



OTP Weekly Briefing

3-10 May 2011 – Issue #86

HIGHLIGHTS:

- PROSECUTION FILES RESPONSE RE REQUEST FOR ASSISTANCE KENYAN GOVERNMENT – DISCLOSURE WOULD BE UNACCEPTABLE RISK FOR VICTIMS AND WITNESSES
- UNSC MEMBERS AND LIBYA CONTACT GROUP REACTIONS TO THE OTP'S BRIEFING ON LIBYA

PREVIEW

- FDLR trial in Germany started, p. 3;
- OTP meets with President McAleese of Ireland, and High Commissioner Navanethem Pillay, p. 6.

10 May - Prosecution [filed](#) a [response](#) to the Government of Kenya's request for assistance pursuant to Article 93(10) and Rule 194 in which the Government requested the "transmission of all statements, documents or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the post-election violence in Kenya."

Prosecution submitted that "a request for materials solely within the possession of the Prosecution is not subject to judicial determination under Article 93(10) and Rule 194" and that the Government of Kenya "has not established that there is an investigation ongoing in Kenya against the same individuals under investigation before the ICC." Furthermore, the Prosecution argued that "the Chamber's duty to protect victims and witnesses is a fatal obstacle to provide confidential information to the Government of Kenya" and that "the Chamber should not provide assistance unless it concludes that providing the requested information will not jeopardize the safety and well-being of persons or the cases before this Court in accordance with article 68."

The Prosecution indicated that it has received reports that persons living in Kenya face threats, intimidation, and other attempts to discourage their participation in the investigation. In this regard, "the Prosecution considers that currently the suspects have the ability to influence the Government of Kenya policy and that any information provided to the Kenyan authorities can be used to attack victims and witnesses." The Prosecution also brought to the Chamber's attention "the circumstances surrounding the recent dismissal of criminal fraud charges against Ruto in Kenya. In particular, it is noteworthy that five witnesses slated to testify against him died before trial, 13 witnesses disappeared and could not be located, and remaining witnesses who survived and were available to testify recanted their previous incriminatory accounts and exculpated Ruto."

Prosecution continued saying that "[s]ince the presentation of their case before the Chamber some members of the Kenyan Government have been campaigning to derail the Prosecutor's investigations. (...) Deputy President Kalonzo Musyoka and other (...) representatives have also sought to persuade other African states that the OTP's investigations of the six suspects is against the Kenyan Government and warrants regional opposition to the Court. They visited several African capitals to garner support for a request to defer this investigation in advance of the African Union Summit in late January 2011. Mr. Musyoka was quoted in the Kenyan media as having stated, regarding the AU's assistance, "We expect a no or yes vote so we can know whether the Court is meant for foreigners or Africans." The same Deputy President and other members of the Government, acting as special envoys, have embarked on a "shuttle diplomacy" campaign to try to persuade Security Council member states to defer the Court's proceedings against the six suspects. Notably, in a 4 March 2011 letter from the Kenyan Ambassador to the Security Council, the Kenyan Government sought to justify a deferral of the Kenya cases by stating that the current ICC process has the potential to reignite violence, breakdown law and order, result in loss of human life in Kenya and disrupt economic, peace and security activities in the sub-region. The letter argued that if the ICC process is not well managed it could "interfere with the sovereignty of member states." The Prosecutor considers it significant that other members of the Government had indicated that they do not consider these actions are in good faith."

The Prosecution finally submitted that it plans to send a preliminary mission to Kenya to evaluate current security protections and risks, and depending on the results of that mission, a more thorough analysis may be performed and an update provided to the Chamber. The Prosecution concluded by adding that in light of the current situation, "it would pose an unacceptable risk to

persons and the investigation to disclose non public information at this time", requesting the Chamber therefore to deny the request for assistance.

UNSC members express support for accountability as the Prosecutor briefs them on Libya

4 May - Following the Prosecutor's first briefing to the UN Security Council on the situation in Libya, all 15 members States expressed their [support](#) to the work of the Court and called for continued cooperation with the Office.

Sir Mark Lyall Grant, Permanent Representative of the UK, stated: *"Given those indications of dreadful criminal acts, we as the international community must continue to support the Prosecutor in thoroughly investigating these allegations and holding those responsible to account. [...] Those holding power in Libya must fulfil their obligations under resolution 1970 (2011) to cooperate with the International Criminal Court and to swiftly hand over any individual who may be indicted."*

Ambassador Peter Wittig from Germany stressed that: *"The perpetrators of crimes against international law in Libya must be made to answer for their actions as soon as possible, and justice must be done for the victims. In unanimously adopting resolution 1970 (2011) and deciding to refer the situation in Libya to the ICC, the Security Council was far-sighted. The resolution focuses on the protection of civilians; each State is responsible for protecting its people against the most serious crimes. That is the second message implicit in resolution 1970 (2011). Its importance is not limited to Libya but goes beyond that country [...] Those who are continuing to commit serious crimes in Libya must know one thing: the Security Council and the ICC, together if necessary or separately, will ensure, within their respective spheres of competence, that crimes against international law shall not go unpunished."*

Ambassador Cabral of Portugal added: *"The ICC has an important role to play in this regard, not only in investigating the most serious crimes and in judging and punishing the perpetrators most responsible, but also in preventing the escalation of violence as a dissuasive instrument for potential perpetrators and sometimes the only source of hope for endangered civilians and communities in conflict zones."*

Ambassador Messone of Gabon assured *"the Prosecutor of [Gabon's] full willingness to cooperate with him in his efforts to fully achieve his objective. We encourage and urge all parties to the conflict in Libya to cooperate unconditionally with the ICC in this process in order to shed light on the nature of crimes so that perpetrators can be brought to justice."*

Ambassador Churkin of Russia confirmed Russia supported *"the efforts by the ICC to carry out a fair and impartial investigation into the actions of all parties to the conflict in Libya and to bring to justice individuals involved in possible crimes against humanity and serious violations of international humanitarian law in Libya."*

Ambassador Li Baodong of China emphasized that China *"attaches great importance to combating impunity and achieving justice. China has always believed that the pursuit of justice should be premised on the core values of safeguarding peace and security and maintaining international peace and harmony."*

Ambassador Amieyeofori of Nigeria stressed that *"the situation in Libya presents an immediate test not only for the ICC as an indispensable tool in our collective conflict resolution efforts, but also for our collective determination to maintain international peace and security."*

Ambassador Salam of Lebanon highlighted that *"the success of the ICC in [its] efforts will act as a deterrent in the future and serve as a tool to end the era of impunity in Libya."*

Ambassador Araud of France further stated: *"By referring the situation in Libya to the ICC, we took an important decision and we took it unanimously. It was an informed decision aimed at ensuring that those mainly responsible for these crimes were prosecuted, judged and imprisoned. The judicial process is under way and must run its course. As the Prosecutor explained, the International Criminal Court will prosecute only the leading perpetrators: those who organized, ordered or financed crimes. There is still time for those who were misled into becoming involved in the criminal campaign led by Al-Qadhafi against innocent civilians to dissociate themselves from it. There can be no political or other kind of solidarity with those who order or commit such crimes."*

5 May - The Contact Group on Libya - comprising 21 States, as well as the UN, the Arab League and other organizations – in its Chairs' Conclusions, "[welcomed](#) the first Report by the Prosecutor of the International Criminal Court on the Qadhafi regime's crimes against humanity, presented to the UN Security Council on 4 May, along with the announcement that the Office of the Prosecutor would submit its first application for an arrest warrant in the coming weeks." Further, the Contact Group concluded that "The Report by the Prosecutor of the ICC and events that have taken place since the Contact Group's first meeting confirmed the participants' conviction that Qadhafi's continued presence would jeopardise any resolution of the crisis. People associated with him should be aware of that and draw conclusions accordingly. A number of them have already understood where the future of Libya lies; others are expected to follow."

I. Investigations and Prosecutions

Over the reporting period, the OTP presented 12 filings in the various cases and conducted 6 missions in 6 countries.

I.1. Situation in the [Democratic Republic of the Congo](#) (DRC)

This situation was referred by the DRC in March 2004. The OTP opened its investigation in June 2004, focusing first on Ituri where some of 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 the FNI and FRPI. The trial of [Thomas Lubanga Dyilo](#) began on 26 January 2009. The trial of Germain [Katanga and Mathieu Ngudjolo Chui](#) began on 24 November 2009; on 8 December 2010, the Prosecution concluded the presentation of its case. [Bosco Ntaganda](#) is at large. In September 2008, the OTP announced the start of its investigation into alleged crimes in the Kivus. On 28 September 2010 the judges issued an arrest warrant under seal against Callixte Mbarushimana, Executive Secretary of the FDLR. He was arrested on 11 October 2010 in Paris, and surrendered to the Court on 25 January 2011. The Confirmation of Charges Hearing is set for 4 July 2011.

4 May - The trial of Ignace Murwanashyaka, President of the FDLR, and his deputy, Straton Musoni, [started](#) before a German Court in Stuttgart. They face 26 counts of crimes against humanity and 39 of war crimes. Together with Callixte Mbarushimana, the Executive Secretary of the FDLR who has been surrendered by France to face trial at the ICC for war crimes and crimes against humanity, they are accused of masterminding atrocities in eastern DRC, including murders, rapes and the burning down of villages in North and South Kivu, DRC.

7/9 May - Despite the legal proceedings against their leadership in Europe, the FDLR continues to attack the local population in North and South Kivu. On 7 May, FDLR reportedly [attacked](#) the convoy of the DRC Minister for Higher and University Education on mission in Rutshuru, North Kivu, killing his driver and body guard. On 9 May, FDLR allegedly [killed](#) one person, injured four others and kidnapped seventeen persons while looting four villages in Kabare territory, South Kivu. The OTP continues its investigation against the leaders of the FDLR for crimes committed the Kivu provinces.

I.2. 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 2,000, abducted more than 2,500 and displaced well over 300,000 in DRC alone. In addition, over the same period, more than 120,000 people have been displaced, at least 450 people killed and more than 800 abducted by the LRA in Southern Sudan and the Central African Republic.

I.3. 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 have been issued, against [Ahmad Harun and Ali Kushayb](#), and against [Omar Al Bashir](#), which are outstanding. Also three summons to appear have been issued, against [Bahar Idriss Abu Garda](#) and against [Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jamus](#). On 12 July, Pre-Trial Chamber I issued a [second warrant of arrest](#) against Omar Al Bashir for three counts of genocide committed against the Fur, Masalit and Zaghawa ethnic groups: genocide by killing, genocide by causing serious bodily or mental harm and genocide by deliberately inflicting on each target group conditions of life calculated to bring about their physical destruction. Abu Garda [voluntarily appeared](#) before the Court pursuant to a summons. The confirmation of charges hearing was held on 19-30 October 2009. On 8 February 2010 the Pre-Trial Chamber issued a decision declining to confirm the charges. The OTP [requested](#) leave to appeal this decision on 15 March and this was denied by the PTC on 23 April. The OTP will present additional evidence. On 25 May the PTC Chamber issued its [Decision](#)

[informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan](#) in the case against Harun & Kushayb. On 17 June, Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jamus [appeared](#) voluntarily before the ICC, to answer charges of war crimes for their roles in the 2007 attack against African Union peacekeepers in Haskanita. The [confirmation of charges hearing](#) for Banda and Jerbo took place on 8 December 2010. On 6 March 2011, Pre-Trial Chamber I [confirmed](#) all of the charges against Banda and Jerbo. A date for the trial has not been set yet.

I.4. 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. In parallel, the Office continues to monitor allegations of crimes committed since the end of 2005. The trial started on 22 November 2010. The Defence decided not to appeal the 17 December Decision on the review of detention of Mr. Jean-Pierre Bemba, pursuant to the Appeals Judgment of 19 November 2010.

I.5. [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. On 31 March the Pre-Trial Chamber authorized the Prosecutor to commence an investigation covering alleged crimes against humanity committed between 1 June 2005 and 26 November 2009. The Prosecutor made his first visit to Kenya since the beginning of the investigation on 8-12 May and his second visit 1-3 December. The Prosecutor submitted two applications for summonses to appear regarding six individuals (William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali) on 15 December 2010. These individuals are alleged to be most responsible in accordance with the evidence. On 8 March 2011, Pre-Trial Chamber II [issued](#) the six summonses to appear. The six suspects voluntarily appeared before the Court on 7 and 8 April 2011. The Chamber scheduled the confirmation hearings on 1st and 21 September 2011.

5 May - Pre-Trial Chamber II issued a [Decision](#) on the Defense's "Application for Order to the Prosecutor Regarding Extrajudicial Comments to the Press". The decision follows upon the request from Kenyan Defence to the Chamber on Prosecution's last public statements made on Mr. Muthaura that he has control over the police in Kenya. The Defence requested that the Prosecutor refrains from presenting inappropriate comments in public as it provides a significant disadvantage for the Defence. In its response, the Prosecution requested the Chamber to dismiss the application as the Prosecutor's statement "*expressed proper and legitimate concerns about the possibility that Mr. Muthaura could exercise authority over the witness protection program.*" Against these two submissions, Judge Trendafilova decided that the "*Prosecutor's comments to the press addressed issues of his concern and within his responsibilities and were therefore not inappropriate.*" Consequently, the Judge rejected Defence's Application. The Chamber decided that the topics discussed by the Prosecutor were not related to the crimes committed by Mr. Muthaura but were specific in relation on the "*protection [of witnesses]*" and the related "*conditions of the judges*". Also, the Chamber recalled the Prosecutor's "*duty to protect witnesses during his investigations and prosecutions*". As a result, the Chamber imposed conditions on Mr. Muthaura "*to refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence.*"

I.6. [Libya](#)

This situation was referred by the UN Security Council on 26 February 2011 by [Resolution 1970](#) (2011). As per the Rome Statute, the Prosecutor shall proceed with an investigation unless there is no reasonable basis to believe that crimes falling under the ICC jurisdiction have been committed. Following a preliminary examination of available information, the Prosecutor [decided](#) to open an investigation on 3 March 2011.

II. Preliminary Examinations

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.

II.1. [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.

II.2. [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 analyzing allegations of international networks supporting armed groups committing crimes in Colombia.

II.3. [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 and to Russia in March 2010. A second mission to Georgia was conducted in June 2010.

II.4. [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. On 3 May, the OTP published a “[Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements](#).” The OTP has not made any determination on the issue.

II.5. [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. On 17-18 July 2009, high-level representatives of the OTP visited Abidjan.

II.6. [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. In 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 informed of its work. From 15 to 19 February 2010, the OTP sent a mission to Guinea, led by Deputy Prosecutor Fatou Bensouda, in the context of its preliminary examination activities. From 19-21 May a second OTP mission met with the Guinean Minister of Justice, Col. Lohalamou, and Guinean judges. A third OTP mission, lead by Deputy Prosecutor Bensouda, went to Conakry from 8 to 12 November 2010, and met with President Sékouba Konaté, Prime Minister Doré, as well as both election candidates. The Guinean authorities extended full cooperation to the Court.

II.7. Nigeria

The Office made its examination of the situation in Nigeria public on 18 November 2010. Nigeria is a State Party to the Rome Statute since 27 September 2001. The Office has been analyzing the alleged crimes committed in Central Nigeria since mid-2004 and is looking forward to engaging constructively with the Nigerian authorities on the issue.

II.8. Honduras

The Office made its examination of the situation in Honduras public on 18 November 2010. Honduras is a State Party to the Rome Statute since 1 July 2002. The Office has received many communications on crimes linked to the coup of June 2009. There were different allegations, mostly regarding alleged massive cases of torture and more than a thousand people being arrested in one day. The Office met with the Honduras Minister Counsellor in The Hague on 22 November, who provided relevant information and promised their full cooperation.

II.9. Republic of Korea

The Office made its examination of the situation in the Republic of Korea public on 6 December 2010. Korea is a State Party to the Rome Statute since 13 November 2002. The Office of the Prosecutor has received communications alleging that North Korean forces committed war crimes in the territory of the Republic of Korea. The Office is currently evaluating if some incidents constitute war crimes under the jurisdiction of the Court. These incidents are: a) the shelling of Yeonpyeong Island on the 23 November 2010 which resulted in the killing of South Korean marines and civilians and the injury of many others; and b) the sinking of a South Korean warship, the Cheonan, hit by a torpedo allegedly fired from a North Korean submarine on 26 March 2010, which resulted in the death of 46 persons.

III. Cooperation – Galvanizing Efforts to Arrest

2 May - President of Ireland, Mary McAleese, met with Deputy Prosecutor Bensouda and Amady Ba, Head of the International Cooperation Section, during a visit to the Court. President McAleese expressed support for the Office and the Court, underlining that massive crimes cannot go unpunished, highlighting also the importance of the ICC's work for future generations.

6 May - Prosecutor Moreno-Ocampo gave a presentation to Political Counsellors in EU delegations and from Member States during an EEAS Seminar on Political and Diplomatic Issues in Brussels. He discussed in particular the interests of justice in relation to the Libya situation and the relation between the ICC and mediation.



9 May - Prosecutor Moreno-Ocampo met with the UN High Commissioner for Human Rights, Navanethem Pillay, during her visit to the Court. The Prosecutor briefed the High Commissioner on the Office's recent activities, focussing on the situations in Libya and Côte d'Ivoire.



IV. Upcoming Events

- 14-15 May - Deputy Prosecutor participates in Sixth Colloquium for International Prosecutors, Freetown
- 24-25 May - OTP participates in a regional conference on the ICC, Doha
- 24 May - Prosecutor attends the screening of "The Prosecutor" at the One World Human Rights Film Festival, Brussels
- 8 June - Prosecutor briefs the UN Security Council on the situation in Darfur, New York
- 16 June - Deputy Prosecutor speaks at the Atrocity Law and Policy Class at Utrecht University, Utrecht

** 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*