



ICC Victims' Rights Legal Update 8 September 2009

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DRC Situation

Lubanga case

- **OTP and Defence granted leave to appeal legal re-characterisation of facts decision; victims' representatives contest the appeal**

[Background] On 14 July 2009, TC I informed 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 ("the Notification").¹ On 11 and 12 August 2009, the Defence and the Prosecution requested leave to appeal the Decision.² The Defence asserted that TC I was wrong to consider that the Observations of the victims' representatives could lead to launching the Regulation 55 process. In turn, the Prosecution argued that the Decision raised the issue of whether Regulation 55 (2) and (3) create a separate regime from Regulation 55 (1), and whether the Chamber may use those provisions to change the legal characterisation of the charges or add new charges based on facts and circumstances that are not contained in the charging document but are established at trial.

On 17 August 2009, victims' legal representatives issued a joint response asserting that the Notification is not subject to appeal and asked the Chamber to declare the requests inadmissible.³ They argued that the

¹ ICC-01/04-01/06-2049: <http://www.icc-cpi.int/iccdocs/doc/doc710538.pdf>

² ICC-01/04-01/06-2073, dated 11 August 2009: <http://www.icc-cpi.int/iccdocs/doc/doc724108.pdf>; ICC-01/04-01/06-2074, dated 12 August 2009: <http://www.icc-cpi.int/iccdocs/doc/doc725647.pdf>

³ ICC-01/04-01/06-2079: <http://www.icc-cpi.int/iccdocs/doc/doc728421.pdf>

notification simply informs the parties and participants of the opening of the mechanism under Regulation 55 (2), without prejudice to the eventual legal re-characterisation of the facts. Alternatively, the victims' representatives submitted that the Notification did not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings, and that an immediate resolution by the Appeals Chamber would not materially advance the proceedings, making the request to appeal inadmissible.

TC I, on 3 September 2009, granted OTP and the Defence leave to appeal on two issues: 1) whether the majority erred in their interpretation of Regulation 55; and 2) whether under Regulation 55 (2) and (3) a Trial Chamber may change the legal characterisation of the charges based on facts and circumstances that, although not contained in the charges, build a procedural unity with the latter and are established by the evidence at trial.

- **Chamber issues clarification and guidelines on legal re-characterisation of the facts**

On 27 August 2009 TC I issued clarification and guidelines in relation to its decision of 14 July 2009 that the legal characterisation of the facts may be subject to change.⁴ According to TC I, the participants may consider the following new legal characterisation of facts in their filings and submissions:

- (a) Article 7(l) (g) ("sexual slavery" as a crime against humanity);
- (b) Article 8(2) (b) (xxii) ("sexual slavery" as a war crime);
- (c) 8(2)(e)(vi) ("sexual slavery" as a war crime);
- (d) 8(2)(a)(ii) ("inhuman treatment" as a war crime); and
- (e) 8(2)(c)(i) ("cruel treatment" as a war crime).

- **Chamber denies Defence's appeal seeking to prevent participating victims from testifying**

On 26 June 2009, the Chamber granted 3 victims' the opportunity to give evidence and allowed their statements and other summaries to be filed confidentially.⁵ On 6 July 2009, the Defence sought leave to appeal, claiming that the decision would contravene the defendant's right to be informed of the nature, cause and content of the charges in detail, as well as the right to be provided with the names and the statements of the witnesses called to testify against him.⁶ It was also claimed that the defendant would not have proper time to prepare his defence. The legal representative of the victims filed observations on the Defence's leave to appeal.⁷

On 8 September 2009, the TC rejected the leave to appeal.⁸

- **Lubanga asks to lift anonymity of 3 victims who will testify**

On 18 August 2009, the Lubanga Defence submitted an urgent request to Trial Chamber I to lift the anonymity of victims a/0225/06, a/0229/06 and a/0270/07 and secure the disclosure of a non-redacted version of their witness statements.⁹ The victims concerned have consented to the lifting of their anonymity vis-à-vis the Defence so long as operational measures of protection by the Victims and Witnesses Unit are put in place.

- **Ngudjolo responds to Prosecutor's request to vary protective measures in the Lubanga case**

[Background] The issue of varying protective measures is ongoing before both Trial Chambers I and II. Regulation 42 (1) of the Regulations of the Court provides that protective measures ordered in respect of a victim or witness in any proceedings before the Court shall also be effective in any other proceedings before the Court. Accordingly, protective measures ordered by TC I in *Lubanga* may bind TC II in the *Katanga and Ngudjolo* case. This is contested by the Defence which asserts that, for the purposes of the *Katanga and Ngudjolo* case, TC II is not bound by the measures of redaction ordered by Trial Chamber I in the *Lubanga* case. Rather, protective measures can be adapted in light of the specific circumstances of each case.

On 17 August 2009, the Ngudjolo Defence submitted Observations on the Prosecutor's request to TC I to vary protective measures first ordered in relation to the *Lubanga* case,¹⁰ and to authorise the modification of redactions to the witness statements and the addition of new redactions.¹¹ As the issue has already been presented to Trial Chamber II, the Defence asserts that OTP is seeking to obtain a different decision from

⁴ ICC-01/04-01/06-2093: <http://www.icc-cpi.int/iccdocs/doc/doc733492.pdf>

⁵ ICC-01/04-01/06-2032, dated 9 July 2009: <http://www.icc-cpi.int/iccdocs/doc/doc707345.pdf>

⁶ ICC-01/04-01/06-2092: <http://www.icc-cpi.int/iccdocs/doc/doc733158.pdf>

⁷ ICC-01/04-01/06-2036-Conf-Corr, dated 9 July 2009, not yet available online.

⁸ ICC-01/04-01/06-2109, dated 8 September 2009, not yet available online.

⁹ ICC-01/04-01/06-2084: <http://www.icc-cpi.int/iccdocs/doc/doc729441.pdf>

¹⁰ ICC-01/04-01/06-2047, dated 14 July 2009: <http://www.icc-cpi.int/iccdocs/doc/doc710440.pdf>

¹¹ ICC-01/04-01/06-2078, dated 17 August 2009: <http://www.icc-cpi.int/iccdocs/doc/doc728406.pdf>

Trial Chamber I and urged the Chamber to deny the Prosecutor's request to suspend the authorisation of protective measures given by Trial Chamber II.

Katanga and Ngudjolo case

- **OTP, OPCV and victims' representatives file observations on the admissibility of the case**

[Background]: On 10 February 2009, Katanga's defence filed a motion challenging the admissibility of the case pursuant to Articles 19(2) (a) and 17(1) of the Statute.¹² The Defence questioned the meaning of "unwilling" and "unable" and that the DRC was able to prosecute Katanga. On 12 June 2009 TC II rejected the motion and found the case admissible. The Chamber held that the challenge was inadmissible because 1) the arrest warrant was by no way flawed and 2) the DRC is unwilling to prosecute the case.¹³ The Defence has appealed the decision.¹⁴

The OTP, victims' legal representatives, OPCV and the authorities of the DRC responded to the Defence Appeal Brief.¹⁵ All generally agreed that the Chamber correctly found the case admissible.

- **Registry appoints Fidel Nsita Luvengika as acting common legal representative for victims**

The Registry held a number of consultations with victims' legal representatives in Brussels and Kinshasa on the appointment of a common legal representative for the larger group of victims.¹⁶ As existing legal representatives of the victims failed to agree on a single common legal representative, the Registrar appointed Fidel Nsita Luvengika on a provisional basis¹⁷ requesting, legal representatives to take all possible steps to consult their clients within two weeks, with the final common legal representative to be appointed within six weeks. The common legal representative is to be given legal and administrative support both at the seat of the Court and in the field.

The Registry also considered legal representation for the group of former child soldiers and found that limiting the legal aid budget to one counsel per team and a case manager remained appropriate given that the team also benefits from the assistance of OPCV. However, it did not oppose the practice of the two counsels currently representing this small group, to rotate representation according to their presence in The Hague.

- **Trial Chamber II postpones start of Katanga trial**

TC II postponed the opening of the *Katanga and Ngudjolo* trial from 24 September to 24 November 2009,¹⁸ given numerous contentious pending issues:

- Disclosure and presentation of evidence
- Alleged illegality of the arrest and detention of Katanga in the Democratic Republic of Congo, as raised by the Defence on 30 June 2009¹⁹
- Measures of protection for witnesses and discrepancies between protection measures granted in the *Lubanga* case and those proposed by OTP in the *Katanga and Ngudjolo* case.

Trial Chamber II will convene a status conference on 30 September 2009.

Central African Republic Situation Bemba case

- **Single Judge rejects amicus request on cumulative charging**

¹² ICC-01/04-01/07-949, public redacted version, 11 March 2009: <http://www.icc-cpi.int/iccdocs/doc/doc642392.pdf>

¹³ ICC-01/04-01/07-1213-tENG, dated 16 June 2009: <http://www.icc-cpi.int/iccdocs/doc/doc711214.pdf>

¹⁴ ICC-01/04-01/07-1279, dated 8 July 2009: <http://www.icc-cpi.int/iccdocs/doc/doc703949.pdf>

¹⁵ OTP, ICC-01/04-01/07-1349, dated 31 July 2009: <http://www.icc-cpi.int/iccdocs/doc/doc719026.pdf>; Victims' Representatives: ICC-01/04-01/07-1318 OA8, dated 17 July 2009: <http://www.icc-cpi.int/iccdocs/doc/doc713205.pdf>; ICC-01/04-01/07-1342-Teng OA8, dated 29 July 2009: <http://www.icc-cpi.int/iccdocs/doc/doc730465.pdf>; ICC-01/05-01/07-1354-tENG, dated 8 August 2009: <http://www.icc-cpi.int/iccdocs/doc/doc732366.pdf>; OPCV, ICC-01/04-01/07-1369, dated 13 August 2009: <http://www.icc-cpi.int/iccdocs/doc/doc727216.PDF>; DRC, ICC-01/04-01/07-1449-Anx, dated 1 September 2009, not yet available online.

¹⁶ ICC-01/04-01/07-1373-Conf-Exp, Report of the Registry on the organisation of the common legal representation of victims, dated 14 August 2009, not yet publicly available. The report follows Trial Chamber II's decision of 2 July 2009 to appoint 2 legal teams for the victims in the Katanga and Ngudjolo case; ICC-01/04-01/07-1328: <http://www.icc-cpi.int/iccdocs/doc/doc715762.pdf>

¹⁷ ICC-01/04-01/07-1380, 14 August 2009: <http://www.icc-cpi.int/iccdocs/doc/doc728109.pdf>

¹⁸ ICC-01/04-01/07-1442, dated 31 August 2009: <http://www.icc-cpi.int/iccdocs/doc/doc734512.pdf>

¹⁹ ICC-01/04-01/07-1263, dated 2 July 2009: <http://www.icc-cpi.int/iccdocs/doc/doc705264.pdf>

[Background] On 15 June 2009, Pre Trial Chamber II confirmed the charges against Bemba but declined to confirm charges of torture and outrages upon personal dignity.²⁰ The Prosecutor has asked for leave to appeal the decision.²¹

On 28 August 2009, a group of experts, women's human rights advocates and human rights organisations²² filed an application for leave to submit an amicus in the Bemba case on the issue of cumulative charging for rape, torture and outrages upon personal dignity.²³ They submit that cumulative charging is a widely accepted and established practice in national and international courts and does not contravene the right of the accused to a fair trial. They assert that the offences of rape and torture require clearly distinct elements, justifying a cumulative charging approach. In addition, the *amici* argue that the negotiating history of the Rome Statute and Elements of Crimes promotes cumulative charging for crimes of sexual violence. Moreover, the *amici* stress that rape has long been considered under the concept of torture in international criminal, human rights, humanitarian, and customary international law. Given that sexual and gender-based violence disproportionately affects women, disallowing cumulative charging also constitutes discrimination on the basis of gender. Finally, the *amici* warn that disallowing cumulative charging risks the trivialisation of rape and other crimes of sexual violence.

Single Judge Ekaterina Trendafilova rejected the application on 4 September 2009 on the basis of ensuring the expeditiousness of the proceedings.²⁴

- **OTP appeals decision on Bemba's interim release; victims' are granted leave to participate in support for appeal**

[Background]: On 14 August 2009, Single Judge Trendafilova granted the conditional interim release of Jean-Pierre Bemba Gombo.²⁵ The decision stated that the continued detention of Mr. Bemba did not appear necessary to ensure his appearance at trial, as well as that deprivation of liberty is an exception, and not a rule.

On the same day, the Prosecution appealed Bemba's release²⁶ asserting that the appeal had suspensive effect.²⁷ OTP argues that the judge was wrong to find that there had been a substantial change of circumstances since the Decision denying interim release of 14 April 2009,²⁸ and that the Single Judge should not have ordered conditional release without considering the conditions of release and specifying a State willing and able to enforce them.

Victims' representatives, who were granted leave to participate in the appeal,²⁹ support that the appeal should have suspensive effect, and lend their support to the Prosecutor's grounds of appeal.³⁰ They emphasise the absence of a change of circumstances and add that in view of the five charges confirmed against the accused and the exercise of jurisdiction by the Court in the most serious crimes, the allegations have extreme gravity and provisional release is not justifiable. Further, the victims' representatives note that Rule 119 (3) of the Rules of Procedure and Evidence requires the victims to be given a chance to participate in the decision on release and thus, in conjunction with the obligation to protect victims under Article 68 (1) of the Rome Statute, the Single Judge should have sought the Observations of any victims that have communicated with the Court in the case and could be at risk as a result of the release of the accused or the conditions thereof.

On 3 September 2009, the Appeals Chamber granted the Prosecutor's request to suspend Bemba's interim release pending the decision on appeal.³¹

²⁰ ICC-01/05-01/08-424: <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>. See Legal Updates for June and July 2009 for further details.

²¹ ICC-01/05-01/08-427, dated 22 June 2009: <http://www.icc-cpi.int/iccdocs/doc/doc701573.pdf>

²² The group includes current and former members of the United Nations Committee Against Torture, United Nations Special Rapporteurs on torture and other cruel, inhuman and degrading treatment, the United Nations Special Rapporteur on violence against women and the Special Rapporteur on women's rights for the African Commission on Human and Peoples' Rights. The Executive Director of the Women's Caucus for Gender Justice, the Center for Constitutional Rights, the Coalition for Women's Human Rights in Conflict Situations, the Feinstein International Center, Greater Boston Legal Services Immigration Unit, the International Women's Human Rights Law Clinic, the Jacob Blaustein Institute for the Advancement of Human Rights, Medica Mondiale, REDRESS, Rights and Democracy and Women's Rights International are also joining the amici request.

²³ ICC-01/05-01/08-488: <http://www.icc-cpi.int/iccdocs/doc/doc734332.pdf>

²⁴ ICC-01/05-01/08-504, dated 4 September 2009, not yet available online.

²⁵ ICC-01/05-01/08-475: <http://www2.icc-cpi.int/iccdocs/doc/doc727230.pdf>

²⁶ ICC-01/05-01/08-485, dated 24 August 2008: <http://www.icc-cpi.int/iccdocs/doc/doc731615.pdf>; Pursuant to Rule 154(1), an appeal against a decision on interim release does not require leave of the Court.

²⁷ ICC-01/05-01/08-485, dated 24 August 2008: <http://www.icc-cpi.int/iccdocs/doc/doc731615.pdf>

²⁸ ICC-01/05-01/08-403: <http://www.icc-cpi.int/iccdocs/doc/doc665482.pdf>

²⁹ ICC-01/05-01/08-499: <http://www.icc-cpi.int/iccdocs/doc/doc736575.pdf>

³⁰ ICC-01/05-01/08-492, dated 31 August 2009: <http://www.icc-cpi.int/iccdocs/doc/doc734819.pdf>

³¹ ICC-01/05-01/08-499: <http://www.icc-cpi.int/iccdocs/doc/doc736575.pdf>

Sudan Situation

- **Judge Sanji Mmasenono Monageng appointed as Single Judge for victims' applications in all three cases**

On 19 August 2009, Pre-Trial Chamber I appointed Judge Sanji Mmasenono Monageng (Botswana) as Single Judge responsible for all issues relating to victims' applications to participate in the proceedings in the confirmation of charges against Abu Garda,³² Harun and Kushayb,³³ and Bashir.³⁴ 11 September 2009 was set as the deadline for application for the victims wishing to participate in the confirmation of charges proceedings.³⁵

Bashir case

- **Legal representatives of the victims request Judge Monageng to expedite decision on victims' participation in the case**

On 13 March 2009, OTP appealed Pre-Trial Chamber I's decision of 4 March 2009 not to issue a warrant for the arrest of Mr. Bashir for the crime of genocide.³⁶ On 27 August 2009, the Victims' Legal Representative requested the Single Judge to expedite her consideration of victims' applications to participate in the proceedings in order to enable participation in the appeal.³⁷ On 1 September 2009, the Single Judge ordered the OTP and the Defence to submit their observations on the victims' applications by 29 September 2009.³⁸

³² ICC-02/05-02/09-55: <http://www.icc-cpi.int/iccdocs/doc/doc729832.pdf>

³³ ICC-02/05-01/07-46: <http://www.icc-cpi.int/iccdocs/doc/doc729836.pdf>

³⁴ ICC-02/05-01/09-31: <http://www.icc-cpi.int/iccdocs/doc/doc729835.pdf>

³⁵ The deadline only applies to victims who wish to participate in the confirmation of charges proceedings. Victims wishing to apply for participation in the case are still allowed to do so.

³⁶ ICC-02/05-01/09-12: <http://www.icc-cpi.int/iccdocs/doc/doc644001.pdf>

³⁷ ICC-02/05-01/09-34: <http://www.icc-cpi.int/iccdocs/doc/doc733209.pdf>

³⁸ ICC-02/05-01/09-38: <http://www.icc-cpi.int/iccdocs/doc/doc734971.pdf>