



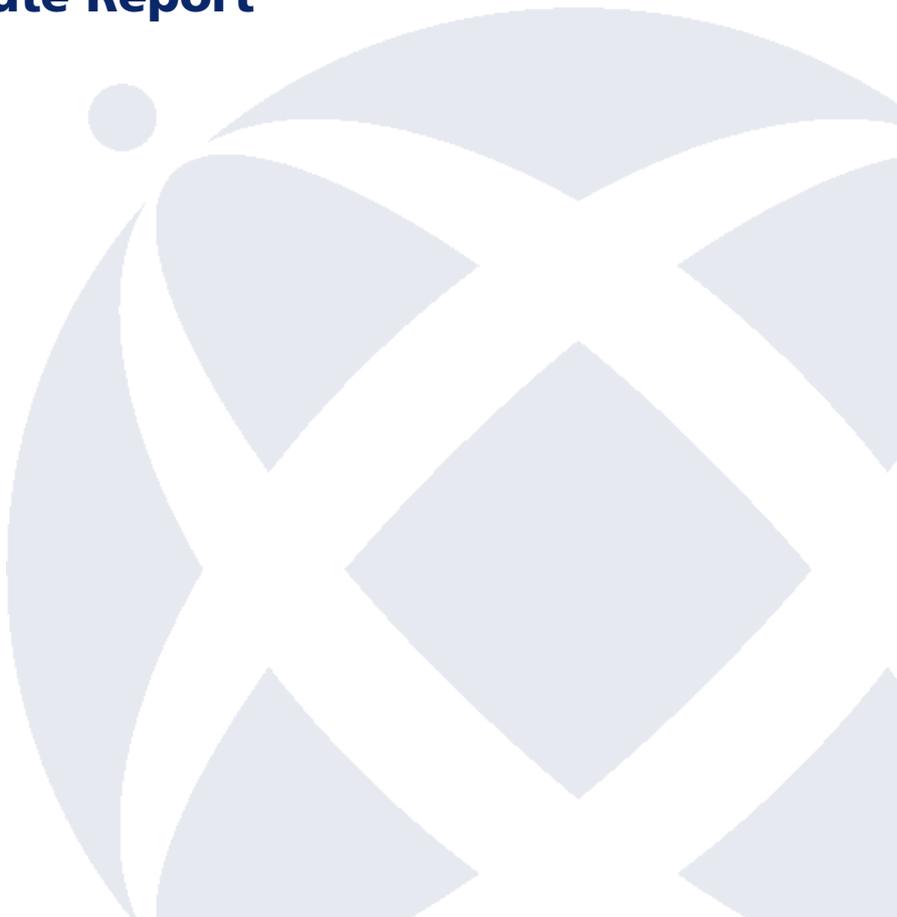
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IBA Monitoring Report

INTERNATIONAL CRIMINAL COURT

September 2006

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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.

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 Two.

This monitoring report is the second to be issued under the project and covers the period from from 1 April to 31 August 2006. The IBA will issue further periodic reports, in addition to ad hoc reports on issues of particular legal significance.

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 general developments in cases and situations during the reporting period. Section 2 focuses in more detail on legal developments in the reporting period. Section 3 looks at the broader operation of the Court with particular reference to transparency and defence issues. Section 4 contains the report's conclusions.

The annexes contain an overview of the Court's jurisdiction and structure, the IBA's monitoring parameters, an IBA press release on the Ugandan Government peace talks with the LRA and possible amnesties, and information on the transfer of the Charles Taylor trial to ICC premises.

Section 1

Cases and situations

How a case comes before the Court

Proceedings may be initiated before the Court by the Prosecutor, a State Party or the Security Council. The Prosecutor analyses particular situations on the basis of information received and then decides whether or not there is a reasonable basis to proceed with a full investigation. If the decision is affirmative, the Pre-Trial Chamber have to authorise the investigation before it can proceed. An investigation by the Prosecutor *proprio motu* has not been launched thus far.

The Security Council can refer a situation to the Court under Chapter VII of the UN Charter where it considers it represents a threat to international peace and security. This is the only manner in which a non-State Party can be brought before the Court without its consent (the Statute provides for non-State Parties to invoke the jurisdiction of the Court voluntarily). The situation in Darfur was referred to the Court by the Security Council.

A State Party can refer a situation to the Prosecutor where crimes in the jurisdiction of the Court appear to have been committed. Such state referrals took place regarding Uganda and the Democratic Republic of Congo (DRC), the initial situations to come before the Court.

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 Darfur, two were dismissed (Iraq and Venezuela) and a further five are still under analysis, including the Central African Republic (CAR), pursuant to a State Party referral, and the Côte d'Ivoire (pursuant to a declaration of acceptance of jurisdiction from a non-State Party). The CAR referral is currently under review by the OTP with regard to admissibility, following a national court decision. The identities of the remaining three countries from among this group of five are currently confidential.

As the previous Monitoring Report described, Thomas Lubanga Dyilo made his first appearance before the Court in conjunction with charges in the DRC situation in March 2006. There has been no further progress regarding executing the arrest warrants issued for five Lords Resistance Army (LRA) leaders in Uganda (one of whom, Raska Lukwiya, is alleged to have been killed, but is awaiting conclusive identification).

In June 2006 the Prosecutor issued the third of his regular reports to the Security Council regarding the situation in Darfur, citing difficulties in conducting investigations in Darfur due to security concerns. According to the Prosecutor these difficulties are now prohibiting effective investigations in Darfur. The Pre-Trial Chamber has asked for observations from eminent human rights officials on the protection of victims and the preservation of evidence in Darfur.

Below is a summary of developments highlighting any significant decisions or areas of focus in pre-trial proceedings during the reporting period in respect of the Lubanga case and the situations currently being investigated by the OTP (more detailed analysis of the ramifications of developments can be found in Section 2 'Legal developments').

The Democratic Republic of Congo

Situation and case

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. In March 2006, the first accused to appear before the ICC, Thomas Lubanga Dyilo was transferred into the custody of the Court. He is charged with enlisting, conscripting and using child soldiers to participate actively in hostilities. The confirmation of charges hearing (which has been postponed once) is currently listed for 28 September. On 28 August the Prosecution filed a Document containing a detailed list of charges and List of Evidence it intends to rely on at the confirmation hearing.

Thomas Lubanga case – overview

The initiation of the Thomas Lubanga Dyilo case in the situation in the Democratic Republic of Congo (DRC) has led to an increase in Court activity focusing on interpretation of the Statute and Rules of the Court. This period saw the beginnings of the development of jurisprudence on such issues as victims' rights, discovery and interlocutory appeals. A few public hearings – mainly status conferences – were held in the Lubanga case.

The confirmation of charges hearing (postponed from June at the Prosecution's request) is currently listed for 28 September. The Prosecution stated its readiness to proceed at this time, but in a filing of 18 August challenges the likelihood of the Defence being ready.

This suggestion is made in the context of several Defence comments regarding the burden of litigating numerous procedural side-issues, which is taking time from the preparation of the Defence. The Prosecution expressed its concern that security of witnesses and victims will be compromised if it reveals witness' identities (as required, in principle, prior to the confirmation hearing), and the hearing is subsequently postponed pursuant to a Defence request.

The Prosecution filing requested the Chamber to order the Defence to indicate its willingness or otherwise to proceed. In a hearing of 24 August the Chamber stated no such order could be made under the Statute or Rules. Furthermore, in the Chamber's view only after the Defence had received disclosure by the Prosecution of the charging document, list of evidence and witness statements would the Defence know if it could comply with its own disclosure obligations and be ready to proceed with the confirmation hearing on 28 September. The issue of the need for any further postponement of the confirmation hearing is expected to be discussed further at the status conference of 5 September.

Charges against Thomas Lubanga

The Prosecution indicated in the Charging Document that the charges it was attempting to prove related only to a non-international armed conflict. It also suggested three legal theories of criminal responsibility in relation to Thomas Lubanga; that he was responsible as a joint perpetrator; by indirect co-perpetration; or under the doctrine of 'common purpose'. The Prosecution requested the Chamber to determine at the confirmation hearing whether the legal requirements of each of these forms of possible liability were satisfied.

The Charging Document itself alleges Mr Lubanga was both President of the Union des Patriotes Congolais (UPC) and the Commander in Chief of its former military wing, the Forces Patriotiques pour la Libération du Congo (FPLC), a militia group at war in the Ituri district. It gives details of several individual cases of children under 15, who, it is alleged, were variously abducted, went voluntarily, or were taken under duress by commanders of the FPLC, trained in military camps and used in military attacks, in some instances killing or wounding members of a rival group and/or suffering injuries themselves. It alleges that the FPLC resembled a 'well-structured' army and that at the time the crimes were allegedly committed Mr Lubanga had effective command and control of the organisation and its members and was fully informed of the acts in question. Further that the use of child soldiers was an established practice of the FPLC.

The Charging Document was filed in an unredacted version for the Defence and a redacted version for the public and victims' representative. The List of Evidence was filed in a redacted version to the Defence pending the decision of the Chamber with regard to the authorisation of redactions.

Disclosure

The underlying issue for the Pre-Trial Chamber (PTC) in interpreting the Statute and Rules has been balancing the extent of disclosure necessary to allow the effective preparation of the Defence and the protection of the fair trial rights of the accused, against the necessary limitations on disclosure and the use of redaction in the interests of the protection of witnesses and victims and the integrity of the investigation.

Finding the right balance has been the subject of much contention during the reporting period, with the Defence argument of insufficient disclosure for the preparation of its case being consistently refuted by the Prosecution. The establishment of a system for disclosure has dominated much of the proceedings during the reporting period and disclosure has been a subject at most of the status conferences. Notable decisions were issued by the Pre-Trial Chamber sitting as a single judge on 15 and 19 May. Aspects of the latter are still under appeal by the Prosecution, following the granting of leave by the PTC.

In a decision of 25 August the PTC ruled that redactions contained in evidence which the Prosecution intends to use at the confirmation hearing can only be made with the authorisation of the PTC. The practice of the OTP in filing redacted documents to the Defence (stating the Defence could apply to have redactions lifted) was rejected as being in breach of the Defence's right to

timely access to evidence and materials necessary for the preparation of its case and its right to a fair trial.

Procedural forms and interlocutory appeals

The last Monitoring Report described the attempt by the OTP to use the procedural remedy of a ‘motion for reconsideration’, which was rejected in a decision of 28 October 2005 by Pre-Trial Chamber II as not existing as a procedural remedy under the Statute. In the Lubanga case, the Prosecution sought again to use a ‘motion for reconsideration’ of a 19 May decision (which established guidelines for limiting disclosure). On the 23 May Pre-Trial Chamber I ruled consistently with its own previous decisions (and that of Pre-Trial Chamber II) that a ‘motion for reconsideration’ is not a valid procedural remedy.

The OTP also sought to use a remedy of ‘Extraordinary Review’ in an application to the Appeals Chamber attempting to challenge a PTC decision refusing to grant leave to appeal at the interlocutory stage. In its first decision, issued on 13 July 2006, the Appeals Chamber definitively rejected the attempted use of this procedural form and declined to look at the substantive matter of the appeal.

Victims’ representation at the investigation stage

A major issue of interpretation of the Rome Statute to come before the Chamber is the right of victims to participate in situations and cases (through their legal representatives).

The previous Monitoring Report discussed in detail Pre-Trial Chamber I’s decision of 17 January 2006 giving six victims a limited participatory right in the DRC situation in general. Against the backdrop of this decision, an additional three victims sought and won the right to participate in the DRC situation during this reporting period.

The separate, but related, issue of victims’ participation rights in particular cases received more definition during this reporting period, the three victims mentioned above also won the right to participate in the Lubanga case. However, Pre-Trial Chamber I denied the group of six victims the right to participate in the Lubanga case.

Pre-Trial Chamber I recently sought observations from the Prosecution and Defence on applications by a further 43 victims to participate in both the DRC situation and the Lubanga case in particular. This issue remains before the Court, with the Defence expressing concerns about its capacity to respond to these numerous victim applications with the confirmation hearing listed imminently.

A Pre-Trial Chamber decision of 24 July requests observations from victims and the DRC Government on the Defence jurisdictional challenge and allegation of ‘l’exception d’incompétence’ of the Court, to be filed by 25 August. The Defence sought leave to reply in advance of observations being filed, citing pressure of time in the context of the confirmation

hearing. In a decision of 28 August, the PTC gave both the Prosecution and the Defence leave to respond (in ten days) to these observations but rejected the request of the Defence for extension of the time and page limit. The decision referred to the proximity of the confirmation hearing and the need for a decision on the Defence challenge to jurisdiction to be issued prior to the hearing.

Scope of charges against Mr Lubanga

Mr Lubanga is currently charged with enlisting, conscripting and using children as soldiers. The Prosecution stated in a 28 June filing that it would suspend its investigation into other potential crimes committed by Mr Lubanga until the end of his pending trial.

The filing came after the Prosecution had earlier told the Pre-Trial Chamber that it anticipated its continuing investigation would uncover additional crimes in which Lubanga would be implicated, and that as a result it could amend the charges against him.

The 28 June document noted that further investigation would not now be practical, due to problems of collection of evidence and the substantial difficulties the Victims and Witnesses Protection Unit has reported in establishing protective measures for victims and potential witnesses against Mr Lubanga. It notes that continuing with further investigation to amend the charges could result in delay and be costly.

The Prosecution indicated that if investigation after Mr Lubanga's trial reveals further crimes, it would seek a new warrant for Mr Lubanga's arrest and pursue those charges in separate proceedings.

On 31 July a group of NGOs addressed a letter to the Prosecutor expressing disappointment that after two years of investigation the indictment did not include a broader range of charges 'representative of the heinous crimes committed' such as murder, torture and sexual violence, by UPC militias (allegedly led by Mr Lubanga).

The letter also refers to concerns that narrow charges may limit victims' rights to participation and, ultimately, reparations. Finally the letter suggests the DRC investigation and prosecution teams are understaffed.

The Prosecutor has indicated in various public statements that the office's policy is to pursue narrow and focused charges in the interests of efficiency, cost and speed. The Prosecutor also indicated in a media roundtable briefing of 25 April that his officer was investigating a second case in Ituri, DRC and that a third was under evaluation.

'Situation': Uganda

Background

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. Five arrest warrants have been issued against the leaders of the LRA for allegedly committing war crimes and crimes against humanity.

To date the investigation has focused on the LRA, but the Prosecutor had previously indicated this is an issue of priorities in relation to the gravity and extent of crimes committed by the LRA, that the Ugandan People's Defence Forces (UPDF) are not excluded from investigation, and that enquiries into allegations concerning UPDF and other groups are ongoing.

Developments

With regard to the investigation of the five LRA leaders against whom arrest warrants have been issued, the OTP states the cases are now in a 'maintenance' phase awaiting execution of the warrants. The OTP has reiterated in the reporting period that the investigation into the possible commission of Rome Statute crimes by the UPDF, the Ugandan Government forces, is continuing.

During the reporting period the Ugandan Government and the LRA leaders initiated peace talks and have apparently reached an agreement encompassing a ceasefire. President Museveni had earlier offered an amnesty to Mr Kony should a peace deal be achieved. The IBA has issued a press release on this issue (see Annex Three) in which Justice Richard Goldstone, the IBA Human Rights Institute co-chair and Former Prosecutor of the ICTY and ICTR stated:

'The ICC is not a political tool of the Ugandan government. Uganda is a State Party to the Rome Statute. It cannot unilaterally withdraw the ICC arrest warrants as it is under an international legal obligation to ensure they are enforced.'

There are currently no further details regarding any possible amnesty aspects of the deal, although it is reported in the media that talks regarding a comprehensive peace agreement are ongoing.

This development has led some organisations to re-evaluate the Rome Statute provision on state referrals and to question the motivation behind States in referring to the ICC. The OTP has stated that a unilateral withdrawal of the Ugandan government referral to the ICC is not possible under the Statute and that the arrest warrants stand. However, there is speculation as to what would be the effect of the Ugandan government offering amnesties to individuals named in ICC arrest warrants, including whether the Prosecutor could decide not to proceed with the prosecution in 'the interests of justice' (such a decision being subject to possible review by the judges who potentially could be asked to withdraw the arrest warrants). It is surprising that neither the OTP nor the judges have commented on these developments in any detail.

'Situation': Sudan (Darfur)

Background

Unlike the other three 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 three times to the Security Council as required under SCR 1593.

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 Inquiry into Darfur. The report by the Commission identifies some 51 suspects, but that list remains under seal, and the Prosecutor's report emphasises that it does not bind his selection of individuals and situations for investigation.

The OTP reported in its December 2005 report to the Security Council that insecurity in Darfur is 'a serious impediment to the conduct of investigations in Darfur', citing in particular the absence of an effective system for the protection of witnesses and victims. In view of difficulties in carrying out investigations in Sudan, the OTP reported that some evidence-gathering has been done in third countries. The report also mentioned that the office would identify persons to be prosecuted 'in the coming months'.

Developments

The Prosecutor's June 2006 report to the SC emphasises that the investigation into the situation in Darfur continues to be hampered by the region's continuing instability and a lack of security for victims, and potential witnesses, stating that this is 'prohibitive of effective investigations'. It also states that in the current phase of the investigation, specific cases have been identified for 'full investigation and possible prosecution'. It further specifies that the OTP expects to investigate and prosecute a sequence of cases rather than a single case, and refers to an agreement with the government of Sudan to facilitate investigations on the ground by setting up interviews in Sudan in August 2006.

The report underlines the stated OTP policy to target those bearing 'the greatest responsibility' for crimes in Darfur, taking into account factors such as gravity of the crimes and deterrent effect.

The report also outlined judicial and quasi-judicial mechanisms in place in Sudan, some specifically established to deal with crimes allegedly committed in Darfur. However, it broadly assesses these mechanisms as being ineffectual in that aim to date. The report notes that admissibility of particular cases, involving consideration of whether Sudanese courts can or will try them, would be determined on a case-by-case basis not based on a judgment of the Sudanese justice system as a whole. However, the report concludes that Sudanese courts do not appear (either currently or previously) to be investigating or prosecuting those crimes in Darfur that are the focus of ICC attention.

Observations sought from Louise Arbour and Antonio Cassese

Under Rule 103 of the RPE, the Chamber may, if it considers it desirable for the ‘proper determination of the case’, invite observations from a State, organisation or person. Pre-Trial Chamber I took the initiative on 24 July of inviting Louise Arbour, (UN High Commissioner for Human Rights), and Antonio Cassese, (Chairperson of the International Commission of Inquiry on Darfur), to submit observations on the protection of victims and the preservation of evidence in the Darfur situation.

Appointment of ad hoc defence counsel

The Pre-Trial Chamber ordered the Registrar to appoint ad hoc counsel to represent the general interests of the Defence in the Darfur situation. The Pre-Trial Chamber has appointed ad hoc counsel in other situations before the Court where no specific accused has been identified, during the reporting period this included an ad hoc counsel to represent general Defence interests with respect to victims’ requests for participation in the DRC situation.

Section 2

Legal developments

Participation rights of victims

Background

The issue of victim participation has a tendency to divide legal opinion along civil and common law lines. Lawyers trained in the common law system, who view the adversarial system as an essential guarantor of a fair trial, perceive victim participation as potentially loading the case against a defendant. Civil law lawyers tend to be more familiar with the the concept of victim participation and view it as simply another factor to be weighed and managed by the judges. The Rome Statute clearly provides for victim participation in line with developing human rights law (see for example the 2005 Resolution of the UN Commission on Human Rights, adopting Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law). Important factors to monitor as the victims' participation system is developed at situation and case stage at the ICC are how such participation is organised in practice by the judges and how protection of victims can be ensured without prejudice to the rights of the Defence.

The issue of victims' rights to participate in proceedings has been the focus of many filings and decisions in proceedings during the reporting period. There is now clear jurisprudence emanating from Pre-Trial Chamber I that 'victims' have the right to participate at the investigation stage in a 'situation'.

However, this right of participation has been clearly distinguished by the Pre-Trial Chamber from participation in a particular case against a named individual, such as Thomas Lubanga. The test for participation at this stage was set much higher. Some victims have been granted the right to participate in the Lubanga case while others have been refused. It is difficult to provide an all-encompassing view of the test adopted as some details of the victims' claims are removed from the relevant decision for protection purposes. Although there is now greater clarity on this issue, the precise legal interpretation of the extent of the causal link between the injury sustained and the crime or crimes charged remains to be developed. Likewise the mode of victim participation is still to be determined.

Developments

In the period since the 17 January decision to allow six victims to participate in the DRC situation there does not appear to have been any outwardly perceivable negative impact on the efficient operation of the Court. On recent occasions the PTC has made clear the limits on these victims' right to be actively involved, for example in denying a victims' representative request to file a

response to Prosecution and Defence observations on victims' participation in the DRC situation. The PTC also denied the three victims' representative's request to participate in a status conference in the Lubanga case.

Organs of the Court have mentioned that victims' participation is envisaged to take place via lawyers representing groups of victims (with due regard for possible conflicts of interest). The Court has not so far revealed publicly information as to the total number of victim applicants in the various situations, so it is difficult to evaluate their potential impact on the functioning of the Court (although informal sources suggest applications to date have not been extensive). It is thus too early to assess whether the volume of applications (either in a case or situation) may affect the efficiency of the proceedings. This is likely to be influenced by the organisation and type of participation authorised by the Chambers.

Victims' rights to participate in situations

During the reporting period the Pre-Trial Chamber I approved three victims' request to participate in the DRC situation, bringing to nine the total number of victims with participatory rights. The decision was announced on 28 July, against the backdrop of the 17 January decision which requires victims to establish that they have suffered harm as a result of Rome Statute crimes committed in the situation under investigation. Such participation is subject to the limitation that victims will generally not be able to participate in closed hearings or have access to non-public documents. A full analysis of the 17 January decision can be found at Annex 4 of the IBA April 2006 Monitoring Report.

Victims' rights to participate in cases

The extent and scope of victims' rights to participate in particular cases received more definition during this reporting period, with three victims who earlier received participatory rights in the DRC situation, also being granted the right to participate in the Lubanga case.

The Pre-Trial Chamber adopted a consistent analysis, ruling (on 29 June and 28 July) that victims must show that their personal rights are affected by the proceedings and establish a sufficient link of causality between the harm they have suffered and the crimes with which the accused is charged. With regard to the 29 June decision, the PTC determined that none of the six victims' alleged injuries directly related to the Article 8(2) charges against Mr Lubanga.

However, the 28 July decision, (granting victim status to the three unnamed applicants) suggests that future jurisprudence may be needed to clarify the exact extent of the causal link required between injury and crime. The decision is heavily redacted, omitting detailed descriptions of the injuries alleged by the victims, although it appears to grant victim status to the parents of children allegedly recruited by the UPC. It remains difficult to predict which types of factual scenarios will satisfy the higher standard required for victim participation in cases in future.

The Defence sought leave to appeal the Pre-Trial Chamber's decision, one of its major objections being the scope of redaction (including the date and place of events and names of persons involved) deprives the Defence of the 'ability to analyse the substance of the applicant's allegations', thus violating the principle of equality of arms. The Defence further argued that the balance between victim and Defence rights under the Statute should be tilted in favour of the Defendant - who faces criminal penalty – as opposed to the victims who seek a civil remedy.

Pre-Trial Chamber I denied the request on technical grounds, stating the Defence should have filed a motion within the required time limits for lifting of the redactions. It also noted that the decision being appealed against only granted the applicants the procedural status of victims, not specifying the manner of their participation, and made no finding regarding the stage at which their identities may be required to be disclosed.

The same victims sought permission to participate in an August status conference, but Pre-Trial Chamber I denied that request, citing the fact that it was awaiting observations from the Defence and the Prosecution on the modalities of victims' participation in particular cases (see above), as well as the fact that the status conference pertained solely to disclosure issues between the Prosecution and the Defence.

Modalities for victims' participation in cases

The Chambers invited the three victims with a right to participate in the Lubanga case to submit observations on their mode of participation in the confirmation hearing. Unfortunately these observations (apparently filed on 8 August) cannot be found on the ICC website but are summarised in a later OTP response to the observations.

It appears the victims have requested: access to the case and situation file for DRC; the right to make written submissions in response to Prosecution and Defence filings; the right to attend status conferences; the right to make oral submissions (including opening and closing statements); and the right to question Mr Lubanga during the confirmation hearing.

The Prosecution observed that victim participation should 'gradually escalate' as the proceedings progress, being at its most pronounced at the final stage when reparations may be under consideration. It also emphasised that the sole purpose of the confirmation hearing was for the OTP to present evidence to meet the requisite proof standard under the Statute regarding the alleged crimes, and that victim participation should not hamper the expeditious conduct of proceedings. In conclusion, the OPT rejected the right of victims' representatives to make opening and closing statements. It suggested victims present their 'views and concerns' after Prosecution and Defence argumentation has been concluded, but before their closing statements. Finally, it doubted the right of victims in principle to question Mr Lubanga, stating such a right is limited under the Statute to questioning witnesses.

The Defence were given an extension of time until 5 September to file their observations on the modalities of the aforementioned victims' participation.

Defence release request and jurisdictional challenge – Lubanga case

Defence counsel for Mr Lubanga was appointed at a few days' notice shortly before the latter's first appearance in Court on 20 March. At this early stage, the Defence orally raised a number of matters which were to resurface frequently in proceedings during the reporting period. Although only superficially briefed, the Defence indicated the possibility of challenging the Pre-Trial Chamber decision of 10 February under which the arrest warrant was issued. In order to make such a challenge, the Defence asked for access to the entire case file in the DRC investigation. The Prosecution opposed the disclosure of the entire case file to the Defence, contending sufficient disclosure had already been made. The polarised positions of the Defence and Prosecution on disclosure issues continued throughout the reporting period.

Finally, the Defence, presuming its remedy would be to appeal the 10 February decision to the Appeals Chamber, requested an extension of the five-day time limit for filing such an appeal from the Pre-Trial Chamber. The latter ruled that as the issues raised concerned jurisdiction and admissibility the matter should be dealt with directly by the Appeals Chamber. Although the Appeals Chamber characterised the Defence application as relating to jurisdiction and not admissibility, the Defence's expanded grounds of appeal continued to refer to admissibility.

Procedural confusion

The appropriateness of the Defence challenge to the 10 February PTC ruling being brought before the Appeals Chamber was first raised in a filing of the Prosecution of 1 May, though proceedings had continued along this route since late March. This filing suggested that the Defence application would have been more appropriately brought directly to the PTC in the form of a challenge to jurisdiction under Article 19. Such challenge can be made at any stage of the proceedings. The Prosecution further suggested that the Appeals Chamber itself could redirect the Defence to the PTC.

A continual theme in Defence filings, in respect of its request for release and challenges to jurisdiction or admissibility, has been its position that it is unable to formulate its arguments, in the absence of sufficient, unredacted disclosure of documents providing full details of ICC charges and information relating to Mr Lubanga's arrest and detention in the DRC. This argument was made on 10 April, when the Defence also challenged the view of PTC (10 February decision) that there was no potential admissibility issue raised by the charges in the ICC warrant as they did not overlap with those contained in the DRC warrant. The Defence has constantly challenged the legality of the proceedings in DRC, maintaining Mr Lubanga was never officially charged or presented with any warrant there, and that this initial illegality taints and renders invalid any subsequent ICC jurisdiction.

Release request to Pre-Trial Chamber

On 23 May the Defence filed a request directly to the PTC requesting the release of Mr Lubanga. Proceedings then continued on two tracks: the challenge to the 10 February decision before the Appeals Chamber, and the request for release before the PTC. Analysis of the relevant filings and decision show that aspects of the substantive issues raised before each were linked and it was not always clear where the dividing line lay. The initial procedural lack of clarity (and alleged problems for Defence counsel in formulating its argument in the absence of sufficient information) seems to have dictated to some extent the subsequent complex and intertwined course of proceedings.

The 23 May request, like earlier ones, cited the purported illegality of arrest and detention in the DRC, prior to Mr Lubanga's transfer into ICC custody. This filing brought to a head some misunderstanding between the PTC and the Defence as to the remedy sought. The PTC responded on 29 May with a decision requesting the Defence to specify the country to which Mr Lubanga sought to be released. The Chamber was motivated by Regulation 51 which deals with interim, rather than permanent, release and requires that the proposed release State be consulted.

On 31 May the Defence clarified that it was not seeking provisional release under Regulation 51, but permanent release under Rule 185, the release request appearing *prima facie* to touch on issues relevant to a challenge to jurisdiction and/or admissibility under Articles 19 and 17 respectively.

Proceeding before Appeals Chamber

In parallel proceedings before the Appeals Chamber during this period the Defence was refused any further extension of time for formulating its appeal grounds. At the same time it was ordered to provide further information on its appeal within two weeks, in particular with regard to issues raised by the Prosecution that jurisdiction was the main issue and should more appropriately be raised initially with the PTC.

On 12 June, (in what appeared to be some agreement with the Prosecution view contained in its 1 May filing), the Defence applied to the Appeals Chamber to withdraw its initial appeal, subject to maintaining its right to challenge jurisdiction under Article 19 before the PTC. The Appeals Chamber rejected this approach in a decision issued on 3 July. Despite recognising the right of the Defence to discontinue its appeal under Rule 157, the Chamber considered that they had no power to authorise a withdrawal of an appeal subject to conditions.

The Chamber reminded the Defence of the deadline it had been given on 30 May to provide additional appeal grounds, gave it a final period of seven days to comply, and quoted Regulation 29, which deals with non-compliance of an order of the Court. The Defence responded on 10 July with an unconditional application to withdraw the appeal, specifically citing the prejudice it would suffer if it were deprived of the opportunity to challenge jurisdiction before the lower Chamber. The Defence framed its application in the alternative, requesting that, should the Appeals Chamber decline to remit the issue to the PTC, the appeal be withdrawn formally via the Registry. At the time of writing there has been no further determination of the Appeals Chamber on this issue.

The release application of 23 May continued to follow its separate course before the PTC and on 13 July the Chamber quoted the various Articles and Rules to which the Defence had recourse on the release issue, giving it ten days to specify which procedural remedy it sought. The Defence responded on 17 July referring to jurisprudence of the ICTR, which (in at least one case cited by the Defence) ordered the subsequent release of a person whose arrest and detention were deemed improper.

In this latest filing the Defence sought to distinguish its right to make any separate admissibility challenges from its request for release. The Defence states that due to alleged procedural abuses in the DRC, leading to violations of the essential rights of the accused, the Court cannot exercise jurisdiction or it would be sanctioning those violations. The Defence also sought relief under Article 85(1) of the Rome Statute, which provides for compensation for persons wrongfully arrested or detained.

Disclosure – Lubanga case

During the reporting period, the Pre-Trial Chamber has been substantially engaged with seeking to clarify provisions of the Statute and Rules with regard to disclosure and in developing a practical framework for its operation. A decision of the Pre-trial Chamber of 19 May established ‘General Principles’ for the disclosure of evidence, including guidelines on exceptions to general disclosure obligations under rules 81(2) and 81(4) of the Rules of Procedure and Evidence and the use of *ex parte* hearings.

Rule 81(2) provides that the Prosecution may ask the Chamber, in an *ex parte* hearing, to exempt from disclosure to the Defence certain information that ‘may prejudice further or ongoing investigations’. Rule 81(2) allows for *ex parte* hearings but the 19 May decision qualifies the rule by specifying that the Defence must be notified of the existence of the application and its legal basis, and have the opportunity to make submissions. The decision notes, though, that ‘*ex parte* proceedings are the exception and not the general rule’ and that such proceedings – conducted in a narrow set of circumstances – are compatible with the European Convention on Human Rights.

Rule 81(4) gives the Chamber discretion ‘to ensure the confidentiality of information ... to protect the safety of witnesses and victims and their families, including by authorising the non-disclosure of their identity prior to the commencement of the trial’. The Chamber interpreted Rule 81(4) to require the Prosecution to show firstly that it had sought protective measures for a particular witness or victim and, secondly that ‘due to exceptional circumstances’ those protective measures are not feasible or are insufficient to prevent harm to that witness or victim.

This decision also dealt with the availability of proceedings to the general public, stating that decisions relating to *ex parte* applications of the Prosecution should be published on the Court’s website (redacted if necessary), and, in cases of extreme sensitivity, at least a general announcement of the decision should be made.

The 19 May decision, establishing a timeline for discovery and disclosure, is also notable in that it effectively freezes the Prosecution's investigation at the time of the commencement of the confirmation hearing (barring exceptional circumstances). The Prosecution argued in its subsequent 24 May 'Motion for Reconsideration', that neither the RPE, nor the Statute, set out definitive guidelines as to when the Prosecution's investigation must end.

Prosecution appeal of 19 May decision

On 23 June, the Pre-Trial Chamber granted the Prosecution leave to appeal some aspects of the above ruling on disclosure but denied the Prosecution leave to appeal against the validity of its announcement of 'General Principles' per se. It granted leave to appeal three aspects of the decision, namely:

- 1) the criteria to be met for granting requests for non-disclosure of the identities of witnesses upon whom the Prosecution will rely at the confirmation hearing;
- 2) the extent to which the Prosecution can continue its investigation into Lubanga's alleged conduct after the confirmation hearing; and
- 3) the specific extent to which rules 81(2) and 81(4) permit *ex parte* hearings – particularly the extent of the notice that must be provided to the Defence.

Determination of the appeal was still pending at the time of writing of the report.

Interlocutory appeals

In its first decision, the Appeals Chamber on 13 July definitively rejected the attempted use by the Prosecution of the remedy of 'Extraordinary Review' of a decision by the Pre-Trial Chamber to refuse to grant leave to appeal its 17 January decision (this deals with the issue of victims' participation rights at the investigation stage). It also rejected extensive OTP argument, citing the policy of several national jurisdictions as support for its position of the existence of a general principle that there is an inherent power of appeal courts to review first instance decisions at the interlocutory stage.

The right to interlocutory appeal is governed by Article 82 of the Statute and the Chamber (referring to the preparatory works of the negotiations on the Rome Statute) determined the legislators were clear that this provision should govern interlocutory appeal rights and that no lacunae existed (as argued by the Prosecution) allowing the importation of any general principle.

The Chamber concluded that 'the application of the Prosecutor is ill-founded and the subject set for consideration non-justiciable.' In the context of prior persistent rejections (by the Pre-Trial Chambers) of OTP's attempted use of 'motions for reconsideration' the decision of the Appeals Chamber appears to send a clear message that 'creative' use of the provisions of the Statute and Rules will not be countenanced and that leave to appeal at the interlocutory stage will only be granted in limited circumstances.

Section 3

Operation of the Court

Transparency of proceedings and accountability

Accessibility

Several issues have been raised by various interlocutors regarding the difficulty of following ICC proceedings through filings and decisions listed on the Court's website (the main conduit of public information), particularly during the pre-trial period when there are a very limited number of public hearings. It is difficult for observers (who are often a conduit to the public) to follow proceedings when relevant documents cannot be located, nor can it be seen if they were filed. With several exceptions, most public filings, decisions and other official documents are available in a database on the ICC's website (www.icc-cpi.int). Documents are provided by the Court in PDF format without any search function, the numbering system is unclear and translations appear chronologically as they are prepared, although an earlier filing may exist in the original language.

Some filings and decisions in the Lubanga case during June and July contained references to certain documents not listed as existing on the Court's website, with no explanation given. The Pre-Trial Chamber ordered the Registry to respond to a Defence allegation that Mr Lubanga was effectively being held in isolation in detention by 5 June. No filing appeared on the website (nor any explanation as to its absence), despite references to a 5 June Registry filing in other documents.

Likewise, also unlisted (with no explanation) are some Defence filings, including a 10 July Defence response to a Prosecution filing challenging Mr Lubanga's request for release, which is referred to in a 13 July decision of the Pre-Trial Chamber relating to the same issue. Also, a filing of 8 August by victims' representatives on the modalities of their participation in the Lubanga case (cross-referenced in another filing) cannot be found. Finally, no record of the observations of the DRC Government on the Defence allegation regarding Mr Lubanga's arrest and detention in DRC cannot be found on the website, though it is cross-referenced as having being filed on 25 August in a recent decision of the Chamber.

These filings, when cross-referenced in decisions, are footnoted 'Conf', implying their contents were confidential. However, this does not explain why they were not listed as having been filed. Additionally, questions could be asked as to whether the entire contents of these documents needed to be kept confidential (or perhaps could be filed as redacted), particularly with regard to victims' observations on modalities of their participation, some of the detail of which was contained in a subsequent Prosecution filing.

With regard to documentation in general, the details of the Court's legal aid system, and in particular the amounts allowed and composition of Defence team at different stages of the proceedings, can be found in a Registry report to the Assembly of States Parties of 2004 and a Committee of Budget and Finance (CBF) report of 2005. However, updated figures are currently contained in a confidential document of the CBF. Registry are requesting the ASP Secretariat to make it public. It is not known why the document is confidential, but it is contended that the resources allocated to Defence should be a matter of public record, particularly where those resources are alleged to be inadequate.

Notification and conduct of hearings

On 22 June, a press release announced a status conference in the Thomas Lubanga case scheduled for 23 June to be held in a public session. The Coalition for the International Criminal Court circulated the notification to its members, but no public notification was available on the ICC website by close of business the day before the hearing. However, it did appear the following morning only hours before the hearing was listed to start at 1100. A status conference listed for 17 August on the ICC hearing calendar was removed shortly before the hearing and reappeared on 24 August. A more obvious notification of a postponement of the hearing and its re-listing would have been helpful.

The Court is obliged under its Regulations to hold public hearings, other than in the exceptional circumstances envisaged under the Statute and Rules. While so few hearings currently take place at the Court, adequate notification to the public is clearly necessary to fulfil the requirement of conducting genuinely public hearings.

It is necessary to follow several links to a calendar listing public hearings on the website, which may be updated by the Court at any time. It is suggested that an improved system be put in place such as listing public hearings in a prominent place on the ICC homepage.

The Court has stated that it is re-designing its website; there is no definite time frame for this project but it is hoped to be completed by the end of the year. In the interim it is suggested that some changes could be made that would substantially increase accessibility of Court decisions and other filings, and provide clear and timely notice of hearings.

All Pre-Trial Chambers are composed of three judges but the Statute provides for the possible designation of a single judge to exercise the functions of the Chamber, except in relation to certain matters (as specified by that Statute). Several hearings in the Lubanga case have been presided over by a single judge and several rulings made, including on significant new issues. As the Court is currently only seized of one case, it is unclear why the full Chamber has not sat. Several interlocutors have commented on this issue and it may be helpful for the Court to clarify its policy in this regard.

Facilities at the Court

Rule 5 of the Court Rules on attending hearings states that: ‘As a matter of courtesy to the Court, drinking, eating and reading are prohibited during hearings.’

Presumably this rule is intended to reflect respect for the court particularly with regard to the two former requirements which are clear. However, Court guards have prohibited the IBA monitor from reading any documents during a hearing, even when it was explained to the guards that the documents were connected with the proceedings in question. On a recent visit to the Court guards were still unclear as to what type of documents could be consulted in the courtroom.

The rule as it is currently being applied would apparently also prohibit consulting the Statute, RPE or ICC decisions during hearings (which may be necessary to assist comprehension of the ongoing proceedings).

It is contended that this rule was not intended to be applied in order to prevent court monitors or the general public from reading relevant documents during hearings. Appropriate instructions should be given to staff to apply it with discretion.

In view of the upcoming confirmation hearing in Lubanga (which could potentially last up to two weeks), consideration also needs to be given to providing some facilities at the Court for monitors (such as an NGO room) and basic services, such as a drinks/snacks machine, for both monitors and the general public (particularly in view of the relative isolation of the Court building).

Defence issues

Facilities for defence counsel

More ad hoc defence counsel have been appointed during the reporting period (one in the Darfur situation to represent the general interests of the defence and the other in the DRC situation – as opposed to the case – to deal with defence interests regarding victim participation issues).

In the previous report it was noted that Defence counsel had problems with access to the Court building, obtaining security passes and office space at the Court. These problems appear to have now been resolved: certain departments of the Court have moved to a new building in the centre of town where Defence counsel for Mr Lubanga has permanent office space and a long term security pass for access.

Staffing of Defence team

Defence counsel in the Lubanga case has previously reported difficulties in dealing unassisted with the volume of work required to address complex and novel issues such as admissibility, jurisdiction, legality of arrest, and disclosure, particularly in the context of the limited time allowed for making certain filings. These difficulties appear to have been exacerbated during the reporting period, with an increase in the number of procedural issues being litigated and the need for interpretation of

various provisions of the Statute, Rules and Regulations of the Court. It is noted in particular that the rate of issuance of decisions on significant matters during late August (in the run up to the confirmation hearing), in particular victim participation issues, has led to a heavy workload on the Defence, whose staffing levels need to be evaluated as a matter of urgency.

Defence counsel has referred to these difficulties in filings and during hearings (sometimes seeking extensions of relatively short time limits for filings), noting particularly his limited personnel when compared with the OTP (the latter having an appeals section and several investigators while currently only dealing with one case at pre-trial stage). Additionally, the Defence needs to travel to DRC to conduct investigations on the ground before the confirmation hearing. Registry was unable to facilitate this trip earlier due to security problems in the DRC during elections. A trip that was planned to take place from 20-30 August had to be cancelled due to the re-scheduling of a status conference from 17 to 24 August. The Defence was reportedly not consulted in this regard. The Defence team is now in the position of trying to make the trip near to the date of the confirmation hearing, if at all, and it is unclear how it will deal with filing requirements that may arise during its absence.

The Defence team now consists of the principal counsel, a legal assistant and a temporarily appointed investigator. The latter (proposed by the Defence) has only been appointed for one month as they do not meet the requirements for an investigator specified under the Registry Regulations. This arrangement was made in light of the Defence's urgent needs for assistance, pending the appointment of a full time investigator. In addition, the Defence is assisted in certain matters by a staff member of the Office of Public Counsel for Defence (see below). The Registry has recently facilitated the additional assistance of two interns.

Under Regulation 83 of the Court Regulations it is stated that the Court shall cover 'all costs reasonably necessary as determined by the Registrar for an effective and efficient defence.' A person may apply to the Registrar for 'additional means' who may also ask for a review of any related decision by the Chamber.

The Defence team reports that it has had informal discussions with Registry underlining its need for further personnel, and, indeed, its difficulties in this regard have been made apparent in its filings. Defence counsel was under the impression that the Registry was constrained from funding any additional staff under the legal aid scheme established by the Committee for Budget and Finance (CBF) of the ASP (which provides for a three-person team at the pre-trial stage), and so had not made any formal request.

However, following recent notification from Registry that this was necessary Defence counsel has made a formal application for an increase in staff. At a recent status conference the Registry indicated it could be flexible on the issue of resources within the context of the general legal aid plan.

The issue of Defence support is crucial during this early phase of operation of the Court. Article 67 requires both that the Defence have 'adequate time and facilities' for the preparation of the

Defence and that the accused be 'tried without undue delay'. It would be a false economy and an affront to Article 67 principles (which reflect international standards of fair trial) to deny the Defence sufficient resources if the result may be that Court proceedings are delayed and the accused is kept in pre-trial detention for longer than necessary.

Defence counsel association

The previous monitoring report cited concerns about 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. No organisation has yet been officially recognised by the Assembly to represent ICC defence counsel and the need for a representative body continues to be a pressing one.

In May the Registry held a meeting with list counsel (those currently registered by the ICC as having fulfilled the requirements for acting as Defence counsel before the Court). List counsel discussed further coordination among themselves including establishing a discrete email list for communication.

Office of Public Counsel for the Defence

The OPCD (OPCD) commenced operation during the reporting period with the appointment of an Associate Counsel. Its function includes 'representing and protecting the rights of the defence' during the investigation stage. It can also directly represent an accused where appointed by the Chamber. Finally, it is mandated to provide 'support and assistance' to the Defence, including providing legal research and advice or appearing before the Chambers. The OPCD is stated under Regulation 77 to be a 'wholly independent office', falling within the remit of the Registry only for administrative purposes.

The office states that its aim is to facilitate the achievement of substantive and structural equality of arms for defence. It further states that while the aim of the legal aid system is to provide the defence with sufficient case-related resources, it is also necessary for the OPCD to address contemporaneously the political, procedural, and legal advantage that the Prosecution enjoys by virtue of the activities of the immediate office of the Prosecutor, and the Prosecution legal advisory section.

Defence counsel in the Lubanga case reported significant improvements in assistance provided by the Court, particularly attributable to the OPCD. The OPCD budget provides for four staff members: a Principal Counsel, an Associate Counsel, a Case Manager and an Administrator. However, the appointment of a Principal Counsel for the office remains outstanding for over a year and is a concern of many NGOs and prospective ICC counsel. (It is reported the counsel should be appointed in the coming months.) In view of the sensitive and novel issues confronted by the Office, with its limited staff, it is urged that the Principal Counsel be appointed as a matter of urgency in order for the office to function fully and determine its longer term policy.

Registry and Defence Counsel

During the reporting period the Registry circulated information to professional legal organisations and ICC list counsel regarding procedures for the impending elections of members for both the Disciplinary and Disciplinary Appeals Board, who will deal with allegations of misconduct against ICC counsel. The Registry has still to initiate the process for the appointment of Legal Aid Commissioners who will evaluate the legal aid system of the Court and can determine, on the request of Registry or counsel, if the means allocated allow for effective and efficient representation.

The Registry is introducing improved procedures to enable an accused to make a more informed choice in selecting defence counsel from the list. The accused will be provided with the entire list of registered counsel, including a summary of the length and areas of their experience, any particular expertise in international criminal tribunals or courts, and proficiency in languages. List counsel have also been asked to provide a brief summary of their background for use at this stage. The accused will then be requested to make a short list of counsel based on this information and will be provided with their full dossier in order to select a counsel.

Section 4

Conclusions

In conclusion, there are several areas of operation of the Court which stand out during the reporting period as having raised important new issues or highlighted existing ones. These are: equality of arms, judicial activity, victims' participation rights, transparency and accessibility and the progress of proceedings.

Equality of arms

The issue raised in the previous monitoring report of equality of arms for the Defence continues to be a cause for concern during this reporting period, in particular the staff resources of the Defence team.

To some extent, the Lubanga case, as the first to come before the Court, has been a vehicle for testing the practical application and legal interpretation of the ICC Statute and Rules. It has thus generated considerable litigation and jurisprudence on such issues as disclosure, victim participation, interlocutory appeals and jurisdictional challenges at the pre-trial stage. In this regard it could be said to be exceptional and to have led to unusual burdens on the parties' resources, in particular the Defence.

Obviously it is particularly important for the credibility of the Court that adequate support is provided for an effective Defence, though some imbalances between Prosecution and Defence are inherent in the system and thus to be expected. Certainly the Prosecution has a need for different and more resources than the Defence. However, the Office of the Prosecutor, although an independent office, is also an integral part of the Court structure. As such it benefits from substantial resources for appeals, investigations and technical backup, unlike the Defence.

Economically, it is not efficient for the Defence to be under-resourced if this may lead to delays in proceedings and resultant costs. For example, though the issue of Defence staffing had been raised some time ago, a formal request to augment the staff is just now before the Registry. Clearly the earlier that action can be taken to deal with such issues, the more efficient it will be for the operation of the Court. The commencement of functioning of the Office of Public Counsel for Defence has improved the situation of the Defence in the case of Mr Lubanga, providing extensive support and research backup.

Judicial activity

Procedural wrangling and delay were highlighted by the Defence request for Mr Lubanga's release and its potential challenges to admissibility and/or jurisdiction (described in Section 2). Attempts to resolve these issues have taken a convoluted route, marked by misperceptions and lack of clarity on

the substance of Defence applications. Although some delay is obviously unavoidable in the context of early interpretation of Court documents, the substantive issues have now been pending for some time.

The Chambers, as judicial supervisors of proceedings, might consider assuming a more active role in seeking early resolution of any unclear issues (particularly where Defence counsel could be said to be the least familiar with Court documents and practice). This could, for example, be dealt with by such means as a hearing in Chambers with both parties, or the establishment of a Rules committee (or other informal mechanism) to attempt to predict problems and accommodate conflicting interests. Dealing with such matters mainly on paper (as appears, at least publicly, to have been the case) seems to have led to increased litigation.

Victims' participation

Victim participation issues have been more clearly defined during the reporting period. There is now jurisprudence from Pre-Trial Chamber I that victims have the right to participation at the situation stage (other Pre-Trial Chambers have yet to rule on this issue). With only nine victims currently authorised to participate in the DRC situation, concerns that proceedings will be hampered by wide-scale victim participation have yet to be tested.

The manner of the participation of three victims in the Lubanga confirmation hearing is currently being determined by the Pre-Trial Chamber. The Court has a responsibility to ensure that victim participation (at any stage) does not hamper the efficiency of the proceedings, prejudice the fair trial rights of the defence or become an unmanageable financial burden. Success will depend on the Court developing an effective system of victim participation. As victim participation is novel within an international criminal court, its success or failure is likely to have a significant impact on the future of victims participation in such fora.

Transparency and accessibility

All organs of the Court have continued to make substantial efforts to maintain regular dialogue with their interlocutors including holding diplomatic, media and NGO briefings and meetings, and reporting to the United Nations.

It is also essential that the Court ensures, to the maximum extent possible, that proceedings are transparent and accessible to the public. It is particularly important to maintain public confidence when many hearings, decisions and filings are confidential or published with information removed (for the security of witnesses and victims).

The Court's website is the primary public source of information on proceedings at this stage. As such it needs to be accessible, comprehensive and regularly updated. Although the website is being updated in its entirety by the Court, certain aspects could be dealt with more urgently, such as providing clear information on hearings. Additionally, the principle of publicly disclosing information (such as the number of victims' applications), should be adhered to wherever possible.

Progress of Proceedings

NGOs have raised questions about narrowness of charges against Mr Lubanga and consequent limits on victim participation and claims for reparations. The OTP has stated that it was investigating additional possible charges against Mr Lubanga, but security problems prevented it obtaining sufficient evidence in reasonable time (although the possibility of later charges against Lubanga has not been ruled out).

According to the OTP, the investigation in Darfur remains hampered by lack of security which is 'prohibitive of effective investigation', but investigations have continued outside the area. To date there have been no public announcements regarding possible charges or individuals identified for potential prosecution.

Arrest warrants were publicly issued in 2005 against five LRA leaders in Uganda. Since then the nascent peace agreement between the Ugandan Government and the LRA has raised concerns about the impact that an offer of amnesty to the wanted LRA leaders could have on the perception of the ICC and the long and costly investigations it has carried out.

However, various organs of the Court have referred both in reports and meetings to difficulties encountered in its early stages of operation. The area most prominent is the need for state cooperation and support to facilitate the execution of arrest warrants and to ensure security for witnesses, victims and Court staff so that effective investigations can be pursued. In particular, the Uganda situation provides a ready focus for discussions on state cooperation and enforcement.

It is against this background that a growing concern has been noted amongst some NGOs and certain States Parties with regard to the progress of proceedings at the ICC. The fact that, after three years of operation, the Court has one individual in custody who is currently indicted on two charges appears to be the paramount concern.

It is not possible to evaluate properly progress with regard to these situations and cases, and other situations under review of the OTP, in the absence of more detailed information as to the time frame for completion of investigations and prosecutions, and the types and number of charges envisaged in various situations, which the OTP contends cannot be revealed in the context of ongoing investigations. The OTP has announced that it will shortly release an evaluation of the first three years of its activity.

The Court recently published a Strategic Plan covering goals and objectives for the next three- and ten-year periods respectively. In this context, a Court Capacity model is also being developed taking into account budgetary requirements and anticipated numbers of investigations and trials.

The OTP states that over the coming three years it intends to conduct between four to six investigations (in either current or new situations), and to complete two trials. With regard to the latter it is emphasised by OTP that the length of proceedings is affected by a number of factors outside its control, including Defence policy, security of witnesses and judicial control.

Some parties consider the OTP aims modest. However, the predictions need to be evaluated in a financial context. The current budget of the ICC is now near to that of ICTY, which has completed a number of trials and currently still has several ongoing, although such a direct comparison fails to take into account the operational, institutional and legal differences between the two institutions. The comparison is not lost on the Court itself nor independent observers, and thus reinforces the obvious point that the long-term acceptance of the Court will also depend on it being seen to be financially viable by States Parties.

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 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 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



NEWS RELEASE

INTERNATIONAL BAR ASSOCIATION

the global voice of the legal profession

[For Immediate Release, Thursday 13 July 2006]

IBA's Human Rights Institute says Ugandan Government must meet its obligations under the Rome Statute

The **International Bar Association's (IBA) Human Rights Institute** is deeply concerned by Ugandan President Yoweri Museveni's recent offer of a blanket amnesty to Joseph Kony, leader of the Lord's Resistance Army (LRA). Mr Kony is one of five LRA leaders against whom the International Criminal Court (ICC) issued arrest warrants in 2005 for allegedly committing war crimes and crimes against humanity in northern Uganda.

Justice Richard Goldstone, Co-Chair of the IBA's Human Rights Institute, Former Prosecutor at the International Criminal Tribunal for the former Yugoslavia, and retired South African Constitutional Court Judge today stated: *'The ICC is not a political tool of the Ugandan Government. Uganda is a State Party to the Rome Statute. It cannot unilaterally withdraw the ICC arrest warrants as it is under an international legal obligation to ensure that they are enforced.'*

He adds, *'The ICC is an independent judicial institution mandated to investigate and prosecute the most serious crimes of international concern. In order to avoid a case going before the ICC, a state must demonstrate that it is genuinely willing and able to investigate and prosecute these crimes. A blanket amnesty would not meet this test or the requirements of international law generally and would only serve to undermine the fight to combat impunity. Peace and justice go hand in hand; one cannot be achieved without the other.'*

Since President Museveni first referred the situation of northern Uganda to the ICC on 16 December 2003, the Ugandan Government has made a number of contradictory statements on the availability

of amnesty to the LRA leaders. On 4 May 2006, President Museveni stated that, 'unconditional forgiveness for all will be a big mistake. Kony and the other four commanders must face trial in The Hague'.¹ Only a week later, however, the President was reported to have made assurances over Kony's safety if he 'got serious about a peaceful settlement' by the end of July.² However, military spokesperson, Major Felix Kulayigye, then told the Associated Press that, '[t]he indictees will face international law. It would be illegal for Uganda's Government to sit down and discuss with the indictees'.³ Most recently, President Museveni offered a blanket amnesty to Mr Kony, 'if he responds positively to the talks with government in Juba, southern Sudan and abandons terrorism'.⁴ The Deputy Premier and Information Minister, Kirunda Kivejinja, is also reported to have stated that the Ugandan Government is not obligated to enforce the ICC arrest warrants.⁵

IBA Executive Director, Mark Ellis, comments that, '*Impunity is the antithesis of accountability. Whether acting out of political expediency or deliberately undermining justice, impunity is a policy premised on bartered settlements and the misguided belief that the choice is between justice and peace.*' He concludes: '*This is a false paradox. In actuality, there can be no lasting peace without justice and justice cannot exist without accountability.*'

ENDS

Editors' Notes

Article 86

Article 86 of the Rome Statute mandates States Parties to 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court' and Article 59 provides that a State Party 'shall immediately take steps to arrest the person in question.'

Background to the Amnesty Law in Uganda

In 2000, legislation was passed to grant amnesty to 'any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of Uganda'.⁶ However, in April 2006, the Amnesty Amendment Bill 2003 was passed to 'deny amnesty to leaders of rebellion [against the government of the Republic of Uganda]; and to provide for the grant of amnesty to persons abducted, those coerced into rebellion and those who apply for amnesty in reasonable time, in good faith and who have demonstrated repentance'.⁷ According to a newspaper report, the Act empowers the Minister of Internal Affairs, on the advice of the security services, to name the individuals excluded from the ambit of the amnesty process by statutory instrument, subject to the approval of Parliament.⁸ However, in relation to President Museveni's recent statements, the Chairperson of the Amnesty Commission, Justice Peter Onega, is reported to have stated that as the Minister of Internal Affairs has not yet named any individuals to be excluded from the Amnesty Act 2000, Kony continues to be eligible.⁹

Background to the ICC Monitoring and Outreach Programme

In October 2005, the IBA started a new ICC Monitoring and Outreach Programme funded by the MacArthur Foundation.

The outreach component to the programme aims to deepen understanding of the place of the ICC both within the broader landscape of international justice and within particular contexts. The IBA has a lawyer based in London who works in partnership with bar associations, lawyers and civil society organisations in key countries, including India, Sudan and Uganda; works with bar associations on the role of lawyers in advancing ratification and implementation of the Rome Statute; and holds sessions on the ICC at regional and international IBA conferences. Reports on outreach, complementarity and ratification/ implementation of the Rome Statute and feedback from the IBA's outreach activities will be made available.

The IBA has a full time-representative in The Hague who monitors the work and the proceedings of the ICC, focusing in particular on issues affecting the fair trial rights of the accused, the implementation of the 1998 Rome Statute, the Rules of Procedure and Evidence, and related ICC documents, in the context of relevant international standards. Input is received from legal experts and other interested parties in assessing the work and proceedings of the Court.

The IBA has recently launched a dedicated section on its website which contains full information on the ICC Monitoring and Outreach Programme, including programme descriptions, agendas and reports. Please visit:

www.ibanet.org/humanrights/ICC_Monitoring_and_Outreach_Project.cfm

Notes

- 1 Felix Osike, 'Museveni Rules Out Talks with the LRA', *The New Vision* (4 May 2006)
- 2 'Uganda: Museveni Gives Rebels Ultimatum', *IRIN News* (17 May 2006)
- 3 Katy Pownell, 'Amid War's Devastation, Ugandans wonder if Sudan talks offer chance at Peace', *FindLaw* (23 June 2006)
- 4 Onapito-Ekomoloi, Press Secretary to H.E. The President, 'News Release: Museveni Assures Kony of Safety', *State House* (5 July, 2006). <http://www.statehouse.go.ug/news.detail.php?newsId=900&category=News%20Release>. The amnesty has been offered until 12 September 2006.
- 5 'Uganda: Gov't, LRA to hold talks despite ICC indictments', *IRIN News* (3 July 2006)
- 6 Amnesty Act 2000, section 3(1).
- 7 Object of The Amnesty (Amendment) Bill 2003.
- 8 'No Amnesty for Rebel Leaders', *Daily Monitor* (19 April 2006).
- 9 'Museveni Amnesty to Kony Illegal – ICC', *Daily Monitor* (6 July 2006).

Annex 4

ICC Facilities for Special Court Sierra Leone Trial

The ICC agreed to provide facilities for the trial of former Liberian president Charles Taylor in The Hague after a resolution passed by the UN Security Council on 16 June endorsed the move. Charles Taylor has been indicted by the Special Court for Sierra Leone (SCSL), but the President of the Court requested the transfer of the trial as Taylor's continued presence in the region was feared to have a disruptive effect on peace and reconciliation.

A Memorandum of Understanding (MoU) between the ICC and the SCSL (dated 13 April 2006) sets out in more detail the agreement between the two courts. The ICC offers the SCSL the use of the ICC's 'service, facilities and support' to try Charles Taylor, but the trial will be conducted in accordance with the Statute and Rules of the SCSL, by judges of that court. The UN Resolution emphasises that the Special Court will retain exclusive jurisdiction over Mr Taylor during his presence in the Netherlands.

While the MoU permits the SCSL to use the ICC's facilities for the trial, it emphasises the different functions and responsibilities of the two courts. It stipulates that the provision of ICC assistance shall not 'impair or adversely affect the functioning of the ICC'. In the event of a conflict of interests, the ICC's interests 'take priority'. It also creates a Trust Fund through which the SCSL must pay the ICC in advance for the costs of its support services and use of ICC facilities. The ICC assumes no responsibility for 'the fulfilment of [the SCSL's] functions and duties'. In the absence of a further agreement, the relationship ends in 30 months.

While the trial itself is entirely under SCSL jurisdiction, its transfer will inevitably have some effect on the ICC. Confusion has already been noted among legal professionals working in the field of international justice. There is a risk that the public perception will be that the trial is being conducted by the ICC, rather than merely hosted by the ICC. An active campaign by both courts will be needed to counteract this confusion, in particular ensuring that the manner of listing Taylor hearings (whether on the ICC website or elsewhere), enables them to be clearly distinguished from ICC hearings.

The trial of Taylor as a former head of state is expected to attract significant media interest, which is likely to increase media focus on the ICC itself. Finally, the eventual presence of SCSL staff in The Hague provides the potential for sharing of expertise, in particular an opportunity for the SCSL, as the older institution, to pass on its experience to various organs of the ICC.