



Promoting the rights
and interests of victims
before the International
Criminal Court

ICC Victims' Rights Legal Update 8 September – 30 October 2009

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Situation in Central African Republic (CAR)

Bemba case

Victims granted right to participate in the Appeal against Bemba's Interim Release

Background: On 14 August 2009, single Judge Trendafilova decided to grant interim release to Jean-Pierre Bemba Gombo, on the basis that the continued detention of Mr. Bemba did not appear necessary to ensure his appearance at trial, as well as that deprivation of liberty should be treated as an exception, not a rule.¹ The Prosecution appealed the decision on the same day.² Legal representatives of victims were allowed to participate in the appeal,³ and filed their observations on 31 August 2009.⁴ The Prosecution response generally concurred with the victims, requesting the Appeals Chamber to reverse its decision of 14 August 2009, ordering continued detention.⁵ The Defence's responses did not share the Prosecution's nor the victims' position.⁶

APRODEC asbl requests leave to file *amicus curiae* on Bemba's Interim Release

On 14 September 2009, the Association for the Promotion of Democracy and Development of the Democratic Republic of Congo (APRODEC asbl) requested leave to submit an *amicus curiae* brief on provisional release of the accused.⁷

Prosecution's request to appeal Confirmation of Charges Decision rejected

Background: On 15 June 2009, Pre-Trial Chamber II confirmed charges against Mr. Bemba, including murder as a crime against humanity and as a war crime; rape, as a crime against humanity and a war crime; and pillaging as a war crime.⁸ The Chamber, however, did not confirm charges of *torture* as a crime against humanity nor as a war crime neither did it confirm *outrages upon personal dignity* as a war crime on the basis that such charges were cumulative and that the Prosecution had failed to properly inform the Defence of all material facts pertaining to those charges. On 22 June 2009, the Prosecution sought leave to appeal the decision.⁹ OPCV and the Defence submitted their observations to the Prosecution's request for leave, as did the Women's Initiative for Gender Justice, acting as *amicus curiae*.

On 18 September 2009, the Chamber rejected the Prosecutor's request for leave to appeal.¹⁰ The Chamber also rejected OPCV's and the *amicus curiae*'s arguments concerning the interpretation of elements of the relevant crimes and the assessment of the evidence, stating that both fall outside the scope of an appeal under Article 82(1)(d) of the Statute. The Chamber affirmed that all facts will be presented to the Trial Chamber, which will be able to decide on the these, as well as to re-characterise facts under Regulation 55 of the Regulations of the Court. The Chamber also pointed out that it is the duty of the Prosecution to furnish all facts underpinning the charges, and that in this instance Mr. Bemba was not in a position to identify the facts underpinning the act of torture to properly prepare his defence.

Defence responds to Women's Initiatives for Gender Justice (WIGJ) *amicus curiae* on cumulative charging

On 14 September 2009, the Defence responded¹¹ to the WIGJ *amicus curiae*¹² on cumulative charging, largely repeating its arguments in response to the Prosecution. It denied that the decision perpetuates discrimination against women and children, and argued that the Accused's rights are more important in the criminal process.

Trial Chamber III constituted

On 18 September 2009, the Presidency constituted Trial Chamber III to try the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.¹³ The appointed judges were: Judge Elizabeth Odio Benito, Judge Adrian Fulford and Judge Joyce Aluoch. Judge Fulford was later declared the presiding judge of Trial Chamber III.

Legal representation of unrepresented applicants

On 9 October 2009, pursuant to a request from Trial Chamber III, OPCV filed observations on legal representation of unrepresented applicants, from the filing of their applications with the Registry up until a decision on their status.¹⁴

¹ ICC-01/05-01/08-475, <http://www.icc-cpi.int/iccdocs/doc/doc727230.pdf>

² ICC-01/05-01/08-476, <http://www.icc-cpi.int/iccdocs/doc/doc728049.pdf>

³ Appeals Chamber decision of 3 September 2009, ICC-01/05-01/08-500, not yet available online, and reasons for such decision of 20 October 2009, ICC-01/05-01/08-566, <http://www.icc-cpi.int/iccdocs/doc/doc766572.pdf>

⁴ ICC-01/05-01/08-492, <http://www.icc-cpi.int/iccdocs/doc/doc734819.pdf>

⁵ ICC-01/05-01/08-519, not yet available online.

⁶ ICC-01/05-01/08-521-tENG, not yet available online.

⁷ ICC-01/05-01/08-522-Corr, dated 16 September 2009: not yet available online

⁸ ICC-01/05-01/08-424, <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>

⁹ ICC-01/05-01/08-427, <http://www.icc-cpi.int/iccdocs/doc/doc701573.pdf>

¹⁰ ICC-01/05-01/08-532, <http://www.icc-cpi.int/iccdocs/doc/doc745391.pdf>

¹¹ ICC-01/05-01/08-518, 14 September 2009: not yet available online

¹² ICC-01/05-01/08-466, dated 31 July 2009: <http://www.icc-cpi.int/iccdocs/doc/doc719028.pdf>

¹³ ICC-01/05-01/08-534, <http://www.icc-cpi.int/iccdocs/doc/doc745448.pdf>, and ICC-01/05-01/08-536, not yet available online.

OPCV recalled the Court's jurisprudence and stated that the Office has been appointed as legal representative of applicants pending a decision on their status or their appointment of another legal representative.

OPCV Requests Trial Chamber to Uphold Victims' existing procedural status at Trial

OPCV requested Trial Chamber III to uphold victims' existing procedural status at trial, invoking legal certainty for victims, as applied by Trial Chamber II in the Katanga case.¹⁵ Should the OPCV's request be granted, victims recognized at pre-trial would automatically be authorised to participate at Trial without another review their applications.

DRC Situation

Lubanga case

Prosecution and Defence appeal Decision notifying possible re-characterisation of facts to include sexual slavery and inhuman treatment

Background: On 14 July 2009, Trial Chamber I notified the parties and participants that the legal characterisation of the facts of the case may be subject to change in accordance with Regulation 55 (2) of the Regulations of the Court.¹⁶

The Prosecutor¹⁷ and the Defence¹⁸ both appealed the Trial Chamber's notification. The Prosecutor also filed an urgent request for suspensive effect of the trial. In his appeal brief, the Prosecutor argued that there was an error in law as to the interpretation of Regulation 55 and the modification of charges by the majority in Trial Chamber I. The main argument was based on negotiating history and scholarly writings, which, according to the Prosecutor, confirm that a Trial Chamber is bound by the facts pleaded by the Prosecution and confirmed by the Pre-Trial Chamber, as per articles 61(3) and 61(9) of the Statute.

The Defence also argued that the Trial Chamber erroneously interpreted Regulation 55 in construing 55(1) separately from the guarantees for the fundamental rights of the accused set out in sub paragraphs (2) and (3). The Defence maintained that the new characterisation of facts would constitute a substantial modification of the charges increasing the gravity of these, rather than simply a re-characterising the facts. Further, the Defence also contended that Regulation 55 should be invoked to correct an error in the legal characterisation of an act made on the confirmation of charges by the Pre-Trial Chamber.

On 22 September 2009, the Prosecution responded to the Defence Appeal, concurring in general terms with the Defence arguments.¹⁹

Victims participate in the Appeal against notification of possible recharacterisation of facts

On 20 October 2009 the Appeals Chamber granted the OPCV the right to participate in the appeal.²⁰ In their observations²¹ they asked the Chamber to declare the Prosecutor's and Defence's appeals unfounded, arguing that there is no limitation on the re-characterisation of the facts by the Chamber. They argued that, as the same facts can constitute a breach of several interdictions under the Rome Statute, they can have an additional characterisations.

On 28 October 2009 the OTP filed their observations on the victims' submission,²² disagreeing as to whether the facts and circumstances as presented in its document containing the charges support the proposed re-characterisation.

In its response, the Defence claimed that the victim's representatives were wrong because, pursuant to the Regulation 55, the charges defined by the Pre-Trial Chamber are exclusively outlined by the decision on the confirmation of charges and not by the facts alleged by the witnesses during trial. The Defence argued that the re-characterisation of the facts shouldn't exceed the facts and circumstances described in the charges.²³

¹⁴ ICC-01/05-01/08-547, not yet available online.

¹⁵ ICC-01/05-01/08-563, not yet available online.

¹⁶ ICC-01/04-01/06-2049, <http://www.icc-cpi.int/iccdocs/doc/doc710538.pdf>

¹⁷ ICC-01/04-01/06-2120, "Document in Support of Appeal against the "Decision giving notice to the parties and participants that the legal characterisation 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", dated 14 September 2009, not yet available online.

¹⁸ Dated 10 September 2009, ICC-01/04-01/06-2112, not yet available online.

¹⁹ ICC-01/04-01/06-2136, not yet available online.

²⁰ ICC-01/04-01/06-2168, <http://www.icc-cpi.int/iccdocs/doc/doc766542.pdf>

²¹ OPCV Observations filed on 23 October 2009, ICC-01/04-01/06-2173: not yet available online.

²² ICC-01/04-01/06-2178, not yet available online.

²³ Defence Response filed on 28 October 2009, ICC-01/04-01/06-2180: not yet available online.

Victims' due to testify request continuation of protective measures

On 18 September 2009, the legal representatives of victims a/0225/06, a/229/06 and a/270/07, who are due to testify when the trial resumes, have requested for continued protective measures and to ensure that the transcripts of their testimonies remain redacted.²⁴ The victims are willing for their anonymity to be lifted as regards the Defence, so long as measures of protection by the Victims and Witnesses Unit are put in place.

Defence responds to VWU Observations on Inconsistent Disclosure Regime between Cases

On 17 September 2009, the Defence responded to the Observations of the Victims and Witnesses Unit²⁵ on the security of witness 44 and the inconsistent disclosure regime between the Lubanga and Katanga cases.²⁶ The Defence asserts that the redaction of documents before their disclosure to the Defence is an exceptional measure that can only be ordered by the Chamber when justified by the circumstances. Accordingly, non-disclosure of the identity of witnesses ordered by a Trial Chamber in one case is not sufficient justification for an identical non-disclosure in another case.

Trial Chamber I adjourns the Lubanga Trial

On 2 October 2009 Trial Chamber I adjourned the Lubanga Trial pending the Appeals Chamber decision on the legal re-characterisation of the facts.²⁷

Chamber rules on questioning of victims participants by their legal representatives

On 16 September 2009, Trial Chamber I established parameters for the questioning of victims by their legal representative.²⁸ The Chamber highlighted that the victims fall into a separate and distinct category from the parties. It was noted that the victims have the right to present their views and concerns (for example as reflected in Rule 91(3) of the Rules of the Court) as long as fair trial and the rights of the accused are preserved. The Chamber concluded that the legal representatives of the victims should conduct questioning in a neutral form, unless otherwise guided or allowed by the bench.

Trial Chamber denies victims' application on the illegal exploitation of natural resources report

Background: On 18 June 2009, during the questioning of the expert witness Mr. Roberto Garreton, the legal representative of certain victims referred to the Final Report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the DRC.²⁹ The legal representative further submitted that said report should be admitted as evidence, to which the Defence opposed.

On 22 September 2009, Trial Chamber I decided that, even though the victims have the right to introduce evidence during trial, the report was of insufficient relevance and the prejudicial effect it would cause to the accused outweighed its probative value.³⁰ Trial Chamber I pointed out that the Defence would be unable to challenge the contents of the report since its authors would not be called to give evidence in the Court.

Katanga and Ngudjolo case

Appeals Chamber rejects Katanga's challenge of admissibility of the case

On 25 September 2009, the Appeals Chamber³¹ rejected Mr. Katanga's appeal against the Chambers' decision,³² confirming the admissibility of the case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

Common legal representative of victims' maintains need for protective measures in pre-trial phase

²⁴ ICC-01/04-01/06-2132-Conf, dated 18 September 2009: not yet available online

²⁵ ICC-01/04-01/06-2099-Conf, dated 31 August 2009: not yet available online

²⁶ ICC-01/04-01/06-2130, dated 17 September 2009: not yet available online

²⁷ ICC-01/04-01/06-2143, <http://www.icc-cpi.int/iccdocs/doc/doc749476.pdf>

²⁸ ICC-01/04-01/06-2127, <http://www.icc-cpi.int/iccdocs/doc/doc743718.pdf>

²⁹ ICC-01/04-01/06-T-194-ENG, <http://www.icc-cpi.int/iccdocs/doc/doc700840.pdf>

³⁰ ICC-01/04-01/06-2135, <http://www.icc-cpi.int/iccdocs/doc/doc745752.pdf>

³¹ ICC-01/04-01/07-1497, <http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf>

³² ICC-01/04-01/07-1234, <http://www.icc-cpi.int/iccdocs/doc/doc701552.pdf>, and ICC-01/04-01/07-1279, <http://www.icc-cpi.int/iccdocs/doc/doc703949.pdf>

On 23 September 2009, the common legal representative of the principal group of victims responded to the Defence's requests for disclosure of the identity of victims in the pre-trial phase.³³ The Defence relied on Pre-Trial Chamber I's decision of 10 June 2008, in which many victims were ordered to reveal their identity to the Defence.³⁴

The common legal representative highlighted that the Pre-Trial Chamber's decision is not binding on the Trial Chamber, and set 30 October 2009 as the date by when she would respond more fully to the Defence request. In the interval, a mission to the DRC was planned for October 2009 for the victims' legal representatives to consult with the victims on their individual concerns. This will enable the legal representative to assess the protection needs of each victim. Moreover, some victims are also Prosecution witnesses and may already be benefiting from protective measures.

Trial Chamber clarifies decision on participation of 345 victims in the Katanga and Ngudjolo case

On 23 September 2009, Trial Chamber II clarified its decision of 31 July 2009³⁵ granted victim status to 287 of 345 applicants. The majority of the Trial Chamber denied victim status to persons applying on behalf of deceased persons, however this was contested by Judge Hans Peter-Kaul in a dissenting opinion. The dissenting judge considered that the relatives of the deceased should be able to represent the interests of the deceased as well as their own in both the trial and reparation phases. The judge noted his decision to this effect rendered in the capacity of Single Judge of Pre-Trial Chamber III in the Bemba case on 12 December 2008.³⁶

Judge Hans-Peter Kaul replaced by Judge Christine Van den Wyngaert

On 30 September 2009 Judge Hans-Peter Kaul was replaced by Judge Christine Van den Wyngaert by means of a decision of the Presidency due to Judge Kaul's heavy work load as Second Vice President of the Court.³⁷

Uganda Situation

Kony case

Appeals Chamber confirms admissibility of the case

On 16 September 2009, the Appeals Chamber rejected the Public Counsel for the Defence (OPCD) appeal against the Decision confirming the admissibility of the case *The Prosecutor v. Joseph Kony, Vincent Otti, et al.*³⁸ Public Counsel for the Defence had appealed the decision on 16 March, requesting that Pre-Trial Chamber II reconsider admissibility, this time allowing the defendant to be represented in the proceedings.³⁹ In its dismissal, the Appeals recalled the nature of Public Counsel for the Defence's mandate - a counsel appointed to represent more generally the interests of the defence, but who cannot speak on behalf of individual suspects as a counsel-client relationship does not exist.

Sudan Situation

Abu Garda case

44 out of 52 Victims Allowed Participating in the Pre-Trial Phase

On 16 September 2009, Judge Sanji Mmasenono Monageng asked the parties to submit observations on the applications for participation of victims.⁴⁰ The Defence submitted that it had no *prima facie* objections to AMIS peacekeeping personnel present during the attack on MGS Haskanita and family members of AMIS peacekeeping personnel killed or injured during the attack participating as victims.⁴¹ However, the Defence argued that the villagers from the village of Haskanita did not relate to the offences, as their applications referred to an attack on Haskanita village, as oppose to the Military Group Site.

³³ ICC-01/04-01/07-1490, dated 23 September 2009: not yet available online

³⁴ ICC-01/04-01/07-579, dated 10 June 2008: <http://www.icc-cpi.int/iccdocs/doc/doc506296.pdf>

³⁵ ICC-01/04-01/07-1347, dated 31 July 2009: <http://www.icc-cpi.int/iccdocs/doc/doc721143.PDF>

³⁶ ICC-01/05-01/08-320, dated 12 December 2008: <http://www.icc-cpi.int/iccdocs/doc/doc610092.pdf>

³⁷ ICC-01/04-01/07-1503, <http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf>

³⁸ Appeals Decision, dated 16 September 2009, ICC-02/04-01/05-408, <http://www.icc-cpi.int/iccdocs/doc/doc743635.pdf>. The impugned decision confirming admissibility is dated 10 March 2009, ICC-02/04-01/05-377, <http://www.icc-cpi.int/iccdocs/doc/doc641259.pdf>

³⁹ ICC-02/04-01/05-379, <http://www.icc-cpi.int/iccdocs/doc/doc644889.pdf>

⁴⁰ ICC-02/05-02/09-106, <http://www.icc-cpi.int/iccdocs/doc/doc743707.pdf>

⁴¹ Defence submission dated 30 September 2009, ICC-02/05-02/09-124, not yet available online.

On 2 October 2009 the legal representative of the victims' applicants a/0581/09 - a/0586/09 filed responded to the Defence's submission, stating that the attack on the AMIS base directly resulted in the victims applicants having to flee from their homes in Haskanita, and that it directly led to their victimisation.⁴² Single Judge Monageng dismissed their response as they did not yet have legal standing.⁴³

On 9 October 2009 the single Judge recognised 44 of 52 applicants as victims, for the purpose of the confirmation of charges hearing.⁴⁴ The legal representative of the rejected applicants immediately requested that the Single Judge consider further information.⁴⁵ However, the request and additional information were rejected on the basis that the deadline to submit supplementary information before the confirmation hearing had already expired.⁴⁶ The Single Judge highlighted, that her decision did not prejudice submissions later in the proceedings in accordance with Rule 89(2).

Pre-Trial Chamber I issues decision on modalities of victims participation

On 6 October 2009, Pre-Trial Chamber I decided on the modalities of victims' participation in the Pre-Trial stage.⁴⁷ Victims shall participate fully in the confirmation of charges hearing, but should bear in mind the limited scope of the hearing and should respect the rights of the suspect. Victims' representatives must seek leave to question witnesses.

On 16 October 2009 victims' representatives requested access to confidential documents and statements relating to witnesses.⁴⁸ Presiding Judge, Sylvia Steiner, ordered the parties to file observations to the victims' representatives' request.⁴⁹ The Prosecution opposed the request, claiming that it was premature, given that there was no indication that the legal representatives would be entitled to examine the witnesses, and that access to confidential documents should only be granted in highly exceptional situations.⁵⁰ The Defence also opposed to the request, arguing that if granted it would undermine protective measures to the witnesses.⁵¹

Confirmation of charges hearing takes place

The confirmation of charges hearing started on the 19th of October and finished on the 30th of October. The Prosecutor presented three witnesses, the Defence presented one witness in closed session. Mr. Abu Garda was present during the hearing and made oral submissions to the bench. Four Legal Representatives, representing 74 victims participated and questioned witnesses.

Al-Bashir case

Amici Curiae defend decision not to include genocide charges in the warrant of arrest

Background: On 4 March 2009, Pre-Trial Chamber I decided in favour of the Prosecutor's request to issue an arrest warrant against Mr. Al-Bashir, including charges of war crimes and crimes against humanity,⁵² while disallowing genocide charges. The majority of the Chamber found there were no reasonable grounds to believe the suspect had committed genocide. On 10 March 2009 the Prosecution sought leave to appeal the decision on the genocide counts.⁵³

On 18 September 2009, the Appeals Chamber granted the Sudan Workers Trade Unions Federation and the Sudan International Defence Group leave to submit observations as *amici curiae* on the Prosecution's appeal and on the applicable test under Article 58 of the Statute on whether there are reasonable grounds to believe that the suspect has committed genocide.⁵⁴ The *amici curiae* concurred with the majority's decision not to include genocide in Mr. Bashir's arrest warrant.⁵⁵

⁴² ICC-02/05-02/09-130, not yet available online.

⁴³ Single judge's dismissal, dated 7 October 2009, ICC-02/05-02/09-140, <http://www.icc-cpi.int/iccdocs/doc/doc751956.pdf>

⁴⁴ ICC-02/05-02/09-147-Red, <http://www.icc-cpi.int/iccdocs/doc/doc758050.pdf>

⁴⁵ ICC-02/05-02/09-154, not yet available online.

⁴⁶ ICC-02/05-02/09-169, <http://www.icc-cpi.int/iccdocs/doc/doc760073.pdf>

⁴⁷ ICC-02/05-02/09-136, <http://www.icc-cpi.int/iccdocs/doc/doc751012.pdf>

⁴⁸ ICC-02/05-02/09-176 and ICC-02/05-02/09-177, not yet available online.

⁴⁹ ICC-02/05-02/09-181, <http://www.icc-cpi.int/iccdocs/doc/doc761006.pdf>

⁵⁰ ICC-02/05-02/09-193, not yet available online.

⁵¹ ICC-02/05-02/09-192, not yet available online.

⁵² ICC-02/05-01/09-3, <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf>

⁵³ ICC-02/05-01/09-12, <http://www.icc-cpi.int/iccdocs/doc/doc644001.pdf>

⁵⁴ ICC-02/05-01/09-43, <http://www.icc-cpi.int/iccdocs/doc/doc745165.pdf>

⁵⁵ ICC-02/05-01/09-44, not yet available online.

Prosecution does not oppose victims' participation. Defence opposes it on several grounds.

On 1 September 2009, Single Judge Sanji Mmasenono Monageng's requested the parties to submit observations on 4 applications for victim participation in the proceedings against Mr. Al Bashir.⁵⁶

- The Prosecution submitted its observations on 29 September 2009,⁵⁷ concluding that *prima facie* all four applicants met the requirements for victims' participation.
- The Defence observations submitted that victims do not have a general right to participate in pre-trial proceedings where their personal interests are not affected, relying on two decisions of the Appeals Chamber of 19 December 2008⁵⁸ and 2 February 2009. It argued the events stated by the applicants do not correspond to the time and place of those alleged in the arrest warrant, and therefore they are not entitled to victim status. In addition, the Defence queries the adequacy of the means of proof of identity submitted by the victims, as well as to the use of an interpreter to fill in the application form. Finally, the Defence requested disclosure of non-redacted versions of the victims' applications, a report compiled by the Registrar, and any other documents necessary to protect the rights of the accused in the investigation of the situation.⁵⁹

Appeals Chamber Refers Registrar's Report on Victims Participation to Pre-Trial Chamber

On 20 August 2009, the Registry submitted a report⁶⁰ to the Appeals Chamber informing that applicants a/0443/09 to a/0450/09 sought to participate in the Prosecutor's appeal against the exclusion of genocide charges. The Registrar sought guidance as to the circumstances in which she should transmit victims' applications directly to the Appeals Chamber in order for it to determine victim status.

The Appeals Chamber found that the Pre-Trial or Trial Chambers were in a better position to assess victims' applications, especially due to their familiarity with the facts underlying the case. In this respect, the Appeals Chamber instructed the Registrar to file the applications, as well as her report, for determination before Pre-Trial Chamber I.⁶¹

⁵⁶ ICC-02/05-01/09-38, <http://www.icc-cpi.int/iccdocs/doc/doc745165.pdf>

⁵⁷ ICC-02/05-01/09-46, not yet available online.

⁵⁸ ICC-01/04-556, dated 19 December 2008: <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>

⁵⁹ ICC-02/05-01/09-45, dated 28 September 2009: not yet available online

⁶⁰ ICC-02/05-01/09-32-Conf-Exp.

⁶¹ Appeals Chamber decision of 23 October 2009, ICC-02/05-01/09-48, <http://www.icc-cpi.int/iccdocs/doc/doc767617.pdf>