

THE CURRENT INVESTIGATION BY THE ICC OF THE SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

SUMMARY

The Democratic Republic of the Congo (DRC) is slowly emerging from one of the most brutal and costly wars in recent history. Atrocities in the region purportedly include mass murder, rape, forced labor, forced relocation and torture. Although most of the official military fighting has ceased, isolated battles and violence against civilians continue, especially in the Ituri region in the northeast of the DRC. In March 2004, the DRC referred its situation to the International Criminal Court (ICC) and on June 23, 2004, the Prosecutor, Luis Moreno Ocampo, announced that he was opening a formal investigation into the situation. On March 17, 2006, Thomas Lubanga Dyilo, leader of the Union des Patriotes Congolais/Forces Patriotique pour la liberation du Congo (UPC/FPLC) militia, was arrested and transferred to the ICC. Lubanga has been charged with committing war crimes that include “enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities.”¹ This is the first arrest made by the ICC since its inception in July 2002.

BACKGROUND

The current conflict in the DRC dates back to 1997, when Laurent-Desire Kabila deposed President Mobutu Sese Seko, a former general who had ruled the country for the better part of thirty-five years. Backed by Rwandan and Ugandan troops, Kabila installed himself as President. Later, Kabila fell out of favor with the Rwandans, who sought to depose him in favor of their own liberation movement. They were thwarted when Kabila received military assistance from Angola, Zimbabwe and other neighbors. Defeated, the Rwandan rebel forces retreated and entrenched themselves in the east of the country. In early 1999, another Congolese faction, backed by Uganda, took control over the northern portion of the nation, in effect splintering the DRC into three territories.

The three sides soon came to a military stalemate and met in Lusaka, Zambia to negotiate a ceasefire. The agreement called for the withdrawal of all foreign troops, allowed for the entrance of UN peacekeepers, and contemplated an “Inter-Congolese dialogue” aimed at establishing a transitional government and democratic elections. All parties signed this document by August 1999.

In the subsequent year and a half, the parties made little progress toward their stated goals. In January 2001, President Kabila was assassinated and replaced days later by his son Joseph, a thirty year-old political novice. The new President made immediate changes intended to resolve lingering obstacles to implementation of the peace process, including allowing the entrance of additional troops from the United Nations peacekeeping force, the UN Organization Mission in the Democratic Republic of the Congo (MONUC), and reinitiating dialogue about the transitional government.² By the next year,

¹ See the following ICC Press Releases for additional information: “First arrest for the International Criminal Court,” March 17, 2006, <http://www.icc-cpi.int/press/pressreleases/132.html>; “Issuance of a warrant of arrest against Thomas Lubanga Dyilo,” March 17, 2006, <http://www.icc-cpi.int/press/pressreleases/133.html>.

² MONUC has remained in the DRC since 1999. In October 2004, the Security Council increased MONUC’s troops to 16,700 and strengthened its Chapter VII mandate to use “all necessary means” to carry out its tasks. Security Council

Kabila had announced that all DRC-allied Angolan, Namibian and Zimbabwean troops had left the country, eventually paving the way for a decisive round of multilateral meetings. The Pretoria Accord, which emerged from these meetings, detailed the formation of the transitional government and discussed the establishment of a Truth and Reconciliation Committee designed to analyze and investigate human rights abuses and bring emotional closure to the years of violence.

The Accord was signed on December 17, 2002 and formally ratified on April 2, 2003. Rwandan and Ugandan troops had officially withdrawn by May 2003. Under the terms of the Accord, President Kabila remained in power. The agreement also instated four vice-presidents who were leaders of the four main rebel movements constituting the major parties to the Accord. A two-year interim constitution was adopted and on May 13, 2005, the National Assembly adopted the post-transition Constitution.³

Elections initially scheduled to take place by June 30, 2005 have been delayed. On June 17, 2005, the National Assembly and Senate approved a six-month extension of the transition period to allow the preparations for elections to be completed.⁴ Elections were postponed again and are expected to take place on June 18, 2006.⁵ The forthcoming elections will be the first national elections in the DRC since 1965. To facilitate the process, an Independent Electoral Commission (IEC) was established in June 2004. Voter registration began peacefully in the capital, Kinshasa, on June 20, 2005. On August 2, 2005, MONUC announced that 2.9 million voters had registered in Kinshasa.⁶ In addition, the IEC will open over 9,000 voter registration offices in the country, of which at least 946 are already in operation⁷ and have registered at least 475,600 voters in Orientale Province and 438,777 in Bas-Congo.⁸ After the registration process was completed, on December 19, 2005, the constitutional referendum was held. The results showed a strong support for the constitution. The referendum will be followed by parliament adoption of the electoral law, which will determine the dates for the election.⁹

Significant challenges facing the IEC in preparing for the elections include concerns regarding security in the run-up to elections, for the registration of voters and for polling. On August 22, 2005, an attack by unidentified militiamen on a registration center in Fataki, Ituri highlighted these concerns and

Resolution 1565 (2004). In March 2005, Security Council Resolution 1592 extended MONUC's mandate till October 1, 2005.

³ Special report of the Secretary-General on elections in the Democratic Republic of the Congo, May 26, 2005, S/2005/320. The Constitution allows for a semi-presidential system: the President would be elected by universal and direct suffrage by an absolute majority of the votes and he/she in turn would appoint the Prime Minister. A balance of powers between the executive, legislative and judiciary is also provided for in the document.

⁴ The UN Security Council noted the extension, calling on all Congolese parties to respect this decision and encouraging them to mobilize for and conduct the electoral process in a peaceful manner. The Council also urged all parties and transitional institutions to endeavor to respect the timetable developed by the IEC. S/PRST/2005/27

⁵ Reuters, *Congo plans to hold elections on June 18-commission*, Kinshasa, February 22, 2006, <http://www.alertnet.org/thenews/newsdesk/L22617263.htm>.

⁶ UN News Service, *Nearly 3 million voters register in DR of Congo's capital, UN says*, August 2, 2005.

⁷ UN News Service, *Millionth voter registered in Kinshasa, UN mission in DR of Congo says*, July 8, 2005.

⁸ UN Office for the Coordination of Humanitarian Affairs, *DRC: Voter registration extended in Orientale, Bas-Congo provinces*, August 15, 2005, www.irinnews.org.

⁹ UN News Service, *Logistical problems put strain on voter registration process in DR of Congo - UN*, August 17, 2005.

prompted the UN to send 700 troops to the area.¹⁰ A significant part of MONUC's training of 900 Congolese police in law-enforcement involved state organization, the role of police during elections, and how to handle infractions that might occur during voter identification and enrollment.¹¹ There are also logistical problems of reaching an estimated electorate of 28 million people in a country the size of Western Europe, which has not had a census since 1984.¹² This problem is exacerbated by an almost total lack of roads in most areas. MONUC is making its vehicles, airplanes and helicopters available to the IEC to aid the distribution of materials for the elections.¹³ Further dangers exist from those groups who stand to lose the most power in an election because they may attempt to seize power militarily.¹⁴

In facing these challenges, the IEC is cooperating closely with MONUC. The upcoming elections will be the biggest and most expensive elections the UN has ever helped to conduct.¹⁵ The UN has 150 electoral personnel helping to organize the elections.¹⁶ Preparations for the elections are now well underway and work is being done to educate the electorate of their rights and duties and the various political parties.¹⁷ MONUC has concerns about the negative impact that increasing acts of "gangsterism" and the presence of illicit arms in the DRC may have on the elections.¹⁸ The Government has in turn banned political activity at all universities and colleges.¹⁹

THE CURRENT CONFLICT

Despite the apparent gains in the past two years, violence continues unabated in much of the DRC. While fighting among official military units has dwindled, armed factions remain in control of their respective areas, terrorizing local civilian populations. The withdrawal of foreign troops proved to be largely symbolic,²⁰ as the various state militaries left behind well-organized proxy networks to act on

¹⁰ UN Office for the Coordination of Humanitarian Affairs, *DRC: 700 UN troops sent to Fataki; protecting voter registration*, August 25, 2005, www.irinnews.org.

¹¹ UN News Service, *In DR of Congo, UN mission lends means of transport to electoral panel*, August 18, 2005.

¹² Special report of the Secretary-General on elections in the Democratic Republic of the Congo, May 26, 2005, S/2005/320.

¹³ UN News Service, *In DR of Congo, UN mission lends means of transport to electoral panel*, August 18, 2005.

¹⁴ UN News Service, *Security Council urges DR of Congo to prepare peacefully for elections*, June 29, 2005. The Security Council has "urged the candidates and political parties to refrain from any action that might disrupt" the electoral process.

¹⁵ UN News Service, *In DR of Congo, UN mission lends means of transport to electoral panel*, August 18, 2005.

¹⁶ UN News Service, *Some 250,000 voters registered in DR of Congo's capital in 10 days - UN mission*, July 1, 2005.

¹⁷ Press briefing on recent developments in Democratic Republic of Congo, May 4, 2005,

<http://www.un.org/News/briefings/docs>. Several hundred political parties have applied to register as participants in the electoral campaign, as required by the law on the organization and operations of political parties. Special report of the Secretary-General on elections in the Democratic Republic of the Congo, May 26, 2005, S/2005/320.

¹⁸ UN News Service, *Insecurity threatens DR of Congo electoral process - UN mission*, June 16, 2005.

¹⁹ UN OCHA, *DRC: Voter registration date set, university politics banned*, June 17, 2005, www.IRINnews.org.

²⁰ Amnesty International has reported that in 2004, the direct support of armed groups by neighboring countries contributed to the persistent instability in the DRC. Amnesty International Report 2005, *Regional Overview: Africa*, <http://web.amnesty.org/report2005/2af-index-eng>. The Security Council has condemned the continued involvement and complicity of the DRC's neighbor countries. In March 2005, Resolution 1592 of the Security Council demanded that the Governments of Uganda, Rwanda and the DRC end violations of the arms embargo imposed by Resolution 1493 (2003) within their respective territories, and end the activities of armed groups operating in the region. This arms embargo was extended for another year by the Security Council in July 2005, SC Resolution 1616 (2005).

their behalf. These operations, which the UN coined “Elite Networks,” are fundamentally designed to exploit the rich supply of natural resources in the DRC.

Large profits from minerals and other resources fuel the continuation of hostilities. The Elite Networks battle over access to mineral deposits, along with agricultural production and local tax revenues. Civilians find themselves caught in the middle of these turf wars, falling victim to the violence and coercion of the various factions of military, ex-military, armed rebels and militia affiliated with the Networks.

Since the hostilities began in 1998, approximately 4 million people have died and 3.4 million civilians have been displaced.²¹ There are about 38,000 casualties each month.²² The lack of law enforcement allows armed groups to act with impunity.²³ Thousands of deaths by mass murder and summary execution since 2002 have been reported by states, international organizations and non-governmental organizations.²⁴ Alleged atrocity crimes are particularly common in the mineral-rich east and northeast of the country. Reports document crimes including mass civilian killings, unlawful arrest, seizure of property, kidnappings, forced displacement, torture, forced prostitution, rape and the illegal use of child soldiers.²⁵ Displaced civilians often fare no better after relocating. In August 2004, 160 Congolese were massacred in a refugee camp in Burundi.²⁶

Much of the violence is concentrated in eastern DRC. Human Rights Watch estimated in November that 60,000 civilian murders have taken place in the Ituri region.²⁷ Approximately 5,000 of these murders took place between July 2002 and March 2003. Today the violence continues,²⁸ for instance, on May 23, 2005, militia members killed nineteen civilians in the town of Nindja and caused an estimated 6,000 people to flee, with many falling victim to acts of mutilation. In the village of Sonsa, an attack by Mayi-Mayi elements resulted in the flight of 100 individuals during which fifteen females were raped.²⁹

Progress has been made regarding the disarmament and reintegration of armed groups. In November, 2001, Security Council Resolution 1376 supported the beginning of MONUC phase III devoted to Disarmament, Demobilization, Repatriation, Reintegration and Resettlement (DDRRR) of foreign

²¹ MONUC, *Why the DRC Matters?*, <http://www.un.org/Depts/dpko/missions/monuc/drc.pdf>.

²² DRC: ‘Thousands’ dying in DR Congo war, BBCNEWS, January 6, 2006, <http://news.bbc.co.uk/2/hi/africa/4586832.stm>.

²³ Human Rights Watch reported that former warlords alleged to have committed serious human rights abuses including war crimes and crimes against humanity have been appointed as generals to the Congolese army rather than facing investigation and prosecution. Human Rights Watch, *D.R. Congo: Army Should Not Appoint War Criminals*, January 14, 2005, <http://hrw.org/english/docs/2005/01/14/congo10014.htm>.

²⁴ International Criminal Court website, press release, *The Office of the Prosecutor of the International Criminal Court opens its first investigation*, June 23, 2004, <http://www.icc-cpi.int/press/pressreleases/26.html>.

²⁵ For example see: *Vicious attacks on civilians force thousands to flee in eastern DR of Congo - UN*, June 7, 2005, <http://www0.un.org/apps/news/story.asp?NewsID=14515&Cr=democratic&Cr1=congo>.

²⁶ Amnesty International Report 2005, *Regional Overview: Africa*, <http://web.amnesty.org/report2005/2af-index-eng>.

²⁷ Human Rights Watch: Commentary: *Arrest All Ituri Warlords*, <http://hrw.org/english/docs/2005/03/11/congo10311.htm>

²⁸ For example see UN News Service, *UN mission reports slaying of 39 by unknown assailants in eastern DR of Congo*, July 12, 2005.

²⁹ *Vicious attacks on civilians force thousands to flee in eastern DR of Congo - UN*, June 7, 2005, <http://www0.un.org/apps/news/story.asp?NewsID=14515&Cr=democratic&Cr1=congo>.

armed groups. By November 26, 2004, MONUC announced that it had repatriated 11,270 people under this program. In 2004, the Disarmament and Community Reinsertion (DCR) Plan for Ituri was launched. The plan was carried out through five transit sites which opened on September 13, 2004. As of August 25, 2005, 16,000 persons³⁰, including at least 4204 children³¹, had handed over their weapons. The disbanded fighters are being integrated into the DRC army which is working to combat armed groups still active in the country.³² On June 25th, with the exception of Bunia, these transit sites were closed.³³

Since the closure, MONUC has launched several operations aimed at dislodging and disarming militia members who have not come forward voluntarily, and also widening the area controlled by the UN force.³⁴ The International Crisis Group has reported that this increase in military action has resulted in large scale reprisals by rebels targeting civilians, leaving the UN to make the decision: “[s]hould it continue to step up the pressure, risking further retaliation against the civilian population, or should it back down?”³⁵ The governments of DRC, Rwanda and Uganda have in turn given Rwandan rebels in DRC until September 30, 2005, to disarm or face “severe” consequences, including political and military repercussions.³⁶

While there has been significant voluntary disarmament under MONUC’s supervision, at least 1,000 militiamen have refused to disarm and are attacking the peacekeepers, government troops and civilians.³⁷ In a disturbing development in mid-June 2005, many of the groups refusing to disarm joined together to form the *Mouvement révolutionnaire congolais* (Congolese Revolutionary Movement), whose aim is to oppose the extension of State authority throughout Ituri.³⁸

MONUC has operated in the DRC since 1999 and thus can inform and advise the Prosecutor as he conducts investigations in the country. A memorandum of understanding is currently being developed

³⁰ UN Office for the Coordination of Humanitarian Affairs, *DRC: 700 UN troops sent to Fataki, Protecting voter registration*, August 25, 2005, www.irinnews.org.

³¹ However, an NGO report from August 2005, states that the 12,500 girls in the government and non-government forces in the DRC are being failed by the disarmament program. UN Office for the Coordination of Humanitarian Affairs, *DRC: 12,500 Girls members of armed groups, NGO report says*, August 25, 2005, www.irinnews.org.

³² UN Office for the Coordination of Humanitarian Affairs, *DRC: Former militiamen now form army’s 4th Brigade*, August 23, 2005, www.irinnews.org.

³³ See MONUC mission website, <http://www.monuc.org/home.aspx?lang=en>.

³⁴ UN News Service, *UN peacekeepers clear area of militia members in eastern DR of Congo*, June 28, 2005; UN News Service, *UN peacekeepers pursue militias in eastern DR of Congo*, July 6, 2005; UN News Service, *UN peacekeepers in DR of Congo seek hidden Rwandan Hutu fighters*, July 7, 2005, UN News Service, *DR of Congo: UN mission launches new military operation in troubled east*, August 26, 2005.

³⁵ International Crisis Group, Jason Stearns, *Rwanda’s genocide still echoes in Congo*, August 24, 2005, www.crisisgroup.org.

³⁶ UN Office for the Coordination of Humanitarian Affairs, *Great Lakes: Hutu rebels given till 30 September to disarm*, August 25, 2005, www.irinnews.org.

³⁷ UN Office for the Coordination of Humanitarian Affairs, *DRC: 700 UN troops sent to Fataki, Protecting voter registration*, August 25, 2005, www.irinnews.org.

³⁸ UN News Service, *Annan welcomes DR of Congo’s decision to disarm militia forcibly*, August 8, 2005, www.un.org.

between the ICC and MONUC which will be mostly limited to the Mission's logistical support for the Court, which the Court will reimburse.³⁹

Sexual Violence

One of the most severe and damaging elements of this conflict has been the pervasive sexual violence perpetrated against women and girls, and to a lesser extent, men and boys. Mass rape has been institutionalized as part of the fighting in this conflict.⁴⁰ Tens of thousands of women and girls have been raped or otherwise subjected to sexual violence.⁴¹ Perpetrators of sexual violence are members of virtually all the armed forces and armed groups that operate in eastern Congo. Though the war has officially ended, the violence and sexual attacks continue.⁴² Amnesty International reported that in 2004, women continued to be raped and subjected to other forms of sexual violence. The report stated that there was no safe haven for women to escape the violence, not even in refugee camps.⁴³

The Rome Statute explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and sexual violence as war crimes and crimes against humanity,⁴⁴ giving the ICC jurisdiction over these crimes. The Statute's provisions for the rights of victims and witnesses and its special recognition of the gravity of sexual and gender crimes puts the Court in a unique position to carry out these investigations and prosecutions. The ICC will only be able to prosecute a small number of the most serious cases of sexual violence, with its jurisdiction limited to crimes committed after July 2002, and restricted in the number of cases it can take. The Congolese courts will also have an important role to play in promoting justice for these victims, following the example and guidance of the ICC.

THE DRC'S REFERRAL TO THE ICC

The DRC signed the Rome Statute of the ICC on September 8, 2000 and ratified the instrument on April 11, 2002. In its statement upon depositing the certificate of ratification, the DRC said that it was ashamed of the atrocities occurring on its territory and looked forward to ICC assistance in punishing those responsible. As a State Party to the ICC, the DRC has consented to the Court's jurisdiction for any crimes enumerated in the Statute arising after July 1, 2002. The ICC is a court of last resort, and therefore recognizes the sovereign right of States to domestically adjudicate crimes, including those covered by the Rome Statute, if they so request. In July 2003, ICC Prosecutor identified the DRC as "the most urgent situation to be followed,"⁴⁵ but did not launch an investigation until the DRC made an express referral to the ICC.

³⁹ Margaret Carey, *Press Briefing on Recent Developments in DRC*, Africa Division, Office of Operations, Department of Peacekeeping Operations (DPKO), May 4, 2005, <http://www.un.org/News/briefings/docs>.

⁴⁰ *The Globe and Mail*, *The War on Women*, November 27, 2004.

⁴¹ Different patterns of abuse have been perpetrated: women have been gang-raped or abducted by combatants for long periods of sexual slavery, sometimes months at a time. Others have been mutilated or gravely injured by having objects inserted into them. The few who fought back when attacked have often been killed.

⁴² Human Rights Watch Report, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, March 2005, <http://hrw.org/reports/2005/drc0305/>.

⁴³ Amnesty International Report, 2005, <http://web.amnesty.org/report2005>.

⁴⁴ Articles 8 and 7 of the Rome Statute.

⁴⁵ *Communications Received by the Office of the Prosecutor of the ICC*, Press Release, July 16, 2003.

In March 2004, the DRC referred its situation to the ICC following significant international pressure to go to the Court. The DRC referred all grave crimes that took place throughout the DRC territory since the entry into force of the Rome Statute on July 1, 2002.⁴⁶ Since ratifying the Rome Statute, DRC President Kabila had become somewhat reluctant to refer the situation to the ICC, partially out of fear that an ICC investigation would hurt the delicate and complex new power-sharing agreement among rival factions. Since the leaders of military and political groups are now members of the DRC government, national stability could be compromised if these leaders are implicated in investigations. The Prosecutor has said he understands these concerns, and pledged to avoid undermining the DRC peace process. In June 2004, he determined that in accordance with the Statute there was a reasonable basis to initiate an investigation.⁴⁷

ICC ACTIVITIES IN THE DRC

On July 5, 2004, the situation in the DRC was assigned to Pre-Trial Chamber I. This Chamber was made up of Judge Claude Jorda, Presiding Judge, Judge Akua Kuenyehia and Judge Sylvia Steiner. On July 14, 2005, the Pre-Trial Chamber determined that “the designation of a single judge will ensure the proper and efficient functioning of the Chamber” and designated Judge Steiner as the single judge for the situation in the DRC during the Court’s recess, from July 22, 2005 through August 18, 2005.⁴⁸

A field office has been set up in Kinshasa to aid the investigation and another is being established in Bunia. There have been several investigative missions by the Court, focusing particularly on the Ituri region, and significant evidence is being collected despite grave security concerns. In the coming months, the Prosecutor will identify persons under investigation. When sufficient evidence has been gathered, he will go to the Pre-Trial Chamber to request issuance of arrest warrants. The Office of the Prosecutor had stated that warrants could be expected in 2006.⁴⁹ Some suspect that arrest warrants have already been issued, but remain under seal to avoid an increase in violence. Once the persons are arrested and brought before the Court, the Pre-Trial Chamber will conduct a confirmation of charges hearing. The Chamber will then transfer the confirmed cases to the Trial Division to proceed. Congolese authorities have already arrested some people in Ituri and the Prosecutor has stated that the Court is waiting to see if the defendants overlap.⁵⁰

The Prosecutor has a duty to address the situation as thoroughly and impartially as possible. For a successful investigation, the support and assistance of the host country is critical. To this end, the Prosecutor has sought to cooperate with the DRC and intergovernmental organizations in order to perform an efficient, timely and confidential investigation. A delegation from the Office of the Prosecutor visited the DRC in July 2004 to meet with Congolese political and judicial officials,

⁴⁶ International Criminal Court website, *Prosecutor receives referral of the situation in the Democratic Republic of Congo*, Press release, April 19, 2004, <http://www.icc-cpi.int/press/pressreleases/19.html>.

⁴⁷ International Criminal Court website, *The Office of the Prosecutor of the International Criminal Court opens its first investigation*, Press release, June 23, 2004, <http://www.icc-cpi.int/press/pressreleases/26.html>.

⁴⁸ Decision on the Designation of a Single Judge, Pre-Trial Chamber I, July 14, 2005.

⁴⁹ MONUC website, *UN criminal court to target Uganda rebels, DR Congo militia*, February 8, 2005, www.monuc.org.

⁵⁰ Edith Lederer, *UN Court Expects 2 or 3 New Cases a Year*, Associated Press, June 9, 2005, <http://www.newsday.com/news/nationworld/world/wire/sns-ap-un-international-court,0,5548069.story?coll=sns-ap-world-headlines>.

representatives of international organizations and embassies, and members of civil society.⁵¹ In October 2004, the DRC and ICC signed an accord giving the Court authority to operate within the DRC and begin investigations within its borders, and also compel DRC authorities to cooperate with the investigations.⁵² A provisional memorandum of understanding on Privileges and Immunities was also agreed to, facilitating activities of the ICC in the DRC until the Government ratifies the Agreement on the Privileges and Immunities of the ICC (APIC).⁵³

Some observers claim that the Prosecutor's presence in the DRC has already had a pronounced deterrent effect on the commission of further atrocities. However, the cooperation and genuine dedication of the Government to the ICC has been called into question. Several civil society organizations joined South Kivu's Coalition for an International Criminal Court in signing an open letter to the President calling for the full implementation of the Rome Statute's provisions into national law and the immediate signature and ratification, without reserve, of the Agreement on the Privileges and Immunities of the ICC.

Seminars

In December 2004 and again in April 2005, the ICC held seminars in the DRC. In the first seminar, lawyers, magistrates, media representatives and members of non-governmental organizations participated in a number of seminars and workshops aimed to promote a better understanding of the objectives, structure and functions of the ICC.⁵⁴ In April, the Registry of the ICC organized a series of seminars for civil and military magistrates from the Ministries of Justice and Defence to inform participants about the mandate and legal framework of the Court.⁵⁵

Status Conference

On February 17, 2005, Pre-Trial Chamber I rendered its decision to convene the first status conference since the Court came into existence. The Chamber stated that this Conference was intended to provide for the protection of victims and witnesses and the preservation of evidence regarding the situation in the DRC.⁵⁶

On March 8, 2005, the Prosecutor filed a detailed response to this decision expressing the view that he should have been entitled to make submissions to be heard on the issue of whether the Pre-Trial Chamber had the authority to convene a status conference at that time. He pointed out that in accordance with Article 42(1) of the Rome Statute, conducting investigations is the responsibility of the Prosecution subject only to a limited judicial supervision by the Chamber. Further, he argued that convening such a conference during an investigation is not authorized under the Statute, the Rules of Procedure and Evidence and the Regulations of the Court. He highlighted that the Chamber's

⁵¹ International Criminal Court website, *First Mission to the Democratic Republic of Congo*, Press release, July 30, 2005, <http://www.icc-cpi.int/press/pressreleases/34.html>.

⁵² International Criminal Court website, *Provisional Memorandum of Understanding on the Privileges and Immunities between the International Criminal Court and the Democratic Republic of Congo*, Press release, October 12, 2004, <http://www.icc-cpi.int/press/pressreleases/48.html>.

⁵³ *Id.*

⁵⁴ ICC Newsletter #3, February 2005.

⁵⁵ ICC Newsletter #4, June 2005.

⁵⁶ Decision to Convene a Status Conference, Pre-Trial Chamber I, February 17, 2005.

appearance of impartiality should not be compromised and that there was no situation at hand requiring the Chamber to provide for the protection of victims and witnesses or for the preservation of evidence in this manner.⁵⁷

The following day, the Pre-Trial Chamber rejected the requests made by the Prosecutor in his response and declined to consider the submissions made therein. The decision stated that the Prosecutor had not availed himself of the appropriate procedural remedy set out in the Rome Statute within the specified time limits, and that by failing to do so, the Prosecutor waived his right to raise concerns regarding the scheduled status conference. Therefore it was confirmed that the conference would proceed as scheduled.⁵⁸

On March 11, 2005, the Prosecutor filed an Application for Leave to Appeal on the basis of Article 82(1)(d) of the Rome Statute.⁵⁹ This Application was denied by the Chamber on March 14th on the grounds that the Prosecutor had not satisfied the first criterion of Article 82(1)(d). The Prosecutor had not shown that the challenged Decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.⁶⁰ The Status Conference was held as scheduled.

This exchange clearly demonstrates the limits of the powers of the Prosecutor and the ability of the Pre-Trial Chamber to oversee the Prosecutor's actions.

Unique Investigative Opportunity

On April 19, 2005, Pre-Trial Chamber I was informed by the Prosecutor that the investigation presented an unexpected and unique opportunity to carry out forensic examinations.⁶¹ On April 21st, the Chamber held that this was a unique investigative opportunity in accordance with Article 56. It decided to convene an *ex parte* consultation (non-disclosed to parties and the public) with the Prosecutor pursuant to Rule 114 of the Rules of Procedure and Evidence to determine appropriate measures to be taken and their implementation.⁶² Once again, the actions of the Prosecutor are checked by the Chamber since he is required to seek its authorization to proceed.

In its decision rendered on April 26, 2005, the Pre-Trial Chamber authorized the Prosecutor to request the Netherlands Forensic Institute (NFI), a Dutch Specialist Laboratory, to perform forensic examinations.⁶³ The NFI may be questioned by the Prosecutor and/or the *ad hoc* counsel for the Defence, a representative for defendants who have not yet been identified, to be appointed by the

⁵⁷ Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, Pre-Trial Chamber I, March 8, 2005.

⁵⁸ Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, Pre-Trial Chamber I, March 9, 2005.

⁵⁹ Prosecutor's Application for Leave to Appeal, Pre-Trial Chamber I, March 11, 2005.

⁶⁰ Decision on the Prosecutor's Application for Leave to Appeal, Pre-Trial Chamber I, March 14, 2005.

⁶¹ Article 56 of the Rome Statute sets out the procedures to be followed if a unique investigative opportunity arises regarding testimony or evidence which may not be available subsequently for the purposes of a trial.

⁶² Decision to Hold Consultation under Rule 114, Pre-Trial Chamber I, April 21, 2005.

⁶³ Decision on the Prosecutor's Request for Measures under Article 56, Pre-Trial Chamber I, April 26, 2005.

Registrar under the Orders of the Chamber. On June 1, 2005, the Chamber approved the NFI's investigation plan and authorized the Prosecutor to provide additional information requested by NFI.⁶⁴

Defense Counsel

On July 7, 2005, the *ad hoc* counsel for the Defence, Maître Joseph Tshimanga, gave his solemn undertaking before the Chamber in accordance with Article 5 of the Draft Code of Professional Conduct for Counsel.⁶⁵ Mr. Tshimanga was appointed by the Registrar in accordance with the above-mentioned Order of April 26, 2005. Mr. Tshimanga will represent the interests of the defense in general and not an individual accused. On August 1, 2005, Mr. Tjarda Van der Spoel was also appointed as *ad hoc* counsel for Defence⁶⁶ and gave his solemn undertaking before the Chamber on August 18, 2005.⁶⁷

Application for Participation of Victims pursuant to Article 68

Article 68 of the Rome Statute allows victims to participate in the proceedings of the Court under certain circumstances. On May 26, 2005, Pre-Trial Chamber I received its first application for participation of victims in the proceedings concerning the DRC. The victims requested the non-disclosure of their identity and any information that could lead to their identification. On May 27th, the Chamber rendered an *ex parte* order under Regulation 86(7) requesting additional information from the applicants concerning the request of the non-disclosure of their identity.⁶⁸ The Pre-Trial Chamber convened an *ex parte* hearing on July 12th to seek further information on the questions asked in the order of May 27th.⁶⁹ On July 12th, the Chamber rendered an oral decision concerning the notification and filing of confidential documents. The Chamber decided to accept the filing of a response from the victims although there had been a delay not in accordance with Regulations 31 and 33. The decision was based on the fact that the Regulations presuppose the existence of an electronic filing system that is not yet in place.⁷⁰ On July 21, 2005, the Chamber decided that an unredacted copy of the Applications could be provided to the Prosecutor, however a redacted copy would be provided to the *ad hoc* counsel for the Defence to protect the identity of the applicants.⁷¹

Also on July 12th, Legal Representative for Victims, Maître Emmanuel Daoud, gave his solemn undertaking before Pre-Trial Chamber I in accordance with Article 5 of the Draft Code of Professional Conduct for Counsel.⁷²

⁶⁴ Decision on the Prosecutor's Communication to the Pre-Trial Chamber, Pre-Trial Chamber I, June 1, 2005.

⁶⁵ Prestation de serment par Maître Joseph TSHIMANGA, Pre-Trial Chamber I, July 7, 2005.

⁶⁶ APPOINTMENT OF Mr. Tjarda Van der Spoel AS AD HOC COUNSEL FOR THE DEFENCE PURSUANT TO THE DECISION OF PRE-TRIAL CHAMBER I DATED 26 APRIL 2005, August 1, 2005.

⁶⁷ Solemn undertaking of Mr. Tjarda VAN DER SPOEL, August 18, 2005.

⁶⁸ Order regarding Request for Additional Information (concerning applications for participation of victims), confidential and ex-parte, June 1, 2005, http://www.icc-cpi.int/library/cases/20050526ordonnanceRDC_En.pdf.

⁶⁹ ICC website, *Ex Parte Hearing to request additional information concerning the request for non-disclosure of the identity of the applicants seeking to participate in the proceedings related to the situation in the DRC*, <http://www.icc-cpi.int/home.html>.

⁷⁰ Décision sur la Demande de Prorogation de Delai, Pre-Trial Chamber I, July 12, 2005.

⁷¹ DECISION ON PROTECTIVE MEASURES REQUESTED BY APPLICANTS, 01/04-1/dp to 01/04-6/dp, July 21, 2005.

⁷² Présentation de serment par Maître Emmanuel Daoud, Pre-Trial Chamber I, July 12, 2005.

Hearing concerning the protection of victims in DRC

On June 14, 2005, Pre-Trial Chamber I issued a decision convening a hearing on July 8th regarding the protection of victims in the situation in the DRC. At the request of the participants at the hearing, and with the consent of the Prosecutor and the *ad hoc* counsel for the Defence, the Chamber decided in an oral decision rendered on July 8th that the matters to be dealt with, and the need to provide for the protection of the participants, required the hearing to be held in closed session. For these reasons also, the content of the above-mentioned decisions will not be made public at this stage.⁷³

Arrest of Thomas Lubanga Dyilo

On March 17, 2006, Thomas Lubanga Dyilo, leader of the Union des Patriotes Congolais/Forces Patriotique pour la liberation du Congo (UPC/FPLC) militia, was arrested in Kinshasa and transferred to the ICC. Lubanga has been charged with committing war crimes that include enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities. Lubanga's arrest warrant, issued on February 10, 2006, was the first warrant to be issued by the ICC in connection with the atrocities in the DRC. Furthermore, this is the first arrest made by the ICC since its inception in July 2002.

For a comprehensive list of all of the decisions of the Pre-Trial Chamber (PTC) please see the separate fact sheet on PTC I.

WHY THE DRC CANNOT PROSECUTE THE CRIMES ALONE

Courts in the DRC currently lack the capability to conduct trials of such magnitude, and it was essential that investigations begin as soon as possible, in order to be successful. Courts are few in number and understaffed; frequently judges do not receive adequate training.⁷⁴ Furthermore, courts in the DRC have been fraught with corruption and their officials implicated in the atrocities.⁷⁵ Human Rights Watch reports that many DRC courts have failed to investigate serious abuses by leaders, charging them instead with minor offenses. The DRC judicial system is also incapable of appearing neutral to victims. Finally, the DRC court system lacks security measures for victims that would encourage them to testify against the perpetrators or come forward with evidence. The ICC is in a unique position to provide both neutrality and victim protection to prosecutions of crimes committed in the DRC.

The ICC has jurisdiction only over crimes committed after July 1, 2002. Furthermore, the Court is limited in its resources and mandate such that it can only prosecute the most heinous crimes and highest-level perpetrators. DRC courts must pick up where the ICC leaves off, prosecuting those offenses the ICC cannot prosecute. The interim government has made important progress in re-establishing national and regional courts. In August 2004, a court in Bunia handed down a high profile conviction, sentencing one former faction leader to 20 years imprisonment for arbitrary arrests aggravated by torture. Such progress within the DRC court system will be increased by cooperation

⁷³ ICC website, *Hearing concerning the protection of victims in DRC*, <http://www.icc-cpi.int/home.html>.

⁷⁴ Many commentators note that the ethnic uprising of 1998 in Ituri began as a property dispute between two tribes which was mishandled by a local court.

⁷⁵ In October 2004, the former chief prosecutor of a military tribunal was himself convicted of the murder and mutilation of a government official and sentenced to death by a new military tribunal.

with the ICC in its investigations and prosecutions. This is extremely important, as the justice system will be vital to the future stability of the country and the region as a whole.

IMPACT ON OTHER NATIONS INVOLVED IN THE CONFLICT

In accordance with Article 12 of the Rome Statute, the ICC has jurisdiction over any crime enumerated in the Statute committed on the territory of a state party, regardless of the perpetrator's nationality. In light of the persistent involvement and complicity of neighboring countries in the conflict, this provision will be of great importance to the investigations in the DRC. Consequently, the Court could also try non-Congolese nationals even if their country of origin is not a state party. If investigators cannot locate suspects within Congolese borders, they will have to rely on the cooperation of neighboring states. However, because the Court must defer to national courts, the Prosecutor may find that other governments may attempt to shield their nationals from ICC investigation by claiming the right to conduct domestic investigations. State parties to the Court are required to comply with requests for surrender; however, of the DRC's neighbors, only Uganda and Namibia have ratified the Statute.

The Prosecutor's decision to investigate human rights violations in the DRC has attracted significant international attention to the DRC and surrounding countries. The ICC has sent a clear signal to the DRC's neighbors that their involvement in the DRC conflict is also under scrutiny. Countries that have provided tacit support for Elite Networks in the DRC will likely reconsider the risks of their actions. Furthermore, this may result in steps to halt Elite Network operations.

Until recently, the DRC's neighbors have not assisted in ending the conflict and have been unhelpful in preventing the passage of weapons and combatants into the DRC. For instance, Ugandan President Yoweri Museveni attempted to put pressure on the ICC prosecutor not to investigate crimes by leaders of armed groups supported by Uganda;⁷⁶ members of armed groups from DRC met openly in Uganda in June 2005;⁷⁷ and UN-appointed monitors were faced with delays from both Rwanda and Uganda in providing information on security and economic matters relating to the DRC.⁷⁸ Some actions in August 2005 have indicated a change in approach. The Ugandan government ordered six members of the Congolese Revolutionary Movement to leave the country or face arrest and prosecution: "[i]n the spirit of supporting security in the Great Lakes region and in support of the interim arrangement in the DRC."⁷⁹ In addition, ministers from the DRC, Rwanda and Uganda have been working together to combat the problem of Rwandan rebels operating in the DRC, ordering the rebels to disarm by September 30, 2005 or face "severe" consequences.⁸⁰

THE ROLE OF CORPORATIONS IN THE DRC CONFLICT

⁷⁶ Human Rights Watch, *Human Rights Overview, Democratic Republic of the Congo, World Report, 2005*, <http://hrw.org/english/docs/2005/01/13/congo9855.htm>.

⁷⁷ UN News Service, *Annan welcomes DR of Congo's decision to disarm militia forcibly*, August 8, 2005, www.un.org.

⁷⁸ UN News Service, *Report to Security Council says Uganda, Rwanda delay answers on DR of Congo*, July 27, 2005, www.un.org.

⁷⁹ UN Office for the Coordination of Humanitarian Affairs, *DRC-Uganda: Six Congolese rebels expelled*, August 25, 2005, www.irinnews.org.

⁸⁰ UN Office for the Coordination of Humanitarian Affairs, *Great Lakes: Hutu rebels given till 30 September to disarm*, August 25, 2005, www.irinnews.org.

Article 25(3) of the Rome Statute extends criminal responsibility to an individual who in any way aids, abets or otherwise assists a criminal group, when that person knows that the group ordinarily commits criminal acts within the jurisdiction of the Court. To this extent, individual executives of corporations who knowingly assist or deal with such groups in the mineral trade may be prosecuted by the ICC. ICC jurisdiction is limited to natural persons⁸¹; therefore it does not include corporations.

Many of the crimes in the DRC have involved businesses and corporate actors because the conflict is almost entirely about the exploitation of natural resources.⁸² Many stand to gain financially through the commission of atrocious crimes including forced child labor, destruction of homes and massacres of civilians near mines. They have played a major role in fueling the ongoing ethnic conflicts in the Ituri and nearby regions. For instance, fighting between armed groups for the control of the gold mining town of Mongbwalu resulted in the deaths of at least two thousand civilians between June 2002 and September 2004.⁸³

The Prosecutor has made corporate actors a target of his investigation for two main reasons. First, he intends to punish corporate actors who have supported the commission of atrocities in order to deter future crimes.⁸⁴ He stated, “[f]ollow the trail of money and you will find the criminals. If you stop the money then you stop the crime.”⁸⁵ Second, the Prosecutor plans to use evidence of financial transactions to prove criminal intent, which is very difficult to establish through other means. In many cases where victims have died, fled, or are too intimidated to testify, corporate records will constitute key evidence against the accused.⁸⁶

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⁸¹ Rome Statute, Article 25(1).

⁸² See Human Rights Watch, *The Curse of Gold*, June 2005, <http://hrw.org/reports/2005/drc0505/>.

⁸³ Human Rights Watch, *D.R. Congo: Gold Fuels Massive Human Rights Atrocities*, June 2, 2005, <http://hrw.org/english/docs/2005/06/02/congo11041.htm>.

⁸⁴ International Criminal Court website, *The Prosecutor on the co-operation with Congo and other States regarding the situation in Ituri, DRC*, Press release, September 26, 2003, <http://www.icc-cpi.int/press/pressreleases/12.html>.

⁸⁵ BBC News, *Firms face blood diamond probe*, September 23, 2003, <http://news.bbc.co.uk/1/hi/business/3133108.stm>.

⁸⁶ For more information see: *Information Regarding the Potential Liability of Businesspersons for Atrocity Crimes under the Rome Statute*, <http://www.amicc.org/docs/ICCandBusTrans.pdf>.