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IBA Monitoring Report

INTERNATIONAL CRIMINAL COURT

April 2006

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Human Rights Institute Report**



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Introduction

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

This monitoring report is the first to be issued under the project and covers the period from the commencement of the project on 17 October 2005 to 31 March 2006 (including an overview of proceedings since 2004). The IBA will issue further periodic reports, in addition to *ad hoc* reports on issues of particular legal significance.

In preparing the report discussions were held with, and comments received from, various sources, including ICC staff, academic institutions, non-governmental organisations, diplomatic missions, relevant Dutch Government departments, defence counsel organisations, individual defence counsel, other international legal professional organisations, and staff of other international criminal courts and *ad hoc* tribunals.

Additionally, the IBA 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.

Section 1 of the report summarises Pre-Trial Chamber activity (from 2004, when proceedings commenced), while Section 2 deals with defence counsel issues. An overview of the Court's jurisdiction and structure can be found at Annex 1.

Monitoring

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 IBA will assess 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 will use in monitoring the ICC has been distributed to all organs of the Court and can be found at Annex Two.

Section 1

Pre-Trial Proceedings

Civil and Common Law Traditions

In order to put the current proceedings at the ICC into perspective, it is important to understand the way in which the Court works, being a hybrid of the common and civil law traditions. The Statute provides for the creation of a Pre-Trial Division (whose judicial function is carried out by Chambers, of which there are currently three constituted), with a judicial supervisory role during the pre-trial and investigation stage. The extent of this role, and the balance between the role of the Office of the Prosecutor (OTP) and the Pre-Trial Chamber under the Statute, has been the subject of discussion and, it appears, some differences of opinion between some of the judges of the Pre-Trial Chambers and the Prosecution in proceedings to date.

States took several years to negotiate the Statute and the Rules of Procedure and Evidence (RPE), which represent to some extent a compromise between the positions of States Parties with different legal traditions. As a consequence, many provisions were thus drafted broadly to facilitate agreement, leaving judges to interpret and determine a number of matters.

Role of the Office of the Prosecutor and the Pre-Trial Division under the Statute

The Office of the Prosecutor is given a clear mandate to receive referrals within the jurisdiction of the Court and for conducting investigations and prosecutions under Article 42 (1) of the Statute. However, under various provisions of the Statute, the Pre-Trial Division has a specific role with regard to several issues arising at the investigation stage. As such the Pre-Trial Chambers can have some active involvement at the investigation stage and exercise powers, some of which are similar to those given to investigating judges in civil law systems.

Judicial involvement starts quite early in the investigation process with the need for Pre-Trial Chamber authorisation of the Prosecutor's decision *proprio motu* to initiate an investigation (Article 15); in addition the Chamber has powers in determining issues of admissibility and jurisdiction (Articles 18 and 19). Powers of the Pre-Trial Chamber can be found throughout the Statute, notably under Article 56, which allows the Chamber to order measures to ensure the efficiency and integrity of the proceedings and protect the rights of the Defence, where the Prosecutor considers there is a 'unique investigative opportunity', and further where the Pre-Trial Chamber, on its own initiative, considers such measures are needed, including the power to appoint an *ad hoc* defence counsel.

Further powers are enumerated under Article 53, including the right to be informed of the Prosecutor's decision not to initiate an investigation or prosecution, 'in the interests of justice', and a power to review decisions by the Prosecutor not to proceed with investigations or prosecutions

'in the interests of justice' either on its own initiative, or where a State Party or the Security Council requests. The Chamber also carries out more traditional functions during pre-trial proceedings, such as issuing arrest warrants, summons and requests, reviewing detention, and holding hearings to determine whether there is sufficient evidence to confirm the charges.

Analysis and investigations

So far, ten 'situations' have been analysed by the Office of the Prosecutor (OTP). Three proceeded to investigation (the Democratic Republic of Congo (DRC), Uganda and Sudan), two were dismissed (Iraq and Venezuela) and a further five are still under analysis, including the Central African Republic (pursuant to a State Party referral), and Côte d'Ivoire (pursuant to a declaration of acceptance of jurisdiction from a non-State party). The identities of the remaining three countries from among this group of five are currently confidential.

Arrest warrants have been publicly issued in one case (Uganda) but no arrests made in this situation during the reporting period. However, a significant event occurred in the DRC investigation on 17 March 2006 when the first accused, Thomas Lubanga Dyilo, was transferred into the custody of the Court. He made his initial appearance on 20 March, marking the first public hearing at the Court. A detailed summary of the proceedings in this case can be found at Annex Three.

Pre-Trial Chambers

Within the Pre-Trial Division, there are three Pre-Trial Chambers currently constituted, which consist of three judges each (although a single judge can be designated to perform certain functions). Each 'situation' (DRC, Uganda and Sudan) has been allocated to one of the Chambers. The proceedings held before the Court have been mainly of a procedural nature and include such issues as the convening of status conferences; the preservation of evidence; protection of witnesses and victims; unsealing, issuing and transfer of arrest warrants; acceptable procedural forms for making applications to the Court; and grounds for granting leave for interlocutory appeals. A more substantive issue arose recently in the DRC situation with regard to the right of victims to participate in proceedings at the investigative stage.

The majority of proceedings have been closed to the public, the main rationale being the need to protect the identity of witnesses and victims and confidentiality of evidence. Decisions and filings are made available on the ICC website in a 'redacted' form (ie with confidential information removed from the record). The analysis of proceedings to date is thus restricted by the fact that only an incomplete version of the deliberations is publicly available. The transfer of Mr Lubanga into the custody of the Court has already led to some changes in this regard with the unsealing of several previously confidential decisions and filings, though generally still in redacted form.

Prosecution Filings during Pre-Trial Proceedings

Occasionally what appear to be off the record communications between certain organs of the Court have become the subject of legal filings by the OTP. In the Uganda case an OTP Application for Clarification of 30 November 2005 concerns an OTP request to be informed about any new information relating to security, 'of which the Chamber has been made aware and which is not currently reflected in the record,' in connection with preparing for a status conference. In an Application of 5 December 2005 the OTP again addresses the issue of the formal record of proceedings, requesting a Description of Informal Communications between Registry and the Chamber regarding security matters. The OTP also provided the factual background to the issue under seal while stating it has no objection to it being made public. Finally, on 10 January 2006, the OTP filed a Notice of OTP Request addressed to the Presidency (in both the Uganda and DRC situations) referring to a memorandum sent to the Presidency on 9 January. This latter notice refers to the OTP request to the Presidency for a preventive and provisional measure 'with the aim of preventing future challenges to the appearance of impartiality of the judges of the Pre-Trial Division.' The purpose of these OTP filings is not clear from an external analysis, but it is notable the Court does not appear to have responded to these Prosecution requests or comments, or at least not on the public record.

'Situation' countries: introduction

The following is an overview of pre-trial proceedings to date in respect of the three situations currently being investigated by the OTP. The summaries in respect of each country are not intended to be an exhaustive review of all proceedings, but to provide an overview of the Court's activity within the reporting period and to highlight any significant decisions or trends.

'Situation': the Democratic Republic of Congo

The situation in the DRC was referred to the ICC on 19 April 2004 and the Prosecutor opened an investigation in June of the same year.

Status conferences and leave to appeal

The Pre-Trial Chamber decided to convene a status conference (decision of 17 February 2005) on its own initiative without consulting the OTP, for the purpose of preserving evidence and protecting witnesses and victims.

This was the subject of an early challenge by the Prosecution regarding the respective roles of the Prosecution and Chamber at the investigation stage. The Prosecution argued that the Statute and RPE did not envisage status conferences being held at the investigative stage and that, in any event, such a decision to convene a status conference should not be taken without the OTP being consulted first. The Chamber did not consider the merits of the argument, but rejected the intervention on the basis that it should have been submitted in the form of an appeal under Article

82 (1) (d) of the Statute and that by failing to do so the Prosecution was now outside the five-day time limit to apply for leave to appeal. An application for leave to appeal against this decision was also rejected.

'Unique Investigative Opportunity' under Article 56

The Prosecution has also made an application (19 April 2005) under Article 56 of the Statute for 'measures' to be authorised to ensure the efficiency and integrity of the proceedings and to protect the rights of the Defence, on the basis of 'a unique investigative opportunity' to carry out forensic examinations. His request was granted by the Chamber on 26 April, in the same decision an *ad hoc* defence counsel was appointed to represent the general interests of the Defence for the purpose of the forensic examinations. The substance of this application is not clear from publicly available filings, but concerns the involvement and subsequent reports of the Netherlands National Forensic Institute (NFI) in relation to the investigation. In another issue of timing, the Prosecution was refused an extension of time to comment on the NFI report. In a decision of 12 August 2005 the Chamber considered the facts that the Prosecutor's forensic expert was unavailable to comment on the report (being on leave), and the length of the report, as insufficient grounds for the 15-day requested extension.

Ad hoc defence counsel submission on jurisdiction and admissibility

There are a number of filings relating to the NFI report, during which a side issue was raised by *ad hoc* counsel for the Defence (in the course of commenting on the NFI report), concerning jurisdiction and admissibility under Article 19(2). In a decision of 9 November 2005, the Chamber declined to look at these arguments on the basis the *ad hoc* counsel was appointed on a narrow basis to deal with the issue of the report only. On the face of it, Article 19(2) (a) only allows challenges to jurisdiction and/or admissibility to be made by an accused or person for whom an arrest warrant or summons has been issued, or States.

Victims' representation at the investigation stage

A major issue of interpretation of the Rome Statute has come before the Chamber recently, concerning the right of victims to participate in proceedings (through their legal representatives) at the investigation stage. This issue is significant as it is the first time an international criminal tribunal/court has granted victim participants a specific right to present their 'views and concerns' during the course of the proceedings.

The Pre-Trial Chamber, in a decision on 17 January 2006, has interpreted the class of victims entitled to this right broadly, granting it to persons who have suffered harm as a result of crime(s) within the jurisdiction of the Court, even where their situation may not be directly linked to the individuals and/or crimes under investigation by the Prosecutor. However, the Chamber has limited the extent of participation by victims at the investigation stage. The OTP has applied for leave to appeal against the decision.

The decision, against which leave to appeal is sought, was taken on 17 January 2006. The final document in the OTP's application for leave to appeal was filed on 6 February 2006 and the Pre-Trial Chamber, in a decision of 31 March 2006, refused leave to appeal. A more detailed summary of this issue is available at Annex 4.

'Situation': Uganda

The situation in Uganda was the first to be referred to the Court. In December 2003 the President of Uganda referred the situation concerning the Lord's Resistance Army (LRA), an insurgent group operating in the north of the country and the Prosecutor opened an investigation on 29 July 2004.

Focus of the investigation on the LRA

To date the investigation has focused on the LRA, but the Prosecutor has indicated this is an issue of priorities in relation to the gravity and extent of crimes committed by the LRA, and that the Ugandan Peoples' Defence Forces (UPDF) are not excluded from investigation, and that enquiries into allegations concerning UPDF and other groups are ongoing. In view of crimes alleged against the UPDF, this approach has been criticised by some human rights organisations, who advocate for a more even-handed approach to ensure that the Court is not perceived as being biased or subject to political manipulation, (particularly as the situation was referred to the Court by the Ugandan Government). Feedback provided within the context of IBA outreach sessions in Uganda on the ICC also supported this view.

Unsealing of redacted arrest warrants

Many of the early proceedings in this situation (later made public) focused around the issuing and unsealing of arrest warrants for five LRA leaders, at the top of the chain of command. They were selected for prosecution in line with the Prosecutor's stated policy of proceeding against those who 'bear the greatest responsibility' for crimes committed under the Statute. On 18 October 2005 the OTP objected to the Pre-Trial Chamber's decision of 13 October 2005 to redact (or keep confidential) dates, places and characteristics of crimes when unsealing the arrest warrants without consultation with his office, by means of stating a position. He argued that the OTP had been given no opportunity to be heard on this point, and that their inability to describe the crimes would impede their potential to get international support for the execution of the warrants, in addition to undermining the principle of maximum transparency in the proceedings. This issue was determined in the broader context of procedural forms acceptable for making application to the Pre-Trial Chamber (see section on 'Procedural forms and leave to appeal' below).

Responsibility for issuance and delivery of arrest warrants

In a decision of 8 July 2005, the Chamber affirmed that under the Statute it was the correct organ to prepare the request and that it was the sole responsibility of the Registrar to transmit the requests

and warrants. However, the Chamber did say that it would not exclude the possibility of the OTP transmitting requests and warrants in ‘specific and compelling’ circumstances. The OTP had objected to this procedure for issuing and delivery of warrants, arguing that it should be able to deliver the arrest warrants and requests for arrest and surrender; that the OTP was the organ of the Court with the most effective capacity to secure international co-operation; and that the timing and manner of transmission of requests could potentially disrupt or undermine protective measures and undermine the security situation, as well as having a negative effect on the investigation. The OTP also requested that it be the organ to transmit the arrest warrant and other requests for cooperation in the Lubanga case. Echoing the decision of the Chamber in the Uganda situation, the judges dealing with the DRC case also determined the Registry to be the proper organ to carry out this function, leaving open the issue of whether the OTP can be authorised to carry out this function in ‘specific and compelling circumstances’.

Experience from the International Criminal Tribunal for the former Yugoslavia (ICTY) suggests that maintaining a degree of flexibility as to the exact modalities (and the roles of the OTP and the Registry in the transmission of warrants, requests and indictments), can be the most effective way of satisfying both safety and security concerns, in addition to maximising the potential for securing arrests. The OTP may sometimes be in a better position than the Registry to deliver such documents due to a better appreciation of security implications, or the existence of cooperation agreements on the ground. As has been noted, in particular with regard to issues arising at pre-trial proceedings, there seems to be some unresolved issues as to the respective roles of the organs of the ICC.

Procedural forms and leave to appeal

In the context of the arrest warrant proceedings, and in particular the issue of redacting the arrest warrants, the OTP made its objections by various procedural means, including stating its ‘position’ and filing a ‘motion for clarification’ and a ‘motion for consideration’. On 28 October 2005 the Chamber rejected these procedural forms, stating they were not provided for under the Statute or the RPE, and that the OTP was limited to filing for leave to lodge an interlocutory appeal. The OTP had argued that the use of such forms is supported by the case law of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), but this argument was rejected by the Chamber, who stated that under Article 21 (the applicable law provision of the Statute) there was no sufficient basis for importing into the Court’s procedural framework remedies from the ad hoc tribunals, other than those existing in the Statute. With regard to the decision mentioned above in the Uganda case, (namely that the Registry was the appropriate organ to transmit the arrest warrants), the Chamber subsequently refused to grant the OTP leave to appeal. In a decision issued on 19 August 2005, the Chamber laid out in detail its arguments for taking a restrictive approach in the granting of leave for interlocutory appeals under Article 82(1)(d). This approach appears to have been followed in subsequent Pre-Trial Chamber decisions on this issue.

Article 53 and the interests of justice

Statements made by the Prosecutor in a speech given to a meeting of Ministry of Foreign Affairs Legal Advisors of States Parties (24 October 2005) led to the Chamber questioning whether the Prosecutor was considering suspending prosecution efforts under Article 53 of the Statute, in which case they should be notified, and have a power to review the decision. The Prosecutor affirmed this was not his intention. The interpretation of Article 53, which allows the Prosecutor to suspend an investigation or prosecution ‘in the interests of justice’ (subject to review by the Chamber), has been the subject of much debate among legal and human rights non-governmental organisations. Some organisations favour a narrow view of the ‘interests of justice’ (ie where an accused is too old or ill to be prosecuted), while it has also been argued that this phrase should include such matters as the potential disruption of peace talks or amnesty by the ICC investigations, prosecutions, and/or the issuing of arrest warrants.

‘Situation’: Sudan

Security Council referral

Unlike the other two situations under investigation, where States Parties referred situations in their countries to the Prosecutor, the situation in Sudan came before the ICC as a result of Security Council resolution 1593 of 31 March 2005 and a subsequent referral to the Prosecutor. In June 2005 the Prosecutor initiated an investigation into the Sudan situation. The Prosecutor has since reported twice to the Security Council as required under Resolution 1593. The Sudanese Government has agreed to submit a report to the OTP on issues specified by that office by March this year.

Investigation difficulties

A substantial body of evidence concerning crimes falling within the jurisdiction of the Court has been submitted to the Prosecutor as a result of a UN Independent Commission of Enquiry into Darfur. However, the OTP has encountered problems in carrying out investigations on the ground in Sudan, in particular in ensuring protection for potential witnesses and victims, and in the absence of a Memorandum of Understanding or similar agreement with the Sudanese Government. In view of difficulties in interviewing witnesses in Sudan, some evidence-gathering has been done in third countries.

Conclusion

It can be seen from several decisions in the Uganda and Congo investigations that a number of issues have arisen as to the interpretation of the Statute and the relative roles and powers of the OTP, the Pre-Trial Chamber and the Registry during the investigation stage.

In general, the Chamber has affirmed its right to take an active role at the investigation stage. The OTP in its application to the Court of 8 March 2005 regarding status conferences has outlined its position as follows:

‘The system enshrined in the Statute is one where the investigation is not performed or shared with a judicial body, but rather entrusted to the Prosecution ... the system also includes a closed number of provisions empowering the Pre-Trial Chamber to engage in specific instances of judicial supervision over the Prosecution’s investigative activities.’

The need for the protection of witnesses and victims and the preservation of evidence is obviously of paramount importance in proceedings before the Court. However, practice of other tribunals and courts has shown that these pressing needs are not necessarily incompatible with the desirability for open and transparent proceedings. It is encouraging that there are now public proceedings at the ICC, and in ordering the unsealing of documents in the Lubanga case, the Pre-Trial Chamber specifically referred to the requirement for a public hearing articulated under Article 67 (1) of the Statute, and to other provisions of the Regulations and Rules regarding the publication of decisions and other documents.

In addition, the unsealing of documents should be carried out to the maximum extent possible (it is noted that in a recent decision of 10 March 2006 the Pre-Trial Chamber authorised the unsealing of several documents in the Uganda situation and that substantial amount of documents have now been ordered to be unsealed in the DRC case).

The Pre-Trial Chamber has rejected the use of certain procedural forms, such as ‘stating a position’, as means of intervention by the OTP. The OTP has thus been restricted to using the procedural form of an appeal under Article 82(1)(d), for which leave is needed. When the OTP has applied for leave for an interlocutory appeal, this has generally been rejected, with the Chamber stating that leave will only be granted under Article 82(1)(d) in very limited cases.

Section 2

Defence Counsel Issues

Rule 20 of the RPE guarantees defence counsel certain facilities, which should be provided by the Registry, to enable them to carry out their duty efficiently and effectively. These facilities are particularly important in ensuring that defence counsel can present themselves at the Court on an equal basis as the OTP, which has a sizeable staff and facilities in the same building as the Court.

Facilities for defence counsel

Two *ad hoc* defence counsel and one provisional defence counsel have been appointed during the reporting period. The former were appointed to deal with specific issues related to forensic examinations and a Netherlands National Forensic Institute report, and the latter as duty counsel for the first accused to appear before the Court. Defence counsel reported that access to the Court buildings was hampered by the fact that insufficient arrangements were in place for issuing permanent security passes, making it necessary, on some occasions, to be accompanied to and from court rooms, offices, the library and the restaurant. Passes were issued for short or temporary periods only, needing renewal. Although some office facilities were made available at the Court, defence counsel reported that they were not of a permanent nature and there were no secure facilities for leaving documents.

Recently appointed duty defence counsel in the Lubanga case reported problems in dealing unassisted with the volume of work required to address complex issues such as admissibility, legality of arrest warrants, and disclosure, particularly in the context of the limited time frame allowed for making certain filings.

The IBA is aware that the Court has only had to deal with a few defence counsel to date, and is still establishing procedures. However, in view of the importance of ensuring equality of arms between the Defence and Prosecution at an early stage, the issues described above, though mainly of a practical nature, need to be addressed as a matter of priority.

Defence counsel association

Other concerns relate to the absence of a designated defence counsel association, the establishment of which can be 'facilitated' by the ASP under Rule 20 (3) of the RPE. This is seen as particularly important to ensure that defence counsel concerns are able to be coordinated and addressed in a centralised and efficient way, and also to organise training and assist in dealing with disciplinary matters, such as are normally dealt with by national bar associations. Defence counsel at the ICTY must belong to the ICTY Association of Defence Counsel (ADC) in order to appear before the Tribunal, and are obliged to undergo training which is provided free of charge by the ADC, with financial support from several sources, including the Registry.

No organisation has yet been officially recognised by the Assembly to represent ICC defence counsel and the need for a representative body is clearly a pressing one. In a positive development, a defence counsel representative has been elected to sit on the Advisory Committee on Legal Texts, the body which considers amendments to the RPE, Elements of Crimes, and Regulations of the Court.

Summary

There is room for greater clarity between organs of the Court during pre-trial activity with regard to their respective roles. The merging of civil and common law systems under the Statute presents many challenges, in the relatively early stages of the Court's operation, in achieving a coherent and consistent judicial process. There are some issues with regard to equality of arms which need to be addressed with reference to defence counsel.

The transfer of the first accused (Lubanga) is a milestone in the operation of the Court and will no doubt provide a ready focus for resolving outstanding issues, such as victims' rights, admissibility and transparency of proceedings.

Annex 1

Background to the International Criminal Court (ICC)

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 war crimes, 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 Phillippe 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 Monitoring the International Criminal Court

(International Bar Association Project)

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 ICC via its network of over 195 member bar associations and law societies 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

Thomas Lubanga Dyilo

(Democratic Republic of Congo)

Summary of First Appearance before ICC Pre-Trial Chamber and Subsequent Proceedings (as at 31 March 2006)

Background

The Prosecutor applied for a warrant of arrest for Mr Lubanga on 13 January 2006 under Article 58 of the 1998 Rome Statute (the Statute). A warrant was issued under seal on 10 February 2006. The warrant was made public on 17 March, following the transfer of Mr Lubanga into the custody of the Court.

The war crimes charges against Mr Lubanga under Article 8(2) (b) (xxvi) of the Statute are conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. He is also charged under Article 8(2) (e) (vii) with conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

This distinction relates to whether the conflict in the Ituri region (to which the charges relate), is categorised as national or international. The Pre-Trial Chamber considered the arrest warrant should include charges under Article 8(2) (b) (xxvi), on the basis the conflict could potentially be categorised as national or international.

Appearance in Court

The accused made his first appearance in Court on 20 March 2006. As this was the first accused to appear at the ICC the hearing attracted a fair amount of attention from the press, diplomats, NGOs and some members of the general public.

The presiding judge (Judge Jorda) allowed photographers one minute to take photographs of the accused before commencing proceedings by asking Prosecution and Defence lawyers to introduce themselves. The OTP was represented by the Deputy Prosecutor, three associate trial lawyers and a case manager. The Defence was represented by duty counsel, Jean Flamme, who had been assigned by the Registry to represent Mr Lubanga on a provisional basis.

The presiding judge asked the defendant some preliminary questions, verified that he spoke fluent French and asked if he had been informed of his rights under Article 67 of the Statute.

When asked his profession, the defendant stated he was a 'politician'. The judge then summarised the main rights granted the Defence under Article 67 and asked the accused about the conditions of his arrest and detention. The accused had no complaints on this point.

The accused confirmed he had been informed of the charges against him and had read the arrest warrant. Defence counsel stated he had not yet had sufficient time to discuss with his client applying for interim release, but would determine this issue in the following days. The Court set the date for the confirmation of charges hearing (as required under Article 61) for 27 June 2006, adding that it could be further postponed.

Defence counsel had prepared a motion for filing but not yet had time to file it with the Registry. He made the point that his client had been deprived of his liberty since March 2003 and that he had been forced to reside in Kinshasa from this date until his arrest in March 2005. He then remained in detention until 17 March 2006, when he was transferred to the custody of the ICC. The Defence alleged the detention in Kinshasa was imposed without the issuing of an arrest warrant or hearing.

The Defence then referred to the Pre-Trial Chamber's decision of 10 February 2006 to issue an international arrest warrant and the decision of 24 February in which certain documents filed by the OTP to justify the issuing of a warrant were to be kept under seal. As the Chamber had made findings on jurisdiction and admissibility in its decision of 10 February, the Defence requested access to the complete OTP dossier. The Defence indicated he was not sure if his client would wish to appeal the decision, but asked for an increase in the time limit to appeal in any event. The OTP asked to respond to these issues in writing after the Defence application was filed and the judge asked for the OTP response to be filed the next day. The hearing lasted approximately half an hour.

The Defence filing was made public the following day and requested that the five-day period for lodging an appeal (under Rule 154 of the Rules of Procedure and Evidence) be extended to 30 days and that they be given access to the OTP dossier (specifying certain filings) in order to examine jurisdiction and admissibility issues.

General comments

The accused was well dressed and respectful to the Court. He appeared in good health, despite his previous imprisonment. His Defence lawyer, who has prior experience of international criminal proceedings before the ICTR, seemed well briefed, particularly considering he had only been instructed the previous day. The judge observed all procedural requirements and conducted the hearing efficiently, at all times ensuring the parties had an opportunity to express any views they may have.

Subsequent developments

Unsealing of documents

Several decisions of the Pre-Trial Chamber since the initial appearance of the accused have concerned the unsealing of filings and documents previously kept confidential. Thus some of the earlier history of the case is being revealed, although many of documents published still have certain parts redacted (in some cases the OTP has been ordered to produce redacted versions of documents for publication).

First defence application

With regard to the Defence application mentioned above (for an extension of the time limit to appeal and access to the OTP dossier), the Chamber determined, in a decision of 22 March, that it was unnecessary for prior leave to be sought from them and such an appeal could be filed directly with the Appeals Chamber. The Pre-Trial Chamber makes a distinction here between appeals under Article 82(1)(a) (jurisdiction and admissibility), for which no prior leave of the PTC is required, and appeals under Article 82(1)(d) (fair and expeditious conduct of the proceedings) for which leave of the Chamber is required.

Defence appeal to Appeals Chamber

On 24 March the Defence filed an appeal directly to the Appeals Chamber against the Pre-Trial Chamber's decision of 10 February. The recently unsealed decision of 10 February deals in detail with a number of legal issues, including the criteria for determining jurisdiction and admissibility at the pre-trial stage; justification for issuing an arrest warrant; the appropriate organ of the Court to deliver arrest warrants; and the need for cooperation requests for freezing of an accused's assets, in connection with possible future claims by victims for reparations.

The Defence grounds for appeal were that the case is inadmissible under Article 17(1) (which deals with issues of investigation and prosecution at the national level and whether a State is 'unable or unwilling' to act) and that subsequently an arrest warrant should not have been issued. The Defence now has 21 days to submit full arguments in support of its appeal.

Prosecution response to Defence application

In a response filed on 24 March, the Prosecution objected to the Defence application for access to the entire prosecution case file. With regard to the specific filings referred to in the Defence application, the Prosecution states that redacted versions of the Court's case file are already available to the Defence and contain sufficient information to enable the Defence to make any challenge on jurisdiction and admissibility.

Disclosure

In a decision of 23 March, the Pre-Trial Chamber requested both Defence and Prosecution to provide observations by 6 April on the system of disclosure to be used regarding evidence to be used at the confirmation hearing, including exculpatory evidence in the possession of the Prosecution. The Pre-Trial Chamber established a temporary system of disclosure to cover the interim period.

Victims' representation

The OTP and the Defence were given until 7 April to present observations on the right of six victims to participate in the case of Lubanga (more detail on this issue can be found in Annex 4).

Annex 4

Victims' Representation Rights at Investigation Stage (Democratic Republic of Congo)

Summary of Proceedings (as at 31 March 2006)

On 17 January, the Pre-Trial Chamber issued a significant decision interpreting, under the 1998 Rome Statute and the Court's procedural rules, the extent of victims' participation in proceedings at the investigation or pre-trial stage. The Chamber granted the status of victims to six unidentified individuals, represented jointly by the Fédération Internationale des Ligues des Droits de l'Homme, and gave them certain rights to participate in proceedings, in order to present views and concerns and file documents pertaining to the situation in the Democratic Republic of Congo (DRC). However, the Chamber went on to limit the rights of victims at this stage, stating they will generally (but not exclusively) not be able to either participate in closed hearings, or have access to non-public documents.

On 23 January the Prosecution applied for leave to appeal against the decision. Among the arguments put forward were the following: the approach taken by the Chamber creates a 'near limitless class of victims' at the investigation stage, who need not show a particular link to any allegations against any possible future accused. That this will result in excessive delays in trials and will create a 'serious burden for all organs of the Court'. Further, that the Chamber has given itself a fact finding and enquiry role, which it does not have the investigative tools to carry out, and which properly belongs to the OTP. Furthermore, the Prosecution emphasised that victims' participation must be organised in a way which does not expose victims and other persons to risks to their well being and safety.

With regard to the ultimate fairness of the trial, the Prosecution argued that this level of involvement of victims' representatives will create a 'serious imbalance' between the influence of the victims and the Defence, given that there is only an *ad hoc* defence counsel appointed at this stage and no identifiable defendant(s) with full procedural rights of participation. In addition, that the test for determining the status of a victim and the low level of proof the Chamber used with regard to commission of crimes under the Statute, could lead to a pre-judging of the issue and is thus potentially prejudicial to the outcome of the trial.

On 27 January the victims' representative filed observations objecting to the Prosecution being given leave to appeal. The representative argued that leave to appeal should only be granted in very limited circumstances under Article 82(1) (d), referring to an earlier determination on this point by an ICC Pre-Trial Chamber. Further arguments were as follows:

- Article 68 and other provisions of the Statute demonstrate the intention of States Parties was that victims should be entitled to participate at all stages of the proceedings; and
- such participation is conditional on protection of the rights of the Defence, and is limited, not allowing access to confidential documents and preserving the right of both Defence and Prosecution to reply to victims' interventions.

The Prosecution argument regarding the unmanageable size of potential victims is countered by the contention that this would also be the case at trial stage, that it is up to the Court to organise an efficient system for victim participation which is envisaged to take place via the appointment of legal representatives for large groups of victims, whose interventions will frequently only be in a written form.

The Prosecution wished to comment further on the victims lawyers' arguments but under the procedural rules of the Court in order to do so had to apply exceptionally for leave to reply. Leave to reply was granted on 1 February and on 6 February the Prosecution filed a Reply further arguing why they should be given leave to appeal and contested the arguments put forward by the victims' representative.

To be granted leave to appeal to the Appeals Chamber, the Prosecution must show under Article 82 (1) (d) of the Statute that the decision by the Pre-Trial Chamber involves an issue that:

'..would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and, for which, ... an immediate resolution by the Appeals Chamber may materially advance the proceedings'.

In a subsequent decision with respect to the DRC, not directly related to the issue of victims' representational rights, the Chamber gave the Prosecution and Defence, but not the victims' representative, the opportunity to comment on a document relevant to the case. The latter were excluded in the following terms:

'the proceedings ... have been conducted confidentially and they do not have any impact on the personal interests of participants VPRS 1 to VPRS 6 because they refer to incidents wholly unrelated to those in which they were allegedly victimized'.

The Chamber seems to be underlining here the approach outlined in its decision of 17 January. Individuals may be given the status of victims before the Court at an early stage because they have suffered harm as a result of crimes committed during the conflict situation under investigation. However, that will not generally give them the same rights as the Prosecution and Defence to be involved directly in confidential proceedings, at least where the harm suffered by that particular victim is unrelated to an alleged perpetrator under investigation by the Prosecutor.

The arrest of Mr Lubanga on 17 March, and the initiation of the first case in the DRC situation, has cast a different light on the issue of victims' rights to representation. In a decision of 28 March the Pre-Trial Chamber determined it must consider specifically the right of the six victims to participate

in the particular case of Lubanga, within the broader context of the DRC situation. The Chamber requested observations of the Prosecution and Defence on this issue by 7 April.

On 31 March the Pre-Trial Chamber rejected the Prosecution's application to be granted leave to appeal against the original decision of 17 January (as referred to above). The Chamber emphasised that leave to appeal at the interlocutory stage would only be granted in exceptional circumstances. The Chamber further determined that if the application for leave did not satisfy the first criteria under Article 82(1) (d) (ie involve an issue that would significantly affect the fair and expeditious conduct of proceedings), that it was not necessary to look at the second criteria.

With regard to Prosecution arguments concerning the protection of the rights of the Defence, the Chamber determined that it could itself fulfil an oversight role at the pre-trial stage and ensure the protection of the rights of all parties: Prosecution, Defence and victims. It further determined that the Prosecution arguments were of a hypothetical, rather than concrete, nature and did not raise any substantive issues regarding the principle of equality of arms *vis-à-vis* the Defence.