

Recent developments in the jurisprudence of the International Criminal Court

– Part 2*

By Eleni Chaitidou, The Hague

VI. Situation in Mali (Pre-Trial Chamber I)¹ – Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Trial Chamber X)²

No proceedings at the situation level took place during the review period. To date, two cases emanated from this situation of which one will be presented in the following.

- Warrant of arrest: 27.3.2018
- Surrender to the Court: 31.3.2018
- Confirmation decision: 30.9.2019
- Commencement of Trial: 14.7.2020
- Victims participating: 1,977
- Current status: Trial

1. Proceedings Before Pre-Trial Chamber I

At the time of the last jurisprudence overview, the Pre-Trial Chamber had concluded the confirmation process, but the Article 61 (7) decision against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (“Mr Al Hassan”) was not yet publicly available.³

a) Confirmation Decision

On 30 September 2019, the Pre-Trial Chamber handed down the decision confirming the charges of crimes against humanity and war crimes against Mr Al Hassan and committing him to trial.⁴ The confirmation decision is very detailed and precisely sets out the facts underpinning the confirmed charges with a view to complying with the guidance given by the Bemba Appeals Chamber’s Majority.⁵ The Chamber found

that there were substantial grounds to believe that Mr Al Hassan was responsible, under Articles 25 (3) (a) of the Rome Statute⁶ – for directly committing the crimes; Article 25 (3) (c) – for assisting in the commission of crimes; and/or Article 25 (3) (d) – for contributing in any other way to the crimes, for crimes against humanity and war crimes⁷ allegedly committed by the armed groups Ansar Eddine/Al Qaeda in the Islamic Maghreb against the civilian population of Timbuktu and its region between 1 April 2012 and 28 January 2013. A few selected key findings may be of interest to the reader:

aa) Regarding the crime of torture as a crime against humanity, pursuant to Article 7 (1) (e), the Chamber had the opportunity to clarify the meaning of the term “lawful sanctions”. Article 7 (2) (e) stipulates that “torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”. This exclusionary rule does not exist in the context of war crimes. It is recalled that the Prosecutor charged Mr Al Hassan with the crime of torture involving amputations and flogging of persons as a result of a judgment rendered by an Islamic tribunal, arguing that these were not “lawful sanctions”.⁸ The Chamber responded that the term “lawful sanctions” (including also corporal punishment) must be interpreted in accordance with internationally recognised human rights, pursuant to Article 21 (3).⁹ In the present case, the Judges opined that corporal punishment, including flogging and amputations, cannot be considered as “lawful sanctions” and may qualify as acts of torture, provided the elements of the crime are fulfilled, including the de-

ulations of the Court and does not allow for a meaningful application of article 74(2) of the Statute” (para. 110).

⁶ Rome Statute of the International Criminal Court (UN [ed.], Treaty Series, vol. 2187, p.3). All articles mentioned in this contribution without reference to the legal instrument are those of the Rome Statute.

⁷ The Chamber found that there were substantial grounds to believe that Mr Al Hassan was responsible for crimes against humanity of torture, rape, sexual slavery, persecution and other inhumane acts (including forced marriages) and the war crimes of torture, cruel treatment, outrages upon personal dignity, passing of sentences without previous judgement pronounced by a regularly constituted court affording all judicial guarantees which are generally recognised as indispensable, intentionally directing attacks against buildings dedicated to religion and historic monuments, rape and sexual slavery.

⁸ 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), paras. 590–591.

⁹ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), paras. 243–247.

* The first part of this article was published in ZIS 2020, 551. This contribution summarizes the jurisprudential developments at the International Criminal Court (ICC) from October/November 2019 until 13.11.2020.

¹ The record carries the situation number ICC-01/12.

² The record carries the case number ICC-01/12-01/18.

³ See Chaitidou, ZIS 2019, 567 (591).

⁴ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud [“Al Hassan Confirmation”]). A corrigendum of the decision was filed on 8.11.2019 and the decision was made public on 13.11.2019.

⁵ ICC, Judgment of 8.6.2018 – ICC-01/05-01/08-3636-Red (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”), paras. 107–110, 115. In its acquittal judgment, the Appeals Chamber Majority had stated: “Simply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52(b) of the Reg-

gree of pain and suffering.¹⁰ The Judges considered the discussion irrelevant whether the armed groups controlling Timbuktu at the time relevant to the charges had the competence to pronounce “legal sanctions”.¹¹

bb) Regarding the war crime of sentencing or execution without due process, within the meaning of Article 8 (2) (c) (iv), the Pre-Trial Chamber stayed close to the Elements of Crimes and held that the Prosecutor must prove two elements: (i) the sentencing of a protected person; and (ii) irregularities in the process that led to the sentencing, either because there was no previous judgment, be it orally or in writing (without paying any regard to procedural or statutory irregularities),¹² or there were shortcomings in the proceedings. The Chamber divided those shortcomings in two categories: they either pertain to the court that rendered the judgment as it was not regularly constituted, in the sense that it did not afford the essential guarantees of independence and impartiality; or they pertain to the procedure followed by the court that rendered the judgment as did not afford all other judicial guarantees generally recognised as indispensable under international law.¹³ Noting with approval the case-law of the Extraordinary Chambers in the Courts of Cambodia, the Chamber accepted that a sentence may be pronounced, either in writing or orally, by any authority empowered to pronounce the sentence at the relevant time.¹⁴ It also argued that it is irrelevant whether the sentence was subsequently suspended or not executed.¹⁵ As regards the term “court”, the Pre-Trial Judges explained that what matters is not its denomination in the internal legal order, but whether it decides matters within its jurisdiction; that also includes administrative or disciplinary bodies.¹⁶ They considered a court to be “regularly constituted” if it is able to afford the essential guarantees of independence and impartiality, and did not lay an emphasis on the manner in which the court was constituted.¹⁷ Drawing on human rights case-law, the Judges further explained their understanding of “independence and impartiality”: “independence” was understood vis-à-vis the legislative and the executive power and may be inferred from (i) the method of appointment; (ii) the term of office of the members of the entity in question; (iii) the existence of safeguards against external pressures; and (iv) whether there is an ap-

pearance of independence.¹⁸ “Impartiality” is given if the members of the court adjudicate objectively and unbiased, on the basis of their knowledge and conscience, in particular when they conform with the presumption of innocence and do not promote the interests of one party.¹⁹ Lastly, whether or not the court did afford the “judicial guarantees generally recognised as indispensable under international law” entails a holistic evaluation of the process encompassing recognised rights, such as fair trial rights (including equality of arms, requirement of reasoned decisions), rights of the accused (including right to be informed of the charges, to challenge detention, to have counsel, to have adequate time and facilities to prepare, to be tried without delay, to examine witnesses and to obtain attendance and examination of witnesses, to receive interpretation and translation), right to appeal, and the publicity principle, principle nullum crimen, nulla poena sine lege, principle of culpability, presumption of innocence, and the principle non bis in idem.²⁰ The violation of one, but essential, judicial guarantee may suffice to commit the crime, as the case may be.²¹ Regarding the mental element, the Judges applied Article 30 underscoring that the perpetrator must not have personally completed a particular value judgment.²²

cc) Regarding the crime against humanity of “other inhumane acts” taking the form of “forced marriage”, pursuant to Article 7 (1) (k), it is worth noting that the Chamber built on the relevant pronouncements of Pre-Trial Chamber II in the Ongwen case and other relevant judgments of other international tribunals. At the outset, it underlined that the criminalisation of this conduct seeks to protect any person’s free choice to choose a spouse, marry and to found a family on a consensual basis, which is distinct from protecting the physical and sexual integrity of a person.²³ The Chamber saw the harm suffered from “forced marriage” in the social stigmatisation of the victim, including for children born in this union.²⁴ In the view of the Judges, whether the marriage is formally or officially concluded is not a prerequisite as it may suffice that subjectively the victim, the perpetrator or a third party consider the couple as being married.²⁵ Equally, it is irrelevant, in their opinion, whether the marriage is not legal-

¹⁰ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 248.

¹¹ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 250.

¹² ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), paras. 368, 370.

¹³ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), paras. 358–359.

¹⁴ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), paras. 363–364.

¹⁵ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 365.

¹⁶ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 374.

¹⁷ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 376.

¹⁸ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 379.

¹⁹ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 380.

²⁰ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), paras. 384–385.

²¹ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 386.

²² ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), paras. 387–389.

²³ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 554.

²⁴ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 555.

²⁵ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 556.

ly recognised by national laws.²⁶ Further, the Judges accepted that, as an indication of the existence of forced marriage, the element of exclusivity may characterise the relationship between the perpetrator and the victim.²⁷ As regards the penalised conduct, the Chamber clarified that it encompasses the forcing of another person, regardless of his or her will, into a “conjugal” union with another person by using physical or psychological force, threat of force or taking advantage of a coercive environment.²⁸ Lastly, the Chamber ruled that the conduct of “forced marriage” as another inhumane act is of “similar character” as any of the other crimes listed in Article 7 (1) and must be assessed on a case-by-case basis.²⁹

At the beginning of the confirmation hearing, the Defence raised several observations on the proper conduct of proceedings, pursuant to Rule 122 (3) of the Rules of Procedure and Evidence,³⁰ which were adjudicated by the Chamber in a separate written decision.³¹ It was subsequently given the opportunity to complement its submission in writing.³² The Defence complained about, *inter alia*, the (i) lack of judicial oversight over the Prosecutor’s investigation and disclosure process, (ii) conduct of the confirmation proceedings, notably the transmittal of a list of questions by the Chamber three days before the commencement of the hearing, and (iii) the difficulties for the Defence to prepare for the confirmation hearing. The Chamber rejected the Defence claims and related requests.

The Defence sought the Chamber’s leave to appeal the confirmation decision. On 18 November 2019, the Pre-Trial Chamber rejected this request³³ and ordered the transmission

of the case file to the Presidency.³⁴ On 21 November 2019, the Presidency constituted Trial Chamber X, composed of Judge Antoine Kesia-Mbe Mindua, Judge Tomoko Akane and Judge Kimberly Prost, and referred to it the case against Mr Al Hassan.³⁵

b) Amendment of the Charges Post-Confirmation

On 30 January 2020, the Prosecutor submitted a request to Pre-Trial Chamber I for “corrections and amendments” to the confirmation decision.³⁶ Without seeking to add charges or substitute more serious charges, pursuant to Article 61 (9), the Prosecutor requested: (i) a set of limited corrections/amendments to the confirmation decision (e.g. the identity, date of arrest) in relation to a number of victims which were the result of an oversight on the Prosecutor’s part (Part I); (ii) reconsideration and correction/amendment of the modes of liability in relation to a number of victims in the confirmation decision, based on the correct information provided in the document containing the charges (“DCC”) (Part II); and (iii) amendment of the charges to include additional factual allegations under the existing charges, based on information obtained since the confirmation hearing and upon additional review of the evidence (Part III).

On 21 February 2020, Pre-Trial Chamber I rejected Parts I and II of the Prosecutor’s request, after it found that they did not amount to a proper amendment of the charges within the meaning of Article 61 (9).³⁷ The Pre-Trial Chamber held that (i) Article 61 (9) does not envisage the possibility for the Chamber to re-examine the facts or the evidence relied upon in the confirmation decision and make corrections to it, regardless of whether the errors are attributable to the Prosecutor or the Chamber;³⁸ (ii) the role of the Pre-Trial Chamber is to set the facts and circumstances of the case, which the Trial Chamber cannot exceed, but can evaluate differently;³⁹

²⁶ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 557.

²⁷ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 558.

²⁸ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), para. 559.

²⁹ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-461-Corr-Red (Al Hassan Confirmation), paras. 561–562.

³⁰ 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.

³¹ ICC, Decision of 30.9.2019 – ICC-01/12-01/18-460-Red2 (Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve). A public redacted version thereof was made public on 18.11.2019.

³² Filing of 22.7.2019 – ICC-01/12-01/18-426-Red (Public redacted version of Submissions requested by the Pre-Trial Chamber).

³³ ICC, Decision of 18.11.2019 – ICC-01/12-01/18-498-Red2 (Décision relative à la requête de la défense aux fins d’autorisation d’interjeter appel de la Décision relative à la confirmation des charges et transmission du dossier à la pré-

sidence en vertu de la règle 129 du Règlement de procédure et de preuve).

³⁴ ICC, Decision of 18.11.2019 – ICC-01/12-01/18-495 (Décision aux fins de verser au dossier toutes les décisions et ordonnances rendues par courrier électronique).

³⁵ ICC, Decision of 21.11.2019 – ICC-01/12-01/18-501 (Decision constituting Trial Chamber X and referring to it the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud).

³⁶ ICC, Filing of 30.1.2020 – ICC-01/12-01/18-568-Red (Public redacted version of “Prosecution Request for corrections and amendments concerning the Confirmation Decision”, 30 January 2020, ICC-01/12-01/18-568-Conf). A public redacted version was filed on 17.2.2020.

³⁷ ICC, Decision of 21.2.2020 – ICC-01/12-01/18-608-Red-tENG (Decision on the Applicable Procedure following the Prosecutor’s Filing of Her Request for Corrections and Amendments of the Decision to Confirm the Charges [“Al Hassan Amendment Procedure”]), para. 50.

³⁸ ICC, Decision of 21.2.2020 – ICC-01/12-01/18-608-Red-tENG (Al Hassan Amendment Procedure), para. 44.

³⁹ ICC, Decision of 21.2.2020 – ICC-01/12-01/18-608-Red-tENG (Al Hassan Amendment Procedure), paras. 46–47.

(iii) the nature of any possible “errors”, as presented by the Prosecutor in Parts I and II of her request, is such that they can be debated and corrected at trial, if need be;⁴⁰ and (iv) regarding Part II specifically, as repeatedly held by the Pre-Trial Chambers, requests for reconsideration have no legal basis in the Statute.⁴¹ In relation to Part III, the Pre-Trial Chamber requested further information as to the circumstances and reasons for collecting the evidence after filing the DCC.⁴²

On 23 April 2020, the Chamber partially granted Part III of the aforementioned Prosecutor’s request and, as a result, modified certain charges against Mr Al Hassan.⁴³ On 22 June 2020, the Chamber rejected Mr Al Hassan’s request for leave to appeal this decision.⁴⁴

2. Proceedings Before the Appeals Chamber

The Pre-Trial Chamber rejected the Defence challenge of admissibility and determined that the case satisfied the gravity requirement under Article 17 (1) (d).⁴⁵ Upon appeal of the Defence under Article 82 (1) (a), the Appeals Chamber upheld the Pre-Trial Chamber’s decision and confirmed that the case against Mr Al Hassan was of sufficient gravity to justify further action by the Court.⁴⁶ The Appeals Chamber judgment is consonant with previous pronouncements on the nature of gravity and its assessments. It suffices perhaps to recapitulate for the reader three key findings, as distilled by

the Appeals Chamber: The parameters of a “case” for the purpose of complementarity, that is the suspect under investigation and the conduct that gives rise to criminal liability under the Statute, are the same for the purpose of gravity.⁴⁷ The gravity requirement under Article 17 (1) (d) aims at excluding those rather unusual cases where the specific facts of a given case technically qualify as crimes under the jurisdiction of the Court, but are nonetheless not of sufficient gravity to justify further action.⁴⁸ The gravity assessment under Article 17 (1) (d) must be made on a case-by-case basis. It involves a holistic evaluation of all relevant quantitative and qualitative criteria, including some of the factors relevant to the determination of the sentence of a convicted person. Quantitative criteria alone, including the number of victims, are not determinative of the gravity of a given case.⁴⁹

3. Proceedings Before Trial Chamber X

Soon after having been assigned the case, the Single Judge, acting on behalf of Trial Chamber X,⁵⁰ and the full Chamber took a series of procedural decisions aimed at preparing the trial. The trial opened on 14 July 2020.

a) Trial Management and Disclosure

With a view to expediting the preparations for trial while ensuring procedural continuity in the case, the Single Judge scheduled three status conferences⁵¹ and ruled on various matters, such as the disclosure regime and related exceptions (redactions), including deadlines for the timely disclosure of the evidence;⁵² availability of victims applications of dual status witnesses to the Parties;⁵³ scope of privileged visits and

⁴⁰ ICC, Decision of 21.2.2020 – ICC-01/12-01/18-608-Red-tENG (Al Hassan Amendment Procedure), para. 45.

⁴¹ ICC, Decision of 21.2.2020 – ICC-01/12-01/18-608-Red-tENG (Al Hassan Amendment Procedure), para. 48.

⁴² ICC, Decision of 21.2.2020 – ICC-01/12-01/18-608-Red-tENG (Al Hassan Amendment Procedure), para. 55.

⁴³ ICC, Decision of 23.4.2020 – ICC-01/12-01/18-767-Corr-Red (Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf). A corrected, public redacted version thereof was filed on 8.5.2020.

⁴⁴ ICC, Decision of 22.6.2020 – ICC-01/12-01/18-893 (Décision relative à la requête de la défense pour autorisation d’interjeter appel de la Décision portant modification des charges confirmées le 30 septembre 2019 à l’encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud). Judge Alapini-Gansou appended a dissenting opinion, ICC-01/12-01/18-893-Anx (Opinion dissidente de Madame la Juge Alapini-Gansou).

⁴⁵ 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”]). *Chaitidou*, ZIS 2019, 567 (593).

⁴⁶ ICC, Judgment of 19.2.2020 – ICC-01/12-01/18-601-Red (Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled “Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense” [“Al Hassan Admissibility Judgment”]).

⁴⁷ ICC, Judgment of 19.2.2020 – ICC-01/12-01/18-601-Red (Al Hassan Admissibility Judgment), paras. 65–66.

⁴⁸ ICC, Judgment of 19.2.2020 – ICC-01/12-01/18-601-Red (Al Hassan Admissibility Judgment), paras. 1, 53, 59.

⁴⁹ ICC, Judgment of 19.2.2020 – ICC-01/12-01/18-601-Red (Al Hassan Admissibility Judgment), paras. 2, 92, 94, 97.

⁵⁰ ICC, Decision of 21.11.2020 – ICC-01/12-01/18-504 (Decision notifying the election of a Presiding Judge and Single Judge).

⁵¹ ICC, Order of 26.11.2019 – ICC-01/12-01/18-507 (Order scheduling a first status conference); Order of 10.12.2019 – ICC-01/12-01/18-521 (Order Setting the Agenda for the First Status Conference); Decision of 22.1.2020 – ICC-01/12-01/18-558 (Decision on Prosecution request for a variation of time limits relating to the disclosure of evidence and scheduling a second status conference); Order of 13.2.2020 – ICC-01/12-01/18-587 (Order setting the agenda for the second status conference); Order of 3.6.2020 – ICC-01/12-01/18-852 (Order scheduling a status conference); Order of 23.6.2020 – ICC-01/12-01/18-897 (Order setting the agenda for the status conference of 30 June 2020).

⁵² ICC, Decision of 30.12.2019 – ICC-01/12-01/18-546 (Decision on the evidence disclosure protocol and other related matters).

⁵³ ICC, Decision of 20.12.2019 – ICC-01/12-01/18-536 (Decision on the Prosecution request for access to the identity

phone calls to Mr Al Hassan by medical experts and members of Defence team.⁵⁴

Some procedural decisions were also taken by the full Chamber. For example, it adopted a protocol on dual status witnesses and handling of confidential information and contact with witnesses by the parties;⁵⁵ organised the victims application process (which follows essentially the regime adopted at pre-trial), set a cut-off date for the receipt of new victims applications,⁵⁶ and admitted new victims to participate or ruled on contentious victims applications.⁵⁷ Early in the proceedings the Chamber indicated to the parties that it would allow the preparation of witnesses by the calling parties and adopt the witness familiarisation protocol (which contains a section on witness preparation) as previously used in the Ntaganda trial.⁵⁸ While the Prosecutor supported this practice, the Defence expressed its opposition to witness preparation or, in the alternative, requested that additional safeguards are imposed.⁵⁹ On 17 March 2020, the Chamber authorised the preparation of witnesses by the calling party and adopted the Ntaganda familiarisation protocol with some adjustments.⁶⁰ The Chamber saw merit in allowing this practice in the present case so as to (i) “assist the witness who will be giving evidence during the proceedings”; (ii) “for the

and applications of participating victims and inviting report and submissions on victim application procedure).

⁵⁴ ICC, Decision of 22.1.2020 – ICC-01/12-01/18-560 (Decision on the scope of privileged visits and phone calls to Mr Al Hassan by medical experts and members of the Defence team).

⁵⁵ ICC, Decision of 19.3.2020 – ICC-01/12-01/18-674 (Decision on the ‘Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant’, the ‘Dual Status Witness Protocol’, and related matters).

⁵⁶ ICC, Decision of 12.3.2020 – ICC-01/12-01/18-661 (Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial); Decision of 12.6.2020 – ICC-01/12-01/18-880 (Decision on request for extension of deadlines for the final transmission of victim applications for participation at trial).

⁵⁷ ICC, Decision of 17.7.2020 – ICC-01/12-01/18-886-Red2 (Public redacted version of “Second decision on the admission of victims to participate in trial proceedings”). A public redacted version thereof was filed on 23.6.2020; Decision of 10.8.2020 – ICC-01/12-01/18-992 (Third decision on the admission of victims to participate in trial proceedings).

⁵⁸ ICC, Decision of 24.1.2020 – ICC-01/12-01/18-562 (Decision on outstanding protocols), para. 4.

⁵⁹ ICC, Filing of 13.2.2020 – ICC-01/12-01/18-591 (Prosecution submission on proposed amendments to Witness Familiarisation and Preparation); ICC, Filing of 13.2.2020 – ICC-01/14-01/18-592 (Defence Submissions on Witness Preparation).

⁶⁰ ICC, Decision of 17.3.2020 – ICC-01/12-01/18-666 (Decision on witness preparation and familiarisation [“Al Hassan Witness Preparation”]).

calling party, to assess and clarify the witness’s evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings”.⁶¹ It continued to explain that during the preparation meeting, the witness will be able to refresh his or her memory to clarify any issues and to understand generally what he or she will be questioned about.⁶² In the view of the Chamber, the safeguards established in the protocol mitigate the risk of any undue influence or interference.⁶³ A Defence request to reconsider the witness preparation authorisation or, in the alternative, grant leave to appeal it, was rejected by the Chamber.⁶⁴

The Chamber set the date for the opening of the trial on 14 July 2020 and the start of the presentation of evidence on 8 September 2020.⁶⁵ It established a series of deadlines organising the proceedings leading up to the opening of said trial, including a calendar for the disclosure of evidence, the submission of provisional/final witness lists with summaries of anticipated witness testimony and other relevant information, the Prosecutor’s trial brief, and joint submission on agreed facts.⁶⁶ In spite of the Coronavirus Pandemic, the Chamber remained firmly committed to maintain the date for the start of the trial.⁶⁷

On 6 May 2020 and 19 August 2020, the Chamber adopted directions on the conduct of proceedings, on issues such as order and time of opening statements, reading out of the charges (for which the Trial Chamber prepared the text on the

⁶¹ ICC, Decision of 17.3.2020 – ICC-01/12-01/18-666 (Al Hassan Witness Preparation), para. 11.

⁶² ICC, Decision of 17.3.2020 – ICC-01/12-01/18-666 (Al Hassan Witness Preparation), para. 15.

⁶³ ICC, Decision of 17.3.2020 – ICC-01/12-01/18-666 (Al Hassan Witness Preparation), para. 16.

⁶⁴ ICC, 9.4.2020 – ICC-01/12-01/18-734 (Decision on Defence request for reconsideration and, in the alternative, leave to appeal the “Decision on witness preparation and familiarisation”).

⁶⁵ ICC, Decision of 18.8.2020 – ICC-01/12-01/18-999 (Decision adjourning the evidentiary hearings).

⁶⁶ ICC, Decision of 6.1.2020 – ICC-01/12-01/18-548 (Decision Setting the Commencement Date of the Trial). The deadline for filing the trial brief was extended to 30 April 2020, ICC, Decision of 5.3.2020 – ICC-01/12-01/18-629 (Decision on Prosecution request for a variation of the time limit to file Trial Brief); The deadline for filing the trial brief was further extended to 18 May 2020, ICC, Decision of 23.4.2020 – ICC-01/12-01/18-770 (Decision on the Prosecution request for a further extension of the time limit to file the Trial Brief).

⁶⁷ ICC, Decision of 20.3.2020 – ICC-01/12-01/18-677 (Decision on the Prosecution request for extension of deadlines relating to the disclosure of evidence and a postponement of the starting date for trial); Decision of 9.6.2020 – ICC-01/12-01/18-867 (Decision on the Prosecution’s request for reconsideration regarding the presentation of opening statements); Decision of 8.7.2020 – ICC-01/12-01/18-940-Red (Decision on Defence Adjournment Request). A public redacted version thereof was filed on 2.9.2020.

basis of the confirmation decision),⁶⁸ in-court presentation of evidence, including the scope and mode of questioning of witnesses, use of video link, introduction of Rule 68 witness statements, arrangements for witnesses at risk of incriminating themselves, and specific guidelines to the legal representatives of victims as to the questioning of witnesses.⁶⁹ Of significance is the Trial Chamber's decision to follow the "submission approach" adopted for the first time in 2015 in the Bemba et al case and to defer the assessment of the admissibility criteria in relation to the evidence to the judgment phase, except when ruling on certain procedural bars is mandatory (see Article 69 [7] or Rules 68, 71 and 72) or appropriate for reasons of fairness.⁷⁰ This aligns the Trial Chamber's evidence approach with that adopted in the Yekatom/Ngaïssona case, which is scheduled to start in February 2021 (see below). The Defence request seeking leave to appeal the Trial Chamber's approach to evidence was rejected by the Chamber.⁷¹

b) Stay of Proceedings

On 16 June 2020, the Defence submitted a request to terminate the proceedings and immediately release Mr Al Hassan.⁷² It claimed that the Prosecutor had been informed at the outset of the investigation that Mr Al Hassan had been interrogated by French and Malian authorities over the course of one year under abusive circumstances amounting to torture. The Defence averred that these abusive circumstances included waterboarding, mock executions, threats with electrocution, being interrogated while hooded, being handcuffed continuously for almost five months, being subjected to sensory forms of torture (loud music, smoke, heat, beaten when he fell), being deprived of adequate food and access to ade-

quate medical care, and being held in prolonged incommunicado detention for approximately a year.⁷³ It also contended that the Prosecutor relied on information obtained from tainted evidence in order to, inter alia, justify her request to arrest and detain Mr Al Hassan and substantiate the charges. The Chamber considered the Defence request to be untimely lodged but, considering the seriousness of the allegations made therein, was prepared to entertain its merits.⁷⁴ The Trial Chamber analysed the allegations in light of its powers to permanently stay the proceedings, as formulated by the Appeals Chamber.⁷⁵ Worth mentioning in this context is the Chamber's affirmation of Pre-Trial Chamber I's finding in the Gbagbo case that fundamental human rights violations "can have the requisite impact on proceedings to constitute an abuse of process only insofar as they can be attributed to the Court", either because the violation is perpetrated by a person associated with the Court or because the Court colluded with a third person.⁷⁶ Having taken the Defence allegations at its highest, the Trial Chamber was nevertheless unable to determine that the Prosecutor had colluded with the national authorities.⁷⁷ Accordingly, the Judges rejected the Defence request.

c) Defence-Related Issues

The request of Mr Al Hassan, pursuant to Article 60 (2), to be provisionally released was rejected.⁷⁸ Notably, the Trial Chamber did not accede to the Defence request to allow Mr Al Hassan, based on exceptional humanitarian circumstances, to join and stay with his family during the Coronavirus Pandemic.⁷⁹

On 9 July 2020, the Defence filed a formal notice of its intention to raise the defence that Mr Al Hassan is not fit to stand trial without, however, seeking a particular relief, in particular a request for medical examination under Rule 135.⁸⁰ The Chamber considered the notice to be untimely, as it had been lodged after the expiry of the deadlines set by the

⁶⁸ ICC, Decision of 6.5.2020 – ICC-01/12-01/18-789-AnxA (Directions on the conduct of proceedings), paras. 9-13; Decision of 14.8.2020 – ICC-01/12-01/18-996 (Decision on Defence request for leave to appeal the "Decision on the Self-contained set of charges").

⁶⁹ ICC, Decision of 6.5.2020 – ICC-01/12-01/18-789 (Decision on the conduct of proceedings) with Annex A containing the directions, ICC-01/12-01/18-789-AnxA (Directions on the conduct of proceedings); Decision of 19.8.2020 – ICC-01/12-01/18-1004 (Supplemental decision on matters related to the conduct of proceedings); Decision of 4.9.2020 – ICC-01/12-01/18-1040 (Third decision on matters related to the conduct of proceeding); Decision of 6.11.2020 – ICC-01/12-01/18-1150 (Decision on matters related to Defence challenges under Article 69(7) of the Statute), paras. 14-15.

⁷⁰ ICC, Decision of 6.5.2020 – ICC-01/12-01/18-789-AnxA (Directions on the conduct of proceedings), paras. 27-34.

⁷¹ ICC, Decision of 28.5.2020 – ICC-01/12-01/18-831 (Decision on Defence request for leave to appeal the "Decision on the conduct of proceedings").

⁷² ICC, Filing of 16.6.2020 – ICC-01/12-01/18-885-Corr-Red3 (Public redacted version of "Corrigendum to 'Defence Request to terminate the proceedings'" ["Termination Motion"]). A public redacted version thereof was filed on 28.7.2020.

⁷³ ICC, Filing of 16.6.2020 – ICC-01/12-01/18-885-Corr-Red3 (Termination Motion), para. 15.

⁷⁴ ICC, Decision of 24.8.2020 – ICC-01/12-01/18-1009-Red (Public redacted version of "Decision on the Defence request to terminate the proceedings and related requests" ["Stay of Proceedings Decision"]), para. 48.

⁷⁵ ICC, Decision of 24.8.2020 – ICC-01/12-01/18-1009-Red (Stay of Proceedings Decision), paras. 49-56.

⁷⁶ ICC, Decision of 24.8.2020 – ICC-01/12-01/18-1009-Red (Stay of Proceedings Decision), para. 57.

⁷⁷ ICC, Decision of 24.8.2020 – ICC-01/12-01/18-1009-Red (Stay of Proceedings Decision), paras. 100, 112, 116.

⁷⁸ ICC, Decision of 5.5.2020 – ICC-01/12-01/18-786-Red (Public redacted version of "Decision on the Defence request for interim release" ["Al Hassan Interim Release"]).

⁷⁹ ICC, Decision of 5.5.2020 – ICC-01/12-01/18-786-Red (Al Hassan Interim Release), paras. 87-91.

⁸⁰ ICC, Filing of 9.7.2020 – ICC-01/12-01/18-942-Red (Public redacted version of "Defence notice of its intention to raise unfitness to stand trial and request for a status conference").

Chamber.⁸¹ Notwithstanding the Chamber's conclusion on timing, it also concluded that, considering the content of the Defence notice, it had not been presented with sufficient information to conclude that Mr Al Hassan is unfit to stand trial.⁸²

Since March 2020, four associate counsel have withdrawn from Mr Al Hassan's Defence team. Concerned about the recurring withdrawal of associate counsel, the Chamber instructed the Registry to appoint a senior independent counsel with the task to enquire whether the accused (i) has any concerns as to the adequacy of his representation and (ii) wishes to raise any issue with the Chamber.⁸³ Upon submission of the report of independent counsel, the Chamber was satisfied that Mr Al Hassan continued to have trust in his lead counsel. Nevertheless, the Judges invited lead counsel to take note of certain issues of concern.⁸⁴

VII. Situation in the Central African Republic I (Pre-Trial Chamber II)⁸⁵ – Prosecutor v Jean-Pierre Bemba Gombo

- First warrant of arrest: 23.5.2008 (unsealed 24.5.2008)
- Warrant of arrest: 10.06.2008 (replacing the first warrant of arrest)
- Surrender to the Court: 3.7.2008
- Confirmation of Charges: 15.6.2009
- Trial: 22.11.2010–13.11.2014
- Conviction: 21.3.2016
- Sentencing: 21.6.2016
- Acquittal on appeal: 8.6.2018
- Victims participating: 5.229

After Jean-Pierre Bemba Gombo ("Mr Bemba") was acquitted on 8 June 2018 by majority on appeal,⁸⁶ he notified the Presidency of his intention to submit an application for com-

pensation under Article 85 and requested a variation of the time and page limits.⁸⁷ Subsequently, on 30 October 2018, the Presidency designated Pre-Trial Chamber II to consider the request and any upcoming Article 85 application, pursuant to Rule 173 (1).⁸⁸

After having extended the applicable six-month time limit for three additional months,⁸⁹ the Pre-Trial Chamber received Mr Bemba's application on 8 March 2019.⁹⁰ Therein, Mr Bemba advanced his claims on two grounds: first, he claimed a miscarriage of justice, within the meaning of Article 85 (3), alleging that (i) the Prosecutor lacked impartiality and pursued a case that was untrue; (ii) the trial was negligently mismanaged; (iii) the excessive involvement of the legal representatives of victims during trial had led to an unbalanced and unfair trial; (iv) victims applications had been industrially falsified; (v) the judgment was of poor and unacceptable quality; and (vi) the proceedings were unduly long.⁹¹ As a result, he requested compensation in the amount of approximately EUR 68.6 million for his time spent in detention, aggravated damages due to the post-judgment position of the ICC towards him, property lost, damaged or destroyed and legal costs incurred. Secondly, and in the alternative, he requested the Pre-Trial Chamber to award, based on its inherent powers, the sum of at least EUR 42.4 million for damages to his property caused through seizure/freezing, or, in the alternative, to submit the claim to binding arbitration under UNCITRAL Arbitration Rules.

With decision dated 18 May 2020, the Pre-Trial Chamber rejected Mr Bemba's application.⁹² As regards the claim

⁸¹ ICC, Decision of 13.7.2020 – ICC-01/12-01/18-952-Red (Decision on the Defence notice on Mr Al Hassan's unfitness to stand trial ["Al Hassan Fit for Trial"]), paras. 23–29. A public redacted version thereof was filed on 2.9.2020.

⁸² ICC, Decision of 13.7.2020 – ICC-01/12-01/18-952-Red (Al Hassan Fit for Trial), paras. 33–42.

⁸³ ICC, Decision of 22.9.2020 – ICC-01/12-01/18-1065-Red (Public redacted version of "Decision on Associate Counsel's request for withdrawal"), para. 12; Decision of 25.9.2020 – ICC-01/12-01/18-1071-Red (Public redacted version of "Decision on Defence's request for a status conference").

⁸⁴ ICC, Decision of 20.10.2020 – ICC-01/12-01/18-1118-Red (Decision on Independent Counsel's Report).

⁸⁵ The record carries the situation number ICC-01/14.

⁸⁶ ICC, Judgment of 8.6.2018 – ICC-01/05-01/08-3636-Red (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"), with dissenting opinion of Judge Monageng and Judge Hofmański (ICC-01/05-01/08-3636-Anx1), separate opinion of Judge van den Wyngaert and Judge Morrison (ICC-01/05-01/08-3636-Anx2), and concurring separate opinion of Judge Eboe-Osuji (ICC-01/05-01/08-3636-Anx3).

⁸⁷ ICC, Decision of 13.11.2018 – ICC-01/05-01/08-3664 (Decision on "Mr. Bemba's request for a variation of the time and page limits in relation to a claim under Article 85 of the Statute" ["Decision on Time and Page Limits"]), para. 2. According to rule 173(2), the request for compensation shall be submitted no later than six months from the date the person making the request was notified of the decision of the Court concerning the either the unlawfulness of the arrest and detention, or the reversal of the conviction or the existence of a grave and manifest miscarriage of justice.

⁸⁸ ICC, Decision of 13.11.2018 – ICC-01/05-01/08-3664 (Decision on Time and Page Limits), para. 3. Rule 173 (1) stipulates: "Anyone seeking compensation on any of the grounds indicated in article 85 shall submit a request, in writing, to the Presidency, which shall designate a Chamber composed of three judges to consider the request. These judges shall not have participated in any earlier judgment of the Court regarding the person making the request".

⁸⁹ ICC, Decision of 13.11.2018 – ICC-01/05-01/08-3664 (Decision on Time and Page Limits), para. 6.

⁹⁰ ICC, Filing of 18.5.2019 – ICC-01/05-01/08-3673-Red2 (Second Public Redacted Version of "Mr. Bemba's claim for compensation and damages" ["Bemba Claim"]).

⁹¹ ICC, Filing of 18.5.2019 – ICC-01/05-01/08-3673-Red2 (Bemba Claim), paras. 22–83.

⁹² ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Mr Bemba's claim for compensation and damages ["Decision on Bemba's Claim"]).

under Article 85 (3), the Chamber held that a request for compensation under Article 85 (3) does not require a prior decision issued by another Chamber that a grave and manifest miscarriage of justice had taken place, but is assessed in two steps: (i) the determination of a grave and manifest miscarriage of justice; and (ii) if answered in the affirmative, whether compensation should be awarded and in what amount.⁹³ The qualifiers “grave and manifest” denote the exceptional nature of the remedy and do not pertain to procedural developments inherent in criminal proceedings.⁹⁴ As regards the interpretation of these terms, Pre-Trial Chamber II followed Trial Chamber II’s interpretation in the Ngudjolo case.⁹⁵ The Judges indicated to accept the “demonstrated or substantiated suspicion of corruption and lack of impartiality on the part of the bench or other examples of gross negligence in the administration of justice to the detriment of the suspect or the accused” to fall within the ambit of Article 85 (3).⁹⁶ They pointed out that, nevertheless Article 85 (3) does not allow the Chamber to re-assess the merits of the various decisions rendered by other chambers in the course of the proceedings.⁹⁷ That also means that arguments that were brought before another chamber in the course of the proceedings and were settled, are not addressed anew and cannot form the basis of an Article 85 claim.⁹⁸ Lastly, the Judges stressed that even if all requirements of Article 85 (3) are fulfilled, the decision to award compensation remains at the discretion of the Court.⁹⁹ That being said, the Chamber dismissed most of the arguments raised by Mr Bemba for having been raised previously during trial and/or on appeal.¹⁰⁰ In particular, the Judges underscored that neither the Majority nor Minority of the Appeals Chamber referred to a miscarriage of justice when entertaining Mr Bemba’s appeal.¹⁰¹ In addition, the Chamber determined that none of Mr

Bemba’s grievances supported the existence of a grave and manifest miscarriage of justice.¹⁰² The only argument the Judges accepted to evaluate was the purported violation of Mr Bemba’s right to be tried without undue delay. Yet, in the view of the Chamber, an acquitted person does not benefit from compensation merely because he or she was detained prior to acquittal or the proceedings were lengthy.¹⁰³

As regards the claim for damages to Mr Bemba’s property, the Chamber reiterated that the freezing/seizure of property is the responsibility of States; any cooperation request is executed under national laws. Conversely, the Court’s Registry acts as a mere channel of communication between the States and the Court.¹⁰⁴ That being said, the Chamber clarified it is not competent to adjudicate on a request for damages connected with or as a result of the conduct of the operations of the States. In the opinion of the Judges, the Registry had adequately discharged its obligations in acting as a channel of communication with the three requested States.¹⁰⁵ The Chamber also held that it has no jurisdiction over financial claims as its mandate is limited to matters falling under Article 85.¹⁰⁶ Redressing damages to property or assets is a private claim and does not fall under the ambit of Article 85 (3), even where a miscarriage of justice occurred.¹⁰⁷ Drawing on “inherent powers” to adjudicate Mr Bemba’s claim was also rejected as the Statute was sufficiently specific and detailed setting out the powers of the Chamber.¹⁰⁸ Lastly, having regard to the duration of the proceedings of approximately ten years, the Chamber noted that Mr Bemba would have been entitled to compensation in many national systems and called upon the States Parties to review the Statute.¹⁰⁹

The request of Mr Bemba seeking leave to appeal the decision denying any compensation, was rejected by the Pre-Trial Chamber arguing that it does not fall under the ambit of Article 82 (1) (d).¹¹⁰

⁹³ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), paras. 21–22. Similarly, ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Decision on the “Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome” [“Ngudjolo Decision”]), para. 16.

⁹⁴ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 33.

⁹⁵ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), paras. 41–42; ICC, Decision of 16.12.2015 – ICC-01/04-02/12-301-tENG (Ngudjolo Decision), paras. 41–45.

⁹⁶ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 42.

⁹⁷ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 25.

⁹⁸ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), paras. 29, 31.

⁹⁹ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 40.

¹⁰⁰ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 29.

¹⁰¹ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 28.

¹⁰² ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 43.

¹⁰³ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 44.

¹⁰⁴ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), paras. 56–57.

¹⁰⁵ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 58.

¹⁰⁶ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), paras. 60–61.

¹⁰⁷ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), paras. 59, 61.

¹⁰⁸ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 62.

¹⁰⁹ ICC, Decision of 18.5.2020 – ICC-01/05-01/08-3694 (Decision on Bemba’s Claim), para. 69.

¹¹⁰ ICC, Decision of 1.10.2020 – ICC-01/05-01/08-3697 (Decision on the request for leave to appeal the “Decision on Mr Bemba’s claim for compensation and damages”).

VIII. Situation in the Central African Republic II (Pre-Trial Chamber II)¹¹¹ – Prosecutor v Alfred Yekatom and Patrice-Edouard Ngaïssona (Trial Chamber V)¹¹²

No proceedings at the situation level took place during the review period. To date, one case against two suspects emanated from this situation.

- Warrant of arrest Yekatom: 11.11.2018 (unsealed 17.11.2018)
- Surrender Yekatom to the Court: 17.11.2018
- First appearance Yekatom: 23.11.2018
- Warrant of arrest Ngaïssona: 7.12.2018 (unsealed 13.12.2018)
- Surrender Ngaïssona to the Court: 23.1.2019
- First appearance Ngaïssona: 25.1.2019
- Joinder of cases: 20.2.2019
- Victims participating: 1,085 (pre-trial)
- Confirmation of charges: 11.12.2019 (made public 20.12.2019)
- Commencement of trial: 9.2.2021
- Current status: Preparations for trial

At the time of the last jurisprudence overview, the Pre-Trial Chamber was deliberating on the confirmation of charges against Alfred Yekatom (“Mr Yekatom”) and Patrice-Edouard Ngaïssona (“Mr Ngaïssona”).¹¹³

1. Proceedings Before Pre-Trial Chamber II

To give context, it is recalled that on 19 August 2019, the Prosecutor submitted the DCC against the two suspects.¹¹⁴ Therein, she alleged that from around September 2013 to approximately December 2014, the Anti-Balaka (composed of members of the Forces Armées Centrafricaines and the Garde Présidentielle, pre-existing “self-defence groups” and others) carried out indiscriminate acts of violence against civilians in and around Bangui and across several prefectures in western Central African Republic (“CAR”) by targeting the Muslim population who were perceived, based on their ethnic, national and religious affiliations, to support the Seleka (a mainly Muslim politico-military coalition).¹¹⁵

Mr Ngaïssona was alleged to be responsible under Articles 25 (3) (a) – for jointly committing the crimes with others; Article 25 (3) (c) – for assisting in the commission of crimes; and Article 25 (3) (d) – for contributing in any other way to the crimes committed by the Anti-Balaka.¹¹⁶ He allegedly pursued, since at least June 2013, a broader Strategic Common Plan, joined by other Anti-Balaka leaders and later the Anti-Balaka National Coordination, with the objective to claim and/or reclaim political power in CAR by using criminal means, in particular, instrumentalising pre-existing “self-defence groups” and others, later known as the Anti-Balaka. They did so knowing that mobilising and using Anti-Balaka groups would result, in the ordinary course of events, in the violent targeting of the Muslim civilian population.¹¹⁷

Mr Yekatom was alleged to be responsible under Articles 25 (3) (a) – for committing the crimes personally or jointly with others; Article 25 (3) (b) – for ordering, soliciting or inducing the commission of the crimes; Article 25 (3) (c) – for assisting in their commission; Article 25 (3) (d) – for contributing in any other way to the crimes committed by Mr Yekatom’s group; and Article 28 (a) – as a military commander, or person effectively acting as a military commander, for failing to prevent or punish their commission.¹¹⁸ He allegedly pursued a narrower Operational Common Plan, joined by members of his command, with the objective to violently target the Muslim civilian population in Bangui, Boeïng, and areas in south-western CAR, including through committing crimes. Mr Yekatom and his elements allegedly committed the crimes as tools of the Strategic Common Plan and in furtherance of its criminal purpose.¹¹⁹ Throughout the time relevant to the charges, Mr Yekatom allegedly reported to and coordinated with Mr Ngaïssona, and his conduct and that of his elements was imputable to members of the Strategic Common Plan, including Mr Ngaïssona.¹²⁰

a) Confirmation Decision

On 11 December 2019, Pre-Trial Chamber II handed down the decision confirming, in part, the charges against the two

¹¹¹ The record carries the situation number ICC-01/14.

¹¹² The record carries the case number ICC-01/04-01/18.

¹¹³ Chaitidou, ZIS 2019, 567 (594).

¹¹⁴ ICC, Filing of 19.8.2019 – 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 [“Yekatom/Ngaïssona DCC”]). The redacted version of the DCC was made public on 18.9.2019.

¹¹⁵ ICC, Filing of 19.8.2019 – ICC-01/14-01/18-282-AnxB1-Red (Yekatom/Ngaïssona DCC), paras. 3, 119. The two suspects are alleged to be responsible for the commission of crimes against humanity (murder and attempted murder, extermination, rape and attempted rape, deportation/forcible transfer, imprisonment or other deprivation of physical liberty, torture and other inhumane acts, persecution) and war crimes (murder and attempted murder, rape and attempted

rape, torture and cruel/degrading treatment, mutilation, outrages upon personal dignity, 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, enforced displacement of civilian population, pillaging, and destruction of the adversary’s property).

¹¹⁶ ICC, Filing of 19.8.2019 – ICC-01/14-01/18-282-AnxB1-Red (Yekatom/Ngaïssona DCC), para. 120.

¹¹⁷ ICC, Filing of 19.8.2019 – ICC-01/14-01/18-282-AnxB1-Red (Yekatom/Ngaïssona DCC), paras. 3, 121.

¹¹⁸ ICC, Filing of 19.8.2019 – ICC-01/14-01/18-282-AnxB1-Red (Yekatom/Ngaïssona DCC), para. 185.

¹¹⁹ ICC, Filing of 19.8.2019 – ICC-01/14-01/18-282-AnxB1-Red (Yekatom/Ngaïssona DCC), para. 189.

¹²⁰ ICC, Filing of 19.8.2019 – ICC-01/14-01/18-282-AnxB1-Red (Yekatom/Ngaïssona DCC), paras. 7, 24, 73.

suspects and committing them to trial.¹²¹ In its decision, the Chamber first addressed two procedural matters before entertaining the merits of the Prosecutor's DCC.

The first procedural matter concerned the Prosecutor's request to submit a corrected DCC. One day before the closing statements in the confirmation hearing, on 10 October 2019, the Prosecutor notified the Chamber and participants that the DCC, including a schedule of charges for each suspect at the end of the DCC, contained three sets of typos: regarding count 19, the text of the DCC and the schedule erroneously referred to the crime of "cruel treatment" instead of the crime of "torture"; regarding count 29, the time frame in the schedule was not aligned with that in the text of the DCC; and regarding counts 12 and 59, the schedule reflects "indirect co-perpetration" instead of direct co-perpetration in relation to Mr Ngaïssona. Therefore, she requested to be allowed to correct the DCC.¹²² The Chamber responded that the proposed changes affected the clarity of the charges (time and nature of crime/mode of liability) and, as a consequence, the suspects' right to be informed of the nature and content of the charges.¹²³ Given that a corrigendum at that stage was not meaningful any longer, the Chamber rejected the Prosecutor's request.

The second procedural matter concerned the objections of the Defence prior to the confirmation hearing. Invited to raise any objections or make observations on the proper conduct of proceedings in writing prior to the confirmation hearing, pursuant to Rule 122 (3),¹²⁴ the Yekatom Defence complained about excessive redactions in the evidence and a significant number of ex parte filings in the case file. It submitted that as a result thereof, Mr Yekatom's rights had been violated and he was prevented from fully participating in the proceedings. As a remedy, the Yekatom Defence requested that the Chamber does not rely on the evidence containing unwarranted redactions or, alternatively, that the proceedings be discontinued.¹²⁵ The Chamber did not identify any prejudice to the integrity or fairness of the proceedings, highlight-

ing that it had taken steps to reclassify filings in the case record and that redactions were either warranted or had been lifted by the Prosecutor.¹²⁶ The Ngaïssona Defence complained that it had not sufficient time to prepare for the confirmation hearing. Accordingly, it requested that, should the charges be confirmed, Rule 122 (4)¹²⁷ be inapplicable allowing the Defence to raise at a later stage any procedural or substantive arguments, should they arise.¹²⁸ The Chamber rejected the request considering that such departure from the wording and purpose of Rule 122 (4) was unjustified.¹²⁹ The Ngaïssona Defence also complained about the propriety of the submissions of victims under Rule 121 (9),¹³⁰ in which they argued that the DCC provided sufficient grounds to hold Mr Ngaïssona liable under Article 28, in addition to Article 25. It claimed this submission amounted to a request to amend the charges pursuant to Rule 121 (4).¹³¹ The Chamber dismissed the argument holding that the victims merely expressed concerns as to the choices made by the Prosecutor in the formulation of the charges.¹³²

Turning to the substantive findings of the Chamber, it is noteworthy to reflect the general conclusions the Chamber espoused at the beginning of its analysis, before discussing the charges in detail. It rejected outright Mr Yekatom's responsibility as commander under Article 28 (a) since, according to its reading of the evidence, the facts supported Mr Yekatom's alleged responsibility as a perpetrator and not for having allegedly failed to prevent or repress crimes committed by others.¹³³ Further, the Chamber also expressed concerns about the compatibility of the notion of "common plan"

¹²¹ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Corrected version of "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona" ["Yekatom/Ngaïssona Confirmation Decision"]). A public redacted version was made available on 20.12.2019, while a corrigendum to the decision was filed on 14.5.2020.

¹²² ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 26.

¹²³ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 28.

¹²⁴ ICC, Decision of 10.9.2019 – ICC-01/14-01/18-327 (Order Setting the Schedule for the Confirmation of Charges Hearing), para. 14. Rule 122 (3) stipulates: "Before hearing the matter on the merits, the Presiding Judge of the Pre-Trial Chamber shall ask the Prosecutor and the person whether they intend to raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing".

¹²⁵ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), paras. 41–43.

¹²⁶ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), paras. 46–48.

¹²⁷ Rule 122 (4) stipulates: "At no subsequent point may the objections and observations made under subrule 3 be raised or made again in the confirmation or trial proceedings".

¹²⁸ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 50.

¹²⁹ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 52.

¹³⁰ Rule 121(9) stipulates: "The Prosecutor and the person may lodge written submissions with the Pre-Trial Chamber, on points of fact and on law, including grounds for excluding criminal responsibility set forth in article 31, paragraph 1, no later than three days before the date of the hearing. A copy of these submissions shall be transmitted immediately to the Prosecutor or the person, as the case may be".

¹³¹ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 53; Rule 121 (4) stipulates: "Where the Prosecutor intends to amend the charges pursuant to article 61, paragraph 4, he or she shall notify the Pre-Trial Chamber and the person no later than 15 days before the date of the hearing of the amended charges together with a list of evidence that the Prosecutor intends to bring in support of those charges at the hearing".

¹³² ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 55.

¹³³ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 58.

with the Statute.¹³⁴ The Judges also clarified that they declined to confirm any charge for which no link between the charged event and the suspect could be established and would not enter any factual findings thereon.¹³⁵

In light of the aforementioned findings, the Chamber confirmed the charges for each suspect in relation to certain events and locations.¹³⁶ Only two forms of criminal responsibility were confirmed in relation to each suspect and in relation to the specific confirmed incidents. Notably, the Chamber declined to confirm a series of charged incidents in relation to Mr Ngaïssona,¹³⁷ arguing mainly that the evidence was too vague and lacking detailed information in order to establish, against the requisite evidentiary threshold, a link between the suspect (specifically, his alleged contribution and intent) and the Anti-Balaka allegedly operating in each specific location, as charged by the Prosecutor.¹³⁸

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

aa) The Judges accepted alternative charging when the facts satisfy more than one crime, arguing that “in light of regulation 55 of the Regulations [of the Court], providing early notice as to the applicable legal qualifications is beneficial both for the rights of the Defence and judicial economy.”¹³⁹

bb) Regarding the contextual elements of crimes against humanity, the Chamber accepted the characterisation of the Anti-Balaka as an “organisation” within the meaning of Article 7 (2) (a), noting its military-like structure, large number of recruits who had been trained, the capability of coordinated attacks, and the formalisation of the group under the authority of the National Coordination.¹⁴⁰

cc) Regarding the war crime of “ordering the displacement of the civilian population”, pursuant to Article 8 (2) (e) (viii), the Chamber held that the term “order” in the definition of the crime does not require a direct order from the suspect within the meaning of Article 25 (3) (b). Rather, the crime may be committed under any form of criminal responsibility set forth in Articles 25 and 28. The Judges supported their interpretation with Paragraph 8 of the General Introduction to

the Elements of Crimes and a comparison with Article 7 (1) (d).¹⁴¹

dd) Regarding the destruction of the Boeing and Bossangoa mosques, the Chamber held that these incidents cannot be qualified as destroying the adversary’s property, pursuant to Article 8 (2) (e) (xii), as there was no evidence that the mosques were a military target. Rather, the Chamber considered the crime of intentionally directing an attack against buildings dedicated to religion, pursuant to Article 8 (2) (e) (iv), to be more appropriate.¹⁴²

ee) Regarding the crime of pillaging, the Chamber rejected to qualify the taking of money at checkpoints as an international crime. Rather, it considered this conduct to qualify as an “ordinary crime of theft and/or extortion”.¹⁴³

ff) Regarding the crime of enlisting children and using them in hostilities, the Chamber confirmed the charge for Mr Yekatom but declined to confirm the charge for Mr Ngaïssona, arguing that the Prosecutor had not established with sufficient evidence the link between the suspect and the facts. Call data records, disclosing contacts between Mr Ngaïssona and Mr Yekatom, media and NGO reports commenting on the presence of child soldiers in Anti-Balaka groups, or post-facto validation of Anti-Balaka members were considered to be too broad and generic in nature. Equally, the Judges did not follow the Prosecutor’s inferences regarding Mr Ngaïssona’s intent.¹⁴⁴

In the confirmation decision, the Pre-Trial Chamber also suspended the time limit for lodging a leave to appeal the decision, and decided that the time limit would only commence after receipt of the decision in French, the language Mr Yekatom and Mr Ngaïssona understand and speak.¹⁴⁵ On 21 February 2020, the French translation of the confirmation decision was filed in the case record.

Subsequently, the Ngaïssona Defence informed the Pre-Trial Chamber that it would not seek to appeal the decision and, therefore, requested that the case file be transmitted as soon as possible to the Presidency so that the latter constitute a Trial Chamber.¹⁴⁶ The Yekatom Defence notified the Chamber of the same, but requested that Mr Yekatom be provisionally released, pursuant to Article 60 (2).¹⁴⁷ A few days later, the Prosecutor requested reconsideration of the

¹³⁴ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 60.

¹³⁵ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), paras. 59, 165.

¹³⁶ These are events preceding and including the 5 December 2013 attack on Bangui, the 5 December 2013 attack on Bossangoa, attacks on the Yamwara School after 5 December 2013, and the crimes committed in PK9 – Mbaïki Axis (Lobaye Prefecture), including the killing of Djido Saleh.

¹³⁷ These locations include the Boeing Muslim Cemetery, Boy-Rabe (Bangui), Yaloké, Gaga, Zawa, Bossemtélé, Boda, Carnot, Berberati and Guen.

¹³⁸ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), paras. 166–239.

¹³⁹ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 121.

¹⁴⁰ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 69.

¹⁴¹ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 94.

¹⁴² ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 96, fn. 265.

¹⁴³ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), fn. 265.

¹⁴⁴ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), paras. 158–162.

¹⁴⁵ ICC, Decision of 11.12.2019 – ICC-01/14-01/18-403-Red-Corr (Confirmation Decision), para. 240.

¹⁴⁶ Filing of 26.2.2020 – ICC-01/14-01/18-434 (Defence request for a swift transmission of the case record to the Presidency pursuant to Rule 129 of the Rules of Procedure and Evidence).

¹⁴⁷ ICC, Filing of 3.3.2020 – ICC-01/14-01/18-438 (Yekatom Defence Application for Interim Release).

confirmation decision or, in the alternative, leave to appeal. In her view, this was necessary because the Judges (i) had refrained from assessing Mr Yekatom's criminal responsibility under Articles 28 and 25 (3) (c) and (d), and (ii) they should have confirmed all supported cumulative and alternative forms of criminal responsibility.¹⁴⁸ The Pre-Trial Chamber rejected both of the Prosecutor's requests, directed the Yekatom Defence to submit its request for provisional release to the Trial Chamber (discussed below), and ordered the transmission of the case file to the Presidency.¹⁴⁹ The Presidency constituted Trial Chamber V, composed of Judge Bertram Schmitt, Judge Péter Kovács and Judge Chang-ho Chung, and referred the case to it.¹⁵⁰

b) Amendment of the Charges Post-Confirmation

On 31 March 2020, the Prosecutor requested that the Pre-Trial Chamber (i) amend the charge of rape confirmed against Mr Ngaïssona by including and confirming a second instance of rape in the context of the 5 December 2013 attack in Bossangoa (that had been rejected at confirmation for lack of evidence), based on new evidence collected after the confirmation hearing; (ii) correct the article number for one count in the confirmation decision in order to clarify that it pertains only to crimes against humanity; and (iii) to take notice that she will submit a request to add additional charges for Mr Yekatom.¹⁵¹

With respect to the request to correct the confirmation decision, the Chamber agreed that the operative part of the decision mistakenly referred to Article 8 (2) (e) (vi) instead of Article 7 (1) (g) and indicated it would file a corrigendum of the confirmation decision.¹⁵²

With regard to the request to amend the confirmed charge of rape against Mr Ngaïssona by including and confirming a second instance of rape, the Chamber opined that the factual allegations underpinning the second instance of rape are entirely different from those underpinning the crime of rape as confirmed, in terms of victim, time, location and alleged perpetrator.¹⁵³ That being said, the Judges concluded that this cannot be qualified as a mere "amendment" of the same charge of rape as initially confirmed, but that it constitutes a new, additional charge requiring a confirmation hearing.¹⁵⁴ Differentiating between requests to add facts to an existing charge and to add a new charge, the Chamber stressed that both must be treated restrictively and exceptionally, in light of the potential prejudice caused to the Defence and the delays caused to the proceedings.¹⁵⁵ Noting that the facts concerned had been rejected originally by the Chamber for lack of sufficient evidence, it also expressed concerns to allow the reintroduction of non-confirmed charges following a supplemental investigation post-confirmation, as this approach would render the Chamber's filter function meaningless.¹⁵⁶ In this context, the Judges recalled that the Prosecutor's general prerogative inherent in Article 61 (9) to continue with the investigation is not unlimited, but, as insisted on by the Appeals Chamber and other pre-trial chambers, it should be largely completed at the stage of the confirmation.¹⁵⁷ In the present instance, the Chamber did not consider the circumstances to justify the triggering of the amendment procedure under Article 61 (9).¹⁵⁸

With regard to the Prosecutor's notice to submit a request to add additional charges for Mr Yekatom, the Chamber reacted with concern and announced it would exercise vigilance to avoid any delays in the proceedings.¹⁵⁹

On the same day the Pre-Trial Chamber issued the above decision, the Prosecutor also submitted the second request for amendment of the charges against Mr Yekatom under Article 61 (9), seeking the addition of new crimes of rape and sexual slavery as war crimes.¹⁶⁰ She informed the Chamber that during the investigation related to the conscription and

¹⁴⁸ Filing of 2.3.2020 – ICC-01/14-01/18-437 (Prosecution's Request for Reconsideration of, or alternatively Leave to Appeal, the "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona").

¹⁴⁹ ICC, Decision of 11.3.2020 – ICC-10/14-01/18-447 (Decision on the Prosecutor's request for reconsideration or, in the alternative, leave to appeal the "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona").

¹⁵⁰ ICC, Decision of 16.3.2020 – ICC-01/14-01/18-451 (Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona).

¹⁵¹ ICC, Filing of 31.3.2020 – ICC-01/14-01/18-468-Red (Public Redacted Version of "Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges (ICC-01/14-01/18-468-Conf)", 31 March 2020).

¹⁵² ICC, Decision of 14.5.2020 – ICC-01/14-01/18-517 (Decision on the "Prosecution's Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges" ["First Amendment Decision"]), para. 9.

¹⁵³ ICC, Decision of 14.5.2020 – ICC-01/14-01/18-517 (First Amendment Decision), para. 20.

¹⁵⁴ ICC, Decision of 14.5.2020 – ICC-01/14-01/18-517 (First Amendment Decision), para. 20.

¹⁵⁵ ICC, Decision of 14.5.2020 – ICC-01/14-01/18-517 (First Amendment Decision), paras. 21, 24.

¹⁵⁶ ICC, Decision of 14.5.2020 – ICC-01/14-01/18-517 (First Amendment Decision), para. 23.

¹⁵⁷ ICC, Decision of 14.5.2020 – ICC-01/14-01/18-517 (First Amendment Decision), paras. 25–26.

¹⁵⁸ ICC, Decision of 14.5.2020 – ICC-01/14-01/18-517 (First Amendment Decision), para. 31.

¹⁵⁹ ICC, Decision of 14.5.2020 – ICC-01/14-01/18-517 (First Amendment Decision), para. 38.

¹⁶⁰ ICC, Filing of 14.5.2020 – ICC-01/14-01/18-518-Red (Public Redacted Version of "Prosecution Motion to Amend the Charges against Alfred YEKATOM" 14 May 2020, [ICC-01/14-01/18-518-Conf] ["Second Article 61(9) Request]).

use of child soldiers, she uncovered credible evidence related to those crimes allegedly committed by Mr Yekatom's subordinates. Upon investigating further, she decided to submit the request in the interest of justice, considering the seriousness and importance of these allegations that, if added, will comprehensively reflect Mr Yekatom's responsibility. The Prosecutor acknowledged that this request, if granted, would impact the preparation of the Defence but averred, *inter alia*, that the Defence will have ample opportunity to prepare and there would be no detrimental impact on the expeditious conduct of the trial, considering that no trial date had been set at the time.¹⁶¹ If the Chamber would grant the request, the Prosecutor requested that the Chamber schedule a hearing for the confirmation of the additional charges.¹⁶²

The Chamber reacted on 1 June 2020.¹⁶³ The Judges remained unpersuaded that the Prosecutor had acted diligently considering that ten months passed from the moment she uncovered the evidence until submitting the request.¹⁶⁴ When balancing the competing rights, the Chamber noted in particular "the disruption caused to the Defence, the delay to the commencement of the trial and the prolongation of the accused's pre-trial custody inherent to the addition of the charges" and, accordingly, rejected the request.¹⁶⁵

The Prosecutor requested leave to appeal both decisions on Article 61 (9), but they were equally rejected.¹⁶⁶

2. *Proceedings Before Trial Chamber V*

Soon after having been assigned the case, Trial Chamber V, presided by Judge Schmitt (who was also designated by the Chamber as Single Judge),¹⁶⁷ took a series of procedural decisions aimed at preparing the trial which is scheduled to start on 9 February 2021.

a) *Trial Management and Disclosure*

It is worth noting that, from the start, the Chamber confirmed the continued applicability of certain procedures adopted at

the pre-trial stage¹⁶⁸ – a condition that contributes to the smooth transition and procedural continuity of proceedings. Upon invitation of the Chamber,¹⁶⁹ the Prosecutor and the parties submitted observations on discrete topics. The Prosecutor also proposed directions for the conduct of the proceedings and a protocol for witness familiarisation. The Ngaissona Defence protested and averred that the Prosecutor lacked the legal basis to make proposals on the conduct of proceedings. The Single Judge made clear that Rule 140 allows the Chamber to take into account proposals from the parties but "stated unequivocally" that the conduct of proceedings will be determined by the Chamber.¹⁷⁰

With a view to advancing the proceedings and mitigating the consequences of the Coronavirus Pandemic on the trial preparations, the Prosecutor was instructed to file a preliminary list of witnesses by 15 June 2020, listing those witnesses she was certain to call to testify and those that she was certain not to call, in light of the Pre-Trial Chamber's decision to decline to confirm certain charges.¹⁷¹ The Prosecutor submitted such provisional list as instructed¹⁷² and a status conference was held on 9 July 2020.¹⁷³

The statements of witnesses whom the Prosecutor intends to call to testify, must be disclosed to the Defence in their original language, together with the translation into the language the accused fully understands and speaks, pursuant to Rule 76 (3). Before the preliminary list of witnesses was submitted by the Prosecutor, the Yekatom Defence requested that the recordings or transcriptions of the interviews of three Sango-speaking witnesses, containing the original answers of the witnesses, be disclosed to the Defence.¹⁷⁴ It had received the transcripts of the interviews containing the questions and answers in French but without the corresponding text in Sango. Noting that the Prosecutor had not yet made her witness choice in the preliminary list, and considering the reduced size of the case after the confirmation of charges, the Single Judge rejected the request as premature.¹⁷⁵ For future purpos-

¹⁶¹ ICC, Filing of 14.5.2020 – ICC-01/14-01/18-518-Red (Second Article 61(9) Request), paras. 2–5, 33–36.

¹⁶² ICC, Filing of 14.5.2020 – ICC-01/14-01/18-518-Red (Second Article 61(9) Request), para. 6.

¹⁶³ ICC, Decision of 1.6.2020 – ICC-01/14-01/18-538 (Decision on the Prosecutor's request to amend the charges against Alfred Yekatom ["Second Amendment Decision"]).

¹⁶⁴ ICC, Decision of 1.6.2020 – ICC-01/14-01/18-538 (Second Amendment Decision), paras. 17–18.

¹⁶⁵ ICC, Decision of 1.6.2020 – ICC-01/14-01/18-538 (Second Amendment Decision), para. 19.

¹⁶⁶ ICC, Decision of 19.6.2020 – ICC-01/14-01/18-560 (Consolidated Decision on filings ICC-01/14-01/18-524-Corr and ICC-01/14-01/18-545 [Prosecutor's requests for leave to appeal the decisions pursuant to article 61(9) of the Rome Statute dated 14 May 2020 and 1 June 2020]).

¹⁶⁷ ICC, Decision of 17.3.2020 – ICC-01/14-01/18-454 (Decision notifying the election of a Presiding Judge and Single Judge).

¹⁶⁸ ICC, Decision of 19.3.2020 – ICC-01/14-01/18-459 (Order Scheduling First Status Conference), para. 8.

¹⁶⁹ ICC, Decision of 19.3.2020 – ICC-01/14-01/18-459 (Order Scheduling First Status Conference).

¹⁷⁰ ICC, Decision of 23.4.2020 – ICC-01/14-01/18-491 (Decision on the Ngaissona Defence Requests Related to the Prosecution Submissions on the Conduct of Proceedings).

¹⁷¹ ICC, Decision of 22.5.2020 – ICC-01/14-01/18-528 (Order to Provide a Preliminary Witness List).

¹⁷² ICC, Filing of 15.6.2020 – ICC-01/14-01/18-553 (Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528).

¹⁷³ ICC, Decision of 4.6.2020 – ICC-01/14-01/18-543 (Second Order Scheduling First Status Conference).

¹⁷⁴ ICC, Filing of 29.4.2020 – ICC-01/14-01/18-498 (Motion for disclosure of witness statements in their original language).

¹⁷⁵ ICC, Decision of 29.5.2020 – ICC-01/14-01/18-535 (Decision on the Yekatom Defence Request for Disclosure of

es, the Single Judge also ruled that the Prosecutor must disclose to the Defence the audio/video recordings of interviews of witnesses or the related transcripts she intends to rely upon at trial containing the questions and answers in Sango as these portions fall under the definition of “original” within the meaning of Rule 76 (3).¹⁷⁶

Related to the above issue is the Chamber’s decision that the Prosecutor is not duty-bound under Rule 76 to disclose draft statements of witnesses prepared by investigators, i.e. statements that are not yet approved and signed by the witness, pursuant to Rule 111.¹⁷⁷ This is so, because draft statements may not accurately reflect what the witness has said, or may contain inaccuracies, errors or omissions.¹⁷⁸ Rather, only formal statements, i.e. those that have been accepted by witnesses as their own, are disclosable under Rule 76.¹⁷⁹ However, draft statements may be disclosable under Rule 77 or Article 67 (2).¹⁸⁰

The opening of the trial is scheduled to take place on 9 February 2021, the presentation of evidence is expected to start in March 2021.¹⁸¹ In order to organise the proceedings leading up to the opening of the trial, the Chamber also adopted a calendar for the disclosure of evidence, the submission of provisional/final witness lists with summaries of anticipated witness testimony and other relevant information, the Prosecutor’s trial brief, joint submission on agreed facts, collection of victims applications (for which, due to the pandemic-related circumstances, the deadline was extended to the end of the Prosecutor’s presentation of evidence).¹⁸²

Judge Schmitt, in his capacity as Presiding Judge, also gave initial directions as to the conduct of proceedings.¹⁸³ These directions concerned, for example, the order and time of opening statements,¹⁸⁴ in-court presentation of evidence,¹⁸⁵

including via video link,¹⁸⁶ or by resorting to Rule 68,¹⁸⁷ arrangements for witnesses at risk of incriminating themselves,¹⁸⁸ and specific guidelines to the legal representatives of victims as to the questioning of witnesses. In particular, victims’ counsel were informed that they do not need to submit their questions in writing in advance but were reminded that their questioning must be limited to matters relevant to the personal interests of victims, such as the harm suffered.¹⁸⁹ The Prosecutor had informed the Chamber that she intends to rely on 152 witnesses, calling 109 of them to give *viva voce* testimony (70 witnesses of which will testify at the seat of the Court).¹⁹⁰ For her presentation of the evidence, the Prosecutor was granted a 400 hours limit.¹⁹¹ The two Defence teams were allotted 200 hours each for the presentation of their respective evidence.¹⁹² Notably, the Presiding Judge indicated that the Chamber reserves the right to limit the number of witnesses.¹⁹³ Lastly, the Presiding Judge clarified that issues unaddressed in his directions, such as the questioning of witnesses, would be resolved during trial.¹⁹⁴

In his initial directions, the Presiding Judge also reiterated that the Chamber will not assess the admissibility of each piece of evidence when submitted, but will defer such assessment to the judgment, except when ruling on certain procedural bars is mandatory (see Article 69 [7] or Rules 68, 71 and 72) or appropriate for reasons of fairness.¹⁹⁵ This cements further the ICC Trial Chambers’ approach established in the Bemba et al, Ongwen, Gbagbo/Blé Goudé, Al Mahdi and Al Hassan cases (see above) to accept evidence as submitted during trial but to leave the onerous assessment of the admissibility criteria to the end, when the entirety of the

Witness Statements in their Original Language [“Decision on Languages”]), para. 9.

¹⁷⁶ ICC, Decision of 29.5.2020 – ICC-01/14-01/18-535 (Decision on Languages), para. 11.

¹⁷⁷ ICC, Decision of 1.6.2020 – ICC-01/14-01/18-539 (Decision on the Yekatom Defence Motion for Disclosure of Draft Witness Statements [“Draft Statements Decision”]).

¹⁷⁸ ICC, Decision of 1.6.2020 – ICC-01/14-01/18-539 (Draft Statements Decision), para. 16.

¹⁷⁹ ICC, Decision of 1.6.2020 – ICC-01/14-01/18-539 (Draft Statements Decision), paras. 17–19.

¹⁸⁰ ICC, Decision of 1.6.2020 – ICC-01/14-01/18-539 (Draft Statements Decision), paras. 24–25.

¹⁸¹ ICC, Decision of 16.7.2020 – ICC-01/14-01/18-589 (Decision Setting the Commencement Date of the Trial [“Start of Trial Decision”]).

¹⁸² ICC, Decision of 16.7.2020 – ICC-01/14-01/18-589 (Start of Trial Decision), paras. 6, 10–11.

¹⁸³ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Initial Directions on the Conduct of the Proceedings [“Conduct of Proceedings”]).

¹⁸⁴ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), paras. 9–15.

¹⁸⁵ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), paras. 16–17.

¹⁸⁶ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), paras. 29–31.

¹⁸⁷ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), paras. 32–35.

¹⁸⁸ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), paras. 36–39.

¹⁸⁹ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), paras. 18–19.

¹⁹⁰ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), para. 21. In the meantime, the Prosecutor updated the list of witnesses and informed the Judges that she intends to call 147 witnesses (specifically, 55 Rule 68 [2] witnesses, 67 Rule 68 [3] witnesses and 25 fully *viva voce* witnesses) and four experts, ICC, Filing of 9.11.2020 – ICC-01/14-01/18-724 (Prosecution’s List of Witnesses and Evidence), para. 4 and fn. 3.

¹⁹¹ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), para. 22.

¹⁹² ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), para. 24.

¹⁹³ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), para. 23.

¹⁹⁴ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), paras. 3–4.

¹⁹⁵ ICC, Decision of 26.8.2020 – ICC-01/14-01/18-631 (Conduct of Proceedings), paras. 52–65.

evidence is assessed as a whole and it crystallises on which evidence the Chamber will base the judgment.

Closer to the start of the trial, the Chamber adopted certain protocols that facilitate certain aspects of the upcoming trial, including a witness familiarisation protocol.¹⁹⁶ Of particular importance is the Chamber's position regarding the Prosecutor's request to allow the preparation of witnesses prior to their testimony.¹⁹⁷ To begin with, the Chamber accepted that it has discretion, pursuant to Article 64 (2) and (3) (a), to adopt procedures to ensure the fair and expeditious trial, which may encompass also witness preparation.¹⁹⁸ However, for the following reasons, it rejected this practice. First, it shared the concerns of the Defence, which opposed such practice,¹⁹⁹ agreeing that witness preparation bears the inherent risk that the witness's evidence is rehearsed and distorted, regardless of the intentions of the calling party.²⁰⁰ The Chamber explained that such contamination may occur simply by conveying implicitly an expectation to the witness as to what he or she is expected to testify. Secondly, it recalled that the witnesses' recollection of events is tested in court through questioning by all parties equally in accordance with the principle of immediacy.²⁰¹ Thirdly, the Judges highlighted that inconsistencies in the testimony of witnesses or deviations from their previous statements are of great importance to the Judges' evaluation of evidence; these inconsistencies and contradictions would be eradicated should the witnesses be prepared prior to their in-court testimony.²⁰² In any event, the witnesses are provided with their previous statement prior to their testimony in order to refresh their memory.²⁰³ Fourthly, the Chamber emphasised that the Victims and Witnesses Unit is responsible for the well-being and safety of witnesses and is best placed to take care of them in the context of their testimony.²⁰⁴ Lastly, the Chamber weighed the Prosecutor's arguments in the exercise of its

discretion, namely the budgetary and logistical constraints, including Coronavirus-related consequences on the proceedings, and the passage of time between the investigation and the trial, but found them without merit.²⁰⁵ This decision is in line with the same approaches adopted in the Lubanga,²⁰⁶ Katanga/Ngudjolo,²⁰⁷ Bemba,²⁰⁸ Bemba et al.,²⁰⁹ Ongwen²¹⁰ and Gbagbo/Blé Goudé²¹¹ cases and may mark an emerging trend in international trials in which, up until now, practitioners accepted without further discussion the practice of witness preparation. The Prosecutor's leave to appeal this decision rejecting witness preparation was rejected by the Trial Chamber.²¹²

b) Charges

As a consequence of the Pre-Trial Chamber's rejection to amend the charges against Mr Yekatom, the Prosecutor approached the Trial Chamber with a view to giving notice of the possible re-characterisation of the facts under Articles 25 (3) (c) and (d) and 28 (a).²¹³ The Chamber recalled the three-step procedure of this remedy at the disposal of the Trial Chamber, which it may exercise to close impunity gaps.²¹⁴ The Chamber also confirmed that it may exercise its prerogative prior to the commencement of trial so as to give early notice to the Defence.²¹⁵ Nevertheless, the Chamber rejected

¹⁹⁶ ICC, Decision of 8.10.2020 – ICC-01/14-01/18-677-Anx1 (Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial).

¹⁹⁷ ICC, Decision of 8.10.2020 – ICC-01/14-01/18-677 (Decision on Protocols at Trial), paras. 9–30.

¹⁹⁸ ICC, Decision of 8.10.2020 – ICC-01/14-01/18-677 (Decision on Protocols at Trial), para. 17.

¹⁹⁹ ICC, Filing of 15.5.2020 – ICC-01/14-01/18-519 (Yekatom Defence Response to the Submissions on the Conduct of Proceedings), paras. 17–21; ICC Filing of – ICC-01/14-01/18-521-Red (Public redacted version of Ngaïssona Defence Response to the Submissions on the Conduct of Proceedings), paras. 3–13.

²⁰⁰ ICC, Decision of 8.10.2020 – ICC-01/14-01/18-677 (Decision on Protocols at Trial), para. 21.

²⁰¹ ICC, Decision of 8.10.2020 – ICC-01/14-01/18-677 (Decision on Protocols at Trial), para. 23.

²⁰² ICC, Decision of 8.10.2020 – ICC-01/14-01/18-677 (Decision on Protocols at Trial), para. 24.

²⁰³ ICC, Decision of 8.10.2020 – ICC-01/14-01/18-677 (Decision on Protocols at Trial), paras. 20, 25, 29.

²⁰⁴ ICC, Decision of 8.10.2020 – ICC-01/14-01/18-677 (Decision on Protocols at Trial), paras. 19–20, 22.

²⁰⁵ ICC, Decision of 8.10.2020 – ICC-01/14-01/18-677 (Decision on Protocols at Trial), paras. 27–30.

²⁰⁶ ICC, Decision of 2.12.2007 – ICC-01/04-01/06-1049 (Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial).

²⁰⁷ ICC, Decision of 14.5.2009 – ICC-01/04-01/07-1134 (Decision on a number of procedural issues raised by the Registry), para. 18.

²⁰⁸ ICC Decision of 18.11.2010 – ICC-01/05-01/08-1016 (Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial) with one dissenting opinion.

²⁰⁹ ICC, Decision of 15.9.2015 – ICC-01/05-01/13-1252 (Decision on Witness Preparation and Familiarisation).

²¹⁰ ICC, Decision of 22.7.2016 – ICC-02/04-01/15-504 (Decision on Protocols to be Adopted at Trial).

²¹¹ ICC, Decision of 2.12.2015 – ICC-02/11-01/15-355 (Decision on witness preparation and familiarisation) with one dissenting opinion.

²¹² ICC, Decision of 11.11.2020 – ICC-01/14-01/18-726 (Decision on the Prosecution Request for Leave to Appeal the Decision on Protocols at Trial).

²¹³ ICC, Filing of 30.4.2020 – ICC-01/14-01/18-503-Red (Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Accused Yekatom's Individual Criminal Responsibility).

²¹⁴ ICC, Decision of 2.6.2020 – ICC-01/14-01/18-542 (Decision on the Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility ["Regulation 55 Decision"]), paras. 10–11.

²¹⁵ ICC, Decision of 2.6.2020 – ICC-01/14-01/18-542 (Regulation 55 Decision), para. 12.

activating Regulation 55 of the Regulations of the Court at this stage, noting in particular that the Pre-Trial Chamber had rejected twice the proposed forms of criminal responsibility and that statutory framework did not provide for the possibility of a review of confirmation decisions by trial chambers.²¹⁶

The Yekatom Defence requested additional information to the charges as framed in the confirmation decision regarding the identity of child soldiers and that of murdered persons.²¹⁷ The Defence submitted that it needed this information in order to verify the age of the child soldiers and whether the murdered persons were actually combatants or civilians. The Chamber rejected this request with a decision dated 13 July 2020.²¹⁸ It clarified that it reviewed the request through the lens of the accused's right to be informed promptly and in detail about the nature, cause and content of the charges (Article 67 [1] [a]), but also reminded the Yekatom Defence that it was bound by the factual scope of the confirmation decision that sets the parameters of the trial.²¹⁹ Upon review, the Chamber concluded that the confirmation decision, especially in light of the confirmed form of criminal responsibility, was framed with sufficient specificity so as to guarantee Mr Yekatom's rights.²²⁰ That said, the Chamber noted that the burden of proof lies with the Prosecutor and that information as to the status of victims, including their identity and age, may be subject to disclosure.²²¹

Soon after lodging its request for additional details to the charges, the Yekatom Defence requested the Chamber to dismiss Mr Yekatom's alleged responsibility as a co-perpetrator under Article 25 (3) (a) and to proceed at trial only with his alleged responsibility for ordering, pursuant to Article 25 (3) (b).²²² The Ngaissona Defence also claimed that the Prosecutor had not duly taken into account the reduced scope of the confirmed charges when submitting its preliminary list of witnesses²²³ and requested at the status conference that the Prosecutor reduce the number of witness-

es.²²⁴ This prompted the Trial Chamber to issue a decision with a view to resolving issues regarding the interpretation of the confirmation decision, as raised by the parties.²²⁵

At the outset, the Chamber reiterated that it is not vested with the power to set the scope of the case and will therefore defer to the findings of the Pre-Trial Chamber.²²⁶ It thereafter turned first to Mr Yekatom who pleaded to dismiss the mode of liability of co-perpetration, because the Pre-Trial Chamber had deviated from the Court's established interpretation of co-perpetration without indicating its own understanding thereof, and had failed to make factual findings in relation to the common plan, the identities of the other alleged co-perpetrators and Mr Yekatom's alleged contribution. While the Chamber agreed that the charges must set out with specificity the exact sub-provision and specific form of criminal responsibility, as set forth in Regulation 52 (c) of the Regulation of the Court,²²⁷ it opined that the constituent legal elements underlying the alleged forms of responsibility must not be laid down, especially when there is clarity in the jurisprudence of the Court.²²⁸ In any event, the Trial Chamber is not bound by the legal interpretation of the Pre-Trial Chamber.²²⁹ Nevertheless, given the particular circumstances of the case, the Trial Chamber informed the parties that it intends to follow the existing jurisprudence of the Court, in particular the Appeals Chamber's construction of co-perpetration.²³⁰ As regards Mr Yekatom's claim that he had not been notified of the facts underlying the objective elements of co-perpetration, the Chamber stressed that the charges must identify "with sufficient clarity and detail the factual allegations which support each of the constituent legal elements".²³¹ Upon review of the confirmation decision, the Chamber held that Mr Yekatom had been provided all relevant facts.²³²

Thereafter, the Chamber turned to Mr Ngaissona who claimed that the Prosecutor may not rely on evidence pertaining to non-confirmed incidents or to facts which fall outside the temporal scope of the charges in order to support the

²¹⁶ ICC, Decision of 2.6.2020 – ICC-01/14-01/18-542 (Regulation 55 Decision), paras. 14–15.

²¹⁷ Filing of 15.6.2020 – ICC-01/14-01/18-554-Red (Motion For Additional Details). The public redacted version of the filings was submitted on 17.6.2020.

²¹⁸ ICC, Decision of 13.7.2020 – ICC-01/14-01/18-585 (Decision on the Yekatom Defence Motion for Additional Details ["Additional Details Decision"]).

²¹⁹ ICC, Decision of 13.7.2020 – ICC-01/14-01/18-585 (Additional Details Decision), paras. 21–22.

²²⁰ ICC, Decision of 13.7.2020 – ICC-01/14-01/18-585 (Additional Details Decision), paras. 26, 32.

²²¹ ICC, Decision of 13.7.2020 – ICC-01/14-01/18-585 (Additional Details Decision), paras. 28–29, 33.

²²² ICC, Filing of 22.6.2020 – ICC-01/14-01/18-565-Red (Motion to Dismiss Co-Perpetration Mode of Liability).

²²³ ICC, Filing of 26.6.2020 – ICC-01/14-01/18-573-Red (Defence Observations on "Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528").

²²⁴ ICC, Transcript of 9.7.2020 – ICC-01/14-01/18-T-012-ENG, p. 35, lines 4–7, p. 37, lines 17–19.

²²⁵ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial ["Scope of Charges Decision"]). The public redacted version of the decision was filed on 30.10.2020.

²²⁶ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), para. 10.

²²⁷ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), para. 17.

²²⁸ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), para. 18.

²²⁹ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), para. 25.

²³⁰ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), para. 26.

²³¹ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), para. 19.

²³² ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), paras. 27–37.

contextual elements of the crimes or to prove Mr Ngaïssona's intent. Upon review of the confirmation decision, the Chamber contradicted the Ngaïssona Defence's interpretation and clarified that unconfirmed incidents indeed form part of the "facts and circumstances" of the contextual elements and cannot be considered excluded simply because Mr Ngaïssona does not bear individual responsibility for them.²³³ Regarding the specificity with which the confirmation decision details the facts relevant for the context, the Trial Chamber accepted, in the specific circumstances of the case, that the confirmation decision be read together with the DCC, to which it refers and that, therefore, Mr Ngaïssona has been sufficiently informed.²³⁴ Lastly, the Chamber also dismissed the Defence's argument that the Prosecutor may not rely on evidence falling outside the temporal scope of the charges. It recalled that "evidence going to facts which fall outside of the temporal scope of the charges may be relied upon to prove facts and circumstances described in the charges, whether for the purpose of establishing the contextual elements of the charged crimes or the modes of liability".²³⁵ Mr Yekatom requested leave to appeal the decision, which the Chamber granted on 13 November 2020. The Chamber granted leave to appeal on two issues: (i) whether the Chamber erred in finding that it was not necessary for the charges to set out the constituent legal elements of the alleged mode(s) of liability in order for the accused to be adequately informed; and (ii) whether it erred in finding that Mr Yekatom was sufficiently informed of the contours of the "common plan" and his alleged "essential contribution" although the Pre-Trial Chamber had not used this terminology established in the jurisprudence of the Court to characterise the relevant facts.²³⁶ At the time of writing, a decision of the Appeals Chamber is pending.

cc) Admissibility of the Case

On 17 March 2020, the day the case record was transmitted to the Trial Chamber, the Yekatom Defence challenged the admissibility of the case against Mr Yekatom.²³⁷ The Yekatom Defence based its challenge on the fact that the CAR

authorities are "now capable to prosecute him in their own Special Criminal Court", while admitting that no such investigation against Mr Yekatom is ongoing.²³⁸ It also invited the Chamber to approach the CAR authorities and to enquire whether they would be able and willing to investigate and prosecute Mr Yekatom and, if yes, to give the CAR authorities the opportunity, within a given time period, to commence an investigation or prosecution, while the Prosecutor shares the results of her investigation with the Special Criminal Court. If the investigation or prosecution does not go forward, the Prosecutor may request a review of the Trial Chamber's decision, pursuant to Article 19 (10).²³⁹

Having heard from the Yekatom Defence, the Prosecutor and the legal representatives of victims, the Trial Chamber agreed with the Defence that there was neither a domestic investigation or prosecution ongoing nor an indication on the part of the CAR authorities to commence such investigation or prosecution.²⁴⁰ In particular, the Chamber highlighted that the CAR referred the situation to the Court, executed the warrant of arrest for Mr Yekatom and did not challenge the admissibility of the case.²⁴¹ As a result, and in line with the Appeals Chamber case-law, the Trial Chamber concluded that the CAR authorities are inactive, rendering the case before the ICC admissible.²⁴² The alternative request to invite the CAR authorities to commence an investigation or prosecution was equally rejected, based on the argument that capacity building of States is not within the Chamber's purview and that the Chamber must ensure that the trial is conducted expeditiously with full respect for the rights of the accused and that of the victims.²⁴³ Lastly, the Chamber clarified that it had not sought the observations from the State before ruling on the admissibility challenge in light of, amongst other, the Yekatom Defence concessions.²⁴⁴

The Trial Chamber's decision was appealed by Mr Yekatom under Article 82 (1) (a).²⁴⁵ At the time of writing, a decision of the Appeals Chamber is pending.

d) Interim Release

The Yekatom Defence's request for interim release, under Article 60 (2) was entertained by the Trial Chamber and

²³³ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), paras. 44–49.

²³⁴ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), para. 50.

²³⁵ ICC, Decision of 29.10.2020 – ICC-01/14-01/18-703-Red (Scope of Charges Decision), para. 51. Similarly, ICC, Decision of 16.7.2015 – ICC-01/13-34 (Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation), para. 17; ICC; Transcript of 24.1.2018 – ICC-02/04-01/15-T-147-Red2-ENG, p. 7, lines 3–12.

²³⁶ ICC, Decision of 13.11.2020 – ICC-01/14-01/18-730 (Decision on the Yekatom Defence Request for Leave to Appeal the Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial), p. 8.

²³⁷ ICC, Filing of 17.3.2020 – ICC-01/14-01/18-456 (Yekatom Defence's Admissibility Challenge – Complementarity ["Yekatom Admissibility Challenge"]).

²³⁸ ICC, Filing of 17.3.2020 – ICC-01/14-01/18-456 (Yekatom Admissibility Challenge), paras. 1, 13, 32.

²³⁹ ICC, Filing of 17.3.2020 – ICC-01/14-01/18-456 (Yekatom Admissibility Challenge), paras. 38–40.

²⁴⁰ ICC, Decision of 28.4.2020 – ICC-01/14-01/18-493 (Decision on the Yekatom Defence's Admissibility Challenge ["Yekatom Admissibility Decision"]), paras. 19–20.

²⁴¹ ICC, Decision of 28.4.2020 – ICC-01/14-01/18-493 (Yekatom Admissibility Decision), para. 20.

²⁴² ICC, Decision of 28.4.2020 – ICC-01/14-01/18-493 (Yekatom Admissibility Decision), para. 21.

²⁴³ ICC, Decision of 28.4.2020 – ICC-01/14-01/18-493 (Yekatom Admissibility Decision), paras. 22–24.

²⁴⁴ ICC, Decision of 28.4.2020 – ICC-01/14-01/18-493 (Yekatom Admissibility Decision), para. 25.

²⁴⁵ ICC, Filing of 19.5.2020 – ICC-01/14-01/18-523 (Yekatom Defence Appeal Brief – Admissibility).

rejected.²⁴⁶ As regards the Yekatom Defence arguments relating to the delays in the proceedings, resulting from, *inter alia*, the joinder, the Prosecutor's request for postponement of the confirmation hearing and request for reconsideration/leave to appeal the confirmation decision, the Chamber found that none of the factors justified Mr Yekatom's release on grounds of unreasonableness of the duration of his detention.²⁴⁷ Equally, as regards the Yekatom Defence arguments to consider release due to equity considerations as a result of infringements of his rights during the arrest proceedings in the custodial State, the Chamber did not identify any such violations or irregularities attributable to the Court and rejected releasing Mr Yekatom.²⁴⁸ This decision was reviewed by the Trial Chamber, pursuant to Article 60 (3), albeit later than 120 days after the initial decision. In sum, the Judges held that the circumstances warranting Mr Yekatom's detention had not changed.²⁴⁹

IX. Situation in Libya (Pre-Trial Chamber I)²⁵⁰ – Prosecutor v Saif Al-Islam Gaddafi (Pre-Trial Chamber I)²⁵¹

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 the Gaddafi case.

- Warrant of arrest: 27.6.2011
- Admissibility decision pre-trial: 31.5.2013
- Admissibility decision appeals: 21.4.2014
- Second admissibility decision pre-trial: 5.4.2019
- Second admissibility decision appeals: 9.3.2020
- Victims participating: --
- Current Status: Suspect at large

Saif Al-Islam Gaddafi ("Mr Gaddafi") was convicted and sentenced to death by the Tripoli Criminal Court in a judgment dated 28 July 2015. Nine months later, on or around 12 April 2016, he was released from prison pursuant to Amnesty Law No. 6 (2015). Subsequently, his counsel challenged the admissibility of the case before the ICC pursuant to Article 17 (1) (c) and 20 (3). The Pre-Trial Chamber rendered on 5 April 2019 a decision determining that the case continues to be admissible before the Court.²⁵² Upon direct

appeal of Mr Gaddafi, the Appeals Chamber confirmed the Pre-Trial Chamber's second admissibility decision.²⁵³

Mr Gaddafi challenged two findings of the Pre-Trial Chamber: (i) it erred in law in holding that Articles 17 (1) (c) and 20 (3) may only be satisfied where a judgment on the merits of a case has acquired *res judicata* effect; and (ii) it erred in law and fact, and procedurally, by failing to determine that the Amnesty Law No. 6 (2015) was applied to Mr Gaddafi and that such application rendered his conviction final.²⁵⁴ The Appeals Chamber key findings are quickly summarised hereunder.

As regards the first ground of appeal, the Appeals Chamber considered first the nature of the trial proceedings before the Tripoli Criminal Court and agreed with the Pre-Trial Chamber that Mr Gaddafi had been tried in absentia. This means that the judgment is not final and that, if Mr Gaddafi is arrested or apprehended, he will be retried.²⁵⁵ The Appeals Chamber also agreed with the Pre-Trial Chamber's conclusion that the judgment relating to Mr Gaddafi, who has been sentenced to death, is subjected to mandatory review under Libyan law and, therefore, not final.²⁵⁶ The Appeals Chamber also confirmed the Pre-Trial Chamber's interpretation that a judgment must be final, in the sense of having acquired *res judicata* effect in the national system, for the case to be inadmissible before the ICC under Articles 17 (1) (c) and 20 (3).²⁵⁷ In the view of the Appeals Chamber, relying only on first-instance judgments without taking into account potential appellate proceedings would render it impossible for the Court to meaningfully assess whether the national proceedings had been conducted for the purpose of shielding, or had not been conducted independently or impartially, within the meaning of Article 20 (3).²⁵⁸ The Appeals Chamber also

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). The previous overview summarises the Pre-Trial Chamber's admissibility decision, see *Chaitidou*, ZIS 2019, 567 (577).

²⁵³ ICC, Judgment of 9.3.2020 – ICC-01/11-01/11-695 (Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled "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'" of 5 April 2019 ["Second Admissibility Judgment"]).

²⁵⁴ 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'").

²⁵⁵ ICC, Judgment of 9.3.2020 – ICC-01/11-01/11-695 (Second Admissibility Judgment), para. 53.

²⁵⁶ ICC, Judgment of 9.3.2020 – ICC-01/11-01/11-695 (Second Admissibility Judgment), para. 54.

²⁵⁷ ICC, Judgment of 9.3.2020 – ICC-01/11-01/11-695 (Second Admissibility Judgment), paras. 58, 61, 63.

²⁵⁸ ICC, Judgment of 9.3.2020 – ICC-01/11-01/11-695 (Second Admissibility Judgment), para. 59.

²⁴⁶ ICC, Decision of 28.4.2020 – ICC-01/14-01/18-495-Red3 (Decision on the Yekatom Defence Application for Interim Release ["Interim Release Yekatom"]). A public redacted version of the decision was filed on 24.7.2020.

²⁴⁷ ICC, Decision of 28.4.2020 – ICC-01/14-01/18-495-Red3 (Interim Release Yekatom), paras. 37–46.

²⁴⁸ ICC, Decision of 28.4.2020 – ICC-01/14-01/18-495-Red3 (Interim Release Yekatom), paras. 48–52.

²⁴⁹ ICC, Decision of 7.9.2020 – ICC-01/14-01/18-643-Red (Decision on the Second Yekatom Defence Motion for Interim Release).

²⁵⁰ The record carries the situation number ICC-01/11.

²⁵¹ The record carries the case number ICC-01/11-01/11.

²⁵² 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

concluded that this interpretation conforms best with the principle of complementarity.²⁵⁹

As regards the second ground of appeal, the Appeals Chamber also confirmed the Pre-Trial Chamber's finding that Amnesty Law No. 6 (2015) was not applicable to Mr Gaddafi and, therefore, had not rendered the Tripoli Criminal Court judgment final within the meaning of Articles 17 (1) (c) and 20 (3).²⁶⁰ Apart from the aforementioned findings, the Appeals Chamber refrained from espousing its views on the applicability of amnesties in the context of Article 17 (1) (c) or whether, when they concern international crimes, they are compatible with international law.²⁶¹ The Appeals Chamber acknowledged the position of the Pre-Trial Chamber but concluded "that international law is still in the developmental stage on the question of acceptability of amnesties".²⁶² Judge Ibáñez Carranza appended a concurring separate opinion in which she argued that the Pre-Trial Chamber's position on the compatibility of amnesties with international law and the Rome Statute was not merely obiter dicta but a core strand of the Pre-Trial Chamber's decision. She offered an analysis on the matter and concluded that amnesties offering impunity for international crimes are impermissible under international law.²⁶³ Judge Eboe-Osui and Judge Bossa appended their thoughts on the dilemma arising from pursuing complementarity and the objective to end impunity.²⁶⁴

X. Situation in the Republic of Kenya (Pre-Trial Chamber II)²⁶⁵ – Prosecutor v Paul Gicheru and Philip Kipkoech Bett (Pre-Trial Chamber A [Article 70])²⁶⁶

Two cases in which a Pre-Trial Chamber had issued warrants of arrest for allegations of offences against the administration of justice remained dormant for years as the suspects are at large. With the surrender of Paul Gicheru, proceedings were re-activated in part in one case.

- Warrant of arrest Gicheru: 10.3.2015 (unsealed 10.9.2015)

²⁵⁹ ICC, Judgment of 9.3.2020 – ICC-01/11-01/11-695 (Second Admissibility Judgment), paras. 59, 61.

²⁶⁰ ICC, Judgment of 9.3.2020 – ICC-01/11-01/11-695 (Second Admissibility Judgment), paras. 93–94, 97.

²⁶¹ ICC, Judgment of 9.3.2020 – ICC-01/11-01/11-695 (Second Admissibility Judgment), paras. 88, 96.

²⁶² ICC, Judgment of 9.3.2020 – ICC-01/11-01/11-695 (Second Admissibility Judgment), para. 96.

²⁶³ ICC, Opinion of 22.4.2020 – ICC-01/11-01/11-695AnxI (Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza on the Judgment on the appeal of Mr Saif AlIslam Gaddafi against the decision of Pre-Trial Chamber I entitled "Decision on the 'Admissibility Challenge by Dr. Saif AlIslam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute'").

²⁶⁴ ICC, Opinion of 9.3.2020 – ICC-01/11-01/11-695-Anx (Concurring Separate Opinion of Judge Eboe-Osui and Judge Bossa).

²⁶⁵ The record carries the situation number ICC-01/09.

²⁶⁶ The record carries the case number ICC-01/09-01/15.

- Surrender Gicheru to the Court: 3.11.2020
- First appearance Gicheru: 6.11.2020
- Current Status: Preparation of Confirmation of Charges

A warrant of arrest was issued by Pre-Trial Chamber II (the functions of which were exercised by a Single Judge) in March 2015 for Paul Gicheru ("Mr Gicheru") and Philip Kipkoech Bett for allegations of corruptly influencing six witnesses, pursuant to Article 70 (1) (c) in conjunction with Article 25 (3) (a) or, in the alternative, Article 25 (3) (b).²⁶⁷ The Single Judge found reasonable grounds to believe that from at least April 2013 Paul Gicheru was the manager and coordinator of a criminal scheme designed to systematically approach and corruptly influence the Prosecutor's witnesses through bribery and other methods of inducements in exchange for their withdrawal as prosecution witnesses and/or recantation of their prior statements. He allegedly finalised agreements with corrupted witnesses, organised the formalisation of their withdrawal and handled the payments of money.²⁶⁸

Mr Gicheru surrendered himself to the authorities of the Netherlands on 2 November 2020.²⁶⁹ On the same day, Pre-Trial Chamber II, to which the Kenya situation was assigned, requested the President of the Pre-Trial Division to "constitute a Chamber to exercise the functions and powers of the Pre-Trial Chamber in the present case", pursuant to Regulation 66bis.²⁷⁰ Judge Tomoko Akane, the President of the Pre-Trial Division, acting under Rule 165 (2),²⁷¹ acceded to this

²⁶⁷ ICC, Decision of 15.3.2015 – ICC-01/09-01/15-1-Red (Decision on the "Prosecution's Application under Article 58(1) of the Rome Statute" ["Warrant of Arrest"]).

²⁶⁸ ICC, Decision of 15.3.2015 – ICC-01/09-01/15-1-Red (Warrant of Arrest), para. 11.

²⁶⁹ ICC, Decision of 2.11.2020 – ICC-01/09-01/15-32 (Decision Constituting a Chamber Composed of one Judge from the Pre-Trial Division to Exercise the Powers and Functions of the Pre-Trial Chamber in the Present Case ["Composition Decision"]), p. 3.

²⁷⁰ ICC, Decision of 2.11.2020 – ICC-01/09-01/15-32 (Composition Decision), p. 3. Regulation 66bis (1) of the Regulations of the Court stipulates: "The President of the Pre-Trial Division, at the request of the Pre-Trial Chamber seized of the relevant situation, shall constitute, in accordance with rule 165(2), a Chamber composed of one judge from the Pre-Trial Division to exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58 with respect to offences defined in article 70". The regulation was adopted by the Judges on 10.2.2016 and entered into force on the same day.

²⁷¹ Rule 165 (2) stipulates: "Articles 39(2)(b), 53, 57(2), 59, 76(2) and 82(1)(d), and any rules thereunder, shall not apply. A Chamber composed of one judge from the Pre-Trial Division shall exercise the functions and powers of the Pre-Trial Chamber from the moment of receipt of an application under article 58. A Chamber composed of one judge shall exercise the functions and powers of the Trial Chamber, and a panel of three judges shall decide appeals. The procedures for con-

urgent request and constituted “Pre-Trial Chamber A (Article 70)”, composed of Judge Reine Adélaïde Sophie Alapini-Gansou, for the purposes of these proceedings.²⁷² On 3 November 2020, following the completion of domestic proceedings in the Netherlands, Mr Gicheru was surrendered to the Court.²⁷³

Judge Alapini-Gansou scheduled the initial appearance of the suspect on 6 November 2020, during which Mr Gicheru appeared via video link technology from the Detention Centre. On the same day, the Office of the Public Counsel for the defence (“OPCD”) made a request before the President of the Pre-Trial Division to be allowed, in the interest of the Defence and the unrepresented co-suspect in the case, to make submissions on the inapplicability of Rule 165 (2), hence the constitution of the single-judge Chamber.²⁷⁴ To this end, the OPCD advanced two main reasons: first, it argued that the rule, adopted in urgency by the plenary of Judges in 2016, “expired” at the 15th ICC Assembly of States Parties as it was never “adopted, amended or rejected” by it, as foreseen in Article 51 (3).²⁷⁵ Secondly, it maintained that, in the event the rule is considered properly in effect, it remains inapplicable as the relevant rule was amended after the warrant of arrest was issued (principle of non-retroactivity).²⁷⁶ The President of the Pre-Trial Division dismissed the request in limine as she was no longer seised of any proceedings related to the case.²⁷⁷

stitution of Chambers and the panel of three judges shall be established in the Regulations”.

²⁷² ICC, Decision of 2.11.2020 – ICC-01/09-01/15-32 (Composition Decision), p. 4.

²⁷³ ICC, Decision of 4.11.2020 – ICC-01/09-01/15-34 (Order Setting the Date for the Initial Appearance of Mr Gicheru), para. 5.

²⁷⁴ ICC, Filing of 6.11.2020 – ICC-01/09-01/15-36 (OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165 [“OPCD Challenge”]).

²⁷⁵ ICC, Filing of 6.11.2020 – ICC-01/09-01/15-36 (OPCD Challenge), paras. 2, 4–5, 17–18.

²⁷⁶ ICC, Filing of 6.11.2020 – ICC-01/09-01/15-36 (OPCD Challenge), paras. 2, 20–21.

²⁷⁷ ICC, Decision of 6.11.2020 – ICC-01/09-01/15-37 (Decision Rejecting in limine the “OPCD Request for Leave to Appear on the Applicability of Provisional Rule 165”).
