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IBA/ICC Monitoring and Outreach Programme

# Balancing Rights

*The International Criminal Court  
at a Procedural Crossroads*

**May 2008**

**An International Bar Association  
Human Rights Institute Report**



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Initiative supported by  
The John D and Catherine T MacArthur Foundation.

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# Contents

<b>Background to the monitoring programme</b> .....	7
<b>Executive Summary</b> .....	9
General Observations.....	9
<b>Specific Observations and Recommendations</b> .....	10
Victims' participation .....	10
Victim and witness protection.....	12
The impact of witness protection on disclosure .....	13
<b>Recommendations</b> .....	14
<b>Introduction</b> .....	15
<b>The Annexes</b> .....	17
<b>Abbreviations</b> .....	17
<b>Chapter 1. Overview of Cases Referred to in the Report</b> .....	19
<b>General Overview</b> .....	19
<b>Summary of Key Decisions</b> .....	20
Decision on protective measures (TC-Lubanga case).....	20
Decision on preventive relocation (PTC-Katanga/Ngudjolo cases).....	21
First Decision on redactions (PTC-1-Katanga/Ngudjolo cases).....	21
Decision on victims' participation (TC-Lubanga case).....	22
Decision on leave to appeal (TC-Lubanga case) .....	22
Decision on procedural rights of victims (PTC-Katanga/Ngudjolo cases) .....	23
i) Significant findings .....	23
<b>Chapter 2. General and Legal Issues</b> .....	25
<b>Legal Rights of Defendants and Victims before the ICC</b> .....	25
The rights of the defence.....	25
The rights of the victims.....	25
<b>The Primacy of rights</b> .....	25
<b>Fair and expeditious proceedings</b> .....	27

<b>Chapter 3. Victim and Witness Protection</b> .....	29
<b>Introduction</b> .....	29
<b>The Role of the Victims and Witness (VWU) Unit</b> .....	29
<b>Protection of victims</b> .....	30
<b>Divergent views regarding risk assessment and criteria for inclusion in the Court’s protection programme</b> .....	31
The Prosecution’s position .....	31
The VWU position.....	31
The VWU’s change of approach .....	32
<b>The use of alternate protective measures</b> .....	33
Preventative relocation of witnesses by the Prosecution.....	33
The position of the Pre-Trial Chamber (PTC) regarding alternate protective measures .....	33
The Trial Chamber majority approach.....	34
<b>Observations by the IBA</b> .....	34
<b>Chapter 4. The impact of Witness Protection on the Process of Disclosure</b> .....	37
<b>Introduction</b> .....	37
<b>Legal framework for Disclosure</b> .....	38
Obligation to Disclose .....	38
Non-disclosure on the basis of protecting victims, witnesses, family members or other persons .....	38
<b>The Prosecution’s Approach to Disclosure</b> .....	39
1. The timings of the referrals for protective measures .....	39
2. The volume of referrals to the VWU.....	39
3. The number and extent of redactions sought by the Prosecution and the absence of clear information in the referrals .....	40
4. The change of approach in the redactions sought.....	40
<b>The Chambers’ approach to interrupting key provisions</b> .....	40
Literal or purposive approach.....	41
Potentially exculpatory material and Article 67(2) .....	41
<b>Observations by the IBA</b> .....	42

<b>Chapter 5. The impact of victims' participation on the rights of the Defence</b> .....	45
<b>Background</b> .....	45
<b>A. The Application Process</b> .....	46
The administrative component.....	46
Streamlining the role of intermediaries.....	46
The judicial component.....	47
The Chambers' evaluation of applications: Interpretations of Article 68(3) and Rule 89 .....	47
<b>B. Criteria and Modalities of Participation</b> .....	48
Definition of harm .....	48
The causal link between the crime and the harm .....	49
IBA observations on the causal link between the crime and the harm.....	50
The procedural rights of victims and modalities of participation.....	51
Anonymous participation of victims .....	51
IBA observations on the procedural rights of victims and the modalities of participation.....	52
Eligibility of the Legal Representatives for Victims (LRVs) and the Office of Public Counsel for Victims (OPCV) to participate in pending appeals .....	53
Legal basis for participation by victims at the appellate level.....	53
Submission of the Parties .....	53
The expeditions consideration of pending appeals .....	54
<b>Managing expectations</b> .....	54
<b>Managing resources</b> .....	55
<b>Chapter 6: General Conclusions and Observations</b> .....	57
<b>Victims' participation</b> .....	57
<b>Victim and Witness Protection</b> .....	59
<b>The impact of witness protection on the process of disclosure</b> .....	60
<b>Recommendations</b> .....	61
<b>Annex 1: Parameters for IBA monitoring of the International Criminal Court</b> .....	63
<b>Annex 2: Breakdown of filings and decisions before the ICC between 1 November 2007 and 22 May 2008</b> .....	65
<b>Annex 3: Number of victims authorized to participate in the proceedings to May 2008</b> .....	67
<b>Annex 4: Key legal provisions referred to in the Report</b> .....	69
<b>Witness protection</b> .....	69
<b>Victims' participation</b> .....	70
<b>Rights of the accused</b> .....	72
<b>Conduct of fair and expeditious proceedings</b> .....	74
<b>Disclosure</b> .....	74



# Background to the Monitoring Programme

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies.

The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. The IBA has a membership of 30,000 individual lawyers and more than 195 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community.

The IBA is currently implementing a MacArthur Foundation-funded programme to monitor the work and proceedings of the International Criminal Court (hereinafter the Court or ICC) and to conduct outreach activities. The IBA's monitoring of both the work and the proceedings of the Court focuses in particular on issues affecting the fair trial rights of the accused.

The methodology for preparing IBA/ICC monitoring reports includes a dual process of research and consultation. The IBA monitor assesses ICC pre-trial and trial proceedings, the implementation of the 1998 Rome Statute (Statute), the Rules of Procedure and Evidence (RPE), and related ICC documents in the context of relevant international standards. A detailed description of the parameters used by the IBA in monitoring the ICC has been distributed to all organs of the Court and can be found at Annex I.

The IBA monitor engages in high level consultations with key stakeholders within and outside the ICC. Within the Court, the IBA monitor consults periodically with designated persons in specific organs of the Court, as well as with senior level ICC staff. External consultations are conducted with non-governmental organizations (NGOs), individual defence counsel, representatives of diplomatic missions and other legal professional organizations.

Within the IBA itself, input is received from legal specialists with extensive experience in international criminal law, international humanitarian law and human rights law.





# Executive Summary

The International Bar Association (IBA) has initiated high level monitoring of the work and development of the International Criminal Court (ICC or the Court) under a MacArthur Foundation funded IBA/ICC Monitoring and Outreach Programme. The parameters of the monitoring programme focus primarily on the fair trial rights of defendants before the Court and the manner in which the Rome Statute, Regulations of the Court and the Rules of Procedure and Evidence are implemented by the different organs of the Court<sup>1</sup>.

Three previous reports have been issued under the programme documenting the situations before the Court, the confirmation of charges proceedings and the pre-trial phase of the case of Thomas Lubanga Dyilo, the first person to be surrendered to the ICC.

Since the surrender of Thomas Lubanga Dyilo to the Court, two additional accused persons have been surrendered to the Court from the Democratic Republic of Congo (DRC), namely Germain Katanga and Mathieu Ngudjolo Chui. With three suspects now before the Court and more than 400 victims applying for the right to participate in the proceedings, the Court is actively engaged in interpreting and implementing the provisions of the Rome Statute and other legal documents in a way that gives meaningful rights to victims of crime without compromising the fair trial rights of the accused. The Court is also faced with the challenge of working out how to effectively protect witnesses from harm without compromising the right of the defendant to full disclosure of both incriminating and exonerating material, that is, documents that tend to show his innocence or could mitigate his guilt.

Between November 2007 and May 2008, there were nearly 700 filings and decisions at the ICC. Key decisions were delivered by the Pre-Trial (PTC) and Trial Chambers (TC) concerning the applications process, the status, rights and modalities for participation by victims at the situation (investigation), pre-trial and trial phases of proceedings before the Court.

## General Observations

The issue of balancing rights is a major challenge for the ICC at this stage in its development. The interpretation of legal provisions governing the participation rights of victims vis-à-vis the fair trial rights of the defendant has posed tremendous difficulties for judges, parties and participants, and the issue remains unsettled. The lower Chambers await the rulings of the Appeals Chamber to provide needed clarity and procedural consistency. Unfortunately, the number of pending interlocutory appeals has been unprecedented. This also raises issues as to the capacity of the Appeals Chamber to deal with the sheer volume of pending appeals.

During the pre-trial phase of the Lubanga case, the judges were reticent to allow interlocutory appellate review. The climate has since changed and the issues are more complex with potentially long-term implications. For the thousands of victims who wish to participate in the proceedings,

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<sup>1</sup> A copy of the monitoring parameters is included in this report at Annex I.

clarity is urgently required to ensure the meaningful exercise of participation rights. For the defendant, it is critical that the determination of the modalities of victim participation does not cause extensive delays in the proceedings.

The protection of victims and witnesses is obviously an urgent priority of the ICC. One major problem highlighted in this report concerns the different approach to risk assessment taken by two key organs of the Court. Inconsistency of approach leads to lack of confidence in the Court, and tensions between important stakeholders could result in the loss of witnesses. Moreover, the problems related to protection notably affect the process of disclosure by prolonging the time required to make final assessments regarding redactions. These issues must be resolved in a timely manner.

The IBA notes that the Court is engaged in a critical standard setting phase of its existence. Critics of the Court suggest that, despite a record number of filings in the last six months, the Court has accomplished very little. Three suspects are in custody, one for almost two years and no trial has thus far commenced. Given the procedural challenges faced by the Court, including the number of pending appeals, it is likely that the trial of Thomas Lubanga Dyilo, the first suspect tried before the ICC, will again be delayed.

The IBA is concerned that the pace of the ICC proceedings is too slow. The IBA considers it critical that while standards are being set and procedure is being worked out, every effort is made to prevent further postponement of the pending trial and confirmation proceedings.

## **Specific Observations and Recommendations**

### **Victims' participation**

1. The IBA recognises that the discrete positions taken on the issue of the application process and the procedural status of victim, the causal nexus between the harm and the crime and the modalities of participation reflect firstly that careful and reasoned arguments have been made by the parties and participants; and secondly, that significant judicial thought has been given to the issues under consideration.
2. The IBA also recognises the challenges being faced by the respective Chambers in foraging through essentially uncharted waters in working to actualize the vision of the drafters of the Rome Statute who granted victims the right to independently and actively participate in primarily adversarial proceedings. This process has however resulted in inconsistent decisions being delivered by different Chambers in respect of the same issues.
3. The IBA is cognizant of the fact that the mere right to participate inevitably increases the number of issues to be litigated and potentially delays the proceedings. The responsibility therefore lies with the respective Chambers to ensure that the timing and modalities of a victim's request to participate do not interfere with the statutory rights of the accused.
4. The IBA however welcomes the decision of the PTC and TC to grant leave to appeal a number of important issues that need to be settled including:

- the right of victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility and relevance of evidence;
  - whether the harm alleged by a victim and the concept of ‘personal interests’ under Article 68(3) of the Rome Statute must be linked with the charges against the accused;
  - whether the victims’ personal interests are generally affected by the situation and case stage of the proceedings thus precluding a case-by-case determination by the judge;
  - and, whether the applications process is a limited, separate and distinct procedure not related to criminal proceedings before the Court and therefore not prejudicial to the defence.
5. The IBA considers that the resolution of these issues by the Appeals Chamber will bring much needed clarity and certainty to the PTC and TC as well as the parties and participants.
  6. Regrettably, the Appeals Chamber is yet to deliver final judgment in a number of pending appeals. In the Lubanga case for example, it was not until the 16 May 2008 that a decision was made allowing three victims to participate in the appeals. On the 22 May the Appeals Chamber decided that some aspects of the appeal in the Lubanga case would have suspensive effect. This decision may have the effect of further delaying the start of the trial as it means that the TC cannot decide on the participation rights of some pending victim applicants until the Appeals Chambers delivers a final judgment.<sup>2</sup>.
  7. The IBA considers that a consolidation of the appeals on victims’ participation by the Appeals Chamber would assist in the expeditious resolution of the outstanding matters.
  8. The IBA notes that the lack of certainty regarding the interpretation of procedural and substantive issues on victims’ participation before the Court has also delayed the completion of a court wide strategy document on victims. The development of a victims’ strategy was initiated by the Registry in response to concerns raised during the fifth session of the Assembly of States Parties (ASP) that the Court’s Strategic Plan did not have a clearly articulated victims’ strategy. Resolution ASP/5/Res.2 was adopted encouraging the Court to continue its dialogue with the Bureau of the ASP and to focus on the concrete implementation of the Strategic Plan of the Court, including the position of victims and the outreach and communication activities of the Court.
  9. The IBA also observes that despite the important liaison role played by intermediaries, there is no written court wide protocol governing the way in which the Court interacts with intermediaries. The IBA considers that it is important for issues related to the role, mandate and security of intermediaries who provide a link between victims and the court to be the subject of a court wide policy document.
  10. Finally, as the procedural framework governing victims’ rights is decided, consideration should be given to the practical impact on the human and financial resources of the Defence. The Defence

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<sup>2</sup> During a hearing on 13 February 2008, the Trial Chamber proposed to the parties and participants that it would continue the preparation for the trial while awaiting the decision of the Appeals Chamber. No one opposed the suggestion. The Chamber indicated that it would consider those pending applications where the victims had suffered harm as a result of the crimes charged against the accused.

team has a limited budget for investigations; any requirement to investigate evidence other than that which is presented by the Prosecution could present significant challenges for the Defence.

## **Victim and witness protection**

11. Regarding the protection of victims: The IBA is concerned that the TC's decision that the Victims and Witnesses Unit (VWU) of the Registry is responsible for the protection of victims from the time they lodge an application to participate in the proceedings may unduly tax the Unit's budgetary and human resources. The IBA is of the view that the Unit's capacity will be significantly stretched, particularly as the VWU has received a large number of requests from the Prosecution for the protection of witnesses.
12. The IBA is particularly concerned about the impasse between the VWU and the OTP concerning the protection of witnesses. The IBA notes that the VWU has set a high standard for assessing whether persons are eligible to be included in the Court's protection programme. The Prosecution, on the other hand, asserts that the standard should be lower and that victims/witnesses should not have to accept any risk as a result of their decision to appear before the Court.
13. The IBA recognises that it is within the discretion of the Registrar to change the approach used for assessing eligibility for inclusion in the Court's protection programme. However, it is unclear how and when this change of approach was made and whether this was communicated to all organs of the Court and to all parties and participants, including the Defence. The IBA notes that in order to ensure transparency and provide certainty for all parties and participants, it is important that any changes be communicated in a timely manner to all parties and participants.
14. The IBA is also concerned that the decisions of the PTC and TC on the matter of witness protection appear to suggest that there was insufficient communication between the Prosecution and the VWU. It is not clear at what stage in the proceedings the Prosecution was made aware of a change of approach to the assessment criteria and whether the latter acted in a timely manner once that information was received. The IBA notes in particular the observations made by the majority judges of the TC in the Decision on Protective Measures, namely that in the impasse between the VWU and the OTP, the Chamber's intervention was sought at a very late stage.
15. The IBA notes that the Prosecution decided to preventively relocate a few of its witnesses who had been refused inclusion into the Court's protection programme by the VWU. The Prosecution justifies its action on the basis of its general responsibility to protect witnesses under Article 68(1) of the Statute. The Pre-Trial Chamber denounced this practice as being contrary to the mandate of the Prosecution. The majority of the judges of the Trial Chamber have however implicitly determined that the Prosecution can make alternate arrangements to protect its witnesses following a refusal by the VWU.

16. The IBA considers that since the Registry as a neutral organ has been entrusted with the responsibility under the Statute to manage the Court's protection programme, alternate protection mechanisms by other organs of the Court or referring parties could potentially discredit the programme. In light of the markedly different positions on this important issue, the IBA considers that the matter should be urgently resolved.
17. The IBA notes further that all of the issues related to the conflict between the VWU and the OTP were discussed in ex-parte closed sessions. While the Chambers may have thought it necessary to address the criteria for inclusion and other confidential issues during closed sessions, the IBA considers that the other parties and participants should have been allowed to participate in a general discussion about the respective roles and mandate of the VWU and the OTP concerning witness protection. It is important that any departure from previously determined standards be the subject of rigorous debate by all parties.

### **The impact of witness protection on disclosure**

18. The IBA notes with concern that the delay occasioned by the impasse between the OTP and the VWU prevented the respective Chambers from expeditiously considering numerous applications for redactions that were pending for some time. The IBA considers that the rights of the defendants before the Court who remain in custody have been adversely affected by this untenable situation.
19. The IBA is concerned that the Prosecution's failure to make timely referrals to the VWU has greatly contributed to the delay that has been experienced. The IBA recognises that there are particular challenges associated with the protection of witnesses and victims in an ongoing conflict situation. However, the IBA nevertheless urges the Prosecution to ensure that referrals are made in a timely manner and that all relevant details are submitted to the VWU, to ensure expeditious consideration of the requests.
20. The IBA is also concerned that the volume of redactions requested and authorised at the pre-trial stage may create a situation where the bulk of pre-trial disclosure takes place following the confirmation of charges proceedings. The IBA cautions against transferring the management of the disclosure process to the period following confirmation and prior to the start of trial as this could create additional delays which adversely impact the expeditiousness and fairness of the proceedings.
21. The IBA therefore urges the Prosecution to seriously examine the volume and nature of the redactions sought pursuant to Rule 81(2) and (4) to ensure that the process of disclosure does not unnecessarily impede the ability of the Defence to adequately prepare its case and the fairness of the proceedings. In this respect we urge the Chambers as the arbiters of the proceedings to continue to carefully assess the redactions sought.
22. The IBA considers that the approach of the majority of the TC in relation to the manner in which potentially exonerating evidence of witnesses who may be at risk should be served

could potentially affect the fairness of the proceedings by depriving the defendant of the full information necessary to conduct appropriate investigations.

## Recommendations

23. To ensure judicial consistency and procedural certainty, all outstanding issues regarding victims' participation should be expeditiously resolved. As submitted by the Prosecution in the Lubanga case, 'the challenge to the Court at this early stage is to apply this innovative framework in each case in a consistent manner, avoiding such varying criteria so as to create a general uncertainty for the victims and other participants.'<sup>3</sup>
24. The IBA considers that as different organs of the Court often rely on intermediaries in the field to liaise with victims, it is imperative that a set of guidelines consistent with the governing legal documents of the Court be drafted. These guidelines should cover the role and security of intermediaries.
25. The IBA considers that the Victims' Participation and Reparations Section of the Registry (VPRS), the Office of the Public Counsel for Victims (OPCV) and the Legal representatives for Victims (LRVs) should ensure that victims are adequately informed about the rights of the Defence and the reasons for any delay in the proceedings. The IBA urges the VPRS in particular to consider placing in the victims' applications booklet a separate paragraph explaining the rights of the Defence and how these can affect the pace of the proceedings and the way in which victims will be allowed to exercise their rights.
26. The IBA urges the Court to resolve the current impasse between the VWU and the OTP concerning the protection of witnesses. The credibility of the Court requires that its protection programme is neutrally administered and there is certainty about the criteria for inclusion into the programme.
27. The IBA urges the VWU to ensure that any change of approach to the criteria for inclusion into the protection programme of the Court, is communicated to all parties and participants in a timely manner.
28. The IBA urges the Prosecution to ensure that referrals to the VWU are made in a timely manner and all relevant information is supplied. This will expedite the processing of applications and prevent delays in the consideration of requests for inclusion into the Court's protection programme. Further, the IBA urges the Prosecution to ensure that there is consistency in its approach to requesting redactions on the basis of a need to protect witnesses.
29. The IBA further encourages the Prosecution to ensure that any issues related to disputed applications and disagreements regarding the decisions taken by the VWU are brought to the attention of the respective Chamber without delay.

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<sup>3</sup> See the Prosecution's Application for Leave to Appeal Trial Chamber I's 18 January 2008 Decision on Victims' participation, ICC-01/04-01/06-1136, 28 January 2008 at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1136-ENG.pdf>.

# Introduction

The IBA is currently implementing a MacArthur Foundation-funded programme to monitor the work and proceedings of the International Criminal Court (hereinafter the Court or ICC) and to conduct outreach activities.

The IBA's monitoring of both the work and the proceedings of the Court focuses in particular on issues affecting the fair trial rights of the accused. The IBA assesses ICC pre-trial and trial proceedings, the implementation of the 1998 Rome Statute (the Statute), the Rules of Procedure and Evidence (RPE), and related ICC documents in the context of relevant international standards. A detailed description of parameters which the IBA uses in monitoring the ICC has been distributed to all organs of the Court and can be found at Annex 2.I.

Ten years after the adoption of the Rome Statute establishing the International Criminal Court (ICC), the Court is at a critical standard setting phase of its existence. The IBA noted that the Court's activity increased exponentially between November 2007 and May 2008. There were nearly 700 public filings and decisions, with a significant number of interlocutory appeals still to be decided by the Appeals Chamber.<sup>4</sup> The Court's activity was focussed to a large extent on addressing procedural issues related to guaranteeing the fair trial rights of the accused while simultaneously ensuring the right of victims to participate and be protected. The IBA noted that as a result of the extensive litigation of these procedural issues, the trial of Thomas Lubanga Dyilo and the confirmation of charges proceedings against Mathieu Ngudjolo Chui and Germain Katanga were once again postponed.

This fourth IBA monitoring report assesses three key issues at the forefront of the Court's activity during the period under review:

- The challenges experienced by the respective Chambers in interpreting the Rome Statute and other legal instruments of the ICC to grant meaningful participation rights to victims without compromising the defendant's right to fair and expeditious proceedings.
- The protection of victims and witnesses and the impasse between the Office of the Prosecutor (OTP) and the Victims and Witnesses Unit (VWU) regarding the criteria for a witness to be included in the Court's protection programme.
- The manner in which the need to protect witnesses, victims and confidential material affects the right of the defendant to disclosure in advance of trial.

Central to the issues under discussion is the consideration of whether the rights of victims should 'trump' the rights of defendants in proceedings before the ICC. Additionally, the Report considers the matter of the Chambers' interpretation of the concept of 'fair and expeditious proceedings'.

The issues reviewed in this report are important for the future determination of proceedings before the ICC. If procedural questions are not expeditiously resolved, trials and confirmation hearings will

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<sup>4</sup> A table detailing the breakdown of cases by Chamber and the main issues addressed is included in this report at Annex II

be delayed and the parties and participants will be deprived of a fair hearing.

The mission statement of the ICC articulated in the Strategic Goals of the Court provides inter alia:

‘ As an independent judicial institution in the emerging international justice system, the ICC will fairly, effectively and impartially investigate, prosecute and conduct trials of the most serious crimes; act transparently and efficiently; and contribute to long lasting respect for and the enforcement of international criminal justice, to the prevention of crime and the fight against impunity.’

The challenge for the Court at this juncture of its existence is how to realise these goals.



# The Annexes

- Annex I - An Overview of the IBA Parameters for Monitoring
- Annex II- Breakdown of filings and decisions before the ICC between 1 November 2007 and 22 May 2008
- Annex III- Number of Victims authorized to participate in proceedings to May 2008
- Annex IV - An Overview of Key Legal Provisions referred to in the Report

## Abbreviations

AC	Appeals Chamber
CICC	Coalition for the International Criminal Court
DRC	Democratic Republic of the Congo
IBA	International Bar Association
ICC	International Criminal Court
ICCPP	ICC Witness Protection Programme
ICTY	International Criminal Court for the former Yugoslavia
LRV	Legal Representative of Victims
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
Regulations	Regulations of the Court
Registry	Registry of the International Criminal Court
ROR	Regulations of the Registry
Statute	Rome Statute of the International Criminal Court
Rules	Rules of Procedure and Evidence
TC	Trial Chamber
UNSC	United Nations Security Council
VPRS	Victims' Participation and Reparation Section
VRWG	Victims Rights Working Group
VWU	Victims and Witnesses Unit



# Chapter 1

## Overview of Cases referred to in Report

### General overview

Following state referrals by the Democratic Republic of the Congo (DRC), Uganda, the Central African Republic (CAR) and a UN Security Council (UNSC) referral of the situation of Darfur, Sudan to the Court, the Office of the Prosecutor (OTP) is currently conducting four investigations. In addition to the four ongoing investigations in Sudan, Uganda, the Democratic Republic of Congo and the Central African Republic, the ICC Prosecutor's office is reportedly analyzing a number of other situations including Côte d'Ivoire<sup>5</sup>.

On 9 November 2007, the TC in the case of Thomas Lubanga Dyilo decided that the trial of Mr. Lubanga would commence on 31 March 2008. Up to this date, Mr. Lubanga had been in custody for 2 years having made his first appearance before the Court in March 2006. The trial date was subsequently postponed to 23 June 2008. Germain Katanga was surrendered by the DRC to the ICC on 18 October 2007. On 7 February 2008, a third arrest warrant was publicly announced and unsealed concerning the situation in DRC for Mr Mathieu Ngudjolo Chui, a Congolese national and alleged former leader of the National integrationist Front (FNI) and a Colonel in the National Army of the Government of the Democratic Republic of the Congo [Forces armées de la RDC/ Armed Forces of the DRC ] (FARDC). The cases of Mr. Katanga and Mr. Chui were subsequently joined by the Pre-Trial Chamber.

On 29 April, the Pre-Trial Chamber unsealed a fourth warrant of arrest in relation to a case from the DRC against Mr. Bosco Ntaganda, alleged former Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo (FPLC), and alleged current Chief of Staff of the Congrès national pour la défense du peuple (CNDP) armed group, active in North Kivu in the DRC.<sup>6</sup>

On 23 May 2008, ICC Pre-Trial Chamber III issued a sealed warrant of arrest for Jean-Pierre Bemba Gombo, which was unsealed on 24 May 2008. The warrant of arrest contains two counts of crimes against humanity: rape and torture, as well as four counts of war crimes: rape; torture; outrages upon personal dignity, in particular humiliating and degrading treatment; and pillaging a town or place.

It is clear that between November 2007 and May 2008, the level of activity before the ICC increased exponentially. There were nearly 700 public filings and decisions in the cases and situations<sup>7</sup> before the Court. At the time of writing, eight interlocutory appeals were pending before the Appeals

<sup>5</sup> For general background information on the cases and situations before the Court see the website of the Coalition for the International Criminal Court (CICC) at <http://www.iccnw.org/?mod=casesituations>

<sup>6</sup> Ibid

<sup>7</sup> A 'situation' before the ICC may shortly be described as a particular context in which a determination is made whether crimes within the jurisdiction of the ICC have been committed in a specific country and entails the process of determining who might be responsible for such crimes. A 'case' begins after an arrest warrant or summons to appear has been issued for one or more identified suspects where one or more crimes within the jurisdiction of the Court seem to have been committed. For more information, see ICC Booklet: 'Victims before the International Criminal Court, a Guide for the Participation of Victims in the Proceedings of the Court', at pg 19, available at [http://www.icc-cpi.int/library/victims/VPRS\\_Booklet\\_En.pdf](http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf). See also Report of War Crimes Research Office, 'Victim Participation before the International Criminal Court', November 2007, at pg. 24, footnote 93, available at [http://www.wcl.american.edu/warcrimes/documents/12-2007\\_Victim\\_Participation\\_Before\\_the\\_ICC.pdf?rd=1](http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf?rd=1)

Chamber and the Prosecution and Defence had sought leave to appeal at least three additional decisions..Both the Trial Chamber (TC) and the Pre-Trial Chamber (PTC) delivered important decisions concerning witness protection, victims' participation and disclosure.

## Summary of Key Decisions

### Decision on Protective Measures (TC-Lubanga case)

Following months of ex-parte hearings related to key procedural issues in the Lubanga case, the TC issued the **Decision issuing a confidential and a public redacted version of the “Decision on disclosure issues, responsibilities for protective measures and other procedural matters.”**<sup>8</sup> The public redacted version was issued in May 2008. The TC was not unanimous in its decision. Judge Fulford and Judge Benito issued the majority opinion; Judge René Blattman issued a separate and dissenting judgment. Significant findings of the majority relevant to this report were:

- The right of endangered witnesses to protection and of the defendant to a fair trial is immutable, and neither can be diminished because of the need to cater to other interests.
- The OTP and the VWU have been unable to agree on the extent of their respective responsibilities for witnesses who may be at risk of harm. The Chamber ruled that the Prosecution's criticisms of the approach of the VWU were without foundation.
- The 'excessive' lateness of referrals by the OTP to the VWU for assessment and inclusion into the Court's protection programme, and the failure to bring the disparity of approach to the attention of the Chamber in a timely manner contributed to significant delays in the expeditious resolution of the matter.
- In relation to the situation of witnesses who provided potentially exculpatory evidence but whose security is also at risk, the majority of the Chamber determined, and the Prosecution agreed, that the most appropriate approach would be for the Prosecution to make concessions of the exculpatory elements in the statement and serve these in a separate document to the Defence without revealing the full identity of the witness.

Significant findings of Judge Blattman:

- The concession of facts by the Prosecution as an alternative to full disclosure of the relevant evidence or material is an inappropriate application of the requirement to disclose exculpatory evidence as provided under Article 67(2).
- Matters which may directly infringe upon the rights of the accused should not be considered in ex-parte proceedings unless the Defence is given an opportunity to make relevant submissions.
- Judge Blattman disagrees with the implicit suggestion of the majority that a referring party may make alternate protective arrangements for a witness whom the VWU has refused to admit into the Court's protection programme.

<sup>8</sup> Decision issuing a confidential and a public redacted version of “Decision on disclosure issues, responsibilities for protective measures and other procedural matters,” ICC-01/04-01/06-1311, 8 May 2008 at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1311-ENG.pdf>.

## Decision on Preventive Relocation (PTC - Katanga/Ngudjolo cases)

On 18 April 2008, Judge Sylvia Steiner, sitting as Single Judge in the Katanga/Ngudjolo cases, issued the *Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules*.<sup>9</sup> This important decision addressed key issues related to the conduct of the confirmation hearing, the protection of witnesses, and disclosure. Significant findings were as follows:

- The confirmation of charges hearing is limited in scope and should not be seen as an end in itself. The prosecution should therefore limit the number of witnesses called to ‘core witnesses’.
- There is no provision within the Statute, the Rules, the Regulations or the RoR, which expressly confers upon the Prosecution the power to preventively relocate witnesses until they are included in the ICCPP.
- The Prosecution’s practice of preventive relocation of witnesses potentially infringes upon the principle of equality of arms and diminishes witness credibility; it must cease immediately.
- The Prosecution’s practice of referring large numbers of witnesses for relocation and requesting extensive redactions cannot be sustained for every confirmation hearing held before the Court.
- The Prosecution need no longer apply for redactions of potentially exculpatory material required be disclosed under Article 67(2). The use of summaries will be sufficient.

## First Decision on Redactions (PTC-I-Katanga/Ngudjolo cases)

The *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements*<sup>10</sup> was issued by Judge Sylvia Steiner sitting as Single Judge of the PTC. The decision resulted from applications for authorisation to disclose redacted versions of statements and interview notes of seven witnesses to the Defence prior to the confirmation of charges hearing made by the Prosecutor during five *ex-parte* closed session hearings with the Prosecution and the VWU between 17 October and 20 November 2007.

The Single Judge declined the Prosecutor’s request to authorise two categories of redactions, namely: i) all identifying information concerning innocent third parties and ii) information relating to the locations of interviews and the names, initials and signatures of the OTP and VWU staff present when witness statements were taken. The Single Judge determined that Prosecution Witnesses who had been or were about to be interviewed by the Prosecution could be characterised as “Prosecution sources” and their identifying information could thus be redacted. Both the Defence and Prosecution were granted leave to appeal the decision.

9 ICC-01/04-01/07-428-Corr, 25 April 2008, at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-428-Corr-ENG.pdf>

10 ICC-01/04-01/07-90, 7 December 2007, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-90-ENG.pdf>.

## **Decision on victims' participation (TC- Lubanga case)<sup>11</sup>**

On 18 January 2008, the TC set important precedents regarding victims' participation. Once again, the Chamber's decision was not unanimous and Judge Rene Blattman issued a separate and dissenting decision. Key issues addressed were:

- a) The criteria for establishing victim status
- b) The modalities of victim participation
- c) Common legal representation for victims
- d) Protective and special measures for victims
- e) The dual status of victims-witnesses
- f) Protection for victim applicants

## **Decision on leave to appeal (TC-Lubanga case)**

In consideration of the overlap in requests by the Defence and Prosecution for leave to appeal the *Decision on Victims' Participation*, the Trial Chamber, on 26 February 2008 issued the *Decision on the Defence and Prosecution requests for leave to appeal the decision on victims' participation of 18 January 2008*.<sup>12</sup>

The Chamber granted leave to appeal on

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

The TC refused leave to appeal on all other issues raised in the requests.

In a separate and dissenting opinion, Judge Blattmann dissented in the reasoning and conclusions of the majority in refusing leave to appeal on a) the modalities of identification for an individual applying to participate as a victim; b) whether anonymous victims will be allowed to participate in the proceedings; and c) the scope of Regulation 56 of the Regulations of the Court which addresses the issue of reparations for victims.

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<sup>11</sup> ICC-01/04-01/06-1119, 18 January 2008, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1119-ENG.pdf>

<sup>12</sup> ICC-01/04-01/06-1191, 26 February 2008, at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1191-ENG.pdf>.

## Decision on Procedural Rights of Victims (PTC- Katanga/Ngudjolo cases)

The *Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case*<sup>13</sup> was delivered by Judge Steiner sitting as Single Judge in the Ngudjolo/Katanga cases. Following consideration of the requests of five victim applicants to participate in the cases against both accused, the PTC granted the applicants the procedural status of victims at the pre-trial stage. The Chamber invited the applicants to make observations concerning whether they wished to remain anonymous during the pre-trial stage of the case, and regarding the set of procedural rights that should be granted to victims who wish to participate at the pre-trial stage of the present case. The Prosecution and Defence were also invited to make observations.

### *Significant findings*

- The victim who requested anonymity will have the right to attend status conferences, receive notification of public documents and make opening and closing statements.
- Other victims will have the right to access confidential filings, decisions and transcripts contained in the case record; the right to examine witnesses called by the Prosecution or Defence; the right of notification of all decisions not classified as ex-parte and the right to make submissions on issues of admissibility and the probative value of the evidence.
- Victim applicants granted the procedural status of victim should not be granted investigative powers independent from the Prosecution.
- Victim applicants granted the procedural status of victim do not have full right of access to the Prosecution's situation and case files.
- The Single Judge considered that additional evidence, introduced by victims granted the right to participate but upon which neither the Prosecution nor Defence intend to rely, is inappropriate at the confirmation stage of the case and would distort the object and purpose of the proceedings and cause delay.

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<sup>13</sup> ICC-01/04-01/07-474, 13 May 2008, at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-474-ENG.pdf>





## Chapter 2

# General Legal Issues

### Legal Rights of Defendants and Victims before the ICC

#### *The rights of the defence*

The right of the defendant to a fair trial is a fundamental tenet of international criminal law. The right is codified in Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR). The Rome Statute and the other legal documents of the Court enshrine these internationally recognized provisions guaranteeing a fair trial for persons who are charged. These rights include the presumption of innocence and the right to trial without delay. Under Article 67(1) of the Statute, the accused is also entitled to certain minimum guarantees including the right to adequate time and facilities to prepare his defence and the right to a public trial without delay. Article 67(2) guarantees that the accused must be given any material which the prosecution has in his possession which he believes shows or tends to show the innocence of the accused, could mitigate his guilt or could affect the credibility of prosecution evidence.

#### *The rights of victims*

The preamble to the Rome Statute recalls the fact that ‘during this century, children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity. The drafters of the Statute and the RPE recognized the importance of guaranteeing the rights of victims of crime to participate in the proceedings and to be protected. The 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 Statute recognizes three fundamental rights of victims:

- a. 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;
- b. 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;
- c. The right to adequate and effective reparation, including access to appropriate forms of reparation<sup>14</sup>

#### **The Primacy of rights**

Central to the issues that will be discussed in the report is a consideration of whether the legal provisions of the ICC provide for a hierarchy of rights. The Rome Statute has no counterpart in international criminal law in its recognition and codification of the rights of victims and the Court’s obligation to respect those rights. However as noted above, the Statute also codifies the

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<sup>14</sup> See The Redress Trust ‘Ensuring the Effective Participation of Victims before the International Criminal Court: Comments and Recommendations regarding Legal representation for Victims’, May 2005 at pg. 1

internationally recognised fair trial rights of the accused in Article 67. Should the judges of the ICC therefore interpret the provisions of the Rome Statute to give primacy to the rights of the defendant over those of the victims?

Article 64(2) of the Rome Statute provides that ‘the Trial Chamber shall ensure that a 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’. Article 68(3) is subject to the caveat that the participation of victims must be consistent with and not prejudicial to the rights of the accused and a fair trial. The protective measures that the Court may implement for victims and witnesses during the investigation and prosecution of crimes ‘shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.

In its *Decision on Protective Measures, the TC in the Lubanga case* decided that both defendants and victims/witnesses enjoy immutable rights under the legal regime of the ICC. The posture of the Chambers appears to be towards a teleological or purposive interpretation of the provisions of the Rome Statute suggesting that a ‘balance of rights’ is envisaged rather than a ‘primacy of rights’. Indeed, the first goal of the Strategic Plan of the ICC concerns the quality of justice. In this regard, the Court commits to conducting ‘fair, effective and expeditious public proceedings in accordance with the Rome Statute and with high legal standards, ensuring full exercise of the rights of all participants’. The Strategic Plan does not therefore envision a priority of rights.

However, one commentator has opined that Article 67 should be considered to possess ‘hierarchically superior status within the Statute’ such that ‘the Court may be required to declare provisions within the Statute inoperative because they conflict with Article 67’.<sup>15</sup>

The judges of the International Criminal Tribunal for the Former Yugoslavia (ICTY) interpreted the provisions of Article 20.1 of the ICTY Statute, which mirrors Article 64(2) of the Rome Statute, in a manner that gives primacy to the rights of accused:

What is clear from the Statute and Rules of the Tribunal is that the rights of accused are given primary consideration, with the need to protect victims and witnesses being an important but secondary one. Article 20(1) of the Statute states that Trial Chambers shall ensure that trials are conducted “with **full respect** for the rights of accused and **due regard** for the protection of victims and witnesses” (emphasis theirs).<sup>16</sup>

It is admittedly difficult to adequately compare the evolving jurisprudence of the ICC with that of the ICTY or the International Criminal Tribunal for Rwanda (ICTR) (hereafter, the Tribunals). The Tribunals did not expressly recognise the right of victims to participate in the proceedings except as witnesses. Moreover, neither the ICTY Statute nor Rules of Procedure and Evidence provide for victims to participate in the proceedings or obtain reparations<sup>17</sup>.

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15 W. Schabas ‘Article 67 Rights of the Accused’ *Commentary on the Rome Statute of the International Criminal Court* (Triffterer ed. 1999) pp. 845-868 at p. 867.

16 See Prosecutor v. Slobodan Milosevic, Decision on Prosecution Motion for Provisional Protective Measures pursuant to Rule 69, Partly Confidential and Ex-parte order of 19 February 2002 at <http://www.un.org/icty/milosevic/trialc/decision-e/20219PM517175.htm>

17 See David Tolbert, ‘The Protection of and Assistance to Witnesses at the ICTY’, Hiram Abtahi and Gideon Boas (eds), *The Dynamics of International Criminal Justice*, pp 193-229 at p.194

The IBA considers that the debate concerning whether the rights of the accused should be given primacy over the rights of victims will continue to be the subject of extensive discourse within the international legal community. It will become particularly relevant to the ICC as the Court grapples to establish the procedural norms governing the participation rights of victims versus the rights of the defendant.

Procedurally, it is still quite early in the life of the ICC to determine whether the Court will adopt the approach that if any other provisions of the Statute conflict with Article 67, the latter provision should prevail. However, extensive submissions have been made by the Defence that Article 68(3) and Rule 89 must be interpreted in a manner that does not derogate from the fair trial guarantees contained in Article 67. It is for this reason that the decision of the Appeals Chamber concerning the interpretation of these key provisions which govern the application process and right of victims to participate in proceedings before the Court is eagerly anticipated.

### **Fair and expeditious proceedings**

Article 67(1) of the Rome Statute provides that an accused person is entitled to a fair and impartial public hearing and to be tried without undue delay. As noted above, it is the responsibility of the TC during the trial of a case to ensure that it is both fair and expeditious. In relation to the confirmation of charges proceedings, the PTC is required to hold a hearing to confirm the charges ‘within a reasonable time after the person’s surrender or voluntary appearance before the Court.’ Fairness and expeditiousness are recurring themes underlying the issues discussed in this report. In determining the manner in which victims are allowed to participate in the proceedings, for example, the Chambers have been constrained by Article 68(3) to ensure that this right does not conflict or prejudice the ‘rights of the accused and a fair and impartial trial.’

Fairness is an overarching requirement of all criminal proceedings and applies equally to proceedings held in a common law, civil law or ‘hybrid’ combination of both, such as the ICC.<sup>18</sup> The principle of fairness is much wider than the concept of expeditiousness. Article 67 for example sets out minimum guarantees to which an accused person is entitled as part of a fair trial. One such minimum guarantee is trial without undue delay. It is therefore important for both elements to be present. It is possible, for example, for proceedings to be conducted expeditiously yet still be deemed unfair.<sup>19</sup>

The challenge for the judges at the ICC is to ensure that the confirmation of charges and trial proceedings are conducted in a manner that is fair and expeditious and takes account of the rights of all parties and participants. The peculiar context in which the ICC operates makes this problematic. The ICC operates in a context where conflict is ongoing and lacks its own enforcement mechanism. There are often grave security risks for victims/witnesses and material obtained by the Prosecutor may be subject to confidentiality restrictions to protect the informants. The Statute

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<sup>18</sup> See Patrick L. Robinson, ‘Fair but Expeditious Trials’ in Hiram Abtahi and Gideon Boas (eds), *The Dynamics of International Criminal Justice*, pp 169-192. The author is the Presiding Judge of Trial Chamber III, ICTY.

<sup>19</sup> Ibid pg 171

requires the Prosecutor to investigate both incriminating and exculpatory material equally and then to disclose potentially exculpatory material in his possession to the defence. However, potentially exculpatory material is often contained within material that the Prosecution may wish to rely on during confirmation or trial proceedings.

The Pre-Trial Chamber in the Katanga/Ngudjolo cases has acceded to a suggestion advanced by the Prosecution for dealing with potentially exonerating material contained in statements of ‘potential’ prosecution witnesses upon whom the Prosecution does not intend to rely for the confirmation of charges proceedings<sup>20</sup>. The Prosecution has suggested that it would directly disclose to the defence summaries of the statements with the relevant exonerating portion, with the identity of the witnesses removed. This would expedite the preparation for the confirmation of charges proceedings and discharge the Prosecution’s obligations under Article 67(2) in respect of potentially exonerating material as well as under Article 61(5) of the Statute which allows for the use of summaries at confirmation proceedings.

The Single Judge of the Pre-Trial Chamber in that case readily accepted this suggestion on the basis that the process of considering redactions and the requirement for reasons justifying each redaction was onerous and would further delay the confirmation proceedings in the case. The Chamber considered that no prejudice would be done to the defence as the were potential prosecution witnesses and the defence would have full disclosure of the material prior to trial if the charges were confirmed.

Both Defence Counsel appealed the decision. Counsel for Germain Katanga sought clarification of a procedural question, which if answered by the Chamber, would not require pursuing the appeal. Counsel for Mathieu Ngudjolo sought leave to appeal the substantive issue of whether disclosure of potentially exonerating material was provided for under Article 61(5) of the Statute, that is, in the form of summaries. Counsel submits that by allowing the Prosecution to disclose potentially exonerating material in summary form at the confirmation stage, the Chamber was only deferring a problematic issue for the trial Chamber to resolve later.

Although Mr. Ngudjolo’s appeal was dismissed in limine as filed out of time, the arguments nevertheless raise interesting questions concerning whether the Chamber’s attempt to act expeditiously could potentially adversely impact the fairness of the proceedings against the defendant.

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<sup>20</sup> See Decision on Preventive Relocation, summarised at Chapter I of this report.

# Chapter 3

## Victim and Witness Protection

### Introduction

The general obligation of the Court to protect and safeguard the interests of victims and witnesses is codified in Article 68 of the Statute. Subsection (1) provides that *‘the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.’* The provision is subject to the caveat that any measures taken by the Court must not be inconsistent with or prejudicial to the fair trial rights of the accused.

Article 43(6) of the Statute provides for the establishment, within the Registry, of a Victims and Witnesses Unit (VWU) which shall provide *‘in consultation with the Office of the Prosecution, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witness’.*

Under the Rome Statute, the Court bears full responsibility for ensuring that victims and witnesses who come forward to seek justice for wrongs committed against them are not placed at undue risk because of their decision to participate in the proceedings. As part of its Strategic Plan, the Court committed to putting in place a system to address all security risks and to strive for maximum security of all participants consistent with the Rome Statute.

The effective management of the system of witness protection is an essential component of fair and effective proceedings. The timely implementation of protective measures for victims and witnesses prior to trial will assist in ensuring that the disclosure process is conducted efficiently.

### The Role of the Victims and Witnesses Unit (VWU)

Although the entire Court has a duty to safeguard victims and witnesses, under the Statute and the legal documents of the Court, the VWU has a special responsibility to administer the system of protection and in particular, to manage the Court’s protection programme (ICCPP). The designation of this task to the Registry ensures that the system of protection is implemented in a neutral and impartial manner. The same criteria for inclusion into the protection programme will thus be applied to victims and witnesses for the Prosecution or the Defence.

In addition to the previously referred to provisions, regulation 96 of the Regulations of the Registry (RoR), provides that in determining the criteria for admission to the protection programme the Registry should take into account Article 68 of the Statute and the following additional criteria:

- a. the involvement of the person before the Court
- b. whether the person himself or close relatives are endangered because of their involvement with the Court;

c. whether the person agrees to enter the protection programme

Importantly, subsection 4 of regulation 96, makes it clear that ‘inclusion in the programme shall be subject to the decision of the Registrar’.

## Protection of victims

The TC in the Lubanga case has made an important determination concerning the protection rights of victims appearing before the Court. The Chamber has decided that the statutory obligation of the Registry under Article 43(6) begins from the time that a completed application has reached the Court. The TC has taken a broad view of protection and determined that the phrase ‘victims who appear before the Court’ should not be limited to actual physical presence before the Court, but should encompass the application process.

The VWU, in its submissions to the TC on this issue, considered that the phrase ‘victims who appear before the Court’ should be interpreted as victims participating in the proceedings and whose status has been recognised by the Chamber. The VWU further submitted that the level and extent of protection provided to such victims should depend on the scope and modality of their participation. The limitations proposed by the VWU seemed to be predicated on the determination that the number of witnesses actually requiring protection would be considerably fewer than the number of potential victim applicants. The Chamber however did not agree.

The decision represents a clear acknowledgment by the Chambers that the risks faced by victims do not necessarily coincide with the start of proceedings before the Court, but could actually begin from the time they make efforts to become involved in the proceedings. In the context of the situations in Darfur, Sudan and Uganda for example, warrants of arrest remain outstanding for the individuals charged with serious war crimes and crimes against humanity and acts of violence against the civilian population continues<sup>21</sup>.

The full implications of the decision are however yet to be assessed. In his speech given at the Sixth Session of the Assembly of States Parties on 10 December 2007, former ICC Registrar, Bruno Cathala, noted that 426 individuals from DRC, Chad and Uganda benefit from the Court’s witness protection programme. He noted that only seven witness relocation agreements had been signed although there were 105 States parties.<sup>22</sup>

A significant number of victims may require the protection of the Court. It may task the human and financial resources of the Unit and may have important budgetary implications for the Court. The Unit will have to assess, among other things, whether previous ‘witness’ relocation agreements that were signed included the possibility of relocating victims and future agreements will have to take victims into account. Relocation of a victim/witness is however considered to be a measure of last

21 See for example the Statement by Mr. Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Statement to the United Nations Security Council pursuant to UNSCR 1593 (2005) - 5 June 2008 at <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080605-ENG.pdf>

22 See Statement by Bruno Cathala, Registrar of the ICC to the Sixth Session of the Assembly of States Parties, New York, 10th December 2007 at [http://www.icc-cpi.int/library/asp/Statement\\_Registrar.19\\_Dec.1545.pdf](http://www.icc-cpi.int/library/asp/Statement_Registrar.19_Dec.1545.pdf)

resort. The Chamber itself acknowledged that there were limitations on the extent of protective measures that can be provided to victims.

## **Divergent views regarding risk assessment and criteria for inclusion in the Court's protection programme**

### *The Prosecution's position*

The Prosecution has determined that, under Article 68 of the Statute, it bears a special responsibility to protect its witnesses. The OTP thus holds that it must have the means to implement its duty through an “independent assessment of the risks affecting and the protection needed by its witnesses.”<sup>23</sup>

The Prosecution asserts that not only is it a benchmark of the Prosecution's independence for it to decide how to lead its case, but also for it to make an independent assessment of the need to protect witnesses at risk.<sup>24</sup> According to the OTP, the role and mandate of the VWU does not change the Prosecution's obligations, nor does the OTP wish to replace or duplicate the mandate and responsibility of the VWU.<sup>25</sup>

The Prosecution is of the view that based on an interpretation of Article 68(1) of the Statute, the starting point for protective measures ought to be “the elimination of all foreseeable risks.”<sup>26</sup> Any lower standard, it maintains, would prevent the Prosecution and the Court from discharging its mandate to protect witnesses and victims. Furthermore, the Prosecution asserts that this standard was previously agreed upon by the Presidency, the Registry and the Prosecution.<sup>27</sup>

### *The VWU position*

The majority of the VWU filings on victim and witness protection have been made ex-parte or confidentially to the Prosecution only.<sup>28</sup> Consequently, information regarding the standards applied by the VWU to assess risk, and the criteria employed for determining eligibility for the ICCPP was derived from decisions made by the respective Chambers.

In the Decision on Preventive Relocation, the Single Judge of the PTC observed that the initial criterion used by the VWU for inclusion in the Court's protection programme was “the real possibility, the concrete likelihood that the [witnesses] would be threatened.” Thereafter however the Single Judge noted that there was a change of approach. The Judge observed that “the Registrar appeared to have increased the threshold for inclusion in the ICCPP and the new standard now being applied by the Registrar was that an individual's acceptance into the ICCPP would have to be “threat based.”

23 See Prosecution's Submission on the Preventive Relocation of Witnesses 132, 163, 238 and 287, 16 april 2008, ICC-01/04-01/07-398, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-398-ENG.pdf> at para. 6

24 Ibid

25 Ibid. See also para 8

26 Ibid para 25

27 Ibid. In its submissions, the Prosecution referred to the ‘Strategic Plan of the International Criminal Court’, Assembly of States Parties, 5<sup>th</sup> Session, ICC-ASP/5/6, 4 August 2006.

28 The VWU has filed a public document entitled ‘Protection of Victims and the Mandate of the VWU’ 12 December 2007, ICC-01/04-01/06-1078, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1078-ENG.pdf>. The issues discussed in that filing are limited to a discussion of the obligation of the VWU to victims who appear before the Court.

The TC's Decision on Protective Measures provides a clearer indication of the VWU's position regarding risk assessment and the criteria for inclusion in the Court's protection programme. From that decision, the IBA notes that the VWU acknowledged that witness protection is not the sole responsibility of one organ of the Court and, therefore, that the Prosecution had an independent duty to protect witnesses by virtue of Article 68's generic provision. However, the IBA notes two differences between the VWU's and the Prosecution's approach.

First, the VWU is of the view that the Prosecution has tended to apply an inappropriately low threshold for inclusion. The VWU asserts that the Prosecution's position that all risks should be eliminated is untenable as it is impossible to eliminate all danger due to the inherently risky nature of the operations of the Court. The VWU's approach to a request for inclusion in the programme is to first make an assessment and thereafter to mitigate any risk to an acceptable level by good practices and protective measures.

Second, the VWU disagrees with the Prosecution's assertion that the Unit is obliged to protect all witnesses who are at risk and not only those who meet the threshold of the VWU. The VWU contends that admission into the protection programme is only triggered if there is a 'high likelihood' that the witness will be harmed or killed unless action is taken. In their view intimidation alone is not sufficient.

### *The VWU's change of approach*

The IBA notes however that the VWU's approach has not been consistent. In at least one referral involving a witness in the Katanga/Ngudjolo cases, the VWU appeared to depart from the 'new standard' that it had set. In the Decision on Preventive Relocation, the Single Judge of the PTC found that in the case of one particular witness, Witness 238, the circumstances met all of the criteria for inclusion in the protection programme set out by the Registrar including the new 'threat-based' threshold. The Registrar nevertheless refused the witness inclusion into the programme.

This prompted the Single Judge to comment:

[One] can only conclude that the Registrar departed from all previous criteria he has previously set out to assess these types of applications. This way of proceeding is unacceptable in light of the fact that the success of the ICCPP and of the model of witness protection embraced by the Statute and the Rules is fully dependent on the **clear pre-determination and transparent application** (emphasis added) of the criteria for inclusion in the programme.<sup>29</sup>

In the TC's Decision on Protective Measures, the VWU admitted to changing its approach, arguing that witness protection was an 'organic and developing' area. The VWU did not agree however that this prevented the Prosecution from exercising its general statutory duty to protect witnesses as prescribed by Article 68 (1).

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<sup>29</sup> See *Decision on Preventive Relocation* referred to in Chapter 1 of this report



## **The use of alternate protective measures**

### *Preventive relocation of witnesses by the Prosecution*

The impasse between the Prosecution and the VWU on this issue created what was in our view an unfortunate and untenable state of affairs. Four witnesses referred by the Prosecution to the VWU for inclusion into the ICCPP were rejected on the basis of the new ‘threat-based standard’. Following the refusal by the VWU, the Prosecution decided to ‘preventively relocate’ the four witnesses.

The Prosecution asserted that the witnesses were important to its case and there was a clear risk that disclosure of their evidence and identity would compromise their security. The Prosecution indicated that preventive relocation was a temporary measure and was not to be construed as an alternative to the Court’s protection programme. The ‘preventive relocation’ was described as an emergency provisional measure.

### *The position of the Pre-Trial Chamber (PTC) regarding alternate protective measures*

The measure taken by the Prosecution had serious consequences. The Single Judge sharply criticized the action, remarking that in implementing such a programme the Prosecution had not only “exceeded its mandate under the Statute and Rules but was also misusing its mandate to de facto shift the power to decide on the relocation of a given witness from the Registry to the Prosecution.”<sup>30</sup>

The result was a determination forthwith that the statements, interview notes and interview transcripts in respect of two of the four witnesses would be excluded for purposes of the confirmation hearing.<sup>31</sup> The Judge found that neither a literal, constructive or teleological interpretation of Article 68(1) allowed for the Prosecution to implement a ‘preventive relocation programme.’ The Judge further re-classified the term ‘preventive relocation’ to ‘reactive relocation’ deciding that the Prosecution’s action was not preventive but a response to the refusal of the VWU to include the witnesses into the programme.

The implications of this decision extend beyond the immediate issue of whose role it is to protect witnesses. By virtue of the Prosecution’s subsequent filings in relation to the evidence and charges against Mr. Ngudjolo and Mr. Katanga, it is clear that the two excluded witnesses were key witnesses upon whom the Prosecution had intended to rely to establish the charges of sexual crimes, specifically sexual slavery and possibly rape and outrage of personal dignity.<sup>32</sup> The Prosecution has since applied for leave to appeal the decision in relation to the issue of the Court’s interpretation of the witness protection mandate.<sup>33</sup>

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<sup>30</sup> Ibid at para 32

<sup>31</sup> Ibid at para 39. Witness 238 was ordered to be included in the programme as indicated in the preceding paragraphs.

<sup>32</sup> See “Prosecution’s Submission of the Document containing the Charges and List of Evidence, Public Document with Public Annexes 1A and 2A and Confidential Annexes,” No: ICC-01/04-01/07-422 21-04-2008 at pg 3.

<sup>33</sup> Ibid

### *The Trial Chamber majority approach*

Two of the three judges of the TC appear to have adopted a more flexible approach to the possibility of alternative protection measures when an application to the VWU is refused. In the *Decision on Protective Measures*, the majority of the TC determined that if the VWU properly assesses and rejects referrals to its protection programme, it is for the referring party to decide, **as it considers appropriate** (emphasis added), whether to secure an alternative protective solution. The majority did not therefore rule out the possibility that a preventive relocation programme could be utilised.

In his separate and dissenting judgment, Judge Blattman disagreed with the majority on this issue. In the Judge's view there was no statutory support for the notion that the prosecution may consider relocation of witnesses as a possibility in their protection procedures. In this regard, Judge Blattman concurs with the views of the Single Judge of the PTC as expressed in the *Decision on Preventive Relocation*.

### **Observations by the IBA**

The issues discussed above raise fundamental and practical concerns for the effective administration of ICC proceedings. One cannot overstate the importance of witness protection, both as it obviously affects victims and witnesses, as well as perceptions of the Court. All parties including the defence require certainty regarding the manner in which the programme will be administered. The uncertainty occasioned by the OTP and VWU's polarised views on this key issue must be resolved urgently. It is important for the Court's credibility that there is a unified approach to witness protection. In our view, the criteria for risk assessment and the standard for inclusion into the Court's protection programme must be clear, consistent and known to all parties, participants and organs of the Court.

The difference of approach between the PTC and the majority of the TC to the issue of whether a referring party may implement alternate protection measures such as preventive relocation upon refusal of an application by the VWU, adds to the general confusion on this matter. The majority of the Chamber did not expressly sanction preventive relocation by the Prosecution, but the decision implies that if inclusion in the Court's protection programme is refused, it is incumbent on the Prosecution to take the necessary steps to protect its witnesses, which could include relocation.

Resolution of this issue is needed to clarify the position not only for the Prosecution but for other potential referring parties such as defence counsel or victims' legal representatives. Unilateral preventive location measures by the Prosecution could also have implications for the principle of equality of arms. The defence should equally have the possibility to implement alternate protection mechanisms following a refusal by the VWU to include a witness into the programme. However, the comparatively limited resources of the Defence preclude such a possibility. If the means to make alternative arrangements for witnesses outside of the scope of the court's protection is only possible for the Prosecution, this may be in breach of the principle of equality of arms.

The admitted 'change of approach' by the Registrar also raises concerns. Article 43(6) and Rule 96 of the Regulations of the Registry, may be interpreted as vesting discretionary powers in the Registrar to change the approach used for assessing eligibility for inclusion in the Court's protection programme. However, it is unclear when this change of approach was made and whether this was communicated to all organs of the Court and to all parties and participants, including the Defence. The IBA considers that even if the Prosecution is the only party presently referring witnesses for inclusion into the programme, it is important for the Registry to communicate any changes in approach to the criteria for inclusion in the protection programme to all parties and participants in a timely manner. This ensures transparency and provides certainty for all concerned.

The question of whether the VWU has adopted an inflexible approach to the criteria for inclusion in the court's protection programme will have to be resolved by the Appeals Chamber. The Prosecution has sought leave to appeal the decision of both the PTC and the TC on protective measures.

It has been noted however, that the action of the Prosecution has also contributed to the unfortunate situation. The IBA notes in particular the observations made by the majority judges of the TC in the *Decision on Protective Measures*, that the Chamber's intervention in the impasse between the VWU and the OTP was sought at a very late stage of the proceedings. The Chamber also accepted the submissions of the VWU that some of the applications for inclusion were not submitted in a timely manner and lacked adequate information to allow for accurate assessment by the VWU. As will be discussed further in the next chapter, lack of timely referrals by the Prosecution to the VWU also impacts the ability of the Chambers to rule expeditiously on Prosecution requests for non-disclosure on the basis of protection of its witnesses.

Finally, the IBA notes that all of the issues related to the conflict between the VWU and the OTP were discussed in *ex-parte* closed sessions. While the Chambers may have thought it necessary to address the specific criteria for inclusion and other confidential issues in relation to specific applications during closed sessions, the IBA considers that the other parties and participants should have been allowed to participate in a general discussion about the respective roles and mandate of the VWU and the OTP and the interpretation of Article 68(1) and Article 43(6). In light of the court-wide standard for risk assessment, and the potential impact of any decision by the VWU on all the parties then it is important that any departure from that standard be the subject of rigorous debate by all parties.



# CHAPTER 4

## The Impact of Witness Protection on the Process of Disclosure

### Introduction

In both the Lubanga case and the Katanga/Ngudjolo cases, the IBA notes that the Prosecution has made several applications for non-disclosure pursuant to the relevant statutory provisions and the rules of the Court. Between December 2007 and April 2008, the Single Judge of the PTC in the Katanga/Ngudjolo cases has delivered six decisions on redactions.

Both the PTC and the TC have had to resolve matters, primarily during *ex-parte* hearings, which relate not only to the manner and timing of disclosure, but also to the tension between the VWU and the OTP regarding the assessment of risk and the extent of protective measures that should be taken in each case. The latter issue as discussed in the previous chapter has adversely affected the expeditious conduct of the proceedings.

The OTP has made it clear that “in relation to witnesses for whom protective measures have been sought but not yet implemented, disclosure of their identities and statements can only take place once adequate protective measures are in place.”<sup>34</sup> At the trial level, the matter has assumed greater urgency no doubt due to the 3 month deadline for full disclosure in advance of trial laid down by the TC.<sup>35</sup> It is now incumbent on the Prosecution to disclose in full to the Defence all witness statements upon which it intends to rely; failure to disclose risks the possibility of not being able to call such witnesses at all.

The situation is no different before the PTC in the Katanga/Ngudjolo cases. The Single Judge noted that her ruling in respect of a number of applications for redactions depended in large part on “whether the witnesses were accepted into the Court’s witness protection programme and the subsequent implementation of the protective measures, if any, accorded to them by the Registrar.”<sup>36</sup>

As previously mentioned, at the heart of the issue is the question of how the Chambers have or have not managed to adequately balance the right of the defendant to prepare his defence with the right of victims and witnesses to be protected. The concept of non-disclosure is not peculiar to the ICC. Similar applications were made, for example, by the prosecutors who appeared before the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>37</sup> However, the ICC legal

<sup>34</sup> See “Prosecution’s application for direction on the lifting of redactions and for non-disclosure of information’ at ICC-01/04-01/06-1008

<sup>35</sup> See Trial Chamber’s Decision on Timing and Manner of Disclosure, 09-11-2007 at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1019-ENG.pdf>

<sup>36</sup> See “Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witness 166 and 233” (Public redacted version) at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-361-ENG.pdf> para. 1 of pg. 9

<sup>37</sup> See for eg. ICTY Trial Chambers, Prosecutor v Brdanin and Talic ‘Decision on Prosecution’s Request for Variation of Third Protective Measures Decision’ at <http://www.un.org/icty/brdjanin/trialc/decision-e/01129PM214121.htm> and Prosecutor v Brdanin and Talic ‘ Decision on Fifth Motion by Prosecution for Protective Measures’ at <http://www.un.org/icty/brdjanin/trialc/decision-e/01115PM213937.htm>. See also ICTY Trial Chambers, The Prosecutor v. Blaskic, ‘Decision of Trial Chamber I on the Prosecutor’s Motion for Video Deposition and Protective Measures’, at <http://www.un.org/icty/blaskic/trialc1/decisions-e/71113PM113320.htm>

framework has no counterpart in international or national legal systems in respect of the rights afforded to victims and witnesses to participate and to be protected.

## Legal Framework for Disclosure

In keeping with internationally recognised requirements of fairness, expeditiousness and transparency governing adversarial proceedings in international criminal law and the rights of the accused articulated in Article 67 (1) of the Statute, the general principle is that disclosure to the Defence should be the rule and non-disclosure the exception. Restrictions on disclosure should only be authorised if consistent with the exceptions provided for in the Statute and the RPE.

### *Obligation to Disclose*

Under the Statute, the Prosecutor has an absolute obligation to investigate incriminating and exonerating circumstances equally<sup>38</sup> and to disclose exculpatory evidence in his possession “as soon as practicable to the Defence.”<sup>39</sup> At the trial level disclosure must be made sufficiently in advance to allow preparation for the trial. The Prosecutor is also obliged under Rule 77 to allow, subject to any restrictions on disclosure in the Statute or Rules, inspection of any books or documents in his possession which are material to the Defence or upon which he intends to rely at the confirmation hearing or trial.

### *Non-disclosure on the basis of protecting victims, witnesses, family members or other persons*

Where disclosure of evidence or information may lead to **grave endangerment** (emphasis added) of a witness or his or her family, Article 68(5) of the Statute allows the Prosecutor to withhold such evidence or information, and to offer instead a summary for proceedings conducted prior to commencement of the trial. The exercise of this option is circumscribed by the caveat that such measures must be carried out in a manner that is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

The regime for restrictions on disclosure, or non-disclosure, is primarily articulated in the Rules of Procedure and Evidence (RPE). As described in Rule 76 of the RPE, pre-trial disclosure is conditional upon protecting the privacy of victims and witnesses, as well as confidential information as provided in the Statute and Rules 81(2) and (4). Rule 81(2) allows for temporary non-disclosure on the basis that further or ongoing investigations may be jeopardised if information in the possession or control of the prosecutor is disclosed to the Defence. Applications by the Prosecutor under this provision “shall be heard on an *ex-parte* basis by the Chamber.”

Rule 81(4) authorises the Chamber of its own accord or by virtue of an application by the Prosecutor to ensure the confidentiality of information and to protect the safety of victims, witnesses and family members; this includes non-disclosure of their identity prior to trial. However, there is no specific

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38 Article 54(1)

39 Article 67(2)

requirement under Rule 81(4) that applications be heard *ex-parte*.

*Ex-parte* applications are considered exceptional measures which must be justified according to the principle of necessity and proportionality.<sup>40</sup> According to the TC, notification of the use and legal basis for the *ex-parte* procedure must be explained to the other party unless it is inappropriate to do so.<sup>41</sup>

## The Prosecution's Approach to Disclosure

As mentioned previously, the impasse between the VWU and the OTP caused significant delays in the pre-trial and trial proceedings during this reporting period. However, the general approach of the OTP in terms of requesting redactions appeared to exacerbate the situation.

### 1. The timing of the referrals for protective measures

In its *Decision on Protective Measures*, the TC noted that the Prosecution referred a significant number of witnesses to the VWU 'excessively late'. The Chamber opined that if the Prosecution had acted in a timely manner, the disagreements which contributed to the delay in assessment could have been resolved in the latter part of 2007.

The IBA notes that, regardless of the assessment criteria used by the VWU, applications for inclusion in the ICCPP will take time to process. The obligation therefore rests with the referring party to ensure that applications are made in as timely a manner as possible. In the case of referrals by the Prosecution, the final list of applications for redactions cannot be completed until the VWU has made a decision on the status of protective measures which is communicated to the Chambers. This has particularly serious implications for the Defence as it could affect the expeditious conduct of the proceedings. The Prosecution is thus urged to make referrals to the VWU in a timely manner.

### 2. The volume of referrals to the VWU

Ancillary to this issue is the sheer volume of referrals. The Prosecution has referred a large number of its witnesses to the ICCPP. While the precise figure is unavailable due to the confidential nature of these proceedings, the Single Judge of the PTC referred to the number as 'unprecedented'<sup>42</sup>. The process of determining eligibility can be protracted since assessments are typically made on a case by case basis.

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<sup>40</sup> Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute, ICC-01/04-01/06-108, ICC-01/04-01/06-108-Corr – Original 19.05.2006; Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102, 15 May 2006.

<sup>41</sup> See 'Decision on the procedures to be adopted for ex parte proceedings' at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1058-ENG.pdf>

<sup>42</sup> See *Decision on Preventive Relocation*, summarised in Chapter I of this report and accompanying footnote

### *3. The number and extent of redactions sought by the Prosecution and the absence of clear information in the referrals*

The Prosecution tends to request extensive redactions, particularly at the pre-confirmation stage. This creates further delays because it requires permission from the TC to lift redactions authorised under Rule 81(4). The Prosecution itself has admitted to the TC that, given the volume of material and high number of redactions, it was unable to finalise the disclosure process within the stipulated time.<sup>43</sup>

As previously noted, the VWU has also indicated that further delay was caused by the fact that the Prosecution, in some cases, failed to submit sufficient details in its applications. The IBA considers it critical that parties who refer matters to the VWU submit all relevant information in order to expedite the processing of applications. Considering the large number of referrals made by the Prosecution, the IBA urges the Prosecution to provide the VWU with sufficiently detailed information to process the applications.

### *4. The change of approach in the redactions sought*

In the Katanga/Ngudjolo cases, the Single Judge of the PTC noted that the Prosecution requested redactions in the statement of witnesses for whom protective measures had already been implemented. The Judge noted that this was a departure from the Prosecution's approach in the Lubanga case, where the Prosecution did not request any redactions to the statements of witnesses who had been accepted in the Court's protection programme. Consequently, the Single Judge ruled that unless there were compelling reasons to depart from the practice followed by the Chamber in the Lubanga case, the requested redactions would not be authorised.

The IBA recognises that each case must be examined on its own merit and the decision of the Single Judge in the pre-trial phase of the Lubanga case does not set a binding precedent for subsequent cases. However, the IBA considers that in order to ensure consistency, the Prosecution should provide reasons justifying a departure from a previous approach in requesting redactions.

## **The Chambers' approach to interpreting key provisions**

On some issues, the approach taken by the respective Chambers has raised questions, some of which await final determination by the Appeals Chamber. In the Katanga/Ngudjolo cases, applications for redactions and subsequent decisions raised important procedural questions about whether the interpretation of provisions governing disclosure should be guided by a strict/literal or teleological/purposive approach. The main concern expressed by the Defence was that the approach of the PTC appeared to suggest that redactions were becoming the rule rather than the exception.

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<sup>43</sup> See 'Prosecution's Request to Extend the time limit for disclosure' ICC-01/04-01/06-1093 14.12.07 at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1093-ENG.pdf> pg. 3, para 4



### *Literal or purposive approach*

The Single Judge of the PTC in the Katanga/Ngudjolo cases was requested to authorise redactions of the identifying details of a victim from Bogoro, DRC who suffered harm as a result of crimes unrelated to those for which the defendants were charged in order to protect the victim's dignity. The Single Judge determined that, based on the intent of the framers of the Statute in relation to the general protection of victims of sexual crimes within the jurisdiction of the Court, it was appropriate, though only on an exceptional basis, to use a purposive approach in interpreting the relevant legal provisions and to extend the notion of victim under Rule 81(4) to cover alleged victims of sexual offences unrelated to the charges in the case.

The Defence challenged the Single Judge's decision on the basis that an overly broad interpretation of Rule 81(4) could have an effect on fairness of the proceedings allowing redactions to become the rule rather than the exception.<sup>44</sup>

The IBA notes however that the Single Judge has at other times determined that it was more appropriate to utilise a strict approach in the interpretation of Statute provisions. The Single Judge did not accede to the Prosecution's request for redactions for 'innocent third parties' and 'potential prosecution witnesses'.<sup>45</sup> In relation to innocent third parties the Prosecution argued that Rule 81(4) refers to Article 54(3)(f) of the Statute which provides for the protection of 'any person'; consequently, redactions which sought to omit the identifying details of OTP and VWU staff should be validly authorised. The Single Judge did not agree. These matters are now pending determination by the Appeals Chamber.

### *Potentially exculpatory material and Article 67(2)*

The Chambers were faced with a particular challenge regarding the Prosecution's request for redactions to statements or other documents that contain potentially exonerating material. In light of the Statute's absolute requirement that the Prosecution investigate exonerating evidence equally and make such evidence available to the Defence as soon as practicable, any decision by the Chamber to authorise redactions to potentially exculpatory material could be viewed as an abrogation of the rights of the Defence.

Article 67(2) provides for the Prosecution to serve the Defence with potentially exonerating material as soon as practicable. However, challenges arise when the relevant statement or document contains both incriminating as well as potentially exonerating material; or when safety concerns arise for witnesses who provided such statements.

The Defence have argued that while there could justifiably be security concerns for incriminating witnesses that result in the Chamber approving a non-disclosure request, there is little likelihood that the Defence would seek to harm a witness who is expected to provide exonerating evidence. In those circumstances, the Defence advocates that they should be served the unredacted version of the

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<sup>44</sup> See **Defence Application for Leave to Appeal the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9** No:ICC-01/04-01/07-169 29.01.2008 at para. 16.

<sup>45</sup> See **First Decision on the Prosecution Request for Authorisation to Redact Witness Statements (First Decision on Redactions)** referred to in Chapter I of this Report

relevant documents and that the witness' identifying details should be withheld from the public.

In the *Decision on Protective Measures* the TC addressed the issue of the Prosecution's obligation to disclose potentially exculpatory material in circumstances where there are concerns about the safety of witnesses. The Prosecution proposed that the Defence should be furnished with anonymous and extensively edited potentially exculpatory statements and documents.

As an alternative to full disclosure, the majority of judges of the TC proposed that the Prosecution should concede potentially exculpatory elements that may assist the Defence. The Prosecution should serve the Defence with a document setting out the relevant admissions without revealing the identity of the witness or information source.

Judge Blattman in his separate and dissenting opinion strongly disagreed with the majority on this issue. Judge Blattman observed that the decision was made during *ex-parte* proceedings from which the Defence was excluded. Consequently no opportunity was given for the Defence to counter the suggestions advanced by the Chamber. The judge further submitted that by allowing such summary documents, the Defence is prevented from receiving the relevant documents in their original form, and thus limited in their ability to utilise them in a meaningful way to advance their case.

The IBA is concerned that the approach by the majority of the Chamber could adversely affect the right of the defendant to full disclosure of potentially exonerating material. The IBA considers that the use of documents containing concessions made by the Prosecution which do not reveal the identifying details of witnesses could derogate from the right of the defendant to fully investigate and utilise potentially exonerating material.

### **Observations by the IBA**

- The IBA notes with concern that the delay occasioned by the impasse between the OTP and the VWU prevented the respective Chambers from expeditiously considering numerous pending applications for redactions. The IBA considers that the rights of the defendants before the Court who remain in custody have been adversely affected by this untenable situation.
- As previously noted, the Prosecution's failure to make timely referrals to the VWU has contributed to the delays experienced. The IBA recognises that there are particular challenges associated with the protection of witnesses and victims in an ongoing conflict situation. However, the IBA nevertheless urges the Prosecution to ensure that referrals are made in a timely manner and that all relevant details are submitted to the VWU to ensure expeditious consideration. The IBA further urges the Prosecution to ensure that any issues related to disputed applications and disagreements regarding the decisions taken by the VWU are brought to the attention of the respective Chamber without delay.
- The IBA is also concerned that the volume of redactions requested and authorised at the pre-trial stage may create a situation in which the bulk of pre-trial disclosure takes place following the confirmation of charges proceedings. The IBA cautions against transferring the management of the disclosure process to the period following confirmation and prior to the start of trial as

this could create additional delays which adversely affect the expeditiousness and fairness of the proceedings.

- The Prosecution is urged to ensure that there is consistency of approach in the request for redactions and to seriously examine the volume and nature of the redactions sought, to ensure that the process of disclosure does not unnecessarily impede the ability of the Defence to adequately prepare its case. The IBA urges the Chambers, as arbiters of the proceedings, to continue to carefully assess the redactions sought.
- The IBA is concerned that the decision of the majority of the TC regarding the manner in which potentially exonerating evidence of witnesses who may be at risk should be served could potentially affect the fairness of the proceedings by depriving the defendant of the full information necessary to conduct appropriate investigations.



## CHAPTER 5

# The impact of victims' participation on the rights of the Defence

### Background

*'[The] rights of the victims to participate do not overshadow the absolute right of the accused to a fair and impartial trial and this must always be at the forefront of our judicial activity.'*<sup>46</sup>

The ICC's system is a hybrid one that draws on both civil and common law traditions. While victims are generally restricted to the role of witnesses in common law jurisdictions, the civil law system permits them more active participation as civil parties. As expressed in the Preamble of the Statute, the States Parties are "mindful that during this century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." With a new court and a new century, the promise was made that victims would no longer be anonymous silent faces in the background of international trials; they would now have a voice.

Victims' rights in this hybrid system create a number of procedural difficulties as "the ICC Statute does not explain how in concrete terms the participation of the victim can be reconciled with the essentially accusatorial procedure, whereby the trial is conceived as a duel between two adversaries – the Prosecution and the Defence – leaving little room for a third protagonist."<sup>47</sup>

The IBA considers that in order for the ICC to successfully balance the rights of victims and defendants in proceedings before the Court, the respective organs of the ICC must efficiently manage the proceedings. Efficient and effective management of proceedings, resources of the Court and expectations of parties and participants is consistent with Goal 1 of the Court's Strategic Goals and the legal documents of the Court. Consequently, the IBA considers that it is incumbent on all organs of the Court to interpret and implement the Rome Statute, in particular Article 68(3), rules 85 and 89 of the RPE and other legal provisions in a manner that allows for meaningful participation of victims without compromising the rights of accused to fair and expeditious proceedings.

During the period under review both the PTC and TC were extensively engaged in interpreting key legal provisions related to the participation rights of victims. Some of the decisions from the respective Chambers led to conflicting results. A number of issues are now subject to interlocutory appellate review. The IBA is of the view that the priority of Chambers, in particular the Appeals Chamber, must be the resolution of existing procedural uncertainties.

An exhaustive consideration of all issues relevant to victims' participation is outside the remit of this report. The discussion in this chapter will therefore be limited to those aspects of victims' participation which directly impact the rights of the accused.

<sup>46</sup> Dissenting Opinion of Judge Rene Blattman, *Decision on Victims' Participation*, 18 January 2008, ICC-01/04-01/06-1119

<sup>47</sup> C. Jorda and J. de Hempinne, 'The Status and Role of the Victim' in A. Cassese, P. Gaeta and J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, vol. II (OUP, Oxford 2002, 1387 at 1388.

## **A. The Application Process**

Under Rule 89 of the RPE, the application process is the victim's first point of contact with the Court. The IBA considers that the Court's approach to the application process is an important indicator of its ability to effectively balance a victim's right to participate against the rights of the accused to fair and expeditious proceedings. Effective management of the application process is both an administrative and judicial exercise.

### *The administrative component*

The administrative component includes ensuring that application forms are concise, user-friendly and easily accessible to all potential victim applicants and intermediaries in the field; providing clear information about the Court's requirement for proof of harm and proof of identity; and, issuing written guidelines concerning the Court's interaction with intermediaries.

The IBA notes that the application form for victims is a 17 page document that is technical and cumbersome. Victims' rights advocates such as the Victims' Rights Working Group (VRWG) have expressed concern that the document is not user friendly and not readily accessible to persons in the field who have limited technical facilities. Consultations with the Victims Participation and Reparations Section (VPRS), the unit of the Registry responsible for facilitating victims' applications, have indicated that there are plans to amend the application forms. The head of the VPRS noted that recent decisions of the respective Chambers have provided greater clarity regarding, among other things, acceptable proof of identity for potential applicants.

An improved application form will also be important from the Defence perspective, as this may reduce the number of times that the Chamber is required to reconsider applications.

### *Streamlining the role of intermediaries*

The IBA understands that a significant number of the victims are assisted by intermediaries in the field. Intermediaries may be international or local NGOs, other individuals or groups who liaise with victims on behalf of the Court for specific purposes. The IBA is concerned that although intermediaries appear to play a significant role in bridging the gap between the Court and victims, there is no Court-wide protocol governing the Court's interaction with intermediaries. Each organ of the Court appears to have its own system and standards.

It is important for the Court to establish written protocols containing clear guidelines and ethical

standards on the role of intermediaries. A set of guidelines for protecting victims has been prepared by the VRWG<sup>48</sup>. The document informs intermediaries, lawyers and other key stakeholders about the way in which they should interact with victims, highlighting in particular the need for confidentiality, neutrality and accuracy of information. The Office of Public Counsel for Victims (OPCV) is also finalising a manual to guide the legal representatives of victims. The IBA considers that the Court should produce a document as a guideline for intermediaries, which refers to the Court's Strategic Goals and the relevant legal texts. This document must be clear and easy to understand particularly for local NGOs in the field who liaise directly with victims.

### *The judicial component*

Under Rule 89(2) the Chamber may reject an application if it considers that 'a person is not a victim or that the criteria set out in Article 68(3) have not been fulfilled. Rule 89 also allows for the Chambers to issue one decision in respect of a number of applications in order to ensure the effectiveness of the proceedings. The judicial component of the management process includes efforts to reduce the length of time that it takes for applications to be determined following the submission of application forms to the Court; and, most importantly, interpreting the legal provisions governing the application process and the right to participate, in particular Article 68(3) and Rule 89 of the RPE in a manner that provides certainty for the parties and participants.

### *The Chambers' evaluation of applications: Interpretation of Article 68(3) and Rule 89*

In evaluating applications to participate, both the Pre-Trial and Trial Chambers appear to have adopted a two-step approach whereby a general "procedural" status is granted to applicants who meet the requirements of Rule 85. The first step appears to be a determination by the Chambers that an applicant meets the criteria to be considered a victim as provided in Rule 85 of the RPE. In this first step, the Chamber does not require independent evidence to support what a victim has indicated on the application form.

Following initial determination that the applicant meets the criteria of a "victim" for purposes of the proceedings, the Chambers appear to invoke a second step, usually later in the proceedings, which involves a determination as to whether or not the victim's "personal interests" have been affected. If it is determined at that stage that the victim's personal interests have been affected, the victim may present his/her views and concerns in a manner that neither prejudices nor conflicts with the rights of the Defence and the fairness of the proceedings.

Both the OPCD, as well as the Prosecution<sup>49</sup>, challenged the PTC's finding of a general "procedural" status of victim that does not require an initial examination of how the personal interests of the applicants are affected. The main contention of the OPCD was that there were no procedural

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<sup>48</sup> The VRWG 'Guidelines for Protecting Victims is available at <http://www.vrwg.org/Publications/05/GuidelinesForProtectingVictims.pdf>

<sup>49</sup> 'Prosecution's Application for leave to appeal the Single Judge's 24 December 2007 "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo" ICC-01/04-428 (7 January 2008) at para. 16.

safeguards in place at this stage to ensure that the applicants meet the requisite criteria to participate as victims. The absence of these safeguards could result in abusive, fraudulent or false claims and no sanction presently exists for false statements by applicants.

In the *Decision on Victims' Participation*, the TC in the Lubanga case appeared to complicate the process further. The majority of the Chamber decided that following this 'initial determination' that the victim satisfied the Rule 85 criteria, in order to participate at specific stages in the proceedings the victim would be required to make separate written applications showing how or why their personal interests have been affected.

The decision was not clear in terms of exactly how this would be done. The concern that has been raised by parties and participants is that the requirement for separate applications will unnecessarily complicate the process for victims while simultaneously lengthening the proceedings.

## **B. Criteria and Modalities of Participation**

### *Definition of harm*

Pursuant to Rule 85 RPE, applicants need to demonstrate that they "have suffered harm as a result of any crime within the jurisdiction of the Court." Pre-Trial Chamber I has determined that at the investigation stage, Judges do not have to "make a definite determination of the harm suffered by the victims, as this will be determined subsequently, where appropriate, by the Trial Chamber in the context of a case."<sup>50</sup> The Pre-Trial Chamber added that at this stage, the determination of a single instance of harm suffered was sufficient to establish the status of victim. As harm is not defined in the ICC's legal texts, it has been decided by the Pre-Trial Chamber that the term should be interpreted on a case-by-case basis, consistent with internationally recognised human rights.<sup>51</sup> Judges have interpreted it so far as including not only physical but also moral and psychological harm, including emotional suffering due to the death of a family member.<sup>52</sup>

Both the Pre-Trial and Trial Chambers remained consistent in relation to the broad interpretation of harm as provided by Rule 85. The Trial Chamber however went further than the Pre-Trial Chambers and included indirect harm in the species of harm within the Court's jurisdiction.

In its decision of 18 January 2008, Trial Chamber I read Rule 85(a) in parallel with Rule 85(b) and considered that since only Rule 85(b), which deals with legal persons, specifies that "direct harm" has to be demonstrated, natural persons could be direct or indirect victims of a crime.<sup>53</sup> The Trial Chamber adverted to the notion of individual or collective suffering and defined the scope of harm quite widely in keeping with Principle 8 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of*

<sup>50</sup> ICC-01/04-101-tEN at para. 82.

<sup>51</sup> Ibid. at para. 81.

<sup>52</sup> ICC-02/05-111, at para. 30-31 and 'Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation' ICC-01/04-374 (17 August 2007) at para. 25.

<sup>53</sup> ICC-01/04-01/06-1119 at para. 92.



The broad interpretation of “harm” to include moral harm has been challenged by the OPCD in relation to the situations in the DRC and Darfur, Sudan. The OPCD noted that Rule 85, although it does not explicitly exclude it, does not include an explicit reference to moral harm.<sup>55</sup> In the *Lubanga* case, the Defence argued that the notion of “collective suffering” goes against the requirement of Article 68(3) that the victims’ personal interests have to be affected. Victims have to demonstrate personal and direct harm; invoking collective interests amounts to granting victims rights that are not provided for in the ICC’s legal texts, to the disadvantage of the Defence.<sup>56</sup>

### *The causal link between the crime and the harm*

A major area of judicial inconsistency has been the approach of the respective Chambers to the causal nexus between the crime and the harm suffered. At the situation stage, a very broad position was taken by the Pre-Trial Chamber in its decision of 17 January 2006.

The Pre-Trial Chamber ruled that the harm suffered has to result from a crime within the jurisdiction of the Court. This means that the crime needs to be included in the crimes enumerated in Article 5 of the Rome Statute, has to satisfy the requirements of Article 11 related to the temporal jurisdiction of the Court, and must meet one of two conditions of Article 12 in relation to territorial jurisdiction.<sup>57</sup> This broad position reflected the view that victims have a general interest in participating in proceedings before the Court even if an accused has yet to be identified.

However, the Pre-Trial Chambers have applied a more restrictive approach to participation in a case.. At the pre-trial stage of the *Lubanga* case, both the Pre-Trial Chamber in the situation in the DRC and the Pre-Trial Chamber in the situation of Darfur, Sudan determined that applicants must demonstrate a sufficient causal link between the harm suffered and the crimes for which the accused bear criminal responsibility, *and* for which the Chambers have issued an arrest warrant.

However, the Pre-trial Chambers have not all adopted the same position. In cases arising from the situation in Uganda for example, PTC II seems to have adopted a slightly different approach. The Chamber required that in order to participate in the pre-trial phase of a case, an applicant must show that he/she suffered harm as a result of the event constituting a crime within the Court’s jurisdiction.<sup>58</sup>

The TC in the *Lubanga* case took an entirely different approach to the issue. In the *Decision on Victims’ Participation*, the majority of judges determined that in order to participate in the trial

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54 ICC-01/04-01/06-1119 at para. 94. The TC referred to Principle 8 of the *Basic Principles* and stated that “a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights.”

55 ICC-01/04-455 at para. 49.

56 ‘Acte d’appel de la Défense relativement à la Décision du 18 janvier 2008 de la Chambre de première instance I concernant la participation des victimes’ ICC-01/04-01/06-1220 (10 March 2008) at para 19.

57 This definition was adopted by Pre-Trial Chamber I in the situation in the DRC (ICC-01/04-101-tEN at para. 85) and referred to in further decisions.

58 ICC-02/04-01/05-252 at para. 12.

proceedings, victim applicants need only demonstrate that they have suffered harm for a crime within the Court's jurisdiction. The applicants would not have to preliminarily indicate that the harm they suffered resulted from a crime listed in the charges confirmed against Mr. Thomas Lubanga Dyilo.<sup>59</sup>

In his dissenting opinion, Judge Blattmann disagreed and said that the Trial Chamber, in its determination of who is a victim, "has the competency to determine whether a person is a victim only when linked to the facts and circumstances found within the charges presented by the prosecution and confirmed by the Pre-Trial Chamber, and must stay within this framework."<sup>60</sup>

Both the Prosecution and Defence were granted leave to appeal on this issue. The Defence argued that admitting victims who have no link to the charges against the accused would unduly increase the number of persons allowed to participate in the proceedings, thus affecting the right of the defence to fair and expeditious proceedings.<sup>61</sup>

The Prosecution argued that the decision to grant victim status to those suffering harm as a result of "any crime falling within the jurisdiction of the Court" may affect the whole scheme of participation and the fairness and expeditiousness of the proceedings, as well as upset the important balance between victims' right to participate and the right of the accused to a fair trial.

### *IBA observations on the causal link between the crime and the harm*

The IBA considers that the correct interpretation of the causal link between the harm and the crime is critical to the smooth and efficient administration of the proceedings. In our view, effective management of victims' participation within the hybrid legal context of the ICC will be impossible unless this issue is settled definitively.

Prior to the TC's *Decision on Victims' Participation*, the parties and victim applicants or their representatives would have understood that their right to participate in a case was possible only if they could demonstrate that they suffered harm as a result of any of the charges for which the defendant was indicted or which were confirmed.. The defendant also expected to potentially face a small number of victim applicants in addition to victims/witnesses presented by the Prosecution.

The TC's decision departed from this early approach. However, the IBA notes that the TC's ruling is not as broad as first appears. As previously noted, the Chamber grants victims the general right to participate without demonstrating harm linked to the charges against the accused. Nevertheless, the manner of participation is actually limited as victims must demonstrate in separate applications how their personal interests are affected by specific issues or evidence in the case.

The IBA considers that apart from strict interpretations of the relevant legal provisions, the Appeals Chamber faces the much larger challenge of determining what is in the best interest of the parties

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<sup>59</sup> *Ibid* at para. 93.

<sup>60</sup> *Ibid*, Separate and Dissenting Opinion of Judge Blattmann, at para. 16.

<sup>61</sup> 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la «Decision on Victims' Participation» rendue le 18 janvier 2008' ICC-01/04-01/06-1135 (21 January 2008) at para. 30.

and participants first of all, and second, as a matter of policy, what is practical and feasible within the context of the ICC.

The IBA further notes that the definition of what could constitute ‘personal interests’ has still not been settled and has been the subject of different judicial approaches.<sup>62</sup> Clear guidance from the Appeals Chamber could prevent inconsistent judicial approaches in the lower Courts.

### *The procedural rights of victims and modalities of participation*

Two key decisions were delivered by the PTC and the TC: the *Decision on Procedural Rights of Victims at Pre-Trial Stage* issued by the Single Judge of the PTC in the Katanga/Ngudjolo cases, and the *Decision on Victims’ Participation* delivered by the TC in the Lubanga case. Both decisions address in detail the rights of victims to participate at the pre-trial and trial stages of a case and the manner in which the Court would allow them to participate.

The decision of the PTC in particular analyses the concept of victims’ participation within the context of civil law systems at the national level and strongly suggests that as the ICC is a hybrid Court, the notion of victims’ participation should be realised in a meaningful way. The Single Judge in this case clearly indicated that victims should have extensive procedural rights at the pre-trial stage, including the right of access to the case record kept by the Registry which includes evidence filed by the Prosecution and the Defence.

The TC *Decision on Victims’ Participation* granted victims the right to lead evidence, to question witnesses and to challenge the relevance or admissibility of evidence. TC I considered that the right to introduce evidence is not limited to the parties since the Court has the right to request the presentation of “all evidence necessary for the determination of the truth,” pursuant to Article 69(3).

Both the Defence and the Prosecution sought and were granted leave to appeal the TC’s decision on this issue.<sup>63</sup> The Defence opposed giving such a right to victims, arguing that it would force the defendant to face two accusers, which would be inconsistent with the principle of equality of arms.<sup>64</sup> The Legal Representatives for Victims contended that the decision did not grant victims the right to lead evidence pertaining to the guilt or innocence of the accused, as the Defence contended, but to present evidence which leads to a determination of the truth.<sup>65</sup>

### *Anonymous participation of victims*

The TC’s *Decision on Victim’s Participation* does not exclude the participation of anonymous victims in the proceedings. Although recognising that “it is preferable that the identities of the victims

<sup>62</sup> For example, the Pre-Trial Chamber in the decision of 17 January 2006 determined that the personal interests of victims are affected in general at the situation stage. Pre-Trial Chamber II in its decision of 10 August 2007 referred to the protection and privacy of victims themselves and possibly the preservation of evidence. A different construction has been utilised by the Appeals Chamber; see in particular the separate and dissenting opinion of Judge Song –ICC 01/04-01/06-925 at para 28.

<sup>63</sup> ‘Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ participation of 18 January 2008’ ICC-01/04-01/06-1191 (26 February 2008).

<sup>64</sup> ICC-01/04-01/06-1220 at para. 48.

<sup>65</sup> See Corrigendum de la Réponse des Représentants légaux des victimes a/0001/06 à a/0003/06 aux requêtes de la Défense et du procureur sollicitant l’autorisation d’interjeter appel de la décision du 18 janvier 2008, ICC-01/04-01/06-1147-Corr - Original: French at para 20

are disclosed in full to the parties,”<sup>66</sup> the Trial Chamber acknowledged that many victims find themselves in a particularly vulnerable position due to ongoing conflict. It therefore rejected the parties’ submissions that anonymous victims should never be permitted to participate in the proceedings. The Pre-Trial Chamber had previously ruled on requests for anonymous participation in the confirmation of charges proceedings, and determined that if the victims maintained their anonymous status, their participation in the case would be limited to access to public documents, attendance at public hearings and opening and closing statements.<sup>67</sup>

The Defence sought leave to appeal the decision, arguing that principles of fairness of the proceedings and equality of arms require that the accused be informed of the identities of all participants, including victims.<sup>68</sup> Leave to appeal was denied by the TC, although Judge Blattmann, in his dissenting opinion, indicated that the participation of anonymous witnesses could affect the fairness of the proceedings.<sup>69</sup>

### *IBA observations on the procedural rights of victims and the modalities of participation*

The IBA recognises that the precise procedural rights that should be granted to victims and the specific modalities of their participation are matters for the Chamber’s discretion under Article 68(3) of the Statute. Nevertheless, the IBA considers that in interpreting this provision the Chambers must give due regard to the fact that specific procedural rights granted to victims could adversely affect the rights of the defendant.

Regarding anonymous participation by victims, the IBA notes that the majority decision of the TC suggests that careful scrutiny will be made of the precise circumstance of the request for anonymity and the potential prejudice to other parties and participants.

The IBA is nevertheless concerned that anonymous participation in the trial proceedings could put the defendant at a disadvantage. Although the Chamber has determined that the level of anonymity requested will determine the weight attached to the evidence of such witnesses, the IBA notes that the TC did not clearly indicate any distinctions in terms of procedural rights that would be granted to anonymous victims versus those whose identities were revealed.

The IBA recalls the decision of the Trial Chamber in the Blaški case at the ICTY, in which the judges emphasized that protection of victims and witnesses during preliminary proceedings and until a reasonable time before the start of the trial was an essential component of the ICTY Statute and Rules.<sup>70</sup> The judges of that Chamber noted, however, that the defendant’s right thereafter to an equitable trial must take precedence; maintaining anonymity for the media and the public is acceptable, but it should not be allowed when facing the accused.<sup>71</sup>

<sup>66</sup> ICC-01/04-01/06-1119 at para. 130.

<sup>67</sup> ‘Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing’ ICC-01/04-01/06-462 (22 September 2006).

<sup>68</sup> ICC-01/04-01/06-1135 at para. 34.

<sup>69</sup> ICC-01/04-01/06-1191.

<sup>70</sup> See *Prosecutor v. Blaški*, Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, Case No. IT-95-14-T, 5 November 1996 para 24.

<sup>71</sup> *Ibid*

## *Eligibility of the Legal Representatives for Victims (LRVs) and the Office of Public Counsel for Victims (OPCV) to participate in pending appeals*

Another important issue that has created some level of uncertainty is whether or not the LRVs and the OPCV acting as LRV are eligible to participate in appeals on the issue of victims' participation. The matter is important because a number of victims who were granted the right to participate in the situation DRC are now awaiting status determination regarding their applications to participate in the case against Thomas Lubanga. The different criteria used to determine participation rights and the subsequent appeals have left their status unclear. Three categories of persons have sought leave to appeal: i) the legal representatives of victims previously granted victim status in the Lubanga case;<sup>72</sup> ii) the victims who have been granted the right to participate in the DRC situation;<sup>73</sup> and iii) the OPCV on behalf of an unspecified category of applicants.<sup>74</sup>

### *Legal basis for participation by victims at the appellate level*

On 13 February 2008 further to a request for clarification on victims' participation in the pending interlocutory appeals from the Pre-Trial Chamber filed by the OPCV,<sup>75</sup> the Appeals Chamber indicated the legal basis for participation pursuant to Article 82(1) (d) of the Statute:

Victims may participate under Article 82(1) (d) through an application for participation that includes a statement 1) specifying how their personal interests would be affected by the said appeal; 2) explaining why the presentation of their views and concerns would be appropriate at that stage of the proceedings; and 3) showing that such participation would not be inconsistent with the fair trial rights of the accused.

The Chamber's decision is consistent with the previous criteria laid down in relation to interlocutory appeals pursuant to Article 82(1) (b) in the decisions of 13 February 2007<sup>76</sup> and 13 June 2007.<sup>77</sup>

### *Submissions of the Parties*

Both the OPCV, and the previously referred victims applicants, submitted that the personal interests of the victims who have not yet been granted the status of participants in the Lubanga case would be affected by the outcome of the appeal, because the decision will affect the way applications are considered as well as the status of victims themselves. The applicants contend that the submissions by the Prosecutor and the Defence urge the Court to restrict in a substantial way the right of victims

<sup>72</sup> See Réponse du représentant légal de a/0105/06 au requête de la défense et de l'accusation sollicitant autorisation d aller en appel contre la décision du 18 janvier 2008, portant sur mode participation des victimes, ICC-01/04-01/06-1154 - Original : French and Corrigendum de la Réponse des représentants légaux des victimes a/0001/06 à a/0003/06 aux requetes de la Défense et du procureur sollicitant l'autorisation d'interjeter appel de la décision du 18 janvier 2008, ICC-01/04-01/06-1147-Corr - Original: French

<sup>73</sup> See Application for Participation Filed by Victims a/0009/06, a/0106/06, a/0107/06, a/0108/06 Seeking Leave to Participate in the Appeals Proceedings against the Decision issued on 18 January 2008 by Trial Chamber I, at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1241-t-ENG.pdf>

<sup>74</sup> See Request of the OPCV Acting as Legal Representative of the Applicants in the Lubanga Case for Participation in the Interlocutory Appeals against Trial Chamber's I Decision dated 18 January 2008, ICC-01/04-01/06-1228 - Original: English

<sup>75</sup> Ibid

<sup>76</sup> See Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" ICC-01/04-01/06-824 - Original: English

<sup>77</sup> See Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007 ICC-01/04-01/06-925 - Original: English

to participate in proceedings, contrary to the founding documents of the Court.

The Prosecution and Defence opposed the applications for leave to participate in the appeal by the OPCV and the victims not yet granted status to participate in the case on the basis that they had no legal standing to participate in the appeals having not been granted participant status in the case. The Defence made no submissions regarding the participation of the applicants previously granted participant status in the case. The Prosecution was not opposed to the participation of those applicants.

### *The expeditious consideration of pending appeals*

The final observations regarding the right of the previously referred participants to be involved in the appeal were filed on 7 April 2008. The Prosecutor urged the Appeals Chamber, in light of the impending trial date of 23 June 2008, to ensure that any victims granted the right to participate in the Appeal present their observations on an expedited basis. To this end, the Prosecution implored the Chamber to give a short time limit within which eligible victim participants could file their observations.

Up to the 15<sup>th</sup> of May 2008 the Appeals Chamber still had not handed down a decision as to whether victims would be allowed to participate in the proceedings. If allowed to participate victims must be given adequate time within which to file observations, and the Prosecution and Defence must also be given time to respond to those observations.

The IBA is concerned that the delay in making a preliminary determination as to whether to allow victims to participate in the appeal, which in our view is a pre-requisite to considering the substantive issues, could result in a delay in delivery of the final decision. If this situation is not addressed, it is very likely that the trial of Thomas Lubanga Dyilo will again be postponed. The IBA considers that expeditious decisions on these issues would provide a greater degree of certainty for the parties and participants involved in the matter.

The IBA recognizes that the novelty and complexity of the issues involved do not lend themselves to expeditious resolution. However, the IBA submits that the Appeals Chambers' preliminary rulings on the issue of participant eligibility may provide some indication as to a possible timetable within which the substantive issues may be finally considered and determined. Additionally, the IBA considers that consolidated appeals of related issues would ensure that matters are expeditiously addressed.

### **Managing expectations**

An important component of the right of victims to participate in proceedings before the ICC is the right to be informed about developments in the proceedings and of any reasons for delay.

The VPRS has produced an informative booklet to help victims through the application process. The booklet is available for download on the Court's website. Victims without Internet access may request that a hard copy be sent by post.

The booklet indicates that victims are informed about the progress of their application at different stages of the proceedings. The IBA is concerned that the booklet mentions only briefly the fair trial rights of the accused; there is neither a section dedicated to informing victims about the rights of accused, nor is the issue comprehensively addressed.

The IBA considers that such information would be useful in helping victims understand that other parties have rights which must be respected by the Court, and that balancing these rights can affect the pace of the proceedings. The IBA therefore urges the VPRS to consider placing in the victims' application booklet a separate paragraph specifically addressing the rights of Defence and how they can affect both the pace of proceedings and the rights of victims.

## **Managing Resources**

The participation of victims in the proceedings before the Court will have an impact on the Court's budget. This is an expense that is expected and all necessary resources should be found to ensure that this right is meaningfully realised.

However, it must be noted that the manner in which victims' may be allowed to participate could also have implications for the defence's human and financial resources. For example, depending on the number of victims authorised to participate in the proceedings, even if victims are represented by a common legal representative, the defence team could be required to face several litigants in addition to the prosecution. In the Katanga/Ngudjolo cases for example, although the date for the confirmation of charges proceedings is imminent, a considerable amount of time and attention has to be expended in responding to filings and observations by the Prosecution and victims legal representatives.

In addition, there are practical challenges. The legal aid programme of the Court allows for a limited budget for investigations. Granting victims the right to call witnesses could present significant challenges for the management of the defence's budget, as the defence would be required to conduct investigations in relation to victims and prosecution witnesses. The IBA recognises that victims' legal representatives also face challenges under the current legal aid system of the Court, in that, legal aid is not available during the applications phase of a case and determination of eligibility for legal aid is at the discretion of the Registrar.

It is therefore important that as the Court engages in the process of developing the normative standards governing the schematic framework for victims' participation, that it takes into account all possible implications of both administrative and judicial decisions in this regard.





## Chapter 6

# General Conclusions and Observations

The issue of balancing rights is a major challenge for the ICC at this stage in its development. The interpretation of legal provisions governing the participation rights of victims vis-à-vis the fair trial rights of the defendant has posed tremendous difficulties for judges, parties and participants, and the issue remains unsettled. The lower Chambers await the rulings of the Appeals Chamber to provide needed clarity and procedural consistency. Unfortunately, the number of pending interlocutory appeals has been unprecedented. This also raises issues as to the capacity of the Appeals Chamber to deal with the sheer volume of pending appeals.

During the pre-trial phase of the Lubanga case, the judges were reticent to allow interlocutory appellate review. The climate has since changed and the issues are more complex with potentially long-term implications. For the thousands of victims who wish to participate in the proceedings, clarity is urgently required to ensure the meaningful exercise of participation rights. For the defendant, it is critical that the determination of the modalities of victim participation does not cause extensive delays in the proceedings.

The protection of victims and witnesses is obviously an urgent priority of the ICC. Yet one major problem highlighted in this report concerns the determination of victim status and the different approach to risk assessment taken by two key organs of the Court. Inconsistency of approach leads to lack of confidence in the Court, and tensions between important stakeholders could result in the loss of witnesses. Moreover, the problems related to protection notably affect the process of disclosure by prolonging the time required to make final assessments regarding redactions. These issues must be resolved in a timely manner.

The IBA notes that the Court is engaged in a critical standard setting phase of its existence. Critics of the Court suggest that, despite a record number of filings in the last six months, the Court has accomplished very little. Three suspects are in custody, one for almost two years and no trial has thus far commenced. Given the procedural challenges faced by the Court, including the number of pending appeals, it is likely that the trial of Thomas Lubanga Dyilo, the first suspect tried before the ICC, will again be delayed.

The IBA is concerned that the pace of the ICC proceedings is too slow. The IBA considers it critical that while standards are being set and procedure is being worked out, every effort is made to prevent further postponement of the pending trial and confirmation proceedings.

### **Victims' participation**

1. The IBA recognises that the discrete positions taken on the issue of the application process and the procedural status of victim, the causal nexus between the harm and the crime and the modalities of participation reflect firstly that careful and reasoned arguments have been made by the parties and participants; and secondly, that significant judicial thought has been given to

the issues under consideration.

2. The IBA also recognises the challenges being faced by the respective Chambers in foraging through essentially uncharted waters in working to actualize the vision of the drafters of the Rome Statute who granted victims the right to independently and actively participate in primarily adversarial proceedings. This process has however resulted in inconsistent decisions being delivered by different Chambers in respect of the same issues.
3. The IBA is cognizant of the fact that the mere right to participate inevitably increases the number of issues to be litigated and potentially delays the proceedings. The responsibility therefore lies with the respective Chambers to ensure that the timing and modalities of a victim's request to participate do not interfere with the statutory rights of the accused.
4. The IBA however welcomes the decision of the PTC and TC to grant leave to appeal a number of important issues that need to be settled including:
  - the right of victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility and relevance of evidence;
  - whether the harm alleged by a victim and the concept of 'personal interests' under Article 68(3) of the Rome Statute must be linked with the charges against the accused;
  - whether the victims' personal interests are generally affected by the situation and case stage of the proceedings thus precluding a case-by-case determination by the judge;
  - and, whether the applications process is a limited, separate and distinct procedure not related to criminal proceedings before the Court and therefore not prejudicial to the defence.
5. The IBA considers that the resolution of these issues by the Appeals Chamber will bring much needed clarity and certainty to the PTC and TC as well as the parties and participants.
6. Regrettably, the Appeals Chamber is yet to deliver final judgment in a number of pending appeals. In the Lubanga case for example, it was not until the 16th of May 2008 that a decision was made allowing three victims to participate in the appeals. On the 22nd of May the Appeals Chamber decided that some aspects of the appeal in the Lubanga case would have suspensive effect. This decision may have the effect of further delaying the start of the trial as it means that the TC cannot decide on the participation rights of some pending victim applicants until the Appeals Chambers delivers a final judgment.<sup>78</sup>.
7. The IBA considers that a consolidation of the appeals on victims' participation by the Appeals Chamber would assist in the expeditious resolution of the outstanding matters.
8. The IBA notes that the lack of certainty regarding the interpretation of procedural and substantive issues on victims' participation before the Court has also delayed the completion of

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<sup>78</sup> During a hearing on 13 February 2008, the Trial Chamber proposed to the parties and participants that it would continue the preparation for the trial while awaiting the decision of the Appeals Chamber. No one opposed the suggestion. The Chamber indicated that it would consider those pending applications where the victims had suffered harm as a result of the crimes charged against the accused.

a court wide strategy document on victims. The development of a victims' strategy was initiated by the Registry in response to concerns raised during the fifth session of the Assembly of States Parties (ASP) that the Court's Strategic Plan did not have a clearly articulated victims' strategy. Resolution ASP/5/Res.2 was adopted encouraging the Court to continue its dialogue with the Bureau of the ASP and to focus on the concrete implementation of the Strategic Plan of the Court, including the position of victims and the outreach and communication activities of the Court.

9. The IBA also observes that despite the important liaison role played by intermediaries, there is no written court wide protocol governing the way in which the Court interacts with intermediaries. The IBA considers that it is important for issues related to the role, mandate and security of intermediaries who provide a link between victims and the court to be the subject of a court wide policy document.
10. Finally, as the procedural framework governing victims' rights is decided, consideration should be given to the practical impact on the human and financial resources of the Defence. The Defence team has a limited budget for investigations; any requirement to investigate evidence other than that which is presented by the Prosecution could present significant challenges for the Defence.

### **Victim and witness protection**

11. Regarding the protection of victims: The IBA is concerned that the TC's decision that the Victims and Witnesses Unit (VWU) of the Registry is responsible for the protection of victims from the time they lodge an application to participate in the proceedings may unduly tax the Unit's budgetary and human resources. The IBA is of the view that the Unit's capacity will be significantly stretched, particularly as the VWU has received a large number of requests from the Prosecution for the protection of witnesses.
12. The IBA is particularly concerned about the impasse between the VWU and the OTP concerning the protection of witnesses. The IBA notes that the VWU has set a high standard for assessing whether persons are eligible to be included in the Court's protection programme. The Prosecution, on the other hand, asserts that the standard should be lower and that victims/witnesses should not have to accept any risk as a result of their decision to appear before the Court.
13. The IBA recognises that it is within the discretion of the Registrar to change the approach used for assessing eligibility for inclusion in the Court's protection programme. However, it is unclear how and when this change of approach was made and whether this was communicated to all organs of the Court and to all parties and participants, including the Defence. The IBA notes that in order to ensure transparency and provide certainty for all parties and participants, it is important that any changes be communicated in a timely manner to all parties and participants.

14. The IBA is also concerned that the decisions of the PTC and TC on the matter of witness protection appear to suggest that there was insufficient communication between the Prosecution and the VWU. It is not clear at what stage in the proceedings the Prosecution was made aware of a change of approach to the assessment criteria and whether the latter acted in a timely manner once that information was received. The IBA notes in particular the observations made by the majority judges of the TC in the Decision on Protective Measures, namely that in the impasse between the VWU and the OTP, the Chamber's intervention was sought at a very late stage.
15. The IBA notes that the Prosecution decided to preventively relocate a few of its witnesses who had been refused inclusion into the Court's protection programme by the VWU. The Prosecution justifies its action on the basis of its general responsibility to protect witnesses under Article 68(1) of the Statute. The Pre-Trial Chamber denounced this practice as being contrary to the mandate of the Prosecution. The majority of the judges of the Trial Chamber have however implicitly determined that the Prosecution can make alternate arrangements to protect its witnesses following a refusal by the VWU.
16. The IBA considers that since the Registry as a neutral organ has been entrusted with the responsibility under the Statute to manage the Court's protection programme, alternate protection mechanisms by other organs of the Court or referring parties could potentially discredit the programme. In light of the markedly different positions on this important issue, the IBA considers that the matter should be urgently resolved.
17. The IBA notes further that all of the issues related to the conflict between the VWU and the OTP were discussed in ex-parte closed sessions. While the Chambers may have thought it necessary to address the criteria for inclusion and other confidential issues during closed sessions, the IBA considers that the other parties and participants should have been allowed to participate in a general discussion about the respective roles and mandate of the VWU and the OTP concerning witness protection. It is important that any departure from previously determined standards be the subject of rigorous debate by all parties.

### **The impact of witness protection on disclosure**

18. The IBA notes with concern that the delay occasioned by the impasse between the OTP and the VWU prevented the respective Chambers from expeditiously considering numerous applications for redactions that were pending for some time. The IBA considers that the rights of the defendants before the Court who remain in custody have been adversely affected by this untenable situation.
19. The IBA is concerned that the Prosecution's failure to make timely referrals to the VWU has greatly contributed to the delay that has been experienced. The IBA recognises that there are particular challenges associated with the protection of witnesses and victims in an ongoing conflict situation. However, the IBA nevertheless urges the Prosecution to ensure that referrals

are made in a timely manner and that all relevant details are submitted to the VWU, to ensure expeditious consideration of the requests.

20. The IBA is also concerned that the volume of redactions requested and authorised at the pre-trial stage may create a situation where the bulk of pre-trial disclosure takes place following the confirmation of charges proceedings. The IBA cautions against transferring the management of the disclosure process to the period following confirmation and prior to the start of trial as this could create additional delays which adversely impact the expeditiousness and fairness of the proceedings.
21. The IBA therefore urges the Prosecution to seriously examine the volume and nature of the redactions sought pursuant to Rule 81(2) and (4) to ensure that the process of disclosure does not unnecessarily impede the ability of the Defence to adequately prepare its case and the fairness of the proceedings. In this respect we urge the Chambers as the arbiters of the proceedings to continue to carefully assess the redactions sought.
22. The IBA considers that the approach of the majority of the TC in relation to the manner in which potentially exonerating evidence of witnesses who may be at risk should be served could potentially affect the fairness of the proceedings by depriving the defendant of the full information necessary to conduct appropriate investigations.

## **Recommendations**

23. To ensure judicial consistency and procedural certainty, all outstanding issues regarding victims' participation should be expeditiously resolved. As submitted by the Prosecution in the Lubanga case, 'the challenge to the Court at this early stage is to apply this innovative framework in each case in a consistent manner, avoiding such varying criteria so as to create a general uncertainty for the victims and other participants.'<sup>79</sup>
24. The IBA considers that as different organs of the Court often rely on intermediaries in the field to liaise with victims, it is imperative that a set of guidelines consistent with the governing legal documents of the Court be drafted. These guidelines should cover the role and security of intermediaries.
25. The IBA considers that the Victims' Participation and Reparations Section of the Registry (VPRS), the Office of the Public Counsel for Victims (OPCV) and the Legal representatives for Victims (LRVs) should ensure that victims are adequately informed about the rights of the Defence and the reasons for any delay in the proceedings. The IBA urges the VPRS in particular to consider placing in the victims' applications booklet a separate paragraph explaining the rights of the Defence and how these can affect the pace of the proceedings and the way in which victims will be allowed to exercise their rights.

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<sup>79</sup> See the Prosecution's Application for Leave to Appeal Trial Chamber I's 18 January 2008 Decision on Victims' participation, ICC-01/04-01/06-1136, 28 January 2008 at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1136-ENG.pdf>.

26. The IBA urges the Court to resolve the current impasse between the VWU and the OTP concerning the protection of witnesses. The credibility of the Court requires that its protection programme is neutrally administered and there is certainty about the criteria for inclusion into the programme.
27. The IBA urges the VWU to ensure that any change of approach to the criteria for inclusion into the protection programme of the Court, is communicated to all parties and participants in a timely manner.
28. The IBA urges the Prosecution to ensure that referrals to the VWU are made in a timely manner and all relevant information is supplied. This will expedite the processing of applications and prevent delays in the consideration of requests for inclusion into the Court's protection programme. Further, the IBA urges the Prosecution to ensure that there is consistency in its approach to requesting redactions on the basis of a need to protect witnesses.
29. The IBA further encourages the Prosecution to ensure that any issues related to disputed applications and disagreements regarding the decisions taken by the VWU are brought to the attention of the respective Chamber without delay.

## ANNEX I

# Parameters for IBA Monitoring of the International Criminal Court

The International Bar Association (IBA) has received a grant from the MacArthur Foundation for an ICC Monitoring and Outreach Programme. The IBA will use its unique position to support, promote and disseminate information about the International Criminal Court via its network of over 195 professional legal organisations and 30,000 individual members.

The IBA is aware of the complexity of the task facing the ICC in creating a new model for international criminal justice, and of the high expectations under which it is operating. While at all times preserving its objectivity, the IBA will maintain close contact with the divisions of the Court. Where appropriate, it will seek the Court's views and also provide information, from its monitoring and outreach activities, which may be helpful to the divisions of the Court. In addition the IBA will seek input and provide information about its monitoring activities to the general public, in particular those affected by conflicts in countries which are the subject of ICC investigations. Below is a description of some parameters which the IBA will refer to when implementing the monitoring aspect of the project.

The IBA's monitoring of both the work and proceedings of the Court will focus in particular on issues affecting the fair trial rights of the accused. The basic rights of the accused have been well established in different international instruments (specifically the International Covenant on Civil and Political Rights), in addition to case law derived from international human rights commissions and courts. The IBA will assess ICC pre-trial and trial proceedings, the implementation of the 1998 Rome Statute, the Rules of Procedure and Evidence, and related ICC documents in the context of relevant international standards.

In conducting its work, the IBA will also refer to internationally accepted principles enshrined in various UN and other instruments (such as the 1990 United Nations Guidelines on the Role of Prosecutors, the 1985 Basic Principles on the Independence of the Judiciary and the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power).

With regard to fair trial rights the IBA will take into account specifically:

- the right to be tried by a competent, independent and impartial tribunal
- the right to a public hearing
- the presumption of innocence
- the right to legal counsel
- the right to be present at the trial
- the right to equality of arms

- the right to have adequate time and facilities to prepare a defence
- the right to call and examine witnesses
- the right not to be compelled to testify against oneself
- the right to be tried without undue delay

The IBA's monitoring work will not be limited to pre-trial and trial proceedings per se, but may also include ad hoc evaluations of legal, administrative and institutional issues which could potentially affect the impartiality of proceedings and the development of international justice.

The IBA will monitor any significant developments in international humanitarian and human rights law, as well as international criminal law and procedure, which may result from the Court's activities.



## ANNEX II

# Breakdown of filings and decisions before the ICC between 1 November 2007 and 22 May 2008

Index- reporting Period 1 November 2007 to 22 May 2008	Total number of Public Filings and decisions in the cases and situations
Total number of public filings and decisions before ICC during reporting period	683
Total number of filings and decisions in Lubanga case	225
Total number of filings and decisions delivered in the cases of Ngudjolo/Katanga	376
Total number of filings and decisions delivered in DRC situation	81
Total number of filings and decisions in Uganda and Darfur, Sudan situations and cases	64
Total number of interlocutory Appeals Pending before Appeals Chamber	8
Total number of decisions of Appeals Chamber	1
Total Number of filings and decisions related to victims	123
Total number of filings and decisions related to disclosure	190



## ANNEX III

# Number of Victims authorized to participate in proceedings to May 2008

Victims authorized to participate in proceedings - total	228
DRC situation	135
Lubanga case	4
Case of Katanga, Ngudjolu	55
Case of Kony et al	14
Uganda situation	9
Darfur situation	11
In the case of Harun, Kushayb	0
in the CAR situation	0



# ANNEX IV

## Key Legal Provisions referred to in the Report

### Witness Protection

#### Rome Statute

##### Article 68

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in Article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in Article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in Article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

##### Article 43(6)

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements,

counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

## **Regulations of the Registry**

### *Regulation 96*

1. The Registry shall take all necessary measures to maintain a protection programme for witnesses, including accompanying support persons, and others considered to be at risk on account of a testimony given by such witnesses or as a result of their contact with the Court.
2. An application for inclusion in the programme may be filed by the Prosecutor or by Counsel.

## **Article 57 (3) (c)**

### *Obligations of the Pre-Trial Chamber*

In addition to its other functions under this Statute, the Pre-Trial Chamber may:

Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information.

## **Article 54 (3) (f)**

### *Duties and powers of the Prosecution with respect to investigations*

The Prosecutor may:

Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

## **Victims' Participation**

### **Rome Statute**

#### **Article 68(3)**

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

## **Rules of Procedure and Evidence**

### **Rule 85**

#### *Definition of victim*

For the purposes of the Statute and the Rules of Procedure and Evidence:

- (a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

### **Rule 89(1)**

#### *Application for participation of victims in the proceedings*

In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular Article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the Defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

## **Regulations of the Court**

### **Regulation 86**

#### *Participation of victims in the proceedings under rule 89*

1. For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, subregulation 2. These standard forms shall, to the extent possible, be made available to victims, groups of victims, or intergovernmental and nongovernmental organizations, which may assist in their dissemination, as widely as possible. These standard forms shall, to the extent possible, be used by victims.

## **Rule 90**

### *Legal representatives of victims*

1. A victim shall be free to choose a legal representative.
2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, inter alia, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

## **Regulations of the Court**

### **Regulation 81**

#### *Office of Public Counsel for victims*

1. The Registrar shall establish and develop an Office of Public Counsel for victims for the purpose of providing assistance as described in sub-regulation 4.
4. The Office of Public Counsel for victims 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.

## **Rights of the Accused**

### **Rome Statute**

#### **Article 66**

##### *Presumption of innocence*

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.



## **Article 67**

### *Rights of the accused*

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
  - (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
  - (c) To be tried without undue delay.

## **Article 67(2)**

### *Right to exculpatory evidence*

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the Defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

## **Regulations of the Court**

### **Regulation 77**

#### *Office of Public Counsel for the Defence*

1. The Registrar shall establish and develop an Office of Public Counsel for the Defence for the purpose of providing assistance as described in sub-regulations 4 and 5.
4. The tasks of the Office of Public Counsel for the Defence shall include representing and protecting the rights of the Defence during the initial stages of the investigation, in particular for the application of Article 56, paragraph 2 (d), and rule 47, sub-rule 2.
5. The Office of Public Counsel for the Defence shall also provide 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.

## **Conduct of fair and expeditious proceedings**

### **Rome Statute**

#### **Article 64(2)**

##### *Obligations of the Trial Chamber*

The Trial Chamber shall ensure that a 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.

## **Disclosure**

### **Rome Statute**

#### **Article 64(3c)**

Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

- (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

## **Rules of Procedure and Evidence**

### **Rule 84**

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with Article 64, paragraphs 3 (c) and 6 (d), and Article 67, paragraph (2), and subject to Article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

### **Rule 76**

#### *Pre-trial disclosure relating to prosecution witnesses*

1. The Prosecutor shall provide the Defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

## **Rule 81**

### *Restrictions on disclosure*

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the Defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
  
4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with Articles 54, 72 and 93, and, in accordance with Article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.