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Digest on International Criminal Court
Investigations in Africa

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NOTE: THIS DIGEST REFLECTS THE STATUS OF CERTAIN INVESTIGATIONS AT THE INTERNATIONAL CRIMINAL COURT AS OF AUGUST 2014 AND WILL BE UPDATED TO REFLECT FURTHER DEVELOPMENTS.

**INTRODUCTION TO THE DIGEST ON
INTERNATIONAL CRIMINAL COURT CASES RELATING TO
THE DEMOCRATIC REPUBLIC OF THE CONGO, DARFUR (SUDAN),
KENYA, AND THE CENTRAL AFRICAN REPUBLIC**

By Andowah A. Newton

D) OVERVIEW AND JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (“ICC” or “Court”) is a permanent, independent judicial body, established to “investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community,” and specifically, genocide, crimes against humanity, and war crimes.¹ The ICC’s permanent status distinguishes it from *ad hoc* international tribunals such as the ones for Rwanda, the Former Yugoslavia, and Sierra Leone. The ICC’s independence from the United Nations (“UN”) means that it does not need a mandate from the UN to try crimes within its jurisdiction. The ICC possesses a “unique mandate,” leading scholars to describe it as the “first judicial institution of its kind” that is able to try individuals for those crimes when national courts are not willing or able to do so.

From a criminal justice perspective, the ICC “represents one of the most significant opportunities the world has had to prevent or drastically reduce the deaths and devastation caused by conflict.” The ICC was established with several purposes: to “help end impunity” for perpetrators of the most serious crimes, deter those who intend to commit those crimes, encourage national prosecutors to bring those individuals to justice, and obtain justice and truth for victims and their families.

The ICC has jurisdiction over individuals, 18 or older, (not states) accused of the crimes listed above, including those accused of aiding, abetting, or assisting in the commission of those crimes. The crimes within the ICC’s jurisdiction are not subject to a statute of limitations, but the ICC does not have jurisdiction over crimes committed before July 1, 2002, the date that the ICC was established.² Nor does the ICC have universal jurisdiction. Rather, the ICC has jurisdiction only when: (i) the accused is a national of a State Party³ or a state that accepts the Court’s jurisdiction, (ii) the crime allegedly took place on the territory of a State Party or a state that accepts the Court’s

¹ The Court will obtain jurisdiction over a fourth crime, the crime of aggression, once: (i) a two thirds majority of the states who are party to the international treaty that established the ICC decide to include the crime in the ICC’s jurisdiction sometime after January 1, 2017 and (ii) at least 30 of those states ratify the proposed amendment concerning the crime, pursuant to the conditions adopted at the Rome Statute Review Conference held in Kampala in 2010.

² The Court’s jurisdiction may be further limited by the date on which the international treaty that established the ICC (“Rome Statute”) entered into force for a particular State, if that date was after July 1, 2002, unless the State decides to accept the jurisdiction for a period preceding that date up until, at the earliest, July 1, 2002.

³ “State Parties” refer to the states that have consented to the Rome Statute, and it is binding only on the states that have done so. As of August 7, 2014 there are 122 State Parties to the Rome Statute—34 from Africa, 27 from Latin America and the Caribbean, 25 from Western Europe and North America, 18 from Eastern Europe, and 18 from Asia/Pacific).

jurisdiction,⁴ or (iii) the United Nations Security Council (“UNSC”) has referred the situation to the ICC. The Court may decline to exercise jurisdiction over a case if it deems that it is “not of sufficient gravity.”⁵

The ICC does not replace national judicial systems. Pursuant to the principle of complementarity, those systems retain responsibility for trying perpetrators of crimes, and receive priority over the ICC. The ICC proceeds only where the state(s) concerned do not, cannot, or genuinely are unwilling to do so;⁶ or do so only to shield an individual from criminal responsibility.

The ICC sits in The Hague, the Netherlands, but may sit elsewhere when the judges consider it appropriate. Four main organs comprise the ICC: (1) the Presidency; (2) the Judicial Divisions (Pre-Trial, Trial, and Appeals Chambers, with a total of eighteen judges), (3) the Office of the Prosecutor (“OTP”), an independent organ of the Court, and (4) the Registry, including semi-autonomous offices of Public Counsel for Victims and the Office of Public Counsel for Defence. The ICC’s budget for 2014 is 121 million euros. States Parties bear primary responsibility for funding the ICC, while governments, international organizations, individuals, corporations, and other entities make voluntary contributions. Approximately eight hundred staff members from approximately 100 States support the ICC. English and French are the working languages; in addition, Arabic, Chinese, Russian, and Spanish are the official languages.

II) HISTORICAL BACKGROUND AND CREATION OF THE INTERNATIONAL CRIMINAL COURT

The international community began discussing the idea of an international criminal court as early as 1872, when one of the founders of the International Committee of the Red Cross proposed the establishment of a permanent court in response to the crimes committed during the Franco-Prussian War. Years later, after World War I, drafters of the 1919 Treaty of Versailles also proposed creating an international criminal tribunal to address the atrocities of that war.

After years of discussion about international criminal tribunals, allied countries established the first ones in the aftermath of World War II—the International Military Tribunal at Nuremberg (1945-46) and the International Military Tribunal for the Far East in Tokyo (1946-48). Recognizing the need for a permanent international court to address atrocities in other international situations, the UN General Assembly (“UN GA”) adopted the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention stated that international penal tribunals with jurisdiction should prosecute the perpetrators of genocide and proposed that the International Law Commission (“ILC”) (a group of international law experts elected by the UN GA) study the potential establishment of such a tribunal.

⁴ States who are not parties to the Rome Statute may accept ICC jurisdiction and may request that the ICC launch an investigation into crimes committed within the state’s territory or by one of its nationals.

⁵ See Rome Statute, Article 17(1)(d).

⁶ See *id.* Article 17(1)(a)-(b).

The Cold War, however, interfered with the ILC's efforts until the 1980's, and decreased interest in creating an international criminal court. After the Cold War ended, the idea of an international criminal justice system re-emerged in the international community. In 1989, towards the end of the Cold War, Trinidad and Tobago proposed to the UN that the ILC return to its task of drafting an international criminal statute. While the ILC began drafting a statute, the UNSC established *ad hoc* tribunals—the International Criminal Tribunal for Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994) in response to the atrocities that were occurring in those regions. Because those tribunals cost large sums of money, yet addressed only crimes committed in those particular conflicts and during specified time periods, the idea of an international criminal justice system resurfaced. States soon began negotiating an international treaty for a permanent international court.

In 1994, the ILC delivered its draft statute to the UN GA and proposed enacting the statute and negotiating a treaty through a conference of plenipotentiaries. The UN GA, in turn, created an Ad Hoc Committee on the Establishment of an International Criminal Court, which issued a report in 1995. The UN GA then created the Preparatory Committee on the Establishment of the ICC. With the input of non-governmental organizations the Preparatory Committee drafted a consolidated version of the statute from 1996 to 1998. The UN GA then convened a Conference of Plenipotentiaries on the Establishment of an international Criminal Court to finalize and adopt the statute.

From June 15 to July 17, 1998, representatives of 160 states met in Rome, Italy to negotiate the statute. On July 17, 1998, 120 of those states voted to adopt the statute (the “Rome Statute of the International Criminal Court”) that established the ICC.⁷ The Rome Statute formally entered into force on July 1, 2002, after several states deposited the 60th ratification in April 2002. The UN then convened the Preparatory Commission for the ICC. The Preparatory Commission drafted the Court's Rules of Procedure and Evidence, the Elements of Crimes, the Relationship Agreement between the ICC and the UN, the Financial Regulations of the ICC, and the Agreement on the Privileges and Immunities of the Court. The Assembly of States Parties, which is the management oversight and legislative arm of the ICC, convened for the first time in September 2002. It adopted the Rules of Procedure and Evidence and elected the Court's first 18 judges in February 2003, and its first prosecutor in April 2003. The UNSC referred the first situation to the ICC in 2005 (Darfur, Sudan).

III) COMMENCEMENT AND PROSECUTION OF CASES AT THE INTERNATIONAL CRIMINAL COURT

The ICC's Office of the Prosecutor (“OTP”) may commence an investigation upon: (1) referral by a State Party, (2) referral by the United Nations Security Council (“UN SC”), or (3) the OTP's own initiative (*proprio motu*), based on information it

⁷ Twenty-one states abstained from voting and seven nations (including the United States) did not vote in favor of the Rome Statute. The United States signed the statute in 2000, but has not submitted it for ratification. The text of the Rome Statute is available at: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

receives from resources that it considers reliable.⁸ Before commencing an investigation *proprio motu*, the OTP must obtain authorization from a Pre-Trial Chamber (“PTC”). The OTP may commence an investigation *proprio motu* into crimes allegedly committed by nationals of non-State Parties or in territories of non-State Parties, provided that the state in question is a UN member state.

The OTP begins by evaluating the information it receives from the sources it considers reliable, and decides whether there is a reasonable basis to proceed with an investigation. The OTP is responsible for investigating all facts and evidence relevant to the alleged crimes, including exonerating circumstances. The OTP may decide not to proceed with a case after its investigation. Alternatively, if the OTP decides to proceed, it applies to the PTC for a warrant of arrest or summons to appear. The PTC may issue a warrant or summons if it decides that it has reasonable grounds to believe that an individual has committed a crime within the Court’s decision. After the individual appears at the Court, the PTC holds a confirmation hearing, then issues a decision on the charges upon which the individual will be tried.

The OTP must prove an accused’s guilt of the alleged crimes beyond reasonable doubt. The accused (who may represent himself or herself), the OTP, or a concerned State may appeal the Court’s decisions throughout the trial. After the trial proceedings, the Trial Chamber issues a decision of conviction or acquittal. For convictions, the Court may impose prison sentences of up to 30 years, or a life sentence “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” An accused or the OTP may appeal the Court’s decisions. The Court may add fines or forfeitures of proceeds, property or assets derived from the crimes committed. The Court cannot, however, impose death sentences. Victims, for the first time in international criminal tribunals, may participate in the proceedings, and may request reparations and receive legal aid representation when the Court deems it appropriate.

IV) INTRODUCTION TO THE 4 INVESTIGATIONS COVERED IN THIS DIGEST AND RELATED ISSUES

As of August 7, 2014 the ICC has commenced 8 investigations. States Parties have referred 4 of those investigations (Uganda, the Democratic Republic of the Congo (“DRC”), the Central African Republic (“CAR”), and Mali); the UN SC has referred 2 (Libya and Darfur, Sudan), and the OTP, *proprio motu*, initiated 2 (Kenya and Cote d’Ivoire). The OTP also has commenced 10 preliminary examinations;⁹ issued 26 arrest warrants and 9 summonses to appear; and holds 10 individuals in custody.¹⁰ Twelve suspects remain at large. Twenty-one cases related to the 8 investigations have been brought before the Court. Five of those cases are at the trial stage and 2 are at the appeals

⁸ Examples of such resources are intergovernmental organizations, non-governmental organizations, and individuals, including victims and their relatives.

⁹ Those examinations are taking place in Afghanistan, Central African Republic (II), Colombia, Georgia, Guinea, Honduras, Iraq, Nigeria, Ukraine, and the Union of the Comoros.

¹⁰ The ICC is currently holding the following individuals in custody: Thomas Lubanga Dyilo, Germain Katanga, and Bosco Ntaganda (DRC); Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Fidele Babala Wandu, Jean-Jacques Mangenda Kabongo, and Narcisse Arido (CAR); and Laurent Gbagbo and Charles Blé Goude (Côte d’Ivoire).

stage. The chart below summarizes the procedural posture of the 4 investigations covered in this digest (the Democratic Republic of the Congo (“DRC”), Darfur (Sudan), Kenya, and the Central African Republic (“CAR”).

Summary of Procedural Posture in DRC, Darfur (Sudan), Kenya, and CAR Situations

(as of August 7, 2014)

<u>Situation</u>	<u>Warrants of Arrest</u>	<u>Summonses to Appear</u>	<u>Accused in Custody</u>	<u>Suspects at Large</u>	<u>Total Number of Cases</u>	<u>Cases in Pre-Trial Stage</u>	<u>Ongoing Trials</u>	<u>Cases in Appeals Stage</u>
DRC	7	N/A	3	1	6	0	0	2
Darfur, Sudan	5	3	N/A	4	5	0	1	N/A
Kenya	1	6	N/A	1	3	0	2	N/A
CAR	2	N/A	1	4	2	1	1	N/A

Source of data shown in table: <http://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>

Delays—The ICC has confronted a wide array of issues in the prosecution of the investigations covered in this digest. One of the main issues has been delay. Article 67 of the Rome Statute¹¹ guarantees an accused the right to be tried “without undue delay.” In *Katanga* and *Ngudjolo Chui* (DRC), the Trial Chamber severed the two cases even though the PTC previously had joined them. The Trial Chamber did so out of concern that an anticipated change in the charges against Katanga would potentially interfere with Ngudjolo Chui’s right to a trial without undue delay. As shown in the chart below, there have been significant delays in processing cases.¹² For example, the time between: (i) the issuance of a summons or warrant and the accused’s appearance has ranged from several days to several years, (ii) the accused’s appearance and the confirmation or dismissal of charges—from several months to thirteen months, (iii) the confirmation of charges and the beginning of trial—from just over a year to almost four years, (iv) the beginning and end of trial—from a year and a half to two and a half years, (v) the end of trial and a conviction or acquittal decision—six and a half months to a year and a half, and (vi) the conviction and sentencing—two and a half to four months.

¹¹ Article 67(1)(c) of the Rome Statute provides: “In the determination of any charge, the accused shall be entitled to...the following minimum guarantees...to be tried without undue delay.”

¹² The CAR situation, in particular, emphasizes the issue with respect to delays. Although the CAR had referred the situation in early 2005, it was not until May 2007 that the OTP announced its decision to open an investigation. That decision took: (1) the CAR’s highest court issuance of a decision in April 2006 holding that its judicial system was incapable of prosecuting the related crimes, (2) the filing by the CAR in September 2006 of a complaint regarding the OTP’s failure to decide within a reasonable time whether to investigate the situation, and (3) the PTC ordering the OTP in December 2006 to report to the PTC on the status of the OTP’s investigation in CAR.

Summary of Procedural Posture in DRC, Darfur (Sudan), Kenya, and CAR Cases

(as of August 7, 2014)

<u>Case</u>	<u>Summons/ Warrant Issued</u>	<u>Appearance of Accused</u>	<u>Confirmation Hearing End Date</u>	<u>Confirmation¹³ /Dismissal of Charges</u>	<u>Trial Start Date</u>	<u>Trial End Date</u>	<u>Conviction/ Acquittal</u>	<u>Sentencing</u>
<i>The Prosecutor v. Thomas Lubanga Dyilo</i> (DRC)	Feb. 10, 2006	Mar. 16, 2006	Nov. 28, 2006	Jan. 29, 2007 (confirmed)	Jan. 26, 2009	Aug. 26, 2011	Mar. 14, 2012 (conviction)	July 10, 2012
<i>The Prosecutor v. Bosco Ntaganda</i> (DRC)	Aug. 22, 2006 & July 13, 2012	Mar. 22, 2013 (voluntary)	Feb. 14, 2014	June 9, 2014 (confirmed)	Pending	N/A	N/A	N/A
<i>The Prosecutor v. Germain Katanga</i> (DRC)	Jul. 6, 2007	Oct. 22, 2007	July 28, 2008	Sept. 2, 2008 (confirmation)	Nov. 24, 2009	May 23, 2011	Mar. 7, 2014 (conviction/acquittal)	May 23, 2014
<i>The Prosecutor v. Mathieu Ngudjolo Chui</i> (DRC)	July 6, 2007	Feb. 11, 2008	July 18, 2008	Sept. 26, 2008 (confirmation)	Nov. 24, 2009	May 23, 2011	Dec. 18, 2012 (acquittal)	N/A
<i>The Prosecutor v. Callixte Mbarushimana</i> (DRC)	Sep. 28, 2010	Jan. 28, 2011	Sept. 21, 2011	Dec. 16, 2011 (dismissal)	N/A	N/A	N/A	N/A
<i>The Prosecutor v. Sylvestre Mudacumura</i> (DRC)	July 13, 2012	Pending	N/A	N/A	N/A	N/A	N/A	N/A
<i>The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")</i> (Darfur, Sudan)	Feb. 27, 2007	Pending	N/A	N/A	N/A	N/A	N/A	N/A
<i>The Prosecutor v. Omar Hassan Ahmad Al Bashir</i> (Darfur, Sudan)	Mar. 4, 2009 & July 12, 2010	Pending	N/A	N/A	N/A	N/A	N/A	N/A
<i>The Prosecutor v. Bahar Idriss Abu Garda</i> (Darfur, Sudan)	May 7, 2009	May 18, 2009 (voluntary)	Oct. 29, 2009	Feb. 8, 2010 (dismissal)	N/A	N/A	N/A	N/A
<i>The Prosecutor v. Abdallah Banda Abakaer Nourain</i> (Darfur, Sudan)	Aug. 27, 2009	June 17, 2010 (voluntary)	Dec. 8, 2010	Mar. 7, 2011 (confirmation)	Nov. 18, 2014 (projected)	N/A	N/A	N/A
Saleh Mohammed Jerbo Jamus (Darfur, Sudan)	Aug. 27, 2009	June 17, 2010 (voluntary)	Dec. 8, 2010	Mar. 7, 2011 (confirmation)	N/A (died 2013)	N/A	N/A	N/A

¹³ "Confirmed" indicates that the Pre-Trial Chamber confirmed all or some of the charges against the accused.

<u>Case</u>	<u>Summons/ Warrant Issued</u>	<u>Appearance of Accused</u>	<u>Confirmation Hearing End Date</u>	<u>Confirmation⁴³ /Dismissal of Charges</u>	<u>Trial Start Date</u>	<u>Trial End Date</u>	<u>Conviction/ Acquittal</u>	<u>Sentencing</u>
<i>The Prosecutor v. Abdel Raheem Muhammad Hussein</i> (Darfur, Sudan)	Mar. 1, 2012	Pending	N/A	N/A	N/A	N/A	N/A	N/A
<i>The Prosecutor v. William Samoei Ruto and Joshua Arap Sang</i> (Kenya)	Mar. 8, 2011	Apr. 7, 2011 (voluntary)	Sept. 8, 2011	Jan. 23, 2012 (confirmation)	Sept. 10, 2013	N/A	N/A	N/A
<i>The Prosecutor v. Uhuru Muigai Kenyatta</i> (Kenya)	Mar. 8, 2011	Apr. 8, 2011 (voluntary)	Oct. 5, 2011	Jan. 23, 2012 (confirmation)	Oct. 7, 2014 (projected)	N/A	N/A	N/A
Francis Kirimi Muthaura (Kenya)	Mar. 8, 2011	Apr. 8, 2011 (voluntary)	Oct. 5, 2011	Jan. 23, 2012 (confirmation)(later withdrawn on Mar. 18, 2013)	N/A	N/A	N/A	N/A
Henry Kiprono Kosgey (Kenya)	Mar. 8, 2011	Apr. 7, 2011 (voluntary)	Sept. 8, 2011	Jan. 23, 2012 (dismissal)	N/A	N/A	N/A	N/A
Mohammed Hussein Ali (Kenya)	Mar. 8, 2011	Apr. 8, 2011 (voluntary)	Oct. 5, 2011	Jan. 23, 2012 (dismissal)	N/A	N/A	N/A	N/A
Walter Osapiri Barasa* (Kenya)	Aug. 2, 2013	Pending	N/A	N/A	N/A	N/A	N/A	N/A
<i>The Prosecutor v. Jean-Pierre Bemba Gombo</i> (CAR)	May 23, 2008	July 4, 2008	Jan. 15, 2009	June 15, 2009 (confirmation)	Nov. 22, 2010	N/A	N/A	N/A
Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido* (CAR)	Nov. 20, 2013	Nov. 25 & 27, 2013; Dec. 5, 2013; Mar. 20, 2014	N/A	N/A	N/A	N/A	N/A	N/A

*The ICC has issued arrest warrants against these individuals for offences against the administration of justice in connection with other cases before the ICC.

Sources of data shown in table: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx; <http://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>; <http://www.haguejusticeportal.net/index.php?id=11791>; <http://www.icc-cpi.int/iccdocs/doc/doc1211991.pdf>; <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>

*Lack of Cooperation—Another major challenge has been a lack of cooperation by States Parties or states subject to the ICC’s jurisdiction. For example, after the Court issued an arrest warrant in the Darfur (Sudan) situation for President Omar al-Bashir, the Sudanese government expelled international aid agencies from Darfur. The African Union and Arab League also condemned the arrest warrant and called for the UN SC to drop or defer the charges. President al-Bashir was re-elected into office in Sudan one year after the Court issued a warrant for his arrest. In *Harun and Abd-Al-Rahman* (“*Ali Kushayb*”) and *Abdel Raheem Muhammad Hussein*, the accused have not appeared in response to the arrest warrants issued. In addition, the Sudanese government repeatedly*

has rejected the ICC's jurisdiction, and has appointed a special prosecutor who filed charges in Sudan against Kushayb.

Similarly, Kenya challenged the ICC's jurisdiction over the *Ruto and Sang* and *Kenyatta* cases.¹⁴ The Appeals Chamber affirmed the Trial Chamber's rejection of those jurisdictional challenges and held that a state must be investigating the same case involving the same individual and substantially the same conduct to render a case inadmissible. The accused were later elected to President and deputy President of Kenya, despite the Court's issuance of summonses to appear two years before. President Kenyatta had also conditioned his participation in the ICC proceedings against him on the alternate scheduling of proceedings on his and Vice-President Ruto's cases, so that one of the two could remain in Kenya to carry out their official duties. In another case involving Kenya (*Muthaura*), the OTP withdrew its charges in part because it claimed that the Kenyan government failed to provide it with important evidence and facilitate access to critical witnesses.

In *Bemba Gombo* (CAR), the president of the CAR reversed his previous position in support of the ICC's jurisdiction. The defendant also challenged the ICC's jurisdiction to hear his case, claiming that CAR courts were capable of prosecuting it, the alleged crimes involved were "not of sufficient gravity" to be prosecuted,¹⁵ and the OTP had engaged in misconduct. The Court dismissed the defendant's challenges.

Witness Tampering—This issue has arisen in several of the cases covered in this digest. Because witnesses were too afraid to testify, recanted their testimony, accepted bribes, and in some cases even died, the OTP withdrew its charges in *Muthaura* (Kenya). In *Barasa* (Kenya), the PTC issued an arrest warrant based on evidence that Barasa influenced a witness by offering to pay for withdrawal of his testimony, in violation of Article 70 of the Rome Statute.¹⁶ Similarly, in *Bemba Gombo* (CAR), the PTC issued arrest warrants, pursuant to Article 70, for five members of the accused's defense team after reviewing evidence that they allegedly bribed witnesses and forged documents.

Evidentiary Issues—The OTP has encountered several issues in its prosecution of cases. In *Lubanga Dyilo* (DRC), the Trial Chamber highlighted the OTP's failure to include sexual violence crimes in its original charges against the accused, rendering those crimes improper for trial. In *Bemba Gombo* (CAR), the PTC requested that the OTP

¹⁴ Article 17(1)(a)-(b) of the Rome Statute provides: "[T]he Court shall determine that a case is inadmissible where...[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; [t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuine to prosecute."

¹⁵ Article 17(1)(d) of the Rome Statute provides: "[T]he Court shall determine that a case is inadmissible where...[t]he case is not of sufficient gravity to justify further action by the Court."

¹⁶ Article 70(1)(a)-(c) of the Rome Statute provides: "The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally: [g]iving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth; [p]resenting evidence that the party knows is false or forged; [c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with, or interfering with the collection of evidence."

change its theory from direct to command responsibility, indicating that there was insufficient evidence to try the accused based on direct responsibility. The Trial Chamber in *Ngudjolo Chui* (DRC) acquitted the defendant because there was insufficient evidence to show that the defendant commanded the group at issue and the witnesses who testified lacked credibility. In *Mbarushimana* (DRC), the PTC dismissed charges because the OTP did not provide sufficient evidence to show that the accused contributed to the war crimes alleged. The PTC also dismissed war crimes charges in *Garda* (Darfur, Sudan), *Kosgey* (Kenya) and *Mohammed Hussein Ali* (Kenya) due to lack of sufficient evidence. In *Al Bashir* (Darfur, Sudan), however, the OTP successfully appealed the PTC's decision to exclude genocide from the arrest warrant.

Developments in International Criminal Law—The Court has confronted many interesting international criminal issues in the investigations covered in this digest. For example, in *Ruto and Sang* (Kenya), Ruto, a sitting head of state had planned to be absent from the proceedings during a timeframe that coincided with trial. Although the Appeals Chamber held that his absence could be allowed only under exceptional circumstances, the Assembly of States Parties simultaneously passed Rule 134bis, allowing the accused to be absent under limited circumstances. In *Bemba Gombo* (CAR), the Trial Chamber permitted the defendant to submit an unsworn statement in his defense,¹⁷ thereby denying OTP's request to cross-examine the defendant on his statement. In *Lubanga Dyilo* (DRC), when the OTP refused to disclose the identity of one of its intermediaries in violation of the Trial Chamber's order, the Trial Chamber imposed a stay.¹⁸ The Trial Chamber in that case also issued a decision detailing the procedures by which reparations would be awarded to victims—a first in international criminal law.

Sources:

- Rome Statute, available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
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- Amnesty International, International Criminal Court: Fact Sheets, available at <http://www.amnesty.org/en/international-justice/issues/international-criminal-court>
- H. Bucheister, *The International Criminal Court: An Overview*, available at <http://www.beyondintractability.org/essay/international-criminal-court-overview>

¹⁷ Article 67(1)(h) of the Rome Statute provides: “[T]he accused shall be entitled to...the following minimum guarantees...[t]o make an unsworn oral or written statement in his or her defence.”

¹⁸ The Appeals Chamber reversed the stay, holding that less drastic measures, such as sanctions, were available.

INTERNATIONAL CRIMINAL COURT CASES REGARDING THE DEMOCRATIC REPUBLIC OF THE CONGO

by Elizabeth Barad

1.1 OVERVIEW

The Democratic Republic of the Congo (DRC) acceded to the Rome Statute that established the International Criminal Court (ICC), on April 11, 2002.¹⁹ In April 2014, the government of the DRC referred the situation in the country to the Prosecutor of the ICC to investigate crimes within the jurisdiction of the Court allegedly committed anywhere in the DRC since July 2002.²⁰ In accordance with this request and the Rome Statute, the Prosecutor investigated such crimes, and on the basis of applications by the Prosecutor, the ICC eventually issued arrest warrants for six defendants.²¹

The first case to be tried and the only conviction the ICC has rendered in its ten-year existence was that of Thomas Lubanga Dyilo²², which has now been appealed.²³ Of the five other individuals for whom arrest warrants were sought, a conviction was rendered on March 7, 2014 for Germain Katanga; Mathieu Ngudjolo Chui was acquitted; charges against another defendant were dismissed following a hearing on the confirmation of charges (Callixte Mbarushimana); A hearing was held on February 10, 2014 to determine whether the case against Bosco Ntaganda should proceed to trial. The last defendant remains a fugitive (Sylvestre Mudacymura).

These cases will be discussed in detail in the chronological order in which the ICC issued warrants for them. First, however, the origins of the war in the eastern DRC and the militias involved in the conflict are discussed.

1.2 ORIGINS OF THE WAR and MILITIAS INVOLVED

The conflict that erupted in the eastern DRC was instigated by the emigration of almost two million Hutu refugees from Rwanda who fled in fear of retaliation by the Tutsi-based Rwanda Patriotic Front (“RPF”) that stopped the genocide in July 1994. The Hutus established themselves in the U.N. refugee camp in Goma, North Kivu in what was then known as eastern Zaire as well as other camps in the east. Among the refugees were members of the *interhamwe*, the paramilitary group that killed almost a million Rwandan Tutsis and moderate Hutus during the 1994-genocide.²⁴ They controlled the Goma camp, and led attacks against Rwandan Tutsi and Congolese ethnic Tutsis, called *Banyamulenge*, who had lived in the Congo for decades²⁵ and who had been discriminated against by the government.

¹⁹ United Nations Treaty Database regarding the Rome Statute.

²⁰ Press Release, ICC-OTP-200404-19-50.

²¹ http://en.wikipedia.org/wiki/International_Criminal_Court_investigations.

²² Ibid.

²³ Voice of America/Reuters, ICC to Put Congolese Warlord on Trial for War Crimes, <http://www.voanews.com/content/icc-to-put-congolese-warlord-on-trial-for-war-crimes/1932842.html>, June 9, 2014.

²⁴ Philip Gourevitch, *We Wish to Inform You that We will be Killed with Our Families*. Picador USA 1998, at 17 and 235.

²⁵ Ibid.

When the vice-governor of South Kivu issued an order for all *Banyamulenge* to leave Zaire on penalty of death, they rebelled, forming the Alliance for Democratic Forces for the Liberation of Zaire (AFDL). The AFDL was supported by Rwanda and Uganda who backed Laurent-Desire Kabila (Kabila), who had been waging a rebellion against President Mobutu in eastern Zaire. The multinational army swept westward to depose Mobutu, ending the first Congo war in May of 1997. Kabila proclaimed himself President on September 7, 1997, and reverted the name of the country to the Democratic Republic of the Congo.

Once in power, Kabila turned against his former allies when they refused to withdraw from the country, particularly the eastern part. He accused them of trying to capture the region's mineral resources, dismissed all ethnic Tutsis from the government and ordered all Rwandan and Ugandan officials to leave the DRC. The two countries retaliated, sending troops to overthrow Kabila which they did. Kabila was later shot by his bodyguard in 2001 and Parliament voted his son, Joseph Kabila, to be President of a Transitional Government. On July 30, 2006 the first elections were held, followed by a second round on October 30 in which Joseph Kabila was elected President.

This second Congo war, also known as Africa's World War, began in August 1998 and officially ended in July 2003 when the Transitional Government took power. The largest war in modern African history, it directly involved eight African countries, i.e. Zimbabwe, Zambia, Angola, Namibia, Libya and Sudan on the side of Kabila and Rwanda and Uganda against him. By 2008 the war and its aftermath had killed 5.4 million people, making it the deadliest conflict since World War II.²⁶

Several peace agreements followed, i.e. the Lusaka Peace Agreement signed on July 10, 1999²⁷, the Global and All-Inclusive Agreement signed on January 13, 2008²⁸ and a ceasefire agreement between the government and 22 armed rebel groups.²⁹

But the agreements did not stem fighting by numerous rebel forces such as the National Congress for the Defense of the People (CNDP), a Tutsi-dominated force, the Movement for the Liberation of the Congo (MLC), a Ugandan-backed militia group, the Coalition of Congolese Patriotic Resistance (PARECO), made up of Congolese ethnic groups, the Democratic Forces for the Liberation of Rwanda (FDLR), a group including Congolese and Rwandan Hutus, some of whom had participated in the 1994 Rwandan genocide and several Mai Mai groups, that are community-based militia groups, made up of warlords, tribal elders and politically-motivated fighters who regularly target civilians and U.N. peacekeeping forces in eastern DRC.

There are currently six main Mai-Mai groups operating in the eastern Congo: the Mai-Mai Yakutumba, Raia Mutomboki, Mai-Mai Nyakiliba, Mai-Mai Fujo, Mai-Mai Kirikicho, and Resistance Nationale Congolaise.

²⁶ http://en.wikipedia.org/wiki/Second_Congo_War.

²⁷ http://en.wikipedia.org/wiki/Lusaka_Ceasefire_Agreement.

²⁸ Global Policy Forum, *Democratic Republic of Congo*, December 2009.

²⁹ Human Rights Watch, *Protection of Civilians in Eastern Congo*, July 2008.

The most recent rebellion, called "M23", began in April 2012 when 300 soldiers decided to mutiny from the Congolese Army (FARDC). The rebels argued that the Congolese government failed to deliver on the promises it made in an earlier peace agreement concluded on March 23, 2009. The rebel group's name refers to this agreement. M23 overtook Goma, the capital of North Kivu, were routed by FARDC and the U.N. peacekeeping forces, and recently renewed fighting with FARDC near Goma.³⁰ There is also a Uganda rebel militia, the Allied Democratic Forces (ADF), an Islamist group with elements of the Somalia al Qaeda-linked Shabaab movement.³¹

1.3 THE DEFENDANTS

1.4 Thomas Lubanga Dyilo (Lubanga)

The ICC issued an arrest warrant for Lubanga on February 10, 2006. Congolese authorities transferred Lubanga to the ICC on March 16, 2006. Following the confirmation of charges in his case on November 2006, on January 29, 2007 Pre-Trial Chamber I confirmed for trial charges of the war crime of conscripting and enlisting child soldiers under the age of 15 years into the Patriotic Force for the Liberation of Congo (FPLC) (which Lubanga founded in the Ituri region of Northeast DR Congo)³² and using them to participate in armed conflict from September 2002 to August 2003.³³ The opening of the trial was delayed by various stays but finally opened on January 26, 2009; Lubanga pleaded not guilty. The Prosecutor concluded the presentation of the case on July 14, 2009 after calling 28 witnesses over 74 days of hearings.

The defense case was postponed pending a decision by the Appeals Chamber on an appeal of whether Lubanga could be convicted of crimes that were not confirmed for trial at the confirmation of charges hearing, specifically sexual violence crimes.³⁴ The Appeals Chamber overturned the Trial Chamber's decision to include these charges since the Prosecutor did not plead this charge at the confirmation hearing.³⁵ Human rights groups expressed their concern about the narrow scope of the charges against Lubanga³⁶ because they only addressed the recruitment of child soldiers and not other crimes against humanity, and the Trial Chamber in its later Sentencing Decision excoriated the then-Prosecutor for failing to include sexual violence crimes in the original charge.³⁷

³⁰ Bienvenu-Marie Bakumanya, Daniel Flynn, *Congo army clashes with M23 rebels close to eastern city of Goma*, Reuters, July 14, 2013.

³¹ Ibid.

³² http://en.wikipedia.org/wiki/Thomas_Lubanga_Dyilo.

³³ http://www.icc-cpi.int/en_menus/icc/situations%20and%29cases/situations/si...

³⁴ <http://www.amicc.org/icc/lubanga> at 2.

³⁵ *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC 01/06/ OA15, Prosecutor's Document in Support of Appeal against the "Decision giving notice to the parties and participant that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" and urgent request for suspensive effect (September 14, 2009).

³⁶ Id. n. 34 at 3.

³⁷ American Non-Governmental Organizations Coalition for the International Criminal Court, *Deconstruction Lubanga, The ICC's First Case: The Trial and Conviction of Thomas Lubanga Dyilo*, September 7, 2012 at 13.

The trial resumed on January 7, 2010 but was suspended on July 8 due to the refusal of the Prosecutor to comply with an order to disclose the identity of an intermediary used to gather evidence. The Appeals Chamber reversed the stay, reasoning that less drastic measures such as sanctions were available.³⁸ The trial continued until March 14, 2012 when the judges found Lubanga guilty of conscripting child soldiers and on July 10 sentenced him to 14 years of imprisonment (the Prosecutor requested a 30-year sentence). The judges also issued for the first time in international law a reparations decision, setting out principles to be applied to awards given to victims of Lubanga's crimes. On October 3, 2012 the defendant appealed the verdict and the sentence and the Prosecution appealed the sentence. A decision on the appeals is forthcoming.

Much of the evidence introduced in the Lubanga trial was in the form of oral testimony; the Trial Chamber heard 67 witnesses and called four expert witnesses. Some defense witnesses testified that prosecution witnesses had been pressured to give false testimony by intermediaries.³⁹ But the prosecution insisted that it had to use intermediaries to speak to witnesses who would have been endangered or apprehensive if ICC investigators approached them directly.

It is noteworthy that this was the first time that victims were able to act as independent third parties during the trial.

1.5 Bosco Ntaganda (Bosco)

The ICC first issued an arrest warrant for Bosco Ntaganda on August 2006 and charged him with the enlistment and conscription of children under the age of fifteen and using them to participate in hostilities.⁴⁰ A second warrant of arrest was issued on July 13, 2012 that listed four counts of war crimes, i.e. murder, attack against civilian population, rape and sexual slavery and pillaging, and also three counts of crimes against humanity, i.e. murder, rape and sexual slavery and persecution.⁴¹ These charges relate to Ntaganda's involvement with the UPC in the Ituri region of Northeast DRC (where he was Lubanga's chief of military operations)⁴² and were added as a result of evidence given during the trial of his former boss Lubanga.⁴³

Ntaganda did not appear before the ICC until March 22, 2013, where he denied his guilt.⁴⁴ His confirmation of charges hearing was held in February 2014. A decision on this was rendered on June 9, 2014 stating that there was sufficient evidence of his involvement to proceed to a trial. He will face 18 counts of war crimes and crimes against

³⁸ Id. n. 16.

³⁹ Id. n. 19 at 7.

⁴⁰ http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/.

⁴¹ Id. at 2.

⁴² "DR Congo: Bosco Ntaganda appears before ICC", BBC NEWS AFRICA, March 26, 2013.

⁴³ Penny Dale, "Profile: Bosco Ntaganda the Congolese Terminator", BBC NEWS AFRICA, March 18, 2013.

⁴⁴ Id. n. 24.

humanity for his alleged involvement in a surge of ethnic violence in the Democratic Republic of Congo more than a decade ago.⁴⁵

Although the ICC sought Ntganda's arrest since 2006, he avoided arrest until he surrendered in 2013. Specifically, on March 18, 2013, Ntganda handed himself in at the U.S. Embassy in Kigali, Rwanda and asked to be transferred to the ICC.⁴⁶ His surrender followed his path after he left the UPC and became chief of staff of the Tutsi-based Congress for the Defense of the People (CNDP). (Ntganda was born in Rwanda, but fled to the Congo after attacks on his fellow ethnic Tutsis). To stem the CNDP's atrocities, the government signed a peace deal with the CNDP on March 23, 2009 and incorporated Ntganda into the Congolese army as a general despite his being wanted by the ICC. He roamed freely in Goma and lined his pockets with profits from the illegal gold trade until his surrender.⁴⁷

In March 2012 Ntganda and other defectors from the Congolese army formed the rebel militia M23 amid pressure on the government to arrest Ntganda.⁴⁸ He later fell out with M23's military leader, Sultani Makenga, and it was speculated that Ntganda's surrender was his only chance of staying alive after his infighting and split with the Makenga faction.⁴⁹

1.6 Germain Katanga (Katanga) and Mathieu Ngudjolo Chui (Ngudjolo)

The ICC issued arrest warrants for Katanga and Ngudjolo on July 6, 2007, respectively charging them for jointly committing three crimes against humanity, i.e. murder, sexual slavery and rape, and seven war crimes, i.e. using child soldiers under the age of 15, attacking civilian populations, willful killing, destruction of property,

⁴⁵ Voice of America/Reuters, *ICC to Put Congolese Warlord on Trial for War Crimes*, <http://www.voanews.com/content/icc-to-put-congolese-warlord-on-trial-for-war-crimes/1932842.html>, June 9, 2014.

⁴⁶ Jeffrey Gettleman, *Wanted Congolese Rebel Leader Turns Himself In to U.S. Embassy*, The New York Times, March 19, 2013.

⁴⁷ "FACT SHEET: Who is Bosco Ntaganda: Lynchpin to Security of International War Criminal?" The Enough Project, www.enoughproject.org.

⁴⁸ "Understanding M23 and the Current Conflict in the DR Congo", UNITED TO END GENOCIDE.

⁴⁹ Id. n. 29 at 3.

⁵⁰ Katanga and Ngudjolo Chui Cases, Coalition for the International Criminal Court, <http://www.iccnw.org/?mod+drctimelinekatanga>.

pillaging, sexual slavery and rape. Pre-Trial Chamber I decided to join the defendants' cases on March 10, 2008 because they were being prosecuted for the same crimes they allegedly committed together in the Ituri district in northeast DRC.⁵⁰ The trial began on November 24, 2009 and the judge granted 366 victims (some of whom were former child soldiers) the right to participate in the proceedings.

Katanga was the commander of the *Patriotic Force of Resistance in Ituri* (FRPI) and Ngudjolo was the leader of the *Front of Nationalists and Integrationists* (FNI).⁵¹ Evidence presented at the trial revealed that Ngudjolo and Katanga led combatants organized under their military groups to attack Bogoro, a village in the Ituri province in the Northeast Congo on February 24, 2003. They attacked not only a military camp that existed in the village, but also the entire civilian population. Their intent was to wipe out the village, destroy the property in it and secure control of the route to Bunia which had been seized by their ethnic opponents, the Hema, controlled by Thomas Lubanga's *Union of Congolese Patriots* (UPC).

The FRPI and FNI, led by Katanga and Ngudjolo, circled Bogoro and, according to the ICC evidence, went on a killing spree, murdering at least 200 civilians, (many under the age of 18), burning their houses, hacking them to death with machetes, imprisoning survivors in a room filled with corpses and sexually enslaving women and girls.⁵²

The Prosecution completed its case on December 8, 2010. The trial resumed on February 21, 2011 when the legal representatives for victims presented witnesses. Katanga's defense counsel began presenting evidence on March 24, 2011 and Chui's defense began on August 15, 2011. Both defendants testified in their own defense.⁵³ Closing oral arguments were given by the Prosecutor, the defense teams and participating victims from May 15th to the 23rd, 2011.

1.7 Severance of Cases

The Trial Chamber decided to separate the two cases on November 21, 2012 because it was considering changing the charge against Katanga from committing crimes indirectly (using others to carry them out) to contributing such crimes by a group acting with a common purpose. The Trial Chamber recognized that these changes would prolong the trial of Katanga and decided it was unnecessary to delay the judgment in the case of Ngudjolo. Therefore, in order to avoid potential violations of Ngudjolo's right to a trial without undue delay, the majority severed the charges. Katanga's defense team requested additional time to conduct investigations regarding the new charge of

⁵¹ Case Information Sheet. The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui, Case no ICC-01/04/07, International Criminal Court.

⁵² http://en.wikipedia.org/wiki/Bogoro_attack.

⁵³ Id. n. 33 at 2.

“common purpose” liability. The Trial Chamber granted the request and asked the defense to provide lists of potential witnesses in July and September 2013.⁵⁴

a. Katanga verdict

Katanga’s trial resumed and on March 7, 2014 Katanga was found guilty of complicity in the 2003 massacre of villages in Ituri.⁵⁵ In a majority verdict, the judges said he had helped plan the attack, and procure weapons used, but they acquitted him of being an accessory to four counts of war crimes and one crime against humanity. He was cleared of using child soldiers. Katanga said he would not appeal his 12-year prison sentence imposed by the ICC. Prosecutor Fatou Bensouda subsequently announced she would not appeal either. Katanga’s conviction thus becomes the first ICC conviction to be confirmed. The sentence was handed down on May 23, 2014.⁵⁶

1.8 Ngudjolo Acquittal

Trial Chamber II acquitted Ngudjolo on December 18, 2012 because the judges found there was insufficient evidence to conclude beyond a reasonable doubt that Ngudjolo was the commander of FNI at the time of the attack on Bogoro.⁵⁷ The judges decided that the prosecution didn’t provide enough evidence to support the charge and the prosecution’s witnesses lacked sufficient credibility to prove that Ngudjolo was the commander of the FNI combatants. However, the judges emphasized that their decision did not mean that no crimes were committed in Bogoro or that the accused was innocent. The Court ordered Ngudjolo to be released, the Appeals Chamber having decided that Ngudjolo would not remain in detention during the appeals phase,⁵⁸ denying the prosecution's request for him to be detained in ICC custody pending the appeal.

Following his acquittal and release, Ngudjolo applied for asylum in the Netherlands, and is presently being held in a Dutch asylum detention center. His defense requested the Appeals Chamber to order the Netherlands to turn him over to the ICC with whom he would agree on a place to live until the Prosecution’s appeal of the acquittal verdict has been decided.⁵⁹ The Prosecution’s appeal is pending.

1.9 Callixte Mbarushimana (Mbarushimana)

⁵⁴ “Trial Chamber Majority Grants Defense Leave for Further Investigations”, Open Society Justice Initiative, <http://www.katangatrial.org/2013/07/trial-chamber-majority-grantsdefense>, July 8, 2013.

⁵⁵ “DR Congo warlord Germain Katanga found guilty at ICC”, BBC NEWS March 7, 2014.

⁵⁶ Hirondelle News Agency <newsletter@hirondelle-consulting.ch> , June 28, 2014.

⁵⁷ “Trial Background: The Trial of Germain Katanga & Mathieu Ngudjolo Chui”, Open Society Initiative, <http://www.katangatrial.org/trial-background/>.

⁵⁸ Id. n. 36.

⁵⁹ “Ngudjolo Detained by the Netherlands as he Seeks Asylum,” Open Society Justice Initiative, <http://www.katangatrial.org/2013/2/ngudjolo-detained-by-the-netherlands>, February 2013.

On September 28, 2010, the ICC issued an arrest warrant for Mbarushimana on five counts of crimes against humanity, i.e. murder, torture, rape, inhumane acts and persecution and six counts of war crimes, i.e. attacks against civilians, destruction of property, murder, torture, rape and inhuman treatment, allegedly committed in the DRC in 2009.⁶⁰ The underlying acts were widespread attacks allegedly committed by troops of the Democratic Forces for the Liberation of Rwanda (FDLR) against civilians in the Kivus in the eastern DRC.⁶¹ Mbarushimana was the Executive Secretary of the FDLR and the judges found reasonable grounds to believe that Mbarushimana bore criminal responsibility for these attacks. The warrant alleged that Mbarushimana was part of the FDLR's plan to create a humanitarian catastrophe in the Kivus to obtain political power. The defendant denied ordering his fighters to kill and rape civilians.⁶²

Following a confirmation of charges hearing in September 2011, on December 16, 2011 Pre-Trial Chamber I declined to confirm the charges against Mbarushimana for trial on the grounds that the Prosecution did not provide sufficient evidence to establish sufficient grounds to believe that he had contributed to the war crimes in the Kivus. The Prosecutor's appeal against his release was rejected on December 23, 2011; Mbarushimana was then released and returned to France where he has refugee status. The Appeals Chamber also dismissed the Prosecutor's appeal against the decision not to prosecute Mbarushimana. Appeals judges didn't make public their reasons for dismissing the prosecution's appeal on all grounds, but they appear to have been in agreement with the lower chamber. In a two-page decision they rejected the prosecution's attempts to stay the release and ruled the appeal against the confirmation of charges hearing "inadmissible".⁶³

1.10 Sylvestre Mudacumura (Mudacumura)

⁶⁰ "The Prosecutor v. Callixte Mbarushimana" ICC-Information on the case, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations.

⁶¹ http://en.wikipedia.org/wiki/Callixte_Mbarushimana.

⁶² "ICC frees Rwandan rebel Callixte Mbarushimana," BBC NEWS AFRICA December 22, 2011.

⁶³ Lauren Comiteau, "Callixte Mbarushimana: A free man in Paris?" International Criminal Bar, December 22, 2011.

⁶⁴ Case Information Sheet, The Prosecutor v. Sylvestre Mudacumura, International Criminal Court.

The ICC issued an arrest warrant for Mudacumura on July 13, 2012. He is the last individual from the DRC for whom an arrest warrant has been issued. He remains at large. In issuing the arrest warrant, the Pre-Trial Chamber found reasonable grounds to believe that Mudacumura, as Supreme Commander and head of the military wing of the FDLR, the militia that includes former Rwandan *genocidaires*, was criminally responsible for committing nine counts of war crimes between January 20, 2009 and September 2010. The enumerated crimes were murder, mutilation, cruel treatment, torture, outrage upon personal dignity, attack against civilians, pillaging, rape and destruction of property.⁶⁴

These crimes were committed in the Kivu provinces in the eastern DRC during an operation called “Umoja Wetu” (Our Unity), a joint military operation with the Congolese army (FARDC) and the Rwanda Defense Forces (FDR) against the FDLR.⁶⁵

The Chamber found grounds to believe that the FDLR continued committing the alleged abuses during operations “Kimia II” (“quiet”, “calm” or “peace” in Swahili) and “Amani Leo” (“our unity” in Swahili) with the United Nations Mission in the DRC (MONUC) and FARDC. In the last days of 2009, MONUC signed an operational order with the government to end the Kimia II operations and begin a new phase, dubbed “Amani Leo”.⁶⁶ The Pre-Trial Chamber found grounds to believe that the FDLR, under Mudacumura’s leadership, responded to the offensives by committing brutal attacks against civilians. The killing of civilians was accompanied by rape.⁶⁷ The FDLR, although somewhat weakened, is still operative⁶⁸ and Mudacumura remains at large.

1.11 CONCLUSION

The ICC has handled six cases regarding the situation in the DRC targeting senior-level Congolese militia leaders upon the referral of the DRC, a party to the Rome Statute establishing the ICC. It produced one conviction, acquitted one defendant after trial and dismissed charges after the confirmation hearing of another defendant due to lack of sufficient reliable evidence. And importantly, for the first time in the history of international criminal justice, victims participated in trials and were entitled to reparations for their suffering through the Victims Trust Fund.

⁶⁵ “Congo: A Comprehensive Strategy To Disarm the FDLR”, Africa Report # 151, International Crisis Group, July 9, 2009.

⁶⁶ “Amani Leo-Old Wine, New Bottles”, Congo Siasa, January 7, 2010.

⁶⁷ “You Will Be Punished”, Human Rights Watch, December 13, 2009.

⁶⁸ “The Foreign Armed Groups”, U.N. Organization Stabilization Mission in the DR Congo, monusco.unmissions.org/Default.aspx?tabid=10727&language=en...

INTERNATIONAL CRIMINAL COURT SITUATION IN DARFUR, SUDAN

by Linda Ford

INTRODUCTION

The International Criminal Court is investigating the conflict in Darfur, and has brought cases against both rebel leaders and government officials, including President Omar al-Bashir. The case against President al-Bashir marks the first time the ICC has issued a warrant against a sitting head of state. It is also an important test for the future of the ICC.

BACKGROUND

Darfur (“Realm of the Fur” in Arabic) lies in western Sudan, sharing a border with Chad. Nomadic Arabs predominantly inhabit the northern part of Darfur, while the southern part of Darfur is home to agrarian, non-Arab groups such as the Fur, Beja, Zaghawa, Nuba, and Daju. About the size of France, the impoverished region is prone to drought, and suffers a long history of conflict over scarce water, grazing rights, and, more recently, oil and gold.

Sudanese President Omar al-Bashir seized power in June 1989 in a bloodless military coup. Al-Bashir was an admirer and associate of Osama bin Laden and provided him with safe haven in Sudan in the early 1990s. In 1993, the United States State Department designated Sudan as a State sponsor of terrorism based on close relationships with Hamas, Hezbollah, al-Qaeda and other terrorist organizations. The National Congress Party (NCP) is the only legally recognized political party in Sudan. Bashir is a hard line Muslim, and has attempted to impose strict enforcement of Sharia law on all Sudanese people, including non-Muslims.

When al-Bashir became President, Sudan was already embroiled in the Second Sudanese Civil War in southern Sudan. The pre-dominantly non-Muslim south opposed imposition of Sharia law, sought independence from the north and fought to retain oil rights. As the civil war in the south dragged on, the non-Arab population in the western

area of Darfur became increasingly marginalized. As in the south, the Darfuri non-Muslims opposed imposition of Sharia law. In addition, some of the oil fields that were at issue in the civil war in the south were actually in Darfur, triggering questions about where the border should be drawn as Southern Sudan (now the Republic of South Sudan) negotiated its independence. Drought conditions in western Darfur further exacerbated a longstanding competition for scarce resources.

In 2003, Darfur rebels attacked government police and military installations. Two main rebel groups - the Sudan Liberation Army (SLA), and the Justice and Equality Movement (JEM) – accused the government of neglecting the western region and oppressing its non-Arab populations. The Khartoum government responded to the attacks by arming the nomadic Arab groups in northern Darfur that were traditionally at odds with the Fur and other agrarian populations. Bands of Arab militia, called the “*Janjaweed*” (a contraction of the Arabic words for man, gun and horse) inflicted brutal punishment on the rebel groups and the civilian villages that supported them. Rebel coalitions fought back, escalating the violence in the region. In the first year of fighting, tens of thousands of rebels, civilians, militia and soldiers were killed, and hundreds of thousands were forced to flee their homes. Journalists reported atrocities including systemic rape, mass killings, burning of villages, maiming, torture and violence against children, pregnant women and the elderly. International humanitarian groups have accused the government of using starvation as a military tactic, recruiting child soldiers, and engaging in a campaign of ethnic cleansing.

In April 2004, the SLA and JEM agreed to a cease fire. The cease fire agreement called for an end to government air strikes against rebel villages, and unrestricted access to humanitarian relief workers. The African Union deployed a small force of peacekeepers from South Africa, Ghana, Rwanda, Zambia, Senegal, Gambia and Nigeria, who together formed the African Mission in Sudan (AMIS). Skirmishes continued, with each side accusing the other of breaking the cease fire. Rebel forces attacked the peacekeepers, looted their camps, and killed or kidnapped the AU workers. Government-supported militia attacked the refugee camps. Talks underway in Abuja, Nigeria broke down.

In September 2004, in hearings before the Senate Foreign Relations Committee, United States Secretary of State Colin Powell used the word “genocide” to describe the government-sponsored killings by the Janjaweed. In January 2005, the UN issued a report accusing the government and militias of systematic abuses in Darfur, but falling short of calling it “genocide”.

The United Nations Security Council (UNSC) also took action to try to respond to the crisis in Darfur. This included its March 31, 2005 resolution 1593, in which it referred the Situation in Darfur to the ICC using its powers under Chapter VII of the UN Convention and articles 12 and 13 of the Rome Statute. The Resolution was adopted by a vote of 11 in favor, none opposed, and four abstentions (Algeria, Brazil, China, and United States). On June 6, 2005, the ICC officially opened the Investigation into the Situation in Darfur.

Meanwhile, in southern Sudan, the 2005 Comprehensive Peace Agreement (CPA) ended civil war in the south and created the autonomous region of Southern Sudan, which in 2011 became the independent country of the Republic of South Sudan.

In May of 2006, after nearly two years of talks, the Sudanese Government and the Sudanese Liberation Movement (SLM) signed the Darfur Peace Agreement (DPA). The agreement called for the disarmament of the Janjaweed and dissolution of rebel forces. However, the SLA and the JEM refused to sign the agreement and its terms were never enforced. The rebel groups splintered into smaller factions and fought amongst themselves. Attacks on peacekeepers, villages and refugee camps continued.

On August 31, 2006, the UN Security Council authorized the deployment of a much larger UN peacekeeping force to the region with Resolution 1706. The Sudanese government, however, refused to allow the UN mission, arguing that it was a threat to the sovereignty of the nation. After extended negotiations, President al-Bashir agreed to allow a joint United Nations / African Union Mission in Darfur (UNAMID), which began deployment in late 2007.

On September 29, 2007, an attack was carried out on the African Union Peacekeeping Mission at the Haskanita Military Group Site in Umm Kadada, North Darfur, Sudan by splinter forces of the JEM allegedly under the direction of Bahar Idriss Abu Garda (Abu Garda).

Efforts to renew peace talks began in October 2007 in Surt, Libya, but failed when several rebel factions refused to participate.

In May 2008, the JEM launched an attack on Omdurman, a suburb of Khartoum. A convoy of 130 JEM vehicles approached the city of Omdurman. They shot down a MiG-29 combat jet that attacked the column, killing the Russian pilot. The rebel force entered the city, and engaged Government troops for several hours of heavy fighting, but never reached Khartoum, the Presidential Palace or the National Radio and Television Building. The Sudanese defense minister General Abdul Rahim Mohammed Hussein reported 106 soldiers and police officers, 30 civilians, and 90 rebels were killed.

In response, the government arrested and detained suspected rebel leaders, human rights workers, activists and attorneys and shut down Sudanese human rights organizations.

Skirmishes between rebel forces and the SAF continued through 2009, with periodic lulls in fighting. The National Security Forces Act (NSFA) was enacted, giving the government broad powers to arrest and detain suspected rebel leaders and activists for prolonged periods of time without bringing formal charges or being subjected to judicial review.

In March 2009 the ICC issued an arrest warrant for al-Bashir on seven charges of war crimes and crimes against humanity. The arrest warrant marks the first ICC charges against a sitting Head of State, and was met with a large protest demonstration in Khartoum. President al-Bashir has refused to recognize the jurisdiction of the court,

calling it a neo-colonial plot aimed at overthrowing the government. In response to the arrest warrant, the Sudanese government expelled international aid agencies from the region accusing them of collusion with the ICC, and blocked UNAMID from investigating reports of violence and abuse. The Arab League and the African Union have also condemned the arrest warrant and called for the charges to be dropped or for prosecution of the case to be deferred by the UNSC.

Presidential elections were held in April 2010. Omar al-Bashir was re-elected President despite the pending charges before the ICC and his refusal to comply with all ICC processes.

In February 2010, ten smaller rebel groups founded the alliance Liberation and Justice Movement. Ongoing peace talks in Qatar culminated in the Doha Document for Peace in May 2011 between the Liberation and Justice Movement and the government of Sudan. Additional rebel groups have come to the table, although fighting continues throughout the region, and living conditions of the quarter of a million displaced persons are extremely dire.

The conflict in Darfur, Sudan and its devastating impact on the civilian population has captured the interest of journalists, celebrity actors and musicians, aid workers, politicians, and activists around the world. The United Nations estimates that between 200,000 and 400,000 people have died and another 2.5 million have been displaced within Sudan and to Chad and Egypt.

ICC PROSECUTIONS

The ICC is investigating both sides of the conflict in Darfur, and has brought cases against both government officials and rebel leaders.

The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")

On February 27, 2007, the ICC issued arrest warrants for Government Minister of Humanitarian Affairs Ahmad Harun, and former Janjaweed militia Commander Ali Kushayb, charging them with 51 counts of crimes against humanity and war crimes committed against the civilian populations in Kodoom, Bindisi, Mukjar, and Arawala in West Darfur between August 2003 and March 2004.

In early 2003, Ahmad Harun was appointed as head of the "Darfur Security desk". As such, he was responsible for recruitment, funding and arming of Militia/Janjaweed. Ahmad Harun is alleged to have incited the government-backed Janjaweed to carry out attacks against civilian populations that were believed to be providing support to rebel forces in Darfur. The evidence against him included a public speech delivered in August 2003 prior to an attack on Mukjar, where he stated that "since

the children of the Fur had become rebels, all the Fur and what they had, had become booty” of the Militia/Janjaweed.⁶⁹

Ali Kushayb was a military commander, known as an “Aqid al Oqada” (“colonel of colonels”) in West Darfur. By mid-2003 he was commanding thousands of Janjaweed. He is alleged to have issued orders to Janjaweed and armed forces to victimize the civilian populations through mass rape, killing, torture, inhumane acts, pillaging and looting of residences and marketplaces, displacement of the resident community, and other alleged criminal acts. [ICC press release 2/27/2007]

The Sudanese government rejected the ICC’s jurisdiction, stating that the Sudanese judiciary was fully competent to deal with any crimes committed in Darfur. In August 2008, Sudan’s justice minister appointed a special prosecutor to investigate crimes in Darfur. In February 2009, the special prosecutor filed charges against Ali Kushayb and two other individuals in connection with incidents that occurred in Deleig, Mukjar, Bandas, and Garsila.

Ahmad Harun and Ali Kushayb have not appeared before the ICC and the arrest warrants are still pending.

The Prosecutor v. Omar Hassan Ahmad al-Bashir

The ICC first called for the arrest of President Omar al-Bashir in July 2008. On July 14, 2008, then-Chief Prosecutor Luis Moreno Ocampo submitted the application for a warrant of arrest, alleging that al-Bashir bore individual criminal responsibility for genocide, crimes against humanity and war crimes committed since 2003 in Darfur and accused him of having “masterminded and implemented” a plan to destroy the three main ethnic groups, the Fur, Masalit and Zaghawa, with a campaign of murder, rape and deportation.

A Pre-Trial Chamber issued an arrest warrant on March 4, 2009. This was the first time that the ICC sought arrest of a sitting head of State. The warrant charged al-Bashir with five counts of crimes against humanity (murder, extermination, forcible transfer, torture and rape) and two counts of war crimes (pillaging and intentionally directing attacks against civilians). However, by a majority vote, the Chamber ruled that there was insufficient evidence to charge him with genocide, because it essentially required that required that “genocidal intent be the only reasonable conclusion to be drawn on the basis of the evidence.”⁷⁰

After the Pre-Trial Chamber declined to charge al-Bashir with genocide in the arrest warrant, the Office of the Prosecution appealed on the grounds that the Pre-Trial Chamber had applied an erroneous standard for evaluating evidence at the arrest warrant stage. In February of 2010, the Appeals Chamber issued its decision, agreeing with the Prosecution. It found that, by requiring the Prosecution to show that the *only* reasonable

⁶⁹ ICC Press Release, February 27, 2007.

⁷⁰ *Prosecutor v. Omar Al Bashir*, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010, ICC-02/05-01/09-73, para. 16.

conclusion to draw on the basis of the evidence was genocidal intent, the Pre-Trial Chamber had required the Prosecution to prove its case beyond a reasonable doubt – the standard of proof at trial – at the arrest warrant stage.⁷¹ The Appeals Chamber directed the Pre-trial Chamber to reconsider genocide charges against al-Bashir based on the correct legal standard. Upon reconsideration, the ICC added three counts of genocide for the ethnic cleansing of the Fur, Masalit, and Zaghawa tribes in a second arrest warrant issued July 12, 2010.

Since the issuance of the arrest warrants, al-Bashir was re-elected as President of the Sudan. He has also traveled throughout parts of Africa – even to Rome Statute States parties. For example, he has traveled to Chad, Kenya, Malawi and Nigeria without being arrested. However, his international mobility is not wholly unencumbered. For example, South Africa initially invited Bashir to the inauguration of President Jacob Zuma, but later determined that it would be obliged to arrest Bashir if he entered South African territory, and so Bashir did not attend. Also, following al-Bashir’s trip to Kenya in 2010, a Kenyan court issued a domestic arrest warrant for al-Bashir, to be enforced if he “ever set foot in Kenya” again. (The Kenyan government later confirmed that the Kenyan warrant would not be enforced.)

The Prosecutor v. Bahar Idriss Abu Garda

Abu Garda, the Chairman and General Coordinator of Military Operations of the United Resistance Front, is from North Darfur and is of the Zaghawa tribe. On May 7, 2009, the Court issued a warrant for Abu Garda, charging him with three war crimes including murder, attacks on peacekeepers, and pillaging in connection with the 2007 rebel attack on the AMIS base in Haskanita.

Abu Garda appeared voluntarily before the Chamber on 18 May 2009. Following the hearing on the confirmation of charges in October 2009, the Pre-Trial Chamber declined to confirm the charges in its February 2010 judgment.

The Prosecutor v. Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo)

In August 2009, the ICC issued summonses to appear for Banda and Jerbo, charging them with three counts of war crimes including murder, attacks on peacekeepers, and pillaging in connection with the 2007 attack on the AMIS base in Haskanita in north Darfur.

In 2007, Banda was the Commander-in-Chief of the JEM, and Jerbo was the Chief of Staff of the Sudan Liberation Army-Unity (SLA-Unity). The two men commanded the rebel force that attacked the AMIS base, during which they killed 12 and wounded 8 peacekeepers from Nigeria, Botswana, Mali and Senegal, and stole vehicles, electronics, money, and ammunition from the camp on September 29, 2007.

⁷¹ *Id.* para. 33.

Banda and Jerbo appeared voluntarily before the ICC on June 17, 2010, and returned to Darfur during adjournments. They did not challenge the jurisdiction of the Court and agreed to stipulate to essential facts to narrow the scope of contested issues in the case. In particular, Banda and Jerbo admit they commanded the force during the attack, but claim that the base was a legitimate military target.

Following the confirmation of charges hearing in December 2010, the Pre-Trial Chamber issued the charges for trial in March 2011. The trial is scheduled to commence on November 18, 2014.

On October 4, 2013, the ICC terminated proceedings against Jerbo, who was reportedly killed during fighting in North Darfur.

The Prosecutor v. Abdel Raheem Muhammad Hussein

Hussein has been the Sudanese Minister of National Defense since 2005. He previously served as the Minister of the Interior and the Sudanese President's Special Representative in Darfur from 2003 to 2004. He is a staunch Islamist and personally loyal to al-Bashir.

On March 1, 2012, the ICC issued a warrant charging Hussein with thirteen counts including seven counts of crimes against humanity including persecution, murder, forcible transfer, inhumane acts, imprisonment or severe deprivation of liberty and torture, and six counts of war crimes including murder, attacks on civilian population, destruction of property, pillaging, and outrage upon personal dignity.

Hussein is accused of recruiting, arming and funding security forces and the Janjaweed militia that attacked civilian Fur populations in West Darfur between August 2003 and March 2004.

Hussein has not been arrested on the warrant and continues to act as the Minister of National Defense.

CONCLUSION

Sudan refuses to recognize the jurisdiction of the ICC. President al-Bashir and the other government officials under indictment have not surrendered. Most African nations, including those that are party to the Rome Statute, have indicated that they will not detain President al-Bashir should he visit. Indeed, al-Bashir has traveled largely without impediment throughout Africa, and even visited Security Council member state China in 2011.

In October 2013, the African Union met in Addis Ababa to discuss whether the 34 African countries that are party to the Rome Statute should withdraw. Rev. Desmond

Tutu, in a New York Times OpEd African war criminals who oppose the ICC to Nazi war criminals who opposed the Nuremberg trials. Kofi Annan also spoke publically in opposition of withdrawal from the ICC. Ultimately, rather than withdrawing from the treaty, the AU called for a deferral of charges against sitting heads of state, including Sudan's al-Bashir.

As a court of last resort, the ICC can offer victims a place to turn when their own governments are unwilling or unable to provide justice in the local courts. The full support of both member and non-member States is essential to its success.

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Politics Versus Justice: The ICC investigation in Kenya

by Stephanie Gibbs

The ICC is undertaking two groundbreaking trials, wherein the current President and Deputy President of Kenya face charges of Crimes Against Humanity for crimes committed during the violence that followed the 2007 presidential election in Kenya. While Deputy President William Samoei Ruto's trial is already under way, opening statements for President Uhuru Muigai Kenyatta's trial are slated for October 7, 2014. The government of Kenya has opposed these prosecutions, challenged the authority of the ICC to hear the cases, and has even threatened to rescind its signature to the Rome Statute.

Background

In 2007, there were two primary candidates for President, incumbent Mwai Kibaki (of Kikuyu ethnicity) of the Party of National Unity ("PNU"), and challenger Raila Odinga (of Luo ethnicity) with the Orange Democratic Movement ("ODM"). Votes were cast on December 27, 2007, which immediately triggered accusations of irregularities influencing the outcome. Despite these irregularities, President Kibaki was hastily declared the winner.

Immediately after Kibaki was named the winner, violent attacks began on Kikuyu communities in the Rift Valley and Nairobi slums. Rallies were called by both political leaders, while Kikuyu communities executed a wave of counter attacks against Luo and Kalenjin communities. The post-election violence ("PEV") continued to spread, with Kikuyus, Luos, and Kalenjins as both victims and perpetrators. Through January 2008, talks were attempted but unsuccessful. The PEV continued, with accusations that the PNU leaders were using the national police and the Mungiki, a mafia-like gang/sect in Kenya, to execute attacks. On February 28, 2008 a power sharing agreement was signed, cementing Kibaki as President, and positioning Odinga in the newly created role of Prime

Minister. Violence continued in some instances, including the army attacking and bombing the local Sabaot Land Defence Force in Mount Elgon, in the Rift Valley.

On March 14, 2008, the Kiegler and Waki Commissions were formed to investigate the election irregularities and the PEV, respectively, and to make recommendations to the government for improvement. On April 17, 2008, the new government was sworn in and it seemed like Kenya was turning a corner. From July to September 2008, the commissions held public hearings. On October 15, 2008, the Waki Commission published its report and its recommendations. According to their PEV numbers, 1,133 people were killed, 3,561 people were injured, 117,261 personal properties were destroyed, and over 350,000 became internally displaced persons (“IDPs”). The Waki Commission recommended an independent tribunal to hear PEV cases, legislation to incorporate crimes against humanity into Kenyan criminal code, a bolstering of witness protection programs, freedom of information to access government records, and reforms relating to security and police forces operations.

The Waki Commission also compiled a list of persons it considered most responsible for the PEV, but did not publish that list in its final report. Instead, it placed the list and the evidence it had gathered in a sealed envelope. In its final recommendations, the Waki Commission indicated that, should Kenya fail to prosecute PEV perpetrators domestically, the matter should be referred to the ICC, and the Waki Commission would provide the Office of the Prosecutor with its list of most responsible persons and evidence.

In the spring of 2009, the Kenya legislature, headed by PM Odinga, failed to pass legislation to enact the recommendations by the Waki Commission. Based on this failure to act, the ICC’s Chief Prosecutor Luis Moreno-Ocampo requested a Pre-Trial Chamber of the ICC to authorize an ICC investigation the situation in Kenya. The Pre-Trial Chamber authorized the investigation in March 2010, and on March 31, 2010, the ICC officially opened their investigation into the PEV.

The OTP initially sought summonses to appear – rather than arrest warrants – for six suspects, divided into two cases that represented the two main opposing sides in the PEV: in case one (the ODM/Kalenjin side), summonses were requested for Ruto, together with senior Kenyan politician Henry Kiprono Kosgey and Head of Operations at Kass FM radio station Joshua arap Sang; in case two (the PNU/Kikuyu side), summonses were requested for Kenyatta, as well as Francis Muthaura (Head of Civil Service and Secretary to the Cabinet at the time of the PEV), and former police commissioner Mohammed Hussein Ali. The Court issued summonses for all six suspects on March 8, 2011.

Hearings to confirm the charges were held in both cases in the early autumn of 2011, to determine whether the Prosecution had presented sufficient evidence to establish substantial grounds to believe that the suspects had committed the crimes charged. The Pre-Trial Chamber rendered its verdict in January 2012. It confirmed charges in case one against Ruto and Sang only, and in case two against Kenyatta and Muthaura only. The Chamber dismissed the charges against Kosgey and Ali on the grounds that the Prosecution had not presented sufficient evidence to warrant sending the cases to trial.

While the ICC cases were pending, Kenya held its next Presidential election as scheduled, in March 2013. Kenyatta ran for President, with Ruto as his Deputy President. Though the two had been on opposing political sides during the 2007 election, they had previously been political allies, and it was suggested by some that their ICC cases had pushed them into a “marriage of convenience” to avoid trial at the ICC.

On March 9, in a tight race against PM Odinga, Kenyatta and Ruto were elected President and Deputy President of Kenya, respectively. While there were allegations of irregularities in Kenyatta’s favor, the Supreme Court of Kenya confirmed that the elections were held in compliance with the constitution and the law. Kenyatta and Ruto were sworn in on April 9, 2013.

Just days after the election, the Prosecution withdrew its charges against Muthaura on March 18, 2013. In a press release, the Prosecutor explained that the withdrawal was due to: the fact that “several people who may have provided important evidence regarding Mr. Muthaura’s actions, have died, while others are too afraid to testify for the Prosecution”; the “disappointing fact that the Government of Kenya failed to provide my Office with important evidence, and failed to facilitate our access to critical witnesses who may have shed light on the Muthaura case”; and the “fact that we have decided to drop the key witness against Mr. Muthaura after this witness recanted a crucial part of his evidence, and admitted to us that he had accepted bribes”.

Kenya’s Appeal of ICC Jurisdiction

Prior to the confirmation of charges hearings, Kenya challenged the admissibility of the cases before the Court. This was the first time that a state, rather than an accused, challenged the admissibility of ICC cases.

On April 21, 2011, Kenya challenged the ICC’s jurisdiction to hear the cases arising out of the 2007 election violence. In submitted parallel challenges to both cases against all suspects, Kenya argued that the case was inadmissible at the ICC pursuant to Article 17 of the Rome Statute because the ICC can only investigate and prosecute cases where the countries that would normally exercised jurisdiction over the matter are either unwilling or unable to investigate and prosecute in good faith. Kenya claimed that it was adequately prepared to investigate the PEV, and that therefore the cases were inadmissible before the ICC. When it lost its challenge before the Pre-Trial Chamber, Kenya appealed the decision to the Appeals Chamber on June 6, 2011.

The major issue on appeal was the nature of the national investigation that could render a case inadmissible before the ICC: Kenya took issue with the ambiguity of the term “case,” and whether that required an investigation of identical individuals and identical subject matter by both the State and the Prosecutor, arguing that as a State, they required “leeway in the exercise of discretion” for complementarity in favor of national jurisdictions; the Prosecution argued that a national investigation only rendered a *case* inadmissible where the national investigation and prosecution was against the same *person* charged by the ICC for the same *acts* at issue in the ICC case.

On August, 31, 2011, the ICC Appeals Chamber ruled in favor of the Prosecution, articulating the “same person/same conduct” test for the admissibility of cases before the ICC. The Appeals Chamber found that the key issue is not whether a state is abstractly investigating crimes committed on its territory (which Kenya argued it was), but whether the state is concurrently investigating the “same case” under consideration by the ICC. Though there may be more flexibility at the situation stage, where no arrest warrants or summonses to appear have been issued, concrete *cases* are only inadmissible where the state is investigating and prosecuting the same person for substantially the same conduct.

Kenya’s mere preparatory steps towards an investigation were found to be insufficient to trump the jurisdiction of the ICC, and Kenya’s assertions that specific defendants were being investigated were found to be unsubstantiated, due to Kenya’s failure to demonstrate any investigative steps undertaken. Thus, the cases were found admissible, and proceeded to confirmation hearing.

Current ICC Trials

Following the dismissal of the charges against Kosgey and Ali at the confirmation hearing and the Prosecution’s withdrawal of charges against Muthaura, the ICC is today proceeding in two cases against a total of three defendants: case one against Ruto and Sang; and case two against Kenyatta alone.

Trial of Ruto and Sang

The trial of Ruto and Sang opened on September 10, 2013, and is currently ongoing. Ruto is charged with crimes against humanity including murder, deportation or forcible transfer of population, and persecution, for actions from December of 2006 through March 2008. Ruto is charged under the mode of liability of indirect co-perpetration. The Prosecutor alleges that Ruto organized a “Network” of ODM supporters, Kalenjin organizations, and others to initiate a wave of violence against the Rift Valley’s Kikuyu community, to expel them from historic Kalenjin lands. Particularly, the Prosecutor points to the coordinated attacks on predominantly PNU villages, the command hierarchy of the Network, the maps distributed targeting specific villages, and the numerous planning meetings to satisfy the contextual elements for crimes against humanity.

Sang is also charged with crimes against humanity, under the mode of liability of contributing to the crimes. The Prosecutor alleges that Sang broadcasted messages with news updates during the media blackout in the weeks following the 2007 election, spreading false and inciting news that Kalenjins had been murdered by PNU supporters, and a call to arms directing civilians to the targeted towns.

While the ICC had previously ruled to allow the trial to continue in Ruto’s planned absence, after a last minute appeal by the Prosecutor, the ICC Appeals Chamber overturned the Trial Chamber’s ruling from below. The decision stated that absences

from proceedings can only be allowed for “exceptional circumstances,” and sought to avoid absences from becoming the rule rather than the exception. On remand, the Trial Chamber applied the Appeals Chamber’s decision, but still decided to excuse Ruto. Around the same time, the Assembly of State Parties (“ASP”) passed new rule 134*bis*, which allows accused persons to skip trial under limited circumstances.

Trial of Kenyatta

The trial of Kenyatta is slated to begin on October 7, 2014 on charges of crimes against humanity including acts of murder, deportation or forcible transfer of population, rape and other forms of sexual violence, other inhumane acts such as destruction of property, and persecution, based on conduct committed from November 2007 through January 2008. The Prosecution alleges that Kenyatta used the Mungiki to further PNU objectives and to execute the attacks on ODM villages, and that, at Kenyatta’s behest, the police refrained from interfering with these attacks during the PEV time period.

In particular, the targeting of the Luo, Luhya, and Kalenjin populations, the meetings between PNU officers and Mungiki representatives that took place in the lead up to the attacks, the oaths taken to solidify loyalty to the PNU, the recruitment of youths to their cause, the uniforms provided to those perpetrating attacks on the villages, and the identification of civilian targets satisfied the contextual elements of crimes against humanity.

Originally the Prosecutor wanted to try Kenyatta and Ruto at the same time. However, President Kenyatta, in presenting himself for pre-trial hearings, offered his cooperation with the proceedings only if he and Deputy President Ruto would be tried at separate times so that at least one of them could remain present in Kenya to carry out the duties of the presidential office.

Article 70 case

On October 2, 2013, an arrest warrant was unsealed for Walter Osapiri Barasa, a former intermediary for the ICC Prosecutor. Barasa is the first defendant ever charged with three counts of corruptly influencing a witness and attempts thereof, pursuant to Article 70 of the Rome Statute, for having offered to pay witnesses to withdraw their testimony in the cases arising out of the Kenya situation.

The ICC issued the Barasa warrant under seal, and found jurisdiction for the unprecedented charges without first consulting with a State Party (i.e. Kenya), because of the risk of information being unduly leaked or an arrest being thwarted. This highlights the ongoing tension between the ICC and the government of Kenya. Ironically, the ICC now depends on the State Parties to “take appropriate measures” to detain and turn over Barasa for prosecution. Legal proceedings are currently ongoing in Kenya to determine whether to turn Barasa over to the ICC.

Conclusion

The investigation and prosecution of the 2007 election fallout have been plagued with delays, political difficulties, and scandals such as witness tampering. Only six years after the violence has the first trial gotten underway. Without a doubt, the future of the ICC as the centerpiece of global criminal justice depends on how it resolves the many challenges it will continue to face through these prosecutions and the resolution of the situation in Kenya.

The ICC Investigation in the Central African Republic

by Brandon C. Smith

I. Introduction

The International Criminal Court's investigation into violence that occurred in the Central African Republic (CAR) began with a referral from the country's government in 2004 and continues today with a multidimensional trial that is midway through its fourth year. Since the referral, the ICC has investigated the conflict, indicted and arrested one suspect (Jean-Pierre Bemba), confirmed his case for trial, and heard the Prosecution and Defense trial cases. In addition, four members of Bemba's defense team and Bemba himself have been arrested and charged with witness tampering. This subdivision will set out the history of this conflict, the allegations against the accused, and the legal theories raised throughout the pre-trial and trial stages of the case.

II. Background to the ICC's CAR Investigation

A. The Central African Republic

The CAR is a landlocked Central African nation bordered by Chad in the north, Sudan in the east, the Democratic Republic of the Congo (DRC) and the Republic of the Congo in the south, and Cameroon in the west. Like many African nations, the CAR suffered through nearly a half-century of strongmen, coups, rebel uprisings, and wars in its post-colonial era. In 2003, the President of the CAR was Ange-Felix Patasse. Since the CAR gained independence from France on December 1, 1958 and Patasse's rise to power in 1993, the country has had only three different presidents; Patasse's immediate predecessor was Andre Kolingba who ruled the country from 1981 to 1993. Over the thirty years prior to 1993, several coups and rebel uprisings led the CAR and its army, the Central African Armed Forces (FACA), to rely on outside military aid to resolve

conflicts. Often, this aid would come from France, but the CAR government also relied on Libya for help.

B. Jean-Pierre Bemba Gombo and the Movement for the Liberation of the Congo

Jean-Pierre Bemba Gombo was born in northeastern DRC to a businessman father who worked closely with former Zairian President Mobutu Sese Seko.⁷² In 1997, rebel forces deposed Mobutu. Their leader, Laurent Kabila, became president. At the time, Bemba was a wealthy businessman in the DRC.⁷³ After Mobutu was ousted and went into exile, Uganda approached Bemba about overthrowing Kabila and helped Bemba found his political party/militia group, the Movement for the Liberation of Congo (MLC).⁷⁴ With Ugandan support, Bemba's MLC conquered swaths of territory in northern DRC.⁷⁵

C. Conflict that led to the ICC prosecution of Bemba

Bemba became involved in conflict in the CAR because he developed a symbiotic relationship with CAR President Ange-Felix Patasse.⁷⁶ In 1993, Ange-Felix Patasse was elected as President of CAR, and he was reelected in 1999. In May 2001, Patasse's predecessor, Andre Kolingba, orchestrated a coup attempt.⁷⁷ Patasse turned to Libya and Bemba for help. Bemba sent MLC troops to the CAR, and Kolingba fled the country.

In the months that followed, Patasse accused his chief of staff, Francois Bozize, of complicity in the coup attempt, and Bozize fled to neighboring Chad.⁷⁸ While Bozize was in Chad, members of Patasse's presidential guard, along with a Chadian man named Abdoulaye Miskine, crossed into Chad to attack Bozize.⁷⁹ Chadian military assisted Bozize in repelling the CAR forces and entered northern CAR, where Bozize set up a base.⁸⁰ In October 2002, Bozize attacked CAR's capital, Bangui, and Patasse turned to Libya, Bemba's MLC, and a militia command by Miskine for help.⁸¹ Over the following five months, Bemba's MLC allegedly entered CAR to support Patasse's forces, where MLC soldiers were committing systematic murders, rapes, and destruction of villages.⁸² These are the crimes that are the focus of the ICC's investigation and case.

⁷² Profile: Jean-Pierre Bemba, BBC News, <http://news.bbc.co.uk/2/hi/africa/6085536.stm>.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Profile: Jean-Pierre Bemba, BBC News, <http://news.bbc.co.uk/2/hi/africa/6085536.stm>.

⁷⁷ Central African Republic: Former Leader Andre Kolingba Apologizes to Nation, IRIN Humanitarian News and Analysis, <http://www.irinnews.org/report/46560/central-african-republic-former-leader-andre-kolingba-apologises-to-nation>.

⁷⁸ Sudan to Host Summit on Central African Crisis, Agence France-Presse, <http://reliefweb.int/report/central-african-republic/sudan-host-summit-central-african-crisis>.

⁷⁹ Great Lakes: Abdoulaye Miskine Flown to Togo, IRIN Humanitarian News and Analysis, <http://www.irinnews.org/fr/report/35538/great-lakes-abdoulaye-miskine-flown-to-togo>.

⁸⁰ Central African Republic: Year-ender 2002: An Uncertain Future Ahead, Even as Peacekeepers Arrive, <http://www.irinnews.org/printreport.aspx?reportid=40796>.

⁸¹ *Id.*

⁸² *Id.*

During this five-month period, Patasse fled the country to Togo where he stayed until his death in 2011.⁸³ In March 2003, Bozize took control of the CAR and served as president until he was deposed by rebels and forced to flee the country in March 2013.⁸⁴ To date, the CAR still suffers from rebel militias, including Joseph Kony's Lord's Resistance Army, pillaging villages across the country.

III. Background to the ICC Investigation

In early 2005, the Office of the Prosecutor announced that the government of the CAR had referred the above-described violence to the ICC for investigation of crimes since 1 July 2002.⁸⁵ At that point, the ICC opened a preliminary examination into the violence. By 2006, the Prosecutor had not officially initiated an investigation into the situation in the CAR, and the CAR government became impatient.⁸⁶ On April 13, 2006, the CAR Court of Cassation, the country's highest court, held that its judicial system was not capable of prosecuting the crimes committed in the 2002-2003 conflict by five people: Bemba, Patasse, a French police officer, and two former aides of President Patasse.⁸⁷ All five were charged in the CAR, but the court stated the country's police force could not arrest them.⁸⁸ According to the BBC, David Celestin Gamou, a CAR Justice Ministry Spokesman, told the AFP News Agency, "The only way to prevent total impunity is to call for international help. The international criminal court should be the best route to follow."⁸⁹ In September 2006, the CAR filed a complaint with the ICC, alleging that the Office of the Prosecutor had failed to decide within a reasonable time whether to investigate.⁹⁰ On December 15, 2006, the ICC's Pre-Trial Chamber issued a decision, ordering the Office of the Prosecutor to report on the status of their investigation.⁹¹

On May 22, 2007, ICC Prosecutor Luis Moreno-Ocampo announced the decision to open an investigation into the CAR conflict.⁹² The announcement noted, "[c]ivilians were killed and raped; and homes and stores were looted. The alleged crimes occurred in the context of an armed conflict between the government and rebel forces. . . . The allegations of sexual crimes are detailed and substantiated. The information we have now

⁸³ Kaye Whiteman, Ange-Felix Patasse Obituary, The Central African Republic's Flamboyant Former President, The Guardian, <http://www.theguardian.com/world/2011/jun/14/ange-felix-patasse-obituary>.

⁸⁴ *Id.*

⁸⁵ The ICC only has jurisdiction over crimes that occurred after its founding statute, the Rome Statute of the International Criminal Court, went into effect; this happened on 1 July 2002.

⁸⁶ Background: Jean-Pierre Bemba, International Justice Monitor, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-background>.

⁸⁷ I Can Still Smell the Dead, Human Rights Watch, <http://www.hrw.org/node/118906/section/12> (citing International Federation of Human Rights (FIDH), "La Cour de Cassation confirme l'incapacité des tribunaux à enquêter sur les crimes graves. Le Procureur de la Cour pénale internationale doit ouvrir une enquête sur la situation en RCA," Apr. 13, 2006, <http://www.fidh.org/La-Cour-de-Cassation-confirme-l>).

⁸⁸ *Id.*

⁸⁹ Hague Referral for African Pair, BBC News, <http://news.bbc.co.uk/2/hi/africa/4908938.stm>.

⁹⁰ Application Challenging Admissibility of the Case Pursuant to Articles 17 and 19(2)(a) of the Rome Statute, No.: ICC-01/05-01/08, Feb. 25, 2010.

⁹¹ Decision on Admissibility and Abuse of Process Challenges, No.: ICC-01/05-01/08, Jun. 24, 2010.

⁹² Central African Republic: ICC Opens Investigation, Human Rights Watch, May 23, 2007, <http://www.hrw.org/news/2007/05/22/central-african-republic-icc-opens-investigation>.

suggests the rape of civilians was committed in numbers that cannot be ignored under international law.”⁹³ The case was allocated to the ICC’s Pre-Trial Chamber III.

IV. Pre-Trial Litigation

Though some in the international community sought prosecution of Patasse, Bemba, Miskine, and others, only Bemba faces charges at the ICC. On May 23, 2008, upon the Prosecutor’s request, the Pre-Trial Chamber issued an arrest warrant for Bemba under seal while Bemba was on a trip in Belgium.⁹⁴ The following day, the warrant was unsealed when Bemba was arrested near Brussels.⁹⁵ On July 1, 2008, a Belgian court held that Bemba could be transferred to the Hague.⁹⁶

Bemba’s first appearance at the ICC was on July 4, 2008.⁹⁷ Originally, Bemba was charged under a theory of direct responsibility for eight crimes: five counts of war crimes (murder, rape, pillaging, torture, and outrage on personal dignity) and three counts of crimes against humanity (murder, rape, torture).⁹⁸ A hearing to confirm the charges was initially scheduled for November 2008, but it was delayed twice until January 12, 2009.⁹⁹ Between January 12, 2009 and January 15, 2009, the Pre-Trial Chamber judges heard evidence and arguments from the Prosecution and Defense as to whether the Prosecution had presented “sufficient evidence to establish substantial grounds to believe” that Bemba committed the crimes charged.¹⁰⁰ Along with arguments from the Prosecution and the defense, the court heard from representatives of fifty-four victims at this hearing.¹⁰¹

In March 2009, the Pre-Trial Chamber judges issued a decision, asking the Prosecution to change their theory from one of direct responsibility to command responsibility.¹⁰² This decision would have a central impact on the future of the case, because the judges effectively stated that the Prosecution lacked enough evidence to go to trial on the direct responsibility theory. Therefore, the main issues from this point forward became whether the Prosecution could show that Bemba was in effective control of MLC fighters perpetrated the above crimes, and that Bemba either ordered the crimes to be committed or failed to prevent or punish the crimes.

⁹³ ICC – Prosecutor Opens Investigation in the Central African Republic, International Criminal Court Press Release, May 22, 2007, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/press%20releases/Pages/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic.aspx.

⁹⁴ Timeline: International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-timeline/>

⁹⁵ *Id.*

⁹⁶ Background: Jean-Pierre Bemba, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-background/>.

⁹⁷ Timeline: International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-timeline/>.

⁹⁸ Background: Jean-Pierre Bemba, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-background/>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Background: Jean-Pierre Bemba, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-background/>.

In June 2009, the Pre-Trial Chamber officially confirmed five out of seven charges on the command responsibility theory against Bemba. Two out of three crimes against humanity charges were confirmed (murder and rape), and the court confirmed the war crimes counts of murder, rape and pillaging. Two torture counts and one count of outrage on personal dignity were dismissed.¹⁰³

Before the trial eventually began in November 2010, the defense filed a motion on February 25, 2010, challenging the ICC's jurisdiction to hear the case.¹⁰⁴ The motion had three points: (1) First, the defense argued that CAR courts were capable of conducting the investigation and prosecution of the case. In August 2008, President Bozize had reversed positions and called on the UN Security Council to declare CAR courts capable of prosecuting the 2002-2003 crimes covered under the Rome Statute. (2) Second, the defense argued that the alleged crimes were not of sufficient "gravity" for the ICC to prosecute the case, as required in Article 17(1)(d) of the Rome Statute. (3) Finally, the defense argued that the Prosecution had engaged in misconduct that made a fair trial impossible for Bemba, specifically delaying the disclosure of evidence, using the judicial system for political purposes, and unlawfully detaining Bemba during his transfer to and subsequent detention at the Hague.¹⁰⁵ The Pre-Trial Chamber disagreed with the defense motion in its entirety, holding: (1) CAR courts were in fact incapable of hearing the case; (2) the alleged crimes were sufficiently grave for the ICC to consider them; and (3) the Prosecution had only been late once at providing discovery, this lateness did not result in prejudice to the defense, and none of the defense's other accusations about prosecutorial misconduct had any foundation or merit.¹⁰⁶

On June 28, 2010 and July 26, 2010, defense lawyers filed appellate motions, arguing that the Pre-Trial Chamber's rulings were erroneous and an abuse of process.¹⁰⁷ On October 19, 2010, the Appeals Chamber promptly dismissed all four grounds of the defense's appeal, upholding the Pre-Trial Chamber's decision and setting the case up for trial.¹⁰⁸ In a final status conference on October 21, 2010, the Trial Chamber set an official date to start the trial on November 22, 2010.¹⁰⁹

V. Trial of Jean-Pierre Bemba

On November 22, 2010, the much-anticipated trial of Jean-Pierre Bemba began with opening statements of the Prosecution, the Defense, and representatives of victims participating in the proceedings. At the onset, initial media reports speculated the trial was set to take "several months" and feature the testimony of one hundred and thirty-five

¹⁰³ *Id.*

¹⁰⁴ See Application Challenging Admissibility of the Case Pursuant to Articles 17 and 19(2)(a) of the Rome Statute, No.: ICC-01/05-01/08, Feb. 25, 2010.

¹⁰⁵ *Id.*

¹⁰⁶ See Decision on Admissibility and Abuse of Process Challenges, No.: ICC-01/05-01/08, Jun. 24, 2010.

¹⁰⁷ Timeline: International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-timeline/>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

victims who had been accepted as participants.¹¹⁰ Over one thousand, six hundred victims were eventually permitted to participate in the proceedings as independent third parties; they are collectively represented by counsel.

The Prosecution's case lasted one year and nine months, and included graphic detail of physical and sexual violence. Countless witnesses recalled gang rapes and brutal treatment as punishment for their support of Bozize's rebels. The Prosecution concluded its case in August 2012, and the Defense began its case the same month, focusing on two issues: (1) whether MLC soldiers in fact committed the physical crimes; and (2) if so, whether Bemba exercised command responsibility over them sufficient to make him legally responsible for their conduct. At the beginning of the case, the defense had announced its indication to call 63 witnesses.¹¹¹ By the time the defense case closed in October 2013, that number was cut to 34 witnesses.¹¹² Most defense witnesses testified via video link, often from unnamed locations.¹¹³ According to defense lawyers, many of the witnesses were refugees who had been forced to flee the country.

A. Whether MLC Soldiers Committed the Crimes

The Prosecution presented testimony from several witnesses to prove that MLC soldiers committed crimes while in CAR. For example, "Witness 178," a MLC soldier, testified that MLC fighters could be identified by their use of the Lingala dialect, plastic boots, and make-up often worn by the soldiers.¹¹⁴ This supported the testimony of victims that they observed these identifying features on the soldiers who committed the crimes.

One of the Prosecution's expert witnesses also gave evidence on this issue. Dr. Andre Tabo, a CAR-based psychiatrist and psychiatry teacher who treated rape victims of the 2002-2003 conflict, testified that MLC fighters raped CAR women as punishment for their support of Patasse's overthrow.¹¹⁵ Upon defense questioning as to how the women he treated knew that the fighters were Congolese, Dr. Tabo responded that many of these CAR women could recognize aspects of the Lingala dialect spoken by the fighters.¹¹⁶ Dr. Tabo further testified that the MLC fighters would often demand to know the location of rebels from the women prior to raping them.¹¹⁷

¹¹⁰ See ICC: Trial Opens for Congo's Ex-Vice President, Human Rights Watch, available at <http://www.hrw.org/news/2010/11/22/icc-trial-opens-congo-s-ex-vice-president>

¹¹¹ Bemba's Lawyers Get Two More Weeks to Conclude Evidence, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/11/bembas-lawyers-get-two-more-weeks-to-conclude-evidence>.

¹¹² Presentation of Defense Evidence Ends in Bemba Trial, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/11/presentation-of-defense-evidence-ends-in-bemba-trial>.

¹¹³ *Id.*

¹¹⁴ Trial Told Patasse Did Not Command Bemba's Troops, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2011/09/trial-told-patasse-did-not-command-bembas-troops>.

¹¹⁵ Expert Explains How MLC Used Rape as a Tool of War, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2011/04/expert-explains-how-mlc-used-rape-as-a-tool-of-war>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

The Defense called witnesses to refute the Prosecution's arguments. For example, the defense called linguistics expert Professor Eyamba George Bokamba, a Ph.D graduate of Indiana University, who testified that it was impossible to tell which side of the conflict a given fighter was on based upon their language.¹¹⁸ Bokamba's reasoning was that many CAR citizens spoke Lingala, so there would be no way to distinguish these citizens from the MLC fighters.¹¹⁹ The Defense expanded upon this reasoning when it called former government officials of President Patasse's government to testify.¹²⁰ Former government spokesman Prosper Ndouba testified that when he was held captive by Bozize's forces, he heard these rebels speaking Lingala.¹²¹ Ndouba further implicated Bozize's forces as the real perpetrators of the 2002-2003 war crimes.¹²² "Witness D04-50" testified that the CAR's presidential guard, not any Congolese force, provided the uniforms for the fighters in the 2002-2003 conflict.¹²³

B. Whether Bemba had Command Responsibility over the MLC forces in CAR

From the very outset of the trial, command responsibility has been the most debated legal topic of the trial. According to the Prosecutor's charges, MLC fighters deployed in the CAR committed murder, rape, and pillaging. To tie Bemba to these acts, the Prosecutor further charged that Bemba "did not take all necessary and reasonable measures within his power to prevent or repress the[] commission" of these acts, and held effective authority over the MLC fighters.¹²⁴ In response, the defense argued that Bemba was not in effective command of the fighters in CAR to be held accountable for their crimes, pointing to the fact that Bemba was actually physically present in the DRC through much of the 2002-2003 conflict.¹²⁵ To support their cases, both the Prosecution and Defense relied on expert and lay witnesses.

The Prosecution presented the testimony of cooperative insider witnesses to explain Bemba's connection to and control over the MLC in CAR. For example, "Witness 213", who lived with Bemba during the conflict, testified that Bemba kept a satellite phone at his house to communicate orders to his MLC commanders on the

¹¹⁸ Was it Bemba's Fighters or Not? Identity of Perpetrators Dominates Trial, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/09/was-it-bembas-fighters-or-not-identity-of-perpetrators-dominates-trial>.

¹¹⁹ *Id.*

¹²⁰ Former Patasse Aide Concludes Testimony in Bemba Trial, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/09/former-patasse-aide-concludes-testimony-in-bemba-trial>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Bemba Trial Resumes With Testimony of Sixth Defense Witness, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/10/bemba-trial-resumes-with-testimony-of-sixth-defense-witness>.

¹²⁴ Command Structure Dominates Bemba Trial This Week, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/10/command-structure-dominates-bemba-trial-this-week>.

¹²⁵ *Id.*

ground in the CAR.¹²⁶ This witness further testified that Bemba would receive radio reports from these commanders on a daily basis, and that Bemba had a communications center set up a few miles from his home in the DRC to receive these radio reports.¹²⁷

Additionally, MLC soldiers who fought for Bemba testified about the degree of control he exercised. “Witness 178” testified that, although Patasse was president of the CAR, the fighters took their orders from Bemba, and that Patasse did not have the power to punish them for misdeeds.¹²⁸ Another soldier, “Witness 173,” testified that MLC troops commanded by General Mustafa Mukiza would be in regular contact with Bemba, and that Bemba would often take looted vehicles recovered by Mukiza’s troops.¹²⁹ “Witness 173” further testified that Bemba was directly collaborating with the presidential guard of Patasse to exchange information, but on cross examination, he admitted that he had only secondhand knowledge of this.¹³⁰

The prosecution also called expert witness General Daniel Opande, a military expert who has commanded UN peacekeeping missions in the past. General Opande testified that, in his opinion, Bemba bore command responsibility because Opande had reviewed the prosecution’s documents and compared them to his own experiences on peacekeeping missions with rebel groups in Central Africa.¹³¹ Based on this data, General Opande concluded that Bemba’s relationship with the MLC fighters was analogous to other rebel military leaders and groups he had encountered in the past.¹³²

When the Defense case began in August 2012, the defense immediately sought to refute the prosecution’s evidence of command responsibility. Many of the Defense witnesses testified to atrocities carried out by Bozize’s rebels. The defense’s first witness, retired French General Jacques Seara, presented his opinion that Bemba did not possess responsibility over the fighters due to his location outside the country and lack of a physical map.¹³³ General Seara further testified that the Patasse-led government actually controlled logistical arrangements for the fighters at the time.¹³⁴ On cross-examination, victim advocates elicited from General Seara that he did not travel to the CAR to compile

¹²⁶ Insider Claims Bemba Was in Direct Control of His Marauding Troops, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2011/11/insider-claims-bemba-was-in-direct-control-of-his-marauding-troops>.

¹²⁷ *Id.*

¹²⁸ Trial Told Patasse Did Not Command Bemba’s Troops, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2011/09/trial-told-patasse-did-not-command-bembas-troops>.

¹²⁹ Witness Says MLC General Took Direct Orders From Bemba, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2011/08/witness-says-mlc-general-took-direct-orders-from-bemba>.

¹³⁰ Witness Did Not See Bemba Talking to Central African Commanders, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2011/08/witness-did-not-see-bemba-talking-to-central-african-commanders>.

¹³¹ Defense Insists Patasse Commanded Bemba’s Troops, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2011/12/defense-insists-patasse-commanded-bembas-troops>.

¹³² *Id.*

¹³³ Victims’ Lawyer Questions Expert on Methodology, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/08/victims-lawyers-question-experts-methodology>.

¹³⁴ *Id.*

his report.¹³⁵ Prosecution lawyers further impeached Seara's account of Patasse's control over the MLC by confronting Seara with logs that purportedly showed the MLC fighters sought ammunitions and supplies from the DRC.¹³⁶ Seara responded that there may be intervals at which assistance from outside the CAR was necessary, but that the CAR government provided the majority of the ammunitions and supplies.¹³⁷

The Defense also called former government officials of President Patasse's government. For example, a former Bemba bodyguard testified that Bemba lacked a command relationship with MLC fighters. Another witness, "Witness D04-50," testified that on a visit to the fighters, Bemba told them to respect the authority of Patasse's commanders.¹³⁸ Later, "Witness D04-51" testified that President Patasse was running the military front at the time through a General Bombayake, who was Patasse's "right-hand man."¹³⁹ More defense witnesses testified to a code of conduct implemented among MLC fighters by Bemba's and to Bemba's conduct of court martial proceedings against fighters who violated the code.¹⁴⁰

As the Defense case nearly hit the six-month mark in April 2013, the Defense called a senior MLC fighter who told the court that Bemba had an "elementary" military background, making it impossible for Bemba to command the fighters.¹⁴¹ Most recently, the Defense has called some of the fighters who testified that they received no orders from Bemba and that all orders came directly from Bozize's forces. Further witnesses in June 2013 corroborated this theory, by alleging directly that Bozize's forces, not Bemba's forces, committed all of the crimes.

C. Procedural Posture Prior to Arrest of Bemba's Defense Team

Originally, the Defense case was set to conclude by July 19, 2013; however, in June 2013, ICC judges extended that date to October 25, 2013.¹⁴² Also in late June, Bemba's lawyers announced that Bemba would testify in his own defense at the conclusion of the defense case by means of an unsworn statement pursuant to Article 67

¹³⁵ Expert Completes Testimony After Victims' Lawyers Question His Methodology, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/08/expert-completes-testimony-after-victims-lawyers-question-his-methodology>.

¹³⁶ Expert: Central Africans Provided Logistics to Bemba Fighters, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/08/expert-central-africans-provided-logistics-to-bemba-fighters>.

¹³⁷ *Id.*

¹³⁸ Patasse Aides Insist Bemba Did Not Command Troops, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/10/patasse-aides-insist-bemba-did-not-command-troops>.

¹³⁹ Patasse Cited in MLC Command, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/10/patasse-cited-in-mlc-command>.

¹⁴⁰ MLC Court Martial Trials Dominate Bemba's Trial, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2012/11/mlc-court-martial-trials-dominate-bembas-trial>.

¹⁴¹ Bemba Had "Elementary" Military Knowledge But Troops Were Well-Trained, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/04/bemba-had-elementary-military-knowledge-but-troops-were-well-trained>.

¹⁴² Judges Order Bemba's Lawyers to Close Defense Case This October, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/07/judges-order-bembas-lawyers-to-close-defense-case-this-october>.

of the Rome Statute.¹⁴³ At the beginning of the case, the defense had announced its indication to call 63 witnesses.¹⁴⁴ By October, that number was cut short to 35 witnesses.¹⁴⁵ The court also announced in October that it intended to call two unnamed witnesses who had been referred to repeatedly by both sides but not called, and prosecutors.¹⁴⁶ The Prosecution applied to question Bemba on the theory that this would clarify his unsworn testimony for the judges.¹⁴⁷ Chief ICC Prosecutor Fatou Bensouda also argued that Article 67 of the Rome Statute should not be used as a “vehicle” for defendants like Bemba to give facts in support of their case and avoid the Prosecution’s questions by giving unsworn testimony.¹⁴⁸ Defense lawyers responded that there was no basis in law for the Prosecution to be allowed to cross-examine Bemba on his unsworn statement.¹⁴⁹

At the end of October 2013, defense lawyers again requested a delay for closing the defense case: this time, until December 15, 2013. Judges granted a shorter extension of time and the next defense witness testified in an entirely closed session for the defense on October 30, 2013.¹⁵⁰ A week later, the judges denied the Prosecution’s request to question Bemba, and gave the defense lawyers a further time extension to close their case until November 15, 2013.¹⁵¹ The purpose of the final delay was to allow remaining defense witnesses to testify.¹⁵²

Then, on November 25, 2013, the most shocking news of the trial to date occurred.

D. Members of Bemba’s Defense Team Charged in New Article 70 Case

¹⁴³ Bemba to Testify in His Own Defense, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/06/bemba-to-testify-in-his-own-defense>.

¹⁴⁴ Bemba’s Lawyers Get Two More Weeks to Conclude Evidence, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/11/bembas-lawyers-get-two-more-weeks-to-conclude-evidence>.

¹⁴⁵ Presentation of Defense Evidence Ends in Bemba Trial, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/11/presentation-of-defense-evidence-ends-in-bemba-trial>.

¹⁴⁶ Judges to Call Two Witnesses in Bemba’s Trial, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/10/judges-to-call-two-witnesses-in-bembas-trial>.

¹⁴⁷ Judges Deny Prosecution Request to Question Bemba, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/11/judges-deny-prosecution-request-to-question-bemba>.

¹⁴⁸ Prosecutors Want to Question Bemba, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/09/prosecutors-want-to-question-bemba>.

¹⁴⁹ Defense Contests Prosecution’s Attempt to Question Bemba, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/10/defense-contests-prosecutions-attempt-to-question-bemba>.

¹⁵⁰ Bemba’s Lawyers Granted More Time to Present Their Evidence, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/10/bembas-lawyers-granted-more-time-to-present-their-evidence>.

¹⁵¹ Bemba’s Lawyers Get Two More Weeks to Conclude Evidence, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/11/bembas-lawyers-get-two-more-weeks-to-conclude-evidence>.

¹⁵² *Id.*

On November 25, 2013, Bemba lead defense lawyer, Aime Kilolo-Musamba, Bemba, and three other members of Bemba's defense team were arrested and charged with witness tampering, under Article 70 of the Rome Statute.¹⁵³ The Court released a statement describing the allegations: that the five suspects had participated in a network whose purpose was to procure false testimony and forged documents before the ICC in the instant case.¹⁵⁴

A few days after their arrest, the five suspects appeared before the Pre-Trial Chamber and denied the charges. Lawyers for the suspects argued that the arrests would impair the defense strategy of Bemba's case, noting that Mr. Kilolo-Musamba's iPad and Blackberry were seized in the arrest, and that these items contained "the entire defense strategy" of Bemba's case.¹⁵⁵ In the weeks that followed, Bemba and Kilolo-Musamba were held under circumstances where they were unable to speak with one another beyond one 30-minute phone call per day.¹⁵⁶ On December 4, 2013, these restrictions were lifted.¹⁵⁷

In early January, the court published the arrest warrants showing that the Prosecution's investigators had tapped Bemba's and his Defense lawyer's phone during the trial, uncovering the scheme to bribe witnesses and present false evidence.¹⁵⁸ Investigations into these tampering crimes had commenced in May 2013 when the Prosecution applied to the Pre-Trial Chamber for an order to the ICC detention center, requesting disclosure of Bemba's telephone communications.¹⁵⁹ Two months later, the Pre-Trial Chamber had granted a further request to intercept calls placed by members of the Defense team, with the assistance of Dutch and Belgian authorities.¹⁶⁰ On December 11, 2013, Bemba named a new defense team headed by Peter Haynes.¹⁶¹ The case against all five suspects remains pending in the Pre-Trial Chamber.

E. Procedural Posture After the Arrest of Bemba's Defense Team

¹⁵³ Central African Republic: Aime Kilolo Musamba, Fidele Babala Wandu, and Jean-Pierre Bemba Gombo Make First Court Appearance Before ICC, allAfrica, <http://allafrica.com/stories/201311291412.html>.

¹⁵⁴ Bemba Case: Four Suspects Arrested for Corruptly Influencing Witnesses; Same Charges Served on Jean-Pierre Bemba Gombo, International Criminal Court Press Release, Nov. 24, 2013, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr962.aspx.

¹⁵⁵ Bemba and His Lawyer Protest Terms of Their ICC Detention, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/12/bemba-and-his-lawyer-protest-terms-of-their-icc-detention>.

¹⁵⁶ *Id.*

¹⁵⁷ Second Bemba Lawyer Appears Before ICC on Evidence Forgery Charges, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/12/second-bemba-lawyer-appears-before-icc-on-evidence-forgery-charges>.

¹⁵⁸ ICC Investigators Tapped Bemba And His Lawyers' Phone Calls, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2014/01/icc-investigators-tapped-bemba-and-his-lawyers-phone-calls>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Bemba Names Peter Haynes His Interim Lead Lawyer, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/12/bemba-names-peter-haynes-his-interim-lead-lawyer>.

Also in late November, the Court denied a final defense request to extend the deadline for closing its case to December 15, 2013.¹⁶² As a result, the presentation of defense witnesses and evidence ended, and the Court ruled that two outstanding defense witnesses would no longer be expected to testify.¹⁶³ According to the original timetable set by judges at the beginning of the case, the Prosecution and victim representatives had eight weeks from the close of evidence to submit their closing briefs, with the defense to file a response in the twelve weeks after the Prosecution and victim briefs.¹⁶⁴ The twelve-week delay is to account for translation of the Prosecution and victim briefs for the bilingual Defense team.¹⁶⁵ These deadlines were suspended for three weeks to coincide with the Court's winter recess in late December 2013 and early January 2014.¹⁶⁶ Toward the end of December, the Trial Chamber held that a defense witness, who disappeared in the middle of his questioning, would still have his testimony admitted in the record.¹⁶⁷ The Court closed the evidence in the case on April 7, 2014.¹⁶⁸ The Prosecution and victim lawyers were directed to file their closing briefs by June 2, 2014.¹⁶⁹ The Defense was then required to file their briefs within twelve weeks after receipt of the Prosecution and victim briefs.¹⁷⁰

VI. Conclusion

Through the seven years of investigation and preparation of this case, the legal community has engaged in a steady debate on the issues of command responsibility and whether Jean-Pierre Bemba can be held accountable for the crimes his MLC soldiers allegedly committed in CAR in 2002-2003. In Fall 2013, this trial suddenly produced “a trial within a trial” that now seeks to become a case of first impression at the ICC on witness intimidation. In the next few months, the Prosecution, the victims' lawyers and the Defense team are slated to present their closing briefs. Additionally, the prosecution of Bemba and members of his Defense team, on charges of witness tampering, will apparently proceed in parallel with the end of Bemba's trial, and the Defense will likely continue to argue that the arrest of four members of the Defense team has prejudiced Bemba's case. However either case turns out, international criminal law has benefited from litigation of the major legal issues involved. For this reason, the Bemba cases will prove instructive for effectively addressing future war crimes and the threat of witness intimidation at the Hague.

¹⁶² Presentation of Defense Evidence Ends in Bemba Trial, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/11/presentation-of-defense-evidence-ends-in-bemba-trial>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Presentation of Evidence Ends in Bemba's Trial, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2014/04/presentation-of-evidence-ends-in-bembas-trial>.

¹⁶⁶ Bemba Judges Suspend Submission Deadlines as Court Goes Into Recess, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2013/12/bemba-judges-suspend-submission-deadlines-as-court-goes-into-recess>.

¹⁶⁷ Judges Accept Evidence of Bemba Witness Who Disappeared, International Justice Monitor, A Project of the Open Society Justice Initiative, http://www.ijmonitor.org/?s=defense+witness+disappear&category_name=jean-pierre-bemba-gombo.

¹⁶⁸ Presentation of Evidence Ends in Bemba's Trial, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/2014/04/presentation-of-evidence-ends-in-bembas-trial>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*