵ In support of the gender-based charges, the amended DCC referred to the evidence of eight witnesses who testified to the rape allegations.⁷²⁶

On 12 June 2014, Pre-Trial Chamber I,⁷²⁷ Judge Van den Wyngaert dissenting,⁷²⁸ issued the decision confirming the charges.⁷²⁹ In its decision, the Chamber found that there was sufficient evidence to establish substantial grounds to believe that Laurent Gbagbo committed the crimes of murder,⁷³⁰ rape,⁷³¹ other inhumane acts⁷³² or, in the alternative,

attempted murder,⁷³³ and persecution.⁷³⁴ The Defence requested leave to appeal the decision,⁷³⁵ which the Chamber denied.⁷³⁶

Contextual elements of crimes against humanity

The Chamber found substantial grounds to believe that the crimes for which Laurent Gbagbo was charged were committed in the context of a widespread and systematic attack directed against a civilian population, thus establishing the contextual elements of crimes against humanity. It based its conclusion on its finding that pro-Gbagbo forces carried out multiple acts of violence within the context of the four Incidents, constituting an attack against civilians perceived to be Ouattara’s supporters.⁷³⁷ It found that this attack was carried out ‘pursuant to or in furtherance of a State or organisational policy’, which was planned and coordinated by ‘Laurent Gbagbo and his inner circle’.⁷³⁸ The Chamber further found that the attack was both widespread and systematic, based on the large number of acts and individuals targeted, its extensive temporal and geographic scope, that it was planned and coordinated, as well as the ‘clear pattern of violence directed at pro-Ouattara demonstrators’.⁷³⁹

Charges for gender-based crimes

The Chamber concluded that there were substantial grounds to believe that the pro-Gbagbo forces committed rape and persecution, carried out through acts including rape, in the course of the First and Fourth Incidents between December 2010 and April 2012.⁷⁴⁰

721 ICC-02/11-01/11-432, p 22. For more information about the decision adjourning the confirmation of charges hearing, see *Gender Report Card 2013*, p 73-87.

722 ICC-02/11-01/11-576, p 6.

723 *Gender Report Card 2013*, p 78-79. See also ICC-02/11-01/11-432, paras 27, 29-30.

724 ICC-02/11-01/11-592-Anx2-Corr2-Red.

725 ICC-02/11-01/11-637-Anx2-Corr2-Red.

726 ICC-02/11-01/11-656-Red, fn 56, 65-67, 154. The witnesses of acts of rape are: P-112, P-117, P-350, P-344, P-369, P-185, P-398, P-404.

727 Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Hans-Peter Kaul (Germany) and Judge Christine Van den Wyngaert (Belgium).

728 ICC-02/11-01/11-656-Anx.

729 ICC-02/11-01/11-656-Red. Henceforth, the term ‘Chamber’ will be used to reflect the opinion of the majority.

730 Article 7(1)(a), Rome Statute.

731 Article 7(1)(g), Rome Statute.

732 Article 7(1)(k), Rome Statute.

733 Articles 7(1)(a) and 25(3)(f), Rome Statute.

734 Article 7(1)(h), Rome Statute. See also ICC-02/11-01/11-656-Red, para 266.

735 ICC-02/11-01/11-676-Red, p 44.

736 ICC-02/11-01/11-680, p 23.

737 ICC-02/11-01/11-656-Red, paras 208-212.

738 ICC-02/11-01/11-656-Red, paras 218-221.

739 ICC-02/11-01/11-656-Red, paras 224-225.

740 ICC-02/11-01/11-656-Red, paras 195-196, 204, 206.

Count two – rape as a crime against humanity

The Chamber found substantial grounds to believe that during the First and Fourth Incidents, at least 38 persons were raped by the pro-Gbagbo forces.⁷⁴¹ In particular, at least 22 women were raped in Yopougon on or around 12 April 2011 after they were attacked in the street or in their homes by individuals armed with guns and machetes.⁷⁴² At least another 16 women and girls were raped during and after the demonstration of Ouattara supporters at the RTI building between 16 and 19 December 2010.⁷⁴³

Concerning the latter Incident, the Chamber concluded that at least one individual was raped during an attack by FDS units, supported by militia and mercenaries on the Abobo-Adjamé highway.⁷⁴⁴ Several other individuals were raped by the FDS forces, who actively searched for, arrested and attacked demonstrators in the neighbourhood of the RTI building, after the demonstration dispersed.⁷⁴⁵ For instance, the Chamber noted:

Two witnesses describe in detail how they were arrested in Williamsville, taken to the *École de police* and raped there by policemen before being let go the following morning. Another witness states that she was taken in a group to the prefecture at Plateau where she and several other women were raped repeatedly during the course of the following days before the witness was eventually released on 19 December 2010.⁷⁴⁶

The Chamber found substantial grounds to believe that other residents of Abobo were raped in the days following the attack by FDS forces, including ‘militia elements’, who raided civilian homes.⁷⁴⁷

741 ICC-02/11-01/11-656-Red, para 195.

742 ICC-02/11-01/11-656-Red, paras 65, 72.

743 ICC-02/11-01/11-656-Red, para 37.

744 ICC-02/11-01/11-656-Red, para 30.

745 ICC-02/11-01/11-656-Red, para 34.

746 ICC-02/11-01/11-656-Red, para 34.

747 ICC-02/11-01/11-656-Red, para 35.

Count four – persecution by means of rape as a crime against humanity

The Chamber confirmed the crime of persecution based in part on its finding that the acts of rape were committed against 38 persons on political, ethnic, national and religious grounds. In particular, the Chamber found that the victims of these acts were targeted by the pro-Gbagbo forces because of ‘their identity as perceived political supporters’ of Laurent Gbagbo’s political opponent Alassane Ouattara.⁷⁴⁸

Counts one, three and four – murder, other inhumane acts, or in the alternative attempted murder, and persecution as crimes against humanity

The Chamber found substantial grounds to believe that murder and other inhumane acts as crimes against humanity were committed during all four Incidents. Specifically, it found that there were substantial grounds to believe that the pro-Gbagbo forces killed at least 160 persons and injured at least 118 persons.⁷⁴⁹ In drawing this conclusion, the Chamber relied on evidence showing that the pro-Gbagbo forces used lethal violence against unarmed civilians, including heavy weapons, fragmentation grenades, rocket launchers, guns, mortar shells and machetes, which resulted in deaths and injuries.⁷⁵⁰ In confirming the charge of other inhumane acts, the Chamber found that the elements of ‘great suffering and serious injury to body’ were satisfied, considering ‘the kind of weaponry used, and in light of the available information on the types of injuries suffered by the victims of the crimes charged’.⁷⁵¹

The charge of attempted murder was considered as an alternative to the charge of other inhumane acts, with respect to the same

748 ICC-02/11-01/11-656-Red, paras 204-205 and p 130.

749 ICC-02/11-01/11-656-Red, paras 193, 197.

750 ICC-02/11-01/11-656-Red, paras 30-33, 44-46, 49, 53, 65.

751 ICC-02/11-01/11-656-Red, para 198.

injuries.⁷⁵² The Chamber concluded that the kind of weaponry used and the types of injuries suffered by the victims demonstrated that ‘the conduct of the pro-Gbagbo forces was designed to bring about, as a consequence, the death of the victims’ and constituted ‘a substantial step for the attainment of said consequence’.⁷⁵³ It added that ‘the fact that the death of the victims did not occur was independent of the perpetrators’ intentions’.⁷⁵⁴

The Chamber also confirmed the charge of persecution as a crime against humanity based on its finding of substantial grounds to believe that the ‘killings’ and ‘injuries’ were committed against 278 persons on political, ethnic, national and religious grounds. The Chamber found that the victims of these acts were also targeted by the pro-Gbagbo forces because of ‘their identity as perceived political supporters’ of Ouattara.⁷⁵⁵

Modes of liability

The Chamber confirmed all charges on the basis of the alternative modes of liability of indirect co-perpetration, instigation or contribution in any other way to the commission or attempted commission of the crimes. However, the Chamber declined to confirm the charges on the basis of command responsibility.⁷⁵⁶ In this respect, it recalled that liability under Article 28 of the Statute differs from liability under Article 25 of the Statute as the former establishes ‘liability for one’s own crimes’ and the latter ‘establishes liability for violation of duties in relation to crimes committed by others’.⁷⁵⁷ It found that in spite of evidence indicating ‘a failure on the part of Laurent Gbagbo to prevent violence or to take adequate steps to investigate and punish the authors of the crimes, [...] the evidence, taken as a whole, demonstrates that

this failure was an inherent component of the deliberate effort to achieve the purpose of retaining power at any cost, including through the commission of crimes’.⁷⁵⁸

In confirming Laurent Gbagbo’s criminal responsibility under alternatively, Article 25 (3)(a), (b) or (d) of the Statute, the Chamber analysed the required material and mental elements for each of these modes of liability based on established jurisprudence.⁷⁵⁹

Material elements

Article 25(3)(a) of the Statute

Regarding liability as an indirect co-perpetrator, the Chamber found substantial grounds to believe that Laurent Gbagbo and his inner circle designed a common plan aimed at ‘retain[ing] power by all means, including through the use of force against civilians’. This was demonstrated by Laurent Gbagbo’s relations with his inner circle composed of a few ‘close associates’, including Simone Gbagbo and Charles Blé Goudé, who ‘shared his objective of staying in power’, and their interactions together and with forces under their control,⁷⁶⁰ which included the FDS, militias, mercenaries and youth organisations. It was also demonstrated through activities undertaken by Laurent Gbagbo and members of his inner circle such as ‘public statements indicating an intention to hold on to power at any cost, including by use of force against civilians’, campaign activities, mobilisation of youth for violent acts and other preparatory activities in anticipation of the use of violence.⁷⁶¹

Laurent Gbagbo’s essential contribution to the common plan was established based on the orders he gave in relation to the march on the RTI building and the Abobo attack, as well as through the support he gave to militias and youth groups, in particular in Yopougon. The Chamber found

752 ICC-02/11-01/11-656-Red, paras 200-203.

753 ICC-02/11-01/11-656-Red, para 201.

754 ICC-02/11-01/11-656-Red, para 201.

755 ICC-02/11-01/11-656-Red, paras 204-205 and p 130.

756 ICC-02/11-01/11-656-Red, paras 265-266.

757 ICC-02/11-01/11-656-Red, para 262.

758 ICC-02/11-01/11-656-Red, para 264.

759 ICC-02/11-01/11-656-Red, paras 230, 244, 252.

760 ICC-02/11-01/11-656-Red, para 231.

761 ICC-02/11-01/11-656-Red, para 231.

that if it had not been for his contribution ‘the crimes would not have been committed or would have been committed in a significantly different way.’⁷⁶²

The Chamber further found that Laurent Gbagbo and his inner circle exercised joint control over the pro-Gbagbo forces, which was possible due to the organised and hierarchical nature of the forces. In particular, Laurent Gbagbo and his inner circle controlled the FDS, militias and mercenaries through ‘the official State hierarchy and a parallel structure’. Control over the militias was further exercised through the provision of weapons and financial support, as well as through the personal links existing between militia leaders and Laurent Gbagbo. Control over the youth organisations was ‘ensured in the context of campaign activities’.⁷⁶³

Article 25(3)(b) of the Statute

With regard to Laurent Gbagbo’s alleged liability for instigating the crimes charged, the Chamber found substantial grounds to believe that he and his inner circle had authority over the direct perpetrators. This finding was made on the same basis as the finding of the exercise of joint control over the pro-Gbagbo forces, in the context of liability under Article 25(3)(a) of the Statute.⁷⁶⁴ The Chamber further found that Laurent Gbagbo’s instruction or instigation with respect to the four Incidents had a direct effect on the commission of the crimes. Specifically, it found that the demonstration leading to the RTI building was suppressed because of Laurent Gbagbo’s order to prevent it. Laurent Gbagbo also ordered the intervention of the national armed forces in Abobo that resulted in the shooting of demonstrators and shelling of the market. Additionally, Laurent Gbagbo mobilised the pro-Gbagbo forces for his cause and directed

762 ICC-02/11-01/11-656-Red, para 232.

763 ICC-02/11-01/11-656-Red, paras 233-234.

764 ICC-02/11-01/11-656-Red, para 245.

their actions through the use of violence against civilians perceived as supporters of the opposing party.⁷⁶⁵

Article 25(3)(d) of the Statute

Concerning Laurent Gbagbo’s alleged liability for contributing in any other way to the commission of the crimes, the Chamber found substantial grounds to believe that Laurent Gbagbo and his inner circle acted with the common purpose to maintain him in power by all means, including through the use of violence. This finding was based upon Laurent Gbagbo’s relations with his inner circle, their interactions amongst each other and with forces under their control, and the activities they undertook such as public statements, campaign activities, other preparatory activities in anticipation of the use of violence, and steps undertaken in reaction to the evolution of the crisis.⁷⁶⁶

The Chamber was satisfied that his contribution to the commission of the crimes was established through the orders and instructions given, his support to militia and youth groups, the activities he undertook in anticipation of the use of violence such as recruiting and financing some pro-Gbagbo forces and acquiring weapons, as well as his participation in meetings with high commanders of the FDS and provision of instructions to pro-Gbagbo forces.⁷⁶⁷

Mental elements

The Chamber found substantial grounds to believe that Laurent Gbagbo acted with intent and knowledge. Regarding liability as an indirect co-perpetrator, the Chamber found that he ‘meant to engage in his activities in the post-election crisis, and to issue orders and instructions, with a view to implement the common plan’ and that he meant to

765 ICC-02/11-01/11-656-Red, paras 246-247.

766 ICC-02/11-01/11-656-Red, para 254.

767 ICC-02/11-01/11-656-Red, para 255.

cause the use of violence against civilians or was aware that the violence would occur in the ordinary course of events.⁷⁶⁸ As for his liability for instigating the crimes, the Chamber found that Laurent Gbagbo ‘meant to instruct or instigate the pro-Gbagbo forces to carry out certain actions in the execution of which the crimes charged were committed’ and that he was aware that crimes would be committed as a consequence of his actions.⁷⁶⁹ With respect to liability as an accessory, the Chamber found that Laurent Gbagbo ‘meant to contribute to the commission of the crimes’ and was aware that his conduct contributed to them.⁷⁷⁰

The findings on Laurent Gbagbo’s intent were based on several factors, including the behaviour of his inner circle and his own behaviour prior to and during the crisis such as public statements made and campaign activities conducted, mobilisation of youth, recruitment of FDS elements, militias and mercenaries, and coordination and continued implementation of the common plan.⁷⁷¹

The finding that Laurent Gbagbo acted with knowledge was based on factors, including his awareness that his actions would cause or were causing harm, his early knowledge of the consequences of his conduct, his awareness that heavy weapons were used by pro-Gbagbo forces against civilians, and his knowledge and exploitation of the allegiance of the pro-Gbagbo militias and youth.⁷⁷² Additionally, with respect to liability under Article 25(3)(a) of the Statute, the Chamber found that Laurent Gbagbo was aware that he exercised control over the pro-Gbagbo forces.⁷⁷³

The Chamber also found that ‘Laurent Gbagbo was aware that the crimes committed in the

context of the four incidents’ were ‘part of a widespread and systematic attack directed against a civilian population, namely known or perceived Ouattara supporters’.⁷⁷⁴

Dissenting Opinion of Judge Christine Van den Wyngaert

In her Dissenting Opinion, Judge Christine Van den Wyngaert asserted that in terms of the charges under Article 25(3)(a), (b) and (d) of the Statute, and based on the evidence presented by the Prosecutor, the case against Laurent Gbagbo was not sufficiently strong to go to trial.⁷⁷⁵ With respect to liability as an indirect co-perpetrator, she was not persuaded that the common plan involved the commission of crimes against civilians or that ‘it was foreseeable’ that the crimes of murder and rape would have occurred in the ordinary course of events. Additionally, she was not persuaded that Laurent Gbagbo used the forces at his disposal to intentionally commit crimes against civilians.⁷⁷⁶

Turning to liability under Article 25(3)(b) of the Statute, Judge Van den Wyngaert found that the evidence did not show that the commission of crimes was explicitly induced and that the allegation of implicit inducement based on public speeches and instructions was not part of ‘a deliberate effort’ on Laurent Gbagbo’s part.⁷⁷⁷

Furthermore, concerning Laurent Gbagbo’s accessorial liability, Judge Van den Wyngaert

768 ICC-02/11-01/11-656-Red, paras 236, 238.

769 ICC-02/11-01/11-656-Red, paras 248-249.

770 ICC-02/11-01/11-656-Red, paras 256-257.

771 ICC-02/11-01/11-656-Red, paras 237, 248, 256.

772 ICC-02/11-01/11-656-Red, paras 238, 250, 257.

773 ICC-02/11-01/11-656-Red, para 240.

774 ICC-02/11-01/11-656-Red, para 239.

775 ICC-02/11-01/11-656-Anx, para 12.

776 ICC-02/11-01/11-656-Anx, paras 5-6. For more information on the requirements to establish liability as an indirect co-perpetrator, including Judge Van den Wyngaert’s Separate and Concurring Opinion in the Katanga case, see ‘Modes of Liability: A review of the International Criminal Court’s current jurisprudence and practice’, *Women’s Initiatives for Gender Justice*, Expert Paper, November 2013, p 60-72, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

777 ICC-02/11-01/11-656-Anx, para 7.

found that there was not sufficient evidence to demonstrate the existence of ‘a group acting with a common purpose in the sense of article 25(3)(d) [of the Statute]’.⁷⁷⁸ In particular, she found that ‘given that nobody would argue that *all* FDS members, *all* mercenaries, *all* militia members and *all* youth group members constituted one large “group acting with a common purpose”, it is necessary to know who *did* belong to the alleged group acting with a common purpose’.⁷⁷⁹ She added that even assuming the existence of a group with a common purpose, she did not consider that there was sufficient evidence to conclude that Laurent Gbagbo’s alleged contributions were made with intent and knowledge.⁷⁸⁰

However, Judge Van den Wyngaert indicated that she ‘could have, in principle, envisaged confirming the charges on the basis of article 28’ with respect to crimes allegedly committed by the FDS and pro-Gbagbo armed groups operating inside the FDS command structure.⁷⁸¹

Charges for gender-based crimes in the Blé Goudé case

Charles Blé Goudé (Blé Goudé) is the second individual to be transferred to the ICC in the Côte d’Ivoire Situation, pursuant to an arrest warrant issued under seal on 21 December 2011.⁷⁸²

778 ICC-02/11-01/11-656-Anx, para 9.

779 ICC-02/11-01/11-656-Anx, para 8 (emphasis in original).

780 ICC-02/11-01/11-656-Anx, para 10.

781 ICC-02/11-01/11-656-Anx, para 11.

782 ICC-02/11-02/11-1. The Arrest Warrant was unsealed on 30 September 2013. See ‘The Prosecutor v. Charles Blé Goudé’, *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/ICC-0211-0211/Pages/default.aspx>.

Confirmation of charges hearing delayed

The hearing on the confirmation of the charges against Blé Goudé was initially scheduled to start on 18 August 2014.⁷⁸³ However, on 4 July 2014, the Prosecution sought a six-week extension of the deadline for completing its disclosure of evidence to be relied upon for the Confirmation of Charges decision, as well as the filing of its DCC and LoE.⁷⁸⁴ The Prosecution claimed that the extension was necessary to ensure that additional evidence would be available, including audio-recorded witness interviews and a number of videos that were submitted as evidence in the Laurent Gbagbo case, which it claimed are also relevant to the Blé Goudé case.⁷⁸⁵ It explained that this new evidence was in the process of being transcribed and reviewed for disclosure and should be available by approximately 15 August.⁷⁸⁶ The Prosecution also argued that it was in the process of attempting to obtain consent from the UN to disclose UN statements gathered as evidence in the Laurent Gbagbo case, which are also relevant to the case against Blé Goudé. It added that it ‘remained uncertain whether this issue [would] be resolved prior to [the start of the hearing]’.⁷⁸⁷

On 11 July, Single Judge Silvia Fernández de Gurmendi of Pre-Trial Chamber I granted the Prosecution’s request and ordered it to file its DCC and LoE by 22 August. The Single Judge also decided to postpone the confirmation of charges hearing until 22 September.⁷⁸⁸ The Single Judge stated that the collection of new evidence ‘will not necessarily justify per se a postponement of the confirmation of charges hearing’.⁷⁸⁹ However,

783 ICC-02/11-02/11-T-3-Red-ENG, p 12 lines 9-16.

784 ICC-02/11-02/11-100-Red, paras 1, 32.

785 ICC-02/11-02/11-100-Red, paras 11-18.

786 ICC-02/11-02/11-100-Red, paras 13, 15, 17.

787 ICC-02/11-02/11-100-Red, para 19. The Prosecution submitted additional arguments regarding the evidence obtained through UN cooperation but they were redacted. See paras 20-22.

788 ICC-02/11-02/11-108-Red, p 7.

789 ICC-02/11-02/11-108-Red, para 10.

the Single Judge determined that ‘it [was] for the Prosecution to determine in the first place what is the evidence that needs to be provided in order to support the charges’.⁷⁹⁰ The Single Judge thus found that a ‘limited’ postponement was warranted, in particular given the Prosecution’s indication that additional evidence already collected was relevant to the case and ‘only need[ed] to be properly processed, disclosed and submitted’.⁷⁹¹ However, the Single Judge found that the Prosecution’s efforts to obtain consent for the disclosure of UN evidence did not justify a postponement, given that the Prosecution had not explained how it expected to resolve the situation within the suggested extended time limit, and thus, a postponement on this ground would be ‘speculative’.⁷⁹²

In the same decision, the Single Judge ordered the Defence to complete the disclosure of any evidence on which it intended to rely at the hearing and file its LoE by 5 September.⁷⁹³ On 28 August 2014, the Defence sought an additional one week extension of this deadline.⁷⁹⁴ It argued that it was ‘investigating issues arising out of the DCC’ and that in light of the ‘sheer amount of material with which [it] ha[d] been provided and the need to conduct an effective investigation to counter the new allegations contained [in the DCC], it showed ‘good cause’ for the request’.⁷⁹⁵ On 29 August, the Prosecution responded that it did not object to the proposed extension of the time limit but was opposed to the request insofar as it was not accompanied by a request to postpone the start of the hearing, in conformity with Rule 121(6) of the RPE.⁷⁹⁶ On

790 ICC-02/11-02/11-108-Red, para 10.

791 ICC-02/11-02/11-108-Red, para 10.

792 ICC-02/11-02/11-108-Red, para 11.

793 ICC-02/11-02/11-108-Red, p 7.

794 ICC-02/11-02/11-132, para 7.

795 ICC-02/11-02/11-132, paras 4-6.

796 ICC-02/11-02/11-136, paras 1-5. The first sentence of Rule 121(6) of the RPE provides that: ‘If the person intends to present evidence under article 61, paragraph 6, he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing.’

1 September, Single Judge granted the Defence request and ordered the Defence to disclose its evidence and file its LoE by 12 September. The Single Judge also postponed the start of the confirmation of charges hearing until 29 September.⁷⁹⁷ At the time of writing this Report, the confirmation of charges hearing had not yet taken place.

Document Containing the Charges

On 22 August 2014, the Prosecution filed its DCC⁷⁹⁸ in which it argued that Blé Goudé was criminally responsible for the crimes against humanity of: murder;⁷⁹⁹ rape;⁸⁰⁰ other inhumane acts,⁸⁰¹ or in the alternative, attempted murder;⁸⁰² and persecution.⁸⁰³ Blé Goudé faces charges as a member of Laurent Gbagbo’s inner circle and the leader of the Pro-Gbagbo Youth upon which he exercised direct control and authority. The Prosecution argued that Blé Goudé played a key role in the post-election violence from 2010 to 2011, as he used his ‘oral speaking skills to mobilise the Pro-Gbagbo Youth and prepare it for combat by legitimising the use of violence’. Blé Goudé is alleged to have used xenophobic rhetoric, inciting hatred against perceived Ouattara supporters.⁸⁰⁴

In terms of the contextual elements of crimes against humanity, to demonstrate the widespread and systematic nature of the attack, the Prosecution relied upon crimes allegedly committed in the course of 38 incidents, including the five Incidents during which the crimes forming the basis of the charges against Blé Goudé are alleged to have occurred, which are described in the introduction to this

797 ICC-02/11-02/11-139, p 5.

798 ICC-02/11-02/11-124-Anx1-Corr.

799 Article 7(1)(a), Rome Statute.

800 Article 7(1)(g), Rome Statute.

801 Article 7(1)(k), Rome Statute.

802 Articles 7(1)(a) and 25(3)(f), Rome Statute.

803 Article 7(1)(h), Rome Statute. ICC-02/11-02/11-124-Anx1-Corr, para 322.

804 ICC-02/11-02/11-124-Anx1-Corr, para 6.

section.⁸⁰⁵ As noted above, with the exception of the Fifth Incident, all of these Incidents were also relevant to the charges sought by the Prosecution and confirmed by the Pre-Trial Chamber in the case against Laurent Gbagbo.⁸⁰⁶ In the initial application for an arrest warrant against Blé Goudé, the Prosecution had relied upon the same four Incidents that supported the charges against Laurent Gbagbo.⁸⁰⁷ However, on 4 July 2014, the Prosecution informed the Chamber and the Defence that the DCC in the Blé Goudé case would include a fifth incident.⁸⁰⁸

The Prosecution submitted, in the context of the five Incidents, that between 16 December 2010 and 12 April 2011, the pro-Gbagbo forces killed at least 184 persons, raped at least 38 women and girls and inflicted serious bodily injury and suffering on at least 126 persons.⁸⁰⁹ According to the Prosecution, the pro-Gbagbo forces committed these crimes on 'political, national, ethnic or religious grounds', and the victims were targeted because of their real or perceived support to Ouattara.⁸¹⁰ The Prosecution accordingly submitted that the pro-Gbagbo forces also committed the crime of persecution against at least 348 persons, including by means of rape.⁸¹¹

Rape was alleged to have been committed by pro-Gbagbo forces during the First and the Fifth Incidents. In relation to the First Incident, the Prosecution alleged that Witness P-0344 was raped after she was captured at the demonstration in which she was participating. Furthermore, members of the Pro-Gbagbo Youth arrested two other women, who were

wearing T-shirts in support of Ouattara. They were arrested and beaten, and one of them was gang-raped. Another woman was taken by Pro-Gbagbo Youth to an empty warehouse, where they gang-raped her and 'threw' her child.⁸¹² The Prosecution alleged that in the days following the demonstration, women were attacked in their homes and raped. One woman who was raped in her home was forced to assist in the murder of her husband. Another young girl was abducted from her parents' home and gang-raped. Additionally, three sisters living in Abobo were gang-raped by men who claimed to be policemen.⁸¹³ Finally, according to the Prosecution, 'on 16 December 2010 and the following days, several women who had been in detention since the day of the demonstration were raped by policemen at the Police School and by men dressed in police uniforms at the police headquarters'.⁸¹⁴ Instances of rape committed by the pro-Gbagbo forces were also presented in relation to the Fifth Incident, during which at least 22 women were allegedly raped, including Witness P-0404, who was raped alongside her mother and her two sisters.⁸¹⁵

The Prosecution argued that these victims were raped because of their real or perceived support to Ouattara.⁸¹⁶ In relation to the acts of rape committed in the context of the First Incident, the Prosecution alleged that some of the victims were raped because they took part in the demonstration. For example, the Prosecution provided evidence that Witness P-0117 heard a policeman mentioning an instruction from Simone Gbagbo 'to rape the women taking part in the demonstration'.⁸¹⁷ The Prosecution claimed that in other instances, victims were told by their attacker after they were raped to 'complain to Ouattara' about the

805 ICC-02/11-02/11-124-Anx1-Corr, paras 77, 331.

806 ICC-02/11-01/11-592-Anx1, para 221. Charges against Laurent Gbagbo were confirmed on 12 June 2014. ICC-02/11-01/11-656-Red, para 266 and p 131.

807 ICC-02/11-02/11-3, para 16.

808 ICC-02/11-02/11-90-Red, para 9. See also ICC-02/11-02/11-100-Red, paras 24-26.

809 ICC-02/11-02/11-124-Anx1-Corr, paras 327-329.

810 ICC-02/11-02/11-124-Anx1-Corr, para 330.

811 ICC-02/11-02/11-124-Anx1-Corr, p 127.

812 ICC-02/11-02/11-124-Anx1-Corr, para 144.

813 ICC-02/11-02/11-124-Anx1-Corr, para 145.

814 ICC-02/11-02/11-124-Anx1-Corr, para 146.

815 ICC-02/11-02/11-124-Anx1-Corr, paras 169-170.

816 ICC-02/11-02/11-124-Anx1-Corr, para 330.

817 ICC-02/11-02/11-124-Anx1-Corr, paras 144, 146.

incident.⁸¹⁸ In the context of the Fifth Incident, the Prosecution alleged that a woman who was gang-raped was told by her attackers that she was raped 'because her brothers contributed to the arrest of Gbagbo'.⁸¹⁹

With respect to Blé Goudé's individual criminal responsibility, the Prosecution presented facts supporting the charges as an indirect co-perpetrator under Article 25(3)(a) of the Statute, but explained that 'those facts [also] apply, when relevant, to the other modes of liability' under which Blé Goudé was charged in the alternative, namely Articles 25(3)(b), (c) and (d) of the Statute.⁸²⁰

Specifically, the DCC alleges that a common plan existed between Blé Goudé, Laurent Gbagbo and his inner circle, aimed at maintaining Laurent Gbagbo as the President of Côte d'Ivoire, 'by all means, including through the commission of the crimes charged'.⁸²¹ According to the Prosecution, by 27 November 2010, the implementation of the common plan had evolved to include a State or organisational policy aiming at a general and systematic attack against civilians who were considered to be Ouattara supporters.⁸²² The Prosecution explained that Blé Goudé's contribution to and implementation of the common plan 'was essential and had a direct effect on the commission of the crimes', including because of his position as the 'uncontested leader' of the Pro-Gbagbo Youth and his 'extraordinary capacity to galvanise and mobilise youth'.⁸²³ The common plan was executed by an 'organised structure' composed of the FDS, militias, mercenaries and the Pro-Gbagbo Youth, considered together as the pro-Gbagbo forces.⁸²⁴ The Prosecution claimed that this structure constituted a hierarchical

and organised apparatus of power over which Blé Goudé, Laurent Gbagbo and other members of his inner circle exercised joint control.⁸²⁵ Furthermore, the commission of the alleged crimes was made possible through the 'unconditional obedience' of the subordinates to the orders of Gbagbo and members of his inner circle, including Blé Goudé.⁸²⁶

Regarding the mental elements, the Prosecution argued that Blé Goudé acted with intent and knowledge: specifically, he intended the realisation of the material elements of the crimes or he knew that they would occur in the ordinary course of events, and he knew that the common plan included a criminal element.⁸²⁷

818 ICC-02/11-02/11-124-Anx1-Corr, paras 144-145.

819 ICC-02/11-02/11-124-Anx1-Corr, para 170.

820 ICC-02/11-02/11-124-Anx1-Corr, paras 171-172.

821 ICC-02/11-02/11-124-Anx1-Corr, paras 173, 323.

822 ICC-02/11-02/11-124-Anx1-Corr, paras 173, 323.

823 ICC-02/11-02/11-124-Anx1-Corr, para 258.

824 ICC-02/11-02/11-124-Anx1-Corr, para 174.

825 ICC-02/11-02/11-124-Anx1-Corr, paras 324-326.

826 ICC-02/11-02/11-124-Anx1-Corr, para 315.

827 ICC-02/11-02/11-124-Anx1-Corr, paras 316-317, 333-334.

Admissibility

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Under Article 19 of the Rome Statute, a suspect, an accused person or a State with jurisdiction may challenge the admissibility of a case before the ICC.⁸²⁸ Generally speaking, such challenges may only be brought once, and must be brought prior to or at the commencement of the trial.⁸²⁹ The Court may also determine the admissibility of a case on its own motion,⁸³⁰ or at the request of the Prosecutor.⁸³¹

The criteria for determining the admissibility of a case are set out in Article 17(1) of the Statute, which provides that a case is inadmissible when:

- a The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- b The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- c The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;
- d The case is not of sufficient gravity to justify further action by the Court.

Articles 17 and 19 of the Statute reflect the principle of complementarity. This principle is enshrined in Article 1 of the Statute, which specifies that the ICC 'shall be complementary to national criminal jurisdictions', and in the preamble of the Statute, which provides that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

828 Article 19(2), Rome Statute.

829 Article 19(4) of the Statute, also providing that '[i]n exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.'

830 Article 19(1), Rome Statute.

831 Article 19(3), Rome Statute.

The Appeals Chamber has developed a two-limbed test for assessing whether a case is inadmissible under Article 17(1)(a) of the Statute.⁸³² First, the Court must determine that the State is actively investigating or prosecuting the same case as the ICC Prosecutor. This has been interpreted to mean that the national investigation or prosecution ‘must cover the same individual and substantially the same conduct’ as alleged before the ICC.⁸³³ Second, the Court must determine that the State is not unwilling or unable to carry out the proceedings genuinely. A case will only be found inadmissible if both limbs of the test are satisfied.

The Statute specifies that in determining whether a State is ‘unwilling’ to conduct the proceedings genuinely, the Court must consider whether domestic proceedings are being undertaken to shield the person concerned from criminal responsibility, whether there is an unjustified delay or whether the proceedings are not being conducted independently or impartially.⁸³⁴ It further specifies that in determining whether a State is ‘unable’ to conduct the proceedings genuinely, the Court must consider whether the State is unable to obtain the accused or the necessary evidence or otherwise carry out proceedings due to a complete or substantial collapse or unavailability of the national justice system.⁸³⁵

At the time of writing this Report, the Court has determined admissibility challenges in seven cases: Katanga, Bemba, Ruto *et al*, Muthaura *et al*, Gaddafi, Al-Senussi, and Laurent Gbagbo. All but one of these cases, that against Al-Senussi, were found to be admissible before the ICC. An eighth admissibility challenge is pending in the Simone Gbagbo case. Three of these challenges

were lodged by the Defence,⁸³⁶ while five were brought by the State in question.⁸³⁷ The Court has also decided the admissibility of cases on its own motion, for example, in the Kony *et al* case.⁸³⁸

During the reporting period, admissibility proceedings were ongoing in three cases arising from two Situations. In September 2013, the Côte d’Ivoire Government challenged the admissibility of the case against Simone Gbagbo, and the Pre-Trial Chamber’s decision on the challenge is pending. In May and July 2014, the Appeals Chamber issued its decisions on the Libyan Government’s admissibility challenges in the cases against Gaddafi and Al-Senussi. The admissibility proceedings in these three cases are examined below.

Côte d’Ivoire: Admissibility challenge in *The Prosecutor v. Simone Gbagbo*

Simone Gbagbo is charged with four counts of crimes against humanity, including murder, rape and other forms of sexual violence, other inhumane acts and persecution. The crimes were allegedly committed in the territory of Côte d’Ivoire between 16 December 2010 and 12 April 2011.⁸³⁹ Simone Gbagbo is the only woman for whom an arrest warrant has been publicly issued by the ICC. She faces charges in her capacity as a member of her husband and former President of Côte d’Ivoire Laurent Gbagbo’s inner circle, allegedly ‘act[ing] as an *alter ego* for her husband, exercising the power to make State decisions’.⁸⁴⁰

Laurent Gbagbo is currently in ICC custody where he faces trial for the same crimes. The Defence

832 ICC-01/11-01/11-547-Red, para 213, citing ICC-01/04-01/07-1497, para 78.

833 ICC-01/09-02/11-274, paras 1, 39.

834 Article 17(2), Rome Statute.

835 Article 17(3), Rome Statute.

836 Katanga, Bemba and Laurent Gbagbo.

837 Ruto *et al*, Muthaura *et al*, Gaddafi, Al-Senussi and Simone Gbagbo.

838 ICC-02/04-01/05-377.

839 ICC-02/11-01/12-1, para 7.

840 ICC-02/11-01/12-1, para 10 (emphasis in original).

had challenged the admissibility of his case, claiming that proceedings had been initiated against him in Côte d'Ivoire for economic crimes and that these proceedings must be presumed ongoing absent evidence to the contrary. The Defence argued that the ongoing proceedings constituted the same case as that under prosecution before the ICC because both cases 'relat[ed] to the same context, namely the post-electoral crisis and the alleged will of Mr Gbagbo to implement a policy to remain in power'.⁸⁴¹ On 11 June 2013, Pre-Trial Chamber I⁸⁴² rejected the admissibility challenge.⁸⁴³ It reasoned that although a prosecution for economic crimes may have been initiated in Côte d'Ivoire against Laurent Gbagbo, the Defence failed to demonstrate that he is being prosecuted within the meaning of Article 17(1)(a) of the Statute since there had been no activity in relation to the alleged proceedings since November 2011.⁸⁴⁴

A third individual in the Côte d'Ivoire Situation, Charles Blé Goudé (Blé Goudé), was transferred to the ICC on 22 March 2014. He faces the same charges as Simone Gbagbo and Laurent Gbagbo. At the time of writing this Report, the confirmation of charges hearing in his case was scheduled to start on 29 September 2014.⁸⁴⁵ Thus far, no admissibility challenge has been filed in his case.

841 ICC-02/11-01/11-436-Red, paras 6, 8.

842 Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Hans-Peter Kaul (Germany) and Judge Christine Van den Wyngaert (Belgium).

843 ICC-02/11-01/11-436-Red, p 13.

844 In light of this finding, the Pre-Trial Chamber found it unnecessary to consider whether the alleged conduct related to the same case as that before the ICC or whether Côte d'Ivoire was unwilling or unable to genuinely carry out the prosecution. ICC-02/11-01/11-436-Red, para 28. No appeal was lodged against this decision.

845 ICC-02/11-02/11-108-Red, para 14; ICC-02/11-02/11-165, para 1.

The Government's admissibility challenge

On 30 September 2013, the Government of Côte d'Ivoire filed a legal challenge to the admissibility of the case against Simone Gbagbo pursuant to Articles 17(1)(a) and 19(2)(b) of the Statute.⁸⁴⁶ In its filing, the Government argued that it was actively investigating or prosecuting the case, and was neither unable nor unwilling to carry out those proceedings genuinely.⁸⁴⁷

Regarding the first limb of the admissibility test, the Government submitted that although the legal characterisation of the charges was different in the domestic indictment and the ICC Arrest Warrant, the domestic proceedings covered 'substantially the same conduct' as alleged before the Court.⁸⁴⁸ It added that although Laurent Gbagbo had been charged in Côte d'Ivoire for economic crimes only, the same was not true for Simone Gbagbo.⁸⁴⁹ It further argued that as international treaties have primacy over national laws in Côte d'Ivoire, the national investigative judge could potentially

846 The filing contained 17 confidential annexes. ICC-02/11-01/12-11-Red, para 23.

847 ICC-02/11-01/12-11-Red, paras 38, 46, 56.

848 ICC-02/11-01/12-11-Red, para 36.

849 ICC-02/11-01/12-11-Red, paras 33-35. Although the list of crimes for which Simone Gbagbo was indicted is redacted in the Government's submission, the Government indicated that the Prosecutor sought charges under specific provisions of the Ivorian Criminal Code. According to the 1981 Criminal Code, these provisions correspond to the following crimes: Article 137 – genocide; Article 138 – crimes against the civilian population; Article 342(1) – murder; Article 342(2) – premeditated murder; Article 139 – crimes against prisoner of war; Article 345 – causing injury or committing violence; and Article 355 – indecent assault. The submission also cites Article 354(4). This sub-provision is not contained in the 1981 Criminal Code; however, Article 354 concerns the crime of rape. The provisions also correspond to the following modes of liability: Article 24 – attempt; Article 25 – direct perpetration; Article 26 – co-perpetration; Article 27 – accessorial liability; Article 28 – incitement; and Articles 29 and 30 – co-perpetration or accessorial liability. ICC-02/11-01/12-11-Red, paras 27-28 and fn 25, 29.

recharacterise the facts during the investigation in order to implement the legal framework established in Article 5 of the Statute.⁸⁵⁰

Regarding the progress of the domestic proceedings, the Government submitted that in February and May 2012, the Prosecutor of the Tribunal of Abidjan-Plateau in Côte d'Ivoire filed a request to open an investigation against Simone Gbagbo and other individuals for a number of crimes.⁸⁵¹ It stated that numerous investigative steps had been undertaken in the case and that on 20 April 2012, Simone Gbagbo was indicted and placed in detention.⁸⁵² The Government claimed that although the investigation was complex, due to the scale, variety and geographic scope of the crimes, it was progressing in an efficient and regular manner.⁸⁵³

The Government then addressed the second limb of the test in Article 17(1)(a) of the Statute, namely its willingness and ability to conduct the proceedings genuinely. Concerning its willingness, the Government submitted that its judicial system included fair trial guarantees in line with regional and international standards, including the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights, and that the national proceedings were not being undertaken to shield Simone Gbagbo from criminal responsibility for the crimes under ICC jurisdiction.⁸⁵⁴ In this respect, the Government noted that the State Prosecutor's request to open

an investigation against Simone Gbagbo preceded the ICC Warrant for her arrest, which was issued the following day under seal.⁸⁵⁵ It also submitted that the domestic proceedings did not suffer from unjustified delays⁸⁵⁶ and that its judicial process contained safeguards to ensure the impartiality and independence of judges.⁸⁵⁷ The Government added that since President Ouattara took power in December 2010, Côte d'Ivoire had consistently shown genuine willingness to cooperate with the ICC.⁸⁵⁸

Regarding its ability to carry out the proceedings genuinely, the Government argued that while the judicial system had been severely affected as a result of the 2010 PEV, it had substantially improved since then.⁸⁵⁹ The Government noted that the restoration of the judicial system had been a priority of the new Government and that exceptional measures were adopted to ensure accountability for serious crimes committed in the aftermath of the 2010 elections. Such measures included the creation of a Dialogue, Truth and Reconciliation Commission; a National Inquiry Commission; and a Special Investigative Cell to accelerate the processing of crimes committed in relation to the PEV.⁸⁶⁰

For these reasons, the Government requested that the Chamber declare the case inadmissible before the ICC. It also requested the Pre-Trial Chamber to allow it to postpone the execution of the Warrant for Simone Gbagbo's arrest, pursuant to Article 95 of the Statute,⁸⁶¹ on the grounds that Simone

850 ICC-02/11-01/12-11-Red, para 37. Côte d'Ivoire added that this could be the case if the legal qualification of 'crimes against humanity', which is absent from the Criminal Code of Côte d'Ivoire, would appear more adequate than that of 'genocide', which falls under the heading of '*infractions contre le droit des gens*'.

851 ICC-02/11-01/12-11-Red, paras 27-28.

852 A list of investigative steps were provided in one of the confidential annexes to the admissibility challenge. ICC-02/11-01/12-11-Red, para 29.

853 ICC-02/11-01/12-11-Red, para 31, referencing one of the confidential annexes to the admissibility challenge.

854 ICC-02/11-01/12-11-Red, paras 48, 53.

855 ICC-02/11-01/12-11-Red, para 52.

856 ICC-02/11-01/12-11-Red, para 54.

857 ICC-02/11-01/12-11-Red, paras 49-50.

858 ICC-02/11-01/12-11-Red, paras 14, 53.

859 ICC-02/11-01/12-11-Red, paras 42-43.

860 ICC-02/11-01/12-11-Red, paras 43-45.

861 ICC-02/11-01/12-11-Red, paras 2, 61 and p 23. Article 95 of the Statute provides that '[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.'

Gbagbo's presence in Côte d'Ivoire was necessary for the proper development of ongoing national proceedings against her.⁸⁶²

The Government submitted additional materials in support of the admissibility challenge on 25 February 2014,⁸⁶³ with authorisation from the Chamber.⁸⁶⁴ On 15 November 2013, the Pre-Trial Chamber granted Côte d'Ivoire's request to postpone the execution of the request for surrender pending determination of the admissibility challenge.⁸⁶⁵ The Chamber also appointed a counsel from the OPCV as the Legal Representative of the Victims who had already communicated with the Court in relation to the case against Simone Gbagbo. Finally, the Chamber invited the Prosecution, the Defence and the Legal Representative of Victims to submit observations on the admissibility challenge.⁸⁶⁶

Responses to the admissibility challenge

On 8 April 2014, the Defence filed its response to Côte d'Ivoire's admissibility challenge.⁸⁶⁷ While the Defence neither opposed nor joined the admissibility challenge,⁸⁶⁸ it emphasised Côte d'Ivoire's rights and duties to prosecute the case. Citing the preamble and Article 1 of the Statute, the Defence observed that 'complementarity is a core guiding principle in the relationship between the Court and States' and stressed that States bore the 'primary responsibility' to prosecute the most serious crimes of international concern.⁸⁶⁹

862 ICC-02/11-01/12-11-Red, paras 59-60.

863 The additional documentation included 21 confidential annexes. ICC-02/11-01/12-37-Red.

864 ICC-02/11-01/12-35, p 7.

865 ICC-02/11-01/12-15, p 9.

866 ICC-02/11-01/12-15, p 9.

867 ICC-02/11-01/12-39.

868 ICC-02/11-01/12-39, para 37.

869 ICC-02/11-01/12-39, para 21.

Regarding the Government's claim that it was investigating or prosecuting the same case as the ICC Prosecutor, the Defence confirmed that Simone Gbagbo has been in preventive detention since April 2011 in a 'remote and difficult to access location', and that proceedings had been instituted against her in Côte d'Ivoire.⁸⁷⁰ The Defence explained that in light of her detention and the absence of evidentiary proof, the suspect could 'neither confirm nor deny the existence, nature or scope' of the domestic investigations. However, it submitted that 'on the balance of probability,' it would be reasonable to believe that 'some investigations should have been carried out'.⁸⁷¹ Regarding the second limb of the test, the Defence observed that Côte d'Ivoire 'appears desirous of exercising its sovereignty' and had informed the Chamber that it was willing and able to do so.⁸⁷²

The Defence also addressed the confidential annexes included in the admissibility challenge, indicating that it had no observations in relation to certain annexes; that some 'are matters for the National Jurisdiction'; that Simone Gbagbo agreed that some annexes 'could, when produced in their entirety, refer to the matters as asserted in the admissibility challenge'; that others 'speak for themselves'; and that some, in so far as the content could be understood to 'refer to any alleged utterance of' Simone Gbagbo, were without foundation.⁸⁷³ It concluded that given her 'unwavering espousal' of the sovereignty of Côte d'Ivoire, Simone Gbagbo wished to 'be tried in public, in full transparency' in her national jurisdiction.⁸⁷⁴ However, it informed the Chamber that under the circumstances, she was 'insufficiently informed to definitively agree or disagree' with the admissibility challenge.⁸⁷⁵

870 ICC-02/11-01/12-39, paras 29, 35.

871 ICC-02/11-01/12-39, para 35.

872 ICC-02/11-01/12-39, para 42.

873 ICC-02/11-01/12-39, paras 31-34.

874 ICC-02/11-01/12-39, para 42.

875 ICC-02/11-01/12-39, para 30.

The Prosecution filed its response to the admissibility challenge on 9 April 2014.⁸⁷⁶ It argued that the challenge should be dismissed on two grounds. First, the Prosecution asserted that although Côte d'Ivoire had provided some information about domestic proceedings against Simone Gbagbo, this information was 'presented in general terms and lack[ed] the precision necessary to determine' whether Côte d'Ivoire was investigating or prosecuting the same case as the ICC Prosecutor.⁸⁷⁷

The Prosecution argued that although the domestic proceedings against Simone Gbagbo appeared to bear 'broad similarity' to the case before the ICC, it was unclear whether the national proceedings covered all aspects of the case before the Court.⁸⁷⁸ Second, the Prosecution argued that in line with the Court's jurisprudence, the Government was required to demonstrate that the national investigations were ongoing 'at the time of the proceedings concerning the admissibility challenge' and that '[a] mere assurance that the national ongoing investigation cover[ed] the same case as that which [wa]s before the Court' would not suffice.⁸⁷⁹ In this respect, the Prosecution argued that while Côte d'Ivoire had shown that national proceedings had been initiated against Simone Gbagbo, it had not demonstrated that these national proceedings included 'concrete and progressive investigative steps' to determine whether the suspect was responsible for the alleged conduct.⁸⁸⁰

For these reasons, the Prosecution argued that the Government had not satisfied the first limb of Article 17(1)(a) of the Statute. It indicated, however, that it would not object to the Chamber granting Côte d'Ivoire 'a final opportunity to substantiate its claim without

delay'.⁸⁸¹ Based on its conclusion that Côte d'Ivoire had not demonstrated that it was investigating the same case as that before the ICC, the Prosecution submitted that it was not necessary to consider the second limb of the test.⁸⁸²

The Legal Representative of Victims filed a response to the admissibility challenge on 9 April 2014, asking the Chamber to reject the challenge and to declare Simone Gbagbo's case admissible before the ICC.⁸⁸³ The response was filed along with 73 public annexes.⁸⁸⁴ The Legal Representative argued that the charges against Simone Gbagbo in Côte d'Ivoire did not cover the 'same conduct' as alleged before the ICC. In addition, the Legal Representative submitted that although it appeared that not all of the charges against Simone Gbagbo in the domestic proceedings were for economic crimes, it was not possible to analyse the nature of the crimes charged.⁸⁸⁵ In this regard, the Legal Representative asserted that no evidence was provided regarding the specific incidents or the geographical scope and timeframe during which the alleged crimes were committed.⁸⁸⁶ Similar to the Prosecution, it concluded that because Côte d'Ivoire had not presented any

881 ICC-02/11-01/12-41-Red, para 59.

882 ICC-02/11-01/12-41-Red, para 57.

883 ICC-02/11-01/12-40-Red, p 43.

884 16 of these public annexes contained redactions to the victims' names or numbers. The first 72 annexes contained selected answers from questionnaires sent to participating victims. Questions asked related to the victims' understanding of the admissibility challenge procedure as well as whether and why the victims wanted to participate in it. Questions also pertained to the victims' perception regarding the ability of Côte d'Ivoire's criminal justice system to prosecute Simone Gbagbo and guarantee her fair trial rights. ICC-02/11-01/12-40-Red, Annexes 1-72. Annex 73 contained observations on the admissibility challenge sent to the Legal Representatives of Victims by the NGO '*Coalition Ivoirienne pour la CPI*', which is in contact with 'numerous victims of the post-electoral violence'. ICC-02/11-01/12-40-Red, Annex 73. See also ICC-02/11-01/12-40-Red, para 101.

885 ICC-02/11-01/12-40-Red, para 36.

886 ICC-02/11-01/12-40-Red, paras 36-37.

876 ICC-02/11-01/12-41-Red. The public redacted version was filed on 24 June 2014.

877 ICC-02/11-01/12-41-Red, para 38.

878 ICC-02/11-01/12-41-Red, para 47.

879 ICC-02/11-01/12-41-Red, paras 48-50.

880 ICC-02/11-01/12-41-Red, para 55.

specific evidence showing that the national authorities were investigating the same crimes as those under investigation before the ICC, it was not strictly necessary to address whether the Government was willing or able to conduct such proceedings.⁸⁸⁷ However, the Legal Representative nevertheless submitted observations in relation to these factors.⁸⁸⁸

With respect to the Government's willingness to investigate and prosecute Simone Gbagbo genuinely, the Legal Representative submitted that certain rights guaranteed by international and regional instruments had not been domesticated into the Côte d'Ivoire legal system. It added that even if certain rights, such as free and equal access to justice, were included in the constitution of Côte d'Ivoire, their application remained theoretical.⁸⁸⁹ The Legal Representative claimed that Côte d'Ivoire could not guarantee a fair trial to Simone Gbagbo, whose case was being prosecuted by an 'ineffective criminal court', which convened only twice in the past 13 years.⁸⁹⁰ It also claimed that the judicial authorities 'substantially depend[ed]' on the executive power.⁸⁹¹ Lastly, the Legal Representative submitted that there had been 'substantial procedural inactivity' between 7 December 2012 and 5 February 2014 in the case against Simone Gbagbo, constituting an unjustified delay, in spite of the Government's claim that since the beginning of the proceedings against her, regular investigative actions had been undertaken.⁸⁹²

Turning to the Government's ability to carry out the proceedings genuinely, the Legal Representative submitted that in line with the Court's jurisprudence, 'the State must provide the Court with evidence of a sufficient degree of specificity and probative value that

887 ICC-02/11-01/12-40-Red, paras 49-50.

888 ICC-02/11-01/12-40-Red, para 51. See also paras 52-93.

889 ICC-02/11-01/12-40-Red, paras 83-84.

890 ICC-02/11-01/12-40-Red, para 85.

891 ICC-02/11-01/12-40-Red, para 86.

892 ICC-02/11-01/12-40-Red, paras 91-93.

demonstrates that it is indeed investigating the case. [...] it is not sufficient merely to assert that investigations are ongoing.'⁸⁹³ The Legal Representative argued that the evidence presented by the Government did not meet this threshold.⁸⁹⁴ It further argued that Côte d'Ivoire's national judicial system was 'precarious' and had 'partially collapsed', citing to the 'weakness and the structural and functional limits of the judicial system'.⁸⁹⁵ It added that Blé Goudé's recent transfer to the ICC seemed 'in complete contradiction' with the Government's statement that its judicial system was 'fully capable' of carrying out proceedings, including in the context of the case against Simone Gbagbo.⁸⁹⁶ The Legal Representative noted that contrary to Côte d'Ivoire's submissions that it had provided exceptional means to support the judiciary in prosecuting serious crimes committed during the post-election crisis through the creation of a Special Investigative Cell, this measure did not attest to the country's ability to prosecute such crimes because it did not have the human or financial resources to do so.⁸⁹⁷

The Legal Representative concluded that the vast majority of victims wished for Simone Gbagbo to be prosecuted before the ICC.⁸⁹⁸ It added that many victims doubted Côte d'Ivoire's ability to render justice and guarantee a fair and independent trial, and that some victims had expressed concern about the respect

893 ICC-02/11-01/12-40-Red, para 56, citing ICC-01/09-01/11-307, para 62.

894 ICC-02/11-01/12-40-Red, paras 56-58.

895 ICC-02/11-01/12-40-Red, paras 65-72, 79. The Legal Representative of Victims cited the following limitations of Côte d'Ivoire's judicial system: jurisdictions and detention centres that remained non-functional since 30 January 2012; the non-functioning of central services in charge of collecting, treating and storing archives, impacting the proper management of files and cases; and the lack of a domestic protection system for victims, witnesses, prosecutors and lawyers involved in cases linked to 'grave international crimes'.

896 ICC-02/11-01/12-40-Red, para 63.

897 ICC-02/11-01/12-40-Red, paras 73-78.

898 ICC-02/11-01/12-40-Red, para 97.

of their rights if Simone Gbagbo were to be prosecuted domestically.⁸⁹⁹ Furthermore, the Legal Representative reported that victims were concerned by the political shift in Côte d'Ivoire that seemed to 'favour national reconciliation over the interests of justice'.⁹⁰⁰ It explained that victims questioned the commitment of the national authorities to prosecute Simone Gbagbo and considered that the national proceedings initiated against her could be a means for the Government to 'buy time' with the ultimate goal of granting amnesty to everyone responsible for the PEV.⁹⁰¹ At the same time, the Legal Representative noted that a significant number of victims had expressed frustration at the length of the ICC proceedings against Laurent Gbagbo, fearing that the case against Simone Gbagbo could proceed at a similar pace. Some victims thus expressed their willingness to accept 'swift national justice' even if their rights might be neglected.⁹⁰² In this regard, the Legal Representative added that many victims were dying because they were not receiving medical or psychological assistance, and therefore, 'they will never receive justice'.⁹⁰³

At the time of writing this Report, the Pre-Trial Chamber had not yet rendered its decision on the admissibility challenge.

Libya: Admissibility challenges in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*

On 27 June 2011, Pre-Trial Chamber I⁹⁰⁴ issued arrest warrants against Colonel Muammar Gaddafi (Muammar Gaddafi), Libya's *de facto* Head of State, his son Saif Al-Islam Gaddafi (Gaddafi), the *de facto* Prime Minister, and Abdullah Al-Senussi (Al-Senussi), the Chief of Military Intelligence.⁹⁰⁵ In issuing the Arrest Warrants, the Chamber found that there were reasonable grounds to believe that Muammar Gaddafi and Gaddafi were criminally responsible, as indirect co-perpetrators under Article 25(3)(a) of the Statute, for the crimes against humanity of murder and persecution committed by Libyan security forces under their control in locations throughout Libya from 15 February 2011 until at least 28 February 2011,⁹⁰⁶ and that Al-Senussi was criminally responsible as an indirect co-perpetrator for the same crimes committed by the armed forces in Benghazi from 15 February 2011 until at least 20 February 2011.⁹⁰⁷

The case against Muammar Gaddafi was terminated on 22 November 2011, following the suspect's death on 20 October 2011.⁹⁰⁸ Libya then challenged the admissibility of the cases against the remaining two suspects. While the Pre-Trial Chamber found that the case against Gaddafi was admissible before the ICC, it found that the case against Al-Senussi was not. The Appeals Chamber has upheld both of these decisions. The Court's decision that the Al-Senussi case is inadmissible

899 ICC-02/11-01/12-40-Red, paras 97-98.

900 ICC-02/11-01/12-40-Red, para 99.

901 ICC-02/11-01/12-40-Red, paras 97-99.

902 ICC-02/11-01/12-40-Red, para 100.

903 ICC-02/11-01/12-40-Red, para 100.

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

905 ICC-01/11-13; ICC-01/11-14; ICC-01/11-15.

906 ICC-01/11-12, para 71. See also ICC-01/11-13, p 6; ICC-01/11-14, p 6.

907 ICC-01/11-12, para 71. See also ICC-01/11-15, p 6. For further information about the Libya Situation and cases, see the *Overview of cases and Situations* section of this Report.

908 ICC-01/11-01/11-28; ICC-01/11-01/11-130-Red, para 21.

before the ICC has been criticised by Al-Senussi's Defence Counsel, family members, and human rights organisations, which claim that Al-Senussi will not receive a fair trial in Libya and will likely face the death penalty.⁹⁰⁹

This section will analyse the Pre-Trial and Appeals Chamber decisions in each of these cases, highlighting key similarities and differences between the two cases.

The Prosecutor v. Saif Al-Islam Gaddafi

The Government's admissibility challenge

On 1 May 2012, the Libyan Government filed a legal challenge to the admissibility of the case against Saif Al-Islam Gaddafi under Articles 17(1)(a) and 19(2)(b) of the Statute.⁹¹⁰ In its filing, the Government explained that its 'principal' objective was to challenge the admissibility of the proceedings against Gaddafi only; however, if it was required to challenge the admissibility of the proceedings against Gaddafi and Al-Senussi as a whole, then the admissibility

909 'Gaddafi spy chief to face trial in Libya', *Aljazeera*, 12 October 2014, available at <<http://www.aljazeera.com/news/middleeast/2013/10/gaddafi-spy-chief-face-trial-libya-2013101234019399461.html>>; 'Amal Alamuddin faces a very different engagement in Libya trial', *The Guardian*, 4 May 2014, available at <<http://www.theguardian.com/world/2014/may/03/amal-alamuddin-george-clooney-gadafi>>; 'Daughter of Libya's former spy chief calls for him to be tried in The Hague', *Reuters*, 11 December 2013, available at <<http://www.reuters.com/article/2013/12/11/us-libya-icc-senussi-idUSBRE9BA0YC20131211>>; 'Gaddafi spy chief should be tried by ICC not Libya, says family', *The Guardian*, 19 October 2012, available at <<http://www.theguardian.com/world/2012/oct/19/gaddafi-spy-chief-icc-libya>>; Amnesty International, 'ICC decision to allow Abdullah al-Senussi to stand trial in Libya "deeply alarming" amidst overwhelming security vacuum', Public Statement, 24 July 2014, available at <<http://www.amnesty.org/en/library/asset/IOR53/008/2014/en/ff042acd-6b17-40c8-a7c7-aeafac552f013/ior530082014en.pdf>>.

910 ICC-01/11-01/11-130-Conf. A public redacted version was filed that same day. ICC-01/11-01/11-130-Red.

challenge related to both cases.⁹¹¹ It argued that these cases were inadmissible because the suspects were being actively investigated at the national level, and these investigations encompassed the conduct described in the Arrest Warrants issued by the Court.⁹¹² Moreover, it argued that its admissibility challenge presented 'a unique opportunity for the Court to uphold "positive complementarity" and to encourage other States emerging from conflict and mass-atrocities in pursuance of genuine national proceedings'.⁹¹³

Regarding the proceedings against Gaddafi, the Government submitted that on 23 November 2011, the Prosecutor-General commenced an investigation in relation to financial crimes allegedly committed by the suspect.⁹¹⁴ On 17 December 2011, the Prosecutor-General initiated a second investigation into 'all crimes committed by Mr Gaddafi during the revolution'⁹¹⁵ including in the period from 15 to 28 February 2011.⁹¹⁶ This second investigation, which began on 8 January 2012, allegedly covered 'all of the factual incidents' described in the ICC Arrest Warrant decision, as well as other 'serious crimes' committed by Gaddafi.⁹¹⁷

911 ICC-01/11-01/11-130-Red, paras 73, 74. The Government's preference to limit the admissibility challenge to the Gaddafi case appears to have been based mainly on the fact that as Al-Senussi was not in Libya's custody at the time of the admissibility challenge, the domestic proceedings against him were expected to take longer. For example, the Government stated: '[...] on 22 March 2012, the Libyan Government specifically notified the Chamber only of its intention to challenge the admissibility of the case against Mr Gaddafi. It may be recalled that the Article 95 submission to suspend the Surrender Request only applied to Mr. Gaddafi since Mr. Al-Senussi was not in Libya's custody. As a consequence, it is the Libyan Government's principal submission that the proper scope of this admissibility challenge, relates only to the case against Mr Gaddafi.' ICC-01/11-01/11-130-Red, para 73.

912 ICC-01/11-01/11-130-Red, para 1.

913 ICC-01/11-01/11-130-Red, para 3.

914 ICC-01/11-01/11-130-Red, paras 23, 42.

915 ICC-01/11-01/11-130-Red, paras 23, 43-44.

916 ICC-01/11-01/11-130-Red, para 25.

917 ICC-01/11-01/11-130-Red, paras 25, 46.

Specifically, it covered ‘rape’⁹¹⁸ as well as ‘the multiple commission of acts of murder and persecution as part of a widespread or systematic attack against a civilian population, pursuant to or in furtherance of the State policy of the Muammar Gaddafi regime’.⁹¹⁹ It stated that a ‘similar investigation’ was initiated in respect of Al-Senussi on 3 April 2012.⁹²⁰ In contrast to the crimes purportedly covered by the domestic investigation, the ICC Arrest Warrants against Gaddafi and Al-Senussi did not include allegations of rape.⁹²¹ The only indication of sexual violence in the ICC cases was the allegation, in relation to the persecution charge, that: ‘once taken into custody, protesters were subjected to torture. One method entailed tying electric wires around their genitals and then turning electricity on.’⁹²²

The Government stated that for the purpose of the domestic proceedings, the alleged criminal conduct was characterised as ‘ordinary crimes’ under domestic law. These ‘ordinary crimes’ were ‘likely’ to include ‘intentional murder; torture; incitement to civil war; indiscriminate killings; misuse of authority against individuals; arresting people without just cause; and unjustified deprivation of personal liberty’.⁹²³ Notably, the Government did not include rape among the list of ‘likely’ charges under domestic law, although it indicated that rape was one of the crimes for which Gaddafi was being investigated.⁹²⁴

The Government noted that it was considering the adoption of legislation that would incorporate Rome Statute crimes, modes of liability and penalties into domestic law, and explained that once this legislation was adopted, Gaddafi and Al-Senussi could potentially be charged with crimes against humanity under Libyan law.⁹²⁵ However,

918 ICC-01/11-01/11-130-Red, para 25.

919 ICC-01/11-01/11-130-Red, para 83.

920 ICC-01/11-01/11-130-Red, para 25.

921 ICC-01/11-14; ICC-01/11-15.

922 ICC-01/11-12, para 46.

923 ICC-01/11-01/11-130-Red, paras 75, 84.

924 ICC-01/11-01/11-130-Red, para 25.

925 ICC-01/11-01/11-130-Red, para 84.

the Government emphasised, the admissibility challenge did not depend on the adoption of this legislation, because the domestic proceedings covered ‘substantially the same conduct’ as that alleged before the ICC.⁹²⁶

Regarding the status of the domestic proceedings, the Government estimated that the investigation in respect of Gaddafi would be completed ‘within the next three weeks’ while the investigation in respect of Al-Senussi would take ‘longer’, because the suspect had been arrested in Mauritania and had not yet been transferred to Libya.⁹²⁷ In terms of concrete investigative steps taken, the Government stated that investigators had interviewed several witnesses in connection with the case against Gaddafi, including four of the suspect’s friends and associates, nine members of the Libyan military, eight ‘volunteers’ armed by the suspect, and six civilians.⁹²⁸ The ‘next step’, the Government stated, would be to interview Gaddafi in order to confirm his identity and inform him of the allegations against him.⁹²⁹ Although Gaddafi was in the custody of ‘local authorities’ in Zintan, also known as the ‘Zintan Brigade’,⁹³⁰ the Government claimed to be ‘negotiating the safe and orderly transfer of Mr. Gaddafi with local authorities from a secret location to a specially constructed prison facility in Tripoli’.⁹³¹

The Government did not provide any evidence collected by the Libyan prosecution services,⁹³² in support of its admissibility challenge. It

926 ICC-01/11-01/11-130-Red, paras 86-87.

927 ICC-01/11-01/11-130-Red, para 91. See also para 41.

928 ICC-01/11-01/11-130-Red, para 45.

929 ICC-01/11-01/11-130-Red, para 48.

930 See eg ICC-01/11-01/11-344-Red, paras 152, 169, 206.

931 ICC-01/11-01/11-130-Red, para 35.

932 In its submission, the Government clarified that the Libyan prosecution services comprise the ‘Prosecutor-General for civilians and the Military-Prosecutor for military persons’, and that the Prosecutor-General is leading the investigation of Gaddafi, while the Military-Prosecutor is leading the investigation of Al-Senussi. ICC-01/11-01/11-130-Red, para 40.

explained that criminal proceedings in Libya pass through four stages (investigation; accusation; trial; and appeal) and that the disclosure of evidence to third parties is strictly prohibited at the investigation stage. This disclosure regime, the Government stated, applied to ‘witness interviews or other documentary evidence, or even details such as witnesses’ names’. Accordingly, the Government provided confidential summary reports of the investigations, rather than samples of actual evidence.⁹³³

Having described the scope and status of the domestic proceedings against Gaddafi and Al-Senussi, the Government next addressed its willingness to carry out the proceedings. It argued that there could be ‘little doubt’ of its willingness in this respect, given that ‘[t]he NTC emerged from a liberation struggle against the tyranny of the Muammar Gaddafi regime’ and had ‘no motive whatsoever to allow Mr Gaddafi or Mr Al-Senussi to enjoy impunity.’⁹³⁴ It also responded to statements made by the OPCD in March 2012, regarding a visit to Gaddafi that same month.⁹³⁵ The OPCD had stated that Gaddafi lacked access to basic necessities such as fresh air and medical care, as well as legal

933 ICC-01/11-01/11-130-Red, paras 39-40.

934 ICC-01/11-01/11-130-Red, para 93. The ‘NTC’ refers to the National Transitional Government, Libya’s interim Government at the time of the admissibility challenge. See ICC-01/11-01/11-130-Red, para 9.

935 ICC-01/11-01/11-130-Red, para 94. As described in detail in the *Gender Report Card 2012*, on 7 June 2012, during a second visit to Gaddafi, four ICC staff, including three Registry and one OPCD staff member, were arrested and detained for 25 days following a meeting with Gaddafi. During their detention, representatives of the Libyan Government issued statements claiming that the OPCD counsel had been found with suspicious documents, including documents from one of Gaddafi’s former accomplices, Mohammed Ismail, as well as blank documents with Gaddafi’s signature. The Libyan Government also alleged that the OPCD counsel had been in possession of ‘spying devices and recorders (a video camera pen and a watch that functions for the same purpose)’. The OPCD denied any wrongdoing and contested the allegations. See *Gender Report Card 2012*, p 192-195.

representation in the domestic proceedings.⁹³⁶ The OPCD also claimed to have been informed that the Libyan authorities were no longer investigating Gaddafi in relation to ‘murder, rape et cetera’, although they had questioned him about lesser offences relating to camel licenses and fish farms.⁹³⁷ The Government claimed that in making these statements, the OPCD was alleging that Gaddafi was being ‘shielded’ or had been subjected to ‘physical abuse and a rushed trial in violation of international standards of due process’. It insisted that these allegations were ‘irresponsible and patently false’, and stated that ‘Libya is meeting the requirements of due process in accordance with international standards’.⁹³⁸

Finally, the Government addressed its ‘ability’ to conduct the proceedings genuinely. It claimed that it was ‘clearly “able to obtain the accused or the necessary evidence and testimony” [because] Mr. Gaddafi is under custody in Libya and an extradition request to Mauritania for Mr. Al-Senussi is pending.’⁹³⁹ It also highlighted its requests for assistance from international organisations concerning the development of the judicial system, and argued that ‘[w]ith the support of the international community [...] and taking into account the expertise presently existing within the Libyan criminal justice system, Libya is able to carry out proceedings in accordance with international standards.’⁹⁴⁰ The Government acknowledged that ‘States emerging from mass-atrocities will not possess a sophisticated or functional judicial system’, but argued:

Where a national judicial system is clearly able to carry out investigations and prosecutions, and could strengthen such capacity with international cooperation and

936 ICC-01/11-01/11-70-Red2, paras 28, 47, 58-59.

937 ICC-01/11-01/11-70-Red2, paras 38-39, 49.

938 ICC-01/11-01/11-130-Red, para 94.

939 ICC-01/11-01/11-130-Red, para 96.

940 ICC-01/11-01/11-130-Red, para 97.

assistance, it would be manifestly at variance with the principle of complementarity to deny the State the opportunity to do so.⁹⁴¹

Responses to the admissibility challenge

In a decision issued on 4 May 2012, the Pre-Trial Chamber⁹⁴² held that the admissibility challenge would be understood as concerning the case against Gaddafi only, and requested that the Prosecution, Defence⁹⁴³ and Legal Representative of Victims file responses to that admissibility challenge.⁹⁴⁴ The Chamber also appointed the Principal Counsel of the OPCV as the Legal Representative of the Victims who had already communicated with the Court in relation to the case.⁹⁴⁵

The Prosecution⁹⁴⁶ and the Legal Representative of Victims⁹⁴⁷ filed their responses on 4 June 2012. In its filing, the Prosecution argued that the domestic case against Gaddafi was ‘almost identical’ to the case before the ICC,⁹⁴⁸ and agreed that the charges in the domestic case need not have the ‘same label’ as the ICC charges for the case to be found inadmissible before the Court.⁹⁴⁹ However, it cautioned that the Government may be ‘unable to move the case forward’, because Gaddafi did not have legal representation in the domestic proceedings, and because the relationship between the central Government and the authorities with custody

of Gaddafi (the Zintan Brigade) was ‘not clear’.⁹⁵⁰ For these reasons, the Prosecution proposed that the Chamber obtain further information from the Government before making a decision on the admissibility of the case.⁹⁵¹

The Legal Representative of Victims, by contrast, requested that the admissibility challenge be rejected.⁹⁵² It argued that the Government’s description of the domestic proceedings was ‘general and vague’, and not supported by sufficiently specific and probative evidence.⁹⁵³ It also raised concerns about the Government’s ability to conduct the proceedings genuinely, in accordance with Article 17(3) of the Statute. For example, it suggested that the Government may be unable to obtain the necessary testimony given the deteriorating security situation in Libya,⁹⁵⁴ and expressed ‘serious doubts’ about the Government’s ability to obtain custody of the suspect.⁹⁵⁵ The Legal Representative acknowledged that a case may be inadmissible where the conduct is charged as ‘ordinary crimes’, providing the domestic proceedings cover ‘substantially the same conduct’ as alleged before the ICC. However, it argued that in this instance, the ‘ordinary crimes’ cited in the Government’s admissibility challenge did not satisfy that test.⁹⁵⁶ The Legal Representative concluded that the victims favoured an international trial, because they believed it was ‘the only way for the world to know what happened to them and to ensure impartiality of the proceedings’.⁹⁵⁷

The Defence filed its response to the admissibility challenge on 24 June 2012.⁹⁵⁸ In its filing, the

941 ICC-01/11-01/11-130-Red, para 98.

942 At the time of this decision, Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Hans-Peter Kaul (Germany) and Judge Christine Van den Wyngaert (Belgium).

943 The Defence at this stage of proceedings was counsel from the OPCD, who the Pre-Trial Chamber appointed as Gaddafi’s Defence Counsel on 17 April 2012. ICC-01/11-01/11-113, p 4.

944 ICC-01/11-01/11-134, para 12 and p 7.

945 ICC-01/11-01/11-134, para 13 and p 7.

946 ICC-01/11-01/11-167-Conf. A public redacted version was filed the following day. ICC-01/11-01/11-167-Red.

947 ICC-01/11-01/11-166-Conf. A public redacted version was filed the following day. ICC-01/11-01/11-166-Red.

948 ICC-01/11-01/11-167-Red, paras 2, 35-38.

949 ICC-01/11-01/11-167-Red, paras 23-25.

950 ICC-01/11-01/11-167-Red, para 8. See also para 41.

951 ICC-01/11-01/11-167-Red, para 46.

952 ICC-01/11-01/11-166-Red, p 24.

953 ICC-01/11-01/11-166-Red, paras 18, 26-28.

954 ICC-01/11-01/11-166-Red, paras 36-37. See also para 38.

955 ICC-01/11-01/11-166-Red, para 47.

956 ICC-01/11-01/11-166-Red, paras 32-34.

957 ICC-01/11-01/11-166-Red, para 53.

958 ICC-01/11-01/11-190-Conf. A public redacted version of this response was filed on 31 July 2012. ICC-01/11-01/11-190-Corr-Red.

Defence emphasised the relevance of fair trial rights to an assessment of the genuineness of the domestic proceedings,⁹⁵⁹ and argued that because Gaddafi faced the death penalty in connection to the domestic proceedings, the ICC was under a 'heightened obligation' to ensure that the proceedings were being conducted fairly.⁹⁶⁰ Regarding the admissibility tests under Article 17(1)(a) of the Statute, the Defence argued that the Government was not investigating the 'same case' as that before the ICC,⁹⁶¹ and that even if it was, it was unwilling to do so genuinely.⁹⁶² In particular, the Defence pointed to violations of Gaddafi's fair trial rights, which indicated that the Government was not willing to conduct the proceedings independently and impartially as required by Article 17(2)(c) of the Statute.⁹⁶³ The Defence also argued the Government was unable to carry out the proceedings genuinely, for reasons including its lack of effective custody of Gaddafi.⁹⁶⁴ Accordingly, the Defence requested the Chamber to reject the admissibility challenge.⁹⁶⁵

Further submissions by the Government

At the request of the Chamber,⁹⁶⁶ the Government filed further submissions regarding the admissibility of the Gaddafi case on 23 January 2013.⁹⁶⁷ In its filing, the Government confirmed that domestic proceedings were still at the investigation stage, but would reach the accusation stage 'within the next four weeks'.⁹⁶⁸ The Government stated that since filing the admissibility challenge in May 2012, the Libyan investigators had interviewed an additional eight witnesses, had interviewed Gaddafi on 'a number of occasions', and had obtained further documentary evidence relevant to the case.⁹⁶⁹

959 ICC-01/11-01/11-190-Corr-Red, paras 37-38.

960 ICC-01/11-01/11-190-Corr-Red, paras 58-66.

961 ICC-01/11-01/11-190-Corr-Red, paras 67-154.

962 ICC-01/11-01/11-190-Corr-Red, paras 155-353.

963 ICC-01/11-01/11-190-Corr-Red, paras 213-309.

964 ICC-01/11-01/11-190-Corr-Red, paras 354-408.

965 ICC-01/11-01/11-190-Corr-Red, para 411.

966 ICC-01/11-01/11-239, p 23.

967 ICC-01/11-01/11-258-Red2.

968 ICC-01/11-01/11-258-Red2, para 60.

969 ICC-01/11-01/11-258-Red2, paras 48-49.

The Government noted that its investigators had not interviewed two witnesses identified by the Chamber, as they were in detention facilities outside the Government's control. However, the Government claimed, the Minister of Justice was in the process of arranging transfer of the control of those facilities to the Government.⁹⁷⁰ The Government also noted that Gaddafi had 'not yet exercised his right to appoint counsel', but stated that if he remained unrepresented once the case reached the accusation stage, the Accusation Chamber would appoint counsel for him.⁹⁷¹ In support of its further submissions, the Government provided samples of evidence collected by the Libyan investigators concerning Gaddafi's alleged criminal conduct.⁹⁷² It stated that if the Chamber required further evidence of the domestic proceedings, it could provide such evidence in six weeks, or alternatively, the Chamber could send representatives to Tripoli to inspect the case file in its entirety.⁹⁷³ It did not explain how this proposed inspection of the case file would comply with the disclosure rules under Libyan law.

Pre-Trial Chamber decision

On 31 May 2013, Pre-Trial Chamber I rendered a unanimous decision, rejecting the Government's challenge to the admissibility of the Gaddafi case.⁹⁷⁴ The Chamber recalled that in line with the jurisprudence of the Appeals Chamber, for a case to be found inadmissible under Article 17(1)(a) of the Statute, the national proceedings must cover 'the same person and substantially the same conduct' as alleged before the ICC.⁹⁷⁵ The Chamber held that for the purposes of this test, 'the assessment of domestic proceedings should focus on the alleged conduct and not its legal characterization'. Accordingly, the fact that the Libyan investigations focused on 'ordinary crimes' as opposed to 'international crimes' did not, by itself, render the case admissible to the ICC.⁹⁷⁶

970 ICC-01/11-01/11-258-Red2, para 50.

971 ICC-01/11-01/11-258-Red2, para 96.

972 ICC-01/11-01/11-258-Red2, para 29. See also paras 30-34.

973 ICC-01/11-01/11-258-Red2, paras 35, 70.

974 ICC-01/11-01/11-344-Red, p 91.

975 ICC-01/11-01/11-344-Red, para 76, citing ICC-01/09-02/11-274, para 39.

976 ICC-01/11-01/11-344-Red, paras 85, 88.

However, the Chamber found that the Government had not provided sufficiently specific and probative evidence to substantiate its claim that it was, in fact, investigating ‘substantially the same conduct’ as alleged before the Court.⁹⁷⁷ The Chamber found that many of the documents provided by the Government did not contain information relevant to the admissibility challenge in the Gaddafi case. For example, some of the documents related to Libya’s investigation in respect of Al-Senussi, although it was not clear how that investigation and the investigation against Gaddafi were linked.⁹⁷⁸ The Chamber concluded that while the Government had taken ‘a number of investigative steps [...] with respect to certain discrete aspects’ of the case before the ICC, it had not provided sufficient evidence of ‘the actual contours’ of the domestic proceedings.⁹⁷⁹

The Chamber noted the Government’s offer to submit further evidence if granted additional time, and its invitation for ICC representatives to inspect the case file in person. However, the Chamber considered that it would be inappropriate to accept these offers, because the Government had been given ‘sufficient opportunities to submit evidence in support of its Admissibility Challenge’.⁹⁸⁰ It held that the submission of further investigative materials would not alter the outcome of the admissibility challenge at this stage, because there were ‘serious concerns’ about the Government’s ability to carry out the proceedings genuinely.⁹⁸¹

Having flagged ‘ability’ as a key issue, the Chamber then presented its findings in that respect. It held that the Government’s ability to conduct the proceedings genuinely must be assessed with regard to domestic law.⁹⁸² It then considered the criteria for ‘ability’ set out

in Article 17(3) of the Statute. Regarding the Government’s ability to ‘obtain the accused’, the Chamber noted that the Government had not secured the transfer of Gaddafi from the custody of the Zintan ‘militia’, or provided evidence that this problem would be resolved in a timely fashion.⁹⁸³ The Chamber observed that the Government could not prosecute Gaddafi without obtaining custody over him, as Libyan law precludes trials *in absentia* unless the accused is outside the country.⁹⁸⁴ The Chamber also expressed concerns about the Government’s ability to ‘obtain the necessary testimony’ in light of its apparent difficulties in protecting witnesses, particularly former members of the Gaddafi regime.⁹⁸⁵ In addition, the Chamber found that the Government was ‘otherwise unable to carry out its proceedings’, given its inability to appoint Defence Counsel for Gaddafi in accordance with Libyan law.⁹⁸⁶ For these reasons, the Chamber found that Libya was unable to carry out the proceedings genuinely, due to the ‘unavailability’ of its judicial system.⁹⁸⁷

The Chamber concluded that the case was admissible before the ICC and reminded Libya of its obligation to surrender Gaddafi to the Court.⁹⁸⁸ The Chamber indicated that the Government could apply to bring a second admissibility challenge if the requirements of Article 19(4) of the Statute have been met.⁹⁸⁹

977 ICC-01/11-01/11-344-Red, paras 134-135.

978 ICC-01/11-01/11-344-Red, paras 106, 115-117, 120-121, 123.

979 ICC-01/11-01/11-344-Red, paras 134-135.

980 ICC-01/11-01/11-344-Red, paras 136-137.

981 ICC-01/11-01/11-344-Red, para 137.

982 ICC-01/11-01/11-344-Red, para 200.

983 ICC-01/11-01/11-344-Red, paras 206-207.

984 ICC-01/11-01/11-344-Red, para 208.

985 ICC-01/11-01/11-344-Red, paras 209-211, 215.

986 ICC-01/11-01/11-344-Red, paras 212-214.

987 ICC-01/11-01/11-344-Red, para 215.

988 ICC-01/11-01/11-344-Red, para 219.

989 ICC-01/11-01/11-344-Red, para 220. Article 19(4) of the Statute provides that: ‘[t]he admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1(c).’

The Government's appeal

On 7 June 2013, the Government filed its notice of appeal against the Pre-Trial Chamber's admissibility decision.⁹⁹⁰ In the supporting document, filed on 24 June 2013, the Government identified four grounds of appeal.⁹⁹¹ First, the Government argued that the Pre-Trial Chamber erred in law by finding that Libya had not satisfied the 'same conduct' test, despite undertaking 'a number of investigative steps' into 'discrete aspects' of the case before the ICC.⁹⁹² In particular, the Government argued that in requiring proof of the 'actual contours' of the domestic investigation, the Chamber was applying an 'overly exacting and narrow interpretation [of Article 17(1)(a) of the Statute], which is inconsistent with the Statute's presumption in favour of national jurisdictions'.⁹⁹³ This 'overly exacting' standard, the Government stated, 'creates the appearance of a Court that is giving short shrift to domestic proceedings by States acting in good faith'.⁹⁹⁴

Second, the Government argued that the Pre-Trial Chamber erred in fact and law by finding that Libya had failed to demonstrate that the domestic proceedings covered the 'same case' as the one before the ICC.⁹⁹⁵ It claimed that the Chamber failed to sufficiently consider the evidence provided by the Government.⁹⁹⁶ For example, it argued that the Chamber erroneously disregarded the documents relating to the domestic proceedings against Al-Senussi, given the links between the two cases.⁹⁹⁷ The Government also claimed that the Chamber erred by failing to consider evidence that the Government would have provided if granted additional time, or if the Chamber had sent representatives to Tripoli to inspect the case file.⁹⁹⁸ In addition, the Government argued that

the Chamber unreasonably 'isolat[ed] particular categories and individual pieces of evidential materials and erroneously minimiz[ed] their significance'.⁹⁹⁹

Third, the Government argued that the Pre-Trial Chamber committed a procedural error, or acted unfairly, by failing to 'take appropriate measures for the proper conduct of the procedure' as required by Rule 58(2) of the RPE.¹⁰⁰⁰ In particular, the Government argued that the Chamber did not take measures to inform itself of ongoing developments in the domestic investigation, in order to determine the challenge on the basis of the facts at the time of the admissibility proceedings. For example, the Chamber did not send representatives to Tripoli to inspect the case file and did not address recent filings by the Government regarding the appointment of a new Prosecutor-General.¹⁰⁰¹ In addition, the Government asserted that the Chamber failed to adopt a procedure addressing the disclosure rules under Libyan law.¹⁰⁰²

Fourth, the Government challenged the Chamber's finding that it was unable to carry out the proceedings due to the 'unavailability' of its judicial system.¹⁰⁰³ It argued that the Chamber applied too strict a standard when assessing the availability of the Libyan judicial system, by focusing solely on 'discrete examples of difficulties that the Government is facing', rather than assessing whether there were 'actual, systemic difficulties' directly affecting the investigation.¹⁰⁰⁴ Next, it contested the Chamber's findings regarding its inability to obtain custody over Gaddafi. It argued that the Zintan Brigade was a 'Government-sanctioned local authority' and therefore, the fact that Gaddafi had not yet been transferred to the central Government in Tripoli did not amount to an 'inability to obtain custody of the accused'.¹⁰⁰⁵

990 ICC-01/11-01/11-350.

991 ICC-01/11-01/11-370-Red3, para 3.

992 ICC-01/11-01/11-370-Red3, para 3(i).

993 ICC-01/11-01/11-370-Red3, para 46. See also para 56.

994 ICC-01/11-01/11-370-Red3, para 70.

995 ICC-01/11-01/11-370-Red3, para 3(ii).

996 ICC-01/11-01/11-370-Red3, para 83(a).

997 ICC-01/11-01/11-370-Red3, paras 87-93.

998 ICC-01/11-01/11-370-Red3, para 83(b).

999 ICC-01/11-01/11-370-Red3, para 83(c).

1000 ICC-01/11-01/11-370-Red3, para 3(iii).

1001 ICC-01/11-01/11-370-Red3, paras 122, 125.

1002 ICC-01/11-01/11-370-Red3, para 126.

1003 ICC-01/11-01/11-370-Red3, para 3(iv).

1004 ICC-01/11-01/11-370-Red3, para 153.

1005 ICC-01/11-01/11-370-Red3, paras 156-157.

The Government also refuted the Chamber's findings regarding its inability to obtain testimony and appoint legal representation for Gaddafi. The Government argued that 'no reasonable tribunal' would have concluded that because the Government was unable to interview two witnesses, it was 'unable to obtain testimony' for the purposes of Article 17(3) of the Statute.¹⁰⁰⁶ The Government further stated that Gaddafi had 'not exercised his right to appoint counsel' in relation to the charges relevant to the admissibility challenge, and reiterated its submission that if Gaddafi remained unrepresented when the case reached the accusation stage, the Accusation Chamber would appoint counsel for him.¹⁰⁰⁷

For these reasons, the Government requested the Appeals Chamber to reverse the decision of the Pre-Trial Chamber, declare the case inadmissible, and suspend the order to surrender Gaddafi pending determination of the appeal.¹⁰⁰⁸

Responses to the Government's appeal

On 16 July 2013, the Prosecution filed its response to the appeal.¹⁰⁰⁹ In its filing, the Prosecution argued that the appeal should be dismissed because there was no error in the impugned decision.¹⁰¹⁰ It suggested that the Pre-Trial Chamber's findings regarding the Government's ability to carry out the proceedings may be 'obiter', as the Chamber had already determined that the first limb of the admissibility test had not been satisfied. However, the Prosecution submitted that the conclusions reached in this 'obiter' were not unreasonable, and thus did not meet the requisite standard for review on appeal.¹⁰¹¹ In particular, the Prosecution argued that it was 'perfectly reasonable' for the Chamber to conclude

that the Government did not have custody over Gaddafi, given that the Government had not claimed to exercise control over the Zintan Brigade prior to the appeal.¹⁰¹²

The Defence filed its response to the appeal on 18 July 2013.¹⁰¹³ In its filing, the Defence argued that the appeal should be summarily dismissed because the Government had not identified any appealable error in the impugned decision.¹⁰¹⁴ The Defence was particularly critical of the Government's claims to have custody of Gaddafi. It argued that '[t]he fact that Mr. Gaddafi is detained by the Zintan Brigade outside the control of the authorities in Tripoli is a notorious and incontrovertible fact' and contended that 'Libya seeks to disguise this fact with semantics, for example calling the Zintan Brigade "*a government-sanctioned local authority*".'¹⁰¹⁵ The Defence argued that this argument was 'unrealistic' and should be summarily dismissed, as it represented an 'entirely new position taken on appeal'.¹⁰¹⁶

The Legal Representative of Victims filed its response to the appeal on 20 August 2013.¹⁰¹⁷ The Legal Representative argued that the Chamber's decision was based on a proper consideration of the facts and evidence, and contained no procedural error.¹⁰¹⁸ It agreed with the Defence that the Government's claim that the Zintan Brigade was a 'Government-sanctioned local authority' was a new factual assertion, which was not raised prior to the appeal.¹⁰¹⁹

1006 ICC-01/11-01/11-370-Red3, para 163.

1007 ICC-01/11-01/11-370-Red3, paras 169-170.

1008 ICC-01/11-01/11-370-Red3, paras 200-201.

1009 ICC-01/11-01/11-384-Conf. A public redacted version of this response was filed on 22 July 2013, with a corrigendum on 23 August 2013. ICC-01/11-01/11-384-Red; ICC-01/11-01/11-384-Red-Corr.

1010 ICC-01/11-01/11-384-Red-Corr, paras 3-4.

1011 ICC-01/11-01/11-384-Red-Corr, para 5.

1012 ICC-01/11-01/11-384-Red-Corr, para 169.

1013 ICC-01/11-01/11-386-Conf. A public redacted version of this response was filed that same day. ICC-01/11-01/11-386-Red.

1014 ICC-01/11-01/11-386-Red, paras 3-4, 6.

1015 ICC-01/11-01/11-386-Red, para 13 (emphasis in original).

1016 ICC-01/11-01/11-386-Red, para 13.

1017 ICC-01/11-01/11-411-Conf. A public redacted version of this response was filed the following day. ICC-01/11-01/11-411-Red.

1018 ICC-01/11-01/11-411-Red, para 18.

1019 ICC-01/11-01/11-411-Red, paras 77-79.

Appeals Chamber decision

On 21 May 2014, the Appeals Chamber,¹⁰²⁰ by majority, Judge Ušacka dissenting,¹⁰²¹ confirmed the Pre-Trial Chamber's decision on the admissibility of the Gaddafi case.¹⁰²² The Chamber¹⁰²³ decided to consider the appeal on its merits, rather than dismissing it summarily as the Defence requested.¹⁰²⁴ Regarding the first ground of appeal (that the Pre-Trial Chamber applied an 'overly exacting' standard by requiring proof of the 'actual contours' of the case), the Chamber found that the Pre-Trial Chamber committed no error,¹⁰²⁵ and provided sufficient reasons for its conclusions.¹⁰²⁶ The Chamber explained:

In assessing admissibility, what is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating. To be able to carry out the assessment [...] it will be necessary for a Chamber to know the contours or parameters of the investigation being carried out both by the Prosecutor and by the State.¹⁰²⁷

Addressing the second ground of appeal (that the Pre-Trial Chamber erred in fact and in law by finding that the Government had not shown that the domestic investigation covered the 'same case' as that before the ICC), the Chamber observed that the Government had submitted two main sets of allegations. First, it had

1020 The Appeals Chamber was composed of Presiding Judge Erkki Kourula (Finland), Judge Sang-Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana), Judge Akua Kuenyehia (Ghana) and Judge Anita Ušacka (Latvia).

1021 ICC-01/11-01/11-547-Anx2.

1022 ICC-01/11-01/11-547-Red, p 96.

1023 Henceforth, the term 'Chamber' will be used to reflect the opinion of the majority.

1024 ICC-01/11-01/11-547-Red, para 25.

1025 ICC-01/11-01/11-547-Red, para 86.

1026 ICC-01/11-01/11-547-Red, para 90.

1027 ICC-01/11-01/11-547-Red, para 85.

alleged that the Pre-Trial Chamber erred in its assessment of the evidence of the investigation against Gaddafi; and second, it had alleged that the Pre-Trial Chamber erred by not considering evidence relating to the investigation against Al-Senussi and evidence that would have been available if the Pre-Trial Chamber had granted the Government additional time and/or sent representatives to inspect the case file in person.¹⁰²⁸ Regarding the first set of allegations, the Chamber found that the Pre-Trial Chamber had not drawn any unreasonable conclusions from the evidence.¹⁰²⁹ Regarding the second set of allegations, the Chamber found that these concerned procedural errors rather than errors of fact or law, and should therefore be addressed in relation to the third ground of appeal.¹⁰³⁰

Concerning the third ground of appeal (that the Pre-Trial Chamber committed a procedural error or acted unfairly by failing to 'take appropriate measures for the proper conduct of the procedure'), the Chamber found that the Pre-Trial Chamber did not err by declining to implement a procedure to receive continuous updates on the domestic investigations. It explained:

[A]dmissibility proceedings should not be used as a mechanism or process through which a State may gradually inform the Court, over time and as its investigation progresses, as to the steps it is taking to investigate a case. Admissibility proceedings should rather only be triggered when a State is ready and able, in its view, to fully demonstrate a conflict of jurisdiction on the basis that the requirements set out in article 17 are met.¹⁰³¹

1028 ICC-01/11-01/11-547-Red, para 98.

1029 ICC-01/11-01/11-547-Red, para 144.

1030 ICC-01/11-01/11-547-Red, para 99.

1031 ICC-01/11-01/11-547-Red, para 164.

The Chamber also found that the Pre-Trial Chamber did not act unfairly by declining to implement a procedure to address the disclosure rules under Libyan law,¹⁰³² or declining to consider the evidence relating to the domestic proceedings against Al-Senussi.¹⁰³³

The Chamber considered it unnecessary to address the fourth ground of appeal (regarding Libya's ability to conduct the proceedings genuinely) because it had already found that the Pre-Trial Chamber did not err in finding that Libya had not shown that it was actively investigating the 'same case'.¹⁰³⁴ For these reasons, the Chamber upheld the Pre-Trial Chamber's decision on the admissibility of the case.¹⁰³⁵

In a separate opinion, Judge Sang-Hyun Song found that the Government was investigating more than some 'discrete aspects' of the case before the ICC; it was in fact investigating the 'same case' as the ICC Prosecutor.¹⁰³⁶ However, Judge Song concluded that the case was nonetheless admissible, because the Pre-Trial Chamber correctly determined that the Government was unable to conduct the proceedings genuinely.¹⁰³⁷ Judge Song argued that regardless of whether the Libyan Government had authority over the Zintan Brigade, the Pre-Trial Chamber reasonably concluded that the Government had not secured the transfer of Gaddafi into the control of the central authorities for trial in Tripoli, and that absent such a transfer, the trial could not take place.¹⁰³⁸ Accordingly, Judge Song agreed with the majority that the appeal should be dismissed.¹⁰³⁹

1032 ICC-01/11-01/11-547-Red, paras 165, 179.

1033 ICC-01/11-01/11-547-Red, paras 181-194.

1034 ICC-01/11-01/11-547-Red, paras 212-214.

1035 ICC-01/11-01/11-547-Red, para 215.

1036 ICC-01/11-01/11-547-Anx1, para 8.

1037 ICC-01/11-01/11-547-Anx1, paras 16-19.

1038 ICC-01/11-01/11-547-Anx1, para 32.

1039 ICC-01/11-01/11-547-Anx1, para 38.

In a dissenting opinion, Judge Anita Ušacka provided a detailed analysis of the principle of complementarity.¹⁰⁴⁰ She argued that the 'same person/same conduct' test developed in the jurisprudence and applied in the impugned decision was irreconcilable with this principle.¹⁰⁴¹ Accordingly, Judge Ušacka proposed a more flexible approach to assessing whether the State was investigating or prosecuting the 'same case' as the one before the ICC, and suggested that in this case, it should suffice to show that the domestic proceedings covered Gaddafi's 'link to the use of the Security Forces in Libya and their consequences'.¹⁰⁴² Judge Ušacka concluded that the impugned decision should be reversed and the matter remanded to the Pre-Trial Chamber for reconsideration in accordance with her interpretation of Article 17(1)(a) of the Statute.¹⁰⁴³

The Prosecutor v. Abdullah Al-Senussi

The admissibility challenge

On 2 April 2013, the Libyan Government filed a legal challenge to the admissibility of the case against Al-Senussi pursuant to Article 17(1)(a) and 19(2)(b) of the Statute.¹⁰⁴⁴ In its filing, the Government argued that it was actively investigating Al-Senussi in connection to murder and persecution committed against civilians in Libya pursuant to a State policy.¹⁰⁴⁵ It stated that this investigation, which began on 9 April 2012,¹⁰⁴⁶ included (but was not limited to) crimes committed in

1040 ICC-01/11-01/11-547-Anx2, paras 12-19.

1041 ICC-01/11-01/11-547-Anx2, paras 47-57. See also paras 20-38.

1042 ICC-01/11-01/11-547-Anx2, para 58.

1043 ICC-01/11-01/11-547-Anx2, paras 63, 66.

1044 Confidential *ex parte* version, available only to the Prosecution. ICC-01/11-01/11-307-Conf-Exp. Confidential redacted version, available to the Prosecution, Defence and OPCV. ICC-01/11-01/11-307-Conf-Red. ICC-01/11-01/11-307-Red2.

1045 ICC-01/11-01/11-307-Red2, para 1.

1046 ICC-01/11-01/11-307-Red2, para 136. In the Gaddafi admissibility challenge, the Government stated that the investigation against Al-Senussi began on 3 April 2012. See ICC-01/11-01/11-130-Red, paras 23, 50.

Benghazi from 15 to 20 February 2011.¹⁰⁴⁷ The Government explained that while the charges against Al-Senussi would not be fixed until the accusation stage, 'the central allegations in the national criminal proceedings remain the same as those in the ICC case – i.e. acts of murder, abductions, arrests and torture of dissidents during the 2011 revolution.'¹⁰⁴⁸

The Government submitted that in order to determine if a State is investigating or prosecuting the 'same conduct' as the ICC Prosecutor, the question should be whether the State is investigating or prosecuting the 'same course of conduct' as alleged before the Court.¹⁰⁴⁹ However, the Government submitted that even if the Chamber rejected this approach and instead looked for a correspondence of particular factual incidents, it would still find that the Government was investigating the 'same conduct' alleged before the ICC.¹⁰⁵⁰

Regarding concrete investigative steps, the Government explained that '[m]ore than 100 witnesses had been interviewed'¹⁰⁵¹ including members of the Libyan military and civilian eye-witnesses.¹⁰⁵² It stated that this witness evidence was relevant to issues including: 'the existence of a State policy' to use lethal force against civilians protesting the regime; Al-Senussi's command over the State Security Forces; and his role in planning and enabling the commission of the crimes.¹⁰⁵³ The Government argued that the witness evidence should be viewed alongside further documentary evidence collected in relation to the Gaddafi case. It explained that this documentary evidence was likely to

1047 ICC-01/11-01/11-307-Red2, para 1.

1048 ICC-01/11-01/11-307-Red2, para 155. See also paras 158-161.

1049 ICC-01/11-01/11-307-Red2, para 72. See also paras 73-89.

1050 ICC-01/11-01/11-307-Red2, para 38(i).

1051 ICC-01/11-01/11-307-Red2, para 156.

1052 ICC-01/11-01/11-307-Red2, paras 170-171.

1053 ICC-01/11-01/11-307-Red2, para 162.

also be used in the Al-Senussi case, 'due to its factual and legal proximity'.¹⁰⁵⁴ The Government provided samples of evidence rather than relying solely on summary reports, as was the initial approach in the Gaddafi admissibility challenge.¹⁰⁵⁵

Regarding its ability to obtain custody of the suspect, the Government stated that since being transferred from Mauritania to Libya in September 2012, Al-Senussi had been detained in a prison facility in Tripoli with 'high quality recreation and cafeteria facilities and inmate rooms that meet minimum international standards'.¹⁰⁵⁶ The Government noted that Al-Senussi received medical care and family visits in detention.¹⁰⁵⁷ It also noted that Al-Senussi had not been appointed counsel in relation to the domestic proceedings, without providing reasons.¹⁰⁵⁸ It stated that it was 'keen' to arrange a privileged visit between Al-Senussi and 'his lawyer', however, from the filing, it appears that this statement referred to his ICC Defence counsel, and did not address his lack of representation in the domestic proceedings.¹⁰⁵⁹

For these reasons, the Government argued that it had provided 'amply sufficient' evidence to show that it was investigating the case, that it was able and willing to do so genuinely, and that Libya was the best forum for the proceedings.¹⁰⁶⁰ It asked the Chamber to consider this evidence in light of the object and purpose of the Rome Statute, particularly the 'primary role of national jurisdictions'.¹⁰⁶¹ It also urged the Chamber to

1054 ICC-01/11-01/11-307-Red2, para 173.

1055 ICC-01/11-01/11-307-Red2, paras 162, 165.

1056 ICC-01/11-01/11-307-Red2, paras 28, 176.

1057 ICC-01/11-01/11-307-Red2, para 178.

1058 ICC-01/11-01/11-307-Red2, para 179.

1059 Specifically, the Government stated that 'Libya remains keen to facilitate a privileged legal visit to Abdullah Al-Senussi by his lawyer and wishes to conclude a Memorandum of Understanding with the ICC as soon as possible for this purpose.' ICC-01/11-01/11-307-Red2, para 179.

1060 ICC-01/11-01/11-307-Red2, paras 36, 194.

1061 ICC-01/11-01/11-307-Red2, paras 37, 41-42.

take into account the ‘fundamental change in circumstances’ since the Security Council referred the Libya Situation to the Court, including Libya’s liberation from the Gaddafi regime, the establishment of the NTC, and the development of the judicial system with support from international organisations.¹⁰⁶² As in the Gaddafi case, the Government urged the Chamber to consider its admissibility challenge with regard to the principle of ‘positive complementarity’.¹⁰⁶³

Responses to the admissibility challenge

The Prosecution filed its response to the admissibility challenge in the Al-Senussi case on 24 April 2013.¹⁰⁶⁴ In its filing, the Prosecution agreed with the Government that the case against Al-Senussi was inadmissible to the Court.¹⁰⁶⁵ However, the Prosecution did not support the Government’s interpretation of the ‘same conduct’ test.¹⁰⁶⁶ The Prosecution concluded that pursuant to Article 19(10) and 19(11) of the Statute, a finding that the case was inadmissible would be subject to revision based on changed circumstances, and proposed that the Court continue to monitor the domestic proceedings accordingly.¹⁰⁶⁷

On 14 June 2013, two weeks after the Pre-Trial Chamber’s decision rejecting the admissibility challenge in the Gaddafi case, the Legal Representative of Victims filed its response to the admissibility challenge in the Al-Senussi case.¹⁰⁶⁸ The Legal Representative agreed with the Prosecution that the Chamber should reject the Government’s interpretation of the ‘same

conduct’ test.¹⁰⁶⁹ However unlike the Prosecution, the Legal Representative argued that the admissibility challenge should be rejected in this case.¹⁰⁷⁰ The Legal Representative argued that the Government had failed to demonstrate that it was investigating the ‘same case’ as the one before the Court.¹⁰⁷¹ She also argued that with the exception of the findings relating to custody, the shortcomings in the Libyan judicial system identified by the Chamber in the Gaddafi case applied equally to this case.¹⁰⁷² In particular, the Legal Representative highlighted the Chamber’s finding that:

[M]ultiple challenges remain and [...] Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these difficulties [...] the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus ‘unavailable’ within the term of article 17(3) of the Statute.¹⁰⁷³

The Defence filed its response to the admissibility challenge in the Al-Senussi case on 14 June 2013.¹⁰⁷⁴ In its filing, the Defence argued that the Government had not demonstrated that it was investigating the case, nor that it was willing and able to do so genuinely.¹⁰⁷⁵ In particular, the Defence argued that it would be ‘untenable’ and ‘inconceivable’ for the Chamber to find that Libya was able to conduct the proceedings against Al-Senussi genuinely, because the Chamber’s findings regarding Libya’s inability to conduct the proceedings against Gaddafi applied equally to this case.¹⁰⁷⁶

¹⁰⁶² ICC-01/11-01/11-307-Red2, paras 37, 50-58, 180-198.

¹⁰⁶³ ICC-01/11-01/11-307-Red2, paras 40, 199-205.

¹⁰⁶⁴ ICC-01-11-01/11-321-Conf. A public redacted version of this response was filed on 2 May 2013. ICC-01/11-01/11-321-Red.

¹⁰⁶⁵ ICC-01/11-01/11-321-Red, para 2.

¹⁰⁶⁶ ICC-01/11-01/11-321-Red, para 21.

¹⁰⁶⁷ ICC-01/11-01/11-321-Red, para 86.

¹⁰⁶⁸ ICC-01/11-01/11-353-Conf. A public redacted version of this response was filed on 17 June 2013. ICC-01/11-01/11-353-Red.

¹⁰⁶⁹ ICC-01/11-01/11-353-Red, para 38.

¹⁰⁷⁰ ICC-01/11-01/11-353-Red, p 34.

¹⁰⁷¹ ICC-01/11-01/11-353-Red, para 65.

¹⁰⁷² ICC-01/11-01/11-353-Red, paras 44, 67.

¹⁰⁷³ ICC-01/11-01/11-353-Red, para 44, citing ICC-01/11-01/11-344-Red, para 205.

¹⁰⁷⁴ ICC-01/11-01/11-356.

¹⁰⁷⁵ ICC-01/11-01/11-356, para 7.

¹⁰⁷⁶ ICC-01/11-01/11-356, paras 8, 61.

The Defence further argued that, as in the Gaddafi case, the Government appeared unable to appoint legal representation for the suspect.¹⁰⁷⁷ It observed that the Government had not attempted to explain why Al-Senussi remained unrepresented in the domestic proceedings.¹⁰⁷⁸

The Defence also argued that the Government was unwilling to conduct the proceedings genuinely, and submitted that the domestic proceedings ‘will be a “show trial” [...] that will inevitably result in Mr. Al-Senussi’s execution’.¹⁰⁷⁹ It further argued that there had been an unjustified delay in the domestic proceedings, noting that the case ‘appears to be stuck – or is being held – at the pre-accusation stage during which a lawyer is denied and the investigation materials remain largely secret’.¹⁰⁸⁰ For these reasons, the Defence requested that the Chamber declare the case admissible and order Libya to surrender Al-Senussi without delay.¹⁰⁸¹

On 14 June 2013, the Prosecution filed additional observations on the admissibility challenge, in light of the Pre-Trial Chamber’s decision on the admissibility of the Gaddafi case.¹⁰⁸² The Prosecution argued that there were some ‘significant differences’ between the Gaddafi and Al-Senussi cases:

[F]irst, Senussi is under custody of the Libyan central authorities, and second, and notwithstanding the existence of detention centers which are not controlled by the Libyan central authorities, it appears that Libya has had the capacity to obtain the *necessary* evidence, which is both specific and sufficiently probative, to

investigate Al-Senussi for the same case as that of the ICC.¹⁰⁸³

The Prosecution concluded that although it remained confident that Libya was investigating Al-Senussi for ‘substantially the same conduct’ as alleged before the ICC, ‘further information is required on how counsel will be secured for Al-Senussi for the purpose of further national proceedings’.¹⁰⁸⁴

The Government responded to the observations of the Prosecution, Defence and Legal Representative of Victims on 14 August 2013.¹⁰⁸⁵ In its filing, the Government addressed the Prosecution’s concerns about Al-Senussi’s legal representation in the domestic proceedings. It confirmed that under Libyan law, the case could not proceed to trial while the suspect remained unrepresented.¹⁰⁸⁶ It stated that it ‘remain[ed] committed’ to providing Al-Senussi with legal representation, but asserted that there had been delays due to ‘the sensitivity of the case and the security situation’.¹⁰⁸⁷ The Government did not provide detailed information about how, or when, the challenges associated with the sensitivity of the case and the security situation would be overcome. However, it submitted that:

[R]ecently, several local lawyers have indicated their willingness to represent Mr. Al-Senussi in the domestic proceedings. The Ministry of Justice is cognisant of the need to ensure that Mr. Al-Senussi appoints a local lawyer by virtue of formal power of attorney and will be taking further steps to facilitate the appointment of such a lawyer in the near future.¹⁰⁸⁸

On 26 September 2013, the Government filed final observations in relation to the admissibility

1077 ICC-01/11-01/11-356, para 121.

1078 ICC-01/11-01/11-356, para 130.

1079 ICC-01/11-01/11-356, para 10.

1080 ICC-01/11-01/11-356, para 164.

1081 ICC-01/11-01/11-356, para 11.

1082 ICC-01/11-01/11-355.

1083 ICC-01/11-01/11-355, para 20 (emphasis in original).

1084 ICC-01/11-01/11-355, para 26.

1085 ICC-01/11-01/11-403-Red2.

1086 ICC-01/11-01/11-403-Red2, para 144.

1087 ICC-01/11-01/11-403-Red2, para 146.

1088 ICC-01/11-01/11-403-Red2, para 146.

challenge.¹⁰⁸⁹ In this filing, the Government reported that on 19 September 2013, the case against Gaddafi, Al-Senussi and 36 others was transferred to the Accusation Chamber. It stated that ‘a principal focus of the Accusation Chamber will be identifying and appointing defence counsel for those defendants who are not yet represented, including Mr. Al-Senussi’¹⁰⁹⁰ and asserted that ‘this final hurdle to securing legal representation will be overcome at the order of the Accusation Chamber in the very near future’.¹⁰⁹¹

Pre-Trial Chamber decision

In a unanimous decision rendered on 11 October 2013, Pre-Trial Chamber I found the case against Al-Senussi inadmissible before the ICC.¹⁰⁹² This marked the first time that a Pre-Trial Chamber had found a case inadmissible before the Court.

The Chamber found that the Government had provided sufficient evidence to enable the Chamber to ‘discern the contours of the domestic case’ and ‘meaningfully compare’ that case with the one before the ICC.¹⁰⁹³ This contrasted with the Gaddafi case, where the Chamber found that the Government had not provided sufficient evidence to enable a comparison between the domestic proceedings and the ICC proceedings.¹⁰⁹⁴ The Chamber specified that for the purpose of this comparison, it would apply the established ‘same conduct’ test rather than the ‘same course of conduct’ test proposed by the Government in its admissibility challenge.¹⁰⁹⁵

Upon reviewing the evidence provided by the Government, the Chamber found that the Libyan Prosecutor-General’s office was

taking ‘adequate, tangible and progressive investigative steps’ in relation to proceedings against Al-Senussi.¹⁰⁹⁶ These steps included ‘conducting interviews of witnesses, obtaining documentary evidence [...] and requesting that external sources provide relevant information’.¹⁰⁹⁷ In addition, the Chamber found that the domestic proceedings against Al-Senussi covered ‘at a minimum, those events that are described in the [Arrest Warrant] Decision as particularly violent or that appear to be significantly representative of the conduct attributed to Mr Al-Senussi’.¹⁰⁹⁸ The Chamber therefore concluded that the Government was investigating the ‘same case’ as that before the ICC.¹⁰⁹⁹

The Chamber then considered the Government’s willingness and ability to conduct the proceedings genuinely. The Chamber held that the recent hearing of the case before the Accusation Chamber, and the fact that the Government provided effective security at this hearing, was a sign that the Government was willing and able to conduct the proceedings genuinely.¹¹⁰⁰ Regarding willingness, the Chamber also found that there was no indication that the domestic proceedings had been undertaken to ‘shield’ the suspect,¹¹⁰¹ or been affected by an unjustifiable delay.¹¹⁰² The Chamber noted the suspect’s lack of legal representation, but found that this was the result of the security situation rather than a sign of the Government’s unwillingness to carry out the proceedings genuinely.¹¹⁰³

1089 ICC-01/11-01/11-455.

1090 ICC-01/11-01/11-455, para 5.

1091 ICC-01/11-01/11-455, para 28.

1092 ICC-01/11-01/11-466-Red, p 152.

1093 ICC-01/11-01/11-466-Red, para 163.

1094 ICC-01/11-01/11-344-Red, paras 134-135.

1095 ICC-01/11-01/11-466-Red, para 66(i).

1096 ICC-01/11-01/11-466-Red, para 161.

1097 ICC-01/11-01/11-466-Red, para 161.

1098 ICC-01/11-01/11-466-Red, para 165.

1099 ICC-01/11-01/11-466-Red, paras 167-168.

1100 ICC-01/11-01/11-466-Red, paras 214-217.

1101 ICC-01/11-01/11-466-Red, para 290.

1102 ICC-01/11-01/11-466-Red, para 291.

1103 ICC-01/11-01/11-466-Red, para 292.

Regarding inability, the Chamber first noted that Libya had custody of the suspect.¹¹⁰⁴ The Chamber then considered the impact of the security situation and the lack of effective witness protection programmes on the Government's ability to obtain evidence and testimony. It found that while those factors had prevented the Government from obtaining the necessary evidence and testimony in the Gaddafi case, they had not had that same effect in the Al-Senussi case. In so finding, the Chamber made note of the evidence that the Government had already collected in relation to the Al-Senussi case, notwithstanding the security concerns in Libya.¹¹⁰⁵ Finally, the Chamber considered whether the Government was 'otherwise unable to carry out its proceedings', given the delays in securing legal representation for Al-Senussi. The Chamber found that the suspect's lack of defence counsel 'while not compelling at the present time, holds the potential to become a fatal obstacle to the progress of the case'.¹¹⁰⁶ However, it found 'no reason to put into question' the Government's claims that the Accusation Chamber would appoint counsel for Al-Senussi 'in the very near future', and that many local lawyers had expressed their willingness to represent the suspect.¹¹⁰⁷

The Chamber concluded that the case against Al-Senussi was inadmissible to the ICC, as the Government was actively investigating the same case and was not unwilling or unable to do so genuinely. The Chamber noted the Prosecution's right to request a review of this decision on the basis of new facts pursuant to Article 19(10) of the Statute.¹¹⁰⁸

In a declaration, Judge Christine Van den Wyngaert noted her agreement that the Chamber's assessment of Libya's ability to carry

out the proceedings related to the Al-Senussi case 'specifically'. Judge Van den Wyngaert explained: 'generalised security concerns in Libya, even those which lead to a substantial collapse of the national judicial system, only become dispositive under article 17(3) of the Statute if Libya is unable to proceed against Al-Senussi "due to" these concerns'. She noted, however, reports that the Libyan Prime Minister had been abducted and released on 10 October 2013, emphasising that '[f]urther deterioration of the security situation could extend to Mr Al-Senussi's legal proceedings and, accordingly, affect Libya's ability to carry out those proceedings'. On this basis, she stated that prior to ruling on the admissibility challenge, she 'would have preferred to seek submissions [...] as to whether Libya's security situation remain[ed] sufficiently stable to carry out criminal proceedings against Mr Al-Senussi'.¹¹⁰⁹

The appeal by the Defence

On 17 October 2013, the Defence filed its appeal against the Pre-Trial Chamber's decision on the admissibility of the case.¹¹¹⁰ In the supporting document, filed on 4 November 2013, the Defence raised three grounds of appeal.¹¹¹¹ First, the Defence argued that the Pre-Trial Chamber erred in law and fact and abused its discretion in finding that the Government is not unwilling and unable genuinely to carry out the proceedings.¹¹¹² In particular, the Defence argued that the Pre-Trial Chamber erred in finding that Libya was willing to conduct the proceedings 'independently, impartially and fairly' with regard to the principles of due process, and that Libya was able to conduct the proceedings genuinely. It argued that

1104 ICC-01/11-01/11-466-Red, para 294.

1105 ICC-01/11-01/11-466-Red, paras 297-301.

1106 ICC-01/11-01/11-466-Red, para 307.

1107 ICC-01/11-01/11-466-Red, para 308.

1108 ICC-01/11-01/11-466-Red, paras 311-312.

1109 ICC-01/11-01/11-466-Anx, para 1.

1110 ICC-01/11-01/11-468-Conf. A public redacted version filed that same day. ICC-01/11-01/11-468-Red.

1111 ICC-01/11-01/11-474, para 3.

1112 ICC-01/11-01/11-474, para 3.

the Pre-Trial Chamber could not reasonably have made such findings when Al-Senussi had no legal representation in the domestic proceedings.¹¹¹³ Moreover, it argued that the Government's failure to arrange a visit between Al-Senussi and his ICC Defence counsel was a sign of Libya's unwillingness and inability to conduct the proceeding genuinely,¹¹¹⁴ and was a factor that 'clearly' prejudiced the admissibility proceedings.¹¹¹⁵ The Defence also argued that it was 'wholly inconsistent' to find that Libya's judicial system was available to try Al-Senussi, having found that the same system was unavailable to try Gaddafi in the same joint case.¹¹¹⁶

Second, the Defence requested that the Appeals Chamber consider new evidence, which became available after the Admissibility decision, demonstrating that the Government was unwilling and unable to conduct genuine proceedings against Al-Senussi.¹¹¹⁷ This new evidence concerned issues including the mistreatment of the suspect in detention and throughout the proceedings in the Accusation Chamber.¹¹¹⁸

Third, the Defence argued that the Pre-Trial Chamber erred in law and fact in finding that Libya was investigating or prosecuting the 'same case' as the one before the ICC.¹¹¹⁹ In particular, the Defence argued that the Pre-Trial Chamber relied heavily on redacted materials to discern the contours of the domestic proceedings, without ordering that these materials be de-redacted for the Defence.¹¹²⁰ It submitted that it was 'grossly unfair' for the Pre-Trial Chamber to rely on these redacted materials when the Defence

was unable to investigate the source of the evidence.¹¹²¹ The Defence further argued that the Pre-Trial Chamber erred in finding that the Government had provided sufficient evidence of the contours of the domestic proceedings against Al-Senussi, but not against Gaddafi, when both cases concerned the same criminal plan. The Defence explained: '[h]aving found that there was insufficient evidence and clarity about this overall plan in Mr. Gaddafi's case, it is inconsistent for the Chamber to have found that there was nevertheless sufficient clarity regarding this same plan in respect of Mr. Al-Senussi.'¹¹²²

For these reasons, the Defence requested that the Appeals Chamber reverse the impugned decision and order Libya to surrender Al-Senussi to the ICC.¹¹²³

Responses to the appeal by the Defence

The Government filed its response to the appeal on 26 November 2013.¹¹²⁴ In its filing, the Government opposed all three grounds of appeal raised by the Defence,¹¹²⁵ with an emphasis on the first ground (that the Pre-Trial Chamber erred in finding that the Government was not unwilling and unable to carry out the proceedings genuinely).¹¹²⁶ In relation to that ground, the Government argued that the suspect's lack of contact with the Defence did not indicate that Libya was unwilling or unable to conduct the proceedings genuinely, because the suspect had no right to legal representation in the admissibility proceedings.¹¹²⁷ The Government also addressed the Defence argument that it was 'wholly inconsistent' for the Chamber to find that the Libyan judicial system was available to try Al-Senussi, but not Gaddafi. It highlighted Judge Van den Wyngaert's declaration that the

1113 ICC-01/11-01/11-474, paras 26-27, 29.

1114 ICC-01/11-01/11-474, paras 23, 38.

1115 ICC-01/11-01/11-474, para 37.

1116 ICC-01/11-01/11-474, para 130.

1117 ICC-01/11-01/11-474, paras 3, 137.

1118 ICC-01/11-01/11-474, para 153.

1119 ICC-01/11-01/11-474, para 3.

1120 ICC-01/11-01/11-474, para 162.

1121 ICC-01/11-01/11-474, para 165.

1122 ICC-01/11-01/11-474, para 175.

1123 ICC-01/11-01/11-474, para 193.

1124 ICC-01/11-01/11-482.

1125 ICC-01/11-01/11-482.

1126 More than half of the Government's filing concerned the first ground of appeal.

1127 ICC-01/11-01/11-482, para 19.

Chamber's findings related to the Al-Senussi case 'specifically',¹¹²⁸ and argued that the Defence had 'ignore[d] the distinctions between the two cases that were found by the Chamber' such as its findings regarding the Government's ability to obtain custody of the suspects.¹¹²⁹ The Government requested the Appeals Chamber to uphold the decision of the Pre-Trial Chamber, reject the request by the Defence to submit new evidence, and refrain from ordering Libya to surrender Al-Senussi to the Court.¹¹³⁰

The Prosecution filed its response to the appeal on 26 November 2013.¹¹³¹ Like the Government, the Prosecution argued that the appeal should be dismissed. It submitted that the Government had provided more evidence in this case than in the Gaddafi case, allowing the Pre-Trial Chamber to discern the contours of the domestic proceedings against Al-Senussi.¹¹³² It further submitted that the Chamber was reasonable to conclude that Libya was willing and able to carry out the proceedings genuinely and argued that, contrary to the arguments of the Defence, 'an inquiry into the admissibility of a case is not primarily an inquiry into the fairness of the proceedings'.¹¹³³ The Prosecution conceded that if a State violated the suspect's fair trial rights to such an extent that the domestic proceedings were clearly inconsistent with the object and purpose of the Statute, particularly Article 21(3),¹¹³⁴ that might be relevant to an assessment of the admissibility of the case. However, the Prosecution argued, 'such a threshold is not met in the instant case'.¹¹³⁵

1128 ICC-01/11-01/11-482, para 45.

1129 ICC-01/11-01/11-482, para 47.

1130 ICC-01/11-01/11-482, para 152.

1131 ICC-01/11-01/11-483. A corrigendum was filed the following day. ICC-01/11-01/11-483-Corr.

1132 ICC-01/11-01/11-483-Corr, para 3.

1133 ICC-01/11-01/11-483-Corr, para 3.

1134 Article 21(3) of the Statute requires the Court to interpret and apply all sources of law applicable in the ICC, including the admissibility provisions in Article 17 of the Statute, in a manner that is 'consistent with internationally recognized human rights'.

1135 ICC-01/11-01/11-483-Corr, para 3.

The Legal Representative of Victims filed her response to the appeal on 20 December 2013.¹¹³⁶ She supported the first and third grounds of the Defence appeal¹¹³⁷ and argued that 'the Pre-Trial Chamber failed to take into account the violations of the defendant's rights in Libya when assessing inability and unwillingness'.¹¹³⁸ However, she opposed the request by the Defence to submit new evidence which had not previously been considered by the Pre-Trial Chamber.¹¹³⁹ Unlike in the Gaddafi case, the Legal Representative did not present the specific views and concerns of the victims on the admissibility challenge in this case.¹¹⁴⁰

Appeals Chamber decision

On 24 July 2014, the Appeals Chamber¹¹⁴¹ unanimously confirmed the Pre-Trial Chamber's decision on the admissibility of the Al-Senussi case.¹¹⁴² The Chamber disposed of the second ground of appeal (the request to submit new evidence) as a preliminary issue.¹¹⁴³ It recalled that in the Gaddafi admissibility proceedings, it had refused to allow the Government to submit new evidence before the Appeals Chamber, and had advised the Government that if it wanted such evidence to be considered, it should apply for leave to bring a second admissibility challenge pursuant to Article 19(4) of the Statute.¹¹⁴⁴ Consistent with that approach, the Chamber dismissed the Defence request to submit new evidence in the case at hand.¹¹⁴⁵

1136 ICC-01/11-01/11-494.

1137 ICC-01/11-01/11-494, para 6.

1138 ICC-01/11-01/11-494, paras 13-15.

1139 ICC-01/11-01/11-494, para 40.

1140 ICC-01/11-01/11-494 cf ICC-01/11-01/11-166-Red, paras 50-55.

1141 At the time of this decision, the Appeals Chamber was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Sang-Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana), Judge Erkki Kourula (Finland) and Judge Anita Ušacka (Latvia).

1142 ICC-01/11-01/11-565, para 299.

1143 ICC-01/11-01/11-565, para 68.

1144 ICC-01/11-01/11-565, para 57.

1145 ICC-01/11-01/11-565, para 58.

The Chamber then considered the third and first grounds of appeal on their merits.

Regarding the third ground (that the Pre-Trial Chamber erred in law and fact in finding that Libya was investigating or prosecuting the ‘same case’), the Chamber first considered whether the Pre-Trial Chamber erred in relying on redacted materials. The Chamber noted that the redactions were limited to the witnesses’ names and identifying information, and found no error in the Pre-Trial Chamber’s finding that such redactions were a necessary and proportionate measure.¹¹⁴⁶ The Chamber next considered whether the Pre-Trial Chamber erred in finding that the Government had provided sufficient evidence to discern the contours of the domestic proceedings in the Al-Senussi case, but not the Gaddafi case. It found that it was reasonable for the Pre-Trial Chamber to arrive at different conclusions in these two cases, because the Government had provided ‘substantially more evidence’ in the Al-Senussi case compared with the Gaddafi case in this respect.¹¹⁴⁷

Concerning the first ground (that the Pre-Trial Chamber erred in finding that the Government was not unwilling and unable genuinely to carry out the proceedings), the Chamber first considered Al-Senussi’s lack of contact with the Defence. It found that as Al-Senussi had no right to participate in the proceedings relating to Libya’s admissibility challenge, the Pre-Trial Chamber did not err by determining the admissibility challenge even though Al-Senussi had not given instructions to the Defence.¹¹⁴⁸

The Chamber then addressed the Defence argument that the Pre-Trial Chamber erred in finding that Al-Senussi’s lack of legal representation did not show that the Government was unwilling or unable to conduct the proceedings genuinely. It held the Pre-Trial Chamber was reasonable to conclude that Al-Senussi’s lack of legal representation was the result of the security situation, rather than a sign of the Government’s unwillingness to conduct the proceedings genuinely.¹¹⁴⁹ It further held that the Pre-Trial Chamber was reasonable to conclude that although the Government had been unable to appoint counsel for Al-Senussi in the past, there was a ‘prospect’ that it would be able to do so in the future. The Chamber conceded that this conclusion involved an ‘element of prediction’, but found that ‘this is not unreasonable for issues such as the present one’.¹¹⁵⁰

The Chamber also considered the Defence argument that it was inconsistent for the Pre-Trial Chamber to treat Gaddafi’s lack of legal representation as evidence of the Government’s ‘inability’, but not to draw that same conclusion in the present case. The Chamber found that these findings were not inconsistent, because ‘the main distinguishing factor between the two cases is the fact that the central authorities were unable to obtain Mr Gaddafi’.¹¹⁵¹ It continued:

Although not stated expressly in [the Pre-Trial Chamber’s] decision, it is implicit that if the central authorities were unable to obtain Mr Gaddafi for purposes of his trial in that case, guaranteeing that a lawyer would be appointed would be considerably more difficult than in the present case.¹¹⁵²

1146 ICC-01/11-01/11-565, para 79.

1147 ICC-01/11-01/11-565, para 96.

1148 ICC-01/11-01/11-565, paras 153-154.

1149 ICC-01/11-01/11-565, paras 189-196.

1150 ICC-01/11-01/11-565, para 201.

1151 ICC-01/11-01/11-565, para 203.

1152 ICC-01/11-01/11-565, para 203.

The Chamber concluded that as the Defence had not identified an appealable error in the impugned decision, that decision should be confirmed.¹¹⁵³

In a separate opinion,¹¹⁵⁴ Judge Song agreed that the appeal should be dismissed, but rejected the majority's approach to assessing whether the Government was investigating the 'same case' as the ICC Prosecutor. While the majority found that a consideration of the factual incidents being investigated was 'central' to comparing the domestic and ICC cases,¹¹⁵⁵ Judge Song held that 'overlap between the incidents is not a relevant factor for the purposes of determining whether the national investigation covers the same conduct as that alleged by the Prosecutor [...] in cases, like the one before us, where there are potentially hundreds of incidents to investigate'.¹¹⁵⁶

In a separate opinion, Judge Ušacka also agreed that the appeal should be dismissed, however she reached that conclusion by interpreting Article 17(1)(a) of the Statute as she had in the Gaddafi case, as detailed above.¹¹⁵⁷ Judge Ušacka noted that in assessing Libya's ability to conduct the proceedings genuinely, both the Pre-Trial Chamber and the majority of the Appeals Chamber had identified several distinctions between the Gaddafi and Al-Senussi cases. Judge Ušacka found some of these distinctions 'far-fetched', but held that 'rather than this being an indication that the Pre-Trial Chamber erred in the case of Mr Al-Senussi, [...] the Pre-Trial Chamber may have been too demanding when it considered whether Libya was able genuinely to investigate and prosecute in relation to Mr Gaddafi'.¹¹⁵⁸

Subsequent developments

On 25 July 2014, the day after the Appeals Chamber issued its decision confirming the inadmissibility of the Al-Senussi case before the ICC, the Prosecutor issued a statement, noting the 'escalating violence in the Situation in Libya', including 'recent reports of alleged attacks carried out against the civilian population and civilian objects in Tripoli and Benghazi'. She expressed that '[s]uch deplorable acts of violence must immediately cease', and stated that her Office 'will not hesitate to investigate and prosecute those who commit crimes under the Court's jurisdiction in Libya irrespective of their official status or affiliation'. She concluded:

My commitment and that of my staff to the pursuit of justice, without fear or favour, for the victims of mass crimes in Libya remains firm and steadfast.¹¹⁵⁹

At the time of writing this Report, the Prosecutor had not applied for a review of the Admissibility decision in the Al-Senussi case, pursuant to Article 19(10) of the Statute. Nor has the Libyan Government brought a second admissibility challenge in the Gaddafi case pursuant to Article 19(4) of the Statute.

1153 ICC-01/11-01/11-565, para 299.

1154 ICC-01/11-01/11-565-Anx1.

1155 ICC-01/11-01/11-565, para 101.

1156 ICC-01/11-01/11-565-Anx1, para 2.

1157 ICC-01/11-01/11-565-Anx2, paras 2-7.

1158 ICC-01/11-01/11-565-Anx2, para 14.

1159 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to the escalating violence in the Situation in Libya', *OTP Press Statement*, 25 July 2014, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-25-07-2014.aspx>.

Trial proceedings

In the period covered by this Report, five ICC cases were at the trial stage of the proceedings: the Katanga trial in the DRC Situation; the Bemba trial in the CAR Situation; the Ruto and Sang and Kenyatta trials in the Kenya Situation; and the Banda trial in the Darfur Situation. However, in the Kenyatta and Banda cases, the scheduled trial start dates of 7 October 2014 and 18 November 2014, respectively, were vacated and at the time of writing no new start dates had been set. Furthermore, two Article 70 cases arising out of the Bemba and Ruto and Sang cases, respectively, continued. There have been significant developments in many cases including charges for gender-based crimes during the reporting period. This section analyses in detail the trial proceedings underway in three such cases, namely the Katanga, Bemba and Kenyatta trials. Key developments in the Ruto and Sang proceedings are also covered.

The case against Katanga, the second involving gender-based crimes to reach the trial judgment stage, resulted in an acquittal for all sexual and gender-based crimes. Accordingly, given that no gender-based crime charges were sought in the Lubanga case and the Trial Chamber acquitted Ngudjolo of all charges, to date, there have been no convictions for gender-based crimes in the ICC's three Trial Judgments.

In the case against Bemba, the submission of evidence concluded on 7 April 2014, and at the time of writing this Report, closing arguments were scheduled to be heard the week of 10 November 2014. On 30 June 2014, the Prosecution filed its DCC in the related Article 70 case alleging offences against the administration of justice committed by Bemba and individuals associated with his defence. Significantly, the DCC implicates seven Defence witnesses whose testimony refuted the allegations in the main case that Bemba was not criminally responsible for rape as a war crime and crime against humanity.

Finally, the only case within the Kenya Situation to include charges for gender-based crimes, that against Kenyatta, faced further setbacks during the period under review. In particular, the Prosecution continued to experience difficulty in obtaining evidence, including witness testimony and the accused's financial records, which according to the Prosecution, has impacted its ability to proceed with the trial. There have also been several critical developments in the Ruto and Sang case, including: the first instance of witnesses being summonsed by the Court; the Trial Chamber permitting the Defence to file a 'No Case to Answer Motion'; and the Chamber excusing Ruto from being physically present at his trial, save for a limited number of hearings.

Democratic Republic of the Congo

DRC: *The Prosecutor v. Germain Katanga*

Trial Chamber II convicts Katanga in ICC's third Trial Judgment¹¹⁶⁰

On 7 March 2014, Trial Chamber II¹¹⁶¹ delivered the ICC's third Trial Judgment in the case of *The Prosecutor v. Germain Katanga*.¹¹⁶² The Trial Chamber unanimously acquitted Germain Katanga (Katanga) as an indirect co-perpetrator under Article 25(3)(a) of the Statute of murder, rape, and sexual slavery as crimes against humanity, as well as wilful killing, directing an attack against the civilian population, pillaging, destruction of property, rape, and sexual slavery as war crimes. Katanga was also acquitted under Article 25(3)(a) of the Statute as a direct co-perpetrator for the war crime of using child soldiers.¹¹⁶³ The majority,¹¹⁶⁴ Judge Christine Van den Wyngaert dissenting, then recharacterised the mode of liability for all charges except using child soldiers, in order to consider Katanga's responsibility as an accessory to the crimes under Article 25(3)(d) of the Statute. It subsequently convicted Katanga as an accessory for the crimes of wilful killing, attacks against the civilian population, pillaging, and destruction of property. However, the Chamber acquitted Katanga as an accessory for the crimes of rape and sexual slavery.¹¹⁶⁵ Judge Van den

1160 The English translation of the Katanga Trial Judgment is not yet available on the ICC website. As such, summary and analysis of the Judgment is based on an unofficial translation from French to English by the Women's Initiatives for Gender Justice.

1161 Trial Chamber II was composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Christine Van den Wyngaert (Belgium).

1162 ICC-01/04-01/07-3436.

1163 ICC-01/04-01/07-3436, para 1421.

1164 Henceforth, the term 'Chamber' will be used to reflect the opinion of the majority.

1165 ICC-01/04-01/07-3436, p 709-710.

Wyngaert issued a Dissenting Opinion,¹¹⁶⁶ and Judges Fatoumata Dembele Diarra and Bruno Cotte issued a separate, Concurring Opinion.¹¹⁶⁷

Katanga is a Congolese national of partial Ngiti ethnicity, born in 1978 in the Ituri district of the DRC.¹¹⁶⁸ The ICC issued a warrant for his arrest, under seal, on 2 July 2007, and he was surrendered to the Court by the Congolese authorities on 17 October 2007.¹¹⁶⁹ Katanga was tried jointly with Mathieu Ngudjolo Chui (Ngudjolo), constituting the Court's second trial, as well as the second case, after the Lubanga case, arising from the DRC Situation.¹¹⁷⁰ Pre-Trial Chamber I confirmed the charges against Katanga and Ngudjolo on 30 September 2008.¹¹⁷¹

The presentation of evidence in the case started on 25 November 2009¹¹⁷² and concluded on 11 November 2011 with Ngudjolo's statement under oath.¹¹⁷³ The presentation of the evidence was declared officially closed on 7 February 2012, after the Chamber had conducted a site visit, on 18 and 19 January 2012, to the DRC.¹¹⁷⁴ Accompanied by representatives of the parties and participants, the Chamber travelled to Bunia, Aveba, Zumba, Kambutso, and twice to Bogoro.¹¹⁷⁵

On 22 July 2009, the Chamber issued an order on the common legal representation of the victims, establishing two groups: a principal group of victims and a group of child soldier victims.¹¹⁷⁶ The Legal Representatives were allowed to question witnesses, submit evidence and observations, and make opening and closing statements.¹¹⁷⁷ Pursuant to Article 68(3) of the Statute, 366 victims, including 11 child soldiers, were authorised to participate in the proceedings through their Legal Representatives.¹¹⁷⁸ As noted in the **Victim Participation and Legal Representation** section of this Report, the VPRS has indicated that to date, 365¹¹⁷⁹ victims were authorised to participate in the Katanga case, including 245 males (or 67.1%) and 117 females (or 32.1%). The gender of two victims authorised to participate (or 0.8%) is unknown.

The Trial Chamber sat for 265 days and heard a total of 54 witnesses: 24 for the Prosecution; 14 for Katanga; eight for Ngudjolo; and three witnesses common to both Defence teams. The Legal Representative of the principal group of Victims also called two witnesses,¹¹⁸⁰ and the Trial Chamber called an additional two witnesses.¹¹⁸¹ Significantly, Katanga chose to testify under oath and gave evidence in 12 hearings.¹¹⁸² The Trial Chamber issued a total of

1166 ICC-01/04-01/07-3436-Anxl.

1167 ICC-01/04-01/07-3436-Anxll.

1168 ICC-01/04-01/07-3436, para 5; ICC-01/04-01/07-717, para 5.

1169 ICC-01/04-01/07-1-US-tENG; ICC-01/04-01/07-3436, para 16.

1170 The cases were joined on 10 March 2008. ICC-01/04-01/07-257, p 11.

1171 ICC-01/04-01/07-717, p 209-212.

1172 ICC-01/04-01/07-3436, para 20.

1173 ICC-01/04-01/07-3436, para 20; ICC-01/04-01/07-T-333-Red2-ENG, p 1 line 9.

1174 ICC-01/04-01/07-3235, paras 2-3 and p 4. The Chamber declared the submission of evidence closed after the report on the site visit was submitted. See also ICC-01/04-01/07-3436, para 20.

1175 ICC-01/04-01/07-3436, paras 106-107.

1176 ICC-01/04-01/07-1328, p 13; ICC-01/04-01/07-1488, p 5.

1177 ICC-01/04-01/07-3436, para 31.

1178 ICC-01/04-01/07-3436, para 36.

1179 The VPRS has indicated that discrepancies between the data regarding victims accepted to participate reported in Chamber decisions and the statistics provided by VPRS may result when Chambers decide to grant victim status not only to the victim mentioned in the application form but also to the person acting on the victim's behalf or to other close relatives listed in the application. VPRS email to the Women's Initiatives for Gender Justice dated 11 September 2014.

1180 The Trial Chamber had initially authorised the appearance of four victims, but upon the request of the Legal Representative of Victims, only two victims gave testimony. ICC-01/04-01/07-2674, p 4; ICC-01/04-01/07-2699-Red, p 8.

1181 ICC-01/04-01/07-3436, para 21.

1182 ICC-01/04-01/07-3436, para 23 and fn 47.

409 decisions and written orders, as well as 168 oral decisions.¹¹⁸³

Following the issuance of the Trial Judgment, on 23 May 2014, Trial Chamber II, by majority, Judge Van den Wyngaert dissenting,¹¹⁸⁴ sentenced Katanga to 12 years of imprisonment and deducted from his sentence the six years and eight months already spent in ICC detention.¹¹⁸⁵ The Sentencing decision in the Katanga case is discussed in further detail below. Furthermore, on 16 April, the Presidency issued a decision replacing two judges and reconstituting Trial Chamber II for the purpose of considering reparations,¹¹⁸⁶ and on 27 August, the newly reconstituted Chamber issued its first order in relation to the reparations proceedings in the case (Reparations Order).¹¹⁸⁷ The Reparations Order is analysed in greater detail in the **Reparations** section of this Report.

The case against Katanga and Ngudjolo was the first ICC case in which crimes of sexual violence, specifically rape and sexual slavery, had been charged. During the trial, the case centred on Katanga and Ngudjolo's alleged indirect co-perpetration in orchestrating an attack on the village of Bogoro in the region of Ituri on 24 February 2003, as commanders of the Ngiti combatants from Walendu-Bindi and the Lendu combatants from Bedu-Ezekere, respectively.¹¹⁸⁸ On 21 November 2012, the majority of Trial Chamber II severed the case against Katanga and Ngudjolo and notified the parties of a potential recharacterisation of the

1183 ICC-01/04-01/07-3436, para 24. Significant among these decisions was the Chamber's rejection of Katanga's admissibility challenge. ICC-01/04-01/07-1213-tENG, p 38. The Appeals Chamber confirmed this decision. ICC-01/04-01/07-1497, para 116.

1184 ICC-01/04-01/07-3484-Anx1.

1185 ICC-01/04-01/07-3484, paras 170, 170 [sic].

1186 ICC-01/04-01/07-3468, p 3.

1187 ICC-01/04-01/07-3508.

1188 The Prosecution had charged and the Pre-Trial Chamber had confirmed that at the time of the attack, Katanga and Ngudjolo were the alleged commanders of the FRPI and the FNI, respectively.

mode of liability with which Katanga was charged (Severance decision).¹¹⁸⁹ On 18 December 2012, the Chamber acquitted Ngudjolo of all charges.¹¹⁹⁰ The Prosecution appeal of Ngudjolo's acquittal is ongoing and covered in detail in the **Appeal Proceedings** section of this Report.

On 9 April 2014, the Prosecution filed a notice of appeal against Katanga's acquittal for the sexual violence charges, indicating its intention to request the Appeals Chamber to reverse or amend the Trial Judgment and/or order a partial new trial before a different Trial Chamber.¹¹⁹¹ On the same day, the Defence filed a notice of appeal against the entire conviction.¹¹⁹² Subsequently, on 25 June 2014, both the Defence and the Prosecution withdrew their appeals, provoking criticism from the Legal Representatives of the Victims participating in the case. The filings of the parties and participants in relation to this issue are analysed in detail in the **Appeal Proceedings** section of this Report.

This section of the Report provides an analysis of the Trial Judgment, highlighting the Trial Chamber's legal and factual findings in relation to the sexual violence charges, as well as on the modes of liability with which Katanga was charged.

1189 ICC-01/04-01/07-3319-tENG/FRA. In this decision, Trial Chamber II, by majority, Judge Van den Wyngaert dissenting, notified the parties and participants, pursuant to Regulation 55 of the Regulations of the Court, of a potential recharacterisation of the facts underlying the form of criminal responsibility with which Katanga was charged, from indirect co-perpetration pursuant to Article 25(3)(a) to accessory liability under Article 25(3)(d) of the Statute. This recharacterisation of the charges was the subject of extensive litigation. For more detailed information on the Regulation 55 proceedings, see *Gender Report Card 2013*, p 92-104. See also 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 116-130, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

1190 ICC-01/04-02/12-3-tENG, p 197.

1191 ICC-01/04-01/07-3462, paras 3-4.

1192 ICC-01/04-01/07-3459, para 4.

Prosecution investigations

Similar to the Lubanga and Ngudjolo Judgments, the Trial Chamber dedicated a section of the Katanga Judgment to the Prosecution's investigation and the credibility of Prosecution witnesses.¹¹⁹³ The Trial Chamber acknowledged that the Prosecution investigation of the Katanga and Ngudjolo case, like that of the Lubanga case, was one of the Prosecution's first, and that it was conducted in a 'strongly insecure' region. It recognised the difficulty in locating witnesses, who were able and unafraid to testify, as well as the the difficulty in gathering reliable documentary evidence in the absence of 'available infrastructures, archives and public information'.¹¹⁹⁴ The Chamber underscored the importance of gathering witness testimony and material evidence closer in time and place to the events in question, noting, for example, that the first investigative steps taken by the Prosecution dated back to mid-2006, three years after the events under investigation.¹¹⁹⁵

As in the Ngudjolo Trial Judgment, the Chamber identified several critical weaknesses in the Prosecution's case. First, the Chamber noted that it would have been desirable for the Prosecution, prior to the commencement of the debates on the merits, to have travelled to the places in question. It listed several examples of how such geographical knowledge would have aided in the clarification of testimony and a clearer appreciation of the evidence.¹¹⁹⁶ Notably, the Trial Chamber had travelled to the DRC on 18 and 19 January 2012, visiting Bunia, Aweba, Zombe,

Kambutso and Bogoro.¹¹⁹⁷ This was the first time an ICC Trial Chamber had visited the site of alleged crimes. As described by the Chamber, the site visit enabled it to verify specific points and obtain a sense of the environment and the geography of places mentioned by witnesses and the accused.¹¹⁹⁸

The Chamber also stated that it would have been desirable for the Prosecution to have called as witnesses several commanders who played a central role prior to, during and after the attack. It also suggested that it would have been desirable to have obtained a statement from Katanga during the investigation phase, as it would have enabled the Chamber to have confronted him with prior statements.¹¹⁹⁹

The Chamber further suggested that the Prosecution should have engaged in a more 'attentive' analysis of the civil status and educational history of its alleged former child soldier witnesses in order to establish their credibility. It noted that it was the Defence teams that had provided a large number of civil status documents and educational records for Prosecution witnesses, which had enabled a more precise determination of the witnesses' ages and the locations in which they had studied. It also underscored the fact that in some cases, the Prosecution did not challenge the authenticity of such documents, which had carried significant weight in the Chamber's assessment of the credibility of the Prosecution witnesses' testimony.¹²⁰⁰

The Chamber concluded by stating that a deeper investigation by the Prosecution into these issues would have permitted a more nuanced interpretation of certain facts and a more accurate interpretation of some of the witnesses' testimonies.¹²⁰¹

1193 Trial Chamber I dedicated a significant part of the Lubanga Trial Judgment to the Prosecution's investigation and the role of Prosecution intermediaries in the case. ICC-01/04-01/06-2842, paras 124-484. Trial Chamber II also addressed the Prosecution's investigation in the Ngudjolo Trial Judgment. ICC-01/04-02/12-3-tENG, paras 115-123.

1194 ICC-01/04-01/07-3436, para 59.

1195 ICC-01/04-01/07-3436, para 61. The concerns of the majority of the Chamber regarding shortcomings in the Prosecution's investigations were reiterated by Judge Van den Wyngaert in her Dissenting Opinion. ICC-01/04-01/07-3436-Anxl, paras 137-141.

1196 ICC-01/04-01/07-3436, para 62.

1197 ICC-01/04-01/07-3436, paras 106-107.

1198 ICC-01/04-01/07-3436, para 108.

1199 ICC-01/04-01/07-3436, para 64.

1200 ICC-01/04-01/07-3436, para 65.

1201 ICC-01/04-01/07-3436, para 67.

Confirmation of charges

The Confirmation of Charges hearing in the Katanga and Ngudjolo case was held before Pre-Trial Chamber I¹²⁰² from 27 June to 16 July 2008.¹²⁰³ On 30 September 2008, Pre-Trial Chamber I, by majority, Judge Anita Ušacka dissenting, issued a decision confirming charges against each accused for seven counts of war crimes and three counts of crimes against humanity.¹²⁰⁴ The war crimes confirmed included: wilful killing, sexual slavery, rape, using children under the age of fifteen to participate actively in hostilities, intentionally directing attacks against a civilian population, pillaging and destruction of property. The crimes against humanity included: murder, rape and sexual slavery.

The Chamber unanimously found that there was sufficient evidence to establish substantial grounds to believe that the accused jointly committed, as co-perpetrators, the war crime of using child soldiers under Article 25(3)(a) of the Statute. The Chamber also unanimously found substantial grounds to believe that the accused committed jointly through other persons, as indirect co-perpetrators, the war crimes of wilful killing, attack against a civilian population, destruction of property, and pillaging, as well as murder as a crime against humanity, under Article 25(3)(a) of the Statute. Regarding the sexual violence charges, as explained below, a majority of the Chamber, Judge Ušacka dissenting, found substantial grounds to believe that the accused committed rape and sexual slavery as war crimes and crimes against

1202 Pre-Trial Chamber I was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Anita Ušacka (Latvia) and Judge Sylvia Steiner (Brazil).

1203 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', 23 November 2009, available at <<http://www.iccwomen.org/news/docs/Katanga-Statement.pdf>>.

1204 ICC-01/04-01/07-717, p 207-212.

humanity, jointly through other persons, under Article 25(3)(a) of the Statute.¹²⁰⁵

The Pre-Trial Chamber, by majority, declined to confirm the charges for other inhumane acts as a crime against humanity,¹²⁰⁶ and unanimously declined to confirm the charges of inhuman treatment¹²⁰⁷ and outrages upon personal dignity as war crimes.¹²⁰⁸

Sexual violence charges

Withdrawal and reinstatement of sexual violence charges

The Katanga and Ngudjolo case was the first to include charges for gender-based crimes. Concerns related to these charges had surfaced early in the case when, prior to the confirmation of charges hearing, the Prosecution withdrew the charges for sexual slavery as war crimes and crimes against humanity, which at that stage were the only gender-based crime charges.¹²⁰⁹

The charges were withdrawn after a ruling from the Single Judge of Pre-Trial Chamber I, that the evidence of two witnesses, including statements, interview notes and interview transcripts, must be excluded for the purposes of the confirmation of charges hearing pending resolution of witness protection issues.¹²¹⁰ The protection issues were

1205 ICC-01/04-01/07-717, p 209-212. See also 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 35-39, 60-72, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

1206 ICC-01/04-01/07-717, p 212. This charge was based on the alleged indiscriminate shooting with firearms or striking of civilians with lances or machetes. ICC-01/04-01/07-717, paras 464-465, 581.

1207 ICC-01/04-01/07-717, p 211. This charge was based on the alleged detention and imprisonment of protected civilians in a room filled with corpses. ICC-01/04-01/07-717, paras 361-364, 570-572.

1208 ICC-01/04-01/07-717, p 211. This charge was based on the allegations that militia members attacked and forced a partially dressed woman to walk through the centre of Bogoro. ICC-01/04-01/07-717, paras 373-377, 570-572.

1209 ICC-01/04-01/07-422, p 3 and para 5.

1210 ICC-01/04-01/07-428-Corr, para 39.

later resolved when the two witnesses were admitted into the Court's Witness Protection Programme. The Prosecution then reinstated the charges of sexual slavery, together with new charges of rape and outrages upon personal dignity.¹²¹¹

Confirmation of the sexual violence charges

In confirming the charges of rape and sexual slavery as war crimes and crimes against humanity, the majority of the Pre-Trial 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 Bogoro village.¹²¹² While it found that there was insufficient evidence to show that these crimes were intended by the accused as part of the common plan to 'wipe out' Bogoro, the Chamber concluded that there was 'sufficient evidence to establish substantial grounds to believe' that the accused knew that 'as a consequence of the common plan, rape and sexual slavery of women and girls would occur in the ordinary course of events'.¹²¹³ The Chamber based this conclusion on its findings that: (1) rape and sexual slavery of women and girls constituted a common practice in Ituri during the conflict; (2) this

'common practice was widely acknowledged amongst the soldiers and the commanders'; (3) 'in previous and subsequent attacks against the civilian population, the militias led and used by the suspects to perpetrate attacks repeatedly committed rape and sexual slavery against women and girls living in Ituri'; (4) the soldiers were trained in camps in which women were 'constantly raped' and held as sexual slaves; (5) the accused and their commanders visited the camps under their control, received frequent reports regarding camp activities, and remained 'in permanent contact with the combatants during the attacks, including the attack on Bogoro'; (6) 'the fate reserved to captured women and girls was widely known amongst combatants'; and (7) the accused were aware of the camps and commanders which 'more frequently engaged in this practice'.¹²¹⁴

Judge Ušacka issued a partially dissenting opinion in which she found that although there was sufficient evidence to find substantial grounds to believe that members of the FRPI/FNI militia had committed rape and sexual slavery in the aftermath of the Bogoro attack, the Prosecution had not presented sufficient evidence linking the accused to these crimes. Instead of issuing the Confirmation of Charges decision, Judge Ušacka stated that she would have adjourned the hearing pursuant to Article 61(7)(c)(i) of the Statute and requested the Prosecution to provide additional evidence linking the suspects with these crimes.¹²¹⁵

1211 For more information, see Women's Initiatives for Gender Justice, 'Partial Conviction of Katanga by ICC – Acquittals for Sexual Violence and Use of Child Soldiers', 7 March 2014, available at <<http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf>>; 'Confirmation of Charges Hearing, Germain Katanga & Mathieu Ngudjolo Chui', June 2008, in *Making a Statement*, Second Edition, Women's Initiatives for Gender Justice, February 2010, p 18, available at <http://www.iccwomen.org/publications/articles/docs/MaS2_10-10_web.pdf>; *Gender Report Card 2008*, p 47-48.

1212 ICC-01/04-01/07-717, p 211-212. See also paras 354, 436, 444.

1213 ICC-01/04-01/07-717, paras 551, 567, 571. The majority found that these crimes appeared to be 'intended and committed incidentally by the soldiers, during and in the aftermath of the attack on Bogoro Village, without a link to the suspect's mental element'. ICC-01/04-01/07-717, paras 377, 570-571. See also 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 35-39, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

1214 ICC-01/04-01/07-717, para 568 and fn 786. See also 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', 23 November 2009, available at <<http://www.iccwomen.org/news/docs/Katanga-Statement.pdf>>.

1215 ICC-01/04-01/07-717, paras 27-29. For a more detailed description of Judge Ušacka's Dissenting Opinion on this point, see 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 37-38, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

During the investigation and pre-trial stages of the case, the Women's Initiatives raised concern with the Prosecution regarding the sufficiency of the evidence presented with respect to gender-based crimes at the pre-trial stage, particularly about the relatively small witness pool supporting the sexual violence charges in the case.¹²¹⁶ The Women's Initiatives also raised concern about the Trial Chamber's 29 October decision, issued prior to the start of the trial, regarding the scope of evidence to be submitted at trial. The Women's Initiatives noted that the Chamber had taken a position to not consider new facts disclosed over the course of trial as a result of the Prosecution's ongoing investigations, stating that the Prosecution is bound by the 'facts and circumstances' as set forth in the confirmed charges. The Women's Initiatives observed that consequently, the decision forced the Prosecution to rely on facts presented only during the pre-trial phase, and expressed concern about the impact of the decision on the Prosecution's ability to adequately present its case regarding, in particular, gender-based crimes.¹²¹⁷

1216 See Women's Initiatives for Gender Justice, 'Rape and sexual slavery – Appeals withdrawn in the Katanga case', 26 June 2014, available at <<http://www.iccwomen.org/documents/Katanga-Appeals-Statement.pdf>>. See also Women's Initiatives for Gender Justice, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', 23 November 2009, available at <<http://www.iccwomen.org/news/docs/Katanga-Statement.pdf>>; Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, CICC Press Conference at the opening of Katanga and Ngudjolo confirmation of charges hearing, 27 June 2008; Women's Initiatives for Gender Justice, 'Katanga/Ngudjolo Confirmation of Charges Hearing', *Legal Eye eLetter*, June 2008, available at <http://www.iccwomen.org/news/docs/Eye_on_the_ICC_2008-2_June_2008.pdf>. See also Brigid Inder, 'Partners for Gender Justice', in Anne-Marie de Brouwer *et al*, *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Series on Transitional Justice, Cambridge Intersentia, Volume 12, 2013, p 329-331, 336-338.

1217 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', 23 November 2009, available at <<http://www.iccwomen.org/news/docs/Katanga-Statement.pdf>>; 'Opening of the ICC Trial of Germain Katanga and Mathieu Ngudjolo Chui', June 2008, in *Making a Statement*, Second Edition, Women's Initiatives for Gender Justice, February 2010, p 16, available at <http://www.iccwomen.org/publications/articles/docs/MaS2_10-10_web.pdf>

Severance of the cases and notice of possible Regulation 55 recharacterisation

On 21 November 2012, the majority of Trial Chamber II, Judge Van den Wyngaert dissenting, issued a decision, severing the Katanga and Ngudjolo case (Severance decision).¹²¹⁸ In the Severance decision, the Chamber also notified the parties and participants, pursuant to Regulation 55 of the Regulations of the Court, of a potential recharacterisation of the facts underlying the form of criminal responsibility with which Katanga was charged, from indirect co-perpetration pursuant to Article 25(3)(a) to accessory liability under Article 25(3)(d) of the Statute.¹²¹⁹ The Chamber indicated that the potential recharacterisation did not apply to the crime of using child soldiers to actively participate in hostilities, which had been confirmed by the Pre-Trial Chamber under direct co-perpetration.¹²²⁰

Trial Chamber's interpretation of sexual and gender-based crimes

The Katanga Trial Judgment marks the first ICC judgment in which the Rome Statute's provisions addressing sexual and gender-based crimes have been interpreted. Although acquitting Katanga of these crimes, the Chamber found that during the attack on Bogoro on 24 February 2003, Ngiti combatants from militia camps in Walendu-Bindi committed rape as war crimes and crimes against humanity, and that in the aftermath of the attack, these combatants, as well as others in the camps, committed sexual slavery as war crimes and

1218 ICC-01/04-01/07-3319.

1219 For more detailed information on the Regulation 55 proceedings, see *Gender Report Card 2013*, p 92-104. See also 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 116-130, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

1220 ICC-01/04-01/07-3319, para 7.

crimes against humanity.¹²²¹ The Chamber's interpretation of the elements of these crimes, as well as its factual findings and legal conclusions in relation to each of the elements, are described in detail below.¹²²²

The Women's Initiatives for Gender Justice presented an initial analysis of the acquittals for rape and sexual slavery and the four indicators utilised by the Chamber in reaching this decision, during a panel organised by the TMC Asser Institute, the CICC and the Grotius Centre for International Legal Studies of Leiden University, titled 'First Reflections on the ICC Katanga Judgment', held on 12 March 2014. Further analysis of these issues and the Katanga Judgment was provided in a speech by Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, on an expert panel held on 11 June 2014 titled 'Prosecuting Sexual Violence in Conflict', during the Global Summit to End Sexual Violence in Conflict.¹²²³

The elements of rape as a war crime and a crime against humanity

Citing the Elements of Crimes of the ICC,¹²²⁴ the Chamber noted that rape as a war crime under Article 8(2)(e)(vi) of the Statute, and as a crime against humanity under Article 7(1)(g) of the Statute, contain two common material elements, namely:

- 1 The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
- 2 The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹²²⁵

The Chamber found that the first element can be established even if the perpetrator does not personally undertake the penetration, including in instances in which 'the perpetrator is himself penetrated' or 'brings about the penetration'.¹²²⁶ It explained that the second element lists the circumstances that will render the invasion of the person's body criminal and that such circumstances include taking advantage of the inability of the victim to consent due to the victim's age. It noted that, with the exception of the specific situation in which the perpetrator takes advantage of the inability of a person to give genuine consent, the Elements of Crimes do not refer to the absence of consent, and found that this factor accordingly does not need to be demonstrated.¹²²⁷ Instead, it found that it is sufficient to demonstrate one of the circumstances of a coercive nature listed in the second element, noting that this interpretation is confirmed by Rule 70 of the RPE.¹²²⁸

1221 ICC-01/04-01/07-3436, paras 999, 1023, pursuant to Articles 8(2)(e)(vi) and 7(1)(g) of the Statute.

1222 Note that the Trial Chamber found that the armed conflict encompassing the attack on Bogoro was non-international in character and accordingly assessed the crimes of rape and sexual slavery as war crimes under Article 8(2)(e)(vi) of the Statute. ICC-01/04-01/07-3436, para 1229.

1223 Women's Initiatives for Gender Justice presentations at panel discussion on 'First Reflections on the ICC Katanga Judgement', 12 March 2014, T.M.C. Asser Institute (The Hague); Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, speech at expert panel on 'Prosecuting Sexual Violence in Conflict', 11 June 2014, Global Summit to End Sexual Violence in Conflict (London), available at <<http://www.iccwomen.org/documents/Global-Summit-Speech.pdf>>.

1224 ICC-ASP/1/3, p 108.

1225 Articles 7(1)(g)-1(1) and (2), 8(2)(e)(vi)-1(1) and (2), Elements of Crimes.

1226 ICC-01/04-01/07-3436, para 963.

1227 ICC-01/04-01/07-3436, paras 964-965.

1228 In this regard, the Chamber cited Rule 70(a) of the RPE, which provides: 'In cases of sexual violence, [...] consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent'. ICC-01/04-01/07-3436, para 966.

The Chamber also noted that to establish rape as a crime against humanity under Article 7(1)(g) of the Statute, the conduct must have been part of a widespread or systematic attack against a civilian population,¹²²⁹ while to establish rape as a war crime under Article 8(2)(e)(vi) of the Statute, the conduct must have taken place in the context of and be associated with a non-international armed conflict.¹²³⁰

Addressing the mental elements of the crimes, the Chamber noted that when the Elements of Crimes do not refer to specific mental elements, it must refer to the knowledge and intent requirements under Article 30 of the Statute. It thus concluded that for rape as both a war crime and a crime against humanity, it is necessary to demonstrate that the perpetrator ‘intentionally [took] possession of the body of the victim’ through deliberate action or failure to act: ‘(1) resulting in penetration; or (2) while he was aware that penetration would occur in the ordinary course of events. Furthermore, [...] the perpetrator must have known that the act was committed by force, threat of force, coercion’ or ‘by taking advantage of the inability of the victim to give genuine consent’.¹²³¹

Finally, the Chamber noted that in addition to the knowledge and intent requirements under Article 30 of the Statute, the Elements of Crimes require that to establish rape as a crime against humanity, the perpetrator must be aware that the conduct was part of or have intended it to be part of a widespread or systematic attack against a civilian population, while to establish rape as a war crime, the perpetrator must have known of the factual circumstances establishing the existence of an armed conflict.¹²³²

1229 ICC-01/04-01/07-3436, para 967, citing Article 7(1)(g)-1(3), Elements of Crimes.

1230 ICC-01/04-01/07-3436, para 968, citing Article 8(2)(e)(vi)-1(3), Elements of Crimes.

1231 ICC-01/04-01/07-3436, paras 969-970, citing Article 30(2), Rome Statute.

1232 ICC-01/04-01/07-3436, paras 971-972, citing Articles 7(1)(g)-1(4), 8(2)(e)(vi)-1(4), Elements of Crimes.

The elements of sexual slavery as a war crime and a crime against humanity

The Chamber noted that, as provided in the Elements of Crimes, to establish sexual slavery as a war crime under Article 8(2)(e)(vi) of the Statute and as a crime against humanity under Article 7(1)(g) of the Statute, two common material elements must be met, namely:

- 1 The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
- 2 The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.¹²³³

Regarding the first element, the Chamber defined the ‘power attaching to the right of ownership’ as ‘the possibility to use, enjoy, and dispose of a person as one’s property, by placing the person in a situation of dependence that leads to a full deprivation of autonomy’. It emphasised that the powers of ownership specified in the first element do not constitute an exhaustive list.¹²³⁴ Citing the jurisprudence of the ICTY and the SCSL,¹²³⁵ it found that demonstrating the power of ownership requires a case-by-case analysis, taking into consideration various factors. It further found that the power of ownership does not necessitate a commercial transaction but rather relates to the inability

1233 ICC-01/04-01/07-3436, para 974, citing Articles 7(1)(g)-2(1) and (2), 8(2)(e)(vi)-2(1) and (2), Elements of Crimes.

1234 ICC-01/04-01/07-3436, para 975.

1235 ICC-01/04-01/07-3436, para 976. Specifically, the Chamber cited IT-96-23-T and IT-96-23/1-T, *Kunarac et al* Trial Judgment, paras 542-543; *Kunarac et al* Appeal Judgment, paras 119, 121; SCSL-04-15-T, *Sesay, Kallon and Gbao* Trial Judgment, para 160; SCSL-03-01-T, *Taylor* Trial Judgment, para 420.

of a victim to change his or her condition.¹²³⁶ Additionally, it found that ‘deprivation of liberty’ can take many forms, and that in analysing this factor, the victim’s subjective perception of her or his situation, including reasonable fears, may be taken into account.¹²³⁷

The Chamber specified that the second element concerns the ability of the victim to determine matters relating to her or his sexual activities. In this regard, it found that sexual slavery covers situations in which women and girls are coerced to ‘share their lives’ with a person with whom they must perform acts of a sexual nature.¹²³⁸

The Chamber also noted that to establish sexual slavery as a crime against humanity under Article 7(1)(g) of the Statute, the conduct must have been part of a widespread or systematic attack against a civilian population,¹²³⁹ whereas to establish sexual slavery as a war crime under Article 8(2)(e)(vi) of the Statute, the conduct must have taken place in the context of and be associated with a non-international armed conflict.¹²⁴⁰

Addressing the mental elements of the crimes as required under Article 30 of the Statute, the Chamber found that the perpetrator must have been aware that he exercised, individually or collectively, one of the attributes of the right of ownership over a person and have intentionally coerced the person to perform acts of a sexual nature or have known that such a result would

occur in the ordinary course of events.¹²⁴¹ It noted that according to the Elements of Crimes, the commission of sexual slavery may involve more than one perpetrator as part of a common criminal purpose and clarified that in instances of collective conduct, Article 30 must be applied to each individual perpetrator.¹²⁴²

Lastly, the Chamber noted that to establish sexual slavery as a crime against humanity, the perpetrator must have been aware that the conduct was part of or have intended it to be part of a widespread or systematic attack against a civilian population, while to establish sexual slavery as a war crime, the perpetrator must have known of the factual circumstances establishing the existence of an armed conflict.¹²⁴³

Credibility of sexual violence witnesses

During the trial, three witnesses, **Witnesses 132, 249 and 353**, who were direct victims of sexual violence, testified in both open and closed session, describing the multiple rapes to which they were subjected during the attack, and their abduction and rape afterwards.¹²⁴⁴ In a section of the Trial Judgment on witness credibility, the Trial Chamber addressed the credibility of two of the sexual violence witnesses: Witnesses 132 and 353. The Chamber found each of the witnesses credible despite contradictions in their testimony, which it attributed to difficulties encountered in speaking about such private experiences and reluctance to divulge personal information.¹²⁴⁵

1236 Such factors include: the victim’s detention or captivity and its duration; limitations on freedom of movement and any other measures taken to prevent or deter escape; use of threats, force or other forms of physical or mental coercion; forced labour; the victim’s position of vulnerability; and the socio-economic conditions under which such powers are exercised. ICC-01/04-01/07-3436, para 976.

1237 ICC-01/04-01/07-3436, para 977.

1238 ICC-01/04-01/07-3436, para 978.

1239 ICC-01/04-01/07-3436, para 979, citing Article 7(1)(g)-2(3), Elements of Crimes.

1240 ICC-01/04-01/07-3436, para 980, citing Article 8(2)(e)(vi)-2(3), Elements of Crimes.

1241 ICC-01/04-01/07-3436, para 981, citing Article 30(2)(a),(b) and (3), Rome Statute.

1242 ICC-01/04-01/07-3436, para 982.

1243 ICC-01/04-01/07-3436, paras 983-984, citing Articles 7(1)(g)-2(4), 8(2)(e)(vi)-2(4), Elements of Crimes.

1244 ICC-01/04-01/07-3436, para 986. For a detailed summary of the testimony on gender-based crimes presented by the Prosecution Witnesses, see *Gender Report Card 2010*, p 165-177. Three additional Prosecution witnesses addressed rape, sexual slavery and forced marriage in the course of their testimony. See *Gender Report Card 2011*, p 226-228.

1245 ICC-01/04-01/07-3436, paras 988, 994.

In its credibility analysis, the Chamber noted that **Witness 132** had given different versions of events in her meetings with Prosecution investigators.¹²⁴⁶ However, it observed that her in-court testimony reflected the last account she had provided investigators and that she had openly acknowledged these contradictions in court, indicating that she had feared stating the truth in her initial meeting.

The Chamber emphasised the ‘particular vulnerability’ of sexual violence victims, noting that female victims of sexual violence risked rejection by their communities for coming forward regarding the crimes they had endured.¹²⁴⁷ It noted that the VWU had informed the Chamber that Witness 132 ‘remained very traumatized’ and recalled that a VWU representative thus accompanied her during her testimony. It found that she did not contradict herself during her in-court testimony, maintaining consistency in her account despite being ‘submerged in waves of emotion and breaking into tears, requiring that the hearing be suspended’.¹²⁴⁸ It also found that aspects of her testimony were corroborated by the testimony of other witnesses.¹²⁴⁹

At the same time, the Chamber noted that Witness 132’s testimony on the circumstances of her abduction ‘appeared incompatible’ with that of Witness 353.¹²⁵⁰ It nevertheless found that

the divergences in their testimonies could be attributed to the state of vulnerability in which they found themselves at the time of the crimes as well as during their in-court testimonies. It thus declined to find that one version of the events prevailed over the other. Rather, it determined it would rely upon the portions of Witness 132’s testimony that appeared ‘coherent and credible’.¹²⁵¹

The Chamber found that **Witness 353** had answered the parties’ questions with ‘simplicity and sincerity’.¹²⁵² It recalled that when certain questions provoked an emotional response, she had informed the parties and participants. It found her testimony to be coherent and clear, despite the ‘particular gravity’ of the crimes about which she had testified.¹²⁵³ While the Chamber found that several parts of her testimony had raised doubts, including her failure to recognise a church in Bogoro and the fact that she had stated that the Ugandans, rather than the UPC, were guarding the village, it attributed these errors to the fact that she was not originally from Bogoro and that there were two churches there with the same name, as well as to the fact that she was under the age of 18 at the time of attack.¹²⁵⁴

The Chamber found that Witness 353 was a vulnerable witness, who ‘had done everything to forget the events [...] and their dramatic consequences’.¹²⁵⁵ It determined that any inaccuracies in her testimony could be explained by the difficulty she encountered in remembering events that ‘she had forced

1246 ICC-01/04-01/07-3436, para 203. The Chamber found that Witness 132 had given two distinct birthplaces and modified the name of the camp in which she was imprisoned, as well as the names of and information regarding persons with whom she was detained.

1247 ICC-01/04-01/07-3436, para 204.

1248 ICC-01/04-01/07-3436, para 204. The Chamber recalled Defence claims that Witness 132 had voluntarily entered into relations with the man she ‘married’, but found that she had consistently maintained her position that she was forcibly ‘married’ to him.

1249 ICC-01/04-01/07-3436, para 208. The Chamber found that corroborating witnesses included Witnesses 249 and D02-148; the identity of other corroborating witnesses remained confidential.

1250 Witness 132 had testified that she had fled from her family home to the bush, where she was captured; Witness 353 had testified that Witness 132 was arrested with her and two other young women in a house in which they hid together. ICC-01/04-01/07-3436, para 206.

1251 ICC-01/04-01/07-3436, paras 211-212. In contrast, Judge Van den Wyngaert found in her Dissenting Opinion that in light of the contradictions between them, the Chamber should disregard both testimonies. ICC-01/04-01/07-3436-AnxI, paras 152-154.

1252 ICC-01/04-01/07-3436, para 333.

1253 ICC-01/04-01/07-3436, para 333.

1254 ICC-01/04-01/07-3436, paras 334-337. The Chamber further found that Witness 132 had indicated that she had gone to school in Bogoro in 2002, although all the schools had been transferred to Bunia in 2001.

1255 ICC-01/04-01/07-3436, para 338.

herself to forget in order to survive in a particularly difficult and hostile social context for female victims of rape'.¹²⁵⁶ It concluded that the coherence of her testimony and precise responses 'demonstrated without equivocation her reliability'.¹²⁵⁷

Factual findings concerning rape and sexual slavery

In finding that the elements of rape and sexual slavery as war crimes and crimes against humanity had been established, the Chamber relied primarily on the testimony of **Witnesses 132, 249 and 353**. It noted that the testimony of these Witnesses had been corroborated by other witnesses, while at the same time pointing out that, as specified under Rule 63(4) of the RPE, corroboration is not required to prove crimes of sexual violence.¹²⁵⁸ The Women's Initiatives for Gender Justice has analysed specific aspects of the testimonies of the sexual violence witnesses in relation to the context of the incidents of rape and sexual slavery.¹²⁵⁹

Rape

Witness 132 testified that she was found by six armed combatants while hiding in the bush and that three of the combatants sexually assaulted her 'through vaginal penetration'. The Chamber found that the Witness was 'in a state of total submission' during the assault, having feared that she would be killed if she did not obey. It determined that such sexual acts committed by

1256 ICC-01/04-01/07-3436, para 338.

1257 ICC-01/04-01/07-3436, para 339. By contrast, as noted in her Dissenting Opinion, Judge Van den Wyngaert would have refrained from relying on the testimonies of these Witnesses in light of the inconsistencies therein. ICC-01/04-01/07-3436-Anxl, paras 152-154 and fn 189-192.

1258 ICC-01/04-01/07-3436, para 986.

1259 Women's Initiatives for Gender Justice presentations at panel discussion on 'First Reflections on the ICC Katanga Judgement', 12 March 2014, T.M.C. Asser Institute (The Hague); Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, speech at expert panel on 'Prosecuting Sexual Violence in Conflict', 11 June 2014, Global Summit to End Sexual Violence in Conflict (London), available at <<http://www.iccwomen.org/documents/Global-Summit-Speech.pdf>>.

assailants during an armed attack against civilians could only be coercive in nature.¹²⁶⁰

Witness 249 testified that during the attack on Bogoro, six armed combatants hunted her down, dragged her into the bush, took off her clothes, threatened to kill her, and 'imposed vaginal penetration'. The same combatants forced her to a place where they detained her, beat her, and raped her again, as she begged them to kill her instead of subjecting her to such treatment. The Chamber noted that during these incidents, Witness 249 was extremely vulnerable and had 'valid reasons to fear for her life'.¹²⁶¹

Witness 353 testified that after witnessing combatants murder those with whom she had been hiding, the combatants forced her to follow them and transport their stolen goods. They physically assaulted her and then detained her in their camp in Walendu-Bindi. Two of the combatants forced her 'to have sexual intercourse' through 'vaginal penetration'.¹²⁶² The Chamber determined that she had been 'afraid for her life and had no other option than to obey'.¹²⁶³

The Chamber found that the perpetrators 'intentionally committed against Witnesses 132, 249 and 353, crimes of rape' while fully aware of the coercive circumstances in which the victims found themselves.¹²⁶⁴ It also found that these rapes were associated with the conflict and that the perpetrators knew of the existence of the conflict.¹²⁶⁵ It further found that the rapes formed part of a systematic attack targeting a civilian population, which was predominantly Hema, and that the perpetrators knew these crimes were part of the attack.¹²⁶⁶ In light of the foregoing, it concluded that the evidence established beyond reasonable

1260 ICC-01/04-01/07-3436, paras 989-990.

1261 ICC-01/04-01/07-3436, para 993.

1262 ICC-01/04-01/07-3436, para 997, citing ICC-01/04-01/07-T-213-Red, p 50-52.

1263 ICC-01/04-01/07-3436, para 997.

1264 ICC-01/04-01/07-3436, paras 992, 995-996, 998.

1265 ICC-01/04-01/07-3436, para 1233.

1266 ICC-01/04-01/07-3436, paras 1166-1167.

doubt that during the attack on 24 February 2003, Ngiti combatants from militia camps in Walendu-Bindi intentionally committed rape as a war crime under Article (8)(2)(e)(vi) and as a crime against humanity under Article (7)(1)(g) of the Statute.¹²⁶⁷ However, ultimately, the Chamber did not find Katanga guilty of these crimes because it determined that their commission did not form part of the common purpose associated with this attack.

Sexual Slavery

In its analysis of the crime of sexual slavery, the Chamber emphasised that the use of the term ‘wife’ by the perpetrators had a particular meaning under the circumstances. Specifically, it found that when it was said that, in the period following the attack on Bogoro, a person had been ‘taken as a wife’ by a combatant or that a person had ‘become his wife’, it referred to a coercive environment and ‘almost certain performance of acts of a sexual nature’.¹²⁶⁸ In this regard, the Chamber noted Witness 132’s testimony that ‘when someone takes you for his wife he can have sex with you at any time, as he wants’.¹²⁶⁹ It concluded that the fact that the combatants had referred to the civilian women captured in Bogoro and taken to the camps as their ‘wives’ demonstrated that they all intended to treat their victims as if they were their ‘possessions’ and to obtain from them ‘sexual favours’.¹²⁷⁰

1267 ICC-01/04-01/07-3436, para 999.

1268 ICC-01/04-01/07-3436, para 1000.

1269 ICC-01/04-01/07-3436, para 1000.

1270 ICC-01/04-01/07-3436, para 1001.

Witness 132 testified that after raping her, armed men took her to a military camp, where she was detained in a hole for a number of days and then forced by the camp commander to live behind his house. She stated that while in the camp, she was forced to perform domestic tasks, and she had wanted to flee but feared disobeying the commander’s orders. She also testified that she was coerced to ‘marry’ and live with a combatant in the camp and to follow him when he was transferred to other camps.¹²⁷¹ The Chamber found that during the attack on Bogoro and throughout her over one and a half years of captivity, Witness 132 was repeatedly raped by combatants, including by the man who ‘took her as his wife’.¹²⁷²

Witness 249 testified that after she was raped during the attack by six Ngiti combatants, she was taken to a militia camp where the perpetrators raped her again. The commander told her that since she refused to reveal the location of the Hema, she would either be killed or become the combatants’ ‘wife’. During her captivity, she was required to live with the combatants and perform domestic chores, to be ‘at the disposal’ of one combatant, and was repeatedly raped by several combatants. She remained in the camp for about one month until she managed to escape.¹²⁷³

Witness 353 testified that after she was forced from her hiding place, along with two other women, she was assigned to be the shared ‘wife’ of two combatants. She was beaten, taken captive, forced to follow combatants and carry their looted property, and taken to a militia camp in Walendu-Bindi.¹²⁷⁴ She was confined in a house in the camp for about three months, where her only task was to have sexual relations with her ‘husbands’.¹²⁷⁵ The Chamber found that she was repeatedly raped during this time by both men. She was afraid to escape for fear that they would kill her but managed to do so after ‘obtaining

1271 ICC-01/04-01/07-3436, paras 1002, 1004.

1272 ICC-01/04-01/07-3436, paras 1006-1007.

1273 ICC-01/04-01/07-3436, para 1009.

1274 ICC-01/04-01/07-3436, para 1014.

1275 ICC-01/04-01/07-3436, paras 1015-1016.

authorisation from her “husband” to leave the camp temporarily.¹²⁷⁶

The Chamber found that the combatants were aware that these women were being held in captivity and intentionally coerced them to perform acts of a sexual nature, thereby committing the crime of sexual slavery.¹²⁷⁷

The Chamber found that other women had also been held in sexual slavery in the aftermath of the Bogoro attack. In this regard, it noted the testimony of Witness 132 that a young girl had been detained with her and repeatedly raped by the combatants. It also noted Witness 353’s testimony that during the attack, two other women were ‘given as wives’ to combatants. It cited Witness 128’s testimony that when he was detained during the attack, he witnessed a Ngiti combatant ‘take a woman by force’ and later learned that she ‘would have been married and later had a child from this same man’. It further cited the testimony of Witness 233, who stated that he knew three women from Bogoro who were captured, taken to Ngiti occupied areas and ‘subjected to a similar fate’.¹²⁷⁸

The Chamber found that the sexual slavery was associated with the conflict,¹²⁷⁹ noting that the three witnesses were sexually enslaved inside the military camps and that their abduction was linked with the hostilities. It also found that the sexual slavery formed part of the systematic attack targeting the predominantly Hema civilian population¹²⁸⁰ and that the perpetrators committed these crimes in full knowledge that they were part of it.¹²⁸¹ Based on this evidence, the Chamber concluded beyond reasonable doubt that combatants from Ngiti militia camps in Walendu-Bindi, as well as other persons in those camps, intentionally committed sexual

slavery as war crimes under Article (8)(2)(e)(vi) of the Statute and crimes against humanity under Article (7)(1)(g) of the Statute in the aftermath of the Bogoro attack.¹²⁸² However, ultimately, the Chamber did not find Katanga guilty of these crimes because it determined that their commission did not form part of the common purpose associated with this attack.¹²⁸³

Katanga’s individual criminal responsibility for the crimes

As indicated above, the Trial Chamber established Katanga’s guilt as an accessory under Article 25(3)(d) of the Statute. It did so after first assessing his responsibility under Article 25(3)(a) of the Statute as a direct co-perpetrator for the crime of using child soldiers and as an indirect co-perpetrator for the remaining crimes charged, and evaluating whether recharacterising the mode of liability under Regulation 55 would exceed the facts and circumstances described in the charges or violate Katanga’s fair trial rights.

Katanga’s criminal responsibility as an indirect co-perpetrator under Article 25(3)(a)

Legal elements of indirect perpetration under Article 25(3)(a)

The Chamber first assessed Katanga’s criminal responsibility for the relevant crimes as an indirect perpetrator under Article 25(3)(a) of the Statute.¹²⁸⁴ It noted that according to this provision, a person will be criminally responsible as an indirect perpetrator when the person ‘commits a crime within the jurisdiction of the Court “through another person, regardless of the criminal responsibility of that other person”’.¹²⁸⁵

1282 ICC-01/04-01/07-3436, para 1023.

1283 Women’s Initiatives for Gender Justice presentations at panel discussion on ‘First Reflections on the ICC Katanga Judgement’, 12 March 2014, T.M.C. Asser Institute (The Hague); Brigid Inder, Executive Director, Women’s Initiatives for Gender Justice, speech at expert panel on ‘Prosecuting Sexual Violence in Conflict’, 11 June 2014, Global Summit to End Sexual Violence in Conflict (London), available at <<http://www.iccwomen.org/documents/Global-Summit-Speech.pdf>>.

1284 ICC-01/04-01/07-3436, para 1398.

1285 ICC-01/04-01/07-3436, para 1398.

1276 ICC-01/04-01/07-3436, para 1015.

1277 ICC-01/04-01/07-3436, paras 1008, 1013, 1018-1019.

1278 ICC-01/04-01/07-3436, para 1021.

1279 ICC-01/04-01/07-3436, para 1234.

1280 ICC-01/04-01/07-3436, para 1167.

1281 ICC-01/04-01/07-3436, para 1166.

In line with previous jurisprudence of the Court, the Chamber applied the ‘control over the crime’ theory in its interpretation of Article 25(3)(a) of the Statute.¹²⁸⁶ The Chamber determined that to be found criminally liable as an indirect perpetrator under this provision, the Prosecution must establish that an individual:

- 1 exercised control over the crime for which the material elements are carried out by one or more persons;
- 2 met the mental elements referred to in Article 30 of the Statute, in addition to the mental elements specific to the crime in question; and
- 3 was aware of the factual circumstances enabling his or her exercise of control over the crime.¹²⁸⁷

The Chamber explained that indirect perpetration through control over the crime can take various ‘legal forms’, including: ‘exercise of control over the will of the physical perpetrators’; and exercise of ‘control over the organisation’. The Chamber found that establishing control over an organisation required an assessment of two factors, namely: (1) the nature of the organisation; and (2) the control exercised upon the organisation. The Chamber explained that the nature of the organisation must be one of ‘functional automation’, whereby ‘orders of superiors are automatically executed’. As for the control exercised upon the organisation, the Chamber explained that the indirect perpetrator must exercise ‘real authority’ and use ‘at least a part of the apparatus of power that is subordinated to him in order to give directions, intentionally, to the commission of a crime, without having to leave to one of his subordinates

1286 For a description of the ‘control over the crime’ theory within the Court’s jurisprudence, see ‘Modes of Liability: a review of the International Criminal Court’s jurisprudence and practice’, *Women’s Initiatives for Gender Justice*, Expert Paper, November 2013, p 27-29, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

1287 ICC-01/04-01/07-3436, para 1399.

the power to decide whether or not to execute the crime’. The Chamber added that indirect perpetration through control over an organisation requires that the perpetrator ‘knew, when he exercised his control, his position within the organization and the fundamental features of the latter ensuring functional automation’.¹²⁸⁸

In terms of Katanga’s criminal responsibility under this mode of liability, the Chamber found that although the Ngiti combatants were part of a militia that constituted an organisation, the Prosecution did not present sufficient evidence to determine ‘the existence of a centralised command’ within the militia. Furthermore, the Chamber found that although Katanga had been the President of the Ngiti militia during the relevant period, the evidence did not establish that he had ‘the material ability to give orders’ to the militia ‘and to ensure their execution’ or that ‘he had the authority to impose disciplinary sanctions on commanders’. On this basis, the Chamber concluded that the evidence did not demonstrate that the Ngiti militia constituted ‘an organised apparatus of power’ or that Katanga exercised ‘control over the militia so that he could exercise control over the crimes’. Having found that the first element of indirect perpetration had not been established, the Chamber did not find it necessary to analyse the remaining elements and unanimously acquitted Katanga of all crimes charged under this mode of liability.¹²⁸⁹

The Chamber also acquitted Katanga as a direct co-perpetrator under Article 25(3)(a) of the Statute for the war crime of using children under the age of 15 to actively participate in hostilities. Although the Chamber found that commanders of the Ngiti militia of Walendu-Bindi *collectivement* used child soldiers in the context of the hostilities linked to the Bogoro attack, it could not conclude that Katanga committed this crime.¹²⁹⁰

1288 ICC-01/04-01/07-3436, paras 1401-1415.

1289 ICC-01/04-01/07-3436, paras 1417-1421.

1290 ICC-01/04-01/07-3436, paras 1087-1088.

Implementation of Regulation 55

Having acquitted Katanga of criminal responsibility under Article 25(3)(a) of the Statute, the Chamber next considered whether the mode of liability could be recharacterised under Regulation 55 in order to consider Katanga's responsibility for all crimes charged, except the war crime of using child soldiers, as an accessory under Article 25(3)(d) of the Statute. Specifically, the Chamber assessed whether such a recharacterisation would exceed the facts and circumstances as set forth in the Confirmation of Charges decision in violation of Article 74(2)¹²⁹¹ of the Statute and Regulation 55(1). It also examined whether the recharacterisation would violate Katanga's rights in contravention of Regulation 55(2) and (3), as well as Article 67(1) of the Statute,¹²⁹² including the right: to be informed of the nature, cause and content of the charges; to adequate time and facilities in preparation of the defence; to be tried without undue delay; to call and examine witnesses; and the right against self-incrimination.

Exceeding the facts and circumstances of the charges

The Chamber found that the factual considerations underlying the proposed recharacterisation under Article 25(3)(d) of the Statute, concerning the existence and composition of the Ngiti militia of Walendu-Bindi *collectivité* and Katanga's role, were substantively those described within the Confirmation of Charges decision.¹²⁹³ It concluded that the

1291 Article 74(2) of the Statute provides in pertinent part: 'The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.'

1292 For additional information on the Court's jurisprudence on the implementation of Regulation 55 to changes to the mode of liability, including in the Katanga case, see 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 109-136, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

1293 ICC-01/04-01/07-3436, para 1484. See also paras 1445-1483.

recharacterisation did not exceed the facts and circumstances of that decision.¹²⁹⁴

Violations of Katanga's rights

Concerning Katanga's right to be informed promptly and in detail of the nature, cause and content of the charges, the Chamber recalled the decision of the Appeals Chamber on the Defence appeal of the Severance decision, which had held that invoking Regulation 55 during the deliberations phase of the trial did not constitute a *per se* violation of Regulation 55.¹²⁹⁵ It further recalled that after the Severance decision, on 15 May 2013, it had provided the Defence with additional information on the proposed recharacterisation.¹²⁹⁶ It thus found no violation of Article 67(1)(a) of the Statute.¹²⁹⁷

Regarding Katanga's right against self-incrimination, the Chamber recalled that in the Severance decision, it had found that Katanga had freely made the choice to testify, without any constraint, in full knowledge of the nature of the charges and the fact that aspects of his testimony could be used against him. It noted that an accused waives his right to remain silent once he

1294 ICC-01/04-01/07-3436, para 1484. As described in greater detail below, in her Dissenting Opinion, Judge Van den Wyngaert disagreed, finding that the majority fundamentally altered the narrative describing the charges in violation of the statutory framework.

1295 ICC-01/04-01/07-3436, para 1486, citing ICC-01/04-01/07-3363, paras 94, 100. See also ICC-01/04-01/07-3363, paras 58, 96.

1296 ICC-01/04-01/07-3436, paras 1513-1514, citing ICC-01/04-01/07-3371, paras 20-25. Specifically, the Chamber noted that it had provided a more precise description of the facts related to the group acting with a common purpose, the acts constituting Katanga's contribution and his knowledge, and the links between these facts and the constituent elements of Article 25(3)(d) of the Statute, which it had also provided.

1297 ICC-01/04-01/07-3436, para 1527. Despite the Appeals Chamber decision, holding that Regulation 55 can be invoked at any stage of the proceedings, including the deliberations phase, as described below, in her Dissenting Opinion, Judge Van den Wyngaert found that that the timing and content of the majority's notice to the Defence was inadequate.

chooses to testify.¹²⁹⁸ The Chamber concluded that it could not ‘be reproached’ for Katanga’s decision not to remain silent and that the Defence claims in this regard were without basis.¹²⁹⁹

In response to Katanga’s assertion that the Chamber had violated his right to an impartial trial,¹³⁰⁰ the Chamber again referred to the Appeals Chamber’s Severance decision, in which it held that Regulation 55 notification was a ‘neutral judicial act’, including when given at a late stage of the proceedings.¹³⁰¹ The Chamber found that no valid reason had been put forth to call into question the Appeals Chamber’s decision and concluded that the accused had benefited from an impartial trial.¹³⁰²

In assessing Katanga’s right to adequate time and facilities for the preparation of his defence, the Chamber acknowledged that the invocation of Regulation 55 at an advanced stage of the proceedings ‘required the Defence to reorient, to a certain extent, its case’ within a limited amount of time.¹³⁰³ Concerning existing evidence, the Chamber considered the totality of measures taken to ensure that the Defence had been able to present its case on the new recharacterisation.¹³⁰⁴ In particular, the Chamber considered whether

1298 ICC-01/04-01/07-3436, paras 1528-1531, citing ICC-01/04-01/07-3319, paras 49-51. The Defence had argued that if the accused had known of the possibility of the recharacterisation of the mode of liability, it would have adopted a more passive strategy, and Katanga would probably not have chosen to testify. ICC-01/04-01/07-3339, para 92; ICC-01/04-01/07-3369, para 166.

1299 ICC-01/04-01/07-3436, para 1531. As described below, in her Dissenting Opinion, Judge Van den Wyngaert found that the Chamber’s reliance on Katanga’s testimony to convict him under a different mode of liability violated his right against self-incrimination.

1300 The Defence had argued that the implementation of Regulation 55 during the deliberations phase gave the impression that the majority of the Chamber sought to convict the accused. ICC-01/04-01/07-3339, paras 14(g)(i), 63-65.

1301 ICC-01/04-01/07-3436, para 1534, citing ICC-01/04-01/07-3363, paras 104-105.

1302 ICC-01/04-01/07-3436, para 1535.

1303 ICC-01/04-01/07-3436, para 1574.

1304 ICC-01/04-01/07-3436, paras 1538-1539.

the Defence had benefited from the necessary human and financial resources to produce any ‘analyses and observations deemed necessary’.¹³⁰⁵ The Chamber concluded that the Defence had submitted, ‘in full knowledge’ of the proposed recharacterisation, ‘written observations adding to, strengthening or nuancing its initial [arguments]’.¹³⁰⁶

The Chamber then considered whether the Defence had the possibility to present new evidence, such as recalling witnesses who appeared during trial, calling new witnesses or presenting new documentary evidence.¹³⁰⁷ It noted that even though they were not indispensable to the fairness of the trial, the Defence had ultimately been able to conduct further investigations, benefiting, ‘once again’, from the necessary human and financial resources.¹³⁰⁸ It further noted that the Defence had decided not to recall any Prosecution or Defence witnesses.¹³⁰⁹

The Chamber also acknowledged that new Defence investigations to identify witnesses had been affected by ‘unforeseen events’ such as a complete or temporary impossibility to travel to several locations in the DRC for security reasons. However, it found that Katanga’s rights were not prejudiced by this factor, given that the Defence chose not to act on alternative solutions suggested by the Registry.¹³¹⁰ Furthermore, the Chamber found that the Defence had not provided information enabling it to assess the relevance of the testimony of the potential witnesses residing in inaccessible locations.¹³¹¹ It concluded that Katanga’s right to adequate time and facilities for the preparation of his defence had not been violated.¹³¹²

1305 ICC-01/04-01/07-3436, para 1577.

1306 ICC-01/04-01/07-3436, paras 1541, 1578.

1307 ICC-01/04-01/07-3436, para 1539.

1308 ICC-01/04-01/07-3436, para 1579.

1309 ICC-01/04-01/07-3436, paras 1556-1557, 1580.

1310 ICC-01/04-01/07-3436, paras 1561-1571.

1311 ICC-01/04-01/07-3436, paras 1585-1586.

1312 ICC-01/04-01/07-3436, paras 1572-1588.

As for the right to be tried without undue delay, the Chamber briefly indicated that it had ensured that the Regulation 55 proceedings were undertaken within strict deadlines in accordance with Article 67(1)(c) of the Statute.¹³¹³ The Chamber thus concluded that the Regulation 55 proceedings did not violate the fair trial rights of the Defence, and rejected the latter's request for a permanent stay of the proceedings.¹³¹⁴

Criminal responsibility as an accessory pursuant to Article 25(3)(d)

Having found the implementation of Regulation 55 permissible in this case, the Chamber proceeded to assess Katanga's criminal liability as an accessory under Article 25(3)(d) of the Statute.

Legal elements of accessory liability under Article 25(3)(d)

Under Article 25(3)(d) of the Statute, a person will be found criminally responsible who:

In any other way contributes to the commission or attempted commission of [a crime within the Court's jurisdiction] by a group of persons acting with a common purpose. Such purpose shall be intentional and shall either:

- i Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- ii Be made in the knowledge of the intention of the group to commit the crime;

¹³¹³ ICC-01/04-01/07-3436, paras 1589-1591. In her Dissenting Opinion, Judge Van den Wyngaert found that the length of the Regulation 55 proceedings violated Katanga's right to be tried without undue delay, as described below.

¹³¹⁴ ICC-01/04-01/07-3436, paras 1592-1595. On 11 December 2013, the Defence had requested a permanent stay of the proceedings. ICC-01/04-01/07-3422.

Relying on previous jurisprudence from Pre-Trial Chambers I and II,¹³¹⁵ the Chamber determined that to be found criminally liable as an accessory under Article 25(3)(d)(ii) of the Statute, the following five elements must be established beyond reasonable doubt:

- i a crime under the jurisdiction of the Court was committed;
- ii the persons who committed the crime belonged to a group acting with a common purpose which was to commit the crime or involved its commission, including in the ordinary course of events;
- iii the accused made a significant contribution to the commission of the crime;
- iv the contribution was made with intent, insofar as the accused meant to engage in the conduct and was aware that the conduct contributed to the activities of the group acting with a common purpose; and
- v the accused's contribution was made in the knowledge of the intention of the group to commit the crime.¹³¹⁶

Regarding the **first element**, the Chamber found it necessary to establish the specific objective, subjective, and contextual elements of each crime charged, as well as the criminal responsibility of individual persons rather than the 'group as such'.¹³¹⁷

¹³¹⁵ ICC-01/04-01/07-3436, para 1617. See also ICC-01/04-01/07-3371, para 16. For a detailed description of the Court's jurisprudence of Article 25(3)(d) of the Statute, see 'Modes of Liability: a review of the International Criminal Court's current jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 77-86, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

¹³¹⁶ ICC-01/04-01/07-3436, paras 1620-1621. See also ICC-01/04-01/07-3371, para 16. For a detailed description of the Court's jurisprudence of Article 25(3)(d), see 'Modes of Liability: a review of the International Criminal Court's current jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 77-86, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

¹³¹⁷ ICC-01/04-01/07-3436, paras 1622-1623.

In terms of the **second element**, in interpreting the ‘action of a group acting with a common purpose’, the Chamber relied on the jurisprudence of the ICTY in relation to JCE liability. The Chamber considered that JCE ‘is based on the notion of “common purpose” and that [e]ven if the modes of liability can vary from one tribunal to another [...] nothing prevents that the definition of the expression “common purpose”, as adopted by the *ad hoc* tribunals can, for the most part, be used’ insofar as it is based on customary international law.¹³¹⁸

According to the Chamber, defining the group’s criminal purpose entailed an assessment of: the criminal goal pursued; its temporal and geographic scope; the type, origin and characteristics of the targeted victims; and the identity of the group, even if each person is not identified. It held that it is not necessary to demonstrate that the group was organised in a military, political or administrative structure, nor that the common purpose was pre-established. Rather, the group’s existence could be inferred from its concerted subsequent action.¹³¹⁹

The Chamber explained that although the group’s common purpose must be to commit a crime, or must entail its commission, it is not necessary that the commission of a crime within the Court’s jurisdiction be the principal objective of the group or that the common purpose be solely criminal. In this regard, it clarified that a group with a political objective that also involves acts of a criminal nature may constitute a group acting in furtherance of a common purpose within the meaning of Article 25(3)(d). It also clarified that the participants in the common purpose must share the same intent: namely, to cause the consequence resulting from the crime or know that it will occur in the ordinary course of events.¹³²⁰

1318 ICC-01/04-01/07-3436, para 1625.

1319 ICC-01/04-01/07-3436, para 1626.

1320 ICC-01/04-01/07-3436, para 1627.

The Chamber added that to establish responsibility as an accomplice to a crime under Article 25(3)(d), it must be shown that the indirect perpetrator shared the common purpose with those who physically carried out the crime, in any form listed under Article 25(3)(a). Furthermore, it must be demonstrated that the crime at issue formed part of the common purpose and did not result from ‘opportunistic action of members’ of the group. Finally, the Chamber determined that Article 25(3)(d) criminalises the contribution to the commission of a crime under the Court’s jurisdiction regardless of whether the accused is a member of the group or external to it.¹³²¹

Concerning the **third element**, the Chamber determined that the accused’s contribution to each crime must be demonstrated, and not only a contribution to the general activities of the group. It found that for a contribution to be considered significant, it must have influenced the commission of the crime, the manner in which the crime was committed, or both. However, the commission of a crime does not have to depend on the contribution. The Chamber further clarified that it is not necessary to establish a direct link between the acts of the accomplice and those of the physical perpetrator or to prove the proximity of the accused to the commission of the crime.¹³²²

With regard to the **fourth and fifth elements**, the Chamber held that the intent requirement applied only to the actions of the accused that constituted his contribution and that it is not necessary to demonstrate that the accused shared the intent of the group to commit the crime.¹³²³

1321 ICC-01/04-01/07-3436, paras 1628-1631.

1322 ICC-01/04-01/07-3436, paras 1632-1636.

1323 ICC-01/04-01/07-3436, paras 1637-1638.

Katanga's criminal responsibility under Article 25(3)(d)

In determining whether the elements of Article 25(3)(d) had been satisfied, the Chamber first recalled its findings that all of the crimes charged had been committed by the Ngiti combatants of the Walendu-Bindi *collectivité*.¹³²⁴ The Chamber then assessed: (1) whether the Ngiti militia constituted a group acting with a common purpose at the relevant time; (2) whether each crime committed by the militia fell within the common purpose; and (3) whether the evidence established that the perpetrators of the crimes were members of the militia.¹³²⁵

The Chamber concluded that the Ngiti combatants and commanders of Walendu-Bindi were part of a militia that constituted an organised armed group, which had 'a unique plan', namely to attack Bogoro village and to 'wipe out [...] not only the UPC military elements but also, and mostly, the Hema civilians who were there'. It found that the manner in which Bogoro was attacked and the Hema civilians 'were hunted down and killed' confirmed 'the existence of a common purpose of a criminal nature against the population of the village'.¹³²⁶

The Chamber also concluded that murder as a war crime and crime against humanity, as well as the war crimes of attack against civilians, destruction of property, and pillaging, each fell within the common purpose. The Chamber reasoned that such crimes were commonly committed by the Ngiti militia, including prior to the Bogoro attack, 'which confirmed that they intended to commit those crimes'.¹³²⁷ The Chamber further emphasised the scale of the

1324 ICC-01/04-01/07-3436, para 1652, namely: murder as a war crime and a crime against humanity, attacking a civilian population as a war crime, pillage and destruction as a war crime and rape and sexual slavery as war crimes and crimes against humanity.

1325 ICC-01/04-01/07-3436, para 1653.

1326 ICC-01/04-01/07-3436, paras 1654-1657.

1327 ICC-01/04-01/07-3436, paras 1658, 1661.

crimes, recalling that Bogoro was 'attacked from each side', that 'villagers were targeted in a systematic manner', and that the crimes against civilians were committed with 'great violence'.¹³²⁸ The Chamber stressed that the acts of destruction of property, including the burning down of houses occupied mainly by Hema civilians, 'occurred within the full locality and during the whole day', and that Bogoro was pillaged 'in great proportions'. The Chamber added that goods destroyed and pillaged, including sheet metal roof covering and livestock, belonged mainly to the Hema civilian population and were 'essential to [their] daily life'.¹³²⁹ Although the Chamber did not refer in its analysis to the number of murders committed by the Ngiti militia, it had previously found that at least 60 persons were killed during the attack, including at least 33 civilians, many of whom were women, children and the elderly.¹³³⁰ The Chamber concluded that the Ngiti combatants intended to commit the crimes of attack on civilians and murder, and that they shared the intent to pillage or knew the crime would occur in the ordinary course of events. The Chamber did not explicitly address the intent of the Ngiti militia in assessing whether the crime of destruction of property formed part of the common purpose.¹³³¹

Having found that these crimes fell within the common purpose, the Chamber next assessed Katanga's contribution to the commission of the crimes. It found that Katanga made a 'truly significant' contribution to the crimes of murder, pillage and destruction of property, by: traveling to Beni on behalf of the Ngiti militia, establishing military alliances and defining a military strategy there; expressing the group's struggle against the Hema, which was assimilated with the UPC; acting as a liaison between local combatants, the Beni authorities and the Congolese army;

1328 ICC-01/04-01/07-3436, para 1656.

1329 ICC-01/04-01/07-3436, paras 1659-1660.

1330 ICC-01/04-01/07-3436, paras 838-840, 869.

1331 ICC-01/04-01/07-3436, paras 1658, 1662.

and receiving and distributing arms and munitions. In this regard, it underscored Katanga's contribution to the preparations for the attack, and the importance of the arms and munitions he obtained for the success of the attack.¹³³²

The Chamber further noted Katanga's testimony, which it found demonstrated that he had intentionally contributed to the crimes.¹³³³ Concerning Katanga's knowledge of the group's intent to commit the crimes, the Chamber found that the evidence demonstrated that he knew of the plan to attack Bogoro as of November 2002 and knew that the arms and munitions, the delivery of which he facilitated, would be used in that attack. It also found that Katanga was aware of the methods of war employed in Ituri during the relevant period, underscoring his knowledge of the massacre of civilians, pillage and destruction in a prior attack on Nyakunde, in which Ngiti combatants of Walendu-Bindi had participated.¹³³⁴ The Chamber also found that Katanga knew about, and 'fully shared', the Ngiti's anti-Hema ideology.¹³³⁵ Thus, the Chamber found beyond reasonable doubt that Katanga significantly and intentionally contributed to the crimes of murder as a war crime and a crime against humanity, as well as attacking a civilian population, destruction of property and pillage as war crimes, in full knowledge of the group's intention to commit the crimes.¹³³⁶

1332 ICC-01/04-01/07-3436, paras 1671-1672, 1676, 1679, 1681.

1333 ICC-01/04-01/07-3436, paras 1682-1683, citing ICC-01/04-01/07-T-318, p 13. Katanga stated under oath that if he had not been constrained to remain in Aweba, he would have personally participated in the attack, and that he considered it his duty to take part in this operation with the APC.

1334 ICC-01/04-01/07-3436, paras 1684-1687.

1335 ICC-01/04-01/07-3436, para 1688.

1336 ICC-01/04-01/07-3436, para 1691.

Katanga's acquittal for the gender-based crimes

The Trial Chamber dedicated two paragraphs of the Trial Judgment to discussing Katanga's criminal responsibility for the crimes of rape and sexual slavery.¹³³⁷ Its analysis centred on an examination of whether each of the crimes charged was part of the common purpose ascribed to the Ngiti militia of Walendu-Bindi, namely, 'to attack Bogoro, which consisted of wiping out from this place not only the UPC military elements but also, and mainly, the Hema population that was there'.¹³³⁸

In contrast to its findings regarding the crimes of attack against civilians, murder, destruction of property and pillaging, the Chamber found that the evidence did not establish that the crimes of rape and sexual slavery fell within the common purpose of the Ngiti militia, and therefore acquitted Katanga as an accessory to these crimes.¹³³⁹ The Chamber appeared to have relied upon four 'indicators' of whether a crime formed part of the common purpose, namely: (1) whether the crimes were numerous and committed repetitively (First Indicator); (2) whether the crimes were necessary to fulfilling the common purpose (Second Indicator); (3) whether the perpetrators of rape and sexual slavery had committed such crimes prior to the Bogoro attack (Third Indicator); and (4) whether the crimes were ethnically motivated, given the ethnic nature of the common purpose, as established by the Chamber (Fourth Indicator).¹³⁴⁰

In relation to the First and Second Indicators, the Chamber reasoned that the evidence did not demonstrate that rape and sexual slavery were 'committed in large numbers or in a repetitive manner' or that wiping out Bogoro

1337 ICC-01/04-01/07-3436, paras 1663-1664.

1338 ICC-01/04-01/07-3436, para 1665.

1339 ICC-01/04-01/07-3436, para 1664.

1340 ICC-01/04-01/07-3436, paras 1663-1664.

‘necessarily occurred through the commission of these crimes’. Regarding the Third Indicator, the Chamber determined that, contrary to its findings in relation to the other crimes, it had not been demonstrated that the Ngiti combatants had committed acts of rape or sexual slavery prior to the Bogoro attack.¹³⁴¹ This finding departed from the majority of the Pre-Trial Chamber’s finding in the Confirmation of Charges decision that the Ngiti militia had committed rape and sexual slavery against women and girls in Ituri in both previous and subsequent attacks against the civilian population.¹³⁴² Concerning the Fourth Indicator, the Chamber found that ‘women who were raped, abducted and turned to slavery had their life “spared” and escaped a certain death because they pretended to belong to an ethnicity other than Hema’.¹³⁴³

The Women’s Initiatives for Gender Justice provided an initial analysis of the acquittals for rape and sexual slavery and the four Indicators utilised by the Chamber in reaching this decision, during a panel organised by TMC Asser Institute, the CICC and the Grotius Centre for International Legal Studies of Leiden University, titled ‘First Reflections on the ICC Katanga Judgement’, held on 12 March 2014. Further analysis of these issues was provided in a speech by Brigid Inder, Executive Director, Women’s Initiatives for Gender Justice, on an expert panel held on 11 June 2014 titled ‘Prosecuting Sexual Violence in Conflict’, during the Global Summit to End Sexual Violence in Conflict.¹³⁴⁴

Ethnicity and sexual violence

Witness 353 testified that her assailants questioned her about her ethnicity, that she denied being Hema, and responded that she was of Nande ethnicity. At that moment, one

person recognised her and stated that she was Hema, to which she replied that she was not Hema but that she was living with a Hema. Two combatants then argued about whose ‘wife’ she would become and decided that she would become both of their ‘wives’.¹³⁴⁵

Witness 132 testified that when she was found by her assailants, they told her to take off her clothes. They then accused her of being Hema, which she denied. The combatants continued to inquire about her ethnicity and insist that she was Hema. They raped her, told her she had become their ‘wife’, and took her to a camp where she was interrogated, imprisoned in a hole and raped again repeatedly. She recounted that one day, when the ‘chief’ of the camp asked her about her ethnicity, she claimed she was Nande, and he replied ‘no, you are Hema’. According to the transcript, ‘[a]fter that, he decided that she would not be released’.¹³⁴⁶

Witness 249 also testified that she was asked about her ethnicity but only after she was repeatedly raped. She claimed not to be Hema but was told ‘that she was Hema because they smelled her odor’. She was also told that if she would not inform her captors of the location of the Hema, she would have to choose between her life and becoming their ‘wife’. She testified that she ‘told them to make that choice’. Witness 249 also testified that she ‘told [the combatants] that it would be better for them to kill me rather than treat me like that, like an animal’.¹³⁴⁷

In a statement issued on the day of the Judgment, the Women’s Initiatives for Gender Justice, expressed that ‘Katanga’s acquittal on charges of rape and sexual slavery is a devastating result for the victims/survivors of the Bogoro attack, as well as other victims of these crimes committed by the FRPI within

¹³⁴¹ ICC-01/04-01/07-3436, paras 1663-1664.

¹³⁴² ICC-01/04-01/07-717, para 568(iii).

¹³⁴³ ICC-01/04-01/07-3436, para 1663.

¹³⁴⁴ Brigid Inder, Executive Director, Women’s Initiatives for Gender Justice, speech at expert panel on ‘Prosecuting Sexual Violence in Conflict’, 11 June 2014, Global Summit to End Sexual Violence in Conflict (London), available at <<http://www.iccwomen.org/documents/Global-Summit-Speech.pdf>>.

¹³⁴⁵ ICC-01/04-01/07-T-213-Red-ENG, p 24-26, 48.

¹³⁴⁶ ICC-01/04-01/07-T-139-Red-FRA, p 9-13, 19-20, 22-23, 25, 28-30, 37, 40, 45, 48, 59, 61, 64.

¹³⁴⁷ ICC-01/04-01/07-T-135-Red-FRA, p 40-43, 58-59.

the ethnically-driven conflict in Ituri'. The Statement indicated that:

it is possible that a higher standard of evidence was expected in relation to sexual violence, including requiring a more deliberate intention to commit these crimes in the Bogoro attack, which they did not require in convicting Mr Katanga for the crimes of directing an attack against a civilian population, pillaging, murder and destruction of property. This Judgment on face value appears to be inherently inconsistent.

The Statement further stressed that:

We are extremely disappointed that the judges appeared to expect a different level of proof regarding Mr Katanga's contribution to these crimes, than they required to convict him on the basis of his contribution to the [other crimes charged], which were committed at the same time as women in the village were being raped [...]. This creates a challenge for the Prosecution to argue more persuasively in support of individual criminal responsibility in relation to acts of rape, taking into account the prevailing approach to these crimes and the associated evidence required by the ICC judges.¹³⁴⁸

1348 Women's Initiatives for Gender Justice, 'Partial Conviction of Katanga by ICC – Acquittals for Sexual Violence and Use of Child Soldiers', 7 March 2014, available at <<http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf>>. See also Women's Initiatives for Gender Justice presentations at panel discussion on 'First Reflections on the ICC Katanga Judgement', 12 March 2014, T.M.C. Asser Institute (The Hague); Brigid Inder, Executive Director, Women's Initiatives for Gender Justice, speech at expert panel on 'Prosecuting Sexual Violence in Conflict', 11 June 2014, Global Summit to End Sexual Violence in Conflict (London), available at <<http://www.iccwomen.org/documents/Global-Summit-Speech.pdf>>.

Dissenting Opinion of Judge Van den Wyngaert

Judge Van den Wyngaert issued a Dissenting Opinion, in which she expressed concurrence with the majority of the Trial Chamber's conclusion that Katanga was not criminally responsible under Article 25(3)(a) of the Statute but indicated that she disagreed with 'almost every aspect' of the remainder of the Judgment.¹³⁴⁹ In particular, in contrast to the majority, she found that the recharacterisation of the mode of liability both exceeded the facts and circumstances set forth within the Confirmation of Charges decision in violation of Regulation 55(1) and Article 74(2) of the Statute and that it violated numerous fair trial rights of the accused under Regulation 55(2) and (3) of the Regulations and Article 67(1) of the Statute. She also found that the evidence failed to establish Katanga's guilt as either an indirect co-perpetrator or as an accessory, pursuant to Article 25(3)(a) and (d) of the Statute, respectively. Furthermore, Judge Van den Wyngaert did not find that the evidence established beyond reasonable doubt the commission of crimes against humanity.¹³⁵⁰ She would have accordingly acquitted the accused.¹³⁵¹

The recharacterisation of the mode of liability exceeded the facts and circumstances of the Confirmation of Charges decision

Judge Van den Wyngaert found that the majority's recharacterisation of the mode of liability resulted in 'a fundamental change in the narrative' of the case and 'introduced totally new factual elements into the charges', in violation of

1349 ICC-01/04-01/07-3436-Anxl, para 1.

1350 ICC-01/04-01/07-3436-Anxl, paras 263-275.

1351 ICC-01/04-01/07-3436-Anxl, para 8.

Regulation 55(1) and Article 74(2).¹³⁵² Judge Van den Wyngaert drew a clear distinction between the ‘facts and circumstances’ set forth in the Confirmation of Charges decision and ‘other factual references’ therein.¹³⁵³ She explained, ‘charges are not merely a loose collection of names, places and events which can be ordered and reordered at will’.¹³⁵⁴ Rather, she observed that ‘[a] similar fact may be a mere detail in one narrative, but constitute the linchpin of another’.¹³⁵⁵ She found in this regard that Katanga had gone from being the ‘(co)-architect’ of the attack on Bogoro to merely having ‘known about the criminal common purpose’ of the Ngiti militia and having made a contribution to it.¹³⁵⁶ She further stated that it was impermissible to ‘simply lift out a particular factual proposition and use this as part of a significantly different factual claim’, noting that the alleged events that took place in Beni¹³⁵⁷ and the prior attack on Nyakunde were of ‘crucial importance’ to the majority’s reasoning, but ‘were all but irrelevant’

1352 ICC-01/04-01/07-3436-Anxl, paras 19, 27. On 27 March 2013, in its decision on the Defence appeal of the Severance decision, the Appeals Chamber determined that it was inevitable that a recharacterisation would result in a change in the narrative. ICC-01/04-01/07-3363, para 58.

1353 ICC-01/04-01/07-3436-Anxl, para 18. The Appeals Chamber rejected this distinction between material and subsidiary facts in its decision on the Defence appeal of the Severance decision. ICC-01/04-01/07-3363, para 56.

1354 ICC-01/04-01/07-3436-Anxl, para 32.

1355 ICC-01/04-01/07-3436-Anxl, paras 19-26, 33. Specifically, Judge Van den Wyngaert found that the majority’s findings regarding the Ngiti militia’s hatred toward the Hema, Katanga’s knowledge of the group’s common purpose, and the *mens rea* of the physical perpetrators were not factual elements to be found within the Confirmation of Charges decision. She noted that the *mens rea* of the physical perpetrators was irrelevant under the theory of indirect co-perpetration pursuant to Article 25(3)(a) of the Statute.

1356 ICC-01/04-01/07-3436-Anxl, para 31(e).

1357 According to Judge Van den Wyngaert, ‘[t]he only proposition related to Beni that is contained in the “facts and circumstances” as confirmed by the Pre-Trial Chamber is the allegation that Germain Katanga and Mathieu Ngudjolo went there to obtain weapons and ammunitions in preparation of the attack on Bogoro (article 25(3)(a)).’ ICC-01/04-01/07-3436-Anxl, para 42.

under the original charges.¹³⁵⁸ She characterised as ‘inappropriate’ the majority’s reliance on the battle in Nyakunde as ‘a central pillar of its case under article 25(3)(d)(ii)’.¹³⁵⁹ She opined that Regulation 55 was ‘not a licence to turn the entire factual and legal framework of a case upside down just in order to avoid an acquittal. Yet, this is precisely what has happened in this case’.¹³⁶⁰

The implementation of Regulation 55 violated Katanga’s fair trial rights

Judge Van den Wyngaert found that the recharacterisation of the mode of liability pursuant to Regulation 55 violated ‘several of the accused’s most fundamental rights’, namely: the right against self-incrimination; the right to be informed promptly and in detail of the nature, cause and content of the charges; the right to adequate time and facilities for the effective preparation of the defence; the right to examine and have witnesses examined; and the right to be tried without undue delay.

The right against self-incrimination

Concerning the right against self-incrimination, Judge Van den Wyngaert argued that Katanga had taken the stand as a witness with the understanding that his testimony could only be used against him as an alleged indirect co-perpetrator pursuant to Article 25(3)(a) of the Statute. She concluded that the majority had essentially required the accused ‘to defend himself *before* he learn[ed] about the precise nature of the allegations against him’ in violation of Article 67(1)(g) of the Statute.¹³⁶¹ She also considered that Katanga’s answers that ‘incriminated him under Article 25(3)(d)(ii) were given in violation of his free will’, and were thus used against him in violation of the same provision.¹³⁶²

1358 ICC-01/04-01/07-3436-Anxl, paras 41-49.

1359 ICC-01/04-01/07-3436-Anxl, para 48.

1360 ICC-01/04-01/07-3436-Anxl, para 314.

1361 ICC-01/04-01/07-3436-Anxl, para 84 (emphasis in original).

1362 ICC-01/04-01/07-3436-Anxl, para 59.

The right to be informed of the charges and to have adequate time and facilities for the preparation of the defence

Judge Van den Wyngaert considered that the timing of the Chamber's Severance decision, issued at the deliberations phase of the proceedings, 'was anything but "prompt" and irreconcilable with the Chamber's 'duty of diligence'.¹³⁶³ She found that the majority failed to give 'sufficiently detailed information' and that the notice was 'grossly inadequate'.¹³⁶⁴ She also considered that the majority was required to explain how the significance of the facts had changed under the recharacterisation, and 'how those changes ha[d] altered the narrative of the charges'.¹³⁶⁵ Judge Van den Wyngaert observed that the majority 'never informed the Defence of the precise evidentiary basis of the charges under Article 25(3)(d)(ii)'.¹³⁶⁶

Failure to afford a reasonable opportunity to investigate

Judge Van den Wyngaert found that the majority failed to afford the Defence a reasonable opportunity to investigate in violation of the right to adequate time and facilities for the preparation of the Defence, and the right to examine witnesses. She found that 'an additional investigation into a number of key factual issues was more than necessary'.¹³⁶⁷ In this regard, she highlighted the increased importance of the battle in Nyakunde under the recharacterisation, and the fact that very little evidence was presented on this issue during

1363 ICC-01/04-01/07-3436-Anxl, paras 61, 63. In its decision on the Defence appeal of the Severance decision, the Appeals Chamber held that, by its plain language, Regulation 55 could be invoked any time before the issuance of the Article 74 Trial Judgment, including during the deliberations phase. ICC-01/04-01/07-3363, para 1.

1364 ICC-01/04-01/07-3436-Anxl, para 61.

1365 ICC-01/04-01/07-3436-Anxl, para 76.

1366 ICC-01/04-01/07-3436-Anxl, para 81.

1367 ICC-01/04-01/07-3436-Anxl, para 87. Judge Van den Wyngaert also opined that the Defence should not have been required to show what information the investigation would have revealed.

trial. She disagreed with the majority that it was 'incumbent upon the Defence to demonstrate why further investigations were absolutely necessary'.¹³⁶⁸ Rather, she found that the issue of necessity was 'not to be measured on the basis of what impact further investigations may have on the outcome of the case' but rather with regard to 'the fairness of the proceedings'.¹³⁶⁹

Judge Van den Wyngaert considered that the alternative means of defence offered by the majority, namely making submissions on existing evidence, was 'less than meaningful'.¹³⁷⁰ She asserted that the majority demonstrated 'a consistent unwillingness to acknowledge the real difficulties encountered by the Defence'.¹³⁷¹

The right to be tried without undue delay

Reasoning that, but for the issuance of the Severance decision, Katanga would have been acquitted together with Ngudjolo on 18 December 2012, Judge Van den Wyngaert found that the majority violated Articles 64(2), 67(1)(c) of the Statute and Rule 142(1) of the RPE, requiring fair and expeditious proceedings, that the accused be tried without undue delay and that the Trial Judgment be issued within a reasonable time after deliberation, respectively.¹³⁷² She observed that the post-severance proceedings lasted until 7 March 2014, more than 15 months, or 444 days. She stated: '[t]o me, this is an inordinately long delay'.¹³⁷³

1368 ICC-01/04-01/07-3436-Anxl, para 91.

1369 ICC-01/04-01/07-3436-Anxl, para 92.

1370 ICC-01/04-01/07-3436-Anxl, paras 99, 101. Specifically, Judge Van den Wyngaert disagreed with the majority's decision to require the Defence to select which witnesses it planned to call prior to having conducted additional investigations.

1371 ICC-01/04-01/07-3436-Anxl, para 103.

1372 ICC-01/04-01/07-3436-Anxl, paras 131-132.

1373 ICC-01/04-01/07-3436-Anxl, para 124.

Katanga's guilt was not established beyond reasonable doubt

In her Dissenting Opinion, Judge Van den Wyngaert stated: 'I am of the view that the charges – whether under article 25(3)(a) or (d) – have not been proven and the case should have been dismissed a long time ago.'¹³⁷⁴ She further stated: '[w]hatever my colleagues may believe in their *intime conviction*, I fear it cannot stand up against the required standard of proof and the dispassionate rigour it demands.'¹³⁷⁵ While she agreed with the majority that Katanga's criminal responsibility was not established under Article 25(3)(a) of the Statute, she found that with respect to Article 25(3)(d) of the Statute, the majority had applied the standard of proof erroneously, that significant evidence was missing, and that there were 'serious credibility problems with crucial prosecution witnesses', requiring an acquittal.¹³⁷⁶

Weaknesses in the Prosecution case and in the 'Majority case'

Judge Van den Wyngaert dedicated a section of her Dissent to the weakness of the Prosecution case, finding that 'the incriminating evidence did not pass muster'.¹³⁷⁷ She specified that, like in the case against Ngudjolo, 'there were many deficiencies in the Prosecution's investigations'. In particular, she noted that the investigations 'took place more than three years after the facts' and that 'a number of crucial sites were never visited'. Furthermore, 'essential forensic evidence was lacking' and 'a number of potential witnesses were either not interviewed [...] or not called to testify'.¹³⁷⁸ She criticised the Prosecution

for failing to interview Katanga, which would have enabled it to 'test a number of important elements that were raised' in his testimony and more effectively cross-examine him. She also criticised the Prosecution for failing to conduct follow-up investigations of its own key witnesses, namely Witnesses 250, 279 and 280, alleged former child soldiers who Defence witnesses testified had never participated in combat.¹³⁷⁹ She concluded that:

Considering the very serious and seemingly systemic nature of these problems, I can only welcome that, under the leadership of the new Prosecutor and Deputy Prosecutor, the Office of the Prosecutor seems to have acknowledged past shortcomings and has demonstrated a greater willingness to critically assess the strength and weaknesses of the cases that are brought before the Court.¹³⁸⁰

Judge Van den Wyngaert also referred to weaknesses in the 'Majority's case', as she found the charges under Article 25(3)(d)(ii) to be formulated by the majority and not the Prosecution.¹³⁸¹ She also found that the majority incorrectly applied the standard of proof, and she disagreed with its evaluation of the evidence. She submitted that any reasonable doubt raised by the evidence 'should be resolved in favour of the accused'.¹³⁸² Judge Van den Wyngaert referred to 'a worrying tendency throughout the Majority Opinion to brush over serious credibility problems' for many of the witnesses, including the testimony of witnesses who were victims of sexual violence.¹³⁸³ She found the majority 'eager to explain away

1374 ICC-01/04-01/07-3436-Anxl, para 171.

1375 ICC-01/04-01/07-3436-Anxl, para 172 (emphasis in original).

1376 ICC-01/04-01/07-3436-Anxl, paras 133, 136.

1377 ICC-01/04-01/07-3436-Anxl, paras 137-138. Judge Van den Wyngaert reiterated the majority's concerns that the investigation began three years after the events, crucial sites were never visited, significant potential witnesses were not called to testify, and Katanga was not interviewed at the investigation stage.

1378 ICC-01/04-01/07-3436-Anxl, para 138.

1379 ICC-01/04-01/07-3436-Anxl, paras 139-140.

1380 ICC-01/04-01/07-3436-Anxl, para 141.

1381 ICC-01/04-01/07-3436-Anxl, para 143. As described in greater detail below, Judge Diarra and Judge Cotte issued a Concurring Opinion, in part, responding to Judge Van den Wyngaert's use of the term 'majority case'. ICC-01/04-01/07-3436-AnxII, para 2.

1382 ICC-01/04-01/07-3436-Anxl, para 151.

1383 ICC-01/04-01/07-3436-Anxl, para 152.

contradictions and inconsistencies' in their testimony on the length of time that had passed since the events in question and the trauma suffered by the witnesses.¹³⁸⁴ In contrast to the majority, she found that even if time lapse and trauma could explain the incoherent or inconsistent testimony, 'this does not justify reliance thereon'.¹³⁸⁵

Judge Van den Wyngaert 'would have refrained from relying on the testimonies' of all of the witnesses who testified as direct victims of sexual violence, Witnesses 132, 353 and 249.¹³⁸⁶ In particular, she referred to inconsistencies between Witness 132's prior statements and her in-court testimony, as well as to contradictions between the accounts given by Witnesses 132 and 353.¹³⁸⁷ In her view, the entire testimony of witnesses who had given false testimony about a matter directly related to the charges should have been disregarded.¹³⁸⁸

In addition, Judge Van den Wyngaert observed that the testimony of Witness 28 – one of the key Prosecution witnesses, who the majority of the Trial Chamber found had lied about his membership in the Ngiti militia, his participation in the battle at Bogoro and his date of birth – was the testimony most cited in the majority opinion, after that of Katanga.¹³⁸⁹ She further found

1384 ICC-01/04-01/07-3436-Anxl, para 152.

1385 ICC-01/04-01/07-3436-Anxl, para 152.

1386 ICC-01/04-01/07-3436-Anxl, paras 152, 154. Judge Van den Wyngaert did not explain why she would not have retained the testimony of the third victim-witness of sexual violence, Witness 249.

1387 ICC-01/04-01/07-3436-Anxl, para 152 and fn 189-191. In contrast to the majority's decision not to afford precedence to one testimony over the other, Judge Van den Wyngaert concluded that the testimonies of both Witnesses 132 and 353 should be discarded.

1388 ICC-01/04-01/07-3436-Anxl, paras 153-154.

1389 ICC-01/04-01/07-3436-Anxl, paras 156, 161-162. In the Lubanga Trial Judgment, Trial Chamber I found that there was a real possibility that Intermediary 143 corrupted the testimony of witnesses. See ICC-01/04-01/06-2842, para 291. Judge Van den Wyngaert found that although the Chamber had not allowed the relevant part of the Lubanga Trial Judgment into evidence, this information could not be ignored when evaluating the credibility of witnesses.

the majority's reliance on Katanga's testimony for the charges under Article 25(3)(d)(ii) to be 'entirely inappropriate', including the way in which it was relied upon.¹³⁹⁰ She observed that his testimony was 'the main source of incriminating evidence' for the charges under Article 25(3)(d), and underscored that under Article 25(3)(a), 'his evidence would have been almost entirely exculpatory'.¹³⁹¹

Katanga's individual criminal responsibility

Katanga's criminal responsibility under Article 25(3)(a)

Agreeing with the majority that Katanga's individual criminal responsibility as an indirect co-perpetrator was not established under Article 25(3)(a), Judge Van den Wyngaert reiterated her position, as set forth in her Concurrence to the Ngudjolo Trial Judgment, that 'the concept of "indirect co-perpetration" has no place under the Statute as it is currently worded, because it adds a fourth form of responsibility to the three forms already laid down in article 25(3)(a)'.¹³⁹² She found this 'expansive interpretation' to be 'inconsistent with article 22(2) of the Statute'.¹³⁹³ Judge Van den Wyngaert further disagreed with the majority's adoption of the 'control over the crime' theory in interpreting Article 25(3)(a), based on the reasons set

1390 ICC-01/04-01/07-3436-Anxl, para 166.

1391 ICC-01/04-01/07-3436-Anxl, paras 167, 170.

1392 ICC-01/04-01/07-3436-Anxl, para 278. In the Confirmation of Charges decision, Pre-Trial Chamber I established a fourth mode of liability under Article 25(3)(a) of the Statute by combining co-perpetration with indirect perpetration to form indirect co-perpetration. ICC-01/04-01/07-717. See also 'Modes of Liability: a review of the International Criminal Court's current jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 60-72, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

1393 ICC-01/04-01/07-3436-Anxl, para 278.

forth in her Concurrence to the Ngudjolo Trial Judgment.¹³⁹⁴

Katanga's criminal responsibility under Article 25(3)(d)(ii)

While 'generally in agreement' with the majority's interpretation of Article 25(3)(d), Judge Van den Wyngaert clarified her position on several points.¹³⁹⁵ First, she found that 'common purpose groups must fulfil the material elements of the crimes and include those who made direct contributions to bringing about those material elements, either personally or through others'.¹³⁹⁶ Secondly, she interpreted Article 25(3)(d) as requiring that the common purpose be '*criminal*', that is, the criminal component must be an inherent part of the common plan.¹³⁹⁷ She would also require that for the contribution to be intentional, the accused 'must be at least aware that he/she is contributing to the *criminal* activities of the group'.¹³⁹⁸ She also found that Article 25(3)(d)(ii) required that the accused

1394 ICC-01/04-01/07-3436-Anxl, paras 280-281. Judge Van den Wyngaert issued a Concurring Opinion to the Ngudjolo Trial Judgment, expressing her disagreement with the application of the 'control over the crime' theory. ICC-01/04-02/12-4. While she agreed with the majority's rejection of a hierarchy of responsibilities within Article 25(3)(a) of the Statute in the Katanga Trial Judgment, she found that its approach lacked consistency as '[t]he notion of hierarchy [was] inherent in the control theory.' She reiterated her agreement with Judge Fulford's Concurrence to the Lubanga Trial Judgment, which advocated for an interpretation of the provision based on its 'ordinary meaning'. For a detailed description of her Concurring Opinion, see 'Modes of Liability: a review of the International Criminal Court's current jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 71-72, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>. See also Women's Initiatives for Gender Justice, 'Second Special Issue of the Legal Eye on the ICC', *Legal Eye eLetter*, April 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye4-13-FULL/LegalEye4-13.html>>.

1395 ICC-01/04-01/07-3436-Anxl, para 283.

1396 ICC-01/04-01/07-3436-Anxl, para 285.

1397 ICC-01/04-01/07-3436-Anxl, para 286 (emphasis in original).

1398 ICC-01/04-01/07-3436-Anxl, para 286 (emphasis in original).

had knowledge of 'the specific crimes the group intend[ed] to commit'.¹³⁹⁹ Given that she did not find evidence establishing that there was a group acting with a common criminal purpose, Judge Van den Wyngaert did not find that Katanga's knowledge of the common criminal purpose had been established.

Judge Van den Wyngaert further disagreed with the majority's conclusion that Katanga made a significant contribution to the crimes as required by Article 25(3)(d) of the Statute.¹⁴⁰⁰ She did not accept that Katanga's involvement in communications and weapons distribution related to the commission of the crimes in Bogoro.¹⁴⁰¹ Rather, she found that his contributions 'were too far removed from the actual commission of crimes'.¹⁴⁰²

Judge Van den Wyngaert concluded by noting that the divergence between her opinion and that of the majority was 'wide-ranging and profound'.¹⁴⁰³ She reflected: '[s]ympathy for the victims' plight and an urgent awareness that this Court is called upon to "end impunity" are powerful stimuli'.¹⁴⁰⁴ She suggested, however, that the 'trial must be first and foremost fair to the accused'.¹⁴⁰⁵

1399 ICC-01/04-01/07-3436-Anxl, para 288.

1400 ICC-01/04-01/07-3436-Anxl, para 305.

1401 ICC-01/04-01/07-3436-Anxl, paras 294, 304.

1402 ICC-01/04-01/07-3436-Anxl, para 305. Judge Van den Wyngaert found that the only way in which contributions to the EMOI plan could be construed as furthering the Ngiti criminal purpose would be to find that it was a precondition for the success of the alleged criminal plan of the Ngiti combatants.

1403 ICC-01/04-01/07-3436-Anxl, para 309.

1404 ICC-01/04-01/07-3436-Anxl, para 310.

1405 ICC-01/04-01/07-3436-Anxl, para 311.

Concurring Opinion of Judges Fatoumata Diarra and Bruno Cotte

Judges Diarra and Cotte issued a Concurring Opinion, containing ‘a number of brief but necessary observations’ in response to Judge Van den Wyngaert’s Dissent, while leaving her ‘with full responsibility for what she has written’.¹⁴⁰⁶ They first addressed Judge Van den Wyngaert’s use of the term ‘Majority case’, and her ‘suggestion’ that the majority assumed prosecutorial functions by recharacterising the mode of liability. They stated: ‘[w]e should not find ourselves compelled to make clear that we in no wise [sic] sought to appropriate a “case”, and even less, to take the place of the Prosecution’.¹⁴⁰⁷ They indicated rather that they ‘merely conducted, with objectivity and without preconceived ideas, as careful and thorough an examination of the evidence in the record as possible’.¹⁴⁰⁸ Judges Diarra and Cotte continued:

We wish to express our astonishment at reading in the conclusion of the dissenting opinion that the charges against Germain Katanga under article 25(3)(d) of the Statute are a creation of the Majority alone for the probable purpose of arriving at a conviction not possible under article 25(3)(a).¹⁴⁰⁹

They explained that their approach was informed by the principles of legality and fair and impartial proceedings.¹⁴¹⁰ They further noted the implication in Judge Van den Wyngaert’s Dissent that they had not complied with the required standard of proof, and had ‘ruled on the basis of our own intimate conviction’.¹⁴¹¹ They stated that assessing the probative value of evidence in a fragmentary manner, or applying the beyond reasonable doubt standard to all the facts in

1406 ICC-01/04-01/07-3436-AnxII-tENG, para 1.
 1407 ICC-01/04-01/07-3436-AnxII-tENG, para 2.
 1408 ICC-01/04-01/07-3436-AnxII-tENG, para 2.
 1409 ICC-01/04-01/07-3436-AnxII-tENG, para 3.
 1410 ICC-01/04-01/07-3436-AnxII-tENG, para 3.
 1411 ICC-01/04-01/07-3436-AnxII-tENG, para 4.

the case, including those not indispensable for a conviction, was inconsistent with the requirements of the Statute.¹⁴¹²

Concerning the Dissent’s critique of the quality of the Prosecution’s evidence, Judges Diarra and Cotte emphasised ‘the need for a distinction between the necessary rigour’ required and an ‘excessive rigidity which we find incompatible with the functions of the judge in general and cases of the kind brought before the Court in particular’.¹⁴¹³ They recalled in this regard that Ituri had undergone years of war and ‘a climate of permanent insecurity’, and that the witnesses had all directly or indirectly experienced war, causing ‘genuine difficulties’ in remembering places and dates.¹⁴¹⁴ They recalled their conclusion that several such witnesses were able to ‘speak credibly’ about the events, and clarified that it was on the basis of their testimony that they had found Katanga criminally responsible.¹⁴¹⁵

Sentencing decision in the Katanga case

On 23 May 2014, Trial Chamber II¹⁴¹⁶ issued the Sentencing decision in the Katanga case. This was the ICC’s second Sentencing decision, following Trial Chamber I’s July 2012 decision sentencing Thomas Lubanga Dyilo to 14 years of imprisonment for co-perpetrating the war crimes of conscripting, enlisting and using child soldiers.¹⁴¹⁷ The Chamber, by majority, Judge Christine Van den Wyngaert dissenting,¹⁴¹⁸ sentenced Katanga to 12 years of imprisonment

1412 ICC-01/04-01/07-3436-AnxII-tENG, para 4.
 1413 ICC-01/04-01/07-3436-AnxII-tENG, para 5.
 1414 ICC-01/04-01/07-3436-AnxII-tENG, para 5.
 1415 ICC-01/04-01/07-3436-AnxII-tENG, para 5.
 1416 Trial Chamber II was composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Christine Van den Wyngaert (Belgium).
 1417 ICC-01/04-01/06-2901, para 107. For further information on the Lubanga Sentencing decision, see *Gender Report Card 2012*, p 198-205. Developments in these appeals are discussed in detail in the *Appeals Proceedings* section of this Report.
 1418 ICC-01/04-01/07-3484-Anx1.

for contributing to the commission of four war crimes (murder, attacking a civilian population, destruction of property and pillaging) and one crime against humanity (murder) during the attack on the village of Bogoro by Lendu and Ngiti militias in February 2003. The time that Katanga had spent in the ICC's custody since 18 September 2007 was deducted from his sentence.¹⁴¹⁹

In a statement issued the day the sentence was handed down, the Women's Initiatives for Gender Justice asserted that:

It is difficult to reconcile a 12-year sentence as reflecting the gravity and scale of these crimes, their ongoing impact on the Bogoro victims or Katanga's level of responsibility. [...] Overall, the sentencing decision seems to demonstrate an imbalance in the level of empathy extended to Katanga as compared to the victims of his crimes.¹⁴²⁰

This section will analyse the sentencing proceedings and decision, taking note of the key factors considered by the Chamber.

Sentencing hearing

The Sentencing decision was rendered after a hearing on 5 and 6 May 2014, at which the Prosecution requested that Katanga receive a sentence of between 22 to 25 years.¹⁴²¹ The Prosecution maintained that the crimes committed during the Bogoro attack were 'amongst the most serious that this Court was established to address and are deserving of an equally serious sentence'. In this regard, the Prosecution noted the crimes for which Katanga was convicted and observed that the Chamber

'also recognised that women were raped and sexually enslaved during and in the aftermath of' the Bogoro attack.¹⁴²²

The Chamber also heard from two Defence witnesses and one Prosecution witness, namely the Bogoro village chief, who spoke about the consequences of the Bogoro attack.¹⁴²³ The village chief told the Prosecution that the main consequence of the attack was poverty, particularly for those left widowed and orphaned by the attack. He also spoke about the ongoing physical and psychological suffering of the survivors, the destruction of buildings and the economic toll of the attack. He noted that many survivors had not returned to Bogoro since the attack, due to their painful memories and fear of further violence.¹⁴²⁴ Notably, the Prosecution witness, the chief of Bogoro village, did not refer to the acts of sexual violence committed during the attack nor the specific physical, psychological and economic impact of these crimes on victims/survivors.

The Legal Representative of Victims asked the village chief a number of questions about the impact of the attack, including a question about the psychological state of the village in light of the sexual violence crimes committed during the attack. However, Presiding Judge Bruno Cotte advised the Legal Representative to abandon that line of enquiry, as Katanga had been acquitted in relation to the sexual violence charges.¹⁴²⁵

The Defence then presented the factors it wished the Chamber to consider when determining the sentence. It submitted that Katanga was 'aged 24 at the time [of the Bogoro attack and] caught up in events which were extreme

1419 ICC-01/04-01/07-T-3484, paras 170, 170 [sic].

1420 Women's Initiatives for Gender Justice, 'Katanga Sentenced to 12 Years by ICC', 23 May 2014, available at <<http://www.iccwomen.org/documents/Statement-Katanga-Sentencing.pdf>>.

1421 ICC-01/04-01/07-T-344-Red-ENG, p 56 lines 20-22.

1422 ICC-01/04-01/07-T-344-Red-ENG, p 53 lines 11-13, 23-25.

1423 ICC-01/04-01/07-T-344-Red-ENG, p 2 lines 3-4, 10, p 4 line 9 to p 27 line 7; ICC-01/04-01/07-T-345-Red-ENG.

1424 ICC-01/04-01/07-T-344-Red-ENG, p 7 line 13 to p 14 line 24.

1425 ICC-01/04-01/07-T-344-Red-ENG, p 20 line 19 to p 21 line 12.

and exceptional', referring to the Congo wars and their impact on the Ngiti and Lendu communities.¹⁴²⁶ It reminded the Chamber of Katanga's age at the time of the attack 11 times during the hearing¹⁴²⁷ and stated 'Germain Katanga [...] does not merit being used as a whipping boy by the ICC. There were bigger and better targets which a failure of adequate investigation has not placed before you or this Court'.¹⁴²⁸ The Defence also displayed photographs of Katanga's children, stating that while this 'might be seen as a plucking of heart strings', the intention was simply to 'put a face to his family'.¹⁴²⁹ The hearing concluded with a statement by Katanga, who vowed that he would 'never forget the victims of this war' and offered them 'compassion from the bottom of [his] heart'.¹⁴³⁰

Sentencing decision

At the outset of the decision, the Chamber recalled that the Rome Statute provides for a maximum sentence of 30 years of imprisonment, unless the 'extreme gravity' of the crimes and the personal circumstances of the convicted person warrant a term of life imprisonment.¹⁴³¹ The Chamber also noted that the Statute and RPE highlight certain factors that must be considered in the determination of a sentence, including the gravity of the crimes, the individual circumstances of the offender, and aggravating and mitigating circumstances.¹⁴³²

It then considered the underlying objectives of sentencing, focusing particularly on the principles of deterrence and punishment, in

1426 ICC-01/04-01/07-T-345-Red-ENG, p 19 lines 24-25. See also p 20 line 3 to p 21 line 25.

1427 ICC-01/04-01/07-T-345-Red-ENG, p 19 line 24, p 22 line 24, p 23 lines 7, 16, 18, 19, p 24 line 1, p 28 line 24, p 32 lines 12, 14, p 38 line 13.

1428 ICC-01/04-01/07-T-345-Red-ENG, p 38 lines 13-15.

1429 ICC-01/04-01/07-T-345-Red-ENG, p 36, lines 9-10.

1430 ICC-01/04-01/07-T-345-Red-ENG, p 48 lines 1-3.

1431 Article 77(1), Rome Statute.

1432 ICC-01/04-01/07-3484, paras 25-26. See also Article 78(1), Rome Statute; Rule 145, RPE.

order to express society's condemnation of the crimes and recognise the suffering of the victims. It also stated that the sentence must contribute to peace and reconciliation, and support the reintegration of the offender into society.¹⁴³³ Finally, it observed that the sentence must conform to the principles of legality and proportionality and reflect the individual circumstances of the convicted person.¹⁴³⁴

The Chamber then applied these sentencing rules and principles to the Katanga case, focusing on three key themes: the gravity of the crimes; aggravating circumstances; and mitigating circumstances.

The gravity of the crimes

The Chamber based its assessment of the gravity of the crimes on four key factors: the violence and scale of the crimes;¹⁴³⁵ the discriminatory nature of the attack;¹⁴³⁶ the harm to the victims and their families;¹⁴³⁷ and Katanga's participation and intent.¹⁴³⁸ Regarding the gravity of the crimes, the Chamber recalled that the attack began while the villagers were asleep, and that the village was 'littered with dead bodies' after the attack.¹⁴³⁹ It noted that the attackers used guns and machetes to kill at least 30 civilians not taking part in hostilities, and took the 'particularly cruel' step of dismembering the victims' bodies with machetes.¹⁴⁴⁰ It recalled that the attackers did not stop at attacking the UPC-FPLC soldiers based at Bogoro, but also tracked down and killed civilians taking refuge at the Bogoro Institute. In addition, the attackers searched for civilians hiding in the bush surrounding Bogoro, in order to kill them or subject them to sexual violence. The Chamber noted that 'victims of

1433 ICC-01/04-01/07-3484, para 38.

1434 ICC-01/04-01/07-3484, para 39.

1435 ICC-01/04-01/07-3484, paras 46-52.

1436 ICC-01/04-01/07-3484, paras 53-54.

1437 ICC-01/04-01/07-3484, paras 55-60.

1438 ICC-01/04-01/07-3484, paras 61-69.

1439 ICC-01/04-01/07-3484, para 46.

1440 ICC-01/04-01/07-3484, paras 47, 49.

sexual violence are often later rejected by their community, which adds to the prejudice they have experienced'.¹⁴⁴¹

The Chamber explained that many survivors did not know the fate of their family members, or had been unable to conduct proper burial ceremonies for them after the attack. The Chamber also observed that women who were raped and abducted had disappeared, and some were considered dead before they managed to escape.¹⁴⁴² It recalled that the attackers had destroyed buildings and houses during the attack.¹⁴⁴³ Finally, it referred to the testimony of the village chief, who had spoken about the ongoing poverty in Bogoro due to the pillaging of essential goods such as food and livestock during the attack.¹⁴⁴⁴

Regarding the discriminatory nature of the attack, the Chamber recalled its findings that the attack was motivated by an 'anti-Hema ideology', and that the attackers interrogated the victims about their ethnic origin before deciding whether to kill them. It concluded that this attack was 'obviously' discriminatory in nature.¹⁴⁴⁵

Concerning the harm to the victims and their families, the Chamber again referred to the village chief's testimony about the ongoing poverty in Bogoro since the attack, as well as the lasting physical and psychological impacts on the victims. It noted that many of the buildings destroyed in the attack had not been rebuilt, and that due to the absence of schools, parents faced great difficulty in ensuring their children received an education. The Chamber also recalled the village chief's statement, in response to a question from the Defence, that Ngiti and Hema people live side-by-side in Bogoro today.¹⁴⁴⁶

1441 ICC-01/04-01/07-3484, para 48 and fn 92.

1442 ICC-01/04-01/07-3484, para 50 and fn 97.

1443 ICC-01/04-01/07-3484, para 51.

1444 ICC-01/04-01/07-3484, para 52.

1445 ICC-01/04-01/07-3484, paras 53-54.

1446 ICC-01/04-01/07-3484, paras 56-60.

Regarding Katanga's participation and intent, the Chamber recalled that Katanga was convicted under Article 25(3)(d)(ii) of the Statute for contributing 'in any other way' to the commission of the crimes.¹⁴⁴⁷ However, the Chamber emphasised that Article 25 of the Statute does not impose a hierarchy of guilt or imply a sentencing scale. As such, it held that the degree of the convicted person's participation and intent must be assessed in concrete terms, by reference to the factual and legal conclusions in the judgement.¹⁴⁴⁸

Turning to the case at hand, the Chamber recalled that the Prosecution had not established that Katanga was present at the attack or the post-battle celebrations, nor that Katanga had control over the Ngiti militia, such that he could exercise control over the crimes, at the time of the Bogoro attack.¹⁴⁴⁹ However, the Chamber recalled that Katanga made a 'significant contribution' to the commission of the crimes by providing logistical support, concluding military alliances and supplying weapons used in the attack.¹⁴⁵⁰ It also recalled that Katanga was the highest-ranking member of the Walendu-Bindi Ngiti militia, also known as the FRPI, at the time of the attack, that he was known as the President of the FRPI, and was recognised as a military authority.¹⁴⁵¹ Finally, the Chamber recalled that Katanga had contributed to the crimes with 'full knowledge' of the Ngiti militia's 'anti-Hema ideology,' and full knowledge that they would commit the crimes of murder, attacking the civilian population, destroying property and pillaging during the attack.¹⁴⁵² For these reasons, the Chamber concluded that the degree of Katanga's participation and intent 'should not be underestimated'.¹⁴⁵³

1447 ICC-01/04-01/07-3484, para 45.

1448 ICC-01/04-01/07-3484, para 61.

1449 ICC-01/04-01/07-3484, paras 62-63.

1450 ICC-01/04-01/07-3484, paras 64-65.

1451 ICC-01/04-01/07-3484, para 66.

1452 ICC-01/04-01/07-3484, para 68.

1453 ICC-01/04-01/07-3484, para 69.

Aggravating circumstances

In line with the Lubanga Sentencing decision, the Chamber held that aggravating circumstances must be proven beyond reasonable doubt,¹⁴⁵⁴ and must exclude any factors taken into account in determining the gravity of the crime.¹⁴⁵⁵ For that reason, the Chamber indicated that it would not consider certain aggravating circumstances alleged by the Prosecution, namely the cruel way that the crimes were committed, the vulnerability of the victims or the discriminatory nature of the attack.¹⁴⁵⁶ Instead, it would only consider the Prosecution's submission that the crimes involved the abuse of power or official capacity.¹⁴⁵⁷

In this respect, the Chamber recalled that Katanga was known as the President of the Walendu-Bindi Ngiti militia since at least 9 February 2003, and that prior to the attack, he had some authority over the militia and played a central role in the supply of weapons to the commanders.¹⁴⁵⁸ These considerations indicated that Katanga was in a position of authority at the time of the attack. However, the Chamber found that the Prosecution had not shown that Katanga abused his position or used his authority to influence the commission of the crimes. As such, the Chamber found no aggravating circumstances in the case.¹⁴⁵⁹

Mitigating circumstances

In accordance with the Lubanga Sentencing decision, the Chamber held that mitigating circumstances must be established on the balance of the probabilities, and could take into account facts not directly related to the crimes such as the convicted person's cooperation with the Prosecution, sincere expressions of remorse

1454 ICC-01/04-01/07-3484, para 34.

1455 ICC-01/04-01/07-3484, para 35.

1456 Notably, the Prosecution did not include acts of rape and sexual slavery within its arguments regarding aggravating circumstances.

1457 ICC-01/04-01/07-3484, para 71.

1458 ICC-01/04-01/07-3484, para 74.

1459 ICC-01/04-01/07-3484, para 75.

or guilty plea.¹⁴⁶⁰ The Chamber also emphasised that a finding of mitigating circumstances did not detract from the gravity of the crimes, but pertained only to the length of the sentence.¹⁴⁶¹

Turning to the case at hand, the Chamber first considered the Defence's argument that Katanga's age, his family life, the length of separation from his family and his reputation as a courageous community leader should be regarded as mitigating circumstances in the case. It noted that while Katanga was only 24 at the time of the attack, the Legal Representative of Victims had argued that it was not uncommon to find commanders of that age in the DRC.¹⁴⁶² The Chamber acknowledged that Katanga had matured since the time of the attack, but found that his testimony indicated that even in 2002 and 2003, he acted with full knowledge of the significance of his actions.¹⁴⁶³

Regarding Katanga's family life, the Chamber observed that Katanga was married and had six children under his care,¹⁴⁶⁴ whose wellbeing would be assisted by Katanga's eventual reintegration.¹⁴⁶⁵ The Chamber found that Katanga's good reputation among the militia did not constitute a mitigating factor, but his good relations with civilians in his community was relevant in this respect.¹⁴⁶⁶ The Chamber concluded that Katanga's young age, the fact that he was father to six children and his good standing in the eyes of his community did constitute mitigating circumstances. However, it indicated that these factors would not be given much weight in the determination of the sentence, given the nature of the crimes for which Katanga had been convicted.¹⁴⁶⁷

1460 ICC-01/04-01/07-3484, paras 32, 34.

1461 ICC-01/04-01/07-3484, para 77.

1462 ICC-01/04-01/07-3484, para 81.

1463 ICC-01/04-01/07-3484, paras 82-83.

1464 ICC-01/04-01/07-3484, para 84.

1465 ICC-01/04-01/07-3484, para 85.

1466 ICC-01/04-01/07-3484, paras 86-87.

1467 ICC-01/04-01/07-3484, para 88.

Next, the Chamber considered the Defence's argument that Katanga's contributions to the peace process in Ituri, and his support for the disarmament and demobilisation of militias and child soldiers, should constitute mitigating circumstances. The Chamber found that Katanga's attempts to promote the peace process, if sincere and real, could be considered as a mitigating circumstance.¹⁴⁶⁸ However, it concluded that although Katanga had played a role in the peace process in Ituri after the Bogoro attack, this role had been more limited than the Defence contended.¹⁴⁶⁹ As such, the Chamber determined that Katanga's role in the peace process did not warrant significant weight in the determination of the sentence. Regarding Katanga's support for disarmament and demobilisation, the Chamber recalled its findings that a demobilisation centre was located in Aveba for the FRPI and child soldiers, and that Katanga was present at its opening. It concluded that Katanga's support to demobilisation efforts could be considered as a mitigating circumstance in the case.¹⁴⁷⁰

In the Statement issued by the Women's Initiatives for Gender Justice, it observed that in determining whether any factors mitigated Katanga's sentence, the Chamber 'seemed particularly moved by the fact that Katanga is a father of six young children'. The Women's Initiatives for Gender Justice further stated that it seemed 'somewhat perverse that Katanga's contribution to the demobilisation of children illegally enlisted and conscripted into his militia group could contribute to a reduction in his sentence'. The Statement expressed that:

Having been acquitted of the crime of the use of children in hostilities, we did not expect that the issue of child soldiers would necessarily feature as an aggravating factor. However, we are

stunned that his role in demobilising children illegally in his militia and under his command was considered a mitigating factor and contributed to a lighter sentence.¹⁴⁷¹

Next, the Chamber considered whether Katanga had expressed remorse for the crimes.¹⁴⁷² The Chamber agreed with the Prosecution and the Legal Representatives of Victims that Katanga did not express any profound or sincere remorse during the trial. While noting that Katanga had offered some general words of compassion for the victims at the sentencing hearing, the Chamber found his remarks to be 'very conventional'. It concluded that Katanga actually had 'great difficulty' in recognising the crimes. As such, the Chamber did not regard Katanga's expression of remorse as a mitigating circumstance.¹⁴⁷³

Concerning Katanga's cooperation with the Court, the Chamber noted that cooperation need not be 'substantial' in order to count as a mitigating circumstance, but must exceed 'good behaviour'.¹⁴⁷⁴ It decided to take into account Katanga's testimony and his cooperative response to questioning. However, it declined to take into account his attendance at hearings and his respectful treatment of Court staff on the grounds that this good conduct was no more than what was expected.¹⁴⁷⁵ The Chamber also referred to a Registry report that indicated that Katanga's behaviour in detention had been 'globally positive', however it did not consider this as a mitigating circumstance, because the Defence did not request that it be treated as such.¹⁴⁷⁶

1471 Women's Initiatives for Gender Justice, 'Katanga Sentenced to 12 Years by ICC', 23 May 2014, available at <<http://www.iccwomen.org/documents/Statement-Katanga-Sentencing.pdf>>.

1472 ICC-01/04-01/07-3484, paras 116-121.

1473 ICC-01/04-01/07-3484, paras 118-121.

1474 ICC-01/04-01/07-3484, paras 126-127.

1475 ICC-01/04-01/07-3484, para 128.

1476 ICC-01/04-01/07-3484, para 129.

1468 ICC-01/04-01/07-3484, para 91.

1469 ICC-01/04-01/07-3484, paras 91-106.

1470 ICC-01/04-01/07-3484, paras 107-115.

Finally, the Chamber considered the Defence's argument that violations of Katanga's rights while in detention in the DRC, such as a lack of legal representation, should be considered mitigating circumstances in the case. The Chamber found that the Court's statutory framework did not foresee the assessment of Congolese detention procedures. It further found that the violations referenced by the Defence could be imputed to the Court only if Katanga was being held by Congolese authorities on behalf of the Court and the violation related to a procedure followed by the Court.¹⁴⁷⁷

Determining that Katanga was held in the DRC on behalf of the Court as of 18 September 2007, the Chamber analysed the Defence claims as of that date. It found that even though Katanga was not initially assisted by counsel on 17 October 2007 at an interrogation, he was assisted by counsel later that day, during the notification of charges against him and until he was sent to The Hague. The Chamber concluded that the Defence had not demonstrated any violation of Katanga's rights during the period that he was held on behalf of the Court.¹⁴⁷⁸

Calculation of the sentence

The Chamber recalled that the Prosecution had requested that Katanga be sentenced to 22 to 25 years of imprisonment, and that Katanga had been convicted as an accomplice to the crimes, committed in a discriminatory and cruel manner, over several months. It also noted that the Bogoro attack was 'one of the most important' attacks in Ituri in 2003.¹⁴⁷⁹ The Chamber indicated that it would give little weight to the mitigating circumstance of Katanga's age and family status, while giving greater weight to his contribution to the demobilisation process.¹⁴⁸⁰ It held that the crimes of murder and attacking a civilian population warranted a more severe sentence

than the crimes of pillaging and destroying property, as the former affected life and physical integrity.¹⁴⁸¹ Taking these factors into account, the Chamber sentenced Katanga to 12 years of imprisonment for murder as a crime against humanity; 12 years for murder as a war crime; 12 years for attacking a civilian population as a war crime; and ten years each for destruction and pillage as war crimes.¹⁴⁸² It ordered a joint sentence of 12 years of imprisonment.¹⁴⁸³

The Chamber then considered whether to deduct time already spent in detention from the 12 year sentence. It noted that the Arrest Warrant was issued under seal on 2 July 2007, and the Congolese authorities were notified of the Arrest Warrant on 18 September 2007. Katanga, who had been in custody in the DRC since February 2005, was then transferred to the Court's Detention Centre on 18 October 2007. The Chamber decided not to deduct from the sentence Katanga's entire period in detention since the Arrest Warrant was issued, as the Defence had proposed. Instead, it deducted Katanga's period in detention since the DRC authorities were notified of the Arrest Warrant on 18 September 2007.¹⁴⁸⁴

The Chamber also considered whether to deduct Katanga's period in detention in the DRC from February 2005 to September 2007 from the sentence, given that Article 78(2) of the Statute allows the Court to deduct any time spent in detention in connection with conduct underlying the crime.¹⁴⁸⁵ However, taking into account the Pre-Trial Chamber's findings in the Katanga admissibility challenge and other evidence pertaining to the domestic proceedings against Katanga, the Chamber found that Katanga was held in the DRC for conduct unrelated to the crimes for which he was

1477 ICC-01/04-01/07-3484, paras 136-137.

1478 ICC-01/04-01/07-3484, paras 138-140.

1479 ICC-01/04-01/07-3484, paras 141, 143.

1480 ICC-01/04-01/07-3484, para 144.

1481 ICC-01/04-01/07-3484, para 145.

1482 ICC-01/04-01/07-3484, para 146.

1483 ICC-01/04-01/07-3484, para 147.

1484 ICC-01/04-01/07-3484, paras 156, 158.

1485 ICC-01/04-01/07-3484, para 159.

convicted. As such, it did not deduct his time in detention in the DRC from February 2005 from the sentence.¹⁴⁸⁶

Finally, the Chamber recalled that the Registry had made a provisional finding that Katanga was indigent on 23 November 2007, and had since found no identifiable assets. In the absence of any information to the contrary, the Chamber indicated that it would not sentence him with a fine.¹⁴⁸⁷

Judge Van den Wyngaert's Dissenting Opinion

Having found that Katanga should be acquitted on all charges, Judge Van den Wyngaert took no position on the appropriateness of the sentence.¹⁴⁸⁸ However, she argued that it was possible to further deduct from the sentence the time between Katanga's arrest in the DRC in February 2005 and the communication of the Arrest Warrant to the DRC authorities in September 2007.¹⁴⁸⁹ Judge Van den Wyngaert found that the documents pertaining to Katanga's arrest in the DRC were 'far from clear with regard to the reason(s) for detention and it would be unfair to hold this ambiguity against Germain Katanga'.¹⁴⁹⁰ She concluded that because it was possible that Katanga's detention in the DRC concerned the conduct underlying the crimes for which he was convicted, the Chamber could exercise its discretion under Article 78(2) of the Statute to deduct that period in detention from the sentence.¹⁴⁹¹

1486 ICC-01/04-01/07-3484, paras 160-167.

1487 ICC-01/04-01/07-3484, para 169.

1488 ICC-01/04-01/07-3484-Anx1, para 1.

1489 ICC-01/04-01/07-3484-Anx1, para 2.

1490 ICC-01/04-01/07-3484-Anx1, para 3.

1491 ICC-01/04-01/07-3484-Anx1, para 5.

Central African Republic

On 7 April 2014, the submission of evidence in the case *The Prosecutor v. Jean-Pierre Bemba Gombo* ('Bemba case' or 'main case') in the Situation of the CAR concluded and Trial Chamber III¹⁴⁹² directed the Prosecution and Legal Representative of Victims to file their closing briefs by 2 June 2014.¹⁴⁹³ Shortly thereafter, on 30 June, the Prosecution filed its DCC in an ancillary case against Bemba and four individuals associated with his defence, alleging offences against the administration of justice under Article 70¹⁴⁹⁴ of the Statute, including witness tampering and evidence forgery (Article 70 case).¹⁴⁹⁵ Significantly, the allegations in the Article 70 case directly implicate seven of the nine Defence witnesses in the Bemba case, whose testimony supported the Defence theory that Bemba is not criminally responsible for the charges of rape. This section of the Report contains an update on the trial proceedings in the Bemba case, followed by a summary of the allegations in the Article 70 DCC, highlighting the potential impact of those allegations on the rape charges in the main case.

1492 Trial Chamber III was composed of Presiding Judge Sylvia Steiner (Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan).

1493 ICC-01/05-01/08-3035, para 7. For a detailed description of the Prosecution presentation of its case against Bemba, including witness testimony, see *Gender Report Card 2012*, p 252-256. For detailed information regarding the Defence presentation of its evidence in the case against Bemba, including witness testimony, see *Gender Report Card 2013*, p 106-115.

1494 Article 70(1) of the Statute provides: 'The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally: (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth; (b) Presenting evidence that the party knows is false or forged; (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence; [...]'

1495 ICC-01/05-01/13-526, para 1; ICC-01/05-01/13-526-AnxB1-Red, para 147.

CAR: *The Prosecutor v. Jean-Pierre Bemba Gombo*

Bemba, a Congolese national, is the first ICC accused to be charged under the doctrine of command responsibility, for his alleged responsibility as a military commander of the MLC. He is charged with two counts of crimes against humanity (rape¹⁴⁹⁶ and murder¹⁴⁹⁷) and three counts of war crimes (rape,¹⁴⁹⁸ murder¹⁴⁹⁹ and pillaging¹⁵⁰⁰) for alleged atrocities committed in the CAR during a non-international armed conflict from October 2002 through March 2003.¹⁵⁰¹

The Prosecution had originally sought a broader range of gender-based crime charges, which in addition to rape as a war crime and a crime against humanity,¹⁵⁰² also included torture by means of rape as a crime against humanity and war crime,¹⁵⁰³ outrages upon personal dignity as a war crime,¹⁵⁰⁴ as well as other forms of sexual violence as a war crime and crime against humanity.¹⁵⁰⁵ However, in both the arrest warrant and confirmation of charges stages of the proceedings, the Pre-Trial Chamber narrowed the charges.¹⁵⁰⁶ Specifically, in issuing the Arrest Warrant for Bemba in May 2008, Pre-Trial Chamber III declined to include the charge of other forms of sexual violence as a crime against humanity, holding that the

1496 Article 7(1)(g), Rome Statute.
 1497 Article 7(1)(a), Rome Statute.
 1498 Article 8(2)(e)(vi), Rome Statute.
 1499 Article 8(2)(c)(i), Rome Statute.
 1500 Article 8(2)(e)(v), Rome Statute.
 1501 ICC-01/05-01/08-424, p 184-185.
 1502 Articles 7(1)(g), 8(2)(e)(vi), Rome Statute.
 1503 Articles 7(1)(f), 8(2)(c)(i), Rome Statute.
 1504 Article 8(2)(c)(ii), Rome Statute.
 1505 Articles 7(1)(g), 8(2)(e)(vi), Rome Statute. ICC-01/05-01/08-26-Red, p 8-10.
 1506 ICC-01/05-01/08-14-tENG, p 37; ICC-01/05-01/08-1-tENG, para 21; ICC-01/05-01/08-424, p 184-185. See also Women's Initiatives for Gender Justice, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo', 22 November 2010, available at <http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf>.

facts submitted by the Prosecutor were not of comparable gravity to those listed in Article 7(1)(g) of the Statute.¹⁵⁰⁷ The Pre-Trial Chamber also declined to include the charge of other forms of sexual violence as a war crime, finding that the act of 'order[ing] people to remove their clothes in public to humiliate them' could be characterised as outrages upon personal dignity as a war crime.¹⁵⁰⁸ Furthermore, in June 2009, in the Confirmation of Charges decision, Pre-Trial Chamber II reasoned that charges of rape as torture and outrages upon personal dignity were cumulative to charges of rape and therefore impermissible,¹⁵⁰⁹ and that in addition there was insufficient evidence or imprecise pleading to substantiate some charges, including rape as torture and outrages upon personal dignity.

The Women's Initiatives requested¹⁵¹⁰ and was granted leave to file an *amicus curiae* brief challenging the Pre-Trial Chamber's reasoning in the Confirmation of Charges decision and arguing that all charges of gender-based crimes requested by the Prosecution should be included.¹⁵¹¹ However, on 18 September 2009, Pre-Trial Chamber II declined to grant the Prosecution request for leave to appeal, and the case proceeded to trial on the more limited charges of rape.¹⁵¹² Following this decision, the Women's Initiatives issued a statement, arguing that:

1507 ICC-01/05-01/08-14-tENG, para 40. Article 7(1)(g) of the Statute includes the crimes against humanity of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity.
 1508 ICC-01/05-01/08-14-tENG, paras 62-63.
 1509 ICC-01/05-01/08-424, paras 72, 190, 302, 312.
 1510 ICC-01/05-01/08-447, para 29.
 1511 ICC-01/05-01/08-451, p 6. See also 'Legal Filings: *The Prosecutor v. Jean-Pierre Bemba Gombo, The Prosecutor v. Thomas Lubanga Dyilo, Women's Initiatives for Gender Justice*, February 2010, available at <<http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf>>.
 1512 ICC-01/05-01/08-532, p 31.

The Pre-Trial Chamber's interpretation of the Rome Statute appears to ignore the distinct crimes articulated in the Statute under which an accused can be charged for sexual violence, and also appears to contradict the Elements of Crimes, which states in its general introduction that 'a particular conduct may constitute one or more crimes'.

The Women's Initiatives argued that 'by excluding the full range of charges for sexual violence in the Bemba case, the Chamber has failed to address the extent of the harm suffered by those raped and those forced to watch family members being raped'. It further noted that:

Other international tribunals such as the International Criminal Tribunal for Rwanda, as well as many national jurisdictions, accept that cumulative charging is appropriate – and necessary – to capture the different and multiple harms experienced by victims/survivors, in particular those who have suffered from sexual violence.¹⁵¹³

Trial proceedings in the Bemba case commenced on 22 November 2010 before Trial Chamber III. The Prosecution presented its case from November 2010 to March 2012, during which time it called a total of 40 witnesses.¹⁵¹⁴ Of these, 14 witnesses, including two expert witnesses, testified to the charges of rape, including ten female witnesses, nine of whom were direct victims of rape.¹⁵¹⁵ The Defence presented its case from August 2012 through November 2013, ultimately calling 34 witnesses during

its presentation of evidence. The Defence did not seek to introduce testimony to disprove the allegations that rape occurred, but instead introduced testimony indicating that rape was committed not by the MLC soldiers, but by other actors, primarily the rebel factions within the CAR. A total of nine Defence witnesses testified either to their knowledge of rapes occurring, or that they witnessed rape, while one woman, Witness 30, testified to having been raped by rebel forces.¹⁵¹⁶

On 2 June and 25 August 2014, respectively, the Prosecution and Defence filed their closing briefs, which remained confidential.¹⁵¹⁷ At the time of writing this Report, closing oral submissions were scheduled to be heard during the week of 10 November 2014.¹⁵¹⁸ The Defence has indicated that Bemba will make an unsworn statement at the beginning of its closing arguments.¹⁵¹⁹

1513 Women's Initiatives for Gender Justice, 'Statement on the ICC decision to omit charges for gender-based crimes against Jean-Pierre Bemba Gombo', available at <<http://www.iccwomen.org/news/docs/Statement--PTC-Decision-on-Bemba.pdf>>.

1514 For a detailed description of the Prosecution presentation of its case against Bemba, including witness testimony, see *Gender Report Card 2012*, p 252-256.

1515 See *Gender Report Card 2012*, p 252.

1516 For more information on the Defence testimony regarding rape, see *Gender Report Card 2013*, p 114-115.

1517 ICC-01/05-01/08-3079-Conf; ICC-01/05-01/08-3121-Conf. At the time of writing this Report, there is no publicly available information regarding whether the Legal Representative of Victims filed her closing brief.

1518 ICC-01/05-01/08-3155, para 9 (iv).

1519 ICC-01/05-01/08-2860, para 7.

CAR: The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido

On 20 November 2013, shortly after the conclusion of Defence testimony in the Bemba case, the Single Judge of Pre-Trial Chamber II,¹⁵²⁰ issued an arrest warrant against Bemba and four individuals associated with his defence, including: Aimé Kilolo-Musamba (Kilolo), the lead attorney of the Bemba Defence team; Jean-Jacques Mangenda Kabongo (Mangenda), the Defence team's case manager; Fidèle Babala Wandu (Babala), described as Bemba's 'long-time confidant', member of the DRC Parliament and Deputy Secretary General of the MLC; and Narcisse Arido (Arido), a Defence team witness.¹⁵²¹ The Warrant followed a confidential application by the Prosecution for a warrant of arrest, filed on 19 November.¹⁵²² In issuing the Arrest Warrant, the Single Judge found reasonable grounds to believe that the suspects were criminally responsible for the commission of offences against the administration of justice as proscribed under Article 70 of the Statute.

Bemba was served the Arrest Warrant at the ICC Detention Centre, where he had been in custody since 2008, while domestic authorities of the Netherlands, France, Belgium and the DRC arrested the remaining four suspects on 23 and 24 November 2013. Each of the suspects was transferred into ICC custody shortly thereafter,

1520 Trial Chamber II was composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Cuno Tarfusser (Italy), and Judge Christine Van den Wyngaert (Belgium).

1521 ICC-01/05-01/13-1-Red2-tENG, p 3-5; ICC-01/05-01/13-526-AnxB1-Red, para 3 and p 6-8.

1522 The Prosecution Application for a warrant of arrest was filed under seal. ICC-01/05-67-US-Exp, cited in ICC-01/05-01/13-179, fn 2. The Application for Warrant of Arrest and its supporting materials were reclassified as confidential on 27 November 2013. ICC-01/05-67-Conf.

apart from Arido, who was transferred in March 2014 following completion of domestic proceedings against him in France.

The Prosecution filed its DCC and LoE on 30 June 2014.¹⁵²³ According to the DCC, between January 2012 and November 2013, Bemba, Kilolo, Mangenda, Babala and Arido, as co-perpetrators, executed a common plan to defend Bemba against charges of crimes against humanity and war crimes before the ICC. The alleged plan involved bribing witnesses, inducing false testimony, coaching witnesses regarding upcoming testimony, knowingly presenting false testimony and presenting forged documents.¹⁵²⁴ The Prosecution claims that **Bemba** led the implementation of the common plan from the ICC Detention Centre, circumventing the ICC Registry's monitoring system, and orchestrating, instructing and/or authorising his co-accused's actions.¹⁵²⁵

1523 The DCC was filed confidentially, and a public version was issued on 3 July 2014. ICC-01/05-01/13-526-AnxB1-Red. On 15 July 2014, all five Defence teams filed confidential LoE. ICC-01/05-01/13-569; ICC-01/05-01/13-570; ICC-01/05-01/13-571-Corr; ICC-01/05-01/13-573; ICC-01/05-01/13-574. The Prosecution and all Defence teams filed their written submissions on 30 July 2014. ICC-01/05-01/13-597; ICC-01/05-01/13-600-Conf-Corr; ICC-01/05-01/13-594-Conf; ICC-01/05-01/13-598-Conf; ICC-01/05-01/13-599-Conf; ICC-01/05-01/13-596-Conf. On 21 August 2014, the Prosecution filed its reply to the Defence submissions. ICC-01/05-01/13-646-Conf. These submissions have been filed confidentially and at the time of writing this Report, public redacted versions had not been made available. Pursuant to the Single Judge's decision of 5 August 2014, the Defence teams were directed to file replies to the Prosecution's written submission by 11 September 2014. ICC-01/05-01/13-610. However, there is no public information available regarding the filing of replies by any Defence team.

1524 ICC-01/05-01/13-526-AnxB1-Red, para 22.

1525 ICC-01/05-01/13-526-AnxB1-Red, paras 3, 23.

Following Bemba's instructions, **Kilolo** and **Mangenda** are accused of engaging in witness bribery, scripting and eliciting their false evidence in court, and presenting forged documents in court,¹⁵²⁶ while Mangenda purportedly relayed information and instructions between Bemba and Kilolo. **Babala** allegedly bribed witnesses and provided funds to Kilolo and others to do so.¹⁵²⁷ **Arido** is alleged to have supplied Kilolo with forged documents for presentation in court, corruptly influenced witnesses and secured other 'false witnesses' to testify.¹⁵²⁸

According to the Prosecution, on 14 June 2012, an anonymous informant 'sent an unsolicited email to the OTP Information Desk alleging a bribery scheme involving Defence witnesses' in the main case.¹⁵²⁹ The Prosecution claims that the informant also shared details on the methods of transferring money via Western Union to witnesses, and told the Prosecution 'that the "Congolese" lawyer of the Accused was behind the payments'.¹⁵³⁰ As described in the Arrest Warrant, on 8 May 2013, the Pre-Trial Chamber, at the Prosecution's request, ordered the Registrar to disclose information on Bemba's telephone communications at the ICC Detention Centre.¹⁵³¹ On 29 July 2013, the Pre-Trial Chamber further authorised the Prosecutor to seize the assistance of the relevant authorities in the Netherlands and Belgium for the purpose of obtaining logs and recordings of telephone calls placed or received by Kilolo and Mangenda.¹⁵³² In granting these requests, the Chamber considered that this evidence 'might have been instrumental to the furthering of the scheme under investigation'.¹⁵³³

1526 ICC-01/05-01/13-526-AnxB1-Red, paras 3, 24-25.

1527 ICC-01/05-01/13-526-AnxB1-Red, paras 3, 26.

1528 ICC-01/05-01/13-526-AnxB1-Red, paras 3, 27.

1529 ICC-01/05-44-Red, para 9.

1530 ICC-01/05-44-Red, para 10.

1531 ICC-01/05-01/13-1-Red2-tENG, para 2.

1532 ICC-01/05-52-Red2, p 7. A redacted version of this decision was made public on 3 February 2014.

1533 ICC-01/05-52-Red2, p 3 and para 5.

Impact of the Article 70 case on Defence witness testimony denying rape charges against Bemba in the main case

Allegations in the Article 70 case that Bemba Defence witnesses provided false testimony in exchange for financial compensation have the potential to seriously undermine Bemba's defence against charges of rape. The Bemba Defence had called at least nine witnesses, who testified against the Prosecution's claim that MLC soldiers, led by Bemba, committed rape against the civilian population in the CAR.¹⁵³⁴ These witnesses introduced testimony indicating that although rape occurred, it was not committed by MLC soldiers but rather by other actors, primarily rebel factions within the CAR. Notably, seven of the nine witnesses are now implicated in the Article 70 case, including Witnesses 2, 3, 4, 6, 7, 23 and 29.

The DCC in the Article 70 case alleges that in or around January 2012, Arido contacted **Witness 3** to 'recruit him' to testify in the Bemba case, promising money and the possibility to live in another country in exchange for false testimony that he was a member of the CAR armed forces from 2002 to 2003. Arido allegedly told Witness 3 that '[w]e have an opportunity to eat' and that Arido was asked by an unidentified individual 'to look for soldiers who can testify for Bemba's Defence', to which Witness 3 replied that in reality 'he had never in his life been a soldier'.¹⁵³⁵ Notably, in June 2013, Witness 3 testified in the Bemba case that he was a former CAR Government soldier, who was present during incidents of rape by FACA soldiers. He testified that the rapes angered him, as the goal was to free Central Africans, not to rape. He also testified that his colleagues raped women whose husbands they suspected of being rebels. The Witness stated that once, when he expressed

1534 For more information, see *Gender Report Card 2013*, p 114-115.

1535 ICC-01/05-01/13-526-AnxB1-Red, para 66.

disapproval of his colleagues' behaviour, one of them pulled a gun on him. Witness 3 blamed the lack of discipline among the CAR soldiers on the short duration of the training they received.¹⁵³⁶

The DCC also alleges that in or around February 2012, Arido organised a meeting between Kilolo, Witness 3 and several other prospective witnesses, including Witness 2, Witness 4, Witness 6, and **Witness 7**. During the meeting, an unidentified person allegedly 'promised the witnesses an opportunity for a new life in Europe if they cooperated'.¹⁵³⁷ Arido is further accused of paying witnesses, including Witness 7, who were instructed to deny receiving the payments.¹⁵³⁸ In the Bemba case, Witness 7 had testified that he was a former Intelligence Officer with the CAR Government forces, and that atrocities were committed by the Bozizé rebels during their occupation of Bangui prior to the MLC's arrival. He said that among the rebel ranks were children, some of them as young as 10 years old. He testified that the rebels were uncontrollable and without means of replenishing their supplies, so they lived off the population. He noted that they were aggressive, threatened people, seized property and raped women, and that whoever tried to stop them would be shot.¹⁵³⁹

The DCC further alleges that Arido 'recruited' **Witness 2** to testify, promising him in return the possibility of seeking asylum in Europe and money, and that although Witness 2 confirmed that he was not in the military, Arido instructed him to claim that he was. The DCC also alleges that Kilolo coached and paid Witness 2 immediately before testifying, and that Witness 2 thereafter falsely testified about being in the CAR armed forces and the related events from

1536 For more information, see *Gender Report Card 2013*, p 114.

1537 ICC-01/05-01/13-526-AnxB1-Red, para 68.

1538 ICC-01/05-01/13-526-AnxB1-Red, para 34.

1539 For more information, see *Gender Report Card 2013*, p 114.

2002 to 2003.¹⁵⁴⁰ In the main case, Witness 2 had testified to being a former CAR soldier, and that it was the Bozizé rebels who committed murders, rapes and pillaging.¹⁵⁴¹

Allegedly, Arido and Kilolo also offered **Witness 4** money in exchange for falsely testifying, and Arido specifically directed him to lie about being in the CAR armed forces. The Prosecution claims that Witness 4 accordingly falsely testified that he did not know Arido and that he was a CAR Government soldier.¹⁵⁴² In the main case, the Legal Representative for Victims had presented Witness 4 with the testimony of a Prosecution witness from Sibut, CAR, who stated that Bemba's troops raped girls, some of them as young as ten years old, who were seen running around the town naked and crying. In response, Witness 4 stated that the residents of Sibut warmly welcomed the joint Congolese and CAR troops and that the CAR troops would never have allowed Congolese to come into their country and rape and murder their people.¹⁵⁴³

In relation to **Witness 29**, the DCC alleges that Kilolo coached the Witness on the content of his testimony. It is further alleged that on 28 August 2013, before beginning his testimony, Witness 29 collected a payment sent to him by an associate of Babala.¹⁵⁴⁴ In the Bemba case, Witness 29 had testified that the CAR rebels raped his wife when they arrived in his neighbourhood on 26 October 2002. He also testified that 'following a tip-off from a neighbour that rebels were holding his wife, he went to her rescue'.¹⁵⁴⁵

1540 ICC-01/05-01/13-526-AnxB1-Red, paras 74-77.

1541 For more information, see *Gender Report Card 2013*, p 114.

1542 ICC-01/05-01/13-526-AnxB1-Red, paras 80-81.

1543 For more information, see *Gender Report Card 2013*, p 114.

1544 ICC-01/05-01/13-526-AnxB1-Red, paras 83, 85.

1545 For more information, see *Gender Report Card 2013*, p 115.

According to the DCC, **Witness 23** was allegedly contacted by an individual in The Hague who promised the witness relocation to Europe if he testified for the Defence that he was a Bozizé fighter. According to the Prosecution, Witness 23 was not a Bozizé fighter, but falsely testified that he was, as well as regarding related matters. Kilolo is also accused of paying Witness 23 on 9 August 2013.¹⁵⁴⁶ In the main case, Witness 23 had testified that the rebels committed numerous crimes, including rape and pillaging, and that several rapes were committed after abusing drugs.¹⁵⁴⁷

Finally, the DCC alleges that on 20 June 2013, the day before **Witness 6** testified, Bemba's sister, Caroline Bemba, paid the Witness through a close associate, and that Kilolo also gave the Witness money before his testimony.¹⁵⁴⁸ Witness 6 then purportedly falsely testified that he did not receive any money from the Defence, other than for transport expenses.¹⁵⁴⁹ In the main case, Witness 6 had testified that General Mazzi, who was in charge of commanding operations for the CAR against the rebels, instructed the Congolese fighters not to loot or rape.¹⁵⁵⁰

At the time of writing this Report, the decision on the Confirmation of Charges was pending before Pre-Trial Chamber II. Uniquely, the decision will be made in writing, without a public hearing, due to the nature of the charges in the case.¹⁵⁵¹ It remains to be seen the impact, if any, the Article 70 allegations will have upon the allegations of rape against Bemba in the main case.

¹⁵⁴⁶ ICC-01/05-01/13-526-AnxB1-Red, paras 102-103.

¹⁵⁴⁷ For more information, see *Gender Report Card 2013*, p 115.

¹⁵⁴⁸ ICC-01/05-01/13-526-AnxB1-Red, para 106.

¹⁵⁴⁹ ICC-01/05-01/13-526-AnxB1-Red, para 106.

¹⁵⁵⁰ For more information, see *Gender Report Card 2013*, p 114.

¹⁵⁵¹ Jean-Jacques Mangenda Kabongo makes first appearance before ICC', *ICC Press Release*, ICC-CPI-20131205-PR969, 5 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr969.aspx>.

Decision ordering the release of Kilolo, Mangenda, Babala and Arido

On 21 October 2014, the Pre-Trial Chamber ordered the release of four suspects in the case: Kilolo, Mangenda, Babala and Arido.¹⁵⁵² Bemba, however, will remain in custody.¹⁵⁵³ This marks the first time that an ICC Chamber has ordered the interim release of a suspect before the Court. The Pre-Trial decision was made '*motu proprio*' by the Single Judge who considered the 'paramount need to ensure' that the duration of ICC pre-trial detention was not unreasonable, as required under Article 60(4) of the Statute.¹⁵⁵⁴ The Chamber also clarified that, even when the duration of detention is not prolonged due to the Prosecutor's inexcusable delay, this does not relieve the Chamber of its independent obligation under Article 60(4) to ensure that suspects are not detained for an unreasonable period, which stems from the 'fundamental right of an accused to a fair and expeditious trial'.¹⁵⁵⁵

The Chamber specified that the reasonableness of the length of detention must be 'balanced *inter alia* against the statutory penalties applicable to the offences at stake'.¹⁵⁵⁶ In this case, in the event of a conviction for an Article 70 offence, the Court may impose a prison term of up to five years, or a fine, or both, under Article 70(3) of the Statute. The Chamber further noted the advanced stage of the proceedings, the documentary nature of the relevant evidence and the fact that this evidence is already on the record.¹⁵⁵⁷ According

¹⁵⁵² ICC-01/05-01/13-703, p 6.

¹⁵⁵³ ICC-01/05-01/13-703, p 4.

¹⁵⁵⁴ ICC-01/05-01/13-703, p 4.

¹⁵⁵⁵ ICC-01/05-01/13-703, p 5.

¹⁵⁵⁶ ICC-01/05-01/13-703, p 4 (emphasis in original).

¹⁵⁵⁷ ICC-01/05-01/13-703, p 4. The Confirmation of Charges decision in this case will uniquely be made without a hearing, oral submissions or live witness testimony, 'due to the nature of the charges in the case'. Jean-Jacques Mangenda Kabongo makes first appearance before ICC', *ICC Press Release*, ICC-CPI-20131205-PR969, 5 December 2014, available online <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr969.aspx>.

to the Chamber, these factors reduce the risk that the ‘proceedings or investigations might be obstructed or endangered, [or] that the alleged crimes be continued or related offences be committed’.¹⁵⁵⁸ The Chamber thus found that a further extension of the four suspects’ pre-trial detention would be disproportionate.¹⁵⁵⁹

On 21 October 2014, the Prosecution filed an Urgent Motion for Interim Stay of the decision (Motion for Interim Stay) before the Pre-Trial Chamber¹⁵⁶⁰ and also appealed the decision.¹⁵⁶¹ The appeal included an Urgent Request for Suspensive Effect of the decision (Request for Suspensive Effect) pending appeal, in which the Prosecution argued that the interim release will have ‘adverse and possibly dire consequences on the proceedings’.¹⁵⁶² The Prosecution submitted that the suspects ‘pose concrete flight risks’ and there is a ‘real danger that they may not appear at trial or when summoned by the Court’.¹⁵⁶³ Further, it argued that since apprehending the suspects ‘required a massive effort by the Prosecution and the concerned authorities in the first place; there is no guarantee that any such cooperation will be forthcoming should the suspects abscond’.¹⁵⁶⁴

On 22 October 2014, the Appeals Chamber rejected the Prosecution’s Request for Suspensive Effect,¹⁵⁶⁵ and the Pre-Trial Chamber dismissed the Prosecution’s Motion for Interim Stay.¹⁵⁶⁶ The interim release decision was subsequently executed, and at the time of writing, three of the suspects had been released to countries where they are nationals or residents: Kilolo to Belgium; Babala to the DRC; and Arido to France. Mangenda’s release to the United Kingdom ‘was to be implemented as soon as the ICC Registry finalises all the necessary arrangements’.¹⁵⁶⁷ The only condition of the interim release was that all four suspects sign declarations ‘(i) stating their commitment to appear at trial, or whenever summoned by the Court; and (ii) indicating the address at which they will be staying’.¹⁵⁶⁸

1558 ICC-01/05-01/13-703, p 4.

1559 ICC-01/05-01/13-703, p 4.

1560 ICC-01/05-01/13-705, para 1 and p 4.

1561 ICC-01/05-01/13-706, p 5.

1562 ICC-01/05-01/13-706, para 4.

1563 ICC-01/05-01/13-706, para 4.

1564 ICC-01/05-01/13-706, para 4.

1565 This is ‘without prejudice to the Appeals Chamber’s eventual decision on the merits of the Prosecutor’s appeal against the Impugned Decision’, ICC-01/05-01/13-718, para 8.

1566 ICC-01/05-01/13-711.

1567 ICC-01/05-01/13-703, p 5-6; Aimé Kilolo Musamba, Narcisse Arido and Fidèle Babala Wandu released from ICC custody, *ICC Press Release*, ICC-CPI-20141023-PR1054, 23 October 2014, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR1054.aspx>.

1568 ICC-01/05-01/13-703, p 6.

Kenya

During the reporting period, trial proceedings continued in the case against Kenyan Deputy President William Samoei Ruto (Ruto) and Joshua Arap Sang (Sang). The opening statements and the testimonies of the first eight Prosecution witnesses in the case are described in detail in the *Gender Report Card 2013*, covering the period until 22 November 2013, when the trial hearings were adjourned.¹⁵⁶⁹ The hearings resumed on 16 January 2014 and have been ongoing since, although they have been adjourned on a number of occasions. The trial against Kenyan President Uhuru Muigai Kenyatta (Kenyatta) is yet to commence, and as discussed below, at the time of writing this Report, it was unclear whether the trial would commence at all due to the Prosecution's claim that it currently has insufficient evidence to proceed due to a lack of cooperation by the Kenyan authorities.

Kenya: The Prosecutor v. William Samoei Ruto and Joshua Arap Sang

Trial Chamber V(a) renders its 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'

On 5 December 2013, the Prosecution requested Trial Chamber V(a)¹⁵⁷⁰ to exercise its powers under Article 64(6)(b) of the Statute to require the attendance and testimony of Witnesses P-0015, P-0016, P-0336, P-0397, P-0516, P-0524 and P-0495, who according to the Prosecution 'have provided highly relevant evidence about the crimes

charged'.¹⁵⁷¹ The Prosecution asserted that these Witnesses, all of whom were under Court protection, gave statements to the Prosecution describing: (1) pre-election meetings they attended – some at Ruto's home – wherein the PEV was planned and the participants, including Ruto, distributed money and weapons; (2) broadcasts on Sang's radio station in which Sang incited violence; and (3) acts of violence during the PEV.¹⁵⁷² The Prosecution further submitted that 'following months – in some cases, years – of cooperation, the witnesses either refuse to continue to communicate with the Prosecution or have affirmatively informed the Prosecution that they are no longer willing to testify'.¹⁵⁷³ The Prosecution explained that the witnesses currently live in Kenya, and 'the

1571 ICC-01/09-01/11-1120-Red2-Corr, paras 1, 5 (Prosecution Request). On 5 March 2014, the Ruto Defence filed its public redacted version of its response to the corrected and amended version of the Prosecution Request under Articles 64(6)(b) and 93 of the Statute, to summon witnesses. ICC-01/09-01/11-1200-Red. On 10 January 2014, the Sang Defence filed its response to the Prosecution Request. ICC-01/09-01/11-1138. On 29 January 2014, the Trial Chamber confirmed that it would hold a public status conference to discuss all matters related to the Prosecution Request. ICC-01/09-01/11-1165. On 10 February 2014, the Kenyan Government filed its submissions on the Prosecution Request. ICC-01/09-01/11-1184. On 11 February 2014, the Prosecution filed its reply to the Ruto and Sang Defence responses. ICC-01/09-01/11-1183-Red. On 20 February 2014, the Prosecution filed a supplementary request adding a witness to the relief sought in the summonses request (Supplementary Request). ICC-01/09-01/11-1188-Conf-Red. On 4 March 2014, the Legal Representative of Victims filed his response to the Prosecution Request and Supplementary Request. ICC-01/09-01/11-1201. On 4 March 2014, the Prosecution filed its further submissions pursuant to the Prosecution Request under Articles 64(6)(b) and 93 of the Statute to summon witnesses. ICC-01/09-01/11-1202. On 5 March 2014, the Ruto and Sang Defence, jointly, filed their additional submissions on the corrected and amended version of the Prosecution Request. ICC-01/09-01/11-1200-Red. On 9 June 2014, the Prosecution filed its second supplementary request to summon a witness (Second Supplementary Request). ICC-01/09-01/11-1349-Conf-Exp.

1572 ICC-01/09-01/11-1120-Red2-Corr, para 1.

1573 ICC-01/09-01/11-1120-Red2-Corr, para 1.

1569 *Gender Report Card 2013*, p 132-135.

1570 Trial Chamber V(a) was composed of Presiding Judge Chile Eboe-Osuji (Nigeria), Judge Olga Herrera Carbuccion (Dominican Republic) and Judge Robert Fremr (Czech Republic).

Prosecution cannot issue its own subpoenas' requiring them to testify at the ICC.¹⁵⁷⁴ The Prosecution submitted that while the Chamber cannot order them to travel to The Hague, it 'has the statutory authority to require the assistance of States in securing the attendance and testimony of witnesses ([A]rticle 64(6)(b)), and States Parties have a corresponding obligation to provide such assistance pursuant to Part 9 of the Rome Statute'.¹⁵⁷⁵

On 17 April 2014, the Chamber rendered its decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation (Summons and Cooperation Decision).¹⁵⁷⁶ In this decision, the Chamber, Judge Olga Herrera Carbucciona dissenting,¹⁵⁷⁷ found that: (1) it has the power to compel the testimony of witnesses; (2) it can, through requests for cooperation, oblige Kenya both to serve summonses and to assist in compelling

1574 ICC-01/09-01/11-1120-Red2-Corr, para 2.

1575 The Prosecution further observed that the Chamber 'has an indisputable interest in hearing the witnesses' evidence to fulfil its mandate to discover the truth'. ICC-01/09-01/11-1120-Red2-Corr, para 2.

1576 ICC-01/09-01/11-1274-Corr2.

1577 ICC-01/09-01/11-1274-Anx. Judge Carbucciona disagreed with the majority's finding that, under Article 93(1) (d) and (l) of the Statute the Chamber can, by way of requests for cooperation, oblige Kenya to serve summonses and to assist in compelling the attendance of the witnesses summoned. While she agreed with the majority that the Chamber has the power under Article 64(6)(b) of the Statute to issue summonses to appear for witnesses, she disagreed that the Government of Kenya is under a legal obligation to enforce such summonses. The Judge concluded by stating that there were two options available to the Chamber under the given circumstances: (i) The Chamber could require the assistance of the Kenyan Government to ensure the voluntary appearance of the witness to appear, and if the witness is unwilling to travel to The Hague, the Chamber could request the assistance of the Government so that the witness' voluntary testimony is given in Kenya; and (ii) The Chamber could issue summonses to appear under Article 64(6)(b) of the Statute, and encourage the Government to make arrangements to secure their appearance, though the Government is under no legal obligation to assist in compelling witnesses to appear. ICC-01/09-01/11-1274-Anx paras 1, 8-9, 27.

the attendance of the witnesses summonsed; (3) there are no provisions in Kenyan domestic law that prohibit such a cooperation request; and (4) the Prosecution has justified the issuance of the summonses.¹⁵⁷⁸

Concerning the competence of a Trial Chamber to subpoena witnesses, the Chamber first considered the objects and purposes of the ICC, emphasising the determination of States Parties 'to put an end to impunity for the perpetrators of [unimaginable atrocities that deeply shock the conscience of humanity] and thus to contribute to the prevention of such crimes', and 'the resolve of the States Parties "to *guarantee* lasting respect for and the *enforcement* of international justice"'.¹⁵⁷⁹ Next, the Chamber examined international law, concluding that a general principle of international law, reiterated in the jurisprudence of the ICJ, is that '[a]n international institution – particularly an international court – is deemed to have such implied powers as are essential for the exercise of its primary jurisdiction or the performance of its essential duties and functions'.¹⁵⁸⁰ Specifically concerning the capacity to compel the appearance of witnesses before the ICC, the Chamber took note of the ECtHR's decision in *Djokaba Lambi Longa v. The Netherlands*, in which the Court observed that it would be 'unthinkable for any criminal tribunal, domestic or international, not to be vested with powers to secure the attendance of witnesses, for the prosecution or the defence as the case may be'.¹⁵⁸¹ The Chamber concluded that its function to conduct criminal trials in cases over which the Court has jurisdiction for purposes of accountability for alleged violations

1578 ICC-01/09-01/11-1274-Corr2, para 193.

1579 ICC-01/09-01/11-1274-Corr2, para 64 (emphasis in original).

1580 ICC-01/09-01/11-1274-Corr2, para 81.

1581 ICC-01/09-01/11-1274-Corr2, para 84. The Chamber emphasised that the ECtHR made the foregoing observations specifically in relation to the character of the ICC as an international criminal court. ICC-01/09-01/11-1274-Corr2, para 85.

of the norms listed in the Rome Statute cannot be effectively discharged if every witness is left free to decide to decline appearance, and the Chamber is left incapable of compelling appearance.¹⁵⁸² Accordingly, the Chamber held that the power to compel the attendance of witnesses 'is an incidental power that is critical for the performance of the essential functions of the Court'.¹⁵⁸³

Next, the Chamber took into account 'Customary International Criminal Procedural Law', in this regard finding that 'a Trial Chamber of an international criminal court has traditionally been given the power to subpoena the attendance of witnesses'.¹⁵⁸⁴ Having examined the statutory frameworks of other international courts, the Chamber observed a 'crystallisation of customary international criminal procedural law, which recognises that a trial chamber of an international criminal court may subpoena a witness to appear for testimony'.¹⁵⁸⁵ On this basis, the Chamber held that 'it would require very clear language indeed for the States Parties to the Rome Statute to be taken to have intended that the ICC – as the permanent international criminal court established for the primary purpose of eliminating impunity for grave violations of international criminal norms – should be the only known criminal court in the world (at the international and the national levels) that has no power to subpoena witnesses to appear for testimony'.¹⁵⁸⁶ Finally, the Chamber considered that Article 4(1)¹⁵⁸⁷ of the Rome Statute would be 'an ample basis to imply any reasonable power necessary for the effective discharge of the mandate of the ICC', and that the 'power to subpoena witnesses is

clearly first among the powers necessary for the performance of ICC functions'.¹⁵⁸⁸ The Chamber concluded that 'there is no doubt at all' that when Article 64(6)(b) states that the Chamber may 'require the attendance of witnesses', this means that the Chamber 'may – as a compulsory measure – order or subpoena the appearance of witnesses as the Arabic, the French and the Spanish texts so clearly say'.¹⁵⁸⁹

Concerning the 'general obligation of states to compel witness appearance at the request of a Trial Chamber', the Chamber found that it is 'competent to make that request of Kenya; and Kenya is obligated to employ compulsory measures against the witness in order to perform the demands of the request'.¹⁵⁹⁰ In support of its conclusion, the Chamber noted that Article 86 of the Statute imposes upon States Parties a 'general obligation to "cooperate fully" with the Court' in its prosecution of crimes within the Court's jurisdiction.¹⁵⁹¹ The Chamber further explored the notion of 'implied powers that make a Court an effective international institution' under international law, in this regard finding that it is 'generally accepted that international organizations can exercise such powers'.¹⁵⁹² The Chamber noted that whereas 'care was taken to show sensitivity to national laws in the provision of article 93(1)(l)', it is 'up to the State on whom a request has been made to specify how national law prohibits – in good faith – the type of the request that was made'.¹⁵⁹³ The Chamber further examined 'the Rule of Good Faith', concluding that the 'efforts of the States Parties in creating a permanent criminal court of last resort, and giving it the mandate to ensure accountability on the part of those suspected of committing crimes that shock the conscience of humanity', would have been

1582 ICC-01/09-01/11-1274-Corr2, para 86.

1583 ICC-01/09-01/11-1274-Corr2, para 86.

1584 ICC-01/09-01/11-1274-Corr2, para 88.

1585 ICC-01/09-01/11-1274-Corr2, para 91.

1586 ICC-01/09-01/11-1274-Corr2, para 92.

1587 Article 4(1) of the Statute provides that '[t]he Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.'

1588 ICC-01/09-01/11-1274-Corr2, para 94.

1589 ICC-01/09-01/11-1274-Corr2, para 100.

1590 ICC-01/09-01/11-1274-Corr2, para 102.

1591 ICC-01/09-01/11-1274-Corr2, para 103.

1592 ICC-01/09-01/11-1274-Corr2, para 104.

1593 ICC-01/09-01/11-1274-Corr2, para 115.

reduced only to creating an ‘illusory or nominal’ institution were it to ‘be accepted that the States Parties did not intend the Court to have the power to compel the appearance of witnesses either of its own force or with the assistance of States Parties’.¹⁵⁹⁴ The Chamber also considered the principle of complementarity, in this regard concluding that ‘for purposes of compellability, witnesses from situation countries must be deemed to be under the same legal obligation to appear under an ICC subpoena as they would be if their national courts were genuinely exercising jurisdiction over the case being tried by the Trial Chamber’.¹⁵⁹⁵

Regarding Kenya’s obligation to honour the request to compel witness attendance, the Chamber first observed that ‘it is clear that the question presented is ultimately dependent on whether the laws of the requested State can be seen in good faith as forbidding the request made’.¹⁵⁹⁶ In this regard, the Chamber observed that in the course of the oral submissions, the Kenyan Attorney General and the Defence consistently avoided answering repeated requests for clarification regarding whether Kenyan law prohibited Kenya from complying with an ICC request to facilitate the compelled appearance of a witness before the Court.¹⁵⁹⁷ The Chamber further found that it was persuaded by the Legal Representative’s position that Kenyan law did not prohibit Kenya from providing such assistance.¹⁵⁹⁸

The Chamber concluded that Kenya’s International Crimes Act does not prohibit Kenya from compelling the attendance of a witness. The Chamber further emphasised that ‘despite repeated specific invitation by the Chamber, the Defence and the Attorney-General have not drawn the Chamber’s attention to any [other] aspect of Kenyan law [...] that prohibits Kenya

from rendering that kind of assistance to the ICC’.¹⁵⁹⁹ The Chamber also concluded that under Kenyan law, the following provisions of the Statute have ‘direct force of law in Kenya: article 64(6)(b) – the power of the Trial Chamber to order witnesses to appear; article 93(1)(d) – the power of the Court to request a State Party to serve court processes; and article 93(1)(l) – the power of the Court to make any other request upon a State Party that is not prohibited by the law of the forum’.¹⁶⁰⁰

The Chamber also addressed whether the Prosecution had justified the requested subpoenas. In this regard, the Chamber first expressed agreement with Trial Chambers IV and V(b) that ‘any cooperation request to a State Party must satisfy the tripartite principles of (i) relevance, (ii) specificity and (iii) necessity’.¹⁶⁰¹ Regarding relevance, the Chamber found that it was satisfied that the testimony of the eight witnesses sought by the Prosecution was relevant to the case and the crimes charged.¹⁶⁰² The Chamber also found that the Prosecution had identified its relief sought with sufficient specificity, noting that the eight witnesses were all clearly identified and that ‘each of them is or may be within the jurisdiction of the Kenyan national authorities’.¹⁶⁰³ In evaluating necessity in the context of whether to issue summonses to witnesses, the Chamber found that it was necessary to consider both whether: (i) the witness’ anticipated testimony is potentially necessary for the determination of the truth; and (ii) a summons, as a compulsory measure, is necessary to obtain the testimony of the witness.¹⁶⁰⁴ The Chamber concluded that the anticipated testimony of the eight witnesses met both of these criteria.¹⁶⁰⁵

1594 ICC-01/09-01/11-1274-Corr2, para 124.

1595 ICC-01/09-01/11-1274-Corr2, para 140.

1596 ICC-01/09-01/11-1274-Corr2, para 157.

1597 ICC-01/09-01/11-1274-Corr2, para 158.

1598 ICC-01/09-01/11-1274-Corr2, paras 159-160.

1599 ICC-01/09-01/11-1274-Corr2, paras 162-164.

1600 ICC-01/09-01/11-1274-Corr2, para 173.

1601 ICC-01/09-01/11-1274-Corr2, para 181. The Chamber cited ICC-01/09-02/11-908, para 100 and fn 216; ICC-02/05-03/09-504-Red, para 4; ICC-02/05-03/09-170, paras 13-14.

1602 ICC-01/09-01/11-1274-Corr2, para 182.

1603 ICC-01/09-01/11-1274-Corr2, para 184.

1604 ICC-01/09-01/11-1274-Corr2, paras 185, 191.

1605 ICC-01/09-01/11-1274-Corr2, para 192.

Accordingly, the Chamber:

- 1 Granted the relief sought in the Prosecution Request and Supplementary Request;
- 2 Ordered the appearance of the witnesses to testify before the Trial Chamber by video-link or at a location in Kenya and on such dates and times as the Prosecution or the Registry communicated to them;¹⁶⁰⁶
- 3 Requested the assistance of the Kenyan Government in ensuring the appearance of the mentioned witnesses, 'using all means available under the laws of Kenya';¹⁶⁰⁷ and
- 4 Directed the Registry to prepare and transmit, in consultation with the Prosecution, the necessary subpoenas to the concerned witnesses, with or without the assistance of the Government of Kenya, as well as the necessary cooperation request to the relevant authorities in Kenya in accordance with Articles 93(1)(d), 93(1)(l), 96 and 99(1) of the Statute.¹⁶⁰⁸

Subsequent filings and decisions

On 23 May 2014, Trial Chamber V(a) rendered its Decision on the Defence applications for leave to appeal the Summons and Cooperation Decision, as well as the request of the Government of Kenya to submit *amicus curiae* observations on

1606 The relevant witnesses were identified as Witness 15, Witness 16, Witness 336, Witness 397, Witness 516, Witness 524, Witness 495, and Witness 323. ICC-01/09-01/11-1274-Corr2, p 77.

1607 The Chamber noted that the requested and required assistance shall include, but is not limited to the following: (i) to communicate to the concerned witnesses the Chamber's requirement of their attendance as indicated above; (ii) to facilitate, by way of compulsory measure as necessary, the appearance of the indicated witnesses for testimony before the Trial Chamber by video-link or at a location in Kenya and on such dates and times as the Prosecutor or the Registrar (as the case may be) shall indicate; and (iii) to make appropriate arrangements for the security of the indicated witnesses until they appear and complete their testimonies before the Chamber. ICC-01/09-01/11-1274-Corr2, p 77-78.

1608 ICC-01/09-01/11-1274-Corr2, p 78.

the appeals.¹⁶⁰⁹ The Chamber, by majority, Judge Chile Eboe-Osuji dissenting,¹⁶¹⁰ granted the Ruto and Sang Defence leave to appeal the impugned decision on the following issues: (1) whether a Chamber has the power to compel the testimony of witnesses; and (2) whether the Government of Kenya, a State Party to the Rome Statute, is under an obligation to cooperate with the Court to serve summonses and assist in compelling the appearance of witnesses subject to a subpoena.¹⁶¹¹ Additionally, the Chamber found that *amicus curiae* observations filed by the Government of Kenya could assist the Chamber in its assessment of the Defence applications for leave to appeal and accordingly granted the Government's request.¹⁶¹² Ruto and Sang filed their respective appeals on 5 June 2014,¹⁶¹³ and the Government filed its observations on 25 June

1609 ICC-01/09-01/11-1313. The Kenyan Government filed its request for leave to make *amicus curiae* observations on 12 May 2014. The Government submitted that although it accepts the majority's finding that the Chamber may issue a summons to appear for voluntary witnesses, it takes issue with any obligation imposed upon a State to compel unwilling witnesses to appear before the Court. The Government maintained that the Chamber should entertain its observations for the following reasons: (i) it has already participated in the written and oral proceedings upon which the Impugned Decision is based; (ii) the issue in need of resolution by the Chamber is 'novel' because the Court has never previously requested the cooperation of a State in compelling witness testimony; (iii) an obligation upon a State to compel witness testimony impacts that State's interests; and (iv) the Kenyan Government is best placed to address how the issues of fairness and expeditiousness of trial 'play out in the national Kenyan context and legal system'. ICC-01/09-01/11-1304, paras 7, 9, 15-18.

1610 Judge Eboe-Osuji stated that he did not consider that an immediate resolution of the interlocutory appeal by the Appeals Chamber would materially advance the proceedings. To the contrary, he expressed concern that the interlocutory appeal could result in further delays to the proceedings. Accordingly, he would have dismissed the applications for leave to appeal. ICC-01/09-01/11-1313-Anx, para 70.

1611 ICC-01/09-01/11-1313, para 40.

1612 ICC-01/09-01/11-1313, para 34.

1613 See ICC-01/09-01/11-1345 and ICC-01/09-01/11-1344, respectively. The Prosecution response was filed on 20 June 2014. ICC-01/09-01/11-1380.

2014.¹⁶¹⁴ At the time of writing this Report, the Appeals Chamber was yet to render its decision on the appeals.¹⁶¹⁵

On 17 June 2014, the Appeals Chamber¹⁶¹⁶ rejected a request by the Ruto Defence, which had been supported by Sang, for suspensive effect of the Summons and Cooperation Decision.¹⁶¹⁷ The Chamber held that Ruto's and Sang's submissions in support of the request did not demonstrate how the implementation of the decision '(i) would lead to an irreversible situation that could not be corrected; (ii) would lead to consequences that would be very difficult to correct and may be irreversible; or (iii) could potentially defeat the purpose of the appeal, were the Appeals Chamber eventually to find in favour of Mr Ruto and Mr Sang'.¹⁶¹⁸ Furthermore, on 19 June 2014, Trial Chamber V(a) granted the Prosecutor's Second Supplementary Request to summon a witness.¹⁶¹⁹ The Chamber reasoned that: (1) the testimony of the witness is relevant to the case; (2) the Prosecution had specified the relief requested with sufficient specificity; (3) the testimony of the witness is potentially necessary for the determination of the truth; and (4) the summons is necessary to ensure the testimony of the witness.¹⁶²⁰

1614 ICC-01/09-01/11-1406. On 30 June 2014, the Prosecution and the Ruto and Sang Defence filed their responses to the Kenyan Government's observations on the appeals against the decision on the Prosecutor's application for witness summonses and resulting request for State Party cooperation. See ICC-01/09-01/11-1412; ICC-01/09-01/11-1413; ICC-01/09-01/11-1414.

1615 On 4 July 2014, the Appeals Chamber rejected Ruto and Sang's applications for leave to make further submissions on the appeal. ICC-01/09-01/11-1417.

1616 The Appeals Chamber was composed of Presiding Judge Akua Kuenyehia (Ghana), Judge Sang-Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana), Judge Erkki Kourula (Finland) and Judge Anita Ušacka (Latvia).

1617 ICC-01/09-01/11-1370, para 11.

1618 ICC-01/09-01/11-1370, para 8.

1619 ICC-01/09-01/11-1377-red, p 8.

1620 ICC-01/09-01/11-1377-red, paras 18-21.

Chamber permits filing of 'No Case to Answer Motion' at close of Prosecution case

On 3 June 2014, Trial Chamber V(A) rendered its 'Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)'.¹⁶²¹ The Chamber noted that while the Statute and the RPE 'do not currently explicitly provide for "no case to answer" motions', Article 64(3)(a) of the Statute provides that the Chamber shall '[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings'. Read together with Rule 134 of the RPE, the Chamber found that it had the 'necessary authority to consider "no case to answer" motions in appropriate circumstances'.¹⁶²² The Chamber stated that it considered the appropriate moment in the current proceedings to file 'no case to answer' motions, if any, would be after the close of the Prosecution case and prior to the presentation of evidence by the Defence.¹⁶²³ However, the Chamber decided that should the Legal Representative of Victims be granted permission to present separate evidence, any 'no case to answer' motion should instead be brought after the completion of the presentation of such evidence by the Legal Representative.¹⁶²⁴

The Chamber recalled that, 'although the burden to prove the guilt of the accused rests on the Prosecution, the Chamber may request the submission of evidence or hear witnesses when

1621 ICC-01/09-01/11-1334. Judge Eboe-Osuji delivered a Separate Opinion relating to para 23 of the Chamber's decision, in which he stated that he fully agreed with 'the essential point of that paragraph: to the effect that a motion of "no case to answer" (made at the conclusion of the prosecution case) calls for "a prima facie assessment of the evidence"; and, "the exercise contemplated is thus not one which assesses the evidence to the standard for conviction at the final stage of the trial", but wished to 'fully explain' why, in his view, 'the approach is a most sensible one'. ICC-01/09-01/11-1334-Anx-Corr, para 2.

1622 ICC-01/09-01/11-1334, para 15.

1623 ICC-01/09-01/11-1334, para 34.

1624 ICC-01/09-01/11-1334, para 34.

it considers this necessary for its determination of the truth'. The Chamber also decided that should it wish to 'request the submission of additional evidence following completion of the Prosecution case and prior to presentation of evidence by the Defence, appropriate directions will be given at the relevant time, including whether or not such evidence is to be produced prior to considering any "no case to answer" motion'.¹⁶²⁵

The Chamber directed the Defence to notify it 'no later than the last day of the Prosecution's case – or completion of any presentation of evidence by the Legal Representative or as requested by the Chamber, as applicable – of their intention to file "no case to answer" motions, if any'.¹⁶²⁶ It further decided that any such 'no case to answer' motion must be filed no later than 14 days after that day, and that responses by the Prosecution and the Legal Representative must be filed within 14 days after notification of the motion. Finally, the Chamber noted that the decision to allow 'no case to answer' motions was not 'intended to in any way pre-judge whether or not a motion of that kind should actually be pursued in this case'.¹⁶²⁷

Decisions on Ruto's presence at trial

Trial Chamber V(A) delivers its Reasons for the Decision on Excusal from Presence at Trial under Rule 134quater

As discussed in the *Gender Report Card 2013*, the ASP amended the RPE governing presence at trial in November 2013 and adopted Rule 134bis, which regulates presence through the use of video technology; Rule 134ter, which relates to excusal from presence at trial; and Rule 134quater, which specifically relates to excusal from presence at trial due to 'extraordinary public duties'.¹⁶²⁸

¹⁶²⁵ ICC-01/09-01/11-1334, para 35.

¹⁶²⁶ ICC-01/09-01/11-1334, para 37.

¹⁶²⁷ ICC-01/09-01/11-1334, paras 37-39.

¹⁶²⁸ See *Gender Report Card 2013*, p 28-34.

On 15 January 2014, Trial Chamber V(A) applied Rule 134quater in an oral ruling, which excused Ruto from continuous presence at trial except for a limited number of hearings (Oral Ruling).¹⁶²⁹ The Chamber advised that the reasons for its decision would be delivered at a later date. On 18 February 2014, the Chamber rendered its reasons, addressing the following issues: (1) whether Rule 134quater is consistent with Article 63(1) of the Statute, which provides that '[t]he accused shall be present during trial'; (2) whether Rule 134quater is consistent with other provisions of the Statute; and (3) the application of the requirements of Rule 134quater in the Ruto and Sang case.¹⁶³⁰

Concerning Article 63(1) of the Statute, the Chamber noted the Prosecution argument that although the Defence interpretation of Rule 134quater was inconsistent with the Statute, 'a reading of the Rule that is consistent with the Statute is possible'. The Chamber also noted the Prosecution argument that the Appeals Chamber provided an authoritative reading of Article 63(1) in the Excusal Judgment, in which

¹⁶²⁹ The hearings in question concerned: (i) when victims present their views and concerns in person; (ii) for the entirety of the delivery of the judgement in the case; (iii) for the entirety of the sentencing hearing, if applicable; (iv) for the entirety of the sentencing, if applicable; (v) for the entirety of the victim impact hearings, if applicable; (vi) for the entirety of the reparation hearings, if applicable; (vii) for the first five days of hearing starting after a judicial recess as set out in regulation 19bis of the Regulations of the Court; (viii) for any other attendance directed by the Chamber either or other request of a party or participant as decided by the Chamber. Accordingly, the Trial Chamber departed from the standards determined by the Appeals Chamber in its 25 October 2013 decision in Ruto and Sang in which the Chamber had reversed the decision of Trial Chamber V(a) and set forth the standards for presence at trial. See further *Gender Report Card 2013*, p 136-147.

¹⁶³⁰ ICC-01/09-01/11-1186. Judge Eboe-Osuji delivered a Separate further Opinion. ICC-01/09-01/11-1186-Anx, para 1.

it identified a number of limitations to the Trial Chamber's discretion under Article 63(1).¹⁶³¹

The Chamber observed that 'some of the limitations under Article 63(1), set out in the Excusal Judgment, are reflected in the new rules'. It noted, however, that in contrast to Rule 134ter of the RPE, which 'faithfully reflects the Appeals Chamber's ruling', Rule 134quater 'deliberately omits' three of the limitations, including: 'i) that the absence must not become the rule; ii) that the absence must be limited to that which is strictly necessary; and iii) that the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis'.¹⁶³² The Chamber concluded that to accept the Prosecution's interpretation would 'run [...] counter to the apparent intention of the drafters of the new rules' and 'would raise questions as to the relation between Rule 134quater and Rule 134ter'.¹⁶³³

Turning to the question of whether Rule 134quater is consistent with other provisions of the Statute, the Chamber found that 'the

1631 ICC-01/09-01/11-1186, paras 48-49. The Appeals Chamber identified the following limitations: (i) The absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) The possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) Any absence must be limited to that which is strictly necessary; (iv) The accused must have explicitly waived his or her right to be present at trial; (v) The rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) The decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested. See also *Gender Report Card 2013*, p 138.

1632 ICC-01/09-01/11-1186, paras 50, 52.

1633 ICC-01/09-01/11-1186, paras 51-52. The Chamber observed that it must 'bear in mind that it is the States Parties who adopt amendments to the Rules'. ICC-01/09-01/11-1186, para 53.

adoption of Rule 134quater of the Rules, without all requirements listed in Rule 134ter of the Rules, was intended to be consistent with Article 63(1) of the Statute and to provide further clarity to that provision'.¹⁶³⁴ It further found that by enacting these Rules, the ASP had 'clarified the position of State Parties in relation to the scope and application of Article 63(1) of the Statute'.¹⁶³⁵ The Chamber noted Article 31(3)(a) of the Vienna Convention on the Law of Treaties, which provides that the interpretation of a treaty 'must take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"'. It held that Rules 134ter and 134quater can be regarded as a 'subsequent agreement' regarding the scope and application of Article 63(1) of the Statute and further recalled that the Rules are meant to be 'an instrument for the application of the Statute'.¹⁶³⁶

The Chamber concluded that 'by repeating the limitations, as set out by the Appeals Chamber, in one rule (Rule 134ter of the Rules), but at the same time consciously omitting three of these limitations in another rule (Rule 134quater of the Rules), the ASP indicated the intention of States Parties to include in the Trial Chamber's discretion the power to conditionally excuse from presence at trial a specific category of accused persons'. It further determined that the adoption of the new rules 'clarifies certain aspects of Article 63(1) of the Statute' and was not inconsistent with any other provision of the Statute if applied in accordance with the conditions to be specified in its decision.¹⁶³⁷

The Chamber next addressed the Prosecution's arguments that Rule 134quater is inconsistent with other provisions of the Statute, including in particular Article 21(3), which sets out the principle of non-discrimination; and Article

1634 ICC-01/09-01/11-1186, para 55.

1635 ICC-01/09-01/11-1186, para 55.

1636 ICC-01/09-01/11-1186, para 56.

1637 ICC-01/09-01/11-1186, para 58.

27(1), which provides that the Statute applies ‘equally to all persons without any distinction based on official capacity’ and that official capacity, including as a Head of State, ‘shall in no case exempt a person from criminal responsibility’. Regarding Article 21(3), the Chamber noted that its purpose is to prevent “adverse distinction” on prohibited grounds, and that such grounds refer to ‘characteristics or status’, in contrast to Rule 134*quater*, which refers to ‘the functions which the person is mandated to perform’.¹⁶³⁸ The Chamber further noted that the grounds listed in Article 21(3) reflect those included in international human rights treaties, which aim to prevent discrimination, and that the ECtHR has defined discrimination as ‘treating differently, without an objective and reasonable justification, persons in relatively similar situations’. The Chamber found that the distinction within Rule 134*quater* of the RPE, namely, between accused ‘mandated to fulfil extraordinary public duties at the highest national level’ and other accused, constitutes an ‘objective and reasonable justification’. Accordingly, the Chamber concluded that there is no conflict between Rule 134*quater* of the RPE and Article 21(3) of the Statute.¹⁶³⁹

With regard to Article 27(1) of the Statute, the Chamber held that Rule 134*quater* ‘cannot be read as limiting the criminal responsibility of those performing “extraordinary public duties at the highest national level”, nor as limiting the Court’s jurisdiction over such persons’. It therefore found that the object of Article 27 was not ‘offended or defeated by Rule 134*quater* of the Rules, or by the Chamber’s decision to allow Mr Ruto, pursuant to the said rule, to be excused from continuous presence at his trial in order to permit him to carry out the functions as contemplated in Rule 134*quater* of the Rules’.¹⁶⁴⁰

¹⁶³⁸ ICC-01/09-01/11-1186, paras 59-60.

¹⁶³⁹ ICC-01/09-01/11-1186, para 60.

¹⁶⁴⁰ ICC-01/09-01/11-1186, para 61.

Finally, the Chamber considered the application of the requirements of Rule 134*quater* of the RPE in the Ruto and Sang case, finding as follows:

- 1 Ruto ‘certainly meets the requirement of Rule 134*quater* of the Rules, whereby the person must be subject to a summons to appear’;¹⁶⁴¹
- 2 The Chamber observed that Rule 134*quater* applies to any person ‘mandated to fulfil extraordinary public duties at the highest national level’ and found that Ruto’s duties as Deputy President ‘are certainly “extraordinary public duties” that, given the structure of the Kenyan government, are at “the highest national level”’;¹⁶⁴²
- 3 Ruto had filed a signed waiver of his right to be present at trial, as required by the Oral Ruling;¹⁶⁴³
- 4 Given the frequency of Ruto’s need ‘to perform extraordinary duties at the highest national level, it would not be desirable to adjourn the hearing each time such a need arises’, and that it was ‘not satisfied that the use of video-link would be an adequate alternative measure’;¹⁶⁴⁴
- 5 ‘[T]he continuous absence of Mr Ruto throughout the entire remainder of the trial may indeed be incompatible with the interests of justice, given the active participation of victims in the proceedings’, and thus the ‘limitations, listed in the Oral Ruling, should attach to the excusal in order to minimise the adverse effects which the absence of the accused may produce’;¹⁶⁴⁵

¹⁶⁴¹ ICC-01/09-01/11-1186, para 62.

¹⁶⁴² ICC-01/09-01/11-1186, para 63. In response to the Prosecution argument that not every activity undertaken by the Deputy President of Kenya meets the requirements Rule 134*quater*, the Chamber agreed that ‘not every duty at the highest national level is an extraordinary one’, but held that ‘the number of extraordinary duties among all duties attached to that position is such as to render a case-by-case analysis impractical’. ICC-01/09-01/11-1186, para 64.

¹⁶⁴³ ICC-01/09-01/11-1186, para 67.

¹⁶⁴⁴ ICC-01/09-01/11-1186, paras 68-69. Further, the Chamber took note of the Prosecution proposal of delegating routine duties to other competent officials, but noted that ‘no legal basis for such a proposition has been presented’. ICC-01/09-01/11-1186, para 70. In view of the foregoing considerations, the Chamber considered that alternative measures, with respect to the present conditional grant of excusal, ‘are inadequate’. ICC-01/09-01/11-1186, para 71.

¹⁶⁴⁵ ICC-01/09-01/11-1186, para 74.

- 6 In view of the Defence’s assurances, it was ‘satisfied that the rights of Mr Ruto will be fully ensured during his absence’;¹⁶⁴⁶
- 7 The requirement that the ‘excusal shall be taken with due regard to the subject matter of the specific hearings in question, should be viewed in the light of the express omission from Rule 134*quater* of the Rules of the requirement of ruling on excusal on a case-by-case basis’, and thus, the Rule ‘must allow for the possibility of the decision being taken without the Chamber’s specific knowledge of the subject matter of each hearing from which the accused seeks to be absent’.¹⁶⁴⁷

The Chamber further noted that as required under Rule 134*quater*, ‘the Oral Ruling will be subject to review at any time’.¹⁶⁴⁸

Prosecution Appeal of Oral Ruling

On 24 February 2014, the Prosecution requested leave to appeal the Oral Ruling.¹⁶⁴⁹ On 2 April 2014, Trial Chamber V(A), by majority with Judge Herrera Carbuccion dissenting,¹⁶⁵⁰ rejected the application, finding that the arguments raised by the Prosecution did not constitute appealable issues under Article 82(1)(d) of the Statute.¹⁶⁵¹

1646 ICC-01/09-01/11-1186, para 75.

1647 ICC-01/09-01/11-1186, para 76. Further, the Chamber was of the view that ‘excluding specific types of hearings from the excusal and allowing for the possibility of requiring presence at other hearings, as in the Oral Ruling, satisfies the requirement that the decision on excusal shall be taken with due regard to the subject matter of the specific hearings in question’. ICC-01/09-01/11-1186, para 77.

1648 ICC-01/09-01/11-1186, para 78.

1649 ICC-01/09-01/11-1189.

1650 ICC-01/09-01/11-1246-Anx.

1651 ICC-01/09-01/11-1246. The Chamber observed that the Prosecution sought leave to appeal the Impugned Decision on the following issues: (i) ‘Is Rule 134:quater of the Rules of Procedure and Evidence, as interpreted by the Chamber when granting conditional excusal to Ruto, consistent with Articles 63(1), 21(3) and 27(1) of the Statute’; and (ii) ‘If Rule 134quater of the Rules is consistent with Articles 63(1), 21(3) and 27(1) of the Statute, does it on its own terms permit the Chamber to conditionally excuse Ruto from presence at trial subject to the conditions in paragraph 79 of the Chamber’s written reasons’. ICC-01/09-01/11-1246, para 6.

Testimonies at trial

The trial against Ruto and Sang commenced on 10 September 2013. The opening statements and the testimonies of the first eight Prosecution witnesses are described in the *Gender Report Card 2013*, covering the period until 22 November when the trial hearings were adjourned.¹⁶⁵² The trial hearings resumed on 16 January 2014 and have been ongoing since, however with a number of adjournments.

As of the time of writing this Report, according to publicly available information, 12 additional Prosecution witnesses had testified.¹⁶⁵³

Significant portions of the testimonies of these witnesses took place in private session due to the need to protect the identity of the witnesses. The testimonies have focused on describing the violence that took place in the Rift Valley following the disputed 2007 election and the nature and scope of the attacks;¹⁶⁵⁴ how the PEV affected their lives;¹⁶⁵⁵ political meetings held in Ruto’s house and elsewhere;¹⁶⁵⁶ Ruto’s relationship with the broader Kalenjin community, including his appointment as ‘spokesman’ for the Kalenjin prior to the elections;¹⁶⁵⁷ political rallies in the context of the elections, including allegations that Ruto, Kosgey and other political leaders asked the Kalenjin to remove non-Kalenjins from the Rift Valley region;¹⁶⁵⁸ the statements made during Sang’s

1652 *Gender Report Card 2013*, p 132-135.

1653 This includes Prosecution Witnesses 356; 128; 409; 442; 508; 469; 673; 247; 405; expert Witnesses Herve Maupeu and Lars Bromley; and former member of the Waki Commission, Gavin McFayden.

1654 See eg ICC-01/09-01/11-T-76-Red-ENG, p 81-86; ICC-01/09-01/11-T-107-Red-ENG, p 3-66; ICC-01/09-01/11-T-109-ENG, p 18-103; ICC-01/09-01/11-T-121-Red-ENG; p 49-94.

1655 See eg ICC-01/09-01/11-T-83-Red-ENG, p 56-69; ICC-01/09-01/11-T-99-Red, p 27-43; ICC-01/09-01/11-T-104-Red-ENG, p 63-72.

1656 See eg ICC-01/09-01/11-T-77-Red-ENG, p 33-35, 57-59.

1657 See eg ICC-01/09-01/11-T-89-ENG, p 4-19.

1658 See eg ICC-01/09-01/11-T-92-Red-ENG, p 13-75; ICC-01/09-01/11-T-93-Red-ENG, p 3-27; ICC-01/09-01/11-T-106-Red-ENG, p 31-58.

radiobroadcasts, including his alleged failure to call for an end to the violence,¹⁶⁵⁹ the work of the Waki Commission,¹⁶⁶⁰ and allegations of vote rigging in the context of the December 2007 presidential election.¹⁶⁶¹

The Ruto and Sang Defence have frequently either alleged that Prosecution witnesses are not telling the truth or queried witnesses as to whether they were giving false testimony.¹⁶⁶² They have also questioned witnesses' interpretation of terms in the Kalenjin language.¹⁶⁶³ The Ruto Defence has also questioned witnesses as to whether money received from the VWU has influenced their testimonies before the Court,¹⁶⁶⁴ and in some cases alleged that 'dual status' witnesses are testifying because they hope to obtain reparations.¹⁶⁶⁵ Furthermore, the Ruto Defence has alleged that USAID gave money to Kenyan human rights organisations, implying that the money was used to influence individuals to testify against Ruto.¹⁶⁶⁶ In cross-examination, the Ruto Defence has also alleged that the Prosecution has failed to verify the testimonies of witnesses and properly investigate its case.¹⁶⁶⁷

Some witnesses have retracted their testimony under cross-examination, while others have explicitly admitted to lying during cross-examination, for example with respect to attending specific political rallies.¹⁶⁶⁸ Concerns

1659 See eg ICC-01/09-01/11-T-100-Red-ENG, p 7-11.

1660 See eg ICC-01/09-01/11-T-117-ENG, p 22-37; ICC-01/09-01/11-T-124, p 15-84.

1661 See eg ICC-01/09-01/11-T-121-Red-ENG, p 47-48.

1662 See eg ICC-01/09-01/11-T-80-Red-ENG, p 117-119; ICC-01/09-01/11-T-85-Red-ENG, p 33; ICC-01/09-01/11-T-101-Red-ENG, p 46-49; ICC-01/09-01/11-T-103-Red-ENG, p 11-14, 21-23, 74-75.

1663 See eg ICC-01/09-01/11-T-94-Red-ENG, p 30-36, 42-43.

1664 See eg ICC-01/09-01/11-T-81-Red-ENG, p 48-50.

1665 See eg ICC-01/09-01/11-T-97-Red-ENG, p 51-52.

1666 See eg ICC-01/09-01/11-T-81-Red-ENG, p 26-31.

1667 See eg ICC-01/09-01/11-T-84-Red-ENG, p 3-5.

1668 See eg ICC-01/09-01/11-T-78-Red-ENG, p 94-99. Regarding Witness 409, see 'ICC witness: I lied about Ruto's rally', *Daily Nation*, 27 February 2014, available at <<http://www.nation.co.ke/news/politics/ICC-witness-I-lied-about-Rutos-rally/-/1064/2225092/-/ovaxq5/-/index.html>>.

with respect to the accuracy of translation have also been raised on various occasions during the trial hearings.¹⁶⁶⁹

Kenya: *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*

Kenyatta Defence withdraws its request to excuse Kenyatta from continuous attendance at trial

As discussed in the *Gender Report Card 2013*, on 26 November 2013 Trial Chamber V(b),¹⁶⁷⁰ by majority, granted the Prosecution motion for reconsideration of the decision in which Kenyatta had been excused from continuous presence at trial.¹⁶⁷¹ The Chamber determined that, as a general rule, Kenyatta has to be present for his trial and stated that any future requests for excusal would be decided pursuant to the standard established by the Appeals Chamber in its 25 October 2013 decision on Ruto's presence at trial.¹⁶⁷²

Following the amendment of the RPE concerning presence at trial at the 2013 ASP, on 24 January 2014, the Kenyatta Defence requested the Chamber to excuse Kenyatta from the opening of the trial, which had been provisionally set for 5 February 2014,¹⁶⁷³ as well as from the initial hearings scheduled in his case, and to allow him to be represented by counsel only, 'due to his extraordinary obligations at the highest national level as the President of Kenya'.¹⁶⁷⁴ However, on 27 January 2014, following the Trial Chamber's 23 January decision vacating the trial date,¹⁶⁷⁵

1669 See eg ICC-01/09-01/11-T-95-Red-ENG, p 61.

1670 Trial Chamber V(b) was composed of Presiding Judge Kuniko Ozaki (Japan), Judge Robert Fremr (Czech Republic) and Judge Chile Eboe-Osuji (Nigeria).

1671 ICC-01/09-02/11-863, p 13. See also *Gender Report Card 2013*, p 146.

1672 ICC-01/09-02/11-863, para 16.

1673 ICC-01/09-02/11-847, p 5.

1674 ICC-01/09-02/11-882-Red, para 1.

1675 ICC-01/09-02/11-886, p 5.

the Defence withdrew its excusal request, ‘which was based upon the premise that the 5 February date was fixed for trial’.¹⁶⁷⁶

Trial Chamber V(b) vacates trial commencement date and makes observations on Kenya’s cooperation

As discussed in the *Gender Report Card 2013*, the Prosecution has claimed that the Kenyan Government is not cooperating fully with the Court, which has impacted the Prosecution’s ability to obtain crucial evidence, and the start date of the Kenyatta trial has been vacated on a number of occasions.¹⁶⁷⁷ During the period covered by this Report, one such delay arose from a 29 November 2013 Prosecution request for Trial Chamber V(b) to make a finding under Article 87(7) of the Statute that the Kenyan Government had failed to comply with the Prosecution’s April 2012 request to produce financial and other records of the accused (Non-Compliance Application). The Prosecution claimed that the records ‘are relevant to critical issues in this case, and may shed light on the scope of the Accused’s conduct, including the allegation that he financed the crimes with which he is charged’.¹⁶⁷⁸ Subsequently, on 19 December 2013, the Prosecution informed the Chamber that it was ‘withdraw[ing]’ from its witness list a witness who admitted he had ‘previously lied to the Prosecution’ and that an additional witness was ‘no longer willing to appear as a witness’ in the case.¹⁶⁷⁹ The Prosecution explained that ‘[h]aving considered the impact of [one of the witnesses] recantation on the case as a whole, [it did] not consider that it [wa]s currently in a position to present a case that satisfies the evidentiary standard applicable at trial, “beyond reasonable

doubt.”¹⁶⁸⁰ It thus requested the Chamber to adjourn the provisional trial date set for 5 February 2014 for a three-month period to allow it to conduct additional investigative steps and the Chamber to rule upon its Non-Compliance Application.¹⁶⁸¹ In response, the Defence asked the Chamber to reject the Prosecution’s request for an adjournment and to terminate the proceedings.¹⁶⁸² The Prosecution replied that such a termination should not be considered before the Chamber ruled upon the Prosecution’s Non-Compliance Application and reiterated its request for the Chamber to do so.¹⁶⁸³

On 23 January 2014, the Trial Chamber vacated the trial date of 5 February 2014, in order to allow time for it to thoroughly consider the requests pending before it and without prejudice to its decisions on the requests.¹⁶⁸⁴ Thereafter, on 31 March, the Trial Chamber¹⁶⁸⁵ rendered its decision on the Prosecution Non-Compliance Application. In the decision, the Chamber first addressed the validity of the Prosecution request for Kenyatta’s records, in light of the Kenyan Government’s argument that only the Court, and not the Prosecution, had the authority to request assistance under Article 93(1) of the Statute. The Chamber concluded that ‘viewed in the context of the statutory framework as a whole,

1680 ICC-01/09-02/11-875, para 15.

1681 ICC-01/09-02/11-875, paras 3, 17-19. See also, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following an application seeking an adjournment of the provisional trial date’, *OTP Press Statement*, 19 December 2013, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-19-12-2013.aspx>.

1682 ICC-01/09-02/11-878-Red, para 5.

1683 ICC-01/09-02/11-892, paras 2-3.

1684 ICC-01/09-02/11-886, p 5.

1685 At the time of this decision, Judge Chile Eboe-Osuji had stepped down from the case pursuant to Article 41(1) of the Statute and Rule 33 of the RPE. Trial Chamber V(b) was subsequently composed of Presiding Judge Kumiko Ozaki (Japan), Judge Robert Fremr (Czech Republic) and Judge Geoffrey Henderson (Trinidad and Tobago). ICC-01/09-02/11-890.

1676 ICC-01/09-02/11-888, para 3. The Defence reserved the right to make a further application under Rule 134*quater* of the RPE should the need arise. ICC-01/09-02/11-888, para 4.

1677 *Gender Report Card 2013*, p 117-119, 152-155.

1678 ICC-01/09-02/11-866, para 1.

1679 ICC-01/09-02/11-875, paras 9, 11, 14.

the Prosecution has clear authority to make independent requests for cooperation under Article 93(1) of the Statute'.¹⁶⁸⁶

Concerning the Prosecution Non-Compliance Application, as a preliminary matter, the Chamber noted that Regulations 108 and 109(1) of the Regulations of the Court, read together, identify the circumstances in which a request for a finding of non-compliance may be made pursuant to Article 87(7) of the Statute. The Chamber observed that it did not appear that the procedure outlined in these provisions, including 'the declaration of exhaustion of consultations and expiry of the timeline within which challenges to the legality of a request may be brought', had been followed.¹⁶⁸⁷ Nevertheless, the Chamber considered that it was in the interests of justice to consider the application, given that the records request had been outstanding for an 'extensive period', the Prosecution submission that 'it had "exhausted" all attempts to secure the records', and the Chamber's finding that the Prosecution had the authority to make the request.¹⁶⁸⁸

The Chamber noted that the records request had been outstanding for nearly two years, and that the Kenyan Government did not initially challenge the legality of the request but instead had indicated that the request had been forwarded to the relevant ministries.¹⁶⁸⁹

The Chamber concluded that there had been 'a substantial unexplained delay on the part of the Kenyan Government in either giving effect to the cooperation request or raising any problems which may have prevented execution of the request'.¹⁶⁹⁰

1686 ICC-01/09-02/11-908, para 24.

1687 ICC-01/09-02/11-908, para 45.

1688 ICC-01/09-02/11-908, para 45.

1689 ICC-01/09-02/11-908, para 50.

1690 In this regard, the Chamber considered that 'the fact that an adjournment is now being necessitated in order to facilitate compliance amply demonstrates the impact that the Kenyan Government's actions have had on the proceedings in this case'. ICC-01/09-02/11-908, para 51.

In determining whether an adjournment was warranted, the Chamber weighed 'the interests of justice in [the] case, including the rights of the accused and the interests of victims'.¹⁶⁹¹ Having noted that the proceedings had been ongoing for approximately three years and that the start of the trial had already been adjourned numerous times, the Chamber observed that 'any further adjournment without justifiable and compelling reasons could constitute undue delay contrary to the rights of the accused'.¹⁶⁹²

The Chamber also observed that the Prosecution had stated that 'it does not at this stage have sufficient evidence to prove guilt beyond reasonable doubt', and therefore found that 'it would be contrary to the interests of justice for the Prosecution to proceed to trial in circumstances where it believes it will not be in a position to present evidence sufficient to reach this evidentiary threshold'.¹⁶⁹³ Furthermore, the Chamber noted that the Prosecution had acknowledged that the possibility of obtaining sufficient evidence as a result of the records request was 'highly speculative', and the 'realistic prospect of otherwise securing conclusive evidence that could support the charges is "minimal"'.¹⁶⁹⁴ The Chamber emphasised that the 'primary obligation to produce a case ready for trial is on the Prosecution', and that it had 'serious concerns regarding the timeliness and

1691 ICC-01/09-02/11-908, para 78.

1692 ICC-01/09-02/11-908, para 80.

1693 ICC-01/09-02/11-908, para 81.

1694 ICC-01/09-02/11-908, para 82. The Chamber further observed that '[i]t has also been submitted that the non-compliance on the part of the Kenyan Government can be attributed to the accused', but in this regard observed that no evidence was provided 'to support that serious allegation and the Chamber is not called upon to decide the issue of any such alleged interference'. ICC-01/09-02/11-908, para 86. Additionally, the Chamber noted that the Prosecution was 'from an early stage of the proceedings, on notice regarding potentially serious challenges to the credibility of certain of its key witnesses', and in this regard emphasised that '[d]espite the fact that the Prosecution has had ample time to prepare the case for trial, this was not done in an appropriately timely manner'. ICC-01/09-02/11-908, para 87.

thoroughness of Prosecution investigations in this case – including, in accordance with its responsibilities under Article 54(1)(a) of the Statute, in verifying the credibility and reliability of the evidence upon which it intended to rely at trial'. On this basis, the Chamber considered it 'appropriate to caution the Prosecution in that regard'.¹⁶⁹⁵

The Chamber observed that '[e]ach of the factors discussed above would lead to the conclusion that, under ordinary circumstances, the Chamber should not grant a further adjournment at this stage'.¹⁶⁹⁶ However, the Chamber also stated that it was 'mindful of the specific circumstances of the present case and some particular factors to be balanced in order to fulfil its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69(3) of the Statute'.¹⁶⁹⁷ The Chamber noted that the 'direct reason for the Prosecution's evidence falling below the standard required for trial, and the consequent Prosecution Requests, appears to have been the decision to withdraw Witness 12 following his admission of having misled the Prosecution regarding his presence at a particular meeting'. The Chamber also noted that the 'present difficulties with the body of evidence upon which the Prosecution relies is clearly the result of multiple interacting factors which have influenced and impacted the manner in which investigations were conducted in this case', including the 'difficulties faced by the Prosecution in securing the cooperation of the Kenyan Government, which prevented access to the financial records of the accused'.¹⁶⁹⁸

Bearing in mind the centrality of State cooperation in the Statute, the Chamber considered it appropriate to take 'all reasonable judicial measures to ensure cooperation by States Parties in furtherance of the truth-seeking function of the Court before making a finding of noncompliance

1695 ICC-01/09-02/11-908, para 88.

1696 ICC-01/09-02/11-908, para 89.

1697 ICC-01/09-02/11-908, para 90.

1698 ICC-01/09-02/11-908, paras 90-91.

and referring the matter to the ASP for its ultimate consideration'.¹⁶⁹⁹ In this regard, the Chamber noted that even though this case is against the accused in his personal capacity, the 'accused is President of the State Party whose cooperation is at issue'.¹⁷⁰⁰ The Chamber further emphasised that 'a distinct aspect of this case' is that the accused 'is currently the Head of the State and Government of the Republic of Kenya, and therefore in a position of particular influence, including over Kenyan society as a whole', and in that regard noted 'certain conduct on the part of the accused, in his capacity as President, which has the potential to contribute to an atmosphere adverse to the Prosecution's investigation on the ground, as well as to foster hostility towards victims and witnesses who are cooperating with the Court'.¹⁷⁰¹

On this basis, the Chamber concluded that 'although some of the difficulties described were foreseeable and do not justify the delay in investigations', certain of these factors 'amount to unique circumstances, beyond the Prosecution's control, which contributed to a loss of evidence in this case and, consequently, might justify granting a strictly limited opportunity to pursue outstanding investigations at this stage'.¹⁷⁰² The Chamber additionally stated that it was 'very mindful of the views of victims, as expressed by [the] LRV, who have an interest in knowing the truth and seeing those who are responsible for the crimes committed held accountable'. In this regard, it observed that given the time which has passed since both the PEV and the commencement of proceedings in this case, it would 'not be in the interests of victims for charges to be withdrawn at this stage when there is a possibility that a limited period of adjournment may enable necessary evidence, potentially

1699 ICC-01/09-02/11-908, para 91.

1700 ICC-01/09-02/11-908, para 92. The Chamber noted that it had 'a responsibility to ensure that there is an opportunity for the Kenyan Government to comply with its obligations, failing which the matter would be referred'. ICC-01/09-02/11-908, para 92.

1701 ICC-01/09-02/11-908, para 94.

1702 ICC-01/09-02/11-908, para 95.

shedding light on matters central to the charges, to be obtained'.¹⁷⁰³

With regard to the rights of the accused, the Chamber stated that it had considered 'the relative complexity of the present case' and further recalled that the accused is not, and never has been, detained in custody in relation to the charges, and is instead subject to a summons to appear.¹⁷⁰⁴ Under these circumstances, the Chamber found that an adjournment of limited duration, and for a clearly defined purpose, which the Chamber considered necessary in the interests of justice, would not be inconsistent with the rights of the accused.¹⁷⁰⁵

Having balanced each of the aforementioned factors, the Chamber concluded that it was appropriate to grant an adjournment for approximately six months.¹⁷⁰⁶ The Chamber also:

- 1 Directed the Prosecution to, within two weeks of the date of the decision, provide the Kenyan Government with an updated request, which is based upon the records request and tailored to reflect the items that remain of specific relevance to the charges;¹⁷⁰⁷
- 2 Directed the Kenyan Government to promptly review the revised request and notify the Prosecution within two weeks of any problems which may impede or prevent its execution;¹⁷⁰⁸

1703 ICC-01/09-02/11-908, para 96.

1704 ICC-01/09-02/11-908, para 97.

1705 ICC-01/09-02/11-908, para 97.

1706 ICC-01/09-02/11-908, para 100.

1707 ICC-01/09-02/11-908, para 100.

1708 To the extent that any problems that may impede or prevent execution of the request are identified, the Kenyan Government and the Prosecution were directed to immediately engage in meaningful consultations with a view to promptly resolving the matter. Such consultations should include the Kenyan Government identifying and, following consultation with the Prosecution, pursuing alternative procedures available under national law pursuant to which the requested information may be provided. In respect of all other requested items, the Kenyan Government was directed to immediately take steps to comply with the request and furnish the information. ICC-01/09-02/11-908, para 100.

- 3 Directed both the Prosecution and the Kenyan Government, at two-monthly intervals commencing on 30 April 2014, to file an update with the Chamber detailing the progress in executing the revised request, or in conducting any consultations to ensure execution;¹⁷⁰⁹ and
- 4 Rejected the defence request to terminate the proceedings.¹⁷¹⁰

The Chamber also scheduled a status conference for 9 July 2014 to provide an opportunity for the Prosecution and the Kenyan Government to update the Chamber on the status of the execution of the revised request, any consultations, and any other relevant issues.¹⁷¹¹ Finally, having found that the Prosecution had the authority to make the records request, the Chamber decided to defer any formal finding of non-compliance under Article 87(7) of the Statute until the expiration of the adjournment period.¹⁷¹²

Subsequent developments

On 23 May 2014, the Prosecution filed its update on the status of cooperation with the Government of Kenya, in which it noted that on 21 and 22 May 2014, the Prosecution had met representatives of the Kenyan Government to discuss the assistance which had been requested in the revised request.¹⁷¹³ According to the Prosecution, a number of points of contention were identified and discussed during the meeting, and 'a quantity of documentary material was identified, from among that set out in the revised request, which the Government undertook to use its best endeavours to obtain

1709 ICC-01/09-02/11-908, para 100.

1710 ICC-01/09-02/11-908, para 99.

1711 ICC-01/09-02/11-908, para 102.

1712 ICC-01/09-02/11-908, para 52.

1713 ICC-01/09-02/11-922, para 2. On 12 May 2014, the Chamber, in light of the parties' submissions, had extended the deadline and ordered that the first update from the Prosecution and the Kenyan Government be submitted no later than 23 May 2014. ICC-01/09-02/11-918, para 5.

and provide to the OTP no later than an agreed date well in advance of the status conference fixed for 9 July 2014'.¹⁷¹⁴ The heavily redacted filing by the Kenyan Government, filed on 10 June 2014, indicated that even though 'some understanding was reached as to the implementation of certain aspects of the Prosecution's Revised Request for Assistance' during the consultative meetings, it was of the view that the Prosecution's request 'generally fail[ed] to meet the Trial Chamber's requirement of adherence to the tripartite principles of (i) specificity, (ii) relevance and (iii) necessity'.¹⁷¹⁵ On 30 June, the Prosecution filed its second update on the status of cooperation, stating that following an agreement reached between the Prosecution and the Kenyan Government at a meeting in May 2014, the Prosecution had received 'a quantity of materials', which the Prosecution was currently analysing and assessing for disclosure. The Prosecution indicated that it expected to have concluded and summarised that analysis by the time of the status conference.¹⁷¹⁶

During the 9 July status conference, some of which was held *ex parte* in closed session, the Prosecution and the Kenyan Government disagreed on the scope and dates of documents that the Prosecution had requested. The Prosecution informed the Court that Kenya had provided it with documents in five out of the eight categories of records it had requested.¹⁷¹⁷ Kenya's Attorney General

1714 ICC-01/09-02/11-922, para 3.

1715 ICC-01/09-02/11-925-Anx, paras 2-3.

1716 ICC-01/09-02/11-927, para 4.

1717 The eight categories include: company records; land ownership and transfers; tax returns; vehicle registration; bank records; foreign exchange records; telephone records; and intelligence records. The Prosecution stated that it had received information of the vehicles registered to Kenyatta, summaries of Kenyatta's tax returns between 1992 and 2012, his bank statements covering the period December 2007 and February 2008, a letter from the Lands Cabinet Secretary Charity Ngilu stating that her officers had searched land records and did not find any title registered to Kenyatta, and a letter from the National Intelligence Service stating that Kenyatta was not 'a target' between December 2007 and February 2008, thus, there was no information on him in their records covering that period. The Prosecution further stated that the Kenyan Government did not provide any information about companies Kenyatta had shares in or served as an officer in, any foreign exchange transactions records or telephone records.

Githu Muigai informed the Court that in some cases the Government was unable to provide the Prosecution with the documents it had requested because the Prosecution request was not always sufficiently specific or clear as to the relevance to the Prosecution case. At the end of the conference, Judge Ozaki ordered both the Prosecution and the Government to file written submissions on the issue of specificity and relevance of documents, and directed the Prosecution and the Government to continue consulting and negotiating regarding the revised request.¹⁷¹⁸

On 29 July 2014, the Trial Chamber rendered its decision on the Prosecution's revised request.¹⁷¹⁹ The Chamber found that the Prosecution request conformed with the criteria of relevance, specificity and necessity, and hence dismissed the objections made by the Kenyan Government, including submissions that the Kenyan Government could not accede to the Prosecution's request because of practical and administrative obstacles.¹⁷²⁰

1718 See 'Kenyan Attorney General and ICC Prosecution Disagree on Documents', *International Justice Monitor (Kenya cases)*, available at <http://www.ijmonitor.org/2014/07/kenyan-attorney-general-and-icc-prosecution-disagree-on-documents/?utm_source=rss&utm_medium=rss&utm_campaign=kenyan-attorney-general-and-icc-prosecution-disagree-on-documents&utm_source=International+Justice+Monitor&utm_campaign=468e4b43c9-kenya-monitor-rss&utm_medium=email&utm_term=0_f42ffeffb9-468e4b43c9-49202497>.

1719 ICC-01/09-02/11-937.

1720 ICC-01/09-02/11-937, p 22.

Kenya: *The Prosecutor v. Walter Barasa*

Since the ICC unsealed an arrest warrant for Kenyan Journalist Walter Barasa (Barasa) in October 2013 for offences against the administration of justice under Article 70 of the Statute relating to his alleged role in corruptly influencing witnesses, Kenyan courts have issued a number of decisions on the matter. As of the time of writing this Report, there remained two separate but related cases in Kenya's court system concerning the ICC Arrest Warrant against Barasa.¹⁷²¹

On 14 May 2014, Justice Richard Mwangi of the Kenyan High Court in Nairobi issued an arrest warrant against Barasa, which, in principle, set in motion the process of his extradition to the ICC. In issuing the Warrant, Justice Mwangi ruled that he was satisfied that Barasa was 'present in Kenya and is the person being sought by the ICC'.¹⁷²²

On 29 May 2014, following an application by Barasa's lawyer, Kibe Mungai, the Kenyan Court of Appeal suspended Barasa's arrest warrant pending resolution of an appeal Barasa filed against the High Court ruling.¹⁷²³ The Court ruled that Barasa's appeal would be rendered irrelevant if the Government were to arrest him before it determined the validity of the arrest warrant issued by the High Court. The Judges thus issued a temporary order 'restraining the Interior Cabinet Secretary and the Director of Public Prosecution from arresting or handing over the appellant to the ICC pending the hearing and

determination of his appeal'.¹⁷²⁴ The Judges further directed the High Court Registry to set a date for hearing the appeal after 28 days had lapsed. It also directed Barasa's legal team to file the appeal and supporting authorities within 10 days from the date of the ruling and the respondents to file their submissions within 10 days thereafter.¹⁷²⁵

As of the time of writing this Report, no hearings had taken place, and it did not appear that a hearing date had been scheduled.

The second domestic proceeding ongoing in Kenya regarding the ICC Arrest Warrant against Barasa concerns Barasa's challenge to the legality of the Warrant under Kenyan law, in which he argued that his constitutional rights would be violated if the warrant is executed.¹⁷²⁶ As discussed in the *Gender Report Card 2013*, on 11 October 2013, High Court Judge George Odunga ordered the Kenyan police to protect Barasa from arrest until the petition had been heard and decided that the petition would be handled by Judge Mwangi.¹⁷²⁷ On 18 October 2013, Judge Mwangi ruled that the Director of Public Prosecutions could file a criminal application requesting the court to issue an arrest warrant without violating Barasa's rights.¹⁷²⁸

1721 For further information regarding this case, see *Gender Report Card 2013*.

1722 'Order for Walter Barasa's extradition to ICC', *Daily Nation*, 14 May 2014, available at <<http://www.nation.co.ke/news/politics/Walter-Barasa-Extradition-ICC-Case-Witness-Tampering/-/1064/2314954/-/hu4gkqz/-/index.html>>.

1723 'Kenyan Court of Appeal Suspends Arrest Warrant Against Barasa', *International Justice Monitor*, available at <http://www.ijmonitor.org/2014/05/kenyan-court-of-appeal-suspends-arrest-warrant-against-barasa/?utm_source=rss&utm_medium=rss&utm_campaign=kenyan-court-of-appeal-suspends-arrest-warrant-against-barasa&utm_source=International+Justice+Monitor&utm_campaign=b4652a23b7-kenya-monitor-rss&utm_medium=email&utm_term=0_f42ffeffb9-b4652a23b7-49202497>.

1724 'Judges stop Barasa extradition to ICC', *Daily Nation*, 29 May 2014, available at <<http://www.nation.co.ke/news/Judges-stop-Barasa-extradition-to-ICC/-/1056/2331442/-/52yo3r/-/index.html>>.

1725 'Kenyan Court of Appeal Suspends Arrest Warrant Against Barasa', *International Justice Monitor*, available at <http://www.ijmonitor.org/2014/05/kenyan-court-of-appeal-suspends-arrest-warrant-against-barasa/?utm_source=rss&utm_medium=rss&utm_campaign=kenyan-court-of-appeal-suspends-arrest-warrant-against-barasa&utm_source=International+Justice+Monitor&utm_campaign=b4652a23b7-kenya-monitor-rss&utm_medium=email&utm_term=0_f42ffeffb9-b4652a23b7-49202497>.

1726 This case originates in a petition filed on 8 October 2013 by Barasa. 'Kenyan Court of Appeal Suspends Arrest Warrant Against Barasa'.

1727 *Gender Report Card 2013*, p 234.

1728 'Kenyan Court of Appeal Suspends Arrest Warrant Against Barasa', *International Justice Monitor*, available at <http://www.ijmonitor.org/2014/05/kenyan-court-of-appeal-suspends-arrest-warrant-against-barasa/?utm_source=rss&utm_medium=rss&utm_campaign=kenyan-court-of-appeal-suspends-arrest-warrant-against-barasa&utm_source=International+Justice+Monitor&utm_campaign=b4652a23b7-kenya-monitor-rss&utm_medium=email&utm_term=0_f42ffeffb9-b4652a23b7-49202497>.

Appeal proceedings

DRC: *The Prosecutor v. Thomas Lubanga Dyilo*

On 14 March 2012, in the ICC's first case, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I¹⁷²⁹ convicted Thomas Lubanga Dyilo (Lubanga) of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities.¹⁷³⁰ On 10 July 2012, the Trial Chamber sentenced Lubanga to 14 years of imprisonment.¹⁷³¹ On 3 October 2012, the Defence filed a Notice of Appeal against the Trial Judgment and the Sentencing decision, and the Prosecution filed a Notice of Appeal against the Sentencing decision.¹⁷³² The parties filed their documents in support of their respective appeals on 3 December 2012.¹⁷³³

As described in greater detail in the *Gender Report Card 2013*, on 26 November 2012, the Defence sought leave to submit new evidence in its appeals of both the conviction and the sentence pursuant to Regulation 62 of the Regulations of the Court.¹⁷³⁴ Specifically, it requested the Appeals Chamber's

authorisation to call two new Defence witnesses, Witnesses 40 and 41, to support its ground of appeal that '[t]he Trial Chamber erred in finding that assessing an individual's age on the basis of his or her physical appearance is sufficient to determine beyond reasonable doubt whether that individual was under the age of 15 years.'¹⁷³⁵ These Witnesses had appeared in Prosecution video excerpts, which the Trial Chamber relied upon in its Judgment to conclude that there were child soldiers under the age of 15 within the FPLC. The Defence also requested to submit as evidence the Witnesses' electoral cards, as well as a copy of Witness 40's diploma, which it argued would show that the Witnesses were 20 and 19 years old, respectively, at the time that the video was filmed and thus not under the age of 15.¹⁷³⁶ The Defence further requested to submit a list of FPLC members signed by Bosco Ntaganda in 2004, which was disclosed by the Prosecution in October 2012 following a Defence request.¹⁷³⁷ According to the Defence, this evidence would demonstrate that the Trial Chamber had erred in finding in the Trial Judgment that the Chamber had remedied the prejudice caused by the Prosecution's late and incomplete disclosure.¹⁷³⁸

1729 Trial Chamber I was composed of Presiding Judge Adrian Fulford (United Kingdom), Judge Elizabeth Odio Benito (Costa Rica) and Judge René Blattmann (Bolivia).

1730 ICC-01/04-01/06-2842, para 1358. For a more detailed description of the Lubanga Trial Judgment, see *Gender Report Card 2012*, p 132-163.

1731 ICC-01/04-01/06-2901, para 107. For a more detailed description of the Lubanga Sentencing decision, see *Gender Report Card 2012*, p 199-205.

1732 ICC-01/04-01/06-2934; ICC-01/04-01/06-2935; ICC-01/04-01/06-2933. The Appeals Chamber granted participating victims authorisation to participate in the appeals of the conviction and the sentence. ICC-01/04-01/06-2951. For additional information on the parties' appeals of the conviction and the sentence, and victims' participation in the appeals, see *Gender Report Card 2013*, p 164-168.

1733 ICC-01/04-01/06-2948-Red; ICC-01/04-01/06-2949; ICC-01/04-01/06-2950.

1734 ICC-01/04-01/06-2942-Red-tENG, para 5 and p 17-18. For additional information on the Defence request to present additional evidence in the appeals, see *Gender Report Card 2013*, p 164-165.

1735 ICC-01/04-01/06-2942-Red-tENG, paras 5, 19 and p 17-18. The Defence also requested to call Witness 297; however, in its initial Scheduling order for a hearing before the Appeals Chamber, the Appeals Chamber only recalled the Defence request for it to hear Witnesses 40 and 41 and scheduled the hearing accordingly. ICC-01/04-01/06-2942-Red-tENG, paras 20-28; ICC-01/04-01/06-3079, p 1.

1736 ICC-01/04-01/06-2942-Red-tENG, paras 8-17, 42, 52 and p 17-18.

1737 ICC-01/04-01/06-2942-Red-tENG, paras 29-41.

1738 ICC-01/04-01/06-2942-Red-tENG, para 29. Trial Chamber I stayed the proceedings twice in response to Prosecution failures to meet its disclosure obligations. See ICC-01/04-01/06-1401, paras 92-94; ICC-01/04-01/06-2517-Red, para 31. For more information on these stays of proceedings, see *Gender Report Card 2008*, p 46; *Gender Report Card 2009*, p 131-132; *Gender Report Card 2010*, p 147-151. In the Trial Judgment, the Trial Chamber had found that it had taken appropriate measures to ensure fairness to the accused in light of the issues concerning Prosecution disclosure obligations. ICC-01/04-01/06-2842, paras 119-123.

On 13 January 2014, the Appeals Chamber¹⁷³⁹ scheduled a hearing for the testimony of Witnesses 40 and 41 via video-link.¹⁷⁴⁰ Initially set for 14 and 15 April, the Chamber rescheduled the hearing for 19 and 20 May 2014.¹⁷⁴¹

Hearing on the appeals of the Trial Judgment and sentence

Witness questioning

On the first day of the hearing, Witnesses 40 and 41 testified via video-link. The Defence first questioned Witness 40, who confirmed his name and date of birth, as indicated on his electoral card and his State diploma.¹⁷⁴² He also confirmed that he had been part of Lubanga's presidential guard, as well as having appeared in the Prosecution video.¹⁷⁴³ In its cross-examination, the Prosecution established that Witness 40 had never seen his birth certificate, did not know his age when he entered primary and secondary school, and did not know the ages of his eight siblings.¹⁷⁴⁴ The Prosecution also questioned the Witness about an error on his electoral card regarding his birthplace.¹⁷⁴⁵

Witness 41 identified himself and confirmed his date of birth.¹⁷⁴⁶ He stated that he had learned his date of birth upon entering primary

school, when his mother showed him a hospital certificate, and also confirmed the ages of his two brothers.¹⁷⁴⁷ He explained that his first voter card was issued in 2005, and identified his second voter card, which was issued in 2010 and presented in Court.¹⁷⁴⁸ He explained that he had obtained his first voter card by presenting his birth certificate and that only those over 18 years of age were entitled to obtain voter cards.¹⁷⁴⁹ He also confirmed his appearance in a video excerpt, in a uniform and carrying a weapon, as a bodyguard for Lubanga,¹⁷⁵⁰ and that he joined the FPLC in 2002.¹⁷⁵¹ On cross-examination, the Witness indicated that he did not know his parents' birthdates or the birthdates of his siblings from his father's second wife.¹⁷⁵² The Prosecution also established that the Witness had obtained his second voter card by presenting his first voter card rather than an official birth certificate.¹⁷⁵³

Arguments by the parties and participants

Defence arguments

On the second day of the hearing, the parties and participants presented their oral submissions, after which Lubanga had the opportunity to address the Appeals Chamber. The Defence underscored the unreliability of nine Prosecution alleged former child soldier witnesses introduced by Prosecution intermediaries, and observed that the Prosecution did not undertake an Article 70 investigation of its intermediaries despite the Trial Chamber's determination that 'there were reasonable grounds to believe that they had persuaded, abetted, or helped these witnesses to

1739 The Appeals Chamber was composed of Presiding Judge Erkki Kourula (Finland), Judge Sang-Hyun Song (Republic of Korea), Judge Sanji Mmasenono Monageng (Botswana), Judge Anita Ušacka (Latvia) and Judge Ekaterina Trendafilova (Bulgaria).

1740 ICC-01/04-01/06-3067, para 1.

1741 ICC-01/04-01/06-3079, p 3; ICC-01/04-01/06-3083, para 1. The Registry had indicated that it was 'unfortunately materially impossible to secure witness appearance on those days, mostly due to circumstances that are outside of the control of the ICC and of the Defence team'. ICC-01/04-01/06-3075, para 2.

1742 ICC-01/04-01/06-T-362-Red-ENG, p 7 lines 2, 3, 14, p 10 lines 6-11.

1743 ICC-01/04-01/06-T-362-Red-ENG, p 10 line 22, p 11 line 1, p 12 lines 4-6.

1744 ICC-01/04-01/06-T-362-Red-ENG, p 17 lines 6-18.

1745 ICC-01/04-01/06-T-362-Red-ENG, p 17 line 21 to p 18 line 25.

1746 ICC-01/04-01/06-T-362-Red-ENG, p 29 lines 12-16.

1747 ICC-01/04-01/06-T-362-Red-ENG, p 30 lines 3-22.

1748 ICC-01/04-01/06-T-362-Red-ENG, p 31 lines 6-18.

1749 ICC-01/04-01/06-T-362-Red-ENG, p 32 lines 10-18.

1750 ICC-01/04-01/06-T-362-Red-ENG, p 32 line 20 to p 33 line 20.

1751 ICC-01/04-01/06-T-362-Red-ENG, p 33 line 13 to p 34 line 4. The Witness stated that he joined the UPC '[o]n the 25th in 2002', failing to indicate the month.

1752 ICC-01/04-01/06-T-362-Red-ENG, p 36 line 22 to p 37 line 10.

1753 ICC-01/04-01/06-T-362-Red-ENG, p 39 lines 3-4.

lie'.¹⁷⁵⁴ The Defence stated: '[w]hen his own work is fundamentally challenged, the Prosecutor obstructs the manifestation of truth.'¹⁷⁵⁵

1754 ICC-01/04-01/06-T-363-Red-ENG, p 5 line 13 to p 6 line 2. In the Lubanga Trial Judgment, the Trial Chamber found that many alleged child soldier witnesses for the Prosecution lied about 'particular crucial details', including their identity, their ages, or the circumstances of their involvement with the UPC. The Trial Chamber did not find that the Prosecution had established beyond reasonable doubt that nine of its witnesses were child soldiers within the UPC/FPIC. ICC-01/04-01/06-2842, paras 180, 480. It found that the evidence provided by these alleged former child soldier witnesses 'as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot be safely relied upon'. It formally 'communicated' these alleged improprieties to the Prosecution for the purposes of an Article 70 investigation. ICC-01/04-01/06-2842, paras 482-483. Article 70 of the Statute covers offences against the administration of justice. For a more detailed description of the role of Prosecution's intermediaries in the Lubanga trial, see *Gender Report Card 2012*, p 138-145.

1755 ICC-01/04-01/06-T-363-Red-ENG, p 6 lines 3-4. The Defence also observed that the Prosecution did not initiate Article 70 proceedings against the three victims who lied in their testimony. ICC-01/04-01/06-T-363-Red-ENG, p 5 line 22 to p 6 line 2. Previously, on 28 February 2014, the Defence had requested that the Appeals Chamber order the Prosecution to indicate actions it had taken under Article 70 of the Statute to investigate three intermediaries and three victims in the Lubanga case, and to disclose to Lubanga all evidence collected in carrying out such an investigation. ICC-01/04-01/06-3066, para 15 and p 10. On 25 March 2014, the Prosecution explained in its response opposing the request that the Trial Chamber did not order the Prosecution to conduct an Article 70 investigation and that the Prosecution had the sole authority to initiate and conduct such investigations pursuant to Rule 165(1) of the RPE. It also provided the reasons why it decided not to pursue Article 70 investigations in this case. Its decision relating to intermediaries was based on the findings of an independent consultant it had hired. ICC-01/04-01/06-3069, paras 1, 6-9. On 17 June 2014, the Appeals Chamber rejected the Defence request, finding that the Prosecution had the sole authority to initiate Article 70 investigations under Rule 165(1) of the RPE and that there was no additional evidence to be disclosed to the Defence, since the Prosecution had not undertaken further investigations into the three victims or the three intermediaries. ICC-01/04-01/06-3114, paras 21-22.

The Defence claimed that the Trial Chamber had relied on ancillary evidence, namely video footage and its subjective, visual appreciation of the age of young soldiers as they appeared in the video, to establish the existence of children under the age of 15 within the FPLC. It stated, 'there remains no precise and verifiable example of the presence of soldiers aged under 15 years of age during the period in question'.¹⁷⁵⁶ The Defence noted that the Trial Chamber referred to Witness 40's picture four times in the Trial Judgment, and determined that 'he was of an age very much below 15 years' despite the fact that the Defence had claimed that he was either 19 or 20 years old.¹⁷⁵⁷ It stated, 'by looking at this particular picture, everybody could easily have believed that he was genuinely young, which we say proves that appearances can be deceiving'.¹⁷⁵⁸ It argued that the Chamber erred in relying on the physical appearance of these individuals to make a finding beyond reasonable doubt. The Defence further argued that the Prosecution was obliged to use due diligence in investigating exonerating evidence, and that the Defence could not be expected to prove the age of each individual in the Prosecution videos.¹⁷⁵⁹

The Defence argued that the Trial Chamber did not take into consideration the irreparable prejudice caused to the Defence by the introduction of false evidence by Prosecution intermediaries, rendering the process unfair.¹⁷⁶⁰ It also argued that crucial evidence was not disclosed 'spontaneously and without delay' by the Prosecution, including the list of FLPC soldiers within the Prosecution's possession

1756 ICC-01/04-01/06-T-363-Red-ENG, p 6 lines 21-23.

1757 ICC-01/04-01/06-T-363-Red-ENG, p 7 lines 6-7, 17-21.

1758 ICC-01/04-01/06-T-363-Red-ENG, p 7 lines 22-24.

1759 ICC-01/04-01/06-T-363-Red-ENG, p 9 lines 7-19. The Defence noted in this regard that in the Judgment, the Trial Chamber stated that 'the Prosecutor was particularly negligent in fulfilling his investigatory duty' by not properly verifying the evidence. ICC-01/04-01/06-T-363-Red-ENG, p 10 lines 18-24.

1760 ICC-01/04-01/06-T-363-Red-ENG, p 11 lines 16-24.

since 2006.¹⁷⁶¹ It asserted that the Prosecution's breach of its statutory disclosure obligations further rendered the trial unfair.¹⁷⁶² With respect to Lubanga's criminal intent, the Defence asserted that the Witnesses' testimony called into question the Trial Chamber's finding that Lubanga knew of recruits under the age of 15 in his presidential guard.¹⁷⁶³ Finally, the Defence argued that criminal intent could not be ascribed to Lubanga in light of his efforts to demobilise child soldiers within the UPC.¹⁷⁶⁴

Prosecution arguments

The Prosecution first argued that the Appeals Chamber should adopt strict criteria for the admission of new evidence on appeal and reject evidence that was available at trial. In this regard, it argued that the evidence provided by the Witnesses was fully available at trial as the accused knew them, having seen them every day as part of his personal guard.¹⁷⁶⁵ The Prosecution also argued that Witnesses 40 and 41 'both presented common and serious credibility problems', as they had not provided their official birth certificates to demonstrate their ages, while their testimony indicated that their voter cards were obtained without official documents and contained errors.¹⁷⁶⁶ It thus argued that credibility concerns should lead the Appeals Chamber to reject this evidence. It asserted that even if the Appeals Chamber admitted this evidence, it would not impact the Trial Judgment, as it only discredited two excerpts of the corroborative video evidence, rather than 'using the Trial Chamber's words, [the] "sheer volume of credible evidence presented and discussed at trial"'.¹⁷⁶⁷

1761 ICC-01/04-01/06-T-363-Red-ENG, p 12 lines 3-4, 12-21.

1762 ICC-01/04-01/06-T-363-Red-ENG, p 14 lines 20-23.

1763 ICC-01/04-01/06-T-363-Red-ENG, p 16 lines 8-24.

1764 ICC-01/04-01/06-T-363-Red-ENG, p 17 line 9 to p 19 line 19.

1765 ICC-01/04-01/06-T-363-Red-ENG, p 20 line 10 to p 21 line 8.

1766 ICC-01/04-01/06-T-363-Red-ENG, p 24 line 19 to p 25 line 11.

1767 ICC-01/04-01/06-T-363-Red-ENG, p 27 lines 11-19.

The Prosecution observed that the Defence had claimed fair trial rights violations three times during the trial,¹⁷⁶⁸ which were rejected by the Trial Chamber. It also asserted that any disclosure issues and the problems related to Prosecution intermediaries were remedied at trial. It further argued that the Prosecution did not breach its disclosure obligations,¹⁷⁶⁹ asserting that it took its disclosure obligations seriously, and that any 'isolated good faith oversights' were marginal in nature.¹⁷⁷⁰ It thus asserted that the fair trial arguments of the Defence should be dismissed.

Legal Representatives of Victims arguments

The Legal Representative of the principal group of Victims asserted that the Defence argument that the presence of child soldiers in an armed group could only be proved by establishing their identities was 'absurd'.¹⁷⁷¹ He described Trial Chamber I as 'scrupulously respectful of Defence entitlements'.¹⁷⁷² He called for the confirmation of Lubanga's guilt, and recalled that victim suffering was not taken into account for the purpose of sentencing, including the rape and sexual enslavement of victims.¹⁷⁷³

Concerning Lubanga's criminal intent, the Legal Representative of the child soldier Victims argued that there was 'absolutely no doubt that the accused was privy to the recruitment of children under 15 years of age for the purpose of using them in hostilities'.¹⁷⁷⁴ He argued that the testimony of Witnesses 40 and 41 did not undermine the Trial Chamber's findings in its Judgment regarding the enlistment, conscription and use of child soldiers under the age of 15. In this regard, he emphasised that under Congolese law, the age of a child could only be

1768 ICC-01/04-01/06-T-363-Red-ENG, p 34 lines 13-18.

1769 ICC-01/04-01/06-T-363-Red-ENG, p 32 line 15 to p 35 line 6.

1770 ICC-01/04-01/06-T-363-Red-ENG, p 37 lines 6-19.

1771 ICC-01/04-01/06-T-363-Red-ENG, p 42 lines 4-7.

1772 ICC-01/04-01/06-T-363-Red-ENG, p 42 line 20.

1773 ICC-01/04-01/06-T-363-Red-ENG, p 46 lines 10-15.

1774 ICC-01/04-01/06-T-363-Red-ENG, p 48 lines 18-20.

established by a birth certificate issued by the civil status registry or *in lieu* of the certificate by court declaration.¹⁷⁷⁵ He therefore argued that the statements of the Witnesses based on voter cards, which were not supported by official birth certificates, should not be accepted as evidence.

Statement of Lubanga

In his statement to the Appeals Chamber, Lubanga emphasised that he had spent nine years in preventive detention, and that such a situation was 'long and terrible for a human being', especially given the distance from his family.¹⁷⁷⁶ He expressed feeling that he 'was a victim of a fledgling legal process', and asked: '[h]ow much time do I still have to wait to know my fate for once and for all?'¹⁷⁷⁷ He thanked the Witnesses for their courage in testifying on his behalf and in saying 'who they are', which 'show[ed] the reality of young FPLC soldiers'.¹⁷⁷⁸ He asserted that images in the video excerpts had been misinterpreted, resulting in his conviction. He stated: '[t]hroughout these proceedings I had the feeling that in this Court, which is so far from Ituri, nobody could understand what really happened.'¹⁷⁷⁹ Lubanga also highlighted his efforts undertaken to prohibit the enlistment of minors and toward demobilising child soldiers.¹⁷⁸⁰

Lubanga claimed that he had acted 'in the middle of the greatest danger', stating, 'I acted for these children, these women, these elderly persons from Ituri. They and I did not have any other recourse'.¹⁷⁸¹ He concluded by stating: '[t]his conflict generated a huge amount of victims. I still regret the actions that I carried out were not able to put an end to that conflict that ravaged our country [...] those who saw me act know that never [...] did I tolerate that children under the age of 15 be recruited as soldiers'.¹⁷⁸²

At the time of writing this Report, no decision had been rendered on the appeals of the Lubanga Trial Judgment or Sentencing decision.

1775 ICC-01/04-01/06-T-363-Red-ENG, p 49 lines 14-18.

1776 ICC-01/04-01/06-T-363-Red-ENG, p 65 lines 15-18.

1777 ICC-01/04-01/06-T-363-Red-ENG, p 65 lines 21-22.

1778 ICC-01/04-01/06-T-363-Red-ENG, p 66 lines 21-22.

1779 ICC-01/04-01/06-T-363-Red-ENG, p 67 lines 10-11.

1780 ICC-01/04-01/06-T-363-Red-ENG, p 69 line 11 to p 71 line 10.

1781 ICC-01/04-01/06-T-363-Red-ENG, p 71 lines 17-19.

1782 ICC-01/04-01/06-T-363-Red-ENG, p 72 lines 2-6.

DRC: *The Prosecutor v. Mathieu Ngudjolo Chui*

On 18 December 2012, in the ICC's second Trial Judgment, Trial Chamber II,¹⁷⁸³ Judge Van den Wyngaert concurring, acquitted Mathieu Ngudjolo Chui (Ngudjolo) of all crimes charged by the Prosecution in the case *The Prosecutor v. Mathieu Ngudjolo Chui*.¹⁷⁸⁴ Ngudjolo was tried jointly with Germain Katanga (Katanga), constituting the Court's second case as well as second trial arising from the DRC Situation, after *The Prosecutor v. Thomas Lubanga Dyilo*. The Katanga and Ngudjolo case was the first in which crimes of sexual violence had been charged.¹⁷⁸⁵ The trial centred on an attack on the village of Bogoro in the Ituri region by the FNI and the FRPI on 24 February 2003. Katanga and Ngudjolo were the alleged commanders of the FRPI and FNI, respectively.

Ngudjolo was charged under Article 25(3)(a) of the Statute with seven counts of war crimes, including: rape, sexual slavery, wilful killings, directing an attack against a civilian population, using children under the age of 15 to take active part in the hostilities, destruction of property, and pillaging.¹⁷⁸⁶ He was also charged with three counts of crimes against humanity, namely: rape, sexual slavery, and murder.¹⁷⁸⁷

On 21 November 2012, the majority of Trial Chamber II severed the case against Katanga and Ngudjolo and notified the parties of a potential recharacterisation of the facts underlying the form of criminal responsibility with which Katanga was charged, pursuant to Regulation

55 of the Regulations of the Court (Severance decision).¹⁷⁸⁸

On 18 December 2012, the Trial Chamber acquitted Ngudjolo of all charges, finding an absence of sufficient evidence to prove his criminal responsibility.¹⁷⁸⁹ The Trial Judgment principally consisted of the Trial Chamber's factual conclusions related to the organisation and structure of the Lendu combatants from Bedu-Ezekere within the relevant period, including Ngudjolo's alleged role and function in that militia. While the Chamber affirmed that the events as alleged, including the crimes, had taken place,¹⁷⁹⁰ it concluded that, in the absence of sufficient evidence, it could not find beyond a reasonable doubt that Ngudjolo was the supreme commander of the Lendu combatants from Bedu-Ezekere at the time of the Bogoro attack, as charged by the Prosecution.¹⁷⁹¹ The Trial Chamber thus acquitted Ngudjolo of all charges, due to the absence of sufficient evidence to prove his criminal responsibility.

In acquitting Ngudjolo, the Trial Chamber found that the Prosecution's three key witnesses, Witnesses 250, 279 and 280, were not credible

1783 Trial Chamber II was composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Christine Van den Wyngaert (Belgium).

1784 ICC-01/04-02/12-3-tENG.

1785 Both Katanga and Ngudjolo were charged with rape and sexual slavery.

1786 Articles 8(2)(b)(xxii), 8(2)(a)(i), 8(2)(b)(i), 8(2)(b)(xxvi), 8(2)(b)(xiii), 8(2)(b)(xvi), Rome Statute.

1787 Articles 7(1)(g), 7(1)(a), Rome Statute.

1788 ICC-01/04-01/07-3319-tENG/FRA. For more detailed information on the Regulation 55 proceedings, see *Gender Report Card 2013*, p 92-104. See also 'Modes of Liability: A review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 116-130, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

1789 ICC-01/04-02/12-3-tENG. See also *Gender Report Card 2013*, p 89-90; Women's Initiatives for Gender Justice, 'Trial Chamber II acquits Ngudjolo in second trial judgment at the ICC', *Legal Eye on the ICC eLetter*, February 2013, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye2-13-FULL/LegalEye2-13.html#2>>.

1790 Specifically concerning the sexual violence charges, the Chamber had found, as a factual matter, that there was extensive evidence attesting to the commission of rape and sexual enslavement. ICC-01/04-02/12-3-tENG, para 338.

1791 ICC-01/04-02/12-3-tENG, paras 499, 503.

and thus could not be relied upon for the purpose of this case. All three Witnesses had claimed to be former child soldiers. Based on contradictions in their testimonies and documentary evidence produced by the Defence demonstrating their actual ages, scholastic records and whereabouts at the time, the Chamber found that the Witnesses lacked credibility in relation to their ages, school attendance and conscription.¹⁷⁹² The Prosecution had relied almost entirely on the testimony of these three Witnesses to demonstrate Ngudjolo's authority as supreme commander of the Lendu militia.¹⁷⁹³ The Chamber also found that several of the witnesses who testified on this issue had based their knowledge on hearsay. It thus accorded this testimony little probative value. The Chamber reasoned that it could not exclude the possibility that these Witnesses had associated Ngudjolo's status at the end of March 2003 to the position he had occupied at the time of the attack in February of that year.¹⁷⁹⁴ The Trial Chamber further declined to infer from the Prosecution evidence

1792 While Trial Chamber I in the Lubanga case had considered evidence concerning the influence that Prosecution intermediaries may have had on witnesses as a significant factor, the role of intermediaries was not similarly highlighted by Trial Chamber II in the Ngudjolo Trial Judgment. Although the credibility of Prosecution witnesses in the Ngudjolo case was, in part, attributed by the Defence to their relationship to Prosecution intermediaries, including those at issue in the Lubanga case, Trial Chamber II declined to include a discussion of these linkages within the Judgment and based its credibility findings on the contradictory testimonies of the witnesses in question and on the contravening evidence presented by the Defence. ICC-01/04-02/12-3-tENG, paras 127-219 and fn 406.

1793 ICC-01/04-02/12-3-tENG, para 343. The Chamber had further suggested that the Prosecution should have engaged in a more 'attentive' analysis of the civil status and educational history of its witnesses. It noted that the Defence teams had provided a large number of civil status documents and educational records, and that the Prosecution had never challenged the authenticity of such documents, which had carried significant weight in the Chamber's assessment of the credibility of the Prosecution witnesses' testimonies. ICC-01/04-02/12-3-tENG, para 121.

1794 ICC-01/04-02/12-3-tENG, paras 432-439, 496.

of Ngudjolo's participation in high-level activities in March 2003 that he was effectively the lead commander of the Lendu combatants from Bedu-Ezekere at the time of the Bogoro attack in February.¹⁷⁹⁵

Prosecution appeal

As described in the *Gender Report Card 2013*, on 20 December 2012, the Prosecution filed its Notice of Appeal against the Judgment.¹⁷⁹⁶ On 19 March 2013, the Prosecution submitted a confidential *ex parte* document in support of the appeal, asserting three grounds of appeal. On 22 March, the Prosecution filed a confidential, redacted version of its document in support of the appeal with the third ground of appeal entirely redacted.¹⁷⁹⁷ On 3 April, the Prosecution filed a public, redacted version of its document in support of the appeal.¹⁷⁹⁸ The arguments supporting the third ground of appeal, which was classified as confidential, *ex parte*, remained fully redacted.¹⁷⁹⁹

In its first ground of appeal, the Prosecution argued that Trial Chamber I had misapplied the requisite standard of proof. The Prosecution asserted that the Trial Chamber had, by engaging in 'a hypothetical alternative reading of the evidence', effectively required a higher standard of proof of 'beyond any doubt', instead of 'beyond reasonable doubt'.¹⁸⁰⁰ The Prosecution

1795 ICC-01/04-02/12-3-tENG, paras 499, 501, 503.

1796 See *Gender Report Card 2013*, p 170-171. See also ICC-01/04-02/12-10. For further information, see Women's Initiatives for Gender Justice, 'Prosecution appeals Trial Chamber II's judgement acquitting Ngudjolo', *Legal Eye on the ICC eLetter*, January 2014, available at <<http://www.iccwomen.org/news/docs/WI-LegalEye1-14/LegalEye1-14.html#1>>.

1797 ICC-01/04-02/12-45.

1798 ICC-01/04-02/12-39-Red2.

1799 The Legal Representatives of Victims have subsequently requested a partial lifting of the confidential classification of the third ground of appeal. ICC-01/04-02/12-76-Conf, cited in ICC-01/04-02/12-77. At the time of writing this Report, the Appeals Chamber had not yet ruled on their request.

1800 ICC-01/04-02/12-39-Red2, para 38 (emphasis in original).

underscored the jurisprudence of the *ad hoc* tribunals and diverse national jurisdictions, asserting that the application of the ‘beyond reasonable doubt’ standard must be based on logic, reason and common sense, as well as the evidence, or lack thereof, that was adduced at trial.¹⁸⁰¹ It argued that the Trial Chamber had engaged in a pattern of concluding that the Prosecution had not established facts beyond a reasonable doubt ‘based on a possible alternative or competing inference or other grounds’ that was neither logical, nor based on the trial record.¹⁸⁰²

The second ground of appeal asserted that the Chamber had erred in failing to consider the totality of the evidence in its assessment of witness credibility, the facts of the case, and Ngudjolo’s guilt. Noting that the Chamber could rely on circumstantial evidence, and that hearsay evidence was admissible, the Prosecution asserted that the Chamber failed to consider relevant corroborating evidence in its assessment of specific facts.¹⁸⁰³

The public redacted version of the third ground of appeal claimed that the ‘Trial Chamber infringed the Prosecution’s right to a fair trial under Article 64(2)¹⁸⁰⁴ by ‘refusing the Prosecution’s persistent requests’ for access to Registry reports on Ngudjolo’s communications from the ICC Detention Centre, which indicated ‘his on-going efforts of witness interference and evidence

1801 ICC-01/04-02/12-39-Red2, paras 42-50.

1802 ICC-01/04-02/12-39-Red2, para 38.

1803 ICC-01/04-02/12-39-Red2, paras 72, 83, 85. In both grounds of appeal, the Prosecution relied heavily on the testimony of Witness 317, an investigator in the MONUC human rights section charged with investigating the Bogoro attack. The Witness testified that Ngudjolo had admitted to her that he had organised the Bogoro attack, as well as a subsequent attack on Mandro. See the transcripts of Witness 317’s testimony: ICC-01/04-01/07-T-228-ENG; ICC-01/04-01/07-T-229-ENG; ICC-01/04-01/07-T-230-ENG. The Prosecution asserted that the Trial Chamber’s decision not to give weight to her testimony, despite finding it credible, demonstrated the Chamber’s failure to properly assess the probative value of the evidence.

1804 ICC-01/04-02/12-39-Red4, paras 31, 140-142.

tampering’ and by ‘ignoring this body of evidence’ when assessing the credibility, in particular, of a Prosecution witness who had recanted earlier statements regarding the killing of civilians in Bogoro.¹⁸⁰⁵

The Prosecution requested a reversal of the Trial Judgment, a factual finding by the Appeals Chamber concerning Ngudjolo’s position of authority, and a full or partial retrial.¹⁸⁰⁶

Defence response

On 18 June 2013, the Defence filed a response to the Prosecution document in support of the appeal, submitting that the acquittal should be confirmed in its entirety.¹⁸⁰⁷ The Defence argued that the Prosecution appeal was ‘frivolous’, and that its arguments were ‘fallacious’ and without legal foundation.¹⁸⁰⁸ The Defence also challenged the admissibility of the appeal based on the inconsistency of the Prosecution’s approach in prosecuting Ngudjolo as an indirect co-perpetrator, while his former co-accused, Katanga, was determined by the Trial Chamber to have merely contributed to the crimes.¹⁸⁰⁹ In the Defence’s view, the Prosecution could not adopt a ‘dual strategy’ in prosecuting Ngudjolo on the basis of Article 25(3)(a) of the Statute and Katanga on the basis of Article 25(3)(d) of the Statute.¹⁸¹⁰

1805 ICC-01/04-02/12-39-Red4, paras 140-142.

1806 ICC-01/04-02/12-39-Red4, paras 231-233.

1807 ICC-01/04-02/12-90-Corr2-Red, paras 8, 367. The redacted corrigendum of the Defence response was filed on 23 October 2013.

1808 ICC-01/04-02/12-90-Corr2-Red, paras 2-3.

1809 ICC-01/04-02/12-90-Corr2-Red, paras 17, 20-21, 24-25, 124. As noted in the *Trial Proceedings* section of this Report, on 7 March 2014, Katanga was convicted by Trial Chamber II as an accessory to the war crimes of directing an attack against a civilian population, pillaging, and destruction of property, as well as murder as a war crime and a crime against humanity under Article 25(3)(d) of the Statute. The Trial Chamber had recharacterised the facts underlying the mode of liability for which Katanga was charged from co-perpetration under Article 25(3)(a) of the Statute, pursuant to Regulation 55 of the Regulations of the Court.

1810 ICC-01/04-02/12-90-Corr2-Red, para 24.

Regarding the Prosecution's first ground of appeal, the Defence recalled that the burden of proof required that each constituent element of the crime be established beyond reasonable doubt, and that the accused must be acquitted if there was any reasonable explanation of the evidence other than his guilt.¹⁸¹¹ It cited the maxim '*in dubio pro reo*', according to which all doubt must be read in favour of the accused.¹⁸¹² The Defence argued that: (i) the Trial Chamber's conclusions were supported by the evidence; (ii) the Chamber committed no legal or material error, but found that the evidence could lead to other rational conclusions; and (iii) the Appeals Chamber could not substitute its judgment for the Trial Chamber's unless the latter's was unreasonable.¹⁸¹³

Concerning the Prosecution's second ground of appeal, the Defence submitted that the Prosecution did not identify which pieces of evidence the Chamber should have considered to convict Ngudjolo.¹⁸¹⁴ The Defence argued that a verdict could not be based on non-credible witnesses and characterised this ground of appeal as a 'vast enterprise in vain to restore the credibility of [Prosecution] witnesses'.¹⁸¹⁵ It recalled in this regard that the Trial Chamber did not rely on the testimony of Witnesses 250, 219 and 28 to corroborate other evidence because it had discarded their testimonies as not credible in the Severance decision, which the Prosecution

did not challenge.¹⁸¹⁶ The Defence repeatedly critiqued the Prosecution for 'sterilising' all efforts of truth seeking and suggested that the Prosecution sought to convict Ngudjolo at all cost, in violation of the presumption of innocence and ignoring evidence to the contrary.¹⁸¹⁷

The Defence argued that the Prosecution's third ground of appeal lacked a legal basis for four reasons: (i) the Prosecution had no basis to appeal fair trial violations as Article 81(1) of the Rome Statute did not list fairness as a basis for Prosecution appeal of trial judgments;¹⁸¹⁸ (ii) access to the recorded calls were no longer a contentious issue in light of the Trial Chamber's final determination of the issue;¹⁸¹⁹ (iii) the third ground of appeal was never the subject of adversary proceedings between the parties and participants;¹⁸²⁰ and (iv) fairness and truth-seeking has been an ongoing concern of the Chamber.¹⁸²¹ The Defence also argued that the Prosecution did not demonstrate how access to the evidence concerning the phone calls would have changed the Trial Judgment, or how Witness 250 would have been rehabilitated.¹⁸²²

1811 ICC-01/04-02/12-90-Corr2-Red, para 30.

1812 ICC-01/04-02/12-90-Corr2-Red, paras 31-38, citing extensively to the ICTY *Delalić* and *Stanišić* cases.

1813 ICC-01/04-02/12-90-Corr2-Red, paras 41, 50, 67-69, 77. The Defence argued that the Chamber did not impose an impossible standard of proof, but rather that there were several possible explanations to be drawn from the evidence that did not exclude acquittal.

1814 ICC-01/04-02/12-90-Corr2-Red, para 117.

1815 ICC-01/04-02/12-90-Corr2-Red, paras 118, 214.

1816 ICC-01/04-02/12-90-Corr2-Red, paras 159, 168, 222.

The Defence recalled that Witnesses 250 and 28 were presented to the Prosecution through its Intermediaries 316 and 183, the latter Intermediary asking Witness 28 to lie to the Chamber. It further recalled Trial Chamber I's findings concerning Intermediary 316 inciting witnesses to give false testimony.

1817 ICC-01/04-02/12-90-Corr2-Red, paras 120, 131.

1818 ICC-01/04-02/12-90-Corr2-Red, paras 241-243.

1819 ICC-01/04-02/12-90-Corr2-Red, paras 241, 246, 279, 281, citing ICC-01/04-01/07-3120.

1820 ICC-01/04-02/12-90-Corr2-Red, paras 241, 286-293.

1821 ICC-01/04-02/12-90-Corr2-Red, paras 241, 294-305.

1822 ICC-01/04-02/12-90-Corr2-Red, para 240. See further ICC-01/04-02/12-126; ICC-01/04-02/12-134-Red.

Participation and observations of the Legal Representatives of Victims

On 6 March 2013, the Appeals Chamber¹⁸²³ granted a joint request¹⁸²⁴ by the Legal Representatives of Victims to participate in the appeal.¹⁸²⁵ As described in the *Gender Report Card 2013*, extensive litigation followed on the participation of anonymous victims in the appeals.¹⁸²⁶

On 1 August 2013, the Legal Representative of the principal group of Victims submitted its observations, requesting a reversal or an amendment of the Trial Judgment, or a new trial, pursuant to Article 83(2) of the Statute.¹⁸²⁷ The Legal Representative agreed with the Prosecution that the Chamber applied a stricter standard than ‘beyond reasonable doubt’, effectively requiring beyond ‘any doubt’, resulting in factual errors affecting the culpability of the accused.¹⁸²⁸ The Legal Representative argued that the Chamber based its exclusion of witness testimony on hypothetical explanations, which were devoid of logic and not supported by the

evidence, vitiating the Judgment.¹⁸²⁹ The Legal Representative argued that if it had correctly applied the beyond reasonable doubt standard, the Chamber would not have discarded the testimonies that would have established Ngudjolo’s criminal responsibility.¹⁸³⁰

The Legal Representative agreed with the Prosecution that the Chamber erred in law and fact by not considering the totality of the evidence. The Legal Representative argued that the Chamber made unreasonable factual findings and did not provide sufficient reasoning for its conclusions.¹⁸³¹ Finally, the Legal Representative agreed with the Prosecution that the Chamber committed a legal and procedural error in not allowing the Prosecution access to documents relating to the evidence.¹⁸³² The Legal Representative’s arguments related to the third ground of appeal were entirely redacted.¹⁸³³

On 22 July 2013, the Legal Representative of the child soldier Victims submitted its observations, focusing on Ngudjolo’s criminal responsibility for the crimes involving the use of child soldiers.¹⁸³⁴ The Legal Representative argued that the Chamber erred in its evaluation of the evidence on Ngudjolo’s authority and in its assessment of the evidence on the link between Ngudjolo and Lendu child soldiers. The Legal Representative argued that a correct assessment would have led the Chamber to conclude that Ngudjolo was the chief of the Bedu-Ezekere combatants who

1823 The Appeals Chamber was composed of Presiding Judge Sanji Mmasenono Monageng (Botswana), Judge Sang-Hyun Song (Republic of Korea), Judge Cuno Tarfusser (Italy), Judge Erkki Kourula (Finland) and Judge Ekaterina Trendafilova (Bulgaria).

1824 ICC-01/04-02/12-23.

1825 ICC-01/04-02/12-30, para 7. In response to the joint request by the Legal Representatives of Victims to lift the *ex parte* classification of the third ground in the Prosecution document in support of the appeal, the Appeals Chamber ordered the Registry to re-classify the document as confidential, finding that in order to enjoy full participation in the appeal and present their views and concerns, the Legal Representatives should be granted access to that information. It considered that their access would not jeopardise the confidentiality of the information as they could not disclose it to third parties. ICC-01/04-02/12-49-Conf; ICC-01/04-02/12-71, para 9.

1826 See further *Gender Report Card 2013*, p 171.

1827 ICC-01/04-02/12-124-Corr-Red, paras 194, 198.

1828 ICC-01/04-02/12-124-Corr-Red, paras 12, 14, 16, 19 (emphasis in original). The Legal Representative agreed with the errors identified by the Prosecution in its first ground of appeal, and identified additional errors with respect to Witnesses 317, D2-176 and 280.

1829 ICC-01/04-02/12-124-Corr-Red, paras 28, 43.

1830 ICC-01/04-02/12-124-Corr-Red, para 43.

1831 ICC-01/04-02/12-124-Corr-Red, para 57.

1832 ICC-01/04-02/12-124-Corr-Red, para 159.

1833 ICC-01/04-02/12-124-Corr-Red, paras 160-192.

1834 ICC-01/04-02/12-125-Corr-Red. The Legal Representative noted that the testimony of Witnesses 279 and 280 was essential for establishing Ngudjolo’s responsibility related to child soldiers as they testified about the existence of child soldiers in the Bedu-Ezekere camps, parades in Zombe, occasionally under Ngudjolo’s command, the use of child soldiers as escorts to commanders and the participation of child soldiers in the Bogoro attack. ICC-01/04-02/12-125-Corr-Red, para 3.

participated in the Bogoro attack, and that there was a link between the child soldiers in Bogoro and Ngudjolo.¹⁸³⁵

Agreeing with the Prosecution, the Legal Representative argued that the Chamber did not adopt a logical vision of the totality of the evidence and applied a standard above ‘beyond reasonable doubt’.¹⁸³⁶ Concerning the Chamber’s misapplication of the standard of proof, the Legal Representative argued that the Chamber applied credibility tests to sensitive and peripheral issues. The Legal Representative identified specific errors in the Chamber’s assessments of the discarded testimonies of alleged former child soldier Witnesses 279 and 280,¹⁸³⁷ as well as the testimonies of discarded Witnesses 250 and 28.¹⁸³⁸ Furthermore, the Legal Representative suggested that the Chamber seemed to ‘seek out’ doubt about the credibility of these Witnesses and

engaged in reasoning not supported by its factual findings, but rather on suppositions.¹⁸³⁹

Moreover, the Legal Representative argued that the Chamber imposed a ‘Western perception’ in its expectation of witnesses, which was not adapted to the Congolese reality.¹⁸⁴⁰ The Legal Representative stated that civil status issues were addressed by the Chamber ‘in flagrant ignorance of the reality’ in a country where this information is weak, and where precise birthdates are not only impossible to know but are considered unimportant for most of the population, especially in rural areas such as those from where the Witnesses originate.¹⁸⁴¹ The Legal Representative further suggested that the Chamber set excessive demands in contradiction to the reality of the DRC, and in a manner unfair to the victims, for example, by considering that witnesses who did not know their age were lying.¹⁸⁴² The Legal Representative’s response to the Prosecution’s third ground of appeal was entirely redacted.¹⁸⁴³

On 29 August 2014, the Prosecution requested an appeals hearing, which both Legal Representatives supported, and which the Defence did not oppose.¹⁸⁴⁴ In response to the Prosecution request, on 18 September 2014, the Appeals Chamber authorised a hearing on the Prosecution appeal of the Trial Judgment, which at the time of writing was scheduled for 21 October.¹⁸⁴⁵

1835 ICC-01/04-02/12-125-Corr-Red, paras 35-36, 141, 157, 196, 198 and fn 100. The Legal Representative argued that Ngudjolo’s status as a military chief implied his use of child soldiers, especially in light of the Chamber’s findings regarding the presence of child soldiers within the Lendu militia and among the assailants in Bogoro.

1836 ICC-01/04-02/12-125-Corr-Red, para 152.

1837 ICC-01/04-02/12-125-Corr-Red, paras 38, 40-47, 50. The Legal Representative argued that Witness 279’s age at conscription had no bearing on his testimony about child soldiers in the camp, their functions and their presence in the Bogoro attack. The Legal Representative recalled that the Chamber noted the contradictions in the testimony of the Witness, although a reading of the entire testimony revealed coherence on the issues raised by the Chamber. They argued that the Trial Chamber failed to consider the particular vulnerability of the Witness, as well as the numerous details he provided on life within the militia, the functions of diverse commanders and the preparation for and unfolding of the attack.

1838 ICC-01/04-02/12-125-Corr-Red, paras 83, 106. The Legal Representative asserted that the Chamber erroneously interpreted the testimony of Witness 250, concluding that the testimony was contradictory to an earlier statement. The Representative argued that the Court thus erred in failing to examine it in light of the totality of his testimony. ICC-01/04-02/12-125-Corr-Red, paras 41-42. Regarding Witness 28, the Legal Representative asserted that in its assessment, the Chamber highlighted unestablished or peripheral contradictions in his detailed testimony, especially about the attack and its preparation.

1839 ICC-01/04-02/12-125-Corr-Red, paras 192-193.

1840 ICC-01/04-02/12-125-Corr-Red, para 194.

1841 ICC-01/04-02/12-125-Corr-Red, para 194.

1842 ICC-01/04-02/12-125-Corr-Red, paras 194-195.

1843 ICC-01/04-02/12-125-Corr-Red, paras 167-190.

1844 ICC-01/04-02/12-193-Red; ICC-01/04-02/12-195, para 2; ICC-01/04-02/12-197, para 2; ICC-01/04-02/12-196, para 17.

1845 ICC-01/04-02/12-199. The Appeals Chamber disregarded the observations filed by the Legal Representatives of Victims as they had not been authorised to submit them. ICC-01/04-02/12-199, paras 10-11.

DRC: *The Prosecutor v. Germain Katanga*

Appeals of the Katanga Trial Judgment and Sentence

On 7 March 2014, Trial Chamber II¹⁸⁴⁶ unanimously acquitted Katanga as an indirect co-perpetrator under Article 25(3)(a) of three crimes against humanity (murder; rape; and sexual slavery) and seven war crimes (wilful killing; using children to participate actively in hostilities; intentionally directing attacks against the civilian population; pillaging; destruction of property; rape; and sexual slavery), committed during the February 2003 attack on the village of Bogoro in Ituri, DRC.¹⁸⁴⁷ The majority,¹⁸⁴⁸ Judge Christine Van den Wyngaert dissenting, then re-characterised the mode of liability for all charges except using children to participate actively in hostilities, in order to consider Katanga's responsibility as an accessory to the crimes under Article 25(3) (d). It convicted Katanga as an accessory for the crime against humanity of murder, as well as the war crimes of murder, attacks against the civilian population, pillaging, and destruction of property. However, it ultimately acquitted Katanga as an accessory to the crimes of rape and sexual slavery.¹⁸⁴⁹ The Katanga Trial Judgment is discussed in detail in the **Trial Proceedings** section of this Report.¹⁸⁵⁰

1846 Trial Chamber II was composed of Presiding Judge Bruno Cotte (France), Judge Fatoumata Dembele Diarra (Mali) and Judge Christine Van den Wyngaert (Belgium).

1847 ICC-01/04-01/07-3436, para 1421.

1848 Henceforth, the term 'Chamber' will be used to reflect the opinion of the majority.

1849 ICC-01/04-01/07-3436, p 709-710.

1850 See also 'Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to article 74 of the Statute in the case of *The Prosecutor v. Germain Katanga*', ICC website, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/documents/986/14_0259_eng_summary_judgment.pdf>.

On 9 April 2014, the Defence filed a Notice of Appeal against the conviction in its entirety.¹⁸⁵¹ The same day, the Prosecution submitted its Notice of Appeal against the acquittals.¹⁸⁵² The Prosecution specified that it was appealing the acquittals for the charges of rape and sexual slavery, including the legal, procedural and factual findings that led to those acquittals.¹⁸⁵³ However, it did not appeal the acquittal for the charge of using children to participate actively in hostilities. The Prosecution indicated that it would request the Appeals Chamber to reverse or amend the decision, and/or order a new (partial) trial before a different Trial Chamber.¹⁸⁵⁴

Discontinuance of appeals

On 25 June 2014, the Defence discontinued its appeal against the conviction.¹⁸⁵⁵ In an annex to its filing, the Defence indicated that it would not be appealing the 12-year sentence imposed by the Trial Chamber either.¹⁸⁵⁶ The annex also contained a brief statement by Katanga, in which he confirmed his acceptance of the Judgment and Sentence, and expressed his 'sincere regrets' to those who had suffered as a result of his conduct, including the victims of Bogoro.¹⁸⁵⁷

Also on 25 June 2014, the Prosecution discontinued its appeal against the acquittals for rape and sexual slavery. The Prosecution explained that it was discontinuing its appeal because the Defence had discontinued its appeal, and because Katanga had accepted the Judgment and the sentence and expressed his regrets to the victims.¹⁸⁵⁸ In a statement issued by the Office of

1851 ICC-01/04-01/07-3459.

1852 ICC-01/04-01/07-3462.

1853 ICC-01/04-01/07-3462, para 3.

1854 ICC-01/04-01/07-3462, para 4.

1855 ICC-01/04-01/07-3497.

1856 ICC-01/04-01/07-3497-AnxA.

1857 ICC-01/04-01/07-3497-AnxA.

1858 ICC-01/04-01/07-3498.

the Prosecutor, the Prosecutor explained that ‘mindful of the interest of the victims to see justice finally done in this case’, she had decided not to appeal the Judgment or the sentence. The statement further indicated that:

The representatives of the victims have been duly informed. They have confirmed the importance for the victims of seeing the crimes and the guilt of Germain Katanga acknowledged with finality. They will now be in a position to focus on the important issue of reparations without further delay.¹⁸⁵⁹

Reactions to the discontinuance of the Prosecution appeal

In a statement released on 26 June 2014, the Women’s Initiatives for Gender Justice said it was ‘extremely concerned and disappointed’ by the Prosecution’s decision to drop its appeal against the acquittals for the sexual violence crimes.¹⁸⁶⁰ The Women’s Initiatives observed that it was unclear why the Prosecution made this decision, when it had no obligation to discontinue its appeal in response to the discontinuance of the Defence appeal, and when this decision would have a ‘significant impact [...] on the victims of these crimes in the Katanga case, as well as [...] serious implications for the ICC, international justice and jurisprudence on crimes of sexual violence’.¹⁸⁶¹ It stated:

1859 ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Germain Katanga’s Notice of Discontinuance of his Appeal against his Judgment of Conviction’, *OTP Press Statement*, 25 June 2014, available at <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-25-06-2014.aspx>.

1860 Women’s Initiatives for Gender Justice, ‘Rape and sexual slavery - Appeals Withdrawn in Katanga case’, 26 June 2014, available at <<http://iccwomen.org/documents/Katanga-Appeals-Statement.pdf>>.

1861 Women’s Initiatives for Gender Justice, ‘Rape and sexual slavery - Appeals Withdrawn in Katanga case’, 26 June 2014, available at <<http://iccwomen.org/documents/Katanga-Appeals-Statement.pdf>>.

[...] yesterday’s statement by Katanga accepting the Judgment, along with his expression of regret to victims, does not seem like an obvious or compelling basis for withdrawing the appeal on Katanga’s acquittal of charges for rape and sexual slavery. These concessions, in our view, do not readily explain or justify a decision not to pursue accountability for acts of sexual violence in this case, and not to invest in sound jurisprudence in relation to these crimes.¹⁸⁶²

The Women’s Initiatives maintained that based on its review of the Trial Judgment, it agreed with the Prosecution Notice of Appeal that there ‘appear[ed] to be errors of fact and law regarding the adjudication of rape and sexual slavery in this case, suggesting solid grounds of appeal’. The Women’s Initiatives stressed that ‘[t]he Judgment, now uncontested, is a step backwards in the body of jurisprudence on sexual violence’, noting its concern about ‘the possible ramifications for the ICC in its future cases’.¹⁸⁶³

In a filing submitted on 26 June 2014, the Legal Representative of the principal group of Victims conveyed the victims’ ‘surprise, disappointment, confusion and disagreement’ with the decision.¹⁸⁶⁴ The Legal Representative also stated that he was ‘not consulted prior to the Prosecutor’s decision’ and ‘never agreed with it’.¹⁸⁶⁵ As such, the Legal Representative contended that the Prosecutor’s public statement about the Legal Representative’s support for the decision was ‘extremely

1862 Women’s Initiatives for Gender Justice, ‘Rape and sexual slavery - Appeals Withdrawn in Katanga case’, 26 June 2014, available at <<http://iccwomen.org/documents/Katanga-Appeals-Statement.pdf>>.

1863 Women’s Initiatives for Gender Justice, ‘Rape and sexual slavery - Appeals Withdrawn in Katanga case’, 26 June 2014, available at <<http://iccwomen.org/documents/Katanga-Appeals-Statement.pdf>>.

1864 ICC-01/04-01/07-3499, para 5.

1865 ICC-01/04-01/07-3499, para 3 (emphasis in original).

inappropriate'.¹⁸⁶⁶ He argued that given the widespread use of rape as a weapon of war in Africa in general and the DRC in particular, it was 'essential for the Court to establish a jurisprudence regarding the accountability of those who contribute to the commission of such heinous acts during armed conflicts'.¹⁸⁶⁷

The Legal Representative also stated that the victims 'seriously question[ed]' the appropriateness of the Prosecutor's observation that Katanga had expressed his sincere regrets to the victims of Bogoro, given that Katanga had refrained from expressing such regrets during the trial and the sentencing hearing.¹⁸⁶⁸ The Legal Representative indicated that the victims did not see how justice could be served by the Prosecution's decision not to challenge the acquittals for rape and sexual slavery, and argued that as a result of the Prosecution's decision, the victims 'will never see justice finally done with regard to this crucial issue for the direct victims of sexual violence, their families, their community and, to a larger extent, the eastern DRC'.¹⁸⁶⁹ He added that the victims had hoped the Prosecution would also appeal the 12-year sentence, and noted that the Prosecutor had previously estimated that Katanga should be imprisoned for 22 years.¹⁸⁷⁰

On 27 June 2014, the Prosecution expressed its 'deep surprise and disappointment' at the response of the Legal Representative of the principal group of Victims to the discontinuance of the Prosecution's appeal.¹⁸⁷¹ In its filing, the Prosecution 'firmly object[ed] to the unfounded assertion that the Prosecutor acted improperly' in her public statement, and argued that the conduct of the Prosecutor and her Office reflected the Office's regard for the victims'

interests.¹⁸⁷² The Prosecution then presented its account of the matter, stating that the day before it formally discontinued its appeal, it had notified the Legal Representative of this decision, and that at 'no point' did the Legal Representative raise any concerns.¹⁸⁷³ The Prosecution added that the same day, it had spoken to the Legal Representative of the child soldier Victims, who had indicated that having a final outcome would be 'a welcome development and good for the case'.¹⁸⁷⁴ The Prosecution asserted that the Prosecutor's public statement conveyed the Prosecution's 'good faith and accurate understanding' of the Legal Representatives' position, based on these conversations the previous day.¹⁸⁷⁵

For these reasons, the Prosecution argued that it had acted in a 'fully transparent and professional manner' with the Legal Representatives.¹⁸⁷⁶ It emphasised that it informed the Legal Representatives of the proposed discontinuances at the earliest opportunity. It concluded that the Prosecutor decided to discontinue the appeal against the acquittals in accordance with her statutory obligations and in the 'responsible exercise' of her discretion, taking into account 'all of the relevant factors, including sensitivity to the interests of victims'.¹⁸⁷⁷

In a letter sent to the Prosecutor on 30 June 2014, the Legal Representative of the child soldier Victims expressed concerns about the scope of the Prosecution's appeal, as well as its discontinuance.¹⁸⁷⁸ The Legal Representative highlighted the fact that Katanga had been acquitted for the charge of using children in hostilities, and described the Prosecution's lack of an appeal against that acquittal as a 'catastrophe that has left

1866 ICC-01/04-01/07-3499, paras 3-4.

1867 ICC-01/04-01/07-3499, para 7.

1868 ICC-01/04-01/07-3499, para 9.

1869 ICC-01/04-01/07-3499, paras 7-8.

1870 ICC-01/04-01/07-3499, para 10.

1871 ICC-01/04-01/07-3500.

1872 ICC-01/04-01/07-3500, para 2.

1873 ICC-01/04-01/07-3500, paras 3-4.

1874 ICC-01/04-01/07-3500, para 5.

1875 ICC-01/04-01/07-3500, para 7.

1876 ICC-01/04-01/07-3500, para 7.

1877 ICC-01/04-01/07-3500, paras 7-8.

1878 ICC-01/04-01/07-3501-Anx.

[the child soldier victims] with a genuine feeling of abandonment'. He also questioned the Prosecutor's statement that as a result of the discontinuance of the appeal, the Legal Representatives of Victims would be able to 'focus on the important issue of reparations'.¹⁸⁷⁹ The Legal Representative observed that as a result of the Trial Chamber's decision to acquit Katanga of the crime of using child soldiers, the victims that he represented had been excluded from the reparations proceedings. The Legal Representative also stated that he was 'extremely shocked' by the Prosecution's claim that he had expressed satisfaction at having a final outcome for the case. This statement, the Legal Representative said, appeared not to be an error, but an 'untruth'.¹⁸⁸⁰

On 2 July 2014, the Prosecution filed a response to the letter from the Legal Representative of the child soldier Victims.¹⁸⁸¹ The Prosecution expressed its 'disappointment' at the letter, and maintained that its statements and filings reflected its 'good faith understanding' of the Legal Representative's position, based on telephone conversations on 24 and 26 June 2014.¹⁸⁸² The Prosecution thus rejected any suggestion that it had misrepresented the facts¹⁸⁸³ and reiterated its argument that the Prosecutor made the decision to withdraw the appeal in accordance with her statutory obligations and in the 'responsible exercise' of her discretion.¹⁸⁸⁴ The Prosecution concluded by expressing its 'hope that the final resolution of this case will help assist in reconciliation efforts and contribute to the healing process for the victims of the attack on the village of Bogoro'.¹⁸⁸⁵

1879 ICC-01/04-01/07-3501-Anx.

1880 ICC-01/04-01/07-3501-Anx.

1881 ICC-01/04-01/07-3502.

1882 ICC-01/04-01/07-3502, paras 1-2.

1883 ICC-01/04-01/07-3502, paras 1-2.

1884 ICC-01/04-01/07-3502, para 3.

1885 ICC-01/04-01/07-3502, para 4.

Reparations

.....

Applications for reparations¹⁸⁸⁶

Gender breakdown of applications for reparations

According to data provided by the VPRS, as of 31 August 2014, the Court had received a total of 13,281 applications for reparations, 2,129 of which were received during the period between 1 September 2013 and 31 August 2014. Of these 2,129 applications, 1,259 (or 59.1%) were received in the DRC Situation. Additionally, 284 applications were received in the Côte d'Ivoire Situation, 239 in the Registered Vessels of Comoros, Greece and Cambodia Situation,¹⁸⁸⁷ 189 in the CAR Situation, 117 in the Mali Situation, 40 in the Uganda Situation, and one in the Libya Situation.

Of the 13,281 applications for reparations received by the Court from 1 January 2005 through 31 August 2014, the gender of 12,699 applicants¹⁸⁸⁸ has been registered. Information provided by the VPRS indicates that 6,778 (or 53.4%) of these applicants were male and 5,921 (or 46.6%) were female. The VPRS has further indicated that the gender of 570 (or 4.3%) applicants was 'unknown', representing a significant decrease in such applicants as compared to last year, when the gender of 33.4% of all applicants (3,591 out of 10,751 applicants) was unknown.¹⁸⁸⁹ The VPRS previously indicated that the designation of 'unknown gender' means that this information may either

1886 All figures in this section are accurate as of 31 August 2014 and are based on statistics provided by the VPRS by email dated 17 September 2014 (VPRS email). Additional emails providing clarification regarding the data were exchanged between the VPRS and the Women's Initiatives for Gender Justice prior to and after receiving the final statistics. These emails are cited below, where appropriate. The VPRS email provided data on victim participation and reparations covering the period between 1 September 2013 to 31 August 2014, as well as covering total numbers from 1 January 2005 through 31 August 2014. All percentages have been calculated on the basis of information provided by the VPRS. Concerning the number of applications received, the VPRS provided information regarding applications received by Situation but not by case. The VPRS email included four types of data, as follows: (i) number of applications received for participation; (ii) number of applications received for reparations; (iii) number of applications received for both participation and reparations (Combined Application); and (iv) number of applications which were unclear and did not specify the type of application, whether participation, reparations, or both (Unspecified Application). As of 31 August 2014, VPRS received 13 Unspecified Applications, which are not included in the figures provided. For the purpose of this section, figures on applications for reparations received include both the number from applications received solely for reparations, as well as numbers from the Combined Applications. VPRS also provided statistics of duplicate applications, which have been submitted by applicants who had already submitted an application form. As of 31 August 2014, a total of 805 duplicate applications for participation, reparations or Unspecified Applications had been received. These duplicates are not included in the figures provided in this section.

1887 The VPRS refers to the Registered Vessels of Comoros, Greece and Cambodia as a 'Situation', but the ICC website does not include it as one of the eight 'Situations under investigations', and rather includes it as one of the nine 'preliminary examinations'.

1888 Out of the 582 other applications received and for which the gender was not indicated, 570 applications were designated as 'unknown gender' and 12 applications were from organisations. In an email dated 3 September 2014, the VPRS clarified that the designation of 'unknown gender' means either that this information may not yet have been processed, or that the application does not provide sufficient information to determine the gender of the applicant.

1889 See *Gender Report Card 2013*, p 191.

not yet have been entered into the database or the applicant has not indicated her/his gender on the application form, and it was not possible to retrieve the information from the application.¹⁸⁹⁰ The Court has received a total of 12 applications for reparations from institutions and/or organisations.

Gender breakdown by Situation of applications for reparations from 1 January 2005 to 31 August 2014

Situation	# male applicants	% male applicants	# female applicants	% female applicants	# Institution + organisation applicants	% institution + organisation applicants	# applicants where gender not registered	% gender not registered	Total	%
DRC	1,569	49.8%	1,413	44.8%	0	0%	171	5.4%	3,153	23.7%
Uganda	253	52.6%	214	44.5%	0	0%	14	2.9%	481	3.6%
Darfur	128	73.6%	41	23.6%	0	0%	5	2.9%	174	1.3%
CAR	2,012	48.1%	1,928	46.1%	0	0%	245	5.9%	4,185	31.5%
Kenya	2,295	52.7%	1,932	44.4%	1	0%	125	2.9%	4,353	32.8%
Libya	4	50%	4	50%	0	0%	0	0%	8	0.1%
Côte d'Ivoire	272	47.7%	292	51.2%	6	1.1%	0	0%	570	4.3%
Mali	51	43.2%	65	55.1%	1	0.8%	1	0.8%	118	0.9%
Registered Vessels of Comoros, Greece and Cambodia	194	81.2%	32	13.4%	4	1.7%	9	3.8%	239	1.8%
Totals	6,778	51%	5,921	44.6%	12	0.1%	570	4.3%	13,281	100%

1890 Explanation provided by the VPRS to the Women's Initiatives by emails dated 3 September 2012 and 20 September 2012.

Reparations proceedings

To date, two cases have reached the reparations stage of the proceedings before the ICC: *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Germain Katanga*. The Katanga case is the first case in which the accused was charged with sexual and gender-based crimes, however, in March 2014, Trial Chamber II acquitted Katanga of these charges.¹⁸⁹¹ Until recently, the Trial Judgments¹⁸⁹² in both cases were subject to appeal. However, as described above in the **Appeals Proceedings** section of this Report, on 25 June 2014, the Prosecution and the Defence withdrew their respective appeals against the Judgment in the Katanga case.¹⁸⁹³ At the time of writing, the appeal against the Lubanga Judgment was still pending, as also described in the **Appeal Proceedings** section of this Report.

DRC: Appeals against the Reparations decision in the Lubanga case

In the Lubanga case, following Lubanga's conviction, Trial Chamber I issued the ICC's first Reparations decision on 7 April 2012, establishing the principles and procedures to be applied to reparations.¹⁸⁹⁴ The decision reflected the participation of all parties and participants in the case, other organs of the Court, including the Registry, the OPCV and the TFV, and the *amicus curiae* participation of NGOs, including the Women's Initiatives for Gender Justice.¹⁸⁹⁵

The Reparations decision was subsequently appealed on numerous grounds by the Defence,¹⁸⁹⁶

1891 As noted in the *Trial Proceedings* and *Appeal Proceedings* sections of this Report, Katanga was initially tried jointly with his co-accused, Mathieu Ngudjolo Chui, until the majority of the Trial Chamber severed the cases on 21 November 2012.

1892 ICC-01/04-01/06-2842; ICC-01/04-01/07-3436.

1893 ICC-01/04-01/07-3498, para 3; ICC-01/04-01/07-3497, para 3.

1894 ICC-01/04-01/06-2904.

1895 For a detailed summary of the Reparations decision and the *amicus curiae* submission of the Women's Initiatives for Gender Justice, see *Gender Report Card 2012*, p 206-223.

1896 ICC-01/04-01/06-2905; ICC-01/04-01/06-2919.

the Legal Representative of the principal group of Victims,¹⁸⁹⁷ and jointly by the OPCV and the Legal Representative of the child soldier Victims.¹⁸⁹⁸ On 14 December 2012, the Appeals Chamber invited those organisations that had been granted leave to submit their observations before Trial Chamber I to request leave to submit observations on the appeals.¹⁸⁹⁹ The Women's Initiatives for Gender Justice submitted its request on 8 March 2013.¹⁹⁰⁰ At the time of writing this Report, no decision had been issued on the request, and the appeals of the decision on Reparations remain pending.

DRC: Trial Chamber II instructs Registry to report on applications for reparations in the Katanga case

On 16 April 2014, following the issuance of the Trial Judgment¹⁹⁰¹ and Sentencing decision¹⁹⁰² in the Katanga case, the Presidency issued a decision replacing two judges and reconstituting the Trial Chamber for the purposes of the reparations proceedings.¹⁹⁰³ On 27 August 2014, the newly reconstituted Chamber issued its first order on reparations in the case (Reparation Order).¹⁹⁰⁴

In the Reparation Order, the Chamber noted that the victims' applications for participation and/or reparations had been received prior to 2009 and contained limited information regarding 'the harm suffered as a result of the crimes and the reparations measures sought'. Therefore, in order

1897 ICC-01/04-01/06-2914.

1898 ICC-01/04-01/06-2909.

1899 ICC-01/04-01/06-2953, para 77.

1900 ICC-01/04-01/06-2993, para 11. Similarly, Justice Plus, *Terre des Enfants*, *Fédération des Jeunes pour la Paix Mondiale* and *Avocats Sans Frontières* filed a joint request to submit observations. ICC-01/04-01/06-2994.

1901 ICC-01/04-01/07-3436.

1902 ICC-01/04-01/07-3484.

1903 The Presidency replaced Judges Bruno Cotte (France) and Fatoumata Dembele Diarra (Mali). The reconstituted Chamber consisted of Judge Christine Van den Wyngaert (Belgium), Judge Silvia Fernández de Gurmendi (Argentina) and Judge Olga Herrera Carbuca (Dominican Republic). ICC-01/04-01/07-3468, p 3.

1904 ICC-01/04-01/07-3508.

to inform its decision on 'what further steps to take', the Chamber instructed the Registry to consult with individual victim 'applicants' regarding these issues. Specifically, the Chamber directed the Registry to contact the applicants, in 'close consultation and collaboration' with the Legal Representative of Victims, with a view to submitting a detailed report, which is to include the victims' application number, the crime as a result of which the victim suffered harm and the type of harm suffered, any documents to establish the victims' identity and harm suffered, and the type and modality of reparations requested.¹⁹⁰⁵ The Registry was further instructed to, 'in consultation with the Trust Fund for Victims', present the victims with 'examples of measures which might be viable means for reparations' in order to gauge their views.¹⁹⁰⁶

The Chamber directed the Registry to annex the information obtained from these consultations to a consolidated report, which includes a summary of the information and recommendations on the types and modalities of reparations, as well as 'factors relating to the appropriateness of awarding reparations on an individual or a collective basis'.¹⁹⁰⁷ The report, which is to be filed by 1 December 2014, must take into account and describe any measures that the TFV or any other organisations have taken 'to redress the damage and harm caused' by the Bogoro attack.¹⁹⁰⁸

Change in Trial Chambers' approach to reparations

It was unclear from the Trial Chamber's Reparation Order whether the Registry has been instructed to consult with all victim applicants in the Katanga case or only with those who applied and were formally recognised as victims and therefore participated in the legal proceedings. The VPRS has since clarified that in implementing

1905 ICC-01/04-01/07-3508, paras 7-8.

1906 ICC-01/04-01/07-3508, para 10.

1907 ICC-01/04-01/07-3508, para 11.

1908 ICC-01/04-01/07-3508, para 11 and p 6.

the Order, in consultation with the Common Legal Representative, it will consult with all victims who have been granted the right to participate in the case, as well as all applicants who submitted an application for reparations.¹⁹⁰⁹ As reflected above, a total of 365 victims were authorised to participate in the Katanga case, including 117 females, 245 males, and three persons whose gender is unknown. Information regarding the total number of victims who have applied to participate in the case was not provided by the VPRS.¹⁹¹⁰

Following the issuance of the Reparation Order, on 1 September 2014, the Women's Initiatives for Gender Justice issued a statement, expressing concern regarding the apparent change in approach to reparations by Trial Chamber II in the Katanga case, as compared with the approach of Trial Chamber I in the Lubanga case. In the statement, the Women's Initiatives noted that although the Chamber observed in the Reparation Order that reparations may be granted on an individual basis, a collective basis, or both, it appeared that the Registry's report, as ordered by the Chamber, was to be based on consultations with individual applicants as opposed to the wider community of Bogoro village.¹⁹¹¹ The Women's Initiatives cautioned that an 'individualised approach to reparations could disadvantage women victims, considering that only 32% of victims recognised in the case are female'.¹⁹¹²

In the statement, the Women's Initiatives explained that based on this data on reparations in the Katanga case, it is clear that the victims recognised to participate in proceedings to date are not fully representative of the gender of the victims affected by the Bogoro attack. The Women's Initiatives

1909 Based on email communication from the VPRS dated 18 September 2014.

1910 As noted previously, the VPRS provided data regarding applications for participation and reparations per Situation but did not provide a breakdown per case. VPRS email dated 3 September 2014.

1911 ICC-01/04-01/07-3508, paras 8-9.

1912 Women's Initiatives for Gender Justice, 'Change in Chambers' Approach to Reparations', 1 September 2014, available at <<http://iccwomen.org/documents/Katanga-Reparation-Order-Statement.pdf>>.

pointed out that it remains unclear whether those currently recognised in the case are representative of the victims in relation to other profile factors such as age and type of harm suffered by victims of the attack.

As noted in the statement, the approach taken by Trial Chamber II in the Katanga case represents a departure from the approach to reparations taken in the Lubanga case. In the Lubanga case, on 16 March 2011, Trial Chamber I instructed both the Registry and the TFV to submit a joint report on reparations prior to the verdict.¹⁹¹³ It also invited both the Registry and the TFV to make observations on reparations principles and procedures immediately following the verdict, along with the parties and participants. Additionally, other 'individuals or interested parties' were invited to seek leave to file submissions on these issues.¹⁹¹⁴ By contrast, the Katanga Reparation Order requests a report on reparations solely from the Registry, and the Registry's report is to be based on consultations with individual applicants, which are to be undertaken in 'close consultation' with the Legal Representatives for Victims. As pointed out by the Women's Initiatives for Gender Justice, the Order significantly limits the role of the TFV in providing input and advice on the scope, type and modalities of reparations in the case. The statement also notes that the TFV administers the voluntary contributions from which any reparations awarded in the Katanga case will be drawn. In addition, the statement points out that thus far, unlike in the Lubanga case, the Chamber has not invited observations from parties and participants, other individuals or interested parties, regarding the reparation scheme to be applied in the Katanga case.¹⁹¹⁵

1913 The Registry and the TFV received the instruction by email dated 16 March 2011. See ICC-01/04-01/06-2806, p 5 and para 1; ICC-01/04-01/06-2803-Red, p 7.

1914 ICC-01/04-01/06-2844, paras 8-10.

1915 Women's Initiatives for Gender Justice, 'Change in Chambers' Approach to Reparations', 1 September 2014, available at <<http://iccwomen.org/documents/Katanga-Reparation-Order-Statement.pdf>>.

In the statement, the Women's Initiatives expressed that:

[...] embarking upon individual reparations may limit the potentially positive effect of reparations and introduce an unintended hierarchy of victims within Situations under investigation by the ICC. As the funding for reparations in this case will be coming from voluntary contributions and not from the convicted person, utilising these resources collectively may be both more efficient and meaningful, especially in light of the limited pool of funding. In the Katanga case an entire village was attacked, motivated in part by the ethnic profile of the village. In such circumstances, pursuing individual reparatory awards is unlikely to address the multi-dimensional and collective nature of the harm experienced by the community of Bogoro.¹⁹¹⁶

The Women's Initiatives further expressed that:

As only the second reparations proceedings embarked upon by the ICC, it is understandable that Chambers may want to explore various options. However, the Women's Initiatives is concerned at the direction suggested by Trial Chamber II and the implications of an individual reparations programme in the context of the Bogoro attack and the wider conflict in eastern DRC, as well as the possible exclusion of female victims in this approach.¹⁹¹⁷

1916 Women's Initiatives for Gender Justice, 'Change in Chambers' Approach to Reparations', 1 September 2014, available at <<http://iccwomen.org/documents/Katanga-Reparation-Order-Statement.pdf>>.

1917 Women's Initiatives for Gender Justice, 'Change in Chambers' Approach to Reparations', 1 September 2014, available at <<http://iccwomen.org/documents/Katanga-Reparation-Order-Statement.pdf>>.

Victim participation and legal representation¹⁹¹⁸

.....

Victim participation in proceedings before the Court is governed by Article 68(3) of the Rome Statute, which states that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

There are also a number of important provisions in the RPE, as well as the Regulations of the Court, which provide a definition of ‘victim’ for the purposes of the Statute, address legal representation for victims, and set out the procedure to be followed in applications to participate and the format of participation in the proceedings.¹⁹¹⁹

¹⁹¹⁸ All figures in this section are accurate as of 31 August 2014 and are based on statistics provided by the VPRS by email dated 17 September 2014 (VPRS email). Additional emails providing clarification regarding the data were exchanged between the VPRS and the Women’s Initiatives for Gender Justice prior to and after receiving the final statistics. These emails are cited below, where appropriate. The VPRS email provided data on victim participation and reparations covering the reporting period for this section (1 September 2013 to 31 August 2014), as well as covering total numbers from 1 January 2005 through 31 August 2014. All percentages have been calculated on the basis of information provided by the VPRS. Due to the rounding-up principle, sometimes percentages may add up to slightly more than 100%; thus, no overall totals are provided in the tables for the columns with percentages. Concerning the number of applications received, the VPRS email included four types of data, as follows: (i) number of applications received for participation; (ii) number of applications received for reparations; (iii) number of applications received for both participation and reparations (Combined Application); and (iv) number of applications which were unclear and did not specify the type of application, whether participation, reparations, or both (Unspecified Application). As of 31 August 2014, VPRS received 13 Unspecified Applications, which are not included in the figures provided. For the purpose of this section, figures on applications for participation received include both the number from applications received solely for participation, as well as numbers from the Combined Applications. Between 1 January 2005 and 31 August 2014, a total of 805 duplicate applications for participation, reparation or Unspecified Applications had been received. These duplicates are not included in the figures provided in this section.

¹⁹¹⁹ See in particular Rules 85, 89-93, RPE, and Regulations 80-81, Regulations of the Court.

Rule 89 of the RPE requires the victim or a person acting with the consent of or on behalf of the victim to submit a written application to the Registrar, who must then submit it to the relevant Chamber. The Chamber may reject the application if it finds the person is not a victim or does not fulfil the criteria set forth in Article 68(3) of the Statute. In 2005, standard victims' application forms were developed by the VPRS. New forms, including a form for individuals and a separate form for organisations, were later developed by the Court in consultation with civil society and introduced on 3 September 2010. These forms and a booklet explaining the functions of the Court, victims' rights and how to complete the forms are available on the Court's website.¹⁹²⁰ The seven-page application form requires the applicant to provide personal information, including: proof of identity; information about the alleged crimes and harm suffered; whether the victims want to present their views and concerns to the Court; whether they are applying for reparations, and if so what form they would want the reparations to take; and their preference for legal representation and communication of their identity to the Defence and Prosecution. Various Chambers have clarified what information must be included in the application.¹⁹²¹

The RPE contain detailed provisions for the appointment of legal representatives of victims authorised to participate, and outline their role

1920 'Forms', *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/forms.aspx>.

1921 For example, the Single Judge of Pre-Trial Chamber II recalled in the *Ntaganda* case that to be considered 'complete', application forms must include: (i) the identity of the applicant; (ii) the date of the crime(s); (iii) the location of the crime(s); (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court; (v) proof of identity; (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim; (vii) if the application is made by a person acting on behalf of a victim, in the case of a child victim, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; and (viii) a signature or thumb-print of the Applicant on the document, at least on the last page of the application. ICC-01/04-02/06-67, para 30.

in the proceedings once appointed. Under the RPE, a victim may choose a legal representative¹⁹²² or, 'for the purposes of ensuring the effectiveness of the proceedings', the Chamber may request victims or groups of victims to choose a common legal representative with the Registry's assistance.¹⁹²³ In 'facilitating the coordination of victim representation', the Registry may refer victims to its list of legal counsel or suggest a common legal representative.¹⁹²⁴ If victims are unable to choose a common legal representative, the Chamber may request the Registrar to make the choice for them.¹⁹²⁵ In the selection of common legal representatives, the Chamber and the Registry are obliged to take all reasonable steps to ensure that the distinct interests of the victims are represented and that any potential conflicts of interest are avoided.¹⁹²⁶ The 'distinct interests of the victims' are defined in Article 68(1) of the Statute as including: age, gender, health and the nature of the crime, particularly if the crime involves sexual or gender violence or violence against children.¹⁹²⁷

The OPCV is an independent office¹⁹²⁸ of the Court established for the purpose of: (i) providing support and assistance to victims and their legal representatives, including legal research and advice, and appearing before the Court in relation to specific issues;¹⁹²⁹ (ii) advancing submissions, on the instruction or with the leave of the Chamber, in particular prior to the submission of victims' applications to participate in the proceedings, when applications pursuant to Rule 89 of the RPE are pending, or when a legal representative has not yet been appointed; (iii) acting when appointed under Regulations 73 or 80 of the Regulations of the Court; and (iv) representing a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice.¹⁹³⁰

1922 Rule 90(1), RPE.

1923 Rule 90(2), RPE.

1924 Rule 90(2), RPE.

1925 Rule 90(3), RPE.

1926 Rule 90(4), RPE.

1927 Rule 90(4), RPE, read together with Article 68(1), Rome Statute.

1928 Regulation 81(2), Regulations of the Court.

1929 Regulation 81(4), Regulations of the Court.

1930 See *Gender Report Card 2013*, p 173.

Victim applications for participation

Overview of applications for victim participation 2005-2014

From 1 January 2005 until the end of August 2014, the Court received a total of 16,194 applications from persons seeking to participate as victims in proceedings.¹⁹³¹ Of those applications, 2,792 were received between 1 September 2013 and 31 August 2014, the period of this Report. This represents a significant increase as compared to the previous reporting period. Specifically, between 1 September 2012 and 30 June 2013, the Court received 357 applications.¹⁹³² However, prior to that, between 1 September 2011 and 31 August 2012, the Court received 6,485 applications.¹⁹³³ Furthermore, between 31 August 2010 and 1 September 2011, the Court received 2,577 applications.¹⁹³⁴ Between 30 September 2009 and 30 August 2010, the Court received 1,765 applications for participation,¹⁹³⁵ while between 1 October 2008 and 30 September 2009, the Court received a total of 568 applications.¹⁹³⁶ Finally from 2005 until 2008, the Court received a total of 1,246 applications.¹⁹³⁷

Breakdown by Situation of applications for victim participation

<i>Situation</i>	<i>Number of applications between 1 September 2013 and 31 August 2014</i>	<i>%</i>	<i>Total number of applications between 1 January 2005 and 31 August 2014</i>	<i>%</i>
DRC	1,303	46.7%	4,079	25.2 %
Uganda	121	4.3%	1,248	7.7 %
Darfur	0	0%	265	1.6 %
CAR	81	2.9%	5,623	34.7 %
Kenya	660	23.6%	4,066	25.1 %
Libya	1	0%	8	0 %
Côte d'Ivoire	283	10.1%	561	3.5%
Mali	115	4.1%	116	0.7%
Registered Vessels of Comoros, Greece and Cambodia ¹⁹³⁸	228	8.2	228	1.4%
Totals	2,792		16,194	

1931 According to the VPRS email, 5,309 victims applied only for participation, and 10,885 applied for both participation and reparations.

1932 See *Gender Report Card 2013*, p 177.

1933 See *Gender Report Card 2012*, p 265.

1934 See *Gender Report Card 2011*, p 280.

1935 See *Gender Report Card 2010*, p 193.

1936 See *Gender Report Card 2009*, p 97.

1937 See *Gender Report Card 2009*, p 95, noting that this period was prior to the Women's Initiatives annual reporting on victim participation statistics.

1938 Although the VPRS refers to the Registered Vessels of Comoros, Greece and Cambodia as a Situation, the ICC website does not include it as one of the eight Situations under investigation, and rather includes it as one of the nine 'preliminary examinations'. See 'Preliminary Examinations', *ICC website*, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx>.

Gender breakdown of applications by Situation

Of the 2,792 applications for victim participation received by the Court between 1 September 2013 and 31 August 2014, the gender of 2,648 applicants (or 94.8%) was registered by the VPRS. Of these, 1,440 (or 54.4%) applicants were male and 1,208 (or 45.6%) were female. The percentage of female applicants has increased slightly as compared to the previous reporting period, when between 1 September 2012 and 30 June 2013, 216 (or 60.5%) of the 357 applicants were male and 141 (or 39.5%) were female.¹⁹³⁹ Between 1 September 2013 and 31 August 2014, the largest number of female applications for participation was received in the context of the DRC Situation. In this Situation, the Court received 484 applications from female victims, representing 18.3% of the total number of applications in which the gender was registered. The Court received more applications from male victims in the DRC, Uganda, Libya, and the Registered Vessels of Comoros, Greece and Cambodia Situations, while more applications from female victims were received in the CAR, Kenya, Côte d'Ivoire and Mali Situations.

Of the 16,194 applications for victim participation received by the Court from 1 January 2005 through 31 August 2014, the gender of 15,386 (or 95%) applicants was registered by the VPRS. 8,315 (or 54%) of these applicants were male and 7,071 (or 46%) were female. The VPRS has indicated that the gender of 791 (or 4.9%) applicants was 'unknown', representing a significant decrease in such applicants as compared to last year, when the VPRS reported that the gender of 28.5% of all applicants (3,705 out of 12,998 applicants) was unknown.¹⁹⁴⁰ The VPRS has indicated that the designation of 'unknown gender' means that this information may either not yet have been entered into its database or the application does

not provide sufficient information to determine the gender of the applicant.¹⁹⁴¹

Overall, the largest number of applications was received in the CAR Situation, in which the Court received 5,623 applications, representing slightly over a third (or 34.7%) of the total number of applications. Of these, 2,600 (or 46.2%) were received from male applicants, while 2,437 (or 43.3%) were received from female applicants, and the gender of 586 applicants (or 10.4%) was unknown. The second largest numbers of applications were received in the DRC and Kenya Situations, including 4,079 (or 25.2%) and 4,066 (or 25.1%), respectively, of all applications received. In the DRC Situation, 2,186 (or 53.6%) were received from male applicants, 1,793 (or 44%) from female applicants and the gender of 98 (or 2.4%) was unknown. In the Kenya Situation, 2,099 (or 51.6%) were received from male applicants, 1,937 (or 47.6%) from female applicants and the gender of 29 (or 0.7%) was unknown.

From 1 January 2005 until 31 August 2014, the Court received more applications from male applicants in six Situations,¹⁹⁴² more applications from female applicants in two Situations¹⁹⁴³ and an equal number in one Situation.¹⁹⁴⁴ Finally, a total of 17 organisations or institutions had applied to participate in seven Situations.¹⁹⁴⁵

1941 Explanation provided by the VPRS to the Women's Initiatives by email dated 3 September 2014.

1942 There were more male than female applicants to participate in the following six Situations: the DRC, Uganda, Darfur, the CAR, Kenya and Registered Vessels of Comoros, Greece and Cambodia.

1943 There were more female than male applicants to participate in the following two Situations: Côte d'Ivoire and Mali.

1944 There was an equal number of male and female applicants in the Libya Situation.

1945 Organisations or institutions have applied to participate in the following seven Situations: the DRC, Uganda, Darfur, Kenya, Côte d'Ivoire, Mali and Registered Vessels of Comoros, Greece and Cambodia.

1939 See *Gender Report Card 2013*, p 180.

1940 See *Gender Report Card 2013*, p 178-179.

Gender breakdown by Situation of applications for victim participation between 1 January 2005 and 31 August 2014

Situation	Number of male applicants	% male applicants	Number of female applicants	% female applicants	Number of institution/organisation applicants	% institution/organisation applicants	Number of gender unknown	% gender unknown	Total	%
DRC	2,186	53.6 %	1,793	44 %	2	0 %	98	2.4 %	4,079	25.2%
Uganda	729	58.4 %	456	36.5 %	2	0.2 %	61	4.9 %	1,248	7.7%
Darfur	193	72.8 %	64	24.2 %	1	0.4 %	7	2.6 %	265	1.6%
CAR	2,600	46.2 %	2,437	43.3 %	0	0 %	586	10.4 %	5,623	34.7%
Kenya	2,099	51.6 %	1,937	47.6 %	1	0 %	29	0.7 %	4,066	25.1%
Libya	4	50 %	4	50 %	0	0 %	0	0 %	8	0%
Côte d'Ivoire	265	47.2 %	290	51.7 %	6	1.1 %	0	0 %	561	3.5%
Mali	50	43.1 %	64	55.2 %	1	0.9 %	1	0.9 %	116	0.7%
Registered Vessels of Comoros, Greece and Cambodia	189	82.9 %	26	11.4 %	4	1.8 %	9	3.9 %	228	1.4%
Totals	8,315	51.3%	7,071	43.7%	17	0.1 %	791	4.9 %	16,194	

Gender breakdown by Situation of applications for victim participation between 1 September 2013 and 31 August 2014

Situation	Number of male applicants	% male applicants	Number of female applicants	% female applicants	Number of institution/organisation applicants	% institution/organisation applicants	Number of gender unknown	% gender unknown	Total	%
DRC	779	59.8 %	484	37.1 %	0	0%	40	3.1 %	1303	46.7%
Uganda	68	56.2 %	53	43.8 %	0	0%	0	0 %	121	4.3%
Darfur	0	0 %	0	0 %	0	0%	0	0 %	0	0%
CAR	0	0 %	64	79 %	0	0%	17	21 %	81	2.9%
Kenya	234	35.5 %	353	53.5 %	0	0%	73	11.1 %	660	23.6%
Libya	1	100 %	0	0 %	0	0%	0	0 %	1	0%
Côte d'Ivoire	119	42 %	164	58 %	0	0%	0	0 %	283	10.1%
Mali	50	43.5%	64	55.7%	1	0.9%	0	0%	115	4.1%
Registered Vessels of Comoros, Greece and Cambodia	189	82.9 %	26	11.4 %	4	1.8 %	9	3.9 %	228	8.2%
Totals	1,440	51.6 %	1,208	43.3 %	5	0.2 %	139	5 %	2,792	

Victims authorised to participate at the ICC between 1 January 2005 and 31 August 2014¹⁹⁴⁶

Pursuant to Article 68(3) of the Statute, victims may apply for and be granted the right to participate at all stages of proceedings before the Court, including the pre-trial, trial, appeal and reparations stages. However, in practice, the Court's jurisprudence has limited the potential for victims to enjoy a general right to participate at the Situation stage of proceedings.

In December 2008 and February 2009, the Appeals Chamber issued two decisions in the DRC and Darfur Situations, rejecting the granting of participation rights to victims at the investigation stage of a Situation and holding that there must be specific judicial proceedings capable of affecting the personal interests of the victims before they can be granted the right to participate.¹⁹⁴⁷ These decisions temporarily put an end to the granting of participation rights to new victim applicants at the Situation stage, although they did not affect the status of victims who had already been authorised to participate in relation to a Situation before the Court. As described in the *Gender Report Card 2011*, decisions in the DRC, the CAR and Kenya

Situations set out the procedural framework to be followed in relation to new and future applications for victim participation in specific judicial proceedings at the Situation stage.¹⁹⁴⁸ Under the current system of victim participation at the Court, victims who have suffered harm caused by the commission of crimes within the jurisdiction of the Court may apply to participate at the Situation stage, while victims who have suffered harm as a result of specific crimes included in the charges against a suspect or accused person can also apply to participate in that specific case.¹⁹⁴⁹

Breakdown of participants by Situation and cases

Of the 16,194 applications for participation that were received by the Court between 1 January 2005 and 30 August 2014, a total of 9,131 victims were authorised to participate, representing 56.4% of all applicants. The CAR Situation, and specifically the Bemba case, continues to include the majority of victims authorised to participate, with more than half of the total victims (or 57.3%) authorised in this Situation.¹⁹⁵⁰ The DRC Situation and related cases, in which a total of 1,976 victim participants were authorised to participate, represents 21.6% of all victim participants,

1946 For the purposes of this sub-section, the number of victims authorised to participate in ICC cases as provided by the VPRS are the current number of victims participating at the trial stage in a given case, when and if the proceedings have reached the trial stage. The figures presented in this sub-section do not include victims who were originally authorised at the pre-trial stage but then were not authorised at the trial stage due to a change in the scope of the charges. According to the ICC website, the Bemba, Katanga, Ntaganda, Ruto and Sang, and Kenyatta cases are considered to be at the trial stage, and the Ngudjolo and Lubanga cases are described as being at the appeal stage; thus, the numbers provided represent the number of victims authorised to participate in the trial stage as well as any additional victims authorised to participate in the appeal stage. In all of the other cases, the numbers provided correspond to the number of victims authorised to participate at the pre-trial stage.

1947 ICC-01/04-556, paras 46, 56, 59; ICC-02/05-177, paras 7-8. See also *Gender Report Card 2009*, p 99-100.

1948 *Gender Report Card 2011*, p 281-285, 188-291.

1949 'A guide for the Participation of Victims in the proceedings of the court', *ICC website*, p 15, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/participation/Pages/booklet.asp>.

1950 According to figures provided by the VPRS, 5,229 of the 9,131 victims granted the right to participate are participating in the CAR Situation and cases. Although no victim participants have been authorised in the CAR Situation itself, victim participants in the Bemba case alone account for 57.3% of the total number of victims authorised. This has been primarily due to a substantial increase in authorised participants during 2011 and 2012. Between 1 January 2005 and 30 August 2010, the CAR Situation and Bemba case amounted to less than 14% of the total number of participating victims (135 of 974 victims). See also *Gender Report Card 2012*, p 266-268 and *Gender Report Card 2010*, p 189.

a major increase from 11.7% last year.¹⁹⁵¹ This increase is due to the high number of applications accepted in the Ntaganda case during the reporting period.¹⁹⁵² In the Kenya Situation and related cases, 1,060 victims were authorised to participate, which accounts for 11.6% of the total number of participating victims, a slight increase from 8% last year.¹⁹⁵³

Between 1 September 2013 and 31 August 2014, a total of 2,647 victims were authorised to participate in four cases, including the Ruto and Sang, Kenyatta, and for the first time, in the Ntaganda and Blé Goudé cases. The highest number of victims were authorised to participate in the Ntaganda case, which includes 1,119 participating victims, or 42.3% of the total number of accepted victims. In the Blé Goudé case, 470 victims were accepted to participate, representing 17.8% of all authorised victims. As reported in the *Gender Report Card 2011*, 560 victims had been accepted to participate in the Kenya cases between 30 August 2010 and 1 September 2011, representing 24.4% of the total number of victims accepted to participate during that reporting period.¹⁹⁵⁴ Between 1 September 2013 and 31 August 2014, an additional 1,058 victims were authorised to participate in the Kenya cases, representing 40% of the total number of victims accepted to participate

during this reporting period.¹⁹⁵⁵ There was no increase in the number of victim participants authorised in the Darfur Situation, which represents 1.5% of participating victims.¹⁹⁵⁶ Neither was there any increase in the Uganda Situation, which accounts for 0.7% of all victim participants.¹⁹⁵⁷

¹⁹⁵¹ See *Gender Report Card 2013*, p 182.

¹⁹⁵² Between 1 September 2013 and 31 August 2014, 1,119 victims were authorised to participate in the Ntaganda case. Prior to this, no victims had been authorised to participate in that case. See *Gender Report Card 2013*, p 181.

¹⁹⁵³ The Kenya Situation and cases represent 1,060 of the 9,131 participating victims at the Court, which amounts to 11.6% of the total. See *Gender Report Card 2013*, p 183.

¹⁹⁵⁴ *Gender Report Card 2011*, p 280.

¹⁹⁵⁵ Between 1 January 2005 and 31 August 2014, 1,060 victims were authorised to participate in the Kenya cases. As noted above, the number of victims authorised to participate in ICC cases between 1 January 2005 and 31 August 2014, as provided by the VPRS, are the current number of victims participating at the trial stage in a given case, when and if the proceedings have reached the trial stage. The figures presented do not include victims who were originally authorised at the pre-trial stage but were not subsequently authorised at the trial stage due to a change in the scope of the charges.

¹⁹⁵⁶ 135 victims (or 1.5%) of the 9,131 victim participants pertain to the Darfur Situation and the five associated cases. As indicated above, victim participants authorised in the Abu Garda case are not included as they are already accounted for in the 103 victim participants in the Banda and Jerbo case.

¹⁹⁵⁷ A total of 62 applicants were authorised to participate in the Uganda Situation and the Kony *et al* case between 1 January 2005 and 31 August 2014. This amounts to 0.7% of the 9,131 authorised victim participants.

Breakdown by Situation/case of victims who were formally authorised to participate in proceedings

<i>Situation and case</i>	<i>Number of victims authorised between 1 Sept 2013 and 31 Aug 2014</i>	<i>% of victim participants between 1 Sept 2013 and 31 Aug 2014</i>	<i>Total number of victims authorised between 1 Jan 2005 and 31 Aug 2014</i>	<i>% of victim participants between 1 Jan 2005 and 31 Aug 2014</i>
DRC Situation	0	0%	203	2.2%
<i>Prosecutor v. Lubanga</i>	0	0%	157	1.7%
<i>Prosecutor v. Katanga</i>	0	0%	365	4%
<i>Prosecutor v. Ngudjolo</i>	0	0%	365 ¹⁹⁵⁸	4%
<i>Prosecutor v. Ntaganda</i>	1,119	42.3%	1,119	12.3%
<i>Prosecutor v. Mudacumura</i>	0	0%	0	0%
<i>Prosecutor v. Mbarushimana</i>	0	0%	132	1.4%
DRC Situation and cases	1,119	42.3%	1,976	21.6%
Uganda Situation	0	0%	21	0.2%
<i>Prosecutor v. Kony et al</i>	0	0%	41	0.4%
Uganda Situation and cases	0	0%	62	0.7%
Darfur Situation	0	0%	14	0.2%
<i>Prosecutor v. Abu Garda</i>	0	0%	89 ¹⁹⁵⁹	
<i>Prosecutor v. Harun and Kushayb</i>	0	0%	6	0.1%
<i>Prosecutor v. Al Bashir</i>	0	0%	12	0.1%
<i>Prosecutor v. Banda and Jerbo</i>	0	0%	103	1.1%
<i>Prosecutor v. Hussein</i>	0	0%	0	0%
Darfur Situation and cases	0	0%	135	1.5%
CAR Situation	0	0%	0	0%
<i>Prosecutor v. Bemba</i>	0	0%	5,229	57.3%
<i>Prosecutor v. Bemba, Kilolo, Mangenda, Babala and Arido</i>	0	0%	0	0%
CAR Situation and cases	0	0%	5,229	57.3%
Kenya Situation	0	0%	0	0%
<i>Prosecutor v. Ruto and Sang</i>	489	18.5%	489	5.4%
<i>Prosecutor v. Kenyatta</i>	569	21.5%	571	6.3%
<i>Prosecutor v. Barasa</i>	0	0%	0	0%
Kenya Situation and cases	1,058	40%	1,060	11.6%

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1958 In November 2012, Trial Chamber II severed the cases against Ngudjolo and Katanga. In its decision, the Chamber held that 'the victims allowed to participate in the initial proceedings [we]re authorised to continue participating in both of the severed proceedings'. ICC-01/04-01/07-3319-tENG/FRA, para 64. For this reason, the 365 victims that were authorised to participate in the joint trial against Ngudjolo and Katanga have been listed as victim participants in both cases. However, as these are the same victims, they have only been counted once in the total number of victims that have been authorised to participate in proceedings between 1 January 2005 and 31 August 2014.

1959 Following the non-confirmation of charges against Abu Garda in 2009, all 89 victims in that case re-applied for and were granted participation status in the Banda and Jerbo case. In order to present an accurate figure of the total number of victims authorised to participate, these 89 victim participants in the Abu Garda case were not counted in the total number of victims authorised, as they were already accounted for in the 103 victim participants in the Banda and Jerbo case.

<i>Situation and case</i>	<i>Number of victims authorised between 1 Sept 2013 and 31 Aug 2014</i>	<i>% of victim participants between 1 Sept 2013 and 31 Aug 2014</i>	<i>Total number of victims authorised between 1 Jan 2005 and 31 Aug 2014</i>	<i>% of victim participants between 1 Jan 2005 and 31 Aug 2014</i>
Libya Situation	0	0%	0	0%
<i>Prosecutor v. Gaddafi and Al-Senussi</i>	0	0%	0	0%
Libya Situation and cases	0	0%	0	0%
Côte d'Ivoire Situation	0	0%	0	0%
<i>Prosecutor v. Laurent Gbagbo</i>	0	0%	199	2.2%
<i>Prosecutor v. Simone Gbagbo</i>	0	0%	0	0%
<i>Prosecutor v. Blé Goudé</i>	470	17.8%	470	5.1%
Côte d'Ivoire Situation and cases	470	17.8%	669	7.3%
Mali Situation	0	0%	0	0%
Registered Vessels of Comoros, Greece and Cambodia Situation	0	0%	0	0%
Total	2,647		9,131	

Breakdown of participants by gender

Of the 9,131 victims authorised to participate in the proceedings between 1 January 2005 and 31 August 2014, the gender of 8,646 was registered by the VPRS, and of these, the gender of 485 (or 5.3%) was registered as ‘unknown’,¹⁹⁶⁰ with the overall division between male and female victims remaining largely the same as last year. Female victim participants accounted for 4,058 of the total number of victim participants (or 44.4%), while male victim participants accounted for 4,588 (or 50.2%).¹⁹⁶¹ In the proceedings against Al Bashir, as well as against Harun and Kushayb, all of the victim participants were male.¹⁹⁶² In the Katanga and Ngudjolo cases, nearly 70% of the victims authorised to participate were male.¹⁹⁶³ No victims have yet been authorised to participate in the Libya Situation, in the case against Gaddafi and Al-Senussi, or in the Mali and Registered Vessels of Comoros, Greece and Cambodia Situations. Between 1 January 2005 and 31 August 2014, the majority of victims authorised to participate were male in all cases except the Kenyatta case in the Kenya Situation, the Laurent Gbagbo and Blé Goudé cases in the Côte d’Ivoire Situation, and the Mbarushimana case in the DRC Situation. In the Kenyatta case, 56.2% of victims authorised to participate in the proceedings were female,¹⁹⁶⁴ while in the Blé Goudé case, female victims represented 56% of

all victim participants.¹⁹⁶⁵ In the Laurent Gbagbo case, 51.8% of all victim participants were female.¹⁹⁶⁶ The case with the highest proportion of female victims authorised to participate in the proceedings was the Mbarushimana case, in which 62.1% (82 of 132) of authorised victims were female. The Mbarushimana case contained the broadest range of gender-based crimes brought before the ICC to date. However, in December 2011, the Pre-Trial Chamber declined to confirm any of the charges against Mbarushimana, and he was subsequently released. While the case against Mbarushimana is not yet listed on the Court’s website as closed, there are currently no active proceedings in which victims could participate.

Regarding the four cases in which victims were authorised to participate between 1 September 2013 and 31 August 2014, in the Blé Goudé and Kenyatta cases, the majority were female. In the Blé Goudé case, out of the 470 victims authorised to participate in the reporting period, 263 (or 56%) were female, while 207 (or 44%) were male. In the Kenyatta case, out of the 569 victims authorised to participate, 319 (or 56.1%) were female, while 250 (or 43.9%) were male. In the Ruto and Sang case, of the 489 victims authorised to participate, 250 (or 51.1%) were male, while 237 (or 48.5%) were female. In the Ntaganda case, of the 1,119 victims authorised to participate, 701 (or 62.6%) were male, while 417 (or 37.3%) were female.

1960 The VPRS email clarified that the designation of ‘unknown gender’ means that this information may either not yet have been processed or the application does not provide sufficient information to determine the gender of the applicant.

1961 During the period covered by the *Gender Report Card 2013*, 46.2% of all victim participants were male, and 41.8% were female victims. See *Gender Report Card 2013*, p 184.

1962 The VPRS email indicated that all 12 victim participants in the case against President Al Bashir were male, as were the six participants in the Harun and Kushayb case.

1963 The VPRS email indicated that of the 365 victims authorised to participate in the Katanga and Ngudjolo cases, 245 were male victims, representing 67.1%.

1964 The VPRS email indicated that 321 of the 571 victims authorised to participate in the Kenyatta case were female.

1965 The VPRS email indicated that 263 of the 470 victims authorised to participate in the Blé Goudé case were female.

1966 The VPRS email indicated that 103 of the 199 victims authorised to participate in the Laurent Gbagbo case were female, representing 51.8%.

Gender breakdown by Situation/case of victims who were formally authorised to participate in proceedings between 1 January 2005 and 31 August 2014

Situation or case	Number of male participants	% male participants	Number of female participants	% female participants	Number of participants gender not registered	% gender not registered	Total
DRC Situation	135	66.5 %	64	31.5 %	4	2 %	203
<i>Prosecutor v. Lubanga</i>	98	62.4 %	57	36.3 %	2	1.3 %	157
<i>Prosecutor v. Katanga</i>	245	67.1 %	117	32.1 %	3	0.8 %	365
<i>Prosecutor v. Ngudjolo</i>	245	67.1 %	117	32.1 %	3	0.8 %	365 ¹⁹⁶⁷
<i>Prosecutor v. Ntaganda</i>	701	62.6 %	417	37.3 %	1	0.1 %	1,119
<i>Prosecutor v. Mudumura</i>	0	0 %	0	0 %	0	0 %	0
<i>Prosecutor v. Mbarushimana</i>	48	36.4 %	82	62.1 %	2	1.5 %	132
DRC Situation and cases	1,227	62.1 %	737	37.3 %	12	0.6 %	1,976
Uganda Situation	15	71.4 %	6	28.6 %	0	0 %	21
<i>Prosecutor v. Kony et al</i>	22	53.7 %	19	46.3 %	0	0 %	41
Uganda Situation and cases	37	59.7 %	25	40.3 %	0	0 %	62
Darfur Situation	11	78.6 %	3	21.4 %	0	0 %	14
<i>Prosecutor v. Abu Garda</i>	46	51.7 %	43	48.3 %	0	0 %	89 ¹⁹⁶⁸
<i>Prosecutor v. Harun and Kushayb</i>	6	100 %	0	0 %	0	0 %	6
<i>Prosecutor v. Al Bashir</i>	12	100 %	0	0 %	0	0 %	12
<i>Prosecutor v. Banda and Jerbo</i>	54	52.4 %	49	47.6 %	0	0 %	103
<i>Prosecutor v. Hussein</i>	0	0 %	0	0 %	0	0 %	0
Darfur Situation and cases	83	61.5 %	52	38.5 %	0	0 %	135

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1967 As indicated above, victim participants in the Katanga and Ngudjolo cases are the same and are counted only once in the total of victims authorised to participate.

1968 As indicated above, victim participants authorised in the Abu Garda case are not included as they are already accounted for in the 103 victim participants in the Banda and Jerbo case.

Gender breakdown by Situation/case of victims who were formally authorised to participate in proceedings between 1 January 2005 and 31 August 2014 *continued*

Situation or case	Number of male participants	% male participants	Number of female participants	% female participants	Number of participants gender not registered	% gender not registered	Total
CAR Situation	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Bemba</i>	2,438	46.6%	2,320	44.4%	471	9%	5,229
<i>Prosecutor v. Bemba, Kilolo, Mangenda, Babala and Arido</i>	0	0%	0	0%	0	0%	0
CAR Situation and cases	2,438	46.6%	2,320	44.4%	471	9%	5,229
Kenya Situation	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Ruto and Sang</i>	250	51.1%	237	48.5%	2	0.4%	489
<i>Prosecutor v. Kenyatta</i>	250	43.8%	321	56.2%	0	0%	571
Kenya Situation and cases	500	47.2%	558	52.6%	2	0.2%	1,060
Libya Situation	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Gaddafi and Al-Senussi</i>	0	0%	0	0%	0	0%	0
Libya Situation and cases	0	0%	0	0%	0	0%	0
Côte d'Ivoire Situation	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Laurent Gbagbo</i>	96	48.2%	103	51.8%	0	0%	199
<i>Prosecutor v. Simone Gbagbo</i>	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Charles Blé Goudé</i>	207	44%	263	56%	0	0%	470
Côte d'Ivoire Situation and cases	303	45.3%	366	54.7%	0	0%	669
Mali Situation	0	0%	0	0%	0	0%	0
Registered Vessels of Comoros, Greece and Cambodia Situation	0	0%	0	0%	0	0%	0
Total ¹⁹⁶⁹	4,588	50.2%	4,058	44.4%	485	5.3%	9,131

1969 These totals excluded the 89 victims in the Abu Garda case, and the 365 victims in the Ngudjolo case, for the reasons explained above.

Gender breakdown by Situation/case of victims who were formally authorised to participate in proceedings between 1 September 2013 and 31 August 2014

Situation or case	Number of male participants	% male participants	Number of female participants	% female participants	Number of participants gender not registered	% gender not registered	Total
DRC Situation	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Lubanga</i>	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Katanga</i>	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Ngudjolo</i>	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Ntaganda</i>	701	62.6 %	417	37.3 %	1	0.1 %	1,119
<i>Prosecutor v. Mudumura</i>	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Mbarushimana</i>	0	0%	0	0%	0	0%	0
DRC Situation and cases	701	62.6%	417	37.3%	1	0.1%	1,119
Kenya Situation	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Ruto and Sang</i>	250	51.1 %	237	48.5 %	2	0.4 %	489
<i>Prosecutor v. Kenyatta</i>	250	43.9 %	319	56.1%	0	0%	569
Kenya Situation and cases	500	47.3%	556	52.6%	2	0.2%	1,058
Côte d'Ivoire Situation	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Laurent Gbagbo</i>	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Simone Gbagbo</i>	0	0%	0	0%	0	0%	0
<i>Prosecutor v. Charles Blé Goudé</i>	207	44%	263	56%	0	0%	470
Côte d'Ivoire Situation and cases	207	44%	263	56%	0	0%	470
Total	1,408	53.2%	1,236	46.7%	3	0.1%	2,647

Overview of female victim participants

Between 1 January 2005 and 31 August 2014, 4,058 female victims were authorised to participate in proceedings before the ICC, representing 44.4% of all authorised victims.¹⁹⁷⁰ The overall division between male and female victims increased slightly as compared to last year, when 2,920 of 6,987 victim participants (or 41.8%) were female.¹⁹⁷¹ Of the total number of victims authorised to participate, 2,320 (or 57.2%) were accepted in the Bemba case, representing the highest number of female victims accepted to participate in a case to date.¹⁹⁷²

Between 1 September 2013 and 31 August 2014, 1,236 female victims were authorised to participate, representing 46.7% of all authorised victim participants.¹⁹⁷³ During this period, the highest number of female victims were accepted to participate in the Ntaganda case, in which 417 female victims were authorised.¹⁹⁷⁴

<i>Situation and case</i>	<i>Number of female victims authorised to participate between 1 Jan 2005 and 31 Aug 2014</i>	<i>% of total female victims authorised to participate between 1 Jan 2005 and 31 Aug 2014</i>	<i>Number of female victims authorised to participate between 1 Sept 2013 and 31 Aug 2014</i>	<i>% of total female victims authorised to participate between 1 Sept 2013 and 31 Aug 2014</i>
DRC Situation	64	1.6 %	0	0%
<i>Prosecutor v. Lubanga</i>	57	1.4 %	0	0%
<i>Prosecutor v. Katanga</i>	117	2.9%	0	0%
<i>Prosecutor v. Ngudjolo</i>	117 ¹⁹⁷⁵		0	0%
<i>Prosecutor v. Ntaganda</i>	417	10.3 %	417	33.7%
<i>Prosecutor v. Mudacumura</i>	0	0%	0	0%
<i>Prosecutor v. Mbarushimana</i>	82	2.0%	0	0%
DRC Situation and cases	737	18.2 %	417	33.7%
Uganda Situation	6	0.1 %	0	0%
<i>Prosecutor v. Kony et al</i>	19	0.5 %	0	0%
Uganda Situation and cases	25	0.6 %	0	0%

table continues next page

1970 As noted above, between 1 January 2005 and 31 August 2014, 9,131 victims were accepted to participate in the proceedings.

1971 See *Gender Report Card 2013*, p 184.

1972 These figures were based on the total number of authorised victim participants whose gender the VPRS was able to register. The VPRS has indicated that it was unable to register the gender of a total of 485 participants (or 5.3% of all victim participants).

1973 As noted above, between 1 September 2013 and 31 August 2014, 2,647 victims were accepted to participate in the proceedings.

1974 For detailed information regarding the percentage of female victims authorised to participate as compared with male victims authorised to participate from 1 January 2005 to 31 August 2014, as well as during this reporting period, see the previous subsection of this Report entitled 'Breakdown of participants by gender'.

1975 As indicated above, the 117 female victims who were authorised to participate in the joint trial against Ngudjolo and Katanga were listed as victim participants in both cases. However, as these are the same victims, they were only counted once in the subtotal for the DRC Situation and related cases, and in the total number of female victims that have been authorised to participate in proceedings between 1 January 2005 and 31 August 2014. A percentage was therefore not provided.

<i>Situation and case</i>	<i>Number of female victims authorised to participate between 1 Jan 2005 and 31 Aug 2014</i>	<i>% of total female victims authorised to participate between 1 Jan 2005 and 31 Aug 2014</i>	<i>Number of female victims authorised to participate between 1 Sept 2013 and 31 Aug 2014</i>	<i>% of total female victims authorised to participate between 1 Sept 2013 and 31 Aug 2014</i>
Darfur Situation	3	0.1 %	0	0%
<i>Prosecutor v. Abu Garda</i>	43 ¹⁹⁷⁶		0	0%
<i>Prosecutor v. Harun and Kushayb</i>	0	0 %	0	0%
<i>Prosecutor v. Al Bashir</i>	0	0 %	0	0%
<i>Prosecutor v. Banda and Jerbo</i>	49	1.2 %	0	0%
<i>Prosecutor v. Hussein</i>	0	0%	0	0%
Darfur Situation and cases	52	1.3 %	0	0%
CAR Situation	0	0%	0	0%
<i>Prosecutor v. Bemba</i>	2,320	57.2 %	0	0%
<i>Prosecutor v. Bemba, Kilolo, Mangenda, Babala and Arido</i>	0	0%	0	
CAR Situation and cases	2,320	57.2 %	0	0%
Kenya Situation	0	0%	0	0%
<i>Prosecutor v. Ruto and Sang</i>	237	5.8 %	237	18.4%
<i>Prosecutor v. Kenyatta</i>	321	7.9 %	319	24.7%
Kenya Situation and cases	558	13.8 %	556	43.1%
Libya Situation	0	0%	0	0%
<i>Prosecutor v. Gaddafi and Al-Senussi</i>	0	0%	0	0%
Libya Situation and cases	0	0%	0	0%
Côte d'Ivoire Situation	0	0%	0	0%
<i>Prosecutor v. Laurent Gbagbo</i>	103	2.5 %	0	0%
<i>Prosecutor v. Simone Gbagbo</i>	0	0%	0	0%
<i>Prosecutor v. Blé Goudé</i>	263	6.5 %	263	20.4%
Côte d'Ivoire Situation and cases	366	9.0 %	263	20.4%
Mali Situation	0	0%	0	0%
Registered Vessels of Comoros, Greece and Cambodia Situation	0	0%	0	0%
Totals	4,058		1,236	

1976 As indicated above, the 43 female victim participants authorised in the Abu Garda case all re-applied for, and were granted, participation status in the Banda and Jerbo case following the non-confirmation of charges against Abu Garda. In order to present an accurate figure of the total number of victim participants authorised by the Chambers, these 43 victims were counted only once in the subtotal for the Darfur Situation and related cases, and in the total number of female victims who were authorised to participate in proceedings between 1 January 2005 and 31 August 2014. A percentage was therefore not provided.

Developments in the victim participation and legal representation system

During the reporting period, the Pre-Trial and Trial Chambers rendered important decisions on the structure and procedures for victim participation and legal representation at the confirmation of charges and trial stages of proceedings. In the Blé Goudé case, for the purposes of the confirmation of charges hearing, the Single Judge of Pre-Trial Chamber I accepted all victims who were previously authorised to participate in the Laurent Gbagbo case. However, for new victim applicants, the Single Judge departed from the collective application process which had been applied in the Gbagbo case to allow individual applications utilising the standard application form. In both the Ruto and Sang and Kenyatta cases, the Registry and Common Legal Representatives continued to report to Trial Chambers V(a) and V(b), respectively on the use of a novel 'registration' system to process victim applications, as well as on their activities and meetings with victims in Kenya. In the Ntaganda case, prior to the confirmation of charges hearing, the Single Judge of Pre-Trial Chamber II appointed two Legal Representatives of Victims at the recommendation of the Registry to reflect the divergent interests of two groups of victims. The charges were confirmed in June 2014 and the case assigned to Trial Chamber VI, which subsequently requested submissions from the parties and participants, as well as the Registry, on how to process applications for participation in the trial. Finally, in preparation for the Banda trial, Trial Chamber IV rendered a decision outlining 11 participatory rights for the 103 victims authorised to participate.

Côte d'Ivoire: *The Prosecutor v. Charles Blé Goudé*

According to the VPRS, a total of 470 victims are authorised to participate in the Blé Goudé case, of which, 207 (or 44%) are male and 263 (or 56%) are female.¹⁹⁷⁷

Decision on victim participation

On 11 June 2014, the Single Judge of Pre-Trial Chamber I¹⁹⁷⁸ issued a decision addressing: the requirements for victim applicants to participate in the Blé Goudé case; the common legal representation of participating victims; and the participatory rights of victims.¹⁹⁷⁹ The Single Judge decided that the 199 victims granted status to participate in the Laurent Gbagbo case may also be granted participatory status in the Blé Goudé case without reapplication.¹⁹⁸⁰ In making this decision, the Single Judge considered that applications for victim participation are not case specific and that applications may be relevant to more than one case.¹⁹⁸¹ The Single Judge ultimately found that 'the charges against Mr Blé Goudé are so similar to the ones against Mr Gbagbo that applicants fulfilling the criteria in one case will in principle satisfy the criteria in the other'.¹⁹⁸² In this decision, the Single Judge also rejected five additional applications made in a Request for Participation of 16 May 2014, because they were 'incomplete and/or not linked to the present case'.¹⁹⁸³

1977 Statistics were provided to the Women's Initiatives for Gender Justice by the VPRS in an email dated 17 September 2014.

1978 Pre-Trial Chamber I was composed of Presiding Judge Silvia Fernández de Gurmendi (Argentina), Judge Hans-Peter Kaul (Germany) and Judge Christine Van den Wyngaert (Belgium).

1979 ICC-02/11-02/11-83.

1980 ICC-02/11-02/11-83, para 18. Neither this Decision nor the two Gbagbo decisions initially authorising the 199 victims provide further details regarding the breakdown of the types of victims authorised to participate. See also ICC-02/11-01/11-138, p 25-26; ICC-02/11-01/11-384, p 22-23.

1981 ICC-02/11-02/11-83, para 12.

1982 ICC-02/11-02/11-83, para 15.

1983 ICC-02/11-02/11-83, para 40 and p 21.

Following a suggestion from VPRS, the Single Judge decided that, for the purpose of participating in the confirmation of charges proceedings, new applicants may use the standard, individual application form, instead of the collective application form used in the Laurent Gbagbo case.¹⁹⁸⁴ The VPRS had recommended that the collective application process should not be followed, since a number of new applicants in the Blé Goudé case had already applied using the standard application form, and 'it was not always easy to bring together victims for the purposes of the application process'.¹⁹⁸⁵

Further, the Single Judge found that 'there are good reasons, as underlined by the OPCV, for the team currently representing victims in the Gbagbo case to also represent victims granted status in the case at hand'. She accordingly appointed the OPCV to represent the victims, supported by a team including a principal counsel, a team member based in the field, and a case manager.¹⁹⁸⁶

The Single Judge enumerated the procedural rights of the victims during the confirmation of charges and related proceedings, which could be exercised through their Legal Representative and were 'in line with' rights granted to victims in the Laurent Gbagbo case.¹⁹⁸⁷ She specified that the Common Legal Representative has the right to attend public sessions of, and make opening and closing statements at, the confirmation of charges hearing, and to access the public records of the case, as well as to redacted and unredacted copies of applications for victims accepted to participate. The Common Legal Representative may also, subject to a determination by the Chamber, be granted permission to attend *in camera* and *ex parte* sessions, to make further oral or written submissions and to have access to confidential documents.¹⁹⁸⁸

On 1 August 2014, the Single Judge issued a Second Decision on victim participation in the pre-trial proceedings, accepting an additional 272 victims of the four alleged incidents identified in the case. The breakdown is as follows: 76 victims of the first incident, which involved alleged attacks linked to the demonstrations by Ouattara supporters in front of the RTI building between 16 and 19 December 2010; 126 victims of the second incident, an alleged attack organised during a women's march in Abobo on 3 March 2011; 24 victims of the third incident, the alleged shelling of the Abobo market and its surroundings on 17 March 2011; and 46 victims of the fourth incident, an alleged attack on Yopougon in or about 12 April 2011.¹⁹⁸⁹ The Single Judge further appointed the OPCV as their Common Legal Representative, and reiterated the participation rights outlined in her first decision.¹⁹⁹⁰ The Single Judge also terminated the status of one victim who had been authorised to participate in the 11 June 2014 decision described above, since he is now deceased.¹⁹⁹¹

1984 ICC-02/11-02/11-83, para 41. For information on the collective application procedure used in the Laurent Gbagbo case, see *Gender Report Card 2012*, p 274-283.

1985 ICC-02/11-02/11-83, para 41.

1986 ICC-02/11-02/11-83, paras 24-25.

1987 ICC-02/11-02/11-83, para 27.

1988 ICC-02/11-02/11-83, paras 26-38.

1989 The Single Judge observed that a number of applicants submitted two application forms, thereby receiving two victim codes. In some instances, these applications were assessed jointly, as one and the same applicant. The Judge noted that as a result the final number of 272 applicants admitted as victims is lower than the number of the 277 applications received, although all applicants qualified as victims pursuant to rule 85(a) of the RPE. ICC-02/11-02/11-111, paras 8, 11-12 and p 13-15.

1990 ICC-02/11-02/11-111, p 13-15.

1991 ICC-02/11-02/11-111, para 29.

Kenya: *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang; The Prosecutor v. Uhuru Muigai Kenyatta*

According to the VPRS, a total of 489 victims are authorised to participate in the Ruto and Sang case, of which 250 (or 51.1%) are male, 237 (or 48.5%) are female and the gender of two victims (or 0.4%) is unknown. In the Kenyatta case, a total of 571 victims are authorised to participate, of whom 250 (or 43.8%) are male and 321 (or 56.2%) are female.¹⁹⁹²

Registry update on common legal representation process in the Kenya cases

On 23 January 2014, the Registry submitted to Trial Chamber V(a)¹⁹⁹³ its Seventh Periodic Report on the general situation of victims in the case and the activities of the VPRS and the Common Legal Representative in the field (Seventh Report) in the Ruto and Sang case.¹⁹⁹⁴ The Seventh Report provides an update on the registration system that had been put in place pursuant to the Trial Chamber's 3 October 2012 decision on victims' representation and participation,¹⁹⁹⁵ which is similarly being applied in the Kenyatta case.¹⁹⁹⁶ The registration system in the Kenya cases introduced the creation of a two-pronged approach to the victim participation application process. Victims who sought to appear individually before the Court would be required to follow the established application procedure foreseen by Rule 89(1) of the RPE,

1992 Statistics were provided to the Women's Initiatives for Gender Justice by the VPRS in an email dated 17 September 2014.

1993 Trial Chamber V(a) was composed of Presiding Judge Chile Eboe-Osuji (Nigeria), Judge Olga Herrera Carbuccion (Dominican Republic) and Judge Robert Fremr (Czech Republic).

1994 ICC-01/09-01/11-1157, p 4; ICC-01/09-01/11-1157-AnxA.

1995 ICC-01/09-02/11-498; ICC-01/09-01/11-460. Identical decisions were issued in the Ruto and Sang and Kenyatta cases. See also *Gender Report Card 2013*, p 193.

1996 ICC-01/09-01/11-1157-AnxA, para 4; ICC-01/09-02/11-860-AnxA. See also *Gender Report Card 2013*, p 207-214.

whereas victims who did not seek to appear individually before the Court would follow a new procedure, in which they register with the Registry through the Court appointed Common Legal Representative in order for their views and concerns to be expressed. Victims who are registered through the new simplified system are not subject to an individual assessment by the Trial Chamber.¹⁹⁹⁷

The Seventh Report referenced the challenges identified by the Trial Chamber in its Victim Participation decision, which may inhibit the registration of victims despite the simplified system put in place.¹⁹⁹⁸ Specifically, the Trial Chamber had expressed concern that:

[S]ome victims may face difficulties as a result of their age or their mental or physical capacities and may not be willing or able to ask another person to register on their behalf. Other victims may be subject to social pressure not to report the crimes they claim to have suffered or be afraid of intimidation or ostracism in the event that their registration becomes known in their community. This is of particular relevance in the present case, where a number of victims were subjected to the alleged crime of rape and where the alleged events occurred less than five years ago.¹⁹⁹⁹

The Trial Chamber further stressed that 'it is essential that victims' representation is as inclusive as possible, without discrimination against victims who are, for a variety of reasons, unable to register'.²⁰⁰⁰

1997 For a detailed summary of the new victim registration system in the Kenya cases, emanating from the 3 October 2014 decision in both cases, see *Gender Report Card 2013*, p 192-214.

1998 ICC-01/09-01/11-1157-AnxA, para 4 and fn 3, citing ICC-01/09-02/11-498, para 51 [sic].

1999 ICC-01/09-02/11-498, para 50.

2000 ICC-01/09-02/11-498, para 51.

In the Seventh Report, the VPRS and Common Legal Representative of Victims submitted that, in constructing the registration system, they remained ‘mindful of [these] challenges’ and thus sought to ‘facilitate consistent interaction between the Common Legal Representative and large numbers of victims while ensuring efficiency and flexibility’.²⁰⁰¹ The Report described the registration system devised for potential victims who wish to participate and who have not already submitted the standard ICC application form. These persons are identified by the VPRS through past and ongoing ‘mapping exercises’.²⁰⁰²

The Common Legal Representative of Victims then arranges to meet with the potential victims in groups, in locations close to their residences, with ‘trained intermediaries’ and occasionally other victims assisting to facilitate the initial meetings by advising on safe locations and inviting the victims to the meeting. At the meeting, victims identified through the mapping exercises are requested to complete a two-page registration form, which includes information that will assist the Common Legal Representative in assessing whether the victim ‘can be considered a victim of the Case’. Victims can choose, after this ‘verification process’ to register with the Registry, through the Common Legal Representative, who transmits their forms to the VPRS.²⁰⁰³ The Seventh Report explained that ‘[t]hrough these [mapping] exercises 240 victims were met from Kisii and Nyamira Counties and 210 were assessed by the CLR’s team as falling within the scope of the Case’.²⁰⁰⁴

The VPRS then registers the forms, grouping the victims in the manner categorised by the

Common Legal Representative.²⁰⁰⁵ The database and groupings are designed to ‘keep track of the victims registered’ and ‘to centralise and collate the information received’.²⁰⁰⁶ In a subsequent report to the Chamber in March 2014, the VPRS stated that it had developed an exportable version of the database, including victim contact information, to assist the Common Legal Representative and his team to keep track of victims and groupings.²⁰⁰⁷

In the Seventh Report, the Registry further described a new ‘presentation model’ developed by the VPRS in collaboration with PIDS, to help inform victims when their applications are ruled to fall outside of the scope of the case, due to the ‘frequency with which the VPRS is called upon to deliver messages of this nature’.²⁰⁰⁸ This presentation model includes audio-visual tools, many translated into Kiswahili, which are designed to deliver complex messages such as ‘the difference between participating victims and victims falling outside the scope of the Case, the difference between victims and witnesses, and the difference between participation and reparations’.²⁰⁰⁹ The VPRS also reported that it has collaborated with local civil society organisations to inform victims of ‘local and national initiatives not related to the Court that may also be relevant’, as well as to ‘survey a random sample of people attending these sessions’ in order to assess how the subject was being received.²⁰¹⁰ The VPRS reported incorporating this feedback, when possible,

2001 ICC-01/09-01/11-1157-AnxA, para 4.

2002 ICC-01/09-01/11-1157-AnxA, para 5.

2003 ICC-01/09-01/11-1157-AnxA, para 5.

2004 ICC-01/09-01/11-1157-AnxA, para 8.

2005 ICC-01/09-01/11-1157-AnxA, para 6. The Seventh Report does not indicate the manner in which these victims are grouped by the Common Legal Representative or the Registry.

2006 ICC-01/09-01/11-1157-AnxA, para 7.

2007 ICC-01/09-01/11-1226-AnxA, paras 6-7. The exportable version of the database is also in use in the Kenyatta case. ICC-01/09-02/11-920-AnxA, para 7.

2008 ICC-01/09-01/11-1157-AnxA, para 11. The same presentation model is also used in the Kenyatta case. ICC-01/09-02/11-883-AnxA, paras 8-9.

2009 ICC-01/09-01/11-1157-AnxA, para 11.

2010 ICC-01/09-01/11-1157-AnxA, paras 11-12.

into the presentation model to increase its effectiveness.²⁰¹¹

In the Kenyatta case, the VPRS also reported that a two-day meeting was held, which included the Common Legal Representative of Victims, his team, local civil society organisations, intermediaries, the PIDS and ‘two experts with backgrounds in communication with victims’.²⁰¹² The meeting, which incorporated examples provided by the experts on various post-conflict countries, sought to develop strategies for effective communication of ‘complex messages to victims of the case and affected communities’.²⁰¹³

Notably, in the tenth periodic reports for both Kenya cases submitted in July 2014, the VPRS reported that it was unable to conduct any field related activities ‘due to instances of violence and insecurity in various parts of Kenya, and instead relied on intermediaries to relay key messages and information’.²⁰¹⁴ Nevertheless, the Common Legal Representative reported that he was able to meet with victims during this period.²⁰¹⁵

2011 ICC-01/09-01/11-1157-AnxA, para 12.

2012 ICC-01/09-02/11-920-AnxA, para 6.

2013 ICC-01/09-02/11-920-AnxA, para 6.

2014 ICC-01/09-02/11-935-Anx1, para 7; ICC-01/09-01/11-1444-AnxA, para 5.

2015 ICC-01/09-02/11-935-Anx1, para 1; ICC-01/09-01/11-1444-AnxA, para 1.

DRC: *The Prosecutor v. Bosco Ntaganda*

According to the VPRS, a total of 1,119 victims are authorised to participate in the Ntaganda case, of which 701 (or 62.6%) are male, 417 (or 37.3%) are female and the gender of one victim (or 0.1%) is unknown.²⁰¹⁶

Decision on the organisation of legal representation for the confirmation of charges and related proceedings

On 20 November 2013, the Single Judge of Pre-Trial Chamber II²⁰¹⁷ issued a decision requesting the VPRS and OPCV ‘to take steps with regard to the legal representation of victims in the confirmation of charges hearing and in the related proceedings’.²⁰¹⁸ The Single Judge recalled the Chamber’s 28 May 2013 decision ordering the Registry to consult with the applicants for victim participation as to their preference regarding legal representation,²⁰¹⁹ and noted that the Registry had submitted three reports together with unredacted copies of 459 application forms.²⁰²⁰ In a fourth report to the Chamber, the Registry had provided observations on: (i) how the applicants were consulted about their preference for legal representation and the results; (ii) ‘potential conflicts of interest among groups of applicants’; and (iii) steps to organise the legal representation of participating victims, including the proposed criteria to ‘guide the selection of common legal representatives’.²⁰²¹

2016 Statistics provided to the Women’s Initiatives for Gender Justice by the VPRS in an email dated 17 September 2014.

2017 Pre-Trial Chamber II was composed of Presiding Judge Ekaterina Trendafilova (Bulgaria), Judge Hans-Peter Kaul (Germany), and Judge Cuno Tarfusser (Italy).

2018 ICC-01/04-02/06-150, p 3. This decision was reclassified as public on 16 January 2014.

2019 ICC-01/04-02/06-150, para 2, citing ICC-01/04-02/06-67, p 22.

2020 ICC-01/04-02/06-150, para 3.

2021 ICC-01/04-02/06-150, para 4, citing ICC-01/04-02/06-141-Conf-Exp.

The Single Judge noted that the Registry report recommended providing legal representation that combined:

[R]elevant expertise and experience, including international criminal litigation experience and experience representing large groups of victims, proficiency in the language of the proceedings, a wide knowledge and understanding of the Case and of its context, as well as of the victims' situation in the field, including expertise relating to the type of victimization suffered by individuals in the group. The legal representative(s) should also demonstrate abilities to communicate easily and to establish a relationship of trust with victims.²⁰²²

The Single Judge observed the applicants' 'serious concerns' regarding the possibility of having one legal team representing both Hema and Lendu/non-Hema victims, or one team representing both former child soldiers and the victims of the attacks allegedly committed by the UPC/FPLC.²⁰²³ Taking these concerns into account, the Registry recommended the creation of two distinct victim groups: one composed of UPC/FPLC child soldiers and another of victims of UPC/FPLC attacks.²⁰²⁴ The Registry had further underscored 'the importance of a team structure around the legal representative(s) in order to have sufficient support in the field to have proximity with victims and be able to continuously inform and receive instructions from them'.²⁰²⁵

On 2 December 2013, the Single Judge issued the Decision Concerning the Organisation

of Common Legal Representation of Victims, appointing two common legal representatives from the OPCV to represent the groups identified by the Registry: one for former UPC/FPLC child soldiers and a second for victims of UPC/FPLC attacks.²⁰²⁶ The Single Judge found that it was appropriate to initiate the organisation of common legal representation while the application process was ongoing and prior to the Prosecution's filing of the final DCC on 10 January 2014, to ensure that the Common Legal Representatives had sufficient time to prepare for the confirmation of charges proceedings. However, the Single Judge explained that the procedural rights of victims would be decided later, along with their authorisation to participate.²⁰²⁷

In deciding on the composition of the two legal teams, the Single Judge considered the 'specific circumstances and features' of the case, including the preferences expressed by applicants to have a 'competent and available' legal representative who is 'capable of understanding the victims, the background of the conflict and of the case and the context in which they live'.²⁰²⁸ The Single Judge also considered the 'limited scope of the confirmation of charges hearing' and that the counsel would be paid by the Court's legal aid budget.²⁰²⁹ In line with the Registry's suggestion, the Single Judge ordered that each Common Legal Representative be assisted by one or more assistants to counsel²⁰³⁰ to ensure assistance by individuals 'with the necessary legal, linguistic, historical and cultural background to communicate directly and closely with the victims on the ground, having due regard for the type(s) of victimization suffered by the victims, in particular victims

2022 ICC-01/04-02/06-150, para 7, citing ICC-01/04-02/06-141-Conf-Exp, para 19.

2023 ICC-01/04-02/06-150, para 8.

2024 ICC-01/04-02/06-150, para 8.

2025 ICC-01/04-02/06-150, para 9, citing ICC-01/04-02/06-141-Conf-Exp, para 20.

2026 ICC-01/04-02/06-160, para 23 and p 11.

2027 ICC-01/04-02/06-160, paras 20-21.

2028 ICC-01/04-02/06-160, paras 24-25.

2029 ICC-01/04-02/06-160, para 24.

2030 ICC-01/04-02/06-160, para 26.

of sexual violence'.²⁰³¹ Finally, the Single Judge ordered the VPRS, OPCV and CSS to finalise the establishment of the two legal representation teams, including the selections of assistants to counsel, and to report to the Chamber on the selection process by 12 December 2013.²⁰³²

On 15 January 2014, the Single Judge assigned a Legal Representative to the group of child soldier victims, as well as a Legal Representative to the group of victims of attacks carried out by the UPC/FPLC.²⁰³³ The Single Judge further granted participatory rights to the two Common Legal Representatives of Victims as follows: 'to make oral submissions in the course of the confirmation of charges hearing or in any other hearing convened, subject to the directions of the Chamber';²⁰³⁴ 'to have access to all public decisions and filings in the record of the case', and access to other materials on a case-by-case basis;²⁰³⁵ to 'be notified of all filings and decisions filed in the course of the proceedings in which they are admitted to participate';²⁰³⁶ and 'to make written submissions on specific issues of law and/or fact'.²⁰³⁷

Moreover, in a 7 February 2014 decision, the Single Judge authorised 198 new victim applicants to participate in the case, 43 of whom were former child soldiers and 155 of whom were victims of UPC/FPLC attacks.²⁰³⁸ The Single Judge also rejected four applications from victims of the UPC/FPLC attacks, and deferred two applications from this group pending additional information to be received from the VPRS.²⁰³⁹

2031 ICC-01/04-02/06-160, para 26.

2032 ICC-01/04-02/06-160, para 27.

2033 ICC-01/04-02/06-211, p 37.

2034 ICC-01/04-02/06-211, para 86.

2035 ICC-01/04-02/06-211, paras 89-91.

2036 ICC-01/04-02/06-211, para 93.

2037 ICC-01/04-02/06-211, para 96.

2038 ICC-01/04-02/06-251, para 19 and p 19-20.

2039 ICC-01/04-02/06-251, para 19 and p 20.

Submissions on victim applications and procedure for participation in the trial proceedings

In preparation for the start of the Ntaganda trial proceedings, scheduled at the time of writing for 2 June 2015,²⁰⁴⁰ Trial Chamber VI²⁰⁴¹ scheduled a status conference for 20 August 2014 and requested submissions from the parties, participants and the Registry on a number of issues, including an 'update on victims' applications and the procedure for allowing victims to participate in the trial proceedings'.²⁰⁴² At the time of writing this Report, the status conference had been postponed to 18 September 2014.²⁰⁴³ The Prosecution, Common Legal Representatives of Victims and Registry filed their respective submissions on 14 August 2014.²⁰⁴⁴

In its submission, the Registry indicated that it had received approximately 2,000 applications for victim participation to date.²⁰⁴⁵ Of those, the Registry had transmitted 1,186 applications to the Pre-Trial Chamber during the pre-trial stage, of which 1,120 were subsequently authorised to participate in the confirmation of charges proceedings.²⁰⁴⁶ In its filing, the Registry estimated that an additional 400 applications may be received, for a total of approximately 2,400 victim applicants in the case.²⁰⁴⁷

2040 ICC-01/04-02/06-382, para 8 and p 9.

2041 Trial Chamber VI was composed of Presiding Judge Robert Fremr (Czech Republic), Judge Kuniko Ozaki (Japan), and Judge Geoffrey Henderson (Trinidad and Tobago).

2042 ICC-01/04-02/06-339, para 5(g) and p 6.

2043 ICC-01/04-02/06-354, para 5 and p 5.

2044 ICC-01/04-02/06-352; ICC-01/04-02/06-351; ICC-01/04-02/06-350.

2045 ICC-01/04-02/06-350, para 10.

2046 ICC-01/04-02/06-350, para 10.

2047 ICC-01/04-02/06-350, para 11.

The procedure for victims previously accepted to participate at the pre-trial stage

In their submissions, the Prosecution and Common Legal Representatives of Victims disagreed on whether victims admitted to participate during the pre-trial stage should be automatically admitted in the trial stage. The Prosecution argued that while victims accepted at the pre-trial stage should not be required to file a new application, the Registry should nonetheless review these applications and ‘report to the Chamber and inform the Common Legal Representative of any individuals who no longer fall within the revised definition of a victim for the purpose of the trial’.²⁰⁴⁸ The Prosecution noted that this procedure would follow the model adopted by Trial Chamber V in the Kenyatta and Ruto and Sang cases.²⁰⁴⁹

The Common Legal Representatives submitted jointly that the victims accepted to participate at the pre-trial stage of the proceedings should all be ‘automatically admitted’ to participate at the trial stage without their victim status being reviewed a second time.²⁰⁵⁰ They noted support for this approach in the decisions of Trial Chambers II and III, in the Katanga and Ngudjolo and Bemba cases, respectively.²⁰⁵¹ The Common Legal Representatives further submitted that ‘although certain aspects of the charges as brought by the Prosecution have not been confirmed by the Pre-Trial Chamber, the non-confirmed incidents/acts are of a very limited nature and do not affect, in any manner, the status of the victims admitted to participate at the pre-trial stage of proceedings’.²⁰⁵²

While the Registry did not make direct submissions on this issue, it did state ‘that

the scope of the present Case has been in some instances narrowed, expanded and/or clarified by the Confirmation of Charges Decision’.²⁰⁵³ Therefore the Registry anticipated making a comprehensive review of all of the approximately 2,400 applicants in the case in order to identify: (1) which of the 1,120 authorised victims remain within the scope of the case; (2) whether the approximately 800 applicants who were never transmitted to the Pre-Trial Chamber might now fall within the newly confirmed scope of the charges; (3) whether any of the 80 applicants who were transmitted to, but not admitted by, the Pre-Trial Chamber fall into the same category; and (4) which of the 400 applications expected during the trial phase fall within the scope of the confirmed charges.²⁰⁵⁴

The procedure for new victim applicants

Regarding the Trial Chamber’s approach to new victim applicants, the Prosecution and Common Legal Representatives of Victims agreed that the Trial Chamber should follow the procedures adopted at the pre-trial phase. However the Registry took a different approach and described two potential admission systems, including either the pre-trial approach, or a new Registry-led victim registration system similar to that introduced in the Kenya cases in 2012, as described above.²⁰⁵⁵

In its brief submissions on the topic, the Prosecution stated that it ‘support[ed] the continuation of the application processes established by the Single Judge’s decision of 28 May 2013, based on the simplified form adopted therein’.²⁰⁵⁶ This one-page form was developed as a way to streamline the application process,

2048 ICC-01/04-02/06-352, para 39.

2049 ICC-01/04-02/06-352, para 39.

2050 ICC-01/04-02/06-351, para 11.

2051 ICC-01/04-02/06-351, para 12.

2052 ICC-01/04-02/06-351, para 13.

2053 ICC-01/04-02/06-350, para 11.

2054 ICC-01/04-02/06-350, para 11.

2055 ICC-01/04-02/06-352, para 41; ICC-01/04-02/06-351, para 25; ICC-01/04-02/06-350, paras 12-21.

2056 ICC-01/04-02/06-352, para 41.

requesting that the applicants provide only the information that was ‘strictly required by law’.²⁰⁵⁷

Similarly, the Common Legal Representatives of Victims submitted that the Trial Chamber should maintain the process for victim applications, which was adopted during the pre-trial stage of the proceedings.²⁰⁵⁸ They emphasised the importance of victims providing specific details in their application forms on the events and the harm suffered, which may be relevant ‘for the determination of the truth and should be duly considered and taken into account by the Chamber for the purpose of the trial proceedings’.²⁰⁵⁹ They also stated that this approach was ‘in compliance with the right enshrined to victims under article 68(3) of the Rome Statute to participate in an effective and meaningful manner in the Court proceedings’.²⁰⁶⁰

In its submission, the Registry emphasised that regardless of its form, the admission system for victims to participate at trial must be ‘meaningful’ as opposed to ‘purely symbolic’, and outlined two possible approaches:²⁰⁶¹ the first would follow the procedures applied during the pre-trial phase of the case; and the second was described as a ‘neutral registration’ system similar to that practiced in the Ruto and Sang and Kenyatta cases.

The Registry described the first option as the ‘Ntaganda Pre-Trial Approach’, which would include:

- 1 A short, simplified two-page application form to be completed by victims seeking to participate in the proceedings with only the first page of the application to be transmitted to the Parties, and the full application, including the documents attached, available to the Chamber;

2057 ICC-01/04-02/06-67, para 21. For a full summary of this decision, see *Gender Report Card 2013*, p 215-220.

2058 ICC-01/04-02/06-351, para 25.

2059 ICC-01/04-02/06-351, para 22.

2060 ICC-01/04-02/06-351, paras 23, 25, 27.

2061 ICC-01/04-02/06-350, para 12.

- 2 Administrative grouping of victims based on the incidents in which the victim applicants were involved or the harm that they suffered;
- 3 A confidential report on applications notified by the Registry that includes basic security information and statistics compiled on the groups of victims whose applications are being transmitted to the Chamber and the Parties; and
- 4 A table attached to the above-mentioned report, listing all individual [...] assessments [...] of victims seeking to participate prepared by the Registry.²⁰⁶²

However, the Registry cautioned that ‘with the limited resources currently available, it would take as long as one year to process all applications’ and to transmit them to the Chamber.²⁰⁶³ It submitted that the most time and resource consuming element of this approach is the preparation of individual paragraphs explaining the Registry’s assessment of whether the applicant qualifies as a victim in accordance with the RPE and within the scope of the case, as well as the redactions associated with these reports.²⁰⁶⁴

For this reason, the Registry suggested an alternative option, described as ‘Neutral Registration through the Registry and Participation through the Common Legal Representative’,²⁰⁶⁵ which would circumvent the review of all individual applications by the Registry, Chamber, and parties pursuant to Article 68(3) of the Statute. The Registry identified this system as similar to that implemented in the Ruto and Sang and Kenyatta cases in 2012.²⁰⁶⁶ The proposed system would require the Registry, in cooperation with the

2062 ICC-01/04-02/06-350, para 13.

2063 ICC-01/04-02/06-350, para 14.

2064 ICC-01/04-02/06-350, para 16.

2065 ICC-01/04-02/06-350, p 10.

2066 ICC-01/04-02/06-350, paras 20-21. For additional information on the system adopted in the Kenya cases, see *Gender Report Card 2013*, p 192-214.

Common Legal Representatives of Victims, to comprehensively report on their activities in relation to victims.²⁰⁶⁷ The report would be public and include the following information:

- 1 Detailed Statistics on the victims' registered forms transmitted to the Common Legal Representatives, grouped administratively by incident and in the case of child soldiers, by harm suffered;
- 2 The general situation of victims participating in the case provided systematically by the Common Legal Representatives, following meetings with the victims;
- 3 Updates on field related activities involving the victims from the Registry's relevant outreach and field units;
- 4 Protection and support-related information on victims who have been referred to the VWU by the Common Legal Representatives;
- 5 Security-related information of relevance to the proceedings and victims participating in the case provided by the Field Security Unit; and
- 6 If necessary, specific examples from the forms received when the Registry considers the instructions provided by the Chamber insufficient to make a determination on the victims' status.²⁰⁶⁸

The Registry submitted that this second proposal 'may be more sustainable' in terms of resources required, and would allow the Registry 'to focus its current limited resources on efficiently registering victims according to the Chamber's pre-established criteria and producing a comprehensive bi-monthly report'.²⁰⁶⁹ While similar to the system applied in the Ruto and Sang and Kenyatta cases, the Registry proposed two modifications to be applied in the

Ntaganda trial.²⁰⁷⁰ First, in the revised system, the Chamber would delegate the responsibility to verify whether a victim qualifies within the Court's definition to the Registry instead of the Common Legal Representatives. The Registry opined that this approach would ensure that the process was undertaken by a 'neutral body' and thus 'provide a greater degree of oversight to the Court, facilitate the work of the legal representatives in the field, and ensure that the criteria established by the Chamber is [sic] systematically applied by the Court'. Second, the registration of participating victims with the Registry would be mandatory, rather than optional as in the Kenya cases, leading 'to greater certainty and consistency in messaging to victims and intermediaries in the field', as well as 'enhanc[ing] foreseeability with respect to the reparations phase'.²⁰⁷¹

The Common Legal Representatives of Victims voiced their strong opposition to the Registry's second proposal, stating that if the model of participation adopted in the Kenya cases is applied in the Ntaganda trial, few victims would be invited to fill in application forms to present evidence relating to the events and the harm they suffered, and the remaining victims would only have the opportunity to register 'in a manner that is not linked to any judicial context'. For this reason, they considered that 'the absolute majority of victims' would be deprived of their right pursuant to Article 68(3) of the Statute to 'positively contribute to the search for the truth and to tell their story and to have their story heard'.²⁰⁷² This, according to the Common Legal Representatives, would render the participation of most victims 'purely symbolic'.²⁰⁷³ The Common Legal Representatives further argued that changing the application process from what was followed during the pre-trial stage was 'very likely to create confusion

2067 ICC-01/04-02/06-350, para 18.

2068 ICC-01/04-02/06-350, para 18.

2069 ICC-01/04-02/06-350, paras 15, 19.

2070 ICC-01/04-02/06-350, paras 20-21.

2071 ICC-01/04-02/06-350, para 21.

2072 ICC-01/04-02/06-351, para 31.

2073 ICC-01/04-02/06-351, para 31.

and to impose an unnecessary and excessive burden on victims, and may ultimately affect the overall effectiveness and the efficiency of the trial proceedings'.²⁰⁷⁴

At the time of writing this Report, the Defence had not yet filed submissions on this matter, which was still pending before the Trial Chamber.

Darfur: *The Prosecutor v. Abdallah Banda Abakaer Nourain*

According to the VPRS, a total of 103 victims are authorised to participate in the Banda case, of which, 54 (or 52.4%) are male and 49 (or 47.6%) are female.²⁰⁷⁵

Decisions on victim applications to participate in the case

On 17 October 2011, Trial Chamber IV²⁰⁷⁶ assessed that each of the 89 victims who were previously authorised by Pre-Trial Chamber I to participate in the proceedings 'have suffered harm as a result of the commission of at least one crime within the charges confirmed by the Pre-Trial Chamber'.²⁰⁷⁷ Therefore, for the purposes of the trial, the Trial Chamber did not re-examine these applications for participation, unless a request in this regard was made by one of the parties or the Registry.

On 12 December 2013, Trial Chamber IV²⁰⁷⁸ granted victim status to 14 additional applicants.²⁰⁷⁹ The Chamber authorised four victims who had claimed to have lost an

2074 ICC-01/04-02/06-351, para 29.

2075 Statistics provided to the Women's Initiatives for Gender Justice by the VPRS in an email dated 17 September 2014.

2076 Trial Chamber IV was composed of Presiding Judge Joyce Aluoch (Kenya), Judge Fatoumata Dembele Diarra (Mali) and Judge Silvia Fernández de Gurmendi (Argentina).

2077 ICC-02/05-03/09-231, paras 15, 17 and p 16.

2078 Trial Chamber IV was composed of Presiding Judge Joyce Aluoch (Kenya), Judge Silvia Fernández de Gurmendi (Argentina) and Judge Chile Eboe-Osuji (Nigeria).

2079 ICC-02/05-03/09-528.

immediate family member during the attack on the peacekeeping mission in Haskanita on 29 September 2007 (the 'Haskanita attack') and 'to have suffered emotional loss, in the form of mental anguish, anxiety, trauma, distress or mental pain'.²⁰⁸⁰ The Chamber authorised a further eight victim participants who had lost family members in the Haskanita attack, and two who claimed to have worked and were present at the AMIS camp during the Haskanita attack.²⁰⁸¹ The Chamber rejected five applicants for reasons including that it was not satisfied that three of the applicants 'provided adequate information which describes on an individualised basis personal recollections of the emotional harm suffered by virtue of the relationship to, and subsequent death of, the peacekeeper in question'.²⁰⁸²

Decision on victim participation rights

On 20 March 2014, the Trial Chamber rendered the Decision on the participation of victims in the trial proceedings, setting out 11 specific participation rights for the 103 victims accepted to participate in the Banda trial, as follows:²⁰⁸³

1 *The interpretation of Article 68(3) of the Statute*

The Trial Chamber first enumerated the following three questions that it will consider when assessing whether to approve a victim's request to present her or his views and concerns during the trial, pursuant to Article 68(3) of the Statute and Rule 89 of the RPE:²⁰⁸⁴ (i) whether the factual or legal issue raised in the application affects the personal interests of the victim; (ii) whether it is appropriate for the victim to participate at the relevant stage of proceedings [...]; and (iii) whether the manner

2080 ICC-02/05-03/09-528, paras 25-26.

2081 ICC-02/05-03/09-528, paras 34, 38.

2082 ICC-02/05-03/09-528, para 34.

2083 ICC-02/05-03/09-545.

2084 ICC-02/05-03/09-545, para 14.

of the victim's participation would cause any prejudice to or inconsistency with the rights of the accused and the requirements of a fair and impartial trial'.²⁰⁸⁵

2 Anonymous victims

With respect to anonymity, the Chamber stated that it 'will carefully scrutinise whether and to what extent it may allow the participation of anonymous victims [on a case-by-case basis], taking into account the potential for prejudice to the parties and participants'.²⁰⁸⁶ The Chamber noted that a balance must be reached between the rights of the accused and the requirements of a fair trial, on the one hand, and the rights of victims and protection concerns on the other.²⁰⁸⁷

3 Participation in person

The Chamber noted that ICC jurisprudence has recognised that there is no absolute statutory right to in-person victim participation.²⁰⁸⁸ Moreover, in order to preserve a fair and expeditious trial and protect the rights of the accused in accordance with Article 64(2) of the Statute, unless otherwise authorised by the Chamber, the views and concerns of victims in the Banda trial will be presented through the Common Legal Representative of Victims.²⁰⁸⁹

4 Dual status individuals

The Chamber noted that there are six 'dual status' victims in the case, as identified by the Prosecution, who in addition to being authorised to participate through their Common Legal Representative will also provide evidence under oath as witnesses.²⁰⁹⁰ This may occur in two ways: first, if a victim is called as a witness by a party, or second if called by the Chamber on its own initiative or at the request of the Common

Legal Representative.²⁰⁹¹ The Chamber indicated that it would establish whether the participation of dual status victims is appropriate in the trial proceedings, by particularly assessing if their participation can be achieved 'in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and expeditious trial'.²⁰⁹²

5 Requests to call witnesses

Next, the Chamber considered the ability of victims to call witnesses in the trial proceedings. While the Statute does not provide an explicit right for victims to call witnesses, the Chamber noted that pursuant to Article 69(3) of the Statute, it 'has the power to request the submission of all evidence that it considers necessary for the determination of the truth'.²⁰⁹³ Therefore, as decided in 2010 by the Appeals Chamber in the Katanga and Ngudjolo case, it held that victims, through their Common Legal Representative, have the right 'to invite the Chamber to exercise its power' to call witnesses.²⁰⁹⁴ The Chamber determined that in the Banda case, it would consider all such applications by taking into account 'whether the testimony: (i) affects the victim's personal interests; (ii) is relevant to the issues of the case; (iii) contributes to the determination of the truth; and (iv) whether the testimony would be consistent with the rights of the accused'.²⁰⁹⁵ In this regard the Chamber directed the Common Legal Representative to file a schedule of the anticipated testimony of victims that the Chamber would be requested to call.²⁰⁹⁶

6 Presenting evidence

The Trial Chamber also recalled that the Appeals Chamber confirmed in the Katanga

2085 ICC-02/05-03/09-545, para 17.

2086 ICC-02/05-03/09-545, para 18.

2087 ICC-02/05-03/09-545, para 18.

2088 ICC-02/05-03/09-545, para 20.

2089 ICC-02/05-03/09-545, para 20.

2090 ICC-02/05-03/09-545, paras 21-22.

2091 ICC-02/05-03/09-545, para 22.

2092 ICC-02/05-03/09-545, para 23.

2093 ICC-02/05-03/09-545, para 24.

2094 ICC-02/05-03/09-545, para 24, citing ICC-01/04-01/07-2288, paras 111-112.

2095 ICC-02/05-03/09-545, para 25.

2096 ICC-02/05-03/09-545, para 26.

and Ngudjolo case the possibility for victims to present evidence to the Trial Chamber.²⁰⁹⁷ On this basis, the Trial Chamber decided that the Common Legal Representative may bring evidence to the attention of the Chamber during the trial, and that the Chamber will make a determination on admitting the evidence on a case-by-case basis.²⁰⁹⁸

7 *Challenging the relevance or admissibility of evidence*

The Trial Chamber noted that during the trial proceedings it may permit the Common Legal Representative's presentation of the views and concerns of victims on the relevance or admissibility of evidence, but only if it determines that the requirements of Article 68(3) of the Statute are met and the victims' personal interests are affected.²⁰⁹⁹

8 *Questioning by the Common Legal Representative of Victims*

The Trial Chamber decided that requests by victims to question witnesses must be made in writing in advance, and no later than seven days before the expected date of testimony.²¹⁰⁰ Furthermore, in addition to the criteria established by the Appeals Chamber in the Lubanga case,²¹⁰¹ the requests must include the following: (i) 'the areas of questioning and the questions to the extent possible, and a justification of how the questions impact the

2097 ICC-02/05-03/09-545, para 27, citing ICC-01/04-01/07-2288, para 40.

2098 ICC-02/05-03/09-545, para 28.

2099 ICC-02/05-03/09-545, para 30.

2100 ICC-02/05-03/09-545, paras 31-32, citing ICC-01/05-01/08-807-Corr, para 37.

2101 The Appeals Chamber set out the procedure to be adopted where any such participation involves the triggering of the Chamber's power to permit victims to tender and examine evidence: '(i) a discrete application; (ii) notice to the parties; (iii) demonstration of personal interests that are affected by the specific proceedings; (iv) compliance with disclosure obligations and protection orders; (v) determination of appropriateness; and (vi) consistency with the rights of the accused and a fair trial'. ICC-01/04-01/06-1432, para 104.

personal interests of the victims'; and (ii) 'a list of relevant documents to be used during questioning'.²¹⁰² If granted leave to question witnesses, the Common Legal Representative of Victims is to ask the questions after the completion of the Prosecution's questioning, with the exception of instances in which the evidence has been brought to the Chamber by the participating victims and the witness has been requested by the Chamber. In such instances, the Common Legal Representative may pose questions before the Prosecution.²¹⁰³ Such questioning must be 'conducted in a neutral manner, without the use of leading or closed questions unless otherwise authorised by the Chamber'.²¹⁰⁴

9 *Access to confidential filings, documents and evidence*

The Chamber determined that the Common Legal Representative may have access to confidential filings and documents 'to the extent that their content is relevant to the personal interests of the victims she represents'.²¹⁰⁵ Additionally, the Common Legal Representative may have access to confidential evidence, but must not communicate this information to her victim clients or anyone not authorised to view it without prior approval from the Chamber.²¹⁰⁶

10 *Obligations on victims to disclose exculpatory information*

The Trial Chamber concurred with the Appeals Chamber's position, as expressed in the Katanga and Ngudjolo case, that 'nothing justifies a general obligation on the victims to disclose every element in their possession, whether incriminating or exculpatory' but nonetheless, 'there may be specific instances in which a Trial Chamber may require victims to disclose exculpatory evidence in their possession to the

2102 ICC-02/05-03/09-545, para 32.

2103 ICC-02/05-03/09-545, para 33.

2104 ICC-02/05-03/09-545, para 33.

2105 ICC-02/05-03/09-545, para 36.

2106 ICC-02/05-03/09-545, paras 37-38.

accused, such as when a party or participant brings to the attention of the Trial Chamber that such information is available and the Trial Chamber finds that such information is necessary for the determination of the truth'.²¹⁰⁷

11 Participation in closed session and ex-parte hearings

Finally, the Chamber decided that it will permit the Common Legal Representative to participate in closed sessions or *ex parte* hearings when the personal interests of the victims so require. The Chamber determined that 'such participation may be subject to an unequivocal agreement with the Common Legal Representative not to disclose to her clients any of the information that is covered by protective measures ordered by the Chamber, which may include the identities of the protected witnesses'.²¹⁰⁸

2107 ICC-02/05-03/09-545, para 40 and fn 43, citing ICC-01/04-01/07-2288, para 71.

2108 ICC-02/05-03/09-545, para 41.

Recommendations

States Parties/ASP

Judiciary

Office of the Prosecutor

Registry

States Parties/ASP

.....

Whistleblower and Anti-Fraud Policies

- **Ensure** that clear information about the existence and content of the Anti-Fraud and Whistleblower Policies is made available to all staff. Further, take steps to urgently translate both policies into comprehensive administrative issuances.
- **Urgently develop** the procedure for reporting, investigating and addressing allegations of retaliation against individuals who have reported misconduct or cooperated with a duly authorised audit or investigation.
- **Heads of Organs** should prioritise the appointment of persons authorised to receive relevant information from whistleblowers, as well as complaints of retaliation.
- **The Registry** should provide training for all staff on the new Whistleblower and Anti-Fraud Policies and include these in the orientation for all new staff, interns, consultants and contractors.

Independent Oversight Mechanism

- **Finalise** the recruitment of the permanent Head of the Independent Oversight Mechanism (IOM) and prioritise the subsequent appointment of the staff positions for 2015 outlined in the IOM Operational Mandate and as approved by the Committee on Budget and Finance.²¹⁰⁹ Competencies prioritised in the appointment of the Head of the IOM should include: the ability to act independently and withstand institutional pressure; experience and qualifications relevant to the mandate of the IOM, including the investigation, inspection and evaluation of the procedural, financial and operational activities of the Court; experience in investigating fraud; advanced investigative skills; demonstrated gender competence; strong drafting abilities; senior management experience; and a well-developed conceptualisation of the IOM as representing the interests of the public, States Parties and the Court in ensuring an ethical, law-abiding and credible public institution.
- **Ensure** the development of a detailed definition of ‘serious misconduct’²¹¹⁰ in the IOM Operational Manuals and the ICC Staff Rules and Regulations. States Parties should also adopt an IOM resolution at the 13th session of the ASP in December 2014, which expressly includes rape and other forms of sexual violence, including sexual abuse and harassment, within the definition of serious misconduct.
- **Make explicit** and reflect in the appointments made to the IOM the need for gender competence in the composition of its staff and operational scope.

2109 ICC-ASP/13/15, Advance version, para 72.

2110 The 2013 Operational Mandate refers to the Court’s definition of ‘serious misconduct’ contained in Rule 24(1)(b) of the RPE but does not expressly include crimes of sexual violence within the definition. ICC-ASP/12/Res.6, Advance version, Annex, para 28.

- **Make explicit** the ability of the IOM to initiate investigations *proprio motu* in addition to its function of receiving reports of misconduct and serious misconduct from the Court in order to start an investigation. The IOM's ability to initiate investigations *proprio motu* consistently and across all organs and areas of the Court is a necessary complement to the reporting obligation and to ensure the independence and integrity of the IOM.
- **Urgently adopt** a new IOM resolution at the 13th session of the ASP, which includes a provision for the waiver of privileges and immunities in accordance with Article 48(5) of the Rome Statute. Given the importance of promoting transparency and accountability, such a provision should be explicit within the formal resolution adopted by the ASP. It would also give greater effect to the IOM's power to recommend that a matter is referred to the relevant national authority for possible criminal prosecution in instances when criminal acts are reasonably suspected to have occurred.
- **Elaborate** an IOM outreach programme to facilitate the dissemination of information to Court staff on the IOM's role, mandate and proceedings. The need for continuous outreach activity within the Court's organs was identified by the first IOM Temporary Head following her preliminary meetings with Court personnel in 2010.²¹¹¹
- **Advance and implement** rules for the IOM that hold accountable staff members found to have committed criminal offences or other serious misconduct (including, if appropriate, by termination of employment). The Staff Rules and Regulations should accordingly ensure that all staff are provided with mandatory training regarding the Court's position on sexual exploitation and abuse, and the consequences for staff of such conduct. 'Serious misconduct' in this regard should be defined in the applicable Rules and Regulations to expressly include, but not be limited to, rape and other forms of sexual violence, including sexual abuse and harassment.
- **Within its annual report** to the ASP, the IOM should provide detailed information regarding the number and types of allegations and complaints, the source, whether internal or external, and the number of allegations relating to each organ, division and unit of the Court. This will enable the IOM to track patterns of misconduct, waste or mismanagement within the Court and provide recommendations to the Court for interventions to address the repetition of such conduct by particular divisions or specific individuals. This will further ensure a systemic rather than incident-based approach to preventing and addressing serious misconduct.
- **Finalise and operationalise** the IOM Operational Manuals.

²¹¹¹ Discussion Paper on the IOM, prepared by the facilitator, Mr Vladimir Cvetković (Serbia), for the sixth meeting of the Hague Working Group on 10 September 2010, para B(1)(a).

Governance

- **The ASP should review** the Court's practices and Staff Rules and Regulations regarding recruitment procedures, including in relation to General Temporary Assistance posts, to ensure harmony between such practices and the relevant ASP resolutions governing recruitment. The Staff Rules and Regulations and current ICC practices appear to contradict the ASP's resolutions on recruitment matters.²¹¹²
- **Each organ** of the ICC should strictly adhere to the requirements in the Rome Statute regarding gender and geographical representation in the recruitment of staff. This should also apply to the promotion and development of staff and avoid perceived or actual discrimination based on gender or other status and identities. A reduction in compliance or ongoing non-compliance with these provisions has resulted in a widening rather than closing of the gap between the number of men and women appointed to professional posts at the ICC across all organs, as well as expanding the gender gap in relation to appointments at mid and senior level positions.
- **Strengthen** compliance with the recommended desirable numbers of nationals appointed to professional posts, as agreed by States Parties, unless there is a clear rationale to explain or justify over-representation of nationals from specific States Parties, eg nationals with exceptional expertise or language skills relevant to the Situations under investigation by the ICC.

As of 14 August 2014, according to the Committee on Budget and Finance, there continues to be a 'chronic imbalance in geographical representation' of staff at the ICC.²¹¹³

As of 31 July 2014, the number of Dutch nationals appointed to professional posts within the ICC exceeds the top end of the desirable range of appointees from The Netherlands by 186%. This is the highest level of over-appointments of nationals from a State Party since the establishment of the Court. According to the Committee on Budget and Finance, the optimal number of Dutch nationals in professional posts is seven. As of 31 July 2014, 20 nationals from The Netherlands had been appointed to professional level posts. This represents an increase of 73% since 31 July 2012.

The second and third highest numbers of nationals appointed to professional posts which exceed the top end of the desirable range of appointees are France at 142% above the desired level of 19, and Belgium which is 100% over the desired level of five.²¹¹⁴

- **In addition** to monitoring the geographical representation at the Court, the Committee on Budget and Finance should also closely monitor gender representation amongst the staff profile of the ICC. Both geographical and gender principles are requirements specified within the Rome Statute regarding the employment of staff.²¹¹⁵ Although the overall numbers of male (52%) and female (48%) employees in professional posts at the ICC appears to be balanced, closer inspection of each professional level reveals that

2112 ICC-ASP/1/Res.10.

2113 ICC-ASP/13/5, paras 51-52.

2114 'Geographical Representation of ICC Professional Staff', status as at 31 July 2014.

2115 Article 44(2), Rome Statute.

women are overwhelmingly clustered into P1 and P2 posts with few women appointed to mid-level and senior decision-making positions. This overall profile and structural imbalance has not changed since 2004.

As of 31 July 2014, there are twice as many men than women at the P5 and P4 level in the Judiciary and fewer women in P2 posts than in the past. In the Office of the Prosecutor, there are three times more men than women at the P5 level, 333% more men than women appointed to P4 posts, and 100% more men than women in P3 level positions. The gender gap has widened at the P5 and P4 levels since 31 July 2012, with no more women appointed at the P5 level and one more male appointee and fewer women than in the past appointed at the P4 level. In the Registry, there are twice as many men than women at the D1 level, 50% more men at the P5 level, 54% more men at the P4 level, and 35% more men than women at the P3 level. While there are 4% fewer women at the P5 level compared with 31 July 2012, the biggest shift in the Registry has been at the P4 level with 39% female appointees as of 31 July 2014 compared with 53% as of 31 July 2012.²¹¹⁶

- **Strengthen** the ICC's institutional framework and existing management structure to support the increasing work of the Court.
- **The ASP** should ensure that the bodies within the Court responsible for compliance, including compliance with Staff Rules and Regulations, are effective and that quality management procedures are fully established by the 14th session of the ASP. The ASP, as part of its governance duties, should actively review reports of the respective bodies, while leaving direct management to the appropriate organ and staff structures.
- **The ASP** should ensure that proposals to amend the Court's legal texts, including the Rome Statute, Rules of Procedure and Evidence, and Regulations of the Court, follow the established procedures involving the Working Group on Lessons Learnt, the Advisory Committee on Legal Texts and the ASP's Working Group on Amendments, prior to considering the adoption of new provisions. Any amendments should be made on the basis of a thorough examination of the existing provisions, and proposed changes should take into account the potential impact on the Court's legal mandate and be made with a view to augmenting and strengthening the work of the ICC, as well as maintaining the integrity of the Rome Statute.
- **States Parties** must ensure that the Registry's ReVision Project is compliant with accepted procedures and recruitment processes including the necessary diversity on recruitment panels and advisory committees, and adheres to the gender and geographical representational requirements specified in the Rome Statute. Since 31 July 2012, there has been a significant regression within the Registry regarding the number of women appointed to mid and senior level professional posts.²¹¹⁷
- **All organs of the Court**, with the support of States Parties, should continue to strive to address: institutional efficiency; under-utilisation or under-performance of sections or posts; under-resourcing of critical areas supporting the mandate and efficacy of the Court; organisational and individual performance; human resource allocation; and financial support to ensure a sustainable and effective ICC.

²¹¹⁶ 'Gender Balance ICC Professional Staff', status as at 31 July 2014.

²¹¹⁷ 'Gender Balance ICC Professional Staff', status as at 31 July 2014. Gender Report Card 2012, p 14-15.

Budget

To the ASP

- **Approval** of the annual Court budget should be based on the mandate of the ICC, the demand on the Court and the available resources. In its annual review of the budget, the ASP should ensure that the Court is sufficiently funded to carry out its mandate effectively, and that it exercises the most efficient use of resources for maximum impact. Under-resourcing could hinder the Court's work in significant areas, such as investigations, legal proceedings, outreach and field operations. It could also affect the Court's ability to adequately protect witnesses, victims and intermediaries during trial, and limit resources necessary to facilitate victim participation in the proceedings.
- **Finance** the activities of the Court through the regular budget, avoiding the use of the Contingency Fund to support the core activities of the Court. A reliance on the Contingency Fund to support activities that are fully anticipated by the Court not only contradicts the purpose of the Fund, but sets a dangerous precedent for future years. Replenishing the Contingency Fund should also be a priority for the ASP in 2014.
- **While for some** appointments a General Temporary Assistance position may be appropriate, permanent appointments should be made for positions that have been mandated by the Rome Statute and its subsidiary bodies. Recruitment for all positions at the ICC must comply with best practice standards and the relevant ASP resolutions.
- **The Registry** should urgently request, and the ASP should immediately provide the necessary funds for the position of Psychologist/Trauma Expert within the Victims and Witnesses Unit (VWU) to be upgraded to an established post. This position has been categorised as a General Temporary Assistance since 2009. Such expertise is mandated by Article 43(6) of the Rome Statute, and as such this position should be securely integrated within the structure of the VWU as an established post. In addition, four new Psychologist/Trauma Expert posts should be urgently recruited to support the minimum of five trials expected in 2015.²¹¹⁸
- **In implementing** the revised legal aid system, the Court and ASP should monitor and evaluate its effectiveness and ensure it does not impede the right to a fair trial, and supports the right to adequate representation and participation of victims.
- **In implementing** the system of legal aid for victims, ensure that the right of victims to choose their legal representative, as set out in Rule 90(1), is respected. While the right of victims to choose their legal representative is subject to the Chamber's prerogative to manage the proceedings, the practice of clustering victims into groups with common legal representation should be accompanied by a robust information programme to ensure all victims are informed of the process prior to proceedings and kept well informed and adequately consulted throughout the legal process.

2118 The Office of the Prosecutor's proposed budget for 2014 envisaged trial hearings in five cases (Ntaganda, Kenyatta, Ruto and Sang, Banda and Laurent Gbagbo). ICC-ASP/13/10, para 22.

- **Retain** the option of external legal counsel for victim representation. This has a number of benefits that may be lost by a full internalisation of victim representation, including allowing for counsel with international experience, strong domestic experience and local knowledge (eg language and culture) and allowing victims, especially victims of sexual violence, to choose a female counsel who may have expertise important to them, such as experience representing victims/survivors of sexual and gender-based violence.
- **Adopt** a decision at the 13th session of the ASP to open an ICC-African Union Liaison Office with an advance team in 2015. Such an office would:
 - stabilise and enhance regional support for the ICC among African Union governments;
 - increase awareness among African peoples of the work and mandate of the ICC; and
 - provide cohesion between the ICC and the policy related efforts of the African Union regarding regional prevention and accountability for war crimes, crimes against humanity and genocide.
- **Undertake** discussions with the UN Security Council and UN General Assembly regarding financing costs arising from referrals of Situations to the Court by the UN Security Council under Article 13(b) of the Rome Statute. As provided for in Article 115 of the Rome Statute, the expenses of the Court may be covered by 'funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council'. As noted, referrals of Situations by the UN Security Council can significantly impact the Court's budget. Future Security Council resolutions referring Situations to the ICC should support the provision of funds if a referral results in the Office of the Prosecutor initiating an investigation, and should also explicitly include a reference to immunity for ICC staff.

To the Court

- **The Court should** accurately and with specificity present its budget proposals to the Committee on Budget and Finance. The Court must continue to prioritise improvements in its budget process, as well as embark on longer term financial planning and a multi-year budget cycle and forecast.²¹¹⁹
- **The Court should** consider the submission of a three-year expenditure forecast to the Committee on Budget and Finance, in addition to the proposed annual budget, as a means of encouraging medium term planning, reducing unexpected budget expenditures and building the capacity of the Court, a large and complex institution, to more effectively identify known or knowable costs.

²¹¹⁹ In 2011, the Committee on Budget and Finance noted a number of budget issues, including the unprecedented number of potential expenses which were not contained in the 2012 proposed budget. The Committee also noted the significantly higher expenses in the Judiciary which had been miscalculated in the 2012 budget submitted by this organ to the Committee on Budget and Finance. ICC-ASP/10/15, Advance version, p 8.

Implementing legislation

- **States should** undertake a holistic and expansive implementation of the Rome Statute into domestic legislation, ensuring that the gender provisions are fully included, enacted and advanced in relevant legislation and judicial procedures.
- **The Court should** retain jurisdiction in situations where a government may have initiated domestic prosecutions for crimes within the jurisdiction of the ICC until such time as the national process demonstrates full compliance with the complementarity standards and threshold of the Rome Statute, encompassing the Articles, Elements of Crimes, and Rules of Procedure and Evidence, including with regard to the prosecution of gender-based crimes.

Elections

To the ASP

- **Elect** six highly qualified and capable new judges at the 13th 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).

Judiciary

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- **Create** two P5 gender legal advisors within the Pre-Trial and Trial Divisions to augment existing sources of legal advice and support the cohesion of legal reasoning and consistency of interpretations across Chambers and between divisions. In light of the number of cases with charges for gender-based crimes now under consideration, as well as the complexity of these crimes and the theories of liability, dedicated posts serving as expert resources for the judges could provide valuable assistance.
- **Undertake** ongoing judicial training on critical issues including: interpretation of the modes of liability under Articles 25 and 28 of the Rome Statute and conceptualisation of 'common purpose' in relation to sexual and gender-based crimes; and analysis of evidence of sexual violence regarding prior commission, repetition and numerosity.
- **Exercise** greater clarity and flexibility in decisions on the confirmation of charges regarding the characterisation of the facts underlying both the crimes and individual criminal liability. This would prevent Chambers having to revert to Regulation 55 at the trial stage of proceedings to correct or clarify the legal characterisation of the facts. Utilisation of Regulation 55 has contributed to significant delays in several cases by correctly allowing for submissions from the Defence, Prosecution and Legal Representatives of Victims regarding such recharacterisations.²¹²⁰ Such delays could be reduced through greater flexibility and clarity at the confirmation stage regarding the presentation and characterisation of the facts.

2120 'Modes of Liability: a review of the International Criminal Court's jurisprudence and practice', *Women's Initiatives for Gender Justice*, Expert Paper, November 2013, p 109-136, available at <<http://www.iccwomen.org/documents/Modes-of-Liability.pdf>>.

- **Ensure** that Rule 90(4) of the Rules of Procedure and Evidence is respected in the appointment of Common Legal Representatives for groups of victims, by ensuring that the distinct interests of individual victims, particularly the distinct interests of victims of sexual and gender-based violence and child victims, are represented and that any conflict of interest is avoided.
- **Ensure** that requests to the Registry regarding common legal representation of victims in the proceedings are made in a timely manner, so as to allow for sufficient time to consult with and seek input from victims to ascertain their views and wishes in relation to legal representation.
- **Ensure** that victims participating in the proceedings can readily access the modalities that have been granted to them. In this regard, the Court should take steps to streamline the process so that participating victims do not need to apply to participate at each phase of proceedings including interlocutory appeals. Expansive, meaningful participation by victims is not incompatible with the rights of the accused and a fair and impartial trial.
- **Continue to allow** the active participation of victims, through their Legal Representatives, in proceedings, including their ability to present evidence and to question witnesses.
- **Review and assess** the collective victim applications process, including through consultations with victims. The potential impact of a collective victim application process on victim participation should be taken into account.
- **Evaluate** and monitor the efficacy of the diverse victim participation models introduced by Chambers in different cases. Based on this evaluation, the judges should adopt a common system to harmonise the rights of victims and meaningful participation with the Court's capacity to process applications and assist and represent victims formally recognised to participate in proceedings. Currently there are several victim participation models, three different victim application forms and four different approaches, which designate the determination of victim status and the organising of victims into collective groups to the judges solely, or where the judges have delegated this role to either the Victim Participation and Reparation Section (VPRS) or the Legal Representatives. All of the current models are attempting to find an effective and efficient approach to collective representation, but need to be streamlined to ensure certainty and predictability in the process.
- **Ensure** reparations decisions and orders allow for a comprehensive assessment of different types of victims and harm and do not unintentionally discriminate against female victims due to, *inter alia*, females being under-represented amongst victims formally recognised in the case or an insufficient presentation of the gender dimensions of the crimes for which the accused was convicted.
- **Continue utilisation** of the special measures provided by the Rome Statute and the Rules of Procedure and Evidence to facilitate the testimony of victims of sexual violence. The effective use of these provisions by Trial Chambers I, II and III reflect the importance and necessity of such measures.

- **In managing** witness testimony, ensure that victims of sexual violence are given the opportunity to testify about their experiences in full. Such testimony is a vital component of the justice process and a crucial part of the experience of justice for victims/witnesses of these crimes. Minimise interventions by judges and counsel in such testimony, while taking necessary measures to prevent re-traumatisation of witnesses in consultation with the VWU.
- **During 2015**, the Presidency of the ICC should oversee an audit on sexual and other forms of harassment and an audit on workplace compliance with Rules and Regulations. These audits should include each organ and be implemented at all levels of the Court. The results of the audit should be shared with the Heads of Organs, the IOM, the Study Group on Governance and the Bureau of the ASP.
- **The Presidency** should consider organising a legal seminar for all judges on the existing jurisprudence from the *ad hoc* tribunals in relation to gender-based crimes. Judicial decisions at the ICC have at times departed from existing jurisprudence and misapplied established tests, with the result that charges have not been included in summonses to appear, arrest warrants, or confirmed in confirmation of charges proceedings, or found to have been proven beyond a reasonable doubt at trial. In issuing decisions, judges should include legal reasoning, including explicit and detailed reference to legal authority relied upon.
- **The Presidency** should consider organising a judicial seminar on the application of the standards of proof required at the different stages of proceedings. This would ensure a more consistent and universal approach by all ICC judges in each division of Chambers.
- **The Presidency** should urgently make public the results of the internal inquiry into the events that gave rise to the detention of ICC staff while on mission in Libya in June 2012. The public report should address: the preparatory stage of deployment; an examination of the security assessment and evaluation carried out prior to the mission; a determination as to whether or not the necessary and appropriate protocols and agreements had been established between the ICC and the Libyan authorities prior to deployment; an evaluation of the composition of the mission team; a full review and evaluation of the response by the ICC once staff had been detained, including what lessons have been learned to strengthen the crisis response facility of the ICC should it face similar situations in the future; and a review and evaluation of the post-release phase.²¹²¹

2121 Letter from the Women's Initiatives for Gender Justice to the President of the ICC regarding the investigation into the situation leading to ICC staff detention in Libya, 6 August 2012, on file with Women's Initiatives for Gender Justice.

Office of the Prosecutor

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- **Strengthen** coordination between the Office of the Prosecutor and the VWU to ensure that witnesses, including women, minors, and victims of sexual and gender-based crimes, are safely supported and protected. This should include active monitoring by the OTP of changes within the VWU in relation to protection practices, first contact, and management of the safe houses, as well as implementation of the new requirement that when visiting females who are under protection in ICC safe houses, one of the two VWU staff members undertaking this visit must be a woman.
- **Continue** to review and strengthen the Prosecution's strategy for the investigation and presentation of evidence of sexual and gender-based crimes, taking into account existing jurisprudence as well as the Office of the Prosecutor's Strategic Plan for 2012-2015 and Policy Paper on Sexual and Gender-Based Crimes.²¹²² For example, ensure that all documents presented to Chambers clearly specify the links between the facts and the elements of each crime alleged, thereby demonstrating the need to charge distinct crimes for the purpose of addressing different types of harm experienced by the victims; that the Prosecution explicitly articulates a full rationale, including a gender analysis, for charging gender-based crimes, providing Chambers with detailed reasoning as to why certain acts constitute gender-based crimes; and that sufficient evidence from diverse sources, including witness testimony is gathered and presented in support of all charges, including charges for gender-based crimes, at all stages of the proceedings.
- **In the event** of a conviction, ensure that submissions and witnesses called at the sentencing stage and submissions at the reparations phase of the proceedings for all crimes, including gender-based crimes, include a gender analysis of the harm and ongoing impact on victims resulting from the crimes. The Prosecution's submissions should include detailed reasoning supporting recognition of these harms in determining the sentence according to Rule 145(1) (c), and as aggravating circumstances under Rule 145(2)(b), as well as for including these harms within the scope of the reparations order.
- **Continue** the implementation of the Office of the Prosecutor's Policy Paper on Sexual and Gender-Based Crimes. The Prosecutor should undertake a planning phase, which includes identification of any structural and operational changes necessary, and the budgetary implications for, full implementation of the Policy within the context of the Strategic Plan 2012-2015. Implementation of the Policy should include a review of staff skills and competencies, as well as plans for training existing staff and recruitment of additional staff in line with the expertise needed to fully implement the Policy. The planning phase should also include the collection of baseline data, identification of focal points and delegation of responsibilities for implementing different aspects of the Policy, as well as timeframes and benchmarks for assessment of progress and follow-up.

²¹²² 'OTP Strategic Plan June 2012-2015', *ICC website*, paras 58-63, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf>; 'Policy Paper on Sexual and Gender-based Crimes', June 2014, *ICC website*, available at <<http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>>.

- **Review** the capacity of the Office of the Prosecutor regarding external relations and communication and enhance the technical expertise and in-house skills in these areas to support the production of clear and cohesive messages as well as the ability to form, sustain and expand strategic relationships with a range of key stakeholders.
- **Undertake** a review of other existing Prosecution Policies as well as its 2010 Operations Manual and harmonise them with the Policy Paper on Sexual and Gender-Based Crimes.
- **Continue to review and strengthen** the Prosecution's practices for identifying and articulating the mode of liability to be charged, particularly in relation to sexual and gender-based crimes, taking into account the available provisions within the Rome Statute, existing jurisprudence from the ICC, as well as relevant jurisprudence from other international courts and tribunals. Within the two cases to have reached the judgment stage inclusive of charges for gender-based crimes, the accused have been either acquitted of all charges or of a limited number of charges, including those of rape and sexual slavery, based on the Chamber's determination that the evidence presented was not sufficient to prove the criminal liability of the accused beyond a reasonable doubt.
- **To support robust** and rapid implementation of the Policy Paper on Sexual and Gender-Based Crimes, the Office of the Prosecutor should establish internal gender focal points with substantive skills and experience in this area within the Jurisdiction, Complementarity and Cooperation Division, Investigations Division, and Prosecutions Division. The diversity and complexity of the work of the Office of the Prosecutor requires that it urgently strengthen its technical and analytical capacity in relation to gender and other issues across and within each of the divisions. In light of the new Policy and given the increase in cases and investigations anticipated in 2015, more staff with gender expertise will be required to ensure the integration of gender issues within the heightened case load, which includes four active investigations, two Article 70 investigations, the preservation of evidence in nine hibernated investigations, monitoring of at least nine potential Situations, five cases at the trial preparation or trial stage, and the possible sentencing, reparations and final appeal in one case.²¹²³
- **As underscored** in the Trial Judgements in the Lubanga and Katanga cases and by the proceedings in the Kenya Situation against Muthaura and Kenyatta, the Office of the Prosecutor must continue to strengthen and refine its procedures for vetting, interviewing and managing local intermediaries in relation to their work with the Office in locating and liaising with potential and actual witnesses. The Prosecution should also continue to review and strengthen its contacts with and assessments of the security and viability of trial witnesses, including continuing to actively investigate potential witness tampering or intimidation, and bringing charges under Article 70 for offences against the administration of justice when applicable.

2123 In submitting its proposed budget for 2015, the Office of the Prosecutor envisaged four active investigations and two Article 70 investigations; trial preparation in two cases (Ntaganda and Laurent Gbagbo); trial hearings in five cases (Ntaganda, Kenyatta, Ruto and Sang, Banda, and Gbagbo); sentencing and reparations proceedings in the Bemba case; and final appeal in one case (Bemba). The proposed budget does not account for the Blé Goudé and Bemba *et al* trials which may also commence in 2015. ICC-ASP/13/10, paras 21-22.

Registry

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- **Ensure the ReVision process**, its recommendations and implementation activities comply with accepted procedures and recruitment processes including the necessary diversity on recruitment panels and advisory committees, and adhere to the gender and geographical representational requirements specified in the Rome Statute. Since 31 July 2012, there has been a significant regression within the Registry regarding the number of women appointed to mid and senior level professional posts.²¹²⁴
- **Implement** the recommendations outlined in the Independent Review Team report on the alleged sexual assault of ICC witnesses by Court staff responsible for supporting witnesses in the DRC safe house and provide regular updates to States Parties regarding specific implementation achievements. The Independent Review Team's public report indicated a number of institutional and chronic short-comings in the VWU's management structure and practices, as well as the lack of effective supervision.²¹²⁵
- **Actively monitor and ensure** a change in the culture and working practices within the VWU.
- **Prioritise** the urgent appointment of suitably qualified female field officers within the VWU. The Independent Review Team public report on the alleged sexual assault of ICC witnesses and the ICC Registrar have stated that a new procedure has been introduced requiring at least two staff members to be present during visits with victims, witnesses and protected persons, including at least one female staff member to be present for visits which involve female protected persons.²¹²⁶ As of 1 March 2014, no female field officers were employed by the VWU in any field offices and thus it was not possible to implement this new procedure.
- **Immediately carry out** an independent inquiry involving all ICC safe houses in order to assess whether any other victims or witnesses have been raped, sexually abused, coerced or harassed by ICC staff, intermediaries or others contracted by the Court.
- **Urgently establish** a crisis management system to ensure the ICC is able to respond to crises in a coordinated, organised and effective manner. It appears that little progress has been made towards establishing such a system since the 2012 crisis when ICC staff members and Defence counsel were detained in Libya by the local authorities. At that time, members of the Office of Public Counsel for the Defence were accused by the Libyan authorities of smuggling spying devices and a coded letter to their client, Saif Al-Islam Gaddafi. To date, the Presidency has not reported on this issue to the ASP and neither has a public report been made available.

2124 'Gender Balance ICC Professional Staff', status as at 31 July 2014. *Gender Report Card 2012*, p 14-15.

2125 'Post Incident Review of Allegations of Sexual Assault of Four Victims Under the Protection of the International Criminal Court in the Democratic Republic of Congo by a Staff Member of the Court', Independent Review Team Public Report, p 5-6, *ICC website*, available at <<http://www.icc-cpi.int/iccdocs/registry/Independent-review-team-ReportEng.pdf>>.

2126 'Post Incident Review of Allegations of Sexual Assault of Four Victims Under the Protection of the International Criminal Court in the Democratic Republic of Congo by a Staff Member of the Court', Independent Review Team Public Report, p 4, *ICC website*, available at <<http://www.icc-cpi.int/iccdocs/registry/Independent-review-team-ReportEng.pdf>>.

- **Promote** the Lists of Counsel, Assistants to Counsel, Professional Investigators, and Experts. Highlight the need for expertise on sexual and gender-based violence among all potential applicants, and seek such information in the candidate application form. Currently, lawyers with this specialised expertise are not yet explicitly encouraged to apply. The Registry should encourage applications from lawyers with this experience on the ICC website. The Counsel Support Section should keep updated and accurate lists publicly available on the Court's website.
- **Prioritise** the need for training individuals on the List of Legal Counsel and the List of Assistants to Counsel on the gender provisions of the Rome Statute and interviewing/working with victims of rape and other forms of sexual violence.
- **Rule 90(4)** of the Rules of Procedure and Evidence mandates that when appointing Common Legal Representatives for groups of victims, Chambers and the Registry shall take all reasonable steps to ensure that the distinct interests of individual victims are represented, and that conflicts of interest are avoided. The Registry must ensure that all appointments of Common Legal Representatives remain faithful to this mandate, particularly when the group includes victims of sexual and gender-based violence and/or child victims, and ensure that proposals for Common Legal Representation are presented to the Chambers in a timely manner.

Victim participation and legal representation

- **Legal Representatives of Victims and the Registry** should disclose the type of training given to intermediaries who interact and set up meetings with potential victims and ensure that their selection is based on the Intermediary Guidelines, particularly that they have received training on 'Gender sensitivity and best practices for working with traumatised or particularly vulnerable victims' and 'Awareness and prevention of secondary traumatisation' as described in the Guidelines.²¹²⁷
- **Clarify** the use of the 'mapping exercise' adopted in the Laurent Gbagbo case and the Kenya cases to identify potential victims in relation to the use of individual application or registration forms. Broad range mapping exercises alone do not generally provide sufficient information regarding the individual circumstances of a victim, which is necessary in order to be able to accurately assess whether a person falls within the scope of an ICC case and therefore could qualify as a victim before the Court.
- **Expand** the use of the 'presentation model' utilised by the VPRS in Kenya to communicate with victims in other Situations whose applications fall outside of the case.
- **The VPRS** must adequately consult with participating victims to ascertain their views and wishes in relation to legal representation, and take those views and concerns into account when making proposals for common legal representation to the Chambers. The Section should develop a systematic approach to common legal representation, including adequate consultation with participating victims, taking into account the resources and time needed for such consultation.

2127 'Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries', *ICC website*, March 2014, p 14, available at <http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf>.

- **Developing guidelines** will be essential to ensure that the distinct interests of victims of crimes of sexual and gender-based violence, especially women and children, are protected when groups of victims are represented by a Common Legal Representative. Training on gender issues and increasing the number of women on the List of Legal Counsel could also assist in ensuring that these distinct interests are protected.
- **Increase** resources to, and the promotion of, the process for victims to apply for participant status in the proceedings of the Court. The Court must make it a priority to inform women in the nine conflict Situations of their right to participate, the application process, and the protective measures the ICC is able/unable to provide for victims.
- **Actively** plan for the participation of women when seeking input from victims at the Situation phase, and establish safeguards to address security concerns, including ensuring that victim representation made under Article 15(3) remains confidential and is not accessible to the Prosecution.
- **In 2015 VPRS should prioritise** completion of the implementation of the new database system for processing applications and provide more accurate data on applicants and recognised victims. Identifying trends in the number of victims applying to participate in Court proceedings is critical in order to understand any barriers faced by certain groups of victims and for the purpose of targeting resources and activities towards underrepresented groups. It is also critical to enhance the VPRS's work, planning and internal evaluation regarding the accessibility of the victim participation process to all 'categories' of victims.
- **In the next 12 months**, steps should be taken to urgently address and strengthen the institutional and personnel capacities of the VPRS including, but not limited to: conducting a review of the quality management processes and oversight of the Section; conducting a skills audit of the Section's staff; reviewing performance and roles; fully implementing the new data collection function introduced in 2010; and creating an effective mechanism and response strategy to avoid a backlog of unprocessed victim application forms.
- **Ensure** that the Court's outreach strategies cover all aspects of the Court's procedures and include outreach to communities generally to explain the requirements for victim participation and what it means to be a victim before the Court. Insufficient outreach or incomplete outreach conducted by the Court through the VPRS and the Public Information and Documentation Section can significantly and directly increase security concerns for victims participating in ICC trials.
- **Review** the Code of Professional Conduct for Counsel. The review should address issues concerning its scope, so as to ensure it applies to all persons, including legal consultants, acting on behalf of accused persons or victims. Article 1 of the Code of Professional Conduct for counsel, adopted by the ASP in December 2005, provides that it only applies to 'defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the International Criminal Court'.²¹²⁸ The review should further address procedures for monitoring compliance with, and responding to, perceived, reported or actual breaches of the Code of Conduct.

²¹²⁸ Trial Chamber III found that the Code does not apply to legal consultants working for the Defence team. ICC-01/05-01/08-769.

Acronyms used in the Gender Report Card 2014

ACLT	Advisory Committee on Legal Texts	MGS	Military Group Site
ACN	Advisory Committee on Nominations	MLC	<i>Mouvement de libération du Congo</i>
ALC	<i>Armée de libération du Congo</i>	MNLA	<i>Mouvement national de libération de l'Anzawad</i>
AMIS	African Union Mission in Sudan	MONUC	United Nations Mission in the Democratic Republic of the Congo
APC	<i>Armée populaire congolaise</i>	MUJAO	<i>Mouvement pour l'unicité et le jihad en Afrique de l'Ouest</i>
AQIM	Al-Qaeda in the Islamic Maghreb	NGO	Non-Governmental Organisation
ASG	Assistant Secretary-General	NTC	National Transitional Government
ASP	Assembly of States Parties	ODM	Orange Democratic Movement
AU	African Union	OPCD	Office of Public Counsel for the Defence
CAR	Central African Republic	OPCV	Office of the Public Counsel for Victims
CBF	Committee of Budget and Finance	OTP	Office of the Prosecutor
CICC	Coalition for the International Criminal Court	PEV	Post-election violence
CSS	Counsel Support Section	PIDS	Public Information and Documentation Section
DCC	Document Containing the Charges	PNU	Party of National Unity
DRC	Democratic Republic of the Congo	RPE	Rules of Procedure and Evidence
ECTHR	European Court of Human Rights	RTI	<i>Radiodiffusion Télévision ivoirienne</i>
EMOI	<i>Etat-major opérationnel intégré</i>	SCSL	Special Court for Sierra Leone
FACA	<i>Forces armées centrafricaines</i>	SGG	Study Group on Governance
FDLR	<i>Forces démocratiques de libération du Rwanda</i>	TFV	Trust Fund for Victims
FDS	<i>Forces de défense et de sécurité</i>	UN	United Nations
FNI	<i>Front des nationalistes et intégrationnistes</i>	UNOIOS	United Nations Office of Internal Oversight Services
FPLC	<i>Forces patriotiques pour la libération du Congo</i>	UPC	<i>Union des patriotes congolais</i>
FRPI	<i>Force de résistance patriotique en Ituri</i>	URF	United Resistance Front
GRULAC	Group of Latin American and Caribbean States	USAID	United States Agency for International Development
GTA	General Temporary Assistance	VPRS	Victim Participation and Reparation Section
HWG	Hague Working Group	VWU	Victims and Witnesses Unit
ICC	International Criminal Court	WEOG	Western European and Others Group
ICJ	International Court of Justice	WGA	Working Groups on Amendments
ICTY	International Criminal Tribunal for the former Yugoslavia	WGLL	Working Group on Lessons Learnt
IHL	International Humanitarian Law		
IOM	Independent Oversight Mechanism		
IPSAS	International Public Sector Accounting Standards		
JCE	Joint Criminal Enterprise		
JEM	Justice and Equality Movement		
LoE	List of Evidence		
LRA	Lord's Resistance Army		

Publications by the Women's Initiatives for Gender Justice

- *Gender Report Card on the International Criminal Court 2014*
- *Gender Report Card on the International Criminal Court 2013*
- *Gender Report Card on the International Criminal Court 2012*
- *Gender Report Card on the International Criminal Court 2011*
- *Gender Report Card on the International Criminal Court 2010*
- *Gender Report Card on the International Criminal Court 2009*
- *Gender Report Card on the International Criminal Court 2008*
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Acknowledgements

Design Keri Taplin, Montage Design

Front cover photograph Daniela Greco



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