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IBA/ICC Monitoring and Outreach Programme

# **The ICC under scrutiny:** **Assessing recent developments at the** **International Criminal Court**

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# Contents

<b>Executive summary</b>	7
<b>Conclusions</b>	8
Recommendations	9
The Court	9
The UN and other information providers	9
The Prosecution	10
The Registry	10
The Assembly of States Parties (ASP)	11
<b>Background to the monitoring programme</b>	12
<b>Abbreviations</b>	13
<b>Introduction</b>	14
<b>Chapter I – Overview of developments in the cases and situations</b>	15
<b>General overview</b>	15
<b>Key Issues arising from cases and situations</b>	16
<i>The Prosecutor v Thomas Lubanga Dyilo</i>	16
<i>The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui</i>	18
Situation in Uganda	20
Situation in Darfur, Sudan	21
Situation in the Central African Republic	22

<b>Chapter II – Confidentiality versus disclosure</b>	25
<b>Introduction</b>	25
<b>Legal background</b>	26
Investigations	26
Confidentiality	26
Disclosure of potentially exonerating material	27
<b>A. The prosecution’s approach to investigations in the DRC</b>	27
The DRC context	27
Relevance not disclosability	27
Poor strategy	28
Management of evidence	29
Staffing	30
Change of approach	30
<b>B. Challenges to disclosure of evidence to the defence</b>	31
Pre-trial context	32
The trial stage	33
The role of the Trial Chamber	33
Confidentiality or disclosure	34
<b>C. Information providers</b>	35
Legality of agreements with information providers	35
Lifting restrictions	36
The UN position	37

<b>D. Managing the impact of the Article 54(3)(e) dilemma</b>	38
The victims	38
Outreach	39
<b>E. Other relevant considerations</b>	39
Reconsideration of Mr Lubanga’s status	39
<b>F. Conclusions</b>	40
<b>Chapter III – Legal aid and other defence issues</b>	43
<b>Introduction</b>	43
<b>A. The legal aid system at the Court</b>	44
<b>B. Proposed cuts to the legal aid budget</b>	44
OPCD, <i>ad hoc</i> and duty counsel	45
<b>C. Determination of indigence</b>	47
Modalities of determining indigence	47
Frozen assets	48
Transparency	49
<b>D. Translations</b>	49
Report on outsourcing translations	51
Potential solutions	51
<b>E. Family visits</b>	52
Funding	52
<b>F. Other relevant issues</b>	53
Reports issued by the Registry	53
<b>G. Conclusions</b>	53

<b>Conclusions</b>	55
<b>Recommendations</b>	56
The Court	56
The UN and other information providers	56
The Prosecution	56
The Registry	57
The Assembly of States Parties (ASP)	58
<b>Annex I: Parameters for IBA monitoring of the International Criminal Court</b>	59

# Executive Summary

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

During the reporting period of June to October 2008, the International Criminal Court experienced a series of highs and lows. A fourth suspect, Jean-Pierre Bemba, former Vice-President of the Democratic Republic of the Congo (DRC), was surrendered to the Court. The confirmation of charges proceedings against Germain Katanga and Mathieu Ngudjolo Chui, though overshadowed somewhat by disclosure-related concerns, were completed by the Pre-Trial Chamber. The prosecution requested a warrant of arrest for Sudanese President Omar al-Bashir for crimes of genocide, war crimes and crimes against humanity, the ICC's first against a sitting head of state. Finally, the AC delivered a long-awaited decision on victims' participation in trial proceedings.

Despite these achievements, however, developments in the case against Thomas Lubanga Dyilo cast a pall over the Court. In July 1998, when delegates celebrated the signing of the historic Rome Statute, creating the first permanent international criminal court, there was international consensus that crimes repugnant to all humanity would never again go unpunished. Ten years later, the judges of the Trial Chamber (TC) in the first case ever before the Court were forced to stay the proceedings due to the prosecution's misuse of a statutory provision [Article 54(3)(e)] allowing information providers such as the United Nations (UN) to convey material confidentially. The prosecution relied extensively on this provision during its investigations in the DRC. Serious challenges ensued when information providers were reluctant to permit disclosure to the defence of confidential material that was also potentially exculpatory.

The TC's decision to stay the proceedings and order Mr Lubanga's release was due in part to its inability to review the confidential material. After a protracted period of delay and two postponements of the trial date, the TC determined that, despite ongoing negotiations by the prosecution to lift restrictions on disclosure of confidential material, there was still a significant body of potentially exonerating material that could not be disclosed. Consequently, the TC ruled that 'the trial process had been ruptured to such a degree that it was now impossible to piece together the constituent elements of a fair trial'.

The legal challenges resulting from the prosecution's approach to investigations in the DRC proved costly for the Court's reputation. The stay of proceedings in the Lubanga case brought the Court, the Office of the Prosecutor (OTP) and information providers, in particular the UN, under intense scrutiny. Victims in the DRC were reportedly devastated and confused by the Court's decision and criticisms that the Court was distant, irrelevant and slow increased.

Despite these major setbacks, the IBA considers that there were nevertheless a number of positive developments including judicial clarification of certain procedural issues by the AC. The decision imposing the stay also appeared to have acted as a catalyst for the negotiations with information providers who shortly thereafter agreed to lift restrictions allowing most documents to be disclosed to the defence (some in redacted form) and the Chamber to view all documents without redactions.

In May 2008, in its third monitoring report entitled 'Balancing rights: the ICC at a procedural crossroads', the IBA examined a number of challenges encountered by the Chambers in seeking to effectively balance the rights of victims and defendants. The current reporting period has again been characterised by challenges related to the balancing of rights: this time, the rights of defendants to disclosure of potentially exonerating material versus the rights of information providers to withhold their consent to such disclosure. This IBA report examines the Court's efforts to balance those rights while safeguarding the fair trial rights of the accused.

In addition to disclosure issues, this IBA report considers several recommendations made by the Committee on Budget and Finance (CBF or the committee) during the work of its eleventh session. The CBF examined the Court's proposed programme budget as well as other relevant material submitted for its consideration. This report assesses in particular the committee's recommendations for budget cuts to legal aid, the funding of family visits for indigent detainees, and translations.

## **Conclusions**

The IBA endorses the Chambers' finding that the Prosecutor's approach to investigations in the DRC led to an unprecedented disclosure dilemma that had the potential to significantly affect the fairness of the proceedings against all the defendants in the cases arising from that situation. In our view, despite the challenges in the DRC context, the prosecution erred in relying primarily on material obtained through cooperation rather than from first-hand investigations. The prosecution's acceptance of blanket agreements was neither consistent with its responsibility to objectively investigate and disclose potentially exonerating material, nor mindful of the Trial Chamber's role as the final arbiter of the process.

The IBA is also concerned by the lengthy negotiations undertaken to lift confidentiality restrictions. In this regard, the IBA considers that the information providers did not always demonstrate confidence in the TC despite assurances that material would not be disclosed to the defence.

The IBA also notes some of the concerns expressed by the UN Office of Legal Affairs, highlighting its own resource challenges vis-à-vis its obligation to cooperate with the Court, and the absence of systematic, timely notification by the Registry of the Chambers' relevant decisions.

The IBA welcomes the much-needed judicial clarity provided by the Appeals Chamber (AC) on a number of issues. The AC settled the question of which right should be given precedence, while making it clear that the Chambers must respect both the right to disclosure and the right to confidentiality. Additionally, the AC confirmed the important role played by the TC in safeguarding the fairness of the disclosure process in the event there is 'doubt' regarding disclosure of potentially exonerating material.



The IBA considers that given the protracted delay in the start of its first trial, the Court's priority must be to review the confidential material and commence Mr Lubanga's trial without delay.

The IBA welcomes efforts by the Office of the Prosecutor (OTP) to revise its investigations strategy, including relying less on confidential material. The IBA urges the OTP to ensure that this revised policy is included in the draft regulations of the OTP. The IBA also encourages the OTP, in light of the clarification provided by the AC, to renegotiate the terms of existing confidentiality agreements with information providers, to include specific provisions for disclosure of confidential material to the Chambers.

From an examination of key developments in all cases and situations before the Court, the IBA considers that despite significant setbacks in the cases from the DRC, the Court's activity is likely to increase in 2009. In this regard, the IBA considers that the recommendations of the CBF to the seventh session of the Assembly of States Parties (ASP) are particularly important. The CBF's proposed cut to the legal aid budget does not reflect the level of projected activity of the Court. In our view, any proposed budgetary cut should only be considered after a thorough review of the amended legal aid system's performance after a period of activity. Considering that the amendment to the legal aid system was undertaken as recently as May 2007, the IBA considers it premature to consider such a review at this time.

## **Recommendations**

### *The Court*

The IBA recommends an amendment to the RPE reflecting the AC decision that the TC must respect both the defendant's right to disclosure of potentially exonerating material in the prosecution's possession, and the confidentiality rights of information providers.

The IBA further recommends that any counter-balancing measures to be utilised by the TC in the event that information providers refuse to allow onward disclosure to the defence should be expressly stated in the amended text. Given the importance of ensuring, to the extent possible, that full disclosure of potentially exonerating material is made to the defendant, the IBA cautions against counter-balancing measures that rely extensively on the use of summaries at the trial stage.

Additionally, there is need for careful regulation of the Court's interaction with information providers. Despite the existence of cooperation agreements, the parameters and implications of the Court's relationship with information providers, including the UN, have not been sufficiently explored.

### *The UN and other information providers*

Information providers made significant, if belated concessions to comply with TC stipulations for review of confidential material. The length of the negotiations process unnecessarily delayed the proceedings and suggested a lack of confidence in the Chambers. In the continuing spirit of cooperation, in the interest of fairness and in light of the AC decision mandating the TC to respect

the confidentiality of disclosed material, the IBA urges all information providers, in particular the UN, to ensure that where possible further efforts are made to allow full disclosure of confidential material to the defence.

### *The prosecution*

The IBA commends the prosecution's efforts to lift confidentiality restrictions in order to fulfil its statutory disclosure obligations or to allow for review by the TC. The IBA regrets however that the process was not begun in a sufficiently timely manner to avoid the unnecessary delays occasioned by the failure to disclose confidential material.

The IBA welcomes the efforts by the prosecution to change the approach adopted in the DRC investigations in respect of other situations. One such notable effort is the requirement of pre-screening of material to determine its relevance to the situation under investigation. The IBA cautions that pre-screening of material may lead to additional difficulties if access is later subject to confidentiality restrictions, given that the prosecution would still be obliged to disclose potentially exculpatory material that comes to its attention during the pre-screening process. The prosecution is urged therefore to ensure that even if there is pre-screening of material from information providers, its access and subsequent ability to disclose the material is not conditioned on Article 54(3) (e).

Additionally, the IBA urges the prosecution to implement such policies as may be necessary to effectively manage all the evidence in its possession and control. Given that any investigation carried out by the defence is ancillary to the prosecution's investigations under Article 54(1) (a), it is important that the prosecution ensure that the recent 'sudden discovery' of unregistered confidential material in the DRC investigations is not allowed to recur in respect of any of the matters pending before the Court.

### *The Registry*

The IBA also notes concerns at the UN Office of Legal Affairs regarding notification of Court decisions and the strain on human resources presented by the processing of ICC requests. The IBA urges the Registry to notify the UN of relevant decisions in a timely manner, whether or not the Chambers officially order notification.

#### **Concerning Registry reports and translations:**

The IBA notes the commendable improvement made by the Registry in the preparation of its 'Report on different legal aid mechanisms before international criminal jurisdictions'. This final report provided further details on the determination of indigence and other important issues raised in its earlier interim report. The final report reflected considerable effort on the part of the Registry to take into account concerns raised by key stakeholders including the Hague Working Group and non-governmental organisations.

The Registry is, however, urged to ensure that reports to be considered by the committee are produced in a more timely manner and submitted well in advance of the working session of the CBF. Regarding consultations with other stakeholders, the Registry is urged to send documents

sufficiently in advance to ensure that meaningful contributions can be made within the stipulated period and prior to any deadline.

The IBA considers that more thought should be given to reducing unnecessary duplication of translation work. Options should be sought for translating administrative documents; when this is not viable, priority should always be given to Court filings. It may be prudent to establish a system at the ICC such that parallel translation departments (ie, the OTP and the Registry) do not duplicate documents.

To improve the efficiency of the Translation Unit, the IBA considers that priority should be given to recruiting typists and proofreaders as a matter of urgency. Thought should be given to utilising the unit exclusively for legal documents.

### *The Assembly of States Parties (ASP)*

In keeping with General Assembly Resolution 58/318, the ASP is urged to create a permanent position within the UN funded from the Court's budget and dedicated to addressing cooperation requests from the ICC.

#### **Concerning CBF recommendations:**

Given the importance of family visits and the financial limitations of indigent detained persons, the IBA urges the ASP to reconsider the CBF's proposal that family visits be funded by voluntary contributions rather than the Court's budget.

The IBA welcomes the CBF recommendation to approve a P-4 position at the Office of Public Counsel for Defence, albeit on a General Temporary Assistance (GTA) basis, for one year, and urges the committee to consider making this post permanent in the future.

The IBA urges the ASP to reconsider the CBF's recommendation to cut the legal aid budget; in the alternative, the IBA proposes that the ASP encourage resort to the Contingency Fund should the need arise.

# Background to the monitoring programme

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

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

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

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

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

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

# Abbreviations

AC	Appeals Chamber
ASP	Assembly of States Parties
CAR	Central African Republic
CBF	Committee on Budget and Finance
DSS	Defence Support Section
DRC	Democratic Republic of the Congo
EU	European Union
GA	General Assembly
GTA	General Temporary Assistance
IBA	International Bar Association
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MONUC	UN Mission in the Democratic Republic of the Congo
NGO	Non-Governmental Organisation
OLA	Office of Legal Affairs
OPCD	Office of Public Counsel for the Defence
OTP	Office of the Prosecutor
PIDS	Public Information and Documentation Section (Registry)
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
TC	Trial Chamber
UN	United Nations
UNSC	United Nations Security Council

# Introduction

The situation in the Democratic Republic of the Congo (DRC) was referred to the International Criminal Court (ICC) on 19 April 2004. On 23 June 2004, after thorough analysis of the situation in the DRC, the Prosecutor announced his decision to open the ICC's first investigation. The prosecution's investigations in the DRC were however characterised by extensive reliance on Article 54(3)(e), the provision in the Rome Statute which allows material to be received confidentially. The UN and other so-called 'information providers' restricted disclosure of confidential material to the defence and the TC resulting in the TC's decision to impose a stay of proceedings in the case against Thomas Lubanga Dyilo.

This IBA report examines activities at the Court from June to October 2008. The report examines the confidentiality versus disclosure dilemma faced by the Court, and the manner in which the respective Chambers interpret the provisions of the Rome Statute and Rules of Evidence and Procedure governing this issue. The report pays particular attention to the Chambers' efforts to safeguard the fair trial rights of defendants, but also highlights the impact of the Chambers' decisions on victims and other stakeholders in the DRC.

In addition, an assessment is made of specific recommendations of the committee on Budget and Finance (CBF or committee) in its report of the work of its eleventh session in September 2008. During the reporting period, the Court produced its proposed programme budget for 2009. In the current context of global financial crisis, budgetary items requiring significant financial outlay have been subject to ever more careful scrutiny. The committee has carefully considered the ICC proposed programme budget and made several recommendations to be considered by the Assembly of States Parties (ASP) during its forthcoming seventh session. One of the largest projected increases for 2009 was in the area of legal aid, an area which the committee describes as having 'serious financial and reputational risks for the Court'. Given the importance of legal aid for indigent defendants and victims, the IBA's report will examine selected CBF recommendations which address this issue and others, such as translations and family visits for indigent detainees.

For a contextual overview, the report begins in Chapter I with a brief summary of recent developments at the Court in all cases and situations. The report will then examine:

- the Court's assessment of the prosecution's interpretation of Article 54(3)(e) and Article 67(2), which provides for a defendant's right to disclosure of potentially exculpatory material. The report details how the prosecution's investigative strategy in the DRC created significant challenges for the Court proceedings, the defendants and victims, and was potentially damaging to the Court's reputation; and
- issues arising from the CBF recommendations on the budget for legal aid, translation and family visits. In light of the importance of legal aid for indigent defendants and victims, the IBA's report will assess the extent to which the ICC is making efforts to manage the cost of legal aid and to address CBF concerns in this regard.

# Chapter I

## Overview of developments in the cases and situations

### General overview

On 17 July 2008, the International Criminal Court (ICC) celebrated ten years since the adoption of the Rome Statute. The ICC currently has four situations under investigation before the Court from the Democratic Republic of the Congo (DRC); Uganda; Darfur, Sudan; and the Central African Republic (CAR). In addition to these ongoing investigations, the Office of the Prosecution is reportedly analysing situations in the Ivory Coast, Georgia, Kenya and Afghanistan.<sup>1</sup>

Four persons are currently in the Court's custody. Mr. Jean-Pierre Bemba Gombo, a former Vice-President of the DRC, was surrendered to the ICC by Belgian authorities on 3 July, pursuant to a warrant of arrest issued by Pre-Trial Chamber (PTC) III. Mr Bemba is charged with crimes against humanity and war crimes arising out of incidents which allegedly occurred in CAR. The confirmation of charges hearing against Mr Bemba, previously scheduled to begin on 4 November 2008, are set to begin on 8 December 2008.

The bulk of the Court's activity over this period has been concentrated on the two ongoing cases arising from investigations in the DRC. In the case *The Prosecutor v Thomas Lubanga Dyilo*, proceedings have focused primarily on disclosure issues that have prevented the trial, the ICC's first, from commencing. Proceedings in that case were indefinitely halted following a decision by Trial Chamber (TC) I to impose a stay of proceedings and to order the unconditional release of the defendant following what it determined to be the prosecution's improper use of Article 54(3)(e) of the Rome Statute and consequent inability to effect proper disclosure to the defence. The AC recently confirmed the TC's decision to stay the proceedings, but reversed its decision to unconditionally release Mr Lubanga, remanding the matter to the TC for reconsideration.

The second case, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, is also plagued by disclosure concerns, however the PTC completed the process of confirming the charges against the two accused. On 26 September 2008, the Chamber confirmed ten out of 13 charges for crimes against humanity and war crimes brought by the Prosecutor against both defendants and committed them to trial.

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<sup>1</sup> A 'situation' before the ICC can be described as a particular context in a specific country, about which a determination is made regarding whether crimes committed fall within the jurisdiction of the ICC and who might be responsible for such crimes. A 'case' begins after an arrest warrant or summons to appear has been issued for one or more identified suspects where one or more crimes within the jurisdiction of the Court seem to have been committed. For more information, see ICC Booklet: 'Victims before the International Criminal Court, a Guide for the Participation of Victims in the Proceedings of the Court', at p19, available at [www.icc-cpi.int/library/victims/VPRS\\_Booklet\\_En.pdf](http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf). See also Report of War Crimes Research Office, 'Victim Participation before the International Criminal Court', November 2007, at p24, footnote 93, available at [www.wcl.american.edu/warcrimes/documents/12-2007\\_Victim\\_Participation\\_Before\\_the\\_ICC.pdf?rd=1](http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf?rd=1)

In the Uganda and Darfur situations, arrest warrants have been issued by the respective PTCs. In the Darfur context, the prosecutor applied for an arrest warrant for Sudanese President Omar al-Bashir for alleged genocide, crimes against humanity and war crimes. The Prosecutor's application is pending before PTC I.

## Key issues arising from the cases and situations

### The situation in the Democratic Republic of the Congo (DRC)

#### *The Prosecutor v Thomas Lubanga Dyilo*

The Court's first case against alleged militia leader Thomas Lubanga Dyilo was due to start on 23 June 2008, having previously been postponed from 31 March. On 13 June 2008, TC I stayed the proceedings against Mr Lubanga on the basis that the prosecution's misuse of Article 54(3) (e) of the Statute and consequent inability to obtain consent to disclose potentially exculpatory confidential material to the defence made it impossible to 'piece together the constituent elements of a fair trial' and importantly, that the Chamber's inability to itself review the documents prevented it from exercising its statutory duty to regulate the process of disclosure and the overall fairness of the proceedings.<sup>2</sup> Despite the TC's assurance that it would not disclose confidential material to the defence, a significant portion of potentially exculpatory material was nevertheless withheld from its consideration.<sup>3</sup>

The TC scheduled a hearing on 24 June 2008 to consider Mr Lubanga's release, during which it advised the prosecution of the pre-conditions for considering a lifting of the stay. The prosecution was directed that any application for a stay should be addressed comprehensively as part of a single application; must allow the TC to retain and review all the documents in unedited form for the entire trial; and should also ensure the availability of material for review by the AC in the event of an appeal.<sup>4</sup>

In a subsequent decision on 2 July 2008, the Chamber ordered the unconditional release of the defendant subject to an order by the AC to suspend the decision in the event of an appeal against the release.<sup>5</sup> The Prosecutor applied to the TC on 10 July 2008 to lift the stay of proceedings and to revoke the release of the accused. In the application, the Prosecutor submitted that it had effectively complied with the conditions set by the TC to lift the stay of proceedings. During July and August the Prosecutor continued to update the Chamber on his continuing efforts to negotiate with information providers to lift confidentiality restrictions.<sup>6</sup>

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2 See 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on 10 June 2008' at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf).

3 Ibid at para 64 and accompanying footnotes

4 Transcript of hearing in case of Thomas Lubanga Dyilo, ICC-01/04-01/06-T-91-ENG CT WT 24-06-2008, pg 31 lines 20-25 and pg 32 lines 1-25, at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-91-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-91-ENG.pdf)

5 "Decision on the Release of Mr Thomas Lubanga Dyilo" at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1418-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1418-ENG.pdf).

6 'Prosecution's provision of information supplementing the "Prosecution's application to lift the stay of proceedings"', 30 July, at [www.icc-cpi.int/cases/RDC/c0106/c0106\\_docAll28.html](http://www.icc-cpi.int/cases/RDC/c0106/c0106_docAll28.html); 'Prosecution's provision of further information supplementing the "Prosecution's application to lift the stay of proceedings"', 8 August, at [www.icc-cpi.int/cases/RDC/c0106/c0106\\_docOTP.html](http://www.icc-cpi.int/cases/RDC/c0106/c0106_docOTP.html); 'Prosecution's additional provision of further information supplementing the "Prosecution's application to lift the stay of proceedings"', 22 August, at [www.icc-cpi.int/cases/RDC/c0106/c0106\\_docOTP.html](http://www.icc-cpi.int/cases/RDC/c0106/c0106_docOTP.html);



On 3 September 2008, the TC rejected the Prosecutor's application to lift the stay, concluding that the proposals outlined in the application 'demonstrably failed to meet the prerequisites set out by the Chamber to enable it to lift the stay of proceedings', and that they infringed fundamental aspects of the accused's right to a fair trial.<sup>7</sup> The Chamber noted that unless and until the conditions outlined by the Chamber on 24 June 2008 were sufficiently addressed,<sup>8</sup> it would be necessary for the stay of proceedings to remain in place. The Prosecutor applied for leave to appeal the decision which was granted by the Chamber on reformulated grounds.

### *Application for review*

On 14 October 2008 the Prosecutor submitted a filing to the TC indicating that the information providers, including the UN, were prepared to comply with all of the TC's stated pre-conditions for review. In relation to the UN, the prosecution appended several annexes. The prosecution gave an undertaking to the UN that if after reviewing the documents, the Chamber ordered disclosure to the defence of confidential material (previously withheld or provided only in summary or redacted form to the defence), without the UN's consent, the prosecution would take all necessary steps up to and as a last resort, applying to withdraw the charges to which the documents relate.<sup>9</sup> At the time of writing, a decision of the TC is pending.

### *Decision of the Appeals Chamber*

On 21 October 2008, the AC issued judgment on the Prosecutor's application against the decision staying the proceedings against Thomas Lubanga. The AC confirmed the decision of the TC, ruling that 'the use of Article 54 (3) (e) of the Statute by the Prosecutor must not lead to breaches of his obligations vis-à-vis the suspect or the accused person. Therefore, whenever the Prosecutor relies on Article 54 (3) (e) of the Statute he must bear in mind his obligations under the Statute and apply that provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial.'<sup>10</sup> In a separate decision, the AC however reversed the TC's decision to unconditionally release Mr Lubanga, directing the TC to decide this issue anew.<sup>11</sup>

The stay of proceedings and order for the release of Mr Thomas Lubanga highlighted the serious dilemma created by the prosecution's approach to Article 54(3)(e) of the Statute during its initial investigations in the DRC. The Article 54(3)(e) challenges also extended to the second DRC case against Germain Katanga and Mathieu Ngudjolo Chui, considered below.

The legal issues arising from the prosecution's use of article 54(3)(e) will be considered in more detail in Chapter II of the report.

7 'Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings"', ICC-01/04-01/06-1467 at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1467-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1467-ENG.pdf).

8 *Supra* no4.

9 Available at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1478-Anx1.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1478-Anx1.pdf).

10 Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf)

11 Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo', at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1487-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1487-ENG.pdf)

### *Confirmation of charges proceedings*

The hearing to determine whether charges brought by the Prosecutor should be confirmed by the PTC commenced on 27 June and lasted until 16 July. The Prosecutor sought to present ‘sufficient evidence to establish substantial grounds to believe that the [suspects] committed each of the crimes charged,’ pursuant to Article 61(7) of the Rome Statute. Throughout the course of proceedings, the defence teams made several objections to the admissibility, relevance and probative value of the evidence presented by the prosecution. In particular defence counsel challenged the reliability of much of the evidence, the mode of liability adopted by the prosecution to link the suspects to the crime and the lack of proof of the mental element required to establish the charges (level of the accused’s knowledge of the offences in question). The defence argued that for the purpose of liability under the Rome Statute persons are required to be actually aware that crimes would occur as a result of their action, rather than merely suspect that crimes might occur.

Proceedings were disrupted briefly by Germain Katanga’s refusal to attend court halfway through the course of proceedings, reportedly due to his frustration at not having received a family visit throughout his period of detention. Following a consultation pursuant to rule 124(1) of the RPE, which addresses situations in which persons are available but nevertheless wish to waive their right to be present at the confirmation hearing, the Chamber granted Germain Katanga’s request for waiver and continued the hearing in his absence.<sup>12</sup>

### *Decision confirming the charges*

The PTC rendered its ‘Decision on the confirmation of charges’ on 26 September 2008,<sup>13</sup> in which it confirmed seven counts of war crimes (wilful killing, using children to participate actively in hostilities, sexual slavery, rape, attacking civilians, pillaging and destruction of property) and three charges of crimes against humanity (murder, sexual slavery and rape). The Chamber declined to confirm two counts of war crimes (cruel or inhuman treatment and outrages upon personal dignity) and one count of crimes against humanity (inhumane acts) alleged by the Prosecutor. Judge Ušacka dissented over the Chamber’s confirmation of the charges of sexual crimes, finding that there was insufficient evidence to establish that the suspects intended rape and sexual slavery to be committed during the attack. Judge Ušacka also dissented from the majority regarding the charge of inhumane acts as a crime against humanity. In her opinion this charge should have been confirmed, as there was sufficient evidence to establish culpability.

The PTC subsequently dismissed an application from Germain Katanga’s Counsel to appeal the decision<sup>14</sup> thereby ending its role in relation to the case. The record of the proceedings was transmitted to the Presidency of the Court. On 24 October 2008, the Presidency constituted TC II

<sup>12</sup> Rule 124(1) of the Rules of Procedure and Evidence provides that ‘if the person concerned is available to the Court but wishes to waive the right to be present at the hearing on confirmation of charges, he or she shall submit a written request to the Pre-Trial Chamber, which may then hold consultations with the Prosecutor and the person concerned, assisted or represented by his counsel.’

<sup>13</sup> Redacted, written decision issued 30 September: *Decision on the confirmation of charges*, ICC-01/04-01/07-717, at [www.icc-cpi.int/library/cases/ICC-01-04-01-07-717-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-717-ENG.pdf).

<sup>14</sup> *Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges*, 24 October 2008, at [www.icc-cpi.int/library/cases/ICC-01-04-01-07-727-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-727-ENG.pdf).

composed of Judges Fatoumata Dembele Diarra, Fumiko Saiga and Bruno Cotte and transmitted the full record of the proceedings in the Katanga and Ngudjolo case to that Chamber.<sup>15</sup>

### *Similar disclosure challenges*

The Decision on the Confirmation of Charges is a laudable development for the Court, offering jurisprudence on many Rome Statute crimes for the first time and marking a key advancement in its second proceedings. Several issues which arose prior to and during the proceedings have, however, brought the process under close scrutiny. The defendants in the case were also deprived of the opportunity to access potentially exculpatory evidence or documents material to the preparation of the defence case due to the residual effect of disclosure issues similar to those faced in the *Lubanga* case.

Indeed, following the TC's halt of the *Lubanga* proceedings, both defence counsel in the *Katanga & Ngudjolo* case applied for a stay of the confirmation of charges proceedings before the Pre-Trial Chamber. Judge Steiner commented in terms similar to those used in the *Lubanga* case that 'at the outset the Single Judge notes the considerable number of documents that the prosecution has collected pursuant to Article 54(3) (e) of the Statute [...]. [T]his considerable number of documents [...] indicate that the prosecution is not resorting to article 54(3) (e) in exceptional or limited circumstances, but rather is extensively gathering documents under such provision'<sup>16</sup> and criticised the Prosecutor's 'reckless' action in accepting thousands of documents under Article 54(3) (e).<sup>17</sup>

Despite the judge's criticisms of both the prosecution and the information providers, in particular the UN, and non-disclosure of over 200 potentially exonerating confidential items to the defence, the PTC allowed the confirmation process to proceed given that the 'bulk' of material had been disclosed or supplied in 'analogous' form and given the limited scope and purpose of the confirmation of charges proceedings.

This decision means, however, that the problem has only been deferred to a later date and must be dealt with by the TC. The decision also raises questions over the defence's ability to prepare for a confirmation hearing, especially when read together with earlier decisions granting the Prosecutor permission to tender summaries of evidence to the defence team.<sup>18</sup> Together, these issues raise questions about the defence's ability to adequately prepare its case during the confirmation of charges process.

The issues arising from the non-disclosure of confidential material at the pre-trial stage will be considered in more detail in Chapter II of the report.

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15 'Decision constituting Trial Chamber II and referring to it the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*', at [www.icc-cpi.int/library/cases/ICC-01-04-01-07-729-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-729-ENG.pdf).

16 'Decision Requesting Observations concerning Article 54 (3) (e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing' at [www.icc-cpi.int/library/cases/ICC-01-04-01-07-543-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-543-ENG.pdf) at para. 9-10

17 'Decision on Article 54(3) (e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing', 20 June 2008, at [www.icc-cpi.int/library/cases/ICC-01-04-01-07-621-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-621-ENG.pdf).

18 See, eg, 'Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules', 25 April 2008, [www.icc-cpi.int/library/cases/ICC-01-04-01-07-428-Corr-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-428-Corr-ENG.pdf).

## Situation in Uganda

### *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*

The warrants of arrest issued by the PTC against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen in the context of investigations in Uganda remain unenforced. Judicial activity focused on victims' applications to participate in the proceedings and the appointment of *ad hoc* defence counsel. PTC II continued to monitor the execution of the arrest warrants and received an update from the Ugandan government in this regard.<sup>19</sup> The Chamber also decided of its own motion to initiate proceedings under Article 19(1) of the Statute to determine the issue of admissibility of the cases against Joseph Kony *et al* given the proposal for the creation of a Special Division of the Ugandan High Court contained in the 'Principal Agreement on Accountability and Reconciliation between the Ugandan Government and the Lord's Resistance Army/Movement Juba, Sudan' (the Principal Agreement).<sup>20</sup>

### *The appointment of ad hoc defence counsel*

There are presently three active *ad hoc* counsel appointed to represent defence interests in the Uganda situation and *Kony* case, in contrast to other proceedings before the Court where the Office of Public Counsel for the Defence (OPCD) has generally been appointed to fulfil this function. *Ad hoc* defence counsel Michiel Pestman, who was appointed by Single Judge Politi to represent the interests of the defence in relation to several victim applications for participation in the Uganda situation and the case against Joseph Kony *et al*, raised questions about the propriety of appointing counsel to represent the interests of the defence when either a defendant has not been named, or in circumstances where a defendant cannot be contacted. Mr Pestman requested leave to appeal the decision appointing him to the role of *ad hoc* counsel claiming that the decision might prejudice the interests of the suspects, from whom he cannot take instructions.<sup>21</sup> This situation is further complicated by the fact that Mr Pestman was appointed to represent four individual suspects, not all of whom may still be alive.

Leave to appeal the decision was rejected on the basis that the request did not satisfy the tenet of fairness as stipulated by the first limb of Article 82(1)(d) (the statutory provision governing interlocutory appeals). The Single Judge considered that 'the absence of contact between counsel and the person represented does not *per se* prevent the former from being able to make a point and thus contribute to the overall fairness of the proceedings'. The judge was of the view that the appointment of counsel to both the situation and the case was designed to ensure that the defense interest was not neglected, irrespective of the specific circumstances of the person whose arrest is sought.

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19 'Request for Further Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest', 18 June 2008, at [www.icc-cpi.int/library/cases/ICC-02-04-01-05-299-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-299-ENG.pdf); Ugandan Government response of 9 July 2008, at [www.icc-cpi.int/library/cases/ICC-02-04-01-05-305-Anx2-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-305-Anx2-ENG.pdf).

20 'Decision initiating proceedings under Article 19, requesting observations and appointing counsel for the Defence, 21 October 2008, ICC-02/04-01/05-320', at [www.icc-cpi.int/library/cases/ICC-02-04-01-05-320-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-320-ENG.pdf).

21 'Request for leave to appeal the Decisions on legal representation, appointment of counsel for the defence, criteria for redactions of applications for participation, and submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07 and request that the appeal have suspensive effect in accordance with Article 83(3) of the Statute', 24 September 2008, at [www.icc-cpi.int/library/cases/ICC-02-04-155-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-155-ENG.pdf).

The PTC is empowered by Article 56(2)(d) of the Statute to take necessary measures to ensure the efficiency and integrity of the proceedings and protect the rights of the defence. The Chamber may therefore authorise counsel to attend and represent the interests of the defence even where the suspect has still not been arrested or has not retained counsel of his own.

### **Situation in Darfur, Sudan**

The situation in Darfur, Sudan has been characterised by the continued non-cooperation of the Sudanese authorities. The existing arrest warrants against Ahmad Haroun and Ali Kushayb have remained unexecuted. In addition to the two pending arrest warrants, the Prosecutor has applied for an arrest warrant against Sudanese President Omar al-Bashir.

The Prosecutor's application for an arrest warrant against President al-Bashir was filed before Pre-Trial Chamber I on 14 July 2008, alleging genocide, crimes against humanity and war crimes in Darfur, Sudan.<sup>22</sup> The application describes President al-Bashir's alleged mobilisation of the state apparatus to plan, commit and cover up crimes against civilians, in particular against the Fur, Massalit and Zaghawa ethnic groups. On the charge of genocide in particular, President Al-Bashir is charged with his role in killing members of the previously mentioned ethnic groups; causing serious bodily or mental harm to members of those groups; and deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part. The prosecution's application is the first against a sitting head of state and the first charge of genocide to be pursued before the ICC.

On 15 October 2008, the Pre-Trial Chamber issued a decision requesting the prosecution to submit additional supporting materials by 17 November.<sup>23</sup> The nature of the requested material remains confidential.

### *Article 16 debate*

The application has led to significant debate in the political arena over a possible suspension of proceedings by the UN Security Council (UNSC). Under Article 16 of the Rome Statute, the UNSC is entitled to defer proceedings for a period of 12 months, at the end of which it may choose to renew the deferral. By the wording of Article 16 the UNSC is empowered to take this action under Chapter VII of the UN Charter, requiring a resolution to be aimed at 'maintaining or restoring international peace and security'.

Article 16 was introduced at the Rome Conference as a compromise between states that wanted the UNSC to exercise greater control over the situations investigated by the ICC, thereby reducing the autonomy of the Prosecutor, and those that preferred to afford less control to the UNSC. Article 16 was intended to provide an intermediate position between the two opposing groups of states, granting the UNSC the power to defer proceedings in the instance of a situation referred

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<sup>22</sup> 'Summary of Prosecutor's Application under Article 58', ICC-02/05-152, at [www.icc-cpi.int/library/cases/ICC-02-05-152-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-152-ENG.pdf).  
Redacted version: Public Redacted Version of the Prosecutor's Application under Article 58, ICC-02/05-157-AnxA, at [www.icc-cpi.int/library/cases/ICC-02-05-157-AnxA-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-157-AnxA-ENG.pdf).

<sup>23</sup> 'Decision Requesting Additional Supporting Materials in relation to the Prosecution's Request for a Warrant of Arrest against Omar Hassan Al Bashir', ICC-02/05-160, at [www.icc-cpi.int/library/cases/ICC-02-05-160-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-160-ENG.pdf).

by a state party or by the Prosecutor himself, at the initial stage of an investigation. It was not intended, however, that the provision might be used at a more developed stage of proceedings, when investigations have been underway for several years and suspects have been named, with arrest warrants issued. It was also not foreseen that Article 16 might be used to delay proceedings initiated by the UNSC itself (the situation in Darfur having been initiated by Resolution 1593, passed in March 2005).<sup>24</sup>

Despite the intended purpose of Article 16, both China and Russia, permanent UNSC members, have supported calls by member states of the African Union, the Arab League and the Organisation of The Islamic Conference for the UNSC to exercise its Article 16 powers. The African Union in particular expressed concern 'at the threat that such development may pose to efforts aimed at promoting the rule of law and stability' and issued a communiqué to the Security Council in July, asking it 'in accordance with the provisions of Article 16 of the Rome Statute of the ICC, to defer the process initiated by the ICC'.<sup>25</sup>

Thus far no action has been taken by the Security Council and, moreover, it is not clear exactly what a deferral would be expected to achieve and how it might contribute to ameliorating the humanitarian situation in Darfur. The deferral would have to be aimed at preserving international peace and security under the terms of Chapter VII of the UN Charter. Moreover, past experience has tended to demonstrate that prosecution of prominent politicians has not hindered peace processes.<sup>26</sup> The IBA considers that any deferral would have to be balanced with the need for justice and should not aim to undermine the work of the ICC. It should be made with allowance for resumption of proceedings at a later date, as foreseen in the wording of Article 16.

Consideration should also be given to other issues that may arise for the Court in the event of a deferral such as: the implications of an Article 16 deferral for previously issued arrest warrants, the preservation of evidence and the continued protection of witnesses.

The IBA considers that it would be ill-advised for the UNSC to consider an Article 16 deferral at this time given that the matter is still pending before the PTC. In addition, serious thought will have to be given as to whether an Article 16 deferral in the Darfur, Sudan context would address the present humanitarian issues that are still pending while simultaneously providing for objective guarantees that justice will be done.

## **Situation in the Central African Republic**

### *The Prosecutor v Jean-Pierre Bemba Gombo*

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 Central African Republic (CAR). Proceedings in the Bemba case have since centred on preparing for the hearing on the confirmation of charges,

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<sup>24</sup> David Scheffer, *The Security Council's Struggle over Darfur and International Justice*, available at <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>.

<sup>25</sup> Communiqué of 142nd meeting, transmitted to the UN SC on 21 July 2008.

<sup>26</sup> For example, the Prosecutions of Slobodan Milosevic at the ICTY, and of Charles Taylor at the Special Court for Sierra Leone, did not impede peace processes in those countries.

set to begin on 8 December.<sup>27</sup> On 31 July the Chamber issued Decision on the Evidence Disclosure System,<sup>28</sup> putting into place a thorough system of disclosure whereby the Prosecutor must submit to the Registry a list, together with analysis of the material supporting its case, in order to allow the Registry to facilitate the disclosure process. The Prosecutor was denied leave to appeal this decision on 25 August.<sup>29</sup> It is hoped that the system put in place will allow the Chamber greater control over the disclosure process and thus avert some of the problems that have been noted in other proceedings.

Jean-Pierre Bemba also applied for and was refused legal aid by the Registrar on the basis that he could not be considered indigent within the meaning of the Statute.<sup>30</sup> The criteria used in the assessment were set out in the Registrar's provisional decision of 25 August and will be considered in more detail in Chapter III of the report.

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27 [www.icc-cpi.int/press/pressreleases/438.html](http://www.icc-cpi.int/press/pressreleases/438.html)

28 Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, at [www.icc-cpi.int/library/cases/ICC-01-05-01-08-55-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-05-01-08-55-ENG.pdf).

29 'Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure', ICC-01/05-01/08-75, at [www.icc-cpi.int/library/cases/ICC-01-05-01-08-75-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-05-01-08-75-ENG.pdf).

30 'Registrar's Decision on the Application for Legal Assistance Paid by the Court Filed by Mr Jean-Pierre Bemba Gombo', ICC-01/05-01/08-76-tENG, at [www.icc-cpi.int/library/cases/ICC-01-05-01-08-76-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-05-01-08-76-tENG.pdf).





# Chapter II

## Confidentiality versus disclosure

### Introduction

The ICC continues to face challenges in its efforts to balance competing rights of parties and participants in the proceedings. While defendants have a right to disclosure of potentially exonerating evidence and to inspect material that is important for the preparation of their case; States Parties, non-governmental and intergovernmental organisations, including the United Nations (UN), who play an important role in providing information to the Court during investigations and prosecutions of cases, also have recognised statutory rights.

Article 54(3)(e) of the Rome Statute (the Statute) and Rule 82 of the Rules of Procedure and Evidence (RPE) prevent any organ of the court from utilising confidential material supplied by information providers without their prior consent. Those provisions, however, come into tension with the statutory right of defendants under Article 67(2) of the Statute to disclosure of potentially exculpatory material. The judges are the final arbiters of the fairness of the disclosure process.

In its November 2007 Monitoring Report, the IBA noted that the number of potentially exculpatory material subject to Article 54(3)(e) restrictions in the prosecution's possession and which could not be disclosed to the defence was an issue of major concern.<sup>31</sup> The prosecution was urged 'in the interests of fairness and expedition to commence the process of requesting the lifting of restrictions in a timelier manner'.<sup>32</sup> The prosecution's reliance on confidentially obtained material during its early investigations in the Democratic Republic of the Congo (DRC) and subsequent developments arising from non-disclosure of potentially exculpatory portions of those materials have since formed the basis of extensive litigation before all Chambers of the ICC, raising several important questions including:

- (a) the prosecution's approach to its investigations mandate;
- (b) challenges to disclosure of evidence to the defence;
- (c) the Court's relationship with information providers; and
- (d) managing the impact of the Article 54(3)(e) dilemma.

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31 See IBA Monitoring Report (International Criminal Court), November 2007, at [www.ibanet.org/images/downloads/11\\_Report\\_IBA\\_Monitoring\\_Report\\_ICC\\_November\\_2007.pdf](http://www.ibanet.org/images/downloads/11_Report_IBA_Monitoring_Report_ICC_November_2007.pdf), p 39

32 *ibid.*

## Legal background

### *Investigations*

In order to establish the truth, the ICC Prosecutor is bound under Article 54(1) (a) of the Rome Statute to extend his investigations to cover ‘all facts and evidence relevant to whether there is criminal responsibility under the Statute, and in doing so to investigate incriminating and exonerating circumstances equally’.<sup>33</sup> In contrast to the position of other international tribunals, the ICC Statute imposes an obligation (the word ‘shall’ is used in Article 54(1) to indicate the non-discretionary nature of the provision) on the Prosecutor to investigate and collect exculpatory evidence on behalf of the accused and to then disclose that material to the defence once it has been collected (under Article 67(2)).

Article 54(1) (a) essentially places the Office of the Prosecutor (OTP) under an obligation to investigate all aspects of the case in order to establish the truth, and the wording of Article 54(1) suggests a prosecutor with a ‘high level of neutrality and impartiality’,<sup>34</sup> who should act as an ‘officer of justice rather than a partisan advocate’.<sup>35</sup> Moreover, ‘the aim of “establishment of truth” provides the matrix against which the Prosecutor should mobilise his or her investigative resources’.<sup>36</sup> Successful prosecution should not be the ultimate aim of the Prosecutor when investigating – this should be ‘establishment of truth’. Appropriate resources should be put into investigating both incriminating and exonerating circumstances.

### *Confidentiality*

Article 54(3) (e) of the Rome Statute provides that the Prosecutor ‘may [...] agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents’. Rule 82 of the RPE provides for restrictions on disclosure of material that is subject to Article 54(3) (e), and refers in particular to Rule 77 which provides for the inspection of materials in the possession of the prosecution that are important for the defence case or are intended to be used by the Prosecutor at the confirmation hearing or at trial.

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<sup>33</sup> This duty as framed in the ICC Statute is unique amongst international tribunals. The provision was inserted in the Statute as a compromise between investigative approaches in adversarial and inquisitorial systems, and is intended to lessen the equality gap between the parties. At the ICTY for example, while Rule 68 of the Rules of Procedure and Evidence provides for disclosure to the defence of potentially exculpatory material which the Prosecutor has in his possession, there is no corresponding duty to actively and objectively search for such material.

<sup>34</sup> S Kirsch, ‘The Trial Proceedings before the ICC’, 6 *International Criminal Law Review* (2006) 275.

<sup>35</sup> C Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’, 1 *Journal of International Criminal Justice* (2003) 603–617. See also Cassese, *International Criminal Law* (2nd ed) (Oxford: OUP, 2008) at 440: ‘[the Prosecutor] acts as an “organ of justice”; thus, at least within the ICC system, the Prosecutor, unlike his counterpart in many national law systems, is not merely a party to trial’; Gregory S Gordon, ‘Toward an International Criminal Procedure: Due Process Aspirations and Limitations’ (2007) 45 *Colum J Transnat’l L* 635: ‘Assuming the investigation goes forward, however, the Prosecutor is not merely an adversarial party to the proceedings; [he also] acts as an “organ of justice” rather than just an opposing party in a contest’; and Giuliano Turone, ‘Powers and Duties of the Prosecutor’ in Cassese, Gaeta and Jones (Oxford, OUP, 2002) p 1137 at 1165: ‘[Article 54(1) (a) clearly shows that the Prosecutor of the ICC is not simply a “party” in the trial, but is supposed to exercise the functions of an impartial “organ of justice”.’

<sup>36</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990 (U.N Doc A/CONF.144/28/Rev.1 at 189).

### *Disclosure of potentially exonerating material*

The prosecution is however bound by Article 67(2) of the Statute to disclose as soon as practicable to the defence evidence in his possession or control which he believes shows or tends to show the innocence of the accused, mitigates his guilt or which may affect the credibility of prosecution evidence. Rule 82 (previously mentioned) does not expressly restrict disclosure of material deemed to be potentially exculpatory contrary to Article 67(2).

The prosecution is bound to respect both Article 54(3)(e) and Article 67(2). The Statute however provides that in case of doubt as to the application of Article 67(2), the TC should resolve the issue. This is consistent with the role of the TC under Article 64(2) to safeguard the fairness and efficiency of the proceedings and manage the disclosure process (Article 64(3)(c)).

#### **A. The prosecution's approach to investigations in the DRC**

The IBA notes that the Prosecutor's approach to Article 54(3)(e) during his initial investigations in the DRC led to breaches of his statutory obligations *vis-à-vis* the accused. In particular, the Prosecutor was in conflict with his obligations under the statute to investigate incriminating and exonerating circumstances equally.<sup>37</sup>

#### *The DRC context*

The prosecution has admitted that at least 50 per cent of the material obtained during investigations in the DRC and on which it now seeks to rely was obtained from information providers and is subject to confidentiality restrictions.<sup>38</sup> The prosecution entered into a number of agreements with several NGOs (some of whose identities have only been revealed to the TC) from which it received crucial information. The main information provider however, was the UN, in particular the UN Mission in the DRC (MONUC).

The prosecution indicates that investigations in the DRC were both complex and challenging. In its Report on the Activities Performed During the First Three Years (June 2003–June 2006), the prosecution highlighted that it was difficult to conduct investigations in situations of on-going conflict 'where even travelling to the areas in question may be impossible, or where the territory suffers from a collapse of functioning institutions. Conditions on the ground for investigators are usually quite difficult, with poor facilities; in some cases, 90 per cent of the Office's investigators returned from their missions with illnesses'.<sup>39</sup>

#### *Relevance not disclosability*

The prosecution's focus in its investigations was on *relevance*, not disclosability under Article 67(2) or Rule 77.<sup>40</sup> In filing support of the appeal against the stay of proceedings in the *Lubanga* case, the prosecution admitted that as the material collected during the DRC investigations was collected

<sup>37</sup> As required by Article 54(1)(a) of the Rome Statute.

<sup>38</sup> Transcript of hearing in Lubanga, 1 October 2007, ICC-01/04-01/06-T-52-ENG, at p 13, lines 17–22.

<sup>39</sup> Available at [www.icc-cpi.int/library/organs/otp/OTP\\_3-year-report-20060914\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf). See in particular, part 1, para 3(a).

<sup>40</sup> 'Prosecution's Observations concerning Article 54(3)(e) Documents identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing', ICC-01/04-01/07-555 05-06-08 at para 7.

before and for the purpose of selecting cases, it could not ‘assess the evidentiary value, incriminatory or exculpatory, of the material’.<sup>41</sup>

Given its obligations under Articles 54(1) (a) and 67(2) of the Statute in regard to exculpatory evidence, it is surprising that the prosecution, in its DRC investigations, chose the risky option of collecting thousands of documents without first ascertaining the nature of the material. The Pre-trial Chamber in the *Katanga & Ngudjolo* case considered this approach to be ‘reckless’ given the implications for a fair trial if information providers refused to consent to the material’s subsequent disclosure.<sup>42</sup>

The prosecution may well have seen this as its only viable option when attempting to conduct investigations in a context of on-going conflict. As the prosecution has asserted, had this avenue not been pursued it is unlikely that they would have been able to investigate and select cases as quickly as they did in the DRC. Nevertheless, extensive reliance on material obtained confidentially from the UN and other sources – for use in the trial and not solely for developing leads – has had very serious consequences.

### *Poor strategy*

The problems arising in the DRC investigations reflect a poor investigative strategy by the prosecution in that situation. Given the Prosecutor’s mandate to investigate objectively, any successful strategy must take into account all of the prosecution’s statutory obligations including the obligation to disclose. The Single Judge in *Katanga & Ngudjolo* pointed out that ‘investigative powers are concomitant with investigative duties and, as the organ primarily in charge of the investigation, the Prosecution is bound to act with due care to ensure that investigative techniques will by no means affect at a later stage the right of accused persons to a fair trial’.<sup>43</sup> The AC decision made the issue even clearer: if the prosecution’s investigative strategy includes reliance on Article 54(3) (e) then its disclosure obligations under Article 67(2) and Rule 77 must be included in the negotiation of confidentiality agreements from the outset.

The AC has acknowledged that the prosecution faced challenges during the early stages of its investigations in the DRC and the importance of Article 54(3) (e) to this process. However, the IBA notes that by its decision, the AC has confirmed that difficulty in accessing material was not an excuse for failing to take the prosecution’s other statutory obligations into account, in particular, the obligation to disclose. The decision reaffirms that the Prosecutor’s investigative strategy cannot be allowed to impede ‘equality of arms’ between the prosecution and the defence. The prosecution’s positive obligation under the Statute to investigate objectively should, in theory, reduce the inequality between the two parties:<sup>44</sup> ‘It will relieve the Defence of the burden to investigate and to prepare for the presentation of each and every detail of the case.’<sup>45</sup> As investigative resources of the defence are unlikely to be on a par with those of the Prosecutor (and, bearing in mind that

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41 ‘Prosecution’s Document in Support of Appeal against Decision to Stay Proceedings’, [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1446-Anx1-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1446-Anx1-ENG.pdf), at para 20.

42 *Supra* n 17 at para 56.

43 See ‘Decision on Article 54(3) (e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing’, ICC-01/04-01/07-621 20-06-08 at para 39.

44 As argued by OPCD, presentation at the Asser Institute.

45 S Kirsch, ‘The Trial Proceedings before the ICC’, 6 *International Criminal Law Review* (2006) 275.

the Prosecutor will have spent much longer investigating a situation and/or case), there would be an ‘obvious inequality of arms’<sup>46</sup> unless impartial investigations can properly be carried out by the Prosecutor.

### *Management of evidence*

Concerns also have been expressed regarding the prosecution’s management of evidence. The IBA is seriously concerned by the remarks of the Single Judge in the *Katanga & Ngudjolo* case:

‘The Single Judge highlights that she is highly disturbed by the fact that a number of incidents have taken place as a result of the Prosecutor’s way of proceeding, including [...]c) the Prosecution’s sudden discovery of 1172 documents relating to the investigation into the DRC situation that have been unregistered within the OTP for years; d) the fact that the Prosecution did not inform the Single Judge or the Defence(s) about this problem for weeks, and it only informed them after the expiration of the 16 June 2008 deadline for effective disclosure of Article 67(2) and rule 77 materials.’<sup>47</sup>

The Single Judge’s remarks were prompted in part by information provided to the Chamber almost on the eve of the commencement of the Confirmation of Charges hearing. At this late date, a member of the OTP staff inadvertently discovered several unregistered CD-ROMs, unregistered hardcopy items, and other items related to the DRC investigations, most of which were generated by the UN. There were 1,172 documents, 19 of which fell within the ambit of Rule 77 material to be inspected by the defence. Only nine of the items could be disclosed as they were without restrictions.

This development raises serious questions about the handling of evidentiary material obtained during the DRC investigations. The prosecution has not clearly indicated how confidential material, some of which included documents that were important to the preparation of the defence’s case, could have been ‘overlooked’ by the prosecution. It is generally expected that the prosecution maintains a detailed inventory process in respect of evidentiary material; one would anticipate even greater security strictures regarding confidential material.

The IBA reiterates the concern expressed by counsel for Germain Katanga (and repeated by the Single Judge):

‘[...] the Defence is very concerned about the management of evidence by the OTP. The effective administration of justice is dependent on adequate management of evidence by the party which is best equipped to conduct investigations and has been endowed with fundamental rights and obligations to that end under the Statute. In relation to disclosure, the question further raised by this incident is whether the OTP is capable of the effective overview and management of its duties.’<sup>48</sup>

The IBA understands that an internal audit of the incident in question has since been ordered by the Prosecutor.

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46 Steven Kay, QC and Bert Swart, ‘The Role of the Defence’ in Cassese, Gaeta and Jones, *supra* n 5, 1421 at 1425.

47 ‘Decision on the 19 June 2008 Prosecution Information and other Matters concerning Articles 54(3)(e) and 67(2) of the Statute and rule 77 of the Rules’, ICC-01/04-01/07-646 25-06-2008 at para 21.

48 *Ibid.*

## *Staffing*

The prosecution's misjudgement in the early phase of DRC investigations has been attributed to a number of factors.<sup>49</sup> Questions have been posed about the human resource capacity of the OTP investigations division; concern has been expressed by at least one NGO that the investigations division is under resourced.<sup>50</sup> The view is that the investigators who are deployed to conduct investigations sometimes lack field experience and knowledge of the country situation under investigation, and often did not remain in the field for long enough periods.<sup>51</sup> In fact, it was felt that in order to gain first-hand evidence without extensive reliance on the UN and other information providers, the OTP should have investigators who are based permanently in the field and who do not simply go in for short missions and then leave.<sup>52</sup>

It is unclear whether the issues arising from the DRC investigations were attributable to staff considerations, as opposed to strategic and policy decisions. While there may presently be a number of staffing concerns at this time given the departure of a number of experienced investigators since 2005,<sup>53</sup> the decisions made by the prosecution during its DRC investigations appear to have been directly attributable to the realities on the ground and its emphasis on cooperation rather than actual first-hand investigations. The prosecution also appeared to have been motivated by concern that if it did not accede to Article 54(3) (e) restrictions, the material would not have been provided at all, effectively short-circuiting investigations in the DRC. The IBA considers that the gravamen of the prosecution's error was its willingness to facilitate blanket reliance on the confidentiality provisions as a pre-condition to being provided with the material.

## *Change of approach*

The prosecution has conceded that its reliance on Article 54(3) (e) in the context of its investigations in the DRC has been excessive.<sup>54</sup> The OTP has since indicated that the problems which have arisen due to its use of Article 54(3) (e) in the DRC context are unlikely to recur.

At a hearing on 3 June 2008 in *Katanga & Ngudjolo*, the prosecution submitted that since October 2006 it had stopped its practice of extensively gathering documents pursuant to Article 54(3) (e) of the Statute and that best practices were put into place after the initial phase of the DRC investigation to reduce the number of lead documents collected subject to Article 54(3) (e) restrictions.<sup>55</sup>

The IBA was informed by the OTP that some of these best practices include implementing procedures for prior screening of information (that is, relevant portions of archived materials within defined parameters) for relevance prior to requesting transmission of documents. This practice is reflected in the European Union (EU)-ICC Security Arrangements implementing the EU-ICC Agreement entitled 'Security Arrangements between the EU Council General Secretariat Security

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49 One anonymous commentator has referred to the situation as a 'crisis of maturity'. See 'The Controversial Actions of the ICC Prosecutor: a Crisis of Maturity?', at [www.haguejusticeportal.net/eCache/DEF/9/769.html](http://www.haguejusticeportal.net/eCache/DEF/9/769.html).

50 Saeed Human Rights Watch report 'Courting History – The Landmark International Criminal Court's First Years', at p 48.

51 *Ibid.*

52 IBA consultations with John Ralston, Executive Director of Institute for International Criminal Investigators and former senior investigator at the International Criminal Tribunal for the former Yugoslavia.

53 *Supra* n 50.

54 Transcript of hearing on 2 October 2007, ICC-01/04-01/06-T-55-ENG, p 2, lines 6–9.

55 Transcript of hearing on 3 June 2008, ICC-01/04-01/07-T-31 ENG FT, p 26, lines 5–8.

Office (GSCSO) and the European Commission Security Directorate (ECSD) and the ICC Security and Safety Section (ICC-SSS) for the Protection of Classified Information Exchanged between the EU and the ICC'.<sup>56</sup>

Under the EU Security Arrangements, the contents of certain types of classified material may be released to a designated ICC focal point. Paragraph 13 of the agreement provides that a designated 'EU Liaison Officer will ensure that documents are identified which may be relevant to the ICC based on the information set out in the ICC's request'. The IBA further understands that to date, similar types of procedures have been implemented in the prosecution's continuing investigations in the DRC as well as to the situations and cases in Central African Republic (CAR) and Darfur, Sudan.

The IBA welcomes the efforts by the prosecution to change the approach adopted in the DRC investigations in respect of other situations. In particular, the IBA welcomes the prosecution's decision to limit its reliance on Article 54(3)(e) and to make efforts to inform information providers about other protective measures provided by the Statute for safeguarding the confidentiality of material and the security of information sources.

The Prosecutor is also urged to consider renegotiating existing confidentiality agreements (where possible) to include a clause providing for disclosure of confidential material to the Chamber. Further, any new agreements concluded under Article 54(3)(e) should be quite limited and relate only to material to be used to generate new evidence.

There are however some concerns regarding the proposed pre-screening of material. For example, it is still not clear to what extent all information providers will accede to a request for pre-screening of material by the Prosecutor. Even in the EU security agreement, not all documents are available for inspection – only those whose security classifications have been downgraded to RESTREINT UE (lower than confidential) and can therefore be released to the ICC or be declassified. In addition, a further challenge may arise if following pre-screening the information providers insist on resorting to Article 54(3)(e), given that the prosecution would still be obliged to disclose potentially exculpatory material that comes to its attention during the pre-screening process.

## **B. Challenges to disclosure of evidence to the defence**

The Article 54(3)(e) challenges were however, more than just theoretical. Three defendants standing before the Court at the instance of the prosecution were unable to access crucial evidentiary material that could potentially prove them innocent, mitigate their guilt or affect the credibility of the prosecution's case due to the decisions made by the prosecution during its investigations in the DRC. The principal aim of disclosure of evidence is to enable the accused to prepare his defence. The availability of adequate time and facilities for the preparation of the defence is a right guaranteed to the accused by Article 67(1)(b) of the Statute. The Statute also guarantees a defendant's right to trial without undue delay.

Prior to the TC's decision to stay the proceedings, the trial against Mr Lubanga had been twice postponed. As noted by Judge Pikis, the timeliness of the proceedings is not only an attribute of a

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<sup>56</sup> See [www.icc-cpi.int/about/Official\\_Journal.html](http://www.icc-cpi.int/about/Official_Journal.html).

fair trial, but is singled out in Article 64(2) as a ‘mandatory, distinct element of a trial under the Statute’.<sup>57</sup>

### *Pre-trial context*

As noted in Chapter I, the issue of non-disclosure on the basis of confidentiality also impacted the pre-trial stage of proceedings in the case of Germain Katanga and Mathieu Ngudjolo Chui. The concern expressed by defence counsel for Germain Katanga is worthy of note: ‘the Defence fails to see how, with large quantities of potentially exonerating evidence withheld from the Defence and thus from the Court, the confirmation [of charges] can have a proper evidentiary basis’.

In its 12th report on the status of confidential material, the prosecution indicates in relation to the *Katanga & Ngudjolo* case that it is still awaiting a response from information providers to lift restrictions on 76 out of 136 potentially exonerating documents and on 45 out of 113 Rule 77 documents.<sup>58</sup> Therefore, despite prosecution submissions concerning ongoing negotiations with information providers, Mathieu Ngudjolo and Germain Katanga are still without a significant portion of potentially exculpatory material or material that would assist in the preparation of their defence.

Similar issues to those faced by the TC in the *Lubanga* case will now be considered by the newly constituted Trial Chamber II in the *Katanga & Ngudjolo* case. The decision of the AC in the *Lubanga* case should provide some useful guidance in this regard; in particular the AC’s ruling that the judges must be the arbiters of the disclosure process while simultaneously respecting the confidentiality of materials. It is anticipated that similar concessions will be made by information providers with respect to the judges’ ability to view the confidential material.

The IBA is however concerned that the process of disclosure at the pre-confirmation stage did not allow defence counsel adequate time and opportunity to prepare their defence. In the *Katanga & Ngudjolo* case, the Pre-Trial Chamber (PTC) was satisfied that the provision of analogous material to the defence would have been adequate to safeguard the rights of the defence and the fairness of the proceedings.

The IBA notes that the judges of the PTC were also prevented from assessing and reviewing the material due to confidentiality restrictions. The judges of the TC in the *Lubanga* case expressed doubt that analogous material would suffice given that they were not in a position to assess the materials in question. Despite the difference between the trial and confirmation process, it is difficult to envisage how the right of the defendant to have access to potentially exculpatory material could be safeguarded by the provision of analogous material to the defence, where the Chamber itself has not had the opportunity to compare that material with other evidence in the proceedings.

As the AC noted in the *Lubanga* case:

‘While the AC cannot exclude that the provision of alternative evidence may, in appropriate circumstances, be one way of ensuring fairness in spite of the non-disclosure of material obtained on the condition of confidentiality under article 54(3) (e) of the Statute, this would require

<sup>57</sup> *Supra* n 10, Separate Opinion of Judge Pikis, at para 31.

<sup>58</sup> 6 October 2008, at [www.icc-cpi.int/library/cases/ICC-01-04-01-07-722-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-722-ENG.pdf).



an assessment by a Chamber of the adequacy of the alternative evidence proposed by the Prosecutor, which was not possible in the present case.’<sup>59</sup>

In this regard, the IBA notes in particular the views of Judge Pikis as indicated in his separate opinion to the AC decision, affirming that fair trial guarantees are not limited to the trial itself but ‘extends to the preparatory processes preceding the trial’.<sup>60</sup> Though Judge Pikis’s views on the effect of non-disclosure of potentially exculpatory material due to confidentiality restrictions at the pretrial stage could be considered *obiter dicta* (not having been one of the issues expressly raised on appeal) they nevertheless have an important bearing on the manner in which the disclosure process is conducted at the pre-trial stage of proceedings. As the judge noted:

‘Confirmation of charges is neither automatic nor free from an evaluation of the evidence adduced, with a direct bearing on the decision of the PTC whether to confirm the charges or not. [...] At the confirmation hearing the person under investigation is entitled to challenge not only the charges but the evidence presented by the Prosecutor...Evidence tending to exonerate a person of the charges levied against him/her could have a bearing on the sufficiency of evidence before the PTC for the purpose of determining whether the standard for the confirmation of charges has been satisfied.’<sup>61</sup>

### *The trial stage*

The decision of the TC to impose a stay on the proceedings against Mr Lubanga was due primarily to the Chamber’s inability to safeguard the fairness of the proceedings as the arbiters of the disclosure process, given that the restrictions on disclosure of the confidential material equally applied to them.

The decision of the AC provided welcome judicial clarification of two important issues:

- (a) the role of the TC as the arbiter of the disclosure process and in particular, the precise meaning of the phrase ‘in case of doubt as to the application of Article 67(2) the Chamber will decide’; and
- (b) whether the right to effect disclosure of potentially exculpatory material to the defence should trump the right to confidentiality of such material.

### *The role of the Trial Chamber*

The AC expressed concern at the prosecution’s blanket agreement to exclude even the Chambers of the Court from access to the material. This was, in their view, contrary to the provisions of Articles 67(2) and 64(2) which gives the Chamber the overall role of guaranteeing that the trial is fair and expeditious. The AC ruled that it is the Chamber who makes the final assessment as to whether material in the possession or control of the Prosecutor has to be disclosed under Article 67(2) and therefore the Chamber should receive potentially exculpatory confidential material.

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<sup>59</sup> *Supra* n 10 at para 95.

<sup>60</sup> *Ibid.* Separate Opinion of Judge Pikis at para 44.

<sup>61</sup> *Supra* n 10, Separate Opinion of Judge Pikis at para 43.

The IBA considers that ensuring that the TC has access to the material is an important safeguard for the defence. The IBA recognises that some concern may be raised that in assessing any potentially exculpatory material the Chamber may also be privy to large quantities of incriminating material contained therein; however, the IBA notes that the Statute and rules give the TC broad powers in relation to its management of the disclosure process including conducting *ex parte* proceedings.

The TC is also solely responsible for determining the evidentiary effect of potentially exonerating material. While the prosecution's assessment of the *nature* of the evidence is a crucial part of the disclosure process, it is for the Chamber to determine what *the effect* of the material is.

In the *Lubanga* case, the prosecution submitted that where the potentially exculpatory material could not 'in fact' – as opposed to 'in principle' – affect the guilt or innocence of the accused, and where the defence had been served analogous material, non-disclosure to the defence would not *per se* be a breach of the prosecution's statutory obligations. This view was correctly rejected by the TC and later confirmed by the AC. Although the initial assessment of the material is at the Prosecutor's discretion (hence the use of the term 'believes' in Article 67(2)), once the Prosecutor makes a determination that the material falls under one of the three categories provided in Article 67(2), it is for the Chamber to determine the evidentiary *effect* of the material. It is not for the prosecution to determine whether evidentiary material 'in fact' or 'in principle' tends to show the guilt or innocence of the accused.

The TC had also noted in its decision that had the prosecution resorted to the confidentiality provision only exceptionally, for the specific purpose of obtaining material to lead to relevant evidence, the conflict between Article 54(3)(e) and Article 67(2) would have been negligible. The prosecution however argued on appeal that Article 54(3)(e) did not place a numerical limit on the material which could be collected under that provision, only on the purpose to which it could be put (solely for generating new evidence). The AC rejected the prosecution's assertions that the TC had misinterpreted Article 54(3)(e). Notably, Judge Pikiš pointed out that there was no evidence to suggest that the prosecution had made any effort to generate new evidence from the material it had received; but was instead comfortable to rest on the hope that information providers would consent to the disclosure of the material to the defence.<sup>62</sup>

### *Confidentiality or disclosure*

The ICC legal documents fail to clarify which right should prevail in the case of tension between confidentiality and disclosure. The TC ruled that given the substantial amount of material at stake in the *Lubanga* case and its exclusion from assessing the material in question, the proceedings would be stayed until the issue could be resolved. The IBA understands that information providers were themselves discomfited by the absence of legal certainty; their concern was that if the restrictions against disclosure to the Chamber were lifted, the latter may choose to exercise its powers under Rule 84 of the RPE, which provides for the Chamber to make the necessary orders for disclosure of materials not previously disclosed under Articles 64(3) and 6(d), and Article 67(2). Interestingly, and by way of contrast, the International Criminal Tribunal for the former Yugoslavia (ICTY)

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<sup>62</sup> *Supra* n 10, Separate Opinion of Judge Pikiš at para 42

amended Rule 68 (disclosure) in 2003 to make it subject to Rule 70 (confidentiality).<sup>63</sup>

The AC's decision appears to clarify the existing lacunae. The judges have confirmed that both sets of rights, namely the right of the defendant to disclosure and of the information provider to confidentiality, must be respected by the Chambers.<sup>64</sup> The AC ruled that the TC cannot order the onward disclosure of confidential material to the defence without the prior consent of information providers. Importantly, if consent is withheld, the TC will then have to resort to counterbalancing measures to protect the rights of the accused. The precise nature of these measures were not specified in the decision; the matter being left for the TC's discretion.

Although the AC decision clarified a number of procedural issues, there are still several practical challenges that remain in the *Lubanga* case. Given the information providers' concessions to all of the TC's pre-conditions, the Chamber may commence the process of review shortly. Considering the amount of material in question, it is not clear how long this process is likely to take. If the Chamber determines that the material is exculpatory and must be disclosed to the defence, it would likely request that the prosecution negotiates further with information providers to allow full disclosure to the defence. The Chamber may also choose to apply some of the counter-balancing measures suggested by the AC. The length of the process is uncertain; however, it is clear that the process could potentially further delay the trial proceedings against the defendant.

### **C. Information providers**

#### *Legality of agreements with information providers*

Information providers such as the UN play a crucial role in facilitating the Court's ability to have access to relevant material that may otherwise not be available. The provision of information to the OTP from external sources is regulated by a series of agreements. The identity of the majority of information providers and the agreements governing their relationship with the Court has remained confidential (except where revealed to the Trial Chambers). However, the agreement made with the UN, and a separate agreement made with MONUC, are public and have been the focus of recent scrutiny. Article 18(3) of the *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* reads:

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<sup>63</sup> Rule 68 provides, 'Subject to the provisions of Rule 70,

- (i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecution evidence.
- (ii) ...
- (iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.
- (iv) the Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.'

<sup>64</sup> 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"', ICC-01/04-01/06-1486, at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf).

‘The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.’<sup>65</sup>

The provision is very similar to the wording of Article 54(3)(e), although it adds the proviso that the information shall not be disclosed to other organs of the Court – which would necessarily include the Chambers. Article 10(3) of the *Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Cooperation between MONUC and the ICC* reads:

‘Unless otherwise specified in writing by the Under-Secretary-General for Peacekeeping Operations or an Assistant Secretary-General for Peacekeeping Operations, documents held by MONUC that are provided by the United Nations to the Prosecutor shall be understood to be provided in accordance with and subject to the arrangements envisaged in Article 18, paragraph 3, of the Relationship Agreement.’<sup>66</sup>

The TC refrained from passing judgement explicitly on the legality of the agreements, citing only the prosecution’s abuse of the provisions. Single Judge Steiner, in the *Katanga & Ngudjolo* case, held that the agreements were not *per se* illegal, as long as they allowed for disclosure of exculpatory material.

The AC refrained from expressly declaring the UN-ICC Agreement illegal. The AC opined that in light of the wording of paragraph 18(3) of the UN-ICC Agreement specifically, ‘the UN and the Prosecutor may agree’, the Prosecutor may pursue alternatives to confidentiality when making arrangements to receive material from the UN. In contrast, the AC considered Article 10 (3) of the agreement with MONUC to be inappropriate; refraining from actually referring to the provision as illegal. In light of the AC judgement, the prosecution will be obliged to obtain material from the UN in a manner that is respectful of its other obligations under the Statute.

### *Lifting restrictions*

Information providers are equally required to respect the roles and rights of other parties and participants to ICC Proceedings. Under the Relationship Agreement between the ICC and the UN, both organisations are required to respect each other’s mandate.<sup>67</sup> The UN therefore has an obligation to cooperate with the Court by ensuring, for example, that where possible the process of lifting of restrictions is expedited so as not to unduly delay court proceedings, and by extension the right of the defendant to an expeditious trial.

The Single Judge in *Katanga & Ngudjolo* made it clear that although the present difficulties faced by the Court concerning confidential material arose out of the Prosecution’s ‘reckless under-assessment during the first two years of the DRC investigation’, such problems could no longer be seen as ‘the prosecution’s problems’ but also had an institutional dimension as well.<sup>68</sup> The judge commented

<sup>65</sup> [www.icc-cpi.int/library/asp/ICC-ASP-3-Res1\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf).

<sup>66</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1267-Anx2-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1267-Anx2-ENG.pdf).

<sup>67</sup> Article 3 of the UN-ICC Relationship Agreement.

<sup>68</sup> *Supra* n 17 at paras 102–103.

that ‘organizations that condition their cooperation with the prosecution on a blank application of Article 54 (3) (e) of the Statute may also be contributing to creating the above-mentioned risk, as it is likely that many of the documents they provide to the prosecution under such condition will contain materials which are potentially exculpatory or otherwise material for the defence.’<sup>69</sup>

It is difficult to fairly apportion blame for delays in the lifting process. The prosecution indicated to the respective Chambers that it made numerous requests to information providers for lifting of restrictions, yet responses were slow and sporadic. It is fair to say that the prosecution did not begin the process of requesting the lifting of redactions in a timely manner. The TC in the *Lubanga* case indicated this unequivocally in November 2007, when it became clear that the prosecution was unlikely to meet the deadline for disclosure imposed by the Chamber<sup>70</sup>.

UN letters annexed to prosecution filings in the *Lubanga* case have all reiterated the UN’s commitment to the process of lifting restrictions in a timely manner.<sup>71</sup> Despite the UN’s stated commitment, it is unclear why the process of lifting restrictions was so protracted.

### *The UN position*

The IBA sought clarification from a senior official at the UN Office of Legal Affairs. The IBA pointed out that due to its failure to lift restrictions on disclosure, the UN had been criticised as having a hidden political agenda.<sup>72</sup> The UN official indicated that its main concern was the significant security risk faced by some of its staff, many of whom were still operating in the field. Additionally, some of the confidential material had been obtained from third parties who also had to be consulted prior to the lifting of restrictions. The UN was also concerned that despite assurances from the TC that it would not order onward disclosure of confidential material to the defence, there were no similar guarantees in the event of an appeal. As previously noted, the AC’s Chamber decision may allay fears in this regard.

Without conceding that the UN had contributed to any delay in the ICC proceedings, the UN indicated that while it has pledged to cooperate with the ICC, there are several other urgent matters that compete for the attention of the small staff who attend to ICC requests. Depending on other demands, the UN official noted that the ICC process is not necessarily prioritised. The UN has not recruited additional staff to facilitate its agreement with the ICC. The problem is said to be one of resources, not willingness.

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69 *Supra* n 16 at para 30.

70 ‘Decision Regarding the Timing and Manner of Disclosure and the Date of Trial’, 9 November 2007 [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1019-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1019-ENG.pdf).

71 See, eg, letters from UN dated 3 July 2008 (2 letters: [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1431-Anx2.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1431-Anx2.pdf); [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1431-Anx3.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1431-Anx3.pdf)), 8 July 2008 ([www.icc-cpi.int/library/cases/ICC-01-04-01-06-1431-Anx4.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1431-Anx4.pdf)), 1 August 2008 ([www.icc-cpi.int/library/cases/ICC-01-04-01-06-1454-Anx1-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1454-Anx1-ENG.pdf)), 7 August 2008 ([www.icc-cpi.int/library/cases/ICC-01-04-01-06-1454-Anx3-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1454-Anx3-ENG.pdf)), 11 August 2008 ([www.icc-cpi.int/library/cases/ICC-01-04-01-06-1462-Anx1-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1462-Anx1-ENG.pdf)), 19 August 2008 ([www.icc-cpi.int/library/cases/ICC-01-04-01-06-1462-Anx3-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1462-Anx3-ENG.pdf)), 19 September 2008 ([www.icc-cpi.int/library/cases/ICC-01-04-01-06-1478-Anx97.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1478-Anx97.pdf)) and 10 October 2008 ([www.icc-cpi.int/library/cases/ICC-01-04-01-06-1478-Anx2.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1478-Anx2.pdf)).

72 Comments of Mr Jean-Pierre Biju-Duval, co-Counsel for Thomas Lubanga, ‘The United Nations has been in Congo for years. It is the key source of information that was provided. What are these superior interests that it is protecting, and which in so doing it is preventing us from having access to documents.’, transcript of proceedings in the case of Thomas Lubanga Dyilo, 24 June 2008, [www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-91-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-91-ENG.pdf) at page 9 lines 10–13.

The official pointed out that by virtue of General Assembly (GA) resolution 58/318, any cooperation or services rendered to the ICC by the UN was done on a reimbursable basis<sup>73</sup>. The GA resolution provides in part that ‘all expenses resulting from the provision of services, facilities, cooperation and any other support rendered to the ICC or the Assembly of States Parties (ASP), including any arrangements that may otherwise be agreed under Article 10 of the Relationship Agreement between the UN and the ICC as a result of the implementation of the Relationship Agreement, shall be paid in full to the Organization.’ The official advised that the ASP had indicated its willingness to pay for a consultant on a short term basis to address ICC cooperation requests, but given the nature and number of requests from the Court, a permanent position paid for by the Court is urgently required.

In addition to the staffing issues, the UN also pointed out that the Court’s decisions are not brought to its attention in a timely manner. There were two decisions<sup>74</sup> in which the respective judges explicitly instructed the Registry to notify the UN; however, the Registry has otherwise not been forthcoming. Certain major decisions of the Trial Chamber – the stay of proceedings, the release of Mr Lubanga and the decisions of the AC, among others, were brought to the UN’s attention by the OTP. However, the official noted that it would have been useful if the relevant transcripts and decisions had been brought to the UN’s attention at an earlier stage.

A senior member of the ICC Registry has confirmed that in the absence of a specific order from the Chamber there are no formal arrangements to bring transcripts and decisions of the Chambers to the UN’s attention.

#### **D. Managing the impact of the article 54(3)(e) dilemma**

##### *The victims*

The ICC was created to redress the wrongs done to ‘millions of children, women and men [who] have been the victims of unimaginable atrocities that deeply shock the conscience of humanity.’<sup>75</sup> Thousands of victims in the DRC look with expectation to the Court for justice. According to many human rights NGOs, victims feel an increasing sense of hopelessness because of the pace of proceedings at the court. The Court is increasingly perceived as distant, irrelevant, slow and complicated.

The TC’s decision to stay the proceedings against Thomas Lubanga and order his release had immediate and strong reactions, particularly in the DRC. According to NGO representatives with whom the IBA spoke, there was tremendous confusion, including alleged public threats against local and international NGOs resulting in some leaving Bunia.<sup>76</sup>

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73 Clause 3; available at <http://daccessdds.un.org/doc/UNDOC/GEN/N03/514/94/PDF/N0351494.pdf?OpenElement>.

74 The Prosecutor v Thomas Lubanga Dyilo, ‘Decision on Defence Requests for Disclosure of Materials’ of 17 November 2006, at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-718\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-718_English.pdf), and The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Decision on Article 54(3) (e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing, 20 June 2008, [www.icc-cpi.int/library/cases/ICC-01-04-01-07-621-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-621-ENG.pdf).

75 Rome Statute, preambular paragraph 2.

76 IBA Consultations with Human Rights Watch, and International Federation for Human Rights (FIDH).

## Outreach

The NGOs pointed out that the Court's response was disappointing as it failed to communicate the technicalities of the decision in clear and straightforward language<sup>77</sup>. Particularly troublesome was a perception, within the DRC, that Mr Lubanga, an ethnic Hema, was being treated differently than Germain Katanga and Mathieu Ngudjolo Chui, in whose case the Pre-Trial Chamber refused to impose a stay and who are of Lendu ethnicity.<sup>78</sup>

The IBA had previously raised concerns about the communications issued by the Court following the stay of proceedings and release of Mr Lubanga in its outreach report, *Beyond The Hague: Forging Linkages between the ICC and key jurisdictions*. The report noted that press releases concerning the stay of proceedings issued by the OTP and the Public Information and Documentation Section of the Registry (PIDS) overlapped and provided conflicting information. The IBA expressed concern in that report that 'for the average reader or for the affected communities in the DRC, such information might have created false expectations or generated confusion.'<sup>79</sup>

The prosecution's error has proved costly for the Court, in particular for victims and defendants. The Court's efforts to manage the impact of the decision to stay the proceedings and order Mr Lubanga's release were not entirely successful. According to human rights NGOs, the AC's decision was even more confusing for local communities than the TC's decision imposing the stay.<sup>80</sup>

The urgent priority of the Court must therefore be (once all pre-conditions have been met) to expedite the review of confidential material and commence the trial proceedings as soon as possible.

## E. Other relevant considerations

### *Reconsideration of Mr Lubanga's status*

The AC overturned the TC's order for Mr Lubanga's unconditional release largely due to the conditional nature of the stay imposed by the TC. The TC's reconsideration of the unconditional release of Mr Lubanga will no doubt be influenced by developments since its order granting release, including the prosecution's most recent filing requesting the Chamber to review the confidential material. As the initial order for release was suspended by the AC, the issue of States Parties' willingness to host the defendant in the event of his release did not arise. However, given the TC's reconsideration of the issue, the question of the existence of cooperation agreements with States Parties to facilitate the hosting of defendants who have been granted interim release by the Chamber merits further consideration.

The marked reluctance of France, Belgium, the United Kingdom and the Netherlands when a question was posed earlier this year in respect of Mathieu Ngudjolo's application for interim release

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<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> The IBA Outreach Report can be accessed at [www.ibanet.org/images/downloads/10\\_Report\\_Beyond\\_The\\_Hague-forging\\_linkages\\_between\\_the\\_International\\_Criminal\\_Court\\_and\\_key\\_jurisdictions\\_Sep2008.pdf](http://www.ibanet.org/images/downloads/10_Report_Beyond_The_Hague-forging_linkages_between_the_International_Criminal_Court_and_key_jurisdictions_Sep2008.pdf)

<sup>80</sup> Consultations with Human Rights Watch.

is indicative of the general posture of States' Parties on this issue.<sup>81</sup> The Registry indicates that enforcement of sentencing and other cooperation agreements to facilitate the defence has been raised with States' Parties on numerous occasions with little success. The IBA urges States' Parties, in keeping with their obligation to cooperate fully with the Court, to conclude such arrangements as will facilitate the release (interim or otherwise) of detained person as appropriate in each circumstance.

In its November 2007 Monitoring Report, the IBA urged States Parties to negotiate cooperation agreements with the Court to facilitate the relocation of defendants who may be acquitted or are granted provisional release by the Court and are unable to return to their country for security reasons. The IBA reiterates this recommendation and urges States Parties to fully comply with their obligations to cooperate with the Court.

## **F. Conclusions**

The IBA endorses the Chambers' finding that the Prosecutor's approach to investigations in the DRC led to an unprecedented disclosure dilemma that had the potential to significantly affect the fairness of the proceedings against all the defendants in the cases arising from that situation. In the IBA's view, despite the challenges in the DRC context, the prosecution erred in relying primarily on material obtained through cooperation rather than from first-hand investigations. The prosecution's acceptance of blanket agreements was neither consistent with its responsibility to objectively investigate and disclose potentially exonerating material, nor mindful of the Chamber's role as the final arbiter of the process.

The IBA is also concerned by the lengthy negotiations undertaken to lift confidentiality restrictions. In this regard, the IBA considers that the information providers did not always demonstrate confidence in the TC despite assurances that material would not be disclosed to the defence. The IBA however notes some of the concerns expressed by the UN Office of Legal Affairs, highlighting its own resource challenges vis-à-vis its obligation to cooperate with the Court, and the absence of systematic, timely notification by the Registry of the Chambers' relevant decisions.

The IBA welcomes the much-needed judicial clarity provided by the AC on a number of issues. The AC settled the question of which right should be given precedence, while making it clear that the Chambers must respect both the right to disclosure and the right to confidentiality. Additionally, the AC confirmed the important role played by the TC in safeguarding the fairness of the disclosure process in the event there is 'doubt' regarding disclosure of potentially exonerating material.

The IBA commends the efforts of the prosecution to persist in negotiations to lift confidentiality in order to fulfil its statutory disclosure obligations, or to allow for review by the Chamber. The IBA however regrets that the process was not commenced in a sufficiently timely manner to avoid the unnecessary delays that have been occasioned by the failure to disclose confidential material.

The urgent priority of the Court must therefore be (once all pre-conditions have been met) to expedite the review of confidential material and commence the trial proceedings as soon as possible.

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<sup>81</sup> See appendices to 'Report of the Registrar on the Execution of the Decision Inviting Observations on the Defence's Application for Interim Release', 28 February 2008, at [www.icc-cpi.int/library/cases/ICC-01-04-01-07-306-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-306-ENG.pdf).



The IBA welcomes efforts by the Office of the Prosecutor (OTP) to revise its investigations strategy including by relying less on confidential material. The IBA urges the OTP to ensure that this revised policy is included in the Draft Regulations of the OTP. The IBA also encourages the OTP, in light of the clarification provided by the AC, to renegotiate the terms of existing confidentiality agreements with information providers, to include specific provisions for disclosure of confidential material to the Chambers.

The IBA also welcomes the efforts by the prosecution to change the approach adopted in the DRC investigations in respect of other situations. In particular, the IBA welcomes the prosecution's decision to limit its reliance on Article 54(3)(e) and to make efforts to inform information providers about other protective measures provided by the Statute for safeguarding the confidentiality of material and the security of information sources.

The IBA also notes the efforts by the prosecution to pre-screen material to determine its relevance to the situation under investigation. The IBA cautions however that pre-screening of material may lead to additional difficulties if access is later subject to confidentiality restrictions, given the Prosecution's obligation to disclose potentially exculpatory material which it may become aware of during the pre-screening process. The prosecution is urged therefore to ensure that even if there is pre-screening of material from information providers, its access and subsequent ability to disclose the material is not conditioned on Article 54(3)(e).

Additionally, the IBA urges the prosecution to implement such policies as may be necessary to effectively manage all the evidence in its possession and control. Given that any investigation carried out by the defence is ancillary to the prosecution's investigations under Article 54(1)(a), it is important that the prosecution ensure that the recent 'sudden discovery' of unregistered confidential material in the DRC investigations is not allowed to recur in respect of any of the matters pending before the Court.

The IBA recommends an amendment to the RPE reflecting the AC decision that the TC must respect both the defendant's right to disclosure of potentially exonerating material in the prosecution's possession, and the confidentiality rights of information providers. The IBA further recommends that any counter-balancing measures to be utilised by the TC in the event that information providers refuse to allow onward disclosure to the defence should be expressly stated in the amended text. Given the importance of ensuring, to the extent possible, that full disclosure of potentially exonerating material is made to the defendant, the IBA cautions against counter-balancing measures that rely extensively on the use of summaries at the trial stage.

Additionally, there is a need for careful regulation of the Court's interaction with information providers. Despite the existence of cooperation agreements, the parameters and implications of the Court's relationship with information providers, including the UN, have not been sufficiently explored.

Information providers made significant, if belated, concessions to comply with TC stipulations for review of confidential material. The length of the negotiations process unnecessarily delayed the proceedings and suggested a lack of confidence in the Chambers. In the continuing spirit of cooperation, in the interest of fairness and in light of the AC decision mandating the TC to respect

the confidentiality of disclosed material, the IBA urges all information providers, in particular the UN, to ensure that where possible further efforts are made to allow full disclosure of confidential material to the defence.

# Chapter III

## Legal aid and other defence issues

### Introduction

By virtue of resolution ICC-ASP/6/Res.2 the Assembly of States Parties (ASP) invited the International Criminal Court (ICC) to ‘present to the Assembly at its next session an updated report on the different mechanisms for legal aid existing before international criminal jurisdictions in order to assess, inter alia, the different budgetary impact of the various mechanisms’. In response, the Registry conducted an analysis of the different legal aid systems, engaged in consultations with international tribunals and special courts and subsequently issued an ‘Interim Report on different legal aid mechanisms before international criminal jurisdictions’ (interim report) on 19 August 2008.<sup>82</sup> The interim report was prepared to facilitate the Committee on Budget and Finance’s (CBF’s)<sup>83</sup> consideration of the issues during the work of its eleventh session.

The interim report was among several documents discussed by the CBF during its eleventh session from 4 to 12 September 2008. Other relevant reports considered by the committee include the Court’s Proposed Programme Budget for 2009 (the proposed budget)<sup>84</sup>; report of the Court on options for outsourcing translation work<sup>85</sup>; the proposed supplementary budget relating to *The Prosecutor v Jean Pierre Bemba Gombo*<sup>86</sup> and the report on appropriate resources for financial investigations under the Court’s legal aid programme<sup>87</sup>. The committee was not able to consider the Court’s updated report on family visits of indigent detainees due to its late submission by the Registry. The committee subsequently issued its report on the work of its eleventh session on 25 September 2008.<sup>88</sup>

The CBF report raises a number of crucial issues that merit consideration due to their potential impact on the defence. These include proposed cuts to the legal aid budget; the role of the Office of Public Counsel for Defence (OPCD) and *ad hoc* counsel; family visits for detained persons and translation issues. As previously noted in Chapter I of this report, a number of these issues have been the subject of judicial attention during the reporting period.

82 ICC-ASP/7/12, at [www.icc-cpi.int/library/asp/ICC-ASP-7-12\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-7-12_English.pdf).

83 The Committee on Budget and Finance was established by the Assembly of States Parties in 2002. It is responsible for overseeing the financial, budgetary and administrative operations of the Court. An important part of its mandate is to review and issue recommendations to the ASP on the Court’s budget. The CBF convenes twice yearly in order to carry out its mandate. Its members, elected by the ASP, are experts in international financial matters.

84 ICC-ASP/7/9, at [www.icc-cpi.int/library/asp/ICC-ASP-7-9\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-7-9_English.pdf).

85 ICC-ASP/7/5, at [www.icc-cpi.int/library/asp/ICC-ASP-7-5\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-7-5_English.pdf).

86 Proposed supplementary budget – preparatory trial activities, *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-ASP/7/17, at [www.icc-cpi.int/library/asp/ICC-ASP-7-17\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-7-17_English.pdf).

87 ICC-ASP/7/4, at [www.icc-cpi.int/library/asp/ICC-ASP-7-4\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-7-4_English.pdf).

88 ‘Report of the Committee on Budget and Finance on the work of its eleventh session’, ICC-ASP/7/15, at [www.icc-cpi.int/library/asp/ICC-ASP-7-15\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-7-15_English.pdf).

## A. The legal aid system at the Court

The legal aid mechanism at the Court was revised following proposals by the Registry in May 2007.<sup>89</sup> Prior to each phase of proceedings counsel is required to submit a detailed 'action plan' for the Registrar's approval,<sup>90</sup> which will detail counsel's expected workload. At the end of each phase of the proceedings (or six months, whichever occurs first) counsel is obliged to submit a report on implementation of the action plan, which is then verified by the Registrar. Each team member then receives a monthly salary corresponding to the post they fill within the team. The payments remain constant throughout the proceedings and are payable even when judicial activity is minimal, such as when waiting for a decision to be delivered.

The defence comprises a core team of lead counsel, one legal assistant and a case manager at the pre-trial phase. At the trial phase the core team is supplemented by an associate counsel, with more resources becoming available depending on the workload of the team.<sup>91</sup> An additional lump sum of €70,000 for investigations is also provided.

The legal aid scheme for victims appearing before the Court is kept separate and is administered at the Registrar's discretion.

## B. Proposed cuts to the legal aid budget

The Court's proposed budget included a projected increase of €2.2 million for legal aid for 2009, largely due to the expectation that three trials were likely to commence in 2009. The committee did not however agree with the Court's projected increase, and accordingly cut the amount of legal aid requested by €700,000 despite a shortfall predicted in the requested amount.<sup>92</sup> The committee rejected what it termed the 'maximalist' approach to the preparation of the legal aid budget noting that it was 'highly unlikely that the full amount proposed would be required by the Court in 2009'.

It is apparent that the issue of legal aid continues to be a cause of concern for the CBF. The committee recalled its previous comments in the report of its ninth session on the escalating costs of the Court's legal aid scheme and the financial and reputational risks to the Court entailed in legal aid.<sup>93</sup>

The IBA is concerned at the committee's decision to cut the legal aid budget. Despite the stay of proceedings in the *Lubanga* case, there are signs that the Chamber may review the confidential documents and the trial could proceed in 2009. In addition, given the recent conclusion of the confirmation of charges hearing in the *Katanga & Ngudjolo* case and the likely start of the confirmation of charges hearing against Mr Bemba, it appears likely, contrary to CBF predictions, that the full amount requested by the Registry will be required in 2009.

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89 Report on the operation of the Court's legal aid system and proposals for its amendment, ICC-ASP/6/4, issued 31 May 2007, available at [www.icc-cpi.int/library/asp/ICC-ASP-6-4\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-6-4_English.pdf).

90 In accordance with Regulation 134 of the Regulations of the Registry.

91 *Supra* n 89, Annex IV.

92 *Supra* n 88 at para 93. The committee noted an error in the calculation of the costs of legal teams for the defence, which had been over-budgeted by €219,000. The actual shortfall to the legal aid budget was therefore €81,000.

93 See 'Report of the Committee on Budget and Finance on the work of its ninth session' ICC-ASP/6/12 at [www.icc-cpi.int/library/asp/ICC-ASP-6-12\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-6-12_English.pdf), at para 126.

It should be borne in mind that the ICC will be entering uncharted waters in the months to come, and it is more likely that the legal aid system will be overextended than underused. As such, any lack of resources will impede defence counsel's ability to adequately prepare its case, unless provision is made to utilise the contingency fund. The IBA further notes that the contingency fund's resources are critical given that there are still several outstanding arrest warrants, the execution of which may occur at any time and may necessitate immediate and extensive access to the fund.

The latest 'Report on different legal aid mechanisms before international criminal jurisdictions' (Report on different legal aid mechanisms) reveals that almost 1,500 documents have been filed in both the *Lubanga* and the *Katanga & Ngudjolo* cases, amounting to some 2.5 filings per day – this in addition to the countless *inter partes* filings made by the Prosecutor to the defence. It must also be remembered that *all* filings must be carefully considered by the defence. While it is not possible to predict whether cases will continue at this level of intensity, the legal aid system should allow defence teams to effectively fulfil their mandates.

In its report on different legal aid mechanisms, the Registry notes that 'given [...] limited experience, no definite benchmark can yet be set for future cases...' The IBA agrees that at this stage in the life of the Court, it would be difficult to make a qualitative assessment of the success or failure of the present legal aid system; it has, however, been endorsed by the CBF as 'a sound structure'.<sup>94</sup> In the IBA's view, the present system has numerous checks and balances to safeguard against potential abuse. However, it is important that the system of legal aid is kept under close scrutiny and is periodically reviewed by the Registrar to ensure that budgeted funds are properly accounted for.

The IBA urges the ASP to reconsider the CBF's budget recommendation regarding legal aid. Alternatively, the IBA proposes that the ASP encourages use of the Contingency Fund should the need arise.

### *OPCD, ad hoc counsel and duty counsel*

The committee appeared to be concerned about the amounts budgeted for *ad hoc* and *duty counsel* for defence. The CBF justified its cut to the legal aid budget partly based on its recommendation that the P4 position (Legal adviser/Counsel) requested by the OPCD should be approved.<sup>95</sup> The committee further reaffirmed its view that the Court should 'look for any inefficiencies and savings that could be achieved in its legal aid scheme, including by [...] evaluating the relationship between the OPCD and defence teams'.<sup>96</sup>

The IBA welcomes the CBF's recommendation approving the P4 position for the OPCD. The OPCD, which is presently staffed with a principal counsel, an associate counsel and a case manager, is mandated with the task of providing legal research and advice to defence teams in addition to its various roles as *ad hoc* counsel.<sup>97</sup> The reliance on the OPCD is likely to increase as more cases and counsel come before the Court. Given this important role, the CBF endorsement of the need

94 Report of the Committee on Budget and Finance on the work of its eighth session, ICC-ASP/6/2 at para 80.

95 *Supra* n 88, at para 93.

96 *Ibid* at para 127.

97 Regulation 77, Regulations of the Court.

for additional staff is timely. It appears however, that the CBF is concerned that the appointment of the OPCD as *ad hoc* or duty counsel could potentially overlap with the appointment of external counsel in the same capacity. This issue is not being raised for the first time; in the report of its ninth session, referring to the OPCD, the CBF noted that ‘the provision of both private and public defence resources combined with the complexity of judicial proceedings in the Court could lead to an unprecedented level of expense.’<sup>98</sup>

The decision to appoint *ad hoc* counsel at different stages of the proceedings is entirely within the judges’ discretion. Different Chambers have thus approached the issue quite differently. Pre-Trial Chamber I in the Darfur, Sudan and DRC situations has appointed only the OPCD to represent the general interests of the defence during the investigative phase of proceedings in respect of victims’ applications for participation. By contrast, the Single Judge in the Uganda situation appointed counsel from the ICC List of Counsel (the List), rather than the OPCD, to protect the general interests of the defence on similar issues. A Chamber may also decide to appoint counsel from the List to address one issue and appoint the OPCD to address another (for example, the OPCD represented the general interests of the defence in the context of the Uganda situation for the purpose of responding to filings by the Victims Trust Fund).

As provided in Regulation 77(4), the IBA supports the appointment of the OPCD to represent the interests of the defence at the situation stage, with the caveat that where conflicts of interest arise, the Chamber should appoint counsel from the List as it deems appropriate.

The IBA considers that at this stage of the Court’s development, there are greater overall advantages to appointing OPCD to act as *ad hoc* counsel during the situation phase. From a practical perspective, there is usually no clear indication as to how long this phase may last as it could take years before a suspect is identified. During this time, the Court may continue to receive applications for victims’ participation and notifications by the Trust Fund. In those circumstances, external *ad hoc* counsel could face significantly greater challenges in dealing with these issues as well as coping with his/her regular practice. OPCD, on the other hand, are ideally placed, qualified lawyers with institutional memory. Overall, the appointment of the OPCD at the situation phase could in the long term result in savings for the Court, provided that the Unit is adequately staffed.

The IBA therefore urges the ASP to endorse the CBF recommendation for the P-4 position within the OPCD and consider making this post a permanent position in the future. The IBA also urges the Pre-trial Chambers to adopt a more consistent approach to appointing *ad hoc* counsel during the pre-trial phase of the proceedings. However, given that at this time the appointment of counsel is a discretionary matter for each Chamber, the IBA encourages the ASP to not only approve the P-4 position for the OPCD, but also the full legal aid budget proposed by the Registry which includes resources for the appointment of external counsel from the List. As the Chambers streamline their approach over time, budgetary allocations for *ad hoc* counsel should be adjusted accordingly.

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98 *Supra* n 93, at para 72.

### C. Determination of indigence

In its Interim Report the Registry revisited its criteria for determining indigence, providing as requested a comparative perspective of the system utilised by other international tribunals. Based on the Registry's criteria, it appeared that some individuals with considerable assets could nevertheless be deemed indigent; a matter which caused the CBF some concern.<sup>99</sup> While the committee agreed that it is appropriate for the indigence test to take account of the high costs of an adequate defence, the committee did not believe it was reasonable for an individual with such assets to receive legal assistance from the Court budget. The problem appears to have resulted from the Court's method of calculating 'monthly disposable means' based on an individual's property and assets. In the opinion of the committee it was not unreasonable for an individual holding property and assets worth several million euro to be required to liquidate some assets to fund their defence.<sup>100</sup> It is not the first time the CBF has expressed concerns; in the report of its ninth session, the committee emphasised 'the need to thoroughly and rigorously examine the claims of indigence made by accused persons. In this regard it was essential for the Court to ensure that it utilized the resources available to it to search for assets.'<sup>101</sup>

#### *Modalities of determining indigence*

Defendants before the ICC must prove indigence; this involves submitting a completed financial information form detailing assets and income. The Defence Support Section of the Registry (DSS) uses this information to conduct its own financial investigation, after which it makes a recommendation to the Registrar who then makes a decision on indigence within one month, in keeping with Regulations 84 and 85 of the Regulations of the Court (and Regulations 130–132 of the Regulations of the Registry).<sup>102</sup> In making its decision, the Registrar takes into account the defendant's 'monthly disposable means' and obligations to dependants.

For the legal aid system to function properly, the procedures used to determine indigence must be effective. The high risk of abuse inherent in the legal aid system would be increased if the assessment of indigence were not conducted with the utmost professionalism and diligence. The Court has taken commendable steps to ensure that efforts will be taken to accurately assess claims of indigence, while respecting the reality that many defendants before the Court may well be declared indigent (note that according to the 'Report on Different Legal Aid Mechanisms before International Criminal Jurisdictions', 60 per cent of ICTY accused were found indigent, and a further 28 per cent were found partially indigent).

To date, three of the four defendants before the ICC have been declared indigent. On 25 August 2008, the Registrar submitted an assessment of Jean-Pierre Bemba's claim of indigence, declaring

99 CBF Report of its 11th session, *supra* n 88, at para 128.

100 Ibid.

101 *Supra* n 93, at para 73.

102 See also the documents 'Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons', ('Report on legal aid'); 'Report on the principles and criteria for the determination of indigence for the purposes of legal aid' (pursuant to para 116 of the 'Report of the Committee on Budget and Finance as at 13 August 2004'); ('Report on indigence'); 'Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons – Update to Annex 2: Payment details of the ICC legal aid scheme', ('Update'); and 'Report on the operation of the Court's legal aid system and proposals for its amendment'.

him provisionally capable of paying his legal costs and supporting his dependants. In rejecting the application, the Registrar indicated that the financial investigation to that point had revealed assets belonging to Mr Bemba which had not been disclosed in the financial form.<sup>103</sup>

### *Frozen assets*

The CBF has expressed concern that wealthy persons might, under the ‘monthly disposable income’ system, still be found indigent. However, it should be noted that although some persons deemed to be wealthy may have considerable assets, it may not be easy or possible to liquidate their assets. The assets assessed should be *realisable*. There may also be the issue of third-party rights over property which must be taken into account in any determination of actual assets that a defendant has at his disposal.

Even more problematic is the issue of frozen assets; many of the accused persons appearing before the Court are likely to have had their assets frozen; three of the four persons presently detained have been the subject of Security Council resolutions freezing their assets.<sup>104</sup>

The report on different legal aid mechanisms explains that ‘[a]llowing accused persons access to their frozen assets to pay for the reasonable legal costs of their defence is consistent with the interests of justice, the approach adopted in national jurisdictions and international sources, and the Court’s wider approach to legal aid, and the notion that those accused who have the means, should contribute to the costs of their defence’.<sup>105</sup>

When frozen assets are factored into a person’s means, such resources cannot be said to be ‘disposable’. Considering that under Article 67(1)(d) of the Statute, a defendant is entitled to counsel if he so chooses, there is a strong likelihood that counsel representing a defendant found not or only partially indigent may find it difficult to collect his fees. The result is that Counsel will have to take the case with reduced or delayed compensation, and/or litigate complex and time-consuming side issues in order to liquidate assets.

The report explains that:

‘[a]s regards how any unfreezing of assets would be effected, this would be a matter between the defendant and the Chamber, since it does not fall within the ambit of the Registrar to request the relevant Chamber to unfreeze the assets of the person concerned. It is to be expected that the Chamber would decide, upon the request of the defendant or on its own motion to request States Parties to exclude from seizure assets which need to be realized for the purpose of the defence of the person, or if already seized, to be released forthwith for that purpose, based on the assessment provided to it by the Registry’.<sup>106</sup>

This explanation does not circumvent the difficulties explained above, and there is no mechanism

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103 ‘Registrar’s Decision on the Application for Legal Assistance Paid by the Court Filed by Mr Jean-Pierre Bemba Gombo’, 25 August 2008, at [www.icc-cpi.int/library/cases/ICC-01-05-01-08-76-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-05-01-08-76-tENG.pdf).

104 Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo; see List Of Individuals And Entities Subject To The Measures Imposed By Paragraphs 13 And 15 Of Security Council Resolution 1596 (2005), at [www.un.org/Docs/sc/committees/DRC/1533\\_list.htm](http://www.un.org/Docs/sc/committees/DRC/1533_list.htm).

105 Para 79.

106 Para 80.



presently in place to allow for it.

The report does recognise, however, that if a Chamber refuses to release frozen assets, such assets cannot be taken into account in assessing that defendant's means. This has to be the correct approach, and should be considered by the CBF. Given the difficulties that Counsel may have in unfreezing assets, however, perhaps the better course would be to assume that these assets cannot be released, and to exclude them from any determination of indigence until such time as progress is made toward their liquidation.

### *Transparency*

Maintaining transparency and setting forth clear, objective criteria are a prerequisite to determining indigence. The IBA considers that the 'Report on Different Legal Aid Mechanisms' provides clear and useful information in this regard. The IBA considers that the report reflects commendable efforts by the Registry to address some of the concerns raised in the CBF report and by other stakeholders including the IBA.

## **D. Translations**

In its report, the CBF recalled that it had expressed concern at the translation rates applied by the Court and the increasing burden of translation costs on the Court's budget and recommending that options for outsourcing translation work be explored with the aim of finding lower cost providers.<sup>107</sup> Although the Registry submitted a report on these issues,<sup>108</sup> the Committee declined to draw any conclusions at this stage. However, the committee expressed no objection to the additional resources proposed, expecting that the Court would have sufficient capacity for several years.

Translation has been a problematic issue for defence teams over the reporting period. Language issues are addressed in the Statute, Rules and Regulations of the Court, the most relevant for this report being the following:<sup>109</sup>

**Article 67(1)(f):** The accused shall be entitled to [...] have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.

**Rule 22(1):** [...] A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

**Regulation 40:** (1) The Registrar shall ensure that [judgements and major decisions] should be translated into all the official languages of the Court. (3). The Registrar shall ensure translation into the other working language(s) of all decisions or orders taken by Chambers during proceedings.

These provisions make it clear that the Court has a responsibility to facilitate translation and that language issues should not be permitted to cause difficulties for parties to the proceedings. Court

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107 Report of its eleventh session, *supra* n 88, para 88.

108 Report of the Court on options for outsourcing translation work, ICC-ASP/7/5, at [www.icc-cpi.int/library/asp/ICC-ASP-7-5\\_\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-7-5__English.pdf).

109 See also Rome Statute Article 50(2): 'The working languages of the Court shall be English and French'; Rule 76(3): The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.

jurisprudence has tended toward a minimalist approach to translation.<sup>110</sup> Deadlines before which counsel must respond to filings run from the date that counsel is notified of a decision.

Defence Counsel for Mathieu Ngudjolo Chui made two separate requests that deadlines run only from the date of receipt of French translations of decisions.<sup>111</sup> Counsel for Mathieu Ngudjolo Chui is French-speaking (indicating in his application form that he possessed ‘a fair knowledge of English’), and the vast majority of decisions and filings have been handed down in English, unnecessarily complicating the proceedings for the team. Counsel’s submissions have not been met favourably by judges,<sup>112</sup> who decided that it was ‘the responsibility of permanent Counsel to compose the Defence team in a manner which will allow him to (i) properly be assisted in the presentation of the case before the Chamber; and (ii) effectively protect the rights of Mathieu Ngudjolo Chui’.<sup>113</sup>

The legal representatives for victims have also expressed concerns about languages at the ICC. During the Confirmation of Charges hearing in the *Katanga & Ngudjolo* case, one of the victims’ legal representatives, Mr Hervé Diakiese remarked that ‘I know that the Court has two working languages, both English and French, but sometimes I feel that the first language is English and the second English too’.<sup>114</sup> Other legal representatives, such as Carine Bapita, have also expressed concerns.<sup>115</sup>

The IBA has noted minor improvement in the translations of recent decisions of the Chamber. Previously, it was not clear how translations were prioritised resulting in much older decisions or other administrative documents being translated before more recent decisions that were often the subject of interlocutory appeal proceedings. The IBA has noted that more effort has been made to translate recent decisions of the Chambers. A notable exception was however the failure to translate the confirmation charges decision in the *Katanga & Ngudjolo* cases in a timely manner. This precipitated an urgent request from counsel for Mr Katanga for the decision to be translated into French in order to facilitate his application for leave to appeal the decision.<sup>116</sup> To date, the defence teams have only received an unofficial translation.

110 See ‘Decision on Ad hoc Counsel for the Defence’s Request for Extension of Time to Respond’, Situation in DRC, 16 June 2006, [www.icc-cpi.int/library/cases/ICC-01-04-156-tENG\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-156-tENG_English.pdf), where Judge Jorda accepted a request from *ad hoc* counsel Joseph Tshimanga (who claimed not to be able to speak English) to have deadlines run from his receipt of French versions of decisions or filings. This precedent was later altered: *Prosecutor v Thomas Lubanga Dyilo*, ‘Decision on the Requests of the Defence of 3 and 4 July’, 4 August 2006, [www.icc-cpi.int/library/cases/ICC-01-04-01-06-268\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-268_English.pdf); *Lubanga*, ‘Decision on defence request for extension of time’, 22 January 2008, [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1125-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1125-ENG.pdf); *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, ‘Decision on the Defence Request concerning time limits’, 27 February 2008, [www.icc-cpi.int/library/cases/ICC-01-04-01-07-304-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-304-ENG.pdf).

111 ‘Requête’, ICC-01/04-02/07-34; 7 May: ‘Requête de la Défense en vue de solliciter la traduction écrite automatique en français de tous les actes de procédure et de toutes les décisions des Chambres qui sont notifiés à Mathieu Ngudjolo dans une langue autre que le français’ (ICC-01/04-01/07-470).

112 ‘Decision on the Defence Request concerning time limits’, 27 February 2008, [www.icc-cpi.int/library/cases/ICC-01-04-01-07-304-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-304-ENG.pdf).

113 *Ibid.* Compare also the Trial Chamber’s decision on a similar request in *Lubanga*: ‘a system would be created in which a party or participant who maintains it has difficulties understanding or utilising the particular working language used by a Chamber would have the benefit of a significantly longer time-period for service of documents than any party or participant who does not raise the same difficulty. [...] [There should be] procedures in place to enable them to deal with applications and filings within the stipulated time-limits of the provisions of the Rome Statute framework, regardless of whether the decision is in English or French.’

114 15 July 2008, [www.icc-cpi.int/library/cases/ICC-01-04-01-07-T49-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-T49-ENG.pdf).

115 *Prosecutor v Thomas Lubanga Dyilo*, ‘Submissions of the Legal Representative of Victim a/0105/06 in Response to the Order Setting out Schedule for Submissions and Hearings Regarding the Subjects that Require Early Determination’, 24 September 2007, paras 15–24, [www.icc-cpi.int/library/cases/ICC-01-04-01-06-961-tENG\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-961-tENG_English.pdf).

116 ‘Request that Mr Katanga be provided with the translation in French of the Decision on the confirmation of charges’, 2 October 2008, [www.icc-cpi.int/library/cases/ICC-01-04-01-07-718-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-718-ENG.pdf).

## *Report on outsourcing translations*

In its 'Report of the Court on options for outsourcing translation work',<sup>117</sup> the Translation Unit reports on its mandate, workload and options for improvement, including 'outsourcing'. The document lists a number of ways in which the ICTY has saved money, including the introduction of a 'document management system' to save on duplication. Money was also saved when the Registry discontinued the production of French transcripts where English was the language spoken by all participants in the proceedings. The IBA considers that this may be a viable long-term option for the ICC given the need to save on limited resources.

The Unit claims in its report that one of the main difficulties in providing translation services is the insufficient number of bilingual Court staff. The Unit also claims to be stretched by the need to provide training, and the fact that it has 'no typists, no proofreaders' and is required to provide substantial assistance to the ASP.<sup>118</sup> Ironically, the ASP, at its Sixth Session, expressed concern over slow translation rates.<sup>119</sup>

The Unit emphasises that as a rule it 'does not provide language services *proprio motu* but translation and interpretation services are requested by clients [...]'.<sup>120</sup> A request from the Registry is thus needed if translations are to be provided to the defence. The Unit also states that the processing of requests is slowed by the sheer number of filings.<sup>121</sup>

## *Potential solutions*

An efficient way to protect the accused's rights under Article 67(1) (f) would be to allow deadlines to run only from the date that counsel receives an order or decision *in his working language*. The Registrar can, via an efficient Translation Section, ensure that counsel receives translations as speedily as possible, minimising prejudice against the defence team. It is hoped that the increase in resources afforded to the Translation Section will better equip the Registrar to carry out this duty.

The IBA considers that priority should be given to urgently recruiting typists and proofreaders as this will be a cheap way of improving the Unit's efficiency. Additionally, thought should be given to utilising the Unit exclusively for legal documents. Translation of administrative documents should be handled elsewhere if possible; in the event that a viable alternative is not available, priority should always be given to Court filings.

The IBA considers that more thought should be given to reducing unnecessary duplication. It may be prudent to establish a 'document management system' similar to that used by the ICTY such that parallel translation departments (such as the OTP which has its own translation services and the Registry) do not duplicate documents. This might also enable other organs to benefit from translations carried out by the OTP. If a translation is made, there is no reason in the IBA's view why such a document should not be available to other relevant persons including the defence.

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117 *Supra* n 85.

118 *Ibid.*, para 25.

119 Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November – 14 December 2007 (International Criminal Court publication, ICC-ASP/6/20), vol II, part B.2, para 70.

120 *Supra* n 85, para 29.

121 Para 30.

The inability of the OTP to produce official documents is apparently due to the absence of revisers; the result is that all revisions must be carried out by the Translation Unit in the Registry. This places undue demand on limited Translation Unit resources. The IBA considers that appointing revisers to the OTP would greatly enhance the overall efficiency of the Court as it would enable the OTP to produce official translations of OTP filings without the need to rely on the Registry. The Registry could then focus its attention on translating other important filings and decisions.

## **E. Family visits**

As noted, the CBF was disappointed not to have received a report on family visits in time for the committee to consider during its eleventh session; the IBA echoes their dissatisfaction and urges the Registry to ensure that important reports are provided in a timely manner for the committee's consideration.

The right to family visits, though not a core human right, is nevertheless an important right for the accused. The right is codified in Regulation 100 of the Regulations of the Court. The IBA is pleased to see that the issue has been considered seriously, and is also pleased to see the Chambers' commitment to this right, as expressed in several decisions in the *Katanga & Ngudjolo* case. The problems associated with family visits were made clear at the confirmation hearing in this same case, Germain Katanga choosing not to attend the hearing on several days due to his dissatisfaction.<sup>122</sup> Clearly, family visits are not just an important right of the accused, but are crucial to the expediency and effective functioning of trials before the Court.

### **Funding**

Based on consultations by the Registry with key stakeholders in advance of the preparation on its 'Interim Report on Family Visits', the main obstacles appear to be funding and the physical capacity of States to *facilitate* family visits.<sup>123</sup>

The committee noted in its report that the Court had revised its criteria for family visits, supporting cost cuts in 2009 from €84,300 to €40,500.<sup>124</sup> However, the CBF reiterated that the question of whether the Court should fund family visits for indigent detainees was a political one to be decided by the Assembly. The committee recommended that, pending a policy decision by the Assembly, *it would be advisable for the Court to seek funding from voluntary contributions.*

The CBF's proposal is problematic, as this is not likely to be a priority for many States. At a time when the problems surrounding family visits have been thrust into the spotlight, the IBA urges the ASP to seriously reconsider this proposal.

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122 See transcript of hearing of 11 July, at [www.icc-cpi.int/library/cases/ICC-01-04-01-07-T-46-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-T-46-ENG.pdf).

123 For example, the DRC authorities have, for some time now, apparently been unable to provide passports to the families of accused persons.

124 First Seminar of the Registry on Detention Matters; 'Family Visits': Proposed Report for Consultation (document not yet publicly available).

## **F. Other relevant issues**

### *Reports issued by the Registry*

The IBA notes the Registry's commendable effort in reformulating its 'Report on different legal aid mechanisms before international criminal jurisdictions'. The final report was an obvious improvement over the earlier draft, and it addressed several concerns that had been brought to the Registry's attention during consultations with key stakeholders including NGOs and The Hague Working Group.

The IBA notes, however, that there was room for improvement in the Proposed Programme Budget. For example, in the table showing the breakdown of the Registry's proposed programme budget, the term legal aid was not mentioned. Legal aid was referred to as 'contractual services and training'. In our view this was not sufficiently clear, particularly considering that it represented a significant budgetary item. The IBA has raised this issue with the Registry in subsequent consultations.

Despite the Registry's laudable efforts to engage and consult with different stakeholders on the family visits issue, the IBA regrets that the Registry failed to submit its report to the CBF in sufficient time for its consideration during the eleventh session. To ensure that there is meaningful feedback given on reports and other important documents, the Registry is encouraged to streamline the consultation process by the timely advanced circulation of draft reports and allowing sufficient time for feedback.

## **G. Conclusions**

There are several items among the CBF recommendations from its eleventh session that require further and careful consideration. This report has addressed the following: the proposed cut to the legal aid budget, the proposal for family visits to indigent detainees, and translation issues. The IBA is concerned that in relation to legal aid, the CBF recommended a budget cut despite indications in respect of the *Bemba* case that at least two trials and one confirmation proceedings are likely to take place in 2009. In this regard, the IBA urges the ASP not to accede to the CBF recommendation for this budget cut.

Regrettably, the late submission of the report on family visits did not allow the CBF to consider the issue in sufficient detail. However, while the IBA agrees with the CBF that the decision to fund family visits will have to be a policy decision made by the ASP, the IBA does not support the CBF's recommendation for proposed funding for family visits to be made from voluntary contributions.

Concerning translations, the IBA considers that more thought should be given to reducing unnecessary duplication of translation. Other options should be found to address the translation of general administrative documents; however, in the event that this is not viable, priority should always be given to Court filings.

It may be prudent to establish a similar system at the ICC such that parallel translation departments (such as the OTP which has its own translation services and the Registry) do not duplicate

documents. The IBA additionally considers that priority should be given to urgently recruiting typists and proofreaders as this will be a cheaper way of improving the Unit's efficiency.

Finally, the Registry is urged to ensure that reports to be considered by the committee are produced in a timelier manner and submitted well in advance of the working session of the CBF. Regarding consultations with other stakeholders, the Registry is urged to ensure that documents are sent sufficiently in advance to ensure that meaningful contributions can be made within the stipulated period and prior to any deadline.

# Conclusions

During the reporting period, the International Criminal Court (ICC) was again faced with the significant challenge of balancing competing rights. On this occasion, the rights in question were those of the defendant to disclosure of potentially exculpatory material in the prosecution's possession and the information providers to confidentiality of documents supplied to the prosecution. The tension between both sets of rights was compounded by the prosecution's approach to the initial phase of investigations in the Democratic Republic of Congo (DRC); in particular the extensive reliance on Article 54(3)(e) confidentiality agreements excluding disclosure of potentially exculpatory material from the defence as well as the Trial Chamber (TC).

The IBA endorses the Chambers' finding that the Prosecutor's approach to investigations in the DRC led to an unprecedented disclosure dilemma that had the potential to significantly affect the fairness of the proceedings against all the defendants in the cases arising from that situation. In our view, despite the challenges in the DRC context, the prosecution erred in relying primarily on material obtained through cooperation rather than from first-hand investigations. The prosecution's acceptance of blanket agreements was neither consistent with its responsibility to objectively investigate and disclose potentially exonerating material, nor mindful of the Chamber's role as the final arbiter of the process.

The IBA is also concerned by the lengthy negotiations undertaken to lift confidentiality restrictions. In this regard, the IBA considers that the information providers did not always demonstrate confidence in the TC despite assurances that material would not be disclosed to the defence.

The IBA also notes some of the concerns expressed by the UN Office of Legal Affairs, highlighting its own resource challenges *vis-à-vis* its obligation to cooperate with the Court, and the absence of systematic, timely notification by the Registry of the Chambers' relevant decisions.

The IBA welcomes the much-needed judicial clarity provided by the Appeals Chamber on a number of issues. The AC settled the question of which right should be given precedence, while making it clear that the Chambers must respect both the right to disclosure and the right to confidentiality. Additionally, the AC confirmed the important role played by the TC in safeguarding the fairness of the disclosure process in the event there is 'doubt' regarding disclosure of potentially exonerating material.

The IBA considers that given the protracted delay in the start of its first trial, the Court's priority must be to review the confidential material and commence Mr Lubanga's trial without delay.

The IBA welcomes efforts by the Office of the Prosecutor (OTP) to revise its investigations strategy including by relying less on confidential material. The IBA urges the OTP to ensure that this revised policy is included in the Draft Regulations of the OTP. The IBA also encourages the OTP, in light of the clarification provided by the AC, to renegotiate the terms of existing confidentiality agreements with information providers, to include specific provisions for disclosure of confidential material to the Chambers.

From an examination of key developments in all cases and situations before the Court, the IBA considers that despite significant setbacks in the cases from the DRC, the Court's activity is likely to increase in 2009. In this regard, the IBA considers that the recommendations of the CBF to the seventh session of the Assembly of States Parties (ASP) are particularly important. The CBF's proposed cut to the legal aid budget does not reflect the level of projected activity of the Court. In our view, any proposed budgetary cut should only be considered after a thorough review of how the amended legal aid system's performance after a period of activity. Considering that the amendment to the legal aid system was undertaken as recently as May 2007, the IBA deems it premature to consider such a review at this time.

## **Recommendations**

### *The Court*

The IBA recommends an amendment to the RPE reflecting the AC decision that the TC must respect both the defendant's right to disclosure of potentially exonerating material in the prosecution's possession, and the confidentiality rights of information providers.

The IBA further recommends that any counter-balancing measures to be utilised by the TC in the event that information providers refuse to allow onward disclosure to the defence should be expressly stated in the amended text. Given the importance of ensuring, to the extent possible, that full disclosure of potentially exonerating material is made to the defendant, the IBA cautions against counter-balancing measures that rely extensively on the use of summaries at the trial stage.

Additionally, there is a need for careful regulation of the Court's interaction with information providers. Despite the existence of cooperation agreements, the parameters and implications of the Court's relationship with information providers, including the UN, has not been sufficiently explored.

### *The UN and other information providers*

Information providers made significant, if belated, concessions to comply with TC stipulations for review of confidential material. The length of the negotiations process unnecessarily delayed the proceedings and suggested a lack of confidence in the Chambers. In the continuing spirit of cooperation, in the interest of fairness and in light of the AC decision mandating the TC to respect the confidentiality of disclosed material, the IBA urges all information providers, in particular the UN, to ensure that where possible further efforts are made to allow full disclosure of confidential material to the defence.

### *The prosecution*

The IBA commends the efforts the prosecution's efforts to lift confidentiality restrictions in order to fulfil its statutory disclosure obligations or to allow for review by the Trial Chamber. The IBA regrets



however that the process was not begun in a sufficiently timely manner to avoid the unnecessary delays occasioned by the failure to disclose confidential material.

The IBA welcomes the efforts by the prosecution to change the approach adopted in the DRC investigations in respect of other situations. One such effort is the requirement of pre-screening of material to determine its relevance to the situation under investigation. The IBA cautions that pre-screening of material may lead to additional difficulties if access is later subject to confidentiality restrictions. The prosecution is urged therefore to ensure that even if there is pre-screening of material from information providers, its access and subsequent ability to disclose the material is not conditioned on Article 54(3)(e), given that the prosecution would still be obliged to disclose potentially exculpatory material that comes to its attention during the pre-screening process.

Additionally, the IBA urges the prosecution to implement such policies as may be necessary to effectively manage all the evidence in its possession and control. Given that any investigation carried out by the defence is ancillary to the prosecution's investigations under Article 54(1)(a), it is important that the prosecution ensure that the recent 'sudden discovery' of unregistered confidential material in the DRC investigations is not allowed to recur in respect of any of the matters pending before the Court.

### *The Registry*

The IBA notes concerns at the UN Office of Legal Affairs regarding notification of Court decisions and the strain on human resources presented by the processing of ICC requests. The IBA urges the Registry to notify the UN of relevant decisions in a timely manner, whether or not the Chambers officially order notification.

### **Concerning Registry reports and translations:**

The IBA also notes the commendable improvement made by the Registry in the preparation of its 'Report on different legal aid mechanisms before international criminal jurisdictions'. This final report provided further details on the determination of indigence and other important issues raised in its earlier interim report. It reflected considerable effort on the part of the Registry to take into account concerns raised by key stakeholders including the Hague Working Group and non-governmental organisations .

The Registry is however urged to ensure that reports to be considered by the committee are produced in a timelier manner and submitted well in advance of the working session of the CBF. Regarding consultations with other stakeholders, the Registry is urged to send documents sufficiently in advance to ensure that meaningful contributions can be made within the stipulated period and prior to any deadline.

The IBA considers that more thought should be given to reducing unnecessary duplication of translation work. Options should be sought for translating administrative documents; when this is not viable, priority should always be given to Court filings. It may be prudent to establish a system at the ICC such that parallel translation departments (ie, the OTP and the Registry) do not duplicate documents.

To improve the efficiency of the Translation Unit, the IBA considers that priority should be given to urgently recruiting typists and proofreaders. Thought should be given to utilising the Unit exclusively for legal documents.

### *The Assembly of States Parties (ASP)*

In keeping with General Assembly Resolution 58/318, the ASP is urged to create a permanent position within the UN funded from the Court's budget and dedicated to addressing cooperation requests from the ICC.

Given the importance of family visits and the financial limitations of indigent detained persons, the IBA urges the ASP to reconsider the CBF's proposal that family visits be funded by voluntary contributions rather than the Court's budget.

The IBA welcomes the CBF recommendation to approve a P-4 position at the Office of the Public Counsel for Defence, albeit on a General Temporary Assistance (GTA) basis, for one year, and urges that consideration be given to making this post permanent in the future.

The IBA urges the ASP to reconsider the CBF's recommendation to cut the legal aid budget; in the alternative, the IBA proposes that the ASP encourage resort to the Contingency Fund should the need arise.

# ANNEX I

## Parameters for IBA monitoring of the International Criminal Court

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

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

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

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

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

- the right to be tried by a competent, independent and impartial tribunal;
- the right to a public hearing;
- the presumption of innocence;
- the right to legal counsel;