IBA/ICC Programme

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Fairness at the International Criminal Court

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IBA/ICC Programme Overview

About the Programme

The International Bar Association's (IBA) Programme ('the Programme') on the International Criminal Court (ICC or 'the Court') monitors fair trial and defence related issues at the ICC and encourages the legal community to engage with the work of the Court.

The IBA's monitoring work includes thematic legal analysis of the ICC's pre-trial and trial proceedings; and ad hoc evaluations of legal, administrative and institutional issues, which could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice.

The Programme also acts as an interface between the Court and the global legal community. As such, special focus is placed on monitoring emerging issues at the Court of particular relevance to lawyers and collaborating with key partners on specific activities, such as the IBA/ICC List Counsel Campaign, to increase engagement of the legal community on ICC issues.

Parameters for monitoring

In keeping with the Programme mandate, the IBA's monitoring of the ICC focuses in particular on fair trial issues and the rights of the accused, as established in relevant provisions of the Rome Statute, the Rules of Procedure and Evidence, Regulations of the Court and other legal texts. The Programme conducts critical analysis of legal, administrative and institutional developments to assess the potential impact on the overall fairness of the proceedings.

IBA/ICC Monitoring includes the following:

- analysis of the interpretation and implementation of fair trial standards at the Court;
- legal, institutional and policy developments impacting defence rights; and
- issues of relevance to the legal profession.

Research is complimented by detailed consultations with key legal professionals, including: Court officials; academics and legal researchers; NGOs; staff of the ad hoc tribunals; individual defence counsel; and diplomatic representatives. Analysis of the relevant issues and detailed findings are published in monitoring reports and widely circulated to an extensive Listserv. To ensure the highest quality, reports are vetted by senior-level IBA officials including the Co-Chairs of the IBA Human Rights Institute.

The IBA expresses its gratitude to all persons who graciously participated in consultations for this report, and to the IBA interns who provided invaluable research assistance.

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Executive Summary

In March 2011, judges in the trial against Thomas Lubanga Dyilo ('the *Lubanga* case') at the International Criminal Court (ICC or 'the Court') dismissed a defence application to permanently stay proceedings against the accused on grounds that the fairness of the proceedings had been irretrievably prejudiced by the prosecution's inappropriate reliance on intermediaries during the trial. This was the second time that the defence had applied for a stay of proceedings based on procedural unfairness arising from alleged prosecutorial misconduct. At the time of writing, the issue of whether the case of Callixte Mbarushimana ('the *Mbarushimana* case') should be permanently stayed for abuse of process is under judicial consideration.

The abuse of process applications in the *Lubanga* and *Mbarushimana* cases highlight the centrality of the principle of fairness in the normative framework of the ICC. The ICC's legal texts reflect internationally recognised fair trial standards including the right of defendants to fair and effective trial proceedings before an independent and impartial tribunal. The legal texts also embody the rights of victims and witnesses in the proceedings. ICC judges are tasked with ensuring that trials are conducted with full respect for the rights of the accused and due regard for the rights of victims.

This International Bar Association (IBA) report monitors and critiques a range of jurisprudential, institutional and policy developments at the ICC between November 2010 and May 2011 through the lens of fairness. The decision to comment on all three areas reflects the IBA's approach to fairness as a holistic concept that pervades all levels of the Court's operation. Support for fairness must be structural as well as jurisprudential; to ensure that fairness is preserved in substance as well as in principle. Protecting fairness is therefore the responsibility of all organs of the Court, as well as the Assembly of States Parties (ASP).

IBA findings

Balancing competing fairness concerns

The report reflects the inherent challenges faced by ICC judges in balancing competing fairness concerns of all parties and participants. This was notably evident in relation to pre-trial disclosure. In several filings before the Pre-Trial Chamber (PTC), the prosecution argued that its **right to a fair trial** was significantly compromised by 'extra-statutory', 'burdensome' and 'inconsistent' disclosure orders by the judges. The defence argued that disclosure obligations imposed by the Chamber were fair and consistent with the prosecution's statutory obligations.

The IBA recognises the difficulty encountered by the prosecution in adapting to different pre-confirmation disclosure regimes, and notes that the prosecution has called for an Appeals Chamber (AC) decision to provide some degree of certainty.

The IBA found that although there were disparate disclosure decisions by the PTCs, in general, the system of disclosure devised by the pre-trial judges requires the prosecution to efficiently organise its resources to ensure timely advanced disclosure to the defence during the pre-trial phase without compromising the security of victims and witnesses. The IBA considers that the decisions ensure the fairness of the proceedings while safeguarding the fair trial rights of the defendant.

Redress for breaches of fairness

The IBA understands the Chambers' position that a permanent stay of proceedings may be too drastic a remedy in situations where the fairness of the trial, though ruptured, is recoverable. However, the *Lubanga* case has established a high threshold for abuse of process applications and no interim remedy has been devised to fully address alleged breaches of a defendant's fair trial rights prior to the conclusion of the trial. The challenge remains to find an appropriate remedy for abuses of process that is proportionate to the gravity of the abuse and fully safeguards the rights of the accused, meanwhile preserving the interests of other stakeholders to have a complete determination of the matter.

Equality of arms

The principle of equality of arms is central to many of the issues raised in this report. It is well established that equality of arms does not mean absolute equality in resources of the parties; it is more concerned with procedural equality. However, the achievement of procedural equality does have implications in terms of resource allocation. Indeed, one of the chief rationales behind the Prosecutor's duty to investigate incriminating and exonerating evidence equally – a defining feature of the ICC – is to ameliorate the asymmetry of resources between the parties. In the reporting period, it became apparent that there were other institutional and policy areas where equality of arms remained a challenge.

Both the prosecution and the defence have, at various times in the reporting period, expressed the view that they have been subjected in some way to

an inequality of arms. These concerns, which are inextricably tied up with resource concerns, seem to be exacerbated by the rapid expansion of the Court's caseload. The prosecution's key concerns relate to the need to devote considerable time and resources in preparing explanatory summaries of potentially exonerating material that will assist the defence with the preparation of its case. The defence's key equality of arms concerns appear to relate both to its relative lack of resources when compared to the prosecution, and to difficulties associated with the defence's lack of institutional status.

Support for the defence

The IBA notes that although the Registry has put in place structures to address the needs of the defence, the extent to which those structures allow the defence to carry out its mandate is limited. During the period under consideration, an internal review into the Offices of Public Counsel (OPCs) was initiated, suggesting that some reform is to be expected regarding the roles of the Office of the Public Counsel of the Defence (OPCD) and the Office of Public Counsel for Victims (OPCV).

The IBA welcomes and supports the current review of the OPCs. The review of the OPCD is particularly relevant from a fairness perspective, as the institutional support to defence interests and defence counsel is, in practical terms, critical to ensuring equality of arms between the defence and the prosecution.

The defence as a fifth organ

There continues to be debate about whether it would be appropriate, useful, or timely to create a separate organ for the defence in the ICC or whether defence support should be outsourced to an external independent representative body of counsel. The report presents several pros and cons of this issue, such as concerns that the creation of the defence office might be premature at this stage given that the Court is yet to complete a full-trial cycle. The IBA considers that in order to redress the current structural inequality faced by the defence, serious consideration should be given to establishing the defence as an organ of the ICC.

State cooperation

The manner in which the defence obtains states' cooperation is notably unclear, particularly on interim release. The process needs to be urgently streamlined and effectively communicated to the defence.

The IBA welcomes Registry efforts to conclude a framework agreement on interim release. The agreement clarifies an important area of the Court's law and practice and crucially ensures respect for the right to pre-trial liberty. The draft agreement does have some shortcomings, including the proposed case-by-case approach, which may allow states to opt out of concluding agreements.

IBA recommendations

To all organs of the Court

1. **Upholding the rights of the defence:** In the unique ICC context, the principle of fairness has implications for the defence and prosecution as well as participating victims. However, the IBA considers that at all times the fair trial rights of the accused must remain paramount in order to ensure the fairness and legitimacy of ICC trials.
2. **Privileged information:** The IBA is concerned at the resource and other challenges that arose in the *Mbarushimana* case, in relation to the inspection of potentially privileged material. In light of the developments in that case, the IBA urges the Court, in consultation with defence counsel and the OPCD, to devise **a policy and protocol** for the inspection of potentially privileged information.
3. **Prioritising equality of arms:** Equality of arms must remain at the forefront of all institutional and policy reforms, including the imminent reforms of the OPCs. Budgetary and financial concerns, as well as political concerns, must not detract from the importance of ensuring equality of arms.
4. **Institutional fairness:** Fair trial principles as applied in the jurisprudence must be reinforced by institutional and resource support. Fairness is an issue that defies compartmentalisation – while the Chambers are the guarantors of a fair trial, and the OPCD and defence counsel are responsible for voicing the concerns of the defence – all organs of the Court, as well as the ASP, have an important role to play in preserving the fairness of proceedings at the ICC.
5. **The defence as an organ of the Court:** The IBA considers that the defence should be established as a fifth organ of the Court,

to redress inequality in structural and policy matters for the defence. The IBA recommends that the issue be considered by the OPCs Review Committee and the Study Group on Governance. If the matter falls outside the limited remit of these bodies, the IBA urges the Presidency to create an appropriate mechanism to specifically consider this issue.

6. **External representative body of counsel:** While the issue of the defence as an organ of the Court remains under consideration, the IBA considers that the idea of establishing an external representative body of counsel should also be explored, given the need to fully represent the interests of counsel practising before the ICC.

To the Offices of Public Counsel Review Committee

1. **Review of the Offices of Public Counsel:** The review of the OPCs constitutes a valuable opportunity to reappraise the strengths and weaknesses of the current structures for supporting defence and victims. The IBA welcomes the fact that the Review Committee is considering the interaction between the OPCD and the Counsel Support Section (CSS), with a view to delineating functions and identifying any necessary tasks which are currently falling through the cracks. The utility of the review would be further optimised if the committee considered removing the defence support structures from the remit of the Registry altogether, through the creation of a fifth organ.

To the prosecution

1. **Manner of disclosure:** Pending an AC decision addressing disparate pre-trial decisions on disclosure, the IBA encourages the prosecution to organise its resources and carry out disclosure in a manner that best facilitates the effective and timely preparation of the defence case at the pre-trial stage of proceedings.

To the Registry

1. **State cooperation:** The IBA urges the Registry to create a standardised protocol governing defence cooperation requests. Such a protocol would be useful in ensuring that defence counsel are aware of the host of issues that can arise in relation to state cooperation, and furthermore, that they are properly equipped to deal with state cooperation issues as the need arises. The protocol should clearly indicate:
   - the steps to be taken by counsel in preparing and transmitting cooperation requests;
   - the Registry's role in this process;
   - the form that the onward transmission by the Registry will take – whether cover letter or note verbale; and
   - the procedure to be followed before the Chamber pursuant to Article 57(3) of the Rome Statute.
2. **Interim release:** The Registry's efforts to prepare a draft framework agreement on interim release is a useful step towards ensuring that the defence's right to interim release can be realised. While the framework agreement will provide greater certainty, states are likely to continue to assess requests for interim release on a case-by-case basis. It is important therefore that the Registry continues broad consultation with a wide range of State Parties to try to conclude several agreements.

To states and intergovernmental organisations

1. **State cooperation to facilitate defence rights:** States are urged to fully cooperate with the Court to ensure that defence rights can be meaningfully realised. This is particularly important in relation to issues that affect the fairness of proceedings – such as defence investigations and interim release. The Netherlands as Host State, bears a particularly important responsibility to ensure fairness in treatment for defendants summoned to appear at the ICC and detained witnesses applying for asylum.
2. **Cooperation by intergovernmental organisations:** Intergovernmental organisations such as the African Union (AU) are urged to cooperate with the ICC on all matters, including on issues of relevance to the defence. The IBA encourages the AU to conclude a memorandum of understanding with the ICC in order to facilitate effective and timely cooperation.

List of acronyms

AC	Appeals Chamber
ADC-ICTY	Association of Defence Counsel at the International Criminal Tribunal for the former Yugoslavia
AMIS	African Union Mission in Sudan
ASP	Assembly of States Parties
AU	African Union
CAR	Central African Republic
CBF	Committee on Budget and Finance
CMSS	Court Management and Support Services Section
CSS	Counsel Support Section
DCDMS	Defence Counsel and Detention Management Section
DRC	Democratic Republic of Congo
DSS	Defence Support Section
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Commission of Human Rights
FARDC	Forces Armées de la République Démocratique du Congo
FDLR	Forces Démocratiques pour la Libération du Rwanda – Forces Combattantes Abacunguzi
FNI	National Integrationist Front
FPLC	Forces Patriotiques pour la Libération du Congo
FRPI	Force de Résistance Patriotique en Ituri
HOD	Head of the Defence Office
HWG	Hague Working Group
IBA	International Bar Association
ICB	International Criminal Bar
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IND	Immigration and Naturalisation Department
MLC	Mouvement de Libération du Congo
OLAD	Office for Legal Aid and Detention Matters
OPCD	Office of Public Counsel for the Defence
OPCs	Offices of Public Counsel
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PNU	Party of National Unity (Kenya)
PTC	Pre-Trial Chamber (this report also specifically refers to PTC I, PTC II, PTC III and the PTCs)

RDF	Rwandan Defence Forces
RPC	Rules of Procedure of the Court
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SGG	Study Group on Governance
STL	Special Tribunal for Lebanon
STL RPE	Special Tribunal for Lebanon Rules of Procedure and Evidence
TC	Trial Chamber (this report also specifically refers to TC I and TC IV)
UN	United Nations
UNSC	United Nations Security Council
UPC	Union des Patriotes Congolais
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit

Introduction

The respect for fairness to accused persons as well as victims of the proceedings is an important component of the mandate of the International Criminal Court (ICC or 'the Court'). The Court's normative texts reflect full respect for the rights of accused persons and victims who appear before the Court. Fairness is, however, a holistic concept that is not limited to judicial proceedings. In order for proceedings to be fair, there must be institutional support structures that enable the parties to effectively realise the rights under the Rome Statute (or 'the Statute').

This International Bar Association (IBA) report is the tenth in a series of monitoring reports by the IBA/ICC Programme. The report monitors and critiques a range of jurisprudential, institutional and policy developments at the ICC between November 2010 and May 2011, through the lens of fairness. The decision to comment on all three areas reflects the IBA's approach to fairness as a holistic concept that pervades all levels of the Court's operation. Support for fairness must be structural as well as jurisprudential to ensure that fairness is preserved in substance as well as in principle. Ensuring fairness is therefore the responsibility of all organs of the Court, as well as the Assembly of States Parties (ASP).

The report addresses a number of ground-breaking decisions and significant filings by the prosecution and defence which address the issue of fairness at the ICC, including: the right to disclosure at the pre-confirmation stage; fairness versus expeditiousness; participation of anonymous victims; identification of privileged communication; and remedies for breach of fairness. The report also discusses ongoing initiatives to review and streamline institutional support systems in order to further enhance the levels of transparency, accountability, and the quality of support provided to the parties. Finally, the report considers the importance of cooperation to the provision of fairness. Particular attention is paid to defence challenges in obtaining cooperation and the impact of this on the overall fairness of the proceedings.

While the report highlights the importance of fairness to all parties and participants, in keeping with the IBA programme mandate, particular attention is paid to fairness issues that significantly impact the defence.

Chapter One – Overview of Cases Referred to in this Report

Democratic Republic of Congo

The Prosecutor v Thomas Lubanga Dyilo: Case No ICC-01/04-01/06

Thomas Lubanga Dyilo is charged with the war crimes of enlisting and conscripting children under 15 years of age into the armed forces and using them to actively participate in hostilities arising from his alleged activities in the context of an armed conflict in the Ituri region of eastern Democratic Republic of Congo (DRC). The conflict lasted from roughly July 2002 to December 2003 and involved various domestic armed groups as well as neighbouring states. During this time, Mr Lubanga allegedly maintained a position as founder and president of *Union des Patriotes Congolais* (UPC), and operated as Commander-in-Chief of its military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC). It is alleged that, in this capacity, Mr Lubanga knowingly enlisted and conscripted children under the age of 15 into the FPLC, and exploited them to engage in hostilities and further the ends of the UPC in the Ituri region. According to the ICC Office of the Prosecutor (OTP), Lubanga's preeminent position in both the FPLC and its military wing enabled him to have de facto ultimate control over the formation and implementation of such policies and practices.

The *Lubanga* trial proceedings began on 26 January 2009. On 8 July 2010, the OTP concluded the presentation of its case, following 74 days of hearing and the testimony of 28 witnesses, among them three experts. The ICC Trial Chamber (TC) itself called two other experts to testify. The defence has challenged the prosecution's case, calling several witnesses of its own. In total, 118 victims have been authorised to participate in the case.

The *Lubanga* case has been plagued by delays. The proceedings were suspended on three occasions: twice due to alleged prosecutorial misconduct in relation to its disclosure obligations, and once due to an application by victims to the Chamber to recharacterise the charges under Regulation 55 of the ICC Regulations of the Court ('the Regulations'). Closing statements are presently scheduled for 25 and 26 August 2011.

The Prosecutor v Germain Katanga and Matthieu Ngudjolo Chui: Case No ICC-01/04-01/07

Germain Katanga and Matthieu Ngudjolo Chui are charged with seven counts of war crimes and three counts of crimes against humanity including: murder or willful killing; inhumane acts; sexual slavery; rape; cruel or inhuman treatment; pillaging; and destruction of property. The charges stem from serious crimes committed in the village of Bogoro in the Ituri district of eastern DRC from January to March 2003. The Bogoro incident was part of a larger conflict in the region between the Lendu and Ngiti ethnicities on the one side, and the Hema ethnicity on the other. During this period, Mr Katanga allegedly operated as commander of the *Force de Résistance Patriotique en Ituri* (FRPI). It is additionally alleged that Mr Ngudjolo Chui was former leader of the National Integrationist Front (FNI).

The prosecution alleges that combatants led by Mr Katanga and Mr Ngudjolo Chui launched a joint attack on Bogoro village, which was directed not only against a military camp located in the village, but also against the predominantly Hema civilian population. It is further alleged that both defendants used children to multiple ends, including direct participation in the joint assault. The trial commenced on 24 November 2009. On 8 December 2010, the OTP completed the presentation of its case, and the defence commenced its case on 21 March 2011.

The Prosecutor v Callixte Mbarushimana: Case No ICC-01/04-01/10

The *Mbarushimana* case is the first case arising from the prosecution's investigations in the Kivu region of the DRC. Callixte Mbarushimana, a Rwandese national, was arrested in France and transferred to the ICC on 25 January 2011. Mr Mbarushimana is charged with five counts of crimes against humanity (murder, torture, rape and inhumane acts) and six counts of war crimes (attacks against the civilian population, destruction of property, murder, torture, rape, inhuman treatment and persecution) arising from the armed conflict in the Kivus region of the DRC between the *Forces Démocratiques pour la Libération du Rwanda – Forces Combattantes Abacunguzi* (FDLR-FCA, hereafter FDLR) and the *Forces Armées de la République Démocratique du Congo* (FARDC) together with the Rwandan Defence Forces (RDF). Mr Mbarushimana is alleged to be the Executive Secretary of the FDLR.

The prosecution alleges that between the dates of 20 January and 25 February 2009, the FDLR leadership decided to launch an offensive, targeting the civilian population of the Kivus in order to fulfill certain political objectives. A series of widespread and systematic attacks were allegedly carried out by FDLR troops in the period between January and September 2009 against civilians in the same region. These attacks were allegedly committed

pursuant to an overarching policy formulated by FDLR leadership, among them Mr Mbarushimana. Specific acts during these attacks include, inter alia, crimes of destruction of property, murder, torture, rape, inhuman treatment and persecution.

The confirmation of charges hearing is now scheduled for 17 August 2011.

The Central African Republic

The Prosecutor v Jean-Pierre Bemba Gombo: Case No ICC-01/05-01/08

Former Congolese Vice-President Jean-Pierre Bemba Gombo has been charged with war crimes and crimes against humanity, for attacks launched against civilians in association with armed conflict in the Central African Republic (CAR) between October 2002 to March 2003. During this time, Mr Bemba was the alleged President and Commander-in-Chief of the *Mouvement de Libération du Congo* (MLC) and military commander of its armed forces, which allied with the government of the CAR against a rising rebel movement. The prosecution alleges that Mr Bemba acted as military commander and had effective command responsibility over the troops responsible for carrying out these widespread and systematic attacks. The Bemba trial began on 22 November 2010. At present, the prosecution is in the midst of presenting its case with ongoing testimony from various witnesses. The *Bemba* trial is the first trial at the ICC of an individual as a military commander pursuant to Article 28 of the Rome Statute.

Darfur, Sudan

There are currently three cases arising from the Prosecutor's investigations in Darfur, Sudan: *The Prosecutor v Omar Hassan Ahmad Al Bashir*; *The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*; and *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*.

The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus: Case No ICC-02/05-03/09

On 17 June 2010, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus appeared voluntarily before the Court in compliance with the summonses to appear issued by the Pre-Trial Chamber (PTC). They are allegedly responsible for three war crimes: violence to life, in the form of murder, whether committed or attempted; intentionally directing attacks against personnel, installations, materials, units, and vehicles involved in a peacekeeping mission; and pillaging. These war crimes were allegedly committed during an attack carried out on 29 September 2007, against the African Union Mission in Sudan (AMIS), a peacekeeping mission stationed at the Haskanita Military Group Site, in the locality of Um Kadada, North Darfur. It is alleged that the attackers killed twelve and severely wounded eight soldiers, destroyed communications facilities and other materials, and appropriated property belonging to the AMIS.

On 7 March 2011, the PTC confirmed the charges against Mr Banda and Mr Jerbo and on 16 March 2011, the case was referred to the Trial Chamber IV (TC IV) by the Presidency. On 16 May 2011, the OTP and the defence in a joint filing to the TC indicated that certain facts have been agreed by both parties, and the defence will contest only three specific issues at their trial: a) whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; b) if the attack is deemed unlawful, whether the accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and c) whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations. Mr Banda and Mr Jerbo are not disputing their actual participation in the attack and both have committed to surrender voluntarily to the ICC.

A date for the trial has yet to be set.

Kenya

The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang: Case No ICC-01/09-01/11

On 8 March 2011, the Pre-Trial Chamber II (PTC II) found that reasonable grounds exist to believe that William Samoei Ruto and Henry Kiprono Kosgey are criminally responsible as indirect co-perpetrators under Article 25(3)(a) of the Rome Statute for crimes against humanity, specifically: murder, forcible transfer of population, and persecution. Furthermore, the PTC also determined that while there are not reasonable grounds to believe that Joshua Arap Sang is also an indirect co-perpetrator, there are reasonable grounds to believe that he otherwise contributed to the commission of the same crimes against humanity.

Mr Ruto is presently a suspended Minister in the Kenyan Government, Mr Kosgey a current Member of Parliament and Chairman of the Orange Democratic Movement (ODM), and Mr Sang is the head of operations at Kass FM radio in Nairobi, Kenya.

The charges stem from the outbreak of post-election violence, which lasted between December 2007 and January 2008. It is alleged that during this

time, Mr Ruto and Mr Kosgey in their capacities as government officials established, promoted and contributed financially to a campaign to carry out widespread and systematic attacks upon civilians of ethnicities affiliated with the opposing Party of National Unity (PNU) political party. As an influential radio broadcaster, Mr Sang allegedly contributed to the implementation of this campaign by placing the station at the disposal of campaign architects, advertising their meetings and by spreading hate messages directed at opposing ethnicities.

The Government of Kenya filed an application challenging the admissibility of the case before the Court, which was rejected by the judges on 30 May 2011. The confirmation hearing is scheduled for 1 September 2011.

The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali: Case No ICC-1/09-02/11

The PCT II found on 8 March 2011 that there exist reasonable grounds to believe that Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali are criminally responsible as indirect co-perpetrators under Article 25(3) of the Rome Statute for crimes against humanity, specifically: murder, forcible transfer, rape, persecution and other inhumane acts. Furthermore, the PTC also determined that while there are not reasonable grounds to believe that Mohammed Hussein Ali is also an indirect co-perpetrator, there are reasonable grounds to believe that he otherwise contributed to the commission of the same crimes against humanity.

Mr Muthaura presently holds the positions of Head of the Public Service and Secretary to the Cabinet, Mr Kenyatta is the current Deputy Prime Minister and Minister of Finance, and Mr Ali is the current Chief Executive Officer of the Postal Corporation.

The charges stem from the outbreak of post-election violence, which lasted between December 2007 and January 2008. It is alleged that during this time, Mr Kenyatta exercised control over the Mungiki criminal organisation, and offered critical contributions to the implementation of a campaign to carry out widespread and systematic attacks on civilians of ethnicities associated with the opposing ODM political party. Similarly, it is further alleged that Mr Muthaura personally led and coordinated a number of meetings between prominent PNU members and members of Mungiki, wherein the campaign's formation and implementation strategies were discussed and agreed upon. Finally, it is also alleged that Mr Ali – the head of the Kenyan Police Forces at the time of the outbreak – was made aware of the campaign and agreed not to interfere with the perpetration of crimes committed by the Mungiki.

The Government of Kenya filed an application challenging the admissibility of the case before the Court which was rejected by the judges on 30 May 2011. The confirmation hearing is scheduled for 1 September 2011.

Chapter Two – The Legal and Normative Framework

The principle of a fair trial is well established in international law.[1] In fact, the normative underpinnings of the concept of fairness in international criminal law derive from its predecessor; international human rights law. Both areas have a common base as they developed in response to atrocities and gross human rights violations committed during the two World Wars. Similarly, the ad hoc tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), were established in order to halt mass abuses of human rights by states against their own citizens or others within their territory.[2] The ICC is no exception.[3] The Rome Statute establishing the ICC specifically entrenches the rights of defendants to a fair trial by an independent and impartial tribunal.

The discourse on fairness in international criminal proceedings is no longer limited to accused persons but now includes recognition of the rights of other parties to the process. Human rights law increasingly recognises victims as beneficiaries of a general concept of fairness; a trend reflected in the constitutive texts, institutional structure and jurisprudence of the ICC.[4] Nevertheless, while it is generally accepted that all participants in the criminal justice process should be treated fairly, the fair trial rights of a defendant must remain paramount in order to preserve the credibility of the trial process.[5]

Legal framework

The concept of fairness has been made a central component of the ICC's constitutive texts because the legitimacy of the Court depends on the fairness of the trial.[6] Furthermore, the ICC is, by its own Rome Statute, bound to apply and interpret law in a manner 'consistent with internationally recognised human rights'.[7] Accordingly, fairness has been treated by the ICC as an indispensible requirement for the continuation of a trial. Indeed, the Court's first trial was very nearly dismissed due to concerns that the fairness of the proceedings had been irredeemably compromised.[8]

Article 64(2) establishes the TC's responsibility to ensure that the trial is 'fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'. That same article empowers the Chamber to take the necessary measures for safeguarding the fairness of the trial.

The concept of fairness is also relevant to the appeals process under the Rome Statute. Article 81(1)(b)(iv) provides that a party has a right to appeal against an acquittal, conviction or sentence on any ground that 'affects the fairness or reliability of the proceedings or decision.' Article 82(1)(d) sets out the right to appeal against any

1 See Article 14 of the International Convention on Civil and Political Rights, Article 6 of the European Convention on Human Rights and Fundamental Freedoms, Article 8 of the American Convention on Human Rights and Article 7 of the African (Banjul) Charter on Human and Peoples' Rights. Fair trial rights of the accused include: right to legal advice; right to pre-trial disclosure; right to a speedy trial; right to silence; and presumption of innocence. Fair trial rights in general include: *nemo judex in causa sua* (nobody can be a judge in his own case); right to an independent and impartial tribunal; right to a fair hearing; right to a public hearing; right to a hearing within a reasonable time; right to reasoned judgment: see Clayton, R and Tomlinson, H. (2010) *Fair Trial Rights* (second edition), Oxford University Press: Oxford, pp 43–44 and 72.

2 For a comparative assessment of normative provisions on fairness at the ICTY/ICTR and ICC see **Annex I** of this report.

3 See Article 66 of the Rome Statute which provides for the presumption of innocence and Article 67 which sets out the due process guarantees of accused persons.

4 For examples, see: Article 68(3) of the Rome Statute which provides victims with the right to participate in proceedings before the Court subject to the rights of the accused and a fair and impartial trial. For commentary and analysis of this provision see: Greco, G. (2007) 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis', *International Criminal Law Review,* Vol 7 (No 2–3): 531–547; Zappala, S. (2010) 'The Rights of Victims v the Rights of the Accused' *Journal of International Criminal Justice* Vol 8 (Issue 1): pp137–164, at pp137–138. For an overview of select jurisprudential developments at the ICC, see **Annex III** of this report.

5 Negri, S. (2007) 'Equality of Arms – Guiding Light or Empty Shell?', in Michael Bohlander (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May: London, p 24, note 45; Bohlander, M, Boed, R and Wilson, RJ. (2006) *Defense in International Criminal Proceedings*, Transnational Publishers: Ardsley.

6 Luban, D. (2010) 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', Besson, S and Tasioulas, J (eds), *The Philosophy of International Law*, pp 569–588, at p 579.

7 Article 21(3) of the Rome Statute.

8 On 15 July 2010, TC I issued an oral decision in which it ordered the unconditional release of Mr Lubanga due to abuse of process on the part of the prosecution. The TC stated: '[t]he trial has been halted because it is no longer fair, and the accused cannot be held in preventative custody on a speculative basis': *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-T-314-ENG Transcript, 15 July 2010, TC I, at p 21, lines 7–9: **www.icc-cpi.int/iccdocs/doc/doc908488.pdf**. The AC, on 8 October 2010, reversed the TC's decision to stay the proceedings as well as the decision to release the accused. Although the AC reiterated that the Prosecutor is obliged to comply with the orders of the TC, it found that the Chamber should have considered imposing other sanctions on the prosecution before staying the proceedings, as the latter measure is to be used only in the rare cases where a fair trial has been made irreparably impossible, which was not the situation in the case at hand: *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-2583, Judgment on the appeal of Prosecutor against the oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo, 8 October 2010, AC: **www.icc-cpi.int/iccdocs/doc/doc947862.pdf**.

other decision 'that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial'.

Rights of the accused

The rights of the accused as referred to in Article 64(2) of the Rome Statute are enumerated in Articles 66 and 67. The key rights of the accused are:

- the right to a competent, independent and impartial tribunal;
- the right to equality of arms;
- the right to the presumption of innocence;
- the right to counsel;
- the right to adequate time and facilities to prepare a defence;
- the right to disclosure of exonerating evidence;
- the right to privacy, including client-counsel confidentiality;
- the right to interim release;
- the right to a public hearing;
- the right to be informed of the charges;
- the right to be present at trial;
- the right to trial without undue delay;
- the right to remain silent;
- the right to humane treatment;
- the right to interpretation and translation;
- the right against retroactive liability;
- the right to reasons for judgment;
- the right against punishment without law; and
- the right to appeal.

Importantly, the rights contained in Article 67 are framed as 'minimum guarantees', rather than an exhaustive list of rights. Article 55 of the Rome Statute sets out the rights of persons during an investigation including: the right against self-incrimination; the right not to be tortured; the right to the free assistance of an interpreter and translator if necessary; and the right to legal assistance.

The Rome Statute does not explicitly refer to the principle of equality of arms, widely considered to be the cornerstone of a fair trial.[9] However, the Court's legal texts oblige the ICC to ensure an efficient and effective defence. Furthermore, Article 54, which requires the Prosecutor to investigate incriminating and exonerating evidence equally, is intended to reduce the inequality (especially in resources) between the prosecution and defence.

Rights of victims

The preamble to the Rome Statute recalls the fact that 'during this century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'. The drafters of the Rome Statute and the Rules of Procedure and Evidence (RPE) recognised the importance of guaranteeing the rights of victims of crime to participate in the proceedings and to be protected. The Rome Statute itself does not define 'victim'. The definition is actually found in the RPE. Rule 85(a) defines a victim as a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court. The Rome Statute recognises three fundamental rights of victims:

- The right to an effective remedy and access to justice, including the ability to have access to, and participate in, proceedings where their personal interests are affected.
- The right to fair treatment, dignity and respect throughout the process including the right to be informed, protection from reprisals and re-traumatisation, access to support and respect for privacy.
- The right to adequate and effective reparation, including access to appropriate forms of reparation.[10]

Fairness – a shared right

Throughout this report, an analysis of the jurisprudence of the ICC consistently reflects the notion of fairness as a shared rather than exclusive right. This broad interpretation was first applied by the judges of Pre-Trial Chamber I (PTC I) to the situation in the DRC. The judges ruled that fairness had implications for *all* participants in the proceedings, not just the defence. The PTC framed 'fairness' as the act of balancing, or finding equilibrium, between the procedural rights of all the participants.[11] It stated:

> 'The term "fairness" (*equité*), from the Latin "*equus*", means equilibrium, or balance. As a legal concept, equity, or fairness, "is a direct emanation of the idea of justice". Equity of the proceedings entails equilibrium between

9 The principle of equality of arms essentially means that the parties are given equal procedural rights and opportunities, or are in 'a procedurally equal position to make their case during the whole course of the trial'. For example, see: Negri, S. (2005) 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure'. *International Criminal Law Review*, Vol 5 (No 4): 513–571, at p 513; and Negri, S. (2007) 'Equality of Arms – Guiding Light or Empty Shell?', in Bohlander, M (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May: London, pp 13–73, p 69.

10 Redress (2005), *Ensuring the Effective Participation of Victims before the International Criminal Court: Comments and recommendations regarding legal representation for victims*, p 1: **www.redress.org/downloads/publications/REDRESS%20-%20Legal%20Representation%20for%20Victims%2023%20May%202005.pdf**.

11 *Situation in the DRC*, ICC-01/04-135-tEN, Decision on the Prosecutor's application for leave to appeal the Chamber's decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, PTC I, at [38]: **www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-135_tEnglish.pdf**.

the two parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings. In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings).'

In support of that view, PTC I referred to decisions of the European Commission of Human Rights (ECHR) and the ICTY.[12]

The PTC II in the Uganda situation has made a more nuanced distinction. The Chamber has suggested that there are two types of fairness, each with different implications in terms of participants' rights: first, a **'general' fairness** which demands that all participants be given a genuine opportunity to present their case and respond to evidence; and secondly, a **'specific' fairness** in criminal proceedings, which gives rise to certain special rights for the person on trial.[13] However, the Chamber noted that '[w]ith regard to criminal proceedings, it is usually understood that the right to a fair trial applies first and foremost to a defendant or to the defence.'[14] This view that the principle of a fair trial demands the privileging of the rights of the defence, where such rights come into conflict with the rights of victims, is generally reflected in the academic literature.[15]

This report considers several prosecution filings before the PTC, in which the prosecution argued that its right to a fair trial was significantly compromised by the disclosure requirements imposed by the PTC. For example, in the cases of *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* and *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang* ('the *Kenya* cases'), the prosecution contended that its **right to a fair trial** was affected by the PTC's decision ordering disclosure to the defence prior to a final decision on the admissibility challenge, which was brought by the Government of Kenya.[16]

Defence counsel consulted by the IBA opined that while it is necessary to preserve the fairness of the proceedings, it is essential not to misinterpret the notion of the right to a fair trial. Counsel noted that the right to a fair trial was designed to protect the defendant against the machinery of the state with its vast resources. In their view, the situation was no different in international trials where the prosecution has considerably more time and resources to undertake investigations.

The IBA agrees with the assessment of PTC II: while there is undoubtedly a need in the context of international criminal proceedings to ensure the fairness of the proceedings for all participants, the fair trial rights of the defendant must never be subordinated to those of the victims or the prosecution.

While there is undoubtedly a need within the context of international criminal proceedings to ensure the fairness of the proceedings for all participants, the fair trial rights of the defendant must never be subordinated to those of the victims or the prosecution.

12 *Ibid*, at note 50 of PTC I's decision, which reads: 'All parties to proceedings must have the opportunity to present their case to the court in circumstances which do not place them at a substantial disadvantage vis-à-vis the opposing party: see ECHR, *Szwabowicz v Sweden*, Opinion of 30 June 1959, Application No 434/58, Yearbook II, p 535. In its decision, Pre-Trial Chamber II defines the concept of fairness as being, inter alia, "[…] closely linked to the concept of 'equality of arms', or of balance, between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour", see Decision of Pre-Trial Chamber I at para 30. In this respect, Pre-Trial Chamber I relies upon the *Tadic* decision rendered by the International Criminal Tribunal for the former Yugoslavia, in which it was said that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case", see *The Prosecutor v Dusko Tadic*, Judgment of 15 July 1999, case no IT-94-1-A at para 48. See also *The Prosecutor v Clément Kayishema and Obed Ruzindana*, Judgment of 1 June 2001, case no ICTR-95-1-A, para 69.'

13 *Situation in Uganda*, ICC-02/04-01/05-90-US-Exp, Decision on the Prosecutor's applications for leave to appeal dated the 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th day of March 2006, 10 July 2006, PTC II at [24]: **www.icc-cpi.int/iccdocs/doc/doc278964.PDF**.

14 *Ibid*.

15 For examples, see: Greco, G. (2007) 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis', *International Criminal Law Review*, Vol 7 (No 2–3): 531–547, p 539; Zappala, S. (2010) 'The Rights of Victims v the Rights of the Accused', *Journal of International Criminal Justice*, Vol 8 (No 1): 137–164, at pp 137–138 and 140.

16 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-52, Prosecution's application requesting disclosure after a final resolution of the Government of the Republic of Kenya's admissibility challenge, 14 April 2011, PTC II, at [3], [10] and [11]: **www.icc-cpi.int/iccdocs/doc/doc1056222.pdf**.

Chapter Three – Jurisprudential Developments Concerning Fairness

While the normative provisions governing the fairness of the proceedings at the ICC are clear, the practical interpretation and implementation of these provisions are less so. Judges have grappled with complex issues such as how to ensure full respect for the rights of accused persons at various stages of the proceedings without undermining the rights of other parties and participants.

This chapter explores emerging jurisprudential developments relating to the concept of a fair trial and discusses the range of perspectives from various stakeholders on this issue. Five key issues which arose during the reporting period were selected for review:

- Disclosure
- Inspection of privileged material
- Admissibility of evidence
- Participation of anonymous victims
- Remedies for abuse of process

Disclosure

The ICC's legal texts place a positive obligation on the prosecution to disclose material within its possession to facilitate the effective and timely preparation of the defence case. Article 67(2) of the Rome Statute requires the prosecution to disclose potentially exonerating material in its possession to the defence as soon as practicable. However, disclosure is one of the most contentious procedural issues at the ICC.

Disclosure at the investigation stage

The Rome Statute does not explicitly provide for disclosure at the arrest warrant stage of the proceedings. Developments during the reporting period in the *Mbarushimana* case highlighted some of the challenges faced by defendants at this initial stage.

Prior to Mr Mbarushimana's surrender to the ICC, the defence petitioned the prosecution for disclosure of material related to the client's arrest for three purposes: to challenge the validity of the arrest warrant pursuant to Rule 117(3) of the RPE; to apply for interim release; and to challenge the admissibility of the case.

The prosecution countered that neither the Rome Statute nor the RPE provided for disclosure in relation to the issuance of an arrest warrant. In support of its position, the prosecution argued that such advanced disclosure as sought by the defence created a risk of disseminating highly sensitive information to a person who is not subject to the Court's control.[17]

The PTC partially granted the defence's application.[18]. It confirmed the defence's right to access documents essential for the purposes of applying for interim release and challenging the validity of the warrant of arrest. However, given the sensitive nature of such disclosure, the PTC understandably limited the scope of the disclosed material. Internal documents prepared by the prosecution in connection with the investigation or preparation of the case were not subject to disclosure,[19] and disclosure of evidence related to the DRC's referral of the situation was made subject to the prosecution's confidentiality obligations and 'the need to protect national security interests of the State from which the documents originated.'[20]

The PTC rejected the Prosecutor's submission that advanced disclosure of information was dependent on an admissibility issue actually pending before the Court.[21] The PTC considered that adopting the Prosecutor's approach would 'unduly restrict and delay the Defence's exercise of the right to effectively make such a challenge.'[22]

IBA comment

The *Mbarushimana* application reflects the very real difficulty faced by the defence to effectively prepare at the early stages of a case due to non-disclosure of crucially relevant material, for example: in relation to applications challenging the arrest warrant, admissibility of the case and interim release.

This has been a recurring issue for the defence: the issue had previously been raised in *The Prosecutor v Jean-Pierre Bemba Gombo* ('the *Bemba*

17 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-31, Prosecution Response to the 'Defence Request for Disclosure', 5 January 2011, PTC I, at [2] and [12]: **www.icc-cpi.int/iccdocs/doc/doc993196.pdf**.

18 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/20-47, Decision on the Defence Request for Disclosure, PTC I, at [17]: **www.icc-cpi.int/iccdocs/doc/doc1008643.pdf**; see Rule 81(1) RPE.

19 *Ibid.*

20 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/20-47, Decision on the Defence Request for Disclosure, 27 January 2011, PTC I, at [18]: **www.icc-cpi.int/iccdocs/doc/doc1008643.pdf**; see Rule 81(1) RPE.

21 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/20-47, Decision on the Defence Request for Disclosure, 27 January 2011, PTC I, at [14]: **www.icc-cpi.int/iccdocs/doc/doc1008643.pdf**; see Rule 81(1) RPE.

22 *Ibid.*

case').[23] In that case, the Appeals Chamber (AC) noted that while there is no express regime for disclosure in relation to applications for interim release in the ICC's legal framework, it does provide for a number of rights and guarantees of the arrested person[24] and that '[i]deally the arrested person should have all such information *at the time of his or her initial appearance* before the Court' (emphasis added).[25]

The IBA welcomes the PTC's recognition of the defendant's right to disclosure at the investigation stage, albeit for specific purposes (namely, to apply for interim release[26] and to challenge the admissibility of the case.[27]) While the right was not interpreted by the Chamber as an unqualified one, the decision underscores that providing access to the evidence relied upon by the prosecution at the arrest warrant stage safeguards the defence's right to 'adequate time and facilities to prepare its defence'.

The right to pre-confirmation disclosure

A number of ground-breaking decisions in the *Mbarushimana* and *Kenya* cases have raised issues of fairness in the context of pre-confirmation disclosure. Judges have departed from the 'bulk rule' developed in the *Lubanga* and the *Katanga and Ngudjolo* cases (that is, that the prosecution should disclose to the defence the bulk of potentially exonerating evidence and evidence material to the preparation of the defence, prior to the confirmation of charges hearing)[28] in favour of the 'totality rule' (requiring total disclosure of all said material prior to confirmation).[29] Additionally, the judges have required the prosecution to prepare summaries to assist the defence in understanding and identifying the relevance of each piece of evidence. The PTCs have thus taken bold steps in requiring the prosecution to organise its resources in the most effective manner to fulfil its statutory disclosure obligations, including full disclosure at the pre-confirmation stage, if they so order.

Primary concerns

While these decisions are welcomed by the defence, the OTP has expressed concern that in several respects the decisions are unfair to the prosecution. The prosecution's primary concerns are:

- **The scope of the disclosure obligations – specifically the duty to disclose all potentially exonerating evidence prior to the confirmation hearing.**

In the *Mbarushimana* and *Ruto/Kosgey and Sang* cases, the PTCs departed from the 'bulk rule' developed in *Lubanga* and *Katanga and Ngudjolo*. The prosecution objected to this shift in approach, arguing that the totality rule placed unfairly burdensome duties on the prosecution. Both PTCs rejected the prosecution's applications for leave to appeal, finding that the departure from the bulk rule was not an issue that significantly affected the fairness of the proceedings. In *Ruto/Kosgey and Sang*, the PTC expressed the view that it was fair to oblige the Prosecutor to organise his office to effect total disclosure at the pre-confirmation stage in a timely fashion.[30]

23 Mr Bemba appealed the decision of a single judge of the PTC denying him interim release on grounds that he had not been given access to all the relevant information underlying the decision for the arrest warrant. The decision appealed was *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-14, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, PTC III: **www.icc-cpi.int/NR/exeres/DBDBFEE6-B2DA-42EB-8BFF-797B998D0A51.htm**.

24 According to the Chamber, these include the arrested persons right to: receive a copy of the warrant of arrest (Rule 117(1) RPE); be informed of the crimes which the person is alleged to have committed; and be informed of his or her rights under the Rome Statute, including the right to apply for interim release pending trial (Article 60(1)). See *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release', 16 December 2008, AC, at [26]: **www.icc-cpi.int/iccdocs/doc/doc610448.pdf**.

25 *Ibid*, at [32]. The Chamber noted, however, that the right is not absolute. According to the Chamber, the person's right to disclosure [at investigation or arrest warrant stage] must be assessed in the light of the circumstances in which the ICC operates. This means that that the right to disclosure is not only counterbalanced by the need to protect victims and witnesses, but also by the need to safeguard ongoing investigations.

26 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/20-47, Decision on the Defence Request for Disclosure, 27 January 2011, PTC I, at [14]: **www.icc-cpi.int/iccdocs/doc/doc1008643.pdf**; see Rule 81(1) RPE.

27 *Ibid*.

28 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC 01/04-01/07-621, Decision on Article 54(3)(e) documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, PTC I, at [8]: **www.icc-cpi.int/iccdocs/doc/doc514860.pdf**; *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, Decision on the Final System of Disclosure and the Establishment of a Time-Table, 15 May 2006, PTC I, at [124]: **www.icc-cpi.int/iccdocs/doc/doc192080.PDF**; *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-803, Decision on the confirmation of charges, 29 January 2007, PTC I, at [154]: **www.icc-cpi.int/iccdocs/doc/doc266175.PDF**.

29 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, PTC II, at [6]: **www.icc-cpi.int/iccdocs/doc/doc1052090.pdf**; *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-87, Decision on issues relating to disclosure, 30 March 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1049622.pdf**.

30 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-93, Prosecution's Application for leave to Appeal the 'Decision on issues relating to disclosure', ICC-01/04-01/10-87, 5 April 2011, PTC I, at [4]: **www.icc-cpi.int/iccdocs/doc/doc1051359.pdf**; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-74, Decision on the 'Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-01/11-44,' 2 May 2011, PTC II, at [27]: **www.icc-cpi.int/iccdocs/doc/doc1065378.pdf**.

- **The need for summaries explaining the relevance of all potentially exonerating material disclosed to the defence.**[31]

In the *Mbarushimana* case, the prosecution contested the Chamber's order to furnish the defence with summaries explaining the relevance of all disclosed potentially exculpatory material.[32] The prosecution argued it was 'manifestly unequal to require the prosecution to bear its own burden to establish substantial evidence to hold the person for trial and also to bear the burden to affirmatively guide the defence to understand and fashion a responsive case.'[33] Mr Mbarushimana's defence contended that prosecution summaries helped to mitigate the inequality of resources between the parties, and asserted that overturning the order would 'render the proceedings wholly unfair to the defence.'[34]

The prosecution also challenged the 'extra-statutory' nature of the orders, contending that it impeded their ability to effectively and independently allocate resources for its *statutory* duties.[35] The defence team in the *Kenya* cases disagreed that the orders were extra-statutory: summaries were a 'fundamental component of the Prosecutor's mandate and duties under Article 54(1) of the Rome Statute.'[36] The defence in *Mbarushimana,*[37] as well as the single judge in *Ruto/Kosgey and Sang,*[38] suggested there was a tension between the prosecution's reluctance to accept extra-statutory duties relating to pre-confirmation disclosure on the one hand, and its commitment to the 'bulk rule' on the other hand (which is itself an extra-statutory rule).

Interestingly, the prosecution also argued that summaries might inadvertently mislead the defence in the preparation of its case.[39] By contrast, Mr Kosgey's defence argued that the summaries would preclude the defence from being 'overwhelmed by the disclosure of potentially irrelevant material.'[40]

- **The need for an Appeals Chamber ruling to resolve apparent inconsistencies in Pre-Trial Chamber decisions on disclosure**

The prosecution argues that there is a disparity between the PTCs approaches to pre-confirmation disclosure. The 'bulk rule' has been applied in some cases[41], while the 'totality rule' has been

31 Rule 77 of the RPE states: 'The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.'

32 *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-93, Prosecution's Application for leave to Appeal the 'Decision on issues relating to disclosure', ICC-01/04-01/10-87, 5 April 2011, PTC I, at [17]: **www.icc-cpi.int/iccdocs/doc/doc1051359.pdf**; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-50, Prosecution's Application for leave to appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters', ICC-01/09-01/11-44, 13 April 2011, PTC II: **www.icc-cpi.int/iccdocs/doc/doc1055273.pdf**.

33 *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-93, Prosecution's Application for leave to Appeal the 'Decision on issues relating to disclosure', ICC-01/04-01/10-87, 5 April 2011, PTC I, at [17]: **www.icc-cpi.int/iccdocs/doc/doc1051359.pdf**.

34 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/94, Defence Response to the Prosecution's Request for Leave to Appeal Decision ICC-01/-04-01/10-87, 10 April 2011, PTC I at [9]: **www.icc-cpi.int/iccdocs/doc/doc1053852.pdf**.

35 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap*, ICC-01/09-01/11-50, Prosecution's Application for leave to appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters', ICC-01/09-01/11-44, 13 April 2011, PTC I, at [6]: **www.icc-cpi.int/iccdocs/doc/doc1055273.pdf**. For a similar argument, see *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-93, Prosecution's Application for leave to Appeal the 'Decision on issues relating to disclosure', ICC-01/04-01/10-87, 5 April 2011, PTC I, at [15]–[16]: **www.icc-cpi.int/iccdocs/doc/doc1051359.pdf**.

36 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap,* ICC-01/09-01/11-58, Defence Response to the 'Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"', ICC-01/09-01/11-44', 15 April 2011, PTC II, at [29]: **www.icc-cpi.int/iccdocs/doc/doc1056838.pdf**.

37 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/94, Defence Response to the Prosecution's Request for Leave to Appeal Decision, ICC-01/-04-01/10-87, 10 April 2011, PTC I, at [6]–[7]: **www.icc-cpi.int/iccdocs/doc/doc1053852.pdf**.

38 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap*, ICC-01/09-01/11-74, Decision on the 'Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"', ICC-01/09-01/11-44, 2 May 2011, PTC II, at [25]–[26]: **www.icc-cpi.int/iccdocs/doc/doc1065378.pdf**.

39 IBA consultation with the Office of the Prosecutor, 20 May 2011, (notes on file with the IBA).

40 *The Prosecutor v Ruto, Kosgey and Sang,* ICC-01/09-01/11–74, Decision on the Prosecution's application for leave to appeal the 'Decision setting the regime for evidence disclosure and other related matters', ICC-01/09-01/11-44, 2 May 2011, PTC II, at [14]: **www.icc-cpi.int/iccdocs/doc/doc1065378.pdf**.

41 *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-102, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, PTC I, at [124]: **www.icc-cpi.int/iccdocs/doc/doc192080.PDF**; *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, 29 January 2007, PCT I, at [154]: **www.icc-cpi.int/iccdocs/doc/doc266175.PDF**; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, PTC I, at [8]: **www.iclklamberg.com/Caselaw/DRC/Katanga/PTC%20I/ICC-01-04-01-07-621-ENG.pdf**.

applied in others;[42] the prosecution has been ordered to write explanatory summaries of the disclosed exculpatory material in some cases,[43] but not in others;[44] some PTCs have required that *all* disclosed exculpatory material be communicated to the Chamber, irrespective of whether the prosecution intended to rely on that material at the confirmation hearing,[45] others did not.[46]

The prosecution has repeatedly sought an AC decision to clarify the disparate approaches to disclosure to prevent continued uncertainty and to facilitate more effective use of its resources in preparation for the confirmation hearing.[47] However, leave to appeal has been consistently refused.[48] PTC I dismissed the prosecution's application for leave to appeal in *Mbarushimana*, finding that the disclosure orders were not so burdensome on the prosecution as to affect the fairness of the proceedings.[49] The PTC II in *Ruto/Kosgey and Sang* ruled that the Prosecution's objections to the explanatory summaries were premised on a misunderstanding of the decision.[50]

IBA comment

The Chambers have taken bold steps in requiring the prosecution to organise its resources in the most effective manner to fulfil its statutory disclosure obligations, including full disclosure at the pre-confirmation stage if the Chambers so order.

The approach taken by the judges in *Mbarushimana* and *Ruto/Kosgey and Sang* appears to reflect the true object and purpose of Article 54(1)(a). From an 'equality of arms' perspective, it seems appropriate that the prosecution furnish the defence with explanations as to the potential relevance of the exonerating evidence to the defence's case. As the defence noted in its filing, the prosecution has considerably more personnel than the defence team. Given this disparity, it is not unreasonable to require the prosecution to properly equip the defence with explanations as to the relevance of the material.

The IBA notes the prosecution's calls for uniformity in pre-confirmation disclosure orders. While an AC decision would assist in providing greater procedural certainty for the prosecution, as the ICC's jurisprudence and practice evolves there is likely to be progressive evolution of a pre-confirmation disclosure regime, which will give the prosecution the benefit of predictability while facilitating the effective preparation of the defence's case.

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42 *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-87, Decision on issues relating to disclosure, 30 March 2011, PTC I, at [20] and p 15–16: **www.icc-cpi.int/iccdocs/doc/doc1049622.pdf**; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-74, Decision on the Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters', ICC-01/09-01/11-44, 2 May 201, PTC II, at [27]: **www.icc-cpi.int/iccdocs/doc/doc1065378.pdf**; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 2 April 2011, PTC III at [24]: **www.icc-cpi.int/iccdocs/doc/doc1052090.pdf**.

43 *The Prosecutor v Bahr Idriss Abu Garda,* ICC-02/05-02/09-35, Second Decision on issues relating to Disclosure, 15 July 2009, PTC I, at [15] and [16]: **www.icc-cpi.int/iccdocs/doc/doc711237.pdf**; *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-87, Decision on issues relating to disclosure, 30 March 2011, PTC I, at [11] and p 15: **www.icc-cpi.int/iccdocs/doc/doc1049622.pdf**.

44 *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-102, Decision on the final system of disclosure and the establishment of a timetable, 15 May 2006, PTC I: **www.icc-cpi.int/iccdocs/doc/doc192080.PDF**.

45 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 2 April 2011, PTC III, at [6]: **www.icc-cpi.int/iccdocs/doc/doc1052090.pdf**.

46 *The Prosecutor v Bahr Idriss Abu Garda,* ICC-02/05-02/09-35, Second Decision on issues relating to Disclosure, 15 July 2009, PTC I, at [9]: **www.icc-cpi.int/iccdocs/doc/doc711237.pdf**; *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-87, Decision on issues relating to disclosure, 30 March 2011, PTC I, at [9] subparagraph (c): **www.icc-cpi.int/iccdocs/doc/doc1049622.pdf**.

47 IBA consultation with the Office of the Prosecutor, 20 May 2011, (notes on file with the IBA); see also *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-93, Prosecution's Application for leave to Appeal the 'Decision on issues relating to disclosure' (ICC-01/04-01/10-87), 5 April 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1051359.pdf**; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-50, Prosecution's Application for leave to appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters', ICC-01/09-01/11-44, 13 April 2011, PTC I, at [5]: **www.icc-cpi.int/iccdocs/doc/doc1055273.pdf**.

48 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-116, Decision on the Prosecution's application for leave to Appeal the 'Decision on issues relating to disclosure', ICC-01/04-01/10-87, 21 April 2011, PTC I, at [29]: **www.icc-cpi.int/iccdocs/doc/doc1056910.pdf**; *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-74, Decision on the 'Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"', ICC-01/09-01/11-44, 2 May 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1065378.pdf**.

49 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-116, Decision on the Prosecution's application for leave to Appeal the 'Decision on issues relating to disclosure', ICC-01/04-01/10-87, 21 April 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1056910.pdf**.

50 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-74, Decision on the Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters', ICC-01/09-01/11-44, 2 May 2011, PTC II, at [18]: **www.icc-cpi.int/iccdocs/doc/doc1065378.pdf**.

Privileged information

The privileging of client-counsel communications is the necessary corollary of a suspect's right to communicate freely with his or her chosen counsel in confidence. The tradition of privileging such communications is widely considered to be integral to the fairness of the trial: indeed, it is recognised to be 'vitally important to the fair administration of justice'.[51]

The Rome Statute expressly recognises the defendant's right to confidentiality of communications with counsel.[52] In this respect, the Statute goes beyond prior instruments of international law such as the International Covenant on Civil and Political Rights (ICCPR),[53] ICTY[54] and ICTR Statutes[55] which did not recognise client-counsel confidentially as a substantive right of the defendant.

Given the importance of privilege to the principle of fairness, the IBA was concerned by the apparent flaws in the procedure for identifying privileged materials raised in the *Mbarushimana* case.[56] Defence counsel in that case raised serious concerns about the preservation of counsel-client confidentiality, specifically in regard to the approach to the identification of privileged communications between Mr Mbarushimana and his counsel.[57]

The issue arose when a collection of documents was seized from the suspect's house by French authorities. The suspect was given an opportunity to remove privileged materials from the hard-copy documents but not the electronic material. The Registry made available to the OTP material seized from the suspect's house. While reviewing the materials an OTP investigator happened upon an email between the suspect and his counsel while reviewing the seized hard-copy material. The Prosecutor halted the review and suspended all investigation and legal staff's access to the materials. The OTP's Information and Evidence Unit conducted a keyword search on the materials, using the details of all lawyers known to have acted for the suspect. The materials recovered by the search were quarantined, and the remainder was made available to the investigation and legal staff.

The prosecution made several proposals for review including that the procedure be carried out by the PTC[58] while the defence requested to perform the procedure itself, or by the Office of the Public Counsel of the Defence (OPCD). The defence's chief concerns were that:

- The Chamber's inspection of the seized materials could be prejudicial to the defence; as it could result in the Chamber being exposed to privileged materials.[59]
- The Registry's breaking of the seals on the evidence bags in the absence of the suspect and his counsel constituted a breach of accepted procedure of international law.[60]

The defence also alerted the prosecution and the PTC to the likely presence of privileged material within the seized electronic material, which had not yet been made available to the prosecution.

The Chamber rejected the defence's suggestion that exposing privileged information to the PTC would be prejudicial to the defence.[61] It declined to rule on the legality of the search or the breaking of seals on evidence bags. The Chamber ruled that it would review the 72 documents, and ordered the Registry to carry out a keyword search on the remaining seized material using keywords provided by the parties.[62] All materials recovered in that search would be turned over the Chamber, which would remove any privileged materials before restoring the prosecution's access to the materials.

The defence sought leave to appeal the decision,[63] which the PTC refused.[64] However, the PTC then issued a subsequent decision ordering the defence to review the seized materials and submit to the Chamber a list of documents

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51 Bohlander, M, Boed, R and Wilson, RJ. (2006) *Defense in International Criminal Proceedings*, Transnational Publishers: Ardsley, p 478.

52 Rome Statue, Article 67(1)(b).

53 ICCPR, Article 14(3).

54 ICTY Statute, Article 21(4)(b).

55 ICTR Statute, Article 20(4)(b).

56 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-58, Defence Response to Prosecution's Request for the Review of Potentially Privileged Material, 18 February 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1025122.pdf**.

57 *Ibid.*

58 *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-54, Prosecution's request for a review of potentially privileged material, 11 February 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1020576.pdf**.

59 *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-58, Defence Response to Prosecution's Request for the Review of Potentially Privileged Material, 18 February 2011, PTC I, at [13]: **www.icc-cpi.int/iccdocs/doc/doc1025122.pdf**.

60 *Ibid,* at [8].

61 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-67, Decision on the 'Prosecution's request for a review of potentially privileged material', 4 March 4 2011, PTC I, at pp 6–7: **www.icc-cpi.int/iccdocs/doc/doc1032482.pdf**.

62 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-67, Decision on the 'Prosecution's request for a review of potentially privileged material', 4 March 2011, PTC I, at p 8: **www.icc-cpi.int/iccdocs/doc/doc1032482.pdf**.

63 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-75, Application for leave to appeal Pre-Trial Chamber I's 'Decision on Prosecution's request for a review of potentially privileged material', 14 March 14 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1038691.pdf**.

64 *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-106, Decision on the Defence's Application for Leave to Appeal the Decision on Potentially Privileged Material dated 4 March 2011, 15 April 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1060007.pdf**.

claiming privilege.[65] This second decision was made following the Registry's indication that it would not be able to perform the keyword search itself within the stipulated time.[66] The Chamber subsequently approved a defence request for the OPCD to assist with the review.[67] At the time of writing, several further decisions on this issue were still pending.

IBA comment

While it is the responsibility and prerogative of the defence to assert privilege, the absence of a clear system for removing privileged information from seized materials is concerning. The IBA notes that the manner in which privileged information was identified and isolated in the *Mbarushimana* case raised serious fairness issues, including:

- the preservation of the accused person's right to communicate with counsel in confidence;
- the potentially prejudicial effect of the Chamber's exposure to privileged material; and
- the defence's right to adequate time and resources to prepare its case.

Given those concerns, the IBA welcomes the PTC's 'Second Decision' permitting the defence to conduct the review. The PTC's initial decision concerning review was concerning both because it interfered with the right of the defendant to communicate freely with his counsel in confidence and because the PTC's exposure to privileged information could be seen as potentially prejudicial to the suspect.

The IBA also welcomes the OPCD's willingness to assist the defence with the task of reviewing the seized materials, given the scale of the task and the short space of time in which the defence had to complete it.

In light of the developments in the case, the IBA urges the Court, in consultation with defence counsel and the OPCD, to devise **a policy and protocol** for the inspection of potentially privileged information.

Fairness or expeditiousness

The AC decision overturning the TC ruling on admissibility of evidence in the *Bemba* case reiterates the importance of ensuring that while expeditiousness is an important component of fairness, the former should never trump the latter. The TC had decided to admit into evidence all items on the prosecution's Revised List of Evidence, without evaluating the admissibility of each item, based on a prima facie finding of admissibility.[68] Both the prosecution and defence sought, and were granted, leave to appeal.[69] The concept of fairness was a recurring concern in both parties' filings.

Both parties contended that the Court's legal texts did not permit the wholesale admission into evidence of the listed items, based on a prima facie finding of admissibility.[70] Both submitted that the TC's decision was irreconcilable with the principle of orality (the appearance and testimony of a witness in person), per Article 69(2) of the Rome Statute.[71]

The AC reversed the decision of the TC. The AC stated that '[w]hile expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements.'[72] The AC confirmed that the orality principle should only be departed from if such departure was 'not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally,' and found that in the case at hand, there was no indication that the TC had considered those fairness issues.[73]

IBA comment

This issue served to illustrate that fairness must not be sacrificed in pursuit of expeditiousness. The right to be tried without undue delay exists in order to *protect* the defendant; and therefore the principle of expeditiousness must not be invoked in such a way as to cause detriment to the defence or unfairness to other parties to the proceedings.

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65 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-105, Second Decision on matters regarding the review of potentially privileged material, 15 April 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1060006.pdf**.

66 *Ibid.*

67 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-114, Defence Request for OPCD Support, 19 April 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1060835.pdf**.

68 *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1022, Decision on the admission of evidence of materials contained in the prosecution's list of evidence, 19 November 2010, TC III, at [8]: **www.icc-cpi.int/iccdocs/doc/doc969801.pdf**.

69 *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1169, Decision on the prosecution and defence applications for leave to appeal the 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 26 January 2011, TC III, at [38]: **www.icc-cpi.int/iccdocs/doc/doc1007975.pdf**.

70 *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1194, Prosecution's Document in Support of Appeal against TC III's 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 7 February 2011, AC, at [18]–[36]: **www.icc-cpi.int/iccdocs/doc/doc1015536.pdf**.

71 *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1191, Defence appeal against the 'Decision on the admission into evidence of material contained in the Prosecution's list of evidence' of 19 November 2010, 7 February 2011, AC, at [53]–[63]: **www.icc-cpi.int/iccdocs/doc/doc1015133.pdf**.

72 *Ibid*, at [33]–[35]; *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, AC, at [55]: **www.icc-cpi.int/iccdocs/doc/doc1066048.pdf**.

73 *Ibid*, at [78]–[79].

Participation of anonymous victims

The participation of victims in ICC proceedings has long been an issue that could potentially negatively impact the fairness of the proceedings. Whilst acknowledging the inherent statutory right of victims to participate in the proceedings pursuant to Article 68(3) of the Rome Statute, the ICC jurisprudence has also clearly reflected the limitations of participation: that the exercise of this right must not impinge on the fair trial rights of accused persons before the Court. One troubling issue has been the scope of participation of anonymous victims and their access to relevant material.

The *Banda and Jerbo* case is instructive on this point. This case is characterised by a significant level of cooperation between the prosecution and the defence in relation to the facts in issue. The parties filed a joint submission regarding certain agreements as to evidence under Rule 69 of the RPE.[74] The relevant Rule 69 agreement was attached to a confidential filing by both parties.[75] However, the Chamber signalled its intention to notify the legal representatives of victims participating in the case and requested submissions of the prosecution and the defence in this regard.[76] In a joint filing, both objected to the provision of the confidential annexures to the victims once they remained anonymous.[77]

The parties argued that victims' participation must not be inconsistent with the rights of the accused to a fair and impartial trial including the fundamental right prohibiting anonymous accusations. In their submission, they argued that if the Chamber requests the observations of anonymous victims, the victims may exercise their right to ask for a more complete presentation of the alleged facts if they disagree with the Rule 69 agreement; and essentially request that points of fact or evidence be added to the case file against the accused. Allowing such requests, they submit, would violate the fundamental principle prohibiting anonymous accusations.

IBA comment

The IBA considers the regulation of the participation of anonymous victims as an important issue for preserving the fairness of the proceedings. The jurisprudence of the ICC has consistently limited the scope of participation by anonymous victims in the proceedings, as it conflicts with the right of the accused to face his accuser.

Remedies for breaches of fairness

Alleged egregious breaches of fairness may result in suspension of the proceedings and provide grounds for an appeal.[78] On at least two occasions in the ICC's first trial against Mr Lubanga proceedings have been stayed due to alleged prosecutorial misconduct. This arose in the first instance from non-disclosure of relevant potentially exculpatory material obtained from confidential sources,[79] and more recently, from failure to disclose relevant information concerning an intermediary as ordered by the Chamber.[80]

On 10 December 2010, defence counsel for Mr Lubanga applied to the TC for a permanent stay of the proceedings in the case. The defence argued that five main elements led to this 'irretrievable prejudice' to the fair trial of Mr Lubanga: i) the improper role of four 'intermediaries' who acted for the prosecution; ii) the Prosecutor's negligence in failing to properly investigate evidence that he introduced during the trial; iii) the Prosecutor's deliberate failure to discharge his disclosure and inspection obligations; iv) the part played by certain participating victims; and v) the failure on the

74 *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* ICC-02/05-03/09-148, Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, 16 May 2011, TC IV: **www.icc-cpi.int/iccdocs/doc/doc1073345.pdf**.

75 Rule 69 of the RPE provides that: 'The Prosecutor and defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such an alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims.'

76 *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus,* ICC-02/05-03/09-151, Joint Observations by the Office of the Prosecutor and the Defence regarding access by Participants to Confidential Annexure 'A' of the 'Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons', 26 May 2011, TC IV, at [2]: **www.icc-cpi.int/iccdocs/doc/doc1080342.pdf**.

77 *Ibid*, at [7].

78 The use of this doctrine by defence counsel is not a new phenomenon in international criminal law. Indeed, defence teams previously introduced the doctrine as early as 1999 and it was recognised by judges at the ad hoc tribunals, as well as the ECCC and the ICC. Defence applications on the basis of this doctrine are in fact quite frequent. Particularly notable are: the *Barayagwiza* case at the ICTR; the *Nikolić*, and *Karadžić* cases at the ICTY; the *Duch* and *Khieu* cases at the ECCC; and the *Lubanga* case at the ICC. The *Barayagwiza* decision set a precedent at the ad hoc tribunals as to abuse of process. Both tribunals relied on this jurisprudence in *Akayesu*, *Nikolić*, *Karadžić*, *Hartmann* and *Šešelj*. The legal foundations were, however, not elaborated or discussed and the power to stay proceedings at the ad hoc tribunals was thus interpreted as deriving from the general and inherent role of the court in guaranteeing and supervising the fair trial of the accused.

79 *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-1401, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, TC I, at [41]–[44]: **www.icc-cpi.int/iccdocs/doc/doc511249.PDF**.

80 *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-2517, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 July 2010, TC I, at [22]–[23]: **www.icc-cpi.int/iccdocs/doc/doc906146.pdf**.

Prosecutor's part to act fairly and impartially.[81] The prosecution opposed the defence application.[82]

The TC ultimately rejected the defence application on the basis that ordering a permanent stay of the proceedings for abuse of process is a drastic remedy to be reserved strictly for those cases that necessitate it. The judges further noted that they would be able in due course, at the end of the trial, to reach final conclusions on the alleged impact of the involvement of the intermediaries on the evidence in this case, as well as on the wider alleged prosecutorial misconduct or negligence.[83]

The *Lubanga* decisions have established the criteria for determining whether an abuse of process is a necessary and appropriate remedy for very serious breaches of fairness. The Chamber must determine: a) whether it would be 'odious' or 'repugnant' to the administration of justice to allow the proceedings to continue; and b) whether the accused's rights have been breached to the extent that a fair trial has been rendered impossible. Trial Chamber I (TC I) has opined that this determination constitutes a matter of judgment, an exercise of discretion involving judicial assessment and that 'not every example of suggested prosecutorial misconduct will lead to a permanent stay of the proceedings; instead, this is a matter of fact and degree'.[84]

Mbarushimana abuse of process application

The issue of abuse of process has again been raised in the *Mbarushimana* case.[85] The defence argues that the prosecution either knowingly, or with gross negligence, presented misleading information to the Court in regards to investigation of the accused by German authorities. Consequently, the defence's procedural right to challenge the legal admissibility of the case was severely compromised. The defence argues that this conduct should be seen as so 'repugnant' to the administration of justice that there should be a permanent stay of proceedings against Mr Mbarushimana.[86]

The Prosecutor counters the defence assertions by submitting that all relevant information about the German investigation was provided to the Chamber.[87] The prosecution states that they never hid the fact that Mr Mbarushimana was considered a suspect in Germany, but because no further action was taken by the German authorities, the accused was not being actively investigated. Finally, the prosecution claims that the defence has abused its discretion and has made serious allegations against the prosecution without proper support. The issue remains under judicial consideration at the time of writing.

IBA comment

The IBA understands the Chambers' position that a permanent stay of proceedings may be too drastic a remedy in situations where the fairness of the trial, though ruptured, is recoverable. However, the *Lubanga* case has established a high threshold for abuse of process applications and no interim remedy has been devised to fully address alleged breaches of a defendant's fair trial rights prior to the conclusion of the trial. The challenge remains to find an appropriate remedy for abuses of process that is proportionate to the gravity of the abuse and fully safeguards the rights of the accused, whilst preserving the interests of other stakeholders to have a complete determination of the matter.

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81 *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-2657, Requête de la Défense aux fins d'anêt définitif des procédures, 10 December 2010, TC I, at [20]: **www.icc-cpi.int/iccdocs/doc/doc1049530.pdf**.

82 *The Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-2678, Prosecution's Response to the Defence's « Requête de la Défense aux fins d'arrêt définitif des procédures », 31 January 2011, TC I: **www.icc-cpi.int/iccdocs/doc/doc1049004.pdf.**

83 *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2690-Red2, Redacted Decision on the 'Defence Application Seeking a Permanent Stay of the Proceedings', 7 March 2011, TC I, at [198]: **www.icc-cpi.int/iccdocs/doc/doc1036342.pdf**.

84 *Ibid.* at [195].

85 *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-177, Defence request for a permanent stay of proceedings, 24 May 2011, PTC I at [3]: **www.icc-cpi.int/iccdocs/doc/doc1078476.pdf**.

86 *Ibid*, at [4].

87 *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10-211, Prosecution's Response to the 'Defence request for a permanent stay of proceedings,' 3 June 2011, PTC I, at [22]–[30]: **www.icc-cpi.int/iccdocs/doc/doc1084080.pdf**.

Chapter Four – Institutional Fairness: Support Structures

Services and structures which qualitatively support the defence and victims are *indispensible* to ensuring the fairness of proceedings. Such services and structures may serve the interests of the defence or victims in general, or, they may serve particular teams representing defence or victims. Support structures provided by the Court are further complemented by the provision of adequate resources to indigent defendants and victims in order to ensure the overall fairness of the proceedings.

Structural overview

At the ICC, institutional support for defendants operates through two main channels: the Counsel Support Section (CSS) – a unit based in the ICC Registry which provides administrative support to both defence and victims' counsel – and the OPCD, an entirely independent office attached to the Registry for administrative purposes. Support for victims and their legal representatives is provided by the Victims Participation and Reparations Section (VPRS), attached to the Division of Court Services and the Office of Public Counsel for Victims (OPCV) – the counterpart of the OPCD mandated to provide legal support and advice to victims and legal representatives.

Counsel Support Section

The CSS was created by the Registrar in 2009. The CSS's role is to provide technical and logistical support to defence counsel, legal representatives of victims and other counsel (such as those representing witnesses at risk of self-incrimination pursuant to Rule 74 of the RPE). The CSS manages the List of Counsel eligible to practice before the ICC and provides training and support for counsel on the list; it also administers the legal aid scheme of the Court on behalf of the Registrar.

The Office of Public Counsel for the Defence

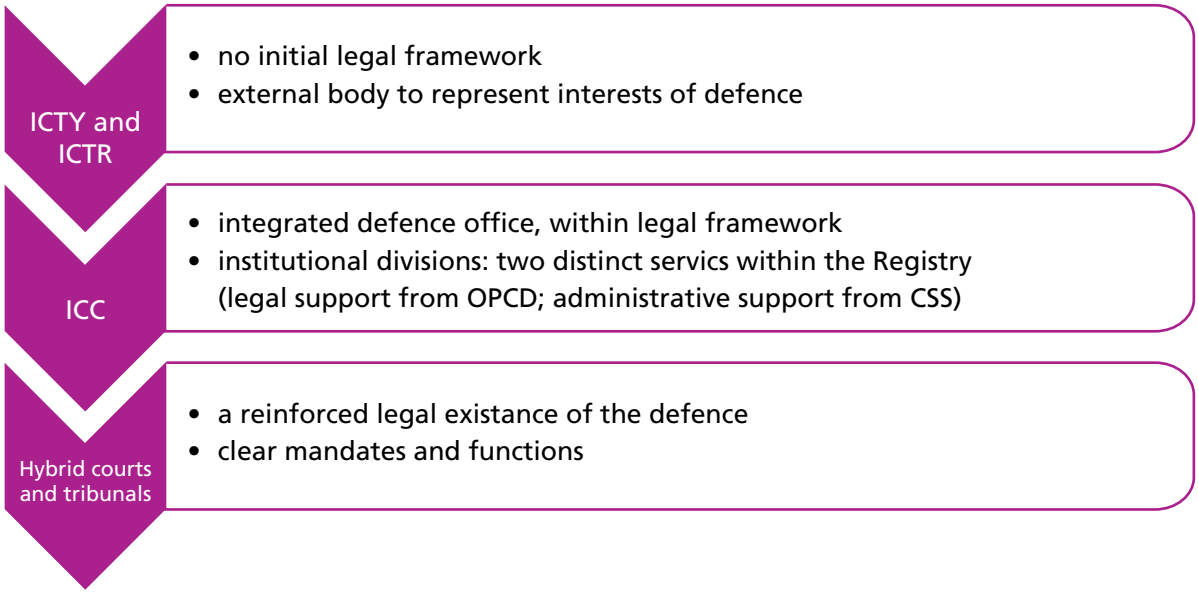
The OPCD is established pursuant to Regulation 77 of the Regulations of the Court ('the Regulations'). The tasks of the OPCD include:

- representing and protecting the rights of the defence during the initial stages of the investigation; and
- providing support and assistance to defence counsel and to the person entitled to legal assistance, including, where appropriate, legal research and advice and appearing before a Chamber in respect of specific issues.

The OPCD is fully independent but falls within the remit of the Registry solely for administrative purposes. The OPCD may include counsel and assistants that meet the criteria for inclusion on the ICC List of Counsel and Assistants to Counsel. Counsel and assistants within the OPCD act independently.

This office was established to remedy an imbalance between the prosecution and defence consistent with the principle of equality of arms by ensuring that defence teams were provided with legal assistance and support during trials. The office is also seen as the institutional voice of the defence.

In the context of international criminal institutions, the existence of the OPCD is a significant advancement to the practice of the ICC's predecessors. No formal structure existed to represent the interests of the defence at the Nuremberg or Tokyo tribunals and the ad hoc tribunals, which led to significant inequalities between the prosecution and the defence. At the ICTY, the general interests of the defence were represented by an external partner of the Tribunal, the Association of Defence Counsel at the ICTY (ADC-ICTY). Lessons learnt from these organisations have resulted in a trend for a more institutionalised organisation of the defence. The most significant achievement in this regard is the separate and autonomous organ created at the Special Tribunal for Lebanon (STL).



The Office of Public Counsel for Victims

The OPCV is the counterpart of the OPCD for victims. Regulation 81 of the RPE establishes the mandate of the OPCV to provide support and assistance to the legal representatives of victims and to victims including, where appropriate, legal research and advice and appearing before a Chamber in respect of specific issues. Regulation 80 of the RPE provides that a Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require and may also appoint counsel from the OPCV.

Part I – Review of the Offices of Public Counsel

In May 2011, a select committee of judges and the Deputy Registrar of the ICC initiated a review of the role of the Offices of Public Counsel (OPCs). The review was prompted by concerns expressed by relevant stakeholders concerning the manner in which the respective mandates were being implemented. The Court has also commenced an internal review of the legal aid system, but the process remains confidential at this stage.

The two major issues prompting review of the OPCs appear to be:

- difference in the interpretation of mandates by both offices; and
- lack of clear mechanisms to ensure governance and accountability for these independent offices.

OPCD Regulation 77	OPCV Regulation 81
Tasks 'shall include': • 'representing and protecting the rights of the defence during the initial stages of the investigation …' • Providing 'support and assistance to defence counsel and to the person entitled to legal assistance, including, where appropriate: (a) Legal research and advice; and (b) Appearing before a Chamber in respect of specific issues.'	The OPCV 'shall provide': • 'support and assistance to the legal representative for victims and to victims, including, where appropriate: (a) Legal research and advice; and (b) Appearing before a Chamber in respect of specific issues.'

Mandates

One significant factor prompting the review of the OPCs is the marked difference in the interpretation of the respective mandates of the OPCD and OPCV. Judge Sir Adrian Fulford, one of the chief architects of the OPCD and one of the judges currently conducting the internal review of the OPCs, has opined that the OPCD was intended to provide 'hands-on, case-focused help to individual defendants and to the Court'. Judge Fulford envisages that the OPCD would expedite trials and reduce expenditure on legal aid, and has expressed concerns that the office was not fulfilling that role.[88]

However, the OPCD has interpreted its mandate differently. The office has tended to act behind-the-scenes rather than in Court, and the Registry's 2010 report emphatically states 'the OPCD is not a public defender's office per se, it exists to supplement rather than replace the role of external defence counsel'.[89] The Registry's report outlines a mandate for the OPCD that emphasises tasks other than appearing in Court:

- First, 'representing the interests of the defence during the investigation stage'.[90] For example, the OPCD was directed by PTC I to represent the general interests of the defence during the investigation stage in the DRC situation.
- Second, 'providing legal advice and research to defence teams and defendants'.[91] The OPCD has emphasised its utility as a receptacle and conduit of institutional knowledge. The appointment of external defence counsel for each case increases the risk that each defence team might 're-invent the wheel'. The OPCD mitigates against that risk, by maintaining a 'collective defence memory' on which external counsel can draw.[92]
- Third, 'advocating for the general interests of the defence in connection with internal and external policies and agreements'.[93] In this capacity, the OPCD represents the rights of the defence in deliberations regarding ICC policies, for example, policies related to intermediaries, victim participation, and legal aid. Additionally, the OPCD engages with external partners, namely civil society and states, on defence-related issues.

The OPCD also steps in to provide assistance and support to defence counsel where necessary. For example in April 2011, the OPCD volunteered to assist the *Mbarushimana* defence team in performing a search on seized materials to identify privileged information.[94]

The OPCD positions itself primarily as an out-of-court actor. It emphasises that its main goals are representing the general interests of the defence in the investigation stage, and supporting defence counsel in the preparation of their defence. It does not seek to affect the defence's strategy, and opts not to appear in court – except to represent defendants during their initial appearance who have not yet been assigned or retained counsel.

By contrast, the OPCV has directly represented more than 1,000 victims in pre-trial and trial proceedings at the ICC in addition to supporting victims' legal representatives.[95] The office also represents the collective interests of victims in Court.

Governance and accountability

Another major concern is the absence of a specific mechanism to review and evaluate the performance of the OPCs. Although the offices fall within the Registry for administrative purposes, the Registrar is currently precluded from monitoring or evaluating their substantive work for risk of trespassing on the OPCs' independence. Although the OPCD and OPCV submit an annual report to the Registrar concerning their overall work, this general report does not necessarily allow the Registry to gauge the work product and performance of individual staff members.

Regulation 144 of the Regulations of the Registry specifies that '[t]he members of the Office shall not receive any instructions from the Registrar in relation to the discharge of their tasks as referred to in regulations 76 and 77 of the Regulations of the Court.' This is consistent with the obligation of the Registrar to carry out her functions in a manner which ensures the 'professional independence of defence counsel.'[96] Any review by the Registry of the substantive functions of the OPCD would arguably violate these provisions.

The independence of the OPCs is an essential prerequisite for carrying out their respective mandates. Independence in this context means being allowed to function without being subjected to pressure of any kind and preserving the privileged relationship between the offices and defendants/victims and counsel/legal representative.

88 Judge Sir Adrian Fulford (2011). 'Reflections of a Trial Judge', *Criminal Law Forum*, Vol 22 (Nos 1–2): 215–223.

89 ICC Registry (2010). *Behind The Scenes: The Registry of the International Criminal Court.* International Criminal Court: The Hague, at p 69.

90 *Ibid.*

91 *Ibid.*

92 *Ibid*, p 70.

93 *Ibid*, p 69.

94 *The Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-114, Defence Request for OPCD Support, 19 April 2011, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1060835.pdf** .

95 By February 2010 the OPCV had represented approximately 1600 victims at the ICC. See: ICC Registry (2010). *Behind The Scenes: The Registry of the International Criminal Court.* International Criminal Court: The Hague, p 67

96 Rule 20(2) of the RPE.

Notwithstanding the need for functional independence, governance and accountability of all the Court's organs and units is vital to its legitimacy. In this regard, the OPCs cannot be exempted from governance, provided that any system of governance does not interfere with their independence.

Concerns

Some general concerns have been expressed regarding the timing and objective of the review, three of which can be summarised as follows:

1. **The review suggests a fundamental misunderstanding of the difference in the roles of the respective offices:** The principals suggest that the expectation that both offices should interpret their roles along similar lines reflects a lack of understanding of the intrinsic differences in representing victims and accused persons.
2. **The review process could provide an opportunity for states concerned about the mushrooming legal aid budget to abolish the offices:** The IBA noted that the review appears to have triggered some concern regarding the future status of the OPCs.
3. **The review process could also provide an excuse for increasing the representative role of the OPCs and limiting the role of external counsel, as a cost-saving measure under the legal aid programme:** If the offices are viewed as a public defender or public victims' representative office, states may limit the scope of the legal aid programme – requiring indigent detainees and victims to only select counsel from these offices.

Lack of support for Offices of Public Counsel

The idea of OPCs does not enjoy unqualified support. At least one member of the List of Counsel consulted by the IBA clearly indicated that the existence of such offices does not fully respect the independence and qualification of external counsel. Counsel opines that the role attributed to these offices should be derogated to an 'International Criminal Court Bar', which would be tasked with providing support to counsel. Indeed, counsel further noted that the existence of the OPCs might lead to a revision of the ICC's reliance on external counsel.[97]

Counsel contends that the OPCD and OPCV should be replaced by a 'research and database office' – tasked with collecting and collating ICC jurisprudence, which would be made widely available to all organs of the Court. The gap that would be left if the OPCs no longer played a legal advisory role would be filled by more effective training of counsel.[98]

IBA comment

In principle the IBA supports any process of review that will ensure increased transparency and accountability for all Court actors. The review process itself must conform to rules of natural justice and all parties and relevant stakeholders must be given an opportunity to be heard and have their views taken into account in arriving at a decision.

The IBA supports the existence of OPCs within the ICC framework. These offices represent an advancement in the practice of the ad hoc tribunals, and although limited to some extent in their powers when compared to similar offices at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the STL, nevertheless play an important role in supporting individual defendants, defence teams, victims and legal representative of victims.

IBA consultations with defence teams suggest that the OPCD's role in providing legal advice and support is invaluable, particularly for teams that have very little time to familiarise themselves with complex ICC jurisprudence and technical issues. This has the effect of ensuring that proceedings are fair and expeditious.

Finally, the IBA supports the implementation of a structured governance and accountability framework for the OPCs, provided that this does not trespass on their independence. In this regard, we consider that the ICC Presidency would be best placed to provide this supervisory role, since they already have full management oversight of the Court.

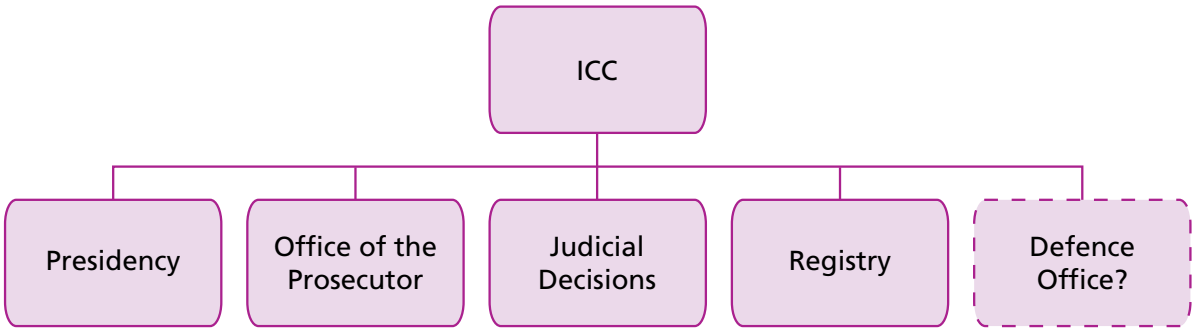
Part II – The defence as an independent organ at the ICC

A recurrent issue in discussions about the institutional architecture of the ICC is whether there should be a separate defence organ. Proponents of this view argue that this would enable the defence to have the concrete institutional status it currently lacks, thus ensuring an effective defence. While no concrete proposal has been made to establish a 'Defence Office' as the fifth organ of the Court, the issue invariably surfaces in informal discussions about institutional support for the defence within the ICC.

Notwithstanding the existing support structure – the CSS and the OPCD – the defence lacks the institutional autonomy and visibility enjoyed by the prosecution. One view is that the establishment of a fifth organ would remedy this perceived anomaly.

97 IBA consultation with Fabio Galiani, Bar of Rome, 20 May 2011, (notes on file with the IBA).

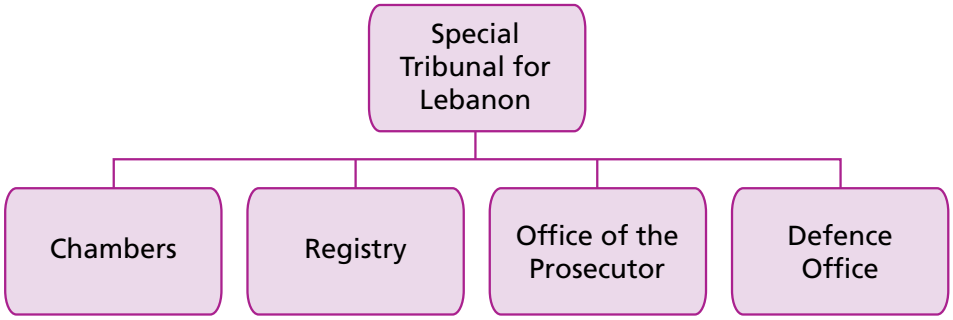
98 *Ibid.*



A contrary view is that defence issues should be dealt with by an independent, representative, and external body of counsel in order to safeguard the fairness and legitimacy of ICC proceedings and the rights of accused persons.[99] The tension between opponents of an internal support structure and those who favour external representation of defence reflects the complexity of the issues at hand.

The Special Tribunal for Lebanon example

Defence-related units within the international courts and tribunals have become increasingly independent over the last two decades.[100] However, the STL has been the only international body to establish a Defence Office as an entirely separate organ.



99 Paper prepared by the International Criminal Bar, November 2009 (on file with the IBA).

100 See **Annex II**: Defence offices, a comparative study.

There are a wide range of arguments for and against the establishment of a 'Defence Office' as a fifth organ of the ICC. Proponents argue that the defence as an organ of the Court would ensure equality of arms; raise the profile of the defence; and ensure financial autonomy and independence for the defence.

The case for a defence organ

- **Equality of arms:** Establishing a defence organ with the same institutional status as the prosecution is necessary in order to uphold the principle of equality of arms.[101] In 2003, Justice Geoffrey Robertson QC, former President of the Special Court for Sierra Leone (SCSL), outlined his vision for a 'permanent Defence Office' in the SCSL which would be the 'fourth pillar' of the Court and ensure equality of arms. Justice Robertson's vision was not realised at the SCSL: the Registrar and the Prosecutor did not support the proposal,[102] and in 2005 the AC ruled that the defence was administratively part of the Registry and was 'not an independent organ of the Special Court.'[103] However when the STL was established in 2007 by the United Nations Security Council (UNSC), then-Secretary-General Kofi Annan supported the creation of an independent defence organ 'to ensure "equality of arms."'[104] The Security Council followed the Secretary-General's proposal, creating a defence organ in the STL.[105]
- **Raising the profile of defence rights:** Proponents also argue that an independent Defence Office would promote the visibility of the defence, and therefore lead to an increased awareness about the rights of the defence in international and national jurisdictions. A greater global awareness and understanding of defence rights could make it easier to obtain state cooperation on matters such as interim release and acquittals, and facilitate defence investigations and access to witnesses.[106]
- **Financial autonomy and independence:** The lack of financial autonomy is one of the major limitations to the effective functioning of the current defence office at the ICC. Both the CSS and the OPCD are financially dependent on the Registry, and, unlike the OTP, do not enjoy the autonomy to determine their operational budget. The ability to determine and manage the budget is key to an office's independence. In this regard, the STL Defence Office provides the only example.

The case for retaining the status quo

- **Timeliness:** At present the STL is the only international body with a defence organ. Therefore, there is very little institutional learning to draw on, and it is difficult to have a clear sense of the range of experiences involved. Individuals in favour of the status quo opined during IBA consultations that the ICC would benefit from a full assessment of the successes and challenges of the STL system before considering the implementation of a similar system at the ICC. It was suggested that the ASP might be more open to considering such a major change to Court's structure if it could build on the STL's experiences. However, the STL is not a fully international body; it functions within a different legislative framework to the ICC, and operates in a very particular political situation. Therefore, it cannot be assumed that any successes of the STL Defence Office would translate to successes in the ICC context.
- **Disruption:** Overhauling the institutional structure of the ICC to include a defence organ would be a disruptive process involving extensive budgetary discussions and consultations, background research, as well as changes in staffing and budgetary arrangements. Time and attention would be diverted from the Court's substantive work, which is particularly concerning given the Court's rapidly increasing workload. Such a major institutional change would divert the Court's focus from its current priority, which is to ensure fair and expeditious proceedings.
- **Perceptions of impartiality:** A further concern is whether establishing a 'Defence Office' within the ICC could entrench suspicions about the Court's impartiality. An ICC 'Defence Office' would therefore need to be sensitive to its public image and ensure that its independence was evident to the outside observer.

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101 IBA consultations with OPCD, April 2011. See also: Thompson, A and Staggs, M. 'The Defence Office at the Special Court for Sierra Leone: A Critical Perspective', War Crimes Studies Center, University of California, Berkeley, April 2007: **http://socrates.berkeley.edu/~warcrime/documents/DefenceOfficeReport.pdf**; Wilson, RJ. '"Emaciated" Defense or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals?' *American University Human Rights Brief*, Winter 2008.

102 Thompson, A and Staggs, M. *Ibid*, pp 31–33; Wilson, RJ. *Ibid*, p 8.

103 *The Prosecutor v Brima et al*, SCSL, Case No SCSL-04-16, Decision on Brima-Kamara Defence Appeal Motion, AC, 8 December 2005, at [83].

104 UN Security Council, Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, 15 November 2006, at [30].

105 Wilson, RJ. See note 78, at pp 8–9.

106 IBA consultations with Office of Public Counsel for Defence, 28 March 2011.

Potential roles of a new defence organ

An ICC 'Defence Office' that combined the two mandates of the OPCD and the CSS would perform the following key tasks:

- representing and protecting the rights of the defence during the initial stages of the investigation;
- supporting and assisting the defence, including: legal research and appearing before a Chamber in respect of specific issues;
- advocating the general interests of the defence in connection with internal and external policies and agreements;
- establishing and maintaining a list of counsel, assistants to counsel and professional investigators;
- providing logistical, administrative and security support to defence counsel; and
- administering the legal aid system.

However, the organ might also be entrusted with an additional spectrum of functions in addition to the combined functions of OPCD and CSS, such as those currently carried out by the STL Defence Office.[107]

Defence Office versus external representative body

Some opponents of an institutionalised defence presence within the ICC argue in favour of an independent external representative body of counsel recognised by the ASP. For many years, the International Criminal Bar (ICB) has sought to achieve this status. The ICB was created in June 2002 and lists its aims as promoting the development of an independent legal profession and practice before the ICC: providing assistance to the lawyers who defend victims and defendants before the Court; and facilitating an effective communication between the bodies of the Court and lawyers.[108]

The ICB asserts that the language of Rule 20(3) of the RPE[109] was included because the drafters recognised that the existence of an independent self-governing bar association was crucial to any fair and independent system of justice.[110]

The issue of an external defence body is however a complex and often controversial one. Despite its 11-year existence, the ICB has not been formally recognised by the ASP and is yet to gain the full support of the lawyers on the ICC List of Counsel.[111]

Conclusions

The debate on an institutional presence for the defence at the ICC is an important one. It is clear that there are several pros and cons to such a decision, as well as significant resource and policy implications. The IBA acknowledges concerns that the creation of the defence office might be premature at this stage given that the Court is yet to complete a full-trial cycle.

While sensitive to the contentious nature of the proposal to create a stand-alone defence organ in the ICC, the IBA supports the inclusion of the defence as the fifth organ of the Court. A defence organ would reflect, at an institutional level, the principle of equality of arms. Importantly, the benefits of a defence organ extend beyond mere symbolism or perception. It would allow the defence office to determine its own budget and would significantly ameliorate many of the difficulties that defence counsel currently face, including obtaining state cooperation.

The IBA considers that the idea of an external representative body of counsel should also be explored, given the need to fully represent the interests of *counsel* practising before the ICC. Nevertheless, given the need to redress inequality in structural and policy matters for the *defence*, the IBA recommends that the committee tasked with reviewing the OPCs and the Study Group on Governance created by the ASP consider the matter of establishing the defence as an organ of the Court. If the matter falls outside the limited remit of these bodies, the IBA urges the ICC Presidency to create an appropriate mechanism to specifically consider this issue.

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107 Such tasks could include overseeing detention matters (currently a task carried out by the ICC Registry); greater functions and competences related to counsel, as in the STL; enjoying equal status with the Prosecutor in respect of rights of audience and negotiations for all purposes related to the proceedings – as is the case in the STL example; responsibility for ensuring that the representation of suspects and accused meets internationally recognised standards of practice; monitoring the performance of counsel and initiating disciplinary proceedings against the counsel concerned in exceptional circumstances; and representing individual suspects and accused in the courtrooms (unlike in the STL, where the Defence Office may not take any instructions from suspects or accused persons or be involved in factual allegations or matters relating to a specific case).

108 Information concerning the ICB can be found on its website at **www.bpi-icb.com**.

109 Rule 20(3) provides that: 'For purposes such as the management of legal assistance in accordance with rule 21 and the development of a Code of Professional Conduct in accordance with Rule 8, the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties.'

110 Paper prepared by the International Criminal Bar, November 2009 (on file with the IBA).

111 The Bar of Rome, an independent national bar association, is pursuing the establishment of a separate independent 'International Criminal Court Bar Association' which would represent counsel practicing before the ICC. See paper prepared by the Bar of Rome (on file with the IBA).

Chapter Five – Ensuring Fairness through Cooperation

The full and timely cooperation of states and intergovernmental organisations is vital to facilitating fair and effective proceedings at the ICC. However, cooperation with states has been one of the Court's greatest challenges since its inception. While the OTP reports that 85 per cent of its cooperation requests are carried out by states, it is also palpably clear that there are areas where cooperation has not been forthcoming – such as the failure to execute outstanding arrest warrants. Cooperation with the Court on issues pertaining to the defence presents a particular challenge for a number of reasons, not least of which is the absence of a clear legal and policy framework to facilitate requests made by the defence.

Legal basis for cooperation

Part IX of the Rome Statute sets out the types of judicial cooperation the Court may request, and under Article 88 States Parties are obliged to ensure that procedures are available under national law for such forms of cooperation. Under Article 86 of the Statute, all States Parties have a general obligation to cooperate with the Court with respect to investigations and prosecutions. The same obligation may also be extended to non-States Parties where the situation on their territory has been referred to the Court by a resolution of the United Nations Security Council (UNSC) under Chapter VII of the Charter of the United Nations, as is presently the case for Sudan and Libya. The Netherlands as the Host State, by virtue of the terms and conditions of the 'Headquarters Agreement' between itself and the ICC, may have additional cooperation obligations that are not shared by other states. Intergovernmental organisations may also be called upon to cooperate where the request originates from a situation referred by the UNSC.

In relation to defence requests, this general position is more nuanced. While Article 86 makes clear that states have an obligation to cooperate with the Court in its investigations and prosecutions, the Court consists of four organs and the defence is not one of them.[112] Thus, defence requests for cooperation transmitted directly to states by defence counsel and not through the Registry – which has the responsibility to provide support, assistance and information to all defence counsel appearing before the Court – are not responded to in the same manner as similar requests made by the OTP.

In fact, the strongest legal grounding for cooperation requests by the defence is an order from the Chamber under Article 57(3) of the Rome Statute which empowers the PTCs to: '(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58… [to] issue such orders… or *seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence*' (emphasis added). In the event of failure to cooperate, the Chamber may make a finding of non-cooperation under Article 87(7) of the Statute.

Protocol governing defence cooperation requests

While it may appear axiomatic that in order to expedite cooperation requests, defence counsel should seek an order of the Chamber; this has not been reflected in the Court's practice. Rather, counsel initially send cooperation requests directly to states. Regrettably, such requests are often ignored, prompting counsel to request the assistance of the Registry. The Registry then transmits Counsel's request with a cover letter or note verbale to the relevant state or organisation. If Registry-backed requests are ignored, counsel then approaches the Chamber. This circuitous approach is resource intensive and needs to be revised.

Specific defence cooperation challenges

Interim release

The issue of interim release remains a major challenge for the ICC. Article 60(2) of the Rome Statute and Rules 118 and 119 of the RPE are the legal bases for interim release and are inextricably linked to the presumption of innocence. Under Article 60(2) of the Statute, a person subject to a warrant of arrest may apply for interim release pending trial and the PTC shall release the person, with or without conditions, if it finds that the conditions for detention pending trial set forth in Article 58(1) are no longer fulfilled.

However, the AC has now made it clear that before a Chamber can finally determine the issue of interim release, a state able and willing to host the defendant in the event of such release must first

112 See discussion in Part II of Chapter 4 of this report.

be identified.[113] Professor Göran Sluiter argues that the AC took a 'wrong and dangerous track' when it required, as a pre-condition to granting interim release, the prior identification of a state that is willing and able to accept the person concerned.[114] He opines that the AC failed to indicate how the terms 'able and willing' should be interpreted and its reference to the Court's dependence on states cooperation to effect interim release decisions signalled that the AC regarded cooperation on this issue as non-mandatory. [115]

The AC decision has further fuelled ongoing debates about the mandatory/non-mandatory nature of cooperation in relation to interim release. At the heart of this debate is the view that the mandatory cooperation in the Court's investigations and prosecutions – referred to in Article 86 of the Statute – does not necessarily include cooperation with the defence. This legal lacuna is compounded by Article 57(3)(b) which limits the Chamber's power to request cooperation on behalf of the defence to '*such cooperation* […] *as may be necessary to assist the person in the preparation of his or her defence*' (emphasis added). Unsurprisingly, States Parties currently view interim release as a voluntary form of cooperation. Thus, without an ad hoc framework agreement by states accepting provisionally released defendants, the right to pre-trial liberty cannot be exercised. Effectively, this means that the ICC's obligation to interpret its provisions in compliance with fundamental human rights norms is completely subjected to political will. As Professor Sluiter argues, 'respect for fundamental human rights norms should never be conditioned upon such highly uncertain factors'.[116]

PRACTICAL AND PRINCIPLED CONCERNS

The current situation has created an untenable situation for the defence. Counsel is left in the invidious position of determining whether it would be appropriate to approach a potential Host State prior to applying to the Chamber for interim release, or, to first approach the Chamber. For example, in the *Mbarushimana* case, on 10 February 2011, prior to formally applying for interim release, defence counsel sent a request for cooperation to the French authorities to ascertain whether they would agree to receive Mr Mbarushimana into French territory in the event that he was granted interim release. The request was accompanied by a note verbale from the Registry. However, up to 14 March 2011 no formal acknowledgement had been received. The PTC however dismissed the application, noting that it was inappropriate for counsel to request an order from the Chamber to ask France to cooperate prior to making the actual application for release.

States have also raised principled and practical concerns about the Court's approach to interim release, including the scope of the obligation at the national level towards the released person. One concern is the frequency with which the suspect may be required to attend Court hearings, which largely depends on the stage of the proceedings. For example, while a defendant may waive his right to attend his confirmation of charges hearings and status conferences, he must be present at trial.[117] Thus, it may be more feasible for a defendant to be released to the Host State or to states in the proximity of the Court. This again may place a disproportionate burden on some states to receive such defendants. Notably, the obligation of the Host State is limited to facilitating the transfer of persons granted interim release into a state *other than* the Host State.[118]

Interim release framework agreement

Ultimately, if cooperation with states is necessary in order to give effect to this right, it is incumbent on the Court to negotiate with states to ensure that framework agreements are in place. Some progress has been made in this regard. The Registry recently completed a draft 'Interim Release Framework Agreement', which will be circulated amongst states. Referred to as the 'exchange of letters on interim release' the draft document creates an agreement between the ICC and a state that agrees to receive ICC defendants ('accused persons') who are granted interim release by a PTC[119] or TC.[120]

KEY ISSUES IN THE AGREEMENT

The agreement contains several concrete provisions for effectively facilitating the interim release of defendants before the ICC. The following key issues are addressed:

113 *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-631-Red, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', 2 December 2009, AC: **www.icc-cpi.int/iccdocs/doc/doc787666.pdf**.

114 Sluiter, G. (2010) 'Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law', *Northwestern Journal of International Human Rights,* Vol 8 (Issue 3): 248–267, at p 265.

115 *Ibid.*

116 *Ibid.*

117 See Article 63 of the Rome Statute which provides that an accused person must be present at trial and may only be removed in exceptional circumstances for disruptive conduct.

118 See Article 47 of the Headquarters Agreement between the ICC and the Host State.

119 A decision to grant interim release can be made by a PTC pursuant to Article 60 of the Rome Statute.

120 A decision to grant interim release can be made by a TC pursuant to Article 61(11) of the Rome Statute.

1. procedure for accepting accused persons;
2. observance and violation of conditions of release;
3. status of accused person in the receiving country;
4. costs associated with the release;
5. termination of the agreement; and
6. resolution of disputes arising under the agreement.

The agreement provides for the Chamber to invite a receiving state for consultations once a decision to grant interim release has been made.[121] Following the consultations, the Registrar sends an official request to the receiving state to enter into an agreement.[122] Once executed, the agreement operates for the period of release ordered by the Chamber subject to termination.

The agreement states that conditions imposed on an accused person by a Chamber will be binding and cannot be modified by the receiving state.[123] In the event of any violation of the conditions or the laws of the receiving state, the latter must report immediately to the Chamber (via the Registry) and is empowered to implement interim measures to prevent ongoing violations. Further, a violation could result in the revocation of the agreement.

The agreement may be terminated in four instances: (a) the period of release expires; (b) the accused person dies; (c) the Chamber decides that the accused person should return to the custody of the Court, or (d) the receiving state decides to terminate the agreement upon consultation with the Chamber.

THE RECEIVING STATE

The receiving state plays an essential role under the agreement. This includes enabling the accused person to: communicate with the Chamber of the Court,[124] and his/her defence counsel[125] on a confidential and unimpeded basis; providing defence counsel and nuclear family members with visas in order to visit the accused person;[126] reporting (to the Chamber) any violation of the conditions of release by the accused person; or any violation of the national laws of the receiving state;[127] providing information or consulting with the Chamber if requested to do so;[128] and determining the state of the accused person in accordance with its national laws.

The agreement also imposes limitations on the receiving state in that it is not able to prosecute the accused person for any conduct for which the accused person is already being tried by the ICC;[129] or transfer the accused person to any third party for trial in relation to the accused person's conduct prior to the interim release.[130]

Under the agreement, the relevant PTC or TC granting interim release can also request (where necessary) information from the receiving state on the observance of any conditions,[131] and 'periodically' consult with authorities from the receiving state where appropriate.[132]

Shortcomings of the draft agreement

One of the primary shortcomings of the agreement is that it operates on a case-by-case basis, thus requiring a specific agreement between the Court and a receiving state in each situation where interim release is granted. This is troubling as a casuistic approach leaves significant latitude for states to opt out of concluding an agreement, particularly in cases where the accused is indigent, since the draft agreement provides that the costs associated with hosting an indigent accused person must be borne by the receiving state.

In addition, the agreement provides that the process of entering into an agreement with a receiving state shall commence *after* a decision on interim release has been made by the Chamber.[133] The process could become unduly protracted as several detailed and complicated consultations may need to take place between the Registrar and the prospective receiving state before an agreement is concluded. This could significantly affect the accused's ability to exercise his or her right to interim release in a timely manner.

The draft agreement also noticeably lacks details concerning termination of the agreement by a receiving state. The agreement merely provides that a receiving state may terminate, in consultation with the Chamber.[134] There is no indication as to what situation may allow the receiving state to terminate the agreement, and whether the accused person and defence counsel will be notified of the consultation and given the opportunity to participate.

Cooperation by intergovernmental organisations

Cooperation with intergovernmental organisations such as the AU also raise particular challenges for the ICC – as such, cooperation is voluntary. Under

121 The authority for the consultations is found in Regulation 51 of the ICC Regulations of the Court which states that: '[f]or the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released.'
122 Exchange of Letters on Interim Release, para II(e) and (f).
123 *Ibid*, para II(h).
124 *Ibid*, para IV(m).
125 *Ibid*, para IV(p).
126 *Ibid*, para IV(p).
127 *Ibid*, para III(j).
128 *Ibid*, paras III(k)(i) and (iii).
129 *Ibid*, para IV(n).
130 *Ibid*, para IV(o).
131 *Ibid*, para III(k)(i).
132 *Ibid*, para III(k)(iii).
133 *Ibid*, para II(d).
134 *Ibid*, para VI(t)(iv).

Article 87(6) of the Rome Statute, the Court may ask any intergovernmental organisation for information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organisation and which are in accordance with its competence and mandate.[135]

However, in the absence of a framework agreement between the Court and the AU – similar to that which currently exists between the ICC and the UN – the decision to cooperate will be entirely discretionary. Despite strenuous attempts by the ICC Presidency to complete a framework agreement to facilitate cooperation between the Court and the AU on matters of mutual concern, the Court's efforts in this regard have been snubbed due to the pending arrest warrant against Sudanese President Omar Al Bashir.[136] The AU has also made its lack of support for an ICC Liaison Office palpably clear.[137]

This creates particular problems for defendants such as Mr Banda and Mr Jerbo – charged with crimes arising from an attack on an AU base at MGS Haskanita – and who require relevant documents in the possession of the AU in order to prepare their defence. According to a defence filing in the case, since October 2010, the defence has written to the AU to request copies of relevant documents in their possession.[138] Up to May 2011, the request had only been acknowledged by a representative of the Office of Legal Counsel but had not been carried out. Defence counsel sought the intervention of the Chambers pursuant to Article 57(3) of the Rome Statute. [139] At the time of writing the Chamber had not yet issued a decision.

States' cooperation

States' cooperation is crucial to ensuring fairness at the ICC. As discussed above, the current practise needs to be urgently streamlined in order to ensure that this right can be meaningfully realised. Where cooperation is delayed or denied in key areas such as defence investigations and interim release, unfairness and delay is the inevitable result.

The Host State bears particular cooperation obligations which are laid out in the Headquarters Agreement between the ICC and the Netherlands. Tensions may arise between the cooperation obligations of the Host State under the Headquarters Agreement and the Court's duty to ensure the rights of defendants and witnesses and the fairness of the proceedings. The Headquarters Agreement is aimed at facilitating 'the smooth and efficient functioning of the Court in the host State.'[140] The agreement is meant to 'regulate matters relating to or arising out of the establishment and the proper functioning of the Court in the host State.'[141]

Facilitating the smooth and efficient functioning of the Court may, however, create challenges for the Host State in particular contexts. The Netherlands as the Host State may find itself disproportionately shouldered with certain obligations due to its unique role. For example, defendants summoned to appear at the ICC may create immigration challenges; there is a real possibility of asylum applications by detained witnesses;[142] and the Host State has been noticeably reluctant to accept defendants granted interim release – even though this would be the most convenient arrangement.

It is absolutely critical that the Host State ensures that its manner of dealing with such matters best facilitates the Court's obligation to ensure fairness for defendants as well as other parties and participants to the proceedings. For example:

1. In relation to summoned defendants: the IBA understands that elaborate arrangements are made with the Host State and the ICC Registry in order to facilitate their entry into the country. A legal fiction is created where the person is in the country of the Netherlands

135 Article 87(6)(b) of the Rome Statute.

136 Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), 3 July 2009, Thirtieth Session of the Assembly of the African Union. **www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf**.

137 Richard Lough, 'African Union accuses ICC Prosecutor of bias', *Reuters* (Addis Ababa, 30 January 2011) **http://af.reuters.com/article/topNews/idAFJOE70T01R20110130**.

138 *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-146, Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union, 11 May 2011, TC IV: **www.icc-cpi.int/iccdocs/doc/doc1070843.pdf**.

139 *Ibid.*

140 Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, 1 March 2008, Preamble.

141 *Ibid*, Article 2.

142 Developments in the *Katanga and Ngudjolo* case poignantly illustrate this point. Three detained witness who were transferred temporarily to The Hague from the DRC pursuant to Article 93 of the Statute for the purpose of testifying before the ICC on behalf of Germain Katanga, claimed during their testimony that they were being illegally detained in Makala prison in Kinshasa, DRC. The witnesses insisted that they were being held in protracted pre-trial detention in the DRC without any knowledge of the likely commencement of proceedings against them; and that based on their testimony before the ICC, their lives and their families could be endangered and, as such, they had applied for political asylum in the Netherlands: See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, TC II Transcripts, 30 March 2011 to 3 May 2011. Professor Sluiter subsequently filed an amicus curiae application before the TC to advise the Chamber on the asylum procedure in the Netherlands as well as for access to the witnesses for the purposes of taking instructions in relation to the asylum application: See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-2968, Request for leave to submit Amicus Curiae Observations by Mr Sculler and Mr Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, 26 May 2001, TC II: **www.icc-cpi.int/iccdocs/doc/doc1081406.pdf**.

but still within the jurisdiction of the ICC. Questions have arisen concerning whether the freedom of these defendants is fully respected and they are eligible to freely enter, travel within, and leave the Host Country (subject to any conditions imposed by the Court).

2. Detained witnesses appearing before the Court who may be subject to inhumane treatment in their country of origin are entitled under international law to apply for asylum in the Host Country. This creates particular challenges for the ICC as well as for the Netherlands. Given its obligations under international law, the Netherlands is required to deal fairly and expeditiously with asylum applications. The ICC is required to consider such applications in a manner that is consistent with internationally accepted human rights standards as provided by Article 21(3) of the Rome Statute.[143] From a fairness perspective, the overarching consideration must be the safety and security of witnesses. Furthermore, such witnesses must enjoy unimpeded access to counsel for the purposes of the asylum application.

Conclusions and recommendations

The process of securing the cooperation of states on matters concerning the defence needs to be streamlined. The IBA urges the Registry to create a **standardised protocol governing defence cooperation requests** endorsed by the Chambers, similar to the eCourt Protocol. The protocol should clearly indicate:

- the steps to be taken by Counsel in preparing and transmitting cooperation requests;
- the Registry's role in this process;
- the form that the onward transmission by the Registry will take – whether it will be a cover letter or note verbale; and
- the procedure to be followed before the Chamber pursuant to Article 57(3) of the Rome Statute.

The CSS – defence counsel's first point of reference – should ensure that this protocol is included in the standard information packet that is made available to counsel.

Cooperation in relation to interim release is a particularly challenging area for the defence. The IBA welcomes the efforts by the Registry to conclude a framework agreement on interim release. The agreement provides much needed clarification of an essential area of the Court's law and practice and is crucial to ensuring that the right to pre-trial liberty can be fully realised. One of the primary shortcomings of the agreement however, is that it operates on a case-by-case basis, thus requiring a specific agreement between the Court and a receiving state in each situation where interim release is granted. This leaves significant latitude for states to opt out of concluding an agreement.

Given the importance of this issue in safeguarding the fair trial rights of defendants at the ICC, the IBA urges states to finalise framework agreements with the Court in order to ensure that the right to interim release can be meaningfully implemented by the Court. The Netherlands as Host State bears a particularly important responsibility to ensure fairness in treatment for defendants summoned to appear at the ICC and detained witnesses applying for asylum.

Intergovernmental organisations such as the AU are urged to cooperate with the ICC on all matters, including on issues of relevance to the defence. The IBA encourages the AU to conclude a memorandum of understanding with the ICC in order to facilitate effective and timely cooperation.

143 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3033, Decision on the security situation of three detained witnesses in relation to their testimony before the Court (art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with article 93(1)(j) of the Statute, 22 June 2011, TC II at [1]–[18]: **www.icc-cpi.int/iccdocs/doc/doc1095863.pdf**.

Annex I

Fair trial provisions in ICTY/ICTR/ICC statutes

	ICTY Statute Article 21	ICTR Statute Article 20	ICC Statute Article 67
Adequate time and facilities to prepare defence	✓	✓	✓
Public hearing	✓	✓	✓
Impartial hearing	×	×	✓
Properly informed of charges	✓	✓	✓
Presumption of innocence	✓	✓	✓
Communicate with counsel of choice	✓	✓	✓
Confidential communication with counsel	×	×	✓
Trial without undue delay	✓	✓	✓
Presence at trial	✓	✓	✓
Legal representation	✓	✓	✓
Call and examine witnesses	✓	✓	✓
Interpretation and translation	✓	✓	✓
Right against self-incrimination	✓	✓	✓
Equality before the law	✓	✓	✓
Right to make unsworn statements	✓	×	✓
Disclosure of exculpatory material	✓*	✓*	✓

* Rule 68 of the ICTY and ICTR RPE

Annex II

Defence offices, a comparative study

International Criminal Tribunal for the former Yugoslavia

At the ICTY, there is no formally integrated defence supporting service in the institutional framework of the Tribunal. Support for defence is internally organised through the Registry's Office for Legal Aid and Detention Matters (OLAD) and the Court Management and Support Services Section (CMSS). The OLAD generally administers the legal aid system of the ICTY. In particular, it determines who is indigent, administers payments and ensures that the system is effective. The CMSS ensures administrative assistance for the defence. Externally, the ADC-ICTY was established in September 2002 to collectively represent defence counsel. Its objective is to ensure a higher quality for defence counsel and to make collective representations of defence counsel to the organs of the Tribunal.

International Criminal Tribunal for Rwanda

At the ICTR, support for the defence is also established and organised through the Registry. The Defence Counsel and Detention Management Section (DCDMS) of the Tribunal assures, in particular, the provision of competent defence counsel to indigent suspects and accused detained under the authority of the ICTR. Specific activities of the legal assistance to lawyers include: compiling and maintaining the List of Defence Counsel submitted to indigent defendants to allow them to choose counsel; briefing counsel on the functioning and jurisdiction of the ICTR; collectively represent counsel with the Registry; ensuring that defence counsel are remunerated; and preparing the lawyers to provide the best possible defence for their clients.

Special Court for Sierra Leone

The SCSL has a Defence Office which is a division of the Registry. It was provided for by Rule 45 of the Rules of Procedure of the Court (RPC), which indicated that the Defence Office shall provide: advice, assistance and representation to suspects and accused through initial legal advice and assistance by duty counsel; legal assistance, as ordered by the Court (if the accused does not have sufficient means to pay for it); or, adequate facilities for counsel in the preparation of the defence. The Office furthermore has competences with regard to the assignment of counsel and duty counsel.

Extraordinary Chambers in the Court of Cambodia

At the ECCC, the Office of the Administration, which is the equivalent of the Registry, has a Defence Support Section (DSS). It was established by Rule 11 of the Internal Rules of the Court. The DSS is required to provide indigent accused with a list of lawyers, to provide legal and administrative support to lawyers assigned to work on cases, including the payment of fees; and providing the defence teams with full office facilities at the DSS.

Special Tribunal for Lebanon

The STL currently constitutes the example of the most developed defence services. The Defence Office of the STL is an independent organ of the Tribunal created by Article 13 of the Statute of the STL, which provides in its objectives: to protect the rights of the defence; to provide support and assistance to defence counsel and persons entitled to legal assistance; and to maintain a list of counsel for persons declared indigent.

Section 7 of the Special Tribunal for Lebanon Rules of Procedure and Evidence (STL RPE) furthermore governs the specific functions of the Defence Office and the Head of the Defence Office (HDO). Rule 57 indicates that the HDO enjoys, for all purposes related to the proceedings, equal status with the Prosecutor in respect to rights of audience and negotiations.

Rule 57 further indicates the numerous functions of the HDO, which include: drawing up and maintaining a list of counsel qualified to

appear before the Tribunal; assign such counsel;[144] act as a representative of the Defence Office; and provide adequate assistance and support to assigned counsel and their staff, including, where appropriate: legal research and memoranda and other advice as deemed necessary; adequate facilities to defence counsel and persons entitled to legal assistance in the preparation of a case; and continuing professional training to defence counsel. The HDO shall also have rights of audience in relation to matters of general interest to defence teams, the fairness of the proceedings, or the rights of a suspect or accused.

Interestingly, the HDO shall, in the interests of justice, ensure that the representation of suspects and accused meets internationally recognised standards of practice and is consistent with the provisions of the STL Statute, the STL RPE, the Code of Professional Conduct for Counsel, the Directive on the Assignment of Defence Counsel and other relevant provisions. In respect of this, the HDO may monitor the performance and work of counsel and the persons assisting them; and in exceptional circumstances and under specific conditions, take steps to ensure an effective defence for a suspect or accused, including: withholding payment, removing counsel, or initiating disciplinary proceedings against the counsel concerned.

Importantly, neither the HDO, nor its members, shall take any instructions from suspects or accused persons or be involved in factual allegations or matters relating to a specific case, which may raise conflicts of interest and affect the independence of the Office.

144 Draw up and maintain the list of counsel; identify counsel available to act as duty counsel at initial hearings of suspects; assign duty counsel with the agreement of the suspect or accused; assign counsel and co-counsel to indigent suspects or accused; assign co-counsel to suspects or accused; verify that the counsel on the list meet the requirements of the rules of procedure; assign persons to self-represented suspects or accused to provide assistance and support; assign counsel for *in absentia* proceedings; establish the criteria for the payment of fees to counsel and their staff; and draw up a list of highly qualified experts, investigators, legal assistants and case managers.

Annex III

Select jurisprudence on fairness issues at the ICC: 2009–2011

Article 66 of the Rome Statute: Presumption of innocence
The Prosecutor v Callixte Mbarushimana
ICC-01/04-01/10-51, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, 31.1.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1011490.pdf**.
The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali
ICC-01/09-02/11-20, Application for order to the Prosecutor regarding extra-judicial comments to the Press of 30.3.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1049484.pdf**.
The Prosecutor v Jean-Pierre Bemba Gombo
ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15.6.09, PTC II: **www.icc-cpi.int/iccdocs/doc/doc699541.pdf**.
ICC-01/05-01/08-1191, Defence appeal against the 'Decision on the admission into evidence of material contained in the Prosecution's list of evidence' of 19 November 2010, 7.2.11, **www.icc-cpi.int/iccdocs/doc/doc1015133.pdf**.
ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3.5.11, AC: **www.icc-cpi.int/iccdocs/doc/doc1066048.pdf**.

Article 67(1)(a) of the Rome Statute: the right to be informed of charges in a language the accused understands
The Prosecutor v Jean-Pierre Bemba Gombo
ICC-01/05-01/08-1191, Defence appeal against the 'Decision on the admission into evidence of material contained in the Prosecution's list of evidence' of 19 November 2010, 7.2.11, **www.icc-cpi.int/iccdocs/doc/doc1015133.pdf**.
ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3.5.11, AC: **www.icc-cpi.int/iccdocs/doc/doc1066048.pdf**.

Article 67(1)(b) of the Rome Statute: the right to adequate time and facilities to prepare the defence
The Prosecutor v Jean-Pierre Bemba Gombo
ICC-01/05-01/08-1191, Defence appeal against the 'Decision on the admission into evidence of material contained in the Prosecution's list of evidence' of 19 November 2010, 7.2.11, **www.icc-cpi.int/iccdocs/doc/doc1015133.pdf**.
ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3.5.11, AC: **www.icc-cpi.int/iccdocs/doc/doc1066048.pdf**.
The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang
ICC-01/09-01/11-16, Decision ensuring the rights of the Defence for the purposes of the initial appearance hearing, 30.3.11, PTC II: **www.icc-cpi.int/iccdocs/doc/doc1049617.pdf**.
The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali
ICC-01/09-02/11-22, Decision Ensuring the Rights of the Defence for the Purposes of the Initial Appearance Hearing, 30.3.11, PTC II: **www.icc-cpi.int/iccdocs/doc/doc1049651.pdf**.

Article 67(1)(b) of the Rome Statute: the right to communicate freely with counsel of the accused's choosing in confidence
The Prosecutor v Callixte Mbarushimana
ICC-01/04-01/10-54, Prosecution's request for a review of potentially privileged material, of 11.2.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1020576.pdf**.
ICC-01/04-01/10-58, Defence Response to Prosecution's Request for the Review of Potentially Privileged Material, 18.2.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1025122.pdf**.
ICC-01/04-01/10-67, Decision on the 'Prosecution's request for a review of potentially privileged material', 4.3.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1032482.pdf**.
ICC-01/04-01/10-105, Second Decision on matters regarding the review of potentially privileged material 15.4.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1060006.pdf**.
ICC-01/04-01/10-114, Defence Request for OPCD Support, 19.4.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1060835.pdf**.
ICC-01/04-01/10-115, Decision on the 'Defence Request for OPCD Support', 21.4.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1056909.pdf**.

Article 67(1)(c) of the Rome Statute: to be tried without undue delay
The Prosecutor v Jean-Pierre Bemba Gombo
ICC-01/05-01/08-1191, Defence appeal against the 'Decision on the admission into evidence of material contained in the Prosecution's list of evidence' of 19 November 2010, 7.2.11, **www.icc-cpi.int/iccdocs/doc/doc1015133.pdf**.
ICC-01/05-01/08-1386, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3.5.11, AC: **www.icc-cpi.int/iccdocs/doc/doc1066048.pdf**.
ICC-01/05-01/08-1022, Decision on admissibility into evidence of material contained in the Prosecution's list of evidence, 19.11.10, TC III: **www.icc-cpi.int/iccdocs/doc/doc969801.pdf**.
ICC-01/05-01/08-1028, Dissenting Opinion of Judge Kuniko Ozaki on Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 23.11.10, TC III: **www.icc-cpi.int/iccdocs/doc/doc970969.pdf**.

Article 67(1)(d) of the Rome Statute: the right to be present at trial and right to legal assistance
The Prosecutor v Jean-Pierre Bemba Gombo
ICC-RoC85-01/08-4-Anx, Decision on the 'Request for review of the Registrar's decision of 25 August 2008 on the application for legal assistance paid by the Court', 25.2.09, Presidency: **http://212.159.242.181/iccdocs/doc/doc667435.pdf**.
ICC-01/05-01/08-567-Red, Redacted version of 'Decision on legal assistance for the accused', 26.11.2009, TC III: **www.iclklamberg.com/Caselaw/CAR/Bemba/TCIII/567.pdf**.
ICC-01/05-01/08-897-Red, Redacted version of Decision on the defence request for adjustment of fees advanced by the Registry pursuant to Trial Chamber III's Decision on legal assistance for the accused of 20 October 2009, ICC-01/05-01/08-897-Conf, 7.12.2009, TC III: **www.icc-cpi.int/iccdocs/doc/doc980773.pdf**.

Article 67(1)(e): the right to examine witnesses, raise defences and present evidence
The Prosecutor v Jean-Pierre Bemba Gombo
ICC-01/05-01/08-1191, Defence appeal against the 'Decision on the admission into evidence of material contained in the Prosecution's list of evidence' of 19 November 2010, 7.2.11, **www.icc-cpi.int/iccdocs/doc/doc1015133.pdf**.
ICC-01/05-01/08-1386 Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3.5.11, AC: **www.icc-cpi.int/iccdocs/doc/doc1066048.pdf**.

Article 67(1)(f): the right to interpretation and translation
The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus
Transcript, ICC-02/05-03/09-T-6-ENG, 13.7.10, PTC I: **www.icc-cpi.int/iccdocs/doc/doc907639.pdf**.
The Prosecutor v Callixte Mbarushimana
ICC-01/04-01/10-87, Decision on issues relating to disclosure, 30.3.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1049622.pdf**.

Fairness as a shared right
Situation in the DRC
ICC-01/04-135-tEN, Decision on the Prosecutor's application for leave to appeal the Chamber's decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31.3.06, PTC I: **www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-135_tEnglish.pdf**.
Situation in Uganda
ICC-02/04-01/05-90-US-Exp, Decision on the Prosecutor's applications for leave to appeal dated the 15th day of March 2006 and to Suspend or Stay consideration of leave to appeal dated the 11th day of March 2006, 10.7.06, PTC II: **www.icc-cpi.int/iccdocs/doc/doc278964.PDF**.

Article 67(2): disclosure of exonerating evidence
The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang
ICC-01/09-01/11-50, Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters', ICC-01/09-01/11-44, 13.4.11, PTC II: **www.icc-cpi.int/iccdocs/doc/doc1055273.pdf**.
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The Prosecutor v Callixte Mbarushimana
ICC-01/04-01/10-87, Decision on issues relating to disclosure, 30.3.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1049622.pdf**.
ICC-01/04-01/10-47, Decision on the Defence Request for Disclosure, 27.1.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1008643.pdf**.
ICC-01/04-01/10-93, Prosecution's Application for leave to Appeal the 'Decision on issues relating to disclosure', ICC-01/04-01/10-87, 5.4.11, PTC I: **www.icc-cpi.int/NR/exeres/84D45DCF-F604-4363-B645-F95DD209C620.htm**.
ICC-01/04-01/94, Defence Response to the Prosecution's Request for Leave to Appeal Decision ICC-01/-04-01/10-87, 10.4.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1053852.pdf**.
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The Prosecutor v Jean-Pierre Bemba Gombo
ICC-01/05-01/08-655, Second decision on disclosure relating to an admissibility challenge, 15.12.09, TC III: **www.icc-cpi.int/iccdocs/doc/doc793056.pdf**.
The Prosecutor v Thomas Lubanga Dyilo
ICC-01/04-01/06-2192-Red, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 29.1.10, TC I: **www.icc-cpi.int/iccdocs/doc/doc808524.pdf**.
The Prosecutor v Bahar Idriss Abu Garda
ICC-02/05-02/09-18, Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties, 30.5.09, PTC I: **www.icc-cpi.int/iccdocs/doc/doc694809.pdf**.
ICC-02/05-02/09-35, Second Decision on Issues relating to Disclosure, 15.7.09, PTC I: **www.icc-cpi.int/iccdocs/doc/doc711237.pdf**.
The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus
ICC-02/05-03/09-49, Decision on issues relating to disclosure, 29.6.10, PTC I: **www.icc-cpi.int/iccdocs/doc/doc902565.pdf**.
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The Prosecutor v Callixte Mbarushimana
ICC-01/04-01/10-211, Prosecution's Response to the 'Defence request for a permanent stay of proceedings', 3.6.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1084080.pdf**.
ICC-01/04-01/10-177 Defence request for a permanent stay of proceedings, 24.5.11, PTC I: **www.icc-cpi.int/iccdocs/doc/doc1078476.pdf**.
The Prosecutor v Jean-Pierre Bemba Gombo
ICC-01/05-01/08-802, Decision on the admissibility and abuse of process challenges, 24.6.10, TC III: **www.icc-cpi.int/iccdocs/doc/doc899684.pdf**.
ICC-01/05-01/08OA3, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges', 19.10.10, AC: **www.icc-cpi.int/iccdocs/doc/doc955029.pdf**.

Interim release
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