Recent Developments in the Jurisprudence of the International Criminal Court

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This article is based on the presentation of selected developments in the jurisprudence of the International Criminal Court (ICC) given at the 2022 meeting of the "Arbeitskreis Völkerstrafrecht" in Berlin.[1] *It discusses decisions of three instances rendered in 2020 and 2021: the confirmation decision against Ali Kushayb and a decision rendered in the situation of the Bolivarian Republic of Venezuela I (pre-trial); the trial judgment and sentencing of Dominic Ongwen (trial); and the appeals judgment regarding the conviction of Bosco Ntaganda (appeal).*

The political developments since February 2022 in Ukraine have put the ICC back in the spotlight. However, before this period, the Court has steadfastly fulfilled its mandate and the judges quietly have rendered decisions marking new milestones in the Court's jurisprudential output.

From the plethora of decisions and judgments, only a very small selection of judicial decisions is 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.

I. Situation in Uganda,[2] The Prosecutor v Dominic Ongwen (Trial Chamber IX)[3]

- 8.7.2005: Warrant of arrest
- 16.1.2015: Transfer Ongwen to the Court
- 23.3.2016: Confirmation of charges
- 6.12.2016–12.3.2020: Trial
- 5.–7.6.2018: Judicial site visit in Uganda
- 4.2.2021: Conviction
- Victims participating: 4,095 (trial)
- Current status: Reparations

Dominic Ongwen was charged with 70 counts of crimes against humanity and war crimes committed by fighters of the Lord's Resistance Army ("LRA") between 1 July 2002 and 31 December 2005 in Northern Uganda. At the beginning of the period relevant to the charges, Ongwen was a battalion commander of the Sinia brigade, one of the four brigades of the LRA. Over time, he was promoted by Joseph Kony, the LRA's undisputed leader, to higher positions and ranks. Ultimately, he was appointed commander of the Sinia brigade. The charges were presented in four clusters: (i) the brutal attacks of LRA fighters subordinate to Ongwen against civilians in four villages: Pajule, Odek, Abok and Lukodi; (ii) Ongwen's personal responsibility in enslaving, mistreating and sexually abusing seven "wives" distributed to him; (iii) the coordinated and systematic effort to abduct and enslave women and girls in Northern Uganda and to distribute them as "wives" or domestic servants to LRA fighters of the Sinia brigade; and (iv) the coordinated and systematic effort to abduct children under the age of 15 in Northern Uganda and forcing them to serve as LRA soldiers in the Sinia brigade in hostilities.

Ongwen's trial has attracted a lot of attention, not least because of Ongwen's very unique biography. He is born in or around 1978 and was abducted in 1987 on his way to school by the LRA and was forcibly integrated as a child soldier into the LRA. He turned from victim to perpetrator in the same armed group that had caused him suffering and provided him a home. These particular circumstances led the Defence to argue exclusionary grounds under Art. 31 of the Rome Statute[4] and the Court to address them in-depth for the first time.

On 4 February 2021, Trial Chamber IX, presided by Judge Bertram Schmitt, convicted Ongwen for 61 counts of crimes against humanity and war crimes.[5] On 6 May 2021, the Judges sentenced him, by majority, to 25 years imprisonment.[6]

1. Conviction

With regard to the conviction judgment, only three topics are presented, namely the Chamber's interpretation of the exclusionary grounds of mental disease or defect, the crimes of forced pregnancy and forced marriage, and the concurrence of certain crimes.

a) Exclusionary Grounds

At the outset, the Chamber clarified that the burden and standard of proof, as set out in Art. 66 (2) and (3), apply equally to the negative finding that grounds of criminal responsibility

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[1] Previous overviews of the Court's jurisprudence are available at *Guhr*, ZIS 2008, 367; *Chaitidou*, ZIS 2008, 371; *ead.*, ZIS 2010, 726; *ead.*, ZIS 2011, 843; *ead.*, ZIS 2013, 130; *Eckelmans*, ZIS 2015, 523; *Chaitidou*, ZIS 2016, 813; *ead.*, ZIS 2017, 733; *ead.*, ZIS 2018, 23; *ead.*, ZIS 2018, 73, *Körner*, ZIS 2018, 546; *Chaitidou*, ZIS 2019, 567; *ead.*, ZIS 2020, 551; *ead.*, ZIS 2021, 46.

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

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

[4] 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.

[5] ICC (Trial Chamber IX), Trial Judgment of 4.2.2021 – ICC-02/04-01/15-1762-Red (Ongwen Judgment).

[6] ICC (Trial Chamber IX), Sentence of 6.5.2021 – ICC-02/04-01/15-1819-Red, Partly Dissenting Opinion of Judge Raul C. Pangalangan, ICC-02/04-01/15-1819-Anx.

are lacking. This means that the Prosecutor must prove that the accused is responsible for the crimes charged and the Court must be convinced of his guilt beyond reasonable doubt.[7] The Judges further added that the grounds for excluding criminal responsibility must be present at the time of the accused's conduct.

Moreover, the Chamber clarified that raising an alibi is not a ground for excluding criminal responsibility within the meaning of Art. 31, but is assessed as a matter of evidence relating to the accused's presence in a location other than the scene of the crime at the relevant time.[8]

The Defence argued that two grounds for excluding Ongwen's criminal responsibility were applicable, namely mental disease or defect and duress. As to the relationship between the two grounds, the Chamber observed that the two cannot co-exist, as mental disease or defect rests on the incapacity to appreciate the unlawfulness of the nature of the conduct, while duress rests on the conscious choice to engage in conduct that amounts to a crime.[9]

aa) Mental Disease or Defect, Art. 31 (1) (a)

The Defence argued that Ongwen suffered from "'severe depressive illness, post-traumatic stress disorder and dissociative disorder (including depersonalization and multiple identity disorder) as well as severe suicidal ideation and high risk of committing suicide', and from 'dissociative amnesia and symptoms of obsessive compulsive disorder'".[10] At first, the Chamber clarified that the mental disease or defect must have existed at the time of the conduct. To this end, it may draw inferences from the accused's mental state during the proceedings, which must be clearly explained and reliable.[11] Whether the legal requirements are fulfilled is determined only by the Chamber which must base its judicial finding on the evidence available.[12] The Judges received forensic reports of six experts and heard five of them;[13] they also drew upon the witnesses' descriptions of Ongwen's behaviour during the relevant time. On evidence, the Chamber found that there was no support for the existence of a mental disease or defect at the relevant time.[14] Notably, the witnesses heard during trial, in particular Ongwen's "wives", did not indicate any particularity suggestive of symptoms of a mental disease or defect.

bb) Duress, Art. 31 (1) (d)

The Defence further argued that Ongwen acted under duress because he was under "continuing threat of imminent death and serious bodily harm" from Joseph Kony and his military apparatus through strict disciplinary rules, tight supervision of commanders, severe punishments and the assertion of spiritual powers.[15] In the view of the Chamber, the ground of duress has three elements: (i) the existence of a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person; the threat in question may either be made by another person or constituted by other circumstances beyond the person's control; the words "imminent" (i.e. immediately) and "continuing" (i.e. ongoing) refer to the nature of the harm (death or bodily injury), not the threat itself; abstract danger or an elevated probability that a dangerous situation might occur does not suffice; lastly, the threat is assessed at the time of the person's conduct;[16] (ii) the person acts necessarily and reasonably to avoid the threat; not all conceivable actions to avoid the threat, irrespective of considerations of feasibility and proportionality, can be expected; it is relevant what others, in comparable circumstances, were able to necessarily and reasonably avoid the threat;[17] (iii) the person did not intend to cause a greater harm than the one sought to be avoided, the emphasis being on the person's intention, not whether the greater harm was indeed avoided; this is assessed case-by-case.[18]

On evidence, the Chamber denied that Ongwen, as higher-level commander, was at the time of the conduct relevant to the charges under any threat of imminent death or physical punishment.[19] To the contrary, the Judges found Ongwen to have taken decisions on the basis of what he thought right or wrong, without consequences, and to have been a source of threats to others.[20] He stayed loyal to Joseph Kony and was promoted for his good performance.[21] The Defence's claim that commanders would be executed for non-obedience of Joseph Kony's orders was also found to be unsupported in evidence.[22] Moreover, the Judges denied the existence of a serious threat insofar as Ongwen had attempted to escape the LRA in 2003 without being killed, and that, as evidenced by many other examples, escaping the LRA was common practice without consequences.[23] Lastly, Joseph Kony's alleged spiritual powers were not deemed capable to create or sustain a threat to Ongwen, nor did the evidence reveal that these alleged powers ever played a role for Ongwen.[24]

[7] Ongwen Judgment (fn. 5), paras 231, 2455, 2588.
[8] Ongwen Judgment (fn. 5), para. 2449.
[9] Ongwen Judgment (fn. 5), para. 2671.
[10] Ongwen Judgment (fn. 5), para. 2450.
[11] Ongwen Judgment (fn. 5), para. 2454.
[12] Ongwen Judgment (fn. 5), para. 2456.
[13] Ongwen allowed only the two experts called by the Defence and the Chamber-appointed expert to interview him psychiatrically. The other three experts called by the Prosecutor based their forensic reports on audio-visual and documentary material provided to them and the information contained in the forensic reports of the experts Ongwen agreed to speak with.
[14] Ongwen Judgment (fn. 5), para. 2580.
[15] Ongwen Judgment (fn. 5), para. 2586.
[16] Ongwen Judgment (fn. 5), paras 2581–2582.
[17] Ongwen Judgment (fn. 5), para. 2583.
[18] Ongwen Judgment (fn. 5), para. 2584.
[19] Ongwen Judgment (fn. 5), paras 2591, 2668–2670.
[20] Ongwen Judgment (fn. 5), paras 2591–2608, 2666–2667.
[21] Ongwen Judgment (fn. 5), paras 2659–2665.
[22] Ongwen Judgment (fn. 5), paras 2609–2618.
[23] Ongwen Judgment (fn. 5), paras 2619–2635.
[24] Ongwen Judgment (fn. 5), paras 2643–2658.

b) Forced Pregnancy, Art. 7 (1) (g), Art. 8 (2) (e) (vi)

The Chamber held that this crime is grounded in the woman's right to personal and reproductive autonomy and the right to family.[25] In the view of the Judges, it does not suffice to punish this crime as a combination of rape and unlawful detention or under the category of "any other form of sexual violence". Rather, this crime has an independent meaning. In a nutshell, the crime depends on the unlawful confinement of a (forcibly made) pregnant woman, with the effect that the woman is deprived of reproductive autonomy.[26]

aa) Actus reus

The actus reus of the crime, whether as a war crime or crime against humanity, is committed when: (i) the perpetrator confined unlawfully a woman; the woman's physical movement must have been restricted, without requiring a specific qualification (e.g. "severe") or minimum duration;[27] (ii) the woman was forcibly made pregnant prior to or during the unlawful confinement without the perpetrator being the one to have forcibly made the woman pregnant;[28] the term "forcibly" does not necessarily require physical violence, but may be accepted in case of "threat of force, or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against the woman or another person, or by taking advantage of a coercive environment, or that the woman made pregnant was a person incapable of giving genuine consent"; it is the existence of coercive circumstances that "undermine the woman's ability to give voluntary and genuine consent".[29]

bb) Mens rea

The perpetrator must have acted with specific intent affecting the ethnic composition of any population or, in the alternative, carrying out other grave violations of international law, such as "confining a woman with the intent to rape, sexually enslave, enslave or torture her".[30] The specific intent does not require that the perpetrator intended to keep the woman pregnant.[31]

c) Forced Marriage, Art. 7 (1) (k)

Ongwen was charged for having forced women to serve as "conjugal partners" to himself and other LRA fighters in his brigade. Like the Pre-Trial Chamber,[32] the Trial Judges grounded the penalization of such conduct in the residual provision Art. 7 (1) (k).[33] They explained that, even though parts of the relevant conduct are captured under other enumerated acts in Art. 7 (1), the "full scope of the culpable conduct" of forced marriage, as well as the impact it has on victims, is not.[34]

In the view of the Judges, every person has the right to enter a marriage with the free and full consent of another person, thus creating a consensual and contractual relationship. Conversely, forced marriage is the imposition, regardless of the will of the victim, of duties that are associated with marriage, including in terms of exclusivity of the (forced) conjugal union imposed on the victim, as well as the consequent social stigma. In delineating the harm, the Judges drew on the fact that the state of being forcibly married "has also social, ethical and even religious effects", which have a serious impact on the victims' well-being, "as the victims may see themselves as being bonded or united to another person despite the lack of consent". Further, if forced marriage results in the birth of children, this affects equally emotionally and psychologically the victim and their children, beyond the physical effects of pregnancy and childbearing. Lastly, the victims' social environment may see them as the "legitimate" spouse.[35] The Chamber concluded that the harm suffered from forced marriage can consist of "being ostracized from the community, mental trauma, the serious attack on the victim's dignity, and the deprivation of the victim's fundamental rights to choose his or her spouse".[36] Against this background, the Chamber compared the concept of forced marriage with other related crimes and concluded that it exists independently of them: For example, sexual enslavement criminalizes the perpetrator's restriction or control of the victim's sexual autonomy while held in a state of enslavement, whereas forced marriage does not necessarily involve ownership over the victim, the quintessential element of enslavement. Rape does not involve the imposition of a marital status on the victim that stigmatizes and traumatizes the victim of forced marriage beyond the suffering from rape.[37] Lastly, the Chamber clarified that forced marriage is a continuing crime, covering the entire period of the forced conjugal relationship until the moment the victim is freed from it.[38]

aa) Actus reus

The actus reus of the crime is committed when: (i) the victim, regardless of his or her will, is forced into a conjugal union with another person; (ii) by using physical or psychological force, threat of force or taking advantage of a coercive environment. Importantly, whether the conduct in question constitutes forced marriage under Art. 7 (1) (k) is assessed on the facts of the case.[39]

[25] Ongwen Judgment (fn. 5), para. 2717.
[26] Ongwen Judgment (fn. 5), para. 2722.
[27] Ongwen Judgment (fn. 5), para. 2724.
[28] Ongwen Judgment (fn. 5), para. 2723.
[29] Ongwen Judgment (fn. 5), para. 2725.
[30] Ongwen Judgment (fn. 5), para. 2727.
[31] Ongwen Judgment (fn. 5), paras 2728–2729.
[32] ICC (Pre-Trial Chamber II), Decision on the confirmation of charges against Dominic Ongwen of 23.3.2016 – ICC-02/04-01/15-422-Red, paras 88–95.
[33] Ongwen Judgment (Fn. 5), para. 2748.
[34] Ongwen Judgment (fn. 5), paras 2747–2748.
[35] Ongwen Judgment (fn. 5), para. 2748.
[36] Ongwen Judgment (fn. 5), para. 2749.
[37] Ongwen Judgment (fn. 5), para. 2750.
[38] Ongwen Judgment (fn. 5), para. 2752.
[39] Ongwen Judgment (fn. 5), para. 2751.

bb) Mens rea

The perpetrator must have acted with intent and need not make a value judgment as to the "inhumane" character of the act. In addition, the perpetrator need only be aware of the factual circumstances that established the character of the inhumane act.

d) Concurrence of Crimes

Whereas the Prosecutor had charged Ongwen with 70 counts, the Chamber convicted him only for 61 counts. This is the result of the Chamber's approach, encouraged by the Appeals Chamber in the Bemba et al. case,[40] not to retain certain legal qualifications of facts proposed in the charges "on account of impermissible concurrence of crimes". The Judges conceded that such an impermissibility rule is not contained in the Statute and that cumulative convictions on the basis of the same conduct may be addressed adequately in sentencing.[41] While they accepted cumulative convictions for the same underlying facts on the basis of two provisions that each contain at least one different legal element requiring proof of fact not required by the other, the Judges opined that cumulative convictions may be impermissible, for example if one crime is fully consumed by or is subsidiary to another.[42]

aa) Permissible concurrence

As regards analogous crimes against humanity and war crimes, namely forced pregnancy, sexual slavery, rape, murder and torture, the Chamber found that the concurrence of analogous crimes against humanity and war crimes is permissible. It followed other Trial Chambers agreeing that the contextual elements, which constitute integral part of the specific crimes, require proof of fact not required by the other. To this argument the Chamber added that also the protection offered by the two sets of crimes is different (crimes against humanity protect the civilian population in times of widespread or systematic attack, war crimes protect persons in times of armed conflict) and that, in terms of protected interests, war crimes and crimes against humanity "complement" each other in the incrimination of the specific crimes.[43]

As regards the concurrence of rape and sexual slavery, both as crimes against humanity and war crimes, the Chamber found that these crimes contain each an element not contained in the other. With a view to capturing fully the culpability of Ongwen, concurrence of the crimes of rape and sexual slavery on the basis of the same facts is permissible. The Judges explained that while rape requires the invasion of the body of a person by conduct resulting in penetration, sexual slavery requires that the victim is subjected to any act of a sexual nature, not necessarily rape. At the same time, sexual enslavement requires that the perpetrator exercises powers attaching to the right of ownership over the victim, which is not required for rape.[44]

bb) Impermissible concurrence

As regards the concurrence of the war crime of torture and the war crime of cruel treatment in case of the same underlying facts, the Chamber was of the view that the legal elements of cruel treatment were fully encompassed within the legal elements of torture, with the latter containing an additional constitutive mental element. In these circumstances, the Chamber held that concurrence of crimes, and consequently cumulative convictions, is impermissible, despite the facts fulfilling the legal elements of both crimes.[45]

As regards the concurrence of torture and other inhumane acts as crimes against humanity in case of the same underlying facts, the Chamber recalled the residual character of the crime of other inhumane acts within Art. 7 (1) and that, in light of the established facts, the harm and protected interests were already fully encompassed by the crime of torture. In these circumstances, the Chamber held that concurrence of crimes, and consequently cumulative convictions, is impermissible.[46]

As regards the concurrence of enslavement and sexual slavery as crimes against humanity, the Chamber held, similar to its discussion on the relationship between torture and cruel treatment, that, based on the same facts, the two crimes cannot concur because the crime of enslavement is entirely encompassed in the crime of sexual slavery. Sexual slavery is a specific form of enslavement, as it requires the victim to engage in at least one act of a sexual nature. However, where the victims, while enslaved, were not subjected to sexual abuse, the Chamber convicted Ongwen for the crime of enslavement.[47]

2. Sentencing

After conviction, the Prosecutor requested the Chamber to sentence Ongwen to not less than 20 years imprisonment, considering also Ongwen's abduction and difficult adolescent years in the LRA. The victims, drawing upon a series of aggravating circumstances, pleaded to sentence Ongwen to life imprisonment; interestingly, they rejected the suitability of traditional methods of restorative justice. Conversely, the Defence highlighted a series of mitigating circumstances and requested a lenient sentence, namely time served, or maximum a sentence of 10 years imprisonment. In addition, the Defence insisted that Ongwen should go through Acholi reconciliation rites, including the Mato Oput ritual that serves to reconcile members of two clans by paying compensation and a ritual of reconciliation intended to prevent killings.

As regards the Acholi traditional justice, the Judges opined that, pursuant to Art. 23 and 77, it does not have a

[40] ICC (Appeals Chamber), Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute" of 8.3.2018 – ICC-01/05-01/13-2275-Red, para. 751.
[41] Ongwen Judgment (fn. 5), para. 2792.
[42] Ongwen Judgment (fn. 5), para. 2796.
[43] Ongwen Judgment (fn. 5), paras 2820–2821.
[44] Ongwen Judgment (fn. 5), paras 3037, 3039, 3079.
[45] Ongwen Judgment (fn. 5), paras 2835, 2893, 2946, 2992.
[46] Ongwen Judgment (fn. 5), paras 2837, 2891, 2944, 2990.
[47] Ongwen Judgment (fn. 5), paras 3051, 3086.

place within the statutory regime as it would contravene the principle of nulla poena sine lege. The Chamber stressed that in light of the principle of legality it is precluded from introducing penalties or sentencing mechanisms not otherwise foreseen in the statutory framework.[48] Besides legal reasons, the Chamber also criticized that the Acholi rituals, the details of which are unclear, were reserved to the members of the Acholi community, thus excluding victims from other ethnic groups.[49] It rejected the Defence claim that traditional justice mechanisms are readily available in Northern Uganda and supposedly accepted by the victims of the case.[50] Lastly, the Judges were also attentive to the reservations towards Mato Oput expressed by witnesses with experience in the field and the High Court of Uganda.[51] In light of all the above considerations, the Chamber concluded that in fact non-deferral to traditional justice mechanisms does not run counter the culture of the people of Northern Uganda.[52]

The Judges, by majority, sentenced Ongwen to 25 years imprisonment, considering as mitigating circumstance Ongwen's abduction and experience as child soldier in the LRA.[53] The Majority Judges rejected life imprisonment due to the unique personal situation of Ongwen.[54]

The Chamber rejected the Defence arguments for mitigation stemming from circumstances falling short of constituting grounds for exclusion of criminal responsibility, pursuant to Rule 145 (2) (a) (i) of the Rules of Procedure and Evidence.[55] As regards Ongwen's current poor health, the Chamber made clear that such considerations are primarily a matter for the enforcement of the imposed sentence. Only in extreme and exceptional circumstances (e.g. the person is terminally ill) could health be taken into account in mitigation.[56] Likewise, duress as a mitigating circumstance was denied for the same reasons set forth in the conviction judgment.[57]

The dissenting Judge, while agreeing fully with the individual sentences, disagreed with his colleagues on the length of the joint sentence. He would have sentenced Ongwen to 30 years imprisonment in order to give due weight to the suffering of the victims. In his view, not imposing on Ongwen a life sentence would have taken adequately Ongwen's particular personal situation into account.

Ongwen came into custody of the Court when the authorities of the Central African Republic, acting as the custodial State, received him on 16 January 2015 on the basis of the ICC warrant of arrest. Accordingly, the period between 16 January 2015 and 6 May 2021, when the sentencing decision was rendered, was ordered to be deducted from the total time of imprisonment.[58] However, the Chamber also exercised its discretion, given in Art. 78 (2), second sentence, and ordered the deduction of the time Ongwen spent in detention between his arrest by the Séléka group on 4 January 2015 and his transfer to the competent authorities of the Central African Republic on 16 January 2015.

II. Situation in the Democratic Republic of Congo,[59] The Prosecutor v Bosco Ntaganda (Trial Chamber VI)[60]

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

Bosco Ntaganda, as a high level member of the Union des Patriotes Congolais ("UPC") and its military wing, the Forces Patriotiques pour la Libération du Congo ("FPLC"), was convicted for the commission of 18 counts of crimes against humanity and war crimes committed in the context of two attacks in Ituri between 6 August 2022 and 31 December 2003 and was sentenced to 30 years imprisonment.[61] Upon appeal of the Prosecutor and the Defence, the Appeals Chamber handed down its judgment on 31 March 2021 confirming Trial Chamber VI's conviction of Ntaganda.[62] A handful of key findings are highlighted in the following.

1. Specificity of Charges

The Defence had argued that most of the charges, as confirmed, had been described "at the level of individual criminal acts", but that the Trial Chamber had convicted Ntaganda

[48] ICC (Trial Chamber IX), Sentence of 6.5.2021 – ICC-02/04-01/15-1819-Red (Ongwen Sentence), para. 26. See also ICC (Appeals Chamber), Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute" of 8.3.2018 – ICC-01/05-01/13-2276-Red, para. 77.
[49] Ongwen Sentence (fn. 48), para. 30.
[50] Ongwen Sentence (fn. 48), paras 35–40.
[51] Ongwen Sentence (fn. 48), paras 32–34.
[52] Ongwen Sentence (fn. 48), para. 41.
[53] Ongwen Sentence (fn. 48), paras 65–83, 88, 392, 395–396.
[54] Ongwen Sentence (fn. 48), paras 387–391.
[55] The Rules of Procedure and Evidence (ICC-ASP/1/3 and Corr.1, as amended by resolutions ICC-ASP/10/Res. 1, ICCASP/11/Res. 2, ICC-ASP/12/Res. 7, ICC-ASP/15/Res. 5 [provisional rules drawn up by the judges] and ICCASP/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.
[56] Ongwen Sentence (fn. 48), para. 103.
[57] Ongwen Sentence (fn. 48), paras 108–112.
[58] Ongwen Sentence (fn. 48), para. 401.
[59] The record carries the situation number ICC-01/04.
[60] The record carries the case number ICC-01/04-02/06.
[61] See *Chaitidou*, ZIS 2019, 567 (571–574).
[62] ICC (Appeals Chamber), Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled "Judgment" of 30.3.2021 – ICC-01/04-02/06-2666-Red (Ntaganda Appeals Judgment).

for acts not contained in the confirmation decision,[63] thus exceeding the facts and circumstances described in the charges. In its view, the criminal acts must be "identified exhaustively" in the document containing the charges (DCC).

At the outset, the Appeals Chamber confirmed that the Pre-Trial Chamber "sets the parameters of the charges by confirming or declining to confirm them in the confirmation decision". After the charges are confirmed, additional details to the charges can be provided in "auxiliary documents", or the charges may be modified by means of amendment.[64] Turning to the case at hand, the Appeals Judges ruled that "the charges must be described in such a way that the trial chamber as well as the parties and participants are able 'to determine with certainty which sets of historical events, in the course of which crimes under the jurisdiction of the Court are alleged to have been committed form part of the charges, and which do not'". They agreed that charges may consist of individual acts, but may also be formulated by specifying a period of time, the geographical area, an identifiable group of perpetrators and an identifiable group of victims. If charges are formulated with the help of parameters, then certain individual acts may be included in the DCC, but the scope of the charges is not limited to them; other facts, not described in the DCC, may fall under the scope of the charges, as long as they fall within the parameters.[65]

On the basis of the aforementioned approach, the Appeals Chamber rejected Ntaganda's complaint that certain individual acts were not part of the "facts and circumstances", as they had not been individualized in the DCC.[66] The Appeals Chamber went even further: Where the Pre-Trial Chamber has remained silent on a particular allegation, it cannot be presumed that these factual allegations have been rejected.[67] According to the Appeals Chamber's understanding, the Pre-Trial Chamber had "considered evidence of some aspects of the crimes charged and, based on that evidence, confirmed the crimes charged in their entirety".[68] In other words, the Pre-Trial Chamber may analyse, on the basis of the evidence presented at the confirmation hearing, only parts of the charges, but confirm them in "their entirety".

The Appeals Chamber's findings must be put in context. In the Ntaganda case, the charges, as confirmed by the Pre-Trial Chamber, had been "updated" in a second DCC by the Prosecutor during trial, upon authorization of the Trial Chamber. At the time the Trial Chamber argued that the Prosecutor provided further specifics to the confirmed charges – the Ntaganda Defence would say: added new facts that had not been considered by the Pre-Trial Chamber.[69] Admittedly, the Appeals Chamber seeks to find a balance between the interests of the accused person to be informed with sufficient detail of the charges and the impossibility in war crime cases to provide neatly all factual details. The Appeals Judges in the Ntaganda case deviated in part from the appeals ruling in the Bemba case that had established, by majority, that only those factual allegations described in the confirmation decision would form the "facts and circumstances" of the charges. Context is key in this regard: While in the Bemba case the charges had been confirmed by the Pre-Trial Chamber broadly, encompassing crimes committed on the entire territory of the Central African Republic for a duration of approximately five months,[70] the Pre-Trial Chamber in the Ntaganda case had confirmed the charges as specified by parameters, such as the locations (collectivité) and specific time periods. Thus, in the Ntaganda case, it can be argued that informing the accused person at trial of individual criminal acts related to known, existing attacks is possible. However, the accused's rights may be prejudiced when the charges are not further specified by certain parameters and confirmed in this manner.

In addition, the Appeals Chamber's understanding that the Pre-Trial Chambers conduct their analyses only in relation to "some aspects of the crimes charged" is also rather peculiar. When comparing the DCCs and the confirmation decisions in the Katanga/Ngudjolo, Ntaganda, Bemba et al, Gbagbo, Blé Goudé and the two Kenya cases, it is clear that the Pre-Trial Chambers analysed *all* facts, as presented by the Prosecutor, and did not limit themselves to certain parts of the charges. A partial or selective review of the factual allegations would not conform with the delineating and filter function of the confirmation process. Moreover, the assumption that the Pre-Trial Chamber's consideration of parts of the evidentiary record for Art. 61 (7) purposes entails that only aspects of the factual allegations underpinning the charges are examined confuses the concept evidence and factual allegations. The Appeals Chamber did also not explain why it accepts that necessary details, in relation to which Ntaganda's conviction is sought by the Prosecutor, were not included in the DCC at the confirmation stage, but were added only at trial, when viewed in light of its own assertion that the investigation should be largely completed at the confirmation stage.[71]

[63] ICC (Pre-Trial Chamber II), Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda of 9.6.2014 – ICC-01/04-02/06-309.
[64] Ntaganda Appeals Judgment (fn. 62), para. 325.
[65] Ntaganda Appeals Judgment (fn. 62), para. 326.
[66] Ntaganda Appeals Judgment (fn. 62), para. 332.
[67] Ntaganda Appeals Judgment (fn. 62), para. 335.
[68] Ntaganda Appeals Judgment (fn. 62), para. 336.
[69] *See Chaitidou* ZIS, 2017, 733 (742).
[70] Ntaganda Appeals Judgment (fn. 62), paras 107, 110.
[71] See ICC (Appeals Chamber), Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence" of 13.10.2006 – ICC-01/04-01/06-568, para. 54; ICC (Appeals Chamber), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges" of 30.5.2012 – ICC-01/04-01/10-514, para. 44, see also ICC (Pre-Trial Chamber II), Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute of 23.1.2012 – ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul, paras 44–52; ICC (Pre-Trial Chamber II), Corrigendum to Decision on the "Prosecution's Request to Amend the

2. Crimes

a) Contextual Elements of Crimes against Humanity

Crimes against humanity are committed as part of a widespread or systematic attack "directed against any civilian population", within the meaning of the chapeau of Art. 7 (1). In determining whether the target of the attack was indeed "any civilian population", all Chambers across instances considered consistently whether the civilian population was the "primary, as opposed to incidental, object of the attack". On appeal, the Defence challenged that the Trial Judges had not entered a specific finding that the civilian population was indeed the primary object of the attack.

The Appeals Chamber affirmed that the consideration that the civilian population was "primary, as opposed to incidental, object of the attack" is used to explain the circumstances in which an attack may be considered to be directed against the civilian population. In the view of the judges, it is not an additional legal requirement that must be satisfied.[72] Importantly, what is meant by "primary object of the attack" is simply that the civilian population was targeted. It does not mean that the main aim of the relevant acts was to attack civilians. To the contrary, an attack directed against a civilian population may also serve other objectives or motives. Whether an attack was directed against a civilian population requires a factual assessment that can be undertaken by means of the criteria set out by the ICTY Appeals Chamber in the Kunarac et al. case.[73]

b) Ordering Displacement of Civilian Population, Art. 8 (2) (e) (viii)

Having regard to the wording of Art. 8 (2) (e) (viii), the Elements of Crimes, and, in the second place, Art. 17 of Additional Protocol II to the Geneva Conventions and Rule 129 (B) of the ICRC's compilation of customary rules of international humanitarian law, the Appeals Chamber clarified that territorial control over the area by the perpetrator is not required for the war crime of displacement to take place in the context of a non-international armed conflict ("NIAC").[74] Notably, the reference to occupied territory in the equivalent crime in the context of an international armed conflict (Art. 8 [2] [b] [viii]) cannot be transposed to the NIAC context. This also means that the civilian population does not need to be under the perpetrator's power and control. Rather, whether the perpetrator was able to give effect to an order to displace the civilian population must be assessed on the facts of the case, having due regard to the perpetrator's "position […] and his or her duties and responsibilities, including his or her ability to ensure compliance with his or her orders".[75]

c) Attacks against Protected Objects/Buildings, Art. 8 (2) (e) (iv)

The Prosecutor challenged the Trial Chamber's interpretation of the law as too narrow when stating that the "attack", committed during the actual conduct of hostilities, is an "act of violence against the adversary, whether in offence or defence", without causing damage or harm to the protected object or building. The Appeals Judges were not unanimous on the interpretation of the word "attack" within the meaning of Art. 8 (2) (e) (iv), but rejected, by majority, for various reasons, the ground of appeal presented by the Prosecutor.[76]

3. Criminal Responsibility

Ntaganda was convicted for crimes on the basis of indirect co-perpetration, pursuant to Art. 25 (3) (a). The Defence, while not challenging the concept as such, took issue, inter alia, with the Trial Chamber's evidentiary discussion related to the elements of the common plan and Ntaganda's essential contribution. The Appeals Chamber findings confirm earlier key findings rendered in the Lubanga case.

a) Common Plan

The Appeals Judges reiterated that, in the absence of direct evidence, the common plan between co-perpetrators may be inferred from their subsequent concerted action, or "from the wider circumstances, including the events on the ground".[77] In their view, the Trial Chamber was therefore correct in relying on evidence of various meetings, specific orders and instructions to the troops, and not only the behaviour of UPC/FPLC members.

b) Essential Contribution

As to whether the essential contribution must be directed to the crime or the common plan, the Appeals Chamber reiterated its Lubanga finding that an accused's essential contribution must be to the crime for which he or she is responsible, but that "the contribution to the implementation of the common plan more generally may still suffice". What matters is whether the perpetrator's contribution "within the framework of the agreement was such that without it, the crime could not

Final Updated Document Containing the Charges Pursuant to Article 61 (9) of the Statute" of 21.3.2013 – ICC-01/09-02/11-700-Corr, paras 35–36; ICC (Pre-Trial Chamber II), Decision Postponing the Date of the Confirmation of Charges Hearing of 6.3.2015 – ICC-02/04-01/15-206, para. 32; ICC (Pre-Trial Chamber I), Decision adjourning the hearing on the confirmation of charges pursuant to article 61 (7) (c) (i) of the Rome Statute of 3.6.2013 – ICC-02/11-01/11-432, paras 25 and 35; ICC (Pre-Trial Chamber II), Second Decision on Disclosure and Related Matters of 4.4.2019 – ICC-01/14-01/18-163, para. 28.

[72] Ntaganda Appeals Judgment (fn. 62), para. 418.

[73] Ntaganda Appeals Judgment (fn. 62), para. 424.

[74] Ntaganda Appeals Judgment (fn. 62), paras 547–550, 564.

[75] Ntaganda Appeals Judgment (fn. 62), para. 559.

[76] Ntaganda Appeals Judgment (fn. 62), paras 1164–1168; Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor's appeal, ICC-01/04-02/06-2666-Red-Anx1; Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor's appeal, ICC-01/04-02/06-2666-Red-Anx4; Partly concurring opinion of Judge Chile Eboe-Osuji, ICC-01/04-02/06-2666-Red-Anx5.

[77] Ntaganda Appeals Judgment (fn. 62), paras 918, 922.

have been committed or would have been committed in a significantly different way".[78]

c) Subjective Element

The Appeals Chamber held that for indirect co-perpetration "the 'knowledge' component of *mens rea* includes an awareness on the part of the co-perpetrator of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise control over the crime".[79]

III. Situation in Darfur/Sudan,[80] The Prosecutor v Ali Muhammad Ali Abd-Al-Rahman („Ali Kushayb") – Trial Chamber I[81]

- 27.4.2007: First warrant of arrest (public on 28.4.2008)
- 16.1.2018: Second warrant of arrest
- 9.6.2020: Voluntary surrender to the Court
- 15.6.2020: Severance from Ahmed Muhammad Harun case
- 9.7.2021: Confirmation of charges
- 5.4.2022: Commencement of trial
- Victims participating: 151
- Current status: Trial

The accused, nicknamed Ali Kushayb, and alleged to be a senior leader of the Janjaweed militia in the Wadi Salih and Mukjar localities, was charged with 31 counts of crimes against humanity and war crimes committed by Janjaweed fighters, together with members of the Sudanese armed forces, police and other auxiliary forces, between August 2003 and March 2004 in Darfur/Sudan. Specifically, the charges concern three attacks on (i) Kodoom, Bindisi and surrounding areas (15–16 August 2003); (ii) Mukjar (late February to beginning March 2004); and (iii) Deleig and surrounding areas (5–7 March 2004). In the following pages, some selected key developments at the pre-trial stage are presented.

1. Confirmation Decision

On 9 July 2021, Pre-Trial Chamber II confirmed the charges against Ali Kushayb.[82] The key findings of the confirmation decision are summarised in what follows.

a) Charges

The Defence had argued that the Prosecutor was prevented from adding in the DCC charges that had not been mentioned in the warrants of arrest. The Pre-Trial Chamber clarified, as others before it, that the Prosecutor is "not bound by the charges as formulated in the warrant(s) of arrest".[83] The wording of the Pre-Trial Chamber is somewhat unfortunate as the warrant of arrest under the Rome Statute does not contain the "charges", but allegations of crimes for which a person is sought to be arrested. The charges are formulated in the DCC at the confirmation stage, limiting the Prosecutor's amendment powers. That being said, the Pre-Trial Judges are correct in arguing that the Prosecutor is entitled to continue investigating after the issuance of the warrant(s) of arrest, with the possibility to redefine the precise nature and contours of the charges.[84]

The Pre-Trial Chamber also accepted the reference to "surrounding areas" to be sufficiently precise as the victims, targeted in the towns identified, were either fleeing these locations or were transported from there to other locations where they were allegedly executed.[85]

Further, the Pre-Trial Chamber confirmed that alternative forms of criminal responsibility are, in principle, permissible and do not per se prejudice the person charged, as long as the "DCC specifies the charged acts and conduct of the suspect in relation to each alternative form of criminal responsibility".[86] Nevertheless, the Chamber only retained one or two forms of criminal responsibility per attack, on the basis that it was not "necessary" to entertain other forms of criminal responsibility.[87]

b) Reasoning of Confirmation Decision

The Pre-Trial Chamber emphasized that it "must engage in an overall assessment of the entire evidentiary basis relied upon by the Prosecutor, including with a view to detecting inconsistencies, ambiguities, contradictions or other weaknesses which would result in the allegations not being supported to the relevant standard".[88]

As regards the level of sufficient reasoning, the Pre-Trial Judges opined that, in contrast to Art. 74 (5) for judgments on the innocence and guilt of the accused, the Statute does not contain a similar provision in respect of Art. 61 (7) decisions. Nevertheless, the adequacy of the reasoning is to be "assessed against the specificity, the rigour and the clarity of the formulation of the findings made by the Chamber".[89]

c) Mistake of Law

The Defence alleged that Ali Kushayb had not been trained in international humanitarian law ("IHL"), Sudanese law made it a capital offence to support the rebels, and he acted upon orders of Ahmed Harun, former Minister of Interior of Sudan. In other words, because of Sudanese law, and/or orders from Ahmed Harun, Ali Kushayb assumed that he was obliged to attack the civilian population, thus excluding his criminal responsibility pursuant to Art. 32 (2) and 33. The Chamber responded by saying that the majority of crimes do not re-

[78] Ntaganda Appeals Judgment (fn. 62), para. 1041.
[79] Ntaganda Appeals Judgment (fn. 62), para. 1045.
[80] The record carries the situation number ICC-02/05.
[81] The record carries the case number ICC-02/05-01/20.
[82] ICC (Pre-Trial Chamber II), Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb') of 9.7.2021 – ICC-02/05-01/20-433-Corr (Ali Kushayb Confirmation Decision).
[83] Ali Kushayb Confirmation Decision (fn. 82), para. 23.
[84] Ali Kushayb Confirmation Decision (fn. 82), para. 23.
[85] Ali Kushayb Confirmation Decision (fn. 82), para. 25.
[86] Ali Kushayb Confirmation Decision (fn. 82), para. 29.
[87] Ali Kushayb Confirmation Decision (fn. 82), paras 95, 105, 114.
[88] Ali Kushayb Confirmation Decision (fn. 82), para. 39.
[89] Ali Kushayb Confirmation Decision (fn. 82), para. 40.

quire that the perpetrator make a *legal* evaluation of the status of victims, but require only that the "perpetrator was aware of the factual circumstances that establish the protected status of the persons or objects that are the subject of these crimes".[90] The Judges observed that, in any event, Ali Kushayb was only required to be aware that the "notion of 'civilian' relates to someone who is not involved in military matters and does not engage in acts of warfare".[91] As to the Defence claim that he was not sufficiently trained in IHL, or that he followed orders, the Chamber remained unconvinced on evidence.[92] Consequently, it rejected the argument of mistake of law and superior orders.

d) Co-Perpetration: Common Plan

Ali Kushayb was charged with co-perpetration for crimes committed in Mukjar and Deleig, within the meaning of Art. 25 (3) (a). More specifically, the common plan was labelled "Mukjar common plan" and "Deleig common plan", thus specifying it geographically and temporally. Nevertheless, the target of the common plan was the same as well as the actors involved in the execution of the common plan. The Pre-Trial Chamber agreed that it is possible for the Prosecutor to define the common plan in respect of each of the charged incidents, in this case Mukjar and Deleig.[93]

e) Identity of Ali Kushayb

Since his initial appearance, Ali Kushayb denied that he is called by that name and insisted to be referred to as Mr Abd-Al-Rahman. This is of significance, as all Court documents, including the two warrants of arrest, and evidence contain this name. Having heard the parties and received evidence on the link between the suspect and the name Ali Kushayb, the Pre-Trial Chamber was convinced that the name Ali Kushayb was attributable to the person in the custody of the Court who refers himself as Ali Muhammad Ali Abd-Al-Rahman. It relied on witness testimonies making a strong connection between the person and the nickname, the fact that he appeared voluntarily before the Court without claiming mistaken identity, and a video in which the accused introduces himself as Ali Kushayb.[94]

2. Transmission of Case File to Trial

The Pre-Trial Chamber, while acknowledging that Ali Kushayb is entitled to receive the confirmation decision in Arabic, the language he fully understands and speaks, varied the time limit for the Defence to request, if it so wishes, leave to appeal the confirmation decision. That being said, the Judges nevertheless ordered that the case file be transmitted to the Presidency so that a Trial Chamber be constituted and trial preparations start.[95] While it is understandable that the transfer of the case take place as soon as possible, the constitution or operation of the Trial Chamber, while the Pre-Trial Chamber is also competent to decide on an Art. 82 (1) (d) request, raises questions. A competence in parallel of a trial and pre-trial chamber on aspects of the case is foreseen only in the narrowly defined situation described in Art. 61 (11). In the present instance, the Pre-Trial Chamber proprio motu extended its competence in the confirmation decision.

The Presidency constituted Trial Chamber I and assigned it with the case on 21 July 2021.[96] Judge Korner, who is presiding, is joined by Judge Alapini-Gansou and Judge Alexis Windsor.

3. Leave to Appeal and Reconsideration

After having received the translation of the confirmation decision in Arabic, the Defence and the Prosecutor requested on 3 and 6 September 2021, respectively, reconsideration and leave to appeal the confirmation decision, pursuant to Art. 82 (1) (d). With decision dated 15 November 2022, the Pre-Trial Chamber rejected all requests.[97]

As to the reconsideration requests, the Pre-Trial Chamber dismissed them in limine based on the argument that it had retained its competence only in relation to a possible request for leave to appeal, as stipulated in the confirmation decision.[98]

As regards the requests for leave to appeal, the Pre-Trial Chamber rejected all issues presented by the parties. However, it is worth reading what the Judges added as afterthought after the discussion on Art. 82 (1) (d). The Chamber's starting point is that decisions challenged under Art. 82 (1) (d) must be interlocutory in nature in the sense that, "should they be found flawed only in the context of an appeal against the final judgement, [they] would adversely impact the proceedings and possibly affect their outcome".[99] In their view, the confirmation decision is not interlocutory, but final in nature and, for this reason, not subject to appeals under Art. 82 (1) (d).[100] This is based on the understanding that the factual findings of the Pre-Trial Chamber are final, as opposed to the Pre-Trial Chamber's evidentiary discussion and conclusions.[101] Lastly, the prompt assignment of the case to a Trial Chamber after confirmation of the charges and the principle

[90] Ali Kushayb Confirmation Decision (fn. 82), para. 76.
[91] Ali Kushayb Confirmation Decision (fn. 82), para. 77.
[92] Ali Kushayb Confirmation Decision (fn. 82), paras 78–85.
[93] Ali Kushayb Confirmation Decision (fn. 82), paras 42–44.
[94] Ali Kushayb Confirmation Decision (fn. 82), paras 53–60.
[95] Ali Kushayb Confirmation Decision (fn. 82), paras 115–116.
[96] ICC (The Presidency), Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb') of 21.7.2021, ICC-02/05-01/12-440.
[97] ICC (Pre-Trial Chamber II), Decision on requests for reconsideration, leave to appeal the confirmation decision and related matters (ICC-02/05-01/20-438-Conf, ICC-02/05-01/20-448, ICC-02/05-01/20-457, ICC-02/05-01/20-465, ICC-02/05-01/20-466-Conf) of 15.11.2021 – ICC-02/05-01/20-517 (Decision on Reconsideration).
[98] Decision on Reconsideration (fn. 97), para. 11.
[99] Decision on Reconsideration (fn. 97), para. 47.
[100] Decision on Reconsideration (fn. 97), paras 46 et seq.
[101] Decision on Reconsideration (fn. 97), para. 49.

of expeditiousness militate against the conclusion that confirmation decisions are appealable under Art. 82 (1) (d).[102] Interpreting Art. 82 (1) (d) in this manner goes against the actual wording of the provision (which does not contain any limitation as to appealable decisions) and the case-law of the Pre-Trial Chambers. The Judges of the Pre-Trial Chambers have been acutely aware of the risk to delay proceedings if requests for appeal were granted. This is evidenced by their recurring reminders that, considering the travaux préparatoires, the remedy is restrictive, and reflected in the fact that only twice, in the Gbagbo and Mbarushimana cases, Pre-Trial Chambers have authorised the parties to appeal the confirmation decision. A clarification of non-appealability in the Court's legal texts could be useful, if this was the wish to the legislator, but is not necessary.

4. Amendment of Charges

Having been denied reconsideration and the right to appeal, the Prosecutor sought an amendment of the charges through Art. 61 (9) to increase the number of victims of the murder charges, having investigated the allegations further after the DCC had been submitted. This request was also rejected by decision on 14 March 2022.[103] Relying on the recent Ntaganda Appeals judgment that in the confirmation decision only some "aspects of the crimes charged" need to be discussed and that criminal acts not mentioned in the DCC may still fall within the facts and circumstances of broadly described charges, the Judges confirmed that they had analysed only what is necessary to show the line of reasoning.[104] They explained that the numbers of murders and rapes indicated in the confirmation decision are not limitative or definitive, and do not prevent alleging further victims beyond those specifically mentioned.[105] It seems the Pre-Trial Chamber views any changes to the number of victims (within the geographical and temporal parameters of the broadly described charges) as a precision of the charge and not an amendment. That being said, it must be ensured that the accused person must be given prompt notice of the content and scope of the charges, either by the Pre-Trial Chamber through the confirmation decision or the Prosecutor by way of auxiliary documents.[106]

This decision is contrary to the approach in the Al Hassan case where the Pre-Trial Chamber authorised the adding of factual allegations related to existing charges.[107]

IV. Situations in the Bolivarian Republic of Venezuela I & II (Pre-Trial Chamber I)[108]

- 27.9.2018: First referral
- 13.2.2020: Second referral
- Current status: investigation/preliminary examination

Six States Parties (Argentina, Canada, Colombia, Chile, Paraguay and Peru) referred the situation concerning the Bolivarian Republic of Venezuela I to the Prosecutor on 27 September 2018, alleging the commission of crimes against humanity by State security forces and groups aligned with the Venezuelan Government on the territory of Venezuela since 12 February 2014. On 13 February 2020, the Prosecutor received a second referral from the Government of Venezuela alleging the commission of crimes against humanity as a result of the application of unlawful coercive measures adopted unilaterally by the Government of the United States of America against Venezuela at least since 2014.

In relation to the first referral, the Government of Venezuela approached the Pre-Trial Chamber with the request to exercise its judicial control over the Prosecutor's preliminary examination and to, inter alia, (i) grant Venezuela access to material and information available to the Prosecutor and (ii) assess whether the Prosecutor engaged sufficiently with the Government of Venezuela in a constructive dialogue.[109]

The Pre-Trial Chamber rejected Venezuela's request by decision dated 14 June 2021,[110] arguing that prior to the Prosecutor's decision under Art. 53 (1), the Pre-Trial Chamber does not have any authority to exercise judicial control over the Prosecutor's conduct of the preliminary examination, neither on the basis of Art. 15, 53 and 18, Regulation 46 (2) of the Regulations of the Court, nor on the basis of extra-statutory powers.[111] Rather, the Judges suggested that the Prosecutor maintain a "meaningful dialogue with Venezuela, in line with the complementary principle, during the preliminary examination and beyond, as the case may be".[112]

This decision, which is the second of its kind, stands somewhat in contrast with the general approach taken by Pre-Trial Chamber III in the situation in the Central African Republic in 2006. The Central African authorities similarly had

[102] Decision on Reconsideration (fn. 97), para. 50.
[103] ICC (Pre-Trial Chamber II), Decision on the Prosecution's application to amend the charges of 14.3.2022 – ICC-02/05-01/20-626 (Ali Kushayb Amendment Decision).
[104] Ali Kushayb Amendment Decision (Fn. 103), para. 17.
[105] Ali Kushayb Amendment Decision (Fn. 103), paras 18–23.
[106] Ali Kushayb Amendment Decision (Fn. 103), paras 25–26.
[107] ICC (Pre-Trial Chamber I), Decision on the Applicable Procedure following the Prosecutor's Filing of Her Request for Corrections and Amendments of the Decision to Confirm the Charges of 21.2.2020 – ICC-01/12-01/18-608-Red-tENG.
[108] The record related to the first referral carries the situation number ICC-02/18. The record related to the second referral carries the situation number ICC-01/20.
[109] ICC (Registry), Transmission of Documents Received from the Authorities of the Bolivarian Republic of Venezuela on 9 July 2021 of 13.7.2021 – ICC-02/18-14, with Annex 1, confidential, and Annexes 2–4, public.
[110] ICC (Pre-Trial Chamber I), Public Redacted Version of "Decision on the 'Request for judicial control submitted to the Pre-Trial Chamber I of the International Criminal Court by the Bolivarian Republic of Venezuela pursuant to Articles 15 and 21.3 of the Statute and Rule 46.2 of the Rules of the regulations of the Court"' of 14.3.2021 – ICC-02/18-9-Red. (Venezuela Decision). The decision was made public on 2.3.2022.
[111] Venezuela Decision (fn. 110), paras 11–15.
[112] Venezuela Decision (fn. 110), para. 20.

approached the Pre-Trial Chamber requesting that they be provided with an update about the status of the preliminary examination which, at the time, had been ongoing for two years. Pre-Trial Chamber III had decided at the time that the preliminary examination conducted by the Prosecutor must be concluded within a reasonable time from the receipt of the referral. Since no information had been given to the referring State, the Chamber requested the Prosecutor to give an estimate when the preliminary examination will be concluded and when a decision whether to open an investigation will be taken.[113]

On 3 November 2021, the Prosecutor announced that he would open an investigation into the situation in the Bolivarian Republic of Venezuela I. The preliminary examination regarding the situation in the Bolivarian Republic of Venezuela II is still ongoing.

[113] ICC (Pre-Trial Chamber III), Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic of 30.11.2006 – ICC-01/05-6.