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IBA/ICC Monitoring and Outreach Programme



The ICC's trials: an examination of key judicial developments at the International Criminal Court between November 2009 and April 2010

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List of Abbreviations

AC	Appeals Chamber
ASP	Assembly of States Parties
CAR	Central African Republic
CBF	Committee on Budget and Finance
CSS	Counsel Support Section
DRC	Democratic Republic of Congo
FARDC	<i>Forces Armées de la République Démocratique du Congo</i>
FPLC	<i>Forces Patriotiques pour la libération du Congo</i>
FRPI	<i>Force de résistance patriotique en Ituri</i>
IBA	International Bar Association
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ID	Investigations Division
JCCD	Jurisdiction, Complementarity and Cooperation Division
MLC	<i>Mouvement de Libération du Congo</i>
NGO	Non-governmental organisations
ODM	Orange Democratic Movement
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PD	Prosecution Division
PIDS	Public Information and Documentation Section
PNU	Party of National Unity
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
TC	Trial Chamber
TFV	Trust Fund for Victims
TJRC	Truth, Justice and Reconciliation Commission
UPC	<i>Union des Patriotes Congolais</i>
VRWG	Victims' Rights Working Group

Since 2005, the International Bar Association (IBA) has initiated high-level monitoring and consultation on the work and proceedings of the International Criminal Court (ICC) under a MacArthur Foundation-funded Monitoring and Outreach Programme. The parameters of the monitoring component of the programme focus primarily on the fair trial rights of defendants before the Court; the interpretation and implementation of the Rome Statute, Rules of Procedure and Evidence and Regulations of the Court; and the manner in which different organs of the Court fulfil their functions under the Court's legal regime.

This eighth monitoring report assesses key judicial developments at the ICC between November 2009 and 5 April 2010. The report examines the cases of Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui, and Jean Pierre Bemba Gombo – the three cases currently at the trial phase of proceedings at the ICC. In addition, the report discusses the case of Mr Bahr Idriss Abu Garda and the situation in Kenya. Five key issues are closely analysed: investigations by the Prosecutor; the situation in Kenya; the role of intermediaries; defence disclosure; and funding the defence.

Significant findings

In general, the IBA considers that a number of unanswered questions remain concerning very important issues at the ICC; most notably in respect of the Investigations Division (ID) of the Office of the Prosecutor (OTP) and the Court's relationship with intermediaries. Intermediaries generally include local non-governmental organisations (NGOs) or grassroots associations, individuals or any other associations or groupings which in some way link the ICC (including the Trust Fund for Victims) to its constituents (victims, witnesses or others) or legal representatives to their clients in remote areas. Presently, the Court's relationship with intermediaries and its obligation towards them is unclear and requires urgent review.

Investigations

The judges' dismissal of the *Abu Garda* case on the basis of weak, inadequate and insufficient evidence raises serious questions concerning the organisation, capacity and strategy of the ID of the OTP. Despite the existence of several detailed policy documents concerning the OTP's operations, there is very little publicly-available information concerning its approach to investigations. It is not expected that the OTP will reveal details of its internal operational

strategy for investigations that could compromise its operations or put staff or informants at risk; however, in the interest of transparency, it would be useful for the Office to provide more information about the way investigations are organised and conducted. The OTP should urgently aim to finalise its internal operational manual, and make non-confidential portions of this document public.

Intermediaries

The IBA considers that it is time for the Court to streamline its policy and practice with intermediaries. Intermediaries play an important role in supporting the work of the Court, including through facilitating investigations, which entails significant risk for these individuals and organisations. The role and status of intermediaries at the Court has become a major issue in the *Lubanga* case. The defence contends that intermediaries acting on the prosecution's behalf coerced or bribed a number of witnesses to testify against Mr Lubanga.

The developments in the *Lubanga* case point to a broader systemic problem at the Court. A number of organs – the OTP, Victims' Trust Fund and Victims' Participation and Reparations Section, among others – rely significantly on intermediaries as part of their operations, yet none of these organs has a publicly-available policy document detailing the nature of and standards governing this relationship. This is particularly worrying in the case of the OTP, which admits to relying on intermediaries as part of its investigations strategy. In light of the need for transparency and openness on the part of the Court's organs, urgent consideration must be given to finalising a publicly-available policy document concerning the Court's relationship with intermediaries.

The Kenya situation

The IBA welcomes the decision of the Pre-Trial Chamber authorising the Prosecutor to commence investigations in Kenya. The Kenyan situation is multi-faceted and careful attention must be paid to the protection of witnesses and victims. Importantly, the international community will be carefully scrutinising whether the expressed commitment by the Kenyan Government to cooperate with the ICC is more than mere words. Clear indicators will include the government's efforts to fully streamline and implement its Witness Protection Act and efforts to prosecute mid- to lower-level alleged perpetrators, who may fall below the ICC's radar. The IBA welcomes the decision of the OTP to

adopt a parallel approach to investigations in Kenya (investigating all sides and relevant parties to the conflict simultaneously) rather than a sequenced approach as was done in relation to other situations before the Court. Given the particular nature of the Kenyan conflict, the IBA considers that this is the most efficient way to approach the Kenyan situation.

Translation and interpretation challenges

The IBA notes that both the *Lubanga* and *Katanga/Ngudjolo* trials continue to be affected by problems of translation and interpretation. Of the two, the *Lubanga* case appears to be experiencing greater challenges. The judges in *Lubanga* have issued a directive on how disputed interpretation issues should be addressed. The interpretation challenges have led to the continued slow pace at which transcripts are finalised and made publicly available on the Court's website.

Closed session hearings

Closed session hearings remain a feature of both trial proceedings. Of the 28 witnesses who testified for the prosecution in the *Lubanga* case, 22 testified with some form of protective measures (such as face or voice distortion, concealment of their identity and some/all of their testimony in closed sessions). This trend regarding closed session hearings has continued with the defence case. The result is that, to many observers, aspects of the cases being tried appear to be shrouded in secrecy.

Funding the defence

The IBA welcomes the decision of the trial judges in the *Bemba* case to order the ICC Registrar to advance a monthly sum to the defence, retroactive to March 2009, to cover long outstanding legal fees. The Registrar had previously determined that Mr Bemba was not indigent and thus did not qualify for funds under the Court's legal aid scheme. The Court had ordered the freezing of accounts and subsequent efforts to lift the freezing order in respect of one account to allow him to meet legal and family obligations had been unduly protracted. The judges made it clear that as a condition of the decision Mr Bemba was to provide an undertaking to reimburse the monies advanced and the Registrar was to register a lien against the relevant account.

The judges' decision was clearly aimed at addressing what was quickly becoming an untenable situation, particularly for defence counsel. The IBA considers that the decision was a pragmatic one which reflects a staunch commitment to safeguarding the fair trial rights of the accused, in particular, the right to an effective defence.

More generally, the *Bemba* decision makes extensive reference to a number of important reports about the Court's legal aid scheme that were produced by the Registry. Regrettably, these reports are not easily accessed from the Court's website as they are normally posted to the documentation pages of the Assembly of States Party's website rather than the Registry section of the ICC's website. The IBA encourages the Registry to upload the relevant legal aid reports to the Counsel pages of the Registry section of the ICC website. Indeed, a more practical solution would be for the Registry to prepare as soon as possible a comprehensive, consolidated document on legal aid, which is made publicly accessible from the same location.

IBA recommendations

To all organs of the ICC

1. The ICC is encouraged to urgently streamline its interaction with intermediaries. The increased litigation on this issue may provide much-needed clarity on certain aspects of the Court's relationship with intermediaries which should help to guide policy decisions. As soon as it is practicable, a court-wide policy document on intermediaries should be finalised.

To the Chambers

2. While mindful of the Court's obligations to protect witnesses under Article 68 of the Statute, the IBA continues to urge the ICC Trial Chambers to limit the number of closed session hearings to those that are strictly necessary for the protection of witnesses or confidential information.
3. The Chambers are urged to ensure that, during the transition from closed to open session, sufficient information is provided in order to ensure that the public is able to keep abreast of the evidence as it unfolds. For example, if a witness completes his or her testimony in closed session an announcement to that effect should take place in open session before proceedings are adjourned.
4. While acknowledging the important need for judges at the Court to efficiently manage trial proceedings, the IBA encourages the Chambers to ensure that disclosure obligations imposed on the defence pursuant to Rules 78 and 79 of the Rules of Procedure and Evidence do not go beyond the limited scope envisaged by those provisions, nor infringe the defendant's right to silence and non-self-incrimination.
5. Where applicable, the Trial Chamber – provided the statutory requirements for granting interlocutory appeal are met – should allow the Appeals Chamber to render a definitive decision on the issue of defence disclosure that will provide jurisprudential certainty.

To the OTP

6. The OTP is urged to reinforce the leadership of the Investigations Division. This should begin with the appointment of a Deputy Prosecutor in charge of investigations.

7. In general, the OTP is urged to address what appear to be gaps in the organisation, capacity and strategy of the Investigations Division as soon as possible.
8. In order to build public confidence in its investigations and in the interest of transparency, the OTP is encouraged to publish non-confidential portions of its Operational Manual, in particular sections concerning investigations, once finalised.
9. The OTP is urged to publish a separate document (similar to the OTP's Victims' Strategy paper) outlining the policy, guidelines and protocols governing its relationship with intermediaries.

To the Registry

10. The Registry is encouraged to upload all the relevant legal aid reports to the counsel page under the Registry section of the ICC website. Indeed, other thematic reports such as family visits for indigent detainees should also be uploaded to this page.
11. In addition, the IBA urges the Registrar to publish a comprehensive document on legal aid as soon as possible. The document could be an interim policy paper which is finalised once the Court has completed the full cycle of its first trial.

To the Kenyan Government

12. The Kenyan Government is strongly encouraged to fully cooperate with the ICC Prosecutor during his investigations, in particular by facilitating the timely surrender of any person who is identified by the Court as a possible suspect. Such person should be afforded the full guarantees of suspected persons under the Rome Statute and recognised in international law.
13. The Kenyan Government must take definitive steps to fully streamline and implement its Witness Protection Act and to ensure the safety and security of persons who cooperate with the ICC as victims or witnesses.
14. The Kenyan Government is urged to make efforts to complement the work of the ICC by ensuring that mid- and lower-level perpetrators are held accountable through prosecutions at the national level.

About the 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 monitoring component follows and reports on the work and proceedings of the ICC. The outreach component of the programme works in partnership with bar associations, lawyers and civil society organisations disseminating information and promoting debate on the ICC in different jurisdictions across the globe.

IBA parameters for monitoring the ICC

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 also assesses ICC pre-trial and trial proceedings, the implementation of the 1998 Rome Statute, the Rules of Procedure and Evidence (RPE), and related ICC documents in the context of relevant international standards.

In addition to the ICC's normative texts, where appropriate the IBA refers 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 takes 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; and
- the right to be tried without undue delay.

The IBA's monitoring work is not limited to pre-trial and trial proceedings per se, but may also include ad hoc evaluations of legal, administrative and institutional issues that could potentially affect the impartiality of proceedings and the development of international justice. The IBA also monitors any significant developments in international humanitarian and human rights law, and international criminal law and procedure, which may result from the Court's activities.

Methodology

The ICC monitoring is carried out via a dual process of research and consultation. 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 from specific organs of the Court, as well as with senior level ICC staff. While preserving its objectivity at all times, the IBA seeks to maintain close contact with the divisions of the Court. External consultations are conducted with non-governmental organisations (NGOs), individual defence counsel, representatives of diplomatic missions and other legal professional organisations.

Overview

There are currently three cases at the trial phase of proceedings before the International Criminal Court (ICC). The prosecution completed the presentation of its evidence against Thomas Lubanga Dyilo, charged with the alleged recruitment and use of child soldiers, in July 2009 and the defence case commenced in late January 2010. On 24 November 2009 the ICC's second trial, against Germain Katanga and Mathieu Ngudjolo Chui, started; ten witnesses have thus far taken the stand. The trial of Jean-Pierre Bemba, former Congolese opposition leader charged with crimes allegedly committed in the Central African Republic (CAR), has been postponed to 5 July 2010 while judges rule on an admissibility challenge that he has filed.

In addition to the ongoing trials, there have been other landmark judicial developments at the Court. The Pre-trial Chamber (PTC) in the case of Bahr Idriss Abu Garda declined to confirm the charges brought by the Prosecutor on the basis that the evidence presented was weak, unreliable and insufficient. In addition, Pre-Trial Chamber II authorised the Prosecutor to commence investigations *proprio motu* (of his own motion) in Kenya. This will be the first time that the Prosecutor will formally use his powers under Article 15 of the Statute.

This report is the eighth in a series of monitoring reports produced by the International Bar Association (IBA) ICC Monitoring and Outreach Programme. The report assesses recent developments in the trials and judicial proceedings at the ICC between November 2009 and 5 April 2010. Five key issues are closely analysed: investigations by the Prosecutor; the situation in Kenya; the role of intermediaries; defence disclosure; and funding the defence.

Layout

The report is arranged into six chapters:

- **Chapter One** provides a summary of the ongoing trial proceedings and an overview of some general issues arising in the trials
- **Chapter Two** examines the issue of investigations by the Office of the Prosecutor in light of the ruling in the case of Abu Garda
- **Chapter Three** discusses the situation in Kenya and the Prosecutor's use of his *proprio motu* powers
- **Chapter Four** examines in detail the role and status of intermediaries at the ICC
- **Chapter Five** assesses defence disclosure obligations
- **Chapter Six** discusses the issue of funding the defence against the background of Trial Chamber III's ruling in the case of Jean-Pierre Bemba

The report concludes with a summary of significant findings and recommendations.

1.1 Introduction

After considerable delay the ICC's first trial against Congolese national Thomas Lubanga Dyilo commenced on 26 January 2009. Ten months later on 24 November 2009, the Court's second trial, against Germain Katanga and Mathieu Ngudjolo Chui, opened. The case against Jean-Pierre Bemba Gombo, another Congolese national charged with crimes allegedly committed in the Central African Republic, was transferred to Trial Chamber III following the confirmation of charges on 15 July 2009. Mr Bemba's trial was scheduled to begin on 27 April 2010 but has been postponed to 5 July whilst the Court determines an admissibility challenge filed by defence lawyers.

1.2 Summary of trial proceedings

The Lubanga case

BACKGROUND

Thomas Lubanga Dyilo is charged on the basis of individual criminal responsibility (Article 25 (3) (a) of the Rome Statute) and as a co-perpetrator under Articles 8(2) (e) (vii) and 8(2) (b) (xxvi) of the Rome Statute with the war crimes of enlisting and conscripting children under the age of 15 years into the *Forces Patriotiques pour la libération du Congo* (FPLC), the military arm of the *Union des Patriotes Congolais* (UPC), and using them to participate actively in hostilities during the Ituri conflict in the DRC from September 2002 until late 2003. Mr Lubanga is the alleged founder of the UPC and president of the group since it was founded in September 2000, and the alleged former commander-in-chief of the FPLC from September 2002 until at least late 2003.

During the first 22 weeks of the trial, from 26 January to 14 July 2009, the prosecution called 28 witnesses, including three experts. Twenty-two of the 28 witnesses testified with protective measures (voice and/or face distortion and all/or parts of their testimony were held in closed session).

Two additional experts were called by the Chamber: Radhika Coomaraswamy, Special Representative of the UN Secretary-General on children and armed conflict, who testified on the definition of conscription and enlistment of girl soldiers; and Kambayi Bwatshia who addressed the Court on the issue of names and other social conventions in the Democratic Republic of Congo (DRC). The judges have granted 101 persons the status of victim authorised to participate in the case. The defence case began on 27 January 2010 and is currently in progress.

THE LEGAL RE-CHARACTERISATION OF FACTS

During the period under review, the Appeals Chamber¹ (AC) ruled on the issue of whether the Trial Chamber should trigger the procedure to legally recharacterise the facts in the case against Mr Lubanga to include the crimes of sexual slavery and inhuman or cruel treatment pursuant to regulation 55 of the Regulations of the Court.² Victims participating in the case had applied to the Trial Chamber to expand the existing charges on the basis that they were limited in scope and did not accurately reflect the facts and evidence in the case. The majority of the judges in Trial Chamber I acceded to the victims' request and gave notice that they would consider triggering the procedure for modification.³ Judge Fulford dissented.⁴

On appeal by the defence, the Appeals Chamber found that the possibility for a Trial Chamber to modify the legal characterisation of the facts is not inherently incompatible with the Rome Statute or general principles of international law. Furthermore, it is not incompatible with the rights of the accused as long as he is given adequate opportunity to prepare an effective defence to the new legal characterisation in the charges against him.

However, the Appeals Chamber stressed that when using Regulation 55, a Trial Chamber should not exceed the facts and circumstances described in the charges and any amendments thereto; to do so would result in a breach of Article 74 (2) of the Statute.⁵

- 1 Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' ICC-01/04-01/06-2205.
- 2 Under Regulation 55 of the Regulations of the Court, the Chamber has the authority to change the legal characterisation of facts to accord with the crimes under Articles 6, 7 or 8 of the Rome Statute or the form of participation of the accused in the said crimes under Articles 25 and 28 of the Statute.
- 3 Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049.
- 4 Decision issuing a second corrigendum to the 'Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" of 17 July 2009' ICC-01/04-01/06-2069-Anx1.
- 5 Article 74 of the Rome Statute sets out the requirements for the Trial Chamber's final decision at the conclusion of a trial. Article 74 (2) provides that 'the Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendment to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial'.

The IBA welcomes the decision of the Appeals Chamber on this issue. In its seventh monitoring report, the IBA had expressed concern at the timing and nature of the victims' application and the potential adverse impact on the right of the defendant to be informed in a timely manner of the nature and content of the charges against him.⁶ The victims' application also raised questions as to whose role it was to present and modify the charges against defendants. The Appeals Chamber made it clear that it is the Prosecutor who is tasked with the investigation of crimes under the jurisdiction of the Court and to proffer charges against suspects.

THE PROSECUTION'S CASE

The prosecution's case is based on the testimonies of alleged former child soldiers, insider witnesses, expert evidence as well as documentary evidence. The prosecution alleges that through the positions he allegedly held as UPC president and commander-in-chief of the FPLC, Mr Lubanga had *de facto* ultimate control over the adoption and implementation of UPC and FPLC policies and practices, including the enlisting and conscripting of children under the age of 15 years into the FPLC and using them to participate actively in hostilities.

According to witnesses called by the prosecution, in 2002 the FPLC reportedly took control of the town of Bunia and certain parts of Ituri. From July 2002 to December 2003, the FPLC allegedly forcibly recruited groups of children in several localities in Ituri. These forcible recruitments were allegedly carried out by FPLC commanders and, on at least one occasion, Thomas Lubanga Dyilo himself allegedly took part in the conscription of a group of children, some of whom were under the age of 15 years. Other children under the age of 15 years allegedly 'voluntarily' joined the FPLC or were made available to it by their parents, particularly after calls for mobilisation directed at the Hema population or, for some of them, out of a desire for revenge after the loss of a close relative allegedly killed by the militias which were fighting the FPLC. The FPLC allegedly accepted them, thus implementing an enlistment policy. Following their recruitment, the children were allegedly taken to FPLC training camps (in Bule, Centrale, Mandro, Rwampara, Bogoro, Sota and Irumu), where they received military training which began the day after their arrival in the camp and could last up to two months, during which they were subjected to rigorous and strict discipline, including lengthy and exhausting physical exercise which lasted all day, as well as being forced to sing aggressive military songs. They also underwent firearms training,

and at the end of their training, the children were often given a military uniform, a firearm and ammunitions. The FPLC commanders then made them fight on the front line.

Children under the age of 15 years allegedly participated actively in hostilities, specifically in Libi and Mbau in October 2002, in Langu in early 2003, in Lipri and Bogoro in February/March 2003 and in Bunia in May 2003. During the fighting, these children reportedly used their weapons; some of them reportedly had to kill, and many recruits lost their lives in combat. Children were also reportedly used as bodyguards by the FPLC commanders, and Thomas Lubanga Dyilo allegedly personally used them.

THE BURDEN OF PROOF

Under the Rome Statute the prosecution bears the burden of proving the case against Mr Lubanga beyond reasonable doubt. The defendant is allowed to remain silent without this being adversely considered against him in the determination of guilt.

Although the prosecution aims to prove Mr Lubanga's guilt, in determining the final verdict in the case the judges must take into account all the evidence that has been presented to them. Under Article 69(3) of the Statute, the Court has the authority to request all evidence that it considers necessary for a determination of the truth. Article 74(2) of the Statute provides that:

'the Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendment to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.'

THE DEFENCE CASE

Although the prosecution bears the burden of proving the case against Mr Lubanga, he has chosen to present a positive defence challenging the prosecution's case. During her opening statement, lead defence counsel Catherine Mabilile indicated that the defence would seek to establish that many of the prosecution's witnesses had fabricated their testimony with the assistance of intermediaries acting on behalf of the OTP. In particular, the defence would aim to prove that six witnesses relied on by the OTP were never child soldiers, a seventh witness lied about his age and an eighth never belonged to the UPC. The defence intends to call parents and friends of the prosecution's witnesses to testify before the Court to try to prove the aforementioned allegations. According to Ms Mabilile, following the oral evidence of the first 16 defence witnesses the defence will invite the

6 IBA Monitoring Report, *Sustaining the International Criminal Court: Issues for consideration at the 2010 Review Conference and beyond*, November 2009 at pp 38-39 available at www.ibanet.org/human_rights_institute/icc_outreach_monitoring/icc_iba_publications.aspx.

Court to draw legal conclusions concerning the fairness of the proceedings. If the Court decides to continue with the case then the defence will focus on demonstrating that Thomas Lubanga did not initiate or participate in the recruitment of minors into the UPC but rather took concrete steps to demobilise child soldiers.

Ten defence witnesses and one former prosecution witness have testified before the Court. A brief informal summary of the main points of the testimony of the defence witnesses may be found at Annex I of this report.

The Katanga/Ngudjolo case

The commencement of the ICC's second trial against alleged Congolese rebel leaders Germain Katanga and Mathieu Ngudjolo Chui was greeted with much anticipation. The *Katanga/Ngudjolo* case is the first trial which includes charges of sexual crimes. In light of the unsuccessful attempts by legal representatives of victims in the *Lubanga* case to persuade the Chamber to re-classify the charges to include sexual crimes, the progress of the *Katanga/Ngudjolo* trial is being carefully scrutinised by civil society organisations and victims' advocates.

Katanga and Mathieu Ngudjolo Chui are jointly charged with three crimes against humanity (murder, sexual slavery and rape) and seven war crimes (using children under the age of 15 to take active part in hostilities; deliberately directing an attack on a civilian population as such or against individual civilians not taking direct part in hostilities; wilful killing; destruction of property; pillaging; sexual slavery; and rape).

THE PROSECUTION'S CASE

Like the *Lubanga* case, the *Katanga/Ngudjolo* case allegedly arose as a result of tensions over disagreements related to natural resources in the district of Ituri, DRC. Germain Katanga, alleged commander of the *Force de résistance patriotique en Ituri* (Patriotic Resistance Force in Ituri, FRPI), allegedly had ultimate control over *Forces Armées de la République Démocratique du Congo* (FARDC) commanders. Mathieu Ngudjolo Chui, former leader of the *Front des nationalistes et intégrationnistes*, (National Integrationist Front, FNI) allegedly had ultimate control over FNI commanders, who sought his orders for obtaining and distributing weapons and ammunition; and allegedly had other commanders under his command. In October 2006 he allegedly obtained his present grade of Colonel in the FARDC Armed Forces of the DRC.

The prosecution alleges that combatants led by Mathieu Ngudjolo Chui and Germain Katanga, mostly of Lendu and Ngiti ethnicity, carried out a joint attack on Bogoro village in the Ituri district on 24 February 2003, directed not only against a

military camp that existed in that village, but also against the civilian population. The attack was intended to completely destroy Bogoro village by killing the predominantly Hema civilian population and destroying homes of civilian inhabitants during and in the aftermath of the attack. The attack was launched in order to secure Lendu and Ngiti control of the route to Bunia which would, amongst other things, facilitate the transit of goods along the Bunia-Lake Albert axis. The killing and/or displacement of the civilian population, together with the destruction of civilian property, was the strategy the perpetrators chose to secure control of the village once it had been seized.

Germain Katanga and Mathieu Ngudjolo Chui are alleged to have used children under the age of 15 years for different purposes including as personal body guards as well as to participate actively in the Bogoro attack. Child soldiers are said to have attacked Bogoro village, killing civilians, destroying property and pillaging the goods of Hema civilians. Civilians were allegedly arrested and imprisoned by FNI/FRPI combatants who locked them up in a room which was filled with the corpses of men, women and children. During the attack, combatants allegedly raped civilians and reduced them to sexual slavery by force, threat of violence or death and/or detention.

Up to the Easter recess on 5 April 2010, ten witnesses had given testimony in the *Katanga/Ngudjolo* case. Three of the witnesses may be described as technical or formal witnesses: the head of the investigations team for this case at the OTP; a visual technician at the ICTY; and the coordinator of medical legal activities at the OTP who testified on forensic matters.

The Bemba case

THE CHARGES AND ALLEGATIONS

Jean-Pierre Bemba Gombo is the first suspect to be named and brought to the seat of the Court as part of the Prosecutor's investigations in the CAR. Mr Bemba, former Vice-President of the Democratic Republic of Congo, was arrested on 23 May 2008 in Belgium and surrendered to The Hague.

The prosecution alleges that from 25 October 2002 to 15 March 2003 there was an armed conflict in the CAR, and that during this conflict a military alliance existed between Mr Bemba and Mr Ange-Félix Patassé, then President of the CAR, in which a segment of the national armed forces allied with the combatants of the *Mouvement de Libération du Congo* (MLC) led by Mr Bemba. The aim of the alliance was to fight a rebel movement led by Mr François Bozizé, former Chief of Staff of the armed forces of the CAR. According to the prosecution's case, the MLC established military bases in the northern part of the CAR, from which they carried

out widespread and systematic attacks against the civilian population.

The Prosecutor originally charged Mr Bemba with criminal responsibility as a 'co-perpetrator' under Article 25(3)(a) of the Rome Statute. Following a decision of the PTC, the Prosecutor amended the charges to include the alternate mode liability as a military commander under Article 28 of the Statute. The PTC rejected co-perpetration as a mode of liability, and relied exclusively on command responsibility.

The PTC confirmed five of the charges: of murder and rape as crimes against humanity, and murder, rape and pillaging as war crimes. The Chamber declined to confirm the charges of torture as a crime against humanity and outrages against human dignity as a war crime, which were based largely on acts of rape and other sexual violence. The Chamber concluded that the charges were fully subsumed by the charge of rape, as the same conduct underpinned both charges. The PTC criticised the prosecutorial practice of cumulative charging as detrimental to the rights of the defence, subjecting the defence to the undue burden of responding to multiple charges for the same facts and delaying the proceedings. The PTC also declined to confirm the charge of torture as a war crime, finding that the Prosecutor had failed to sufficiently demonstrate the specific intent of the perpetrators. The prosecution's request for leave to appeal was refused and the case was transmitted to Trial Chamber III.

ADMISSIBILITY CHALLENGE

On 25 February, the defence submitted a challenge to the admissibility of the case based on grounds of complementarity, the lack of the requisite level of gravity and an abuse of process in the case against Mr Bemba. The defence submitted that the case against the accused is inadmissible under Article 17(1)(b) of the Statute because the CAR judicial authorities investigated and then decided not to prosecute Mr Bemba. The defence also argued that the case is inadmissible under Article 17(1)(c) of the Statute because the CAR judicial authorities' dismissal constituted a completion of the prosecution against Mr Bemba; further, that in light of the absence of an investigation or prosecution, the CAR authorities were not unable or unwilling genuinely to prosecute. The defence also contended that the case fails to satisfy the level of gravity that would justify the Court's involvement. The prosecution challenged each ground advanced by the defence. At the time of writing a hearing to determine this issue was set for 27 April 2010.

The Bemba admissibility challenge is the second such challenge to be made at the trial stage of proceedings at the ICC. A challenge to the admissibility of the case made by Germain Katanga was rejected by the Trial Chamber and the decision was confirmed on appeal.

1.3 Challenges common to the trial cases

Closed session hearings

The first trials at the ICC will certainly be remembered for the significant number of closed session hearings. Of 28 witnesses called by the prosecution in the *Lubanga* case, 22 have had to testify with the benefit of protective measures and either partially or entirely in closed sessions. The same is now proving to be true for the defence. IBA consultations reveal that the plethora of closed sessions has created a negative perception about the proceedings. Despite efforts by the Public Information and Documentation Section (PIDS) of the Court to produce and disseminate audiovisual summaries and other forms of information about the trial proceedings, it is difficult for some members of the public, particularly those in affected communities, to understand why such a proportion of the proceedings appears to be in 'secret' or 'closed' sessions.

Attempting to monitor the proceedings remotely is significantly hampered by the frequent movement into or out of closed sessions. For example, a witness may have commenced his/her testimony in open (public) session when the party questioning the witness indicates that they need to go into closed session to ask additional questions. For individuals following remotely via the ICC's weblink, the message appearing on the screen indicates 'closed or private session'. On some occasions the message has simply been 'no broadcast'. The individual following remotely then has to wait for the public session to resume. Quite often the testimony of the witness is completed in closed sessions and the trial is adjourned without any public indication that this has occurred.

In the *Katanga* case, on at least two occasions the Chamber has ruled that matters that were dealt with in closed session at the behest of one of the parties should have been heard in open session. The Chamber therefore ordered that the transcripts of the public portion of the hearing be revised to include the proceedings which took place in private session. It was clear from the transcript that there had in fact been no need to resort to a closed session hearing. While closed session hearings continue to feature in the *Katanga/Ngudjolo* case, there appear to be comparatively fewer closed session hearings in that case than the *Lubanga* trial.

Technical problems and challenges with translation and interpretation

During the reporting period, both the *Lubanga* and *Katanga* case continued to be hampered by problems with interpretation and translation. In its June 2009 monitoring report entitled *First Challenges*,⁷ the IBA highlighted the significant challenges related to translation, interpretation and production of transcripts in the *Lubanga* case. The IBA notes that concerns related to disputed interpretation persist. Following several incidents of disputed interpretation by the *Lubanga* defence team, on 1 April 2010 the judges issued an order on the procedure to be adopted for addressing interpretation errors.⁸

1.4 Comparative legal perspectives

The ICC judges have previously emphasised the *sui generis* nature of the Court as justification for their departure from established jurisprudence at the ad hoc tribunals. However, at the ICC itself, while there is no doctrine of binding precedent, it is quickly becoming clear that the jurisprudence in the *Lubanga* case – in relation to both substantive and procedural law – does influence the decisions taken in the other Trial Chambers.

Two of the three judges currently adjudicating in the *Lubanga* case – Judges Adrian Fulford and Elizabeth Odio Benito – are also assigned to the *Bemba* case. The judges have requested observations from the parties and participants concerning whether to depart from the jurisprudence in the *Lubanga* case on important procedural issues.⁹ It is noteworthy that the judges requested observations on whether or not to apply the procedures adopted in the *Lubanga* case but not those implemented in the *Katanga/Ngudjolo* case.

Differences in approach

There has been some consistency between the *Lubanga* and *Katanga/Ngudjolo* Trial Chambers on key issues such as the implementation of protective measures and witness proofing and familiarisation, among others.

However, there have also been notable differences. For example, the judges in the *Katanga/Ngudjolo* case have implemented a very strict regime for efficient management of the proceedings, in particular in relation to the length of time allotted to each party for the presentation of their case.¹⁰ The judges in *Lubanga* appear to allow much more flexibility to a party in the presentation of its case and have not allocated set time limits within which each party must complete the questioning of witnesses and the overall presentation of their case. Ironically, however, the judges in the *Katanga/Ngudjolo* case appear to be overly indulgent during oral arguments by counsel on issues of law.

7 See *First Challenges: An examination of recent landmark developments at the International Criminal Court*, June 2009, available online at www.ibanet.org/human_rights_institute/icc_outreach_monitoring/icc_iba_publications.aspx.

8 Order on the procedure for suggested interpretation errors, ICC-01/04-01/06-2387, 1 April 2010.

9 Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG-ET. The Trial Chamber ordered written submissions from the parties on whether the practices adopted by Trial Chamber I in the *Lubanga* case, relating to the manner in which evidence is submitted, participation by victims, protective measures and the disclosure obligations of the parties, should be adopted or varied for the *Bemba* trial.

10 Directions for the conduct of the proceedings and testimony in accordance with Rule 140, ICC-01/04-01/07-1665, 20 November 2009.

2.1 Introduction

Doubts about the conduct of investigations which arose in the context of disclosure challenges leading to the stay of proceedings in the *Lubanga* trial¹¹ have resurfaced following the decision of Pre-Trial Chamber I not to confirm the charges laid by the Prosecutor in the case of *Prosecutor v Abu Garda*.¹² In its decision, Pre-Trial Chamber I remarks repeatedly on the insufficiency and inadequacy of the OTP evidence. Evidence submitted by the Prosecutor in order to establish ‘substantial grounds to believe that Mr Abu Garda is criminally responsible as a co-perpetrator or as an indirect co-perpetrator within the meaning of Article 25(3)(A) of the Statute for the Attacks on the MGS Haskanita’ is described as ‘weak and unreliable’¹³ and ‘scant’.¹⁴ Summaries of interviews of anonymous witnesses are said to ‘lack specific information’.¹⁵ Documents are submitted which are condemned for having ‘little relevance’.¹⁶

Again and again, between paragraphs 158 and 233 of the Pre-Trial Chamber’s decision in the *Abu Garda* case, the same complaint is made: evidence submitted by the Prosecutor in support of the charges is scant, unreliable, inadequate and irrelevant. Criticism has been levelled at the Pre-Trial Chamber for overstepping the boundaries of its role under the Statute, but this does not alter the fact that the Prosecutor simply failed to reach the ‘substantial grounds’ threshold required for the confirmation of charges, a much lower standard than the ‘beyond reasonable doubt’ requirement of the trial level. Clearly, serious problems in relation to the gathering of evidence by the investigation division of the OTP still exist.

2.2 Legal overview

The initiation of an investigation by the Prosecutor is governed by Article 53 of the Rome Statute, which states that ‘the Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute.’ The Prosecutor is bound, in coming to his decision, to consider whether the information

available to him provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed, whether the case is or would be admissible under Article 17, and whether substantial reasons exist to believe that an investigation would not serve the interests of justice.

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The decision on whether to proceed is the Prosecutor’s alone, but where the situation was referred to the Court by a State or the UN Security Council and the Prosecutor decides not to proceed with an investigation because there is not either a sufficient legal or factual basis to seek a warrant, the case is inadmissible, or a prosecution would not be in the interests of justice, he must inform the referring State or the Security Council of his decision and the reasons behind it. In these circumstances it is open to the referring State or the Security Council to request that the Pre-Trial Chamber review the Prosecutor’s decision. Where the Pre-Trial Chamber is of the view that the decision of the Prosecutor not to proceed was incorrect, it may request that he reconsider it (though he is under no obligation to come to a different decision). Should the Prosecutor decide not to proceed because a prosecution would not be in the interests of justice, Article 53(3)(b) provides that the Chamber may review this decision on its own initiative.¹⁷

That said, it should be noted that the powers of the Prosecutor with respect to the initiation of investigations are fettered in a number of important ways. The Chamber must sanction proceedings which are initiated by the Prosecutor of his own motion, and may in certain specific circumstances review prosecutorial decisions not to proceed with cases against given individuals.

11 For a comprehensive analysis of the issues which lead to the stay of proceedings in the *Lubanga* case, see the IBA’s fifth monitoring report entitled, *The ICC under scrutiny: Assessing recent developments at the International Criminal Court*, June 2009, available at www.ibanet.org/human_rights_institute/icc_outreach_monitoring/icc_iba_publications.aspx.

12 Decision on the Confirmation of Charges, *Prosecutor v Abu Garda*, ICC-02/05-02-/09-243-Red, 8 February 2010.

13 Ibid, para 173.

14 Ibid, para 179.

15 Ibid, para 196.

16 Ibid, para 197.

17 Rome Statute, Art 53(3)(b).

2.3 Organisational structure

Beyond the Prosecutor himself and his immediate staff, the OTP is organised into three main divisions: the Investigations Division (ID), the Prosecution Division (PD), and the Jurisdiction, Complementarity and Cooperation Division (JCCD). The ID is comprised of about half the staff of the OTP. ID investigators assist the Prosecutor in refining suspect lists, pursuing leads, interviewing potential witnesses and establishing the context in which the crimes are alleged to have been committed. The ID is currently led by Michel de Smedt, who is described on the OTP pages of the ICC's website as the acting Head of Investigations. The IBA has since been advised that Michel de Smedt is confirmed as the Head of Investigations.

2.4 Leadership of the Division

IBA consultations suggest that there are concerns that the leadership of the ID needs to be strengthened. As previously indicated, the Division is headed by Michel de Smedt. Efforts are also underway to recruit a senior level (P5) Investigations Coordinator with general responsibility for supervising investigative activities – providing direction to team leaders on the development of investigations and developing policy proposals relating to investigative activities.¹⁸

No new Deputy Prosecutor for Investigations has been recruited since the resignation of Serge Brammertz in June 2007. The reason for this is unclear. The Statute stipulates that the Prosecutor may be assisted by 'one or more' Deputy Prosecutors.¹⁹ The ID is one of the most important units at the OTP and the leadership of the Division should reflect this.

In general, the Division suffers from difficulties in recruiting and retaining qualified and experienced investigators in relation to both new and ongoing investigations. As the number of preliminary examinations and investigations increases, this problem gets worse. All of these issues exacerbate the considerable security, cultural, linguistic and co-operational challenges faced by the ID discussed below.

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Unfortunately, the Investigations Division cannot always rely on the cooperation and assistance of the States in which it conducts its investigations. Support from the international community can be sporadic and attempts can be made to exert political pressure on investigators.

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2.5 Challenges in investigations

Investigations into criminal conduct in domestic jurisdictions are ordinarily carried out by police forces. These law enforcement agencies operate within clearly-defined jurisdictional limits and are equipped with broad powers of arrest, search and seizure by domestic legal systems. By contrast, the investigations conducted by the ID span the entire globe. ID investigators lack even the most mundane police powers, and must depend on domestic law enforcement agencies and on international organisations for assistance in the conduct of their enquiries. Investigators must also familiarise themselves with cultural nuances in order to communicate effectively with victims and potential witnesses while also coping with the linguistic difficulties which arise in any such multinational situation. These challenges are compounded by the fact that the ID may be investigating a large number of unrelated country situations simultaneously.

Unfortunately, the ID cannot always rely on the cooperation and assistance of the States in which it conducts its investigations. Support from the international community can be sporadic and attempts can be made to exert political pressure on investigators. Furthermore, the aims of the ID may not coincide with those of other international actors some of whom would for one reason or another prefer the ICC Prosecutor not to commence or continue an investigation.

Naturally, investigations undertaken by the ID often relate to situations where conflict is ongoing. Operating in such conflict situations raises security and logistical challenges, restricting the movement of investigators and requiring steps to be taken for their protection and the protection of the victims and potential witnesses with whom they come into contact. The lack of infrastructure in areas of conflict makes this task all the more difficult.

18 A request was made in the Proposed Programme Budget for 2010 for the reclassification of the post of P4 senior investigator to the P5 investigations coordinator; *ibid*, p 40, Objectives.

19 Article 42(2) of the Rome Statute.

In its Prosecutorial Strategy 2009-2012, published on 1 February 2010, the OTP aims '[t]o continue ongoing investigations into seven cases, to conduct up to four new investigations of cases in current or new situations and to be ready to start another investigation on short notice'.²⁰ No details concerning the methodology that will be utilised to fulfil these objectives are publicly available. Presumably such details are contained in internal working documents. The OTP's Operational Manual is yet to be finalised and it is unclear, once complete, whether all or part of it will be made public.²¹

2.6 Conclusions and recommendations

An effective ID is crucial to the fulfilment of the OTP's mandate. The IBA considers that the OTP must therefore invest time and resources to ensuring that the Division is adequately staffed and that there is a strong leadership base. The Abu Garda decision speaks volumes concerning the investigations carried out by the OTP and there is likely to be even greater scrutiny concerning the prosecution's investigations in Kenya.

The IBA recommends that:

- The OTP reinforces the leadership of the Investigations Division. This should begin with the appointment of a Deputy Prosecutor in charge of investigations.
- In general, the OTP should address what appear to be gaps in the organisation, capacity and strategy of the Investigations Division as soon as possible.
- In order to build public confidence in its investigations and in the interest of transparency, the OTP is encouraged to publish non-confidential portions of its Operational Manual, in particular sections concerning investigations, once finalised.

20 Office of the Prosecutor, Prosecutorial Strategy 2009-2012, 1 February 2010.

21 The OTP has indicated that it will prioritise the finalisation and implementation of its Operational Manual during the course of 2010. See Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009.

Chapter Three – The Kenya Situation

3.1 Introduction

Following the controversial presidential election of 27 December 2007, Kenya collapsed into a state of political, economic and humanitarian crisis. The scale of atrocities committed in the aftermath of the presidential elections captured the attention of the world. According to Kenyan authorities, 1,220 persons were killed during the violence, hundreds of rapes were documented and many more were unreported, 350,000 persons were internally displaced and 3,600 persons were injured.

On 31 March 2010 the Prosecutor of the ICC received authorisation from the Pre-Trial Chambers to commence investigations in Kenya *proprio motu* (of his own motion) pursuant to Article 15 of the Statute. This was the first application by the Prosecutor to utilise his *proprio motu* powers under the Statute, as all prior situations before the ICC had been referred by the State Party concerned or the UN Security Council (in the situation of Darfur, Sudan).

Though welcomed by many Kenyans, the ICC's intervention in Kenya comes at a critical time for the country. Expectations concerning the OTP's activities in the country are high, but there are fears that timelines for adequate investigations and prosecutions are short, given the imminence of the 2012 presidential elections and the current issues surrounding the new draft constitution.

3.2 Background of events in Kenya post-election 2007

In Kenya ethnic divisions are deep rooted, with over 40 different tribes and ethnic groups spread over different areas of the country. The political manipulation of ethnicity has been widespread since independence in 1963, and impunity has been rife for those implicated in orchestrating political violence. Prior to the crisis in 2007-2008, Kenya faced serious human rights violations in the past, notably at the time of electoral processes. Every election since the establishment of a multi-party system in 1991 witnessed widespread violence.²² Numerous Kenyan official commissions' reports²³ and Kenyan NGO reports²⁴ have denounced the politically-instigated ethnic clashes that occurred following the 1992 and 1997 presidential elections. Despite state knowledge of such violations, no one was prosecuted

22 See Human Rights Watch: 'Ballots to Bullets - Organized Political Violence and Kenya's Crisis of Governance', March 2008, accessible at <http://www.hrw.org/en/reports/2008/03/16/ballots-bullets>.

23 See for instance the report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31 July 1999.

24 See for instance FIDH/KHRC report n°471/2, April 2007: 'Massive internal displacements in Kenya due to politically instigated ethnic clashes'.

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Though welcomed by many Kenyans, the ICC's intervention in Kenya comes at a critical time for the country.

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for the massive crimes committed in Kenya. This culture of impunity is undoubtedly one reason for the recurrence of such human rights violations.²⁵

The 2007 election campaign emphasised the ethnicity of the candidates and the parties, with the opposition Orange Democratic Movement (ODM) led by Raila Odinga building a political coalition based on the widespread perception that the government led by President Mwai Kibaki had entrenched tribalism and governed in the interests of the Kikuyu community, and the ruling Party of National Unity (PNU), on the other hand, making Luo cultural traditions a target.²⁶

Following the elections in December 2007, within minutes of the Commission's declaration of Kibaki as victor, tribe-based rioting and violence, primarily directed against Kikuyus, broke out across Kenya.²⁷ Violence and human rights violations reportedly ranged from looting, burning and mass rapes to other sexual violence against both women and men.²⁸ The events in Kenya were also particularly characterised by disproportionate and excessive use of force by the police against unarmed protesters, mainly in opposition strongholds including Kisumu, Kakamega, Migori, and the low income settlements of Nairobi.

3.3 The Waki Commission

Failed attempts at negotiating a mediation process between Kibaki and Odinga led to the intervention of former UN Secretary General and Chair of the African Union Panel of Eminent African Personalities, Kofi Annan.²⁹

25 FIDH (International Federation for Human Rights) Report, Question & Answer, Kenya and the International Criminal Court, 28 October 2009, at http://www.iccnw.org/documents/QA_Kenya-ICC.pdf.

26 Human Rights Watch: 'Ballots to Bullets - Organized Political Violence and Kenya's Crisis of Governance', March 2008, at <http://www.hrw.org/en/reports/2008/03/16/ballots-bullets>.

27 Jeffrey Gettleman, 'Disputed Vote Plunges Kenya into Bloodshed' *The New York Times*, 31 December 2007, at http://www.nytimes.com/2007/12/31/world/africa/31kenya.html?_r=1.

28 FIDH (International Federation for Human Rights) Report, Question & Answer, Kenya and the International Criminal Court, 28 October 2009, at http://www.iccnw.org/documents/QA_Kenya-ICC.pdf.

29 'Kofi Annan takes over Kenyan Mediation', Associated Press (CBS News), 10 January 2008, at <http://www.cbsnews.com/stories/2008/01/10/world/main3695650.shtml>.

Eventually, on 28 February 2008, a power-sharing agreement – the National Accord and Reconciliation Act – in which Kibaki would remain President and Odinga would gain the new post of Prime Minister, was reached. A coalition government was created in April 2008 with an equal number of ministers for the PNU and the ODM. The agreement also established three commissions: (i) the Commission of Inquiry on Post Election Violence (also known as the Waki Commission named after its chair Justice Philip Waki of Kenya’s Court of Appeal); (ii) the Truth, Justice and Reconciliation Commission (TJRC); and (iii) the Independent Review Commission on the General Elections held in Kenya on 27 December 2007.³⁰

The Waki Commission recommended wide-ranging reforms of the police as well as the creation of a special tribunal for Kenya, independent of the judiciary, anchored in a constitutional amendment and staffed by both Kenyan and international judges and prosecutors. The final Waki Commission report, issued on 15 October 2008, recommended the establishment of a Special Tribunal to ensure accountability for persons bearing the greatest responsibility for the post-election crimes. Failing this an envelope containing names of those suspected to bear the greatest responsibility for these crimes was to be forwarded to the Prosecutor of the ICC.³¹

3.4 The first *propio motu* request

The power of the ICC Prosecutor to conduct investigations on the territory of a sovereign state was one of the most controversial and highly contested provisions throughout the Rome Statute drafting process. There was concern that ‘an itinerant’ Prosecutor with ‘excessive powers’ could undermine the legitimacy of the Court.³² Proponents, however, considered that this power to initiate prosecutions without a voluntary referral by a State Party or from the United Nations Security Council was a crucial indicator of the independence and impartiality of the Prosecutor. The compromise that was struck was the requirement under Article 15 that the Pre-Trial Chamber should first authorise any exercise of the Prosecutor’s *propio motu* powers.

30 Agreement on the Principles of Partnership of the Coalition Government (Annex 21), and The National Accord and Reconciliation Act 2008, (Annex 22).

31 On 9 July 2009, the African Union Panel of Eminent African Personalities, chaired by Kofi Annan, announced its submission to the Prosecutor of a sealed envelope containing a list of persons allegedly implicated and supporting materials previously entrusted to Mr Annan by the Waki Commission on the post election violence. See ‘ICC Prosecutor receives materials on post-election violence in Kenya’, ICC-OTP-20090716-PR438, Press Release 16 July 2009 at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/pr438>.

32 See Report of the Preparatory Committee on the Establishment of the International Criminal Court, UNGAOR, 51st Session, Vol1, Supp No 22, UN Doc A/51/22 (1996) para 151.

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The Kenyan context is unique. Both sides of the political divide could potentially face prosecution.

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The judges’ decision to authorise the investigations in Kenya was not unanimous. Judge Kaul dissented from the majority on the basis that his analysis of the supporting material presented by the prosecution and the relevant legal provision led him to conclude that the atrocities, though serious, fell short of the legal definition of crimes against humanity as provided by Article 7(2) of the Rome Statute.

This should be cause for reflection by the OTP. In light of recent developments in the *Abu Garda* case (as discussed in Chapter Two of this report), the Prosecutor must ensure that the investigations carried out in Kenya are as extensive and thorough as possible.

3.5 The approach to investigations

The Kenyan context is unique. Both sides of the political divide could potentially face prosecution. The OTP has in the past adopted a sequenced approach to its investigations. For example, in the DRC, it commenced investigations in Ituri which resulted in cases against alleged rebel leaders on opposite sides of the conflict – Thomas Lubanga (Hema ethnicity) and Germain Katanga and Mathieu Ngudjolo (Lendu, Ngiti ethnicity) – but not against government forces. Investigations have now moved to the Kivus. This approach is likely to have a destabilising effect in Kenya if utilised. The IBA welcomes the decision of the OTP to adopt a parallel (investigating all sides and all parties to the conflict simultaneously) rather than sequential approach to investigations, as was done in previous situations.

More broadly, the Prosecutor has advocated a ‘three-pronged approach’ that would involve prosecution by the ICC of those most responsible, coupled with national accountability proceedings for low-level and other perpetrators, the format for which would be determined by the Kenyan Parliament.³³ The third prong would include other mechanisms, such as a Truth, Justice and Reconciliation Commission (TJRC). Such a commission can co-exist with either national

33 ‘ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya’ press release, 30 September 2009, at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/pr456>.

tribunals or the ICC, or both.³⁴ The commission would focus on truth, reparations and reforms, while the courts of law focus on criminal accountability. Thus while ICC investigations and prosecutions are ongoing, the Kenyan Government should also not abdicate its responsibility to ensure effective domestic processes.

The UN has warned that a repeat of the 2007 violence could occur after the 2012 presidential election unless Kenya strengthens its institutions and the perpetrators of the 2007 violence are punished.

3.6 Next steps

The President and Prime Minister of Kenya have pledged their full support for the investigation process. The Government noted that it remains fully committed to discharging its responsibility in accordance with the Rome Statute in order to establish a local judicial mechanism to deal with the perpetrators of the post-election violence, and that it remains committed to cooperate with the ICC within the framework of the Rome Statute and the Kenyan International Crimes Act.³⁵

Government cooperation is key to the process. However, it may also be the most difficult aspect of the prosecution's investigations. The Prosecutor has, to date, failed to successfully bring a case against any members of government for their role in atrocities allegedly committed within their country – Uganda and the DRC are cases in point. Jean-Pierre Bemba, albeit a Congolese senator, is charged with crimes allegedly committed in the CAR.

The protection of witnesses is another major concern. In a press release issued following the Pre-Trial Chamber's decision, local NGO the International Commission of Jurists, Kenya, noted that '[t]he decision brings to the fore the issue of witness protection which has not been sufficiently addressed through existing legislation and available mechanisms'.³⁶ The group encouraged the government to put in place urgent measures to protect victims and witnesses.

The UN has warned that a repeat of the 2007 violence could occur after the 2012 presidential election unless Kenya strengthens its institutions and the perpetrators of the 2007 violence are punished. Fears of Kenyans 'rearming for the 2012 poll' are very real.³⁷

Despite assurances from the Prosecutor, numerous questions remain: will the prosecution realistically be able to complete investigations prior to the imminent elections in 2012? Given the widespread allegation of police involvement in the atrocities, to what extent will the OTP be able to successfully carry out its investigations without relying on agents of the state?

The ICC PIDS has proactively commenced outreach and public information activity in Kenya – a welcome development which must continue. Managing expectations and ensuring that the public is kept informed concerning the process is key to ensuring the success of the ICC's presence in Kenya.

3.7 Conclusions and recommendations

The decision of the Pre-Trial Chamber authorising the Prosecutor to commence investigations in Kenya is a welcome development. The Kenyan situation is multi-faceted and careful attention must be paid to the protection of witnesses and victims. Importantly, the international community will be carefully scrutinising whether the expressed commitment by the Kenyan Government to cooperate with the ICC is more than mere words.

The IBA recommends that:

- The Kenyan Government ensure that it fully cooperates with the ICC Prosecutor during his investigations, in particular by facilitating the timely surrender of any person who is identified by the Court as a possible suspect. Such person should be afforded the full guarantees of suspected persons under the Rome Statute and recognised in international law.
- The Government take definitive steps to fully streamline and implement its Witness Protection Act and to ensure the safety and security of persons who cooperate with the ICC as victims or witnesses.
- The Government make efforts to complement the efforts of the ICC by ensuring the mid- and lower-level perpetrators of the violence are held accountable.

34 FIDH (International Federation for Human Rights) Report, Question & Answer, Kenya and the International Criminal Court, 28 October 2009, at http://www.iccnw.org/documents/QA_Kenya-ICC.pdf.

35 Statement by HE the President and the Right Honorable Prime Minister, 5 November 2009 (Annex 28) <http://www.icc-cpi.int/iccdocs/doc/doc786003.pdf>.

36 See ICJ Press Statement on Pre-Trial Chamber II's Decision on Kenya, http://www.icj-kenya.org/index.php?option=com_content&task=view&id=298&Itemid=70.

37 Kenyans 'rearming for 2012 poll', 7 October 2009, at <http://news.bbc.co.uk/2/hi/africa/8293745.stm>.

4.1 Introduction

The role and status of intermediaries and their relationship with different organs of the ICC has become a matter of pressing concern. The issue is now the subject of intense litigation in the *Lubanga* case, as the defence allege that the majority of witnesses relied on by the Prosecutor to prove its case were either coerced or bribed by intermediaries acting on behalf of the OTP. The Court has asked the prosecution whether or not it intends to call the relevant intermediary to rebut the defence allegations. The OTP is vehemently opposed to any such suggestion, arguing that exposing its intermediaries is not only unnecessary but also counter-productive and potentially dangerous. Publicly revealing the intermediary’s identity, according to the OTP, would significantly hamper its future operations in the field and jeopardise ongoing investigations.

.....

Each organ of the ICC has its own policy and protocols for interacting with intermediaries, yet there is no court-wide policy concerning the Court’s relationship with intermediaries and its obligation towards them.

.....

4.2 The Court’s reliance on intermediaries

The OTP, the Registry and the Trust Fund for Victims (TFV) rely extensively on intermediaries to fulfil their respective mandates. Each organ of the ICC has its own policy and protocols for interacting with intermediaries, yet there is no court-wide policy concerning the Court’s relationship with intermediaries and its obligation towards them. The matter is detailed and complex, and issues that relate more directly to challenges faced by the intermediaries themselves are fully elaborated in a very detailed commentary by the Victims’ Rights Working Group (VRWG).³⁸ This chapter aims to examine the impact of the absence of transparency in the Court’s relationship with intermediaries on the fairness of the proceedings and the public perception of the ICC.

38 The Victims Rights Working Group is a network of national and international civil society groups and experts created in 1997 under the NGO Coalition of the International Criminal Court.

.....

Indeed, the OTP makes it clear that due to the lack of its own police force and the need to work in potentially hostile environments, investigations and prosecutions would be impossible without the assistance of intermediaries.

.....

Who is an intermediary?

The term intermediary does not appear in the Rome Statute, Rules of Procedure and Evidence or other subsidiary texts of the ICC. Civil society organisations such as the VRWG define an intermediary as including ‘local non-governmental organisations (NGOs) or grassroots associations, individuals or any other associations or groupings which in some way link the ICC (including the Trust Fund for Victims) to its constituents (victims, witnesses or others) or legal representatives to their clients in remote areas.’³⁹

Role played by intermediaries

Intermediaries play a variety of different roles in their interaction with the ICC. According to the OTP, it relies on intermediaries to conduct activities related to its investigations in the field, including identifying and facilitating access to potential witnesses, contacting individuals and collecting documents. Indeed, the OTP makes it clear that due to the lack of its own police force and the need to work in potentially hostile environments, investigations and prosecutions would be impossible without the assistance of intermediaries.⁴⁰

Intermediaries assist the Victims Participation and Reparations Section (VPRS) of the Registry by providing general information for victims about their right to participate in proceedings; helping victims with applications to participate in proceedings; and assisting Registry staff to make contact with and correspond with victims.⁴¹ Legal representatives of victims and the Office of

39 Victims Rights Working Group, Comments on the Role and Relationship of Intermediaries with the International Criminal Court, at p 1. Available online at <http://www.torturecare.org.uk/files/VRWG%20Role%20of%20intermediaries%20with%20ICC.doc>.

40 Prosecution’s Submissions in Response to Trial Chamber’s Oral Request of 10 February 2010, ICC-01/04-01/06-2310-Red, 25 February 2010, at para 12 and 13.

41 See above note 2 at p 2.

The OTP does not indicate either in its Court filings or any of its policy papers what standards intermediaries are held to. Neither does it make clear whether its relationships with intermediaries are on an ad hoc basis or governed by memoranda of understanding.

‘The Prosecution has made considerable effort to identify and evaluate intermediaries’ reliability, knowledge, integrity and ability to perform tasks discretely to protect themselves, witnesses and the ongoing investigation. It does not recruit any intermediary until the evaluation is complete. Thereafter, the OTP continues to monitor and evaluate their productivity, loyalty, accuracy, security, reliability and honesty.’
 The OTP does not indicate either in its Court filings or any of its policy papers what standards intermediaries are held to. Neither does it make clear whether its relationships with intermediaries are on an ad hoc basis or governed by a memorandum of understanding.

Public Counsel for Victims (OPCV) often rely on intermediaries to convey information to clients or potential witnesses and to obtain victims’ views and concerns for particular issues.⁴² They also assist in the identification and implementation of TFV projects which benefit victims and affected communities. Intermediaries also play a key role in the Court’s outreach mandate by cooperating with the PIDS on important outreach activities.

4.3 The ICC’s obligation to intermediaries

On 20 June 2007 the ICC Registry organised a consultative forum on intermediaries with different organs of the Court and NGOs. A subsequent consultative meeting was held in January 2009. The consultative meetings identified some core issues that needed to be resolved: the need for a clear definition of intermediary; the scope of the Court’s role in providing logistical, technical, financial support, as well as training; the protection of intermediaries; and the need for a coordinated approach to intermediaries.

Protocol and policy towards intermediaries

Early in the life of the ICC, victims’ rights advocates and other civil society organisations who work directly with intermediaries have called for the ICC to streamline its policy concerning intermediaries. The main concern has been that while the Court acknowledges its reliance on intermediaries, it has failed to take concrete steps to ensure their protection and to provide necessary support.

Protection

The Rome Statute and other legal texts of the ICC are silent concerning the Court’s relationship with or obligation towards intermediaries. The Court’s primary obligation under the Rome Statute and RPE is to protect victims, witnesses and members of their families. Article 68(1) of the Statute provides that the Court shall take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses. Under Rule 81 (4) of the RPE the Court shall take necessary steps to ensure the confidentiality of information, to protect the safety of witnesses and victims and members of their families, including by authorising the non-disclosure of their identity prior to the commencement of the trial.

Although specific organs of the Court rely significantly on intermediaries to carry out their work, each organ has its own policy and protocol. There is no uniform, consistent, court-wide policy which sets out the Court’s expectations, its current practice and its obligations towards intermediaries. In some cases, intermediaries may act based on a contractual arrangement with the ICC or a memorandum of understanding.

The Office of the Prosecutor

The OTP, for example, has no publicly-available document which sets out its relationship with intermediaries. In its 2009-2012 Prosecutorial Strategy document, the OTP reiterated its duty to protect *inter alia* third parties/intermediaries at risk on account of the Court’s activities. More recently, in the *Lubanga* case, the OTP provided some details concerning its approach to and relationship with intermediaries. The OTP indicated that:

The absence of a clear, consistent policy regarding the Court’s relationship with intermediaries has significant implications for the defence and the fairness of the proceedings.

42 Ibid.

However, under Article 54(3) (f) the Prosecutor is authorised to 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.

The Appeals Chamber has since decided that the Court's obligation to protect persons also extends to 'persons at risk on account of the activities of the Court'. This decision was made in response to an appeal by the Prosecutor against the refusal of Judge Sylvia Steiner, Single Judge of Pre-Trial Chamber I, to authorise the redactions of statements and interview notes of seven witnesses for the protection of 'innocent third parties'; that is, persons who are not victims, current or prospective prosecution witnesses or sources or members of their families pursuant to Rule 81(4) of the RPE and Article 54(3)(f) of the Rome Statute. The Appeals Chamber determined that Rule 81(4) of the RPE is not limited to the category of persons referred to therein but should be read to include the words 'persons at risk on account of the activities of the Court' in order to reflect the intention of the drafters of the Statute and RPE.

Trial Chamber I in the *Lubanga* case has determined that although the Appeals Chamber decision was made in the context of Pre-Trial proceedings, the decision is equally applicable to trial proceedings. The Trial Chamber concluded that

'any individual still living or working in the DRC who assists during interviews, or who acts as an intermediary or a source, may well be affected if his or her cooperation with, or assistance to, the Court is revealed, and such people would thus be at risk on account of the activities of the Court.'⁴³

While the judges have determined that the provisions on the protection of victims and witnesses in the Statute and RPE also apply to intermediaries, the scope of the Court's obligation to protect is unclear. Thus far, the protective measures appear to be limited to redacting relevant portions of statements or documents and not revealing the identity of the intermediary to the defence or the public. It remains an open question whether the ICC has an obligation to implement the same level of protection for intermediaries in the field as it would for witnesses, including (if the level of risk is very high) entry into the Court's protection programme.

43 Decision on the 'Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque Information of 5 December 2008*', 9 April 2009, ICC-01/04-01/06-1814-Conf as referred to in 'Redacted Decision on the application to disclose the identity of intermediary 143', 10 December 2009, ICC-01/04-01/06-2190-Red.

Training and support

The Victims' Strategy, a court-wide inter-organ policy paper, is the first public indication from the Court in a policy document of a duty and intent to train and provide support to intermediaries. Paragraph 46 of the Strategy provides:

'If the rights of victims are to be effective, victims must first be aware of their right to participate so that they can take informed decisions about whether and how to exercise it, and must be assisted to apply to participate throughout if they wish to do so. The Court recognizes that these can most effectively be carried out in partnership with individuals and organizations that are close to victims. *To that end, the Court will identify and provide training and support to intermediaries who decide to assist victims in relation to their participation in ICC proceedings.* The Registry will make available standard application forms that are both user-friendly for the victims and capable of providing the Chambers with the information they need. It will co-operate with intermediaries and legal representatives to ensure that victims can present complete information so as to allow their applications to be properly considered by the relevant chambers.' [emphasis added]

This is a welcome development given that in many cases intermediaries do not have a legal background and they are unfamiliar with the complex legal proceedings of the Court.

4.4 Over-reliance on intermediaries

However, civil society groups indicate that while training is a major concern, a more troubling issue is that intermediaries are being asked to carry out functions that ought properly to be done by the staff of the Court, who do in fact have the resources to undertake these functions.

Significantly the VRWG noted that:

'Many of the organizations and individuals working as intermediaries do not have prior experience of dealing with Courts or judicial proceedings. Some intermediaries are human rights NGOs with experience in documenting human rights violations; others may be grassroots networks providing humanitarian or other support to victims. There was a variety of training needs for such NGO, however the main concern of intermediaries was not training; the concern was that the intermediaries were being asked to do more and more complex work which really should be performed by the Court, without any recognition for it. The answer is not to provide more precise training for such NGOs, but to ensure that there is a proper distribution of tasks that reflects the capacities and local context of intermediaries, and which properly recognizes their role.'

4.5 Impact on the defence

The absence of a clear, consistent policy regarding the Court's relationship with intermediaries has significant implications for the defence and the fairness of the proceedings. For example it is not clear whether intermediaries are made specifically aware of the Prosecutor's duty to investigate incriminating and exonerating evidence equally, and that such evidence must later be disclosed to the defence.

The defence of Thomas Lubanga rests in part on allegations that intermediaries relied on by the OTP allegedly bribed or assisted witnesses to fabricate evidence against the defendant. The defence has called for full disclosure of the identity of particular intermediaries said to be responsible for unscrupulously coercing witnesses. The prosecution opposes the application. The prosecution contends that in the *Lubanga* case it utilised the assistance of six intermediaries to reach half of its trial witnesses. They contend that the defence had an opportunity in cross-examination to test the veracity of the accounts of prosecution witnesses and to test whether they had been coached or induced to lie before the Court, and no evidence of impropriety has emerged. As such, there was no reason to disclose the identity of essential and active intermediaries or to call them as witnesses.

The OTP did, however, propose alternatives for the Chamber to consider before determining whether or not to disclose the identities of the intermediaries to the defence. First, the prosecution suggests that an appropriate member of the OTP should be called as a witness in order to hear evidence and test relevant aspects of the OTP's use of intermediaries. Only thereafter, if the Chamber considers it necessary, the Chamber may then call those intermediaries affected by allegations for an in camera hearing at which neither party is present. The parties and participants can submit the questions they wish to put to the intermediary. Only as a last resort, after the above options have been exhausted and there are continuing, concrete questions on the role of the intermediaries, should the Chamber consider disclosing the identities of the intermediaries.⁴⁴

The options proposed by the prosecution have been rejected by the defence. The judges' decision on the matter is still pending.

4.6 Conclusions and recommendations

Lack of transparency in the Court's interaction with intermediaries could potentially jeopardise the integrity of proceedings before the Court. While it is true that the absence of enforcement mechanisms, such as a specific police force, places the ICC at a disadvantage in effectively carrying out investigations and prosecutions, it is important that the Court's reliance on third parties such as intermediaries does not compromise the fairness of proceedings.

The IBA recommends that:

- The ICC urgently streamlines its interaction with intermediaries. The increased litigation on this issue may provide much-needed clarity on certain aspects of the Court's relationship with intermediaries which may help to guide policy decisions. As soon as it is practicable, a court-wide strategy document on intermediaries should be finalised.
- The OTP publish a separate document (similar to the OTP's Victims' Strategy paper) outlining the policy, guidelines and protocols governing its relationship with intermediaries.

⁴⁴ Prosecution Proposed Procedure for Dealing with Intermediaries, ICC-01/04-01/06-2362 19-03-2010 at p 4.

5.1 Introduction

The defence's disclosure obligation has been the subject of litigation in the *Lubanga* case. Most recently, in a filing of 25 February 2010, the prosecution complained that it was being ambushed by the defence 'with undisclosed allegations that were improperly withheld from [prosecution] witnesses whose credibility were now being impugned'.⁴⁵ This, they contended, was contrary to the Chamber's order concerning the defence's disclosure obligations.

The disclosure regime established by the Rome Statute and the Rules of Procedure and Evidence places the bulk of the obligation for full disclosure of both incriminating and exonerating material on the Prosecutor.

Disclosure of evidence lies at the heart of an accused's right to a fair trial.⁴⁶ The disclosure regime established by the Rome Statute and the Rules of Procedure and Evidence places the bulk of the obligation for full disclosure of both incriminating and exonerating material on the Prosecutor. Under the ICC legal regime, a defendant's right to full disclosure exists whether or not he elects to remain silent or fails to raise a defence.⁴⁷ While the ICC's legal texts clearly enunciate the Prosecutor's disclosure obligations vis-à-vis the defence, the scope of the defence's reciprocal obligation in this regard is more limited.

The prosecution's submissions raise questions about the appropriate scope of the defence's disclosure obligations. As will be seen in this chapter, the issue raises a number of interesting questions concerning whether there should be parity between the prosecution and the defence's obligation to disclose.

45 Prosecution's Submissions in Response to Trial Chamber's Oral Request of 10 February 2010, ICC 01/04-01/06-2310-Red 25-02-2010, p3.

46 H Brady, 'Disclosure of Evidence', in Roy S Lee (ed), *The International Criminal Court - Elements of Crime and Rules of Procedure and Evidence* (2001) 403.

47 Judgement on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06, 11 July 2008 para 50.

5.2 Legal and jurisprudential background

The legal regime governing disclosure by the defence is provided in the ICC RPE; the Rome Statute is silent on this issue. Rule 78 of the RPE provides for prosecution inspection of material in the possession of the defence which the latter intends to use as evidence during the confirmation hearing or at trial. Under Rule 79 the defence is required to notify the Prosecutor of its intent to raise the existence of an alibi or raise a ground for excluding criminal responsibility provided for in Article 31(1).

According to one commentator, during the negotiations on the RPE at the Preparatory Commission, Rules 78 and 79 were far more controversial than their counterparts Rules 76 and 77 governing the prosecution's duty to disclose.⁴⁸ During debates in the first session of the Preparatory Commission, some delegations were opposed to imposing reciprocal disclosure obligations on the defence.⁴⁹ The inclusion of Article 79 was a compromise that was consistent with corresponding provisions in the Rules of Procedure of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), which was primarily aimed at facilitating the expeditious conduct of trial proceedings.⁵⁰

The limited disclosure obligations imposed on the defence aim to preserve the very important balance between the need for effective and efficient management of the proceedings, and the rights of the accused as delineated under the Rome Statute.

The limited disclosure obligations imposed on the defence aim to preserve the very important balance between the need for effective and efficient management of the proceedings, and the rights of the accused as delineated under the Rome Statute. The Rome Statute not only guarantees the right to remain silent as an inalienable right of the accused, but it also assures that in the event that the accused opts to remain silent, his silence

48 See above note 49 at p 404

49 Ibid at p 414.

50 Ibid at p 415 and corresponding footnote. See for example Rule 67(A) (ii) of the ICTY and ICTR Rules.

should not be considered in the determination of his guilt or innocence. While the Trial Chamber bears the responsibility of efficiently managing proceedings, it must be careful to ensure that its decisions do not impinge on the defence's inalienable rights in this regard.

5.3 Timing and scope of defence disclosure

The timing of defence disclosure has been the subject of interesting judicial consideration. The standard provided in Rule 79 (4) is 'sufficiently in advance' to enable the Prosecutor to prepare adequately and to respond. Determining what constitutes sufficiently advanced notification is a matter for the judges' discretion.

Interpreting Rule 79 (4)

The prosecution argues that a purposive interpretation of Rule 79 read together with the other relevant provisions supports a reciprocal approach to disclosure. It submits that the Chamber should ensure that disclosure occurs 'materially in advance' of any defence evidence in order to facilitate adequate prosecution preparation. Furthermore, the prosecution supports 'sufficiently early' disclosure of the main lines of the defence case, preferably before the beginning of the trial, as this they contend, is in the interests of justice and judicial economy.

5.4 Significant jurisprudence in the Lubanga case

Oral Decision on Redactions and Disclosure

Judicial economy appears to have been an important determinant in the approach taken by the judges during the early stages of pre-trial preparation in the *Lubanga* case. The judges attempted to expedite the disclosure process by urging the defence to reveal its basic line of defence beforehand, and risked impinging on the defendant's fundamental right to silence and non self-incrimination.

In an *Oral Decision on Redactions and Disclosure* delivered on 18 January 2008, the Trial Chamber decided that late disclosure by the defence of the lines of defence on which it intends to rely at trial could have consequences for decisions relating to disclosure to the accused. The Chamber indicated that although the defendant was fully entitled to rely on his right to silence, 'unreasonable decisions by the defence to make late disclosure may have an effect on the determinations by the

Chamber as to what constitutes a fair trial'.⁵¹

The defence requested leave to appeal the aforementioned judgment. The Appeals Chamber decided that the defence was entitled to full disclosure in relation to the case as a whole as known by the Prosecutor.⁵² As such, the accused was fully entitled to rely upon the right to remain silent. However, the Appeals Chamber noted that the Trial Chamber's decision should not be read as placing pressure on the accused to testify or raise defences at an early stage as a condition of obtaining prosecution disclosure.⁵³

Judge Georgios M Pikis, in his partly dissenting opinion, stated that the question the Appeals Chamber should have answered was 'whether the trial chamber erred in imposing an obligation on the defence to disclose the lines of defence in advance'.⁵⁴ According to Judge Pikis, the very invitation of the Trial Chamber to the accused to disclose his lines of defence suggested that the right of the accused to remain silent as provided under Article 67(1)(g) of the Rome Statute is not absolute. He stated that the judgment signifies that the accused at some stage of the proceedings is under a duty to disclose his line of defence, and if he fails to do so then he will have to bear the consequences.⁵⁵ Judge Pikis stressed that the right to silence is interwoven with the presumption of innocence of the accused and it is the duty of the prosecution to prove the case against him beyond reasonable doubt.⁵⁶

51 'Oral Decision on Redactions and Disclosure, ICC-01/04-01/06-T-71-Eng, 18-01-2008 The Chamber further noted that... '[If] For instance, given the need to protect witnesses and others who have provided information to the Court [...] the Bench is put in a position at a late stage of the proceedings, without any proper justification, of being asked to order the disclosure of exculpatory witnesses when at that point in time it is impossible to secure their necessary protection, the possibility exists that the Court will conclude that the continued trial is fair notwithstanding the failure to reveal their identities to the accused.'

52 Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433 11/07/2008, para 35, 38, 51.

53 Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433 11/07/2008, para 55. Other aspects of the impugned decision not strictly related to disclosure by the defence were also subject to appeal. It is mentioned here to highlight what appears to be an overzealous attempt by the Trial Chamber to control the proceedings, including by determining which information in the prosecution's possession was relevant to the preparation of the defence case. The Trial Chamber ruled that the prosecution were not obliged to serve material that related to the general use of child soldiers in the DRC as such material did not appear to be relevant to the charges faced by the accused. The defence also appealed this aspect of the Chamber's ruling and the International Criminal Bar was granted leave by the Appeals Chamber to make submissions on this issue as *amicus curiae* (friend of the Court). The Trial Chamber's decision on this issue was overturned.

54 Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433 11/07/2008, Partly dissenting opinion of Judge Georgios M Pikis, para 1.

55 Ibid at para 11.

56 Ibid at para 14.

Decision on Defence Disclosure

In its *Decision on Defence Disclosure* issued on 20 March 2008, prior to the Appeals Chamber's decision referred to above, the Trial Chamber interpreted Rules 78 and 79 of the RPE and Regulation 54 of the Regulations of the Court.⁵⁷ The judges determined that, notwithstanding the existence of certain inviolable rights of the accused under the Rome Statute, there were important provisions in the Statute which define the (disclosure) obligations that could be imposed on the accused in order to secure a fair and expeditious trial.⁵⁸ The Chamber considered that under the Rome Statute framework, the accused's right to a fair trial is not necessarily compromised by the imposition of an obligation to reveal details of defences and prospective evidence in advance, in appropriate circumstances. The Chamber noted that although in principle Regulation 54 permits it to order advanced disclosure by the defence, it was obliged to utilise those powers in an appropriate manner, taking into account the rights of the accused, the status of disclosure by the Prosecutor and the circumstances of the case.

The judges in the *Lubanga* case thus adopted a broad interpretation of Regulation 79(4). In their view, the Chamber's power to order advanced disclosure of prospective defences was not limited to an alibi defence or one excluding criminal responsibility.⁵⁹

57 ICC-01/04-01/06, 20-03-2008

58 *Decision on Disclosure by the Defence*, at para 27 and 28. In a prior decision, Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial, ICC-01/04-01/06-1083, 13-12-2007, the Chamber requested submissions from the parties concerning the interpretation to be given to Rule 79(1) and the scope and timing of defence disclosure, including *inter alia*, the lines of defence (including details of facts and issues underpinning the lines of defence); the names of witnesses to be called and the statements of the witnesses; the identity and content of documents the defence intends to rely on; instructions to expert witnesses; and the objections to the admissibility of prosecution witnesses.

59 The Chamber ordered the defence to disclose three weeks before trial a document setting out the intended defences and any factual or legal issues he intends to raise; details of any applications concerning admissibility or relevance or other issues of law to be resolved prior to commencement of trial; and to furnish the prosecution, following completion of its evidence, with the name, address and date of birth of any witness to allow it to conduct appropriate enquiries. The Chamber and the participants were also to be provided with any evidence other than the oral testimony of witnesses, three days in advance of its presentation. The judges further indicated that, depending on the circumstances of alleged child soldiers, it may on an exceptional basis order advance disclosure of the defence questions or lines of questioning to facilitate the protection of these individuals under Article 68(1). The Trial Chamber eventually rescinded its order concerning defence advance disclosure of applications on admissibility et al in light of 'the history of late disclosure [by the prosecution] to the accused.' The Chamber decided that the defence may not at that time have sufficient mastery of the totality of the evidence to enable it to effect informed compliance. See 'Decision on the Defence request for leave to appeal the *Decision on Disclosure by the Defence*' ICC-01/04-01/06-1313, 08-05-2008 at para 23.

.....

In declining leave to appeal, the majority of the Trial Chamber made it clear that the defence disclosure obligations were considered as 'a case management tool' designed 'to advance the fair and expeditious conduct of the proceedings'.

.....

Leave to appeal

The defence applied for leave to appeal substantive portions of the decision but the application was refused. The defence argued that the Chamber's order affected the defendant's right to silence and had a direct impact on the fair and expeditious conduct of the proceedings. Importantly, the prosecution did not oppose two of the three grounds advanced by the defence and submitted that the Court's order arguably affected the rights of the defence and the fairness of the proceedings, and the matter should be resolved by the Appeals Chamber. In declining leave to appeal, the majority of the Trial Chamber made it clear that the defence disclosure obligations were considered as 'a case management tool' designed 'to advance the fair and expeditious conduct of the proceedings'.⁶⁰ The judges indicated that their order would not have a negative impact on the defence's right to silence, as the disclosure obligation was limited to situations in which the accused advances a positive case (thereby waiving his right to silence).

Judge Blattman, in a strong dissent, disagreed with the majority view on this issue. In his opinion, an accused does not waive his right to silence by choosing to advance a positive defence. He notes: '[an] accused's right to silence is fundamental and it cannot be considered that an accused person has only two options: either to sit in silence throughout the entirety of the proceedings without advancing any sort of defence, or to waive the right to silence'.

The decision of the majority of the Chamber declining leave to appeal was regrettable. Given the significant impact of this issue on the fairness of the proceedings, a view shared by both the prosecution and defence, and in light of Judge Blattman's dissent, the matter ought properly to have been finally determined by the Appeals Chamber.

60 ICC-01/04-01/06-1313, Public Decision on the Defence request for leave to appeal the *Decision on disclosure by the defence*, para 22.

.....

The ICC's legal texts do not fully elaborate the timing and scope of defence disclosure. However, the Rome Statute is very clear concerning the defendant's fundamental right to not incriminate his or herself and to remain silent, without this being taken into account in determining guilt.

.....

Redacted Second Decision on Disclosure by the Defence and Decision on whether the prosecution may contact defence witnesses⁶¹

The Chamber was called upon to determine three issues: first, whether it was appropriate for the prosecution to contact defence witnesses prior to their oral testimony being given; second, whether the defence should be required to disclose additional details regarding the evidence the defence witnesses intend to give, whether in the form of statements, notes or other means of recording; and third, the timeliness of defence disclosure which the OTP contends should be at least three weeks prior to the commencement of the trial.

In relation to the first issue, the defence team had visited the DRC, conducted investigations, identified 16 witnesses for the accused and provided their names and addresses to the prosecution. They also provided brief summaries of the matters that they anticipated would be covered during the witnesses' testimonies, which went beyond the Chamber's decision on disclosure. The prosecution sought to interview one of the witnesses prior to his testimony, to which the defence strenuously objected. The Chamber ruled that no party calling a witness 'owns that witness'; as such, once appropriate arrangement can be made with the organ of the Registry responsible for dealing with witnesses and provided that there is full compliance with previous decisions of the Chambers concerning contact with witnesses, the prosecution would be able to meet with the witness in question.

Concerning disclosure, however, the Chamber acknowledged that the position and resources of the defence and prosecution were not the same and this would therefore have an impact on the nature of the order made by the Court. The Chamber refused the prosecution's application on the basis that the defence had had limited time to spend with its witnesses due to resource constraints

and they had already furnished summaries to the OTP (as a courtesy as this had not been ordered by the Chamber). Thus it was disproportionate and unnecessary to order additional disclosure except in a very limited and specific context, due to the distance between the Court and the DRC.⁶²

5.5 From *Lubanga* to *Bemba*

The jurisprudential developments on this matter in the *Lubanga* case are significant particularly in light of the fact that decisions from the *Lubanga* case on several procedural issues have been applied to other cases at the ICC. Indeed, there is every likelihood that a similar approach will be taken in the case of Jean-Pierre Bemba, given that two of the three judges in that case are also adjudicating in the *Lubanga* trial. Significantly, the judges in the *Bemba* case have requested submission from the parties involved concerning whether or not to apply or depart from the jurisprudence in the *Lubanga* case on this and other issues.

The Bemba defence team have submitted that advanced disclosure of its defence will infringe the accused's right to silence and non-self incrimination. The prosecution, on the other hand, submit that rulings of the Lubanga Trial Chamber on defence disclosure have a firm legal basis under the Statute and Rules and should be followed in the *Bemba* case. In their view, all of the disclosure requirements enunciated by the Chamber serve to secure a fair and expeditious trial and assist the Chamber to determine the truth, but do not impinge on protected defence rights.

At the time of writing, the Bemba Trial Chamber had not yet delivered its decision.

5.6 Conclusions and recommendations

The ICC's legal texts do not fully elaborate on the timing and scope of defence disclosure. However, the Rome Statute is very clear concerning the defendant's fundamental right to not incriminate his or herself and to remain silent, without this being taken into account in determining guilt. The *Lubanga* case has adopted a broad interpretation of the legal texts which could have an impact on the fairness of the proceedings and could affect the rights of the defendant as set out in the Rome Statute.

Effective management of the proceedings should never be allowed to trump the fair trial rights of the accused. The prosecution bears the burden of proof and cannot be said to be placed in the same position as the defence. The defence has limited human and material resources compared to those of the Prosecutor, and as such would find it difficult to thoroughly examine the

61 ICC-01/04-01/06-2192-Red, 20 January 2010.

62 Ibid at para 58.

material disclosed by the Prosecutor and prepare submissions regarding issues of admissibility or relevance within the timelines stipulated by the Chamber.

The correctness of the Lubanga Trial Chamber's ruling on advanced disclosure by the defence has not been fully tested. In light of the potential impact of this issue on the defendant's entitlement to silence and non self-incrimination, the IBA considers that this is an important matter that should be properly determined by the Appeals Chamber. Resolution by the Appeals Chamber would provide much needed clarity, certainty and integrity for current and future proceedings.

The IBA recommends that:

- The judges at the ICC should carefully assess the full implications of a disclosure regime that goes further than the provisions of the legal texts, namely Rules 78 and 79 of the Rules of Procedure and Evidence.
- Where applicable, the Trial Chamber – provided the statutory requirements for granting interlocutory appeal are met – should allow the Appeals Chamber to render a definitive decision on this issue that will provide jurisprudential certainty.

Chapter Six – Funding the Defence

6.1 Introduction

On 26 November 2009 the Trial Chamber in the case of Jean-Pierre Bemba delivered an important decision concerning the provision of legal assistance to defendants before the Court.⁶³ The decision is remarkable for its succinct yet detailed interpretation of a vexed but fundamental issue at the ICC: funding the defence. Its most significant feature is, however, the practical and decisive approach taken by the Chamber in resolving a long outstanding issue that threatened to undermine the fundamental rights of a defendant and ultimately the legitimacy of the ICC.

6.2 Background

On 27 May 2008, Pre-Trial Chamber III directed an order to the Portuguese Republic concerning the identification, tracing, freezing and seizure of the property and assets of Mr Jean-Pierre Bemba. On 25 August 2008, based on her investigations into his financial means, the Registrar provisionally decided that Mr Jean-Pierre Bemba is not indigent and that, accordingly, he is ineligible for legal assistance, in full or in part, paid by the Court.

On 10 October and 14 November 2008, the Pre-Trial Chamber rejected the defence application for the lifting of the seizure of Mr Bemba's property and assets. It also ordered the Registrar to monitor, in consultation with the Portuguese authorities, the distribution of €36,260 per month, drawn from a Portuguese bank account owned by Mr Bemba, to meet his financial obligations to his family and counsel. The defence made an application for the freezing order on another account to be lifted as the Portuguese account had insufficient funds to cover the fees and expenses of the defence team as well as the subsistence contribution to Mr Bemba's family. The Pre-Trial Chamber granted their request and made the order.

The issue was not resolved. The defence filed several applications before the Chamber for the matter to be addressed; ultimately requesting, following the reduction of the team for non-payment of fees, that the proceedings be stayed.

6.3 The legal position

The Rome Statute framework enshrines the fundamental rights afforded to defendants before the Court. The accused has a statutory entitlement to adequate time and facilities for the preparation

of his defence and to be tried without undue delay (Article 67 of the Rome Statute).

Under the legal regime of the Court, the Registrar is mandated to administer the legal aid system of the Court, which ensures that indigent detainees are afforded effective legal representation at the Court's expense. Regulation 83 of the Regulations of the Court provides that legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in Regulation 68 and staff expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances.

Where a person applies for legal assistance to be paid by the Court, the Registrar makes a determination of the applicant's means and whether he or she should be provided with full or partial payment of legal assistance.⁶⁴ Means include all assets which the applicant directly or indirectly enjoys or is free to dispose, such as but not limited to direct income, bank accounts, real or personal property, pensions, stocks, bonds or other assets held.⁶⁵ The Registrar may also take into account any property transferred to the applicant if relevant, and his apparent lifestyle. The Registrar's findings are based on the declaration of the applicant as well as an independent investigation carried out by the financial investigator.

To date four defendants have been declared provisionally indigent before the ICC.⁶⁶

6.4 The Registrar's submissions

The Registrar refused to grant legal aid to the defendant on the basis, *inter alia*, that the freezing order on one bank account would be lifted in the near future and that the winding up of certain property in which the accused has interest is in progress.⁶⁷

In her submissions to the Chamber, the Registrar indicated that she is bound by Rule 4.1 of the Financial Regulations and Rules adopted by the Assembly of States Parties (ASP or the Assembly);

⁶⁴ Regulation 84 of the Regulations of the Court.

⁶⁵ *Ibid* at 84(2).

⁶⁶ Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui, charged in respect of the Prosecutor's investigations in the Democratic Republic of Congo and Mr Bahu Idriss Abu Garda, charged in respect of the Prosecutor's investigations in the Darfur, Sudan have all been found provisionally indigent.

⁶⁷ The Registrar's response was filed confidentially. As such any references to the Registrar's submissions were obtained from the relevant footnotes in the Trial Chamber's decision. See for example para 68 of the Decision, see above note 35.

⁶³ Redacted version of *Decision on legal assistance for the accused*, (The Decision) ICC-01/05-01/08-567-Red, 26-11-2009.

as such, she is limited to paying monies only in accordance with the approved Court budget.⁶⁸ The Registrar further submitted that the monies allocated for legal assistance can only be used for the defence of those individuals who are indigent.⁶⁹ The Registrar also observed that transfer of funds from one fund to another is only possible under Rule 4.8 of the Financial Regulations and Rules if authorised by the ASP or in exceptional circumstances.

In the Registrar's view, the defendant's lack of access to his funds was temporary and having been declared indigent, there was no option under the documents governing the financial framework of the Court to advance funds to Mr Bemba (notwithstanding that this situation had persisted for some time).

The Chamber noted that the Registrar's submission lacked precise information concerning the date when either the winding up of the assets or unfreezing of the account would take place, neither was any basis provided for the Registrar's expectation that funds from either source would soon become available. The judges found that there were no adequate indications as to when, in the near or distant future, the accused would be able to pay his lawyers.⁷⁰

6.5 Provision of legal assistance – a sensitive issue

Providing legal aid to indigent defendants has always been a difficult and sensitive issue at the ICC. The Committee on Budget and Finance (CBF) – a subsidiary body of the ASP mandated to provide recommendations to the Assembly concerning the Court's budget – has in the past described legal aid as entailing 'significant financial and reputational risks to the Court'.⁷¹ The Committee has expressed concern at the 'escalating' costs of legal aid and routinely recommends a reduction in the amount submitted annually by the Registrar to the proposed budget.⁷² The Court has been mandated by the Committee at every meeting since 2004 to submit an updated report on different aspects of legal aid.⁷³

The CBF has been particularly concerned about the Court's formula for determining indigence as, in their view, the Court's proposed formula could result in persons with significant

The Chamber's decision resonates with common sense. It clearly reflects the importance that the ICC judges place on ensuring that the defendant's lack of access to his or her resources does not hamper the fair and expeditious conduct of the proceedings. To have counsel appearing pro bono for several months must hamper the effective preparation of the defence.

means being declared indigent.⁷⁴ The Committee suggested that alternatives to the method utilised by the Court be considered and discussed, and that it might also be desirable to establish absolute thresholds of asset holdings above which legal aid would not be provided.⁷⁵ The Court was mandated to comparatively assess the formula utilised by the ad hoc tribunals to determine this issue and submit a report.⁷⁶ During the work of the CBF's thirteenth session, the Registrar submitted the 'Report of the Court on legal aid: alternative models for assessment of indigence'.⁷⁷

The situation in the *Bemba* case – where a defendant who is declared not indigent, but whose assets have been frozen and are therefore inaccessible, requires advanced funds for his defence under the Court's legal aid scheme – is somewhat unique. Given that such funds would not have been anticipated in the Court's budget for legal aid, the Registrar would have to resort to the Contingency Fund (a fund available for exceptional and unforeseen events at the Court not anticipated in the proposed Programme Budget).

The difficulty was created in part by Portugal's slow response to the Court's order for unfreezing of the assets. If States fail to cooperate in a timely manner to unfreeze accounts (frozen at the behest of the Court) the defendant, though declared not indigent, will for all practical purposes be unable to fund his defence and satisfy obligations to family members. In such a situation, a practical solution must be found.

68 Ibid at para 77.

69 Ibid.

70 See above note 35 at para 68.

71 Report of the Committee for Budget and Finance on the Workings of the 4th Session, ICC-ASP/4/2, para 49. See also Report of the Committee on Budget and Finance on the work of its eleventh session, ICC-ASP/7/15, para 126.

72 See for example Report of the Committee on Budget and Finance on the work of its thirteenth session, ICC-ASP/8/15, at para 95 and 96.

73 Ibid at para 124.

74 See for example, Report on the operation of the Court's legal aid system and proposals for its amendment, ICC-ASP/6/4.

75 See note 72 at para 128.

76 See for example 'Interim report on different legal aid mechanisms before international criminal jurisdictions', ICC-ASP/7/12.

77 ICC-ASP/8/24.

6.6 The decision

The Chamber's decision resonates with common sense. It clearly reflects the importance that the ICC judges place on ensuring that the defendant's lack of access to his or her resources does not hamper the fair and expeditious conduct of the proceedings. To have counsel appearing pro bono for several months must hamper the effective preparation of the defence.

The Trial Chamber concluded that given the resources currently available to Mr Bemba, he is seriously at risk of being denied the opportunity to properly prepare for a timely trial before the ICC. In the Chamber's view, the combined effect of the current lack of access on the part of the Court and the accused to the assets that have been traced and identified, together with the refusal by the Registrar to provide temporary financial assistance, (even with a mechanism for repayment to the Court once the accused's funds are released), is that Mr Bemba has been placed in a regrettable position.

The Chamber has ordered the Registrar to:

- provide funding in the sum of €30,150 a month, to be paid retrospectively to March 2009 and ongoing until there is a material change in circumstances;
- obtain a sworn declaration from the defendant outlining his current disposable means, his patrimony including any inheritance from his father;
- secure a legally-binding power of attorney and a power of sale in favour of the Registrar over the villa in Portugal (in accordance with the applicable national law), which is to be sold, inter alia, to refund the accused's legal assistance (to the extent that this is funded by the Court);
- secure an appropriate, legally enforceable document, signed by the accused, enabling the Court to be repaid out of the funds of the accused, as and when they become available.

In so doing the Chamber has taken concrete and practical steps to resolve what was quickly becoming an untenable impasse between defence counsel and the Registrar which threatened to derail the proceedings.

The Chamber was careful to emphasise that the Registrar has a difficult obligation to ensure that the scarce resources of the Court are not wasted. The Court also acknowledged that the public perception of the ICC could be negatively affected if the Court is seen to fund a wealthy accused; hence the detailed order for securing repayment of the advanced funds.

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One of the priorities of the new Head of the Counsel Support Section must be to ensure that reports on the Court's legal aid programme are fully accessible to the public.

.....

6.7 The wider context

In general, the Registry has made significant efforts to implement an effective and efficient legal aid scheme that reflects some of the best practices of the ad hoc tribunal, yet is tailored to the unique nature of the ICC. As previously indicated, detailed reports on the legal aid scheme have been submitted to the ASP and to date there have been no reports of some of the shameful abuses of the legal aid system which characterised the ad hoc tribunals. These are, however, early days in the life of the ICC and a full evaluation will await the completion of a full trial cycle.

However, the numerous reports produced by the Court are virtually unknown to the public – and in particular members of the legal profession who would be concerned about these issues – because they are not easily accessible on the Court's website. The difficulty lies in the fact that as the reports are produced for consideration by the ASP they are uploaded to the documentation section of the ASP pages on the website. However, if one is not aware that these reports were published for a particular session of the Assembly, they can be very difficult to find.

The Defence Support Section of the Registry, which formerly had responsibility for technical and logistical matters concerning defence counsel as well as the legal aid programme, has now been subsumed into the newly-formed Counsel Support Section (CSS). The CSS will now also be responsible for all counsel-related matters including legal aid for victims.⁷⁸ The head of that unit is currently under recruitment. One of the priorities of the new Head of Counsel support section must be to ensure that reports on the Court's legal aid programme are fully accessible to the public.

78 The Office of Public Counsel for Defence, which is mandated under Regulation 77 of the Regulations of the Court to provide support and assistance to defence counsel and to represent the general interests of the defence in certain contexts, will continue to fulfil its mandate independently of the CSS. The mandates of both are different and there is no overlap in functions.

6.8 Conclusions and recommendations

The developments in the case of Jean-Pierre Bemba have brought into the public domain an issue that is normally addressed confidentially at the Court (consonant with the provisions of the Regulations of the Court and Registry). The provision of legal assistance is a sensitive but important issue with potentially serious financial and reputational risks for the Court, but also potentially serious implications for defendants.

The decision of the Chamber was both practical and principled, and clearly reiterated the Court's commitment to safeguarding the rights of the defendant without compromising the integrity or financial reputation of the Court.

The IBA recommends that:

- The Registrar publish a comprehensive document on legal aid as soon as possible. The document could be an interim policy paper which is finalised once the Court has completed the full cycle of its first trial.
- The Registry uploads all the relevant legal aid reports to the Counsel page under the Registry section of the ICC website. Indeed, other thematic reports such as family visits for indigent detainees should also be uploaded to this page.

Significant Findings and Recommendations

In general, the IBA considers that a number of unanswered questions remain concerning very important issues at the ICC; most notably in respect of the Investigations Division (ID) of the Office of the Prosecutor (OTP) and the Court's relationship with intermediaries.

Intermediaries generally include local non-governmental organisations (NGOs) or grassroots associations, individuals or any other associations or groupings which in some way link the ICC (including the Trust Fund for Victims) to its constituents (victims, witnesses or others) or legal representatives to their clients in remote areas. Presently, the Court's relationship with intermediaries and its obligation towards them is unclear and requires urgent review.

Investigations

The judges' dismissal of the *Abu Garda* case on the basis of weak, inadequate and insufficient evidence raises serious questions concerning the organisation, capacity and strategy of the ID of the OTP. Despite the existence of several detailed policy documents concerning the OTP's operations, there is very little publicly-available information concerning its approach to investigations. It is not expected that the OTP will reveal details of its internal operational strategy for investigations that could compromise its operations or put staff or informants at risk; however, in the interest of transparency, it would be useful for the office to provide more information about the way investigations are organised and conducted. The OTP should urgently aim to finalise its internal operational manual, and make non-confidential portions of this document public.

Intermediaries

The IBA considers that it is time for the Court to streamline its policy and practice with intermediaries. Intermediaries play an important role in supporting the work of the Court including through facilitating investigations, which entails significant risk for these individuals and organisations. The role and status of intermediaries at the Court has become a major issue in the *Lubanga* case. The defence contends that intermediaries acting on the prosecution's behalf coerced or bribed a number of witnesses to testify against Mr Lubanga.

The developments in the *Lubanga* case point to a broader systemic problem at the Court. A number of organs – the OTP, TFV, VPRS, among others – rely significantly on intermediaries as part of their operations, yet none of these organs has a publicly-available policy document detailing the nature of and standards governing this relationship. This is particularly worrying in the case of the OTP which admits to relying on intermediaries as part of its investigations strategy. In light of the need for transparency and openness on the part of the Court's organs, urgent consideration must be given to finalising a publicly-available policy document concerning the Court's relationship with intermediaries.

The Kenya situation

The IBA welcomes the decision of the Pre-Trial Chamber authorising the Prosecutor to commence investigations in Kenya. The Kenyan situation is multi-faceted and careful attention must be paid to the protection of witnesses and victims. Importantly, the international community will be carefully scrutinising whether the expressed commitment by the Kenyan Government to cooperate with the ICC is more than mere words. Clear indicators will include the government's efforts to fully streamline and implement its Witness Protection Act and efforts to prosecute mid- to lower-level alleged perpetrators, who may fall below the ICC's radar. The IBA welcomes the decision of the OTP to adopt a parallel approach to investigations in Kenya (investigating all sides and relevant parties to the conflict simultaneously) rather than a sequenced approach as was done in relation to other situations before the Court. Given the particular nature of the Kenyan conflict, the IBA considers that this is the most efficient way to approach the Kenyan situation.

Translation and interpretation challenges

The IBA notes that both the *Lubanga* and *Katanga/Ngudjolo* trials continue to be affected by problems of translation and interpretation. Of the two, the *Lubanga* case appears to be experiencing greater challenges. The judges in *Lubanga* have issued a directive on how disputed interpretation issues should be addressed. The interpretation challenges have led to the continued slow pace at which transcripts are finalised and made publicly available on the Court's website.

Closed session hearings

Closed session hearings remain a feature of both trial proceedings. Of the 28 witnesses who testified for the prosecution in the *Lubanga* case, 22 testified with some form of protective measures (such as face or voice distortion, concealment of their identity and some/all of their testimony in closed sessions). This trend regarding closed session hearings has continued with the defence case. The result is that, to many observers, aspects of the cases being tried appear to be shrouded in secrecy.

Funding the defence

The IBA welcomes the decision of the trial judges in the *Bemba* case to order the ICC Registrar to advance a monthly sum to the defence, retroactive to March 2009, to cover long outstanding legal fees. The Registrar had previously determined that Mr Bemba was not indigent and thus did not qualify for funds under the Court's legal aid scheme. The Court had ordered the freezing of accounts and subsequent efforts to lift the freezing order in respect of one account to allow him to meet legal and family obligations had been unduly protracted. The judges made it clear that as a condition of the decision Mr Bemba was to provide an undertaking to reimburse the monies advanced and the Registrar was to register a lien against the relevant account.

The judges' decision was clearly aimed at addressing what was quickly becoming an untenable situation, particularly for defence counsel. The IBA considers that the decision was a pragmatic one which reflects a staunch commitment to safeguarding the fair trial rights of the accused, in particular, the right to an effective defence.

More generally, the Bemba decision makes extensive reference to a number of important reports about the Court's legal aid scheme that were produced by the Registry. Regrettably, these reports are not easily accessed from the Court's website as they are normally posted to the documentation pages of the Assembly of States Party's website rather than the Registry section of the ICC's website. The IBA considers that the Registry should prepare a comprehensive, consolidated document on legal aid, which is publicly accessible from the Registry page of the ICC website.

IBA recommendations

To all organs of the ICC

1. The ICC is encouraged to urgently streamline its interaction with intermediaries. The increased litigation on this issue may provide much-needed clarity on certain aspects of the Court's relationship with intermediaries which should help to guide policy decisions. As soon as it is practicable, a court-wide policy document on intermediaries should be finalised.

To the Chambers

2. While mindful of the Court's obligations to protect witnesses under Article 68 of the Statute, the IBA continues to urge the ICC Trial Chambers to limit the number of closed session hearings to those that are strictly necessary for the protection of witnesses or confidential information.
3. The Chambers are urged to ensure that, during the transition from closed to open session, sufficient information is provided in order to ensure that the public is able to keep abreast of the evidence as it unfolds. For example, if a witness completes his or her testimony in closed session an announcement to that effect should take place in open session before proceedings are adjourned.
4. While acknowledging the important need for judges at the Court to efficiently manage trial proceedings, the IBA encourages the Chambers to ensure that disclosure obligations imposed on the defence pursuant to Rules 78 and 79 of the Rules of Procedure and Evidence do not go beyond the limited scope envisaged by those provisions, nor infringe the defendant's right to silence and non-self-incrimination.
5. Where applicable, the Trial Chamber – provided the statutory requirements for granting interlocutory appeal are met – should allow the Appeals Chamber to render a definitive decision on the issue of defence disclosure that will provide jurisprudential certainty.

To the OTP

6. The OTP is urged to reinforce the leadership of the Investigations Division. This should begin with the appointment of a Deputy Prosecutor in charge of investigations.

7. In general, the OTP is urged to address what appear to be gaps in the organisation, capacity and strategy of the Investigations Division as soon as possible.
8. In order to build public confidence in its investigations and in the interest of transparency, the OTP is encouraged to publish non-confidential portions of its Operational Manual, in particular sections concerning investigations, once finalised.
9. The OTP is urged to publish a separate document (similar to the OTP's Victims' Strategy paper) outlining the policy, guidelines and protocols governing its relationship with intermediaries.

To the Registry

10. The Registry is encouraged to upload all the relevant legal aid reports to the counsel page under the Registry section of the ICC website. Indeed, other thematic reports such as family visits for indigent detainees should also be uploaded to this page.
11. In addition, the IBA urges the Registrar to publish a comprehensive document on legal aid as soon as possible. The document could be an interim policy paper which is finalised once the Court has completed the full cycle of its first trial.

To the Kenyan Government

12. The Kenyan Government is strongly encouraged to fully cooperate with the ICC Prosecutor during his investigations, in particular by facilitating the timely surrender of any person who is identified by the Court as a possible suspect. Such person should be afforded the full guarantees of suspected persons under the Rome Statute and recognised in international law.
13. The Kenyan Government must take definitive steps to fully streamline and implement its Witness Protection Act and to ensure the safety and security of persons who cooperate with the ICC as victims or witnesses.
14. The Kenyan Government is urged to make efforts to complement the work of the ICC by ensuring that mid- and lower-level perpetrators are held accountable through prosecutions at the national level.

Annex I: Summaries of Defence Witnesses in Lubanga Case up to 2 April 2010

The defence case in the trial of Thomas Lubanga Dyilo commenced on 27 January 2010. To date 23 witnesses have testified, many of them with protective measures such as image and voice distortion and in closed sessions. The summaries below are informal summaries of publicly-available witness testimonies compiled by the IBA.

1. Witness 002 was the first defence witness to testify. He testified with protective measures – voice and image distortion – and most of his oral evidence was given in closed session. This witness is the father of an alleged former UPC child soldier who testified on behalf of the prosecution. The witness alleges that his son gave false testimony to the Court as during the period of 2002-2003 (the period during which Thomas Lubanga is accused of conscripting and enlisting children). His son was living with him at home in eastern DRC. According to the witness his son left home in 2007 and went to live with his aunt from his mother's side.

The witness alleges that his son was promised a job by a certain organisation as a result of which the boy travelled with his uncle to the organisation's offices in Beni. According to the witness, the uncle told him that persons from the organisation talked to his son in private and he was therefore not aware of the context of their conversation. Nonetheless, after the meeting the child told his uncle that he would not return home with him. The witness did not say in open session when his son and the uncle travelled to Beni. The witness also told the Court that a person from the same organisation also visited their home and reassured his wife that their son was alive and studying. Furthermore, that person managed to convince his wife to sign some documents so that the child could study for free.

The witness testified that he did not tell the police that his son intended to testify before the ICC and give false testimony. When asked by the prosecution counsel why he did not tell that to the police, he indicated that the police would never prevent someone from testifying before the ICC. The witness also told the Court that in his neighbourhood there were rumours that he had sent his son to testify before the ICC as a child soldier in order to receive money.

2. Witness 003 was Mr Maki Dera Joseph, born in 1962 in Zabuda, Congo. He testified without protective measures. Nonetheless, the first part of his oral testimony was conducted mainly in closed session. Mr Maki was the uncle of the boy that testified as a prosecution witness and whose father was defence witness.

Mr Maki told the Court that he accepted US\$200 from intermediaries to convince his nephew to give false testimony. He also stated that he gave permission to Court officials to take x-ray images of his nephew in order to determine his age. The witness stated that the intermediaries threatened to imprison him if he decided to betray them.

The witness also told the Court that he was receiving threats from his neighbours and family members when they realised that he was cooperating with the Court. He said that due to the pressure he was receiving from the community his wife deserted him and he sought refuge in the bush out of fear of being attacked.

Mr Maki testified that he went to the wise men of the village to ask for forgiveness and they put him in touch with the UPC secretary-general. The UPC officials advised him to talk with Mr Lubanga's defence lawyers. He indicated that the UPC authorities did not offer him money to testify as a defence witness for Mr Lubanga.

Counsel Mabilile asked the witness why in previous interviews with the defence lawyers he stated that he knew Mr Lubanga, whilst in the Court he said that he did not know him. His response was that he first told the defence what the intermediaries had paid him to say; however, he now wished to tell the Court the truth.

3. Witness 004 was Claude Nyéki Django. He gave his testimony without protective measures, but a large part of his testimony was given in closed sessions.

Mr Django is now 20 years old. Mr Django told the Court that together with other boys, he was taken by a man named Dudu in Beni, where they had to lie to some people by saying that they served as child soldiers in the UPC forces. According to the witness, Mr Dudu was aware that he and the other boys never served as soldiers. The witness stated that Mr Dudu coached him on what he should say.

The witness told the Court that the UPC was not conscripting children against their will. He stated that children voluntarily were joining the UPC forces and they were always free to quit and return home. The children that usually joined the UPC forces were mostly children that lived on the street.

The witness stated that he knew Mr Lubanga prior to the commencement of the war. According to the witnesses testimony, Mr Lubanga used to sell beans in a warehouse and the witness's family used to buy beans from him. The witness broke down in tears when describing to the Court how his mother was murdered by Lendu militia men, while he and his little brothers were hiding under the bed.

4. Witness 005 gave testimony under protective measures, such as voice and face distortion. The majority of her testimony was conducted in closed session. During the short open sessions, the witness referred to a visit by a man to her house, whose name was not revealed.

5. Witness 012 gave testimony under protective measures. The oral evidence of this witness was given entirely in closed sessions, therefore no information about the witness's identity or the issues on which he testified is publicly available.

6. Witness 026 gave testimony under protective measures (voice and face distortion). Witness 026 was a former soldier of the UPC. He served in UPC until 2003, when the fighting in Bunia occurred between UPC and Ugandan fighters. After that, he went to Mongbwalu where he joined the People's Armed Forces of Congo (FAPC). He served in FAPC for a year, and during that time he kept contact with his family (mother, brothers and sisters).

The witness was asked by the counsel of the OTP to identify three individuals in three photographs. Witness 026 identified Mr Thomas Lubanga, Mr Bosco Ntaganda and Mr Floribert Kisembo. Witness 026 gave most of his oral evidence in closed session.

7. The seventh defence witness was **Mr Bakamuna Asime Tresor** and he testified without protective measures. Mr Tresor is today 25 years old, and he joined the UPC in 2002, when he was 17. He was demobilised from UPC in 2004-2005. He stated that he joined the UPC out of frustration because he could not stand seeing people being killed. According to the testimony that he gave to the Court, he felt that he had to defend himself and his family. Mr Tresor said to the Court that he received training in Mandro, and during his tenure in the UPC forces he was the driver of Mr Bosco's brother. He testified that although he participated in several battles, the one in Bunia was the worst of them.

The witness stated that the person that first talked to him about the possibility to appear before the Court as a witness was one of the wise men of the village named Mbuna. The witness stated that the first time he met with the lawyers of the defence team of Mr Lubanga was in 2007 and that Mr Mbuna was present.

8. Witness 16 gave his testimony under protective measures. The witness testified that a person, to whom he referred as Mr X, approached him saying he was working for the ICC and asking him to lie before OTP investigators. The witness told the Court that Mr X coached him and other persons to say that Mr Lubanga enrolled children, among which there were also girls, in the army and that the witness was one of those children. Furthermore, the witness stated that Mr X provided him and other persons, who were also claiming before OTP investigators to have been child soldiers, with names of former FPLC commanders so they could mention them to the investigators.

Witness 16 testified that he agreed to lie before the Court because Mr X offered him money and some drinks. The witness said to the Court that Mr X arranged meetings between him and the OTP investigators in Bunia and in Kampala, Uganda. He stated that he stayed in Kampala for two weeks.

The defence counsel presented to the Court a threatening letter that was purportedly written by officials of the UPC, and was supposed to be sent to officials in Kinshasa. Witness 16 recognised the letter and stated that Mr X wrote it. The letter was read in the courtroom, and it stated:

'We know that wherever you are going to move to, we are going to find you. Do you think that our strength is finished? Even your offspring, we are going to wipe it out. Do whatever you like but know that you can not escape death. And do not imagine that it is going to come from elsewhere.

It will come from us the authorities of the UPC.'

The witness admitted to the OTP counsel that he had been lying to the OTP throughout the period of 2005 until 2007.

9. Witness 25 was Mr Dieu Merci Nobirabo Todabo, aged 21. Mr Todabo testified without protective measures, and his testimony concerned mainly the activities of one of his friends during the school year 2002-2003. The witness stated that during the years 2001-2002, together with his friend whose name was not given in an opened session, he was attending a school in Bunia. When the war broke, both the witness and his friend fled from Bunia.

Mr Todabo told the Court that he found out later on that his friend had fled to Getti where he had joined the FRPI. According to the witness, his friend returned to Bunia for the following academic year in September 2003. The witness told the Court that he lost his job in order to take all the steps needed to come to The Hague and testify before the ICC. He explained that he had to travel to Kinshasa during the Christmas holiday period, and had to return back to work before the school reopened. However, he was not able to return on time and therefore he lost his job.

10. The **tenth defence witness** was a woman who gave all her testimony in closed session. Therefore no information regarding her or the evidence that she provided were made known to the public.

11. Witness 15 was a former prosecution witness, who started his testimony in June 2009 by saying that he had given false evidence to the OTP investigators. The Chamber therefore decided that he should be re-examined. What follows is the summary of the re-examination.

Witness 15 gave testimony under protective measures. He told the Court that he never served as a child soldier in the UPC forces. According to the witness, the evidence that he gave to the OTP investigators in 2005 was fabricated by an intermediary. He stated that the intermediary told him to pretend, before the OTP investigators, that he could not read and that he had problems with his vision in order to avoid difficult questions. The witness said to the Court that the OTP investigators did not influence him in any way and that they were not aware of the fact that the witness was lying.

The witness stated that the reason he did not tell anyone, between 2005 and June 2009, that he was lying was because he was afraid that he would end up in prison. He said he requested several times for the services of a lawyer but his request was refused both by the OTP investigator and the Victims and Witnesses Unit (VWU).

The witness told the Court that in 2009 he was provided with a lawyer, but the lawyer told him that he could be arrested and prosecuted for giving false testimony. The witness told the Court that out of fear of being prosecuted he was careful with what he was saying and he sometimes camouflaged the facts.



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