



## OTP Weekly Briefing – 2-8 February – Issue #23

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### THIS WEEK'S HIGHLIGHT:

#### **Appeals Chamber rules it was a legal error to reject genocide charges against President Al Bashir**

3 February - The ICC Appeals Chamber unanimously [affirmed](#) the Prosecutor's position that Pre-Trial Chamber (PTC) I applied the wrong legal test when it decided on 4 March 2009 not to retain the three counts of genocide in the arrest warrant against Sudanese President Al Bashir. The Appeals Chamber directed the PTC to decide anew whether the arrest warrant should be extended to cover the charge of genocide. *"It was a legal error to reject the genocide charges,"* said the Prosecutor, stressing: *"The prosecution maintains that President Al Bashir's intention is to destroy the Fur, Masalit and Zaghawa. Hunger and rape are his weapons. This is genocide. The decision of President Al Bashir to expel the humanitarian organizations that keep alive the victims of the crimes is new evidence confirming Al Bashir's genocidal intent and will be presented to the judges."*

In its 4 March 2009 decision, PTC I had stated that it would only issue an arrest warrant for genocide if it was the *only* reasonable conclusion to be drawn from the Prosecutor's evidence. The Appeals Chamber found this is the standard required for a conviction, "beyond a reasonable doubt", and more demanding than "reasonable grounds to believe" as required at the arrest warrant stage, which amounted to an error of law. The Appeals Chamber was of the view that the substance of the matter should be considered by the PTC and not by the Appeals Chamber and therefore remanded the matter to the PTC for a new decision, using the correct standard of proof.

*More reactions on the decision on page 2.*

### 1. Investigations and Prosecutions:

#### *a. General overview of the cases*

Over the week, the OTP presented 4 filings in the various cases and conducted 4 missions in 4 countries.

#### *b. Situation in the [Democratic Republic of the Congo \(DRC\)](#)*

This situation was referred by the DRC in April 2004. The OTP opened its investigation in June 2004, focusing on Ituri where the most serious crimes had been committed by the main armed groups. Four arrest warrants have been issued against [Thomas Lubanga Dyilo](#) and [Bosco Ntaganda](#), leaders of the UPC, and [Germain Katanga](#) and [Mathieu Ngudjolo Chui](#), leaders of FNI and FRPI. The trial of the [Prosecutor v. Thomas Lubanga Dyilo](#) began on 26 January 2009. The trial of [Katanga and Ngudjolo Chui](#) began on 24 November 2009. [Bosco Ntaganda](#) is at large. In September 2008, the OTP announced the start of its investigation into alleged crimes in the Kivus.

31 January - UN Secretary-General [announced](#) the nomination of Margot Wallström as his Special Representative on Sexual Violence in Conflict. Sexual violence related crimes are among the worst crimes under the ICC's jurisdiction and related charges have been brought against nine ICC suspects so far. Sexual violence crimes have also been committed on a large scale in the Kivu provinces of the DRC where the Prosecutor opened an investigation.

**Case: *The Prosecutor v Bosco Ntaganda***

3 February - UK Government spokesperson in the House of Lords, Lord Brett, confirmed that the UK continues to press for Bosco Ntaganda to be handed over to the ICC and that the UK Ambassador has discussed the issue with the UN Secretary-General's Special Representative Alan Doss and received assurances that the UN mission will support the DRC Government in carrying out the warrant

**c. Situation in [Uganda](#)**

This situation was referred by Uganda in January 2004. The OTP opened its investigation in July 2004. Five arrest warrants have been issued against [top leaders of the Lord's Resistance Army \(LRA\)](#): Joseph Kony, Vincent Otti (allegedly killed in 2007 on order of Kony), Okot Odhiambo, Raska Lukwiya (killed on 12 August 2006, whose arrest warrant has been withdrawn), and Dominic Ongwen. These arrest warrants are outstanding. Since early 2008, the LRA is reported to have killed more than 1,250, abducted more than 2,000 and displaced close to 300,000 in DRC alone. In addition, over the past year, more than 80,000 people have been displaced, and close to 250 people killed by the LRA in Southern Sudan and the Central African Republic.

**d. Situation in [Darfur, the Sudan](#)**

This situation was referred by the UN Security Council in March 2005. The OTP opened its investigation in June 2005. Three arrest warrants and one summons to appear have been issued against [Ahmad Harun and Ali Kushayb](#), [Omar Al Bashir](#), and [Bahar Idriss Abu Garda](#). Three arrest warrants are outstanding. The Prosecution [appealed](#) the decision of the majority of the Chamber to dismiss the charges of genocide. On 3 February the Appeals Chamber ruled that it was a legal error to reject the charges of genocide against President Al Bashir. Abu Garda [voluntarily appeared](#) before the Court pursuant to a summons. Following his initial appearance on 18 May, he was allowed to leave The Netherlands. The confirmation of charges hearing was held on 19-30 October 2009.

*Continuation of this week's highlight*

3 February - In a reaction to the ICC Appeals Chamber, US Assistant Secretary for the Bureau of Public Affairs, Philip J. Crowley, [said](#) *"the United States strongly supports international efforts to bring those responsible for genocide and war crimes in Darfur to justice and believes firmly that there cannot be a lasting peace in Darfur without accountability and justice. And we will continue to encourage the Government of Sudan and all parties to the conflict to cooperate fully with the International Criminal Court and its prosecutor, as required by UN Security Council [Resolution] 1593, passed in 2005."* US Assistant Secretary of State for African Affairs Johnnie Carson [said](#) *"We think that President Bashir should present himself to the court to face charges"*.

The National Congress Party in Sudan, led by Al Bashir, [reacted](#) to the Appeal Chamber's decision by criticising the "persistent targeting" against President Bashir. In contrast, [Human Rights Watch](#) and [Amnesty International](#) called on President Bashir to face justice in The Hague. JEM spokesperson Ahmed Hussein Adam [recalled](#): *"the destruction that was inflicted upon Darfur speaks for itself. (...) Bashir was in charge and publicly told the army that he does not want any prisoners or wounded from Darfur."*

**e. Situation in the [Central African Republic \(CAR\)](#)**

This situation was referred by the CAR in December 2004. The OTP opened its investigation in May 2007. One arrest warrant has been issued against [Jean-Pierre Bemba Gombo](#) for crimes committed in 2002-2003. The [confirmation of charges hearing](#) was held on 12-15 January 2009. On 15 June 2009, Pre-Trial Chamber II rendered its confirmation of charges decision. On 18 September, the case was referred to Trial Chamber III. The trial is set to start on [27 April 2010](#). In parallel, the Office continues to monitor allegations of crimes committed since the end of 2005.

**f. [Kenya](#)**

The Office made its examination of the post-election violence of December 2007-January 2008 public in February 2008. On 9 July 2009, the African Union Panel of Eminent African Personalities, chaired by Kofi Annan, announced the [submission to the OTP of a sealed envelope containing a list of persons allegedly implicated and supporting materials previously entrusted to Mr. Annan by the Waki Commission](#). On 5 November the Prosecutor informed President Kibaki and Prime Minister Odinga of his view that crimes against

humanity had been committed and of his duty, in the absence of national proceedings, to act. Both the President and the Prime Minister committed to cooperate with the Court. On 26 November the Prosecutor requested authorization from Pre-Trial Chamber II to open an investigation, noting that: 1,220 persons had been killed; hundreds raped, with thousands more unreported; 350,000 people were forcibly displaced; and 3,561 injured as part of a widespread and systematic attack against civilians.

1-2 February - In response to a letter from the Prosecutor dated 22 January 2010, Justice Minister Mutula Kilonzo updated the OTP on proposals for amending the Witness Protection Act 2006.

2 February - Prime Minister Raila Odinga [stated](#) that that the Government is ready to provide the ICC full cooperation in whatever it requires. "It means that if anyone is indicted by the ICC, that the Government will make that person available to face the trial," said Odinga. "Even if Raila Odinga is indicted, the Government will make him available."

3 February - New allegations of threats against post-poll violence witnesses have been [reported](#). Two women from the Rift Valley, one a mother of six, received dozens of threatening messages over the last three months.

3 February - Pre-Trial Chamber II [rejected](#) the application by Professors Max Hilaire and William A. Cohn to appear as *amicus curiae* concerning the Prosecutor's request to open an investigation in Kenya on the basis that "the proposed submission of observations would not assist in reaching a proper determination on the Prosecutor's Request."

## **2. Preliminary Examinations:**

### *a. Statistics on [Article 15 Communications](#) and other preliminary examination activities*

A preliminary examination is the first phase of the Office of the Prosecutor activities, in order to assess if an investigation should be opened. It is a phase during which the Office first assesses the jurisdiction of the Court, whether crimes falling under the ICC jurisdiction may have been, or are possibly being, committed in a given situation; if the conditions are met, whether genuine investigations and prosecutions are being carried out by the competent authorities in relation to these crimes; and, as a third step, whether the possible opening of an investigation by the Prosecutor would not go against the [interests of justice](#). During this phase, and in accordance with Article 15, the Office proactively evaluates all information on alleged crimes from multiple sources, including "communications" from individuals and parties concerned. The triggering of a preliminary examination does not imply that an investigation will be opened.

### *b. Afghanistan*

The Office made its examination public in 2007. It examines alleged crimes within the jurisdiction of the Court by all actors involved. The OTP met outside Afghanistan with Afghan officials and organizations. The OTP sent requests for information to the Government of Afghanistan and has not yet received an answer.

### *c. Colombia*

The Office made its examination public in 2006. It examines alleged crimes within the jurisdiction of the Court and investigations/proceedings conducted in Colombia against the allegedly most serious perpetrators, paramilitary leaders, politicians, guerrilla leaders and military personnel. The Office is also analysing allegations of international networks supporting armed groups committing crimes in Colombia.

### *d. Georgia*

The Office made its examination public on 14 August 2008. The Georgian Minister of Justice visited the OTP. Russia, a State not Party to the Statute, has sent 3,817 communications to the OTP. The Prosecutor requested information from the Governments of Russia and Georgia on 27 August 2008. Both the Russian and Georgian authorities responded. The Office conducted a visit to Georgia in November 2008. Visits to both countries are planned for 2010.

2 February - The Georgian Young Lawyers' Association and the Georgian Human Rights Center presented the Prosecutor "August Ruins", a comprehensive report on the violations of human rights and humanitarian law committed during August 2008, documenting acts of murder, looting, and destruction, particularly against ethnic Georgians in South Ossetia.

5 February - The Russian authorities confirmed its invitation to the OTP to conduct a mission to Moscow, scheduled for 9 and 10 March. The objective of the mission will be to meet with the relevant authorities of the Russian Federation, in particular the General Prosecutor's Office and gather further information on national proceedings.

*e. [Palestine](#)*

On 22 January 2009, the Palestinian National Authority lodged a declaration with the Registrar under Article 12(3) of the Rome Statute which allows States not party to the Statute to accept the Court's jurisdiction. The OTP will examine issues related to its jurisdiction: first whether the declaration accepting the exercise of jurisdiction by the Court meets statutory requirements; and second whether crimes within the Court's jurisdiction have been committed. The Office will also consider whether there are national proceedings in relation to alleged crimes. A delegation from the Palestinian National Authority, and Representatives of the Arab League visited the Court on 15-16 October 2009 to present a report in support of the PNA's ability to delegate its jurisdiction to the ICC. On 11 January, the OTP sent a [letter](#) summarizing its activities to the United Nations at their request, in the context of following up on the Goldstone Report.

4 February - UN Secretary-General transmitted to the General Assembly the reports received from Israel and the Palestinian National Authority on their investigations into alleged crimes committed in Gaza.

*e. Côte d'Ivoire*

The Court has jurisdiction over the situation in Côte d'Ivoire by virtue of an Article 12(3) declaration submitted by the Ivorian Government on 1 October 2003. The declaration accepts the jurisdiction of the Court as of 19 September 2002. The most serious crimes, including alleged widespread sexual violence, were committed in 2002-2005. On 17-18 July 2009, high-level representatives of the OTP visited Abidjan.

*g. [Guinea](#)*

The Office made its examination of the situation in Guinea public on 14 October 2009. Guinea is a State Party to the Rome Statute since 14 July 2003 and, as such, the ICC has jurisdiction over war crimes, crimes against humanity and genocide possibly committed in the territory of Guinea or by nationals of Guinea, including killings of civilians and sexual violence. The Office has taken note of serious allegations surrounding the events of 28 September 2009 in Conakry in accordance with Article 15 of the Statute. On 12, 13 and 15 January 2010, OTP high level representatives held consultations with President Compaore of Burkina Faso, mediator for the contact group on Guinea, and President Wade of Senegal to ensure that they are fully informed of its ongoing work.

2 February - The OTP met at the seat of the Court with representatives of the "Association des victimes, parents et amis des événements du 28 Septembre 2009" to discuss, *inter alia*, the association's activities and the upcoming visit of the Deputy Prosecutor to Conakry. In the meantime, preparations for this visit, scheduled from 15 to 19 February, are progressing.

### **3. Cooperation – Galvanizing Efforts to Arrest:**

4 February - Prosecutor Moreno-Ocampo [addressed](#) the Council for Foreign Relations in Washington, where he spoke about the creation of an international justice system supported by 110 State Parties that should be supported by non-State Parties. He also explained the criteria to exercise jurisdiction and select situations and cases, and the preventive impact of the Court's activities.



4 February - Deputy Prosecutor discussed, *inter alia*, recent developments in the Court's jurisprudence and the need to implement the Court's outstanding arrest warrants during the Atrocity Crimes Litigation Conference, organized by David Scheffer, former US Ambassador-at-Large for War Crimes Issues, at Northwestern University, Chicago.

4-5 February - The Prosecutor met with Stephen Rapp, US Ambassador-at-Large for War Crimes Issues, and with Michelle Gavin, Senior Director for African Affairs at the National Security Council. The Prosecutor also met with Senator Russ Feingold and Congressmen Russel Carnahan to discuss their efforts to support the arrest of Joseph Kony in light of the "LRA Disarmament and Northern Uganda Recovery Act".

4-5 February - OTP attended an expert group meeting in New York on mechanisms to address residual issues related to the closing of the international and hybrid criminal tribunals, organized by Western Ontario University and ICTJ in collaboration with the Canadian mission to the UN.

#### **4. Coming Events:**

- 15 February - Prosecutor will address the Cinema for Peace gala event on the role of movies in explaining the crimes under the Court's jurisdiction.
- 17-19 February - OTP mission, lead by Deputy Prosecutor, to Guinea in the context of preliminary examination activities
- 18 February - OTP attends seminar on the ICC and ratification of the Rome Statute in El Salvador, organized by the authorities of El Salvador and the Inter-American Juridical Committee of the OAS.
- 18 February - Prosecutor delivers speech at *Challenge Future* event hosted by Herausforderung Zukunft, Bochum
- 19 February - Prosecutor opens the London International Model United Nations Conference 2010
- 23 February - Prosecutor meets Baroness Scotland QC, Attorney General for England and Wales and Northern Ireland
- 26-27 February - Deputy Prosecutor participates in IBA workshop on implementing legislation in Malawi
- 6 March - Deputy Prosecutor participates in the WOMEN Inc. International Festival, Amsterdam
- 7-10 March - Deputy Prosecutor delivers keynote address for International Women's Day, School of Law of the University of California, Davis, and Santa Clara University School of Law
- 12 March - Deputy Prosecutor participates in "Gender-Based Violence and Access to Justice in Conflict and Post-Conflict Areas" conference organized by Cornell Law School, Washington
- 17 March - Prosecutor meets with Shirin Ebadi, Nobel Peace Prize Winner, and Mr. Karim Lahidji, Vice-President FIDH
- 22-25 March - Resumed session of the meeting of the Assembly of States Parties, New York
- 22-23 March - Prosecutor delivers the Amnesty International Chair public human rights lecture, Ghent University
- 6 April - Prosecutor participates in the International Forum of the 37<sup>th</sup> FIDH Congress, on Justice, in Armenia.
- 27 April - Start of the trial against Jean-Pierre Bemba Gombo

\* This document reflects the views of the Office of the Prosecutor of the ICC. For more information, contact Mrs. Olivia Swaak-Goldman, International Cooperation Adviser in the Office of the Prosecutor, at [Olivia.Swaak-Goldman@icc-cpi.int](mailto:Olivia.Swaak-Goldman@icc-cpi.int)