

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

By **Eleni Chaitidou**, The Hague\*\*

*During the period 2019–2020, the International Criminal Court (“Court” or “ICC”) issued a series of important judgments and decisions. The Appeals Chamber authorised the commencement of the investigation in Afghanistan, which had previously been rejected by the Pre-Trial Chamber, decided on the admissibility challenge in the Al Hassan case, the second challenge in the Gaddafi case and continued its deliberations on the appeals against the conviction of Ntaganda and the acquittals of Gbagbo and Blé Goudé. Two cases were assigned to Trial Chambers which started the trial preparations immediately: in the Al Hassan case, the trial commenced on 14 July 2020, while in the Yekatom/Ngaïssona case, the trial is scheduled to start on 9 February 2021. Preparations for the reparations phase are underway in the Ntaganda case, and in the Ongwen case, the delivery of the judgment has been scheduled for 4 February 2021. It has also been a busy year for the Pre-Trial Chambers. Apart from concluding the pre-trial phase in the Al Hassan and Yekatom/Ngaïssona cases, Pre-Trial Chambers have also given authorisation for the commencement of the investigation in the Bangladesh/Myanmar situation, and reviewed, for a third time, the Prosecutor’s decision not to open an investigation in the situation on the vessels registered in the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia. Further, a Pre-Trial Chamber was tasked with determining whether Bemba was entitled to compensation. Moreover, following the political changes in Sudan, Ali Kushayb, who has been a fugitive for over 13 years, was surrendered to the Court. Likewise, Gicheru, suspected of having committed offences against the administration of justice, surrendered to the Court five years after the warrant of arrest was issued for him. As with other judicial authorities at the national level, the Coronavirus Pandemic posed challenges for the Court, but did not halt its operation. The above developments demonstrate the Court’s achievements throughout these unusual times.*

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

---

\* Previous overviews of the Court’s jurisprudence are available at ZIS 2008, 367; 2008, 371; 2010, 726; 2011, 843; 2013, 130; 2015, 523; 2016, 813; 2017, 546; 2017, 733; 2018, 23, 73; 2019, 567. This contribution summarizes the jurisprudential developments at the International Criminal Court from October/November 2019 until 13.11. 2020.

## **I. Situation in the Democratic Republic of the Congo (Pre-Trial Chamber I)<sup>1</sup> – Prosecutor v Bosco Ntaganda (Trial Chamber VI)<sup>2</sup>**

- First warrant of arrest: 22.8.2006 (public on 28.4.2008)
- Second warrant of arrest: 13.7.2012
- Surrender to the Court: 22.3.2013
- Confirmation of charges: 9.6.2014
- Trial: 2.9.2015–30.8.2018
- Victims participating: 2,129
- Conviction: 8.7.2019
- Sentencing: 7.10.2019
- Current status: Appellate proceedings

While appellate proceedings are ongoing, the Trial Chamber has also rendered a series of decisions concerning the reparations. On 5 December 2019, The Single Judge, acting on behalf of Trial Chamber VI, adopted a calendar with various deadlines according to which the reparation proceedings would be carried out.<sup>3</sup> On 28 February 2020, the Chamber received observations on the reparation process, as ordered, from the Defence,<sup>4</sup> the legal representatives of victims,<sup>5</sup> the Prosecutor,<sup>6</sup> the Registry,<sup>7</sup> the Trust Fund for Victims (“TFV”),<sup>8</sup> and later from the government of the Democratic

---

\*\* The author is a Senior Legal Officer at the Kosovo Specialist Chambers, currently on leave from the International Criminal Court. The views expressed in this article are those of the author alone and do not necessarily reflect the views of the International Criminal Court or the Kosovo Specialist Chambers. All decisions discussed in this paper can be accessed on the Court’s website or the Legal Tools Database (<http://www.legal-tools.org> [13.12.2020]).

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

<sup>2</sup> The record carries the case number ICC-0/04-02/06.

<sup>3</sup> ICC, Decision of 5.12.2019 – ICC-01/04-02/06-2447 (Order setting deadlines in relation to reparations).

<sup>4</sup> ICC, Filing of 6.3.2020 – ICC-01/04-02/06-2479-Red (Defence submissions on reparations). The public redacted version was filed on 6 March 2020.

<sup>5</sup> ICC, Filing of 28.2.2020 – ICC-01/04-02/06-2474 (Submissions on Reparations on behalf of the Former Child Soldiers); Filing of 28.2.2020 – ICC-01/04-02/06-2477-Red (Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations).

<sup>6</sup> ICC, Filing of 28.2.2020 – ICC-01/04-02/06-2478 (Prosecution’s Observations on Reparations).

<sup>7</sup> ICC, Filing of 28.2.2020 – ICC-01/04-02/06-2475 (Registry’s Observations on Reparations).

<sup>8</sup> ICC, Filing of 28.2.2020 – ICC-01/04-02/06-2476 (Trust Fund for Victims’ observations relevant to reparations).

Republic of the Congo<sup>9</sup> and, upon leave,<sup>10</sup> the International Organisation for Migration.<sup>11</sup> Due to the Coronavirus Pandemic, the Single Judge requested observations from all parties and participants as to whether and how the current restrictions in place, in particular regarding travel, impact their respective proposals in their earlier submissions.<sup>12</sup>

Having received on 19 February 2020 a list with proposed experts on reparations from the Registry, the Chamber proceeded to appoint four experts and requested a joint report by 30 October 2020 on (i) the scope of liability of the convicted person; (ii) the scope, extent, and evolution of the harm suffered by both direct and indirect victims, including the long-term consequences of the crimes on the affected communities and including the potential cost of repair; (iii) appropriate modalities of reparations; and (iv) sexual violence, in particular sexual slavery, and the consequences thereof on direct and indirect victims.<sup>13</sup> The experts were also encouraged to consult the expertise rendered in other cases and use it in their report.<sup>14</sup>

With a view to enhancing the efficiency and effectiveness of the reparation process, the Chamber issued a decision on the reparation process<sup>15</sup> and gave, among other things, the following instructions:

- (i) The Victims Participation and Reparation Section (“VPRS”) within the Registry shall identify victims potentially eligible for reparations amongst those who participated in the trial; participating victims who have not yet expressed their wish to receive reparations shall be presumed willing to be considered as potential beneficiaries of reparations; their consent may be sought at the implementation stage.<sup>16</sup>
- (ii) The VPRS should assess whether victims eligible for reparations in the Lubanga case are also potentially eli-

gible for reparations in the Ntaganda case; if entitled, their consent may be sought at the implementation stage.<sup>17</sup>

- (iii) The VPRS is tasked to identifying as many potential beneficiaries for reparations as possible, including displaced victims, and marginalised or vulnerable victims who may have particular difficulties in making themselves known, and finalise this exercise as soon as practicable.<sup>18</sup>
- (iv) The use of an application form for reparations is not mandatory, and victims may provide information through other means; the application forms collected will not be assessed individually by the Chamber at this stage.<sup>19</sup>
- (v) The VPRS is instructed to prepare a sample of potential beneficiaries of reparations, in consultation with the parties and TFV from the group of participating victims in the case, those that are eligible for reparations in the Lubanga case, and potentially new identified beneficiaries.<sup>20</sup>

The Chamber ordered the VPRS to submit a first report on the above by 30 September 2020 and thereafter every three months.<sup>21</sup> On 30 October 2020, the experts submitted two reports.<sup>22</sup>

## II. Situation in Darfur/Sudan (Pre-Trial Chamber II)<sup>23</sup> – Prosecutor v Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”, Pre-Trial Chamber II)<sup>24</sup>

The most significant development during the reporting period in this situation was the unexpected surrender of Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), who has been a fugitive for over 13 years.

- First warrant of arrest: 27.4.2007
- Second warrant of arrest: 16.1.2018 (public on 11.6.2020)
- Surrender: 9.6.2020
- Victims participating: 6
- Confirmation hearing: 22.2.2021

<sup>9</sup> ICC, Filing of 2.3.2020 – ICC-01/04-02/06-2480 (Transmission des observations de la République Démocratique du Congo).

<sup>10</sup> ICC, Decision of 17.1.2020 – ICC-01/04-02/06-2460 (Decision on request for leave to submit Amicus Curiae observations).

<sup>11</sup> At the time of writing, a public redacted version of the filing was not available.

<sup>12</sup> ICC, Decision of 9.4.2020 – ICC-01/04-02/06-2507 (Order to provide information on the impact of COVID-19 measures on operational capacity).

<sup>13</sup> ICC, Decision of 14.5.2020 – ICC-01/04-02/06-2528 (Public redacted version of “Decision appointing experts on reparations” [“Decision Appointing Experts”]); ICC, Decision of 20.7.2020 – ICC-01/04-02/06-2553 (Decision on Request for an Extension of Time for Filing of Experts’ Report).

<sup>14</sup> ICC, Decision of 14.5.2020 – ICC-01/04-02/06-2528 (Decision Appointing Experts), para. 17.

<sup>15</sup> ICC, Decision of 26.6.2020 – ICC-01/04-02/06-2547 (First Decision on Reparation Process [“First Reparation Decision”]).

<sup>16</sup> ICC, Decision of 26.6.2020 – ICC-01/04-02/06-2547 (First Reparation Decision), paras. 26–30.

<sup>17</sup> ICC, Decision of 26.6.2020 – ICC-01/04-02/06-2547 (First Reparation Decision), para. 31.

<sup>18</sup> ICC, Decision of 26.6.2020 – ICC-01/04-02/06-2547 (First Reparation Decision), paras. 33–34.

<sup>19</sup> ICC, Decision of 26.6.2020 – ICC-01/04-02/06-2547 (First Reparation Decision), paras. 35–36.

<sup>20</sup> ICC, Decision of 26.6.2020 – ICC-01/04-02/06-2547 (First Reparation Decision), para. 38.

<sup>21</sup> ICC, Decision of 26.6.2020 – ICC-01/04-02/06-2547 (First Reparation Decision), para. 44.

<sup>22</sup> ICC, Filing of 30.10.2020 – ICC-01/04-02/06-2623 (Registry Transmission of Appointed Experts’ Reports) with two annexes.

<sup>23</sup> The record carries the situation number ICC-02/05.

<sup>24</sup> The record carries the case number ICC-02/05-01/20. The case was severed from the case against Ahmad Muhammad Harun ICC-02/05-01/07 and a new case number was assigned and case record opened.

- Current status: Preparation confirmation hearing

### 1. Arrest Warrants

The first warrant of arrest was issued by Pre-Trial Chamber I on 27 April 2007 for Ali Muhammad Ali Abd-Al-Rahman (Mr Abd-Al-Rahman) and Ahmad Muhammad Harun for crimes against humanity and war crimes allegedly committed, pursuant to Article 25 (3) (a) and (d) of the Rome Statute,<sup>25</sup> against members of the Fur, Zaghawa and Masalit populations between August 2003 and March 2004 in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surroundings in Darfur.<sup>26</sup> Mr Abd-Al-Rahman, who allegedly was also known as Ali Kushayb, was considered to be a senior Janjaweed leader and member of the Popular Defence Force who allegedly implemented the counter-insurgency campaign of the Sudanese Government and fought alongside the Sudan People's Armed Forces against organised rebel groups in Darfur.

Upon application of the Prosecutor, Pre-Trial Chamber II, to which the situation had been assigned in March 2012,<sup>27</sup> issued on 16 January 2018 a second warrant of arrest for Mr Abd-Al-Rahman *secret* and *ex parte*, pursuant to Article 58 (6). The Judges added the crime of murder and other inhumane acts allegedly committed against at least 100 Fur men in Deleig and surroundings between approximately 5 and 7 March 2004. They had reasonable grounds to believe that Mr Abd-Al-Rahman was responsible for those additional crimes (i) as direct and indirect perpetrator, and indirect co-perpetrator (Article 25 [3] [a]); (ii) for having ordered them (Article 25 [3] [b]); (iii) for otherwise having contributed to them (Article 25 [3] [d]; and [iv] as military commander or a person effectively acting as a military commander (Article 28 [a]).<sup>28</sup>

### 2. Severance of the Case

Mr Abd-Al-Rahman was initially prosecuted together with Ahmad Harun in case ICC-02/05-01/07. Noting that Ahmad Harun may not surrender any time soon to the Court, the

Single Judge<sup>29</sup> severed the charges, prior to the initial appearance of the suspect, and directed the Registry to open a new case record for Mr Abd-Al-Rahman.<sup>30</sup> He explained that proceeding against Ahmad Harun in absentia, pursuant to Article 61 (2), was not a viable option as the requirements under Article 61 (2) (b) have not been met and proceeding in this fashion would cause delays, thus potentially prejudicing the right of Mr Abd-Al-Rahman to a fair and expeditious trial.<sup>31</sup> It was also made clear that the participatory rights of the six victims participating in the joint case<sup>32</sup> remained unaffected by the severance of the charges.<sup>33</sup>

### 3. Initial Appearance

The Single Judge, acting on behalf of the Chamber,<sup>34</sup> convened the initial hearing for Mr Abd-Al-Rahman on 15 June 2020,<sup>35</sup> which Mr Abd-Al-Rahman attended via video link from the Detention Centre. At the end of the hearing, the Single Judge informed the parties that the confirmation of charges hearing will commence on 7 December 2020.<sup>36</sup>

At the initial appearance, the suspect insisted that his name was Abd-Al-Rahman and not Ali Kushayb. This is of importance as the name Ali Kushayb was hitherto part of the case name. On 26 June 2020, the Single Judge decided that henceforth the suspect should be addressed in court proceedings, official court documents and filings, as well as the Court's public information material as Mr Abd-Al-Rahman, as opposed to Ali Kushayb, but denied to change the case name, until the Chamber is in a position to decide on this matter.<sup>37</sup>

Two further oral rulings continued to be the object of litigation after the initial appearance: Before reading out the crimes which Mr Abd-Al-Rahman is alleged to have committed, as provided in Article 60 (1), the suspect made known to the Single Judge that he waived his right for the crimes to be read out. Nevertheless, the Single Judge ordered that the

<sup>25</sup> 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.

<sup>26</sup> ICC, Decision of 27.4.2007 – ICC-02/05-01/20-18 (Warrant of Arrest for Al Kushayb); Decision of 27.4.2007 – ICC-02/05-01/20-17-Corr (Decision on the Prosecution Application under Article 58 [7] of the Statute).

<sup>27</sup> ICC, Decision of 15.3.2012 – ICC-02/05-01/07-65 (Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situation).

<sup>28</sup> ICC, Decision of 16.1.2018 – ICC-02/05-01/20-80-Red (Public redacted version of "Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')", 16 January 2018, ICC-02/05-01/07-74-Secret-Exp). The warrant of arrest was made public on 11 June 2020.

<sup>29</sup> ICC, Decision of ICC, Decision of 9.6.2020 – ICC-02/05-01/20-86 (Decision on the designation of a Single Judge).

<sup>30</sup> ICC, Decision of 12.6.2020 – ICC-02/05-01/20-92 (Decision severing the case against Mr Ali Kushayb ["Ali Kushayb Severance Decision"]).

<sup>31</sup> ICC, Decision of 12.6.2020 – ICC-02/05-01/20-92 (Ali Kushayb Severance Decision), para. 8.

<sup>32</sup> ICC, Decision of 17.6.2010 – ICC-02/05-01/07-58 (Decision on 6 Applications for Victims' Participation in the Proceedings).

<sup>33</sup> ICC, Decision of 12.6.2020 – ICC-02/05-01/20-92 (Ali Kushayb Severance Decision), para. 11.

<sup>34</sup> ICC, Decision of 9.6.2020 – ICC-02/05-01/07-80 (Decision on the designation of a Single Judge).

<sup>35</sup> ICC, Decision of 11.6.2020 – ICC-02/05-01/20-88 (Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb).

<sup>36</sup> ICC, Transcript of 15.6.2020 – ICC-02/05-01/20-T-001-ENG ET, p. 23.

<sup>37</sup> ICC, Decision of 26.6.2020 – ICC-02/05-01/20-8 (Decision on the Defence request to amend the name of the case).

crimes be read out in public.<sup>38</sup> Further, the suspect's request for a minute of silence to be observed in memory of the victims of Sudan was not acceded to by the Single Judge.<sup>39</sup> Both rulings were not appealed by the Defence. Rather, it requested that these oral rulings be reasoned in writing.<sup>40</sup> With decision of 18 August 2020, the Single Judge dismissed such request.<sup>41</sup> Following this decision, the Defence sought leave to appeal two issues arising from the decision and the two oral rulings, which was granted summarily by the Single Judge.<sup>42</sup> At the time of writing, the Appeals Chamber has not yet ruled on the matter.

#### 4. Disclosure and Related Matters

At the initial appearance, Mr Abd-Al-Rahman confirmed that he speaks Arabic.<sup>43</sup> Thereafter, his Defence counsel requested the Chamber, on the basis of Article 67 (1) (f), to instruct the Registry to provide the Defence team with interpretation and translation services for the suspect's preparation and communication with his defence team ("First Request").<sup>44</sup> In addition, the Defence requested, based on rule 20 (1) (b) of the Rules of Procedure and Evidence,<sup>45</sup> that the Registry provide interpretation and translation services for free to the Defence on a provisional basis, pending the Pre-Trial Chamber's and/or Appeals Chamber's ruling on the matter ("Second Request").<sup>46</sup>

The Single Judge rejected the First Request arguing that the suspect's right to interpretation and translation under Article 67 (1) (f) is not absolute but limited to understanding

the proceedings against him.<sup>47</sup> This does not include private and privileged communications with counsel.<sup>48</sup> Rather, it is the responsibility of counsel to organise his team in such a manner which allows him to protect the interests of his client and to use the legal aid funds to ensure that his client's needs are satisfied.<sup>49</sup> The Defence sought leave to appeal the Single Judge's interpretation of Article 67 (1) (f), in particular the finding that private and privileged communications between the suspect and his counsel are not covered by the right to interpretation and translation to be paid by the Court.<sup>50</sup> Highlighting the fact that the suspect did not choose counsel with appropriate language skills from the list of counsel, but selected counsel with whom he cannot communicate, the Single Judge reformulated the appealable issue and granted the appeal.<sup>51</sup> After having disposed of the Defence request for leave to appeal the decision on the First Request, the Single Judge also rejected the Second Request noting that the matter was pending before the Appeals Chamber.<sup>52</sup> The Appeals Chamber sided with the Single Judge and confirmed that Article 67 (1) (f) concerns Court proceedings and documents and not communications with counsel.<sup>53</sup>

Due to constraints caused by the COVID pandemic, the Chamber did not hold, unlike in previous cases, a status conference on disclosure of evidence. Rather, it sought detailed observations from the parties in writing.<sup>54</sup> Subsequently, the Single Judge issued an order on disclosure setting, *inter alia*, the redaction regime of non-standard and standard information (which essentially follows principles set forth in previous decisions) and adopting a protocol on handling confidential information and contacting witnesses of the opposing

<sup>38</sup> ICC, Transcript of 15.6.2020 – ICC-02/05-01/20-T-001-ENG ET, p. 6.

<sup>39</sup> ICC, Transcript of 15.6.2020 – ICC-02/05-01/20-T-001-ENG ET, p. 22.

<sup>40</sup> ICC, Filing of 18.6.2020 – ICC-02/05-01/20-2 (Requête aux fins d'exposé écrit des motifs de deux décisions orales rendues lors de l'audience de comparution initiale).

<sup>41</sup> ICC, Decision of 18.8.2020 – ICC-02/05-01/20-118 (Decision on the Defence Request to provide written reasoning for two oral decisions).

<sup>42</sup> ICC, Decision of 31.8.2020 – ICC-02/05-01/20-142 (Decision on the Defence Request for Leave to Appeal Three Decisions).

<sup>43</sup> ICC, Transcript of 15.6.2020 – ICC-02/05-01/20-T-001-ENG ET, p. 20.

<sup>44</sup> ICC, Filing of 25.6.2020 – ICC-02/05-01/20-7 (Requête en vertu de l'Article 67-1-f).

<sup>45</sup> 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.

<sup>46</sup> ICC, Filing of 9.7.2020 – ICC-02/05-01/20-93 (Requête en vertu de la Règle 20-1-b).

<sup>47</sup> ICC, Decision of 10.7.2020 – ICC-02/05-01/20-94 (Decision on the Defence request under article 67 (1) (f) of the Rome Statute ["Ali Kushayb Language Decision"]), para. 15.

<sup>48</sup> ICC, Decision of 10.7.2020 – ICC-02/05-01/20-94 (Ali Kushayb Language Decision), para. 15.

<sup>49</sup> ICC, Decision of 10.7.2020 – ICC-02/05-01/20-94 (Ali Kushayb Language Decision), para. 17.

<sup>50</sup> ICC, Filing of 16.7.2020 – ICC-02/05-01/20-97 (Demande d'autorisation d'interjeter appel de la "Decision on the Defence request under article 67 (1) (f) of the Rome Statute" (ICC-02/05-01/20-94)).

<sup>51</sup> ICC; Decision of 7.8.2020 – ICC-02/05-01/20-109 (Decision on the Defence Request for Leave to Appeal the "Decision on Defence request under article 67 (1) (f) of the Rome Statute"), para. 12.

<sup>52</sup> ICC, Decision of 13.8.2020 – ICC-02/05-01/20-112 (Decision on the Defence Request pursuant to Rule 20 of the Rules of Procedure and Evidence).

<sup>53</sup> ICC, Judgment of 5.11.2020 – ICC-02/05-01/20-199 (Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 10 July 2020 entitled 'Decision on Defence request under article 67(1)(f) of the Rome Statute'); Opinion of 5.11.2020 – ICC-02/05-01/20-199-Anx (Partially Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza).

<sup>54</sup> ICC, Decision of 2.7.2020 – ICC-02/05-01/20-14 (Order seeking observations on disclosure and related matters).

party.<sup>55</sup> Due to the provisional nature of the information received from the Prosecutor, the Single Judge refrained from adopting a calendar for disclosure.<sup>56</sup> In response to the Prosecutor's observation that she may not be able to finalise the disclosure of the evidence ahead of the confirmation hearing, the Single Judge ordered the submission of bi-weekly progress reports on the review, translation and disclosure of evidence.<sup>57</sup>

On 16 September 2020, the Prosecutor requested that the Chamber postpone the commencement of the confirmation hearing to 1 June 2021 as she was unable to comply with her statutory disclosure obligations prior to the confirmation hearing set to commence on 7 December 2020.<sup>58</sup> In a second decision on disclosure, the Chamber reprimanded the Prosecutor for, *inter alia*, the lack of prioritisation in her evidence review, the insufficiency of information in the bi-weekly progress reports and for having disclosed mainly open source reports and press articles whose relevance is unclear.<sup>59</sup> Accepting that the case has been dormant for many years, the Chamber recalled that the Prosecutor is expected to be "trial ready at any time after applying for an arrest warrant"<sup>60</sup> and to disclose to the suspect immediately upon surrender all material submitted in support of the Prosecutor's Article 58 applications for the warrants of arrest.<sup>61</sup> The Judges also reminded the Prosecutor, relying on previous case-law, that it was not the quantity of evidence but the true relevance of the evidence that is essential to the confirmation decision, such as forensic evidence, audio/visual evidence, and testimony based on personal experience of witnesses.<sup>62</sup> Accordingly, it encouraged the Prosecutor to focus her review and disclose the most relevant evidence, to liaise with the Defence on translations of core evidence, to propose alternative evidence in case disclosure is prevented by the existence of confidential

agreements, and provided concrete directions as to the content of the bi-weekly reports.<sup>63</sup> Following the spirit of previous decisions ordering an in-depth analysis chart, the Chamber ordered the Prosecutor to indicate the relevance of each piece of evidence either by (i) highlighting the relevant part in the evidence as incriminating or exculpatory or both; or (ii) to provide specific reference to the page and/or paragraph numbers in the metadata field in the electronic system in which the evidence is stored.<sup>64</sup> The Chamber indicated it would rule on the postponement request once the Prosecutor has provided updated information pursuant to the instructions of the Chamber.<sup>65</sup>

In response to the Prosecutor's request for postponement of the confirmation hearing, the Defence requested a stay of proceedings. It alleged, *inter alia*, that a postponement would not resolve the difficulties faced by the Prosecutor, in particular the lack of resources and lack of cooperation with Sudan. The Single Judge rejected the request by expressing his doubts as to the compatibility of a request for stay of proceedings with the Court's legal instruments and recalling that he has yet to decide on the postponement request.<sup>66</sup>

#### 5. Postponement of Confirmation Hearing

On 2 November 2020, the Chamber postponed the confirmation hearing to 22 February 2021 and set new deadlines for the disclosure of evidence and the submission of the document containing the charges.<sup>67</sup> As regards the disclosure of all 95 witness statements upon which the Prosecutor intends to rely at the confirmation hearing,<sup>68</sup> the Chamber shortened the time limit under rule 121 (3), and instructed the Prosecutor to disclose them by 7 December 2020 in their original language, together with corresponding translation into Arabic, if available, and with provisional redactions, if necessary, to protect the identity of witnesses or other persons at risk.<sup>69</sup> The Prosecutor was instructed to submit the application for withholding the identity of those witnesses by 18 December 2020.<sup>70</sup> The Judges also gave further guidance as to the Pros-

<sup>55</sup> ICC, Decision of 17.8.2020 – ICC-02/05-01/20-116 (Order on disclosure and related matters ["Ali Kushayb Disclosure Order"]). Annex 1 to this order contains the e-Court protocol containing the technical requirements for the parties and participants when submitting evidence electronically. Annex 2 to this order contains 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".

<sup>56</sup> ICC, Decision of 17.8.2020 – ICC-02/05-01/20-116 (Ali Kushayb Disclosure Order), para. 9.

<sup>57</sup> ICC, Decision of 17.8.2020 – ICC-02/05-01/20-116 (Ali Kushayb Disclosure Order), para. 17.

<sup>58</sup> ICC, Filing of 16.9.2020 – ICC-02/05-01/20-157-Corr-Red (Prosecution's request to postpone the confirmation hearing).

<sup>59</sup> ICC, Decision of 2.10.2020 – ICC-02/05-01/20-169 (Second Order on disclosure and related matters ["Ali Kushayb Second Disclosure Decision"]), paras. 15–20, 27–28.

<sup>60</sup> ICC, Decision of 2.10.2020 – ICC-02/05-01/20-169 (Ali Kushayb Second Disclosure Decision), para. 14.

<sup>61</sup> ICC, Decision of 2.10.2020 – ICC-02/05-01/20-169 (Ali Kushayb Second Disclosure Decision), para. 15.

<sup>62</sup> ICC, Decision of 2.10.2020 – ICC-02/05-01/20-169 (Ali Kushayb Second Disclosure Decision), para. 21.

<sup>63</sup> ICC, Decision of 2.10.2020 – ICC-02/05-01/20-169 (Ali Kushayb Second Disclosure Decision), paras. 16, 22, 28, 34.

<sup>64</sup> ICC, Decision of 2.10.2020 – ICC-02/05-01/20-169 (Ali Kushayb Second Disclosure Decision), para. 24.

<sup>65</sup> ICC, Decision of 2.10.2020 – ICC-02/05-01/20-169 (Ali Kushayb Second Disclosure Decision), para. 35.

<sup>66</sup> ICC, Decision of 16.10.2020 – ICC-02/05-01/20-186 (Decision on Defence Request for a Stay of Proceedings).

<sup>67</sup> ICC, Decision of 2.11.2020 – ICC-02/05-01/20-196 (Decision on the Prosecutor's Request for postponement of the Confirmation Hearing and related deadlines ["Ali Kushayb Postponement Decision"]).

<sup>68</sup> ICC, Decision of 2.11.2020 – ICC-02/05-01/20-196 (Ali Kushayb Postponement Decision), para. 10.

<sup>69</sup> ICC, Decision of 2.11.2020 – ICC-02/05-01/20-196 (Ali Kushayb Postponement Decision), para. 34.

<sup>70</sup> ICC, Decision of 2.11.2020 – ICC-02/05-01/20-196 (Ali Kushayb Postponement Decision), para. 34.

ecutor's specifications related to the relevance of each piece of disclosed evidence to the charges.<sup>71</sup>

Noting the persistent denial of the Defence that the suspect is not "Ali Kushayb", the Chamber also ordered the Prosecutor, as a matter of urgency, to disclose until 7 December 2020 all evidence linking Mr Abd-Al-Rahman with the nickname "Ali Kushayb" together with a detailed submission illustrating in which each of the disclosed items would support the conclusion that the suspect was known at the time as "Ali Kushayb".<sup>72</sup>

Lastly, the Chamber ordered that the Prosecutor submit the document containing the charges in a narrative style with relevant facts presented exhaustively, in detail and chronological order by 4 January 2021, ahead of the rule 121 (3) deadline, endeavouring to pinpoint the places, times and (approximate) number of victims corresponding to each charge, as well as the particular underpinning the elements of the crimes.<sup>73</sup> Further, the Prosecutor was ordered to present by 15 January 2021, the evidentiary material in a separate "pre-confirmation brief", linking each statement of fact with the most probative supporting evidence, duly explaining which evidence is believed to support each charge and the reason why that would be the case.<sup>74</sup>

#### 6. Funding from the United Nations

On 26 June 2020, the Defence approached the Chamber noting that the suspect has a legitimate interest in the Court's satisfactory financial state in order to ensure his right to a fair, impartial and independent trial.<sup>75</sup> To this end, it requested the Single Judge to instruct the Registry to submit to the United Nations ("UN") a funding request pursuant to Article 115 (b) for an amount not less than the total updated costs of the Court's activities carried out to date in the situation in Sudan (amounting to EUR 47,510,100 in 2018).<sup>76</sup> It also proposed that the Registry engage in negotiations for a separate arrangement with the UN on this matter and inform periodically the Defence and the Chamber on the progress made.<sup>77</sup> In the alternative, the Defence requested that this matter be referred to the Presidency, should the Chamber find that this matter falls within the competence of the Presiden-

cy.<sup>78</sup> The Single Judge rejected such request arguing that the Defence has no legal standing to either evaluate or make recommendations as to the Court's financial management.<sup>79</sup> He also explained that the Chamber has no role in the Court's budgetary matters and lacks the power to refer such matter to the Presidency.<sup>80</sup> A Defence request for leave to appeal the decision was rejected by the Single Judge.<sup>81</sup> A further Defence request to reconsider the decision rejecting leave to appeal was rejected by the full Chamber.<sup>82</sup>

#### 7. Interim Release

On 1 July 2020, the Defence requested that Mr Abd-Al-Rahman be released provisionally to the Netherlands and offered that he comply with any conditions the Chamber deems necessary, except financial securities, as Mr Abd-Al-Rahman lacks financial resources.<sup>83</sup> The Single Judge found that continued detention of the suspect was necessary to ensure that the suspect does not exert pressure on witnesses, either directly or indirectly through his supporters (Article 58 [1] [b] [ii]).<sup>84</sup> The Single Judge also clarified that he had not sought the observations of the Host State, pursuant to regulation 51 of the Regulations of the Court, given that he had not granted interim release.<sup>85</sup> Upon appeal, the Appeals Chamber confirmed the Single Judge's decision.<sup>86</sup> Importantly, it clarified that the Chamber was not duty-bound to seek the observations of the Host State and/or the State on the territory of which interim release is sought when hearing an application for interim release, in the absence of any prospect for the application to succeed; rather such obligation is only trig-

<sup>71</sup> ICC, Decision of 2.11.2020 – ICC-02/05-01/20-196 (Ali Kushayb Postponement Decision), paras. 39-40.

<sup>72</sup> ICC, Decision of 2.11.2020 – ICC-02/05-01/20-196 (Ali Kushayb Postponement Decision), para. 38.

<sup>73</sup> ICC, Decision of 2.11.2020 – ICC-02/05-01/20-196 (Ali Kushayb Postponement Decision), para. 41.

<sup>74</sup> ICC, Decision of 2.11.2020 – ICC-02/05-01/20-196 (Ali Kushayb Postponement Decision), para. 42.

<sup>75</sup> ICC, Filing of 26.6.2020 – ICC-02/05-01/20-10 (Requête en vertu de l'Article 115-b ["UN Funds Defence Request"]), para. 13.

<sup>76</sup> ICC, Filing of 26.6.2020 – ICC-02/05-01/20-10 (UN Funds Defence Request), para. 14.

<sup>77</sup> ICC, Filing of 26.6.2020 – ICC-02/05-01/20-10 (UN Funds Defence Request), para. 14.

<sup>78</sup> ICC, Filing of 26.6.2020 – ICC-02/05-01/20-10 (UN Funds Defence Request), para. 15.

<sup>79</sup> ICC, Decision of 23.7.2020 – ICC-02/05-01/20-101 (Decision on the Defence request under article 115 (b) of the Rome Statute ["UN Funds Decision"]), para. 7.

<sup>80</sup> ICC, Decision of 23.7.2020 – ICC-02/05-01/20-101 (UN Funds Decision), para. 8.

<sup>81</sup> ICC, Decision of 13.8.2020 – ICC-02/05-01/20-110 (Decision on the Defence Request for Leave to Appeal the "Decision on the Defence request under article 115 (b) of the Rome Statute").

<sup>82</sup> ICC, Decision of 23.9.2020 – ICC-02/05-01/20-163 (Décision relative à la demande aux fins de réexamen de la décision ICC-02/05-01/20-110 présentée par la défense [ICC-02/05-01/20-113]).

<sup>83</sup> ICC, Filing of 1.7.2020 – ICC-02/05-01/20-12 (Requête en vertu de l'Article 60-2).

<sup>84</sup> ICC, Decision of 14.8.2020 – ICC-02/05-01/20-115 (Decision on the Defence Request for Interim Release [Ali Kushayb Interim Release Decision]), para. 29.

<sup>85</sup> ICC, Decision of 14.8.2020 – ICC-02/05-01/20-115 (Ali Kushayb Interim Release Decision), para. 32.

<sup>86</sup> ICC, Judgment of 8.10.2020 – ICC-02/05-01/20-177 (Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled "Decision on the Defence Request for Interim Release" ["Ali Kushayb Judgment on Interim Release"]).

gered when the Chamber considers conditional release or the State has indicated its willingness to receive the detained person on its territory.<sup>87</sup>

### 8. Reparations

On 17 July 2020, the Defence requested that the Chamber consider, independent of the outcome of these proceedings, adopting nine additional principles on reparations, pursuant to Article 75 (1), and obtaining *amicus curiae* observations on the proposed additional principles, pursuant to rule 103.<sup>88</sup> The Single Judge dismissed the request as premature arguing that the reparation stage only follows the conviction of the person and that the Pre-Trial Chamber is not empowered to deal with issues of reparations.<sup>89</sup> In his view, adopting additional principles on reparations would amount to amending the Court's legal framework.<sup>90</sup> A direct appeal against this decision, pursuant to Article 82 (1) (a), was dismissed as inadmissible by the Appeals Chamber on the basis that it was not related to jurisdiction.<sup>91</sup> The Defence also requested leave from the Pre-Trial Chamber to appeal the decision. This request was granted by the Single Judge regarding the issue whether the Pre-Trial Chamber is competent to consider adopting reparation principles in this case and to seek rule 103 observations.<sup>92</sup> At the time of writing, the Appeals Chamber ruling is yet to be rendered.

### III. Situation in Palestine (Pre-Trial Chamber I)<sup>93</sup>

- Lodging ad hoc declaration: 22.1.2009
- Decision not to Initiate Investigation: 3.4.2012<sup>94</sup>
- Lodging ad hoc declaration: 1.1.2015
- Accession Palestine to Rome Statute: 2.1.2015
- Opening of Preliminary Examination: 16.1.2015
- Referral of situation: 22.5.2018

It is recalled that Palestine referred the situation to the ICC Prosecutor encompassing “past, ongoing and future crimes within the Court's jurisdiction, committed in all parts of the

territory of the State of Palestine”.<sup>95</sup> It specified the territory as comprising “the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, [...] includ[ing] the West Bank, including East Jerusalem, and the Gaza Strip”.<sup>96</sup>

Subsequently, and despite her conclusion that the requirements under Article 53 (1) have been met to open an investigation,<sup>97</sup> the Prosecutor submitted a request to the Pre-Trial Chamber for a preliminary ruling on the scope of the Court's territorial jurisdiction, pursuant to Article 19 (3).<sup>98</sup> She submitted that, in her understanding, the “Court's territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza”, delimited by the demarcation line agreed to in the 1949 Armistices.<sup>99</sup> Nevertheless, in order to place the investigation on a sound jurisdictional basis, facilitate the practical conduct of the investigation by demarcating the proper scope of the investigation, and give the victims, the referring State, and other interested States, parties or entities an opportunity to be heard, she sought a judicial confirmation of her understanding of the extent of Palestine's territory.<sup>100</sup> In this context, the Prosecutor also raised the issue of Palestine's statehood as a preliminary question in relation to which the Pre-Trial Chamber is asked to determine whether Palestine is a State (Party) for the purposes of the Statute by virtue of its accession to the Statute or whether Palestine's statehood must be determined on the basis of the relevant criteria under public international law. In the Prosecutor's view, with its accession to the Statute, Palestine had become a State Party accepting

<sup>87</sup> ICC, Judgment of 8.10.2020 – ICC-02/05-01/20-177 (Ali Kushayb Judgment on Interim Release), paras. 55, 61.

<sup>88</sup> ICC, Filing of 17.8.2020 – ICC-02/05-01/20-98 (Requête et observations sur les réparations en vertu de l'Article 75-1).

<sup>89</sup> ICC, Decision of 18.8.2020 – ICC-02/05-01/20-117 (Decision on the Defence request and observations on reparations pursuant to article 75 (1) of the Rome Statute [“Ali Kushayb Reparations”]), paras. 12–13.

<sup>90</sup> ICC, Decision of 18.8.2020 – ICC-02/05-01/20-117 (Ali Kushayb Reparations), para. 11.

<sup>91</sup> ICC; Decision of 4.9.2020 – ICC-02/05-01/20-145 (Decision on the admissibility of the appeal).

<sup>92</sup> ICC, Decision of 31.8.2020 – ICC-02/05-01/20-141 (Decision on the Defence Request for Leave to Appeal the Decision pursuant to Article 75 (1) of the Rome Statute).

<sup>93</sup> The record carries the situation number ICC-01/18.

<sup>94</sup> ICC, Declaration of 3.4.2012 (Situation in Palestine).

<sup>95</sup> ICC, Decision of 24.5.2018 – ICC-01/18-1-AnxI (Annex I to Assignment Decision [Palestine Referral]), p. 8, para. 9.

<sup>96</sup> ICC, Decision of 24.5.2018 – ICC-01/18-1-AnxI (Palestine Referral), footnote 4.

<sup>97</sup> ICC, Filing of 22.1.2020 – ICC-01/18-12 (Prosecution Request pursuant to article 19 [3] for a ruling on the Court's territorial jurisdiction in Palestine [Prosecutor's Article 19 [3] Request]), para. 4.

<sup>98</sup> The Prosecutor had filed the request on 20 December 2019 (ICC-01/18-9 with public Annex A) and filed supplementary information including two memoranda issued by the State of Israel. Thereafter, the Pre-Trial Chamber ordered the Prosecutor to re-file her request by incorporating references to the supplementary information and instructed the Registrar to strike the Prosecutor's initial request and supplementary information from the record of the situation, ICC, Decision of 21.1.2020 – ICC-01/18-11 (Decision on the Prosecutor's Application for an extension of the page limit).

<sup>99</sup> ICC, Filing of 22.1.2020 – ICC-01/18-12 (Prosecutor's Article 19 [3] Request), paras. 3, 11–17. In the Prosecutor's view, this determination is without prejudice to any final settlement, including land-swaps, potentially agreed upon by Israel and Palestine.

<sup>100</sup> ICC, Filing of 22.1.2020 – ICC-01/18-12 (Prosecutor's Article 19 [3] Request), paras. 5–6.

the Court's jurisdiction in accordance with Article 12 (1).<sup>101</sup> She maintained that the consequence of Palestine's status as a State Party is that its statehood need not be assessed separately in order to ascertain the Court's ability to exercise its jurisdiction within the meaning of Article 12 (2).

With decision dated 28 January 2020, the Chamber organised the proceedings pursuant to rules 58 and 59.<sup>102</sup> It invited Palestine and the victims of the situation to submit written observations on the Prosecutor's Article 19 (3) request as they have standing to do so.<sup>103</sup> In this regard, it also appointed counsel from the Office of Public Counsel for victims ("OPCV") to represent the victims of the situation that are not represented by counsel.<sup>104</sup> The Chamber also invited interested States, organisations and persons to request leave to submit amicus curiae observations by 14 February 2020, and, if authorised, to submit their observations by 16 March 2020.<sup>105</sup> Israel, as a State with an interest in the adjudication of the Prosecutor's request, was invited to submit directly observations, without seeking leave from the Chamber, by 16 March 2020.<sup>106</sup> The Chamber ultimately received observations from Palestine, ten groups of victims and the OPCV, on behalf of unrepresented victims, as well as, upon authorisation to participate as amici curiae, nine States and international organisations,<sup>107</sup> and 34 persons/non-governmental entities. A consolidated response by the Prosecutor was submitted on 30 April 2020.<sup>108</sup>

Moreover, further to a statement of President Abbas on 19 May 2020 that "the Palestinian Liberation Organization and the State of Palestine are absolved, as of today, of all the agreements and understandings with the American and Israeli governments and of all the commitments based on these understandings and agreements, including the security ones", the Chamber invited Palestine to provide by 10 June 2020 additional information on this statement, including whether it pertains to any of the Oslo agreements between Palestine and Israel; the Prosecutor and Israel were invited to respond by

24 June 2020.<sup>109</sup> At the time of writing, a decision on the merits of the Prosecutor's request is pending.

#### IV. Situation on the Registered Vessels of the Union of the Comoros, Hellenic Republic and the Kingdom of Cambodia (Pre-Trial Chamber I)<sup>110</sup>

- Gaza Flotilla Incident: 31.5.-5.6.2010
- Referral of situation: 14.5.2013
- Prosecutor's Decision not to Investigate: 6.11.2014
- Request of Comoros to Review: 29.1.2015
- First Review Decision of Pre-Trial Chamber I: 16.7.2015
- Appeals Judgment Dismissing Prosecutor's Appeal: 6.11.2015
- Prosecutor's Second Decision not to Investigate: 29.11.2017
- Second Request of Comoros to Review: 23.2.2018
- Second Review Decision of Pre-Trial Chamber I: 15.11.2018
- Granting Prosecutor's Leave to Appeal: 18.1.2019
- Second Appeals Judgment Rejecting Prosecutor's Appeal: 2.9.2019
- Prosecutor's Third Decision not to Investigate: 2.12.2019
- Request of Comoros to Review: 2.3.2020
- Third Review Decision of Pre-Trial Chamber I: 16.9.2020
- Current status: Leave to appeal lodged by Comoros

The last jurisprudence overview summarised the proceedings until September 2019 when the Appeals Chamber rejected the Prosecutor's appeal against Pre-Trial Chamber I's Second Review Decision and instructed the Prosecutor to reconsider her original decision until 2 December 2019 according to the guidelines set forth in the Appeals Judgment and considering the Pre-Trial Chamber's findings in the First Review Decision of 16 July 2015.<sup>111</sup> In the following, the reader will be presented with a short overview of the proceedings as they developed after September 2019. Subject to the pending leave to appeal the Pre-Trial Chamber's Third Review Decision, these developments conclude a five-year litigation over whether or not an investigation should have been initiated over events that have taken place over ten years ago.

##### 1. Prosecutor's 2019 Reconsideration

In her third decision, the Prosecutor maintained her position that there is no reasonable basis to proceed with an investigation because there is no potential case that is sufficiently grave to be admissible before the ICC within the meaning of Article 17 (1) (d) and that, therefore, the preliminary examination must be closed.<sup>112</sup> She explained her position in five

<sup>101</sup> ICC, Filing of 22.1.2020 – ICC-01/18-12 (Prosecutor's Article 19 [3] Request), paras. 7–8.

<sup>102</sup> ICC, Decision of 28.1.2020 – ICC-01/18-14 (Order setting the procedure and the schedule for the submission of observations ["Rule 59 Order"]).

<sup>103</sup> ICC, Decision of 28.1.2020 – ICC-01/18-14 (Rule 59 Order), para. 13.

<sup>104</sup> ICC, Decision of 28.1.2020 – ICC-01/18-14 (Rule 59 Order), para. 14.

<sup>105</sup> ICC, Decision of 28.1.2020 – ICC-01/18-14 (Rule 59 Order), para. 15, 17.

<sup>106</sup> ICC, Decision of 28.1.2020 – ICC-01/18-14 (Rule 59 Order), para. 16.

<sup>107</sup> Czech Republic, Organization of Islamic Cooperation, Federal Republic of Germany, Australia, Republic of Austria, Federative Republic of Brazil, Hungary, League of Arab States, Republic of Uganda.

<sup>108</sup> ICC, Filing of 30.4.2020 – ICC-01/18-131 (Prosecution Response to the Observations of Amici Curiae, Legal Representatives of Victims, and States).

<sup>109</sup> ICC, Order of 26.5.2020 – ICC-01/18-134 (Order requesting additional information).

<sup>110</sup> The record carries the situation number ICC-01/13.

<sup>111</sup> See Chaitidou, ZIS 2019, 451 (467).

<sup>112</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Final decision of the Prosecutor concerning the "Article 53(1) Report" (ICC-01/13-6-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Cham-

points that responded to the errors found by Pre-Trial Chamber I in its 2015 Third Review Decision:

a) As regards the group of potential perpetrators, the Pre-Trial Chamber had criticised in 2015 the Prosecutor for failing to consider whether the investigation would extend to those who may bear the greatest responsibility for the alleged crimes. The Pre-Trial Chamber reminded the Prosecutor to focus on those who bear the greatest responsibility and not to be limited by seniority or hierarchical positions.<sup>113</sup> In response, the Prosecutor submitted that the investigation in this situation would likely focus only on the physical perpetrators, as it cannot be assumed that members of the Israeli Defence Forces (IDF), other than the direct perpetrators, made sufficient contributions to the crimes, did not discharge their responsibility or did not take necessary and reasonable measures to prevent the crimes within the meaning of Article 28.<sup>114</sup> However, the Prosecutor assessed that the direct perpetrators would be difficult to identify and the cases would be of limited scope.<sup>115</sup> In particular, the investigation would only reveal a number of perpetrators responsible for some part of the crimes but not all crimes and would not necessarily establish the responsibility of other perpetrators, namely accessories or superiors.<sup>116</sup>

b) As regards the scale of the identified crimes, the Pre-Trial Chamber had criticised in 2015 the Prosecutor's contention that the situation involved only a limited number of victims and recalled that in the Abu Garda and Banda cases the Prosecutor had decided to prosecute despite lower number of victims.<sup>117</sup> In response, the Prosecutor conceded to take the number of victims into account when assessing the scale of crimes, but, relying on the Appeals Chamber judgment, emphasised that she was not duty-bound to follow the Pre-Trial Chamber's assessment; instead she was free to attribute appropriate weight.<sup>118</sup> She also argued that none of the potential cases arising from the situation would encompass *all* the victimisation which has been identified in the situation as a whole; rather, the totality of the victimisation could only be

prosecuted in a series of confined cases.<sup>119</sup> Unlike the Abu Garda and Banda cases, which had been considered sufficiently grave, *inter alia*, because of the special status of the victims being peacekeepers and the ensuing effect on the local population, the victims aboard the vessels did not hold such special status, as they were neither peacekeepers nor humanitarian assistance workers.<sup>120</sup>

c) As regards the nature of the crimes, the Pre-Trial Chamber had criticised in 2015 the Prosecutor's limited analysis of the alleged crimes committed and her failure to accept that the mistreatment inflicted on the passengers of the Mavi Marmara could amount to the war crime of torture or inhumane treatment.<sup>121</sup> In response, the Prosecutor averred that the mistreatment varied in nature and degree: while a relatively large number of persons were handcuffed and restricted in movement, only a small number of persons were subjected to direct violence.<sup>122</sup> She took issue with the Pre-Trial Chamber's legal assessment of the facts and opined that, instead of according significance to the legal characterisation, weight should be given to the factual nature of the identified conduct.<sup>123</sup> In her view, even if the additional legal characterisation were to be accepted, it would not alter the weight afforded to the nature of the crimes.<sup>124</sup>

d) As regards the impact of the crimes, the Pre-Trial Chamber had criticised in 2015 that the Prosecutor had not sufficiently taken into account the impact of the crimes on the victims and their families.<sup>125</sup> In response, the Prosecutor insisted that she had taken this factor into account and that it was up to her, within a margin of appreciation, to attribute appropriate weight.<sup>126</sup> However, she attributed only limited weight to this aspect, as (i) she considered the impact of the alleged crimes to be closely related to the scale of the crimes, which was relatively small; and (ii) she was not in a position to assess the symbolic, moral or political effects of the alleged crimes on the population in Gaza and beyond in any objective or reliable way. In this context, she also replied to the Pre-Trial Chamber's observation that she had not taken into account several fact-finding reports prepared by States and the United Nations suggesting that the crimes had an impact beyond the suffering of the victims. The Prosecutor noted that these reports varied in their conclusions and further

---

ber's request of 15 November 2018 and the Appeals Chamber's judgment of 2 September 2019 ["Prosecutor's Third Decision"].

<sup>113</sup> See ICC, Decision of 16.7.2015 – ICC-01/13-34 (Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation ["First Review Decision"]), para. 23; *Chaitidou*, ZIS 2016, 813 (841).

<sup>114</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 26.

<sup>115</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 24.

<sup>116</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), paras. 25–26.

<sup>117</sup> ICC, Decision of 16.7.2015 – ICC-01/13-34 (First Review Decision), para. 26.

<sup>118</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 32.

<sup>119</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), paras. 34, 93.

<sup>120</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), paras. 35–36.

<sup>121</sup> ICC, Decision of 16.7.2015 – ICC-01/13-34 (First Review Decision), paras. 28 et seq.

<sup>122</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 38.

<sup>123</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 43.

<sup>124</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 43.

<sup>125</sup> ICC, Decision of 16.7.2015 – ICC-01/13-34 (First Review Decision), paras. 46–47.

<sup>126</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), paras. 46–47.

added that domestic authorities in Turkey, Germany, Spain, Sweden and the United Kingdom discontinued their inquiries into said events.<sup>127</sup> In her view, the preliminary assessment of domestic authorities not to proceed with an investigation or prosecution may potentially be an indication of insufficient gravity.<sup>128</sup>

e) As regards the manner of commission of the alleged crimes, the Pre-Trial Chamber had criticised in 2015 the Prosecutor's conclusion that there was no plan or policy to attack civilians, having failed to (i) take into account information regarding the use of live fire by the IDF prior to boarding the Mavi Marmara, (ii) consider systematic cruel and abusive treatment of detained passengers in Israel, (iii) recognise the unnecessarily cruel treatment of passengers during the taking of the Mavi Marmara and attempts to conceal the crimes, and (iv) having considered the fact that the events aboard the Mavi Marmara were unique and that crimes were not committed (the same way) on other vessels of the flotilla to indicate that the alleged crimes had not occurred pursuant to a plan.<sup>129</sup> In response, the Prosecutor revised her position on and included information of live fire for the purpose of establishing a plan or policy.<sup>130</sup> Nevertheless, she emphasised that other available information was inconsistent with the existence of a plan or policy (or at least a plan or policy that involved persons beyond those directly implicated in the crimes), as killings occurred in the context of the passengers' violent resistance, live fire was only used in the second attempt of the IDF to board the vessels, IDF members made use of less-lethal weapons and tactics, some victims were evacuated.<sup>131</sup> Yet, given the Pre-Trial Chamber's direction at this stage to accept conflicting information, she accepted the possibility that the identified crimes had been committed according to a plan or policy by IDF members boarding the vessels (and not necessarily shared by other IDF troops).<sup>132</sup> As regards the subsequent alleged systematic abuse of detained passengers in Israel, the Prosecutor averred that, while she may take into account information beyond the Court's jurisdiction, the alleged abusive treatment was not systematic, was not acquiesced by military or other superiors, and associated with the events on the vessels.<sup>133</sup> Even if she would take into account this extra-jurisdictional conduct, she could give this consideration only limited weight given the absence of information linking the perpetrators of the alleged

conduct in Israel with the perpetrators of the identified crimes on the vessels.<sup>134</sup> As regards the Pre-Trial Chamber's finding that the Prosecutor had failed to take into account the additional factors that would support the existence of a plan or policy, the Prosecutor accepted their relevance but noted that they did not add significantly to or change her previous conclusion.<sup>135</sup>

In conclusion, the Prosecutor reiterated that the assessment of gravity is based on a unique appreciation of the various factors and that analogies between (potential) cases are neither helpful nor instructive.<sup>136</sup> Noting the selective mandate of the Court, the Prosecutor recalled that she enjoys under Article 53 (1) (b) a margin of appreciation and that States share the burden of prosecuting crimes under the principle of complementarity.<sup>137</sup>

## 2. Pre-Trial Chamber's Third Review Decision

On 2 March 2020, the Union of the Comoros submitted for a third time a request to the Pre-Trial Chamber to review the Prosecutor's decision not to open an investigation, pursuant to Article 53 (3) (a) and rule 107.<sup>138</sup> It alleged that the Prosecutor failed to comply with the Pre-Trial Chamber's directions in relation to all five points mentioned above and also failed to apply the correct evidentiary standard, as interpreted by the Pre-Trial Chamber. It also requested that the Pre-Trial Chamber sanction the Prosecutor for persistently not complying with the directions of the Chamber, pursuant to Article 71 and rule 171, and that an *amicus curiae* prosecutor reconsider the decision not to investigate.

Upon receipt of further responses and replies of the victims, the Prosecutor and the Union of the Comoros,<sup>139</sup> the Pre-Trial Chamber rendered on 16 September 2020 unanimously its third review decision.<sup>140</sup> The Chamber's main legal findings are briefly summarised as follows:

At the outset, the Chamber reiterated that the criteria under Article 53 are exacting legal requirements and that, when met, the Prosecutor is duty-bound to open an investigation, unless the investigation would not serve the interests of jus-

<sup>127</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 52.

<sup>128</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 53.

<sup>129</sup> ICC, Decision of 16.7.2015 – ICC-01/13-34 (First Review Decision), paras. 33 et seq.

<sup>130</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), paras. 61–63.

<sup>131</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 65.

<sup>132</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), paras. 67–69.

<sup>133</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), paras. 71–81.

<sup>134</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 82.

<sup>135</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 83.

<sup>136</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), para. 90.

<sup>137</sup> ICC, Filing of 2.12.2019 – ICC-01/13-99-Anx1 (Prosecutor's Third Decision), paras. 95–96.

<sup>138</sup> ICC, Filing of 2.3.2020 – ICC-01/13-100 (Application for Judicial Review by the Government of the Comoros).

<sup>139</sup> ICC, Decision of 6.3.2020 – ICC-01/13-101 (Order on the filing of responses and replies); Decision of 19.3.2020 – ICC-01/18-106 (Decision on the "Prosecution's urgent request for extension of time").

<sup>140</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Decision on the 'Application for Judicial Review by the Government of the Comoros ["Third Review Decision"]').

tice, pursuant to Article 53 (1) (c).<sup>141</sup> The Judges also recalled that the evidentiary standard at this stage is low, calling only for a sensible or reasonable conclusion, without the information needing to be clear, univocal or not contradictory.<sup>142</sup> They then explained that the purpose of assessing gravity is to “prevent the Court from investigating, prosecuting and trying peripheral cases” that otherwise technically fall under the Court’s jurisdiction.<sup>143</sup> The Judges recalled that the purpose of the gravity requirement is not to oblige the Court to choose only the most serious cases, but merely to oblige it not to prosecute cases of marginal gravity. The Chamber also recapitulated the relevant criteria for assessing the gravity of “potential cases” which is composed of two parameters:<sup>144</sup> (i) the persons likely to be the objects of the investigation, namely those being the most responsible for the crimes irrespective of seniority or their hierarchical position;<sup>145</sup> and (ii) the alleged crimes committed that, due to their scale, nature, manner of commission, and impact, are likely to be the object of the investigation.<sup>146</sup> The Judges clarified that the gravity assessment involves a holistic evaluation of these quantitative and qualitative criteria.<sup>147</sup>

a) As regards the group of potential perpetrators, the Pre-Trial Chamber determined that the Prosecutor committed new errors. The Chamber criticised that when defining this factor and attributing weight, she inappropriately included and relied on the extraneous consideration that the potential cases would be of limited scope.<sup>148</sup> The Chamber also considered it erroneous on the part of the Prosecutor from the outset to prematurely confine the scope of potential perpetrators to only those that directly perpetrated the crimes, excluding all

other categories of perpetrators.<sup>149</sup> Indeed, determinations as to precise contribution of the person involved, mens rea, possible modes of liability and possible grounds for excluding criminal responsibility, cannot be made on the basis of limited information available at this pre-investigative stage.<sup>150</sup> Further, in the view of the Chamber, the Prosecutor’s erroneous assessment conflicts with her obligation to determine the truth, within the meaning of Article 54 (1) (a) and the applicable evidentiary standard, as interpreted by the Chamber.<sup>151</sup> Lastly, the Judges also took issue with the Prosecutor’s determination that the identification of perpetrators would be difficult, a consideration that is irrelevant for gravity purposes.<sup>152</sup>

b) As regards the scale of the identified crimes, the Pre-Trial Chamber accepted that its previous direction in 2015 had exceeded its powers under Article 53 (3), as determined by the Appeals Chamber. It therefore did not review the Prosecutor’s argumentation.<sup>153</sup>

c) As regards the nature of the crimes, the Pre-Trial Chamber held that the Prosecutor had committed errors as she (i) failed to reconsider her previous factual findings by applying the Pre-Trial Chamber’s interpretation of the evidentiary standard to the facts at hand, contrary to the Appeals Chamber direction;<sup>154</sup> and (ii) failed to take into account the legal characterisation of the facts as torture and inhumane treatment in her assessment of the gravity of the potential case(s), as part of the nature of the crimes.<sup>155</sup> Addressing the Prosecutor’s argument that weight should be given to the factual nature of the identified conduct and not its legal characterisation, the Chamber responded that the legal characterisation was a relevant factor for gravity purposes and that, by awarding it “neutral significance”, the Prosecutor effectively had disregarded the Pre-Trial Chamber’s 2015 direction in this regard.<sup>156</sup> In the opinion of the Chamber, the Prosecutor also committed a new error in alleging that some cases would be less grave than others because some of the victims were subjected to fewer or less severe forms of mistreatment (e.g. handcuffing and restrictions in movement). According to the Pre-Trial Judges, the Prosecutor had engaged in a premature assessment of the severity of the mistreatment, in abstract, without considering that the personal circumstances of the

<sup>141</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 15, 101; Decision of 16.7.2015 – ICC-01/13-34 (First Review Decision), paras. 13–14. Different the Appeals Chamber in the Afghanistan situation which assumes that the Prosecutor has discretionary power to initiate investigations in the context of proprio motu investigations, ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 26.

<sup>142</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 16; Decision of 16.7.2015 – ICC-01/13-34 (First PTC Review), para. 13.

<sup>143</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 22.

<sup>144</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 18; Decision of 16.7.2015 – ICC-01/13-34 (First PTC Review), para. 21.

<sup>145</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 19; Decision of 16.7.2015 – ICC-01/13-34 (First PTC Review), para. 23.

<sup>146</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 20.

<sup>147</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 21.

<sup>148</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 39, 45.

<sup>149</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 40–41.

<sup>150</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 41.

<sup>151</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 42–43, 45.

<sup>152</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 44–45.

<sup>153</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 50.

<sup>154</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 57, 59, 61–63, 71.

<sup>155</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 58–59, 63, 71.

<sup>156</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 64–66.

victims may ultimately influence such assessment.<sup>157</sup> Moreover, the Prosecutor had committed a new error by taking into account prematurely, when assessing the weight to be attached to the nature of the crimes, questions concerning the status of the victims and potential grounds for excluding criminal responsibility, in particular whether the perpetrators acted in self-defence.<sup>158</sup> According to the Judges, the status of victims was already part of the Article 53 (1) (a) assessment when the Prosecutor accepted, despite alleged uncertainties in the information, the protected status of the victims. As a consequence, she could not rely on the same uncertainties, inherent in the present evidentiary threshold, and attribute less weight to the nature of the crimes in the context of Article 53 (1) (b).<sup>159</sup> Similarly, the Judges opined that taking into account reasons for excluding criminal responsibility are misplaced as they are irrelevant factors when assessing gravity.<sup>160</sup>

d) As regards the impact of the crimes, the Pre-Trial Chamber held that the Prosecutor had failed to take into account the Chamber's 2015 directions in part by not considering the international concern caused by the events.<sup>161</sup> In particular the Prosecutor failed to demonstrate how she assessed the international reports, calling into question that she has assigned any weight to these international concerns.<sup>162</sup> The Prosecutor also committed a new error when conflating the impact of the alleged crimes on the victims (i.e. the harm suffered and damage caused) with the scale of victimisation (i.e. number of victims, geographical area, span and intensity of alleged crimes).<sup>163</sup> In relation to the Prosecutor's claim to have attributed limited weight to the impact on victims, the Judges were of the view that she failed to demonstrate how she has assessed the harm suffered by the victims, thus suggesting that she has not attributed any weight to this factor.<sup>164</sup> Lastly, the Judges pointed out that the Prosecutor had committed a new error in considering domestic proceedings as this factor is only relevant for complementary purposes and not the gravity requirement.<sup>165</sup>

e) As regards the manner in which the alleged crimes had been committed, the Pre-Trial Chamber determined that, the

Prosecutor failed to genuinely correct her errors because she continued to apply the evidentiary standard incorrectly.<sup>166</sup> Her decision to attribute less weight to the use of live fire prior to boarding, due to unclear and conflicting accounts, was in contradiction with the Chamber's interpretation of the evidentiary standard and an abuse of her prerogative to evaluate the facts.<sup>167</sup> Equally, the Prosecutor's decision to give limited weight to the mistreatment of passengers on Israeli territory, because of missing information linking the perpetrators of the alleged conduct in Israel with the perpetrators of the identified crimes on the vessels, was misguided as all alleged perpetrators were in the service of the Israeli Government and the Prosecutor should have assessed this information together with other information in her possession against the applicable evidentiary standard.<sup>168</sup> As regards the additional factors (excessive use of force, alleged concealment of the crimes and absence of crimes on other vessels), the Chamber reiterated that the Prosecutor incorrectly drew on the existence of several possible explanations to assign less weight to the possibility that the crimes were committed pursuant to a plan or policy, in direct contradiction to the evidentiary standard established by the Chamber.<sup>169</sup>

As regards the Prosecutor's concluding remarks on gravity, the Judges took issue with the Prosecutor's argument regarding the selective mandate of the Court. Specifically, the Judges clarified that gravity is "not a criterion for the selection of the most serious situations and cases, as argued by the Prosecutor, but a requirement for the exclusion of (potential) cases of *marginal gravity*".<sup>170</sup> Therefore – considering that gravity at this stage relates to potential cases and not the situation – if at least one potential case not of marginal gravity arises out of the given situation, the requirements of Articles 53 (1) (b) and 17 (1) (d) are fulfilled.<sup>171</sup> The Chamber also disagreed with the Prosecutor's evaluation that gravity cannot be compared across cases and potential cases, stating that the Abu Garda, Banda and Al Mahdi cases were of comparable or lesser gravity than the potential cases arising from the present situation where the victims comprise 10 persons killed, 50–55 seriously injured and possibly hundreds having allegedly suffered from outrages upon personal dignity, torture or inhumane treatment.<sup>172</sup> In the view of the Judges, inconsistent application of the gravity criterion across cases

<sup>157</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 67.

<sup>158</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 68, 71.

<sup>159</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 69.

<sup>160</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 70.

<sup>161</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 76.

<sup>162</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 78, 83.

<sup>163</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 79.

<sup>164</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 80, 83.

<sup>165</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 81, 83.

<sup>166</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 88–89, 94.

<sup>167</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 91.

<sup>168</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 92.

<sup>169</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 93.

<sup>170</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 96.

<sup>171</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 97.

<sup>172</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 99–100.

and potential cases would open the Court up to criticism of double-standards and arbitrariness.<sup>173</sup>

Despite the Prosecutor's failure to comply with the Chamber's 2015 directions and commission of new errors, the Judges did not request the Prosecutor to reconsider her 2014 initial decision not to open an investigation. The Judges held that it was unclear to them, after the Appeals Chamber judgment of 2 September 2019, whether and to what extent they may request the Prosecutor to correct the identified errors. More specifically, the Judges held, first, that the guidance of the Appeals Chamber was unclear as to whether they could request the Prosecutor to correct errors related to questions of law and the application of the law to the facts.<sup>174</sup> In their opinion, in the present proceedings, the interpretation of the evidentiary standard (a question of law), was inextricably linked with the application of the law to the facts, namely how the Prosecutor applied the evidentiary standard to the facts and which weight she attributed.<sup>175</sup> And second, the Judges found that it was unclear to them whether and to what extent they may request the Prosecutor to correct errors related to her assessment of the factors relevant to the gravity requirement, in particular the attribution of weight.<sup>176</sup> In fact, the Chamber considered the Appeals Chamber jurisprudence to be unclear as regards the exact distribution of prerogatives between the Prosecutor and the Pre-Trial Chamber in Article 53 (3) (a) proceedings. As a result, the Chamber found that the Prosecutor had failed to genuinely reconsider her 2014 decision in light of the Chamber's 2015 directions, but rejected Comoros request.

On 22 September 2020, the Union of the Comoros lodged leave to appeal this decision.<sup>177</sup> By the time of writing, a decision of the Pre-Trial Chamber is pending.

#### V. Situation in the Islamic Republic of Afghanistan (Pre-Trial Chamber II)<sup>178</sup>

- Prosecutor's Request: 20.11.2017
- Victims representations: several millions
- Pre-Trial Chamber Decision Rejecting Investigation: 12.4.2019

<sup>173</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 101.

<sup>174</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 107.

<sup>175</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), paras. 108–109. See also ICC, Opinion of 2.9.2019 – ICC-01/13-98-Anx (Partly Dissenting Opinion of Judge Eboe-Osuji).

<sup>176</sup> ICC, Decision of 16.9.2020 – ICC-01/13-111 (Third Review Decision), para. 110.

<sup>177</sup> ICC, Filing of 22.9.2020 – ICC-01/13-112 (Application on behalf of the Government of the Union of the Comoros for Leave to Appeal the “Decision on the ‘Application for Judicial Review by the Government of the Comoros’” of 16 September 2020).

<sup>178</sup> The record carries the situation number ICC-02/17.

- Appeals Chamber Judgment Authorizing Investigation: 5.3.2020
- Current Status: Investigation ongoing

It is recalled that on 20 November 2017, the Prosecutor submitted a request for authorisation of an investigation into crimes allegedly committed on the territory of Afghanistan by, inter alia, the Taliban and associated armed groups, the Afghan army and other (national and local) security forces, the United States of America (“US”) armed forces and the Central Intelligence Agency (“CIA”), in the period since 1 May 2003, as well as other crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002.<sup>179</sup>

On 12 April 2019, Pre-Trial Chamber II rejected the Prosecutor's request for authorisation to commence an investigation into the situation on the basis that the investigation would not serve the interests of justice.<sup>180</sup> While the Chamber followed, for the most part, the legal test applied in past Article 15 decisions,<sup>181</sup> it opined that the test “must include a positive determination to the effect that investigations would be in the interests of justice”.<sup>182</sup> In essence, four reasons were

<sup>179</sup> ICC, Filing of 20.11.2017 – ICC-02/17-7-Red (Public redacted version of “Request for authorization of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp), para. 376. Afghanistan deposited the instrument of accession to the Rome Statute on 10 February 2003. Accordingly, the Statute entered into force for Afghanistan on 1 May 2003.

<sup>180</sup> ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan [“Decision Rejecting Investigation”]). Judge Kesia Mbe Mindua appended a concurring and separate opinion, ICC, Opinion of 7.6.2019 – ICC-02/17-33-Anx-Corr (Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua).

<sup>181</sup> ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras. 29–31, 36, 70–71.

<sup>182</sup> ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), para. 35. Previous Pre-Trial Chambers have consistently held that the “interests of justice” element is a negative requirement that is only reviewed by the Pre-Trial Chamber if the Prosecutor decides not to proceed with an investigation on the basis of this element, see for example ICC, Decision of 31.3.2010 – ICC-01/09-19-Corr (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya [“Kenya Authorisation Decision”]), footnote 35 and para. 63; Decision of 15.11.2011 – ICC-02/11-14-Corr (Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire” [“Côte d'Ivoire Authorisation Decision”]), paras. 207–208; Decision of 27.1.2016 – ICC-01/15-12 (Decision on the Prosecutor's request for authorisation of an investigation [“Georgia Au-

advanced by the Chamber for taking a negative decision: the (i) time lapse between the alleged crime and the Prosecutor's request for authorisation; (ii) scarce cooperation obtained by the Prosecutor; (iii) likelihood that both relevant evidence and potential suspects might still be available and within reach of the Prosecutor's investigative efforts; and (iv) need for significant amount of resources that would go to the detriment of other investigations or prosecutions.<sup>183</sup>

### 1. Proceedings before the Appeals Chamber

Upon authorisation, the Prosecutor appealed the Pre-Trial Chamber's decision on two grounds: (i) whether the Pre-Trial Chamber erred in law in making a positive determination that the initiation of an investigation into the situation in Afghanistan was not in the interests of justice; and (ii) whether the Pre-Trial Chamber abused its discretion in assessing the interests of justice.<sup>184</sup> On 5 March 2020, the Appeals Chamber unanimously reversed the Pre-Trial Chamber's decision and authorised the commencement of the investigation into the situation.<sup>185</sup> Of importance are the following key findings:

a) When examining requests for authorisation under Article 15 (4), the Pre-Trial Chamber shall not review the Prosecutor's analysis of the factors under Article 53 (1) (a) to (c).<sup>186</sup> This is based on the Appeals Chamber's understanding that Articles 15 and 53 establish two separate regimes: proprio motu investigations are governed exclusively by Article 15, while investigations following a State Party or Security Council referral are governed by Article 53 (1).<sup>187</sup> In other words, in case of proprio motu investigations, the criteria of Article 53 (1) are not determinative for the Pre-Trial Chamber's decision, but only those set forth in Article 15 (4). Moreover, in the view of the Appeals Chamber, rule 48<sup>188</sup> can also not be relied upon by the Pre-Trial Chamber to import the criteria for its review in the context of Article 15

(4).<sup>189</sup> In addition, it quashed the line of argumentation of the Kenya Pre-Trial Chamber (and that of all other pre-trial chambers thereafter) which had argued that the identical evidentiary standard set forth in Articles 15 (3)/(4) and 53 (1) also informs the subject-matter of its review.<sup>190</sup> In the view of the Appeals Chamber this interpretation obscures the evidentiary standard with the object of its review.<sup>191</sup> As a result, Article 15 (4) only requires the Pre-Trial Chamber to determine whether there is a reasonable *factual* basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and that potential case(s) arising from such investigation appear to fall within the Court's jurisdiction.<sup>192</sup> It does not require the Pre-Trial Chamber to review the Prosecutor's assessment of complementarity or interests of justice.<sup>193</sup> Hence, the Pre-Trial Chamber erred when including in its Article 15 (4) review the analysis of the interest of justice factor as set out Article 53 (1) (c).<sup>194</sup>

b) While the Appeals Chamber considered it not necessary to examine the second ground of appeal, it nevertheless did so due to its importance and extensive litigation before it. The Appeals Chamber confirmed that the Prosecutor does not need to make a positive finding on the interest of justice factor as it is formulated in the negative in Article 53 (1) (c).<sup>195</sup> The Pre-Trial Chamber's reasoning in support of its conclusion regarding the interest of justice "was cursory, speculative and did not refer to information capable of supporting it". In particular, the Pre-Trial Chamber did not adequately consider the gravity of the crimes and the interests of victims.<sup>196</sup>

c) As regards the scope of the authorised investigation, the Pre-Trial Chamber had argued that the authorisation, if granted, would only encompass incidents that are "closely linked", rather than "sufficiently linked" and that for incidents that are not "closely linked", a new request for authori-

---

thorisation Decision"], para. 58; Decision of 9.11.2017 – ICC-01/17-9-Red (Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017 ["Burundi Authorisation Decision"], para. 190.

<sup>183</sup> ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras. 91–96.

<sup>184</sup> ICC, Filing of 30.9.2019 – ICC-02/17-74 (Prosecution Appeal Brief).

<sup>185</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan ["Judgment Authorisation Afghanistan"]).

<sup>186</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), paras. 25, 45.

<sup>187</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 33.

<sup>188</sup> Rule 48 stipulates: "In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)".

---

<sup>189</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 35.

<sup>190</sup> ICC, Decision of 31.3.2010 – ICC-01/09-19-Corr (Kenya Authorisation Decision), paras. 20–25; Decision of 15.11.2011 – ICC-02/11-14-Corr (Côte d'Ivoire Authorisation Decision), paras. 17–18, 21; Decision of 27.1.2016 – ICC-01/15-12 (Georgia Authorisation Decision), paras. 4–5; Decision of 9.11.2017 – ICC-01/17-9-Red (Burundi Authorisation Decision), para. 28.

<sup>191</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 36.

<sup>192</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), paras. 34, 39, 45.

<sup>193</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), paras. 39–41.

<sup>194</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), paras. 37, 46.

<sup>195</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 49.

<sup>196</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 49.

sation must be submitted.<sup>197</sup> Further, the Pre-Trial Chamber had argued that incidents taking place outside Afghanistan (such as persons captured in or outside of Afghanistan and mistreated/tortured outside Afghanistan on the territory of States Parties in the context of the CIA detention program of the CIA) would not fall under the Court's jurisdiction for lack of nexus with the armed conflict.<sup>198</sup> In response, the Appeals Chamber rejected the Pre-Trial Chamber's narrow interpretation of "closely linked" as "unworkable in practice"<sup>199</sup> and clarified that the authorisation of the investigation cannot be restricted to incidents specifically mentioned in the Prosecutor's Article 15 (3) request and to incidents that are only "closely linked" to those mentioned incidents. Restricting the scope in this manner would not take into account the Prosecutor's limited investigative powers during the preliminary examination phase and "erroneously inhibit the Prosecutor's truth-seeking function".<sup>200</sup> The Appeals Chamber also disagreed with the Pre-Trial Chamber's nexus interpretation. Noting the broad wording of the chapeau of Article 3 common to the 1949 Geneva Conventions, it held that "it is incorrect to assume that, merely because the alleged capture of the victim did not take place in Afghanistan and the alleged criminal act also occurred outside Afghanistan, the conduct cannot possibly have taken place in the context of, and have been associated with, the armed conflict in that State". Rather, the nexus must be established for each incident case-by-case.<sup>201</sup> As a consequence, the Appeals Chamber authorized the investigation as framed by the Prosecutor.<sup>202</sup>

The Appeals Chamber made further comments on the relevance of Articles 18 and 98 in the context of authorisation proceedings pursuant to Article 15 (4):

d) Considerations of admissibility may be raised under Article 18 after the proprio motu investigation has been authorised.<sup>203</sup>

e) Immunities under Article 98 (including agreements entered by States) affect the execution of requests under the cooperation regime of the Statute and are not relevant when determining whether the initiation of an investigation should be authorised.<sup>204</sup>

Judge Ibáñez Carranza appended a separate opinion to the judgment expressing her disagreement with the Appeals Chamber's "statements made in passing" and outside the

scope of the appeal that the Prosecutor has discretion when deciding whether or not to open proprio motu investigations, and that the Article 53 (1) (a) and (b) criteria only apply to State Party and Security Council referrals.<sup>205</sup>

Victims also lodged direct appeals before the Appeals Chamber against the Pre-Trial Chamber's decision rejecting the commencement of the proprio motu investigation.<sup>206</sup> During the hearing on 5 December 2019, the Appeals Chamber decided orally, by majority, that the victims had no legal standing under Article 82 (1) (a) to bring an appeal and dismissed their appeal as inadmissible.<sup>207</sup> Judge Ibáñez Carranza dissented arguing that the ruling should have been rendered in the form of a written judgment and that victims should have been granted legal standing under Article 82 (1) (a) to bring the appeal against a decision denying the authorization to commence an investigation.<sup>208</sup> On 4 March 2020, the Appeals Chamber provided in writing the reasons for its oral ruling.<sup>209</sup>

## 2. Proceedings before Pre-Trial Chamber II

On 15 April 2020, the Prosecutor informed the Chamber that Afghanistan requested her Office to defer to its domestic investigation of persons whom it is investigating and prosecuting.<sup>210</sup> She attached the deferral request which contained also a table which broadly describes the type of cases in relation to which the authorities propose to provide further information.<sup>211</sup> She explained that due to the Coronavirus Pandemic, the Afghan authorities have been unable to specify with supporting material the investigations currently ongoing and informed the Chamber that she has agreed that Afghanistan may supplement the deferral request with further information until 12 June 2020.

<sup>197</sup> ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras. 41–42.

<sup>198</sup> ICC, Decision of 12.4.2019 – ICC-02/17-33 (Decision Rejecting Investigation), paras. 51–56.

<sup>199</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 63.

<sup>200</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 61.

<sup>201</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), paras. 73–76, 78.

<sup>202</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 79.

<sup>203</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 42.

<sup>204</sup> ICC, Judgment of 5.3.2020 – ICC-02/17-138 (Judgment Authorisation Afghanistan), para. 44.

<sup>205</sup> ICC, Opinion of 6.3.2020 – ICC-02/17-138-AnxCorr (Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan).

<sup>206</sup> ICC, Filing of 2.10.2019 – ICC-02/17-73-Corr (Corrigendum of Updated Victims' Appeal Brief); Filing of 1.10.2019 – ICC-02/17-75-Corr (Corrigendum of Victims' Joint Appeal Brief against the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" of 30 September 2019, ICC-02/17-75).

<sup>207</sup> ICC, Transcript of 5.12.2019 – ICC-02/17-T-002-ENG ET, pp. 2–5.

<sup>208</sup> ICC, Opinion of 5.12.2019 – ICC-02/17-133 (Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the majority's oral ruling of 5 December 2019 denying victims' standing to appeal [Preliminary reasons]).

<sup>209</sup> ICC, Reasons of 4.3.2020 – ICC-02/17-137 (Reasons for the Appeals Chamber's oral decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan).

<sup>210</sup> Filing of 15.4.2020 – ICC-02/17-139 (Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18 (2) of the Statute).

<sup>211</sup> Filing of 15.4.2020 – ICC-02/17-139-Anx1 (Letter Requesting Deferral).