Recent developments in the jurisprudence of the International Criminal Court – Part 2*

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II. Situation in Uganda (Pre-Trial Chamber II)[1]

No developments took place at the situation level during the review period. To date, two cases emanated from this situation. The Kony et al case, originally a case against Kony and other four commanders, including Ongwen, is dormant as the suspects have not been arrested yet. At the occasion of the surrender of Ongwen, it was decided to separate the cases and to proceed against Ongwen separately.

1. Prosecutor v. Joseph Kony and Vincent Otti (Pre-Trial Chamber II)[2]

- Warrant of arrest: 8 July 2005 (public on 13 October 2005)
- Victims participating: 40
- Current status: Suspects at large

On 16 January 2015, Dominic Ongwen, one of the co-suspects in the case, consented to appear voluntarily before the ICC and was transferred to the custody of the Court. Five days later, on 21 January 2015, he arrived at the detention centre of the Court, and on 26 January 2015 made his initial appearance before the Single Judge. With decision dated 6 February 2015, having received observations from the Prosecutor, the Single Judge decided not to proceed with the confirmation of charges proceedings in absentia in respect to Joseph Kony and Vincent Otti and Okot Odhiambo.[3] The Single Judge based her decision on the reservations expressed by the Prosecutor, the fact that the Court 'currently [lacked] the necessary resources to proceed against the other co-suspects in absentia', and the 'significant, but unjustified budgetary implications'.[4] The Chamber also made reference to the impact of such course of action on victims participating in the case as only those victims would continue to participate at trial who are linked to the charges against Dominic Ongwen causing disappointment to those who would not continue participating in trial proceedings, if charges were to be confirmed.[5] Accordingly, she severed the case against Ongwen from that involving the other co-suspects and a new case record was opened for the case against Ongwen.

2. Prosecutor v. Dominic Ongwen (Trial Chamber IX)[6]

- Warrant of arrest: 8 July 2005 (public on 13 October 2005)
- Surrender to the Court: 16 January 2015
- Initial appearance: 26 January 2015
- Confirmation of charges: 26 March 2016
- Victims participating: 4.100
- Trial start: since 6 December 2016
- Current status: presentation of evidence by the Prosecutor

a) Proceedings Before Pre-Trial Chamber II

At the initial appearance of Ongwen, the date of 24 August 2015 was set provisionally as the date on which the confirmation hearing would commence. Considering the time passed since the warrant of arrest was issued against Ongwen, and the time needed for the Prosecutor to re-activate her contacts with witnesses and prepare the case for the confirmation of charges hearing, it was clear that that time frame was too ambitious. The commencement of the confirmation hearing was later postponed to 21 January 2016.[7] The renewed requests of the defence to postpone the start of the hearing were rejected.[8]

On 27 February 2016, the Single Judge at the time, Judge Ekaterina Trendafilova, established principles for the disclosure system, set staggered deadlines for disclosure inter partes, ordered the communication of all evidence to the Chamber, addressed issues of translation of evidence and confidentiality agreements affecting evidence, and ordered the parties to submit an in-depth analysis chart, according to the established practice of this Chamber.[9] With judgment dated 17 June 2015, the Appeals Chamber reversed the disclosure decision to the extent an in-depth analysis chart was ordered without seeking first the observations of the parties.[10]

* The first part of this article was published in ZIS 2017, 733. The third part will be published in ZIS 2/2018.

[1] The record carries the situation number ICC-02/04.

[2] The record carries the case number ICC-02/04-01/05.

[3] ICC, Decision of 6.2.2015 – ICC-02/04-01/05-424 (Decision Severing the Case Against Dominic Ongwen ["Severance Decision"]).

[4] ICC, Decision of 6.2.2015 – ICC-02/04-01/05-424 (Severance Decision), para. 7.

[5] ICC, Decision of 6.2.2015 – ICC-02/04-01/05-424 (Severance Decision), para. 7.

[6] The record carries the case number ICC-02/04-01/15.

[7] ICC, Decision of 6.3.2015 – ICC-02/04-01/15-206 (Decision Postponing the Date of the Confirmation of Charges Hearing).

[8] ICC, Decision of 26.11.2015 – ICC-02/04-01/15-348-Red (Decision on the Defence "Request to Postpone Confirmation of Charges Hearing"); a leave by the Defence to appeal this decision was rejected, Decision of 18.12.2015 – ICC-02/04-01/15-373-Red (Decision on the Defence request for leave to appeal the "Decision on the Defence 'Request to Postpone Confirmation of Charges Hearing'"); Decision of 12.1.2016 – ICC-02/04-01/15-396 (Decision on requests to postpone the hearing on the confirmation of charges).

[9] ICC, Decision of 27.2.2015 – ICC-02/04-01/15-203 (Decision Setting the Regime for Evidence Disclosure and Other Related Matters).

[10] ICC, Judgment of 17.6.2015 – ICC-02/04-01/15-251 (OA3, Judgment on the appeal of the Prosecutor against the decision

This appellate decision effectively terminated the early pre-trial chambers' efforts to compel the Prosecutor to present the evidence in an organised and analytical manner thus contributing to the fair and expeditious conduct of the proceedings. Indeed, the Judges agreed to insert their decision not to "impose" on the parties any in-depth analysis charts in the Chambers Manual.[11] It is worth noting that other international institutions have picked up the idea of a document organising the presentation of the evidence, a practice that the ICC abandoned since the Appeals judgment in the Ongwen case.[12]

With decision dated 5 March 2015, principles on the application process of victims were established so as to facilitate the collection of applications. The decision gave judicial guidance on topics, such as outreach mission of the relevant Registry section, the use of simplified application form, the process of collection of application forms and the use of intermediaries, and the transmission of the applications to the Chamber and the parties.[13] Due to the limited nature of the allegations contained in the 2005 warrant of arrest against Ongwen, no victims participating in the Kony et al case were eligible to participate in the Ongwen case.

The composition of the Pre-Trial Chamber changed with the termination of the mandate of the Presiding Judge of the Chamber in March 2015. The newly appointed Single Judge, Judge Tarfusser, took a series of procedural decisions with a view to preparing the case for the confirmation decision. He first adopted the same procedure of applying redactions as developed by various Trial Chambers, thus allowing for the automatic application of redactions by the disclosing party for certain categories of redactions prior to disclosure of evidence on the basis of standardised justification.[14] He also amended the decision on victims issued on 5 March 2015 and established a simplified admission procedure on 3 September 2015.[15] With decision on 27 November 2015, the Single Judge resolved issues arising from contested victims' applications for participation, admitted a first set of victims, addressed their legal representation and confirmed their procedural rights.[16] Further decisions on victims' issues were taken on 15 and 24 December 2015.[17]

In the status conference held on 19 May 2015, the Prosecutor indicated to the Chamber that the charges she intends to bring against Ongwen would exceed the factual basis underpinning the warrant of arrest, thus raising the question of the applicability of article 101. In a decision dated 7 July 2015, the Single Judge found that, contrary to the Prosecutor's assertion, Ongwen had not "voluntarily appeared" before the Court but had been formally "surrendered" within the meaning of articles 101 and 102 (a).[18] In his view, any transfer of a suspect to the Court is to be considered a "surrender" if it "takes place in compliance with a request for arrest and surrender transmitted by the Court and that the relevant arrangements for the surrender of the person to the Court are those agreed upon between the authorities of the requested State and the Registrar".[19] The person's consent to his or her "surrender" is irrelevant in that regard.[20] The Prosecutor was denied leave to appeal this decision.[21]

Further to the issue of whether a waiver was needed due to the enlargement of the charges, the Single Judge ordered the Prosecutor to submit a formal notice of the intended charges, prior to the submission of the document containing the charges, so as to ease the preparations of the Defence and inform Ongwen of the content and nature of the charges.[22] The Prosecutor did so on 18 September 2015.[23]

of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters").

[11] Chambers Manual, p. 10 (available at https://www.icccpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf [25.12.2017]).

[12] See rule 86 (3) (b) of the Rules of Procedure and Evidence of the Kosovo Specialist Chambers, KSC-BD-03/54 of 114 (adopted on 17.3.2017 and revised on 29.5.2017).

[13] ICC, Decision of 4.3.2015 – ICC-02/04-01/15-205 (Decision Establishing Principles on the Victims' Application Process).

[14] ICC, Decision of 23.4.2015 – ICC-02/04-01/15-224 (Decision on issues related to disclosure and exceptions thereto).

[15] ICC, Decision of 3.9.2015 – ICC-02/04-01/15-299 (Decision concerning the procedure for admission of victims to participate in the proceedings in the present case).

[16] ICC, Decision of 27.11.2015 – ICC-02/04-01/15-350 (Decision on contested victims' applications for participation, legal representation of victims and their procedural rights).

[17] ICC, Decision of 15.12.2015 – ICC-02/04-01/15-369 (Decision on issues concerning victims' participation); Decision of 24.12.2015 – ICC-02/04-01/15-384 (Second decision on contested victims' applications for participation and legal representation of victims).

[18] ICC, Decision of 7.7.2015 – ICC-02/04-01/15-260 (Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominic Ongwen ["Article 101 Decision"]). All articles mentioned in this paper without reference to the legal instrument are those of the Rome Statute (UN [ed.], Treaty Series, vol. 2187, p.3).

[19] ICC, Decision of 7.7.2015 – ICC-02/04-01/15-260 (Article 101 Decision), para. 4.

[20] ICC, Decision of 7.7.2015 – ICC-02/04-01/15-260 (Article 101 Decision), para. 12.

[21] ICC, Decision of 1.9.2015 – ICC-02/04-01/15-298 (Decision on the "Prosecution's application for leave to appeal the 'Decision on the applicability of article 101 of the Rome Statute in the proceedings against Dominic Ongwen'").

[22] ICC, Transcript of Hearing, 19.5.2015, ICC-02/014-01/15-T-6-ENG, p. 10, lines 7-25.

[23] ICC, Filing of 18.9.2015 – ICC-02/04-01/15-305-Red3 (Notice of intended charges against Dominic Ongwen), as redacted on 27.5.2016, and supplemented in Filing of 25.5.2016 – ICC-02/-04-01/15-311-Red (Public redacted version of "Request for permission to supplement the 'Notice of intended charges against Dominic Ongwen' filed on 18.9.2015", 5.10.2015, ICC-02/04-01/15-311-Conf).

With decision of 10 September 2015, the Chamber recommended to the Presidency holding the confirmation of charges hearing (3-5 days expected) in situ in Uganda, noting that the Prosecutor and the Defence had expressed themselves in favor of this proposal.[24] However, given the upcoming Ugandan presidential and parliamentary elections and the technical and operational limitations due to the move of the Court's resources to the new premises, the Presidency, pursuant to rule 100, declined to follow the Pre-Trial Chamber's recommendation and decided that the confirmation hearing shall take place at the seat of the Court in The Hague.[25]

A further novelty in the Court's proceedings was undertaken when the Single Judge decided, upon application of the Prosecutor, to hear the testimony of eight witnesses during pre-trial, in the presence of the Prosecutor and the Defence, so as to preserve their evidence under article 56 of the Rome Statute ("Article 56 Evidence").[26] The witnesses were victims of sexual violence who were believed to having been subjected to pressure which, in turn, was considered to impact on their willingness to testify at trial.[27] The testimony was taken in closed session and was video-recorded and a written transcript was produced. This may prove, also for other cases, to be an effective measure to receive evidence which may otherwise be lost or interfered with at a later stage. Moreover, the technical preservation of the evidence at the Court makes it easy for the Trial Chamber to access the evidence without further restrictions or impediments. Finally, it is noteworthy to report that in this context the Single Judge declined to allow any form of witness preparation, arguing that the "circumstances of the taking of testimony under article 56 of the Statute in the present case are different from trial proceedings".[28]

With decision of 23 March 2015, all charges presented by the Prosecutor were confirmed and Ongwen was committed to trial.[29] The 70 charges, as confirmed, can be divided into those concerning attacks on four internally displaced persons' camps in Pajule, Odek, Lukodi and Abok, sexual and gender-based crimes and the conscription and use of child soldiers. The Defence request asking for leave to appeal the confirmation decision was rejected.[30] This trial is to date the largest trial in scope in the history of the Court.

b) Proceedings Before Trial Chamber IX

Trial Chamber IX, assigned with the case,[31] took a series of procedural decisions prior to the start of the trial which was set to commence on 6 December 2016 with the opening statements.[32] The presentation of the evidence started on 9 January 2017. The Chamber designated Judge Bertram Schmitt to exercise the functions of the Presiding and Single Judge.[33] At the time of writing, the Chamber has heard already 46 witnesses who were called by the Prosecutor.

aa) Trial Management

The first thing Trial Judges regularly seek to establish at the outset is a calendar according to which the proceedings will unfold in a predictable, organised and expeditious manner. In this case, the deadline of three months prior to the commencement of the trial was set for the disclosure of incriminating material, including the submission of final list of witnesses (with summaries of anticipated witness testimony),[34] list of evidence and a "pre-trial brief".[35] A further cut-off date

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[24] ICC, Decision of 10.9.2015 – ICC-02/04-01/15-300 (Recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda).

[25] ICC, Decision of 28.10.2015 – ICC-02/04-01/15-330 (Decision on the recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda).

[26] ICC, Decision of 27.7.2015 – ICC-02/04-01/15-277-Red (Decision on the "Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute" ["First Article 56 Decision"]); Decision of 12.10.2015 – ICC-02/04-01/15-316-Red (Decision on the "Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute" ["Second Article 56 Decision"]).

[27] ICC, Decision of 27.7.2015 – ICC-02/04-01/15-277-Red (First Article 56 Decision), paras 1 and 6-8, 14; Decision of 12.10.2015 – ICC-02/04-01/15-316-Red (Second Article 56 Decision), paras 2, 4, 9.

[28] ICC, Decision of 18.8.2015 – ICC-02/04-01/15-293-Red (Decision on the "Prosecution's submissions on the conduct of proceedings pursuant to decision ICC-02/04-01/15-277"), para. 14.

[29] ICC, Decision of 23.3.2016 – ICC-02/04-01/15-422-Red (Decision on the confirmation of charges against Dominic Ongwen); a separate opinion of Judge Perrin de Brichambaut was appended to the decision, Opinion of 19.5.2016 – ICC-02/04-01/15-422-Anx-tENG (Separate opinion of Judge Marc Perrin de Brichambaut).

[30] ICC, Decision of 29.4.2016 – ICC-02/04-01/15-428 (Decision on the Defence request for leave to appeal the decision on the confirmation of charges); the partly dissenting opinion of Judge Perrin de Brichambaut is appended to the decision, Opinion of 10.5.2016 – ICC-02/04-01/15-428-Anx (Opinion partiellement dissidente du Juge Marc Perrin de Brichambaut).

[31] ICC, Decision of 2.5.2016 – ICC-02/04-01/15-430 (Decision constituting Trial Chambers VIII and IX referring to them the cases of The Prosecutor v. Ahmad Al Faqi Al Mahdi and The Prosecutor v. Dominic Ongwen).

[32] ICC, Decision of 30.5.2016 – ICC-02/04-01/15-449 (Decision Setting the Commencement Date of the Trial ["Trial Date Decision"]).

[33] ICC, Decision of 3.5.2016 – ICC-02/04-01/15-431 (Decision Notifying the Election of a Presiding Judge and Single Judge).

[34] As amended in ICC, Decision of 6.6.2016 – ICC-02/04-01/15-453 (Decision on the Prosecution request for variation of the time limit to provide its provisional list of witnesses and summaries of their anticipated testimony).

[35] ICC, Decision of 30.5.2016 – ICC-02/04-01/15-449 (Trial Date Decision), para. 7.

for transmission of victims' applications to participate at trial was equally set 60 days prior to the commencement of the trial.[36] The Single Judge also ordered the Defence to notify the Chamber and all participants by 9 August 2016 of its intention to raise a ground for excluding criminal responsibility pursuant to article 31 and related evidence, without prejudice to whether a defence may be advanced later at trial.[37]

In his capacity as Presiding Judge, Judge Bertram Schmitt rendered directions on the conduct of proceedings.[38] Worth mentioning is that, while he organised the presentation of the evidence (Prosecutor, victims, Defence) in general,[39] he declined to issue any regulations on the actual mode of questioning leaving this to the case-by-case determination at the relevant time.[40] Following earlier decisions (Bemba et al case, Gbagbo and Blé Goudé case, Bemba case, Lubanga case, Katanga and Ngudjolo case) case, the Chamber also prohibited the practice of witness preparation and declined to adopt a corresponding protocol.[41] The Prosecutor's request for leave to appeal this decision was equally rejected by the Chamber.[42]

bb) Admissibility of Evidence and Related Matters

As regards the Chamber's approach to assessing the admissibility of evidence, the Single Judge recalled that the Chamber would defer any assessment of the evidence as to its relevance and probative value to the deliberation of the judgment, unless, in exercise of its discretion, it decides to rule on admissibility related issues upfront.[43] As a result, the Chamber regularly recognised pieces of evidence as formally "submitted". The Chamber thus followed the approach taken earlier in the Bemba et al case (and the Gbagbo/Blé Goudé case).[44] When called upon to rule on the submission of items related to the interception of the Lord Resistance Army's radio communications by the Ugandan government, the Chamber seized the opportunity to explain its approach in more detail. It emphasised that this approach "does not involve making any relevance, probative value or potential prejudice assessments at the point of submission – not even on a prima facie basis".[45] It continued to explain to the parties that this is rooted in the understanding that article 69 (4) gives the Chamber discretionary power to rule on admissibility criteria for evidence submitted.[46] The Chamber added: "Article 74 (2) stipulates that the Chamber's final judgment can be based only on evidence 'submitted and discussed' before it at the trial. Nowhere does this provision – or any other in the Court's applicable law – mandate that the evidence to be considered for the final judgment must have also been previously declared 'admitted' or that a formal procedural step of 'admission' of each item of evidence is otherwise required".[47] Addressing apprehensions of the Defence the Chamber clarified that it may exclude items as an exception of the general rule at any time and that, as a safeguard against undue reliance, it must provide a reasoned judgment.[48] It also recalled that the Defence retains every opportunity to challenge and object to any piece of evidence that the Chamber will consider at the time of deliberating the judgment. Yet, it also clarified that not every item of evidence will be discussed in the judgment.[49] A request for leave to appeal this decision was rejected by the Chamber.[50]

The Chamber also accepted a series of prior recorded statements under rule 68 (2) that were not introduced into the proceedings through a witness. In this respect, it followed to a great extent the holdings set out in corresponding Rule 68 decisions in the Bemba et al case, in relation to which two of the three judges in this case sat on the bench.[51] Those state-

[36] ICC, Decision of 30.5.2016 – ICC-02/04-01/15-449 (Trial Date Decision), para. 10.

[37] ICC, Decision of 7.6.2016 – ICC-02/04-01/15-460 (Decision on "Prosecution's request to order the Defence to comply with rule 79"); Decision of 4.8.2016 – ICC-02/04-01/15-515 (Decision on Defence Notification on a Later Filing Date for Potential Article 31 [1] Submissions); Decision of 7.6.2016 – ICC-02/04-01/15-460 (Decision on "Prosecution's request to order the Defence to comply with rule 79").

[38] ICC, Decision of 13.7.2016 – ICC-02/04-01/15-497 (Initial Directions on the Conduct of Proceedings ["Conduct of Proceedings Decision"]).

[39] ICC, Decision of 13.7.2016 – ICC-02/04-01/15-497 (Conduct of Proceedings Decision), paras 9-10.

[40] ICC, Decision of 13.7.2016 – ICC-02/04-01/15-497 (Conduct of Proceedings Decision), para. 5.

[41] ICC, Decision of 22.7.2016 – ICC-02/04-01/15-504 (Decision on Protocols to be Adopted at Trial), paras 4-17.

[42] ICC, Decision of 19.9.2016 – ICC-02/04-01/15-537 (Decision on Prosecution Request for Leave to Appeal the Decision on Witness Preparation).

[43] ICC, Decision of 13.7.2016 – ICC-02/04-01/15-497 (Conduct of Proceedings Decision), paras 24-26.

[44] See *Chaitidou*, ZIS 2016, 813 (828-829).

[45] ICC, Decision of 1.12.2016 – ICC-02/04-01/15-615 (Decision on Prosecution Request to Submit Interception Related Evidence ["Interception Decision"]), para. 7.

[46] ICC, Decision of 1.12.2016 – ICC-02/04-01/15-615 (Interception Decision), para. 7.

[47] ICC, Decision of 1.12.2016 – ICC-02/04-01/15-615 (Interception Decision), para. 7.

[48] ICC, Decision of 1.12.2016 – ICC-02/04-01/15-615 (Interception Decision), para. 11.

[49] ICC, Decision of 1.12.2016 – ICC-02/04-01/15-615 (Interception Decision), para. 13 ("Examples of when items may not be discussed in the judgment could include items which, upon consideration during deliberations, end up being assessed as: [i] going solely to points ultimately having no impact on the Chamber's essential findings or [ii] needlessly cumulative in relation to other evidence supporting these findings. Reasoning a judgment in this manner is fully consistent with conducting an item-by-item assessment.").

[50] ICC, Decision of 20.12.2016 – ICC-02/04-01/15-641 (Decision on Defence Request for Leave to Appeal the Decision Recognising Interception Related Evidence as Submitted).

[51] ICC, Decision of 18.11.2016 – ICC-02/04-01/15-596-Red (Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68 [2] [b] of the Rules); Decision of 22.11.2016 – ICC-02/04-01/15-600 (De-

ments are part of the evidence and will be assessed, together with other pieces of evidence, at the stage of deliberating the judgment. The Chamber also accepted, on a case-by-case basis, a series of rule 68 (3) statements (i) when the witness is present before the Chamber, (ii) the witness does not object to the introduction of his or her prior recorded testimony, and (iii) the opposing party and the Chamber have the opportunity to examine the witness.[52] The statement thus introduced does not replace but complement the statement of a witness in court.[53] This procedure evidently shortens the questioning time in court and maximises efficiency of the proceedings. The Chamber also accepted agreed facts between the parties as proven (such as Ongwen's background and parentage of certain children and the occurrence of the Pajule attack) and encouraged the parties to agree on more facts.[54]

As expected, the Prosecutor approached the Trial Chamber and requested that the Article 56 Evidence related to seven witnesses[55] be "admitted" for the purposes of trial. The Defence sought to reject the "admission" of the evidence and claimed, inter alia, that (i) the Article 56 Evidence was to be considered "prior recorded testimony" which the Pre-Trial Single Judge was not authorised to take; (ii) the prejudice of admission outweighs any probative value; and (iii) its rights under article 67 had been violated. The Chamber dismissed the Defence claims and ruled that the evidence had not been obtained in violation of the Statute or internationally recognised human rights. It then deferred the assessment of the relevance or probative value of the Article 56 Evidence until deliberating the judgment.[56] A Defence request for leave to appeal this decision was rejected by the Chamber.[57]

A renewed request by the parties and participants to hold the opening statements of the trial in Uganda was considered "not desirable" by the Chamber due to security concerns and logistical difficulties, noting also the workload of the Chamber's individual judges in other cases. As a result, the Chamber rejected the requests and a recommendation to the Presidency to change the place of proceedings was not made.[58] The request for a judicial site visit to Northern Uganda was equally rejected without prejudice to reconsidering this matter at a later stage in the proceedings.[59]

cc) Victims Participation

As regards victims' participation, it is recalled that the Pre-Trial Chamber had accepted the applications of 2.026 victims to participate in the proceedings.[60] In the first status conference, the Chamber had already indicated that it would follow the procedure adopted at the pre-trial stage[61] regarding victims' applications.[62] The Trial Chamber set the deadline for submission of further victims' applications on 6 October 2016.[63] In total, 4.100 victims participate in the trial proceedings.[64] A large group of victims is represented by counsel

cision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded testimonies under Rule 68 [2] [b] and [c]); a leave by the Defence to appeal both decisions was rejected by the Chamber, Decision of 5.12.2016 – ICC-02/04-01/15-622 (Decision on Defence Requests for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600); a Defence request for reconsideration was also rejected, Decision of 23.2.2017 – ICC-02/04-01/15-711 (Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68 [2] [b] of the Rules of Procedure and Evidence); see also *Chaitidou*, ZIS 2016, 813 (831).

[52] ICC, Decision of 5.12.2016 – ICC-02/04-01/15-621 (Decision on Prosecution's Application to introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68 [3] of the Rules).

[53] ICC, Judgment of 1.11.2016 – ICC-02/11-01/15-744 (OA8, Judgment on the appeals of Mr. Laurent Gbagbo and Mr. Charles Blé Goudé against the decision of Trial Chamber I of 9.6.2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68 [2] [b] and 68 [3]""), para. 79.

[54] ICC, Decision of 19.7.2016 – ICC-02/04-01/15-500 (Decision on Joint Agreed Facts Submission).

[55] The Prosecutor had decided not to rely on one witness for the purposes of the confirmation of charges decision and the Pre-Trial Chamber did not include the facts related to the witnesses concerned in the confirmation of charges decision.

[56] ICC, Decision of 10.8.2016 – ICC-02/04-01/15-520 (Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute).

[57] ICC, Decision of 9.9.2016 – ICC-02/04-01/15-535 (Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence).

[58] ICC, Decision of 18.7.2016 – ICC-02/04-01/15-499 (Decision Concerning the Requests to Recommend Holding Proceedings In Situ and to Conduct a Judicial Site Visit in Northern Uganda ["In Situ Decision"]), para. 3.

[59] ICC, Decision of 18.7.2016 – ICC-02/04-01/15-499 (In Situ Decision), para. 4.

[60] ICC, Decision of 27.11.2015 – ICC-02/04-01/15-350 (Decision on contested victims' application for participation, legal representation of victims and their procedural rights); Decision of 24.12.2015 – ICC-02/04-01/15-384 (Second Decision on contested victims' applications for participation and legal representation of victims).

[61] ICC, Decision of 3.9.2015 – ICC-02/04-01/15-299 (Decision concerning the procedure for admission of victims to participate).

[62] ICC, Transcript of Hearing, 23.5.2016, ICC-02/04-01/15-T-25-ENG, p. 29, lines 23-24; Order of 4.5.2016 – ICC-02/04-01/15-432 (Order Scheduling First Status Conference and Other Matters), para. 4.

[63] ICC, Decision of 26.9.2016 – ICC-02/04-01/15-543 (Decision concerning 300 Victims Applications and the Deadline for Submitting Further Applications ["Ongwen First Victims' Decision"]), para. 10.

[64] ICC, Decision of 26.9.2016 – ICC-02/04-01/15-543 (Ongwen First Victims' Decision); Decision of 4.11.2016 – ICC-02/04-01/15-586 (Decision Concerning 610 Victim Applications [Registry Report ICC-02/04-01/15-544] and

chosen by the victims; the remaining victims are represented by counsel from the Office of Public Counsel for victims as common legal representative. On 30 August 2017, the Chamber adopted the same "resumption of action procedure" applicable in other cases according to which applicants may continue action initiated before the Court by deceased victims.[65]

dd) Ongwen's Health

Ongwen's mental health has been raised on various occasions during the trial. On 5 December 2016, one day before the opening statements, the Defence requested a stay of proceedings and a psychiatric and/or psychological examination of Ongwen pursuant to rule 135 since, in the assessment of two Defence experts, "Ongwen does not understand the charges brought against him at the International Criminal Court and is not fit to stand trial".[66] The following day, at the opening of the trial, the Chamber addressed this issue at the start and rejected the Defence request. The Chamber did so, inter alia, on the basis that Ongwen had previously admitted at the confirmation stage to understand the charges; his Defence requested translation of material into Acholi; and the insufficiency of information.[67] Subsequently, and having been provided with the report of the Defence expert, the Chamber determined that Ongwen was fit to stand trial and rejected the medical examination for this specific purpose.[68] Nevertheless, the Chamber appointed an expert, proposed by the Registry, and ordered a psychiatric examination of Ongwen with a view to (i) making a diagnosis as to any mental condition or disorder that he may suffer at the present time; and (ii) providing specific recommendations on any necessary measures/treatment required to address such condition or disorder in the ICC detention centre.[69]

On 7 June 2017, the Prosecutor indicated that three mental health experts she had chosen wished to examine Ongwen but that he had refused. The Chamber responded that it cannot compel an accused to participate in a psychiatric examination.[70] At the same time it declined to give guidance as to how it might consider Defence evidence in case the Prosecutor's experts are not given an opportunity to interview Ongwen or what kind of evidence would or would not be probative in relation to a potential mental disease or defect defence.[71]

III. Situation in Central African Republic (Pre-Trial Chamber II)[72]

No proceedings at the situation level took place during the review period. To date, two cases emanated from this situation, the Bemba case and Bemba et al case.

1. Prosecutor v. Jean-Pierre Bemba (Trial Chamber III)[73]

- First warrant of arrest: 23 May 2008 (public on 24 May 2008)
- Warrant of arrest: 10 June 2008 (replacing the first warrant of arrest)
- Surrender to the Court: 3 July 2008
- Confirmation of Charges: 15 June 2009
- Trial: 22 November 2010-13 November 2014
- Conviction: 21 March 2016
- Sentencing: 21 June 2016
- Victims participating: 5.229
- Current status: appeal proceedings against conviction and sentencing

The case against Jean-Pierre Bemba Gombo finally concluded on 13 November 2014. While the trial was ongoing in this Main Case, Bemba's lead counsel, Kilolo, and case manager, Mangenda, had been arrested and incarcerated for the suspicion of having committed offences against the administration of justice (see Bemba et al case). In the course of the trial, the Chamber heard in total 77 witnesses, including 40 witnesses called by the Prosecutor, 34 witnesses called by the Defence, two victims as witnesses called by the victims' legal representatives, and one witness called by the Chamber; moreover, the Chamber permitted three victims to present their views

1183 Victim Applications [Registry Report ICC-02/04-01/15-556]).

[65] ICC, Decision of 30.8.2017 – ICC-02/04-01/15-962 (Decision on LRV Request Concerning the deaths of Participating Victims). See also the summary of developments in the Ntaganda case with further references to case-law, *Chaitidou*, ZIS 2017, 733 (743-744).

[66] ICC, Filing of 5.12.2016 – ICC-02/04-01/15-620-Red (Public Redacted Version of "Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence" filed on 5.12.2016), para. 76.

[67] ICC, Transcript of Hearing, 6.12.2016 – ICC-02/04-01/15-T-26-ENG, p. 17, line 25 to p. 19, line 15; a leave by the Defence to appeal this decision was rejected by the Chamber, Decision of 3.1.2017 – ICC-02/04-01/15-645 (Decision on Defence Request for Leave to Appeal the Decision on Mr. Ongwen's Understanding of the Nature of the Charges).

[68] ICC, Decision of 16.12.2016 – ICC-02/04-01/15-637-Red (Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen ["Ongwen Medical Examination Decision"]), paras 14-28.

[69] ICC, Decision of 16.12.2016 – ICC-02/04-01/15-637-Red (Ongwen Medical Examination Decision), paras 30-34; a leave by the Defence to appeal this decision was rejected by the Chamber, Decision of 12.1.2017 – ICC-02/04-01/15-650 (Decision on Defence Request for Leave to Appeal the Decision Ordering a Medical Examination of the Accused).

[70] ICC, Decision of 28.6.2017 – ICC-02/04-01/15-902 (Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused ["Ongwen Expert Examining Decision"]), para. 7.

[71] ICC, Decision of 28.6.2017 – ICC-02/04-01/15-902 (Ongwen Expert Examining Decision), para. 7.

[72] The record carries the situation number ICC-01/05.

[73] The record carries the case number ICC-01/05-01/08.

and concerns.[74] The Bemba trial has seen the highest number of participating victims at the ICC to date, namely 5.229 in total, including 14 organisations.[75]

a) Judgment

The Chamber finally rendered its judgment on 21 March 2016 convicting Bemba, as a person effectively acting as a military commander, for the commission of murder and rape as crimes against humanity and war crimes and pillaging as war crime committed by members of the Mouvement de libération du Congo ("MLC") in various locations in the territory of the Central African Republic ("CAR") from on or about 26 October 2002 to 15 March 2003. The most important findings in this judgment pertain to two issues: the legal requirements of the contextual elements of crimes against humanity, as enshrined in article 7 (1)[76] and (2) (a),[77] and command responsibility, as enshrined in article 28. Judge Steiner[78] and Judge Ozaki[79] appended to the judgment a separate opinion each. The main findings of the Chamber are summarised in what follows.

aa) Contextual Elements of Crimes Against Humanity

The Chamber applied, to a great extent, the legal definitions of the contextual elements of crimes against humanity as developed in recent decisions. As regards the requirement "attack" within the meaning of article 7 (2) (a), the Chamber drew upon the established formulation "campaign or operation carried out against the civilian population" that it further described as a "series or overall flow of events as opposed to a mere aggregate of random acts".[80] In this context, the Prosecutor had proposed to interpret the notion broadly, encompassing "any mistreatment of the civilian population", including pillaging which is not a crime against humanity. The Chamber clarified that "only those acts enumerated in Article 7 (1) (a) to (k) may be relied upon to demonstrate the 'multiple commission of acts' for the purposes of Article 7", without prejudice to acts not listed in article 7 (1) being considered for other purposes, such as the requirements "directed against a civilian population" or "policy".[81]

As regards the requirement "civilian population", the Chamber resorted to article 50 (1) of Additional Protocol I which it considered relevant in the context of crimes against humanity.[82] The civilian population must have been the "primary" target of the attack. To this end, regard may be paid to the number of civilians and the manner in which civilians were targeted.[83] Furthermore, the term "civilian population", was considered not to be "limited to populations defined by common nationality, ethnicity or other similar distinguishing features".[84] When civilians and non-civilians are present, the Chamber identified a series of factors by way of which it would determine whether the attack was directed against the civilian population: for example, the means and methods used during the attack, the status and number of victims, the nature of the crimes, the form of resistance and the discriminatory nature of the attack.[85] In this context, it clarified that allegations of pillaging would be considered as a factor. Finally, the Chamber opined that there is no requirement that "the individual *victims* of crimes against humanity be 'civilians'".[86]

As regards the requirement "organisation" within the meaning of article 7 (2) (a), the Judges merely replicated the definition advanced by Trial Chamber II in the Katanga case.[87] Judge Ozaki in her separate opinion criticised the

[74] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Judgment pursuant to Article 74 of the Statute ["Bemba Judgment"]) with eight annexes.

[75] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 21.

[76] The chapeau of article 7 (1) reads: "For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

[77] Article 7 (2) (a) reads: "For the purpose of paragraph 1: (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".

[78] ICC, Opinion of 21.3.2016 – ICC-01/05-01/08-3343-AnxI (Separate Opinion of Judge Sylvia Steiner ["Separate Opinion Steiner"]).

[79] ICC, Opinion of 21.3.2016 – ICC-01/05-01/08-3343-AnxII (Separate Opinion of Judge Kuniko Ozaki ["Separate Opinion Ozaki"]).

[80] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 149.

[81] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 151.

[82] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 152.

[83] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 154.

[84] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 155.

[85] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 153.

[86] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 156.

[87] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 158. The Katanga Chamber had stipulated the following: "Turning first to its plain meaning, the term 'organisation' must be understood as an '[a]ssociation, régie ou non par des institutions, qui se propose des buts déterminés' [an association, whether or not governed by institutions, that sets itself specific objectives]. This very general definition does not, however, allow the contours of an organisation to be clearly circumscribed. To such end, the Chamber places the term in its context. The question then arises as to whether the normative connection of the organisation to the existence of an attack within the meaning of article 7 (2) (a) may affect the definition of the characteristics of such organisation. In the Chamber's view, the connection of the term 'organisation' to the very exist-

oftentimes circular argumentation adopted in the jurisprudence of the Court ("organisation has sufficient capabilities to carry out an attack against a civilian population")[88] and proposed the following criteria, "at a minimum: (i) a collectivity of three or more persons; (ii) existing for a certain period of time, which, at least, transcends the period during which the policy was formed and implemented; (iii) with a particular aim or purpose, whether it is criminal or not, and (iv) with a certain structure"; and (v) additional potentially relevant factors, such as "whether the group has an established internal hierarchy; whether the group exercises control over part of the territory of a state; the group's infrastructure and resources; and whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria".[89]

As regards the requirement "policy", the Chamber insisted that the Statute does not "envisage any requirement of demonstrating a 'motive' or 'purpose' underlying the policy to attack the civilian population".[90] The "policy" must not be formalised and may be inferred from a variety of factors, such as (i) the character of the attack as "planned, directed or organised"; (ii) recurrent pattern of violence; (iii) use of public or private resources to further the policy; (iv) involvement of the State or organisational forces in the commission of the crimes; (v) statements, instructions, documentation; (vi) underlying motivation.[91] Finally, the course of conduct must reflect a link to the State or organisational policy; the perpetrators must not "necessarily be motivated by the policy, or that they themselves be members of the State or organisation".[92]

As regards the requirement "widespread", the Chamber recalled that this term refers to the large-scale nature of the attack or the large number of targeted persons means that "such attack may be 'massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims". In the view of the Chamber, the temporal scope of the "attack" does not impact the analysis of "widespread".[93] Since the Confirmation of Charges decision had only confirmed the widespread nature of the attack, the Chamber considered itself prevented from elaborating on the term "systematic" and assessing the facts in this respect.

As regards the "nexus" requirement, the Chamber recalled that such assessment must be conducted on an objective basis "considering, in particular, the characteristics, aims, nature and/or consequences of the act".[94] Lastly, as regards the "knowledge" of the attack, the Chamber emphasised that this relates to the mens rea of the actual perpetrators of the crimes and not that of commanders.[95]

bb) Command Responsibility

The concept of command responsibility within the meaning of article 28[96] has been applied, for the first time, in the Bemba case. It therefore is of particular importance to under-

ence of the attack and not to its systematic or widespread nature presupposes that the organisation has sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts referred to in article 7 (2) (a) of the Statute. It therefore suffices that the organisation have a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population. Accordingly, as aforementioned, the organisation concerned must have sufficient means to promote or encourage the attack, with no further requirement necessary. Indeed, by no means can it be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-State", ICC, Judgment of 7.3.2014 – ICC-01/04-01/07-3436-tENG (Judgment pursuant to article 74 of the Statute), para. 1119.

[88] ICC, Opinion of 21.3.2016 – ICC-01/05-01/08-3343-AnxII (Separate Opinion Ozaki), para. 25.

[89] ICC, Opinion of 21.3.2016 – ICC-01/05-01/08-3343-AnxII (Separate Opinion Ozaki), para. 29.

[90] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 159.

[91] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 160.

[92] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 161.

[93] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 163.

[94] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 164.

[95] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 168.

[96] Article 28 (a) reads: "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution". It is recalled that the Pre-Trial Chamber had requested the Prosecutor to amend the charges under article 61 (7) (c) (ii) by including command responsibility and, subsequently confirmed the charges on this basis, see ICC, Decision of 15.6.2009 – ICC-01/05-01/08-424 (Decision Pursuant to Article 61 [7] [a] and [b] of the Rome Statute on the charges of the Prosecutor Against Jean-Pierre Bemba Gombo).

stand how the Trial Chamber interpreted the different elements of this mode of liability.

To begin with, the Chamber described the concept of command responsibility as holding superiors criminally liable for actions of their subordinates because they have failed to properly fulfil fundamental responsibilities that are aimed at "ensuring the effective enforcement of fundamental principles of international humanitarian law, including the protection of protected persons and objects during armed conflict". In view of the Judges, article 28 reflects the responsibility of superiors "by virtue of the powers of control they exercise over their subordinates".[97] Further, the Judges held that article 28 contains a distinct mode of liability from those encapsulated in article 25 and must be characterised as a sui generis form of criminal responsibility.[98] In its analysis of article 28 (a), the Chamber entertained six elements: (i) "crimes within the jurisdiction of the Court must have been committed by forces"; (ii) "the accused must have been either a military commander or a person effectively acting as a military commander"; (iii) "the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes"; (iv) "the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes"; (v) "the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution"; and (vi) "the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them".[99]

A "military commander" is defined by the Chamber as any person "who is formally or legally appointed to carry out a military command function".[100] It further explained that the provision not only encompasses military commanders as "part of the regular armed forces of a [S]tate" but also those in "non-governmental irregular forces", appointed "in accordance with their internal practices or regulations, whether written or unwritten".[101] In case the person is "effectively acting as a military commander", the Chamber clarified that while the person is not formally or legally appointed as a military commander he or she acted as commander over the forces that committed the crimes. Lastly, the Chamber opined that the provision "includes individuals who do not perform exclusively military functions" and applies to all commanders at all levels, irrespective of their ranks and the number of subordinates.[102]

As regards the requirement that "the accused must have had effective command and control, or effective authority and control", the term "command" was compared to "authority, especially over armed forces" whereas "authority" was considered to refer to the "power or right to give orders and enforce obedience".[103] Yet, both notions had "no substantial effect on the required level or standard of control", but rather denote, in the view of the Chamber, "the modalities, manner or nature in which a military commander or person acting as such exercises control".[104] The term "effective control" was considered to establish a minimum degree of influence over the forces, namely that of "material ability to prevent or repress the commission of the crimes or to submit the matter to the competent authorities".[105] The Chamber adopted the Pre-Trial Chamber's explanation that "effective control" is "generally a manifestation of a superior-subordinate relationship between the [commander] and the forces or subordinates in a de jure or de facto hierarchical relationship (chain of command)".[106] In the view of the Chamber, this entails that the commander "must be senior in some sort of formal or informal hierarchy to those who commit the crimes".[107] Faced with the argument that Bemba's MLC troops were allegedly subordinated to the CAR authorities, the Chamber elaborated that the commander must not have had "exclusive authority and control over the forces" but may share responsibility with another.[108] Also, the Chamber clarified that the identification of the group or unit of principal perpetrators at a particular crime site is sufficient and that it is not necessary that they be identified by name.[109] The proof of "effective control" can be deduced from a variety of factors, such as (i) official position of the commander within the military structure and tasks carried out; (ii) power to issue orders, including the commander's capacity to order forces or units to engage in hostilities; (iii) capacity to ensure compliance with orders, including consideration of whether orders were actually followed; (iv) capacity to re-subordinate units or make changes to command structure; (v) power to promote, replace, remove, discipline a subordinate or initiate investigations; (vi) authority to send forces to locations of hostilities and

97 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 172.
98 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), paras 173-174.
99 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 170.
100 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 176.
101 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 176.
102 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), paras 177, 179 and 187.
103 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 180.
104 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 181.
105 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 183.
106 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 184.
107 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 184.
108 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 185.
109 ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 186.

with draw them at any given moment; (vii) independent access to, and control over, the means to wage war; (viii) control over finances; (ix) capacity to represent the forces in negotiations or interact with external bodies or individuals; (x) representation of ideology of the movement to which subordinates adhere.[110] Lack of effective control was deduced by the Trial Chamber from (i) existence of difference exclusive authority over the forces; (ii) disregard or non-compliance with orders or instructions of the accused; (iii) weak or malfunctioning chain of command.[111]

As regards the requirement "knowledge that forces were committing or about to commit crimes", as foreseen in article 28 (a) (i), the Chamber conceded that actual knowledge of the accused cannot be presumed but must be established by "direct or indirect (circumstantial) evidence".[112] The Judges accepted to establish proof of the accused's actual knowledge by inference but cautioned that that inference "must be the only reasonable conclusion available based on the evidence".[113] The Chamber then listed the following indicia that may become relevant: (i) orders to commit crimes or notification that subordinates were involved in crimes; (ii) number, nature, scope, location and timing of illegal acts; (iii) type and number of forces involved; (iv) available means of communication; (v) modus operandi of similar acts; (vi) scope and nature of the commander's position and responsibility; (vii) location of the command; and (viii) notoriety of illegal acts.[114] Just like the commander does not need to know the identity of the subordinates involved, it is also not necessary for him to know "every detail of each crime committed by the forces".[115] Even though the Chamber had notified the parties of a possible re-characterisation of the facts under regulation 55 of the Regulations of the Court to include the alternate "should have known" mental element within the meaning of article 28 (a) (i), it eventually did not.[116] As a result, the Chamber did not engage further into a discussion on the standard to be applied.

As regards the requirement of the commander having "failed to take all necessary and reasonable measures within his power", as foreseen in article 28 (a) (ii), the Chamber explained that this ought to be assessed on a case-by-case basis and in concreto.[117] The qualification "necessary" was defined as "appropriate for the commander to discharge his obligation", while the qualification "reasonable" was considered to refer to "measures […] reasonably falling within the commander's material power".[118] In the view of the Chamber, what matters is not the commander's "explicit legal capacity" but his "material ability to act".[119] Article 28 (a) (ii) imposes three distinct duties upon the commander: (i) preventing the commission of crimes; (ii) repressing the commission of crimes; or (iii) submitting the matter to the competent authorities for investigation and prosecution. The Chamber underscored that "failure to discharge any of these duties may attract criminal responsibility".[120]

"Preventing the commission of crimes" was circumscribed by Trial Chamber III to mean that the commander "fails to take measures to stop crimes that are about to be committed or crimes that are being committed".[121] Again, the Judges made their assessment dependent on whether the commander had the material power to intervene in a specific situation, having regard to, for example, whether the commander had (i) ensured that the forces are adequately trained in international humanitarian law; (ii) secured reports that military actions were carried out in accordance with international law; (iii) issued orders aiming at bringing relevant practices in line with rules of war; and (iv) took disciplinary measures to prevent the commission of crimes; (v) issued orders specifically meant to prevent crimes, as opposed to routine orders; (vi) protested against or criticised criminal conduct; (vii) insisted before a superior authority that immediate action be taken; (viii) postponed military action; (ix) suspended, excluded or redeployed violent subordinates; and (xi) conducted military operations in such a way as to lower the risk of specific crimes or remove opportunities for their commission.[122]

"Failure to repress the commission of crimes" was considered to overlap to a certain degree with the duty to "prevent the commission of crimes", in particular when "involving crimes in progress and crimes which involve on-going elements being committed over an extended period".[123] At the same time, the duty to repress was considered to also encompass the obligation to punish forces after the commission of crimes.[124] Lacking formal competence to take certain measures does not relieve, in the opinion of the Chamber, the

[110] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 188.
[111] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 190.
[112] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 191.
[113] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 192.
[114] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 193.
[115] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 194.
[116] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), paras 57 and 196.
[117] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 197.
[118] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 198.
[119] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 199.
[120] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 201.
[121] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 202.
[122] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), paras 203-204.
[123] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 205.
[124] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 206.

accused from complying with his duty to repress crimes.[125] In case the military commander holds disciplinary power, he must exercise it within the limits of his competence; if he does not, then he may satisfy his duty by, for example, "proposing a sanction to a superior who has disciplinary power or remitting the case to the judicial authority with such factual evidence as it was possible to find". In this context, the Chamber accepted the "minimum standard" formulated by the ad hoc tribunals, directing chambers to "look at what steps were taken to secure an adequate investigation capable of leading to the criminal prosecution of the perpetrators".[126]

"Submitting the matter to the competent authorities for investigation and prosecution" comes into play when the commander has no power to sanction those who committed the crimes or if he has the ability to take certain measures but such measures would be inadequate.[127] In the view of the Chamber, such submission must take place before competent authorities; "referral to a non-functioning authority or an authority likely to conduct an inadequate investigation or prosecution may not be sufficient".[128]

As a last element, the Chamber espoused its views on the requirement that the crimes committed by the forces have been "a result" of the failure of the commander to exercise control properly over them. The starting point of the Chamber was that any person "should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it".[129] Rejecting the standard of "but/for" causation between the commander's omission and the crimes committed,[130] it held that a "nexus requirement would clearly be satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes".[131] The Chamber considered it unnecessary, on the facts of the case, to delineate further the scope of the causation.

Judge Steiner agreed with the interpretation given by the Pre-Trial Chamber in this case that "it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28 (a)".[132] In relation to the degree of risk, she proposed the degree of "high probability". According to her, "the causality requirement would be satisfied where, at least, there is a high probability that, had the commander discharged his duties, the crime would have been prevented or it would have not been committed by the forces in the manner it was committed".[133] Judge Ozaki laid down a number of factors to be considered when shaping the standard and argued that it is "more than a merely theoretical nexus to the crimes".[134] She expressed agreement with the formula reached in the judgment insofar as "(i) the requirement of a causal link under Article 28 would be clearly satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes from being committed"; and (ii) that such a standard is higher than that required as a matter of law for the purposes of Article 28".[135]

b) Sentencing

In its sentencing decision Trial Chamber III followed the general structure of sentencing decisions adopted in other cases. After elaborating on the objectives of sentencing before the ICC,[136] it first identified and assessed the relevant factors, as set forth in article 78 (1) and rule 145 (1) (c) and (2). The factors were discussed under three headings: (i) the gravity of the offence; (ii) the person's culpable conduct; and (iii) the person's individual circumstances.[137] The Chamber then balanced all relevant factors pursuant to rule 145 (1) (b) and pronounced a sentence for each crime, as well as a joint sentence specifying the total period of imprisonment, as dictated by article 78 (3), first sentence. Article 78 (3), second sentence, prescribes that the total sentence cannot be less than the highest individual sentence. Further guidance stems from rule 145 (1) (a) which instructs the Judges that the sentence must reflect the culpability of the convicted person. As highlighted by the Appeals Chamber, the sentencing Chamber has considerable discretion in imposing a proportionate sentence.[138] Finally, once the sentence has been imposed, article 78 (2) requires deduction of the time the convicted person has spent in detention upon an order of the Court.

[125] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 207.
[126] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 207.
[127] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 208.
[128] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 208.
[129] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 211.
[130] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 211.
[131] ICC, Judgment of 21.3.2016 – ICC-01/05-01/08-3343 (Bemba Judgment), para. 213.
[132] ICC, Opinion of 21.3.2016 – ICC-01/05-01/08-3343-AnxI (Separate Opinion Steiner), para. 23.
[133] ICC, Opinion of 21.3.2016 – ICC-01/05-01/08-3343-AnxI (Separate Opinion Steiner), para. 24.
[134] ICC, Opinion of 21.3.2016 – ICC-01/05-01/08-3343-AnxII (Separate Opinion Ozaki), paras 22-23.
[135] ICC, Opinion of 21.3.2016 – ICC-01/05-01/08-3343-AnxII (Separate Opinion Ozaki), para. 23.
[136] ICC, Decision of 21.6.2016 – ICC-01/05-01/08-3399 (Decision on Sentence pursuant to Article 76 of the Statute ["Bemba Sentencing Decision"]), paras 10-11.
[137] ICC, Decision of 21.6.2016 – ICC-01/05-01/08-3399 (Bemba Sentencing Decision), para. 20.
[138] ICC, Judgment of 1.12.2014 – ICC-01/04-01/06-3122 (A4 A6, Judgment on the appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"), para. 34.

Perhaps of interest is the Chamber's approach to sentencing a convicted person on the basis of article 28. It recalled that "it is not, inherently, a hierarchically lower or higher mode of liability in terms of gravity than commission of a crime under Article 25 (3) (a), or any other mode of liability identified in Article 25 (3) (b) to (e)".[139] Inspired by the jurisprudence of other tribunals adjudicating similar cases, the Chamber held that a commander's "ongoing failure to exercise the duties to prevent or repress […] is generally regarded as being of significantly greater gravity than isolated incidents of such a failure".[140] Further, the Chamber added that "high-level leaders, regardless of the mode of liability, generally bear heavier criminal responsibility than those further down the scale".[141] Lastly, the Chamber underscored that the "culpability of a superior and his or her degree of moral blameworthiness might, depending on the concrete circumstances, be greater than that of his or her subordinates", even though he is removed from the acts of his subordinates.[142]

Bemba was sentenced to 18 years' imprisonment; no fine was ordered in addition. Some of his assets had been frozen or seized by the Court on the basis of article 57 (3) (e). The Chamber clarified that these orders "constituted a protective measure for the purpose of forfeiture, in particular, for the ultimate benefit of the victims. It is not a sanction". In the view of the Judges, there is no "risk that Mr. Bemba will be doubly punished because of any sentence imposed and the freezing order".[143]

c) Appellate Proceedings

The Defence appealed the judgment of conviction and both the Prosecutor and the Defence appealed the decision on sentencing. At the time of writing, the appeals proceedings are pending. The reader may be intrigued to know that on 30 October 2017 the Appeals Chamber ordered for submissions on the contextual elements of crimes against humanity.[144] The issues tabled for discussion concern the legal, factual and evidential aspects of the Trial Chamber's findings on the contextual elements. Hence, the Appeals Chamber enquires, for example, "How should a "policy" be understood: can it be inferred from the manner in which the crimes were committed or does it require something more?"; or "What was the organisational policy in the present case?" or "Whether, on the basis of the evidence accepted as credible in this case, it was erroneous for the Trial Chamber to have concluded that there was an attack directed against a civilian population, i.e. a course of conduct involving the multiple commission of criminal acts against a civilian population".

In addition, the Appeals Chamber scheduled five days of hearings from Tuesday, 9 January 2018 to Friday, 12 January 2018 and on Tuesday, 16 January 2018 to hear submissions on the two appeals against Trial Chamber III's judgment of conviction and sentencing decision.[145]

d) Reparations

On 26 August 2016, the newly composed Trial Chamber III authorised amicus curiae submissions of the Queen's University Belfast Human Rights Centre, Redress Trust, the United Nations ("UN") Office of the High Commissioner for Human Rights and the Office of the Special Representative of the United Nations Secretary-General on Sexual Violence in Conflict and the International Organization for Migration.[146]

On 3 April 2017, the Defence requested that the reparation proceedings be suspended since Bemba's conviction is currently deliberated on appeal. In response, the Chamber noted the narrowly defined suspension scenarios in the Statute which do not apply in the present case. Noting the preparatory stage of the reparation proceedings, it considered a suspension of the reparation proceedings to be inappropriate[147] and rejected the request. In the words of the Chamber, "[t]he suspension of all reparations proceedings until after the Appeals Chamber has rendered its decision would substantially impact on the victims' interests to access reparations in a timely manner".[148] Conversely, the Chamber accepted that a reparations order be only implemented once the conviction decision itself has been confirmed on appeal.[149]

On 2 June 2017, the Chamber appointed four experts to assist in the reparation proceedings and ordered them to submit reports in relation to which the participants were invited to respond.[150]

[139] ICC, Decision of 21.6.2016 – ICC-01/05-01/08-3399 (Bemba Sentencing Decision), para. 16.

[140] ICC, Decision of 21.6.2016 – ICC-01/05-01/08-3399 (Bemba Sentencing Decision), para. 17.

[141] ICC, Decision of 21.6.2016 – ICC-01/05-01/08-3399 (Bemba Sentencing Decision), para. 17.

[142] ICC, Decision of 21.6.2016 – ICC-01/05-01/08-3399 (Bemba Sentencing Decision), para. 17.

[143] ICC, Decision of 21.6.2016 – ICC-01/05-01/08-3399 (Bemba Sentencing Decision), para. 83.

[144] ICC, Order of 30.10.2017 – ICC-01/05-01/08-3564 (Order for submissions on contextual elements of crimes against humanity).

[145] ICC, Order of 7.11.2017 – ICC-01/05-01/08-3568 (A, A2, A3, Scheduling order for a hearing before the Appeals Chamber). The Chamber also issued an order in which it set out the topics and the order in which they would be discussed during the hearing, ICC, Order of 27.11.2017 – ICC-01/05-01/08-3579 (A, A2, A3, Order in relation to the conduct of the hearing before the Appeals Chamber). The hearings eventually lasted three days (9-11 January 2018).

[146] ICC, Decision of 26.8.2016 – ICC-01/05-01/08-3430 (Decision on requests to make submissions pursuant to article 75 [3] of the Statute and rule 103 of the Rules of Procedure and Evidence).

[147] ICC, Decision of 5.5.2017 – ICC-01/05-01/08-3522 (Decision on the Defence's request to suspend the reparations proceedings ["Bemba Suspension Decision"]).

[148] ICC, Decision of 5.5.2017 – ICC-01/05-01/08-3522 (Bemba Suspension Decision), para. 19.

[149] ICC, Decision of 5.5.2017 – ICC-01/05-01/08-3522 (Bemba Suspension Decision), para. 15.

[150] ICC, Decision of 2.6.2017 – ICC-01/05-01/08-3532-Red (Public redacted version of "Decision appointing experts on reparations", 2.6.2017). A leave by the Defence to appeal this

2. Prosecutor v. Jean-Pierre Bemba et al (Trial Chamber VII)[151]

- Warrant of arrest against accused: 20 November 2013
- Initial appearance of Bemba, Kilolo, Babala: 27 November 2013
- Initial appearance of Mangenda: 5 December 2013
- Initial appearance of Arido: 20 March 2014
- Document Containing the Charges: 30 June 2014
- Confirmation of Charges: 10 November 2014
- Trial: 29 September 2015-1 June 2016
- Conviction: 19 October 2016
- Sentencing: 22 March 2017
- Victims participating: -
- Current status: appeal proceedings against conviction and sentencing

It is recalled that all five accused were convicted on 19 October 2016, to varying degrees, for the commission of offences against the administration of justice involving up to 14 witnesses, pursuant to article 70 (1) (a), (b) and (c).[152] Between 12 and 14 December 2016, the Chamber held the sentencing hearing during which it heard submissions and evidence presented by the parties. Four of the convicted persons (Kilolo, Mangenda, Babala and Arido) were at liberty when the Chamber deliberated its decision on sentencing.[153] Previously, they had spent about 11 months in the Court's detention before they were released at the end of October 2014. All convicted appeared in court for the rendering of their sentence.

In their sentencing decision the Judges of Trial Chamber VII followed the same structure as Trial Chamber III and other chambers before, discussing the factors for each convicted person individually, separately and organised in three main "baskets": (i) the gravity of the offence; (ii) the person's culpable conduct; and (iii) the person's individual circumstances.[154]

As regards the Chamber's position on general points of law on sentencing, the following may be of interest to the reader. With regard to the "gravity of the crime" factor, the Chamber recalled that this factor must be assessed in concreto, in the light of the particular circumstances of the case. Any factors taken into account when assessing the gravity of the offence cannot be considered*?* as aggravating circumstance, and vice versa.[155] As regards mitigating circumstances, the Chamber underscored that they must relate directly to the convicted person and be established on a balance of probabilities.[156] As regards aggravating circumstances, the Chamber held that they must relate to the commission of the offence or to the convicted person him- or herself and be established "beyond reasonable doubt". The absence of mitigating circumstances does not constitute an aggravating circumstance.[157] The Judges also recalled that any sentence must reflect the culpability of the convicted person, as stipulated in rule 145 (1) (a) and be proportionate to the crime, as set forth in articles 81 (2) (a) and 83 (3).[158] Finally, it was brought to mind that the Chamber must deduct the time previously spent in detention in accordance with an order of the Court.[159]

Yet, while the assessment remains, in principle, the same, article 70 (3) and rules 163 and 166 of the Rules of Procedure and Evidence modify the relevant statutory framework for the punishment of offences defined in article 70. The most fundamental difference, in comparison to article 5 crimes, is that the Court may not impose a term of imprisonment exceeding five years, as stipulated in article 70 (3). The Chamber interpreted this provision to mean that for article 70 offences the Statute does not allow a sentence for one or more offences against the administration of justice to exceed five years.[160] In support of their construction, the Judges drew upon, inter alia, article 70 (3) which "eliminates" article 77 (1) that allows for the imposition of a sentence of 30 years' imprisonment; the conceptual difference between "offences" and "crimes" in the Statute; a combined reading of articles 70 (3) and 78 (3); and the fact that in contrast to fines, as set out in rule 166 (3) of the Rules of Procedure and Evidence, sentences of imprisonment may not be cumulative beyond the five-year maximum.[161]

Most noteworthy in this decision is the Chamber's finding that a suspension of sentence is possible under the Statute. While it acknowledged that the Statute and the Rules remain silent on this matter, it opined that it had the power to suspend a sentence since the Statute "allows a Chamber to impose a sentence of imprisonment and, at the other end of the spectrum, it allows a Chamber to decline to impose a sentence. If these measures are possible, then surely the intermediate step of a suspended sentence is likewise possible".[162]

In light of the foregoing, the Chamber sentenced Babala to six months' imprisonment and Arido to eleven months'

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decision as rejected, Decision of 29.6.2017 – ICC-01/05-01/08-3536 (Decision on the Defence request for leave to appeal the decision appointing experts on reparations).

[151] The record carries the case number ICC-01/05-01/13.

[152] See also *Chaitidou*, ZIS 2016, 813 (821-835).

[153] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Decision on Sentence pursuant to Article 76 of the Statute ["Bemba et al Sentencing Decision"]).

[154] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 43.

[155] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 23.

[156] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 24.

[157] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 25.

[158] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 36.

[159] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 39.

[160] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 30.

[161] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), paras 31-35.

[162] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 41.

imprisonment.[163] Since the imposed sentence for both of them was less than (Babala) or equivalent (Arido) to the credit to be applied for the period of time they have been in custody, their sentence was considered by the Chamber as served.[164]

For Mangenda the Chamber pronounced a joint sentence of 24 months of imprisonment for which the time he had spent in detention was deducted.[165] In addition, the Chamber agreed, mindful of his good behaviour and the consequences of incarceration for his family, to "suspend the operation of the remaining term of imprisonment for a period of three years so that the sentence shall not take effect unless during that period Mr. Mangenda commits another offences anywhere that is punishable with imprisonment, including offences against the administration of justice".[166]

For Kilolo the Chamber pronounced a joint sentence of 2 years and six months of imprisonment for which the time he had spent in detention was deducted; he was also ordered to pay a fine of EUR 30,000 to be paid within three months of the decision.[167] In addition, the Chamber agreed, mindful of his good behaviour, his family situation and consequences of incarceration on his professional life, to suspend the operation of the remaining term of imprisonment for a period of three years "so that the sentence shall not take effect "(i) if Mr. Kilolo pays the fine, as imposed by the Chamber […] and (ii) unless during that period Mr. Kilolo commits another offences anywhere that is punishable with imprisonment, including offences against the administration of justice".[168]

For Bemba, the Chamber pronounced a joint sentence of 12 months' imprisonment. It is recalled that he had been already sentenced to 18 years' imprisonment in relation to charges of crimes against humanity and war crimes in the Main Case. Since Bemba was detained on account of the sentencing decision by Trial Chamber III, the Chamber considered it not appropriate that this term be served concurrently with his existing sentence but rather consecutively.[169] As regards the benefit of deduction of time previously spent in detention pursuant to article 78(2), the Chamber, by Majority, ordered no deduction of time since Bemba (i) already benefited in the context of the Main Case from the deduction of time from the time the first warrant of arrest was issued on 24 May 2008 until at least the date the Trial Chamber III sentencing decision was issued, namely on 21 June 2016; (ii) should not benefit twice from deduction of time while being in detention; and (iii) after 21 June 2016, Bemba remained in detention because of his conviction and sentence in the Main Case.[170] In addition, the Chamber ordered the payment of a fine of EUR 300,000.[171]

Judge Pangalangan appended a partially dissenting opinion to the sentencing decision expressing his disagreement with some aspects of the sentence regarding Bemba.[172] While he concurred in the result of one additional year of imprisonment, he would have given Bemba full sentencing credit for his detention in this case, i.e. the article 70 proceedings. In his view, this follows from the "straightforward application" and mandatory language of article 78 (2) and should not be withheld from the convicted person. He also held that Bemba's sentence was disproportionally low. Judge Pangalangan would have imposed "something closer to four years of imprisonment" since this higher sentence would have reflected better the severity of Bemba's conduct. At the time of writing, the conviction judgment and sentencing decision are in appeal.

[163] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), paras 67 and 97.
[164] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), paras 68 and 98.
[165] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), paras 147-148.
[166] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 149.
[167] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), paras 195-196 and 199. The money was ordered to be transferred ultimately to the Trust Fund for Victims. Since one bank account of Kilolo had been frozen by the Pre-Trial Chamber, it was left to Kilolo to inform the Court whether he elects to use that bank account to pay his fine, ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 200.
[168] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 197.
[169] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 250.
[170] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), paras 251-260.
[171] ICC, Decision of 22.3.2017 – ICC-01/05-01/13-2123-Corr (Bemba et al Sentencing Decision), para. 261. The money was ordered to be transferred ultimately to the Trust Fund for Victims.
[172] ICC, Opinion of 22.3.2017 – ICC-01/05-01/13-2123-Anx (Separate Opinion of Judge Raul C. Pangalangan).