



COMMITTEE ON AFRICAN AFFAIRS

ELIZABETH BARAD
Co-CHAIR
585 WEST END AVENUE
NEW YORK, NY 10024
PHONE: (917) 364-5093
elizabethbarad@gmail.com

JASON SPEARS
Co-CHAIR
420 EAST 55TH STREET, #9A
NEW YORK, NY 10022
Phone: (404) 664-2375
spears.jason.c@gmail.com

KIIRU GICHURU
SECRETARY AND TREASURER
135-15 83rd AVENUE, #4J
JAMAICA, NY 11435
Phone: (347) 432-4502
gichuru7@gmail.com

**DIGEST ON INTERNATIONAL CRIMINAL COURT
INVESTIGATIONS IN AFRICA**

May 20, 2016

TABLE OF CONTENTS

<u>PAGE</u>	<u>INVESTIGATION</u>
3	INTRODUCTION
12	DEMOCRATIC REPUBLIC OF THE CONGO
22	DARFUR (SUDAN)
33	KENYA
42	CENTRAL AFRICAN REPUBLIC
60	MALI

***NOTE: THIS DIGEST IS AN UPDATE OF A PRIOR VERSION WHICH
REPORTED ON THE STATUS OF CERTAIN INVESTIGATIONS OF THE
INTERNATIONAL CRIMINAL COURT PRIOR TO AUGUST 2014.***

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

By Andowah A. Newton

I) 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

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).

that accepts the Court's 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 proposed budget for 2016 is 153.12 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.

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

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).

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 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.

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.

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

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 FIVE INVESTIGATIONS COVERED IN THIS DIGEST AND RELATED ISSUES

As of January 18, 2016, the ICC has commenced ten investigations. States Parties have referred five of those investigations (Uganda, the Democratic Republic of the Congo ("DRC"), the Central African Republic ("CAR"), CAR II and Mali); the UN SC has referred two (Libya and Darfur, Sudan), and the OTP, *proprio motu*, initiated three (Kenya, Cote d'Ivoire and Georgia). The OTP has seven ongoing preliminary examinations;⁹ has issued 29 arrest warrants and nine summonses to appear; and holds six individuals in custody.¹⁰ Thirteen suspects remain at large. Twenty-three cases related to the ten investigations have been brought before the Court. Five of those cases are at the trial stage, one defendant, Bemba, awaits sentencing and two cases are at the reparations stage. The chart below summarizes the procedural posture of the five investigations covered in this digest (the Democratic Republic of the Congo ("DRC"), Darfur (Sudan), Kenya, the Central African Republic ("CAR") and Mali).

⁹ Those examinations are taking place in Afghanistan, Colombia, Guinea, Iraq, Nigeria, Palestine and Ukraine.

¹⁰ The ICC is currently holding the following individuals in custody: Bosco Ntaganda (DRC); Jean-Pierre Bemba Gombo (CAR); Laurent Gbagbo and Charles Blé Goude (Côte d'Ivoire); Dominic Ongwen (Uganda), and Ahmad Al Faqi Al Mahdi (Mali).

Summary of Procedural Posture in DRC, Darfur (Sudan), Kenya, CAR and Mali Situations
(as of March 24, 2016)

<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>
FAlign DRC	6	N/A	1	1	6	0	1	0
Darfur, Sudan	5	3	N/A	5	5	0	0	N/A
Kenya	3	6	N/A	3	5	2	1	N/A
CAR	6	N/A	1	4	2	0	1	N/A
Mali	1	N/A	1	N/A	1	1	N/A	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 delays. 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 almost one year, (iii) the confirmation of charges and the beginning of trial—from just over a year to one case where trial has still not commenced after almost five 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 almost three years, 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, Mali and CAR Cases

(as of March 24, 2016)

<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)	July 7, 2015	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)	April 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)	N/A (trial date vacated)	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>Confirmation¹³/ Dismissal of Charges</u>	<u>Trial Start Date</u>	<u>Trial End Date</u>	<u>Conviction / Acquittal</u>	<u>Sentencing</u>
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
<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) But action withdrawn Dec. 4, 2014	N/A	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
<i>Walter Osapiri Barasa*</i> (Kenya)	Aug. 2, 2013	Pending	N/A	N/A	N/A	N/A	N/A	N/A
<i>The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett</i> (Kenya)	March 10, 2015	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	Nov. 15, 2015	Mar. 21, 2016 Conviction	T.B.A.
<i>Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido*</i> (CAR)	Nov. 20, 2013	Nov. 25 & 27, 2013; Dec. 5, 2013; Mar. 20, 2014	No hearing	Nov. 11, 2014	Sept. 29, 2015	N/A	N/A	N/A

<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. Ahmad al-Faqi al Mahdi</i> (Mali)	Sept. 18, 2015	Sept. 30, 2015	March 6, 2016	March 24, 2016	N/A	N/A	N/A	N/A

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>

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

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.

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.”

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 members of the accused's defense team and related individuals 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 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.

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."

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 and updated (3/2/16)

I) 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 initially rendered in its ten-year existence was that of Thomas Lubanga Dyilo,²² which was appealed, with the conviction confirmed. Of the other individuals, a conviction was rendered on March 7, 2014 for Germain Katanga; Mathieu Ngudjolo Chui was acquitted, and the acquittal was confirmed on appeal, and he was released; charges against Callixte Mbarushimana were dismissed following a hearing on the confirmation of the charges, and he was released; the trial of Bosco Ntaganda began on September 2, 2015 and is ongoing. The last defendant remains a fugitive (Sylvestre Mudacumura).²³

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

II) 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 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

¹⁹ United Nations Treaty Database regarding the Rome Statute.

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

²¹ http://everythingexplained.today/International_Criminal_Court_investigation_in_the_Democratic_Republic_of_the_Congo/.

²² *Id.*

²³ *See supra* n. 21

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

Congolese ethnic Tutsis, called *Banyamulenge*, who had lived in the Congo for decades²⁵ and who had been discriminated against by the government.

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's (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, 1999,²⁷ 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 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

²⁵ *Id.*

²⁶ <http://www.csmonitor.com/World/Africa/Africa-Monitor/2011/1129/A-brief-history-of-Congo-s-wars>

²⁷ http://www.un.org/Docs/s815_25.pdf

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

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

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.

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, but were routed by FARDC and the U.N. peacekeeping forces.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

III) THE DEFENDANTS

A. Thomas Lubanga Dyillo (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 DRC)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 16, 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

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

³¹ Andrew McGregor, *Ugandan Rebel Movement Reemerges Along Oil-Bearing Ugandan/Congolese Border*, Jamestown Foundation July 24, 2013, available at http://www.refworld.org/country,,THE_JF,,COD,,5204f9e64,0.html.

³² <http://www.theguardian.com/world/2014/mar/07-simba>.

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).

about the narrow scope of the charges against Lubanga³⁶ because they only addressed the recruitment of child soldier 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

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 time he spent in the ICC's custody was deducted from this total 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. On December 1, 2014 the Appeals Chamber confirmed both the verdict and the sentence. On March 3, 2015, the Appeals Chamber instructed the Trust Fund for Victims (TFV) to present a draft implementation plan for collective reparations, which the TFV did on November 3, 2015. The judges deemed the TFV's reparations plan incomplete and set a schedule for the TFV to submit additional elements by May 7, 2016 and by December 31, 2016 to file a submission including the list of potential victims, an assessment of the extent of harm done to victims, the anticipated amount of Lubanga's liability and, if necessary, the revised monetary amount that the Fund intended to contribute in order to implement the plan.

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.

Notably, this was the first time in the history of international criminal justice that victims were permitted to participate as independent third parties during the trial.

B. Bosco Ntganda (Bosco)

The ICC first issued an arrest warrant for Bosco Ntganda on August 2006 and charged him with the enlistment and conscription of children under the age of fifteen and using them to participate

³⁶ Human Rights Watch, *DR Congo: ICC Charges Raise Concern*, July 31, 2008, available at <http://hrw.org/news.2006-07/31/dr-congo=icc-charges-raise-concern>.

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.

³⁸ Judgment of The Appeals Court in the Case of the Prosecutor v. Thomas Lubanga, October 8, 2010.

³⁹ See *supra* n. 21 at 7.

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 Ntganda'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

Ntganda did not appear before the ICC until March 26, 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 faces 18 counts of war crimes and crimes against humanity for his alleged involvement in a surge of ethnic violence in the Democratic Republic of Congo more than a decade ago.⁴⁵ He is currently on trial, and his defense started February 29, 2016.

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 DRC 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

⁴⁰ *Id.*

⁴¹ <https://www.icc-cpi.int/drc/ntaganda>.

⁴² *Id.* at 2.

⁴³ "DR Congo: Bosco Ntganda appears before ICC", BBC NEWS AFRICA, March 26, 2013.

⁴⁴ Penny Dale, "Profile: Bosco Ntaganda the Congolese Terminator", BBC NEWS AFRICA, March 18, 2013.

⁴⁵ *See supra* n. 43.

⁴⁶ 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.

⁴⁷ Jeffrey Gettleman, *Wanted Congolese Rebel Leader Turns Himself In to U.S. Embassy*, The New York Times, March 19, 2013.

⁴⁸ "FACT SHEET: Who is Bosco Ntaganda: Lynchpin to Security of International War Criminal?" The Enough Project, www.enoughproject.org.

⁴⁹ "Understanding M23 and the Current Conflict in the DR Congo," UNITED TO END GENOCIDE.

C. 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, 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 Ngudjolo'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. 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 to 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

⁵⁰ See *supra* n. 29 at 3.

⁵¹ Katanga and Ngudjolo Chui Cases, Coalition for the International Criminal Court, <http://www.iccnw.org/?mod+drctimelinekatanga>

⁵² *Id.*

⁵³ *Id.* at 2.

severed the charges. Katanga's defense team requested additional time to conduct investigations regarding the new charge of "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

2. 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 in Trial Chamber II 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 The Chamber also ordered that the time spent in detention—between September 18, 2007 and May 23, 2014—be deducted from his sentence.⁵⁷ On November 13, 2015, the Appeals Chamber reduced the sentence, setting the date for completion of the sentence as January 18, 2016. On December 19, 2015, Katanga was transferred to a prison facility in the DRC to serve his sentence of imprisonment.⁵⁸ Decisions on possible victim reparation will be rendered later.⁵⁹

3. 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 Chui was the commander of FNI at the time of the attack on Bogoro.⁶⁰ The judges decided that the Prosecution did not 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,⁶¹ denying the Prosecution's request for him to be detained in ICC custody pending the appeal.

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 *Id.*

⁵⁷ *Id.*

⁵⁸ Hirondele News Agency, newsletter@hirondele-consulting.ch, June 28, 2014.

⁵⁹ Although Katanga has finished serving his sentence on the ICC conviction, he remains in prison and is currently on trial in the DRC for other crimes. See https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1206.aspx.

⁶⁰ "Trial Background: The Trial of Germain Katanga & Mathieu Ngudjolo Chui", Open Society Initiative, <http://www.katsngatral.org/trial-background/>.

⁶¹ International Justice Monitor, *ICC Appeals Chamber Upholds Ngudjolo's Acquittal*, available at <http://www.ijmonitor.org>.

Following his acquittal and release, Ngudjolo applied for asylum in the Netherlands, which was denied, and he was deported to the DRC on May 11, 2015.⁶²

D. Callixte Mbarushimana (Mbarushimana)

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 2009.⁶³ 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.⁶⁴ 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.

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;⁶⁵ Mbarushimana was then released and returned to France where he has refugee status. The Appeal Chamber also dismissed the Prosecutor's appeal against the decision not to prosecute Mbarushimana. Appeals judges didn't made 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."⁶⁶

E. Sylvestre Mudacumura (Mudacumura)

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

⁶² lawyerblog.com/icc-acquitted-defendant-ngudjolo-deported-drc

⁶³ "The Prosecutor v. Callixte Mbarushimana" ICC-Information on the case, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations

⁶⁴ *Id.*

⁶⁵ "ICC frees Rwandan rebel Callixte Mbarushimana," BBC NEWS AFRICA December 22, 2011.

⁶⁶ Lauren Comiteau, "Callixte Mbarushimana: A free man in Paris?" International Criminal Bar, December 22, 2011.

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.⁶⁷

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.⁶⁸

The Chamber had 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.”⁶⁹ 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. The FDLR, although somewhat weakened, is still operative,⁷⁰ and Mudacumura remains at large.

IV) CONCLUSION

The ICC has fairly and even-handedly adjudicated cases arising out of the situation in the DRC targeting senior-level Congolese militia leaders. It has produced one conviction, albeit with a lengthy process and a minimal sentence. The Court has also demonstrated that it affords defendants a fair trial, as demonstrated by the acquittal of one defendant after trial and the dismissal of charges after the confirmation hearing of a second 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.

At the same time, the contribution these cases have made to deterring further crimes against humanity is questionable, due particularly to the delays in securing suspects’ arrests and the Prosecution’s low success rates. Moreover, the dismissal and acquittals demonstrate the difficulty in obtaining evidence of the crimes given the country’s instability, and raised significant criticisms of the Prosecution’s investigative techniques.

Nevertheless, the ICC remains the best option for ensuring prosecution of atrocity crimes committed in the DRC. Though the DRC has established some mechanisms for domestic prosecution, it cannot yet handle prosecutions of those most responsible, and the ICC is currently the only judicial body that can address them. There is also evidence that the ICC’s DRC prosecutions are having some impact on the strategic decisions of militia commanders,⁷¹ and

⁶⁷ Case Information Sheet, *The Prosecutor v. Sylvestre Mudacumura*, International Criminal Court.

⁶⁸ “Congo: A Comprehensive Strategy To Disarm the FDLR,” Africa Report # 151, International Crisis Group, July 9, 2009.

⁶⁹ “Amani Leo-Old Wine, New Bottles,” Congo Siasa, January 7, 2010.

⁷⁰ “You Will Be Punished,” Human Rights Watch, December 13, 2009.

⁷¹ Nick Gorno, “The deterrent effect of the ICC on the commission of international crimes,” The

some ex-combatants have reportedly noticed that rebel leaders have modified their behavior to avoid the possibility of prosecution—though this remains unverified and hostilities continue in the DRC.

INTERNATIONAL CRIMINAL COURT SITUATION IN DARFUR, SUDAN

by Linda Ford; updated by Victoria L. Safran (1/19/16)

I) INTRODUCTION

The International Criminal Court investigated the conflict in Darfur, and brought cases against both rebel leaders and government officials, including President Omar al-Bashir. The case against President al-Bashir marked the first time the ICC had issued a warrant against a sitting head of state. The Sudan cases present an important test for the future of the ICC.

II) BACKGROUND

Darfur (“Realm of the Fur” in Arabic) lies in western Sudan, sharing a border with Chad. The northern part of Darfur is predominantly inhabited by nomadic Arabs, 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 conservative 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 systematic 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 (AU) 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 Sudanese Armed Forces 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.

In April 2015, al-Bashir was again re-elected President.

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.

A. ICC Prosecutions

The ICC investigated the conflict in Darfur, and brought cases against both government officials and rebel leaders.

1. *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 42 counts and 50 counts, respectively, 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 recruiting, funding and arming the Militia/Janjaweed. Ahmad Harun allegedly 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.⁷²

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.⁷³

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.

⁷² ICC Press Release, Feb. 27, 2007.

⁷³ *Id.*

2. 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 “genocidal intent be the only reasonable conclusion to be drawn on the basis of the evidence.”⁷⁴

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 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.⁷⁵ 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.

Al-Bashir was re-elected as President of Sudan in 2010 and again in 2015, and has now been in power for over 27 years.

As time has passed since the ICC arrests warrants were issued, restrictions on al-Bashir’s ability to travel internationally have diminished. Initially, international travel appeared to pose an imminent threat of arrest for al-Bashir. For example, in 2009, South Africa withdrew its invitation to al-Bashir to the inauguration of President Jacob Zuma, and determined that it would be required to arrest al-Bashir if he entered South African territory. Botswana also announced it would arrest al-Bashir if he visited. Uganda and Turkey revoked invitations to al-Bashir to visit. France moved the France-Africa summit that was to be held in Egypt to France, and warned it would arrest al-Bashir if he attended. In December 2010, al-Bashir cancelled planned trips to CAR and Zambia, following protests.

⁷⁴ ICC, *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,” Feb. 3, 2010, ICC-02/05-01/09-73, para. 16.

⁷⁵ *Id.* para. 33.

Earlier in 2010, however, Chad was the first ICC member state to welcome al-Bashir, and al-Bashir has travelled there repeatedly. Al-Bashir then visited Kenya that year. His visit was defended by both Kenya and the African Union. Although a Kenyan court afterwards 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 warrant would not be enforced. In 2011, al-Bashir visited Djibouti and Malawi, both ICC member states. In 2011, al-Bashir cancelled a planned trip to Nigeria following protests but was then welcomed there in 2013 (although he reportedly departed early when human rights lawyers there called for his detention). In 2014, he visited the DRC.

In one positive development for the ICC, in April 2015, al-Bashir cancelled a trip to Indonesia, reportedly because his aircraft was denied permission to travel through the airspace of certain unnamed countries en route to Indonesia.

However, that event was followed by perhaps the biggest blow to the ICC when South Africa reversed course in June 2015 and allowed al-Bashir to visit for an African Union summit. South Africa faced widespread international condemnation for its refusal to arrest al-Bashir, and South Africa’s ruling party, the ANC, responded by stating that it wanted South Africa to withdraw from the ICC. On August 31, 2015, al-Bashir flew to China for his second visit there. (While China is not a signatory to the ICC, it is a permanent member of the UN Security Council.) In October 2015, al-Bashir visited Algeria and attended the India-Africa Summit in New Delhi.

Al-Bashir has also reportedly visited a number of other countries, including Saudi Arabia, Egypt, Ethiopia and Qatar.

3. *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 Aubu 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.

On April 23, 2010, the Pre-Trial Chamber denied the Prosecutor’s application to appeal the decision and declined to confirm the charges.

4. *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.

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.

The Pre-Trial Chamber confirmed the charges in March 2011.

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

The trial against Banda was originally scheduled to commence on May 5, 2014, but that trial date was vacated. In July 2014, the trial date was rescheduled for November 18, 2014, and a cooperation request was sent to Sudan in order to facilitate Banda's presence at trial. On August 5, 2014, the envelope containing the cooperation request was returned unopened.

The Defense asserted that Banda remained willing to appear before the ICC, but in light of Sudan's non-cooperation, the Chamber determined that Banda's voluntary appearance was no longer feasible, regardless of Banda's willingness to appear voluntarily. Concluding that the summons to appear that it had initially issued was inadequate, the Chamber issued a warrant for Banda's arrest on September 11, 2014. The trial date was vacated and preparatory measures for trial were suspended pending Banda's arrest or voluntary appearance.

On January 13, 2015, Banda's motion for reconsideration of the order to issue an arrest warrant was denied, but his application was granted for leave to appeal the issue of whether the trial court had erred in issuing the warrant without providing Banda an opportunity to be heard, under circumstances where he had not violated any Court orders and continued to communicate with the Court through counsel. On March 3, 2015, the Appeals Chamber denied the appeal.

On October 16, 2015, the Prosecution requested that the Chamber issue a finding of non-compliance by Sudan pursuant to Article 87(7) of the Rome Statute based on Sudan's failure to comply with the ICC's order to arrest Banda. Sudan failed to respond. On November 19, 2015, the Chamber issued a finding of non-compliance and referred the matter to the UN Security

Council. By virtue of its membership in the UN, Sudan is obligated to comply with Security Council Resolution 1593 requiring full cooperation with the ICC. In December 2015, the Prosecutor again urged the UN Security Council to take action with respect to Sudan's blatant disregard of its obligations.

5. *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 conservative Muslim 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.

III) 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 has visited countries outside Africa as well.

In October 2013, the African Union met in Addis Ababa to discuss whether the 34 African countries that are parties to the Rome Statute should withdraw. The African Union expressed frustration that the ICC was unfairly targeting Africa and Africans. It also argued that prosecutions against sitting heads of state and senior government officials interfere with states' sovereignty and stability, and should be suspended until the officials leave office. Rev. Desmond Tutu and Kofi Anan spoke publicly in opposition to withdrawal from the ICC. Ultimately, rather than withdrawing from the treaty, the African Union called for a deferral of charges against sitting heads of state.

The African Union's challenges to the ICC's legitimacy and its opposition to the ICC's prosecution of al-Bashir, as a sitting head of state, have created conflicts of loyalty for African nations that are both African Union members and ICC member states. South Africa's refusal to arrest al-Bashir in June 2015 was a significant setback for the ICC.

As a court of last resort, the ICC is intended to 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. The Sudan cases provide a striking example of the difficult hurdles the ICC faces when the defendants' own nation is unwilling to cooperate with it, and other nations are unwilling to assist in enforcing outstanding arrest warrants. Deepening the ICC's problems in the Sudan cases, the UN Security Council has failed to respond to the ICC's calls for assistance. The al-Bashir case in particular has presented a significant test of the ICC's power. At the present time, that power appears to be in serious jeopardy.

Sources:

African Union Says ICC Should Not Prosecute Sitting Leaders, THE GUARDIAN, Oct. 12, 2013; <http://www.theguardian.com/world/2013/oct/12/african-union-icc-kenyan-president>

Al-Bashir's Failure to Fly to Indonesia Reinforces Fugitive Status: NGO, THE JAKARTA POST, APR. 21, 2015, <http://www.thejakartapost.com/news/2015/04/21/al-bashir-s-failure-fly-indonesia-reinforces-his-fugitive-status-ngo.html>

Bashir Leaves Nigeria Amid Calls for Arrest, ALJAZEERA, July 16, 2013, <http://www.aljazeera.com/news/africa/2013/07/201371674249998727.html>

BashirWatch, <http://bashirwatch.org>

Chad Refuses to Arrest Omar al-Bashir on Genocide Charges, THE GUARDIAN, July 22, 2010, <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>

Decisions and Declarations of the Extraordinary Session of the Assembly of the African Union, Oct. 12, 2013, available at http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf

Desmond Tutu, *In Africa, Seeking a License to Kill*, N. Y. TIMES, Oct. 10, 2013, <http://www.nytimes.com/2013/10/11/opinion/in-africa-seeking-a-license-to-kill.html>

Elise Keppler, *Dispatches: Think Again, President Al-Bashir*, HUMAN RIGHTS WATCH, Apr. 21, 2015, <https://www.hrw.org/news/2015/04/20/dispatches-think-again-president-al-bashir>

Egypt Will Join ICC But Ensure That Sudan's Bashir is Safe From Arrest: Official, SUDAN TRIBUNE, Feb. 21, 2015, <http://www.sudantribune.com/spip.php?article45596>

ICC Suspect al-Bashir Travels to Djibouti, COALITION FOR THE ICC, May 9, 2011, <http://www.iccnw.org/?mod=newsdetail&news=4505>

Marlise Simons, *Sudan: President Cancels Zambian Trip*, N. Y. TIMES, Dec. 15, 2010, <http://www.nytimes.com/2010/12/15/world/africa/15briefs-Bashir.html>

Mark Kersten, *Sudan, South Africa and the Future of the International Criminal Court in Africa*, THE WASH. POST, Oct. 13, 2015, <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/10/13/sudan-south-africa-and-the-future-of-the-international-criminal-court-in-africa/>

Mehari Taddele Maru, *The Future of the ICC and Africa: The Good, the Bad, and the Ugly*, AL JAZEERA, Oct. 11, 2013 <http://www.aljazeera.com/indepth/opinion/2013/10/future-icc-africa-good-bad-ugly-20131011143130881924.html>

Patricia McGroarty and Matina Stevis, *Sudanese's President Bashir Leaves South Africa Despite Court Order*, WALL ST. J., Dec. 14, 2015, <http://www.wsj.com/articles/sudanese-president-bashir-defies-court-order-and-leaves-south-africa-1434376546>

Situation in Darfur, Sudan, International Criminal Court, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx

Somini Sengupta, *Omar al-Bashir Case Shows International Criminal Court's Limitations*, N. Y. TIMES, June 15, 2015, http://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html?_r=0

South Africa Plans to Leave International Criminal Court in Africa, REUTERS, Oct. 11, 2015, <http://www.reuters.com/article/us-safrica-icc-idUSKCN0S50HM20151011>

Sudan, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/place/Sudan>

Sudan's al-Bashir Meets with Algerian Leadership on Ties, GLOBAL TIMES, Oct. 13, 2015, <http://www.globaltimes.cn/content/946805.shtml>

Sudan's Bashir in DRC Amid Calls for His Arrest, SUDAN TRIBUNE, Feb. 26, 2014, <http://www.sudantribune.com/spip.php?article50092>

Sudan's Omar al-Bashir in Malawi: ICC wants answers, BBC NEWS, Oct. 11, 2015, <http://www.bbc.com/news/world-africa-15384163>

The Way Forward: Ending Human Rights Abuses and Repression Across Sudan, HUMAN RIGHTS WATCH, Oct. 6, 2009, <https://www.hrw.org/report/2009/10/06/way-forward/ending-human-rights-abuses-and-repression-across-sudan>

Uganda Signals Intention to Arrest President Bashir, NEW AFRICA ANALYSIS, July 20, 2009, <http://archives.newafricaanalysis.co.uk/index.php/uganda-signals-intention-to-arrest-president-bashir/>

United Nations Mission in the Sudan, UNITED NATIONS,
<http://www.un.org/en/peacekeeping/missions/past/unmis/>

Who Are Sudan's Rebel Leaders? BBC NEWS, Feb. 23, 2010
<http://news.bbc.co.uk/2/hi/africa/7039360.stm> 2/23/2010

Will Peace Return to Darfur? BBC NEWS, Feb. 23, 2010
<http://news.bbc.co.uk/2/hi/africa/8533097.stm>

POLITICS VERSUS JUSTICE: THE ICC INVESTIGATION IN KENYA

by Stephanie Gibbs; updated by Victoria L. Safran (3/20/16)

The current President, Uhuru Muigai Kenyatta, and Deputy President, William Samoei Ruto, of Kenya were charged by the ICC with crimes against humanity in connection with the violence that followed the 2007 presidential election in Kenya. In October 2014, Kenyatta became the first sitting head of state to appear before the ICC, but the prosecution of Kenyatta was besieged with difficulties from the outset, and the case against Kenyatta collapsed. In March 2015, the ICC terminated the case following the Prosecution's application to withdraw the charges due to insufficiency of the evidence.

The trial of Deputy President William Samoei Ruto (along with that of co-defendant Joshua Arap Sang, a former Kenyan journalist) continues. The government of Kenya has opposed the prosecution of both cases, challenged the authority of the ICC to hear the cases, and threatened to rescind its signature to the Rome Statute. In addition, three other individuals are being prosecuted on allegations of witness tampering in connection with the trials of Ruto and Sang.

D) Background

In 2007, there were two primary candidates for President of Kenya, 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 continued to spread, with Kikuyus, Luos, and Kalenjins as both victims and perpetrators. Through January 2008, talks were attempted but unsuccessful. The violence 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 post-election violence, 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 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 post-election violence 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 post-election violence, 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 post-election violence 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 into the situation in Kenya. The Pre-Trial Chamber authorized the investigation in March 2010, and on March, 31, 2010, the ICC officially opened its investigation into the post-election violence.

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 post-election violence: 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 post-election violence), 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 11, 2013. In a press release, the Prosecutor explained that the charges were withdrawn because “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.”

II) 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 have 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 post-election violence, 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” under the Rome Statute and whether it requires that the state investigation focus on the exact same individuals and subject matter as the ICC investigation. Kenya argued that, as a sovereign state, it must be accorded “leeway in the exercise of discretion” for complementarity in favor of national jurisdictions. The Prosecution argued that a national investigation rendered a *case* inadmissible only where the national investigation and ICC prosecution were 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 inadmissible only 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.

III) ICC Trials

Following the dismissal of the charges against Kosgey and Ali at the confirmation hearing, the Prosecution's withdrawal of charges against Muthaura, and the termination of proceedings against Kenyatta, only the case against Ruto and Sang continues.

A. Termination of Kenyatta Proceedings

Kenyatta was accused of crimes against humanity, including murder, deportation or forcible transfers of population, rape and other forms of sexual violence, destruction of property and persecution relating to acts committed from November 2007 through January 2008. The Prosecution alleged 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 post-election violence 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.

Initially, Kenyatta's trial was scheduled to commence on February 5, 2014. The ICC granted the Prosecution two adjournments so it could continue to collect evidence against Kenyatta. The Prosecution indicated that it was having difficulty procuring relevant records from the Kenyan government.

On December 3, 2014, the ICC rejected the Prosecution's request for a further indefinite adjournment until the Kenyan government complied with its cooperation request to produce financial and other records relating to Kenyatta. The Trial Chamber reasoned that the Prosecution had the burden of presenting a case ready for trial and had had ample time to do so, as investigations had been ongoing for over five years and proceedings well over three years. Further, the Trial Chamber found that the Prosecution had failed to act vigorously to pursue the issue of the government's noncompliance.

At the same time, the Trial Chamber denied the Defendant's motion for an acquittal, and stated that its denial of the adjournment request was without prejudice to the Prosecution's right to bring new charges in the event it obtains sufficient evidence. The Trial Chamber instructed the Prosecution to file a notice indicating either its intention to proceed to trial, or to withdraw

charges in the case. On December 5, 2014, the Prosecution filed a notice to withdraw the charges, stating that the evidence had not improved to a degree that would justify proceeding to trial. On March 13, 2015, the ICC terminated proceedings against Kenyatta.

Separately, on December 3, 2014, the Trial Chamber issued a decision denying the Prosecution's application for a finding of non-compliance against the Kenyan government for failing to comply with the Prosecution's request to produce documents, and to refer the non-compliance matter to the Assembly of State Parties ("ASP"). Although it rejected the Prosecution's application, the ICC did acknowledge that the government's conduct fell short of the good faith cooperation required under the Rome Statute. The ICC stated, however, that it was not convinced that the non-compliance had affected the exercise of the Court's functions and powers. Among other reasons, the ICC noted the Prosecution's delay in pursuing the noncompliance issue, and its admission that it was speculative whether the Prosecution would have sufficient evidence to proceed to trial even if the government had fully complied.

The Prosecution was granted leave to appeal the non-compliance issue. On August 19, 2015, the Appeals Chamber granted the Prosecution's appeal, reversed the previous decision, and remanded the matter to the Trial Chamber. The Appeals Chamber found that the Trial Chamber had erred in the exercise of its discretion by improperly considering the impact that referral of the matter to ASP would have on Kenyatta, even though he was not a party to the noncompliance proceeding, by inconsistently assessing the sufficiency of evidence and the Prosecutor's conduct, and by failing to address whether judicial measures had been exhausted. The matter is now before the Trial Chamber.

B. Trial of Ruto and Sang

The trial of Ruto and Sang began 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 2006 through March 2008. Ruto is charged as an indirect co-perpetrator. 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, and to expel them from historic Kalenjin lands. Particularly, the Prosecutor points to coordinated attacks on predominantly PNU villages, the command hierarchy of the Network, maps distributed targeting specific villages, and numerous planning meetings to satisfy the contextual elements for crimes against humanity.

Sang is charged under Article 25(3)(d) of the Rome Statute as having contributed to the commission of crimes against humanity. The Prosecutor alleges that Sang used his radio show during the media blackout in the weeks following the 2007 election to incite violence by broadcasting false news that Kalenjins had been murdered by PNU supporters, and that he helped coordinate attacks by directing civilians to the targeted towns.

While the ICC had previously ruled that it would allow the trial to continue in Ruto's planned absence, after a last minute appeal by the Prosecutor, the ICC Appeals Chamber overturned the ruling. 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 ASP passed new rule 134*bis*, which allows accused persons to skip trial under limited circumstances.

In a controversial decision dated August 15, 2015, the Trial Chamber allowed statements of five witnesses who later recanted them in court, or failed to testify, to be admitted into evidence against Ruto and Sang. The Trial Chamber declined to admit statements of eleven other witnesses.

On February 12, 2016, in a major setback to the prosecution, the Appeals Chamber reversed the Trial Chamber's decision on the use of the witness statements. The Appeals Chamber held that the statements of the five witnesses could not be used as evidence in the trial. Because the prosecution has previously emphasized the importance of the statements to its case, the impact of the decision on the continued prosecution of the case is unknown.

In its decision, the Appeals Chamber held that Rule 68 of the ICC's Rules of Procedure and Evidence could not be used as a basis for admission of the statements. Following the commencement of the trial, Rule 68 was amended to allow the admission of witness statements in cases involving evidence of witness interference. The Appeals Chamber held that the amended rule could not be applied because it was not in force when the trial began, and retroactive application would result in detriment to the accused. However, the decision leaves open the possibility that the witness statements could still be admitted through some other procedural means. Specifically, the Appeals Chamber noted that Article 69(3) of the Rome Statute grants the court the authority to receive all evidence "that it considers necessary for the determination of the truth."

In another significant development, a motion is pending before the Trial Chamber on the issue of whether the prosecution presented sufficient evidence to compel Ruto and Sang to present a defense. This motion is being referred to as the "no case to answer" motion. In October and November 2015, the defense brought the motion, and the prosecution submitted its response in November 2015. Oral argument was presented in January 2016. Although there are no specific provisions in the Rome Statute or rules for such a motion, the Trial Chamber determined that it could hear the motion under the general powers granted by Article 64 to manage proceedings, as well as under other inherent powers granted by the Rome Statute and ICC Rules. The Trial Chamber has stated that the applicable test is whether, on a *prima facie* assessment of the evidence, sufficient evidence has been introduced which, if accepted, would provide a reasonable basis for conviction. The sufficiency of each count will be considered individually, so the Trial Chamber has the option to dismiss some but not all of the counts.

The Appeals Chamber's determination that the five witness statements are inadmissible could bear heavily on the upcoming decision in the "no case to answer" motion, unless the Trial Chamber determines that the statements can be admitted through other procedural means.

C. Witness Tampering Charges

Three individuals have been charged with witness tampering and obstruction of justice in connection with the Ruto and Sang cases.

1. Barasa

On August 2, 2013, an arrest warrant for Kenyan journalist, Walter Osapiri Barasa, a former intermediary for the ICC Prosecutor, was issued under seal. The warrant was unsealed on October 2, 2013. Barasa was the first defendant ever charged under the Rome Statute for bribing, or attempting to bribe, witnesses to withdraw their testimony. Barasa is charged with three counts of corruptly influencing a witness, or attempting to do so, under Article 70 of the Rome Statute that concerns offenses against the administration of justice.

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 that information might be leaked, or an arrest thwarted. The ICC's handling of the matter highlights the ongoing tension between the ICC and the government of Kenya. Ironically, the ICC now depends on Kenya to "take appropriate measures" to detain and turn over Barasa for prosecution.

On August 21, 2015, Barasa submitted a challenge to the warrant for his arrest. He requested the warrant be withdrawn and replaced with a summons to appear, and promised to fully cooperate. On September 10, 2015, the ICC dismissed the request. Currently, litigation in Kenya is ongoing to determine whether to extradite Barasa to the ICC.

2. Gicheru and Bett

On March 10, 2015, warrants were issued under seal for the arrests of Kenyan lawyer, Paul Gicheru, and fellow Kenyan, Philip Kipkoech Bett. The two were arrested on July 30, 2015; the warrants were then unsealed on September 10, 2015. Gicheru was charged with six counts of corruptly influencing a witness; Bett was charged with four. The prosecution alleges that the two bribed, or tried to bribe, prosecution witnesses in the Ruto and Sang cases, that Paul Gicheru was the manager of the scheme to corrupt witnesses, and that Philip Kipkoech Bett participated in the effort. The ICC compared Bett's role in the scheme to that of Barasa. As it had when it issued the Barasa warrant, the ICC ruled that there was no need to consult with any State Party prior to issuing the warrants for Gicheru and Bett.

IV) Conclusion

The investigation and prosecution of the 2007 election fallout was plagued with troubles from the outset, including delays, political difficulties and witness tampering. It took six years following the post-election violence in Kenya for the first trial to commence. The trial against Kenyatta collapsed after the prosecution conceded that it lacked sufficient evidence to proceed. The prosecution of Ruto and Sang also faces serious challenges, and there has been much speculation that the trial may soon be terminated.

The termination of the Kenyatta proceedings was a severe blow to the ICC, and has deepened questions with respect to the ICC's future as the centerpiece of global criminal justice. Unfortunately, the beleaguered prosecution of Ruto and Sang will likely further undermine the power and authority of the ICC.

Sources for Updates:

ICC, *Prosecutor v. Kenyatta*, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx

ICC, *Prosecutor v. Ruto and Sang*, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/chambers/Pages/index.aspx

ICC, *Prosecutor v. Barasa*, https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/ICC-0109-0113/Pages/default.aspx

ICC Withdraws Charges Against Kenyatta, ALJAZEERA, Dec. 5, 2014, available at <http://www.aljazeera.com/news/africa/2014/12/icc-case-against-kenyatta-dropped-2014125114529703204.html>

Marlise Simons and Jeffrey Gettleman, *International Criminal Court Withdraws Charges of Crimes Against Humanity*, NEW YORK TIMES, Dec. 15, 2014, available at http://www.nytimes.com/2014/12/06/world/africa/uhuru-kenyatta-kenya-international-criminal-court-withdraws-charges-of-crimes-against-humanity.html?_r=0

Owen Bowcott, *ICC Drops Murder and Rapes Charges Against Kenyan President*, THE GUARDIAN, Dec. 5, 2014, available at <http://www.theguardian.com/world/2014/dec/05/crimes-humanity-charges-kenya-president-dropped-uhuru-kenyatta>

Tom Maliti, *Appeals Chamber Reverses on Witness Statements*, Feb. 12, 2016, available at <http://www.ijmonitor.org/2016/02/appeals-chamber-reverses-decision-on-witness-statements/>

Tom Maliti, *Trial Chamber Will Take Time to Reach Decision on “No Case to Answer” Submissions*, Feb. 3, 2016, available at <http://www.ijmonitor.org/2016/02/trial-chamber-will-take-time-to-reach-decision-on-no-case-to-answer-submissions/>

Tom Maliti, *Chamber to Hear Submissions on “No Case to Answer Motion in Ruto and Sang Trial”*, Jan. 13, 2016, available at <http://www.ijmonitor.org/2016/01/chamber-to-hear-submissions-on-no-case-to-answer-motion-in-ruto-and-sang-trial/>

Tom Maliti, *Judges Unanimously Terminate Charges Against Kenyatta*, INTERNATIONAL JUSTICE MONITOR, March 18, 2015, available at <http://www.ijmonitor.org/2015/03/judges-unanimously-terminate-charges-against-kenyatta/>

Tom Maliti, *ICC Admits Statements of Five Witnesses as Evidence Against Ruto and Sang*, INTERNATIONAL JUSTICE MONITOR, Aug. 20, 2015, available at <http://www.ijmonitor.org/2015/08/icc-admits-statements-of-five-witnesses-as-evidence-against-ruto-and-sang/>

Tom Maliti, *Who are the Witnesses in the Second Kenya Bribery Case at the ICC?* INTERNATIONAL JUSTICE MONITOR, Sept. 23, 2015, available at <http://www.ijmonitor.org/2015/09/who-are-the-witnesses-in-the-second-kenya-bribery-case-at-the-icc-part-3/>

Valentina Pop, *International Criminal Court to Reconsider Kenya Ruling*, WALL STREET JOURNAL, Aug. 19, 2015, <http://www.wsj.com/articles/international-criminal-court-to-reconsider-kenya-ruling-1439996467>

THE ICC INVESTIGATION IN THE CENTRAL AFRICAN REPUBLIC

by Brandon C. Smith; updated by Victoria L. Safran (2/25/16)

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. Following the ICC's investigation of the conflict, it indicted and arrested one suspect, Jean-Pierre Bemba. His trial began in November 2010; on March 21, 2016, he was found guilty of war crimes and crimes against humanity. In addition, in November 2013, Bemba and four others were arrested and charged with witness tampering in connection with Bemba's primary trial. The witness tampering case also proceeded to trial. The Prosecution rested its case in November 2015; the Defense case is ongoing.

Discussed below are the history of the CAR conflict, the allegations against the accused, the legal theories raised throughout the pre-trial and trial stages of the primary case, and the posture of the related witness tampering case.

II) Background

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 until Patasse's rise to power in 1993, the country 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 was born in northeastern DRC to a businessman father who worked closely with former Zairian President Mobutu Sese Seko.⁷⁶ In 1997, rebel forces deposed Mobutu. Their leader, Laurent Kabila, became president. At the time, Bemba was a wealthy businessman in the DRC.⁷⁷ 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

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

⁷⁷ *Id.*

for the Liberation of Congo (MLC).⁷⁸ With Ugandan support, Bemba's MLC conquered swaths of territory in northern DRC.⁷⁹

C. Conflict Leading to ICC Prosecution of Bemba

Bemba became involved in conflict in the CAR because he developed a symbiotic relationship with CAR President Ange-Felix Patasse.⁸⁰ In 1993, Ange-Felix Patasse was elected as President of CAR, and was re-elected in 1999. In May 2001, Patasse's predecessor, Andre Kolingba, orchestrated a coup attempt.⁸¹ Patasse turned to Libya and a prominent Congolese politician, Jean-Pierre 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.⁸² 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.⁸³ Chadian military assisted Bozize in repelling the CAR forces and entered northern CAR, where Bozize set up a base.⁸⁴ In October 2002, Bozize attacked CAR's capital, Bangui, and Patasse turned to Libya, Bemba's MLC, and a militia commanded by Miskine for help.⁸⁵ Over the following five months, Bemba's MLC allegedly entered CAR to support Patasse's forces, where MLC soldiers committed systematic murders and rapes, and destroyed villages.⁸⁶ These crimes are the focus of the ICC's investigation and case.

During this five-month period, Patasse fled the country to Togo where he stayed until his death in 2011.⁸⁷ 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 2013.⁸⁸ To date, the CAR still suffers from rebel militias, including Joseph Kony's Lord's Resistance Army, pillaging villages across the country.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Profile: Jean-Pierre Bemba*, BBC News, <http://news.bbc.co.uk/2/hi/africa/6085536.stm>.

⁸¹ *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>.

⁸² *Sudan to Host Summit on Central African Crisis*, Agence France-Presse, <http://reliefweb.int/report/central-african-republic/sudan-host-summit-central-african-crisis>.

⁸³ *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>.

⁸⁴ *Central African Republic: Year-end 2002: An Uncertain Future Ahead, Even as Peacekeepers Arrive*, <http://www.irinnews.org/printreport.aspx?reportid=40796>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 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>.

⁸⁸ *Id.*

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 July 1, 2002.⁸⁹ 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.⁹⁰ 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.⁹¹ All five were charged in the CAR, but the court stated the country's police force could not arrest them.⁹² 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."⁹³ 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.⁹⁴ 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.⁹⁵

On May 22, 2007, ICC Prosecutor Luis Moreno-Ocampo announced the decision to open an investigation into the CAR conflict.⁹⁶ 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 suggests the rape of civilians was committed in numbers that cannot be ignored under international law."⁹⁷ The case was allocated to the ICC's Pre-Trial Chamber III.

⁸⁹ 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.

⁹⁰ *Background: Jean-Pierre Bemba*, International Justice Monitor, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-background>.

⁹¹ *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>).

⁹² *Id.*

⁹³ *Hague Referral for African Pair*, BBC News, <http://news.bbc.co.uk/2/hi/africa/4908938.stm>.

⁹⁴ 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.

⁹⁵ Decision on Admissibility and Abuse of Process Challenges, No.: ICC-01/05-01/08, Jun. 24, 2010.

⁹⁶ *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>.

⁹⁷ *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.

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.⁹⁸ The following day, the warrant was unsealed when Bemba was arrested near Brussels.⁹⁹ On July 1, 2008, a Belgian court held that Bemba could be transferred to the Hague.¹⁰⁰

Bemba's first appearance at the ICC was on July 4, 2008.¹⁰¹ 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).¹⁰² A hearing to confirm the charges was initially scheduled for November 2008, but it was delayed twice until January 12, 2009.¹⁰³ 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.¹⁰⁴ Along with arguments from the Prosecution and the Defense, the court heard from representatives of fifty-four victims at this hearing.¹⁰⁵

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.¹⁰⁶ 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 who perpetrated the above crimes, and that Bemba either ordered the crimes to be committed or failed to prevent or punish the crimes.

⁹⁸ Timeline: International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-timeline/>

⁹⁹ *Id.*

¹⁰⁰ Background: Jean-Pierre Bemba, International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-background/>.

¹⁰¹ Timeline: International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-timeline/>.

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/>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 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.¹⁰⁷

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.¹⁰⁸ The motion presented three points: (1) 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); (2) the alleged crimes were not of sufficient "gravity" for the ICC to prosecute the case, as required under Article 17(1)(d) of the Rome Statute; and (3) the Prosecution had engaged in misconduct that made a fair trial impossible for Bemba, by 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.¹⁰⁹

The Pre-Trial Chamber denied the motion in its entirety, holding that: (1) CAR courts were in fact incapable to hear the case; (2) the alleged crimes were sufficiently grave for the ICC to consider them; and (3) the Prosecution had been late only once in 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.¹¹⁰

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.¹¹¹ On October 19, 2010, the Appeals Chamber denied the Defenses's appeal on all four grounds, upholding the Pre-Trial Chamber's decision and setting the case up for trial.¹¹² In a final status conference on October 21, 2010, the Trial Chamber set an official date to start the trial on November 22, 2010.¹¹³

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 victims who had been accepted

¹⁰⁷ *Id.*

¹⁰⁸ 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.

¹⁰⁹ *Id.*

¹¹⁰ See Decision on Admissibility and Abuse of Process Challenges, No.: ICC-01/05-01/08, Jun. 24, 2010.

¹¹¹ Timeline: International Justice Monitor, A Project of the Open Society Justice Initiative, <http://www.ijmonitor.org/jean-pierre-bemba-gombo-timeline/>.

¹¹² *Id.*

¹¹³ *Id.*

as participants.¹¹⁴ 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 plans to call 63 witnesses.¹¹⁵ By the time the defense case closed in October 2013, that number was cut to 34 witnesses.¹¹⁶ Most defense witnesses testified via video link, often from unnamed locations.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ Dr. Tabo further testified that the MLC fighters would often demand to know the location of rebels from the women prior to raping them.¹²¹

¹¹⁴ 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>

¹¹⁵ *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>.

¹¹⁶ *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>.

¹¹⁷ *Id.*

¹¹⁸ *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>.

¹¹⁹ *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>.

¹²⁰ *Id.*

¹²¹ *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.¹²² Bokamba's reasoning was that many CAR citizens spoke Lingala, so there would be no way to distinguish these citizens from the MLC fighters.¹²³ The Defense expanded upon this reasoning when it called former government officials of President Patasse's government to testify.¹²⁴ Former government spokesman Prosper Ndouba testified that when he was held captive by Bozize's forces, he heard these rebels speaking Lingala.¹²⁵ Ndouba further implicated Bozize's forces as the real perpetrators of the 2002-2003 war crimes.¹²⁶ "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.¹²⁷

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

From the outset, 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.¹²⁸ In response, the Defense argued that Bemba was not in effective command of the fighters in CAR and could not be held accountable for their crimes, pointing to Bemba's presence in the DRC through much of the 2002-2003 conflict.¹²⁹ 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

¹²² *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>.

¹²³ *Id.*

¹²⁴ *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>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *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>.

¹²⁸ *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>.

¹²⁹ *Id.*

communicate orders to his MLC commanders on the ground in the CAR.¹³⁰ 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.¹³¹

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 Patasse did not have the power to punish them for misdeeds.¹³² Another soldier, “Witness 173,” testified that MLC troops commanded by General Mustafa Mukiza were in regular contact with Bemba, and that Bemba would often take looted vehicles recovered by Mukiza’s troops.¹³³ “Witness 173” further testified that Bemba was directly collaborating with the presidential guard of Patasse to exchange information, but on cross-examination, he admitted he had only secondhand knowledge of this.¹³⁴

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.¹³⁵ Based on this data, General Opande concluded that Bemba’s relationship with the MLC fighters was analogous to that of other rebel military leaders and groups he had encountered in the past.¹³⁶

When the Defense case began in August 2012, it 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.¹³⁷ General Seara further testified that the Patasse-led government actually controlled logistical arrangements for the fighters at the

¹³⁰ *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>.

¹³¹ *Id.*

¹³² *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>.

¹³³ *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>.

¹³⁴ *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>.

¹³⁵ *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>.

¹³⁶ *Id.*

¹³⁷ *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>.

time.¹³⁸ On cross-examination, victim advocates elicited from General Seara that he did not travel to the CAR to compile his report.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

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.¹⁴² 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."¹⁴³ 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.¹⁴⁴

As its 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.¹⁴⁵ The Defense also called some fighters who testified that they received no orders from Bemba and that all orders came directly from Bozize's forces. Additional witnesses in June 2013 corroborated this theory, stating that Bozize's forces, not Bemba's forces, committed all of the crimes.

¹³⁸ *Id.*

¹³⁹ *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>.

¹⁴⁰ *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>.

¹⁴¹ *Id.*

¹⁴² *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>.

¹⁴³ *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>.

¹⁴⁴ *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>.

¹⁴⁵ *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>.

C. The Trial Concludes

Originally, the Defense case was set to conclude in July 2013; ICC judges extended that time to October 2013.¹⁴⁶ 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 of the Rome Statute.¹⁴⁷ While the Defense had announced initially that it intended to call 63 witnesses,¹⁴⁸ by October 2013 it had cut that number to 35 witnesses.¹⁴⁹ 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.¹⁵⁰ The Prosecution requested permission to question Bemba on the theory that this would clarify his unsworn testimony for the judges.¹⁵¹ It also argued that a defendant should not be allowed to use Article 67 of the Rome Statute for the purpose of giving unsworn testimony in support of his case and thereby avoid cross-examination under oath by the Prosecution.¹⁵² Defense lawyers responded that there was no basis in law for the Prosecution to be allowed to cross-examine Bemba on his unsworn statement.¹⁵³

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, 2013.¹⁵⁴ A week later, the judges denied the Prosecution's request to question Bemba, and gave the defense

¹⁴⁶ *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>.

¹⁴⁷ *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>.

¹⁴⁸ *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>.

¹⁴⁹ *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>.

¹⁵⁰ *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>.

¹⁵¹ *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>.

¹⁵² *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>.

¹⁵³ *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>.

¹⁵⁴ *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>.

lawyers a further extension of time to close their case until November 15, 2013.¹⁵⁵ The purpose of the final delay was to allow remaining defense witnesses to testify.¹⁵⁶

Then, on November 25, 2013, in a surprising development, it was announced that Bemba and his lead defense counsel, Aime Kilolo-Musamba, along with three others had been arrested and charged with witness tampering in connection with the trial under Article 70 of the Rome Statute.¹⁵⁷ Thus, that case, which is described below began to proceed simultaneously with the primary case.

Also in late November, the Court denied a final Defense request to extend the deadline for closing its case to December 15, 2013.¹⁵⁸ 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.¹⁵⁹ Toward the end of December 2013, the Trial Chamber held that a defense witness, who had disappeared in the middle of his questioning, would still have his testimony admitted in the record.¹⁶⁰ The Court rejected the Prosecution's application to introduce evidence of witness tampering in the main trial.

The Court closed the evidence in the case on April 7, 2014.¹⁶¹ In October 2014, after briefs had been filed, the Trial Chamber took the unusual step of reopening the presentation of evidence for the limited purpose of recalling a prosecution witness, after the witness wrote letters in which he claimed to possess knowledge of witness tampering by the Prosecution and the court's Victims and Witnesses Unit. The testimony was heard in a closed session.¹⁶² Oral arguments were presented in November 2015.

¹⁵⁵ *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>.

¹⁵⁶ *Id.*

¹⁵⁷ *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>.

¹⁵⁸ *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>.

¹⁵⁹ *Id.*

¹⁶⁰ *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.

¹⁶¹ *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>.

¹⁶² Wairagala Wakabi, *Recalled Witness in Bemba Trial to Testify in Closed Session*, INTERNATIONAL JUSTICE MONITOR, Oct. 22, 2014, available at <http://www.ijmonitor.org/2014/10/recalled-witness-in-bemba-trial-to-testify-in-closed-session/>.

D. The ICC Finds Bemba Guilty

On March 21, in a unanimous verdict, the ICC found Bemba guilty of five counts of war crimes and crimes against humanity, including murder, rape and pillage committed by his soldiers against civilians.¹⁶³ Bemba is the third individual ever to be found guilty by the ICC, and the most senior.¹⁶⁴ His conviction is also noteworthy in that it marks both the first time that the ICC has based a conviction on the theory of command responsibility and the first time that it has issued a conviction for rape as a war crime.¹⁶⁵

In a 364-page judgment, the judges found Bemba responsible for the crimes of his subordinates on the ground that he had knowledge that his soldiers were committing crimes, but failed to take reasonable steps to prevent or repress them.¹⁶⁶ Furthermore, the court determined that the failure to act on the part of Bemba and senior commanders “was deliberately aimed at encouraging the attack.”¹⁶⁷ The crimes constituted war crimes because they occurred in the context of an intense, protracted armed conflict involving governmental authorities and organized groups, and the perpetrators of the crimes were aware of the existence of that conflict.¹⁶⁸ The crimes were crimes against humanity because the evidence showed that the soldiers conducted a widespread attack against the civilian population comprising multiple crimes against a large number of victims; the crimes were committed pursuant to an organizational policy; and the perpetrators were aware that their crimes were part of a broader attack against the civilian population.¹⁶⁹

The judges rejected Bemba’s argument that once he sent his troops to neighboring CAR to fight against the coup attempt, he no longer had command responsibility over them, and was unable to issue orders to them. The ICC determined that, to the contrary, Bemba had effective authority and control over his troops, retained regular, direct communications with his commanders and issued operational orders to them.¹⁷⁰ The tribunal concluded that by failing to exercise control, when he had both the ability and obligation to do so, Bemba, as commander and the ultimate authority, bore criminal responsibility for the crimes of his soldiers.¹⁷¹

¹⁶³ Judgment Pursuant to Article 74 of the Statute ¶ 684, March 21, 2016, available at https://www.icc-cpi.int/en_menus/icc/situations_and_cases/situations/situation_icc_0105/related_cases/icc_0105_0108/court_records/chambers/trial_chamber_iii/Pages/3343.aspx

¹⁶⁴ Wairagala Wakabi, *Bemba Found Guilty Over Rapes, Murders in Central African Republic*, International Justice Monitor, March 21, 2016, available at <http://www.ijmonitor.org/2016/03/bemba-found-guilty-over-rapes-murders-in-central-african-republic/>

¹⁶⁵ Marlise Simons, *Congolese Politician Jean Pierre is Convicted of War Crimes*, N.Y. TIMES, Mar. 21, 2016, available at <http://www.nytimes.com/2016/03/22/world/africa/congolese-politician-jean-pierre-bemba-is-convicted-of-war-crimes.html>

¹⁶⁶ ICC, *Prosecutor v. Bemba, et al.*, Judgment Pursuant to Article 74 of the Statute ¶ 684, 706-34

¹⁶⁷ *Id.* at ¶ 685

¹⁶⁸ *Id.* at ¶ 649-68

¹⁶⁹ *Id.* at ¶ 669-92

¹⁷⁰ *Id.* at ¶ 696-705

¹⁷¹ *Id.* at ¶ 735-42

E. The Witness Tampering Case Proceeds to Trial

Following the witness tampering arrests in November 2013, the ICC released a statement describing the allegations, and claiming that the five suspects had participated in a network whose purpose was to procure false testimony and to present forged documents in the ICC trial against Bemba.¹⁷²

A few days after their arrest, three of the suspects, Bemba, Kilolo, who was the lead defense counsel in the main case, and Fidèle Babala, a member of the DRC Parliament and close associate of Bemba, appeared before the Pre-Trial Chamber and denied the charges. Jean-Jacques Mangenda Kabongo, who was the defense case manager, made his first appearance on December 4, 2013.¹⁷³ (The fifth suspect, Narcisse Arido, who had been named as an expert witness in the primary trial, did not make his first appearance before the ICC until March 2014, after a French appellate court rejected his extradition appeal and transferred him to the ICC.)¹⁷⁴

Bemba's lawyer argued that the arrests would impair the defense strategy of Bemba's case, noting that Kilolo's iPad and BlackBerry had been seized in the arrest, and that these items contained "the entire defense strategy."¹⁷⁵ In the weeks that followed, Bemba and Kilolo were held under circumstances where they were unable to speak with one another beyond one 30-minute phone call per day.¹⁷⁶ On December 4, 2013, these restrictions were lifted.¹⁷⁷

On December 11, 2013, Bemba named a new defense team headed by Peter Haynes.¹⁷⁸ In early January 2014, the court published the arrest warrants showing that the Prosecution's investigators had, by means of tapping Bemba's and his defense lawyer's phone during the trial,

¹⁷² 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.

¹⁷³ Wairagala Wakabi, *Second Bemba Lawyer Appears Before ICC on Evidence Forgery Charges*, INTERNATIONAL JUSTICE MONITOR (Dec. 5, 2013), available at <http://www.ijmonitor.org/2013/12/second-bemba-lawyer-appears-before-icc-on-evidence-forgery-charges/>

¹⁷⁴ Wairagala Wakabi, *Bemba Witness Appears Before ICC Judge on Evidence Tampering Charges*, INTERNATIONAL JUSTICE MONITOR, Mar. 20, 2014, available at <http://www.ijmonitor.org/2014/03/bemba-witness-appears-before-icc-judge-on-evidence-tampering-charges/>.

¹⁷⁵ *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>.

¹⁷⁶ *Id.*

¹⁷⁷ *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>.

¹⁷⁸ *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>.

uncovered the scheme to bribe witnesses and present false evidence.¹⁷⁹ Investigations into these witness tampering crimes had commenced in May 2013 when the Prosecution applied to the Pre-Trial Chamber for an order directed to the ICC detention center, requesting disclosure of Bemba's telephone communications.¹⁸⁰ 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.¹⁸¹

The Prosecution revealed that its case began with an anonymous tip that witnesses had been improperly influenced, and was followed by a one-year investigation. In March 2014, the judge denied the Defense's application to require the Prosecution to reveal the identity of the informant, but did allow the Defense access to the information provided by the informant, with all identifying information redacted.¹⁸²

The suspects were all placed in custody following their surrender to the ICC. In October 2014, the ICC judge ordered that the suspects, except Bemba, be released from custody, because their continued detention would be disproportionate to the potential penalties they faced.¹⁸³ The Prosecution's applications to the Pre-Trial Chamber to overturn the release order, and to the Appeals Chamber, to suspend the order, were rejected, and the suspects were released.¹⁸⁴

On November 11, 2014, the primary charges against the five suspects were confirmed on the basis of written submissions, and without a public hearing.¹⁸⁵ The Pre-Trial Chamber found that Bemba was the primary beneficiary of the common plan to defend him in the main case, which involved the commission of the offenses against the administration of justice. Bemba was also found to be responsible for the overall planning and coordination of the offenses; while he did not directly participate in coaching witnesses or making payments, he directed his co-Defendants by instructing them as to the content of testimony desired from witnesses, and payments to be made to witnesses.¹⁸⁶

¹⁷⁹ *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>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Prosecutor v. Bemba, et al.*, Second Decision on the "Defence request for disclosure," Mar. 27, 2014, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/ptcII/Pages/298.aspx

¹⁸³ ICC, *Prosecutor v. Bemba, et al.*, Decision Ordering the Release, Oct. 21, 2014, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/ptcII/Pages/703.aspx

¹⁸⁴ Wairagala Wakabi, *Judge Orders Interim Release of Bemba Lawyers*, INTERNATIONAL JUSTICE MONITOR, Oct. 21, 2014, available at <http://www.ijmonitor.org/2014/10/judge-orders-interim-release-of-bemba-lawyers/>

¹⁸⁵ ICC, *Prosecutor v. Bemba, et al.*, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute 70(a), (ICC 01/05-01/13-1600), Nov. 11, 2014, available at https://www.icc-cpi.int/en_menus/icc/situations_and_cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/ptcII/Pages/749.aspx

¹⁸⁶ *Id.* at 97-106.

Kilolo, the lead defense counsel in the main case, and Mangenda, the case manager of the Defense, were found to have played essential roles in implementing the overall strategy of defending Bemba, and committing the offenses.¹⁸⁷ Kilolo allegedly instructed witnesses as to the content of their testimony, supplied them with cash payments and continued contact with witnesses beyond the time period allowed.¹⁸⁸ The Pre-Trial Chamber found that Mangenda acted as the liaison between Bemba and Kilolo to facilitate commission of the offenses.¹⁸⁹ The involvement of Babala, a politician and close associate of Bemba, and Arido, who was listed in the main trial as an expert witness, was found to be more limited,¹⁹⁰ with Babala personally transferring money to witnesses¹⁹¹ and Arido recruiting witnesses to give false testimony and making payments to them.¹⁹²

On January 23, 2015, the single judge of the Pre-Trial Chamber provisionally ordered Bemba's release from detention, subject to determination by the Trial Chamber.¹⁹³ On the same day, the judge also rejected Defendants' application for leave to appeal the confirmation of charges decision.¹⁹⁴

The Trial Chamber then, on March 27, 2015, rejected Arido's request that the charges against him be withdrawn on the ground that they were not sufficiently "grave" and Arido had already spent 11 months in detention. The Trial Chamber held that no "gravity" requirement attaches to Article 70 proceedings, and withdrawal was not otherwise warranted.¹⁹⁵

On May 22, 2015, the Trial Chamber set the commencement date of trial for September 29, 2015.¹⁹⁶

¹⁸⁷ *Id.* at 37, 52.

¹⁸⁸ *Id.* at 53-72.

¹⁸⁹ *Id.* at 73-85.

¹⁹⁰ *Id.* at 37, 52.

¹⁹¹ *Id.* at 77-85.

¹⁹² *Id.* at 86-96.

¹⁹³ *Prosecutor v. Bemba, et al.*, Decision on "Mr. Bemba's Request for provisional release," Jan. 23, 2015, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/ptcII/Pages/798.aspx

¹⁹⁴ ICC, *Prosecutor v. Bemba, et al.*, Joint decision on the applications for leave to appeal the "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute," Jan. 21, 2015, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/ptcII/Pages/801.aspx

¹⁹⁵ ICC, *Prosecutor v. Bemba, et al.*, Decision on Arido Defence request to withdraw the charges, Mar. 27, 2015, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/ptcII/Pages/801.aspx

¹⁹⁶ ICC, *Prosecutor v. Bemba, et al.*, Order setting the commencement date of trial, May 22, 2015, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/ptcII/Pages/801.aspx

A week later, on May 29, 2015, the Appeals Chamber reversed the Pre-Trial Chamber's October 21, 2014 decision granting Kilolo, Mangenda, Babala and Arido interim release from detention. The Appeals Chamber held that in evaluating whether Defendants had been detained for an unreasonable time period, the Pre-Trial Chamber focused almost exclusively on the reasonableness of the time period in contrast to the potential penalties Defendants faced, and did not properly weigh the risks of release such as possible obstruction of the investigation and court proceedings. Thus, the Appeals Chamber remanded the matter to the trial court. However, given time considerations, the Appeals Chamber decided that re-arresting the Defendants did not serve the interest of justice and thus that they would remain released pending the decision of the Trial Chamber.¹⁹⁷

Applying the same reasoning, the Appeals Chamber also reversed the decision of the Pre-Trial Chamber ordering Bemba's release, and remanded the matter to the Trial Chamber.¹⁹⁸

On August 17, 2015, the Trial Chamber determined that the four accused who had been released would remain released, subject to conditions, including agreement to abide by all Court orders, to provide prior notice of any address change or travel plans, not to contact any witnesses except through counsel and to refrain from making any public statements regarding the case. Bemba withdrew his request for release and so remained in custody.¹⁹⁹

Despite the Defense's request for an adjournment and challenges to various evidentiary hearings, the trial commenced on September 29, 2015, as scheduled. The Prosecution's case relied heavily on intercepted emails and telephone conversations that allegedly support the charges that witnesses were coached and paid for their testimony.²⁰⁰ The majority of prosecution witnesses

[cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/appeals-chamber/Pages/960.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/appeals-chamber/Pages/960.aspx)

¹⁹⁷ ICC, *Prosecutor v. Bemba, et al.*, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for re-classification, May 29, 2015, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/appeals-chamber/Pages/969.aspx

¹⁹⁸ ICC, *Prosecutor v. Bemba, et al.*, Judgment on the appeal of the Prosecutor against the decision of the Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr. Bemba's Request for provisional release,'" May 29, 2015, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/appeals-chamber/Pages/970.aspx

¹⁹⁹ ICC, *Prosecutor v. Bemba, et al.*, Decision Regarding Interim Release, Aug. 17, 2015, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/tcVII/Pages/1151.aspx

²⁰⁰ Wairagala Wakabi, *Bemba's Witness Tampering Trial opens Sept. 29*, INTERNATIONAL JUSTICE MONITOR, Sept. 28, 2015, available at <http://www.ijmonitor.org/2015/09/bembas-witness-tampering-trial-opens-sept-29/>; Jennifer Easterday, *Witness Tampering Case opens at the ICC*, INTERNATIONAL JUSTICE MONITOR, Sept. 28, 2015, available at <http://www.ijmonitor.org/2015/09/witness-tampering-case-opens-at-the-icc/>; Wairagala Wakabi, *Analyst: Intercepted Calls Show Prohibited Contact between Bemba's Lawyer and Witnesses*, INTERNATIONAL JUSTICE MONITOR, Oct. 14, 2015, available at <http://www.ijmonitor.org/2015/10/analyst-intercepted-calls-show-prohibited-contact-between-bembas-lawyer-and-witnesses/>

were individuals who allegedly were influenced to give false testimony. Most testified in private sessions either live from the Hague or by video conference from an undisclosed location.²⁰¹

A Western Union official testified in open court as to money transfers that were made (the transfers that the Prosecution contends were made in return for false testimony), and as to Western Union's cooperation with the ICC's requests for information.²⁰² An analyst with the ICC's Prosecution office testified that Kilolo contacted seven witnesses by telephone and sent text messages to others during the time period that such contact was prohibited. The Prosecution contends that the witness tampering charges extend to a total of fourteen witnesses who testified for the Bemba in the main trial, but that the criminal plan among the accused involved many more.²⁰³ The Prosecution closed its case in November 2015.²⁰⁴

As of March 2016, the Defense is the process of presenting its case. The five accused have asked to call a total of 26 witnesses, although not all may testify. The judge has ordered Kilolo to drop an expert witness who was to testify about the general practice of preparing witnesses, using intermediaries and making payments, on the basis that such testimony is irrelevant. The judge has also rejected Kilolo's plans to call five character witnesses, although he has indicated he may accept the admission of prior recorded testimony from character witnesses. Kilolo has requested leave to appeal the judge's rulings with respect to the expert and character witness testimony.²⁰⁵

V) Conclusion

²⁰¹ Tom Maliti, *Witnesses Testify Mostly in Private Sessions in Bemba Witness Tampering Trial*, INTERNATIONAL JUSTICE MONITOR, Nov. 5, 2015, available at

<http://www.ijmonitor.org/2015/11/witnesses-testify-mostly-in-private-sessions-in-bemba-witness-tampering-trial/>

²⁰² Tom Maliti, *Western Union Official Testifies About Transactions in Bemba's Witness Tampering Trial*, INTERNATIONAL JUSTICE MONITOR, Dec. 3, 2015, available at

<http://www.ijmonitor.org/2015/12/western-union-official-testifies-about-transactions-in-bemba-witness-tampering-trial/>

²⁰³ Wairagala Wakabi, *Analyst: Intercepted Calls Show Prohibited Contact Between Bemba's Lawyer and Witnesses*, INTERNATIONAL JUSTICE MONITOR, Oct. 14, 2015, available at <http://www.ijmonitor.org/2015/10/analyst-intercepted-calls-show-prohibited-contact-between-bembas-lawyer-and-witnesses/>

²⁰⁴ Wairagala Wakabi, *Bemba and Associates set to Begin Defense in Bemba Witness Tampering Trial*, INTERNATIONAL JUSTICE MONITOR, Feb. 19, 2016, available at <http://www.ijmonitor.org/2016/02/bemba-and-associates-set-to-begin-defense-in-witness-tampering-case/>

²⁰⁵ ICC, *Prosecutor v. Bemba, et al.*, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses (ICC 01/05-01/13-1600), Feb. 4, 2016, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/chambers/tcVII/Pages/1600.aspx; Application for Leave to Appeal Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses (ICC 01/05-01/13-1600), Feb. 9, 2016, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/ICC-0105-0113/court-records/fop/defence/Pages/1614.aspx; Wairagala Wakabi, "Bemba and Associates set to Begin Defense in Bemba Witness Tampering Trial," INTERNATIONAL JUSTICE MONITOR, Feb. 19, 2016, available at <http://www.ijmonitor.org/2016/02/bemba-and-associates-set-to-begin-defense-in-witness-tampering-case/>

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 should be held accountable for the crimes his MLC soldiers allegedly committed in CAR in 2002-2003. In finding Bemba guilty of war crimes and crimes against humanity, the ICC has resoundingly voiced its opinion on the issue. The case marks the first time the ICC has based a conviction on the theory of command responsibility, as well as the first time that the ICC has issued a conviction for war crimes and crimes against humanity premised on acts of rape.

Meanwhile, the witness tampering trial still in progress--“the trial within a trial”--presents a case of first impression at the ICC on witness intimidation. The Bemba conviction represents a rare and much-needed success for the ICC that could have far-reaching implications. Future ICC trials will reveal whether the ICC is able to build on the success of the Bemba trial.

THE INTERNATIONAL CRIMINAL COURT CASE REGARDING MALI

By Elizabeth Barad

I) Introduction

On January 16, 2013, the Office of the Prosecutor (OTP) opened an investigation into alleged crimes committed in the territory of Mali since 2012.²⁰⁶ The situation in Mali was referred to the Court by the Government of Mali on July 13, 2012.

After conducting a preliminary examination of the situation, including an assessment of the admissibility of potential cases, the OTP determined that there was a reasonable basis to proceed with an investigation. The Prosecutor determined that Ahmed al-Faqi al-Mahdi, a member of the Islamic court set up by Malian jihadis to enforce strict Sharia law,²⁰⁷ should be arrested. The Court issued an arrest warrant and, on September 26, 2015, Ahmed al-Faqi al-Mahdi was surrendered to the Court by the government of Niger and transferred to the ICC's detention center in The Hague, Netherlands.²⁰⁸ The situation in Mali was then assigned to Pre-Trial Chamber I where the confirmation hearing opened on March 1, 2016.

II) The Charges

Ahmed al-Faqi al-Mahdi was charged with war crimes stemming from intentional attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu.²⁰⁹ The arrest warrant alleged that from June 30, 2012 to July 10, 2012, Mr. al-Faqi attacked ten monuments, at least one of which was a World Heritage Site.²¹⁰

The defendant is said to have jointly ordered or carried out the destruction of the mausoleums and Timbuktu's famous Sidi Yahia mosque, dating back to the 15th and 16th centuries.²¹¹ About 4,000 ancient manuscripts were also stolen or burned. Prosecutors alleged that jihadists set upon shrines with pickaxes and iron bars as well as vehicles, in what the chief Prosecutor, Fatou Bensouda, said was a "callous assault on the dignity of an entire population and their cultural identity."

²⁰⁶ Situations and Cases in the ICC, Situation in Mali, available at https://www-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

²⁰⁷ The Guardian, Agence France-Presse in The Hague, *Destruction of Timbuktu sites shocked humanity, prosecutor tells ICC*, available at <http://www.theguardian.com/law/2016mar/01/destruction-of-timbuktu-sites-shocked-humanity-prosecutor-icc>.

²⁰⁸ See *supra* n. 205.

²⁰⁹ *Id.*

²¹⁰ International Criminal Court, *Situation in Mali: Ahmed Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu*, January 16, 2013, available at https://www.icc-cpi.int/en_menus%20and%20media/press%20releases/ages/pr1154.aspx.

²¹¹ See *supra* n. 205.

III) Background on Timbuktu and the Conflict there

Timbuktu was founded between the 11th and 12th century by Tuareg tribes, and was listed as a UNESCO world heritage site in 1998. The desert city's golden era was during medieval times, when it became a flourishing commercial town in the lucrative trans-Saharan gold and salt trade, as well as a major educational and spiritual center.²¹² Although Timbuktu's wealth has declined sharply since then, its rich cultural legacy has stood the test of time. The city boasted an impressive array of ancient monuments and priceless artifacts, including its striking earthen mosques—made from mud and wood—and a vast trove of scholarly manuscripts held in public and private collections.²¹³

Historically, Timbuktu has been a major hub for the diffusion of Islam in West Africa. Scholars from around the Islamic world traveled to the oasis city to study at the prestigious University of Sankore, which had some 25,000 students and 180 Koranic schools in its heyday. In 1893, with the colonization of West Africa by France, Timbuktu was brought under French rule until 1960, when Mali became independent.

Mali was often hailed as one of the most successful democracies in West Africa until a coup toppled President Amadou Toumani Toure in 2012, and seized control of the presidential palace and the state television station.²¹⁴ The coup led al Qaeda-linked Islamists to capitalize on the chaos and establish themselves in the northern part of the country. In these areas, they applied a strict interpretation of Sharia law by banning music, smoking, drinking and watching sports on TV. Amid international outrage, they also repeatedly targeted Timbuktu's ancient burial sites. Islamist militants regarded such shrines as idolatrous and thus prohibited by their religion. Throughout the period that the Islamists controlled Timbuktu, the armed groups consisted of Al-Qaeda in the Islamic Magreb ("AQIM") and the Malian Islamist group, Ansar Eddine, a mainly Tuareg movement associated with AQIM.²¹⁵

In 2012, Islamist fighters attacked ten mausoleums and a mosque. "After the attack, the Islamists told the people that worshipping saints is not right, according to their form of Islam, and the destruction was necessary," said Ibrahim Ag Mohamed, a local guide.²¹⁶ The destruction of Timbuktu's ancient shrines added a moral and cultural crisis to a desperate humanitarian situation.

²¹² Teo Kermeliotis, CNN, *New Fears for Timbuktu in Mali Conflict*, January 28, 2013, available at <http://www.cnn.com/2013/01/18/world/africa/mali-timbuktu-destruction-unesco/>.

²¹³ *Id.*

²¹⁴ AlJazeera English, *Mali mutiny 'topples' President Toure*, March 20, 2012, available at <http://www.aljazeera.com/news/africa/2012/03/201232251320110970.html.SBRE90>.

²¹⁵ *See supra* n. 211.

²¹⁶ Teo Kermeliotis, CNN, *New Fears for Timbuktu in Mali Conflict*, January 28, 2013, available at <http://www.cnn.com/2013/01/18/world/africa/mali-timbuktu-destruction-unesco/>.

On January 28, 2013, French and Malian government troops began retaking Timbuktu from the Islamist rebels.²¹⁷ The force of 1,000 French troops with 200 Malian soldiers retook Timbuktu without a fight. The Islamist groups had already fled north a few days earlier, having set fire to the Ahmed Baba Institute, which housed many important manuscripts. Following France's intervention to halt the advance of Islamist fighters, UNESCO issued calls for the protection of the fabled city, and urged armed forces to safeguard the nation's historic and religious landmarks.

IV) The Defendant, Ahmad al-Faqi al-Mahdi

Ahmad al-Faqi al-Mahdi was born in Agoune, 100 kilometers west of Timbuktu, belongs to the Ansar Tuareg tribe, and was an active personality in the occupation of Timbuktu. He was a member of Ansar Eddine, working closely with the leaders of Ansar Eddine and AQIM when the two groups controlled Timbuktu. Until September 2012, he was at the head of the "Hesbah" ("Manners' Brigade"), the anti-vice squad, operational from May 2012. He was also associated with the work of the Islamic Court of Timbuktu, participating in executing its decisions, and involved in the destruction of ten mausoleums and a mosque mentioned in the charges.

The defendant said in the Pre-Trial Chamber only the following: "My name is Ahmed al-Faqi al-Mahdi, and I am from the Tuareg tribe, I was born about 40 years ago. I am a graduate of the teachers' institute in Timbuktu and I was a civil servant in the education department beginning in 2011."²¹⁸

V) Conclusion

The case against al-Faqi is the first one in which the ICC indicted an individual for war crimes associated with attacking religious buildings or historical monuments. It is also the first case before the ICC arising out of the Prosecutor's investigation regarding the situation in Mali. The chief Prosecutor of the ICC called al-Faqi's arrest an "important step forward in the fight against impunity, not only in Mali, but also the broader Sahel and Sahara region in Africa, whose populations have been in recent years subjected to unspeakable crimes."²¹⁹

²¹⁷ Adam Diarra, Reuters, *French seal off Mali's Timbuktu, rebels torch library*, January 28, 2013, available at <http://www.reuters.com/articles/us-mali-rebels-idUSBRE9OOOC720130128>.

²¹⁸ David Smith, The Guardian, *Alleged militant appears at The Hague charged with cultural destruction in Mali*, available at <http://www.theguardian.com/law/2015/sep/30/ahmad-al-faqi-al-mahdi-the-hague-international-criminal-court-mali-timbuktu>.

²¹⁹ See *supra* n. 205.