



Newsletter

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Editorial

For the second time now the States Parties decided to allocate time for a general debate during their annual Assembly. In their statements, states' representatives recognised the good work of the staff of the ICC and also commented on the Court's impact in the countries of situations. The main emphasis, however, was placed on co-operation. The States shared the Court's view that co-operation is essential for it to function effectively and appealed that the necessary support by all stakeholders be provided, in particular in the areas of the execution of outstanding arrest warrants, witness protection and enforcement of sentences. Finally, the relation between peace and justice was commented on by many delegations.

This forum of dialogue, engaging the Court, States and civil society, has to retain its dynamism and vitality. It should also preserve its informal tone essential to allow us, advocates for international justice, to discuss important issues related to the Court's development, for example, the legal aid system, and family visits for detainees in The Hague.

Bruno Cathala, Registrar

The new ICC judges are sworn-in

The three new International Criminal Court (ICC) judges elected by the Assembly of States Parties (ASP) at the end of 2007 were sworn-in at a ceremony on 17 January. The ceremony took place at the seat of the Court in The Hague. Judge Daniel David Ntanda Nsereko of Uganda, Judge Fumiko Saiga from Japan and Judge Bruno Cotte from France, each made a public solemn undertaking before the President of the Court, Judge Philippe Kirsch and the other 14 ICC judges. The solemn undertaking was witnessed by the President of the ASP, H.E. Mr Bruno Stagno Ugarte, in accordance with the Rules of Procedure and Evidence of the Court.

Welcoming the new judges, President Kirsch said, "The judges of the ICC are all very happy to welcome our new colleagues and we look forward to working with them."

Mr Stagno Ugarte, emphasised the opportunity of the new judges to contribute to the work of the Court at a crucial time, "The three new judges take the oath of office today at a crucial point in time - the Court has now entered the trial phase, now that charges have been confirmed in one case. The new judges will have the distinct opportunity to contribute to the development of the criminal jurisprudence of the Court."

He further added, "A judge of the International Criminal Court bears a heavy burden. The victims of the crimes within the jurisdiction of the Court look to the judges to administer justice in situations that have deeply affected and impacted on their lives and their communities. The accused would also expect that their trials would be conducted in a fair, effective and impartial manner. If the Court stands as a permanent beacon of light and of hope, the judges are the bearers of that light and hope to the persons suffering at the hands of the perpetrators of these heinous crimes within its jurisdiction."

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In his statement, Mr Stagno Ugarte also paid tribute to the three judges who resigned in 2007: Judge Maureen Harding Clark (Ireland), Judge Karl Hudson-Phillips (Trinidad and Tobago) and Judge Claude Jorda (France).

The judges of the ICC are all people of high moral character, impartiality and integrity, with the qualifications for appointment to the highest judicial offices in their countries. All have extensive experience relevant to the Court's judicial activity and are elected on the basis of their established competence in criminal law and procedure in relevant areas of international law, such as international humanitarian law and the law of human rights. Judges have judicial expertise in specific issues, including violence against women or children. All are fluent in at least one of the working languages of the Court, English and French.

During the plenary session held the same day, the 18 ICC judges decided upon which divisions the new judges would be assigned. The assignment is made on the basis of the nature of the functions each one will perform and the qualifications and experience of the judge. This ensures that each division benefits from an appropriate combination of expertise in criminal law and procedure, and international law.

In conclusion, Judge Daniel David Ntanda Nsereko and Judge Bruno Cotte were assigned to the Trial Division. Judge Fumiko Saiga was appointed to the Pre-Trial Division.

In accordance with article 39(3) of the Rome Statute, the assignments of all the judges of the Pre-Trial and Trial Divisions will last until 11 March 2009 and thereafter, until the completion of any case the hearing of which has already commenced in the division concerned.

Latest public legal filings

For an update of all public legal filings relating to situations and cases before the Court, please consult the ICC website at:

www.icc-cpi.int/cases.html.



Photo: left to right Judge Saiga, Judge Nsereko and Judge Cotte

The three new judges:

Judge Daniel David Ntanda Nsereko from Uganda, was elected to fill a judicial vacancy from the African Group of States. He has been elected for a four-year, three-month term and is assigned to the Trial Division.

He has more than twenty years of comprehensive experience in criminal law and procedure. As an Advocate, he has been representing defendants in criminal and civil cases before Magistrates' Courts, the High Court and the Court of Appeal in Uganda since 1972. He served as a trial observer to Swaziland in 1990 and to Ethiopia in 1996, writing comprehensive confidential reports in the context of international human rights standards. From 1983 to 1984, Judge Nsereko served as expert consultant for the Crime Prevention and Criminal Justice Branch of the United Nations Centre for Social Development and Humanitarian Affairs. He has written extensively on criminal law and procedure, human rights and international humanitarian law. He has been Professor of Law at the University of Botswana since 1996. Judge Nsereko holds the degrees of LL.B from the University of East Africa in Tanzania, M.C.J. from Howard University, and LL.M and J.S.D. from New York University in the United States.

Judge Fumiko Saiga from Japan, was elected from the Asian Group of States. She has been elected to fill a judicial vacancy for a term of fifteen months. Judge Saiga has been assigned to the Pre-Trial Division.

Between 2003 and 2007, Judge Saiga represented Japan as Ambassador Extraordinary and Plenipotentiary to the Kingdom of Norway and to the Republic of Iceland, serving as Ambassador with responsibility for Human Rights from 2005. She has considerable expertise in Japan's relations with the United Nations and has been extensively involved in human rights issues, particularly gender issues. She was active in the process of ratification of the Convention on the Elimination of All Forms of Discrimination against Women and has legal expertise on gender issues, including violence against women.

Judge Bruno Cotte from France, was elected from the Western European and Others Group of States (WEOG). He has been elected to fill a judicial vacancy for a term of four years and three months and is assigned to the Trial Division.

A senior judge in France, he served for the last seven years as President of the Criminal Chamber of the *Cour de Cassation* (Supreme Court of Appeal) where he dealt with international criminal law cases. From 1984 to 1990, he was Director for Criminal Affairs and Pardons in the Ministry of Justice, dealing with international mutual legal assistance in criminal matters, issues related to the definition of crimes against humanity and associated litigation. Judge Cotte also served as Attorney General of the Versailles Court of Appeal from May to September 1990; Public Prosecutor of the *Tribunal de Grande Instance de Paris* (Paris District Court) from 1990 to 1995; and Counsel for the Prosecution of the *Cour de Cassation* from 1995 to 2000.

The Assembly of States Parties holds its sixth session in New York



Photo: President Philippe Kirsch, United Nations Secretary-General Ban Ki-moon, President Bruno Stagno Ugarte and Prosecutor Luis Moreno-Ocampo © ASP

The sixth session of the Assembly of States Parties met from 30 November to 14 December 2007 at United Nations Headquarters in New York.¹

General debate

The United Nations Secretary-General, Mr Ban Ki-moon, addressed the Assembly. Forty-eight States Parties, three observer States, as well as ten non-governmental organisations then participated in the general debate.

Election to fill judicial vacancies

On 30 November and 3 December 2007, the Assembly elected the following three judges: Mr Daniel David Ntanda Nsereko (Uganda, African States, list A, male), Ms Fumiko Saiga (Japan, Asian States, list B, female) and Mr Bruno Cotte (France, Western European and Other States, list A, male).

Pursuant to a drawing of lots, the term of office of Judge Fumiko Saiga will end on 10 March 2009, while the terms of office of Judge Bruno Cotte and Judge Daniel Nsereko will end on 10 March 2012. Judge Saiga will be eligible for re-election.

Election of the members of the Committee on Budget and Finance

On 7 December 2007, the Assembly elected by acclamation the following six members of the Committee on Budget and Finance, who shall serve three-year terms of office, beginning on 21 April 2008:

Mr David Banyanka (Burundi); Ms Carolina María Fernández Opazo (Mexico); Mr Gilles Finkelstein (France); Mr Juhani Lemmik (Estonia); Mr Gerd Saupe (Germany) and Mr Ugo Sessi (Italy)

Election of the President of the Assembly for the seventh to ninth sessions

On 13 December 2007, the Assembly elected

by acclamation Ambassador Christian Wenaweser, Permanent Representative of Liechtenstein to the United Nations, as President of the Assembly for the seventh to ninth sessions.

Special Working Group on the Crime of Aggression

Discussions focused on a non-paper by the Chairman, Ambassador Christian Wenaweser, on defining the individual's conduct in relation to the crime of aggression. The non-paper met with broad agreement among delegations as it duly reflected the leadership nature of the crime, as well as ensured the application of the leadership requirement to all forms of participation referred to in article 25 of the Rome Statute, such as aiding and abetting.

Strong support was expressed for using United Nations General Assembly resolution 3314 (XXIX) as a basis in defining an act of aggression. Discussions continued, however, as to whether the acts that would qualify as aggression should be listed in an exhaustive or non-exhaustive manner.

As regards the conditions for the exercise of jurisdiction, consideration was given to two new elements concerning the crime of aggression, namely the suggested role of the Pre-Trial Chamber and the so-called 'green light' option with regard to the Security Council's role.

Resolutions

Permanent premises (ICC-ASP/6/Res.1)

The Assembly decided that the permanent premises of the Court should be constructed on the *Alexanderkaserne* site and, in this connection, authorised the host State to launch the architectural design competition, while reserving the right of the Assembly to authorise the signing of contracts.

Furthermore, the Assembly established an Oversight Committee, composed of members from ten States Parties, to provide strategic oversight for the project. Its main tasks include the recruitment of a Project Director, consideration of financing options for the project, as well as preparation of refined cost estimates based on the results of the architectural design competition.

Strengthening the International Criminal Court and the Assembly of States Parties (ICC-ASP/6/Res.2)

The resolution includes, *inter alia*, provisions concerning the plan of action for achieving universality and full implementation of the Rome Statute, equitable geographical representation and gender balance in the recruitment of staff, and the arrears of contributions by States Parties.

Furthermore, the Assembly encouraged the Court to continue its outreach activities, including through the implementation of the Strategic Plan for Outreach, and to strengthen the dialogue with States Parties on this matter.

As regards the issue of co-operation, the Assembly endorsed 66 recommendations, contained in annex II of the resolution, as well as requested the Bureau to appoint a focal point to continue the work on co-operation in close co-ordination and dialogue with the Court.

In addition, the resolution addresses the issue of legal aid and, in this connection, the Assembly requested the Court to submit to the next session of the Assembly a report on the different mechanisms for legal aid in order to assess the budgetary implications.

As regards the issue of family visits of indigent detainees, the Assembly requested the Court to submit a report at its next session, in consultation with relevant organisations, and to assess, *inter alia*, the legal and policy aspects, as well as the human rights dimension and budgetary impact of family visits.

Review Conference

In resolution ICC-ASP/6/Res.2, the Assembly agreed to hold the Review Conference in the first semester of 2010, with a duration of five to ten working days, as well as endorsed the draft rules of procedure for the Conference.

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1. The official records of the sixth session of the Assembly of the States Parties are available at: www.icc-cpi.int/asp/asprecs/ASP_6thsession.html.

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Furthermore, the Assembly requested the Bureau to submit to the resumed sixth session of the Assembly proposals concerning the venue of the Review Conference, taking into account the non-exhaustive list of criteria contained in the report of Working Group on the Review Conference.

Amendment to the regulations of the Trust Fund for Victims (ICC-ASP/6/Res.3)

The Assembly amended regulation 27 of the regulations of the Trust Fund for Victims to allow more flexibility to the Board of Directors and the Secretariat in accepting voluntary contributions intended for groups of victims with particular needs, if the funds have been raised at the initiative of the Trust Fund, and as long as all the criteria defined in regulation 27 (a) and (b) are fulfilled.

Programme budget for 2008 (ICC-ASP/6/Res.4)

The Assembly approved the programme budget for 2008 of €90,382,100, a staffing level of 679, and a Working Capital Fund of €7,405,983. It also decided that the Court shall adopt the scale of assessments of the United Nations applicable for 2008, with membership adjustments applicable to the Court.

Amendments to the Financial Regulations and Rules (ICC-ASP/6/Res.5)

The Assembly decided to amend rule 110.1 of the Financial Regulations and Rules to include a requirement that the Internal Auditor shall report annually, and on an *ad hoc* basis where appropriate, to the Committee on Budget and Finance through the Chair of the Audit Committee. The Committee on Budget and Finance shall refer any matters to the Assembly of States Parties which require the attention of the Assembly.

Amendments to the pension scheme regulations for judges of the International Criminal Court (ICC-ASP/6/Res.6)

The Assembly approved amendments to the pension scheme regulations for judges, which entered into force as of the sixth session and thus apply to the newly elected judges. Once fully implemented, the amendments would result in annual savings of €2.2 million.

Recommendations

Recommendation concerning the election of the Registrar of the International Criminal Court (ICC-ASP/6/ Recommendation 1)

The Assembly recommended that elements such as, *inter alia*, qualifications, the criteria set forth in article 36, paragraph 8, of the Rome Statute, managerial skills, familiarity

with governmental and inter-governmental processes, diplomatic skills, as well as the ability to co-operate with others, be taken into account by the judges in the election of the Registrar of the International Criminal Court. In addition, the Assembly recommended that the Registrar and Deputy Registrar should not be of the same nationality or from the same regional group.

Resumed sixth session of the Assembly of States Parties

The Assembly decided that its resumed sixth session shall be held from 2 until 6 June 2008 at United Nations Headquarters in New York and shall focus on the Special Working Group on the Crime of Aggression and on the Review Conference.

Bureau of the Assembly of States Parties

At its 17th meeting, on 14 December 2007, the Bureau designated Ambassador Kirsten Biering (Denmark) as Co-ordinator of The Hague Working Group.

At its 18th meeting, also on 14 December 2007, the Bureau agreed to extend the mandate of its Working Groups in The Hague and New York, which will consider the following issues:

The Hague Working Group

- Engage with the Court on the strategic planning process and its concrete implementation, including on the priority issues identified in resolution ICC-ASP/5/Res.2, and continue the dialogue with the Court on Outreach;
- Consider the issue of the budget of the Court, while respecting the special role of the Committee on Budget and Finance; and
- Co-operation.

The New York Working Group

- Continue to monitor the implementation

of the plan of action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court;

- Review on a regular basis the status of payments received throughout the financial year and consider additional measures to promote payments by States Parties;
- Engage with the Court on concrete proposals for an independent oversight mechanism; and
- Carry out consultations with a view to submitting proposals as regards the venue of the Review Conference to the resumed sixth session of the Assembly and continue the preparations of the Review Conference, including financial and legal implications, as well as practical and organisational issues.

Facilitators

As regards The Hague Working Group, the Bureau designated Mr Yves Haesendonck, Ambassador of Belgium to the International Organisations in the Netherlands, as focal point to continue the work on co-operation.

As regards the New York Working Group, the Bureau designated Ms Polly Ioannu (Cyprus) and Mr Sabelo Sivuyile Maqungo (South Africa) as facilitators for the issues of the arrears of States Parties and the Review Conference, respectively.

The Hague Working Group

The Co-ordinator, Ambassador Kirsten Biering (Denmark), chaired the first meeting of the Working Group, held on 17 January 2008.

The President of the Assembly, H.E. Mr Bruno Stagno Ugarte (Costa Rica), addressed the Working Group and referred to the importance of the Working Groups in The Hague and in New York, acknowledging the progress made on the various issues mandated to the Groups by the Bureau.



President-elect of the Assembly, Ambassador Christian Wenaweser (Liechtenstein) © ASP

Decisions rendered so far in preparation for the Lubanga trial



Mr Lubanga Dyilo in Court © ANP

Since the start date of the Lubanga trial was announced in October of 2007, Trial Chamber I has called a number of status conferences in order to prepare in advance for all aspects of the Court's first trial. During these conferences Trial Chamber I received written and oral submissions from the various parties and participants and has rendered decisions aimed at facilitating the fair and expeditious conduct of the forthcoming trial.

Amongst the issues under consideration have been matters related to: Procedure to be used in preparing witnesses to give testimony before the Chamber in Court; procedure to be adopted for *ex parte* proceedings; procedure to be adopted for instructing expert witness; status of evidence before Trial Chamber I of evidence heard by the Pre-Trial Chamber and, the decision of the Pre-Trial Chamber in trial proceedings and the manner in which evidence shall be submitted; live transcripts in French and English from the commencement of the trial; disclosure; victim participation; e-Court protocol; various issued related to witness testimony during trial; and remote access to the broadcast of closed sessions. The Chamber also reviewed its ruling on the detention of Mr Thomas Lubanga Dyilo.

30 November 2007: In order to prepare and familiarise witnesses with the process of giving testimony before the Court, Trial Chamber I detailed the procedure in a decision explaining how the Victims and Witness Unit (VWU) should, in consultation

with those providing testimony, achieve this. This familiarisation will enable the witness to understand Court procedure and how the process of examination works. It will also reassure those testifying about their own role in the process.

The Chamber also noted the responsibility of the Court to explain amongst other things, the legal obligation of the witness to tell the truth when testifying; matters related to the security and safety of witnesses in order to determine the necessity of applications for protective measures; and the provision for witnesses to acquaint themselves with those who may examine them in Court. This entails "walking witnesses through" the courtroom and its procedure prior to the day of testimony, explaining the layout of the Court, and particularly where the various participants will be seated and the technology that may be used in order to minimise any confusion or intimidation.

6 December 2007: Trial Chamber I described the approach that should determine using *ex parte* hearings - *Ex parte* procedures are only to be used exceptionally when they are truly necessary and when no other, lesser, procedures are available. The Court must ensure that their use is proportionate given the potential prejudice to the accused. Even when an *ex parte* procedure is used, the other party should be notified of the procedure, and its legal basis should be explained, unless to do so is inappropriate.

10 December 2007: The Chamber ordered

the following on the procedures to be adopted for instructing expert witnesses:

- i) the parties are to instruct a joint expert on any relevant issue, if possible;
- ii) the joint expert should be jointly instructed;
- iii) if the parties cannot agree joint instructions, the joint expert is to be given separate instructions, wholly or in part;
- iv) the parties shall only instruct separate experts after that proposed course has been raised with the Chamber;
- v) to the extent that victims are participating on an issue or as regards evidence which is to be the subject of expert evidence, they are to be given an opportunity to contribute to the expert's instructions (jointly with the parties or separately);
- vi) whenever a party or a participant intends to instruct an expert, the name of the expert is to be included in a filing;
- vii) whenever an expert is to be instructed jointly, the instructions to the expert should be filed with the Chamber at an early stage;
- viii) if a participant wishes to instruct an expert he or she should request the leave of the Chamber;
- ix) if an expert who is to be relied on is not on the list of experts (established and maintained by the Registry according to Regulations of the Court), an application should be made forthwith to include his or her name on the list, and the Chamber should be notified by way of email to the Legal Adviser to the Trial Division.

13 December 2007: A decision was made on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted.

14 December 2007: The Chamber ordered the Registry to provide live transcripts in French and English from the commencement of the trial, if this is technically feasible, on the request of the defence.

18 December 2007: An order was made on the prosecution's applications for the lifting of redactions, non-disclosure of information and disclosure of summary evidence.

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18 January 2008: A decision was given regarding victim participation (see below).

24 January 2008: The Court has put in place a system of electronic management of the evidence held by, and exchanged between, the parties to its proceedings. The Trial Chamber considered the applicability of the current e-Court protocol and its use in the trial proceedings. It was decided that all documents disclosed by the parties and participants should be provided in a protocol-compliant format, with the required metadata fields completed. The Registry should also provide facilities and assistance for training defence teams and legal representatives of victims participating in the proceedings in the use and application of the e-Court protocol, if necessary.

29 January 2008: Trial Chamber I decided on the scope of examination by a party not calling a witness, the manner in which traumatised and vulnerable witnesses shall present their evidence, and live testimony by means of audio or video-link technology.

30 January 2008: In order to protect sensitive information, the Trial Chamber decided that the live broadcast of closed session hearings and the live transcription of such proceedings should not be accessible to anyone outside the courtroom up until the time a system allowing access management on a user by user basis is available.

Besides, having suspended the 31 January 2008 deadline for final disclosure to the Defence, Trial Chamber I scheduled a public hearing for 13 February to hear submissions

from parties and participants on the implication of this suspension on preparations for the trial.

1 February 2008: The Rome Statute requires that the Chamber undertake a periodic review of any decision on interim release. The Trial Chamber in its review of the overall period of detention has not made any finding that the preparation for trial has been delayed by the prosecution and in light of the general progress that has been made to facilitate the commencement of the trial it concluded that the period of detention of the accused has not been unreasonable. Accordingly, the Chamber decided that Thomas Lubanga Dyilo should continue to be detained in accordance with Rule 118(2).

A landmark decision for the process of victim participation

On 18 January 2008, Trial Chamber I rendered a milestone decision in the development of case law regarding the participation of victims in proceedings before the Court in the case of *The Prosecutor v. Thomas Lubanga Dyilo*¹. The right of victims to participate in proceedings is an innovation in international justice, and this decision can be viewed as a step forward in this area in that it implements many of the rights codified in the Rome Statute. In particular, this decision defines the role of the Victim Participation and Reparations Section (VPRS) in this process.

Although in the past few months the pre-trial chambers have rendered authoritative decisions on victims' issues,² buttressing existing case law, this much-awaited decision is the first attempt at defining the scope of victim participation in the first trial to be held before the International Criminal Court. In this decision, Trial Chamber I have addressed most of the fundamental issues related to victim participation: the process for assessing applications, the personal interests of the victim for the purpose of participating in the case, the modalities for participation prior to and during the trial, reparations, common legal representation, and victim protection, etc..

In dealing with these issues, the Trial Chamber circumscribes the mandate of the VPRS at the various stages of the proceedings.

Firstly, the judges enumerate the documents that will be accepted for the purpose of establishing the identity of the victims and thus the admissibility of their applications. Here, the VPRS will request the victims to submit the necessary documents, and transmit to the judges any relevant information.

The decision also deals with the issue of how the Chamber evaluates the victims' interests for the purposes of participating in the trial. In order to determine whether the interests of the victims are affected by the case, the judges will first consider whether there is an evidential link between the victim and the evidence the Chamber will be considering during the trial, and secondly, whether the victim is affected by an issue that may arise during the trial because his or her personal interests are engaged. To assess whether the interests of the victims relate to the prosecution's "summary of presentation of evidence", the Chamber has stated that it wishes to be assisted by the report of the VPRS on the applications for participation.

However, subsequently, the victim must set out in writing his or her personal interests for the purposes of participation at a specific stage of the trial. This will probably be done by the victim's legal representative.

Furthermore, Trial Chamber I ordered the VPRS to include in its reports to the Chamber recommendations on common legal representation. This is because the mandate of the VPRS is not only to assist victims in finding and organising their legal representation, but also to assist the Chambers when it is necessary to request that victims choose a common legal representative. In this decision, the Trial Chamber emphasised the need to adopt a flexible approach to the issue in order to ensure that the distinct interests of the victims are represented and that any conflict of interest is avoided.

Lastly, the Registry must inform victims who have applied to participate in the proceedings of the decision and its implications, and transmit some key documents to their legal representatives. In its order of 5 September 2007 on subjects that require early determination, the Chamber underscored the importance of informing the victims.

Conclusively, this decision establishes many important foundations for the principle of victim participation and thus sets a noteworthy precedent.

1. ICC-01/04-01/06-1119

2. See the decisions of Pre-Trial Chamber I in the situations in the Democratic Republic of the Congo (ICC-01/04-374 of 17 August 2007 and ICC-01/04-423 - Cor of 31 January 2007) and in Darfur (ICC-02/05-110 of 3 December 2007 and ICC-02/05-111-Corr of 14 December 2007), and the decision of Pre-Trial Chamber II in the situation in Uganda (ICC-02/04-101 of 10 August 2007).