Northwestern Journal of International Human Rights

Volume 11 | Issue 3 Article 8

Summer 2013

ICC in the Year 2011: Atrocity Crime Litigation Review for the Year 2011

Ashagrie Abdi

Jessica Dwinell

Kelly Hamren Anderson

Jamie Liebert

Puspa Pokharel

ICC in the Year 2011: Atrocity Crime Litigation Review in the Year 2011

Ashagrie Abdi

Jessica Dwinell

Kelly Hamren Anderson

Jamie Liebert

Puspa Pokharel

SITUATION IN THE CENTRAL AFRICAN REPUBLIC (CAR): THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO - ICC-01/05-01/08[1]

A. Background Information

1. Armed Conflict of an "International Character" in the CAR

¶1 The ICC found that there were substantial grounds to believe that from October 26, 2002, until March 15, 2003, an armed conflict of an "international character" occurred in the Central African Republic ("CAR"). The national armed forces of Ange-Felix Patasse, who was president of the CAR at the time of the conflict, joined with combatants under the authority of Jean-Pierre Bemba Gombo ("Bemba"), the leader of the *Mouvement de Liberation du Congo* ("MLC"), to confront a rebel movement led by Francois Bozize, who was the former Chief-of-Staff of the Central African Army (Forces Armees Centrafricaines – FACA).

¶2 Bemba, operating as the President and Commander-in-Chief of the MLC, exercised effective authority and control over the MLC troops. Over the course of the conflict, MLC forces committed crimes of a widespread and systematic nature against the civilian population of the CAR. These crimes included murder, rape, and pillaging. There are substantial grounds to believe that Bemba was aware of the crimes committed by MLC troops, but did not take reasonable measures to prevent the crimes.

[1] ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/Pages/case%20the%20prosecutor%20v%20jean-pierre%20bemba%20gombo.aspx.

2. CAR Referral to the ICC, Surrender of Jean-Pierre Bemba Gombo, and Charges

¶3 The CAR ratified the Rome Statute on October 3, 2001, and referred the crimes committed on CAR territory to the ICC on December 21, 2004. After determining that the conditions required by the Rome Statute to launch an investigation had been satisfied, an investigation into the crimes was opened on May 10, 2007.

¶4 On June 15, 2009, Pre-Trial Chamber II concluded that there were substantial grounds to believe that Bemba, as a military commander within the meaning of article 28(a) of the Rome Statute, was responsible for two crimes against humanity and three war crimes, including rape, murder, and pillaging. The confirmation of the charges occurred on September 18, 2009, and the trial proceedings under Trial Chamber III began on November 22, 2010.

B. Recent Trial Developments

1. Decisions Regarding Victim Participation

¶5 On July 8, 2011, the Chamber issued its decision on 401 victim applications to participate in the proceedings. In the decision, given the large volume of victim applications that had been received, the Chamber set September 16, 2011, as the final deadline for the submission of any new victim applications to participate in the Bemba trial. Out of 401 applications reviewed, the court granted 307 applicants a participating status. The defense contested the admission of some of the 401 applicants on the basis that they did not provide proper identification as proscribed by the court in earlier proceedings. The Chamber decided that any official documents such as unemployment cards, notarized acts, marriage certificates, and student identification cards would "constitute a sufficient basis for establishing an applicant's identity."

¶6 On October 25, 2011, the Chamber issued another decision regarding 270 new applications from victims who wished to participate in the trial. Out of 270 applications reviewed by the court, 264 applicants were granted participating status. The defense raised an objection with regard to applicants who had already filed an application and been rejected. The defense alleged that amended applications were of an "opportunistic nature" and had been tailored to conform to the facts covered by the charges. The Chamber concluded that it was not required to assess the credibility and reliability of amended applications by examining the nature of the information added to any amendments.

2. Witness Testimony Regarding Operations of the MLC

¶7 Trial proceedings have recently centered on testimony provided by individuals who were involved in the military operations during the armed conflict, and who were consequently in a position to observe the acts of the MLC.

¶8 During the past few months, those who served with the FACA testified about their observations of MLC operations in PK 13, in Bangui, reporting incidents of plunder, rape, and pillaging committed by the MLC and *Banyamulenge* (a term used to describe Tutsi Rwandans believed to have been under the control of Bemba and the MLC). According to witness testimony, MLC generals, under the authority of Bemba, did little to contain their troops or punish the violent acts. Trial Chamber III continues to hear witness testimony as the case against Bemba continues.

SITUATION IN LIBYA: THE PROSECUTOR V. MUAMMAR MOHAMMED ABU MINYAR GADDAFI, SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI – ICC-01/11-01/11[2]

A. Background Information: State Directed Violence against Civilian Demonstrators

¶9 In response to events in Tunisia and Egypt in early 2011, state policy was developed at the "highest level of the Libyan State machinery" to quell and prevent civilian demonstrations against the Gaddafi regime, by any means necessary, including the use of lethal force.

¶10 From February 15, 2011 until February 28, 2011, the Libyan Security Forces implemented an attack against civilian demonstrators and those perceived as dissidents. The attack was concentrated in Tripoli, Misrata, and Benghazi, and resulted in the killing, injury, arrest, and imprisonment of hundreds of civilians.

¶11 On February 26, 2011, the United Nations Security Council ("U.N.SC") decided, in a unanimous vote, to refer the situation in Libya to the ICC prosecutor. On March 3, 2011, the ICC prosecutor concluded that there was a reasonable basis to believe crimes within the ICC's jurisdiction had been committed in Libya, and officially opened an investigation.

1. Charges and Warrants of Arrest

¶12 On June 27, 2011, Pre-Trial Chamber I issued 3 warrants for arrest. The Chamber found that there were reasonable grounds to believe that under article 25(3)(a) of Rome Statute, Muammar Gaddafi ("Gaddafi"), Saif Al-Islam Gaddafi ("Saif Al-Islam"), and Abdullah Al-Senussi ("Al-Senussi") were criminally responsible, as indirect perpetrators, on two counts of crimes against humanity. The crimes against humanity included murder, within the meaning of article 7(1)(a) of the Statute, and persecution, within the meaning of article 7(1)(h) of the Statute.

¶13 Both Gaddafi and Saif Al-Islam developed and helped implement the plan to quell civilian demonstrations against the Gaddafi regime. As the Libyan Head of State under the title of Leader of the Revolution, Gaddafi exercised ultimate control and authority over the Libyan State apparatus of power, including the Security Forces. As Gaddafi's unspoken successor and a powerful member of his inner circle with the powers of a *de facto* Prime Minister, Saif Al-Islam had control over important parts of the State apparatus necessary to implement the anti-demonstration operations and initiatives.

¶14 Additionally, Al-Senussi used his authority as Colonel in the Libyan Armed Forces and head of the Military Intelligence to implement the plan to quell the demonstrations, and directly ordered troops to attack civilians.

2. Recent developments

Gaddafi's Death and Decision to Terminate the Case Against Him

¶15 Initially, although Gaddafi's death on October 20 was depicted in the worldwide media, there was no concrete evidence to support a withdrawal of the warrant for his arrest. On November 4, 2011, the Embassy of Libya provided the ICC with a copy of the death certificate of Gaddafi. Then, on November 22, the ICC terminated the case against Gaddafi on the grounds

[2] ICC, Prosecutor v. Muammar Mohammed Abu Minyar Gadaffi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi, ICC-01/11-01/11, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Pages/icc01110111.aspx.

that the purpose of the criminal proceeding was to determine individual criminal responsibility and that jurisdiction cannot be exercised over a deceased person.

Capture of Saif Al-Islam and the Possibility of Trial in Libya

¶16 Saif Al-Islam was captured on November 19, 2011, as he attempted to flee Libya, and is currently held in custody by Libyan authorities. The National Transition Council ("NTC"), serving as the interim body currently governing Libya, wanted a Libyan judge to try Saif Al-Islam and all those accused of crimes that were committed under the auspices of the deposed Gaddafi regime. Although potential Libyan withdrawal of the case against Saif Al-Islam would pose an unprecedented event in history of the ICC (never before has a state removed a case from the jurisdiction of the ICC once the case has been determined admissible), a national admissibility challenge was explicitly included in the ICC's mandate. But for a complementarity principle stating that courts in a defendant's home country should have priority over the ICC, a majority of countries would not have signed the treaty in the first place.

¶17 During a visit to Libya on November 22, 2011, ICC Prosecutor, Luis Moreno Ocampo, met with the Libyan Minister of Justice, Mustafa Abdul Jalil, to discuss the NTC's position with regards to proceedings against Saif Al-Islam. The prosecutor informed the Minister of Justice that in order to remove the case against Saif Al-Islam from the ICC's jurisdiction, the NTC needed to submit an admissibility challenge before Pre-Trial Chamber I, pursuant to articles 17 and 19 of the Rome Statute. The chairman of the NTC provided Prosecutor Ocampo with a letter addressed to the President of Pre-Trial Chamber I, which confirmed the arrest of Saif Al-Islam and affirmed Libyan jurisdiction over future prosecution of the case. In the letter, the NTC pledged to work closely with the prosecution and the Pre-Trial Chamber to facilitate the process of bringing the case against Saif Al-Islam within Libyan jurisdiction. It will ultimately be left to the judges of the ICC to decide on the issue of admissibility. So far, the issue of investigation and related legal issues about the suspect are left to the Libyan Transitional Authorities. Still, the ICC has been demanding a report about the progress of the case and the health conditions of the suspect.

¶18 There are some obstacles to the NTC claim that Libyan courts should hold the trial. First, Libyans must demonstrate that they are capable of actually investigating and prosecuting Saif Al-Islam. However, the country's judicial system is currently in disarray after years of dictatorial rule. There is additionally some concern that, if Libya successfully withdraws the case from the ICC in favor of a trial in Libya, the hearings will be of a retributive nature rather than geared towards justice. The situation raises an important question as to whether Libyan rebels, who were recently fighting for their lives, can be trusted to uphold international human rights standards in the treatment of their recent enemies.

Current Situation with Al-Senussi

¶19 Despite rumors that Al-Senussi was captured two days after Saif Al-Islam's arrest, Libyan defense minister, Osama Jweli, has stated that there is no evidence that Al-Senussi has been caught, and the Minister of Justice to the NTC informed the ICC that he could not confirm the capture of Gaddafi's former intelligence chief. The Libyan Transitional Authorities decided to put those indicted on trial in Libya. Meanwhile, the ICC has been demanding information about their progress. However, there has not been much discussion about Al-Senussi.

3. THE SITUATION IN THE SUDAN

A. Background

¶20 If there are controversies over the jurisdiction of the ICC, the issue of Sudan is at the forefront. First of all, it a case that involves a sitting head of state. Secondly, since Sudan is not a party to the ICC, jurisdiction in Sudan resulted not from the Rome Statute, but from U.N. Security Council Resolution 1593, which, in 2005 referred the situation in Darfur to the ICC Prosecutor and required Sudan to cooperate with the ICC. While Sudan has not consented to its jurisdiction, the Court argued that the Resolution is binding on all U.N. member states, including Sudan. Under the ICC Statute, the ICC was authorized, but not required, to accept the case.

¶21 The conflict in Darfur stems from ethnic tensions between the Afro-Arab majority, which held governmental power in 2002, and its oppression of the black Sudanese population. In 2002, these tensions triggered black Sudanese rebel groups—the Sudan Liberation Army and the Justice and Equality Movement—to attack Sudanese government troops in Darfur. Early defeats by rebel groups led the Sudanese government to begin financing the Janjaweed, an Arab militia, to fight the rebel coalition, though the government continues to deny this fact. The Janjaweed proceeded to attack black villages in Darfur, committing many human rights violations and drawing international scrutiny in 2005, which precipitated the referral of Sudan to the ICC.

¶22 Since the ICC accepted the case, the Liberation and Justice Movement, serving as an umbrella to rebel groups, and the Government of Sudan negotiated a peace agreement in the peace forum held in Doha, Qatar. However, from a humanitarian perspective, the situation in Sudan remains dire, as evidenced by the ICC Prosecutor's Special Report to the U.N. for Darfur in June 2011. In the special report, Prosecutor Luis Moreno Ocampo reported that attacks on civilians continued in the first half of 2011, including wide-spread sexual and gender-based violence and crimes against human rights workers. Further, he declared that government forces and the Janjaweed militia were "deliberately inflicting conditions of life calculated to bring about physical destruction" and restricting access to information on war crimes and crimes against humanity in Sudan.

B. Banda & Jerbo[3]

¶23 Abdallah Banda, the previous commander-in-chief of the Justice and Equality Movement Collective-Leadership, and Saleh Jerbo, the previous chief of staff for the Sudanese Liberation Army Unity, are currently awaiting trial by the ICC. On March 7, 2011, Banda and Jerbo were committed to trial for the war crimes charged by the ICC. Pretrial Chamber I had found substantial grounds to believe both Jerbo and Banda were criminally responsible as co-perpetrators for three war crimes committed in the Haskanita camp in the South Darfur state: (1) violence to life and attempted violence to life; (2) intentionally directed attacks against personnel, installations, material, units and vehicles involved in a peacekeeping mission; and (3) pillaging. Accusations included the intensified attacks by the Sudanese Liberation Army Unity, led by Jerbo, in the Abyei region. An attack by SLA-Unity and the Justice & Equality Movement forces, led by Banda, resulted in the death of twelve African Union Mission in Sudan (AMIS) peacekeepers in Darfur. In response, the presidency referred the case to Trial Chamber IV.

[3] ICC, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050309/Pages/icc02050309.aspx.

¶24 Trial Chamber IV has recently made procedural decisions about the use of victims and witnesses in the case. The Chamber issued orders instructing the registry to consult the organization of common legal representation for the 89 victims participating in the case. In considering the participatory rights of the anonymous victims and their potential impact on the rights of the defendants, Trial Chamber IV concluded that the non-anonymous victims' observations of the evidence should be submitted to the Chamber. This decision illustrated the need for the ICC to balance the rights of the defendants to stand trial against identified witnesses against the need to protect Sudanese victims whose families might still face danger in the war-ridden country. The continuing conflict in Sudan has also made it difficult for the defense team to build their case, as any local persons that might have information to exonerate Banda and Jerbo are at risk of harassment and attack by the Sudanese government if they cooperate with the ICC. Though the defense team filed requests for the ICC to intervene on the issues of both the cooperation of the Government of Sudan and the African Union, pursuant to articles 53 and 64 of the Rome Statute, the Chamber denied the request for intervention because it lacked sufficient specificity.

¶25 On September 28, 2011, the Prosecutor and defense jointly submitted a statement of contested and agreed facts. The defense team only contested: (1) whether the attack on Haskanita on September 29, 20007 was unlawful; (2) if found unlawful, whether the defendants were aware of the factual circumstances of the attack; and (3) whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations. This was significant because the trial would only proceed on the basis of contested issues, and the parties may not present evidence other than on contested issues.

C. Prosecutor vs. Al-Bashir[4]

¶26 In 2010, Pretrial Chamber I issued a charge of genocide, as well as crimes against humanity against al-Bashir. On June 8, 2011, ICC Prosecutor Luis Moreno Ocampo told the U.N. Security Council that al-Bashir continued to commit crimes against humanity and genocide against residents of Darfur in defiance of the U.N. Al-Bashir had been denying crimes and attempting to divert attention by publicizing cease fire agreements that were immediately violated after being announced, as well as proposing special court investigations that were never intended to happen. However, little progress has been made, as al-Bashir remains the president of Sudan. In January 2011, the OTP received information that al-Bashir travelled to Chad in January 2010 for Chad's Independence Day. Pre-Trial Chamber I queried Chad about their failure to arrest al-Bashir. Similarly, in 2011, al-Bashir visited Djibouti, which is supposed to enforce arrest warrants issued by the court, for the inauguration of the country's president. Consequently, on May 12, 2011, the ICC informed the Security Council that Djibouti had failed to heed this request. Again on October 19, 2011, the ICC requested Malawi to explain its alleged failure to arrest and surrender Al-Bashir when he visited Malawi the previous week. Moreover, the ICC sent a diplomatic note to Malawi's embassy in Brussels, reminding Malawi of its legal obligations, per the Rome Statute.

¶27 The issue of the weakness of the ICC, seen by the apparent disregard for its requests in the aforementioned instances, has been a prominent issue. The ICC, framed by the Rome Statue,

[4] ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/Pages/icc02050109.aspx.

allows governments "more room to refuse, delay, or manipulate assistance with the court than the ICTY and ICTR." This may be due to the complementary nature of the ICC, which is authorized to proceed only if state fails to institute (fair) proceedings. Further, states that refuse to join the ICC implicated in a crime must be notified, and are entitled to a deferral, which can frustrate proceedings. Unlike the U.N., the ICC Statute does not permit the international court to decide whether information requested by the state would be detrimental to a state's national security interest, further weakening the ICC. Also unlike the ad-hoc courts of the U.N., the ICC must first establish a "situation" exists which can be time and labor intensive. These and other problems leave some commentators to conclude that while the ICC has more lofty goals than other international criminal courts, its framework creates weaknesses that lead to problems for the ICC in securing outside assistance and processing crimes. This creates "a disparity… between ambition and achievement."

¶28 The latest development in the case against the Sudanese President was that the Kenyan High Court issued an arrest warrant on Nov. 28, 2011. The Court said that the Government must arrest Mr. al-Bashir, "should he ever set foot in Kenya." The Sudanese Government has taken immediate action in response to the arrest warrant by the Kenyan High Court by expelling the Kenyan Ambassador to Khartoum and summoning its own ambassador from Nairobi to Khartoum.

D. Harun & Ali Kushayb[5]

¶29 Harun, who has served as Minister of State of Interior of the Government of Sudan, as well as Minister of State for Humanitarian Affairs, has been accused by the ICC for committing war crimes (twnty-two counts) and crimes against humanity (twenty counts). Similarly, Kushayb, who served as a leader in the Popular Defense Forces, has been accused of twenty-two counts of crimes against humanity and twenty-eight counts of war crimes.

¶30 Both arrest warrants are still pending, since, as in 2010, both Harun and Kushayb continue to enjoy immunity and have yet to submit themselves to ICC requests for prosecution. In January 2011, the Government of Sudan affirmed that it declined to investigate Harun, and instead, promoted him as a governor. He has subsequently been seen in the international community, including being flown by the U.N. to a peace meeting in Abyei, in order to "ensure that violence was avoided given his authority over the local tribes." On June 8, 2011, ICC Prosecutor Luis Moreno Ocampo told the U.N. Security Council that Harun continued his illegal actions with impunity as a government official. The Prosecutor further concluded that Harun was likely responsible for the increased conflict in Abyei. In his ministerial position, Harun oversaw the population of internally displaced persons in Darfur, and is accused by aid agencies of hindering relief efforts.

¶31 Kushayb was previously held in Sudanese custody, released in April 2008, and re-arrested in October 2008. However, the Sudanese government has not disclosed whether they will turn Kushayb over to the ICC to stand trial.

[5] ICC, Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, ICC-02/05-01/07, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases /icc%200205%200107/Pages/darfur_%20sudan.aspx.

E. The Situation in Côte d'Ivoire[6]

¶32 Côte d'Ivoire signed the Rome Statute on November 30, 1998, but has not yet ratified it. However, in April 2003, Côte d'Ivoire accepted the jurisdiction of the ICC under the provisions of article 12 (3) of the Rome Statute. The investigation marked the first time that the Court had opened an investigation on this basis.

¶33 The ICC Prosecutor has been examining the situation in Côte d'Ivoire since 2003 in order to determine whether an investigation was warranted, following the submission of a declaration by the Ivorian government recognizing the jurisdiction of the Court. On December 14, 2010, newly-elected President of Côte d'Ivoire Alassane Ouattara sent a letter to the Office of the Prosecutor reaffirming the Ivorian government's acceptance of the Court's jurisdiction. On May 4, 2011, President Ouattara reiterated his wish that the Court open an investigation. After a preliminary examination, the Prosecutor concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed in Côte d'Ivoire since November 28, 2010. President Ouattara vowed, in an attempt to unify the country, to hold those responsible accountable for their crimes, which left an estimated 3,000 people dead. Additional charges included: 72 people disappeared, 520 subject to arbitrary arrest and detentions, and 100 reported cases of rape. Consequently, the crimes under ICC's authority will likely include genocide, war crimes, crimes against humanity, and other violations.

¶34 This makes Côte d'Ivoire the first country to be investigated without being party to the court under the Rome Statute. The Prosecutor Louis Moreno-Ocampo visited the country on June 17, 2011, announcing to victims that they had thirty days to make representations to the Pre-Trial Chamber III. The OTP requested from the judge authorization to open a full investigation on June 23, 2011.

¶35 Côte d'Ivoire accepted jurisdiction pursuant to article 12(3) of Statute of ICC for "purposes of identifying, investigating, and trying the perpetrators and accomplices of acts committed" on its territory since September 2002 by Laurent Gbagbo, who was president at the time. Additionally, Ouattara specifically renewed jurisdiction of the ICC in May 2011 to investigate post-election crimes because, "in light of the gravity of the crimes, he requested the assistance of the Court in order to ensure that the perpetrators would not go unpunished." Notably, Ouattara requested that the ICC review the post-election crimes only, which some suggest was due to his worry that the ICC's review of the 2002-2003 conflict would reveal wrongdoings (including systematic killings and rapes) by members of his own party. However, Ouattara has repeatedly affirmed that the ICC should look at crimes on both sides of the 2010-2011 election violence.

¶36 On June 28, 2011, ICC Deputy Prosecutor Bensouda and Côte d'Ivoire Justice Minister Kouadio signed a formal agreement promising the government's full cooperation as outlined by Part 9 of the Rome Statute. Ouattara also promised to ratify the Rome Statute "as soon as possible."

¶37 Meanwhile, in August, government authorities arrested 57 soldiers from former president Laurent Gbagbo's government for crimes ranging from murder and kidnapping, to buying illegal arms.

¶38 In October 2011, Pretrial Chamber III granted the Prosecutor's request to open an investigation as to the crimes committed after the November 2010 election as well as any relevant crimes committed since 2002. Côte d'Ivoire invited Prosecutor Moreno-Ocampo to

[6] ICC, Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc02110111/Pages/icc02110111.aspx.

return to the country in October 2011 to meet with victims, government officials, and opposition representatives. On November 30, 2011 Mr. Gbagbo was transferred to The Hague, the first former head of a state to appear before the Court. On his appearance before the Court on December 5, 2011, he claimed that he was "deceived" about his transfer to The Hague. He said he was told he was going to meet a judge in the north-eastern town of Korhogo when the arrest warrant was produced. His lawyer Habiba Toure told the BBC that "the transfer had been illegal under Ivorian law" and that "current President Alassane Ouattara should also face justice."

THE SITUATION IN THE REPUBLIC OF KENYA

A. General Background

¶39 The two cases related to the situation in Kenya were bought before the court when the OTP received the information about the crimes committed in Kenya with regards to the post-election violence during 2007-2008. It was the first instance in which the Prosecutor acted *proprio motu* (article 15, Rome Statute). ICC judges authorized an investigation based on a recommendation from the Prosecutor. On March 31, 2010, the Pre-Trial Chamber granted the Prosecutor's request as to the proceedings in the investigation of the cases on crimes against humanity allegedly committed in Kenya.

¶40 The cases of six Kenyans suspected of inciting the violence post-presidential election in 2007-2008 received a great deal of hype after the African Union backed the Kenyan Government's bid to convince the International Criminal Court to defer the case. Furthermore, the letter from the African Union to the U.N. Security Council to have the trials deferred is considered a political gesture, "which [would] serve[] only to further alienate Africa from ICC." However, the request of deferral from the African Union, similar to the one asked for in the ICC case of Sudanese President Omar Al-Bashir for alleged atrocities in Darfur, is associated with "a now established pattern on the part of African states to seek deferrals in cases where political elites are implicated."

¶41 The present cases at the ICC are highly anticipated. It is questionable whether all or a few of the six high-profiled suspects will be committed to trial, or set free altogether because of the upcoming election scheduled in 2012. Kenya is scheduled to hold general elections next year, and Uhuru and Ruto plan to run for presidency.

¶42 The issue of witness intimidation has been highly contentious in the cases against the six Kenyans facing charges at the ICC, even though the trial has yet to begin. In two of the cases, Kenya tried to halt the proceedings in The Hague by establishing its own national proceedings, filing appeals to the ICC itself which were not substantiated properly with the appropriate evidence. Many argue that even if the Kenyan Government had tried to initiate the national proceedings, "the lack of substantive witness protection system in the country is one of the major impediments to credible national trials." Numerous cases of witness intimidation have been reported by the Kenyan media, and the Kenya National Commission on Human Rights revealed that several witnesses had reported cases of intimidation to their team during the ICC investigations. Human Rights watch is calling on the government to urgently provide full funding to the existing Witness Protection Agency and ensure that it is "robust, credible, and has the option of relocating at-risk, high value witnesses outside Kenya." The fear is even greater for the defendants Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, because they are governmental post holders. Because of that fear, the ICC Prosecutor Luis Moreno-Ocampo

requested the Kenyan Government to remove the head of civil service Francis Muthaura for fear that his influence over the country's police could lead to witness coercion. However, the likelihood of witness intimidation from people who are highly allied with the defendants is high, especially when there is no effective witness protection mechanism within the Kenyan judicial system.

B. The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang[7]

¶43 William Samoei Ruto (the suspended Minister of Higher Education, Science and Technology of the Republic of Kenya) and Henry Kiprono Kosgey (currently a member of the Parliament and the Chairman of the Orange Democratic Movement) are both suspected of being criminally responsible as indirect co-perpetrators pursuant to article 25(3)(a) of the Rome Statute for crimes against humanity:

- murder (article 7(l)(a));
- forcible transfer of population (article 7(l)(d)); and
- persecution (article 7(l)(h)).
- Joshua Arap Sang (currently the Head of Operations at Kass FM in Nairobi, the Republic of Kenya) is suspected of having otherwise committed the following crimes against humanity:
- murder (article 7(l)(a));
- forcible transfer of population (article 7(l)(d)); and
- persecution (article 7(l)(h)).

C. The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali[8]

¶44 Francis Kirimi Muthaura (currently holding the positions of Head of the Public Service and Secretary to the Cabinet of the Republic of Kenya) and Uhuru Muigai Kenyatta (currently holding the positions of Deputy Prime Minister and Minister for Finance of the Republic of Kenya) are suspected of being criminally responsible as indirect co-perpetrators pursuant to article 25(3)(a) of the Rome Statute for crimes against humanity:

- murder (article 7(l)(a));
- forcible transfer (article 7(l)(d));
- rape (article 7(l)(g));
- persecution (articles 7(l)(h)); and
- other inhumane acts (article 7(l)(k)).

¶45 Mohammed Hussein Ali (currently holding the position of Chief Executive of the Postal Corporation of Kenya) is suspected of having otherwise contributed (within the meaning of

[7] ICC, The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, ICC-01/09-01/11, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/Pages/icc01090111.aspx.

[8] ICC, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, ICC-01/09-02/11, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx.

article 25(3)(d) of the Rome Statute) to the commission of the following crimes against humanity:

- murder (article 7(l)(a));
- forcible transfer (article 7(l)(d));
- rape (article 7(l)(g));
- persecution (article 7(l)(h)); and
- other inhumane acts (article 7(l)(k)).

D. Legal Actions Taken Under the Cases

¶46 In March 2010, the Pre-Trial Chamber II authorized the Prosecutor to commence an investigation into the situation of Kenya.

¶47 On March 8, 2011, the Pre-Trial Chamber II issued summons to appear to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, and to Francis Kirimi Muthara, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.

¶48 On May 5, 2011, in the case of The Prosecutor v. Francis Kirimi Muthaura, the Pre-Trial Chamber II issued the decision, "Application Order to the Prosecutor Regarding Extrajudicial Comments to the Press."

¶49 On May 30, 2011, the Pre-Trial Chamber rejected the Government of Kenya's claim as to the inadmissibility in both the cases as per article 19(2)(b). On August 30, 2011, the Appeals Chamber affirmed the decision in The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.

¶50 On August 5, 2011, the Single Judge decided to admit 327 victims as participants. In the confirmation of charges hearing, and in the related proceedings, the Single Judge appointed Ms. Sureta Chana as the common legal representative from all the admitted victims in Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.

E. Legal Highlights in the Cases

1. Summons to William Samoie Ruto, Henry Kiprono Kosgey and Joshua Arap Sang in the First Case and Francis Keirimi Muhtaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali in the Second Case

¶51 While deciding whether to issue summons to the defendants in both of the cases, the Pre-Trial Chamber decided on several questions. Firstly, it decided on the jurisdiction and the admissibility of the case. On March 31, 2010, the court decided that it had jurisdiction over the cases. As to admissibility, the Chamber did not examine admissibility, considering it "only discretionary at the stage of the case especially when the proceedings were triggered by the *proprio motu* powers of the chamber."

¶52 The Chamber in The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang then examined if the crimes presented in the Prosecutor's application had been committed. The chamber found that there were reasonable grounds to believe that immediately after the announcement of the results of the Presidential election and specifically starting from December 30, 2007 until the end of January 2008, attacks were carried out in several districts in the Republic of Kenya, with the targets being the Kikuyo, Kamba and Kisli ethnic groups, which were considered PNU supporters in the election. The attacks were widespread and systematic.

The attacks were committed pursuant to organization policy: there was a plan to punish PNU supporters and expel them from the Rift valley with the ultimate aim of creating a uniform Orange Democratic Movement (ODM) voting bloc.

¶53 In order to implement the plan, Ruto and Sang established a network of perpetrators belonging to the Kalenjin community mostly consisting of ODM political representatives, media representatives, former Kenyan police and army, Kalenjin elders as well as local leaders. There were reasonable grounds to believe that the network had the capacity to perform acts which infringed on basic human values, was under responsible command and had an established hierarchy, and worked with the primary purpose and intention to attack the civilian population. The Chamber found that the network qualified as an "organization" within the meaning of article 7(2) of the Rome Statute. The chamber also found that there were reasonable grounds to believe that the crimes against humanity of murder, forcible transfer, and persecution had all occurred. However, the Chamber found that there was insufficient evidence to support the Prosecutor's allegation of acts constituting torture as a crime against humanity.

¶54 Similarly, in case of Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, the Chamber was satisfied that the events that occurred constituted an "attack" within the meaning of article 7(1) of the Rome Statute. Furthermore the Chamber concurred that the targeted population was civilian, distinguished on the basis of their political affiliation to the ODM. Because the attacks by the Mungiki in Nakuru and Naivasha were organized, followed the same pattern and were large scale attacks resulting in a high number of victims, the Chamber considered that the statutory requirement that the attack to be widespread or systematic to be fulfilled. The Chamber found that Mungiki operated as a large and complex hierarchical structure within a particular command structure. The structure consisted of the strict disciplinary measures for the obedience to the internal rules, a trained military wing, which qualified this structure as an organization. As for the policy requirement, the Chamber found that on the basis of the material relating to the occurrence, prior to the attacks, planning meetings were held locally in Nakuru and Naivasha and the attacks were carried out on the basis of the policy established by the Mungiki Organization.

¶55 With respect to whether the alleged acts constituted crimes against humanity, the Chamber found that murder and forcible transfer of population as acts constituting crimes against humanity. The chamber found that rape, as an act constituting a crime against humanity, was committed in Nakuru, but not in Naivasha (due to lack of substantiating evidence). The Chamber found that acts like forcible circumcision properly qualified as "other inhumane acts" constituting crimes against humanity and were committed in Nakuru and Naivasha against the population. Finally the Chamber found that acts of murder, forcible transfer of the population and other inhumane acts were committed against a collectivity identified group on political grounds by reason of its perceived affiliation with the ODM, which constituted persecution as an act consisting of a crime against humanity.

2. Dissenting Opinion by Judge Hans Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summons to Appear for Ruto, Henry Kosgey And Sang in the First Case and Muthuara, Kenyatta and Ali in the Second Case.

¶56 As per the judge, the ICC lacked jurisdiction *ratione materiae* in both of these cases because the crimes alleged did not amount to crimes against humanity pursuant to article 7 of the Statute. The judge was not convinced that the crimes alleged in Kenya were committed pursuant to the policy of organization within the meaning of article 7(2)(a). In the case of The Prosecutor

v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, the judge was convinced that the network was more reflective of the Tribal branch and not of any political, media, financial or military branched within it. Businessmen offered financial assistance because they belonged to the Kalenjin community. The retired army generals or commanders trained the Kalenjin youth because they belonged to the Kalenjin community and wished to assist the leaders. The Emo Foundation and Kass FM were instruments of the Kalenjin community with the goal of promoting Kalenjin culture and interest and supporting Kalenjin politicians in the election campaign.

¶57 Accordingly, the violence committed was ethnically driven. The dissenting opinion revolved around whether the Tribal Branch alone or members of a tribe can be considered an "organization" within the meaning of article 7(2)(a) of the statute. According to the Judge, merely having the Tribal branch within the network did not meet the legal requirements of an organization within the article 7(2)(a) of the Rome Statute. In order to fall under this article, the attack directed against the civilian population "…ha[d] to be attributable to a state like 'organization'…"

¶58 Whereas in the case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, the Prosecutor maintained that the activities of the two stakeholder groups, i.e Mungiki and Pro-PNU youth in Nakuru and Naivasha and the Kenyan Police Forces in Kisumu and Kibera, as being attributable to one organization. However Judge Hans Peter Kaul maintained that the Mungiki gang and the Kenyan Police Forces did not share a common hierarchy, but rather maintained separate structures. Furthermore, for him, the fact that the 'cooperation' between the Mungiki gang and the Kenyan Police Forces was established shortly before the 2007 Presidential elections demonstrated the ad hoc nature of the partnership of the two stakeholder groups which could not satisfy the criteria of an organization.

¶59 The dissenting opinion was also against the majority decision where it considered the Mungiki gang alone as the entity which had established a policy of attacking the civilian population. For him, the activities of the Mungiki gang were limited in nature and were territorially restricted to the slums of Nairobi. Furthermore, the fact that it could only have committed the crimes alleged with the support of certain individuals within the Kenyan political elite and the police apparatus created a doubt as to whether it had the capacity and means at its disposal to attack any civilian population on large scale. The judge failed to see that the alleged crimes were committed pursuant to a policy of a state-like 'organization' within the meaning of article 7 of the Statute.

3. Decision on the Defense "Application for Order to the Prosecutor Regarding Extrajudicial Comments to the Press" in The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali

¶60 The Application was based on comments made by the Prosecutor during a press conference which took place on March 14, 2011, where he stated that Muthaura had control over police in Kenya, on the basis that he is still holding the post of head of civil service in Kenya. On the basis of the statement made by the Prosecutor, the defense argued that it had potential to infect the investigation process and significantly disadvantage the defense. While addressing the issue, the Chamber stressed the Prosecutor's duty to protect the witness during his investigations and prosecutions. Moreover, the statement made by the Prosecutor is considered to reflect his role in the present criminal proceedings which cannot be considered to prejudge the questions which are yet to be determined in the present case. The Chamber found that the statement made

by the Prosecutor was a concern for the witnesses in the case which is within his responsibilities and were therefore not appropriate.

4. Judgment on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute

¶61 The Chamber examined the preliminary question as to whether the present cases are being investigated or prosecuted by the Republic of Kenya within the meaning of article 17(1) of the Statute. In this aspect, the Government of Kenya asserted that the admissibility of the case should be assessed against the criteria established by the Chamber in the March 31, 2010 Authorization Decision. However, the Government seems to have misunderstood the fact that those investigations in the same case must also cover the same persons subject to court proceedings. As to the Chamber, this interpretation by the Government was misleading as the criteria established by the Chamber on March 31, 2010 was "simply indicative of the sort of elements that the court should consider in making an admissibility determination within the *context of a situation,* namely when the examination is in relation to one or more 'potential' case(s)." The test is more specific when it comes to an admissibility determination at the "case," which starts with an application by the Prosecutor for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified. In this context, where the Government had been asserting that the investigations as to the present cases in the ICC were going on, there was doubt as to whether it had been applying the same test that the court required it to.

¶62 The Government of Kenya persistently argued that the applicable test was that domestic investigations must encompass any person, as far as he/she was at the *same level of hierarchy,* rather than same person/same conduct test. Thus the Appeal Chambers in both of the cases maintained that unless the investigation for the same person for the specific crime is not undertaken by the national jurisdiction, there can be no conflict of jurisdiction.

¶63 Furthermore, the Government relied mainly on judicial reform actions and promises for future investigative activities, and it provided no concrete evidence of the steps currently going on as to the investigation. Likewise, as per the records or the annexes furnished by the government, the Chamber found that the Government fell short of any concrete investigative steps regarding the three suspects. Thus, in absence of information regarding the ongoing investigations against the suspects, the Chambers considered that there remained a situation of inactivity in both of the cases.

5. Dissenting Opinion of Judge Anita Usacka on the Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chmaber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"

¶64 The judge dissented on the grounds that the Pre-Trial Chamber II, while exercising its discretion under Rule 58(2) of the Rules of Procedure and Evidence, did not completely acknowledge the sovereign rights of Kenya and the principle of complementarity. In fact, she viewed the Chamber as giving too much weight to expeditiousness while it exercised its discretion under Rule 58(2) rather than the Appellant's sovereign right to investigate and prosecute the case itself. This, in view of the judge, led to an abuse of discretion under Rule 58(2) of the Rules of Procedure and Evidence.

F. Other Issues in The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang

¶65 During the initial hearings to confirm the charges, the ICC victims' representative Sureta Chana accused Kenyan MP Charles Keter of threatening the witnesses testifying against the three suspects during a radio station call-in program. Keter is considered a supporter of Ruto, Kosgey, and Sang. The call was made to Kass FM, the same station through which Sang carried out his activities in this crime.

THE SITUATION IN THE CONGO

¶66 The DRC government referred "the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC" to the Prosecutor in April 2004**.**

¶67 In 2011, the situation in the Congo demonstrated significant progress in the existing trial and new investigation. The trial of the Lubanga case ended in August 2011 pending judgment. The case of Callixte Mbarushimana has survived the challenges on the validity of the arrest warrant and jurisdiction of the Court, but ultimately was dismissed by the Pre-Trial Chamber due to a lack of substantial evidence.

¶68 Meanwhile, another situation in the Congo related to the November 2011 election attracted the attention of the Prosecutor when it announced that, "the electoral process should not feed a sense of impunity on the part of those responsible for such crimes. On the contrary, it should strengthen the rule of law and the fight against impunity." Whether this has an impact on the existing proceedings indirectly or will bring other perpetrators into the ICC courtroom may depend on how politics in the Congo affects the issue.

A. Thomas Lubanga Dyilo[9]

¶69 The trial was put on hold for six weeks in early 2011 due to various challenges brought by the Defense, in particular regarding the disclosure of the identity of witnesses and participating victims, and resumed on March 21, 2011.

¶70 On February 23, 2011, Trial Chamber I issued a confidential written decision refusing Thomas Lubanga Dyilo's defense application to stay the proceedings as an abuse of the process. The presentation of evidence stage closed on May 20, 2011. Closing statements in the trial against Thomas Lubanga Dyilo were made on August 25 and 26, 2011.

¶71 Over the course of 220 hearings, the Chamber heard thirty-six witnesses called by the Office of the Prosecutor, including three experts, nineteen witnesses called by the Defense and three witnesses called by the legal representatives of the victims participating in the proceedings. The Chamber also called four other experts to testify.

1. Disclosing Evaluations or Assessments of the Result of Prosecutor's Investigators ("Internal Work Product")

¶72 The Defense requested the disclosure of documents of witness No. 31, which the Prosecutor challenged. The prosecution determined that although material may be subject to

[9] ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx.

restrictions on disclosure (e.g. Rules 81 and 82 of the Rules), it is appropriate to "isolate information that ought to be disclosed from that which constitutes non-disclosable internal work product" in order to provide it to the accused. The Chamber, after analyzing relevant articles of the Rome Statute and Rules of Procedure, concluded that:

¶73 "…the evaluations or assessments of [the prosecutor's] investigators are not ordinarily disclosable; instead, it is the information and material that led to any relevant evaluations or assessments that, depending on the circumstances, should be provided to the defense under Article 67(2) of the Statute or Rule 77 of the Rules."

2. Victim Participation

¶74 The Lubanga Court carried problems related to the issue of victim participation from 2010 to 2011. On March 3, 2011, the Registry submitted the Sixth Report to Trial Chamber I on Victims' Applications under Regulation 86(5) of the Regulations of the Court, containing seven new victims' applications to participate in the Lubanga case.

¶75 Finally, on August 25 and 26, the trial of Thomas Lubanga Dyilo came to an end. The Prosecutor and Defense Counsel[10] presented their closing arguments.

B. The Prosecutor v. Callixte Mbarushimana[11]

¶76 On January 4, 2011 the French Court of Cassation authorized the surrender of Mr. Mbarushimana to the ICC.

1. Validity of the Arrest Warrant

¶77 On January 10, 2011, the defense for Mr. Callixte Mbarushimana challenged the validity of the arrest claiming that there was no substantive ground to issue the arrest warrant.

¶78 The Chamber rejected the request of the Defense Counsel, ruling that Rule 117(3) of the Rules only allows challenges "as to whether the warrant of arrest was properly issued" and "the

---

[10] The defense counsel presented the following during the closing argument:
i. Contrary to the claims of the OTP, existence of the crimes charged has not been proved beyond all reasonable doubt.
ii. The individuals presented as former child soldiers without exception lied before the Chamber.
iii. Intermediaries had arranged for false testimony to be brought before the Court and had themselves lied when called to give the testimony.
iv. The Congolese government intervened, directly or indirectly, in the investigations as well as in the judiciary process.
v. The Prosecutor did not carry out proper investigations.
vi. The alleged individual criminal responsibility of Thomas Lubanga as a co-perpetrator must be assessed in light of the DRC government's influence on the OTP.
vii. It was strongly denied that Thomas Lubanga personally contributed to the organization and leadership of the armed FPLC force that took over control of Bunia in August 2002 and imposed the systematic enlistment of the children of Ituri.
viii. It was submitted that Mr. Lubanga did not have effective control because soldiers only followed the orders of Thomas Lubanga if they agreed. If they did not agree, they took contrary actions.
ix. It must be demonstrated that the accused was aware that his conduct in the normal course of events (a virtually certain consequence) would necessarily have led to the enlistment of children under the age of 15. Secondly, it is necessary to prove that Thomas Lubanga was aware that a crime was a necessary consequence of his conduct and that he accepted and tolerated this consequence.

[11] ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/Pages/icc01040110.aspx.

admissibility of a case is not a substantive requisite for the issuance of a warrant of arrest, unless there are uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review…."

2. Right of Defense to Disclosure

¶79 The Defense submitted a request for the disclosure of certain materials on the ground that the requested materials were necessary to enable the defense to, inter alia, (i) challenge the admissibility of a case pursuant to article 19(2)(a) of the Statute; (ii) challenge the validity of the warrant of arrest of Mr. Mbarushimana pursuant to Rule 117(3) of the Rules of Procedure and Evidence; and (iii) seek interim release upon Mr. Mbarushimana's first appearance.

¶80 The Prosecutor argued that "…no statutory basis [exists] for disclosure by the Prosecutor prior to the surrender of the arrested person to the Court and, furthermore, such disclosure would pose risks to the ongoing investigations and the security of witnesses and victims; the accused has no right to pre-surrender disclosure for the purpose of challenging the admissibility of the case because there is no live admissibility issue pending; a challenge to validity of the warrant of arrest under Rule 117 of the Rules is limited to the formal and procedural aspects as opposed to objections to the Chamber's finding of reasonable grounds upon which the warrant was based."

¶81 Not persuaded by the prosecution, the Chamber declared: "…an effective exercise of the right to make a challenge to the admissibility of the case or the jurisdiction of the Court…requires access to relevant documents. For these reasons, the Chamber acknowledges that the defense must have access to documents that are essential in order effectively to challenge the admissibility of the case or the jurisdiction of the Court."

3. Press Release and the Impartiality of the Proceedings

¶82 On October 18, 2010, the defense for Mr. Mbarushimana requested the Chamber to (i) exercise its power under the Rome Statute to ensure the impartiality of the proceedings, and (ii) order the Prosecutor to publish an immediate and public retraction of the Press Release. The Press Release stated, inter alia:

> [a]s late as August 2010, the FDLR was involved in the commission of more than 300 rapes in DRC's North Kivu province, yet Callixte Mbarushimana blatantly continued to refute any allegation against his movement. (...) Callixte Mbarushimana is the first senior leader arrested by the ICC for the massive crimes committed in the Kivu provinces of the Democratic Republic of the Congo (DRC). (...) FDLR, a group calling itself a "liberation force" is the most recent incarnation of Rwandan rebel groups established by former genocidaires who fled to DRC after the 1994 Rwandan genocide. From the DRC, they regrouped, organized and launched attacks on Rwanda, with the goal of removing its new government through violence. Their activities contributed to triggering the two Congo wars, 1996-2002, which resulted in an estimated 4 million victims, the largest number of civilian casualties since the Second World War. Since then, the FDLR has continued to commit horrific crimes against the civilian population. (...) After 16 years of continuous violence, this could be an opportunity to finally demobilize the group led by the former genocidaires" added the Prosecutor. "Their leaders are gone.

¶83 The defense alleges that some of the statements included in the Press Release run counter to Mr. Mbarushimana's right to a fair hearing conducted impartially.

¶84 On the other hand, the Prosecutor replied on November 9, 2011 that (i) the Request was premature; (ii) the Request was ill-founded in law; (iii) the prejudice relied upon by Mr. Mbarushimana was purely speculative; and (iv) the Request was factually and logically flawed and should be dismissed on the merits and consequently asked the Chamber to dismiss the Request.

¶85 The Chamber held that "Mr. Mbarushimana enjoys certain rights irrespective of his surrender to the Court of which the Chamber is… the ultimate guarantor, including the right to presumption of innocence." In order to fulfill its duties relating to this responsibility and to its role of the guarantor of the suspect's rights, the Chamber has the necessary powers to take appropriate measures to protect these rights."[12]

¶86 The court continued that, "the Chamber is of the view that allegations of prejudice to suspects on account of public statements suggesting their guilt before a conviction by a court, such as the allegations made by the defense in the Request, are primarily of relevance to the issue of presumption of innocence." The right to be presumed innocent [under article 66(1) of the Statute] is therefore guaranteed by the Statute not only to accused persons, but also to those with respect to whom a warrant of arrest or a summons to appear has been issued, before their surrender to the Court."

¶87 The Chamber then resorted to European Court of Human Rights jurisprudence to analyze the presumption of innocence and public information in the press release. It found some statements permissible, as they "may be interpreted as a mere assertion (...) that there was sufficient evidence to support a finding of guilt by a court." It also took note of the European Court of Human Rights assertion that, it is incompatible with the presumption of innocence when statements made by public officials encourage the public to believe the suspect to be guilty and prejudge the assessment of the facts by the competent judicial authority. And finally the Chamber decided that:

¶88 Some of the above-mentioned parts of the Press Release were formulated without due care and may lead to misinterpretation. It would have been preferable if the Press Release had made it clear that there are reasonable grounds to believe that acts of rape were committed by the FDLR in the North Kivu province and that Mr Mbarushimana is alleged to bear individual criminal responsibility for these acts. It could also have been made moreclear that no allegation of genocide has been made with respect to Mr Mbarushimana in the present case. The Chamber is of the view that when making his future public statements, the Prosecutor should be mindful of the suspect's right to be presumed innocent until proved guilty. Having said this, however, the Chamber finds that, in this instance, the risk that the Press Release might have encouraged the public to believe that Mr Mbarushimana is guilty of the alleged crimes and that it prejudged the assessment of the facts by the Court is not of such seriousness as to warrant the ordering of the measures sought by the defense.

4. Decision on the Request of the Cooperation of State

¶89 On January 27, 2011, the defense requested state cooperation on:

[12] ICC-01/04-01/10-51 01-02-2011 1/11 FB PT, Decision on the Defense Request for an Order to Preserve the Impartiality of the Proceedings paragraph 6.

> (a) Such "supporting documentation" as supplied by the Democratic Republic of the Congo together with the state referral of March 3, 2004, and any contemporaneous documentation or record of meetings with the OTP retained by the DRC authorities which may shed light on the scope of the referral; and
>
> (b) reasons for the filing of the Request as confidential, ex parte, Defense only, including the contention that since the purpose of the Defense Request was effectively an investigative procedure designed to obtain information which may or may not be introduced as evidence - there should be no duty on Counsel to publish his strategy to the Prosecution.

¶90 The Chamber stated the importance of the proper preparation of defense and granted the Defense's Request in part [as some of the requested documents were already in the hands of Prosecutor], and sought the cooperation of the DRC with respect to the transmission of "any contemporaneous documentation or record of meetings with the OTP retained by the DRC authorities which may shed light on the scope of the referral."

5. The Request for Interim Release

¶91 Mr. Mbarushimana requested to be released pursuant to article 60(2) of the Rome Statute to his domicile in the Republic of France. The Court invited competent authorities of the French Republic to submit observations on the Request for Interim Release, and, in particular, on the issues of (i) whether there would be any legal impediment to Mr. Mbarushimana's return to French territory, should he be released by the Chamber, and (ii) whether the French authorities would be in a position to impose one or more of the conditions set in Rule 119 of the Rules, should the Chamber order the conditional release of Mr Mbarushimana to France. The court also invited the Netherlands authorities to submit observations on the Request for Interim Release, and, in particular, on the practical aspects of Mr Mbarushimana's release to the French Republic.

¶92 The prosecution submitted that the detention of Mr. Mbarushimana must continue since the conditions set out in article 58(1) of the Statute subsist. The prosecution also asserted the possibility of a flight risk, considering that the suspect was a resident of the EU, which allowed him to travel anywhere and diminished the probability he would appear again since he faced a long imprisonment. Moreover, as a leader of FDLR, he had a network of international and national contacts of people that could provide him with the means to abscond. The Defense reiterated its request for Mr. Mbarushimana's interim conditional release and suggested "electronic tagging" as an alternative to continued detention to monitor Mr. Mbarushimana's movements on a "round-the-clock" basis. The Defense also argued that the interests protected under article 58(l)(b) of the Statute may be guaranteed by an alternative to the deprivation of liberty. The Defense suggested that the perceived flight risk should be construed in reference to the circumstances of Mr. Mbarushimana, and not solely by reference to the gravity of the offences with which Mr. Mbarushimana was charged or the possible lengthy sentence which he may face.

¶93 The Republic of France submitted, inter alia, that there was no impediment to Mr. Mbarushimana's return to France upon release. The Kingdom of the Netherlands submitted that given the fact that Mr. Mbarushimana requested to be released to the Republic of France, the Netherlands, in compliance with the agreement between the ICC and the host State, "will

facilitate the transfer of Mr. Mbarushimana into the French Republic should he be granted interim release."

¶94 The Chamber said that the interim release or the continued detention of a person within the Court's statutory framework is governed by article 60 in conjunction with article 58(1) of the Statute. It also recalled the decision by the Appeals Chamber where it held that, "the decision on continued detention or release pursuant to article 60(2) read with article 58(1) of the Statute is not of a discretionary nature. Depending upon whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person shall be continued to be detained or shall be released." It is important to observe that "the reasons for detention pursuant to article 58(l)(b) (i) to (iii) of the Statute are in the alternative". Hence, "if one of the conditions laid down in article 58(l)(b) of the Statute is fulfilled, the other conditions need not be addressed for a ruling under article 60(2) of the Statute."

¶95 After having closely observed the case, the Chamber found the continued detention of Mr. Mbarushimana necessary to ensure he appeared at trial, did not obstruct or endanger the investigations and the proceedings before the Court, and did not continue committing crimes.

6. A Request for Permanent Stay of Proceedings

¶96 On May 24, 2011 the Defense requested the Chamber award a permanent stay of the proceedings against Mr. Mbarushimana on account of an abuse of process as the Prosecutor "mischaracterized the proceeding of Mr. Mbarushimana in German Court." On June 3, 2011, the Prosecutor submitted that the Defense merely reiterated arguments previously submitted in its challenge to the validity of the warrant of arrest which was rejected by the Chamber.

¶97 The Court stated that, on one hand, the principle of abuse of process leading to the Court's authority to stay proceedings is not provided by the Statute, nor is it generally recognized as an indispensable power of a court of law. On the other hand, the Statute safeguards the rights of the suspect and the accused, most notably under articles 55 and 67, and that article 21(3) requires that the Court exercise its jurisdiction in accordance with internationally recognized human rights norms, first and foremost, the right to a fair trial. Of course, its ambit and applicability in proceedings before the ICC had been repeatedly addressed by ICC precedent, including by the Appeals Chamber.

¶98 However, not each and every breach of the rights of the suspect and the accused is tantamount to an abuse of process entailing the need to grant a stay; only gross violations of those rights, such as to make it impossible for the accused "to make his/her defense within the framework of his rights" justify that the course of justice be halted. The Appeals Chamber reiterated that a stay of proceedings was a "drastic" and "exceptional" remedy. Thus, even if it were to be determined that the Prosecutor erred in characterizing the nature of the proceedings concerning Mr. Mbarushimana pending before the German authorities at the time of the submission of the Application, such behavior could not be equated to the type of conduct that usually form a basis for a stay of proceedings due to an abuse of judicial process—like delays in bringing the accused to justice, broken promises to the accused with regard to his prosecution, and bringing the accused to justice by illegal or devious means. Accordingly, such behavior failed to reach the threshold of gravity which must be present in a purported violation of the rights of the accused for such violation to trigger the stay of the proceedings.

7. Challenges to the Jurisdiction of the Court

¶99 The Defense challenged the jurisdiction of the court. On August 16, 2011, the Chamber also invited the Democratic Republic of the Congo ("DRC") and the representatives of the victims in communication with the Court to submit their observations on the Challenge by September 12, 2011. The DRC submitted a confidential reply to the challenge.

¶100 In its challenge to the jurisdiction, the Defense presented three arguments consecutively.

¶101 First, it argued that: "the 'situation of crisis that triggered the jurisdiction of the Court' at the date of [the] referral did not envisage the events then unfolding in the North and South Kivus ('the Kivus')." Second, "even if it be found that the crisis situation triggering the jurisdiction of the Court encompassed events in the Kivus," the Prosecutor had not shown that the Forces Démocratiques de Libération du Rwanda ("FDLR") "committed atrocity crimes prior to March 3, 2004 such that it contributed to the aforementioned 'situation of crisis.' Third, "in the circumstances, there exists no 'sufficient nexus' between the charges against Mr. Mbarushimana and the scope of the situation".

¶102 The Prosecutor replied that: the Government of the Democratic Republic of the Congo ("DRC") "did not geographically or temporally limit the scope of the situation;" the DRC Government "did not subsequently contest the temporal or geographic scope of the current investigations relating to events during 2009 in the Kivus;" and accordingly, "the conduct which forms the subject matter of the case is an integral part of the situation in DRC and falls squarely within the jurisdiction of the Court."

¶103 In addressing "whether the facts underlying the charges brought by the Prosecutor against Mr. Mbarushimana can be said not to exceed the territorial, temporal and possibly personal parameters defining the situation under investigation," the Chamber rejected the Defense's jurisdictional challenge.

¶104 Regarding the first argument by the Defense, the Chamber said that "in submitting the Referral, the competent authorities did not intend to limit the Court's jurisdiction to one or more particular provinces within its territory."

¶105 Regarding the second argument by the Defense, the Chamber began with underscoring that "crimes committed after the time of a referral may also fall within the jurisdiction of the Court." It concluded that "the Chamber believes that the events underlying the crimes against Mr. Mbarushimana are sufficiently linked to the factual scenario of crisis which prompted the DRC Referral."

¶106 Ruling on the third argument of the defense, the Chamber stated that: "[t]he considerations developed and the U.N. documents referred to above show that the crimes allegedly perpetrated by FDLR forces, which form the basis of the charges against Mr. Mbarushimana, are indeed inextricably linked to the situation of crisis in the DRC…."

¶107 Therefore, the challenges to the jurisdiction were rejected.

8. Release of Mr. Mbarushimana

¶108 The Chamber started with illustrating the standards to be used to confirm or reject charges brought by the Prosecutor. It said:

> The standard of substantial grounds to believe has been interpreted by the Chamber in light of article 21(3) of the Statute and the jurisprudence of the European Court of Human Rights to mean "strong grounds for believing", such

> that the Prosecution "must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations.
>
> This standard accords with the purpose of the confirmation hearing which "is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought."

¶109 The Chamber found the commission of most of the alleged crimes, but declined to confirm the charges on the ground of the nexus between the commission of the crimes and the suspect. To reach that conclusion the Court discussed the following major issues:

Individual Responsibility

¶110 At the hearing, the Defense argued that article 25(3)(d) liability applies only to persons outside of the group acting with a common purpose by citing late Professor Cassese. The Chamber said that accepting this line of interpretation "would create results at odds with common sense in circumstances where persons who lack the intent to commit any crimes themselves contribute to group crimes with knowledge of the group's intention to commit those crimes." The Chamber identified the correct interpretation of 25(3)(d) liability as applying irrespective of whether the person is or is not a member of the group acting with a common purpose.

Level of Contribution

¶111 The Chamber underlined that it would be inappropriate for such liability to be incurred through any contribution to a group crime. The Chamber noted that, "during the process of drafting the Statute, earlier language of what became article 17(l)(d) of the Statute, setting out, inter alia, the criteria of admissibility and requiring that the "crime" in question should be of sufficient gravity, gave way to the current formulation which requires the 'case' to be of sufficient gravity." This clarifies the drafter's intention that not only crimes, but also contributions to crimes, need to reach a certain threshold of significance in order to be within the Court's ambit. Without some threshold level of assistance, "every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability for their infinitesimal contribution to the crimes committed." For these reasons, the Chamber considered that 25(3)(d) liability would become overextended if any contribution were sufficient.

¶112 The chamber resorted to an ad hoc tribunal faced with similar situation and said: "The ad hoc tribunal jurisprudence can be of assistance in defining contributions in any other way." In particular, the Chamber noted that the current formulation of Joint Criminal Enterprise (JCE) liability at the ad hoc tribunals only required a significant contribution to give rise to liability; the contribution need not be substantial as a matter of law. The Chamber said, "the principles set out by the ad hoc tribunals with respect to the analogous modes of liability cannot be applied to the modes of liability set out in article 25(3) without modification, as there are a number of differences between those modes of liability and those set out in the Statute." In explaining its reasoning, the Chamber said that "the jurisprudence of the ad hoc tribunals does not require the aider and abettor to share the intent of the perpetrator to commit the crime, whereas under article 25(3)(c) of the Statute the aider and abettor must act with the purpose of facilitating the commission of that crime. There is also scholarly disagreement as to whether the *actus reus*

required should likewise differ from the ad hoc tribunals' 'substantial contribution' requirement.'"

¶113 As for which contributions are significant, the Chamber concluded that "this requires a case-by-case assessment as it is only by examining a person's conduct in proper context that a determination can be made as to whether a given contribution has a larger or smaller effect on the crimes committed." In doing so, the Chamber resorted to the developed jurisprudence in ad hoc tribunals and scholars and enumerated: i. the sustained nature of the participation after acquiring knowledge of the criminality of the group's common purpose; ii. the efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes; iii. whether the person created or merely executed the criminal plan; iv. the position of the suspect in the group or relative to the group; and perhaps most importantly, v. the role the suspect played vis-à-vis the seriousness and scope of the crimes committed.

Contributions After the Fact: Whether 25(3)(D) Liability Incorporates the Contributions to Crimes After They Have Occurred

¶114 There is no clear indication or provision under article 25(3)(d) of the Statute regarding this aspect. But, the chamber noted that "the potential for finding people criminally responsible for *ex post facto* contributions to international crimes, at least when such contribution was given pursuant to a prior agreement between the principal and accomplice, has been recognized by the International Law Commission and case law from the Nuremberg era and the ad hoc tribunals."

Intention

¶115 With regard to the requirement of intention, the Chamber found that in order for a person to incur 25(3)(d) liability, the person must both: "(i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility."

9. Decision of the Majority

¶116 In the context of the analysis of the contextual elements of crimes against humanity, namely in light of the analysis of the evidence as a whole, the majority was not satisfied that the threshold of substantial grounds to believe that the FDLR pursued the policy of attacking the civilian population was met. Based on the analysis of the evidence as a whole, there were likewise no substantial grounds to believe that the FDLR leadership constituted "a group of persons acting with a common purpose" within the meaning of article 25(3)(d) of the Statute, in particular in light of the requirement that the common purpose pursued by the group must have at least an element of criminality. Thus, it was found that that the suspect did not provide any contribution to the commission of such crimes, much less a "significant" one.

¶117 Even though the suspect was the Executive Secretary of the FDLR, "the lack of any suggestion that [he] was bestowed with the power to exercise any form of authority over FDLR commanders and soldiers on the ground, both his residence in Paris and the very nature of his tasks - limited as they were to the issues concerning the relationship of the FDLR with the media and the external world - make it apparent that there was no link between him and the FDLR soldiers and troops on the ground." And "the evidence does not provide substantial grounds to believe that the Suspect contributed to the FDLR's alleged plan of attacking civilians by agreeing to conduct an international media campaign in support of it."

¶118 With regard to the press release, the Chamber said that even though there were many press releases [the content of which were also dictated by other FDLR Leaders], "the evidence

presented is insufficient to show that the Suspect was using his press releases to 'extort political concessions' from the FDLR. There is little extortionate nature found in the press releases, and the comments the Suspect makes in relation to the "consequences" of war with the FDLR or the need for dialogue are insufficient evidence to show a pattern of extortion." Moreover, "…even those press releases explicitly denying accusations of crimes leveled against the FDLR remain per se neutral, unless it is demonstrated (i) that the Suspect knew that he was denying the truth; and (ii) that this denial of the truth was done in furtherance of an FDLR policy." In the majority's view "the evidence is contradictory as to whether Mr. Mbarushimana, or even the FDLR political leadership, was aware of the crimes committed on the ground." Besides, the evidence is not sufficient to demonstrate that the Suspect denied crimes in furtherance of a policy of the organization. According to the understanding of the majority, arguments raised by the prosecution to support its allegations that the Suspect was aware of the commission of crimes and that denial of these crimes was a policy of the organization are based on assumptions about Mr. Mbarushimana's knowledge of the alleged crimes at the time when he distributed his radio communications and press releases.

¶119 The Suspect participated on two state-level meetings held in Rome in 2005 between the Government of the DRC and the FDLR for the purposes of peace negotiations. In the context of those peace negotiations, the Suspect conceded to and accepted the use of "humanitarian corridors" which would allow civilians to abandon the zones or areas under FDLR control as necessary to reduce the population's suffering. Thus, the chamber concluded that the Suspect, in his capacity as Executive Secretary of the FDLR and having the responsibility to act as the FDLR's spokesperson, was actively involved in the Saint Egidio peace process and had the authority to represent the FDLR and speak on its behalf in its contact with external actors. But, the prosecution had failed to demonstrate the impact Mr Mbarushimana's involvement in the Saint Egidio peace process had on the crimes committed by the FDLR in 2009 or on the FDLR troops' ability to continue to commit crimes. The Chamber further observed that, insofar as humanitarian corridors could only serve to prevent the exposure of civilians to the risks of the conflict, the Suspect's role in the creation of such corridors ran counter to the prosecution's allegation that Mr. Mbarushimana contributed to the commission of the alleged crimes.

¶120 There was also no substantial evidence showing the Suspect encouraged the morale of the troops through press releases. Most of these press releases and speeches only contained words of encouragement and praise for the troops, homages and tributes to the FDLR leaders and combatants, or, more broadly, optimistic commentary as to the prospective fate of the FDLR's struggle. The chamber was persuaded that "the press releases prepared and issued by the Suspect were intended to address the international community, rather than the troops in the field, and that, accordingly, they did not have an impact on the troops on the ground."

¶121 Therefore, the Trial Chamber declined to confirm the charges against the suspect and ordered his release by the majority.

10. Dissenting Opinion of Judge Sanji Mmasenono Monageng [Presiding Judge]

¶122 The presiding judge dissented, finding substantial grounds to confirm the charges brought against the Suspect. The judge found the conclusion that evidence did not establish substantial grounds to believe that the FDLR pursued the policy of attacking the civilian population was based on an incorrect application of the standard of "substantial grounds to believe." In this regard "most of the evidence regarding the existence of an order to create a humanitarian catastrophe comes from insiders. It is thus not unlikely that the fear of prosecution for the crimes

attributed to their organization affected their statements. They may have tried to disavow the suspicion of their involvement in the commission of crimes."

¶123 The majority found that the existence of an organizational policy was not established to the required threshold. However, article 7(2)(a) of the Statute imposed the requirement that the attack against a civilian population be committed pursuant to or in furtherance of a State or organizational policy. In Katanga and Ngudjolo Chui, the Pre-Trial Chamber I stated, inter alia, that such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit "a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organizational group."

¶124 With regards to the attack on civilians, such an attack is understood to mean a course of conduct involving the multiple commissions of acts referred to in article 7(1) of the Statute against any civilian population. It is not necessary to prove that the entire civilian population of the area in question was targeted. The attacks on civilians were also systematic. "… [T]hese acts evince a discernible pattern of crimes and were of an organized and systematic nature by virtue of their regular and organized occurrence, the deployment of significant military resources and the involvement of senior FDLR military figures in carrying out attacks. Moreover, I consider these incidents to be a non-accidental repetition of similar criminal conduct on a regular basis."

¶125 The finding of the majority on the common purpose did not reflect the reality on the ground. "[T]he organizational policy of the FDLR included the commission of acts of violence, such as murder, cruel treatment, mutilation, rape, destruction of property and pillaging. I am of the view that these acts were part of the common purpose." The majority also said that they could not find any document that refer to attack on the civilians on the FDLR Steering Committee held from 16 to 19 January 2009. But, "[the presiding judge found] it quite natural that an organization which, like the FDLR, seeks to present itself as law-abiding, would not mention in a public document setting out its objectives that one of its goals is to attack civilians, kill them and burn their houses." The finding that the Suspect "…did not have power, control or authority over FDLR commanders and soldiers did not, in and of itself, preclude a finding that the Suspect made a significant contribution to the commission of crimes by FDLR soldiers. Most importantly, such power or authority was not required under article 25(3)(d) of the Statute." Instead the majority should have focused on what was actually alleged by the prosecution, namely that the Suspect contributed to the crimes committed by the FDLR's military wing through his role in the political wing of the FDLR organization.

¶126 The finding that the press releases did not have impact on the FDLR troops as they were intended for the international community while acknowledging the fact that fact the press releases were available to FDLR commanders and soldiers in the field was "erroneously premised on the assumption that FDLR soldiers could not be a potential audience solely because the FDLR press releases were also intended to address the international community." Such a consideration ignored the fact that the FDLR press releases also served as a tool for denying and concealing the FDLR's criminal activity.

¶127 On the issue of the group of persons, the Prosecutor alleged that Ignace Murwanashyaka, Sylvestre Mudacumura and Callixte Ivdbarushimana, together with other members of the FDLR membership (the "Common Purpose Group"), constituted a group of persons acting with a common purpose within the meaning of article 25(3)(d) of the Statute, and "this inner core of leaders" formed the Common Purpose Group that adopted and executed a common plan involving the commission of crimes for which the suspect, Mr. Mbarushimana, now stood accused. The FDLR Steering Committee meeting was held from January 16-19, 2009, decisions

were made with respect to the media campaign, and the document containing conclusions of the meeting was signed by Ignace Murwanashyaka and Callixte Mbarushimana. There were substantial grounds to believe that Ignace Murwanashyaka, Callixte Mbarushimana, Gaston lyamuremye, Sylvestre Mudacumura and Djuma Ngilishuti, all members of the Executive and Steering Committee of the FDLR, formed the "group of persons" within the meaning of article 25(3)(d) of the Statute and that these persons were sufficiently identified. More than that, it was not necessary to establish the fact that there had to be physical presence.

¶128 With regards to significant contribution through the press, “without the Suspect and his press statements, there would be less of a reason for the FDLR to commit crimes because they would no longer be linked to any political message.” The defense depended on the Nuremburg’s Trial of Fritzsche where it was held that no one should be held responsible for denying crimes via propaganda. That case reasoned that there was insufficient evidence that Fritzsche could control the content of his statements or that he knew what he was saying was false. The present case is distinguishable from Fritzsche's circumstances in that “the evidence in the present case shows that the Suspect had authority over shaping the FDLR's media campaign, discretion as to what was said and, as will be explored further below, knowledge of the criminal activity of his organization.”

¶129 The defense argued that, “the Suspect is being criminalized for exercising his right to free speech.” The Suspect's denials were not merely the expression of an opinion on historical facts; “they are statements contributing to the commission of international crimes.” To follow the defense’s logic, it seems unclear how anyone could ever be convicted of criminal orders, instigation, solicitation etc. without violating their human rights. “The Suspect's actions in context do show that the Suspect was using the international media campaign to conceal past crimes and encourage future ones and hence he contributed significantly.”

¶130 With regard to the requirement of intention under art 25(3)(d), “the Majority ostensibly finished its analysis with the objective requirements for 25(3)(d) liability, I consider it important to complete the analysis by discussing 25(3)(d) liability's subjective elements as well.” The evidence clearly established that the Suspect's conduct constituted a significant contribution to the crimes committed and was composed of acts the Suspect meant to engage in: “press release writing, making statements to the media and the troops, speaking with other members of the FDLR leadership. Thus, he acted intentionally.”

¶131 Accordingly, there were substantial grounds and evidence to confirm the charges brought against the accused.

¶132 The Appeals Chamber, saying that “the reason for confirming the decision of the majority will be given in due course”, rejected the appeal lodged by the Prosecutor against the decision of the Pre-Trial chamber.

C. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui[13]

¶133 On August 15, 2011, the defense of Mathieu Ngudjolo Chui began to present its evidence before Trial Chamber II. 8 witnesses were called by the defense of Ngudjolo Chui, who also testified in his own defense from November 8, 2011. On September 17, 2011, Germain Katanga

[13] ICC, Prosecutor v. Germain Katanga, ICC-01/04-01/07, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx; ICC, Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/ICC-01-04-02-12/Pages/default.aspx.

also testified before Trial Chamber II in his own defense. Closing arguments in the case are expected in early 2012.

¶134 Starting from March 25, 2011 to Nov. 11, 2011, most of the activities in the Katanga Court have been hearing witnesses of the defense. Mr. Katanga himself testified on his own behalf. His younger brother has also been to the court to testify for the defense counsel.

1. Request of the Defense to Obtain Assurances with Respect to Self-incrimination for the Accused

¶135 After Mr. Mathieu Ngudjolo testified on his own behalf, his defense requested the Court to give assurance that the testimony by the accused would not be used to incriminate him. The defense also requested the same assurance for other defense witnesses.

¶136 On the other hand, the Prosecution on August 11, 2011 responded and objected to such assurances being given to Mr. Ngudjolo. The prosecution submitted that "the statutory protections against self-incrimination should not apply to an accused person as these protections exist to enable the Court to compel witnesses to answer questions." The Prosecution further argued that "the Court does not have the authority to compel an accused person to testify, and that if Mathieu Ngudjolo voluntarily testifies, he thereby waives his right to remain silent and accepts that all evidence he gives can be used against him in this case or in any subsequent prosecution." Moreover, the Prosecution noted that "article 93(2) of the Statute is meant to secure the attendance of a witness and is not applicable to persons charged by the Court, whose appearance is secured through other means."

¶137 The Chamber remarked that, "although the directions for the conduct of the proceedings and testimony stipulated that 'if an accused consents to giving evidence, he or she becomes subject to the same rules that are applicable to other witnesses,' it is clear that the position of an accused who chooses to testify in his own defense cannot be systematically equated to that of any other witness." In particular, "there are provisions in the Statute and the Rules relating to the testimony of witnesses that are inapplicable to an accused who appears as a witness in his own trial, as they are incompatible with the rights of the defense."

¶138 The Chamber underlined that "the assurance provided for in article 93(2) of the Statute is meant to facilitate the appearance of witnesses before the Court. The Chamber concludes that providing such assurances would be irreconcilable with the status of accused." Recalling that the accused has the right to remain silent and cannot be compelled to testify by virtue of article 67(l)(g) of the Statute, the Chamber pointed out that, "once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating." Accordingly, the Chamber concluded that "[t]he testimony of the accused may thus be used as evidence against them in the present case. Moreover, if they decline to answer a permissible question, the Chamber may draw any adverse inferences as appropriate."

D. The Prosecutor v. Bosco Ntaganda[14]

¶139 The ICC issued a sealed warrant for the arrest of Bosco Ntaganda, the alleged former deputy military commander in Lubanga's FPLC militia, in August 2006. The warrant was unsealed in April 2008, but Ntaganda remains at large. Ntaganda is accused of three counts of

[14] ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx.

war crimes related to the recruitment and use of child soldiers in 2002 and 2003. His nationality is disputed: the ICC arrest warrant states that he is "believed to be a Rwandan national," but other sources state that he is an ethnic Tutsi from DRC's North Kivu province. At the time the warrant was unsealed, Ntaganda was a commander in a different rebel group, the National Congress for the People's Defense (CNDP), in North Kivu. Ntaganda later agreed to be integrated into the Congolese armed forces as part of a January 2009 peace deal, and he was reportedly promoted to the rank of military general. The Congolese government has since refused to pursue Ntaganda on behalf of the ICC, arguing that, to do so would jeopardize peace efforts in the Kivu region.

¶140 Surprisingly, the Congo government, after referring the situation to the Court by itself, has integrated the fugitive to the army rather than arresting him. Criticizing such a move, Human Rights Watch on March 18, 2011 stated that, "the decision to integrate Ntaganda in the army rather than arresting him has contributed to further abuses and undermined the hoped-for deterrent effect of the ICC. Human Rights Watch has documented extensive crimes committed in DRC by forces under Ntaganda's command since January 2009." The act of the Congo government, after referring the case to the ICC, may cast doubt on the commitment of the Congolese Government to bring perpetrators to justice, by transferring some suspects to ICC while integrating others into its army.

THE COURT IN THE EYES' OF THE OUTSIDERS

A. With Regard to Impartiality

¶141 At the start of the trial of Lubanga, which was the first trial by the ICC, Luis Moreno-Ocampo, presented it as "a signature case that would show the world the atrocious plight of child soldiers and their destroyed lives." However, as usual and even more than ever, in 2011, there was an ongoing mixed feeling about the Court.

¶142 Not denying the need for the ICC but doubting its impartiality and independence, a Kenyan journalist and cartoonist said: "[t]he court is itself set up to achieve political purposes and is therefore open to criticisms of bias and selective prosecutions. While these are legitimate concerns, we should not lose sight of the fact that the court does try real cases and deal with real crimes; and that some justice (however selective) is better than none… [The ICC] targets African countries and "rogue" states simply because… [the West] will not countenance their citizens or their allies being subject to international processes…. International justice, like most other international systems, is an evolving concept and therefore we should consolidate whatever advances have been made while at the same time seeking to extend them."

¶143 In 2011, after the issuance of the arrest warrant for Gaddafi, The African Union's chairman, Jean Ping, told reporters that the "court was 'discriminatory' and focused on crimes committed in Africa but ignored those committed by Western powers, including in Afghanistan, Iraq and Pakistan." Accordingly, the AU adopted a motion that recommended member states not cooperate with the execution of this arrest warrant.

B. With Regard to the Selection of Cases and Investigations

¶144 Its scope may be narrow, but the ICC dockets are hardly stuffed with frivolous charges. They are replete with chronically overlooked cases of rape, mass murder and other atrocities. The injustice lies in the ongoing human rights violations that take place outside The Hague every

day, sometimes under regimes that the ICC is already probing. Indeed, Human Rights Watch criticized the ICC as well for inconsistent case selection—not necessarily because of political or racial bias, but because investigations had often overlooked major crimes and perpetrators.

¶145 Gender-related violence is another potential blind spot, particularly in the case of Thomas Lubanga Dyilo, a DRC rebel now on trial for crimes related to child soldiers. Women's Initiatives for Gender Justice recently expressed outrage at "the absence of charges for gender-based crimes in the case against the leader of a militia group widely known to have committed rape, sexual enslavement, and other forms of sexualized violence."

¶146 Citing José Ayala Lasso, a former U.N. High Commissioner for Human Rights, who warned, "a person stands a better chance of being tried and judged for killing one human being than for killing 100,000." Caroline.com underlines that, "[t]hough the International Criminal Court hasn't corrected that imbalance, it has tipped the scales of justice just slightly, toward a collective moral gravity."

¶147 Human Rights Watch has clearly indicated the concern by stating, "[t]he delivery of justice at the International Criminal Court (ICC) is at risk despite progress by the ICC prosecutor…With the appointment of a new prosecutor by year's end and new cases in Libya, the ICC prosecutor should close gaps in investigation and prosecution strategies and bring additional cases." Many investigations conducted by ICC have brought significant progress, "making an important contribution to tackling impunity for some of the world's worst crimes. But these cases have not gone far enough to ensure that justice delivered by the ICC will resonate with concerns of victims and affected communities."

¶148 Specifically referencing the situation in the Congo, Human Rights Watch also stated: "[t]he absence of ICC investigations into government officials or those backed by officials threatens to repeat the mistake the court made in the Ituri investigation by not going higher up the chain of command. That is, it risks reinforcing perceptions that the ICC cannot prosecute officials of those governments on which it relies for cooperation, in turn, compromising perceptions of its independence." Human Rights Watch also recommended that: "…additional investigations in order to go higher up the chain of command for crimes committed in the Ituri region, including to consider whether Ugandan, Rwandan, and Congolese officials are liable pursuant to articles 25 and 28 of the Rome Statute as a matter of individual or command responsibility, respectively. Indicate at the earliest opportunity plans for these additional cases or explain why such cases are not being pursued."