

Recent developments in the jurisprudence of the International Criminal Court

By Eleni Chaitidou, Den Haag**

During the period 2018–2019 the International Criminal Court (“Court” or “ICC”) issued a series of important Judgments and Decisions. The Appeals Chamber ruled on the question of heads of States immunities in the case against Omar Hassan Ahmad Al Bashir and acquitted, by majority, Jean-Pierre Bemba Gombo. Trial Chamber I acquitted, by majority, Laurent Gbagbo, the former President of Côte d’Ivoire, and Charles Blé Goudé, Trial Chamber VI convicted Bosco Ntaganda of crimes against humanity and war crimes. Trial Chamber IX continued to hear witnesses in the trial against Dominic Ongwen and visited the crime locations in Uganda. Pre-Trial Chamber I ruled, by majority, that the ICC has jurisdiction over the situation involving the deportation of Rohingya, rejected an admissibility challenge on grounds of ne bis in idem in the case against Saif Al-Islam Gaddafi and confirmed the charges against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud. Pre-Trial Chamber II rejected the Prosecutor’s request for authorization to commence an investigation into the situation in the Islamic Republic of Afghanistan and issued warrants of arrest against two suspects in the situation in the Central African Republic II.

From the plethora of Decisions and Judgments, only a selection of judicial rulings will be presented in this article. As always, the “appetizers” presented in this short overview do not cover all developments that deserve to be discussed here. It is hoped that the interested reader will take this overview as an incentive to seek out further information on the Court’s website. The selection of decisions and proposed key findings reflect the author’s personal choice and preference – any misrepresentation or inaccuracy rests with the author alone. A factsheet introduces the situation or case discussed thus informing the reader of relevant basic facts.

* Previous overviews of the Court’s jurisprudence are available at Guhr, ZIS 2008, 367; Chaitidou, ZIS 2008, 371; *id.*, ZIS 2010, 726; *id.*, 2011, 843; *id.*, 2013, 130; Eckelmans, 2015, 523; Chaitidou, 2016, 813; *id.*, 2017, 733; *id.*, ZIS 2018, 23; *id.*, ZIS 2018, 73, Körner, ZIS 2018, 546. This contribution is based on a presentation of the latest jurisprudential developments at the International Criminal Court given at the annual meeting of German-speaking international criminal lawyers (“Arbeitskreis Völkerstrafrecht”) in Salzburg on 10.5.2019. However, it also considers selectively jurisprudential developments until 10.11.2019.

** The author is a Senior Legal Officer at the Kosovo Specialist Chambers, currently on leave from the International Criminal Court. The views expressed in this article are those of the author alone and do not necessarily reflect the views of the International Criminal Court or the Kosovo Specialist Chambers. All decisions discussed in this paper can be accessed on the Court’s website or the Legal Tools Database, <http://www.legal-tools.org> (2.12.2019).

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

On 10 January 2019, the Trust Fund for Victims notified Pre-Trial Chamber I of its intention to undertake 11 projects² in the Democratic Republic of the Congo (“DRC”), pursuant to regulation 50 (a) (ii) of the Regulations of the Trust Fund for Victims.³ Since the Pre-Trial Chamber did not avail itself of the opportunity to respond to the notification, the Trust Fund for Victims was authorized to proceed with the activities. To date, six cases emanated out of the DRC situation.

1. Prosecutor v. Thomas Lubanga Dyilo (Trial Chamber II/ Presidency)⁴

- Warrant of arrest: 10 February 2006 (public on 17 March 2006)
- Surrender to the Court: 17 March 2006
- Confirmation of charges: 29 January 2007

¹ The record carries the situation number ICC-01/04.

² ICC, Filing of 10.1.2019 – ICC-01/04-753 (Notification par le Conseil de direction du Fonds au profit des victimes de sa conclusion en vue d’entreprendre des activités supplémentaires en République démocratique du Congo conformément à la règle 50 (a) du Règlement du Fonds au profit des victimes). The projects are described in a confidential annex to the filing.

³ Regulation 50 (a) of the Regulations of the Trust Fund reads: “For the purposes of these regulations, the Trust Fund shall be considered to be seized when: (a) (i) the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families; and (ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. (iii) Should there be no response from the Chamber or should additional time be needed by the Chamber, consultations may be held with the Board to agree on an extension. In the absence of such an agreement, the extension shall be 30 days from the expiry of the period specified in sub-paragraph (a) (ii). After the expiry of the relevant time period, and unless the Chamber has given an indication to the contrary based on the criteria in sub-paragraph (a) (ii), the Board may proceed with the specified activities”.

⁴ The record carries the case number ICC-01/04-01/06.

- Trial: 26 January 2009–26 August 2011
- Victims participating: 129 (trial)
- Conviction: 14 March 2012
- Sentencing: 10 July 2012
- Appeal Judgments: 1 December 2014
- Transfer Lubanga to DRC: 19 December 2015
- Current status: Implementation of reparations

It is recalled that the Appeals Chamber amended the reparation order of Trial Chamber I that had convicted Thomas Lubanga Dyilo (“Mr Lubanga”) 2012. In its Judgment and amended reparation order, pursuant to article 75 (2) of the Rome Statute,⁵ the Appeals Chamber also tasked the Trial Chamber to set the size of the reparation award for which Mr Lubanga is liable.⁶ This responsibility fell upon Trial Chamber II, which was assigned with the Lubanga case after the mandate of the Judges of Trial Chamber I had ended.

a) Decision Setting Size of Reparation Award

One of the difficult aspects in these reparation proceedings proved to be the identification of eligible victims as Trial Chamber I had not specified the precise number of, or proportion, of the victims of the case. In order to have a benchmark, Trial Chamber II instructed the Trust Fund for Victims, as part of its draft implementation plan, to identify the victims who qualify for reparations and assess the extent of the harm caused to the victims.⁷ Subsequently, it also directed the legal representatives of two groups of participating victims and the Office of Public Counsel for victims (“OPCV”) to locate and identify potentially eligible victims.⁸ The Chamber made clear that the victims’ applications so provided would be only a “sample” of all of the potentially eligible victims.⁹ The identification and location process was completed on

31 March 2017.¹⁰ Between 31 May 2016 and 15 June 2017, the Trust Fund for Victims, together with the legal representatives and the OPCV, submitted 473 applications of potentially eligible victims. The Defense of Mr Lubanga filed submissions on the redacted dossiers of potential beneficiaries.

On 15 December 2017, Trial Chamber II issued its Decision, setting the size of the reparation award for which Mr Lubanga is liable. At the outset, the Chamber clarified that the 473 victims’ applications were only representative of the victims who suffered harm as a consequence of the crimes committed by Mr Lubanga and that the Trust Fund for Victims was free to consider further applicants for the collective award at the implementation stage of reparations.¹¹

As regards the number of victims, the Judges found that out of the 473 victims, who were considered to form only a “sample”, 425 victims met the criteria of rule 85 of the Rules of Procedure and Evidence.¹² The Chamber acknowledged that, despite its efforts, it was unable to determine a precise number of victims, but was certain that the number of victims who suffered harm from Mr Lubanga’s actions was greater than the number of victims who submitted applications, amounting to “hundreds and possibly thousands”.¹³ When assessing the applications submitted, the Chamber accepted material, physical and psychological harm, but rejected “transgenerational” harm, i.e. the repercussions former child soldiers suffered from the ordeals endured by their parents.¹⁴

⁵ Rome Statute of the International Criminal Court (UN [ed.], Treaty Series, vol. 2187, p. 3). All articles mentioned in this paper without reference to the legal instrument are those of the Rome Statute.

⁶ ICC, Judgment of 3.3.2015 – ICC-01/04-01/06-3129 (Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2), paras 239–242; see also ICC-01/04-01/06-3129-AnxA (Amended Order for Reparations), paras 80–81.

⁷ ICC, Decision of 14.8.2015 – ICC-01/04-01/06-3161-tENG (Decision on the “Request for extension of time to submit the draft implementation plan on reparations”), para. 6.

⁸ ICC, Order of 15.7.2016 – ICC-01/04-01/06-3218-tENG (Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations” [“Order Instructing Registry”]).

⁹ ICC, Order of 15.7.2016 – ICC-01/04-01/06-3218-tENG (Order Instructing Registry), para. 8.

¹⁰ ICC, Order of 21.12.2016 – ICC-01/04-01/06-3267-tENG (Order to complete the process of identifying victims potentially eligible to benefit from reparations).

¹¹ ICC, Decision of 21.12.2017 – ICC-01/04-01/06-3379-Red-Corr-tENG (Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable” [“Size of Reparations Decision”]), paras 36, 191.

¹² ICC, Decision of 21.12.2017 – ICC-01/04-01/06-3379-Red-Corr-tENG (Size of Reparations Decision), paras 190, 239–240. The Rules of Procedure and Evidence (ICC-ASP/1/3 and Corr.1, as amended by resolutions ICC-ASP/10/Res. 1, ICC-ASP/11/Res. 2, ICC-ASP/12/Res. 7, ICC-ASP/15/Res. 5 [provisional rules drawn up by the judges] and ICC-ASP/17/Res. 2). All rules mentioned in this paper without reference to the legal instrument are those of the ICC’s Rules of Procedure and Evidence.

¹³ ICC, Decision of 21.12.2017 – ICC-01/04-01/06-3379-Red-Corr-tENG (Size of Reparations Decision), paras 199, 212, 231, 233, 244, 292.

¹⁴ ICC, Decision of 21.12.2017 – ICC-01/04-01/06-3379-Red-Corr-tENG (Size of Reparations Decision), paras 172, 176, 178, 185, 188, 247. The Trial Chamber did not assess the harm alleged by each victim specifically but presumed the average harm for each direct and indirect victim once child-soldier status (in case of direct victim) and a close personal relationship with a child soldier (in the case of indirect victim) was established.

As regards the form of reparation, the Chamber recalled that the group of 425 victims would receive collective reparations, as was ordered in 2015 by the Appeals Chamber.¹⁵

Finally, Mr Lubanga's liability was set at a total of USD 10,000,000: USD 3,400,000 in respect of 425 victims (USD 8,000 for each direct and indirect victim), USD 6,600,000 in respect of any other victims who may be identified.¹⁶ Victims, who were not in a position to submit their application yet, were encouraged to come forward and submit applications at a later stage. Their applications would be screened by the Trust Fund for Victims at the implementation stage of the reparations and submitted for final approval to the Chamber.¹⁷ The Trust Fund for Victims was directed to contact the Government of the DRC in order to explore options how the Government may contribute to the reparation process.¹⁸

On 7 February 2019, the Trial Chamber approved the proposals submitted by the Trust Fund for Victims on the process of locating other potentially eligible victims and determining their eligibility for reparations.¹⁹ Therein, it also ruled that the Victims Participation and Reparation Section ("VPRS") assist the Trust Fund for Victims in the screening process of new applications and that, if the Trust Fund for Victims would consider an applicant as non-eligible, the person would have the right to challenge this decision before the Trial Chamber.²⁰ It was also made clear that only upon approval of the Trial Chamber would the new applicants become beneficiaries of the reparations.²¹ By that time, the Trust Fund for Victims had informed the Trial Chamber that it had earmarked EUR 3,850,000 to complement the reparations award.

b) Appellate Proceedings

Upon appeal of a group of victims and Mr Lubanga, the Appeals Chamber rendered on 18 July 2019 the Judgment on the

size of the reparation award of Trial Chamber II.²² The Appeals Chamber grouped the grounds of appeal in three clusters. A selection of the salient findings is recapitulated hereunder.

aa) The first group of grounds of appeal concerns the Trial Chamber's methodology in deciding on the monetary amount of reparations for which Mr Lubanga was held liable; in addition to its decision to decide on the eligibility for reparations of certain individual victims.²³

(1) Responding to the Defense argument that the Trial Chamber had acted unlawfully by awarding reparations to (yet) unidentified victims "on its own motion", the Appeals Chamber rejected this argument as, in its view, such power resides in article 75 (1), second sentence. Moreover, a Trial Chamber is not limited to base its Decision only upon requests for reparations (rule 94), but may resort to other information. Notably, limiting the reparation process to those who applied would contravene the nature of collective reparations and potentially exclude a large number of victims. That said, the Appeals Chamber conceded that the number of victims at the time of the crimes are relevant as they may be a starting point for the consideration of reparations. "However, other parameters for determining what reparations are appropriate include considerations of what reparations measures are envisaged and how many victims are likely to come forward and benefit from them".²⁴

(2) With a view to ensuring that reparations are "appropriate", the Chamber must ensure, inter alia, that the convicted person has had the opportunity to make meaningful submissions on the manner in which the Chamber intends to conduct the reparations proceedings, including how it assesses the information and the standard of proof.²⁵ "Estimates must be based on a sufficiently strong evidential basis; any uncertainties must be resolved in favour of the convicted person".²⁶

¹⁵ ICC, Decision of 21.12.2017 – ICC-01/04-01/06-3379-Red-Corr-tENG (Size of Reparations Decision), para. 194.

¹⁶ ICC, Decision of 21.12.2017 – ICC-01/04-01/06-3379-Red-Corr-tENG (Size of Reparations Decision), paras 259, 279–281.

¹⁷ ICC, Decision of 21.12.2017 – ICC-01/04-01/06-3379-Red-Corr-tENG (Size of Reparations Decision), para. 293.

¹⁸ ICC, Decision of 21.12.2017 – ICC-01/04-01/06-3379-Red-Corr-tENG (Size of Reparations Decision), para. 299.

¹⁹ ICC, Decision of 4.3.2019 – ICC-01/04-01/06-3440-Red-tENG (Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining their Eligibility for Reparations ["Approval Decision"]). The confidential version of the Decision was rendered on 7.2.2019.

²⁰ ICC, Decision of 4.3.2019 – ICC-01/04-01/06-3440-Red-tENG (Approval Decision), paras 29, 37 et seq.

²¹ ICC, Decision of 4.3.2019 – ICC-01/04-01/06-3440-Red-tENG (Approval Decision), paras 30, 47.

²² ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (Judgment on the appeals against Trial Chamber II's "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" ["2019 Reparation Judgment"]).

²³ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 9.

²⁴ Article 75 (2), second sentence, reads: "On this basis, in its decision, the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting". ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), paras 77–89, 91.

²⁵ This was also confirmed in relation to participating victims regarding the assessment of their eligibility for reparations, ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 156.

²⁶ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 90.

(3) Responding to the Defense argument that the Trial Chamber had erroneously assessed the reparation award on the basis of the “aggregate individual harm”, without assessing the actual cost of the reparations ordered, the Appeals Chamber first gave guidance in general terms. In setting the convicted person’s liability, the Trial Chamber must take into account and balance (i) the cost of reparations to be put in place, (ii) the different harms suffered by (indirect and direct) victims and, as the case may be, the collective of victims and (iii) the rights of the convicted person. To this end, it may rely on estimates considered to be as accurate as possible.²⁷ In the case at hand, the Appeals Chamber agreed with the calculation of the Trial Chamber regarding the amount set for victims from the sample and those who may be identified later.

(4) In relation to the victims’ ground of appeal, the Appeals Chamber accepted that the Trial Chamber’s overall procedure for the assessment of eligibility failed to ensure equal conditions for all victims.²⁸ Accordingly, it amended the Trial Chamber’s ineligibility findings concerning 48 applicants and authorized them to seek a new assessment of their eligibility by the Trust Fund for Victims in the course of the implementation stage of the reparations.²⁹

bb) The second group of grounds of appeal concerns the assessment of individual requests and standard of proof.³⁰ Under this group, the following pronouncements are worth mentioning:

(1) The Appeals Chamber specifically approved the application of the “balance of probabilities” standard and acknowledged that the Trial Chamber had correctly applied it.³¹

(2) The Appeals Judges also accepted the Trial Chamber’s conclusion that, on the basis of the documentation available, 425 victims are a sample of the potentially eligible victims and that “hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted”.³²

cc) The third group of grounds of appeal concerns two arguments raised by Mr Lubanga: “how to take into account, when calculating the monetary value of a person’s liability for reparations, a convicted person’s role in the commission of the crimes in question, also vis-à-vis other possible co-perpetrators, and how to take into account other issues that he or she may raise with a view to mitigating his or her liability”.

The second argument concerns the application of the non ultra petita rule in reparations proceedings.³³

(1) Regarding the Defense claim that the Trial Chamber had erred by not taking into account the existence of other co-perpetrators, the Appeals Chamber recalled its ruling in the Katanga case: “in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person’s liability to repair that harm’ and [...] ‘it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm”.³⁴

(2) In relation to the Defense assertion that the Trial Chamber’s award decision exceeded the award size the victims requested, thus ruling ultra petita, the Appeals Chamber recalled its determination in the Katanga case that the principle of non ultra petita does not apply in reparation proceedings.³⁵

As a result, the Appeals Chamber, while confirming the Trial Chamber II decision for the most part, amended “it in part such that the victims whom the Trial Chamber found ineligible to receive reparations, and who consider that their failure to sufficiently substantiate their allegations, including by supporting documentation, resulted from insufficient notice of the requirements for eligibility, may seek a new assessment of their eligibility by the [Trust Fund for Victims], together with other victims who may come forward in the course of the implementation stage”.³⁶ Judge Chile Eboe-Osuji and Judge Luz del Carmen Ibañez Carranza appended separate opinions to the Judgment.³⁷

Mr Lubanga remains in detention in the DRC. His sentence of imprisonment is fulfilled on 15 March 2020.

²⁷ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 108.

²⁸ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 169.

²⁹ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), paras 170–171.

³⁰ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 10.

³¹ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 198–206.

³² ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), paras 228, 233.

³³ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 11.

³⁴ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 308. See also ICC, Judgment of 8.3.2018 – ICC-01/04-01/07-3778-Red (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” [“Katanga Reparations Judgment”]), para. 178.

³⁵ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 329. See also ICC, Judgment of 8.3.2018 – ICC-01/04-01/07-3778-Red (Katanga Reparations Judgment), paras 146–148.

³⁶ ICC, Judgment of 18.7.2019 – ICC-01/04-01/06-3466-Red (2019 Reparation Judgment), para. 332.

³⁷ ICC, Opinion of 18.7.2019 – ICC-01/04-01/06-3466-AnxI (Separate Opinion of Judge Eboe-Osuji); Opinion of 16.9.2019 – ICC-01/04-01/06-3466-AnxII (Separate Opinion of Judge Luz del Carmen Ibañez Carranza).

2. *Prosecutor v Bosco Ntaganda (Trial Chamber VI)*³⁸

- First warrant of arrest: 22 August 2006 (public on 28 April 2008)
- Second warrant of arrest: 13 July 2012
- Surrender to the Court: 22 March 2013
- Confirmation of charges: 9 June 2014
- Trial: 2 September 2015–30 August 2018
- Victims participating: 2,129
- Conviction: 8 July 2019
- Sentencing: 7 October 2019
- Current status: Appellate proceedings

The trial against Bosco Ntaganda (“Mr Ntaganda”) lasted three years.³⁹ During the trial, the Chamber heard 101 witnesses of whom 86 appeared in person before the Judges (71 witnesses for the Prosecutor, 12 witnesses for the Defense, including Mr Ntaganda, and three victims).⁴⁰ Moreover, five victims appeared to present their views and concerns.⁴¹ The Chamber took into account 82 facts upon which the parties had agreed (rule 69).⁴² On 16 March 2018, the Chamber declared the presentation of evidence closed (rule 141 [1]).⁴³ Between 28 and 30 August 2018, the parties and victims made their closing statements.⁴⁴

a) *Conviction*

Almost a year later, on 8 July 2019, Trial Chamber VI handed down its Judgment convicting Mr Ntaganda for the commission of 18 counts of crimes against humanity and war crimes committed in the context of two attacks in Ituri between 6 August 2002 and 31 December 2003: The first attack was directed against the Banyali-Kilo collectivité between 20 November 2002 and 6 December 2002 and the second attack was directed against the Walendu-Djatsu collectivité between 12 February 2003 and 27 February 2003.⁴⁵ The Judges found Mr Ntaganda to be criminally responsible as a

direct perpetrator for the crimes of murder and persecution⁴⁶ and as an indirect co-perpetrator for the remaining crimes. Mr Ntaganda was formally appointed by Mr Lubanga as Deputy Chief of Staff within the military wing of the Union des Patriotes Congolais (“UPC”), called Forces Patriotiques pour la Libération du Congo (“FPLC”), in charge of operations and organisation.⁴⁷ He had a heavy weapons unit under his command and was responsible for military training, including disciplinary measures.⁴⁸

aa) An issue that appears in almost every trial concerns the exact scope of the confirmed charges that delineate the scope of the trial and provide the limits of ensuing conviction. A typical argument of Defense counsel is that a particular factual allegation is not within the “facts and circumstances described in the charges”, within the meaning of article 74 (2). Prompted by the Defense, the Chamber first set out its understanding of the scope of the charges before delving into the merits of the Prosecutor’s allegations.

(1) Charges that consist of individual criminal acts remain confined to those acts. Any act not confirmed by the Pre-Trial Chamber remains outside the scope of the charges.⁴⁹

(2) Charges that are framed more broadly, such as the crime of deportation that occurs across a range of time and places, does not necessarily need to be “framed as a specific incident of an aggregate of acts (e.g. deportation of identified persons at a particular time and place)”. Instead, individual acts referred to by the Pre-Trial Chamber as part of the charge are only “examples of the conduct falling within the parameters” and remain “evidential details”. In other words, these examples do not delimit the charge; other examples may be added at trial as long as they fall within the specific parameters of the charges as confirmed.⁵⁰

(3) The Chamber may consider whether a specific type of criminal act (e.g. murder) is committed in narrowly confined temporal and geographical space and/or other parameters. Charges do not need to be framed narrowly as long as they fall within the specific parameters of the charges as confirmed by the Pre-Trial Chamber.⁵¹

(4) Continuous crimes, which take place during a prolonged period of time, must fulfil the legal requirements during the entire period.⁵²

³⁸ The record carries the case number ICC-01/04-02/06.

³⁹ For a summary of important decisions and developments in the Ntaganda trial, see *Chaitidou*, ZIS 2017, 733 (737).

⁴⁰ ICC, Annex of 8.7.2019 – ICC-01/04-02/06-2359-AnxA (Procedural Overview), paras 1, 13.

⁴¹ ICC, Annex of 8.7.2019 – ICC-01/04-02/06-2359-AnxA (Procedural Overview), para. 13.

⁴² ICC, Annex of 8.7.2019 – ICC-01/04-02/06-2359-AnxA (Procedural Overview), para. 22.

⁴³ ICC, Annex of 8.7.2019 – ICC-01/04-02/06-2359-AnxA (Procedural Overview), para. 36; ICC, Decision of 16.3.2018 – ICC-01/04-02/06-2259 (Decision closing the presentation of evidence and providing further directions).

⁴⁴ ICC, Annex of 8.7.2019 – ICC-01/04-02/06-2359-AnxA (Procedural Overview), para. 38.

⁴⁵ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Judgment [“Ntaganda Judgment”]).

⁴⁶ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 528, 532-533, 737-742, 745-752.

⁴⁷ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 321.

⁴⁸ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 323, 360, 371, 515, 639.

⁴⁹ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 39.

⁵⁰ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 40.

⁵¹ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 41, 865, 868-874, 968.

⁵² ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 42.

(5) Lastly, the Chamber noted that charges had been confirmed by the Pre-Trial Chamber in relation to a number of additional villages for which the Prosecutor, at trial, had not adduced any evidence. Consequently, the Trial Chamber informed the parties that it had not entered findings on those locations.⁵³

bb) The Judgment contains new additions to the Court's interpretation of the crimes and forms of criminal responsibility that are briefly introduced hereunder. In general, it seems fair to say that the Judgment follows approvingly the settled case law of other chambers across divisions. In relation to the contextual elements of crimes against humanity, the following findings merit our attention:

(1) For the purpose of determining whether the widespread and systematic attack was "directed against any civilian population", the Chamber determined that it may consider whether a military operation complied with the requirements of international humanitarian law, including the principle of distinction between legitimate targets and protected persons or objects and the duty to take precautionary measures.⁵⁴

(2) As regards the definition of "organization" within the meaning of article 7 (2) (a), the Chamber noted the varying definitions in the Court's case law but refrained from stipulating its own or adhering to an existing definition. Rather, it merely concluded that "it is evident that the UPC/FPLC had a well-organised structure".⁵⁵ The policy was inferred from, inter alia, documents, meetings, expressions used, as well as military actions undertaken by the UPC/FPLC.⁵⁶

cc) In relation to the contextual elements of war crimes, the following findings are worth our attention:

(1) The Pre-Trial Chamber had confirmed the charges of war crimes in the context of an armed conflict not of an international character ("NIAC").⁵⁷ The Defense had questioned the classification of the armed conflict arguing that it qualifies as an international armed conflict ("IAC"). The Trial Judges proceeded, without having invoked regulation 55 of the Regulations of the Court,⁵⁸ to discuss whether at the time relevant to the charges an IAC or NIAC had existed.⁵⁹ However, this did not further matter as the Chamber

acknowledged that the IAC classification had not been alleged by the Prosecutor nor was it supported by evidence suggesting that clashes between armed forces of two or more States had taken place.⁶⁰

(2) During several months of the temporal scope of the charges no active hostilities had taken place. Yet, the Chamber considered that the armed conflict continued to exist since there was no "lasting absence of armed confrontation between the UPC/FPLC and its opponents" and the UPC/FPLC was controlling significant parts of the territory of Ituri.⁶¹

(3) As regards the possibility of an internationalization of the NIAC⁶² through the involvement of Rwanda and Uganda in Ituri alongside the UPC/FPLC, the Chamber concluded that it lacked evidence to infer that (i) the UPC/FPLC had acted under "overall control" of those two States or on their behalf; and (ii) in relation to Uganda specifically, that the fighting had taken place within the area of the DRC under effective control of the Uganda armed forces.⁶³ This determination is in harmony with the assessment of Trial Chamber I in the Lubanga case.

dd) In relation to the crimes, the following selective findings are particularly noteworthy:

(1) In relation to the crime of persecution within the meaning of article 7 (1) (h), the Chamber clarified that the deprivation of a fundamental right is considered to be "contrary to international law" if "the right cannot be enjoyed by the person entitled to it". This deprivation may be caused also by non-State armed groups, who can be held accountable for serious human rights violations.⁶⁴ In addition, for an act to fall under the ambit of article 7 (1) (h), a "minimum level of severity" must be attained.⁶⁵

(2) Incidental displacement as a result of a lawful attack, or collateral consequences of a lawful attack, may not amount to a forcible transfer of population within the meaning of article 7 (1) (d). At the same time, the forced character of displacement does not entail that "unlawful targeting" took place and that the displaced population formed the 'object of

⁵³ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 641, 645–646.

⁵⁴ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 668.

⁵⁵ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 675.

⁵⁶ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 682–689.

⁵⁷ ICC, Decision of 9.6.2014 – ICC-01/04-02/06-309 (Decision Pursuant to Article 61 [7] [a] and [b] of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda), paras 31, 36, 74.

⁵⁸ A request for recharacterization of the facts had been made for the modes of liability which, however, was rejected by the Trial Chamber majority, see *Chaitidou*, ZIS 2017, 733 (741).

⁵⁹ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 699.

⁶⁰ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 700.

⁶¹ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 721.

⁶² The Chamber affirmed that such internationalization would take place "if a degree of control is exercised by the intervening third State over a non-State actor fighting in opposition to, or without the consents of, the government, that goes 'beyond the mere financing and equipping' of the armed group and also involves 'participation in the planning and supervision of military operations'", ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 727.

⁶³ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 728–730.

⁶⁴ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 993.

⁶⁵ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 994.

[an] unlawful attack designed to coerce [its] departure”. Rather, what is decisive is a “genuine lack of choice on the part of the individuals transferred”. The requirement of “lawful presence” includes internally displaced persons who have established temporary homes after being uprooted from their original communities”.⁶⁶

(3) The war crime of ordering the displacement of the civilian population within the meaning of article 8 (2) (e) (viii) requires an order to displace (in whatever form), not necessarily made to the civilian population. In addition, it is not necessary that the order be aimed at the displacement of an *entire* civilian population. The qualifier “imperative” to the term “military reasons” is “subsumed in the general concept of “military necessity” and denotes that the instances of lawful displacement are limited.⁶⁷

(4) The war crime of attacking civilians within the meaning of article 8 (2) (e) (i) belongs to the category of offences committed during the actual conduct of hostilities, i.e. the attack is committed before the civilians have fallen into the hands of the attacking party. The mere launching of the attack suffices, no actual harm to civilians as a result of the attack is required.⁶⁸

(5) The war crime of pillaging within the meaning of article 8 (a) (e) (v) “comprises all forms of appropriation, public or private, including not only organised and systematic appropriation, but also acts of appropriation committed by fighters in their own interest”. The reference to “military necessity” in footnote 62 of the Elements of Crimes does not provide an exception to the prohibition of pillaging. Rather, it clarifies that the concept of military necessity is “incompatible with a requirement that the perpetrator intended the appropriation for private or personal use, as any military necessity would require its use to be directed to further the war effort and thus use for military purposes”. In addition, the pillaging must not have taken place on a “large scale”.⁶⁹

(6) In relation to the war crime of attack against protected building within the meaning of article 8 (2) (e) (iv), the Chamber confirmed that the crime belongs to the category of offences committed during the actual conduct of hostilities.⁷⁰ It requires that the perpetrator has launched an attack; any damage or destruction of the object is not required. Pillaging of protected objects does not constitute an “attack” within the meaning of article 8 (2) (e) (iv).⁷¹

(7) The war crime of destroying property of an adversary within the meaning of article 8 (2) (e) (xii) may be committed during and outside conduct of hostilities, after a party has taken control over the area. The property of an “adversary” is considered to belong to “individuals or entities aligned with or with allegiance to a party to the conflict that is adverse or hostile to the perpetrators”. In case no allegiance is expressed, it suffices to demonstrate that the physical perpetrators considered the persons or entities to be adverse “by showing that they were not aligned to or supportive of the perpetrators’ party or its objectives”. Allegiance may be inferred from ethnicity or place of residence. All property is protected unless they constitute military necessity. The burden of proof in showing that the destruction was not justified by military necessity is on the Prosecutor. Attacks against military objects causing incidental harm to a civilian object may not amount to a war crime under article 8 (2) (e) (xii) only if the damage was not expected to be excessive in relation to the concrete and direct military advantage anticipated.⁷²

ee) In relation to the forms of criminal responsibilities, the Chamber’s findings on indirect co-perpetration are the most important. For the first time, a Trial Chamber entered a conviction on the basis of indirect co-perpetration within the meaning of article 25 (3) (a) “where the common plan is executed through other persons, who function as a tool of all of the co-perpetrators”.⁷³ Several Pre-Trial Chambers, including that in the Ntaganda case, have previously accepted this form of criminal responsibility and confirmed charges accordingly. The Judges of Trial Chamber VI considered this form of responsibility to be a particular form of co-perpetration,⁷⁴ requiring the existence of the following objective and subjective elements, as recapitulated below:

(1) The existence of an *agreement or common plan* between the accused and one or more other persons to commit the crimes or to engage in a conduct which, in the ordinary course of events, would result in the commission of the crimes.⁷⁵

(2) The *control* of the members of the common plan over a person or persons who execute the material elements of the crimes by subjugating the will of the direct perpetrators. The accused has control over the crime by virtue of his or her essential contribution to it and the resulting power to frustrate its commission. The existence of an organization used to subjugate the will of the physical perpetrators is one of the forms in which the commission through another person can take place. In this respect, the Chamber added: “while the potential physical perpetrators are interchangeable within the

⁶⁶ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 1056, 1069.

⁶⁷ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 1080-1083, 1098.

⁶⁸ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 904.

⁶⁹ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 1028-1030, 1044.

⁷⁰ More broadly see ICC, Judgment of 27.9.2016 – ICC-01/12-01/15-171 (Judgment and Sentence), para. 15; *Chaitidou*, ZIS 2016, 813 (873).

⁷¹ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 761, 1136, 1141–1142.

⁷² ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 1158, 1160, 1162, 1166.

⁷³ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 772.

⁷⁴ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), para. 772.

⁷⁵ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 774, 775–776.

organisation, the criterion of control means that the indirect perpetrator used ‘at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of the crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed’.” In arriving at this conclusion, the Chamber must conduct a normative assessment of the role of the accused in the specific circumstances of the case. The action of the other person(s) must be attributed to the accused as if it were his or her own. The control over the crime element distinguishes commission from, in particular, aiding and abetting within the meaning of article 25 (3) (c).⁷⁶ In this context, it is worth pointing out that the Chamber attributed the conduct of civilians, who also executed material elements of certain crimes, to Mr Ntaganda in the event it was able to ascertain that the civilians acted as tools in the hands of the co-perpetrators. The Judges accepted this on the basis that the civilians followed orders from the UPC/FPLC leadership and acted under general coercive circumstances resulting from the presence of armed UPC/FPLC soldiers who were themselves committing crimes at the time. Hence, in the view of the Judges, they were used as tools. For conduct in relation to which the circumstances the civilians carried out the acts were unclear, the Chamber refrained from making an attribution to the co-perpetrators, including Mr Ntaganda.⁷⁷

(3) The mens rea of the accused must meet the standard stipulated in article 30 and any special intent requirement set out in the law.⁷⁸

b) Sentencing

Between 17 and 20 September 2019, the Chamber held a hearing on sentencing during which it heard three witnesses.⁷⁹ On 7 November 2019, the Trial Chamber sentenced Mr Ntaganda to a total of 30 years imprisonment, as requested by the Prosecutor. It took into account the gravity of the crimes, Mr Ntaganda’s degree of contribution and intent, and his individual circumstances. While aggravating circumstances were identified in relation to parts of the crimes, the Judges did not accept any mitigating circumstances in Mr Ntaganda’s favor. When making submissions for sentencing, the Prosecutor invited the Chamber to consider “uncharged conduct”, i.e. the rape and sexual slavery involving female and male UPC/FPLC soldiers over the age of 15 years, as aggravating circumstances.⁸⁰ The Chamber rejected the consideration of such conduct as aggravating circumstance for lacking

⁷⁶ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 774, 777–780.

⁷⁷ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 820–825.

⁷⁸ ICC, Judgment of 8.7.2019 – ICC-01/04-02/06-2359 (Ntaganda Judgment), paras 774, 1169.

⁷⁹ ICC, Decision of 7.11.2019 – ICC-01/04-02/06-2442 (Sentencing Judgment), para. 6.

⁸⁰ ICC, Decision of 7.11.2019 – ICC-01/04-02/06-2442 (Sentencing Judgment), para. 128.

any sufficient link to the crimes for which Mr Ntaganda has been convicted.⁸¹ The time Mr Ntaganda has spent in detention in The Hague (22 March 2013 to 7 November 2019) will be deducted from his sentence, pursuant to article 78 (2).⁸²

c) Reparations

On 25 July 2019, the Single Judge, acting on behalf of Trial Chamber VI,⁸³ ordered the Registry to provide information on (1) a proposed methodology for the identification of victims; (2) whether experts could be useful to assist the Chamber; and (3) an update on the security situation in the DRC.⁸⁴

d) Appellate Proceedings

The Judgment convicting Mr Ntaganda has been appealed by the Prosecutor and the Defense. Appellate proceedings are ongoing. The parties may appeal the sentencing Decision within 30 days from notification of the sentencing Decision (rule 150 [1]).

II. Situation in Darfur/Sudan (Pre-Trial Chamber II)⁸⁵ – Prosecutor v Omar Hassan Ahmad Al Bashir (Pre-Trial Chamber II)⁸⁶

No proceedings at the situation level took place during the review period. To date, five cases emanated from this situation.

The most significant developments occurred in the case against Omar Hassan Ahmad Al Bashir (“Mr Al Bashir”), the former president of Sudan, when the Appeals Chamber rendered its Judgment on the question whether a State Party was correct in refusing to arrest and surrender a sitting head of State on the grounds that he enjoyed immunities.

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

As previously discussed,⁸⁷ Pre-Trial Chamber I found on 11 December 2017 that the Hashemite Kingdom of Jordan (“Jordan”) had failed to comply with its cooperation duties under the Statute by not arresting and surrendering Mr Al Bashir who had been on its territory on 29 March 2017 for

⁸¹ ICC, Decision of 7.11.2019 – ICC-01/04-02/06-2442 (Sentencing Judgment), para. 129.

⁸² ICC, Decision of 7.11.2019 – ICC-01/04-02/06-2442 (Sentencing Judgment), para. 252.

⁸³ ICC, Decision of 25.7.2019 – ICC-01/04-02/06-2365 (Decision notifying the designation of a Single Judge).

⁸⁴ ICC, Order of 25.7.2019 – ICC-01/04-02/06-2366 (Order for preliminary information on reparations).

⁸⁵ The record carries the situation number ICC-02/05.

⁸⁶ The record carries the case number ICC-02/05-01/09. The situation and related cases were reassigned to Pre-Trial Chamber II in March 2018.

⁸⁷ See Chaitidou, ZIS 2018, 73 (75).

the 28th Arab League Summit in Amman. The matter was referred to the Assembly of States Parties (“ASP”) and the Security Council.⁸⁸ In its reasoning, the Pre-Trial Chamber followed the approach taken in relation to South Africa.⁸⁹ Upon certification,⁹⁰ Jordan appealed this decision.⁹¹ Upon Jordan’s request, the Appeals Chamber ordered the appeal’s suspensive effect.⁹²

Upon invitation,⁹³ the Appeals Chamber received 12 *amici curiae* observations (from the Government of Mexico and 11 professors of international law)⁹⁴ as well as submissions of the African Union and the League of Arab States Organisation. The Chamber’s invitation to the Government of Sudan and Al Bashir to make submissions on the issues raised in the appeal remained unanswered.⁹⁵ A hearing was held before the Appeals Chamber from 10 to 14 September 2018.

⁸⁸ ICC, Decision of 11.12.2017 – ICC-02/05-01/09-309 (Decision under article 87 [7] of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir). Judge Marc Perrin de Brichambaut appended a minority opinion to the decision, ICC-02/05-01/09-309-Anx-tENG (Minority opinion by Judge Marc Perrin de Brichambaut).

⁸⁹ ICC, Decision of 6.7.2017 – ICC-02/05-01/09-302 (Decision under article 87 [7] of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir). Judge Marc Perrin de Brichambaut appended a minority opinion to the decision, ICC-02/05-01/09-302-Anx (Minority opinion by Judge Marc Perrin de Brichambaut).

⁹⁰ ICC, Decision of 21.2.2018 – ICC-02/05-01/09-319 (Decision on Jordan’s request for leave to appeal); Judge Marc Perrin de Brichambaut appended a minority opinion to the decision, ICC-02/05-01/09-319-Anx (Minority opinion by Judge Marc Perrin de Brichambaut).

⁹¹ Filing of 12.3.2018 – ICC-02/05-01/09-326 (The Hashemite Kingdom of Jordan’s appeal against the “Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir”).

⁹² ICC, Decision of 6.4.2018 – ICC-02/05-01/09-333 (Decision on Jordan’s request for suspensive effect of its appeal against the decision on the non-compliance by Jordan with the request for the arrest and surrender of Mr Omar Al-Bashir).

⁹³ ICC, Order of 29.3.2018 – ICC-02/05-01/09-330 (Order inviting expressions of interest as *amici curiae* in judicial proceedings [pursuant to rule 103 of the Rules of Procedure and Evidence]).

⁹⁴ ICC, Decision of 21.5.2018 – ICC-02/05-01/09-351 (Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal).

⁹⁵ ICC, Order of 25.5.2018 – ICC-02/05-01/09-352 (Order inviting submissions).

On 6 May 2019, the Appeals Chamber handed down its Judgment on the matter.⁹⁶ The core question at issue was whether “Heads of State immunity finds application in a situation where the Court requests a State Party of the Rome statute to arrest and surrender the Head of State of another State (in this instance, Sudan), which, while not being party to the Rome Statute, is the subject of a referral to the Court by the UN Security Council and, in terms of Resolution 1593, obliged to fully cooperate with the Court”.⁹⁷ As the reader will realize, the discussion focused mainly on article 27 (2) and its interplay with various provisions of the Rome Statute. The Chamber’s position on this point was unanimous.

The Appeals Chamber started the discussion with the preliminary question whether and to what extent customary international law provides for immunity of a head of State. Without difficulty, the Judges confirmed the existence of head of State immunities in inter-State relations under customary international law, which prevents the exercise of criminal jurisdiction over heads of State.⁹⁸ On the other hand, article 27 (2) entails that a head of State cannot claim immunity if he or she appears personally before the ICC for prosecution. Likewise, head of State immunity does not present a bar to the ICC opening an investigation in relation to or issuing a warrant of arrest against a head of State.⁹⁹

Noting a number of international legal instruments, and the issuance of warrants of arrest against then sitting President Slobodan Milošević and President Charles Taylor, the Appeals Chamber further opined that article 27 (2) has acquired the status of customary international law.¹⁰⁰ In the Judges’ view, the provision mirrors the principle that immunities do not stand in the way when prosecuting heads of States before international courts.¹⁰¹ This is grounded in the very nature of an international court, such as the ICC, empowered to act on behalf of the international community as a whole – as opposed to domestic courts which exercise the State’s sovereign power.¹⁰² The principle of *par in parem non*

⁹⁶ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Judgment in the Jordan Referral re Al-Bashir Appeal [“Jordan Appeal Judgment”]); Opinion of 6.5.2019 – ICC-02/05-01/09-397-Anx1 (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa).

⁹⁷ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 96.

⁹⁸ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 101.

⁹⁹ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 102.

¹⁰⁰ Claims to the contrary, espoused by the Pre-Trial Chamber (albeit in different composition) in relation to South Africa and Jordan were expressly discarded, ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 113.

¹⁰¹ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 106, 113, 117.

¹⁰² ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 115.

habet imperium does not apply in the relationship between the State and the international court.¹⁰³ In this context and almost in passing, the Appeals Judges added that the onus does not lie on those to prove that an *exception* of immunities exists but on those who claim that there exists such *immunity* in relation to international courts.¹⁰⁴ The Appeals Chamber then concluded that “no immunities under customary international law operate in such a situation to bar an international court *in its exercise of its own jurisdiction*”.¹⁰⁵ With the pronouncement that customary international law does not foresee any bar to prosecuting heads of States before international courts, the Appeals Chamber followed and fully endorsed the “customary law approach” of Pre-Trial Chamber I that had argued similarly in 2011 concerning Malawi’s failure to cooperate with the Court.¹⁰⁶

The Appeals Judges then affirmed article 27 (2)’s direct impact on the cooperation regime under Part IX of the Statute (“vertical effect”). In their view, article 27 (2), both as a matter of conventional law and customary international law, bars requested States Parties from relying on immunities, be it under international or domestic law, in relation to a head of State’s arrest and surrender pursuant to an ICC warrant of arrest.¹⁰⁷ A State Party has agreed to this principle when ratifying or acceding to the Rome Statute.¹⁰⁸ Invoking immunities as a ground to refuse cooperation with the ICC, which is fully reliant on State cooperation, would run counter to the purpose enshrined in article 27 (2) and effectively hamper the Court’s exercise of jurisdiction.¹⁰⁹ The State Party would not “cooperate fully” within the meaning of article 86. To the contrary: the prosecution of heads of States would be “reduced to a purely theoretical concept” were States Parties

at liberty to refuse cooperation on the grounds of immunities.¹¹⁰

In the opinion of the Appeals Chamber, article 27 (2) also permeates the “horizontal relationship” between States when a State Party is requested by an international court to arrest and surrender a head of State of another State Party.¹¹¹ Again, article 27 (2) dictates that States Parties may not invoke immunities in the horizontal relationship as they agreed (by ratifying or acceding to the Rome Statute) that immunities cannot prevent the Court from exercising jurisdiction, which is in line with customary international law.¹¹² The Appeals Chamber also remained unpersuaded by Jordan’s argument that immunities become relevant through article 98, which, in the absence of a waiver, preserves the immunity of officials of both States Parties and non-States Parties from foreign criminal jurisdiction. In the view of the Appeals Judges, article 98 (1) is a procedural rule that guides the Court how it shall proceed – if and when immunities exist.¹¹³ It is not “in its own right a fountain of immunity”.¹¹⁴ Given that article 27 (2) bars States Parties to rely on immunities both vertically and horizontally, there is hence no immunities at stake and, as a result, no need for seeking a waiver.¹¹⁵ Finally, the Appeals Chamber acknowledged that article 98 (1) remains a relevant procedural safeguard as it directs the Court to consider the requested State’s obligations towards “third States”, i.e. non-States Parties, before proceedings with a request for cooperation.¹¹⁶

The next question for the Appeals Chamber to examine was whether Sudan, a non-State Party to the Rome Statute, was entitled to invoke immunities. It was recalled that the situation in Darfur/Sudan, from which the case emanates, had been referred to the Court by UN Security Council resolution 1593 (2005) that also imposed on Sudan the duty to “cooperate fully” with the Court. This obligation to cooperate as per resolution 1593 (2005) flows from article 25 of the UN Charter that imposes a duty on UN member States to carry out Security Council decisions.¹¹⁷ Turning to the Statute, the Appeals Chamber clarified that it recognizes only two regimes of cooperation: that applicable to States Parties and that to non-States Parties (article 87 [5]). It does not foresee a

¹⁰³ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 115.

¹⁰⁴ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 116.

¹⁰⁵ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 114 (*emphasis added by the author*).

¹⁰⁶ ICC, Decision of 13.12.2011 – ICC-02/05-01/09-139-Corr (Corrigendum to the Decision Pursuant to Article 87 [7] of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir); see also *Chaitidou*, ZIS 2013, 130 (145). For a detailed and instructive overview of the different approaches, see *Kress*, in: Bergsmo/Ling (eds.), *State Sovereignty and International Criminal Law* (TOAEP EPublisher), 2012, accessible at <http://www.toaep.org/ps-pdf/15-bergsmo-ling> (2.12.2019).

¹⁰⁷ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 121–122.

¹⁰⁸ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 121.

¹⁰⁹ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 122, 124.

¹¹⁰ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 124.

¹¹¹ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 114, 127.

¹¹² ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 127.

¹¹³ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 130.

¹¹⁴ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 130–131, 144.

¹¹⁵ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 130.

¹¹⁶ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 131.

¹¹⁷ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 139–140.

“third cooperation regime” for States affected by Security Council referrals.¹¹⁸ Noting the binding nature of the cooperation obligation set out in the Security Council resolution and the language employed therein (which mirrors that in article 86), the Appeals Chamber concluded that the statutory cooperation regime for States Parties applies equally to Sudan without, however, making Sudan a State Party to the Rome Statute with all attendant obligations and powers.¹¹⁹ That being the case, Sudan’s cooperation obligations, including article 98 (1), must be understood and interpreted in harmony with article 27 (2). With this argument the Appeals Chamber closed the circle and, recalling its previous discussion, reiterated that a State Party, at the horizontal level, cannot invoke immunity of its head of State if another State Party proceeds with the arrest and surrender of said head of State following an ICC warrant of arrest.¹²⁰ In the present instance, “[t]he legal obligation under Resolution 1593, which imposed upon Sudan the same obligation of cooperation that the Rome Statute imposes upon States Parties, including with regard to the applicability of article 27 (2) of the Statute, prevailed as *lex specialis* over any immunity that would otherwise exist between Sudan and Jordan”.¹²¹ The Judges also underscored that *vis-à-vis* the Court Sudan could not claim immunities that otherwise may exist under national or international law as it would not “fully cooperate” in accordance with the Rome Statute.¹²² Hence, since Sudan could not rely on immunities, (1) Jordan was not in a situation of conflicting legal obligations but was obliged to arrest and surrender Al Bashir; and (2) for the Court the question of a waiver by Sudan did not arise.¹²³

Regarding Jordan’s reaction not to cooperate, the Appeals Chamber noted that it was not up to Jordan to unilaterally decide not to execute the Court’s cooperation request for arrest and surrender of Mr Al Bashir. Rather, if the State encounters difficulties, it must seek consultations with the Court pursuant to article 97.¹²⁴

As regards the Pre-Trial Chamber’s discretionary decision to refer the matter of non-compliance to the ASP and the Security Council (article 87 [7]), the Appeals Chamber, by majority, held that the Pre-Trial Chamber erred when it found that Jordan had not sought consultations with the Court, and

thus had abused its discretion.¹²⁵ The two dissenting Judges, Judge Solomy Balungi Bossa and Judge Luz del Carmen Ibañez Carranza, held that, on the facts of the case, there was no abuse of discretion discernible on the part of the Pre-Trial Chamber.¹²⁶ Consequently, the Pre-Trial Chamber’s decision to refer the matter was reversed.

III. Situation in Libya (Pre-Trial Chamber I)¹²⁷

No proceedings at the situation level took place during the review period. To date, three cases emanated from this situation. No warrant of arrest in this situation has been executed yet. Interesting developments can be reported from two cases.

1. *Prosecutor v Saif Al-Islam Gaddafi (Pre-Trial Chamber I)*¹²⁸

- Warrant of arrest: 27 June 2011
- Admissibility ruling pre-trial: 31 May 2013
- Admissibility ruling appeals: 21 April 2014
- Second admissibility ruling pre-trial: 5 April 2019
- Victims participating: -
- Current status: Appellate proceedings

It is reported that, since his arrest on 19 November 2011, Saif Al-Islam Gaddafi (“Mr Gaddafi”) remained in the custody of the militia controlling Zintan, Libya. On 6 June 2018, Mr Gaddafi lodged a challenge to the admissibility of his case before the ICC since, as he asserted, he was convicted by the Tripoli Criminal Court on 28 July 2015 for “substantially the same conduct” as alleged in the proceedings before the ICC. He also confirmed that on or around 12 April 2016 he was released from prison pursuant to Amnesty Law No. 6 (2015).

The Pre-Trial Chamber rendered a decision on admissibility on 5 April 2019, determining that the case continues to be admissible before the Court.¹²⁹ The most noteworthy findings are quickly summarized in the following:

Contrary to what the Prosecutor argued, the Chamber found that the suspect’s lodging of an admissibility challenge is not dependent on the suspect’s arrest and surrender to the Court. Mr Gaddafi’s right to challenge, according to article 19 (4), is rooted in the fact that he is sought by an ICC

¹¹⁸ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 137, 142.

¹¹⁹ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 140–142.

¹²⁰ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 143.

¹²¹ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 144.

¹²² ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), para. 143.

¹²³ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 144–146.

¹²⁴ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 152–153.

¹²⁵ ICC, Judgment of 6.5.2019 – ICC-02/05-01/09-397-Corr (Jordan Appeal Judgment), paras 193–213.

¹²⁶ ICC, Opinion of 6.5.2019 – ICC-02/05-01/09-397-Anx2 (Joint Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza and Judge Solomy Balungi Bossa).

¹²⁷ The record carries the situation number ICC-01/11.

¹²⁸ The record carries the case number ICC-01/11-01/11.

¹²⁹ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Decision on the “Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17 (1)(c), 19 and 20(3) of the Rome Statute” [“Second Admissibility Decision”]). Judge Marc Perrin de Brichambaut appended a minority opinion to the decision, ICC-01/11-01/11-662-Anx (Separate concurring opinion by Judge Marc Perrin de Brichambaut).

warrant of arrest.¹³⁰ Issues of cooperation, in this case the surrender of Mr Gaddafi, are independent of issues of admissibility.¹³¹

In line with previous jurisprudence, the burden of proof lies on the party challenging the admissibility of the case. In order to discharge this burden, the challenging party must present “evidence of a sufficient degree of specificity and probative value”.¹³²

The Chamber agreed with the Defense as regards the legal test for challenges based on the principle *ne bis in idem*. It involves the assessment of four elements: (1) the person has been tried by national court; (2) the national trial was with respect “to the same conduct” as that alleged in the case before the ICC; (3) the national proceedings were not for the purpose of shielding within the meaning of article 20 (3) (a); and (4) the national proceedings were not otherwise lacking in sufficient independence or impartiality, nor did they involve egregious due process violations, to the extent that the proceedings were incapable of providing genuine justice within the meaning of article 20 (3) (b).¹³³

Article 20 (3), as interpreted in harmony with internationally recognized human rights, requires that the person has been the subject of a completed trial with a *final* Judgment on conviction or acquittal that has acquired a *res judicata* effect. A decision on the merits of the case by a trial court is not sufficient.¹³⁴ Since Mr Gaddafi’s conviction was rendered in absentia and should still be subject to appeal before the Court of Cassation, the Chamber did not accept the finality of the Judgment rendered by the Tripoli Criminal Court.¹³⁵

In response to the Defense argument that the Amnesty Law No. 6 (2015) renders the Judgment final, the Chamber held that the Amnesty Law is actually not applicable to the crimes Mr Gaddafi was prosecuted domestically.¹³⁶ But more importantly, in the Chamber’s opinion, the Amnesty Law No. 6 (2015) is not applicable regarding the crimes Mr Gaddafi is prosecuted for before the ICC. In the words of the Chamber, “there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international

law”.¹³⁷ In order to demonstrate said trend, the Chamber took pains discussing, in an exemplary way, relevant jurisprudence of international(-ized) criminal courts, regional human rights authorities, such as the Inter-American Court for Human Rights, the European Court for Human Rights and the African Commission on Human and Peoples’ Rights, and the Human Rights Committee.¹³⁸ In the view of the Chamber, “[a]mnesties and pardons intervene with States’ positive obligations to investigate, prosecute and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate”.¹³⁹

The Defense lodged an appeal against this decision.¹⁴⁰ A hearing on this appeal took place 11-12 November 2019 before the Appeals Chamber, presided by Judge Chile Eboe-Osuji.¹⁴¹

2. *Prosecutor v Mahmoud Mustafa Busayf Al Werfalli (Pre-Trial Chamber I)*¹⁴²

- First warrant of arrest: 18 April 2017 (public on 24 April 2017)
- Second warrant of arrest: 4 July 2018
- Victims participating: --
- Current status: Suspect at large

On 4 July 2018, Pre-Trial Chamber I issued a second warrant of arrest against the suspect Mahmoud Mustafa Busayf Al Werfalli (“Mr Al Werfalli”) for the commission of an additional war crime of murdering 10 persons on 24 January 2018 in Benghazi, Libya.¹⁴³ Of note is the Chamber’s assessment of admissibility since Mr Al Werfalli was purportedly subject to domestic investigation for the acts described in the second warrant of arrest. It found that due to the limited information at hand, and regardless of whether the “entity exercising authority in the territory [...] can be considered a State for the

¹³⁰ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), paras 22, 24.

¹³¹ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), para. 24.

¹³² ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), para. 32.

¹³³ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), paras 26, 31.

¹³⁴ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), paras 36–47.

¹³⁵ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), paras 48–53.

¹³⁶ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), paras 56–59.

¹³⁷ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), para. 61.

¹³⁸ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), paras 62–76.

¹³⁹ ICC, Decision of 5.4.2019 – ICC-01/11-01/11-662 (Second Admissibility Decision), para. 77.

¹⁴⁰ ICC, Filing of 20.5.2019 – ICC-01/11-01/11-669 (Defence Appeal Brief in support of its appeal against Pre-Trial Chamber I’s “Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute”).

¹⁴¹ ICC, Order of 24.9.2019 – ICC-01/11-01/11-672 (Order scheduling a hearing before the Appeals Chamber and inviting participation in judicial proceedings); ICC, Decision of 1.11.2019 – ICC-01/11-01/11-681 (Decision on the conduct of the hearing before the Appeals Chamber).

¹⁴² The record carries the case number ICC-01/11-01/17.

¹⁴³ ICC, Warrant of 4.7.2018 – ICC-01/11-01/17-13 (Second Warrant of Arrest).

purposes of article 17 of the Statute”, there remains a situation of inactivity.¹⁴⁴

IV. Situation in Palestine (Pre-Trial Chamber I)¹⁴⁵

- Lodging ad hoc declaration: 22 January 2009
- Decision not to Initiate Investigation: 3 April 2012¹⁴⁶
- Lodging ad hoc declaration: 1 January 2015
- Accession Palestine to Rome Statute: 2 January 2015
- Opening of Preliminary Examination: 16 January 2015
- Referral of situation: 22 May 2018

On 1 January 2015, Palestine lodged an ad hoc declaration under article 12 (3) to the Court, accepting the Court’s jurisdiction over crimes allegedly “committed in the occupied Palestine territory, including East Jerusalem, since June 13, 2014”,¹⁴⁷ and, the following day, deposited the instrument of accession to the Rome Statute with the UN Secretary-General.¹⁴⁸ On 22 May 2015, Palestine lodged a referral, requesting the Prosecutor to investigate, “in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the Court’s jurisdiction, committed in all parts of the territory of the State of Palestine”.¹⁴⁹ In the referral letter, the “State of Palestine” was indicated to encompass “Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip”.¹⁵⁰ At the meeting with the Office of the Prosecutor, the Palestinian Minister of Foreign Affairs and Expatriates of Palestine clarified that the temporal scope of the situation comprises alleged crimes from 13 June 2014 with no end date.¹⁵¹ With Decision

of 24 May 2018, the Presidency assigned the situation to Pre-Trial Chamber I.¹⁵²

With a view to ensuring that the Court’s “role and activities are properly understood and accessible, particularly to the victims of situations and cases before the Court”, the Chamber issued on 13 July 2018 a Decision on information and outreach.¹⁵³ It underscored that outreach and information activities “in situation countries are quintessential to foster support, public understanding and confidence in the work of the Court”, while they, at the same time, enable the Court to “better understand the concerns and expectations of victims, so that it can respond more effectively and clarify, where necessary, any misconceptions”.¹⁵⁴

The Chamber recalled the rights victims enjoy under the Statute and international human rights, in particular their right to “provide information to, receive information from and communicate with the Court, regardless and independently from judicial proceedings, including during the preliminary examination stage”.¹⁵⁵ The Chamber underlined in no uncertain terms that only “[w]hen and if the Prosecutor takes the decision to open an investigation, the Chamber will, in a second step, give further instructions to the Registry in order to increase its activities and inform and assist victims in more detail regarding their potential participation in conformity with the Statute”.¹⁵⁶ Accordingly, the Registry was instructed, *inter alia*, to establish a continuous system of interaction, i.e. public information and outreach activities, between the Court and victims “residing within or outside of Palestine”, create an informative site on the Court’s website for victims and was directed to the questions it should focus on at this stage.¹⁵⁷

The decision is not about victims’ participation. It also does not single out any particular community allegedly affected. It leaves unaffected the Prosecutor’s powers to conduct the preliminary examination in accordance with the criteria of article 53 (1). Rather, it allows the Court to maintain control over the information distributed to affected communities and others about the Court’s mandate and work.

¹⁴⁴ ICC, Warrant of 4.7.2018 – ICC-01/11-01/17-13 (Second Warrant of Arrest), paras 27–29.

¹⁴⁵ The record carries the situation number ICC-01/18.

¹⁴⁶ ICC, Declaration of 3.4.2012 (Situation in Palestine).

¹⁴⁷ ICC, Decision of 24.5.2018 – ICC-01/18-1 (Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I [“Assignment Decision”]), Annex I – ICC-01/18-1-AnxI (“Annex I to Assignment Decision”), p. 2.

¹⁴⁸ See Secretary-General of the United Nations, “State of Palestine: Accession”, 6.1.2015, Reference: C.N.13.2015. Treaties-XVIII.10 (Depositary Notification), <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf> (2.12.2019). Thus, the Statute entered into effect for Palestine on 1 April 2015.

¹⁴⁹ ICC, Decision of 24.5.2018 – ICC-01/18-1-AnxI (Annex I to Assignment Decision), p. 8, para. 9.

¹⁵⁰ ICC, Decision of 24.5.2018 – ICC-01/18-1-AnxI (Annex I to Assignment Decision), p. 8 fn. 4.

¹⁵¹ ICC, Decision of 24.5.2018 – ICC-01/18-1-AnxI (Annex I to Assignment Decision), p. 2.

¹⁵² ICC, Decision of 24.5.2018 – ICC-01/18-1 (Assignment Decision).

¹⁵³ ICC, Decision of 13.7.2018 – ICC-01/18-2 (Decision on Information and Outreach for the Victims of the Situation [“Outreach Decision”]).

¹⁵⁴ ICC, Decision of 13.7.2018 – ICC-01/18-2 (Outreach Decision), para. 7.

¹⁵⁵ ICC, Decision of 13.7.2018 – ICC-01/18-2 (Outreach Decision), paras 8–11.

¹⁵⁶ ICC, Decision of 13.7.2018 – ICC-01/18-2 (Outreach Decision), para. 12.

¹⁵⁷ ICC, Decision of 13.7.2018 – ICC-01/18-2 (Outreach Decision), paras 14–18.

V. Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar (Pre-Trial Chamber III)¹⁵⁸

- Prosecutor’s Application for Jurisdiction Ruling: 9 April 2018
- Decision on Jurisdiction: 6 September 2018
- Application for Authorization to Initiate Investigation: 4 July 2019
- Victims representations: n/a
- Current status: Decision pending

The present situation made a “detour”, as it were, before being assigned to Pre-Trial Chamber III. Prior to submitting an application under article 15 (3), the Prosecutor requested the President of the Pre-Trial Division to assign her request for a ruling on jurisdiction under article 19 (3) to a Pre-Trial Chamber pursuant to regulation 46 (3) of the Regulations of the Court.¹⁵⁹ This procedural avenue allows information, requests or matters not arising out of a situation assigned to a Pre-Trial Chamber to be addressed by a Pre-Trial Chamber, according to a roster established by the President of the Pre-Trial Division.¹⁶⁰ Similar proceedings have been conducted in the past concerning the 2013 events in Egypt.¹⁶¹

1. Prosecutor’s Request for Ruling on Jurisdiction

On 9 April 2018, the Prosecutor submitted a request, using the procedure under regulation 46 (3) of the Regulations of the Court, and sought a ruling from a Pre-Trial Chamber on the question whether the Court may exercise jurisdiction over the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar (“Myanmar”) to the People’s Republic of Bangladesh (“Bangladesh”).¹⁶² She contended that article 19 (3) is the appropriate legal basis to ask for a ruling as it is not confined to any particular stage of the proceedings.¹⁶³

The Prosecutor reported that she received various public reports and information as well as 42 individual communications, pursuant to article 15 (1), on crimes committed against the Rohingya people.¹⁶⁴ She claimed that the crimes escalated on 25 August 2017 with the initiation of a “clearance operation”. Since then, more than 670,000 Rohingya, hitherto lawfully present in Myanmar, have been intentionally deported across the international border into Bangladesh, joining more than 160,000 Rohingya who had been forced out of Myanmar in previous years.¹⁶⁵ She conceded that the coercive acts relevant to deportation occurred on the territory of a non-State Party, Myanmar, but maintained that one legal element of the crime of deportation (crossing the international border) occurred on the territory of a State Party, Bangladesh.¹⁶⁶ The Prosecutor therefore opined that the Court may exercise jurisdiction based on the principle of territoriality, as enshrined in article 12 (2) (a).¹⁶⁷ Already in 2014, when declining to initiate an investigation in the situation in the Republic of Korea, the Prosecutor asserted the Court’s jurisdiction for conduct that commenced on the territory of a non-State Party (North Korea) and concluded on the territory of a State Party (South Korea).¹⁶⁸

2. Pre-Trial Chamber I’s Ruling on Jurisdiction

The President of the Pre-Trial Division assigned the request to Pre-Trial Chamber I, according to the roster.¹⁶⁹ In the following, the Chamber invited the authorities of Bangladesh¹⁷⁰ and the authorities of Myanmar¹⁷¹ to submit observations on

¹⁵⁸ The record carries the situation number ICC-01/19.

¹⁵⁹ Regulation 46 (3) of the Regulations of the Court reads: “Any matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber in accordance with sub-regulation 2, shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the President of that Division”.

¹⁶⁰ The relevant administrative decisions of (former) Presidents of the Pre-Trial Division are made public on the website of the Court at

https://www.icc-cpi.int/rule_46-3_records (2.12.2019). The roster itself is not public.

¹⁶¹ See *Chaitidou*, ZIS 2016, 813 (838).

¹⁶² ICC, Filing of 9.4.2018 – ICC-RoC46(3)-01/18-1 (Prosecution’s Request for a Ruling on Jurisdiction under Article 19 [3] of the Statute [“Article 19(3) Application”]).

¹⁶³ ICC, Filing of 9.4.2018 – ICC-RoC46(3)-01/18-1 (Article 19 [3] Application), paras 53–54.

¹⁶⁴ ICC, Filing of 9.4.2018 – ICC-RoC46(3)-01/18-1 (Article 19 [3] Application), para. 7.

¹⁶⁵ ICC, Filing of 9.4.2018 – ICC-RoC46(3)-01/18-1 (Article 19 [3] Application), paras 8–9, 11.

¹⁶⁶ ICC, Filing of 9.4.2018 – ICC-RoC46(3)-01/18-1 (Article 19 [3] Application), paras 2, 28. Bangladesh deposited its instrument of ratification on 23.3.2010. The Statute entered into effect for Bangladesh on 1.6.2010.

¹⁶⁷ ICC, Filing of 9.4.2018 – ICC-RoC46(3)-01/18-1 (Article 19 [3] Application), paras 2, 13, 31–50.

¹⁶⁸ ICC, Report of June 2014 (Article 5 Report), para. 39 and fn. 17. See *Chaitidou*, ZIS 2016, 813 (849).

¹⁶⁹ ICC, Decision of 11.4.2019 – ICC-RoC46(3)-01/18-2 (Decision assigning the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” to Pre-Trial Chamber I).

¹⁷⁰ ICC, Decision of 7.5.2019 – ICC-RoC46(3)-01/18-3 (Decision Inviting the Competent Authorities of the People’s Republic of Bangladesh to Submit Observations pursuant to Rule 103 [1] of the Rules of Procedure and Evidence on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”). Bangladesh submitted its observations confidentially.

¹⁷¹ ICC, Decision of 21.6.2018 – ICC-RoC46(3)-01/18-28 (Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103 [1] of the Rules of Procedure and Evidence on the

the Prosecutor's request. It also held a status conference on 20 June 2018, in closed session, in the presence of the Prosecutor.¹⁷² On 17 August 2018, the Prosecutor filed a "Notice of the Public Statement Issued by the Government of Myanmar" into the official records.¹⁷³

Upon receipt of various *amici curiae* submissions, the observations of Bangladesh¹⁷⁴ and victims' submissions, Pre-Trial Chamber I rendered its decision on 6 September 2018, by majority, Judge Marc Perrin de Brichambaut dissenting.¹⁷⁵ The following findings are worthy of our attention.

The Chamber's Majority accepted to hear the views of affected victims on the basis of article 68 (3) and rule 93, clarifying that their interests are affected by the Prosecutor's request.¹⁷⁶ Notably, this is the earliest opportunity in proceedings that victims have been heard by the Court to date. It also accepted to consider the public statement of Myanmar, since the Prosecutor had introduced it through her filing in the official records, even though Myanmar had declined to engage with the Court.¹⁷⁷

As regards the Chamber's authority to engage with the Prosecutor's request, the Chamber's Majority declined to rely on article 19 (3), as proposed by the Prosecutor, given that its applicability at this stage is controversial.¹⁷⁸ Rather, it held that it is competent to decide on the question raised by the Prosecutor on the basis of article 119 (1), since the Court's jurisdiction is "clearly subject to dispute with Myanmar".¹⁷⁹ The Majority Judges also drew upon the Court's power to

determine its own competence, also known as the principle of *Kompetenz-Kompetenz* or *compétence de la compétence*.¹⁸⁰

As regards the abstract legal question whether the Court has territorial jurisdiction in the present instance, the Chamber's Majority first gave its interpretation on the crime of deportation within the meaning of article 7 (1) (d), without making any factual findings. It confirmed that article 7 (1) (d) contains two separate crimes,¹⁸¹ namely deportation and forcible transfer, that are distinguishable on the basis of the displacement requirement: deportation is linked to the destination of another State, while forcible transfer is linked to another location within the State.¹⁸² As regards the conduct underlying the crime of deportation, the Majority Judges, noting the crime's "open-conduct" nature, held that various types of conduct may qualify as "expulsion or other coercive acts",¹⁸³ including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.¹⁸⁴

The Majority Judges then set forth their interpretation of article 12 (2) (a) clarifying that the Court's territorial jurisdiction is given if "at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party".¹⁸⁵ Recalling the prominent statement in the *Lotus* case that territoriality "by no means coincides with territorial sovereignty", the Majority found support for its aforementioned interpretation in international case law, international instruments and national legislation, including that of Myanmar and Bangladesh, as well as the object and purpose of the Rome Statute.¹⁸⁶ Importantly, the Judges underscored that the drafters of the Rome Statute had intended to allow the Court to exercise its jurisdiction in the same circumstances in which States Parties would be allowed to assert their criminal jurisdiction, subject to international law.¹⁸⁷ In addition, they highlighted that the Statute envisages the transboundary crime of deportation without limitation as to the destination requirement and without the

"Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute").

¹⁷² ICC, Order of 11.5.2018 – ICC-RoC46(3)-01/18-4 (Order Convening a Status Conference). The Chamber appended a list of questions to be discussed with the Prosecutor, ICC-RoC46(3)-01/18-4-Anx.

¹⁷³ ICC, Filing of 17.8.2018 – ICC-RoC46(3)-01/18-36 (Notice of the Public Statement Issued by the Government of Myanmar).

¹⁷⁴ On 5.7.2018, the Registry informed the Chamber that the Embassy of Myanmar to the Kingdom of Belgium had refused to accept the delivery of the Chamber's decision inviting Myanmar for observations and the Prosecutor's article 19 (3) request.

¹⁷⁵ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ["Decision on Jurisdiction"]).

¹⁷⁶ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), para. 21.

¹⁷⁷ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), para. 23.

¹⁷⁸ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), para. 27.

¹⁷⁹ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), para. 28.

¹⁸⁰ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), paras 30–33.

¹⁸¹ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), paras 53, 57–60.

¹⁸² ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), paras 55, 57–60.

¹⁸³ See Paragraph 1 of the Elements of Crimes of the crime of deportation or forcible transfer of population ("The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts" – footnotes omitted).

¹⁸⁴ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), para. 61.

¹⁸⁵ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), paras 64, 72.

¹⁸⁶ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), paras 65–70.

¹⁸⁷ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), para. 70.

need for the conduct to have taken place on the territories of two State Parties.¹⁸⁸

Most intriguing are the Majority's remarks on the relevance of other crimes in relation to which the Court could be competent. On the basis of its interpretation of article 12 (2) (a), the Majority indicated that the Court would also be competent over the crime of persecution (article 7 [1] [h]) and other inhumane acts (article 7 [1] [k])¹⁸⁹ if one element or part of these crimes takes place on the territory of a State Party.¹⁹⁰ Indeed, since the Majority addressed a legal question in the abstract, it was free to invite the Prosecutor to consider those crimes as well.

Finally, the Majority addressed the Prosecutor's comment made in the course of the proceedings that her request for a ruling on jurisdiction "precedes any preliminary examination" and that, if the Chamber would confirm the Court's jurisdiction, she would proceed to announce the opening of a preliminary examination.¹⁹¹ Noting the Prosecutor's submission that she has received material and information (and analyzed it) and that, therefore, she inevitably has considered the Court's jurisdictional parameters under article 53 (1) (a) before submitting the request, the Majority rejected the Prosecutor's construction of a "pre-preliminary examination phase". Rather, in the view of the Judges, the steps undertaken by the Prosecutor demonstrate that she is actually conducting a preliminary examination.¹⁹² The Chamber recalled that no announcement of the commencement of the preliminary examination was necessary and that she was duty-bound, under the Rome Statute, to complete such examination of the information and material within a reasonable time, pointing to the detrimental effects a prolonged examination phase can have on the reliability of the evidence and the rights of victims.¹⁹³

The question of how preliminary examinations should be conducted by the Office of the Prosecutor, in particular the requirement to conclude the preliminary examination within a reasonable time, did not only arise in the present instance but played a significant role in the situation that will be presented next.

¹⁸⁸ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), para. 71.

¹⁸⁹ The alleged appalling living conditions of the Rohingya in Bangladesh and allegations that the authorities of Myanmar impede their return to Myanmar were considered by the Majority to amount potentially to other inhumane acts, ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), para. 77.

¹⁹⁰ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), paras 74–79.

¹⁹¹ ICC, Filing of 11.7.2018 – ICC-RoC46(3)-01/18-33 (Prosecution Response to Observations by Intervening Participants), fn. 10 and para. 37.

¹⁹² ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), para. 82.

¹⁹³ ICC, Decision of 6.9.2018 – ICC-RoC46(3)-01/18-37 (Decision on Jurisdiction), paras 84–88.

Judge Marc Perrin de Brichambaut appended a partly dissenting opinion to the Majority's ruling, stating that, at this point in time, the Chamber lacks a legal basis to render a decision, relying on the Kompetenz-Kompetenz principle is inappropriate and that the pronouncements of the Chamber amount to an advisory opinion, lacking any binding force. In his view, the Prosecutor is entitled to conduct the preliminary examination with a view to determining whether to submit an article 15 (3) request, without the assistance of the Pre-Trial Chamber. Judge Marc Perrin de Brichambaut thus concluded that the question of jurisdiction should be preserved for subsequent proceedings.¹⁹⁴

3. Proceedings before Pre-Trial Chamber III

With memorandum dated 12 June 2019, the Prosecutor informed the Presidency of her intention to submit an article 15 (3) request.¹⁹⁵ On 25 June 2019, the Presidency assigned the situation to the newly constituted Pre-Trial Chamber III, presided by Judge Olga Herrera Carbuca.¹⁹⁶

Prompted by the Registry, specifically the VPRS, responsible for the collection of victims' representations under article 15 (3), second sentence, and rule 50 (3), the Chamber granted, on 26 June 2019, an extension of time to collect said representations until 28 October 2019 and to submit a consolidated report until 31 October 2019.¹⁹⁷ The Chamber also accepted the draft representation form, as proposed by the VPRS, allowing victims to report on crimes since at least

¹⁹⁴ ICC, Opinion of 6.9.2018 – ICC-RoC46(3)-01/18-37-Anx (Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut).

¹⁹⁵ ICC, Memorandum of 12.6.2019 – ICC-01/19-1-Anx (Notice pursuant to regulation 45 of the Regulations of the Court). The memorandum is appended to the Presidency decision assigning the situation to Pre-Trial Chamber III, as foreseen in regulation 46 (1), first sentence, of the Regulations of the Court.

¹⁹⁶ ICC, Decision of 25.6.2019 – ICC-01/09-1 (Decision on the constitution of Pre-Trial Chamber III and on the assignment of the situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar); ICC, Decision of 27.6.2019 – ICC-01/19-4 (Decision on the Election of the Presiding Judge).

¹⁹⁷ ICC, Decision of 26.6.2019 – ICC-01/19-6 (Decision on the "Registry's Request for Extension of Notice Period and Submissions on the Article 15(3) Process" ["Decision on Victims Representations"]). The time period provided in the Regulations of the Court is 30 days, see regulation 50 (1) of the Regulations of the Court. This tight deadline has proven in all authorization proceedings to be too ambitious and has regularly been amended by the Judges.

9 October 2016.¹⁹⁸ Subsequent amendment suggestions to the representation form tabled by the Prosecutor were rejected.¹⁹⁹

On 4 July 2019, the Prosecutor submitted the request for authorization under article 15 (3).²⁰⁰ Therein, she seeks authorization from Pre-Trial Chamber III to proceed with an investigation into allegations of crimes in the period since 9 October 2016. Relying on Pre-Trial Chamber I's ruling on jurisdiction, she clarified specifically that she intends to investigate crimes in relation to which at least one element occurred on the territory of Bangladesh and which occurred within the context of two waves of violence in the Rakhine State on the territory of Myanmar as well as other crimes sufficiently linked to those events.²⁰¹

The Prosecutor maintained that there is a reasonable basis to believe that crimes against humanity, such as deportation (through coercive acts such as killings, rape and other forms of sexual violence, other inhumane acts, destruction of property), persecution on ethnic/religious grounds and other inhumane acts (such as the violation of the right to return), were committed by the Myanmar armed forces, jointly with the Border Guard Police, Myanmar police force and non-Rohingya civilians.²⁰² The Prosecutor also indicated to investigate crimes purportedly committed by the Arakan Rohingya Salvation Army ("ARSA") armed group should they fall within the jurisdiction of the Court.²⁰³ In this context, she hinted at information that suggests the existence of an armed conflict between the ARSA and the Myanmar armed forces during which war crimes may have been committed.²⁰⁴

As regards the temporal scope of the investigation, the Prosecutor claimed that the crimes were committed in the course of two waves, the first since at least 9 October 2016 and the second since at least 25 August 2017 ("clearance operation").²⁰⁵ However, she also sought authorization to investigate prospective crimes that may be committed after

the filing of the article 15 (3) request ("continuing crimes").²⁰⁶

As regards the admissibility of potential cases, as set forth in article 53 (1) (b), the Prosecutor claimed that there is no information available indicating that investigations or prosecutions in Myanmar or Third States have taken or are taking place.²⁰⁷ In addition, she contended that the potential cases appear to be sufficiently grave to justify further action by the Court.²⁰⁸

Finally, the Prosecutor affirmed that there are no reasons to believe that an investigation would not be in the interests of justice, pursuant to article 53 (1) (c).²⁰⁹

At the time of writing, a decision of Pre-Trial Chamber III deciding on the Prosecutor's request to proceed with an investigation is pending.

VI. Situation in the Registered Vessels Registered in the Union of the Comoros, Hellenic Republic and the Kingdom of Cambodia (Pre-Trial Chamber I)²¹⁰

- Gaza Flotilla Incident: 31 May–5 June 2010
- Referral of situation: 14 May 2013
- Prosecutor's Decision not to Investigate: 6 November 2014
- Request of Comoros to Review: 29 January 2015
- Review Decision of Pre-Trial Chamber I: 16 July 2015
- Appeals Judgment Dismissing Prosecutor's Appeal: 6 November 2015
- Prosecutor's Second Decision not to Investigate: 29 November 2017
- Second Request of Comoros to Review: 23 February 2018
- Second Review Decision of Pre-Trial Chamber I: 15 November 2018
- Granting Prosecutor's Leave to Appeal: 18 January 2019
- Second Appeals Judgment Rejecting Prosecutor's Appeal: 2 September 2019
- Current status: Reconsideration of Decision not to Investigate

The 2016 jurisprudence overview summarized the proceedings until November 2015 when the Appeals Chamber dismissed in limine the appeal of the Prosecutor against Pre-

¹⁹⁸ ICC, Decision of 26.6.2019 – ICC-01/19-6 (Decision on Victims Representations), para. 17.

¹⁹⁹ ICC, Decision of 11.7.2019 – ICC-01/19-9 (Decision on the Prosecutor's "Request on the Victim Representation Form").

²⁰⁰ ICC, Filing of 4.7.2019 – ICC-01/19-7 (Request for authorisation of an investigation pursuant to article 15 ["Article 15(3) Request"]).

²⁰¹ ICC, Filing of 4.7.2019 – ICC-01/19-7 (Article 15 [3] Request), paras 20, 297.

²⁰² ICC, Filing of 4.7.2019 – ICC-01/19-7 (Article 15 [3] Request), paras 4, 67–68, 75, 82–83, 85–222.

²⁰³ ICC, Filing of 4.7.2019 – ICC-01/19-7 (Article 15 [3] Request), para. 24.

²⁰⁴ ICC, Filing of 4.7.2019 – ICC-01/19-7 (Article 15 [3] Request), paras 24, 61–66.

²⁰⁵ ICC, Filing of 4.7.2019 – ICC-01/19-7 (Article 15 [3] Request), para. 5.

²⁰⁶ ICC, Filing of 4.7.2019 – ICC-01/19-7 (Article 15 [3] Request), para. 23.

²⁰⁷ ICC, Filing of 4.7.2019 – ICC-01/19-7 (Article 15 [3] Request), paras 228–277.

²⁰⁸ ICC, Filing of 4.7.2019 – ICC-01/19-7 (Article 15 [3] Request), paras 278–289.

²⁰⁹ ICC, Filing of 4.7.2019 – ICC-01/19-7 (Article 15 [3] Request), paras 290–296.

²¹⁰ The record carries the situation number ICC-01/13.

Trial Chamber I's first review Decision.²¹¹ In the following, the reader will be presented with a short overview of the proceedings as they developed after 2015.

1. Prosecutor's Reconsideration

Following the appellate proceedings in November 2015, the Prosecutor embarked on a reconsideration exercise of her original decision not to initiate an investigation and, on 29 November 2017, notified Pre-Trial Chamber I of her conclusion.²¹² As summarized by the Pre-Trial Chamber, the Prosecutor's 2017 reconsideration Decision is divided in three parts:

a) First part: This part relates to the discussion on whether the Pre-Trial Chamber's first review decision discloses a well-founded basis to reach a different conclusion than that contained in the Prosecutor's original decision. The Prosecutor took issue with the Pre-Trial Chamber's Decision for a variety of reasons, such as the Chamber's error in the interpretation of a provision, failure to address or to provide sufficient reasoning with respect to certain issues, and the Chamber's misunderstanding of the material. In sum, the Prosecutor concluded that she disagrees with and cannot follow the Pre-Trial Chamber's reasoning and that, for that reason alone, the reconsideration could be terminated. Nevertheless, the Prosecutor accepted, in the exercise of her discretion enshrined in article 53 (3) (a), to address the arguments of the Union of the Comoros and the victims, as discussed in the second part.²¹³

b) Second Part: This part relates to the discussion of seven issues raised before Pre-Trial Chamber I, namely the relevance of allegations of live fire, prior to the boarding, to the analysis concerning any plan or policy; considerations related to the victims of the identified crimes; relevance of allegations of mistreatment of detainees on Israeli territory; relevance of alleged damage to CCTV cameras aboard the Mavi Marmara; considerations related to the occurrence of the identified crimes uniquely aboard the Mavi Marmara; the nature of the identified crimes aboard the Mavi Marmara; and considerations related to the perpetrators of the identified crimes. In the Prosecutor's view, none of the above issues, either separately or cumulatively, warrant a departure of her

conclusions in the original decision not to proceed with an investigation.²¹⁴

c) Third Part: This part relates to the discussion and evaluation of material received by the Prosecutor since her original decision dated 6 November 2014, such as personal accounts and observations of participating victims, an opinion of a retired military officer and forensic pathologist, copies of forensic reports prepared by Turkish authorities, photographs and other material prepared by counsel in the proceedings. In the Prosecutor's view, the information newly received does not move her to exercise her residual discretion under article 53 (4) and to reconsider her original decision not to proceed with an investigation.²¹⁵

As a result, the Prosecutor informed the Pre-Trial Chamber that she remained of the view that there is no reasonable basis to proceed with an investigation and that the preliminary examination must be closed.²¹⁶ Subsequently, the referring State, the Union of the Comoros, lodged again an application, asking the Pre-Trial Chamber to review the Prosecutor's reconsideration Decision and to direct her to reconsider her decision not to proceed with an investigation.²¹⁷

2. The Second Review Decision

On 15 November 2018, the Pre-Trial Chamber decided by majority, Judge Péter Kovács dissenting, on the request for second review of the Union of the Comoros. The Chamber's main legal findings are briefly summarized as follows.

At the outset, the Majority clarified that the Prosecutor had actually rendered two discrete Decisions: a reconsideration Decision under article 53 (3) (a) and a reconsideration Decision under article 53 (4).²¹⁸ In the following, the Majority shortly analyzed the nature and differences between the two reconsideration regimes.

In relation to the Prosecutor's reconsideration Decision under article 53 (4),²¹⁹ the Majority explained that whereas article 53 (3) (a) reconsideration Decisions are based on information already in possession of the Prosecutor, article 53 (4) reconsideration Decisions are based on "new facts and information".²²⁰ The Majority went on to explain that even

²¹¹ See *Chaitidou*, ZIS 2016, 813 (839).

²¹² ICC, Filing of 29.11.2017 – ICC-01/13-57 (Notice of Prosecutor's Final Decision under Rule 108 [3]). The actual decision is appended to the notification, see ICC-01/13-57-AnxI (Final Decision of the Prosecution concerning the "Article 53(1) Report" [ICC-01/13-6-AnxA], dated 6 November 2014 ["Prosecutor's Second Decision"]).

²¹³ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Decision on the "Application for Judicial Review by the Government of the Union of the Comoros" ["Second Review Decision"]), paras 29–32.

²¹⁴ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 33–34.

²¹⁵ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 35–37.

²¹⁶ ICC, Filing of 29.11.2017 - ICC-01/13-57-AnxI (Prosecutor's Second Decision), para. 2.

²¹⁷ ICC, Filing of 23.2.2018 – ICC-01/13-58-Red, (Application for Judicial Review by the Government of the Union of the Comoros).

²¹⁸ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 42, 51.

²¹⁹ Article 53 (4) reads: "The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information".

²²⁰ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 52.

though article 53 (4) reconsideration Decisions are within the Prosecutor's discretionary powers (as the terms "may" and "at any time" in the provision suggest), the article 53 (1) criteria governing the decision to initiate an investigation must nevertheless be applied so as to avoid arbitrariness.²²¹ Lastly, the Majority held that article 53 (4) reconsideration Decisions cannot be challenged by the referring entity since article 53 (3) (a) only refers to article 53, sub-paragraph (1) and (2), but not sub-paragraph (4) and no other provision in the Statute or the Rules of Procedure and Evidence provides such a remedy.²²² As a result, insofar as the Union of the Comoros requested that the Chamber review the Prosecutor's assessment of new material and information she received after her original decision pursuant to article 53 (4), this part of the application was dismissed in limine by the Pre-Trial Chamber.²²³

In relation to the Prosecutor's reconsideration Decision under article 53 (3) (a),²²⁴ the Majority considered that, based on certain statements made and the fact that she had considered the arguments of the participants rather than the Chamber's review Decision, the Prosecutor had willfully refrained from complying with the Chamber's review Decision.²²⁵ Noting that the Prosecutor thus challenged certain fundamental notions enshrined in the Statute, the Majority discussed at length whether the Prosecutor was under an obligation to abide by the Chamber's review decision or whether she was free to disregard it and adopt another basis of her reconsideration in the exercise of her discretion under article 53 (3) (a).²²⁶

The Majority Judges made clear that, despite the wording in article 53 (3) (a) that the Chamber may "request" the Prosecutor to reconsider the original Decision, the review Decision of the Pre-Trial Chamber remains, as rule 108 (1) indicates,²²⁷ a judicial *Decision*, which must form the basis for

the Prosecutor's reconsideration.²²⁸ In the opinion of the Majority, this finding bears the following three consequences in the present case:

a) *Obligation to Comply*: The Prosecutor is under an obligation to comply with the Chamber's review Decision,²²⁹ considering the Chamber's supervisory powers under article 53 (3) (a) (which translate ipso jure into an obligation on the part of the Prosecutor to comply with the decision of the Chamber),²³⁰ the Chamber's power to sanction participants in case of deliberate refusal,²³¹ the principle of effectiveness²³² and the general principle of law that parties to legal proceedings must comply with judicial Decisions.²³³ Crucially, in the opinion of the Majority, were the Prosecutor at liberty to set aside the Chamber's review Decision, this would essentially negate the opportunity of referring States to challenge the Prosecutor's original decision.²³⁴

b) *Review Decision Basis for Reconsideration*: The Chamber's review Decision forms the basis for the Prosecutor's reconsideration.²³⁵ The Majority found fault with the Prosecutor's approach to disregard the Chamber's review Decision and to reconsider her original decision exclusively on the basis of submissions provided in the context of the proceedings.²³⁶ In the opinion of the Majority, the Prosecutor does not enjoy the authority to determine autonomously the basis of her reconsideration.²³⁷

c) *Finality of Reconsideration Decision*: Since the Prosecutor did not take into account the Chamber's review Decision in the present case, the Prosecutor's reconsideration Decision cannot be considered as "final" within the meaning of rule 108 (3).²³⁸ Thus, the Majority ruled that the Pre-Trial Chamber retains jurisdiction and its oversight role continues to be in effect until and when the Prosecutor has concluded

²²¹ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 53.

²²² ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 54.

²²³ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 55, 118.

²²⁴ Article 53 (3) (a) reads: "At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision".

²²⁵ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 83–85.

²²⁶ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 87.

²²⁷ Rule 108 (1) reads: "A decision of the Pre-Trial Chamber under article 53, paragraph 3(a), must be concurred in by a majority of its judges and shall contain reasons. It shall be communicated to all those who participated in the review".

²²⁸ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 90–94.

²²⁹ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 96–99.

²³⁰ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 98.

²³¹ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 102–104.

²³² ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 105–106.

²³³ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 107.

²³⁴ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 100.

²³⁵ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 110.

²³⁶ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 111, 113.

²³⁷ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 112.

²³⁸ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 114.

her reconsideration in light of the Chamber's review Decision.²³⁹

That said, it is important to stress that the Majority readily acknowledged the Prosecutor's freedom in relation to two aspects: The Prosecutor's discretion over *how* to proceed with the reconsideration pursuant to rule 108 (although not *whether* to proceed), and her discretion as to the *outcome* of the reconsideration process.²⁴⁰

Finally, the Majority reminded the Prosecutor of her obligation to conclude the reconsideration "as soon as possible", pursuant to rule 108 (2), calling the Prosecutor's attention to the detrimental effects a prolonged preliminary examination phase has on the rights of the referring State and victims.²⁴¹ As a result, it instructed the Prosecutor to conclude her reconsideration within six months from the notification of the Chamber's second review decision, namely by 15 May 2019.²⁴²

The partly dissenting Judge, Judge Péter Kovács, agreed with the Majority to dismiss the request for review the article 53 (4) reconsideration Decision²⁴³ but considered the Prosecutor's article 53 (3) (a) reconsideration Decision to be final within the meaning of rule 108 (3).²⁴⁴ In his view, the Prosecutor's decision not to investigate under article 53 (1) (a) and/or (b) and rules 105–107 "cannot be reconsidered twice in accordance with article 53 (3) (a) of the Statute and rule 108 (3) of the Rules".²⁴⁵ He was critical of the Majority's approach as this "might also open the door for endless reconsideration requests".²⁴⁶

3. The Appeal

On 18 January 2019, the Prosecutor was granted leave to appeal the second review Decision on two issues.²⁴⁷ The Prosecutor's request for suspensive effect of the appeal,²⁴⁸ in

particular for the sake of not rendering a reconsideration Decision prior to the Appeals Chamber's ruling on the matter, was initially denied.²⁴⁹ On 1 May 2019, a hearing was held in the presence of the Prosecutor, representatives of the Union of the Comoros and victims representatives.²⁵⁰ On 3 May 2019, the Appeals Chamber set the date for the delivery of the Judgment and suspended the time limit set by the Pre-Trial Chamber for the Prosecutor's reconsideration of her original decision, as it was expiring on 15 May 2019.²⁵¹

On 2 September 2019, the Appeals Chamber rendered the Judgment in which it was asked to examine two questions: First, can the Pre-Trial Chamber consider the Prosecutor's reconsideration Decision as not final in the circumstances that, in the view of the Pre-Trial Chamber, the Prosecutor did not carry out the reconsideration in accordance with the Chamber's article 53 (3) (a) request? Second, in the context of review proceedings, is the Prosecutor bound by the Pre-Trial Chamber's conclusions on law or fact set forth in its request to the Prosecutor under article 53 (3) (a)?

The Appeals Chamber highlighted that the reconsideration process after the Pre-Trial Chamber's article 53 (3) (a) request is governed by rule 108 and recalled that the "ultimate decision as to whether to initiate an investigation is that of the Prosecutor".²⁵² Nevertheless, it agreed, by majority, that the Pre-Trial Chamber retains the power (derived from the statutory power to request reconsideration and the judicial nature of the Pre-Trial Chamber's "request"²⁵³) to determine whether the Prosecutor's reconsideration Decision actually amounts to a proper final Decision within the meaning of rule 108 (3).²⁵⁴ The Appeals Chamber Majority opined that, were it otherwise, the Prosecutor could ignore the Pre-Trial Chamber's request for reconsideration, which would negate the effectiveness of the article 53 (3) (a) review proceedings.²⁵⁵ That said, the Appeals Chamber Majority clarified that the Pre-Trial Chamber's scope of the review is limited to establishing whether the Prosecutor has carried out the recon-

²³⁹ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), paras 114–116.

²⁴⁰ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 109.

²⁴¹ ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 120.

²⁴² ICC, Decision of 15.11.2018 – ICC-01/13-68 (Second Review Decision), para. 121.

²⁴³ ICC, Opinion of 15.11.2018 – ICC-01/13-68-Anx (Partly Dissenting Opinion of Judge Péter Kovács ["Dissenting Opinion"]), paras 1, 25, 31.

²⁴⁴ ICC, Opinion of 15.11.2018 – ICC-01/13-68-Anx (Dissenting Opinion), paras 10, 15, 18–19.

²⁴⁵ ICC, Opinion of 15.11.2018 – ICC-01/13-68-Anx (Dissenting Opinion), para. 21.

²⁴⁶ ICC, Opinion of 15.11.2018 – ICC-01/13-68-Anx (Dissenting Opinion), para. 10.

²⁴⁷ ICC, Decision of 18.1.2019 – ICC-01/13-73 (Decision on the Prosecutor's request for leave to appeal the "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'").

²⁴⁸ Article 82 (3).

²⁴⁹ ICC, Decision of 31.1.2019 – ICC-01/13-81 (Decision on the Prosecutor's request for suspensive effect).

²⁵⁰ ICC, Transcript of 1.5.2019 – ICC-01/13-T-1-ENG (Transcript of Hearing).

²⁵¹ ICC, Decision of 3.5.2019 – ICC-01/13-97 (Scheduling Order for delivery of judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 15 November 2018 entitled "Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'").

²⁵² ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's "Decision on the "Application for Judicial Review by the Government of the Union of the Comoros" ["Second Appeals Judgment"]), paras 57–58, 76, 79.

²⁵³ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), paras 1, 60–61.

²⁵⁴ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), paras 1, 59.

²⁵⁵ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), para. 59.

sideration in accordance with the Pre-Trial Chamber's article 53 (3) (a) request.²⁵⁶

As regards the manner, in which the Prosecutor must carry out the reconsideration following the Pre-Trial Chamber's article 53 (3) (a) request, the Appeals Chamber underscored two things: First, as already conceded by the Pre-Trial Chamber, the Pre-Trial Chamber cannot direct the Prosecutor as to the outcome of the reconsideration;²⁵⁷ and second, when carrying out the reconsideration, the Prosecutor must "demonstrate how she addressed the relevant issues in light of the pre-trial chamber's directions".²⁵⁸

In responding to the question whether the Prosecutor is bound by the Pre-Trial Chamber's conclusions on law and fact contained in the article 53 (3) (a) request, the Appeals Chamber Majority ruled that: (1) in relation to questions of law, and despite the margin of appreciation the Prosecutor enjoys when deciding whether to initiate an investigation, she is bound by the legal interpretation of substantive and procedural law by the Pre-Trial Chamber contained in the article 53 (3) (a) request;²⁵⁹ (2) in relation to questions of fact, the Prosecutor cannot ignore the Pre-Trial Chamber's article 53 (3) (a) request to consider certain available information when determining whether there is a sufficient factual basis to proceed with an investigation. However, it is not for the Pre-Trial Chamber, in the opinion of the Appeals Chamber's Majority, "to direct the Prosecutor as to how to assess this information and which factual findings she should reach".²⁶⁰ Rather, it is for the Prosecutor to assess the available information and to apply the law (as interpreted by the Pre-Trial Chamber, as the case may be) to the facts.²⁶¹

The Appeals Chamber Majority continued to explain that, in the present case, since the assessment of gravity involves the consideration of numerous factors, the Pre-Trial Chamber has to respect the Prosecutor's margin of appreciation and cannot direct the Prosecutor as to how she should apply the law to the facts, which factual findings she should reach, which weight to give to individual factors, and which result she should arrive to, when assessing gravity.²⁶² Finally, the Appeals Chamber explained, on the basis of some examples, why the Prosecutor had not carried out the reconsideration in light of the article 53 (3) (a) request and where the Pre-Trial Chamber, in the first review decision under article 53 (3) (a),

appeared to have directed the Prosecutor in assessing the information available.²⁶³ Insofar as the Pre-Trial Chamber had appeared to direct the Prosecutor as to how to apply the law to the facts, which factual findings she should reach and which weight to give to the factors affecting gravity, the Appeals Chamber Majority ruled that the Prosecutor is not bound by these determinations.²⁶⁴ In this context, it is unclear from the Judgment on which basis the Appeals Chamber reverted to the Chamber's first review Decision in 2015 (of which it was not seized in the present appeal) and assessed the manner in which certain findings had been entered.

As a result, the Appeals Chamber Majority confirmed the Pre-Trial Chamber's second review decision and amended it insofar as the Prosecutor must reconsider her original decision according to the guidelines set forth in the Judgment until Monday, 2 December 2019.

Judge Chile Eboe-Osuji and Judge Luz del Carmen Ibañez Carranza appended dissenting opinions to the Judgment. Judge Chile Eboe-Osuji, who concurred with the outcome of the Majority Judgment, developed his understanding of the article 53 (3) (a)/(b) regime, criticized the Majority's distinction between questions of law and those of fact as being meretricious, and clarified that a direct appeal under article 82 (1) (a) is the more appropriate route for any appeal arising in the course of review proceedings since the question of whether or not to initiate an investigation is a decision with respect to jurisdiction.²⁶⁵ At the time of writing, the dissenting opinion of Judge Luz del Carmen Ibañez Carranza was not available.

VII. Situation in the Islamic Republic of Afghanistan (Pre-Trial Chamber II)²⁶⁶

- Prosecutor's Request: 20 November 2017
- Victims representations: several millions
- Decision Rejecting Investigation: 12 April 2019
- Current Status: Appellate Proceedings

1. Pre-Trial Proceedings

On 20 November 2017, the Prosecutor submitted to Pre-Trial Chamber III, assigned with the situation in the Islamic Republic of Afghanistan ("Afghanistan"),²⁶⁷ the request for authorization to commence an investigation into the situation

²⁵⁶ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), para. 61.

²⁵⁷ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), para. 76.

²⁵⁸ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), para. 77.

²⁵⁹ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), paras 78, 82.

²⁶⁰ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), para. 80.

²⁶¹ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), para. 80.

²⁶² ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), paras 2, 81–82.

²⁶³ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), paras 83–93.

²⁶⁴ ICC, Judgment of 2.9.2019 – ICC-01/13-98 (Second Appeals Judgment), para. 94.

²⁶⁵ ICC, Opinion of 2.9.2019 – ICC-01/13-98-Anx (Partly Dissenting Opinion of Judge Eboe-Osuji).

²⁶⁶ The record carries the situation number ICC-02/17.

²⁶⁷ ICC, Decision of 3.11.2017 – ICC-02/17-1 (Decision assigning the situation in the Islamic Republic of Afghanistan), together with annex I containing the Prosecutor's notification dated 30.10.2017, pursuant to regulation 45 of the Regulations of the Court, ICC-02/17-1-AnxI.

pursuant to article 15 (3). Therein, the Prosecutor asked to be authorized to investigate alleged crimes committed on the territory of Afghanistan by, inter alia, the Taliban and associated armed groups, the Afghan army and other (national and local) security forces, the United States of America (“US”) armed forces and the Central Intelligence Agency (“CIA”), in the period since 1 May 2003, as well as other crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002.²⁶⁸

On 9 November 2017, the Chamber issued a decision, accepting the draft victims’ representation form proposed by the Registry, ordering the VPRS to (1) organize the process of victims’ representations, (2) undertake a preliminary rule 85 assessment of (individual and collective) representations and (3) to submit a report thereon.²⁶⁹ The deadline for submission of victims’ representations (regulation 50 [1] of the Regulations of the Court) was extended to 31 January 2018. By that date, the Chamber had received 173 individual and 526 collective representations of victims on behalf of several millions of victims.²⁷⁰

On 5 December 2017, the Chamber ordered the Prosecutor to submit additional information concerning, inter alia, “allegations attributed to special forces of a number of international forces operating in Afghanistan”,²⁷¹ which the Prosecutor submitted on 14 and 18 December 2017.

With the arrival of new and departure of outgoing Judges in March 2018 and ensuing need to (re-)compose the Chambers of the Court,²⁷² the Presidency dissolved Pre-Trial Chamber III and reassigned the situation to a newly composed Pre-Trial Chamber II.²⁷³

²⁶⁸ ICC, Filing of 20.11.2017 – ICC-02/17-7-Red (Public redacted version of “Request for authorization of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp), para. 376. Afghanistan deposited the instrument of accession to the Rome Statute on 10.2.2003. Accordingly, the Statute entered into force for Afghanistan on 1.5.2003.

²⁶⁹ ICC, Decision of 9.11.2017 – ICC-02/17-6 (Order to the Victims Participation and Reparation Section Concerning Victims’ Representations).

²⁷⁰ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan [“Decision Rejecting Investigation”]), para. 27 and fn. 10.

²⁷¹ ICC, Order of 5.12.2017 – ICC-02/17-8 (Order to the Prosecutor to Provide Additional Information).

²⁷² The Presidency assigns the Judges, after consultation, to the Divisions, pursuant to Rule 4bis. It also constitutes the Pre-Trial Chambers and assigns situations thereto, pursuant to regulation 46 (1) and (2) of the Regulations of the Court.

²⁷³ ICC, Decision of 16.3.2018 – ICC-02/17-30 (Decision assigning judges to divisions and recomposing Chambers).

On 12 April 2019, Pre-Trial Chamber II rejected the Prosecutor’s request for authorization to commence an investigation into the situation on the basis that the investigation would not serve the interests of justice.²⁷⁴ It is the first time that a Pre-Trial Chamber rejected an article 15 request for proprio motu investigations.

a) Regarding the procedural aspects of article 15 proceedings, the reader will find the following pronouncements of particular interest:

aa) The Chamber followed, for the most part, the legal test applied in past article 15 decisions, namely the examination of article 53 (1) criteria against the evidentiary threshold of “reasonable basis to proceed”,²⁷⁵ with one exception: The Judges highlighted that the test “must include a positive determination to the effect that investigations would be in the interests of justice”.²⁷⁶ In this context, the Judges affirmed the Chamber’s “decisive filtering role”²⁷⁷ and their responsibility “to avoid engaging in investigations which are likely to ultimately remain inconclusive”, thus infringing “on fundamental individual rights without serving either the interests of justice or any of the universal values underlying the Statute”.²⁷⁸

bb) The Chamber’s scrutiny of the incidents, categories of crimes and groups of alleged perpetrators is confined to those described by the Prosecutor in the article 15 request. As a

²⁷⁴ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation).

²⁷⁵ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 29–31, 36, 70–71.

²⁷⁶ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), para. 35. Previous Pre-Trial Chambers have consistently held that the “interests of justice” element is a negative requirement that is only reviewed by the Pre-Trial Chamber if the Prosecutor decides not to proceed with an investigation on the basis of this element, see for example ICC, Decision of 31.3.2010 – ICC-01/09-19-Corr (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), fn. 35 and para. 63; ICC, Decision of 15.11.2011 – ICC-02/11-14-Corr (Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire” [“Côte d’Ivoire Authorisation Decision”]), paras 207-208; ICC, Decision of 27.1.2016 – ICC-01/15-12 (Decision on the Prosecutor’s request for authorization of an investigation [“Georgia Authorisation Decision”]), para. 58; ICC, Decision of 9.11.2017 – ICC-01/17-9-Red (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 [“Burundi Authorisation Decision”]), para. 190.

²⁷⁷ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 30, 33.

²⁷⁸ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 33–34.

corollary, the Prosecutor can only investigate those incidents that are specifically authorized by the Chamber “as well as those comprised within the authorization’s geographical, temporal and contextual scope, or closely linked to it”.²⁷⁹

cc) The Chamber’s authorization does not cover the “situation as a whole”. In the Judges’ view, the need to preserve the filtering function entails that only incidents that are “closely linked”, rather than “sufficiently linked”,²⁸⁰ fall within the scope of authorization. The “closeness link” cannot be determined in abstract but may be ascertained by taking into account certain factors, such as the “[p]roximity in time and/or location, identity or connection between alleged perpetrators, [...] same policy or programme”.²⁸¹ The Judges concluded that for incidents that are not “closely linked”, a new request for authorization must be submitted.²⁸²

b) Regarding the question whether, on the basis of the information submitted, one or more crimes have been committed within the jurisdiction of the Court, the Judges made the following pronouncements:

aa) Regarding the Court’s territorial jurisdiction, the Chamber confirmed that the conduct may either occur in full or in part on the territory of a State Party, or be completed on the territory of a State Party or be initiated on the territory of a State Party and continued on the territory of a non-State Party or vice versa.²⁸³

bb) Regarding the Court’s subject-matter jurisdiction, the Chamber accepted that there is a reasonable basis to believe that war crimes (in the context of a non-international armed conflict) and crimes against humanity (in the context of a widespread or systematic attack against the civilian population by the Taliban and associated groups) have occurred.²⁸⁴ However, it refrained from entering any concrete findings on facts and law.

cc) Regarding the nexus requirement for war crimes, the Chamber ruled that the crime must have occurred “in the context of *and* was associated with”²⁸⁵ the armed conflict (*emphasis* added by the *author*). This finding concerned in particular allegations of persons being captured in or outside of Afghanistan and mistreated/tortured outside Afghanistan (detention program of the CIA). In the view of the Judges,

such conduct could only fall under the Court’s jurisdiction if the victim was captured within the borders of Afghanistan (where the armed conflict exists) and if the alleged conduct (not merely the abduction) has taken place at least in part on the territory of Afghanistan.²⁸⁶ Conversely, persons captured outside Afghanistan fall outside the Court’s jurisdiction due to the lack of nexus with the non-international armed conflict.²⁸⁷

dd) Regarding “other acts” purportedly committed by international armed forces, and for which the Prosecutor had not entered specific findings in the article 15 (3) request, the Chamber reiterated its approach, as summarized above, that such conduct would fall outside the authorization since the authorization would only extend to those incidents specifically referred to by the Prosecutor in the article 15 (3) request.²⁸⁸

c) Regarding the admissibility of potential cases, the Chamber concurred with the Prosecutor in stating that the potential cases against Taliban members and associated anti-governmental armed groups as well as Afghan forces/authorities would be admissible.²⁸⁹ In relation to domestic investigations in the US, the Chamber held that no criminal investigations or prosecutions appear to have been conducted on the incidents, which the Prosecutor described in the article 15 (3) request.²⁹⁰ In this context, the Chamber recalled that proceedings designed to result in non-judicial and administrative measures “do not result in inadmissibility under article 17”.²⁹¹ The Chamber also confirmed the gravity of “all the ‘categories’ of crimes” allegedly committed by the Taliban and associated armed groups, Afghan forces and US forces/CIA.²⁹²

d) Regarding the “interests of justice” determination – which was decisive in rejecting the Prosecutor’s article 15 (3) request for authorization – the Chamber cautioned the Prosecutor about conducting a partial or inaccurate assessment, in light of the consequences it might have on the “paramount objectives of the Statute and hence the overall credibility of the Court, as well as its organisational and financial sustainability”.²⁹³ Rather, the Chamber explained, an investigation

²⁷⁹ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 39–40, 68–69.

²⁸⁰ Accepting the “sufficient link” investigation, see for example ICC, Decision of 15.11.2011 – ICC-02/11-14-Corr (Côte d’Ivoire Authorisation Decision), paras 178–179; ICC, Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorisation Decision), para. 64.

²⁸¹ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 41–42.

²⁸² ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), para. 42.

²⁸³ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), para. 50.

²⁸⁴ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 60–66.

²⁸⁵ See the Elements of Crimes of war crimes.

²⁸⁶ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 51–55.

²⁸⁷ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 55–56.

²⁸⁸ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 67–69.

²⁸⁹ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 74–77.

²⁹⁰ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 78–79.

²⁹¹ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), para. 79. Similarly, ICC, Decision of 9.11.2017 – ICC-01/17-9-Red (Burundi Authorisation Decision), para. 152.

²⁹² ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 80–86.

²⁹³ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), para. 88.

would only be in the “interests of justice” if “prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame”.²⁹⁴ In essence, four reasons were advanced by the Chamber for taking a negative decision: the (1) time lapse between the alleged crime and the Prosecutor’s request for authorization; (2) scarce cooperation obtained by the Prosecutor; (3) likelihood that both relevant evidence and potential suspects might still be available and within reach of the Prosecutor’s investigative efforts; and (4) need for significant amount of resources that would go to the detriment of other investigations or prosecutions.²⁹⁵

Judge Antoine Kesia-Mbe Mindua appended a concurring and separate opinion on the scope of the Pre-Trial Chamber’s authorization of an investigation and the meaning of the term “interests of justice”.²⁹⁶

2. Appellate Proceedings

The Prosecutor and victims requested leave to appeal the Decision rejecting the Prosecutor’s request for authorization. On 17 September 2019, the Pre-Trial Chamber granted leave to the Prosecutor – but not to the victims for lack of legal standing.²⁹⁷ The questions certified for appeal are: (1) whether articles 15 (4) and 53 (1) (c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice; and (2) whether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those facts.

In the meantime, groups of victims and individual victims as well as two organizations also lodged direct appeals before the Appeals Chamber.²⁹⁸ A hearing has been scheduled to

take place 4–6 December 2019 before the Appeals Chamber, Judge Piotr Hofmański presiding, in which the admissibility of the appeal under article 82 (1) (a), the legal standing of victims and the merits of the Prosecutor’s and victims’ appeals will be discussed.²⁹⁹ Interested States were invited to make submissions and to participate in the hearing; professors of criminal procedure and international law were invited to express an interest to make submissions as *amici curiae*.³⁰⁰ Subsequently, the Appeals Chamber allowed 15 *amici curiae* either to lodge their submissions in writing or to attend the hearing and allowed also the Office of Public Counsel for the defence to make submissions as *amicus curiae*.³⁰¹

On 25 October 2019, the ad hoc Presidency acceded to the ICC President’s request to be replaced for this appeal. He was replaced by Judge Kimberly Prost.³⁰²

VIII. Situation in Mali (Pre-Trial Chamber I)³⁰³

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

1. *The Prosecutor v Ahmad Al Faqi Al Mahdi (Trial Chamber VIII)*³⁰⁴

- Warrant of arrest: 18 August 2015
- First appearance: 30 September 2015
- Confirmation decision: 24 March 2016
- Trial: 22–24 August 2016
- Conviction and Sentencing: 27 September 2016
- Victims participating: 8 (trial)/139 (reparations)
- Current status: Implementations of reparations

On 29 August 2018, Ahmad Al Faqi Al Mahdi (“Mr Al Mahdi”) was transferred to prison facilities in Scotland, United Kingdom, in order to serve the remainder of his sentence

²⁹⁴ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), para. 89.

²⁹⁵ ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras 91–96.

²⁹⁶ ICC, Opinion of 7.6.2019 – ICC-02/17-33-Anx-Corr (Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua).

²⁹⁷ ICC, Decision of 17.9.2019 – ICC-02/17-62 (Decision on the Prosecutor and Victims’ Requests for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan”). Judge Antoine Kesia-Mbe Mindua appended a partially dissenting opinion as he was of the view that in the context of article 15 proceedings, victims have legal standing to request leave to appeal the Chamber’s decision, Opinion of 17.9.2019 – ICC-02/17-62-Anx (Partially Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua).

²⁹⁸ Filing of 2.10.2019 – ICC-02/17-73-Corr (Corrigendum of Updated Victims’ Appeal Brief); Filing of 1.10.2019 – ICC-02/17-75-Corr (Corrigendum of Victims’ Joint Appeal Brief against the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situ-

ation in the Islamic Republic of Afghanistan” of 30. September 2019, ICC-02/17-75).

²⁹⁹ Order of 27.9.2019 – ICC-02/17-72-Corr (Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters [“Order on Hearing”]).

³⁰⁰ Order of 27.9.2019 – ICC-02/17-72-Corr (Order on Hearing), paras 3–4, 20–21.

³⁰¹ ICC Decision of 24.10.2019 – ICC-02/17-97 (Decision on the participation of *amici curiae*, the Office of Public Counsel for the Defence and the cross-border victims).

³⁰² Decision of 25.10.2019 – ICC-02/17-99 (Decision replacing a judge in the Appeals Chamber). The reasons of the Presidency are set out in a memorandum appended to the decision, ICC-02/17-99-Anx.

³⁰³ The record carries the situation number ICC-01/12.

³⁰⁴ The record carries the case number ICC-01/12-01/15.

of imprisonment.³⁰⁵ The Trust Fund for Victims is pursuing the implementation of reparations.³⁰⁶

2. *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Pre-Trial Chamber I)*³⁰⁷

- Warrant of arrest: 27 March 2018
- Surrender to the Court: 31 March 2018
- First appearance: 4 April 2018
- Confirmation hearing: 8–17 July 2019
- Victims participating: 882
- Confirmation decision: 30 September 2019
- Current status: Preparation of trial

On 27 March 2018, Pre-Trial Chamber I issued a warrant of arrest against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan”) on 13 counts of crimes against humanity and war crimes committed by the armed groups Ansar Eddine/Al Qaeda in the Islamic Maghreb against the civilian population of Timbuktu and its region, between April 2012 and January 2013.³⁰⁸ The arrest was executed swiftly, Mr Al Hassan was transferred to the Court on 31 March 2018 and appeared before the Single Judge, acting on behalf of Pre-Trial Chamber I, on 4 April 2018.³⁰⁹ During the initial appearance, the confirmation hearing was scheduled to commence on 24 September 2018.³¹⁰ Mr Al Hassan indicated to the Single Judge that he fully understands and speaks Arabic.³¹¹

The most important matter for any Pre-Trial Chamber upon arrival of a suspect at the Court’s detention centre is to organize the disclosure of evidence between the parties. This was done by the Single Judge with Decision of 16 May

2018.³¹² Suffice to mention that the disclosure regime follows in essence the principles set out in the 2008 disclosure Decision of Pre-Trial Chamber III in the Bemba case, instructing the parties to communicate all evidence to the Chamber.³¹³ Redactions of standard information (approved in advance by the Chamber) are implemented directly into the evidence prior to disclosure.³¹⁴ Disagreements over particular redactions, if not resolved *inter partes*, can be decided by the Chamber.³¹⁵ A new element added to the redaction regime is that the Chamber, in order to be in a position to exert judicial control, is provided with the non-redacted version of the evidence so as to verify, at its discretion, the redactions implemented by the disclosing party and, if need be, to request the lifting of redactions *proprio motu*.³¹⁶ Nevertheless, it was clarified that the confirmation Decision would only rely on the evidence as disclosed to the Defense. The Chamber also requested the parties to provide observations on the requirement to submit, when disclosing evidence, an in-depth-analysis chart (“IDAC”) of evidence.³¹⁷ Upon having received the parties’ observations, the Single Judge subsequently opined that the parties were not required to submit an IDAC.³¹⁸

The second matter that the Single Judge turned his attention to was the organization of the victims’ application process so as to “allow the greatest number of victims to participate in the proceedings as soon as possible”.³¹⁹ In a framework decision on victims, the Single Judge addressed issues, such as outreach activities of the Registry to disseminate

³⁰⁵ See ICC, Press Release of 3.5.2018 (“Ahmad Al Faqi Al Mahdi transferred to UK prison facility to serve sentence”) available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1451> (2.12.2019).

³⁰⁶ See *Koerner* ZIS 2018, 546 (552).

³⁰⁷ The record carries the case number ICC-01/12-01/18.

³⁰⁸ ICC, Warrant of 27.3.2018 – ICC-01/12-01/18-2-tENG (Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud). The Decision accompanying the warrant of arrest was issued later, ICC, Decision of 22.5.2018 – ICC-01/12-01/18-35-Red2-tENG (Decision on the Prosecutor’s Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud). See also *Koerner* ZIS 2017, 546 (557).

³⁰⁹ ICC, Decision of 3.4.2018 – ICC-01/12-01/18-12-tENG (Order Scheduling the First Appearance of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud).

³¹⁰ ICC, Transcript of 4.4.2018 – ICC-01/12-01/18-T-1-Red-ENG (Transcript of Hearing), p. 10, lines 17–19.

³¹¹ ICC, Transcript of 4.4.2018 – ICC-01/12-01/18-T-1-Red-ENG (Transcript of Hearing), p. 7, lines 1–4.

³¹² ICC, Decision of 16.5.2018 – ICC-01/12-01/18-31-tENG-Corr (Decision on the Evidence Disclosure Protocol and Other Related Matters [“Disclosure Decision”]).

³¹³ ICC, Decision of 31.7.2008 – ICC-01/05-01/08-55 (Decision on the evidence disclosure system and setting a time table for disclosure between the parties).

³¹⁴ ICC, Decision of 16.5.2018 – ICC-01/12-01/18-31-tENG-Corr (Disclosure Decision), paras 29–30.

³¹⁵ ICC, Decision of 16.5.2018 – ICC-01/12-01/18-31-tENG-Corr (Disclosure Decision), para. 31.

³¹⁶ ICC, Decision of 16.5.2018 – ICC-01/12-01/18-31-tENG-Corr (Disclosure Decision), para. 32. This element was taken up by Pre-Trial Chamber II in the *Yekatom/Ngaïssona* case (see below).

³¹⁷ ICC, Decision of 16.5.2018 – ICC-01/12-01/18-31-tENG-Corr (Disclosure Decision), paras 43–52.

³¹⁸ ICC, Decision of 29.6.2018 – ICC-01/12-01/18-61-tENG (Decision on the In-Depth Analysis Chart of Disclosed Evidence). The full Chamber denied the Defence leave to appeal the decision, ICC, Decision of 18.9.2018 – ICC-01/12-01/18-130-tENG (Decision on the Defence “Request for an alternative mechanism to facilitate disclosure or, in the alternative, request for leave to appeal the decision concerning in-depth analysis charts”).

³¹⁹ ICC, Decision of 24.5.2018 – ICC-01/12-01/18-37-tENG (Decision Establishing the Principles Applicable to Victims’ Applications for Participation [“Al Hassan Victims’ Decision”]), para. 10.

information, the approval of the proposed dual-purpose application form (participation and reparations) for victims, and the process of collection, processing and transmission of applications. The Single Judge accepted applications submitted by successors of deceased victims, following the approach in the Bemba case.³²⁰ As the assessment of the applications was outsourced to the VPRS,³²¹ the Single Judge gave detailed guidance on the criteria to be applied and quality of the supporting material.³²² Under this simplified process, the Single Judge would only assess a limited number of applications that pose assessment problems. Lastly, the Single Judge also instructed the Registry to consult victims on their preferences for legal representation and to make recommendations to the Chamber.³²³

In a second decision, the Single Judge provided further guidance on discrete questions from the VPRS: (1) authorizing the VPRS to consider as falling within the time frame of the case any application which, if not providing a precise date, contains information about the general context, and on the basis of which it can be inferred that the application falls within the temporal scope of the charges; (2) laying down the criteria for considering as admissible applications that describe any form of underlying act constituting the crime of persecution (article 7 [1] [h]); and (3) accepting that victims who have sustained psychological harm by witnessing crimes perpetrated against other members of the population of Timbuktu, on condition that they provide a detailed description of the events and proof of residence in Timbuktu.³²⁴

In a third Decision, the Single Judge, having been informed of the reservations expressed by victims to submit collective application forms, did not adopt the collective application form. He also rehearsed the rights victims enjoy under the statutory framework and decided on the legal representation of victims that were divided into two groups.³²⁵ With decision dated 1 July 2019, 882 victims were admitted.³²⁶

The Single Judge rendered further decisions with a view to preparing the confirmation hearing, such as an order to translate the Prosecutor's application for a warrant of arrest into Arabic,³²⁷ order to file the document containing the charges and list of evidence in French 60 days prior to the commencement of the hearing,³²⁸ and a number of decisions on the anonymity of witnesses.

Regarding the document containing the charges, the Chamber gave further directions on the structure and presentation of charges in said document. The Judges underscored that legal considerations, rather than a fact-based analysis, should inform the structure of the document containing the charges.³²⁹ Moreover, the charges in the document containing the charges should be presented in one part, rather than in two parts (entitled "Charges" and "Submissions").³³⁰ In addition, the Chamber also gave instructions as to the description of the facts underpinning the charges.³³¹ On 11 May 2019, the Prosecutor submitted, according to article 61 (3), an amended and corrected document containing the charges in French.³³²

The confirmation hearing was postponed for the first time on 20 July 2018.³³³ As rehearsed by the Single Judge, the factors informing the decision to postpone related to the difficulties arising from the challenging security situation in Mali,³³⁴ delays on the part of the Prosecutor to disclose evidence within the statutory time frame,³³⁵ and the Prosecutor's notice to request a number of witnesses to be heard before the Pre-

³²⁰ ICC, Decision of 24.5.2018 – ICC-01/12-01/18-37-tENG (Al Hassan Victims' Decision), para. 52.

³²¹ ICC, Decision of 24.5.2018 – ICC-01/12-01/18-37-tENG (Al Hassan Victims' Decision), paras 56–62.

³²² ICC, Decision of 24.5.2018 – ICC-01/12-01/18-37-tENG (Al Hassan Victims' Decision), paras 42–55.

³²³ ICC, Decision of 24.5.2018 – ICC-01/12-01/18-37-tENG (Al Hassan Victims' Decision), paras 64–71.

³²⁴ ICC, Decision of 8.10.2018 – ICC-01/12-01/18-146-tENG (Second Decision on the Principles Applicable to Victims' Applications for Participation).

³²⁵ ICC, Decision of 20.3.2019 – ICC-01/12-01/18-289-Red-tENG-Corr (Decision on Principles Applicable to Victims' Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings).

³²⁶ ICC, Decision of 1.7.2019 – ICC-01/12-01/18-391-Red (Décision relative à la participation des victimes à la procédure).

³²⁷ ICC, Decision of 1.6.2018 – ICC-01/12-01/18-42-tENG (Decision on the Defence Request for an Arabic Translation of the Prosecution Application for the Issuance of a Warrant of Arrest).

³²⁸ ICC, Decision of 5.10.2018 – ICC-01/12-01/18-143-tENG (Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges ["DCC Timing Decision"]).

³²⁹ ICC, Decision of 5.10.2018 – ICC-01/12-01/18-143-tENG (DCC Timing Decision), para. 29.

³³⁰ ICC, Decision of 5.10.2018 – ICC-01/12-01/18-143-tENG (DCC Timing Decision), para. 29.

³³¹ ICC, Decision of 5.10.2018 – ICC-01/12-01/18-143-tENG (DCC Timing Decision), para. 30.

³³² The Prosecutor filed a public redacted version on 2.7.2019, ICC, Filing of 2.7.2019 - ICC-01/12-01/18-335-Corr-Red (Version publique expurgée de la «Version amendée et corrigée du Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud» ICC-01/12-01/18-335-Conf-Corr, 11 mai 2019).

³³³ ICC, Decision of 20.7.2018 – ICC-01/12-01/18-94-Red-tENG (Decision Postponing the Date of the Confirmation Hearing ["First Postponement Decision"]).

³³⁴ ICC, Decision of 20.7.2018 – ICC-01/12-01/18-94-Red-tENG (First Postponement Decision), para. 20.

³³⁵ ICC, Decision of 20.7.2018 – ICC-01/12-01/18-94-Red-tENG (First Postponement Decision), paras. 10, 25–26.

Trial Chamber under article 56.³³⁶ The start of the confirmation hearing was scheduled for 6 May 2019. It became clear, however, that in the given circumstances, this date was also unrealistic to hold. Hence, the Single Judge rescheduled the commencement of the confirmation hearing for 8 July 2019.³³⁷ Prior to the commencement of the hearing, the Single Judge issued a Decision organizing the hearing, which lasted from 8-17 July 2019.³³⁸ The parties and participating victims were allowed to submit written observations after the hearing.³³⁹

On the day the hearing commenced, the Defense made oral submissions requesting the disqualification of all Judges of Pre-Trial Chamber I and suspension of the hearing until said request is decided. The Pre-Trial Chamber, lacking the competence to decide matters of disqualification, dismissed the request for suspension. The Defense directed its request for disqualification to the Presidency, which convened a Plenary of Judges on 19 August 2019. The request for disqualification was dismissed with Decision dated 12 September 2019.³⁴⁰

On 4 July 2019, the Defense challenged the admissibility of the case, arguing that the case lacked sufficient gravity (article 17 [1] [d]) because of the limited scope of the charges, Mr Al Hassan's low rank and relatively minor role in the events that took place in Timbuktu in 2012.³⁴¹ Upon receipt of observations from the Prosecutor, the Malian Government and the victims, the Chamber rejected the challenge.³⁴² In assessing the gravity of the case, the Chamber considered quantitative and qualitative criteria in line with the Court's

settled case law.³⁴³ One pronouncement that stands out in particular is the Chamber's affirmation that in its assessment it would take into account "all relevant aspects of the Prosecutor's allegations against Mr Al Hassan considered as a whole", including facts alleged to constitute the contextual elements of the crimes.³⁴⁴ Regarding the Defense allegation that Mr Al Hassan was merely a low-ranking police administrator, the Chamber replied, consonant with the Appeals Chamber 2006 ruling in the DRC situation regarding the prosecution of Mr Ntaganda,³⁴⁵ that the Statute is not limited to high-ranking perpetrators.³⁴⁶ For the purpose of ascertaining the gravity, the Chamber relied holistically on a number of considerations, including the number of charges, the geographical and temporal scope of the charges, the repercussions of the crimes on victims, the discriminatory motive of the crimes based on religious and/or gender-based grounds, the vulnerability of certain victims, Mr Al Hassan's contributions to the crimes as well as his degree of intent, as alleged by the Prosecutor.³⁴⁷ On 4 October 2019, the Defense submitted the notice of appeal against the Decision.

On 30 September 2019, the Chamber handed down the Decision confirming the charges. At the time of writing, the public redacted version of the decision is not available yet. The Decision can be appealed with leave of the Chamber pursuant to article 82 (1) (d).

IX. Situation in the Central African Republic II (Pre-Trial Chamber II)³⁴⁸ – Prosecutor v Alfred Yekatom and Patrice-Edouard Ngaïssona (Pre-Trial Chamber II)³⁴⁹

The situation was referred to the Court by the Government of the Central African Republic ("CAR") with a letter dated 30 May 2014, in which allegations of renewed violence occurring on the territory of the CAR since 1 August 2012 were made.³⁵⁰ No proceedings at the situation level took place during the review period. To date, one case against two sus-

³³⁶ ICC, Decision of 20.7.2018 – ICC-01/12-01/18-94-Red-tENG (First Postponement Decision), para. 21.

³³⁷ ICC, Decision of 18.4.2019 – ICC-01/12-01/18-313-tENG (Decision Rescheduling the Date of Filing of the Document Containing the Charges and the Commencement of the Confirmation Hearing).

³³⁸ ICC, Decision of 24.6.2019 – ICC-01/12-01/18-385 (Ordonnance portant calendrier aux fins de l'audience de confirmation des charges); ICC, Decision of 27.6.2019 – ICC-01/12-01/18-390 (Ordonnance modifiant l'«Ordonnance portant calendrier aux fins de l'audience de confirmation des charges» ["Second Hearing Calendar Decision"]).

³³⁹ ICC, Decision of 27.6.2019 – ICC-01/12-01/18-390 (Second Hearing Calendar Decision), para. 4.

³⁴⁰ ICC, Decision of 12.9.2019 – ICC-01/12-01/18-458-AnxI-Red (Decision of the Plenary of Judges on the Defence Application for the Disqualification of judges of Pre-Trial Chamber I from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*).

³⁴¹ ICC, Filing of 4.7.2019 – ICC-01/12-01/18-394-Red (Public redacted version of "Submissions for the confirmation of charges"), paras 256–286.

³⁴² ICC, Decision of 27.8.2019 – ICC-01/12-01/18-459-tENG (Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case ["Gravity Decision"]).

³⁴³ ICC, Decision of 27.8.2019 – ICC-01/12-01/18-459-tENG (Gravity Decision), paras 47–48.

³⁴⁴ ICC, Decision of 27.8.2019 – ICC-01/12-01/18-459-tENG (Gravity Decision), para. 53.

³⁴⁵ ICC, Judgment of 13.6.2006 – ICC-01/04-169 (Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58").

³⁴⁶ ICC, Decision of 27.8.2019 – ICC-01/12-01/18-459-tENG (Gravity Decision), para. 50.

³⁴⁷ ICC, Decision of 27.8.2019 – ICC-01/12-01/18-459-tENG (Gravity Decision), para. 57.

³⁴⁸ The record carries the situation number ICC-01/14. ICC, Decision of 18.6.2014 – ICC-01/14-1 (Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II ["Assignment Decision"]).

³⁴⁹ The record carries the case number ICC-01/04-01/18.

³⁵⁰ ICC, Annex to Decision of 18.6.2014 – ICC-01/14-1-AnxI (Annex 1 to Assignment Decision).

pects emanated from this situation *The Prosecutor v Alfred Yekatom and Patrice-Edouard Ngaïssona*:

- Warrant of arrest Yekatom: 11 November 2018 (unsealed 17 November 2018)
- Surrender Yekatom to the Court: 17 November 2018
- First appearance Yekatom: 23 November 2018
- Warrant of arrest Ngaïssona: 7 December 2018 (unsealed 13 December 2018)
- Surrender Ngaïssona to the Court: 23 January 2019
- First appearance Ngaïssona: 25 January 2019
- Joinder of cases: 20 February 2019
- Victims participating: 1.085
- Confirmation hearing: 19 September–11 October 2019
- Current status: Deliberations on confirmation of charges

1. Proceedings against Alfred Yekatom (ICC-01/14-01/18)

On 11 November 2018, Pre-Trial Chamber II issued a warrant of arrest against Alfred Yekatom (“Mr Yekatom”) for his responsibility for crimes against humanity and war crimes committed by militias, known as the “Anti-Balaka”, in various locations in the CAR, including Bangui and the Lobaye Prefecture, between 5 December 2013 and August 2014.³⁵¹ The warrant of arrest was unsealed on 17 November 2018. Shortly after his arrival at the ICC Detention Centre on 18 November 2018, Mr Yekatom made his initial appearance on 23 November 2018 before the Judges of Pre-Trial Chamber II.³⁵² The confirmation hearing was scheduled to commence on 30 April 2019.³⁵³

The language skills of the suspect are a typical issue that the Pre-Trial Chamber has to pay special attention to from the start as they impact the fair and expeditious conduct of the pre-trial proceedings. During the initial appearance, Mr Yekatom claimed that he spoke Sango “perfectly” while his

French was “not very good”.³⁵⁴ Upon request of the Prosecutor, the Single Judge, acting on behalf of the Chamber,³⁵⁵ ordered the Registry’s Language Services Section to assess Mr Yekatom’s French proficiency level.³⁵⁶ Based on the results of this assessment, the Single Judge determined that Mr Yekatom is not proficient in Sango but in French.³⁵⁷ Drawing upon the Appeals Chamber 2008 Judgment on languages,³⁵⁸ the Single Judge clarified that article 61 (1) (a) requires the assessment of general language abilities; for complex and technical tasks in criminal proceedings, Mr Yekatom is assisted by his counsel.³⁵⁹ As a result, Mr Yekatom is provided with witness statements (rule 76) in the original language and in French and is assisted, if he so wishes, with a French-Sango interpreter.³⁶⁰ However, in relation to filings, the Single Judge declined a translation of *all* documents into French save for core documents that are essential to understand the nature, cause and content of the charges within the meaning of article 61 (1) (a), such as the warrant of arrest and the document containing the charges.³⁶¹ The Single Judge also denied the assistance of interpreters for the Defense team, stressing that the right to be informed does not extend to Mr Yekatom’s counsel and members of his Defense team.³⁶²

The Single Judge further issued a Decision on disclosure of evidence in preparation of the confirmation hearing, instructing the parties, *inter alia*, to communicate all evidence to the Chamber, including the regime on exceptions to disclo-

³⁵¹ ICC, Warrant of 17.11.2018 – ICC-01/14-01/18-1-Red (Public Redacted Version of “Warrant of Arrest for Alfred Yekatom”, ICC-01/14-01/18-1-US-Exp, 11 November 2018). Mr Yekatom is alleged to be responsible for the commission of crimes against humanity (murder, deportation/forcible transfer, imprisonment or other deprivation of physical liberty, torture, persecution, enforced disappearance and other inhumane acts) and war crimes (murder, torture and cruel treatment, mutilation, intentional attack against the civilian population and buildings dedicated to religion, enlistment of children under the age of 15 years and their use to participate actively in hostilities, displacement of civilian population and destruction of the adversary’s property).

³⁵² ICC, Decision of 20.11.2018 – ICC-01/14-01/18-15 (Decision setting the date for the initial appearance of Alfred Yekatom).

³⁵³ ICC, Transcript of 23.11.2018 – ICC-01/14-01/18-T-1-ENG (Transcript of Hearing), p. 8, line 25.

³⁵⁴ ICC, Transcript of 23.11.2018 – ICC-01/14-01/18-T-1-ENG (Transcript of Hearing), p. 6, lines 20–21.

³⁵⁵ ICC, Decision of 6.12.2018 – ICC-01/14-01/18-27 (Decision designating a Single Judge).

³⁵⁶ ICC, Order of 19.12.2018 – ICC-01/14-01/18-36-Corr (Corrigendum of “Order to Conduct a French Language Proficiency Assessment of Alfred Yekatom”).

³⁵⁷ ICC, Decision of 11.1.2019 – ICC-01/14-01/18-56-Red (Public Redacted Version of “Decision on Language Proficiency of Alfred Yekatom for the Purposes of the Proceedings” [“Language Decision”]). The Defense request for leave to appeal this decision was denied, ICC, Decision of 23.1.2019 – ICC-01/04-01/18-65-Red (Public Redacted Version of “Decision on Defence Leave to Appeal the ‘Decision on Language Proficiency of Alfred Yekatom for the Purposes of the Proceedings’”).

³⁵⁸ ICC, Judgment of 27.5.2008 – ICC-01/04-01/07-522 (Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”).

³⁵⁹ ICC, Decision of 11.1.2019 – ICC-01/14-01/18-56-Red (Language Decision), para. 17.

³⁶⁰ ICC, Decision of 11.1.2019 – ICC-01/14-01/18-56-Red (Language Decision), para. 18.

³⁶¹ ICC, Decision of 11.1.2019 – ICC-01/14-01/18-56-Red (Language Decision), para. 19.

³⁶² ICC, Decision of 11.1.2019 – ICC-01/14-01/18-56-Red (Language Decision), para. 20.

sure (redactions) applicable to confidential information contained in the evidence.³⁶³

2. *Proceedings against Patrice-Edouard Ngaïssona (ICC-01/14-02/18)*

On 7 December 2018, Pre-Trial Chamber II issued a warrant of arrest against Patrice-Edouard Ngaïssona (“Mr Ngaïssona”) for his responsibility for crimes against humanity and war crimes committed by militias, known as the “Anti-Balaka”, in various locations in the CAR between at least 5 December 2013 and at least December 2014.³⁶⁴ Mr Ngaïssona was arrested by the French authorities on 12 December 2018 and, upon completion of national proceedings, was transferred to the Court on 23 January 2019. He made his initial appearance before the Judges of Pre-Trial Chamber II on 25 January 2019.³⁶⁵ The confirmation hearing was scheduled to commence on 18 June 2019.³⁶⁶

3. *Proceedings against Alfred Yekatom and Patrice-Edouard Ngaïssona (ICC-01/14-01/18)*

Following the surrender of Mr Ngaïssona to the Court, the Pre-Trial Chamber decided on 20 February 2019, after hearing the Prosecutor and the two suspects, to join the two cases as they emanate from the same situation and the specific crimes alleged against Mr Yekatom and Mr Ngaïssona overlap substantially.³⁶⁷ The Chamber addressed also the follow-

ing points: The date of 18 June 2019 set for the commencement of the confirmation hearing in the Ngaïssona case was retained as the date for the confirmation hearing in the joint case³⁶⁸ and the Defense of Mr Ngaïssona was invited to make observations on the disclosure regime adopted in the Yekatom case.³⁶⁹ Both suspects sought to appeal the joinder decision but were denied leave to do so.³⁷⁰

On 5 March 2019, the Chamber issued a framework decision organizing the upcoming application process of victims, including outreach activities of the Registry to disseminate information, the approval of the proposed dual-purpose application form (participation and reparations), and the process of collection, processing and transmission of applications.³⁷¹ Two things are worth mentioning: (1) As in the Al Hassan case, the Chamber accepted applications submitted by successors of deceased victims, following the approach in the Bemba case;³⁷² and (2) as in the Al Hassan case, the Chamber outsourced the assessment of the applications to the VPRS, while keeping overall control of the assessment process. The Chamber only assesses a limited number of applications that pose assessment problems.³⁷³ Lastly, the Chamber also instructed the Registry to consult victims on their preferences for legal representation and to make recommendations to the Chamber.³⁷⁴

The Chamber rendered further Decisions on procedural issues with a view to preparing the confirmation hearing, such as disclosure- and translation-related issues,³⁷⁵ protocol

³⁶³ ICC, Decision of 23.1.2019 – ICC-01/14-01/18-64-Red (Public Redacted Version of “Decision on Disclosure and Related Matters”). A Defense request for leave to appeal the Decision was denied, ICC, Decision of 8.2.2019 – ICC-01/14-01/18-79 (Decision on Defence Leave to Appeal the “Decision on Disclosure and Related Matters”).

³⁶⁴ ICC, Warrant of 7.12.2018 – ICC-01/14-02/18-2-Red (Public Redacted Version of “Warrant of Arrest for Patrice-Edouard Ngaïssona”). Mr Ngaïssona is alleged to be responsible for the commission of crimes against humanity ([attempted] murder, extermination, deportation/forcible transfer, imprisonment or other deprivation of physical liberty, torture, persecution, enforced disappearance and other inhumane acts) and war crimes ([attempted] murder, torture, cruel treatment, mutilation, intentional attack against the civilian population and buildings dedicated to religion, intentional attack against personnel, installations, material, units or vehicles involved in humanitarian assistance, pillaging, enlistment of children under the age of 15 years and their use to participate actively in hostilities, displacement of civilian population and destruction or seizure of the adversary’s property).

³⁶⁵ ICC, Decision of 24.1.2019 – ICC-01/14-02/18-12-Corr (Corrigendum of “Decision setting the date for the initial appearance of Patrice-Edouard Ngaïssona”).

³⁶⁶ ICC, Transcript of 25.1.2019 – ICC-01/14-02/18-T-1-ENG (Transcript of Hearing), p. 9, lines 5–6.

³⁶⁷ ICC, Decision of 20.2.2019 – ICC-01/14-01/18-87 (Decision on the joinder of the cases against Alfred Yekatom and

Patrice-Edouard Ngaïssona and other related matters [“Joinder Decision”]), para. 11.

³⁶⁸ ICC, Decision of 20.2.2019 – ICC-01/14-01/18-87 (Joinder Decision), para. 18.

³⁶⁹ ICC, Decision of 20.2.2019 – ICC-01/14-01/18-87 (Joinder Decision), para. 21.

³⁷⁰ ICC, Decision of 21.3.2019 – ICC-01/14-01/18-154 (Decision on the Defence Requests for leave to appeal the “Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters”).

³⁷¹ ICC, Decision of 5.3.2019 – ICC-01/14-01/18-141 (Decision Establishing the Principles Applicable to Victims’ Applications for Participation [“Victims’ Framework Decision”]).

³⁷² ICC, Decision of 5.3.2019 – ICC-01/14-01/18-141 (Victims’ Framework Decision), para. 36.

³⁷³ ICC, Decision of 5.3.2019 – ICC-01/14-01/18-141 (Victims’ Framework Decision), paras 39–45.

³⁷⁴ ICC, Decision of 5.3.2019 – ICC-01/14-01/18-141 (Victims’ Framework Decision), paras 46–53.

³⁷⁵ ICC, Decision of 4.4.2019 – ICC-01/14-01/18-163 (Second Decision on Disclosure and Related Matters); ICC, Decision of 10.4.2019 – ICC-01/14-01/18-169 (Decision on the “Prosecution’s Request to Vary the Decision on Disclosure and Related Matters (ICC-01/14-01/18-64-Red)”); ICC, Decision of 24.5.2019 – ICC-01/14-01/18-206 (Decision on the “Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters”).

on handling of confidential information,³⁷⁶ victims' participation³⁷⁷ and legal representation of victims³⁷⁸

With request dated 1 May 2019, the Prosecutor requested the postponement of the confirmation hearing for reasons involving *inter alia* witness protection. With Decision dated 15 May 2019, the Chamber granted the Prosecutor's request and scheduled the hearing to commence on 19 September 2019.³⁷⁹ Particular attention should be paid to the Chamber's pronouncement that only a single document containing the charges should be prepared, thus rejecting the practice of some Pre-Trial Chambers to ask for a "pre-confirmation brief".³⁸⁰ In addition, the Chamber embraced the approach of Pre-Trial Chamber I in the Al Hassan case regarding the structure of the document containing the charges and the description of the facts underpinning the charges.³⁸¹

On 19 August 2019, the Prosecutor submitted the document containing the charges.³⁸² Prior to the hearing, the Chamber issued a detailed schedule on the conduct of the hearing.³⁸³ The hearing, which commenced on 19 September, was suspended after five days to allow the Prosecutor to give a written response to the Defence arguments and resumed again on 11 October 2019. At the time of writing, the Judges deliberate on whether to confirm the charges or not.

³⁷⁶ ICC, Decision of 22.3.2019 – ICC-01/14-01/18-156 (Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses). The protocol is annexed to this Decision, see ICC-01/14-01/18-156-AnxA.

³⁷⁷ ICC, Decision of 21.6.2019 – ICC-01/14-10/18-227-Red (Decision regarding the Registry's First Assessment Report on Applications for Victim Participation, the Registry's First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims' procedural position); ICC, Decision of 13.9.2019 – ICC-01/14-01/18-338 (Decision regarding the Registry's Outstanding Transmissions of Applications for Victim Participation).

³⁷⁸ ICC, Decision of 23.5.2019 – ICC-01/14-01/18-205 (Decision on the Legal Representation of Victims).

³⁷⁹ ICC, Decision of 15.5.2019 – ICC-01/14-01/18-199 (Decision on the "Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines" ["Postponement Decision"]).

³⁸⁰ ICC, Decision of 15.5.2019 – ICC-01/14-01/18-199 (Postponement Decision), para. 40.

³⁸¹ ICC, Decision of 15.5.2019 – ICC-01/14-01/18-199 (Postponement Decision), paras 41–42.

³⁸² ICC, Filing of 18.9.2019 – ICC-01/14-01/18-282-AnxB1-Red (Public redacted version of "Document Containing the Charges", ICC-01/14-01/18-282-Conf-AnxB1, 19 August 2019).

³⁸³ ICC, Decision of 10.9.2019 – ICC-01/14-01/18-327 (Order Setting the Schedule for the Confirmation of Charges Hearing).