

# Recent developments in the jurisprudence of the International Criminal Court – Part 1\*

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The period 2016-2017 was busy for the International Criminal Court (“ICC”). Three judgments convicting six persons in total (Al Mahdi, Arido, Babala, Bemba, Kilolo, Mangenda) and two reparations orders against two convicted persons were delivered (Al Mahdi, Katanga). Trial proceedings in the Gbagbo/Blé Goudé case, Ntaganda case, and the Ongwen case commenced or were ongoing. Besides interlocutory appeals, various appellate proceedings in relation to the judgments of convictions, decisions on sentencing and reparations orders were initiated. In comparison, it has been rather quiet in the Pre-Trial Division, until the moment the Prosecutor approached Pre-Trial Chamber III to open an investigation in two situations (Afghanistan, Burundi). From the plethora of decisions and judgments, only a selection of judicial rulings will be presented in this article.

As always, 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)<sup>1</sup>

No proceedings at the *situation* level took place during the review period. To date, six cases emanated from this situation. The Lubanga and Katanga cases are in the reparation phase, the Ngudjolo case was concluded with the Appeals

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\* Previous overviews of the Court’s jurisprudence are available at ZIS 2008, 367; 2008, 371; 2010, 726; 2011, 843; 2013, 130; 2015, 523; 2016, 813. 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 The Hague on 12.5.2017. It considers jurisprudential developments until 15.11.2017. The second part of this article will be published in ZIS 1/2018.

\*\* The *author* is a 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> [4.12.2017]). The *author* wishes to thank her colleagues Adeline Bedoucha, Andreanne Charpentier-Garant and Teodora Jugrin for their valuable comments on parts of the paper.

<sup>1</sup> The record carries the situation number ICC-01/04; ICC, Decision of 21.8.2015 – ICC-01/04-639 (Decision Re-assigning the Situation in the Democratic Republic of the Congo).

Chamber’s confirmation of his acquittal in 2015, the charges had not been confirmed in the Mbarushimana case and the warrant of arrest against Mudacumura is yet to be executed. The Ntaganda case is in the trial phase.

### 1. *Prosecutor v. Thomas Lubanga Dyilo (Trial Chamber II/ Presidency)*<sup>2</sup>

- Warrant of arrest: 10 February 2006 (public on 17 March 2006)
- Surrender to the Court: 17 March 2006
- Confirmation of charges: 29 January 2007
- Trial: 26 January 2009-26 August 2011
- Victims participating: 146 (trial)
- Conviction: 14 March 2012
- Sentencing: 10 July 2012
- Appeal Judgment: 1 December 2014
- Transfer Lubanga to DRC: 19 December 2015
- Current status: Reparations

It is recalled that on 22 September 2015, a Panel of three Judges appointed by the Appeals Chamber, determined that it was not appropriate to reduce Lubanga’s sentence of 14 years’ imprisonment, pursuant to article 110 of the Rome Statute<sup>3</sup> and rule 224 of the Rules of Procedure and Evidence,<sup>4</sup> and decided that it would review his sentence two years from the issuance of the decision.<sup>5</sup> On 7 August 2017 (as amended on 5 September 2017), the Panel issued a scheduling order for the second review of the sentence.<sup>6</sup> Since 19 December 2015 Lubanga spends the remainder of his sentence in prison facilities in the Democratic Republic of the Congo (“DRC”).

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

<sup>3</sup> Rome Statute of the International Criminal Court (UN [ed.], Treaty Series, vol. 2187, p. 3). All articles mentioned in this paper without reference to the legal instrument are those of the Rome Statute.

<sup>4</sup> The Rules of Procedure and Evidence (ICC-ASP/1/3 and Corr.1, as amended by resolutions ICC-ASP/11/Res. 2, ICC-ASP/12/Res. 7 and ICC-ASP/15/Res. 5). All rules mentioned in this paper without reference to the legal instrument are those of the ICC’s Rules of Procedure and Evidence.

<sup>5</sup> ICC, Decision of 22.9.2015 – ICC-01/04-01/06-3173 (Decision on the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo [“Lubanga First Sentence Review Decision”]). See also Chaitidou, ZIS 2016, 813 (814 s.).

<sup>6</sup> ICC, Order of 7.8.2017 – ICC-01/04-01/06-3346 (Scheduling Order for the second review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo); Order of 5.9.2017 – ICC-01/04-01/06-3355 (Order modifying the “Scheduling Order for the second review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo”).

The Panel reviewed Lubanga's sentence with a view to deciding whether to reduce it. To this end, it recalled the guiding considerations it had established in its First Sentence Review Decision and added that "the second review would be limited to the Panel's consideration of whether there has been any significant change in circumstances since the date of the First Sentence Review Decision".<sup>7</sup> Having considered all submissions, the Panel determined that there has been no significant change in circumstances regarding the factors<sup>8</sup> entertained in the First Sentence Review Decision and declined to reduce the sentence. Perhaps of interest is the Panel's consideration, already espoused in the First Sentence Review Decision, that a reduction of sentence as a remedy for human rights violations does not find a basis in article 110 or rule 223.<sup>9</sup> Lastly, the Panel found that since Lubanga's sentence expires on 15 March 2020, there is no need for a further review of his sentence, unless Lubanga applied for a review under rule 224 (3).<sup>10</sup>

## 2. *Prosecutor v. Germain Katanga (Trial Chamber II)*<sup>11</sup>

- Warrant of arrest: 2 July 2007
- Surrender to the Court: 17 October 2007
- Confirmation of charges: 26 September 2008
- Trial: 24 November 2009-23 May 2012 (together with Ngudjolo Chui)
- Severance from Ngudjolo case: 21 November 2012
- Victims participating: 364 (trial)
- Conviction: 7 March 2014
- Sentencing: 23 May 2014
- Transfer Katanga to DRC: 19 December 2015
- Current status: Reparations

On 4 March 2014, Katanga was convicted by Trial Chamber II in its previous composition, by majority, as an accessory, within the meaning of article 25 (3) (d), to the crime against humanity of murder and war crimes of murder, destruction of enemy property, pillaging, and attack against a civilian population as such or against individual civilians not taking direct part in hostilities, committed on 24 February 2003 in Bogoro.<sup>12</sup> On 23 May 2014, the Judges of Trial

<sup>7</sup> ICC, Decision of 3.11.2017 – ICC-01/04-01/06-3375 (Second Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo ["Lubanga Second Sentence Review Decision"]), para. 30.

<sup>8</sup> The factors are to be found in article 110 (4) and rule 223.

<sup>9</sup> ICC, Decision of 3.11.2017 – ICC-01/04-01/06-3375 (Lubanga Second Sentence Review Decision), para. 92.

<sup>10</sup> ICC, Decision of 3.11.2017 – ICC-01/04-01/06-3375 (Lubanga Second Sentence Review Decision), para. 95.

<sup>11</sup> The record carries the case number ICC-01/04-01/07.

<sup>12</sup> ICC, Judgment of 4.3.2014 – ICC-01/04-01/07-3436-tENG (Judgment pursuant to article 74 of the Statute) with six annexes; Opinion of 7.3.2014 – ICC-01/04-01/07-3436-AnxI (Minority Opinion of Judge Christine Van den Wyngaert).

Chamber II, by majority, sentenced him to 12 years' imprisonment.<sup>13</sup>

### a) *Reparations Order*

Almost three years later, on 24 March 2017, a newly composed Trial Chamber II delivered the reparations order against Katanga.<sup>14</sup> Therein, it entertained 341 applications for reparations by victims of which 297 have shown that they were victims of Katanga.<sup>15</sup> The most important findings are summarised hereinafter.

At the outset, the Chamber recalled the purpose of and nature of reparation proceedings: the Chamber recalled that they aim at "deliver[ing] justice to victims by alleviating, as far as possible, the consequences of the wrongful acts" and are intrinsically connected with the criminal proceedings, yet distinct from them.<sup>16</sup>

As regards the principles to be applied, the Chamber pronounced to adopt the principles as enunciated in the Lubanga case and to address the five elements of a reparations order the Appeals Chamber established in the same case.<sup>17</sup> The Trial Judges opined that in order to satisfy the five elements of reparations, it is necessary to analyse all 341 applications individually; this analysis would also "inform the Chamber's assessment of the total extent of the harm caused to the Applicants".<sup>18</sup>

As regards the element that the "Chamber 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 of which the person was convicted", the Trial Chamber set forth its understanding of the relevant rule 85 criteria for the victims who suffered harm as a result of the crimes for which Katanga was convicted.<sup>19</sup> The Chamber also set out the criteria, evidentiary principles and evaluation method according to which it assessed the applications and supporting documentation that victims brought forward in order to substantiate their claims.<sup>20</sup> Accordingly, in the annex to the Reparations Order, the Chamber set out its assessment of whether the

<sup>13</sup> ICC, Decision of 23.5.2014 – ICC-01/04-01/07-3484-tENG (Decision on Sentence pursuant to article 76 of the Statute); Opinion of 23.5.2014 – ICC-01/04-01/07-3484-AnxI (Dissenting opinion of Judge Christine Van den Wyngaert).

<sup>14</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Order for Reparations pursuant to Article 75 of the Statute ["Katanga Reparations Order"]).

<sup>15</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 168.

<sup>16</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 15-16.

<sup>17</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 30-31.

<sup>18</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 33.

<sup>19</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 35-43.

<sup>20</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 45-73.

341 applicants qualify, “on a balance of probabilities”,<sup>21</sup> as “victims” for the purposes of reparations. Worthy of note is the Chamber’s appraisal that the applications “do not, at first sight, seem to contain exaggerated or extravagant allegations and appear credible, including vis-à-vis the findings of fact entered by Trial Chamber II, sitting in its previous composition, in its Judgment”.<sup>22</sup>

As regards the element that the order must “define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted”, the Chamber set forth its understanding of the relevant rule 85 criteria for the victims who suffered harm as a result of the crimes for which Katanga was convicted. The Chamber assessed, against the findings contained in the Judgment on conviction, the following: (i) material harm,<sup>23</sup> such as destruction of houses, outbuildings of houses and business premises; destruction or pillaging of furniture, personal effects and wares; pillaging of livestock, destruction of fields and harvest, and pillaging of harvest (as to the extent of the harm, the Chamber presumed the harm sustained, in general, to be equivalent to consumption per capita);<sup>24</sup> destruction or pillaging of family property; (ii) physical harm;<sup>25</sup> (iii) psychological harm either connected to the death of a relative or to the experience of the attack on Bogoro;<sup>26</sup> and harm *sui generis*, such as, loss of living standard, loss of opportunity and forced departure.<sup>27</sup> In its consideration of the harm, the Chamber did not consider physical or psychological harm occasioned by rape or sexual slavery, for which Katanga was not found guilty.<sup>28</sup> Equally, former child soldiers were declared ineligible for reparations since Katan-

ga was not found guilty for those crimes.<sup>29</sup> In this regard, the Chamber invited the Trust Fund for Victims “to give consideration as part of its assistance mandate, wherever possible, to the harm suffered by the Applicants in the attack on Bogoro upon which the Chamber has not been in a position to act in the case”.<sup>30</sup>

Upon assessment of the applications in the light of the aforementioned, the Chamber summarised the concrete harm, including the destruction of 230 houses and six outbuildings, the destruction and pillaging of three business premises made of durable material and 18 business premises made of other material, pillaging of 150 cows and eight goats, physical harm in two instances (bullet wounds), psychological harm in connection to the death of a close relative (spouses, parents, children, grandparents and grandchildren) in 201 instances, psychological harm in connection to the death of a distant relative in 284 instances, and psychological harm in connection to the attack in Bogoro in all 297 instances.<sup>31</sup>

As regards the extent of the harm, the Chamber ruled that the monetary value must be assessed at the time of the award.<sup>32</sup> For the purpose of material harm, the Chamber took into account the “economic context of the Ituri region and that of the village of Bogoro in particular”.<sup>33</sup> The economic context was considered immaterial for other types of harm.<sup>34</sup> In the following, the Chamber set forth its calculation of the monetary value for each head of harm and summarised it in a table. Where the Chamber could not identify any reference to consult, it made an *ex aequo et bono* assessment of the harm.<sup>35</sup> The monetary value of the extent of the harm thus identified was considered to amount to USD 3.752.620.<sup>36</sup>

As regards Katanga’s personal liability, the Chamber’s starting point was Katanga’s conviction as an accessory within the meaning of article 25 (3) (d). That said, the Chamber did pay heed to the specific factual and legal elements of that

<sup>21</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 50.

<sup>22</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 66.

<sup>23</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 76-107.

<sup>24</sup> The Chamber determined that “consumption of livestock per capita amounts to the value of the total livestock kept – one cow, two goats and three hens – and consumption of fields or harvests per capita amounts to the price fetched by ten piquets of the commonest crops in Bogoro”, ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 101.

<sup>25</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 108-111.

<sup>26</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 112-135; “transgenerational harm” (i.e. a phenomenon whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter) was not accepted. However, the Chamber recommended that children be monitored and afforded particular attention.

<sup>27</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 136-139.

<sup>28</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 146-152.

<sup>29</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 157-161.

<sup>30</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 344 (footnote omitted).

<sup>31</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 169, 171, 174, and 175.

<sup>32</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 185.

<sup>33</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 188.

<sup>34</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 189.

<sup>35</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 191. Accordingly, the Chamber set psychological harm connected to the death of a near relative *ex aequo et bono* at USD 8.000, psychological harm connected to the death of a distant relative *ex aequo et bono* at USD 4.000 and psychological harm connected to the experience of the attack *ex aequo et bono* at USD 2.000, ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 232 and 236.

<sup>36</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 239.

participation.<sup>37</sup> Lastly, against the backdrop that the crimes, for which Katanga was held responsible, had been committed by a plurality of persons, the Chamber held that “the justification advanced to order against the convicted person an award for reparations for the totality of the harm suffered by the victims [...] cannot be imported into the particular context of cases before this Court”.<sup>38</sup> Having had regard to all factors, as described above, the Chamber set the total amount of Katanga’s liability for reparation at USD 1.000.000.<sup>39</sup>

As regards the type of reparations, the Chamber opted for a combination of individual and collective reparations.<sup>40</sup> “Individual reparation” was defined as a benefit to which the person is exclusively entitled;<sup>41</sup> “collective reparation” must benefit a group or category of persons who – in their perception – have suffered shared harm.<sup>42</sup> In relation to collective reparations, the Chamber differentiated further between “community reparations” (e.g. school, hospital),<sup>43</sup> and reparations focusing on individual members of the group (e.g. special healthcare).<sup>44</sup> As regards the modalities of reparations, the Chamber determined that each victim the Chamber has identified receive a symbolic award of USD 250 compensation.<sup>45</sup> The Chamber also made an award of collective reparations in the form of “support for housing, support for an income-generating activity, support for education and psychological support”.<sup>46</sup> It is worthy of mention that a number of victims “specifically rejected certain modalities, such as commemorative events, broadcasts of the trial, the erection of monuments or the tracing of missing persons”.<sup>47</sup>

As regards the implementation of the Reparations Order, the Chamber directed the Trust Fund for Victims “to prepare a draft plan for the implementation of the present order for reparations” and laid down the procedure for approval of the draft plan.<sup>48</sup> In addition, the Trust Fund for Victims was in-

ited to consider providing resources for the funding and implementation of individual and collective reparations.<sup>49</sup> In a second decision, the Chamber will decide whether to approve the draft plan and enjoin the Trust Fund for Victims to carry it out. Lastly, the Defence was directed to discuss with the Trust Fund for Victims Katanga’s contribution to the modalities, should he so wish to partake, such as a “letter of apology, public apologies, or the holding of a ceremony of reconciliation once he has served his sentence”.<sup>50</sup>

#### *b) Implementation of Reparations Order and Appellate Proceedings*

On 17 May 2017, the Trust Fund for Victims notified the Trial Chamber of its decision to complement the payment of the individual and collective awards for reparations for 297 victims in the amount of USD 1.000.000.<sup>51</sup> In addition, the Trust Fund for Victims submitted on 25 July 2017 a draft implementation plan, as ordered by Trial Chamber II.<sup>52</sup>

Furthermore, the Reparations Order was appealed by the Defence, the legal representatives of victims and the Office of Public Counsel for victims (“OPCV”).<sup>53</sup> Subsequently, the Appeals Chamber gave directions on the conduct of the appeal proceedings.<sup>54</sup>

#### *3. Prosecutor v. Bosco Ntaganda (Trial Chamber VI)<sup>55</sup>*

- First warrant of arrest: 22 August 2006 (public on 28 April 2008)
- Second warrant of arrest: 13 July 2012

<sup>37</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 251-263.

<sup>38</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 263.

<sup>39</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 264.

<sup>40</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 293.

<sup>41</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 271.

<sup>42</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 275.

<sup>43</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 279.

<sup>44</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 280.

<sup>45</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 300.

<sup>46</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 304.

<sup>47</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 301.

<sup>48</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 307-314.

<sup>49</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), paras 330-342.

<sup>50</sup> ICC, Order of 24.3.2017 – ICC-01/04-01/07-3728-tENG (Katanga Reparations Order), para. 318.

<sup>51</sup> ICC, Filing of 17.5.2017 – ICC-01/4-01/07-3740 (Notification pursuant to regulation 56 of the TFV Regulations regarding the Trust Fund Board of Director’s decision relevant to complementing the payment of the individual and collective reparations awards as requested by Trial Chamber II in its 24.3.2017 order for reparations).

<sup>52</sup> ICC, Filing of 25.7.2017 – ICC-01/04-01/07-3751-Red (Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24.3.2017 [ICC-01/04-01/07-3728]) with five confidential annexes.

<sup>53</sup> ICC, Filing of 29.6.2017 – ICC-01/04-01/07-3747-Red (Defence Document in Support of Appeal against the Reparations Order); OPCV, Filing of 27.6.2017 – ICC-01/04-01/07-3746-Red (Public Redacted Version of Document in Support of the Appeal against Trial Chamber II’s “Ordonnance de réparation en vertu de l’article 75 du Statut”); Legal Representatives of Victims, Filing of 27.6.2017 – ICC-01/04-01/07-3745-tENG (Document in Support of the Appeal against the Order for Reparations under Article 75 of the Statute with its Annex II).

<sup>54</sup> ICC, Decision of 7.8.2017 – ICC-01/04-01/07-3752 (A3, A4, A5, Directions on the conduct of appeal proceedings).

<sup>55</sup> The record carries the case number ICC-01/04-02/06.

- Surrender to the Court: 22 March 2013
- Confirmation of charges: 9 June 2014
- Trial: since 2 September 2015
- Victims participating: 2.131
- Current status: presentation of evidence by the Defence

Trial Chamber VI, assigned with this case,<sup>56</sup> has taken a series of interesting decisions prior to and during the trial which was set to commence on 2 September 2015.<sup>57</sup> The case is, at present, very advanced and it may be expected that the judgment will be rendered next year.

#### *a) War Crimes Committed Against Child Soldiers*

After the charges had been confirmed in June 2014, trial preparations started before Trial Chamber VI. One of the contested issues, already at the pre-trial stage, had been the confirmation of charges 6 and 9 involving rape and sexual slavery of child soldiers under the age of 15 years which had been members of the armed group Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (“UPC/FPLC”). The Defence had alleged that the crimes against child soldiers are not foreseen in the Statute since international humanitarian law (“IHL”) does not protect persons taking part in hostilities from crimes committed by other persons taking part in hostilities on the same side of the armed conflict. The Pre-Trial Chamber approached this issue by first enquiring whether the children had lost the protection under IHL by taking direct/active part in hostilities at the time they were victims of acts of rape and/or sexual slavery. The Judges acknowledged that the children were members of the armed group but considered that this alone could not be seen as determinative proof of direct/active participation in hostilities, considering that their presence in the armed group is specifically proscribed under international law in the first place. They then assessed the children’s status from a practical point of view, noting that the children could not be considered to have taken active part in hostilities during the specific time when they were subject to acts of sexual nature. Drawing upon common article 3 of the 1949 Geneva Conventions and article 4 of Additional Protocol II to the Geneva Conventions, the Pre-Trial Chamber clarified that the child soldiers enjoyed protection under IHL from acts of rape and sexual slavery, as reflected in article 8 (2) (e) (vi). As a result, the charges were confirmed.

Shortly before the commencement of trial, the Defence raised the issue again. On 1 September 2015, it requested that the Trial Chamber finds that the Court lacks material jurisdiction over the charges 6 and 9 arguing that child soldiers could

not be victims of rape and sexual slavery as war crimes committed by members of their own armed group.<sup>58</sup> As a consequence, it requested that no evidence be presented in relation to these charges until the matter is decided.

The Trial Chamber responded, first, that the crimes concerned were part of the Statute in article 8 (2) (e) (vi), allowing the Court to exercise jurisdiction over the charges. The Judges also observed that the provision did not specify the category of victims but related to all persons.<sup>59</sup> Responding to the Defence argument that prosecuting Mr. Ntaganda on the basis of charges 6 and 9 would violate the principle of *nullum crime sine lege*, the Chamber held that charging Mr. Ntaganda separately for the rape and sexual slavery of child soldiers (in contrast to other persons) did not unduly broaden the scope of article 8 (2) (e) (vi) but was simply a manner to denote the different groups of victims.<sup>60</sup> In closing the matter, the Chamber clarified that it would not address, at this stage, whether such children can be victims of rape and sexual slavery when committed by members of the same group but that it would address this question of substantive law in the judgment.<sup>61</sup> Accordingly, the request was rejected in its entirety and the presentation of evidence at trial continued as planned. The Defence appealed the decision directly under article 82 (1) (a) requesting that the Appeals Chamber determines that the Trial Chamber is barred from exercising jurisdiction over charges 6 and 9.

The Appeals Chamber first addressed the admissibility of the appeal since the Defence had actually filed an article 19 challenge to the *ratione materiae* jurisdiction of the Court which the Trial Chamber had entertained as a question of substantive law. In this particular instance, the Appeals Chamber confirmed the admissibility of the appeal arguing that decisions rejecting article 19 challenges on the grounds that they do not challenge the jurisdiction of the Court must be considered to be “decisions with respect to jurisdiction” within the meaning of article 82 (1) (a).<sup>62</sup>

As to the merits of the appeal, it is worth mentioning that the Appeals Chamber accepted that the question whether or not article 8 (2) (e) (vi) covers factual allegations involving child soldiers having been raped or held in sexual slavery by members of their own armed group was jurisdictional in

<sup>56</sup> ICC, Decision of 18.7.2014 – ICC-01/04-02/06-337 (Decision constituting Trial Chamber VI and referring to it the case of *The Prosecutor v. Bosco Ntaganda*).

<sup>57</sup> ICC, Transcript of Hearing, 3.7.2015, ICC-01/04-02/06-T-22-Red-ENG, p. 5, lines 10-16. A leave to appeal this decision was rejected, ICC, Decision of 4.8.2015 – ICC-01/04-02/06-760-Red (Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date).

<sup>58</sup> ICC, Filing of 1.9.2014 – ICC-01/04-02/06-804 (Application on behalf of Mr. Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9).

<sup>59</sup> ICC, Decision of 9.10.2015 – ICC-01/04-02/06-892 (Decision on the Defence’s challenge to the jurisdiction of the Court in respect of counts 6 and 9 [“First Jurisdiction Decision”]), para. 25.

<sup>60</sup> ICC, Decision of 9.10.2015 – ICC-01/04-02/06-892 (First Jurisdiction Decision), para. 27.

<sup>61</sup> ICC, Decision of 9.10.2015 – ICC-01/04-02/06-892 (First Jurisdiction Decision), para. 28.

<sup>62</sup> ICC, Judgment of 22.3.2016 – ICC-01/04-02/06-1225 (OA2, Judgment on the appeal of Mr. Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect to Counts 6 and 9” [“First Appeals Judgment on Jurisdiction”]), para. 20.

nature. This is the case because the question is legal in nature, the resolution of which may result in the crime charged falling outside the *ratione materiae* jurisdiction of the Court; no further factual or evidentiary assessment is necessary.<sup>63</sup> The Chamber went at great length distinguishing its approach in this case from that taken in the Kenya cases by highlighting that in those cases the Appeals Chamber was confronted with the question of whether an “organisational policy” within the meaning of article 7 (2) (a) existed as a matter of law *and* fact and whether any challenge to these findings, legal or factual, is necessarily jurisdictional in nature.<sup>64</sup> Nevertheless, it acknowledged that in certain circumstances some verification as to whether the facts alleged correspond in law to the crimes charged may be necessary.<sup>65</sup> Accordingly, where the challenge would, if successful, eliminate the legal basis for a charge on the facts alleged by the Prosecutor, it may be considered to be a jurisdictional challenge.<sup>66</sup> As a result, the Appeals Chamber determined that the Trial Chamber had erred in rejecting the Defence challenge on the basis that it was a matter for determination at trial and remanded the challenge to the Trial Chamber for it to address the challenge properly under article 19.

In considering the matter again, the Trial Chamber determined that the Defence had already challenged the *ratione materiae* jurisdiction at the pre-trial stage before the commencement of trial<sup>67</sup> but accepted the existence of exceptional circumstances meriting the adjudication of a second jurisdictional challenge.<sup>68</sup> As regards the merits of the challenge, the Trial Chamber clarified that neither article 8 (2) (b) (xxii) and (2) (e) (vi) nor the corresponding Elements of Crimes contained a particular victim status requirement (“protected person”).<sup>69</sup> The Chamber further was unable to identify any limitations from the broader international legal framework,

such as (inter)national instruments and case-law,<sup>70</sup> the Martens Clause<sup>71</sup> and rationale of IHL,<sup>72</sup> the ICRC commentary,<sup>73</sup> and general principles of international law.<sup>74</sup> The Chamber went one step further and declared the prohibition of rape and sexual slavery to be peremptory norms entailing that this prohibition applied both in times of peace and war, irrespective of the status of the victims.<sup>75</sup> As a result, the Chamber determined that “members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery” under the statutory framework and confirmed that the Court had jurisdiction over the conduct as described in charges 6 and 9.<sup>76</sup>

The Defence appealed the second decision anew under article 82 (1) (a) requesting the Appeals Chamber to scrutinise whether the Trial Chamber had erred in law when determining that victims of war crimes of rape and sexual slavery do not have to be protected persons in terms of the 1949 Geneva Conventions or common article 3. The Appeals Chamber approached the issue by confirming that, in contrast to other provisions, neither the plain wording of articles 8 (2) (b) (xxii) and (2) (e) (vi) and the *chapeau* of articles 8 (2) (b) or (e), nor the drafting history or context provide that the victims must be protected persons in terms of the 1949 Geneva Conventions or common article 3.<sup>77</sup> The Chamber then enquired whether the specific *chapeau* reference “within the established framework of international law” in articles 8 (2) (b) and (2) (e) allowed the introduction of an additional status requirement. As a matter of principle, the Chamber agreed that this element, when viewed in light of article 21, “permits recourse to customary and conventional international law regardless of whether any lacuna exists, to ensure an interpretation of article 8 of the Statute that is fully consistent with, in particular, international humanitarian law”.<sup>78</sup> Indeed, this is one of the rare occasions in which the Court may have recourse to customary law when interpreting or applying the Statute – a source that is otherwise not resorted to due to its

<sup>63</sup> ICC, Judgment of 22.3.2016 – ICC-01/04-02/06-1225 (First Appeals Judgment on Jurisdiction), paras 36, 40-41.

<sup>64</sup> ICC, Judgment of 22.3.2016 – ICC-01/04-02/06-1225 (First Appeals Judgment on Jurisdiction), paras 35-38.

<sup>65</sup> ICC, Judgment of 22.3.2016 – ICC-01/04-02/06-1225 (First Appeals Judgment on Jurisdiction), para. 39.

<sup>66</sup> ICC, Judgment of 22.3.2016 – ICC-01/04-02/06-1225 (First Appeals Judgment on Jurisdiction), paras 3 and 39.

<sup>67</sup> The Chamber considered the term “commencement of the trial” within the meaning of article 19 (4) to pertain to the start of the hearing “during which the Article 64 (8) (a) procedure is followed and any opening statements are made”, and thus aligned its interpretation with that of other chambers, ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9 [“Second Jurisdiction Decision”]), para. 17.

<sup>68</sup> ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second Jurisdiction Decision), paras 22-26.

<sup>69</sup> ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second Jurisdiction Decision), paras 40-44. In this regard, the Chamber explained that the term “also” in articles 8 (2) (b) (xxii) and (2) (e) (vi) pertains to the catch-all crime “any other form of sexual violence”, para. 41.

<sup>70</sup> ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second Jurisdiction Decision), paras 45-50.

<sup>71</sup> ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second Jurisdiction Decision), para. 47.

<sup>72</sup> ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second Jurisdiction Decision), paras 48-49.

<sup>73</sup> ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second Jurisdiction Decision), para. 50.

<sup>74</sup> ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second Jurisdiction Decision), para. 53.

<sup>75</sup> ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second Jurisdiction Decision), paras 51-52.

<sup>76</sup> ICC, Decision of 4.1.2017 – ICC-01/04-02/06-1707 (Second Jurisdiction Decision), para. 54.

<sup>77</sup> ICC, Judgment of 15.6.2017 – ICC-01/04-02/06-1962 (OA5, Judgment on the appeal of Mr. Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” [“Second Appeals Judgment on Jurisdiction”]), paras 46-51.

<sup>78</sup> ICC, Judgment of 15.6.2017 – ICC-01/04-02/06-1962 (Second Appeals Judgment on Jurisdiction), para. 53.

applicability “in the second place”.<sup>79</sup> In other words, the Court may resort to customary law because the Statute allows it expressly. As to the question whether this text element indeed introduces a status requirement to the war crimes of rape and sexual slavery, the Appeals Chamber clarified that IHL in general and in respect to the crimes of rape and sexual slavery provides protection for persons irrespective of their affiliations and, therefore does not categorially exclude members of an armed group from protection.<sup>80</sup> With a view to ensuring a proper delineation of war crimes from ordinary crimes and avoiding an undue expansion of the application of the Rome Statute, the Chamber emphasised that the nexus requirement must be rigorously ascertained in each instance.<sup>81</sup>

*b) Restrictions of Contacts and Ntaganda’s Hunger Strike*

Prior to the commencement of the trial, suspicion arose that confidential information may have been passed on from within the ICC detention centre and prosecution witnesses in the Ntaganda case interfered with. As a result, the Prosecutor sought to receive non-privileged list of contacts, call logs and visitation logs, as well as the imposition of restrictive measures on communications between any person at the detention centre and certain persons in the field. In turn, the Chamber ordered certain restrictive measures on Ntaganda’s contacts in order to protect witnesses, such as the post-factum review of Ntaganda’s phone conversations, the imposition of certain restrictions on his non-privileged contacts, restrictions on his visiting regime, the active monitoring of Ntaganda’s non-privileged phone calls, and prohibition of use of coded language.<sup>82</sup> These restrictions were kept under review by the Chamber. On 7 September 2016, it ruled to maintain them, with some minor adjustments, as they remained, in the view of the Judges, necessary.<sup>83</sup>

The following day, on 8 September 2016, Ntaganda went on hunger strike, refused to appear in the courtroom and did not give his counsel a mandate to represent him during his absence. His counsel stated that Ntaganda “is not in either a psychological or a physical condition, or due to his psychological and physical condition at the present time, he is not able to attend the proceedings”.<sup>84</sup> After a short adjournment of the hearing during which counsel consulted with Ntaganda, the Majority of the Chamber continued hearing witnesses in the absence of the accused, ordered his counsel to represent Ntaganda’s interests in his absence and considered that Ntaganda had waived his right to be present voluntarily.<sup>85</sup> At the same time, the Chamber made arrangements to appoint a medical expert who would assess Ntaganda’s fitness, pursuant to rule 135 of the Rules.<sup>86</sup> Approximately one week later, this decision was reconsidered and no medical expert was appointed since Ntaganda terminated his hunger strike and re-engaged with the Chamber.<sup>87</sup>

On 19 May 2017 – the restrictive measures had been in place for approximately two and a half years – the Chamber reviewed the necessity and proportionality of the measures ordered.<sup>88</sup> By that time, the presentation of evidence by the Prosecutor and the victims’ legal representatives had been concluded; the presentation of evidence by the Defence was imminent.<sup>89</sup> Noting, *inter alia*, that a risk of interference with witnesses and witness coaching still existed, the Chamber maintained the restrictions on contacts with modifications, loosened, in part, the restrictions on telephone calls and visits but maintained the restriction as to language used and discussions of case-related matters.

Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7.9.2017).

<sup>84</sup> ICC, Transcript of Hearing, 8.9.2016, ICC-01/04-02/06-126-ENG, p. 14, lines 7-9.

<sup>85</sup> ICC, Transcript of Hearing, 8.9.2016, ICC-01/04-02/06-126-ENG, p. 22, lines 1-25; Opinion of 14.9.2016 – ICC-01/04-02/06-1504 (Partially dissenting opinion of Judge Robert Fremr on the oral rulings on Mr. Ntaganda’s absence and request for adjournment). Despite the Chamber’s decision to continue with the proceedings in his absence, it nevertheless underscored the principle that “that in the absence of an excusal having been granted by the Chamber, the accused is under an obligation to be present”, ICC, Transcript of Hearing, 8.9.2016, ICC-01/04-02/06-126-ENG, p. 10, lines 10-11.

<sup>86</sup> ICC, Transcript of Hearing, 13.9.2016, ICC-01/04-02/06-T-130-Red-ENG, p. 18, lines 18-23.

<sup>87</sup> ICC, Decision of 28.10.2016 – ICC-01/04-02/06-1598 (Decision on Defence request for independent medical evaluation and related matters).

<sup>88</sup> ICC, Decision of 19.5.2017 – ICC-01/04-02/06-1913-Red2 (Public redacted version of “Further decision reviewing the restrictions placed on Mr Ntaganda’s contacts” [“Ntaganda Further Review Restrictions Decision”]).

<sup>89</sup> ICC, Decision of 19.5.2017 – ICC-01/04-02/06-1913-Red2 (Ntaganda Further Review Restrictions Decision), paras 20 and 23.

<sup>79</sup> Article 21 (1) (b).

<sup>80</sup> ICC, Judgment of 15.6.2017 – ICC-01/04-02/06-1962 (Second Appeals Judgment on Jurisdiction), paras 60-66.

<sup>81</sup> ICC, Judgment of 15.6.2017 – ICC-01/04-02/06-1962 (Second Appeals Judgment on Jurisdiction), para. 68.

<sup>82</sup> ICC, Decision of 18.8.2015 – ICC-01/04-02/06-785-Red (Decision on Prosecution requests to impose restrictions on Mr. Ntaganda’s contacts), paras 3, 6, 43, 60 and 69. The measures date back to 8.12.2014.

<sup>83</sup> ICC, Decision of 7.9.2016 – ICC-01/04-02/06-1494-Red3 (Decision reviewing the restrictions placed on Mr. Ntaganda’s contacts [“Ntaganda Restrictions Review Decision”]); a lesser redacted version of the decision was made available on 21.11.2016 – ICC-01/04-02/06-1494-Red4. Leave by the Defence to appeal this decision was partially granted, namely in respect to whether the restrictions were “necessary and proportionate” and the role of regulation 101 (2) of the Regulations of the Court, see Decision of 16.9.2016 – ICC-01/04-02/06-1513 (Decision on Defence request for leave to appeal the “Decision reviewing the restrictions placed on Mr. Ntaganda’s contacts”). The Appeals Chamber confirmed the decision, ICC, Judgment of 8.3.2017 – ICC-01/04-02/06-1817-Red (OA4, Judgment on Mr. Bosco



In an effort to mitigate further any possible risk of witness interference, the Judges had also imposed certain temporary restrictions on contacts of other ICC detainees with certain individuals, ordered the removal of certain persons from their non-privileged contact lists, ordered active monitoring of non-privileged phone calls and granted the Prosecutor access to this material.<sup>90</sup> Of interest to the reader may be in this context the Chamber's affirmation that regulation 101 (2) of the Regulations of the Court and articles 64 (2) and 68 (1) vest the Chamber with the power to impose measures on any detained persons within the Court's jurisdiction, even those of whose case the Chamber is not seized, "as long as any restrictive measures imposed have a nexus to the case with which the Chamber is seized and are lawful, necessary and proportionate".<sup>91</sup>

*c) Procedural Decisions*

Other noteworthy procedural decisions concerned the adoption of a series of protocols that facilitate the efficient conduct of the proceedings, such as on redactions,<sup>92</sup> handling confidential information and contacts between a participant

and witnesses of the opposing participant,<sup>93</sup> dual status witnesses and vulnerable witnesses,<sup>94</sup> and witness familiarisation.<sup>95</sup> The Chamber also rendered directions on the conduct of proceedings,<sup>96</sup> organising in general the presentation of evidence (Prosecutor; victims; Defence; Prosecutor in rebuttal, if applicable; Defence in rejoinder, if applicable) and providing directions on a variety of issues, such as no case to answer motions,<sup>97</sup> hostile witnesses,<sup>98</sup> scope, order and mode of questioning,<sup>99</sup> the submission of evidence other than

<sup>90</sup> ICC, Decision of 18.8.2015 – ICC-01/04-02/06-786-Red4 (Decision on restrictions in relation to certain detainees ["Ntaganda Restriction Decision"]), paras 8-9, 12, 41-42. The restrictions on Katanga's contacts were lifted the moment Katanga left the Court's detention centre and was transferred to the DRC on 19.1.2016. However, he was reminded of his obligation of confidentiality and that the Court has jurisdiction over acts of corruptly influencing witnesses, ICC, Decision of 21.1.2016 – ICC-01/04-02/06-1058-Red (Public redacted version of "Decision on second Katanga Defence request for permanent lifting of restrictions on contact", 16.12.2015, ICC-01/04-02/06-1058-Conf-Exp). With Lubanga's transfer to the DRC for the remainder of his sentence of imprisonment on 19.12.2015, the Chamber decided that the restrictions should only remain in place for a specific time and entrusted the Registry with ensuring that no confidential material other than those strictly required for the reparation proceedings are permitted to be transferred from the ICC detention centre, ICC, Decision of 26.1.2016 – ICC-01/04-02/06-1061-Corr-Red2 (Public redacted version of "Corrected version of 'Decision on Lubanga Defence request for lifting of certain restrictions on contacts' (ICC-01/04-02/06-1061-Conf-Exp)", 21.1.2016, ICC-01/04-02/06-1061-Conf-Exp-Corr). The restrictive measures concerning Lubanga's communications and visits were lifted after the presentation of evidence of the Prosecutor in the Ntaganda case concluded, Decision of 15.8.2017 – ICC-01/04-02/06-2000-Red2 (Public redacted version of "Second decision reviewing the restrictions in place for Mr Lubanga", 21.7.2017, ICC-01/04-02/06-2000-Conf-Exp). At that time, the measures for Lubanga had been in place for approximately 24 months.

<sup>91</sup> ICC, Decision of 18.8.2015 – ICC-01/04-02/06-786-Red4 (Ntaganda Restriction Decision), para. 46.

<sup>92</sup> ICC, Decision of 12.12.2014 – ICC-01/04-02/06-411 (Decision on the Protocol establishing a redaction regime), with annex A.

<sup>93</sup> ICC, Decision of 12.12.2014 – ICC-01/04-02/06-412 (Decision on adoption of a 'Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant'), with annex A; see also Decision of 4.4.2017 – ICC-01/04-02/06-1849 (Decision on the Defence request regarding the application of certain protocols).

<sup>94</sup> ICC, Decision of 18.2.2015 – ICC-01/04-02/06-464 (Decision adopting the Protocol on dual status witnesses and the Protocol on vulnerable witnesses).

<sup>95</sup> ICC, Decision of 17.6.2015 – ICC-01/04-02/06-656 (Decision on the protocol on witness familiarisation), with two annexes.

<sup>96</sup> ICC, Decision of 2.6.2015 – ICC-01/04-02/06-619 (Decision on the conduct of proceedings ["Ntaganda Conduct of Proceedings Decision"]); the decision on the conduct of proceedings was further supplemented by Decision of 27.3.2016 – ICC-01/04-02/06-1342 (Supplemental decision on matters related to the conduct of proceedings ["Supplement to Ntaganda Conduct of Proceedings"]); Decision of 30.1.2017 – ICC-01/04-02/06-1757 (Decision supplementing the Decision on the Conduct of Proceedings [ICC-01/04-02/06-619] and providing directions related to the preparations for the presentation of evidence by the Defence); Decision of 11.5.2017 – ICC-01/04-02/06-1900 (Decision on further matters related to the presentation of evidence by the Defence).

<sup>97</sup> ICC, Decision of 2.6.2015 – ICC-01/04-02/06-619 (Ntaganda Conduct of Proceedings Decision), para. 17.

<sup>98</sup> ICC, Decision of 2.6.2015 – ICC-01/04-02/06-619 (Ntaganda Conduct of Proceedings Decision), para. 47-49.

<sup>99</sup> ICC, Decision of 2.6.2015 – ICC-01/04-02/06-619 (Ntaganda Conduct of Proceedings Decision), paras 21-30. See also ICC, Decision of 12.10.2015 – ICC-01/04-02/06-897-Red2 (Decision on Prosecution's request to hear P-0039's testimony by way of video-link), para. 12. As to the Chamber's understanding of "leading questions", see Transcript of Hearing, 29.1.2016, ICC-01/04-02/06-T-59-ENG, p. 29, lines 2-4, 11-17 (the Presiding Judge defined leading question as "a question that suggests the answer to the person being interrogated that may be answered by a mere yes or no"); leave to appeal this oral decision was rejected, Decision of 19.2.2016 – ICC-01/04-02/06-1184 (Decision on Defence request for leave to appeal the Chamber's decisions overruling objections to certain questions put to Witness P-0017). Rather than exercising its powers under rule 140 (2) (c) of the Rules, the Chamber, tabled for discussion with the parties the mode of questioning while the trial was already ongoing, as the order



through a witness,<sup>100</sup> and the modalities of participation of victims through their counsel.<sup>101</sup> It also requested Ntaganda to declare that he understood the charges previously confirmed by the Chamber.<sup>102</sup> As the Kenya chamber before, the Chamber also authorised, on the basis of article 64, witness preparation by the calling party prior to their testimony.<sup>103</sup> It opined that this mechanism would enhance the efficiency and expeditiousness of testimony and adopted a protocol in this regard. On 22 June 2015, the Chamber acknowledged the parties' joint submission on agreed facts.<sup>104</sup> As regards the admission of documentary evidence other than through a witness, the Chamber follows the traditional and arduous approach of admitting evidence as adopted in some other cases.<sup>105</sup> This means the Judges admit the evidence after

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dated 8.3.2016 demonstrates ("Whether some witnesses should first provide a narrative about the events before the calling party starts asking set of more specific and narrow questions; whether background information should be elicited by way of leading questions"), Order of 8.3.2016 – ICC-01/04-02/06-1198 (Order requesting submissions on certain matters related to the conduct of proceedings), para. 3 (vi). Later on the Judges "encourage[d]" the parties, where appropriate, to continue to enable witnesses to provide a narrative account of particular topics", see Decision of 27.3.2016 – ICC-01/04-02/06-1342 (Supplement to Ntaganda Conduct of Proceedings), para. 19.

<sup>100</sup> ICC, Decision of 2.6.2015 – ICC-01/04-02/06-619 (Ntaganda Conduct of Proceedings Decision), paras 52-53.

<sup>101</sup> ICC, Decision of 2.6.2015 – ICC-01/04-02/06-619 (Ntaganda Conduct of Proceedings Decision), paras 63-70.

<sup>102</sup> ICC, Decision of 2.6.2015 – ICC-01/04-02/06-619 (Ntaganda Conduct of Proceedings Decision), para. 9. Such declaration was submitted by the Defence, as ordered, on 29.6.2015, see ICC (Defence of Ntaganda), Submission of 26.6.2015 – ICC-01/04-02/06-678-AnxA (Déclaration attestant de la compréhension des charges par l'accusé).

<sup>103</sup> ICC, Decision of 16.6.2015 – ICC-01/04-02/06-652 (Decision on witness preparation ["Ntaganda Witness Preparation"]), including annex A. Further directions are contained in ICC, Decision of 27.3.2016 – ICC-01/04-02/06-1342 (Supplement to Ntaganda Conduct of Proceedings), paras 10-11.

<sup>104</sup> ICC, Decision of 22.6.2015 – ICC-01/04-02/06-662 (Decision on Prosecution and Defence joint submission on agreed facts).

<sup>105</sup> The item-by-item assessment of evidence was adopted in the Lubanga case, Katanga/Ngudjolo case, Bemba case, and Ruto/Sang case. It is only with the arrival of Trial Chamber VII in the Bemba et al. case, that this trend was interrupted when it decided that the evidence be considered "submitted" before and during trial and assessed only at the time the judgment is deliberated. In the following, the trial chambers in the Gbagbo/Blé Goudé case and Ongwen case followed suit. Pre-Trial Chambers regularly do not assess the "relevance" and "admissibility" of evidence, save for the application of article 69(7), see, for example, ICC, Decision of

having assessed each piece of evidence individually and according to the three-step test, as enshrined in article 69 (4), on a prima facie basis ("relevance", "probative value", "outweighing any prejudicial effect").<sup>106</sup>

The Prosecutor sought notice of possible re-characterisation of the facts underlying the modes of liability on two occasions.<sup>107</sup> The two requests, lodged under regulation 55 of the Regulations of the Court, were rejected by the Chamber by majority.<sup>108</sup>

Like other chambers before, Trial Chamber VI recommended to the Presidency, pursuant to rule 100 (2) of the Rules, to hold the opening statements in Bunia, DRC, with a view to "bringing the judicial work of the Court closer to the affected communities".<sup>109</sup> Considering, inter alia, the security situation on the ground, estimated costs, and the impact on victims, the Presidency declined to accede to this proposal and decided that the opening statements be held in The Hague.<sup>110</sup> Meanwhile, the Prosecutor also proposed to conduct a judicial site visit to the Ituri district prior to the commencement of the hearings for a greater appreciation of the evidence. This request was rejected orally during a status conference on 22 April 2015.<sup>111</sup> A renewed proposal was later rejected again for the Prosecutor had failed to identify any concrete disputed facts that would require verification on the ground and failed to present new arguments; however, the Chamber recalled its earlier pronouncement to revisit the

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8.6.2014 – ICC-01/04-02/06-308 (Decision on Admissibility of Evidence and Other Related Matters), paras 25-28.

<sup>106</sup> ICC, Decision of 19.2.2016 – ICC-01/04-02/06-1181 (Decision on Prosecution's first request for the admission of documentary evidence); Decision of 28.3.2017 – ICC-01/04-02/06-1838 (Decision on Prosecution's request for admission of documentary evidence).

<sup>107</sup> ICC, Filing of 9.3.2015 – ICC-01/04-02/06-501 (Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55 [2]); Filing of 15.6.2015 – ICC-01/04-02/06-646 (Prosecution second request for notice to be given of a possible recharacterisation pursuant to regulation 55 [2]).

<sup>108</sup> ICC, Transcript of Hearing, 16.2.2017 – ICC-01/04-02/06-T-197-Red-ENG, p. 73, line 16 to p. 74, line 6. The Chamber, while highlighting the chamber-led nature of the regulation 55 notification, found that "[a]t this stage of the proceedings the Chamber finds it appropriate to inform the parties that the majority of the Chamber, Judge Fremr disagreeing, does not consider that the appearance of any possible re-characterisation of the facts arises at this time, either with respect to the two aforementioned requests or on any other issue".

<sup>109</sup> ICC, Recommendations of 19.3.2015 – ICC-01/04-02/06-526 (Recommendation to the Presidency on holding part of the trial in the State concerned), para. 21.

<sup>110</sup> ICC, Decision of 15.6.2015 – ICC-01/04-02/06-645-Red (Decision on the recommendation to the Presidency on holding part of the trial in the State concerned).

<sup>111</sup> ICC, Transcript of Hearing, 22.4.2015, ICC-01/04-02/06-T-19-ENG, p. 9, lines 1-7.

matter either proprio motu or upon application at the end of the presentation of evidence by the Prosecutor and again after the closing of the presentation of evidence by the Defence.<sup>112</sup> On 8 February 2017, the Defence requested again the Chamber to consider favourably the holding of a judicial site visit in locations that are relevant to nine areas of facts that are disputed between the parties. Once more, the Chamber rejected such request for lack of specificity, or because the issues were not actually in dispute.<sup>113</sup>

*d) Updated Document Containing the Charges*

One procedural question merits particular attention as it concerns a controversial issue that has put a strain on the first trials before the Court. In the decision dated 6 February 2015, the Chamber ordered the submission of an updated document containing the charges (“Updated DCC”),<sup>114</sup> a decision that still follows the “old” approach taken in the first trials.<sup>115</sup> Labelling it an “operative document”, the Updated DCC was considered to be necessary to inform the accused of the nature and content of the charges, including the underlying facts and circumstances.<sup>116</sup> Upon submission of a draft Updated DCC by the Prosecutor and further submissions of the parties on principal points of disagreements, the Chamber resolved any outstanding disagreements between the parties over the charges and ordered the Prosecutor to submit an updated DCC. Worth mentioning is the Chamber’s appreciation of the nature of the confirmation proceedings: “the Pre-Trial Chamber is not required to consider each factual allegation in detail but rather only to determine whether there is sufficient evidence to establish substantial grounds to believe that the crimes charged were committed”.<sup>117</sup> The Prosecutor’s request for reconsideration or, in the alternative, leave to appeal this decision was rejected by the Chamber.<sup>118</sup> In addition to the Updated DCC, the Prosecutor was ordered to provide a so-called “pre-trial brief” three months before the start of the trial.<sup>119</sup>

The Trial Chamber’s determination that the Pre-Trial Chamber is not required to consider each factual allegation is erroneous; actually, Pre-Trial Chambers have always scrutinised *each and every* factual allegation presented by the Prosecutor against the applicable evidentiary standard in order to determine whether or not to confirm the charges in part or in full. The Trial Chamber fails to differentiate between the evidentiary threshold, on the one hand, and the facts to be assessed, on the other hand. The arduous and lengthy litigation between the parties and the Chamber at trial over the draft Updated DCC also illustrates rather clearly the risks of putting a judicial decision of the pre-trial chamber at the disposal of the parties.

*e) No Case to Answer Motion*

Another interesting procedural issue arose when the Defence, encouraged by the Chamber,<sup>120</sup> on 25 April 2017 submitted a “no case to answer motion” in respect to selected charges for a partial judgment of acquittal. The Chamber rejected the request orally on 29 May 2017, immediately prior to the commencement of the presentation of the evidence by the Defence. The Chamber provided its reasoning in writing on 1 June 2017. While it noted that it enjoyed “broad discretion” to entertain such a motion, it also briefly touched upon the advantages (judicial economy and efficiency) and disadvantages (lengthy litigation) of such a procedural step.<sup>121</sup> It therefore concluded that a no case to answer motion “ought to be entertained only if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of the proceedings”.<sup>122</sup> Importantly, the Chamber affirmed its prerogative to initiate no case to answer proceedings proprio motu.<sup>123</sup> In the present case, adjudicating the motion was considered not appropriate and the request was

<sup>112</sup> ICC, Decision of 10.1.2016 – ICC-01/04-02/06-1096 (Decision on Prosecution’s request to conduct a site visit).

<sup>113</sup> ICC, Decision of 24.2.2017 – ICC-01/04-02/06-1801 (Decision on the Defence’s request to conduct a site visit before the presentation of the case for the Defence).

<sup>114</sup> ICC, Decision of 6.2.2015 – ICC-01/04-02/06-450 (Decision on the updated document containing the charges [“Decision on Updated DCC”]).

<sup>115</sup> See *Chaitidou*, ZIS 2013, 130 (150 s.); *Chaitidou*, ZIS 2010, 726 (728 s., 731).

<sup>116</sup> ICC, Decision of 6.2.2015 – ICC-01/04-02/06-450 (Decision on Updated DCC), paras 17-18.

<sup>117</sup> ICC, Decision of 6.2.2015 – ICC-01/04-02/06-450 (Decision on Updated DCC), para. 28.

<sup>118</sup> ICC, Decision of 18.3.2015 – ICC-01/04-02/06-519 (Decision on the Prosecution’s request for reconsideration or, in the alternative, leave to appeal).

<sup>119</sup> ICC, Decision of 6.2.2015 – ICC-01/04-02/06-450 (Decision on Updated DCC), para. 89; the Chamber recalled that the pre-trial brief “albeit of potentially significant assistance to the Defence, is not a statutory document [...]. [I]t is one of

several supplementary documents designed to provide additional assistance and notice to the Defence of the nature of the Prosecution’s case and how the intended evidence relates to the charges”, Decision of 19.2.2015 – ICC-01/04-02/06-467 (Decision on “Prosecution’s request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief”), para. 11.

<sup>120</sup> ICC, Decision of 2.6.2015 – ICC-01/04-02/06-619 (Decision on the conduct of proceedings), para. 17. In this decision, the Chamber had instructed the Defence to lodge such a motion no later than five days after the end of the presentation of evidence by the Prosecutor, or, if applicable, the legal representatives of victims.

<sup>121</sup> ICC, Decision of 1.6.2017 – ICC-01/04-02/06-1931 (Decision on Defence request for leave to file a “no case to answer” motion [“Decision on no case to answer”]), paras 25-26.

<sup>122</sup> ICC, Decision of 1.6.2017 – ICC-01/04-02/06-1931 (Decision on no case to answer), para. 26.

<sup>123</sup> ICC, Decision of 1.6.2017 – ICC-01/04-02/06-1931 (Decision on no case to answer), para. 27.

rejected. The Defence sought leave to appeal this decision under article 82 (1) (d) which was granted by the Chamber.<sup>124</sup>

One of the questions the Appeals Chamber addressed was whether such a procedural step was permissible under the Court's statutory framework. While acknowledging that such a procedure is not expressly foreseen in the Court's documents, it nevertheless considered that it is within the Chamber's discretion and permissible on the basis of article 64 (6) (f) and rule 134 (3).<sup>125</sup> In this regard, the Appeals Chamber confirmed the formulation devised by the Trial Chamber. Mindful of article 21 (3), the Appeals Chamber also confirmed that the Trial Chamber's decision not to conduct the "no case to answer" procedure did not infringe Ntaganda's fair trial rights, in particular the right to remain silent.<sup>126</sup> It is disappointing that the Appeals Chamber did not assess more broadly whether this procedure is compatible with the overall structure of the Rome Statute. For example, the purpose of the confirmation of charges stage was only mentioned when discussing available statutory safeguards for the accused.

#### f) Ntaganda's Testimony

Ntaganda agreed to testify before Trial Chamber VI under oath. Prior to his testimony, the Chamber ruled, *inter alia*, that (i) the Witness Preparation Protocol applied in his case;<sup>127</sup> (ii) he could maintain "appropriate" contact with his counsel during the entirety of his testimony;<sup>128</sup> and (iii) rule 74 assurances are not applicable.<sup>129</sup> His testimony started on 14 June 2017 and concluded on 13 September 2017, with the summer recess in between. In total, he remained at the disposal of his counsel, the Prosecutor and the legal representatives of victims for 33 days (127 hours and 2 minutes in total). His testimony also extended to one agreed fact ("Agreed Fact 69") that he, during his testimony, denied having knowledge of. With decision of 9 October 2017, the

<sup>124</sup> ICC, Transcript of Hearing, 14.6.2017, ICC-01/04-02/06-T-209-Red-ENG, p. 24, lines 23-25, p. 25, lines 3-4 and p. 26, lines 11-13.

<sup>125</sup> ICC, Judgment of 5.9.2017 – ICC-01/04-02/06-2026 (OA6, Judgment on the appeal of Mr. Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion" ["Judgment No Case To Answer"]), para. 44.

<sup>126</sup> ICC, Judgment of 5.9.2017 – ICC-01/04-02/06-2026 (Judgment No Case To Answer), paras 46-56.

<sup>127</sup> ICC, Decision of 8.6.2017 – ICC-01/04-02/06-1945 (Decision on further matters related to the testimony of Mr Ntaganda ["Ntaganda Testimony Decision"]), paras 14-16.

<sup>128</sup> ICC, Decision of 8.6.2017 – ICC-01/04-02/06-1945 (Ntaganda Testimony Decision), para. 20 ("The Chamber therefore finds that communication between the accused and the Defence may be maintained during the entirety of his testimony, noting that any such communication should always be appropriate, in the sense that counsel is not permitted to advise Mr. Ntaganda as to how he ought to respond to a question or line of questioning").

<sup>129</sup> ICC, Decision of 8.6.2017 – ICC-01/04-02/06-1945 (Ntaganda Testimony Decision), para. 24.

Chamber allowed the Prosecutor, who would have otherwise presented evidence during trial, to request the tendering of evidence in relation to Agreed Fact 69.<sup>130</sup>

#### g) Victims Participation

As regards victims' participation, the Chamber adopted a newly designed admission procedure.<sup>131</sup> In this decision, the Chamber, *inter alia*, delegated essentially the *prima facie* assessment of the victims' applications to the Registry which would conduct such assessment following the guidelines by the Chamber;<sup>132</sup> ordered that the applications of victims admitted by the Pre-Trial Chamber be reviewed again;<sup>133</sup> determined that victims' applications, unless introduced as evidence, cannot be relied upon in the trial judgment;<sup>134</sup> and instructed the Registry to enquire with the victims on the continued representation of the legal representatives appointed by the Pre-Trial Chamber.<sup>135</sup> In a second decision, the Chamber decided, by majority, to maintain the legal representation system.<sup>136</sup> In its fourth decision concerning victims, the Chamber accepted that "any closely-connected individual, such as a close relative of a participating victim who is now deceased, may seek leave to continue the action initiated by the participation victim, but may do so on behalf of the deceased victim".<sup>137</sup> To this end, the applicant must submit

<sup>130</sup> ICC, Decision of 9.10.2017 – ICC-01/04-02/06-2058 (Decision on parties' submissions concerning Agreed Fact 69).

<sup>131</sup> ICC, Decision of 6.2.2015 – ICC-01/04-02/06-449 (Decision on victims' participation in trial proceedings ["Ntaganda Victims' Decision"]).

<sup>132</sup> ICC, Decision of 6.2.2015 – ICC-01/04-02/06-449 (Ntaganda Victims' Decision), paras 30, 32.

<sup>133</sup> ICC, Decision of 6.2.2015 – ICC-01/04-02/06-449 (Ntaganda Victims' Decision), para. 24 (iii).

<sup>134</sup> ICC, Decision of 6.2.2015 – ICC-01/04-02/06-449 (Ntaganda Victims' Decision), para. 36.

<sup>135</sup> ICC, Decision of 6.2.2015 – ICC-01/04-02/06-449 (Ntaganda Victims' Decision), para. 54.

<sup>136</sup> ICC, Decision of 16.6.2015 – ICC-01/04-02/06-650 (Second decision on victims' participation in trial proceedings); the Chamber admitted further victims to participate in the proceedings or accepted resumption of action on behalf of deceased victims, Decision of 2.7.2015 – ICC-01/04-02/06-696 (Third decision on victims' participation in trial proceedings); Decision of 16.11.2015 – ICC-01/04-02/06-1011 (Fifth decision on victims' participation in trial proceedings); Decision of 17.12.2015 – ICC-01/04-02/06-1059 (Sixth decision on victims' participation in trial proceedings); Decision of 1.7.2016 – ICC-01/04-02/06-1427 (Seventh decision on victims' participation in trial proceedings); Decision of 27.10.2016 – ICC-01/04-02/06-1597 (Eighth decision on victims' participation in trial proceedings); see also Decision of 20.6.2017 – ICC-01/04-02/06-1970 (Decision on withdrawal of a victim's application for participation).

<sup>137</sup> ICC, Decision of 1.9.2015 – ICC-01/04-02/06-805 (Fourth decision in victims' participation in trial proceedings ["Fourth Victims' Decision"]), para. 8.

evidence of (i) the death of the victim; (ii) his/her relationship to the deceased victim; and (iii) in case entitlement to continue the action cannot be presumed, the appointment by the deceased victim's family members.<sup>138</sup> In this context, the Chamber instructed the Registry to develop a so-called "resumption of action application form" and adopted a procedure according to which applicants may continue action initiated before the Court by deceased victims.<sup>139</sup>

Finally, it is worth mentioning that three victims were authorised to testify while five other victims were authorised to present their views and concerns at trial via video link.<sup>140</sup> The Chamber established criteria according to which victims may present evidence, namely (i) the presentation of evidence by victims must be consistent with the rights of the accused; (ii) the hearing of the victims' evidence must be considered appropriate, taking into account its relevance; and (iii) victims are not allowed to testify anonymously.<sup>141</sup> However, it is unclear what quality the Chamber attributes to the two different modes of victims actively taking part in the evidentiary hearings and whether or how it would be used for the purposes of the judgment, if at all.

#### *h) Article 70 Investigation*

The suspected leaking of information in the Ntaganda case from the ICC detention centre and alleged interference with

<sup>138</sup> ICC, Decision of 1.9.2015 – ICC-01/04-02/06-805 (Fourth Victims' Decision), para. 8.

<sup>139</sup> ICC, Decision of 1.9.2015 – ICC-01/04-02/06-805 (Fourth Victims' Decision), paras 12-13. The same approach was also adopted by Trial Chamber III in the Bemba case, ICC, Decision of 24.3.2016 – ICC-01/05-01/08-3346 (Decision on "Requête relative à la reprise des actions introduites devant la Cour par des victimes décédées"); Trial Chamber II in the Katanga case, ICC, Decision of 20.5.2016 – ICC-01/04-01/07-3691-tENG (Decision on the applications for resumption of action lodged by the family members of deceased victims a/0015/09, a/0032/08, a/0057/08, a/0166/09, a/0192/08, a/0225/09, a/0281/08, a/0282/09, a/0286/09, a/0298/09, a/0354/09, a/0361/09, a/0391/09, a/2743/10 and a/30490/15); Trial Chamber VIII, Decision of 2.6.2017 – ICC-01/12-01/15-223 (Decision on LRV Request for Resumption of Action for Deceased Victim a/35084/16).

<sup>140</sup> ICC, Decision of 15.2.2017 – ICC-01/04-02/06-1780-Red (Public redacted version of "Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns" [10.2.2017, ICC-01/04-02/06-1780-Conf, "Ntaganda Victim Evidence Decision"]). Judge Ozaki disagreed with the Majority's calling of victims to testify or present their views and appended a partly dissenting opinion to the Ntaganda Victims Evidence Decision, Opinion of 15.2.2017 – ICC-01/04-02/06-1780-Anx-Red (Partly Dissenting Opinion of Judge Kuniko Ozaki). Initially, the Chamber had authorised six victims to present their views, but one victim was withdrawn from the list.

<sup>141</sup> ICC, Decision of 15.2.2017 – ICC-01/04-02/06-1780-Red (Ntaganda Victim Evidence Decision), para. 11.

witnesses led to the opening of investigative measures at the DRC situation level that had some repercussions on the Ntaganda trial proceedings. On 13 August 2015, the Prosecutor approached on an ex parte basis Pre-Trial Chamber I, assigned with the DRC situation, and requested judicial assistance to obtain evidence for investigating article 70 offences in the context of the Ntaganda case. More specifically, she requested that the Pre-Trial Chamber authorise access to Ntaganda's and Lubanga's non-privileged call and visitor logs, and recordings of non-privileged phone conversations from 22 March 2013 onwards (the date of Ntaganda's arrival at the ICC detention centre).<sup>142</sup> For the Pre-Trial Chamber to be fully apprised of the facts, the Ntaganda Trial Chamber ordered the transfer of relevant parts of the case record to Pre-Trial Chamber I.<sup>143</sup> At the time of writing, there is no decision publically available that indicates how the Pre-Trial Chamber entertained the request. However, the fact that the Pre-Trial Chamber acceded to the Prosecutor's request may be deduced from another subsequent decision of 4 November 2016 in which the Pre-Trial Chamber granted Ntaganda access by electronic means to the material obtained, namely his and Lubanga's ICC detention centre call records and recordings.<sup>144</sup>

All the while proceedings in the Ntaganda trial unfolded without any information as to the progress of the investigation. The Trial Chamber, in the context of its review of the restrictive measures placed on Ntaganda's contacts, reminded the Prosecutor that "Article 70 investigations cannot be permitted to continue indefinitely in a manner which could impact proceedings in the Ntaganda case" and encouraged her "to conclude relevant portions of [the] investigations as promptly as possible".<sup>145</sup> On 7 November 2016, the Prosecu-

<sup>142</sup> The request is not publically available. The information is taken from ICC, Decision of 28.4.2017 – ICC-01/04-02/06-1883 (Decision on Defence request for stay of proceedings with prejudice to the Prosecution ["Ntaganda Stay Decision"]), para. 4.

<sup>143</sup> ICC, Decision of 19.8.2015 – ICC-01/04-02/06-788 (Decision on request for transfer of part of the case record to Pre-Trial Chamber II).

<sup>144</sup> ICC, Decision of 4.11.2016 – ICC-01/04-738 (Decision on the "Prosecution's request to provide Bosco Ntaganda with access to evidence obtained pursuant to article 70). This can also be deduced from the disclosure note that the Prosecutor submitted in the Ntaganda case record shortly when disclosing the material obtained under article 70, see ICC, Filing of 7.11.2016 – ICC-01/04-02/06-1616 (Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70 ["Ntaganda Disclosure Note"]), para. 8.

<sup>145</sup> ICC, Filing of 7.11.2016 – ICC-01/04-02/06-1616 (Ntaganda Disclosure Note), para. 10. This reminder was repeated by Trial Chamber VI on 7.9.2016, as summarised in ICC, Decision of 7.9.2016 – ICC-01/04-02/06-1494-Red3 (Ntaganda Restrictions Review Decision), para. 24 ("The Chamber also takes this opportunity to recall its prior guidance to the Prosecution that any Article 70 investigations should be concluded as expeditiously as possible, and that any related

tor indicated by way of a notice submitted in the Ntaganda case record the disclosure of voluminous evidence consisting of copies of the non-privileged contact and visitor logs and (over 20,000 audio) recordings of Ntaganda and Lubanga since 22 November 2013 onwards.<sup>146</sup> She argued that the “review of approximately 450 of these telephone conversations reveals Ntaganda’s involvement in a broad scheme to pervert the course of justice, including by coaching potential Defence witnesses, obstructing Prosecution investigations and interfering with Prosecution witnesses”.<sup>147</sup> The material was disclosed on the basis that it was material for the preparation of the defence, as foreseen in rule 77 of the Rules. These allegations and disclosure of voluminous evidence prompted the Defence to request a stay of the proceedings on 14 November 2016 in order to assess the disclosed material and the prejudice resulting therefrom. Two days later, prior to the start of the hearing on 16 November 2016, the Chamber clarified that it understood the Defence request to be a request for “immediate adjournment” and rejected it as unwarranted.<sup>148</sup> In the following, the Prosecutor sought to introduce the evidence obtained and applied that it be admitted from the bar table. On 23 February 2017, the Chamber declined to admit the evidence arguing that its “probative value at this stage, due to its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused”.<sup>149</sup>

On 20 March 2017, the Defence requested anew that the proceedings against Ntaganda be stayed permanently with prejudice to the Prosecutor. It alleged that “[t]he acquisition by the Prosecution team in this case of 4,684 conversations of Mr. Ntaganda, concurrent with trial proceedings, given the high relevance of those conversations to Defence strategy as well as to Mr. Ntaganda’s personal knowledge of the case amounts to an abuse of the Court’s process, as a result of which Mr. Ntaganda cannot receive a fair trial”.<sup>150</sup> On

28 April 2017, the Chamber rejected the request stating that there was no abuse of process and that, accordingly, “it is possible to continue conducting a fair trial in the present case”.<sup>151</sup> Nevertheless, as a measure to ensure the fair and expeditious conduct of the proceedings, the Chamber decided “that the Prosecution shall not be allowed to use the material obtained in the context of the Article 70 proceedings during the Defence’s presentation of evidence unless specifically authorized by the Chamber [...] upon receipt of a substantiated request to be filed sufficiently in advance”.<sup>152</sup> It also anticipated taking additional measures, if requested, such as “allowing the Defence to recall Prosecution witnesses, and/or disregarding certain evidence”.<sup>153</sup>

Article 70 was also invoked by the Defence when requesting to initiate proceedings against a prosecution witness because he had purportedly lied in Court. This request was rejected by the Chamber on the basis that this matter pertained to the credibility of the witness and that, in any event, it lacked the power to direct the Prosecutor and that.<sup>154</sup> This ruling is in accordance with previous rulings of Trial Chamber III in the Bemba case.

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applicable disclosure of information to the Defence be made as soon as possible”).

<sup>146</sup> ICC, Filing of 7.11.2016 – ICC-01/04-02/06-1616 (Ntaganda Disclosure Note), para. 15.

<sup>147</sup> ICC, Filing of 7.11.2016 – ICC-01/04-02/06-1616 (Ntaganda Disclosure Note), para. 3.

<sup>148</sup> ICC, Transcript of Hearing, 16.11.2016, ICC-01/04-02/06-T-159-Red-ENG, p. 3, line 14 to p. 7, line 24; on the same day, the Chamber also rejected an oral Defence request for suspensive effect of the decision, ICC-01/04-02/06-T-159-Red-ENG, p 17, lines 1-18. Leave by the Defence to appeal the decision rejecting the “adjournment” request was rejected by the Chamber, Decision of 12.12.2016 – ICC-01/04-02/06-1677 (Decision on request for leave to appeal the Chamber’s decision rejecting the Defence request for a stay of proceedings).

<sup>149</sup> ICC, Decision of 23.2.2017 – ICC-01/04-02/06-1799 (Decision on Prosecution’s request pursuant to Regulations 35 for an extension of time to submit evidence), para. 6.

<sup>150</sup> ICC, Filing of 21.3.2017 – ICC-01/04-02/06-1830-Red (Public redacted version of “Defence Request for stay of

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proceedings with prejudice to the Prosecutor”, 20.3.2017, ICC-01/04-02/06-1830-Conf), para. 2.

<sup>151</sup> ICC, Decision of 28.4.2017 – ICC-01-02/06-1883 (Decision on Defence request for stay of proceedings with prejudice to the Prosecution [“Ntaganda Stay Proceedings Decision”]), para. 61. Leave by the Defence to appeal this decision as rejected by the Majority of the Chamber, Decision of 13.6.2017 – ICC-01/04-02/06-1955 (Decision on Defence request for leave to appeal the “Decision on Defence request for stay of proceedings with prejudice to the Prosecution”); Opinion of 13.6.2017 – ICC-01/04-02/06-1955-Anx (Dissenting Opinion of Judge Robert Fremr).

<sup>152</sup> ICC, Decision of 28.4.2017 – ICC-01-02/06-1883 (Ntaganda Stay Proceedings Decision), para. 61.

<sup>153</sup> ICC, Decision of 28.4.2017 – ICC-01-02/06-1883 (Ntaganda Stay Proceedings Decision), para. 62.

<sup>154</sup> ICC, Decision of 13.10.2016 – ICC-01/04-02/06-1580-Red (Public redacted version of “Decision on Defence request seeking the Chamber to order the Prosecution to conduct an investigation into the testimony of Witness [REDACTED] under Article 70”), paras 3 and 5.