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IBA/ICC Monitoring and Outreach Programme

First Challenges:

**An examination of recent landmark developments
at the International Criminal Court**

June 2009

An International Bar Association
Human Rights Institute Report

Supported by the John D and Catherine T MacArthur Foundation

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Contents

Executive Summary

Background	8
General observations	9
The <i>Lubanga</i> Case	9
Notable achievements	9
Concerns	9
Recommendations	11
The <i>AI-Bashir</i> Case	12
Observations	12
Recommendations	13
The <i>Bemba</i> Case	13
Observations	13
Recommendations	14

Introduction

About the Programme	15
Background	15
Methodology and layout	16

Abbreviations

Chapter I: The Contextual Framework

Background	19
The Court's first years	19
Beyond the courtroom	20
Conclusions	20

Chapter II: The Case of Thomas Lubanga Dyilo: The ICC's First Trial

Introduction	21
A. Background	21
The child soldier phenomenon	21
Delays during the pre-trial phase	22
B. The first moments	22
IBA comments	23
C. Management of the proceedings	23
D. Treatment of witnesses	24
1) Rule 74: self incrimination	24
<i>Who should give the warning?</i>	24
<i>IBA comments</i>	25
2) Witnesses proofing and familiarisation	25
<i>The experience at the tribunals</i>	26
<i>IBA comments</i>	26
3) Protective measures	27
<i>Nature of protective measures imposed</i>	27
<i>Impact of protective measures on the defence</i>	28
<i>IBA comments</i>	28
4) Questioning of witnesses	29
<i>Questioning by the Chamber</i>	29
<i>The ICTY example</i>	30
<i>IBA comments</i>	30

E. Defence issues	30
Equality of arms	30
The Office of Public Counsel for Defence	31
Disclosure	31
Anonymous victims	32
Opportunity to confer with defendant	32
F. Victim participation	32
Challenges in preparation	33
Questioning of dual status victims	33
The Office of Public Counsel for Victims	33
Security of legal representatives	34
G. Translation and interpretation	34
Inaccuracies in interpretation	35
The Court Management Unit	35
The Chamber's approach	36
IBA comments	36
H. Transcripts and summaries	37
Summaries	37
Practice at the tribunals	38
IBA comments	38
General conclusions	38

Chapter III: The Case of Sudanese President Omar Al-Bashir

Introduction	40
Background	40
A. The genocide charges	41
The judges' decision	41
Interlocutory appellate review	42
B. Cooperation	43
Sudan	43
Non-states parties	43
States parties	44
Implementing legislation	44
C. Immunity	45
Article 98	45
D. Timing of the application: peace versus justice	46
IBA comments	47
Conclusions	48

Chapter IV: The Case of Jean-Pierre Bemba

Introduction	49
Background	49
Key judicial developments	50
A. Issues arising from application for interim release	50
Disclosure after initial surrender to the Court	50
States cooperation	51
IBA comments	51

B. Decision adjourning the confirmation of charges hearing	52
Delay	53
C. Comparative assessment of the disclosure regime in the <i>Bemba</i> case and the <i>DRC</i> cases	54
Advantages/disadvantages of the <i>Bemba</i> disclosure system	54
More focused prosecution	54
Fuller picture of the evidence/ability to organise proceedings	54
Disclosure through a neutral third party – the Registry	55
Conclusions	56
Chapter V: Conclusions and Recommendations	
The <i>Lubanga</i> case	57
Notable Achievements	57
Concerns	58
Recommendations	59
The <i>Al-Bashir</i> case	60
Observations	61
Recommendations	61
The <i>Bemba</i> case	62
Observations	62
Recommendations	63
Annex I: Parameters for IBA Monitoring of the International Criminal Court	64

Executive Summary

Background

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

As part of its efforts to consistently and constructively monitor the ICC, the IBA has to date produced five monitoring reports which closely examine and critique the procedural developments at the ICC. Past IBA monitoring reports have noted the challenges faced by the Court in guaranteeing adequate resources for defence counsel under its legal aid system; balancing the rights of victims and defendants before the Court; interpreting the Court's legal text on key issues such as witness protection, disclosure and victims' participation; and closely examining issues arising from the stay of proceedings in the case of Thomas Lubanga.

In 1998, following the historic signing of the Rome Statute the ICC came into being. In July 2002, the Rome Statute became effective and the Court's work officially began. The IBA considers that 2009 is quite significant for the ICC, being the year in which the Court began its first-ever trial and issued its first arrest warrant for a sitting head of state. These landmark developments represent the first steps towards realising the vision for a permanent institution dedicated to ending impunity.

This sixth IBA report looks closely at these landmark developments at the ICC. The opening chapter recalls that although these achievements are defining moments for the ICC, they follow in the footsteps of a rich history of international criminal proceedings that started at Nuremberg and Tokyo, and more recently at the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL).

In subsequent chapters, the IBA looks closely at important developments in the judicial proceedings in the cases of Thomas Lubanga Dyilo, the first suspect to be surrendered to the ICC from the Democratic Republic of Congo (DRC); the arrest warrant issued against President Omar Al-Bashir of Sudan; and the case of Jean-Pierre Bemba Gombo, the first case in the ICC's investigations in the Central African Republic (CAR).

The IBA is mindful of the fact that the Court has not completed the first cycle of its activities and thus it is still too early to fully assess its impact. However, the report emphasises that the credibility of the ICC depends on publicly accessible, fair and effective proceedings as well as a strong external relations mandate. In our view this requires a realistic budgetary outlay, a strong and independent judiciary, focused well-investigated prosecutions and continuing engagement with states parties, regional organisations, civil society and other key stakeholders. Making significant efforts to engage with stakeholders will demand the attention and focus of those at the highest level of the Court. The

external relations mandate of the President of the Court and the visibility of senior Court officials has now become even more important.

General observations

The Lubanga case

The trial of Thomas Lubanga Dyilo commenced on 26 January 2009. It was a historic moment – the first trial at the world’s only permanent international criminal court, and the first time that victims had the right to actively participate in international criminal proceedings. The postponement of the *Lubanga* trial in June 2008 led to concerns about the viability of the ICC. However, the commencement of the trial has helped to restore public confidence in the credibility of the Court.

Notable achievements

- The progress made in the *Lubanga* trial to date is encouraging. Of the prosecution’s initial list of 31 witnesses, 17 have testified. The firm, decisive approach of the Chamber in managing the proceedings augurs well for the future of the trial. The first witness’ retraction of his initial testimony temporarily overshadowed the proceedings and led to intense media speculation and criticism of the Court. However, the pace of the trial quickly improved.
- The IBA is encouraged by the general treatment of witnesses by the judges, parties and participants. Thus far, there has been no indication that witnesses have been harassed or re-traumatised as a result of their testimony before the Court. The IBA therefore notes that, with the exception of the special circumstances surrounding the testimony of the first witness, the familiarisation process being implemented by the Victims and Witnesses Unit (VWU) of the Registry appears to be successful.
- Concerning victims and the role of legal representatives, the IBA is satisfied that victims have been afforded the opportunity to participate in a meaningful way in the trial. The delayed notification of the right to participate may however have affected the legal representatives’ timely preparation for the trial.
- The IBA notes the efforts by the Chamber to fully respect the rights of the defence while respecting the rights of victims and witnesses. In this regard, the IBA welcomes the Chamber’s decision to allow the Office of Public Counsel for Defence (OPCD) access to the proceedings in real time in order to be able to provide legal assistance and support for the defence during the trial.

Concerns

- A major challenge of the *Lubanga* trial to date has been that so much of the proceedings is held in closed session due to fears for the witnesses’ safety. Even though Mr Lubanga can view the witness on the computer monitor, the number of closed session hearings arguably impinges on his right to open, transparent public proceedings. While mindful of the challenging circumstances of many witnesses who take significant risks to testify before the Court, the IBA is concerned that the

defendant's right to open justice and the public perception of the trial are being affected by the fact that much of the proceedings is conducted in closed session.

- The IBA regrets that the issue of self-incrimination was not fully explored prior to the commencement of the trial. Indeed, it is unclear why this was not done. There were several hearings leading up to the trial and it would have been evident that, given the nature of the evidence and the background of witnesses expected to testify, the issue of self-incrimination was likely to arise. Clear judicial and policy determinations ought to have been made at this earlier stage such that legal representatives of victims, the VWU, the Office of the Prosecutor (OTP) and any other relevant organs of the Court would be suitably apprised of their responsibilities in that regard.
- The IBA is also concerned that the late disclosure of the potentially exculpatory confidential material which initially led to the stay of proceedings in the *Lubanga* case may have affected the defendant's ability to properly prepare his case and conduct an effective defence. Indeed, given the imminence of the trial the defence may not even have had a full opportunity to decide whether to seek leave to appeal the Chamber's decision to retain some redactions and impose what in its view were appropriate counter-balancing measures.
- The residual effect of the Article 54(3)(e) confidentiality issue may yet create challenges for the defence at a later stage in the trial. The defence may wish to rely on the evidence, seek additional information or question witnesses based on the confidential material but would however be prohibited from doing so under Rule 82 of the Rules of Procedure and Evidence, which could have a significant impact on its case.
- The IBA is also concerned by the use of leading questions during the questioning of witnesses. The IBA cautions against questioning witnesses in a manner that may inadvertently be unfair to the defendant. As such, we urge that great care be taken in particular by the prosecution, the other participants and the judges to avoid leading questions.
- The IBA notes that the practical implications of the appointment of the Office of Public Counsel for Victims (OPCV) to represent victims appearing before the Court seems to be a matter of concern for some legal representatives. It is felt by some legal representatives that the legal support mandate of the office should be its primary focus and less emphasis should be placed on acting in a representative capacity for victims. In their view, the full involvement of the office in the *Lubanga* trial proceedings as well as other cases before the Court tasks the already limited resources of this office and is not sustainable. Additionally, it is felt that there is the risk that the representation of victims could become institutionalised which defeats the objective of encouraging external counsel to sign up to the ICC's list of counsel. Counsel are also concerned that the approach of different Chambers to the appointment of the OPCV or the legal representatives lacks consistency.
- The IBA notes with concern the issues raised regarding accuracy of interpretation. Given the complexity of international criminal proceedings which involve different languages and cultural nuances, this is not surprising. The IBA considers that procedural safeguards such as regular verification of the accuracy of the interpretation and transcription by the Registry's translation/interpretation services are key to resolving such issues. The Chamber has stressed that interpreters must provide full interpretations and not summaries of what was said. The Chamber plays an

important oversight role in investigating and resolving any disagreements emanating from interpretation.

- The IBA is concerned that transcripts of the proceedings are not posted in a timely manner on the Court's website. Given the importance of open, transparent public proceedings and the significance of public access to the record of the proceedings, the IBA considers that this issue must be addressed urgently.

Recommendations

- The IBA welcomes the Chamber's ruling that sensitive, informed advice given by the legal representatives of the witnesses (or, where there is no legal representative present in Court, the ad hoc lawyer assigned to give advice) should serve to allay witnesses' fears of future prosecution based on their testimony before the Court. However, given the complexity of Rule 74 the IBA recommends that consideration be given to formulating guidelines for counsel who must provide advice to their clients on the issue of self-incrimination. In addition, it is recommended that the Registry includes this issue in its training for List Counsel in order to encourage a uniform approach to the provision of such advice.
- While the participation of victims in the proceedings is encouraging, there appears to be little practical distinction between those who remain anonymous and those whose identity is disclosed, as both categories are often represented by the same legal representative. The IBA urges the Chamber to be vigilant in ensuring that victims who have remained anonymous do not inadvertently benefit from the same participatory rights as the non-anonymous victims. In our view, if this is not done then the distinction in the modalities of participation for each category of witnesses will have no practical significance.
- The IBA encourages dialogue between the legal representatives and the OPCV during which specific concerns may be ventilated. The respective Chambers are also encouraged to ensure that there is consistency in the appointment of the OPCV vis-à-vis legal representatives for victims.
- The IBA notes that the ICC's legal texts do not specifically address the issue of the protection of legal representatives of victims. As such, any efforts by the Court in this regard would be a matter of policy. The IBA recommends that this matter continues to be a source of dialogue between the Court, legal representatives and key stakeholders
- In order to ensure that the OPCD continues to provide meaningful support and advice to defence teams during ongoing trial proceedings, the IBA reiterates the recommendations made in its monitoring report, *The ICC Under Scrutiny: Assessing recent developments at the International Criminal Court*, that the P4 (senior level) position in the OPCD should be approved on a permanent basis. Given the likelihood of a second trial in 2009, the limited resources of the OPCD will be severely tasked without this additional position.
- The IBA urges the Court Management Unit and all other relevant organs of the Court to ensure that once the review of the transcripts has been completed and accuracy of the record verified, that transcripts of the proceedings are posted on the Court's website as soon as is reasonably practicable.

- The IBA notes that although the Court produces audio-visual summaries of the proceedings, no written summaries are produced. Given the importance of summaries as an outreach and public information tool, the IBA urges the relevant organs of the Court to arrive at a consensus concerning this issue as soon as possible. While discussions are ongoing concerning whether to utilise the models of the ad hoc and hybrid tribunals, the IBA urges the Court to implement a pilot project as soon as practicable.

The Al-Bashir case

The decision to issue an arrest warrant for Sudanese President Omar Al-Bashir – the ICC’s first for a sitting head of state – was a bold step for the Court, which has been both criticised and lauded. IBA’s research and consultations suggest that the controversial nature of the *Al-Bashir* case has been due not only to its political implications, but also to the timing of the application and the fact that genocide charges were included in the application for the warrant (contrary to the opinion of ‘experts’ on Darfur and the recommendations of the United Commission of Inquiry on Darfur).

The Chamber’s decision has also been controversial because of the strong divergence of views between the majority of judges and the dissenting judge over the genocide charges, and the ruling that all members of the United Nations Security Council (UNSC) (even non-states parties to the Statute) should be notified of the decision, despite the non-mandatory terms of the UNSC referral to non-party states.

Observations

- The IBA supports interlocutory review of the Chamber’s decision regarding the genocide charges. If leave to appeal is granted, it is hoped that the Appeals Chamber (AC) will provide clarity as to what inferences must be drawn by the Pre-Trial Chamber (PTC) on the evidence at the arrest warrant stage of proceedings.
- The IBA regrets that in its decision the Chamber did not expressly address the relationship between Articles 27 and 98 of the Rome Statute regarding the issue of immunities. Article 98 of the Rome Statute requires the Chamber not to proceed with a request for arrest and surrender which would cause the requested state to act contrary to its obligations under international law with respect to the immunities of a person from a third state, unless a waiver has been obtained from the third state. In our view judicial reasoning by the Chamber on this issue could have allayed the confusion of some states regarding perceived conflicts between their obligations under international law and the Statute.
- The IBA considers that the arrest warrant decision has major implications for the way the ICC is publicly perceived. Criticism about the ICC’s alleged bias against Africa and negative views about the impact of ICC proceedings on local peace processes has increased significantly since the warrant was issued. The Court’s engagement with regional groups such as the African Union (AU) and the Arab League has now taken on a level of urgency.
- The IBA considers that sustained engagement with regional organisations and individual states must be carried out at the highest level of the Court. The IBA is encouraged by indications from the Presidency that there is a desire to increase its external relations mandate including by visiting

key African countries. The IBA is also encouraged by the continuing efforts of the Registrar, and senior officials in the OTP to also visit key countries. The continued high-level visibility can only augur well in generating support for the Court's work.

Recommendations

- The IBA notes the proposed meeting of African states parties in Addis Ababa, Ethiopia on 8-9 June 2009 which was organised following the issuance of the arrest warrant for President Al-Bashir. The IBA recalls the commitment of the AU to combating impunity, promoting democracy, the rule of law and good governance throughout the African continent. In this regard, the IBA encourages the AU, as a regional leader, to fully support the work of the ICC on the continent and to collaborate with the Court to combat impunity for crimes affecting thousands of African victims.
- The IBA also welcomes the Court's formation of a court-wide Africa strategy group to help counter a number of the misperceptions about its work in Africa. The IBA considers that it is important that this group is truly representative of all organs and interests in the Court (including the defence). The IBA further encourages the Court to ensure that the message that is disseminated is clear, consistent and representative of every aspect of the Court's mandate including its commitment to fair trials.
- The IBA also fully supports the Court's efforts to open a field office in Addis Ababa. In our view this office would be a central hub for the Court's interface with the African Union and states parties in the region.
- The IBA recognises that these efforts will require a realistic budgetary outlay. We urge the Assembly of States' Parties to fully support the Court's efforts in this regard.
- The IBA encourages the ICC to engage in sustained discourse with states parties concerning implementing legislation, in order that all states can give effect to the Court's requests for cooperation. The IBA also urges states parties who do not have or are in the process of passing implementing legislation, to move expeditiously to ensure that this process is finalised.

The Bemba case

The case of Jean-Pierre Bemba, though the ICC's first arising from the prosecution's investigations in the CAR, is the third case that has (almost) completed the confirmation of charges stage at the ICC. The judicial pronouncements in the *Bemba* case indicate that there have been notable improvements in the approach taken to the process of disclosure at the pre-trial stage of proceedings from the approach of the other Chambers. This is a welcome development, given that the judges, parties and participants have had the opportunity to assess the impact of previous decisions in other situations and cases on the defendants and pace of the proceedings. The overall success of the revised process remains to be seen given that the process is yet to move to the trial phase. The fact that the Trial Chamber will, from the outset, have access to all the evidence of either party appears to be a benefit that should enable more efficient preparation for trial.

Observations

- The IBA welcomes the decision of the PTC to implement a disclosure regime that allows for both incriminating and exonerating material to be filed in the record of the case with the Registrar from the confirmation stage of the proceedings. In our view, this system will allow all the parties, including the defence, to be better prepared for the confirmation hearing and ultimately the trial.
- The IBA also welcomes the decision of the Appeals Chamber concerning disclosure to the defence at the time of arrest and surrender to the Court. The Appeals Chamber decided that in order to ensure equality of arms and an adversarial procedure, the defence must, to the largest extent possible, at the time of his or her initial appearance at the Court, be granted access to documents that are essential in order to effectively challenge the lawfulness of detention.
- The IBA notes that the Chamber's decision to adjourn the confirmation of charges hearing and invite the Prosecutor to amend the charges was a correct application of Article 61(7)(c) of the Rome Statute. This is in contrast to the approach of the PTC in the *Lubanga* case, which unilaterally re-characterised the charges against the defendant. The IBA regrets however the timing of the decision. In our view this delayed the proceedings and lengthened the time that the defendant will spend in custody before a final decision is made by the Chamber.
- The IBA regrets that states parties are still reluctant to negotiate agreements with the Court to host defendants who may be provisionally released by the Court. The IBA considers that this almost renders illusory the defendant's right to apply for interim release.

Recommendations

- The IBA reiterates its recommendation in its November 2007 monitoring report in which it encouraged the Registry to proactively negotiate cooperation agreements with states parties to facilitate the hosting of defendants who may be provisionally released or who have been acquitted by the Court and cannot return to their country for security reasons.
- The IBA encourages states parties to fully cooperate with the Court in this regard, in keeping with their obligations under Part 9 of the Rome Statute. The IBA recognises that this will require continuous dialogue between the Court and relevant stakeholders such that concerns can be discussed with a view to reaching a compromise position.

Introduction

About the Programme

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. The IBA has a membership of 30,000 individual lawyers and more than 195 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community.

The IBA is currently implementing a MacArthur Foundation-funded programme to monitor the work and proceedings of the International Criminal Court (hereinafter the Court or ICC) and to conduct outreach activities. The 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 outreach component of the programme aims to deepen understanding of the ICC's place both within the broader landscape of international justice and at the local level. Findings from the monitoring and outreach component of the programme are documented in separate reports and widely distributed to the Court, the IBA membership and the global legal community.

Background

In July 2002, the world's first permanent international criminal court became a living reality – fulfilling the dream embodied by the historic signing of the Rome Statute in 1998. Almost seven years later, the ICC has continued this legacy with the commencement of its first trial and the issuance of its first arrest warrant for a sitting head of state. While these are defining moments for the ICC, they follow in the footsteps of a rich history of international criminal proceedings that started at Nuremberg and Tokyo, and more recently at the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL).

Previous IBA monitoring reports have documented several of the procedural challenges experienced by the Court during its early phase. The IBA is mindful of the fact that the Court has not completed the first cycle of its activities and thus it is still too early to fully assess its impact. What is clear is that the ICC has moved beyond the conceptual into the fully active phase of its existence. Guaranteeing fair trials through efficient and effective proceedings requires a realistic budgetary outlay, a strong and independent judiciary, focused well-investigated prosecutions and continuing engagement with states parties, regional organisations, civil society and other key stakeholders. Making significant efforts to engage with stakeholders will demand the attention and focus of those at the highest level of the Court.

This sixth IBA monitoring report looks critically at these first moments: the start of the *Lubanga* trial; the arrest warrant for Sudanese President Omar Al-Bashir; and also considers the developments in the case of Jean-Pierre Bemba, the ICC's first case arising from its investigations in the Central African

Republic (CAR).

Methodology and layout

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

The report is divided into five chapters:

Chapter 1 provides a contextual overview of the issues discussed in the report, including a brief look at the historic significance of the creation of the world's only permanent international criminal court.

Chapter 2 assesses the *Lubanga* trial proceedings since 26 January to the spring judicial recess on 8 April. As the trial is ongoing, IBA observations are limited to the procedural aspects of the trial and the manner in which the normative instruments are being interpreted. Particular emphasis is placed on the impact of the Chamber's decisions on Mr Lubanga's fair trial rights.

Chapter 3 of the report looks closely at developments in the case against Sudanese President Omar Al-Bashir. The report discusses some of the complex legal issues – including the charge of genocide, diplomatic immunity and cooperation – arising from the decision of the PTC to issue the Court's first arrest warrant for a sitting head of state. The discussion goes beyond the legal issues and also highlights some of the debates on the ICC's role in Africa and the effect of the arrest warrants on peace in Darfur.

Finally, in Chapter 4 the IBA examines several noteworthy legal developments in the case of Jean-Pierre Bemba. The chapter focuses in particular on key decisions regarding pre-trial disclosure to the defence.

The report ends with general conclusions and recommendations on the issues discussed.

Abbreviations

AU	African Union
AC	Appeals Chamber
ASP	Assembly of States Parties
CAR	Central African Republic
CBF	Committee on Budget and Finance
CMU	Court Management Unit
Unit	Court Management Unit
DRC	Democratic Republic of Congo
DCC	Document Containing the Charges
FPLC	Forces Patriotique du Congo
GTA	General temporary assistance
IBA	International Bar Association
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MLC	Mouvement de Libération du Congo
NGO	Non-governmental organisation
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
Regulations	Regulations of the Court
Statute	Rome Statute of the International Criminal Court
RPE	Rules of Procedure and Evidence
Rules	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
TC	Trial Chamber

UPC	Union des Patriotiques Congolais
UN	United Nations
UNSC	United Nations Security Council
VWU	Victims and Witnesses Unit
WVS	Witnesses and Victims Service
PIDS	Public Information and Documentation Section

Chapter I

The Contextual Framework

Background

The historic signing of the Rome Statute in July 1998 was a defining moment for international criminal justice. For almost fifty years, since the end of the First World War, efforts have been made to establish a permanent international criminal court. Events in the former Yugoslavia and Rwanda shocked the world out of its complacency and the idea of prosecuting those who committed international crimes gained broad-based support in global public opinion and among governments.¹ The time, effort and resources expended on the creation of ad hoc tribunals proved to be the catalyst for a permanent institution with universal recognition that would not suffer the same challenges as its predecessors.²

Following ratification of the Rome Statute by 60 countries in July 2002, the die was cast. The vision of a permanent international institution with the power to exercise jurisdiction over persons for the most serious crimes of international concern, had become a reality. Today there are 108 states parties to the Rome Statute. Almost 11 years since the historic moment in Rome, the Court has started its first trial and issued its first arrest warrant for a sitting head of state.

The mandate of the International Criminal Court (ICC) is aptly described by Professor M Cherif Bassiouni in these words:

‘The purposes of the ICC include: dispensing exemplary and retributive justice; providing victim redress; recording history; reinforcing social values; strengthening individual rectitude; educating present and future generations, and more importantly, deterring and preventing future human depredations. To accomplish these results, the ICC must act with predictability, consistency and publicly perceived fairness, and when appropriate it must have the courage and wisdom to temper the harshness of the law with understanding and compassion.’³

The Court's first years

During its first five years, the Court was extensively engaged with interpreting its legal texts. Significant judicial time was spent defining issues such as: the scope of victims' rights and the modalities of their participation; the guarantee of fair trial rights and equality of arms; and the protection of witnesses and confidential information. Judicial consensus was not always achieved. Divergent approaches to the same issue by different Chambers created uncertainty for the parties and participants and led to several requests for interlocutory review by the Appeals Chamber.

To some extent, the ICC has made considerable advances over its counterparts at the ad hoc tribunals. On certain issues the Court has relied on best practices from the tribunals and judges and

1 See M Cherif Bassiouni, *The Statute of the International Criminal Court: A documentary history*, p19.

2 Ibid.

3 Ibid.

counsel have been able to benefit from a rich and diverse jurisprudential history. On others, such as witness proofing, the ICC has departed from the tribunals' approach.

Several aspects of the Court's normative framework and activity are yet in their infancy. Though significant progress has been made, challenges remain. The hybrid context of the ICC, a mixture of civil and common law legal systems, creates its own challenges as the proceedings take place in an adversarial context but with judges or lawyers from different legal backgrounds. The participation rights of victims, while a significant achievement of the Rome Statute, are difficult to implement in practice.

Beyond the courtroom

The decision of the Pre-Trial Chamber of the ICC to issue an arrest warrant against President Al-Bashir of Sudan, the ICC's first against a sitting head of state, has presented new and diverse challenges for the Court and highlighted its precarious but critical dependence on the support of states. The *Al-Bashir* case has led to increased concern about the ICC's susceptibility to political interference from the UNSC and fuelled debates concerning the primacy of peace versus justice in post-conflict countries.

The Al-Bashir arrest warrant has also led to renewed criticism regarding the ICC's role in Africa. The case has revived concerns that the Court's prosecutions are focused only on crimes committed on the African continent and less so in other parts of the world. Whether these concerns are illusory or real, the Court's proactive engagement with key regional organisations such as the African Union must now become its urgent priority.

Conclusions

Although in relative terms, an institution of seven years could still be considered an infant, the expectations of the public, states parties and civil society for the ICC are high. The Court's priority must be to ensure that there are focused investigations and timely prosecutions which are not limited to one geographic region; that trials are fair and expeditious and that there is continuous engagement with key stakeholders. On the other hand, states, regional organisations and all like-minded groups have a responsibility to fully support the court to ensure that it fulfils its mandate of ending impunity for crimes of concern to the international community as a whole.

As will be seen in this report, some of the issues being faced by the ICC are attributable to the unique provisions of its founding texts. In 2010, the ICC review conference will be held in Kampala, Uganda where states parties, interested states and other stakeholders including members of civil society will have the opportunity to engage in dialogue about the ICC's next years.

Chapter II

The Case of Thomas Lubanga Dyilo: The ICC's First Trial

Introduction

The trial of Thomas Lubanga Dyilo commenced on 26 January 2009. It was a historic moment – the ICC's first trial and the first time that victims had the right to actively participate in international criminal proceedings. The *Lubanga* trial follows in the footsteps of a rich history of international criminal proceedings that started at Nuremberg and Tokyo, and more recently at the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL).

A. Background

The case against Thomas Lubanga Dyilo arose from investigations conducted by the Office of the Prosecutor (OTP) in the Democratic Republic of Congo (DRC) since June 2004. The situation in the DRC was referred to the Court by the DRC Government in March of that same year. Thomas Lubanga was eventually surrendered to the Court in March 2006.

Mr Lubanga is charged as a co-perpetrator under Articles 8(2) (e) (vii) and 8(2) (b) (xxvi) of the Rome Statute with the war crimes of enlisting and conscripting children under the age of 15 years into the Forces Patriotique du Congo (FPLC), the military arm of the political party Union des Patriotiques Congolais (UPC), and using them to participate actively in hostilities during the Ituri conflict. Mr Lubanga was allegedly the President of the UPC from 2000 and, since 2002, the alleged leader of the FPLC.

The child soldier phenomenon

The ICC Prosecutor has been criticised by some non-governmental organisations (NGOs) for the limited charges against Mr Lubanga given the scope of the conflict in Ituri, DRC.⁴ The issue of the number of children engaged in combat has, however, increasingly become a matter of global concern. Of the estimated 300,000 children actively engaged in combat globally, some 120,000 are thought to be in Africa.⁵ Additionally there are undocumented numbers of children in rebel groups in Southeast Asia and South America.⁶

A prosecution for the offence of recruiting child soldiers and using them to participate actively in hostilities could potentially have an important deterrent effect on such crimes worldwide. Under the Rome Statute no distinction is made between the active recruitment of a child under the age of 15 years or their passive (or voluntary) enlistment. The *Lubanga* trial will provide an opportunity for the

⁴ See Human Rights Watch report 'Courting History', p63.

⁵ See Timothy Webster, 'Babes with arms: International Law and Child Soldiers', 39 *George Washington International Law Review* (2007), p 231.

⁶ Ibid.

Court to further develop the jurisprudence of the Special Court for Sierra Leone on the recruitment of child soldiers. Of particular interest will be the Chamber's interpretation of the role of girl soldiers.

Delays during the pre-trial phase

The *Lubanga* case has had an inauspicious journey through the Chambers of the ICC. Mr Lubanga spent three years in custody at the ICC before the start of his trial. During the pre-trial stage, administrative issues related to the allocation of resources under the Court's legal aid scheme and disclosure-related challenges led to extensive litigation and delays. Lead Counsel, Mr Jean Flamme, eventually withdrew for health reasons and Maitre Catherine Mabile was appointed and required time to familiarise herself with the case and compose a team.

Disclosure problems and challenges arising from the protection of witnesses created further delays before the Trial Chamber (TC or the Chamber). On 23 June 2008, the TC indefinitely suspended the proceedings and ordered Mr Lubanga's unconditional release on the basis that the prosecution had failed to disclose potentially exonerating material to the defendant or to the Chamber because of confidentiality restrictions.⁷ The Appeals Chamber confirmed the stay of proceedings but overturned the decision to release Mr Lubanga. The stay was finally lifted in November 2008 after information providers agreed to disclose most of the potentially exculpatory material to the defence and all of the material to the judges.

The IBA considers that the delays leading to the start of the *Lubanga* trial had a negative impact on the public perception of the ICC. The commencement of the trial on 26 January 2009 has helped to restore public confidence in the credibility of the Court. The Court is now expected to fulfil the defendant's expectations of fair and expeditious proceedings, the victims' expectations of expedited justice and the public's interest in open and transparent proceedings. The *Lubanga* trial is also the first real test of the ICC's technological, judicial, prosecutorial and institutional mechanisms in the context of a trial.

B. The first moments

The start of the *Lubanga* trial was a significant moment in international justice. For the first time in the history of international criminal proceedings, opening speeches were made not only by the prosecution and defence, but also by legal representatives of victims. Regrettably, the defence counsel's opening speech, which was postponed to the following day, was not broadcast in the DRC.

The Outreach Unit of the Registry later explained that arrangements had been made for a live public screening of the proceedings to be held in Bunia, the capital of Ituri in the DRC on the first day of the trial. The broadcasts were part of the Court's Communication Strategy for the trial which aimed to 'publicise the first trial at the ICC and to make the proceedings accessible to the general public

⁷ Under Article 54(3)(e) of the Rome Statute, the prosecution may obtain documents from information providers (such as the United Nations) on agreement that they remain confidential from other organs of the Court. The ICC Appeals Chamber has ruled that in cases where conflicts arise between the need to respect the confidentiality of materials and to comply with disclosure obligations to the defence, the matter should be resolved by the Trial Chamber. For an extensive discussion on the stay of proceedings in the *Lubanga* case and the use of Article 54(3)(e) please see the November 2008 IBA report, *The ICC under scrutiny - assessing recent developments at the Courts* at http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx.

and to the communities most affected by the crimes committed'.⁸ Arrangements were made with a local television station to facilitate this process. However, it was not anticipated that the opening of the proceedings would have gone beyond the first day. The local television station thus continued with its regular programme agenda as it had already devoted several hours to ICC programming the previous day.

IBA comments

Some persons consulted felt that the Outreach Unit had made a tremendous effort to ensure that the proceedings of the first day were broadcast, and therefore the developments with the defence speech were unavoidable. However, others considered that the Unit should have prepared for such an eventuality.

In our view, the failure to broadcast the defence speech was regrettable as it reportedly led to concerns about the partiality of the Court among Mr Lubanga's supporters on the ground. The IBA does agree that to some extent, the Unit should have prepared for the eventuality that the opening proceedings may have continued beyond the first day. Given the number of parties and participants in the proceedings it was more likely than not that this would have been the case. The IBA however commends the Unit for the efforts made to solve the problem including by making sure that the satellite feed for the second day was available.

C. Management of the proceedings

The judges of the TCs are required by the Statute and Rules of the Court to conduct fair and expeditious proceedings. At the time of writing, 17 witnesses had testified, including alleged former child soldiers, political, military and other witnesses as well as experts. The prosecution had presented documentary evidence, videos and recordings in support of its case.

The trial is proceeding at a robust pace. This seems to be largely attributable to the proactive and firm approach adopted by the Chamber. There is a clear sense of judicial management. Proceedings are being conducted expeditiously without undue delay caused by procedural issues. Most persons consulted by the IBA, including members of the international diplomatic community, were pleased at the efficiency of the proceedings so far.

On the prosecution's side, there was some concern at the decision to withdraw senior trial attorney Ekkehard Withopf from the case shortly before the commencement of the trial. The Deputy Prosecutor in charge of prosecutions, Mrs Fatou Bensouda, assumed leadership of the case in his stead. The IBA is assured that though a number of the team members are not at senior levels, they have been involved with the case since its inception. At this stage in the proceedings, the composition of the prosecutorial team does not appear to have had an adverse impact on its ability to conduct the case efficiently.

Indeed, defence concerns relate more to the prosecution's decision not to call certain witnesses included on its initial list. The prosecution contends that this decision has been prompted by the prevailing security concerns of some of its witnesses, and has indicated that those witnesses are

⁸ See Communications Strategy Trial of Thomas Lubanga at http://www2.icc-cpi.int/NR/rdonlyres/F8CB60B0-731D-41DB-9705-B45E20F0BE66/279608/Outreach_SP_Lubanga_ENGpdf.pdf.

available to be called by the defence. Given that under the Rome Statute the Chamber lacks any power to compel a witness' attendance to testify, getting those witnesses to testify on behalf of the defence could be problematic. The Chamber has thus far left the matter to be resolved between the defence and prosecution.

D. Treatment of witnesses

Very early in the proceedings, the prosecution's first witness (an alleged child soldier from the DRC) recanted his initial testimony, raising questions about the level of preparation he had received prior to testifying. The reason for the retraction was not clear.

The incident with the first witness highlights three complex issues that the *Lubanga* Trial Chamber has had to address: warning against self-incrimination, witness proofing/familiarisation, and protective measures. All of the issues potentially affect the fairness of the trials and efficient conduct of the proceedings.

1) Rule 74: self incrimination

Rule 74 of the Rules of Procedure and Evidence (RPE) is a complex provision that seeks to strike a balance between the interests of the international community to obtain information to facilitate efficient and successful prosecutions, and the risk that the persons providing such information could be subject to prosecution on account of their testimony. Finding the correct balance proved to be difficult during the work of the Preparatory Commission. According to one commentator, Donald Piragoff, 'it was an issue that took a year to resolve, where debate was often deadlocked.'⁹ An additional consideration was the extent of immunity offered – should it apply only to proceedings before the Court or should it also extend to national courts? Could it possibly be extended to national courts in any case? While the Court could limit subsequent use of the evidence vis-à-vis its own proceedings, it had no control over how others might use the evidence.¹⁰

Who should give the warning?

Following the developments with the first witness, the TC issued an oral ruling on the scope of the provision and on how it is to be put into practice.¹¹ The Chamber made it clear that notification did not have to be in a formal court setting administered by the Bench. The Chamber took into account the complexity of Rule 74 and the challenging experience faced by witnesses who are unaccustomed to the courtroom. The Chamber considered it sufficient for the notification to be given by a suitably qualified lawyer who was familiar with the Rome Statute and the relevant national law. Legal representatives of dual status victims/witnesses were tasked with dispensing the advice with the caveat that the process should not 'trespass into the area of witness proofing'. Additionally a lawyer was appointed by the Court with the express task of advising witnesses of their position under Rule 74, where they did not have a legal representative present in Court.

9 Donald K Piragoff, 'Chapter Four: Evidence' in Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Ardsey: Transnational Publishers, 2001), p349 at 391-396.

10 *Ibid.*

11 Transcript of 28 January 2008; available at www2.icc-cpi.int/iccdocs/doc/doc624554.pdf.

IBA comments

It is regrettable that the issue of self-incrimination was not fully explored prior to the commencement of the trial. Indeed, it is unclear why this was so. There were several hearings leading up to the trial and it would have been evident that, given the nature of the evidence and the background of witnesses expected to testify, the issue of self-incrimination was likely to arise. Clear judicial and policy determinations ought to have been made at that stage such that legal representatives of victims, the Victims and Witnesses Unit (VWU), the Office of the Prosecutor (OTP) and any other relevant organs of the Court would be suitably apprised of their responsibilities in that regard.

The IBA endorses the Chamber's ruling that sensitive, informed advice given by the legal representatives of the witnesses (or, where there is no legal representative present in Court, the ad hoc lawyer assigned to give advice) may allay witnesses' fears of future prosecution. The Chamber has, however, left it to counsel's discretion to explain the nuances of a very complex legal provision. While the Chamber's aversion to a strict formulaic approach to the advice that should be given to witnesses is understood given the variances in the circumstances of different witnesses, the absence of guidelines in this regard could be potentially problematic.

The IBA recommends that consideration be given to formulating guidelines for counsel who must provide advice to their clients on the issue of self-incrimination. In addition, it is recommended that the Registry includes this issue in its training for List Counsel in order to encourage a uniform approach to the provision of such advice.

The assistance of the VWU will be particularly important in formulating guidelines where such advice is being given to young or particularly sensitive witnesses (such as former child soldiers). In such cases, it may well be (as submitted by the prosecution) that if based on the law there is no reasonable prospect of prosecution, serious consideration should be given to whether a warning is indeed necessary.

2) Witness proofing and familiarisation

The practice of witness 'proofing' during which a witness is prepared for testimony by the party calling him/her, has been forbidden by both the Pre-Trial and Trial Chambers in the *Lubanga* case. The decision has marked a notable divergence from the practice of the international tribunals. The interpretation of the merits of the practice diverges radically between Courts and commentators, emphasising the inherent subjectivity of the issue.

In place of 'proofing', the judges in the *Lubanga* case have implemented the system of witness familiarisation which is to be carried out by a neutral entity, namely the VWU. The process is designed to create an atmosphere where witnesses are willing to testify without fear, discomfort or insecurity. As such the process includes the opportunity for the witness to read through their statement prior to testimony; a contact meeting with the party calling the witness and the other parties/participants; a psycho-social assessment; and familiarisation with the courtroom layout. The VWU indicates that the same familiarisation procedure would be carried out irrespective of the party calling the witness.

The experience at the tribunals

Prior to the establishment of the ICC, witness proofing occurred as a matter of established practice at the ad hoc tribunals.¹² It was determined at the ICTY that ‘proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial’.¹³ In the *RUF* trial at the SCSL, the TC noted that the purpose of proofing was ‘for counsel to discuss matters, including the witness’ proposed evidence, with the witness who has little experience appearing in court’.¹⁴ The Chamber stated that this was a legitimate practice which serves the interests of justice, particularly given the fact that many witnesses were testifying about traumatic events in a foreign and intimidating environment.

The ICC-Pre-Trial Court decision led to a wave of litigation at the ad hoc tribunals as defence teams sought to use it as a basis for seeking an order striking out the practice.¹⁵ At both the ICTY and ICTR, however, the practice of proofing was upheld, serving to emphasise the divide between the ad hoc tribunals and the ICC. Some commentators have strongly criticised the ICC’s failure to follow established and relevant law, asserting that the ICC’s approach serves to confuse the system and detract from the formation of a consolidated body of consistent international criminal legal principles.¹⁶

IBA comments

The IBA notes that the Chamber’s prohibition on proofing may have significant implications for the party calling the witness, given that there may be a considerable gap between the witness’ initial statement and the testimony in court. Cultural nuances and language barriers which are a feature of most international proceedings could add to this challenge.

At this stage in the *Lubanga* trial it is difficult to assess whether the prohibition on proofing has adversely affected the witnesses called by the prosecution. The prosecution opted not to appeal the decision when it was handed down. The defence fully support the Chamber’s decision, submitting that proofing is tantamount to ‘rehearsing’ a witness in advance of testimony and prevents them testifying spontaneously.

The IBA considers that given the Chamber’s prohibition on proofing, the process of familiarisation by the VWU becomes even more important. According to that Unit, preliminary feedback from witnesses who had been through the familiarisation process and had testified was positive. The decision of the Chambers in the *Lubanga* case cannot yet be considered a final determinant of the

¹² *Prosecutor v Limaj, Bala and Musliu*, Decision on Defence Motion on Prosecution Practice of ‘Proofing’ Witnesses, Case No. IT-03-66-T, 10 December 2004), at 2.

¹³ *Limaj*, *ibid.*

¹⁴ *Prosecutor v Sesay, Kallon and Gbao (RUF)*, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, Case No. SCSL-04-15-T, 26 October 2005.

¹⁵ *Prosecutor v Milan Milutinovic et al.* Case No. IT-05-87-T, Decision on Ojdanic Motion to Prohibit Witness Proofing, Trial Chamber, 12 December 2006. See *Prosecutor v Karemera, Ngirumpatse and Nzirorera*, Case No. ICTR-98-44-T.

¹⁶ As stated by several commentators, ‘the establishment of a coherent international concept of trial advocacy’. Ruben Karemaker, B Don Taylor III, and Thomas Wayne Pittman, ‘Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence’ 21 *Leiden Journal of International Law* (2008) 683. See also Boas G, *The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (2007), at 9: ‘[w]hile these tensions [between common-law and civil-law principles] were instrumental in the development of important aspects of international criminal law, it is now time to abandon the preoccupation of international criminal courts and tribunals with this dichotomy and embrace the newly created system of international criminal law as a jurisdiction in its own right.’

practice of witness proofing. The parties in the *Katanga and Ngudjolo* case may yet raise the issue before TC II, which could diverge from the *Lubanga* practice and instead choose the approach of the ad hoc tribunals.

3) Protective measures

The ICC's ability to provide adequate protection to witnesses is crucial to the Court's credibility. The Court has a general responsibility under Article 68 of the Statute to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. The TC may, as necessary prior to and/or during the trial, implement such measures as are necessary to provide for the protection of the accused, witnesses and victims.¹⁷

However, protective measures implemented by the Chamber have the potential to adversely affect the rights of the defendant to fair and expeditious proceedings. The IBA recognises the difficulty the Chamber faces in seeking to protect witnesses who testify and other persons potentially at risk on account of their testimony, and the right of defendants to open and transparent proceedings. Measures implemented by the Chamber must be necessary, proportionate and consistent with standards laid down in internationally recognised human rights law.

Nature of protective measures imposed

Since the start of the *Lubanga* trial, the Chamber has implemented a number of protective measures, including withholding information about witnesses' identity from the public; expunging the name and other identifying details from the public record; use of pseudonyms; and conducting parts of the proceedings on camera.¹⁸ Of the 17 witnesses, only two experts and one witness for whom protective measures were denied have testified without protective measures being implemented.¹⁹ Significant portions of the witnesses' testimony, including questioning by the defence, have been held in closed session.

Similar protective measures were imposed at the SCSL to facilitate testimony of former child soldiers or traumatised witnesses. According to the Witnesses and Victims Service (WVS) of the SCSL, 80 to 90 per cent (of a total of 518) witnesses testified with protective measures such as pseudonyms, screening, voice distortion and where the need arose in closed session. In some cases where the child soldiers or victims of gender violence were very traumatised the option of video link (voice link) was also used, in which witnesses testified from a separate room without facing the accused or going into the court room. In such cases only WVS support staff and other persons authorised by the Court were allowed to be with the witness in the room. The witness could however be viewed by the accused and

¹⁷ Article 64(6)(e) of the Statute provides that in performing its functions prior to trial or during the course of the trial, the Trial Chamber may as necessary...[p]rovide for the protection of the accused, witnesses and victims.

¹⁸ These measures are among those provided for in Rule 87 of the Rules of Procedure and Evidence.

¹⁹ Witness 43, a magistrate and President of the Tribunal du Grand Instance from the DRC, was called by the prosecution to testify concerning, among other things, his arrest in 2002 by UPC representatives. The witness applied for protective measures upon his arrival in The Hague on the basis that 'he was worried for himself and his family now that his evidence had become more concrete'. He requested face and voice distortion, a pseudonym, and the removal from the record of any information that may identify him, including his current employment and address. The application for protective measures was refused on the basis that the witness had been operating in a public capacity since his arrest, the accused had known for some time that he was going to testify on behalf of the prosecution and no threats had been made to him. The Chamber stressed the importance of the principle of open justice, noting that although important to take into account the subjective concerns of individual witnesses, any limitation to this principle must also be fully substantiated and objectively founded. See *Lubanga* trial Transcript 153-Eng pp58-65 at <http://www2.icc-cpi.int/iccdocs/doc/doc659934.pdf>.

other persons via monitors inside the court room.

Impact of protective measures on the defence

Although Mr Lubanga is able to view the witnesses from a monitor in the courtroom, the Chamber's resort to protective measures that prevent public scrutiny is troubling. The European Court of Human Rights has held that the public character of proceedings 'protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 67(1), namely a fair trial.'²⁰

Former ICTY Vice-President and Judge of the Appeals Chamber Florence Mumba has highlighted that whilst there may be need for limited exception to the right of a public trial, public hearings 'serve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on 'framed' trials, and giving the public a chance to suggest changes to the law or justice system.'²¹

The test of whether closed session is the appropriate measure as laid down in the *Milosevic* case at the ICTY is whether witness' fears are legitimate and well founded.²² Something more than a general expression of fear by the witness for their safety must be shown. Some specific reason must be established and the TC must be satisfied that the fear expressed has an objective foundation.²³ The risk in question must be sufficiently proximate to the witness.

IBA comments

The IBA considers that the fact that the defendant may be present during the closed session does not remove the possibility that closed sessions may be prejudicial to the rights and interests of the defence. First, closed sessions and protective measures can affect the public perception of the defendant's responsibility. For example, if the identity of the witness is protected, the defence will be forced to raise any issues concerning the credibility of the witness in closed sessions. Secondly, if a witness provides incorrect testimony in public session, there is a greater possibility that persons involved in the event in question will be in a position to identify the false testimony and offer to testify as a defence witness. This possibility will be eliminated if the public is unable to access key information pertaining to the testimony of the witness, for example the identity and physical appearance of the witness.

The IBA is mindful of the challenging circumstances of many witnesses who take significant risks to testify before the Court. However, the IBA is concerned that public perception of the trial and the defendant's right to open justice is being affected by the fact that much of the proceedings is conducted in closed session.

²⁰ ECHR, *Werner v Austria*, Judgement of November 24, 1997, para. 45.

²¹ Florence Mumba, 'Ensuring a Fair Trial Whilst Protecting Victims and Witnesses—Balancing of Interest', in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Richard May et al eds, 2001), pp359, 365.

²² *Prosecutor v Milosevic*, 'Decision On Third Prosecution Motion For Protective Measures For Sensitive Source Witnesses Testifying During The Croatia Phase Of The Trial' 23 September 2002, p2.

²³ *Prosecutor v Milosevic*. 'Decision On Prosecution Motion For Trial Related Protective Measures For Witnesses' (Bosnia), 30 July 2002, para 11.

4) Questioning of witnesses

The IBA is encouraged that the manner in which witnesses are being questioned during the *Lubanga* trial has allowed them to maintain their dignity and privacy, yet facilitates their ability to recount their story. In this regard we welcome the approach taken by the Bench and all parties and participants of questioning witnesses in a manner that avoids harassment or intimidation. The IBA takes note in particular of the Chamber's willingness to allow witnesses to testify in the manner most comfortable for them, such as by giving an uninterrupted narrative.

The IBA notes, however, that on occasion the prosecution has resorted to leading questions, to which the defence has strenuously objected. The TC delivered an oral decision specifically addressing the issue.²⁴ In order to ensure that questions are fair and that witnesses are allowed to testify spontaneously, the prosecution is urged to fully comply with the Chamber's decision in this regard.

Questioning by the Chamber

It is well known that questions asked by judges could give rise, however inadvertently, to a perception of judicial predisposition on certain specific issues in the case. Rule 140 (2) (c), gives the TC the 'right to question a witness before or after that witness is questioned by a participant'. The Chamber is authorised by Article 69(3) of the Statute to request the submission of all evidence that it considers necessary for the determination of the truth. In the *Lubanga* case, the judges have not thus far extensively questioned witnesses, however given the clear provision of Rule 140, the Chamber's authority to question witnesses is well-founded.

However, it has been noted that questions concerning the role of girl soldiers were posed to some witnesses by one of the judges. Regrettably, a few of the questions appeared to be definable as 'leading'.²⁵ Though the Chamber has chided prosecuting counsel for asking leading questions, it would appear that similar strictures are not applied to questions posed by the judges. It is arguable that the underlying rationale of the Court's oral decision on leading questions – the need to avoid influencing or pre-empting the content of the witness's response – applies with even more force to questions posed by the judges.

²⁴ Presiding Judge Fulford: 'Good. One final matter for reflection overnight is the issue of leading questions on the part of the Prosecution when witnesses are being asked questions by the Prosecution, and these are witnesses who you have called. This is a thought for your consideration, Ms Bensouda. Given that for the reasons that Maitre Mabille explained at the end of last week, no firm lines of defence, indeed no lines of defence at all have been identified, and there has been no indication as to what matters are in issue, it may be best to proceed on the basis that matters of identity, general background, where people were born, where they were educated, the circumstances of their past life, matters of that kind are probably the areas where leading questions will not be inappropriate. However, when it – when we come to the point in the story, particularly of those who were former child soldiers or who give evidence about what happened to them, then a greater degree of caution should be exercised and the presumption should be that the witness should really give the evidence without the kind of artificial prompting by the Prosecution which would be entailed by leading questions. Now, that is a general suggestion for you to reflect on. It may be, I don't know, that before particular witnesses are called if there are particular issues which are in dispute which are brought to your attention by Maitre Mabille, then a sensible device would be to avoid leading in those areas, but we'll have to see how this unfolds'. Transcript of 26 January 2009, pp72-73

²⁵ Judge Odio Benito: 'You said that the orders given by the commanders entailed taking girls by force that is, "raping them and taking them to the place where we lived." Could you explain to us a little bit more about that? That means that you took these women and girls and brought them to your camp? Could you explain a little bit?'

A. 'We would take them from their parents and take them to a place, a place that we would find where we could do those things, and after that we would free them.'

Judge Odio Benito: '**Or perhaps you also killed them?**' [Emphasis added]

A. 'No, we didn't kill them.'

See *Lubanga* trial transcript 138, p21 lines 14-23 at <http://www.icc-cpi.int/iccdocs/doc/doc649086.pdf>.

The ICTY example

At the ICTY judges are permitted to call additional evidence and question witnesses in the same manner as judges at the ICC.²⁶ In the *Celebici* case, the TC held that it had discretion to put questions to a witness in order ‘to clarify issues which remain unclear after an answer by the witness’.²⁷ The decision suggests that questioning of witnesses by the bench should be primarily for clarifying ambiguities, and not for eliciting new evidence or to pursue new lines of inquiry which were not pursued by either the prosecution or the defence.

The manner in which the Chamber has questioned witnesses has also been challenged before the ICTY in the *Hadzihasanovic* case and the *Prlic* case.

In the *Hadzihasanovic* case, the defence first indirectly raised the issue, by filing a ‘Motion Seeking Clarification of the TC’s Objective in its Questions Addressed to Witnesses’, dated 7 January 2005. The defence argued that the power of the Chamber to put questions to witnesses was linked to their power to ensure a fair determination of the issues, and therefore sought clarification as to how certain categories of questions were conducive to this aim – that is, questions concerning issues which had not been raised by either party.

The Chamber in that case referred to the procedural safeguards which it had put in place to ensure that judicial questioning did not prejudice the parties – such as by allowing the defence to conduct further questioning after the judges’ intervention, and by taking the defence motion into consideration when deciding upon the probative weight of the witness’s evidence at the end of the case.

IBA comments

The IBA is satisfied that procedural safeguards are in place to ensure that questions asked by the judges are fair – such as ensuring that the defence is given the opportunity to further question witnesses. However, the IBA is concerned that questions posed that are suggestive of the answer could be unfair to the defence and may not always be rectified by the fact that the defence is given the last word. While we welcome the Chamber’s rigour in ensuring that it has all relevant evidence necessary ‘to establish the truth’, the IBA cautions against questioning of witnesses in a manner that may inadvertently be unfair to the defendant.

E. Defence issues

Equality of arms

The start of the *Lubanga* trial has brought into focus the issue of equality of arms for the defence. The issues discussed above namely protective measures, publicity of proceedings and questioning of witnesses directly impact the fair trial guarantees provided to the defendant under Article 67(1) of the Rome Statute. In addition to these issues consideration must be given to whether the defence has adequate resources to conduct a proper defence.

²⁶ Rule 98 of the ICTY Rules of Procedure and Evidence.

²⁷ *The Prosecutor v Delalic et al*, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, 1 May 1997, <http://www.icty.org/x/cases/mucic/tdec/en/70501DE2.htm>.

The Office of Public Counsel for Defence

The IBA notes that the Office of Public Counsel for the Defence (OPCD) in keeping with its mandate under Regulation 76 of the Regulations of the Court has provided substantive legal research and support to the Lubanga defence team. Given the daily length of proceedings, the defence team has very little time or resources to carry out research to be able to respond in a timely manner to legal issues as they arise. In order to facilitate this assistance, the Chamber has permitted the OPCD to have real time access to the proceedings from their offices.

The OPCD's role in this regard is similar to that of the legal advisory section of the Office of the Prosecutor and is an important step in ensuring equality of arms for the defence. In the IBA's view, equality of arms does not necessarily refer to equality of means. Equality of arms simply requires that the defence should never be placed at a 'substantial disadvantage' vis-à-vis the prosecution in terms of its ability to present its case. Given the limitations on the size of the defence team due to constraints under the Court's legal aid budget, the supporting role of the OPCD is crucial to filling the gap.

The IBA is of the view that in order to fulfil its mandate, the OPCD must be adequately staffed. During the meeting of its seventh session, the Assembly of States Parties (ASP) approved a P4 (senior level) position on a general temporary assistance (GTA) basis for the office. The IBA is aware that the issue will be reconsidered by the Committee on Budget and Finance (CBF). The IBA reiterates its recommendations made in its monitoring report – *The ICC Under Scrutiny: Assessing recent developments at the International Criminal Court*²⁸ - that the P4 (senior level) position should be approved on a permanent basis. Given the likelihood of a second trial in 2009,²⁹ the limited resources of the OPCD will be severely tasked without this additional position.

Disclosure

In its opening statement the defence expressed concern at the impact of the late disclosure of confidential material that had previously been subject to restrictions under Article 54(3)(e). Of greater concern was the fact that up to the start of the trial the defence did not have access to the annexes to the TC's decision which allowed the prosecution to disclose the confidential material in a restricted manner.

The IBA regrets the delay in this regard given that the non-disclosure of confidential material had led to the stay of proceedings in the case. The IBA is concerned that the late disclosure of the potentially exculpatory confidential material may have affected the defendant's ability to properly prepare his case and conduct an effective defence. Indeed, the defence may not even have had a full opportunity to decide whether to seek leave to appeal the Chamber's decision to retain some redactions and impose what in its view were appropriate counter-balancing measures.

The residual effect of the Article 54(3)(e) confidentiality issue may yet create challenges for the defence at a later stage in the trial. The defence may wish to rely on the evidence, seek additional information or question witnesses based on the confidential material but would however be prohibited from doing so under Rule 82 of the Rules of Procedure and Evidence, which could have a significant impact on its case.

²⁸ This report can be accessed at http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx.

²⁹ Trial Chamber II has set a trial date of 24 September 2009 for the commencement of the *Katanga/Ngudjolo* case.

Anonymous victims

The Chamber has determined that victims that have chosen to remain anonymous will have less opportunity to actively participate, such as by questioning witnesses called by the prosecution. This was intended by the Chamber to safeguard the interests of the defendant who is entitled to know and be able to confront those who allege that they have suffered harm arising from the charges against him.

But this distinction has little practical significance. In reality, the victims are not divided amongst representatives on the basis of their status. Legal representatives may simultaneously represent victims who choose to remain both anonymous and non-anonymous. In such circumstances it will be difficult for defence counsel to challenge questions asked on behalf of anonymous victims as these could also be legitimately raised by the legal representatives on behalf of those whose identities have been disclosed.

The IBA urges the Chamber to be vigilant in ensuring that victims who have remained anonymous do not inadvertently benefit from the same participatory rights as the non-anonymous victims. In our view, if this is not done then the distinction in the modalities of participation for each category of witnesses will have no practical significance.

Opportunity to confer with defendant

Defence counsel has requested additional time to confer with their client at the end of the day. The IBA understands from the Registry that in principle the defence can confer with the defendant up to 8pm each day at the detention centre. However, as the detention centre is some distance from the Court, the defence request additional time after court to speak with their client at the seat of the court before he is transferred to the detention unit. The Registry has indicated that although it has tried to be as flexible as possible on this issue, for security reasons the defendant cannot remain at the seat of the court beyond a stipulated time; he must be transported to the detention centre. This rule, it advises, applies to all defendants.

The IBA welcomes the Chamber's consideration of ways in which to facilitate increased access to Mr Lubanga for the defence team at the end of the day.

F. Victim participation

The participation of victims at the ICC is an important innovation of the Rome Statute. Under Article 68(3) of the Rome Statute, victims whose personal interests are affected and who have suffered harm as a result of crimes within the Court's jurisdiction may be permitted to present their views and concerns during the proceedings. The IBA welcomes the historic opportunity for victims to participate in the *Lubanga* trial. In our view, the participation of victims is a fulfilment of one of the main goals of the Rome Statute.

The TC in the *Lubanga* case set out the modalities of participation at the trial stage in its decision on

18 January 2008. The TC ruled that the harm suffered could also include indirect harm,³⁰ and that victims could lead evidence pertaining to the guilt or innocence of the accused and could challenge the admissibility or relevance of evidence. The Appeals Chamber ruled (overturning the decision of the TC on this point) that participating victims must show a link between the charges against Mr Lubanga and the harm suffered by the victim.

Challenges in preparation

The ability of victims to participate in the *Lubanga* trial has raised its own unique challenges. For example, although the stay of proceedings was lifted in November 2008, it was not until 15 December that the Chamber ruled on pending applications to participate. The legal representatives concerned were thus hampered in the timely preparation for questioning witnesses in the trial as access to the prosecution's list of witnesses and the case record was only available to them once their status had been determined by the Chamber.

The IBA regrets that access for legal representatives to relevant material in the case record was delayed. The IBA notes, however, that this has not prevented the legal representatives from questioning witnesses where necessary.

Questioning of dual status victims

Defence questioning of dual status victims/witnesses during the *Lubanga* trial has revealed inconsistencies between the information contained in the victims' applications to participate, the statement given to OTP investigators and their testimony in court. There have been at times markedly divergent accounts of the same incident contained in different documents.

This is a matter of concern for some legal representatives who indicate that the circumstances under which applications for participation are made are less than ideal. In their view, it is not surprising that there are inconsistencies between the application form and a witness' statement because the questions asked by an investigator for the purpose of establishing a case may differ from those asked by an intermediary who lacks a legal background and who may omit important details from the application to participate.

The Office of Public Counsel for Victims

The IBA notes that there appears to be some concern on the part of legal representatives for victims regarding the Chambers' interpretation of the mandate of the Office of Public Counsel for Victims (OPCV). This issue goes beyond the *Lubanga* case as the office has been appointed to represent victims in other cases and situations before the Court.

The appointment of the OPCV to represent victims is consistent with the Court's legal texts. The office has a dual mandate: under regulation 80 of the Regulations of the Court (the Regulations), the Chamber may appoint the OPCV to represent victims; however, under regulation 81 the office is also tasked with providing substantive legal support and advice to the legal representatives of victims.

³⁰ The Chamber has since ruled, however, that indirect victims who have suffered harm as a result of the conduct of alleged child soldiers recruited by the UPC were not eligible to participate in the trial. See Redacted version of 'Decision on indirect victims' ICC-01/04-01/06 8 April 2009.

However, the practical implications of the OPCV's appointment appear to be a matter of concern. It is felt by some legal representatives that the legal support mandate of the office should be its primary focus and less emphasis should be placed on acting in a representative capacity for victims. In its view, the full involvement of the office in the *Lubanga* trial proceedings as well as other cases before the Court tasks the already limited resources of this office and is not sustainable. Additionally, it is felt that there is the risk that the representation of victims could become institutionalised which defeats the objective of encouraging external counsel to sign up to the ICC's list of counsel. Counsel are also concerned that the approach of different Chambers to the appointment of the OPCV or the legal representatives lacks consistency.

The IBA notes that in the *Lubanga* case, the TC allowed the OPCV to continue to represent dual status victim/witnesses whom they had previously represented during the pre-trial phase. Thus the principal counsel and other senior legal officers from the office are in court daily for the hearings. The principal counsel has indicated however that she has effectively organised her staff to ensure that no aspect of the office's mandate is compromised and that the office has always responded in a timely manner to Counsel's request for assistance.

The IBA considers that this matter is of some concern and needs to be resolved in a timely manner. The IBA encourages dialogue between the legal representatives and the OPCV on this issue during which frank exchanges about specific concerns may be ventilated. The respective Chambers are also encouraged to ensure that there is some consistency in the appointment of the OPCV vis-à-vis legal representatives for victims.

Security of legal representatives

The legal representatives for victims have repeatedly raised the issue of their security to the Chamber. The Chamber ordered the Registrar to examine the issue, including by consulting with the DRC as to necessary steps that could be taken to ensure the security of counsel.

One legal representative of victims from the Congo revealed that the threats had increased since the commencement of the *Lubanga* trial as the lawyers representing victims had become even more visible. The Registry representative indicated, however, that their interviews with the legal representatives concerned did not disclose the existence of security risks which could justify the Chamber's intervention (even if a legal basis existed).

The IBA notes that the ICC's legal texts do not specifically address the issue of the protection of legal representatives of victims. As such, any efforts by the Court in this regard would be a matter of policy. The IBA recommends that this matter continues to be a source of dialogue between the Court, legal representatives and key stakeholders.

G. Translation and interpretation

The issue of translation and interpretation created some challenges during the period under review in the *Lubanga* trial. The IBA recognises that interpretation is an intense, exhausting activity.³¹ It is even more challenging in the highly specialised and demanding context of international criminal

³¹ See Joshua Karton, 'Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony', 41 *Vanderbilt Journal of Transnational Law* 1 2008, p30.

proceedings where most proceedings involve at least three languages: French, English and the native language of the defendant and/or victims and witnesses.³² The multi-cultural nature of international trials also creates additional challenges for interpreters who are often not familiar with cultural nuances and colloquial expressions.

Inaccuracies in interpretation

Following the first half of the testimony of the first witness called by the prosecution, the defence counsel were alerted by the defendant to inaccuracies in the interpretation from Swahili to French. The prosecution also expressed concerns regarding the record of the interpretation noted in the transcript. The Chamber proposed a solution whereby the parties who noted the difficulty could confer with the interpreters with a view to rectifying the situation. A report was also subsequently provided to the Chamber. Defence counsel noted that the significant effort required to check the transcript was extremely time-consuming and an unfair burden on the defendant whose primary concern is to focus on the testimony of the witnesses.

The IBA agrees with this conclusion. Whilst there may be occasions on which the defendant is able to identify translation errors, ideally the defendant should be focusing on the substance of the witness's testimony, and cannot be expected to regularly audit the accuracy of the interpretation. Rule 42 of the RPE requires the Court to arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and Rules. The Registrar is tasked with the responsibility of ensuring that there is interpretation of all proceedings into English and French (or any other designated working language) and for the language of the accused person if he does not speak any of the working languages.³³

The Court Management Unit

The Court Management Unit (CMU or 'Unit') of the Registry which has responsibility for interpretation and translation services identified a number of factors which may have led to some of the challenges that arose in the trial. These include the number of languages involved; the nuances of the local languages and dialects; the implementation of protective measures such as voice distortions; lack of diligence by persons in court using technical equipment (such as poor microphone use); and the need for parties to modify behaviour to facilitate interpretation (such as speaking in slow, measured tones, waiting until the interpretation of one speaker is complete before another person continues).

The Unit considered that, generally speaking, the technical problems experienced in the *Lubanga* trial so far have been relatively minor. The CMU pointed out that the minor challenges did not appear to affect the expeditiousness of the trial and that, with continuous review, improvements were expected over time.

The IBA was assured that the Court has the technical capability to conduct efficient proceedings including hiring and training experienced interpreters. Indeed, the CMU pointed out that experienced interpreters at P3 and P4 (mid and senior) level positions, many of whom had formerly

³² Ibid p35.

³³ See Regulation 40 (2)(a) and (b) of the Regulations of the Court.

worked at the ad hoc tribunals, have been hired. It is understood that they are further trained at the ICC. However, the Court's retentive capacity has been poor. The IBA understands that some of the trained interpreters have since been recruited by the Extraordinary Chambers of the Court of Cambodia, the Special Tribunal for Lebanon and the United Nations (UN) in New York.

The Chamber's approach

The TC's preliminary approach to the issue is encouraging. The Chamber's oral response to defence counsel's concern proposed several options for the party disputing the accuracy of interpretation. First, the Chamber stressed that interpreters must provide full interpretations and not summaries of what was said. Secondly, if an interpreter does not initially hear what was said by a witness (and thus fails to translate it) but confirms what was said on subsequently listening to the tape of the testimony, the interpreter is now authorised to amend the official transcript in that regard. Importantly, where there are disagreements emanating from any side, these are to be investigated and resolved.

IBA comments

The IBA considers that whilst it is encouraging, the Chamber's decision could extend even further. In light of the fact that Article 67(1) (f) ensures the right of the defence to have the assistance of a competent interpreter, and such interpretations as are necessary to meet the requirements of fairness, the Chamber has an independent obligation to ensure the accuracy of the interpretation and that translations meet the necessary standards for a fair trial. This is also consistent with the Chamber's duty to adjudicate the 'truth' – the truth cannot and should not be based on translation and interpretation errors. In this regard, the Preparatory Committee on the Establishment of the ICC envisaged that the 'President [of the Chamber] should play an active role in guiding the trial proceedings by conducting the debate and monitoring the manner in which evidence for or against the accused was reported.'³⁴ The Presiding Judge/Chamber can therefore *of its own motion* request a review of the accuracy of the transcripts/exhibits if it has grounds to believe that there may be errors.³⁵

The IBA also considers that procedural safeguards such as regular verification of the accuracy of the interpretation and transcription by the Registry's translation/interpretation services are key. This is consistent with the practice at the ICTY in which there is an established procedure whereby the parties can regularly request the Registry's translation services to conduct a review of the accuracy of the transcripts.³⁶ The parties do not need to prove in advance that there has been a mistranslation; they merely need to submit a form detailing the dates of the relevant transcripts. The IBA understands from the CMU that this process of review takes place.

As one commentator noted, in many ways, including linguistically, the ICC presents new and greater challenges. While the ad hoc tribunals' jurisdiction is contained to specific conflicts and thus to specific language groups, the ICC's jurisdictional reach is much wider.³⁷ While it is incumbent on

³⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, I, paragraph 265 GA/OR, Fifty-First Session, Supplement No. 22 (A/51/22 and Add. 1).

³⁵ *Prosecutor v Hadzihasanovic*, Trial Judgement 15 March 2006 paragraph 304-306.

³⁶ *Prosecutor v Seselj*, 'Decision on the Accused's Motions Concerning the Quality of Interpretation (Submissions 352, 354 And 366)' 15 July 2008, p6 <http://www.icty.org/x/cases/seselj/tdec/en/080715.pdf>.

³⁷ Ibid 31.

all the parties and participants to point out inaccuracies in the record which they are aware of, the Registry bears the responsibility of ensuring that all that can be done to minimise inaccuracy – such as by constant reviewing the record – is done. As the final arbiter of the facts, the onus lies on the Chamber to ensure the qualitative outcome of the proceedings.

H. Transcripts and summaries

The regulations of the Court provide that real time transcripts of hearings shall be provided in at least one of the working languages of the Court to the extent technically possible.³⁸ The regulations make it clear that the transcripts constitute an integral part of the record of the proceedings.³⁹ During consultations the CMU pointed out that the ICC's technical capabilities in this regard were far advanced to even those at the ad hoc tribunals.

The IBA notes with concern that transcripts of the proceedings are not posted in a timely manner on the Court's website. The delay appears to be occasioned in part by the review process arising from disputed interpretations. The CMU indicated that the Unit's priority is to ensure the accuracy and availability of transcripts for the parties, participants and the Court to facilitate the efficient conduct of proceedings; the public access to transcripts is thus a secondary concern. The Unit did not appear to be aware that a number of transcripts were still not publicly available on the Court's website.

While the IBA agrees that the judges and parties to proceedings should be given priority in relation to transcripts, the importance of ensuring that this 'integral record of the proceedings' is also publicly available should not be overlooked. Given the extent of protective measures implemented in the *Lubanga* case, including closed session hearings, it is difficult for members of the public to carefully follow proceedings; they should be able to review the Court's official records as soon as possible. This is also an important component of the principle of open justice and the need for the Court to conduct transparent and publicly accessible proceedings.

The IBA urges the CMU and all other relevant organs of the Court to ensure that once the review process has been completed and accuracy of the record verified, transcripts of the proceedings are posted on the Court's website as soon as is reasonably practicable.

Summaries

Summaries of proceedings are an important public information tool capable of informing members of the public about the ongoing trial proceedings in a succinct manner. The IBA notes that currently audio-visual summaries of the proceedings are produced by the Public Information and Documentation Section (PIDS). These have proved to be a useful and effective outreach tool and the IBA urges the Registry to ensure that the necessary resources are allocated so that the production of audio-visual summaries can continue.

However, no written summaries are produced by the ICC for public dissemination. The TC suggested that it compile a short and balanced summary of each witness' evidence that will be made available to PIDS for publication. The views of the parties were canvassed. While agreeing that such summaries would be beneficial, it was generally felt that given the importance of judicial independence and

³⁸ See Regulation 27 of the Regulations of the Court.

³⁹ Subsection 2 of Regulation 27.

impartiality, the summaries should not be issued by the Chamber. The prosecution suggested that it was not a matter requiring judicial determination but dialogue between the Registry, defence and the legal representatives of victims.

Practice at the tribunals

As noted by the prosecution, the practise at the SCSL and ad hoc tribunals varies from the filing of advanced evidence summaries (initial ICTY approach); trial minutes (SCSL); to short weekly updates on the proceedings before the court (current ICTY approach to cope with the volume of cases). The prosecution was of the view that the adoption of the SCSL or the ICTY practice would eliminate any need for litigation on this matter.

Consultations with PIDS and CMU on this issue indicate that dialogue is still ongoing. It appears that no consensus has been reached as to the most feasible approach to be taken that will ensure that accurate summaries are produced in a timely manner. The Units indicate that consideration had been given to the approach at the SCSL and the ICTY, but neither was fully suited to the ICC context and each had disadvantages.

IBA comments

The IBA welcomes the inter-organ dialogue on this important issue. There is no doubt that for the public, advanced notice of witnesses to be called and their likely testimony would be an effective communication tool, thus enhancing the public nature of the trial as provided by Article 64(7) of the Rome Statute. Given the importance of summaries as an outreach and public information tool, the IBA urges the relevant parties to arrive at a consensus in a timely manner. This may well mean implementing a pilot project to test either the SCSL or the ICTY approach in order to assess its feasibility in the context of the ICC.

General conclusions

The start of the ICC's first trial is an important milestone for the Court. To affected communities and the world at large, the ICC has moved beyond mere procedural decisions to its core mandate of trying the most heinous crimes of concern to the international community. The *Lubanga* trial is likely to set important precedents for the conduct of similar cases before the ICC. However, the jurisprudence on several issues is far from settled – for example, other Chambers may depart from the *Lubanga* decision on witness proofing or Rule 74 (self-incrimination).

The IBA is encouraged by the pace of judicial proceedings. The firm, decisive approach of the Chamber augurs well for the future of the trial. Despite the initial challenges related to disclosure of confidential material and the protection of witnesses, the prosecution is to be commended for its efforts to facilitate the efficient and fair conduct of proceedings. The IBA is also encouraged by the general treatment of witnesses by the judges, parties and participants. Thus far, there has been no specific indication that witnesses have been harassed or re-traumatised as a result of their testimony before the Court. In this regard, the IBA notes that, with the exception of the special circumstances surrounding the testimony of the first witness, the familiarisation process being implemented by the VWU appears to be successful.

The start of the trial has raised public awareness of and interest in the phenomenon of the recruitment and use of child soldiers - which may have an important potentially deterrent effect. However, significant portions of the proceedings are conducted in closed session due to prevailing security concerns. The Chamber's mandate to protect witnesses will have to be carefully weighed against the defendant's right to open justice. While a difficult balancing exercise for the Chamber, the IBA reiterates that it is crucially important for the Court's credibility that the trial is open and transparent. This is also an important component of Mr Lubanga's fair trial rights.

The IBA is pleased that victims have been afforded an opportunity to participate in the *Lubanga* trial, an important milestone achievement in international criminal justice. It is still to be seen whether victims will seek to lead evidence to establish Mr Lubanga's guilt or innocence and what implications this will have for the defence's case.

Though significant progress has been made, the IBA is conscious that difficulties remain. At the completion of the trial, the most significant legacy of the *Lubanga* case must be that, even though it was the ICC's first trial, it was conducted fairly and expeditiously.

A summary of the recommendations made concerning the *Lubanga* trial is provided at Chapter V of the report.

Chapter III

The Case of Sudanese President Omar Al-Bashir

Introduction

The landmark decision by Pre-Trial Chamber (PTC or Chamber) I of the ICC to issue an arrest warrant for President Omar Hassan Ahmad Al-Bashir (hereafter President Al-Bashir or Al-Bashir) of Sudan raises interesting and complex legal issues. The warrant is the International Criminal Court (ICC)'s first-ever for a sitting head of state. The decision has led to intense debate on several fundamental issues including: the jurisdictional implications of a United Nations Security Council (UNSC) referral; immunities for heads of state; and cooperation under the ICC regime. The Chamber's decision has also had significant political repercussions.

The Prosecutor's request for the arrest warrant has been criticised by different persons.⁴⁰ Many of the critics were concerned by the prosecution's decision to include genocide among the charges, the timing of the application and the decision to make the application public. The warrant has also revived the peace versus justice debate and exacerbated latent concerns that the Court is disproportionately targeting the continent of Africa.⁴¹

Background

The International Commission of Inquiry on Darfur (the Commission) was established by former United Nations (UN) Secretary-General Kofi Annan pursuant to UNSC resolution 1564. The Commission reported to the UN in January 2005 that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur, Sudan and recommended that the situation be referred to the ICC. Sudan is not a party to the Rome Statute.

On 31 March 2005, pursuant to Resolution 1593, the UNSC determined that the situation in Darfur, Sudan continued to constitute a threat to international peace and security and, acting under Chapter VII of the UN Charter, referred the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. The Prosecutor opened the first investigations in June 2005. Two arrest warrants were issued by the PTC for two alleged perpetrators namely Ahmad Harun, Minister of Humanitarian Affairs and Ali Kushayb, alleged leader of the government allied Janjaweed militia. Both warrants remain outstanding.

40 See for example, Christopher Gosnell, 'The Request for an arrest warrant in Al-Bashir: Idealistic Posturing or Calculated Plan', *Journal of International Criminal Justice* 6 (2008), pp841-851; Andre Cayley, 'The Prosecutor's Strategy in seeking the arrest of Sudanese President Al-Bashir on Charges of Genocide', *Journal of International Criminal Justice* 6 (2008) pp829-840; Brauman R, 'The ICC's Bashir Indictment: Law against Peace', *World Politics Review*, 23 July 2008 available at <http://www.worldpoliticsreview.com/article.aspx?id=2471> (accessed May 2, 2009).

41 See for example Alex deWaal, 'The ICC, Sudan and the Crisis of Human Rights', blog entry on African Arguments Online at <http://africanarguments.org/2009/03/the-icc-sudan-and-the-crisis-of-human-rights/> (accessed May 2, 2009).

In July 2008, the Prosecutor announced his intention to apply for an arrest warrant against President Al-Bashir for his role in allegedly using the state apparatus to facilitate the commission of war crimes, crimes against humanity and genocide of the civilian population in Darfur. On 4 March 2009 PTC I issued an arrest warrant for President Al-Bashir for five counts of crimes against humanity and two counts of war crimes.⁴² The majority of the Chamber (Judge Anita Ušacka dissenting) declined to issue the arrest warrant for the crime of genocide on the basis that the material provided by the prosecution in support of its application failed to demonstrate the specific intent to establish genocide.⁴³ The majority of the judges noted that the prosecution was at liberty to seek an amendment to the arrest warrant to include the charges of genocide if following further investigations they obtained additional evidence which could establish genocidal intent.⁴⁴

Under Article 6 of the Rome Statute, the crime of genocide refers to the commission of certain acts, including killing or causing serious bodily harm with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The definition is further elaborated in the Elements of Crime.⁴⁵ While there may be evidence of physical acts which could constitute genocide, the specific intent to commit genocide (or genocidal intent) is seen as the most difficult element of the offence to establish.

A. The genocide charges

The inclusion of genocide charges against President Al-Bashir has been one of the most controversial aspects of the prosecution's case.⁴⁶ In its report, the Commission on Darfur concluded that 'the government of the Sudan had not pursued a policy of genocide'.⁴⁷ The Commission found that while two elements of genocide might arguably be deduced from the gross violations of human rights perpetrated by government forces and the militias under their control, 'the crucial element of the genocidal intent appeared to be missing, at least as far as the central government authorities were concerned'.⁴⁸ The Commission did note, however, that the ultimate decision as to whether governmental officials in Darfur acted with the requisite genocidal intent was a matter for the determination of a competent court on a case-by-case basis.

The judges' decision

The prosecution did not adduce direct evidence to support the genocide charges, asking the Chamber to draw reasonable inferences or conclusions from the evidence presented. The PTC examined evidence presented by the prosecution of an alleged strategy by the Sudanese government

42 ICC 02/05-01/09 Decision on Prosecution's Application for an Arrest Warrant against Omar Hassan Al Bashir, 4 March 2009.

43 Ibid.

44 Ibid.

45 The Elements of Crime (the Elements) is designed to 'assist the Court in the interpretation and application of articles 6, 7 and 8 of the Rome Statute.' The Elements elaborates on the definition of genocide in Article 6 by providing among other things that the prosecution must prove that 'the victims belong to the targeted group; the conduct took place in the context of a manifest pattern of similar conduct directed against [the] group or was conduct that could itself effect such destruction; and that the perpetrator acted with the intent to destroy in whole or in part the targeted group.'

46 See for example, Andrew Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide', at <http://jicj.oxfordjournals.org/cgi/reprint/mqn071?ijkey=NrNWGXcGEo5XDB1&keytype=ref> (last accessed May 4, 2009). The article was published prior to the decision of the PTC. Andrew Cayley, a former senior trial lawyer in the Office of the Prosecutor, contended that the evidence presented by the prosecution did not point specifically to a genocidal campaign and could equally have been part of a cruel counter-insurgency campaign by the government of Sudan.

47 Available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf at p4.

48 Ibid.

to deny and conceal the commission of crimes in Darfur, official government documents and official statements purportedly made by President Omar Al-Bashir. The majority of judges found that the evidence provided indications of President Al-Bashir's individual criminal responsibility for war crimes and crimes against humanity but not of an intent to commit genocide.

The majority of the PTC determined that the evidentiary 'standard [for genocide] would be met only if the materials provided by the prosecution in support of its application show that the **only** reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a specific intent (by the Government of Sudan) to destroy in whole or in part the Fur, Masalit and Zaghawa groups [emphasis added].'⁴⁹ Therefore, if the existence of genocidal intent is only one of several reasonable conclusions that could be drawn from the materials submitted by the prosecution then the prosecution had failed to meet the evidentiary standard required under Article 58 of the Rome Statute (the provision governing arrest warrants).⁵⁰

The dissenting judge was of a contrary view, finding that the position of the majority that genocidal intent is the **only** reasonable inference available on the evidence creates a much higher standard of proof more suited to the trial stage of the proceedings (proof beyond reasonable doubt) and not to an application for an arrest warrant.⁵¹ In the judge's opinion, given that each stage of proceedings at the ICC requires a different standard of proof, the prosecution need not demonstrate that such an inference is the **only** reasonable one at the arrest warrant stage (the first stage).⁵²

Interlocutory appellate review

The prosecution has since applied for leave to appeal the Chamber's decision in relation to the genocide charges. Though mindful of the statutory requirements for interlocutory appellate review, the IBA is in favour of an interlocutory appeal of the genocide charges given the strong dissent and particularly as this is the first case before the ICC in which genocide is alleged.⁵³ The IBA considers that interlocutory review by the Appeals Chamber could provide much-needed clarity concerning the inferences to be drawn in cases of this nature at the arrest warrant stage of proceedings. The IBA recalls that the appeal by the Prosecutor in the case of Bosco Ntaganda from the Democratic Republic of Congo (DRC) allowed the Appeals Chamber to provide clarity on key issues such as the gravity threshold.⁵⁴

However, the question now arises as to who should participate in an appeal (if granted). The public nature of the arrest warrant raises the issue of whether the defence (and perhaps the victims) should have an opportunity to respond to the prosecution's application for leave to appeal. Given that all

49 Decision, para. 158.

50 Decision, para. 159.

51 Decision para 31.

52 Decision para 32.

53 Interlocutory appeals are provided for under Article 82(1)(d) of the Rome Statute and will only be considered if the party seeking leave establishes that the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Chambers an immediate resolution by the Appeals Chamber would materially advance the proceedings.

54 See Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest', Article 58.

<http://www2.icc-cpi.int/iccdocs/doc/doc183559.pdf> It is not entirely clear why the judges write such detailed and lengthy decisions at this stage given the limited nature and low evidentiary threshold of Article 58. It may be attributable to the fact that the Court is still in its infancy and is making determinations concerning novel legal and procedural issues. There were no Pre-trial chambers at the ad hoc tribunals for example so the process was much different..

prior arrest warrant applications were made ex-parte and under seal, the issue never arose. The Bosco Ntaganda warrant application was ex-parte and under seal, as was the appeal: indeed, the Appeals Chamber decision was not made public until several months later.

The Statute and Rule of Procedure of Evidence (RPE) are silent as to whether the Chamber may invite parties who were not included in the original application to respond or make observations on an appeal of this nature. Although Article 82(1)(d) of the Statute governing interlocutory appeals allows either party to appeal based on certain fixed criteria, Rule 155 of the RPE requires the Chamber that delivered the impugned decision to notify the parties who were involved in the proceedings giving rise to the decision. In this case, the Prosecutor was the only party involved. In our view, where the warrant is sealed, the question of defence involvement does not arise. In this context however, where a landmark issue is being litigated, it would be in the interests of justice to have the defence position represented.

B. Cooperation

Sudan

President Al-Bashir has made it clear that Sudan does not recognise the ICC and will not cooperate with the Court.⁵⁵ In its eighth report to the UNSC, the Office of the Prosecutor (OTP) noted that since 2005, the Office had tried to establish a working relationship with the Sudanese Government and that a level of cooperation was initially provided. However, following the issuance of the first arrest warrants against Ahmad Harun and Ali Kushayb in 2007, cooperation ceased.⁵⁶

The language of the UNSC concerning Sudan's obligation to cooperate is clear. By virtue of its membership in the UN and being a party to the UN Charter, Sudan is obliged to accept the binding authority of the Security Council acting under its Chapter VII mandate. Article 25 of the UN Charter states that 'the members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

Non-states parties

The specific language of Resolution 1593 (2005) does not, however, place an obligation on all UN member states to cooperate with the ICC's investigation and prosecution of cases in Sudan. Whilst the language of the referral is couched in mandatory terms for Sudan ('shall cooperate'), the Security Council merely uses hortatory language for other states ('urges' all states to cooperate fully with the Court).

In its arrest warrant decision, the PTC ruled that the arrest warrant should be notified to all UNSC members (including non-states parties). The legal basis for the Chamber's order is not clear. In our view, notwithstanding the fact that the referral was made under Chapter VII of the UN Charter, the language clearly sets out its non-obligatory nature for non-states parties, whether a member of the Security Council or not.

⁵⁵ Shortly after the decision issuing the arrest warrant, President Al-Bashir ordered the expulsion of a significant number of humanitarian aid workers from the country.

⁵⁶ See eighth report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005) at <http://www.icc-cpi.int/NR/rdonlyres/DCBF2658-4DBA-43EE-BCBC-FB2330FF7AD8/279075/8thUNSCreportsenttoUNENG1.pdf>

One commentator argues that ‘one of the implications of a Security Council referral is that all States are automatically put under an international obligation to comply with requests for cooperation by the Court’.⁵⁷ However, Article 48 of the UN Charter makes it clear that it is for the UNSC to decide who is bound by its resolutions.⁵⁸

There is therefore no specific obligation for non-states parties to cooperate with the ICC stemming from their status as member states of the UN, other than the language merely encouraging them to do so. Any action taken by a state that is not a party to the Rome Statute, regardless of its membership in the UN, is voluntary. States may see cooperation with the ICC as increasingly attractive, but this is not binding.⁵⁹ States which have not ratified the Rome Statute may enter into an agreement under Article 87(5) in order to aid the court on an ad hoc basis.

States parties

The position of states parties is different. Article 86 of the Rome Statute requires states parties to ‘cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’. In reality, the ICC has an ‘Achilles’ heel’, in that it lacks its own enforcement mechanism. This means that the Court must rely on states to enforce the arrest warrant against President Al-Bashir.

Implementing legislation

But cooperation creates practical challenges. Some states do not yet have implementing legislation codifying Rome Statute crimes at the national level, setting out a clear cooperation regime with the ICC and which expressly addresses the issue of immunity. For states that do not have the type of legal system where the Rome Statute automatically takes effect at the national level, without need for further legislative enactments, there could be some practical difficulties.

South Africa is one of the few African countries with clear, unambiguous legislation that addresses the issue of immunity for heads of state for Rome Statute crimes. Subsection 2 of South Africa’s Implementation of the Rome Statute Act provides that:

‘despite any other law to the contrary, including customary and conventional international law, the fact that a person... (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official...is [not] a defence to a crime’.

South Africa has clearly put in place the legal mechanisms for arrest and surrender of President Al-Bashir if he came onto their territory.⁶⁰

The situation is less clear in other countries and the ICC is well-advised to increase its efforts to encourage states to implement legislation which codifies Rome Statute crimes and specifically

⁵⁷ ‘Comments on the Security Council Referral of the Situation in Darfur to the ICC’; Luigi Condorelli and Annalisa Ciampi, *Journal of International Criminal Justice* 2005 3(3): pp590-599.

⁵⁸ Article 48 of the UN Charter provides, ‘The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations **or by some of them, as the Security Council may determine.**’ [emphasis added]

⁵⁹ According to Article 34 of the Vienna Convention on the Law of Treaties, ‘a treaty does not create either obligations or rights for a Third State without its consent’.

⁶⁰ It appears that this may have been the reason that President Al-Bashir was not invited to attend the inauguration of the next President of South Africa on 9 May. See Fabricius, ‘A victory for human rights at inauguration’, *Saturday Star* at <http://www.thestar.co.za/index.php?fSectionId=2474>.

addresses the question of immunity. While it could be said that Article 98 applies to requests for surrender and assistance and thus does not prevent a state from arresting President Al-Bashir, it seems good sense to ensure that if he is arrested, the process of surrender is not unduly hampered. The IBA further encourages states parties, particularly those who have had such legislation pending for some time, to increase their efforts to ensure that the necessary legislation is in place to facilitate cooperation with the Court.

C. Immunity

The main issue affecting states' willingness to cooperate with the ICC is that of President Al-Bashir's immunity. Under customary international law, President Al-Bashir is entitled to immunity from prosecution for acts committed in a personal or official capacity by virtue of his status as President. However, Article 27 of the Rome Statute removes functional and personal immunity for persons who fall under the Court's jurisdiction.

The issue of whether President Al-Bashir would be able to claim immunity from prosecution becomes a jurisdictional question. The judges unanimously decided that the UNSC's referral of the situation in Darfur, Sudan had conferred jurisdiction on the ICC and thus Sudan's status as a non-state party had no effect on the Court's exercise of jurisdiction in the case. Thus the Chamber ruled that Article 27(1) and (2) of the Statute applied to President Al-Bashir.

The language of the Security Council referral itself is ambiguous concerning the issue of immunities; there is no express waiver of immunities. However, as one commentator notes, the mere act of a referral could be considered an implied waiver of immunity since the exercise of jurisdiction must be in accordance with the legal texts of the Court.⁶¹

Article 98

But there is still the matter of Article 98 of the Statute, which the Chamber declined to address in its decision.⁶² Under this provision, the Court may not proceed with a request to a state for surrender or assistance which would force the requested state to act contrary to its obligations under international law, with respect to the diplomatic immunity of a person from a third state (in this case Sudan).⁶³ The Court is required to first obtain Sudan's cooperation for a waiver of immunity.

Article 98 is potentially troubling for both states parties and non-states parties to the Rome Statute. If President Al-Bashir travels to a state party to the Rome Statute, should the state give priority to its obligations under customary international law or under the Rome Statute? The decision would seem to depend on whether the state concerned accepts the Court's interpretation that the UNSC referral vests the Court with jurisdiction, made Sudan analogous to a state party and effectively amounted to an implied waiver of immunity.⁶⁴ As previously discussed, this appears to be a common-sense

61 See Giuseppe Palmisano, 'The ICC and Third States' *Essays on the Rome Statute of the International Criminal Court*, Ed Flavia Lattanzi and William Schabas: 2000, p 417.

62 One scholar, Dapo Akande, who has written extensively on the issue of immunities, strongly criticises the Pre-Trial Chamber's failure to address the issue of how Article 98 should be interpreted in the context of the *Al-Bashir* case. See 'Who is Obligated to arrest Bashir', EJIL analysis March 13 2009 at <http://www.ejiltalk.org/who-is-obliged-to-arrest-bashir/> (last accessed 3 May 2009).

63 Heads of State have immunity under international law – see the International Court of Justice *Arrest Warrants* case (DRC v Belgium, 2002).

64 *Supra* n 65.

reasoning of the effect of a UNSC referral under Article 13(b) of the Rome Statute.

For non-states parties the situation is less clear. Despite being a referral under Chapter VII of the UN Charter, the non-mandatory language of the referral places no express obligation on non-states parties; thus they may choose to give primacy to their prevailing obligations under customary international law.⁶⁵ As one scholar noted, given the language of the referral, non-states parties could at most be said to have been given 'permission to act' but nothing more.⁶⁶

D. Timing of the application: peace versus justice

Opponents of the arrest warrant argue that the timing of the warrant was poor, and a significant impediment to ongoing peace negotiations in Darfur.⁶⁷ It was felt that the issuance of an arrest warrant for President Al Bashir would endanger the Comprehensive Peace Agreement (CPA) signed between the Government of Sudan and the Sudan People's Liberation Movement (SPLM) in 2005. The CPA envisions that within a six-year transitional period the two parties to the agreement will form the Government of National Unity, hold elections and form a new government. As part of the deal, a referendum is to be held in 2011 giving the south of Sudan the opportunity to break away and become an independent state in its own right. It was feared that President Al Bashir and his loyalist within the National Congress Party (NCP) may simply withdraw from the CPA, and that a breakdown in the agreement would have devastating effects for all of Sudan with a dramatic escalation in violence across the country.

The African Union (AU) opposed the arrest warrant on the basis that it could have deleterious consequences for the previously mentioned peace negotiations underway in Darfur.⁶⁸ The AU's response has ranged from issuing a comprehensive declaration opposing the arrest warrant; calling on the Security Council to invite the Court to defer the arrest warrant under Article 16 of the Statute; and the establishment of a high-level Panel of Eminent Personalities chaired by former South African President, Thabo Mbeki to 'examine the situation in depth, and to submit recommendations on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed.'⁶⁹ The AU has also called for a meeting of African states parties to the Rome Statute.

To some persons, the AU request for a meeting of African states parties to the Rome Statute, ostensibly to consider all options, including withdrawal from the Statute, is a matter of some concern. The meeting is scheduled for 8 and 9 June in Addis Ababa, Ethiopia.

The responses have not all been negative. Archbishop Desmond Tutu calls the issuance of an arrest warrant 'an extraordinary moment for the people of Sudan – and for those around the world who have come to doubt that powerful people and governments can be called to account for inhumane

65 President Al-Bashir has travelled to several non-states parties since the arrest warrant was issued including Egypt, Ethiopia and Qatar.

66 *Supra* n. 65.

67 See for example a number of blog entries on the Social Science Research Council 'Making Sense of Darfur' page including Julie Flint, 'Justice and Hunger', at <http://www.ssrc.org/blogs/darfur/2009/03/06/justice-and-hunger/>, Alex DeWaal, 'Unchartered Waters' at <http://www.ssrc.org/blogs/darfur/2009/03/05/unchartered-waters/> (last accessed 3 May 2009).

68 See AU Declaration on the Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan at [http://www.africa-union.org/root/au/Conferences/2009/january/summit/Decisions/ASSEMBLY%20AU%20DEC.%20208-242%20\(XII\)%20all%20in%20one.pdf](http://www.africa-union.org/root/au/Conferences/2009/january/summit/Decisions/ASSEMBLY%20AU%20DEC.%20208-242%20(XII)%20all%20in%20one.pdf) (last accessed 3 May 2009).

69 *Ibid* at para 7.

acts'.⁷⁰ In addition, other states parties to the Rome Statute have fully supported the Court's decision in this regard.⁷¹

IBA comments

The IBA regrets that the arrest warrant against President Al-Bashir is being interpreted as an indication that the ICC is disproportionately targeting the African continent. The IBA notes that the AU has reiterated its commitment to combating impunity, promoting democracy, the rule of law and good governance throughout the African continent. The role of the AU in fully supporting the ICC at this critical time cannot be overstated.⁷²

The IBA considers that the Mbeki-led panel is not necessarily antithetical to the ICC's interests. Although the Chairman has made it clear that a critique of the ICC's arrest warrants are not part of the panel's mandate, recent media reports suggest that the panel will be meeting with the ICC Prosecutor.⁷³ The IBA considers that engagement between the panel and the ICC is a positive and welcome step; such dialogue can serve to reveal common ground between the different mandates of both groups.

On the Court's side, there needs to be sustained court-wide engagement with the AU, together with other regional bodies such as the Arab League. The IBA is encouraged that there are positive signs of such engagement including the formation of a Court-wide Africa strategy group to help counter misperceptions about the Court's role in Africa. Indeed, in paragraph 3 of the UNSC 1593 resolution, the ICC and the AU are invited to 'discuss practical arrangements that will facilitate the work of the Prosecutor and the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity'.⁷⁴

Sustained engagement with regional organisations and individual states must be carried out at the highest level of the Court. The IBA is encouraged by indications from the Presidency that there is a desire to increase its external relations mandate including by visiting key African countries. The IBA is also encouraged by the sustained efforts by the Registrar, and senior officials in the OTP to also visit key countries. The continued high-level visibility can only augur well in generating support for the Court's work.

The IBA encourages the Court to ensure that the message that is disseminated is clear, consistent and representative of every aspect of the Court's mandate including its commitment to fair trials.

The IBA also fully supports the Court's efforts to open a field office in Addis Ababa. In our view this office would be a central hub for the Court's interface with the African Union and states parties in the region.

70 See Desmond Tutu, 'Will Africa let Sudan off the Hook', *New York Times*, 3 March 2009.

71 See 'Sudan: European Union Presidency Declaration following ICC decision concerning the arrest warrant for President Al-Bashir' at http://www.eu-un.europa.eu/articles/fr/article_8537_fr.htm.

72 See Justice Richard Goldstone, 'Does the ICC target Africa?', in *EQ: Equality of Arms Review*, Issue 2, March 2009, http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/EQ_Magazine.aspx.

73 See 'African Union panel on Darfur will meet ICC:Mbeki', *Washington Post* at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/02/AR2009050201520.html>.

74 See UN Security Council Resolution 1593 at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

The IBA recognises that these efforts will require a realistic budgetary outlay. We urge the Assembly of States' Parties to fully support the Court's efforts in this regard.

Conclusions

The application for and issuance of an arrest warrant for a sitting head of state was a bold step for the ICC, which has been both criticised and lauded. Though a 'first' in many respects, it is not the first time that the ICC has had to grapple with negative views about the impact of its proceedings on local peace processes. This debate is likely to continue.

The IBA regrets that the Chamber did not expressly address in its decision the relationship between Articles 27 and 98 of the Statute regarding the issue of immunities. In the IBA's view this could have allayed some of the confusion that some states appear to have regarding any conflict between their obligations under international law and the Statute.

The IBA encourages the Court to continue to engage in sustained dialogue with States to facilitate cooperation and ensure support for its efforts. In particular, the IBA encourages the ICC to dialogue with states parties concerning the implementation of legislation so that all states can give effect to the Court's requests for cooperation. In this regard, we urge states parties who do not have or are in the process of drafting such legislation to expedite the process.

Chapter IV

The Case of Jean-Pierre Bemba

Introduction

The case of Jean-Pierre Bemba Gombo (hereafter the *Bemba* case) is the ICC's first case arising from the Prosecutor's investigations in the Central African Republic (CAR). From 12 to 15 January 2009, the confirmation of charges hearing in the case against Mr Bemba was held at the ICC. At the time of writing, a decision by the Pre-Trial Chamber (PTC or Chamber) III on whether or not to confirm the charges against Mr Bemba is still pending. The confirmation of charges hearing was adjourned by the Chamber and the judges requested that the prosecution amend the charges to reflect a mode of liability of superior responsibility as provided by Article 28 of the Rome Statute.

The *Bemba* case is noteworthy for a number of reasons. The case provides an important opportunity for comparative assessment of the pre-trial disclosure regime in the cases arising from the Democratic Republic of Congo (DRC). In addition, the Appeals Chamber issued an important decision on disclosure at the 'arrest warrant stage'.⁷⁵ Novel legal issues have also been raised by the Chamber's decision to adjourn the confirmation of charges hearing.

This chapter will be limited to a consideration of procedural developments in the case and will not include substantive discussions about the evidence adduced in support of the charges.

Background

The case against Jean-Pierre Bemba, former Congolese Opposition leader, arises from the Prosecutor's investigation into the situation in the CAR. The prosecution alleges that Mr Bemba is criminally responsible under Article 25(3) (a) of the Rome Statute for crimes committed in CAR during an armed conflict between 25 October 2002 and 15 March 2003.

According to the arrest warrant issued by PTC III on 10 June 2008, Mr Bemba is allegedly criminally responsible, jointly with another person or through other persons, within the meaning of Article 25(3)(a) of the Rome Statute, for three counts of crimes against humanity including rape, torture and murder; and five counts of war crimes including rape, pillaging a town or place, outrages upon personal dignity, murder and torture.

The prosecution alleges that these crimes were committed during a protracted armed conflict in the CAR involving, on the one hand, the national armed forces of then CAR President, Mr Patassé, which had joined forces with combatants from the Mouvement de Libération du Congo (MLC); and on the other hand CAR rebel forces. The prosecution asserts that Mr Bemba was both the President and Commander-in-Chief of the MLC and thus his contribution was essential to the implementation of a common plan between himself and Mr Patassé to send MLC combatants to the CAR to provide military assistance to Mr Patassé.

⁷⁵ Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release', ICC-01/05-01/08 OA at <http://www2.icc-cpi.int/iccdocs/doc/doc610448.pdf>.

Key judicial developments

A. Issues arising from application for interim release

Disclosure after initial surrender to the Court

Jean-Pierre Bemba was arrested by Belgian authorities pursuant to an ICC arrest warrant on 24 May 2008, and surrendered to the Court on 3 July 2008. Mr Bemba's defence team applied on 23 July for interim release under Article 60(2) of the Rome Statute; this was denied.⁷⁶ The defence subsequently appealed the decision.⁷⁷

In order to consider this application, the PTC (or the single judge exercising jurisdiction) must consider whether the reasons for which an arrest warrant had been issued still apply; such as whether there are reasonable grounds to believe the offence was committed, the possibility of evidence tampering and the likelihood of the defendant appearing for trial. Normally arrest warrants are obtained by the Prosecutor in ex-parte proceedings during which evidence and information are placed before the PTC. The judges must be satisfied that the person for whom the warrant is sought has committed the alleged offences.⁷⁸ The defence does not have access to the material relied upon by the prosecution until after he is surrendered to the Court and wishes to challenge the legality of his detention.

The majority of the judges of the Appeals Chamber (Judge Pikis dissenting) noted that the legal texts of the Court did not provide for an express regime for disclosure relating to interim release applications. It was noted that the provisions regulating disclosure at the pre-trial phase relate to disclosure for the purposes of the confirmation of the charges against the suspect. After conducting a review of relevant jurisprudence from the European Court of Human Rights, the Appeals Chamber ruled that 'in order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order to effectively challenge the lawfulness of detention, bearing in mind the circumstances of the case'.⁷⁹

Significantly, the Appeals Chamber decided that the arrested person should have all such information at the time of his or her initial appearance before the Court. The Appeals Chamber emphasised that the disclosure requirement was not absolute and the defendant's right of the defendant could be circumscribed to protect witnesses and victims and the confidentiality of ongoing investigations.

The IBA welcomes the Appeals Chamber's decision which highlights the importance of timely disclosure of material by the prosecution from the moment that a suspect is arrested and surrendered to the Court. The Chamber's insistence on early disclosure is to be welcomed as it goes to the heart of the principle of equality of arms and the fairness of the proceedings. The Prosecutor is now required to organise the disclosure of relevant material to the defence from the time an application is made

76 See Application for interim release, ICC-01/05-01/08-49, at <http://www.icc-cpi.int/iccdocs/doc/doc534845.pdf>. Article 60(2) provides that 'A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-trial Chamber is satisfied that the conditions set forth in Article 58(1) are met then the person shall continue to be detained. If the Pre-trial Chamber is not so satisfied then the Chamber may release the person, with or without conditions.'

77 See Notice of Appeal against the Decision on the Application for Interim Release of Jean-Pierre Bemba Gombo, ICC-01/05-01/08, at <http://www.icc-cpi.int/iccdocs/doc/doc548007.pdf>.

78 Article 58(1) of the Rome Statute.

79 *Supra* no 81 at paragraph 1.

for an arrest warrant.⁸⁰ Despite the caveat that material may be redacted for reasons of security and confidentiality, timely disclosure will assist the defence with advance preparation for the confirmation of charges and trial.

States cooperation

Mr Bemba subsequently made two further applications for interim release with appropriate conditions to one of three countries: Portugal, Belgium or the Netherlands. The responses of the states concerned were transmitted to the Chamber by the Registrar, but are deemed confidential and thus not publicly available.⁸¹

The observations of the respective states can be gleaned from the decision of the single judge who presided in Mr Bemba's third application.⁸² The judge noted that none of the countries seemed willing to accept the applicant if conditionally released, and accordingly they offered no guarantees that would ensure the applicant's appearance at trial.⁸³ The Chamber reiterated the ICC's lack of enforcement mechanism and its need to rely on states, 'without which the applicant's trial might be compromised.'⁸⁴

The judge emphasised the need for caution in considering the question of interim release due to the Court's lack of direct means to re-arrest a suspect. The judge justified this 'cautious approach' by relying on the decision of the ICTY Appeals Chamber in the *Boskoski* case, that the failure of the Croatian Government to 'issue guarantees of the Appellant's appearance for trial', combined with other factors, 'weigh[ed] heavily' against his provisional release.⁸⁵ Mr Bemba's willingness to adhere to restrictions on his liberty such as continuous police surveillance or wearing 'an electronic monitoring bracelet' could not be taken into account by the judge because the requested countries did not offer any guarantees.⁸⁶

IBA comments

The reliance of the ICC on states' cooperation for matters such as witness relocation, enforcement of sentences and interim release could well be described as the Court's greatest weakness (or 'Achilles' heel' as noted in the previous chapter). It is not difficult to appreciate the dilemma of states which are called upon by the Court to on the one hand arrest and surrender a suspect, and on the other to facilitate the interim release of that same person.

However, as the Court's consideration of whether or not to grant interim release must take into account the willingness (or lack of) of states to 'host' a defendant in the event of interim release, non-cooperation by states in this regard could render the suspect's right merely illusory and of no

⁸⁰ Note the Chamber's statement at paragraph 2 of the decision: 'To allow this to take place, the Appeals Chamber considers that the Prosecutor should have this in mind when submitting an application for a warrant of arrest under article 58 of the Statute and should, as soon as possible, and preferably at that time, alert the Pre-Trial Chamber as to any redactions that he considers might be necessary'.

⁸¹ It should be noted that in similar circumstances in the case of Germain Katanga, one state requested that their observations to the Court on interim release be reclassified as public. See Report of the Registrar on the Execution of the Decision Inviting Observations on the Defence's Application for Interim Release of Germain Katanga, ICC-01/04-01/07-251 and Annexes ICC-01/04-01/07-251-Anx1.

⁸² See Decision on Interim Release, ICC-01/05-01/08-403.

⁸³ Ibid paragraph 48.

⁸⁴ Ibid paragraph 49.

⁸⁵ ICTY, Prosecutor v Ljube Boskoski et al, 'Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release', Case No. (IT-04-82-AR65.2), 28 September 2005.

⁸⁶ Supra no 82 at paragraph 50.

practical effect. Urgent resolution of this issue is necessary as it is clear that similar challenges will also apply to suspects who may be acquitted and may not be able to return to their country (perhaps for security reasons).

The IBA recalls its recommendation in its November 2007 monitoring report encouraging the Registry to proactively negotiate cooperation agreements with states parties to facilitate interim release or defendants who have been acquitted who cannot return home.⁸⁷ The efforts undertaken by the Registry and the Assembly of States' Parties Focal Point on Cooperation in this regard are welcome.

The IBA reiterates its call to states parties to fully cooperate with the Court – including by facilitating such agreements – in keeping with their obligations under Part 9 of the Rome Statute. The IBA recognises that this will require continuing dialogue between the Court and relevant stakeholders such that concerns can be discussed with a view to reaching a compromise position.

B. Decision adjourning the confirmation of charges hearing

Following the conclusion of the oral submissions during the confirmation hearing in January, the parties submitted additional written submissions up to 30 January. The Pre-Trial Chamber had 60 days in which to determine whether there was sufficient evidence to confirm the charges and commit the matter to trial.⁸⁸ Halfway into this period, the Chamber made a decision to adjourn the proceedings,⁸⁹ deciding that the evidence provided by the Prosecutor '[appeared] to establish a different crime (mode of liability), namely the mode of liability under Article 28 of the Statute'. Article 28 denotes liability by superior responsibility, as opposed to individual criminal responsibility as provided by Article 25 of the Statute. The Chamber emphasised that the decision was intermediate and not intended to pre-determine the final decision in any way.

The PTC's decision to adjourn the hearing and request that the prosecution amend the charges pursuant to Article 61(7)(c)(ii) of the Statute marks the first time that this provision has been correctly utilised at the ICC. The provision was referred to by the PTC in the *Lubanga* case but then, arguably, misapplied when the Chamber took the legally questionable decision to recharacterise the charges of its own motion without reverting to the Prosecutor as required by the Statute. That Chamber's decision led to request for appeals by the prosecution and defence,⁹⁰ both of which were rejected.⁹¹

⁸⁷ See IBA Monitoring Report International Criminal Court November 2007 at http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx.

⁸⁸ The 60 day deadline is set by Regulation 53 (Regulations of the Court).

⁸⁹ 'Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute', 3 March 2009, www.icc-cpi.int/iccdocs/doc/doc638848.pdf.

⁹⁰ 'Request for leave to Appeal the Pre-Trial Chamber's "D cision sur la confirmation des charges" of 29 January 2007', 5 February 2007, ICC-01/04-01/06-807-Conf; 'Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 "D cision sur la confirmation des charges"', 5 February 2007, www.icc-cpi.int/iccdocs/doc/doc247837.PDF.

⁹¹ 'Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges', 24 May 2007, www.icc-cpi.int/iccdocs/doc/doc271674.PDF.

By contrast, the PTC in the *Bemba* case did not purport to be able to make the decision to recharacterise the charges itself, making it clear that the ultimate decision must rest with the Prosecutor.⁹²

The Chamber's decision also interprets the word 'hearing' as found in Article 61(7)(c)(ii), as including the period 'subsequent to the oral sessions and as long as the Chamber has not made its final determination on the merits and issued a decision whether or not to confirm the charges'.⁹³ The IBA considers this a reasonable interpretation of the word which appears necessary in order to give effect to the provision. In practical terms, the 'oral hearing' lasts for a short time and it would be impracticable were the power of the Chamber to adjourn the proceedings and invite the prosecution to amend the charges limited to the oral sessions.

The PTC decision also signifies a more critical approach toward the form of liability included in the charging document; command responsibility was never considered in the context of either of the cases from the Democratic Republic of Congo (DRC), despite the fact that the accused therein – alleged leaders of militia groups – could suitably have been charged under the provision⁹⁴ (regardless of the suitability of charges under Article 25). Amnesty International has since submitted an amicus curiae brief discussing the notion of superior responsibility.⁹⁵

Delay

Despite the Chamber's correct approach to Article 61(7)(c)(ii), there are nevertheless some concerns regarding timing. The Chamber's decision was issued on the 3 March 2009, almost 35 days from the date the last written submissions were received.⁹⁶ Although the Chamber was only half-way into the 60 day deadline, the delay occasioned by the decision could only be justified by its necessity. The Chamber concedes that the parties and participants referred implicitly or explicitly to command responsibility during their submissions but was nevertheless of the view that the idea of an alternate mode of liability was not sufficiently addressed.

The decision is certainly a message to the Prosecutor to be specific when choosing the modes of liability with which the suspect is charged. Although the prosecution had charged Mr Bemba with 'other modes of liability' in the Document Containing the Charges (DCC), this was not sufficiently certain. In the revised DCC, submitted on 30 March, the prosecution addressed the issue comprehensively. In the document the prosecution included Article 28 liability 'as an alternative to, not in substitution of, the liability of Jean-Pierre Bemba as a principal to the crime pursuant to Article 25(3)(a) of the Statute.'⁹⁷

⁹² The Chamber noted that '[b]y...adjourning the hearing it does not purport to impinge upon the Prosecutor's functions as regards the formulation of the appropriate charges or to advise the Prosecutor on how best to prepare the document containing the charges. The Chamber holds the view that it is the responsibility of the Prosecutor to build and shape the case according to his statutory mandate pursuant to Article 54(1)(a) of the Statute. The responsibilities of the Chamber lie in exerting judicial oversight during the pre-trial proceedings and rendering its decision in accordance with article 61(7) of the Statute' *Supra* no 93 at paragraph 39.

⁹³ *Supra* n 93.

⁹⁴ See Thomas Weigend, 'Intent, Mistake of Law, And Co-Perpetration in the Lubanga Decision On Confirmation of Charges' 6 *J Int'l Crim Just* 471: 'In the final analysis, Lubanga's role in the recruitment of child soldiers might be better captured by the concept of superior responsibility (Article 28 ICC Statute) than by the notion of co-perpetration'.

⁹⁵ See Amicus Curiae Observations on Superior Responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08-406.

⁹⁶ Regulation 33 of the Regulations of the Court provides that for the purposes of any proceedings before the Court days shall be understood as calendar days.

⁹⁷ 'Public Redacted Version Of the Amended Document containing the charges filed on 30 March 2009', 30 March 2009, ICC-01/05-01/08-395-Anx3, www.icc-cpi.int/iccdocs/doc/doc652083.pdf, at paragraph. 57.

The IBA considers that although no issue can be taken with the correctness of the Chamber's decision, the delay occasioned by it is unfortunate for the suspect who has a right to a confirmation decision 'within a reasonable time',⁹⁸ and a right to an expeditious trial. It is hoped that the reconstituted PTC can reach a final decision long before the expiry of the reset 60-day period.

C. Comparative assessment of the disclosure regime in the Bemba and DRC cases

Advantages/disadvantages of the Bemba disclosure system

The *Bemba* disclosure system differs from the approach followed in the *Lubanga* and *Katanga/Ngudjolo* cases in the DRC situation in that it requires the prosecution to disclose all relevant evidence – both incriminating and potentially exonerating – to the Chamber (not merely the evidence that will be relied on at the confirmation hearing). In addition the prosecution is required to draft an in-depth analysis chart, linking each piece of evidence to the charges against the suspect. Disclosure is also to be carried out via the the Registry.

In the IBA's view, there are several advantages to the Bemba disclosure system not least of which are more organised and thus shorter proceedings; and focused disclosure by the prosecution.

More focused prosecution

The revised *Bemba* disclosure system is beneficial in that it requires the Prosecutor to assess in advance how each piece of evidence tangibly contributes to the case. Despite initial protestations that the burden imposed by the Chamber was exorbitant and could not reasonably be complied with, the prosecution has to its credit complied with the Chamber's decision. In fact issues related to disclosure were relatively minor throughout the course of pre-trial proceedings in the *Bemba* case, especially when compared with the protracted battles fought over redactions in the *DRC* cases (although the lack of activity could equally be explained by the fact that much of the law concerning redactions has now been settled by the Appeals Chamber).

The judges were satisfied that the prosecution had fulfilled its obligations to disclose all exculpatory materials in its possession, including confidential material obtained under Article 54(3)(e) to the defence (with the providers' consent).⁹⁹ Accordingly, the parties should not have much material that remains undisclosed, thus expediting the process of post-confirmation disclosure (subject to further investigations).

Fuller picture of the evidence/ability to organise proceedings

A key innovation in the *Bemba* disclosure system is that the Chamber is able to look at all the evidence in the possession of the Prosecutor or the defence that is related to the case, not just the evidence

⁹⁸ Article 61(1).

⁹⁹ Hearing of 12 January 2009; transcript available at www.icc-cpi.int/iccdocs/doc/doc617110.pdf. Note also the comments of Deputy Prosecutor Fatou Bensouda during the hearing: 'Your Honour, the Prosecution has performed a fair and unbiased investigation. We have disclosed, your Honour, all evidence which might or can exculpate Jean-Pierre Bemba, and we have disclosed this as readily as we have disclosed incriminating evidence.'

that is presented in court by either party.¹⁰⁰ Thus the Chamber is able to have a fuller picture of the evidence within the context of the case, allowing it in advance of the hearing to determine what the real issues are likely to be (and to allot time accordingly).

One notable effect of the *Bemba* disclosure system was shortened confirmation of charges proceedings. The Chamber was able to more easily organise the structure of the hearing by placing all the evidence on record alongside the ‘analysis chart’ that each party was mandated to prepare.¹⁰¹ The result is that proceedings were shortened to a record four days. By contrast, the *Lubanga* confirmation of charges hearing (which did not utilise an analysis chart) lasted for 20 days despite the limited charges against the defendant.¹⁰²

Disclosure through a neutral third party – the Registry

The Chamber’s requirement that all the evidence be placed on the record with the Registrar enables it to appreciate whether the defence has all the relevant material at the confirmation stage to facilitate efficient preparation for the hearing. The Chamber was able to keep tabs on the disclosure process by requesting a report from the Registry on whether the process was being properly carried out. It is clearly advantageous to be able to solicit a report from a neutral third party on whether the process is being complied with.¹⁰³

The PTC in *Lubanga* had expressly rejected the possibility of comprehensive disclosure through the Registry, based among other things on the idea that it would be contrary to the defence’s rights to force it to rely on evidence.¹⁰⁴ This reasoning seems to be based on the view that once evidence is put on the record, it must be relied on at the confirmation hearing. The decision in *Bemba* successfully navigates between these two positions – all evidence must be placed on record, but there is no reason why this should compel either party to rely on it.

100 The Chamber’s access to evidence will only be limited insofar as the prosecution determines that any evidence is insufficiently relevant to the case, and is unable to draw up an ‘analysis chart’ linking the evidence to the charges. However, this minor omission is outweighed by the pressure on the prosecution to focus his case.

101 ‘Decision on the Schedule for the Confirmation of Charges Hearing’, 29 December 2008 (www.icc-cpi.int/iccdocs/doc/doc613810.pdf) in which Judge Trendafilov comments, ‘the order of the presentations in the Proposed Schedule was based on the Model Chart. Consequently, the Single Judge finds it reasonable to expect that both the Prosecutor and the Defence already have their evidence organised in that order [...] the Single Judge considers that, in accordance with the Decision on Disclosure [...] both parties should follow the order of the Model Chart when presenting their case’.

102 The Chamber’s schedule was derived from consultation with the parties; see transcripts of 26 October 2006 (www.icc-cpi.int/iccdocs/doc/doc216073.PDF), 3 November 2006 (www.icc-cpi.int/iccdocs/doc/doc216085.PDF) and ‘Decision on the schedule and conduct of the confirmation hearing’ (www.icc-cpi.int/iccdocs/doc/doc243552.PDF). Katanga followed a similar approach; see Proposed Schedule of the Confirmation Hearing, www.icc-cpi.int/iccdocs/doc/doc501059.PDF; hearing of 10 June 2009, www.icc-cpi.int/iccdocs/doc/doc506497.PDF and ‘Decision on the Schedule for the Confirmation Hearing’, www.icc-cpi.int/iccdocs/doc/doc511676.PDF.

103 ‘Decision on the Implementation of Disclosure to the Defence’, 10 October 2008, www.icc-cpi.int/iccdocs/doc/doc574317.pdf; ‘The Chamber [...] orders the Registrar to submit a report [...] on the following issues: 1) whether the disclosure process between the parties has been facilitated through the Registry as ordered by the Chamber’s Decision on Disclosure of 31 July 2008; 2) whether disclosure has taken place under the conditions established by the Chamber’s Decision on Disclosure; 3) whether and when the Defence has been granted access to all evidence disclosed by the Prosecutor [...]’.

104 See ‘Decision On The Final System Of Disclosure And The Establishment Of A Timetable’, 15 May 2006, www.icc-cpi.int/iccdocs/doc/doc192080.PDF.

Despite the apparent advantages of the revised disclosure system utilised in *Bemba*, the prosecution still encountered some difficulty with the system as it struggled to effect timely disclosure.¹⁰⁵ Thus, although there was definite improvement from the *DRC* cases, much work remains to be done in order to fully streamline the process of disclosure.

Conclusions

The *Bemba* case, though the ICC's first arising from the prosecution's investigations in the CAR, is the third case that has (almost) completed the confirmation of charges stage of proceedings at the ICC. The judicial pronouncements in the *Bemba* case indicate that there have been notable improvements in the approach taken to the process of disclosure at the pre-trial stage of proceedings by the other Chambers. This is a welcome though not surprising development, given that the judges, parties and participants have had the opportunity to assess the impact of previous decisions on the defendants and pace of the proceedings. The overall success of the revised process remains to be seen given that the process is yet to move to the trial phase. The fact that the Trial Chamber will, from the outset, have access to all the evidence of either party appears to be a benefit that should enable more efficient preparation for trial.

Other key decisions indicate that significant pronouncements have been made concerning timely disclosure of material to the defence from the moment of arrest and surrender to the Court. This is also a welcome development.

The IBA does however regret that the issue of states cooperation in concluding agreements that will facilitate interim release for defendants before the Court has made little progress. In the IBA's view, this is effectively rendering the right to request such release of little effect. The IBA continues to urge the Registry to engage with states parties on this issue with a view to its timely resolution.

¹⁰⁵ See 'Decision on the Postponement of the Confirmation Hearing,' 17 October 2008, www.icc-cpi.int/iccdocs/doc/doc606235.pdf, at para. 20, in which the Chamber noted 'the existence of significant problems that have emerged so far in the evidence disclosure system especially regarding the Prosecutor's obligation to disclose this material to the Defence correctly, fully and diligently in accordance with the timetable set in the Decision of 31 July 2008'. The difficulties encountered by the prosecution caused the PTC to postpone the start date of the confirmation hearing by a month.

Chapter V

Conclusions and Recommendations

Almost seven years after the coming into force of the Rome Statute, the ICC has truly evolved into an active force in the international legal community. Two major historic developments at the Court made news headlines around the world – the commencement of the Court’s first ever trial and the issuance of the first arrest warrant for a sitting head of state. Of no less significance to the people of the Central African Republic (CAR) and the Democratic Republic of Congo (DRC) was the commencement of the confirmation of charges proceedings in the case of Jean-Pierre Bemba Gombo.

The first five years of the Court were primarily occupied with addressing procedural issues and interpreting the normative instruments. Given the uniqueness of this hybrid institution – a mixture of civil and common law legal systems, where victims have the right to participate – it is not entirely surprising that this process has been a formidable challenge.

The IBA is mindful of the fact that the Court has not completed the first cycle of its activities and thus it is still too early to fully assess its impact. What is clear is that the ICC has moved beyond the conceptual into the fully active phase of its existence. Guaranteeing fair trials through efficient and effective proceedings requires a realistic budgetary outlay, a strong and independent judiciary, focused well-investigated prosecutions and continuing engagement with states parties, regional organisations, civil society and other key stakeholders. Making significant efforts to engage with stakeholders will demand the attention and focus of those at the highest level of the Court.

The *Lubanga* case

The postponement of the *Lubanga* trial in June 2008 led to concerns about the viability of the ICC. The commencement of the trial on 26 January 2009 has helped to restore public confidence in the credibility of the Court. The Court is now expected to fulfil the defendant’s expectations of fair and expeditious proceedings, the victims’ expectations of expedited justice and the public’s interest in open and transparent proceedings.

This IBA report examined several procedural issues arising from the *Lubanga* case including protective measures for witnesses; judicial management of the proceedings; defence and victims’ concerns; and challenges related to translation and interpretation.

Notable achievements

- The progress made in the *Lubanga* trial to date is encouraging. Of the prosecution’s initial list of 31 witnesses, 17 have testified. The firm, decisive approach of the Chamber in managing the proceedings augurs well for the future of the trial. The first witness’ retraction of his initial testimony temporarily overshadowed the proceedings and led to intense media speculation and criticism of the Court. However, the pace of the trial quickly improved.

- The IBA is encouraged by the general treatment of witnesses by the judges, parties and participants. Thus far, there has been no indication that witnesses have been harassed or re-traumatised as a result of their testimony before the Court. The IBA therefore notes that, with the exception of the special circumstances surrounding the testimony of the first witness, the familiarisation process being implemented by the victims and witness unit (VWU) appears to be successful.
- Concerning victims and the role of legal representatives, the IBA is satisfied that victims have been afforded the opportunity to participate in a meaningful way in the trial. The delayed notification of the right to participate may however have affected the legal representatives' timely preparation for the trial.
- The IBA notes the efforts by the Chamber to fully respect the rights of the defence while also respecting the rights of victims and witnesses. In this regard, the IBA welcomes the Chamber's decision to allow the Office of Public Counsel for Defence (OPCD) access to the proceedings in real time in order to be able to provide legal assistance and support for the defence during the trial.

Concerns

- A major challenge of the *Lubanga* trial to date has been that so much of the proceedings is held in closed session due to fears for the witnesses' safety. Even though Mr Lubanga can view the witness on the computer monitor, the number of closed session hearings arguably impinges on his right to open, transparent public proceedings. While mindful of the challenging circumstances of many witnesses who take significant risks to testify before the Court, the IBA is concerned that the defendant's right to open justice and the public perception of the trial are being affected by the fact that much of the proceedings is conducted in closed session.
- The IBA regrets that the issue of self-incrimination was not fully explored prior to the commencement of the trial. Indeed, it is unclear why this was not done. There were several hearings leading up to the trial and it would have been evident that, given the nature of the evidence and the background of witnesses expected to testify, the issue of self-incrimination was likely to arise. Clear judicial and policy determinations ought to have been made at this earlier stage such that legal representatives of victims, the VWU, the Office of the Prosecutor (OTP) and any other relevant organs of the Court would be suitably apprised of their responsibilities in that regard.
- The IBA is also concerned that the late disclosure of the potentially exculpatory confidential material which initially led to the stay of proceedings in the *Lubanga* case may have affected the defendant's ability to properly prepare his case and conduct an effective defence. Indeed, given the imminence of the trial the defence may not even have had a full opportunity to decide whether to seek leave to appeal the Chamber's decision to retain some redactions and impose what in its view were appropriate counter-balancing measures.
- The residual effect of the Article 54(3)(e) confidentiality issue may yet create challenges for the defence at a later stage in the trial. The defence may wish to rely on the evidence, seek additional

information or question witnesses based on the confidential material but would however be prohibited from doing so under Rule 82 of the Rules of Procedure and Evidence, which could have a significant impact on its case.

- The IBA is also concerned by the use of leading questions during the questioning of witnesses. The IBA cautions against questioning witnesses in a manner that may inadvertently be unfair to the defendant. As such, we urge that great care be taken in particular by the prosecution, the other participants and the judges to avoid leading questions.
- The IBA notes that the practical implications of the appointment of the Office of Public Counsel for Victims (OPCV) to represent victims appearing before the Court seems to be a matter of concern for some legal representatives. It is felt by some legal representatives that the legal support mandate of the office should be its primary focus and less emphasis should be placed on acting in a representative capacity for victims. In their view, the full involvement of the office in the *Lubanga* trial proceedings as well as other cases before the Court tasks the already limited resources of this office and is not sustainable. Additionally, it is felt that there is the risk that the representation of victims could become institutionalised which defeats the objective of encouraging external counsel to sign up to the ICC's list of counsel. Counsel are also concerned that the approach of different Chambers to the appointment of the OPCV or the legal representatives lacks consistency.
- The IBA notes with concern the issues raised regarding accuracy of interpretation. Given the complexity of international criminal proceedings which involve different languages and cultural nuances, this is not surprising. The IBA considers that procedural safeguards such as regular verification of the accuracy of the interpretation and transcription by the Registry's translation/interpretation services are key to resolving such issues. The Chamber has stressed that interpreters must provide full interpretations and not summaries of what was said. The Chamber plays an important oversight role in investigating and resolving any disagreements emanating from interpretation.
- The IBA is concerned that transcripts of the proceedings are not posted in a timely manner on the Court's website. Given the importance of open, transparent public proceedings and the significance of public access to the record of the proceedings, the IBA considers that this issue must be addressed urgently.

Recommendations

- The IBA welcomes the Chamber's ruling that sensitive, informed advice given by the legal representatives of the witnesses (or, where there is no legal representative present in Court, the ad hoc lawyer assigned to give advice) should serve to allay witnesses' fears of future prosecution based on their testimony before the Court. However, given the complexity of Rule 74, the IBA recommends that consideration be given to formulating guidelines for counsel who must provide advice to their clients on the issue of self-incrimination. In addition, it is recommended that the Registry includes this issue in its training for List Counsel in order to encourage a uniform approach to the provision of such advice.
- While the participation of victims in the proceedings is encouraging, there appears to be

little practical distinction between those who remain anonymous and those whose identity is disclosed, as both categories are often represented by the same legal representative. The IBA urges the Chamber to be vigilant in ensuring that victims who have remained anonymous do not inadvertently benefit from the same participatory rights as the non-anonymous victims. In the IBA's view, if this is not done then the distinction in the modalities of participation for each category of witnesses will have no practical significance.

- The IBA encourages dialogue between the legal representatives and the OPCV during which specific concerns may be ventilated. The respective Chambers are also encouraged to ensure that there is consistency in the appointment of the OPCV vis-à-vis legal representatives for victims.
- The IBA notes that the ICC's legal texts do not specifically address the issue of the protection of legal representatives of victims. As such, any efforts by the Court in this regard would be a matter of policy. The IBA recommends that this matter continues to be a source of dialogue between the Court, legal representatives and key stakeholders
- In order to ensure that the OPCD continues to provide meaningful support and advice to defence teams during ongoing trial proceedings, the IBA reiterates the recommendations made in its monitoring report, *The ICC Under Scrutiny: Assessing recent developments at the International Criminal Court*, that the P4 (senior level) position in the OPCD should be approved on a permanent basis. Given the likelihood of a second trial in 2009, the limited resources of the OPCD will be severely tasked without this additional position.
- The IBA urges the Court Management Unit and all other relevant organs of the Court to ensure that once the review of the transcripts has been completed and accuracy of the record verified, that transcripts of the proceedings are posted on the Court's website as soon as is reasonably practicable.
- The IBA notes that although the Court produces audio-visual summaries of the proceedings, no written summaries are produced. Given the importance of summaries as an outreach and public information tool, the IBA urges the relevant organs of the Court to arrive at a consensus concerning this issue as soon as possible. While discussions are ongoing concerning whether to utilise the models of the ad hoc and hybrid tribunals, the IBA urges the Court to implement a pilot project as soon as practicable.

The *Al-Bashir* case

The decision to issue an arrest warrant for Sudanese President Omar Al-Bashir – the ICC's first for a sitting head of state – was a bold step for the Court, which has been both criticised and lauded. IBA's research and consultations suggest that the controversial nature of the *Al-Bashir* case has been due not only to its political implications, but also to the timing of the application and the fact that genocide charges were included in the application for the warrant (contrary to the opinion of 'experts' on Darfur and the recommendations of the United Commission of Inquiry on Darfur).

The Chamber's decision has also been controversial because of the strong divergence of views between the majority of judges and the dissenting judge over the genocide charges, and the ruling that all members of the UNSC (even non-states parties to the Statute) should be notified of the

decision, despite the non-mandatory terms of the UNSC referral to non-party states.

Observations

- The IBA supports interlocutory review of the Chamber's decision regarding the genocide charges. If leave to appeal is granted, it is hoped that the Appeals Chamber will provide clarity as to what inferences must be drawn by the PTC on the evidence at the arrest warrant stage of proceedings.
- The IBA regrets that in its decision the Chamber did not expressly address the relationship between Articles 27 and 98 of the Rome Statute regarding the issue of immunities. Article 98 of the Rome Statute requires the Chamber not to proceed with a request for arrest and surrender which would cause the requested state to act contrary to its obligations under international law with respect to the immunities of a person from a third state, unless a waiver has been obtained from the third state. In our view judicial reasoning by the Chamber on this issue could have allayed the confusion of some states regarding perceived conflicts between their obligations under international law and the Statute.
- The IBA considers that the arrest warrant decision has major implications for the way the ICC is publicly perceived. Criticism about the ICC's alleged bias against Africa and negative views about the impact of ICC proceedings on local peace processes has increased significantly since the warrant was issued. The Court's engagement with regional groups such as the African Union (AU) and the Arab League has now taken on a level of urgency.
- The IBA considers that sustained engagement with regional organisations and individual states must be carried out at the highest level of the Court. The IBA is encouraged by indications from the Presidency that there is a desire to increase its external relations mandate including by visiting key African countries. The IBA is also encouraged by the continuing efforts of the Registrar, and senior officials in the OTP to also visit key countries. The continued high-level visibility can only augur well in generating support for the Court's work.

Recommendations

- The IBA notes the proposed meeting of African states parties in Addis Ababa, Ethiopia on 8-9 June 2009 which was organised following the issuance of the arrest warrant for President Al-Bashir. The IBA recalls the commitment of the AU to combating impunity, promoting democracy, the rule of law and good governance throughout the African continent. In this regard, the IBA encourages the AU, as a regional leader, to fully support the work of the ICC on the continent and to collaborate with the Court to combat impunity for crimes affecting thousands of African victims.
- The IBA also welcomes the Court's formation of a court-wide Africa strategy group to help counter a number of the misperceptions about its work in Africa. The IBA considers that it is important that this group is truly representative of all organs and interests in the Court (including the defence). The IBA further encourages the Court to ensure that the message that is disseminated is clear, consistent and representative of every aspect of the Court's mandate including its commitment to fair trials.
- The IBA also fully supports the Court's efforts to open a field office in Addis Ababa. In our view

this office would be a central hub for the Court's interface with the African Union and states parties in the region.

- The IBA recognises that these efforts will require a realistic budgetary outlay. We urge the Assembly of States' Parties to fully support the Court's efforts in this regard.
- The IBA encourages the ICC to engage in sustained discourse with states parties concerning implementing legislation, in order that all states can give effect to the Court's requests for cooperation. The IBA also urges states parties who do not have or are in the process of passing implementing legislation, to move expeditiously to ensure that this process is finalised.

The *Bemba* case

The case of Jean-Pierre Bemba, though the ICC's first arising from the prosecution's investigations in the CAR, is the third case that has (almost) completed the confirmation of charges stage at the ICC. The judicial pronouncements in the *Bemba* case indicate that there have been notable improvements in the approach taken to the process of disclosure at the pre-trial stage of proceedings from the approach of the other Chambers. This is a welcome development, given that the judges, parties and participants have had the opportunity to assess the impact of previous decisions in other situations and cases on the defendants and pace of the proceedings. The overall success of the revised process remains to be seen given that the process is yet to move to the trial phase. The fact that the Trial Chamber will, from the outset, have access to all the evidence of either party appears to be a benefit that should enable more efficient preparation for trial.

Observations

- The IBA welcomes the decision of the PTC to implement a disclosure regime that allows for both incriminating and exonerating material to be filed in the record of the case with the Registrar from the confirmation stage of the proceedings. In our view, this system will allow all the parties, including the defence, to be better prepared for the confirmation hearing and ultimately the trial.
- The IBA also welcomes the decision of the Appeals Chamber concerning disclosure to the defence at the time of arrest and surrender to the Court. The Appeals Chamber decided that in order to ensure equality of arms and an adversarial procedure, the defence must, to the largest extent possible, at the time of his or her initial appearance at the Court, be granted access to documents that are essential in order to effectively challenge the lawfulness of detention.
- The IBA notes that the Chamber's decision to adjourn the confirmation of charges hearing and invite the Prosecutor to amend the charges was a correct application of Article 61(7)(c) of the Rome Statute. This is in contrast to the approach of the PTC in the *Lubanga* case, which unilaterally re-characterised the charges against the defendant. The IBA regrets however the timing of the decision. In our view this delayed the proceedings and lengthened the time that the defendant will spend in custody before a final decision is made by the Chamber.
- The IBA regrets that states parties are still reluctant to negotiate agreements with the Court to host defendants who may be provisionally released by the Court. The IBA considers that this renders almost illusory the defendant's right to apply for interim release.

Recommendations

- The IBA reiterates its recommendation in its November 2007 monitoring report in which it encouraged the Registry to proactively negotiate cooperation agreements with states parties to facilitate the hosting of defendants who may be provisionally released or who have been acquitted by the Court and cannot return to their country for security reasons.
- The IBA encourages states parties to fully cooperate with the Court in this regard, in keeping with their obligations under Part 9 of the Rome Statute. The IBA recognises that this will require continuous dialogue between the Court and relevant stakeholders such that concerns can be discussed with a view to reaching a compromise position.

Annex I

Parameters for IBA Monitoring of the International Criminal Court

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

The IBA is aware of the complexity of the task facing the ICC in creating a new model for international criminal justice and of the high expectations under which it is operating. While at all times preserving its objectivity, the IBA will maintain close contact with the divisions of the Court. Where appropriate, it will seek the Court's views and 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.