

Recent developments in the jurisprudence of the International Criminal Court*

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The activities at the Court, in particular at trial, have picked up speed in the last two years. As of September 2016, the Court's judicial activities mainly take place in the courtroom. Three trials are ongoing (Laurent Gbagbo/Blé Goudé, Ntaganda, and Bemba et al) and one more is in preparation (Ongwen); two trials were recently concluded with the conviction of the accused (Bemba and Al Mahdi) whereas in another trial the charges have been "vacated" (Ruto/Sang). Reparation proceedings are underway at different stages against three convicted persons (Lubanga, Katanga, Bemba).

Over the years, the selection of decisions and judgments to be summarized has become ever more difficult. Rather than presenting salient decisions rendered in all situations and cases, the approach taken this time is to concentrate on developments of the last two years where novel legal questions were addressed or Judges applied provisions for the first time. In the Lubanga and Katanga cases, a panel of three appeals judges was tasked to consider whether to reduce the sentence of the convicted persons. In the Ngudjolo and Bemba et al cases, compensation was requested from the Court; in the Katanga case, the Presidency was confronted with approving domestic prosecutions for the first time even though the sentenced person had served his sentence. In the Al Bashir case, new approaches were tested to standardize the Court's interactions with States that fail to arrest and surrender a suspect. The Bemba et al case was and still is unique in many respects and has raised a lot of interesting new legal questions under the statutory regime. In the Al Mahdi case, the accused, charged with one crime, made an admission of guilt. The Prosecutor's decisions to investigate or not also came under judicial scrutiny: former President Mohammed Morsi attempted to move the Prosecutor to open an investigation through the Pre-Trial Chamber. In the Georgia situation, the Prosecutor tabled her wish to commence an investigation to the Pre-Trial Chamber. In the Comoros situation, she decided not to open an investigation and was promptly challenged before the Pre-Trial Chamber by the referring State. Finally, interesting indicators as regards future investigations may be found in the Prosecutor's annual reports on preliminary examinations.

Undoubtedly, the "appetizers" presented in this short overview do not cover all developments that deserve to be discussed here. It is hoped that the interested reader will take this overview as an incentive to seek out further information on the Court's website. 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 the situation or case discussed thus informing the reader of relevant basic facts.

I. Situation in the Democratic Republic of the Congo (Pre-Trial Chamber I)¹

- Referral by the Democratic Republic of Congo: 3 March 2004 (publically announced on 19 April 2004)
- Victims participating: 73

No proceedings at the situation level took place during the review period. To date, six cases against six individuals emanated from this situation. Four cases have been concluded (Lubanga Dyilo, Katanga, Ngudjolo Chui, and Mbarushimana), one trial is ongoing (Ntaganda), and one suspect is still at large (Mudacumura).

1. *The Prosecutor v. Thomas Lubanga Dyilo (Trial Chamber II)*²

- Warrant of arrest: 10 February 2006 (made public on 17 March 2006)
- Confirmation of charges: 29 January 2007
- Trial: 26 January 2009-26 August 2011
- Judgment: 14 March 2012
- Decision on Sentencing: 10 July 2012
- Decision on Reparations: 7 August 2012
- Appeals Judgments on Conviction and Sentencing: 1 December 2014
- Appeals Judgment on Reparations: 3 March 2015
- Current status: reparation stage

Even though criminal proceedings against Mr. Lubanga have been finalized before the Court, this case shows that proceedings may continue still for quite a while after the judgment against the accused becomes final. This concerns first and foremost the issue of reduction of sentence and the issue of reparations.

* Previous overviews of the Court's jurisprudence are available at ZIS 2008, 367; 2008, 371; 2010, 726; 2011, 843; 2013, 130; 2015, 523. This contribution is based on a presentation of the latest jurisprudential developments at the International Criminal Court given at the annual meeting of German-speaking international criminal lawyers in Göttingen on 3.6.2016.

** The *author* is legal officer in the Pre-Trial and Trial Division of the Court. The views expressed in this paper are those of the *author* alone and do not reflect the views of the International Criminal Court. All decisions discussed in this paper can be accessed on the Court's website or the Legal Tools Database (<http://www.legal-tools.org>).

¹ The record carries the situation number ICC-01/04; ICC, Decision of 21.8.2015 – ICC-01/04-639 (Presidency, Decision Re-assigning the Situation in the Democratic Republic of the Congo), online available at:

<http://www.legal-tools.org/en/doc/cdb338/> (3.12.2016).

² The record carries the case number ICC-01/04-01/06.

a) Reduction of Sentence

A panel of three appeals judges, appointed by the Appeals Chamber,³ reviewed Mr. Lubanga's sentence (14 years) with regard to deciding whether to reduce it pursuant to article 110 of the Rome Statute.⁴ The Panel held a hearing for this purpose on 16 July 2015,⁵ the date at which Mr. Lubanga would have served two thirds of his sentence, in the presence of the parties and participating victims. A request of Mr. Lubanga to disqualify one of the panel members, Judge Silvia Fernández de Gurmendi, triggered the postponement of the sentence review hearing, which was rescheduled for 21 August 2015.⁶ The disqualification request was dismissed by the Plenary on 3 August 2015.⁷

With its decision of 22 September 2015, the Panel declined to reduce the sentence of Mr. Lubanga.⁸ Selected key findings are presented hereunder: article 110,⁹ complemented

³ Rule 224 (1) of the Rules of Procedure and Evidence; ICC, Decision of 15.6.2015 – ICC-01/04-01/06-3135 (Appeals Chamber, Decision appointing three judges of the Appeals Chamber for the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo), online available at: <http://www.legal-tools.org/en/doc/4d085e/> (3.12.2016).

⁴ Rome Statute of the International Criminal Court (UNTS vol. 2187, p. 3). All articles mentioned in this paper without reference to the legal instrument are those of the Rome Statute.

⁵ ICC, Decision of 15.6.2015 – ICC-01/04-01/06-3137 (Panel, Scheduling order for the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo), online available at: <http://www.legal-tools.org/en/doc/a8c1d5/> (3.12.2016).

⁶ ICC, Decision of 8.7.2015 – ICC-01/04-01/06-3148 (Panel, Order rescheduling the hearing for the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo), online available at: <http://www.legal-tools.org/en/doc/3617c4/> (3.12.2016).

⁷ ICC, Decision of 3.8.2015 – ICC-01/04-01/06-3154-AnxI (Plenary, Decision of the Plenary of Judges on the Defense Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of The Prosecutor v. Thomas Lubanga Dyilo), online available at: <http://www.legal-tools.org/en/doc/5379d7/> (3.12.2016).

⁸ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Panel, Decision on the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo ["Lubanga Review Sentence Decision"]), online available at: <http://www.legal-tools.org/en/doc/88b3f6/> (3.12.2016).

⁹ Article 110 (3) and (4) provide: "3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time." "4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present: (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions; (b) The voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, and in

by rule 223 of the Rules of Procedure and Evidence,¹⁰ provides the legal framework for reducing sentences of convicted persons. As the wording of article 110 (3) suggests, the review exercise is automatic and mandatory ("the Court shall review the sentence") and thus need not be triggered by an application of the convicted person.¹¹ However, the decision whether to reduce the sentence is within the discretionary powers of the Panel ("the Court may reduce").¹² As a prerequisite to consider reduction of sentence, the existence of at least one factor in favor of reduction must exist; the factors are laid down in article 110 (4) and rule 223. Yet, the mere presence of a factor in favor of reduction does not in itself mean that the sentence will be reduced. Rather, reduction is the result of a weighing exercise of all factors.¹³ In case the Panel does not reduce the sentence, it is not necessary to establish "exceptional circumstances".¹⁴ The Panel also rejected Mr. Lubanga's argument that there exists a presumption of early release after two-thirds of the sentence has been served.¹⁵

As regards the relevant factors, the Panel rejected the Prosecutor's argument to include the "gravity" of the crime,

particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reductions of sentence, as provided in the Rules of Procedure and Evidence."

¹⁰ The Rules of Procedure and Evidence (ICC-ASP/1/3 and Corr.1, as amended by resolutions ICC-ASP/11/Res. 2 and ICC-ASP/12/Res. 7). All rules mentioned in this paper without reference to the legal instrument are those of the ICC's Rules of Procedure and Evidence. Rule 223 provides: "In reviewing the question of reduction of sentence pursuant to article 110, paragraphs 3 and 5, the three judges of the Appeals Chamber shall take into account the criteria listed in article 110, paragraph 4 (a) and (b), and the following criteria: (a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime; (b) The prospect of the resocialization and successful resettlement of the sentenced person; (c) Whether the early release of the sentenced person would give rise to significant social instability; (d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; (e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age."

¹¹ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 20.

¹² ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 21.

¹³ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 22.

¹⁴ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 23.

¹⁵ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 27.

holding that this element is already considered when determining the sentence.¹⁶ As regards the article 110 (4) (a) factor (“person’s cooperation”), the Panel determined that cooperation or assistance, which does not continue post-conviction and which was taken into account in imposing the original sentence, is generally not considered for the purpose of reducing the same sentence. However, it highlighted that this non-consideration may not always be automatic as sometimes the person’s assistance may only become apparent post-sentence.¹⁷ As regards the article 110 (4) (c) factors (“other factors establishing a clear and significant change of circumstances”), the Panel clarified that they relate to the factors set out in rule 223. In order to determine whether “changed circumstances” exist, “it is necessary to find that there are changed circumstances in relation to the factors listed in rule 223 (a), (d) and (e) [...] from the time that the sentence was imposed”.¹⁸ Finally, the Panel did not accept Mr. Lubanga’s proposal to consider his alleged human rights violations that occurred prior to and during the trial proceedings for the purpose of sentence review since these considerations had already been considered at the stage of sentencing.¹⁹

The Panel also clarified that since the duty to review the sentence is upon the Court, relevant information, be it for or against release, may be presented by any of the participants involved (accused, Prosecutor, States, victims, Registry). Accordingly, the Panel did not establish any “burden of proof” requirement on the accused.²⁰

Mr Lubanga expressed his wish to return to the Democratic Republic of the Congo (“DRC”) to serve the remainder of his sentence of imprisonment. On 24 November 2015 the Court and the DRC authorities concluded an ad hoc agreement on the execution of the punishment of Mr. Lubanga at a prison facility in the DRC. After designating the DRC as the State of enforcement pursuant to article 103,²¹ Mr. Lubanga was transferred, together with Mr. Katanga, to the DRC on 19 December 2015.²² The Panel of three appeals judges announced to review again Mr. Lubanga’s sentence two years

from the issuance of its sentence review decision, i.e. at one point in 2017.²³

b) Reparations

Some words are in order about the current status of the reparation proceedings in this case. It is recalled that the Appeals Chamber amended the reparation decision of Trial Chamber I²⁴ and annexed a reparation order to its judgment.²⁵ The Appeals Chamber established five essential elements that a reparation order under article 75 must contain “at a minimum”.²⁶

First essential element: the order must be directed against the convicted person, regardless of whether reparations are ordered “through” the Trust Fund, pursuant to article 75 (2), second sentence.²⁷ In the view of the Appeals Chamber, “reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence”.²⁸ Article 75 (2), second sentence, is not an alternative to making an order “against a convicted person”, in accordance with article 75 (2), first sentence, but an alternative to making an order “directly” against the convicted person.²⁹

Second essential element: the order for reparations must establish and inform the convicted person of the scope of his or her liability.³⁰ The appellate judges established that the “convicted person’s liability for reparations must be proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case”.³¹ This actually means that the civil liability of a principal per-

¹⁶ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 24.

¹⁷ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 30.

¹⁸ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 28.

¹⁹ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), paras 74 f.

²⁰ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 32.

²¹ ICC, Decision of 8.12.2015 – ICC-01/04-01/06-3185 (Presidency, Decision designating a State of enforcement), online available at:

<http://www.legal-tools.org/en/doc/fae14f/> (3.12.2016). The ad hoc agreement between the Court and the DRC authorities can be found in the annex to this decision, ICC-01/04-01/06-3185-Anx.

²² ICC, Press Release of 19.12.2015, Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment, ICC-CPI-20151219-PR1181.

²³ ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Lubanga Review Sentence Decision), para. 79.

²⁴ ICC, Decision of 7.8.2012 – ICC-01/04-01/06-2904 (Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations), online available at: <http://www.legal-tools.org/en/doc/a05830/> (3.12.2016).

²⁵ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7.8.2012 with AMENDED order for reparation [Annex A] and public annexes 1 and 2 [“Lubanga Reparations Appeals Judgment”]), online available at: <http://www.legal-tools.org/en/doc/c3fc9d/> (3.12.2016). The order is appended to the judgment, ICC-01/04-01/06-3129-AnxA.

²⁶ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 32.

²⁷ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 32, 65 ff., 76.

²⁸ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 65.

²⁹ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 71.

³⁰ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 32, 118.

³¹ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 118.

petrator may be higher than that of the accessory to a crime. The indigence of the convicted person is not a relevant consideration for not imposing liability on the convicted person as his or her personal financial situation may change over time.³² Indeed, regulation 117 (1) of the Regulations of the Court mandates the Presidency to “monitor the financial situation of the sentenced person on an ongoing basis, even following completion of a sentence of imprisonment, in order to enforce fines, forfeitures or reparation orders”.

Third essential element: the order “must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98”.³³ In case a Trial Chamber decides to award only collective reparations it “is not required to rule on the merits of the individual requests for reparations”.³⁴

Fourth essential element: the order must “define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it”.³⁵ The Appeals Chamber drew a distinction between identifying the harm and assessing the extent of the harm for purposes of determining the nature and/or size of the reparation award, and considered that the harm must be determined by the Trial Chamber in the reparation order.³⁶ This was deemed necessary as to avoid that reparations are awarded to remedy harms that are not the result of the crimes for which the convicted person was not held responsible. It therefore found it of paramount importance that the Trial Chamber “clearly define[s] the harms that result from the crimes for which the person was convicted”.³⁷ As regards the assessment of the extent of the harm, the Appeals Chamber accepted that this may be done either by the Trial Chamber, with or without the assistance of experts, or, alternatively, that the Trial Chamber define the criteria to be applied by the Trust Fund in assessing the extent of the harm.³⁸ It thereafter defined the harm to direct and indirect victims caused by the crimes for which Mr. Lubanga was convicted.³⁹ In doing so, the Appeals Chamber also ruled that, “in the circumstance of this case” acts of sexual or gender-based violence, which had not been attributed to Mr. Lubanga, as a consequence cannot

be taken into account when defining the harm for reparation purposes.⁴⁰ Victims of sexual violence may nevertheless benefit from the assistance activities provided by the Trust Fund, in accordance with regulation 50 (a) of the Regulations of the Trust Fund.⁴¹

Fifth essential element: the order “must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted”.⁴² Again, the Appeals Chamber cautioned against imposing liability for reparations on the convicted person with respect to persons who, despite being members of the broader collective, suffered harm that did not result from the crimes for which the convicted person was found guilty.

Having thus amended the 2012 reparation order of Trial Chamber I, the Trust Fund (article 79) was instructed by the Appeals Chamber “to implement the amended order for reparations in accordance with this judgment and the attached Annex A”. Finally, the Appeals Chamber ordered that the Trust Fund submit, six months after issuance of the judgment, a draft implementation plan for approval to a newly constituted Trial Chamber to which this matter would be referred.⁴³ The Presidency referred the Lubanga case to the newly constituted Trial Chamber II.⁴⁴

The Trust Fund submitted, after an extension of time, its draft implementation plan on 3 November 2015,⁴⁵ which, however, Trial Chamber II considered to be incomplete. As a result, it deferred the approval of the draft implementation plan and ordered the Trust Fund to supplement its original proposal.⁴⁶ The Trust Fund for Victims’ request for leave to appeal this decision was dismissed by Trial Chamber II for

³² ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 102 ff.

³³ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 32, 152.

³⁴ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 152.

³⁵ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 32, 181.

³⁶ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 181.

³⁷ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 184.

³⁸ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 183, 203.

³⁹ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 191.

⁴⁰ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 196 ff.

⁴¹ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 199.

⁴² ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 32, 205, 214.

⁴³ ICC, Decision of 3.3.2015 – ICC-01/05-01/06-3129 (Lubanga Reparations Appeals Judgment), para. 242.

⁴⁴ ICC, Decision of 17.3.2015 – ICC-01/04-01/06-3131 (Presidency, Decision referring the case of The Prosecutor v. Thomas Lubanga Dyilo to Trial Chamber II), online available at:

<http://www.legal-tools.org/en/doc/08204a/> (3.12.2016).

⁴⁵ ICC, Filing of 3.11.2015 – ICC-01/04-01/06-3177-Red (Trust Fund for Victims, Filing on Reparations and Draft Implementation Plan), online available at:

<http://www.legal-tools.org/en/doc/2a256c/> (3.12.2016).

⁴⁶ ICC, Decision of 9.2.2016 – ICC-01/04-01/06-3198-tENG (Trial Chamber II, Order instructing the Trust Fund for Victims to supplement the draft implementation plan), online available at:

<http://www.legal-tools.org/en/doc/8b7c4f/> (3.12.2016).

lack of locus standi under article 82 (1) (d).⁴⁷ The Trust Fund reverted to the Judges with supplementary information regarding its proposed implementation plan on 7 June 2016.⁴⁸

In the meantime, with a view to achieving some progress, the Chamber's Majority decided, on 15 July 2016, to proceed at least in relation to symbolic reparations that may be developed in parallel to other projects for victims and for which no previous identification of beneficiaries is necessary.⁴⁹ It therefore ordered the Trust Fund "to study the feasibility of developing a concrete project aiming at providing prompt symbolic reparations", such as "commemoration and/or building a statue for child soldiers".⁵⁰ At the same time, the Chamber's Majority placed an open invitation to States and organizations, such as the United Nations, its specialized agencies, as well as non-governmental organizations, to provide the Chamber with additional information and their expertise on "current or past collective projects for former child soldiers" in East of the DRC.⁵¹ The Judges listed a catalogue of questions on which it sought to receive input and announced to hold a hearing on 11, 13 and 14 October 2016 in which the observations are discussed with the parties.⁵² The dissenting Judge, Olga Herrera Carbuccion, disagreed to hold a hearing which she considered to "prolong the limited mandate of this Chamber" and criticized the Majority for giving priority to symbolic reparations without taking into account other collective reparations. It is hoped that the Chamber will

soon find an appropriate avenue to proceed with the implementation of the reparation order.

2. *The Prosecutor v. Germain Katanga (Trial Chamber II)*⁵³

- Warrant of arrest: 2 July 2007 (made public on 18 October 2007)
- Surrender to the Court: 17 October 2007
- Confirmation of charges: 26 September 2008
- Trial: 24 November 2009-23 May 2012
- Severance from Ngudjolo case: 21 November 2012
- Judgment: 7 March 2014
- Decision on Sentencing: 23 May 2014
- Current status: reparation stage

a) *Reduction of Sentence*

Mr. Katanga was convicted, by majority, for having contributed in any other way in the commission of crimes against humanity and war crimes on 14 March 2014.⁵⁴ The judgment on conviction and the sentencing decision⁵⁵ are final as Mr. Katanga and the Prosecutor discontinued their respective appeals against the judgment on conviction and neither appealed the sentence. On 20 April 2015, the Presidency⁵⁶ issued a confidential order requesting Mr. Katanga to express his views on the designation of a State of enforcement for his sentence of imprisonment. On 4 May 2015, Mr. Katanga provided his views indicating his wish to serve the remainder of his sentence in the DRC.⁵⁷ Following the conclusion of an agreement on 24 November 2015 between the Court and the DRC authorities on the execution of the punishment of Mr. Katanga at a prison facility in the DRC, the Presidency designated the DRC as the State of enforcement.⁵⁸ On

⁴⁷ ICC, Decision of 4.3.2016 – ICC-01/04-01/06-3202-tENG (Trial Chamber II, Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9.2.2016), online available at:

<http://www.legal-tools.org/en/doc/1a64c9/> (3.12.2016).

⁴⁸ ICC, Filing of 7.6.2016 – ICC-01/04-01/06-3209 (Trust Fund for Victims, Additional Programme Information Filing), online available at:

<http://www.legal-tools.org/en/doc/b0251c/> (3.12.2016).

⁴⁹ ICC, Decision of 15.7.2016 – ICC-01/04-01/06-3219 (Trial Chamber II, Request Concerning the Feasibility of Applying Symbolic Collective Reparations ["Feasibility Study Decision"]), online available at:

<http://www.legal-tools.org/en/doc/ba36b3/> (3.12.2016);

Judge Herrera Carbuccion appended a dissenting opinion to the decision, Opinion of Judge Herrera Carbuccion, ICC-01/04-01/06-3217-Anx-tENG, online available at:

<http://www.legal-tools.org/en/doc/518503/> (3.12.2016).

⁵⁰ ICC, Decision of 15.7.2016 – ICC-01/04-01/06-3219 (Feasibility Study Decision), para. 12.

⁵¹ ICC, Decision of 15.7.2016 – ICC-01/04-01/06-3217-tENG (Trial Chamber II, Order pursuant to rule 103 of the Rules of Procedure and Evidence ["Rule 103 Order"]), para. 8, online available at:

<http://www.legal-tools.org/en/doc/5042ab/> (3.12.2016).

Judge Herrera Carbuccion appended a dissenting opinion to the decision: Opinion of Judge Herrera Carbuccion, ICC-01/04-01/06-3217-Anx-tENG, online available at:

<http://www.legal-tools.org/en/doc/518503/> (3.12.2016).

⁵² ICC, Decision of 15.7.2016 – ICC-01/04-01/06-3217-tENG (Rule 103 Order), para. 11.

⁵³ The record carries the case number ICC-01/04-01/07.

⁵⁴ ICC, Decision of 7.3.2014 – ICC-01/04-01/07-3436-tENG (Trial Chamber II, Judgment pursuant to article 74 of the Statute), online available at:

<http://www.legal-tools.org/en/doc/f74b4f/> (3.12.2016);

Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-AnxI, online available at:

<http://www.legal-tools.org/en/doc/9b0c61/> (3.12.2016);

concurring opinion of Judges Fatoumata Diarra and Bruno Cotte, ICC-01/04-01/07-3436-AnxII-tENG, online available at:

<http://www.legal-tools.org/en/doc/d6e47f/> (3.12.2016).

⁵⁵ ICC, Decision of 23.5.2015 – ICC-01/04-01/07-3484-tENG (Trial Chamber II, Decision on Sentence pursuant to article 76 of the Statute), online available at:

<http://www.legal-tools.org/en/doc/5af172/> (3.12.2016).

⁵⁶ Rule 199.

⁵⁷ Article 103 (3) (c); Rule 203; ICC, Decision of 7.4.2016 – ICC-01/04-01/07-3679 (Presidency, Decision pursuant to article 108 (1) of the Rome Statute ["Article 108 Decision"]), para. 1, online available at:

<http://www.legal-tools.org/en/doc/6565f5/> (3.12.2016).

⁵⁸ ICC, Decision of 8.12.2015 – ICC-01/04-01/07-3626 (Presidency, Decision designating a State of enforcement), online available at:

19 December 2015, Mr. Katanga was transferred to a prison facility in the DRC, together with Mr. Lubanga.⁵⁹

In the meantime, a panel of three appeals judges, appointed by the Appeals Chamber,⁶⁰ reviewed the 12-year sentence of Mr. Katanga. On 18 September 2015, Mr. Katanga would have served two thirds of his sentence at the Court. A hearing was held on 6 October 2015,⁶¹ during which he publically dissociated himself from the crimes for which he was held responsible. After the hearing Mr. Katanga filed a video recording in which he apologized to the victims of the crimes for which he was convicted. The Panel in its decision dated 13 November 2015 followed the interpretations of the Lubanga Panel.⁶² Its review of the various factors, however, led the Judges to release Mr. Katanga from detention. His sentence was reduced by 3 years and 8 months and the date for completion of his sentence set on 18 January 2016.

b) Approval for Domestic Prosecution

It follows from the above, that Mr. Katanga would return to the DRC to serve his sentence only for about a month, until 18 January 2016. However, developments at the domestic level would not result in his release and would turn the light onto another aspect of the Statute that had not been explored in the Court's practice hitherto. On 13 January 2016, the DRC authorities informed the Court of a decision of the "Haute Cour Militaire" according to which Mr. Katanga was prosecuted domestically for a number of offences, other than those for which he was convicted, allegedly committed by him between 2002 and 2006. Accordingly, on 18 January 2016, the day of his scheduled release, Mr. Katanga was not discharged from detention in the DRC.⁶³

Article 108 (1) dictates that the State of enforcement may not proceed with the prosecution, punishment or extradition of a convicted person in its custody for any conduct prior to that person's delivery to the State of enforcement, unless this

<http://www.legal-tools.org/en/doc/8d5ad5/> (3.12.2016). The ad hoc agreement can be found in the annex to this decision, ICC-01/04-01/07-3626-Anx.

⁵⁹ ICC, Press Release of 19.12.2015, Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment, ICC-CPI-20151219-PR1181.

⁶⁰ Rule 224 (1); ICC, Decision of 3.8.2015 – ICC-01/04-01/07-3572 (Appeals Chamber, Decision appointing three judges of the Appeals Chamber for the review concerning reduction of sentence of Germain Katanga), online available at:

<http://www.legal-tools.org/en/doc/6d1c80/> (3.12.2016).

⁶¹ ICC, Decision of 13.8.2015 – ICC-01/04-01/07-3574 (Panel, Scheduling order for the review concerning reduction of sentence of Mr. Germain Katanga), online available at:

<http://www.legal-tools.org/en/doc/0ee6af/> (3.12.2016).

⁶² ICC, Decision of 13.11.2015 – ICC-01/04-01/07-3615 (Panel, Decision on the review concerning reduction of sentence of Mr. Germain Katanga), online available at:

<http://www.legal-tools.org/en/doc/f36347/> (3.12.2016).

⁶³ ICC, Decision of 7.4.2016 – ICC-01/04-01/07-3679 (Article 108 Decision), para. 4 ff.

has been approved by the Court. The Presidency clarified that the provision makes it incumbent upon the State of enforcement to request such approval prior to the commencement of domestic proceedings.⁶⁴ Article 108 (3) provides that such requirement ceases to exist if the sentenced person, inter alia, "remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court". The Presidency, responsible to declare its approval pursuant to rule 215, was of the view that in the present case article 108 (3) was not fulfilled since Mr. Katanga did not have the opportunity to remain voluntarily for more than 30 days on DRC territory as he remained detained.⁶⁵ As regards the manner in which the Presidency would exercise its approval function, the Presidency noted that no criteria are contained in the Statute or the Rules. Accordingly, it adopted a broad approach whereby "the Court's approval should only be denied when the prosecution, punishment or extradition of sentenced persons may undermine certain fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court".⁶⁶ Having rejected the arguments of Mr. Katanga regarding, inter alia, the possible infringement of the ne bis in idem principle (article 20 [2]) and fair trial rights, the Presidency approved the prosecution of Mr. Katanga by domestic courts. An appeal by Mr. Katanga was dismissed as inadmissible.⁶⁷

c) Reparations

As regards the issue of reparations, it is noted that the Trial Chamber II received reparation applications of victims on 29 February 2016. The Chamber has not taken any decision on reparations in relation to those victims to date.

*3. The Prosecutor v. Mathieu Ngudjolo Chui (closed)*⁶⁸

- Warrant of arrest: 6 July 2007 (made public on 7 February 2008)
- Surrender to the Court: 7 February 2008
- Confirmation of charges: 26 September 2008
- Trial: 24 November 2009-23 May 2012
- Severance from Katanga case: 21 November 2012
- Acquittal: 18 December 2012
- Release from ICC custody: 21 December 2012

⁶⁴ ICC, Decision of 7.4.2016 – ICC-01/04-01/07-3679 (Article 108 Decision), para. 18.

⁶⁵ ICC, Decision of 7.4.2016 – ICC-01/04-01/07-3679 (Article 108 Decision), para. 17.

⁶⁶ ICC, Decision of 7.4.2016 – ICC-01/04-01/07-3679 (Article 108 Decision), para. 20.

⁶⁷ ICC, Decision of 9.6.2016 – ICC-01/04-01/07-3697 (Appeals Chamber, Decision on the admissibility of Mr. Katanga's appeal against the "Decision pursuant to article 108 [1] of the Rome Statute"), online available at:

<http://www.legal-tools.org/en/doc/cdc248/> (3.12.2016).

⁶⁸ The record, after the case was severed from that against Mr. Katanga, carries the case number ICC-01/04-02/12.

- Appeals Judgment: 27 February 2015 (upholding acquittal)

Mr. Ngudjolo was acquitted of all charges by Trial Chamber II.⁶⁹ The Appeals Chamber rejected, by majority, the Prosecutor's appeal,⁷⁰ and, thus, the first-instance acquittal judgment became final.

Subsequently, Mr. Ngudjolo requested compensation from the Court under article 85. He addressed the request to the Presidency, which, in turn, referred the request, pursuant to rule 173 (1),⁷¹ to Trial Chamber II,⁷² responsible for ordering reparations in the Lubanga and Katanga case. In his request,⁷³ Mr. Ngudjolo alleged that his arrest and detention had been unlawful and that a grave and manifest miscarriage of justice had occurred because (i) his case had been joined with that of Mr. Katanga, (ii) of the Pre-Trial Chamber's confirmation of charges decision, and (iii) Trial Chamber II's comment in the acquittal judgment that "finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent". Mr. Ngudjolo requested to be awarded EUR 906.346,- for the material and moral damage that he had suffered, and that the Court order the implementation of an awareness campaign in "Bedu Ezekere" in order to explain Mr. Ngudjolo's acquittal.⁷⁴ On 23 November 2015, a hearing was held on the matter.

⁶⁹ ICC, Decision of 18.12.2012 – ICC-01/04-02/12-3-tENG (Trial Chamber II, Judgment pursuant to article 74 of the Statute), online available at:

<http://www.legal-tools.org/en/doc/2c2cde/> (3.12.2016).

⁷⁰ ICC, Decision of 27.2.2015 – ICC-01/04-02/12-271-Corr (Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled „Judgment pursuant to article 74 of the Statute“), the corrigendum was registered on 7.4.2015, online available at:

<http://www.legal-tools.org/en/doc/efb111/> (3.12.2016); Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, ICC-01/04-02/12-271-AnxA, online available at:

<http://www.legal-tools.org/en/doc/45f67c/> (3.12.2016).

⁷¹ Rule 173 (1) reads: "Anyone seeking compensation on any of the grounds indicated in article 85 shall submit a request, in writing, to the Presidency, which shall designate a Chamber composed of three judges to consider the request. These judges shall not have participated in any earlier judgement of the Court regarding the person making the request."

⁷² ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Trial Chamber II, Decision on the "Requête en indemnisation en application des dispositions de l'article 85 [1] et [3] du Statut de Rome" ["Ngudjolo Article 85 Decision"]), para. 4, online available at:

<http://www.legal-tools.org/en/doc/5df284/> (3.12.2016).

⁷³ ICC, Filing of 14.8.2015 – ICC-01/04-02/12-290 (Defense for Mr. Ngudjolo, Requête en indemnisation sur pied de l'article 85 [1] et [3] du Statut de Rome), online available at:

<http://www.legal-tools.org/en/doc/fd2283/> (3.12.2016).

⁷⁴ ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Ngudjolo Article 85 Decision), para. 7.

With decision dated 16 December 2015, Mr. Ngudjolo's request was dismissed in its entirety. For the first time, a chamber gave its understanding on the elements and conditions under article 85 that are shortly presented in the following: At the outset, Trial Chamber II clarified that any request for compensation under any alternative of article 85 necessitates first a "decision of the Court", which precedes said request, as set out in rule 173 (2).⁷⁵ The Chamber also added that an acquittal judgment does not render an arrest or detention unlawful or constitutes, in and of itself, a grave and manifest miscarriage of justice within the meaning of rule 173 (2) (c).⁷⁶ In relation to the term "grave and manifest miscarriage of justice" within the meaning of article 85 (3), the Chamber stressed the high threshold inherent in article 85 (3) and the fact that "not every error committed in the course of the proceedings is automatically considered a 'grave and manifest' miscarriage of justice". Rather, in the view of the Judges, the provision only captures "a certain and undeniable miscarriage of justice following, for example, an erroneous decision by a trial chamber or wrongful prosecution". The miscarriage of justice must be "a clear violation of the applicant's fundamental rights and must have caused serious harm to the applicant".⁷⁷ Yet, even if the Chamber would determine a grave and manifest miscarriage of justice, it still retains discretion in awarding compensation.⁷⁸ Crucially, the Chamber also made clear that the article 85 procedure cannot be used as a vehicle to review alleged errors in the conduct of the Prosecutor's investigation⁷⁹ or re-assess the merits of decisions rendered by other chambers in the course of the proceedings.⁸⁰ Notwithstanding the absence of a "decision" within the meaning of rule 173 (2), the Chamber, in the interests of justice, proceeded to entertain Mr. Ngudjolo's main arguments, rejecting one after the other. From this decision, it is clear that the threshold to receive compensation under article 85 is rather high.

II. Situation in Darfur/Sudan (Pre-Trial Chamber II)⁸¹

- Referral by Security Council: 31 March 2005
- Victims participating: none

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

⁷⁵ ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Ngudjolo Article 85 Decision), para. 13.

⁷⁶ ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Ngudjolo Article 85 Decision), para. 15, 18.

⁷⁷ ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Ngudjolo Article 85 Decision), para. 45.

⁷⁸ ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Ngudjolo Article 85 Decision), para. 46.

⁷⁹ ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Ngudjolo Article 85 Decision), para. 30.

⁸⁰ ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Ngudjolo Article 85 Decision), para. 47.

⁸¹ The record carries the situation number ICC-02/05.

competent Pre-Trial Chamber (Abu Garda),⁸² the accused in another case died (Jerbo),⁸³ and the remaining three cases are dormant (Harun and Al Kushayb, Banda, Hussein). Only the travel activities of President Omar Al Bashir kept the Pre-Trial Chamber active.

*The Prosecutor v. Omar Hassan Al Bashir (Pre-Trial Chamber II)*⁸⁴

- First warrant of arrest: 4 March 2009
- Second warrant of arrest: 12 July 2010
- Victims participating: 12
- Current status: suspect at large

At the beginning of 2015, Pre-Trial Chamber II issued a series of decisions requesting States to arrest and surrender the suspect to the Court.⁸⁵ Its attempts to move States to arrest Mr. Bashir remained, as in the past, unsuccessful. On 9 March 2015, Pre-Trial Chamber II determined that Sudan was not cooperating with the Court and referred the matter to the Security Council.⁸⁶ Of interest to the reader may be the Chamber's statement confronting directly the Security Council ("SC"): "In this context, the Chamber wishes to reiterate that, unlike domestic courts, the ICC has no direct enforce-

ment mechanism in the sense that it lacks a police force. As such, the ICC relies mainly on the States' cooperation, without which it cannot fulfill its mandate. When the SC, acting under Chapter VII of the UN Charter, refers the situation in Darfur, Sudan to the Court as constituting a threat to international peace and security, it must be expected that the Council would follow-up by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of Sudan to cooperate in fulfilling the Court's mandate as entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the SC, any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile."⁸⁷

On 15 April 2015, the Pre-Trial Chamber issued a decision whereby it delegated to the Registry the responsibility to request (or remind) States to arrest and surrender Mr. Bashir whenever the Court or any of its organs became aware of information of his travel, whether planned or ongoing.⁸⁸ With this decision, the Pre-Trial Chamber ceased its practice to issue decisions requesting or reminding States of their obligations to cooperate with the Court. It would only take action when issuing decisions on non-cooperation. As a side, this decision was filed in the case records of all cases pending before Pre-Trial chambers thus harmonizing the practice of all pre-trial chambers.

On 13 June 2015, Mr. Bashir entered the territory of the Republic of South Africa for the purpose of attending an African Union summit scheduled to take place from 7 to 15 June 2015. In response to the Prosecutor's request to clarify the obligations of South Africa vis-à-vis the Court, the Presiding Judge of Pre-Trial Chamber II responded that such clarification was not necessary since there "exists no ambiguity or uncertainty with respect to the obligation of the Republic of South Africa to immediately arrest and surrender" the suspect.⁸⁹ At that time, the Registry had already sent a note verbale to the South African Embassy in The Hague reminding the Republic of South Africa of its obligations. It is known that Mr. Bashir left the country without being arrested. On 4 September 2015, the Chamber requested the competent South African authorities to submit their views on the events surrounding the failed arrest and surrender of the suspect Mr. Al Bashir for the purposes of the Chamber's deter-

⁸² This is the case of *The Prosecutor v. Bahar Idriss Abu Garda* (ICC-02/05-02/09); see ICC, Decision of 8.2.2010 – ICC-02/05-02/09-243-Red (Pre-Trial Chamber I, Decision on the Confirmation of Charges), online available at:

<http://www.legal-tools.org/en/doc/cb3614/> (3.12.2016).

⁸³ The accused Saleh Mohammed Jerbo Jamus died and proceedings were terminated against him on 4.10.2013, see ICC, Decision of 4.10.2013 – ICC-02/05-03/09-512-Red (Trial Chamber IV, Public redacted Decision terminating the proceedings against Mr. Jerbo), online available at:

<http://www.legal-tools.org/en/doc/def820/> (3.12.2016).

⁸⁴ The record carries the case number ICC-02/05-01/09.

⁸⁵ ICC, Decision of 23.1.2015 – ICC-02/05-01/09-222 (Pre-Trial Chamber II, Decision on the "Prosecution's Notification of Travel in the Case of The Prosecutor v Omar Al Bashir"), online available at:

<http://www.legal-tools.org/en/doc/fc4e3b/> (3.12.2016); ICC, Decision of 24.2.2015 – ICC-02/05-01/09-224 (Decision Regarding Omar Al Bashir's Travel to the United Arab Emirates and his Potential Travel to the Kingdom of Saudi Arabia, the State of Kuwait and the Kingdom of Bahrain), online available at:

<http://www.legal-tools.org/en/doc/7f6546/> (3.12.2016); ICC, Decision of 24.3.2015 – ICC-02/05-01/09-232 (Decision Regarding Omar Hassan Ahmad Al Bashir's Travel to the Kingdom of Saudi Arabia and the Arab Republic of Egypt), online available at:

<http://www.legal-tools.org/en/doc/293b36/> (3.12.2016).

⁸⁶ ICC, Decision of 9.3.2015 – ICC-02/05-01/09-227 (Pre-Trial Chamber II, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan ["Sudan Compliance Decision"]), online available at:

<http://www.legal-tools.org/en/doc/59d181/> (3.12.2016).

⁸⁷ ICC, Decision of 9.3.2015 – ICC-02/05-01/09-227, (Sudan Compliance Decision) para. 17.

⁸⁸ ICC, Decision of 15.4.2015 – ICC-02/05-01/09-235-Corr (Pre-Trial Chamber II, Corrigendum of Orders to the Registrar concerning action to be taken in case of information relating to travel of suspects), online available at:

<http://www.legal-tools.org/en/doc/4b854c/> (3.12.2016).

⁸⁹ ICC, Decision of 13.6.2015 – ICC-02/05-01/09-242 (Pre-Trial Chamber II, Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir), para. 1, online available at:

<http://www.legal-tools.org/en/doc/c2dc80/> (3.12.2016).

mination pursuant to article 87 (7).⁹⁰ The Republic of South Africa returned to the Chamber and requested an extension of time for the submission of its report since the circumstances surrounding Mr. Al Bashir's departure from the African Union summit were currently discussed before domestic courts. Such extension of time was granted by decision dated 15 October 2015. Moreover, the State Party was "ordered" to report back to the Chamber on the developments in the relevant domestic judicial procedures.⁹¹ Since then, no further developments took place in this matter.

On 11 July 2016, the Pre-Trial Chamber found that the Republic of Djibouti and Republic of Uganda had failed to comply with the request to arrest and surrender Mr. Al Bashir and referred the matter to the Assembly of States Parties and the SC.⁹² In its argumentation, the Chamber followed the 9 April 2014 decision of Pre-Trial Chamber II directed against the DRC.⁹³

III. Situation in Central African Republic I (Pre-Trial Chamber II)⁹⁴

- Referral by the Central African Republic: 21 December 2004
- Victims participating: none

⁹⁰ ICC, Decision of 4.9.2015 – ICC-02/05-01/09-247 (Pre-Trial Chamber II, Order requesting submissions from the Republic of South Africa for the purposes of proceedings under article 87 [7] of the Rome Statute), online available at: <http://www.legal-tools.org/doc/8a12a8/> (3.12.2016).

⁹¹ ICC, Decision of 15.10.2015 – ICC-02/05-01/09-249 (Pre-Trial Chamber II, Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87 [7] of the Rome Statute), online available at: <http://www.legal-tools.org/doc/4c586d/> (3.12.2016).

⁹² ICC, Decision of 11.7.2015 – ICC-02/05-01/09-266 (Pre-Trial Chamber II, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute), online available at: <http://www.legal-tools.org/doc/a09363/> (3.12.2016); ICC, Decision of 11.7.2015 – ICC-2/05-01/09-267 (Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute), online available at: <http://www.legal-tools.org/doc/51c322-1/> (3.12.2016).

⁹³ ICC, Decision of 9.4.2014 – ICC-02/05-01/09-195 (Pre-Trial Chamber II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court), online available at: <http://www.legal-tools.org/doc/89d30d/> (3.12.2016).

⁹⁴ The record carries the situation number ICC-01/05.

No proceedings at the situation level have taken place during the review period. Out of this situation, two cases emanated so far. In the course of the trial in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08),⁹⁵ the Prosecutor had received information from an anonymous source that defense witnesses in that case may have been bribed or illicitly coached by the defense of Mr. Bemba. As a result, the Prosecutor turned to the Pre-Trial Chamber assigned with the situation and requested its assistance in gathering relevant evidence. In the following, the major steps leading to the opening of a second case in the situation are described.

1. The Prosecutor's Investigation

On 3 May 2013, the Prosecutor informed the Chamber that she was investigating potential offences against the administration of justice under article 70 and rule 165 in the context of the Bemba case, and that such investigation would require a number of additional investigative measures. Single Judge

⁹⁵ Jean-Pierre Bemba Gombo was convicted on 21.3.2016, see ICC, Decision of 21.3.2016 – ICC-01/05-01/08-3343 (Trial Chamber III, Judgment pursuant to Article 74 of the Statute), online available at:

<http://www.legal-tools.org/doc/edb0cf/> (3.12.2016); Judge Sylvia Steiner and Judge Kuniko Ozaki appended both separate opinions to the judgment: Separate Opinion of Judge Sylvia Steiner, ICC-01/05-01/08-3343-AnxI, online available at:

<http://www.legal-tools.org/doc/edb0cf/> (3.12.2016); Separate Opinion of Judge Kuniko Ozaki, ICC-01/05-01/08-3343-AnxII, online available at:

<http://www.legal-tools.org/doc/496d5d/> (3.12.2016). Mr. Bemba was sentenced to 18 years imprisonment on 21.6.2016, see ICC, Decision of 21.6.2016 – ICC-01/05-01/08-3399 (Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute), online available at:

<http://www.legal-tools.org/doc/f4c14e/> (3.12.2016); Judge Kuniko Ozaki appended a separate opinion to the decision: Separate Opinion of Judge Kuniko Ozaki, ICC-01/05-01/08-3399-AnxI, online available at:

<http://www.legal-tools.org/doc/440dbf/> (3.12.2016). The Defense lodged an appeal against the judgment of conviction, see Public Redacted Version of Appellant's document in support of the appeal, 28.9.2016, ICC-01/05-01/08-3434-Red; it also filed a notice to appeal the sentence decision, see Defense Notice of Appeal against Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 22.7.2016, ICC-01/05-01/08-3412, online available at:

<http://www.legal-tools.org/doc/4e5be3/> (3.12.2016). Also the Prosecutor filed a notice of appeal against the sentence decision, see Prosecution's Notice of Appeal against Trial Chamber III's "Decision on Sentence pursuant to Article 76 of the Statute", 22.7.2016, ICC-01/05-01/08-3411, online available at:

<http://www.legal-tools.org/doc/3b3e0a/> (3.12.2016).

Cuno Tarfusser, acting on behalf of the Pre-Trial Chamber,⁹⁶ responded favorably five days later, on 8 May 2013, and, on the basis of article 57 (3) (a),⁹⁷ ordered the Registrar “to make available to the Prosecutor the complete log of all telephone calls placed or received by [Mr Bemba] during his stay at the detention centre, as well as any available recording of all non-privileged calls either placed or received by him”.⁹⁸ As such calls were not directed to counsel, no need for further safeguards to protect the counsel-client privilege was deemed necessary.⁹⁹ She was further authorized to contact key witnesses of the Bemba defense for interview purposes in deviation of the protocol regulating contacts between witnesses and the parties, as established by Trial Chamber III.¹⁰⁰

Having analyzed the evidence thus acquired that further solidified grounds for suspicion, the Prosecutor approached the Single Judge again and requested further judicial assistance. On 19 July 2013, she sought authorization to collect recordings of telephone intercepts from the Dutch and Belgian authorities involving the telephones of Mr. Kilolo, lead counsel of Mr. Bemba, and Mr. Mangenda, case manager in the defense team of Mr. Bemba, under article 57 (3) (a).¹⁰¹ Also in this instance, the Single Judge accorded to the Prosecutor’s request and, on 29 July 2013, granted such authorization.¹⁰² Mindful of the counsel-client privilege pursuant to

rule 73 possibly being affected by this decision, the Single Judge ruled that such privilege is forfeited “whenever an accused uses such right with a view to furthering a criminal scheme, rather than to obtaining legal advice”. In his estimation, this “behaviour is to be regarded as an abuse of the statutory right and entails that neither the accused nor the lawyer are any longer entitled to the confidentiality which otherwise pertains to lawyer-client communications as a matter of course”.¹⁰³ Acknowledging the absence of any explicit statutory provision, he nevertheless deemed such exception to the privileged nature of communications between an accused and his/her counsel to be broadly accepted at the national and international level.¹⁰⁴ The interception of privileged communications involving counsel, however, necessitated further safeguards to be put in place in order to differentiate those communications ordinarily privileged from those which fall under the crime-fraud exception. Upon suggestion of the Prosecutor, the Single Judge appointed a “really independent” counsel, unconnected with either party, and tasked him with (i) reviewing the call logs provided by the Dutch and Belgian authorities with a view to identifying whether the logs show calls received from or placed to parties connected to the investigation; (ii) listening to the recordings of any such calls, and (iii) providing “elements of the recordings which may be relevant for the limited purpose of the investigation of the Prosecutor’s investigation and delivering them to the Prosecutor”. The Single Judge found that in this way the “privilege would be strictly maintained on all such recordings which would not offer elements of interest or relevance for the purposes of the Prosecutor’s investigation”.¹⁰⁵ The use of an independent third actor, who is not associated with any of the parties, appears to be a prudent and the only viable solution. The Prosecutor could not have possibly distinguished privileged calls from those relevant to the investigation lest she becomes privy to confidential information. The potential suspects were not yet aware of the investigative measures taken and, forming the object of the investigation, would logically not be best placed to assist in

⁹⁶ ICC, Decision of 6.5.2013 – ICC-01/05-45 (Pre-Trial Chamber II, Decision designating a Single Judge), online available at:

<https://www.legal-tools.org/doc/2f4103/> (3.12.2016).

⁹⁷ Article 57 (3) (a) reads: “In addition to its other functions under this Statute, the Pre-Trial Chamber may: (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation.”

⁹⁸ ICC, Decision of 8.5.2013 – ICC-01/05-44-Red (Pre-Trial Chamber II, Decision on the Prosecutor’s “Request for judicial assistance to obtain evidence for investigation under Article 70” [“First Judicial Assistance Decision”]), p. 8, operative part, online available at:

<http://www.legal-tools.org/doc/0db33f/> (3.12.2016).

⁹⁹ ICC, Decision of 8.5.2013 – ICC-01/05-44-Red (First Judicial Assistance Decision), para. 4.

¹⁰⁰ ICC, Decision of 8.5.2013 – ICC-01/05-44-Red (First Judicial Assistance Decision), para. 11 f.

¹⁰¹ ICC, Filing of 12.2.2014 – ICC-01/05-51-Red (Office of the Prosecutor, Public redacted version of “Request for judicial order to obtain evidence for investigation under article 70”, 19.7.2013, ICC-01/05-51-Conf-Exp), online available at: <http://www.legal-tools.org/doc/24a421/> (3.12.2016).

¹⁰² ICC, Decision of 29.7.2013 – ICC-01/05-52-Red2 (Pre-Trial Chamber II, Decision on the Prosecutor’s “Request for judicial order to obtain evidence for investigation under Article 70” [“Second Judicial Assistance Decision”]), online available at:

<http://www.legal-tools.org/doc/a13ba0/> (3.12.2016); the decision was rendered public with redactions on 3.2.2014). Leave to appeal this decision, once it was notified to the defense in the case, were rejected for lack of standing of the participants at the time of the issuance of the decision, see

ICC, Decision of 14.2.2014 – ICC-01/05-01/13-187 (Pre-Trial Chamber II, Joint decision on applications for leave to appeal decisions issued in the situation following their reclassification, submitted by the Defense for Mr. Mangenda, the Defense for Mr. Kilolo and the Defense for Mr. Bemba), online available at:

<http://www.legal-tools.org/doc/d46501/> (3.12.2016); ICC, Decision of 26.3.2014 – ICC-01/05-01/13-295 (Decision on the “Requête d’autorisation d’appel de la décision publique ICC-01/05-01/13-18714-02-2014 ‘joint decision’” submitted by the Defence for Jean-Jacques Mangenda on 19.2.2014), online available at:

<http://www.legal-tools.org/doc/8e24cf/> (3.12.2016).

¹⁰³ ICC, Decision of 29.7.2013 – ICC-01/05-52-Red2 (Second Judicial Assistance Decision), para. 3.

¹⁰⁴ ICC, Decision of 29.7.2013 – ICC-01/05-52-Red2 (Second Judicial Assistance Decision), para. 4.

¹⁰⁵ ICC, Decision of 29.7.2013 – ICC-01/05-52-Red2 (Second Judicial Assistance Decision), para. 6 f.

gathering incriminating evidence against themselves. Equally, it would not have been appropriate for the Single Judge or the Chamber to take over this task as this would have meant to actively collect evidence upon which the Chamber may subsequently have to pass judgment. Hence, the institution of “independent counsel” was born.

On 10 October 2013, the Single Judge granted a further request for judicial assistance and ordered the Victims and Witnesses Unit (“VWU”), inter alia, to provide the Prosecutor with (i) all available telephone contact information for all 62 Bemba defense witnesses, and (ii) all available telephone contact information for VWU mobile phones issued to defense witnesses during their stays in the Netherlands.¹⁰⁶

2. Prosecutor’s Article 58 Request

Approximately one month later, on 19 November 2013, the Prosecutor requested the issuance of a warrant of arrest under article 58 against five suspects, including Mr. Bemba, Mr. Kilolo and Mr. Mangenda. The other two suspects were Mr. Bemba’s long-time political ally Mr. Banda, and Mr. Arido, a potential defense witness in the Bemba case. On the same day, the Single Judge requested the Presidency to waive the immunities Mr. Kilolo and Mr. Mangenda that they may enjoy under the Rome Statute, the Headquarters Agreement¹⁰⁷ and the Immunities Agreement¹⁰⁸ in order to issue and execute a joint warrant of arrest against them and others for article 70 offences against the administration of justice. Since Judge Tarfusser was Second Vice-President at the time of said request, he also requested to be excused from deciding as member of the Presidency.

The following day, the Presidency, noting the terms of article 25 of the Headquarters Agreement, and article 18 of the Immunities Agreement, decided that no such waiver need be granted.¹⁰⁹ It justified its decision by clarifying that immuni-

ties relate only to “legitimate functions performed by counsel and persons assisting”, such as case managers, but that in the instant case there was “no immunity attaching to the acts allegedly committed by the persons concerned which presents a bar to their arrest and potential detention on remand”.¹¹⁰ Considering article 30 of the Headquarters Agreement and article 26 of the Immunities Agreement, the Presidency decided to waive the immunities of the two suspects “to the extent necessary for the issuance and execution of the arrest warrant against them [...] and for their potential detention on remand pending investigation or prosecution of those offences”.¹¹¹ With this last decision, the Presidency cleared the way for Single Judge Tarfusser to issue the warrant of arrest against the five suspects. A new case record was opened.

3. *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido (Trial Chamber VII)*¹¹²

- Warrant of arrest against accused: 20 November 2013
- Initial appearance of Mr. Bemba, Mr. Kilolo, Mr. Babala: 27 November 2013
- Initial appearance of Mr. Mangenda: 5 December 2013
- Initial appearance of Mr. Arido: 20 March 2014
- Document Containing the Charges: 30 June 2014
- Confirmation of charges: 10 November 2014
- Trial: 29 September 2015-1 June 2016
- Current status: judgment deliberations

a) *Proceedings Before Pre-Trial Chamber II*

As announced above, on 20 November 2013 Single Judge Tarfusser issued a warrant of arrest against all five suspects having found reasonable grounds to believe that they had committed offences against the administration of justice involving the presentation of false or forged evidence and the corrupt influencing of witnesses.¹¹³ In the course of the pre-trial process leading up to the confirmation of charges stage, the Single Judge took a series of decisions on procedural matters that are presented shortly in the following.

ground of a conflict of interest. The Presidency, in turn, designated Judge Akua Kuenyehia to carry out the functions as Second Vice-President pursuant to regulation 11 (2) of the Regulations of the Court, see Annex III annexed to the Waiver Decision, ICC-01/05-68-AnxIII, online available at: <http://www.legal-tools.org/doc/d80992/> (3.12.2016).

¹¹⁰ ICC, Decision of 20.11.2013 – ICC-01/05-68 (Waiver Decision), para. 10.

¹¹¹ ICC, Decision of 20.11.2013 – ICC-01/05-68 (Waiver Decision), para. 11 ff.

¹¹² The record carries the case number ICC-01/05-01/13.

¹¹³ ICC, Decision of 5.12.2013 – ICC-01/05-01/13-1-Red2-tENG (Pre-Trial Chamber II, Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido), online available at: <http://www.legal-tools.org/doc/9f1848/> (18.12.2016).

¹⁰⁶ ICC, Decision of 10.10.2013 – ICC-01/05-62-Red (Pre-Trial Chamber II, Decision on the Prosecutor’s “Third request for judicial order to obtain evidence for investigation under Article 70” dated 7.10.2013 [ICC-01/05-60-Conf-Exp]).

¹⁰⁷ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08 (entered into force on 1.3.2008), online available at:

<http://www.legal-tools.org/doc/45e340/> (3.12.2016).

¹⁰⁸ Agreement on the Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3 (Part.II-E)^{bis} (entered into force on 22.7.2004), online available at:

<http://www.legal-tools.org/doc/6eefbc/> (3.12.2016).

¹⁰⁹ ICC, Decision of 20.11.2013 – ICC-01/05-68 (Presidency, Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19.11.2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of The Prosecutor v. Jean-Pierre Bemba Gombo [“Waiver Decision”]), para. 11, online available at:

<http://www.legal-tools.org/doc/d2253f/> (3.12.2016). Since Judge Tarfusser was Second Vice-President at the time of his request for waiver of immunity, he also requested to be excused from deciding as member of the Presidency on the

A substantial portion of the evidentiary material in this case consisted of intercepted communications between the accused. The independent counsel was appointed again to review electronic and other material of the suspects with a view to identifying privileged or irrelevant material. The parties were ordered to provide the independent counsel with a list of keywords that would assist him in identifying the privileged material. The independent counsel was required to report back to the Single Judge.¹¹⁴ The appointment of the independent counsel was not considered warranted for calls between the accused, Mr. Bemba, and his case manager.¹¹⁵ Requests to disqualify the independent counsel or to call him as a witness at the confirmation stage were rejected.¹¹⁶

¹¹⁴ ICC, Decision of 13.12.2013 – ICC-01/05-01/13-41-Red (Pre-Trial Chamber II, Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings), online available at:

<http://www.legal-tools.org/doc/5e8f7f/> (3.12.2016); the Bemba, Kilolo and Mangenda defense requested leave to appeal/reconsideration which were denied, see ICC, Decision of 18.12.2013 – ICC-01/05-01/13-50 (Pre-Trial Chamber II, Decision on “Demande d’autorisation d’interjeter appel contre la ‘Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings’ [ICC-01/05-01/13-41-Conf-Red]”), online available at:

<http://www.legal-tools.org/doc/24fc69/> (3.12.2016); ICC, Decision of 18.12.2013 – ICC-01/05-01/13-51 (Decision on “Defense request for leave to appeal decision ICC-01/05-01/13-41-Conf-Red”), online available at:

<http://www.legal-tools.org/doc/eb6fda/> (3.12.2016); ICC, Decision of 19.12.2013 – ICC-01/05-01/13-56 (Decision on the “Requête d’autorisation d’appel de la décision ICC-01/05-01/13-41-Conf-Red”), online available at:

<http://www.legal-tools.org/doc/a60137/> (3.12.2016); ICC, Decision of 20.1.2014 – ICC-01/05-01/13-114 (Decision on the “Demande en reconsideration de la décision du 19.12.2013 sur la requête en autorisation d’appel de la décision ICC-01/05-01/13-41-Conf-Red” submitted by the Defence for Mr. Mangenda), online available at:

<http://www.legal-tools.org/doc/9a4d07/> (3.12.2016). An additional decision on the matter can be found in ICC, Decision of 25.4.2014 – ICC-01/05-01/13-366-Red (Decision on the “Prosecution’s Request to Refer Potentially Privileged Materials to Independent Counsel”), online available at: <http://www.legal-tools.org/doc/514608/> (3.12.2016).

¹¹⁵ ICC, Decision of 17.12.2013 – ICC-01/01-01/13-48 (Pre-Trial Chamber II, Decision on the “Prosecution’s request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel”), online available at:

<http://www.legal-tools.org/doc/ecb7c7/> (3.12.2016).

¹¹⁶ ICC, Decision of 25.4.2014 – ICC-01/05-01/13-362-Red (Pre-Trial Chamber II, Decision on the request for disqualification of Independent Counsel filed by the Defense of Jean-Pierre Bemba Gombo), online available at:

The article 70 investigation was triggered by the hint of an anonymous informant, who informed the Office of the Prosecutor about an alleged witness bribery scheme orchestrated by the suspects. While the content of the information provided must be disclosed to the defense, the identity of the anonymous informant must be “strictly preserved”, the Single Judge ordered at the time.¹¹⁷ He defined an anonymous informant as “a person who, usually in exchange for the assurance of anonymity, contacts an investigator in order to ‘inform’ him or her of something he or she considers of potential interest to the investigator, thereby either triggering a new investigation or supplementing already available information in the context of previously opened investigations or proceedings”; and clarified that “by no means can information provided by an informant, whether anonymous or not (as opposed to a witness statement), be regarded, treated or relied upon as evidence in the context of judicial proceedings, and even less constitute the sole basis for a judicial decision”.¹¹⁸

The Mangenda defense requested that the Court refrains from exercising its jurisdiction in relation to Mr. Mangenda and that the case be submitted to the Dutch authorities for the purpose of prosecution in accordance with article 70 (4) (b).¹¹⁹ The Dutch authorities informed the Court that they saw “no reason [...] to prosecute Mr. Mangenda Kabongo,

<http://www.legal-tools.org/doc/26ffcb/> (3.12.2016), the public redacted version was registered on 19.5.2014; leave to appeal this decision was denied, see ICC, Decision of 17.6.2014 – ICC-01/05-01/13-502 (Decision on the “Defence request for leave to appeal decisions ICC-01/05-01/13-362-Conf and ICC-01/05-01/13-366-Conf” submitted by the Defence for Mr. Bemba), online available at:

<http://www.legal-tools.org/doc/aed748/> (3.12.2016); ICC, Decision of 4.6.2014 – ICC-01/05-01/13-457 (Decision on the “Defence request to compel the attendance of the Independent Counsel for examination during the confirmation proceedings” submitted by the Defence for Jean-Pierre Bemba Gombo), online available at:

<http://www.legal-tools.org/doc/6207bc/> (3.12.2016).

¹¹⁷ ICC, Decision of 27.3.2014 – ICC-01/05-01/13-298 (Pre-Trial Chamber II, Second Decision on the “Defence request for disclosure” submitted by the Defence for Jean-Pierre Bemba on 20.2.2014 and related filings [“Second Disclosure Decision”]), online available at:

<http://www.legal-tools.org/doc/c43642/> (3.12.2016).

¹¹⁸ ICC, Decision of 27.3.2014 – ICC-01/05-01/13-298, (Second Disclosure Decision), p. 4 f. See also ICC, Decision of 15.4.2014 – ICC-01/05-01/13-337 (Pre-Trial Chamber II, Decision on the “Defence request for a confidential investigative measure pursuant to article 57 [3] [b] of the Rome Statute”), online available at:

<http://www.legal-tools.org/doc/963151/> (3.12.2016).

¹¹⁹ Article 70 (4) (b) reads: “Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.”

under its domestic jurisdiction, for the facts as set out in the request”.¹²⁰ Accordingly, the prosecution of Mr. Mangenda continued before the ICC.

Rule 165 (3) allows that the confirmation of charges process for article 70 proceedings take place “without a hearing”; the Single Judge organized the confirmation process in writing.¹²¹ A request of the Kilolo defense to call four witnesses to provide viva voce testimony was rejected with the argument that “absent compelling reasons to the contrary, presentation of evidence in documentary form is the preferred modality by which evidence is introduced at the stage of the confirmation of charges proceedings”.¹²²

The calendar was set first during the initial appearance of Mr. Bemba, Mr. Kilolo and Mr. Babala¹²³ and was amended three times.¹²⁴ The postponement of several months became

unavoidable, inter alia, due to the time required by the Dutch authorities to make their final reports on the intercepted communications available to the Court.¹²⁵ Various deadlines for submissions were set mirroring the order in which the parties would have made their submissions, in writing and orally, in the context of an article 5 confirmation process. On 30 June 2014, the Prosecutor submitted the document containing the charges (“DCC”) together with the list of evidence.¹²⁶ The Bemba defense challenged the DCC by objecting to its form. The Single Judge rejected such remedy as, in his estimation, the challenges pertained to the merits of the case which the defense should raise in its written submissions.¹²⁷ Likewise, the Arido defense complained about the fact that the Prosecutor had added in the DCC “one new charge”, “three new modes of liability” and “two new alleged courses of conduct” that purportedly went beyond the warrant of arrest and thus infringed Mr. Arido’s statutory rights. The Single Judge responded by pointing out that the Chamber would not interfere with the Prosecutor’s framing of the charges in the DCC if presented within the timeframe of rule 121 (3) and (4).¹²⁸ As regards the alleged violation of the rule of speciality under article 101, the Single Judge determined that the DCC was based on the same factual allegations as presented in the warrant of arrest and that, as a result, the course of conduct underlying the offences for which he was surrendered remained the same.¹²⁹ The parties submitted their written submissions in lieu of the hearing on 30 July 2014.

¹²⁰ ICC, Decision of 17.3.2014 – ICC-01/05-01/13-263 (Pre-Trial Chamber II, Decision on the “Requête à la Cour de ne pas exercer sa compétence, en application de l’art. 70.4 (b) du Statut de Rome et de la règle 162.a, ‘Demande en désaisissement’” submitted by the Defence for Mr. Mangenda), para. 10, online available at: <http://www.legal-tools.org/doc/8fbb9a/> (3.12.2016).

¹²¹ Rule 165 (3) stipulates: “For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.”

¹²² ICC, Decision of 25.4.2014 – ICC-01/05-01/13-363 (Pre-Trial Chamber II, Decision on “Requête aux fins d’audition de témoins de la Défense à l’audience de confirmation des charges” filed by the Defence of Aimé Kilolo Musamba), p. 4, online available at: <http://www.legal-tools.org/doc/5d9ea0/> (3.12.2016).

¹²³ ICC, Transcript of 27.11.2013 – ICC-01/05-01/13-T-1 (Pre-Trial Chamber II, Transcript of Hearing), p. 15, online available at:

<http://www.legal-tools.org/doc/42e95e/> (3.12.2016); leave to appeal this oral order was denied, see ICC, Decision of 14.1.2014 – ICC-01/05-01/13-93 (Pre-Trial Chamber II, Decision on the “Requête en autorization d’appel [art. 82.1.d]” submitted by the Defence for Mr. Mangenda), online available at: <http://www.legal-tools.org/doc/ef42ff/> (3.12.2016).

¹²⁴ ICC, Decision of 14.3.2014 – ICC-01/05-01/13-255 (Pre-Trial Chamber II, Decision on the “Prosecution’s request for variation of time limits pursuant to regulation 35 of the Regulations of the Court concerning the confirmation of charges” dated 3.3.2014), online available at:

<http://www.legal-tools.org/doc/01ad13/> (3.12.2016); ICC, Decision of 28.5.2014 – ICC-01/05-01/13-443 (Decision amending the calendar for the confirmation of the charges), online available at:

<http://www.legal-tools.org/doc/78d62b/> (3.12.2016); ICC, Decision of 5.8.2014 – ICC-01/05-01/13-610 (Decision on the “Prosecution request for variation of time limit for confirmation response” dated 4.8.2014), online available at: <http://www.legal-tools.org/doc/9d5506/> (3.12.2016).

¹²⁵ ICC, Decision of 21.10.2014 – ICC-01/05-01/13-703 (Pre-Trial Chamber II, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido), p. 4, online available at: <https://www.legal-tools.org/doc/fdd733/> (3.12.2016).

¹²⁶ ICC, Filing of 3.7.2014 – ICC-01/05-01/13-526-AnxB1-Red (Office of the Prosecutor, Document Containing the Charges), online available at:

<https://www.legal-tools.org/doc/cdbe96/> (3.12.2016); the original confidential version was filed on 30.6.2014.

¹²⁷ ICC, Decision of 11.7.2014 – ICC-01/05-01/13-561 (Pre-Trial Chamber II, Decision on the “Defence objection to the form of the document containing the charges” submitted by the Defence for Mr. Bemba on 2.7.2014 and on the “Requête urgente de la Défense tendant à obtenir de la Chambre préliminaire II l’autorisation d’accès aux Annexes confidentielles du document ICC-01/05-01/08-346-Conf dans l’affaire le Procureur c. Jean-Pierre Bemba Gombo” submitted by the Defence for Mr. Babala on 7.7.2014), online available at: <http://www.legal-tools.org/doc/d248f2/> (3.12.2016).

¹²⁸ ICC, Decision of 15.7.2014 – ICC-01/05-01/13-567 (Pre-Trial Chamber II, Decision on “Narcisse Arido’s Request for an Order Rejecting the Prosecution’s Document Containing the Charges [ICC-01/05-01/13-526-AnxB1] and for an Order to the Prosecution to File an Amended and Corrected Document Containing the Charges” [“Decision on Objections”]), p. 4 f.; online available at:

<http://www.legal-tools.org/doc/cb345d/> (3.12.2016).

¹²⁹ ICC, Decision of 15.7.2014 – ICC-01/05-01/13-567 (Decision on Objections), p. 5.

On 21 August 2014, the Prosecutor responded to the submissions of the defense and on 11 September, the defense replied to the Prosecutor's response.

The Single Judge had denied the suspects' requests for interim release affirming that the conditions of article 58 (1) (b) were continuously met. Prior to the issuance of the confirmation of charges decision, on 21 October 2014, the Single Judge, acting *proprio motu*, however released four of the accused from detention¹³⁰ who had spent several months to almost a year in detention.¹³¹ The decision directed at Mr. Kilolo, Mr. Mangenda, Mr. Babala and Mr. Arido is remarkably short. Referring to article 60 (4) he argued that the "duration of the detention has to be balanced *inter alia* against the statutory penalties applicable to the offences at stake in these proceedings and that, accordingly, the further extension of the period of the pre-trial detention would result in making its duration disproportionate".¹³² The Prosecutor's request to stay *ad interim* the release order was dismissed.¹³³ Upon appeal of the Prosecutor, the Appeals Chamber, on 29 May 2015, reversed the decision and clarified that in the absence of an inexcusable delay on the part of the Prosecutor reference to article 60 (4) was misplaced; rather, article 60 (3), in conjunction with article 21 (3) is the correct legal basis on which the Single Judge should have based the release decision.¹³⁴ The Appeals Chamber criticized that in the context of the article 60 (3) review the lapse of time may not be considered, on its own, as a "changed circumstance" overriding any other factor. Instead, the Single Judge must review "whether the conditions of article 58 (1) (a) and (b) of the Statute, which were found to be met in the initial article 60 (2) assessment, have changed such that detention is no longer

justified".¹³⁵ Hence, the time already spent in detention must be considered "along with the risks that are being reviewed under article 60 (3) of the Statute, in order to determine whether, all factors being considered, the continued detention 'stops being reasonable' and the individual accordingly needs to be released. [...] The potential penalty for the offences charged may be a factor to take into account in assessing whether the time in detention is reasonable. Nevertheless, this factor cannot be assessed in isolation, but would need to be considered in light of all of the circumstances of the case".¹³⁶ The Appeals Chamber remanded the matter to Trial Chamber VII to which the four accused (together with the accused Mr. Bemba) had been committed in the meantime. As regards the accused who have been at liberty since 21 October 2014, the Appeals Chamber found that "it would not be in the interests of justice for the suspects to be re-arrested because of the reversal of the [Single Judge's decision]".¹³⁷

On 11 November 2014, Pre-Trial Chamber II confirmed the charges, in part, against the five suspects and committed them to trial.¹³⁸ As regards the scope of the charges, the Chamber confirmed the offences of corruptly influencing 14 witnesses (article 70 [1] [c]), presenting false evidence (article 70 [1] [b]), and giving false evidence (article 70 [1] [a]) on the part of 14 defense witnesses, all perpetrated in various ways by the five accused. A number of charges involving several modes of criminal responsibilities were declined, alas without any further reasoning. The factual scope of the charges in relation to Mr. Arido was limited to only four witnesses. The Chamber also declined the charges involving 14 allegedly forged documents. Despite the novelty of legal issues and the many interpretative uncertainties under article 70, the confirmation decision does not dwell much on the applicable law. The few interpretative approaches of the Chamber are quickly summarized: in response to the Arido defense argument to take into account in article 70 proceedings "gravity" and "interests of justice" considerations and, for those reasons alone, to decline the charges, the Chamber recalled that such considerations cannot be invoked in the

¹³⁰ ICC, Decision of 21.10.2014 – ICC-01/05-01/13-703 (Pre-Trial Chamber II, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido ["Bemba et al Release Decision"]), online available at:

<http://www.legal-tools.org/doc/fdd733/> (3.12.2016).

¹³¹ Article 70 (3) establishes that for offences of the administration of justice, the potential penalty is, *inter alia*, imprisonment "not exceeding five years".

¹³² ICC, Decision of 21.10.2014 – ICC-01/05-01/13-703 (Bemba et al Release Decision), p. 4.

¹³³ ICC, Decision of 22.10.2014 – ICC-01/05-01/13-711 (Pre-Trial Chamber II, Decision on the Prosecutor's "Urgent Motion for Interim Stay of the 'Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido'"), online available at:

<http://www.legal-tools.org/doc/281904/> (3.12.2016).

¹³⁴ ICC, Decision of 29.5.2015 – ICC-01/05-01/13-969 (Appeals Chamber, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification ["Bemba et al Appeals Judgment Interim Release"]), online available at:

<http://www.legal-tools.org/doc/cc45d2/> (3.12.2016).

¹³⁵ ICC, Decision of 29.5.2015 – ICC-01/05-01/13-969 (Bemba et al Appeals Judgment Interim Release), para. 44.

¹³⁶ ICC, Decision of 29.5.2015 – ICC-01/05-01/13-969 (Bemba et al Appeals Judgment Interim Release), para. 45.

¹³⁷ ICC, Decision of 29.5.2015 – ICC-01/05-01/13-969 (Bemba et al Appeals Judgment Interim Release), para. 57. Subsequently, Trial Chamber VII, which had been seized of the case at the time the Appeals Chamber ruling was rendered, upheld the release of the four accused, subject to conditions, but based its decision on the proper legal bases, see ICC, Decision of 17.8.2015 – ICC-01/05-01/13-1151 (Trial Chamber VII, Decision Regarding Interim Release), online available at:

<http://www.legal-tools.org/doc/27d999/> (21.11.2015).

¹³⁸ ICC, Decision of 11.11.2014 – ICC-01/05-01/13-749 (Pre-Trial Chamber II, Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute ["Bemba et al Confirmation Decision"]), online available at:

<http://www.legal-tools.org/doc/a44d44/> (3.12.2016).

context of article 70 as rules 163 (2) and 165 (2) make clear.¹³⁹ As regards article 70 (1) (a), the Chamber clarified that false testimony relates to “any type of information that the witness provides or withholds while testifying under oath”. Any third person may be prosecuted as an accessory, irrespective of whether the witness is prosecuted.¹⁴⁰ As regards article 70 (1) (b), the Chamber explained that the notion “evidence” encompasses all types of evidence, including oral evidence; the evidence is deemed “presented” when it is “introduced in the proceedings, thereby being made available to the parties, the participants and the Chamber”; the notion “party” covers members of the defense team and the accused.¹⁴¹ “Corruptly influencing” within the meaning of article 70 (1) (c) was interpreted to include any “conduct that that may have (or is expected by the perpetrator to have) an impact or influence on the testimony”; the term “corruptly”, in the view of the Judges, suggests the aim of “contaminating the witness’s testimony”. Crucially, the Chamber determined that the “offence of corruptly influencing a witness is constituted independently from whether the pursued impact or influence is actually achieved and must therefore be understood as a conduct crime, not a result crime”.¹⁴² Finally, it confirmed that article 25 is applicable in the context of article 70 offences.¹⁴³ Leave to appeal this decision by various defense teams was rejected and the case record transmitted to the Presidency, as per rule 129.

b) Proceedings Before Trial Chamber VII

Trial Chamber VII, assigned with the case,¹⁴⁴ took a series of interesting procedural decisions which mark a significant

departure from the manner in which trials have been prepared and conducted at the ICC in the past. The fact that the charges involve article 70 offences and not crimes within the meaning of article 5 does not make the procedure any simpler or different. The procedural framework, under which the prosecution of article 70 offences takes place, is the same as for article 5 crimes (rule 163 [1]).¹⁴⁵ To the contrary, the fact that the Bemba case was still ongoing and the number of accused in this case posed several challenges to the Trial Chamber which it sought to overcome by taking foremost a pragmatic approach. It is also worth mentioning that, for the first time, a Single Judge was designated (Judge Bertram Schmitt) who would resolve preparatory matters as set out in rule 132 bis.¹⁴⁶ This aligns the working methods of the trial chambers with those of the pre-trial chambers and, perhaps, contributes to the expediting the judicial resolution of requests.

Unlike other trial chambers, this Chamber, by Majority, declined to allow the Prosecutor to submit a so-called “Updated DCC” in which she frames the charges anew for the accused. In a noteworthy decision dated 10 June 2015, the Chamber’s Majority explained in detail why such a remedy is neither “appropriate nor compatible with the procedural regime set out in the Statute”.¹⁴⁷ Crucially, in the Majority’s view, the confirmation decision is a judicial decision which cannot be “updated” by the parties.¹⁴⁸ The charges set out in the confirmation decision are binding on the Trial Chamber. Finally, the Chamber’s Majority determined that the confirmation decision satisfies the minimum requirements of article 67 (1) (a).¹⁴⁹ The Minority Judge argued that the submission of an updated DCC is entirely at the discretion of the Trial Chamber and would satisfy the statutory requirement that the accused be notified of the charges. He nevertheless acknowledged that the confirmation decision is the overarching authoritative document that controls the Updated DCC and that

¹³⁹ ICC, Decision of 11.11.2014 – ICC-01/05-01/13-749 (Bemba et al Confirmation Decision), para. 22 f.; Rule 163 (2) stipulates: “The provisions of Part 2, and any rules thereunder, shall not apply, with the exception of article 21.” Rule 165 (2) reads: “Articles 53 and 59, and any rules thereunder, shall not apply.”

¹⁴⁰ ICC, Decision of 11.11.2014 – ICC-01/05-01/13-749 (Bemba et al Confirmation Decision), para. 28.

¹⁴¹ ICC, Decision of 11.11.2014 – ICC-01/05-01/13-749 (Bemba et al Confirmation Decision), para. 29.

¹⁴² ICC, Decision of 11.11.2014 – ICC-01/05-01/13-749 (Bemba et al Confirmation Decision), para. 30.

¹⁴³ ICC, Decision of 11.11.2014 – ICC-01/05-01/13-749 (Bemba et al Confirmation Decision), para. 32.

¹⁴⁴ ICC, Decision of 30.1.2015 – ICC-01/05-01/13-805 (Presidency, Decision constituting Trial Chamber VII and referring to it the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido), online available at:

<http://www.legal-tools.org/doc/45641d/> (3.12.2016); ICC, Decision of 18.3.2015 – ICC-01/05-01/13-854-Corr (Decision replacing a judge in Trial Chamber VII), online available at:

<http://www.legal-tools.org/doc/e18242/> (3.12.2016); ICC, Decision of 24.8.2015 – ICC-01/05-01/13-1173 (Decision

replacing two judges in Trial Chamber VII), online available at:

<http://www.legal-tools.org/doc/631f5b/> (3.12.2016).

¹⁴⁵ Rule 163 (1) reads: “Unless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply mutatis mutandis to the Court’s investigation, prosecution and punishment of offences defined in article 70.”

¹⁴⁶ ICC, Decision of 25.8.2015 – ICC-01/05-01/13-1181-Corr (Trial Chamber VII, Decision Notifying the Election of a Presiding Judge and Single Judge), online available at:

<http://www.legal-tools.org/doc/dee925/> (3.12.2016).

¹⁴⁷ ICC, Decision of 10.6.2015 – ICC-01/05-01/13-992 (Trial Chamber VII, Decision on the Submission of Auxiliary Documents [“Updated DCC Decision”]), para. 8, online available at:

<http://www.legal-tools.org/doc/6a4ba2/> (3.12.2016).

¹⁴⁸ ICC, Decision of 10.6.2015 – ICC-01/05-01/13-992 (Updated DCC Decision), para. 10.

¹⁴⁹ ICC, Decision of 10.6.2015 – ICC-01/05-01/13-992 (Updated DCC Decision), para. 19.

no new facts and circumstances may be introduced.¹⁵⁰ The same approach was later followed in the Gbagbo/Blé Goudé case.¹⁵¹

Twice, the Prosecutor sought to reintroduce certain declined modes of participation into the trial by requesting the Judges to trigger regulation 55 of the Regulations of the Court and to re-characterize the facts underlying the charges. Both requests were denied. The first time, on 15 September 2016, before the commencement of the trial,¹⁵² the Chamber gave a set of explanations that deserve to be discussed in more detail: it first recalled that the specific modes had been rejected in the confirmation decision and that the Prosecutor had not asked for leave to appeal, or request an article 61 (9) amendment. In the view of the Chamber, granting this request would amount to providing the Prosecutor with an opportunity to seek a “de facto appeal” of the confirmation decision.¹⁵³ Indeed, the Chamber did not agree with the Prosecutor’s general approach seeking “a mechanism whereby the [Prosecutor] immediately seeks to start a procedure which aims at modifying the legal characterization of the confirmed charges and reintroduces modes of liability which were just rejected by the Pre-Trial Chamber”.¹⁵⁴ Half way through the trial, on 15 January 2016, the Chamber again denied the Prosecutor’s renewed request that notice be given for a possible re-characterization of the facts by considering the modes of liability previously rejected by the Pre-Trial Chamber. The Chamber argued that the Prosecutor had not presented any substantiated argument requiring revision of the previous decision on Regulation 55 of the Regulations of the Court.¹⁵⁵

On 15 September 2015, the Chamber rendered the decision on witness familiarization in which it rejected that, addi-

tionally, the witnesses be “prepared” by the parties.¹⁵⁶ The Chamber emphasized that “‘witness preparation’ cannot be considered a general principle of law”, and referred to the trial chambers’ discretion to adopt adequate procedures.¹⁵⁷ Witness preparation was refused on the grounds that witness preparation greatly affects the spontaneity and reliability of testimonies of witnesses.¹⁵⁸ This decision announces perhaps a trend back to the early case-law of the Court denying any witness preparation or proofing in ICC proceedings. Indeed, thereafter, the same approach was followed in the Gbagbo/Blé Goudé and Ongwen cases.¹⁵⁹

Shortly before the commencement of the trial, the Chamber ruled on the manner it will assess evidence that will not be introduced through a witness. In reference to article 69 (4), the Chamber informed the parties that as a general rule it will defer its assessment of the admissibility criteria of evidence until deliberating its judgment pursuant to article 74 (2).¹⁶⁰ At the same time, the Chamber clarified that it would retain its competence to rule on admissibility of any evidence, where appropriate, such as under article 69 (7), or rule 68, according to which certain statutory pre-requisites must be met before introducing evidence. The Chamber adopted this approach for the following reasons: (i) to more accurately assess the relevance and probative value of a given item of evidence after having been presented with all evidence at trial, (ii) to save a significant amount of time during trial by not assessing evidence at the point of submission but rather in the judg-

¹⁵⁰ ICC, Opinion of 16.6.2015 – ICC-01/05-01/13-992-Corr-Anx (Trial Chamber VII, Partly Dissenting Opinion of Judge Eboe-Osuji), online available at:

<http://www.legal-tools.org/doc/986312/> (3.12.2016).

¹⁵¹ ICC, Decision of 7.5.2015 – ICC-02/11-01/15-58 (Trial Chamber I, Order setting the commencement date for trial), para. 17, online available at:

<http://www.legal-tools.org/doc/91fe93/> (3.12.2016).

¹⁵² ICC, Decision of 15.9.2015 – ICC-01/05-01/13-1250 (Trial Chamber VII, Decision on Prosecution Application to Provide Notice pursuant to Regulation 55 [“First Regulation 55 Decision”]), online available at:

<http://www.legal-tools.org/doc/ea422e/> (3.12.2016).

¹⁵³ ICC, Decision of 15.9.2015 – ICC-01/05-01/13-1250 (First Regulation 55 Decision), para. 10.

¹⁵⁴ ICC, Decision of 15.9.2015 – ICC-01/05-01/13-1250 (First Regulation 55 Decision), para. 11. Leave to appeal this decision by the Prosecutor was denied on the first day of the trial, Transcript of Hearing, 29.9.2015, ICC-01/05-01/13-T-10-Red-ENG, p. 8, line 20 to p. 9, line 15, online available at: <http://www.legal-tools.org/doc/c10806/> (3.12.2016).

¹⁵⁵ ICC, Decision of 15.1.2016 – ICC-01/05-01/13-1553 (Trial Chamber VII, Decision on Prosecution’s Re-application for Regulation 55 [2] Notice), online available at: <http://www.legal-tools.org/doc/8ddec3/> (3.12.2016).

¹⁵⁶ ICC, Decision of 15.9.2016 – ICC-01/05-01/13-1252 (Trial Chamber VII, Decision on Witness Preparation and Familiarisation [“Witness Familiarization Decision”]), online available at:

<http://www.legal-tools.org/doc/89dbf6/> (3.12.2016).

¹⁵⁷ ICC, Decision of 15.9.2016 – ICC-01/05-01/13-1252 (Witness Familiarization Decision), para. 20.

¹⁵⁸ ICC, Decision of 15.9.2016 – ICC-01/05-01/13-1252 (Witness Familiarization Decision), para. 22 f.

¹⁵⁹ ICC, Decision of 2.12.2015 – ICC-02/11-01/15-355 (Trial Chamber I, Decision on witness preparation and familiarisation), online available at:

<http://www.legal-tools.org/doc/aa620a/> (3.12.2016); Judge Geoffrey Henderson appended a partly dissenting opinion on the point of witness preparation to this decision, Partially Dissenting Opinion of Judge Henderson, 3.12.2015, ICC-02/11-01/15-355-Anx1, online available at:

<http://www.legal-tools.org/doc/a1555d/> (3.12.2016); ICC, Decision of 22.7.2016 – ICC-02/04-01/15-504 (Trial Chamber IX, Decision on Protocols to be Adopted at Trial), online available at:

<http://www.legal-tools.org/doc/311696/> (3.12.2016).

¹⁶⁰ ICC, Decision of 24.9.2015 – ICC-01/05-01/13-1285 (Trial Chamber VII, Decision on Prosecution Requests for Admission of Documentary Evidence [ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf]; [“Admissibility Decision”]), online available at: <http://www.legal-tools.org/doc/5a06b3/> (3.12.2016).

ment;¹⁶¹ (iii) deferring assessment of evidence is consonant with the Chamber's right and duty to assess evidence freely, according to rule 63 (2) and article 69 (4),¹⁶² and (iv) no reason to assume that professional judges may consider evidentiary material deemed irrelevant or prejudicial.¹⁶³ As a result, the Chamber indicated that it would recognize the evidence as "formally submitted" within the meaning of article 74 (2). Leaves to appeal this decision by two defense teams were rejected by the Chamber.¹⁶⁴ On 13 November 2015, the Chamber orally rejected the Prosecutor's request for reconsideration.¹⁶⁵ No other decision symbolizes the difference in approach between jurists from the Romano-Germanic legal tradition and the common law more. The decision of Trial Chamber VII should not come as a surprise. Article 69 (4) expressly and unambiguously gives the Chambers discretionary power ("may") to rule on the relevance or admissibility of any and each piece of evidence. The Appeals Chamber in the Bemba case left it to the discretion of the trial chambers to determine the admissibility criteria of the evidence throughout the trial or at the judgment stage ("the Chamber may defer its consideration of these criteria until the end of the proceeding").¹⁶⁶ The same approach was subsequently followed in the Gbagbo/Blé Goudé case and Ongwen case.¹⁶⁷

¹⁶¹ ICC, Decision of 24.9.2015 – ICC-01/05-01/13-1285 (Admissibility Decision), para. 11.

¹⁶² ICC, Decision of 24.9.2015 – ICC-01/05-01/13-1285 (Admissibility Decision), para. 10, 12.

¹⁶³ ICC, Decision of 24.9.2015 – ICC-01/05-01/13-1285 (Admissibility Decision), para. 12.

¹⁶⁴ ICC, Decision of 12.10.2015 – ICC-01/05-01/13-1361 (Trial Chamber VII, Decision on Babala and Arido Defence Request for Leave to Appeal the Trial Chamber's "Decision on Prosecution Requests for Admission of Documentary Evidence"), online available at:

<http://www.legal-tools.org/doc/a19620/> (3.12.2016).

¹⁶⁵ ICC, Transcript of 13.11.2015 – ICC-01/05-01/13-T-37-Red-ENG (Trial Chamber VII, Transcript of Hearing), p. 58, lines 6 ff., online available at:

<http://www.legal-tools.org/doc/e671fa/> (3.12.2016).

¹⁶⁶ ICC, Decision of 3.5.2011 – ICC-01/05-01/08-1386 (Appeals Chamber, 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"), online available at:

<http://www.legal-tools.org/doc/7b62af/> (3.12.2016); see also *Chaitidou*, ZIS 2011, 849.

¹⁶⁷ ICC, Decision of 29.1.2016 – ICC-02/11-01/15-405 (Trial Chamber I, Decision on the submission and admission of evidence), online available at:

<http://www.legal-tools.org/doc/7b6dce/> (3.12.2016); Judge Geoffrey Henderson appended a dissenting opinion to this decision, Dissenting Opinion of Judge Henderson, 1.2.2016, ICC-02/11-01/15-405-Anx, online available at:

<http://www.legal-tools.org/doc/6fbd2c/> (3.12.2016); ICC, Decision of 13.7.2016 – ICC-02/04-01/15-497 (Trial Cham-

ber IX, Initial Directions on the Conduct of the Proceedings), para. 24 ff., online available at: <http://www.legal-tools.org/doc/60d63f/> (3.12.2016).

As announced in the decision dated 24 September 2015, deferring the evidence assessment does not entail that evidence considered inadmissible would not be ruled upon. In the course of the trial, numerous decisions under article 69 (7) and rule 68 were rendered enabling the parties to advance their arguments with certainty in the evidentiary discussion at trial. As the Chamber clarified later on 29 March 2016: "The Chamber does not anticipate discussing any Article 69 (7) considerations in the trial judgment – applications filed on this basis are being ruled upon before then as an exception to the general rule that the Chamber defers admissibility assessments until the judgment."¹⁶⁸ The Chamber also clarified that the parties were not required to support procedural motions, such as under article 69 (7), with "evidence" meeting the same admissibility criteria as evidence being considered in the judgment. In other words, an article 69 (7) application is not limited to admissible "evidence" in the same way as a trial judgment.¹⁶⁹

For example, on 16 September 2015, the Chamber ruled on the Kilolo defense request to exclude several categories of evidence purported to be privileged as counsel-client conversations pursuant to article 69 (7).¹⁷⁰ The Judges clarified first that the nature of the offences that are the subject-matter of the case has no bearing on the applicability of article 69 (7),¹⁷¹ and thereafter, confirmed the two-pronged test that had been established already by Trial Chamber I in the Lubanga case: first, it would be necessary to determine if there is a violation of the Statute or internationally recognized human rights; and second, if such a violation is established, the Chamber would consider whether the pre-requisites under sub-paragraphs (7) (a) or (b) are met.¹⁷² On the merits of the request, the Chamber considered that the Kilolo defense failed to establish the privileged nature of the material in question and, consequently, failed to establish a violation of the Statute. By the same token, the Chamber held that the Prosecutor's acquisition of the material in question was not an interference with Mr. Kilolo's right to privacy. In review-

ber IX, Initial Directions on the Conduct of the Proceedings), para. 24 ff., online available at:

<http://www.legal-tools.org/doc/60d63f/> (3.12.2016).

¹⁶⁸ ICC, Decision of 29.3.2016 – ICC-01/05-01/13-1753 (Trial Chamber VII, Decision on Bemba Defence Application for Admission of D20-2's Prior Recorded Testimony Pursuant to Rule 68 (2) (b) of the Rules ["29.3.2016 Decision"]), para. 10, online available at:

<http://www.legal-tools.org/doc/39bad9/> (3.12.2016).

¹⁶⁹ ICC, Decision of 29.3.2016 – ICC-01/05-01/13-1753 (29.3.2016 Decision), para. 11.

¹⁷⁰ ICC, Decision of 16.9.2015 – ICC-01/05-01/13-1257 (Trial Chamber VII, Decision on Kilolo Defence Motion for Inadmissibility of Material ["First Article 69 [7] Decision"]), online available at:

<http://www.legal-tools.org/doc/77cc56/> (3.12.2016).

¹⁷¹ ICC, Decision of 16.9.2015 – ICC-01/05-01/13-1257 (First Article 69 [7] Decision), para. 8.

¹⁷² ICC, Decision of 16.9.2015 – ICC-01/05-01/13-1257 (First Article 69 [7] Decision), para. 9.

ing a violation of the right to privacy, the Chamber applied a three criteria test, as adopted by the European Court of Human Rights: (i) the measure must have a basis in law, (ii) the law in question should be accessible and foreseeable for the person concerned, and (iii) the law must set forth with sufficient precision the conditions in which the measure may be applied to enable the person to regulate his/her conduct.¹⁷³

On 24 September 2015, the Chamber rejected a further article 69 (7) request to declare inadmissible telephone intercepts.¹⁷⁴ On 30 October 2015, the Chamber rejected the defense allegation that recordings, logs and other material derivative of calls made on Mr. Bemba's non-privileged telephone line at the ICC detention centre and Mr. Arido's article 55 (2) statement to the French authorities had been obtained by means of a violation of the Statute or internationally recognized human rights.¹⁷⁵ On 29 April 2016, the Chamber rejected yet another article 69 (7) defense application to declare inadmissible, *inter alia*, Western Union records that allegedly had been obtained in violation of national laws, *viz.* without any prior authorization or court order from the competent Austrian authorities.¹⁷⁶ In addressing the defense arguments, the Chamber held that despite the wording of article 69 (8) and rule 63 (5) national laws may become relevant in an article 69 (7) analysis when enquiring whether the measure concerned "was so manifestly unlawful [...] that it amounts to a violation of the Statute or internationally recognised human rights".¹⁷⁷ Hence, the Chamber's analysis "may

also have some element of reviewing national law when national authorities act pursuant to Court cooperation requests". The Judges accepted that such an approach creates tension between articles 69 (7) and (8) that requires the Chamber to balance its obligations under both provisions.¹⁷⁸ The defense had also argued that several chapter IX provisions had been infringed, such as articles 96 (3) and 99. In response, the Chamber highlighted that part IX provisions should not be conflated with article 69 (7) considerations as the former address the relationship between the Court and the requested State and "are not generally apt to protect the interests of the individual". If part IX were to be construed that national laws be respected in the course of executing cooperation requests, then every potential breach of national procedure, even one that may not amount to a human rights violation, will be deemed to violate article 69 (7). This interpretation, however, would render article 69 (8) "superfluous" as it was designed to make sure that the Court would not get involved with intricate questions of domestic law.¹⁷⁹ Accordingly, the Chamber determined that "infringements of domestic procedure do not per se constitute violations of the Statute", and that a State's failure to respect its own national procedures does not automatically result in a violation of the Statute for article 69 (7) purposes.¹⁸⁰ On the basis of the information available, the Chamber found that the conduct of national authorities was not manifestly unlawful and, consequently, no violation within the meaning of article 69 (7) occurred. On the same argumentation, the Chamber rejected a defense request to declare inadmissible communications intercepted and call data records collected by the Dutch authorities.¹⁸¹

In reaction to two Oberlandesgericht Wien decisions, of which the defense had become aware subsequently, the Chamber was faced again with the challenge to revisit its previous decision on the matter and declare inadmissible the Western Union records pursuant to article 69 (7). The Austrian decisions repealed the two initial lower-court rulings due to a lack of basic reasoning and denied authorization of two judicial orders submitted by the Austrian public prosecutor's office concerning the collection of the Western Union records. In a decision of 14 July 2016, the Chamber reconsidered its previous Western Union Decision insofar as it determined that the internationally recognized right to privacy has

¹⁷³ ICC, Decision of 16.9.2015 – ICC-01/05-01/13-1257 (First Article 69 [7] Decision), para. 16 ff.

¹⁷⁴ ICC, Decision of 24.9.2015 – ICC-01/05-01/13-1284 (Trial Chamber VII, Decision on Request to declare telephone intercepts inadmissible), online available at: <http://www.legal-tools.org/doc/2451cf/> (3.12.2016); a request for re-consideration of the decision or, alternatively, a request to appeal said decision was rejected, see ICC, Decision of 27.10.2015 – ICC-01/05-01/13-1425 (Decision on Motion for Reconsideration or Leave to Appeal Decision ICC-01/05-01/13-1284), online available at: <http://www.legal-tools.org/doc/9c4178/> (3.12.2016).

¹⁷⁵ ICC, Decision of 30.10.2015 – ICC-01/05-01/13-1432 (Trial Chamber VII, Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible), online available at:

<http://www.legal-tools.org/doc/1b7b66/> (3.12.2016); as regards Mr. Arido's article 55 (2) statement, see also ICC, Decision of 29.4.2016 – ICC-01/05-01/13-1854 (Decision on Requests to Exclude Western Union Documents and other Evidence pursuant to Article 69 [7] ["Western Union Decision"]), para. 75 f., online available at: <http://www.legal-tools.org/doc/c98c99/> (3.12.2016).

¹⁷⁶ ICC, Decision of 29.4.2016 – ICC-01/05-01/13-1854 (Western Union Decision).

¹⁷⁷ ICC, Decision of 29.4.2016 – ICC-01/05-01/13-1854 (Western Union Decision), para. 32 ff.; the Chamber follows the early rulings of the Lubanga Pre-Trial Chamber, see ICC, Decision of 29.1.2007 – ICC-01/04-01/06-803-tEN (Pre-Trial

Chamber I, Decision on the confirmation of charges), para. 62 ff., online available at:

<http://www.legal-tools.org/doc/b7ac4f/> (3.12.2016).

¹⁷⁸ ICC, Decision of 29.4.2016 – ICC-01/05-01/13-1854 (Western Union Decision), para. 33 f.

¹⁷⁹ ICC, Decision of 29.4.2016 – ICC-01/05-01/13-1854 (Western Union Decision), para. 35 ff.

¹⁸⁰ ICC, Decision of 29.4.2016 – ICC-01/05-01/13-1854 (Western Union Decision), para. 40.

¹⁸¹ ICC, Decision of 29.4.2016 – ICC-01/05-01/13-1855 (Trial Chamber VII, Decision on Requests to Exclude Dutch Intercepts and Call Data Records), online available at: <http://www.legal-tools.org/doc/e4815b/> (3.12.2016).

been violated.¹⁸² However it found that the admission of the Western Union records is not antithetical to and would not seriously damage the integrity of the proceedings, as set out in article 69 (7) (b), considering the nature of the violation (error of legal reasoning by a national court), the conduct of the Prosecutor and the specificities of the case.¹⁸³

The Chamber also rendered a series of rule 68 (2) and (3) decisions concerning prior recorded testimonies and ruled on their admissibility. Of interest to the reader may be the first decision dated 12 November 2015 in which the Chamber sets out its understanding of “prior recorded testimony”.¹⁸⁴ The Judges highlighted that in order to be qualified as “prior recorded testimony”, it is necessary that “the persons are questioned in their capacity as witnesses in the context of or in anticipation of legal proceedings”.¹⁸⁵ Moreover, in order to admit prior recorded testimonies within the meaning of rule 68 (2), it is necessary that the tendering party intends “to adduce the prior recorded testimony for the truth of its contents”; the provision will regularly not be applicable to prove “that the witness stated something – irrespective of if it is true or not – or in order to prove inconsistencies in the witness’s statements”.¹⁸⁶ As regards rule 68 (3) statements, the Chamber determined that allowing the introduction of rule 68 (3) statements is within the discretionary power of the Chamber. When considering such requests, it may take into account (i) the fact that an in-court-testimony of a witness can be considerably shortened through the admission of prior recorded testimony, as long as the witness does not object to the submission of his or her prior recorded testimony,¹⁸⁷ (ii) whether the evidence relates to issues that are not materially in dispute, (iii) whether the evidence is central to the allegations or the case, and (iv) whether the evidence is corroborative.¹⁸⁸

On 9 November 2015, the Chamber also rendered a decision in which it took judicial notice of trial transcripts and corresponding audio-visual recordings in the Bemba case according to article 69 (6).¹⁸⁹ The Chamber held to take judicial notice of facts of common knowledge without first assessing the relevance of these facts. Importantly, the act of judicial notice did not extend to the truth or falsity of facts in the records.¹⁹⁰ The Chamber also did not deem it necessary to consider any admissibility criteria or to rule on admission prior to taking judicial notice.

Upon request of the Prosecutor, the Chamber issued a decision on 3 December 2015, based on, *inter alia*, articles 64 (6) (b) and 93 (1) (b) and (d), summoning two witnesses to appear before the Court via video-link.¹⁹¹ When entertaining the Prosecutor’s application for the issuance of a cooperation request, the Chamber considered the tripartite test of whether the request was (i) relevant, (ii) specific, and (iii) necessary.¹⁹² The witnesses were ordered to appear on such dates and times as communicated to them.¹⁹³ The State concerned was requested assistance in accordance with article 93 (3), including to (i) communicate to the witnesses concerned the requirement of attendance, (ii) cooperate in serving the summons upon the witnesses, (iii) facilitate by way of compulsory measure as necessary the appearance of the witnesses for testimony via video-link, and (iv) make appropriate arrangements for the security of the witnesses, in consultation with the VWU.¹⁹⁴

On 4 March 2016, the Single Judge ruled on various requests for defense witnesses to testify via video link.¹⁹⁵ Of significance is the Single Judge’s finding that in-court and video link testimony are not meaningfully different for the following reasons: (i) article 69 (2) and rules 67, 68 (3) and

¹⁸² ICC, Decision of 14.7.2016 – ICC-01/05-01/13-1948 (Trial Chamber VII, Decision on Request in Response to Two Austrian Decisions [“Second Western Union Record Decision”]), para. 28, online available at: <http://www.legal-tools.org/doc/be034a/> (3.12.2016).

¹⁸³ ICC, Decision of 14.7.2016 – ICC-01/05-01/13-1948 (Second Western Union Record Decision), para. 32 ff.

¹⁸⁴ ICC, Decision of 12.11.2015 – ICC-01/05-01/13-1478-Red-Corr (Trial Chamber VII, Decision on Prosecution Rule 68 [2] and [3] Requests [“Rule 68 Decision”]), online available at:

<http://www.legal-tools.org/doc/11bc8c/> (3.12.2016); Judge Pangalangan appended a separate opinion to this decision, Separate Opinion of Judge Raul C. Pangalangan, 16.12.2015, ICC-01/05-01/13-1478-Anx, online available at: <http://www.legal-tools.org/doc/2697de/> (3.12.2016).

¹⁸⁵ ICC, Decision of 12.11.2015 – ICC-01/05-01/13-1478-Red-Corr (Rule 68 Decision), para. 29 ff.

¹⁸⁶ ICC, Decision of 12.11.2015 – ICC-01/05-01/13-1478-Red-Corr (Rule 68 Decision), para. 34.

¹⁸⁷ ICC, Decision of 12.11.2015 – ICC-01/05-01/13-1478-Red-Corr (Rule 68 Decision), para. 48.

¹⁸⁸ ICC, Decision of 12.11.2015 – ICC-01/05-01/13-1478-Red-Corr (Rule 68 Decision), para. 50.

¹⁸⁹ ICC, Decision of 9.11.2015 – ICC-01/05-01/13-1473 (Trial Chamber VII, Decision on Prosecution Request for Judicial Notice [“Judicial Notice Decision”]), online available at:

<http://www.legal-tools.org/doc/50d28b/> (3.12.2016).

¹⁹⁰ ICC, Decision of 9.11.2015 – ICC-01/05-01/13-1473 (Judicial Notice Decision), para. 3 f.

¹⁹¹ ICC, Decision of 3.12.2015 – ICC-01/05-01/13-1343-Red (Trial Chamber VII, Decision on the “Prosecution’s Requests under Articles 64 [6] [b] and 93 of the Rome Statute to Summon Witnesses [“Summon Witnesses Decision”]), online available at:

<http://www.legal-tools.org/doc/c49fec/> (3.12.2016).

¹⁹² ICC, Decision of 3.12.2015 – ICC-01/05-01/13-1343-Red (Summon Witnesses Decision), para. 18, 20 ff.

¹⁹³ ICC, Decision of 3.12.2015 – ICC-01/05-01/13-1343-Red (Summon Witnesses Decision), p. 11.

¹⁹⁴ ICC, Decision of 3.12.2015 – ICC-01/05-01/13-1343-Red (Summon Witnesses Decision), p. 11 ff.

¹⁹⁵ ICC, Decision of 4.3.2016 – ICC-01/05-01/13-1697 (Trial Chamber VII, Decision on Video-Link Testimony for Defence Witnesses [“Video-Link Testimony Decision”]), online available at:

<http://www.legal-tools.org/doc/c75e4c/> (3.12.2016).

134 bis equate in-court and video-link testimony,¹⁹⁶ (ii) testimony via video link is one possibility of giving viva voce testimony,¹⁹⁷ (iii) factual similarities between in-court testimony and video-link testimony,¹⁹⁸ and (iv) video-link testimony may be more conducive to the efficient administration of justice than in-court testimony, such as overcoming hardship on witnesses, logistical obstacles, time and resource constraints.¹⁹⁹ While the Single Judge accepted to defer to the wishes of the parties, he determined that this deference may nevertheless be countered by other considerations, such as relative logistical burden on the Registry and the requirements of expeditiousness.²⁰⁰ Ultimately, the Chamber enjoys a certain degree of discretion.²⁰¹

The trial commenced on 29 September 2015 during which 19 witnesses testified. The parties' closing statements were made on 31 May and 1 June 2016. On 19 October 2016, the Chamber rendered its verdict convicting all five accused to varying degrees.²⁰² From the many issues that could be presented in this paper, only the Chamber's most important legal determinations on the applicable law are briefly summarized in what follows. As a general observation, the Chamber relied, in essence, on the interpretations set out in the confirmation decision but analyzed further in-depth the scope of articles 70 (1) (a)-(c) and 25 (3).

Article 70 (1) (a) was seen to be fulfilled if the witness "intentionally affirms a false fact or negates a true fact when directly asked. The same applies if the witness is not directly asked but intentionally withholds information that is true, and that is inseparably linked to the issues explored during questioning". Withholding true information was considered to be equal to giving "incomplete and partly untrue evidence, and therefore false testimony", as in this case the judges would be misled in their enquiry into the facts of the case.²⁰³ Not all information was considered to trigger the applicability of article 70 (1) (a) but only such information that is "material", i.e. pertains to information that has an impact on the assessment of the facts relevant to the case or the assessment of the credibility of witnesses (such as prior contacts with the calling party and the content of such contacts, receipt of pay-

ments of money, promises and telephone calls, and acquaintance with the accused or other persons associated with the accused).²⁰⁴ However, as the Chamber highlighted, there is no requirement that the false testimony be material "to the outcome of the case".²⁰⁵ Finally – and importantly – the Chamber held that the witness must have given an "objectively untrue statement".²⁰⁶

Article 70 (1) (b) was considered to be addressed to those who have the right to present evidence to a chamber in the course of proceedings before the Court ("party"). The term "party" was interpreted broadly, relating (at least) to the Prosecutor and her team representing her Office, as well as "all members of the Defense team that are charged, individually or jointly, with the accused's representation, including the presentation of evidence". Crucially, the Chamber did not adopt a formalistic approach, relying on the formal job title, but paid regard to the actual role of the member of the defense team in the specific circumstances of the case. In the view of the Chamber, this interpretative approach includes (lead) counsel, associate counsel, assistant counsel and "any other person, regardless of his or her job title, who is of equal functional importance to the Defense team as any of its aforementioned members".²⁰⁷ This explanation was necessary to explain the Chamber's decision to subsume under the term "party" the "case manager" within the defense team of Mr. Bemba. As the Pre-Trial Chamber noted earlier, the term "evidence" encompasses all types of evidence, including oral testimony.²⁰⁸ Finally, the offence is committed by the "party" when the false or forged evidence is being presented, in other words "introduced in the proceedings, irrespective of whether the evidence is admissible or the presenting party intends to rely on it. In the case of oral testimony, this takes place at least when a witness appears before the Court and testifies". The party is made responsible for presenting the false or forged evidence, but not for having produced it.²⁰⁹

The first alternative in article 70 (1) (c) ("corruptly influencing a witness") was construed broadly by the Trial Chamber, "allowing many different modes of commission to be captured thereunder that are capable of influencing the nature of the witness's evidence", such as bribing in form of paying money, providing goods, rewards, gifts or making promises, but also the "pressuring, intimidating or threatening of witnesses or causing injuries that aim at procuring a particular

¹⁹⁶ ICC, Decision of 4.3.2016 – ICC-01/05-01/13-1697 (Video-Link Testimony Decision), para. 10.

¹⁹⁷ ICC, Decision of 4.3.2016 – ICC-01/05-01/13-1697 (Video-Link Testimony Decision), para. 11.

¹⁹⁸ ICC, Decision of 4.3.2016 – ICC-01/05-01/13-1697 (Video-Link Testimony Decision), para. 12.

¹⁹⁹ ICC, Decision of 4.3.2016 – ICC-01/05-01/13-1697 (Video-Link Testimony Decision), para. 13.

²⁰⁰ ICC, Decision of 4.3.2016 – ICC-01/05-01/13-1697 (Video-Link Testimony Decision), para. 16.

²⁰¹ ICC, Decision of 4.3.2016 – ICC-01/05-01/13-1697 (Video-Link Testimony Decision), para. 14.

²⁰² ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Trial Chamber VII, Judgment pursuant to Article 74 of the Statute ["Bemba et al Judgment"]), online available at: <http://www.legal-tools.org/doc/fe0ce4/> (3.12.2016).

²⁰³ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 21.

²⁰⁴ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 22.

²⁰⁵ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 23.

²⁰⁶ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 24.

²⁰⁷ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 34.

²⁰⁸ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 38.

²⁰⁹ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 40.

testimony by the witnesses”.²¹⁰ According to the Chamber, the influence on the witness can also be assumed if the perpetrator “modifies the witness’s testimony by instructing, correcting or scripting the answers to be given in court, or providing concrete instructions to the witness to dissemble when giving evidence, such as to act with indecision or show equivocation”. Conversely, merely “recapitulating the information the witness already knows” would not trigger the applicability of the provision.²¹¹ The use of the word “‘corruptly’ signifies that the relevant conduct is aimed at contaminating the witness’s testimony”. In this context, the Chamber stressed that it would be “essential to pay heed to the legal framework which contextualises the conduct of the perpetrator”.²¹² Lastly, the Chamber did not require that the conduct of the perpetrator have any actual effect on the witness. “It is not required for this offence that the criminal conduct actually influences the witness in question – the offence can be complete even if the witness refuses to be influenced by the conduct in question”.²¹³

All offences under article 70 must be committed “intentionally”. In its interpretation of the term “intentionally”, the Chamber relied on article 30 and held that it embraces both *dolus directus* in the first degree (direct intent) and second degree (oblique intent).²¹⁴ The Chamber did not find support in the wording of article 70 that the commission of the offences required special intent.²¹⁵

The five accused had been charged for having committed the offences in various ways. Like Pre-Trial Chamber II, the Chamber confirmed that article 25 remains fully applicable in the context of article 70 offences.²¹⁶ The judgment offers a comprehensive analysis of four forms of responsibility, including direct perpetration (article 25 [3] [a], first alternative), co-perpetration (article 25 [3] [a], second alternative), soliciting and inducing (article 25 [3] [b]), and aiding and abetting or otherwise assisting (article 25 [3] [c]). As regards the law on “co-perpetration” the Chamber mainly follows, not surprisingly, the case-law established in the Lubanga case.²¹⁷ Perhaps of interest to the reader is the manner in which the Chamber defined the “soliciting and inducing” form and “aiding and abetting” form of participation.

Contrary to what the Pre-Trial Chamber held, the Trial Chamber determined that while the notions “soliciting” and “inducing” describe in general the conduct of the accessory prompting the commission of the offence, they nevertheless carry a distinct meaning which should not be conflated.²¹⁸ “Soliciting” means that the accessorial perpetrator “asks or urges the physical perpetrator to commit the criminal act”,²¹⁹ “inducing” means that the accessorial perpetrator “exerts influence over the physical perpetrator, either by strong reasoning, persuasion or conduct implying the prompting of the commission of the offence. Compared to the form of liability of ‘soliciting’, the concept of ‘inducing’ represents a stronger method of instigation”.²²⁰ Both forms are distinguishable from the “ordering” form “insofar as they do not require the perpetrator to hold a position of authority vis-à-vis the physical perpetrators”, i.e. a superior-subordinate relationship between the instigator and the physical perpetrator.²²¹ Furthermore, the Chamber required that the “soliciting” or “inducing” must have had a “direct effect on the commission or attempted commission of the offence. This means that the conduct of the accessory needs to have a causal effect on the offence”.²²² Finally, the Chamber clarified that the accessory is held liable only if the offence in fact occurs or is attempted. The instigator does not execute the offence and has no control over it. The control over the offence lies with the physical perpetrator. This element assists in delineating the article 25 (3) (b) forms of liability from those contained in article 25 (3) (a).²²³

With respect to article 25 (3) (c), the Chamber, at the outset, put the provision in context with the other forms of criminal responsibility contained in article 25 (3). When compared to article 25 (3) (a), the assistance form under article 25 (3) (c) implies a lower degree of blameworthiness since the accessorial perpetrator does not exercise “essential control” over the offence but “merely contributes to or otherwise assists in an offence committed by the principal perpetrator”.²²⁴ When compared to article 25 (3) (b), the assistance form again implies a lower degree of blameworthiness since the “instigator directly prompts” the commission of the offence, “while the assistant’s contribution hinges on the determination of the principal perpetrator to execute the of-

²¹⁰ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 45.

²¹¹ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 46.

²¹² ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 47.

²¹³ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 48.

²¹⁴ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 29.

²¹⁵ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 31.

²¹⁶ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 54.

²¹⁷ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 61 ff.

²¹⁸ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 74.

²¹⁹ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 75.

²²⁰ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 76.

²²¹ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 77.

²²² ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 81.

²²³ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 79 f.

²²⁴ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 85.

fence”.²²⁵ As in the case of article 25 (3) (b), the Chamber gave the terms “aids”, “abets” and “otherwise assists” independent meaning, even though they belong to the broader category of assisting in the (attempted) commission of an offence. The Chamber held that “‘aiding’ implies the provision of practical or material assistance” and that it overlaps in part with the third alternative of “otherwise assists”;²²⁶ “‘abetting’ describes the moral or psychological assistance of the accessory to the principal perpetrator, taking the form of encouragement of or even sympathy for the commission of the particular offence”.²²⁷ The assistance may be given before, during or after the offence has been perpetrated.²²⁸ Furthermore, the Chamber required that the assistance of the accessory “must have furthered, advanced or facilitated the commission of such offence”, i.e. the assistance must have been causal for the commission or attempted commission of the offence. A specific minimum threshold or qualifier to filter those forms of contributions that should not be encompassed by article 25 (3) (c) was purposefully not introduced by the Chamber, mainly because such a filtering is actually made on the basis of two elements: (i) the requisite causality element, and (ii) the enhanced mens rea requirement as stipulated in the opening clause in article 25 (3) (c) (“[f]or the purpose of facilitating the commission of such a crime”).²²⁹ In relation to the subjective element, the Chamber highlighted that article 25 (3) (c) introduces a “higher subjective mental element” beyond article 30 which means that the “accessory must have lent his or her assistance with the aim of facilitating the offence”. In the view of the Chamber, the “elevated subjective standard relates to the accessory’s facilitation, not the principal offence”.²³⁰ In addition, the accessory must have had intent with regard to the principal offence pursuant to article 30.²³¹

Immediately after the verdict was rendered in open court, the Prosecutor requested, on the basis of article 81 (3) (a),²³² that the four convicted persons (Mr. Kilolo, Mr. Mangenda, Mr. Babala and Mr. Arido) be remanded and placed into custody of the Court pending the Chamber’s decision on sentencing. After a short exchange between the parties, this request was rejected by the Chamber on the spot. It did not

consider that article 81 (3) (a) applies since (i) the four convicted persons were not in custody when the verdict was rendered, and (ii) an appeal was not pending at the time. The Chamber also noted articles 60 (3) and (5) and 61 (11) and decided that no changed circumstances warranted the amendment of its interim release decision of 17 August 2015. It therefore declined to issue an order of detention to secure the convicted persons’ presence during sentencing.²³³

c) Proceedings Before Trial Chamber VI

As reported above, Mr. Mangenda was released on 21 October 2014 with decision of the Single Judge acting on behalf of the Pre-Trial Chamber. One of the preconditions to be released was that the persons concerned indicate their address at which they would be staying pending trial. Mr. Mangenda, a DRC national, refused the option of being released to the DRC and had no immediate entitlement to enter any other country. More specifically, the United Kingdom of Great Britain and Northern Ireland, to which Mr. Mangenda intended to be released, had revoked his visa earlier that day. He was therefore not released “immediately”, on 21 October 2014, but remained in the Court’s detention centre until 31 October 2014, the day on which a country was willing to accept him and Mr. Mangenda was willing to go to.

Approximately one year later, on 21 April 2015, Mr. Mangenda presented a compensation claim under article 85 (1) to the Presidency requesting the amount of EUR 27.000,- for his “unlawful detention” between 21 and 31 October 2014.²³⁴ On 2 October 2015, the Presidency referred the matter to Trial Chamber VI.²³⁵ Trial Chamber VI (and not Trial Chamber VII) was assigned with this matter since its judges had not “participated in any earlier judgment of the Court regarding the person making the request”, as required in rule 173 (1).

Trial Chamber VI added little to the interpretation of article 85 but followed the approach of Trial Chamber II in the Ngudjolo case. It denied any compensation to Mr. Mangenda and rejected his request with decision dated 26 February 2016 stating that his detention was not unlawful.²³⁶ The Chamber

²²⁵ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 86.

²²⁶ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 88.

²²⁷ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 89.

²²⁸ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 96.

²²⁹ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 90 ff.

²³⁰ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 97.

²³¹ ICC, Decision of 19.10.2016 – ICC-01/05-01/13-1989-Red (Bemba et al Judgment), para. 98.

²³² Article 81 (3) (a) reads: “Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal.”

²³³ ICC, Transcript of 19.10.2016 – ICC-01/05-01/13-T-51-ENG ET (Trial Chamber VII, Transcript of Hearing), p. 32, line 21 to p. 34, line 16, online available at: <http://www.legal-tools.org/doc/2bea30/> (3.12.2016).

²³⁴ ICC, Filing of 1.5.2015 – ICC-01/05-01/13-921-Red (Defense for Mr. Mangenda, Public Redacted Version of Request for Compensation for Unlawful Detention), online available at:

<http://www.legal-tools.org/en/doc/0f7ef0/> (3.12.2016), the confidential version had been filed on 21.4.2015.

²³⁵ ICC, Decision of 2.10.2015 – ICC-01/05-01/13-1329 (Presidency, Decision referring the “Request for Compensation for Unlawful Detention” to Trial Chamber VI), online available at:

<http://www.legal-tools.org/doc/df3bb6/> (3.12.2016).

²³⁶ ICC, Decision of 26.2.2016 – ICC-01/05-01/13-1663 (Trial Chamber VI, Decision on request for compensation for

noted the absence of a “decision” on unlawfulness of the detention within the meaning of rule 173 (2) but, like Trial Chamber II, “in the interests of justice” nevertheless proceeded with the assessment of the request.²³⁷ The Chamber noted that Mr. Mangenda’s release was contingent upon his indication of a valid address. Since he could not provide the Court with it, one of the pre-conditions to his release was not fulfilled, and he had “no entitlement to immediate and unconditional release as of 22 October 2014”.²³⁸ The Chamber also assessed and denied any negligence on the part of the Registry to secure Mr. Mangenda’s release.²³⁹ Mr. Mangenda’s request for leave to appeal under article 82 (1) (d) was granted, by Majority.²⁴⁰ With judgment dated 8 August 2016, the appeal was dismissed and the decision of Trial Chamber VI confirmed.²⁴¹

IV. Situation in Mali (Pre-Trial Chamber I)²⁴²

- Referral by Republic of Mali: 13 July 2012
- Victims participating: none

Out of this situation, one case emanated which is presented below.

*The Prosecutor v. Ahmad Al Faqi Al Mahdi (Trial Chamber VIII)*²⁴³

- Warrant of arrest: 18 September 2015
- Surrender to the Court: 26 September 2015
- First appearance: 30 September 2015
- Confirmation of charges: 24 March 2016

unlawful detention [“Mangenda Article 85 Decision”]), online available at:

<http://www.legal-tools.org/doc/5f55f6/> (3.12.2016).

²³⁷ ICC, Decision of 26.2.2016 – ICC-01/05-01/13-1663 (Mangenda Article 85 Decision), para. 18 ff.

²³⁸ ICC, Decision of 26.2.2016 – ICC-01/05-01/13-1663 (Mangenda Article 85 Decision), para. 23.

²³⁹ ICC, Decision of 26.2.2016 – ICC-01/05-01/13-1663 (Mangenda Article 85 Decision), para. 25 f.

²⁴⁰ ICC, Decision of 13.5.2016 – ICC-01/05-01/13-1893 (Trial Chamber VI, Decision on Defense request seeking leave to appeal the “Decision on request for compensation for unlawful detention”), online available at:

<http://www.legal-tools.org/doc/b4de28/> (3.12.2016); Judge Chang-Ho Chung appended a dissenting opinion to this decision, Dissenting Opinion of Judge Chang-Ho Chung, 13.5.2016, ICC-01/05-01/13-1893-Anx, online available at: <http://www.legal-tools.org/doc/c600b5/> (3.12.2016).

²⁴¹ ICC, Decision of 8.8.2016 – ICC-01/05-01/13-1964 (Appeals Chamber, Judgment on Mr. Mangenda’s appeal against the “Decision on request for compensation for unlawful detention”), online available at:

<http://www.legal-tools.org/doc/af8c45/> (3.12.2016).

²⁴² The record carries the situation number ICC-01/12.

²⁴³ The record carries the case number ICC-01/12-01/15.

- Victims participating: 8
- Trial: 22-24 August 2016
- Current status: reparation stage

1. Proceedings Before Pre-Trial Chamber I

On 18 September 2015, the Single Judge, designated by Pre-Trial Chamber I, issued a warrant of arrest for Mr. Al Mahdi (also known as “Abou Tourab”), a religious expert, for having intentionally directed an attack against ten buildings of a religious and historical character (article 8 [2] [e] [iv]) in Timbuktu between around 30 June and 10 July 2012, under various forms of criminal responsibility.²⁴⁴ The attacked buildings were nine mausoleums and one mosque forming part of the cultural heritage of Timbuktu and of Mali; with the exception of one mausoleum, they all had the status of protected UNESCO world heritage sites. At the relevant time, after the retreat of the Malian army, the town of Timbuktu was under the control of the armed group “Al Quaida Au Maghreb Islamique” (AQMI) and Ansar Dine, a Touareg movement associated with AQMI.²⁴⁵ The two groups set up an administrative structure of the city, including Islamic police, Islamic Tribunal, a media commission, and the “Hesbah”, the morality brigade. Mr. Al Mahdi was believed to be the head of the “Hesbah”, who personally and jointly with others participated in the destruction of the buildings concerned.²⁴⁶ The buildings were destroyed completely or severely damaged by the use of weapons, and tools, such as pickaxes and iron bars. The warrant of arrest does not contain any legal or evidentiary discussion. Indeed, the Single Judge argued that it was not “necessary” at this stage to make any findings on the interpretation of the law or to espouse his views on the forms of criminal responsibility presented by the Prosecutor.²⁴⁷ Issues of admissibility (notably whether this case meets the “gravity” test) are addressed by short reference to the 2006 Appeals Judgment regarding the issuance of the warrant of arrest against Bosco Ntaganda.²⁴⁸ The fact that this case would not involve any loss of human life would not be discussed at all in this case, neither by the Pre-Trial nor the Trial Chamber.

At the time of the issuance of the warrant of arrest, Mr. Al Mahdi was already in detention in the Republic of Niger from where he was surrendered to the Court, on 26 September 2015. He made his initial appearance before the Single Judge

²⁴⁴ ICC, Decision of 18.9.2015 – ICC-01/12-01/15-1-Red (Pre-Trial Chamber I, Mandat d’arrêt à l’encontre d’Ahmad Al Faqi Al Mahdi [“Al Mahdi Warrant of Arrest”]), the public redacted version was registered on 28.9.2015), online available at:

<http://www.legal-tools.org/doc/c5ea5e/> (3.12.2016).

²⁴⁵ ICC, Decision of 18.9.2015 – ICC-01/12-01/15-1-Red (Al Mahdi Warrant of Arrest), para. 5.

²⁴⁶ ICC, Decision of 18.9.2015 – ICC-01/12-01/15-1-Red (Al Mahdi Warrant of Arrest), para. 8 f.

²⁴⁷ ICC, Decision of 18.9.2015 – ICC-01/12-01/15-1-Red (Al Mahdi Warrant of Arrest), para. 10.

²⁴⁸ ICC, Decision of 18.9.2015 – ICC-01/12-01/15-1-Red (Al Mahdi Warrant of Arrest), para. 12.

of Pre-Trial Chamber I on 30 September 2015.²⁴⁹ The Prosecutor presented the charge on 17 December 2015²⁵⁰ together with a separate document setting out her written submissions concerning the charge.²⁵¹ The presentation of the charging document deviates from previous practice. In doing so, the Prosecutor complied with stipulations in the Pre-Trial Manual (released in September 2015) that was later endorsed and amended by all Judges of the Court in February 2016.²⁵² While the Prosecutor presented a list of evidence on which she relied for the purposes of the confirmation of charges,²⁵³ the defense chose not to disclose any evidence or file a list of evidence.²⁵⁴ The hearing on the confirmation of charges was held on 1 March 2016.²⁵⁵ The defense did not object to the charge presented by the Prosecutor.

In the confirmation of charges decision, rendered on 24 March 2016, the Chamber confirmed the charge against Mr. Al Mahdi retaining also all modes of criminal responsibility which encompass almost the entire catalogue of article 25 (direct perpetration, co-perpetration, soliciting or inducing, aiding and abetting or otherwise assisting, contributing in any other way).²⁵⁶ Of interest is the Majority's expressed

preference not to engage with issues of credibility of witnesses or probative value of evidence as these issues should be resolved at trial – "except where the answer is manifest".²⁵⁷ This issue in particular was taken up by the Minority Judge, Judge Péter Kovács, who appended a separate opinion to the confirmation decision.²⁵⁸ He criticized the Majority for its approach in evidentiary matters and stated that it "underestimate[d] the significant role of the Pre-Trial Chambers in exercising their filtering functions".²⁵⁹

As regards the multiple alternative modes of criminal responsibility presented by the Prosecutor, the Chamber deemed it "appropriate" to confirm the charge with the various alternative forms in order for the Trial Chamber to determine the most appropriate one.²⁶⁰ An evidentiary discussion relating to each form of responsibility is missing. Rather, the Chamber described Mr. Al Mahdi's conduct in generic terms, and concluded that all forms of responsibility as presented by the Prosecutor were to be confirmed.²⁶¹ This development (in particular in the present case) may be seen at odds with the express intention of pre-trial chambers in the past to filter the charges and streamline the discussion at trial. The novel approach is seemingly informed from the experience in the Katanga case and the application of regulation 55 of the Regulations of the Court during the deliberation phase. The confirmation of a series of alternative forms of criminal responsibilities may be interpreted as a measure to restrict the application of regulation 55 of the Regulations of the Court in subsequent phases of the proceedings. It provides a comfortable position for the Prosecutor to present her arguments on a broad basis at trial. However, from a defense point of view and trial management perspective, this open approach has obvious drawbacks. It may need to be revisited by future pre-trial chambers, depending on the strength of the evidence presented and the specificities of the case.

2. Proceedings Before Trial Chamber VIII

Trial Chamber VIII was constituted and assigned with the case.²⁶² Also in this case, a Single Judge, Judge Raoul Pan-

²⁴⁹ ICC, Transcript of 30.9.2015 – ICC-01/12-01/15-T-1-ENG ET (Pre-Trial Chamber I, Transcript of Hearing), online available at:

<http://www.legal-tools.org/doc/e40682/> (3.12.2016).

²⁵⁰ ICC, Filing of 17.12.2015 – ICC-01/12-01/15-62 (Office of the Prosecutor, Chef d'accusation retenu par l'Accusation contre Ahmad Al Faqi Al Mahdi), online available at:

<http://www.legal-tools.org/doc/a83616/> (3.12.2016); an English translation was filed on 8.1.2016, ICC-01/12-01/15-70-AnxA, online available at:

<http://www.legal-tools.org/doc/0a471b/> (3.12.2016).

²⁵¹ ICC, Filing of 15.1.2016 – ICC-01/12-01/15-66-red (Office of the Prosecutor, Document présentant les conclusions factuelles et juridiques du Bureau du Procureur au soutien du Chef d'accusation dans l'affaire contre Ahmad Al Faqi Al Mahdi; the original confidential filing was submitted on 17.12.2015), online available at:

<http://www.legal-tools.org/doc/2ac52a/> (3.12.2016).

²⁵² ICC, Chambers Manual, 2016, p. 11 f.

²⁵³ ICC, Filing of 18.12.2015 – ICC-01/12-01/15-67, with confidential annex (Office of the Prosecutor, Dépôt de l'inventaire des preuves que l'Accusation entend produire à l'audience de confirmation des charges) online available at:

<http://www.legal-tools.org/doc/633fd7/> (3.12.2016).

²⁵⁴ ICC, Decision of 24.3.2016 – ICC-01/12-01/15-84-Red (Pre-Trial Chamber I, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi [„Al Mahdi Confirmation Decision“]), para. 9, online available at:

<http://www.legal-tools.org/doc/bc8144/> (3.12.2016).

²⁵⁵ ICC, Transcript of 1.3.2016 – ICC-01/12-01/15-T-2-ENG-Red2 (Pre-Trial Chamber I, Transcript of Hearing) online available at:

<http://www.legal-tools.org/doc/1a7bdc/> (3.12.2016).

²⁵⁶ Compared with the warrant of arrest, the form of aiding and abetting or otherwise assisting (article 25 [3] [c]) was added in the charging document. This is in conformity of the

Statute as long as the Prosecutor does not exceed the factual allegations on the basis of which the suspect was surrendered to the Court.

²⁵⁷ ICC, Decision of 24.3.2016 – ICC-01/12-01/15-84-Red (Al Mahdi Confirmation Decision), para. 19.

²⁵⁸ ICC, Opinion of 9.5.2016 – ICC-01/12-01/15-84-Anx (Separate Opinion of Judge Péter Kovács [“Al Mahdi Separate Opinion“]), para. 9 ff., online available at:

<http://www.legal-tools.org/doc/d6ba07/> (3.12.2016).

²⁵⁹ ICC, Opinion of 9.5.2016 – ICC-01/12-01/15-84-Anx (Al Mahdi Separate Opinion), para. 1.

²⁶⁰ ICC, Decision of 24.3.2016 – ICC-01/12-01/15-84-Red (Al Mahdi Confirmation Decision), para. 22.

²⁶¹ ICC, Decision of 24.3.2016 – ICC-01/12-01/15-84-Red (Al Mahdi Confirmation Decision), para. 45 ff.

²⁶² ICC, Decision of 2.5.2016 – ICC-01/12-01/15-86 (Presidency, Decision constituting Trial Chambers VIII and IX and referring to them the cases of The Prosecutor v. Ahmad Al

galangan, was designated to decide on all preparatory matters.²⁶³ At that point in time, it was on public record that Mr. Al Mahdi intended to make an admission of guilt pursuant to article 65. The Chamber held a status conference during which it was decided that (i) with the agreement of the parties, the judgment and sentencing will be rendered simultaneously in the event of conviction,²⁶⁴ and that (ii) the evidentiary material presented by the Prosecutor at the confirmation stage were to be considered presented and accepted by the accused for the purposes of article 65.²⁶⁵ With decision of 1 June 2016, a calendar for disclosure and other motions was established and the date of the commencement of trial was set on 22 August 2016, after the end of Ramadan.²⁶⁶

In total eight victims (three natural persons and five institutions) were admitted at trial to participate in the proceedings.²⁶⁷ The natural persons alleged to have suffered personal economic and moral harm as a result of the events underpinning the charge.²⁶⁸ A common legal representative, previously chosen by some victims, was appointed to represent all participating victims.²⁶⁹ It is a welcome development by the Chamber not to appoint as legal representative for victims the

Office of Public Counsel for victims but to appoint counsel from outside the Court.

During the trial, which lasted three days (22-24 August 2016), Mr. Al Mahdi made an admission of guilt. Three witnesses testified on the part of the Prosecutor, and all participants made submissions on sentencing. A detailed and comprehensive agreement between Mr. Al Mahdi and the Prosecutor on the nature and consequences of Mr. Al Mahdi's admission of guilt was presented to the Trial Chamber.²⁷⁰ In this agreement, Mr. Al Mahdi in writing accepted responsibility for his actions. The Prosecutor indicated to recommend to the Trial Chamber a sentence within the range of nine to eleven years. Following article 65 (5),²⁷¹ this agreement is not binding on the Trial Chamber.

On 27 September 2016, the Trial Chamber convicted Mr. Al Mahdi of the war crime of having intentionally attacked the protected objects in Timbuktu and sentenced him to 9 years of imprisonment.²⁷² The Chamber's most important findings are quickly summarized: in the view of the Chamber, "directing an attack" within the meaning of article 8 (2) (e) (iv) "encompasses any acts of violence against protected objects".²⁷³ Crucially, in the view of the Chamber, the Statute does not make a distinction whether the act of violence is "carried out in the conduct of hostilities or after the object had fallen under the control of an armed group".²⁷⁴ This interpretative approach reflects, in the estimation of the Chamber, the special status of the protected objects and the fact that humanitarian law protects cultural objects as such from crimes committed in battle and out of it.²⁷⁵ As regards the various forms of criminal responsibility confirmed by the Pre-Trial Chamber, the Chamber discussed only one, namely that of co-perpetratorship (article 25 [3] [a], second alternative). In this context, the Chamber highlighted that no hierarchy exists "within the variations set out under Article 25 (3) (a) of the Statute".²⁷⁶ It clarified that it must elect which mode of liability reflects best the full scope of the accused's

Faqi Al Mahdi and The Prosecutor v. Dominic Ongwen), online available at:

<http://www.legal-tools.org/doc/b97276/> (3.12.2016).

²⁶³ ICC, Decision of 4.5.2016 – ICC-01/12-01/15-87 (Trial Chamber VIII, Decision Notifying the Election of a Presiding Judge and Single Judge), online available at:

<http://www.legal-tools.org/doc/97f77b/> (3.12.2016).

²⁶⁴ ICC, Transcript of 24.5.2016 – ICC-01/12-01/15-T-3-Red-ENG (Trial Chamber VIII, Transcript of Hearing), p. 4, lines 1 ff., online available at:

<http://www.legal-tools.org/doc/80b091/> (3.12.2016).

²⁶⁵ ICC, Transcript of 24.5.2016 – ICC-01/12-01/15-T-3-Red-ENG (Trial Chamber VIII, Transcript of Hearing), p. 22, lines 12 ff., online available at:

<http://www.legal-tools.org/doc/80b091/> (3.12.2016).

²⁶⁶ ICC, Decision of 1.6.2016 – ICC-01/12-01/15-93 (Trial Chamber VIII, Decision Setting the Commencement Date of the Trial), online available at:

<http://www.legal-tools.org/doc/53f427/> (3.12.2016).

²⁶⁷ ICC, Decision of 8.6.2016 – ICC-01/12-01/15-97-Red (Trial Chamber VIII, Public redacted version of "Decision on Victim Participation at Trial and on Common Legal Representation of Victims ['First Al Mahdi Victims Decision']"), online available at:

<http://www.legal-tools.org/doc/c8c749/> (3.12.2016); Public redacted version of "Second Decision on Victim Participation at Trial", 12.8.2016, ICC-01/12-01/15-156-Red, online available at:

<http://www.legal-tools.org/doc/90149c/> (3.12.2016); after the issuance of the second decision on participation, one victim withdrew its application to participate.

²⁶⁸ ICC, Decision of 8.6.2016 – ICC-01/12-01/15-97-Red (First Al Mahdi Victims Decision), para. 34.

²⁶⁹ ICC, Decision of 8.6.2016 – ICC-01/12-01/15-97-Red (First Al Mahdi Victims Decision), para. 38.

²⁷⁰ ICC, Filing of 9.9.2016 – ICC-01/12-01/15-78-Anx1-tENG-Red2 (Office of the Prosecutor and Defense for Mr. Al Mahdi, Agreement regarding admission of guilt), online available at:

<http://www.legal-tools.org/doc/910457/> (3.12.2016).

²⁷¹ Article 65 (5) stipulates: "Any discussions between the Prosecutor and the defense regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court."

²⁷² ICC, Decision of 27.9.2016 – ICC-01/12-01/15-171 (Trial Chamber VIII, Judgment and Sentence ["Al Mahdi Judgment"]), online available at:

<http://www.legal-tools.org/doc/042397/> (3.12.2016).

²⁷³ ICC, Decision of 27.9.2016 – ICC-01/12-01/15-171 (Al Mahdi Judgment), para. 15.

²⁷⁴ ICC, Decision of 27.9.2016 – ICC-01/12-01/15-171 (Al Mahdi Judgment), para. 15.

²⁷⁵ ICC, Decision of 27.9.2016 – ICC-01/12-01/15-171 (Al Mahdi Judgment), para. 15 f.

²⁷⁶ ICC, Decision of 27.9.2016 – ICC-01/12-01/15-171 (Al Mahdi Judgment), para. 60.

individual criminal responsibility since he can only be convicted of only one form of article 25 (3) (a) commission for each incident or discrete type of criminal conduct.²⁷⁷ The fact that Mr. Al Mahdi personally participated in the destruction of five buildings was considered to support the Chamber's conclusion that he made an essential contribution to the crime charged pursuant to a common plan.²⁷⁸ Given that the Chamber had decided to hold Mr. Al Mahdi responsible as a co-perpetrator, it was considered unnecessary to make a finding on the accessory liability alternatives.

On 29 September 2016, the Chamber issued a calendar for the reparations phase and set a deadline for submission of reparation applications.²⁷⁹ It also asked for the submission of a report by one or more experts identified by the Registry with expertise on (i) the importance of international cultural heritage, (ii) the scope of the damage caused to the protected buildings in Timbuktu, and (iii) the scope of the economic and moral harm suffered. The parties, the Trust Fund and Malian authorities were invited to make general submissions.

V. Regulation 46 (3) Request (Egypt)

- Prosecutor's Decision: 23 April 2013
- Submission for Judicial Review: 5 September 2014
- Assignment to Pre-Trial Chamber: 10 September 2014
- Review Decision: 12 September 2014

The proceedings in this situation are unusual but not less worthy of attention. Regulation 46 (3) of the Regulations of the Court²⁸⁰ was applied for the first time in the Court's history in this instance. The Chamber's involvement was triggered by former President of the Arab Republic of Egypt, Mohamed Morsi, who had lodged a declaration under article 12 (3) on 13 December 2013,²⁸¹ asking for the Prosecutor's intervention "over all crimes committed in Egypt following the military coup on 3 July 2013 which resulted in the arrest of Egypt's first democratically elected President and the suspen-

sion of the Egyptian Constitution".²⁸² As admitted by the complainant, the 12 (3) declaration had been signed on 10 August 2013, after the military coup in Egypt.²⁸³ On 23 April 2013, the Prosecutor had declined to open an investigation on the grounds that (former) President Morsi and his government lacked locus standi to seize the Court.²⁸⁴ On 25 April 2013, the Registrar had decided not to accept the declaration as having been presented on behalf of the Egyptian State.²⁸⁵

In the following, the complainant sought judicial review of the Prosecutor's decision not to open an investigation into allegations involving "massive, systematic and widespread" crimes committed in the Arab Republic of Egypt.²⁸⁶ He addressed, inter alia, the President of the Pre-Trial Division requesting her to assign this matter to a Pre-Trial Chamber under regulation 46 (3) of the Regulations of the Court.²⁸⁷ The President of the Pre-Trial Division, Judge Christine van den Wyngaert at the time, assigned the matter to Pre-Trial Chamber II, based on a pre-established roster.²⁸⁸ Of importance is her statement that she is duty-bound to direct the matter to a Chamber as long as the matter "does not appear (a) to fall outside the competence of the Pre-Trial Chamber, or (b) to be manifestly frivolous".²⁸⁹ Two days later, on 12 September 2014, Pre-Trial Chamber II dismissed the review

²⁷⁷ ICC, Decision of 27.9.2016 – ICC-01/12-01/15-171 (Al Mahdi Judgment), para. 60.

²⁷⁸ ICC, Decision of 27.9.2016 – ICC-01/12-01/15-171 (Al Mahdi Judgment), para. 61.

²⁷⁹ ICC, Decision of 29.9.2016 – ICC-01/12-01/15-172 (Trial Chamber VIII, Reparations Phase Calendar).

²⁸⁰ Regulation 46 (3) of the Regulations of the Court reads: „Any matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber in accordance with sub-regulation 2, shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the President of that Division.“

²⁸¹ ICC, Filing of 23.5.2014 – ICC-RoC46(3)-01/14-2-AnxA (Complainant, Request for review of the Prosecutor's decision of 23.4.2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25.4.2014 ["Complaint"]), fn. 2 and para. 23, online available at: <http://www.legal-tools.org/doc/6fc257/> (3.12.2016).

²⁸² ICC, Filing of 23.5.2014 – ICC-RoC46(3)-01/14-2-AnxA (Complaint), para. 7.

²⁸³ ICC, Filing of 23.5.2014 – ICC-RoC46(3)-01/14-2-AnxA (Complaint), para. 7.

²⁸⁴ ICC, Filing of 23.5.2014 – ICC-RoC46(3)-01/14-2-AnxA (Complaint), para. 10, 34.

²⁸⁵ ICC, Filing of 23.5.2014 – ICC-RoC46(3)-01/14-2-AnxA (Complaint), para. 11, 35.

²⁸⁶ ICC, Filing of 1.9.2014 – ICC-RoC46(3)-01/14-2 (Complaint, Re-filing before the President of the Pre-Trial Division of the "Request for review of the Prosecutor's decision of 23.4.2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25.4.2014"), para. 18, online available at:

<http://www.legal-tools.org/doc/7ce712/> (3.12.2016).

²⁸⁷ Regulation 46 (3) of the Regulations of the Court provides: "Any matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber in accordance with sub-regulation 2, shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the President of that Division."

²⁸⁸ ICC, Decision of 10.9.2014 – ICC-RoC46(3)-01/14-1 (President of the Pre-Trial Division, Decision assigning the "Request for review of the Prosecution's decision of 23.4.2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25.4.2014" to Pre-Trial Chamber II ["Assignment Decision"]), online available at:

<http://www.legal-tools.org/doc/51f209/> (3.12.2016).

²⁸⁹ ICC, Decision of 10.9.2014 – ICC-RoC46(3)-01/14-1 (Assignment Decision), para. 3.

request in limine.²⁹⁰ In sum, it found that it lacked proprio motu powers to review the Prosecutor's decision under article 53 (3) (b) since the Prosecutor had not based her decision on interests of justice considerations as foreseen in article 53 (1) (c).²⁹¹ Of importance is also the Chamber's statement as to the Registrar's role in the context of article 12 (3) declarations: his role is "merely administrative"; "[b]eyond that, the Registrar has no power to make a legal or judicial ruling upon receipt of any declaration".²⁹² A subsequent request for reconsideration or, in the alternative, leave to appeal the decision was dismissed in limine ruling that the complainant had no locus standi.²⁹³

VI. Situation in the Union of the Comoros, Hellenic Republic and the Kingdom of Cambodia (Pre-Trial Chamber I)²⁹⁴

- Gaza Flotilla Incident: 31 May to 5 June 2010
- Referral of situation: 14 May 2013
- Prosecutor's Decision: 6 November 2014
- Review request by Union of the Comoros: 29 January 2015
- Review decision: 16 July 2015
- Victims' participating: 418

1. The Gaza Flotilla Incident

On 3 January 2009, Israel imposed a naval blockade off the coastline of the Gaza strip up to a distance of 20 miles from the coast. Between 31 May and 5 June 2010, a flotilla of seven ships bound for the Gaza strip was intercepted by the Israeli Defense Forces ("IDF") at 64 miles from the coast of the Gaza. On board of the ships were about 700 passengers

from approximately 40 countries who had the intention to break the Israeli blockade and deliver humanitarian goods to the Gaza population. The interception operation resulted in the death of 10 and bodily harm of 50-55 persons, as well as outrages upon personal dignity of a significant number of passengers. The majority of the crimes occurred on board of one vessel (Mavi Marmara). The transported goods were confiscated and later distributed in Gaza with the assistance of the United Nations ("UN").

Three ships were registered in States Parties, namely the Union of the Comoros (the Mavi Marmara), the Hellenic Republic (the Eleftheri Mesogios/Sofia) and the Kingdom of Cambodia (the Rachel Corrie). The Union of the Comoros referred the situation involving the crimes flowing from the interception of the flotilla by the IDF. The situation began on 31 May 2010 and lasted until at least 5 June 2010 when the last ship was intercepted.

2. The Prosecutor's Decision Not to Open an Investigation

Upon receipt of the referral of the Union of the Comoros, the Prosecutor conducted a preliminary examination²⁹⁵ at the end of which she decided not to open an investigation into the situation. She communicated her analysis and decision in a report dated 6 November 2014.²⁹⁶ The Prosecutor accepted the existence of an international armed conflict in view of Israel's military occupation of Gaza; alternatively she found that the conflict between Israel and Hamas could be qualified as a non-international armed conflict. As regards the crimes, she saw grounds to believe that the war crimes of willful killing, willfully causing serious injury, outrages upon personal dignity, and intentional directing attacks against civilian objects (if the naval blockade would be considered unlawful) had been committed, but declined to qualify the events as crimes against humanity arguing that there was no widespread or systematic attack directed against the civilian population. Finally, the Prosecutor maintained that the "potential cases" emanating from this situation do not satisfy the "gravity" threshold in article 17 (1) (d). She based her decision on considerations, such as the limited scope of the situation (mainly one day; three vessels), small number of victims, nature of the crimes (no indications of torture or inhuman treatment), manner of commission of the crimes (crimes were not systematic or resulted from a deliberate plan or policy to attack; force was confined to one vessel), and impact of the crimes (crimes had impact on the victims aboard the vessels, but did not have any significant impact on the population of Gaza). Lacking any countervailing qualitative considerations the Prosecutor decided that the limited potential cases would not justify the Court's intervention into this situation.

²⁹⁰ ICC, Decision of 12.9.2014 – ICC-RoC46(3)-01/14-3 (Pre-Trial Chamber II, Decision on the "Request for review of the Prosecutor's decision of 23.4.2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25.4.2014 ['Egypt Review Decision']"), online available at:

<http://www.legal-tools.org/doc/bfbb8f/> (3.12.2016).

²⁹¹ ICC, Decision of 12.9.2014 – ICC-RoC46(3)-01/14-3 (Egypt Review Decision), para. 8 f.; in relation to its review competence under article 53 (3) (a), the Chamber stated that lacking a request by a State Party or the Security Council, it could not proceed, para. 7.

²⁹² ICC, Decision of 12.9.2014 – ICC-RoC46(3)-01/14-3 (Egypt Review Decision), para. 10.

²⁹³ ICC, Decision of 22.9.2014 – ICC-RoC46(3)-01/14-5 (Pre-Trial Chamber II, Decision on a Request for Reconsideration or Leave to Appeal the "Decision on the 'Request for review of the Prosecutor's decision of 23.4.2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25.4.2014'"), online available at:

<http://www.legal-tools.org/doc/7ced5a/> (3.12.2016).

²⁹⁴ The record carries the situation number ICC-01/13.

²⁹⁵ Article 53 (1).

²⁹⁶ ICC, Filing of 6.11.2014 – ICC-01/13-6-AnxA (Office of the Prosecutor, Article 53 [1] Report), online available at: <http://www.legal-tools.org/doc/6b833a/> (3.12.2016).

3. The Review Decision

The Union of the Comoros, the referring State, challenged the decision of the Prosecutor and requested the Chamber to review it under article 53 (3) (a).²⁹⁷ In short, it based its review request on two principal grounds: (i) failure to take into account alleged crimes that fall outside the jurisdiction of the Court (i.e. outside the three vessels) when assessing gravity, and (ii) errors in assessing the gravity factors. Victims were invited by the Chamber to express their views and concerns in relation to the review application of the referring State.²⁹⁸

On 16 July 2015, Pre-Trial Chamber I issued its decision, by majority, and requested the Prosecutor to reconsider her decision.²⁹⁹ Article 53 (3) gives little indication as to the details of the review conducted by the Chamber. It is therefore of particular interest how Pre-Trial Chamber I analyzed the scope and standard of review. As regards the scope of the review, the Majority held that only the “considerations underlying the final conclusion that an investigation should not be opened” are subject to review.³⁰⁰ This is owed to the fact that the object and purpose of article 53 (3) (and consequently the competencies of the Chamber) are different than those of article 15 (4)/53 (1).³⁰¹ In light of the foregoing, the Majority concluded that it does not review the Prosecutor’s decision *ex novo*, but that it is bound by the issues raised in the review request that have a bearing on the Prosecutor’s conclusion not to investigate.³⁰² As grounds for review the Majority accepted the allegation of procedural errors, errors of fact and law which “materially affected” the Prosecutor’s decision.³⁰³ As will be criticized by the dissenting Judge, the Majority did not clarify wherefrom it retrieves those criteria.

Regard must be paid to the Majority’s understanding of the conduct of preliminary examinations and the manner in which the Prosecutor ought to evaluate information. The Chamber clarified that the exercise of prosecutorial discretion is to be found only in article 53 (1) (c), namely in case the

investigation would not serve the interests of justice. Conversely, articles 53 (1) (a) and (b) require the application of exacting legal requirements that instruct the Prosecutor, in case they are met, to open an investigation.³⁰⁴ This is the first time an authoritative interpretation of article 53 (1) is given that sheds light on the Prosecutor’s obligations during preliminary examinations. Indeed, prosecutorial discretion under the Rome Statute is not the norm but limited to a specific scenario. This does not prevent the Prosecutor from exercising her functions independently.

The above understanding also affects the quality of the information at the pre-investigative stage and the manner in which the Prosecutor evaluates them. The Majority reminded the Prosecutor that the information at this stage need not be “clear, univocal or not contradictory”, and that “the existence of conflicting accounts, are not valid reasons not to start an investigation but rather call for the opening of such an investigation”. Indeed, the term “shall” in article 53 (1) expresses the presumption that the Prosecutor investigates in order to be able to properly assess the relevant facts.³⁰⁵ The Majority’s holdings may be seen as a response to the position of the Office of the Prosecutor in previous cases, such as the Mbarushimana case, in which it had insisted that the Pre-Trial Chamber does not resolve any inconsistencies or contradictions at the confirmation stage (“substantial grounds to believe”) but that those are better resolved at trial – a position that was not followed, neither by the Pre-Trial Chambers nor by the Appeals Chamber. It must have seemed contradictory for the Majority to accept the resolution of inconsistencies and contradictions at the preliminary examination stage (“reasonable basis to believe”) but to be required to “overlook” their existence at procedural stages where the evidentiary threshold warrants a more stringent analysis of the evidence (“substantial grounds to believe”).

With respect to the first ground, the Majority determined that when assessing gravity the Prosecutor had erred not to consider facts falling outside the jurisdiction of the Court (i.e. events in Gaza). It held that jurisdiction limits the Court to render judgment on facts falling outside the jurisdiction but does not preclude the Court from considering facts falling outside the jurisdiction of the Court in order to determine a matter falling within its jurisdiction.³⁰⁶ It also remarked that the Prosecutor actually had not applied her own approach consistently as she did take into account certain facts outside the jurisdiction of the Court, such as when assessing the impact of the crimes on the population in Gaza.³⁰⁷ For this reason, the Majority ultimately concluded that while the Prose-

²⁹⁷ ICC, Decision of 29.1.2015 – ICC-01/13-3-Red (Union of the Comoros, Application for Review pursuant to Article 53 (3) (a) of the Prosecutor’s Decision of 6.11.2014 not to initiate an investigation in the Situation), online available at: <http://www.legal-tools.org/doc/b60981/> (3.12.2016).

²⁹⁸ ICC, Decision of 24.4.2015 – ICC-01/13-18 (Pre-Trial Chamber II, Decision on the Victims’ Participation), online available at: <http://www.legal-tools.org/doc/118fc5/> (3.12.2016).

²⁹⁹ ICC, Decision of 16.7.2015 – ICC-01/13-34 (Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation [“Review Decision”]), online available at: <http://www.legal-tools.org/doc/2f876c/> (3.12.2016).

³⁰⁰ ICC, Decision of 16.7.2015 – ICC-01/13-34 (Review Decision), para. 8.

³⁰¹ ICC, Decision of 16.7.2015 – ICC-01/13-34 (Review Decision), para. 9.

³⁰² ICC, Decision of 16.7.2015 – ICC-01/13-34 (Review Decision), para. 10.

³⁰³ ICC, Decision of 16.7.2015 – ICC-01/13-34 (Review Decision), para. 12.

³⁰⁴ ICC, Decision of 16.7.2015 – ICC-01/13-34 (Review Decision), para. 14.

³⁰⁵ ICC, Decision of 16.7.2015 – ICC-01/13-34 (Review Decision), para. 13.

³⁰⁶ ICC, Decision of 16.7.2015 – ICC-01/13-34 (Review Decision), para. 17.

³⁰⁷ ICC, Decision of 16.7.2015 – ICC-01/13-34 (Review Decision), para. 18.

cutor had espoused an erroneous abstract principle, her error did not affect the validity of her gravity assessment.³⁰⁸

With respect to the second ground, the Majority reviewed the Prosecutor's assessment of the various gravity factors she determined relevant for determining whether the "potential cases" are sufficiently "grave". In line with existing case-law, the Chamber agreed that "gravity" at the situation stage involves a generic assessment of whether "the groups of persons that are likely to form the object of the investigation capture those who may bear the greatest responsibility for the alleged crimes"; and that "gravity" must be assessed from both a "quantitative" and "qualitative" view point looking into factors, such as the nature, scale and manner of commission of the alleged crimes, as well as their impact on victims.³⁰⁹

As regards the group of potential perpetrators, the Majority criticized the Prosecutor's conclusion that there was no reasonable basis to conclude that "senior IDF commanders and Israeli leaders" were responsible as perpetrators or planners of the crimes. It corrected the Prosecutor in stating that her analysis should focus on who bears the greatest responsibility and not be limited by seniority or hierarchical positions.³¹⁰ This finding is critical and, again, may be said to have been a reaction to the Prosecutor's changing position when compared to her Office's position adopted in the Ntaganda case in 2006. It is recalled that at the time of the first warrant of arrest, Pre-Trial Chamber I had declined to issue a warrant of arrest against Bosco Ntaganda for lack of "gravity" with the argument that he was not one of the highest-ranking perpetrators.³¹¹ On appeal, lodged by the Prosecutor who argued – against – such a restrictive interpretation, the Pre-Trial Chamber's decision was reversed.³¹² Of relevance to our discussion is the Appeals Chamber finding in 2006 that "the deterrent effect of the Court is highest if no category of perpetrators is per se excluded from potentially being brought before the Court. The imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved. [...] Individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes. [...] Various provisions of the

Rome Statute could relate to persons other than the most senior leaders suspected of being the most responsible. [...] [Also], the Preamble to the Rome Statute mentions 'most serious crimes' but not 'most serious perpetrators'".³¹³ The same standard was expected to be applied in the present situation and the Majority concluded that this error affected the validity of the Prosecutor's 6 November 2014 decision.

Also as regards the various "gravity" factors, the Majority identified further flaws and material errors. As regards the scale of the crimes, the Majority criticized the Prosecutor's argument relating to the limited numbers of victims (ten persons killed, 50-55 persons injured, and an unknown number of persons having suffered outrages upon personal dignity). The Majority Judges underscored that the numbers of casualties actually exceeded numbers in cases in which the Prosecutor had decided to investigate and prosecute, such as in the Abu Garda case and Banda case.³¹⁴ From today's perspective, the Al Mahdi case shows that actually no human casualties are necessary for the Prosecutor to commence an investigation.

As regards the nature of the crimes, the Majority Judges criticized the Prosecutor's limited analysis of the crimes committed and her failure to take them into account when assessing "gravity". In its view, she should have additionally accepted, on the evidence, the crimes of torture and inhuman treatment.³¹⁵

In relation to the manner of commission of the crimes, the Majority took issue with the Prosecutor's conclusion that there was no plan or policy to attack civilians. The Majority highlighted that the Prosecutor (i) did not take into account information regarding the use of live fire by the IDF prior to boarding the Mavi Marmara,³¹⁶ (ii) unreasonably failed to consider cruel and abusive treatment of detained passengers in Israel which seems to point to a systematic abuse and not isolated acts of individual IDF soldiers,³¹⁷ (iii) unreasonably failed to recognize the facts of unnecessarily cruel treatment of passengers during the taking of the Mavi Marmara and attempts to conceal the crimes,³¹⁸ and (iv) unreasonably failed to recognize the fact that the events aboard the Mavi Marmara were unique (carrying no humanitarian supplies but 80% of passengers of the entire flotilla, including "activists" allegedly linked to Hamas) and that crimes were not committed (the same way) on other vessels of the flotilla.³¹⁹

³⁰⁸ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 19.

³⁰⁹ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 21.

³¹⁰ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 23.

³¹¹ ICC, Decision of 10.2.2006 – ICC-01/04-02/06-20-Anx2 (Pre-Trial Chamber I, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58), online available at: <http://www.legal-tools.org/doc/d68b07/> (3.12.2016).

³¹² ICC, Decision of 13.7.2006 – ICC-01/04-169 (Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 [Ntaganda Warrant of Arrest Judgment]"), online available at: <http://www.legal-tools.org/doc/8c20eb/> (3.12.2016).

³¹³ ICC, Decision of 13.7.2006 – ICC-01/04-169 (Ntaganda Warrant of Arrest Judgment), para. 73 ff.

³¹⁴ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 26.

³¹⁵ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 28 ff.

³¹⁶ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 33 ff.

³¹⁷ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 37 f.

³¹⁸ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 39 ff.

³¹⁹ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 42 f.

With respect to the impact of the crimes, the Majority observed that the impact on the victims and their families is already an indicator for sufficient “gravity”. Contrary to the Prosecutor’s assertion, the fact that the supplies were ultimately distributed in Gaza was deemed irrelevant.³²⁰

The dissenting Judge, Judge Péter Kovács, expressed his disagreement on a number of points that merit our attention. Having regard to the wording³²¹ and drafting history of article 53 (3) (a), Judge Kovács held that the Chamber enjoys a margin of discretion and is not legally compelled to address the merits of the review request of the complainant entity. Rather, in his view, such review is warranted only “if it is convinced that the issues raised in said application reveal clear error[s] on the part of the Prosecutor”.³²² As to the scope of review, Judge Kovács proposed to interpret the term “decision” within the meaning of article 53 (3) (a) as “conclusion arrived at” regardless of the specific grounds relied upon by the Prosecutor. This interpretative approach becomes even more compelling when issues of jurisdiction are involved to which the Chamber cannot “turn a blind eye” merely because the Prosecutor has taken a decision based on “gravity”. Indeed, in his view, the Majority acted inconsistent in purporting to limit its review to the considerations underlying the Prosecutor’s decision, i.e. gravity, but then to enter findings on jurisdiction, such as the occurrence of other crimes.³²³ The dissenting Judge also found fault in the Majority’s approach to adopt a standard of review similar to that of interlocutory and final appeals on the merits without proper explanation. In his view, the article 53 (3) (a) review calls “for a more deferential approach” necessitating a careful balance between the independence of the Prosecutor and the supervisory role of the Pre-Trial Chamber.³²⁴ His final point of disagreement as regards article 53 (3) (a) concerned the Majority’s assessment of “gravity”. In his estimation, the Prosecutor’s assessment of gravity was not “necessarily unreasonable” and her decision did not require reconsideration. He compared the present situation with other situations before the Court, for example in Kenya and Côte d’Ivoire, and found that there were no qualitative factors or aggravating circumstances to warrant a different decision in the present

situation.³²⁵ Finally, the dissenting Judge expressed reservations in accepting the constitutive elements of the war crimes of willful killing and willfully causing great suffering since the injuries sustained on board the Mavi Marmara were “apparently incidental to lawful action taken on conjunction with the protection of the blockade”.³²⁶

4. The Appeal

The Appeals Chamber, by majority, dismissed in limine the Prosecutor’s appeal as inadmissible as the Pre-Trial Chamber’s decision was not a decision determining admissibility.³²⁷ Yet, the Appeals Chamber Majority did not miss this opportunity to comment on the consequences of article 53 (3) (a) decisions. The Judges held that following a ruling under article 53 (3) (a) the Prosecutor is obliged to reconsider her decision but “retains ultimate discretion over how to proceed”.³²⁸ The Appeals Chamber confirmed the obvious, as the word “may” in article 53 (3) (a) suggests. However, the appellate Judges may have felt to add this clarification since the Pre-Trial Chamber’s Majority general tone in the decision and concluding remark³²⁹ could have been viewed to direct the Prosecutor to open an investigation into the situation. Indeed, a more careful wording would have avoided this misconception and would have accorded to the wording of the law. Last but not least, it should be mentioned that two Judges of the Appeals Chamber disagreed with their colleagues as to the characterization of the Pre-Trial Chamber’s review decision and held that in their view the impugned

³²⁰ ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 46 f.

³²¹ The provision reads, in relevant part: “[T]he Pre-Trial Chamber *may* review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and *may* request the Prosecutor to reconsider that decision” (emphasis added by *author*).

³²² ICC, Opinion of 16.7.2015 – ICC-01/13-34-Anx-Corr (Partly Dissenting Opinion of Judge Péter Kovács [“Comoros Dissenting Opinion”], annexed to Review Decision), para. 2 ff., online available at:

<http://www.legal-tools.org/doc/0fceb2/> (3.12.2016).

³²³ ICC, Opinion of 16.7.2015 – ICC-01/13-34-Anx-Corr (Comoros Dissenting Opinion), para. 10 ff.

³²⁴ ICC, Opinion of 16.7.2015 – ICC-01/13-34-Anx-Corr (Comoros Dissenting Opinion), para. 6 ff.

³²⁵ ICC, Opinion of 16.7.2015 – ICC-01/13-34-Anx-Corr (Comoros Dissenting Opinion), para. 14 ff.

³²⁶ ICC, Opinion of 16.7.2015 – ICC-01/13-34-Anx-Corr (Comoros Dissenting Opinion), para. 31 ff.

³²⁷ ICC, Decision of 6.11.2015 – ICC-01/13-51 (Appeals Chamber, Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation [‘Comoros Appeals Judgment’]”), para. 50 f., online available at:

<http://www.legal-tools.org/doc/a43856/> (3.12.2016).

³²⁸ ICC, Decision of 6.11.2015 – ICC-01/13-51 (Comoros Appeals Judgment), para. 59.

³²⁹ The Majority of Pre-Trial Chamber I concluded: “As a final note, the Chamber cannot overlook the discrepancy between, on the one hand, the Prosecutor’s conclusion that the identified crimes were so evidently not grave enough to justify action by the Court, of which the *raison d’être* is to investigate and prosecute international crimes of concern to the international community, and, on the other hand, the attention and concern that these events attracted from the parties involved, also leading to several fact-finding efforts on behalf of States and the United Nations in order to shed light on the events. The Chamber is confident that, when reconsidering her decision, the Prosecutor will fully uphold her mandate under the Statute”, see ICC, Decision of 16.7.2016 – ICC-01/13-34 (Review Decision), para. 51.

decision was falling within the ambit of article 82 (1) (a) since the decision “exclusively addressed admissibility”.³³⁰

VII. Situation in Georgia (Pre-Trial Chamber I)³³¹

- Authorization to commence investigation: 27 January 2016
- Victims’ representations: 6.335

On 13 October 2015, the Prosecutor submitted a request for authorization of an investigation into the situation in Georgia pursuant to article 15, together with 192 public and confidential annexes.³³² Following requests regarding Kenya and Côte d’Ivoire, this is the third request of such kind submitted by the Prosecutor. It is the first step to intervene outside the African continent.

The situation was assigned to Pre-Trial Chamber I³³³ which, unlike other pre-trial chambers in the past, did not organize the process of receiving victims’ representations to be submitted in accordance with article 15 (3), second sentence. The victims were informed by the Prosecutor, as provided in rule 50 (1),³³⁴ and within 30 days submitted their representations to the Court.³³⁵ The Victims Participation and Reparation Section (“VPRS”) collected the representations and submitted them, together with a report, to the Chamber on 4 December 2015.³³⁶ Notwithstanding the lack of judicial

involvement, the VPRS successfully collected and presented the representations of 6.335 individuals within this short time frame. It is the biggest number of participating victims in authorization proceedings to date.

1. The Conflict

A description of the conflict will assist the reader to appreciate better the Chamber’s decision. In the months leading to the August 2008 conflict, in particular July 2008, tensions increased in and around South Ossetia between the Georgian and South Ossetian sides involving armed clashes, detention of Georgian military personnel by South Ossetian forces, shelling and firing on the town of Tskhinvali and southern environs causing several casualties and property damage. Beginning August 2008 exchanges of fire intensified in Georgian and South Ossetian controlled areas. The South Ossetian authorities commenced to evacuate parts of the civilian population to North Ossetia in Russia, while some Georgians left the area for locations elsewhere in Georgia. Despite the televised announcement of a unilateral cease-fire by the President of Georgia in the evening of 7 August 2008, fighting began anew around 22:00h when Georgian armed artillery units fired at “fixed and moving” targets in South Ossetia, including Tskhinvali and surrounding areas, using heavy weaponry. Soon, the fighting involved Russian, South Ossetian, Abkhaz military units and irregular armed elements which developed into a combined inter-state conflict between Georgian and Russian forces on one level, and an intra-state conflict involving South Ossetian and Abkhaz fighters, accompanied by irregular armed groups and Georgian forces on another level.

On 8 August 2008, Georgian armed forces entered the territory of South Ossetia from the south, while Russian armed forces entered from the north through the “Roki tunnel”. The Georgian armed forces launched a ground attack against the city of Tskhinvali as well as operations on the left and right flanks of the city. The flank operations seemed to aim at moving northwards with a view to blocking movements of the Russian troops from the north. In the afternoon of 8 August 2008, the Georgian troops seized control of a great part of Tskhinvali and a number of surrounding villages. Yet, the Georgian forces encountered significant armed confrontation from South Ossetian forces, supported by Russian armed forces on the ground, covered by air strikes and elements of the Russian Black Sea Fleet, which attacked Georgian armed forces in Tskhinvali and other targets on Georgian territory. The Russian air forces reportedly attacked locations in central Georgia and gradually extended their attacks to other parts of Georgia, including the capital Tbilisi. The Russian forces were joined by South Ossetian militias. Experiencing heavy resistance, the Georgian forces withdrew and by 10 August 2008 most Georgian troops had left the South Ossetian territory preparing a defensive line for protection of Tbilisi. Yet, they were pursued by Russian and South Ossetian troops who moved beyond the administrative boundary of South Ossetia and occupied adjacent areas deeper into Georgian territory, including the town of Gori, by 12 August 2008.

³³⁰ ICC, Opinion of 6.11.2015 – ICC-01/13-51-Anx (Joint Dissenting Opinion of Judges Silvia Fernández de Gurmendi and Judge Christine van den Wyngaert, annexed to Comoros Appeals Judgment), online available at:

<http://www.legal-tools.org/doc/a86345/> (3.12.2016).

³³¹ The record carries the situation number ICC-01/15.

³³² ICC, Filing of 13.10.2015 – ICC-01/15-4 (Office of the Prosecutor, Request for authorization of an investigation pursuant to article 15 [“Georgia Request”]); in the following, two corrected versions of the request were submitted, the last of which dating 17.11.2015, ICC-01/15-4-Corr2, online available at:

<http://www.legal-tools.org/doc/eca741/> (3.12.2016).

³³³ ICC, Decision of 8.10.2016 – ICC-01/15-1 (Presidency, Decision assigning the Situation in Georgia to Pre-Trial Chamber I), online available at:

<http://www.legal-tools.org/doc/053c24/> (3.12.2016); according to regulation 46 (2) of the Regulations of the Court, the situation is assigned to a Pre-Trial Chamber, amongst other, as soon as the Prosecutor has informed the Presidency of her intention to submit a request for authorization, pursuant to regulation 45 of the Regulations of the Court.

³³⁴ The notice can be found under:

https://www.icc-cpi.int/iccdocs/otp/Article_15_Application--Notice_to_victims-ENG.pdf (3.12.2016).

³³⁵ Regulation 50 (1) of the Regulations of the Court.

³³⁶ ICC, Filing of 4.12.2015 – ICC-01/15-11 (Victims Participation and Reparation Section, Report on the Victims’ Representations Received Pursuant to Article 15 (3) of the Rome Statute), online available at:

<http://www.legal-tools.org/doc/eb0a8b/> (3.12.2016).

Despite a six-point peace plan negotiated between the Russian Federation and the European Union on 12 August 2008, and the signing of a ceasefire agreement between the Presidents of Georgia and the Russian Federation on 15 and 16 August 2008, respectively, Russian and South Ossetian forces reportedly continued their advances and occupied additional locations which had previously been under Georgian control and administration. As of 15 August 2008, Russian troops withdrew from undisputed Georgian territory but created a 20km “buffer zone” in the area adjoining the administrative boundary line of South Ossetia inside Georgian-administered territory. Civilians entered and exited the zone through Russian military checkpoints; Georgian security forces were denied access.

On 8 September 2008, an implementation agreement was reached according to which, inter alia, Russian armed forces were required to withdraw from areas adjacent to the administrative boundary line of South Ossetia by midnight of 10 October 2008. Accordingly, Russian forces withdrew from most parts of the “buffer zone” on 8-9 October 2008 following the deployment of EU monitors on 1 October 2008. The Georgian police returned to the “buffer zone” on 10 October 2008.

The civilian population, in particular ethnic Georgian civilians, was attacked primarily by South Ossetian forces, including an array of irregular militias, in Georgian-administered villages in South Ossetia and Georgian villages in the “buffer zone”. The attack took place on a large scale and targeted a large number of civilian victims, including the deliberate killing of 51 to 113 ethnic Georgians, the displacement of in total about 135.000 persons (the conflict led to a 75 % decrease in the ethnically Georgian population in South Ossetia), as well as the destruction of over 5.000 dwellings belonging to ethnic Georgians. Moreover, it was reported that from August to October 2008, primarily South Ossetian forces arbitrarily detained 345 civilians, of whom many were held in detention facilities in poor conditions. A significant number of houses of ethnic Georgians were systematically looted before they were set ablaze. It was reported that perpetrators moved in groups and used trucks to remove looted goods. These acts were reportedly committed with a view to forcibly expelling ethnic Georgians from the territory of South Ossetia in furtherance of the overall objective to change the ethnic composition of the territory, sever any remaining links with Georgia and secure independence. The de facto leadership of South Ossetia reportedly acknowledged some aspects of the policy of expulsion, in particular the deliberate destruction of civilian homes in order to prevent the return of the ethnic Georgian population. Accounts varied as regards the conduct of Russian armed forces: some members actively participated, others remained passive, and others intervened to protect and assist civilian victims.

2. The Authorization Decision

On 27 January 2016, Pre-Trial Chamber I authorized, on the basis of article 15 (4), the commencement of an investigation for crimes within the jurisdiction of the Court committed in and around South Ossetia between 1 July and 10 October

2008, and any other events which may have occurred outside South Ossetia or outside the relevant time period but that are sufficiently linked thereto.³³⁷ Despite their unanimous decision to authorize, the Judges were split over two fundamental questions: the functions of the Pre-Trial Chamber in the context of article 15 and the analysis of the material as regards admissibility. Their differing views on those points will be presented in what follows.

As regards the review standard, the Chamber relied on previous case-law and underscored that the information submitted do not need to “point towards only one conclusion” or to be “conclusive”; rather, a “sensible or reasonable justification for a belief” that a crime was or is being committed is sufficient.³³⁸ The margin within which the Prosecutor may disregard information was narrowed to only “manifestly false” information.³³⁹ This latter holding draws upon the Chamber’s position in the Comoros situation. Finally, contrary to the Kenya authorization decision,³⁴⁰ the Chamber did not limit the material scope of the investigation to the crimes mentioned in the authorization decision³⁴¹ but extended the authorization to all crimes within the jurisdiction of the Court.³⁴² This approach is correct as the article 15 information is regularly limited and only a full-fledged investigation will bring to light evidence that will allow a proper determination on the crimes committed.

As regards the context of war crimes, the Chamber proceeded in its analysis of the request on the basis that an international armed conflict existed as of 1 July 2008 until 10 October 2008 between Georgia and the Russian Federation.³⁴³ More specifically, it held that an international armed conflict existed between Georgian and Russian armed forces at the latest with the direct intervention of Russian armed forces into South Ossetian territory on 8 August 2008 until 12 August 2008 (when the 12 August peace plan was agreed upon); and thereafter until 10 October 2008 when Russian forces occupied portions of Georgian territory beyond the

³³⁷ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Pre-Trial Chamber I, Decision on the Prosecutor’s request for authorization of an investigation [“Georgia Authorization Decision”]), operative part and para. 64, online available at: <http://www.legal-tools.org/doc/a3d07e/> (3.12.2016).

³³⁸ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 25.

³³⁹ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 25.

³⁴⁰ ICC, Decision of 31.3.2010 – ICC-01/09-19-Corr (Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), para. 208 f., online available at:

<http://www.legal-tools.org/doc/f0caaf/> (3.12.2016).

³⁴¹ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 63.

³⁴² ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 64.

³⁴³ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 27.

administrative boundary line of South Ossetia, referred to as the “buffer zone”. It also assumed that there was an international armed conflict as early as 1 July 2008 as the Russian Federation exercised “overall control” over the South Ossetian forces.³⁴⁴ On the basis of the material, it would have been open for the Chamber also to conclude that a non-international armed conflict involving protracted hostilities between Georgian armed forces and South Ossetian forces existed. This alternative characterization would not have changed, however, the outcome of the decision. Moreover, the Chamber accepted that there was a widespread and systematic attack against the civilian population in South Ossetia and the “buffer zone”. The attack had been executed primarily by South Ossetian armed forces, including militias, following the policy to expel ethnic Georgians from the territories concerned within the meaning of article 7 (2) (a).

The Chamber found that crimes against humanity (murder, deportation or forcible transfer of population and persecution) and war crimes (willful killing, destruction of property, and pillaging) had been committed.³⁴⁵ It also accepted the war crime of intentionally directing attacks against peacekeepers though highlighting that several questions remained open regarding the purported loss of protected status of both Georgian and Russian peacekeeping forces as a result of their direct involvement in hostilities. Yet, it considered that these open questions did not preclude investigation but should be resolved as part of it.³⁴⁶

The Chamber criticized the Prosecutor for having “acted too restrictively” when declining determinations on other crimes (intentionally directing attacks against civilians and civilian objects, imprisonment or severe deprivation of physical liberty, and crimes involving sexual and gender-based violence, including rape) because she had only limited information, had been presented with conflicting views, or lacked corroborative information by third parties.³⁴⁷ Nevertheless, the Majority Judges asserted that it would be “inappropriate” to rectify the Prosecutor’s assessment and go beyond the

submissions of the Prosecutor since this would mean to “go beyond the scope of the Pre-Trial Chamber’s mandate under article 15 (4)”³⁴⁸ which the Chamber Majority saw to be “strictly limited”.³⁴⁹ On what statutory basis the Majority construed its limited mandate was not further explained.

This approach marks a departure from the existing case-law on article 15, in which other chambers went beyond the Prosecutor’s determinations.³⁵⁰ Also the Minority Judge, Judge Péter Kovács, did not agree with such a (self-imposed) restrictive position. He advocated for a thorough, independent and objective judicial inquiry into the Prosecutor’s material and victims’ representations and saw himself not bound by the terms of the Prosecutor’s article 15 (3) request.³⁵¹ He stressed the need for judicial control over the Prosecutor’s actions which excludes a “strictly limited” review.³⁵² He found arguments in the wording of article 15 (4) which stipulates that the “[...] Pre-Trial Chamber, upon examination of the request *and* the supporting material, *considers* that there is a reasonable basis to proceed with an investigation [...]” (emphasis added by the *author*). He also saw his position reinforced by rule 50 (4) which authorizes the Chamber to request further material from the Prosecutor and the victims.³⁵³ He exemplified the need for an independent oversight by highlighting that the Prosecutor had applied inconsistent methodology in assessing facts, for example, relating to attacks against peacekeepers and sexual violence. Despite insufficient or contradictory information, the Prosecutor did not refrain from drawing conclusions in relation to the first set of allegations, while she declined to enter any determination in relation to the second set of allegations.³⁵⁴ Accordingly, Judge Kovács rectified the Prosecutor’s assessment and, on the basis of the material and victims’ representations, determined that there was a basis to believe that also other crimes against humanity (such as imprisonment or other severe deprivation of physical liberty, rape, torture and other inhumane acts) as well as war crimes (such as intentionally directing

³⁴⁴ How the Chamber arrived to the conclusion that the Russian Federation exercised such control is not further explained in the decision. The Prosecutor highlighted, for example, (i) Russia’s role in organizing, coordinating and planning of military operations of South Ossetian forces, (ii) Russia’s provision of weapons, training, equipment, and logistical support, (iii) the holding of South Ossetian offices at the governmental level, and positions in South Ossetian de facto military, security and intelligence apparatuses by former senior officials of the Russian army, Russian nationals, or ethnic Ossetians of Russian nationality, and (iv) Russia’s passportization policy and financial aid to South Ossetian institutions, ICC, Filing of 13.10.2015 – ICC-01/15-4 (Georgia Request), para. 85 ff.

³⁴⁵ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 29, 31.

³⁴⁶ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 29.

³⁴⁷ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 34.

³⁴⁸ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 35.

³⁴⁹ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 3.

³⁵⁰ See in particular ICC, Decision of 15.11.2011 – ICC-02/11-14-Corr (Pre-Trial Chamber III, 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, online available at: <http://www.legal-tools.org/doc/e0c0eb/> (3.12.2016).

³⁵¹ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Separate Opinion of Judge Péter Kovács [“Georgia Separate Opinion”], annexed to Georgia Authorization Decision), para. 6, 11, 19 f.; online available at: <http://www.legal-tools.org/doc/28b159/> (3.12.2016).

³⁵² ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 4.

³⁵³ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 5.

³⁵⁴ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 22 ff.

attacks against the civilians and civilian objects and launching disproportionate attacks against said civilians and civilian objects by both Georgian and Russian forces, intentionally directing attacks against buildings dedicated to education, historic monuments, and hospitals, unlawful confinement, rape, torture, inhuman treatment, willfully causing great suffering, and the taking of hostages) had been committed by all sides involved in the conflict.³⁵⁵

As regards the admissibility of “potential cases”³⁵⁶ the Majority held that they would be “largely admissible”.³⁵⁷ The Majority Judges explained that if only some of the potential cases are not investigated or prosecuted by any national authorities, the admissibility criterion enshrined in article 53 (1) (b) with respect to complementarity is satisfied.³⁵⁸ With respect to South Ossetia, the Majority asserted that any proceedings would not meet the test of article 17 since South Ossetia is not a recognized State.³⁵⁹ With respect to Georgia, the Majority determined a situation of “inactivity” by accepting the argumentation of the Georgian authorities expressed in a letter dated 17 March 2015 that progress was prevented due to “a fragile security situation in the occupied territories in Georgia and the areas adjacent thereto, where violence against civilians is still widespread”.³⁶⁰ With respect to the Russian Federation, the Majority assessed its activities in relation to two sets of crimes: (i) the forcible displacement campaign to expel ethnic Georgians from South Ossetia and the “buffer zone”, and (ii) the attacks against Russian peacekeepers. In relation to the forcible displacement campaign, the Russian authorities alleged that they had been denied any assistance by Georgian authorities to conduct the investigation, and claimed that, having questioned Russian servicemen, they were unable to confirm any involvement of Russian soldiers in the crimes.³⁶¹ The Majority expressed doubts “whether the Russian authorities’ inability to access crucial evidence, i.e. to interview Georgian witnesses, constitutes inability within the meaning of article 17 of the Statute” but found it “unwarranted to attempt to conclusively resolve this question”, considering that there are other potential cases within the situation that would be admissible.³⁶² In relation to the attacks against Russian peacekeepers the Majority accepted that investigations were ongoing and determined that those

potential cases could be inadmissible.³⁶³ All “potential cases” were deemed to be sufficiently “grave”.³⁶⁴ Finally, the Majority confirmed that there were no substantial reasons to believe that an investigation would not serve the interests of justice.³⁶⁵

The Minority Judge criticized the Majority’s “short-cut” admissibility determinations and presented a more comprehensive analysis of the available information and indicated possible flaws in national investigations. With respect to South Ossetia, the Judge criticized the Majority’s “oversimplified” position to reject outright possible activities by the de facto South Ossetian authorities as relevant for the purpose of article 17 determinations. He based his approach on the following considerations: (i) a contested entity may still “enjoy an undisputed control over the territory and have the capacity to exercise criminal jurisdiction”, this issue becomes even more complex in case of a “nasciturus State, if the entity is able to set up a genuine rule of law mechanism”,³⁶⁶ (ii) a categorical standpoint runs counter to the “basic philosophy of the ICC”, and (iii) proceedings are disregarded or the person may be barred from lodging a *ne bis in idem* challenge under article 19 (2) (a) because domestic proceedings have not been conducted by a “State”.³⁶⁷ Cognizant of the wider implications of such a finding, Judge Kovács stressed that this “matter requires a case-by-case assessment without having an automatic effect on the legal status of the non-recognized entity”.³⁶⁸ This last point is an interesting addition to the interpretation of article 17 that has not yet been the subject of discussion before the Court.

With respect to Georgia, Judge Kovács agreed as to the result that there was ultimately a situation of “inactivity”³⁶⁹ but analyzed the various documentation submitted by the Georgian authorities and identified possible flaws in the national investigation. Interestingly, according to his analysis the ICC Prosecutor could have come to the conclusion that the admissibility test was not met “way before October 2015”.³⁷⁰ More concretely, assessing the first Georgian report dated May 2010 which documented the progress of two national preliminary examinations commencing beginning August 2008, the Minority Judge declared that the investigation in Georgia had fallen short of both the required incidents

³⁵⁵ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 26 ff.

³⁵⁶ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 36 f.

³⁵⁷ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 57.

³⁵⁸ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 39.

³⁵⁹ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 40.

³⁶⁰ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 41.

³⁶¹ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 44.

³⁶² ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 46.

³⁶³ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 50.

³⁶⁴ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 51 ff.

³⁶⁵ ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorization Decision), para. 58.

³⁶⁶ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 65.

³⁶⁷ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 66.

³⁶⁸ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 66.

³⁶⁹ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 54.

³⁷⁰ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 47 and fn. 94.

and alleged persons (the two elements composing the “case”) for the purpose of satisfying article 17 (1).³⁷¹ In his estimation, subsequent investigative efforts (from 2011 to 2014) by Georgian authorities concerned only lowest ranking perpetrators and did not involve serious incidents which are of concern to the ICC Prosecutor; in addition, no charges had been presented against any perpetrator. In relation to the lack of prosecutions, Judge Kovács clarified that these investigative activities clearly did not fulfill the required admissibility test since national investigations “should not be confined to simply ‘collect evidence’ but should aim at prosecutions”.³⁷² Finally, he analyzed the latest documentation, the November 2014 report, the 17 March 2015 letter and the August 2015 report, and discussed possible implications for determinations under article 17.³⁷³

With respect to the Russian Federation, Judge Kovács considered the Majority’s “inability” to make an admissibility finding involving the forcible displacement campaign legally erroneous. In his view, article 17 instructs the Chamber to render an admissibility determination on the basis of the facts as they exist at the time of the assessment.³⁷⁴ Contrary to what the Majority found, Judge Kovács held that the Russian investigation “was very limited and contradictory” and “lacked the required degree of seriousness and completeness for the purposes of satisfying the test under article 17 (1) (a) or (b)”.³⁷⁵ He concluded that “at the minimum” there exists “a situation of inactivity with respect to these potential case[s] if not unwillingness on the part of the Russian authorities to genuinely carry out the investigation”.³⁷⁶

This article 15 decision was based on a large amount of documentary material and victims’ representations unprecedented in article 15 proceedings. The wealth of the information, and victims’ representations, allowed the Chamber to take an informed decision based on its own reading of the material. Even though article 15 decisions do not bind the Prosecutor in the future selection of cases, they nevertheless provide an opportunity to assess the facts objectively and to map the crimes of the entire situation. The Prosecutor has already indicated to take the time she needs to conduct the investigation into this situation.

VIII. Preliminary Examinations

The Prosecutor regularly reports on her Office’s preliminary examination activities. In her latest update, the Prosecutor reports that since July 2002 she received 11.519 communica-

tions in total. During the last reporting period (1 November 2014 to 31 October 2015) alone, the Office of the Prosecutor received 502 communications relating to article 15 of which 360 were manifestly outside the jurisdiction of the Court, 42 warranted further analysis, 71 were linked to a situation already under analysis and 29 were linked to a pending investigation or prosecution.³⁷⁷

1. Ongoing Examinations

The Prosecutor is currently conducting ten preliminary examinations in relation to the following situations:

- a) Afghanistan³⁷⁸ concerning allegations of war crimes and crimes against humanity committed by Afghan governmental forces and their allies (ISAF³⁷⁹ and US forces) as well as anti-governmental forces (Taliban and other non-governmental armed groups) between at least January 2007 and October 2015.³⁸⁰ Her examination includes also the bombardment of the Kunduz hospital, operated by Médecins Sans Frontières, by the US air force;³⁸¹
- b) Burundi³⁸² concerning allegations of crimes (such as killings, imprisonment, torture, rape and other forms of sexual violence, and enforced disappearance) since April 2015;³⁸³
- c) Colombia³⁸⁴ concerning allegations of a number of crimes against humanity between governmental forces, paramilitary groups and rebel armed groups as well as amongst them since November 2002; and allegations of a number of war crimes since November 2009; as regards the progress of national investigations and prosecutions, the Prosecutor determined that she still lacked tangible evidence demonstrating substantial progress in Colombian investigations and prosecutions;³⁸⁵

³⁷⁷ ICC, Office of the Prosecutor, Report on Preliminary Examination Activities, 2015 (“2015 Preliminary Examinations Report”), para. 17; the report is available on the website of the Court:

<http://www.legal-tools.org/doc/ac0ed2/> (3.12.2016).

³⁷⁸ Afghanistan is a State Party to the Rome Statute. The Statute entered into force for Afghanistan on 1.5.2003.

³⁷⁹ “ISAF” stands for “International Security Assistance Force”.

³⁸⁰ 2015 Preliminary Examinations Report, para. 115 ff.

³⁸¹ 2015 Preliminary Examinations Report, para. 120.

³⁸² Burundi is a State Party to the Rome Statute. The Statute entered into force for Burundi on 1.12.2004.

³⁸³ Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening a Preliminary Examination into the situation in Burundi, 25.4.2016 (available on the website of the Court).

³⁸⁴ Colombia is a State Party to the Rome Statute. The Statute entered into force for Colombia on 1.11.2002. Due to Colombia’s article 124 declaration, the Court may exercise its jurisdiction over war crimes only from 1.11.2009 onwards.

³⁸⁵ 2015 Preliminary Examinations Report, para. 164 ff.

³⁷¹ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 43 f.

³⁷² ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 45 ff.

³⁷³ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 49 ff.

³⁷⁴ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 58.

³⁷⁵ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 60.

³⁷⁶ ICC, Opinion of 27.1.2016 – ICC-01/15-12-Anx-Corr (Georgia Separate Opinion), para. 61.

- d) Guinea³⁸⁶ concerning allegations of crimes against humanity resulting from the “28 September 2009 massacre” in the Conakry stadium;³⁸⁷ it is believed that during the 28 September 2009 massacre, 156 persons were killed and at least 109 women became victims of rape and other forms of sexual violence.³⁸⁸ Despite the extremely limited geographical and temporal scope of the conflict situation forming the basis for a potential investigation, the Prosecutor found that there was a reasonable basis to believe that crimes against humanity (murder, imprisonment or other severe deprivation of liberty, torture, rape and other forms of sexual violence, persecution and enforced disappearance) have been committed. This determination seems somewhat at odds with her determination regarding the “Maidan events” (see Ukraine below) in relation to which she declined to qualify them as crimes against humanity referring specifically to their limited geographic (in and around Maidan square within the city of Kyiv) and temporal (only specific dates, killings mainly on 18-20 February 2014) scope;³⁸⁹
- e) Iraq/United Kingdom (“UK”)³⁹⁰ concerning allegations of systematic torture, killings, rape and sexual violence, and inhuman treatment of detainees committed by members of the UK armed forces in UK-controlled facilities across Iraq between 2003 and 2008;³⁹¹
- f) Nigeria³⁹² concerning allegations of crimes against different groups and forces at different times throughout the various regions of the country, including activities of (i) “Boko Haram” and the Nigerian Security Forces, (ii) inter-communal, political and sectarian violence in central and northern parts of Nigeria, (iii) violence amongst ethnically-based gangs and militias and/or between such groups and the Nigerian armed forces in the Niger Delta, and (iv) alleged crimes committed in context of the Presidential and National Assembly elections in 28 March 2015 and the State elections on 11 April 2015;³⁹³ during the last reporting period, the Office of the Prosecutor focused its analysis on alleged crimes committed in the context of the non-international armed conflict opposing

“Boko Haram” to the Nigerian armed forces and other supporting forces covering the period 1 January 2013 to 31 March 2015;³⁹⁴ the Prosecutor identified eight potential cases, six for conduct of the “Boko Haram” and two for Nigerian Security Forces.³⁹⁵

- g) Palestine³⁹⁶ concerning allegations of crimes committed by IDF and Palestinian armed groups on the territory of Palestine in the context of several military operations into Gaza since 13 June 2014;³⁹⁷
- h) Ukraine³⁹⁸ concerning allegations of crimes arising from the “Maidan” events from 21 November 2013 until 22 February 2014, and the events in East Ukraine related to the annexation of Crimea and occupation of other parts of the country after 20 February 2014;³⁹⁹ the Prosecutor declined to characterize the “Maidan events” as crimes against humanity within the meaning of article 7, arguing that the crimes were not “widespread or systematic”.⁴⁰⁰ She did not as yet espouse her views on the legal characterization of the events post-February 2014. For the purpose of delineating the “situation”, she considered that even though the events as of late-February 2014 are distinct from the “Maidan events” they can nevertheless be perceived as a continuation of the situation involving the “Maidan events”. As a result, she extended the temporal scope of the preliminary examination into the situation.⁴⁰¹ Finally, the Prosecutor expressed her readiness to investigate in this situation also the shooting down of the Malaysia Airlines MH17 aircraft in July 2014;⁴⁰²
- i) Union of the Comoros (reconsideration of the Prosecutor’s 6 November 2014 decision);

³⁸⁶ Guinea is a State Party to the Rome Statute. The Statute entered into force for Guinea on 1.10.2003.

³⁸⁷ 2015 Preliminary Examinations Report, para. 170 ff.

³⁸⁸ 2015 Preliminary Examinations Report, para. 171.

³⁸⁹ 2015 Preliminary Examinations Report, para. 96 ff.

³⁹⁰ Iraq is not a State Party to the Rome Statute. The UK is a State Party to the Rome Statute. The Statute entered into force for the UK on 1.7.2002.

³⁹¹ A preliminary examination was opened on 13.5.2014 following the communication of new information submitted by NGOs. It is recalled that former Prosecutor Luis Moreno Ocampo decided on 9.2.2006 not to act upon earlier communications arguing that the gravity threshold for potential cases was not met; see online at:

<http://www.legal-tools.org/doc/5b8996/> (3.12.2016).

³⁹² Nigeria is a State Party to the Rome Statute. The Statute entered into force for Nigeria on 1.7.2002.

³⁹³ 2015 Preliminary Examinations Report, para. 190.

³⁹⁴ 2015 Preliminary Examinations Report, para. 192.

³⁹⁵ 2015 Preliminary Examinations Report, paras 195 ff.

³⁹⁶ Palestine acceded to the Rome Statute on 2.1.2015.

³⁹⁷ A preliminary examination was opened on 16.1.2015 following Palestine’s its lodging of a second article 12 (3) declaration on 1.1.2015, accepting the Court’s jurisdiction for alleged crimes “committed in the occupied Palestinian territory, including East Jerusalem, since 13.7.2014” and its accession to the Rome Statute on 2.1.2015. It is recalled that former Prosecutor Luis Moreno Ocampo decided not to act upon Palestine’s first article 12 (3) declaration lodged on 22.1.2009, since in his view Palestine’s “observer status” at the UN did not allow Palestine to join the Rome Statute; see online at:

<http://www.legal-tools.org/doc/f5d6d7/> (3.12.2016).

³⁹⁸ Ukraine is not a State Party to the Rome Statute.

³⁹⁹ A preliminary examination was opened on 25.4.2014 following Ukraine’s lodging of the first article 12 (3) declaration on 9.4.2014 regarding the “Maidan” events. Following the lodging of the second article 12 (3) declaration on 8.9.2015, the Prosecutor announced on 29.9.2015 to extend the temporal scope of her ongoing preliminary analysis to include also all other events committed in the territory of Ukraine since 20.2.2014 onwards.

⁴⁰⁰ 2015 Preliminary Examinations Report, para. 95 ff.

⁴⁰¹ 2015 Preliminary Examinations Report, para. 106 ff.

⁴⁰² 2015 Preliminary Examinations Report, para. 110.

- j) Gabonese Republic⁴⁰³ concerning allegations of crimes that occurred on the territory of Gabon since May 2016 and in context of presidential elections.⁴⁰⁴ The Prosecutor received a referral from the Government of the Gabonese Republic on 21 September 2016 containing allegations of genocide and crimes against humanity.

2. Completed Examinations

After having conducted a preliminary examination since 6 December 2010, the Prosecutor, in June 2014, declined to open an investigation into the situation in the Republic of Korea (or “South Korea”)⁴⁰⁵ for lack of jurisdiction *ratione materiae*.⁴⁰⁶ The situation involved two incidents: (i) the sinking of a South Korean warship (the Cheonan), and (ii) the shelling of South Korea’s Yeonpyeong Island on 23 November 2010 which resulted in killing of four persons (two civilians and two military) and the destruction of military and civilian facilities on a large scale (estimated cost USD 4.5 million). Both attacks were purportedly launched from the Democratic People’s Republic of Korea (“DPRK”). The Prosecutor confirmed that the Court has territorial jurisdiction since the conduct occurred on South Korean territory or vessels registered in South Korea. She also accepted that at the time of the incidents, an international armed conflict existed: both countries are technically still at war pending the negotiation of a peace agreement. Also, the resort to armed force between them created an international armed conflict. However, she considered that the sinking of a military war ship was not a war crime under article 8. Also, the attack against Yeonpyeong Island did not fulfill the legal requirements of the two war crimes of intentional attack against the civilian population (article 8 [2] [b] [i]) or intentional attack in the knowledge that such attack will cause excessive incidental death, injury or damage (article 8 [2] [b] [iv]). To the extent the attack targeted military objects, article 8 was not applicable. To the extent the attack had an impact on civilians or civilian facilities, the information available did not allow the conclusion that they were the objects of the attack.

On 28 October 2015, the Prosecutor, having conducted a preliminary analysis into the situation since 18 November 2010, decided not to open an investigation into the situation in Honduras⁴⁰⁷ for lack of jurisdiction *ratione materiae*.⁴⁰⁸

⁴⁰³ Gabon is a State Party to the Rome Statute. The Statute entered into force for Gabon on 1.7.2002.

⁴⁰⁴ Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic, 29.9.2016 (available on the website of the Court).

⁴⁰⁵ South Korea is a State Party to the Rome Statute. The Statute entered into force for South Korea on 13.11.2003. The Democratic People’s Republic of Korea is not a State Party to the Rome Statute.

⁴⁰⁶ Office of the Prosecutor, Situation in the Republic of Korea – Article 5 Report, June 2014, online available at: <http://www.legal-tools.org/doc/ef1f7f/> (3.12.2016).

⁴⁰⁷ Honduras is a State Party to the Rome Statute. The Statute entered into force for Honduras on 1.9.2002.

The situation involved allegations arising from the coup d’état of 28 June 2009. On that day, former President José Manuel Zelaya Rosales was arrested, following an arrest warrant by the Supreme Court of Justice, by members of the armed forces and forcibly flown to Costa Rica. Immediately thereafter, the then de facto government implemented a series of measures restricting freedom of movement, assembly and expression. Demonstrations against the coup d’état organized by Zelaya supporters throughout the country met resistance and violence by state security forces resulting in large-scale human rights abuses. In the following years, violence escalated sharply throughout Honduras owed, in part, to the rise of drug-trafficking and criminal organizations, the proliferation of weapons and local rivalries. In the absence of information suggesting the existence of an armed conflict or genocide, the Prosecutor focused her analysis on whether crimes against humanity (including killings, imprisonment or severe deprivation of liberty, causing serious injuries, torture, sexual violence, and enforced disappearances) had been committed. Of importance is her explanation that the statutory definition of crimes against humanity imposes strict legal requirements that distinguish this type of crimes from ordinary crimes committed as part of a “general, chronic and structural violence”. In the present instance, the Prosecutor denied the existence of the contextual elements of crimes against humanity, albeit calling this situation a “borderline case”.

3. Examination: Maybe Completed – Maybe Not?

Following reports of mass executions, sexual slavery, rape and other forms of sexual violence, torture, mutilations, recruitment of child soldiers, the persecution of religious and ethnic minorities, and wanton destruction of cultural property, committed by the so-called Islamic State of Iraq and al-Sham/Greater Syria (“ISIS”), the Prosecutor reacted publically on 8 April 2015 stating that “the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage”.⁴⁰⁹ It seems that the Prosecutor took a decision under article 53 (1) (a) not to open an investigation. This statement appears, however, somewhat at odds with her preliminary analysis of the jurisdictional parameters of the situation. She recalled that the Court may not exercise territorial jurisdiction since neither Iraq nor Syria are State Parties to the Rome Statute. However, she affirmed that the Court can exercise personal jurisdiction over nationals of States Parties who joined the ranks of ISIS, such as Tunisia, Jordan, France, United Kingdom, Germany, Belgium, the Netherlands, and Australia. Indeed, the Prosecutor would be compe-

⁴⁰⁸ Office of the Prosecutor, Situation in Honduras – Article 5 Report, October 2015, online available at:

<http://www.legal-tools.org/doc/54755a/> (3.12.2016).

⁴⁰⁹ Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, 8.4.2015 (available on the website of the Court at:

<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>).

tent to proceed with an investigation pursuant to article 12 (2) (b), if all other parameters under article 53 (1) were met.

The Prosecutor further acknowledged that ISIS is to be considered as a “military and political organization”, led by nationals of Iraq and Syria, but determined that “at this stage, the prospects of [her] Office investigating and prosecuting those most responsible, within the leadership of ISIS, appear limited”. One may infer from this statement that she also took a decision under article 53 (1) (b) having directed her analysis to individuals at the leadership level of the ISIS. If this were the case, her decision would be based on the admissibility element in article 53 (1) (b) but not its jurisdictional counterpart in article 53 (1) (a). As a side note, in light of the Comoros decision and the 2006 Appeals Chamber judgment concerning the issuance of a warrant of arrest against Bosco Ntaganda, it is hoped that the Prosecutor would extend her examination to those who bear the “greatest responsibility” regardless of their hierarchical position within the ISIS leadership.