

Recent developments in the jurisprudence of the International Criminal Court*

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"[...] at no point can [victims'] participation be seen as having had a negative impact on the expeditiousness of the trial".¹

On 1.7.2012, the International Criminal Court ("ICC") celebrated its 10th anniversary, an occasion which prompted academics and observers to tentatively draw conclusions on the Court's output during the first years of its existence. The Court has seen its first judgment convicting Thomas Lubanga Dyilo for the commission of war crimes and sentencing him to 14 years imprisonment. Soon thereafter, it acquitted and released Mathieu Ngudjolo Chui from custody. But these developments do not represent fully the judicial activities of the Court over the last 10 years:

Pre-Trial Chambers have been assigned eight situations² from which 18 cases emanated. Against 28 suspects the Court issued 21 warrants of arrest and 9 summonses to appear.³ To date, warrants of arrest against 13 suspects are still outstanding. Pre-Trial Chambers have held 9 confirmation of charges hearings. Proceedings against four suspects termi-

* Previous overviews of the Court's jurisprudence are available online at ZIS 2008, 371; ZIS 2010, 726; ZIS, 2011, 843. The paper is based on a presentation of ICC jurisprudence before the "Arbeitskreis Völkerstrafrecht" in Nuremberg, Germany, on 5.5.2012, but includes judicial developments until 15.2.2013. The author wishes to thank Gilbert Bitti and Donald Riznik who kindly commented on earlier drafts and expresses her gratitude to Kathryn Finley, Mary-Anne Power and Daphne Vlachojannis for their creative literary suggestions. All decisions and filings mentioned in this paper can be retrieved from the Court's website or the Legal Tools Database, accessible at <http://www.legal-tools.org/en/go-to-database/> (14.3.2013).

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¹ ICC (Trial Chamber III), Opinion of 23.2.2012 – ICC-01/05-01/08-2140 (Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims – ICC-01/05-01/08-2138), para. 8.

² Democratic Republic of the Congo, Uganda, Central African Republic, Darfur/Sudan, Republic of Kenya, Libya, Ivory Coast and the Republic of Mali.

³ The number of suspects does not include two further persons who were sought by a warrant of arrest but who died in the meantime. This concerns suspects Raska Lukwyia (ICC [Pre-Trial Chamber II], Decision of 11.7.2007 – ICC-02/04-01/05-248 [Decision to Terminate the Proceedings against Raska Lukwyia]) and Muammar Mohammed Abu Minyar Gaddafi (s. in the text below). The number of warrants of arrest considers each warrant issued and excludes the two warrants withdrawn.

nated at the pre-trial stage as the charges were not confirmed. Five Trial Chambers have been constituted as a result of the confirmation of charges. The Lubanga and Katanga/Ngudjolo trials have been concluded, the Bemba trial is ongoing, and the Banda/Jerbo, Ruto/Sang and Muthaura/Kenyatta trials are in preparation. The Appeals Chamber has provided guidance in a series of interlocutory appeals and received its first appeals against Trial Chamber I's judgment and decisions on sentencing and reparations as well as Trial Chamber II's judgment acquitting Mathieu Ngudjolo Chui. The Prosecutor is conducting preliminary examinations in seven situations⁴ and has taken a decision not to proceed in relation to three further situations.⁵

In the meantime, the different chambers have produced a gargantuan amount of jurisprudence which elucidates further the provisions of the Rome Statute⁶ and its Rules of Procedure and Evidence.⁷ Important input to the Court's jurisprudential corpus has been provided by the Pre-Trial Chambers which pioneered first through an untested thicket of provisions. The Trial Chambers have gained speed in adding their perspective to the exegesis of the Court's basic documents.

This overview presents some jurisprudential highlights of those situations and cases in which judicial developments took place between October 2011 and mid February 2013. In so doing, a few key findings of the decisions deemed important are presented. It is hoped that these "appetizers" inspire the reader to seek out further information in the decisions themselves. Undoubtedly, the selection of decisions and proposed key findings reflect the author's personal choice and preference – any misrepresentation or inaccuracy rests with the author alone. A factsheet introduces each situation and case informing the reader of relevant basic facts.

⁴ These situations include Afghanistan, Colombia, Georgia, Guinea, Federal Republic of Nigeria, Honduras, and the Republic of Korea. S. for more information http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx (11.3.2013).

⁵ This concerns the situation in Venezuela, Iraq (2006) and Palestine (2012).

⁶ Rome Statute of the International Criminal Court = UNTS vol. 21187, p. 3. All articles mentioned in this paper without reference to the legal instrument are those of the Statute.

⁷ Rules of Procedure and Evidence = ICC-ASP/1/3 (Part II-A). All rules mentioned in this paper without reference to the legal instrument are those of the ICC's Rules of Procedure and Evidence.

I. Situation in the Democratic Republic of the Congo (Pre-Trial Chamber II)⁸

- Referral by the Democratic Republic of Congo: 3.3.2004 (publicly announced on 19.4.2004)
- Victims participating: 73⁹

On 15.3.2012, the situation in the Democratic Republic of Congo ("DRC"), including all emanating (pre-trial) cases, was assigned to Pre-Trial Chamber II.¹⁰ No proceedings at the *situation* level took place during the review period.¹¹ To date, five cases against six individuals emanated from this situation. Three cases are in their pre-trial phase, two trials have been concluded. They are presented hereafter.

1. The Case of the Prosecutor v Thomas Lubanga Dyilo (Trial Chamber I)¹²

- Warrant of arrest: 10.2.2006 (public on 17.3.2006)
- Surrender to the Court: 17.3.2006
- Confirmation of charges: 29.1.2007
- Trial: 26.1.2009-26.8.2011
- Victims participating: 120¹³
- Judgment: 14.3.2012
- Hearing on sentencing: 13.6.2012
- Decision on Sentence: 10.7.2012
- Decision on Reparations: 7.8.2012
- Current status: appeals against the judgment, sentencing and reparation decisions

a) Judgment

On 14.3.2012, Trial Chamber I delivered its long-awaited judgment at the Court. Thomas Lubanga Dyilo was found guilty for having committed, together with others, the war

crimes of conscripting and enlisting children under the age of fifteen years into the Force Patriotique pour la Libération du Congo ("FPLC")¹⁴ and using them to participate actively in hostilities in a non-international armed conflict from early September 2002 to 13.8.2003 in Ituri, DRC.¹⁵ Only a few key findings are presented in the following:

Due to the "specific circumstances of the case and, in particular, the defence submissions that the reliability of the entire body of prosecution evidence was affected",¹⁶ the Trial Chamber gave an overview of the development of the Prosecutor's *investigation*.¹⁷ It subsequently addressed carefully the issue of "interfering *intermediaries*", an aspect of the case which the Judges in the past had indicated to revisit when rejecting the Defence request to stay the proceedings.¹⁸

Departing from the findings of the Pre-Trial Chamber and using its power under regulation 55 of the Regulations of the Court, the Chamber re-characterized the *conflict* in its entirety as non-international between the UPC/FPLC and other rebel groups throughout the period covered by the charges.¹⁹ The evidence of the case revealed that there were "a number of simultaneous armed conflicts" in Ituri. As a matter of law, the Chamber agreed that international and non-international armed conflicts may exist simultaneously on a single territory.²⁰ As a matter of facts, the Judges ruled that there was insufficient evidence to establish that Rwanda and Uganda exercised "overall control" over the UPC/FPLC.²¹ Moreover, while there was evidence demonstrating Uganda's direct

¹⁴ The FPLC is the military wing of the Union des Patriotes Congolais ("UPC"). The accused was President of the UPC and commander-in-chief of the FPLC throughout the time period relevant to the charges.

¹⁵ ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute). For a summary (pursuant to Art. 74 para. 5 S. 4), s. ICC (Trial Chamber I), Summary of 14.3.2012 – ICC-01/04-01/06-2843 (Summary of the "Judgment pursuant to Article 74 of the Statute").

¹⁶ ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute), para. 124.

¹⁷ *Ibid.*, paras. 125-177.

¹⁸ *Chaitidou*, ZIS 2011, 843 (845); ICC (Trial Chamber I), Decision of 7.3.2011 – ICC-01/04-01/06-2690-Red (Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings").

¹⁹ ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute), para. 567. Pre-Trial Chamber I had categorized the armed conflict as international from July 2002 until 2.6.2003 and non-international in character for the period 2.6.2002 until late December 2003, s. ICC (Pre-Trial Chamber I), Decision of 29.1.2007 – ICC-01/04-01/06-803-tENG (Decision on the confirmation of charges), paras. 220 and 236.

²⁰ ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute), para. 540.

²¹ *Ibid.*, para. 561.

⁸ The record carries the situation number ICC-01/04.

⁹ ICC (Pre-Trial Chamber I), Decision of 11.4.2011 – ICC-01/04-593 (Decision on victims' participation relating to the situation in the Democratic Republic of the Congo); ICC (Pre-Trial Chamber I), Decision of 18.8.2011 – ICC-01/04-597-Red (Redacted version of the Decision on 13 applications for victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo). It is recalled that victims will only participate in the event of judicial proceedings.

¹⁰ ICC (Presidency), Decision of 15.3.2012 – ICC-01/04-607 (Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations).

¹¹ Decisions in the proceedings against Sylvestre Mudacumura which were taken before the issuance of the warrant of arrest are presented under section I. 5. below.

¹² The record carries the case number ICC-01/04-01/06.

¹³ It is noted that in the judgment the Trial Chamber withdrew the right of nine victims to participate in the proceedings. Hence, the number of originally 129 participating victims decreased after the issuance of the judgment.

intervention at the time, the Judges specified that the UPC/FPLC took part in “protracted violence carried out by multiple non-state armed groups [...] notwithstanding any concurrent international armed conflict between Uganda and the DRC”.²² By the same token, the Chamber concluded that the “Ugandan military occupation of Bunia airport” did not affect the legal characterization of the armed conflict.²³ As to the role of the DRC, the Judges acknowledged that the government had provided “limited support” to some militias active at the time but were unable to find that it had “a role in organizing, coordinating or planning the military actions of the UPC/FPLC during the period relevant to the charges”.²⁴

With respect to the interpretation of art. 8 para. 2 lit. e sub-para. vii, the Chamber clarified that the provision contains three “separate offences”.²⁵ The first two alternatives, “conscription” and “enlistment”, are both forms of *recruitment* of children under the age of 15 “whether coercively (conscription) or voluntary (enlistment)”.²⁶ They are both continuous crimes until the child reaches 15 years or leaves the group.²⁷ Consent of the child to his/her recruitment “does not provide an accused with a valid defence”.²⁸ *Participating* actively in hostilities signifies a situation in which children participate directly in hostilities or support the combatants in any other way. To what extent an “indirect role” of the child, possibly absent from the scene of hostilities, would fall under art. 8 para. 2 lit. e sub-para. vii depends on whether “the support provided by the child to the combatants exposed him or her to real danger as a potential target”.²⁹ This can only be determined on a case-by-case basis.³⁰ Facts relating to sexual violence were not considered by the Chamber’s Majority as those facts had not been included in the Pre-Trial Chamber’s decision confirming the charges which set the scope of the case.³¹ The dissenting judge advocated to include sexual violence in the legal concept of “use to participate actively in the hostilities”, as this “critical aspect” of the crime would otherwise remain invisible.³² She also pointed out that the harm suffered may stem “from within the same armed group”

and that sexual violence committed against children “causes irreparable harm and is a direct consequence to their involvement with the armed group”.³³

With regard to the interpretation of the requisite elements of (direct) *co-perpetration* within the meaning of art. 25 para. 3 lit. a, the Chamber’s Majority confirmed the Pre-Trial Chamber’s “control over the crime” approach. With regard to the *objective* elements of co-perpetration, the Majority required the existence of an agreement or common plan between at least two individuals³⁴ which includes “a critical element of criminality, namely that its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed”.³⁵ Further, the co-perpetrator must have provided an essential contribution to the common plan which resulted in the commission of the crimes.³⁶ With regard to the *subjective* elements of co-perpetration, the Majority clarified that art. 30 does not encompass the concept of *dolus eventualis*.³⁷ In the view of the Majority, the formulation “awareness that a consequence will occur in the ordinary course of events” means that the participants anticipate, based on their knowledge of how events ordinarily develop, that the consequence will occur in the future. [...] As to the degree of risk [...] it must be no less than awareness on the part of the co-perpetrator that the consequence ‘will occur in the ordinary course of events’. A low risk will not be sufficient”.³⁸ The Majority’s approach was criticized by the dissenting judge who declared the concept of “control over the crime” not to be supported by the Statute. In his view, art. 25 para. 3 does not establish any “hierarchy of seriousness as regards the various forms of participation in a crime”,³⁹ since there is no sentencing range according to the degree of participation.⁴⁰ He eventually put forth his own interpretation of the constitutive elements of co-perpetration.⁴¹

b) Sentencing

On 13.6.2012, the Chamber held a hearing on sentencing (art. 76 para. 2) in which, amongst other, two witnesses in the

²² Ibid., para. 563.

²³ Ibid., para. 565.

²⁴ Ibid., para. 553.

²⁵ Ibid., paras. 609 and 620.

²⁶ Ibid., para. 607.

²⁷ Ibid., para. 618.

²⁸ Ibid., para. 617.

²⁹ Ibid., para. 628.

³⁰ Ibid., para. 628.

³¹ Ibid., para. 630. The Chamber recapitulated that the Prosecutor, while referring to instances of sexual violence, had not requested to amend the charges. In the past, the legal representatives of victims had requested unsuccessfully that the Trial Chamber include this conduct at trial by using its powers under regulation 55 of the Regulations of the Court. S.a. *Chaitidou*, ZIS 2010, 726 (727).

³² Dissenting Opinion of Judge Odio Benito, annexed to ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute), p. 613 para. 16.

³³ Dissenting Opinion of Judge Odio Benito, annexed to ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute), p. 614 para. 19.

³⁴ ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute), paras. 980 and 981.

³⁵ Ibid., paras. 984 and 987.

³⁶ Ibid., para. 1006.

³⁷ Ibid., para. 1011.

³⁸ Ibid., para. 1012.

³⁹ Dissenting Opinion of Judge Fulford, annexed to ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute), p. 597 para. 8.

⁴⁰ Dissenting Opinion of Judge Fulford, annexed to ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute), p. 598 para. 9.

⁴¹ Dissenting Opinion of Judge Fulford, annexed to ICC (Trial Chamber I), Judgment of 14.3.2012 – ICC-01/04-01/06-2842 (Judgment pursuant to Article 74 of the Statute), p. 601 et seq.

DRC testified through video-link and Mr. Lubanga made an unsworn statement.⁴² On 10.7.2012, the Chamber's Majority pronounced a joint sentence of 14 years imprisonment.⁴³ Prior to assessing various factors,⁴⁴ the Chamber set out the applicable law and principles, including the standard of proof⁴⁵ and double counting⁴⁶. Most noteworthy is the Chamber's approach to consider evidence which may "exceed the facts and circumstances set out in the Confirmation Decision, provided the defence has had a reasonable opportunity to address them".⁴⁷ This concerned in particular the various allegations of sexual violence and sexual slavery which could not be considered in the judgment as they had not been included in the charges by the Prosecutor, a fact that had met the Judges' disapproval.⁴⁸ Thus, the Chamber accepted that this "activity is a relevant factor in the determination of the sentence" pursuant to rule 145 para. 1 lit. c and rule 145 para. 2 lit. b sub-para. iv⁴⁹ and discussed relevant evidence.⁵⁰ Final-

⁴² ICC (Trial Chamber I), Transcript of 13.6.2012 – ICC-01/04-01/06-T-360-Red2-ENG-CT (Transcript of Hearing).

⁴³ ICC (Trial Chamber I), Decision of 10.7.2012 – ICC-01/04-01/06-2901 (Decision on Sentence pursuant to Article 76 of the Statute).

⁴⁴ In determining the sentence, the Chamber considered the gravity of the crimes (ibid., paras. 36-44), the large-scale and widespread nature of the crimes (ibid., paras. 49-50), the degree of participation and intent of Mr. Lubanga (ibid., paras. 52-53) and his individual circumstances (ibid., para. 56). The Chamber found no additional aggravating factors (ibid., paras. 57-81) but considered as a mitigating factor Mr. Lubanga's cooperation with the Court "notwithstanding some particularly onerous circumstances" (ibid., paras. 91 and 97).

⁴⁵ Aggravating factors must be established beyond reasonable doubt (ibid., para. 33), while mitigating factors must be established "on a balance of probabilities" (ibid., para. 34.).

⁴⁶ Factors which have been taken into consideration for the gravity of the crime are not considered additionally as aggravating circumstances (ibid., para. 35).

⁴⁷ Ibid., para. 29.

⁴⁸ Ibid., para. 60: "The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. He advanced extensive submissions as regards sexual violence in his opening and closing submissions at trial, and in his arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber. However, not only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis. Notwithstanding this stance on his part throughout these proceedings, he suggested that sexual violence ought to be considered for the purposes of sentencing."

⁴⁹ Ibid., paras. 67-68.

⁵⁰ Ibid., paras. 69 et seq. However, as the evidence presented did not sufficiently link Mr. Lubanga with the commission of sexual violence, the Majority disregarded this factor for the

ly, the Prosecutor, who had requested the Chamber to sentence Mr. Lubanga to 30 years imprisonment, suggested as a general sentencing policy the application of a "consistent baseline" of 80% of the statutory maximum (i.e. 24 years) which should additionally be adjusted by considering aggravating and mitigating circumstances. This approach was rejected by the Chamber with reference to the requisite proportionality between the crime and the sentence (art. 81 para. 2 lit. a).⁵¹ Given Mr. Lubanga's financial situation, a fine (art. 77 para. 2) was not imposed.⁵² The dissenting Judge disagreed with the Majority's disregard for the "damage caused to the victims and their families, particularly as a result of the harsh punishments and sexual violence suffered by the victims of these crimes" and the Majority's "differentiated sentence" for each crime.⁵³

c) Reparations

On 7.8.2012, Trial Chamber I handed down its decision regarding reparations.⁵⁴ A direct reparation order against Mr. Lubanga pursuant to art. 75 para. 2 s. 1, was not rendered as he was declared indigent.⁵⁵ Consequently, the Chamber established first a number of principles on reparations (art. 75 para. 1) and subsequently gave other directives with a view to awarding reparations through the Trust Fund for Victims.

The principles provide guidance in awarding "appropriate, adequate and prompt" reparations⁵⁶ to victims, addressing issues such as the definition of the class of beneficiaries⁵⁷ the possibility of reparation awards for special victims groups

purpose of sentencing (ibid., paras. 74-75). The Chamber indicated to address this issue again in the context of reparations, ibid., para. 76.

⁵¹ Ibid., para. 93.

⁵² Ibid., para. 106.

⁵³ Dissenting Opinion of Judge Odio Benito, annexed to ICC (Trial Chamber I), Decision of 10.7.2012 – ICC-01/04-01/06-2901 (Decision on Sentence pursuant to Article 76 of the Statute), pp. 41-52.

⁵⁴ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations).

⁵⁵ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 269. However, the Chamber noted the possibility for Mr. Lubanga to apologize voluntarily to the victims (symbolic, non-pecuniary reparation) which cannot be enforced by Court order.

⁵⁶ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 242.

⁵⁷ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 194-197. The Chamber drew upon the established categories of direct and indirect victims and legal entities (rule 85 lit. a and b).

(victims of sexual or gender-based violence⁵⁸ and child victims⁵⁹), causation,⁶⁰ the scope⁶¹ and forms⁶² of reparations as well as certain procedural aspects⁶³. The Judges underlined the Court's responsibility to take into account the needs of *all* victims when addressing reparations⁶⁴ and not only those who participated in trial or applied for reparations.⁶⁵ Generally, the Chamber voiced its preference for a "collective approach"⁶⁶ but did not exclude the awarding of individual reparations provided they would not create any "tensions and divisions" within victim groups.⁶⁷ These abstract principles become more concrete once the reader reaches the second part of the decision:

As there was no direct order against the convicted person and no assets of Mr. Lubanga deposited with the Trust Fund,

⁵⁸ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 207.

⁵⁹ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 210-216.

⁶⁰ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 249-250.

⁶¹ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 217-221.

⁶² ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 222-241. The forms of reparations include the modalities stipulated in the Statute (restitution, compensation, rehabilitation) and are complemented by other forms of reparations, such as the publication of the judgment, a voluntary apology of Mr. Lubanga, outreach and promotional programs, and educational campaigns.

⁶³ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 198-199 (accompanying identification documents); para. 200 (prioritization of victims groups); paras. 202-206 (accessibility and consultation with victims); and paras. 258-259 (publicity of proceedings).

⁶⁴ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 189. S.a. the instruction to the Registry to make appropriate arrangements for a representation of "current victims participating in the proceedings, along with the broader group of victims who may ultimately benefit from a reparations plan", *ibid.*, para. 268.

⁶⁵ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 187.

⁶⁶ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 219 and 274.

⁶⁷ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 220.

the Judges accessed "other" financial resources of the Trust Fund (i.e. voluntary funds) and entrusted this court-external entity with the task to "determine the appropriate forms of reparations", identify victims and beneficiaries,⁶⁸ and implement the reparation awards according to a "five-step implementation plan" endorsed by the Chamber.⁶⁹ This avenue was made possible because the Judges read "through the Trust Fund" in art. 75 para. 2 s. 2, to mean that "the Court is able to draw on the logistical and financial resources of the Trust Fund in implementing the award".⁷⁰ Even though the Chamber purports to "[decline] to issue specific orders to the [Trust Fund for Victims] on the implementation of reparations that are to be funded using voluntary contributions",⁷¹ it is true that the Chamber directed the Trust Fund to provide reparations to victims in this case. Yet, shortly thereafter the Chamber also noted that "in circumstances when the Court *orders reparations against an indigent convicted person*, the Court may draw upon 'other resources' that the [Trust Fund for Victims] has made reasonable efforts to set aside" (emphasis added).⁷² It is therefore somewhat unclear whether the Chamber issued an order, if any, and who is its addressee. The Chamber had the possibility to clarify its position later (see below in the following section).

Procedurally, the Judges of Trial Chamber I, whose term of office had ended,⁷³ "un-seized" themselves and referred the continuation of the reparation proceedings to a "different-

⁶⁸ All reparation applications of victims were ordered to be transmitted to the Trust Fund for Victims. The Chamber declined to assess them, s. ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 284 and point (b) of the operative part.

⁶⁹ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 261, 266 and 281 et seq. The Trust Fund for Victims (art. 79) was established by the Assembly of States Parties (ICC-ASP/1/Res.6). It is not an organ of the Court, s. Art. 34.

⁷⁰ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 270. The Chamber further relied on rule 98 para. 5 and regulation 56 of the Regulations of the Trust Fund, s. ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 271.

⁷¹ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 289.

⁷² ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 271.

⁷³ Judge Blattmann's term of office had ended in March 2009. The term of office of Judges Fulford and Odio Benito ended in March 2012. All three continued in office to complete the trial pursuant to art. 36 para. 10.

ly composed Chamber”.⁷⁴ Accordingly, a newly composed chamber will oversee and possibly review decisions of the Trust Fund for Victims.⁷⁵ A team of multidisciplinary experts will assist the Court and collaborate with the Trust Fund (rule 97 para. 2) throughout this process.⁷⁶

d) Proceedings before the Appeals Chamber

The Trial Chamber considered the decision on reparations not to be a *reparation* order within the meaning of rule 150 para. 1 but rather a decision under art. 75 para. 1 and informed the parties accordingly.⁷⁷ Hence, in the view of the Trial Judges any appeal would have needed to be authorized under art. 82 para. 1 lit. d. On 29.8.2012, the Trial Chamber granted the Defence leave to appeal the decision on reparations with regard to four issues.⁷⁸ At the same time, and despite the Chamber’s directions, two victims’ groups together with the Office of Public Counsel for Victims and the Defence lodged direct appeals pursuant to art. 82 para. 4 in conjunction with rule 150 para. 1. Upon receiving submissions on the admissibility of the appeals by the parties and participants,⁷⁹ the Appeals Chamber finally shed light on the admissibility of

the appeals submitted.⁸⁰ It considered the reparations decision to be a final judicial “order for reparations” and thus declared the Defence appeal under art. 82 para. 1 lit. d inadmissible.⁸¹ Consequently, the Judges accepted the victims’ and Defence⁸² appeals lodged under art. 82 para. 4 and further gave directions on the further conduct of proceedings. The enforcement of the reparation decision has been suspended.⁸³

Finally, on 3.10.2012 the Prosecutor gave notice to appeal⁸⁴ the sentencing decision and the Defence gave notice to appeal both the *judgment* and *sentencing* decision of Trial Chamber I.⁸⁵ Both filed within 90 days of notification of the relevant judgment and sentencing decision their documents in support of the appeals, i.e. by 3.12.2012.⁸⁶ The Prosecutor asserts that the sentence imposed on Mr. Lubanga is inadequate and disproportionate to the objective gravity of the crimes.⁸⁷ Further, the Prosecutor finds fault with the Chamber’s test in identifying aggravating factors as well as the Trial Chamber’s failure to take into account Mr. Lubanga’s abuse of authority and trust. In its appeal against the conviction, the Defence requests that Mr. Lubanga be acquitted and released.⁸⁸ It alleges the infringement of the right to a fair trial by rehearsing failures on the part of the Prosecutor and takes issue with the Trial Chamber’s interpretation of the crimes enshrined in art. 8 para. 2 lit. e sub-para. vii and the

⁷⁴ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), para. 261. A legal argument referring the matter to a “differently composed” Trial Chamber was not advanced. Given the fact that the Judges’ mandate had terminated, it may be assumed that the Judges considered the trial to be completed within the meaning of Art. 36 para. 10 with the issuance of this decision. Any further judicial involvement in the implementation stage of reparation phase is thus not considered to be part of “the trial”. Trial Chamber II similarly concluded that the trial “continues until the decisions called for by Article 74, either guilt or acquittal, decision under 76, sentencing, and in case of guilt and reparations under Article 75, until all those decisions have been handed down”, ICC (Trial Chamber II), Transcript of 18.6.2012 – ICC-01/04-01/07-T-341 ET (Transcript of Hearing), p. 8 line 23 until p. 9 line 1.

⁷⁵ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 262 and 286.

⁷⁶ ICC (Trial Chamber I), Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Decision establishing the principles and procedures to be applied to reparations), paras. 263-266. The Chamber delegated the selection and appointment of experts to the Trust Fund for Victims which will also oversee their work.

⁷⁷ ICC (Trial Chamber I), Decision of 29.8.2012 – ICC-01/04-01/06-2911 (Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations), paras. 3 and 20.

⁷⁸ ICC (Trial Chamber I), Decision of 29.8.2012 – ICC-01/04-01/06-2911 (Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations).

⁷⁹ ICC (Appeals Chamber) Decision of 17.9.2012 – ICC-01/04-01/06-2923 (A A2 A3 OA21, Directions on the conduct of the appeal proceedings).

⁸⁰ ICC (Appeals Chamber), Decision of 14.12.2012 – ICC-01/04-01/06-2953 (A A2 A3 OA21, Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings).

⁸¹ Ibid., paras. 51, 63 and 64.

⁸² Referring to art. 82 para. 4, the Appeals Chamber determined that “it appears possible that Mr. Lubanga is adversely affected by the Impugned Decision”, *ibid.*, para. 66.

⁸³ Art. 82 para. 3 in conjunction with rule 156 para. 5.

⁸⁴ Regulation 57 of the Regulations of the Court.

⁸⁵ Before handing down the judgment, the Trial Chamber specified the time when the parties would be notified thereof (regulation 31 of the Regulations of the Court) as this had implications for lodging any appeal, s. ICC (Trial Chamber I), Decision of 15.12.2011 – ICC-01/04-01/06-2834 (Decision on the translation of the Article 74 Decision and related procedural issues). The ruling was made that the parties are deemed notified of the judgment when receiving the French translation. The same was determined for the decision on sentencing. Thus, the parties were deemed notified of the judgment and the decision on sentencing on 31.8.2012.

⁸⁶ Regulation 58 of the Regulations of the Court.

⁸⁷ ICC (Office of the Prosecutor), Filing of 3.12.2012 – ICC-01/04-01/06-2950 (Prosecution’s Document in Support of Appeal against the “Decision on Sentence pursuant to Article 76 of the Statute” [ICC-01/04-01/06-2901]).

⁸⁸ ICC (Defence of Mr. Lubanga), Filing of 3.12.2012 – ICC-01/04-01/06-2948-Red (Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre du “Jugement rendu en application de l’Article 74 du Statut” rendu le 14 mars 2012).

relevant evidentiary examination. Finally, the Defence disagrees with the Majority's approach in establishing Mr. Lubanga's criminal responsibility both in terms of law and facts. In the appeal against the sentencing decision, the Defence requests the Appeals Chamber to either reverse or reduce the sentence.⁸⁹ Worth mentioning is also the claim to deduct the time Mr. Lubanga spent in detention in the DRC before being surrendered to the Court (art. 78 para. 2). As an auxiliary argument, the Defence also takes issue with the Chamber's approach to examine allegations of sexual violence and maltreatment of child recruits thus exceeding the "facts and circumstances described in the charges".

As a next step, responses to the documents in support of the appeals have been filed within 60 days of notification of said document, i.e. by 4.2.2013.⁹⁰ Replies may follow thereafter within a time limit as ordered by the Appeals Chamber.⁹¹ The victims who participated in the trial and whose right to participate was not revoked were asked to submit their observations on the appeals against Trial Chamber I's conviction and sentencing decision by 4.2.2013. The parties may each respond to the victims' observations by 4.4.2013.⁹²

2. The Case of the Prosecutor v Germain Katanga/Mathieu Ngudjolo Chui (Trial Chamber II)⁹³

- Warrant of arrest against Katanga: 2.7.2007 (public on 18.10.2007)
- Warrant of arrest against Ngudjolo: 6.7.2007 (public on 7.2.2008)
- Surrender Katanga to the Court: 17.10.2007
- Surrender Ngudjolo to the Court: 7.2.2008
- Confirmation of charges: 26.9.2008
- Trial: 24.11.2009-23.5.2012
- Victims participating: 364
- Judicial site visit: 18-19.1.2012
- Acquittal Ngudjolo: 18.12.2012
- Current status: Deliberations in re Katanga

⁸⁹ ICC (Defence for Mr. Lubanga) Filing of 3.12.2012 – ICC-01/04-01/06-2949 (Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la "Décision relative à la peine, rendue en application de l'article 76 du Statut" rendue par la Chambre de première instance I le 10 juillet 2012).

⁹⁰ Regulation 59 of the Regulations of the Court.

⁹¹ Regulation 60 of the Regulations of the Court.

⁹² ICC (Appeals Chamber), Decision of 13.12.2012 – ICC-01/04-01/06-2951 (A4, A5, A6, Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions).

⁹³ The record carries the case number ICC-01/04-01/07. Initially, the two persons were accused separately. With decision of 10.3.2008, the Pre-Trial Chamber joined the cases. By severing the charges at trial the case against Mr. Ngudjolo was assigned a new case number (ICC-01/04-02/12). The case number regarding Mr. Katanga remains the same.

a) Proceedings prior to severance of charges

The Chamber visited locations in Ituri, DRC on 18/19.1.2012⁹⁴ and the Presiding Judge declared the submission of evidence as closed on 7.2.2012 (rule 141 para. 1). Prior to hearing the closing statements, the Defence of Mr. Katanga, joined by the Defence of Mr. Ngudjolo, requested that parts of the Lubanga judgment relating to the issue of intermediaries be admitted as evidence in the present case. The Chamber accepted that judicial decisions can be admitted as evidence⁹⁵ and, considering that the evidentiary hearing was closed, addressed the question under which conditions the evidentiary phase of the proceedings may be re-opened.⁹⁶ In the end, the Judges rejected the Defence request as they did not consider the admission of the relevant Lubanga findings to contribute significantly to the manifestation of the truth in the present case.⁹⁷ A Defence leave to appeal this decision was rejected by the Chamber.⁹⁸ The closing statements were heard between 15 and 23.5.2012 and the Chamber retired to deliberate.⁹⁹

In the meantime, readers may be interested to know about the fate of the three detained witnesses who entered the ICC detention centre on 27.3.2011 and later claimed asylum before the Dutch authorities once their evidence had been concluded before the Court.¹⁰⁰ It is recalled that the Chamber, while declaring that the Court was duty-bound to return the witnesses to the DRC once their testimony was finished, suspended this obligation until the final outcome of the witnesses' asylum requests. "[A]s the Court was unable to reach an agreement with the Dutch authorities on who would bear responsibility for the [d]etained [w]itnesses' custody during the treatment of their applications for asylum", the Court kept the three detained witnesses in its custody on the basis of

⁹⁴ ICC (Trial Chamber II), Decision of 1.12.2011 – ICC-01/04-01/07-3213-tENG (Decision on the judicial site visit to the Democratic Republic of the Congo), including annex B containing a protocol for the conduct during the site visit. S.A. press release dated 27.1.2012 http://www-icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr765.aspx (14.3.2013).

⁹⁵ ICC (Trial Chamber II), Decision of 26.4.2012 – ICC-01/04-01/07-3279 (Décision relative à la requête de la Défense de Germain Katanga tendant à l'admission d'extraits du jugement prononcé dans l'affaire Lubanga), para. 13.

⁹⁶ Ibid., para. 14.

⁹⁷ Ibid., para. 18.

⁹⁸ ICC (Trial Chamber II), Decision of 14.5.2012 – ICC-01/04-01/06-3292 (Decision on the Defence Application for Leave to Appeal the "Décision relative à la requête de la Défense de Germain Katanga tendant à l'admission d'extraits du jugement prononcé dans l'affaire Lubanga").

⁹⁹ ICC (Trial Chamber II), Order of 20.4.2012 – ICC-01/04-01/07-3274 (Ordonnance relative aux modalités de présentation des conclusions orales).

¹⁰⁰ For a summary of events and decisions during the last review period (2010/2011), s. Chaitidou, ZIS 2011, 843 (846).

art. 93 para. 7 until this day.¹⁰¹ Meanwhile the asylum proceedings continued before the Dutch courts. In this connection, the Chamber requested twice the cooperation of the Host State in transferring the three detained to hearings before the District Court in The Hague and the Court of Appeals in The Hague.¹⁰² As regards the national asylum proceedings, the Chamber was informed that the Hague District Court confirmed the applicability of “Dutch immigration law to the processing and assessment of the witnesses’ asylum applications on the basis of the fact that the witnesses are on Dutch territory”.¹⁰³ The Chamber recently noted that the asylum requests of all three detained witnesses have been rejected by the Host State Immigration and Naturalization Service. These decisions are currently appealed before the national judicial authorities.¹⁰⁴ A decision by the District Court of The Hague ordering the Host State to enter into consultations with the Court with a view to ending the witnesses’ custody by the Court was overturned by the Court of Appeals in The Hague. This question is now before the Hoge Raad of The Netherlands.¹⁰⁵

On 21.11.2012, the Chamber severed the charges (art. 64 para. 5) and announced to render the judgment against Mr. Ngudjolo on 18.12.2012. With regard to Mr. Katanga, the Judges, by majority, informed all participants that the mode of liability argued in this case (indirect co-perpetration) may be subjected to change according to regulation 55 of the Regulations of the Court and be based instead on art. 25 para. 3

lit. d.¹⁰⁶ The Prosecutor, Defence and the victims were requested to submit their observations by January 2013. The Majority discussed at length whether the activation of regulation 55 of the Regulations of the Court would prejudice the Defence rights at this advanced stage of the proceedings. It did not identify any negative impact. In particular, the Judges emphasized that the facts to be re-characterized would not exceed those contained in the confirmation of charges decision.¹⁰⁷ The dissenting Judge considered the Majority’s art. “25(3)(d) Notice Decision [...] to be entirely inconsistent with the rights of the accused and strongly believe[d] that this decision is in violation of Regulation 55 itself and Articles 64(2) and 67(1)”.¹⁰⁸ Rather, the dissenting Judge espoused the view that the Chamber, which does not have “a general truth-seeking mission”,¹⁰⁹ “should have, at this point in time, reached its verdict on the basis of the charges as confirmed by the Pre-Trial Chamber and made its decision under Article 74”.¹¹⁰ The Defence of Mr. Katanga was granted leave to appeal this decision on 28.12.2012.¹¹¹ The matter is now before the Appeals Chamber which ordered “that the Trial Chamber should not proceed with the trial on the basis of the Impugned Decision and decide[d] that the appeal shall have suspensive effect”.¹¹²

b) Judgment against Ngudjolo Chui

Finally, on 18.12.2012, the Chamber acquitted Mr. Ngudjolo¹¹³ and ordered his release¹¹⁴. The judgment is a meticulous and

¹⁰¹ ICC (Trial Chamber II), Order of 1.6.2012 – ICC-01/04-01/07-3303-tENG (Order on duty counsel’s requests concerning the detention of Witnesses DRC-D02-0236, DRC-D02-P-0228 and DRC-D02-P-0350), para. 1. S. previously also ICC (Trial Chamber II), Decision of 1.3.2012 – ICC-01/04-01/07-3254 (Decision on the Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350).

¹⁰² ICC (Trial Chamber II), Order of 7.9.2012 – ICC-01/04-01/07-3314 (Ordonnance portant sur la requête du conseil de permanence relative au transfèrement des témoins DRC-D02-P-0236, DRC-D02-P-0228, et DRC-D02-P-0350 devant la Cour de district de La Haye [Article 44-3 de l’Accord de siège]); ICC (Trial Chamber II), Order of 17.10.2012 – ICC-01/04-01/07-3318 (Order in relation to the request by duty counsel of DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 to be transferred to hearings before the Court of Appeals of The Hague).

¹⁰³ ICC (Trial Chamber II), Decision of 1.3.2012 – ICC-01/04-01/07-3254 (Decision on the Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350), para. 21.

¹⁰⁴ ICC (Trial Chamber II), Decision of 8.2.2013 – ICC-01/04-01/07-3352 (Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350), para. 16.

¹⁰⁵ Ibid., para 16.

¹⁰⁶ ICC (Trial Chamber II), Decision of 21.11.2012 – ICC-01/04-01/07-3319 (Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés). However, this does not concern the mode of liability in relation to the war crime of using child soldiers in armed hostilities, *ibid.*, para. 7.

¹⁰⁷ Ibid., paras. 23 and 31.

¹⁰⁸ Dissenting Opinion of Judge van den Wyngaert annexed to ICC (Trial Chamber II), Decision of 21.11.2012 – ICC-01/04-01/07-3319 (Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés), p. 38 para. 11.

¹⁰⁹ Ibid., p. 49 para. 35.

¹¹⁰ Ibid., p. 37 para. 6.

¹¹¹ ICC (Trial Chamber II), Decision of 28.12.2012 – ICC-01/04-01/07-3327 (Decision on the “Defence Request for Leave to Appeal the Decision 3319”).

¹¹² ICC (Appeals Chamber), Decision of 16.1.2013 – ICC-01/04-01/07-3344 (OA 13, Decision on the request for suspensive effect of the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court), para. 9.

¹¹³ ICC (Trial Chamber II), Judgement of 18.12.2012 – ICC-01/04-02/12-3 (Jugement rendu en application de l’article 74 du Statut).

¹¹⁴ The same day, the Prosecutor requested that Mr. Ngudjolo be kept in detention pending the appeal pursuant to art. 81 para. 3 lit. c. The Trial Chamber rejected this request by oral decision shortly thereafter, *s.* ICC (Trial Chamber II), Tran-

succinct factual analysis discussing key evidence related to the structure and organization of the militia allegedly led by the accused, as well as his role and functions.¹¹⁵ In essence, the Judges held that the evidence did not allow them to conclude beyond reasonable doubt that the accused was the commander of the Lendu combatants from Bedu-Ezekere during the attack against the Bogoro village on 24.2.2003. Consequently, his purported responsibility as indirect co-perpetrator could not be retained.¹¹⁶ As regards the crime of conscription of child soldiers, for which Mr. Ngudjolo was held accountable as co-perpetrator, the Chamber stated that the evidence did not establish any link between the accused and the child soldiers present in Bogoro.¹¹⁷ As in the Lubanga case, the Chamber cast a critical eye on the investigations conducted by the Prosecutor.¹¹⁸ The Trial Chamber avoided making any further findings, lest it pronounce on issues affecting the judgment against the co-accused, Mr. Katanga.¹¹⁹ In particular, the Chamber refrained from advancing its interpretation of art. 25 para. 3 lit. a,¹²⁰ a subject which has aroused, as we have seen, some controversy in the Lubanga case. That said, one judge nevertheless expressed her disagreement with the “control over the crime” theory permeating the concept of “indirect co-perpetration” within the meaning of art. 25 para. 3 as adopted by the pre-trial chambers and the Majority of Trial Chamber I.¹²¹ The Prosecutor gave notice to appeal the judgment.¹²² She has 90 days to file the document in support of the appeal, i.e. until 19.3.2013,¹²³ to which the other participants may respond within 60 days of notification of the document in support of the appeal.¹²⁴

Following Trial Chamber II’s oral decision to release Mr. Ngudjolo, the Prosecutor appealed that decision and requested the Appeals Chamber to order the suspension of its implementation pending the appeal. However, the Appeals Chamber rejected the Prosecutor’s request to suspend the Trial Chamber’s order to release as it was of the opinion that the Prosecutor had not advanced any strong reasons “which

clearly outweigh Mr. Ngudjolo’s statutory right to be released immediately following his acquittal”.¹²⁵ Consequently, Mr. Ngudjolo “was released from the Court’s custody and handed over to the authorities of the Host State for transfer to the [DRC], pending the lifting of a travel ban imposed upon Mr. Ngudjolo by the Security Council of the United Nations”.¹²⁶ Considering this development, the Prosecutor withdrew her appeal against the decision to release.

In the meantime, the Defence of Mr. Ngudjolo opposed to his return to the DRC and asked for protective measures as he fears for his safety and well-being in his home country. Instead, he seeks to be relocated to Belgium where he intends to apply for asylum.¹²⁷ Mr. Ngudjolo brought this matter to the attention of the Appeals Chamber.¹²⁸

3. *The Case of the Prosecutor v Bosco Ntaganda (Pre-Trial Chamber II)*¹²⁹

- First warrant of arrest: 22.8.2006 (public on 28.4.2008)
- Second warrant of arrest: 13.7.2012
- Victims participating: --
- Current status: Suspect at large

Since 2006, a warrant of arrest has been outstanding for Bosco Ntaganda for allegedly having committed as a co-perpetrator, like Thomas Lubanga Dyilo, the war crimes of conscription and enlistment of children under the age of fifteen and their use to participate actively in armed hostilities punishable under art. 8 para. 2 lit. b sub-para. xxvi and 8 para. 2 lit. e sub-para. vii.¹³⁰

script of 18.12.2012 – ICC-01/04-02/12-T-3-ENG (Transcript of Hearing).

¹¹⁵ ICC (Trial Chamber II), Judgement of 18.12.2012 – ICC-01/04-02/12-3 (Judgement rendu en application de l’article 74 du Statut), para. 110.

¹¹⁶ Ibid., paras. 110, 500-503.

¹¹⁷ Ibid., paras. 114 and 516.

¹¹⁸ Ibid., paras. 115-123.

¹¹⁹ Ibid., paras. 109 and 112.

¹²⁰ Ibid., para. 110 (“[...] quelle que soit l’interprétation que l’on donne à l’article 25-3-a du Statut”).

¹²¹ ICC (Trial Chamber II), Judgement of 18.12.2012 – ICC-01/04-02/12-4 (Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert).

¹²² ICC (Office of the Prosecutor), Filing of 20.12.2012 – ICC-01/04-02/12-10 (Prosecution’s Appeal against Trial Chamber II’s “Judgement rendu en application de l’article 74 du Statut”).

¹²³ Regulation 58 para. 1 of the Regulations of the Court.

¹²⁴ Regulation 59 para. 1 of the Regulations of the Court.

¹²⁵ ICC (Appeals Chamber), Decision of 20.12.2012 – ICC-01/04-02/12-12 (OA, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect), paras. 22-25.

¹²⁶ ICC (Trial Chamber II), Decision of 21.12.2012 – ICC-01/04-02/12-14 (Decision on the “Requête urgente de la Défense en vue de solliciter la relocalisation internationale de Mathieu Ngudjolo hors du continent africain et sa présentation devant les autorités d’un des Etats parties au Statut de la Cour pénale internationale aux fins de diligenter sa procédure d’asile”), para. 6.

¹²⁷ ICC (Defence of Mr. Ngudjolo), Filing of 21.12.2012 – ICC-01/04-02/12-15 (Requête urgente de la Défense en vue de solliciter la relocalisation internationale de Mathieu Ngudjolo hors du continent africain et sa présentation devant les autorités d’un des Etats parties au Statut de la Cour pénale internationale aux fins de diligenter sa procédure d’asile).

¹²⁸ Rule 151 para. 1. Upon filing the appeal, the case file was transmitted to the Appeals Chamber.

¹²⁹ The record carries the case number ICC-01/04-02/06.

¹³⁰ ICC (Pre-Trial Chamber I), Warrant of 22.8.2006 – ICC-01/04-02/06-2-tENG (Warrant of arrest); ICC (Pre-Trial Chamber I), Decision of 6.3.2007 – ICC-01/04-02/06-1-tENG-Red (Decision on the Prosecution Application for a Warrant of Arrest). The warrant was unsealed with ICC (Pre-Trial Chamber I), Decision of 28.4.2008 – ICC-01/04-02/06-18 (Decision to unseal the warrant of arrest against Bosco Ntaganda).

On 13.7.2012, the Chamber issued a second warrant of arrest against Mr. Ntaganda¹³¹ for the alleged commission of crimes against humanity and war crimes between 1.9.2002 and 30.9.2003 in different locations in Ituri.¹³² In relation to the applicable mode of liability, the Judges did not follow strictly the Prosecutor's argumentation that the suspect be held accountable as co-perpetrator but specified that Mr. Ntaganda was criminally responsible as an *indirect* co-perpetrator. With regard to the war crimes, the Chamber followed the submission of the Prosecutor in characterizing the armed conflict during the entire period relevant to the charges as non-international.¹³³ It is recalled that in the first warrant of arrest Pre-Trial Chamber I, formerly assigned this case, had characterized the armed conflict during the same period relevant to the charges as partly international and partly non-international in character. Considering the Lubanga judgment, this assessment may be subject to change also in this case.

4. The Case of the Prosecutor v Callixte Mbarushimana (Pre-Trial Chamber III)¹³⁴

- Warrant of arrest: 28.9.2010 (public on 11.10.2010)
- Surrender to the Court: 25.1.2011
- Hearing on the confirmation of charges: 16-21.9.2011
- Victims participating: 130
- Status: Termination of proceedings

a) Proceedings before the Pre-Trial Chamber

After the confirmation of charges hearing, the Chamber rejected the Defence challenge to *jurisdiction*. The Defence had argued that the events for which Mr. Mbarushimana was purportedly responsible were not covered by the temporal and territorial parameters of the referral. In response, the Chamber reiterated¹³⁵ that the crimes must have "occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the [r]eferral". It continued to specify that the situation may relate to crimes which hap-

pened at the time of the referral but also to "crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral".¹³⁶ After analysis of the relevant facts, the Court's jurisdiction was confirmed.

Mr. Mbarushimana was charged with having contributed "in any other way" to the commission of crimes against humanity and war crimes in the context of a non-international armed conflict in the Kivu provinces in 2009. On 16.12.2011, Pre-Trial Chamber I, by majority, declined to confirm all charges against Mr. Mbarushimana.¹³⁷ While the Chamber found, to the threshold required, that Forces Démocratiques de Libération du Rwanda ("FDLR") soldiers had committed some of the war crimes alleged, the Majority held that the *crimes* had not been committed "pursuant to or in furtherance of an organizational policy", as required to qualify as crimes against humanity.¹³⁸ The dissenting Judge disagreed with the Majority's evidentiary conclusions and opined that crimes against humanity had occurred pursuant to a policy "to create a humanitarian catastrophe".¹³⁹

The Chamber also gave shape to art. 25 para. 3 lit. d.¹⁴⁰ It considered art. 25 para. 3 lit. d to provide "for a residual form of accessorial liability, encapsulating contributions to crimes that cannot be characterized under article 25 (3) (a)-(c) of the Statute."¹⁴¹ The Chamber further explicated that an art. 25

¹³¹ ICC (Pre-Trial Chamber II), Decision of 13.7.2012 – ICC-01/04-02/06-36-Red (Decision on the Prosecutor's Application under Article 58). This decision includes the warrant of arrest, while in all other cases the warrant of arrest has been issued separate from the decision.

¹³² However, note that the Chamber found specific crimes to have taken place only in the time periods 18-23.11.2002 and 17.2.2003-2.3.2003. Nevertheless, despite this specific statement of facts, Mr. Ntaganda was held responsible, to the required standard, for alleged crimes committed throughout the entire period (1.9.2002 – end of September 2003).

¹³³ ICC (Pre-Trial Chamber II), Decision of 13.7.2012 – ICC-01/04-02/06-36-Red (Decision on the Prosecutor's Application under Article 58), paras. 47-50.

¹³⁴ The record carries the case number ICC-01/04-01/10.

¹³⁵ S. already ICC (Pre-Trial Chamber I), Decision of 6.9.2010 – ICC-01/04-575 (Decision requesting clarification on the Prosecutor's Application under Article 58), paras. 11-12.

¹³⁶ ICC (Pre-Trial Chamber I), Decision of 26.10.2011 – ICC-01/04-01/10-451 (Decision on the "Defence Challenge to the Jurisdiction of the Court"), para. 16. S.a. Pre-Trial Chamber III's authorization decision into the situation in the Republic of Côte d'Ivoire, as discussed below under section VII.

¹³⁷ ICC (Pre-Trial Chamber I), Decision of 16.12.2011 – ICC-01/04-01/10-465-Red (Decision on the confirmation of charges). The dissenting opinion of the Presiding Judge is appended to the decision.

¹³⁸ ICC (Pre-Trial Chamber I), Decision of 16.12.2011 – ICC-01/04-01/10-465-Red (Decision on the confirmation of charges), paras. 242 et seq.

¹³⁹ ICC (Pre-Trial Chamber I), Decision of 16.12.2011 – ICC-01/04-01/10-465-Red (Dissenting Opinion of Judge Mmasenono Monageng), p. 214 para. 134: "The case against Mr. Callixte Mbarushimana is not a conventional one, but what the Majority sees as 'insufficient evidence' I see as 'triable issues' deserving of the more rigorous fact finding that only a Trial Chamber can provide."

¹⁴⁰ Art. 25 para. 3 lit. d reads: "In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime".

¹⁴¹ ICC (Pre-Trial Chamber I), Decision of 16.12.2011 – ICC-01/04-01/10-465-Red (Decision on the confirmation of charges), para. 278.

para. 3 lit. d perpetrator may be inside or outside the group acting with a common purpose.¹⁴² The common purpose must include an element of criminality “but does not need to be specifically directed at the commission of a crime”.¹⁴³ As to the level of contribution, the Chamber specified that the contribution to a crime committed or attempted must be at least “significant”.¹⁴⁴ This can only be assessed on a case-by-case basis and the Chamber presented several factors which may assist in determining that significance.¹⁴⁵ The Chamber also explained that *ex post facto* contributions would be encompassed by art. 25 para. 3 lit. d.¹⁴⁶ As to the requisite *mens rea*, the Chamber opined that the “‘intentionality’ of the contribution must include an additional element, linking the contribution with the crimes alleged”, without coinciding with the requirements set out in sub-paras. (i) and (ii) of art. 25 para. 3 lit. d.¹⁴⁷ Based on the evidence as a whole, the Majority was not convinced that the “FDLR leadership constituted ‘a group of persons acting with a common purpose’” featuring an element of criminality¹⁴⁸ and that Mr. Mbarushimana “did not provide any contribution to the commission of such crimes, even less a ‘significant’ one”.¹⁴⁹ The dissenting Judge again disagreed with the Majority’s assessment of the evidence and concluded that a “group of persons acted with a common purpose of attacking civilians”¹⁵⁰ to which Mr. Mbarushimana had contributed significantly and intentionally.¹⁵¹

Some further key findings on *procedural matters* are presented shortly in the following: the Chamber rejected the Prosecutor’s assertion that in pre-trial proceedings any “inconsistencies, ambiguities or contradictions in the evidence should be resolved in favour of the Prosecut[or]” but rather asserted its authority to engage in a comprehensive evidence

assessment for the purposes of the confirmation of charges.¹⁵² It also gave some further guidance as to the requisite specificity of the document containing the charges (“DCC”) by rejecting the Prosecutor’s use of certain formulations in the DCC, such as “included but not limited to”¹⁵³ and broad temporal and geographical indicators¹⁵⁴, for being too unspecific. The bench emphasized that “the DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances.”¹⁵⁵ Finally, the Chamber also gave its understanding of the relationship between the warrant of arrest and the DCC in relation to the description of facts and their related legal characterization. In principle, the DCC must not follow strictly the factual and legal framework of the warrant of arrest which is “provisional”. However, in light of the rule of speciality (art. 101), the facts described in the DCC must be (at least) “implicit in the description of the course of conduct underlying the crimes in relation to which a ‘concise statement of the facts’, in accordance with art. 58 (2) (c) [...], has been provided”.¹⁵⁶

In light of the 16.12.2011 decision, the Pre-Trial Chamber ordered the release of Mr. Mbarushimana. In the following, the Prosecutor sought a stay of the Judges’ release order pending the Prosecutor’s leave to appeal the confirmation decision. That request was rejected by the Chamber¹⁵⁷ which argued that the warrant of arrest ceased to exist with the rejection of the charges (art. 61 para. 10). The Appeals Chamber declared the Prosecutor’s related appeal to be inadmissible.¹⁵⁸ Victims were not granted the right to participate in this appeal as “any delay [...] in the delivery of this admissibility

¹⁴² Ibid., paras. 272-275.

¹⁴³ Ibid., para. 271.

¹⁴⁴ Ibid., para. 283. Note in this regard the slightly distinct terminology advanced in the Kenya confirmation of charges decisions (s. below under section V) and the separate opinion as appended to ICC (Appeals Chamber), Judgement of 30.5.2012 – ICC-01/04-01/10-514 (Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”), pp. 30-34.

¹⁴⁵ ICC (Pre-Trial Chamber I), Decision of 16.12.2011 – ICC-01/04-01/10-465-Red (Decision on the confirmation of charges), para. 284.

¹⁴⁶ Ibid., paras. 286-287.

¹⁴⁷ Ibid., para. 288.

¹⁴⁸ Ibid., para. 291.

¹⁴⁹ Ibid., para. 292.

¹⁵⁰ ICC (Pre-Trial Chamber I), Decision of 16.12.2011 – ICC-01/04-01/10-465-Red (Dissenting Opinion of Judge Mmasenono Monageng), p. 172 para. 47.

¹⁵¹ ICC (Pre-Trial Chamber I), Decision of 16.12.2011 – ICC-01/04-01/10-465-Red (Dissenting Opinion of Judge Mmasenono Monageng), p. 200 para. 101, p. 204 para. 112 and p. 205 para. 114.

¹⁵² ICC (Pre-Trial Chamber I), Decision of 16.12.2011 – ICC-01/04-01/06-465-Red (Decision on the confirmation of charges), paras. 45-47. S.a. under section V. the relevant findings of Pre-Trial Chamber II in the Kenya cases.

¹⁵³ ICC (Pre-Trial Chamber I), Decision of 16.12.2011 – ICC-01/04-01/10-465-Red (Decision on the confirmation of charges), para. 83.

¹⁵⁴ Ibid., para. 85.

¹⁵⁵ Ibid., paras. 82, 110-113.

¹⁵⁶ Ibid., para. 91.

¹⁵⁷ ICC (Pre-Trial Chamber I), Decision of 19.12.2012 – ICC-01/04-01/10-469 (Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana).

¹⁵⁸ ICC (Appeals Chamber), Decision of 20.12.2011 – ICC-01/04-01/10-476 (OA 3, Decision on the appeal of the Prosecutor of 19 December 2011 against the “Decision on the confirmation of the charges” and, in the alternative, against the “Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana” and on the victims’ request for participation); ICC (Appeals Chamber), Decision of 24.1.2012 – ICC-01/04-01/10-483 (OA 3, Reasons for “Decision on the appeal of the Prosecutor of 19 December 2011 against the ‘Decision on the confirmation of the charges’ and, in the alternative, against the ‘Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana’ and on the victims’ request for participation” of 20 December 2011).

decision could have an effect on the release of Mr. Mbarushimana¹⁵⁹. Mr. Mbarushimana was released from detention on 23.12.2011.

b) Proceedings before the Appeals Chamber

For the first time ever, a leave to appeal an art. 61 para. 7 decision was granted. The Pre-Trial Chamber acceded to the Prosecutor's request to appeal the confirmation decision on three issues.¹⁶⁰ The Appeals Chamber, in response, unanimously confirmed the Pre-Trial Chamber's decision declining to confirm the charges.¹⁶¹ In particular, it gave its understanding of the functions of pre-trial proceedings,¹⁶² the purported comparability of art. 61 proceedings to ICTY/ICTR proceedings,¹⁶³ and the authority of a Pre-Trial Chamber to evaluate evidence comprehensively, including the credibility of witnesses¹⁶⁴. The Appeals Chamber also postulated that the Prosecutor's "investigation should largely be completed at the stage of the confirmation of charges hearing [...] Where the Prosecutor requires more time to complete the

investigation, rule 121(7) [...] permits him to seek the postponement of the confirmation of charges hearing".¹⁶⁵

*5. The Case of the Prosecutor v Sylvestre Mudacumura (Pre-Trial Chamber II)*¹⁶⁶

- Warrant of arrest: 13.7.2012
- Victims participating: --
- Current status: Suspect at large

On 15.5.2012, the Prosecutor requested the issuance of a warrant of arrest against Sylvestre Mudacumura for the alleged commission of war crimes and crimes against humanity.¹⁶⁷ This request was dismissed in limine by Pre-Trial Chamber II for lack of "specificity in detailing the conduct underlying the alleged crimes" and specific references to the crimes (art. 58 para. 2 lit. b and c).¹⁶⁸

Upon submission of a second request,¹⁶⁹ the Chamber issued a warrant of arrest against Mr. Mudacumura,¹⁷⁰ allegedly the highest ranking military commander in the Forces Démocratiques de Libération du Rwanda, for having purportedly ordered (art. 25 para. 3 lit. b) the commission of war crimes in the Kivu provinces from 20.1.2009 until end of September 2010.¹⁷¹ It also confirmed that the case falls under the jurisdiction of the Court as the crimes alleged are "sufficiently linked to the situation which initially triggered the referral", dating back to 3.3.2004.¹⁷² Like Pre-Trial Chamber

¹⁵⁹ ICC (Appeals Chamber), Decision of 24.1.2012 – ICC-01/04-01/10-483 (OA 3, Reasons for "Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation" of 20 December 2011), para. 34. This stems from the fact that the Appeals Chamber has adopted a particular victims' participation scheme at the (interlocutory) appellate stage. Above all, it considers itself not to be "automatically [...] bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance". Rather, participation is only authorized if the victims have shown in a new application that their personal interests are affected by the issues on appeal and the Appeals Judges determined victims' participation to be appropriate, s. ICC (Appeals Chamber), Judgement of 13.2.2007 – ICC-01/04-01/06-824 (OA 7, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"), paras. 1, 2 and 43. Judges in the Appeals Chamber have dissented from this position in the past.

¹⁶⁰ ICC (Pre-Trial Chamber I), Decision of 1.3.2012 – ICC-01/04-01/10-487 (Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the confirmation of charges'").

¹⁶¹ ICC (Appeals Chamber), Judgement of 30.5.2012 – ICC-01/04-01/10-514 (OA 4, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges").

¹⁶² Ibid., paras. 39 and 47.

¹⁶³ Ibid., para. 43.

¹⁶⁴ Ibid., paras. 44-45.

¹⁶⁵ Ibid., para. 44. S.a. the dissenting opinion of Judge Kaul in the Kenya cases in which he cautioned against "phased investigations" advocating instead that the "investigation is complete, if at all possible, at the time of the [Confirmation] Hearing", s. Dissenting Opinion of Judge Kaul annexed to ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), para. 52 (the same language can be found in Kenya Case 2).

¹⁶⁶ The record carries the case number ICC-01/04-01/12.

¹⁶⁷ ICC (Office of the Prosecutor), Filing of 15.5.2012 – ICC-01/04-612-Red-Corr (Corrigendum to "Public redacted version of Prosecution's Application under Article 58").

¹⁶⁸ ICC (Pre-Trial Chamber II), Decision of 31.5.2012 – ICC-01/04-613 (Decision on the Prosecutor's Application under Article 58), paras. 5 and 7.

¹⁶⁹ ICC (Office of the Prosecutor), Filing of 4.7.2012 – ICC-01/04-616-Red2 (Prosecution's Application under Article 58).

¹⁷⁰ ICC (Pre-Trial Chamber II), Decision of 13.7.2012 – ICC-01/04-01/12-1-Red (Decision on the Prosecutor's Application under Article 58). As in the Ntaganda case, this decision includes the warrant of arrest. In all other cases the warrant of arrest has been issued separate from the decision.

¹⁷¹ It is to be noted that the Chamber discussed the crimes only in relation to specific time frames but was nevertheless "satisfied that between 20 January 2009 and the end of September 2010, Mr. Mudacumura is responsible under article 25 (3) (b) of the Statute for the crimes" (ibid., para. 76).

¹⁷² ICC (Pre-Trial Chamber II), Decision of 13.7.2012 – ICC-01/04-01/12-1-Red (Decision on the Prosecutor's Application

I in the Mbarushimana case, with which this case shares great similarities, the Chamber declined to include crimes against humanity in the warrant of arrest as it could not reasonably conclude from the evidentiary record that an organizational policy existed.¹⁷³ It is also worth mentioning that in dealing with the count of torture¹⁷⁴ the Chamber may have abandoned its approach to cumulative charging as previously taken in the Bemba case¹⁷⁵. Lastly, it is noted that the Chamber drew conclusions from the absence of an organizational policy also with regard to Mr. Mudacumura's possible criminal responsibility and rejected his potential liability as indirect co-perpetrator.¹⁷⁶

II. Situation in Uganda (Pre-Trial Chamber II)¹⁷⁷

- Referral by Uganda: December 2003 (publicly announced on 29.1.2004)
- Victims participating: 21¹⁷⁸

The Chamber issued a decision on victims' participation at the situation level on 9.3.2012, thus unifying the Chamber's approach in this situation with the approach taken in other situations.¹⁷⁹ It set the substantial and procedural framework for possible victims' participation and appointed the Office of Public Counsel for Victims as legal representative for the

under Article 58), paras. 14-16. The Chamber followed in this regard Pre-Trial Chamber I in the Mbarushimana case, as discussed above.

¹⁷³ ICC (Pre-Trial Chamber II), Decision of 13.7.2012 – ICC-01/04-01/12-1-Red (Decision on the Prosecutor's Application under Article 58), para. 29. As to the Chamber's understanding of the conceptual difference between the war crime of "intentionally directing attacks against the civilian population" (art. 8 para. 2 lit. e sub-para. i) and an "attack directed against any civilian population" within the meaning of art. 7, s. para. 38 in the said decision.

¹⁷⁴ ICC (Pre-Trial Chamber II), Decision of 13.7.2012 – ICC-01/04-01/12-1-Red (Decision on the Prosecutor's Application under Article 58), para. 50. Due to the redactions, it is not possible to make such an observation in relation to other counts.

¹⁷⁵ ICC (Pre-Trial Chamber II), Decision of 15.6.2009 – ICC-01/05-01/08-424 ("Decision Pursuant to Article 61 [7] [a] and [b] of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo"), paras. 190 and 201-205.

¹⁷⁶ ICC (Pre-Trial Chamber II), Decision of 13.7.2012 – ICC-01/04-01/12-1-Red (Decision on the Prosecutor's Application under Article 58), para. 62.

¹⁷⁷ The record carries the situation number ICC-02/04.

¹⁷⁸ 33 victims' applications are still awaiting assessment by the Chamber. All other applications will only be assessed once an "issue" arises which may require judicial determination.

¹⁷⁹ ICC (Pre-Trial Chamber II), Decision of 9.3.2012 – ICC-02/04-191 (Decision on Victims' Participation in Proceedings Related to the Situation in Uganda).

recognized and applying victims pending the appointment of a common legal representative.

To date, only one case has emanated from this situation which is still in the pre-trial phase.

*The Case of the Prosecutor v Joseph Kony et al. (Pre-Trial Chamber II)*¹⁸⁰

- Warrants of arrest: 8.7.2005 (public on 13.10.2005)
- Victims participating: 40
- Current status: Suspects at large

No developments took place in this case during the review period.

III. Situation in the Central African Republic (Pre-Trial Chamber II)¹⁸¹

- Referral by the Central African Republic: 21.12.2004 (publicly announced 7.1.2005)
- Victims participating:¹⁸² --

No proceedings at the *situation* level took place during the review period. To date, only one case emanated from this situation. The Bemba case is in the trial phase and is discussed below.

*The Case of the Prosecutor v Jean-Pierre Bemba Gombo (Trial Chamber III)*¹⁸³

- First warrant of arrest: 23.5.2008 (public on 24.5.2008)
- Warrant of arrest: 10.6.2008 (replacing the first warrant)
- Surrender to the Court: 3.7.2008
- Confirmation of charges: 15.6.2009
- Victims participating: 5.229
- Current status: Defence presentation of evidence

During the review period, Trial Chamber III, responsible to ensure the conduct of fair and expeditious proceedings, issued a series of case management decisions on issues, such as witness schedules, Defence presentation of evidence,¹⁸⁴ victims' presentation of evidence and their right to express their

¹⁸⁰ The record carries the case number ICC-02/04-01/05.

¹⁸¹ The record carries the situation number ICC-01/05.

¹⁸² ICC (Pre-Trial Chamber II), Decision of 11.11.2010 – ICC-01/05-31 (Decision on Victims' Participation in Proceedings Related to the Situation in the Central African Republic).

¹⁸³ The record carries the case number ICC-01/05-01/08.

¹⁸⁴ ICC (Trial Chamber III), Decision of 24.5.2012 – ICC-01/05-01/08-2221 (Decision on the starting date of the defence presentation of evidence and related issues); ICC (Trial Chamber III), Decision of 7.6.2012 – ICC-01/05-01/08-2225 (Decision on the "Submissions on Defence Evidence").

views and concerns in person;¹⁸⁵ and admissibility of evidence. Some highlights are summarized below:

As a result of the Appeals Chamber judgment on the issue of admissibility of evidence,¹⁸⁶ the Chamber set a three-step admissibility test (“relevance”, “probative value”, “sufficiently relevant and probative to outweigh any prejudicial effect”)¹⁸⁷ according to which it assessed the admissibility of the submitted material¹⁸⁸ item-by-item that had been used in trial since its commencement. In this context, the Chamber also clarified that there is no statutory requirement “that items sought to be admitted into evidence must be submitted via the ‘bar table’ when they cannot be submitted through a witness.” In the opinion of the Judges, the submission of evidence by way of a ‘bar table’ motion is not the only “permissible way to seek the admission of documentary evidence”.¹⁸⁹ Moreover, with respect to victims’ applications, the Chamber’s Majority denied their admission due to the fact that,

¹⁸⁵ S. in particular, ICC (Trial Chamber III), Decision of 22.2.2012 – ICC-01/05-01/08-2138 (Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims). For the Chamber’s differentiation of the two modes of participation, s. *ibid.*, para. 19. Judge Steiner partly dissented on the criteria set by the Chamber as well as the actual assessment of victims’ requests, s. ICC (Trial Chamber III), Opinion of 23.2.2012 – ICC-01/05-01/08-2140 (Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims – ICC-01/05-01/08-2138); ICC (Trial Chamber III), Decision of 24.5.2012 – ICC-01/05-01/08-2220 (Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08); ICC (Trial Chamber III), Order of 6.3.2012 – ICC-01/05-01/08-2158 (Order on the implementation of Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims).

¹⁸⁶ ICC (Appeals Chamber), Judgement of 3.5.2011 – ICC-01/05-01/08-1386 (OA 5 OA 6, Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled „Decision on the admission into evidence of materials contained in the prosecution’s list of evidence). S.a. *Chaitidou*, ZIS 2011, 843 (849).

¹⁸⁷ Trial Chamber III followed essentially the jurisprudence of Trial Chamber I and II.

¹⁸⁸ The Chamber clarified that evidence was “submitted” within the meaning of art. 64 para. 3 if its admission was recorded either orally or in writing in the record of the case, ICC (Trial Chamber III), Decision of 9.2.2012 – ICC-01/05-01/08-2012-Red (Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011), para. 160.

¹⁸⁹ ICC (Trial Chamber III), Decision of 9.2.2012 – ICC-01/05-01/08-2012-Red (Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011), para. 55.

albeit relevant, their probative value is limited.¹⁹⁰ It explained that victims’ applications are administrative documentation for the purposes of a rule 89 determination and do not qualify as “testimony”.¹⁹¹ Finally, the Majority also declared prior written statements of witnesses who already testified in Court as admissible¹⁹² provided that the requirements of rule 68 para. b were fulfilled.¹⁹³ It made clear, however, that fairness and the principle of orality “dictate that written statements should not be used to fill in the gaps in a witness’ testimony”.¹⁹⁴

The Pre-Trial Chamber had confirmed the charges against Mr. Bemba pursuant to art. 28 para. a because it believed that Mr. Bemba “knew” that MLC troops committed crimes. It had not considered the “should have known” standard under that provision. On 21.9.2012, the Chamber notified the parties of the possibility to modify the legal characterization of the facts “so as to consider in the same mode of responsibility the alternate form of knowledge” (“should have known”).¹⁹⁵ After having considered the participants’ submissions with respect to the possible procedural impact by the regulation 55 notification, the Chamber suspended temporarily the trial hearings for two and a half months until 4.3.2013 in order to provide the accused with adequate time to prepare effectively his defence.¹⁹⁶ The Defence was not granted leave to appeal

¹⁹⁰ Judge Ozaki dissented arguing that for the purpose of testing a witness’s credibility, victims applications should have been admitted, s. ICC (Trial Chamber III), Opinion of 14.2.2012 – ICC-01/05-01/08-2015-Red (Public Redacted Version of the Partly Dissenting Opinion of Judge Kuniko Ozaki on the First decision on the prosecution and defence requests for the admission of evidence of 15 December 2011), paras. 7-23.

¹⁹¹ ICC (Trial Chamber III), Decision of 9.2.2012 – ICC-01/05-01/08-2012-Red (Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011), paras. 100-101.

¹⁹² The Chamber highlighted that the prior testimonies concerned were not meant to substitute the witnesses’ testimony in Court but were admitted to complement such testimony, *ibid.*, para. 147.

¹⁹³ *Ibid.*, paras. 134-139; 142-143; 145.

¹⁹⁴ *Ibid.*, para. 153. As before, Judge Ozaki dissented from the Majority’s interpretation of rule 68 and rejected the admission of prior written statements, s. ICC (Trial Chamber III), Opinion of 14.2.2012 – ICC-01/05-01/08-2015-Red (Public Redacted Version of the Partly Dissenting Opinion of Judge Kuniko Ozaki on the First decision on the prosecution and defence requests for the admission of evidence of 15 December 2011), paras. 28-39.

¹⁹⁵ ICC (Trial Chamber III), Decision of 21.9.2012 – ICC-01/05-01/08-2324 (Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55 [2] of the Regulations of the Court).

¹⁹⁶ ICC (Trial Chamber III), Decision of 13.12.2012 – ICC-01/05-01/08-2480 (Decision on the temporary suspension of

this decision.¹⁹⁷ Subsequently, the Defence waived the opportunity to conduct further investigations, recall witnesses or submit additional evidence and the Chamber lifted the temporary suspension of the trial proceedings.¹⁹⁸ The hearings resumed on 25.2.2013.

This case has seen the participation of an unprecedented high number of victims. All victims are grouped in two and each group is represented by one legal representative; two victims have been authorized to give evidence as witnesses and three victims have been granted the right to express their views and concerns by way of video-link technology. In spite of the high number of victim applicants and the onerous processing, the Presiding Judge underscored that victims' participation has not caused any delays in the proceedings.

As of 14.8.2012, the Defence commenced to present its arguments and evidence. The Defence was granted in total 230 hours to question the witnesses it wishes to call. At the time, it had been estimated that the presentation of evidence by the Defence will be completed within eight months.¹⁹⁹ Difficulties in the availability of Defence witnesses²⁰⁰ moved the Chamber to amend the order of their appearance and to consider possible alternatives to live testimony in The Hague, such as the "organization of *in situ* hearings" at the seat of the International Criminal Tribunal for Rwanda in Arusha, Tanzania, "or the presentation of testimony via video-link technology".²⁰¹ As mentioned above, the Defence presentation of

evidence had been suspended, thereby influencing the time schedule in addition. When finally the trial hearings resumed in February 2013, the Defence presentation of evidence started with the testimony of a Defence witness via video-link from an appropriate location.²⁰² A decision on *in situ* hearings has not been taken yet.

IV. Situation in the Sudan/Darfur (Pre-Trial Chamber II)²⁰³

- Referral by Security Council: 31.3.2005
- Victims participating: ²⁰⁴--

On 15.3.2012, the Sudan/Darfur situation (and related cases) was assigned to Pre-Trial Chamber II.²⁰⁵ No proceedings at the *situation* level have taken place during the review period. Out of this situation, five cases emanated so far: in one case the charges were not confirmed by the competent Pre-Trial Chamber;²⁰⁶ another case is in its trial preparation and three cases are in their pre-trial phase. The pending cases are introduced in what follows.

the proceedings pursuant to Regulation 55 [2] of the Regulations of the Court and related procedural deadlines).

¹⁹⁷ ICC (Trial Chamber III), Decision of 16.1.2013 – ICC-01/05-01/08-2487-Red (Public Redacted Version of "Decision on 'Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55[2] of the Regulations of the Court and related Procedural Deadlines'" of 11 January 2013).

¹⁹⁸ ICC (Trial Chamber III), Decision of 6.2.2013 – ICC-01/05-01/08-2500 (Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497).

¹⁹⁹ ICC (Trial Chamber III), Decision of 7.6.2012 – ICC-01/05-01/08-2225 (Decision on the "Submissions on Defence Evidence"), paras. 10 and 11.

²⁰⁰ For example, the Chamber confirmed that one witness who had commenced his testimony before the Chamber "did not present himself to continue giving testimony" while another witness had not boarded the plane and "therefore [...] did not present himself to give testimony before the Chamber as scheduled", ICC (Trial Chamber III), Decision of 3.10.2012 – ICC-01/05-01/08-2329 (Decision on the amended order of witnesses to be called by the defence), paras. 3 and 4.

²⁰¹ ICC (Trial Chamber III), Order of 28.9.2012 – ICC-01/05-01/08-2327 (Order setting an agenda for a status conference on issues related to the presentation of evidence by the defence), para. 3; ICC (Trial Chamber III), Decision of 28.9.2012 – ICC-01/05-01/08-2242-Red (Public redacted

version of "Decision on the 'Third Defence Submissions on the Presentation of its Evidence'" of 6 July 2012).

²⁰² ICC (Trial Chamber III), Decision of 14.12.2012 – ICC-01/05-01/08-2482-Red (Public redacted version of "Decision on measures to facilitate the continued presentation of evidence by the defence"); ICC (Trial Chamber III), Decision of 15.2.2013 – ICC-01/05-01/08-2509 (Decision on issues related to the testimony of Witness D04-19 via video-link).

²⁰³ The record carries the situation number ICC-02/05.

²⁰⁴ Pre-Trial Chamber I, formerly assigned this situation, had granted participatory rights to victims at the situation level. However, this decision was reversed by the Appeals Chamber in the ICC (Appeals Chamber), Judgment of 2.2.2009 – ICC-02/05-177 (OA, OA2, OA3, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007). The Pre-Trial Chamber II, now assigned the situation and cases emanating therefrom, has not attempted as yet to reshape the victims' participation regime and follow the approach taken in other situations.

²⁰⁵ ICC (Presidency), Decision of 15.3.2012 – ICC-02/05-241 (Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations).

²⁰⁶ This is the case of the Prosecutor v Bahar Idriss Abu Garda (ICC-02/05-02/09), s. ICC (Pre-Trial Chamber I), Decision of 8.2.2010 – ICC-02/05-02/09-243-Red (Decision on the Confirmation of Charges); ICC (Pre-Trial Chamber I), Decision of 23.4.2010 – ICC-02/05-02/09-267 (Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'").

1. *The Case of the Prosecutor v Ahmad Muhammad Harun (Ahmad Harun)* and *Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Pre-Trial Chamber II²⁰⁷

- Warrants of arrest: 27.4.2007
- Victims participating: 6
- Current status: Suspects at large

No developments took place in this case during the review period.

2. *The Case of the Prosecutor v Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber II)*²⁰⁸

- First warrant of arrest: 4.3.2009
- Second warrant of arrest: 12.7.2010
- Victims participating: 12
- Current status: Suspect at large

The travel activities of the suspect to States Parties moved the Chamber once more to address the issue of non-cooperation.²⁰⁹ After having received information that, in spite of a note verbale reminding the Republic of Malawi of its obligations, Mr. Bashir had not been arrested during a recent visit to the country, the Chamber had a further opportunity to discuss the issue of immunities.²¹⁰ Malawi, having been invited to clarify its position,²¹¹ responded that it had accorded Mr. Bashir, as sitting head of State, all immunities and privileges, "including freedom of arrest and prosecution within territories of Malawi", in line with international law.²¹² Before all else, the Chamber made clear that it is the Court only which decides whether immunities apply in a given case.²¹³ It further continued to reiterate that at the time of the *issuance* of the warrant of arrest, the official capacity of the suspect is irrelevant,

pursuant to art. 27.²¹⁴ Malawi's response, however, raises the question whether "sitting heads of States not parties to the Statute, enjoy immunity with respect to *enforcement* of a warrant of arrest [...] by national authorities" (emphasis added).²¹⁵ This issue invokes art. 98 para. 1.²¹⁶ However, this provision could only be relied upon in case the requested State indeed would "act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person [...] of a third State". The ensuing discussion centred on the question whether heads of States actually *enjoy* immunities under international law in respect to proceedings before international courts related to the commission of international crimes. With reference to historic precedents, international instruments and case law, this idea was rejected – also with respect to former or sitting heads of States not parties to the Statute: "[...] the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution [for the commission of international crimes] by an international court".²¹⁷ As a result, the Chamber concluded that Malawi could not rely on art. 98 para. 1 "to justify refusing to comply with the cooperation request"²¹⁸ as it was not in conflict between its treaty obligations towards the Court and its obligations under customary international law towards Sudan.²¹⁹ Consequently, the Court made a finding to the effect that Malawi had failed to cooperate and referred the matter to the Security Council and the Assembly of States Parties (art. 87 para. 7).

The Chamber took the same decision with respect to Chad, which had equally failed to arrest Mr. Bashir during a recent visit.²²⁰

²¹⁴ Ibid., para. 14.

²¹⁵ Ibid., para. 16.

²¹⁶ Art. 98 para. 1 reads: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of immunity".

²¹⁷ ICC (Pre-Trial Chamber I), Decision of 13.12.2011 – ICC-02/05-01/09-139-Corr (Corrigendum to the Decision Pursuant to Article 87 [7] of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir), para. 36.

²¹⁸ Ibid., para. 37.

²¹⁹ Ibid., para. 43.

²²⁰ ICC (Pre-Trial Chamber I), Decision of 13.12.2011 – ICC-02/05-01/09-140-tENG (Decision pursuant to article 87 [7] of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir). This was the second time the Court addressed Chad, s. ICC (Pre-Trial Chamber I), Decision of 27.8.2010 – ICC-02/05-01/09-109 (Decision informing the United Nations Security Council and the Assembly of the

²⁰⁷ The record carries the case number ICC-02/05-01/07.

²⁰⁸ The record carries the case number ICC-02/05-01/09.

²⁰⁹ S.a. *Chaitidou*, ZIS 2011, 843 (850); 2010, 726 (733).

²¹⁰ ICC (Pre-Trial Chamber I), Decision of 13.12.2011 – ICC-02/05-01/09-139-Corr (Corrigendum to the Decision Pursuant to Article 87 [7] of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir).

²¹¹ S. regulation 109 para. 3 of the Regulations of the Court. ICC (Pre-Trial Chamber I), Decision of 19.10.2011 – ICC-02/05-01/09-137 (Decision requesting observations about Omar Al-Bashir's recent visit to Malawi).

²¹² Pre-Trial Chamber, Decision of 13.12.2011 – ICC-02/05-01/09-139-Corr (Corrigendum to the Decision Pursuant to Article 87 [7] of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir), para. 7.

²¹³ Ibid., para. 11. This conclusion was supported by art. 119 para. 1 and rule 195 para. 1.

Having received information of Mr. Bashir's alleged imminent visits to Chad and Libya in February 2013, the Chamber again raised the issue of State cooperation with the Court in the process of arrest and surrender of Mr. Bashir. With reference to Libya, which is a non-State Party, the Chamber clarified that Libya had been "urged" to cooperate by dint of Security Council resolution 1593 (2005).²²¹

3. *The Case of the Prosecutor v. Abdallah Banda Abakaer Nourai ("Banda") and Saleh Mohammed Jerbo Jamus ("Jerbo")*, Trial Chamber IV²²²

- Summonses to appear: 27.8.2009 (public on 15.6.2010)
- First appearance: 17.6.2010
- Confirmation of charges: 7.3.2011
- Victims participating: 89
- Current status: Trial preparation

With a view to preparing the trial, the Chamber addressed a number of issues concerning victims' participation. Most importantly, it accepted victims, which were granted participatory rights at pre-trial, to participate in trial without assessing their applications anew,²²³ provided that the crime(s) to which the victim status relates, was confirmed in the charge(s) by the Pre-Trial Chamber.²²⁴ The Chamber also added that it would re-assess applications rejected in pre-trial if new information became available.²²⁵ Finally, a deadline was set by the Chamber for the submission of new victims' applications prior to trial (13.1.2012).²²⁶ On 14.9.2011, one common legal representative team for victims participating in the case was appointed pursuant to rule 90 para. 3.²²⁷

States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad).

²²¹ ICC (Pre-Trial Chamber II), Order of 15.2.2013 – ICC-02/05-01/09-145 (Order Regarding Omar Al Bashir's Potential Visit to the Republic of Chad and to the State of Libya).

²²² The record carries the case number ICC-02/05-03/09.

²²³ ICC (Trial Chamber IV), Decision of 25.5.2012 – ICC-02/05-03/09-337 (Decision on common legal representation), para. 32. The same approach had been adopted previously by Trial Chamber II and III.

²²⁴ ICC (Trial Chamber IV), Decision of 28.10.2011 – ICC-02/05-03/09-231-Corr (Corrigendum to Decision on the Registry Report on six applications to participate in the proceedings), paras. 15-16.

²²⁵ Ibid., para. 16.

²²⁶ Ibid., para. 30.

²²⁷ Two former legal representatives of two participating victims opposed the appointment of a common legal representative and sought the Chamber's review of the appointment in accordance with regulation 79 para. 3 of the Regulations of the Court. Trial Chamber IV confirmed the appointment of the two lawyers forming the common legal representative team for victims, s. ICC (Trial Chamber IV), Decision of 25.5.2012 – ICC-02/05-03/09-337 (Decision on common legal representation). A leave to appeal this decision was rejected, s. ICC (Trial Chamber IV), Decision of 13.7.2012 –

Also in this case, the Prosecutor gathered documents under art. 54 para. 3 lit. e which the Prosecutor is obliged to disclose pursuant to art. 67 para. 2 and rule 77 but for which he could not secure the information providers' consent to disclose. The Chamber, warning of the possible consequences of such non-disclosure,²²⁸ instructed the Prosecutor to secure the agreement of the information providers.

Further, the Defence approached the Chamber for the second time with the request to ask the African Union to provide the accused with specific documents deemed necessary for the preparation of the defence.²²⁹ Complying with the Chamber's specific requirements for a cooperation request under art. 57 para. 3 lit. b, the request was largely granted this time and the Chamber ordered the Registrar to transmit a cooperation request to the African Union.²³⁰

Finally, on 6.1.2012 the Defence requested the temporary stay of the proceedings.²³¹ It did so by arguing in essence that the Defence is unable to investigate referring, in particular to the lack of cooperation by the Government of Sudan, the many security risks for potential witnesses, and the difficulties in accessing documents from other sources. In the opinion of the Defence, the many "severe restrictions" have seriously impaired the rights of the Defence under art. 67 para. 1.

ICC-02/05-03/09-367 (Decision on the application for leave to appeal the "Decision on common legal representation").

²²⁸ ICC (Trial Chamber IV), Decision of 23.11.2011 – ICC-02/05-03/09-259 (Decision on Article 54 [3] [e] documents), para. 18: "If the prosecution is unable to secure the agreement of the providers for a more comprehensive disclosure, the Trial Chamber will need to consider whether a fair trial may still be conducted in the absence of the disclosure of the potentially exculpatory or Rule 77 material to the defence".

²²⁹ The Chamber has previously denied a similar request by the Defence in relation to Sudan and the African Union. S. ICC (Trial Chamber IV), Decision of 1.7.2011 – ICC-02/05-03/09-169 (Decision on „Defence Application pursuant to articles 57 [3] [b] & 64 [6] [a] of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan); ICC (Trial Chamber IV), Decision of 1.7.2011 – ICC-02/05-03/09-170 (Decision on the „Defence Application pursuant to Articles 57 [3] [b] & 64 [6] [a] of the Statute for an order for the preparation and transmission of a cooperation request to the African Union“). For more information on the procedural history, s. Chaitidou, ZIS 2011, 843 (851). S.a. an interesting discussion on the interpretation of Art. 57 para. 3 lit. b in ICC (Pre-Trial Chamber I), Decision of 25.4.2008 – ICC-01/04-01/07-444 (Decision on the "Defence Application pursuant to Article 57 [3] [b] of the Statute to Seek the Cooperation of the Democratic Republic of Congo [DRC]").

²³⁰ ICC (Trial Chamber IV), Decision of 21.12.2011 – ICC-02/05-03/09-268-Red (Public redacted Decision on the second defence's application pursuant to Articles 57 [3] [b] and 64 [6] [a] of the Statute).

²³¹ ICC (Defence for Mr. Banda and Mr. Jerbo), Filing of 6.1.2012 – ICC-02/05-03/09-274 (Defence Request for a Temporary Stay of Proceedings).

As a fair trial under those circumstances is impossible, the Defence requested that the proceedings be stayed “until such time as the minimum guarantees of a fair trial can be met”.²³² By decision dated 26.10.2012, the Chamber rejected the request for temporary stay of proceedings on the basis that the “defence has not shown any prejudice that [...] cannot be remedied in the course of trial”.²³³ Rather, the Chamber concluded “that the better approach is for the case to go to trial. If need be, the defendant’s complaint will be kept in mind in the course of the trial”.²³⁴ The Chamber announced to set the date of commencement of the trial in due course.²³⁵

Readers of the previous overview will remember the issue of translation of all prosecution witnesses’ statements into Zaghawa as a consequence of the accused’s right to be tried in a language which they fully understand and speak (art. 67 para. 1 lit. a).²³⁶ The Chamber noted that the accused “have been provided with audio translations into Zaghawa of the statements of 13 out of the 15 prosecution witnesses” and that two further witness statements in Zaghawa will be provided by February 2013.²³⁷ The Prosecutor aims to finalize the translation of annexes to the witness statements by March 2013.²³⁸

4. *The Case of the Prosecutor v Abdel Raheem Muhammad Hussein (Pre-Trial Chamber II)*²³⁹

- Warrant of arrest: 1.3.2012
- Victims participating: --
- Current status: Suspect at large

A warrant of arrest was issued on 1.3.2012 against Mr. Hussein, current Minister of National Defense of the Republic of Sudan, for being allegedly responsible as indirect co-perpe-

trator for the commission of crimes against humanity and war crimes at different locations in Darfur from August 2003 to March 2004.²⁴⁰ Due to the fact that the case bears similarities with the Harun/al Kushayb and the Al Bashir case, the Chamber relied to a great extent on its previous findings made in those cases. Moreover, the Chamber declared the suspect’s previous and current official positions to be irrelevant to the Court’s exercise of jurisdiction pursuant to art. 27²⁴¹ and recalled Sudan’s obligations to cooperate.²⁴²

V. *Situation in the Republic of Kenya (Pre-Trial Chamber II)*²⁴³

- Authorization to commence investigation: 31.3.2010²⁴⁴
- Victims participating:²⁴⁵ --

It is recalled that the Government of Kenya sought the Court’s assistance in accordance with art. 93 para. 10 with a view to accessing the Prosecutor’s investigation file into the post-election violence in Kenya. This cooperation request was rejected by the Chamber.²⁴⁶ Subsequently, the State sought leave to appeal this decision from the Pre-Trial Chamber²⁴⁷

²⁴⁰ ICC (Pre-Trial Chamber I), Decision of 1.3.2012 – ICC-02/05-01/12-1-Red (Public redacted version of “Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein”); ICC (Pre-Trial Chamber I), Warrant of 1.3.2012 – ICC-02/05-01/12-2 (Warrant of Arrest for Abdel Raheem Muhammad Hussein).

²⁴¹ ICC (Pre-Trial Chamber I), Decision of 1.3.2012 – ICC-02/05-01/12-1-Red (Public redacted version of “Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein”), para. 8.

²⁴² Ibid., para. 32.

²⁴³ The record carries the situation number ICC-01/09.

²⁴⁴ ICC (Pre-Trial Chamber II), Decision of 31.3.2010 – ICC-01/09-19-Corr (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya).

²⁴⁵ ICC (Pre-Trial Chamber II), Decision of 3.11.2010 – ICC-01/09-24 (Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya).

²⁴⁶ ICC (Pre-Trial Chamber II), Decision of 29.6.2011 – ICC-01/09-63 (Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93 [10] of the Statute and Rule 194 of the Rules of Procedure and Evidence).

²⁴⁷ The Government of Kenya had also launched a direct appeal under Art. 82 para. 1 lit. a which was dismissed by the Appeals Chamber on the grounds that the Pre-Trial Chamber’s decision did “not constitute a ‘decision with respect to admissibility’”, s. ICC (Appeals Chamber), Decision of 10.8.2011 – ICC-10/09-78 (OA, Decision on the admissibility of the “Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93 [10] of the Statute and Rule 194 of the Rules of Procedure and Evidence’”).

²³² Ibid., para. 47.

²³³ ICC (Trial Chamber IV), Decision of 26.10.2012 – ICC-02/05-03/09-410 (Decision on the defence request for a temporary stay of proceedings), para. 89. Leave to appeal this decision was granted in part, ICC (Trial Chamber IV), Decision of 13.12.2012 – ICC-02/05-03/09-428 (Decision on the “Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”); ICC (Trial Chamber IV), Opinion of 17.12.2012 – ICC-02/05-03/09-430 (Decision on the “Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”, Dissenting opinion of judge Eboe-Osuji).

²³⁴ ICC (Trial Chamber IV), Decision of 26.10.2012 – ICC-02/05-03/09-410 (Decision on the defence request for a temporary stay of proceedings), para. 159.

²³⁵ ICC (Trial Chamber IV), Order of 14.12.2012 – ICC-02/05-03/09-429 (Order scheduling a status conference).

²³⁶ S. Chaitidou, ZIS 2011, 843 (851).

²³⁷ ICC (Trial Chamber IV), Decision of 26.10.2012 – ICC-02/05-03/09-410 (Decision on the defence request for a temporary stay of proceedings), paras. 132-133.

²³⁸ Ibid., para. 134.

²³⁹ The record carries the case number ICC-02/05-01/12.

which was eventually rejected.²⁴⁸ In brief, it was argued by the Judges that the issues raised by the Kenyan government relate to domestic proceedings and do not affect those before the Court.²⁴⁹ Interestingly, the Chamber remained silent as to whether a State may be considered a “party” to the proceedings within the meaning of art. 82 para. 1. Meanwhile, Kenya had lodged a second art. 93 para. 10 cooperation request in which it sought receipt of material in relation to the Kenya situation and the two cases. This application was again denied with reference to existing security concerns.²⁵⁰

An application to disqualify former Prosecutor Moreno Ocampo was dismissed by the Appeals Chamber as he had already left office by the time the Appeals Judges handed down their decision.²⁵¹

Out of this situation two cases emanated which are at the trial stage. The two cases were conducted in parallel throughout the pre-trial phase and have been assigned, after the confirmation of charges, to one Trial Chamber. They will therefore be presented together.

*1. The Case of the Prosecutor v William Samoei Ruto and Joshua Arap Sang (Trial Chamber V)*²⁵²

- Summonses to appear: 8.3.2011
- First appearance: 7.4.2011
- Confirmation of charges: 23.1.2012
- Victims registered: n/a²⁵³
- Trial start (scheduled): 28.5.2013
- Current status: Trial preparation

*2. The Case of the Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta (Trial Chamber V)*²⁵⁴

- Summonses to appear: 8.3.2011
- First appearance: 8.4.2011
- Confirmation of charges: 23.1.2012

²⁴⁸ ICC (Pre-Trial Chamber II), Decision of 29.5.2012 – ICC-01/09-86 (Decision on the Government of Kenya’s Application for Leave to Appeal Pursuant to Article 82 [1] [d] of the Rome Statute).

²⁴⁹ Ibid., para. 11.

²⁵⁰ ICC (Pre-Trial Chamber II), Decision of 12.7.2012 – ICC-01/09-97 (Decision on the Second Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93 [10] of the Statute and Rule 194 of the Rules of Procedure and Evidence). The Judges made clear that Kenya did not require seeking prior authorization to access publicly available documentation.

²⁵¹ ICC (Appeals Chamber), Decision of 6.9.2012 – ICC-01/09-96-Red (OA2, Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr. David Nyekorach-Matsanga).

²⁵² The record carries the case number ICC-01/09-01/11.

²⁵³ At the pre-trial stage, 327 victims had participated in the proceedings.

²⁵⁴ The record carries the case number ICC-01/09-02/11.

- Victims registered: n/a²⁵⁵
- Trial start (scheduled): 9.7.2013
- Current status: Trial preparation

a) Proceedings before the Pre-Trial Chamber

Pre-Trial Chamber II confirmed the charges against four out of six suspects in both Kenya cases on 23.1.2012. Due to the volatile security situation in Kenya, the Chamber had decided to issue the decisions in both cases at the same time.²⁵⁶ The disagreement between the Judges with regard to the Court’s exercise of jurisdiction in this situation remained throughout the proceedings and caused the Pre-Trial Chamber to take its decisions under art. 61 para. 7 by majority.²⁵⁷

In Case 1,²⁵⁸ the Chamber’s Majority declined to confirm all charges against Henry Kiprono Kosgey due to the insufficiency of evidence and the prejudice caused to the Defence by dint of the non-disclosure of information which was crucial in determining Mr. Kosgey’s individual criminal responsibility.²⁵⁹ However, it confirmed the charges against Mr. Ruto as indirect co-perpetrator with others (art. 25 para. 3 lit. a) and Mr. Sang as contributing in any other way (art. 25 para. 3 lit. d) to the commission of crimes against humanity. It is worth mentioning that the temporal scope of the case has been significantly reduced by the Chamber: while the Prosecutor in the DCC claimed the suspects’ responsibility for the commission of crimes “from on or about 30 December 2007 to the end of January 2008”, the Chamber confirmed the charges only with respect to specific locations for particular days or short time periods.²⁶⁰ Regarding art. 25 para. 3 lit. d, the Chamber was of the view that this “residual mode of accessory liability” requires “a less than ‘substantial’ contribution, as far as such contribution results in the commission of the crimes charged”.²⁶¹ The requests of Mr. Ruto and Mr.

²⁵⁵ At the pre-trial stage, 229 victims had participated in the proceedings.

²⁵⁶ ICC (Pre-Trial Chamber II), Decision of 26.10.2011 – ICC-01/09-01/11-357 (Decision on the Issuance of the Decision Pursuant to Article 61 [7] of the Rome Statute), paras. 12-13.

²⁵⁷ In both cases, the dissenting opinion is annexed to the decision confirming the charges. S.a. Chaitidou, ZIS 2010, 726 (734).

²⁵⁸ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute).

²⁵⁹ Ibid., paras. 293-297.

²⁶⁰ Crimes have been allegedly committed in Turbo town on 31.12.2007, Greater Eldoret area between 1. and 4.1.2008, Kapsabet town in the period 30.12.2007 and 16.1.2008 and Nandi Hills from 30.12.2007 to 2.1.2008.

²⁶¹ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), para. 354. Even though the Chamber took note of the Mbarushimana jurisprudence, it did not follow Pre-Trial Chamber I’s assumption of “significant” contribution.

Sang for leave to appeal this decision were rejected by the Chamber on 9.3.2012 and the case was sent for trial.²⁶²

In Case 2,²⁶³ the Chamber's Majority rejected the admissibility challenge of Mohammed Hussein Ali, the former Commissioner of the Kenyan police, under art. 17 para. 1 lit. d,²⁶⁴ but declined to confirm all charges against him, as it did not believe that the Kenya Police participated in the attack.²⁶⁵ However, the Judges confirmed the charges against Mr. Muthaura and Mr. Kenyatta as it held them accountable as indirect co-perpetrators (art. 25 para. 3 lit. a) for the commission of crimes against humanity in Naivasha and Nakuru (Rift Valley Province). As in Case 1, the temporal scope of the case has been significantly reduced by the Pre-Trial Chamber from approx. one month²⁶⁶ to five days (24-28.1.2008). As already held in the summonses, the Judges did not accept the characterization of forcible circumcision as a crime of 'other sexual violence' (art. 7 para. 1 lit. g) but characterized it as an 'other inhumane act' (art. 7 para. 1 lit. k).²⁶⁷ The requests of Mr. Muthaura and Mr. Kenyatta for leave to appeal this deci-

sion were rejected by the Chamber on 9.3.2012 and the case was sent for trial.²⁶⁸

Procedural matters: It is worth mentioning that in both cases all three Judges rejected the Prosecutor's recurring claim to accept the Prosecutor's evidence as reliable without any further assessment. As in the Mbarushimana case, the Judges affirmed their authority to assess freely and independently all evidence, "regardless of its type or which party relied upon it".²⁶⁹ The Majority also had the opportunity to elaborate on the required specificity of the DCC,²⁷⁰ the applicability of rule 79 in the pre-trial stage,²⁷¹ the Defence challenges to the conduct of the investigation,²⁷² and cumulative charging²⁷³.

²⁶² ICC (Pre-Trial Chamber II), Decision of 9.3.2012 – ICC-01/09-01/11-399 (Decision on the Defences' Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute).

²⁶³ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-02/11-382-Red (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute).

²⁶⁴ "[I]n determining the gravity of the case, factors such as the scale, nature and manner of commission of the alleged crimes, their impact on victims, and the existence of any aggravating circumstances, together with others, listed in rule 145 para. 1 lit. c of the Rules relating to the determination of sentence, are of particular relevance", s. ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-02/11-382-Red (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), para. 50.

²⁶⁵ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-02/11-382-Red (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 224-226, 425-427.

²⁶⁶ In the DCC, the Prosecutor claimed the suspects' responsibility for the commission of crimes "from on or about 30 December 2007 to 31 January 2008".

²⁶⁷ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-02/11-382-Red (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 265-266, 270. The Prosecutor requested the Trial Chamber to employ regulation 55 para. 2 of the Regulations of the Court with a view to re-characterizing, inter alia, acts of forcible circumcision as "other forms of sexual violence", s. ICC (Office of Prosecutor), Filing of 3.7.2012 – ICC-01/09-02/11-445 (Prosecution's application for notice to be given under Regulation 55 [2] with respect to certain crimes charged).

²⁶⁸ ICC (Pre-Trial Chamber II), Decision of 9.3.2012 – ICC-01/09-02/11-406 (Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges).

²⁶⁹ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 58-61; ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-02/11-382-Red (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 72-75. S.a. Dissenting opinion of Judge Kaul annexed to ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), p. 169 para. 53 et seq; ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-02/11-382-Red, p. 189 para. 58 et seq.

²⁷⁰ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 99, 101 and 103; ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-02/11-382-Red (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), para. 106.

²⁷¹ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), para. 107.

²⁷² ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 51-53; ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-02/11-382-Red (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 63-65. However, attention is drawn to the elaborations of the dissenting Judge on the completeness of investigations: "In case a Pre-Trial Chamber is not convinced that the investigation is complete, it may use its powers under articles 61 para. 7 lit. c and 69 para. 3 of the Statute in order to compel the Prosecutor to complete his investigation before considering committing any suspect to trial. I consider this issue to be of utmost importance for the success of this Court", s. dissenting Opinion of Judge Kaul

The accused in both cases challenged the jurisdiction *ratione materiae* of the Court before the Pre-Trial Chamber (i) contesting the Chamber's adopted definition of "organization" within the meaning of art. 7 para. 2 lit. a and (ii) advancing that the facts of the case do not satisfy the definition of "organization". The Majority addressed the challenges in the decisions confirming the charges and dismissed them in limine.²⁷⁴ In essence, the Majority held that the true nature of the Defence challenge is "evidentiary", relating to the merits of the Prosecutor's case which should be addressed under art. 61 para. 7.²⁷⁵

b) Proceedings before the Appeals Chamber

Subsequently, the Defence in both cases lodged an appeal under art. 82 para. 1 lit. a against the Majority's decision with respect to jurisdiction and advanced, more or less, the same arguments before the Appeals Chamber. The Judges, in turn, rejected the appeals and confirmed that the question whether the contextual element of an "organizational policy" existed both as a matter of law and facts pertains to the substantive merits of the case.²⁷⁶ In the Chamber's view, any other interpretation would "conflate the separate concepts of jurisdiction and the confirmation process"²⁷⁷ and cannot, according-

annexed to ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373, p. 168 para. 52.

²⁷³ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 280-281.

²⁷⁴ However, in Case 1 the Chamber rejected the first limb of the challenge (definition of the term "organisation"), and only dismissed in limine the second limb ("sufficiency of evidence"), s. ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 33-34.

²⁷⁵ ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-01/11-373 (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 35-36; ICC (Pre-Trial Chamber II), Decision of 23.1.2012 – ICC-01/09-02/11-382-Red (Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute), paras. 30-35.

²⁷⁶ ICC (Appeals Chamber), Decision of 24.5.2012 – ICC-01/09-01/11-414 (OA3 OA4, Decision on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute"); ICC (Appeals Chamber), Decision of 24.5.2012 – ICC-01/09-02/11-425 (OA 4, Decision on the appeal of Mr. Francis Kirimi Muthaura and Mr. Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute").

²⁷⁷ ICC (Appeals Chamber), Decision of 24.5.2012 – ICC-01/09-02/11-425 (OA 4, Decision on the appeal of Mr. Fran-

ly, form part of a jurisdictional challenge. As a result, whether or not the events concerned qualify as crimes against humanity has been postponed to after trial. Maybe the most crucial comment by the Appeals Chamber can be found in the following statement: "As the Prosecutor has expressly alleged crimes against humanity, including the existence of an organizational policy, the Appeals Chamber finds that the Court has subject-matter jurisdiction over the crimes with which [the accused] have been charged".²⁷⁸ This implies that whenever the Prosecutor has determined that a situation/case falls within the jurisdiction *ratione materiae* of the Court,²⁷⁹ the Judges must agree with such a determination and have no supervisory function.

c) Proceedings before the Trial Chamber

Following the practice of other trial chambers, the Judges requested the Prosecutor to submit an updated "post-confirmation document containing the charges" as this "will assist in providing a readily accessible statement of the facts underlying each charge".²⁸⁰ Before doing so, however, the parties were instructed to consult each other with a view to "resolving any areas of disagreement as to [...] whether the draft updated DCC properly reflects the Confirmation Decision".²⁸¹ Subsequently, the parties returned to the Chamber submitting their points of disagreement over the content of the updated DCC. The Chamber, in turn, decided whether a particular al-

cis Kirimi Muthaura and Mr. Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute"), para. 35. The same was held in Case 1.

²⁷⁸ ICC (Appeals Chamber), Decision of 24.5.2012 – ICC-01/09-02/11-425 (OA 4, Decision on the appeal of Mr. Francis Kirimi Muthaura and Mr. Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61 [7] [a] and [b] of the Rome Statute"), para. 36. The same was held in Case 1.

²⁷⁹ Art. 53 para. 1.

²⁸⁰ ICC (Trial Chamber V), Order of 5.7.2012 – ICC-01/09-01/11-439 (Order for the prosecution to file an updated document containing the charges), para. 7; S.a. ICC (Trial Chamber V), Order of 5.7.2012 – ICC-01/09-02/11-450 (Order for the prosecution to file an updated document containing the charges), para. 8. Further guidance regarding the content of the charges was given in ICC (Trial Chamber V), Order of 20.11.2012 – ICC-01/09-01/11-475 (Order regarding the content of the charges); ICC (Trial Chamber V), Order of 20.11.2012 – ICC-01/09-02/11-536 (Order regarding the content of the charges).

²⁸¹ ICC (Trial Chamber V), Order of 5.7.2012 – ICC-01/09-02/11-439 (Order for the prosecution to file an updated document containing the charges), para. 7; ICC (Trial Chamber V), Order of 5.7.2012 – ICC-01/09-02/11-450 (Order for the prosecution to file an updated document containing the charges), para. 8.

legation could be retained in the updated DCC.²⁸² Perhaps of interest in this context are the Chamber's findings as regards (i) the question which document constitutes an authoritative statement of the charges for trial,²⁸³ (ii) the binding nature of the temporal and geographical scope of the charges set in the decision confirming the charges,²⁸⁴ and (iii) the legal consequences attributed to the Pre-Trial Chamber's silence on relevant facts in the decision confirming the charges²⁸⁵. The two decisions presented here are, in some respect, rather disquieting contributions²⁸⁶ to the discussion about the specificity of the confirmation of charges decision/the necessity

for an "updated DCC". Nevertheless, they raise the legitimate question as to the degree of precision with which pre-trial chambers' confirmation decisions have been drafted in the past.²⁸⁷ An interesting development in this context is the Prosecutor's recent art. 61 para. 9 request to the Pre-Trial Chamber to "re-insert" certain factual allegations previously denied by the Pre-Trial Chamber's Majority as lacking adequate support. The Prosecutor explained that since the confirmation hearing she had obtained new evidence supporting the factual allegations she seeks to add. The Single Judge, acting on behalf of Pre-Trial Chamber II, asked for observations on the Prosecutor's request by the accused and the victims. In addition, the Single Judge, recalling that the investigator "ideally" should have been complete by the time of the confirmation hearing, requested the Prosecutor to "clarif[y] the reasons for not conducting the investigation in due course in compliance with the Appeals Chamber's jurisprudence".²⁸⁸

In the course of both trial preparations, the Chamber issued a series of case management decisions. Of particular interest to the reader may be the Chamber's decision permitting pre-testimony "witness preparation" by the calling party.²⁸⁹ It is recalled that all chambers at the Court have prohib-

²⁸² ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-01/11-522 (Decision on the content of the updated document containing the charges); ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-02/11-584 (Decision on the content of the updated document containing the charges).

²⁸³ ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-01/11-522 (Decision on the content of the updated document containing the charges), para. 18; ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-02/11-584 (Decision on the content of the updated document containing the charges), para. 22.

²⁸⁴ ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-01/11-522 (Decision on the content of the updated document containing the charges), paras. 28 and 32; ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-02/11-584 (Decision on the content of the updated document containing the charges), para. 53.

²⁸⁵ ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-01/11-522 (Decision on the content of the updated document containing the charges), para. 19; ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-02/11-584 (Decision on the content of the updated document containing the charges), para. 23.

²⁸⁶ For example, rather than subjecting the draft "post-confirmation DCC", which must "indicate the material facts and circumstances underlying the charges as confirmed", to the parties' scrutiny, the Trial Chamber could refer this matter back to the Pre-Trial Chamber which heard the case with the request to specify the factual basis upon which the Chamber relied when confirming the charges (art. 64 para. 4). In this regard, Judge Eboe Osuji's statement ("There is no power in the Trial Chamber to order the Pre-Trial Chamber to clarify the content of the [confirmation decision] if it is to be taken as the primary document of reference for the charges.") without more seems unconvincing; s. his concurring separate opinion annexed to ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-01/11-522 (Decision on the content of the updated document containing the charges), pp. 30-31 (p. 5/6). The proposed approach has the advantage that the trial chamber need not speculate about the Pre-Trial Chamber's approach to the facts as it does in this case when assuming incorrectly that the pre-trial chamber "may not have examined in detail, in its Confirmation Decision, each factual allegation contained in the DCC and it may have chosen to focus on only some selected allegations and evidence sufficient for the task before it" (*emphasis added*).

²⁸⁷ In two instances, Trial Chambers have appealed to the Pre-Trial Judges to provide Trial Chambers with a specific factual statement, s. ICC (Trial Chamber II), Decision of 21.10.2009 – ICC-01/04-01/07-1547-tENG (Decision on the Filing of a Summary of the Charges by the Prosecutor), para. 31; ICC (Trial Chamber III), Decision of 20.7.2010 – ICC-01/05-01/08-836 (Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges). S.a. separate opinion of Judge van den Wyngaert, annexed to ICC (Trial Chamber V), Decision of 28.12.2012 – ICC-01/09-01/11-522 (Decision on the content of the updated document containing the charges), p. 37 para. 2 ("This is not to say that I believe this to be an ideal situation. It would be far better if the Pre-Trial Chamber had itself formulated the charges exhaustively or made clear which parts of the Prosecutor's Document Containing the Charges it confirmed and which ones it rejected"). She made the same statement in Case 2.

²⁸⁸ ICC (Pre-Trial Chamber II), Decision of 29.1.2013 – ICC-01/09-02/11-614 (Decision Requesting Observations on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"), para. 9. S a. section I. 4. b above.

²⁸⁹ ICC (Trial Chamber V), Decision of 2.1.2013 – ICC-01/09-01/11-524 (Decision on witness preparation); ICC (Trial Chamber V), Decision of 2.1.2013 – ICC-01/09-02/11-588 (Decision on witness preparation). Up to this point, only Judge Ozaki, now Presiding Judge of Trial Chamber V, had accepted witness proofing to be compatible with the Statute, s. ICC (Trial Chamber III), Opinion of 24.11.2010 – ICC-01/05-01/08-1039 (Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial). Leave to appeal the "witness preparation

ited hitherto any “witness proofing”.²⁹⁰ The bench also requested submissions on the modes of liability applied in the cases, possibly with a view to applying regulation 55.²⁹¹

The Chamber also laid down the parameters for prospective victims’ participation and representation at trial.²⁹² Most remarkable, in this context, is the Chamber’s “different approach” in relation to the application procedure.²⁹³ The Judges introduced the concepts of “individual participation” and “participation through a common legal representative” which are determinative for the application scheme.²⁹⁴ Only victims who will appear individually in person or through video-link before the Chamber²⁹⁵ are required to go through the rule 89 procedure.²⁹⁶ All other victims will simply register with the

Registry as victim participants, “indicating their names, contact details as well as information as to the harm suffered”.²⁹⁷ This registration, however, “does not imply any judicial determination of the status of the individual victims”.²⁹⁸

The rule 85 assessment (“definition of victims”) for both victim categories, hitherto reserved for the bench, has been delegated exclusively to the common legal representative.²⁹⁹ In the opinion of the Judges, no prejudice to the Defence derives from this scheme as the common legal representative “is expected to voice the concerns of all victims”.³⁰⁰

decision in Case 1 was rejected, ICC (Trial Chamber V), Decision of 11.2.2013 – ICC-01/09-01/11-596 (Decision on the joint defence request for leave to appeal the decision on witness preparation).

²⁹⁰ S. Chaitidou, ZIS 2008, 371 (372); 2011, 843 (848).

²⁹¹ ICC (Trial Chamber V), Order of 14.5.2012 – ICC-01/09-01/11-413 (Order scheduling a status conference), para. 5; ICC (Trial Chamber V), Order of 15.6.2012 – ICC-01/09-01/11-426 (Order setting the deadline for submissions on Regulation 55 and Article 25 [3]); ICC (Trial Chamber V), Order of 14.5.2012 – ICC-01/09-02/11-422 (Order scheduling a status conference), para. 5.

²⁹² ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims’ representation and participation); ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims’ representation and participation).

²⁹³ The Chamber made this statement alleging the “large number of victims involved and also unprecedented security concerns and other difficulties that may be associated with the completion of a detailed application form”, s. ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims’ representation and participation), para. 24; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims’ representation and participation), para. 23. Reference was also made to the time-consuming and resource-intensive review process of victim applications at the Court. Without more, this can be said to be true in relation to all situations/cases before the Court.

²⁹⁴ It can be argued that the two categories have been supplemented by a third group comprising all those victims who do not register but whose views and concerns are generally voiced through the common legal representation, as the Chamber explains later in the decisions.

²⁹⁵ Which of the victims will be authorized to participate personally in the proceedings and at which point during trial, will be decided by the Chamber, ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims’ representation and participation), para. 58; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims’ representation and participation), para. 57.

²⁹⁶ Specifications as to the procedure are made in ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460

(Decision on victims’ representation and participation), paras. 56-58; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims’ representation and participation), paras. 55-57. However, this does not entail any rule 85 findings by the Chamber, as will be explained further down in the text.

²⁹⁷ ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims’ representation and participation), paras. 25 and 49; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims’ representation and participation), paras. 24 and 48.

²⁹⁸ ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims’ representation and participation), para. 38; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims’ representation and participation), para. 37.

²⁹⁹ ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims’ representation and participation), para. 53; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims’ representation and participation), para. 52. The only decision the Chamber will take with regard to victims wishing to appear is “which victims shall be authorised to participate individually, either in person or via video-link, and at which point of the proceedings”, s. ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims’ representation and participation), para. 58; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims’ representation and participation), para. 57. This is in contrast to the Rules of Procedure and Evidence which require a judicial decision on each application. Rule 89 para. 1 instructs the Register to submit all victims’ applications to the Chamber. Rule 89 para. 2 stipulates: “The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings” (*emphasis added*).

³⁰⁰ ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims’ representation and participation), para. 38; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims’ representation and participation), para. 37.

Common legal representation conveys the views and concerns of victims who applied or registered³⁰¹ and encompasses, in a general manner, also those of victims who did not register.³⁰² The appointed common legal representative will be the contact person for the victims he/she represents and formulate their views and concerns, while the OPCV will act on behalf of the common legal representative before the Chamber.³⁰³ Only when delivering opening and closing statements and upon prior authorization may the common legal representative appear before the Chamber.³⁰⁴

With this decision the Chamber has left the Statute and Rules behind it. Whether its ambition to maximize efficiency justifies such a departure from the Court's basic texts is open to dispute. No leave to appeal this decision was lodged by either party.

The Defence in Case 2 requested the Chamber to hold the trial either in Kenya or at the premises of the ICTR in Arusha. The Chamber requested observations by all concerned "before deciding whether to recommend the Presidency to consult the relevant national authorities".³⁰⁵

³⁰¹ "During the trial phase all victims, regardless of whether they have registered or not, will be represented through common legal representation", s. ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims' representation and participation), para. 53; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims' representation and participation), para. 52.

³⁰² ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims' representation and participation), para. 52; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims' representation and participation), para. 51. This may be the case because victims choose not to register or face practical or security related difficulties.

³⁰³ ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims' representation and participation), paras. 41-44; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims' representation and participation), paras. 40-43.

³⁰⁴ ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-01/11-460 (Decision on victims' representation and participation), paras. 71, 73 and 75; ICC (Trial Chamber V), Decision of 3.10.2012 – ICC-01/09-02/11-498 (Decision on victims' representation and participation), paras. 70, 72 and 74. The Chamber terminated the appointment of the common legal representatives appointed by the Pre-Trial Chamber and appointed new counsel for trial, s. ICC (Trial Chamber V), Decision of 23.11.2012 – ICC-01/09-01/11-479 (Decision appointing a common legal representative of victims); ICC (Trial Chamber V), Decision of 20.11.2012 – ICC-01/09-02/11-537 (Decision appointing a common legal representative of victims).

³⁰⁵ ICC (Trial Chamber V), Order of 17.1.2013 – ICC-01/09-02/11-602 (Order requesting observations in relation to the "Defence Application for change of place where the Court shall sit for Trial"), para. 6. S. before, ICC (Trial Chamber

VI. Situation in Libya (Pre-Trial Chamber I)³⁰⁶

- Referral by Security Council: 26.2.2011
- Victims participating: --

As in other existing situations, the Chamber issued a decision on victims' participation at the situation level.³⁰⁷ Out of this situation, one case emanated against originally three suspects which is pending before Pre-Trial Chamber I. This case is presented below.

*The Case of the Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Pre-Trial Chamber I)*³⁰⁸

- Warrants of arrest: 27.6.2011
- Termination of proceedings against Muammar Gaddafi: 22.11.2011
- Victims participating: --
- Current status: Libya challenged admissibility of case against Saif Al-Islam Gaddafi

Following the death of Muammar Mohammed Abu Minyar Gaddafi, the Chamber terminated proceedings against him on 22.11.2011.³⁰⁹

The proceedings relating to Saif Al-Islam Gaddafi took a different turn: the Chamber was informed by Libya that the suspect was arrested on 19.11.2011 and that it would notify the Court of its decision on the arrest and surrender at a later stage.³¹⁰ Subsequently, the implementation of the surrender request was suspended by the Chamber in light of the fact that it intended to request further information from the Libyan authorities.³¹¹ Soon thereafter, (i) the Office of Public

V), Decision of 7.11.2012 – ICC-01/09-02/11-522 (Decision on the defence request to change the place of the proceedings). S.a. ICC (Trial Chamber V), Order of 1.2.2013 – ICC-01/09-01/11-580 (Order requesting observations in relation to the "Joint Defence Application for change of place where the Court Shall Sit for Trial").

³⁰⁶ The record carries the situation number ICC-01/11.

³⁰⁷ ICC (Pre-Trial Chamber I), Decision of 24.1.2012 – ICC-01/11-18 (Decision on Victims' Participation in Proceedings Related to the Situation in Libya).

³⁰⁸ The record carries the case number ICC-01/011-01/11.

³⁰⁹ ICC (Pre-Trial Chamber I), Decision of 22.11.2011 – ICC-01/11-01/11-28 (Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi).

³¹⁰ ICC (Registry), Filing of 29.11.2011 – ICC-01/11-01/11-34-Anx (Implementation of the "Decision to Add Document to Case Record" [ICC-01/11-01/11-29-Conf-Exp]). Mr. Gaddafi is held in Zintan, s. ICC (Pre-Trial Chamber I), Decision of 7.12.2012 – ICC-01/011-01/11-239 (Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi), para. 45.

³¹¹ ICC (Pre-Trial Chamber I), Decision of 1.12.2011 – ICC-01/11-01/11-38 (Decision Regarding the "Report of the Reg-

Counsel for the Defence (“OPCD”) was authorized “to represent the interests of the Defence in all instances related to the proceedings against Saif Al-Islam Gaddafi”; and (ii) Libya was requested to provide information on various topics, including the question “whether and when the Libyan authorities intended to surrender [the suspect] to the Court”.³¹²

Next, Libya sought postponement of the surrender request in accordance with art. 94 pending the completion of national investigations in relation to other crimes. At the same time it informed the Chamber, among other things, that it would not contest the admissibility of the case at this time. In response, the Chamber shed some light on the relationship between arts. 94 and 89 para. 4 and held that art. 89 para. 4 is the *lex specialis* provision in relation to surrender requests.³¹³ As this provision does not cater for any postponement, the postponement request was dismissed and Libya was asked to arrange for Mr. Gaddafi’s surrender.³¹⁴

On 22.3.2012, Libya announced that it would challenge the admissibility by 30.4.2012. At the same time, it sought suspension of the execution of the surrender request pursuant to art. 95 pending the Chamber’s decision on that challenge. Considering that at the time of the application, no admissibility challenge had been submitted, the Chamber rejected Libya’s second postponement request and recalled Libya’s cooperation obligations.³¹⁵ The Chamber left open the question whether art. 95 is applicable to surrender requests for the time being. Against this decision, Libya lodged an appeal under art. 82 para. 1 lit. a which was rejected by the Appeals Chamber as inadmissible.³¹⁶ In the meantime, Mr. Xavier-Jean Keita and Mrs. Melinda Taylor from the OPCD were appointed as counsel for Mr. Gaddafi.³¹⁷ On 1.5.2012, Libya lodged formally a challenge of the admissibility with respect to the case against Mr. Gaddafi³¹⁸ and requested once more to postpone

the execution of the request for arrest and surrender”).

³¹² ICC (Pre-Trial Chamber I), Decision of 6.12.2011 – ICC-01/11-01/11-39-Red (Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi), para. 11.

³¹³ ICC (Pre-Trial Chamber I), Decision of 7.3.2012 – ICC-01/11-01/11-72 (Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi), para. 15.

³¹⁴ *Ibid.*, p. 8.

³¹⁵ ICC (Pre-Trial Chamber I), Decision of 4.4.2012 – ICC-01/11-01/11-100 (Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi), para. 18.

³¹⁶ ICC (Appeals Chamber), Decision of 25.4.2012 – ICC-01/11-01/11-126 (OA 2, Decision on “Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’” of 10 April 2012).

³¹⁷ ICC (Pre-Trial Chamber I), Decision of 17.4.2012 – ICC-01/11-01/11-113 (Decision Appointing Counsel from the OPCD as Counsel for Saif Al-Islam Gaddafi).

³¹⁸ ICC (Pre-Trial Chamber I), Decision of 4.5.2012 – ICC-01/11-01/11-134 (Decision on the Conduct of the Proceed-

ings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”), para. 8.
³¹⁹ ICC (Government of Libya), Filing of 1.5.2012 – ICC-01/11-01/11-130-Red (Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute).
³²⁰ ICC (Pre-Trial Chamber I), Decision of 4.5.2012 – ICC-01/11-01/11-134 (Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”), para. 9.
³²¹ Art. 19 para. 3 s. 2, in conjunction with rule 59 para. 1 lit. a.
³²² S. Art. 19 para. 3 s. 2, in conjunction with rule 59 para. 1 lit. b.
³²³ ICC (Pre-Trial Chamber I), Decision of 4.5.2012 – ICC-01/11-01/11-134 (Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”).
³²⁴ ICC (Pre-Trial Chamber I), Order of 14.9.2012 – ICC-01/11-01/11-207 (Order convening a hearing on Libya’s challenge to the admissibility of the case against Saif Al-Islam Gaddafi); ICC (Pre-Trial Chamber I), Decision of 2.10.2012 – ICC-01/11-01/11-212 (Decision on OPCD requests in relation to the hearing on the admissibility of the case), para. 6. The transcripts of the hearings are available on the website of the Court.
³²⁵ ICC (Pre-Trial Chamber I), Decision of 7.12.2012 – ICC-01/11-01/11-239 (Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi), para. 10.
³²⁶ ICC (Pre-Trial Chamber I), Decision of 10.1.2013 – ICC-01/11-01/11-249 (Decision requesting Libya to provide observations).

ings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”), para. 8.

³¹⁹ ICC (Government of Libya), Filing of 1.5.2012 – ICC-01/11-01/11-130-Red (Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute).

³²⁰ ICC (Pre-Trial Chamber I), Decision of 4.5.2012 – ICC-01/11-01/11-134 (Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”), para. 9.

³²¹ Art. 19 para. 3 s. 2, in conjunction with rule 59 para. 1 lit. a.

³²² S. Art. 19 para. 3 s. 2, in conjunction with rule 59 para. 1 lit. b.

³²³ ICC (Pre-Trial Chamber I), Decision of 4.5.2012 – ICC-01/11-01/11-134 (Decision on the Conduct of the Proceedings Following the “Application on behalf of the Government of Libya pursuant to Article 19 of the Statute”).

³²⁴ ICC (Pre-Trial Chamber I), Order of 14.9.2012 – ICC-01/11-01/11-207 (Order convening a hearing on Libya’s challenge to the admissibility of the case against Saif Al-Islam Gaddafi); ICC (Pre-Trial Chamber I), Decision of 2.10.2012 – ICC-01/11-01/11-212 (Decision on OPCD requests in relation to the hearing on the admissibility of the case), para. 6. The transcripts of the hearings are available on the website of the Court.

³²⁵ ICC (Pre-Trial Chamber I), Decision of 7.12.2012 – ICC-01/11-01/11-239 (Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi), para. 10.

³²⁶ ICC (Pre-Trial Chamber I), Decision of 10.1.2013 – ICC-01/11-01/11-249 (Decision requesting Libya to provide observations).

operation requests under part IX.³²⁷ Accordingly, the Chamber temporarily postponed the execution of the surrender request until such time that the Chamber has ruled on the admissibility of the case whilst reminding Libya “that all necessary measures are taken during the postponement in order to ensure the possibility of an immediate execution of the Surrender Request should the case be found admissible”.³²⁸

A delegation of the Court, including counsel for Mr. Gaddafi, went (for the second time) to Libya to meet the suspect, as previously agreed with the Libyan authorities. On 7.6.2012, the delegation met with Mr. Gaddafi but was detained immediately thereafter until 2.7.2012.³²⁹ On 3.7.2012, the ICC delegation returned to The Hague.³³⁰ In the aftermath, Libya requested the appointment of OPCD to be revoked.³³¹ The Chamber rejected this request but expressed its intention to “explore at this stage the options that can be pursued with a view to securing the appointment of regular counsel by Mr. Gaddafi”.³³²

Following a Defence request for disqualification, the Appeals Chamber elaborated on aspects of the presumption of innocence and its impact on the content of statements made by former Prosecutor Moreno-Ocampo in relation to pending cases.³³³ While the Appeals Chamber found some of the

Prosecutor’s statements to be inappropriate,³³⁴ it did not find them to “amount to grounds for [the Prosecutor’s] disqualification”³³⁵ and rejected the request.

Abdullah Al-Senussi was arrested in Mauritania on 17.3.2012³³⁶ and purportedly extradited to Libya on 5.9.2012.³³⁷ The Chamber requested Libya to confirm the extradition of the suspect and inform the Court of his current whereabouts.³³⁸ Recently, the Chamber rejected any postponement arguments by Libya against the execution of the Court’s surrender request and ordered the Libyan authorities to proceed to the immediate surrender of Mr. Al-Senussi to the Court.³³⁹ Resorting to its powers under art. 57 para. 3 lit. b, the Chamber further requested the Libyan authorities to arrange a privileged visit between the suspect and appointed counsel.³⁴⁰

VII. Situation in the Republic of Côte d’Ivoire (Pre-Trial Chamber I)³⁴¹

- Declarations under art. 12 para. 3: 18.4.2003,³⁴² confirmed 14.12.2010³⁴³ and 3.5.2011³⁴⁴

sion of 12.6.2012 – ICC-01/11-01/11-175 (OA 3, Decision on the Request for Disqualification of the Prosecutor), paras. 23 et seq.

³³⁴ Ibid., paras. 31 et seq. S. in this respect also ICC (Trial Chamber I), Decision of 12.5.2010 – ICC-01/04-01/06-2433 (Decision on the press interview with Ms. Le Fraper du Hellen); ICC (Pre-Trial Chamber I), Decision of 31.1.2011 – ICC-01/04-01/10-51 (Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings); ICC (Pre-Trial Chamber II), Decision of 11.2.2011 – ICC-01/09-42 (Decision on the “Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor’s Application under Article 58 [7]”).

³³⁵ ICC (Appeals Chamber), Decision of 12.6.2012 – ICC-01/11-01/11-175 (OA 3, Decision on the Request for Disqualification of the Prosecutor), para. 34.

³³⁶ ICC (Government of Libya), Filing of 1.5.2012 – ICC-01/11-01/11-130-Red (Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute), para. 30.

³³⁷ ICC (Government of Libya), Filing of 7.9.2012 – ICC-01/11-01/11-205 (Libyan Government’s provisional report pursuant to the Chamber’s Decision of 9 August 2012 & Request for leave to file further report by 28 September 2012), para. 13.

³³⁸ ICC (Pre-Trial Chamber I), Order of 10.12.2012 – ICC-01/11-01/11-241-Corr (Corrigendum to the Order in relation to the request for arrest and surrender of Abdullah Al-Senussi).

³³⁹ ICC (Pre-Trial Chamber I), Decision of 6.2.2013 – ICC-01/11-01/11-269 (Decision on the “Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC”), paras. 24-36.

³⁴⁰ Ibid., paras. 37-40.

³⁴¹ The record carries the situation number ICC-02/11.

³²⁷ ICC (Pre-Trial Chamber I), Decision of 1.6.2012 – ICC-01/11-01/11-163 (Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute), para. 32.

³²⁸ ICC (Pre-Trial Chamber I), Decision of 1.6.2012 – ICC-01/11-01/11-163 (Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute), para. 40.

³²⁹ ICC (Pre-Trial Chamber I), Decision of 4.7.2012 – ICC-01/11-01/11-184 (Decision on the OPCD “Demande urgente en extension de délai”), para. 5.

³³⁰ Information as to the Defence perspective of events, s. ICC (Defence of Saif Al-Islam Gaddafi), Filing of 31.7.2012 – ICC-01/11-01/11-190-Corr-Red (Public Redacted Version of the Corrigendum to the “Defence Response to the ‘Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute’”).

³³¹ Libya based its request on (i) an alleged “serious misjudgment” of counsel that could amount to a breach of duties under the Code of Conduct for counsel, and (ii) the adverse impact of the retention of the OPCD as counsel for the suspect on Libya’s willingness to cooperate with the Court for the purposes of the admissibility proceedings.

³³² ICC (Pre-Trial Chamber I), Decision of 21.11.2012 – ICC-01/11-01/11-233-Red (Decision on the “Submissions of the Libyan Government with respect to the matters raised in a private session during the hearing on 9-10 October 2012”), para. 37.

³³³ ICC (Appeals Chamber), Decision of 11.5.2012 – ICC-01/11-01/11-140 (OA 3, Decision on the request to temporarily suspend the Prosecutor from conducting any prosecutorial activities related to the case pending the determination of the request for disqualification); ICC (Appeals Chamber), Deci-

- Request for authorization: 23.6.2011
- Victims representations: 658 individual, 25 collective representations
- Chamber's authorization for events after 28.11.2010: 3.10.2011
- Chamber's authorization for events prior to 28.11.2012: 22.2.2012
- Victims' participation: --

Following the Prosecutor's decision to proceed with an investigation into the situation in the Ivory Coast, he sought authorization from Pre-Trial Chamber III to commence the investigation.³⁴⁵ On 3.10.2011, the Chamber authorized the commencement of the investigation in relation to the post-election violence which erupted in the aftermath of the presidential elections after 28.11.2010 as well as in relation to any "continuing crime".³⁴⁶ It also requested the Prosecutor to submit further information in relation to alleged crimes committed between 19.9.2002 and 28.11.2010, as alluded to in the first art. 12 para. 3 declaration, the Prosecutor's request and victims' representations.³⁴⁷

³⁴² To be consulted at:

<http://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf> (14.3.2012).

³⁴³ To be consulted at:

<http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf> (14.3.2012).

³⁴⁴ To be found in annex 15 to the filing of the Defence of Mr. Gbagbo, ICC (Defence of Mr. Gbagbo), Filing of 24.5.2012 – ICC-02/11-01/11-129 (Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12 [3], 19 [2], 21 [3], 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo).

³⁴⁵ ICC (Office of the Prosecutor), Filing of 23.6.2011 – ICC-02/11-3 (Request for authorisation of an investigation pursuant to article 15).

³⁴⁶ ICC (Pre-Trial Chamber III), Decision of 3.10.2011 – ICC-02/11-14 (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire). A corrigendum was issued by the Chamber on 15.11.2011, carrying the document number ICC-02/11-14-Corr.

³⁴⁷ ICC (Pre-Trial Chamber III), Decision of 15.11.2011 – ICC-02/11-14-Corr (Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire"), paras. 183-185 and 213. The dissenting judge opined that the Majority could have expanded the investigation's starting date to 2002 without asking the Prosecutor to revert to the Chamber with further material, s. ICC (Pre-Trial Chamber III), Opinion of 5.10.2011 – ICC-02/11-15-Corr (Corrigendum to "Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire"), paras. 56-57.

In general, the Chamber followed Pre-Trial Chamber II's interpretation of art. 15 para. 4 against which the Prosecutor's request and supporting material was assessed. The reader's attention is drawn to some differences in approach: the Prosecutor averred that pro-Gbagbo forces purportedly had committed crimes but that he could not draw the same conclusion in relation to pro-Ouattara supporters.³⁴⁸ The Chamber, however, undertook an independent assessment of the entirety of the information submitted³⁴⁹ and concluded that both parties to the conflict, pro-Gbagbo forces *and* pro-Ouattara loyalists, had allegedly committed crimes against humanity³⁵⁰ and war crimes.³⁵¹ Moreover, the Chamber identified other crimes committed by the parties to the conflict which were described in the supporting material but not presented by the Prosecutor. This, in turn, led one judge to dissent as she considered the Chamber's approach thus to exceed the supervisory functions of a Pre-Trial Chamber.³⁵²

With regard to the timeframe of the investigation, Pre-Trial Chamber III, borrowing from the Mbarushimana jurisprudence,³⁵³ authorized the investigation to extend also to future crimes for which no specific information had been submitted at the time of the Prosecutor's request, "insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011".³⁵⁴ It is re-

³⁴⁸ ICC (Office of the Prosecutor), Filing of 23.6.2011 – ICC-02/11-3 (Request for authorisation of an investigation pursuant to article 15), para. 75. Nevertheless, the Prosecutor made reference to crimes purportedly committed by pro-Ouattara loyalists, s. *ibid.*, paras. 147, 152-155.

³⁴⁹ ICC (Pre-Trial Chamber III), Decision of 15.11.2011 – ICC-02/11-14-Corr (Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire"), para. 30.

³⁵⁰ Since 28.11.2010.

³⁵¹ The existence of a non-international armed conflict was assumed between pro-Ouattara and pro-Gbagbo forces for the period between 25.2.2011 and 6.5.2011, s. ICC (Pre-Trial Chamber III), Decision of 15.11.2011 – ICC-02/11-14-Corr (Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire"), para. 127.

³⁵² ICC (Pre-Trial Chamber III), Opinion of 5.10.2011 – ICC-02/11-15-Corr (Corrigendum to "Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire").

³⁵³ ICC (Pre-Trial Chamber I), Decision of 28.9.2010 – ICC-01/04-01/10-1 (Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana), para. 6; this was later confirmed by Pre-Trial Chamber in response to Mbarushimana's jurisdiction challenge (s. in the text above).

³⁵⁴ ICC (Pre-Trial Chamber III), Decision of 15.11.2011 – ICC-02/11-14-Corr (Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire").

called that Pre-Trial Chamber II in its Kenya authorization decision had established an exact time frame for the investigation and had not permitted the Prosecutor to extend his investigation to prospective events.³⁵⁵ With regard to the type of offences, the Chamber clarified that “the Prosecutor is not limited as to range of offences within the jurisdiction of the Court that he is entitled to consider, provided they fall within the timeframe for the investigation hereby authorised by the Chamber”.³⁵⁶ This is also in contrast to Pre-Trial Chamber II’s decision in the Kenya situation which restricted the Prosecutor’s investigation to the crimes he identified in his request at the time.³⁵⁷

Upon submission of additional material, the Chamber broadened the temporal scope of the investigation as far back as 19.9.2002.³⁵⁸

By decision dated 15.3.2012, the Presidency dissolved Pre-Trial Chamber III and assigned the situation in the Republic of Côte D’Ivoire (and the related cases) to Pre-Trial Chamber I.³⁵⁹ Out of this situation, two cases emanated so far which are presented in the following.

1. *The Case of the Prosecutor v Laurent Koudou Gbagbo (Pre-Trial Chamber I)*³⁶⁰

- Warrant of arrest: 23.11.2011 (public on 30.11.2011)
- Surrender to the Court: 30.11.2011
- Confirmation of charges: 19.2.-28.2.2013
- Victims participating: 199
- Current status: Drafting art. 61 para. 7 decision

d’Ivoire”), para. 179. S.a. here the dissenting judge in ICC (Pre-Trial Chamber III), Opinion of 5.10.2011 – ICC-02/11-15-Corr (Corrigendum to “Judge Fernandez de Gurmendi’s separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”), paras. 70-73.

³⁵⁵ ICC (Pre-Trial Chamber II), Decision of 31.3.2010 – ICC-01/09-19-Corr (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), para. 206.

³⁵⁶ ICC (Pre-Trial Chamber III), Decision of 22.2.2012 – ICC-02/11-36 (Decision on the “Prosecution’s provision of further information regarding potentially relevant crimes committed between 2002 and 2010”), para. 38.

³⁵⁷ ICC (Pre-Trial Chamber II), Decision of 31.3.2010 – ICC-01/09-19-Corr (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), paras. 208-209.

³⁵⁸ ICC (Pre-Trial Chamber III), Decision of 22.2.2012 – ICC-02/11-36 (Decision on the “Prosecution’s provision of further information regarding potentially relevant crimes committed between 2002 and 2010”).

³⁵⁹ ICC (Presidency), Decision of 15.3.2012 – ICC-02/11-37 (Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d’Ivoire situations).

³⁶⁰ The record carries the case number ICC-02/11-01/11.

In the warrant of arrest, Laurent Gbagbo was found to be responsible as indirect co-perpetrator for the alleged commission of four counts of crimes against humanity allegedly committed between 16.12.2010 until 12.4.2011.³⁶¹ It is noteworthy that the Prosecutor, changing his previous position about the existence of a State policy,³⁶² now argues that Mr. Gbagbo and his “inner circle” pursued an “organizational policy” within the meaning of art. 7 para. 2 lit. a. The Chamber accepted the re-characterization in this respect but left it open to revisit this issue at a later stage.³⁶³ The same was held with regard to the pertinent form of the suspect’s individual criminal responsibility.

On 24.1.2012, the Single Judge, acting on behalf of Pre-Trial Chamber III,³⁶⁴ established a *disclosure* system which relies on the disclosure system followed in the Abu Garda case, albeit with some modifications inspired from other cases.³⁶⁵ In short, only the evidence on which the parties intend to rely upon in the hearing is communicated to the Chamber.³⁶⁶ The (inter partes) disclosure of exculpatory evidence is notified to the Chamber through a disclosure note but not communicated to it. However, the disclosure note is accompanied by a concise summary of the content of each item and an explanation of its relevance as potentially exculpatory.³⁶⁷ This, in the opinion of the Single Judge, would

³⁶¹ ICC (Pre-Trial Chamber III), Warrant of 23.11.2011 – ICC-02/11-1 (Warrant Of Arrest For Laurent Koudou Gbagbo); ICC (Pre-Trial Chamber III), Decision of 30.11.2011 – ICC-02/11-9-Red (Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo). In contrast to Pre-Trial Chamber II, this Chamber rightly differentiated the time frame in relation to the context and the individual crimes and sought the arrest of Gbagbo on account of the alleged commission of crimes supported by evidence, s. ICC (Pre-Trial Chamber III), Decision of 30.11.2011 – ICC-02/11-9-Red (Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo), paras. 36, 47, 54 and 69.

³⁶² As accepted by the Judges in ICC (Pre-Trial Chamber III), Decision of 15.11.2011 – ICC-02/11-14-Corr (Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”), para. 51.

³⁶³ ICC (Pre-Trial Chamber III), Decision of 30.11.2011 – ICC-02/11-01/11-9-Red (Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo), paras. 47-48.

³⁶⁴ Art. 57 para. 2.

³⁶⁵ ICC (Pre-Trial Chamber III), Decision of 24.1.2012 – ICC-02/11-01/11-30 (Decision establishing a disclosure system and a calendar for disclosure).

³⁶⁶ ICC (Pre-Trial Chamber III), Decision of 24.1.2012 – ICC-02/11-01/11-30 (Decision establishing a disclosure system and a calendar for disclosure), paras. 15 and 19.

³⁶⁷ ICC (Pre-Trial Chamber III), Decision of 24.1.2012 – ICC-02/11-01/11-30 (Decision establishing a disclosure system and a calendar for disclosure), para. 24. The requisite

serve “the limited scope of the confirmation of charges proceedings”.³⁶⁸ Following the approach of other Pre-Trial Chambers,³⁶⁹ the Single Judge set a progressive calendar for disclosure with staggered time limits, urging the Prosecutor “to fulfil his disclosure obligations as soon as practicable without waiting for the statutory deadlines to expire”.³⁷⁰ Lastly, the Single Judge requested the Prosecutor to prepare in relation to the incriminating evidence reflected in the document containing the charges and the list of evidence “a chart organizing each item in light of the constituent element of the relevant crimes (Element Based Chart)” which, ultimately, shall be filed in the record of the case once all incriminating evidence has been disclosed, i.e. 30 days before the commencement of the confirmation hearing (rule 121 para. 3).³⁷¹ In this decision, the Single Judge also adopted a “simplified procedure” regarding redactions.³⁷²

In a further set of decisions the framework for *victims’* participation through collective applications was regulated.³⁷³ Subsequently, 199 victims, represented by one common legal representative, were granted participatory rights in relation to the confirmation of charges hearing.³⁷⁴

summary and explanation of relevance is also applied to rule 77 items which are material to the preparation of the defence, s. *ibid.*, para. 27.

³⁶⁸ ICC (Pre-Trial Chamber III), Decision of 24.1.2012 – ICC-02/11-01/11-30 (Decision establishing a disclosure system and a calendar for disclosure), para. 20.

³⁶⁹ S. for example ICC (Pre-Trial Chamber II), Decision of 20.4.2011 – ICC-01/09-01/11-62 (Decision on the “Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge” and Establishing a Calendar for Disclosure Between the Parties); ICC (Pre-Trial Chamber I), Decision of 30.3.2011 – ICC-01/04-01/10-87 (Decision on issues relating to disclosure).

³⁷⁰ ICC (Pre-Trial Chamber III), Decision of 24.1.2012 – ICC-02/11-01/11-30 (Decision establishing a disclosure system and a calendar for disclosure), para. 38.

³⁷¹ ICC (Pre-Trial Chamber III), Decision of 24.1.2012 – ICC-02/11-01/11-30 (Decision establishing a disclosure system and a calendar for disclosure), para. 40.

³⁷² ICC (Pre-Trial Chamber III), Decision of 24.1.2012 – ICC-02/11-01/11-30 (Decision establishing a disclosure system and a calendar for disclosure), paras. 48 et seq.

³⁷³ ICC (Pre-Trial Chamber III), Decision of 6.2.2012 – ICC-02/11-01/11-33 (Decision on issues related to the victims’ application process), paras. 7-8; ICC (Pre-Trial Chamber I), Decision of 5.4.2012 – ICC-02/11-01/11-86 (Second decision on issues related to the victims’ application process).

³⁷⁴ ICC (Pre-Trial Chamber I), Decision of 4.6.2012 – ICC-02/11-01/11-138 (Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings); ICC (Pre-Trial Chamber I), Decision of 6.2.2013 – ICC-02/11-01/11-384-Corr (Corrigendum to the Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings).

On 29.5.2012, the Defence challenged the *jurisdiction* of the Court by claiming that the limited scope of the 18.4.2003 declaration “is not relevant to the period covered by the allegations” against the suspect.³⁷⁵ In the alternative, the Defence asked the Chamber to decline its exercise of jurisdiction and impose a permanent stay of proceedings on the grounds that Mr. Gbagbo’s rights under art. 55 and 59 had been infringed, rendering a fair trial “impossible”.³⁷⁶

The Chamber rejected the challenge and confirmed the Court’s jurisdiction. In doing this, it clarified first that art. 12 para. 3 declarations “cannot be equated with a referral”³⁷⁷ and that States, accepting the Court’s jurisdiction under art. 12 para. 3, are not entirely free “in framing a situation that may be investigated by the Court”.³⁷⁸ Rather, it is “ultimately for the Court to determine whether the scope of acceptance, as set out in the declaration, is consistent with the objective parameters of the situation”.³⁷⁹ With regard to the case at hand: as the Republic of Côte d’Ivoire did not wish to “restrict the scope [of the 18 April 2003 declaration] by temporal or other limitations to the crimes”, “other than referring to the initial events of 19 September 2002”,³⁸⁰ the Chamber concluded that the State had accepted the jurisdiction of the Court for events since 19.9.2002, including those which form the factual basis of the warrant of arrest.³⁸¹ With regard to the second limb of the Defence request, the Chamber clarified that it was unrelated to a jurisdiction challenge³⁸² but that it would address this issue under the angle of a possible abuse of process.³⁸³ The Judges accepted that violation of fundamental rights may impact on the ICC proceedings, but only if attributable to the Court.³⁸⁴ As the Chamber did not identify any such violations with the involvement of the Court, it rejected the Defence’s alternative request as well. On 21.8.2012, the Defence lodged an appeal against this decision under art. 82 para. 1 lit. a. The Appeals Chamber upheld the Pre-Trial Chamber ruling.³⁸⁵ Worthy of attention is the Ap-

³⁷⁵ ICC (Pre-Trial Chamber I), Decision of 15.8.2012 – ICC-02/11-01/11-212 (Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12 [3], 19 [2], 21 [3], 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo [ICC-02/11-01/11-129]”), paras. 9 and 27.

³⁷⁶ ICC (Pre-Trial Chamber I), Decision of 15.8.2012 – ICC-02/11-01/11-212 (Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12 [3], 19 [2], 21 [3], 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo [ICC-02/11-01/11-129]”), paras. 10, 68-76.

³⁷⁷ *Ibid.*, para. 57.

³⁷⁸ *Ibid.*, para. 59.

³⁷⁹ *Ibid.*, para. 60.

³⁸⁰ *Ibid.*, para. 61.

³⁸¹ *Ibid.*, para. 65.

³⁸² *Ibid.*, para. 88.

³⁸³ *Ibid.*, para. 90.

³⁸⁴ *Ibid.*, para. 92.

³⁸⁵ ICC (Appeals Chamber), Judgement of 12.12.2012 – ICC-02/11-01/11-321 (OA 2, Judgment on the appeal of Mr. Lau-

peals Chamber's response to the suspect's allegation that a State may not accept jurisdiction for crimes committed after the art. 12 para. 3 declaration is made. The Appeals Judges emphasized that "article 12 (3) of the Statute does not prevent a State from accepting the jurisdiction of the Court prospectively".³⁸⁶ The phrase "crime in question" contained in that provision "neither limits the scope of a declaration to crimes that occurred in the past nor to crimes committed in a specific 'situation'".³⁸⁷ The Appeals Chamber thus concluded that "subject to any stipulations made in the declaration of acceptance, if a State accepts the jurisdiction of the Court under article 12 (3) of the Statute, the acceptance is general".³⁸⁸

The *confirmation hearing* was initially set to start on 18.6.2012,³⁸⁹ but has been postponed twice with a view to ensuring proper Defence preparation and out of consideration for Mr. Gbagbo's health condition.³⁹⁰ Three medical experts were appointed³⁹¹ to examine whether Mr. Gbagbo is fit to take part in the proceedings³⁹² and participants were asked for observations on the expert reports and on the subsequent procedure to be followed.³⁹³ A hearing on this specific issue took place on 24./25.9.2012.³⁹⁴ On 2.11.2012, the Chamber

rent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings).

³⁸⁶ Ibid., para. 83.

³⁸⁷ Ibid., para. 84.

³⁸⁸ Ibid., paras. 82 and 84.

³⁸⁹ ICC (Pre-Trial Chamber III), Transcript of 5.12.2011 – ICC-02/11-01/11-T-1-ENG (Transcript of the hearing), p. 8, line 12.

³⁹⁰ ICC (Pre-Trial Chamber I), Decision of 12.6.2012 – ICC-02/11-01/11-152-Red (Decision on the "Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012"); ICC (Pre-Trial Chamber I), Decision of 2.8.2012 – ICC-02/11-01/11-201 (Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing).

³⁹¹ This was based upon rule 135 which, in the opinion of the Chamber, is also available to the Pre-Trial Chamber, s. ICC (Pre-Trial Chamber I), Decision of 12.6.2012 – ICC-02/11-01/11-152-Red (Decision on the "Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012"), para. 26.

³⁹² ICC (Pre-Trial Chamber I), Decision of 2.8.2012 – ICC-02/11-01/11-201 (Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing), para. 2.

³⁹³ ICC (Pre-Trial Chamber I), Decision of 2.8.2012 – ICC-02/11-01/11-201 (Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing), p. 8.

³⁹⁴ ICC (Pre-Trial Chamber I), Order of 12.9.2012 – ICC-02/11-01/11-241 (Order scheduling a hearing in relation to Mr. Gbagbo's fitness to take part in the proceedings against him); ICC (Pre-Trial Chamber I), Decision of 20.9.2012 –

finally decided that Mr. Gbagbo is fit to take part in the proceedings before the Chamber³⁹⁵ as his medical conditions did not affect his capacities³⁹⁶ to exercise meaningfully his fair trial rights. However, the Chamber indicated to make some practical arrangements for Mr. Gbagbo to take part in the hearing. A Defence leave to appeal this decision was rejected³⁹⁷ and a new date for the confirmation hearing set.³⁹⁸ The hearing took place between 19. and 28.2.2013.³⁹⁹ Particularly notable in this context were the Chamber's directions for the precise description of facts in the new DCC.⁴⁰⁰

2. *The Case of the Prosecutor v Simone Gbagbo (Pre-Trial Chamber I)*⁴⁰¹

- Warrant of arrest: 29.2.2012 (public on 22.11.2012)
- Victims participating: --
- Status: Suspect reportedly detained in Côte d'Ivoire

Against the wife of Laurent Gbagbo, Pre-Chamber III, previously assigned the case, issued a warrant of arrest under seal on 29.2.2012 which was unsealed by Pre-Trial Chamber I on 22.11.2012.⁴⁰² Having allegedly acted as an alter ego for her husband and having belonged to "Mr. Gbagbo's inner circle"

ICC-02/11-01/11-249 (Decision on issues related to the hearing on Mr. Gbagbo's fitness to take part in the proceedings against him).

³⁹⁵ ICC (Pre-Trial Chamber I), Decision of 2.11.2012 – ICC-02/11-01/11-286-Red (Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court).

³⁹⁶ The capacities necessary to exercise fair trial rights include "(i) to understand in detail the nature, cause and content of the charges; (ii) to understand the conduct of the proceedings; (iii) to instruct counsel; (iv) to understand the consequences of the proceedings; and (v) to make a statement.", *ibid.*, para. 50.

³⁹⁷ ICC (Pre-Trial Chamber I), Decision of 29.11.2012 – ICC-02/11-01/11-307 (Decision on three applications for leave to appeal).

³⁹⁸ ICC (Pre-Trial Chamber I), Decision of 14.12.2012 – ICC-02/11-01/11-325 (Decision on the date of the confirmation of charges hearing and proceedings leading thereto).

³⁹⁹ The Defence unsuccessfully sought leave to appeal the decision setting the new date for the confirmation of charges hearing. ICC (Pre-Trial Chamber I), Decision of 14.1.2013 – ICC-02/11-01/11-350 (Decision on the "Demande d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire du 14 décembre 2012 'on the date of the confirmation of charges hearing and proceedings leading thereto' [ICC-02/11-01/11-325])".

⁴⁰⁰ Ibid., paras 27 and 28.

⁴⁰¹ The record carries the case number ICC-02/11-01/12.

⁴⁰² ICC (Pre-Trial Chamber III), Warrant of 29.2.2012 – ICC-02/11-01/12-1 (Warrant of Arrest for Simone Gbagbo); ICC (Pre-Trial Chamber III), Decision of 2.3.2012 – ICC-02/11-01/12-2-Red (Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo).

the suspect is believed to be responsible as indirect co-perpetrator for the commission of crimes against humanity from 16.12.2010 until 12.4.2011 in the neighbourhoods of Abidjan and the west of Côte d'Ivoire. As in the case of her husband, the Chamber has indicated to revisit the legal characterization of the suspect's individual criminal responsibility.⁴⁰³ It is the first time a married couple is prosecuted at the same time before the Court.

VIII. Situation in Mali (Pre-Trial Chamber II)⁴⁰⁴

On 13.7.2012, the Republic of Mali referred the situation in Mali to the Prosecutor for crimes against humanity and war crimes allegedly committed on its territory, in particular the North, since January 2012.⁴⁰⁵ The State has indicated the possible crimes which allegedly occurred. This assessment, however, is not binding on the ICC Prosecutor. The situation has been assigned to Pre-Trial Chamber II.⁴⁰⁶ On 16.1.2013, the Prosecutor decided to commence the investigation into the situation in Mali.⁴⁰⁷

IX. Situation in Palestine

It is recalled that the Government of Palestine had lodged an art. 12 para. 3 declaration accepting the exercise of jurisdiction by the Court for "acts committed on the territory of Palestine since 1.7.2002".⁴⁰⁸ In April 2012, former Prosecutor Moreno Ocampo rendered his decision with regard to the situation in Palestine.⁴⁰⁹ He confined his considerations to the issue whether the declaration pursuant to art. 12 para. 3 was

appropriately submitted by a "State".⁴¹⁰ The gist of the Prosecutor's argumentation may be found in paragraph 6 of his statement: "In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term 'State' under article 12(3) which would be at variance with that established for the purpose of article 12(1)."

⁴⁰³ ICC (Pre-Trial Chamber III), Warrant of 29.2.2012 – ICC-02/11-01/12-1 (Warrant of Arrest for Simone Gbagbo), para. 16.

⁴⁰⁴ The record carries the situation number ICC-01/12.

⁴⁰⁵ The letter of referral is available at:

<http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf> (14.3.2013).

⁴⁰⁶ ICC (Presidency), Decision of 19.7.2012 – ICC-01/12-1 (Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II).

⁴⁰⁷ S. the Prosecutor's press release available at:

http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr869.aspx (14.3.2013).

⁴⁰⁸ The declaration is available at:

<http://www.icc-cpi.int/NR/rdonlyres/7CFB4B01-0B7E-4590-A8A8-7863E516F0A3/279777/20090122PalestinianDeclaration7.pdf> (14.3.2013).

⁴⁰⁹ The statement was issued on 3.4.2012 and can be found at:

<http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (14.3.2013).

⁴¹⁰ Art. 12 para. 3 stipulates: "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9".