



ICC Victims' Rights Legal Update 4th March – 31 May 2011

Note: The summaries below are unofficial summaries of ICC decisions and related pleadings relevant to victims' rights issues. The summary does not purport to be complete. For a more in-depth review, please review the documents hyper-linked in this summary. Any comments on this Legal Update should be directed to Gaelle Carayon at gaelle@redress.org.

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Situation in the Democratic Republic of Congo (DRC)

Developments in the DRC Situation

Framework decision on victim participation in situation/investigation phase

[Background] On 19 December 2008, the Appeals Chamber (AC) reversed two decisions on victims' participation, and ruled that victims could participate at the stage of investigation in a situation, only within the context of judicial proceedings.¹ Ever since, the status of victims who had already been granted participatory status in the DRC Situation (prior to the December 2008 decision) has been unclear.

On 11 April 2011, Pre Trial Chamber I (PTC I) established a new framework for victims in the DRC Situation.² It ruled that only when a judicial proceeding arises, will the Chamber assess new victims' applications for participation in the situation. The Victims Participation and Reparation Section ("VPRS") is to transmit only those applications which are complete and relate to the subject matter of the said proceeding.

With regards to applications which had already been ruled upon by previous decisions, the Chamber made a distinction between 2 groups of victims:

- Victims whose status in the DRC situation was recognised by the 24 December 2007 decision: the majority of the Chamber found that as this decision had been reversed in its entirety on appeal, applications ruled upon by the 24 December 2007 decision will have to be fully reassessed.
- Victims whose status in the DRC Situation was recognized by other decisions: should judicial proceedings arise, PTCI will limit its assessment to whether victims' personal interests are affected by the said proceeding, endorsing previous findings in relation to whether the applicant qualifies as a victim under Rule 85.

Developments in the Lubanga case

Seven new victims' applications pending before the Chamber

On 8 March 2011, Trial Chamber I (TC I) invited the Parties to present their observations on seven new victims' applications for participation.³ On 5 April 2011, the Prosecution submitted that five applications met the requirements for participation status.⁴ It added that of the remaining two applications; one required further information, and the other contained redactions that made it impossible to assess whether it met the requirements. Following the receipt on 11 May 2011, of additional information, the Defence requested on 18 May 2011 that the Chamber reject 2 applications, arguing, *inter alia* that they both contained discrepancies.⁵ A decision is pending.

Three post-testimony victim statements admitted into evidence

On 2 March 2011, TC I admitted into evidence 3 written victim statements, clarifying the circumstances in which their voting cards had been obtained.⁶ Both the Office of Public Counsel for Victims (OPCV) and the Prosecutor had sought to tender these statements in response to the Defence's allegations that the 3 victims had falsified evidence and lied during their testimony. The Chamber reasoned that the statements were clearly relevant, and probative of, the credibility of the witnesses.

A Timetable for closing submissions is set as the Lubanga trial nears its end

¹ Judgment on victim participation in the investigation stage of the proceedings, 19 December 2008, ICC-01/04 OA4 OA5 OA6, <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>.

² Decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo, 11 April 2011, ICC-01/04, <http://www.icc-cpi.int/iccdocs/doc/doc1053881.pdf>.

³ Order on the transmission of 7 new victims' applications and the submission of observations, <http://www2.icc-cpi.int/iccdocs/doc/doc1036606.pdf>. Transmission to the parties of seven new victims' applications for participation in accordance with Trial Chamber I's Order of 8 March 2011, <http://www2.icc-cpi.int/iccdocs/doc/doc1039195.pdf>.

⁴ Prosecution's Observations on Seven Redacted Applications for Victim Participation in the Case, 5 April 2011, ICC-01/04-01/06-2718, <http://www.icc-cpi.int/iccdocs/doc/doc1051177.pdf>.

⁵ Observations de la Défense sur les "informations supplémentaires reçues sur une demande de participation conformément à la norme 86.4 du Règlement de la Cour" transmises le 12 Mai 2011, 18 May 2011, ICC-01/04-01/06-2738, <http://www.icc-cpi.int/iccdocs/doc/doc1074215.pdf>.

⁶ Application for leave to tender into evidence material from the "bar table", 29 November 2010, ICC-01/04-01/06-2647, <http://www.icc-cpi.int/iccdocs/doc/doc973637.pdf>; Prosecution's Application for Admission of three documents from the Bar Table Pursuant to Article 64(9), 20 December 2010, ICC-01/04-01/06-2666, <http://www.icc-cpi.int/iccdocs/doc/doc988180.pdf>; Decision on the legal representative's application for leave to tender into evidence material from the "bar table" and on the Prosecution's Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9), 2 March 2011, ICC-01/04-01/06-2694, <http://www2.icc-cpi.int/iccdocs/doc/doc1030454.pdf>. On 9 March 2011 a Corrigendum to the Decision was published: <http://www.icc-cpi.int/iccdocs/doc/doc1037321.pdf>.

On 12 April 2011, TC I set the timetable for closing submissions.⁷ The Prosecution and the Legal Representatives (LRV) are to file their written closing submissions no later than 1 June 2011, the Defence no later than 15 July 2011. The Prosecution may file a reply to the Defence by 1 August, and the Defence will have until 15 August to file its final reply. The submissions should address all the relevant legal and factual issues arising in the case. The oral closing statements are scheduled for Thursday 25 August 2011 and Friday 26 August 2011, during which, parties and participants should be prepared to entertain questions from the Bench.

Developments in the Katanga and Ngudjolo case

TC II rejects *amicus curiae*'s request from QUB Human Rights Centre

[Background] On 30 June 2009, QUB Human Rights Centre requested to file an *amicus curiae* regarding the interpretation of common Element 1 of the Elements of Crimes of sexual slavery and its relationship with the definition of enslavement.⁸

On 7 April 2011, Trial Chamber II (TC II) rejected the request.⁹ The Chamber noted the difficulties of interpretation it might face in its analysis of articles 7(1)(g)-2 and 8(2)(b)(xxii)-2 of the Elements of Crimes. However, the Chamber held that the submission would not provide information which it could not obtain otherwise.

TC II refuses to set up automatic disclosure system for victims

[Background] On 15 April 2011, Victims' Legal Representatives jointly requested the Chamber to disclose a document regarding the credibility of Defence witness 176, which had been exchanged pursuant to rule 77 of the Rules. They also requested the Chamber to set out the modalities for the communication of such documents to the victims and suggested that the system adopted in the *Lubanga* case be followed, whereby documents are automatically communicated to the LRV if they can show a personal interest in the disclosure.¹⁰

On 21 April 2011, TC II, while granting the request for disclosure of the report regarding witness 176, refused to apply the system adopted in the *Lubanga* case. Thus, the Chamber will consider on a case-by-case basis whether victims' access to the documents exchanged under rule 77 is necessary to ensure their effective participation under article 68(3) of the Statute.

Developments in the Mbarushimana case

Chamber sets a deadline for the transmission of applications for victims' participation

On 15 March 2011, Pre Trial Chamber I (PTC I) I ordered VPRS to transmit to the Chamber complete applications for victim participation in proceedings at the pre-trial stage of the case, no later than 45 days before the commencement of the confirmation of charges hearing (originally scheduled for 4 July 2011).¹¹ Given that the start of the confirmation of charges hearing was postponed to 17 August 2011, all applications need to be received by 30 June 2011.¹²

On 24 May 2011, 14 applications were transferred to the parties for observations.¹³ The Registry indicated that it had also just received 783 new applications, of which 530 appeared to be complete.¹⁴

⁷ Order on the timetable for closing submissions, 12 April 2011, ICC-01/04-01/06-2722, <http://www.icc-cpi.int/iccdocs/doc/doc1054586.pdf>.

⁸ QUB Human Rights Centre argued that the Rome Statute limits the definition of sexual slavery to that found within the 1929 Slavery Convention, in contrast to its wider scope as recognised under international customary law. The Centre held that any broader reading of the definition of the term sexual slavery would render the Elements of Crimes inconsistent with the Rome Statute. See: Motion for Leave to submit as *amicus curiae* on observations related to sexual slavery submitted by Queen's University Belfast Human Rights Centre, 30 June 2009, ICC-01/04-01/07-1257, <http://www.icc-cpi.int/iccdocs/doc/doc704753.pdf>.

⁹ Décision relative à la demande d'autorisation par le Queen's University Belfast Human Rights Centre en vue de soumettre en tant qu'*amicus curiae* des observations sur la définition des crimes d'esclavage sexuel, 7 April 2011, ICC-01/04-01/07-2823, <http://www.icc-cpi.int/iccdocs/doc/doc1052184.pdf>.

¹⁰ Requête conjointe, 15 April 2011, ICC-01/04-01/07-2837, <http://www.icc-cpi.int/iccdocs/doc/doc1057723.pdf>.

¹¹ Order setting a deadline for the transmission of applications for victims' participation, 15 March 2011, ICC-01/04-01/10-78, <http://www.icc-cpi.int/iccdocs/doc/doc1039423.pdf>.

¹² Decision on the Prosecution's request for the postponement of the confirmation hearing, 31 May 2011, ICC-01/04-01/10-207, <http://www.icc-cpi.int/iccdocs/doc/doc1078853.pdf>.

¹³ Recalling the Prosecutor's duty to respect the interests and personal circumstances of victims, the Chamber decided that the applications may be provided to the Prosecution without redactions. Decision requesting the Parties to submit observations on 14 applications for victims' participation in the proceedings, 24 May 2011, ICC-01/04-01/10-181, <http://www.icc-cpi.int/iccdocs/doc/doc1079386.pdf>.

¹⁴ First transmission to the Pre-Trial Chamber of applications to participate in the proceedings, 20 May 2011, ICC-01/04-01/10-166, <http://212.159.242.180/iccdocs/doc/doc1077419.pdf>.

PTC I rejects request for interim release

On 19 May 2011, PTCI rejected a Defence application for the interim release of Mr. Mbarushimana to France.¹⁵ The Chamber argued that Mr Mbarushimana's continued detention is necessary to ensure his appearance at trial, to ensure that he does not obstruct or endanger the investigations and the proceedings before the Court, and to prevent him from continuing with the commission of crimes. It ruled that conditional release using an electronic bracelet ("electronic tagging") would not provide sufficient guarantees to that end and that there were indications that Mr Mbarushimana would be inclined to intimidate witnesses. On 23 May 2011, the Defence appealed the decision.¹⁶

Situation in Central African Republic (CAR)

Developments in the Bemba Case

401 new applications for victim participation before the Chamber

On 21 April 2011, the Registry transferred 401 applications for victim participation to the parties.¹⁷ On 17 May 2011, the Prosecution submitted that 316 applications met the requirements for participation¹⁸, 46 contained redactions that made it difficult to assess them, and 3 of the applications - while providing a proof of identity not previously listed as admissible proof of identification, should nevertheless be granted participation status. All other applications required further information or documentation.

The Defence opposed all 401 applications.¹⁹ It stressed that it was only given 21 days to process the applications and lacked the proper resources to do so in the short time given. The Defence also claimed that some intermediaries had encouraged victims to lie and exaggerate the harm they had suffered.²⁰ A decision is pending.

TC III clarifies victims' participation in the procedure in relation to evidence

On 31 March 2011, Trial Chamber III (TC III) rejected an application by Mr Zarambaud, a victims' representative, to question witness 6.²¹ The Chamber found that Mr. Zarambaud had not provided sufficient justification as to why he wanted to question the witness. The Chamber recalled its earlier decisions of 19 November 2010 and 12 July 2010 on the interpretation of the personal interests of victims under article 68(3) of the Statute in order to participate in the proceedings.²² Exceptionally, Mr. Zarambaud was allowed to submit a new application with detailed reasons as to why the personal interests of the victims he represents are affected by the testimony of witness 6. On 4 April 2011, Mr. Zarambaud was granted the right to question the witness.²³

On 31 May 2011, TC III similarly clarified that participants who wish to submit an item as evidence, or wish to raise an issue relating to the relevance or admissibility of evidence, should first file a written application setting out the reasons as to why their personal interests are affected.²⁴

Situation in Sudan

Developments in the Banda and Jerbo case

Charges against Banda and Jerbo confirmed

¹⁵ Decision on the "Defence Request for Interim Release", 19 April 2011, ICC-01/04-01/10-163, <http://www.icc-cpi.int/iccdocs/doc/doc1076545.pdf>;

¹⁶ Defence Notice of Appeal of Pre-Trial Chamber I's Decision ICC-01/04-01/10-163, 23 May 2011, ICC-01/04-01/10-170, <http://www.icc-cpi.int/iccdocs/doc/doc1077686.pdf>.

¹⁷ Ninth transmission to the parties and legal representatives of the applicants of redacted versions of applications for participation in the proceedings, 21 April 2011, ICC-01/05-01/08-1382, <http://www.icc-cpi.int/iccdocs/doc/doc1063742.pdf>.

¹⁸ Prosecution's Observations on 401 Applications for Victims' Participation in the Proceedings, 17 May 2011, ICC-01/05-01/08-1414, <http://www.icc-cpi.int/iccdocs/doc/doc1073879.pdf>.

¹⁹ Observations de la Défense sur la "Neuvième transmission aux parties et aux représentants légaux des versions expurgées des demandes de participation à la procédure", 17 May 2011, ICC-01/05-01/08-1413, <http://212.159.242.180/iccdocs/doc/doc1073853.pdf>.

²⁰ The Defence refers to the public testimony of witness 0073 who indicated on 24 February 2011 that a team of persons who presented themselves as coming from the ICC and dealing with reparations, had encouraged victims to exaggerate or invent the harm suffered in their participation forms, if they wanted to "eat of the cake".

²¹ Oral decision of the TC III, 31 March 2011, ICC-01/05-01/08-T-93-Red-ENG, <http://www.icc-cpi.int/iccdocs/doc/doc1036143.pdf>.

²² Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, <http://www.icc-cpi.int/iccdocs/doc/doc969802.pdf>

²³ Oral decision of TC III, 4 April 2011, ICC-01/05-01/08-T-94-ENG, <http://www.icc-cpi.int/iccdocs/doc/doc1050938.pdf>.

²⁴ Order on the procedure relating to the submission of evidence, 31 May 2011, ICC-01/05-01/08-1470, <http://www.icc-cpi.int/iccdocs/doc/doc1082085.pdf>.

On 7 March 2011, PTC I confirmed the charges of war crimes against Abdallah Banda and Saleh Jerbo, and committed them to trial.²⁵ The Chamber held that there are reasonable grounds to believe they are criminally responsible as direct co-perpetrators under article 25(3)(a) of the Statute for the attack that took place on 29 September 2007 at Haskanita against a military observer group of the African Union Mission in Sudan. On 16 March 2011, the Presidency of the ICC constituted Trial Chamber IV (TC IV), composed of Judge Fatoumata Dembele Diarra (Mali), Joyce Aluoch (Kenya), Silvia Fernández de Gurmendi (Argentina), and ordered the referral of the Banda/Jerbo case to that Chamber.²⁶ A date for the start of the trial is yet to be set.

Consultations on the organisation of common legal representation on the way

On 21 April 2011, TC IV ordered the Registry to start consultations with the 89 participating victims, currently represented by 5 legal teams, with a view to appointing a common legal representative.²⁷ The Chamber held that consultations with victims should be conducted in the presence of their current legal representatives and that in the event that they are unable to choose a common legal representative by 23 June 2011, the Registry will be required to submit a proposal on the organisation of common legal representation by 28 June.

Situation in Kenya

Developments in the Ruto, Kosgey and Sang Case

Pre-Trial Chamber issues summons to appear

[Background] On 15 December 2010, the Prosecution submitted an application for summons to appear regarding three individuals associated with the Orange Democratic Movement (Ruto, Kosgey, Sang).²⁸

On 8 March 2011, Pre-Trial Chamber II (PTC II) granted the request and issued summons to appear for all three suspects.²⁹ The Chamber found that there are reasonable grounds to believe that Ruto and Kosgey are criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute, and that Sang is criminally responsible as having contributed to crimes committed by a group of persons within the meaning of article 25(3)(d) of the Statute, for the following acts constituting crimes against humanity:

- (i) murder within the meaning of article 7(1)(a) of the Statute
- (ii) forcible transfer of population within the meaning of article 7(1)(d) of the Statute
- (iii) persecution within the meaning of article 7(1)(h) of the Statute

On 7 April 2011, the suspects appeared before the Court. The confirmation of charges is scheduled to start on 1 September 2011. On 3 June 2011, the Chamber requested observations from the parties and the victims on the desirability of conducting the confirmation of charges hearings in the Republic of Kenya.³⁰ The Chamber held that victims will submit their observations through the OPCV.

Pre-Trial Chamber decides on framework for victims' participation

On 30 March 2011, PTC II set out a framework for victims' participation.³¹ It ruled that an applicant may be recognized as a victim in the Ruto et al. case if he or she has shown that the alleged crime against humanity was committed from 30 December 2007 until the end of January 2008 in locations including Turbo town, the greater Eldoret area, Kapsabet town and Nandi Hills town, Kenya.

The Chamber requested VPRS to ensure the presence of a VPRS representative in the field, and to request missing information within two weeks after receipt of victims' applications. VPRS is also to take appropriate steps towards organizing common legal representation for the purposes of the confirmation of

²⁵ Corrigendum of the "Decision on the Confirmation of Charges", 8 March 2011, ICC-02/05-03/09-121-Corr-Red, <http://www.icc-cpi.int/iccdocs/doc/doc1036947.pdf>.

²⁶ Decision constituting TC IV and referring the case of The Prosecutor v. Banda and Jerbo, 16 March 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1041550.pdf>.

²⁷ Order instructing the Registry to start consultations on the organisation of common legal representation, 21 April 2011, ICC-02/05-03/09-138, <http://www.icc-cpi.int/iccdocs/doc/doc1056932.pdf>; Report recommending a decision concerning the common legal representation, 15 April 2011, ICC-02/05-03/09-134, <http://www.icc-cpi.int/iccdocs/doc/doc1060000.pdf>.

²⁸ Prosecutor's Application Pursuant to Article 58 as to Ruto, Kiprono Kosgey and Arap Sang, 15 December 2010, ICC-01/09-30-Red, <http://www.icc-cpi.int/iccdocs/doc/doc985613.pdf>.

²⁹ Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-01, <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf>. Judge Kaul dissented in both cases on the question of whether the crimes alleged amounted to crimes against humanity under the jurisdictional ambit of the Court. He argued that the Court lacks subject-matter jurisdiction in the Kenya Situation.

³⁰ The Chamber decided that victims should submit their observations through the OPCV. All observations should be received no later than 13 June 2011. Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, 3 June 2011, ICC-01/09-01/11-106, <http://www.icc-cpi.int/iccdocs/doc/doc1083960.pdf>.

³¹ First Decision on Victims' Participation in the Case, 30 March 2011, ICC-01/09-01/11-17, <http://www.icc-cpi.int/iccdocs/doc/doc1049619.pdf>.

charges hearings.³² Lastly, the Chamber indicated that it would adopt a flexible yet cautious approach with regard to substitute forms of identity, being aware of purported practice of identification fraud in Kenya. All applications for participation in the proceedings leading to the confirmation of charges hearing should be filed no later than 8 July 2011.³³

On 17 May 2011, the Registry indicated that it had received approximately 90 applications for participation and transferred 59 of them to the parties for observations.³⁴

Victims not allowed to participate during initial appearance

On 30 March 2011, PTC II rejected a motion by Legal Representatives of 7 victim applicants to make “representations under article 68” at the initial appearance of Ruto, Kosgey and Sang.³⁵ The Chamber argued that victim applicants can only exercise their rights under article 68(3) once they are granted participation status and that even in such a case, their intervention would not have been appropriate at this stage of the proceedings. The Chamber reiterated that the purpose of the initial appearance is to inform the suspects of the charges and their rights under the Statute. The Chamber also strongly reaffirmed that only victims who had expressly requested to participate in the proceedings would be granted such a right and that submission of a reparation request fell short of that requirement.

OPCV to represent victims in both cases with no conflict of interest

On 7 April 2011, the OPCV informed PTC II that no conflict of interests had arisen from the representation of victims in both Kenyan cases.³⁶ Although the OPCV found a future conflict of interest unlikely, it noted that the Principal Counsel has constituted a separate and autonomous legal team for each case and that confidential information will not be shared between the teams. The legal teams however anticipate sharing resources to the extent of their common interest.

Pre-Trial Chamber II confirms admissibility

[Background] On 31 March 2011, the Government of the Republic of Kenya filed an application challenging the admissibility of both cases pursuant to article 19(2)(b) and Article 17(1)(a) of the Statute.³⁷ The Government argued that the Chamber must make its determination with a full understanding of the constitutional and judicial reforms in the country, as well as the “investigative processes that are currently under way”, and consider that Kenya is willing and able to conduct investigations and proceedings for all crimes arising from the post-election violence. Victims who had applied to participate in the proceedings were also invited to submit, through the OPCV, their observations on the admissibility challenge.³⁸

On 30 May 2011, PTC II rejected the admissibility challenge, arguing that the Kenyan Government did not provide concrete evidence that there are ongoing investigations against the six suspects “at the time of the proceedings concerning the admissibility challenge”.³⁹ The Court recalled, that at the ‘case’ stage “the national investigations must encompass both the person and the conduct which is subject to the case before the Court”. In particular, the Chamber considered that the Government failed to provide any information as to the conduct, crimes or the incidents for which the suspects are being investigated or questioned.

³² Victims can only exercise their rights under article 68 once they are granted participation status. See: Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings, 30 March 2011, ICC-01/09-01/11-14, <http://www.icc-cpi.int/iccdocs/doc/doc1049577.pdf>.

³³ As of 17 May, 90 applications had been transmitted to the Chamber, First transmission to the Pre-Trial Chamber of applications to participate in the proceedings, 17 May 2011, ICC-01/09-01/11-91, <http://www.icc-cpi.int/iccdocs/doc/doc1057169.pdf>.

³⁴ First transmission to the parties and legal representatives of redacted applications to participate in the proceedings, 17 May 2011, ICC-01/09-01/11-92, <http://www.icc-cpi.int/iccdocs/doc/doc1057170.pdf>.

³⁵ Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings, 30 March 2011, ICC-01/09-01/11-14, <http://www.icc-cpi.int/iccdocs/doc/doc1049577.pdf>.

³⁶ OPCV Submission on Appointment for Representation of Victims in the Ruto et al. Case, 7 April 2011, ICC-01/09-01/11-45, <http://www.icc-cpi.int/iccdocs/doc/doc1052259.pdf>; OPCV Submission on Appointment for Representation of Victims in the Muthaura et al. Case, 7 April 2011, ICC-01/09-02/11-49, <http://www.icc-cpi.int/iccdocs/doc/doc1052281.pdf>.

³⁷ Application on behalf of the Government of the Republic of Kenya pursuant to article 19 of the ICC Statute, 31 March 2011, ICC-01/09-01/11-19, <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>.

³⁸ Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, ICC-01/09-02/11-40, <http://www.icc-cpi.int/iccdocs/doc/doc1050890.pdf>; Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute, 4 April 2011, ICC-01/09-01/11-31, <http://www.icc-cpi.int/iccdocs/doc/doc1050886.pdf>.

³⁹ Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-01/11-101, <http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf>.

On 30 May 2011, PTC II adopted a similar decision in the *Muthaura et al.* case.⁴⁰ On 6 June 2011, the Government of Kenya appealed the decision in both cases.⁴¹

PTC II rejects *amicus curiae* brief of ICJ-Kenya

On 11 May 2011, PTC II rejected a request of the International Commission of Jurists-Kenya Section to submit an *amicus curiae* brief regarding the effectiveness of Kenya's judicial system and the implementation of the legal and judicial reforms.⁴² In ruling so, the Chamber recalled that it would only accept *amicus curiae* briefs on an exceptional basis, when it is of the view that such observations providing specific expertise are needed on particular topics and that this is desirable for the proper determination of the Case.

A similar decision was taken on the request of the International Commission of Jurists to intervene as *amicus curiae* in the *Muthaura et. al* case.⁴³

Developments in the Muthaura, Kenyatta and Ali case

Pre-Trial Chamber issues summons to appear

[Background] On 15 December 2010, the Prosecution submitted an applications requesting Pre-Trial Chamber II (PTC II) to issue a summons to appear for three individuals associated with the Party of National Unity (Muthaura, Kenyatta, Ali).⁴⁴

On 8 March 2011, PTC II issued summons to appear for all three suspects.⁴⁵ The Chamber found that there are reasonable grounds to believe that Muthaura and Kenyatta are criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute, and that Ali is criminally responsible as having contributed to crimes committed by a group of persons within the meaning of article 25(3)(d) of the Statute, for the following acts constituting crimes against humanity:

- (i) murder within the meaning of article 7(1)(a) of the Statute
- (ii) forcible transfer of population within the meaning of article 7(1)(d) of the Statute
- (iii) rape within the meaning of article 7(1)(g) of the Statute
- (iv) other inhumane acts within the meaning of article 7(1)(k) of the Statute⁴⁶
- (v) persecution within the meaning of article 7(1)(h) of the Statute

On 8 April 2011, the suspects appeared before the Court. The date for the confirmation of charges hearing was set to 21 September 2011.⁴⁷ On 3 June 2011, the Chamber invited the parties and the victims to submit their observations on the desirability of conducting the confirmation of charges hearings in the Republic of Kenya.⁴⁸

Pre-Trial Chamber decides on framework for victims' participation

⁴⁰ Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-02/11-96, <http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf>.

⁴¹ Appeal of the Government of Kenya against the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 6 June 2011, ICC-01/09-01/11-109, <http://www.icc-cpi.int/iccdocs/doc/doc1084702.pdf>; Appeal of the Government of Kenya against the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 6 June 2011, ICC-01/09-02/11-104, <http://www.icc-cpi.int/iccdocs/doc/doc1084704.pdf>.

⁴² Decision on the "Request for leave to submit Amicus Curiae Observations on behalf of the Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence, 11 May 2011, ICC-01/09-02/11-87, <http://www.icc-cpi.int/iccdocs/doc/doc1071168.pdf>.

⁴³ Decision on the "Request for leave to submit Amicus Curiae Observations on behalf of the Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence", 11 May 2011, ICC-01/09-02/11-87, <http://www.icc-cpi.int/iccdocs/doc/doc1071168.pdf>.

⁴⁴ Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31-Red, <http://www.icc-cpi.int/iccdocs/doc/doc985621.pdf>.

⁴⁵ Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01, <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf>. Judge Kaul dissented.

⁴⁶ The Chamber rejected that the acts of forcible circumcision alleged by the Prosecutor constituted "other forms of sexual violence" within the meaning of article 7(1)(g) of the Statute. It argued that the acts of forcible circumcision could not be considered acts of a 'sexual nature' as required by the Elements of Crimes, but were to be qualified as "other inhumane acts" within the meaning of article 7(1)(k) of the Statute. The Prosecutor appealed against the decision. On appeal, the Chamber explained that it didn't exclude the fact that acts of forcible circumcision could have a sexual nature. However, *in casu*, the Prosecutor did not provide sufficient evidence and information to support such a claim.

⁴⁷ Decision Setting a New Date for the Initial Appearance, 18 March 2011, ICC-01/09-02/11-8, <http://www.icc-cpi.int/iccdocs/doc/doc1043690.pdf>.

⁴⁸ The Chamber decided that victims should submit their observations through the OPCV. All observations should be received no later than 13 June 2011. Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, 3 June 2011, ICC-01/09-02/11-162, <http://www.icc-cpi.int/iccdocs/doc/doc1083962.pdf>.

On 30 March 2011, PTC II set out a framework for victims' participation analogous to the one adopted in the *Ruto et al.* case.⁴⁹ It recalled the criteria needed for applications to be granted and ruled that an applicant may be recognized as a victim in the *Muthaura et al.* case if he or she has shown that the alleged crime against humanity was committed from 24 January 2008 until the end of January 2008 in locations, including Nakuru town and Naivasha town in Kenya.

Situation in Lybia

Arrest warrants sought against Gaddafi and two others

On 16 May 2011, the Prosecutor requested the Court, pursuant to article 58 of the Statute, to issue arrest warrants for:

- Muammar Mohammed Ubu Minyar Gaddafi, the chairman of the Revolutionary Command Council;
- Saif Al-Islam Gaddafi, the *de facto* Prime Minister;
- Abdullah Al-Senussi, the head of Regime Security and Military Intelligence.⁵⁰

The Prosecutor stated that there are reasonable grounds to believe that the three are responsible, pursuant to article 25(3)(a) of the Statute, as direct (Muammar Gaddafi) and indirect (Saif Gaddafi and Abdullah Al-Senussi) perpetrators, for murder and persecution as crimes against humanity.

Situation in Ivory Coast

Situation in the Republic of Côte d'Ivoire assigned to Pre-Trial Chamber II

On 19 May 2011, the Presidency received a letter from the Prosecutor, indicating his intention to submit a request for the authorisation of an investigation into the situation of the Republic of Côte d'Ivoire, considering that "there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed in Côte d'Ivoire since 28 November 2010".

On 20 May 2011, the Presidency issued a decision assigning the situation in the Republic of Côte d'Ivoire to Pre-Trial Chamber II (PTC II) composed of Judges Ekaterina Trendafilova (Bulgaria), Hans-Peter Kaul (Germany) and Cuno Tarfusser (Italy).⁵¹

⁴⁹ First Decision on Victims' Participation in the Case, 30 March 2011, ICC-01/09-02/11-23, <http://www.icc-cpi.int/iccdocs/doc/doc1049652.pdf>.

⁵⁰ Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 16 May 2011, ICC-01/11-4-Red, <http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf>.

⁵¹ Decision Assigning the Situation in the Republic of Côte d'Ivoire to Pre-Trial Chamber II, 20 May 2011, ICC-02/11-1, <http://www.icc-cpi.int/iccdocs/doc/doc1073873.pdf>.