

Judicial developments in the jurisprudence of the International Criminal Court in 2017–2018*

By **Thomas Körner**, Den Haag**

2017–2018 has seen judicial activity in all three divisions of the Chambers of the International Criminal Court ('Court' or 'ICC'). The Appeals Chamber issued its longest judgment yet, in the case of the Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, et al. ("Bemba et al." case). Three cases are currently pending before Trial Chambers: the case of Prosecutor v. Bosco Ntaganda before Trial Chamber VI, the case of Prosecutor v. Laurent Gbagbo and Chalres Blé Goudé before Trial Chamber I and the case of Prosecutor v. Dominic Ongwen before Trial Chamber IX, as well as several ongoing reparation proceedings. The Pre-Trial section has seen a multitude of activity with the arrest warrant (and subsequent arrest) of Al-Hassan in the Mali situation, an Article 15 decision in the situation of Burundi as well as several further pending requests, such as an Article 15 request for the situation of Afghanistan.

This article will cover the judicial decisions issued in the period from May 2017 to May 2018.¹ The Appeals Chamber judgment in the case Prosecutor v. Jean-Pierre Bemba Gombo, rendered on 8 June 2018, will not be included in this article, as it is outside of the time frame. The representation of jurisprudence in this article is not exhaustive, not all decisions rendered by the Chambers of the Court will be discussed. Rather, the article attempts to highlight and summarise the most important decisions and show notable developments in the jurisprudence of the Court. It is hoped that the reader will be persuaded to look up further jurisprudence of the ICC (which can be found on the Court's official website²), as well as to read the full decisions discussed below – an exercise for which this article cannot be a substitution.

I. Appeals Chamber decisions in the Bemba et al. Case

Background. The Bemba et al. Case is the first 'Article 70' case tried by the Court. Article 70 is the provision in the

* Previous overviews of the Court's jurisprudence are available at ZIS 2008, 371; 2010, 726; 2011, 843; 2013, 130; 2015, 523; 2016, 813; 2017, 733 and 2018, 23 and 73, authored by Eleni Chaitidou and Franziska Eckelmans. This contribution is based on a presentation of the latest jurisprudential developments of the International Criminal Court, given at the annual meeting of German-speaking international criminal lawyers in Marburg on 9 June 2018.

** The author is an associated legal officer in a chamber of the International Criminal Court. The selection of the decisions and their representation are entirely the work and opinion of the author and do not reflect the official views of the Court.

¹ The article does not aim to provide a critical analysis of the rendered decisions, but an overview of jurisprudence. Accordingly, its style will be descriptive and commentaries will be kept to a minimum.

² www.icc-cpi.int (30.11.2018).

Rome Statute³ governing offences against the administration of justice. During the case of the Prosecutor v. Jean-Pierre Bemba Gombo ("Bemba Case" or "Main Case") the accused, one of his counsels (Mr Kilolo), a case manager in the defence team (Mr Mangenda) and two further persons (Mr Babala and Mr Arido) interfered with witnesses in order to ensure that these witnesses would testify in favour of the accused, Mr Bemba. The Prosecution initiated proceedings under Article 70 of the Statute in respect of the tampering of fourteen witnesses.

On 19 October 2016, Trial Chamber VII convicted all five accused for offences against the administration of justice.⁴ Findings of guilt were pronounced with regard to (i) giving false testimony (Art. 70 [1] [a]), (ii) presenting evidence that the party knows is false or forged (Art. 70 [1] [b]) and corruptly influencing witnesses (Art. 70 [1] [c]) on various degrees of participation.⁵ On 22 March 2017, Trial Chamber VII issued its decision on sentencing.⁶ Therein, the Chamber imposed terms of imprisonment of varying degrees and fines for Mr Kilolo and Mr Bemba. Messrs Kilolo, Mangenda, Babala and Arido each had already spent 11 months in detention. Mr Bemba was, at that point in time, still in detention for purposes of the Main Case. For Messrs Kilolo and Mangenda, the imposed sentences of prison exceeded the 11 months (Mr Mangenda received a term of 2 years of imprisonment, Mr Kilolo a term of 2 years 6 months). The Chamber suspended both of the remaining terms of imprisonments under certain conditions.⁷

The decisions. Almost one year later, on 8 March 2018, the Appeals Chamber issued its judgments on the Appeal against the Bemba et al. Judgment⁸ and the Appeal against

³ Any Article cited without further specification is to be understood as being an Article of the Rome Statute.

⁴ Trial Chamber VII, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.).

⁵ Trial Chamber VII, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), pp. 455–457.

⁶ Trial Chamber VII, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/13-2123-Corr (The Prosecutor v. Jean-Pierre Bemba Gombo et al.). For a detailed overview of the Bemba et al. Judgment and Sentencing Decision, see Chaitidou, ZIS 2016, 813 (832). A more concise summary can be found in Chaitidou, ZIS 2018, 23 (35).

⁷ Trial Chamber VII, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/13-2123-Corr (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), pp. 98 and 99.

⁸ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74

the Bemba et al. Sentencing Decision⁹. The appeal judgments are very voluminous, the Bemba et al. Appeals Judgment alone covering nearly 700 pages. In deference to the size of the two decisions, this article will cover only the major and most important pronouncements made by the Appeals Chamber.

1. The Bemba et al. Appeals Judgment

The Appeals Chamber pronounced itself on a multitude of issues in its judgement. This article will cover the Appeals Chamber's findings on: (i) the scope of Article 70 (1) (b) of the Statute; (ii) the affirmation of the evidence approach taken by Trial Chamber VII; (iii) Articles 69 (7) and 69 (8); (iv) the lawyer-client privilege and its exceptions and (v) certain evidentiary matters.

a) Trial Chamber VII convicted Messrs Bemba, Kilolo and Mangenda under Article 70 (1) (b) for having presented the false evidence of 14 corruptly influenced witnesses as co-perpetrators under Article 25 (3) (a).¹⁰ In its analysis regarding this point, the Trial Chamber first stated that the person committing the offence must be a person having “the right to present evidence to a chamber in the course of proceedings before the Court.”¹¹ It then proceeded to define “false” and “forged” evidence,¹² with all types of evidence, including oral testimony, falling under the scope of Article 70 (1) (b)¹³ and stated that the actus reus of the offence is the presentation of said evidence.¹⁴ This presentation of false evidence was fulfilled, in the Chamber's view, with the calling of the cor-

rupted witnesses by Mr Kilolo, “whom he had coached extensively and illicitly in advance of their testimony, and presented their evidence knowing that they would testify falsely”.¹⁵

The Appeals Chamber did not follow this interpretation in its judgment. First, it agrees with the Trial Chamber that the focus of the provision is on the act itself, the *presenting* of false evidence and not so much on who gives this presentation.¹⁶ However, according to the Appeals Chamber a person cannot “present” false or forged oral testimony since “presentation” means the introduction of the evidence into the proceedings¹⁷ and, in case of oral testimony, this act – the introduction – is done by the witness him- or herself and not by the party calling the witness or questioning him or her. The Appeals Chamber elaborates: “[w]hile the calling party may hope or anticipate that the witness will lie before the chamber, it remains the independent decision of the witness to do so when he or she gives evidence in the court. The actual ‘presentation’ of testimonial evidence is therefore not an act of the party, but an autonomous act that can only be made and controlled by the witnesses him- or herself.” It concludes by stating that “a party calling a witness can hope for a certain result but cannot ‘know’ that the evidence, which does not yet exist, is false or forged within the terms of article 70 (1) (b)”.¹⁸ Consequently, the Appeals Chamber overturned the convictions of Messrs Bemba, Kilolo and Mangenda in respect of Article 70 (1) (b).

of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.). Judge Geoffrey Henderson appended a separate opinion, ICC-01/05-01/13-2275-Anx.

⁹ Appeals Chamber, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, 8 March 2018, ICC-01/05-01/13-2276-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.).

¹⁰ Trial Chamber VII, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), pp. 455–456.

¹¹ Trial Chamber VII, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para 33. The Chamber then proceeds to define the members of a defence team who fall under this term (para. 34) and states that the accused falls also under the group of people who can commit an Article 70 (1) (b) offence (para. 35).

¹² Trial Chamber VII, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 39–40.

¹³ Trial Chamber VII, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 38.

¹⁴ Trial Chamber VII, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 41.

¹⁵ Trial Chamber VII, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 830. The conduct is imputed to Messrs Bemba and Mangenda via the mode of co-perpetration of Article 25 (3) (a).

¹⁶ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 702.

¹⁷ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 703.

¹⁸ Both citations can be found at Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 709.

b) During the trial phase, Trial Chamber VII pronounced its approach on the assessment of evidence. It declared that it will consider the relevance, probative value and potential prejudice of items of evidence at the end of the trial, during the deliberation stage of the judgment. Only when certain procedural requirements would impede the submission of evidence (such as Article 69 [7] or Rule 68 of the Rules of Procedure and Evidence), would the Chamber make a ruling upfront with regard to this specific point – still leaving the final weighing of the probative value of the evidence to the deliberation stage.¹⁹ In its judgment, the Trial Chamber explained that it considered all “recognised” submitted evidence and all corresponding objections in its deliberations. However, the Chamber’s admissibility approach does not mean that all of these items have been discussed in the judgment.²⁰

This approach was attacked by the appeal of the Defence teams, which argued that both, the lack of an individual case-by-case ruling regarding the admission of each item of evidence, as well as the deferral of any decision on admissibility until the judgment, violated, amongst others, the (fair trial) rights of the accused.²¹ In its judgment, the Appeals Chamber clarifies that the approach taken by the Trial Chamber was in conformity with the statutory prerequisites and did not cause undue prejudice to the accused. It considers that these requirements, especially Article 74 (2), do not mandate an individualised admission of each item of evidence.²² Further, the fact that the Trial Chamber assesses the relevance and probative value of the evidence at the end of the trial – at the deliberation stage, without any prior ruling on the relevance

or admissibility – does not, according to the Appeals Chamber, violate the accused’s fair trial rights.²³ The Appeals Chamber explains that the statutory scheme foresees the “submission” of evidence – not a mandatory ruling of admissibility for each item – and that these submitted items form the evidentiary basis for the decision under Article 74 (2). Therefore, the parties must “expect” that all submitted items can be considered by the Chamber for the decision on the guilt or innocence of the accused. Further, even if a Trial Chamber would render a decision on the relevance or admissibility during the trial, it would have to repeat the exercise at the final stage while having all the evidence before it, which would mean that the initial assessment by the Trial Chamber could change and no “certainty” would be created by it on which the parties could rely.²⁴

The approval of this evidentiary approach by the Appeals Chamber has substantial consequences for other trials pending before the Court. Two of three other proceedings currently at the trial stage use the same or a similar evidentiary approach.²⁵ Had the Appeals Chamber found that the approach installed by Trial Chamber VII was irreconcilable with the statutory framework, both proceedings in the Gbagbo/Blé Goudé and Ongwen case would have had to make profound re-adjustments to their evidentiary systems. However, the judgment by the Appeals Chamber was not unanimous on this point. Judge Henderson disagrees with this approach,²⁶ stating that in his view such approach would violate the fair trial rights of the accused.²⁷

¹⁹ 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), 24 September 2015, ICC-01/05-01/13-1285 (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 9, 13.

²⁰ Trial Chamber VII, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 193.

²¹ The approach of an individualised ruling about an item’s admissibility was, up until then, the approach of the previous Trial Chambers.

²² Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 578. In paragraphs 576–599, the Appeals Chamber proceeds to explain that the statutory scheme provides for the “submission” of evidence. While a trial chamber can – and in certain cases must – provide a ruling on the admissibility of an item of evidence, this is independent from the entirety of the evidence which is “submitted” and form the base for the judgment of the trial chamber, pursuant to Article 74 (2). Further, such approach does also not violate the requirements for a reasoned decision, pursuant to Article 74 (5).

²³ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 607.

²⁴ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 608–609.

²⁵ See: Trial Chamber I, , Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405 (The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé) and Trial Chamber IX, Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497 (The Prosecutor v. Dominic Ongwen).

²⁶ Bemba et al. Appeals Judgment, Separate Opinion of Judge Geoffrey Henderson, 8 March 2018, ICC-01/05-01/13-2275-Anx, pages 15–22.

²⁷ It may be harder for a reader trained in a country with a civil law tradition to understand why this evidentiary approach is so controversial, as it is more inspired by precisely this tradition. For an example which explains the reluctance

c) Another noteworthy issue on which the Appeals Chamber pronounced itself is the spheres of international and national law and the degree to which they can overlap in the course of the trials before the Court. During the course of its proceedings, the Trial Chamber had to pronounce rulings on certain items concerning financial transactions and whether these items were inadmissible as evidence pursuant to Article 69 (7). Article 69 (8) of the Statute prohibits the court to rule on the application of a state's national law when deciding on the relevance or admissibility of evidence collected by that state.

Since a criterion in the *chapeau* of Article 69 (7) mandates that evidence must have either been obtained in violation of the Rome Statute or internationally recognised human rights – and this might imply acts that have been performed according to national law²⁸ – the Trial Chamber tried to reconcile the seeming contradiction between the *chapeau* of Article 69 (7) and the prohibition prescribed by Article 69 (8). It stated that it “will review the application of national law only to the extent necessary to determine whether a violation occurred under Article 69 (7) of the Statute. In other words, the Chamber in these situations engages with national law solely to determine if something so manifestly unlawful occurred that it amounts to a violation of the Statute or internationally recognised human rights. If the Chamber cannot conclude that such manifestly unlawful conduct occurred at the national level, the Chamber is not permitted to further examine whether a mere infringement of domestic rules of procedure transpired.”²⁹

The Appeals Chamber did not follow this approach, specifying that “[A]rticle 69 (8) of the Statute establishes an unequivocal separation between the national and international spheres in the respective competences of the Court and the State”.³⁰ Accordingly, the Appeals Chamber found that a chamber has no competence to assess whether there have been “manifest” violations of the national law when deciding

on the inadmissibility of evidence pursuant to Article 69 (7).³¹

After finding that no violation of the statute³² or internationally recognised human rights existed, the Appeals Chamber proceeded to control the proportionality of the interference in the right to privacy.

Since the bar of Article 69 (8) to assess national law is absolute, the Appeals Chamber stated that it would control whether the “applicable standard under international law for legitimate inferences with the right to privacy” was respected. Stating that this assessment is independent of a previous control by national courts, the Appeals Chamber proceeded and found that the interference was not disproportionate.³³

Lastly on this matter, the Appeals Chamber had to evaluate the effect of two decisions by national courts which had repealed two of the three authorisations to collect the financial transactions. The Trial Chamber found that, under reference of these domestic decisions, the right to privacy had been violated. The Appeals Chamber disagreed, explaining that domestic rulings “may be part of the relevant factual background for a determination on whether certain evidence is inadmissible on the grounds of article 69 (7) of the Statute” but that it was not for the Court to decide on the basis of “national law or domestic rulings interpreting and applying

rooted in a perceived dichotomy between the common and civil law systems, the separate opinion of Judge Henderson is instructive.

²⁸ E.g., in the specific case, the internationally recognised right to privacy was at issue. This right can be limited, but the interference must take place “in accordance with the law”.

²⁹ Trial Chamber VII, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69 (7), 29 April 2016, ICC-01/05-01/13-1854 (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 34.

³⁰ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 288.

³¹ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 296.

³² In an interesting side-note it needs to be mentioned that the Appeals Chamber confirmed the ruling by the Trial Chamber that violations to Part 9 of the Rome Statute, which contain the provisions on cooperation and judicial assistance, do not constitute violations of the Statute for the purposes of Article 69 (7). Reason is that Part 9 of the Statute addresses sovereignty concerns of the states and is not apt to protect the rights and interests of the individual. Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 318–319.

³³ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 332–339.

such national laws”.³⁴ After conducting its assessment, the Appeals Chamber found that the two domestic decisions did “not indicate that a violation of the Statute or internationally recognised human rights occurred”.³⁵

These findings were not unanimous: Judge Henderson explained in his opinion that he believed that a violation of the internationally recognised human right of privacy had occurred and that in the circumstances of this case, an inquiry into Austrian law was required. He also found that the interference was disproportionate to the right to privacy. However, Judge Henderson then proceeded to assess whether these violations justify the inadmissibility of the evidence under Article 69 (7) (b) of the Statute and concluded in the negative.³⁶

Despite finding that the Trial Chamber erred on certain points, the Appeals Chamber ultimately found that the Trial Chamber did not err in its conclusion that the disputed evidence was not inadmissible.

d) Part of the evidence used during trial was intercepted telephone calls between Mr Bemba and Mr Kilolo. The admissibility of this evidence was attacked by the Defence by asserting a violation of legal professional privilege, since Mr Kilolo was acting as Mr Bemba’s counsel during the commission of the offences. In the pre-trial phase of the case, the competent Single Judge of Pre-Trial Chamber II held that the privilege of client-lawyer communications emanating from Article 67 (1) (b) of the Statute and Rule 73 of the Rules of Procedure and Evidence does not apply to situations where this communication is used for “furthering a criminal scheme, rather than to obtaining legal advice, the more so when [...] the counsel seems to be an accomplice in the scheme.”³⁷ During the Trial phase, Trial Chamber VII upheld this “crime-fraud exception” and ruled that the intercepted com-

munications could be used as evidence during the trial.³⁸ The Appeals Chamber agreed with the decisions by the lower chambers, citing the text of Rule 73 that the professional privilege covers communications made in the context of the professional relationship and concluding that it does, consequently, not extend to communications “that do not take place in the context of such professional relationship”. According to the Appeals Chamber,³⁹ activities made in the context of the implementation of a criminal activity fall outside of the professional relationship and are therefore never covered by Rule 73 of the Rules and the professional privilege.⁴⁰

Furthermore, the Appeals Chamber made other noteworthy findings regarding procedural matters in its judgment.

With regard to the standard of review for factual errors, the Appeals Chamber repeated the – up to then⁴¹ – standard of review that it would determine whether a reasonable Trial Chamber could have been satisfied as to the finding in question. The Appeals Chamber explains that the determination of which factual finding was reasonable is guided by the strength of the underlying evidence: in cases of weak or contradictory evidence, the Trial Chamber has to explain in a more thorough manner how it came to a specific factual conclusion and this explanation will be of greater significance in the determination whether this conclusion was reasonable.⁴²

³⁴ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 342.

³⁵ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 343–346.

³⁶ Bemba et al. Appeals Judgment, Separate Opinion of Judge Geoffrey Henderson, ICC-01/05-01/13-2275-Anx, paras 5–37.

³⁷ Pre-Trial Chamber II, Decision on the Prosecutor’s “Request for judicial order to obtain evidence for investigation under Article 70” 3 February 2014, ICC-01/05-52-Red2 (Situation in the Central African Republic), para. 3.

³⁸ Trial Chamber VII, Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, ICC-01/05-01/13-1257 (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 13.

³⁹ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 431–435.

⁴⁰ The Appeals Chamber further explains that the determination whether a communication is made in the context of a professional relationship between a client and a counsel must not be determined in isolation but in view of all available information. Further, communications which are not made in the context of a professional relationship (because they relate, for instance, to criminal activity) do not gain status as privileged because other parts of the communication are not made with furtherance to criminal activities and are therefore covered by the Rule 73 privilege. See, paragraph 439.

⁴¹ It appears that this standard was changed by the majority of the Appeals Chamber in The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, ICC-01/05-01/08-3636-Red. It remains to be seen if this reversal of standard of review will be the new standard or if future judgments will revert back.

⁴² Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo

This means that not only the relevant evidence but also the argumentation and extend of analysis provided by a trial chamber is determinative of the reasonableness of a factual finding.

Similarly, the Appeals Chamber held that the obligation emanating from Article 74 (5) of the Statute to provide a reasoned decision does not mean that the Trial Chamber is required to exhaustively address “each and every factor” which came before it. Rather, “[i]t must be clear from the Trial Chamber’s decision which facts it found to have been established beyond reasonable doubt and how it assessed the evidence to reaches these factual findings.” The Appeals Chamber states that it assumes that the Trial Chamber has evaluated all the evidence before it as long as there are no indications that a piece of evidence is completely disregarded. This, for example, is the case when evidence which is clearly relevant is not addressed by the Trial Chamber. However, the Appeals Chamber states that a trial chamber has “a degree of discretion as to what to address and what not to address in its reasoning.”⁴³

2. *The Bemba et al. Appeals Judgment on Sentencing*

In its judgment on the Trial Chamber’s sentencing decision, the Appeals Chamber confirmed the sentences with regard to Mr Babala and Arido. In respect of Messrs Bemba, Kilolo and Mangenda it reversed the sentences and remanded it back to Trial Chamber VII for a new determination. The Appeals Chamber found three substantial errors in the Trial Chamber’s sentencing decision with regard to (i) the weight accorded to the nature of the false testimony provided by the witnesses; (ii) the effect of the type of participation on the sentence and (iii) the Trial Chamber’s power to suspend sentences.

a) Assessment of the nature of the unlawful testimony. During the considerations of the gravity of the offences in the context of Article 70 (1) (a), the Trial Chamber took into consideration that the false testimony provided by the witnesses concerned matters other than the merits of the case.⁴⁴

Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 96–98.

⁴³ Appeals Chamber, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 102–106.

⁴⁴ Trial Chamber VII, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/13-2123-Corr (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 115, 167 and 217.

While the importance of the issue on which false testimony is provided may be a factor in the assessment of the gravity, the Appeals Chamber found that the simple distinction (between lies which go to the merits of the case at hand and other matter) is an extraneous consideration for the assessment of the gravity of the crime. It explains that matters other than the merits of a case, such as issues of witness credibility, are equally important to the truth-seeking function of a trial chamber. Further, the Appeals Chamber points out that “merits” and “non-merits” of a case may not always be clearly distinguishable and that certain information might concern both. Accordingly, it does not consider that the fact that the testimony was false with regard to matters others than the merits of the case is in and of itself a factor for the gravity of the offense and found that the Trial Chamber erred in this regard.⁴⁵

b) Assessment of the mode of liability in the determination of the appropriate sentence. The Trial Chamber, when listing the factors it considered for the determination of an appropriate sentence, stated that it distinguished whether the participation of the convicted person was as a principal perpetrator or an accessory.⁴⁶

In its judgment on the appeal of the sentencing decision,⁴⁷ the Appeals Chamber pointed out that a mode of liability is generally indicative of a greater or lesser participation in a crime, depending on whether the person is a principal or accessory to a crime. The Appeals Chamber continues that this does however not signify that a principal perpetrator always deserves a higher sentence than an accessory to a crime.⁴⁸ The Appeals Chamber continues to analyse the way how the Trial Chamber used this distinction: it notes that (i) the sentences for the crimes which were committed as co-perpetrators were higher than the ones which were committed as an accessory; (ii) that the relevant factual findings for the different offences were essentially the same and (iii) that the Trial Chamber did not provide any further explanation how

⁴⁵ Appeals Chamber, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, 8 March 2018, ICC-01/05-01/13-2276-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 38–45

⁴⁶ Trial Chamber VII, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/13-2123-Corr (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 145, 193 and 248.

⁴⁷ While the Trial Chamber made these considerations with regard to all three convicted persons, the Prosecution appealed this point only with respect to Mr Bemba and Kilolo. Accordingly, the Appeals Chamber limited its control of this issue to only the sentences against Mr Bemba and Mr Kilolo.

⁴⁸ Appeals Chamber, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, 8 March 2018, ICC-01/05-01/13-2276-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 60.

the distinction between principal and accessory perpetrator influenced the sentence. Given that the sentences for the crimes committed as an accessory were lower, the Appeals Chamber concludes that the Trial Chamber reduced the sentence only because of the mode of liability. This, according to the Appeals Chamber, amounts to an error.⁴⁹

c) The Trial Chamber's power to suspend sentences. In its decision on sentencing, the Trial Chamber stated that it had an inherent power to suspend sentences: it first notes that the statutory framework of the Rome Statute does not regulate the suspension of sentences and concluded that there is a *lacuna*. It then argued that it would be unfair for a convicted person to impose an unconditional prison sentence in cases where a chamber found that a suspended sentence would be more appropriate solely for the reason that the statutory scheme does not provide for this possibility. The Trial Chamber concluded by finding that it is inherent to the power of imposing and determining a sentence to also suspend such sentence.⁵⁰

The Appeals Chamber cited first to the notion of "inherent powers" in general and states that this concept should be invoked restrictively and – in principle – only with regards to procedural matters.⁵¹ It found that the Trial Chamber erred when finding that there was a *lacuna* in the statutory system: the Rome Statute and the related provision contain an exhaustive identification of types of penalties (which simply does not foresee a suspension of sentences).⁵² Accordingly, the Trial Chamber cannot invoke the notion of "inherent powers" to introduce the suspension of sentences.⁵³ Accordingly, the Appeals Chamber overturned the Trial Chamber also in this regard.

The Appeals Chamber then vacated the imposed sentences on Messrs Bemba, Kilolo and Mangenda and remanded

the decision back to Trial Chamber VII⁵⁴ to determine the sentence anew.⁵⁵

II. Decisions related to reparation proceedings

1. Trial Stage: Reparations Order in the Al Mahdi case

a) Background. On 27 September 2016, Trial Chamber VIII, after an admission of guilt by the accused, issued a decision on the conviction of Mr Ahmad Al Faqi Al Mahdi for the war crime of attacking protected objects as a co-perpetrator under Articles 8 (2) (e) (iv) and 25 (3) (a) of the Statute. Mr Al Mahdi was found guilty of attacking and destroying ten mausoleums in Timbuktu, Mali, and sentenced to nine years.⁵⁶

On 17 August 2017, Trial Chamber VIII issued its Reparations Order in the case.⁵⁷

This is the third reparations order issued by the Court.⁵⁸ In its decision, Trial Chamber VIII outlined first the importance of cultural heritage, making references to *amicus* submissions by the UNESCO and other organisations.⁵⁹ The Chamber then proceeded to repeat the principles and procedures for reparations which were established by the Appeals Chamber.⁶⁰ 139 victims applied for reparations via the Legal Representative for Victims, the Chamber identified three groups as relevant victims: the community of Timbuktu, the Malian population as a whole, as well as the international community as a whole. However, the Chamber states that it will only address the harm suffered by the first group, the community of Timbuktu, since addressing their harm would effectively

⁴⁹ Appeals Chamber, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, ICC-01/05-01/13-2276-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 61.

⁵⁰ Trial Chamber VII, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/13-2123-Corr (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), paras 40–41.

⁵¹ Appeals Chamber, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, ICC-01/05-01/13-2276-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 75.

⁵² In case of offences against the administration of justice, Article 70 (3) of the Statute.

⁵³ Appeals Chamber, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, ICC-01/05-01/13-2276-Red (The Prosecutor v. Jean-Pierre Bemba Gombo et al.), para. 77.

⁵⁴ It must be noted that the possibility to remand the matter to the lower Chamber is not foreseen by the Rome Statute. The Appeals Chamber simply stated that it "considers that the power to remand follows from its power to reverse the sentence". It seems that the Appeals Chamber considers this to be an inherent power.

⁵⁵ The re-sentencing decision was issued by Trial Chamber VII on 17 September 2018: Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, ICC-01/05-01/13-2312. It is not discussed in this article, as it is outside of the time frame of this overview.

⁵⁶ Trial Chamber VIII, Judgment and Sentence, ICC-01/12-01/15-171 (The Prosecutor v. Ahmad Al Faqi Al Mahdi).

⁵⁷ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi).

⁵⁸ The two previous orders were issued in the Lubanga and Katanga cases.

⁵⁹ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 13–22.

⁶⁰ Appeals Chamber, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, 3 March 2015, ICC-01/04-01/06-3129 (The Prosecutor v. Thomas Lubanga Dyilo).

also address the broader harm suffered by the Malian and international community.⁶¹

b) Harm suffered. As to the specific harm suffered, the Chamber found that three kinds of harm were caused by the crimes for which Mr Al Mahdi was convicted and rejected the existence of two others. It rejected bodily harm and damage to property other than the buildings which were object of the attack.⁶² Regarding the bodily harm, the Chamber stated that it was impossible to tell if it was caused by the attackers of the mausoleums or by other people in a manner which the convicted person could've known or reasonably anticipated.⁶³ Regarding damages to property other than the mausoleums, victims alleged that they lost personal property as a result of the attack on the mausoleums, when fleeing Timbuktu in the wake of the attack. Similarly, the Chamber did not see itself in a position to establish the circumstances how exactly the harm was caused and therefore whether it was sufficiently foreseeable for Mr Al Mahdi that his acts and conduct would lead to this kind of damage.⁶⁴

Conversely, the Trial Chamber did establish that harm was caused by the damage to the mausoleums⁶⁵ as well as moral harm due to the attacks.⁶⁶ Regarding the former, the Chamber considered collective reparations to be appropriate, since the mausoleums belonged to the entire community of Timbuktu. The Chamber notes that the UNESCO had already rebuilt or restored the attacked mausoleums. It therefore concluded that appropriate measures are such which are aimed at rehabilitating the mausoleums and measures to promote non-repetition of such attacks.⁶⁷ With regard to the moral harm, the Trial Chamber VIII considered that mental pain and anguish and disruption of culture were established. As to the reparations for this kind of harm suffered, the Chamber ordered individual reparations for the mental pain and anguish suffered by those whose ancestors' burial sites were damaged in the attack and collective reparations for the

mental pain and anguish as well as the disruption of the culture of the Timbuktu community as a whole.⁶⁸

The third kind of harm the Trial Chamber found existed is more specific: the mausoleums also presented a source of economic income for certain groups.⁶⁹ These were guardians of the mausoleums, people maintaining them or certain business owners.⁷⁰ The Chamber awarded individual reparations to those whose livelihood *exclusively* depended on the mausoleums. For the more general economic harm suffered, collective reparations were awarded.⁷¹

c) Implementation of the order. Mr Al Mahdi's liability for the harm caused was estimated at 2.7 million euros.⁷² The Chamber provided guidance for the implementation of the reparation order via the Trust Fund for Victims.⁷³ Only one aspect of the numerous considerations shall be pointed out here: the extent to which traditional justice mechanisms should be used during the implementation of the order. The Chamber noted that these mechanisms play a paramount role in Timbuktu's culture. However, it also observes several submissions by the experts appointed for the reparations phase that these mechanisms have a history of discrimination, especially towards women. The Chamber merely notes this 'conflicting information' and decides not to rely on traditional justice mechanisms for the implementation of the order.⁷⁴ It further notes that so far only 139 applications for participation during the reparations phase had been received and considered that the potential number of victims in the case is significantly higher.⁷⁵

2. Appeals Stage: Judgment on the appeal against the Reparations Order in the Al Mahdi case

a) Background. On 17 August 2017, Trial Chamber VIII issued its Reparations Order in the Al Mahdi case (see above).⁷⁶ The Legal Representative of Victims in the case

⁶¹ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 51–56.

⁶² Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 93–103.

⁶³ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), para. 97.

⁶⁴ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), para. 102.

⁶⁵ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 60–67.

⁶⁶ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 84–92.

⁶⁷ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), para. 67.

⁶⁸ ICC Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 85 and 90.

⁶⁹ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 72–83.

⁷⁰ Trial Chamber VIII cites to businesses who sell sand perceived as holy from the sites of the mausoleums.

⁷¹ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 81 and 83.

⁷² Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 109 and 123.

⁷³ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 135 and 148.

⁷⁴ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), para. 147.

⁷⁵ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), para. 141.

⁷⁶ Trial Chamber VIII, Reparations Order, ICC-01/12-01/15-236 (The Prosecutor v. Ahmad Al Faqi Al Mahdi).

appealed this order on two grounds. First, he argues that the Trial Chamber erred by limiting the individual reparations to those whose livelihoods exclusively depended upon the destroyed mausoleums and those whose ancestor's burial sites were damaged in the attack. Second, the LRV appealed the implementation plan which accorded the Trust Fund for Victims several powers during the execution of the Chamber's reparation order, especially with regard to the confidentiality of the information participating victims need to provide.

b) Determinations by the Appeals Chamber. On 9 March 2018, the Appeals Chamber issued its judgment on the appeal against the Reparations Order.⁷⁷ Regarding the first ground of appeal, the Appeals Chamber found that the Trial Chamber did not err in the exercise of its discretion when limiting the individual reparations to persons whose livelihood depended exclusively on the mausoleums.⁷⁸ In respect of the second ground of appeal raised by the Legal Representative for Victims, the Appeals Chamber only found an issue with the general parameters provided by the Trial Chamber in respect of the screening process of the victims applying for individual reparations. It considered that the delegation of tasks to the Trust Fund for Victims in the implementation of the order was relatively limited. Specifically at issue was the task by the Trust Fund to determine whether any applying victim is part of the group eligible for individual reparations.⁷⁹ The Appeals Chamber notes that the Trial Chamber maintains oversight of the process and will eventually endorse the result of the screening by the Trust Fund and amend it, if necessary. The Appeals Chamber concludes by stating that the Trial Chamber's delegation of tasks is in conformity with the statutory requirements but stresses that, in case administrative decisions by the Trust Fund are challenged, it is part of the Chamber's judicial functions to make a final determination. This means in cases where victims are found not eligible for individual reparations, they are entitled to request a decision by the Chamber to review this decision.⁸⁰ However, the Appeals Chamber found an error related to the confidentiality of the applicants' information. After a short admonishment that the Legal Representative for Victims did not substantiate this point of this appeal, the Appeals Chamber nevertheless considered the merits of this point.⁸¹ According to the Appeals Chamber, the Trial Chamber erred in ordering victims who

are applying for individual reparations with the Trust Fund for Victims to reveal their identity to the convicted person as a pre-condition for this application. When deciding on the availability of information concerning victims for the defence, the Trial Chamber has a degree of discretion. However, the Appeals Chamber found that the Trial Chamber failed to justify why applicants had already to disclose their identity during the screening process and reversed the Reparation Order in this regard. However, the identities of applying victims must be made available to the Trust Fund for Victims, since it is the Trust Fund who will conduct the screening procedure.⁸² Consequently, the Appeals Chamber amended the Reparations Order in the Al Mahdi case accordingly.

3. Appeals Stage: Judgment on the appeals against the Reparation Order in the Katanga case

a) Background. On 24 March 2017, Trial Chamber II issued its order on reparations in the Katanga case.⁸³ Therein, it declared that an individual analysis of all 341 applications for reparations was required to fulfil the elements which the Appeals Chamber identified as necessary for a reparation order.⁸⁴ These individual analyses were put in an annex to the order while explaining the general approach of the analysis in the order itself.⁸⁵ In the order, the Chamber evaluated the specific harms and determined specific amounts for the compensation for each identified harm.⁸⁶ For the 297 applications which the Chamber deemed eligible for reparations, the Chamber considered it appropriate to award individual reparations⁸⁷ (The Chamber further determined that additionally collective reparations were appropriate.).

Trial Chamber II further rejected, amongst others, the application of 5 victims for transgenerational harm caused by the attack which formed the foundation of the conviction of Mr Katanga. The Chamber found that, even while stating that the victims in question suffered "in all likelihood from transgenerational psychological harm", that there is no suffi-

⁷⁷ Appeals Chamber, Judgment on the appeal of the victims against the "Reparations Order", ICC-01/12-01/15-259-Red2 (The Prosecutor v. Ahmad Al Faqi Al Mahdi).

⁷⁸ Appeals Chamber, Judgment on the appeal of the victims against the "Reparations Order", ICC-01/12-01/15-259-Red2 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 33–43.

⁷⁹ Appeals Chamber, Judgment on the appeal of the victims against the "Reparations Order", ICC-01/12-01/15-259-Red2 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), para. 59.

⁸⁰ Appeals Chamber, Judgment on the appeal of the victims against the "Reparations Order", ICC-01/12-01/15-259-Red2 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), para. 72.

⁸¹ Appeals Chamber, Judgment on the appeal of the victims against the "Reparations Order", ICC-01/12-01/15-259-Red2 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), para. 82.

⁸² Appeals Chamber, Judgment on the appeal of the victims against the "Reparations Order", ICC-01/12-01/15-259-Red2 (The Prosecutor v. Ahmad Al Faqi Al Mahdi), paras 87, 94–96.

⁸³ Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG (The Prosecutor v. Germain Katanga), date of English translation: 17 August 2017.

⁸⁴ Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG (The Prosecutor v. Germain Katanga), para. 30–33.

⁸⁵ Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG (The Prosecutor v. Germain Katanga), para. 64–167.

⁸⁶ Section IX "Assessment of the extent of the harm". See, for example the overview table at page 81.

⁸⁷ Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG (The Prosecutor v. Germain Katanga), para. 286. The Chamber accorded 250 US dollar as "symbolic reward" for compensation as individual reparation to each victim.

cient evidence to establish a causal nexus between the trauma and the attack in question. It therefore rejected the application of these witnesses.⁸⁸

The Defence of Mr Katanga and several different groups of victims filed appeals in reaction to the decision. On 9 March 2018, the Appeals Chamber issued its decision on these appeals against Trial Chamber II's order.⁸⁹

b) Determination by the Appeals Chamber. The Appeals Chamber upheld the order by the Trial Chamber, except with regards to its finding regarding the lack of a causal link between the attack on Bogoro and the transgenerational psychological harm of the 5 rejected applicants (which was appealed by the Legal Representatives of Victims).

The Appeals Chamber found that the findings by the Trial Chamber that the five applicants suffered "in all likelihood" from transgenerational harm and that there was no causal nexus with the crimes at issue to be contradictory. It also analysed the assessment of the individual applications of the five victims in question and found that the Trial Chamber did not further elaborate on its finding that the causal link had not been established. It concluded that the Trial Chamber erred to properly reason its decision in this regard⁹⁰ and remanded the matter of reassessing the nexus between the crimes for which Mr Katanga was convicted and the transgenerational psychological harm back to the Trial Chamber.⁹¹

c) Comments on the general approach taken by Trial Chamber II. The Appeals Chamber, while discussing a ground of appeal brought forward by the Defence of Mr Katanga,⁹² also comments on the general approach to reparations proceedings.⁹³ It finds that the Trial Chamber did not

abuse its discretion when deciding to conduct an individual assessment of each application and allocate monetary value for each harm suffered. However, it emphasises that it "is not persuaded that the approach chosen by the Trial Chamber for the reparations proceedings before it, which was based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays in the award of reparations".⁹⁴ It proceeds with a detailed analysis of its critiques⁹⁵ and provides general guidelines on what it considers to be a more appropriate manner to conduct reparation proceedings.⁹⁶ This creates the impression that the Appeals Chamber, while accepting that the reparations order of Trial Chamber II is permitted within the statutory framework, wants nevertheless convince future chambers to depart from the approach taken by the Chamber.⁹⁷

III. Decisions related to the Pre-Trial phase

1. Article 15 decision in the Burundi case

a) Background. On 5 September 2017, the Prosecution submitted its request for authorisation of an investigation into crimes allegedly committed in Burundi. This request for investigation is made against the setback of Burundi's withdrawal from the Rome Statute: on 27 October 2016, Burundi notified the Secretary General of the UN of its intention to withdraw, pursuant to Article 127. This withdrawal will, according to the disposition, become effective on 27 October 2017. On 25 October 2017, Pre-Trial Chamber III issued an under seal ex parte decision authorising the Article 15 request

⁸⁸ Trial Chamber II, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG (The Prosecutor v. Germain Katanga), para. 132–134.

⁸⁹ Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07-3778-Red (The Prosecutor v. Germain Katanga).

⁹⁰ Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07-3778-Red (The Prosecutor v. Germain Katanga), paras 237–239.

⁹¹ Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07-3778-Red (The Prosecutor v. Germain Katanga), para. 260.

⁹² It must be noted that the specific ground of appeal in question did not really call for the analysis by the Appeals Chamber. The Defence challenged the application of the standard of proof of "a balance of probabilities" with regard to a specific finding of the Trial Chamber, not the overall approach in the Reparations Order. It seems that the ground for appeal was rather used as opportunity to make these remarks.

⁹³ Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017

entitled "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07-3778-Red (The Prosecutor v. Germain Katanga), paras 64–73.

⁹⁴ Appeals Chamber, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", ICC-01/04-01/07-3778-Red (The Prosecutor v. Germain Katanga), para. 65.

⁹⁵ For instance, the Appeals Chamber points out that the Trial Chamber spent considerable efforts to establish an estimation of the overall harm suffered by the victims (over 3,7 million USD, the annex with the individual analysis of each application being over a thousand pages long). The Trial Chamber then determined the amount for which Mr Katanga was liable at 1 million USD. Since the Trust Funds for Victims used that latter figure for its implementation plan of the Reparation Order and the individual reparations of 250 USD were a symbolic award, the specific amount of overall harm suffered is meaningless for the continuation of the reparation proceedings. Ibid, paras 66–68.

⁹⁶ Ibid, para. 72.

⁹⁷ The first four "Key findings" listed by the Appeals Chamber at the beginning of the judgment all concern the approach taken by Trial Chamber II which was ultimately upheld.

by the Prosecution. A public redacted version of this decision was issued on 9 November 2017.⁹⁸

b) The effects of Burundi's withdrawal. In its decision authorising investigations according to Article 15, the Pre-Trial Chamber first discusses shortly the effects of Burundi's withdrawal on the proceedings before the Court. It stresses that there is a distinction between the jurisdiction of the Court, which ceases to have effect one year after the reception of the notification of withdrawal by the state pursuant to Article 127 (1) and the state's duty of cooperation pursuant to Article 127 (2).

The power of jurisdiction prescribed by Article 127 (1) is immutable, which means that the Court can also choose to *exercise* this jurisdiction after the point in time specified by Article 127 (1).

With regard to the state's duty to cooperate, the situation is less certain. Article 127 (2) clearly states that the State's duty to cooperate persists in connection with criminal investigations and proceedings which started prior to the date the withdrawal became effective. However, the Pre-Trial Chamber points out that there is some ambiguity for the State's duty to cooperate in cases where the crimes in question fall still under the jurisdiction of the Court but the criminal investigations and proceedings only commenced after the withdrawal became effective. After having noted this ambiguity, the Pre-Trial Chamber states that the case at hand did not require the resolution of this question, as the decision pursuant to Article 15 was rendered two days before the withdrawal came into effect.⁹⁹

c) Authorisation of the Pre-Trial Chamber. The Pre-Trial Chamber proceeds to assess whether there is a reasonable basis to proceed with an investigation into crimes committed, which fall under the jurisdiction of the Court. After conducting a thorough assessment, it finds that there is a reasonable basis to believe that five crimes against humanity have been committed.¹⁰⁰ Having concluded this analysis, the Pre-Trial Chamber notes that the Prosecution did not request an authorisation for investigations into war crimes. The Prosecution

stated that, despite there being evidence of some armed confrontation, it considered that there was no reasonable basis to believe that the degree of intensity or the level of organisation was of such as to justify the assumption of a non-international armed conflict. The Pre-Trial Chamber disagrees with this conclusion and finds that the Prosecution "acted too restrictively and has imposed requirements on the material that cannot reasonably be met in the absence of an investigation." It therefore also authorised an investigation into whether a non-international armed conflict existed and whether war crimes were committed.¹⁰¹

The Pre-Trial Chamber concludes with a series of noteworthy expansions of the Prosecution's request.

With regard to the temporal scope of the investigation, the Pre-Trial Chamber requested that an investigation from 26 April 2015 onwards be allowed. The Pre-Trial Chamber expands this temporal scope: it notes that some of the crimes were committed before 26 April 2015 and takes this as an occasion to also authorise investigations into these crimes, provided that the contextual elements of the crimes are fulfilled. Further, it notes that, due to the continuous nature of some of the crimes, the Prosecution is also authorised to conduct investigations into crimes even if they continue after 26 October 2015.¹⁰²

With regard to the material scope, in addition to the authorisation to investigate potential war crimes, the Pre-Trial Chamber states that the Prosecution is authorised to investigate *any crime* within the jurisdiction of the Court. It emphasises that "the Prosecutor is not restricted to the incidents and crimes set out in the present decision but may [...] extend her investigation to the crimes against humanity or other article 5 crimes".¹⁰³

With regard to the geographical scope, the Pre-Trial Chamber notes that some of the crimes were committed outside of Burundi by Burundian nationals. It therefore authorises the Prosecution to investigate crimes committed in Burundi or outside of Burundi by Burundian nationals pursuant Articles 12 (2) (a) and 12 (2) (b).

⁹⁸ Pre-Trial Chamber III, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red (Situation in the Republic of Burundi).

⁹⁹ *Ibid.*, paras 23–25. As mentioned above, the withdrawal came into effect on 27 October 2017 and the under seal *ex parte* version of the Pre-Trial Chamber's decision was issued on 25 October 2017. Due to the proximity of the two dates but even more because of the Chamber's comment, it can be assumed that the Pre-Trial Chamber issued its decision on purpose before 27 October 2017, in order to avoid having to address this question.

¹⁰⁰ Murder and attempted murder (see para. 67 of the decision), Imprisonment or Severe Deprivation of Liberty (see paras 88–90), Torture (see para. 109), Rape (see para. 116), Enforced Disappearance (see para. 129) and Persecution (see para. 136).

¹⁰¹ Pre-Trial Chamber III, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red (Situation in the Republic of Burundi), paras 137–141.

¹⁰² Pre-Trial Chamber III, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red (Situation in the Republic of Burundi), para. 192.

¹⁰³ Pre-Trial Chamber III, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red (Situation in the Republic of Burundi), para. 193.

This signifies that on each of the possible factors of circumscribing jurisdiction – temporal, geographical and subject matter – the Pre-Trial Chamber considerably expanded the authorisation *proprio motu*.¹⁰⁴

2. Warrant of arrest against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Al Hassan”)

On 27 March 2018, Pre-Trial Chamber I issued a warrant of arrest against Mr Al Hassan.¹⁰⁵ He was transferred into the custody of the Court on 31 March 2018. The arrest warrant was issued for four crimes against humanity¹⁰⁶ and four war crimes.¹⁰⁷ The background of the case is the same as the Al-Mahdi one: the occupation of Timbuktu by Al-Qaeda in the Islamic Maghreb and Ansar Dine. Mr Al-Hassan is alleged to have been a member of Ansar Dine and the Islamic police, which was set up during the occupation of Timbuktu, acting as its *de facto* chief. It needs to be noted that the time frame for the destruction of buildings – 29/30 June 2012 to 11/12 July 2012¹⁰⁸ – is the same one as the timeframe of the crime of attacking protected objects for which Mr Al-Mahdi was

found guilty.¹⁰⁹ Since the Prosecution alleges in the request for Mr Al-Hassan’s arrest warrant that 22 mausoleums have been destroyed,¹¹⁰ it is reasonable to assume that at least part of the alleged crimes are identical to the destruction of 10 mausoleums for which Mr Al-Mahdi has been convicted. It remains to be seen whether any expeditiousness can be drawn from this fact.

¹⁰⁴ One explanation could be that the Pre-Trial Chamber wanted to avoid future problems with the duty of Burundi to cooperate pursuant to Article 127 (2). As explained above, the Pre-Trial Chamber foresaw that there might be a different level of cooperation applicable if the investigations and proceedings had started after the withdrawal became effective. By enlarging the parameters of the investigation in this manner, a ruling on this question could be avoided.

¹⁰⁵ Pre-Trial Chamber I, Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-2-tENG (The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud). Disclosed on 28 March 2018.

¹⁰⁶ Torture (article 7 [1] [f] of the Statute); rape and sexual slavery (article 7 [1] [g] of the Statute); persecution of the population of Timbuktu on religious and gender grounds (article 7 [1] [h] of the Statute); and other inhumane acts (article 7 [1] [k] of the Statute), committed either under Article 25 (3) (a) or 25 (3) (b).

¹⁰⁷ Violence to person and outrages upon personal dignity (articles 8 [2] [c] [i] and 8 [2] [c] [ii] of the Statute); the passing of sentences without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable (article 8 [2] [c] [iv] of the Statute); rape and sexual slavery (article 8 [2] [e] [vi] of the Statute) and intentionally directing attacks against buildings dedicated to religion and historic monuments (article 8 [2] [e] [iv] of the Statute), committed either under Article 25 [3] [a] or 25 [3] [b].

¹⁰⁸ “Version publique expurgée de la Requête urgente du Bureau du Procureur aux fins de délivrance d’un mandat d’arrêt et de demande d’arrestation provisoire à l’encontre de M. Al Hassan Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud”, 20 March 2018, ICC-01/12-54-Secret-Exp”, 31 March 2018, ICC-01/12-01/18-1-Red, para. 208.

¹⁰⁹ Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171 (Prosecutor v. Ahmad Al Faqi Al Mahdi), para. 38.

¹¹⁰ Décision relative à la requête du Procureur aux fins de délivrance d’un mandat d’arrêt à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018, ICC-01/12-01/18-35-Red2, para. 147 (The Pre-Trial Chamber split up the initial pronouncement to issue a warrant of arrest [see Fn. 105] and the reasons for the arrest warrant into two different decisions.).