IBA Monitoring Report

INTERNATIONAL CRIMINAL COURT

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Executive summary

The International Bar Association (IBA) has initiated high level monitoring and consultation on 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 Evidence and Procedure are implemented by the different organs of the Court. Two reports have been issued under the programme documenting the history of the situations before the Court and the early phase of the pre-trial stage of the case of Thomas Lubanga Dyilo, the first person to be surrendered to the ICC. This third IBA monitoring report covers the period from November 2006–October 2007. The report provides an overview of the significant developments in the situations and cases before the Court during the reporting period as a contextual reference point for a discussion of some of the salient issues. The website of the ICC does not make it easy to follow the developments in the cases or situations before the ICC. For this reason, IBA monitoring reports set out details to provide the context in which developments should be followed and understood. The focus on challenges encountered by the defence in this report should not be interpreted as a disregard for other important issues such as victims' participation. The aim is to direct attention to the significant impact of these challenges on the function of the Court and the rights of the defendant.

Significant findings

- The efficient and effective conduct of the pre-trial phase of the Lubanga case was significantly hampered by a number of administrative challenges encountered by the defence team which negatively impacted the pace of the proceedings.
- Some of the administrative concerns cited by the Lubanga defence team included insufficient staff, inability to effectively conduct investigations in the Democratic Republic of Congo (DRC) and some technological challenges.
- The issue of disclosure created substantial challenges for the defence. The defence reported extensive use by the prosecution of summaries and redactions which impaired the ability of the defence to adequately prepare its case. The prosecution justified its use of summaries and redactions on the basis that no other adequate protective measures were available to guarantee the security of victims and witnesses.
- The Registry has initiated a proposal for reform of the Legal Aid programme which is pending approval. It is anticipated that the proposed reforms will significantly improve the efficiency level of the defence team particularly at the pre-trial phase.The Committee of Budget and Finance does not recommend the approval of an increased legal aid budget.
- If the proposal for reform of the Legal Aid system is not favourably considered by the Assembly of States Parties (ASP), the difficulties encountered during the Lubanga case may be repeated in the case of Germain Katanga and subsequent cases before the ICC.

- The lack of cooperation by States parties and especially the Sudanese Government in the enforcement of the outstanding arrest warrants issued by the Court against the five Lord's Resistance Army (LRA) leaders from Uganda and Ahmad Harun and Ali Kushayb from Sudan, is threatening to undermine the viability of the Court as an international justice institution dedicated to fighting impunity.

Legal developments

- The presiding judge of the Pre-Trial Chamber (PTC) made several significant rulings on the procedure to be followed during the confirmation of charges hearing. The PTC did not expressly rule that hearsay evidence was inadmissible during the confirmation of charges hearing but determined that where hearsay evidence was elicited from a witness during the confirmation of charges hearing the Chamber would either a) declare the witness' testimony inadmissible in whole or in part, or b) assess the evidence against the background of the witness' lack of first hand knowledge.
- The Presiding Judge of the PTC determined that re-examination was unwarranted at the confirmation of charges hearing. The judge considered that Rule 140(2) of the Rules of Procedure and Evidence (RPE) (which prescribes the manner in which witnesses could be questioned before the trial chamber) applied with equal force to pre-trial proceedings. The judge made this determination after applying this interpretation of Rule 140(2) to a consideration of Rule 122(1) of the RPE (which allows the presiding judge of the PTC to determine the conduct of the proceedings).
- In relation to the issue of victims' participation during the confirmation of charges hearing, the PTC decided that if victims maintained their anonymous status during the confirmation of charges hearing their participation in the case would be limited to access to public documents, attendance at public sessions and making opening and closing statements.
- The Appeals Chamber delivered several significant rulings concerning the issue of disclosure. The Chamber determined that disclosure was a right and non-disclosure the exception. Any restriction on disclosure on the basis of protection of witnesses must be shown to be necessary because other protective measures are not feasible or insufficient.
- On the issue of the use of summaries the Appeals Chamber ruled that there is in principle no difficulty with the use of summaries by the prosecutor at the confirmation of charges hearing even if the identities of the relevant witnesses had not been disclosed prior to the hearing. This was on condition that the use of the summaries was not inconsistent with the fair trial rights of the accused.
- The Appeals Chamber also noted that it was important that the single judge provide sufficient reasoning in his/her decision authorising non-disclosure primarily because a number of the applications by the prosecution or the victims' representatives are made ex-parte and the defence cannot adequately challenge them.

Conclusions and recommendations

- The IBA supports the proposal by the Registry for reform of the legal aid system. The IBA urges the ASP to carefully consider the impact of administrative challenges faced by the defence on the overall productivity level of the Court and its ability to expeditiously deal with cases. In this regard, the IBA encourages the CBF to reconsider its proposal not to recommend an increase in the budgetary allocation for the legal aid programme.
- The IBA welcomes in particular the proposal for a core team consisting of lead counsel, a P2 legal assistant and a case manager to act throughout the proceedings except when counsel acts alone. While the IBA welcomes the proposal for P4 associate counsel to be appointed upon definite confirmation of the charges, the IBA recommends that the Registrar considers appointing the P4 co-counsel as part of the core defence team from the pre-trial stage of the case. This would ensure that there is senior counsel with sufficient history of the case from the outset. In the alternative, it is suggested that if the P4 counsel is to be appointed only during the transition phase (between pre-trial and trial phase) of the proceedings, that this be done once the charges have been confirmed whether there are appeals pending against the confirmation of charges or not.
- The IBA also supports the recommendation for an increase in the staff complement of the OPCD to cope with the increasing demands on the resources of that office. The IBA however urges that the Registry provide more clarity regarding the recommendation for a GTA P4 Counsel to be added to the OPCD team for nine months instead of a permanent position.
- The IBA strongly urges that the delay occasioned by the administrative challenges in the Lubanga case should not be repeated in the case of Germain Katanga or any subsequent case.
- In this regard, the IBA encourages clear and timely judicial interventions to resolve administrative issues involving the legal representation of the defendant in order to protect the fair trial rights of the defendant before the Court.
- Notwithstanding the previous recommendation, the IBA welcomes the use of Legal Aid Commissioners to assist in the resolution of disputes arising within the legal aid programme in order to allow judicial activity to be concentrated on substantive legal issues.
- In some respects the confirmation of charges proceedings in the Lubanga case seemed to assume the status of a mini-trial. It appeared that the volume of incriminatory evidence disclosed by the prosecution and the length of the discovery procedure contributed to significant delays in the process. The IBA urges the OTP and the PTC to consider adopting a shorter summary approach to the confirmation of charges proceedings provided that such an approach would not compromise the rights of any of the parties or participants to the proceedings.
- The IBA urges the OTP to commence the process of requesting permission for the lifting of restrictions concerning evidence that is subject to Article 54(3)(e) in a more timely manner. This is particularly important where such evidence is potentially exculpatory.

- The IBA welcomes the 14th December 2006 Appeals Chamber decisions which emphasised the need for the Single Judge to provide clear reasons for allowing non-disclosure to the defence on the basis of Rule 81(2) and (4) of the RPE. These decisions affirm the principle of openness and transparency of judicial proceedings and ensure that both the defendant and the public have a full understanding of judicial decisions.
- Regarding the mandate of *ad hoc* defence counsel, the IBA urges the PTC and the Registry to clearly indicate to counsel the limitations of their mandate at the time that the initial appointment is made, in order to avoid misunderstanding.
- The IBA encourages States parties and especially the Sudanese Government to cooperate with the Court in enforcing the arrest warrants issued for Ahmad Harun and Ali Kushayb for war crimes and crimes against humanity allegedly committed in Darfur, Sudan and against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen for similar crimes allegedly committed in Uganda.
- The IBA further urges States Parties to enter into cooperation agreements with the Court that assist the defence. For example, to facilitate effective and secure investigations by the defence as well as to facilitate the relocation of defendants who may be acquitted or are granted provisional release by the Court and who may be unable to return to their country for security reasons. In this regard the IBA also urges the Court through the Registrar to proactively negotiate these species of cooperation agreements.
- The IBA supports the proposal for portions of the Lubanga trial to be held in situ provided that adequate security arrangements can be made for the judges and all parties and participants. The IBA welcomes the proposed feasibility report to assist the Court in determining the logistical and financial implications of the proposal. It is anticipated that the Report will be publicly available prior to the commencement of the Lubanga trial.

Introduction

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

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

On 1 July 2007 ICC marked the fifth anniversary of the coming into force of the Rome Statute. This monitoring report examines the court at a critical juncture in its existence. It is the third to be issued under the programme and covers the period from November 2006 to October 2007. There were significant developments during the reporting period including the confirmation of the charges against Thomas Lubanga Dyilo and his committal for trial. In addition a second person, Germain Katanga has been surrendered by the DRC to the jurisdiction of the Court. This report will focus on the major jurisprudential developments emerging from the Pre-Trial Chamber in the Lubanga case during the period under consideration, preliminary issues noted in the Katanga case, as well as notable developments in the situations in the DRC, Uganda, Darfur-Sudan and the Central African Republic. While recognising that there were also important developments in the area of victims' participation, states cooperation and the strategic plan of the Court, those issues will not be covered by this report but may be considered more fully in subsequent reports.

Discussions were held with and comments received from various sources including ICC staff, academics, non-governmental organisations (NGOs), diplomatic missions, defence counsel organisations, individual defence counsel, other international legal professional organisations and staff of the ad hoc international criminal tribunals.

Additionally the IBA Monitor sought input from a number of IBA and other legal specialists, with a variety of prosecution, defence and judicial experience in international and national criminal law and proceedings, and international humanitarian and human rights law.

The report is divided into six chapters:

Chapter 1: The situation and cases from the Democratic Republic of Congo.
An examination of key developments and issues arising from the cases of Thomas Lubanga Dyilo and Germaine Katanga

Chapter 2: The situations in Darfur-Sudan, Uganda and the Central African Republic

Chapter 3: The confirmation of charges proceedings

Chapter 4: Defence-specific issues

Chapter 5: Other legal issues

- In situ hearings

Chapter 6: Conclusions and recommendations

The Annexes

Annex 1: An overview of the Court's jurisdiction and structure

Annex 2: Parameters for IBA monitoring of the International Criminal Court

Annex 3: An IBA news release on the non-enforcement of the arrest warrants issued against Ali Kushayb and Ahmad Harun

Annex 4: An IBA news release on the surrender of Germain Katanga to the ICC

Abbreviations

CBF	Committee on Budget and Finance
DRC	Democratic Republic of the Congo
DVC	Division of Victims and Counsel
FPLC	Patriotic Forces for the Liberation of Congo
FRPI	Patriotic Resistance Force in Ituri
GTA	General Temporary Assistance
IBA	International Bar Association
IBAHRI	Human Rights Institute (of the IBA)
ICC	International Criminal Court
LRA	Lord's Resistance Army
MONUC	UN Mission in Democratic Republic of the Congo
NIF	National Integrationist Front
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence (adopted in September 2002)
Regulations	Regulations of the Court (adopted in May 2004)
Registry	Registry of the International Criminal Court
Statute	Rome Statute of the International Criminal Court (entered into force on 1 July 2002)
TC	Trial Chamber
UNSC	United Nations Security Council
UNHCHR	UN High Commissioner for Human Rights
UPC	Union of Congolese Patriots
UPDF	Ugandan People's Defence Force
VPRS	Victims' Participation and Reparation Section
VWU	Victims and Witnesses Unit
WIGJ	Women's Initiative for Gender Justice

Chapter 1
The situation and cases in the Democratic Republic of Congo

General overview

The situation in the DRC was referred to the ICC on 19 April 2004 and an investigation was opened by the prosecutor in June 2004**.** Thomas Lubanga Dyilo, the first person to be surrendered to the Court made his first appearance in March 2006.[1] The level of activity before the ICC has increased exponentially since that time. While there were admittedly numerous filings related to the situations before the Court and in relation to the DRC specifically, the transfer of Mr Lubanga into the jurisdiction of the Court now presented the challenge and opportunity to develop the jurisprudence and procedure relative to the interpretation of the Statute, the RPE and the Regulations of the Court.

On 9 November 2006 after being twice postponed, the long-awaited confirmation of charges proceedings against Mr Lubanga was held before PTC I. The hearing commenced almost nine months after Mr Lubanga was surrendered to the jurisdiction of the Court. The pre-trial process appeared to be characterised by delay. The administrative and resource challenges articulated by the Lubanga defence team (discussed more fully in Chapter 4) generated a number of filings and requests for adjournments. The delay was further exacerbated by several prosecution applications for non-disclosure under Rule 81 of the RPE which were challenged by the defence.

On 29 January 2007 the charges against Mr Lubanga for the war crimes of enlisting, conscripting and using children under 15 years of age as soldiers contrary to humanitarian law were confirmed. (The Chamber made modifications to the original charges which will be considered in more detail in Chapter 3.) A major development during the reporting period was the withdrawal of lead defence counsel in the case, Jean Flamme, on medical grounds. On 5 June 2007 the record in the proceedings in the case of Thomas Lubanga was transmitted from PTC I to Trial Chamber I by the Presidency.

Significantly, while determinations of the modus operandi for trial were being made in status conferences in the Lubanga case, the second person from the DRC, Germain Katanga was surrendered to the jurisdiction of the Court on 18 October 2007. Mr Katanga is charged with three counts of crimes against humanity and six counts of war crimes.

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1 For a detailed factual summary of developments in the Lubanga case please see the IBA/ICC Monitoring reports April 2006 and September 2006 at http://www.ibanet.org/humanrights/ICC_Monitoring.cfm. Diary updates in the Lubanga case are available at the IBA website at http://www.ibanet.org/humanrights/lubanga_court_updates.cfm

This chapter will be a general review of major issues encountered by the PTC immediately preceding the confirmation of charges hearing in the Lubanga case, developments during the hearing itself and issues arising from the withdrawal of counsel. A brief overview of the charges and preliminary issues in the case of Germain Katanga will then follow.

The case of Thomas Lubanga Dyilo

Overview

The September 2006 IBA/ICC monitoring report detailed the early jurisprudential developments in the Lubanga case in the areas of victims' rights, the process of discovery, interlocutory appeals as well as a number of procedural challenges deriving from these developments.

The period preceding the confirmation of charges proceedings

A number of critical issues were dealt with by the Chamber during the period immediately preceding the confirmation of charges. There were daily filings on material issues ranging from the application for interim release of Mr Lubanga, the application by a number of additional victims to participate in the case, a determination of the modalities for participation in the hearing by anonymous victims previously granted participation rights in the case and the communication of evidentiary material following disclosure to the defence of incriminating evidence by the prosecution.

During the month of October to early November 2006, the Chamber continued to be actively engaged in the exercise of trying to balance the need to conduct expeditious proceedings as provided in Article 61(1) of the Statute[2] and the right of the detained person to have 'adequate time and facilities for the preparation of the defence' as provided in Article 67 of the Statute. By 5 October 2006 a single judge in the PTC fixed the new date for the confirmation hearing for 9 November 2006 considering that on August 28 the prosecution had provided the Chamber and the defence with a detailed description of the charges and the evidence upon which it intended to rely. The Chamber appeared to predicate its decision on the consideration that 30 days before the hearing the defence should be in a position to have 'effective access' to the evidence on which the prosecutor intended to rely during the said hearing.

It must be noted however that the defence's contention throughout was that the numerous applications by the prosecution for redactions and the use of summaries operated to substantially prejudice the ability of the defence to have sufficient time and facilities to prepare its case.

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2 Article 61(1) provides inter alia that 'Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial.' The provision of 'within a reasonable time' suggests the need for proceedings to be held expeditiously.

Additionally the defence considered itself hampered by the logistical challenges with which it was faced in attempting to conduct investigations in the DRC which resulted in the inability to meet the timelines imposed by the Chamber.

Significant decisions of the Appeals Chamber on disclosure

During the reporting period the Appeals Chamber delivered a number of important decisions concerning the issue of disclosure. As will be discussed in more detail, defence counsel objected to the decision of the PTC to proceed with the confirmation of charges hearing while a number of appeals were pending but the Chamber did not accede to counsel's request for an adjournment. The first decision of the Appeals Chamber to be discussed is the judgment delivered on 13 October 2006. The prosecution had applied for a motion for reconsideration and in the alternative leave to appeal the single judge's decision. (The single judge had determined that the motion for reconsideration was not the proper procedural motion to be applied.) Leave to appeal was granted on the 23 June 2006.

The single judge had granted leave to appeal: a) the issue of the determination of the criteria to be met for granting applications for protection purposes for non-disclosure of the identity of witnesses upon whom the prosecution would rely prior to the confirmation of charges hearing; b) the temporal scope of the investigations against Mr Lubanga and the temporal nature of the redactions; and c) the extent of the *ex parte* regime in the context of applications under Rule 81(2) and (4) of the RPE.

The Appeals Chamber in a majority decision upheld the ruling of the single judge that the proper test to be applied in relation to applications for redactions and restrictions on disclosure pursuant to Rule 81(4) of the RPE was the necessity and proportionality test. This meant that the Chamber would have to authorise the restrictions after evaluating all the circumstances and determining whether less restrictive protective measures were infeasible or insufficient.

In relation to the temporal nature of redactions, the Prosecutor had argued that the single judge's decision that redactions in witness statements pursuant to rule 81(2) of the RPE were temporary and could not be maintained beyond the time limits stipulated in rule 121(4) and (5) of the RPE were erroneous. This was because the ruling incorrectly assumed that barring exceptional circumstances the Prosecutor had to conclude his investigation in the current case by the time the confirmation hearing started. The Appeals Chamber reversed the ruling of the single judge on this issue. The Chamber examined the approach taken by the single judge to the interpretation of Article 61 (4) of the Statute and determined that the single judge had erred in coming to a conclusion as to the temporal nature of the Prosecutor's right to investigate and on that basis had decided that redactions could not be maintained beyond fifteen days before the commencement of the confirmation hearing.

In relation to the *ex parte* regime, the Appeals Chamber ruled that there was no duty on the prosecution to file applications under Rule 81(2) and 81 (4) *inter partes* so as to notify the defence of

the existence of the application and its legal basis as there may be cases where this approach would be inappropriate.

The decision has significant implications for the defence particularly in relation to the nature and scope of redactions. Furthermore it establishes a precedent in relation to the conduct of *ex parte* applications under Rule 81(2) and (4).

The use of summaries and redactions

Two decisions on redactions were issued by the Appeals Chamber on 14 December 2006. The first appeal[3] concerned the use of summaries by the prosecution during the confirmation of charges proceedings without prior disclosure of the identity of the relevant witnesses. Article 68(5) of the Statute allows the prosecutor to withhold the statements of witnesses and submit a summary thereof instead where full disclosure may result in grave endangerment to the witness or family member. Paragraph 5 of Rule 81(5) however provides that the summarised material and information may not be introduced during the trial without full prior disclosure to the accused.

In the impugned decision of 15 September 2006 the Pre-Trial Chamber had authorised the use of summaries on the basis that no other adequate protective measures were available and feasible. The defence submitted that Articles 61(5) and 68(5) and Rule 81(5) of the Rules provided that the prosecution was precluded from relying on summaries at the confirmation hearing unless the corresponding statements had been provided to the defence. Summaries were therefore only to be used to protect the identity of witnesses from disclosure to the public and not to the defence. The prosecutor submitted to the contrary that nothing in the procedural law before the ICC suggests that summaries may only be used if the identities of the respective witnesses are disclosed to the defence.

The Appeals Chamber determined that the use of summaries as provided for in Article 61(5) of the Statute was not subject to any explicit condition and approval by the Pre-Trial Chamber prior to the presentation at the confirmation hearing. With respect to the use of summaries pursuant to Article 68(5) of the Statute the Appeals Chamber held that the argument that the prosecutor may only rely on the summaries if the identities were disclosed to the defence was not supported by a proper interpretation of Rule 81(5) of the Rules.

Further, the Appeals Chamber concluded that if the PTC takes sufficient steps to ensure that the use of summaries of evidence in the circumstances described above would be used in a manner not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial, the use of such summaries would be permissible. The Chamber held that this would have to be determined on a case-by-case basis, also bearing in mind the character of the confirmation hearing.

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3 See '*Judgment of the Appeals Chamber on the Appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and amended Requests for Redactions under Rule 81"*' at ICC-01/04-01/06(OA 5).

The most significant feature of the decision was arguably the finding by the Appeals Chamber that the single judge had failed to provide sufficient reasons for the decision to authorise non-disclosure. The Chamber decided that at a minimum the PTC must provide reasons to support its findings irrespective of the phase of the proceedings, even in redacted form to the defence.

This decision is significant as it demonstrates the importance of transparency in judicial proceedings particularly when applications are made *ex parte* with serious implications for the rights of the defendant. The Appeals Chamber emphasised that disclosure was the rule and restrictions on disclosure should be made exceptionally after a careful consideration of all the circumstances. In order to ensure that the rights of the defendant are not impugned it is important that full reasons be given in order to provide the opportunity for the decision to be challenged at the appellate level.

The second[4] Appeals Chamber decision of 14 December again reversed the ruling of the single judge on the basis that insufficient reasoning was provided for the decision to authorise redactions.

Both decisions were delivered following the confirmation of charges hearing and thus the documents that were the subject of the impugned decision were not taken into account by the PTC in its deliberations on the confirmation of the charges against Mr Lubanga. Unfortunately the PTC provided only limited reasons for its decision for not awaiting the decision of the Appeals Chamber before commencing the confirmation of charges proceedings. The main reason advanced by the PTC was that the defence had not argued for the appeals to have suspensive effect.

The confirmation of charges hearing and subsequent developments

Summary

The confirmation of charges hearing and the period following, up to the point of transmission of the record of the proceedings to the Trial Chamber was arguably one of the most significant phases of the pre-trial proceedings in the Lubanga case. Previously articulated defence concerns regarding inadequate staffing resources for the defence team resurfaced following the withdrawal of lead counsel at a critical phase in the proceedings.

Lead counsel, Jean Flamme withdrew from the Lubanga case on medical grounds. The concomitant impact was further delay in the proceedings, urgent filings made by Mr Lubanga himself with the assistance of a legal assistant and the urgent assignment of duty counsel to protect the interests of the defence on the critical issue of an appeal against the confirmation of charges decision. The new lead counsel, Catherine Mabille, was not formally appointed until June 2007 after almost five months. Some of the general issues raised during this phase will be considered below. The confirmation of charges proceedings will be considered in more detail in Chapter 4.

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4 See '*Judgment of the Appeals Chamber on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"*' of 14 December 2006 at ICC-01/04-01/06.

Features of the confirmation of charges proceedings

The defence cited a number of preliminary concerns prior to the commencement of the hearing including the fact that there were four pending appeals before the Appeals Chamber including an appeal on jurisdiction and admissibility. These were rejected on the basis that the defence had not argued that the appeals should have 'suspensive effect'.

The prosecution's main contention was that the defence had not complied with the order of the Court to allow inspection of the defence evidence well in advance of the hearing.

The confirmation of charges hearing lasted for approximately three weeks. The prosecution relied extensively on the use of documentary evidence calling only one witness to give viva voce evidence. Objection was taken by the defence to the prosecution's attempted use of evidence which the defence alleged had been obtained pursuant to an illegal search and seizure operation in the DRC. This objection was raised in the preliminary oral submissions of the defence prior to the commencement of the hearing and the presiding judge ruled that the issue would be determined at the end of the hearing. The Court subsequently ruled that all items obtained further to the search and seizure operation were to be identified by the prosecution as such. As previously noted, the charges against Mr Lubanga were confirmed on 29 January 2007.

Withdrawal of counsel

Jean Flamme sought and obtained leave of PTC I in February 2007 to withdraw from his position as lead counsel for Mr Lubanga pursuant to Regulation 78 of the Regulations of the Court, which requires defence counsel to obtain the permission of the Chamber before withdrawing from a case. Mr Lubanga with the help of a legal assistant filed an application before the Appeals Chamber and all Chambers of the Court requesting a stay of 'all acts and proceedings likely to affect the rights of the defence'. The prosecution opposed the application on the basis that the withdrawal of counsel should not unduly delay the proceedings, result in an indefinite suspension or impede the expeditious administration of justice.

The prosecution further contended that the 'few remaining procedural steps' could be provided by the OPCD and that Mr Lubanga could be assisted by any remaining member of the defence team to file the documents due on 23 February. The remaining members of the defence team were at that time legal assistants.

The Appeals Chamber unanimously ruled that it had no power to order a stay of proceedings in the other Chambers but granted the application for stay of proceedings before the Appeals Chamber. The Appeals Chamber was of the view that contrary to the submissions of the prosecutor the absence of Counsel could not be rectified by the OPCD and the service of assistants was 'no substitute for the services of counsel'.

Appointment of new counsel

There were major challenges in the process of appointing lead counsel to replace Mr Flamme. On 20 March 2007, Catherine Mabille was selected by Mr Lubanga as lead counsel for the defence. Ms Mabille's request for additional resources as a condition precedent to formal acceptance was refused by the Registrar.

The Head of Victims and Counsel Division in the Registry publicly notified the Chambers and all parties of Ms Mabille's appointment. This information prompted the Pre-Trial Chamber to render a decision reactivating the suspended time limits previously given to the defence and ordering the defence to respond to the prosecutor's request for leave to appeal by 5 April 2007. This further prompted the prosecutor to file the 'prosecution's submission in anticipation of a Status Conference.' On 3 April 2007, Mr Lubanga filed a 'clarification' indicating that Ms Mabille had not formally confirmed her appointment as Counsel and requesting the Presidency to stay all acts or proceedings related to the defence pending the effective appointment of Counsel.

The Registrar subsequently filed observations in response detailing the basis for his refusal and requesting the Presidency to confirm that there was no legal basis upon which to consider Counsel's request for additional resources without formal confirmation on her part. The Presidency ruled in favour of Mr Lubanga in staying the transmission of the record of the pre-trial proceedings from PTC I to the Trial Chamber.

During this stalemate the Appeals Chamber and the Presidency ordered that duty counsel be appointed without delay to facilitate the completion of the necessary filings in relation to the pending appeals.

Application by Mr Lubanga himself for additional means

On 3 May 2007 Mr Lubanga filed the public part of his formal application to the Registry for additional means pursuant to Regulation 83 of the Regulations of the Court. Mr Lubanga made it clear that these additional means were being sought for the trial phase of the proceedings and for a smooth transition during this critical pre-trial stage. The Registrar refused the application for additional means on the basis that the application was premature as the Appeals Chamber's decision on the confirmation of charges had not yet been delivered. Mr Lubanga on his own motion sought a review of the Registrar's decision. The situation prompted intervention by the International Criminal Bar and L'Ordres des Avocats de Paris who sought leave to appear as *amicus curiae.*

In the interim the PTC refused leave to appeal the confirmation of charges decision pursuant to Article 82(1) (b) on 24 May 2007 but the decision of the Appeals Chamber on the application of the defence pursuant to Article 82(1) (d) was still pending.

Significantly the single judge of the PTC ruled on the 5 June 2007 that on the basis of the decision refusing leave to appeal the PTC was no longer seised of the matter and thus had no jurisdiction to hear Mr Lubanga's application for additional means or the applications to appear as *amicus curiae.*

The implication of this decision was that at the judicial level the fundamental issue of the allocation of resources and the assignment of counsel for a defendant in custody remained unresolved. By a decision of 5 June the Presidency transmitted the record of the proceedings in the Lubanga case from PTC I to Trial Chamber I including all the applications previously referred to, noting that 'there should be no gap in the proceedings and the issue of the assignment of defence counsel must be subject to judicial control'.

While the intervention of the Presidency was a welcome one, there is some concern as to the timeliness of the intervention having regard to the status of the defendant and the issues involved. The IBA urges timely judicial interventions to address administrative challenges which have the potential to adversely impact the proceedings before the Court as well as the rights of the defendant.

Following the decision of the Appeals Chamber rejecting the defence's appeal against the confirmation of charges decision, the Registrar acceded to a number of the requests for additional means filed by Mr Lubanga. Ms Mabille confirmed her appointment as defence counsel for Mr Lubanga on 21 June 2007.

Case transmitted to Trial Chamber I

Following the transmission of the record of the proceedings to the Trial Chamber the Trial Chamber promptly issued a timetable regarding preliminary matters to be determined in status conferences. It was however clear that a number of the challenges that had beset the former team still persisted. Due to the short period of time between the confirmation of Counsel's appointment and the first status conference before the Trial Chamber the team was still absent co-counsel. Additionally there were a number of technological challenges which prevented effective communication amongst team members and between the defence and other organs of the Court as well as access to evidence.

At the Status Conference on the 1-2 October the Prosecution indicated that although several documents which included both incriminatory and exculpatory material had already been disclosed to the Defence, there were still a large number of documents that had not yet been disclosed. Further, that a number of the materials yet to be disclosed were in the form of handwritten statements and thus electronically unsearchable. A significant hurdle was the fact that at least 50% of these documents had been obtained pursuant to Article 54(3) of the Statute which 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 providers of the information consents'. Of some concern was the revelation by the Prosecution that a significant number of lifting requests were still pending.

The fact that the Lubanga case is now at the trial stage and the prosecution has still not completed its disclosure obligations is of some concern. The impression that is given, absent further

explanation from the prosecution, is that lifting requests in relation to Article 54(3) (e) evidence were not commenced in a timely manner. At this stage of the proceedings where full disclosure is even more critical, this situation will obviously contribute to a further delay in the proceedings.

In relation to the issue of languages, the Chamber has been advised that apart from English and French, Swahili (as spoken in the Ituri region) and Kilendu may require interpretation during the proceedings. The need to translate evidence into languages other than the official court languages has the potential to significantly delay the trial proceedings. The issue will be closely followed in future monitoring reports.

The Trial Chamber has now set the trial date in the case of Mr Lubanga for 31 March 2008.

The case of Germain Katanga

Background

On 18 October 2007, Germain Katanga o/c Simba was surrendered by the DRC to the ICC and transferred to the ICC detention centre in The Hague. From continuing investigations in the Ituri region in DRC, the prosecutor concluded that there were reasonable grounds to incriminate Germain Katanga, a second alleged Congolese militia commander, for the commission of crimes against humanity and war crimes in the territory of Ituri, DRC, in early 2003. The prosecution alleges that Germain Katanga is the former senior commander of the Force de Résistance Patriotique en Ituri (Patriotic Resistance Force in Ituri – 'FRPI'). Mr Katanga was arrested along with other militiamen in March 2005 by DRC authorities following an alleged attack upon MONUC peacekeepers on 25 February 2005 in Ituri in which nine peacekeepers were killed.

Charges against Germain Katanga

On 2 July 2007, following the presentation of evidence by the prosecution, an arrest warrant was issued under seal by PTC I for Mr Katanga alleging six counts of war crimes and three counts of crimes against humanity including murder, sexual slavery, willful killing and other inhumane acts allegedly committed in Ituri in early 2003. The arrest warrant was unsealed on 18 October 2007.

PTC I found that there were reasonable grounds to believe that Mr Katanga, as the highest ranking FRPI commander, played an essential role in the planning and implementation of an indiscriminate attack against the village of Bogoro, in the territory of Ituri, on or around 24 February 2003; and that during and after the course of that attack which was directed primarily towards persons of Hema ethnicity in the village of Bogoro, Mr Katanga, along with other militia ,implemented a common plan to commit acts of murder, serious bodily harm, sexual slavery of women and girls and other egregious crimes against civilians. NGOs have welcomed the breadth of the charges against Germain Katanga particularly for sexual crimes. The previous IBA report had noted that some members of the NGO community had been concerned that the scope of the charges against Mr Lubanga was too limited.

First court appearance

Mr Katanga made his first appearance before PTC I on the 22 October 2007. He is being represented by the OPCD as duty counsel. The presiding judge urged Mr Katanga to quickly select counsel to represent him as the principal counsel for the defence could not be appointed as duty counsel for the duration of the proceedings.

During the course of enquiries by the presiding judge pursuant to Article 60, the issue of the language spoken and understood by Mr Katanga was raised. The detained person and his duty counsel insisted that he did not understand or speak French or Swahili sufficiently well for the purposes of judicial proceedings. Lingala interpreters were obtained after a short recess of the Court but the presiding judge made it clear that the arrangement was only to facilitate those proceedings.

The determination by the Chamber of the language spoken and/or understood by the detained person for the purpose of the proceedings is a fundamental requirement of the fair trial guarantees provided in Article 67(1) of the Statute. The Chamber indicated that it had come to a conclusion about the languages spoken and understood by the detained person on the basis of Court documents in its possession obtained from the Registry. The PTC has since ordered the Registrar to file additional documents detailing the circumstances of arrest and surrender of Mr Katanga. The PTC I noted that the Registrar may have been privy to certain specific information about the languages spoken and understood by Mr Katanga obtained during the process of arrest and surrender which may be useful to the Court.

Request for interim release

No application for interim release was made by Principal Counsel on behalf of Mr Katanga. Counsel submitted that there was no information as to why a warrant of arrest was necessary to secure Mr Katanga's attendance at Court as opposed to a summons. It was noted that in its decision to issue an arrest warrant the Chamber did not detail the basis for proceeding via an arrest warrant rather than a summons. The Chamber indicated that the analysis of the evidence and information would be set out in a subsequent decision.

The absence of this information prevented Principal Counsel from making detailed submissions in support of an application for interim release. Principal Counsel however made submissions concerning the conditions of Mr Katanga's detention in the DRC, which the prosecutor later argued were irrelevant to the present proceedings unless it could be shown that the circumstances of detention were at the instance of the ICC.

The prosecutor deemed it inappropriate that defence counsel chose to orally raise a number of issues that were not relevant for the preliminary proceedings and noted that the OTP would be prepared to respond to any written submissions filed.

Chapter 2
The situations in Darfur-Sudan, Uganda and the Central African Republic

General overview

The prosecutor has thus far opened investigations into four situations namely in the DRC, Uganda, Sudan and the Central African Republic. The OTP has however analysed a number of situations including Iraq and Venezuela (which were subsequently dismissed) and Cote d'Ivoire (pursuant to a declaration of acceptance of jurisdiction from a non-State party). The prosecutor has indicated that investigations are ongoing on at least three continents.

Uganda

The situation in Uganda was the first to be referred to the ICC. In December 2003 the situation was referred to the ICC by the Ugandan President and investigations were launched by the OTP on 29 July 2004. The referral concerned the activities of the Lord's Resistance Army (LRA) although the OTP did not rule out the possibility of investigations against the Ugandan People's Defence Forces (UPDF) and other groups. Five arrest warrants have been issued against the leaders of the LRA: Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen. The warrant against Raska Lukwiya was withdrawn by the prosecutor on 22 March 2007 and the proceedings against him terminated by PTC II upon proof of his death. During the reporting period a number of filings were unsealed and made public including the requests to Sudan and the DRC for the arrest and surrender of the suspects named in the warrant.

Developments

The previous monitoring report highlighted the concerns expressed about the initiation of peace talks between the Ugandan Government and the LRA resulting in an agreement encompassing a ceasefire. The suggestion of an amnesty being offered to Mr Kony had sparked discussion about the effect of amnesties being offered to individuals named in ICC arrest warrants. On 6 October 2006 in response to a request from the Pre-Trial Chamber concerning the status of the arrest warrants for the LRA leaders, the prosecution submitted that there had been no request to 'withdraw' the arrest warrants, and that peace and justice were mutually reinforcing objectives and should be viewed as such. The prosecution's position was based on a letter to the Registry from the Ugandan Government reaffirming its commitment to its obligations under the Rome Statute and its continuing commitment to cooperate with the ICC while detailing its attempts to negotiate a settlement with the LRA.

The Uganda situation has raised the issue of peace v justice as the LRA leaders have asked to be shielded from prosecution by the ICC in exchange for their participation in peace talks with the Government. The prosecutor has made it clear that the arrest warrants will stand whether or not there are peace talks being initiated. The UN High Commissioner for Human Rights, Louise Arbour, in a press release on 11 May 2007 urged the Ugandan Government and the LRA to reject impunity and ensure adherence to international standards of accountability during peace talks.

Darfur, Sudan

Background

On 31 March 2005 the United Nations Security Council (UNSC) adopted Resolution 1593 referring the situation in Darfur Sudan to the prosecutor of the ICC. The prosecutor was presented with the documents generated from a UN Independent Commission of Inquiry into Darfur chaired by Professor Antonio Cassesse identifying a list of 51 suspects. In June 2005 having evaluated the documents submitted to him the prosecutor launched an investigation into the Sudan situation. In keeping with the mandate of the Security Council the prosecutor made periodic reports to the UNSC concerning the progress of his investigations, the most recent of which was 7 June 2007.

Request for observations and the appointment of ad hoc defence counsel

On 24 July 2006, the Pre-Trial Chamber I issued a 'Decision Inviting Observations in application of Rule 103 of the Rules of Procedure and Evidence' inviting Professor Cassese, former Chairperson of the International Commission of Inquiry in Darfur, Sudan, and Louise Arbour, United Nations High Commissioner for Human Rights, to submit written observations on issues concerning the protection of victims and the preservation of evidence in Darfur, Sudan. The written submissions were filed respectively on 25 August 2006 and on 10 October 2006. The decision invited the prosecutor or his representative and the *ad hoc* counsel for the defence to submit a written response to the observations within ten days of notification of same. On the 28 August 2006, Mr Hadi Shalluf was appointed by the Registrar as *ad hoc* counsel for the defence.

Ad hoc defence counsel

Ad hoc defence counsel's response to the observations was by way of a preliminary challenge to jurisdiction and admissibility filed on the 9 October 2006. In this preliminary filing, Counsel submitted that Sudan is a sovereign nation and not subject to the jurisdiction of the Court having not ratified the Statute nor entered into any convention to bring itself within the jurisdiction of the Court.

Ad hoc defence counsel also made a filing at the start of the procedure requesting the Court to stay the proceedings pending a preliminary determination on the issue of jurisdiction and admissibility and requesting an extension of time for one month from the date of notification of the Chambers' decision on the abovementioned issues within which to file the previously requested observations.

In addition Counsel sought leave of the Court to travel to Sudan to make enquiries regarding the substantive issues raised in the observations of the experts and to protect the general rights of the defence.

The challenge to admissibility and jurisdiction and all related applications were rejected by the Chamber on the basis of non-compliance with Article 19(2) of the Statute. The Chamber ruled in this fashion on the basis that Article 19(2) related to the determination of jurisdiction and admissibility in relation to a *case* and not to a situation and that therefore *ad hoc* defence counsel had no legal standing to make the application.

The Chamber also noted in a decision delivered on the 2 February 2007 that the applications by *ad hoc* defence counsel exceeded the scope of his mandate under Rule 103 of the RPE. The decision of the PTC in this regard created serious administrative challenges for the *ad hoc* counsel regarding payment of fees for the relevant period. The issue will be discussed in more detail in Chapter 4.

Developments

On the 27 February 2007, pursuant to Article 58, the prosecutor requested that PTC I issue summonses to appear against Ahmad Harun and Ali Kushayb for war crimes and crimes against humanity. The prosecutor submitted that following his investigations there were reasonable grounds to believe that both men bore criminal responsibility for the abovementioned crimes committed in Darfur in 2003 and 2004.

In a judgment of 27 April 2007 the PTC issued arrest warrants for Ahmad Harun and Ali Kushayb charging 42 and 50 counts respectively of war crimes and crimes against humanity. The Chamber opined that based on the information before the Court Ali Kushayb was in the custody of the Government of Sudan and that Ahmad Harun may have concealed evidence to protect the Government's counter-insurgency policy, their arrest and surrender appeared to be necessary to secure their attendance before the Court.

The major hurdle in the situation of Darfur is the challenge faced by the Court in securing the arrests of the two suspects named in the arrest warrants. This is primarily due to the posture of the Government of Sudan who rejects the jurisdiction of the ICC and has thus far refused to hand over the suspects. Sudanese Justice Minister Mohamed Ali el Mardi is reported as saying that 'the country rejects any jurisdiction of the International Criminal Court (ICC) to prosecute Sudanese citizens and the government will not cooperate with the Court nor send its citizens to the international tribunal'.

Up to March 2007 the Sudanese Government had been holding Mr Kushayb and three others in custody pending trial in Sudan. The precise nature of those charges was not clear but the prosecutor indicated that those before the national court were different from those for which he was sought by the ICC. However, the Government refused to hand him over to the ICC and subsequently released him on 1 October 2007 on the basis of 'lack of evidence'. Ahmad Harun has also been promoted by the Sudanese Government to the position of Minister of Humanitarian

Affairs and Co-President of the national committee responsible for investigating alleged human rights violations committed in the Darfur region. The IBA Human Rights Institute (IBAHRI) issued a news release denouncing the release of Mr Kushayb and calling on the Sudanese Government to enforce the arrest warrants against Ali Kushayb and Ahmad Harun. A copy of the news release is annexed to the report at Annex 3.

Central African Republic (CAR)

Background

On the 22 December 2004, the situation in the Central African Republic (CAR) was referred to the Office of the Prosecutor (OTP). CAR is a State Party to the Rome Statute having ratified it on the 3 October 2001 and the Statute entered into force on 1 July 2002. The matter was referred by the Presidency to Pre-Trial Chamber III on 19 January 2005. Judge Sylvia Steiner was elected as presiding judge.

The Government of CAR appeared concerned by the seeming delay of the prosecutor to decide whether or not to initiate an investigation into the situation in CAR and thus requested the intervention of the Chamber to compel the prosecution to provide information on its alleged failure to decide within a reasonable time whether or not to initiate an investigation. In November 2006 the Chamber requested that the OTP provide information on the status of its preliminary examination including an estimate of when a decision would be taken pursuant to Article 53(1) of the Statute.

OTP response

The OTP indicated that there was no legal basis for the Chamber's request as under Article 53(1) the referring State only has a right to review a decision of the prosecutor **not** to proceed with an investigation under the Statute but it was the sole responsibility of the OTP to initiate an investigation and to determine the breadth and scope of a preliminary assessment.

Nevertheless the OTP provided some limited explanation for the delay in initiating an investigation. The OTP explained that after the initial referral from the Government of CAR, it continued to receive additional reports from NGO sources that required assessment. Further, the CAR authorities provided certain information later than originally promised and the Jurisdiction, Complementarity and Cooperation Division of the OTP was analysing the situation based on the material received.

Developments

On 22 May 2007 the OTP announced the opening of an investigation in CAR in accordance with Article 53(1) of the Statute. The Cour de Cassation of CAR had decided that in relation to the alleged crimes the national authorities in CAR were unable to carry out the necessary criminal proceedings in particular to collect evidence and apprehend the accused.

The OTP has analysed serious crimes and in particular allegations of rape, killing and looting during the armed conflict of 2002–2003. A central feature of the CAR situation is the high number of rapes and other crimes of sexual violence. Steps are already being taken together with the Registry to secure the protection of victims. So far the prosecutor has indicated that the investigations are not directed to a particular suspect but in keeping with the policy of the OTP and the Statute, the focus will be on the individual(s) who bear the greatest responsibility for the most serious crimes.

The Registrar has recently announced the opening of a field office in CAR to provide logistical support for the investigation, including the protection of witnesses.

Chapter 3
The confirmation of charges proceedings

Introduction

On 9 November 2006, Pre-Trial Chamber I commenced the confirmation hearing into the charges against Thomas Lubanga Dyilo to determine pursuant to Article 61(7) of the Statute, whether there was sufficient evidence to provide substantial grounds to believe that he had committed the offences for which he was charged. The process was new having no counterpart in any of the *ad hoc* tribunals or special courts. Prior to the hearing the Chamber was concerned with ensuring that the process of disclosure was equitably and expeditiously conducted. In addition to the role of the prosecution and the defence in the proceedings the Chamber also had to determine the modalities of participation for the victims through their legal representatives.

Procedural issues pursuant to Rule 122 of the RPE

During the status conferences that were held in anticipation of the confirmation of charges hearing, the presiding judge of PTC I sought to determine the procedural modus operandi for the hearing in keeping with Rule 122 of the RPE. The Chamber issued a decision on 7 November 2006 in which it requested that the defence and prosecution file a list of issues of jurisdiction, admissibility and concerning the proper conduct of the proceedings prior to the confirmation hearing pursuant to Rule 122(2) and (3).

In a public filing with a confidential annex, the prosecution addressed only two issues, namely the lack of opportunity to inspect material in the defence's possession pursuant to Rule 78 and the fact that the defence evidence as filed had not been made available to the prosecution for review and analysis sufficiently in advance of the hearing.[5]

The defence on the other hand interpreted the Order of the Chamber as conflating the procedure for opening submissions with the right of the defence to challenge jurisdiction and admissibility and to raise issues pertaining to the proper conduct of the proceedings.[6] This position derived from a reading of Rule 122(4) which prevents either the prosecution or defence from reiterating during the confirmation or trial proceedings any objections or observations raised prior to the confirmation of charges hearing pursuant to Rule 122(3). The discomfort of the defence in this regard appeared to be based on a perception that to file a list of such issues would amount to filing

5 See prosecution's information in respect of the 'Decision concerning list of issues on jurisdiction, admissibility or proper conduct of the proceedings' at www.icc-cpi.int/library/cases/ICC-01-04-01-06-682_English.pdf.

6 See defence 'Response to Order of 7 November 2006' at 6 See defence 'Response to Order of 7 November 2006' at 6 See Defence 'Response to Order of 7 November 2006' at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-681_English.pdf.

a skeleton brief thus disclosing defence strategy and tactics to the prosecution in advance of the hearing.

The defence nevertheless listed several issues which it considered a preliminary and non-exhaustive list, reserving the right to make additional objections and/or observations regarding the proper conduct of the proceedings. The main issues concerned the four pending appeals which presumably (though not indicated in the submissions) were the appeals against jurisdiction and admissibility, denial of request for interim release and two appeals on prosecution applications for redactions which were still pending before the Appeals Chamber. In addition the defence cited a violation of the principle of equality of arms attributable primarily to the prosecution's alleged breach of its disclosure obligations, its reliance on illegally obtained evidence, the use and abuse of redactions and summaries exacerbated by the Chamber's failure to compel the prosecution to comply with its Orders and to address material issues of irregularity raised by the defence.

The fundamental concern of the defence as noted in this filing and a subsequent filing of 8 November 2006[7] was for an adjournment of the hearing. The difficulty was, however, that at this point there had been two previous adjournments.

The Chamber in its response issued that same day declined to address the substantive issues raised by the defence opting instead to reiterate that the submissions of both the prosecution and defence would be heard in the time allocated (a total of two hours) during the morning session of the hearing on 9 November.[8] The Chamber further made an Order granting the prosecution access to the evidence of the defence filed in the list of evidence.

The presentation of evidence

One of the fundamental concerns frequently mooted concerning the ICC confirmation of charges proceedings is the absence of clear procedural guidelines. Procedurally the judges of the PTC in the Lubanga case had no legal precedent and Article 61 which governs the proceedings is silent concerning the procedure. Recourse was thus taken to Rule 122(1) of the RPE which vests a significant amount of discretion in the presiding judge to determine how the proceedings are to be conducted.

With regard to the type of evidence to be called, the guidance given by Article 61 is that the prosecutor: 'may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.' Article 69 of the Statute states that the Court may rule on the relevance and admissibility of any evidence taking into account the probative value and any prejudice that such evidence may cause to a fair trial.

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7 See Pre-Trial Chamber I, 'Requête de report de l'audience de confirmation des charges' at 7See Pre-Trial Chamber I, 'Requête de report de l'audience de confirmation des charges' at 7See Pre-Trial Chamber I-'Requête de report de l'audience de confirmation des charges' at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-684_French.pdf.

8 See Pre-Trial Chamber I, 'Decision on the Defence Request to postpone the Confirmation Hearing' at www.icc-cpi.int/library/cases/ICC-01-04-01-06-686_English.pdf.

The issue concerning the procedural modalities for the examination or re-examination of witnesses was raised by the prosecution at the status conference of 26 October 2006 in advance of the hearing. The question was a classic statement of whether the adversarial or inquisitorial approach would be favoured by the Chamber during the proceedings. The prosecution sought clarity from the bench as to whether the presiding judge intended to put questions to the witness before the witness was questioned by the prosecution pursuant to Rule 140(2) of the RPE. It is noted that this provision explicitly refers to proceedings before the Trial Chamber. The presiding judge appeared to favour a less restrictive interpretation of Rule 140(2) and considered it as applying equally to pre-trial proceedings thus qualifying Rule 122(1). The presiding judge considered that the Chamber may put any questions to a witness at any stage of the proceedings and that therefore re-examination is unwarranted at a confirmation hearing. The approach taken by the presiding judge appeared to be a feature of civil law systems and raises the question as to whether a similar approach would be taken by a differently constituted Chamber.

Another issue arose on the decision by the prosecution to call a witness to give evidence in person. The original decision of the Chamber in this regard was delivered during *ex parte* proceedings and was thus classified as confidential but was later reclassified as public and annexed to a decision designating it as such.[9] The witness was a child protection expert who had worked for MONUC whose evidence was detailed in a document which was initially subject to Article 54(3)(e) restrictions. Following a successful application to lift the restrictions subject to redactions in portions of the statement and the invocation of Rule 81(3) of the RPE during the testimony, the prosecution sought leave of the Chamber to add the witness to its list of evidence for the confirmation proceedings. As a condition of the order, the UN specifically requested that the prosecution not pose certain questions, the answers to which could breach confidentiality. The defence filed a motion to exclude anonymous hearsay evidence from the testimony of the prosecution witness. (The motion was filed as part of the original *ex parte* application and therefore was not publicly available.)

The Chamber's ruling on the issue is quite significant and likely to establish a precedent in relation to witnesses' evidence that were previously subject to Article 54(3)(e) restrictions for which the information provider seeks to invoke the provisions of Rule 82(3) and through which hearsay evidence might be introduced.

Two material issues were to be determined by the Chamber. The first was whether the restriction imposed by the information provider or the UN on the questions to be asked by the prosecution on the grounds of confidentiality pursuant to Rule 82(3), applied with equal force to the Chamber and the defence. Secondly, the Chamber had to determine what evidential weight should be given to the testimony of the witness and whether the probative value of the testimony overall outweighed any potential prejudicial effect on the fair trial rights of the accused in keeping with Article 69(4) of the Statute and against general principles of relevance and admissibility per Rule 63(1) and (3).

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9 See 'Decision on the Motion by the Defence to exclude anonymous hearsay testimony of the Prosecution witness' at www.icc-cpi.int/library/cases/ICC-01-04-01-06-693-Anx1_English.pdf.

The Chamber rejected the defence's application but did not expressly rule that as a general principle in the confirmation of charges proceedings hearsay evidence would be deemed inadmissible. The Chamber relied on jurisprudence emanating from the ICTY and determined that where hearsay evidence is elicited from a witness the Chamber would either declare the witnesses' testimony inadmissible in whole or in part or assess the evidence of the witness in light of the absence of first hand knowledge on his part. The Chamber further ruled that the decision of the witness to not answer questions of the prosecutor on the basis of Rule 82(3) applied with equal force to questions put by the Chamber or the defence and the witness would not be compelled to answer.

The role of victims in the proceedings

Another major issue for determination by the Pre-Trial Chamber was the modalities of participation for those victims who had previously been granted participation status in the case of Thomas Lubanga. As previously discussed in the April and September 2006 IBA monitoring reports, six victims had been granted a limited right of participation in the DRC situation on the 17 January 2006 but only four victims were ultimately granted the right to participate in the Lubanga case.

Three of the victims sought the leave of the Chamber through their representative to participate in the confirmation of charges hearing while retaining their anonymity.[10]

The defence has expressed concern about the participation of victims at the pre-trial stage of the proceedings contending that on a proper interpretation of the Rules and the Statute there is no scope for such participation where the issue being determined is whether the Chamber finds sufficient evidence to establish substantial grounds to believe that the person has committed the crime for which he/she is accused and not a determination of guilt or innocence.

The Chamber determined that if the victims maintained their anonymous status then their participation in the case would be limited to access to public documents, attendance at public hearings and opening and closing statements.

Confirmation of the charges

On the 29 January 2007, PTC I confirmed the charges against Mr Lubanga.

The Chamber considered that the burden of proof of sufficient evidence to establish substantial grounds to believe as described in Article 67 (1) of the Statute meant that the charges must go beyond mere theory or suspicion. The Chamber ruled that its decision would be based on a determination of whether the test of 'sufficient evidence to establish substantial grounds to believe' had been met with respect to the evidence which had been admitted for the purposes of the confirmation hearing excluding the evidence affected by the 14 December Appeals Chamber decisions.

10 See 'Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing' at www.icc-cpi.int/library/cases/ICC-01-04-01-06-462_tEnglish.pdf , 22 September 2006.

In relation to the issue of criminal responsibility, the Chamber found that Mr Lubanga was liable for the crimes charged as a co-perpetrator under Article 25 (3) of the Statute; that he was the President of the UPC during the relevant period and that he generally exercised ultimate control over the UPC/FPLC and the policies they adopted. The Chamber found that there was a common plan between Mr Lubanga and high ranking UPC commanders to recruit minors subject them to military training and cause them to participate actively in hostilities.

The Chamber determined that from July 2002 to June 2003 the conflict was international because of the presence of Uganda in Ituri, DRC. Further, that from 2 June 2003 to the end of December 2003 the conflict was non-international. This differed from the prosecution's characterisation of the conflict during the relevant period.

In confirming the charges the Chamber added charges of its own motion under Article 8(2)(b)(xxvi) referring to the same crime but committed in the context of an international conflict. There is no express power pursuant to Article 61 for the PTC of its own motion to amend or substitute charges preferred by the prosecutor.

It is surprising and unfortunate that the PTC chose not to exercise the option provided under Article 61(7) (c) of inviting the prosecutor to amend the charge rather than exercising such power itself. Under Article 61(4) the Statute requires advance notice to be given by the prosecutor if he decides to amend or withdraw any of the charges. One purpose of this provision would appear to be the opportunity that it affords the defence to challenge the prosecution's decision to amend or reclassify any of the charges. Where the decision to amend or reclassify the charge is at the instance of the PTC and not the prosecution this may raise issues of fairness since the only opportunity that the defence would have to challenge the amended charges would be on appeal provided that the defence can satisfy the statutory requirement for the grant of leave to appeal provided by Article 82(1)(b).

The charges under Article 8(2)(b)(xxvi) for the period beginning September 2002 to June 2003 and under Article 8(2)(e)(vii) for the period beginning 2 June to 13 August 2003 were confirmed.

Appeal against confirmation of the charges

After the Pre-Trial Chamber confirmed the charges against Mr Lubanga on 29 January 2007 the defence and the prosecution filed appeals against the decision and the victims' representatives filed a request for leave to respond to the defence's appeal and to participate in any subsequent appeal proceedings.

Both the defence and the prosecution opposed the application of the victims' representative on the basis that the victims had failed to demonstrate that their personal interests were at stake pursuant to Article 68(3) of the Statute. In particular, the defence submitted that Article 82 referred only to parties to the appeal and victims could only be designated participants not parties at this stage.

The defence appeal was pursuant to Article 82(1) (b) of the Statute which provides that 'either party may appeal against a decision granting or denying release of a person being investigated or prosecuted'. The defence filed submissions on the admissibility of the appeal pursuant to a request from the Appeals Chamber. The defence submitted that a decision of the PTC confirming the charges against Mr Lubanga is an appealable decision within the meaning of Article 82(1)(b) as it has the effect of denying Mr Lubanga's release. The prosecution opposed the defence's application on the basis that it was incorrectly brought under Article 82(1)(b) but should instead have been brought under 82(1)(d) which provides that 'either party may bring an appeal in accordance with the RPE against a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial'.

The prosecution however filed a separate appeal against the confirmation of charges pursuant to Article 82(1)(d). Under this provision leave of the PTC was required. The prosecution contended that the PTC acted beyond the scope of its powers by confirming a charge not brought by the prosecution itself in that although the prosecutor. The Prosecutor had charged Mr Lubanga with conscripting or enlisting children under the age of 15 years into the armed forces or groups or using them to participate actively in hostilities in a conflict of a non-international character under Article 8(2)(e)(vii). The PTC confirmed the charges under Article 8(2)(b)(xxvi) for the period from the beginning of September 2003 to 2 June 2003 and under Article 8(2)(e)(vii) for the period 2 June to 13 August 2003 contrary to the charges brought by the prosecution. The PTC had thus effectively determined that the charges were committed in the context of a conflict of a non-international character from September 2002 to June 2003, thus necessitating the additional charge under Article 8(2)(b)(xxvi). The defence also subsequently filed an appeal pursuant to Article 82 (1)(d).

On 24 May 2007, the PTC refused leave to appeal the decision on confirmation of charges on the basis that the applications did not demonstrate that the impugned decision affected the fair and expeditious conduct of the proceedings or the outcome of the trial, or that its immediate resolution by the Appeals Chamber may materially advance the proceedings.

On 13 June 2007, the Appeals Chamber dismissed the Appellant's appeal of 30 January 2007 by ruling that the confirmation of charges decision was not admissible under Article 82(1)(b) of the Statute.

Chapter 4
Defence-specific issues

Introduction

The right of a defendant to a fair trial within a reasonable time and to equality of arms between the prosecution and the defence are fundamental guarantees of international human rights law and enshrined in the Rome Statute. The issue is whether these are theoretical assertions or are honoured in practice. Article 67 of the Rome Statute enshrines the fundamental right of every accused person appearing before the ICC to a fair hearing with certain minimum guarantees. These include the right to have adequate time and facilities for the preparation of the defence and such other rights as could collectively be referred to as the principle of 'equality of arms'.

This chapter will examine a number of concerns and challenges reported by defence counsel practicing before the ICC and the approach of the various organs of the Court to a number of the issues raised.

Equality of arms

Equality of arms between the prosecution and the defense requires that the defence should never be placed at a 'substantial disadvantage' vis-à-vis the prosecution in terms of its ability to present its case. In practice, however, the right to equality of arms between the prosecution and defence is rarely met either at the national or international level. There is clear understanding of the need for the extensive resources allocated to the prosecution since its mandate is not limited to a particular case or situation. The concept of equality of arms requires that the defence has adequate resources to properly conduct its case without disadvantage.

Regulation 83 of the Regulations of the Court guarantees that the Court will cover 'all costs reasonably necessary' as determined by the Registrar for an 'effective and efficient' defence. Those costs include payments to counsel and staff, expenses involved in gathering evidence, overhead, translation and interpretation costs, and travel costs.

Although the regulations quoted above are steps in the right direction their implementation has proved difficult. The defence team of Mr Lubanga has encountered several administrative and procedural challenges. A number of the issues articulated by former lead counsel Mr. Jean Flamme concerned the question of the administration and implementation of the Legal Aid Programme of the Court specifically in relation to the payment of counsel's fees, the insufficiency of the staffing of the defence's legal team, the inadequacy of the budgetary allocation to the defence and other general administrative concerns. Counsel argued that the prosecution was given an unfair advantage against the defence. The assistance by interns and trainees in the defence team appeared not to be enough and a considerable lack in equality of arms was indicated.

Adequacy of resources for defence

Staffing

In the 2004 'Report to the ASP on Options for ensuring Adequate Defence Counsel for Accused Persons',[11] it was proposed that the composition of the defence team would be left to the discretion of the lead counsel who should adhere to the budget ceiling imposed. The core team at the pre-trial stage of the Lubanga case consisted initially of lead counsel and a G5 assistant.

The policy of the Registry was not to augment the defence team of its own motion without a formal application to that effect. The defence made a formal request to the Registry for two case managers and two P2 legal assistants but was granted only one case manager. The Chamber's intervention was sought and at the Court's instruction a P2 assistant was added to the defence team.

Throughout the pre-trial phase of the Lubanga case it became patently obvious that a co-counsel at P4 level was necessary to supplement the team. On occasions when the lead counsel was required to travel to the DRC to conduct investigations it was noted that the OPCD had to provide the support to the defence team at that time by making submissions in court and even taking instructions on behalf of the defendant. This is not the role envisioned for the OPCD as the opportunity is created for conflicts of interest to arise.

Fees

The partial payment of Counsel's fees was also a point of contention during the proceedings. Lead counsel, Mr Flamme, requested the PTC to instruct the Registrar to pay the defence 100 per cent of its legal fees per month and not the 60 per cent partial payment system which was in force. Counsel for the defence vehemently challenged the system of payment on the basis that it breached the principle of equality of arms as there were no similar restrictions for the prosecutor and his staff.

The Registry explained that this arrangement was designed to ensure maximum accountability on the part of counsel. The arrangement was that at the outset counsel was expected to submit a work plan. Once the plan was approved by the Registry then counsel and members of his team were paid 60 per cent of the fees per month. The remaining portion would then be paid once the Registry reviewed the implementation of the work plan against a submitted monthly statement of fees detailing the activities of the team. Under a similar system before the ICTY, defence counsel were paid 80 per cent of fees per month pending the submission of the monthly statement.

The issue of the payment of fees also arose in relation to the situation in Darfur, Sudan. The interpretation by *ad hoc* defence counsel of the scope of his mandate created an administrative impasse between the Registrar and counsel concerning the issue of the payment of fees for the period November 2006 and February to March 2007. It appears from the filings that *ad hoc* counsel claimed fees for the specified period during which he carried out his mandate.

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11 See report at http://www.icc-cpi.int/library/asp/ICC-ASP-3-16-_defence_counsel_English.pdf.

On 2 February 2007 the PTC determined that the mandate of *ad hoc* defence counsel was strictly restricted to responding to the observations of the experts and did not extend automatically to other issues arising during the pre-trial stage. Consequently, the head of DVC in the Registry refused payment of Counsel's fees for the above-mentioned period. Applications by the counsel for review of the Registry's decision were refused by the Chamber as well as a subsequent request for leave to appeal the Chamber's rejection of the request for review.

The difference in interpretation and understanding of counsel's mandate and the ancillary administrative issues resulted in fundamental challenges to the administrative mechanism of the Court and to the impartiality of the Chamber. One of the concerns expressed by *ad hoc* counsel is that the Chamber did not formally indicate until February 2007 that his mandate was strictly limited to responding to the observations of the experts. It was his understanding that he was assigned to protect the general interests of the defence notwithstanding the specific request to respond to the observations. It may well have been that the Chamber considered the understanding of Counsel's remit to be obvious in light of the issues under consideration. It is submitted that to avoid similar situations a clear statement indicating the limited scope of the mandate of *ad hoc* counsel should be made at the time of appointment.

The matter was referred to a Legal Aid Commissioner for determination. The position of Legal Aid Commissioner is provided for under Regulation 136 of the Regulations of the Registry. He or she is to act as arbiter in matters of dispute concerning legal aid. Recommendations are made to the Registrar but the latter is not bound by the recommendations. It is not clear what guidelines if any the Legal Aid Commissioner has been provided with to make a determination of the issue and whether there are any specific timelines for his report. The implementation of the position of Legal Aid Commissioner is however a new and welcome development which will hopefully result in the expeditious resolution of matters of this nature.

The Registry's position

The Registry has insisted that during the pre-trial period it provided Thomas Lubanga Dyilo's defence team with the assistance required by the relevant court documents and by the legal assistance scheme. The Registrar indicates that in keeping with his mandate pursuant to Regulation 83 of the Regulations of the Court, he has provided the defence throughout the pre-trial proceedings with all the resources reasonably necessary to ensure an efficient and effective defence. In his view he cannot exercise his discretion on his own initiative to increase the resources allocated to the defence team under the legal aid programme unless a formal application with accompanying reasons is made by counsel.

It is submitted that Regulation 83 must be interpreted within the overarching contextual framework of Article 67 guaranteeing fair trial rights of the accused as well as general principles of international human rights law. While it is not difficult to agree that the Registrar is constrained to act within the parameters of the Statute and Regulations of the Court, it is obvious that a restrictive

approach to the exercise of discretion can have deleterious consequences on the proceedings before the Court and the rights of the accused.

Proposed amendments to the Legal Aid Programme

The Registry has taken the initiative to launch a review of the Legal Aid Programme.[12] This decision is strongly welcomed and supported by civil society. After broad consultation the Registry has made several recommendations for an increase in the legal aid budget. These include recommendations for the addition of a P2 legal assistant at the pre-trial stage and a P4 Associate Counsel to augment the core defence team at the pre-trial stage once the charges against the defendant have been 'definitely confirmed' The Registry appears to interpret 'definitely confirmed' as referring to the period after the finalisation of all pending appeals concerning the confirmation of the charges.

It is noted however that the recommendation for the P4 counsel to be appointed only upon 'definite confirmation of the charges' might leave room for a deficiency in the defence team as was the situation with the Lubanga case. If for some reason, as in the Lubanga case, lead counsel withdraws or is released from the case during the transition period, the core defence team as proposed would still consist of a P2 Counsel and a case manager. The IBA recommends that a P4 co-counsel be part of the core defence team from the pre-trial stage of the case. This would ensure that there is senior counsel with sufficient history of the case from the outset. In the alternative, it is suggested that the P4 counsel is appointed once the charges have been confirmed whether there are appeals pending against the confirmation of charges or not.

The Registry also proposed changes to the payment of fees to counsel. The existing partial payment system would remain but it was proposed that counsel should be paid 75 per cent of the fees at the outset with the remainder to be paid upon submission of the monthly statement of fees.

The Committee of Budget and Finance (CBF) in its report of the meeting of its eighth session on 29 May 2007 appeared to support the proposed recommendations of the Registrar noting that 'there was general agreement in the Committee to recommend the adoption of the proposed amendments to the legal aid system contained in the document'. The Committee did however also comment that '*ad hoc* judicial decisions could prejudice the overall integrity of the legal aid system as administered by the Registrar'.

The IBA is concerned that this comment could be interpreted as a criticism of the Court's role as arbiter and guardian of the fair trial rights of the accused and perceived as a challenge to judicial independence. Similar concerns were reportedly raised by NGOs and it appears that the CBF may have reconsidered its position on this issue as the impugned statement is noticeably absent from the report issued following the meeting of the ninth session of the CBF.

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12 See Document entitled 'Report on the Court's Legal Aid System and proposals for its amendment' at http://www.icc-cpi.int/library/asp/ICC-ASP-6-4_English..pdf

There was an apparent shift in the stance of the CBF in the report of the ninth session of 28 September 2007. The Committee appeared to be concerned by the rapidly escalating costs of legal assistance and determined that they would not recommend that the increase in the legal aid budget be approved. The decision appeared to have been motivated by the information that the DVC within the Registry had spent only 29 per cent of the situation-related resources available to it due to a delay in the commencement of the first trial. The Committee was not convinced that the budgetary increase being sought was justified in light of this underspend. This shift in the CBF's stance has caused some concern within the Registry and to members of civil society particularly as the activity of the Court continues to increase. As one member of the diplomatic community opined the ICC is no longer in the dormant phase, it is now in the working or activity phase.

Disclosure

The defence took issue during the pre-trial stage with the manner of disclosure, the timing of disclosure and the volume and nature of the evidence disclosed. The technological challenges were noted from the outset. A single judge of the PTC ruled in the decision of 15 May 2006 that the Registry should make necessary arrangements to provide the defence with access to and training in the software that is necessary to facilitate the exchange of evidence between the prosecution and the defence and the subsequent filings in the record. Furthermore the Registry was ordered to provide Thomas Lubanga Dyilo with unrestricted access to a computer terminal in the Detention Unit for the purpose of accessing evidence and material as exchanged between the prosecutor and the defence.

In relation to the manner of disclosure the major challenge was in relation to the defence's technological capacity to support disclosure. A number of documents were provided on CD which required uploading unto the defence system which experienced a number of initial problems. Some materials were incompatible with the defence computer system and the defence did not have access to the Court's central computer network there. That situation was resolved after a few months with the help of the Court's IT department.

However, technology challenges again hampered the new defence team on moving to the new offices at the seat of the Court. It appeared that though the intention was to have the new team settled in new offices in time for the first status conference before the Trial Chamber, the technological issues had not yet been fully resolved to ensure the team's access to the system and materials.

Further, the defence has indicated during recent status conferences before the Trial Chamber that the key word search mechanism of the prosecutor is of little or no assistance to the team. The defence has not acceded to the prosecution's suggestion to supply it with additional keywords for the purpose of identifying potentially exculpatory material for disclosure pursuant to Article 67(2) contending that the duty rests on the prosecution to determine which material within its possession should be deemed to be exculpatory.

After consulting with the parties the Trial Chamber has designated an expert to address a number of the challenges raised by the parties in the use of the e-court protocol.

The defence team in principle has expressed no objection to the addition of metadata for use with documents transmitted electronically between the parties for the purpose of searching between them. The prosecution also supports the e-court protocol in principle but cautions that it should not be transformed into a case specific analysis tool which is beyond the purpose envisioned by Regulation 26. The report of the expert is still pending.

Timing of disclosure

In relation to the timing of pre-trial disclosure, Article 61(3) of the Statute obliges the prosecutor to provide the person with the charging document within a reasonable time before the hearing and to inform him of the evidence on which the prosecutor intends to rely. The prosecution's obligation under Rule 76(1) requires that the defence be supplied with the names of witnesses whom the prosecutor intends to call to testify and copies of prior statements made by those witnesses sufficiently in advance of the hearing to enable the adequate preparation of the defence. This rule is circumscribed by the provisions of Rules 81 and 82 and the protection and privacy of witnesses and protection of confidential information. The prosecution is required by virtue of Rule 121(3) to provide a detailed description of the charges and the list of evidence to be presented at the hearing to the defence and the PTC at least 30 days in advance of the hearing unless he intends to present new evidence whereupon the time limit is 15 days.

The main contention of both the defence and the prosecution apparent from the filings is that there was little strict adherence on either side to timelines imposed by the Chamber. The prosecution complained that almost the day before the confirmation proceedings were due to commence it had still not received the defence list of evidence contrary to the directive of the Chamber. The Chamber faced a delicate task in balancing the rights of both parties particularly when faced additionally with the human resource challenges articulated by the defence. Notwithstanding the need to ensure a balance, clear indication from the Chamber of the need to adhere to timelines for discovery is essential to the expeditious resolution of the proceedings.

The use of summaries and redactions

In its 8 November 2006 submissions concerning the list of issues on jurisdiction, admissibility and the proper conduct of the proceedings, the defence strenuously objected to what it considered the 'use and abuse of redactions and summaries' by the prosecution to prevent the defence from accessing highly exculpatory information and potential witnesses and from being informed about the nature of the prosecution's case.

The 14 December 2006 Appeals Chamber decisions on disclosure (previously discussed in Chapter 1) has significant implications for the defence. The Appeals Chamber has determined the method that should be employed by the PTC when considering the applications for restrictions on

disclosure or non-disclosure. The decisions seem to suggest that *ex parte* applications will continue to be fully utilised at the pre-trial stage as the issue is one for the discretion of the Chamber or single judge. The need to protect victims and witnesses and preserving confidentiality while ensuring the rights of defendant will continue to be a fundamental challenge for the Chambers. The Appeals Chamber's insistence on clearly stated reasons by the Chamber justifying the decision to restrict disclosure appears to be a clear recognition of this fact.

Restrictions arising from Article 54(3)(e) of the Statute

The defence has also raised as an issue of concern the number of potentially exculpatory documents in the possession of the prosecution that are the subject of Article 54(3)(e) restrictions. By virtue of Article 67(2) of the Statute the prosecution has a duty to disclose exculpatory evidence in its possession to the defence. Article 54(3)(e) could potentially operate to override Article 67(2) since a number of pieces of exculpatory evidence in the possession of the prosecution may be subject to the Article 54(3)(e) restrictions. The Court will thus be required to determine the appropriate balance between the two provisions so as to safeguard the fair trial rights of the accused.

On occasion during the pre-trial proceedings the prosecution was requested to provide the Chamber with information as to the number of documents still subject to Article 54(3) restrictions and for which lifting applications were still pending. The issue resurfaced during the status conference in the case of Thomas Lubanga Dyilo before the Trial Chamber during which the prosecutor conceded the gravity of the problem as a significant number of the documents were still the subject of pending lifting requests.

It is clear that the prosecution will continue to place heavy reliance on the use of evidence that is subject to confidentiality restrictions. In the interests of fairness and expedition particularly if some of those documents are exculpatory the prosecution is urged to commence the process of requesting the lifting of restrictions in a timelier manner.

The absence of cooperation agreements_that facilitate the defence

The Office of the Prosecutor (OTP) opened an investigation of the situation of the DRC on 23 June 2004. It was only on 17 March 2006 (after almost two years of investigations) that an arrest warrant was publicly announced for Thomas Lubanga Dyilo. The defence team alleged that since the opening of the investigation the OTP undertook 70 missions to the DRC. On the contrary, the defence team visited the DRC only once and reportedly encountered several challenges in conducting investigations within the DRC for a number of logistical reasons (and partially due to the deteriorating security situation on the ground).

The defence contends that this was due in large part to the fact that Counsel had to rely on the facilities afforded by the Court on the ground which was primarily designed to facilitate the prosecution and not the defence. The team was assisted by MONUC but it was reported that no formal agreement was in place to facilitate direct cooperation between MONUC and the defence.

The issue of cooperation with States Parties to facilitate the effective working of the Court has been frequently discussed. At present the information received does not suggest that there are any specific agreements in place with any States Party to facilitate the defence in conducting investigations. It would seem that the obligation of States Parties to cooperate with the Court should not be limited to facilitating the arrest and surrender of suspects who are the subject of ICC arrest warrants. The relevant organ of the Court is urged to adopt a proactive stance in this regard to negotiate other species of cooperation agreements. States parties should for example, provide for assistance to the defence and in particular the facilitation of secure and efficient investigations. They should also cover the case of suspects who may be acquitted and might, for security reasons, be unable or unwilling to return to their countries. The same might apply to suspects who may be granted provisional release by the Court

Other general defence issues

Facilities for defence counsel

The provision of working facilities to the defence, which enable them to carry out their duty efficiently and effectively, is the responsibility of the Registry. These facilities are important in ensuring that defence counsel can present themselves at the Court on a sufficiently equal basis with the OTP, which has sizeable staff and facilities in the same building as the Court.

The previous IBA reports documented some of the challenges initially faced by the legal team for Mr Lubanga and duty counsel. In the early stages it was reported that access to the court building was hampered by the fact that insufficient arrangements were in place for issuing permanent security passes, making it necessary to be accompanied to and from the court rooms, offices, the library and even the restaurant. Although some office facilities were available at the court, defence counsel reported that they were not of a permanent nature and there were no secure facilities for documents. Defence counsel also reported problems in dealing unassisted with the volume of work required to manage such a complex case particularly in light of the limited time frame allowed for making certain filings.

During the latter part of the reporting period the Registry made efforts to relocate the new defence team to the seat of the Court in Voorburg in advance of the first Status Conference before the Trial Chamber. Lead counsel, Ms Mabille, has referred to the new offices as better equipped. The move was welcomed by the defence team but was unfortunately hampered by the technological challenges previously alluded to. The Registry has indicated that the IT personnel from the Registry have been working to resolve the problems.

Association of defence counsel

The concern regarding the absence of a dedicated defence counsel association at the ICC has been discussed in the two previous IBA reports. Unfortunately the issue remains unresolved. There is still no organisation officially recognised by the ASP under Rule 20(3) of the RPE to represent defence counsel.

Following the meeting in May 2006 between ICC list counsel and the Registry, an exclusive intranet system for list counsel was established. The formalities for the formation of an association have reportedly not yet been finalised but discussions on the issue are said to be continuing. A meeting of the List Counsel at the ICC is scheduled for spring 2008 at which major decisions are expected to be taken. The IBA reiterates its support for such an association particularly in light of the numerous issues faced by defence counsel during the reporting period.

Office of Public Counsel for the Defence

The OPCD provided significant assistance to the defence team during the pre-trial phase of the Lubanga case with a limited staff component itself. The IBA is pleased to note the long awaited appointment of the principal counsel, Xavier-Jean Keita, who was appointed in January 2007. It is noted however that with the increased level of activity before the Court there is an increased need for additional staff to complement the OPCD team. Between May to September 2007 the OPCD has been appointed by the Court to act as duty counsel in the DRC and Sudan situations responding to over 100 applications for victim's participation. In addition, in October 2007, the OPCD was appointed as duty counsel in the case of Germain Katanga. The principal counsel has stressed that the mandate of the OPCD as duty counsel cannot extend to representing individual accused persons beyond their initial appearance as this would create a possible conflict of interest and compromise the ability of the OPCD to fully support defence teams in other cases and situations.

Pursuant to Regulation 77 of the Regulations of the Court, the tasks of the OPCD include representing and protecting the rights of the defence during the initial stages of the investigation, in particular for the application of Article 56, paragraph 2(d) and Rule 47(2). The OPCD also provides institutional support to defence counsel and persons entitled to legal assistance including appearance before the Chamber on specific issues and legal research and advice.

Staffing needs of OPCD

The Registry has proposed that an additional GTA-P4 position be assigned to the OPCD as part of the proposed reform of the Legal Aid programme. The Registry has indicated that the core staff complement of the OPCD and the OPCV are the same in terms of the number of assigned positions but that the OPCV has been granted additional P4, P3 and P2 staff due to 'situational needs'. The proposed addition of the GTA-P4 is for a nine month period and is said to be a response to the increased demands on the OPCD. The CBF at its ninth session has recommended that this proposal not be approved by the ASP. While in principle there is general support for an additional staff member to the OPCD, the issue is still being debated within the NGO community specifically in relation to the temporal nature of the proposed position and the mode of recruitment (GTA position rather than via the Court's general recruitment process).

Independence of the OPCD

Under Regulation 77, the OPCD is deemed to be a wholly independent office, falling under the Registry's remit solely for administrative purposes. It is submitted that the designation of independence is as important as the appearance of independence. Lack of public knowledge particularly in situation countries about the role and mandate of the OPCD can contribute to the misperception that the OPCD is simply another department of the Registry. It is important to expand the public appearance of the OPCD as a separate and independent office of the Court and increase its direct accessibility through public resources of the Court.

The IBA welcomes all initiatives aimed at increasing the presence of OPCD counsel at Court related outreach activities including conferences and workshops which may prove to be an adequate means of achieving the envisaged goal. Additionally it is also recommended that more information about the OPCD should be provided on the Court's website particularly on ways in which persons requiring legal assistance or attorneys appointed as duty or *ad hoc* counsel can utilise the services of the OPCD.

Chapter 5
Other legal issues

In situ hearings

Background

At the Status Conference of 4 September 2007 in the case of Thomas Lubanga Dyilo, Trial Chamber I announced that the possibility of in situ hearings was being investigated by a Legal Advisor to the Chamber. On the basis of this feasibility study, the Trial Chamber will make a determination about whether or not to hold parts of the Lubanga trial in the DRC.

The notion of an in situ hearing in principle appears to be favoured by the parties and participants in the case as well as some NGO's. The OTP and the Victims' Representatives support the idea of bringing the proceedings of the court closer to the victims and affected communities. While not objecting to the idea in principle, the defence adopts a more cautious approach pointing to the importance of assuring the fairness and expeditiousness of such hearings.

Civil society has taken part in the public discussion and often expressed support for the transfer of the trial closer to the affected communities. The underlying motivations include the belief that such transfer would dispel criticisms that the ICC is a European court remote from countries where the crimes were committed and that it would maximise the impact of the court on prevention of further commission of crimes. In addition, it was suggested that *in situ* hearings would advance victims' right to access to justice and benefit the judges, who would acquire a better understanding of the cultural and geographical context of the crimes by sitting in the region where they were committed.

Legal and practical considerations

Article 62 of the Rome Statute provides that unless otherwise decided the trial will be held at the seat of the court. The RPE further provides that the change of seat is subject to the determination whether it would be in the 'interest of justice' to do so. The drafting history shows that adherence to this element entails that the change of seat must not only be practicable but also respect the defendant's right to fair and impartial trial. Both the fairness of the proceedings and the practical feasibility should therefore be part of the respective considerations.

In considering the specific considerations for the defence, the first issue concerns the need for efficient and adequate logistical support to the defence team. The completion of this support during the initial stages of the proceedings faced considerable challenges and it will be important to ensure that the court mission in the DRC is indeed equipped to achieve adequate assistance to the defence team during an in situ hearing.

A second issue concerns the security of the accused and the defence team. During the reporting period some observers have expressed their concerns regarding the safety of the defence team and

emphasised the need for adequate and secured detention facilities on the ground. In this respect it will be important to ensure that the court mission has the capacity to guarantee the security of all persons involved, including the defence team and the accused, during an in situ trial.

The third issue relates to the notion that in situ hearings would benefit the Trial Chamber while being closer to the affected communities and result in a more open and visible court. Fair trial standards require that the engagement of the judges with the affected community is limited to the context of the trial only. It seems therefore important to note that the specific presence and the role of the Trial Chamber on the ground may have a more limited value than envisaged.

The trial of Thomas Lubanga Dyilo is the first before the court and has as such an important role in setting standards for other proceedings before the court. On the one hand this calls for visible and accessible proceedings for the victims and affected communities from the outset; on the other hand in order to set a standard of required expeditiousness it is important to prevent delays in the process as much as possible. In view of the challenges faced by all participants so far, it seems appropriate to look for suitable and adequate solutions. Present day visual technology may offer efficient and adequate solutions to bring the trial closer to the affected communities. A suggestion has been mooted by at least one member of the diplomatic community that consideration could be given to transferring only limited parts of the trial, such as the opening, to a suitable location in the DRC and then continuing the substantive parts of the trial in The Hague.

The determination as to whether the transfer of the hearings would be in the interest of justice requires a thorough assessment of the situation. The findings of the feasibility report commissioned by the Trial Chamber are anticipated. Given recent reports of renewed tensions in the Ituri region of DRC, the strong determinants appear to be security and other logistical considerations as well as the financial feasibility of such an endeavour.

Chapter 6

Conclusions and recommendations

General considerations

During the reporting period there was significant increase in the activity of the Court, in particular before the Pre-Trial Chambers and the Appeals Chamber. The Chambers were called upon to interpret the Statute, RPE and the Regulations of the Court in relation to critical issues related to the rights of the defence versus the rights of the other parties and participants in the proceedings.

The case of Thomas Lubanga Dyilo

In the case of Thomas Lubanga Dyilo the most significant development was the confirmation of the charges and his committal for trial. The PTC was required through the mechanism of status conferences to achieve two major goals: to facilitate a proper system of disclosure between the parties and to ensure that the hearing was held within a reasonable time. Both issues had significant implications for Mr Lubanga. The longer the period of delay before the hearing, the more protracted his detention. On the other hand, as his counsel submitted in numerous filings before the PTC, the use of summaries and redactions created a challenge for the defence team in the preparation of the defence.

The emerging jurisprudence from the Appeals Chamber on the use of summaries and redactions however suggest that the Court has sought to carefully balance the provisions of Article 67(1) and Article 68. The use of summaries and redactions by the prosecution has been deemed to be exceptions to the general right to disclosure enjoyed by the defence which should only be circumscribed where no other feasible protective measures can be utilised. The Appeals Chamber has clearly stated that if an application for non-disclosure is granted to the prosecution the single judge must clearly state the reasons for acceding to the prosecution's request. This supports the principle of transparency and ensures that there is judicial certainty.

The administrative challenges

Unfortunately the plethora of administrative challenges experienced by the defence team negatively impacted on the pace of the proceedings in the Lubanga case. A number of issues between lead counsel and the Registry concerning resources had to be resolved before the PTC thus leading to further delay in addressing the substantive issues. The review of the legal aid system is a welcome initiative. At this critical juncture of the court the lessons learnt from 'the first case' of Thomas Lubanga will have to be carefully applied to subsequent cases and more urgently to the case of Germain Katanga.

The IBA supports the proposed increase in the legal aid budget made by the Registry as there is no indication that the funds which will carry over from the underspend in 2007 will be adequate to support the needs of defence teams during the trial phase in the Lubanga case and the pre-trial phase of the Katanga case which are both projected to commence in early 2008. The IBA also supports an increase in the staff complement of the OPCD in light of the increased activity and the utility of its role in proceedings before the Court.

The confirmation of charges

Although the PTC sought and obtained submissions from Counsel on the conduct of the proceedings and the issues for determination, the approach of the Chamber itself to certain issues was still not clear. It was not clear for example why the Chamber did not think it necessary to await the ruling of the Appeals Chamber on four pending appeals. In relation to two of the appeals on redactions the impugned decisions of the single judge were reversed. The Chamber simply noted that the documents which were the subject of that decision were not taken into account. It is submitted that for the purposes of pre-trial proceedings clear reasoning by the PTC concerning the issue of pending interlocutory appeals would provide more guidance to the parties in proceedings before the Chamber.

The situations

The major challenge faced by the Court in relation to at least two of the situations under investigation is the lack of states' cooperation in enforcing the outstanding arrest warrants. The ICC's role as a permanent judicial institution dedicated to ensuring accountability for crimes against humanity and war crimes and to bringing an end to impunity for the alleged perpetrators of such crimes must be fully supported by all states and in particular States Parties to the Rome Statute. The prosecutor has made several public speeches urging the full cooperation of states and is expected to make further pleas during the next session of the Assembly of States Parties in late November 2007.

The IBA fully supports every effort to engage the cooperation of States with the Court to facilitate not just the arrest and surrender of the subjects of arrest warrants but other forms of meaningful cooperation to support the work of the Court. The subsequent IBA reports will explore more fully the issue of states' cooperation.

Recommendations

- The IBA supports the proposal by the Registry for reform of the legal aid system. The IBA urges the ASP to carefully consider the impact of administrative challenges faced by the defence on the overall productivity level of the Court and its ability to expeditiously deal with cases. In this regard, the IBA encourages the CBF to reconsider its proposal not to recommend an increase in the budgetary allocation for the legal aid programme.

- The IBA welcomes in particular the proposal for a core team consisting of lead counsel, a P2 legal assistant and a case manager to act throughout the proceedings except when counsel acts alone. While the IBA welcomes the proposal for P4 associate counsel to be appointed upon definite confirmation of the charges, the IBA recommends that the Registrar considers appointing the P4 co-counsel as part of the core defence team from the pre-trial stage of the case. This would ensure that there is senior counsel with sufficient history of the case from the outset. In the alternative, it is suggested that if the P4 counsel is to be appointed only during the transition phase (between pre-trial and trial phase) of the proceedings, that this be done once the charges have been confirmed whether there are appeals pending against the confirmation of charges or not.
- The IBA also supports the recommendation for an increase in the staff complement of the OPCD to cope with the increasing demands on the resources of that office. The IBA however urges that the Registry provide more clarity regarding the recommendation for a GTA P4 Counsel to be added to the OPCD team for nine months instead of a permanent position.
- The IBA strongly urges that the delay occasioned by the administrative challenges in the Lubanga case should not be repeated in the case of Germain Katanga or any subsequent case.
- In this regard, the IBA encourages clear and timely judicial interventions to resolve administrative issues involving the legal representation of the defendant in order to protect the fair trial rights of the defendant before the Court.
- Notwithstanding the previous recommendation, the IBA welcomes the use of Legal Aid Commissioners to assist in the resolution of disputes arising within the legal aid programme in order to allow judicial activity to be concentrated on substantive legal issues.
- In some respects the confirmation of charges proceedings in the Lubanga case seemed to assume the status of a mini-trial. It appeared that the volume of incriminatory evidence disclosed by the prosecution and the length of the discovery procedure contributed to significant delays in the process. The IBA urges the OTP and the PTC to consider adopting a shorter summary approach to the confirmation of charges proceedings provided that such an approach would not compromise the rights of any of the parties or participants to the proceedings.
- The IBA urges the OTP to commence the process of requesting permission for the lifting of restrictions concerning evidence that is subject to Article 54(3)(e) in a more timely manner. This is particularly important where such evidence is potentially exculpatory.
- The IBA welcomes the 14th December 2006 Appeals Chamber decisions which emphasised the need for the Single Judge to provide clear reasons for allowing non-disclosure to the defence on the basis of Rule 81(2) and (4) of the RPE. These decisions affirm the principle of openness and transparency of judicial proceedings and ensure that both the defendant and the public have a full understanding of judicial decisions.

- Regarding the mandate of *ad hoc* defence counsel, the IBA urges the PTC and the Registry to clearly indicate to counsel the limitations of their mandate at the time that the initial appointment is made, in order to avoid misunderstanding.
- The IBA encourages States parties and especially the Sudanese Government to cooperate with the Court in enforcing the arrest warrants issued for Ahmad Harun and Ali Kushayb for war crimes and crimes against humanity allegedly committed in Darfur, Sudan and against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen for similar crimes allegedly committed in (Uganda).
- The IBA further urges States Parties to negotiate cooperation agreements with the Court to facilitate effective and secure investigations by the Defence; to facilitate the relocation of defendants who may be acquitted or are granted provisional release by the Court and who may be unable to return to their country for security reasons. In this regard the IBA also urges the Court through the Registrar to proactively negotiate these species of cooperation agreements.
- The IBA supports the proposal for portions of the Lubanga trial to be held in situ provided that adequate security arrangements can be made for the judges and all parties and participants. The IBA welcomes the proposed feasibility report to assist the Court in determining the logistical and financial implications of the proposal. It is anticipated that the Report will be publicly available prior to the commencement of the Lubanga trial.

Annex 1

Background to the International Criminal Court

Jurisdiction

The ICC was established by the Rome Statute of 1998 and its jurisdiction commenced on 1 July 2002.It is a permanent court, based in The Hague, which is mandated to prosecute individuals for genocide, crimes against humanity and war crimes. The Court will ultimately have jurisdiction over the crime of aggression but will not exercise such jurisdiction until aggression has been further defined by the States Parties. This is expected to be achieved by 2009 when a review conference of the Rome Statute will take place. The ICC can only try nationals of States that have ratified the treaty or crimes that have taken place on the territories of States that have ratified, apart from in the case of a Security Council referral. The ICC only has jurisdiction over crimes committed after the entry into force of its Statute, that is 1 July 2002.

Method of referral

Countries ratifying the treaty that created the ICC grant it authority to try their citizens for warcrimes, crimes against humanity and genocide. Cases may be referred to the Court by States Parties or the Security Council, or the Prosecutor may initiate an investigation on his own initiative, subject to the approval of the Pre-Trial Chamber of the Court. In addition, a country that is not a State Party may voluntarily choose to accept the ICC's jurisdiction. The Security Council has the power to suspend investigations for renewable periods of 12 months, if it decides an ICC investigation may interfere with the Security Council mandate to maintain international peace and security.

Complementarity

The Court operates under the principle of complementarity – this means that the primary responsibility to investigate and prosecute crimes of serious international concern remains with national prosecutors and courts. The Court may only intervene in, and deal with, crimes in its jurisdiction where the national system fails to do so and where a State shows itself to be unable or unwilling to prosecute such crimes.

Organisation of the Court

The ICC is composed of four organs: the Presidency; the Registry; the Office of the Prosecutor; and the Assembly of States Parties.

The Presidency

The Presidency is headed by the President, Judge Phillipe Kirsch, and two Vice-Presidents, who are elected by an absolute majority of the 18 judges of the Court for a three-year period, which is renewable. The judges are assigned to the different Chambers of the Court (Pre-Trial, Trial and Appellate). The Presidency is responsible for the administration of the Court. The Office of the Prosecutor however is an independent office, and as such is not administered by, but coordinates with, the Presidency, as necessary.

The Registry

The Registry is responsible for the administration of the Court and is headed by the Registrar, Mr Bruno Cathala, who was appointed on 24 June 2003. The Registry is responsible for defence counsel issues, the administration of legal aid, court management, victims and witnesses issues, detention unit, and other general administrative matters such as finance, translation, building management, procurement and personnel.

The Office of the Prosecutor (OTP)

The OTP is headed by a Chief Prosecutor, who is elected by the Assembly of States Parties. The current incumbent is Mr Luis Moreno Ocampo, who took office on 16 June 2003. The Chief Prosecutor is assisted by two Deputy Prosecutors. The OTP is independent of other organs of the Court but coordinates its activities with other parts of the Court as necessary. The mandate of the Office is to conduct investigations and prosecutions of crimes that fall within the jurisdiction of the Court, as mentioned above. The Rome Statute provides that the Office of the Prosecutor shall act independently.

The Assembly of States Parties (ASP)

The ASP consists of all States who are party to the 1998 Rome Statute which established the International Criminal Court. It is the governing and legislative body of the Court. The ASP has a Bureau composed of a President, two Vice-Presidents and 18 members. It also has several smaller working groups that meet throughout the year to discuss in more detail issues such as the definition of the crime of aggression. It has a Secretariat based at the Court in The Hague. The ASP meets in plenary session at least once a year in The Hague and/or New York.

Annex 2

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

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

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

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

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

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

Annex 3

NEWS RELEASE

INTERNATIONAL BAR ASSOCIATION
the global voice of the legal profession

[For Immediate Release: Monday, 08 October 2007]

IBA Calls on the Government of Sudan to Enforce the ICC Arrest Warrants Issued Against Ali Kushayb and Ahmad Harun

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The **International Bar Association's Human Rights Institute** (IBAHRI) condemned the action of the Government of Sudan in recently releasing Janjaweed Militia leader Ali Mohamed Ali Abdel-Rahman, also known as Ali Kushayb. This decision, coupled with the appointment of Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of Sudan, to the position of Minister of State for Humanitarian Affairs provides additional evidence of the continuing violation by the Sudanese Government of a peremptory resolution of the Security Council and its disregard for the International Criminal Court (ICC).

Ali Kushayb and Ahmad Harun are two suspects against whom the ICC issued arrest warrants on 27 April 2007 for alleged war crimes and crimes against humanity including several counts of murder, rape and torture. The Sudanese Government was believed to have been holding Mr. Kushayb in custody since November 2006 for what they described as 'suspicion of violating Sudanese laws' and investigation for

criminal acts in Darfur. However, according to a statement issued by Mr Lam Akol, the Sudanese Foreign Minister, Ali Kushayb was released on Monday 01 October due to 'lack of evidence' against him.

The IBAHRI calls on Sudan to enforce the arrest warrants issued by the ICC and play its part in bringing an end to impunity for these serious crimes under international law. The IBA further urges the international community to bring pressure to bear on the Government of Sudan to surrender Ali Kushayb and Ahmad Harun to the jurisdiction of the ICC as continued failure to do so undermines the credibility of the Court and respect for international criminal justice.

Justice Richard Goldstone, Co-Chair of the IBAHRI and former Prosecutor at the International Criminal Tribunal for the Former Yugoslavia, stated, *'We call for the support of the international community to secure the enforcement of the arrest warrants issued against Ali Kushayb and Ahmad Harun. Unless the political will can be mustered, the Court is being hobbled, weakened and its credibility is being undercut.'*

Mark Ellis, IBA Executive Director comments, *'The International Criminal Court is the first permanent institution of international criminal justice dedicated to ending impunity for war crimes and crimes against humanity. To undermine the ICC is to deal a fatal blow to accountability for the most heinous atrocities committed against humanity.'*

ENDS

Annex 4

NEWS RELEASE

INTERNATIONAL BAR ASSOCIATION

The Global Voice of the Legal Profession

[For Immediate Release: Friday, 19 October 2007]

IBAHRI Welcomes the Surrender of Germain Katanga to the International Criminal Court

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The **International Bar Association's Human Rights Institute** (IBAHRI) today welcomed the announcement that the Democratic Republic of Congo (DRC)'s Government has surrendered Germain Katanga, also known as Simba, to the International Criminal Court (ICC). The IBA Executive Director, Mark Ellis, says: '*We applaud the Government of the DRC in cooperating with the ICC. Its commitment to combat impunity and establish the rule of law is welcomed by IBAHRI. The transfer of Mr Katanga reinforces the status of the ICC as an indispensable judicial institution committed to investigating and prosecuting serious crimes of international concern.*'

In 2005 the IBAHRI started a new ICC Monitoring and Outreach Programme funded by the MacArthur Foundation. The IBAHRI's monitoring of both the work and the proceedings of the Court focuses in particular on issues affecting fair trial rights of the accused.

In this regard Mark Ellis further comments: '*Germain Katanga is the second suspect to be surrendered to the ICC and his case will be the second case to go to trial before the ICC. The IBAHRI urges that due consideration be given to challenges encountered and lessons learnt during the pre-trial phase of the case of Thomas Lubanga Dyilo. The priority of the Court must continue to be that the suspect is afforded all of the fair trial guarantees enshrined in the Rome Statute and the Rules of the Court, including the right to trial without delay while protecting and safeguarding the interests of victims and witnesses.'*

ENDS